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Family Mediation in Ireland

Name: Sinead Maire Conneely

Submitted in candidacy for the Degree of Doctor of Philosophy

University of Dublin (Trinity College)

Submission Date: 20th November 2000

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SUMMARY

Empirical research into the operation of the family mediation service in the Republic of Ireland is set against a backdrop of theoretical and practical discussion. Chapter One analyses the principles and practices of various mediation forms and provides the essential arguments in favour of mediation. Chapter Two outlines the negative view adopted by feminists, the informal justice critics and others while Chapter Three provides an extensive review of the empirical literature surrounding the exercise of mediation in other common law jurisdictions. The central themes of gender, domestic violence, child contact and the interests of children are revisited in each section.

Client and mediator questionnaires were randomised, computerised and graphed using the SPSS package in order to illuminate the issues in Chapter Four. Specifically, the project assessed the demographics of clients entering the mediation service, their emotional and material state and the level of conflict in their relationship. Clients were tracked through the system, in order to establish the rate and form of agreement reached, the reasons for any absence of settlement and the future intentions of the couples. Consumer assessment of the mediation experience and the extent to which they considered the experience helpful was logged.

The Northern Irish Service was also a focus of this research, with the recounting of the limited empirical evidence available in that jurisdiction and a survey of mediator attitudes, beliefs and experiences in Chapter Five. This research demonstrated the extensive similarity of stance across the border, despite the divergence in the form of mediation adopted.

The conclusion that a voluntary family mediation service has a contribution to make to the dispute resolution scheme in Ireland, particularly if it strengthens its approach to domestic violence, is not radical. What is significant is the emergence of this assessment from fresh empirical research conducted in this jurisdiction, providing a legitimate footing for Ireland's place in the international mediation debate.

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INTRODUCTION

In July 1986, the Family Mediation Service in the Republic of Ireland was set up on a pilot basis and since that time it has established itself firmly in the marital dispute resolution landscape. 'The establishment of a nationwide Family Mediation Service was a priority objective in the government's action programme',[1] an objective realised in the past year. Coupled with the radical endorsement of mediation in the English Family Law Act 1996 and the collapse of state mediation provision in Northern Ireland, these developments seemed to prompt an immediate review of the Irish service provider.

Much has been written on the topic of family mediation in recent years; mediators have sought to explain and justify their approach and methodology, critics have tried to uncover the risks and traps of this alternative dispute resolution process, while social scientists have attempted to measure and count the relative costs and benefits, both material and social, of mediation. Yet, little research has emerged bringing these schools of thought together by examining the theoretical and empirical, the supportive and critical approaches in a manner that seeks to draw broad conclusions. Moreover, unlike the fruitful debates emanating from the United States and England, the family mediation services in Ireland, north and south, have not produced bountiful discussion. To some extent, this work seeks to fill the lacunae in the mediation literature and aims to provide an overview of the debates, while grounding new empirical research on the Irish mediation service in international theoretical and empirical controversies.

Chapter One concerns itself with the origins and the rise of family mediation in the common law world and the incorporation of the practice into legislation. Essentially, it deals with the views of practitioners, their claims and assumptions, theories and philosophies. It is concerned with the models of mediation developed by practitioners, as examples of best practice in the field. This Chapter suggests that mediation has provided safeguards to ensure that the experience is a positive and beneficial one for the client and the central advantages of mediation over the adversarial system are guaranteed.

Chapter Two encapsulates the critical view of these issues, revisiting the origins of mediation from a more sceptical perspective and highlighting specific difficulties with particular forms of practice, notably compulsory, in-court and therapeutic mediation.

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[1] Minister Ahern at the launch of the new service for the South East region.

Obstacles to the successful completion of mediation in a manner that provides for the clients' protection are highlighted, while the significant theoretical critique of informal justice and feminist arguments are examined closely and their themes restated in the later chapters of this work. The feminist assertion that mediation has failed to adequately grapple with the problem of domestic violence in client relationships, leaving the victims exposed to repeated violence, has force, particularly where access to children has been organised without regard to the presence of violence in the home.

It could be argued in response to these accusations that the adversarial system has not necessarily demonstrated an engagement with the identified problems and in fact, mediation is being judged against an ideal. In reply, it can be suggested that the litigation system is a necessary and inevitable consequence of our legal system. When cases fail to settle, then adjudication is required. Therefore, it is for the novel approach to justify its necessity, its utility and its entitlement to public funding. This Chapter proceeds on the assumption that the flaws of judicial judgment are remediable and it is the alternative on offer that must defend its existence and growth.

In Chapter Three an extensive review of the empirical literature surrounding the practice of mediation is carried out, surveying evidence on the role of the mediator, user satisfaction levels, cost, effectiveness and long term effects of court-based and out-of-court mediation models, child custody and comprehensive mediation practices. Here, empirical evidence on the benefits of mediation for children is assessed, as well as the literature seeking to establish process dangers for women attending mediation services, particularly where they are victims of domestic violence. The most recent research in England on the pilot studies established after the 1996 Act is also featured.

Chapter Four is pivotal to this work, since it is concerned exclusively with new empirical research into the operation of the Family Mediation Service in the Republic of Ireland. Both client and mediator questionnaires are examined, in an attempt to ascertain the level of effectiveness of mediation, its effect on the clients outlook for the future, on the parental relationship and on children. The outcome of the mediation sessions is recorded and analysed in order to paint a picture of the typical parenting and financial agreement reached, the reasons why agreements are not forthcoming and the clients' intentions for the future. Ideally, this project would have compared these results with a random sample of litigating couples but this research is not, as yet, available in Ireland and is beyond the scope of the present work. Although this constrains significantly the conclusions that may be reached, the present investigation lays the groundwork for future comparative analysis.

It should be noted at the outset that the client questionnaires were designed and administered by the family mediation service itself and for this reason may not have addressed the questions most proximate to the concerns of researchers in the field. However, the statistical computations and assessments were conducted independently of the Centre, ensuring, at least, that all relevant information came to light. This disinterested translation of the respondents' answers into discernable patterns represents the central contribution of this work to the family mediation pool of knowledge.

Finally, Chapter Five focuses on the mediation service in Northern Ireland, examining the limited empirical research available in that jurisdiction, but also supplementing it with the analysis of service mediators' responses to an extensive questionnaire eliciting their views. This form was also completed by the practitioners employed in the Republic of Ireland, allowing for the comparison of views and attitudes. Again, the subject of domestic violence is broached.

The survey included all mediators employed by the family mediation service in the Republic of Ireland, since it is the flagship service in this jurisdiction. A rapidly expanding and confident mediation provider, it has attracted increased public funding in recent years and has embarked on a successful regionalisation programme with governmental support and encouragement. This has ensured a high public profile and a high degree of influence for the service in any mediation debate or controversy emerging in the jurisdiction. The comparator, a mediation service operating out of Relate offices in Northern Ireland, was chosen for logistical reasons and because, in theory at least, it also provided an example of a well-established state funded grouping of mediators. Like its sister organisation in the Republic, it has insisted on high standards in mediator training and education and has utilised and adhered to generally recognised codes of practice. Unfortunately, the response rate from the Northern Irish group was not as high as the rate in the Republic, a problem that could be attributed to the breakdown of the mediation system there and a consequent loss of morale on the part of practitioners. This section becomes, as a result, more a glimpse at the current state of mind of mediators than a rigorous investigation into their perspectives. It does, however, illustrate many of the themes that run through the research and provides an opportunity for mediators to voice their positions and strategies.

This thesis seeks to encourage the development of a well-informed mediation debate in this jurisdiction and to make a contribution to the growing body of knowledge in the field. More particularly, it seeks to highlight the singular nature of the mediation experience, its

potential and its pitfalls, from an Irish perspective. The temptation to transplant knowledge from foreign studies into Ireland is strong, particularly where financial constraints do not permit their repetition. Useful information can be gleaned in this way and this work does examine international studies in some detail. Nevertheless, there is no substitute for the empirical assessment of mediation as it is practised in Ireland and the contribution of this thesis lies here.

CHAPTER ONE

Introduction

This chapter seeks to describe the practice of family mediation and to place the practice in the context of the rise of alternative dispute resolution generally. Mediation has been described as a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs.[2] In examining the forms of mediation, this chapter seeks to elaborate on this description and illustrate the rich variety in practice which is not reflected in any definition of the procedure.

Mediation can also be examined in the context of the civil justice system as a whole; the various forms of family mediation are, to a greater or a lesser degree, within that system and should be compatible with the aims and objectives of the civil justice system and with its reform. The rise of alternative dispute resolution mechanisms in general and family mediation in particular originates in a critique of the adjudicative system and rising levels of disillusionment within government, the judiciary and amongst the general public.

In so far as a theoretical framework for mediation has developed, it is described. While the development of a theoretical basis for the practice seems to have been slow and arduous, mediation is not without a unique philosophical approach. In some sense it can be reasonably argued that the philosophical grounding for family mediation lies in the critique of formalism and the adversarial system; it is not so much an intellectually distinct and independent form of dispute resolution as a reaction to the system which has traditionally held sway in the Western world. Yet it is imperative that mediation distinguish itself from adjudication, arbitration and negotiation by lawyers, in order to establish itself as a separate order. From the critique has emerged grounded practice with aims and objectives, which diverge from those of the court system. This debate is explored.

The vision of mediation's advocates is explored. It is a search for the internal logic of mediation, for the view that mediation has of itself, where it has come from, what it seeks to

[2] J Folberg and A Taylor, Mediation, A Comprehensive Guide to Resolving Conflicts without Litigation (Jossey-Bass, 1984), p 7.

achieve and how it fits into the existing frameworks of dispute resolution. The claims and underlying assumptions of the practice are examined in some detail; this illustrates clearly how mediation perceives its own contribution to the work of dispute resolution. Family mediation in its various forms is examined, forms which may be established variations, recognisable as distinct models of practice, or more often merely variations which originate in the style, approach and philosophy of the mediator.

Mediation possesses a number of safeguards for the protection of clients, safeguards that the practice is anxious to enhance and develop, specifically, privilege of communications, high standards in the selection and training of mediators and codes of ethics. The last two may be seen as aspects of the professionalisation of mediation which will provide security for the client entering the process. While this chapter considers the growth of mediation in common law jurisdictions, it does not attempt to give a detailed account of the history of mediation in each country but merely, for illustrative purposes, describes a trend towards the adoption of mediation in divorce cases. This is no more evident than in the legislative encouragement of the practice, well-established in the United States and more recently revealed in the United Kingdom. As it becomes increasingly the darling of the legislature, the future of mediation seems assured.

The Origins of Mediation as an Alternative Dispute Resolution Mechanism

Mediators have pointed to the ancient art in the custom and law of the East, particularly China and Japan, where the sustenance of harmonious relationships was felt to be damaged by the self-help and adversarial proceedings involved in legal action. There is anthropological evidence of a form of mediation in African custom, where settlement without judge or sanctions depends on the availability of a person of status who will intervene in the dispute.[3] Indeed extensive reference is made to the literature of legal anthropology in mediation discussions.

More recently, ethnic and religious sub-groups in the United States have practised their own alternative procedures in order to retain their separate identity and to avoid conceding power to the majority government or secular authority. Auerbach refers to these "intriguing experiments which testify to a persistent counter tradition to legalism",[4] experiments which testify to an enduring vision of community and harmonious settlement of disputes. The

[3] J Folberg and A Taylor, *op cit*, pp 1-3.

[4] Auerbach, J Justice without Law? (Oxford University Press, 1983) p 4.

break with this tradition is perceived to be the growth of the rights culture in the 1960's. Indeed the drive for the enshrinement of positive rights to end the oppression of marginalized groups was not confined to the United States but could be illustrated equally by the Catholic civil rights movement in Northern Ireland or the feminist movement in the Republic. The argument goes that the focus on rights has played a significant part in the "transformation of Western political culture from the harmony ideology of feudal societies into twentieth century participatory democracies".[5] While this movement is accredited with some value, the rights orientated public culture has been greeted with scepticism from some quarters, who suggest that legal solutions are not sufficient to guarantee access to individualised remedies for those whose lives have been disrupted by the legal disputes.[6] Thus, alternative dispute resolution mechanisms are in a sense a rethinking of the rights ideology as a method of dispute resolution and as a definition of social relations.

In the United States, it became evident by the late 1960's that interest in alternative dispute mechanisms had renewed. Remarkable growth in the alternative dispute resolution industry was evident, exemplified by the development of organisations, courses and an extensive literature. Three particular concerns predominated; "a feeling on the part of the American legal establishment that the court system was becoming intolerably overloaded...; a felt need on the part of professionals and others for specialised private fora to serve particular interests and a view that over and above the concomitant increase in congestion, delay and expense, the system was incapable in a more fundamental way of living up to the ideals of access to justice for all".[7] Alarms were sounding in political and legal circles and the streams of thought converged to promote alternative mechanisms in law and practice, at national and community level. Modern formalised systems of alternative dispute resolution developed in industrial relations, commercial disputes, community relations and the criminal justice system.[8] In the United States, they obtained their legitimacy from the earlier sub-culture experiences and in New Zealand from Maori culture. There has been no real attempt to legitimise the practice with reference to earlier historical forms in the UK, although reference is commonly made to the Chinese experience.

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[5] Dr Julia MacFarlane, Editor: Rethinking Disputes: The Mediation Alternative (Cavandish, London 1997) p 1.

[6] *Ibid*, p 2.

[7] William Twining "Alternative to what? Theories of litigation, procedure and dispute settlement in Anglo-American Jurisprudence: Some neglected classics" (1993) 56 MLR 380.

[8] There is a description of the legislative and community developments from this time in Folberg and Taylor, *op cit*, pp 5-7.

In Ireland, the practice has been placed in the context of the Irish value system, in particular the teachings and practices of the Roman Catholic Church.[9] This may suggest that mediators feel that the practice needs to be conceptualised as a natural and necessary development of what has gone before or at least as a practice with roots in ancient times. It also suggests a need to defend the empathetic position that mediation holds on the choice of separation. It is argued that divorce by mutual consent was available in Ireland in antiquity and supported by the Early Christian Church. Like modern mediation, the view of the Roman Catholic Church, that the validity of marriage depends on the mutual consent of the parties and the doctrine that marriage is invulnerable to the will of the spouses to dissolve it, has been question by theologians within the Church.[10] The perspective of the Second Vatican Council, that marriage is a man and woman's sharing of love and intimacy, presupposes that all adults can achieve this intimacy and continue to sustain it but does not deal with the implications of this supposition.[11] Moreover, one mediator has called on Catholic thinking to illustrate the dangers of the rights-based approach to dispute resolution: "The attempt to translate all morality into the language of rights could constitute an enormous impoverishment of morality in the Christian and the wider human tradition. Where would that leave friendship, hope, love and forgiveness".[12] These are the values which are incorporated into the spirit of mediation, it is claimed.[13]

Alternative Dispute Resolution and the Civil Justice System

The perceived crisis in the civil justice system which led government and the judiciary alike to view alternative dispute resolution as a preferable means of solving disagreements also led to a concern with renovation of the civil justice system itself. As Auerbach put it "a movement toward substantive justice, outside the procedural norms of the legal system, has evolved into a movement for procedural reform of the judicial system".[14] The advocacy of alternative dispute resolution can be viewed as an integral part of this process; thus viewed it appears less as an alternative and more as a means of renovating and entrenching the litigation system and supporting the judicial process, particularly where it is integrated into

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[9] Maura Wall Murphy "Separating with dignity within the Irish value system" in Eric Plunkett, editor Mediation: A Positive Approach to Marital Separation, (1988, Family Mediation Service), p 8. See also Leargas, transmitted on RTE 1, 10 November 1998 where separation was examined in light of ancient Irish law, Irish mythology and the teachings of St Paul.

[10] See the views of the Jesuit theologian, Makin, cited in Wall Murphy, *ibid*, p 10.

[11] *Ibid.*

[12] Enda McDonagh, cited in Wall Murphy, *op cit*, p 12.

[13] *Ibid.*

[14] Auerbach; Justice without Law? *op cit*, p 15.

the public justice system through the provision of in-court schemes. The idea of the 'multi-door courthouse' where cases are siphoned into alternative mechanisms before the adjudication stage is reached, reflects this view. While models of alternative dispute resolution vary widely according to factors such as who acts as mediator, the degree of voluntariness and court sponsorship, any model can be described with reference to the degree of integration with the civil justice process.[15]

According to Roberts, interest in the 'alternatives' has come at a moment where there is a renewed self-consciousness about the civil justice system as it stands.[16] Indeed, it has come at a time of great innovation and change in that system. This decade in Britain, for instance,[17] has been characterised by an emphasis on the ideal of a speedy, efficient and cost-effective model of civil justice which allows maximum access. In March 1994, Lord Woolf was asked by the Lord Chancellor to review the rules and procedures of the civil courts in England and Wales. Reporting in 1996, he recommended a three-tier system of legal proceedings and new civil proceedings rules with the objective of increasing openness and co-operation between the parties to the dispute.[18]

Moreover, a pilot rule has introduced a standard case-managed system for ancillary relief applications in family law which envisages that once an application is made to court, it should be kept moving by the court. Information should be presented to the court in precise form and the simultaneous filing of statements reduces cost and delay. Evidence should be limited to that which is relevant. The emphasis is on resolution through the joint efforts of

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[15] In England court linked mediation was supported by the Report of the Committee on Alternative Dispute Resolution established by the General Council of the Bar under the chairmanship of Lord Justice Beldam (October 1991).

[16] Simon Roberts "Alternative dispute resolution and civil justice; an unresolved relationship" (1993) 56 MLR 462, p 463.

[17] Developments are not confined to the United Kingdom. The Family Court of Australia has introduced a system of simplified procedures and case management to change the emphasis from traditional litigation processes to earlier, more cost-effective resolution by other means. See Ian Kennedy "Simplified procedures and case management: The Australian experiment" November [1997] IFL 9.

[18] See Access to Justice; Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996, The Draft Civil Procedure Rules ('Brown Book', I and II) and the series of consultation papers on various aspects of the system including judicial case management for fast track and multi-track, multi-party actions, security for costs, high court jurisdiction, small claims procedure, clinical negligence cases and conditional fees. See also the British Government White Paper, Modernising Justice (Stationary Office, 1998), where these proposals are brought together.

the judge, the lawyers and the parties.[19] They attend an initial appointment to ensure that the issues are before the court at an early stage and a Financial Dispute Resolution Appointment to facilitate resolution in an informal setting before a District Judge.[20] The proactive court model with an active case management system in operation is a radical movement within the justice system which attempts to transform the ethos from what is perceived to be the slow-moving, expensive and adjudicative, to the more efficient settlement. A research study conducted by KPMG for the Lord Chancellor's Department confirmed expectations that the draft rule, with the sharper focus on issues and its tighter time-tabling, produced better settlement rates and thus guaranteed the place of the rule in the reformed civil justice system.[21] While aspects of the proposals have not escaped criticism,[22] they certainly confirm legislative perceptions and intentions with regard to the reform of the litigation process.[23]

Civil justice reform has not been neglected in this jurisdiction. In 1995, a Working Group on a Courts Commission, the "Denham Group", was established in order to carry out a wide-ranging operational review of the court system in Ireland. The terms of reference were to review the operation and financing of the courts and the group had investigative, advisory and recommendatory functions on the foregoing matters. Between October 1995 and November 1998 the Commission issued six separate reports recommending necessary institutional changes with the introduction of modern management techniques and structures into the courts' system. It sought the establishment of a permanent and independent body to manage a unified court system,[24] to provide necessary support services to the judiciary, administrative reinforcement and an efficient communications system between staff and judges.[25] This would support the constitutional right of access to the courts, which is undermined by serious delays and inefficiencies in the system of court administration. The courts could better protect the rights of the Irish people if a modern management system were to underpin the administration of justice, according to the

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[19] The Ancillary Relief Pilot Program (LCD, 1999). See the Family Proceedings (Amendment No 2) Rules 1997, S.I. 1997/1056 which came into force 21 April 1997 and Practice Direction of 25 July 1996.

[20] Maggie Rae "A proactive court for ancillary relief cases" [1995] Fam Law 133.

[21] Ancillary relief pilot scheme prepared by KPMG (November 1996).

[22] See David Hodson "Government proposed reforms of ancillary relief" [1999] Fam Law 265 and "Ancillary relief reform: Response of the Judges of the Family Division to Government proposals" [1999] Fam Law 159.

[23] See The Lord Chancellor's Speech to the UK Family Law Conference, Inner Temple, 25 June 1999. Pilot reforms were rolled out on 5 June 2000.

[24] The Court Service Act 1998 was passed as a result.

[25] Working Group on a Courts Commission: Management and Financing of the Courts (First Report, April 1996, Government Publications), p 51.

Report.[26] The Group investigated the possibility of improved judicial case management of family disputes as well as the establishment of regional family courts, endorsed as the long-term solution to the problem of delay.[27] Improvements in the current system, including the creation of family law divisions and changes in staffing and ancillary services, were recommended in the meantime. Further, the Group supported the establishment of a pilot scheme to record and report on family law decisions and assemble statistics for publication, uncovering the way justice and the rule of law are being administered by the Courts.[28] The issue of information and access to court documents generally by the public and the media was addressed in the final report.[29]

Voluntary mediation is a form of alternative dispute resolution that has thrived in family dispute resolution; it seeks to support the parties in their independent negotiations, giving them the ability and space to control their own agreements and avoiding the relinquishing of control to lawyers and the civil justice system generally. Nevertheless, any bilateral exchange will take place in the context of legal norms so that parties are inevitably "bargaining in the shadow of the law".[30] Private ordering by the parties is facilitated by the rules and procedures used in court and parties receive 'bargaining endowments'[31] from the system. The more uncertain the legal norms and predicted outcome, the more the bargaining position of the parties is affected and altered. Thus even in the context of the purest form of alternative resolution, the civil justice system remains influential.

Indeed, Roberts has argued that alternative dispute resolution models could be characterised with reference to their degree of separation from the civil justice system. The support of party negotiations without lawyers is at a distance from the system, innovative forms of legal practice are adjacent to it while novel procedures at the threshold of the court are part of the civil justice system itself. Rhetorically at least, all three are linked by a claim that

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[26] Working Group on a Courts Commission: Towards the Courts Service (Third Report, November 1996, Government Publications), p 33.

[27] The Law Reform Committee of the Law Society has supported calls for the establishment of regional family courts and has also recommended the organisation of judicial training for domestic violence cases. See Owen McIntyre "Domestic violence: The case for reform" [2000] 1 IJFL 10, p 16.

[28] Frank Martin "The Denham Commission Reports: A critical analysis" [1999] 4 IJFL 18, pp 20-21.

[29] Working Group on a Courts Commission: Conclusion (Sixth Report, November 1998, Government Publications).

[30] See Mnookin and Kornhauser "Bargaining in the shadow of the law: the case of divorce" 88 Yale LJ 950 (1979).

[31] Indications of the particular allocation a court will impose if the parties fail to reach agreement.

they seek settlement and they possess a common mode of intervention in mediation.[32] Nevertheless, the distinction between negotiated outcomes and imposed decisions is neither clear cut nor unchanging. Any discussion of mediation, a practice which lays claim to the former and rejects the latter, should be seen in the context of a civil justice system which remains influential, which is not as adjudicatory as it is sometimes painted and which is in a state of constant flux.

The Rise of "Family Mediation"

The impetus for the development of family mediation lies, like alternative dispute mechanisms generally, in the growth of the litigation culture and the realisation of its limits. Judges considered that successful mediation could avoid challenges to their authority, where adjudications in hotly contested claims were likely to be ignored.

The 1930's in Britain saw the earliest beginnings of conciliation, characterised by a strong focus on reconciliation. The Denning Committee of 1947 held on to the centrality of this aim but reconciliation was a light that faded fast, in the face an ever-rising demand for divorce. The reconciliation provisions in the Divorce Act 1969 were a dead letter from inception because of the changes to the grounds for divorce, the abolition of legal aid for the divorce process itself and of hearings in undefended cases as well as the need to contain costs.[33] "Reconciliation had played its part in making divorce law palatable; now it was to be discarded".[34] The 1960's and 1970's saw a rapid rise in the number of couples seeking divorce in most Western societies, straining the system beyond the most pessimistic of forecasts. Thus, while the rhetoric of reconciliation lingered, the pressure on the system demanded a more practical and separation focused service.

Consumer dissatisfaction with litigation services fed into the growth of alternatives, not simply because of the financial costs of those services, but also because feelings of disempowerment accompanied excursions into litigation. Disputants wanted to regain control and retreat from professional management of family transition, a mood that struck a cord with some strands of conservative ideology.[35] The plight of one-parent families, their sharp descent into poverty and the detrimental impact of acrimonious divorces on children

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[32] Roberts, *op cit*, p 463.

[33] John Eekelaar and Robert Dingwall "The development of conciliation in England" in Divorce Mediation and the Legal Process (Clarendon Press, 1988), pp 1-11.

[34] *Ibid*, p 11.

[35] Simon Roberts "Decision making for life apart" (1995) 58 MLR 714.

provided further impetus for family mediation. As early as 1963, the United States had taken steps on the alternative route. In that year the Association of Family and Conciliation Courts was founded in order to promote court-connected family conciliation. By the 1970s this body had begun promoting the use of mediation as an alternative to family court litigation. By the 1980s national organisations such as the Family Mediation Association had actively entered into private practice.[36]

Walker argues that although it would be wrong to suggest that the ad hoc development of mediation is totally unique to England, the process has reached a point of consolidation in other countries rather more quickly and easily.[37] It is for this reason that this chapter concentrates on the development of family mediation in England. The English experience illustrates several forms of mediation which grew up together, making comparison possible.

The development of family mediation in the UK since the 1970's is something of an intricate tale, characterised for the most part by favourable reports followed by legislative inaction. The first time that the legislature made any provision for conciliation was the Practice Direction on Matrimonial Conciliation issued 27 January 1971, by the President of the Family Division of the High Court with the concurrence of the Lord Chancellor.[38] It provided for referral of appropriate cases to the court welfare officer who would then report to the court on whether or not the parties had been assisted by conciliation in the resolution of their dispute. Reconciliation and an inquiry leading to a welfare report were distinguished, perhaps in recognition that the former had failed.[39] The court welfare officer could alternatively, in her discretion, refer the parties to a probation officer, marriage guidance counsellor or some other appropriate body, as the case required. Despite some high praise from mediators the Direction had little impact.[40]

In 1974 the Finer Committee on One Parent Families recommended that 'conciliation' should be able to assist families with the consequences of divorce in a more civilised way than the adversarial process.[41] Nevertheless, it appears that the working definition of conciliation utilised by the Committee extended beyond the bounds of family mediation as

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[36] Folberg and Taylor, *op cit*, p 5.

[37] *Ibid.*

[38] For the full text of the Direction, see Lisa Parkinson, Conciliation in Separation and Divorce: Finding Common Ground (Croom Helm, London 1986), p 63.

[39] Eekelaar and Dingwall, *op cit*, p 12.

[40] *Ibid, p* 64.

[41] Sir M Finer: Report of the Committee on One-Parent Families: Cmnd 5629, (1974, London HMSO).

we now understand it, applying to conciliatory advice from any professional rather than to a formal system of conciliation.[42] Yet it clearly distinguished between the concepts of reconciliation and conciliation and this was a welcome move from the viewpoint of the emerging services. The recommendations of the Committee, which included the setting up of a family court, were ignored. However, the report served to assist the mobilisation of those who sought change under the banner of conciliation.

Legislative inaction may also have spurred judicial activism; after the publication of the report, Bristol County Court began an innovative scheme whereby the divorcing couple would meet the registrar and then retire with the Court Welfare Officer to see whether agreement could be reached. These developments have been described as the 'managerial version' of mediation, with short meetings and little attention given to the quality of the settlements.[43] Early moves establishing an independent conciliation service also originated in Bristol, where a sub-group of the Bristol Finer Joint Action Committee undertook work which lead to the establishment of the Bristol Courts Family Conciliation Service, which was, by 1979, operating on a full time basis. The title of the service is misleading insofar as the scheme had no formal connection with the local courts.

Thus, while successive governments declined the invitation to develop this mechanism, fragmented progress was occurring. Court-based conciliation with the use of the probation service and court welfare officers was growing while in a parallel development, the voluntary services, originally focused on child welfare issues, were gradually extended to encompass all issues in a framework which distanced itself from social work origins.

The legislature did not entirely abandon the concept and in February 1982 the Interdepartmental Committee on Conciliation, "the Robinson Committee", was set up in order to report to the government on the scope and effectiveness of existing conciliation services and to consider whether and if so, how, they should be supported and developed "within existing resource planning". The Report grouped services into four categories; independent/voluntary services, out-of-court conciliation based on the probation service, in-

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[42] *Ibid*, para 4.288 states that conciliation is "assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation, by reaching agreements or giving consents, or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers fees and every other matter arising from the breakdown which calls for a decision on future arrangements".

[43] Eekelaar and Dingwall, *op cit*, p 17.

court mediation and Magistrate Court services. This, in itself, bore testimony to the fragmented nature of the developing practice.

Accepting the definition of conciliation set out in the Finer report, contentious though it was, the Report was not a positive one from the point of view of mediation. It questioned the effectiveness of the out-of-court conciliation schemes and was pessimistic on the question of the effectiveness of mediation, measuring effectiveness in terms of ability to bring about a reduction in costs and encourage settlement. The report suggested that there was no evidence that the demand for out-of-court mediation services was large or indeed that it would develop substantially. The conclusion was that the "case for central government support for a national out-of-court conciliation service is not made".[44] It did, however, suggest that provision should be made for conciliation in the procedure of the court with an extension of in-court conciliation to follow.

It should be noted that the report was vehemently criticised by the Bristol Courts Family Conciliation Service, amongst others. Arguing that the Committee did not understand the operation of mediation in practice, they suggested that many of the assertions made, such as the vulnerability of parties without legal representation and the suppression of conflict, were based on false premises.[45] For once, the inaction of the government was a cause of celebration.

In July 1982 the Lord Chancellor announced the setting up of a second committee under the chairmanship of Mrs Justice Booth, in order to examine procedures and practices of the High Court and the county courts in respect of proceedings under the Matrimonial Causes Act 1973 and to recommend reforms which might be made to mitigate the intensity of disputes, to encourage settlements and to provide further for the welfare of children of the family having regard to the desirability of achieving greater simplification and the saving of costs.[46] The Committee reported in 1985,[47] advocating the use of conciliation. It appeared to have a concept of conciliation closer to the model adhered to by mediators themselves than that envisaged by the Finer report, in that it suggests that parties should reach their own agreements with the help of a neutral third party who does not seek to impose any particular solution on them. The voluntariness of the process would be guarded jealously. However,

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[44] *Ibid*, para 5.7.

[45] The Trustees of the BCFCS, "Conciliation: The Inter-Departmental Report examined" [1984] Fam Law 48.

[46] Hansard 15 June 1982. See also Lisa Parkinson "Conciliation, pros and cons (1) and (2)" [1983-1984] Fam Law 22 and 183.

[47] Report of the Committee on Matrimonial Causes Procedure (Booth Report, July 1985).

while recognising the benefits of early intervention, the Report concluded that the "obvious place of conciliation is at the initial hearing",[48] after legal proceedings have been filed. The legislature did not choose to act on the recommendations of the report, possibly because, like Finer, it had substantial financial implications for the government.

Following the Robinson Committee recommendation that a research unit be established to monitor the different types of conciliation schemes, the Conciliation Project Unit at the University of Newcastle Upon Tyne was set up and it reported in 1989. Classifying mediation services according to the degree of judicial and probation control and according to their place within or without the courts, the results were positive for the independent mediators. The report suggested high satisfaction rates generally and independent schemes with no probation control were considered the most successful in achieving the aims of mediation.

Rapid but sporadic development characterised the growth of mediation in the 1980s and despite the legislative cold shoulder the movement tried to consolidate and make uniform their ideals and practice. In 1983 the National Family Conciliation Council, an association of independent schemes, was established to share knowledge and promote best practice within this newly developed field. In the last years of that decade family mediation had reached into the private fee-for service market offering a new model of partnership between lawyers and social work professionals, the latter having dominated earlier practice. The increasing involvement of lawyers paved the way for comprehensive mediation on all issues and even community-based mediation strove to move beyond the limits of the child focus.[49] In 1990 NFCC issued a Policy Paper on the setting up of a national family conciliation service and endorsed many of the recommendations of the Newcastle Report, specifically the need for clear dividing lines between conciliation and other legal/welfare services and the need to ensure that consumers remained in control of the outcome.[50]

In examining the development of family mediation in other jurisdictions, many of the same themes emerge. Particularly within the United Kingdom, developments bore some resemblance to the English experience. From 1985-1986 the Scottish Office funded a pilot project in Edinburgh, while the Scottish Family Conciliation Service at Strathclyde

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[48] *Ibid*, para 3.12.

[49] Janet Walker "Family mediation" in Rethinking Disputes: The Mediation Alternative *op cit*, p 61.

[50] The NFCC changed its title to the National Association of Family Mediation and Conciliation Services and then to the National Family Mediation (NFM). See Lisa Parkinson, Family Mediation (Sweet and Maxwell, 1997) at Appendix G.

obtained a grant for a four-year project consisting of a central office and four community based conciliation centres. However, moves to amend the Divorce (Scotland) Act 1976 in order to make statutory provision for conciliation in divorce proceedings and to impose a duty on solicitors to consider conciliation at an early stage did not succeed. The motion was withdrawn on the basis that it was premature and was not necessarily the best method of proceeding.[51] The growth of voluntary schemes and umbrella organisations followed a similar pattern to England. In 1986 the Scottish Association of Conciliation Services was formed, later changing its name to Family Mediation Scotland. In contrast to the experience in England, there seemed to be a willingness on the part of the government to financially support mediation in Scotland, if only for research and evaluation purposes. Yet like England, there was a marked reluctance to place mediation on a statutory footing.[52]

The development of mediation in Canada, like the UK, was characterised by the parallel development of in-court and out-of-court systems. Court-connected mediation services emerged in 1972 in Alberta and since that time various services have developed in every province, with voluntary mediation growing up along side, often charging fees to clients.[53] While the development appears to resemble the English system, it has been argued that practitioners in the United States[54] and Canada have focused their attention on clinical practice issues, such as training and skills development, while the development of charitable, community based family mediation services as the dominant form in England "has resulted in a peculiar focus on the organisational issues",[55] a focus which has endured.

The Australian experience is reminiscent of the US-Canadian model, with early legislative intervention to provide a court-based service for disputes concerning children.[56] Property disputes were dealt with in conferences chaired by the Registrar with the presence of lawyers and extensive documentation as preconditions of attendance. A compulsory step in the case-flow process, it had been suggested that these meetings were directory rather than conciliatory.[57] However, legislative intervention ensured the establishment of a legal

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[51] The move was initiated by Lord James Douglas Hamilton: Hansard, 21 March 1985.

[52] For a description of the development of mediation in Northern Ireland, see Chapter Five below, p 255.

[53] For a description of the services in various Canadian States see Law Reform Commission Consultation Paper on Family Courts (March 1994) Appendix 1, pp 193-201.

[54] *Ibid*, pp 203-205.

[55] Janet Walker "Family mediation" *op cit*, p 62.

[56] The Family Law Act 1975 established a Director of Counselling and Welfare, operating as part of the court service.

[57] Alastair Nicholson "Mediation in the Family Court of Australia" (1994) 32(2) Family and Conciliation Courts Review 138, p 141.

mandate for new dispute resolution strategies,[58] and a mediation service governed by rules of court. The service offers both counselling and conciliation, is available even before litigation is contemplated and has been characterised as a process invoking a mixture of techniques in order to effect change and agreement.[59] Mediation is conducted using two mediators, often a man and a woman, with different professional backgrounds. Parties may be advised or directed by the court to attend and it is unusual for solicitors to be present although not impossible. Despite appearances, it has been concluded that the Australian provisions are exhortatory rather than coercive.[60]

New Zealand has tended towards a 'mixed system'; courts may refer couples to conciliation, either in-court or out-of-court, at the State's expense.[61]

The first official interest in the subject of family mediation in Ireland comprised of a seminar held by the Department of Justice in 1984. Two years later, the Departments' *Statement on the Governments Intentions with regard to Marriage, Separation and Divorce* proposed that a family court should have the power to adjourn proceedings to allow recourse to mediation services where necessary or appropriate. This work was to be undertaken by either existing voluntary bodies or by a conciliation service attached to the court itself. The Joint Committee on Marriage Breakdown[62] envisaged a mediation model, which was voluntary, independent, nation-wide, comprehensive and available before court proceedings arose.

In 1986, the first mediation service became available to the public in the Republic of Ireland. The Family Mediation Service is a state-funded facility that operates an out-of-court, voluntary and free service. In 1994, the Law Reform Commission published a consultation paper on family courts, followed by a report two years later which recommended the establishment of a system of regional family courts with a unified family law jurisdiction and saw the mediation service as complementary to this recommendation. Information about this service could be obtained from advice centres attached to the court

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[58] Courts (Mediation and Arbitration) Act 1991.

[59] Alastair Nicholson, *op cit*, p 141.

[60] Law Reform Commission Consultation Paper on Family Courts (March 1994), Appendix 1, p 170.

[61] John Eekelaar: Family Law and Social Policy (Weidenfeld and Nicolson, 1984) p 57.

[62] Report of the Joint Committee on Marriage Breakdown (Stationary Office, 27 March 1985) chapter 8 Pl. 3074.

but the service itself would remain completely separate from the judicial process.[63] The provision of mediation in Ireland differs from the community-based mediation prevalent in England in that it is entirely funded by public resources and from the prevalent models in Canada and the US in its out-of-court character. It should be noted, however, that the Commission on the Family suggested that the lack of trained mediators and consequent waiting lists could be greatly alleviated by the private sector of mediator practitioners who would be fee charging. Increased use of the service would put even greater stress on resources and it is possible that the service will not remain universally free,[64] although government commitment remains strong, with financial support for the present programme of expansion.[65]

The Incorporation of Mediation into Legislation

Common law countries have varied radically in the willingness shown by their governments to legislate for mediation, yet at this stage it has become evidence that a jurisdiction that has not incorporated the practice into the law of the land is more the exception than the rule. While existing matrimonial legislation in many countries required that the possibility of conciliating parties to a marriage be considered,[66] increasingly states have buttressed this provision with judicial powers or indeed obligation to refer former partners to mediation.

The New Zealand Family Proceedings Act 1980 compels lawyers to make their clients aware of the availability of in-court 'counselling'[67] facilities. Section 9 of the Act allows the parties to refer themselves for counselling before any formal papers are lodged with the court; after proceedings are commenced they are referred under section 10 unless there is reasonable cause to dispense with the reference and dispensations are not given lightly. Section 19 allows the judge to make an adjournment to allow the parties to attend conciliation. If these attempts fails further conciliation processes occur in the more formal

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[63] Law Reform Commission Consultation Paper on the Family Courts (March 1994) and Law Reform Commission Report on Family Courts (LRC 52-1996), p 127. See also Brian Gallagher "LRC Consultation paper on Family Courts-a practitioner responds" Law Society of Ireland Gazette, October 1994 302, p 304.

[64] Final report to the Minister for Social, Community and Family Affairs from the Commission on the Family: Strengthening Families For Life, (July 1998), pp 212-222.

[65] In 1998, the government trebled funding to £900,000. There are now centres located in Dublin, Limerick, Cork, Tralee, Wexford, Dundalk, Galway and Athlone.

[66] See for example Northern Ireland, Gillian Kerr, "Northern Ireland Family Mediation Service" *op cit*, p 86.

[67] This phrase which appears repeatedly in New Zealand law appears to relate to attempts to reconcile the parties and to mediate once it becomes evident that reconciliation is not possible. Under the Family Proceedings Act 1980 s 12, Family Court Conciliators are obliged to explore the former before engaging in the latter.

setting of the court, via a mediation conference presided over by a judge. The Chairman of the conference may, by consent of the parties, make any order that could have been made by a Family Court. Legal advisors may be present but generally take little active part in the negotiations.[68]

The notion of counselling also appears in section 37 of the Domestic Protection Act 1982, which provides that a judge may recommend that either party attend for counselling where a protection order is sought from the court and s 37A[69] which empowers a judge to compel the respondent to attend. It appears that the latter provision envisages group counselling for violent persons and is not an exercise in mediation, as it is understood here. Under the New Zealand legislation, the term 'counselling' envisages a blend of mediation and therapy. In any given context it can mean either or both and this indeterminate use of the phrase is very unhelpful.[70] Thus, while the word is often used the concept remains somewhat elusive.

The Australian legislature's buttressing of in-court conciliation in 1975 has already been referred to. More recently, the Law Reform Commission circulated an Issues Paper on the subject of family proceedings in an adversarial system of litigation. The Commission asks consultees to suggest ways in which litigious behaviour could be discouraged and incentives given for participation in consensual dispute resolution approaches.[71] The approach of the Commission was premised on the desirability of promoting alternative dispute mechanisms as primary forms of dispute resolution in family proceedings and does indicate the possibility of future excursions into this field by the Australian legislature. The Australian Family Law Reform Act 1995 amended part 11 and 11A of the 1975 Act, in order to encourage the use of non-litigious dispute resolution mechanisms.[72] The Court may advise the parties to seek the assistance of a family or child mediator and can adjourn proceedings before it to facilitate mediation.[73] It allows mediation providers to advertise their services in Family Court Registries. Although the Court must only consider giving advice about primary dispute resolution, the direction is given in all cases where primary

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[68] Priestly, "Mediation conferences-the New Zealand Family Court's alternative to litigation" in J Eekelaar and S Katz, The Resolution of Family Conflict, Comparative Legal Perspectives (Butterworths, 1984).

[69] Inserted in 1985.

[70] For a description of the provisions of New Zealand law dealing with counselling see Helen Cureen "Domestic protection and counselling" 3 (1992) Family Law Bulletin p 119.

[71] Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings (IP 22, November 1997, p 142.

[72] See HA Finlay, RJ Bailey Harris and MFA Otlowski; Family Law in Australia (5th ed, 1997, Butterworths) para 2.108.

[73] Sections 19B (1)-(2) and 19BA (i).

methods are not deemed to be unsuitable.[74] The person authorised to conduct the interview must take account of the bargaining power of the parties, the risk of child abuse or family violence, the emotional and psychological state of the participants and the ability of one party to misuse the process for their own advantage.[75]

The prevalence of 'mediation' thinking on the part of law reform bodies is clearly illustrated by a discussion paper on divorce produced by the Fiji Law Reform Commission,[76] which recommended the introduction of compulsory mediation procedures prior to divorce except where parties had been, in the court's view, separated for a long time or had reconstituted families.

Florida and Virginia have legislated for discretionary divorce mediation of economic issues while several jurisdictions, New Jersey, North Carolina, California, Delaware and Maine, mandate mediation in all contested child-custody cases.[77] It should be noted that California's mandatory mediation first became effective in 1981 and this State has been the trendsetter in both substantive and procedural divorce reform in the United States.[78] An amendment to the Supreme Court Rules in Tennessee allows the court to compel participation in a judicial settlement conference, mediation or case evaluation.

The most recent developments in England concerning legislative provision for mediation have been well documented and debate has raged about the suitability of the proposals and of the legislation which has followed. The controversy and debate surrounding the enactment of the mediation provisions of the Family Law Act 1996 is recounted here in some detail because it throws light on the central expectations and fears which have emerged.

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[74] Altobelli, "Mediation: Primary dispute resolution 1996: Mandatory dispute resolution 2000?" (1997) AJFL 12.

[75] Family Law Regulations, Order 25, rule 5. See Anne Marie Blaney "Family mediation: A comparative overview" (1999) 2 IJFL 2, p 7.

[76] Family Law Reform: Discussion Paper 2-1997 pp 21-23. The Australian Family Law Reform Act 1995 was considered to be a useful model.

[77] Carol Bruch "And how are the children? The effect of ideology and mediation on child custody and children's well-being in the United States" 2(1988) International journal of law and the family 116.

[78] Trina Grillo "The mediation alternative: Process dangers for women" 100 Yale LJ 1545 (1991).

In the wake of the publication of a Law Commission discussion paper[79] on the grounds for divorce, the government published its own consultation paper,[80] which suggested the diversion of the resolution of the consequences of ending a marriage away from the courts and legal profession and towards mediation. The paper emphasised the need to identify saveable marriages using mediation, which would be the norm rather than an exception and it promised that in future issues would be handled in ways most likely to lead to resolution.

In May 1995 the government issued a Green Paper,[81] which proposed that clients wishing to be represented in family proceedings under legal aid provisions would be referred to an intake mediation meeting so that the benefits of the practice could be explained to them.[82] Legal aid could be applied for only if the client had acceptable reasons for refusing mediation. The aim was clearly the achievement of net savings on legal aid expenditure.[83] Mediation was described in the most glowing of terms as a system that was superior at identifying saveable marriages.[84] The enthusiasm for mediation evident in the green paper was sudden and unexpected, especially in light of the pessimism of the Interdepartmental Committee. Described by Roberts as "nothing short of a revolution",[85] the government was sponsoring a scheme of divorce that placed bilateral, party negotiation at the helm and marginalised the representative role of lawyers.

It was closely followed by a White Paper,[86] where the radical ideas were refined but survived broadly unchanged. The White Paper made it clear that mediation would have to carry a heavy load, going beyond improved communications for the purposes of joint decision making towards helping the parties to deal with hurt and anger, address issues which might impede their ability to negotiate amicably and aid reconciliation.[87]

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[79] Law Commission (1988): Facing the Future: A Discussion Paper on the Ground for Divorce, Law Com No 170.

[80] Looking to the Future: Mediation and the Ground for Divorce (Cm 2424, 1993).

[81] Legal Aid-Targeting Need (HMSO May 1995).

[82] *Ibid*, para 9.9.

[83] The paper costed the legal and matrimonial bill for 1992-1993 at £1565 per case and put the likely cost of future mediation at £550.

[84] See White Paper: Looking to the Future (Cm 2799 of 1995).

[85] Simon Roberts "Decision making for life apart" (1995) 58 MLR 714, p 718.

[86] Looking to the Future, *op cit*.

[87] Simon Roberts "Towards negotiated divorce" (1995) 5(2) Family Mediation 9, p 10.

The papers had their critics, who argued that there was no evidence that mediation had the mass appeal or utility supposed.[88] They argued that the government was not allowing a free choice,[89] was creating a two-tier divorce system, which would disadvantage those unable to pay for the services of a solicitor in general and women in particular.[90] Solicitors argued that the papers ignored the decisions of *Edgar v Edgar*[91] and *Pounds v Pounds*,[92] which made it clear that for an agreement to be binding on a couple both parties must receive independent legal advice.[93] Indeed the Solicitors Family Law Association urged the government to make this a pre-requisite in order to ensure the success of and confidence in the new system.[94]

Mediators combated these criticisms; they suggested, for instance, that the legally aided client is presently in an inferior position as certain decisions regarding the conduct of the case must be referred to the Legal Aid Board along with all reasonable offers of settlement. Moreover, the implication in the assertion that a two-tier system is being created seems to be that the legally aided will receive an inferior service. Mediators, who believe that mediation can lead to a better and cheaper outcome for the client, challenge this view. The need for legal assistance in drafting the agreement and advice in informing clients of the legal consequences of the agreement are recognised in the White Paper.[95] Nevertheless some commentators operating within the practice feared the high expectations of the government proposals, particularly with regard to the interests of children and wondered at the complete avoidance of any real discussion on the contribution of court welfare officers to date.[96]

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[88] Gwynn Davis "Mediation and the ground for divorce: A new era of enlightenment or an Orwellian nightmare" [1994] Fam Law 103, p 104.

[89] Chris Barton "Divorced from the process" [1994] Fam Law 104.

[90] Eileen Pembridge "Two tier divorce" [1995] Fam Law p 345.

[91] [1981] FLR 19.

[92] [1994] 1 FLR 775.

[93] Phillipa Pearson "Response to the legal aid green paper" [1995] Fam Law 702.

[94] It should be noted that criticism was directed at changes in the provision of legal aid and the movement from a system where the client chooses a solicitor to one where the government franchise scheme in fact limits that choice. In Ireland legal aid and advice has been made available through law centres staffed by government solicitors and although provision is made for the use of private practitioners the availability of client choice is already limited. See Civil Legal Aid Act 1995, s 31 and the Legal Aid Board Annual Report 1997, p 8.

[95] Maggie Rae "Mediation and Divorce" 1995 5(2) Family Mediation 8.

[96] Dick Greenslade "Looking to the future" 1995 5(2) Family Mediation 3.

A Bill was produced in due course, providing that the court may direct parties to attend a meeting to learn about mediation facilities anytime after it has received the statement of marital breakdown, thus ensuring that those who do not fall within the legal aid net will have the opportunity to mediate. In its passage through parliament, the House of Commons Standing Committee was keen to ensure that mediation as a process is just, voluntary and that domestic violence cases are screened out at an early stage. They were also interested in how the focus on children was carried out in practice.[97]

The Family Law Act 1996 was therefore born into a controversy. Part III applies to mediation in disputes relating to family matters and makes changes to the Legal Aid Act 1988, in order to allow the Legal Aid Board to fund mediation for any person whose financial resources are below a certain level and to allow the Board to make contracts for the provision of mediation. Mediators participating in the scheme are bound by a code of practice[98] and as expected, a person will not be granted representation unless s/he has attended a meeting with a mediator,[99] although this provision does not apply to proceeding under, *inter alia*, Part IV of the 1996 Act, which concerns domestic violence orders.[100]

One writer has pointed out that there is no guidance in the Act, regulations or explanatory information provided by the Legal Aid Board explaining how the question of whether mediation is suitable is to be decided at the initial intake meeting.[101] In addition, it appears that during the mediation process a legal aid certificate will not be available. Clients will be channelled to participating solicitors and it may be difficult to persuade the local area office to grant a legal aid certificate after mediation has concluded. The central and predominant difficulty remains; if a mediator decides that a couple are suitable the application for legal aid will be refused.[102] The client will, however receive green form advice during mediation so that there is no question of cutting the parties off from appropriate legal assistance.[103]

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[97] Ruth Bush "Final stages of the Family Law Bill" 1996 6(2) Family Mediation 3.

[98] Legal Aid Act 1988, s 13B(7).

[99] *Ibid* at s 15(3F) inserted by the 1996 Act, s 29.

[100] See generally LaFollette and Purdie; A Guide to the Family Law Act 1996 (Butterworths, 1996), chapter 5.

[101] Andy King "No legal aid without mediation" [1998] Fam Law 331.

[102] It appears that circuit court judges are doubtful about the wisdom of the introduction of mediation into the legal aid system. The Submission of the Committee of the Council of Her Majesty's Circuit Judges on the Green paper states; "mediation should be kept separate from legal aid: legal aid should continue to be available for litigation, where litigation is reasonable. Mediation should be available in every potentially litigable family dispute, subject to a means tested contribution. Mediators...should not be permitted to determine whether a party is acting unreasonably". [1994] Fam Law 278, p 283.

[103] *Ibid*, p 334.

Nevertheless, the section remains controversial and is at the present time being tested by pilot schemes before it is 'activated' by the recognition of mediators for the purposes of the Act. The Lord Chancellor announced the decision not to implement Part II of the Act in the year 2000, as expected, because of what he described as the disappointing results of the preliminary research conducted on the information meeting,[104] despite the contrary view taken by his Advisory Board on Family Law.[105]Given that the information meetings are "critical for the success of a reformed divorce process" and a "government must proceed on hard evidence, not wishful thinking",[106] the future of Part II of the 1996 Act would appear to be in doubt. The Lord Chancellor claims that the government remains committed to the policy of promoting mediation contained in Part III of the Act,[107] although it would seem unlikely at this stage that the compulsory information meeting will be the tool used in this effort.

In 1990, family conciliation in Scotland became integrated into the legal system. A Rule of Court was introduced, giving sheriffs the power to refer parents in disputes over their children to family conciliation services where this is considered appropriate.[108] A similar provision was introduced into the Court of Session, but referrals can only be made with the consent of the parties.

The Family Law (Divorce) Act 1996 in the Republic of Ireland demands that a solicitor discuss the possibility of engaging in mediation, to help effect a separation on an agreed basis, prior to the initiation of proceedings.[109] The names and addresses of persons qualified

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[104] LCD Press Release, 1999 and Speech of the Lord Chancellor to the UK Family Law Conference, Inner Temple 25 June 1999.

[105] The Advisory Board on Family Law expressed its 'surprise and disappointment' at the decision and considered that there were sufficient grounds, on the basis of the research to date, for implementation to proceed. It confirmed that the decision left a strong sense of unfinished business and uncertainty over the future. Advisory Board on Family Law Third Annual Report (Stationary Office, 1999/2000).

[106] Speech to the UK Family Law Conference, *op cit*.

[107] *Ibid*.

[108] Sheriff Court Rule 132F.

[109] Similarly in Canada, the federal Divorce Act 1985 provides for a lawyer's duty to inform clients of mediation facilities and legislation in Ontario, Newfoundland and Yukon permits the court to appoint a mediator at the parties' request. Saskatchewan legislation required the parties to family proceedings to attend a mediation screening and orientation session. However, an internal and external evaluation resulted in the expansion of group parent education sessions and the elimination of the mandatory component of the orientation and screening.

to provide a mediation service for spouses must be furnished.[110] The court may adjourn cases to facilitate reconciliation, mediation and agreed separation where the parties seek a judicial separation or a divorce from the court.[111] Further, the Children Act 1997 introduces a new Part IV into the Guardianship of Infants Act 1964, which provides that the solicitor discuss the possibility of using mediation with a client before the institution of proceedings. In the White Paper on Marital Breakdown, the Government recognised the success of mediation services and proposed to determine the nature of long-term provision. Responsibility for the service moved to the Department of Equality and Law Reform and the then Minister suggested that placing mediation on a statutory basis was the best means of strengthening the service.[112] While the Irish Government has not chosen to act on this idea yet, it has in no way lessened its commitment to the provision of mediation. In fact it has increased the resources allocated for the support of the service, reaffirming its place as an integral part of the legislative and administrative framework to minimise marital conflict.[113] In addition, the Commission on the Family has recommended the introduction of preliminary information sessions before legal proceedings are advanced, for all couples who decide to separate.[114]

The Claims of Mediation

Family mediation practitioners have been careful to distinguish the practice from other forms of alternative dispute resolution and in some countries, from therapy and counselling. They appear to have succeeded in making a credible delineation. Unlike arbitrators, mediators cannot impose a solution on the parties; the mediator's role is merely to bring the parties together, to facilitate analysis of the dispute and to foster an atmosphere in which the parties themselves will reach an agreement. The mediator is a non-partisan third party, who gains authority from the consent of the parties themselves and although the mediator may assist the parties in reaching agreement by generating "objective criteria",[115] or by

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[110] See Judicial Separation Act 1989, ss 5(1)(b) and 6(1)(b) and the Family Law (Divorce) Act 1996, ss 6(2)(b) and 7(2)(b).

[111] Judicial Separation Act 1989, s 7(1) and The Family Law Act 1996, s 8.

[112] Mr Mervyn Taylor, Press Release (Wednesday, 10 March 1993). The Family Mediation Service is now under the auspices of the Department of Social, Community and Family Affairs.

[113] See Law Reform Commission Report on Family Courts, *op cit*, para 9.17. See also Strengthening Families for Life, *op cit*, which approved of the government allocation of an extra £600,000 for the expansion of the mediation service in 1998. The Report renewed calls for the placing of the service on a statutory basis.

[114] Strengthening Families for Life, *op cit*, para 11.11.

[115] Standards of fairness recognised by the parties. R Fisher, W Ury and B Patton: Getting to Yes (2nd ed, Penguin, 1993).

suggesting alternatives to contentious proposals, the mediated agreement is only validated by the informed consent of the parties. However, the distinction between mediation and therapy has not been made as unequivocally because of the therapeutic benefits sought by participants and legislators. Indeed it is possible to go so far as to say that therapeutic mediation is a practice model and it is dealt with as such under the next section.

Although mediation is not monolithic, commentators and practitioners have come to associate a myriad of benefits with the practice. The benefits appear to be incidental rather than aimed at from the outset and despite the fact that different forms of mediation may produce greater or lesser beneficial results there is some common ground emerging, at least where mediation is voluntary. Empowerment of the parties has been suggested as a possible side effect of voluntary mediation: the parties are not subjected to a solution imposed by adjudication but can tailor their agreement to meet their own needs and priorities. In the 1980s community work and family systems approaches redefined social work as a means of helping clients to help themselves, an approach rooted in communitarian ideology. It has been suggested[116] as the source of the empowerment benefit in mediation, although pressure group activity is not a concern of voluntary sector mediation, which appears to have a more individualised approach to clients.

Confusion is reduced and issues are clarified during the mediation process. Communication between the parties and mutual responsibility is promoted. Where children are involved parents can be alerted to their needs, parental co-operation is increased and both parents are encouraged to remain in their children's' lives. This has lead to the suggestion that the marriage saving focus of early conciliation gave way to child saving, offering a model of parental harmony.[117] A reduction in conflict and hostility is often cited as a primary effect of the process, states which are said to be aggravated by the judicial process because of the approach of lawyers and the orientation of the adjudicative system.[118]

Mediators feel that the conversion of a family dispute into a legal issue involves considerable artificiality;[119] they prefer an approach which recognises that a family remains despite the divorce or separation and valuable relationships ought to be fostered and preserved. Indeed, even solicitors have not managed to remain impervious to the mediation

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[116] Dingwall and Eekelaar, *op cit*, p 16.

[117] *Ibid*, p 15, although the authors do suggest that mediation could also preserve respect for the institution of marriage by particularising the failures as the result of the conflict of each partner's personal aspirations.

[118] Lisa Parkinson "Conciliation, pros and cons", *op cit*, pp 22-25.

[119] Nigel Fricker "Family law is different" [1995] Fam Law 306, p 309.

cries, considering the benefits which they could reap from the new practice. Their approach is not always a cynical plan to dump emotionally charged or unprofitable cases on an under service, but may stem from a sincerely motivated interest in client concerns and requirements.[120] The details of the process are kept private and interference is limited to one professional. Agreements can deal with issues which could not easily be framed in terms of legal rights and entitlements; they can go beyond law to create 'win-win solutions' for the parties.

The Lord Chancellor recently addressed the closing session of the Fourth European Conference on Family Law[121] and neatly summarised what are now considered to be the positive attributes of a well-functioning mediation practice. It is conflict reducing, forward looking, constructive, in that it challenges entrenched positions and enables people to find a way forward which is mutually beneficial, parties are more likely to adhere to agreements which they have constructed themselves and the financial costs of resolving disputes, for the parties and for the State, are reduced. The Law Reform Commission endorsed a similar view.[122]

The Constitution and Mediation

Article 41 of the Irish Constitution, Bunreacht na hEireann, treats the family founded on marriage[123] as a vital social institution "the natural, primary and fundamental unit group of society" possessing rights which cannot be transferred or given away, lost by the passage of time or abandoned by non-exercise.[124] The State pledges to guard with special care, the institution of marriage and to protect it against attack.[125] This duty provides a backdrop against which all public policy measures affecting the family must be viewed, including the advent of family mediation.

The Constitution demands respect for the autonomy of the family and it is arguable that this is supported by mediation and undermined by state interference via the judicial process. The weight of this responsibility is illustrated by the fate of the Matrimonial Home Bill

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[120] Brian MacMahon "Mediation: You could make your business more profitable" Law Society of Ireland Gazette, December 1994 379, pp 380-381.

[121] Lord Irvine of Lairg, Friday 2 October 1998, Strasbourg.

[122] Law Reform Commission Consultation Paper on Family Courts, *op cit*, para 2.03.

[123] *State (Nicolaou) v An Bord Uchtala* [1966] IR 567.

[124] *Ryan v Attorney General* [1965] IR 294, 308.

[125] Article 41.3.

which proposed to provide every spouse with an equal right of ownership in the matrimonial home and household effects unless they already had rights, or had agreed otherwise. The Supreme Court[126] ruled that this violated the 'authority of the family', the right of every couple to make joint decisions. The universal application of the proposal made it a disproportionate measure. Further, it may not be possible for the Irish government to restrict the availability of legal aid in certain situations. While the courts have found that the duty of administering justice and adjudicating by due process does not create any obligation on the State to intervene in private civil litigation so as to ensure that one party is as well equipped for the dispute as the other,[127] refusals of legal aid have been successfully challenged in family law cases where the courts accept that a persons viewpoint should be before the court.[128] The possibility of this type of action must not be ignored.

The possibility of reconciliation is not ruled out in mediation and may emerge through discussion. In this way, mediation may strengthen the institution of marriage in conformity with constitutional principles. This requirement is further strengthened by the amendment to the Constitution, which provides that a court must ensure before a divorce is granted that there is no reasonable prospect of a reconciliation between the spouses.[129]

The Assumptions Underlying Mediation

The claims made on behalf of mediation are to a large extent premised on certain underlying assumptions about the nature of the practice and the nature of human behaviour. In order to fully comprehend the claims it is necessary to make the assumptions explicit. It is often assumed that mediation is a voluntary exercise and participants have freely chosen this model of dispute resolution for themselves. This is possibly the most fundamental assumption, because it lies at the basis of several of the benefits that are presumed to accrue to participants and where volition is absent, it is not possible to suppose that the same benefits will in fact materialise.

Mediators hold a belief that participants in a personal dispute can generally make better decisions about their lives than an outside authority such as a judge or arbitrator and parties

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[126] *In Re Matrimonial Home Bill 1993* [1994] 1IR 325.

[127] *MC v The Legal Aid Board* [1991] 2IR 43(HC), per Gannon J.

[128] See *MF v Legal Aid Board* [1993] 13 ILRM 797 (SC). See also *Stevenson v Landy*, High Court, Unreported February 1993 where the requirement that the mother would be successful in resisting a wardship application was unacceptable to the court.

[129] Article 41.3.2 (ii).

are more likely to abide by the terms of an agreement if they feel some responsibility for the outcome and have developed a commitment to the process used to reach the agreement. The past history of the parties is only important to relation to the present or as a basis for predicting future needs, intentions, abilities or reactions. The more accurately a mediated agreement reflects the needs, intentions and abilities of the participants the more likely it is to last. The process should include a way of modifying the agreement in the future since needs, intentions and abilities are likely to change. Change is a constructive and viable part of the agreement and must be considered. The process is substantially the same for all participants and situations but techniques, scheduling and tasks to be accomplished may vary to match the circumstances, the clients and the uniqueness of the mediation. The last assumption supports mediation's claim to inject flexibility into the resolution process.

These assumptions are made explicit by the claims of mediators but certain other assumptions are made in relation to behaviour, which may not be so apparent. For instance, mediation is premised on the belief that people try to escape what they perceive as negative or destructive (pain) and go towards what they perceive as advantageous or positive (pleasure). Without this assumption, which underlies all contracting models, the parties could not be left to negotiate their own best interest for themselves. In addition, mediation holds that people make more complete and therefore better decisions when they are consciously aware of the feelings created by conflicts and deal effectively with those feelings i.e. integrate the feelings into decisions without allowing the emotions to overwhelm rational concerns.[130] This is an assumption that may be more significant in certain forms of mediation such as therapeutic mediation and less significant in others. It should be noted that it is often assumed that the couple have a right not to receive therapy or counselling[131] although one prominent mediator suggests that whether or not the process of helping the clients to draw a line under past grievances and discover a fair way to negotiate in their future relationship falls into the domain of counselling is "quite immaterial".[132]

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[130] The assumptions of mediation outlined here are taken entirely from eight propositions of mediation set out in Folberg and Taylor, *op cit*, p 14. The authors suggest that acceptance of those principles is essential to the development of mediation as a process and as a profession.

[131] Eric Plunkett, Mediation: A Positive Approach to Marital Separation, *op cit* at Appendix I.

[132] Christopher Richards "Mediation-managing conflict and resolving disputes" [1998] Fam Law 169, 170. In this article the writer makes explicit the common assumption of mediators that a relationship of real meaning continues after divorce.

In describing the values of mediation the view has been expressed that mediation is empathetic to separation as a choice, that it respects the clients' spiritual and cultural values and that it goes beyond the best interests of the child to consider the balanced interests of the entire family.[133] It is safe to assume that the practice of mediation in Ireland is characterised by similar assumptions.

Models of Family Mediation

The presence of several distinct forms of mediation makes generalised claims about the practice difficult. This is compounded by the fact that the theoretical distinctions between the types are often not complied with in practice. Nevertheless, it is arguable that despite the presence of endemic variety in the operating practices of mediators, it is possible to broadly outline models of mediation that conform to reality. It cannot be assumed that the variations are problematic for mediators; many would assert that the ability to move between forms is a foundational benefit and ensures a versatility that is never present in an adjudicative system of resolving disputes.

The fundamental distinction between voluntary out-of-court mediation and in-court mediation must be drawn first. In-court mediation, as the name suggests, is characterised by the conduct of mediation on court premises. The place of mediation is the unifying thread, but there are many variations. Mediation may be mandatory or voluntary, clients may be self-referred or referred by the court, the mediator may be a court officer who is obliged to report to the court on the proceedings, or may not be so obliged. The mediator could equally be independent of the court, or at the other extreme, could be a family court judge.[134] The model is present in all jurisdictions except for Ireland because of the poorly developed court welfare system in this country.

The model has been the subject of criticism[135] and the Lord Chancellor preferred the voluntary, community-based model of mediation even in the face of contrary recommendations from government-sponsored reports. In this country, the Report of the Joint Oireachtas Committee on Marriage Breakdown (1985) proposed that any mediation scheme should be out-of-court and voluntary, conditions that the Family Mediation Service enthusiastically embraced. Voluntary or community mediation is conducted outside of court

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[133] *Ibid, p* 170.

[134] See, for example, New Zealand Family Proceedings Act 1980, s 14(1).

[135] See Chapter 2, p 67 below.

premises and involves an independent mediator who does not report to the court; the proceedings are confidential and privileged. Traditionally, the clients were self-referred or referred by solicitors but with the passing of the 1996 Act in England, clients may be referred by the Legal Aid Board or by the court in the future.

Mediation also divides on the willingness to engage in therapeutic practices. Indeed there is a jurisdictional element in this context; it seems to be the case that at one end of the spectrum countries expect and oblige a therapeutic or counselling component, New Zealand for instance, while at the other extreme mediators have been rapidly distancing themselves from their social work origins and are quick to distinguish the practice of mediation from the practice of family therapy.[136] Mediators in Ireland are frequently recruited from the human sciences and they do not display the readiness to deny the therapeutic element,[137] although the Family Mediation Service has pointed out that it does not offer marriage guidance counselling or therapy. Parkinson argues that although mediation can have therapeutic effects, it is now widely acknowledged that it is not therapy.[138] Yet, it is necessary to recognise that mediators will often have backgrounds in counselling or therapy and will continue to be concerned with the long terms benefits of the process in terms of communication and relationship.[139]

Therapeutic family mediation is practised using techniques derived from family therapy and it a form of intervention which has been stringently criticised and questioned,[140] even from within. This form of mediation differs little from clinical therapy or family therapy and utilises a family systems approach, a perspective which views the family as a system of mutually interacting and interdependent parts and sets the site of pathology in the system rather than in the individual. The technique was developed as a means of treating mental illness and holds that the individual must be seen within the structure of the family so that changing the organisation of the family allows a new therapeutic system to develop; the patient is seen 'in context'. The pathology has to be diagnosed and treated, sometimes aided by covert techniques such as one-way mirrors. The basic exchange is between the therapist and the parties, rather than between the parties themselves and the theory suggests that by manipulating behaviour patterns the therapist may modify perceptions. Covert adversarial

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[136] Literature originating in England seems to have taken this approach.

[137] See Delma O'Regan "Marital separation, a life transition" in Eric Plunkett, Mediation: A Positive Approach to Marital Separation, *op cit*, p 15 for a psychological analysis of the process of separation.

[138] Lisa Parkinson, Family Mediation, *op cit*, p 84.

[139] See Chapter Five, p 262 below.

[140] See Chapter 2, p 70 below.

power may be used where the family prove resistant.[141] The cool detachment of the observer is preferred,[142] although the family therapist joins the family in order to achieve data and diagnosis.[143]

In stark contrast to the therapeutic focus, mediators may take a settlement-directed approach. Here the aim is to reach a settlement by concentrating on overt issues and looking for practical solutions. Little time is given over to the underlying conflict and relationships; instead the mediator manages structured negotiations, in a model that makes bargaining the core activity. This form of intervention is influential because it has many prominent exponents, such as John Haynes and because of the pressure on mediators to prove their value to the dispute resolution system by producing settlements in large numbers and in a short space of time. It is likely that this model will become more prominent in England when the provisions of the new legislation are in place; mediators will have to prove their 'effectiveness' in order to retain public funding.

It appears that an increasing number of family mediation services in England are adopting the Coogler model of practice that deploys a structure to ensure a fair process and outcome, with the mediator taking a modest profile throughout. Discussions are limited to those issues for which decisions are needed in order to obtain a settlement, there is advance agreement on the rules of procedure and the guidelines to be followed by all the parties to the mediation.[144]

Finally, a model of mediation has been termed 'transformative' in that it seeks to encourage self-determination and autonomy (empowerment) in a non-directive manner and it seeks to facilitate the participants in becoming more aware of and responsive to each other's feelings (recognition).[145] It seems that in fact that this is more a result of mediation being conducted in an ethical and sensitive way, than an actual model in itself. It can also be seen as a claim of mediation in general rather than the monopoly of one form of the practice.[146]

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[141] Marian Roberts "Systems or selves?: Some ethical issues in family mediation" [1990] JSWL 6.

[142] *Ibid*, p 11.

[143] See Salvador Minuchin, Families and Family Therapy (Tavistock, 1974).

[144] Marian Roberts: Mediation in Family Disputes; Principles of Practice (2nd ed, Arena, 1997), pp 112-113.

[145] See RAB Bush and JP Folger; The Promise of Mediation: Responding to Conflict through Empowerment and Recognition (Jossey-Bass, 1994).

[146] For a description of the models employed in Ireland, see Chapter Five, p 263 below.

Mediation in Practice: Variations on the Model

Agreement that there is no single "right way" to practice mediation has ensured a diversity in the provision of the service which is at the same time a strength, ensuring that bureaucracy does not take over and a weakness, as the potential client cannot be certain of the form of service s/he will receive. Within the models described in the last section there is a bewildering degree of variety on the basis of the type of disputes that mediation is prepared to address and the way that it addresses them.

In recent years there has been a shift away from the primary focus on the issue of custody and access and an increasing willingness to tackle financial disputes and to offer a comprehensive service. The reasons for this are manifold; mediators argue that the two are often inextricably linked and it is difficult or impossible to separate them, lawyers have become involved as mediators and as advisors to mediators and this has allowed questions of financial settlement to be addressed while legislators have recognised that mediation on a single issue is unlikely to result in any substantial savings for the exchequer.

Mediation may vary on the basis of the personnel involved; anchor mediation for instance involves a lawyer mediator assisting the family mediator at one stage of the process without being involved throughout.[147] Alternatively, a process known as co-mediation may be utilised. In this instance it is argued that the presence of two mediators working together introduces balance, including gender balance if this is required, support, wider perspectives, complementary skills, particularly where the co-mediation is inter-disciplinary, models for the couples' behaviour and a greater assurance that good practice is being followed.[148] Naturally there are costs, both financial and logistical, as well as the possibility of disagreement, domination and diversion. In Scotland, the sole lawyer-mediator method has been in use since lawyers began training as mediators in 1993. There are advantages such as costs savings where the solicitor can give the parties general legal advice on their entitlements but there is a risk that lawyers will find it difficult to move to the role of non-partisan when their background training is so imbued with advocacy.

Where there is serious and overt conflict between the parties it would be possible to conduct shuttle mediation i.e. the parties remain apart and the mediator moves from one to the other. This form is not welcomed in family mediation; it seems to defeat the purpose. More

[147] Lisa Parkinson: Family Mediation, *op cit*, p 71.

[148] *Ibid*, pp 72-73.

acceptable is the 'caucus' where the mediator spends some time alone with each disputant. There are difficulties with regard to confidentiality here and the time-consuming nature of the practice can make it costly. Nevertheless, it may be required in a particular case and is a technique that can readily fit into any model of mediation.

In the US and Canada a practice known as "brief-structured" mediation has developed, which can be rigid in approach in that the decisions required and the time-scale for making them are agreed in advance with the parties. Possibly because mediators in these jurisdictions deal largely with financial disputes, this method has become popular as a means of keeping down the number of sessions and lowering costs. It is most appropriate where the settlement-based mediation model is in use and indeed it is hard to conceive of a technique more fitting to this model.

Mediation may be characterised according to the style and approach of the mediator. Muscle mediation involves behaviour of a mediator, which closely resembles the role of an adjudicator, where the mediator tells the parties what is fair and appropriate in their particular case. In contrast, scrivener mediation involves a mediator who regards the role as little more that that of a recorder of the parties' agreement.[149] It is the variation in practice based on the individual mediators perception of the role and the dispute that is most dangerous or disconcerting for the client, who may find it difficult to know in advance the style the mediator will adopt.

Mediation in Practice: The Model Procedure

The degree to which a mediation session is structured will depend to a large extent on the kind of issues being resolved and model used by the mediator. Thus, where financial and property issues are addressed in a settlement based mediation the sessions are likely to be well structured, while a mediator dealing with an access dispute and interested in the transformative model is unlikely to be as concerned with the steps in the process. Nevertheless, it is necessary for every mediation to proceed with some minimum reference to a timetable.

Described by Haynes as the "intake" process, the first step is an engagement with the parties where the nature and purpose of the mediation is explained and the ground rules set out. Then the mediator will engage in a fact finding and data gathering exercise, ensuring

[149] Folberg and Taylor, *op cit* at chapter 6.

that all relevant information is on the table, investigating the dispute and the perspectives of the parties. The mediator will then explore the options and the alternatives with the parties, help them to negotiate and decide, produce a draft agreement and allow them to begin a testing period, after which the agreement will be reviewed.[150]

Parkinson also describes a stage where the mediator prepares for the first mediation session, considering both the logistics and the referral information, facts, issues and concerns. She also considers a stage where the agreement to mediate is made by gaining the informed consent of both parties. While the latter stage would not apply in all mediation models, its presence is an important reminder that mediation aims to have the consent of the parties before it may proceed.[151]

The Theoretical and Philosophical Underpinnings of Mediation

Philosophy and the Reaction to the Adversarial System

Twining has stated "the vast bulk of the mediation literature is atheoretical, representing a series of pragmatic and ad hoc reactions to some specific perceived problems in the American legal system at a particular period in history".[152] It is an accusation that is just, but should not detract from the serious efforts made on behalf of mediation to find it a theoretical home. Any advance in locating mediation on a theoretical level contributes substantially to the understanding of its aims and directions.

Fuller suggests that adjudication as a form of social ordering is limited, in that it is not useful where the effectiveness of human association would be destroyed if it were organised around formally defined rights and wrongs. He gives the agreements of a married couple as an example. Essentially, it cannot grapple adequately with polycentric tasks and is confined for this reason to dealing with rights, avoiding any engagement in any affirmative direction of affairs.[153] It is argued that judicial proceedings do not favour the direct and active

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[150] Janet Walker "Family mediation" *op cit*, pp 66-70. These stages are identical to the seven stages outlines by Taylor and Folberg, *op cit*, at chapter three.

[151] See also Anna Connolly "Stages on the mediation process" in Eric Plunkett, Mediation: A Positive Approach, *op cit*, pp 24-31, where she describes the stages as introduction, exploring the issues/developing options, negotiation/decision making, writing up the agreement and review.

[152] William Twining "Alternative to what? Theories of litigation, procedure and dispute settlement in Anglo-American jurisprudence; Some neglected classics" (1993) 56 MLR 380, 381.

[153] LL Fuller "The forms and limits of adjudication" 92 Harv L Rev 353 (1979).

participation of the parties in the solution of family matters. Socially and culturally, judicial proceedings are based on the idea of a dialectic opposition of antagonistic positions, promoting confrontation and reducing dialogue and understanding. "The impressive and violent conflict that characterise it and the reduced engagement of the interested in the decision clearly stress the factors of instability and precariousness of the reached solutions".[154]

Mediation claims to focus attention on needs and interests and away from rights, which it considers to be the domain of adjudicative models of dispute resolution. It focuses on why a claim is being asserted and the interests or desires which motivate the assertion of a right in contrast to adjudication, which uses legal norms to objectify conflict. Mediation is commonly described with reference to the ways in which it differs from adjudication not only in form, such as who participates and how it is organised, but also in substance and orientation.[155] It seeks pragmatic and tailor-made solutions, chosen by the parties themselves. Founded on a philosophy of self-determination, mediation claims that disputes need not require the application of legal standards in all cases. The strength and acceptance of the adjudicative model has perhaps ensured that mediation would seek to explain and justify its orientation in juxtaposition with adjudication. This is unfortunate in that it creates a dualism and suggests that a choice must be made and the options are mutually exclusive.

The argument runs along the following lines; adjudication increases conflict between the parties, while mediation reduces it; adjudication disempowers the parties while mediation empowers them; adjudication is rights based, mediation is interest-based and adjudication confines itself to set solutions while mediation offers flexible options for settlements. The predication of a philosophy on a dichotomy is possibly not the best philosophical foundation for a practice. Perhaps when mediation is more widely understood and accepted it will not need to derive a basis from a critique of another model, but will instead be appreciated for its uniqueness and innate possibilities.

Mediation and Negotiation by Lawyers

It is also necessary for mediation to distinguish itself from lawyer negotiations; indeed it is imperative that this is done completely and that it successfully illustrates the particular

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[154] Antonio Farinha, Report to the Fourth European Conference on Family Law (CONF4 (98) RAP6 7 September 1998, Strasbourg), p 5.

[155] Dr Julie MacFarlane "The mediation alternative" *op cit*, p 19.

strengths of mediation. Lawyer negotiation is often seen as more satisfactory and conciliatory than adjudication and the accusation may be formed that if lawyer negotiations divert cases from the courts and reduce the acrimony and bitterness associated with the adversarial process, mediation is unnecessary. Theories and ideologically motivated debate have grown up as both practices vie for territory in the dispute resolution field. Mediators argue that lawyer negotiation is carried out at a very late stage in the dispute process and only on the basis of the legal positions. The feuding and posturing of lawyers may impede settlement and costs are high. Settlement may not be initiated until a full legal case has been complied and lawyers operate on a 'positional bargaining' approach, which fails to engage other avenues of settlement opportunity.[156] It appears that lawyer-negotiations are viewed as tainted with the rights focus and win-lose model of resolution that characterises the adversarial process generally.

However, it is arguable that there are two models of lawyer negotiations, which stand in an integrative relationship with each other. The distributive approach applies to property and financial matters, looks at rights and seeks a speedy settlement in the traditional style while the integrative approach is more often applied in access and custody disputes, is more concerned with interests and the achievement of mutual gains.[157] Certainly, the first model may involve coercion or deceit on the part of the client, with lawyer acquiescence, but the second is very much in line with the philosophy of mediation.

Indeed, Kressel et al[158] have identified two models associated with different styles of mediation; the problem-solving model, which seeks integrative solutions and mutual gains and the settlement orientation model which prefers speedy to high quality or durable settlement. Both models derive from the satisfaction story of mediation ie the aim is to settle conflict and produce client satisfaction. Contrast the transformation story, which seeks to transform the client's character and facilitate their personal growth through empowerment[159] and recognition.[160] Thus, mediation seeks to justify its existence with reference to its transformative effect, an element that is completely lacking in lawyer-negotiations no matter how conciliatory the approach assumed by the lawyers. Perhaps this

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[156] *Ibid*, p 7.

[157] D Ellis and N Stuckless, Mediating and Negotiating Marital Conflicts (Sage, 1996) chapter 2, citing J Rubin "Models of conflict management" [1994] Journal of Social Issues 33.

[158] Mediating and Negotiating Marital Conflicts, *op cit* citing K Kressel et al "The settlement-orientation vs the problem solving style in custody mediation" [1994] Journal of Social Issues 50, pp 67-83.

[159] Individuals are restored in their sense of value and worth and are sure of their capacity to survive.

[160] The ability to acknowledge and empathise with others.

explains the emphasis that mediation has placed on theories that have their origins in counselling and the human sciences generally.[161]

Theories from Therapy

A developed theoretical structure would appear to be a necessary pre-requisite to the development of mediation as a coherent intellectual exercise and as a practice. The relative youth of mediation in its modern Western form has, however, meant that it must borrow from the theoretical frameworks of other disciplines. This has lead to the importation of a number of different foundations, which may not necessarily complement each other. Arguably there are favourable ramifications in that inter-disciplinary co-operation and the development of a common pool of knowledge are encouraged. Nevertheless, the transfer has left mediation open to the criticisms levelled at the practices associated with the transferred theoretical perspective.

The use of systems theory in mediation is the clearest example of this. It has already been encountered in the context of the discussion of therapeutic mediation.[162] Despite the assertion that it provides "a means of understanding personal experience and life events in the context of wider social and family processes",[163] concern has been expressed that this approach leads to intrusive and uninvited treatment. Parkinson denies the inevitability of the connection between the use of systems theory and the practice of family therapy and suggests that a systems perspective is merely a conceptual tool, which does not necessitate the provision of treatment. She argues that examining interactions and patterns of communication can help mediators to move from linear cause and effect explanations that encourage blame.[164] The problems are exacerbated by the use of common technical terms, denoting different approaches in family therapy and mediation. Terms such as 'reframing'[165] and 'circular questioning'[166] are common to both yet arguably the way techniques are used differs so radically that the words cease to have the same meaning.

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[161] See Chapter Five, p 263 below.

[162] See p 40 above. It entails an approach which treats the family as the sum of its mutually dependent parts.

[163] Lisa Parkinson; Family Mediation, *op cit*, pp 90-91.

[164] Lisa Parkinson; Family Mediation, *op cit*, p 91.

[165] This is a communication and conflict management skill which Parkinson suggests is used by mediators to restate positions and concerns in a positive way and Roberts suggests is "designed [by family therapy] to challenge the parties different values". *Ibid, p* 91.

[166] These focus on communication and interactions between the participants and invite them to think about the perspective of the other. It is used in mediation in order to clarify positions and in family therapy in order to treat the participants. *Ibid*, p 91.

Nevertheless, where mediators have a therapeutic background it is difficult to ensure that the mediator is using the technique in the manner best suited to the objectives of mediation. It is suggested that systems theory offers valuable concepts for describing how relations are renegotiated in divorce, particularly the concept of boundaries.[167]

The theory of attachment and loss helps mediators to understand the feelings of meaning, belonging and connectedness that may be destroyed or undermined by the divorce or separation. The mediator then tries to create a temporary respite before major changes and decisions are made and facilitate planning for an uncertain future. The theory holds that a cycle of poor parenting may be created where children experience insecure attachments to their own parents. They may show pathological reactions to loss in later life, or may have difficulties in forming and maintaining lasting relationships.[168] From the psychological viewpoint, each person must gain a redefinition of self in divorce and a new perspective on their role identity.[169] It is a theory most at home in a counselling service, yet while mediation never claims provide counselling it is argued that an understanding of the centrality of attachment and the grieving process associated with loss enriches the practice of mediation.[170] The obvious problem for mediation is trying to reconcile the appropriation and use of counselling theories with the position that mediation is not counselling.

In Ireland, family mediators have viewed the separation process as a life crisis with emotional and psychological dimensions that must be acknowledged by mediation. The psychological tasks of the persons coming into mediation are to process feelings of grief, to let go of the marital state and the life that has been built around it and to re-establish a sense of self in the world as a separated person. Mediators are asked to respond appropriately to the feeling content of the client's reaction to separation, allow a session with the family after the final agreement in order to acknowledge the change in the family and project ahead to the future in order to provide the structures for living a new life or establishing a new identity.[171]

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[167] Robert Emery; Renegotiating Family Relationships: Divorce, Child Custody and Mediation (Guilford Press, 1994), pp 19-20.

[168] Other psychological explanations throw light on human relations such as intimacy, power struggles, grief and identity conflicts, Emery, *op cit*, pp 23-27.

[169] Robert Emery, *op cit*, pp 29-36.

[170] Lisa Parkinson, *op cit*, pp 89-90.

[171] Delma O'Regan "Marital separation-a life in transition" in Eric Plunkett, Mediation: A Positive Approach to Marital Separation *op cit*, p 15.

Theories from other Human Sciences

Role theory

The origins of this perspective are sociological; it seeks to explain patterns of interaction where there are sharply conflicting perceptions, activities, demands and power arrangements. The concept of role refers to the behavioural performance of status expectations and holds that each status that a person occupies in a particular society involves multiple associated roles. Lawyers, mediators and clients may share a number of roles; all three may involve themselves in behaviour of the helper, the helpee or the advocate and this, in itself, can create conflict and confusion. Where members are seen to be usurping the domain of others, conflict is exacerbated.[172] In the literature on conciliation role allocation to legal and social experts has been made explicit; Henschel and Erickson[173] viewed mediation as a rational and systematic process that occurs in fundamental and sequential phases, a view commonly accepted now. Moreover, the Family Mediation Centre in Atlanta has developed specific rules for the service with role expectations itemised and accepted by all the parties.[174] While few centres would go so far as to make the parties sign the description of the roles, few would neglect to include a description of the mediators role in their literature. The possibility of role strain inherent in the advisory and counselling processes of dispute resolution is reduced by clear delineation of purpose. Role theory provides the rationale for the initial meeting, where the work of the mediator and the work which is outside the mediators domain, is described for the parties.

Theories from the Natural Sciences

Mediation has utilised chaos theory in its search for a theoretical home. The theory argues for the global nature of systems, it concludes that however unpredictable the variations in disruptive patterns, for instance weather patterns, very small differences in input could make a major difference in the final shape of the pattern, particularly where the intervention comes at a critical turning point. The significance for mediation is that even small changes in 'surface tension effects' may influence the development of new family structures and patterns more profoundly than expected, with early interventions being more influential

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[172] Dr Howard H Irving, Family Law: An Interdisciplinary Perspective (Carswell, 1981), pp 6-16.

[173] *Ibid,* citing Henschel and Erickson, Mediation of Family Disputes-A Proposed Model (1977, unpublished).

[174] *Ibid*, p 9.

than later ones when functional structures have solidified.[175] Mediation is inspired by the theory to conclude that if the varying distance between the couple could be measured, it would not be a reliable predictor of the distance between them at the end of the mediation. This may justify the practice of mediation even where it appears that the couple are very distant.

Moreover, mediation argues from this theory that conflict between the couple is a form of turbulence[176] which creates an energy drag but mediation can result in agreement without resolving all conflict, by using energy constructively to manage the dynamics of change. The problem with the use of any theory from the physical sciences is one of relevance. The arguments must necessarily be based on very loose analogy; indeed it is hard to see how a discovery about snowflakes or storms could be of pressing importance in the context of human relationships. The use of such theories leaves mediation open to an accusation that it is poorly premised on an inappropriate theory which it is using, unsuccessfully, to add scientific credibility to the practice.

Conflict Theories

The conceptualisation of conflict is central to the theoretical work of mediation. Conflict is seen as a dynamic process where the movement of one party affects the subsequent movement of the other. Classification is on simple/individual, group or organisational lines and although it will cease because of its own internal tendencies, this process is slow. Conflict may be described in terms of the attributes of the parties or the options for resolution. Dollard and Miller take the latter perspective and divide conflict into three types: approach-approach where both resolution options are equally attractive, mutually exclusive and the person wants both; approach-avoidance where a person wants one option for strong reasons, but for equally strong reasons, may not have it; avoidance-avoidance occurs where a person has two disliked options and must take one. This categorisation appears to be based on the internal process of the client and would fit into the counselling perspective on mediation.[177]

Rummel differentiates between latent conflict and actual conflict on three levels; potentialities, dispositions/powers and manifestations. In divorce, conflict begins as a

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[175] Lisa Parkinson, *op cit*, pp 92-94.

[176] This is caused where the forces of stability interact with the forces of instability.

[177] Taylor and Folberg *op cit*, pp 19-20.

structure of opposing interests, a potential which if activated becomes manifest in the action or threat of action to the others detriment. The life cycle of conflict moves from the latent to initiation to balancing of powers to the balance of power and then the disruption of the equilibrium. Mediation finds a place in the balancing of powers at a time that the conflict has become manifest or even before then, when the parties become aware of a conflict situation or structure. The use of mediation at this early stage can eliminate the need for manifestation.[178]

The analysis of Deutsch[179] has caught the imagination of mediation. He proposed that manifest conflict is conflict that is overt and expressed while the underlying conflict is implicit and hidden or denied. However, the implicit conflict may lie behind a manifest conflict where the parties feel that the manifest issue is easier to cope with or they chose to deny the presence of the implicit problem. They may not even be consciously aware of it. It was he who coined the resolution outcome terms, mutual loss (lose-lose), gain for one (win-lose) and mutual gain (win-win). Mediation views itself as an advantageous process in the promotion of mutual gain. Again, much of this theoretical perspective appears to come from a human science basis.

Benjamin observed that conflict is endemic in all human relationships, engendered by change, which causes intrapersonal and interpersonal stress. The mediator sees conflict as the source of both risk and opportunity and couples that are in overt conflict may be most suitable for the practice because this form, in contrast to latent conflict, lends itself to resolution.[180]

Conflict theory adopts analogies with the physical sciences also; differential equations from physics have been used to explain dynamic theories,[181] while the form of the double helix has been used to illustrate the phases of conflict development. Folberg and Taylor argue that nuclear fission is the ultimate in conflict and divergence while nuclear fusion, the merging of diverse elements to produce great energy, is the ultimate in convergence.[182] Again it has to be questioned whether in fact this type of analysis obscures more than it illuminates.

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[178] *Ibid*, pp 21-23.

[179] M Deutsch: The Resolution of Conflict (Yale University Press, 1973).

[180] See Benjamin "The mediator as trickster" (1995) 13(2) Mediation Quarterly 144 and Christopher Richards "Mediation-managing conflict and resolving disputes" [1998] Fam Law 169, p 170.

[181] Folberg and Taylor, *op cit*, p 20.

[182] *Ibid, p* 27.

The perspective also seeks to illustrate the superiority of mediation by contrasting it with adjudication and arguing that the latter is a less appropriate system of conflict resolution in a society where "great value is placed on individual freedom and choice, where structures are more collective and egalitarian and where few persons or institutions are universally accepted as worthy of having the necessary authority to impose solutions".[183]

Mediation and Feminist Theory

It has been suggested that the Western concept of law is based on a "patriarchal paradigm characterised by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles....".[184] Mediation rejects the objectivist approach and promises to consider disputes in terms of relationships and responsibilities; it undermines authority and hierarchy and allows the parties to make their own decisions. Those decisions are informed by content rather than by abstract principle. Rule and precedent do not confine the parties' resolution. Moreover, the emotional element is recognised by the process; mediators are aware of the psychological processes underlying the dispute as well as any latent conflict, or at least of the possibility that underlying processes are working. Commentators characterised mediation as a "feminist alternative to the patriarchally inspired adversary system".[185] Yet this perspective has been drowned out in recent years as a feminist critique of mediation grows. Feminist theoretical support is vital for the survival and growth of mediation where doubts are being raised about the safety of the approach for women.

Safeguards in Mediation

Privilege and Inadmissibility of Evidence

It became apparent at an early stage that the development of family mediation would be threatened if the content of the proceedings could be used as evidence in court at a later stage. The concepts of privilege and inadmissibility apply to the tendering of evidence before a court of law and should be distinguished from confidentiality, which is the duty of the mediator to refrain from passing on mediation confidences to third parties. These

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[183] *Ibid, p* 28.

[184] Trina Grillo "The mediation alternative: Process dangers for women" 100 Yale LJ 1545 (1991).

[185] *Ibid*, p 1548.

situations are often confused and the remedies and safeguards available to the parties are very different.

In England, a practice grew up which treated mediation statements as privileged, supported by the Booth Committee, which argued that absolute privilege should attach. The Newcastle Report suggested that this was most unlikely, as it would preclude an exception in relation to evidence of child abuse.[186] The Law Commission reasoned that while it was likely that the courts would find that the privilege attached at common law, it was preferable to put the matter beyond doubt by the creation of an absolute statutory privilege.[187]

The matter was finally settled for the purposes of matrimonial disputes over children[188] by the Court of Appeal judgment in *Re D (Minors)*.[189] In cross applications for residence orders, the mother of two young children filed a statement by a clinical psychologist who had acted as a mediator. The father objected, arguing that it revealed what had occurred on a privileged occasion. Lawyers for the mother suggested that any privilege rested on the "without prejudice" ground and was subject to the same exceptions. In a sense, it was an argument that the mediation process was a method of pre-trial bargaining and negotiation. The father's lawyers argued that mediation attracted an independent and absolute head of privilege. The Court of Appeal did not find that the privilege was absolute but the exception was confined to the "very unusual case" of a statement which clearly indicates that the maker has in the past caused, or is in the future likely to cause serious harm to the well-being of a child.[190] The correct approach was to treat mediation privilege as having emerged into a new category and it was not necessarily constrained by the rules applicable to "without prejudice".[191] Clearly, the court considered that mediation is more than a pre-trial negotiation procedure or at least does not form part of the legal process, lending support to what was termed "best professional practice" on the issue. Naturally, there is some remaining uncertainty surrounding phrases such as "well-being" and "serious harm" which will have to be addressed on a case by case basis. In addition, as the privilege belongs to the

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[186] T Ingman "Privilege in the mediation process" (1995) 111 LQR 68.

[187] *Ibid*, p 70.

[188] Marian Roberts argues that the decision is confined to child disputes arising from proceedings under the Children Act 1989 and the "without prejudice" privilege continues to attach to property issues. This heading does not cover statements that are insufficiently related to the dispute negotiated. Marian Roberts Mediation in Family Disputes: Principles of Practice, *op cit*, p 137.

[189] [1993] 2 WLR 721.

[190] Per Sir Thomas Bingham MR, p 728.

[191] *Ibid* p 726.

parties themselves, they may chose to waive it and in such circumstances the mediator would be compelled to testify.[192] The Family Law Act 1996 did not address this issue, presumably because the common law position is considered sufficient protection for the mediation process.

In Ireland, the Law Reform Commission recommended that, in light of the strong public interest in fostering mediation, the practice should attract privilege. In the context of marriage guidance counselling, *ER v JR*[193] established that communications between spouses and a priest attracted privilege. The nature of the privilege was the public interest, which arose from the preservation and support of the institution of marriage, obliged by the Constitution.[194] The privilege belonged to the spouses and could be waived by them. The Law Reform Commission thought that the courts would possibly extend the privilege into other reform contexts, including mediation; in *PM v PA* that possibility was not ruled out by the High Court.[195]

In 1989, the legislature rendered inadmissible in evidence in any court, communications, written or oral, between a spouse and a third party who is assisting towards a reconciliation or agreement on the terms of a separation where proceedings under the Act have been adjourned for that purpose.[196] However, this meant that the Irish system was embracing two different models simultaneously, which ought to be mutually exclusive; admissibility subject to privilege and inadmissibility under statute.[197] The Law Reform Commission felt that this situation should be regularised so that one or the other model is used. The privilege model allows the privilege to be waived where the public interest is at stake. The inadmissibility model confers greater protection and certainty, it is easier for the parties to grasp the concept and it does not depend on any action by the parties to prevent disclosure in court.

Having examined the arguments in detail the Law Reform Commission recommended that information arising during the course of mediation should, subject to a number of exceptions, be inadmissible as evidence in any subsequent court proceedings and statutory

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[192] Marian Roberts: Mediation in Family Disputes: Principles of Practice, *op cit*, p 137.

[193] [1981] ILRM 125 Carroll J, relying on *Cook v Carroll* [1945] IR 515.

[194] Article 41, Bunreacht na hEireann.

[195] [1997] 2IFLR 129, Mr Justice Laffoy.

[196] Judicial Separation and Family Law Reform Act 1989, s 7.

[197] Law Reform Commission Report on Family Courts, *op cit*, para 9.48. This contradiction was not addressed in the Consultation Paper two years earlier.

provisions to this effect should be enacted. The Report suggests that this would give significant support to the mediation process, encourage full and frank disclosure and discussion by participants in the knowledge that what they say cannot be used against them in any subsequent court proceedings. Where mediation is unsuccessful all parties are in the same position at the initiation of court proceedings as they would have been had they not mediated their dispute. This approach is also called the "sealed room" model.

In 1996, the Irish government enacted a wider provision that is not confined to mediation sessions which take place as a result of a court adjournment.[198] It renders inadmissible "any oral or written communication.....for the purposes of seeking assistance to effect a reconciliation or to reach agreement between them on some or all terms of a separation or divorce, whether or not made in the presence of or with the knowledge of the other spouse". Although it does not cover mediation in general, it does ensure that all divorce mediation communications are inadmissible in court, without requiring any action on the part of either spouse or any mediator. The privilege model should now fade away in this context, as any co-existence is likely to cause confusion and uncertainty for the parties and their legal advisors.

Other jurisdictions have acted to protect mediation from invasions by the courts, even where the mediation structures operate closely with the courts. In New Zealand, an absolute privilege backed by a criminal sanction attaches to the proceedings of the mediation conference. It seems that this refers to the protection of confidences from dissemination to third parties and is in fact an instance of the protection of confidentiality. The confusion in terminology compounds the problem of distinguishing the two issues. Nevertheless, it has been noted that there is general acceptance in Common Law jurisdictions of the view that statements made during mediation require a certain level of protection.[199] In Australia, information derived from mediation sessions is inadmissible in subsequent court proceedings,[200] an approach endorsed by the Scottish Law Commission in their report on the subject.[201]

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[198] Family Law (Divorce Act) 1996, s 9.

[199] Law Reform Commission Report on Family Courts, *op cit*, para 9.46.

[200] Family Law Act 1975, s 62(a)(1) as amended by the Family Law Act 1995.

[201] Scottish Law Commission (1992) Report on Evidence: Protection of Family Mediation (Scot Law Com No 136), para 2.14.

The Professionalisation of Mediation: Training

The somewhat fragmented development of voluntary mediation in certain jurisdictions caused anxiety that this would result in a lack of uniformity in standards and practices within mediation. Fears were expressed that mediator's professional origins could have a considerable influence on their approach to practice, that 'lawyers and mental health practitioners practice mediation in fundamentally different ways'.[202] This was particularly acute where mediation was carried out on a part time basis. Training and experience is expected to produce a convergence between lawyer and non-lawyer mediators, so that lawyers broadened their practice beyond a structured negotiation model, towards a more therapeutic focus.[203]

In recent times, the 'professionalisation' of mediation has been a core theme in the literature as mediation struggles to gain recognition as separate from but equal to law and social work. Training and accreditation were central planks in this process and from an early stage the establishment of regulated training for mediators was a priority. In England, the NAFMCS adopted a pilot selection procedure on the basis of the candidates' aptitude, thus ensuring that a wide range of professional backgrounds were represented within the mediation service. Nevertheless, reservations were expressed about a system, which places aptitude over academic qualification.[204] This may be a result of the unique perspective in mediation; Parkinson has stated, for instance, that "mediators personal qualities are as important as their specialist knowledge and technical skills"[205] and she elaborates with a daunting list of personal qualities that a mediator ought to possess including warmth, respect, balance, optimism, maturity and a sense of humour. The nature of mediation may demand an emphasis on personality in the selection process.

In 1996, the UK College of Family Mediators was established in order to set, promote, improve and maintain the highest standards of professional conduct and training for those in the field, to register mediators and to make information available to the public. Set up jointly by the Family Mediators Association, Family Mediation Scotland and National

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[202] Edward Kruk "Practice sessions, strategies and models: The current state of the art of family mediation" 26(1998) Family and Conciliation Courts Review 197, p 212.

[203] Christopher Richards "Mediators with attitude" [1998] Fam Law 633.

[204] Law Reform Commission Consultation Paper on the Family Courts *op cit*, para 2.30.

[205] Lisa Parkinson, Family Mediation *op cit* p 359.

Family Mediation, the provision of a common register and common criteria for selection became the imperative but difficult tasks facing the College. At present, it requires 105 hours of family mediation training, 30 hours of practice, professional practice supervision of up to 5% of practice or at least two hours per year. Family lawyers retain a choice of routes to accreditation as mediators in Scotland[206] and the Law Society retains control over the process there. Family Law Regulations set out the qualifications that a mediator must have in Australia and provide for a third level qualification, specific mediation training and a period of supervised mediation.[207]

The Family Mediation Service in Ireland was also concerned with the issue of training standards and have followed the international standards of the Academy of Family Mediators in the US which provide for 30 hours of core mediation skills training, 30 hours of specialist training in marital separation, 100 hours of face to face supervised practice, the completion of at least 15 mediations and continuing education of at least 20 hours every two years. The AFM now have new requirements for different levels of membership, depending on whether the mediator is working in a practising or consultancy role. General practice now requires 2 years after training experience and 25 cases or 250 hours of mediation. This illustrates the fact that standards are rising all the time. Mediators continue to push for better systems of training; Parkinson has argued that there are four pillars of mediation training-mediation/conflict resolution/negotiation skills, legal/financial knowledge, knowledge of adult, child/family development and helping professional skills.[208] Without all four, training is inadequate.

Nevertheless, the Law Reform Commission in Ireland has reported serious concerns at the increasing numbers of people practising mediation with little or no training. They recommended a formal training programme for mediators under the auspices of a University, at post-graduate level and of two years full time duration. There would be some exceptions to the degree requirement for students with an exceptional portfolio of relevant experience.[209] The Mediators Institute of Ireland is seeking an accreditation system with minimum requirements including a primary degree, three years post-qualification experience and general suitability before acceptance into training.[210] The Commission on the Family recently acknowledged their role in the development of training and

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[206] This is undertaken by Comprehensive Accredited Lawyer-Mediators (CALM).

[207] Section 62G and s 55A, Family Law Act 1995.

[208] Lisa Parkinson, *op cit*, p 361.

[209] Law Reform Commission Report on Family Courts, *op cit*, para 9.31.

[210] Law Reform Commission Consultation Paper on Family Courts, *op cit*, para 2.29.

accreditation. Yet while the Irish system is rigorous and improving, it falls far short of the training regime proposed by the Law Reform Commission, which suggests that mediators cannot become complacent about their training programmes.[211] The Denham Commission has recommended the establishment of a countrywide system of training and accreditation.[212]

Professionalisation and Standards of Practice

In order to buttress the standards established during successful selection and training, organisations have developed codes of practice which revolve around a number of common themes central to good mediation. The Law Society of England and Wales has issued a code addressed to solicitors who practice as mediators in family disputes, while standards have been established by the NFCC in England and by similar bodies in Canada and the US.[213] Professional practice supervision and consultancy is being phased in, to ensure that high standards are maintained and fledgling mediators are supported.

The introduction of the Family Law Act 1996 has strengthened the position of the code of practice in the UK. Any contract entered into by the Legal Aid Board must oblige the mediator to comply with a code of practice; the code must be designed to ensure that the parties are not there because of fear of violence or other harm, they are informed of the availability of independent legal advice, the possibility of reconciliation must be kept under review and where there are children, there must be means to ensure that the parties are encouraged to take their children's interests into account.[214] This is obviously a greatly abbreviated form of code, but because it is laid down in legislation it has an authority that others may lack. Additionally, where mediators do not comply with these requirements, they may lose the recognition of the Legal Aid Board and thereby lose funding for the practice. In this way, the code of ethics has come into its own in England.

The Council of Europe has set out a recommendation on family mediation which has been adopted by the Committee of Ministers. It provides that mediation should not be mandatory, that states should promote the development of mediation and allow access to the practice.

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[211] Ireland has not legislated for mediator training and there is no statutory provision for the appointment of mediators.

[212] See F Martin, *op cit*, p 22.

[213] The American Bar Association has prepared 14 standards of conduct for lawyers serving as divorce and family mediators.

[214] Section 13B(6).

States should ensure that there are procedures for training and qualification and standards are achieved and maintained.[215] The recommendation offers a set of common principles but does not attempt harmonisation in the face of the wide diversity of practice models in Europe.

In Ireland, the Family Mediation Service have adapted the Standard of Practice for Divorce Mediators[216] for Irish purposes and arguably the provisions reflect the themes which are common to all codes of practice in family mediation. It suggests that the mediator must inform the parties about the process, the mediator must remain neutral, impartial and free from bias,[217] mediation is a voluntary process and the couple must accept the mediator as a person of integrity. Objectivity and fairness are essential and information received is confidential.[218] In addition, the mediator must refuse to testify voluntarily in subsequent court proceedings and must work towards establishing the privilege of mediators. Mediators should empower the couple by educating them about resources available to them and encouraging them to seek expert outside help in the course of the mediation. They should not offer legal advice or therapy and should not mediate with individuals who are disturbed to an extent that their judgement is severely impaired. The couple have a right to change their minds. While the mediator's satisfaction with the final written document is secondary to that of the couple, if s/he feels that it is illegal, inequitable or damaging to children, the mediator may withdraw from the mediation. A mediator should not prolong unproductive sessions once an impasse has been reached. Couples should be encouraged to seek adjournment of legal proceedings while trying mediation, on the basis of goodwill. A mediator should not receive money or items of value other than salary and fees as this may interfere with the impartial performance of duties. Mediators have a responsibility to upgrade their skills and to promote the profession and should not mediate in areas where they are not qualified in training or experience.[219] However, Wall notes that because mediation is in it infancy in this country "we cannot afford to be dogmatic about codes of practice or programmes of training or models of practice".[220] It might equally be argued that this is precisely why we must.

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[215] Recommendation No R(98)1, adopted by the Council, January 1998.

[216] Adopted in principle by the American Bar Association in 1983.

[217] Impartiality refers to the absence of any positive or negative preconceptions on the part of the mediator regarding either party while neutrality refers to the absence of a personal position on a particular situation.

[218] The mediator must not disclose the contexts of discussions unless both parties authorise the withdrawal of confidentiality under Principle III vi of Recommendation R(98) 1, Committee of Ministers.

[219] See Maura Wall Murphy "Code of practice and its implications for inter disciplinary training" in Mediation: A Positive Approach, *op cit*, p 47 and The Rules of Family Mediation, *ibid* at Appendix II.

[220] *Ibid*, p 51.

Conclusion

This chapter has sought to describe mediation contextually, in relation to alternative dispute mechanisms and the civil justice system. It examines in detail the structures that keep mediation in place in terms of its theoretical underpinnings and philosophy, its claims and assertions and its method of operation. In essence, it describes the process in a positive light, attempting to encapsulate the key features that marks mediation apart as a system of dispute resolution.

The theoretical debate surrounding the practice identifies a central problem, which is reflected over and over again in the literature. The incorporation of the theories of other disciplines will inevitably lead to an accusation that a transmutation of the ideals, aims and perspective has occurred. The result of the inability of mediation to establish a separate, distinct and uniform theoretical framework to support it, is confusion at the least and at worse an actual contamination of the practices by other disciplines.

Yet, despite a lack of coherence in the theoretical foundations of the practice, it has developed a distinctive philosophy and outlook that is heavily grounded in notions of both autonomy and caring. If it appears contradictory at times, it is because it has struggled to reconcile principles and practices that have not been placed together before. Its difficulties are a result of its radical newness of outlook and a belief that clients can be supported into becoming independent and autonomous.

Moreover, it has achieved a strong consensus on ethical requirements, despite the disparate nature of mediation in practice. It is a grounded practice in the sense that the practical and the empirical are central; there is emphasis on the actual conduct of mediation on the ground and the training schemes seek to achieve uniformity without quelling flexibility and flair. If this chapter has described the actual practice of mediation in detail, it is because mediation is concerned with the interaction as well as the theory. This approach is refreshing and despite problems in clearly identifying the source of mediation principles, it is certainly the case that mediation has avoided rigidity and stagnation.

At this stage, the conclusion must be that mediation has come to a point in its development that it cannot be ignored, underestimated or dismissed as a transient phenomena. It places itself credibly in an historical and anthropological context and recent legislative initiatives in the UK particularly illustrate beyond all doubt the seriousness with which legislatures

have approach the practice. Whether it can be seen as a panacea for all the ills of the adjudication system, as a vanguard for the liberty and empowerment of separating couples and their children or as merely the result of the civil justice system's critical self-examination, it cannot and must not be ignored by lawyers.

CHAPTER TWO

Introduction

Although family mediation originated or revived as a result of a critique of the adjudicatory system of dispute resolution, it has not been immune from criticism, facing scepticism and fear from many quarters. The critique of mediation arises from a number of divergent sources, from the purely legal and theoretical to the empirical debates of the social sciences. This chapter deals only with the actual accusations levelled against mediation as a dispute resolution mechanism; the testing of these assertions and the empirical data which has resulted from this work, is the subject of the next chapter.

It is necessary to revisit the origins of mediation in this chapter, specifically the claim of mediation to continuity of age-old tradition of farthest Africa and the East. It appears that this analysis is flawed in the sense that little can be gleaned about modern Western experience from these examples. More crucially, the practice of conciliation in these climes has been undermined by closer and more critical examination.

This chapter deals first with the least severe accusations. Criticisms relating to specific forms of mediation, describing the limits of particular models and practices or simply observing that mediation cannot be a 'panacea' for all the ailments of the civil justice system, are not severe since they do not seek to undermine the practice as a whole or to question the need for any excursions down this particular path of dispute resolution. Often they argue from a perspective that approves many of mediation's claims. This critique merely seeks to point out the pitfalls and limitations and is not the subject of hostility within the practice. In fact, many mediators have engaged in this debate and are enthusiastic in addressing and grappling with the challenges posed.

More worrying for mediation is a stringent theoretical critique of informal justice that has developed in the United States. This has the potential to undermine the very basis on which mediation rests and any discussion of mediation cannot escape an acknowledgement of the problems brought to light by this work. Moreover, theorists have become concerned about the potential harm to women that might result where mediation substitutes itself in areas traditionally the subject of adjudication. Feminist critiques of mediation cannot be ignored or are ignored at the peril of the practice.

Serious concern has been expressed about the ability of mediation to deal with unequal bargaining positions between the parties and the problems that this could cause in cases of domestic violence, in particular. Moreover, it has been suggested that mediation is imbued with certain ideological stances, such as the advocacy of joint custody of children. These stances can undermine both the 'own bargain' ethos of mediation itself and the relative bargaining positions of the parties entering mediation.

This chapter paints a very bleak picture of mediation and suggests that it is characterised by a number of serious shortcomings that make this choice one of inherent and substantial risk for the individual and for society as a whole. Whether this pessimism is justified in light of empirical experience is assessed in the next chapter.

The Origins of Mediation Re-Visited

Mediation has placed itself in an historical and anthropological context in order to gain legitimacy and pre-empt any attacks on the practice on the basis of its newness or radicalism. In doing so, however, it has left itself open to attack where the original versions are shown to be less benevolent than they first appeared. One case of private ordering amongst an African tribe caused the commentator to conclude that the customary system of dispute resolution reinforced structural gender inequalities and possessed hazards for those who are less skilful in negotiation or fail to live up to the prevailing community standards of morality or behaviour.[221] Moreover, it appeared in that instance that the mediator had the formal authority to impose a solution on the parties. The case illustrates the problems with an attempt to make assumptions about a process on the basis of experience in another cultural context. While the practices of the Bakwena may be so removed from the event of informal justice in the modern Western world that sensible comparison should not be attempted, it is equally the case that positive or beneficial effects experienced in foreign cultures or at different times in history may not translate themselves easily into Western reality. The point is that little can be gained by the invocation of mediation in the past or in diverse cultures; the modern Western experience has to be examined and judged on its own merits and in the context of Western society and values.

[221] Anne Griffiths "Mediation, conflict and social inequality; Family dispute processing amongst the Bakwena" in Dingwall and Eekelaar; Divorce Mediation and the Legal Process (Clarendon press, 1988) p 129. The Bakwena are a Tswana tribe in Botswana.

This is well illustrated by the experience of mediation in Japan. Legislation, the Conciliation of Personal Affairs 1939[222] provides for the practice of *chotei* on the basis of ethical principles and paternalistic compassion, indigenous to traditional Japanese culture. Mediators are comprised of a board of three, two lay people and one family court judge and the mediation is conducted on the court premises. Although the committee may make recommendations, the decision is reached by the parties to the dispute. Despite the presence of a well-established working model of mediation situated in a place which does not favour adversarial means of resolving disputes, the results of an examination of the Japanese system are not favourable. According to the study of the Law Reform Commission,[223] the resolution of the dispute *per se* is considered more important than the resolution of the dispute in accordance with any objective legal norms of justice.

Yet, it has to be remembered that it was established in the context of an increasingly totalitarian and militaristic society during the nineteen thirties, as part of the ideology of the authoritarian state rather than as a result of any spirit of liberalism. After the defeat of the Imperial regime, it was absorbed into a new system, which substituted the language of paternalism for that of welfare yet expressly avoided a treatment of rights. It remains a deeply conservative institution that conceals an imposition of particular ideals of family life.[224] The de-emphases of rights remains a central tenet of the system; a divorce case will proceed to litigation only if conciliation fails.

Despite the entrenchment of the practice in the legal history and system of Japan, the social conditions of racial homogeneity and a culture of co-operation, indications are that mediation is decreasing in popularity and has a declining success rate where it is practised.[225] While the non-judicial settlement of family disputes remains the norm rather than an exception to the adjudicatory system in Japan and meditation is not viewed as an 'alternative' system, serious concerns have been raised about the practice. Specifically, insufficient attention is paid to the legality of each party's position, mutual concession is the

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[222] This was replaced by the Law of the Adjustment of Divorce Affairs 1948 which made *chotei* a prerequisite for most lawsuits of an adversarial nature in family relations.

[223] Law Reform Commission Consultation Paper on Family Courts (March, 1994), pp 205-211.

[224] S Minamikata "*Kaji Chotei*: Mediation in the Japanese family court" in Dingwall and Eekelaar Divorce Mediation and the Legal Process, *op cit*, pp 122 and 126.

[225] Law Reform Commission Consultation Paper, *op cit*, p 209 and S Minamikata "Kaji Chotei: Mediation in the Japanese family court" *op cit*.

goal rather than the means to a fair settlement and the element of compulsory participation is undesirable.[226]

Moreover, there are serious concerns about the possibility of coercion by mediators; professional skill is not prised and mediators generally come from a higher social strata and are better educated than the clients. The power of persuasion may derive from the status gap between mediator and clients.[227] The remnants of the Confucianistic family and social system may result in *chotei* "favouring the stronger or traditionally authoritative party at the expense of the legal rights of the weaker".[228]

The apparent preference for mediated over adjudicated settlements may be a symptom of the weak judicial structures; the Japanese judiciary do not have injunctive powers, the scope of contempt of court power is limited, with implications for the treatment of domestic violence cases in the courts. The divorce trial is open to the public while mediated settlements are private. The laws deliberate lack of clarity prevents it from casting any shadow on the mediation process at all.[229] Thus, institutional pressure is brought to bear on the couple; the weakness of the civil justice system means that trial has little advantage over the mediated solution.[230]

It would seem pointless and counterproductive to base any conclusions about the Western model of mediation on the Japanese experience, yet while mediators have been quick to point to the differences where coercion and inequality are alleged, they continue to evoke the Japanese case to illustrate the possibilities of widespread and effective mediation.[231] Like her Western sister, Japanese mediation has been publicly characterised as a procedure through which couples resolve their own disputes with the aid of Commissioners who are fair, impartial and understanding. Yet, few restraints are placed on procedural abuse and family court judges are uninterested in supervising the work.[232] The discrepancy between the rhetoric and the practice confirms that it cannot be taken for granted that mediators will accurately describe their practices.

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[226] Law Reform Commission Consultation Paper, *op cit,* pp 209-211.

[227] M Murayanna "British and Japanese mediation" [1997] Fam Law 419, p 420.

[228] Law Reform Commission Consultation Paper, *op cit*, p 210.

[229] S Minamikata, *op cit*, p 123.

[230] M Murayanna, *op cit*, p 219.

[231] See Janet Walker report to the Fourth European Conference on Family Law "Family Mediation in Europe" (Strasbourg, 7 September 1998, CONF4 (98) RAP5), p 6, "Japan, with its long tradition of mediation, emphasises the importance of restoring harmony, of mutual apology and pardon".

[232] S Minaminkata, *op cit*, p 124.

The historical excursions by various groups and sub-cultures into mediation and other informal alternatives to the adjudicative system has been explained in terms of a need to soften the pursuit of individual advantage and turn it into a community strength.[233] These groups shared sets of common values, perceptions and aspirations and "despite diversity they used identical processes because they shared a common commitment to the essence communal existence; mutual access, responsibility and trust".[234] Like Japanese society, they were homogenous and co-operative. Yet even at that, the flight from legal formalism in the United States, for instance, has been problematic for Americans, who were, from the inception of the country, bound by the ideals of contractarianism.[235] This analysis raises the issue of whether it is possible to declare anything of value from past experiments in mediation.

The legal, cultural and historical context is of the utmost significance; historical hangovers remain even in modern environments and cloud our ability to understand the underlying processes. The practice of mediation in the past has been premised on the existence of homogenous groups of same-thinking individuals who have a common interest in buttressing their communities "of ideology, of faith and even of profit",[236] through co-operation and compromise. The values and assumptions that underlie the process are not made explicit, but are agreed implicitly by all participants. In the battle between individual freedom and the community good, mediation in history has reinforced the latter.

The origins of mediation do not augur well for its future; our society is increasingly characterized by religious and cultural heterogeneity, by rising demands for individual rights, freedom and expression, variation in values and perspectives. Indeed, many of these changes are causes of celebration in Western democracies, they are considered to be the defining characteristics of the system. While Auerbach laments the ignoring of the social good in a country where legal contentiousness increases social fragmentation and the dominant ethic is competitive individualism, he consoles himself with the reality that there is no tolerable or preferable alternative.[237] While law raises at least as many questions as it solves about the nature of the good society, it is only when there is "congruence between individuals and their community, with shared commitment to common values, is there a

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[233] Auerbach; Justice without Law? (Oxford University Press, 1983) p 139.

[234] *Ibid*, p 4.

[235] *Ibid*, p 139.

[236] *Ibid*, p 3.

[237] *Ibid*, p 11.

possibility for justice without law".[238] His starting position is not far from the exponents of mediation but he finishes with complete pessimism about the ability of alternative mechanisms to survive or prosper in modern America.

At the very least, it can be suggested that if mediation is to survive, it must abandon the pretence that it is continuing an on-going tradition. Family mediation as we understand it began in the Western world in the latter part of the twentieth century and that is the time and place which it must serve in order to prosper. The analysis of Auerbach, at least, suggests that this is not likely.

Family Mediation and the Civil Justice System

Commentators have suggested that the practice of family law involves particular sensitivity "to the welfare needs of children, the trauma of separation and divorce and the consequent emotional and psychological changes and the diverse cultural expectations and family structures of various ethnic groups".[239] In other words, family law is different to and distinct from other areas of legal practice; the critical function of the court in a family dispute is to evaluate present and future needs and responsibilities of several members of the family, an exercise which turns on judicial discretion rather than vested legal rights.[240]

Lawyers dealing in family cases are less adversarial in their approach and are inclined to adopt a settlement orientation.[241] Studies of legal dispute processing over a wide variety of areas suggests that litigation tends to be a last resort rather than a norm and this is particularly pronounced in matrimonial cases.[242] Commentators have gone so far as to suggest that lawyer negotiations are in fact superior to mediation as a form of dispute resolution mechanism.[243] In a developed welfare state there is little possibility of party controlled settlement, particularly since the introduction of child support legislation in the UK and Australia. The intrusion of third party interests and concerns are inevitable and make the pursuit of an agreement between the parties alone futile. Moreover the changeable facts of matrimonial disputes, including needs, resources and desires of the parties, means

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[238] *Ibid*, p 16.

[239] Judge Nigel Fricker "Family Law is different" [1995] Fam Law 306.

[240] *Ibid*, p 306.

[241] Dingwall and Greatbatch, *op cit*, p 370. See also Richard Ingleby "The solicitor as intermediary" in Eekelaar and Dingwall, *op cit*, p 43.

[242] *Ibid.*

[243] *Ibid*, p 54.

that the best system examines the dispute over the longer period of time.[244] The parties may not realise the relevance of information that they hold unless their negotiations are guided by a solicitor. Possibly the most significant advantage of the solicitors presence is the placing off a buffer between parties whose marriage and parting may be characterised by violence and bitterness.

Given these arguments, along with the general movement towards reform of the civil justice system, the question becomes whether we really require mediation at all.[245] Moreover, there is potential for tension between mediation and the civil justice system in the UK, where the new arrangements for the support of party decision making and the formal process of divorce fail to keep their distance. Judicial 'case-management' may require that where third party negotiations fail, further sponsorship of settlement attempts arise.[246] Coupled with the legal aid provisions in the 1996 Act, this may prove to be coercive in effect.

The increasing reliance of the civil justice system on mediation entails the potential for the overburdening of the service that could result in less time being available to explore the dynamics of the dispute. Formal constraint could cause mediation to lose its flexibility and place the quality of the process at risk. As none of the safeguards that exist in formal legal adjudication apply to the mediation process, the principles and ethics of mediation must be rigidly adhered to at all costs.[247] These principles provide the only protection for the client and where the interaction between mediation and the civil justice system causes the former to become less voluntary or less flexible, the client is at risk.

Models of Mediation: Particular Problems

In-Court and Compulsory Mediation

The Japanese model has been particularly criticised for the fact that clients are forced to participate in the procedure; increasingly mediators have come to see that the voluntariness of the practice must be guarded if it is to retain it unique benefits. Yet Japan is not alone in

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[244] It could be suggested in reply that the mediation review session is designed to serve this purpose.

[245] Cf The British Government White Paper "Modernising Justice" (Stationary Office, 1998) on the creation of a community legal service which is to replace the current system of legal aid. A flexible funding assessment is proposed to replace the existing merits test for legal aid, which will ask whether mediation might be a better way of dealing with any particular case.

[246] Simon Roberts "Decision making for life apart" *op cit*, p 721.

[247] K Stylianou "Tensions between family mediation principles and the formal legal system" [1998] Fam Law 211.

the presence of mandatory mediation provisions.[248] Compulsion may be explicit, where the procedure is mandatory,[249] or implicit, where the parties are under the impression that it is mandatory. The parties may believe that the mediator, for instance a court welfare officer, is representing the court as an adjudicator. The mediator may have a court-reporting role and as a result the proceedings may not be confidential.[250]

From the viewpoint of mediators, it has been suggested that if legislation foresees an ending of mediation on the grounds of lack of efficacy, compulsory mediation could quickly change into one more formal step to be added to the normal divorce procedure. Additionally, it gives the reluctant spouse an opportunity to delay and procrastinate as well as holding dangers for the principle of equality before the law. It may lead to discrimination.[251]

Ingleby has set out three sets of arguments against compulsory participation in mediation.[252] The arguments, he suggests, can be divided into three broad categories; definitional which state that mediation loses its defining characteristics if the parties do not enter the process of their own volition or the process is institutionalised; the rule of law arguments which suppose that compulsory mediation represents a challenge to many of the ideas comprehended by the rule of law; justification arguments which hold that arguments in favour of compulsory mediation are based on unwarranted extrapolations from data on voluntary mediation.[253] Indeed, compulsory mediation may increase the cost and formality of dispute processing. While the second set of arguments have been levelled against mediation in general, it is the case that in-court and compulsory mediation have borne the brunt of the critics' ire.

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[248] In Norway spouses who have children under the age of 16 have to attend mediation before their separation and divorce can be brought to a court.

[249] A judge may order the parties to mediate; See Australian Family Law Act 1975, s 14(1).

[250] The mediator will have a sanction power over the parties in such a case. See John H Wade "Forms of power in family mediation and negotiation" (1994) 8(1) AJFL 40, p 48.

[251] Report by Renate Winter to the Fourth European Conference on Family Law (RAP 2, 17 August 1998), p 5-6.

[252] While various writers have voiced concerns at the use of this model, his are particularly well expressed and contain a useful summary of the problems.

[253] Richard Ingleby "Court sponsored mediation: The case against mandatory participation" (1993) 56 MLR 441, p 443.

In Ireland, the Joint Committee on Marriage Breakdown[254] did not favour mediation through the Court Welfare Service for a practical reason that the system attached to the courts in Ireland was limited and for the more principled reason that people were unlikely to enter into mediation if they became aware that the could be reported in court proceedings.

The presence of a judicial figure as mediator[255] is more delicate again, tending to escavate deep-rooted fears about mediation and the justice system as a whole. It has been cogently argued that the role of mediator is entirely inappropriate for a court officer; if courts provide mediators from their own personnel, they place at risk public confidence in the integrity and impartiality of the justice system.[256] Street suggests that the 'caucus'[257] lies at the heart of the mediation process, yet to allow a judge to proceed in this way would be to forsake a fundamental precept upon which public confidence in the system is founded. Private access to a representative of the court by one party in the absence of the other is a repudiation of basic principles of natural justice and the absence of hidden influence that courts must observe.[258] Even if the centrality of the caucus has been overstated in this analysis, the fear remains that judicial mediation risks damaging the image and authority of judges, while at the same time pressuring clients into 'voluntary' settlements. The system appears to involve adjudicated solutions, from the perspective of the client at least, but without the safeguards inherent in the adjudication process.

The Joint Committee on Marriage Breakdown felt that the judge and the court surroundings could intimidate the parties into settlement and blind them to the fact that they held decision-making power. There was a risk that the judge would be inclined to turn mediation into adjudication and in any event it was unlikely that the courts would have sufficient time to give over to the practice.[259]

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[254] Report of the Joint Committee on Marriage Breakdown, (Stationary Office, 27 March 1985).

[255] See for example, New Zealand Family Proceedings Act 1980, s 14(1).

[256] Sir Laurence Street (Former Chief Justice of New South Wales) "Mediation and the judicial Institution" (1997) 71 ALJ 794.

[257] A private discussion between the mediator and each of the participants.

[258] *Ibid*, p 796.

[259] Report of the Joint Committee on Marriage Breakdown (Stationary Office PL 3074, 27 March 1985), para 8.11.

Therapeutic Mediation

It has been cogently argued that therapeutic mediation represents a threat to the integrity of mediation in its application of models from the biological and engineering sciences. The methods, which include hidden surveillance, are designed to increase the apparatus of power of the practitioner. The detachment of the therapist undermines the person focus of mediation; the diagnosis and treatment of the family can occur without the full and informed consent of the parties to the practice. The view of the professional is elevated over the view of the parties, who may not even be aware that they are being treated. This lack of full and informed consent undermines the voluntariness of the family therapy procedure and has been contrasted with community mediation, which emphasises the centrality of consent and the freedom to reject a settlement.

As a result of these difficulties mediation has displayed a certain anxiety to distance itself from the practices of family therapy and the assumptions of systems theory.[260] The realisation of the parties' authority through their control of the mediation process is foundational and can be contrasted with the systems approach that denies the paramountcy of the individual's perceptions and meanings. Critics suggest that the mediation process utilises family systems theory in order to impose a value free universe[261] and although advocates have argued that this is a misleading and dangerous misunderstanding of the theory, it is even evident from defensive accounts that it is a theory that avoids blame.[262] Interestingly, venomous attacks on mediation informed by the ideas and practices of family therapy have come from within mediation itself[263] and illustrate its capacity to be self-critical as a movement. Nevertheless, the techniques of family therapy are being used in the practice of mediation and the use of techniques derived from the Milan school of systemic

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[260] Marian Roberts "Systems or selves? Some ethical issues in family mediation" [1990] JSWL 6.

[261] Trina Grillo "The mediation alternative: Process dangers for women" (1991) 100 Yale L J 1545.

[262] Joshua Rosenberg "In defence of mediation" (1992) 30(4) Family and Conciliation Courts Review 422, p 430. For instance, both parents would have to be educated where one is threatening or abusing a child and an abused spouse would have to find other kinds of reactions if blame was not thought to be helpful in controlling the abuse. It is assumed that a woman who seeks to restrict the access of a father with a history of irresponsibility is using the child for revenge rather than expressing a well-founded doubt about his capacity to parent. See pp 431-432.

[263] *Ibid*, pp 8-11.

family therapy is also not uncommon in mediation practice.[264] This can greatly undermine claims to voluntariness and respect for the integrity of the client and can lead to an allegation that conciliation is merely a cover for tampering with family life, with an intensification of control through notions of therapy and treatment.[265]

Settlement Mediation

Where mediation utilises a settlement-based approach, it risks the loss of many of the therapeutic benefits. The advocacy of mediation has been premised on the argument that the fault-based adversarial system must accept responsibility for some of the anger and conflict which surrounds the divorce process. Yet it has to be recognised that anger and conflict are necessary and unavoidable aspects of the 'uncoupling process' itself and it is arguable that the settlement-based mediation method cannot deal adequately with these psychological issues.[266] Sclater suggests that the increased use of mediation will not necessarily remove or even reduce the expression of negative emotions, particularly in the UK where a therapeutic model has been avoided and the past is relegated to insignificance.[267]

The parties can feel pushed into making an agreement by timetables and the danger of making compromise the end rather than the means arises. The differences between settlement mediation and lawyer negotiation may be small in practice; in principle, the parties make their own agreement in mediation but where the underlying issues and problems are not addressed and speed is a concern, there is a danger that the mediator will be very influential in the outcome.

Critical writings on the models of mediation have damaged compulsory in-court and the strongly therapeutic versions of the practice. At the same time, the contribution of mediation itself to this debate must be recognised and the result has been the realisation that voluntary and out-of-court procedure, with an independent and professionally trained mediator, is a preferable and superior system. It is the system in operation in Ireland and the one recently endorsed in the UK. For the purposes of argument, the rest of this Chapter will

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[264] *Ibid*, p 11 and see Sirpa Taskinen report to the Fourth European Conference on Family Law (RAP 4, 26 August 1998) which acknowledges that mediation which seeks to support the goal of personal growth risks obscuring the role of mediation with the role of family therapy.

[265] See Gwynn Davis "Mediation in Divorce: A theoretical perspective" [1983] JSWL 131, p 139.

[266] Dr Shelley Day Sclater "The limits of mediation" [1995] Fam Law 494, p 495.

[267] *Ibid*, p 495.

take this model as the paradigm and proceed on the assumption, unless otherwise stated, that family mediation involves this method of practice.

The Limits of Mediation: Beyond the Models

Enforcement of Mediation Agreements

There are no guarantees that the mediated settlement will in any way reflect the thinking of the court or the precedent established in similar cases. Where parties have limited access to legal advice, they are unlikely to be aware of their legal position; indeed even the mediator may be wholly ignorant of judgements and laws that constitute the legal background of the case. The gap is less serious in Ireland where the parties have freely chosen to enter into mediation and may leave and opt for the legal process at any stage. It is of undeniable concern in the UK where legal aid candidates may find themselves routinely shunted in the direction of mediation with little chance of moving into the formal legal mechanisms. However, a mediation agreement usually expressly states that it is not legally binding on the couple who have agreed to the arrangements within. Where this is the case, neither spouse has any means of enforcing the understanding against a defaulting spouse.[268]

The document must be transformed into a formal legal separation agreement in order to make it legally enforceable. When it is so transformed, it is subject to the ordinary law of contract and will be voidable if the court is satisfied that it has been entered into due to fraud or duress, or it is clearly unconscionable. Proof that either or both of the parties did not obtain independent legal advice prior to entering the agreement is not, of itself, a sufficient ground for invalidation.[269] Contrast this stance with the approach of the courts to obtaining the consent of a non-owning spouse to any disposition by the owning spouse relating to the family home, under the Family Home Protection Act 1976. The person seeking to rely on the presence of consent has the burden of proving that it was informed; the spouse must have full knowledge of what he or she is doing and must be given the opportunity to obtain independent legal advice.[270] However, it does appear that the

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[268] The term 'memorandum of understanding' is used in Scotland to describe the mediated agreement because it has no legal standing and the word agreement could entail construction as a contract. See Mary Lloyd report to the Fourth Conference on Family Law of the Council of Europe "The Status of Mediated Agreements and Their Implementation" (CONF4 (98) RAP1, 20 July 1998).

[269] Alan Shatter; Family Law in the Republic of Ireland (4th ed, Butterworths, 1997) p 302.

[270] *Bank of Ireland v Smyth* [1996] 1 ILRM 241.

suggestion that the spouse takes independent legal advice is sufficient and where the opportunity is rejected then the consent will be validly obtained.[271]

Remedies for breach of the agreement include ordinary damages, specific performance, transfer of property orders and non-molestation injunctions. Unless the agreement is made a rule of law, however, contempt of court and attachment of earnings orders are not available remedies. Before a court will make an agreement a rule of law,[272] it must be satisfied that the agreement is fair and reasonable and adequately protects the interests of spouses and any children of the marriage. A separation agreement cannot bar subsequent maintenance proceedings, even where it is made a rule of court[273] and a court will not enforce any provision which is contrary to the welfare of a child.

A separation agreement has the important consequence of precluding an application under the Judicial Separation Act. The Supreme Court has not rewarded attempts to bypass an agreed settlement by instituting proceedings under the legislation[274] and Keane J has stated, in dicta in support of private ordering that "where parties have entered into a binding contract to dispose of differences that have arisen between them as husband and wife, it would be unjust to allow one party unilaterally to repudiate that agreement...".[275] Nevertheless, it appears that an agreement does not act as a barrier to either spouse seeking ancillary relief in subsequent divorce proceedings[276] and they will not be bound by any agreement not to apply. This is due to the constitutional duty of the court to make the provision it considers proper in the circumstances.[277]

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[271] *Allied Irish Banks v Finnegan* [1996] 1 ILRM 401. See J C Wylie: Irish Conveyancing Law (2nd ed Butterworths, 1996) para 16.69. In addition the High Court has allowed severance in order to limit the invalidating effects to the family home. *Allied Irish Banks v O'Neill* [1995] 2 IR 473.

[272] Family Law (Maintenance of Spouses and Children) Act 1976, s 8.

[273] Note that the court may not vary a maintenance clause downwards even if the agreement has been made a rule of court.

[274] See Alan Shatter, "Degrees of separation" Gazette of the Law Society of Ireland, March 1998, p 16 which concerns the Supreme Court decision in *O'D v O'D* [1998] IFLR 83 where it was held that a couple who entered into a legally binding agreement to live separate and apart could not issue subsequent proceedings for judicial separation even though the agreement did not contain an express covenant not to sue. See also Paul Ward "separation agreements-A binding alternative to judicial separation" [1998] Fam Law 490.

[275] Shatter, "Degrees of separation" *op cit*, p 18.

[276] Family Law (Divorce) Act 1996, s 20(3) merely requires the court to have regard to the terms of a separation agreement.

[277] Shatter, *op cit*, p 329.

In the UK, mediation is considered a voluntary process and the courts on the whole do not get involved; the couple cannot register the agreement nor can they make it enforceable.[278] It is against public policy for any agreement to fetter or oust the jurisdiction of the court in matrimonial proceedings relating to financial provision or property adjustment. However, it has been the policy of the law to encourage parties to settle their financial disputes between themselves and an agreement dealing with the financial consequences of divorce can be enforced through the making of a Consent Order. Once made, the legal effect derives from the court order and not from the agreement.[279] The court requires only a broad appraisal of the financial circumstances of the parties before it will act on an agreed settlement,[280] a procedure that can be viewed as little more than a rubber-stamping exercise. However, it remains unclear whether in fact the couple must first take the agreement to their solicitors before it may be presented to the court; probably they must. As mediators become increasingly competent, there is growing judicial respect for the agreements reached and mediated agreements are considered to be legally binding in Germany and Norway, which may indicate the direction in which the law is heading.[281] In addition, the courts may be reluctant to interfere with freely negotiated agreements on financial matters made by parties with full knowledge and proper advice unless there is some "clear and compelling reason," such as duress or failure to disclose.[282]

It appears though that at present mediation agreements simply are not enforceable in most countries, at least without endorsement by the court. In Ireland, the constitutional duty of the courts ensures that a party cannot be prohibited from applying for ancillary relief at a latter date and it is doubtful whether this right could be excluded without an amendment to the Constitution.[283] The Oireachtas cannot prevent the judiciary from ascertaining whether proper provision has been made for spouses and dependent children, even where a separation agreement has been made final and conclusive and is made a rule of court.[284]

It is ironic that the force of mediation critics is greatly dissipated by the unenforceability of the mediation agreement. Without judicial review and approval, it is only a private

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[278] Mary Lloyd, *op cit.*

[279] Marian Roberts: Mediation in Family Disputes: Principles of Practice, *op cit*, p 71.

[280] Stephan Cretney and Judith Masson Principles of Family Law (6th ed, Sweet and Maxwell, 1997), pp 400-401.

[281] Janet Walker Report to the Fourth European Conference on Family Law, *op cit*, p 13.

[282] S Cretney and J Masson, *op cit*, p 403.

[283] Specifically, Article 41.3.2.

[284] Shatter, *op cit*, pp 334-335.

understanding between the parties. After judicial approval, it becomes binding and enforceable, but may be varied at any time in the future in Ireland due to the obligations of the judiciary. In England, the position is unclear although the judiciary gives scant attention to the provisions of privately negotiated agreements in family law and this may be a matter of concern. Perhaps the agreements rest on the ignorance of the parties and their belief that they are in fact enforceable but it has to be concluded that in Ireland, at least, the formal legal system has not stepped aside for the private order to reign and has not shirked its responsibilities as arbitrator and protector. This is ironic because this must be the greatest weakness of mediation from the viewpoint of the practice itself. It must remain ancillary, secondary and ultimately expendable. It offers no redress in the face of a broken agreement, except renegotiation, no certainty and no security for the parties. This may explain why the subject is simply never addressed in the literature surrounding mediation.

The Professional Status of Mediators

While the development of codes of practice and of ethics, standardisation in the selection and training of mediators and the rise of umbrella organisations to represent voluntary mediation are to be welcomed, it remains the case that no central, compulsory training scheme exists, there is no central rota of members[285] and the profession is not governed by a central regulatory authority. The provisions of codes are often aspirational and it is unclear whether mediators are held accountable for breaches and if so, what sanctions apply. While the Law Society in England and Wales has introduced rules for lawyer-mediators and serious breaches may be grounds for disciplinary action,[286] the legal professional is often criticised for remaining self-regulatory. It is considered that this may not offer the general public sufficient protection from the unscrupulous, even though a solicitor risks being struck off the roll.[287] Mediators have no such incentive for honest practice. Indeed, the very claim of mediators to constitute a profession has been questioned on the basis of their lack of proper regulation.

Professional orientation, it is argued, is characterised by technical competence acquired over long-training, adherence to professional norms, autonomy in decision making and self-

[285] The Irish Government is of the opinion that it is not its function to create a national register of family mediators: See Mary Lloyd report, *op cit.* Ireland has not legislated for mediator training or standards.

[286] Guide to the Professional Conduct of Solicitors (1993), chapter 22.

[287] See Lewis Becker "Ethical concerns in negotiating family law agreements" (1996) 30 Fam L Q 587, on the American Bar Association Model Rules for Professional Conduct.

imposed control based on standards and peer review.[288] It is clearly the case that mediation organisations are striving towards these ideals, yet the degree of professionalism amongst individual mediators is perceived to be ad hoc; while some mediators strive for professional standing, others occupy the role of the quasi-professional and do not subscribe to an organised body with disciplinary powers. More worrying still is the presence of 'loose cannons' within the practice, who may not be properly trained or competent to perform the tasks incumbent on a mediator.[289]

Financial Disclosure in Comprehensive Mediation

A variety of other limitations arise when mediation practice is examined closely and few are more undermining than disclosure difficulties experienced by mediators. With the increasing prevalence of comprehensive mediation, the requirement that mediators ensure the full disclosure of the parties' financial position has become more pressing. The mediator has no formal authority over the parties and no power to sanction them if they are less than honest.[290] Indeed, given the requirement of confidentiality and privilege or inadmissibility of evidence in latter court proceedings it is highly unlikely that dishonesty would ever come to the attention of a court. Mediators argue in their defence that solicitors can check the disclosures and a well-trained and confident mediator will recognise the discrepancy, with the help of information provided by the other party.[291]

Richards uses a theoretical explanation for the reluctance of parties to disclose, derived from family therapy; each parent upholds the principle that both have reciprocal specialist financial responsibility, a principle that is acutely threatened by the disclosure of finances in mediation. The disclosure is seen by the client and by implication should be seen by the mediator as a disempowering removal of the family role that the client has occupied up until the separation.[292] There are a number of serious difficulties with this position; the first is the utilisation of family therapy, which is a problematic perspective in the context of mediated solutions.[293] Less obviously, the approach suggests that the unwillingness to disclose financial assets is not a symptom of a more powerful spouses attempt to undermine

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[288] Hoy and Mishell; Educational Administration: Theory, Research and Practice (Random, 1987) p 150.

[289] Jonathan Black-Branch "The professional status of mediators" [1998] Fam Law 39, p 41.

[290] Note that where the parties make a private agreement on financial and property matters which is embodied in a Consent Order, the court requires full and frank disclosure: Rule 9, Matrimonial Causes Rules 1985.

[291] Christopher Richards "Disclosing finances in mediation" [1998] Fam Law 278.

[292] *Ibid*, p 279.

[293] See Chapter 2, page 70 above.

the less financially astute spouse, but is a part of the loss-adjustment process. The implication is that the reluctant spouse must be understood and cajoled rather than threatened with legal sanctions. This may not be the most appropriate method of ensuring compliance and it tends to place the underhand nature of the conduct to one side.

Richards recognises that a sufficiently cunning client would be able to hide assets without the high level of discomfort that becomes apparent to the mediator and serves to signal deceit.[294] The fundamental problem is that the mediation could proceed to a settlement on the basis of flawed information, to the serious detriment of one party. This weakness can only be remedied by the efforts of solicitors, working outside of the mediation process and ultimately by ending the mediation and progressing to court where adequate orders to compel disclosure are available.[295] The result is that comprehensive mediation cannot stand-alone and relies on the adjudicatory system, whether the work of solicitors or the threat of the court, to ensure equity.[296] Where it attempts to avoid this dependence, it runs the serious risk of producing unfair settlements based on faulty premises.

Social Class and Mediator Neutrality

There appears to be a strong relation between social class and divorce rates in the UK, with higher rates of divorce amongst lower social classes, although the fee-paying nature of voluntary mediation to date has ensured a largely middle class profile of clients. It is sometimes suggested that lower socio-economic groups are less likely to keep appointments and may lack the verbal skills needed for effective conciliation,[297] yet the 1996 Act will ensure that the profile of those attending mediation in the future will be largely from lower socio-economic groups. It is unclear whether or not the service as currently provided will suit the needs of a different social class. The issue has not arisen in Ireland to the same extent as the service has been, from its inception, free and available to all. Nevertheless, the

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[294] Christopher Richards, *op cit*, p 278.

[295] A court can overcome disclosure difficulties by granting an order for discovery and it can make a costs order against a non-disclosing party. Barron J, in an unreported decision of the Irish Supreme Court (*W vW*, 25 November 1999), suggested *obiter* that the action could be set down for trial even where discovery had not produced full disclosure so that the issue could be determined at the hearing and the defaulting party would be available for cross-examination. For an analysis of the benefits of this approach see Paul Ward "Sanctions and financial disclosure" [2000] Fam Law 366.

[296] The courts in the UK can only approve agreements which are supported by evidence of the parties income and capital precisely because of the non-disclosure cases which doffed the English courts in the late 1970's. See Richard Ingleby, "The solicitor as intermediary" *op cit*, p 54.

[297] Lisa Parkinson "Conciliation; Pros and cons" [1983] Fam Law 183.

question of whether the practice is more attractive to those in higher socio-economic classes remains. The social status of the clients may also affect their ability to reach their own agreement or to resist any imposition of a preferred settlement by the mediator. In theory, mediators must be neutral and unbiased, yet concern has been expressed about the ability of mediators to impose their own values on the parties and steer them towards a stereotyped compromise which is not in their interests.[298] In addition, mediators who are unaware of their own personal prejudices may attempt to manage conflict in an authoritarian manner.[299]

Dingwall and Greatbatch have questioned how far the ideals of couples themselves taking control over the decision-making and making their own decisions are actually realised or realisable in practice.[300] Mediators, in facilitating the mediation process, may in fact be influencing the outcome. Indeed, in a stronger version of the argument, mediation may be merely substituting the insidious influence of the mediator for the open decision of a judge.[301] Nor can it be said that the minimal intervention role of the divorce mediator is agreed and established. The White Paper on Divorce in the UK envisaged a mediation method that was an active, extensive intervention in which "expertise beyond skill in orchestrating communications, more akin to divorce consultancy", was required.[302] The inevitable tension between party control and any institutionalised third party help is exacerbated by the loss of definition which goes with an attempt to combine help with communication and other forms of specialist intervention.[303] It is inevitable that the mediator will have some impact on the parties' decision. Parties attempting to escape one form of professional domination may find themselves in the arms of another, more covert and unregulated form. Even mediators agree that divorce mediation can and must incorporate some elements of enforcement,[304] but the degree of enforcement remains the subject of heated debate.[305] Although this debate cuts across social class, clients with lower levels of education and resources will find it more difficult to resist mediator pressure.

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[298] Michael Freeman "Towards a more humane system of divorce" JP, 21 March 1981.

[299] Lisa Parkinson, *op cit*, p 184.

[300] See Chapter Three, p 117 below.

[301] Robert Dingwall "Empowerment or enforcement: Some questions about power and control in divorce mediation" in Dingwall and Eekelaar, *op cit*, p 150.

[302] Simon Roberts "Decision making for life apart" *op cit*, p 720.

[303] Simon Roberts "Alternative dispute resolution and civil justice; An unresolved relationship" (1993) 56 MLR 452, p 456.

[304] See Robert Dingwall, *op cit*, p 151.

[305] See Chapter Three below and Dingwall and Greatbatch "Who is in charge? Rhetoric and evidence in the study of mediation" [1993] JSW&FL 367.

The Theoretical Critique of Informal Justice: The Purposes of Mediation

The most rigorous critical examination of informal justice originated in the United States and emerged from an historical perspective on the practices of alternative dispute resolution. Several types of argument are used to explain the rise of informal justice including the idealist argument which suggests that the failings of the adversarial system were responsible, the materialist argument which cites the need of capital for social control mechanisms and a third mode of explanation which emphasises political forces and the necessity of the state to hide the conservative content of the law. A fourth approach looks at the role of professionals in the movement towards informalism and the requirement of lawyers and courts to reduce case burdens coupled with the desire of professionals within the informal processes to increase their share of work.[306] Whatever perspective is adopted, the purely idealist version of the rise of mediation expounded by mediators appears to be overly simplistic.

The perspectives on the reasons for mediations development are necessary to reveal its purposes. The result of the materialist and political explanations of the rise of mediation is the vision of informal mechanisms of dispute resolution as the agents of state control.[307] Critics argue that the primary business of ADR is social control by the state in order to manage capitalist accumulation and defuse resistance that this engenders, if necessary, in a purposive and proactive manner. Efforts are concentrated on the dominated of contemporary capitalism; workers, the poor, ethnic minorities and women. The mechanisms "obliterate the fundamental distinction between public and private, state and civil society, what is forbidden and what is allowed".[308] This is not an unfortunate side effect of the alternative dispute resolution practice, but the foundational aim and objective of informal justice. The goal of mediation under this perspective is to individualise justice and disaggregate claims, so that under-classes cannot marshal themselves against the ill effects of capitalism or the state that facilitates it. Informal institutional development that emanates from the state is a suspect development that seeks, futilely, to depoliticise conflict.

The denigration of adjudication by mediation is challenged also; formal justice has sometimes been a revolutionary force and despite its limits, remains a useful weapon for the powerless. Formal law limits the substantive reach of state intervention and constrains the

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[306] Richard R Abel; The Politics of Informal Justice vol 1 (Academic Press, 1982) pp 3-4.

[307] *Ibid*, pp 270-280.

[308] *Ibid*, p 6.

procedures by which the state intervenes. It may be less accessible but more worth striving for.[309]

The Critique of Informal Justice and the Claims of Mediation

Abel confronted the claims of the proponents of informal justice by grouping their claims into four categories. The first suggestion emanating from the supporters of ADR is that the techniques are a necessary response to inexorable economic forces, the intolerable burden on the courts and the cost of litigation; the argument suggests that the insistence on procedural due process is the cause of the court crisis. He responds to this assertion by proposing that the fact that the courts are in crisis does not dictate the response to the crisis; the courts could be instantly relieved of congestion if all corporate plaintiffs were expelled, for instance.

A second line of argument is based on consumer preference; the public dislike and distrust the courts and prefer informal methods of dispute resolution. It is suggested in reply that justice may be more important than speed and the public may prefer authority and leverage where they are faced with an unequal opponent. Informal legal institutions can cool out grievances only temporarily at most; complainants who invoke them quickly perceive their inutility and apathy sets in. A third rhetorical devise of proponents is the use of catchwords such as claims to neutrality, co-operation and autonomy. Yet, this neutrality conceals values, confirms existing advantage and effects compromise between unequals. The supporters of ADR invoke false comparisons; mediation is compared with adjudication that is more expensive and less accessible, but most mediated cases would be handled by lawyer negotiation so the comparison is not viable.

The claims of the practitioners to professionalism are also questioned. Alternative dispute resolution mechanisms use staff that possess little or no training, operate with minimal supervision and are bound by few rules because individuation is the primary function.[310] Further, although informal mechanisms purport to relieve the fiscal crisis of the state, the inexpensive nature of the services permits enormous expansion of the apparatus of mediation and since informal institutions supplement rather than displace their formal counter-parts, the fiscal crisis may be aggravated rather than relieved.[311] It should be noted

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[309] *Ibid*, pp 307-308.

[310] *Ibid*, p 7-9 and Chapter 10.

[311] *Ibid*, p 5 and see also Chapter 10.

that the critical stand on alternative dispute resolution does recognise that the movement expresses values that elicit broad allegiance such as autonomy, equality of access to justice and co-operation, values which should be striven for in the substantive law rather than in the form of dispute resolution.[312]

Critiques of Settlement and Compromise

Early critical material doubting the value of compromise within the legal system is provided by the theories of Bentham who suggested that the object of adjudication is the implementation and application of positive law made by the legislator to promote utility; the latter is best promoted by a system of procedure devoid of artificial and technical devices, with protection against mis-decision provided in it's simplicity and publicity. He viewed the Danish Courts of Reconciliation and similar experiments in France with ambivalence, because of the importance he attached to the full implementation of substantive law, deemed to be consistent with utility. Reconciliation would be a by-product of the rendering of complete justice in this manner.[313] Doubting whether bargaining is ever really equal or consent truly free, he thought that any compromise inevitably involves a denial of justice and a sacrifice of rights.

Commentators have argued against the vision of adjudication and of settlement[314] offered by the proponents of alternative dispute resolution mechanisms in much the same terms as these early offerings from Bentham, although usually without reference to his work. Specifically, Fiss has forcefully asserted that it is not axiomatic that settlement is preferable to judgment or should be institutionalised on a wholesale and indiscriminate basis; "it should be treated instead as a highly problematic technique for streamlining dockets".[315] He sees settlement as the civil analogue of the plea bargain in criminal law, characterised by coerced consent and bargain makers without authority. In the end, justice may not be done and it certainly will not be seen to be done. The absence of a trial and judgement makes subsequent judicial involvement problematic. The judge may be confronted with a request

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[312] *Ibid*, p 310 and the "delegalisation impulse" described in Auerbach, *op cit*, pp 13-14.

[313] William Twining *op cit*, pp 383-385.

[314] There have been eloquent defences of compromise as a means of order society. See Stuart Hampshire; Innocence and Experience (Penguin, 1989) p 189. "Life and liveliness within the soul and within society consists in perpetual conflicts between rival impulses and ideals and that justice presides over the hostilities *and finds sufficient compromises* to prevent madness in the soul or civil war or war between peoples". (Emphasis added).

[315] Owen Fiss "Against settlement" (1984) 93 Yale LJ 1073, 1075.

for a modification of the consent decree and must retrospectively reconstruct the situation, as it existed at the time that the decree was entered into; the exercise "borders on the absurd and is likely to dissipate whatever savings in judicial resources the initial settlement may have produced".[316]

The critique of Fiss is more radical than an analysis of the mechanics of appeal and enforcement of mediated agreements. The fundamental argument surrounds the very ethic of settlement itself, which he sees as a capitulation to the conditions of mass society that should neither be encouraged nor praised.[317]

Asserting that the purpose of adjudication needs to be understood in broader terms than those supplied by the advocates of alternative dispute resolution, he sees adjudication as an exercise by public officials in giving force to the values embodied in authoritative texts. It is an exercise in the interpretation of those values and an attempt to bring reality into accord with them. In settlement, the court is deprived of an occasion to render an interpretation and where parties leave justice undone, it is society at large that pays the price. The parties may be content to live under the terms of the bargained for regime, yet ideals may be betrayed or an undesirable status quo maintained.

Advocates of alternative dispute resolution see adjudication essentially in private terms, as simply a means to the end of the dispute and miss the fundamental need of society for the public imprimatur of a judge. For Fiss, civil litigation is an institutional arrangement for using state power to bring the recalcitrant reality closer to our chosen ideals;[318] it is a view inevitably at odds with all settlement and compromise within the civil justice system. While he is willing to assume that no other country conceived of and uses law in the way that Americans do, it is arguable that the development of constitutional law in Ireland has also depended on the willingness of individuals to avoid compromise and settlement in the interests of principle.

The writings of Fiss and of Bentham are certainly traditionalist and arguably idealist. Perhaps they are unrealistic in their vision of the adjudicative system that can also use compromise and settlement at the expense of justice and does not always provide solutions that advance the greater good. Yet they cannot be easily dismissed; the presence of a free

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[316] *Ibid*, p 1084.

[317] *Ibid*, p 1075.

[318] *Ibid*, pp 1086-1088.

and independent judiciary, who are blind and impartial, charged with the task of protecting the constitutional rights of nation, has been long sought and was hard won. Any alternative system must acknowledge the aspiration, at least, of the adjudicatory system to do justice publicly and openly and to provide justice for all.

Mediation and the Rule of Law

It is possible to understand the critique of mediation in terms of its effect on the rule of law. This concept has been described as an obscure and ambiguous constitutional doctrine[319] yet it provides a convenient shorthand for a cluster of rights and ideas, such as the principle of legality, the presumption of procedural safeguards in the administration of justice and due process, the separation of powers, certainty and the promotion of mutual justice and individual rights.[320]

Ingleby has contrasted the objective rules and acknowledgement of opposing interests of professionalised justice with the absence of publicity, stated rules and the denial of opposition in incorporated justice.[321] Although his critique concerns the practice of compulsory in-court conciliation, his arguments are for the most part applicable to voluntary forms of the practice. The two ideas comprehended by the rule of law are that the law should conform to standards designed to enable it to effectively guide action and legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement.[322] Mediation is challenged by these requirements in the privacy of the process and the diversion of cutting edge cases away from the formal system. It fails in the protection of the disputant, protection of third party interests and the maintenance of the separation of powers.[323]

Ingleby goes on to argue that the effect of compulsory mediation, in particular, is to create rules against litigation and to replace the habit of settlement in professionalised justice with a rule in favour of settlement in incorporated justice. Voluntary mediation may face the same rebuke in England and Wales, for legal aid candidates at least, with the passing of the

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[319] Luc B Tremblay; The Rule of Law: Justice and Interpretation (McGill Queens University Press, 1997) p 22.

[320] *Ibid*, pp 29-30. See also Rawls, A Theory of Justice (Clarendon 1972) p 235, "the conception of formal justice, the regular and impartial administration of public rules becomes the rule of law when applied to the legal system".

[321] Richard Ingleby "Court sponsored mediation" *op cit*, p 450.

[322] *Ibid*, quoting Raz; The Authority of Law (Oxford University Press, 1979) p 218.

[323] See Bunreacht na hEireann, Article 6.

Family Law Act 1996. At any rate, it replaces one habit with another and individuals are no longer the bearer of rights but the components of a problem, where litigation is deviant rather than different behaviour.[324] Mediation could argue that the concept of the rule of law is so contested within legal and political theory that it amounts to a mere rhetorical flourish. Yet it represents the pursuit of justice itself[325] and unless we are to abandon the aim, mediation will be asked to evaluate its position in light of those principles.

Mediation, Women and Feminist Theory

While it is true to say that mediation was initially greeted with some warmth by feminists[326] a developing consensus shows wariness at the growth of mediation. The patterns that have lead to the development of conciliation are ones that are problematic to women and a unifying aspect of mediated solutions lies in a shared ideological concern to present and place the family in the private sphere. Feminists fear for the fate of the individual woman pursuing her case through mediation and for women in general as the family is re-privatised and condemned to an invisible realm, yet again. While the state asserts that it has no interest in the dynamics of the individual family and it is not the place of the state to interfere, supervision and intervention in families by court and welfare agencies continues. However, it continues concealed and cloaked by the assertions of privacy and is rendered benevolent by images of caring and appeals to the welfare of children.[327]

Historically, the law interfered only reluctantly with the 'sacred rights of husbands and fathers' and the position of women was one of extreme vulnerability in all social classes. State intervention on the pretext of children's interests in working class homes aggravated difficulties there, as welfare and child saving were not considered to require the procedural safeguards of formal justice. Later, the informal role of the probation service in England became transformed into a chance to act as gatekeepers, controlling working class access to the Magistrates courts. While the same system did not pertain to this country, the legitimating role of welfare rhetoric is significant because conciliators, whether in-court or out-of-court are inclined to adopt the language of welfare and child-protection, establishing themselves as spokespersons for children and reminding parents of their responsibilities.

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[324] Ingleby, *op cit*, pp 450-451.

[325] Tremblay, *op cit*, p 232 where he argues that the rule of law is the most basic concept of constitutional law and it is justice itself.

[326] See Chapter One, p 51 above.

[327] Anne Bottomley "What is happening to family law? A feminist critique of conciliation" in J Brophy and C Smart: Women in Law: Explorations in Law, Family and Sexuality (Routledge & Kegan Paul, 1985) p 162.

The fear is that mediation will be used, like the informal processes of the past, to gain access to families and to adjudicate informally. The substance of this fear is debatable, but the argument goes further.

It is suggested that private ordering in itself can only be detrimental to women because their economic, social and psychological vulnerability all militate against the image of equal bargaining presumed in mediation. Ignoring power relationships present in the private domain can only serve to reproduce them.[328] Social ordering though consensus has a detrimental impact on women where power relations are simply re-affirmed and the weakness of the position of women is hidden by relegation to the private sphere. Mediation looks to both the interests of children (welfarism) and party control (private ordering) for justifications, neither of which serve the interests of women.

Mediation is distinguished from lawyer negotiation and singled out for a more negative prognosis because of the presence of the lawyer compromises in the 'shadow of the law'. Further, negotiations are conducted on a bilateral basis so that rights are provided and the woman is insulated from her spouse. Adjudication is re-examined in light of the new developments in alternative fields and formal justice is found to offer substantive rights, procedural safeguards and lawyers who mitigate the power imbalance between the parties.[329] These are benefits that are destroyed by privatisation of disputes and it is vital for feminists that the family is spared this fate. Indeed, there have been calls for lawyers to reclaim their professionalism while representing mediating clients. They should not fall victim to the process to the extent that their role as advocate of the client is impaired, it is argued.[330]

In the face of a reaffirmation of familial ideology from mediation, feminists have sought to defend the gains won in the adjudicatory system and defend that system in order that further gains can be possible in the future.

Feminists have also examined the practice of mediation at a closer range and discovered that the norms governing micro-legal systems are unwritten and unperceived but they are present and violations of these norms may produce strong reactions and informal sanctions. Conflict is styled as a personal quarrel by mediation where fault, wrong and blame are not

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[328] *Ibid*, p 179.

[329] *Ibid*, pp 184-185.

[330] Professor P Byran "The lawyers role in divorce mediation" (1993) 27 Fam LQ 180, 193.

appropriate. The family is viewed as a self-contained unit in a value free universe where principles and fault are off limits to the clients.[331] This has the potential to damage women who are the subject of stereotypes and assumptions that are never laid bear during the process. Those who fail to conform to preconceived notions of the good woman will be penalised, perhaps unconsciously, by the mediator who is a conveyer of dominant values of which they are not aware.

While one of the principle justifications for the introduction of mediation into the divorce process is that context would be substituted for abstract principle, in fact the history of the relationship, a vital part of the context, is removed. This may discourage women from asserting rights where they have been injured, losing the positive benefits of a rights claim which may enhance individual and political growth and help women to distinguish self from other.[332] Mediation is premised on formal equality that gives equal control but unequal responsibility and is blind in the face of the different marital and child-rearing experiences of women and the history of any particular marital relationship.

Mediation promised to include emotion in a way that was not available in the rational court environment, yet it has not made anger a welcome guest. Arguably there is more room for the expression of anger in the context of adversarial proceedings even though the conflict is by proxy. The sidelining of this emotion is hailed as a positive attribute of mediated disputes, yet it contributes to societies' fear of female anger and aggression, the suppression of which may be experienced as depression, pain or guilt.[333]

The views of the critics of informal justice on the position of women in mediation, encountered earlier, are remarkably similar to the feminist perspectives. It is suggested that informal procedures allow the state to increase its surveillance and control over the domestic sphere, where the behaviour of the petitioner is examined as closely as that of the respondent. No fault quickly becomes all fault. Yet at the same time the coercive powers of the state are withdrawn from the disadvantaged party and women are denied the leverage of fault-based divorce. What appears as help may be coercive and what appears as inefficient coercion may actually be the neutralisation of conflict.[334] The public-private divide is also central to this perspective.

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[331] Trina Grillo *op cit*, pp 1557-1566.

[332] Carol Gilligan; In a Different Voice: Psychological Theory and Women's Development (2nd ed, Harvard University Press, 1993).

[333] Grillo, *op cit*, p 1576.

[334] Abel, *op cit*, p 308.

Critical Legal Studies and Mediation

The approach of many of the mediation critiques falls broadly within the critical legal studies movement, a perspective on family law which questions generally held assumptions. The school has its origins in the United States but various writers on this side of the Atlantic have come to be associated with its arguments. Specifically, much of the feminist literature can be viewed from this perspective. The development of the movement has been stimulated by the increasing dissatisfaction with the orthodox model of family law. The law in this area is increasingly characterised by a mix of open-ended aspirations which are supposed to guide the decision-maker, but less internal coherence is in evidence and it seems to be losing prestige as it struggles to fit into the formalistic paradigm of law. For the critical school law, is political in that it institutionalises power and creates and perpetuates ideologies and patriarchy. It is a view preoccupied with two themes, which are evident at this stage; the nature of the public-private dichotomy and the role played by ideology in the legal system. For the theorists, liberal philosophy and the Industrial Revolution brought about the physical separation of home and work and justified the existence of a limited state that did not concern itself with family life. Power relations are thus played out unimpeded. At the same time the nature of relationships is constructed by ideology and the law plays a part in creating the social views.[335] These concepts underlie much of the critique of mediation surveyed so far, yet the value of this work has been contested and the movement has been challenged.

Eekelaar has suggested that the single overarching dichotomy of public-private appears suspect when it is considered that the market is public when contrasted with the family and private when contrasted with the state. Law has broken down the distinctions between the family and the outside world which have pre-dated liberalism.[336] The reply, of course, is that the family is private no matter what contrasts are made. For Eekelaar, the law exists to serve the public interests and intervenes little in the family unless that interest is threatened, yet this brings us back to the point made by feminists that inaction and non-intervention supports the existing power distributions. Commentators have also questioned the use of ideology as an analytical tool by the movement; it is difficult to extract and to measure and

[335] Stephan Parker and Peter Drakos "Closer to a critical theory of family law" (1990) 4(2) AJFL 159.

[336] John Eekelaar "What is 'critical' family law?" (1989) 105 LQR 244, pp 251-258.

impossible to control for ideology from a particular source.[337] It may be that the critical theorists have tried to prove too much in theories with little empirical content. Nevertheless, they have made important contributions to the debate on family law in general and to our understanding of mediation in particular.

Whether a critical or a non-critical approach is adopted, many of the same themes will emerge at any rate. Whether the advocacy of mediation is seen as a drive to re-privatise the family or simply as a means to encourage co-operative decision-making, the significant effect is that cases will no longer reach judges where the system is working. What is gained from the critical legal movement, whether their analysis is ultimately accepted or not, is the concern that more sophisticated and far-reaching effects may be at work. The seemingly benign process of family mediation may in fact have ideological connotations or could be reinforcing or redefining the public-private divide. While Eekelaar is right in avoiding a dogmatic adherence to metaphors, it is impossible to completely dismiss their work. The significance for mediation is that the whole debate is being conducted above its head; as a movement it has failed to address and explore the issues of legal theory and seems assured of a barrage of criticism which it cannot defend as its profile increases and the theoretical gap remains.

Power, Relationships and The Mediation Process

Mediation claims to empower the parties by enabling them to reach their own informed and balanced agreement, yet the parties to a marriage are rarely entirely equal in emotional and financial resources and for this reason critics have voiced concerns about the possibility of unfairness in the agreements reached.

The concerns surrounding power imbalances are often associated with gender issues, particularly disparities of income and earning power. Irish legislation has recognised the vulnerability of the caring spouse and compels a judge, in considering financial adjustment, to have regard to the degree to which future earning capacity of the spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.[338] In *L v L*[339] the Supreme

[337] Parker and Drakos, *op cit*, p 168. See however Eileen Fegan "Ideology after discourse: A reconceptualisation for feminist analyses of the law" (1996) 33 Journal of Law and Society, 173, p 189, where she stated that "a reconceptualisation and self-conscious employment of ideology may be instructive to feminist analysis of law".

[338] Family Law (Divorce) Act 1996, s 20(1)(g). See also s 20(1)(f).

[339] [1992] 2 IR 77.

Court ruled that while Article 41[340] of the Irish Constitution does not give a mother an entitlement to a share in matrimonial property, it does affect the determination of a court presented with an alimony or maintenance claim, in that the court will endeavour to ensure that as far as possible she will not be forced by economic necessity to work outside the home. This article leads support to the legislative provisions enabling a transfer of property or other financial adjustment on separation.[341]

Mediators, in contrast, are keen to downplay the issue of unequal bargaining positions as a result of gender, suggesting instead that bargaining power tends to be more evenly distributed between parties to a marriage than the relative earning capacities and financial resources of the spouses would suggest. Each partner has significant power and influence over certain areas and it is more helpful to think of personality traits rather than gender roles.[342] While one partner may be more powerful in social prestige, earnings and career, the other partner may have closer emotional bonds with the children.

For mediation, power is relational, relative, neutral and fluid. It is a benign force unless misused and is constantly changing over and back between the parties. Power imbalances are often found in relationships that work and perceptions of power imbalances may be more imagined than real.[343] When mediation recognises power imbalances, they tend to be many and varied; factors such as ending the marriage, the ability to resist settlement, the guilt of the other party, grief, confidence, suicide threats, verbal dominance, silence, knowledge, closeness to children, support of family and friends, all are characterised as potentially disruptive of the balance of bargaining power.[344] "Bargaining power involves a complex and subtle interplay of forces, objective and subjective, perceived and otherwise".[345] This view inevitably neutralises much of what critics would consider

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[340] Article 41.2 protects women in the home, but has been cited in defence of discriminatory legislation and is generally thought to be dated. See Kelly The Irish Constitution (3rd ed, Butterworths, 1994) pp 1009-1010.

[341] The Article also supports the principle of family autonomy which undermined government attempts to provide every married person with equal rights of ownership of the family home. See *In Re Matrimonial Home Bill 1993* [1994] 1 IR 325 and Chapter One, p 36 above.

[342] Lisa Parkinson; Family Mediation, *op cit*, p 233.

[343] *Ibid*, pp 234-235.

[344] *Ibid*, pp 237-246.

[345] Marian Roberts "Family mediation and the interests of women, facts and fears" (1996) 6(2) Family Mediation 8.

unacceptable disparities in parties positioning, distracting attention from the centrality of economic resources.[346]

Mediators have combated their critics by going on the offensive and arguing that mediation was not intended or designed to alleviate the poverty of female headed families post divorce. The presence of power differentials in other forms of dispute resolution mechanisms, including adjudication, is cited in defence of mediation.[347] The perspective fails to recognise that the onus is on meditation, a new procedure, to prove its utility. While the flaws of the adjudication system are well-known and long duration, it will not be abandoned.

Another key element of mediation's defence is the assertion that power imbalances are manageable. Indeed, given the number and prevalence of these inequalities, it is a necessary assumption if mediation is to be practised at all. Mediators may seek to control intimidation during mediation, obtain and share full information and explore all available options with the parties. Nevertheless, even where mediators attempt to intervene, they have very limited coercive powers. Although they can and should exercise the sanction power[348] of withdrawal where it become evident that the disparity is such that mediation is inappropriate, the public must depend on the mediator's acceptance of and adherence to the codes of practice and ethics.

The negotiating behaviour of the client must be understood and power imbalances addressed, though the mediator is bound to avoid overt interference in the process of client self-determination. Ultimately, for some mediators, it may be "up to the parties to protect their own interests",[349] in a contractual model of decision-making. For some, the obligation of neutrality is paramount and "observing that a woman seems to be less effective at

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[346] See Mnookin and Kornhauser "Bargaining in the shadow of the law: The case of divorce" *op cit,* where the importance of factors such as the legal backdrop, the transaction costs and the relative risk aversion of the parties were highlighted.

[347] Marian Roberts "Family mediation and the interests of women, facts and fears" (1996) 6(2) Family Mediation, 8.

[348] John H Wade "Forms of power in family mediation and negotiation" (1994) 8(1) AJFL 40, pp 44-52, characterised the exercise of power in mediation as formal, expert, associational, recourse, procedural, sanction, nuisance, habitual, moral and personal. He acknowledges that mediators exercise power at every stage in order to influence the dynamics of the negotiation but this is power over process rather than an exercise of power to press for a particular substantive outcome.

[349] Coulson R: Family Mediation: Managing Conflict, Resolving Disputes (2nd ed, Jossey Bass Publishers, 1996) p 24.

negotiating than her husband, for example, does not give the mediator the obligation, or even the right to represent her interests over her spouses".[350] This free market approach to power imbalance accords with the criticism of informal justice that mediation tends to reproduce pre-existing inequalities.

A more interventionist approach by mediators risks an accusation that it is increasing state control and disempowering clients. The line between correcting power imbalances and directing the mediation is hard to discern. If mediators could perceive all power imbalances and rectify them to a sufficient extent to allow for fair and equal exchange then this model would be preferable to the *laissez faire* approach, yet this is hardly a realistic aim. This is the paradox at the heart of mediation, the need to simultaneously maintain neutrality and compensate for unequal bargaining power in the relationship between the parties. In the end, it comes down to simply ensuring that both parties receive independent legal advice since the paradox ensures that lawyers cannot be removed from the process and protecting the voluntariness of the procedure, in the hope that unsuitable couples screen themselves out.

Domestic Violence and Family Mediation

The Incidence and Severity of Domestic Violence

It is generally accepted that a degree of violence within the home is common and overwhelmingly the victims are women. Although studies are not always representative, evidence from the United Kingdom suggests that up to half of all divorces occur where marriages have been characterised by violence. Again, it is generally accepted that women may be violent towards their partners, but the context and consequences of their use of physical aggression will usually be quite different from those of a mans.[351] Official government statistics in England reveal that between 42% and 49% of female homicides are women killed by their former or current partners compared to 7%-11% of men by women.[352] The 1996 British Crime Survey found that victims were more likely to be injured in a domestic setting than by other kinds of assaults. 13% reported broken bones and one third of incidents caused the victim to seek medical assistance. Local studies showed that the problem is more widespread than the 11% estimate of the British Crime Survey. 25% of

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[350] *Ibid*, p 25.

[351] Susan Atkins and Brenda Hoggett; Women and the Law (Basil Blackwell, 1984), pp 124-125.

[352] Fiona Raitt "The ethics of mediating in abusing relationships" 1997 JR 76, p 88.

women in an Islington survey reported injury as a result of domestic violence, as many as one in eight women had been raped by their partners, 27% of women in Hammersmith had been repeatedly threatened and 10% were attacked with a weapon. A recent survey in Hackney discovered that between one in four and one in nine women had experienced domestic abuse in the previous year and the type of abuse experienced by the women surveyed would fall within a generally recognisable definition of criminal violence.[353]

In the United States, national surveys indicate that marital violence occurs in 16% of all marriages, but marriages ending in divorce were characterised by higher rates of violence.[354] Those most at risk from domestic violence are separated and divorced women; although comprising only 10% of all women in the States, they account for three quarters of battered women and report being victimised fourteen times as often as women still living with their partners.[355] American research estimates the number of battered wives who enter divorce mediation at between 10% and 50% of the total number of women using these services.[356]

Although there are no accurate figures, even the lowest estimate is large enough to make the issue one of significance for mediation. Northern Ireland has suffered form a lack of consistency in report of domestic violence, although indications from one local survey suggested that it affected the lives of 27% of women.[357] Similar problems plague any research efforts in the Republic, where the extent of the problem has been impossible to discern. Women who seek assistance form the Departments of Social Welfare, the Environment, or Health are not documented and no policy exists in relation to their plight.[358] Further criminological research in Ireland continues to obscure and ignore the criminal danger to women and arguably domestic violence is less hidden than unseen in this country.[359] It is certainly no longer true to say that the aid of the Gardai is rarely invoked. In 1997, 4,144 incidents of domestic violence were recorded in the official statistics, with

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[353] Elizabeth Stanko "Domestic Violence", Conference Paper at Dublin Castle Conference: Working Together: An Integrated Approach to Victims of Crime (10-11 December 1997).

[354] Newsline "Domestic violence: The facts" [1995] Fam Law 4.

[355] Katherine M Reihing "Protecting victims of domestic violence and their children after divorce: The American Law Institute's model" (1999) 37(3) Family and Conciliation Courts Review 393.

[356] Kaganas and Piper "Domestic violence and domestic mediation" [1994] JSW&FL 265, p 268.

[357] Monica McWilliams and Joan McKiernan: Bringing it Out in the Open: Domestic Violence in Northern Ireland (HMSO, Belfast, 1993), p 5 and see Chapter Five, p 276 below.

[358] See Maeve Casey; Domestic Violence Against Women: The Woman's Perspective (Federation of Women's Refuges 1987). See also Roisin MacDermott, Dublin Castle Conference, *op cit, p* 71.

[359] Eliabeth Sanko, *op cit*, p 58.

1,135 arrests (27% of incidents) and 992 persons injured.[360] Research conducted by Women's Aid in 1995 suggested that 18% of Irish women had been in abusive relationships and 55% knew another woman who is being abused. They suggest that these figures are conservative because of reluctance to disclose due to the shame, stigma and blame still attached to violence within the home.[361] Despite the lack of research, there is little reason to hope that the rate of spousal abuse in Ireland would differ from other industrialised societies.

Compounding the problem of prevalence is the fact that the abuse often escalates before and after separation.[362] Resistance can lead the batterer to make his power more explicit and separation is perceived as the ultimate act of rebellion. 75% of women in the United States who report battering to the police are divorced or separated, many women are killed after the separation and the abuse can continue for years after the relationship has ended.[363] Thus mediation is undertaken at a time when women are most vulnerable, when 'personal safety must be of great concern to those to whom the woman turns for help'.[364]

Not all of the violence experienced by spouses can be categorised as severe; American studies have indicated that two thirds of assaults can be seen as low or moderate in severity, such as pushing, shoving, hitting or biting.[365] Nevertheless, this cannot blind to the presence of severe violence in a significant number of cases and to tendencies towards escalation of the violence. Where researchers have conducted face-to-face interviews with battered women, their testimony has been to the fear and misery of their married lives. One Irish study has shown that battering occurs frequently and from early on in the relationship. In most cases it will occur while the woman is pregnant and serious or severe injury is common.[366]

Yet, for the purposes of mediation it is more helpful to focus on the impact that the violence has had on the victim, rather than to attempt any objective measurement of severity. The fear of the victim can cause a failure to communicate and will undermine the ability of the

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[360] An Garda Siochana Annual Report 1997.

[361] Roisin MacDermott, *op cit.*

[362] Kaganas and Piper, *op cit*, p 267. An important feature of female domestic homicide is the fact that the victim has left the relationship when the incident took place, confirmed by studies in Canada and New South Wales. See Monica McWilliam and Linda Spence Taking Domestic Violence Seriously (HMSO, 1996) p 45.

[363] *Ibid*, p 267.

[364] Monica McWilliams and Linda Spence, *op cit*, p 45.

[365] Newsline, *op cit*, p 4.

[366] Maeve Casey, *op cit.*

victim to negotiate effectively. It is also important that the presence of emotional, property and familial abuse is recognised because dehabilitating effects for the purposes of negotiation may accompany such abuse.[367] The 'culture of battering' consists of a pattern of domination and control by the abuser and of denial and minimisation of the abuse by the victim; the latter internalises the abusers rules and operates a system of self-censorship which makes any equality of dealing power with the abuser impossible, whatever the actual level of physical violence.

The Causes of Domestic Violence

Theories have arisen and diverged on the causes of wife-battering; they range from the pathological interpretations where battering is attributed to the possession of certain anti-social characteristics and the entire problem is individualised, to the ideological explanations which suggest that male violence against women is a necessary concomitant of women's generally oppressed position. Thus threats of violence are viewed as a means of controlling wives and the entire problem is viewed from a social perspective. Between the extremes lie explanations that locate the phenomena in structural causes, the frustration and stress of poor economic conditions and resources theories, which also assume that violence will be more prevalent in families with less access to resources. Under this analysis, violence is manifested where the husband fails to possess the superior skills, talents and resources on which his status is grounded.[368] Only theories from ideology can explain why violence occurs in middle-class households where the husband is successful and achieving. It is undeniable that wife-beating is deeply rooted in the religious, legal and cultural heritage of Anglo-American society, espoused by Early Christian theology as a means of ensuring female submissiveness and explicitly tolerated by the Common Law where the abuse fell within the confines of reasonableness. Equally, the manifest failure of the civil justice system to deal adequately with domestic violence has been well documented,[369] a failure on the part of police, prosecution and the judiciary which lends credibility to the more cynical versions of the battering explanation. In addition, the extent of the phenomenon appears to make individualistic explanations insufficient.

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[367] Kaganas and Piper, *op cit*, pp 270-271. See also Kaganas and Piper "Towards a definition of abuse" (1993) 3(2) Family Mediation 8.

[368] Michael Freeman "What do we know about the causes of wife-battering?" (1977) 7 Fam Law 196.

[369] Deborah Rhodes; Justice and Gender (Harvard University press, 1989) pp 237-244 and see also Monica McWilliams and Linda Spence: Taking Domestic Violence Seriously: Issues for the Civil and Criminal System (Stationary Office, 1996). For an assessment of UK caselaw in this area see Hoggett and Atkins, *op cit*, pp 127-145.

It suffices to say that there may be a link between the inferior and dependent position of women generally and their maltreatment within the home, a possibility not recognised by mediation in theory or in practice. The individualising and privatising processes of mediation become ominous in the context of spousal abuse; the danger exists that violence against women will be re-hidden in a process which adheres to the familial ideology but does not recognise the dangers that this ideology can pose for women. For some theorists at least, it is an underlying cause of abuse within the home. Mediation must establish a position in the debate on the causes of marital violence if it is to involve itself safely in cases where violence has been present. A failure to do so will leave the process opaque on this issue from a theoretical viewpoint and will damage the confidence of feminists, in particular. An accusation that mediation cannot deal successfully with domestic violence could quickly become an accusation that mediation contributes to a culture that is responsible for domestic violence, if this aspect of the practice remains unaddressed.

Mediation has been called upon to wed the work of social control agent with that of the helping agent, in order to hold the violent to account, to protect the victim and to prevent and re-mediate abusive behaviour through mental health knowledge. Suggesting that mediation falls between the legal and mental health systems, it has a responsibility to marry the pathological explanations of domestic violence with the social morality view of feminism in order to develop a complete understanding of what maintains this behaviour.[370] The ability of mediation to perform such a task is questionable, given its poor theoretical basis and the innate diversity in the provision and practice of mediation. Indeed, despite the credibility and unity that it would provide for the practice, it seems highly unlikely that it will achieve such a lofty goal. However, while it cannot be asked to solve the ills of society, it is not unreasonable to require that it does not aggravate them.

Mediation and Domestic Violence in Practice

It would certainly be unfair to suggest that family mediators are unaware of the importance of screening for domestic violence. They recognise the way in which the fear of violence can impact on the ability of a client to mediate an agreement for themselves.[371] This recognition has been carried into legislation, as the Family Law Act 1996 expressly provides that a mediator must determine whether a client is present due to fear of violence

[370] Janet R Johnston "Gender, violent conflict and mediation" (1993) 3(2) Family Mediation 9, p 12.

[371] Mary Winner "Capacity to mediate" (1997) 7(2) Family Mediation 17.

or other harm.[372] What the legislation fails to provide, however, is that mediation should be terminated if this is the case. This is a controversial omission. What is simply one element of a fitness test for mediation,[373] is for critics a fundamental issue. The way that mediation addresses this issue is of monumental importance both in terms of the fate of the victims of violence and the perception of mediation practice as a whole. The analysis proposed by mediation to the domestic violence dilemma is clear-cut and simple. The mediation of a separation where the marriage has been characterised by abuse is seen as an extreme case of unequal bargaining power. The Australian Family Law Rules cite family violence and the continuing dominance of one party as factors that affect the power imbalance and therefore the ability of both parties to negotiate on an equal footing. Nevertheless, they are cited as two factors amongst several others, which include overwhelming emotions due to separation, a history of broken agreements and alcohol or drug abuse. While the factors are discussed with the parties by the mediator, the decision to leave mediation is ultimately theirs alone.

Mediations envisage the utilisation of mediation where violence has occurred. It has been suggested that an adequate code of practice and safeguards ought to be in place; the intake procedure should check for violence or abuse, mediators should have adequate knowledge of the personal protection orders that the courts can make, adequate working conditions and safeguards should be provided in the place of mediation and the address of a client should be kept confidential. Mediation centres should provide for separate waiting areas and arrival and departure times of clients could be staggered, if this is necessary. The party against whom the allegation is made should not deny the basic facts and if the facts are in dispute then mediation should not be continued; indeed, mediators do recognise that in some cases legal proceedings are more appropriate than a mediated agreement.[374] It is evident from these discussions in the literature that mediators do envisage the practice of mediation where there has been violence.

The philosophy at the basis of this stance is one of empowerment and fairness; the victim of domestic violence should not be denied access to the benefits of mediation because of a violent partner. The client has a right to choose mediation regardless of the events of the marriage and the presence of violence should not be seen as a special kind of disability,

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[372] Section 13B(6).

[373] Mary Winner, *op cit*, p 17.

[374] Lisa Parkinson, Family Mediation, *op cit*, pp 252-259.

which debars the practice.[375] Mediators are cautioned not to use partial or emotive language or to make value judgements as this could cause one party to reject the mediation; "opportunities to help both parties bring the situation under control will be lost".[376] It seems that it is necessary to have the co-operation of the perpetrator of violence, yet mediation depends on some capacity for consensuality; it requires honesty, the desire to settle and a capacity for compromise, traits rarely in the repertoire of abusers in relation to their targets.[377]

Mediation has placed its faith in the ability of well-trained mediators to off-set power imbalances through the utilisation of skills learned in role play and in supervised sessions; this is possibly because it needs to show that it is appropriate and useful to mediate where there is or has been violence. The reason for this requirement has been cynically described in the literature, which recognises that if mediation deals only with couples whose relationship has been violence free then it will not receive much work.[378] The task for mediation is, however, an onerous one. The claim to empower the woman must rely on the ability of mediation to discern battering in a screening process or at an intake meeting. Batterers come form all socio-economic backgrounds and have a full range of personalities. They fare well in psychological testing, often better than their victims and are not perceived as especially angry or aggressive. Although the immediate family may be only too well aware of the manipulative and controlling traits, confiding in a mediator is often a tremendous step. Almost invariably, the abuser will view himself as a victim and acts of self-defence on the part of others will be perceived by him as aggressions. Mediators can get the misleading impression that the relationship has been "mutually hurtful" as a result.[379]

Family violence is often perceived by mediation in terms of categorisation of the source of the violence. The work of Johnston is often cited in the literature. She suggests that violence could be divided into four categories, namely, ongoing or episodic male battering, female initiated violence, male controlled interactive violence, separation/divorce trauma and

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[375] Christopher Richards "But he'd never lay a finger on the kids: Domestic violence and mediation" [1997] Fam Law 127.

[376] Lisa Parkinson, Family Mediation, *op cit*, p 256.

[377] Hilary Astor "Violence and family mediation: Policy" (1994) 8 AJFL 3.

[378] Christopher Richards, *op cit*, p 127.

[379] N Fricker and M Fricker, "Facing up to domestic violence; Part I" [1997] Fam Law 125, p 126.

psychotic/paranoid reactions.[380] The implications for mediation, according to the writer, are that separation related violence responds best to mediation where the practice is found to be both appropriate and helpful. Violence has also been classified in terms of motivation of the perpetrator; control instigated and anger instigated violence are intended to dominate the victim and is generally perpetrated by males while conflict instigated violence is intended as a means of resolving an actual conflict and may be instigated by either males or females.[381] It would seem reasonable that mediation would exclude certain kinds of violence from its remit, for instance control instigated or ongoing male battering. Yet, mediation has shown a marked reluctance to fetter its discretion in this way. Moreover, while the categories have some value for the purposes of exposition, in any individual case it would be easy to mistake one kind of violence for another. What appears to be separation trauma could in fact be a last ditch attempt to control a spouse who is attempting to extricate herself from the relationship. The wrong label will lead to the wrong approach and perhaps put safety in jeopardy.

In common with other aspects of mediation, there is no overall consensus on the ability of mediation to handle violence. Some mediators have come to recognise a need for exclusion; "it is crucial to remember that where there is a history of control by violence...mediation is usually not appropriate".[382] Exploring the practical implementation of recommended policy, Gribben describes a detailed system of intake for mediators to discern the presence of violence that has not been vocalised. The inability of one party to express their wants, threats of unilateral action, reluctance to meet with the mediator alone and indications of isolation, for instance, should operate as warning bells for mediators.[383] Professionals must have a knowledge of methods of ensuring safety, perpetrators must consent to intervention orders and the parties should physically separate immediately. Ground-rules, resources and skills may allow the mediation to proceed, but the presumption should favour exclusion.[384]

Nevertheless, she suggests that mediators should consider the alternatives to mediation before the couple are advised to leave; the implication is that if a mediator considers that the clients needs will not be well served elsewhere then the mediation of a violent

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[380] J Johnston "Domestic violence and parent-child relationships in families disputing custody" (1995) 9 AJFL 12, p 17.

[381] Christopher Richards "Domestic violence: What is there for mediation?: A Conference Report" (1996) 6(3) Family Mediation 8.

[382] Susan Gribben "Mediation of family disputes" 6(1992) AJFL 126, p 133.

[383] S Gribben "Violence and family mediation" 8(1994) AJFL 22, p 31.

[384] *Ibid*, p 33.

relationship may proceed. This view represents a radical departure from the role that the formal legal system has traditionally allocated to informal mechanisms. Indeed, it involves the mediator in the role of arbitrator between methods of dispute resolution, undermining the position of the formal legal system. The case examples do not uphold this stringent criticism,[385] yet the seeds of a perception of mediation as the central mechanism are present. Even where mediators agree that exclusion is preferable issues arising from exceptions to the rule such as the unavailability of alternatives, the presence of 'minor' violence, or of the free and informed consent of the parties remain. Moreover, the difficult problem of ensuring effective exclusion seems unlikely to disappear; there must be reliable identification of violence in every case where there has been violence, tests that produce false negatives have to abandoned.[386] Yet is by no means clear that mediation will travel the road of exclusion presumptions at this stage[387] so that the debate and discussion surrounding the use of mediation in the context of domestic violence remains crucially relevant to any examination of the practice.

Perhaps the greatest weakness of mediation is its diversity; it is almost impossible to say anything categorically about the interaction of mediation and domestic violence while this diversity remains. Mediators continue to come to the practice via other professional routes and the origins of the mediators are often associated with particular modes of mediation. Arguably, members of the helping professions may be antagonise men by labelling them as violent and having overt sympathy with the woman,[388] it could equally be suggested that their approach would ignore the lessons of feminist theory and they would adopt instead an approach which placed responsibility on the family system. Yet again, the lack of a definite and articulated theoretical approach has made it difficult to perceive the dynamics of mediation in operation.

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[385] For instance, Gribben gives the example of a case where a couple have decided that they will not turn to the formal legal system if the case is not dealt with in mediation. *Ibid*, pp 35-37.

[386] H Astor, *op cit*, pp 16-20.

[387] Contrast the unequivocal position of the courts on abuse necessitated by the Constitution. In the *People (Director of Public Prosecutions) v T* (1988) 3 Frewer 141, Walsh J considered that the constitutional obligation placed on the courts to enforce the protection afforded to the family and to family life in Article 41 included an obligation to enforce those provisions against family members guilty of injuring other family members.

[388] This was suggested by Lisa Parkinson, Family Mediation, *op cit*, p 254.

Divorce Mediation, Domestic Violence and the Critical Approach

A critical picture of the practice in the context of domestic abuse has emerged to some extend in the description of the practice. Thus, it can be argued that the diversity of mediation in practice and the lack of a theoretical framework makes any intervention in this field precarious. This problem is compounded by the difficulties which a mediator will encounter in a bid to empower one party at the expense of another in order to redress unequal bargaining positions, assuming that the abuse has come to light and the mediator has correctly understood the nature and the source of the abuse. Yet, many of these limitations have been raised by mediators in an attempt to establish a best practice in the area and to improve on existing understandings. This is not true of the limits imposed by the lack of a theoretical framework surrounding the practice, although it is likely that mediators would not consider that this alone should impede their progress. It has received a far more critical treatment in literature outside of the process.

For Raitt,[389] the claimed benefits of mediation, namely informality and flexibility, the future focus and the empowerment of the parties, are all systematically undermined when cases involving domestic violence are mediated. The normalisation of the dispute where abuse has been a factor and the movement away from rights and towards compromise can cause a negative impact on both the individual victim and the common good. The information that emerges about the violence cannot be used in evidence in court proceedings, the private order confines and separates itself from the public order of the courts. The future focus of mediation ensures the process dangers inherent in the practice for women are compounded, as the past is de-emphasised and blame avoided. This may leave the victim feeling guilty and despairing while the victimiser is never called to account. This focus exemplifies the artificiality and expediency of the process.[390]

The contradiction at the heart of the mediation in this area is rarely made explicit in the literature surrounding mediation: An ethical dilemma is created when a mediator must assist the parties in reaching an agreement without direct advocacy for the victim. The more that the bargaining positions of the parties are equalised, the more that mediation infringes

[389] Fiona Raitt "Informal justice and ethics of mediating in abusive relationships" (1997) JR 76, pp 76-90.

[390] *Ibid*, p 85.

its promise to remain neutral and non-interventionist as between the parties. Although neutrality is impossible to sustain to any meaningful extent and partisanship is rife, the danger is that partisanship may take the form of upholding the dominant values of a given society instead of the empowerment of a weaker party. Thus, in a society where wife battering is endemic and batterers are protected by the privacy of the home, mediation may be positively harmful.

Since violence against women has been traditionally marginalized by the criminal justice system at every stage of the procedure, the woman is not empowered by any system outside of mediation so she comes to mediation with poor bargaining power. There, she faces a risk that abuse will be defined too narrowly to include her in any intervention by the mediator; indeed the Johnston scheme only deals with physical violence although psychological damage, economic deprivation and forced social isolation may leave a woman living in dread and impair her ability to negotiate on her own behalf. Detection and removal of scars built up over years is likely to prove to be too onerous a task for the practice; with all its flaws the legal process remains a place where rights are declared and affirmed and victimisers may be held to account by a higher authority. The verbalisation of the abuse is insufficient redress.[391] The suggestion that a rebuttable presumption against the practice of mediation where there has been domestic abuse seems, in this light, to be the only feasible solution.[392] Anything less will run the risk of undermining the ethical basis of the practice, negates the benefits of mediation and could be downright harmful and unsafe.

Other critics have disputed the claim of mediation to be in the process of consolidating professional practice in the area in a way that protects the victims of violence. On the contrary, it is suggested that the practice often ignores and minimises the impact of violence, reminiscent of attitudes and practice of the police in the 1970's and 1980's.[393] Violence is privatised, the victim is blamed, there is minimal understanding of the dynamics and difficulties involved and mediators rarely know for certain whether there has been domestic abuse. They may depend on solicitors to inform them of a history of violence where screening procedures are inadequate or, more likely, not in place at all.[394] The dependency may inhibit the development of adequate procedures that are felt to be unnecessary and the client is left to depend on the instinct of the mediator and the

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[391] *Ibid*, pp 84-90.

[392] *Ibid, p* 86, drawing from the Conference Report on the Toronto Forum.

[393] Hester, Radford and Kelly; Women, Violence and Male Power: Feminist Activism, Research and Practice (Open University Press, 1996) p 92.

[394] *Ibid, p* 92.

compassion of the solicitor to ensure that she is not damaged by a process that has not accounted for her circumstances. Mediation is felt to contribute to the silence that surrounds spousal abuse and any institutionalisation of mediation reduces the public space that is required for any meaningful intervention.[395]

In the United States mediation has been used as an outgrowth of the restorative justice movement in criminal justice cases in order to bring victims and victimisers together to restore social bonds.[396] The institutionalisation of mediation and the use of the practice in domestic violence cases in order to reduce recidivism and restore family bonds[397] are possible directions for the emerging family mediation movement and must be examined. Critics of this development argue that it "tends to erase the moral frames that enable us to denounce and punish victimisers"[398] and the same accusation can be levelled against mediation of domestic disputes involving violence. For critical legal theorists, the legal rights of crime victims are evaporated and a discourse on rights is ignored, a fundamental tool of redress. The discourse of rights is progressively exchanged by the discourse of needs and the 'domesticisation' of violence occurs; mediation "erases any morality which competes with the morality of mediation and in the process, it disappears violence".[399]

Domestic Violence and Legislation

The consultation paper[400] that preceded the enactment of the Family Law Act 1996 in England had been subjected to harsh criticism of its approach to domestic violence.[401] It is suggested that it throws more light on the intention and perspective of the government than the Act itself and for this reason would repay a review. Despite rhetoric that describes the need to protect more vulnerable members of families, the paper as a whole presents a negative prognosis for those who are entangled in a violent relationship. It was suggested in the paper that the proposal to divide free-standing protection orders from the rest of the divorce process was necessary because some separating couples might seek to exploit allegations of molestation and violence in order to avoid considering the merits of

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[395] Sara Cobb "The domesticisation of violence in mediation" (1997) 31 Law & Society Review 397.

[396] *Ibid*, p 399.

[397] *Ibid*. These are the claimed benefits of mediation in the justice system.

[398] *Ibid*, p 397.

[399] *Ibid*, p 397.

[400] Looking to the Future; Mediation and the Ground for Divorce (Cm 2424, 1993).

[401] F Kaganas and C Piper "The divorce consultation paper and domestic violence" [1994] Fam Law 143.

mediation and thereby gain access to a publicly funded legal service.[402] People so desperate to avoid mediation would appear to be eminently unsuitable for it. In addition, a victim may have to proceed with a formal application for a protection order in order to lend veracity to her complaint. This pre-requisite would defeat the avowed object of reducing costs and place a further burden on the victim.[403]

When the Act was passed, it failed to alleviate these concerns: the victim must attend a meeting with a mediator,[404] perhaps in the presence of her abuser, unless she is seeking orders under Part IV of the Act. Little opportunity is given for the victim to draw attention to her plight; if it has not become known by the end of the first meeting she will have to continue in mediation. The elimination of the intolerable behaviour ground for obtaining a divorce means that another important source of information is closed off. Mediation, once in progress, will inhibit rather than encourage the disclosure of the abuse to involved professionals.[405]

The legal aid provisions of the Act undermine the voluntary nature of mediation and since voluntariness is threatened by the presence of violence in a relationship, the net effect is an unacceptable risk to the victim. The weaker party may be forced to capitulate to veiled threats or innuendo that a mediator is unlikely to discern. The adherence of the mediator to a code of practice that requires the establishment of the voluntary presence is insufficient protection for a victim, where the mediator is free to conclude that, although a woman has been attacked, she is present because she understands the benefits of mediation. There is more to the issue of voluntariness than simply the motivation for attendance; her ability to negotiate for herself while in the mediation process may be impaired and notions of mutual co-operation and respect for the other party are unlikely to have any impact on the abusing spouse.[406] The interaction of the Act and the approach of mediation has to be taken into consideration, particularly the reluctance of mediators to categorically exclude any class of domestic abuse. True, National Family Mediation has advised that mediation should not be carried out where there has been chronic violence, which includes threats as well as actual physical violence, but since screening is not routine such assurances are weak.[407] Moreover, the tendency to approach abuse in terms of actual physical harm remains; since the

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[402] Looking to the Future, *op cit*, para 10.2.

[403] Kaganas and Piper, "The divorce consultation paper" *op cit*, p 144.

[404] See s 15(3F).

[405] Kaganas and Piper, "The divorce consultation paper" *op cit*, p 399.

[406] F Kaganas and C Piper; "Divorce mediation and domestic violence" *op cit*, p 266.

[407] *Ibid*, p 272.

perpetrator is not facing a criminal charge, the widest possible definition of abuse is preferable.

Studies in the New Zealand courts[408] have found that in-court mediation offered a no blame environment where parties could be brought together; both of these factors made it unsuitable where there had been violence, yet couples are routinely referred to counselling.[409] The domestic violence exemption is rarely utilised in custody and financial disputes and a woman may be requested to attend counselling where she is seeking a protection order from the court.[410] A respondent may be directed to attend.[411] In *Dawson v Dawson*,[412] the judge ordered an abused wife to participate in counselling and said that if she failed to so participate the "occupation order is to be brought back to the Family Court for review with a view to its discharge".[413] This, in effect, imposes a far harsher penalty on the victim for refusal to attend that an abuser would be subject to. One refuge worker described her frustrations to the researchers; she suggested that there was a hidden agenda to restore the family through the use of counselling whilst the priority of the refuge was to ensure the safety of women. It is not an appropriate method where there has been a criminal act.[414] Although the study examined in-court conciliation, the criticisms and fears of the researchers are translatable into an out-of-court context, particularly where voluntariness is undermined or the parties feel obliged to participate because of the attitude taken by solicitors or judges.

In Ireland, the element of voluntariness has been guarded, yet the issues of whether the party is there because of pressure from their former partner and the unequal bargaining position of a domestic violence victim remain. The Law Reform Commission felt compelled to describe the weaknesses of mediation where there has been violence. A mediated agreement where one party is suffering from fear may be unsafe and issues such as custody and financial adjustment could be dealt with by a court in formal legal

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[408] H Lapsley, N Robertson and R Busch "Domestic protection study: Family court counselling" (1993) 3 Family Law Bulletin 152.

[409] The Family Proceedings Act 1980 allows the court to demand that a couple attend counselling but s 10(3)(2) of that Act provides a dispensation where there has been domestic violence.

[410] Domestic Protection Act 1982, s 37.

[411] Domestic Protection Act 1982, s 37A.

[412] (1984) 3 NZFLR 353.

[413] *Ibid*, p 359.

[414] Lapsley, Robertson and Busch, *op cit*, p 153.

proceedings or through lawyer negotiations.[415] It was suggested that the right to bodily integrity should never be compromised and any violent behaviour should be dealt with promptly and coercively. The Report recommended that attempts at mediation in the context of violence be considered "usually inappropriate".[416]

Custody, Access and Domestic Violence

There is little overt acknowledgement in the literature surrounding the practice of mediation of the link between the battering of a female partner and the physical and sexual abuse of children, which has been estimated at between thirty and seventy percent of cases.[417] Even when children have not been attacked, they are likely to be adversely affected by witnessing violence against a loved one, which is in itself a form of "passive mental maltreatment"[418] and by the high levels of fear and tension in the home. Yet the issues of domestic violence and child custody and access are separated out in the minds of mediators, with implications for both women and children. This section assumes that the abused spouse will often be the primary child carer on the basis of the greater likelihood that the wife is both. Research findings support the view that child-rearing responsibilities predominantly fall on women. A Eurobarometer study concluded, "analysis shows that, in spite of the intention to perform all tasks together, fathers still play a minor role".[419] Research in this country has confirmed that the sexual division of labour has not declined.[420]

Mediation has taken a strong ideological stand in favour of continuing contact with both parents, as an aspect of the best interests of the child. Ideally, this notion is hard to reject although it is not in keeping with the promise of mediation to recoil from interference in the

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[415] Law Reform Commission Consultation Paper on Family Courts (March 1994), p 50, citing the Interdepartmental Committee on Family Violence in New Brunswick "Women abuse guidelines" (June 1990).

[416] Law Reform Commission Report on Family Courts (LRC 52-1996), para 9.10.

[417] Fiona Raitt "Domestic violence and divorce mediation" (1996) JSW&FL 11, p 17. Where spousal abuse is severe the co-relation is as high as 77%. An American Bar Association Report suggested that domestic violence is the single major precursor to child abuse and neglect fatalities, women do not report the abuse for fear of losing custody and prevention programmes focus only on the mothers, ignoring the men who batter. See Howard A Davidson "Child abuse and domestic violence: Legal connections and controversies" (1995) 29 Fam LQ 357, p 372.

[418] Marianne Hester and Lorraine Radford "Contradictions and compromises: The impact of the Children Act on women and children's safety" in M Hester, L Kelly and J Radford: Women, Violence and Male Power; Feminist Activism, Research and Practice, p 90.

[419] The European and the Family cited in Gabriel Kiely "Fathers in Families", Imelda Colgan McCarthy (editor); Irish Family Studies: Selected Papers (UCD, 1995) p 147.

[420] *Ibid*, pp 147-157.

decision making process of the clients. Although mediators cannot force parents to agree to certain arrangements, they can and do put considerable moral pressure on parents to adopt a preferred solution to their child-care problems. The attitude reflects the trend in favour of joint custody in United States legislation and courts, a trend which found favour in England with the passing of the Children Act 1989. There, a welfarist checklist had to be considered by the judiciary in determining the best interests of a child and continued access to both parents appeared as a factor.[421] While this was only one of several factors to be considered by the court and it is submitted that this was a positive addition, it appears to have been elevated by a professional view from a factor to be taken into account to a prerequisite for the child's interests.[422]

As courts in the US and England have moved from maternal preference in child custody matters to joint custody preference, the blinded application that once characterised the former and made it unjust, now characterises the latter. While physical care and control of the children remains with their former primary carer, the decision-making powers are evenly divided so that responsibility and power are separated from each other. Increasingly, concerns have been expressed about the lack of any research evidence that joint custody does in fact enhance parental involvement and financial support. The growing consensus of the American literature is emerging and disapproving the form where there are strong objections from one parent.[423] It is certainly not clear that mediation has broached the dilemma of which is better for the child, more contact or less conflict.

The policy movement has had several detrimental impacts on women; the first involves a diminution of bargaining power on divorce. Ironically, a standard that depends on the best interests of the child penalises the more risk adverse and therefore the more caring parent, because of the legal uncertainty it creates.[424] Arguably a joint custody presumption would be an improvement on this, yet this allows the spouse who is less interested in custody to bargain away the right in return for financial relief or privileges. In general terms, the trend has adversely affected the amount of support that a custodial parent would expect to receive on the basis that children will spend more time with the other parent, whether or not this is in fact the case.

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[421] Children Act 1989, s 1(3).

[422] See Carol S Bruch "And how are the children? The effects of ideology and mediation on child custody law and children's well-being in the United States" International Journal of law and the family 2 (1988) 106, p 109.

[423] Carol S Bruch, *op cit,* p 110.

[424] Mnookin and Kornhauser "Bargaining in the shadow of the law" *op cit*, p 978.

While these issues are in need of an airing, they are not the central arguments against the position of mediation on custody and access issues. It has been suggested, since the passing of the Children Act 1989, that the movement towards private ordering, coupled with a movement which favours contact in every case, has endangered the safety of women and children where there has been violence in the marriage. Like the recent promotion of mediation, the philosophy of the Children Act reflected an onus on individual responsibility, a preference for non-intervention and a diminutive role of the state in supporting dependent individuals.[425] Yet, the Act did not entail a complete step away from ordering the social world and commentators have reacted bitterly against the heralding of contact with fathers as the new family 'cure all' where violence had been a feature in the relationships involved. Violent ex partners often use contact with children to continue attempts to control the other parent who is then placed at a higher risk of continuing abuse. A survey by the Women's Aid federation England found that half of the refuges surveyed had evidence that women had been further abused after contact with their ex-partners made necessary by the Children Act.[426] This evidence is seldom taken into account in judicial settlements because of the belief that 'parental conflict' could somehow be set aside from the consideration of the child's current welfare.[427]

The justice system has typically obscured battering where custody and access are at issue.[428] Fathers who merely express an interest in their children are deemed to be good parents while mothering comes under extensive scrutiny. Women's attempts to escape have been held against her, as life in a refuge demonstrates her inability to provide good accommodation, use of tranquillisers in an effort to cope with her abuse is evidence of her inability to be a caring parent.[429] A woman who tries to resist contact is likely to be labelled "implacably hostile"[430] and part of the problem. The thinking has infiltrated both the legal profession and mediation practice. The fears of the woman for her personal welfare are not

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[425] Hester and Radford, "The impact of the Children Act" *op cit*, pp 86-87.

[426] *Ibid*, p 91.

[427] *Ibid.*

[428] See *In Re M (Minors)(Contact),* The Times 13 February 1998, 43 where the Court of Appeal ruled that the matter of contact was one of discretion and not of principle. Domestic violence should not be considered a ban on the making of an order for contact. See also *Z v Z* [1996] Fam Law 225 and *A v A* [1997] Fam Law 62. However note *re D* [1997] 2 FLR 48 where the Court of Appeal upheld a denial of contact in circumstances of violence and more recently *In re M,* The Times 25 November 1998, where Wall J found that a violent father must demonstrate that he is a fit person to have contact and would not destabilise or upset the children.

[429] Hester and Radford, *op cit*, p 90.

[430] Professor Carol Smart and Dr Bren Neale "Arguments against virtue: Must contact be enforced?" [1997] Fam Law 332.

given credence, breaking the old link between the child's welfare and the circumstances of the primary carer.[431] Hale LJ of the Family Division admits this support that the legal system has given to controlling or vengeful men: 'Most of my time was spent oppressing women, specifically mothers'.[432]

It has been recently confirmed that the courts are not prepared to act against reluctant fathers in order to ensure that contact takes place. They are only prepared to address issues of child welfare if these are framed in the context of a threatened denial of adult rights, most usually the father's right of contact. This is despite the fact that the dispute will ultimately fall to be resolved by reference to criteria of child welfare.[433]

Yet, movement of these disputes from the courts into mediation can only aggravate this trend, as the decisions of judges, which are open to scrutiny and criticism, are replaced by the covert pressure of a mediator's appeal to the child's welfare. Battered women are in a very poor position to resist moral pressure of this kind; often they are experiencing guilt about the separation, which they may view as depriving their children of their nuclear home. Women are defined by their mothering role in both the courts and the mediation process. In the United States, many writers have reached the conclusion that mediation of child custody disputes in the context of domestic violence is likely to be disastrous, leaving the vulnerable in danger of re-victimisation. The problem is accentuated in that jurisdiction where custody mediation is often mandatory.[434]

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[431] Note, however, the dramatic increase in US legislation concerning child custody in cases of family violence. Forty-four states have legislation to guide judges in these cases, the vast majority mandate a consideration of violence in determining the best interests of the child. Eight states have rebutable presumptions in relation to custody where there has been violence. Yet it is not clear that the domestic violence presumptions have effected ameliorative and protective outcomes for the abused parent and children. Family violence project of the National Council of Juvenile and Family Court Judges "Family violence in child custody statutes: An analysis of state codes and legal practice" (1995) 29 Fam LQ 197, 199, 221-222. The increasing recognition of the place of domestic violence considerations in child custody and access disputes in Australia is described by Patrick Parkinson "Custody, access and domestic violence" (1995) 9 AFLJ 41.

[432] Hale "A view from Court 45" [1999] Child and Family Law Quarterly 377. It must be noted that this particularly bleak assessment of the court's attitude to contact in the fact of domestic violence has been ameliorated in recent times. See the discussion at Chapter Three, p 187 below.

[433] Julia Pearce, Gwynn Davis and Jacqueline Barron "Love in a cold climate: Section 8 applications under the Children Act 1989" [1999] Fam Law 22, p 27. It should be noted that the researchers do not see this as a reflection of a discriminatory stance by the courts and believe that the explanation lies in the absence of an adult right.

[434] Domestic violence custody cases are not mandated to mediation in states where there is a presumption which operates in favour of the battered spouse in custody disputes. Nevertheless the methods of identification are

The new orthodoxy defines parents who do not agree with the arrangement as deviant; the needs of children as judged by the mediator, will take precedence over the woman's need to make a fresh start and establish a real measure of independence, or simply her need to feel safe. The needs of children, as they themselves perceive them, will be viewed mere collusions or the longer-term best interests will be described as paramount. The latest phase of child psychology will take precedence[435] and any warnings about the inappropriate wholesale adoption of the views of social science research into a different discipline are likely to be ignored. Mediation professionals come from backgrounds that give them an insight into and an awareness of this type of work, but often there are various perspectives and raging debates, which makes any categorical position taken on the basis of one view unsafe. This work may be helpful to legislators and policy makers, but should never replace or undermine the considered decision on a court of law on the facts.

The presence of the child focus has even emerged in the critical writings concerning the role of mediation in cases involving domestic violence. It is suggested that the screening procedure for domestic violence should involve another layer, in addition to the effect of violence on the woman or the 'impact of the abuse', of the best interests of the child.[436] It seems that even the critics of mediating violence must translate the woman's rights and fears into an aspect of the best interests of children in order to demand her protection.

The ideal of the egalitarian post divorce family, co-operating in its continuing child rearing responsibilities, on a joint and mutual basis, is admirable. The critics do not dispute the benefits to children of the presence in their lives, of two loving and responsible adults. Yet, the world in which we live is not ideal, the marriages that end in divorce are far from ideal. Children are abused in up to one quarter of families that divide; spouses are abused in up to half of these relationships. Given this cold reality, the barrier to ideal divorce is not merely the 'implacably hostile' spouse, but the continued and endemic presence of violence within the married family.

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flawed, the screening techniques are unsophisticated and specialised procedures and facilities are not available where battered adults elect to mediate. Family violence project, *op cit*, p 219.

[435] Anne Bottomley "What is happening to family law", *op cit*, p 43.

[436] Fiona Raitt "Domestic violence and divorce mediation", *op cit*, pp 18-19.

Child Issues Mediation in Ireland

The structure of the debate differs radically in Ireland where guardianship rights, which relate to the legal rights and responsibilities surrounding parenthood, are shared jointly by the married parents[437] of the child regardless of who has physical care and control. The effect of an award of custody is not the exclusion of the parent from the child's life; the absent parent must be consulted on all matters affecting the child's welfare. This could be viewed, from the perspective of the American debate as compulsory joint legal custody. The most likely question for mediation will be one of access arrangements that become kernel. Mediation is in a peculiar position of strength in this area, the courts will be reluctant to interfere where parents have agreed between themselves the duration, frequency and circumstances of access.

Mediators in the Republic have cited the need for a child to remain in contact with both parents, without addressing the underlying conflict between this preferred outcome and the ethic of private ordering. It has been described as a value assumption within the principles of mediation that "children need both parents and have a right to be in contact with both".[438] It is suggested that a discussion of needs and interests as parents usually elicits an awareness of the common interest in the child's welfare, in the face of "clear evidence [from Wallerstein and Kelly] that children need close and continuous contact with both parents".[439] This will ensure that 'hostile opening positions' seeking sole custody disappear as the mediator makes the spouses see where they might be meeting their own needs to get even with or to disengage from the other spouse at the expense of the needs of children.[440] This is a prime example of the approach so vehemently criticised in the literature; the author takes an uncritical view from the research, ignoring even the caution of Wallerstein

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[437] Guardianship of Infants Act 1964, s 6(1). Note,the courts can award joint custody, thereby dividing the physical care and control of the child between parents under the Guardianship of Infants Act 1964, s 11A.

[438] Maura Wall Murphy "Code of practice and its implications for interdisciplinary training" *op cit*, p 53.

[439] Anna Connolly "Stages in the mediation process" in Eric Plunkett (editor); Mediation: A Positive Approach to Marital Separation, *op cit*, p 28.

[440] *Ibid*, p 28.

herself[441] to reach a position on what is best for the children in all cases. She goes on to instruct mediators to use their skills and influence to ensure that a particular agreement is reached. Guilt appears to play a role as a tool of the profession and unfortunately certain spouses will be more vulnerable to these tactics than others. Labelling the position of the spouse seeking sole custody as 'hostile', she does not suggest that there should be any investigation into the reasons why a spouse has taken this extreme position. She assumes that all parents have a common interest in the welfare of their children, in a country where child abuse is not uncommon.

It could be argued in defence of the approach of mediation that in fact the courts have taken a very strong line on the importance of regular and continued access of a child to both parents and display the greatest reluctance to prohibiting or suspending access. Nevertheless, it is only a question of time before the mothers right to bodily integrity and the child's right of contact with the other parent will come into conflict in the facts of a case. It would be naive to suppose that these constitutionally endowed rights do not come into contest on a regular basis. In such circumstances, it is submitted that the courts provide the proper forum for such a balancing and mediation cannot hope to cope with the fundamental issues involved.

Conclusion

At every level the practice of mediation has been undermined, challenged and questioned; from the ability of a mediator to ensure impartiality to that very impartiality in the face of a serious imbalance of power, mediation has had to contend with the critical perspective of commentators. Yet, it has fended off its attackers to a remarkable degree, on some fronts. Many of the commentaries relate only to a specific form of mediation or a particular style of practice and where the movement can show that it has stepped away from that particular approach, it removes itself at the same time from the firing line. A holding fast to the ethic of voluntariness is possibly the best protection available; many of the critical writers assume the hand of the state in directing couples towards the informal system of dispute resolution. Where out-of-court, voluntary mediation is clearly established, its presence becomes a matter of consumer choice and individual autonomy. A critic may take the view

[441] Wallerstein and Kelly were the authors of the first long term study of children following divorce and their views have differed since on the policy implications of their findings. The serious reappraisals of their views in the reports from mental health professionals are not addressed. See Carol Bruch, *op cit,* p 109.

that it is a poor choice from the viewpoint of the client's interests, yet it is nonetheless a valid choice.

Equally valid is the task of the critic who seeks to enrich the knowledge of potential clients by adding credence to the case against mediation; a valid choice involves an informed decision, after all. They claim that mediation holds process dangers for women, particularly women who are subjected to violence, in its application of a contractual model of negotiation, which assumes equality of bargaining power. Moreover, it has developed an ideological position on child contact which is impossible to reconcile with neutrality and 'consumer choice'. It threatens the client in its failure to regulate itself sufficiently, in its inherent diversity and in its failure to ensure adequate financial disclosure. Yet for all of this, the most crushing indictment of mediation comes from those who suggest that it harms the greater good and undermines the rule of law. A failure to come to grips with the dynamic of mediation now may cost us greatly in the future; there may be a reopening of cases and a consequent burdening of the civil justice system as a result of agreement, which have not operated successfully or have simply been unfair. More fundamentally, we may pay a greater price again for complacency if in an attempt to lighten the load on the civil justice system now, we neglect to uphold the rule of law itself and watch the demise of family law from an area of pragmatism governed by principle to an area of pure compromise and bargaining.

CHAPTER THREE

Introduction

The advocates of mediation have tended to overlook the theoretical debates, focusing instead on the possibilities of the practice as illustrated and tested by empirical research. Indeed, it is fair to say that the results of the empirical studies carried out on mediation in practice have been far more encouraging than the critical theoretical literature would expect. While such evidence has been the subject of debate and has not always been entirely consistent, mediation has fought a better defence in this area than in the theoretical field. Perhaps it is the case that the advocates of mediation are less concerned with theory and more with practice. This would seem to suggest itself from an examination of the content of the literature surrounding mediation. At any rate, it suffices to say that adherents have shown an interest in and a concern about the empirical work carried out to date and for this reason alone it is important that the research features in any review of the practice.

Governments have also displayed a keenness to test the assertions of the practice through empirical study. The British Government, in particular, has commissioned work in this field, in order to ascertain whether investment and legislative support are appropriate. While studies have abounded, this chapter concentrates on the findings in England and Wales, chiefly because the development of mediation in that jurisdiction has already been described in detail and in the United States, where researchers have been most prolific.

This chapter also highlights the problems generated by this type of research. The most significant weaknesses include the difficulty in making comparisons between studies that have used different research methods, survey and sampling techniques or have examined wholly different forms of practice. Linked to this is the problem of inference: it may be the case that a certain project has shown high satisfaction rates or positive outcomes for clients but the conditions must remain identical if it is to be inferred that mediation is of benefit to clients in another project. A change in the intake method that interferes with the voluntariness of the procedure, for instance, would destroy the value of the survey in terms of the possibility of generalisation.

Ruth Deech has argued cogently against the use of statistical evidence in formulating divorce law. She suggests that the use made of empirical material and social science in the

1960s "led to wholly inaccurate predictions"[442] and there is no reason to suppose that this is a more reliable tool today.[443] Contrasting conclusions may be drawn from the same sets of figures, depending on the political view of the commentator. Some research evidence may be emphasised at the expense of other results or certain theories might not be investigated. Reformers have frequently ignored the logical conclusions, which can be drawn from certain empirical reports in order to promote change, which is at odds with the findings. Arguably the "most misleading preconception contained in statistics is that facts may be gathered in the same way in different countries and conclusions may be drawn from them in the same fashion".[444] Comparative law, as a tool of law reform, suffers from transplant problems due to political differentiation[445] and research falls to the same fate. It becomes clear that statistics have the potential to obscure as well as to illuminate and many possible conclusions may be drawn from a particular set of figures: "fact gathering should be done without preconception, on a wide scale, from many different sources".[446] These warnings serve to remind that law making is essentially a function of the legislature, an issue of public policy which may be informed by the work of social scientists but must never be given over to them. Precedent and principle are valuable preservers of rights, while social science at home and abroad is not.[447] Yet, empirical findings have served as the backdrop to recent developments in family mediation. Mediators often have backgrounds in the social sciences and are inclined to accept the validity and the importance of measuring the benefits of the service.

It is safe to delve into the social science debate as long as it is remembered that the methods have their limits, the conclusions reached are rarely either clear cut and uncontested or entirely certain and conclusive. The perspective of the lawyer and the mediator on the value and place of empirical research may differ when the issue of law reform is raised, yet mediation is entitled to demonstrate its utility through empirical work. Equally, the legal standpoint must remain firm and insist that principle is not undermined where favourable findings prompt legislative support.

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[442] Ruth Deech "Divorce law and empirical studies" (1990) 106 LQR 229, p 229.

[443] *Ibid.*

[444] *Ibid*, p 239.

[445] O Kahn Freund "On the uses and misuses of comparative law" (1974) 37 MLR 1.

[446] Deech, *op cit*, p 244.

[447] *Ibid*, p 245.

Pilot Research in England and Wales: Information Meetings

Between June 1997 and March 1998 fourteen pilot information meetings were launched in eleven areas of England and Wales in order to determine the effect of a compulsory information meeting on the actions of couples seeking separation.[448] While over 90% of attendees found these structured, non-directive, non-advisory meetings useful, only 13% took up the offer to meet with a marriage counsellor. 7% of attendees went on to mediate their dispute. Moreover, 39% of attendees reported that the meeting made them more likely to seek legal advice from a solicitor. It seems that in order to overcome the temptation to be directive or to give advice to attendees, presenters were inclined to suggest that a solicitor would be the best person to answer questions. Attendees who were interviewed afterwards suggested that they thought a solicitor would be better positioned to protect their interests than mediation and some attendees were under the impression that they could only access mediation if they attended a solicitor first.

On a less negative note, 66% of women and 52% of men who indicated that violence was relevant to their situation felt better informed about where to get help following an information meeting, although it was clear that inconsistencies were inherent in the individual meeting with the presenter. Overall, few attendees thought that their safety had been compromised by attendance. However, the status of religious divorce, an issue of central importance to members of ethnic and cultural minorities, was not addressed.[449] The Second Interim Report found that 57% of attendees would consider going to mediation in the future if it seemed appropriate.[450] While clients who met with a presenter rather than a CD ROM and those who met for one hour rather than twenty minutes were more likely to find the experience helpful, no form of information meeting managed to encourage more than 14% of those attending to try mediation. The vast majority of people attended the meeting without their spouse, yet many of the options described to them required the

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[448] Under s 8(2) Family Law Act 1996 a party making a statement of marital breakdown must have attended an information meeting not less than three months beforehand. It should be noted that, in Ireland, the Commission on the Family has recommended the establishment of pilot projects for the provision of information on mediation.

[449] Caroline Bridge "Diversity, divorce and information meetings-ensuring access to justice" [2000] Family Law 645, pp 646-647.

[450] Richard Collier "The dashing of a 'liberal dream'?The information meeting, the 'new family' and the limits of the law" [1999] CFLQ 257, p 266.

commitment of both parties.[451] Often clients refused the offer of mediation because they thought the absent spouse would not be willing to attend. If the government objective of encouraging greater use of mediation is to be realised, the process will have to be promoted at the information meetings to a much greater degree, according to the researchers. Even then, expectations of a 40% take up rate are wholly unrealistic since the endemic problem of persuading both partners of its virtues remains.[452] It must also be noted that these pilot information meetings involved volunteers rather than the conscripts envisaged by the 1996 Act. The problem of self-selection of the research sample was combated with the use of specific tests for generalisability throughout the research evaluation, yet it remains particularly acute where compulsion is likely in the future. According to the Lord Chancellor, such compulsory meetings could result in much more disappointing findings.[453] The negative response of the Lord Chancellor to the research findings[454] has been criticised on the basis that the information pilots were not devised to divert attendees into mediation, yet they are seen as failing when the attendee chose one of the other options discussed at the meetings.[455] Underlying the Lord Chancellor's view is a problematic opposition between mediation and solicitors, where consultation of the latter is viewed as the rejection of the former. This is despite the fact that mediators themselves encourage the parties to obtain legal advice and assistance.[456]

The Legal Aid Board commissioned research in order to investigate the operation of section 29 of the 1996 Act, which envisages a mandatory meeting with a mediator for legal aid applicants. The results of this encounter would then be considered by the Board in assessing eligibility. The preliminary findings are not encouraging. After the introduction of section 29, the number of cases deemed to be unsuitable for mediation rose dramatically, particularly in the non-profit sector, which had a high proportion of section 29 referrals. There was an increase in intake at the services, but only a modest increase in mediations, with less than 20% of referred clients choosing to continue. Doubts were raised about the agreement rate and the cost of provision.[457] It seems that solicitors remain reluctant to implement the provision and the non-legally aided partner typically fails to engage in the

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[451] Information Meetings and Associated Provisions within the Family Law Act 1996-Summary of Research in Progress, Professor Janet Walker (17 June 1999 Lord Chancellors Dept).

[452] Janet Walker "Information meetings revisited" [2000] Fam Law 330, p 333.

[453] Speech to the UK Family Law Conference, *op cit.*

[454] In June 1999 the Lord Chancellor announced that he was delaying a decision on the implementation of Part II until the evaluation was complete. See Janet Walker "Information meetings revisited" *op cit.*

[455] Richard Collier, *op cit*, p 266.

[456] *Ibid.*

[457] See Gwynn Davis "Monitoring publicly funded mediation" [1999] Fam Law 625.

process, effectively undermining the participation of the legally aided spouse. This finding has been confirmed by a local snapshot study, which discovered a direct correlation between both parties attending a section 29 meeting and proceeding to engage in mediation.[458] Indeed, the results have prompted one researcher to suggest that mediation would be better viewed as a potentially valuable supplement to lawyer negotiation rather than a complete alternative.[459] The research has not gone unchallenged and one small-scale study showing considerably higher success rates may serve to illustrate the impact of mediator skill, training, experience and supervision.[460] At present, clients are required to consider participation at a time when the meaning of their decision is still unclear whereas initial legal advise and negotiation followed by mediation could protect vulnerable clients whilst clarifying the issues in dispute and ensuring adequate financial disclosure. On the basis of this research, the conclusion that mediation only appeals to a minority is hard to resist.

Empirical Evidence on the Role of the Mediator: The Process of Mediation

The correspondence between mediation in theory and mediation in practice with regard to the role of the mediator as neutral facilitator of the parties' bargain has been questioned in the literature. In principle, mediation suggests that the couple must retain decision-making authority, while the basic exchange is merely aided by the impartial third party in the form of a mediator. Yet, commentators who suggest that this ideal is not found in practice as often as these assertions would suppose have challenged the claims.

The findings of Dingwall and Greatbatch, based on the transcriptions of verbal exchanges from audiotapes of both in-court and out-of-court divorce mediation sessions, suggest instead that mediators have considerable scope for exerting pressure on the parties, for favouring certain options and for using references to the children in order to sanction parents rather than to focus on the child's interests. Mediation can incorporate some level of enforcement in order to ensure that settlements meet moral criteria external to the standards of the disputants and thereby impose a different set of norms about the conduct and outcome of the dispute.[461] If mediation encounters actually tended towards empowerment, their organisation would look like mundane conversation, where participants keep each

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[458] Therese Nichols "Mediation: Section 29 and all that" [1999] Fam Law 656.

[459] *Ibid*, p 634.

[460] Ian Butler "Outcome measures in all issues mediation" [2000] Fam Law 212.

[461] Robert Dingwall "Empowerment or enforcement? Some questions about power and control in divorce mediation", Dingwall and Eekelaar, *op cit*, pp 151-152.

other in order by a variety of informal and consensual based techniques.[462] This was not found to be the case and it is suggested that mediators play an important part in orchestrating encounters in ways inconsistent with party control.[463]

Mediators were found to have extensive influence over both the process and the outcome, although restrained by the need to depict their role as formally neutral. This power was used positively to encourage some options and negatively to discourage others. Interestingly, the research found few differences between the behaviour of probation officers holding joint interviews with the couple in the course of preparing a welfare report and the behaviour of mediators working in the independent agencies. While the probation officers were less constrained about offering opinions on the merits of a suggestion, any difference was a matter of degree rather than kind. Both groups relied mainly on indirect expressions of their positions so that the appearance of neutrality could be sustained.[464] This, it is suggested, should encourage policy makers to treat with caution the findings of studies, which assume that because the organisational settings are different, there are marked differences in the actual process.[465]

Moreover, the work suggests that the choice of bargaining or therapeutic style of mediation did not affect the use of techniques to focus issues; the mediators could simply ask a question which redirected attention towards negotiation and they might sanction the couple by suggesting that they were impeding the object of the session or that they were being self-centred.[466] Co-mediation appeared to offer advantages in the provision of additional insights into problems. Nevertheless, the research found that co-workers rarely sought to counteract pressure placed on the parties and in two agencies they normally collaborated in the application of pressure, strengthening interventions and increasing the likelihood that clients would experience mediation as coercive and intimidatory.[467]

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[462] Distinguish orchestrated encounters, where order is maintained by the actions of one party who is recognised by the others as arbiter and pre-allocated encounters, where order is based on an elaborate and formal body of rules.

[463] Note that the fieldwork in this study was on one independent mediation service in England which yielded a single case study. Although the author defends the use of a single study, the inferential possibilities are very weak.

[464] R Dingwall and D Greatbatch "Behind closed doors: A preliminary report on mediator/client interaction in England" (1991) 29(3) Family and Conciliation Courts Review 291, p 296.

[465] *Ibid*, p 298.

[466] *Ibid, p* 295.

[467] *Ibid*, p 299.

This work has been the subject of an extended debate between the authors and Marian Roberts, a prominent advocate of the practice. She suggests that the writers ignored the staged nature of the mediation process and failed to locate the information given by the mediator within a stage.[468] The relevance of a strategy deployed by a mediator relates crucially to the timing within the process. They return that they did not find evidence of discrete stages within the process but rather an impressive variety of encounters and a range of ways in which mediators can proceed. Moreover they suggest that Roberts must demonstrate the difference that the location within a session would make to the selective facilitation[469] of the mediator.[470]

She questions the value of research that focuses on several different forms of mediation practice that differ radically in the conditions under which they operate and prefers an exclusive focus on the framework and style adopted by independent, out-of-court mediation.[471] They retort that it is not for a researcher to capitulate to the parameters laid down by the practice itself; any examination must be independent of boundaries that may not actually exist outside of mediation theory.[472]

Critical and determining elements of the process were excluded in the use of audiotapes, such as the extra verbal clues to meaning, according to Roberts while the exclusion of party perspectives was also condemned. When the data is actually analysed it becomes evident that the mediator who attempted to influence the outcome of the process was actually unsuccessful as the mediation was terminated when the parties choose to leave.[473] Dingwall and Greatbatch reply that this criticism illustrates a failure to address problems with the evidential value of the participants' accounts and the real differences between *in situ* understandings and *post hoc* reflections.[474] They agreed that videotaping might be more productive although when research was conducted again using this method as a replacement for the audiotape, little revision of the first findings was required. They argue that the fact

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[468] Marian Roberts "Who is in charge? Reflections on recent research on the role of the mediator" [1992] JSW&FL 372, p 377.

[469] This is where the mediator creates opportunities in a session to explore some options, while disregarding or passing over others.

[470] Dingwall and Greatbatch "Who is in charge? Rhetoric and evidence in the study of mediation" [1993] JSW&FL 367, p 373.

[471] Roberts, *op cit*, p 378.

[472] Dingwall and Greatbatch, *op cit* at n 470, pp 369-371.

[473] Roberts, *op cit*, p 379-381.

[474] Dingwall and Greatbatch "Family mediation researchers and practitioners in the shadow of the green paper: A rejoinder to Marian Roberts" (1995) 17 JSW&FL 199, p 203.

that the clients walked out of a mediation in these circumstances was not relevant: "the point of the research was simply to demonstrate the scope for mediators to encourage some outcomes and to resist others while continuing to present themselves as neutral".[475]

The debate also encompasses the criticisms and defence of conversational analysis as a tool of research in the context of mediation and many of the other criticisms are raised again by Roberts in this context.[476] Suggesting that experts in the field of conversational analysis have described serious conceptual and methodological reservations that were not described in this research, Roberts draws attention to the dangers when analysing strips of talk in isolation from contemporary and independent sources of information. She reiterates the centrality of non-verbal communication and the fact that the analysts' view of what is displayed is elevated above that of the participants. Although the socio-cultural context of an utterance is central to meaning and action, the details of manner and style of delivery are virtually impossible to examine in research of this kind, casting doubt on the generality of the findings.[477]

The researchers again attempt to defend their methodology, arguing that the work cited in support of the effects of the social structure on talk is actually dedicated to arguing the opposite conclusion.[478] The aspects of the critique addressing non-verbal communication and the interactants perspectives had previously been addressed.

Yet, it seems that the researchers were only seeking to ensure that clients were made aware of the values adopted by mediators, advocating a more formal structure to the interaction. It seems that standards of practice should be based on the direct evidence of the actual behaviour of mediators and further research would aid the definition of specific interactional phenomena identified as important for high-quality mediation. It has to be conceded by mediation that the research is important and of long-standing and does appear to indicate that mediators are not always neutral with regard to the outcome of the case. In certain respects, it is hard to understand the strong objections of adherents to this conclusion; it would be nothing less than unrealistic to think that a mediator would never have a preferred solution or would never seek to impose that solution on clients. The whole rationale of training and ethical standards stems precisely from the fact that the practice is

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[475] Dingwall and Greatbatch (1991) *op cit* at n 470, p 375.

[476] Marian Roberts "Who is in charge? Effecting a productive exchange between researchers and practitioners in the field of family mediation" [1994] JSW&FL 439, pp 444-446.

[477] *Ibid.*

[478] Dingwall and Greatbatch (1995), *op cit* at n 474, pp 202-203.

not immune from partiality and mediator influence. The rejection of the research findings on bases adamantly defended by the researchers does not coincide with promises to amend and improve practice in the light of research evidence.

In preceding chapters, the dilemma of the mediator facing grave imbalances of power between the parties was noted. Rectification of power imbalance may be necessary, yet intervention is disempowering and undermines neutrality. Davis found anecdotal evidence that less powerful clients felt that they were being forced to capitulate by a mediator who wanted a settlement in the face of strong resistance to compromise on the part of the stronger clients.[479] In a study of in-court conciliation, he discovered that the tactics employed by mediators included endless delay and crude arm-twisting,[480] although an examination of out-of-court practice led to the observation that, on the whole, responsibility for decisions did rest with the parties.[481] Mediators were actively challenging and could at times empower a weaker party, although they found it harder to be tough where both parties where present at the same time than in the context of individual counselling sessions. It should be noted, however, that the method used by Davis is controversial in that it demands that a client recall the experience and is limited in that it can only illustrate how the client perceives the sessions. This can be a useful exercise and some knowledge is gained but the limits of the method should be taken into account in assessing the worth of the material results.

The findings of the study are not uncontroverted and various research investigations have suggested that mediation consumers do not feel coerced by the process or by the mediator into reaching a settlement or reaching a settlement on particular terms. Canadian research suggested that as many as 69% of clients who took part in a process conducted on court premises did not feel that they had been pressurised.[482] However, if 31% did feel pressured in any way then the process does possess dangers of which clients in general and mediators in particular should be made aware.

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[479] He relied on 51 interviews from former customers at the Bromley Family Conciliation Bureau. See Gwynn Davis; Partisans and Mediators: The Resolution of Divorce Disputes (Clarendon Press, 1988) p 63.

[480] Gwynn Davis and Kay Bader "In-court mediation: The consumer view" [1985] Fam Law 82, p 84.

[481] Gwynn Davis and Marian Roberts: Access to Agreement: A Consumer Study of Mediation in Family Disputes (Open University Press, 1988) p 148.

[482] Alberta Law Reform Institute: Court Connected Family Mediation Programs in Canada, (Research Paper No 20, May, 1994) p 47.

An absence of neutrality may not be as problematic as it first appears. Where a party is attempting to dominate the other party or the proceedings, then partisanship is an unavoidable and beneficial effort by the mediator to rectify an imbalance and to allow the session to proceed. While this is recognised by mediation, it seems that the attempt may be more widespread than they are prepared to accept if the research findings are accurate. Yet, if it is a present and perhaps unavoidable feature of the mediation relationship, then it would be better exposed and examined than denied and hidden by practitioners. The reality of partiality has caused Dingwall and Greatbatch to recommend that clients are not mislead into thinking that they are entering a neutral arena; they should be clear about what values the mediators have adopted, about the relative merits of various outcomes and about the degree of pressure they consider legitimate. Clients must be genuinely free to enter or leave mediation at any point without prejudicing the subsequent course of their divorce because, once locked into mediation, they have few means of resisting pressure short of walking out. Defined standards ought to be shared amongst the staff and explained to clients while accountability and client complaint procedures should become features of the system.[483]

Moreover, commentators have suggested that a dynamic, pro-active approach rather than a passive approach is more effective. The mere facilitation of exchanges between the parties is unlikely to produce agreement.[484] Indeed, this is a view reached by Dingwall and Greatbatch who conclude that "any attempt to eliminate or reduce the use of negative sanctions would curtail the ability of mediators to establish and maintain a process of negotiation, which in turn might well lessen the chances of agreement being reached".[485] This finding does suggest that mediation must endorse a level of intervention through the establishment of procedural rules, structuring the process to obtain relevant information and re-framing party statements to identify important issues and proposals. Sanctioning and focusing may be inevitable if mediators are to establish and maintain discussions that are directed at reaching agreements.[486]

Kressel found, through the analysis of audio and video taped mediation sessions, that mediators could be categorised according to their settlement or problem-solving orientation. The former are strictly neutral while the latter are prepared to depart from strict neutrality

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[483] Dingwall and Greatbatch "Behind closed doors: A preliminary report on mediator/ client interaction in England" (1991) 29(3) Family and Conciliation Courts Review 291, pp 301-302.

[484] J Pearson and N Thoennes "A preliminary portrait of client reactions to three court mediation programs" (1984) 3 Mediation Quarterly 21.

[485] Dingwall and Greatbatch (1991), *op cit* at n 483, p 301.

[486] *Ibid*, p 295.

when conflict resulted from the destructive behaviour of one spouse. Concluding that the problem solving approach yields more agreements and more durable agreements, the research also discovered that it produced higher levels of client satisfaction.[487] Certainly, it is hard to imagine how a mediator might attempt to deal with an interpersonally dysfunctional parent without resorting to a more coercive approach and there is research evidence that in those circumstances the mediator will assist the other parent in getting their legitimate needs met and at times will challenge the dysfunctional behaviour.[488] This form of research, which has as a focus the mediation process itself, is rare and it is vital if mediation is to be uncovered as more than a catalogue of effects. However, it does suffer from the limitations of the case study method used. While recovering from long received scorn, it remains suspect in scientific terms because of the size of the samples and the intervention of the subjective perceptions of the researchers.

There must be a very thin line between effective mediation that reframes the parties' statements into proposals and partial mediation that suggests the proposals preferred by the mediator. What mediators will perceive as an example of the former, critics will explain as the latter. This illustrates the weakness of this measure of mediation by itself and the need for the use of less subjective methods to supplement the analysis.

Testing the Claims of Mediation: The In-Court Model

User Satisfaction in Child Custody Mediation

The first experiment with in-court mediation in England was introduced at Bristol County Court in March 1977 and involved a preliminary appointment with a court registrar to try to settle the dispute. It has been, in latter years, almost entirely overshadowed by the development of the out-of-court model in that jurisdiction. However, important early research work was carried out on court premises and it would be premature to decline to revisit this knowledge. In addition, it remains a popular model in the United States, where custody mediation is often compulsory in contested cases.[489]

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[487] Howard H Irving and Michael Benjamin: Family Mediation: Contemporary Issues (Sage, 1995), p 413.

[488] Kenneth Kressel, et al "Research in contested custody mediations: An illustration of the case study method" (1989) 24 Mediation Quarterly 55.

[489] A substantial proportion of American in-court mediation programmes categorically mandate participation (36.6%) or permit judicial referrals which may be mandatory (36.6%). See Nancy Thoennes et al "Mediation and domestic violence: Current policies and practices" (1995) 33(1) Family and Conciliation Courts Review 6 and Chapter Two, p 67 above.

One consumer survey sought to uncover the benefits and the pitfalls of the procedure in Bristol and Newport County Courts;[490] the study drew up a list of all of those who attended preliminary appointments and those who were willing and could be traced were interviewed.[491] The study concentrated on the 144 cases involving an initially contested application for custody and/or access with a mediation appointment in 64% of those cases. In Newport, only twenty cases were examined because the sample population was much smaller. Research was complied through interviews with the clients and observation of the process by the researchers.

Respondents were critical of the overcrowding and the lack of privacy in the waiting areas, which exacerbated their feelings of tension. Generally, the parents did not negotiate together, often because the solicitors wanted to act as intermediaries. This induced a feeling of loss of power and control. Clients expressed frustration at being asked to return several times to mediation meetings, when they felt that the issue had simply gone beyond them.[492] 38% of clients in Bristol had attended more than one appointment and in Newport it was even more common for several appointments in the same case to take place. Clients complained that they were put under pressure to reach a settlement, with repeated adjournments where they failed to do so. Clients appreciated the presence of solicitors, but many were critical of the welfare officer, perhaps because their purpose was not entirely clear-cut. There was a failure to distinguish between mediation and court advisor roles and a general drift into partisanship. Interestingly, from the point of view of current practice, the approval rate was higher when the parties were seen together rather than separately.[493]

Only a minority of clients spoke at the meeting in chambers and there was a general impression that the Registrar was there to decide the case. Clients were intimidated by the court surroundings and were given the impression by solicitors that it would be inappropriate for them to address the Registrar. Parties were often unhappy about the agreement reached and many of the agreements did not survive. Of those questioned, 32%

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[490] Conciliation in Divorce research project carried out by the Department of Social Administration, University of Bristol (1981-1984).

[491] 27% could not be traced and 68.5% of the remainder were actually interviewed.

[492] Gwynn Davis and Kay Bader "In-Court mediation: The consumer view 1 and 2" [1985] Fam Law 42, 82, pp 43-45.

[493] *Ibid*, pp 45-46. The approval rate was 60% where the parties were seen together and 44% where they were interviewed separately.

reported that the agreement had broken down.[494] While a majority of respondents thought that the agreement was fair, 57% did report that the meeting had not served any purpose in their case. Most felt 'upset', 'angry' or 'disappointed' on leaving the court after the final mediation meeting. However, parties to an appointment concerning custody/access rather than the divorce decree were more likely to give positive answers. In ten cases out of thirty-eight in Bristol, both parties recorded feeling 'relieved' or 'pleased'.

For Davis and Bader,[495] the conclusion to be drawn was that an appeal for help entailed a loss of power. Autonomy and dignity were not retained by the couple in the process of in-court mediation. A lack of skill characterised the work of the in-court conciliators; persuading the less resolute that they had little or no chance of winning the case or other forms of crude arm-twisting were prevalent. They searched for compromise regardless of the long-term viability of the proposed arrangements or the justice of the case.[496] Parties were left feeling frustrated and ultimately devoid of control.

This conclusion is not undisputed. Studies in the United States have yielded very different results, suggesting that in-court mediation is associated with a high degree of user satisfaction and, even amongst those who failed to reach an agreement, a clear majority would encourage others to try.[497] A statewide study conducted in California revealed that more than 80% viewed the mediation session as positive or very positive and over 80% felt that they had not been rushed, intimidated or pressured.[498] This result is particularly notable given that the child custody mediation sessions were mandatory for the participants. One study examined couples using three successive questionnaires in three different jurisdictions. The amount of time that the clients spent in mediation in the three places varied considerably: 65% of respondents in Connecticut attended only one session while the average over the three cases was 3.3 sessions. Lawyer participation also varied radically: In 75% of instances in Los Angeles, the lawyer saw the mediator, while the figure was only 11% in Connecticut. However, the responses of the clients to the questions posed were remarkably similar across the three cases. 60-70% felt that the mediation had helped them

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[494] *Ibid*, pp 48 and 82.

[495] *Ibid*, p 83.

[496] *Ibid*, p 84.

[497] Jessica Pearson and Nancy Thoennes "A preliminary portrait of client reactions to three court mediation programs" (1984) 3 Mediation Quarterly 21. The research settings were Los Angeles Conciliation Court, Family Relations Division of the Connecticut Supreme Court and the Domestic Relations Division of Minnesota Family Court.

[498] Mary A Duryee "Mandatory mediation: Myth and reality" (1992) 30(4) Family and Conciliation Courts Review 507, pp 509-510.

to focus on the needs of children, 70-80% thought that they were given the opportunity to air grievances and the same number thought that mediation had helped to keep the discussion on track.[499] Despite these positive findings, 45% of respondents reported feelings of defensiveness, 20-30% felt confused about mediation and its goals and between one half and one third thought that the process had been rushed and that they had been given assembly line treatment.[500] While 35-40% reported that they had arrived at a permanent custody or visitation agreement, with a further 20-30% having reached some agreement, one in three of those who reached an agreement still maintained that they had made little or no progress in their case. Those who reached an agreement did credit the process with improving their relationship with their ex-spouse, while for those who did not, any change in the relationship was for the worst.

Despite the mixed results of this survey, the reaction of the researchers was positive; a substantial proportion of respondents at each site appreciated the opportunity to express themselves. The authors concluded on the basis of longitudinal research that mediation generates a great deal of user satisfaction and its clients compared well to a control group in terms of reported satisfaction with the final agreement and also their perceptions of the completeness of the agreement.[501] Agreement and satisfaction levels were comparable at all sites regardless of the time spent per case, although the writers did acknowledge that a sizeable minority felt rushed or poorly understood. They suggested that client satisfaction rates might be raised by client education that would eliminate erroneous client expectations of lengthy counselling or evaluations.

This conclusion has to be questioned, suggesting as it does that clients will be more satisfied if they expect less without examining the validity of the client expectations. While many clients did express views which suggested that they had misunderstood the goals of mediation, clients also considered that mediators had been biased in favour of their spouse, had rushed them into making decisions or had not understood or respected their point of view. Educating mediators would seem to be as appropriate a resolution as educating clients in this regard. The extent to which the researchers in this work heard or understood the complaints of the clients has also to be questioned; they did not address the fundamental issue of whether, in light of these findings, in-court mediation is a positive or negative

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[499] Jessica Pearson and Nancy Thoennes "A preliminary portrait of client reactions to three court mediation programs", *op cit* at n 497, p 32.

[500] *Ibid*, pp 32-34.

[501] Jessica Pearson and Nancy Thoennes "Mediating and litigating custody disputes: A longitudinal evaluation" (1984) 17 Fam L Q 497, p 505.

experience for clients and whether it is useful for the justice system to carry on with this approach.

Davis suggests, in addition, that the results of this survey appear to have been arrived at on the basis of quantification of responses to researchers' direct questions, reflecting a style of intervening which tends to produce findings that confirm, or more occasionally undermine, the researchers' prior conceptions.[502] He continues with a stinging critique of the work; while 70-80% appreciated, on being asked, the opportunity to air their grievances, 30-40% complained that they were not heard or understood. While the writers observed that an agreement is not synonymous with a solution, they did not draw any conclusions about the true nature of mediation on court premises.[503] Further, in evaluating the long-term satisfaction of mediation clients in comparison with non-mediators, the authors failed to give any useful description of the characteristics of the control group used and left open the possibility that they were systematically different from those who mediated.[504]

Nevertheless, time and again the positive experiences of clients involved in court based mediation have been documented by researchers, illustrating a strong preference for mediation over litigation and the appreciation of the opportunity to express a viewpoint.[505] Survey results indicate that clients are generally more satisfied with parenting arrangements they determine by themselves in mediation and more dissatisfied with court imposed parenting plans.[506] Yet, it cannot be assumed that satisfaction with the process implies that a client approves of the agreement reached. One court study found that clients were more equivocal about the nature of the agreements reached, satisfaction with the overall result of mediation fell within the uncertain range as did responses about whether their agreement

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[502] Gwynn Davis "The halls of justice and justice in the halls" in Dingwall and Eekelaar; Divorce Mediation and the Legal Process, *op cit*, p 108.

[503] *Ibid.*

[504] Professor Robert J Levy "Comment of the Pearson-Thoennes study and on mediation" (1984) 17 Fam L Q 525, p 527.

[505] Mary Dupree "Mandatory court mediation: Demographic summary and consumer evaluation of one court service" (1992) 30(2) Family and Conciliation Courts Review 260.

[506] Alan Slater, Jan A Shaw and Joseph Duquesnel "Client satisfaction survey: A consumer evaluation of mediation and investigative services" (1992) 30(2) Family and Conciliation Courts Review 252. This work suffered from a number of problems. The response rate was 40% and respondents who received brief mediation, males, minorities and lower socio-economic groups were underrepresented. The researchers warned against generalisation to any population whose characteristics differ from the sample. In addition, only one county in California was examined and there appears to be substantial variation among the family court services in Californian Superior courts. See Isolina Ricci, Charlene E Depner and Karen V Cannata "Profile: Child custody mediation services in California Superior Courts" (1992) 30(2) Family and Conciliation Courts Review 229.

was in everybody's best interest. Respondents also expressed distrust in their spouse's willingness to live up to the agreement.[507] While it is certainly desirable that clients should experience mediation as pleasant and empowering, the concern of lawyers must be the quality and durability of the agreements reached.

Irving and Benjamin concluded, after an examination of fifty empirical studies, that a user satisfaction rate of between 60% and 80% for both process and outcome was present where the couple had reached agreement. The rate remained relatively high, at between 40% to 60% where the couple had failed to agree. The data, they suggest, supported the conclusion that user satisfaction levels are comparable to or perhaps higher than those applicable to other types of professional service.[508] The authors' own work, which concentrated on a court based program in Toronto, concluded that 75% of clients had positive feelings about their contact with the service, 80% agreed that they would return if the need arose and 59% suggested that conciliation was the main reason for any change that had been accomplished.[509] Nevertheless, all clients had agreed to participate in the mediation process, so that the same satisfaction rates might not apply where mediation is mandatory. The authors do not describe the orientation of the service in sufficient detail to allow the reader to ascertain whether a therapeutic approach was preferred, a choice which could affect the levels of clients satisfaction and the possibility of inferring that similar approval would follow in this jurisdiction. This is a significant omission.

While much of the American research has described consumer views in relation to particular court connected mediation services, more ambitious work involved an examination of satisfaction across services provided in one State, California, which has legislated for compulsory mediation.[510] The work revealed state-wide satisfaction with the court-based services in terms of helpfulness, the opportunity to discuss issues and the outcome of the mediation. Clients were positive about the experience, even where the mediator was authorised to make recommendations to the court in the absence of agreement.[511] While reaching an agreement was the strongest determinant of client satisfaction, a substantial proportion of clients found the service helpful even though they

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[507] Slater, Shaw and Duquesnel, *op cit*, p 265.

[508] Irving and Benjamin: Family Mediation: Contemporary Issues, *op cit* pp 415-416.

[509] Howard H Irving; Family Law: An Interdisciplinary Perspective (Carswell, 1981) p 55.

[510] Charlene E Depner, Karen Cannata and Isolina Ricci "Client evaluations of mediation services: The impact of case characteristics and mediation service models" (1994) 32(3) Family and Conciliation Courts Review 306.

[511] There was a difference of 4% between recommending and non-recommending services on the question of the clients' perception of their opportunity to discuss the issues.

failed to do so. The work was interesting in its discovery that 76% of clients were satisfied with the results of the mediation and, even where an agreement had not been reached, 60% of clients noted their satisfaction. There was a statistically significant tendency for mediation to be rated as more helpful by parents with less education and lower income and by ethnic minorities, although these groups were also more likely to feel intimidated. The weakness of the study lies in its snapshot nature; it focuses on a brief time interval, depicting a cross section of families at all stages of the process, although this deficiency is recognised in the research itself.

Cost and Effectiveness of Child Custody Mediation

An evaluation of the effectiveness of mediation is a complex task that necessarily includes many variables, from the number of cases referred and settled to the durability of those settlements. The issue is central to any governmental examination of the process, with a view to providing public funding, though it has also stood in the frontline of the debate between the advocates and the sceptics.

In Britain, the establishment of the Robinson Committee in 1982 marked the first national and systematic survey of mediation in practice. The ensuing report compared the settlement rates of divorce court and conciliation files and suggested that conciliation was best developed through court-based services. It was, however, to suffer a barrage of well-founded criticism that managed to successfully undermine the veracity of the findings.[512] Cases that resulted in agreement pre-decree nisi or in reconciliation were treated as unsuccessful conciliations for the purposes of the study, ensuring that any comparison between the in-court and the out-of-court process was misleading. It was unclear from the report whether cases in which some of a number of issues had been agreed were to be regarded as settled or unsettled and the report did not attempt to examine the durability or workability of agreements reached with the help of a conciliator. In addition, the fixed costs for in-court conciliation were not taken into account and out-of-court services were not offered accommodation within the existing court or probation facilities, undermining the conclusion that, on the basis of cost, court services only should be supported by central government.[513]

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[512] See Lisa Parkinson; Family Mediation, *op cit*, pp 323-324.

[513] Carolyn Yeats "The Interdepartmental Report on Conciliation: A step backwards" [1983] JSWL 335, pp 337-340.

The Committee observed that in-court conciliation conducted by court welfare officers had a success rate of 50%. However, it did not specify whether it was referring to the pre-litigation schemes run by the Divorce Court Welfare Service, in-court mediation or the settlement rate following the preparation of a welfare report. In bracketing together all the settlements reached and including all settlements reached once the parties had embarked on the court process, the Committee may well have counted cases that were compromised more out of resignation than out of any genuine agreement.[514]

Further research was commissioned in the wake of the Report,[515] which concluded that conciliation was associated with increased costs due to the exclusive focus on child issues. As a result, it was recommended that mediation would broaden its remit. Researchers examined court-based services that exhibited high and low rates of judicial control, computing costs in a manner that allowed for accommodation and accommodation-related expenses, administration, wages and client expenditure.[516] Using multiple regression analysis, it emerged that there was a tendency for in-court conciliation to generate some offsetting cost reductions in the dispute settlement process, but these reductions were by no means sufficient to produce anything remotely resembling a net reduction in the cost of dispute settlement. The research could not show that conciliation pays for itself in terms of savings elsewhere. The significance of this research cannot be overestimated, in that it examined various mediation practices on a cross-national and long-term basis and utilised a multi-disciplinary team of researchers. Yet, the very ambition of the research has been criticised; it resulted in much of the data being compiled by third parties who were at a distance from the researchers and there was a risk that researcher innovation and verification were affected as a result.[517]

It is indisputable that the report was a thorough and comprehensive document, but it failed to evade criticism. On the question of costs, the judgement that in-court costs would be less than the independent alternatives was affected, like conclusions in the preceding report, by the assumption that the former would not have the accommodation implications of the latter. Yet, not all courts would be in a position to provide facilities for mediation and some

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[514] Gwynn Davis "Conciliation: The Inter-Departmental Report examined" [1984] Fam Law 52, p 53.

[515] Conciliation Project Unit, University of Newcastle Upon Tyne, which reported in 1989.

[516] Anthony Ogus, Michael Jones Lee, William Cole and Peter McCarthy "Evaluating alternative dispute resolution: Measuring the impact of family conciliation on costs" (1990) 53 MLR 57, pp 64-72.

[517] Gwynn Davis "Reactions to the Conciliation Project Unit Report" [1989] Fam Law 261.

would be in a position to offer rooms to a national independent service.[518] Cases where the clients had finished with legal proceedings but wanted to negotiate access in mediation and cases where the couple reconciled were left out entirely of the costing equation and no account was taken of the wider social costs of divorce by traditional means. It is certainly the case that mediators were unhappy about the findings on cost, but this factor alone has never been given the same pride of place in mediation rhetoric that it has enjoyed in government circles. Moreover, it has been suggested that, while cost measurement lay at the heart of the Newcastle research, there are good sociological reasons why conciliation will never pay for itself and it is unrealistic and unfair to require that it would when social services generally do not.[519]

More fundamental was the inability of the Conciliation Project Unit to show that in-court mediation reduced the number of disputed issues. The evaluation of the effectiveness of conciliation posed considerable problems, in that the services differed in terms of aims and clientele and it was necessary to allow for the influence of external factors. The researchers did discover a tendency for in-court conciliation with strong judicial control to produce a lower settlement rate than other forms and the clients were more likely to report dissatisfaction with access arrangements than the other conciliation and non-conciliation client categories. Only 44% of in-court clients could say that the custody and access problems had not re-emerged.[520] It was argued against the findings that the report had omitted to study the effects of conciliation on children or to distinguish between spousal and parental conflict, the latter being the characteristic focus of family conciliation.[521]

There was more optimistic research conducted in England, which suggested a settlement rate of 70% for access disputes and 45% for custody. The researchers interviewed 74 people who had agreed or confirmed settlements at the mediation appointment and found that the agreement survival rate was 50%, with a further 16% altering by mutual consent. 32% of the agreements had broken down completely. Nevertheless, the study was conducted in one court premises on a small scale. In addition, a number of factors must be borne in mind including the fact that the each case may have involved a number of issues, there could have been more than one appointment and the actual negotiation and agreement could have

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[518] Carolyn Yeats "The Conciliation Project Report: A study of non-judicial dispute resolution in family cases" [1990] JSW&FL 33, pp 35-38.

[519] Gwynn Davis "Reactions to the Conciliation Project Unit Report" [1989] Fam Law 261.

[520] Anthony Ogus, Janet Walker and Michael Jones Lee "The Conciliation Unit Project Report: A summary" [1989] Fam Law 252.

[521] Thelma Fisher "Reaction to the Conciliation Unit Project Report" [1989] Fam Law 259.

taken place before the appointment. Arguably, cases where the appointment served merely to confirm a settlement agreed between lawyers should not have been included among the successes of conciliation.[522]

Evaluative data on an Australian in-court process indicated that 72% of parties presenting themselves for conciliation counselling resolved at least one issue in their dispute, whereas in 62% of cases a total resolution was achieved. The type of issue in dispute affected resolution rates. Where the dispute concerned the daily care and control of children agreement rates were considerably lower (57%) than when the right to make long-term decisions about children was at issue (81%). Three months after mediation, only 11% of applicants had filed an application in the Court. It must be noted that in Australia, there is no accepted understanding of conciliation: the term is used generically to denote any consensual non-adversarial process and does not distinguish between conciliation, mediation and appraisal. Thus, it may provide for a degree of "informed direction".[523]

American studies suggested that agreement rates in mediation fluctuate between 40% and 60% for complete agreement and 10-20% for partial agreement that led researchers to conclude that in-court mediation is both efficient and effective and contributes to court diversion, with consequent cost savings for clients and government.[524] However, the evidence is not always consistent, particularly on the question of public cost savings.[525] Results came primarily from small-scale projects; the Charlottesville mediation project,[526] for instance, suggested that the implementation of a custody mediation programme could cause a dramatic reduction in court hearings. 77% of mediation disputes were found to have ended in verbal or written agreement, a figure that compared favourably with the litigation control groups in the study.[527] The analysis of Duryee confirms a high rate of full or partial agreement in one Californian court service (76%), although it should be noted that almost

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[522] See Dingwall and Eekelaar: Divorce Mediation and the Legal Process, *op cit*, pp 98 and 111 and Davis and Bader, *op cit*, p 82.

[523] Alastair Nicholson "Mediation in the Family Court of Australia" (1994) 32(2) Family and Conciliation Courts Review 138, pp 139-140. See also Anne Marie Blaney " Family mediation: A comparative overview" [1999] 2 IJFL 2, p 7.

[524] Howard H Irving and Michael Benjamin Family Mediation: Contemporary Issues *op cit*, pp 414-415.

[525] *Ibid*, p 418.

[526] See Robert Emery; Renegotiating Family Relationships: Divorce, Child Custody and Mediation (Guildford Press, 1994) pp 178-184.

[527] 72% of the litigation clients proceeded to court.

one in four couples failed to agree on anything and it is vital to consider the impact of the total failure cases on the overall cost of the dispute resolution system.[528]

Much cited research in Canada examined settlement rates and the content and durability of agreements. This research consisted of two small empirical studies of the Toronto Conciliation Service that were undertaken in the late 1970's, comparing a procedure which emphasised problem solving and agreement with a court intake service, which had a crisis counselling and referral focus. It concluded that 70% of clients reached an agreement and a small number (12%) also reconciled. Only 9.8% of clients had returned to the court with their agreement within the following year, although most had made informal and mutually acceptable changes.[529] In contrast those couples who did not reach an agreement were twice as likely to return to court four or more times.[530]

Yet, an evaluation of court connected mediation in three other Canadian cities with in-court child issues systems found, on the basis of court records, that 64% of cases went to full or partial settlement with 6% of the clients reconciling. Of the clients interviewed, only 38% indicated that they had reached a full agreement and 20% suggested that a partial settlement had been achieved. The researchers explained the discrepancy by speculating that some settlements may have unravelled after mediation.[531]

Research conducted by Pearson and Thoennes discovered that 60% of clients who mediated reached an agreement in the process and 60% of those who tried but failed would stipulate to an agreement prior to their court hearing. Successful mediation appeared to lead to higher compliance rates and those clients moved through the system faster than their adversarial counterparts. However, the unsuccessful mediation clients moved through the system at the slowest rate and used more resources in terms of lawyers' fees than any other group.[532]

While the prognosis of the researchers was very positive, it is arguable that the study emphasised the benefits where mediation is successful to the detriment of an analysis of

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[528] Mary Duryee "Mandatory court mediation: Demographic summary and consumer evaluation of one court service" *op cit*, p 261.

[529] Howard H Irving: Family Law: An Interdisciplinary Perspective, *op cit*, pp 41-66.

[530] *Ibid*, p 59.

[531] Alberta Law Reform Institute, *op cit* p 43, citing James Richardson: Court Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results (Ottawa, 1988).

[532] Jessica Pearson and Nancy Thoennes "Mediating and litigating custody disputes: A longitudinal evaluation" *op cit*, pp 504-517.

possible problems for the system as a whole when it fails. Levy suggests that couples who agree to and follow through on voluntary social services are much more likely to be co-operative, less litigious and more pleased with the outcome than those who refuse, although the researchers produced F tests which suggested that successful mediation clients did not fare significantly better as a result of initially having lesser disputes or greater levels of co-operation with their spouses. It was alleged that the researchers' values illustrate a bias in favour of mediation, an allegation that is strongly denied by the writers.[533] The accusation does raise the question of whether research in this area is disguised advocacy and the need for caution where this is a possibility. Moreover, this form of small scale, one-project study suffers from severe limitations with regard to any generalisation and compounded limitations where that generalisation is cross-national. It is arguable that the American work compares unfavourably in this regard to the more ambitious government-sponsored research in Britain and is best described as quasi-experimental.

The Long-Term Effects of Child Custody Mediation

Mediators cite improved post-divorce relations and psychological benefits to parents and children as an integral effect of mediated settlements. While such transformations in personal well being and in communication between spouses can be viewed as merely elements in the test of effectiveness, these claims go beyond aspirations to high settlement rates at low cost, towards a fundamental alteration of the post-marital relationship. It could be suggested that such claims are more appropriate where therapeutic mediation is practised but commonly they are also viewed as side effects of settlement orientated approaches and are integral to the assertions made by mediation in defence of itself.

The Newcastle researchers attempted to measure improvements in communication and concluded that, as a whole, conciliation made no difference to the way in which parties related to each other. Any improvement tended to occur in all groups and was the result of the passage of time that allowed negative feelings to subside and of the settling of disputes that had the potential for continuing hostility. In addition, they found that there was no evidence to suggest that attendance at in-court conciliation services led to reduced distress. Indeed, these results are hardly surprising given findings that users of in-court conciliation

[533] Robert J Levy "Comment on the Pearson-Thoennes study and on mediation" *op cit.* He suggests that the groups "designed as experimental and control were too small and chosen according to unexplained criteria.....case mortality, especially differential mortality in the control and experimental groups during the study's measurement phase makes any inferences about outcomes of the experimental treatment unreliable", p 528.

services were confused about the purpose and functioning of conciliation, felt under pressure to attend and that some clients also felt pressurised into reaching an agreement. In addition, clients did not welcome the experience of being in a court, which many saw as having criminal overtones and carrying a stigma.

The Newcastle surveys, especially at the time of the third follow up study, were based on such a small sample of the divorcing population that the findings may have been skewed. Parkinson suggests that the findings from a much larger American study conducted by Pearson and Thoennes are more significant because they involved larger scale samples, used control groups and carefully constructed measures to test for bias in the research design.[534] However, services vary in the extent to which they offer therapeutic facilities as an integral part of the mediation experience and the same service may vary over time, making any comparisons between studies difficult and tenuous. For instance, while independent services in Britain took a positive view of mediation as a vehicle for the delivery of therapy at the time of the Newcastle study,[535] the perspective has been amended in recent times.[536] This factor must be taken into account in any consideration of empirical research on the psychological and relational benefits of in-court mediation, particularly in jurisdictions where greater emphasis may be placed on the value of counselling and therapy within the settlement process. Moreover, the researchers found that mediation appears to have only a modest ability to alter relationships where it is successful and acknowledged that the benefits are limited where the mediation has not resulted in agreement. This clearly suggests that any positive effects that mediation may have on the long-terms adjustment of the couple do not accrue to all those who enter the process. The work did suggest, however, that mediating parents were more co-operative than those who took part in court proceedings, having allowed for differences in initial levels of co-operation. While successful mediation clients reported twice the rate of co-operation of those who did not try mediation, the rate was six times higher than among those who had gone to mediation but failed to settle any issues.[537]

Certain Canadian research is at odds with this negative trend, suggesting that the relationships had improved, marital conflict had decreased and individuals had received

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[534] Lisa Parkinson, *op cit*, p 331.

[535] Simon Roberts "A blueprint for family conciliation?" (1990) 53 MLR 88, p 89.

[536] Lisa Parkinson; Family Mediation *op cit*, p 84, "couples who come to mediation have a right not to be given therapy in the guise of mediation".

[537] Pearson and Thoennes "Mediating and litigating custody disputes: A longitudinal evaluation", *op cit*, pp 506 and 509.

psychological benefits from the process. Clients reported that the success of conciliation was primarily attributable to improvements in trust, communication and understanding (35%) and reduced emotional tension or conflict (17%). Reaching an agreement as a result of conciliation counselling was incidental, the primary benefit was subjective and in the form of relief from emotional distress.[538] It appeared from the study that long-term benefits are attainable, with 53% reporting improvements in the overall family situation one year later.[539] The improvement in life satisfaction was linked to attending three or more sessions.

The research represented a serious attempt at controlling to ensure that those who reached agreement would not have done so in the absence of the conciliation process. Willing applicants were randomly assigned either to an established intake service or to a special conciliation counselling service and usefully compared with each other. Both spouses had to agree to participate in the counselling and in the research project and they had to be referred by a judge or their own lawyers before they were included in the sample. While this method gave interesting and valid comparisons, the mediation group was likely to be more amenable to the process and to have higher success rates than the general divorcing population. Further, the results are out of line with the general trends in Canadian research that has not managed to demonstrate a post-divorce impact and there appears to be little difference between mediation and non-mediation groups in terms of the levels of hostility and conflict.[540]

Even the researchers who produced the positive Canadian data have been forced to acknowledge recent research, which suggests that court-based mediators have failed to help clients to deal with deeper relational problems, possibly because they operated under time constraints and had a professional socialisation, which prompted them to stick to facts and issues.[541] Indeed, the lack of effect seems inevitable from research findings that indicate that mediators put very little effort into processing relational issues for disputants, concentrating instead on facts and interests.[542]

At best, the results of the research in this area are mixed, ranging from Irving and Benjamin who found 60-70% of respondents gained better co-parental relations to Mathis and

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[538] Howard H Irving: Family Law: An Interdisciplinary Perspective, *op cit*, pp 54-66.

[539] *Ibid*, pp 55 and 60.

[540] Alberta Law Reform Institute, *op cit* p 45.

[541] Irving and Benjamin; Family Mediation: Contemporary Issues, *op cit* pp 412-413.

[542] William A Donohue, Judith Lyles and Randall Rogan "Issues development in divorce mediation" (1989) 24 Mediation Quarterly 19, p 29.

Yingling who found limited changes. It has been thought that the differences in research findings reflect the resource poverty of court-based as opposed to private mediation's clients. The former tends to have more serious problems and are less amenable as a result to major relational changes. It may also be the case that only services which offer therapeutic models and longer hours of service are likely to find that relationships have altered.[543]

User Satisfaction, Efficiency and Long-term Effects of Comprehensive Mediation

In many ways, the discussion of mediation in Britain in terms of child issues that characterised the early innovations has become redundant, at least in terms of the out-of-court experience. Moreover, the independent services seem to have gradually taken over the role of service provider in the field of mediation generally. Little research evidence exists in the field of comprehensive in-court mediation; researchers have tended to concentrate their focus on all-issues mediation out-of-court or on the child disputes mediated on court premises. It was not until 1986 that Bristol County Court began an experiment that introduced a form of mediation appointment for contested ancillary relief, which was subjected to independent research.

The research concluded that the parties had come under pressure to settle but the system was preferable to the custody mediation conducted by the welfare officer because of a clearer location of authority. Clients were found to have understood the model and regarded it as no less acceptable than other aspects of ancillary relief proceedings, certainly preferable to being deflected away from the courts.[544] In the view of the researchers, the more rapid disposal of cases in the Bristol courts was a result, in part at least, of the mediation appointment system.[545] Any long-term benefits were unlikely to accrue to clients, however, given the nature of the appointment and the lack of opportunity afforded to clients to participate. Judicial interventions tended to be highly influential and often decisive and could explicitly foreshadow the trial verdict. Lawyer domination was a feature. The aim of the procedure was the rapid settlement of a dispute, with the avoidance of any or protracted litigation, rather than any impulse to bring the parties into mutual accord or to alleviate the emotional distress of the separation. Although Davis has defended the system,[546] it bears

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[543] Irving and Benjamin, *op cit* pp 417-418.

[544] Gwynn Davis "Mediation appointments for money and property in the Bristol County Court" [1991] Fam Law 130, p 135.

[545] *Ibid*, p 133.

[546] *Ibid*, pp 134-135.

little resemblance to the independent model that has come to characterise the practice of family mediation.

A pilot programme in Melbourne revealed that the rate of full settlement of all issues in a dispute was highest where the couple presented both financial and child issues (78%). The vast majority of clients were very satisfied and found mediation to be an understandable experience, had little difficulty in translating their agreement into an order and would recommend it to their friends. However, the programme revealed an over representation of clients in professional occupations who were highly motivated to avoid litigation, although the researchers found that their disputes could not be judged as simpler to resolve. One quarter of the clients felt that their spouse had taken advantage of them during the discussion, 15% felt that in hindsight they should have taken more legal advice before reaching an agreement and one in five thought that they would have reached a more favourable settlement in court. Follow up telephone interviews conducted 6-10 months after the final session showed that in 86% of cases where agreement was reached, it was being carried out or followed with only minor changes. Of the eight cases (14%) that required significant changes, only one involved subsequent court proceedings. Although the results were positive, it is doubtful whether the follow up time span was sufficient to provide a conclusive picture of the fate of mediated agreements.[547]

While the in-court models of mediation in Canada have conducted only child mediation in line with the general trends, the Montreal service has provided an interesting source of contrast by offering mediation on property division and maintenance issues as well. The comparison proved fruitful and there was research evidence, which indicated that the Montreal service fared better in terms of compliance rates (97%) and post-divorce impact. Although the positive achievements of the service were noted, the Alberta Law Reform Institute did suggest that the results might reflect a greater acceptance of dispute resolution in Quebec.[548] The cultural explanations of diverging research results are rarely utilised by the researchers but should not be ignored, as they highlight the limits of any cross-study comparison.

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[547] Alastair Nicholson "Mediation in the Family Court of Australia", *op cit*, pp 144-145.

[548] Alberta Law Reform Institute, *op cit*, p 46.

Testing the Claims of Mediation: The Out-Of-Court Model

User Satisfaction in Child Custody Mediation

Mediation that is conducted away from the auspices of the courthouse has become the favoured model on these islands and for the purposes of research in Ireland, the only one that merits close attention. Despite the recommendations of the Robinson Committee, the British government has also chosen to endow and encourage the out-of-court practice, in the belief that it offers more of the benefits claimed by the advocates and fewer of the harms levelled against mediation by detractors. An examination of the empirical research that tests the substance of the claims of independent mediators becomes, in light of this analysis, a vital element in any examination of the practice and any prognosis for the future.

Early research into the independent services for child related disputes in the UK focused on the innovations at Bromley Family Conciliation Bureau. Disputes brought to that forum mainly concerned children and access disputes in particular. Although it was closely linked in terms of administration and personnel with the statutory court welfare service, it operated a form of conciliation that had more in common with independent services. Evidence emerged that parents felt that they had been helped to work out contact arrangements, although some suggested that they had been put under pressure in the process. The samples were often extremely small, one study consisting only of 51 parents involved in 39 cases. Moreover, the researchers were forced to acknowledge that cases referred to an out-of-court mediation service were unlikely to comprise a wholly representative cross section of access disputes and there was a possibility that the parties were less entrenched than their counterparts who experienced a preliminary court hearing, a court welfare report or an adjudication.[549] Yet, further research confirmed high satisfaction rates at Bromley, with 81% of clients suggesting that mediators were fair and impartial and majorities satisfied with the process and the outcome of the mediation. Nevertheless, this research had a low response rate to the enquiries (14%) so that statistically reliable conclusions could not be drawn.[550]

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[549] Gwynn Davis and Marian Roberts: Access to Agreement: A Consumer Study of Mediation in Family Disputes (Open University Press, 1988) pp 16 and 145.

[550] Alison Trice "Research findings at South East London Family Mediation Bureau" (1997) 7(1) Family Mediation 8.

The introduction of a new rule of court referral procedure into Scottish mediation caused research interest to be raised. One small study was conducted in order to ascertain client reaction to the procedure, consisting of 48 parents who completed postal questionnaires. This group represented 33% of the population of clients who attended the independent services as court referrals during the research timeframe. Whilst many of the parents had reacted with surprise and disappointment over the decision of the court to refer them to mediation rather than to decide the case, overall the parents displayed a positive attitude towards conciliation. Over one half said that they would recommend the service to other parents in disputes over their children and they claimed that they were helped by the calm and reasoned presence of the mediator, the less hostile atmosphere of the service and the information and advice provided.[551]

The Conciliation Unit Project investigations were conducted on a more solid research footing, surveying six independent mediation services and using two control groups that did not have any form of conciliation in operation. Clients were more satisfied with the agreements reached where they had used the independent services rather than the court based models and with the exception of services with high probation control, high levels of compliance with the agreements existed. Interestingly, probation controlled mediation was the category with the highest satisfaction rate (79%), followed by the independent services with no probation control (69%) and then the court based services (57-59%). At the end of the study period, parties were asked whether they remained satisfied with the process and outcome of conciliation and again the users of the independent services had the highest rates, with over 76% indicating that they would recommend conciliation to others. 89% of clients at services without probation control would recommend it, while only 63% of users of in-court conciliation would urge others to take the same route. This was good news for the providers of independent mediation but there were some sampling difficulties, as the services had first to write to clients seeking their consent to the Unit approaching them. Approximately 25% of the sample responded.[552]

Further research sought to examine the longer-term impact of mediation and dedicated part of the study to an in-depth focus on the consumer's view of the child focused mediation

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[551] Fiona Garwood: Trying To Get Us Talking: A Study of the Rule of Court Referrals to Family Conciliation Services (Family Mediation Scotland, 1992) pp 7-9.

[552] Carolyn Yeats "The Conciliation Unit Project Report" *op cit*, p 35.

undertaken.[553] The numbers involved were not large enough to produce statistical evidence but it did emerge that couples often had very different perspectives on the mediation experience. The study found that 91% of those who had reached agreements on children only were glad that they had gone to mediation and many gave positive statements about their experiences.[554] This confirmed earlier work, which found that 64% of custodial mothers were still satisfied with visitation arrangements two years after the settlement.[555] Yet, despite the encouraging feedback the CPU was to conclude that an exclusive focus on child issues created an unrealistically narrow process that failed to address issues that often impacted on or were inextricably intertwined with decisions about children.[556] This conclusion serves as a warning that consumer satisfaction with independent services generally may not be equally distributed between all-issues and child related mediation and more fundamentally, consumer satisfaction alone may not be sufficient justification for the presence of a state sponsored mediation service.

Cost and Effectiveness of Child Issues Mediation

The Inter-Departmental Report concluded that out-of-court conciliation services were not cost effective and did not save money, on the basis of elaborate financial calculations. It proved almost impossible to show that conciliation had a direct impact on legal aid expenditure because it often takes place before legal proceedings are initiated and legal proceedings may not follow, or may only follow after a considerable time. The costs were calculated on the basis of the immediate development of 170 local conciliation services whereas the incremental development preferred by mediators would have had different cost implications.[557]

The Newcastle team found that the current cost of providing child focused mediation was significantly less than the cost of providing comprehensive mediation, but users of the former tended to make as much use of courts and solicitors as non-mediating couples. Compounding this problem was the fact that the rates of payment for mediators allowed in

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[553] Janet Walker and Peter McCarthy: Evaluating the Longer Term Impact of Family Mediation (Relate, 1996) chapter 6.

[554] *Ibid,* p 29.

[555] Gwynn Davis and Marian Roberts; Access to Agreement: A Consumer Study of Mediation in Family Disputes *op cit*, p 137. It should be noted that 36% of custodial mothers and 60% of non-custodial fathers expressed discontent with the access arrangements which were in operation at that time.

[556] Conciliation Project Unit, University of Newcastle Upon Tyne, Report (1989) preface, p i.

[557] Paras 4.25-4.26 and Trustees of Bristol Courts Family Conciliation Service "Conciliation: The Inter-Departmental Report examined" [1984] Fam Law 48, p 51.

the calculation,[558] were considered to be very low, while solicitor-mediators were also[559]considerably less well remunerated than they would have expected as advising solicitors.[560] Using multiple regression analysis, the researchers sought to discern whether independent mediation had any offsetting effects on costs in the dispute resolution system generally. Although there was some evidence of this in probation linked services where mediation was effective, court data was only available in a small number of cases.[561] Independent mediation added to the net cost of settling child disputes. Yet, the analysis found that 13% of users of child-focused mediation thought that going to mediation had helped them to obtain a cheaper divorce.

While the earlier study could not provide information concerning additional legal costs, the longer-term evaluation did suggest that the average solicitors bill for non-legal-aided child issues mediation was £5,055, though data was provided in only 20 cases. This did not compare favourably with comprehensive mediation, but the difference was not statistically significant. The researchers thought that the increased costs were connected with the prevalence of child support disputes in child issues mediation and would decrease in importance with the inception of the Child Support Agency.[562] Although it was clear from the study that independent mediation failed in the claim to reduce the net social costs of dispute resolution, the effectiveness of this form of mediation was examined using other indicators. It should be noted, however, that a study of the independent service in the early 1980's found that where agreements were reached in mediation there was a considerable reduction in the applications for legal aid in both custody and access issues. At least some of these cases would have gone to a contested court hearing and solicitors indicated that the conciliation had avoided the need for a legal aid certificate or reduced the cost of the certificate half of the time.[563]

Scottish research found that parents did not complain about the costs of attending the family conciliation services appointments, even though they had sometimes travelled long distances or had taken time off work to do so. This may have been due to the fact that they

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[558] £8.50 an hour.

[559] £30 per session.

[560] Walker, McCarthy and Timms: Mediation: The Making and Remaking of Co-operative Relationships: An Evaluation of Comprehensive Mediation (1996) chapter 9.

[561] 92 cases, of which only seven were conciliated. A Ogus, Jones-Lee, Cole and McCarthy "Evaluating alternative dispute resolution: Measuring the impact of family conciliation on costs" (1990) 53 MLR 57.

[562] Walker and McCarthy, *op cit* at n 353, p 20.

[563] Janet Walker "Family conciliation in Great Britain: From research to practice to research" (1989) 24 Mediation Quarterly 29, p 36.

felt pressure from the courts and from their solicitors to attend.[564] However, the compulsory referrals represented a significant cost to the mediation services; all of the co-ordinators reported an increase in their workload. The processing of referrals, excluding the time spent with both parents together, was estimated by one co-ordinator as over ¼ of the service's total budget for the payment of conciliators. The referrals required three times the amount of administration resources of other referrals.[565] This result is very significant in light of the English proposals and suggests that it cannot be assumed that the origins of a referral will not affect the cost of the case.

The Bromley researchers measured the outcome of single mediation appointments to conclude that on the mediators' account, 38% had ended in agreement, with some progress recorded in a further 25% of cases, a rate that had improved over the life of the Bureau. Parents suggested a rate of 56%, with a further 5% leading to interim agreements.[566] Agreement levels had been higher where the clients were referred by solicitors and where the divorce was obtained prior to attending the service. This would tend to thwart the common suggestion that mediation in the very earliest stages of the dispute achieves the best results.[567] 25% of the agreements reached in mediation had survived in tact, with a further 21% altered by agreement between the parties. 42% of the agreements had broken down, which was discouraging, although the breakdown rate was lower than the Bristol in-court conciliation study had revealed.[568] A number of parents commented that they would have preferred if the Bureau had more enforcement powers in relation to agreement, but this is an area where even courts find it notoriously difficult to have their rulings adhered to.

The study does undermine that centrality of agreement rates as a measure of effectiveness, since 61% of couples with agreements had maintained access at the time of the study, while

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[564] Fiona Garwood, *op cit*, pp 7-8. Over half of the sample felt pressurised into attending.

[565] *Ibid*, pp 7-9.

[566] Davis and Roberts, *op cit*, p 52. Carolyn Yeats conducted a survey of ten independent conciliation services and found that 48.5% agreed on all issues, 19.1% achieved a partial settlement and 7.6% reconciled. A high of 78% agreement was recorded in Hull and Humberside Family Conciliation Service, but 53% changed their agreements quickly, causing problems with their former partners in 25.5% of cases. See Janet Walker "Family conciliation in Great Britain: From research to practice to research" *op cit*, p 33.

[567] *Ibid*, p 54. In contrast Australian research has found that early intervention yields a higher rate of agreement (73%) than intervention farther down the litigation process (59%). See Alastair Nicholson "Mediating in the Family Court of Australia", *op cit*, p 140. The intervention of litigation may explain the discrepancy as not all of the divorce decrees would have been obtained as a result of a court hearing or it may be the case that the negative effects of litigation on the mediation process diminish with time.

[568] *Ibid*, p 134.

71.5% of couples that had failed to reach an agreement had continuing access in fact.[569] While the sample was very small and the study did show that reaching an agreement affected levels of contentment, the doubt raised that rate of agreement should not be the ultimate measure of effectiveness must be taken on board. The researchers themselves noted that they attached little importance to the success rates measured in terms of agreements reached on the day; the point of a consumer survey is instead to reveal the meaning of the appointment for the consumer. The Bureau's work "should in general be assessed in terms of the parties' improved negotiating capacity, rather than the use of absolute and final concepts such as agreement and failure to agree".[570] Yet, difficulties in assessing the capacity of the parties and in measuring any alterations force research back towards reliance on absolute measures.

Although the Newcastle research had made it clear that mediation was more effective when it was disassociated from the judicial process, child focused mediation was less effective than comprehensive in resolving disputed issues. Comprehensive mediation led to resolution of all the disputed issues in twice as many cases as child focused mediation, despite having to deal with a wider range of disputes. 37% of the child centred cases ended without agreement on any issue at all and the researchers found that mediators have overestimated agreement rates regarding contact disputes. However, on a more positive note, 88% of those who started child mediation completed the process, as compared with only 54% of comprehensive clients, possibly due to the length of time taken. For the researchers, the fact of withdrawal could indicate satisfaction as well as dissatisfaction, where the clients simply felt that they had achieved what they had expected. 38% of the child mediation clients were satisfied with the outcome, with 26% reporting dissatisfaction.[571]

A long-term study showed that users of child-focused mediation were more likely to have disagreements about contact arrangements with the children and with new partners and grandparents. They were more likely to disagree about matters connected with child rearing, such as health care, education and religious up bringing than those who entered comprehensive mediation.[572] Users of the child issues only service were more likely to seek help from outside the family with child related problems after mediation. New areas of dispute were more likely to emerge and this group was more likely to come into contact

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[569] *Ibid*, p 137.

[570] *Ibid*, p 147.

[571] Walker, McCarthy and Timms, *op cit* at n 360, chapter 5.

[572] Walker and McCarthy; Evaluating the longer-term impact of family mediation, *op cit*, p 16.

with judges and solicitors in the years following mediation.[573] The incomplete nature of any settlement reached in this forum means that it is more costly in private and social terms than the comprehensive alternative. While the sampling attrition was higher for child mediation than for comprehensive in the long-term study, researchers found no discernible differences between respondents and non-respondents in terms of gender, age, social class, geographic distance between former partners or initial attitude to mediation,[574] so that the results are unlikely to be an effect of the higher attrition rate.

The agreement rate in Scotland, where parents had been referred by the courts, was not high, with only fifteen out of forty eight clients coming to an agreement. A further thirteen had to return to the courts for a settlement. Twenty out of the forty-eight decided not to proceed with the mediation and also returned to the courts. It was discovered that parents who reached agreements in conciliation were more likely to have disputes lasting less than six months, so that the process appeared to be less beneficial where disputes were of long-standing.[575]

Long Term Effects of Child Issues Mediation

One of the most clear cut findings to emerge from the Bromley study, in the researchers' own view, was that the service did not effect a transformation in the parents' relationship with one another. Fewer than half of those who reported reaching an agreement believed that their relationship had significantly altered as a result of attendance at mediation. Indeed, several parents thought that this was an unreasonable expectation on the part of the practice.[576] 68% of all clients at Hull and Humberside Family Conciliation Service thought that deeper underlying problems were not brought out in the mediation interview and the relationship with their partners remained much the same.[577]

The Newcastle research attempted to measure the extent to which the broader objectives of mediation were achieved by the independent services offering child-custody mediation, through the use of reported client perceptions of change. Over half of those interviewed thought that mediation had resulted in improved communication, clarification of areas of disagreement, improved party negotiation skills, protection of the best interests of children

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[573] *Ibid* at chapter 3.

[574] *Ibid,* p 6.

[575] Fiona Garwood, *op cit*, pp 5-6.

[576] Davis and Roberts, *op cit*, p 138.

[577] Janet Walker "Family conciliation in Great Britain", *op cit*, p 35.

and agreement on custody and access. Yet, on every measure, except the interests of children and agreement on child related issues, comprehensive mediation scored higher than the child focused alternative. While 35% of child issues clients thought that bitterness and tension had been reduced as a result of the mediation experience, a substantial 15% thought that it had, in fact, increased. 12% suggested that communication with the ex-partner had disimproved and 14% suggested that their personal feelings were now more negative.[578] Analysis of the variance revealed a significant difference between the mediation types in terms of long-term positive effects, but there was little variation between the different services. It did appear, however, that the services which took more time were more likely to reap long term benefits for their clients, although it has to be acknowledged that the passage of time itself has been shown to be the most significant factor in the improvement of personal well-being after marriage breakdown. Attributing cause and effect, in the face of two factors working simultaneously, is a notoriously problematic task.

The findings contrasted with the initial Conciliation Policy Unit study, which had concluded that mediation appeared to do little to improve communication or to reduce conflict for many couples.[579] However, the results of the further study were confirmed using a questionnaire, which measured levels of post-divorce resentfulness. Users of comprehensive mediation had significantly lower resentment scores than the users of child issues mediation. It was impossible to tell whether this result was an effect of the choice of mediation type or whether, indeed, clients with lower levels of resentment initially were more likely to choose comprehensive mediation, a difficulty acknowledged in the research.[580] Using regression analysis, the researchers measured the impact of the kind of help that the clients indicated they had received on resentment scores. Where mediation had helped clients to sort out arrangements for children, resentment decreased to a statistically significant extent but where mediation had dealt with feelings of hurt and blame clients were actually more likely to continue to experience these feelings than those who had not received assistance. The researchers explained this discrepancy as a result of the fact that those who were not helped either did not need help in this regard or did not suffer from these emotions to the same degree.[581] While this is entirely plausible, the revelation does act as a caution against any superficial analysis of cause and effect in this area.

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[578] Walker, et al: The Making and Re-making of Co-operative Relationships, *op cit*, p 80.

[579] *Ibid*, p 81.

[580] *Ibid*.

[581] Walker and McCarthy: Evaluating the Longer term Impact of Family Mediation, *op cit*, pp 30-31.

Similar trends were discernible from the longer-term evaluation, which took place over three years. Comprehensive clients were more likely to feel that mediation had helped them to maintain better relations with their ex partner, with 63.6% as opposed to 30.8% of child custody mediation clients expressing positive responses. Reduction in the level of conflict in the relationship was also related to the type of mediation used by the clients, with 45.5% of comprehensive as opposed to 23.4% of child issues consumers registering a change. 45.5% of child issues clients thought that it had helped them to sort out arrangements for children and surprisingly, 57.6% of comprehensive clients had been assisted in this regard. There was a larger discrepancy in terms of the ability of the different types of mediation to encourage the parties to end the relationship amicably, with 51.5% of all-issues, as opposed to 20.5% of child focused mediation succeeding in this quest.

Mediation forms did not diverge in terms of their ability to assist clients in dealing with hurt and blame, understanding why the relationship ended, coming to terms with the separation or having a better relationship with the children. One in four clients suggested that mediation had not helped in any way whatsoever,[582] but three in ten did suggest that mediation had helped in ways that did not appear in the questionnaire, such as dealing with other feelings and achievement of clearer perspectives. Interestingly, the child-focused mediation user relationships had improved over time, with 23.8% reporting 'friendliness' after mediation and 48.8% in the follow up giving this verdict. More than 70% of those who reached agreements compared with 44% of those who did not, described their relationship as friendly. It may be that the Bromley research was pre-mature in discounting the significance of agreement in advancing the long term good of the clients. It would seem that those who reached agreements during mediation had established better communication with partners concerning issues relating to children in either type of mediation,[583] although it might be that their higher levels of communication had enabled them to reach an agreement.

A series of questions were posed to clients concerning the frequency of communication about issues concerning children. While the differences between all-issues and child mediation were not statistically significant, it would appear that there is an inclination towards greater communication between parents who engaged in all-issues mediation. For instance, 36% of all comprehensive users would often discuss children's achievements and development compared with 23% of those involved in child focused practice. However, communication rates in the longer term did not differ between the types of mediation with

[582] *Ibid*, p 9.

[583] *Ibid*, p 30.

similar evidence uncovered in relation to the propensity to disagree about financial matters and levels of psychological stress.[584]

At the same time, the research made it clear that in a relatively high number of cases communication about children breaks down entirely. Between 28% and 33% of child-focused clients never discussed children's achievements or development, children's health or major decisions affecting their lives.[585] 32% of child-issues mediation clients were in disagreement about contact and 10.4% had clashed over residence since completing mediation.[586] Between 9 and 14% had fallen out over the religious upbringing of children, their health care or their education. Disagreements over contact with grandparents and new partners were also relatively common.[587]

User Satisfaction in Comprehensive Mediation

The Conciliation Project Unit Report concluded that conciliation in independent services was more effective than the court based services on offer and conciliation should be widened to include all-issues arising from separation and divorce. While the comparison between in and out-of-court services was somewhat undermined by the reported differences in clientele, stage of divorce proceedings and duration of the dispute, the conclusion did spur the creation of pilot comprehensive projects in the independent sphere.[588] The Newcastle researchers undertook to monitor the experiments and practice was reviewed in light of their work.[589] While the findings of this study were overwhelmingly positive and suggested that comprehensive mediation was preferable to a child issues only model, the sample of comprehensive mediation users was biased in favour of higher socio-economic groups and the researchers acknowledged that it was difficult to know whether those who were less articulate would manage the process.[590] This certainly has the potential to

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[584] *Ibid*, pp 14-18 and p 32.

[585] *Ibid*, p 15.

[586] The figures for comprehensive mediation clients were 15.5% and 3.2% respectively. There did not appear to have been any disagreements in the aftermath of mediation on the issues of religious upbringing of children, child health and education.

[587] *Ibid*, p 16. 17.1% and 20.3% respectively had disagreed over these issues.

[588] Lisa Parkinson: Family Mediation, *op cit*, p 325. The Report had suggested, p 196, that users of independent services tended to be from higher socio-economic groups, were more likely to be owner-occupiers and to be in higher income brackets.

[589] See Walker, McCarthy and Timms: Mediation: The Making and Re-Making of Co-operative Relationships, *op cit*.

[590] *Ibid*, pp 44 and 122.

undermine the comparison drawn between all-issues and the single issue forms but does not detract from the positive view adopted with regard to the former, where the atypical profile of the sample population in terms of their social class is taken into account. In a follow-up study conducted by two of the members of the Newcastle team, users of child-focused mediation were found to be twice as likely as those using all-issues mediation to be legally aided.[591] It is very possible that this is a result of the lower-income levels of this group and represents a substantial check on the generalisability of the research.

Nevertheless, consumer satisfaction rates were high, according to the follow-up research, with 63% of respondents indicating after three years that they were glad that they had taken part in mediation.[592] Users of all-issues mediation were more likely to hold a positive view of mediation, 82% found that it had been a valuable experience and they commonly suggested that they had been helped by mediation to sort out arrangements for the children (57.6%), maintain good relations with their former spouse (45.5%), reduce conflict between themselves and their ex-partner (63.6%), end the relationship amicably (51.5%), sort out maintenance (69.7%) and share out property (72.7%).[593]

Only three percent of all-issues users suggested that mediation had not helped in any way whatsoever. While just over half stated that they were satisfied in general terms with the outcome of the mediation, 18% remained dissatisfied and despite the fact that the impartial role adopted by mediators was appreciated by many clients, some expressed concern about the balance between impartiality and guidance. It would appear that clients would often have welcomed more advice and guidance, although the researchers did suggest that many over-estimated the extent to which the law provided guidelines as to what was reasonable in the circumstances. Many clients did perceive and appreciate the fairness of the mediator, the provision of a safe forum for discussion, the separation of the issues and the reasonable stand of the mediators, yet clients would have enjoyed the opportunity to meet with the mediators without the presence of their former partners, particularly before the commencement of the mediation.[594] The overall time taken to complete mediation was longer than many would have liked, as a result of numerous appointments and the lengthy gaps between them. Had they been paying for the service, some of the clients would have demanded tighter organisation.

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[591] Walker and McCarthy: Evaluating the Longer term Impact of Mediation, *op cit*, p 20.

[592] Although a substantial number wished that they had not gone (25%). *Ibid*, p 8.

[593] *Ibid*, p 9.

[594] Walker, McCarthy and Timms, *op cit*, pp 55-58. See also Newsline Extra "Mediation evaluation" [1994] Fam Law 213, p 214.

The reluctance of mediation to deal with the past, the problems that had led to the breakdown or the state of the relationship at present were problematic for some of the consumers.[595] There were various and divergent views on the structure of comprehensive mediation, ranging from observations that it was well structured and suited to the task at hand to views that it was unstructured or inflexible. The researchers did suggest that if a certain rigidity was present, it may be the result of the infancy of the projects and the relative lack of confidence of mediators and would fade away in time.[596] Consumers were intimidated by the budget forms and appeared to find them daunting, leading to fears on the part of the researchers that a less educated clientele would find the financial disclosure process even more unattractive. Clients and mediators alike thought that this stage in the proceedings was monotonous and time consuming, with clients also suggesting that they found it intrusive.[597]

While it could hardly be expected that clients would exit the service without any criticisms, the mediation services examined the findings of the research without complacency, using it constructively in order to improve on levels of consumer satisfaction. In October 1994, mediators from the pilot projects met to review their practice in light of the report. The procedure in relation to budget forms was amended so that the clients worked out the details and the mediator dealt only with the resulting totals and more user-friendly schedules were produced. The mediators suggested that public funding would allow more availability of mediators, at times when it would be more convenient for clients to call. However, the issue of increased individual time with the mediator was thought to raise as many problems as it resolved and there was reluctance on the part of practitioners to alter models in light of this request. This demonstrates an ability to resist consumer led demands for alterations where any resulting changes would impede the objectives of mediation or cause different problems for clients and can be seen as a practice strength.[598]

The positive views of the Newcastle research, coupled with the willingness of mediation practitioners to evolve in light of empirical feedback suggests that levels of consumer satisfaction in out-of-court, comprehensive schemes are likely to be high, at least where the consumers are largely middle class and participate voluntarily. Certainly, the findings are a long way from the view of the Inter-Departmental Committee, which concluded that there

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[595] *Ibid*, p 61.

[596] *Ibid*, p 63.

[597] *Ibid*, pp 64-68.

[598] Thelma Fisher "Family mediators go comprehensive" [1994] Fam Law 697.

was no evidence that the demand for out-of-court services was large or that it would develop substantially.[599] The positive experiences from a consumer viewpoint are to ensure high referral rates in the future.

Cost and Effectiveness of Comprehensive Mediation

The Newcastle research estimated the cost of providing comprehensive mediation at an average of £557 per case in 1994, pointing out at the same time the low rates of pay for both mediators and solicitors in the initial developmental phase when goodwill was high.[600] If mediators and solicitors were to be paid at the more realistic rate, comprehensive mediation would cost £795 per case. Costs did vary between the services, but this appeared to be a result of the willingness of local lawyers to work for relatively low rates of pay, which was unlikely to continue in the long-term. Variables such as the time taken to complete the mediation and the level of lawyer involvement within the service were significant in their effect on costs.[601] While the initial study was not in a position to estimate the cost of solicitors' services in addition to mediation, long-term research found that mediation clients generally employed solicitors during the process of a divorce. The average solicitor's bill for a non-legally aided user of comprehensive mediation was £1,744 in 1996. However, the team was only provided with relevant information in 23 cases so that this figure can be taken as indicative only.

The study concluded that while mediating all-issues is more expensive, where mediation is successful and the agreements stand, it is a cost-effective process that reduces fees.[602] The fact that this form was more expensive than single-issue mediation is hardly surprising, given that it took an average of three times as many appointments and four times as much mediator time to complete. Non-completed cases are burdensome on the mediation service and the traditional dispute resolution system as a whole and the average non-completed mediation case spent 60% as much time in the service as the completed cases.[603] Certainly, it would seem unlikely that a case which goes through a mediation process, fails to settle and continues to make its way through the adjudicatory system in the normal way would

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[599] Inter Departmental Committee on Conciliation (Robinson Committee), Report 1983, para 5.7. See Trustees of Bristol Courts Family Conciliation Service, *op cit* for the arguments against this conclusion.

[600] Walker, Timms and McCarthy: Mediation: The Making and Re-making of Co-operative Relationships, *op cit*, p 154.

[601] Mediation evaluation [1994] Fam Law 213.

[602] Walker and McCarthy: Evaluating the Longer term Impact of Family Mediation, *op cit*, p 20.

[603] Walker, McCarthy and Timms, *op cit*, p 49.

save costs by any estimation. Thus, there is a close relationship between the efficiency, in terms of completion rates and the cost of mediation in evaluating the cost saving potential of the process.

Where agreement is reached, however, it is far more likely to reduce expenditure and comprehensive mediation does appear to have lowered the overall costs of divorce for the consumer. Only two people who responded to the Newcastle questionnaires suggested that the solicitor's costs had increased as a result of their attendance at comprehensive mediation, while 60% felt that it had helped to reduce the size of their legal bills. Generally, two out of three thought that the use of comprehensive mediation had assisted in reducing the costs, which they would have incurred had they tried to settle the dispute by other means, with only 15% suggesting that their costs had increased as a result of the attempt.[604] The second questionnaire found a similar response, with 69% of all-issues users advocating the cost reducing qualities of the service but a third questionnaire found a drop in the level of support, with only 43.8% of comprehensive clients agreeing that comprehensive mediation had helped them to obtain a cheaper divorce.[605] This result, while still representing a respectable figure, does highlight the pitfalls of research which concentrates on the immediate aftermath of the mediation, rather than allowing a time lag that enables the client to see whether in fact and in retrospect mediation has been of benefit.

Mediators' reports to the Newcastle researchers suggested that 39% of couples that attended comprehensive mediation reached agreement on all of the issues in dispute, 41% reached agreement on some issues and 20% failed to reach any agreement. Approximately half of the couples reached agreement on property and finance, but the comprehensive users were more likely to agree child residence and contact than users of child issues services. This peculiar result was explained by the researchers as an effect of the inextricable link between child issues and financial disputes and the need to address the latter in order to resolve the former satisfactorily.[606] Yet it is also the case that comprehensive mediation clients were initially less likely to be in conflict about arrangements for the children than financial issues and the higher rates of agreement reached on children may be a result of the lower pre-existing rates of disagreement on this matter.[607] In addition, the data obtained from consumers suggested that mediator assessments overestimated the agreement rate, although

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[604] Walker, McCarthy and Timms, *op cit*, p 152.

[605] Walker and McCarthy: Evaluating the Longer term Impact of Family Mediation, *op cit*, p 9.

[606] Walker et al: The Making and Re-making of Co-operative Relationships, *op cit*, pp 71-72.

[607] Newsline Extra "Mediation evaluation" [1994] Fam Law 213.

the general trend in the direction of higher rates for comprehensive mediation users was verified.

Completion rates for comprehensive mediation varied between the services, from 70.6% in Bristol to 41.2% in Coventry. In addition, where lawyer-mediators were not used clients were less likely to complete the mediation process, but were as likely to reach agreement where they did complete. Completion rates were higher for child-focused mediation, with a peak of 94.6% in Bristol, but the researchers were doubtful about the utility of this measure as a gauge on the effectiveness of mediation, given that comprehensive mediation users often reached agreement on some issues before leaving mediation and the different nature of the formal ending of child issues and all-issues mediation.[608] The variation between services could be explained by the fact that some services were less prone to providing data concerning cases where a couple had dropped out of mediation and the highest completion rates were found in the services which had the lowest response rates.[609]

In their responses to the long-term evaluation, clients were very positive about comprehensive mediation as an aid to agreement, with 72.7% suggesting that it had helped them to share out property, 69.7% noting that it had helped in sorting out maintenance and 57.6% stating that it aided the settlement of child arrangements. In each case, the rate was higher than the corresponding figure for child mediation. Those who mediated all issues were found to be more likely to reach agreement as a result and were less likely to disagree in the aftermath. There was little difference between the two practices in the propensity of their clients to disagree about property and financial issues, as distinct from issues relating to children.[610] Yet, since the former are the predominant concern of comprehensive clients, the difference between the forms of mediation on this measure may not be as great as it would first appear. The researchers appeared to take from the data the message that comprehensive mediation deals with child disputes in a global manner while child issues mediation tends to leave issues unresolved which erupt into fresh disagreements at a later stage. Equally, it could be argued that users chose the type of mediation which best matched the nature of their most serious concerns, the clients of child-focused mediation having more entrenched problems in this area, causing problems both in relation to the rates of agreement in child issues mediation and rates of compliance when mediation terminates. In fact, it seems that many child related disputes were settled by the users of comprehensive

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[608] Walker, McCarthy and Timms, *op cit*, p 77.

[609] *Ibid.*

[610] Walker and McCarthy, *op cit*, pp 14-17.

mediation before they entered the process and could not, on the whole, be described as an area of major conflict for this group. Regardless of the reason, it is clear that comprehensive mediation users were more content with their child-care arrangements, with 43% of child focused users as compared to only 21% of all-issues users indicating that they would like to change the current arrangements.[611]

American research conducted on a voluntary mediation service offering comprehensive mediation in California found that 59% of clients had reached final, written divorce agreements with 15% resolving one or more of the critical issues relating to their separation or temporary support. 26% were unable to reach agreement on anything substantive.[612] It should be noted that the clientele were predominantly white and well educated and had volunteered both for the mediation and for participation in the research project. Although higher settlement rates have been recorded, the researcher in this case did alert to the risk that too high a rate might indicate a coercive process.[613] The research does tend to support the conclusion of the Newcastle studies that higher rates of agreement are to be found in comprehensive mediation, suggesting that it is more difficult to reach an agreement on a single issue dispute than on a multiple issue one. However it also indicates that significant savings can be made through the use of either custody or comprehensive mediation, rather than the adversarial process, findings that have failed to be confirmed in England.[614]

The Long-term Effects of Comprehensive Mediation

Research on the relational effects of all-issues mediation in the private sphere has led to divergent conclusions.

Despite the law response rate[615] between 70-80% reported improvements in communication, clarification of the issues and thought that mediation had helped them to come to an agreement. The follow-up questionnaire, which had an even lower response rate, found that the level of conflict between spouses was not less than the level between spouses that had never attended mediation.[616] When post-divorce conflict did occur, those who had been through mediation were as likely as those who had settled without recourse to

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[611] *Ibid.*

[612] Joan B Kelly and Mary Duryee "Women's and men's views of mediation in voluntary and mandatory mediation settings" (1992) 30(1) Family and Conciliation Courts Review 34, p 39.

[613] Joan B Kelly "A decade of divorce mediation research: Some answers and questions" (1996) 34(3) Family and Conciliation Courts Review 373, p 375.

[614] *Ibid*, p 376.

[615] Researchers only received responses from 26% of the all-issues users in the original study.

[616] Walker and McCarthy, *op cit*, p 5.

mediation to seek traditional legal remedies. While the response rate was disappointing and could undermine the force of the findings, the researchers found no factors that indicated that respondents were distinguishable in some way from non-respondents, either demographically or with regard to their previous attitude towards mediation.

It seemed from the research that comprehensive users rate their experience higher than those who had engaged in child issues mediation, in terms of the assistance they received in reducing conflict (63.6%), ending the relationship amicably (51.5%) and maintaining a good relationship with their former partner (45.5%).[617] At the same time child issues users were slightly more likely to suggest that they had been helped to have better relationships with their children and to come to terms with the ending of the relationship. Either way, some of the figures were disappointingly modest, given the weight that mediation theorists attach to the ability to provoke lasting relationship changes.

Only 24.4% of comprehensive consumers proposed that it had helped them to deal with feelings of hurt and blame. There was no improvement over time in the relationship, although comprehensive clients were less likely to profess anger at their former spouse and had lower levels of resentment overall. Parents were more able and more likely to communicate about issues concerning their children, but the rates were relatively low with a high point of 36% often discussing major decisions affecting the children's lives and a low point of 17% who never consulted on the children's health. Differences between the two users groups on this issue were not significant.[618] The poor results displayed by the Newcastle research are perhaps less a reflection of the inability of family mediation in general to produce lasting improvement in relationships and more an effect of the kind of settlement-orientated mediation which is carried on in Britain. This is at least arguable in defence of the more ambitious aspirations of the practice.

The quality of the post-divorce relationship appears to be closely connected to the ability of the couple to come to an agreement in mediation. Four in ten of those who failed to come to terms recorded that their relationships had not changed at all since mediation. In contrast, seven in ten of those who had reached an agreement described their relationship as friendly. Of course, there is a risk that this was a pre-existing feature, which enabled the couple to come to an agreement in the first place. The Newcastle findings, although interesting, were based on too modest a sample to be reliable in themselves. A larger study, conducted in the

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[617] *Ibid*, p 9.

[618] *Ibid*, p 15.

United States, found that mediation had only a modest ability to alter relationship patterns and psychological adjustment was not radically affected.[619]

By 1996, it was possible to conclude that research in the United States and Canada had demonstrated small but short-lived increases in co-operation and communication.[620] While comprehensive mediation users reported less conflict during divorce and more co-operation after divorce, beneficial results were, for the most part, no longer apparent two years later. Kelly, in comparing a voluntary comprehensive practice with an in-court child custody service, found no significant difference between the levels of self-reported anger towards the spouse after mediation.[621] Lengthier processes did appear to promote more frequent, less conflicted communication but this could have been as a result of the ameliorating effects of time itself. Research in the United States and England was consistent in reporting that psychological adjustment was not affected in a statistically meaningful manner by comprehensive divorce mediation.[622]

Mediation and Litigation: An Empirical Comparison

User Satisfaction Compared

There are grave difficulties with any attempt to compare the mediation and adjudication systems of dispute resolution. Direct comparison is impossible since the potential decision of a court in a particular mediated case cannot be known and the results would rarely be an exact mirror, at any rate.[623] However, where researchers have attempted to discern whether mediation is preferable to the traditional adversarial system those empirical exercises have been the most useful. Mediation advocates argue, with some justification, that the practice can only be realistically and fairly judged in light of available alternatives. They cannot and do not claim that mediation is a panacea, but simply that it is preferable to the existing dispute resolution system. The ability of researchers to demonstrate this superiority is the most significant test of the credibility of these claims. Certainly, whether the mediation involved is court based, or independent, comprehensive or child issues, user satisfaction

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[619] Lisa Parkinson: Family Mediation, *op cit*, pp 331-332, citing the work of Pearson and Thoennes "Divorce mediation research results" in Folberg and Milne: Divorce Mediation: Theory and Practice (1988), p 429.

[620] Joan B Kelly "A decade of divorce mediation research" *op cit*, p 379.

[621] Kelly and Duryee, *op cit*, p 44.

[622] Kelly, "A decade of divorce mediation research" *op cit*, p 380.

[623] Joshua Rosenberg "In defence of mediation" (1992) 30(4) Family and Conciliation Courts Review 422, p 445.

rates have emerged as consistently high. The question here is whether, by comparison with the adversarial system, they appear healthy.

The Charlottesville Mediation Project randomly assigned families to a court-based mediation programme and traditional adversarial settlement procedure. This significant innovation controlled for the ever-present possibility that mediation clients were simply less conflictual at the start of the process than their litigation counterparts. Consistently, the mediation group showed statistically significant differences in satisfaction rate with regard to the process and outcome of mediation. Evaluative research has typically found a high degree of satisfaction with mediation, illustrating that positive results obtained in experimental and quasi-experimental research do generalise to other settings.[624] Canadian research on court-based programmes confirms the high rates of user satisfaction with mediators, although litigation clients were generally satisfied with their lawyers.[625]

Important and in depth research conducted in the United States further illustrates the findings. The project compared two samples, one from an independent comprehensive mediation programme and the other from an adversarial process. It should be noted that while all of the mediation sample electing to proceed with mediation after the initial session were included, only those adversarial cases which could be located were counted.[626] The mediation sample differed demographically from the adversarial sample; clients were younger and better educated on average and were more likely to have children under eighteen. The groups were not randomly assigned and were comparison rather than matched control groups. Yet, few baseline differences in the levels of marital conflict or pre-settlement co-operation were reported, although the mediation sample took a more benign view of their spouse on measures of honesty and fair-mindedness. The researcher was satisfied that bias had not been introduced as a result of the failure to include mediation clients who did not proceed past the initial interview, or as a result of the attrition that occurred in both samples.[627]

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[624] Robert E Emery and Joanne A Jackson "The Charlottesville Mediation Project: Mediated and litigated child custody disputes" (1989) 24 Mediation Quarterly 3, p 11 and Robert Emery: Renegotiating Family Relationships, *op cit*, p 188.

[625] Alberta Law Reform Institute, *op cit*, p 43.

[626] 43%. See Joan B Kelly "Mediated and adversarial divorce: Respondents perceptions of their processes and outcomes" (1989) 24 Mediation Quarterly 71.

[627] *Ibid*, p 76.

Between 65-82% of both samples had positive views of the professionals involved but significantly more mediation than adversary clients rated their professional as highly skilled, helpful in proposing ways to resolve disagreements and in controlling anger. While neither process was seen by clients as particularly enhancing their ability to stand up for themselves, the mediation group perceived mediation as assisting in their assumption of greater financial responsibility in managing personal finances. Between 41-46% of all respondents thought that their spouse had an advantage over them in the divorce negotiations, regardless of resolution process, but the adversary group were significantly more likely to believe that their attorney had imposed a viewpoint on them. Differences in the satisfaction rates with respect to property settlements were not significant, although mediation clients were more inclined to perceive their spousal support agreements as fair, after the attorney review of the agreement and had higher levels of emotional satisfaction. Mediation clientele were more likely to report that custody and visitation arrangements would be better for everyone in the family. At final divorce, 69% of mediation respondents were somewhat to very satisfied compared with 47% of adversarial respondents.[628]

The positive view of this research was supported by further American studies.[629] One child custody evaluation randomly assigned the population into mediation and litigation groups to discover that successful mediation resulted in higher satisfaction rates in terms of the process and outcome. 85% of successful mediation clients thought that their agreement was pretty complete, while only 60% of the control group agreed. On the long-term measures, successful mediation scored considerably higher than litigation; satisfaction rates remained stable over time and mediating spouses continued to express the greatest satisfaction with their divorce decrees and final orders. For the unsuccessful mediation candidates, the lower rates of satisfaction were more reflective of the levels reached after experiencing the adversarial process.

This survey illustrates the persuasiveness of user satisfaction in mediation, the high levels of satisfaction expressed by mediation candidates relative to their adversarial counterparts appears to cut across variables such as the location and the scope of the mediation process.

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[628] *Ibid*, pp 77-84.

[629] J Pearson and N Thoennes "Mediating and litigating custody disputes", *op cit*, pp 504-508 and p 518, Table 1.

Cost and Effectiveness Compared

The Alberta Law Reform Institute was forced to conclude, in light of comparative Canadian research, that mediation did not prove to be less expensive than traditional litigation. In fact, legal costs were higher overall for those who participated in mediation than for those who did not, except where there was a lawyer on the mediation staff that could be consulted and then, only modest savings were made.[630]

American research was more cheerful in the conclusions reached, with substantial savings to Denver consumers who had been successful in mediation, but little was saved where mediation failed. Further, it should be noted that the clients in the Denver study did not have to pay for the mediation services, which were offered to them as an incentive to participate.[631] In contrast, a more recent study suggested that couples who used the adversarial process had legal fees twice those of mediation clients which, given the duplication involved in the litigation process, seems to be in line with intuitive expectations.[632] It is certainly arguable that mediation, in addition, could reduce government expenditure. In California, where mandatory mediation for child disputes exists, the number of custody trials has been reduced to fewer than 2% of those parents disputing child issues, saving court, administrative and judicial time and expense.[633]

Yet in England, researchers have failed to produce such optimistic data. The Newcastle researchers came to the conclusion that mediation of child issues added significantly to the overall resource cost, with additional cost over and above the cost of the traditional system borne primarily by the taxpayer. Independent programmes were particularly burdensome in this regard. Later investigation did suggest that clients perceived the process of comprehensive mediation as more cost effective than the adversarial system, although the researchers thought that low rates of remuneration within the mediation process artificially reduced costs.

The problems of a comparison in this regard are many-fold. It is difficult to conclude with any degree of certainty that successful mediation reduces the number of clients before the

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[630] Alberta Law Reform Institute, *op cit*, p 44.

[631] Pearson and Thoennes, "Mediating and litigating custody disputes", *op cit*, p 507.

[632] Joan B Kelly "Is mediation less expensive?: Comparison of mediated and adversarial divorce costs" (1990) 8 Mediation Quarterly 15.

[633] Joan B Kelly "A decade of divorce mediation research", *op cit*, p 376.

courts, given than most cases are settled by solicitors at any rate. The costs of providing a litigation system will have to be met from public funds regardless of the presence or absence of a family mediation service, whilst the latter, particularly when provided on an out-of-court basis, represents a new and additional investment. Despite flaws in the work of the Interdepartmental Committee, this point was usefully made and illustrated the precarious position of any new demands on the public purse. Certainly, it is easier to show by empirical investigation that the non-legally aided consumer will pay less in legal fees as a result of attempting mediation than the State will make savings, though even this is not inevitable where mediation fails or only child issues are addressed.

There is strong evidence that clients save in legal fees in the United States; if the matter is less clear cut on this side of the Atlantic, it is perhaps because of a divergence in rates of pay or in the work practices of lawyers, which recalls the dangers inherent in any cross jurisdictional comparison. Ultimately, any savings will depend on the ability of clients to trust the process and outcome to a degree that they need lawyers less and alternatively on the rate of lasting settlement. It can be argued that if mediation must defend its existence, it is unlikely to make a strong case on the basis of cost alone.

Measuring the comparative effectiveness of mediation against the adversarial system is a difficult task entailing not simply the measurement of settlement, compliance with and endurance of the mediated agreement but also an analysis of the adversarial system itself, where files may not be available or detailed enough to allow for thorough investigation of a single issue. Where research has utilised non-randomly assigned populations for the purposes of such a comparison and preferred two groups who assign themselves to their respective processes, it leaves itself open to the objection that the mediated sample were initially more co-operative and their high settlement rates, a result of this pre-existing difference. While this accusation does not completely devalue the benefits of this form of research study or the mediation process itself, it does tend to undermine arguments that mediation is superior per se, rather than superior for a certain description of client.

Nevertheless, some researchers have used random assignment methods in order to produce a more experimental setting. Pearson and Thoennes utilised this method for their research into the Denver mediation project and found higher rates of compliance with mediated agreements when compared with agreements reached in the litigation system. Re-litigation rates were lower in the mediation samples than in the adversarial group. However, the substantial differences appear only when mediation has been successful. For instance, 85% of successful mediation clients reported that their ex-spouse was generally complying with

the terms of their agreement, but the figure was closer to 60% where mediation was unsuccessful or the adversarial system had been used. Similarly, 30-40% of the litigation and the unsuccessful mediation groups reported that serious disagreements had arisen over the terms of the settlement, with only 14% of the successful mediators reporting such problems.[634] However, smaller differences were found in a second study and there were no differences in a third investigation. Moreover, the figures for agreement rates were less supportive of mediation's superiority. 60% of clients who mediated reached agreement in the process and 60% of the adversarial sample also settled before reaching the court, although a further 60% of those who tried but failed to produce an agreement in mediation stipulated to an agreement prior to their court hearing.[635]

The average number of months between the initiation of proceedings and the promulgation of final orders was lowest for the successful mediators, at 9.7 months, in contrast to the litigation group that took 11.9 months to move through the system. However, the time taken was highest for the unsuccessful mediation group who took 13.4 months to complete the process of divorce.[636] A long-term evaluation suggested that mediation clients were still less likely to be experiencing serious disagreements over their settlements ten months after the promulgation of their final orders and remained more likely to report compliance, with only 4% filing or receiving a motion to modify custody or visitation compared with 15% of the litigation group.[637] While the time lag of nine to ten months was probably not long enough to establish an accurate picture of the aftermath of the processes, the researchers suggested with a degree of support that mediated agreements do not break down more rapidly than those worked out by lawyers or imposed by judges. The assertion that mediated agreements may be more durable is more difficult to sustain from the evidence, particularly in light of the fact that the study suffered from serious methodological problems which are difficult to control in field research. Half of the couples refused the offer to mediate and these were the more acrimonious partners, there was an unfortunate plan for analysis in which the litigation group as a whole was compared to two different mediation groups and the failure to report results separately for mothers and fathers was also problematic.[638]

Further research in the field of in-court child custody mediation attempted to overcome these limitations by obtaining higher rates of agreement to participate in random assignment

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[634] J Pearson and N Thoennes "Mediating and litigating custody disputes", *op cit*, p 505.

[635] *Ibid*, p 504.

[636] *Ibid*, p 507.

[637] *Ibid*, p 509.

[638] Robert Emery and Joanne Jackson "The Charlottesville Mediation Project", *op cit*, p 9.

and the retention of all the participants in a single mediation group, regardless of the outcome of the process. Statistics on court programmes pertain to a group of divorcing parents who are particularly acrimonious so that any positive benefits shown to mediation are unlikely to stem from the fact of initial co-operation between the couple rather than the effect of the dispute resolution process. The results could be viewed as a conservative estimation of the relative merits of mediation in the face of the adversarial process. A statistically significant difference between the adversarial process and the mediation process, in terms of the settlement rate, was uncovered. 77% of the cases randomly assigned to mediation ended in agreement, with only 31% of the adversarial cases reaching agreement out of court.[639] In addition, settlements were reached more rapidly in mediation, taking an average of three weeks as opposed to seven weeks where clients were involved in the litigation process.

Court records and the records of the Office of Child Support Enforcement were monitored for a period of two years following the entry of the parents into the study. Researchers found that re-litigation rates were high for the entire sample and the difference between the mediation and adjudication groups was not statistically significant. However, 51% of parents in the mediation set had to be sent notices for overdue child support payments compared with 71% of the families who reached agreement through the adversary system.[640] It is interesting to note that the positive findings seem to dissipate with time, so that studies that dwell on the initial aftermath of the dispute resolution process are more enthusiastic about the merits of mediation than those taking a longer-term perspective. Further research could not seem to engender optimism about compliance rates. In a comparison of comprehensive divorce mediation with adversarial settlement conducted by Kelly, there was more compliance immediately after the final divorce among the parents who had mediated, but the differences were no longer significant two years later. Rates of actual re-litigation were too small to analyse.[641]

Canadian research into court based mediation displayed interesting results. It seems that compliance rates varied drastically between services, such that one could boast a rate of 97% as opposed to 66% in the litigation sample, whereas two services had no appreciable difference in compliance compared with the litigation group and one service had clients

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[639] *Ibid*, p 11.

[640] Robert Emery: Renegotiating Family Relationships, *op cit*, pp 180-181.

[641] Joan B Kelly "Mediated and adversarial divorce resolution processes: A comparison of post-divorce outcomes" [1991] Fam Law 382.

who defaulted more frequently than the litigation clients.[642] The only service that out-performed the litigation system on this measure was the most comprehensive of the four and the only service where the mediators were not required to produce custody reports for the courts.[643] This result serves as a useful reminder that it is impossible to comment on mediation in general, where services can vary so radically in their approach and in their scope and it warns against any attempt at generalisation from the research results of a single project study.

The Long-Term Effects Compared

The conclusion from American and Canadian research appears to be that, while there are increases in co-operation and improvement in communications following custody mediation, the benefits are short-lived. This is not to suggest that this proposition has found universal acceptance. Emery argued in a follow up study conducted nine years after the divorce process that the parents who had gone through the child custody mediation communicated more about their children and non-custodial parents were more involved in current child-related discussions than those who did not mediate. Yet, in terms of broader psychological outcome, the researcher could find no difference between the samples and there was no divergence in children's mental health or in the warmth of parent-child relations.[644]

The Denver study did suggest that mediation might help clients to feel more confident in their ability to work out problems without returning to the court. This group reported[645] that their relationship with their ex-spouse was no more than strained, while only 30-40% of the litigation sample would categorise their relationship in similar terms. Access to children remained high amongst those who mediated and they were most likely to report that their relationship with their former partner, in terms of communication, co-operation and understanding, had improved.[646] Yet, it is doubtful that the ten-month time span of this study was sufficient to produce reliable evidence of the endurance of mediation's advantages.

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[642] Alberta Law Reform Institute *op cit*, p 44.

[643] *Ibid*, p 42.

[644] Robert Emery: Renegotiating Family Relationships, *op cit*, pp 190-191.

[645] Eight out of ten respondents (80%).

[646] Pearson and Thoennes, "Mediating and litigating custody disputes", *op cit*, pp 508-510.

Canadian research certainly indicates that mediation has little measurable post-divorce impact, with an in-court study suggesting little difference in the levels of hostility and conflict between mediation and litigation settlement groups, although one service which offered more comprehensive mediation had spouses who were more likely to have discussions about their children. This anomaly could be explained by the clients' pre-existing attitudes in that particular service; clients attending often expressed the goal of avoiding future conflict and hostility with their ex-spouses.[647]

In-depth research was conducted in California in the early 1980's which proposed to examine the legal, economic, psychological and inter-personal effects of a comprehensive mediation project, measured against the adversarial system, during and after the divorce process. The two groups were compared at five points in time, beginning with entry and ending two years after the divorce and there were few initial baseline differences. The study hypothesis was that the mediated interventions would lead to fewer and less intense conflicts in the two years after divorce. However, the research revealed that the frequency of conflict after one year was unrelated to the type of divorce process and was instead a symptom of the presence of minor children. There was more lingering conflict in the adversarial sample regarding financial issues and visitation but two years after the divorce the effects had disappeared. The beneficial effects of mediation appeared to diminish as time went on and mediation was found to have only a short-term impact on parental conflict and behaviour.

While the experience of mediation did impact initially on levels of parental co-operation, by the time of the last examination the mediation group advantages had disappeared. Indeed, in the second year of the study, the researchers found that the adversarial sample clients who still had contact had increased their co-operation slightly, while the mediation co-operation levels had slightly diminished. However, mediation parents did continue to regard each other as more supportive in the parenting role than their adversarial counterparts, two years after divorce. Differences in contact and communications between parents concerning the children had virtually disappeared after two years, with the exception of major decisions affecting the children, which mediated settlement parents were more likely to discuss.

Measures of psychological adjustment assessing anger, guilt, depression and stress levels showed no contrast between the two samples either at the beginning of the process, at final divorce or two years after the divorce. Repeated measures analysis indicated that the

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[647] Alberta Law Reform Institute *op cit*, p 45.

diminution of symptoms between the beginning of the divorce process and the final divorce was not a function of the mediation or the adversarial process but was attributable to the passage of time.[648] While the researcher was driven to conclude that any beneficial effects that mediation engendered were primarily short-term rather than long lasting, she also suggested that the results had to be viewed with caution given the self-selection of the samples and the predominantly white, middle-class and well educated backgrounds of the participants. Mediation was voluntary and was offered by experienced and well-trained mediators, the adversarial cases were settled through a variety of means and the study was conducted entirely in California, where divorce laws and proceedings differ from other jurisdictions.[649]

Despite the disappointing findings it has been suggested that variations in the co-parental relationship may be engendered by lengthier processes, however, it remains the case that research from England, the United States and Canada is consistent in reporting that neither parent nor child psychological adjustment is affected in a meaningful way by custody or comprehensive divorce mediation procedures.[650] The comparative material seems to suggest that the litigation process does not have a negative impact on psychological well being, or if it does the magnitude of the impact is no greater than the mediation process would produce.

Children in Mediation Practice

Mediation claims the ability to bring about an improvement in the co-parental relationship, with a consequent beneficial impact on the child. Certainly, the extent to which it has managed to demonstrate effects on the long-term familial relationships through empirical study is substantially less than it would have hoped.[651] While there are initial improvements in parental communications and reduction in parental conflict, they are not enduring, a crucial element in the expectation of advocates. It would appear from the research that the most fruitful contributions were those, which were child-focused and employed "the sensitivity and insightfulness of therapeutic mediation"[652] and mediation utilising the settlement approach can expect less success.

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[648] Joan B Kelly "Mediated and adversarial divorce resolution processes" [1991] Fam Law 382, pp 382-385.

[649] *Ibid*, pp 387-388.

[650] Joan B Kelly "A decade of divorce mediation research" *op cit*, p 380.

[651] *Ibid*, p 379.

[652] Nicholas Eadon "A study of mediation, conflict and the implications for the child" [1998] Fam Law 353.

The welfare and interests of the child has played a central role in the rhetoric, which surrounds the practice of mediation, in justifying government support and spending and in mandatory referral of parents in other jurisdictions. It appears likely to remain a primary basis for the continuing development of the service. In fact, the Family Law Act 1996 states that where mediators are providing mediation services paid for by the Legal Aid Board, a code of practice will oblige the mediator to ensure that the parties consider the welfare, wishes and feelings of each child and the extent to which each child should be given the opportunity to express their feelings in mediation.[653] Yet, it is not an area that has proven fruitful in terms of research and analysis, for a myriad of reasons, including the problem of designing measures that are sufficiently sensitive and the number of intervening variables involved.[654] Researchers may be reluctant to interview children directly and there are multi-consent procedures involved where they chose to do so.

In addition, the studies that have been carried out have failed to show consistent and measurable benefits for children. Where there has been evidence that the parents discern advantages for the children, it has lead to complex and unusual conclusions such as the superiority of all-issues mediation over child issues mediation in the field of child disputes.[655] Recent research concluded that about two out of three parents felt that their children had positively benefited from their parent's mediation, even where agreement between the parents had not been reached. Some saw mediation as a positive influence on contact and thought that it stopped children from being used in the dispute. In some instances, the parents thought that the mediator had taken a very prominent role in keeping the focus on children's needs and interests. Interestingly, many would have liked to see greater involvement of the children in the mediation process, but they were divided on whether this was necessary to ensure that children's views were represented and whether it would be distressing, especially for young children.[656] Again, it should be noted that this form of indirect measure, where the parents testify to the children's gains from mediation, is not the most useful.

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[653] Section 27(8).

[654] Lisa Parkinson; Family Mediation, *op cit*, p 340.

[655] Walker and McCarthy, *op cit*, pp 12 and 17.

[656] Eddie Leggett "What clients say in Derbyshire" (1998) 8(2) Family Mediation 20.

Mediation may be preferable to the adversarial process in the production of initial and some residual benefits,[657] yet research in this area has been disappointing for the practice. Direct assessment of the child has revealed that there is little improvement in the psychological adjustment of children as a result of the intervention of mediation, even though it may help the non-residential parent to stay in touch with the child. Children do poorly in cases of protracted, antagonistic mediation which results from the mandatory referral of child custody disputes in the United States and certainly this subset do not compare well to children whose parents have undergone the more traditional adversarial procedures,[658] although it cannot be assumed that the same evidence would emerge in a voluntary setting. This result reinforces the disparate nature of mediation and the impossibility of generalisation from one result, particularly if the conditions under which mediation is practised differ radically.

Pearson and Thoennes[659] concluded that post-divorce adjustment of children depended on the interaction of a number of variables including the quality of the relationships, the quality of the parental care, the child's environment and the wider family dynamics. This conclusion must stand to reason. It would hardly to realistic to expect that the truncated intervention of mediation would make substantial and permanent changes in the lives of children, particularly where the children do not participate.[660]

The whole issue of the child's voice in mediation is a controversial one. In Britain at present children are rarely directly involved in the mediation, usually because they are too young or it is not considered necessary by the parents. Mediators may feel that the involvement of children places an unfair burden on them, leading them to believe that they are responsible for the adult decision. Indeed, it was widely considered that mediation would serve to enhance the interests of children without their involvement, by avoiding the negative consequences of competitive adversarial litigation and concentrating the minds of parents on their needs. It is perhaps due to the lack of progress in this regard that interest has been spurred in the direct involvement of children. It is suggested that allowing the

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[657] For instance mediation parents were more likely to rely on each other for child care and were more supportive of each-other in their parenting roles. See Joan B Kelly, "A decade of divorce mediation research" *op cit*, p 379.

[658] Carol S Bruch "And how are the children? The effects of ideology and mediation on child custody law and children's well-being in the United States" (1988) 2 International Journal of Law and the Family 106, p 117.

[659] J Pearson and N Thoennes "Divorce mediation results" in Folberg and Milne, *op cit*, p 429.

[660] In the study cited, the children were seen by the mediator in 13% of the Connecticut cases, 28% of the Los Angeles cases and 66% of the Minneapolis cases.

voice of the child into the mediation process acknowledges the worth of the child and alleviates distress, particularly since research evidence shows that the parents' views of what children think can differ considerably from what the children themselves think.[661]

A Scottish study found that children were only involved in 19% of cases, despite a policy of considering the involvement of children in every case and follow up work indicated that the children had been unsure and nervous about their involvement. Nevertheless, the majority of children[662] thought that they had benefited from the experience, through improved communication, expression and understanding of their situation. The mediator had assisted in conveying messages to parents and making requests on the child's behalf.[663] The study, though encouraging for voluntary mediation, was small scale and localised and it would certainly be unsafe to draw any far-reaching conclusions from it.

Further, strong arguments exist which consider that children's involvement may be harmful to the process itself. The decision-making authority of the parents may be undermined, the mediator may be forced to abandon the neutral role and adopt the position of child advocate and the distinctions between mediation and therapy may become dangerously blurred. Research has shown that children's views often change over time and mediators have come to accept that the right of parents to determine their own decisions about their children is not necessarily at odds with the welfare of the children.[664] While these factors would tend to suggest that a direct role for children is not considered necessary within the practice, the Report of National Family Mediation in 1992 found instead that there was a continuum of views amongst mediators, with a large section of the opinion that children should be consulted where this is appropriate. Only two out of thirty services saw children frequently, with children involved in about 8% of cases, on average. The NFM developed a consultation policy that included direct consultation by the mediator where this was jointly agreed with the parties but preferred indirect consultation whereby the parents would bring the children's perspectives into the process. Empirically, it remains to be seen whether changes in mediation policy and practice in this regard will affect the impact of the process on children.

Joint custody arrangements have been strongly endorsed by mediation and although not an issue in this country, the position does illustrate an ideological commitment to time-sharing

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[661] Marian Roberts: Mediation in Family Disputes: Principles of Practice (Arena, 2nd ed, 1997) p 140.

[662] Twenty four out of twenty eight.

[663] Fiona Garwood: Children in Conciliation (Scottish Association of Family Conciliation Services, 1989).

[664] Marian Roberts, *op cit,* n 661, above.

and continuity of family relations after divorce. In general, research indicates that mediation results in more joint legal custody agreements than the adversarial process and in some places expanded visiting patterns for the non-custodial parent. The agreements reached tend to differ from lawyer negotiated or litigated settlements in their level of specificity which may account for high rates of compliance. No difference in the level of child support has been found although mediation fathers are more likely to pay for extras and to provide for college fees.[665]

One American study compared various forms of consensual joint legal and physical custody cases with cases where the court imposed an order to this effect at trial and found that both court and mediation involvement were negatively related to successful outcomes.[666] However, the study was carried out on a system of mandatory mediation for contested custody cases and it is hardly surprising that the children who were doing well after one year were the children whose parents were committed to the arrangement and came to it by themselves. It is certainly arguable that voluntary mediation clients have more in common with this group than with the clients of a mandatory system. Yet, the research does provide evidence that the process of mediation, devoid of parental volition and goodwill, will not produce successful timesharing agreements or improve the developmental functioning of the children. This should not undermine the potential of mediation as a tool for parents who chose to co-parent after divorce, or the beneficial effects of parental co-operation for the children.

Gender and Mediation: The Empirical Evidence

The strong assertions of feminists that women are endangered or exploited by the process of mediation have been contested by the practice on grounds of research evidence to the contrary. Advocates of mediation are inclined to discount the theoretical fears, preferring to rely on empirical evidence. Further, it has been suggested that much of the feminist critique is based on inaccurate assumptions about women, namely, that they do not know what they want or cannot speak for themselves and where they do make certain demands, for co-operation with their former spouse or increased contact for their children with fathers, they are mistaken, reactionary or contradictory.[667] It is also common for mediators to point to the weaknesses of other methods of dispute resolution in terms of fairness, although the faults

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[665] Joan B Kelly "A decade of divorce mediation research", *op cit*, p 376. Canadian research has concluded that there was higher child support payments in one mediation programme. See below, p 173.

[666] See Carol S Bruch, *op cit*, p 122.

[667] Marian Roberts: Mediation in Family Disputes, *op cit*, pp 157-158.

of the adversarial or bilateral lawyer negotiation methods are arguably better corrected through the reform of that system rather than the creation of another.

It has been advanced that feminists have used unsourced case-analysis data, which does not allow for a judgement on whether the most accurate account of what transpired at the mediation session has been given.[668] Yet, the perception of the reporter is a valid and significant contribution to knowledge in itself and the accounts of clients must be given credence and respect. Further, it has been alleged that material from mediation/evaluation sessions[669] has been used by feminists to bolster claims and mediators have distinguished this form of practice from what they consider to be 'pure mediation'.[670] Problems illuminated by feminists more often reflect difficulties in the substantive child law than the weaknesses of mediation. They fail to recognise that mediation clients, as people who leave relationships and resist giving in to spousal demands prior to mediation, are less in need of protection than many spouses with intact marriages.[671]

Nevertheless, mediation has gone a long way in defending the practice against the feminist form of accusation, principally but not entirely with reference to the views of women who have completed the process. Some of the results have evidenced a special relationship between women and mediation. An American study suggested, for instance, that mediation women are more likely to say that the process helped them to stand up for themselves than men or women in the adversarial process, confirming the central tenet of empowerment through mediation.[672] At the same time, women were not found to have any increased confidence in their own ability to negotiate in the future, contrary to expectations. The findings did nothing to support the expectation that women would be disadvantaged by divorce mediation and in all measurements of process and outcome satisfaction, women in mediation expressed as much satisfaction as women in the adversarial system and were as satisfied as mediating men with the overall process.

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[668] Mary Duryee "Mandatory mediation: Myth and reality" *op cit*, p 513.

[669] This is a process in which the mediator also functions as an evaluator and quasi-decision maker.

[670] Joshua D Rosenberg "In defence of mediation", *op cit*, p 424.

[671] *Ibid*, p 446. However not all spouses leave the relationship, presumably many are left by the other spouse. In addition much is made in this analysis of the State's failure to intervene in order to protect the interests of the more weak-willed spouse in an ongoing marriage. It seems that the State generally intervenes only at the instigation of a member of the family but the act of seeking a divorce can be such request.

[672] Joan B Kelly "Mediated and adversarial divorce", *op cit*, p 80.

It could be argued that, at the very least, women did not perceive themselves to be acting at a disadvantage in the negotiations. 74% of women would recommend the process to a friend and an additional 13% would probably do so. Where women terminated mediation, they did so because they felt overwhelmed or perceived their spouse to be impossible or too angry to negotiate a fair agreement.[673]

Further, it seems that some of the research perceived by critics as supporting the argument of the inferior position of women in the process was actually misinterpreted. The Charlottesville Mediation Project divided their responses according to gender and found that the men who had undergone mediation had much higher satisfaction levels than the adversarial men in terms of the process, the settlement reached and the impact of the settlement on themselves, their relationship with their former partners and the couples' children. However, women who had undergone mediation, while agreeing that the process had a beneficial impact on their children, were less likely than women in litigation to feel that they had won more and lost less of what they wanted.[674] It was this result, in particular, which caused critics to suggest that women in litigation were in a better position than women in mediation.

Emery, who conducted the study, has questioned this interpretation and argued instead that the study shows that there are high satisfaction rates for all those who mediate and for mothers who litigate. Fathers who litigate reported a notably lower level of satisfaction, 'a little', which held as a pattern for virtually every question in the study. The divergence between women in litigation and mediation was explained using co-relation analysis, showing a negative co-relation between men and women's responses in litigation and a positive co-relation in mediation. Thus, it was concluded that while women felt that they had won in litigation and men felt that they had lost, both women and men in mediation thought that they had won. Nevertheless, it remained true to say that women in litigation felt that they had won what they wanted to a greater degree than women in the mediation process. They were also slightly more inclined to feel that their rights had been protected.[675] Moreover, the point that fathers benefited more from mediation cannot be overlooked and the results demonstrated that women were satisfied with either process, which could indicate their inclination to agree rather than equally positive experiences.

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[673] *Ibid*, p 86.

[674] Robert Emery and Joanne Jackson "The Charlottesville Mediation Project" *op cit*, p 12.

[675] Robert Emery: Renegotiating Family Relationships *op cit*, pp 185-188.

The study was carried out on an in-court scheme, which primarily served families from lower socio-economic backgrounds, so conservative estimations of satisfaction levels for both men and women would be expected, although this would be unlikely to affect the comparison between the genders. It focused on child issues disputes only and this might have affected the output. For instance, women litigating for child custody are likely to be very satisfied with the process and outcome because they are more likely to be successful. Where other issues are addressed, the levels of female approval of the litigation system could be reduced.

It is unfortunate that there has been little research focused on the gendered impact of mediation and the work carried out has not managed to reach a consensus. A Californian study did not tally with the Charlottesville findings and suggested instead that women and men equally preferred the mediation process to adversarial settlement.[676] This was explained by the researchers as an effect of the independent as opposed to the court setting of the mediation where issues of winning and losing are more highly focused,[677] the fact that the second study was carried out on a comprehensive service, the sample divergence in relation to social class and the different legal climate in the two states where research was conducted.[678] Again, it is difficult to avoid the conclusion that this type of research is of very limited value for generalisation purposes, although it could be argued that the contrasting legal climes might indicate the variety of experiences in litigation rather than in mediation. Indeed, further and more recent research has underscored the gender differences experienced in litigation, in work that compared the sample of a public custody mediation group with a private comprehensive mediation group. Where gender differences were found, higher satisfaction was reported by women than men who mediated precisely because, according to Emery, women were more satisfied with both litigation and mediation than men.[679]

This research has viewed the feminist debate over mediation as a pair of competing predictions, with one school advancing that women would view the process less favourably and would obtain less favourable results because they have had less access to wealth, power and resources than men and would defer to relational considerations instead of advancing their own needs and rights. The alternative suggests that the female focus on co-operation, mutuality of interaction and preference for problem solving dialogue over formal strategies

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[676] Joan B Kelly, *op cit*, p 84.

[677] *Ibid*, p 85.

[678] Robert Emery: Renegotiating Family Relationships *op cit*, p 189.

[679] *Ibid*.

would result in the mediation process being preferable to women.[680] For the researchers, the solution lay in the measurement of gender satisfaction levels and views of the mediator functioning, the process and the outcome of the practice. They reported that there were no gender differences with regard to the perceptions about the mediator, although women were more likely than men to agree that the mediator was skilful and rated the mediators' ability to keep the mediation focused on important issues significantly higher than men. The clients reported having equal influence over the terms of the agreement and it was interesting to see that the independent mediation sample were more likely than the in-court sample to agree that this was the case.[681] This would appear to indicate that the form of the mediation might be a more significant factor in the determination of client satisfaction than the gender of the clients.

Women in the court sample were more inclined than men to report that the mediator had given them an opportunity to express their own view and to put aside their anger in order to focus on the children. There were no gender differences in the satisfaction rates of the mediator terminators, although it would appear that women who left the process were significantly more likely than men to feel that they lacked the financial knowledge and information, were emotionally drained and unprotected, unable to have a say or that their spouse had an advantage over them in the negotiations.[682] Men were significantly less satisfied than women with the results of court-based mediation[683] but there was no gender difference in the independent sample. Women in the terminator group seemed to be more forgiving of the process than the men and were more likely to say that they would still recommend it to a friend.[684] Levels of anger and reported co-operation concerning the children did not vary according to gender nor did they vary according to the form of mediation used.

The data suggested to the researchers that women were satisfied with mediation because it gave them a voice and greater strength and resolve in relation to their former partner. It would support the second view of feminism, which sees mediation as a process peculiarly suited to the feminine view of the world. Where women had been disempowered, they were able to terminate the mediation and thereby avoid the negative predictions offered by the

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[680] Joan B Kelly and Mary Duryee "Women's and men's views of mediation in voluntary and mandatory mediation settings" *op cit*, pp 36-37.

[681] *Ibid*, p 42.

[682] *Ibid*, p 43.

[683] 48% as compared with 67%.

[684] 76% as compared with 41%.

first view of feminism. The researchers were confident enough to conclude that the results were supportive of the positive functioning and experience of women in mediation, where there are a sufficient number of sessions and mediators are trained and experienced.[685] Indeed, this appears to be a fair assessment. Women appeared to be no less satisfied than men with the process which dealt with financial disputes, in addition to the child disputes method where the satisfaction levels were more assured.[686] Several small-scale studies have confirmed the positive trends; one in-court mandatory mediation consumer survey found that women's responses were significantly more favourable than the responses of the men, particularly on the question of the opportunity afforded to express their views and on the ability of the practice to focus on important issues.[687]

The trends in the American research appear to have been replicated in other jurisdictions. Australian research also concluded that women's perceptions of all-issues mediation in terms of process and outcome were as positive or more positive than those of their ex-partners, regardless of whether agreement had been reached in a particular case.[688]

Consumer research in Britain illustrated that women in particular regarded the agreements they reached as fair and did not regard themselves as disadvantaged by the process. Nevertheless, the study did demonstrate that mediation efforts were for the most part geared towards remedying the mans disadvantages, ensuring access and promoting joint custody, rather than aiding the hard-pressed single parent mother on a limited income.[689] This could be an effect of the limited scope of the mediation practised at that time and may not replicate itself to the same degree in an all-issues setting.

Mediators were active and challenging in order to control dominance and allow the empowerment of the weaker party, sometimes in order to pave the way for compromise on her part.[690] Apparently, husbands were more likely to think that their former wives had been able to manipulate the male mediator, whereas they encountered less sympathy from female

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[685] *Ibid*, pp 44-47.

[686] The researchers commented on the particularly high rates of dissatisfaction amongst men who mediated child custody disputes, because Californian law had created an expectation of joint legal and physical custody. Equal time-sharing was sought by over half of the fathers but realised in only 12% of court cases. In both litigation and mediation, women were more likely to have their desires in relation to the time spent with their children met.

[687] Mary Duryee "Mandatory court mediation", *op cit*, p 265.

[688] Marian Roberts, Mediation in Family Disputes, *op cit*, p 161.

[689] Davis and Roberts: Access to Agreement, *op cit*, p 117.

[690] *Ibid*, p 122.

mediators.[691] Contrary to expectations, where mediators displayed a preference it appeared to be for the client of the opposite sex. This has important implications in that most mediators are women,[692] although it cannot be taken as a given that the consumers perceptions were accurate reflections of the actual thought processes of the mediators.

The research discussed only measured self-reported levels of satisfaction and did not objectively assess whether women had, in fact, achieved as much in terms of outcome as men. It is clear that the process of mediation is attractive to women but the more important query is the objective one of whether in fact it is beneficial or detrimental to them. The variation in the cases makes comparison between litigation and mediation results difficult and complex, but there has been some research in this area. In particular, it appears that there is no evidence of negative financial consequences, especially the often expressed fear that men would persuade mothers to accept less financial support by using custody as a bargaining chip or mothers would bargain away much needed property in order to gain custody and avoid excessive visitation.[693] If such fears were founded research should show that mothers in mediation achieve less, financially, than mothers who litigate whereas, in fact, measurement of the effects of different dispute resolution processes on women and children has produced evidence that they are not necessarily adversely affected by the dispute resolution mechanism chosen. The researchers compared the terms of divorce settlements reached through mediation, attorney negotiation and judicial assistance in the States of New York and Georgia and discovered that the agreements reached differed according to the mechanism used in the former only. There, judicially assisted judgements disadvantaged women and children somewhat more than the other mechanisms in the distribution of assets, but mediated agreements were less likely to include a child support obligation than either of the other methods, regardless of the kind of custody arrangement agreed. Women who used the adversarial system were more likely to have assistance with the economic burden of child rearing than those who mediated their agreements.[694]

The Georgian results were in contrast to these findings and suggested instead that there was no statistically significant difference in the value of property women received in settlements from the three primary mechanisms. The reasons for the inter-state discrepancy included the

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[691] *Ibid*, p 128.

[692] It appears that mediators in services affiliated to the National Family Mediation are predominantly women. See McCarthy, Walker and Timms (1994) *op cit*, p 127.

[693] Marian Roberts: Mediation in Family Disputes *op cit*, p 161.

[694] Carol Bohmer and Marilyn L Ray "Effects of different dispute resolution methods on women and children after divorce" (1994) 28(2) Family Law Quarterly 223, pp 226-232.

implementation of the child support guidelines in Georgia but not New York, the rise of the lawyer-mediator to a position of primacy in Georgia, as well as the role of mediation in the legal culture of that state.[695] For Roberts, this research displayed that women and children did not lose out in terms of outcome by choosing mediation,[696] but it is suggested that this is only true for Georgia.

In fact, the research shows that women and children are potentially disadvantaged by mediation, particularly where a strong joint custody strategy is coupled with a disinclination to take an equally rigid view of child support obligations. Further, it suggests that the involvement of lawyers in mediation and the creation of guidelines are addressed to all third party interveners neutralises the differences engendered by the variation in dispute resolution mechanisms and allows mediation clients in Georgia to benefit from a less unpleasant process whilst not losing out in terms of outcome.[697] Certainly, this is not a negative outcome for mediation but it does advise caution. Despite the fact that the divorce laws of the two states examined were similar, making them suitable for the purposes of comparison, the outcomes differed. The system of mediation, in terms of the kind of mediators used, the professional training and affiliation of mediators and the position of mediation within the legal framework remain significant intervening variables that can cause a surprising degree of variance in mediation outcomes. As if to underscore the possible variations in result, Canadian research has concluded that in one scheme, women achieved higher child support payments through mediation than in litigation, with a significant gain of $100 per month, on average.[698]

Mediation schemes that examine access only and exclude the question of child support may be particularly detrimental to women. There is research evidence to suggest that these issues are inextricably linked and in fact successful mediation of access is more likely to occur where there was a low level of dispute over child support on separation. Interestingly, where fathers have custody, the issue of child support from the non-residential mother does not seem to be a significant predictor of the outcome of visitation. Moreover, the research found that where non-residential fathers were in arrears in the payment of child support, they were more likely to see their access deteriorate at the post-programme interview.[699]

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[695] *Ibid*, p 245.

[696] Marian Roberts: Mediation in Family Disputes, *op cit*, p 161.

[697] Bohmer and Ray, *op cit*, p 245.

[698] Alberta Law Reform Institute *op cit*, p 44.

[699] Jessica Pearson and Jean Anhalt "Examining the connection between child access and child support" (1994) 32(1) Family and Conciliation Courts Review 93.

It would be unfair to give the impression that there have been no dissenting voices in the debate. In-court conciliation research in the UK caused one researcher to comment that several women felt that they had been let down by the process; the mediator was more inclined to press them into an agreement as they were perceived to be more pliable or was unwilling challenge the husband's aggressive or manipulative behaviour. Interestingly, the research confirmed that the gender bias applies to clients of the opposite sex, since this service was conducted entirely by women. It found that it was usually women clients who alleged that their spouse had not been sufficiently challenged by the mediator.[700] Nevertheless, many of the comments from the women were positive and it may be the case that in-court mediation is peculiarly vulnerable to neutrality lapses on the part of the mediator. This was, at any rate, a small-scale study and like much of the research in this field, has limited value in terms of wider generalisations to the population of women in mediation. Moreover, it is fair to say that the research evidence of the negative impact on women has been anecdotal and while not seeking to undervalue the importance of this form of enquiry, it has to be recognised that the experiences may not be typical.

On balance, the research indicates that women are not disadvantaged by mediation, as such[701] and despite the undoubted existence of some negative experiences, the cases relied on by feminists are atypical. It may even be possible to go so far as to say that women prefer mediation because it offers a more sensitive process that does not adversely affect the outcome of their settlement. Mediation has perhaps responded to the feminist critique in a way that causes their criticisms to become unfounded and so the debate has been a worthy one. While the process is neither inherently detrimental to women, nor inherently beneficial to them, much depends on the skill and competence of the mediator, the implementation of well-developed screening programmes, structural and procedural safeguards, high standards of practice, of provision and delivery.[702] Certainly, the empirical evidence battle has been won in relation to gender and disadvantage, but winning the war entails vigilance on the part of mediation. It is true to say that mediation cannot remedy the social ills that have preceded it; the poverty of single mothers, the division of labour within the family and unequal rates of pay for women, but the privacy of the practice leaves these phenomena singularly unseen and imposes a heavy obligation on mediation not to aggravate the position of any underclass that comes through its doors.

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[700] Gwynn Davis: Partisans and Mediators: The Resolution of Divorce Disputes (Clarendon Press, 1988), p 69.

[701] Irving and Benjamin, *op cit*, p 416.

[702] Marian Roberts: Mediation in Family Disputes, *op cit*, p 162.

Domestic Violence and the Practice of Mediation

Feminists have suggested that spousal abuse causes deterioration in self-esteem and impedes the ability of the victim to negotiate. One interesting study carried out in the United States analysed men and women's responses to a questionnaire, in order to ascertain whether abuse affected the ability of the client to negotiate in child-issues mediation.[703] The researchers found that the impact of abuse differed according to gender. Women reporting abuse felt less empowered than the non-abused women, while there was no significant difference in the levels of personal empowerment for men. The abused women were more likely to report that their partners could out-talk them, had taken revenge on them in the past or they were afraid to openly disagree because of the fear of future harm, than other women or abused men. Self-efficacy in the situation was not related to abuse. Both men and women who had been abused felt that their partners had controlled decision-making and might physically harm them in the future. Abused women were more likely than abused men to feel that the court system would empower them by listening to them and treating them fairly.[704] However, the study only examined physical violence and research was conducted in one location and it did not endeavour to ascertain the effect of long-term abuse. Yet, the fact that the women who were abused displayed lower levels of personal empowerment and were significantly more fearful of their partners,[705] suggests that it is necessary for mediation to take feminist concerns in this area seriously.

The prevalence of domestic violence within marriage would suggest that the divorce mediation process is likely to encounter the problem on a regular basis. It is unlikely in the extreme that clients would have sufficient understanding of the process dynamic to screen themselves out in numbers that would eliminate the presence of domestic violence victims in mediation. It may be the case that the actual level of domestic violence in the caseload of mediation services is more alarming than has been imagined. In two United States court connected mediation settings, 80% of women and 72% of men reported experiencing abuse during marriage or separation, most of which occurred more than six months prior to the separation. Intimidation was the most common form of abuse reported, but two out of three of the women and half of the men reported physical abuse by their spouses.[706] A short study

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[703] Lisa Newmark et al "Domestic violence and empowerment in custody and visitation cases" (1995) 33(1) Family and Conciliation Courts Review 30.

[704] *Ibid*, p 57.

[705] *Ibid*, p 43.

[706] Joan B Kelly "A decade of divorce mediation research", *op cit*, p 381.

of a mandatory mediation programme in California, in contrast, found that 18% of clients included an allegation of domestic violence at the initial intake phase with a further 8% alleging that child abuse had taken place.[707]

This radical discrepancy could be explained in terms of the definition of abuse used in the studies, the willingness of clients to disclose the violence or abuse, the sensitivity of the process in extracting this sort of information, or lower levels of marital violence in fact. More worrying than this form of divergence in findings is the lack of examination of the incidence of domestic violence by the researchers in general. Even where projects have divided the perceptions of clients along the lines of gender, they have not seen fit to include a study of this phenomenon. The conclusion must be that the researchers are content to blindly accept that there is adequate screening in place, or that the mediation process can adequately discern the severity, duration and effect of the violence. With little research evidence for support, they are content to assume that "under certain conditions, mediation may be more beneficial than detrimental for couples among whom domestic violence has occurred".[708] In research, bias can appear in the choice of subjects for examination, as well as the treatment of those subjects.

While there is some evidence of client satisfaction with mediation where there had been physical and emotional abuse during the marriage or after the separation, the evidence is not strong. It has also been argued that when compared to lawyer negotiation, mediation makes a greater contribution towards reducing post-process verbal and physical abuse.[709] An Australian study of in-court, voluntary conciliation assessed the satisfaction of a group of clients who reported that domestic violence was a significant issue against the satisfaction of a comparison group. Overall, 61% of the sample regarded physical and/or emotional abuse as a significant issue in their lives, but the research found no statistically significant difference between the two groups in terms of their satisfaction with the process of mediation, the skills of the mediator or the agreement reached.[710] However, while the concluding questionnaire was sent to all the mediation clients only 29% were completed

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[707] Mary Duryee "Mandatory court mediation: Demographic summary and consumer evaluation of one court service", *op cit*, p 262.

[708] Joan B Kelly, *op cit*, p 381.

[709] *Ibid.*

[710] Barbara Davies, et al "A study of client satisfaction with Family Court Counselling in cases involving domestic violence" (1995) 33(3) Family and Conciliation Courts Review 324, p 335. Note that Order 25A Rule 5 Family Law Act 1975 provides that when determining if a dispute may be mediated the mediator must take account of the risk of family violence and the degree of equality of bargaining power between the parties.

and returned to the service and the research did not examine whether there was anything to indicate that respondents were more satisfied than the non-respondents. Further, the researchers were of the opinion that the 42% of women who described both themselves and their partner as victims might be prone to joint attribution of responsibility because of the self-blaming of abused women.[711] If abuse can potentially alter and distort the women's perceptions of the reality of their lives, it has to be questioned whether their statement of satisfaction with mediation is an adequate indication that they are supported and aided by the process.

Some of the more detailed and revealing research on domestic violence and the mediation process has come from Britain in recent years. The attitude and practice of court welfare officers has been compared with voluntary mediators and some pessimistic conclusions drawn. The research consisted of a national postal questionnaire of the National Family Mediation affiliated and provisionally affiliated services, followed by a small number of in-depth interviews.[712] The services differed radically in the extent to which they perceived domestic violence to be present in their caseloads. Court welfare officers estimated that up to 90% of their cases involved domestic violence, but when voluntary mediators were asked whether clients had experienced this form of behaviour, only 11.5% agreed that they had. Strangely only 3.1% of voluntary mediators suggested that they had little or no experience of domestic violence and over 21% had ended mediation at some stage because of the problem. 67.8% of voluntary mediators expected that domestic violence would become an increasing practice problem in the future.[713]

This appears to be an alarming discrepancy between the professional estimations of the extent of the problem, although it is certainly the case that court welfare officers are likely to deal with the more conflictual cases.[714] On examination of the monitoring forms returned by the voluntary services to the NFM, it seemed that the figures varied tremendously and more often than not the services did not provide information on the incidence of domestic violence. One service in possession of a screening facility found that domestic abuse was a

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[711] *Ibid*, p 339. They also discussed the possibility that the violence was separation violence and had not been on going during the marriage.

[712] The return rate was 96.6% for the voluntary mediation services, 43.8% for individual mediators, 94% for the court welfare teams and 41.9% for court welfare officers. Marianne Hester, Chris Pearson and Lorraine Radford: Domestic Violence: A National Survey of Court Welfare and Voluntary Sector Mediation Practice (Policy Press, 1997).

[713] *Ibid*, p 41.

[714] *Ibid*, p 7.

feature in 31.1%.[715] It would appear that voluntary mediators have a marked tendency to underestimate the levels of domestic violence in their practice or, more seriously, to ignore or discount the potential presence of the problem. One small sample of a single service found that violence was acknowledged by clients in 23% of cases, but this figure was likely to be an underestimate because there had been no separate enquiry by the mediator into the question.[716] An American study of an upper-middle class sample of couples in mediation found that a full 25% regularly exhibited violence during the last part of their marriage and the course of their divorce.[717]

The researchers were primarily interested in discovering whether there were any links between the practice approach adopted by the individual mediators and court welfare officers and their definitions of domestic violence. Practice approaches were found to divide between the safety orientated approach, which was concerned with the identification of domestic violence by means of separate meetings and ensuring the safety of the client in the process/outcome and the emphasis on always mediating approach, which focused on joint meetings and made little connection between issues of power and domestic violence. A mixed, non-specific approach encapsulated aspects of both. Of the voluntary mediators, only 10.6% espoused the safety approach, 29.1% preferred to mediate in all cases and the majority, 60.4% used a mixture of approaches.[718] The court welfare officers, in contrast, were more likely to adopt the safety view with 16.2% preferring this method of operation.

The questionnaires also showed variations in how domestic violence was defined by the professionals, both in terms of the behaviours involved and in terms of the perpetrator. Physical violence, the use of or threats with a weapon, sexual abuse and humiliation were most strongly associated with domestic violence and were also the behaviours most associated with violence from men to women. The more psychological and indirect forms of abuse rated least highly as violence, which was problematic for the researchers as these are also the forms most resistant to detection in mediation sessions.[719] The mediators did not consider the fact that psychological abuse could impact in such a way as to undermine

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[715] *Ibid*, p 54.

[716] Thelma Fisher "The incidence of domestic violence in one family mediation service" (1993) 3(2) Family Mediation 16.

[717] Donald T Saposnek; Mediating Child Custody Disputes: A Systematic Guide for Family Therapists, Court Counsellors, Attorneys and Judges (Jossey Bass, 1983) p 252.

[718] Hester, Pearson and Radford, *op cit*, p 13.

[719] Marianne Hester and Chris Pearson "Domestic violence and mediation practices" (1997) 7(1) Family Mediation 10.

the ability of the victim to make the voluntary choice of opting out of mediation. The court welfare interviewees were seeing an increasingly wide range of behaviours as constituting domestic violence and the only behaviours carried out primarily by women were found not to constitute violence in their view i.e. nagging and refusing to have sex.[720]

In both sets of questionnaires, researchers found that the more the professional focused on the safety of the client, the wider the definition of domestic violence they were likely to adopt. In addition, the respondents who saw violence as predominantly from men to women were more likely to adopt a safety approach, whilst those who saw violence as more mutually expressed were more likely to try to proceed with the mediation.[721]

Court welfare officers were anxious to emphasise that women might be violent or abusive towards men but it appeared from their experience that men were the usual aggressors in cases of violence. Voluntary mediators seem to have the same experience: in fact two thirds had little or no experience of handling violence against men, but they were more inclined to obscure this fact with gender-neutral language.[722] While individual mediators expressed the view that abuse was never acceptable, some of the voluntary mediators felt that violence was a normal part of most relationships and could be acceptable where it was 'confinable'. They tended to perceive violence as mutual; in fact, they were twice as likely as court welfare officers to view the problem in this way. While court welfare officers saw no distinction between violence during the marriage and violence on separation, some voluntary mediators thought that violence would only impede mediation in the former case.[723]

The National Family Mediation in the UK issued guidelines for the screening of domestic violence, recommending routine screening by separate meeting, with priority given to the individuals' perception of violence rather than any judgement about the levels or the type of violence.[724] The guidelines provide that, if mediation continues, procedures to ensure client

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[720] They saw emotional and verbal abuse, non-verbal intimidation and threats against children as being weakly male to female or equally male or female behaviour. See Hester, Pearson and Radford, *op cit* at n 712, p 9.

[721] Hester and Pearson *op cit* at n 719, p 10.

[722] Hester, Pearson and Radford *op cit*, p 46.

[723] *Ibid*, pp 40-41.

[724] In 1991, the Government of Ontario stated that mediation would not receive legislative or financial support until it could show that it was not harmful to abused women. In response to this the Toronto Forum on Women Abuse developed guidelines for mediation with the help of women's advocates and representatives from domestic violence provider communities, which are also used in the United States. See Barbara Landau "The

and child protection must be in place and continued attention must be paid throughout the mediation to the possible existence of violence. Clients should be given information and advice on other options. These guidelines were drawn up at least partly in response to the requirements of the Family Law Act 1996,[725] legislation which has made the issue of domestic violence victims in mediation more critical.

Research in England sought to measure the reality of the screening process against this aspiration and found that only half of the voluntary mediators, whose service had a screening policy, used pre-mediation questions on domestic violence systematically with all clients.[726] Many of the services without a specific screening policy would only carry out the screening process if they were aware of domestic violence in the case and they relied on the clients' solicitors to provide this information. Services with specific and separate intake procedures rarely asked about the issue of abuse and some of the intake staff were not trained mediators. However, about 11.5% of mediators saw their clients separately at the initial interview, which they felt aided disclosure but the onus was very much on the client. There appeared to be an assumption in the voluntary mediation sector that abused persons would screen themselves out,[727] but the policy in many services was still under construction at the time of the research. An American study of mostly court-based programmes found that 20% did not screen mediation referrals at all and only half of the programmes surveyed collected information directly and privately from the parties prior to the start of the mediation.[728]

While 25.1% of respondents in the English research indicated that their service had specific guidelines and procedures for mediating in violence cases, a significant number[729] did not know what the position was where they worked. Even where guidelines were in place, they were underpinned by the assumption that all cases could be mediated, that mediators would always have prior knowledge of the violence and few mentioned issues of child protection

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Toronto Forum on Women Abuse: The Process and Outcome" (1995) 33(1) Family and Conciliation Courts Review 63.

[725] Section 7 (a) and (b).

[726] Less that 8% of the total sample. *Ibid*, p 43. 14.4% of court welfare officers screened the clients at all stages of the procedure and 51.6% indicated that screening should be extended in a systematic way. Agreement focused welfare officers were more likely to feel that the issue should be raised by clients or their representatives.

[727] *Ibid*, pp 43-44.

[728] Nancy Thoennes, Peter Salem and Jessica Pearson "Mediation and domestic violence: Current policies and practice" (1995) 33(1) Family and Conciliation Courts Review 6.

[729] Almost 19% of mediators. *Ibid*, p 45.

and the risks to children in the context of domestic violence. One service categorised violence by type using Johnston's terminology but did not suggest how the categories were to be related to the clients. The service deemed that mediation was appropriate where there was a volatile relationship with mutual violence, where violence resulted from non-violent provocation or where there was once off incidents in the context of separation.[730]

The weaknesses of the voluntary mediation system with regard to the identification of domestic violence become even more critical when it is noted that many of the court welfare officers avoided mediation and preferred to refer clients elsewhere, usually to a local independent service. Although in theory known cases of domestic violence were not referred, despite this policy cases involving violence were referred by default because of inadequate screening in the court welfare process.[731] Thus, while court welfare officers had expertise in the area of domestic violence and a more safety orientated approach, they sent their mediation cases to the voluntary sector and did not adequately ensure that the cases sent did not involve allegations of violence. The voluntary sector then proceeded to mediate the case, with a wholly inadequate screening procedure and used a mediator who might not be aware of the marital history and the presence of violence. While the vast majority of mediators recognised that domestic violence can affect the balance of power between the parties to the mediation,[732] any intention to redress the upset depends entirely on the mediators' awareness of the existence of violence.

Moreover, it is questionable whether the techniques described by the voluntary mediators are fit for the task. 72.2% of voluntary mediators suggested that they co-mediated in order to ensure a balance of power, a system hardly sufficient in the face of domestic violence. However, the same number suggested that they would challenge the controlling, undermining and intimidating behaviour and 64.3% would ensure that the women received and continued to receive independent legal advice. Yet the options geared towards empowering the woman directly were far less extensively used and in some instances were offered to both parties. One mediator suggested that mediation should empower the abuser since the abused spouse would be elated and empowered by the fact of separation. Only 17.6% suggested counselling to the woman, 11.5% used individual caucusing, 20.7% shuttled and 11% allowed the woman to bring a friend or a member of her family. It

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[730] Hester, Pearson and Radford, *op cit*, p 46.

[731] *Ibid*, pp 20-22.

[732] Over 95%.

appears that the mediators preferred methods that were less disruptive of the standard form of mediation.[733]

The Australian government commissioned a research report in 1996 in order to investigate how mediation services dealt with domestic violence. It demonstrated that mediation agencies approached the issue with seriousness but without uniform success. Despite their best efforts, agencies were not identifying violence reliably nor did they invariably have the policies, facilities and knowledge to ensure the safety and equal participation of women who were targets of violence. While mediation services responded to the report by rapidly defining and refining their training, policies and practices,[734] whether policy and practice now coincide remains to be seen.

A small-scale Canadian study which used the simulated client technique to assess ten mediators found that seven of them were highly interventionist in response to the abused woman's disadvantaged position and in the interests of her safety, either controlled decision making regarding the format of the mediation or attempted to hold tight reigns over the joint sessions. The method used in this analysis provided interesting qualitative data but arguably created an artificial situation that might not reflect reality. Moreover, the researchers found that the degree of control exercised with regard to the process and the outcome had a largely disempowering effect on the abused spouse.[735] This conclusion leaves mediation in a quandary. If the mediator continues the process in the normal way and avoids intervention, the woman is disempowered by her spouse and if the mediator intervenes for her protection, the mediator disempowers her.

American researchers have advocated, contrary to feminist views, that mediation be available to all of those who have been the victims of domestic violence and does not approve of a blanket ban on domestic violence cases entering the process. An Alaskan pilot mediation project was legislatively prohibited from serving abused women, a move which resulted in the elimination of more than 60% of prospective users from the scheme. The programme staff concluded that many of those who were excluded believed that the prohibition was damaging to them and in their own cost-benefit analysis, the services offered were valuable enough to overcome the risks. However, the service offered a free

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[733] *Ibid*, pp 47-48.

[734] Hilary Astor "Mediation and disputes involving violence against women: Recent Australian developments" (1998) 8(2) Family Mediation 18.

[735] Edward Kurk "Power imbalance and spouse abuse in divorce disputes: Deconstructing mediation practice via the simulated client technique" (1988) 12 International Journal of Law, Policy and the Family 1, p 14.

service in a country where low cost legal advocacy is not readily available and commentators were forced to conclude that it was impossible to tell whether the battered women would have opted to mediate had other similarly priced alternatives been on offer.[736]

Research in the United States on the practice of mediation in the context of domestic violence has found that 70% of represented programmes ensured that their mediators received some type of training in relation to domestic violence, but it was significantly more likely in mandatory than in voluntary programmes.[737] While either screening or conversation in the mediation session could bring violence to the attention of the mediator, relatively few cases were excluded from mediation as a result. The majority of respondents said that less than 5% were eliminated due to spousal abuse allegations and the vast majority[738] said that less than 15% were eliminated. Although these results were impressionistic and the rates of domestic violence likely to vary across the programmes, it did appear that there was a lower percentage of elimination in self-referral programmes and the rate was highest where legislation or court rule specifically allowed exclusions and specified the criteria to be used. Only 40% of the respondents indicated that they always gave the abused spouse the option of withdrawing from the mediation, although a further 40% indicated that they sometimes did.[739]

In most of the sites where special techniques were used[740] decisions about how and when to use them were left entirely with the individual decision-maker such as the mediator. 39% of mandatory programmes had special approaches set out by court rule or legislation. Yet, it was very unusual for mediators to state that they would always use a special technique when violence was alleged except in relation to additional screening[741]or offering the presence of a support person.[742] Only 20% suggested that they would never simply mediate as usual, 74% would sometimes carry on the mediation regardless of the allegation and 6% would never do so. Over half stated that they never used telephone mediation, over one third would never have separate sessions and three in ten would never use shuttle

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[736] Nancy Thoennes et al "Mediation and domestic violence: Current policies and practices" (1995) 33(1) Family and Conciliation Courts Review 6, p 9.

[737] *Ibid*, p 11.

[738] 85%.

[739] *Ibid*, p 17.

[740] 73%.

[741] 44%.

[742] 34%.

mediation. It seems though, that the presence of training in the area of domestic violence may serve to heighten awareness of the need to consider the use of special approaches. In programmes where the mediators had received training only 3% suggested that they would always mediate as usual and 25% stated that this was never done.[743] It seems that programmes where the issue of domestic violence is addressed in court rule or in the law are significantly more likely to report that there are non-negotiable issues in mediation[744] than those relying on individual decision makers.[745] This would suggest that mediators might need guidance from the courts or the legislature on the best ways to proceed when faced with issues of violence. This might provide them with the confidence to alter the process in the face of violence allegation and to accept that this does not undermine the process of mediation in general or the mediator's neutrality in particular.

Child Contact and Domestic Violence

The presence of domestic violence in a parental relationship is a strong indicator of child abuse, which occurs in between 30-70% of cases where there has been abuse of the parent.[746] A Principal Registry sample of divorce petitions lodged on the grounds of unreasonable behaviour found that in 19% of cases women reported the involvement of children in violence. In a further 19% of cases, children were either indirectly involved when they came between parents or were directly subjected to a violent assault by their fathers. Yet, access was denied in only one of these cases.[747] Further, research has suggested that a high rate of violence is associated with child contact in families where domestic violence had previously been an issue and there exists a considerable body of evidence on the harm done to children by witnessing domestic violence,[748] on the extent of continuing violence perpetrated by former partners and the use of contact to further this

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[743] *Ibid*, pp 20-21.

[744] 50%.

[745] 18%. *Ibid*, p 22.

[746] Marianne Hester and Chris Pearson "Domestic violence, mediation and child contact arrangements: Issues from recent research" (1993) 3(2) Family Mediation 3. Children are 1,500 times more likely to be abused in homes where domestic violence occurs than in non-violent homes. See Jennifer Maxwell "Mandatory mediation of custody in the face of domestic violence: Suggestions for courts and mediators" (1999) 37(3) Family and Conciliation Courts Review 335, p 347.

[747] Judy Corlyon "Violent allegations" (1993) 3(2) Family Mediation 14. The research concluded that the unreasonable behaviour ground was not used to exit a marriage quickly but was a reflection of the marital history.

[748] Catherine Ayoub, Robin Deutoch and A Maraganore "Emotional distress in children" (1999) 37(3) Family and Conciliation Courts Review 297, p 309. It is as powerful as the actual experience of abuse for children.

end. A recent investigation has confirmed that both children and their custodial parents are often abused as a result of contact[749] ordered by the court, despite the availability of ample evidence of previous abuse. Three quarters of parents said that their partners' violence was not considered by the court to be convincing reason for refusing contact even though over 90% had experienced a pattern of domestic violence which indicated a risk of homicide. They thought that the courts had failed to adequately assess the impact on and risk to children and did not consider their views.

Mediators exhibited similar attitudes and created the same dangers for abused families. Professionals exerted pressure on mothers to reach agreement over contact regardless of the desirability or their safety and the researchers credited only refuge workers with any understanding of the relationship between spouse/child abuse and contact.[750] The fourteen mediators who were interviewed displayed a lack of understanding of the patterns involved in violent behaviour and while mothers wanted contact, they suffered from violence and abuse when it took place and received no support from the system. The professionals, including the mediators, would not take account of the father's ability to parent and many children suffered "gross neglect, varying levels of abuse and terror at being left alone with an unpredictable or drunk father".[751] Mediators defined abuse purely in terms of physical violence and they rarely knew with any degree of certainty whether a particular client had been the subject of an attack, although individual mediators seemed to understand the ways in which safety could be ensured. However, the numbers approached by the researchers were small, they were self-selected and reached through the professionals who were interviewed first. The sample is not necessarily representative.

A more recent study suggested that, while a majority of voluntary sector mediators indicated that they would refer child abuse allegations to an appropriate child protection agency,[752] some preferred to assess the validity of the allegations first. A small minority suggested that they would not inform any social service of the allegation and were under the

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[749] 10% of children were sexually abused, 15% physically assaulted, 26% abducted, 30% neglected and 62% suffered emotional harm. Two out of three parents were physically abused by former partners as a result of contact. See Lorraine Radford Unreasonable Fears? Child Contact in the Context of Domestic Violence: A Survey of Mother's Perceptions of Harm (Women's Aid, November 1999).

[750] Marianne Hester and Lorraine Radford: Domestic Violence and Child Contact Arrangements in England and Denmark (The Policy Press, 1996).

[751] This quote refers to the position in Denmark but the researchers concluded that women in that jurisdiction were more entitled to support than in England and the outcome with regard to custody matters was remarkably similar. See Judy Corlyon "Book Review" (1996) 6(3) Family Mediation 17, p 18.

[752] 78%.

impression that the confidentiality of the process warranted this approach. While most of the mediators recognised the possible detrimental effects on children of living with domestic violence, relatively few[753] indicated that this would lead them to consider that residence/contact might not be appropriate for the children. None of the respondents made any reference to the implications for the safety or the well being of the abused party and any possible detrimental effects this could have on the child. Even where one mediator recognised the fear of violence experienced by women, she placed the responsibility for safety on the mother rather than questioning the abuser behaviour.[754]

Voluntary mediators often saw the protection of children from fear and harm in relation to contact with the domestic violence perpetrator as contrary to the guiding principle of mediation that arrangements for children should include contact with both parents. Some were reluctant to question the authority of any agreements by parents, however inappropriate.[755] Indeed the approach adopted by mediators the other side of the Atlantic seems to be similar, preferring the Wallerstein and Kelly attitude that parenting can be maintained as a relatively conflict free sphere of behaviour within a very deprived and unhappy marriage. For some commentators, even past incestuous behaviour on the part of the father should not raise the consideration of whether contact continues and suggest instead that "perhaps the husband could voluntarily agree to restrict his visitation to daytime visits and/or visits with a third party present in order to allow time to build up trust".[756]

Mediation can console itself with the knowledge that that adversarial system has also failed to grapple with this issue. Yet its failure has not been universal. The possibility of providing a legislative presumption against custody or contact in cases of proven domestic violence is present and has been exercised.[757] Indeed, the Advisory Board on Family Law are strongly of the view that practice guidelines need to be introduced which would compel the court to consider the harm a child has suffered as a consequence of violence and the harm the child is at risk of suffering if a contact order is made as part of the best interests of the child test.

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[753] Nearly 19%.

[754] Marianne Hester, Chris Pearson and Lorraine Radford: Domestic Violence: A National Survey, *op cit*, pp 52-53.

[755] *Ibid*, p 60.

[756] Donald T Saposnek: Mediating Child Custody Disputes, *op cit*, p 253.

[757] This is the case in thirteen American States in relation to custody and in New Zealand in relation to contact. The New York Domestic Relations Law, sec 240 provides that the court must considerthe effect of domestic violence on the best interests of the child. The American Law Institute Model Statute places the burden on the domestic violence instigator of proving that the custodial responsibility sought will not endanger the child or the other parent. See also Northern Ireland, Chapter Five, p 277 below.

Moreover, the court must consider, in particular, whether the safety of the child and the residential parent can be secured before, during and after contact and could take account of the effect of domestic violence on the caring parent, the motivation of the parent seeking contact and his likely behaviour, his appreciation of the effect of his conduct and his capacity to change. The Report suggested that legislative amendment could be reconsidered at the end of a monitoring period, in light of the impact of the guidelines.[758] It is easy to envisage that such reforms could have an ameliorating effect in the context of the adversarial system but it is unlikely to alter mediation practice. Indeed, the winds of change have already blown in relation to the judicial approach in England, where it has been accepted that the term 'implacable hostility' is inappropriate where a mother's fears are genuinely and rationally held[759] and violent fathers may be expected to demonstrate their fitness to exercise contact.[760] For the Court of Appeal, violence to a partner involves a significant failure in parenting, it constitutes a failure to protect the child's carer and a failure to protect the child emotionally,[761] so that it can no longer be assumed that contact with a physically violent parent will be, by the court's assessment, in the child's best interests.[762] Further, there is much to be said for a judicial determination where a question as fundamental as contact arises. When the right of a man to see his child and the right of a woman and/or children to bodily integrity compete, who sets the balance and where that balance is set are central issues in the divorce settlement and are issues that go beyond the individual family to the entire social setting.

Conclusion

The work of the researcher in the field of mediation is constant and evolving, yet despite the abundance of literature in this field and on-going nature of the research, little can be ascertained with certainty in concluding the empirical debate on mediation. It would appear that research in Britain has preferred the independent, comprehensive schemes to court-based, child issues negotiation while in the United States researchers have taken a more benevolent view of the latter. Certainly, it may be suggested that substantial evidence testifies to high rates of user satisfaction across all forms of family mediation and across

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[758] Advisory Board on Family Law; Children Act Sub-Committee, A Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence (Stationary Office, 2000).

[759] *Re P* [1998] 2 FLR 696.

[760] *Re M* [1999] 2 FLR 321.

[761] *Re H* [2000] 2 FLR 334.

[762] Felicity Kaganas, Shelly Day Sclater "Contact and domestic violence-winds of change?" [2000] Fam Law 630, p 634.

jurisdictions. If anything has been categorically demonstrated, it is the positive impression that the practice leaves on clients. Mediation also appears to be associated with higher rates of compliance than adjudication, with high rates of settlement and compromise and it may be more appealing to the divorcing population in terms of cost, although the jury is still out on that question.

However, it is equally apparent from the empirical evidence that mediation has little effect on delays in and length of the divorce process, the long-term impact on interpersonal dynamics is, at best, only slight and certainly diminishes with time. There is no evidence to suggest that relationships between parents and children improve as a result of the mediation process. Thus, there are a number of important outcome variables on which evidence regarding the usefulness of mediation is equivocal and according to Kressel and Puritt, there is as yet no compelling evidence indicating that it is preferable to adjudicatory procedures.[763] Yet, neither is there any compelling data, which shows that mediation is necessarily inferior to the adjudication process, that it has been rejected by clients, that agreements break down more rapidly or are not adhered to, that conflict and acrimony are increased or that women are harmed by the process.

The failure of feminism to illustrate the detrimental effects of mediation on women through research is a significant victory for the process, partly achieved because of the increased gender awareness of mediators brought about by the feminist debate. While it may be discerned from the studies that mediation is a process that serves the interests of men more than the interests of women, this is not to suggest that it has failed to serve women. In fact, women are particularly impressed with the opportunity of expression afforded by mediation, suggesting some level of empowerment from the process.

If mediation has a weak link it is the treatment of domestic violence, an issue that affects large sections of the divorcing population. Laudable efforts have been made to ensure the safety of the practice in this area in the form of guidelines that encourage mediators to screen and to adapt mediation techniques to suit the special needs of the victims. Yet, at least in Britain, they have been ignored in practice and mediators continue in the face of dangerous and criminal conduct. The safety of women and children has not been the first priority of mediation, which continues to prefer the principles of ignoring past behaviour

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[763] See Janet Walker "Family conciliation in Great Britain: From research to practice to research" *op cit*, p 45 citing K Kressel and D G Puritt "Themes in the mediation of social conflict" (1985) 41(2) Journal of Social Issues 179.

and fault and continuing contact with an absent parent to the requirements of equal bargaining power and the creation of an environment without fear. Research in this field uncovered the considerable diversity in mediation practice within and between services, a diversity that goes beyond the issue of violence and affects every aspect of the process.

In this diversity lies the central dilemma of the empirical research. It has been naively assumed that conciliation is a uniform intervention[764] and when this assumption is removed, the universal conclusions from the research efforts reduce to the particular research setting and the possibilities for wider generalisation are destroyed. It becomes impossible to assess the balance of harm and benefit for clients in any service on the basis of evidence from other services and jurisdictions. However, it does allow mediation to assert that under certain conditions it can be positive and beneficial, surpassing the traditional adversarial procedure on every variable. It does not allow mediation to assert that it is usually or inevitably superior to any other form of settlement assistance, or that all the benefits that have discerned in various projects can be found in any particular practice, by reason only of the fact that the process is conciliatory.

Possibly, mediation in the future will become more homogenous in form and style, allowing the researchers the luxury of easy generalisations and the client the security of knowing the likely benefits of the process. In the meantime the paucity of indisputable evidence about mediation leads to perhaps the only certain conclusion, that more research is required.

[764] *Ibid*, p 45.

CHAPTER FOUR

Introduction

This chapter sets out the findings of an empirical study conducted using client questionnaires compiled and administered by the Family Mediation Centre, from 1997 until 1999.[765] When clients first entered the process they were asked to complete a pre-mediation form that attempted to ascertain the existing levels of conflict and co-operation in the relationship and the emotional state of the client. Mediators then completed an intake form for each couple, detailing demographic information, the issues of concern to the couple and the reasons for the breakdown of the relationship. An outcome form was completed by the mediators at the close of mediation, describing either the agreement reached or the reasons for the failure to reach a consensus. Each client was asked to complete a post-mediation questionnaire, measuring their level of satisfaction with the process and the degree to which, if any, their perceptions had altered as a result of their participation in mediation.

Since questionnaires involved were very detailed, particularly the intake and outcome forms and resources and time were limited, a random sample of the clients was taken and examined by this researcher in place of an extensive review of the entire group. This sample included one hundred couples or two hundred individual clients, which allowed response measurement of both the overall group of clients and the relationship between couples. It also permitted an examination of the relationship between the gender of the client and their response to a number of interesting queries. Where clients were asked to answer questions in their own words or to expand on questions set out in the questionnaires, their replies are examined in detail and all of the questionnaires received by the Service are included. Although such responses are in no way representative in the statistical sense, they do give a flavour of the variety and strength of views held by the clients. They also expose weaknesses in the questionnaires by showing the ways in which questions were interpreted and misinterpreted by the clients and serve as a warning against any blinded reliance on the results where the questions may have been open to numerous meanings.

The importance of empirical study cannot be over-emphasised. Little is known in this jurisdiction about the demographic profile of the mediation clientele, their views and

[765] Information was also collected from several semi-structured interviews with Eileen Fitzgearld and Mary Lloyd of the Family Mediation Service.

feelings and their experiences of the mediation process. This examination allows comparison with studies in other jurisdictions. We can compare agreement rates or client satisfaction levels, for instance and the service can seek to develop in ways demanded by clients. It may be possible to conclude that certain types of mediation practice yield more productive results, in terms of rate of agreement or improvement in client relationships, than others.

It is unfortunate that it was not possible to compare this mediation group with clients who engaged in the court system in preference to mediation, but such an exercise is beyond the scope of this work. Thus, this chapter cannot answer the central question of whether court or mediated solutions are preferable; indeed it cannot even answer the question of whether clients fare better or worse financially under the respective methods of resolution. It seeks only to compare the results of mediation with the aims, aspirations and claims of mediation in a jurisdiction where little research has been conducted to date on this increasingly important dispute resolution industry.

Pre-Mediation Forms

Record

Pre-mediation forms were issued by the Family Mediation Centre from November 1997 and all clients of the service between this date and March 1999 completed forms. The cut off date of 22 March 1999 is arbitrary.[766] In all, 926 forms were completed and coupled.[767] However, there were some forms left out of this number. Fourteen forms were missing with no explanation for the absence and a further two forms were returned by the clients uncompleted. Thirteen couples had incorrect reference numbers on their forms and this made it difficult to find matching forms for these clients in the follow-up questionnaires, so a decision was made to exclude them entirely. The errors are mostly random and would not affect the representativeness of the sample. At any rate, the numbers involved are small and so for convenience these couples are excluded altogether. In all thirty-nine couples were excluded, or 8.4% of the total population from which the sample was drawn.

Results

[766] The collection date.

[767] 463 couples.

The pre-mediation forms sought to assess the nature of the couple's relationship with each other and with the children and the emotional state of each client on entering the process. It appears from the replies that 62.3% of the respondents had discussed details of the separation with their spouse, prior to attending their first mediation session with a further 3.7% having some limited discussions. Significantly, 34% reported that they had not discussed the separation and were about to embark on mediation with no prior communications about the matter with their partner.

When respondents were asked to describe the general level of communication within the marriage at that time, their replies varied, with significantly higher numbers giving negative responses. 30.5% suggested that the level of communication was very poor with an additional 26.5% describing their communication as poor. 24% gave an answer which placed their level of communication in the middle of the scale but only 15% described communication as good and a mere 4% thought that their communication levels were very good.

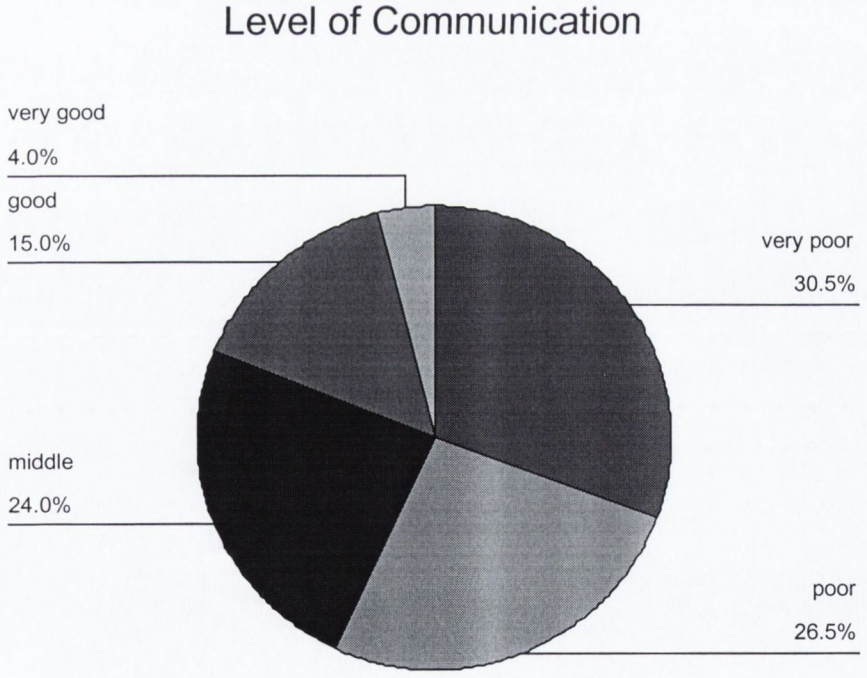

Figure 4.1 Level of communication

The questionnaire asked clients to describe the level of conflict with their partner. The results were similar although slightly less pessimistic than the communication evidence

suggested. The largest number of clients[768] described their relationship as conflictual or very conflictual, with 31.7% suggesting that their relationship was in the middle of the conflict scale. 19.1% stated that they had little conflict and only 11.6% suggested that their relationship was characterised by very little conflict.

Figure 4.2 Level of conflict

On the other hand parents, by and large, thought that they were coping well with the emotional needs of their children. 24.6% stated that they were coping very well, 27.7% were coping well and 28.8% thought that they were in the centre of the scale between coping very poorly and very well. 18.9% in total admitted that they were coping either poorly or very poorly with the emotional needs of their children at the time of entry into the mediation process.

[768] 37.7%

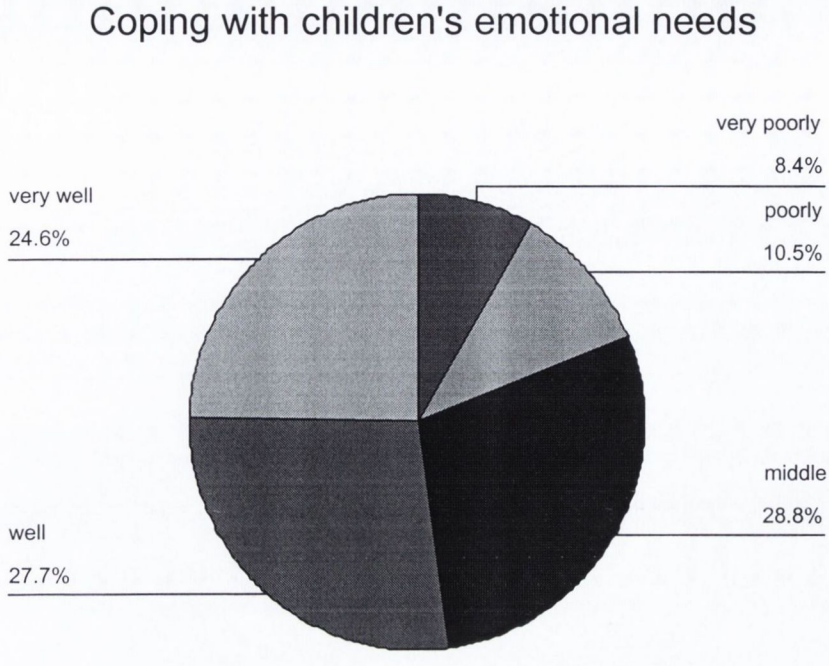

Figure 4.3 Coping with children's emotional needs

The joint parenting approach of the couples was inclined to be co-operative, according to the reports of the clients. 25.4% characterised their approach as very co-operative and an additional 19.2% said that they adopted a co-operative approach. The largest number of clients (31.6%) thought that their approach was in the middle of the scale. Only 13% of clients suggested that their joint parenting approach was very uncooperative, with a further 10.9% admitting that it could be classified as simply uncooperative.

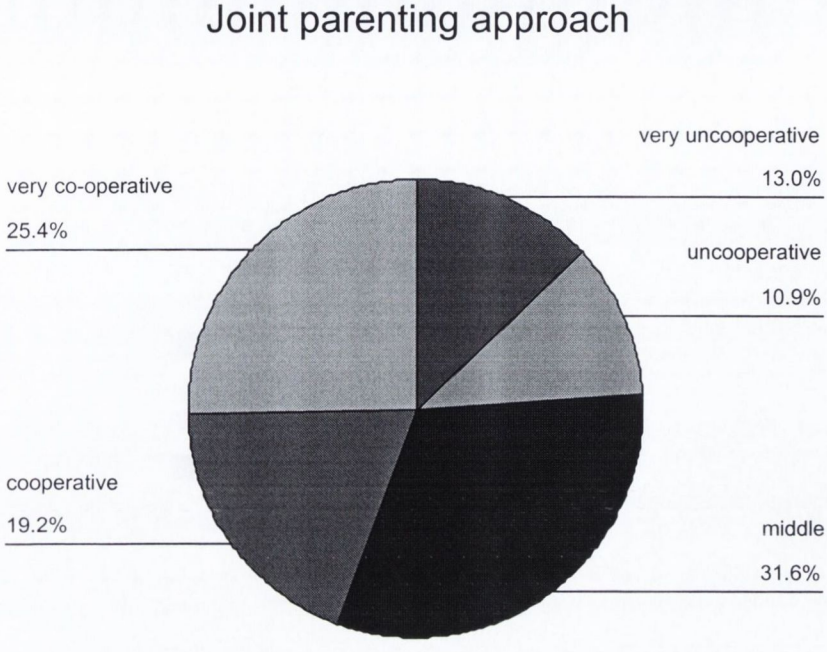

Figure 4.4 Joint parenting approach

The majority of clients reported that their children were not involved in the conflict,[769] but a significant minority of clients thought that they were embroiled in their parent's relationship difficulties (37.4%). The remainder of the sample (.5%) did not know whether or not their children had been caught up in their dispute.
This query appears to have created a great deal of confusion, which is evident from the answers given to the open-ended section of the question.

Clients were asked what feelings they were experiencing strongly at that time. Clients tended to give a variety of responses, with 32% suggesting that they were distressed, 40% experiencing anger, 29.5% suffering from fear and 43% from loneliness. 24% were depressed and 26% were confused, 26.5% suggested that they were feeling resentment and 19.5% reported a sense of disbelief. Interestingly, the only emotion felt by a majority of clients was sadness, with 63.5% of clients agreeing that they were sad. Some clients had positive feelings, with 28.5% reporting a sense of relief and 22% feeling hopeful.

[769] 62.1%.

Open-ended Questions in the Pre-Mediation Form

Involvement of Children in the Conflict

Clients were asked whether or not they thought that their children had become involved in the parental conflict and if so, to specify the nature of the involvement. Unfortunately, it appears from the responses that clients interpreted this question in a variety of ways. Although most clients (59%) suggested that the children were not embroiled in the conflict, clients who agreed that they had become involved demonstrated by their answers that they believed the children to be aware of or affected by the conflict rather than actually involved in it. It was not uncommon for clients to agree that the children were involved in their conflict but nevertheless fail to specify how this involvement manifested itself.

This was the only question on the pre-mediation form that enabled the client to elucidate views in their own words and it adds a certain richness to the interpretation, which is difficult to reproduce in statistics derived from set responses. In this analysis, I went outside of the selected sample and examined every pre-mediation form submitted to the centre, including those forms deemed unsuitable for inclusion in the sample selection because of computer error or failure of a partner to complete the form. While it appears that only a very small minority of cases could be deemed to illustrate the actual involvement of children in marital disharmony, the responses are interesting in that they reflect a parental assessment of the impact of separation on their children.

Certain clients saw the question as an attempt to ascertain the level of the children's awareness of the difficulties. Mothers suggested that they "may have sensed something but it isn't in the open yet" and the children were "asking questions about the separation", or "they know that there is something going on and it is not a happy situation". Clients stated that the children had been kept informed by them; one father stated that his wife had told the children of the separation, another that they were "aware of the differences, but not caught in the middle". His ex-partner gave a similar analysis. Children were said to be "watching and listening", had picked up on a lack of intimacy and communication, on the presence of tension, or had become aware that "things were not right". A father thought that it was "very difficult for the kids not to be aware, this very awareness involves them".

More commonly, however, parents described the effect of parental conflict on the children of the relationship. They felt that the continuing arguments or angry outbursts were taking their toll on the children, who were described as very emotional, misbehaving, angry or disobedient and very commonly, parents reported that their children were confused. Some were in denial, others felt guilty. The atmosphere in the home had been adversely affected by the relationship problems and this had an impact on the children. They appeared to be concerned about their future, had difficulties in expressing their feelings, were worried and suffered from insecurity or loss of confidence. One mother suggested that schoolwork had suffered, another that a child was developing behavioural problems and a third child had speech difficulties. It was also common for parents to report that a child was missing the absent parent; one father suggested that the child was "missing the parent not living at home" and the mother agreed, another said that they "cry a lot, don't understand why mammy has left". Children felt an impact on their lives because they were "living out of their own home" or had to "adjust to a one parent situation". Parents sometimes appeared to be surprised at the question and could not see how the children would fail to be affected, as "they are part of both of us and must be involved" and they are "bound to be affected in some way". It is possibly the case that all of these parents confused the notion of child involvement with the effect of the conflict on the child. One mother put it well when she said, "they were not so much involved as suffering from the consequences of it". Several clients answered that the children were not involved but clarified this with their belief that the divide had impacted on them.

Respondents also used the opportunity to highlight what they considered to be undesirable, inappropriate or undermining behaviour on the part of their ex-partner. A divergence in the perspectives of the parents was common and is mostly clearly illustrated here. In one case, the mother maintained that the "children had been manoeuvred into belligerence" against her, while the father stated that they had become isolated from their mother due to "her lack of emotional and material support". Clients accused former partners, for instance, of lying to the children, of using them as bait, of speaking about the other parent in a negative way and of threatening to take the children away in order to force the other party to remain in the relationship. One woman suggested that her ex-partner, without much thought for his feelings, had used the child as a pawn. A father thought that his wife's drinking and attitude to her son had caused the child's involvement in the conflict. One respondent thought that it was difficult for his children to live with the "embarrassment of what my wife had done"; another complained that he had no "real say in what they do". A mother accused the father of using less access time in order that she might "feel the pressure of being with the children all the time" and a father suggested that his wife's dedication to the children was

"over the top and contributing to the decision to separate". One parent expressed concern at being left alone to cope with the mixed feelings of her child, as best she could. Curiously, one client used the opportunity to highlight the behaviour of the child. He thought that his daughter had little respect for him and his new partner, was always comparing their actions with her mother's and finding them wanting.

A small number of respondents thought that the question related to the actual content of the disagreements and revealed in their answers that children were commonly the subjects of dispute. One client reported that the conflict had been largely caused by different views on the children's place in the marriage, although the mother suggested that they were not involved. Clients submitted that they had different attitudes towards upbringing and no joint agreement on the handling of problems. One put the situation clearly when she suggested that the "child does not contribute to the conflict, but we argue about him". A couple appeared to have disagreements on the disciplining of a young child, although the father in that case suggested that the child was too young to understand and by implication, to be involved. One father stated that the children "get upset when I try to take them with me", another noted tension between himself and the children's mother when dealing with the children.

The variety of interpretation leaves an undesirable level of confusion and uncertainty attaching to the meaning of the responses. It seems that very few children were actually involved in the parental conflict, according to the report of parents. The most common suggestion was that children were acting as peacemakers, they were "anxious about both and trying to please all sides", "they try to be impartial and feel conscious about being disloyal to either", "try to help", "try to keep the peace", "try to sort things out so we [the parents] would remain friends", "try to be equally nice to both of us" or show "concern that we [the parents] respect each others rights and future security". More worryingly, respondents noted that children had taken sides in the dispute, or had become "caught in the crossfire". In certain cases, a parent mentioned that an older child had become involved in the discussions; one mother stated that this had not helped the situation. One woman mentioned that her children had witnessed the violent behaviour of her husband. Phrases such as "tug of war" and "torn between parents" were used in the responses, as parents recognised that their children were getting caught in the middle. Clients often expressed the view that the other party had involved the children in order to "get his own way". Children could also intervene of their own accord in order to end a dispute and "stop fight talking".

It also appears that children, particularly older children, had sometimes rejected one parent and some of the respondents were of the opinion that this constituted involvement on the part of the child. In several cases, the rejection was placed at the door of the other parent. A man suggested that his children tended "to take one side, their mother's". The children's mother thought that the reason for this was their anger at his neglect of them and abuse of her. In one case, the father stated that he had no communication with his twenty-one year old son and limited communication with an eighteen-year old daughter. Interestingly, the mother also mentioned the animosity of the children towards their father and the fact that he blamed this situation on her. A mother reported that an adult son was distancing himself from her and another son was showing anger towards his father. One woman thought that her daughter "had a wonderful relationship with her father and lost it" and the father agreed that the "daughter does not like me anymore". A father mentioned that his daughter was not talking to her mother; another father stated that he had been totally rejected by his daughter but his son "seemed ok".

It should be noted, on a more hopeful note, that parents sometimes thought that their children were recovering well. One suggested that since her husband had moved out the arguments had ceased and the children were no longer involved. Another thought that the sixteen-year old understood that things had been worse and a third stated that the children were coping. It seems that many children were trying to remain neutral.

Gender and the Pre-Mediation Questionnaires

When cross-tabulations of gender and the pre-mediation variables were conducted, it was possible to compare and contrast the views of women with the views of men in the random sample. While this revealed that women were more likely to feel that the level of communication with their partner was very poor or men were more likely to suggest that there was little conflict in the relationship, when tested very few of these differences were statistically significant. In fact, the only differences that registered in this sense was a higher level of distress amongst the women.[770] Thus, while more men claimed to feel loneliness, confusion, sadness and slightly more were experiencing depression and more women experienced the other emotions listed, it is clearly the case that the gender differences which appeared in the responses were not reliable indicators of real gender differences in experience or perception.

[770] Chi Square value of .006.

In addition to the gender cross-tabulations, the results of the pre-mediation questionnaires were divided in order to ascertain the levels of agreement and disagreement between couples in the random sample. In response to the query of whether or not the clients had discussed details of their separation with their partner, there was an agreement rate of 48% between couples on a positive response. A further 21% agreed on a negative response and 16% of couples disagreed with each other.

Only half of the couples agreed on the level of communication between them, with a majority of those opting to describe their communication in negative terms. While the reminder of couples disagreed, they did not take diametrically opposed positions; for instance 14% differed only in the description of the relationship as poor or very poor. Only 1% differed to the extent that one partner suggested that the relationship was very good while the other perceived communication levels to be very poor.

43% of couples agreed on a description of the level of conflict in their relationship; most commonly[771] they suggested that the level was mid-way between a very conflictual relationship and a relationship characterised by very little conflict. The most common disagreement, at 9%, was a female description of middle conflict coupled with a male claiming that there was little conflict. Generally, disagreement was spread out widely over the possible options with, for instance, 18% of couples varying in their description between insistence on the presence of conflict and the assertion that there was little conflict in the relationship, but the remainder giving answers close to their spouse's analysis.

Couples had been asked how they were coping with the emotional needs of their children. Only 34% of couples agreed exactly on their record in dealing with their children's requirements, although the majority of those couples agreed a positive response to the question. It would seem that, although couples were unlikely to give the same answer, the majority gave answers that were, in substance, very alike. Only 14% of couples gave answers that conflicted to the extent that one was suggesting that they were coping either well or very well while the partner reported poor or very poor coping skills.

Similarly, when couples were asked to describe their joint parenting approach, a minority managed to reach an exact agreement (34%), with a small majority of these taking a positive view. Only 9% disagreed to the extent that one person viewed the relationship as uncooperative or very uncooperative while the other took a positive view.

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[771] 18% of couples.

Parents were asked whether they considered that their children had become involved in their conflict. A higher rate of an agreement (53%) was discernible in reply to this query, with the majority[772] giving a negative response. There was a slightly higher tendency for women to say that the children were involved where men said that they were not than the other way around.[773]

When the emotional responses to the breakdown of the marriage are examined, similar rates of agreement are discernible. For instance, 48% of couples agreed a response to the question of whether or not they were experiencing anger strongly at the time, with a majority answering the query in the negative.[774] The most common coupling of a disagreeing couple was a male who was angry with a female who was not.[775] Similarly, over 60% agreed a response to the question concerning the presence of fear in their lives, with a vast majority answering in the negative. The bulk of the disagreeing couples involved a female experiencing fear with a male who did not experience the emotion. 50% of couples agreed a reaction to the presence or absence of loneliness, 18% agreed its presence, while 32% agreed its absence. A small majority of the disagreeing couples were represented by a man who was suffering from loneliness and a woman who was not experiencing this emotion.[776] 54% of couples agreed a reaction to the experience of distress, with a large majority claiming that the emotion was absent in their lives.[777] Of those who disagreed with each other, most involved a female who agreed that there was distress in her life and a male who disagreed.[778]

The positive emotions registered slightly higher rates of agreement, but generally clients reported their absence. 61% of couples agreed that they did not feel hope, with only 5% agreeing that the emotion was present was in their lives. 65% of couples agreed on the query regarding their experience of relief, with 54% claiming its absence.[779] In the disagreeing couples women were, again, more likely to feel hope and relief.[780]

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[772] 38% of couples.

[773] 22% as opposed to 17% of clients.

[774] 34% of couples compared with 14% of couples who agreed a positive response.

[775] 31% compared with 21% of angry females coupled with males who were not angry.

[776] 28% as opposed to 22% in the opposite direction.

[777] 45% of couples as opposed to 9% of couples that agreed distress was present.

[778] 32% as opposed to 14% of couples.

[779] In 11% of cases both parties were experiencing the emotion.

[780] 20% as opposed to 15% of males coupled with females who did not experience the positive emotions.

68% agreed on the subject of depression, 60% of couples involved two people who said that they were not the clutches of this emotion. Men and women were equally likely to experience this emotion with a partner who did not. The same percentage of couples agreed on the subject of confusion, with 58% nominating a negative response. Of those who disagreed, a small majority were women who did not experience the feeling married to men who expressed confusion.

63% of couples agreed on the question of resentment, again the clear majority agreeing that they did not feel resentment.[781] Only 8% of couples involved two people with this emotional response. The majority of the disagreeing couples involved a woman who felt resentment and a man who did not. 59% of couples agreed on the issue of sadness; interestingly a very high figure of 43% of couples involved two partners who were feeling sad with only 16% agreeing that neither of them felt this way. Of those who disagreed, most were women who did not feel sadness with men who did, rather than the other way around.[782] 67% of couples agreed on their feelings of disbelief, the vast majority of those gave a negative response.[783] Of those who disagreed, the majority were couples where the women had feelings of disbelief and the men did not.[784]

While more than half of the couples agreed on the emotional responses to the breakdown of the marriage and its aftermath, it was generally the case that couples failed to reach a high level of agreement on their responses to the pre-mediation questionnaire. Outside of the emotional response measures, less than half of the sample managed to agree a response. This fact leads to a more pessimistic conclusion than is warranted, however, because the responses of couples tended to cluster close to each-other; it was rarely the case that couples would view the situation in diametrically opposed ways.

Intake Questionnaires

Record

Intake and outcome forms for 78 couples were retrieved from the sample (156 clients or 78% of the sample). Twenty two couples were not included in the analysis because the Service was unable to locate their questionnaires. It would appear that most of those clients

[781] 23% as opposed to 14% who agreed that they felt resentment.

[782] 25% as opposed to 16% of couples.

[783] 64% of couples.

[784] 21% as opposed to 12%.

were still in the mediation process and had active files without completed outcome questionnaires. It seems that, in addition, mediators were inconsistent in their approach to the completion of the paperwork; in certain cases detailed and appropriate answers were received for each question, while in others the mediator neglected to address the questionnaire almost completely. For this reason, the results are worked out on the basis of the questions actually answered rather than on the number of people in the sample and this must be borne in mind when examining the results. It became apparent that the mediators were not conscientious in seeking responses to certain questions and this in itself is interesting, in that it reflects their concerns.

Demographic Characteristics of Mediation Clients

Research was conduced into the clients of the Service during the first three years of its operation as a pilot scheme.[785] This work concluded that the most numerous age group for men was 36-40 and for women was 31-35 years, with almost half of the clients aged 35 or under. The current research would suggest that the most numerous age group for women was 41-45[786]and for men 36-40.[787] Over half of the clients are under forty, with the bulk of them between the ages of 36 and 45.[788] Thus, while the profile of the clientele remains relatively youthful, the Service may be attracting an older group than in the past. 13% of clients were in their late forties,[789] with 8% in their early fifties. In contrast, 15% were between the ages of 26 and 30,[790] which would lead to the conclusion that the Centre was facilitating the ending of as many long-standing marriages as early breakdowns. However, it is also possible that the small numbers involved in the present study can explain the difference between these results and the earlier research, although ages were recorded for 133 clients from the sample.

Mediators completed questions on the length of marriages, which would support the initial theory. Only 8% of couples had been married for two years or less, 10% for three to five years, while almost one quarter of the sample had been married for between six and ten

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[785] See Maire Nic Giolla Phadraig "Marital separation in Ireland-situating the results of research on the first three years of operation of the Family Mediation Service" in Gabriel Kiely: In and Out of Marriage: Irish and European Experiences (Family Studies Centre, UCD, 1992).

[786] 24%.

[787] 25%.

[788] 43.6% of the clients were in this age group

[789] 9% of women and 18% of men.

[790] 20% of females and 10% of males.

years. This was the largest single group, closely followed by those married for eleven to fifteen years.[791] Over one third of the clients had been married for over sixteen years; in fact 13% were married for over twenty-five years. Thus, it was apparent that the Centre dealt mainly with marriages that had survived for several years.

All of the couples surveyed were married to each other and only two female clients had been married before. Generally the couple had decided to separate, only one couple had actually decided against it and one was undecided. In addition, five females and ten males stated that they had not decided to separate but their spouses responded that they preferred that option. There appears to have been some confusion arising from the question "are you cohabiting?". Originally, it was envisaged that this question would relate only to the unmarried but it was often answered by married couples. When the couples were asked whether they were living together at the time of the intake session, they generally answered negatively. Thus, even at this early stage many couples had already physically separated. However, in 20 cases (or one quarter of the sample) the mediator recorded that the couple were still living under the same roof.[792]

The vast majority of clients were Irish, with only three couples comprising of two foreign nationals.[793] Three British females, one Dutch female, a Canadian and an Italian male also attended. In fact, the service did not deal with a single person outside of the Western world.

The question concerning religious affiliation was commonly left unanswered by the mediators but of the couples that were asked, 76.9% of males and females were Roman Catholic. The questionnaire specifically noted that a further 10% were non-practising Catholic, 2.5% were Church of Ireland or Church of England, 2.5% of females were described as 'other Christian', 5% of females and 2.5% of males had no religion and 7.6% of males were of unknown religion.

The original research concluded that over half of the husbands were in one of the three highest social classes and 17% were unemployed, which was almost half the rate for separated men in the census. The women were more likely to be employed than the Labour Force Survey would suggest was typical for separated women, with 45% either employed, self-employed or assisting relatives.[794]

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[791] 20% of couples.

[792] See p 214 below.

[793] There was one Irish Canadian couple, one British couple and one Finnish woman with an Italian husband.

[794] See Maire Nic Ghiolla Phadraig, *op cit*, p 12.

Again, the present research suffers from the enormous drawback of incomplete questionnaires, but it does suggest that mediation clients continue to be more affluent than the general population of separating couples. 10.2% of the sample was classified as higher professional, with a further 32% in the lower professions. 19.5% could be labelled non-manual intermediary workers and a minority[795] were engaged in manual labour of any kind and the majority of those were in skilled employment.[796]

Cross-tabulations of males and females were conducted on this data in order to discern any appreciable differences between the sexes in terms of their social class background. 47.4% of men were in the top three social classes, 42% were engaged in professional work and only 16.7% could be described as semi/unskilled manual workers. The women also fare well with 54% in the top three categories, 27% in professional employment and only 11.5% classed as semi/unskilled manual workers. However, while the breakdown is similar, a social class was described for fewer women than men; only 57 women compared with 71 men were categorised on these lines in the intake forms.[797] Men were more likely to be described as higher professionals, with 14.1% of men as compared with 2.6% of women falling under this heading. When gender and social class were cross tabulated and a chi-square produced it appeared that there was a statistically significant relationship between the variables.[798]

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[795] 38.3%.

[796] 21.1%.

[797] Thus, the question was not answered for 26.9% of women but only 9% of men.

[798] The significance of the Chi-square was .000 and there were no cells with an expected count of less than five, indicating a reliable result.

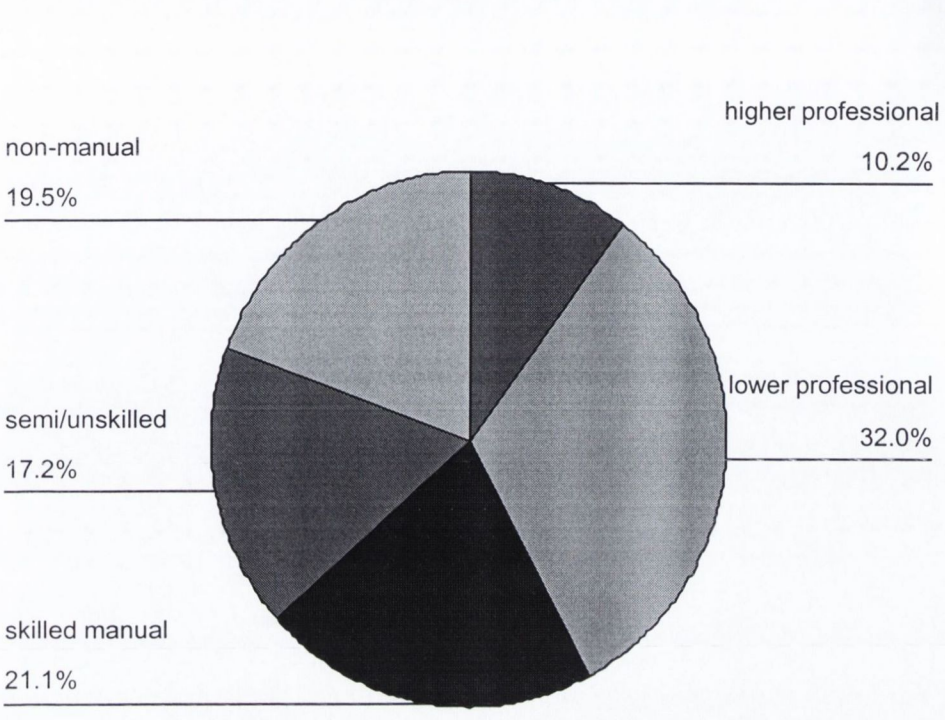

Figure 4.5 Social class

In general, it became clear that the clients entering mediation were gainfully employed in some capacity, with 80.6% in the labour market and a further 12.9% working in the home. Only 5% of the sample were unemployed. A gender cross-tabulation was conducted and curiously the employment status of women was as likely to be recorded as the status of men; this question was answered in the case of 70 males and 69 females. The research shows that only 5.1% of males and 3.8% of females could be described as short or long-term unemployed. The figure for women is beguilingly low, since 23.1% of women were described as housewives and there is no record of any husband working in the home. 57.7% of males were described as employed, with 53.8% of females falling into this category. Significantly, 26.9% of males were self-employed with only 5% of females so described. There was only one male in retirement, this is probably an effect of the youthful profile of the clientele, two females were studying (2%) and surprisingly, only one female was registered as on a career break. Men and women were almost equally likely to have this question ignored by the mediator, answers were omitted for 11% of women and 10% of men.

The chi-square test also registered a significant relationship between the gender of the client and their employment status.[799]

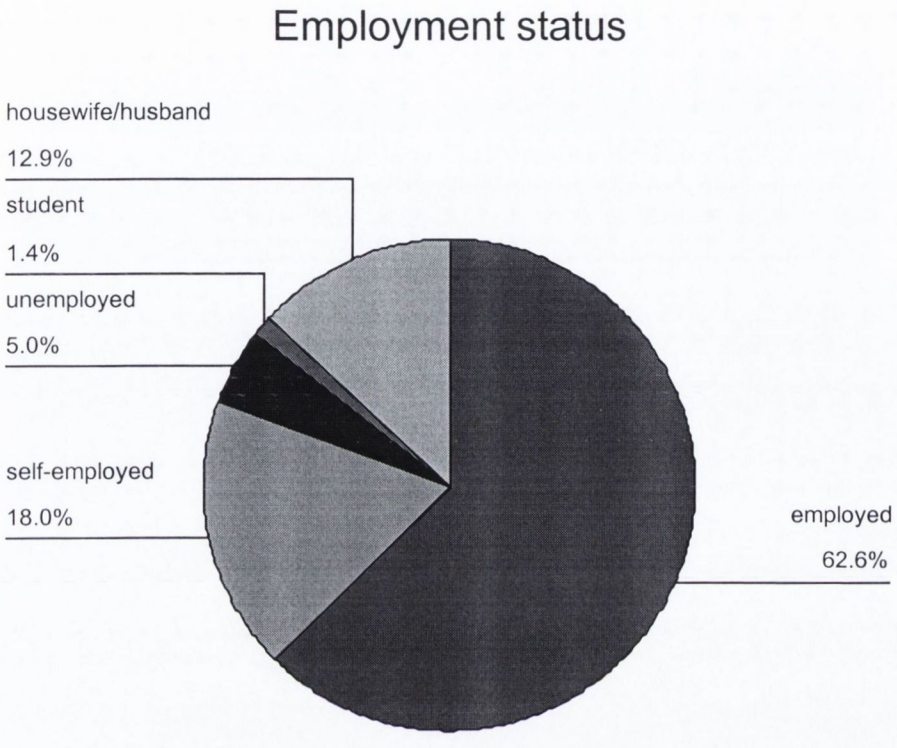

Figure 4.6 Employment status

The intake forms seemed to indicate that a large number of clients were subsisting on relatively low incomes, with 18.5% earning less than £5,000 and a further 10.9% failing to register any income whatsoever. The largest single group of clients earned between £10,000 and £15,000,[800] although 23.8% were earning more than £25,000 a year.

[799] The chi-square was .000.

[800] 20.7%.

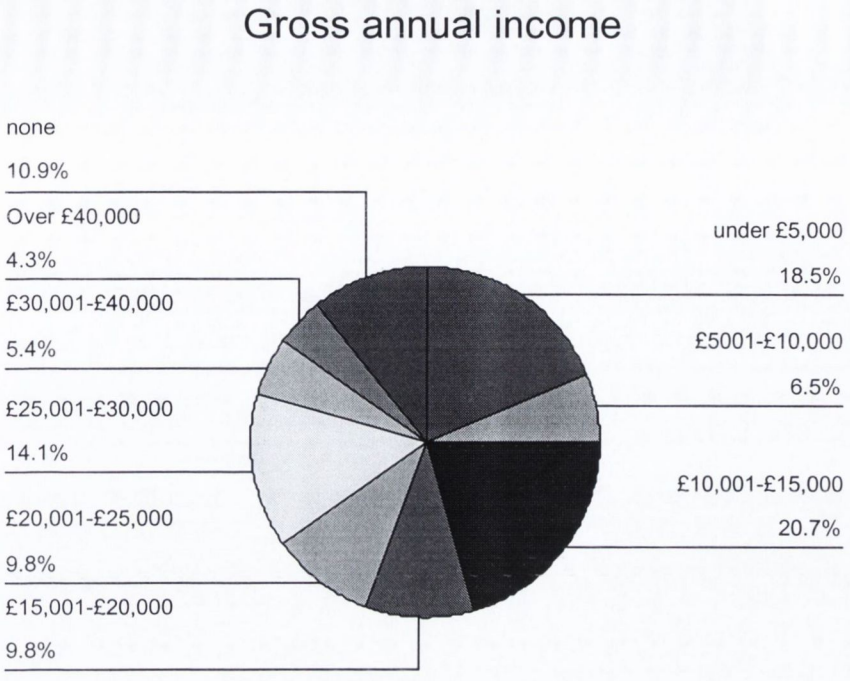

Figure 4.7 Gross annual income

However, when gender cross-tabulations were conducted, it appeared that income levels were depressed by the inclusion of women. Although the question was more likely to be answered for males than females,[801] when the comparisons are drawn it becomes clear that females are disadvantaged in terms of their earning power even where answers are supplied on their behalf.[802] Only 3.8% of men but 18% of women were earning £5,000 a year or less. Similarly 2.6% of men and 5.1% of women were earning between £6,000 and £10,000 per annum. The trend is also visible in the middle income brackets, 12.8% of men and 11.5% of women earn between £11,000 and £15,000 with the percentage of men to women rising as we move into the higher incomes. 8% of men and 4% of women earn between £16,000 and £20,000, 10% of men and 1% of women earn between £21,000 and £25,000, 11.5% of men and 5% of women earn between £26,000 and £30,000. In the over £30,000 range of income 5% of men and 1% of women could be found, with only men earning more than forty thousand a year (5%). Women were more likely to have no income at all with 10% of women and 2% of men falling under this heading. Women made up 80% of those clients who had no income at all and 82.4% of those earning less than £5,000 a year. Men, on the other hand, comprised 80% of those earning between £30,000 and £40,000 per annum and

[801] The question was answered for 36 females and 46 males.

[802] A higher proportion of women in part-time employment might explain the discrepancy in income, but the mediators did not determine whether clients were employed on a full time or part time basis.

100% of those receiving more than £40,000 in gross income. The statistical test conducted indicated that there was a significant relationship between the level of income and the gender of a client.[803]

Early research suggested that clients had a higher than average level of education with 27% of men and 18.1% of women attending third level institutions. The research found that 17.6% of men and 19.9% of women had completed their education at primary school.[804] This trend is apparent in the present study. Over one quarter of mediation clients had attended third level institutions,[805] and a substantial majority of clients completed second level.[806] Only 7.8% had left school after primary level with a further 7.8% attending second level but failing to complete a leaving certificate.[807] Of the 51 couples where level of education was described by the mediators, there were only three couples where both parties had only received primary school education. A further three males and one primary educated female were married to partners with second level education. One primary educated woman was married to a man with third level education. There were thirty couples where both parties had second level education, representing half of the entire group and a further eight women with husbands who received third level education.

[803] Chi square value of .002.

[804] Maire Nic Ghiolla Phadraig *op cit*, p 11.

[805] 26.5%. Twelve couples had third level education, or 14% of women and 20.5% of men.

[806] An additional 57.8% of clients. When the length of the marriage is taken into account this would seem to be particularly high.

[807] 5% of men and women began but did not complete secondary education.

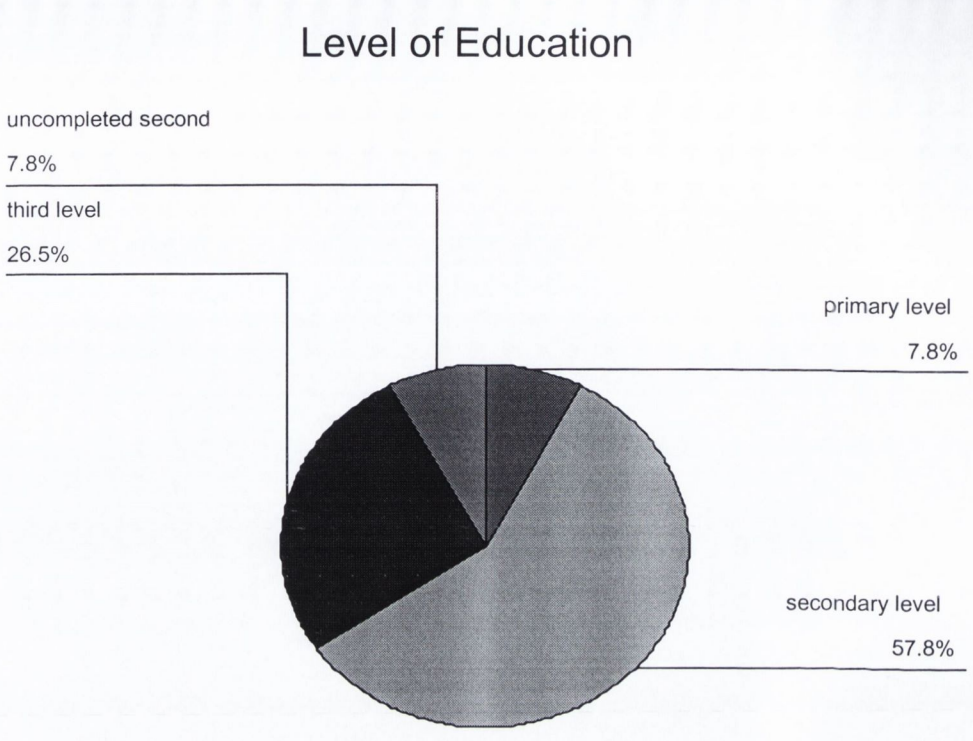

Figure 4.8 Level of education

This illustrates, not only the fact that mediation clients tend to be educated, but also the fact that couples tend to be educated to the same level. There was one couple where the woman had primary school education and the man had attended third level, but this couple could certainly to be regarded as outliers. The gap between women and men in terms of their level of education achieved still exists; men continue to receive tertiary training at a higher rate than women. However, the distance may be less in a younger client profile. In addition, the chi square test confirmed that the gap was not statistically significant.[808]

The original research suggested that 93% of couples had children with an average family size of 2.68 children, over half had either one or two children.[809] This is confirmed here; 73 couples had children while only two did not (2.6%). If anything, the service is becoming almost exclusively the preserve of the family with children. Two children remain the most common number (40%) and 62.8% of couples had either one or two children. 20% of couples had three children and 17.2% had four or more.

[808] Chi square value was .853.

[809] Maire Nic Ghiolla Phadraig, *op cit*, p 13.

The majority of the couples answering said that they had taken advice on their marriage,[810] with 37.5% stating that they had not sought assistance. In addition, several clients,[811] mainly women, sought help on their own without the support of their partner and one man also stated that he had taken advice alone. Three couples said that they were interested in working on the marriage and while thirteen males and six females also stated this desire; it is to be supposed that only cases where both parties had this intention were likely to be fruitful in this regard. This result is interesting in that it demonstrates that clients do not come to the Service with a misconception that marriage guidance counselling is offered. When couples come to mediation, they have already decided that the marriage is over.

Overwhelmingly, the clients who sought advice had approached relationship counsellors[812] with only one couple attending family therapy and one dealing with a psychologist. The women who sought assistance without their husbands also went to relationship or personal counsellors.

For 71% of couples this was the first attempt at separation, the remainder had tried before.

Reasons for the Marital Difficulties

It appears that the issue of the root cause of marital problems was one which concerned or interested the mediators as it was commonly answered on behalf of the clients, with replies recorded for 62 males and 70 females. This area was examined in earlier research and it appeared then that a communication gap was the most common response (over 25% gave this answer) with personality clash cited by one in five. Sexual problems were reported by one in ten and one in seven wives and one in twelve husbands blamed alcohol. A third party was the reason given by one in seven, with money problems accounting for one on twelve and different interests for one in ten.[813]

The present research is entirely supportive of these findings. 34.4% of clients suggested that a communication gap or difficulty was the sole causative factor in the breakdown of their relationship and it was commonly cited by both men and women. 24% of wives and 30% of husbands thought that this had been the major contributing factor. The personality clash

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[810] 43.7%.

[811] Eleven female clients sought outside assistance.

[812] 78.5%.

[813] Maire Nic Giolla Phadraig, *op cit*, p 13.

grounds was slightly less popular than it appears to have been in the past with only 9.6% of clients mentioning this, usually in conjunction with different interests.

Curiously, money problems did not seem to feature as a cause of strife in many marriages; only 5% of males and 2% of females considered that it was a contributory factor in the breakdown of their relationship. Again, it appears that sexual problems were infrequent or at least were not cited as a cause of the disharmony, they were mentioned by less than 3% of men and women. One couple suggested that physical illness had triggered the breakdown of their relationship and only one man and one woman suggested that unemployment had been a factor. One man and one woman thought that the birth of a child had precipitated the collapse of their relationship and pre-marital pregnancy was put forward by one male as causative of the problems. Three women and one man suggested that they had clashed with their partners on child rearing practices. Four women and one man thought that working conditions had contributed to their problems.

It would seem that the issues most commonly associated with marital difficulties did not feature to the extent that might have been expected. Thus, 15% of husbands and 14% of wives described the involvement of a third party as a fundamental cause of their separation. Only 9.8% of clients considered that this reason alone had been responsible for the undermining of their marriage, although almost as many considered that it was a causative factor in conjunction with the breakdown of communication within the relationship.

9% of women and 6% of men, which would seem to be a surprisingly low number, mentioned alcohol, drug abuse and violence. In fact, almost as many people suggested that mental illness had caused their problems with 5% of men and 4% of women locating their most fundamental difficulties in this area. A further 2.6% of women and men mentioned this problem along with other reasons for the breakdown of the relationship.

When the statistical test was conducted on the gender cross-tabulations it became clear that men and women did not give different reasons for the breakdown of the relationship to a statistically significant degree.

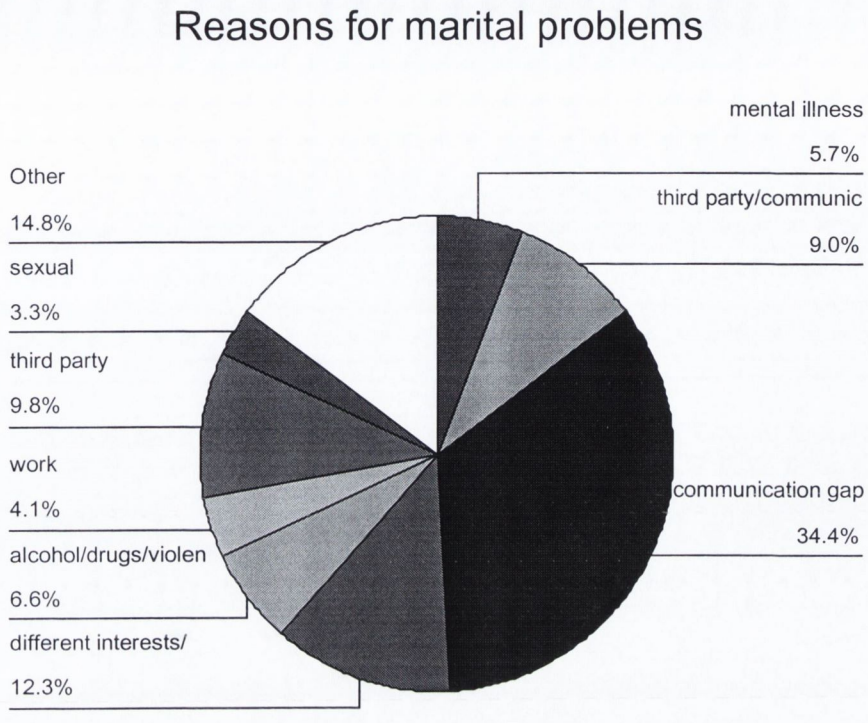

Figure 4.9 Reasons for marital problems

There were, however, a wide variety of other problems listed by the clients. Two men thought that interference from family members had been unhelpful; one woman suggested that the age difference between herself and her husband had caused problems for them. Two women thought that they spent too much time apart from their spouses, one because her husband worked away and the other because of his involvement with sport. One woman gave the jealousy of the husband as a reason.

It was unfortunate that violence was not listed as a causative factor in the breakdown of the marriage, but three women nevertheless cited it as the reason for the separation. One woman cited the sexual abuse of the children by her husband and two women described their husband's drug addiction as the root cause of their marital collapse.

Couples were asked when their problems first arose. Answers diverged widely. The early research found that marriage difficulties were identified as early as the first six months by one in six spouses but about ten percent were married for over 16 years when these problems first arose.[814] Here, the question was regularly ignored by the mediators; only 82

[814] *Ibid*, p 13.

clients were consulted on the matter, but it seems that it was relatively unusual for the problems to appear within the first six months of married life. Only 9% of couples discovered that they were in difficulty at this early stage. 14.6% of husbands and 14.6% of wives suggested that their problems arose within one or two years, with exactly the same number with problems arising within 3-5 years and 8-10 years. 17% of men and 19.5% of women thought that their problems had arisen after eleven years of marriage. The figures then retreat. 9.7% of men and women stated that their difficulties had arisen after sixteen years and only 4% claimed that they had arisen after twenty-five years of married life. Thus, the even spread makes it impossible to generalise, except to say that the largest number of couples found that their problems had arisen between eleven and fifteen years, but it is only slightly higher than any other single group. It is interesting to note the high degree of convergence between the male and female answers on this issue. Generally, couples agreed on the time of the first discovery of problems in the relationship.

Issues for Mediation

Research on the pilot project had argued that the largest single issue for mediation was the arrangements for children,[815] closely followed by the future of the family home and maintenance.[816] Just over half of the clients referred to the property and asset division and one third suggested that they would need assistance in reaching agreement on all of these issues.[817]

Mediators asked the couples to list the issues that they hoped could be addressed in mediation and the responses were along the lines of the previous research.[818] 26.4% of couples hoped to address all of the issues listed in the questionnaire, with an additional 27.3% interested in addressing all issues except property, which in many cases would not be applicable.[819]

Surprisingly, only 75.4% of couples wished to address the issue of children and 74% of couples required assistance in agreeing on the family home or maintenance. Only 29% of

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[815] 81.5% of husbands and 79% of wives cited this issue.

[816] 70% of couples described the former as significant and almost 75% of couples wanted to reach agreement on the latter.

[817] Maire Nic Ghiolla Phadraig, *op cit*, p 14.

[818] Statistics were calculated on the couples that had answered the question. Answers were not recorded for 19 men and 16 women.

[819] Since the property issue did not include the family home.

couples had an interest in discussing property and assets, aside from the family home. Men and women gave very similar answers in this section; when gender cross-tabulations were conducted, it became evident that the clients did not vary in their list of issues according to their gender to a statistically significant degree.

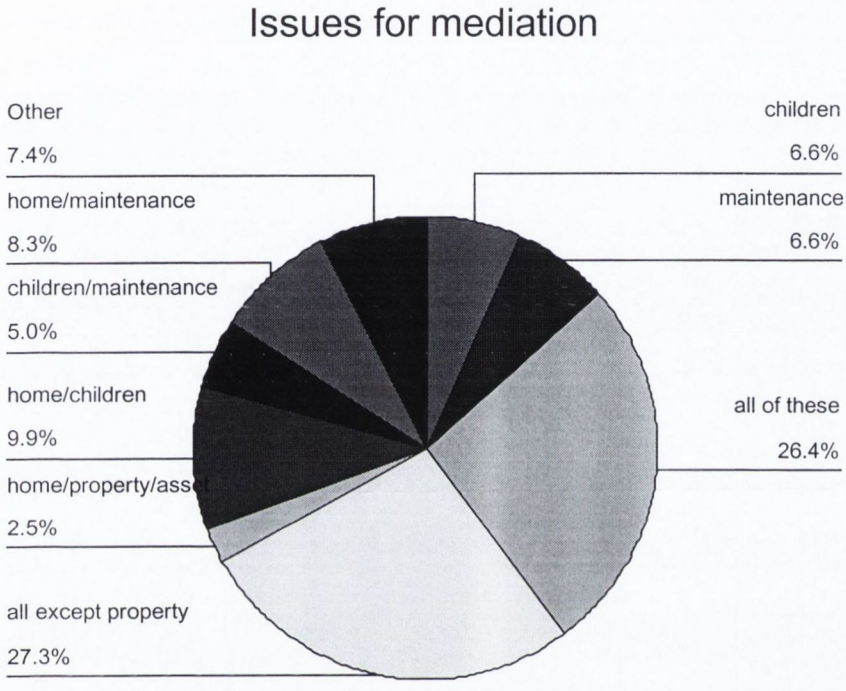

Figure 4.10 Issues for mediation

Living Arrangements

While the mediators appeared to have made a serious attempt to answer the questions concerning the couples' accommodation, this section caused a great deal of confusion. Generally, it would seem from the intake forms that couples were living apart by the time of survey and where they were still together, they were for the most part living in a jointly mortgaged family home. This question was answered for 70 couples, of which 35% were living together at the time of the intake form completion. 79% of those clients were living in jointly mortgaged property, with 16% owning their home outright and 4% renting privately.

While 65% of couples were living apart at the time of the questionnaire it appears that couples were usually living apart for a short time, generally under six months. Of those who answered the question, 40% of couples were living apart for this short time, 22% were apart

for between six months and one year, 25% were apart for one to three years and only 12.5% had been physically separated for more than three years.

8.5% of males and 61% of females not living with their partner, were living in the family home. Where the male was not living in the family home he was recorded as living in private rented accommodation in 29% of cases, with his parents in 10.6% cases, in a home mortgaged by both in 8% of cases and in a home mortgaged by himself in 6% of cases. This record only accounts for just over 60% of the men who are living apart from their spouses at the time that mediation was first entered into. The large lacuna in our knowledge concerning the whereabouts of the rest throws doubt on the reliability of these findings.

Where females were living outside the family home they were recorded as living with parents in 6.3% of cases and in rented accommodation in the same number of cases. This record, coupled with the figures on occupation of the family home, accounts for over seventy percent of the women who were not living with their spouses and is, as a result, a slightly better indication of residence than the information that can be gleaned concerning men. However, it becomes clear at this stage that these figures are incomplete and it is unwise to place any reliance on them, beyond their indication that women are more likely than men to remain in the family home after separation.

The value of the family home was given in 51 cases and the highest number of houses were in the £100,000-£150,000 region of value.[820] The next most common grouping, at 22%, was the £70,000-£100,000 range, with lower numbers at the top and bottom ends of the scale; only 4% had homes worth over £300,000 and 4% had homes worth less than £50,000. Indeed, most of the clients[821] lived in homes worth less than £150,000. It has to be remembered that the clients in this survey are drawn from the Dublin region and are likely to have experienced a considerable increase in the value of their homes, since the forms were completed.

[820] 28%.

[821] 62%.

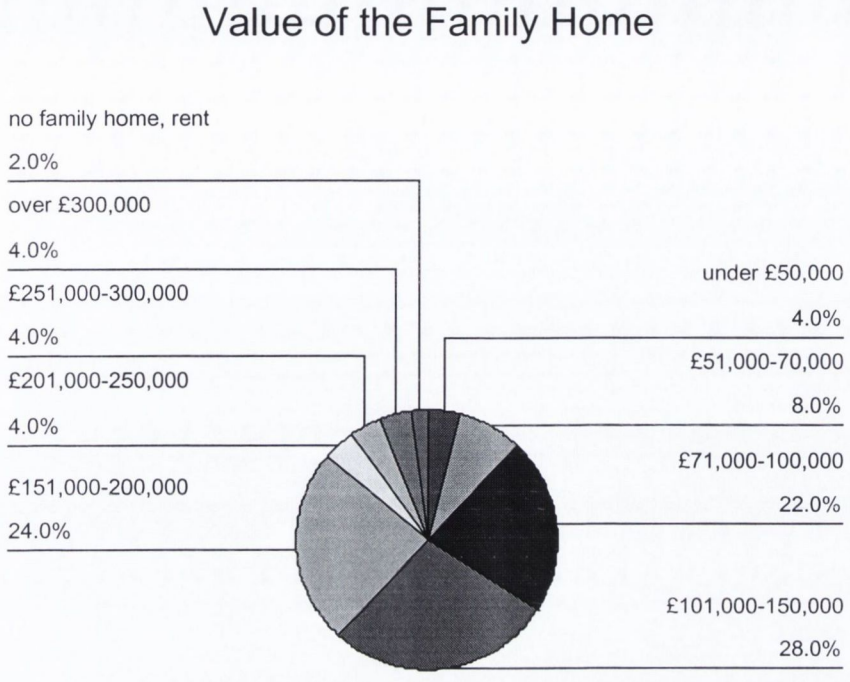

Figure 4.11 Value of the family home

Most commonly, the mortgage remaining was £21,000-£30,000,[822] closely followed by a mortgage of £11,000-£20,000.[823] There was only one case at the bottom end of the scale, with a £5,000 mortgage remaining on the family home and one case in each of the categories £81,000-£90,000 and £91,000-£100,000. Seven couples owned their houses jointly with no mortgage attaching to the property, representing about 13% of our population. Generally speaking, the homes of the clientele were valuable, with relatively small mortgages remaining.

Legal Representation and Court Orders

Mediators seemed to be interested in establishing whether or not the couple were legally represented or bound by court orders on entering the mediation process. These questions were answered on behalf of 72 client couples and it is perhaps somewhat surprising that the largest single category comprised of couples where neither sought or received legal advice or representation.[824] It would also appear from the questionnaires that women were more

[822] 24%.

[823] 22%.

[824] 35.2%.

likely to see a solicitor than men, with 18.3% of women and 7% of men seeking a solicitor without their partner. Only 7% of couples had gone to the same solicitor, where both parties had sought legal advice they would generally see separate advisors.[825]

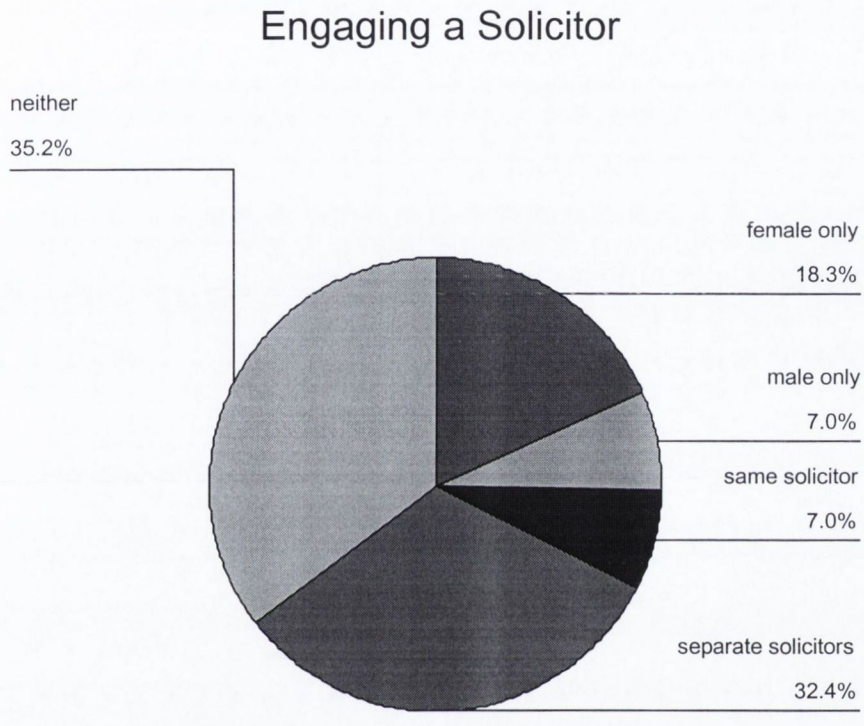

Figure 4.12 Engaging a solicitor

While a minority had attended court in the past in order to settle a matter in relation to their separation, the figure was by no means insignificant. 24% of couples had found themselves in court seeking a variety of orders. The largest single type granted by the court was a barring order, with 11% of clients coming to mediation having obtained this order. 5% had custody orders in place, 7% had maintenance granted by the court and 2% had sought access. There was one case relating to sexual abuse of children. It is interesting to see that there was no case of either nullity or legal separation.

[825] 32.4%.

Post-Mediation Questionnaires

Record

Only 128 of the post-mediation questionnaires mailed to clients were returned to the Service,[826] with an additional response returned uncompleted because only one session had been attended and another respondent unidentifiable by reason of a computer error. This represents only 13.8% of the service clientele for the relevant period. The post-mediation forms were matched with their pre-mediation counterparts and 15 forms could not be located;[827] it appears that five of these forms had been excluded from the original sample and there does not appear to be any explanation for the absence of the remaining eleven forms. This gave a collection of 113 pre and post-mediation matched forms that were usable in the research.

The Reliability of the Post Mediation Results

There is grave risk that the small number of self-selected clients who returned their post mediation forms differed in a fundamental way from the vast majority of participants who failed to do so. Specifically, there was a real fear that these clients were less conflictual and more open in their marital communication than the sample and would, as a result, be more likely to produce an agreement in mediation. This possibility was explored by comparing the results of the pre-mediation questionnaires of the sample with the results of the pre-mediation questionnaires of those who returned post mediation forms, in order to ascertain whether and in what ways the post mediation respondents differed from their sample counterparts.

There were more female respondents in the post mediation group than in the random sample, 54% of the former were women compared with 50% of the latter. The former group was more likely to have discussed the details of the separation with their partner.[828] However, when a cross tabulation and a chi square test were produced, it became clear that this difference was not statistically significant. The level of communication with their former partner was less likely to be described by the post mediation respondents as very

[826] There were 29 couples amongst the responses.

[827] 11.7%.

[828] 65.5% as compared with 59.5% of the sample.

poor,[829] but it was also less likely to be described as very good.[830] Again, the statistical tests showed that this was not a significant variation. Likewise, the post mediation group were less likely to perceive their relationship as very conflictual,[831] but the clients were also less likely to see their relationship as characterised by very little conflict.[832] The statistical tests questioned the significance of this variation.

The post mediation respondents were less inclined to report that they were coping very poorly with their children's emotional needs[833] yet were as likely to say that they were coping very well with those needs.[834] However, the random sample stated that their joint parenting approach was very co-operative in larger numbers than the post-mediation respondents[835] and the latter also had a slightly greater tendency towards the negative end of the scale on this issue.[836] Interestingly, the post mediation group were also more likely to suggest that the children were involved in the conflict.[837] It appears that this was the only statistically important difference registered, which suggests that the post mediation respondents had more problems in this area than the random sample clients.[838] The significance may not be as strong as it appears because 66.7% of cells had an expected count of less than five which makes this measure unreliable, or at least prompts caution in a conclusion that the groups differ. At any rate, it clearly undermines the suggestion that the post mediation respondents were involved in less problematic relationships at the start of mediation.

The two groups were equally likely to be experiencing distress and anger. The post mediation group were slightly more likely to be fearful[839] and sad[840]. The sample was more likely to feel loneliness,[841] depression,[842] confusion,[843] resentment[844] and disbelief.[845]

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[829] 26.5% as compared with 30.5% of the sample.

[830] .9% as compared with 4% of the random sample.

[831] 17.5% of the sample and 15% of the post mediation group.

[832] 11.5% of the random sample compared with 8% of the post mediation answers.

[833] 8% as compared with 4.4% of the sample.

[834] 23% in both cases.

[835] 24.5% compared with 16.8% of the post mediation respondents.

[836] 25.7% of the post-mediation group answered that their joint parenting approach was uncooperative or very uncooperative, while 23% of the random sample gave this verdict.

[837] 44.2% as compared with 35.5% of the random sample answered yes to this question.

[838] The significance of the Chi Square was .008, which suggests that the frequencies do not occur by random chance. The standard indicator of a significant result, alpha =. 05.

[839] 31.9% compared with 29.5% of the sample.

[840] 65.5% compared with 63.5%.

[841] 43% compared with 24.8% of the post mediation respondents.

Interestingly, the only difference of significance in the statistical sense was the level of loneliness in the random sample.[846] Given that the level of other negative emotions did not substantially vary between the two groups, this finding can be disregarded.

The positive emotions of hope and relief were evenly disbursed between the two groups, with the sample displaying a slightly higher incidence of hope[847] and the post mediation group more inclined to admit that they felt a sense of relief.[848] However, these variations did not register statistically, when chi-squares were produced.

The conclusion from this analysis is clearly that the post mediation questionnaire results are a reliable indication of the trends within the mediation service and of the thoughts and feelings of the clients who engaged in the mediation process. It would not appear that those who returned their post-mediation questionnaires to the service were different from the typical or randomly chosen mediation client, at least in so far as it is possible to judge from the pre-mediation questionnaires alone. At a minimum, it can be argued that their pre-mediation questionnaires did not display any significant variation from the norm.[849]

Results of the Post Mediation Survey

The largest group of clients answering the query on the effect of mediation suggested that it had worked for them (47.3%) with a substantial number commenting that it had been partially successful (25%). Only 27.7% of clients reported that the process had not worked for them.

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[842] 24% compared with 16.8%.

[843] 26% compared with 24.8%.

[844] 26% compared with 20.4%.

[845] 19.5% compared with 14.2%.

[846] The significance of the chi-square was .001.

[847] 22% compared with 20.4% of the post mediation group.

[848] 29.2% compared with 28.5% of the sample.

[849] While it is possible to say that those who replied were typical of clients entering mediation it is impossible to go beyond this to establish that they were necessarily typical in the outcome achieved. However, the fact that they resembled the general mass of clients on entry is a strong indication that they achieved a typical result.

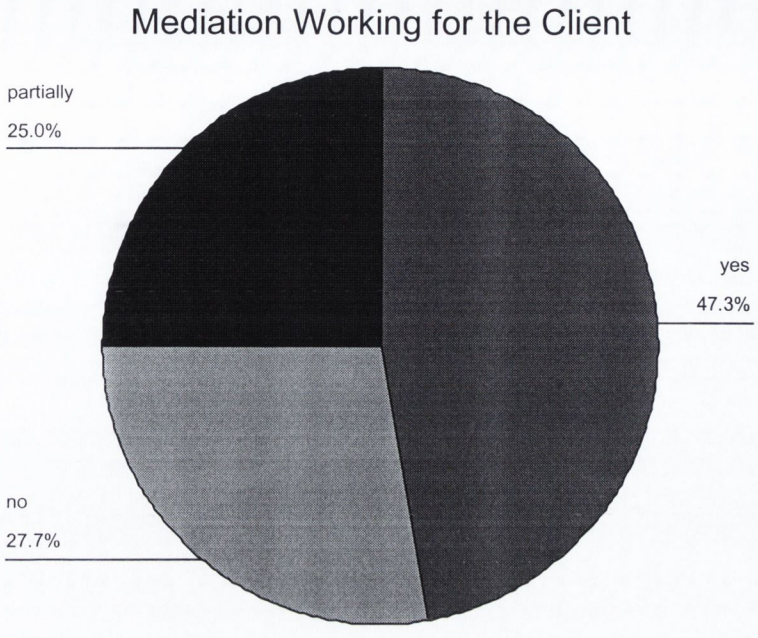

Figure 4.13 Mediation working for the client

However, clients did not generally feel that the process had helped to improve communication with their partner, with 51.3% giving a negative response to this query. A very substantial minority did agree that communication between them had improved.[850]

Most clients thought that mediation had helped to reduce conflict, with 58.6% of the sample agreeing that this had been a result of their participation in the process. Clients felt that mediation had also helped them to understand the needs of their children[851] and in fact, only 29.6% of clients gave a negative response to this query.[852] It should be noted, however, that 26.5% of clients reported that the question was not applicable to them, presumably because their children were grown or perhaps because they felt that they already had a good understanding of their children's needs.

The overwhelming majority of clients did not change their view of their partner as a result of the mediation experience.[853] Only 21.3% said that their view had changed and 8% of clients maintained that their view had altered in a negative way.

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[850] 47.8%.

[851] 70.4%.

[852] These figures do not include clients who did not answer the question or who suggested that the question did not apply to them.

[853] 77.9%.

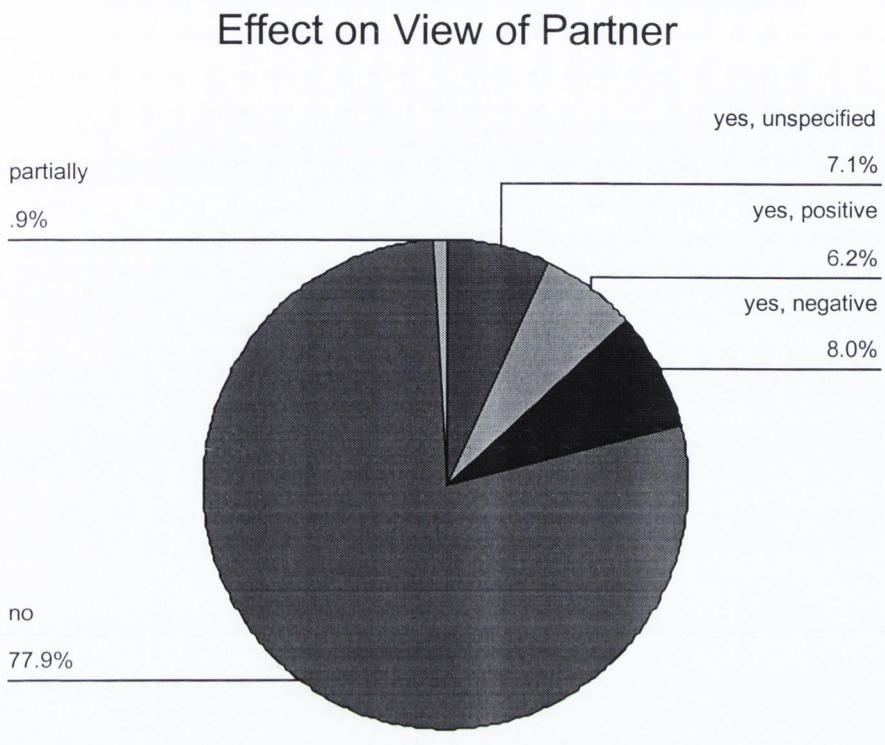

Figure 4.14 Effect on view of partner

A small majority of clients did not change their view of the future after mediation[854] although 18.9% did report an unspecified change and an additional 22.5% were of the view that a positive alteration had occurred. 5.4% formed a more negative expectation as a result of their participation.

[854] 53.2%.

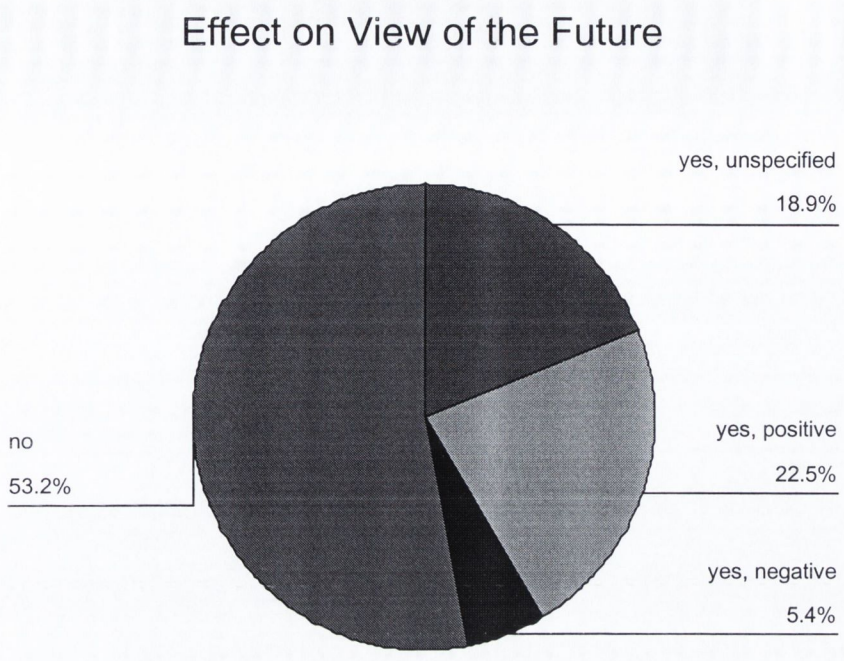

Figure 4.15 Effect on view of future

Most parents thought that they could discuss issues about the children with their former partner[855] with only17.2% stating that they could not. 11.6% of the clients did not think that the question applied to them.

However, parents were unlikely to alter their view of their parenting relationship, with 61.8% stating that their opinion had not changed. It should be noted that a further 11.8% suggested that their view had not altered because it had always been positive. 13.7% said that their view had altered but did not specify the direction of the change, 9.8% felt that they now had a more positive outlook on their relationship in this regard while 2% now thought that their view was more negative as a result of participation in mediation. 9.7% of clients asserted that the question did not apply to them.

[855] 82.8%.

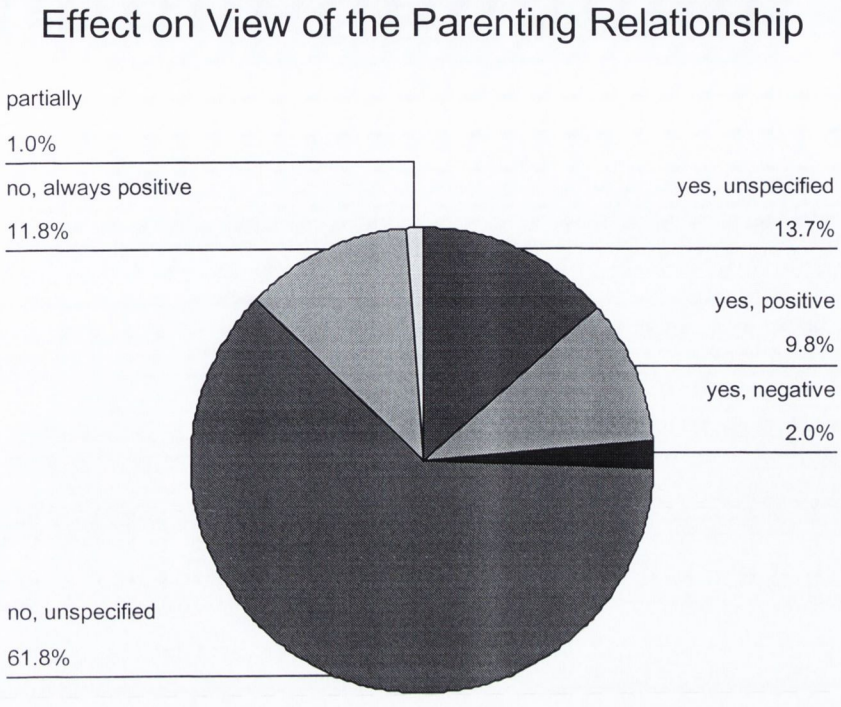

Figure 4.16 Effect on view of the parenting relationship

It was very unusual for the children to attend a family session at the Centre, according to the client reports.[856] In fact, 98% answered this question in the negative.[857]

Clients appeared to be waiting for very short periods before their first appointment; 57.1% waited for one month or less, 35.7% waited for one to three months and only 7.2% waited for more than three months. Only two clients waited over six months for an appointment and it appears that this couple cancelled previous appointments with the service, which explains the delay. 88.2% of the clients took the first appointment offered by the service with only 11.8% refusing this and rescheduling.

[856] See p 240 below where mediators reported that children attended in 6% of cases.

[857] It should be noted that 9.7% of clients thought that the question was not applicable.

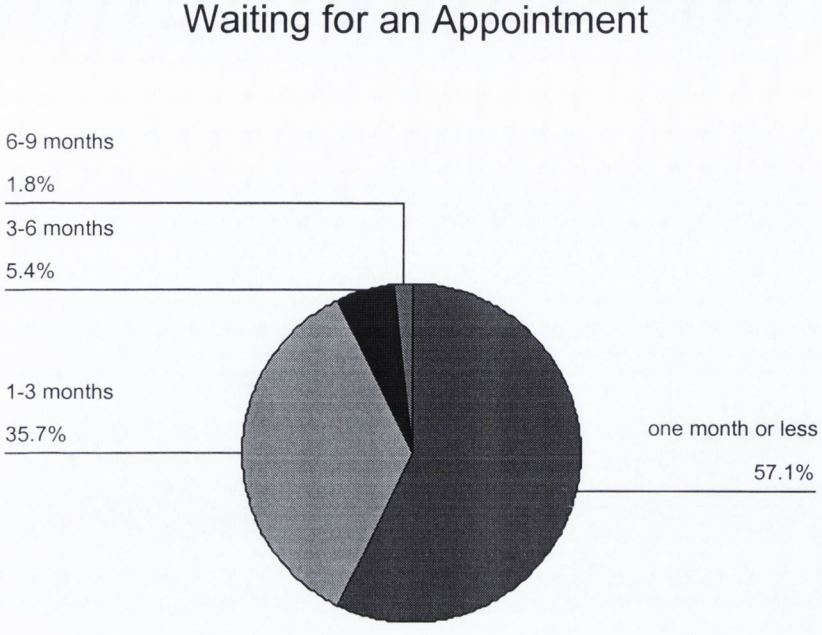

Figure 4.17 Waiting for an appointment

Post Mediation Questionnaires and the Agreement Reached

It is interesting to see that most clients professed to reach full agreement on all issues in mediation (60.2%). Of the 39.8% who failed to reach full agreement, 52.2% managed to reach agreement on some issues. Thus, almost 80% of the clients settled some of the problems that they brought to mediation.

The questionnaire asked clients who had only agreed on some issues to specify the issues on which they had reached agreement and the results of this query varied widely. It would appear that the parenting issue was more likely to be agreed, 25% agreed on parenting compared with 12.5% on the family home and 4% on financial arrangements. However, it is interesting to note the large number of issues which clients agreed on without reaching agreement on all issues, 16.6% agreed on all issues except finance, 12.5% agreed all issues except parenting and 8% agreed on all issues except the family home. 16.7% of clients managed to reach agreement on all of the issues listed. It has to be remembered that this question dealt with a very small sample of people since it excluded all of those clients who reached agreement on all issues or completely failed to reach agreement on any of the issues listed in the questionnaire.

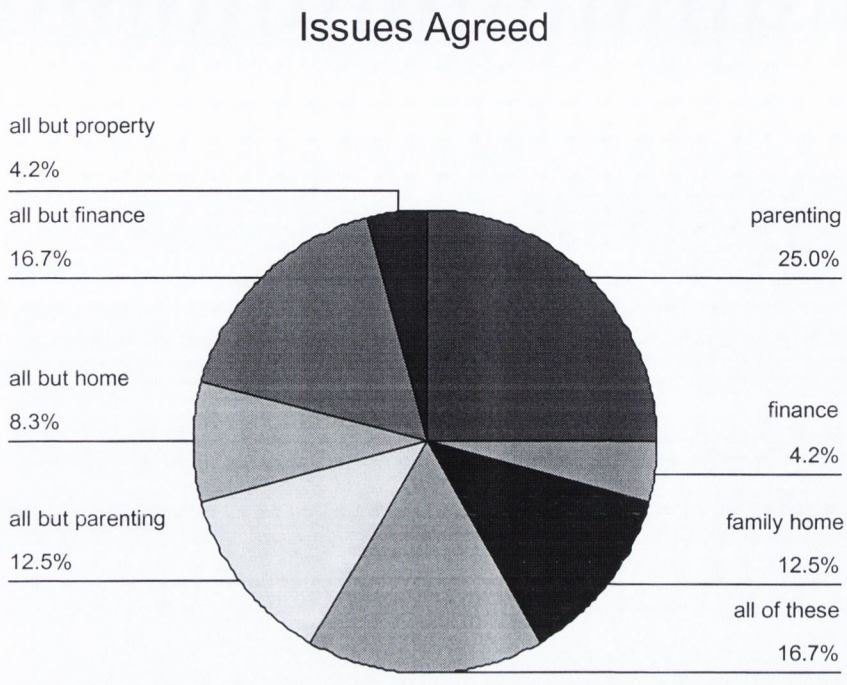

Figure 4.18 Issues agreed

Those who reached full agreement on all issues were asked about their intentions for the future. The vast majority of these clients thought that they would take their agreement to a solicitor in order to have it drawn up into a separation agreement (77.5%), with only 13.3% actually stating that they did not intend to follow this course of action. The other options suggested in the questionnaire were not as popular with the clients; only 15.5% of clients who reached full agreement thought that they would have the agreement made into a rule of court, 12.7% suggested that they would act on their agreement without legalising it and a surprisingly low 26.8% thought that they would apply for a divorce. It should be noted in relation to the latter option that a further 4% were still undecided on the issue but it is interesting to see that the majority of clients who reached agreement[858] did not intend to apply for divorce.

Clients who failed to reach agreement were asked about their intentions. Many clients in this minority intended to find a solicitor and go to court in order to resolve their difficulties;[859] One quarter of the remainder also intended to consult a legal advisor but did not envisage that a court case would be necessary. Clients also thought that they might live

[858] 69%.

[859] 51.2%.

apart without an agreement (14%), or would make another attempt at reaching a compromise (7%). It is interesting to see that only 2.3% intended to return to the marriage.

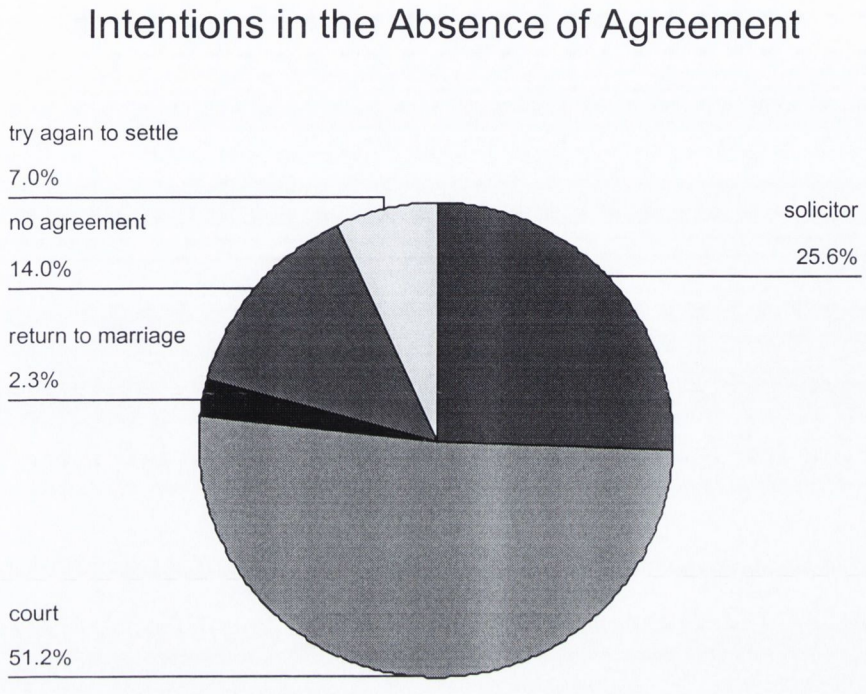

Figure 4.19 Intentions in the absence of agreement

Clients who failed to reach an agreement were asked why, in their opinion, the process had broken down. A wide variety of replies were received, but it would appear that parties were likely to find it too difficult to co-operate with their former partner or a partner would not continue with the mediation (24.4% in each case). Some clients felt that they were not being heard (8.9%) and it was not uncommon for clients to give more than one of these problems as the cause of the failure to reach agreement. Over 6.7% of clients stated that they had reached agreement but their partner had backed out subsequently. One client suggested that the agreement reached simply did not work in practice. Only one client suggested that mediation itself was too stressful to continue with the process.

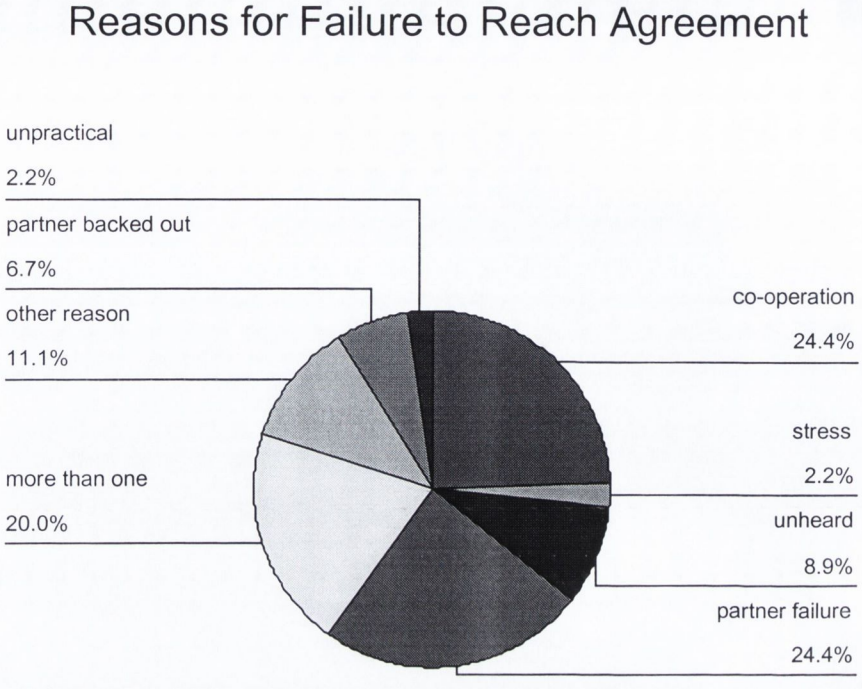

Figure 4.20 Reasons for failure to reach agreement

Degree of Agreement Between Couples on the Result of the Mediation Process

In all, there were only 28 cases where both parties to a marriage answered and returned a post-mediation questionnaire. Although this figure is too small to make any accurate statistical statements, it is interesting to see the level of agreement between any responding couple with regard to the actual outcome of the process. In the case of 19 couples, both parties stated that full agreement had been reached on all issues and they intended that the agreement should be drawn up into a separation agreement by a solicitor. However, several couples disagreed on whether they intended, in addition, to seek a divorce. One couple agreed that mediation had not resulted in an agreement, another that they reached full agreement and would be seeking to make it a rule of court. One couple agreed that they had reached a final settlement but they intended to act on the agreement without legalising it.

Despite the fact that the majority held consistent views on what had occurred, not all couples agreed with each other. One female reported that she intended to negotiate through a solicitor, while her husband thought that they would live apart without an agreement. One male suggested that they had only come to an interim agreement and would live apart without an agreement, while his partner stated that they had "more or less" agreed on all

issues and would act on the agreement without legalising it. This is possibly a variation in interpretation rather than a fundamental disagreement about what had been decided. Indeed, this was also the case with a couple where the husband thought that they had agreed all issues and would seek a separation agreement, while the woman stated that they had agreed all the issues listed and would live without an agreement until one could be finalised. Another couple only disagreed on whether they would get the agreement drawn up into a separation agreement by a solicitor or have it made a rule of court. In fact, only one couple seemed to have fundamentally disagreed on the result of their efforts. The husband thought that parenting, the family home and property had been agreed while his wife suggested that only parenting "apparently" had been settled. While this cannot in any sense demonstrate that couples take a common view of the results of mediation, it would seem that this particular group did leave the process with a singular perception on what had been agreed.

Open-Ended Questions on the Post-Mediation Form

Client view of their partner

All of the post-mediation questionnaire responses received by the family mediation service were examined in order to produce an analysis that was more in-depth and reflective of respondent attitudes.[860] The post-mediation questionnaire had asked clients whether or not their participation in mediation had changed their view of their partner. Several forms of elaboration featured in the returned questionnaires, including reports of deterioration in their opinions of their former partners. "I realised he is not going to change his lifestyle no matter what happens", "my view has become more negative", "it has made me more aware that what he says and what he does are two different things", "in reality he is not interested in my well-being" and "I found that mediation brought out his true colours, I saw the really nasty side of him and how difficult he can make things". Moreover, at times the perception of the partner as a parent also deteriorated; "I found that he had no understanding of his child's needs and was only interested in the assets of the family", "he really does not understand single parenthood as it is not his experience". A heavy preponderance of this negative change response came from women; in fact only two men suggested that their view of their partner had disimproved as a result of mediation. One simply stated that his opinion was now more negative, the other put it more harshly, "she is a money-sucker".

[860] 128 responses.

Positive changes in the views of the respondents were also in evidence from an examination of responses. At times, clients received help in coming to terms with the ending of the relationship and in developing some new understanding of their former partners. One man suggested that his wife's refusal to carry on mediation, on the basis of mediator bias, helped him to realise how traumatised she was by the separation. Another husband found that his wife "as confused as [him]". A woman thought that mediation enabled her to see that they were not meant for each other, while another respondent thought that it allowed her to realise the reasons why her husband was seeking to legalise the separation. Three responses contended that it had created more understanding; a woman saw a side of her husband that she had not seen before, even in counselling and another found her partner more willing to compromise than formerly. Respondents could be very explicit in this way, for instance, "I really appreciate my partner's co-operation in trying to find the best solution under difficult circumstances" and "I understand her better and realise my mistakes and if we got back together I would not repeat the same thing again".

However, several clients who stated that they had not changed their view of their partner further elaborated in order to display the difficulties they faced in dealing with the person. "I know what he is like, he agreed to pay the money on a certain date each month and I feel sure that he will let us down", "my partner never listened to my needs, his own grew bigger all the time and his only way to communicate is to manipulate", "he is impossible to deal with", "there is still no flexibility", "he does not know how to reach inside himself and be really honest", "he backs himself into a corner that he can't get out of". One male respondent complained of his partner's greed, "my partner is still of the view that I have more money than I do and she is entitled to all of it", another of his partner's abandonment of the process of mediation. A woman suggested that she did not feel any better about the rejection and the betrayal as a result of having engaged in mediation and it seems that the parenting aspect of the relationship was also in contention here; "I feel he is extremely selfish in not regarding our son's needs". Curiously, one response that stated that the view held had not altered, also suggested a degree of improved co-operation; "mediation helped him to accept reality and concentrate on the basic things that we had to sort out and not whether we'd get back together". One respondent seems to dispute the very rationale of the query; "I didn't see the process as a means of gaining understanding of my partner's actions but merely as a means of sorting out what needed to be sorted". This raises the crucial point that the satisfaction of clients in this process is inextricably linked to their expectations of the process.

View of the parenting relationship

The service asked clients whether, in their view, mediation had helped them to change their view of the parenting relationship. It would appear that this question was problematic in that many respondents misunderstood the query and related instead the state of their relationship with their children. "Before mediation I was very conscious of not communicating with the boys, not wanting them to have the same outlook on life as their father", "I have always been a good mother but due to my separation I now find all my time is with my kids and I love them more for it", "I have a clear view about my daughter and her needs and I would do my utmost to ensure her happiness and security", "I am a better father; before I spent no time with them, now I spend lots of time with them", "I have always understood my parenting responsibilities", "I feel I will have a bigger role as a parent". It should be noted that all of these respondents stated that their parenting relationship had been altered by mediation but it could be suggested from these statements that it was their relationships with their children that had, in fact, changed. Nevertheless, the respondents had very positive experiences of this type, which would have been of benefit to their children and may have had a knock on effect on the relationship between the parents; "it helps to focus on the children's needs and pain at a time when rational thinking is not at its height", "to ensure that the boys' needs are looked after properly", "children come first, then me", "I will understand their needs and plan for the future". It appears that the clients received a message about the importance of the children's needs and concerns from mediation but confused this message with the relationship between the partners as parents.

However, this misconception was not universal. There were respondents who understood and answered the question, reporting that their relationship with their partner as a parent had improved: "it reinforced the fact that although we've separated we are still a family, just in a different way and we will always be parents to the children", "A more open feeling about parenting with my wife", "more aware of issues in general", "I have a say and concerns", "need for communication between parents". At the same time there were clients, although fewer, who felt that their parenting relationship had altered for the worse; "I will involve ex-partner less in everyday type decisions", "I realise that I will have look after all my child's needs emotionally and physically". It is hard to see that this is a result of their experience of mediation; it is more likely to be an effect of the virtual single parenthood that is sometimes the result of marriage breakdown.

The respondents who stated that their parenting relationship had not altered as a result of their participation in mediation demonstrated the same confusion that characterised the positive responses. Thus, respondents thought that the service was inquiring into their relationship with their children, "I don't wish to separate and I am quiet comfortable with my parenting role, my children are healthy, well and getting on with their lives", "I always had a good parenting relationship with both children before", "I know what my parenting responsibilities are, I feel very positive about it", "I still know that my child's welfare come first and foremost in my life".

Again, the confusion was not universal and several respondents addressed what they perceived to be the underlying problems with the parenting relationship, which caused it to be impervious to the efforts of mediation. "The same problems remain", "I am more or less excluded from parenting by the attitude of my wife, the attitude of the children and their ages (18 and 21)", "my ex-partner is seeking to punish me for having children with someone else by denying me proper access on a regular basis to our kids", "my ex-partner is living the life of a single man, with visits to the family and no responsibilities", "my daughter still as difficulty in communicating with me, she won't visit me. I feel my wife has poisoned my daughter towards me". Indeed, these answers illustrated the fundamental nature of the problems experienced by parents with regard to their relationship as parents; one female respondent stated that her "partner wants no part in parenting", another suggested that the children's father could not make decisions or look after himself and could not be trusted with the girls. One male respondent thought that the relationship had not changed, but did feel that his view of parenting had: "I feel my opinion is as important as my ex-partner's".

Certain respondents stated that their relationship had not changed but went on to explain that they had always had a good parenting relationship; "we always put our children first, regardless", "I would have always realised the importance of a joint parenting role", "always had good access and relationship", "it was and is ok", "both of us know that the children come first", "always realised how important it was", "I believe and it was confirmed by the mediator that we are both doing it right", "we always agreed", "there was never a problem with parenting". For these clients, at least, the lack of alteration was a welcome result.

View of the future

The service asked its clients whether mediation had helped to change their view of the future. Again, the variety of answers ranged from agreement with positive and negative connotations to disagreement. Certainly, many clients envisaged that their view of the future had improved because of changes in their own outlook and disposition; "I have become a person in my own right, being more positive", "I learnt thing about myself and need to express my own needs and feelings", "more positive and less fearful", "I am beginning to feel better in mind and have less problems psychologically", "I am at peace with myself". Moreover, clients appreciated the contribution of mediation; "it helped me to be a stronger person, I have gone through all the different stages and it made me realise that I have done everything to (a) make the marriage work and (b) when it failed, to reach an agreement". One respondent found it helpful to know that there was "someone you could turn to other than a solicitor". Even some of the unsuccessful clients thought that the service was worthwhile; "mediation is a very positive way for a couple who are separating and it can work great if both are willing to communicate about things. It is such a pity that it was not right for me, he made things too difficult".

However, clients tended to associate the mediation process and the separation in their minds, making it hard to differentiate the effects, whether good or bad; "everyday is special and I feel I can deal with people better after going through mediation /separation". Moreover, many found that their view of themselves was intrinsically connected with a more negative view of their partner which arose after mediation: "I learnt about the weakness of my partner's position on the need to separate", "it has made me realise how strong and positive I am in comparison to my partner and how honest and consistent I am".

Yet, despite these elements of confusion, the service can be heartened by the responses as a whole. Three respondents suggested that they had been given hope, two felt more confident and two respondents reported greater optimism for the future, "that even circumstances and situations that seem impossible to sort out, can be dealt with and brought forward". Other clients felt more certain, more secure, happier, more aware of "things generally". They suggested that they "could see things clearly on a long term basis" and had "bigger insight into separation". The "moving on" process had been assisted by the intervention and mediation had encouraged the clients to face practicalities. One male respondent suggested that it had shown him that there was life after separation; another had learned to start a new life. Two responses from women are interesting on the issue of empowerment; one thought that it helped her to realise that she was the only one who could decide her future, another that she should "fight for a fair deal and not feel guilty for having the courage to try and get on with [her] life after realising that the marriage is not working".

Certain clients agreed that mediation had changed their view of the future but continued on to describe a future that was, in some sense, more negative; "I am in limbo and am likely to remain there for the foreseeable future". Clients also identified the mediation experience as the root of this increased sense of dismay: "it makes everything seem so final and because mediation didn't work for us, life seems a little bleaker", "I will never use mediation again, or at least I will make sure that the mediator is genuinely unbiased". For some, a certain insight was achieved, even though this resulted in a more pessimistic view of the future; "it made me realise how difficult it will be to agree things amicably with my partner. I will need to develop more patience and tolerance". For others, all that ensued was extreme cynicism: "keep away from money suckers". Parents formed the opinion that two parent family life was over, two women in particular commented on this, "at the end of the day my role is as a single parent and his relationship with our child is, unfortunately, isolated from that", "I will be the only stable parent in my daughter's life".

Clients occasionally included extra commentary, even where they had stated that there was no change in their view of the future. Four respondents reported their uncertainty about the future, the fact that they are entering into the unknown. One reported feeling confused and another respondent thought that the future still looked pretty bleak, despite the fact that she would have some level of financial security. Court cases loomed on the horizon: "I still need a divorce, maintenance orders and proper access", "my son's father will still be proceeding with court proceedings". One woman suggested that although agreement had been reached "money worries are still the same except that I have all the worry now. My ex-partner just has to pay the maintenance, he doesn't have to make it go round". One respondent did not believe in looking too far into the future, another thought that it was the present situation rather than the mediation process that had altered her view of the future. It seems that in one case, engaging in mediation had delayed court proceedings because the courts are closed for the summer months. The respondent in this case was very unhappy to discover this side-effect. One man could not see how mediation could possibly alter perceptions in this way since it was used to negotiate separation, not reconciliation. For these clients, it would be true to say that "nothing has changed".

Unusually, it appears that there were clients who thought that their perceptions had not been altered because their view of the future had been positive before engaging in mediation: "my view of the future is very clear and positive and always has been", "I know what I am doing and where I am going", "I know myself and my child have to make a future for ourselves".

Miscellaneous comments

A small number of clients included letters and short notes with their post-mediation questionnaires in order to express their views to the full.

One woman stated that her husband cancelled several appointments and was hostile to the idea of separation. This led her to the conclusion that it may be impossible to mediate an agreement where partners are still living together and a real acceptance of the facts has not occurred. She waited 8-12 months for an appointment at a time when house prices were rising rapidly and her chances of buying out her husband were falling. It appears that this waiting period was very unusual[861] and the delay is probably the result of her husband's reluctance to engage in mediation rather than the failure of the service to provide an appointment within a reasonable time. It does raise questions, however, about the ability of a partner to cause hardship to the other through the promise of mediation followed by repeated failure to attend.

Even more worryingly, a women wrote to the service suggesting that her reluctant partner had agreed to a settlement in mediation, but later ignored the agreement and refused to move from the family home. She suffered two physical assaults at his hands in the intervening time and several verbal threats and she felt that this was partly as a result of the non-binding nature of the mediation agreement. Participation in mediation also accommodated her husband in his delaying tactics as the courts were closed for the summer.

One client suggested that the service was not skilful enough for the partner who was trying to solve marriage problems and it appeared to be biased towards the partner who had caused the marriage to break down. This woman was of the opinion that the process would need the presence of a solicitor for each party before it could be useful and in the meantime was a waste of client and State money.

However, one woman wrote to say that, although she had backed out of mediation because of a high level of animosity with her partner, she was not critical of the service. In order to work she thought that there would have to be openness, fairness, honesty and mutual

[861] See p 225 above.

respect and in her case her husband had not been honest, did not comply with the requests of the mediator with regard to financial arrangements and was not concerned about the children. She felt, despite these problems, that the mediator was excellent and had an intuitive knowledge of where their problems lay.

Occasionally, clients suggested alternatives to the questionnaire list in order to explain more fully why they had failed to reach agreement with their partners in mediation.[862] One couple were waiting for expert opinion on pension settlements and the health of another client was "in question". It was more common for clients to report that their partner's attitude or behaviour had left them with little alternative but to seek another means of dispute resolution: "my partner is being selfish, wants the financial expenses for the children shared 50:50 but not parenting and the family home, I had no other option but to go to a solicitor", "he agreed things and just before it goes through he changes his mind", "he kept changing his mind", "partner wants more money than I can afford and wants to sell the home to raise the money", "partner refuses mediation and sent me a solicitor's letter", "partner only attended one session", "my ex-partner does not want me to be guardian and that is still the case after mediation", "my partner feel that he has done nothing wrong, I finished the relationship so I have to suffer", "my partner was intend on getting his own way with no regard for our son and he sneered at a lot of what I had to say", "my partner was unable to see that I could not afford the financial settlement he wanted and was not willing to negotiate on other matters until the financial ones were sorted out". Bitterness and anger were plainly in evidence in these responses, in one case producing an aggressive report: "the bitch wanted everything".

At the same time, although ready to blame their partner for the failure, the unsolicited comments of respondents were not entirely negative: "mediation helped me to start the legal battle with my husband, the service was very helpful and was excellent, if you are dealing with someone who is willing to help and not take everything for himself as happened in my case", "mediator was very good, took no sides and kept the sessions practical", "the counsellor was very skilled and made appropriate suggestions". Some clients reached agreement but found that the financial arrangements did not work out in practice and several clients noted that their agreement was interim only and the final outcome was not yet clear, or the final wording was still the subject of debate. One respondent changed his mind on the family home after receiving legal advice.

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[862] See p 228 above.

A few respondents mentioned intentions with regard to their future actions, which did not feature as responses on the questionnaire: "to live apart but come to an agreement", "my partner is applying for custody and maintenance through the courts", "we have agreed to use another mediator attached to the family therapy centre". A very distressed client suggested that she intended to "buy a gun or a packet of rat poison". One response with reference to future intentions is relevant to the empowerment debate in relation to female clients; she intended to agree the financial sum and conditions of her partner's choice, as a court would have "driven any communication away and the effect on the child would have been too great".

Gender and the Post Mediation Questionnaires

Each of the post mediation variables was cross tabulated with gender in order to discern any significant difference in the way that men and women experienced the mediation process. It was apparent that men were more likely to say that mediation had worked for them and less likely to say that it had not worked; 32.8% of women as compared with 21.2% of men thought that mediation had not been successful in their eyes. However, this difference was not statistically significant. Likewise, all of the variables examined under this heading could illustrate some gender difference in the response offered by the clients, but none would appear to have made any impact in the statistical sense. Indeed, in some cases the degree of difference present was not large at all and the positive view was divided between the genders according to the question asked. Thus, men were more inclined to say that communication had improved and conflict has reduced as a result of mediation, while women were more inclined to agree that it had helped them to understand the needs of their children. Clients did not differ according to gender in their response to the question which asked whether they could discuss issues about the children with their partner and they differed only slightly in answering questions on their present view of their partner, their view of their parenting relationship and of the future. At any rate, since no statistically significant difference could be found, any discrepancies should be put down to sampling error. It would certainly be rash to attempt any assertion of a gap in the experience of men and women on the basis of this evidence.

Outcome Forms

Mediators were asked to complete outcome questionnaires for each couple that had gone through the mediation process, regardless of the success or failure of the intervention.

While outcome forms were completed for 78 of the sample couples, questions were regularly left unanswered by mediators and to this extent, any attempt to place reliance on the results is undermined. They do provide a valuable insight into the rates of agreement reached by the service and the broad outline of the post separation life of the couples involved.

The Agreement Reached in Mediation

The mediators were asked to state whether each particular couple had reached agreement in the mediation process. It seems that a majority did, in fact, succeed in settling their differences, 56.4% of couples left mediation with a compromise solution to their difficulties. For 90.7% of those couples, the agreement reached was final and in full settlement of all issues disputed. Only 7% produced a final, partial agreement and a mere 2.3% reached an interim partial agreement.

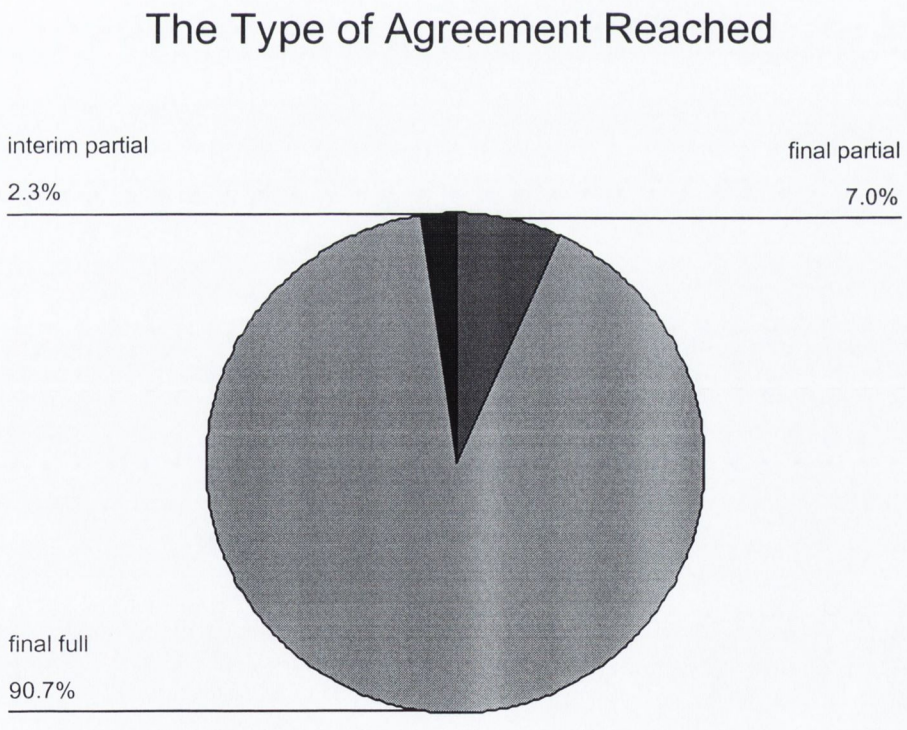

Figure 4.21 The type of agreement reached

It seems that clients did not take long to reach their settlements. The majority[863] had four or fewer meetings with the mediator, only 2.6% of clients required eight appointments and the largest group had four meetings.[864]

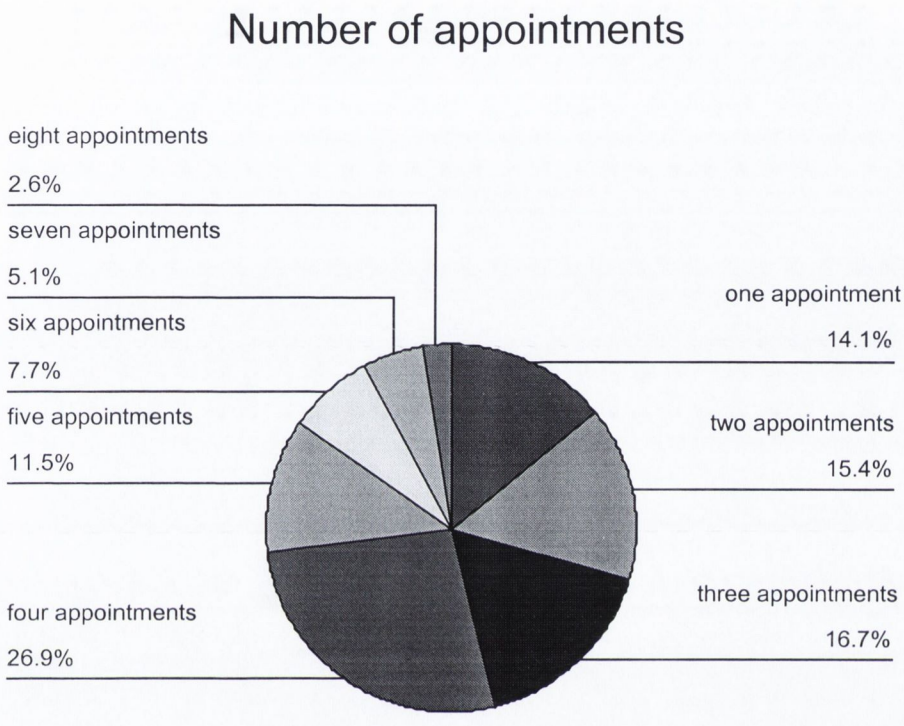

Figure 4.22 Number of appointments

It is interesting to examine the relationship between the number of appointments attended by the clients and the presence or absence of an agreement. It would be wasteful in terms of cost if those who failed to reach agreement were to receive the same resources as those who reached an agreement. Instead, we find that there is a strong statistical relationship between the two variables.[865] No couple managed to reach an agreement in one session, but 32.4% of those who failed to reach agreement only attended mediation on one occasion. While 20.5% of those settled had six or more appointments, only 8.7% of those who failed to reach a compromise took six or more hours of mediator time. However, although those who left without an agreement were less likely to have as many appointments as those who agreed, 20% had four appointments with the service and a substantial 14.6% had more than four sessions before they decided to go elsewhere.

[863] 73.1% of clients. Almost half of the clients (46.2%) had less than four meetings.

[864] 26.9%.

Of those who reached agreement, the vast majority decided that they would take the agreement to their solicitors (90.7%). It is interesting to note that in 35% of cases, neither party had engaged a solicitor before embarking on the mediation process[866] and it would have been interesting to find out whether the couple intended to seek separate or joint legal advice at this stage. It seems from the outcome questionnaires that there was rarely a court order in place (18%) when couple embarked on the process. Yet, the intake questionnaires suggested that 24% of clients sought legal orders before they entered mediation. This discrepancy can probably be explained by the fact that mediators neglected to give answers for 14% of clients on the outcome form.

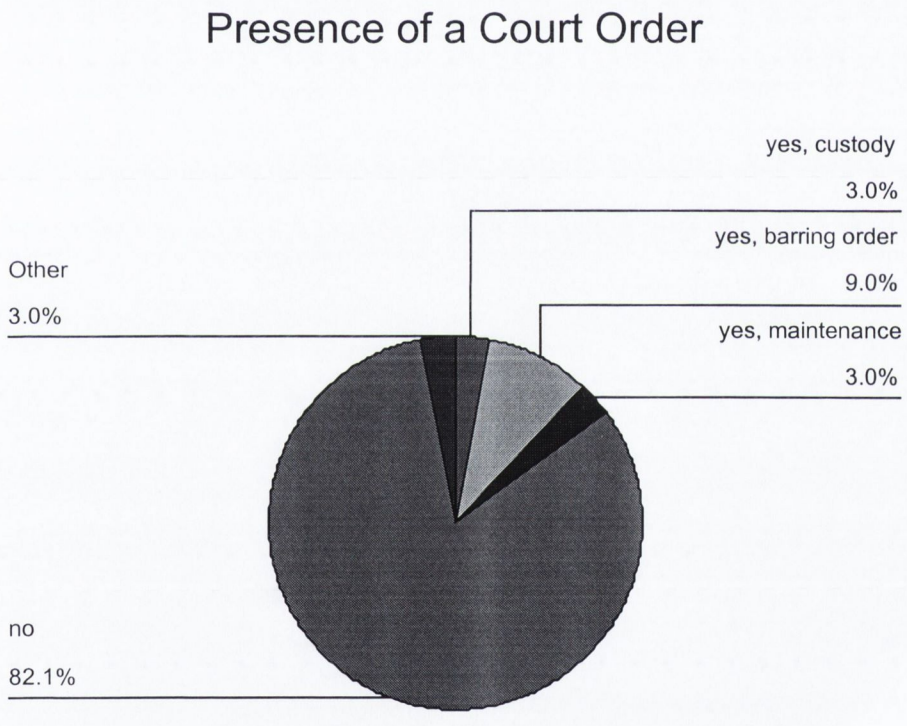

Figure 4.23 Presence of a court order

Children attended the service in only 6.6% of cases[867] and it seems that there was no instance where anyone in another category, such as stepparents or grandparents, attended. In 93.4% of cases, only the couple themselves were present.

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[865] The chi-square value is .000.

[866] See p 217 above.

[867] Contrast client reports, which suggest attendance at family sessions in 2% of cases.

The clients seemed to settle a range of disputes in the mediation process; generally they resolved all of the issues listed in the outcome questionnaire.[868] In some cases, it is likely that the clients did not have to resolve all of the issues contemplated in the questionnaire.

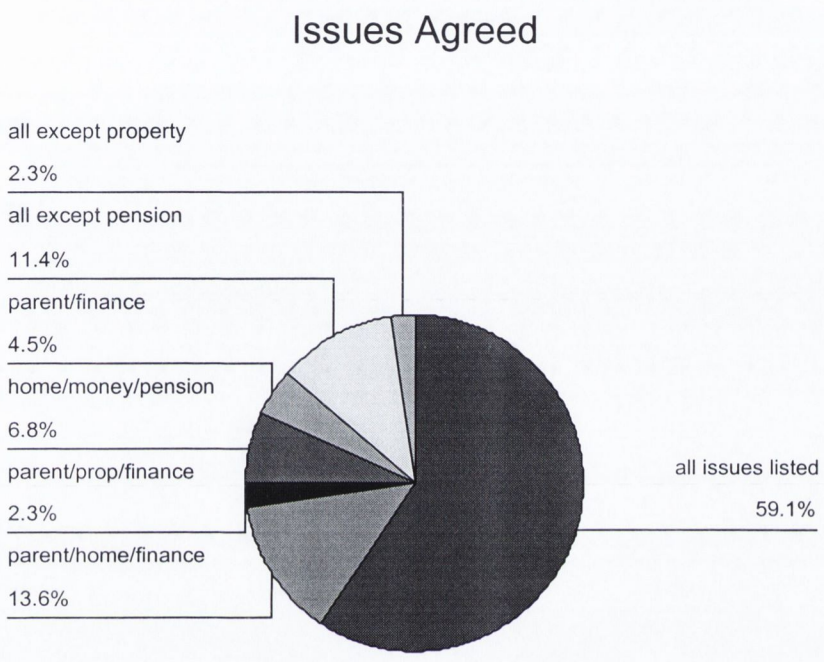

Figure 4.24 Issues agreed

Parenting in the Agreement

Just ten per cent of the clientele who reached an agreement were childless or had a grown family, so that parenting issues were likely to have been of central concern to the clients in mediation. Most parents chose full involvement of both parents in the lives of their children (45.2%) but it is interesting to note that they were as likely to agree to the minimal involvement of one parent as the equal involvement of both parents (9.5%). The couples who agreed to minimal involvement seemed to prefer that one parent would no longer have any contact with the children; this was the arrangement in two cases where the father was a drug addict, for instance. A substantial minority of parents agreed to the partial involvement of one parent.[869]

[868] 59.1%.

[869] 35.7%.

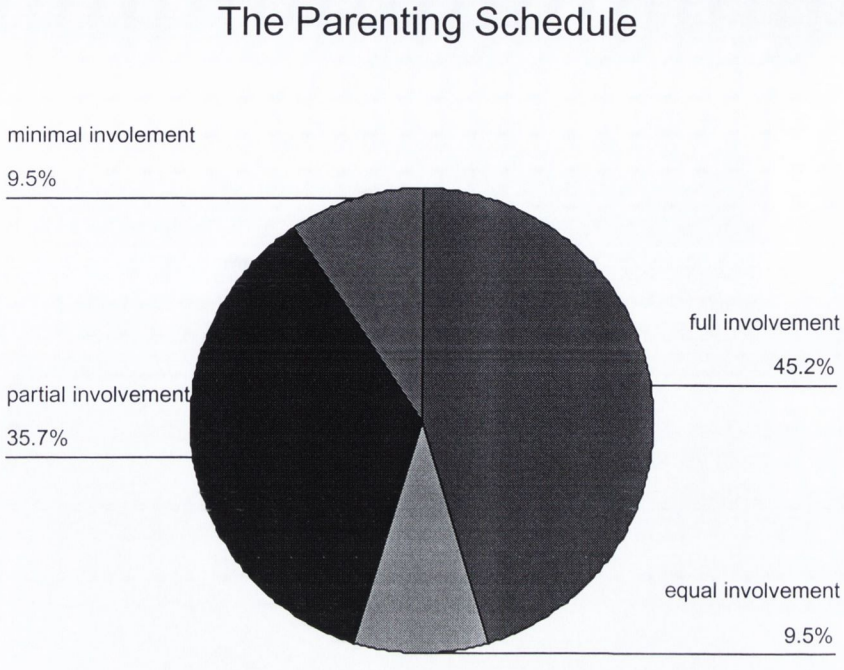

Figure 4.25 The parenting schedule

A primary residence for the children of the family was agreed in all cases. 89% of clients agreed that all of the children of the family were to reside with their mother, in 6% of cases the children were divided between the parents and 5% of couples agreed that all of the children would reside with the father.

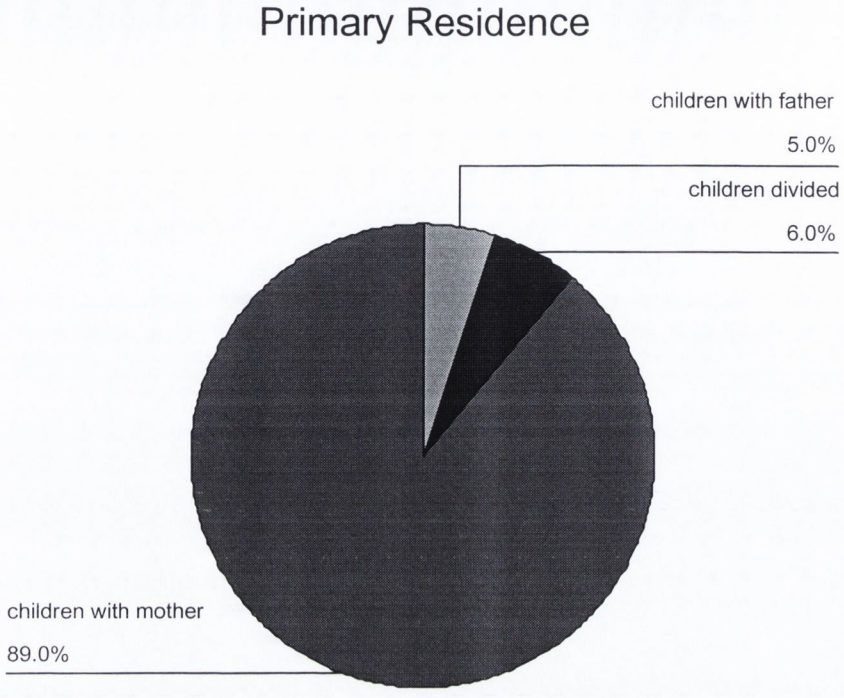

Figure 4.26 Primary residence

In general, children were accustomed to regular contact with members of their extended family and parents agreed that this would continue after the separation.[870] A minority of children did not have an established pattern of contact; generally the parents in these cases were content that this would remain the case (8%). Only three per cent of answers suggested that a pattern of contact would be disrupted.

Children were unlikely to face significant changes in their lifestyle as a result of the mediated agreement, according to the mediators. However, a small number of children were going to experience all of the changes envisaged in the outcome questionnaires, as the location of their school and home altered as a result of their parents agreement (6.1%). A further 4.1% of children would have to leave the family home after its sale. 4% of children would have no further contact with their fathers and 2% would find themselves living in a step family situation.

[870] 87%.

The Nature and Effect of the Agreement Reached

It seems that the agreement reached between the parties would not usually necessitate the return to work of either party, simply because most of the clients were already working outside of the home (56.4%). However in 25.5% of cases, women would have to return to paid employment. It would have been interesting to ask whether clients would have to move from part time to full time employment after the separation and the failure to collect this information leaves an important gap in the research.

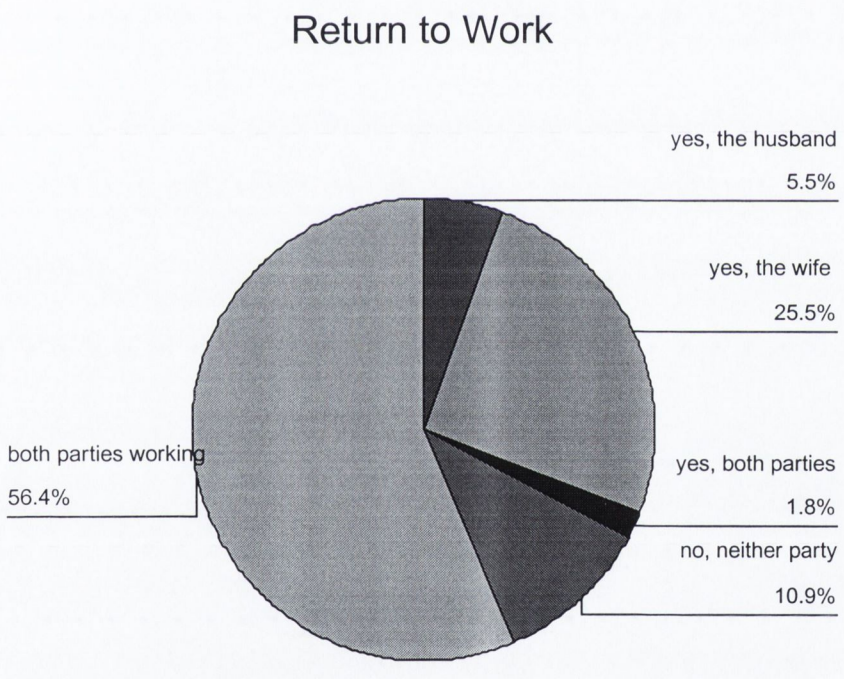

Figure 4.27 Return to work

Clients agreed that financial support would not be paid at all in 11.5% of cases where the question was answered, but it was agreed that it would be paid in 75% of cases to children. It should be noted that while it would appear that 13.5% of wives received support for themselves, many of the mediators confused the concept of payment to the wife with payment for her benefit. Thus, it is unclear whether money paid to women was for their support or for the support of the children in their care.

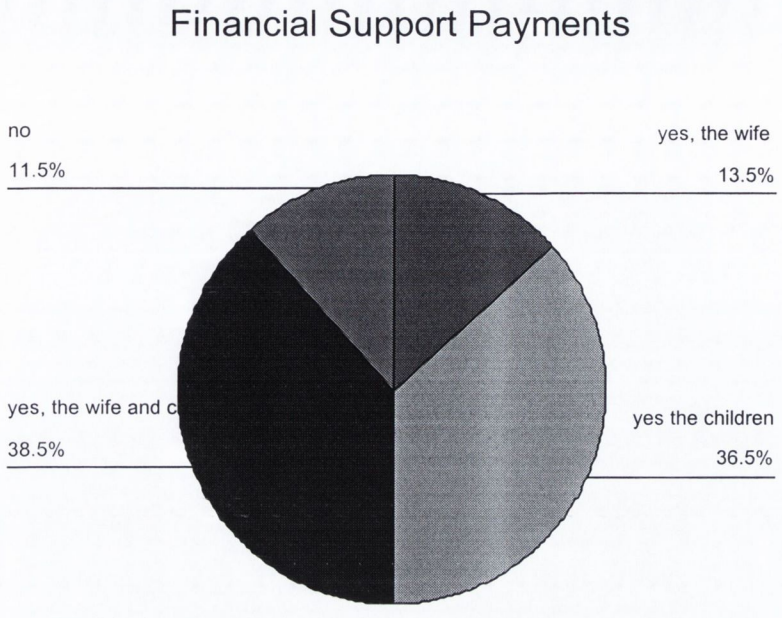

Figure 4.28 Financial support payments

Since children usually remained with their mothers and parents did not propose radical changes in the lifestyle of the children, the family home was retained for the wife and children in most cases.[871] It was sold in 17.8% of cases while 5.6% of husbands and 2.2% of wives stayed on in the family home without any children.

[871] 64.4%.

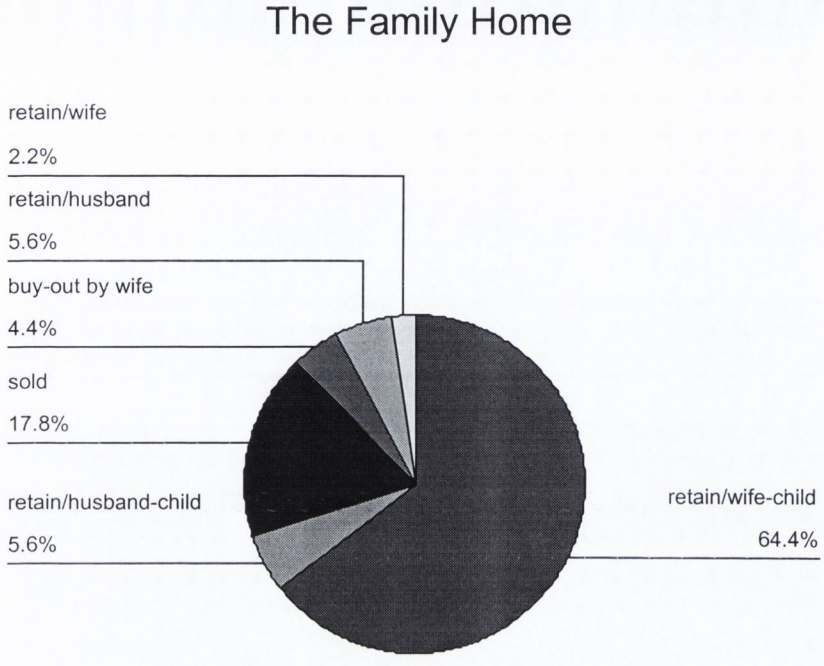

Figure 4.29 The family home

Mediators were asked to specify whether there would be any changes made to the legal ownership of the family home where it was to be retained. The most common reply was that the clients were not going to make any changes so that in the typical case joint ownership would continue.[872] However, a substantial number of couples agreed that to a transfer of title into the sole name of one spouse.[873]

Where the couple agreed that the home would be sold, mediators were supposed to record the division of proceeds agreed as a result of the sale. It should be noted that this represents a small minority of clients since the question was not applicable in 82% of cases[874] and not all of the questionnaires were answered[875] even where the question was applicable. Yet, it is clear from the results that the clients did not address this issue during mediation and no agreement had been reached at all on the appropriate division in most cases. This is a very serious omission on the part of the Service that tends to suggest that the long-term future of the partners was not a priority.

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[872] 54.8%. See p 215 above, which suggests that joint ownership is almost universal in relation to couples living together at the time of mediation.

[873] 45.2%.

[874] The house was to be retained in these cases.

[875] The mediator did not answer in the question in 6.5% of relevant cases

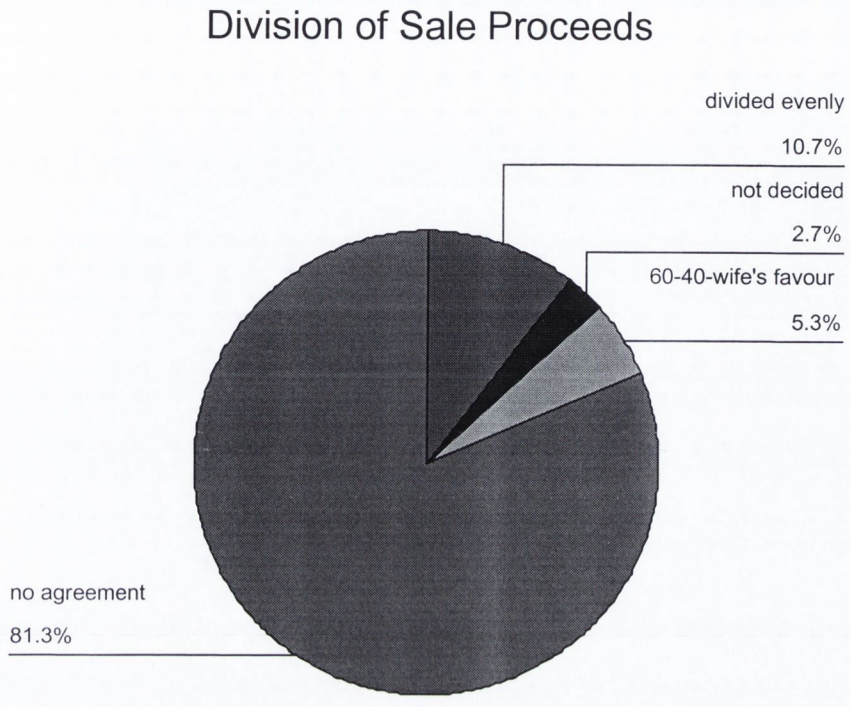

Figure 4.30 Division of sale proceeds

In any case, it seems that just over half of the clients did not intend to purchase other accommodation,[876] regardless of whether they had decided to sell or retain the family home. A substantial minority (48.8%) would be in the market for another mortgage, leaving the remainder in rented accommodation, in all likelihood.[877]

[876] 51.2%.

[877] Despite the fact that the research did not resolve the issue of whether the family home was to be retained or sold, this question was answered by mediators, presumably because one partner would have to purchase alternative accommodation even where the family home was to be retained. Given the lack of resolution to the question of sale or retention, however, the issue of accommodation purchase should be seen as an assessment of the intention of the spouse living outside the family home.

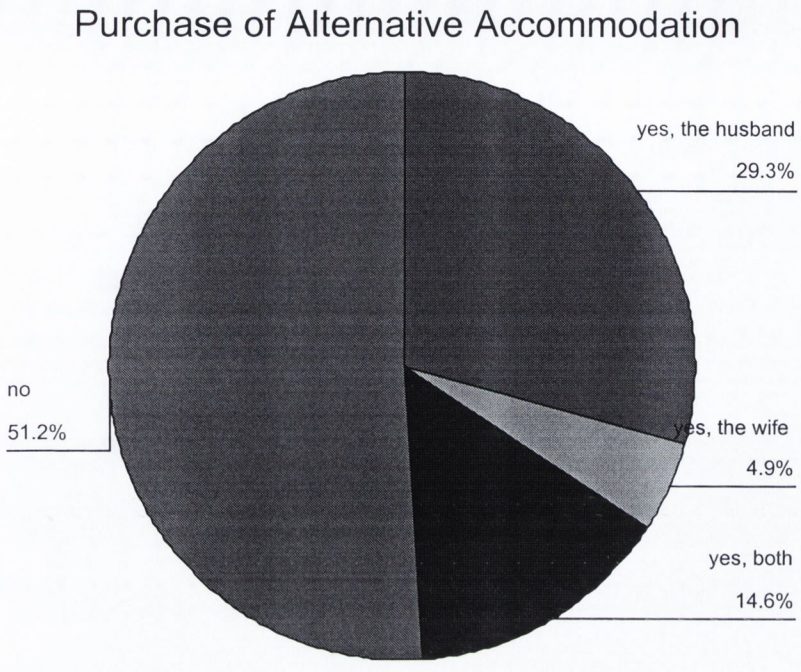

Figure 4.31 Purchase of alternative accommodation

Couples Failing to Reach Agreement

The Service was interested in determining why mediation had failed to end in an agreement between the spouses. It seems that the most likely difficulty to emerge was the failure of one or both parties to attend a mediation session,[878] but it also interesting to note that the next most common reason for the failure to proceed was the decision of the couple to return to the marriage. 15.2% of those who did not reach an agreement decided to defer separation.[879] Mediators stated that couples were going to contact their solicitors instead in 12.1% of cases but this does not illuminate the reasons for their choice. Health problems, violence and lack of financial disclosure were also mentioned as stumbling blocks. In 12.1% of cases, the couple simply could not agree and were forced to abandon the effort.

[878] 21.2%.

[879] Contrast the client reports in the port mediation questionnaires, which revealed that only 2.3% intended to return to the marriage and almost 77% would contact a solicitor.

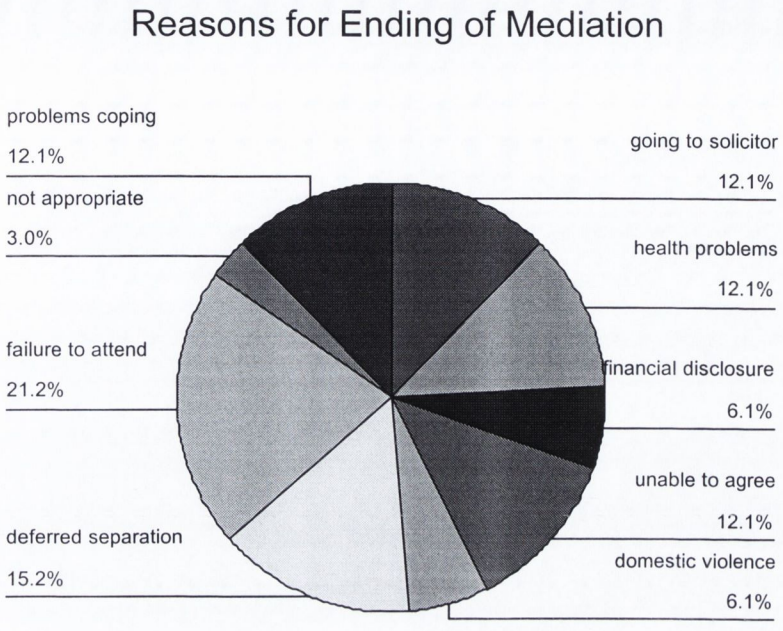

Figure 4.32 Reasons for ending mediation

While the service asked its mediators to specify the issue on which mediation ended, it is clear from the analysis above that mediation did not usually end because the couple could not reach agreement on a particular issue, but numerous outside factors impeded their attempts at compromise. Mediators, perhaps as a result, rarely answered the question and this must be borne in mind when examining the results. In 73.5% of cases, the mediator could not identify a specific issue that caused the collapse of the process, but it seems that where mediators did reply, the family home was the major stumbling block to agreement.

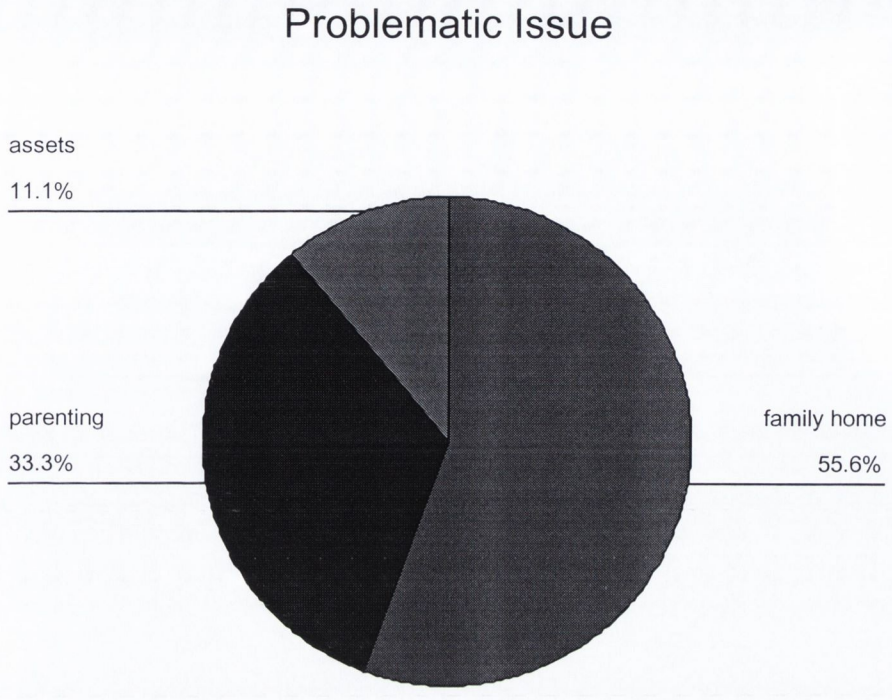

Figure 4.33 Problematic issue

Divorce and the Mediation Process

Clients did not intend to rush headlong for a divorce at the conclusion of the mediation process; they were as likely to report an intention not to file for a decree as a settled intention to divorce (15.2%). A substantial majority were still undecided at the close of the mediation process.[880] Note however that the post-mediation forms completed by the clients themselves suggest that 26% had decided to apply for a divorce.

[880] 69.6%. This could also suggest that the clients were reluctant to say that they intended to apply for a divorce.

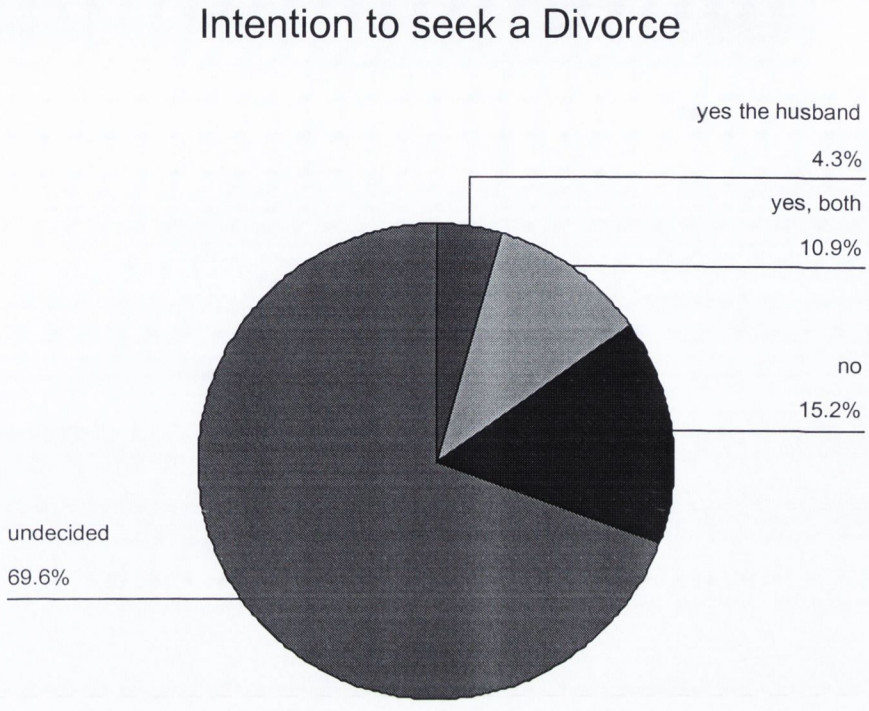

Figure 4.34 Intention to seek a divorce

Conclusion

The questionnaires distributed by the family mediation centre revealed important facts about the profile of the clientele, their aspirations for the process, the agreements they reached or the reasons why they failed to settle and their perception of mediation itself. Moreover, they allow comparison of client experience on grounds of gender.

The pre-mediation questionnaires were the most reliable as the entire sample was represented and the questionnaires were fully completed and returned. These suggest that while clients had discussed details of their separation with their partner,[881] low levels of communication within the relationship were usual. Again, many clients were willing to admit that their marriage had been conflictual or very conflictual,[882] which would seem to go against the assertion that mediation deals with 'easy cases'. Parents were more reluctant to admit to any failings in relation to their parenting relationship or their children but it was evident that many were in a vulnerable emotional state when entering mediation. The

[881] Although a majority had these discussions, a significant minority (34%) did not. See p 191 above.

[882] 37.7% of clients.

responses to the open ended questions probably gave a clearer picture of the clients' frame of mind than the direct questions concerning emotional response, but it was rare, at any rate, for clients to suggest that they were not in the clutches of some strong negative feelings at that stage. Interestingly, men and women did not differ in their perception of the state of their marital and parenting relationships or their feelings at the time they entered the system. In addition, although couples failed to register high rates of agreement, the vast majority gave answers that revealed a view of the past that was not in complete contradiction to their partner's perspective.

Earlier research had painted a picture of mediation as the preserve of the affluent, educated, middle class client and it is a view confirmed and strengthened in this work. While it is by no means an exclusively middle income facility, the service continues to be attractive to the employed, home owning sector. Interestingly, it was in demographic characteristics that men and women diverged most radically. The fear of feminists is realised to the extent that women remain poorer, of lower social standing and education and generally more vulnerable in economic terms than the men they meet in mediation. It is in fact the only serious divergence; men and women gave similar reasons for the breakdown of the relationship, they put forward the same issues for resolution and their experiences of mediation were similar.

The post-mediation questionnaires suggested that clients found that mediation had worked for them;[883] it helped to reduce the conflict in the relationship and aided their understanding of their children's needs. They did not feel that communication with their partner or the parenting relationship generally had improved. Their view of their partner and of the future had not altered for the better as a result of the mediation process. It would, perhaps, have been ambitious to expect that it would, given the fact that clients usually attended four meetings.[884]

Possibly the most significant contribution of this research lies in the analysis of the agreement reached in mediation. More than half of the couples that came to mediation reached an agreement, the vast majority coming to a final and full settlement of the issues in contention. There is an interesting discrepancy between the client reports in the post-mediation questionnaires and the mediator answers on the clients' behalf in the outcome forms. It seems that clients themselves suggest that they reached full agreement on all

[883] See p 221 above.

[884] See p 239 above.

issues in 60% of cases[885] while the mediators report a slightly more conservative figure of 56% for full agreement. This would tend to support the reliability of mediator reports and suggest that they do not seek to inflate their success rates in the final assessment. Clients who did not reach agreement gave their own assessment of the reasons for this failure in the post mediation forms and the mediators gave more detailed assessments in the outcome questionnaires. While the non-attendance of one partner was the principal problem in both sets of answers, the mediators also picked up on domestic violence, the lack of financial disclosure and the decision to defer separation. The latter is interesting in that it would suggest that over 15% of clients who failed to reach an agreement were going to return to the marriage. The post- mediation questionnaires measure this group at only 2.3% of clients.[886] This is the most serious discrepancy to emerge from the questionnaires. It may reflect mediator concern to show that the process does not discourage reconciliation or simply the fact that couples that chose to defer their separation do not necessarily intend to reconcile. Clients might have felt constrained by the structure of the post-mediation questionnaire, which suggested particular answers, although several clients wrote notes in response to this question in order to explain their difficulties more fully. Their responses would suggest that the mediators perceived many of the more fundamental problems that caused the failure of the process.

The post-mediation questionnaire sought to uncover the intentions of clients; it seems that, generally, those who reached a compromise would have it drawn up into a separation agreement by a solicitor, while those who failed to reach a settlement would also turn to lawyers for a solution.[887] The outcome form took a more extensive look at the agreements reached in mediation and established that the parenting schedule reflected the desire of parents to have full involvement with their children, although not exclusively[888] and children typically remained with their mothers in the family home. Financial support was commonly paid to women and children, unsurprisingly, given the discrepancies in income revealed in the income questionnaire. However, one quarter of women would have to return to paid employment outside of the home, as a result of the agreement.

This research is not without its weaknesses. It was not possible to locate the entire sample when examining the income and outcome forms and mediators were not always conscientious in filling them out. The post-mediation questionnaires came from a small,

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[885] Over half of the remaining clients professed to reach agreement on some issues. See p 226 above.

[886] See p 227 above.

[887] See p 227 above.

[888] See p 242 above.

self-selecting group, which may differ from the population in some way, not visible from their pre-mediation answers. Yet, the results are in line with both earlier research and expectation and do provide a measure of insight into the operation of mediation in Ireland.

CHAPTER FIVE

Introduction

This Chapter seeks to describe and assess the practice of mediation in Northern Ireland, using empirical literature emerging from the jurisdiction and the results of a survey distributed to the service mediators in February 2000. The same questionnaire was completed by mediators in the Republic of Ireland, allowing for a simple and revealing comparison of attitudes and experiences in the two parts of the island.

Problematically, Northern Irish mediators did not respond to an extent that would allow for wide generalisations and safe assumptions on the attitudes and methodology of mediators practising in the jurisdiction.[889] It would seem, from informal discussion,[890] that this may reflect low morale within the service and increasing uncertainty surrounding the future of family mediation in Northern Ireland. For this reason, any commentary based the survey is by its nature tentative, although it serves to provide the first real glimpse of the Irish mediator's mentality and approach.

If literature concerning the practice of mediation in the Republic of Ireland has been sparse, then it has been almost non-existent in Northern Ireland, so the task of collating prior work with new evidence becomes essential and timely. Where cross-national comparisons of mediation are conducted, the dynamics of the Northern Irish system are often left unexplored. For instance, when the Law Reform Commission conducted an examination of the practice in other jurisdictions seven years after the establishment of the Northern Irish service, it included Japan, Denmark and New Zealand, but failed to address the system in Northern Ireland.[891]

Originally, the practice of mediation in Northern Ireland began under the auspices of the court, which had the power to refer parties with children to the Health and Social Services Board. The scheme was unsuccessful and the aims confused. It was not until 1987 that the

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[889] Only four mediators in Northern Ireland returned questionnaires and generally twelve mediators operated from the service. However, by the time the survey was carried out, there were only eight practising mediators at the service, two of whom were on leave of absence. Ten practitioners in the Republic responded, representing almost 80% of mediators operating within the Family Mediation Service nationally.

[890] Informal interviews with Sheena Bell of the Northern Irish Family Mediation Service and Claire Archbold of the Office of Law Reform.

[891] Law Reform Commission, Consultation Paper on Family Courts (March 1994) at Appendix 1.

Northern Ireland Family Mediation Service opened its doors to the public from within the Relate offices, offering a neutral, out-of-court setting for resolution at an early stage in the dispute.[892] The programme received government funding and began life as a three-year pilot scheme, which was simultaneously evaluated.

The service focuses on child and parenting issues- child-centred mediation is the only form available in Northern Ireland- providing an interesting comparison with the comprehensive mediation offered in the Republic. Further, non legally aided clients in Northern Ireland are asked to make a donation, while in the South the service is fully funded and free to all. In common with the service in the Republic, it had aimed to expand provision of mediation to the regions, with the opening of an office in Foyle as well as Belfast and consideration of further regionalisation in the future. However, these developments were overtaken by a more recent radical decline in service provision, which indicates that a trans-province service is unlikely at the present juncture.

This Chapter seeks to demonstrate the uniqueness of the practice of mediation in Northern Ireland by examining of the views of clients and professionals engaged in the service, while avoiding the common assumption that Northern Ireland will fall into line with the conclusions derived from English and Scottish mediation experiences, despite its separate origin and development. Although there are many points of convergence, particularly with regard to mediator training and standards,[893] Northern Ireland is deserving of a separate and distinct focus.

Empirical Research into the Northern Ireland Family Mediation Service

Pre-Mediation Results

It seems that the majority of clients using the service were from the upper occupational groups, in common with their counterparts in the Republic. A higher proportion of women attending mediation were in employment than the population average and mediation clients

[892] Gillian Kerr "Northern Ireland Family Mediation Service" (1988) 39 NILQ 86. See also Kate Lewis "Family conciliation services in Northern Ireland" in Thelma Fisher: Family Conciliation in the United Kingdom: Policy and Practice (2nd ed, Jordans 1992), p 13.

[893] The Family Mediation Service in Northern Ireland is affiliated to National Family Mediation in England.

generally showed high levels of employment and of income.[894] Mediation users were more likely to have children under the age of eighteen than the divorcing public, according to one study at least.[895]

Clients received information about the service from Relate, the marriage guidance agency, rather than their solicitors and were self-referred in general. Further, 43% of first contacts were self-referrals by women, while only 2% were from couples jointly.[896] When the Northern Irish service was first established, it was anxious to establish good links with the legal profession, although recognising other potential sources of referral such as social workers, general practitioners, health visitors, marriage guidance counsellors, Citizen Advice Bureaus, self-help and other voluntary organisations. Yet, these agencies have not proven as fruitful as expected, with the exception of marriage guidance, which is particularly disappointing in the case of solicitors given the legal imperative to consider the possibility of conciliating the parties to a marriage.[897] However, it must be remembered that there is no statutory requirement for a solicitor to certify that reconciliation has been discussed with the divorce petitioner, since at the time the Matrimonial Causes (Northern Ireland) Order 1978 was enacted it was considered that such a provision would not necessarily have added anything to existing good practice.[898]

In addition, it seems that the Court will always, in general terms, advise the parties that services exist which may help them to restore or come to terms with difficulties without having to resort to further litigation, particularly where children are involved.[899] Oddly, it seems that court referrals are not featuring regularly in the mediation service either. This may be explained by very early self-referral of clients to mediation, before the first involvement of a solicitor or the institution of legal proceedings. Alternatively, it may suggest reluctance on the part of the legal profession to suggest this route to clients with

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[894] Report to the Office of Law Reform - Claire Archbold, Ciaran White, Pat McKee, Lynda Spence, Brendan Murtagh and Monica McWilliams Divorce in Northern Ireland: Unravelling the System (Stationary Office, 1999) p 194.

[895] *Ibid*, p 208.

[896] *Ibid,* p 193.

[897] Gillian Kerr, *op cit*, p 86. See also Report to the Office of Law Reform Divorce in Northern Ireland Unravelling the System, *op cit*, p 193, which records that information about the service was obtained from solicitors in just 10% of cases compared with 33% of clients who were informed by Relate. Although a total of fifty-one first contacts were from solicitors, this represents less than half the client self-referral rate.

[898] This is somewhat anomalous since other reconciliation provisions were adopted from the Matrimonial Causes Act 1973.

[899] Kerry O'Halloran, Family Law in Northern Ireland (Gill and Macmillan, 1997), pp 189-190.

any level of enthusiasm. Indeed, a recent consultation paper on divorce reform in Northern Ireland noted that the rate of solicitor referral to mediation is low and explained this in terms of solicitor reluctance to support a practice they felt was in competition with their own. Further, there was a low level of awareness on the part of the legal profession of their existence, as well as confusion over their function.[900] The consultation paper noted the provision in the Irish Family Law (Divorce) Act 1996 requiring a solicitor to discuss the availability of counselling, mediation and other services with a client. The information provided here, it suggested, is less subjective than a discussion of whether reconciliation is realistic in a particular case and more in keeping with the traditional role of a solicitor.[901] Thus, it would appear that there is a strong possibility that solicitors will play an increased role in mediation referrals in the future.

Most of the respondents thought that they understood what mediation was about when they first heard of it, a fact emerging from the research in the Republic also. It seems that eleven out of thirty four respondents felt under some pressure to attend mediation from a partner or a social worker, which is a matter of considerable concern and unfortunately the question was not asked in the context of the service in the South. The researchers considered that this could be a positive finding since 'respondents may have to make some working agreement to accommodate the needs of their children',[902] although it does undermine the voluntariness of the process. When embarking on mediation, clients looked on the process as a means of amicable resolution, they wanted help or advise about the children, but also hoped that their partners could be 'made to see sense'.[903]

Clients were not fearful of the service and entered hopeful that it would help their situation. The vast majority of clients told their friends and families that they were attending, contrary to the researchers' expectations. They had suspected that the Northern Irish sense of 'keeping things in the family'[904] would deter clients from either using or publicising their use of mediation. This perspective is unique given that mediation is generally regarded as a more private alternative to the glare of the formal legal system of dispute resolution. At any rate, it would appear that the concerns were unfounded. Clients held positive opinions of the staff, the appointment system and the environment in which the process took place,

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[900] Office of Law Reform, *op cit*, p 59.

[901] Office of Law Reform Divorce in Northern Ireland: A Better Way Forward (Belfast Stationary Office, December 1999).

[902] *Ibid*, p 23.

[903] Robinson and Devine, *op cit*, p 9.

[904] *Ibid.*

although some would have preferred a location closer to their homes. This information was not gleaned from respondents in the Republic, but the establishment of regional offices serves to combat any complaints in this regard. The service in Northern Ireland strives to accommodate clients in relation to appointment times and does not have a waiting list, while in the Republic, clients were usually seen within a short space of time, with 57% waiting one month or less for an appointment. There was some debate amongst respondents on the appropriate level of donation accepted from clients who are not entitled to legal aid; they suggested an income-related charge and non income-related set charge per mediation in almost equal numbers. The issue does not arise in the context of mediation in the Republic.

The Mediation Process

Despite the fact that child issues mediation clients present fewer problems for solution than comprehensive mediation attendees, the research found that that those attending in Northern Ireland had multiple, complex and interrelated problems to resolve. While clients usually came to mediation in order to discuss child-related issues, in fact a total of 128 issues were noted by respondents in Northern Ireland. The most common related to access, maintenance of children, custody, venue for access, contact with family members, schooling and housing. The broader nature of the issues tackled in the Republic makes the services difficult to compare in this regard, although it does appear from the outcome statistics that housing, child support and access were commonly discussed here. Curiously, it seems that access to other family members was a relatively non-contentious issue in the Republic, given the widespread choice to continue prior arrangements into the future.[905]

Mediators estimated that agreement was reached in around 70% of cases and if accurate, this represents a high success rate in terms of outcome.[906]

In 1994, research was undertaken to determine the levels of client satisfaction in the mediation service, which revealed a very high level of approval of 'both the practical organisation of the service and the mediation process'.[907] It must be noted, however, that the results were based on 34 responses to 164 questionnaires, giving an individual response

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[905] See Chapter Four, p 243 above.

[906] Report to the Office of Law Reform, Archbold et al, *op cit*, p 194.

[907] Gillian Robinson and Paula Devine Client Satisfaction Survey 1994 Final Report (November 1995, Family Mediation Service), unpublished, p iii. It should be noted that this research may be dated at this stage and a re-evaluation of the service is necessary to give a comprehensive and contemporary picture.

rate of just 27%. Although this was accepted as satisfactory by the researchers for a variety of reasons, it does run the risk of being misrepresentative of the mediation population in Northern Ireland, as a whole. Over half of the respondents (58%) said that they would return to mediation in the future if necessary, while eight out of ten would recommend the service to others. Only five clients would decline to do so. Over half were satisfied with the mediation experience, with higher rates where clients had attended three or more mediation appointments. While the satisfaction rates are high, they compare unfavourably with those recorded in the initial evaluation of the service, where satisfaction levels reached 75% and 97% of respondents were prepared to recommend the service. The fall was attributed by the researchers to the increased complexity and entrenchment of the problems presenting for mediation, making resolution more onerous from the point of view of the practice. In addition, they suggested that the increased referrals from social services may have resulted in less motivated clients, which could also affect the rates of satisfaction.[908] This is particularly important since clients reported pressure exerted by social workers to engage in mediation. New mediators might not have had sufficient time to settle into the practice and refine their skills. However, more recent research conducted from November 1996 to May 1997 found that 90% of clients would use the service again and 95% would recommend it to others.[909] The majority of clients concluded that mediators displayed the main skills identified by the service as central; namely, they listened to the clients' point of view, understood their perspectives and were even-handed between the partners. However, they were more likely to concur with the presence of the first skill than the other two.

Generally, clients thought that mediation had either helped their situation or had not change things, with only very small numbers suggesting that their predicament had been exacerbated as a result of attendance. Only seven out of the thirty-one respondents thought that bitterness and tension between them as a couple had increased, while five out of twenty eight felt that they were less able to acknowledge each other's feelings. This also emerged from the research in the Republic, where only 8% formed a more negative view of their partner as a result of mediation. The researchers identified areas where mediation was most likely to help, including focusing the partners on common ground, identifying and clarifying the disagreements, considering all the options, focusing on the future rather than the past and aiding participation in decisions.[910] The most recent research again concluded

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[908] *Ibid*, p 17.

[909] The response rate for this research was 40-50%, but the results were based on only 21 replies.. Linda Kerr and Orr Report on Family Mediation Service Client Satisfaction Questionnaire (Northern Ireland Family Mediation Service, 1997) unpublished.

[910] *Ibid*, p 19.

that satisfaction rates were high, although adversely affected by the fact that many clients attended alone, making agreement impossible.[911] Research in 1997 concluded that 81% of service clients had reached agreement with their partners, a figure which is high even by international standards.

In 55%-59% of cases, agreements endured subsequent to mediation[912] but those centred on child related issues, which were common, were more likely to last. Access conflicts prompted the most resilient agreements, with 64% surviving and over half of the agreements on schooling, contact with family members, housing, venue for access and custody of children endured. It is possible that changes in circumstances were responsible for at least some of the agreements breaking down.[913] The most recent figures suggest that a further 18% of agreements were partly working with only 23% breaking down entirely.[914] Over half of the clients surveyed said that they would like the offer of other services such as children's counselling, contact centres and information on parenting. Many were interested in the provision of follow up meetings and phone calls after mediation sessions had ended.

Very significantly, the research found that, for those people who had experienced problems subsequent to mediation, the largest group resolved them by talking directly to their partner. Since they attended mediation in the first place because of an inability to settle issues privately, this finding points towards an improvement in the communication of the couple. This is explained in the research as a skill acquired through attendance at mediation. While this may have explanatory power, the passage of time must also be taken into account. Thirteen out of thirty four clients addressed new problems in this manner, but a very substantial number of the remaining respondents preferred to leave the issue to their solicitors. Four clients decided to go to court, with the same number choosing to return to mediation. The researchers noted that the problems arising post-mediation might be beyond the remit of the child-issues only service, explaining the relatively low rate of return to mediation.

Children in the Northern Irish Family Mediation Service

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[911] Report to the Office of Law Reform, Archbold et al, *op cit*, p 207. 56.3% of respondents expressed satisfaction with the service and over 66% of petitioners professed their contentment.

[912] Post mediation questionnaires were distributed three months after mediation was completed.

[913] Robinson and Devine, *op cit*, p 22.

[914] Kerr and Orr, *op cit*.

A minority of clients[915] thought that mediation had achieved a positive outcome for their children, a finding bound to disappoint mediators. Fourteen out of thirty three did not believe that it had been beneficial and nine were undecided. While it is difficult to argue from this evidence that the benefits for children are readily discernable and significant, parents may be defensive about their children's needs at this point in time, a trait which also emerged from the research in the Republic. However, over 70% of clients in the Republic thought that mediation had helped them to understand the needs of their children, which must be regarded as a positive outcome from the child's point of view. The phrasing of the query may be of vital significance in this regard; even subtle insinuations of shortcomings on the part of parents in dealing with their children are likely to be met with forceful replies, while suggestions that parents have improved their skills in the course of mediation may be more warmly received. In both jurisdictions children were a rarity, their physical presence was seldom required or requested at mediation sessions. In Northern Ireland, a substantial minority[916] supported the presence of children. Given that the role of the child's voice in mediation is a relatively controversial one, this view lends weight to the arguments in favour of direct participation.

The researchers noted in their conclusion that staff reactions to findings were always positive and focused on improving the system and ameliorating difficulties. They suggested that such a service could only go from strength to strength. This absence of entrenchment and willingness to alter in the face of criticism is also evident within the family mediation service in the Republic of Ireland.

Survey of Mediators in Northern Ireland and the Republic of Ireland

Backgrounds

Mediators were asked to specify their professional background in a questionnaire delivered to practitioners in both parts of the island, given suggestions that this factor may influence mediator attitude or behaviour. Specifically, it has been argued that non-lawyer mediators go beyond settlement models and incorporate elements of therapy into their methods.[917] The largest number of mediators in the Republic had counselling backgrounds,[918] a further two

[915] Ten out of thirty three.

[916] Eleven clients out of the twenty-seven who expressed a view.

[917] See Edward Kruk "Practice issues, strategies and models: The current state of the art of family mediation (1996) 26, 2 Family and Conciliation Courts Review 197, p 212.

[918] Four mediators had been counsellors. One mediator had been a psychologist and family therapist.

trained as social workers and unusually, one had been a management consultant. There were two mediators with legal backgrounds. Contrast Northern Ireland, where half came from social work and half from counselling. However, mediators there also mentioned experience in other fields such as teaching and health care. It would appear that while counsellors account for the most numerous conversions to the profession, it cannot be readily inferred that their perspective is dominant, given that they make up only half of mediators currently practicing in the services examined. Further, their responses to the questionnaire did not illustrate an inclination to adopt a more therapeutic focus than their colleagues, contrary to what may have been anticipated.

Aspirations

When mediators were asked what they considered to be the primary aims of mediation, nine mediators in this jurisdiction suggested that settlement of disputes would feature in the top three; all of the mediators in Northern Ireland were of the same opinion. Seven mediators in the Republic would place the reduction of conflict in the top three aims, with all of the mediators in Northern Ireland suggesting that it should feature in the top four. Six mediators in the Republic thought that the improvement in the parenting relationship was one of the top three aims of mediation; again, all of the Northern Irish respondents placed it in the top four.

Thus, it is interesting to see that, despite the differences in the form of mediation practiced in the two parts of the island, mediators reached a high degree of agreement on the central aims of their practice. Half of the respondents in the Republic ticked the fair distribution of marital assets, although only two thought it merited a very high place on the list of aims. The absence of comprehensive mediation in Northern Ireland meant that it was less significant there. Two mediators suggested that the practice should seek to empower clients, one thought that it would lead to spiritual growth. There was one clash of opinion, where a mediator with a background in counselling thought that the practice should aim to help the client come to terms with the ending of the relationship and another, with a non-counselling background, suggested that this was a counselling concern only and was not the responsibility of mediation. While mediators' backgrounds did not result in radical divergence, it may be the cause of more subtle differences in approach and concern. Indeed, this emerges clearly when it is considered that half of the Northern Irish mediators thought that aiding this acceptance process should be an aspiration of mediation.

Only two mediators in the Republic considered that the promotion of joint-custody as an option warranted a high place on the list of aims,[919] while two of the mediators in Northern Ireland gave it pride of place. Improvement in parental communication and respect for parental decision making were also mentioned there. This probably stems from the primary focus on child issues in that jurisdiction. Despite these variations, a striking consensus emerged, which suggests that in Ireland, mediators see their work as a form of dispute settlement that reduces conflict and improves parental relationships.

Methodology

When mediators were asked which form of mediation they preferred, a similar consensus emerged. Whatever type of mediation they practiced, mediators were of the unanimous belief that comprehensive out-of-court mediation should be available to the public. In the Republic, four practitioners thought that child issues out-of-court mediation should also be available, with two of the Northern Irish mediators of the same opinion. Only one mediator ventured to state the case for the availability of an in-court model for child issues, particularly child custody, but also warned that there would have to be considerable discussion and careful planning first.[920] One thought that there might be merit in an in-court model in cases of domestic violence.

Mediators were asked to outline the advantages of their chosen model. In the Republic, they suggested, in reply, that comprehensive mediation allows for the creation of an integrated package that establishes a new agreed future for the whole family, ensures that the couple have control and ownership of their own agreement and aids power balancing in the mediation setting. The adversarial and mediation processes are separated, allowing greater autonomy for mediation. Mediators in Northern Ireland chose a form of mediation that they do not practice themselves, so that their answers were more inclined to indicate the advantages of mediation generally, rather than the specific advantages of an out-of-court, comprehensive model over alternative forms. However, one did suggest that mediation imposed by courts is devalued, although it can lead to viable outcomes and most forms, of necessity, become comprehensive to a greater or lesser degree.

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[919] One mediator noted that they promoted joint parenting rather than joint custody which is politically and sociologically sensitive and its viability the subject of debate.

[920] It is interesting to note that neither of the two mediators with legal backgrounds were in favour of an in-court model.

Mediators were asked whether they had a preference for therapeutic or settlement models of mediation. It became clear from the replies that the professionals did not consider that this simplistic dichotomy reflected their approach. One mediator suggested that the models of operation may be placed on a continuum from facilitative, to transformative,[921] to a mixed model of facilitative and transactional, to transactional/pragmatic and finally to evaluative, where facilitative is perceived as high on improving inter-personal relationships and evaluative is high on reaching an agreement. The therapeutic model, as developed by Benjamin and Irving, is not really classic mediation, but belongs more to family therapy. Three mediators in the Republic of Ireland suggested that they utilised a transformative model of mediation, thus revealing that they are very interested in improving the quality of inter-personal relationships in the course of mediation. Two suggested that the model would have to be adjusted to the needs of the individual couple and were willing to utilise either form. Two respondents thought that the forms were not mutually exclusive and therapeutic techniques could be utilised as part of a settlement strategy. Two preferred a therapeutic approach which did not adopt a settlement orientation, where possible. Only one practitioner, a former solicitor, adopted an approach that focused on settlement. Contrast the Northern Irish responses, where three of the mediators preferred a settlement approach, although it was suggested that there is always an element of therapy and balance is important. One thought that their approach was rational-analytical, therapeutic, educative, normative and evaluative in that order.

There does seem to be a worrying lack of consensus amongst mediators on the issue of methodological approach; this is probably unsurprising given the proliferation of perspectives and terminology in the theoretical literature surrounding the area. It is clear that mediators in the Republic do not wish to be constrained by the rigid settlement orientation to the exclusion of other perspectives, showing concern that their practice achieves some therapeutic benefits for clients. Whatever the terminology used, they aim to transform the relationship as well as achieve agreement. In Northern Ireland, mediators are content, for the most part, to reach for an agreement, probably with the hope and expectation that the experience will bring a transformation as a by-product. In the end, the differences may be subtle where more extreme therapeutic models are rejected, but the diversity of viewpoint on this subject remains significant, particularly if it informs the way mediators carry on their work.

[921] See above, Chapter One, p 41.

Obstacles to Agreement

The most significant problems encountered in mediation were recounted by the mediators. Only two respondents in the Republic of Ireland felt that violence directed at a spouse and/or children was the most significant, but it was mentioned as one of the top three difficulties by half of the group. Violence directed at the mediator was only mentioned by one person. The presence of an impasse, whereby the clients cannot reach agreement, was listed by four respondents, while the same number cited the failure to attend mediation as a common problem. One member of this group of mediators suggested that it was a right and privilege of clients to decline to attend and the failure to do so could only be seen as problematic where the client felt unwelcome at the Centre. Centrally, problems in obtaining financial disclosure were described as the primary difficulty faced by mediators in four replies and was cited as a significant problem in a further four cases.[922] Half of the group mentioned the interference by parties' solicitors in the process. Two people thought that the clients did not keep the agreements made in mediation, although one mediator stated that this information was not available to the Service. Only one mediator thought that clients were inclined to confuse the concept of mediation with marriage guidance and personal counselling.

Mediators drew attention to other obstacles, not cited in the questionnaire. The reluctance of one spouse, usually the husband, to recognise the reality of the separation or the resentment of the husband where a barring order had been obtained were put forward as complicating factors. Conflict, anger and verbal abuse made the process more difficult and it was sometimes hard to enable clients to move from their established positions. Clients might not be emotionally ready for mediation and may need counselling either before or in conjunction with the process. Clients were often at different stages in coming to terms with the ending of the relationship and the party who was ready to finalise would push ahead with legal proceedings rather than wait for the other to come to a point where they were willing and able to mediate. One mediator suggested that there was a lack of information and understanding of the cost implications and stress of the adversarial system. It seems that mediators also faced administrative problems in their work; one complained of too much paper and computer work, the need to resort to standard format agreements and the constraints of one-hour sessions. Clients were inclined to perceive the mediator as a judge or an arbitrator and this caused confusion.

[922] For the court approach to financial disclosure in Ireland, see Chapter One p 77, n 295 above.

In Northern Ireland, three mediators cited the confusion of mediation with marriage guidance and counselling as a significant problem. Perhaps the close connection between the mediation service and Relate is contributing to the lack of clarity. Failure to attend, to reach agreement and to keep agreements reached were common problems. Half of the group cited the interference by the parties' solicitors as creating difficulties for them. Violence directed towards a spouse or child was only cited by one mediator. Further, in contrast with the service in the Republic, none of the mediators thought that failure to disclose financial information was a central difficulty. Perhaps their procedures in this regard are more stringent, the mediators are simply not aware of the problem or they are not willing to admit that they face obstruction. More likely, the discrepancy may be explained by the absence of a comprehensive model, which demands both more financial disclosure and more accurate disclosure than the child-issues only service available in Northern Ireland. While there is no room for complacency on the issue, the financial support of children by the non-residential parent is assessed by the child support agency in Northern Ireland,[923] relegating the question of financial disclosure in mediation to a less central place. Mediators made other suggestions in addition to the examples in the questionnaire. Clients sometimes felt intimidated by their partner because of past experience, often one party might wish to mediate, but the other would change their mind and unresolved issues from the past relationship would reappear at the mediation sessions.

Future Legislation

The next group of questions sought to measure the attitude of mediators to changes in the legal environment in which mediation operates, specifically to the introduction of some element of compulsion in attendance. It appears that mediators, north and south of the border, were in favour of governmental funding. Only one mediator, from the Republic, disagreed with this proposition.

A more varied response was discernable when mediators were asked to comment on the introduction of a compulsory information meeting that would not place any particular emphasis on mediation. The majority of mediators in the Republic of Ireland were in agreement with such a scheme, with three in strong agreement and a further three simply agreeing with the proposal. One mediator remained neutral, while three respondents disagreed with the terms. Half of the mediators in Northern Ireland thought the proposal

[923] Child Support (Northern Ireland) Order 1991.

would be beneficial, with one remaining neutral. One disagreed with the suggestion, arguing that an English pilot study had found that most clients still opted for a solicitor, despite the fact that those who chose mediation had high satisfaction rates. Mediators were more united in response to the next proposal, which suggested that only legally aided clients would have to attend the compulsory information sessions. Nine mediators in the Republic of Ireland expressed their disagreement with this distinction, with six disagreeing strongly and only one mediator expressed a neutral position on the issue. There was unanimous disapproval of distinguishing legally aided clients from the rest of the divorcing population in Northern Ireland.

The next question aimed to measure mediator support for the voluntariness of the practice in a direct way; it suggests that clients should be legally bound to attend a meeting with a mediator before embarking on a process to obtain a separation or divorce. While four mediators in the Republic were in disagreement with the proposal, an equal number seemed to be undecided on the issue and retained a neutral stand. Two practitioners thought that it would be a good idea. Thus, while this proposal did not gain the same level of support as the non-directive compulsory information meeting, it would seem that a substantial proportion of mediators here have not formed a strong commitment to the concept of voluntary presentation at mediation and are willing to keep an open mind on future options in referrals. The Northern Irish results demonstrate that mediators there are even more open to the suggestion, with three in agreement and only one dissenting voice.

However, when the proposal was altered so that only legally aided clients would be asked to attend with a mediator, the responses were very negative. Nine mediators in the Republic, with the remainder remaining neutral and all of the mediators in Northern Ireland challenged the scheme. Several mediators in the Republic took the trouble to express their views on voluntariness separately from this set of questions. One argued that the questions had been heavily dominated by an assumption that people will only do things if required by law or mandated by a judge, an assumption with which the mediator disagrees. Referral to mediation must remain voluntary and it will not work if someone is in the room against their will, as they will veto outcomes and resist agreements. Another agreed that mediation must remain voluntary and stand-alone. However, information sessions which included information on counselling, mediation, litigation, effects on children and the grieving process could be make mandatory or be strongly advised to clients.

The issue of mandatory mediation for child-issue disputes is a controversial one and provides a useful means of testing commitment to the notion of voluntary mediation. Eight

mediators in the Republic could not support this practice, although only one expressed this disagreement strongly and two thought that there was merit in the suggestion. Contrast Northern Ireland, where mediators seemed to be more amenable to the idea of compulsion in child-issues mediation, with three expressing agreement and only one dissent. Negative opinions were more numerous where compulsory mediation was proposed in cases involving all the issues of relationship breakdown including financial disagreements. Nine mediators in the Republic expressed disagreement, three of them strongly, while just one mediator thought that it would be beneficial. However, in Northern Ireland there was a striking variety in responses with one in strong agreement, one in agreement, one neutral and one in disagreement. Essentially, there was some inclination on the part of mediators in Northern Ireland to agree with the proposal demonstrating again their waning commitment to the notion of voluntary mediation in all cases. The picture emerging from the Republic, at least, is one of openness to the concept of mandating information sessions, but opposition to the idea of mandatory mediation. One mediator suggested that while mediation must remain voluntary, with statutory support, it could be the first port of call and all professions should be encouraged to refer clients in the first instance to mediation through influence or persuasion.

Domestic Violence

The issue of domestic violence was not satisfactorily addressed in the client and mediator questionnaires assessed in the last chapter. In order to fill this void and to explore the area more fully, mediators were asked in this questionnaire whether they inquire into a history of domestic violence before or during the course of mediation. In Northern Ireland, mediation clients attended an individual pre-mediation screening appointment. Most enquirers did not proceed beyond this stage, often because an intake worker had adjudged the risk of domestic violence to be unacceptable. All of the mediators, north and south of the border, replied that they undertake an investigation at the intake session, interviewing clients separately. Questions are posed which are 'tactful and sensitive' on the decision making history, how rows were handled and whether there had been any violence. In addition, mediators assessed the body language and power play over the course of mediation and asked follow up questions in subsequent sessions to make sure that the client felt safe. While the screening at intake is brief in the Republic of Ireland, the violent relationship may become apparent to mediators at a latter stage due to the attitude or behaviour of one or both partners. Hurt and anger may have to be dealt with before mediation is possible. It must be noted that this issue is often raised in critiques of the practice, possibly creating a certain level of defensiveness by mediators in the area. One commented thus; 'a lot of law

journals criticise mediation as unable to deal with domestic violence or power imbalance; this is nonsense and merely a justification for bringing clients back into the adversarial system. Lawyers don't seem to understand how power shifts continuously in mediation and clients are well able to look after themselves'.

Estimates of the prevalence of domestic violence in relationships presenting for mediation varied radically. For instance, two mediators suggested that there was physical and emotional violence with control by one person in 15% of cases, while another working at the same centre thought that at least one third of couples, if not more, exhibited abusive relationships. Two others also found that one third was the appropriate figure, with about 10% with major power imbalances. Three mediators were unable to arrive at a number and estimated that a 'certain percentage' demonstrated these problems, generally less than one third but more than a negligible number of clients. One mediator suggested that violence was not prevalent, but power and control issues were often uncovered in mediation. The variety in responses is a serious cause for concern; definitional difficulties alone do not explain the discrepancies, since those with low estimates were including emotional abuse in their number. It seems highly unlikely that mediators operating in the same service are getting cases that differ to such a radical extent and one plausible explanation is that mediators are not at one in their view of what constitutes violence or clients are not disclosing incidents to some of the service providers. Alternatively, it has been suggested by the practitioners that the low estimates of domestic violence may be a result of significant levels of client self-screening and screening by other professionals, such as solicitors, who inform and refer clients. Mediators may be generalising from specific cases that come to mind, since the service has not been in a position, to date, to accurately assess the prevalence of violence in client relationships. However, it does alert to the presence of a continuum of views in professional groupings and mediators do not represent an exception to this fact.[924]

Responses from Northern Ireland showed a greater level of internal consistency, but gave estimates of violence levels that were far higher than those of the mediators in the Republic. In fact, one mediator suggested that violence was so common that it was not even

[924] Mediators are not the only professional group experiencing difficulties in estimating the level of violence in attending client relationships. A survey of family law solicitors in Northern Ireland revealed assessments ranging from 'rare' to one third of cases to three quarters of cases, with the majority citing half of couples as the appropriate figure. There were suggestions that these clients may be more prepared to settle their ancillary relief claims at a substantial undervalue, although one solicitor thought that victims of violence were empowered by the divorce process. See Report to the Office of Law Reform, Archbold et al, *op cit*, p 169.

mentioned; it had become a natural part of problem solving. Two mediators suggested that half or more of the clients attending there displayed incidents of violence, while one mediator suggested that the figure was more like '99% here in Derry'. The remaining mediator, who appears to be out of tune with the general approach, suggested that they had limited experience of domestic violence in mediation practice.

Mediators in the Republic described the forms of violence encountered by them in the course of their work. Just as low levels of violence were commonly reported, the mediators thought that the type of violence was not usually serious. Verbal abuse, threats, pushing and shoving were given as examples, with the suggestion that few couples exhibited significant domestic violence. This was explained by one practitioner as self-screening by victims or possibly lack of information on mediation. Another suggested that the violence was generally interactive, hitting, pushing and throwing things with an inability to deal with anger more common than a power or control problem, but in 5%-10% of cases violent incidents were more serious and power and control dynamics evident. Mediators thought that it was once off in many cases, under extreme provocation in most cases and in the past or connected with alcohol consumption. One said that while emotional abuse was far more prevalent, physical violence usually occurred where there has been consumption of alcohol and a row developed. Yet, another mediator at the same centre suggested that physical violence coupled with emotional abuse was most prevalent although emotional abuse alone also occurred. Violence was 'separation-related' only, did not cause injury or was self-abusive in nature such as reckless driving or excess drinking. Two mediators recognised the presence of psychological abuse, constant verbal denigration and 'put downs', as well as the abuse by men of economic power and by women of power in the area of parenting and child care. One mediator listed the forms of violence in order of prevalence as verbal abuse, shoving and pushing, grabbing, striking and calculated injury.

In Northern Ireland, not alone were the estimates of violence considerably higher than in the Republic, but the type of violence described was more serious. Behaviours ranged from pushing, refusing to allow a partner to leave by physical restraint or threats, to injuries requiring hospitalisation such as miscarriage, broken bones and severe bruising. Generally, it took the form of physical abuse of the woman, but one mediator suggested that there were more significant levels of female to male violence in the West of the Province. Again, the discrepancies are difficult to account for, unless we simply assume that Northern Ireland is plagued with higher and more lethal levels of domestic violence.[925]

[925] See pp 276-279 below.

Generally speaking, mediators altered their attitude and methodology when they discovered that there was a history of violence in a relationship. They examined the level and frequency of violence and the safeguards in place, to discern whether or not it was safe for the victim to proceed with the mediation, as well as any steps taken by the perpetrator to overcome their violent behaviour. The stance of the mediator could become more interventionist, they might be more alert to power issues and watchful for a possible lack of balance or more likely to caucus than in the usual case. Several mediators suggested that the violence would have to be openly addressed and acknowledged by the parties and ground rules established before the mediation could proceed. During mediation, mediators watched for signs of intimidation and tried to ensure that the personal safety of the parties did not depend on the outcome of the agreement. The process would proceed at a slower pace. One mediator stated that if there was a current risk of violence then mediation might be ended and the victim advised of the options available at that point. In the alternative, the violence could be openly acknowledged before proceeding. One mediator gave a list of procedures to be followed on discovery of an abusive relationship, which could be regarded as a form of best practice in the area and reflected the general consensus on the appropriate response; the mediator should check to see if the victim wishes to mediate, ask that the violence be placed on the table as an issue to be discussed, ask the victim what they would need to feel safe while negotiating, the mediator would be more likely to caucus and the couple should be asked to see their solicitors. One mediator suggested that there is a wide diversity of views on the handling of domestic violence, on a continuum from screening out at an intake meeting with separate sessions through to asking questions at the intake, but relying on interactional assessment throughout the mediation process. Both of these approaches were visible from the questionnaire replies, although the practice notably tended towards the latter in the Republic of Ireland.

However, where violence was in the past and the victim had since taken back their power, one practitioner thought that there might not be any issue of fear or safety remaining. Further, three respondents did not believe that this knowledge would affect the way in which they carried on their work. One suggested that the process is the same unless a client does not feel safe, which is very rare and then there might be a caucus or private meeting at the mediator's discretion. One considered that mediators are trained in the dynamics of abuse and are capable of assessing whether or not mediation should take place and empowering the victim so that the experience is beneficial to them. A mediator will have to work with the realities of each individual couple. The professionals spoke in terms which suggested that the problem was mutual rather then placing the responsibility on the abuser;

'both parties must feel understood', 'clients must negotiate what will help to ensure that they are both safe during and at the mediation process'.

Despite the high levels of violence reported in Northern Ireland, mediator methodology was very similar to that reported in the Republic. Safety issues were to the forefront of their minds, with provision for separate rooms and staggered arrival and departure times. One mediator thought that attitude and methodology would not differ in the face of a violent relationship, although acknowledging that psychological violence and intimidation were harder to address. There was an increased awareness of the potential for violence and its triggers. Again, there was a hint that partners bore equal responsibility in the resolution of this problem; 'both clients must feel able to address issues without fear of repercussions after sessions or in the future'.

Knowledge of Outcomes

Mediators were asked to estimate the rate of full agreement reached in their practice. The purpose of this question was to ascertain the accuracy of their answers in light of empirical findings on the actual level of agreement reached in mediation, thereby revealing any tendency to exaggerate results. The estimates varied widely, which may reflect the current caseload of mediators, but also illustrates their own views on the rate of agreement to be expected in a successful practice. Three mediators in the Republic over-estimated the rate of agreement, suggesting that 70%-80% reached full agreement on all issues, whereas the correct result is in the region of 60%. However, two respondents under-estimated the rate of agreement, guessing between 30%-50%. Half of the group came close, with responses in the region of 50%-70%. While there was a slight inclination towards over-estimation, it has to be remembered that many of the clients who failed to reach full agreement did solve some of their problems in mediation and this could leave exaggerated success rates in the minds of the mediators. The Northern Irish responses varied even more radically with one mediator opting for each of the rates of 5%-15%, 20%-30%, 40%-50% and 60%-70%.

Most of the mediators in the Republic[926] thought that parents were most likely to opt for the full involvement of both parents in the lives of the children, which is in fact the case. One defined this as shared parenting with the father having the children every second weekend to stay overnight, although the centre policy definition would call for additional weekday contact under this arrangement. Three mediators thought that equal parenting was the most

[926] Six mediators, in fact.

likely result to come from mediation, whereas in fact this represents only 9.5% of agreements reached. Two chose partial involvement with one parent, which was the case on a substantial minority of agreements,[927] with a further two respondents accurately identifying this resolution as the second most popular choice of parents. Again, the discrepancies may be explained by the particular caseloads of mediators displaying a disproportionate number of equal parenting agreements at the time of the questionnaire. At any rate, the majority did have an accurate view of the typical parental settlement, which is important in case parents would feel under pressure to conform to 'normality'. Mediators in Northern Ireland also opted for full or equal involvement as the most likely choices of parents, with the same number relying on each option. One mediator thought that parents would chose either full involvement of both parents or partial involvement of one parent in the children's lives.

Attitudes Towards the Adversarial System and the Legal Profession

The next set of questions sought to elicit mediator views on the adversarial system and the ideal role they envisaged for solicitors. Mediators were asked to express a view on the proposition that the adversarial system results in increased conflict, reducing the prospect of lasting agreement. Mediators in the Republic agreed with this viewpoint, with four in strong agreement, five simply agreeing and only one respondent expressing a neutral position. One expressed a view that the adversarial system makes it more difficult to reach agreement in the first instance. Mediators in Northern Ireland registered a unanimous opinion that this was a correct view, with one in strong agreement with the statement. One mediator suggested that the legal system also reduced the prospect of children keeping in touch with both parents.

The respondents were asked to comment on a proposal that clients should receive legal advice in all mediated cases whether before, during or after mediation. Perhaps contrary to expectations, mediators north and south of the border expressed their unanimous support of this policy, indicating that they see the legal profession as providers of a vital and complementary service rather than competitors in the market for marital breakdown services. In fact, the majority in the Republic expressed their strong agreement with this proposal. Again, when mediators were asked to comment on the proposal that clients would only receive legal advice where it was necessary in the opinion of the mediator, they demonstrated their unanimous support for free access to legal advice. Six mediators were in

[927] 35.7%.

strong disagreement with this investment in mediator power and the remaining respondents expressing their simple disagreement with the suggestion. Mediators in Northern Ireland were also unanimous in their disapproval although less emphatically, with only one in strong disagreement.

Mediators in the Republic gave a clear and positive verdict on the proposition that it is generally advisable that clients should see their solicitors before a final agreement is reached, with four in strong agreement, five in agreement and only one mediator remaining neutral, on the grounds that this is a decision for clients themselves. One mediator in Northern Ireland also preferred neutrality, one expressed no opinion, but the remainder were in agreement. This result was in line with the views expressed in response to the next proposal, which put forward that clients should only see their solicitors after a final agreement was reached in mediation. None of the respondents were in agreement, with three mediators in the Republic in strong disagreement, although two did remain neutral. In Northern Ireland, there was one neutral answer and one person did not express an opinion. However, the remaining mediators were evenly divided on the proposal. The variation in reply reveals less commitment to a central place of legal advice than was displayed by mediators in the Republic. A possible explanation for this may lie in the type of mediation practised; since only child issues are dealt with, which are often of a less legalistic nature, advice may not be as necessary in order for Northern Irish clients to come to terms with their partners.

Interestingly, mediator reaction to the suggestion that, in the future, solicitors should be at hand to advise clients during all stages of the mediation process was very diverse. Four mediators expressed their strong agreement with the statement, while a further four were in disagreement with it and the remainder were neutral. Those who agreed did so in a more entrenched manner than those who disagreed, but the division is clear nonetheless. In Northern Ireland, mediators were more inclined to disagree with this suggestion, with half adopting a negative stance, one remaining neutral and one declining to express an opinion either way. Again, there were mixed responses to the proposition that in the future solicitors should play a reduced role in marital and child disputes, with three respondents in the Republic remaining neutral, five agreeing, a further mediator in strong agreement and one respondent disagreeing. A similar inclination to agree was discernable in Northern Ireland, where two agreed, one gave no opinion and one remained neutral.

It seems that, while positions have not hardened, a trend is discernable. Mediators are by and large in favour of the provision of legal advice to clients while they are engaged in

mediation, but remain sceptical of the adversarial system and generally believe that the role of lawyers should be reducing in the future. 'Solicitors have an advisory role in relation to clients legal rights, but counselling agencies are in a better position to improve communication between clients and mediation is better for parenting issues', one mediator asserted. They are of the view that clients should see their solicitors before reaching an agreement, yet are reluctant to see solicitors engaging in all stages of the process. Indeed, given that half of mediators reported that they have experienced difficulties in mediation due to the interference of solicitors, it is surprising that four respondents in the Republic are in favour of their continuous availability. The partnership ideal is strong and widely supported, 'there needs to be more communication and dialogue between solicitors and mediators to improve understanding of each other's role'. One mediator proposed that the new Family Mediation Board could prove an opportunity to forge this partnership, representing family solicitors in private practice and in legal aid, mediators, counsellors, citizen information centres and social welfare staff.

Mediators gave varied replies to the proposition that solicitors and mediators must operate on a partnership basis if mediation is to be successful. Three mediators in the Republic agreed, with a further four giving their strong agreement, thus representing a clear majority of mediators. Yet, two disagreed and one remained neutral. In Northern Ireland, the partnership concept received unanimous support from mediators, with three mediators in strong agreement with the notion. Serving to confirm this finding, all of the respondents rejected the proposition that the work of solicitors and mediators is diametrically opposed and partnership is neither possible nor advisable. Negative attitudes towards the adversarial system did not translate into a negative view of lawyers or their work and mediators on both parts of the island have a clear view of the need for a good relationship between practitioners in the dispute resolution field. Indeed, it could be said that their view of lawyers is non-adversarial in nature.

The next statement asserted that mediation is a system of dispute resolution that suits certain clients, but should remain ancillary to the legal system, which would continue to deal with difficult cases. Although a majority of mediators in the Republic disagreed with the statement as expected,[928] four were in agreement, which may be regarded as a surprising result. One mediator who disagreed thought that lawyers were necessary where cases cannot be mediated, but the mediation system is alternative rather than ancillary. One of the agreeing mediators did qualify their support by saying that mediation can and does deal

[928] Six mediators.

with difficult cases. Nevertheless, the result was unanticipated given the loaded language of the statement. Indeed, mediators were conscious of the limitations of the practice. One stated that problems remain in relation to the status of the mediated agreement and the cost of making it binding on the clients, another thought that the practice may be counter-productive if the parties are not willing or competent to negotiate, the positions are extreme and hardened, there is a grave imbalance of power between the parties or the clients are not participating voluntarily. In Northern Ireland, mediators divided evenly, with two in agreement although, again, one mediator qualified agreement by saying that the system is complementary rather than ancillary and objected to the use of the word 'difficult'.

Incidence and Severity of Domestic Violence in Northern Ireland

After the 'troubles', the highest number of killings in Northern Ireland have been as a result of domestic violence. During the five-year period from 1991-1995, twenty-one women were killed by their partners, representing 48% of all women murdered in Northern Ireland. Between 1996 and 1999, twenty-seven women were murdered by their partners. This figure compared badly with Britain and the Republic of Ireland.[929] Further, in 1999 alone, the Royal Ulster Constabulary dealt with 7,411 cases of physical violence in the home, 86 incidences of grievous bodily harm and 20 rapes. In 90% of cases, the victims were women.[930] This gives some insight into the extent and severity of domestic violence in Northern Ireland, a phenomenon notoriously hard to estimate with any degree of accuracy. One quarter of women in a sample of divorce petitioners and respondents had experienced domestic violence, even though some of the group were relying on no fault facts to prove the breakdown of the marriage.[931] One local community survey of women's health in the Ardoyne area of North Belfast also found that domestic violence affected the lives of 27%, more than one in four, of the women interviewed.[932] An in-depth Northern Irish study of the experiences of a sample of 56 victims discovered that the violence began early, increased in intensity and frequency, was on going rather than isolated and was serious, often requiring

[929] There are one hundred women killed every year by their partners or ex-partners in England and Wales, which represents about half of women killed in that jurisdiction. Between 1990 and 1994 in the Republic of Ireland, ten women were killed as a result of domestic violence while the same figure in Northern Ireland was twenty-nine. See Monica Mc Williams and Linda Spence Taking Domestic Violence Seriously (HMSO, 1996) p 41.

[930] Northern Irish Information Service, Press Release, 7 May 1998, p 2.

[931] Office of Law Reform, *op cit*, p 22.

[932] Monica McWilliams and Joan McKiernan *op cit*, p 5.

medical treatment. Weapons were commonly used, women were beaten while pregnant, raped and threatened with death.

Many of the children in the survey had been emotionally and physically scarred by the attacks on their mothers, whether through witnessing the violence or suffering actual assault where they intervened to protect their parent.[933] Yet, several women lost custody of all or some of their children since courts and social workers did not seem to consider a history of violence to be relevant in the consideration of whether these men were fit fathers. Violence was adjudged to be an 'isolated incident' or social workers made judgments against women because they were in a refuge and their husbands were 'living in a nice home'.[934]

There have been attempts to rationalise the high level of domestic violence in Northern Ireland,[935] but they remain tentative. Certainly, it can be argued that women are less likely to leave violent relationships and will stay for a longer time because of the influence of religious and social opinions. There was some evidence in one study that husbands enlisted clerical support to pressurise women into remaining or returning home. A more traditional society than Britain, negative social attitudes towards divorce make it harder to leave, particularly for women in the travelling community.[936] It appears that marriages are likely to survive for a longer time where the couple have been married in a church, service rather than a registry office. When the divorce figures for 1998 are broken down, the median survival time for a Church marriage was 14 years compared with ten years where the couple had married in a registry office.[937]

The impact of the 'troubles' also has important explanatory power. The police would not answer calls from nationalist areas for fear of traps and women in this community described their reluctance to call on the police for help as they were seen as the 'harasser' and

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[933] *Ibid*, pp 36-37.

[934] *Ibid*, p 40.

[935] Monica McWilliams and Joan McKiernan Bringing it out in the open: Domestic violence in Northern Ireland (Belfast, HMSO 1993), pp 50-57.

[936] Yet it is mainly traveller and working class women who use refuges in the Republic of Ireland. Women's Aid disputes the theory that this reflects a higher rate of violence in these communities but suggest, instead, that these women have no access to money and nowhere else to go. Women's aid argue that their national helpline deals with queries from hundreds of women annually, from all social classes and backgrounds.

[937] Annual Report of the Register General 1998 (Stationary Office, 1998), section 8.

unlikely to assist.[938] Domestic violence was considered of far lesser importance than the terrorist activities that represented a threat to the state.[939] Women rarely resorted to the paramilitaries, but one respondent had asked the Ulster Defence Association to remove her husband from the home. The widespread availability of guns was a compounding factor, as well as difficulties experienced by women in getting re-housed in 'their own' areas. It has been proposed that civil unrest can create the conditions for increased domestic abuse of women, even after the political conflict has been resolved. Demobilised soldiers can manifest their frustration with integration into civilian life through violence in the home, while the rebuilding of economic or judicial systems may cause the suffering of women to be relegated to low priority status.[940] In the context of Cambodia, it has been suggested that years of civil war left individuals too numb or over-whelmed to care about domestic violence and the population has grown familiar with the use of violence to resolve disputes.[941] In South Africa, one commentator believes that the absence of accessible targets for growing social aggression results in the displacement of violence to the family arena.[942] Any of these theories many be usefully applied by analogy in the Northern Irish context.

There have been legal developments in recent years. The passing of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 represents a legislative breakthrough, not simply because it clarifies powers of arrest and criminalizes the break of a non-molestation order, but also because it recognises that progressive, coherent legislation and policies are required to provide just remedies for victims of domestic violence. Moreover, it has added an important novel element in an amendment to the Children (Northern Ireland) Order 1995.[943] This provides that where a court is considering whether to grant a residence or contact order in favour of someone who has a non-molestation order against him, the court will have to take into account any harm that the child might come to through seeing or hearing domestic violence.

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[938] See Christine Taylor "Northern Ireland: The policing of domestic violence in nationalist communities" 10(2) Wisconsin Women's Law Journal 307 (1995). She suggests that a combination of sexism and sectarianism pervades the Royal Ulster Constabulary, leaving nationalist women, in particular, without protection.

[939] *Ibid.*

[940] Human Rights Watch World Report 1999. This suggestion was made in the wake of the Bosnian conflict.

[941] Robin S Levi 'Cambodia: Rattling the killing fields' (Family Violence Prevention Fund, 1999).

[942] Graeme Simpson 'Jackasses and jack rollers: Re discovering gender in understanding violence' (Centre for the study of violence and reconciliation, 1992).

[943] See s 12A Children (Northern Ireland) Order 1995, as inserted by s 28 Family Home and Domestic Violence (Northern Ireland) Order 1998, SI 1998 No. 1071 (N.I.6).

This provision makes it vital for a mother to obtain a non-molestation order where child arrangements are likely to be challenged by a perpetrator in court,[944] while reinforcing the centrality of court protection in the face of violence. Contrast the position of the mother in mediation. There is no legislative imperative that a mediator should consider the negative implications of contact or residence with a violent parent; indeed, good practice would discourage mediators from very active interventions promoting particular solutions. Mediators in Northern Ireland suggested that levels of violence were high, further illustrating the seriousness of the problem and confirming other research in the area. However, their approach to domestic violence could be described as tame. Only one mediator suggested ending mediation and even this person considered that the open acknowledgement of violence could operate as an alternative. None suggested that an immediate non-molestation order be obtained, which could provide state-backed assurances to the victim, as well as securing her position before a court in the event that mediation failed to achieve the resolution required.

The reason for this may be the presence of an aggressive pre-mediation screening policy, which eliminates the most serious cases at the outset, reducing the chances of a mediator being called on to act in the face of a serious violent conflict. Yet, the central requirement of even-handedness on the part of the mediator may lead to a non-condemnatory stance, which interprets the violence as a family dynamic rather than criminal behaviour. There was a tendency on the part of Irish mediators to minimise the seriousness of the clashes and to suggest that the explanation for the violence lay in individual pathology, for example, high levels of alcohol consumption. Yet, one study into domestic violence in Northern Ireland found little conclusive evidence of a causative relationship between alcohol and violence.[945] In only 20% of cases was the women hit only when the man was drinking and a further 20% of women reported that their husbands did not drink at all. Instead, this survey revealed that violence, coupled with emotional abuse, was used to control women's behaviour. This would suggest that a better explanation for violence is unequal power relations, a theory which focuses on the vulnerable position of women in Northern Irish society generally and sees violence as a means of perpetuating this subordination. Unlike theories of individual pathology, it does not individualise and excuse the behaviour but rather seeks to place the violence in a broader social context. The approaches of mediators

[944] This limitation was recognised in the Advisory Board on Family Law: Children Act Sub-Committee Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence, (unpublished 2000), p 25 which suggested that "most people affected by domestic violence do not approach the court for injunctions".

[945] McWilliams, *op cit*, p 41.

and feminist commentators continue to diverge in a very real way on the issue of mediation of abusive relationships, it seems.

Background to Divorce in Northern Ireland

There is little doubt that Northern Ireland is experiencing a rise in the rate of divorce. In 1998, 2,459 marriages were dissolved, representing an increase of 13% on the previous year and of 59% on the 1988 figure. This translates into a divorce rate of less than 3.5 per 1,000 of the married population, which is low compared to England and Wales (13.5) and Scotland (10.9), although it is around the European average.[946] In 1996, 4% of the population in the Republic of Ireland described themselves as separated, legally separated, deserted, divorced or no longer married by reason of an annulment.[947]

The main ground for divorce in Northern Ireland was non-cohabitation[948] for two years with consent, but the behaviour ground featured in 17% of cases, representing a rise of 150% on the figure of a decade ago.[949] Adultery was cited in just 6% of cases, although when petitioners and respondents were asked in a Northern Irish divorce census to explain why their marriage had broken down, one in eight cited infidelity. The respondents commonly thought, at 29%, that a lack of communication had been responsible, with a further 12% suggesting that their spouse had been living a single life.[950] However, these figures hide the extent of the acrimony involved in marital breakdown in Northern Ireland. A court record study of the divorce in the province found that 13% of participants had secured personal protection or exclusion orders in the past and a further 15% had pleaded unreasonable behaviour, citing particulars of violent incidents. One in ten respondents considered abuse to be the real reason for the marriage breakdown and 40% claimed to have been subject to some form of abuse by their spouse.[951]

Half of the marriages ending in divorce had lasted between five and fourteen years with one quarter surviving between five and nine years. The age group most frequently recorded was

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[946] Office of Law Reform, *op cit*, pp 18-19.

[947] Census 1996: Principal Demographic Results (Central Statistics Office, Dublin, 1997) Table 7A.

[948] 73% cite separation rather than the fault based facts. Contrast England and Wales where 75% prefer the fault based facts.

[949] It appears that there is a marked gender difference in the number of behaviour based divorce decrees granted. The ground was used by 27% of female, but only 5% of male petitioners.

[950] Report to the Office of Law Reform, Archbold et al, *op cit*, p 100.

[951] Claire Archbold, Pat McKee and Ciaran White "Divorce law and divorce culture: The case of Northern Ireland" 10(4) (1998) Child and Family Law Quarterly 377, p 385.

thirty to thirty four years and it was clearly shown to be the case that those who married young, under the age of twenty-four, were most likely to divorce.[952] The number of children affected by divorce is steadily increasing; at least 5.99% of the juvenile population were children of divorced parents by 1994 and it is a trend that seems destined to continue upwards.[953]

60% of respondents to the divorce census were in full or part-time employment, but the fact that a significant percentage were economically active was not reflected in the gross income of survey participants, with over half earning less than £10,000 per annum and a greater proportion earning less than £5,000 per annum than might have been expected from statistics pertaining to the general population.[954] Significant numbers of respondents were employed in clerical and secretarial work, with a slight under representation of professional, craft and related occupations. It is important to contrast these traits with the mediation client profile, since it serves to underline the uniqueness of their clientele.[955] Survey participants suggested that they were rarely referred to other services, including mediation, by their solicitors. It seems that only 7% of petitioners and 4% of respondents were advised to contact a third party, other than a barrister. However, satisfaction with solicitor performance was high, with almost 50% commenting that it had been either 'brilliant' or 'very good/good'. Only 15% assessed their solicitor's contribution as 'poor'.[956]

The Future of the Family Mediation Service in Northern Ireland

In December 1999, the Office of Law Reform published a consultation paper on reforming the divorce law in Northern Ireland.[957] It suggested that, as yet, mediation does not feature too widely in the divorce process. Research indicated that many of those going through a divorce were profoundly confused in relation to the services and remedies available, whether inside or outside the legal system. This lack of knowledge increased stress and uncertainty and created a stumbling block to the creation of a more holistic approach that

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[952] Annual Report of the Register General 1998 (Stationary Office, 1998), section 8. 65% of men and 80% of women divorcing in 1996 were under 24 when they married.

[953] Report to the Office of Law Reform, Archbold et al, *op cit*, p 55.

[954] NI Annual Abstract of Statistics No 16, 1998, Table 12.4 shows that 14.38% of the population earned less than £5,000. The corresponding survey figure was 32.4%. See Report to the Office of Law Reform, Archbold et al, *op cit*, p 101.

[955] See p 255 above.

[956] Report to the Office of Law Reform, Archbold et al, *op cit*, p 110.

[957] Office of Law Reform Divorce in Northern Ireland: A Better Way Forward (Belfast Stationary Office, December 1999).

recognises the importance of access to non-legal services.[958] Further, this absence of knowledge leads to under-utilisation, particularly since that there was no gateway into mediation at any stage in the matrimonial law system.[959] In the face of this reality, the paper proposed the encouragement of agreement between the parties and of mediation as an objective of the divorce system in Northern Ireland. The government lamented the fact that the service is not being used to its full potential, perhaps because families going through the system are simply unaware of its existence as a viable method of dispute resolution.

At the same time, the paper suggested that currently "negotiation and settlement are valued and promoted by those working within the legal system"; a culture of non-adversarialism exists.[960] Financial, property and child care issues are resolved through a process of negotiation and settlement where the focus is firmly on the practicalities of living apart rather than on the divorce decree, according to the report. While child issues are likely to be resolved sooner than financial ones, negotiation about all issues may begin well before divorce proceedings are commenced and may result in a legally binding private separation agreement by consent order through attachment to the petition.[961] The publication discerned a trend towards a specialist family law ethos, concentrating on a conciliatory approach rather than on traditional adversarial strategies, allowing acrimony to be minimised and costs saved. Further, settlements reached at one step removed from the court are likely to be within the range that the court would make, according to the report, thus preventing injustice to the economically weaker party and promoting fairness.[962]

The task of reforming the civil justice system has not been ignored in Northern Ireland. The Civil Justice Reform Group in Belfast has produced its final report, with recommendations on listing, case management, evidence, pleadings, costs and fees.[963] Further, case management techniques piloted in England and Wales in ancillary relief cases are already being used as a matter of practice in several Northern Irish Courts, according to the Office of Law Reform.[964] Increased judicial control of time-tabling, case progress, lodgement of papers and evidence prevents delay and stops the parties from using the procedure to

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[958] *Ibid*, p 54.

[959] *Ibid*, p 22.

[960] *Ibid*, p 33.

[961] *Ibid*, p 21.

[962] *Ibid*, p 35.

[963] The Civil Justice Reform Group Final Report: Review of the Civil Justice System in Northern Ireland (Belfast Stationary Office, 2000).

[964] Office of Law Reform, *op cit*, p 79.

obstruct the resolution of issues, with repeat listing in some county courts to allow for negotiation opportunities so that bargaining time is built into the system and is no longer seen as an obstacle to minimising delay.

This analysis of the legal system would seem to undermine assertions of the need for a family mediation service, yet the paper goes on to justify its call for increased their utilisation. It suggested that professionals recognise that the process of agreement and imposed legal settlement may be far from synonymous and their long-term results very different. Research has shown that where parties have come to their own agreement about post-divorce arrangements, those arrangements were more likely to be successful. Where solicitors are involved the parties themselves may not agree on the result of the settlement and this limitation can and should be offset by increased and appropriate use of mediation, where the divorcing couple are not denied an input into the resolution. In the end, the paper comes down strongly in favour of encouraging alternative dispute resolution for the sake of agreement stability. Indeed, it is a conclusion in line with current thinking on civil justice reform generally; the Civil Justice Reform Group has recommended that a pilot scheme be established to evaluate the feasibility of voluntary mediation in Queen's Bench Division commercial and medical negligence cases and it welcomed the extension of legal aid to alternative dispute resolution procedures.[965]

The Consultation Paper emphasised the need for information provision, in light of widespread failure to use non-legal services to their capacity. In this regard, it examined the notion of an information meeting, but considered that a compulsory approach focusing only on those entering the divorce system was unlikely to be appropriate in Northern Ireland, where many clients accessed the matrimonial legal system long before they divorce and the ways into the system were various.[966] Instead, it proposed that a co-ordinated information provider would perform the role of dissemination at an early stage, without any element of advice or counselling. The government thought that instead of the group and individual meetings provided in other jurisdictions, a drop-in approach might be suitable for Northern Ireland, with some sensitivity to any embarrassment and stigma felt about accessing the service.[967] The paper rejected the provision of information services at the Magistrates Court as limited to those cases that had already found their way into the court system and were

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[965] Civil Justice Reform Group Final Report, *op cit*, p 111.

[966] *Ibid*, p 56. Note that the information meetings in England as presently constituted draw attention to the availability of mediation for the resolution of contentious issues but do not specifically promote its use. See The Advisory Board on Family Law Third Annual Report to the Lord Chancellor (Stationary Office, 2000), p 7.

[967] *Ibid*, p 58.

more likely to have passed the point at which such a service would be most useful. In addition, it had the potential to cause confusion in the minds of court users who would see the service provider as akin to a duty solicitor.

The paper noted the obligation imposed on member states by the Council of Europe to promote and strengthen family mediation,[968] without limiting the right of access to the courts guaranteed by Art 6(1) of the European Convention on Human Rights and the Human Rights Act 1998. Further, it noted the principle that mediation should be voluntary, as encapsulated in the Council of Europe recommendation. The government felt that compulsory mediation would be entirely inappropriate in those cases where even voluntary mediation would be considered unsuitable, for example, where violence is or has been present. It would be inappropriate to force mediation in cases where third party intervention was not required to reach agreement. Rather than following the English route in requiring parties to attend mediation meetings before receiving legal aid,[969] the government believed that "through the provision of information, people will be able to make an informed choice about whether mediation would be suitable for them".[970] They would encourage clients to explore the option without being unduly restrictive about the point in time at which they should do so. Although court-related mediation has found favour with the Council of Europe, the Northern Irish government remained reticent and preferred to evaluate experiences in other jurisdictions before readdressing the issue in due course. It recognised the importance of a mechanism whereby mediated agreements could be made into court orders by consent, a problem identified in the responses to mediator questionnaires also.

It is interesting to compare the position adopted by the paper with the views expressed by mediators practising in Northern Ireland. Generally, it would appear that practitioners are more open to the possibility of mandating information sessions or meetings with mediators than the government, which preferred to rely on client discretion in this regard. Both government and professionals rejected proposals involving a distinction between the recipients of legal aid and the divorcing population as a whole, while all commentators envisaged increased funding in the future. The government demonstrated a marked reluctance to contemplate mediation where domestic violence had occurred, a caution which did not emerge from the mediator questionnaires. The complementary and necessary role of legal advice was recognised in all sectors.

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[968] Recommendation R(98)1.

[969] Section 29 Family Law Act 1996.

[970] Office of Law Reform, *op cit*, p 62.

Conclusion

It is beyond argument that examining the organisation and practice of family mediation in Northern Ireland serves as a useful tool in the analysis of mediation in general, but particularly in the Republic of Ireland, given the numerous points of departure between the two systems. Further, the analysis serves to illustrate the practical benefits of mediation for the Northern Irish participant. Clients emerging from the process can expect to be satisfied with the service they receive, they will usually have resolved contentious issues and will be prepared to recommend the service to others. While many will find that their agreements will have to be altered over time, unforeseen difficulties can usually be resolved by direct communication with their ex-partner. However, they are unlikely to accept that the process achieved beneficial outcomes for their children.

Mediators in the two parts of Ireland emerged from similar professional backgrounds, they held the same aims and aspirations and utilised similar methodology. While their assessment of levels and severity of domestic violence differed, their methodological responses did not. Northern Irish mediators suffered from client confusion of marriage guidance and personal counselling with mediation to a far higher degree, but were less likely to report difficulties in obtaining financial disclosure. The visions of the future revealed by the respondents were not dissimilar; in both parts of Ireland they displayed an aversion to a bias in favour of non-legally aided clients and recognised the necessity for government funding of their service. However, mediators in Northern Ireland were more open to the notion of compelling attendance, with three out of four agreeing that there was merit in mandatory mediation for child issues. All mediators tended to exhibit negative attitudes towards the adversarial system, particularly its perceived potential to exacerbate conflict. This did not translate into an aversion towards lawyers, with the central role of legal advice plainly acknowledged by respondents. Mediators recognised the need for the partnership and co-operation of professionals providing marital breakdown assistance.

Crucially, although the Northern Irish family mediation service has emerged from research investigations as a positive contributor to client welfare, at the time of writing there is no not-for-profit service available to the separating/divorcing public or their advisors in Northern Ireland. At present, mediation is provided by accredited staff on a private basis only. This serious difficulty deserves to be addressed as a matter of urgency. Further, there

is a danger that judicial frustration at the absence of a service could lead to the development of in-court mediation, with all the attendant drawbacks of this form of practice. Indeed, the provision of 'mediation-type interventions' by court-based social workers could only serve to further blur the distinction between adjudication and mediation and between voluntary participation and compulsion, despite indications that the government does not favour mandatory mediation. At most, it suggests that improved public information is required to bring the practice to the attention of those who might find it helpful, a proposal that could hardly alarm even the most ardent critics of mediation. The quelling of any anxiety surrounding the lack of commitment of Northern Irish mediators to the concept of voluntariness by strong and persistent government loyalty to the concept coupled with positive research findings, prompts the notion that the element of consumer choice in the field of dispute settlement is to be welcomed. It is all the more unfortunate then that this choice is no longer available to the Northern Irish participant.

What remains of concern is the issue of domestic violence. It is doubtlessly the case that the stance on the importance of abuse as an issue in mediation and have encouraged their practitioners through policy statements and training to ensure that clients are adequately screened and protected. However, it appears that mediators have not reached a consensus on the extent of violence in the relationships presenting for mediation and while they do have a common approach, it is sometimes diametrically at odds with the perspective of feminist commentators and activists in the field. Mediators displayed a high level of confidence in relation to their knowledge and ability to deal with the problem. Certain that they could identify controlling and abusive relationships and could proceed with the process in a manner that protected the client without destroying self-determination, mediators in the Republic of Ireland demonstrated a reluctance to screen clients out of mediation at the outset. Only one suggested that clients should be told to consult their solicitors. Service providers have argued that, in fact, mediators encourage all of their clients to seek legal assistance; respondents may not have felt it necessary in answering the query to point out this practice in relation to domestic violence cases in particular. Further, they suggest that screening takes place at all stages of the process; even where a client proceeds from the initial meeting, they may be asked to seek legal protection or to leave at a latter date when more serious or undermining violence comes to light.

In Northern Ireland, where the estimation of violence rates were such that exclusion seemed almost impossible without undermining service provision, reluctance to screen at an initial stage could be explained as a form of misplaced self-preservation. In fact, it seems that the Northern service has demonstrated a marked willingness to preclude mediation outright

where the violence risk assessment suggests that it is not safe to proceed. What is harder to comprehend is the unwillingness to screen out victims of domestic violence at an early stage in the Republic of Ireland where they represent less than one third and perhaps as few as 5% of the clients. It is submitted that a discovery of domestic violence should prompt the mediator to suggest immediate legal advice, with a view to obtaining court protection and providing safety in a form that mediation alone cannot offer. While violence is an issue that has received serious consideration in mediation circles, this has not always lead to uniform perceptions and it is certainly inadvisable and premature to allow complacency to settle on the family mediation service in Ireland.

CONCLUSION

It is proper to ask where the foregoing takes us, in terms of our understanding of the mediation process in Ireland. In other words, what contribution has this study made to the sum of family mediation knowledge? Centrally, this work has drawn together the very dispersed literature on the theoretical benefits and drawbacks of mediation, as well as its empirical successes and failures. It places Irish mediation in the context of international controversies and concerns, at once exhorting its virtues and condemning its vices, in an attempt to achieve a balanced and realistic view of its possibilities.

Further and crucially, it creates and brings to light an in-depth and extensive statistical assessment of client and mediator questionnaires, enabling examination of the practice in light of international experience and an evaluation of the process, in terms of outcome and client satisfaction. While the methods employed are not innovative, the subject matter is much neglected and the results provide the most detailed picture yet of the typical mediation client, their self-reported experience of mediation and the agreement that emerges from their engagement in the process. The project addresses the fundamental concerns of critics, such as the preference for joint parenting and the gender balance of power, suggesting they may not be well founded, since parents appear to be autonomous in their problem solving and women do not differ, to an appreciable extent, from men in their responses to a wide range of inquiries. Yet, women continue to earn substantially less than men and their post-separation financial position does not emerge clearly from the mediator outcome assessments. Further, the crucial issue of domestic violence is largely ignored in the questionnaires. High settlement rates are revealed, with full credit to the service, yet it would seem that clients are unlikely to alter their view of the future or their parenting relationship or their partner as a result of participation. The research paints a picture that is likely to bring a mixed reaction from mediators and detractors alike, but it may pave the way for a more realistic approach to the virtues and vices of the practice.

For the first time, mediators are asked to express their views on a wide range of significant issues, including their methodology in the face of domestic violence and their attitude towards legislative interference in the current arrangements. The study has not gone down the road of many predecessors and ignored Northern Ireland, but rather has focused on the jurisdiction, examining the terrain in which mediation operates and the special difficulties

faced there. While survey respondents were not numerous, they provided in some instances a very clear picture of the perspective of the Northern Irish mediator and again, this is a previously unheard voice.

However, it is a study with limitations. The ideal of a litigation comparator group was not attainable, nor indeed, for this reason, was it possible to comment on any lacunae in the adversarial system that might benefit from legislative intervention in the future. Supporters of mediation may well feel that an unfair comparison has been drawn and the litigation system would not withstand the level of scrutiny to which mediation has been subjected. Even if this is true, it does not detract from the essential knowledge of the mediation experience that can be gleaned from the study, from its comparative potential should a litigation study come into being, nor indeed, from the positive contributions of mediation evidenced in the research.

It has become trite to suggest that mediation is not a panacea, but this is often admitted within the practice itself. Mediation cannot and should not be expected to cure all the ills of divorce for the couple and their children, from the financial to the psychological, while alleviating the strain on the public purse. Indeed, exaggerated expectations have caused the recent legislative disappointment in England and the failure to fulfil promises that should not have been made in the first instance acts as ammunition for its critics and detractors. The promise of mediation is many-fold and this research suggests that not all of the expectations have been realised. Although this does not mean that the process is without virtue, it cannot be allowed to make unsubstantiated claims and see them unchallenged. A more realistic notion of what mediation does in fact achieve can lead to improvement in technique, in the accuracy of public and legislative perceptions and in the relationship with the adversarial system.

The Effectiveness of Family Mediation

Although much of the empirical evidence in this area is both equivocal and controversial, on some measures, at least, comprehensive and out-of-court mediation has been adjudged cost effective. In the Republic of Ireland, mediation is provided free of charge to non-legally aided clients, providing a considerable saving to the consumer where full or partial agreement is reached. Further, it appears that rates of agreement on all issues are relatively high, with 39% of couples achieving full and final settlement in the Newcastle survey and almost 60% of clients in the Republic exiting mediation with a completed agreement, a figure in line with American research. Half of the mediators in the Republic of Ireland

accurately assessed the rate of agreement, although the Northern Irish replies were more varied and uncertain. A slight tendency to over-estimate the level of settlement probably stems the high numbers of partial compromises obtained. Those who failed to reach a solution spent less time in mediation, thereby keeping the additional expenditure involved in failed cases to a minimum. One third of those who failed to reach agreement only attended one mediation session. Unusually, it appears that comprehensive mediation is more likely to result in a positive outcome for care and control arguments than the child issues mediation practiced in Northern Ireland.

It is arguable and at least one study has sustained the theory that there are higher rates of compliance with mediated agreements as opposed to solutions achieved in an adversarial setting, although the positive effects seem to dissipate with time. The debate is on going, but it can be said with certainty that the research has failed to definitively establish the superiority of adversarial procedures, the early breakdown of mediated settlements or the lack of adherence thereto. Where successful, mediation results in more rapid settlement. Certainly in Ireland, clients reached an understanding in a matter of months and the majority required four or fewer sessions. Over one third of couples entering family mediation in the Republic have not engaged a solicitor, yet in a short space of time the vast majority will leave the service having settled some of the issues in contention between them. This would suggest the possibility of effective dispute resolution where an efficient and consistent service provider is installed.

Long Term Effects of Family Mediation

It can be stated with some degree of confidence that mediation has failed to generate sustainable benefits for its clients, although comprehensive mediation has been more successful in this regard than the child-issues alternative. Research in Britain, Canada and the United States has confirmed that improvements in co-operation, communication and psychological adjustment are short-lived, disappearing after two years. Certain studies have suggested that parents may feel more confident in their ability to solve problems without outside intervention as a result of attendance at mediation, but again it has not been proven that this trait endures over time, while the diminution of negative feelings seem more closely related to the passage of time than the choice of dispute resolution mechanism. Research into the mediation service in the Republic of Ireland serves to confirm this literature. A small majority of clients did not believe that mediation had aided the amelioration of inter-spousal communication and overwhelmingly, their view of their partner had not been altered as a result of participation in the process. The client's

perception of the future and of the parenting relationship remained unchanged for the most part, although the respondents did feel that mediation had worked for them. It would seem that the expectations of clients and mediators diverged; where the participants simply sought and agreement, the facilitators hoped for improvement in the relationships and perceptions of the attendees.

User Satisfaction in Family Mediation

Consistently, research has confirmed high rates of user satisfaction in family mediation, regardless of the form undertaken, sustained over time. It is rare for a client to argue that mediation has not helped them in any way and the practice has demonstrated a willingness to alter in light of adverse client comment. Couples randomly assigned to mediation as opposed to litigation groups felt that the process had aided their assumption of greater personal responsibility in managing finances. They denied that a viewpoint had been imposed on them and were inclined to perceive their agreement as fair and beneficial for all family members. These findings have been confirmed in this jurisdiction, where 47% of clients thought that mediation had worked for them and a further 25% asserted that it had been at least partially successful. In Northern Ireland, at least eight out of ten clients would recommend the service to others while over half would return to mediation in the future, if necessary. More recent research suggests that the figures may be substantially higher, with up to 90% displaying a willingness to re-enter the process should the need arise. However, the potential of mediation is not always immediately obvious to client target groups; preliminary research into the pilot projects in England and Wales would lead to the conclusion that even where the programme is explained, the automatic attraction of newcomers may not ensue. Yet, this cannot detract from the positive feedback received from clients where they do participate. It may be that the process is more attractive in practice than in theory.

Children and Family Mediation

The beneficial impact of mediation on the welfare and well being of children and on the possibilities of effective post-divorce co-parenting has been central to the philosophical foundations of the practice as well as the justification of governmental expansion programmes. Despite the intuitive attraction of these claims, there has been little evidence of long-term advantages in terms of the psychological adjustment of children or the warmth of parent-child relations. Indeed, it could hardly be expected that this truncated intervention would produce permanent alterations in family interaction and children's perceptions,

particularly when it is considered that children are rarely involved directly in the mediation process and their inclusion remains controversial.

Initial improvements in parental communication are not enduring and the majority of clients in Ireland thought that mediation had failed to alter the parenting relationship, although clients also expressed the view that mediation had helped them to understand the needs of their children. The process in Ireland attracted clients who were happy and confident with their own performance as parents before they entered mediation and as a rule, their parenting relationships were not uncooperative. In Northern Ireland, where child issues mediation is practised, only a minority of clients thought that mediation had achieved a positive outcome for their children and clients felt that children would benefit from direct contact with a mediator, which is absent from the service as presently operated. Even allowing for a level of defensiveness on the part of clients in the area of parenting and their relationships with their children, couples who mediate are not wholly convinced of the positive impact of their choice on children, while researchers remain sceptical of the endurance of any such effect.

Gender, Domestic Violence and Child Contact

The feminist critique of mediation represents the most sustained attack on the practice since its recent rise to prominence in Western dispute resolution. Yet, it has not been supported by the empirical research, which suggests, instead, that women do not perceive themselves to be disadvantaged in mediation and are commonly satisfied with their experience. Further, there is no evidence of negative financial consequences for a woman who chooses mediation over adversarial settlement or lawyer negotiation. In Ireland, there were no significant gender differences on pre-mediation measures although men and women differed demographically, in terms of their income and employment levels. Mediators were not conscious of gender questions, ignoring the issue of spousal maintenance, for instance. Although it could be ascertained that women usually obtain care and control of the children and remain in the family home after separation, little else regarding their financial circumstances could be discerned with certainty. Satisfaction levels did not vary according to gender, a result in line with international findings.

Although mediation has been able to combat accusations of gender bias generally, it has been somewhat less successful in derailing the belief that it affords insufficient protection to the victims of domestic violence. The act of separation itself often acts as a point of escalation in violence, so that mediation is undertaken at a time of extreme vulnerability for

clients in violent relationships. While research has shown that the victims of violence are satisfied with the mediation experience and the presence of screening techniques, there remains a lack of mediator awareness of the presence of violence. Screening is an enormously difficult task in practice; the victim may be reluctant to disclose the abuse for reasons of fear, self-blame, denial, shame, loyalty or distrust. It relies heavily on the attitude and judgment of the mediator. Where the practitioner does not know the relationship history, they cannot ensure client safety and equality of bargaining power or adequately guard against re-victimisation and exploitation. Even where the violence is acknowledged, it remains to be demonstrated that mediation has the tools to correct the power imbalance and protect the client. The Family Mediation Service Questionnaire did not dwell on this central issue, which is significant in itself. Follow up research suggests that Irish mediators, north and south of the border, seek to determine whether there has been violence in the relationship and the majority felt compelled to alter their mediation techniques in response, though not necessarily by exclusion of the clients or insistence on legal advice. However, mediators in both jurisdictions varied widely in their analysis of the level and forms of abuse encountered in mediation practice and were inclined to take a more neutral and less condemnatory stance than feminist commentators in the area.

Child contact is an interrelated question, where mediation has taken a strong ideological stand in favour of continuing contact with both parents as an aspect of the best interests of the child. Ideally, this notion is hard to reject, although it is not in keeping with the promise of mediation to recoil from interference in the decision making process of clients. The Irish mediation service endorses this position, which coupled with the ethic of private ordering, the reluctance to examine past behaviour and the high rate of violence associated with contact in families where there has been a history of domestic abuse, may be dangerous for children and their care-takers. However, only 20% of mediators in the Republic of Ireland considered that the promotion of joint custody warranted a high place on the list of aspirations of the practice, compared with half of the mediators in Northern Ireland. Research in England has suggested that while mediators recognise that domestic violence can have a detrimental impact on children, relatively few (18%) indicated that this would lead them to consider that residence or contact might not be appropriate. However, if the Irish mediation service has tried to pressurise parents into accepting equal parenting in all cases, it has been singularly unsuccessful in this pursuit. The largest group of parents (45%) opted for full involvement, which usually consists of fortnightly visits with the absent parent, possibly a weekend stay-over. Indeed, parents were as likely to agree to the minimal involvement of one parent as the equal involvement of both (9.5%), the former representing the virtual end of further contact. 36% agreed to the partial involvement of one parent and

while the questionnaires do not describe what this might entail, it is clearly less than the full involvement of the absent parent. A primary residence for children was agreed in all cases. Thus, in the words of Oswald, while the ethos of mediation stresses the importance for children of continuing contact with both parents, "a decision incorporating that view is by no means forced on parents".[971]

Yet, it remains to be established whether the service perceived a relationship between the issues of domestic violence and child contact and if so, the extent to which mediators would be prepared to intervene in favour of a particular outcome. This prompts a significant dilemma for a non-interventionist practice, entailing a movement from parental self-determination towards child protection. Moreover, it is premised on the accurate identification of violent relationships, which has yet to be demonstrated.

The Future of Family Mediation in Ireland

Progress in the reform of the civil justice system and the increasingly conciliatory attitude displayed by family lawyers could lead to the conclusion that mediation is not strictly necessary; since the civil justice system must be sustained at any rate, public interest would be better served by expenditure on ameliorating the negative effects of the litigation process, rather than supporting a parallel and duplicating system. It might be added that mediation has failed to fulfil many of the early expectations; even after explanation, it is less attractive to the divorcing population than was first hoped, while its ability to produce enduring psychological and relationship benefits, both for adults and children, remains in question. Its theoretical and philosophical foundations are weak and the practice has failed to provide a convincing defence against important critiques, particularly the assertion that it has the potential to undermine the fair distribution of marital assets on separation and ultimately, the rule of law itself.

Yet, clients who experience mediation are quick to defend the technique; they are willing to recommend it to others and are open to returning in the future. Settlements are typically arrived at, often on a wide range of issues and where successful, mediation can play a role in the reduction of public expenditure on separation and divorce. The survival and general availability of mediation becomes an issue of consumer choice and freedom. It will not

[971] Ann Oswald "Mediation in family disputes" (1996) SCOLAG Journal 20, p 22.

answer the needs of all couples, but while it continues to fulfil the requirements of any number of this vulnerable group, legislators should be slow to undermine its provision. Indeed, this is all the more forceful since critics have not succeeded in sustaining assertions that it impacts negatively on women, that agreements reached are not adhered to or that they break down at a faster rate than litigated settlements, adding to the ultimate cost of divorce. Irish mediators have displayed a more positive attitude towards the legal profession than might have been anticipated and they envisage a 'partnership' model of interaction, to achieve optimum levels of agreement and compromise at an early stage. They remain committed, particularly in the Republic of Ireland, to an ideal of voluntariness as a superior method of protecting the client from the negative consequences identified by critics. Indeed, the freedom to reject mediation at any stage in favour of lawyer settlement is a fundamental safeguard to the interests and dignity of the service users.

If mediation has a significant flaw, it has been the ambivalent attitude adopted towards the treatment of domestic violence and the issue of child contact in the context of an abusive relationship. Although mediation has striven to come to terms with this central debate, the concerns of feminists in this regard have not abated and the inappropriateness of 'privatising' a dispute in such circumstances remains. It is critically important for mediation to re-examine the issue and to develop best practice in the area. Mediators should be encouraged to err on the side of exclusion, where a violent history is uncovered and if fully informed clients insist on their right to engage in mediation, the mediator must ensure that legal advice is obtained, with a view to obtaining an immediate non-molestation or barring order. The safety of the victim and any dependant children ought to be prioritised, with the professional keeping in mind the criminal nature of the behaviour and the State interest in its termination. Once violence is uncovered, it is not longer appropriate to treat the dispute as one of private, family concern only. Children are at high risk in violent home, both as the victims of violence and as its witnesses and this must be considered when issues of care, control and access are discussed. In order to achieve these ideals, the screening process must be strengthened and the violence victims encouraged to make a solicitor their first port of call in mediation literature and publicity.

When this work began, the future of family mediation in Ireland seemed to be assured. North and South, the governments were committed to its presence on the dispute resolution landscape and the real concern was to strengthen and improve the present provider, rather than to debate the question of whether mediation is necessary or beneficial. In the Republic of Ireland, the government had chosen a comprehensive, independent, out-of-court service, provided free to all participants, laudably. Clarification and strengthening of the position

on domestic violence, along with consistent research and assessment, would ensure that the services had their place amongst the best in the world. Indeed, it would appear from the empirical research conducted for this study that the 'Irish model' is remarkably successful by any standards and on many indicators but particularly in terms of settlement rate and may indeed provide a model of best practice in other jurisdictions.

However, the virtual collapse of the State provider in Northern Ireland re-frames the central issues for consideration and places a renewed focus on the requirement of consumer choice and freedom, the merits of mediation as a process of dispute resolution and the beneficial impact of the process on participants. For North and South, the structure of the mediation debate becomes diametrically opposed as client advocates seek to re-establish the service in the former jurisdiction while in the latter they seek to ensure that clients are protected and informed of any drawbacks and disadvantages of participating in the strong and confident process that is mediation.

Broadly, the development of mediation in Ireland has served to illustrate the ever-changing nature of the mediation debate and the need to constantly re-assess positions in that debate if the public is to be offered, at once, a divorce mediation service and unimpeded access to the adversarial system. The requirements of upholding the rule of law by public justice and providing for consumer choice by private resolution are best reconciled by the provision of a voluntary divorce mediation service and it is only when the service is provided without resort to compulsion that this delicate balance can be maintained.

APPENDIX I

Mediator Questionnaire for Northern Ireland and the Republic of Ireland

Please tick the boxes.

Question 1: What is your professional background?

Solicitor/ barrister [ ]
Social worker [ ]
Counsellor [ ]
Health care worker [ ]
Teacher [ ]

Other, please specify.....

Question 2: What you consider to be the *principal aims* of mediation? Please number according to importance if you consider that more than one answer is appropriate, with number one representing the most important aim, number two the next most important aim, etc.

Settlement of disputes [ ]
Reduction of conflict [ ]
Improving the parental relationship [ ]
Reduction in the cost of legal aid [ ]
The identification of 'savable' marriages [ ]
Improving the individual's sense of self-worth [ ]
The promotion of joint custody as a viable parenting option [ ]
The avoidance of the legal process [ ]
The protection of privacy in family life [ ]
The fair distribution of marital assets [ ]
Helping the client to come to terms with the ending of the relationship [ ]

Other, please specify.....

.....

.....

Question 3: Please indicate the model of mediation practice which you would like to see available in Ireland

Child issues, in-court mediation [ ]
Child issues, out-of-court mediation [ ]
Comprehensive, in-court mediation [ ]
Comprehensive, out-of-court mediation [ ]

Other, please specify.....

.....

Question 4: What advantage does this form of mediation offer, in your opinion?

.....

.....

.....

Question 5: Which of the following mediation models would you prefer to use?

Settlement-orientated mediation [ ]
Therapeutic mediation [ ]

Other, please specify.....

.....

Question 6: What would you describe as the *most significant* problems encountered in practice? Please number responses according to importance if you feel that there is more than one answer, with number one representing the most significant problem.

Please make any other comments that you feel might be helpful, the list is merely illustrative.

Clients fail to attend the sessions [ ]
Clients fail to reach agreement [ ]
Clients do not keep the agreements they make [ ]
Clients have confused the process with marriage guidance counselling or personal counselling[ ]
Violence directed towards you [ ]
Violence directed towards a spouse/the children [ ]
Problems in obtaining financial disclosure of assets [ ]
Interference by the parties' solicitors [ ]

Other, please specify.....

.....

.....

.....

Question 7: Please give your opinion on the following statements:

(i) The government should provide full funding for the mediation service.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(ii) All clients should be bound by law to attend an information meeting which explains the various options open to them in resolving any disputes arising from their separation. The meeting would not place any special emphasis on mediation.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(iii) Only legally aided clients should be bound by law to attend such an information meeting.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(iv) All clients should be bound by law to attend a meeting with a mediator before embarking on the process of obtaining a legal separation or divorce.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(v) Only legally aided clients should be bound by law to attend a meeting with a mediator.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(vi) Mediation should be mandatory for all child issue disputes.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(vii) Mediation should be mandatory for all marital and child disputes, including financial disputes.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

Question 8: Do you find out from your clients whether there has been a history of violence in the home?

Yes [ ]
No [ ]

If yes,

(i) When and how do you get this information.....

.....

.....

.....

.....

(ii) How prevalent would you consider violence to be, in your experience as a mediator? For instance, is it a feature of most relationships, half of the relationships, one third of relationships, a certain percentage of relationships or hardly any relationships.

.....

.....

(iii) What form and level of violence is typical, in your view?

.....

.....

.....

.....

.....

.....

.....

(iii) Does the presence of violence alter your attitude towards mediation or the method you use in any significant ways and if so, in what ways?

.....

.....

.....

.....

.....

Question 9: In your experience as a mediator, what would you consider to be the rate of full agreement on all issues?

Less than 5% [ ]
5%-15% [ ]
16%-20% [ ]
21%-30% [ ]
31%-40% [ ]
41%-50% [ ]
51%-60% [ ]
61%-70% [ ]
71%-80% [ ]
81%-90% [ ]
Over 91% [ ]

Question 10: In your experience as a mediator, what type of parental agreement is most likely to emerge from mediation?

Equal parental involvement [ ]
Full parental involvement [ ]
Partial involvement with one parent [ ]
Minimal involvement with one parent [ ]
No involvement with one parent [ ]

Question 11: Please tick the box which represents your opinion on each of the following statements.

(i) The adversarial system results in an increase in conflict, reducing the prospect of lasting agreement.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(ii) Clients should receive legal advice in all mediated cases, whether before, during or after mediation.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(iii) Clients should only receive legal advice where it is necessary in the opinion of the mediator.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(iv) It is generally advisable that clients would see their solicitors before a final agreement is reached.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(v) Clients should see their solicitors, but only after a final agreement has been reached.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(vi) In the future, solicitors should be at hand to advise clients during all stages of the mediation process.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(vii) In the future, solicitors should play a reduced role in marital and child disputes.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(viii) Solicitors and mediators must operate on a partnership basis if mediation is to be successful.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(ix) The work of solicitors and mediators is diametrically opposed and partnership is neither possible nor advisable.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [ ]

(x) Mediation is a system of dispute resolution which suits certain clients but should remain ancillary to the legal system which will continue to deal with difficult cases.

Strongly agree [ ] Agree [ ] Neutral [ ] Disagree [ ] Strongly disagree [].

Please feel free to make any other comments and suggestions.

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