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MANDATORY MEDIATION IN ENGLAND AND WALES: MUCH ADO ABOUT NOTHING?

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Abstract

This article is concerned with the thorny issue of mandatory mediation. In so doing, the piece charts the development of court-linked mediation in England and Wales from the days of the Woolf reforms and examines the growing clamour from judges, policymakers, commentators and, more recently, mediators for a shift from a mere cajoling of parties to mediate to outright compulsion. The article examines recent proposals for the introduction of mandatory mediation in English civil justice and sets out the view that, while mandatory mediation is inevitable and not *per se* objectionable on legal or policy grounds, care must be taken to ensure that it is implemented in such a way as to balance up different important policy drivers including efficiency, preserving the qualitative goals of mediation and filling the ‘justice gap’ that mediating in the shadow of the court can leave.

Keywords: mediation; mandatory mediation; access to justice; court-based mediation; mediation policy; litigants in person.

[A] INTRODUCTION

There have been few issues as controversial within English civil justice as mandatory mediation. The practice has become common in other jurisdictions but here on these shores we have grappled with the notion over the past few decades. The debate has been hotly contested. On the one side, proponents have pointed to the slow growth of voluntary mediation and the benefits for parties and the state that may accrue from mandating use. On the other, critics have argued that compelling parties to mediate is anathema to the grass-roots ethos of the process,

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that it is of questionable legality and, more fundamentally, that dragging recalcitrant parties kicking and screaming into mediation will simply not work.

While the issue has hung in the balance over the last couple of decades, it now seems that we stand ready to fully embrace mandatory mediation within the English civil justice system. That bulwark against compulsion to mediate, the Court of Appeal's decision in *Halsey v Milton Keynes NHS Trust* (2004), has seen increasing attacks by judges on and off the bench. The new Master of the Rolls, Sir Geoffrey Vos, has also spoken out in favour of the practice (Vos 2021a; 2021b), his views echoed in a recent Civil Justice Council ADR Committee report (Civil Justice Council 2021a) which declared that mandatory mediation was lawful and, moreover, should be introduced into the justice system. In a similar vein, the interim report of the Pre-action Protocol Working Group (Civil Justice Council 2021b) has recently proposed introducing compulsory, good faith dispute settlement measures for prospective litigants, the Department of Education has signalled a desire to implement mandatory mediation in special educational needs and disability (SEND) disputes (Secretary of State for Education 2022) and, most eye-catchingly perhaps, the Ministry of Justice has issued a consultation over its plans to introduce mandatory telephone mediation for all small claims with indications that such developments could in future be extended to all county court cases (Ministry of Justice 2022).

The writing is hence on the wall. Mandatory mediation seems inevitable. Against this backdrop, this article charts the development of mediation within the English civil justice system, the motives behind the drive to compel litigants to mediate and reviews some of the debates around the practice of compulsion. I offer the view that it is time to move on from the debate over the desirability of mandatory mediation. It is important now to map how mediation, mandatory or otherwise, might be developed appropriately in the English civil justice system, charting a balance between necessary efficiency drivers, litigants' quests for justice and making the best of the potential, qualitative benefits of mediation.

[B] THE JOURNEY TOWARDS MANDATORY MEDIATION IN ENGLAND AND WALES

Since the advent of the Civil Procedure Rules 1998 (hereinafter CPR), as part of the overriding objective to deal with cases 'justly and proportionately' (section 1.1), settlement has been promoted in different ways through the justice system, including through pre-action protocols, a reformed

part 36 offers regime and also through promotion of alternative dispute resolution (ADR)—chiefly mediation—by the courts bolstered by the use of cost penalties for unreasonable refusals to mediate (*Halsey v Milton Keynes NHS Trust* 2004). Although mediation was already practised in England and Wales at this stage (for example, in community and family contexts), the CPR had a catalytic impact on developing the process as an adjunct to court proceedings. It should be recalled that the Woolf Reforms (Lord Woolf 1995; 1996) that led to the CPR's enthusiastic embracement of ADR arose from a perception of crisis in the incumbent civil justice system. The drive to court-sponsored settlement and greater use of ADR was seen as an antidote to this malaise. The measures introduced thus mirror their emergence in other jurisdictions including the United States and are tied largely to the agenda of 'efficiency proponents'.¹ Chiefly then, ADR was promoted in the English justice system to render courts more efficient and save the state time and money by diverting cases into non-judicial forms of dispute resolution.

Despite this push towards mediation and other settlement practices in the system, mandatory mediation, however, has largely been formally eschewed. Indeed, Lord Woolf (1996: lxi, para 18) was at pains to point out that ADR should be encouraged but not mandated. Although some courts did flirt with the notion of mandatory mediation in early, post-CPR decisions (eg *Shokusan v Danovo* 2004), the Court of Appeal judgment in *Halsey* stopped those developments in their tracks. In short, the view expressed by Lord Dyson in the leading judgment was that to compel litigants to mediate would amount to an unacceptable obstruction of their right to access courts under article 6 of the European Convention on Human Rights (ECHR). While isolated incidents of rogue judicial compulsion did arise from time to time (for example, in *C v RHL* 2005), a distinction has since been drawn between the legitimate practice of pressuring parties to mediate and the illegitimate practice of compulsion.

But the line in the sand between compulsion and mere pressure has begun to wash away and can be detected in different ways. Although not mandating participation in mediation itself, compulsory mediation information and assessment meetings (MIAMs) have become an established feature of English family justice (Children and Families Act 2014, section 10). In a similar fashion, ACAS early conciliation is a mandatory requirement in the Employment Tribunal setting, by dint of which all parties seeking to access the tribunal must discuss the possibility of conciliated settlement with an ACAS conciliator as a precondition (Employment Tribunals Act 1996, section 18A).

¹ To borrow the language of Silbey & Sarat (1989).

As noted in the recent Civil Justice Council report on compulsory ADR, courts have sailed very close to the wind of compulsion in making mediation orders which draw the distinction between mandatory mediation and ordering parties to *attempt* mediation (Civil Justice Council 2021a: para 29, citing *Uren v Corporate Leisure (UK) Ltd* 2011 and *Mann v Mann* 2014). The new edition of the Chancery Guide 2022 on ADR (para 10.8) conveys a similar sentiment:

the court may ... stay the case or adjourn a hearing of its own motion to encourage and enable the parties to use ADR. The stay will be for a specified period and may include a date by which representatives of the parties with authority to settle and their legal advisers are required to meet, or a requirement for parties to exchange lists of neutral individuals who are available to carry out ADR and seek to agree on one ... Although the court may strongly recommend mediation, it cannot order that a mediation takes place and will not recommend an individual or body to facilitate ADR.²

Equally, although not formally concerned with compulsion, some arm-twisting initiatives may have that effect in practice. For instance, it has been argued that the cost-sanction rules for unreasonable refusals to mediate became so robustly enforced as to amount to compulsion by the back door (Ahmed 2012). There is also some evidence of *de facto* compulsion—or at least a perception of such within litigants—in pilot court mediation programmes in England and Scotland (Reid & Doyle 2007; Boyack 2017).

[C] THE RATIONALE BEHIND SHIFTING TO MANDATORY MEDIATION

The pressure to move to formal acceptance of compulsion into mediation has been growing in recent times. This has occurred, not least on the basis that holding the line between compulsion and pressure was not sustainable. De Girolamo pointed to a ‘schizophrenia’ between a formal rejection of compulsion on the one hand and the rolling-out of heavy arm-twisting on the other (De Girolamo 2016). More specifically, there has been a burgeoning disquiet and adverse commentary in respect of the cost sanctions regime for unreasonable refusals to mediate (Ahmed 2012; De Girolamo 2016; Civil Justice Council 2018: para 8.29). This has arisen because of the contradictions and uncertainty manifest in the case law, the inadequacy of requiring parties and their lawyers to have to judge *ex ante* if a refusal to mediate would be seen as reasonable or not, and the

² See also the pro-ENE judgment of Master Victoria McCloud in *Telecom Centre (UK) Ltd v Thomas Sanderson Ltd* (2020). See also McCloud (2020).

principled opposition to the legitimacy of punishing a party in costs when they have been vindicated in court. This latter point was emphasized by Patten LJ in the controversial Court of Appeal decision in *Gore v Naheed* (2017: para 49): 'I have some difficulty in accepting that the desire for a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct, particularly when, as here, those rights are ultimately vindicated.' More recent case law emphasizing the fact that unreasonable refusals to mediate are but one factor to balance up in determining whether to impose cost sanctions on parties have exacerbated the uncertainty in this area.³

Turning to lower-value disputes such as small claims, an increasing view has emerged that existing court-based mediation schemes, including those with default or opt-out approaches to mediation, are simply not doing enough to draw parties into the process and are ineffective in the face of well-cemented client and lawyer reluctance to mediate (Ministry of Justice 2022: 8). Mindful of the fundamental ethos of mediation, mediation providers have on balance not been in favour of mandatory mediation over the years, but that sentiment appears to be shifting of late.⁴

[D] STAGING POSTS TO MANDATORY MEDIATION

Two significant recent developments have paved the way for the shift towards formal mandatory mediation: first, the Court of Appeal decision in *Lomax v Lomax* (2019a) and, secondly, the recent Civil Justice Council's report on compulsory ADR (Civil Justice Council 2021a).

Lomax v Lomax

Although not concerned with mediation but rather judge-led early neutral evaluation (ENE), *Lomax* can be seen as a significant milestone on the journey to mandatory mediation. The case involved a dispute under the Inheritance (Family and Dependents Act) 1975 arising between the spouse of the deceased and her stepson. The claimant (the spouse) favoured ENE to aid settlement but this was resisted by the defendant. At first instance, despite viewing that the case was one that 'cries out, indeed screams out' for judge-led evaluation, after reviewing the relevant rules and relevant guidance in the 'White Book' and Chancery Guide on Chancery Financial

³ For a recent review of case law in this area, see Allen 2022.

⁴ See, for example, the views of CEDR, expressed recently in South 2022.

Dispute Resolution, Mrs Justice Parker determined that ENE could not be ordered without both parties' consent (*Lomax v Lomax* 2019b: para 123). On appeal, the decision was overturned with the Court of Appeal holding that parties' consent for recourse to ENE under rule 3.1(2)(m) of the CPR was not required. LJ Moylan took the view (at para 32) that if the need for consent had been required it would have been expressly written into the rules and that anything contrary to this in guidance could not lead to a departure from the legal position. Significant emphasis in this regard was placed on the 'overriding objective' and the court's duty to deal proportionately with individual cases for the greater good. In terms of the rule against compulsory mediation in *Halsey*, the court (at para 25) was keen to point out that ENE could be distinguished from mediation. Nonetheless, the court hinted that a departure from the current approach to compulsory mediation could be justified in noting (at para 27) that, 'the courts have gone a long way since Halsey'. Furthermore, the court's pro-mediation sentiment (at 29) can be seen in its referral to the words of Norris J in *Bradley v Heslin* (2014): 'it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken ... [T]he warnings are not being heeded, and those embroiled in them need saving from themselves.'

The Civil Justice Council Report on compulsory alternative dispute resolution

While *Lomax* pushed at the gate, it was arguably wrought asunder by the recent Civil Justice Council report on compulsory ADR (Civil Justice Council 2021a). The principal focus of this report was the issue of legality of the practice of compelling parties to undertake ADR. On reviewing the relevant authorities, the report authors produced a clear view that compulsory ADR (including mediation) does not, in principle, contravene the right to fair access under article 6 ECHR. Rather, the view was taken that mandatory ADR may represent a proportionate response to the need to ration delivery of civil justice and in principle does not amount to an absolute bar on accessing justice through the courts. In arriving at this conclusion, the report reviewed the decision in *Halsey* as well as commentary and judicial developments since.⁵ The conclusions were supported by an examination of the elements of compulsion that already exist in the English system and the practice of mandatory mediation in other jurisdictions. The European Court of Justice decisions in *Rosalba Alassini* (2010) and *Menini v Banco Popolare Società Cooperativa* (2018)

⁵ Including the views of judges made extrajudicially such as (at para 41) Mr Justice Lightman (2007) and (at para 46) Lord Dyson's own amended views of the rule in *Halsey* (Dyson 2010).

were seen as especially instructive in supporting the view that mandatory mediation would not contravene article 6 in so far as any scheme did not compel parties to settle or lead to significant costs and delay (Civil Justice Council 2021a: paras 37-41). The report did, however, identify a range of issues that would require further thinking if ADR processes were to be rolled out in a compulsory fashion across the English civil justice system (paras 90-113). These included issues of costs and timing of referral to ADR, the quality of third-party neutrals and provision of legal advice in and around ADR processes. We shall examine these issues below (at pages 100-104)

[E] CURRENT PROPOSALS FOR MANDATORY MEDIATION

One significant manifestation of this new thinking can be found in the Ministry of Justice's proposed mandatory telephone mediation scheme for small claims in the county courts (Ministry of Justice 2022). Expanding the current opt-out service, the proposals would introduce a mandatory, post-filing mediation scheme (subject to yet to be determined exceptions) which would apply to all small claims in the county courts (generally cases below £10,000 in value). All cases would be stayed for a period of 28 days to allow the mediation to take place, with the process conducted by Ministry of Justice-employed mediators. Mediations would be (as is normally the case in the current voluntary scheme) held over the telephone and be scheduled for one hour. The consultation also sought views on the penalties to be imposed on parties for non-compliance with mediation orders. Signalling a future intention to expand mandatory mediation to all county court cases, responses were also sought about the need for further regulation of the mediation profession in England and Wales

Proposals have also been made to introduce mandatory mediation into the realm of SEND disputes (Secretary of State for Education 2022). Elements of compulsion are already present in the system. Parents seeking access to the First-tier Tribunal require a mediation certificate which warrants that they have consulted an adviser as to the possible use of mediation to resolve their dispute (Children and Families Act 2014, section 55). Additionally, where a parent requests mediation, then the local authority must make this available (section 52). The new proposals, however, would require families and local authorities to attempt mediation prior to registering an appeal to the tribunal (Secretary of State for Education 2022: para 31). The new measures would be undergirded by

clear expectations of how different parties should engage in mediation, including timescales for mediation to take place and ensuring that local authority decision-makers attend meetings [and] ... appropriate support available to parents to help them understand the mediation process and how best to engage with it (para 31).

[F] MOVING THE DEBATE ALONG

While compelling parties to mediate is always going to sow division, it is perhaps time to stop the debate over the merits or otherwise of the practice. First, it is important to distinguish compulsion *into* mediation from compulsion *within* mediation.⁶ Secondly, although from a theoretical perspective, mandatory mediation can be seen as conceptually quite different to voluntary species of the process, with the informed consent of parties to engage in the process removed, the practice is far more consonant theoretically to the court-linked models that have developed over the last couple of decades. Driven as they are by pressure to take part, participants' informed consent into the mediation process in these settings is already heavily compromised. Thirdly, from a practical perspective, court-sponsored settlement is well embedded in our system of civil justice, and the pressure to best save public funds in the administration of civil justice will continue unabated. Equally, mediation and other such settlement-based practices offer the *possibility* of effective dispute resolution for many litigants, and thus it is legitimate to encourage their use in the most effective ways.

But *how* mediation is implemented within the justice system raises a number of important concerns that may be brought more sharply into focus by the introduction of mandatory schemes. These will be discussed under the following three interlinked themes: the need to improve efficiency in the administration of civil justice; maximizing the qualitative benefits of mediation; and dealing with the 'justice' gap in mediation.

Efficiency drivers

In the Ministry of Justice's consultation paper on the introduction of mandatory mediation in small claims, although there is some reference to the qualitative benefits of mediation, the main rationale behind the shift to compulsion is clear: the superiority of compulsion over voluntary approaches in improving uptake and the resultant impact on cost savings in the system. The consultation paper notes that the new scheme is

⁶ Although, as discussed below at page 104, it is important to ensure that the way schemes are implemented ensures that the former does not bleed into the latter.

'expected to divert up to 20,000 cases each year from the court system, freeing up judicial resources to be used for complex cases' (Ministry of Justice 2022: 5) and that, despite the current opt-out, free small claims scheme,

in only 21% of small claims do both parties agree to attend a mediation session ... This means that ... judicial time and expertise is being utilized on cases where it may not be required, as parties have not attempted to resolve their case consensually. As a result, court resources are drawn away from more complex cases; it takes longer for everyone to access the justice they deserve; and the courts function less efficiently than they might (Ministry of Justice 2022: 8, internal citations omitted).

It may be contended that compelling parties into mediation is counterproductive as parties are less likely within which to reach agreements. Evidence on settlements rates in mandatory mediation is patchy and much of it is context-specific. In reviewing evidence from Australia and the United States, however, the Civil Justice Council report on compulsory ADR notes that settlement rates in mandatory programmes do not always vary significantly from their voluntary counterparts (Civil Justice Council 2021a: para 7.21). Even if settlement rates fall when mediation shifts to a mandatory form, given the potentially large rise in cases diverted into mediation, if mediation is significantly cheaper for the state than the alternative of those cases proceeding through the court system then large efficiency gains can still be made. There has also been a significant debate around the best timing for mediation. This is a finely balanced issue. In terms of efficiency for both the state and the parties, pre-action referral seems most appropriate, limiting the sunk costs run up in ongoing litigation. It has also been recognized, however, that parties may require time to bottom out their case before it is ripe for negotiation or mediation and so later referral may be more effective in practice (Civil Justice Council 2021a: paras 106-111).

Retaining the qualitative benefits of mediation

While the emphasis on efficiency is understandable and historically consonant with attempts across the globe to embed mediation within formal justice processes, there are well-documented dangers of prioritizing efficiency at the expense of other qualitative benefits of mediation. Efficiency drivers can lead to underfunding, poor quality of service and a compromising of participants' self-determination in the mediation process (Welsh 2001). Efficiency-driven species of mediation may become very settlement-focused and unlikely to engage with the qualitative benefits that might arise from a proper exchange of disputants' views, efforts to build

mutual understanding, the seeking out of creative solutions to best meet parties' interests and forging the repairing of relationships (Lande 2022).

In the context of the proposed SEND mediation reforms, Doyle has lambasted the increasing perceptions of mediation as 'cheap and fast settlement based on compromise' (Doyle 2022). She also recounts her experience of the negative consequences of the growing institutionalization of the mediation process in this context:

when I started in SEND mediation, 20 years ago, the norm was preparatory calls with every attendee and a 3-4-hour in-person meeting: long, yes, but also an indication of the commitment required and the time needed to allow for constructive and collaborative working. Today, the norm is little or no pre-discussion and a 1½-hour meeting ... and often there is pressure from LAs to squeeze mediation into the margins of a busy day.

In a similar vein, the proposed roll-out of one-hour, time-limited telephone mediation in small claims does smack of the cheapest possible offering, with the shuttle-based nature of the process mitigating the opportunity for exploration of all relevant issues required to provide meaningful and high-quality settlements.

Ensuring adequate quality of mediators is also important. In higher-value disputes in which sophisticated parties aided by their lawyers can choose from established ADR providers, there may be no need for any new measures beyond the current market and self-regulatory regimes⁷ that exist in the English mediation field. In lower-value disputes, however, where mediation may be made available at free or at low cost, and particularly when it is compulsory, some additional level of quality assurance is required. In these settings mediators may be drawn from court staff (as in the current Ministry of Justice opt-out scheme in small claims) or external, rostered mediators who have been vetted as meeting certain required industry standards. But there are no universally mandated standards in England and Wales for civil mediators. The authors of the Civil Justice Council's report on compulsory ADR hence state that 'more systematic regulation is required' (Civil Justice Council 2021a: para 103). A co-regulation model in which a professional body is empowered by the state to set minimum standards and oversee the profession may in the longer term be the most appropriate way to proceed,

⁷ Through for example, the Civil Mediation Council.

balancing up the desire for responsiveness and flexibility in the field with the need for assured quality of practice.⁸

Efficiency also demands that measures to compel participation are backed up with teeth. Obvious ways in which to censure non-compliance may include cost sanctions or the striking-out of claims. While such measures can be seen as proportionate in the face of the legitimate aims to promote mediation in this context, the Ministry of Justice in its small claims mediation consultation poses the more general question as to how to gauge whether a party has ‘adequately engaged with the mediation process’ (Ministry of Justice 2022: question 13). In terms of what this might entail, Lande (2022) points to the fact that efficiency-driven court-based mediation⁹ is often subject to significant oversight by the court in terms of whether parties in mediation have met ‘good faith participation’ requirements. In the event that a case does not settle, the mediator may be requested to report back on the conduct of the parties in the mediation to the court which may then apply appropriate sanctions.

Reference to such ‘good faith’ obligations has begun to be seen in the context of English civil justice. For example, the Civil Justice Council’s interim report on pre-action protocol reform (Civil Justice Council 2021b) calls for the parties to be placed under a ‘good faith obligation to resolve or narrow the dispute’ (paras 2.08-2.14). In the recent case of *Hertsmere Borough Council v Watret & Co Ltd* 2020, Master Davidson (with the parties’ consent) issued an order which required that the parties: ‘meaningfully engage in the mediation process in a genuine attempt to reach settlement of these proceedings’. The order continued:

either party shall be at liberty to make an application relying on evidence as to the conduct of the parties at the mediation ... with regards to the costs consequences of that conduct or with regards to the Court deciding whether or not either party has failed to engage with the mediation process (paras 4b and 4c).

Such obligations hold an appeal. Parties in dispute often suffer a lack of trust in one another. An assurance that one’s opponent must act in good faith in a mediation may persuade a reluctant participant that the process may be meaningful and that their opponent will not simply deploy it as a time-wasting exercise or fishing expedition. These measures are problematic, however, in terms of determining objectively

⁸ The Irish Mediation Act 2017, section 12, anticipates this kind of model developing in the future through the establishment of a Mediation Council that would promote mediation, develop standards in the provision of mediation, issue codes of practice and maintain a register of approved mediators.

⁹ What he terms ‘litimediation’.

what this kind of behaviour amounts to. Staying for a period of time? Making an offer? Being receptive to reasonable demands of the other side? More importantly, any ‘good faith’ participation requirements that call for the mediator to report on the conduct of parties in the process may undermine some of the key, qualitative benefits of mediation. Parties’ knowing that a mediator may report back on their behaviour and exercise some kind of judgement upon them may damage the candour of exchanges in meditation, negatively impact on perceptions of mediator neutrality and pose significant challenges to the confidential and without-prejudice nature of the process.

The ‘justice gap’

As discussed above (see 97–98) for mandatory mediation to represent a proportionate measure limiting the right of litigants to access a judicial determination, it cannot operate as a *de facto* bar to the same. So, the mediation process cannot compel settlement, nor be prohibitively expensive or lead to excessive delays. The mooted Ministry of Justice small claims service shall be free to users and offers the promise of a swift reference to mediation. In higher-value claims, the not insignificant fees for external mediation services may be seen as proportionate given the potentially heavy cost of litigation, but the middle ground—a significant roll-out of mandatory mediation across the county courts for example—would require planning to ensure that a cost-effective and timely mediation service could be offered for users in a manner consonant with the requirements of article 6.¹⁰

The more fundamental objection voiced about court-based mediation is that it may not provide justice to those who are seeking a court outcome. As a process centred on identifying parties’ interests and finding common ground upon which an agreement can be built, the mediation process is not fundamentally concerned with giving effect to the legal rights of litigants. There has been significant critique of this blending of non-legal processes within formal justice (Genn 2009). Others have argued cogently that justice is not just the preserve of law. Law is only one barometer of fairness. Parties in dispute may hold a variety of extrajudicial needs beyond legal remedies that they may seek to prioritize (Relis 2009) which may be achieved within mediation. Equally, recent research suggests that

¹⁰ It is notable that the authors of the Civil Justice Council’s interim report on pre-action protocols plumped for the broader notion of compulsory, good faith endeavours to settle claims rather than ADR as such on the basis that the limited availability of well-regulated, free or low-cost and timely ADR may raise concerns under article 6 ECHR (Civil Justice Council 2021b: para 2.10).

lay participants in mediation may be able to determine their own sense of justice in outcomes rendered in the process (Irvine 2020).

Nonetheless, in the context of court referral it seems important that, if parties seek to sacrifice their potential rights in favour of a negotiated outcome and give their informed consent to the same, some appreciation of their legal position (a sense of what they may be giving up when determining to settle) would be helpful. Given their neutrality, it is ethically difficult (and depending on the experience of the mediator, not always possible) for a mediator to fill that gap in knowledge. On that basis, providing some access to legal advice and assistance in and around mediation seems necessary. The authors of the Civil Justice Council report on compulsory ADR seem to accept this point (Civil Justice Council 2021a: paras 104-105) and Sir Geoffrey Vos recently noted that 'for formal mediation to work well, the parties require to ... have their rights properly explained to them and ... [be] in receipt of independent legal advice' (Vos 2021b: para 32). Given the difficulty resourcing legal assistance in lower-value claims where parties will often enter court proceedings without lawyers, I have previously advocated the use of lay advisers as a proportionate way to tackle this problem (Clark 2020). Lawyers and other party advocates play a range of other important roles beyond tendering legal advice in supporting clients in mediation. For example, they can help clients plan strategy, better articulate their position and uncover their interests, as well as act as a bulwark against overly pushy mediators. This is important in the court-based setting where there is some evidence of parties feeling that they were under excessive pressure from mediators to settle (Reid & Doyle 2007: 4-5). In efficiency-driven environments mediators may seek to prove their financial worth to those holding the purse strings, with the resultant danger that they become overly incentivized to broker settlements at all costs (Brazil 2006: 266).

[G] CONCLUSION

It seems that the ghost of *Halsey* will finally be put to rest. After decades of resistance the dam has burst and the rivers of enthusiasm for mandatory mediation have begun to run. In a sense this was rendered inevitable by the chain of events that set court-sponsored mediation in motion in England and Wales at the time of Woolf. Mediation's journey from outside the court system to its linking with courts and formal justice systems, to judicial encouragement and arm-twisting and finally to compulsion is a pattern that can be found in many other jurisdictions. It has just taken that bit longer to reach this destination on these shores.

This is just the beginning of the journey rather than the end, and we need to plan those next steps carefully. While arguably the Court of Appeal's view on mandatory mediation in *Halsey* is merely *obiter*, a definitive judicial Court of Appeal ruling on the legality of the practice would help to settle the issue. Equally, while it seems that courts are already empowered to refer parties to mediation under the current provisions of the CPR,¹¹ an amendment to the rules to specifically set out court powers in respect of mandatory mediation may be preferable for clarity and to ensure that court-ordered mediation retains some consistency.

There remain many choices to be made with respect to the how and when to compel parties to mediate in different settings. In some areas there may be blanket, 'automatic referral' rules (as in the Ministry of Justice small claims proposals) or discretionary powers for judges to order the parties to mediate. We may also see the further development of pre-filing mandatory requirements to mediate including within online dispute resolution portals (eg the Small Claims Portal for Accidents).¹²

In all of this, as noted in this article, we need to find some way to balance the different policy drivers that might take mediation in different directions. First, care must be taken to stay within the confines of acceptable limitations on litigants' rights to access court as articulated by the European Court of Justice in *Rosalba Alassini and Menini*. Equally, the priority of efficiency may result in a focus on speed, economy, real or perceived pressure to settle within mediations and perhaps judicial scrutiny of participants' conduct to aid effective enforcement. Such measures, however, can also lead to compromising the qualitative benefits of mediation, providing scant opportunities for proper inter-party dialogue and exploration of interests while also rendering parties at the whim of poor quality mediators with a 'thinning' of their self-determination within the process. 'Justice gaps' that may arise, particularly when participants attend mediation without lawyers, also need to be recognized and addressed if the process is not to avoid characterization as providing second-class justice.

In charting this future course, taking a leaf out of mediation's book, it is essential that there is proper dialogue and exchange between a range of stakeholders including policymakers, mediators, judges, lawyers, academics and end-user groups. Future developments also need piloting, coupled with proper and sustained funding for independent evaluation.

¹¹ CPR rule 1.4(2)(e) requires courts to actively manage cases by 'encouraging parties to use an alternative dispute resolution procedure if the court considers that appropriate ...'.

¹² Official Injury Claim Homepage.

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