Getting it funded
MIAMs and Court-based mediation in Scotland

Professor Bryan Clark
1. Introduction

Mediation has been present in Scotland since the 1980’s, first taking root in family and community disputes but since extended to a wide range including employment, education, civil, commercial and construction matters. Despite initial reluctance in developing mediation further, the Court Reform (Scotland) Act 2014 introduced the new ‘simple procedure’ for low value civil claims. This procedure is designed to be flexible, informal and quick, and it places an obligation on parties to seek the possibility of mediation or negotiation.

This to be welcomed but mediation practice in this area needs reformed to guarantee informed participatory and outcome consent of participants. Therefore, it is suggested that introducing uniform referral practices to mediation (e.g. MIAMs), and marshalling lay advisors to assist parties, are necessary to ensure a fair balance between goals of formal civil justice, the assertion of individual legal rights and the negotiation of interests.

2. Limits of court based mediation

Parties in mediation may be willing to sacrifice a particular legal entitlement to attain an agreement that better reflects their underlying interests. Critics suggest that participants in mediation run the risk of being short-changed in justice terms even when they express subjective satisfaction with the process. Settlement rates and party satisfaction are no proxies for justice where legitimate legal entitlements are compromised and recrafted as mere disagreements.

3. Informed Consent

Informed consent is necessary to ensure fair balance between goals of formal justice, assertion of legal rights and negotiation of parties’ interests.

There are two aspects of informed consent:

1. the explanation to the party and ensuring their understanding of the consequences of participating in a process (participatory consent);

2. to ensure that the party fully understands the nature of any agreement reached through a process (outcome consent).

To ensure fairness of mediation parties must therefore provide participatory and outcome informed consent.

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4. Ensuring Informed Consent of Mediation

In order to ensure informed consent, measures of objective fairness need to be injected into court-based mediation:

1. There should be a **consistent mechanism by which litigants are channelled into mediation** in Scotland, possibly through a MIAM to ensure the informed consent of users to participate in the process.

2. Mediation services should be **publicly subsidised**

3. To help ensure that all parties can give informed consent to outcomes rendered within mediation, some level of **party representation should be made available to all in mediation**.

4. The provision of lay advisers for litigants in person needs development.

5. To achieve these, the **system needs proper financing**.

5. Funding for Mediation

Mediation rules under the ‘simple procedure’ are not underpinned with a fully funded scheme.

Currently mediation is largely provided pro bono, which critics may argue shows that mediation represents a second-class justice.

The roll out of mediation throughout sheriff courts in Scotland has the potential to lead to much greater demand for mediation, making the pro bono system unsustainable.

To achieve informed consent through Mediation Information and Assessment (MIAMs), provision of mediators and training for lay advisors there needs to be proper funding of the system.
Bryan is a Professor of Law and Civil Justice at the University of Newcastle Law School where he teaches and researches civil justice, mediation and aspects of commercial law. Over the past decade he has worked with a range of organisations in the field of mediation including Scottish Mediation, the Civil Mediation Council and Relationships Scotland.


Please cite this document as: B Clark ‘Getting it funded: Court based mediation in Scotland’ (2019) Newcastle University Law School Briefing