Kluwer Mediation Blog

Civil or Common Law: what are the sources of Scottish judicial attitudes to mediation?

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Lord Gill, Lord Justice Clerk and Chairman of the Scottish Civil Courts Review

Scotland sits on the north-west fringe of Europe, and is probably best known for whisky, rain and heroic failure on football and rugby pitches. While part of the United Kingdom of Great Britain and Northern Ireland, many people don't realise it has its own legal system. And why should they? Even English publications often talk of UK law as if it were a single system. While some areas of law do apply throughout the UK (such as tax and employment), as a general rule there is no such thing as UK Law. There are three different legal systems: England and Wales (one system), Scotland, and Northern Ireland.

When it comes to substantive law, 'Scots Law' (as it is properly known) belongs to a small group of 'mixed jurisdictions'. These are territories where history has bequeathed a blend of the Common Law and Civilian traditions, and include South Africa, Quebec, Louisiana and Israel. While some take issue with the term (for example Douglas Osler, who associates its use with Scottish nationalist revisionism) every Scottish law student is still taught that Scotland has Civilian roots with a Common Law overlay. Its founding father, Viscount Stair, spent a lengthy exile in the Netherlands and drew on both Canon and Civil Law in his classic text.

Having studied law sometime in the middle of the last century, these are not matters I think about very often. In day-to-day mediation, disputes look pretty similar wherever they take place. But recently I have found myself wondering whether these deep-rooted traditions affect judges' attitudes towards alternatives to the courts. It is of course dangerous to generalise about judicial attitudes (or anyone else's, for that matter). There are no doubt as many views on mediation as there are judges, even in countries whose courts appear to favour more widespread use. In England and Wales, for example, while Lord Woolf famously provided authoritative encouragement to

greater use of mediation, including the use of costs sanctions, other senior judges see things differently. Lord Neuburger, Master of the Rolls, recently criticised the simplistic equation: courts bad, mediation good.

Having said all that, my interest was piqued by recent corresondence with French academic, Adrian Borbely. His words are worth quoting: 'The French judicial system works like an attracting magnet: once a case enters, it has a 95% chance of finishing by a court decision (or legal bargaining aiming to anticipate the said decision). In America, the system works like a repelling magnet: when a court is seized, the case has a 95% chance of being settled outside the courtroom and the system has integrated numerous tools to do so (mediation, conciliation, pre-trial conferences, mini-trials, etc).' So I find myself wondering whether the 'mixed' jurisdiction of Scotland is closer to Civilian France or Common Law USA.

Empirically, there seems to be little mediation taking place here. In 2008/9 the number of court actions raised with a value exceeding £5,000 (5713 Euros) was just over 50,000. At the same period Scotland's leading commercial mediation provider (Core Solutions) reported being involved in 130 mediations over two years between 2007 and 2009. Even if some additional mediations were taking place, the total still represents a tiny fraction (less than 0.01%) of the courts' caseload. Could judicial attitudes have anything to do with it?

Here I turn to the recent Report of the Scottish Civil Courts Review (http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Vol1Chap1_9.pdf), known as the 'Gill Review' after its Chairman, Lord Gill, Scotland's second most senior judge. Coming some fifteen years after the 'Woolf reforms' in England and Wales, the Gill Review was keenly anticipated. The opening page is trenchant: 'Scottish civil courts provide a service to the public that is slow, inefficent and expensive. Their procedures are antiquated and the range of remedies that they can give is inadequate… minor modifications to the status quo are no longer an option.' Of course this much could be said of numerous European court systems, and those who read this blog may expect that, given such a damning diagnosis and radical intent, mediation would feature among the proposed remedies. However, when we look at the chapter on mediation (Ch 7) we see that the Review specifically rejects the practice that has helped to embed mediation in England and Wales: the use of costs sanctions to penalise those who unreasonably refuse to consider mediation. It also rejects the milder proposal that those raising an action should have to say what steps they have taken to resolve their dispute informally. Much of the chapter is devoted to re-affirming the courts as the mainstay of the justice system and asserting that mediation is unsuitable for personal injuries matters. What remains is small beer indeed: information, leaflets and a free small-claims scheme.

For those who are interested, the Review did propose far-reaching reforms to litigation. The adoption of pre-action protocols, case management and a third tier of civil courts were among the proposals. But looked at through Borbely's prism it seems that the judges who wrote the Review are more comfortable with the attracting rather than repelling magnet.

The Gill Review does not necessarily represent the views of all Scottish judges. However, last month another prominent figure joined the debate. Lord Hope is Deputy President of the Supreme Court of the United Kingdom. While originally a Scottish judge, Lord Hope now sits in London and hears appeals from throughout the UK. When speaking in Glasgow he declared that those who say that the courts should be a last resort are mistaken. He cited the effect on the law's development and the risk of 'under-settlement' as reasons for concern.

So where does this leave Scotland? Admittedly this is a partial and subjective snapshot. The reasons for mediation's limited foothold in Scotland may be many, and our Civilian heritage is only one possible explanation. However, it is hard to shake off Borbely's vivid metaphor. The courts in Scotland look set to remain an 'attracting magnet' for some time to come. In the meantime those of us who consider mediation to be a viable, speedy and humane process look to the free-market, trusting that consumers and businesses will eventually choose the most appropriate dispute resolution method without judicial encouragement.

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