Delivering Justice: What Are the Essential Elements of a Dispute Resolution System

The very titles of the first two talks today tell us something of the culture change that is sweeping through the law, here and throughout the English-speaking world. Whatever we think of particular techniques, the business of the justice system is now 'dispute resolution'. This begs the question: 'resolution according to which criteria?' If I have a longstanding dispute with my neighbour over noisy floorboards and eventually move house in disgust, the dispute is resolved, but hardly well.

The crucial missing word is of course 'justice'. I suspect everyone in this room is signed up to it as an ideal, works for it day in and day out and is outraged by its absence. We have a government department devoted to it. So I want to be clear – dispute resolution and justice are intimately connected. Try the simple thought experiment of imagining someone with a legal problem being told 'You will get a resolution, but it won't be just'.

Justice, however, is not the sole domain of the courts[1]. It is part of our cultural script, once characterised by William McIlvanney as the Scots' *'terrible sense of fairness'*.[2] Most of the time, we don't need anyone else to tell us what is just. For example, if my neighbour and I discuss the height of our leylandii hedge, and agree that seven foot two is a fair height, we can reasonably be trusted to assess how just this is. Businesses and individuals make millions of deals and agreements every day without the interference or supervision of the courts.

Why does this matter? We are here today to consider how the justice system best assists people of modest means to resolve their disputes. I will first describe an important but rather neglected facet of justice. Then I apply this to the experience of small claims litigants in Scotland. And I end with a practical proposal to improve things, one with few drawbacks and several benefits. Whatever we decide to do has to be just, not only in the eyes of legal insiders but in the opinion of parties themselves.

Which justice?

Disputes are of course as old as humanity, and it is worth reminding ourselves that 'dispute resolution' is not a new fangled technique. As Derek Roebuck tells us *'Everywhere in the Ancient Greek World ... arbitration was normal and in arbitration the mediation element was*

[1] Indeed, Cicero said *'Summum ius summa iniuria' (More law, more injustice)*
[2] William McIlvanney cited in Hearn, J (2000) *'Claiming Scotland: National Identity and Liberal Culture'* Edinburgh: Polygon, p.1,

primary.'[3] Things have moved on, and the modern state provides dispute resolution on an industrial scale. But one key question remains the same: by what criteria do people evaluate the effectiveness of the justice system?

Intuitively this is easy. Does it deliver 'just' or 'fair' results? This is known as 'substantive' justice, but it turns out that results are very subjective indeed. Not only is 'one man's floor another man's ceiling' but even the law is not always predictable. Numerous studies have confirmed the trickiness of predicting what the courts will do. In one experiment forty experienced lawyers from Iowa were given the same set of facts about a personal injury claim (twenty for each side), along with identical case files and a list of recent precedents. They then had two weeks to prepare for a settlement negotiation.

The law professor conducting the experiment described the results as *'sobering'*[4] with settlements ranging from $15,000 and $95,000 and scattered almost randomly in between. Another study described a personal injuries case to two groups of law students, randomly assigned as either plaintiffs or defendants, asking them to predict what finding the judge would make, between 0 and $100,000. Plaintiffs' estimates averaged over $14,000 dollars higher than defendants'.[5]

Justice has a more stable dimension, however. If 'what we get' is substantive justice, then 'how we are treated' is procedural justice. And procedural justice matters a great deal. Numerous studies have probed and tested this idea, which has been found to hold true across cultures and legal systems.[6] Furthermore, people's views on the fairness of a particular process had a marked effect on the credibility of the whole justice system.

One procedural justice finding is not on the face of it great news for mediators. When asked to describe their ideal adjudication system, a majority of Western people come up with something akin to the adversarial system, where an authoritative, impartial judge hears both sides of the argument before delivering a binding decision.[7] On more careful analysis, this preference for adversarialism is greatest when things are urgent, binary or zero sum, and there is little need to preserve a relationship for the future.[8]

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[3] Roebuck, D (2007) 'The Myth of Modern Mediation' *73 Arbitration (1) 105-116 p.106;* see also Abel, R (1983) 'Mediation in Pre-Capitalist Societies' in *Windsor Yearbook of Access to Justice 175-185 p.181 'In pre-capitalist societies, people of high as well as low status invest extraordinary amounts of time in mediation, an investment that (proportionately) far exceeds the resources devoted to the adjudication of disputes in our society.'*

[4] Williams, G (1983) *Legal Negotiation and Settlement 5-7*, cited in Levin, M (2001) 'The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion' *16 Ohio States Journal on Dispute Resolution 267-298 p.289*

[5] Babcock, L & Lowenstein, G (1997) 'Explaining Bargaining Impasse: The Role of Self-serving Biases' *11 Journal of Economic Perspectives (1) 109-126*

[6] For a review see MacCoun, R (2005) 'Voice, Control and Belonging**:** The Double-Edged Sword of Procedural Fairness' *Annual Review of Law and Social Science (1)171–201*

[7] Ibid, p.175

[8] Ibid, p.176

However, whether the decision is made by the parties themselves or by a judge, a second feature of procedural justice applies. People's assessment of the fairness of a process depends on their treatment.[9] This in turn breaks down into three key elements:

1) Voice: the opportunity to present views, concerns and evidence to third party
2) Being heard: the perception that *'third party considered their views, concerns and evidence'*[10]
3) Treatment: being treated in *'a dignified, respectful manner'*[11]

Procedural considerations are a better predictor of satisfaction than substantive ones. In other words, even where people have 'lost' in an adjudicated forum, they are more likely to rate themselves satisfied (and to respect the whole system) when they believe they have been fairly treated. This finding holds good for the treatment of employees and doctors' bedside manner.[12]

Procedural Justice in Scottish Small Claims

What does this tell us about the experience of people of modest income in the Scottish justice system? Are they being given 'voice'? Do they believe that their views and concerns are being heard? And are they being treated with dignity and respect?

Data is hard to come by. Professors Genn and Paterson's *'Paths to Justice'*[13] study is still one of our few sources. What we did learn is that, for nine out of ten legal problems, *'no legal proceedings were commenced, no ombudsman was contacted and no ADR process was used.'*[14] There was hardly evidence of robust faith in the law: only 48% thought an adjudicated decision was fair, compared with 71% in England and Wales. And 23% said they had accepted this because of a *'general sense of powerlessness'* compared to 6% in England & Wales.[15]

A more recent perspective comes from an evaluation of the Small Claims Mediation Pilots in Aberdeen and Glasgow Sheriff Courts, during which the researchers observed small claims proceedings. Their description makes uncomfortable reading: *'A number showed clear signs of unease (e.g. trembling, flustered), whether claiming for a personal or business debt. The layout of the court and lack of familiarity with its etiquette and its personnel were observed*

[9] Lind, E & Tyler, T (1988) *The Social Psychology of Procedural Justice* cited in Welsh, N (2001) 'Making Deals in Court Connected Mediation: What's Justice Got to Do With It?' *79 Washington University Law Quarterly 788-858*
[10] Welsh (2001) p.820
[11] Ibid, p.820; A fourth factor, neutrality, might be expected to feature, but people seem to have been more influenced by the third party's attempts at even-handedness and attempts at fairness.
[12] See MacCoun (2005) p.179
[13] Genn, H & Paterson, A (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* Oxford: Hart Publishing
[14] Ibid, p.176
[15] Ibid. p.254

to be among the contributing factors to their unease.'[16] It is probably difficult for even the most careful court to remove all anxiety from those appearing for the first time, but the next section is more troubling:

> *'...in one of the pilot courts ... the clerk sat at the narrow end of a long table just below the bench, and a lawyer, often representing many pursuers, sat at the table very near the clerk and the bench. However unrepresented parties were called to stand at the opposite end of the table, physically more distanced from the clerk and from the sheriff than the opposing solicitor. In the other pilot court party litigants were encouraged to step forward when the case called. One was told sharply by the sheriff about court etiquette on where and how to stand while addressing the court. After the sheriff's interjection the party was more nervous and less coherent than when first attempting to explain the issues in the claim.'*[17]

Those of us who are familiar with courts and the demands placed on them may have some sympathy for sharp-ish case processing, but it seems unlikely that these litigants would rate their experience highly on any of the procedural justice criteria; voice, being listened to or dignified and respectful treatment. Indeed, the study found that just over 30% said they were satisfied with the experience of going to court.[18]

How to improve the situation?

It is possible that those with greater resources, particularly in the business sector, will hold a more positive view of court experiences. Scotland has its fair share of able advocates who can make the adversarial system whirr like a well-oiled machine. Today's focus, however, is on delivering justice for those without deep pockets. Others will speak knowledgably about making the most of the court system. I turn to alternatives to that system.

Mediation is now widely used throughout the world.[19] In simplest terms when people have a dispute a third person helps them to find a mutually acceptable solution. Mediation generally, but not always, involves a face-to-face meeting between the parties. Mediators are usually not known to the parties and work hard to be impartial. They also avoid expressing a preference for a particular outcome, so that the agreement is seen as being generated by the parties themselves. In small claims, mediation typically lasts between one and three hours, with the mediator finishing by recording any agreement and giving it to the parties to act on.

[16] Ross, M & Bain, D (2009) *In Court Mediation Pilots: Report on Evaluation of in Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* Scottish Government, Courts and Constitution Analytical Team, p.28
[17] Ibid. p.29
[18] Ibid, p.61
[19] See Alexander, N (2009) *International and Comparative Mediation: Legal Perspectives (Global Trends in Dispute Resolution, Vol. 4)* Alphen aan den Rijn, Netherlands: Kluwer International Business

Does it work? Here again we face the difficulty of assessing substantive justice. Ross and Bain found that more mediation than non-mediation parties felt they had been either wholly or partially successful (admittedly on a small sample).[20] Of course it is impossible to find a comparable group of identical non-mediated cases. It seems that once more procedural justice offers a clearer and more consistent picture. When it came to treatment, just under 80% expressed satisfaction with the experience of mediation and just under 60% with the result.[21] More specifically,

> *'parties felt they had an opportunity to explain their side of the story, to have a face to face meeting, the process was fair, affordable (but most paid nothing) moved them quickly towards resolution, was a good use of time, made settlement easier than doing it themselves, and made them think about how to deal with future disputes*.'[22]

Interestingly the mediation group express higher levels of satisfaction with the Sheriff's communications (at just over 60% as against 50%), supporting other findings that a procedurally good experience with one aspect of the justice system enhances people's overall respect for the law.

One other finding deserves mention. When it came to complying with agreements, 90% had settlements carried out compared to 67% in the non-mediation group. On such a small sample it is hard to say whether this is a product of the particular cases, but it does seem to support the idea of enhanced respect for the law following a procedurally positive experience.

These results are comparable to those in other jurisdictions.[23] I make a simple point. If mediation delivers substantive results comparable to the courts, if it delivers treatment that is as good if not better than that delivered by the courts, if it is no more expensive than court processes, and if, as a bonus, compliance rates are higher than those of litigation, then why would the Scottish justice system not make use of this option wherever possible?

There are probably several answers to this rhetorical question, but I would like to suggest one possible cause: those who use the justice system and those who work in it may have very different perspectives on its purpose. A recent study of Canadian medical negligence mediation made a remarkable finding: that, whether they liked mediation or not, litigants and their lawyers used entirely different language in describing it. The author found that: *'For lawyers on the whole, mediation was a vehicle for monetary settlement or case*

[20] Ross & Bain (2009) p.56
[21] Ibid, p.60
[22] Ibid, p.63
[23] For a review see Jones (ed.) (2004) 'Conflict Resolution in the Field: Assessing the Past, Charting the Future' *22 Conflict Resolution Quarterly (1&2) Special double issue*

abandonment, where strategy, negotiation and money talk played out.'[24] In contrast, *'far from a forum of tactical strategies, for disputants mediation was a place to treat human needs and preserve human dignity.'*[25] Furthermore:

> *'a recurrent theme for plaintiffs is their astonishment, anger and incomprehension of why defendants or their lawyers generally did not provide any explanations, acknowledgements of their harm, or apologies during mediations'*[26]

When it came to the goals of mediation, *'93% of plaintiffs and 89% of physicians discussed the importance of expressing themselves and "being heard"'.*[27] They repeatedly return to themes of explanation, apology and ensuring there is no repeat of the problem. Lawyers, on the other hand, said:

- *'It's an invaluable adversarial tool'*[28]
- *'That's also important to know, who in the piece is the soft person'*[29]
- *'It was a financial call... So I could say "I believe I've gotten enough money that's within the range of numbers a court is likely to award"'*[30]

While some may suggest that small claims do not compare to medical negligence in terms of the impact on parties, it would be a mistake to suggest that the amount of money at stake is any indicator of how seriously people take the matter. And it seems implausible that Canadian lawyers are all that different from their Scottish counterparts. Those of us with legal training ought therefore to pause before assuming that our assessment of a process will be the same as that of a 'lay' person.[31] Ross and Bain's research repeatedly suggests that lawyers' and judges' reservations about mediation were not shared by parties.

A modest proposal

I return to our question: for those of modest means, how can we deliver justice that is procedurally fair while also being proportionate to the sums claimed. My suggestion is that, while reforming the court system to make it better, faster, cheaper and more accessible, we

[24] Relis, T (2008) *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* Cambridge: Cambridge University Press, p.10; see also McAdoo, B & Hinshaw, A (2002) 'Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri: Supreme Court ADR Committee Report' *67 Journal of Dispute Resolution* reporting that lawyers' selection of mediation is motivated by saving litigation expense (85%), speeding settlement (76%) and making settlement more likely (69%)

[25] Relis (2009) p.10; also *'plaintiffs vehemently stressed they sued not for money, but for a hole host of extralegal aims of principle'* (p.10)

[26] Ibid, p.51

[27] Ibid, p.174; this is comparable to mediation users' responses in Aberdeen and Glasgow, see Ross & Bain (2009) p.55

[28] Ibid, p.166

[29] Ibid, p.168

[30] Ibid, p.148

[31] See also Ross & Bain (2009) p.64 *'attitudes to the case develop as the case proceeds, are more complex than may be assumed by lawyers and judges, and most do not seek a day in court or formal judgement.'*

also raise our eyes and look beyond it. Wherever possible, we should encourage people to try and resolve their disputes through mediation. I propose the simple device of asking parties to say in their pleadings that they have taken an informed decision not to mediate (or that it has been unsuccessful). This would ensure that mediation has been considered. The report into the Aberdeen and Glasgow mediation pilots makes the same suggestion, adding that such a step would '*complement rather than undermine the adjudication elements of civil justice.*'[32]

I have attempted to outline one of the essential elements of a dispute resolution system: procedural fairness. I then considered how Scottish small claims procedures fare on this measure. And finally I made a modest proposal: that people raising a court action should be required to state that they have made an informed choice not to attempt mediation. This will open a potentially valuable avenue to large numbers of people and, rather than take away from the justice system, enhance it by empowering people to work out what is fair and just for themselves.

[32] Ross & Bain (2009) p.80