Alternative dispute resolution and civil justice: A relationship resolved?

Waters, B.

Alternative Dispute Resolution and Civil Justice: A Relationship Resolved?

***Ben Waters**

At a time when there was a perceived civil justice crisis, published in the Modern Law Review of May 1993, was an article written by Simon Roberts, in which he reasserted the importance of party control over dispute processes and their professional management, and between negotiated outcomes and imposed decisions. This article revisits Roberts' view that the relationship between civil justice and alternative dispute resolution (ADR) (particularly mediation) could be resolved by introducing three models to encourage extra-judicial dispute resolution. The relationship between ADR and civil justice is reassessed and the extent to which these models have been incorporated is evaluated. To understand how civil justice reform in England and Wales has and will affect the way in which those who use the civil justice system engage with it, this article provides analysis of the developing relationship between ADR and the civil justice system and predicts its future direction of travel.

Keywords: ADR, mediation, civil justice, access to justice.

INTRODUCTION

The term ADR encompasses a wide range of processes broadly falling within two categories, determined by the way in which a dispute is resolved: adjudicative and agreement based.[1] The main debate around that ADR's relationship with the civil justice system concerns the extent to which ADR is encouraged, coerced or mandated, without compromising the rule of law. This article contributes to the debate around these issues by considering the changing landscape of civil justice and assessing the impact of aspects of civil justice/ADR reform, by reference to the framework models proposed by Roberts, evaluating what relationship has emerged and what future predictions can be made. The emphasis will be on mediation as this process has arguably gained more momentum than any other. Genn et al. observe that despite the range of processes included under the ADR umbrella, the focus of current ADR policy in England and Wales and the rest of the UK is on mediation rather than other forms of private dispute resolution.[2]

To gain a sense of what ADR might be and of its relationship to civil justice in England and Wales during early 1990s, Roberts considered three specific aspects associated with these issues; firstly, processes supportive of party negotiations, secondly, innovative processes on the threshold of the court and, thirdly, novel forms of intervention by lawyers. He believed there to be a crucial difference between allowing the looming prospect of a trial to encourage the parties towards a negotiated settlement and active steps on the part of a court to promote one. Roberts argued that once the court seeks to sponsor settlement, the difference

* Principal Lecturer, *School of Law, Policing & Social Sciences, Canterbury Christ Church University, Kent, England, CT1 1QU: ben.waters@canterbury.ac.uk*

[1] B. Waters, S. Shipman and W. Wood*, Brown and Marriott*, *ADR Principles & Practice*, (4th ed.) (2018) 1.

[2] H. Genn et al. in F Steffek et al., *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads,* (2013) 137.

between the self-constructed, negotiated outcome and the imposed third-party decision becomes blurred.[3]

Roberts concluded that by the early 1990s ADR had more than one 'life' and that this label had become associated with areas of evolving practice in three significantly different locations. One of these lives, around the provision of support for party negotiations, was at a distance from civil justice; another involving innovative forms of legal practice, was adjacent to it; and a third constituted of novel procedures on the threshold of the court, was part of civil justice itself. Roberts argued that all three lives are linked to the shared objective of 'settlement' and a common mode of intervention in 'mediation'.[4]

In considering how to make the relationship between ADR and civil justice more efficient, Roberts proposed the incorporation three models into the judicial repertoire of dispute resolution. These included a reference away for further bilateral negotiation; a reference to some form of out of court 'mediation'; and direct attempts by judiciary to promote settlement. The extent to which these conceptualisations have been adopted will be considered and Roberts' commentary on the indistinction of what he described as party control, lawyer intervention and judicial management (which to him were the locations by which different strands of 'alternative' intervention could be identified), will be assessed.[5]

The framework proposed by Roberts will be considered after evaluating civil justice policy reform changes over the past twenty-five years. This will include consideration of the comparative developments taking place in the US, as the debate is assisted by seeing how some of these within a similar system of justice have been, or potentially could be, incorporated into the civil justice system of England and Wales. Reference to various civil justice reviews will assist identifying some of the developments defining an emerging relationship between ADR and civil justice through policy reform. To move the debate forward, arguments suggesting that the relationship gap as viewed by Roberts has been significantly narrowed, if not resolved, will be posited. Concluding thoughts will be provided about the future direction of travel and changes that are likely to affect society, including the development of increased ADR encouragement, coercion and mandation

THE CHANGING LANDSCAPE OF CIVIL JUSTICE

Access to justice arguably involves the ability of citizens to have readily available opportunities to enforce their civil rights for resolving their disputes. For civil justice, this involves providing an infrastructure which is accessible, affordable and produces fair outcomes.[6] Genn considers that the challenge in this regard is to find a balance between procedures that are seen as fair, that contribute to substantive justice and provide reasonable access to justice so that rights can be enforced, but are not so complicated or expensive as to make proceedings inaccessible.[7] Part of the civil justice infrastructure should also arguably

[3] S. Roberts, Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship, *Modern Law Rev.* 1993, 458-462.
[4] Ibid at [4].
[5] Ibid at [467-470].
[6] See Lord Woolf, *Access to Justice: The Final Report*, (London: HMSO, 1996) at: <http://www.dca.gov.uk/civil/final/overview.htm>. (last accessed 10th May 2021).
[7] H. Genn, *Judging Civil Justice*, (2014) 15.

include the provision of opportunities for disputes to be resolved through ADR. Members of the senior judiciary in England and Wales, including Lords Neuberger and Jackson have viewed mediation as part of the complement of case management tools for judges' use to ensure that substantive justice is protected.[8]

During the early 1990s, Galanter claims that there were contradictory messages concerning the trend of disputing and the habits of disputants. On the one hand, the volume of civil litigation was growing;[9] and the perception of this increase was being signaled in desperate calls from senior judiciary for more courts and further judicial appointments. At the same time, according to Glasser and Roberts, there were signs of disenchantment with the traditional trial-oriented mode of disputing on the part of litigants, and a shift towards settlement directed processes.[10]

Dispute resolution and access to justice are inextricably linked to the important constitutional principle of the rule of law, considered by Lord Bingham as including the requirement that the law must be accessible and, so far as possible, intelligible, clear and predictable.[11] Furthermore, where the disputing parties have tried unsuccessfully to resolve their dispute through, what Bingham describes as additional (as opposed to alternative) dispute resolution efforts, means must also be provided for resolving, without prohibitive cost or undue delay, bona fide civil disputes which the parties themselves are unable to.[12]

The access to justice principle is further reinforced by Article 6 (1) European Convention on Human Rights (ECHR)[13] applied in numerous cases traced back to *Golder v United Kingdom,* in which the Strasbourg court stated that 'the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the "universally recognised" fundamental principles of law.'[14] Lord Neuberger claimed that access to the courts is the bedrock of the rule of law: 'rights are valueless if they cannot be realised . . . and it is therefore essential that all . . . citizens have fair and equal access to justice.'[15] Linked to this, the courts in England and Wales have, in their decision-making, contributed to the debate about court-compelled ADR. The Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust*[16] therefore illustrates the current position of the civil courts regarding access to justice and mediation. *Halsey* declined to accept that the courts could compel parties to mediate against their will, on the grounds that to do so would be a breach of an individual's Article 6 right to have their case considered by a court.[17]

By the early 1990s the government was concerned that the state of the civil justice system in England and Wales was compromising these very principles of unqualified human rights, being beset by excessive costs, delay, and complexity. These three interdependent factors

[8] D. De Girolamo, Rhetoric and Civil Justice, (2016) 35(2) *Civil Justice Quarterly* 162, 11.
[9] M. Galanter, 'Law Abounding: Legalisation Around the North Atlantic', (1992) 55(1) *Modern Law Rev.* 8-11, in C. Glasser and S. Roberts, Dispute Resolution: Civil Justice and its Alternatives, (1993) 56(3) *Modern Law Rev.* 280-281.
[10] Glasser and Roberts Ibid at [281].
[11] T Bingham, *The Rule of Law*, (London: Penguin, 2010) 37.
[12] Ibid at [85-86].
[13] Article 6(1) ECHR provides that '. . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
[14] [1975] 1 EHRR 524, para. 35.
[15] Lord Neuberger, *Justice in an Age of Austerity* (Tom Sargant Memorial Lecture, 2013) at [28], [26], in A. Adams and J. Prassl, Vexatious Claims: Challenging the Case for Employment Tribunal Fees, (2017) 80(3), *Modern Law Rev*. 412.
[16] [2004] EWCA (Civ) 576.
[17] P. Brooker, *Mediation Law: Journey through Institutionalism to Juridification*, (2013), 70.

were arguably significantly impairing access to justice. [18] By the end of the decade the system according to Michalick, was placing litigation out of the reach of most of the population and failing to provide fair, economical and timely access to justice.[19]

In 1994 the Lord Chancellor invited the Master of the Rolls, Lord Woolf, to review the civil justice system in England and Wales. Published in 1996, Lord Woolf's Final Report concluded that the civil justice system was too expensive, in that the costs often exceeded the value of the claim, it was too slow in concluding cases and too unequal. There was according to Woolf a lack of equality between the powerful, wealthy litigant and the under resourced litigant. He also considered the system too uncertain in terms of forecasting the cost of litigation and how long it would last, believing it also to be incomprehensible to many litigants. Above all, Woolf viewed the system as too organisationally fragmented. There was no clear overall responsibility for the administration of civil justice; it was too adversarial with cases being party-led and the rules of court, all too often, were being ignored by the parties and not enforced by the court.[20]

A wholesale reform of the civil justice system in England and Wales followed, which included the implementation of the *Civil Procedure Act* 1997[21] including a modified and updated civil code. The *Civil Procedure Rules* (CPR), introduced in April 2000, not only placed an emphasis on ensuring that cases be dealt with justly and at proportionate cost, 'the Overriding Objective',[22] but also encouraged disputants to attempt settlement without recourse to litigation.[23] This is evidenced through the introduction of a number of pre-action protocols to encourage disputants to be more cooperative once a letter of claim had been written, and to consider settlement options in order to avoid litigation. The objectives of pre-action conduct and protocols clearly state that before commencing proceedings, the court will expect the parties to have exchanged sufficient information to try to settle the issues without proceedings and to consider ADR to assist settlement.[24] This clearly suggests negotiation as a recommended option. The relationship between ADR and civil justice therefore became ripe for development.

Here it is perhaps worth pausing to mention the 'multi-door courthouse' theory as an example of how the relationship between civil justice and ADR had developed during the latter part of the twentieth century in the USA. At the Pound Conference, convened in 1976 to examine concerns about the efficiency and fairness of the court system and dissatisfaction with the administration of justice,[25] Professor Frank Sander introduced the multi-door courthouse idea following research into the 'varieties of dispute processing' and outlined the design of a 'Dispute Resolution Center,' where a screening clerk would 'direct disputants to the process most appropriate for their case. A post-conference report included many ideas touching on topics as wide-ranging as the proliferation of administrative agencies to the role of the trial judge in issuing discovery sanctions, including some of interest to the ADR community.

[18] P. Michalick, *Justice in Crisis: England and Wales*, in A.A.S. Zuckerman (ed.), *Civil Justice in Crisis, Comparative Perspectives of Civil Procedure*, (1999) 117.
[19] Ibid at [164].
[20] Woolf n 6.
[21] See <http://www.legislation.gov.uk/ukpga/1997/12/contents>. (last accessed 16 July 2021).
[22] CPR Part 1.1 (1) at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>.
[23] B. Waters, "The Importance of Teaching Dispute Resolution in a Twenty-First-Century Law School" *The Law Teacher*, (2017) 51(2) 232.
[24] See Practice Direction on Pre-Action Conduct and Protocols, specifically the objectives of pre-action conduct and protocols 3 (c) and (d). at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct>. (last accessed 16 July 2021).
[25] L. Camille Hebert, The Impact of Mediation: 25 Years after the Pound Conference, 17 *Ohio State Journal Dispute Resol*. 527 (2002), 684.

Noteworthy was the idea of local courts and communities creating Neighborhood Justice Centers (NJCs); essentially facilities that 'would be designed to make available a variety of methods of processing disputes, including arbitration, mediation and referral to small claims courts.'[26] This theory subsequently gained traction beyond NJCs across the USA with the development of a variety of court-based schemes.[27]

The similarities of Roberts' proposals to Sander's conceptualisations, such as the idea of the encouragement/referral of cases to negotiation and/or mediation as well as judicial case management, are useful in framing the debate and understanding some of the developments in the changing civil justice landscape. ADR's developing relationship with civil justice in England and Wales will be considered and approached by reference to Roberts' theories and proposed models.

ADOPTED CONCEPTUALISATIONS

In assessing the status of the relationship between ADR and civil justice, the civil justice landscape can be considered in light of Roberts' proposed models to determine whether these have been adopted in any recognisable or nuanced way. It should also be noted that Roberts' proposals concerned the potential for settlement once litigation was commenced.

Within five years of the *Access to Justice Act* 1999 and implementation of the CPR, ADR had achieved a prominent role in the reformed civil justice system in England and Wales.[28] Evident now is the fact that adversarial litigation has, as will be examined below, given way to a more pluralist dispute resolution approach and disputants are becoming less rigid when choosing their dispute resolution forum.

1. *A reference away for further bilateral negotiation*

Despite observations about the poor state of the civil justice system and concerns about the growing volume of litigation in England and Wales during the mid-1990s, twenty-five years ago only a small proportion of civil disputes were litigated. A very small percentage of litigated cases required adjudication with the vast majority of cases being either settled or abandoned before trial.[29] Writing in 1993, Menkel-Meadow observed that the movement in the United States, the United Kingdom and elsewhere to foster 'alternatives to litigation' as a way of resolving disputes, [had] also increased the focus on bilateral negotiation.[30]

The pre-action protocols introduced as part of the Woolf Reforms, were clearly designed to encourage a culture of openness and negotiation. A responsibility was now imposed on parties involved in a civil dispute to seriously consider the viability of litigation as a means of

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[26] American Bar Association Report of Pound Conference Follow-Up Task Force, 74 *Federal Rules Decisions* 159, 161 (1976), *id,* p. 687.
[27] F.E.A. Sander, Varieties of Dispute Processing, 70 *Federal Rules Decisions*, 111, 131, (1976) in T. Heeden, Remodelling the Multi-Door Courthouse to Fit the Forum to the Folks: How Screening and Preparation Will Enhance ADR 95 *Marquette Law Review*, 2012, 3, 942-943.
[28] S. Shipman, Court Approaches to ADR in The Civil Justice System, *Civil Justice Quarterly*, 2006, 25(Apr) 184.
[29] W. Twining, "Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics" (1993) 56(3) *Modern Law Rev*. 382.
[30] See S. Roberts, 'Mediation in the Lawyers' Embrace' (1992) 55 *Modern Law Rev*. 258; Frank Sander, S. Goldberg and N. Rogers, *Dispute Resolution* (2nd ed, 1992); L. Riskin and J. Westbrook, *Dispute Resolution and Lawyers* (1987) in C. Menkel-Meadow (1993) 56(3) *Modern Law Rev*. 361.

resolving their dispute. The pre-action protocols were intended to promote more contact between disputing parties, to encourage earlier and fuller exchange of information, to assist pre-action investigation and where possible to settle the dispute before proceedings were necessary. The protocols also included a requirement that the parties should consider ADR with the possibility of subsequent costs sanctions for litigating parties failing to conduct themselves according to the spirit of the pre-action protocols in that regard.[31]

Once proceedings had been commenced, Roberts' suggested a pre-trial appointment, where the judge reviews the case, draws the parties' attention to the cost of proceeding to trial and recommending further attempts to achieve a negotiated outcome before trial.[32] Under the current rules the case management conference (CMC), which is an informal early-stage hearing where the parties discuss preliminary issues and directions concerning outstanding matters, can be ordered by the court following the filing of Allocation Questionnaires. This enables parties to reflect on the proceedings and consider or continue negotiation(s) with the possibility of either party making a Part 36 offer to settle the claim.

The Woolf Reform process therefore involved a shift in the court's role from providing a forum for dispute resolution to one of 'promoting settlement'.[33] The potential for which Roberts predicted and about which he had reservations due to concerns regarding coerced decision-making.[34] According to Zander, research commissioned by the Law Society and the Civil Justice Council indicated favourable responses to introduction of the pre-action-protocols for personal injury and clinical negligence work. There was more openness, more voluntary disclosure and cases were better prepared.[35] But whilst cases were generally settling earlier, there was no clear evidence that settlement levels had increased, although county court statistics reveal that there does seem to be more settlement between issue and trial and fewer trials. Using the county court as an example of litigation activity, in the year two thousand the total number of cases issued in the county court was 1,943,513, of those, 71,233 or 3.66 per cent went to trial. In 2019, whilst there was a slight increase in the number of cases issued at 2,029,248, fewer cases; 54,747 or 3.19 percent went to trial.[36] This is broadly reflective of similar activity in the higher courts over the same period.

There is a danger that at one extreme, if the pre-action protocols are to be taken literally by disputants and the courts refer significant numbers of cases away for further bilateral negotiation, that the role of the court and the common law system will arguably become compromised. Menkel-Meadow supports the point made by some critics that removing too many cases through negotiated settlements will leave an inadequate base of cases from which the common law system develops its precedential rulings. Others she maintains suggest that the negotiator's practical requirements to consider the 'needs' or 'interests' of parties results in a 'psychologising' of what should be a principled, legal and political process.[37]

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[31] Ibid at paras. 8-10.
[32] Roberts, (Model 1), n 3 above at [468].
[33] S. Roberts, Settlement as Civil Justice, (2000) 63(5) *Modern Law Rev.* 739.
[34] Roberts n 3 above at [469].
[35] M. Zander, *Cases and Materials on the English Legal System* (2007), 10th ed. 62 and 132-140.
[36] Civil Justice Statistics, at: <https://www.gov.uk/government/collections/civil-justice-statistics>. (last accessed 16 July 2021).
[37] See for example J. Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Rev.* 76; H. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Rev.* 668; C. Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: The Law of ADR' (1991) 19 *Florida State Law* Rev 1; id, 'For and Against Settlement: The Uses and Abuses of the Mandatory Settlement Conference' (1985) 33 *UCLA Law Rev*. 485; M. Galanter, 'The Emergence of the Judge as a Mediator in Civil Cases' (1986) 69 *Judicature* 257 in C. Menkel-Meadow (1993) *Modern Law Rev.* 56(3), 368.

There is no evidence to suggest that parties' legal interests are being compromised in such a way through a reference away for further bilateral negotiation of the kind recommended by Roberts in his Model I or, indeed that the foundational common law principle of stare decisis is being undermined.

2. *A reference to some form of out of court 'mediation'*

Encouraging the use of ADR was to be an essential feature of judicial case management.[38] Similar to his first model, Roberts suggested a pre-trial appointment, involving reference away for further negotiations, this time 'mediated' by a third party.[39] The court is now under a duty to encourage parties to use ADR where appropriate.[40] Through their case management powers judges may stay cases for private dispute resolution to take place,[41] this regularly occurs at CMC stage and most commonly the stay will be ordered to enable the parties to attempt mediation.[42] Courts can also give directions requiring the parties to consider ADR on their own initiative without a CMC.[43] This seems very close to what Roberts envisaged under his Model II, and was not very different from what he observed was already taking place in the family courts in the early 1990s through referrals to Divorce Court Welfare Officers, who then engaged in a kind of therapy/conciliation with the parties.[44]

Woolf was a proponent of ensuring access to justice for all and whilst supporting and promoting the use of ADR to achieve this, he made it clear that litigants should not be mandated to use it, but that the court should have the power to impose sanctions if a party unreasonably refused a court proposal to attempt ADR, including an offer of mediation.[45] Judicial case management enables costs sanctions to be imposed both on parties for failing to consider or attempt ADR, and this applies both pre-litigation or once proceedings have been commenced.[46] The decision in *Dunnett v Railtrack*[47] sent a clear message that a party's unreasonable refusal to mediate would most likely incur costs penalties, and as Brooker suggests, the judgment prepared the ground for mediation to become more fully incorporated into the litigation process.[48]

The argument that diverting legal disputes away from the courts and into mediation as a strategy for increasing access to justice is not without its critics. Genn contests this notion claiming the outcome of mediation is 'not about just settlement it is just about settlement'. She argues that mediation does not contribute to access to the courts because it is specifically non-court based. Neither does it contribute to substantive justice, because mediation

[38] Woolf n 6 above at [11, 9(c)].
[39] Roberts, (Model II), n 3 above at [468].
[40] CPR r.1.4 (2)(e). See also Shipman, n 28.
[41] CPR 26.4.
[42] See <https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/case-management>. (last accessed 20 July 2021).
[43] Paragraph 4.10 (9) of Practice Direction supplemental to CPR 29 See <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part29/pd_part29>. (last accessed 20 July 2021).
[44] Roberts n 3, above at [468].
[45] Woolf n 6.
[46] See Under CPR 44.3, and CPR 44.5.
[47] [2002] EWCA Civ 303.
[48] Brooker n 17 above at [117].

requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving.[49]

Arguments of this nature are supportive for not forcing or incentivising parties to consider private dispute resolution, particularly a dispute which merits adjudication on rights-based issues. This is broadly in line with Roberts' proposed modelling, as he considered the authority which courts necessarily enjoy in the context of adjudication, could be weakened if roles become blurred through judges being drawn into managerial activity and themselves 'strive to encourage settlement'.[50] What shrewd judicial case management involves is careful consideration of which cases might be best suited for private dispute resolution.

(a) Mediation Provision

Whilst there is no explicit or direct state sponsorship of mediation in England and Wales or other parts of the UK, it can be argued that certain developments such as judicial costs sanctions, a small claims mediation service and the introduction of an on-line court, suggest that there is growing support for mediation.

Twenty-five years ago, speculation about the potential for the institutionalisation of mediation from the government's standpoint and the provision of a general network of mediation agencies (parallel to the courts), was thought to be a remote prospect mainly on financial grounds.[51] The lack of direct state intervention has however allowed for the growth of private (unregulated) mediation services, which are frequently used to assist disputing parties to resolve a whole range of civil and commercial disputes.[52] Today there are significantly more mediation providers mainly operating in the areas of civil and commercial disputes[53] and family-related disputes,[54] but also in other conflict areas such as those arising in the workplace.[55]

Whilst the institutionalisation or state sponsorship of mediation has not explicitly materialised, there are representative organisations such as the Civil Mediation Council (CMC) and the Family Mediation Council (FMC), which suggest a drift towards it. The CMC describes itself as the recognised authority in the country for matters relating to civil, commercial, workplace and other non-family mediation, whose mission is to inspire all sectors of society to use mediation when resolving disputes.[56] The FMC with six organisational members[57] acts as an umbrella body for family mediation and is dedicated to promoting best practice in family mediation, claiming that its central aim is to ensure the public can confidently access family

[49] H. Genn, (2012) "What Is Civil Justice For? Reform, ADR, and Access to Justice," *Yale Journal of Law & the Humanities*: Vol. 24: Iss. 1, Article 18, 411.

[50] Roberts, n 3 above at [461].

[51] Ibid at [458]; and Glasser & Roberts, n 9 above at [281].

[52] Notably in the field of civil and commercial mediation CEDR at: <https://www.cedr.com/ , ADR Group at: http://www.ADRgroup.co.uk/>. (last accessed 20 July 2021).

[53] For civil and commercial mediation, ibid., CEDR and the ADR Group.

[54] Organisations providing family mediation training including the Family Mediators Association, the ADR Group, Resolution, National Family Mediation, and the College of Mediators.

[55] Some of the leading providers of workplace mediation are Globis, TCM and UK Mediation.

[56] Established in 2003 the CMC currently has 58 organisations registered as mediation providers in the civil-commercial field, see: <http://www.civilmediation.org/about-cmc>. (last accessed 24 July 2021).

[57] The College of Mediators, the Family Mediators Association, the Law Society, National Family Mediation and the family lawyers' body Resolution. See the FMC's website at <https://www.familymediationcouncil.org.uk/>. (last accessed 24 July 2021).

mediation services that offer high quality mediation provided by mediators who meet the FMC standards.[58]

Whilst government may have been slow to directly sponsor mediation, there is clear evidence that the courts were embracing 'the spirit of the Woolf Reforms' and prepared to refer cases to some form of 'Robertsian' out of court 'mediation', as displayed by Brooke LJ in *Dunnett v Railtrack*, when he said *obiter* that "A mediator may be able to provide solutions which are beyond the powers of the court to provide."[59]

(b) Lawyers as Mediators

Lawyers acting in the capacity as mediators was a topic of discussion thirty years ago and, central to an ADR pilot scheme proposed by the Beldam Committee,[60] was that lawyers should act as mediators.[61] Lawyers in the USA had long presented themselves in neutral capacities alongside their traditional adversarial roles.[62] With the steady growth of mediation training organisations in the UK,[63] an increasing number of lawyers (solicitors and barristers) have undergone mediation training. Although the Solicitors Regulation Authority (SRA) still does not formally view mediation as part of a solicitor's work, with only a small number of law firms offering discreet mediation services, there are several lawyer mediators providing their mediation services as members of independent panels or organisations.[64]

Many barristers have on the other hand entered the ADR market more overtly by adding mediation to their practice portfolios. Their legal qualifications and independent status (being self-employed) make barristers attractive third-party neutrals. There are however many more mediators trained for the amount of work available, particularly for civil and commercial disputes where a small number of mediators are performing the bulk of mediation work.[65]

Roberts expressed concerns about the lawyer mediator role, not least from the perspective of presenting mediation as part of legal practice, as opposed to something which lawyers might do on the side. As such Roberts had reservations about the Beldam Committee's proposals to use lawyers as mediators as part of the Committee's proposed ADR pilot scheme.[66]

(c) Lawyers and ADR

Practising solicitors handling litigation are under a professional duty to advise their clients about ADR. Under paragraph 2.02(1)(b) of the *SRA's Code of Conduct* 2011[67] solicitors must, when considering options available to a client involved in a civil dispute, discuss whether

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[58] See <https://www.familymediationcouncil.org.uk/>

[59] *Dunnett v Railtrack* n 47, para. 14.

[60] In 1991 the General Council of the Bar established a Committee on Alternative Dispute Resolution to 'enquire into the possibility of promoting a system of court-based alternative dispute resolution' chaired by Lord Justice Beldam, which concluded that 'court-based ADR would be of value across a wide field of civil disputes.

[61] Roberts n 3 above at [463 and 365].

[62] S.E. Purnell, 'Attorney as Mediator' (1985) 32 *UCLA Law Rev.* 986 in ibid at [463].

[63] See n 52 to 55; all these organisations also provide mediation training.

[64] Both CEDR and ADR Group have panels of accredited mediators. See also Clerksroom at: <https://www.clerksroom.com/mediation>.

[65] Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, para. 2.26, available at https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf, 14 paras. 217-220.
See also the Seventh CEDR Mediation Audit 2016, at: <https://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf>. (last accessed 31 July 2021).

[66] Roberts, n 3 above at [462-467].

[67] The *SRA's Code of Conduct* at: <https://www.sra.org.uk/solicitors/handbook/code/content.page>. (last accessed 31 July 2021).

mediation or another ADR procedure may be more appropriate than litigation, arbitration, or other formal processes.

The indiscriminate recommendation of adversarialism, is not only foolhardy and potentially punitive through costs penalties but can never produce the perfect result.[68] Sander suggests two lines of enquiry; firstly, establishing the disputants' goals in making a forum choice. Secondly, if the disputants are amenable to settlement, determining the obstacles to settlement and in what forum they might best be overcome.[69]

There have certainly been efforts to refer cases to mediation as proposed by Roberts under his second model. Lawyers are making referrals (often to other lawyer-mediators) so too the judiciary, under their case management powers by encouraging parties to try ADR, and there are now many more mediation providers available for parties to use.

3. *Direct attempts by judiciary to promote settlement*

Roberts' modelling supported judicial intervention and envisaged the introduction of a procedure under which mediation could be built directly into the litigation process, and which involves attempts by court personnel to mediate in negotiations on court premises before the dispute progresses to trial.[70]

There is evidence of more direct intervention by the judiciary, suggestive of mediation being built into the litigation process, and which involves attempts by court personnel to mediate in negotiations on court premises before the dispute progresses to trial, as suggested by Roberts as a third model. In 2016 Lord Justice Briggs noted in his Civil Courts Structure Review (CCSR) final report, that in some county courts, there existed a form of small claims conciliation (or mediation) being undertaken by District Judges.[71] Attendance is compulsory at such case management appointments, where parties failing to attend have their claims or defences dismissed or struck out.[72] Parties are invited to consider settlement, and the District Judge provides assistance in the form of informal Early Neutral Evaluation (ENE), similar to the procedure operating at financial dispute resolution hearings in the Family Court, which are treated as meetings held for the purposes of discussion and negotiation. Those cases not settling are given case management directions designed, according to Briggs, to enable the parties to prepare for trial much more effectively than is customary in the Small Claims Track.[73] This approach, albeit not 'widespread' is almost identical to what Roberts proposed (although with reservations about concerns involving the blurring of the lines between judicial settlement promotion and adjudication) as a third model.[74]

(a) Justice, Coercion and Compulsion

Traced back to the time of Bentham, the relationship between civil justice and ADR has attracted academic, scholarly, and jurisprudential commentary and debate. Twining asserts

[68] Waters n 23 above at [237].
[69] F.E.A. Sander & S.B Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, 10 *Negotiation J.* 49, 66 (1994).
[70] Roberts, Model III n 3 above at [469].
[71] Briggs n 65.
[72] ibid.
[73] ibid.
[74] Roberts, Model III n 3 above at [469].

that to Bentham, compromise even in situations of equality of bargaining power when parties freely consent, involves the sacrifice of rights and hence a cost, which is only ever justified as the lesser of two evils. Bentham anticipated modern commentators in doubting whether bargaining is ever really equal or consent truly free. On this interpretation, Twining considers it likely that Bentham would have looked with deep suspicion on modern efforts to promote mediation, negotiation, or arbitration (especially in private), and other alternatives to the kind of open, cheap, simple, speedy implementation of the law that would be achieved in his ideal court system.[75]

Other commentators do not believe that settlement as a generic practice is preferable to judgment or should be institutionalised on a wholesale and indiscriminate basis. Fiss for example considers settlement to be the civil analogue of plea-bargaining, suggesting that consent is often coerced, with the bargain perhaps being struck by someone without authority.[76] For such critics the absence of trial and judgment renders subsequent judicial involvement troublesome and although judicial work is reduced, justice may not be done. Like plea-bargaining, Fiss argues that settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.[77]

Conversely, Fuller likens adjudication to a form of social ordering which if inefficient cannot be good.[78] Assessing the role of justice through the prism of Rawls theory of justice as 'fairness', Welsh argues that dispute resolution advocates in the USA perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties.[79] A state of affairs present in England and Wales when Roberts was writing in 1993 and which Woolf identified when undertaking his civil justice review in the mid-1990s,[80] particularly the right to trial and the right to free expression, which Welsh contends are essential for achieving political and social justice.[81]

(b) Judicial Activism (a means of quasi-compulsion?)

One of the spheres within which different strands of 'alternative' intervention could be identified for Roberts was judicial intervention as part of procedures on the threshold of the court. As it clearly did in the early 1990s, the crisis in terms of civil justice resourcing remains today and as Zuckerman observes 'there is no escaping the fact that court resources are limited, there are only so many judges, so many courtrooms and so much administrative support.'[82] Discouraging litigants from using those resources by encouraging extra-judicial dispute resolution is one means by which the CPR attempt to ensure an efficient use of available court resources.[83] Genn maintains that the solution to the problems with civil justice as identified by Woolf, lies in judicial case management, proportionate and rationed procedures, strictly enforced timetables, greater co-operation and less adversarialism, earlier settlements, and strong pressure to mediate applied through costs sanctions. The introduction of the CPR required judges to become case managers responsible for rationing

[75] J. Bentham, *Principles of Judicial Procedure*, in Twining n 29 above at [384-5].
[76] O. Fiss, "Against Settlement", *Yale Law Journal*, 1984, 93, at 1075.
[77] ibid.
[78] L. Fuller and K. Winston, The Forms and Limits of Adjudication, *Harvard Law Review*, Vol. 92, No. 2 (Dec 1978), 361.
[79] N. Welsh, 'Remembering the Role of Justice in Resolution', *Journal of Legal Education*, Vol. 54, 2004, 56.
[80] Roberts n 3 above at [23].
[81] Welsh n. 80 above at [52], in Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do with It? 79 *Washington University L.Q*. 787, 820-826.
[82] Zuckerman in Shipman n 28 above at [2].
[83] Ibid Shipman at [2].

procedure, guided by principles of efficiency, equality of arms, and expedition.[84] Judicial case management has certainly influenced the development of the civil court's relationship with ADR described by Michalick as the lynchpin to the Woolf Reforms, as it now enables judges to control litigation at all stages, so that parties cannot indulge 'their worst excesses.'[85]

In the post-Woolf era direct attempts have been made by the judiciary to use the CPR to promote settlement.[86] Judicial intervention (as Roberts described it) or activism has been evident through reported decisions, and in particular those which have displayed judicial application of the costs provisions available under CPR 44.[87] Whilst costs sanctions were not envisaged by Roberts, there now exists a significant body of case law demonstrating the courts' commitment to promoting ADR by imposing costs sanctions on parties who fail unreasonably to consider using ADR. In 2002, Lord Woolf held in *Cowl and Others v Plymouth City Council*[88] that parties must consider ADR before starting legal proceedings, particularly where public money was involved. That decision was followed more significantly by *Dunnett v. Railtrack*,[89] in which the Court of Appeal used Part 44 to deny the successful defendant their legal costs because their refusal to contemplate mediation prior to the appeal (after it had been suggested by the court), was unreasonable.

The message conveyed by *Dunnett* was reinforced in *Hurst v. Leeming*, in which Lightman J held that it was for the judge to decide whether a party's refusal to mediate was justified,[90] considered variously along with *Royal Bank of Canada Trust Corp. v. Secretary of State for Defence,*[91] to signify the high-water mark of the court's approach to punishment (in costs sanctions) for a party failing unreasonably to consider mediation.[92] In the former case, the High Court suggested that a refusal to mediate would be justified only in exceptional circumstances. Despite being predominantly successful at trial, the judge in the latter case denied the Ministry of Defence its legal costs due to its refusal to mediate, stating that the reason given for refusing mediation (that the case involved a point of law) did not make the case unsuitable.[93] The Court of Appeal demonstrated its support for ADR by imposing costs sanctions in various cases during this period, highlighting the risks for parties if they unreasonably refused to try ADR. For example where in a personal injury case due to the insurers' apparent unwillingness to give their solicitors instructions to enable them to demonstrate how they were fulfilling their obligations under CPR Part 1, and in particular CPR 1.3, the court considered that the appropriate course to take was to reduce the amount of costs recoverable by the defendant by the sum of £5,000.[94] In a commercial dispute over the supply of goods, a party withdrew from an arranged mediation shortly before trial unreasonably. The court ordered that the successful appellants should only be entitled to their costs up to the date that they had originally agreed to the mediation, and therefore were not entitled to any costs of trial preparation or the trial itself. The appellants' view that the mediation had no real prospect of succeeding did not entitle them to withdraw, as that view

[84] Genn n 49 above at [401].
[85] Michalick n 18 above at [153].
[86] CPR 44.3, and CPR 44.5 n. 47.
[87] Ibid.
[88] [2001] EWCA (Civ) 1935.
[89] See n 47.
[90] [2001] EWHC (Ch) 1051 and [2003] 1 Lloyd's Rep. 379.
[91] [2003] EWHC (Ch) 1479.
[92] Genn n 2 above at [21, 143-144], and Genn n 49 above at [407].
[93] Ibid at [408].
[94] Per Brooke LJ in *Neal v Jones Motors* [2002] EWCA Civ 1731.

may have been wrong and the mediation may have been successful, thereby avoiding the need for further litigation.[95]

Although generally considered to be a retreat from the earlier position taken by the court in *Dunnett,* as it redresses the balance in favour of a successful party who has refused to mediate, the decision in *Halsey v Milton Keynes General NHS Trust*,[96] can be interpreted as confirming the central place of ADR in the resolution of civil disputes. *Halsey* remains a clear reminder that litigants and their lawyers must routinely consider whether their dispute is suitable for ADR, with the proviso that a properly reasoned refusal to mediate on the facts of the case should not affect a successful litigant's entitlement to its costs. Whilst *Halsey* is a controversial decision having attracted extra-judicial debate on the Article 6 issue, as well as compulsion,[97] the case provides useful guidelines to which courts should have regard when exercising their discretion to impose an adverse costs order. In those circumstances, the court should have regard to the following factors: the nature of the dispute, the merits of the case, the extent to which settlement had been explored, whether costs of ADR would be disproportionately high, whether any delay in setting up or attempting ADR would have been prejudiced and whether ADR had a reasonable prospect of success.[98]

Since *Halsey* however, the cases on unreasonable refusal to mediate display inconsistency. There have been decisions where imposing a sanction has been considered justified, for example *Thakkar v Patel,* in which the court admonished the Defendants for 'dragging their feet' following a recommendation to mediate in a money dispute where the parties were not far apart on the issues, which subsequently led to the proposed mediation being abandoned.[99] The court declined to impose sanctions in *Gore v Naheed* and held that the defendant's refusal to mediate in a dispute over an easement involving complex issues rendered it unsuitable for mediation.[100] In *Car Giant v LB Hammersmith* the court refused to impose an indemnity costs order against the claimant who delayed for 17 months before agreeing to mediate, on the basis that not every case is suitable for early mediation and the claimants were justified in awaiting expert evidence before going ahead with mediation.[101] These case examples are a reminder that the court management powers extending to costs sanctions are inherently in the discretion of the court.

It was however Lord Justice Dyson in *Halsey* who promoted the use of the Ungley Order as a way to encourage parties' use of ADR. This court direction, devised by Master Ungley, requires parties who consider a case unsuitable for ADR to file a witness statement with the court no later than 28 days before trial, giving full reasoning. The trial judge will then consider those reasons at the conclusion of the trial when deciding the appropriate costs order to make.[102] Such Orders recognise the importance of encouraging parties to *consider* whether the case is suitable for ADR and impresses upon them that, if they refuse even to consider that question, they run the risk of an adverse costs order even if successful at trial. Ungley Orders are widely used in clinical negligence cases and their use has been extended to other arenas, as

[95] *Leicester Circuits Ltd. v. Coates Brothers PLC* [2003] EWCA (Civ) 290.
[96] See n 16.
[97] Brooker n 17 above at [130]; de Girolamo n 8 above at [3-4]; Genn n 49 above at [408-409].
[98] Ibid, commonly referred to as the Halsey Guidelines. See A.J.C. Koo, Ten Years After Halsey, (2015) 34 *Civil Justice Quarterly* 77-95.
[99] [2017] EWCA Civ 117.
[100] [2017] EWCA Civ 369.
[101] [2017] EWHC 464 (TCC).
[102] See n 16, paras. 32 and 33.

illustrated by the 2014 family law case of *Mann v Mann*, in which Mostyn J stated that *"I cannot compel the parties to engage in the mediation. But I can robustly encourage them by means of an Ungley Order."* [103]

In 2019, an important judicial development influencing the debate about compulsion and court ordered ADR involved Early Neutral Evaluation (ENE), which is a non-binding/without prejudice ADR process involving parties' presenting their case submissions to a judge, following which the judge will predict the likely trial outcome. The Court of Appeal in *Lomax v Lomax*[104] confirmed that courts are empowered to compel non-consenting parties to submit their case to ENE. This decision and the court's suggested approach regarding ENE was followed in *Telecom Centre v Thomas Sanderson Ltd*[105] and in relation to mediation, in *McParland v Whitehead*.[106] In the latter case the judge specifically referred to the Lomax decision, stating that "*it inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey*".

Notwithstanding the court's promotion of extra-judicial settlement and the encouragement of ADR usage (both aspects of Roberts' modelling), arguments abound that compulsory mediation represents a challenge to the ideas comprehended by the rule of law.[107] Ingleby predicted in 1993 that the effect of compulsory mediation would be to create rules against litigation, by replacing the habit of settlement in '*professionalised justice*' with a rule in favour of settlement in '*incorporated justice*.'[108] In effect, arguing that to embrace the idea of ADR compulsion, would endanger the habit of settlement by replacing it with a rule in favour of settlement.[109]

The reform process has arguably not progressed to the point described by Roberts in his third model, and institutional intervention involving direct attempts by judiciary to promote settlement, has not fully materialised (save perhaps in isolated examples as mentioned above and with the small claims procedure considered below). Whilst the judiciary has become far more interventionalist and prepared to encourage the use of ADR, particularly mediation, the current situation falls short of the kind of quasi-compulsion now present in some other parts of Europe, without compromising the rule of law.

AN EMERGENT RELATIONSHIP

Having considered the extent to which Roberts' models have been adopted in any specific or nuanced way, the developing relationship between ADR and civil justice in England and Wales can be further examined through analysis of the findings of the civil justice reviews undertaken by Lord Justice Jackson in 2010, Lord Justice Briggs in 2016 and more recently, the Civil Justice Council's ADR Working Group in 2018 and the Civil Justice Council's Review on Compulsory ADR in 2021. There is undoubtedly growing support for ADR, particularly mediation, in the post-Woolf era and there is evidence that the civil courts have embraced a kind of state-sponsored mediation (through the imposition of costs sanctions), which for

[103] [2014] EWHC 537 (Fam).
[104] EWCA Civ 1467.
[105] [2020] EWHC 368 (QB).
[106] [2020] EWHC 298 (Ch).
[107] R. Ingleby, Court Sponsored Mediation: The Case Against Mandatory Participation, (1993) *Modern Law Rev.* 450.
[108] ibid.
[109] ibid.

certain disputes has gained traction, whereas in other locations it has lacked uptake. ADR has also attracted significant focus in England and Wales as a direct result of judicial and parliamentary intervention.

1. Some Post-Woolf Developments

(a) Mediation Pilot Schemes

Similar in model to that proposed by Roberts in 1993 and not conceptually dissimilar to Sander's Pound Conference proposals, court-annexed ADR initiatives were introduced during the late 1990s in English courts (through implementation of the Beldam Committee's recommendations for court-based ADR for a wide range of civil disputes).[110] However, the experience of the voluntary mediation pilot schemes in Central London and in the Court of Appeal revealed only a modest uptake.[111] Genn et al. reviewed two court-based pilot schemes established in the Central London County and inspired by the Ontario Mandatory Mediation Programme. The quasi-compulsory mediation scheme, known as an automatic referral to mediation (ARM) operating from April 2004 to March 2005, involved early random allocation by the court of 100 defended cases per month to mediation, with an opportunity to opt out (not fully mandated therefore). Where objections were raised, a District Judge reviewed cases and tried to persuade the parties to agree to mediation. The other pilot, a voluntary mediation scheme (VOL), which had been operating in the court since 1996, involved 160 mediated cases together with a large number of control cases, and cases where mediation had been rejected, broadly operated along the lines proposed by Roberts. Although the statistics for ARM can be challenged, the findings of the study into these two schemes provide lessons about the impact of automatic referral and judicial pressure on the uptake of mediation, about user experiences, and about the potential for mediation to offer savings to the justice system in administrative and judicial time.[112]

The Genn research revealed that of the ARM cases reviewed, mediation in cases other than personal injury significantly reduced the likelihood of trial as compared with non-mediated cases. The analysis also showed that while judicial time spent on mediated ARM cases was lower than on non-mediated cases, administrative time was higher.[113] However, of the ARM cases that were automatically referred to mediation, the parties in 80 percent of them objected. Of the 1,232 cases referred to mediation, only 172 were mediated, with a settlement rate of 53 percent. Most cases concluded by means of an out-of-court settlement without ever going to mediation.[114]

Through the ARM scheme, the court was effectively ordering parties to attempt mediation on its own initiative, essentially what Roberts was proposing with his second and third models. The scheme however coincided with the *Halsey* decision, which expressed the view, albeit obiter, that the courts have no power to order unwilling parties to mediate as it would be contrary to ECHR Article 6.[115] Parties in around 80% of the cases that were automatically

[110] The Commercial Court, the Court of Appeal and many regional courts started operating court-annexed ADR schemes during the 1990s.
[111] H. Genn et al. *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure,* at: <https://www.researchgate.net/publication/32894907_Twisting_arms_court_referred_and_court_linked_mediation_under_judicial_pressure. 8>. (last accessed 1 August 2021).
[112] Ibid at [i].
[113] Ibid at [iii].
[114] Ibid at [197].
[115] Halsey n 16 above at [9].

referred to mediation in ARM objected, requiring considerable judicial time to deal with applications to opt out. Of the 1,232 cases referred to mediation, 172 were actually mediated, with a settlement rate of 53%.[116]

The study shows that forcing unwilling parties into mediation does not create the best environment for settlement. For instance, no interviewees who participated in the ARM pilot had anything good to say about the conditions under which mediations took place at Central London; the rooms were cramped, too hot and no refreshments were available.[117] Overall, Genn et al. took the view that the significance of the parties' willingness to negotiate and compromise as an explanation for success and failure in mediation, sits uncomfortably with the evident support shown by some mediation organisations for an experiment in compulsory mediation.[118]

Despite the demand for the VOL scheme increasing in 2002 following the *Dunnett* decision, Genn et al. found that mediation settlement rates had actually been declining from the high of 62 per cent in 1998 to below 40 per cent in 2000 and 2003, with the settlement rate not exceeding 50 percent, they viewed this finding as significant given the potential cost impact of unsettled mediation.[119] The research reveals that about one-quarter of respondents mentioned judicial encouragement or directions, or fear of potential costs sanctions, as reasons given by parties for attempting mediation. By contrast, in the 1998 review of the VOL scheme, only a handful of respondents gave court encouragement as a reason and there was no reference to costs sanctions. Again, this seems to suggest that compelling parties to mediate will not ensure high settlement rates.

The evidence from such schemes suggests that facilitation and encouragement together with selective and appropriate pressure is more effective than blanket coercion to mediate. Evidence from other evaluations of court-based mediation schemes around about the same time in Exeter, Guildford and Birmingham support this conclusion according to Genn.[120] The evidence of the Central London County Court schemes indicates that, while in the English context the prevailing policy of judicial pressure to mediate accompanied by the threat of sanctions is capable of propelling cases into mediation, this is not necessarily particularly effective in terms of settlement rates.[121]

The findings of these schemes suggest that mediation does not operate best under compulsion, and that settlement rates do not necessarily increase in a system which either encourages or imposes mediation. Evaluation of these schemes however suggests that a more effective mediation policy would combine education and encouragement through communication of information to parties involved in litigation,[122] as many of the 'excuses' for not mediating seemed to suggest unfamiliarity with mediation. Perhaps a concerted effort by

[116] Genn n 111 above at [55 and 73-74].
[117] Ibid at [111].
[118] Ibid at [200].
[119] Ibid at [200].
[120] Ibid at [202].
[121] Ibid at [205].
[122] ibid.

policymakers to educate and encourage parties to mediate in the *post-Halsey* era, might improve mediation settlement success rates.

(b) Small Claims

Evidence of the court's developing relationship to ADR and in particular mediation, can be demonstrated through the court's Small Claims Mediation Service (SCMS), established in 2007 by Her Majesty's Court Service (HMCS). This is the closest in nature to Roberts' third model in which he proposed a procedure under which mediation is built directly into the litigation process once proceedings have been commenced, involving attempts by court personnel to mediate on court premises before the dispute progresses to trial. The scheme provides free mediation for users should each party voluntarily elect for it. Of those cases issued in the county court, around 50 percent are allocated to the small claims track, being cases of a monetary value not exceeding £10,000 and on average 10 per cent of these are referred to the SCMS.[123]

By 2017 around ten thousand small claims mediations were being conducted annually by telephone (via sequential telephone conversations with the mediator) under the auspices of the County Court scheme by regionally appointed mediators employed by Her Majesty's Court's and Tribunal Service (HMCTS), with a very significant proportion of the cases revealing high customer satisfaction levels.[124] The scheme has a high settlement rate at approximately 65 to 70 percent.[125]

(c) Legislation

There have been no legislative steps to integrate mediation into the civil justice system for claims exceeding £10,000. However, the *Children and Families Act* 2014 extended the use of the mediation information and assessment meeting (MIAM) for private family related disputes, so that these meetings (where a trained family mediator meets the parties to discuss mediation and consider its suitability as an option) are now effectively a pre-condition for commencing family proceedings. It is arguably impractical to impose MIAMs as a preliminary condition for all civil disputes and could present practical issues as to who in a civil dispute should attend such meetings. Most proponents of compulsion accept that there would have to be some opt-outs and that the court would necessarily retain some discretion. There can also be legitimate disagreement as to when during proceedings ADR is appropriate.[126]

Judicial medation, which has gained traction in other jurisdictions[127] was introduced in the UK for employment cases in 2006. The process within the employemnt tribunal arena involves bringing the parties together for mediation before a trained Employment Judge who remains neutral and tries to assist the parties in resolving their dispute, which may include remedies

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[123] S. Prince, Presentation: *Meeting on Fostering Inclusive Growth and Trust in Justice Institutions*, 12 November 2014, at: <https://www.slideshare.net/OECD-GOV/presentation-by-dr-pim-albers-at-the-meeting-on-fostering-inclusive-growth-and-trust-in-justice-institutions-12-november-2014>. (last accessed 1 August 2021).

[124] *The Interim Report of Civil Justice Council's ADR Working Group; Future of ADR*, 17 at: <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-ADR-in-civil-justice-20171017.pdf>.

[125] See Prince n 123.

[126] Waters et al. n 2 above at [446].

[127] The Netherlands, Canada, the United States, China and Australia. See T. Sourdin & A. Zariski Eds, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution,* (Thomson Reuters, 2013); L. Otis & E.H. Reiter, Mediation by Judges: A New Phenomenon in The Transformation of Justice, 6 *Pepperdine Dispute Resolution L.J.* 351, 352 (2006).

which would not be available at a hearing before an Employment Tribunal.[128] The findings are however mixed, as by 2010 research suggested that no discernable statistically significant effect could be identified for the impact of judicial mediation regarding case settlement rates.[129] Nevertheless, the *Employment Tribunals (Constitution and Rules of Procedure) Regulations* 2013, introduced updated tribunal rules which include duties for the Employment Tribunal to encourage the use of ADR, including ACAS conciliation, mediation, judicial mediation and other means of resolving disputes by agreement, but as stated, this is merely 'encouragement'.[130]

Whilst successive governments since the late 1990s have supported the use of ADR, it is questionable therefore whether parliamentary intervention has encouraged more out of court negotiated settlements. Perhaps the pilot schemes operating on the London Central County courts and examples of those elsewhere including Exeter, have not provided conclusive evidence to convince government that ADR should be explicitly incorporated into the infrastructure of the civil justice system.

(d) The Online Court and ODR

The Civil Justice Council has developed plans to introduce an internet-based dispute resolution service for low value claims below £25,000.[131] The proposed Online Court Her Majesty's Online Court (HMOC) would have three tiers. Tier 1 will provide online evaluation to assist a user to categorise and understand options regarding a claim. Tier 2 provides a facility for reviewing case papers to support either negotiation or mediation; including automated negotiation tools and Tier 3 is a decision-making tool for judges to hand down judgments based on submissions received online. Some of the HMOC proposals seem to be an information technology (IT) articulation of Roberts' three models.

The Council's proposals which have gained support from senior judiciary including Lord Justice Briggs (see below), propose that implementation of the HMOC will produce two major benefits. First, they will give rise to increased access to justice with a more affordable and user-friendly service available to many more people. Second, there will be substantial costs savings, both for individuals as well as for the court system; fewer cases will reach judges and those that do, will be less expensive as the need for a physical hearing would not be required.

2. Civil Justice Reviews

(a) The Jackson Report

Lord Justice Jackson's 2010 Review of Civil Litigation Costs included palpable support for ADR, to the extent that a whole chapter in his Final Report was reserved for it and its utility in the resolution of civil disputes

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[128] See the guidance document on Judicial mediation at employment tribunals: England and Wales (T612), at: https://www.gov.uk/government/publications/judicial-mediation-at-employment-tribunals-england-and-wales-t612. (last accessed 1 August 2021).

[129] See *Evaluating the use of judicial mediation in Employment Tribunals*, by Unwin et al. at: <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating-judicial-mediation-march10.pdf>. At the end of the study, 57% of mediated cases and 61% of unmediated interested cases were resolved, without a hearing.

[130] *The Employment Tribunals Rules of Procedure 2013* (as subsequently amended up to 17th February 2015) 7, at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/429633/employment-tribunal-procedure-rules.pdf> (last accessed 1 August 2021).

[131] See *Civil Justice Online Dispute Resolution Advisory Group's Report* - February 2015.

> Alternative dispute resolution ('ADR') (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be…..Nevertheless ADR should not be mandatory for all proceedings. The circumstances in which it should be used (and when it should be used) will vary from case to case, and much will come down to the judgment of experienced practitioners and the court.[132]

Whilst Jackson rejected the submission by mediation providers that procedural judges should impose sanctions on parties who had not mediated prior to the issue of proceedings without a good reason,[133] he did support the judiciary encouraging mediation and suggested that they point out its considerable benefits. He also supported the imposition of costs penalties on parties unreasonably refusing to mediate, with the proviso that the form of any costs penalty must be in the discretion of the court.[134]

Rather than coercion, Jackson favoured education as the most appropriate way to promote ADR and this included the recommendation that a serious campaign be undertaken to ensure that all litigation lawyers, judges, the public and small businesses are properly informed about the benefits of ADR. Whilst perhaps there is growing ADR awareness in the UK, mediation for instance is not yet culturally normal and without professional advice the public are generally not familiar with it or comfortable using it.[135] It is arguable therefore that Jackson's vision in this regard remains a work in progress.[136]

The recommendation that an authoritative handbook should be published, explaining clearly and concisely what ADR is and giving details of all reputable mediation providers, has however been adopted.[137] It is noteworthy to also mention that several former Appellate judges have, applied their efforts to the promotion of mediation; notably Sir Brain Neil, Sir Henry Brooke and Sir Allan Ward. All of whom have at various times chaired the CMC.

(c) The Briggs Report

The overall terms of reference of Lord Justice Briggs' Civil Court Structure Review (CCSR) involved a review of the structure by which the Civil Courts provide the state's service for the resolution of civil disputes in England and Wales.[138] Briggs noted that the small claims mediation service was effective and useful but there were insufficient mediators to satisfy the national demand.[139] The Final Report noted that a form of ENE modelled on the Financial Dispute Resolution (FDR) hearing operating with success in the Family Division was also being successfully conducted in some county courts.[140]

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[132] Lord Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), xxii-xxiii, at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>. (last accessed 18 August 2021).

[133] Genn n 49 above at [416].

[134] Ibid at [361].

[135] *The Interim Report of the Civil Justice Council's ADR Working Group: ADR and Civil Justice*(October 2017), at: <https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-ADR-in-civil-justice-20171017.pdf>, at [17] para 4.12. See also the *Final Report* at: <https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADRWG-Report-FINAL-Dec-2018.pdf>.(last accessed 18 August 2021).

[136] Waters et al. n 1 above at [xii].

[137] S. Blake, J. Browne and S. Sime, *Jackson ADR Handbook*, (2013).

[138] Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (December 2015) 3, para. 1 Introduction, at: <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> (last accessed 18 August 2021).

[139] Ibid at [16, para. 2.30].

[140] Briggs n 65.

The research undertaken by Briggs reveals that mediation is, at best, patchy in England and Wales. Although for higher value disputes and those of small value, the position would appear to be 'broadly satisfactory', but in his view

> 'there is a substantial proportion of claims of modest value where mediation is under-used and certain types of dispute, notably personal injury and clinical negligence, seemed to make insufficient use of mediation.' [141]

For the future, Briggs recommended that at the portal to the online court there should be encouragement for the use of ADR pre-action, that at Tier 2 case officers can help the parties choose appropriate forms of ADR, these might include judicial ENE or mediation. He considered that there should be a reintroduction of the county court after-hours mediation scheme to fill the gap left by the ending of the National Mediation Helpline for claims of all values. As to whether any form of ADR should be compulsory Briggs said the civil courts have declined after consideration over many years, to make any form of ADR compulsory. This is, in many ways, both understandable and as it should be.[142]

(c) The Civil Justice Council's ADR Consultation and Review on Compulsory ADR

As part of the CJC's consultation on ADR there was considered a need to contemplate the future role of mediation, and how rule-makers can encourage greater use of it (the ADR Working Group perceived that ADR usage in the civil justice system remained patchy and inadequate). Established in 2016, the Working Group's terms of reference included a need to review the ways in which ADR is encouraged and positioned within the civil justice system. The *Working Group* was primarily concerned with mediation and included a review of existing forms of its encouragement (and other suitable forms of ADR) in civil cases in the Civil Procedure Rules, case law and the powers of the court. The Working Group also considered alternative approaches to encourage the use of mediation (and other suitable forms of ADR) in civil disputes, including practices in other jurisdictions. It provided an assessment of proposals for reforms to the rules or for initiatives that might be taken outside the formal rules.[143]

The main points of interest outlined in the interim report published in October 2017, which assess the current position of ADR in relation to the civil justice system can be summarised as follows:

- ADR has not become integral to the civil justice system, it has had its successes undoubtedly, but they have been extremely patchy;
- If Online Dispute Resolution (ODR) techniques become woven into the design of the court system, then the debate about whether or not to compel ADR may simply become obsolete;
- There are specific challenges which ADR faces in serving cases of middle or lower value;
- There has been a failure so far to make ADR familiar to the public and culturally normal.[144]

[141] Ibid at [15, para. 2.24].
[142] Ibid at [28, para 2.86].
[143] *The Interim/Final Reports of the Civil Justice Council's ADR Working Group: ADR and Civil Justice*, n 135, Terms of Reference, 4.
[144] ibid., *Interim Report*, at [7 and 8].

The CJC research recognises several challenges currently facing the mediation community in relation to issues of legitimacy and regulation. It reveals that the civil justice system has been fully prepared to require parties to take part in Financial Dispute Resolution hearings, Early Neutral Evaluation and even MIAMs, but have been less assertive in support of mediation. The CJC's findings suggest that in the case of those three examples, the courts have confidence that a trusted individual is going to conduct a reliable and consistent process (civil mediation is significantly less regulated than family mediation). In the Working Group's opinion, this acts as a brake upon its further acceptance by the judiciary, the professions and possibly the parties to litigation themselves, and they consider that issue should be an important part of the debate.[145]

In June 2021, the CJC published its review on Compulsory ADR. It considered two questions, firstly, whether parties to a civil dispute can be compelled to participate in an ADR process? Secondly, if the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? The review committee concluded that ADR can be made compulsory, subject to several factors, conceding that more work is necessary to determine the types of claim and the situations in which compulsory ADR would be appropriate and most effective.[146]

Partly driven by the extra pressure on the courts and the wider justice system driven by the Covid-19 pandemic, the government's consultation in 2021 on promoting mediation/ADR, aims to improve access to dispute resolution opportunities across the civil, family and tribunals jurisdictions.[147] It will be interesting to see what steps government takes to promote and encourage early extra-judicial dispute settlement based on the responses to the consultation.

The various reviews and consultations since Woolf suggest that interest in ADR in England and Wales and the UK is growing and to an extent is being incorporated into the fabric of the civil justice system. When assessing ADR's current relationship to the civil justice system, the findings of the recent CJC Working Group's review of the ADR landscape provides useful evidence of the status quo.

Overall however, attempts to formally incorporate ADR and particularly mediation through court annexation have not occurred; the pilot studies undertaken in the Central London County Court produced mixed results and legislation has not been introduced to institutionalise ADR. Nevertheless, there is evidence of developing state sponsorship in the form of the Small Claims Mediation Service and the introduction of the online court, despite Early Neutral Evaluation or judicial mediation perhaps not taking off (yet) as it has in some other jurisdictions.

[145] Ibid at [65].
[146] Civil Justice Council Report on Compulsory ADR available at: https://www.judiciary.uk/ (last accessed 25 August 2021).
[147] Dispute Resolution in England and Wales: Call for Evidence, available at https://www.gov.uk/government/consultations/dispute-resolution-in-england-and-wales-call-for-evidence (last accessed 25 August 2021).

CONCLUSION

Since the early 1990s, there have been developments in line with Roberts' modelling. Based on these developments and others, it is possible to make predictions about the future relationship between the civil justice system and ADR, visualise the landscape at least in the medium-term, and assess the impact of any likely future developments.

The USA and Canada have, to varying degrees, integrated ADR within their systems of justice, and Macfarlane observes that considerable progress has been made toward achieving the 'multi-door courthouse' idea reflecting an expanding legal pluralism. Many court centres offer mediation, neutral evaluation/assessment services, counseling, duty counsel services, case management, and judicial settlement conferencing programmes.[148] Some of these concepts were offered by Roberts for inclusion within the civil justice system of England and Wales. For instance, case management and increased judicial intervention to encourage parties to use ADR have been realised. Prior to the establishment of the Small Claims Mediation Service (SMCS) in 2007 there had been an upsurge in ADR process choice and increased uptake according to Zander, however it had not become integral to the civil justice system.[149] The SCMS is probably the best evidence to show that Roberts' idea of cases being referred away for mediation (with party agreement) has been adopted (albeit for claims up to a certain value) and integrated.

The recent CJC research however reveals that ADR as an overall concept has not become an integral part of the civil justice system as perhaps Roberts might have predicted it could, but various categories of dispute in England and Wales (notably family and employment) require parties to take steps to explore settlement. There is no settlement requirement, but commitment, time and often money is required to explore the possibility.[150] In commenting on the CJC's report on Compulsory ADR, the Master of the Rolls said: "ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on 'resolution' rather than 'dispute'. This report opens the door to a significant shift towards earlier resolution."[151] If the CJC's report attracts judicial support, then the potential for an increase in court ordered ADR may materialise.

With tribunal procedure, we have witnessed the introduction of judicial mediation for employment disputes, but this has not been adopted for civil claims. The online court's approach to dispute resolution involving reviewing case papers to support either negotiation or mediation; including automated negotiation tools, is perhaps the closest England and Wales currently has to any system-integrated vision conceived by the promotors of ADR a quarter of a century ago, and in the medium term it is not unlikely that this will expand to claims exceeding £25,000 if successfully piloted. The impact of these changes will have a beneficial effect on access to justice, but only for those who have the available IT.

With government's response to the Woolf Report in the form of the *Access to Justice Act* 1999, the attendant CPR and Practice Directions and resulting judicial intervention, has

[148] J. Macfarlane, ADR and the Courts: Renewing Our Commitment to Innovation, *Marquette Law Review*, 2012, 3, 927-940.
[149] Zander n 35 above at [141-150].
[150] See n 143 above at [7].
[151] See n 146 at https://www.judiciary.uk/ (last accessed 25 August 2021).

produced a growth in extra-judicial private dispute resolution. This has been facilitated by the imposition of costs penalties (something which Roberts perhaps did not envisage), as well as through directions to litigants to explore ADR whilst proceedings are stayed (something Roberts did propose). There is arguably no ADR compulsion[152] (of which Roberts was not in favour) and certainly not in the same way or to the extent evident in other jurisdictions. The relationship that civil justice in England and Wales currently has to ADR, is best described as one which involves an element of inducement or one which operates a 'carrot and stick' approach. But recent judicial decisions such as *Lomax v Lomax* do suggest that this might be changing.

Twenty-five years ago, there was little (if any) mention of ADR or mediation within case reports. In the current post-Woolf era of satellite litigation, there is an abundance of judicial *obiter dicta* within law reports recommending the use of ADR, particularly mediation, and examples of parties being punished with adverse costs orders for having unreasonably refused to try resolving their dispute through ADR.[153] Whilst there is support and encouragement, England and Wales have not however reached the stage where government directly sponsors a formalised and institutional ADR framework since Roberts and others opened up scholarly discussion around such issues in the early 1990s. The government's response to its recent consultation on ADR may however provide scope for a move towards increased institutionalisation.

In considering therefore whether the relationship between ADR and civil justice is resolved, of the Robertsian conceptualisations which have been adopted, the post-Woolf era has without doubt produced a culture within the civil justice system of promoting bilateral negotiation (Roberts Model I). This is particularly true for parties in contemplation of litigation during the pre-action protocol period. There is clear evidence that a culture of encouragement to use this period as an opportunity to negotiate settlement terms has developed. Reference to some form of out of court 'mediation' has gained traction (Roberts Model II). The CPR have provision to allow judges to order procedural stays to enable litigants to pursue private dispute resolution options, commonly mediation. There have been direct attempts by the judiciary to promote settlement at various stages during the litigation life cycle. The small claims procedure suggests conceptual adoption of a procedure through which mediation is built into the litigation process, involving attempts by court personnel (small claims mediators) to mediate on court premises (by telephone) before the dispute progresses to trial (Roberts Model III) and given its current success, there are sound arguments for expanding this, perhaps to all fast track claims.

Significant aspects of Roberts' models have therefore been broadly adopted and if the status of ADR's relationship to civil justice is measured against these criteria, progress has been made towards resolving the relationship. In the medium-term, beyond judicial observance of the *Halsey Guidelines* and the adoption and extension of the online court's ADR provisions, several other developments clarify the relationship further and have a beneficial impact on access to justice. Despite the author's reservations expressed earlier, these might include the introduction of the MIAM for civil claims of a certain value, which if successful could lead to

[152] See De Girolamo n 8.

[153] See *Dunnett v Railtrack* [2002] EWCA Civ 303; *Halsey v Milton Keynes General NHS Trust and Steel v Joy* [2004] EWCA (Civ) 576; PGF II SA v OMFS Company Limited [2013] EWCA Civ 1288; and also, *Bradley & Anr v Heslin & Anr* [2014] EWHC 3267.

compulsory ADR (probably mediation) initially for fast track claims, operating along the lines of the Ontario Mandatory Mediation model perhaps.[154] Blanket compulsion received very little support in the CJC's 2017/18 consultation response and such proposals would undoubtedly divide stakeholder opinion.[155] Neither Woolf, Jackson nor Briggs supported compulsion following their comprehensive reviews, and certainly the *obiter dicta* emerging from numerous superior court decisions indicate that the judiciary are mostly conceptually disinclined. More recent court decisions might signify a change in attitude however, and if the Master of the Rolls' comments following the CJC's 2021 Report on Compulsory Mediation is an attitude indicator, then perhaps the next generation of judges and policy makers will be more polemical.

MIAM and SCMS extension as well as ODR developments and the increased use of ENE are all medium-term predictions. Based on the direction of travel with some of the changes to date, the multi-door or claims triage/screening concept, whilst an unlikely medium-term prospect in Sander's proposed format, should not be ruled out as a long-term possibility. One major development on the horizon is judicial dispute resolution (JDR) and particularly judicial mediation, whilst the response to this for some employment cases in England and Wales is mixed, there is evidence from other jurisdictions, notably Canada and some US states that this is working effectively.[156] Landerkin and Pirie maintain that judicial mediation of the kind now established in Canada, could well be extended to other civil disputes if appropriately and judicially devised, and become an integral part of the functioning of the modern judge.[157] The likelihood of increased judicial intervention of this kind in England and Wales in the long term is realistic.

The impact of all these predicted developments should improve access to justice. The civil justice relationship gap as viewed by Roberts has been significantly narrowed if not resolved. The development of increased ADR encouragement, through the introduction of MIAM for civil cases, the introduction of (small claims type) mediation for higher value claims and online justice, as well as increased use of ENE and judicial mediation, should improve access to justice for all in England and Wales.

[154] Under Rule 24.1. Most civil actions in Toronto, Windsor and Ottawa are subject to mandatory mediation. Certain civil actions, such as family law cases, are excluded.
[155] Ibid, para. 8.24 *Final Report.* See <https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/>. (last accessed 1 September 2021)
[156] See notes 140 to 142 inclusive.
[157] H. F. Landerkin & A. J. Pirie, What's the Issue: Judicial Dispute Resolution in Canada, 22 *Law Context: A Socio-Legal J.* 25 (2004) 25.