Tania Sourdin and Margaret Castles***

IS THE TAIL WAGGING THE DOG? FINDING A PLACE FOR ADR IN PRE-ACTION PROCESSES: PRACTICE AND PERCEPTION

Abstract

Alternative Dispute Resolution ('ADR') processes, particularly mediation, have been integrated into court and tribunal processes in various ways. Civil courts increasingly require parties to engage in pre-action dispute resolution protocols prior to the issue of proceedings. These initiatives take various forms, and have varying degrees of success. In 2018 the authors undertook an extensive evaluation of the impact of pre-action protocols in the South Australian Supreme and District Courts. This culminated in a report that has subsequently informed reform to the relevant pre-action processes in South Australia in 2020. This article develops a particular aspect of the inquiry: the impact that lawyers may have on the take-up and efficacy of mediation in a pre-action setting. It focusses on a less explored element of the pre-action ADR debate — the possible reasons for reluctance around pre-action engagement within the legal profession. The article concludes that there are a number of influences — systemic, preferential, and professional — relating to the timing, content, and nature of such processes, which have a significant impact on achieving change in this area.

I Introduction

Research suggests that most civil disputes are resolved before entry into any court or tribunal system.[1] Most parties will either negotiate an outcome or give up without ever seeking to litigate. An increasing emphasis on mandatory Alternative Dispute Resolution (ADR) before commencing court and tribunal proceedings

* Professor and Dean, Newcastle Law School.

** Senior Lecturer, Adelaide Law School.

The authors acknowledge funding and support provided by the Law Foundation of South Australia and the Supreme Court of South Australia to support the research that informed this study.

1 Naomi Burstyner et al, 'Using Technology to Discover More about the Justice System' (2018) 44(1) *Rutgers Computer and Technology Law Journal* 1, 4–5; Naomi Burstyner et al, 'Why Do Some Civil Cases End up in a Full Hearing: Formulating Litigation and Process Referral Indicia through Text Analysis' (2016) 25(4) *Journal of Judicial Administration* 257, 258 ('Why Do Some Civil Cases End up in a Full Hearing?').

continues to reduce the number of disputes entering the court and tribunal system. For example, mediation as an early or pre-action requirement has been introduced in many jurisdictions, including Australia and the UK, as a way to encourage timeliness and efficiency in the civil justice system.[2] As a result, those disputes that do end up in the litigation system form a very small minority of the overall number of disputes in society. Once within the litigation system, traditional trial processes account for the determination of an even smaller proportion of disputes.[3]

Parties have always been able to negotiate disputes before embarking on litigation, and many of them do so. Civil justice reform increasingly focuses on an additional layer, the early use of facilitated negotiations through forms of ADR as a strategy to keep disputes out of the legal system, but there are differing views relating to the timing, value and efficiency of ADR interventions. For example, some consider using an ADR process such as mediation at a pre-action stage of limited utility as evidence has not yet been gathered or exchanged.[4] Others consider that early ADR can be of assistance, even if settlement does not directly result, because it may narrow the factual and legal issues in dispute.[5] These views represent different perspectives relating to the objectives of ADR processes: first, as primarily a dispute resolution opportunity; and second, as a 'triage' style case management strategy that can be used to narrow or clarify disputed issues and plan any necessary future steps. This second objective relates more to improving the management of complex disputes as they proceed through court,[6] rather than to resolve a dispute.

There are other more philosophical concerns that are based on perceptions of the litigation system rather than understandings about the objectives of ADR processes. For example, mandatory ADR requirements, pre-action or otherwise, have often been regarded as controversial by some lawyers and judges because of concerns that access to justice will be threatened by ADR.[7] This is promoted by the acceptance

2 See Tania Sourdin, 'Resolving Disputes without Courts?' (2013) 32(1) *The Arbitrator and Mediator* 25, 30–2.

3 Burstyner et al, 'Why Do Some Civil Cases End up in a Full Hearing?' (n 1) 259.

4 Patricia Bergin, 'The Global Trend in Mediation; Confidentiality; and Mediation in Complex Commercial Disputes an Australian Perspective' (Speech, Mediation Conference, Hong Kong, 20 March 2014) 12–13 [26]–[28] <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Bergin_20140320.pdf>.

5 See generally Tania Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes outside Courts* (Report, Australian Institute of Judicial Administration, 2012) ('*Exploring Civil Pre-Action Requirements*').

6 Patricia Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia' (Speech, The Hong Kong Mediation Council, 11 May 2012) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.05.11.pdf>. See also Ryan Murphy and Tania Sourdin, 'Skilled Mediators and Workplace Bullying' (2019) 29(3) *Australasian Dispute Resolution Journal* 146.

7 See generally Sourdin, *Exploring Civil Pre-Action Requirements* (n 5).

of an underlying adversarial philosophy that suggests that parties should be able to conduct their cases as they see fit. A more pragmatic and related perspective is that litigation is contextual and fluid, and therefore forcing parties to negotiate in particular time frames or formats is counterproductive.

This article discusses one area identified in a 2018 review conducted by the authors into pre-action protocols in the Supreme and District Courts of South Australia ('Review') — the impact of lawyer attitudes to pre-action ADR use. In particular, the authors examine the diverse factors which may inform lawyers' attitudes to ADR take-up, and consider whether it is the legal profession, rather than other elements of the justice sector, that are driving the agenda in relation to pre-action requirements. Following a discussion of issues and research relating to ADR use, the authors evaluate some of the commentary received over the last few months of the review process. In this regard, the article considers what might be driving perceptions that seem to be at odds with theory and research and that perhaps reflect a narrow and idiosyncratic view of the role of ADR in civil dispute resolution.

The authors conclude that irrespective of the particular protocols in place, there is significant influence by the legal profession on the uptake of pre-action protocols or mediation, and that the attitude of the legal profession is a critical factor in the take-up and success of any initiatives to embed pre-action ADR in civil litigious disputes.

This article proceeds in three parts. First, the available literature and empirical research identifying the key issues of concern in undertaking mediation early in legal processes are summarised, focussing on timing, effectiveness, cost and value. Second, the additional issues of concern and the ideas identified by lawyers during the review process are discussed. Third, discussion of preferences and perceptions are explored in the context of cultural and systemic influences that might be informing lawyer attitudes to the timing and value of early mediation in court process. Finally, the authors conclude that while, in principle, there is broad support for pre-action processes within the legal profession, there are systemic cultural and practical influences that must be considered when designing and implementing such opportunities.

II Background and Review Findings

Many civil court jurisdictions require parties to engage in some form of communication before issuing proceedings. In South Australia, both the Supreme and District Courts have, for some time, required applicants to state their claim via a reasoned offer in a letter of demand, and required respondents to respond to that letter with a reasoned offer.[8] In 2014, rules were introduced that required parties in medical negligence and construction disputes to engage in a more detailed series

8 *Supreme Court Civil Rules 2006* (SA) r 33; *Uniform Civil Rules 2020* (SA) rr 61.7, 61.9 (*'UCR'*).

of pre-action steps, including a mandatory meeting between lawyers and parties to attempt to resolve the case before issuing proceedings.[9] These protocols mandated a series of party-directed communications and offers; however, they stopped short of requiring mediation.

In 2018, the Law Foundation of South Australia and the Supreme Court of South Australia funded a review of the impact of these pre-action protocols in the District and Supreme Courts of South Australia. The primary focus of the Review was to gauge the use, impact and perceived value of the processes introduced in 2014. While the 2014 pre-action protocols did not mandate any form of mediation, the value of mandatory pre-action mediation (as exists in some other jurisdictions) was high on the agenda in civil justice reform. The Review offered an opportunity to investigate both the impact of the 2014 protocols, and perceptions about the value of mediation as part of the pre-action process. Part of the Review involved a consideration of stakeholders' attitudes to pre-action mediation as an addition to the existing protocols. The results of the Review were published in 2018 in a report written by the authors of this article and Madeline Muddle.[10]

The Review methodology comprised a literature review, the creation of an expert advisory group to design the survey methodology, and preliminary data collection from lawyers and insurers in medical negligence and construction practice. Data was collected from the South Australian District and Supreme Court case files from 2014 to 2018. An online survey of the legal profession, including barristers and solicitors, was undertaken, as well as interviews with applicants, respondents, solicitors, barristers, and judicial officers.[11]

The key findings were thematically grouped covering cost, timeliness, fairness and justice, effectiveness, and attitudes and behaviour. The Review supported retaining the existing structure for pre-action protocols, and strongly recommended strengthening the protocols to include pre-action mediation.[12] It is not the purpose of this article to reiterate the findings of the Review. However, in exploring the drivers of attitudes to pre-action mediation, the following broad summary is useful: for legal practitioners, it is important that legal services are efficient and cost-effective and processes that are perceived to offer value in terms of a litigation process are prioritised over those that are more focussed on dispute resolution. Mandatory ADR at particular (non-flexible) times was resisted because it was perceived to be costly without offering benefit because of poor timing. Conversely, in those cases where protocols were used, compliance did not generally increase the cost of proceedings. Overly litigious and combative behaviour was identified as a negative factor in any ADR process. Of concern was the frequent failure to comply with the protocols: both solicitors and judicial officers reported compliance with the protocols being the exception rather

9 *Supreme Court Civil Supplementary Rules 2014* (SA) ch 3 pt 2.

10 Tania Sourdin, Madeline Muddle and Margaret Castles, *The Evaluation of Specific Pre-Action Processes in South Australia* (Report, October 2018).

11 Ibid 4 [1.13].

12 Ibid xiv.

than the rule, with enforcement of the protocols by judicial officers occurring rarely and only on request of the parties.[13]

The Review concluded that increased compliance with the protocols would be more likely if there was targeted and more rigorous enforcement. The Review recommended that there was significant evidence to suggest that pre-action mediation was a viable option, particularly in the case of medical negligence disputes, but would require both management and supervision to support compliance.

In 2020, the South Australian civil court rules, including pre-action protocol requirements, were revised,[14] and now reflect some of the outcomes of the Review. Therefore, the current pre-action protocols differ from those that were the subject of the Review. The 2020 revision requires parties and solicitors in any civil proceeding to engage in a pre-action meeting, with specific outcomes required such as attempted settlement or the mapping out of the evidence and other material required for trial.[15] The *Uniform Civil Rules 2020* (SA) ('Rules') provide a more directed and structured process of engagement between parties, and encourage, but do not require, mediation at the pre-action stage.

III Factors in Determining the Timing of ADR

A *Timing and the Concept of Ripeness*

The timing of any ADR process has been acknowledged in past ADR literature as an important factor in the eventual resolution of any dispute, and at times has been linked to the concept of 'ripeness'.[16] Ripeness refers to the presence of factors that may make the parties more likely to reach agreement, or may make mediation more appealing.[17] Ripeness can also refer to a broader range of factors, including the parties' emotional, financial or organisational readiness to negotiate, and the extent to which legal representatives are satisfied that factual and legal issues are sufficiently clear to enable an informed view of the risks of litigation and settlement options. It might relate to clarity in terms of understanding the substantive issues, or to the emotional state of the disputants, for example, whether a grieving process has commenced or been completed (in respect of a lost relationship, asset, opportunity, etc) or whether financial, commercial or other impacts have settled.[18] However, these factors may be less important than previously thought. It is clear, for example, that many pre-action

13 Ibid 94–5 [6.7].

14 *UCR* (n 8) ch 7 pt 1.

15 Ibid r 61.12.

16 Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Thomson Reuters, 1st ed, 1995) 118.

17 International Institute for Conflict Prevention and Resolution, *ADR Suitability Guide (Featuring Mediation Analysis Screen)* (Report, 2006) 12.

18 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 97, 128.

ADR schemes that apply in commercial and other areas result in early settlement.[19] Similarly, early ADR researchers such as Stephen Goldberg, Frank Sander and Nancy Rogers indicated that it is not necessary for all legal and evidentiary issues to be apparent and readily addressed to enable processes such as mediation to succeed.[20] Ripeness may therefore be a question of perception rather than a critical factor in terms of selecting an appropriate time for an ADR intervention.

In relation to court and tribunal referrals to ADR, different courts and tribunals adopt different approaches, with some opting for early ADR referral and others opting for late referral.[21] Early referral may not be productive if the parties have not had enough time to investigate issues and obtain advice. However, it has been suggested that 'when disputes are not subject to an early ADR process, they may take longer to resolve when a process is eventually used'.[22] In addition, the longer a case is litigated may have an impact on the likelihood that ADR will result in a resolution. This is because 'adversarial' court-related processes may polarise disputants and make them more inclined to behave in an oppositional manner.[23] One study, conducted by Patricia Bergin in New South Wales, did, however, suggest that in certain types of cases (complex commercial) later referral may be appropriate.[24] Some reforms in both New South Wales and Victoria have been focussed on encouraging and requiring parties to exchange evidence at an earlier point, partly because this may result in earlier referral to ADR through improving the parties' capacity to make informed decisions about risk and opportunity.[25]

It is probable that ripeness should be considered in the context of any referral process; however, it should also be weighed against the cost savings that may occur in early referral. It may be that re-referral mechanisms, which can be triggered after

---

19 See ibid 124; Tania Sourdin, 'Using Alternative Dispute Resolution to Save Time' (2014) 33(1) *The Arbitrator and Mediator* 61, 66 ('Using ADR to Save Time').

20 Stephen B Goldberg, Frank EA Sander and Nancy H Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Little, Brown and Co, 2nd ed, 1992) 353.

21 See Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4(1) *Victoria University Law and Justice Journal* 46; Sourdin, '*Exploring Civil Pre-Action Requirements*' (n 5) 124; Sourdin, 'Using ADR to Save Time' (n 19); Timeliness Project Team, *The Timeliness Project, Background Report* (Report, Monash University, October 2013) 11–35, 235–37.

22 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 127. See also discussion relating to time factors in Tania Sourdin, 'Evaluating Alternative Dispute Resolution (ADR) in Disputes about Taxation' (2015) 34(1) *The Arbitrator and Mediator* 19, 23–4.

23 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 127.

24 See PA Bergin, 'The Right Balance between Trial and Mediation: Vision, Experiences and Proposals' (Speech, Court of Cassation, Rome, 19 October 2012) 15 [46] <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.10.19.pdf> ('The Right Balance between Trial and Mediation').

25 See *Civil Procedure Act 2010* (Vic); *Civil Procedure Act 2005* (NSW).

a determination that a matter is not ripe, are necessary. Careful consideration of the information needed to indicate ripeness is also necessary, in light of findings that the parties can resolve even complex cases with less than complete legal case preparation.[26]

B *Costs and Trial Date*

In the past, some mediation referral programs have cited the stage which the case has reached and the extent of time pressure for resolution as important factors in determining appropriateness for mediation.[27] This may be partly because, in some instances, disputants need to incur costs to appreciate the issues involved in the litigation, and need to factor ongoing costs into their capacity to continue to litigate. Also, as one respondent to a survey relating to the Commercial Division of the Supreme Court of New South Wales noted, '[t]he higher level of legal costs helps to focus a party's mind on the "reality" of expensive, time-consuming litigation'.[28]

Awareness of legal costs and other potential costs (eg loss of opportunity and profit costs, costs in stress, management and time costs) can be important in terms of providing an incentive to negotiate or mediate. For those within the litigation system, the provision of hearing dates and the reality presented as a result of interlocutory events may provide a 'sword of Damocles'.[29] The Review identified some support for the perception that in litigated matters, parties were more likely to consider negotiation once a hearing date was set and hearing was imminent.[30]

Some literature places importance on the 'extent of time pressure for resolution' as a factor influencing the appropriateness for mediation or some other form of ADR.[31] This might be related to the notion that, at times, potential litigants will only become inclined to settle once they see how taxing a litigation or arbitration process might be. An influential factor could include a realisation of the mounting cost and energy investment as litigation progresses, giving rise to an incentive to try to resolve the

26 Goldberg, Sander and Rogers (n 20) 353.

27 See Stuart Rabner and Glenn A Grant, *Civil CDR Program Resource Book* (Book No 2, New Jersey Courts, September 2011) 1-3–1-4 <https://www.njcourts.gov/courts/assets/civil/civilcdrresourcebook.pdf?c=7gj> where it was assumed that '[t]he earlier that assessment can be made, the greater the likelihood of reducing litigation time and cost': at 1-3.

28 A survey respondent in Tania Sourdin, 'An Evaluative Study of the Commercial Division of the Supreme Court of New South Wales' (PhD Thesis, University of Technology Sydney, 1996) 140.

29 Ibid.

30 Sourdin, Muddle and Castles (n 10) 46 [3.43].

31 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 128 [5.5].

dispute.[32] One early study on interstate disputes highlighted the curvilinear relationship between when the mediation occurs and the duration of dispute.[33]

The authors' analysis suggests that there is not one propitious period per conflict, but two. The data demonstrates that conflict management at the very outset of the dispute has a much higher probability of leading to a quick end to the dispute than an effort that starts just a bit later. It does not take long for the disputes to become entrenched in the minds and actions of the participants, and the findings regarding duration dependence indicate that ongoing disputes can indeed become entrenched. The effectiveness of conflict management experiences a low point during an intermediate period of prolonged disputes.[34] If the dispute is not resolved early, efforts to reach an agreement during this intermediate period are not likely to prove effective, and, in fact, mediation may appear to be counterproductive. Another point is reached later in the life of a conflict where diplomacy, again, becomes increasingly effective. One of the inferences drawn from this is that expectations should be lowered during this intermediate period, though efforts should not necessarily be curtailed.[35]

Some more recent studies by the Australian Centre for Justice Innovation have shown that later referral to ADR may impact on settlement and that late referral to ADR may mean that settlement is less likely.[36]

C *Readiness for Negotiation*

In terms of referral, once a matter is within a court system, there are again differing professional views about how much evidence should be available before mediation can be attempted. For example, lawyers may consider that mediation is more useful after discovery has taken place or after the most relevant evidence has been exchanged. A major problem in commercial litigation has been the cost of discovery (or disclosure) of documents before trial. Bergin has, for example, noted that

> [t]he discovery process has also been identified as a reason for not sending matters to mediation. Parties have suggested that it would be premature and counter-productive to send a matter to mediation prior to the parties seeing the documents of their opponents.[37]

---

32 See Sourdin and Burstyner (n 21); Sourdin, 'Using ADR to Save Time' (n 19); Timeliness Project Team (n 21).

33 Patrick M Regan and Allan C Stam, 'In the Nick of Time: Conflict Management, Mediation Timing, and the Duration of Interstate Disputes' (2000) 44(2) *International Studies Quarterly* 239.

34 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 128.

35 Regan and Stam (n 33) 256–7.

36 See Sourdin and Burstyner (n 21); Sourdin, 'Using ADR to Save Time' (n 19); Timeliness Project Team (n 21).

37 Bergin, 'The Right Balance between Trial and Mediation' (n 24) 16 [48].

The number of documents that can be subject to discovery can vary, with some jurisdictions now having little focus on discovery (for example the Supreme Court of New South Wales or the Federal Court of Australia[38]) and the documents 'discovered' might be as few as 30 or more than 30,000. However, generally, a much smaller proportion of that number are actually relevant in trial. The resources needed to evaluate these documents, and determine whether or not the documents are useful, can be significant in terms of money and time. In addition, whilst this process may be necessary to determine the strength of the evidence, it is perhaps less helpful in terms of reaching early pragmatic resolution.

A single referral point, whether that be pre-action or at some other stage, is unlikely to work for every case, particularly if there is insufficient evidence to inform assessment of merit. Yet the pursuit of evidence may be so costly and time-consuming that parties become more entrenched and committed to the litigation and are less inclined to settle.

D *Mandatory versus Voluntary ADR Process*

Many court-related pre-action initiatives have been introduced within Australia which are intended to encourage or require the early resolution of disputes without the need to commence proceedings in courts or tribunals. They are designed to lower costs, encourage cooperation between disputants and avoid litigation wherever possible. For example, the *Civil Dispute Resolution Act 2011* (Cth) requires parties to file a 'genuine steps' statement setting out what attempts have been or could be taken to resolve the dispute, with specific reference to both facilitation and negotiation.[39]

A drawback of voluntary models is that, without referral, the choice of process can be left to the disputants and their lawyers who may not choose ADR processes (or any processes) that can help resolve a dispute and save cost and time. Concerns about ripeness may result in opportunities for ADR intervention to pass. Poor understanding of process possibilities and resistance to early negotiation may influence take-up of suitable processes.

According to a large recent empirical research project about the use of pre-action requirements, their effectiveness is contingent on participants' compliance with requirements and this can be supported by education, sanctions, incentives and other processes to support compliance.[40] Another finding was that there should

38 *Uniform Civil Procedure Rules 2005* (NSW) r 21. The discretion must be exercised having regard to ss 56 and 57 of the *Civil Procedure Act 2005* (NSW) and *Federal Court Rules 2011* (Cth) r 20.14. The Federal Court's revised regime for discovery was adopted in 2011. If a party wishes to receive documents from another party (or a third party) they must seek the Court's permission. See also Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management* CPN-1.

39 *Civil Dispute Resolution Act 2011* (Cth) s 4 ('*Civil Dispute Resolution Act*').

40 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) ch 3.

be exceptions to any ADR referral, that is, not all disputes should be diverted from courts.[41]

IV Additional Data from the South Australian Review

The Review explored attitudes to the requirement of pre-action protocols that parties engage in, and also explored attitudes to the timing and use of mediation as a formal process before or during the litigation process.

The results of this investigation provide valuable additional information about what is driving attitudes and behaviours towards pre-action arrangements and early mediation. Whilst mediators, judicial officers and lawyers appear to agree that the settlement of a civil dispute is almost always a better option than a judicial hearing,[42] there are significantly different perspectives about the nature and timing of the processes to be used to support settlement. There was also notable resistance to any sense of imposed time frames for achieving these steps, and to any suggestion that mediation be mandated in the pre-action stage.

Mediation theory suggests that an interest-based facilitative process convened early, may well enable the parties to better understand their legal rights and options, decide what they want to achieve and move towards mutual agreement early on. The 'stick' of significant legal costs and time savings is a clear motivator, as is the potential achievement of better outcomes (by reference to a broader range of indicators than litigation can offer). Lawyers and judges may have differing views, with some considering that it is premature to attempt to resolve a dispute until pleadings and document exchange are complete. Some practitioners and members of the judiciary suggest that parties will not settle a dispute until a trial date is set. There is also a clear perception amongst some within the profession that there is no point attempting serious settlement discussions or using ADR processes such as mediation until most of the facts and expert evidence is available.[43] This is because prior to that time, neither party has the legal certainty to undertake risk assessment as part of a negotiation. Such perceptions reflect an understanding that ADR is a risk assessment process that will fit in to the litigation process at a predictable point, driven by the steps in litigation rather than a view that it is an independent process with more diverse objectives and potential outcomes.

Such perceptions could be dismissed as out-of-date and old fashioned, the result of habits and cultures perpetuating practices of the last century. Many of these perceptions do indeed reflect the typical experience of litigation in the late 20th century (with which both authors are familiar) when ADR was often perceived as a novelty and, at best, a last-ditch attempt to resolve a dispute shortly before trial. However, despite the passage of decades, these perceptions appear to continue to influence

41 Ibid ch 2, ch 6.

42 Sourdin, Muddle and Castles (n 10) 27–8.

43 Ibid 46.

perspectives of ADR in disputes where litigation is a factor. Exploring views about mediation amongst lawyers, judges and others involves considering factors that are linked to the cultures that exist in the legal domain, as well as factors that may be linked to negotiation tactics and understandings. One important aspect is the influence that lawyers representing parties have in facilitating or limiting the use of mediation. The authors suggest that there are both strategic legal and more subtle cultural reasons behind this phenomenon.

A *Proximity of the Court Door*

Feedback from lawyers and judges in South Australia suggests that the proximity of the court door (in other words, the hearing date) is perceived to be a critical factor in terms of settlement behaviour, suggesting that as the reality (and costs) of trial near, parties are pushed into a 'now or never' decision-making mode.[44] The proximity and inevitability of trial (with the accompanying cost, stress, and risks) is likely to be a factor in terms of ADR take-up. The authors did not, however, explore the psychological drivers behind this phenomenon. Data suggests that the later attempts at negotiation are left, the less likely a satisfactory outcome will be reached.[45] However, it is noted that aspirations of success, the downplaying of negative factors, and a failure to recognise the diverse costs of pushing on until the last minute are also the sort of issues that a facilitative mediator or dispute counsellor would invite parties to think about in any mediation. It is also worth mentioning that last-minute attempts to settle are not the same as deliberately or strategically determining the moment to negotiate, and presupposing that a fully contested hearing outcome is inevitable overlooks the value of having these conversations earlier.

Research undertaken as part of the Review suggests that participants agreed in principle to mediation as a process and a valuable option in some cases.[46] However, there was also a strong sense that 'lawyers know best' in terms of responses from legal practitioners. This is hardly surprising: if a case is commenced in court, the stakes and the costs are high. Proving or disproving liability is a game of evidence, strategy and exhaustive factual evaluation. This very work is what will either underpin an effective negotiation or inform decisions to proceed to trial. In this context, ripeness for mediation turns on the availability and content of persuasive factual information and legal argument before parties are prepared to engage in negotiation and persuasion in a mediated setting. However, it is clearly influenced by the legal approach to resolution which may unconsciously privilege risk and prospects of success more than the interests of the parties and their potential capacity in terms of effective negotiation.

44 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 128.

45 Sourdin and Burstyner (n 21) 48.

46 Sourdin, Muddle and Castles (n 10) 106 [6.47].

B *High or Low Stakes Disputes*

The view of participants in the Review was that lower stakes cases tended to be more suited to mediation than high stakes cases.[47] There is neither evidence nor experience to suggest that lower (financial) stake cases are more likely to settle at mediation than more significant claims. However, consideration of the role and influence of lawyers does suggest why this might be a common perception.[48]

In the context of medical negligence disputes, there is an understandable perception among respondents that the applicant should be able to prove their case, and that a robust response in defence of often complex questions of causation and liability is developed before settlement options can be considered. This is not least because some medical negligence disputes are worth millions of dollars and can have serious negative reputational and other impacts on multiple respondents. Evaluation of risk is a necessary precursor to settlement, and is not something that can be undertaken easily or early, particularly if reputation, public perception, punitive or regulatory intervention, or administrative pressure on multiple stakeholders is likely. This can be contrasted with a claim where the stakeholders are a customer and a service provider, who may both anticipate outcome and risk and make early decisions about what options can be acceptable. In such situations, there is more certainty and the parties are more in control of what they will offer to finalise the dispute.

It makes sense to assume that disputes worth a great deal of money (in comparison to the respondent's resources, or the applicant's need) may be more difficult to resolve without a compelling reason, and for respondents, this reason will often be the predicted likelihood of doing worse in a trial. If insurers are involved there may be other financial and commercial interests influencing these decisions. There may also be factors relating to the abrogation of decision-making, such as a reluctance within an organisation to resolve at an early stage without the benefit of clear legal advice.

Another perception is that mediation is valuable in the case of self-represented litigants ('SRLs'). This is a reflection of the confusion that SRLs experience and the consequential impact on the progress of the case. This perception is, however, not uniform across Australia and indeed in some jurisdictions, SRLs were excluded from mediation processes until relatively recently.[49] However, many now consider that represented parties are likely to benefit from an impartial third party working with both parties to assist SRLs to identify and evaluate options and engage with the represented party in an independently managed process. This perhaps relates to a concern raised in the Review related to the issues presented by self represented applicants or those represented by inexperienced lawyers.[50]

47 Ibid 59 [3.86].

48 Ibid 105 [6.44]–[6.45].

49 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 183.

50 Sourdin, Muddle and Castles (n 10) 55–6 [3.72]–[3.73].

C *Complexity and Enforcement of Protocols*

Clear messaging coming from the investigation conducted as part of the Review was that the timeframes and rules around the protocols were too complex.[51] Described by the authors as 'medium touch', the protocols set out a series of detailed steps (including communication of claims/defence, exchange of key documents and a meeting between parties) subject to stated timelines. There are numerous steps around these three discrete phases, which may explain the common observation by investigation participants that they understand what to do (being repeat players in the field) but that new or interstate practitioners have no idea and do not comply.

Although there is a perception of complexity, participants interviewed as part of the Review concluded that the costs of compliance with pre-action protocols in South Australia did not make a noticeable difference to cost.[52] In light of the above comments concerning ripeness for litigation, it may also be that having finally prepared to commence litigation, lawyers see this sort of pre-action engagement as an untimely and ineffective repetition of what will happen in the first few months of litigation. The underlying issues may not simply be that the processes are complex, but that the inflexible (and short) time limits and precise sequencing of the steps limit flexibility in any attempts to reach pre-trial resolution.

In relation to enforcement of the protocols, the clear message from participants in the survey (both lawyers and judges) was that judicial officers did not actively enforce protocols, and would only intervene to consider compliance if one of the parties complained.[53] This was sometimes seen as encouragement to only pay lip service to the protocols.[54] This might reflect a view that the parties themselves need to be responsible for negotiation and settlement, which occurs in the private sphere, and that the courts are therefore engaged and interested in preparing a matter for trial. Whilst this conceptual division of responsibility might make sense in terms of philosophy and funding, it is probably not very realistic. It seems that lawyers and litigants alike do need prompting and support to effectively engage in resolution initiatives, and if the court is genuinely concerned in playing a leadership role in this regard, additional attention to compliance is necessary. It also reflects the reality reported by judicial officers that they did not have the time to engage in this form of case management.[55]

According to a large recent empirical research project about the use of pre-action requirements,[56] their effectiveness is contingent on participants' compliance with requirements and this can be supported by education, sanctions, incentives and processes to support compliance. Leadership from the courts in both promoting and

51 Ibid.

52 Ibid 56 [3.74], 68 [4.27].

53 Ibid 94–5 [6.7].

54 Ibid 56 [3.75].

55 Ibid 117 [7.28], 119 [7.33].

56 Timeliness Project Team (n 21).

enforcing these processes would seem to be a necessary part of this process. This is supported by other research emphasising the importance of visible compliance processes to entrench the use of the processes.[57]

V Legal Culture and System Influences on Attitudes to ADR

Twenty-first century litigation in Australia is a highly structured, directed, and focussed process, one primary aim of which is to ensure that a matter is ready for trial via judicial determination.[58] This inevitably involves the creation of a well-argued case theory supported by documentary and other evidence. The 'pieces' of litigation — the pleadings, the facts, the documents, the evidence, and the witnesses — are all carefully curated, with only those allegations, facts, and evidence that are admissible in court and supportive of the case captured in the process. In South Australia, as in most other states in Australia, the process is highly regimented, with specific and inflexible rules about the content of pleadings, the relevance of documents, and the requirements for expert reports. Pleadings are designed to be accusatory — consisting of allegations that state the parties' best case, often something of an ambit claim. Documents are evaluated in terms of what they prove, rather than what they might say about the parties and their circumstances. Irrespective of any preference for negotiation, the process is highly adversarial with both parties presenting their best (legal) case as robustly as possible. This adversarial nature of litigation commences at the pre-action stage when detailed notices of claim or defence are required from both parties before pleadings are commenced. In view of this objective, it is unsurprising that the focus is on making a case ready for hearing rather than resolving a matter, and results in both parties and lawyers adopting a positional stance.

Writing on this phenomenon in 2010, Don Peters suggests that the highly competitive nature of legal practice, coupled with suspicion about the motives of other participants, tends to provoke non-collaborative engagement.[59] He suggests that lawyers are culturally resistant to flexible and non-rules-based processes, which are antithetical to the analytical and rules-based framework of most legal work and that through training and inclination, lawyers are minded to translate complex issues into a simple framework for litigation, which does not work well for more flexible processes.[60] Olivia Rundle, reporting on research conducted in 2007–08, suggests

---

57 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 169.

58 The *UCR* (n 8) states several goals, including the efficient resolution of disputes, proportionality, and fairness: at r 1.5. The current view is to encourage parties to engage in self-directed resolution processes early, and if these do not work, to then focus on preparation for trial. This reflects the idea that the parties will still be in a position to seek ADR but that the court will not provide that opportunity.

59 Don Peters, 'It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes' (2010) 9(4) *Richmond Journal of Global Law and Business* 381, 410.

60 Ibid.

that lawyers tend to view preparation for mediation as similar to preparing for trial,[61] and that a 'law-focussed, settlement-driven, lawyer-in-charge' approach prevails in court-annexed mediation processes.[62] If this is so, it goes someway to explaining the reluctance to mediate: preparing for a trial (as opposed to a facilitated discussion) is time-consuming and costly, and if mediation is seen as analogous to a trial, lawyers may be understandably reluctant to engage in such a process if they are not substantially prepared on law and fact.

Viewed together, these explanations suggest a cultural disconnect from facilitative, interest-based processes coupled with a default position of putting forward the best legal case, rather than exploring broader outcomes irrespective of the legal position. This is perhaps exacerbated by the increased emphasis on using mediation processes to resolve the dispute and/or to narrow the legal, procedural and evidentiary issues in advance of a hearing. Such goals may tend to co-opt the mediation process into a court management role and in doing so, frame the process as another fact-based, rights focussed negotiation on the path to trial.[63]

A *Framing the Dispute*

For many lawyers, the 'normal' development of a potentially litigious matter will involve consulting the client, preparing statements, gathering evidence and evaluating prospects of success, well before any formal pre-litigation exchange takes place. During this phase, it is more likely that parties (particularly applicants) have developed a positive view of their case and are already framing it in terms of blame, recompense, legal rights and wrongdoings. This framing or narrative creation may not be conducive to productive, interest-based discussion and exploration,[64] and can be contrasted with the requirements of a typical commercial ADR clause which would commonly require initiation of communication that at least partly includes some negotiation and solution-finding, shortly after the dispute arises.

In view of the well-established choreography that has developed in respect of many civil cases, it is understandable that a pre-action process may, so close to the initiation of proceedings, be seen as a hurdle to be crossed, rather than an opportunity for serious discussion and genuine negotiation.[65] Once an applicant decides to commence proceedings, parties are likely to anticipate that pleadings will clarify issues of liability and quantum in detail and may have preference for doing so via formal, court related documentation rather than through a process involving pre-action letters and

61 Olivia Rundle, 'Lawyers Preparation for Court Connected Mediation: The Supreme Court of Tasmania' (2013) 32(1) *University of Tasmania Law Review* 20, 35.

62 Olivia Rundle, 'Lawyers' Perspectives on "What is Court-Connected Mediation for?"' (2013) 20(1) *International Journal of the Legal Profession* 33, 33.

63 Ibid.

64 William LF Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …' (1981) 15(3) *Law and Society Review* 631, 641.

65 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 117.

negotiation or mediation. The reliance on court-related documentation is more likely to be a preferred approach in view of the short timeframes in which respondents may have to respond to formal claims or the issuing of proceedings.[66] This leaves little time for anything other than a defence to the allegations, rather than any careful thought about resolution processes or options.

The Review concluded that there were issues in terms of compliance with pre-action protocols for medical negligence and construction disputes and it seems clear that the processes were used inconsistently.[67] The protocols were used in less than 50% of medical negligence claims, although there was evidence that repeat players in both medical negligence and construction claims were more likely to comply with the protocols, but often regarded the protocols as a hurdle rather than an opportunity to focus on resolution.[68] There may be a range of reasons behind a reluctance to engage in such pre-action processes. One observation is that lawyers understand that in excess of 95% of civil cases in medium and higher tier courts that are initiated will not go to trial, and fully anticipate that most cases will either settle, or result in a default judgment or a withdrawal. However, they may consider that initiating litigation is necessary to drive such outcomes.

There may also be powerful cost incentives for lawyers to delay settlement. If this is the situation, cost incentives and sanctions, provided that they are contemporaneous, may support some pre-action engagement. Money, and the simplistically accurate presumption that lawyers make more money from a contested preparation and trial than early mediation is also sometimes posited as a reason for lower uptake, as are charging models in which mediation is a less costly step than quick turnover document preparation.[69] Whilst there is no avoiding this factor in terms of pre-action ADR uptake, this article reflects on best practices, not decisions motivated by extrinsic goals. In addition, it is important to note that many cases do settle before court proceedings are commenced,[70] and sometimes the cases that go forward are necessarily difficult and so may not be so easily resolved at an early stage.

As noted above, the role of lawyers is critical in terms of the timing of settlement-related processes and whether there is compliance with pre-action requirements. In this regard, most lawyers, both in general and as interviewed and polled in the

66 In South Australia, the timeframe for responding to a general pre-action document is within 21 days (or 30 days for a personal injury claim): *UCR* (n 8) r 61.2. The timeframe for filing a defence is within 28 days after the service of the claim: at r 65.1(1).

67 Sourdin, Muddle and Castles (n 10) 104 [6.41].

68 Ibid ch 6–7.

69 Bryan Clark, *Lawyers and Mediation* (Springer, 2012) 43.

70 Sourdin, Muddle and Castles (n 10) 39 [3.18]. Feedback from construction lawyers suggests that only about 4% of claims made result in litigation. It might be that these are cases that have some element of difficulty. Higher numbers were estimated by medical negligence lawyers: at 40 [3.19].

Review, appeared to be, in principle, in favour of ADR.[71] Despite some initial resistance, courts and tribunals have gradually, but consistently, incorporated ADR into processes, sometimes as a compulsory step,[72] and sometimes as an option.[73] However, despite this, early mediation is not necessarily supported (and may be resisted) and where ADR is undertaken, lawyers may not engage in the processes in a way that supports settlement.

B *Issues of Timing*

In his extensive survey of lawyers and ADR in the United Kingdom, Bryan Clark makes a series of observations, supported by data, suggesting that lawyers ordinarily determine the timing and efficacy of mediation. Clark suggests first, that when lawyers are involved, there is a statistically lower uptake of mediation than when parties are not represented.[74] Clark suggests that whilst in principle enthusiasm for mediation is high, in reality, lawyers are consistently resistant other than when legislation mandates mediation.[75] The reasons for this include fears about 'disingenuous use of the process by opponents', as well as concerns about the efficacy of the process.[76]

Second, Clark notes that in the lawyer-client dynamic, lawyers tend to sit higher in the hierarchy and thus exert more control and direction over clients.[77] Coupling innate resistance to mediation with this power dynamic might explain a preference not to use or encourage mediation until such time as the lawyer is comfortable that they are sufficiently (legally) informed to assess risks, rather than focussing on the best time to engage in mediation from the perspective of the client's diverse needs and interests. This concern is echoed by Rundle, who notes the ease with which lawyers might modify the expectations of their clients to fit a legalistic view of the role of mediation.[78] One applicant, in response to the Review, noted:

> If the lawyer had said 'we are worried about costs, let's have a mediation with the other side', I would have jumped at that. I didn't know it was a possibility. I just expected the process the lawyer was taking was the normal process.[79]

---

71 Clark (n 69) 29.

72 See, eg, the Equal Opportunity Commission and the South Australian Employment Tribunal.

73 See, eg, the Magistrates Court of South Australia.

74 Clark (n 69) 30.

75 Ibid 33.

76 Ibid 30.

77 Ibid 37. Clark points out that the greater the control and power of the client, the less likely the lawyer is to be able to exert this type of control.

78 Rundle (n 61) 37.

79 Sourdin, Muddle and Castles (n 10) 83 [5.29].

The Review also noted that at the time of the investigation there was little readily available information about pre-action processes or the purpose and function of mediation on court websites, leaving parties mostly dependent upon their lawyers for information.[80]

Ignorance is another factor that Clark explores. He suggests that poor understanding of process coupled with cultural resistance may be contributing factors.[81] The authors also suggest that ignorance or a lack of understanding about process options is a significant factor in some jurisdictions in Australia. Mediation for example can be a distinctive facilitative process which can be contrasted with 'conferencing' which is often evaluative. In the Australian context, conferencing can involve the canvassing and evaluation of parties' positions and shuttle negotiation focussing on compromise and finding the 'right' settlement sum, that can be facilitated by senior members of the bar or retired judges. This may be seen as the norm by many practitioners who have only experienced this type of engagement when engaged in an ADR process. In superior civil courts, such conferencing processes may be defined as mediation with more facilitative processes seldom being used.[82] Rundle points out the preference for lawyers to argue the case in a legalistic, rights-based framework in mediation just as they would in a court or arbitration.[83] Data from past studies also support the conclusion that processes may not resemble the more facilitative and interest-based industry supported models of mediation as lawyers continue to act in an adversarial manner.[84] Against this background, it is understandable that lawyers might consider there is nothing particularly unique about mediation that will shift the status quo.

Legal practitioners deal with risk in the legal context, inevitably framed in terms of the pinnacle of litigious engagement, the trial. Lawyers seek information about what evidence will support their client's position in the context of a litigated outcome — they are concerned about facts and evidence and the persuasive interpretation and presentation of both. Lawyers are trained to seek outcomes that fit within legal parameters as an indicator of a fair result.[85] They also want to know what the other party will rely upon. From the perspective of a litigation lawyer, the perception might be that quite a lot of factual information needs to be known and tested before considering settlement options. In the normal course of litigation, this information is generally not all going to be available until some months into the process. In South Australia, as in most other jurisdictions in Australia, the pleadings set out the factual allegations and the legal structure of the case. This is then supplemented by the discovery and exchange of documents, which can be evaluated to determine the

80 Ibid 95 [6.9].

81 Clark (n 69) 46.

82 Tania Sourdin and Nikola Balvin, 'Mediation Styles and Their Impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20(3) *Alternative Dispute Resolution Journal* 142.

83 Olivia Rundle, 'Lawyers' Participation in Mediation and Professional Ethical Disposition' (2015) 18(1) *Legal Ethics* 46, 51.

84 See generally Sourdin and Balvin (n 82).

85 Rundle (n 61) 34.

strategy and strength of claim, and the taking of witness statements to support facts asserted, which is sometimes supplemented by obtaining expert evidence. Legal professionals in the Review frequently commented on the need for the process to be completed to ensure sufficient information and independent assessment is available in order to consider resolution.[86] Further, that respondents indicated that they would need very persuasive evidence of risk to be interested in early resolution before evidence is available on liability.[87] This was a consistent concern in the Review, particularly in relation to medical negligence disputes, but equally applicable to a range of negligence or breach of contract cases. For example, one participant commented that:

> Whether you are a plaintiff or a defendant, there is a process you have to go through to be in a position to resolve a file … in terms of getting instructions and being in a position to give advice that the matter needs to be resolved … and having some expert support, something I can argue about … You can't have an informal conference before you have had an opportunity to look at those issues. Often, they are complicated. You may have a question of liability, a question of causation, and a question of quantum.[88]

Lawyers, as part of their law school training and post-law school experience, may consider that advising clients about settlement in the absence of such material is fraught with doubt and risk. Other professionals, who may make decisions more readily against a background of uncertainty, may not perceive risk in the same way. Lawyers in undertaking this unconscious analysis, may not consider factors outside the narrow litigation framework that could include the interests of the clients or the potential for imaginative and flexible (non-legal) solutions.[89] Kathy Douglas and Becky Batagol suggest that despite explicit guidance on the need for collaboration and non-adversarial approaches to mediation by the Law Council of Australia,[90] lawyers continue to be adversarial and thus obstructive to the core goals of mediation,[91] and may be reluctant to permit clients to speak freely in mediation for fear they will say something that compromises the legal case.[92]

Lawyers may, due to training, culture, or other reasons, simply default to adversarial behaviour. These matters were explored in the Productivity Commission report into

86 Sourdin, Muddle and Castles (n 10) 58 [3.83]–[3.84], 60 [3.90], 105 [6.44].

87 Ibid 98 [6.21].

88 Ibid 58 [3.83].

89 Rundle (n 61) 37.

90 See Law Council of Australia, *Guidelines for Lawyers in Mediations* (August 2011) guideline 6.

91 Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758, 763.

92 Ibid 766.

justice access arrangements in 2014,[93] and noted by respondents to the Review who outlined examples of particularly aggressive or obstructive behaviour.[94] However, it seems that such instances are not the norm, and that most lawyers endeavour to engage in good faith, albeit 'not perfectly'.[95] In this regard, increasingly there are calls for a greater focus on non-adversarial and more collaborative principles to underpin legal education, including strong arguments for teaching ADR as a foundation for legal studies that might effectively shift some of these cultural preferences in the future.[96]

C *Litigant Influence*

Litigants also play a role in determining mediation suitability and outcomes. Jeffrey Rachlinski discusses this dilemma in terms of risk evaluation by litigants, suggesting that people are poor at making choices about compromise when risk and uncertainty are high.[97] He also notes that in a purely economic decision-making model, litigants will make choices based on the predicted rate of returns and risk.[98] However, litigant choices cannot only be explored in this context, as clearly procedural justice is also relevant. Fairness perceptions, as well as perceptions relating to psychological satisfaction, may be relevant.[99] Unlike mathematical risk evaluation, such considerations are contextual and unique to each person. Rachlinski suggests that the way that the choice is framed will influence how these issues are factored into decision-making by parties.[100] Related to this is an 'invested resources' approach that litigants adopt; the more resources are committed (legal costs, disbursements, time, emotion, distress), the more the client balances the possible settlement offers against the resources invested.[101] An offer that might have been accepted at an early stage is likely not to be as attractive at a later stage when it is balanced against additional costs incurred. This is exacerbated if the lawyer has over-promised in the early stage of litigation,[102] leaving the client with the impression that they are going to do better than is realistically likely, and that mediation somehow translates as 'getting less'.[103] Although a

93 Productivity Commission, *Access to Justice Arrangements Inquiry Report* (Report No 72, September 2014) 216, 247–54, 306, 420.

94 Sourdin, Muddle and Castles (n 10) 96 [6.12]–[6.13].

95 Ibid 95 [6.10].

96 Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014); Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of ADR in Legal Education' (2013) 18(2) *Deakin Law Review* 315, 316.

97 Jeffrey Rachlinski, 'Gains, Losses, and the Psychology of Litigation' (1996) 70(1) *Southern California Law Review* 113, 118–19.

98 Ibid 122.

99 Ibid 117.

100 Ibid 125; Tom R Tyler, 'What Is Procedural Justice: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103, 124.

101 See generally Rachlinksi (n 97).

102 Peters (n 59) 400.

103 Ibid 402.

mediated resolution may therefore be framed in terms of 'compromise' and 'win-lose' comparisons, at least two respondents to the Review noted the value of the mediation process as a reality check to clients in understanding the complex road ahead.[104] Another respondent suggested that the 'judicial air' of a mediator can be useful in explaining matters to a difficult client.[105]

These emotional and economic drivers demonstrate how difficult it can be for people to consider options and make decisions. A facilitative mediation process, that focusses on these issues and on imaginative outcomes that could be achieved as an alternative to litigation, might be a necessary circuit breaker. If, however, legal advisers continue to adopt an adversarial, conservative and 'legally certain' stance, it is less likely that such factors will be explored.

The following scenario illustrates the interplay of issues that might influence decision-making in a mid-value personal injury claim:

> Dana suffers an injury in a fall from a hospital bed shortly after surgery. She suffers distressing injuries: torn stitches; sprains and bruising; and ongoing minor hip pain. The hospital agrees that there was a fall and that there were injuries as described by Dana but does not really know the nature or extent of the hip pain, whether it preceded the fall, or indeed whether it is serious.
>
> Dana and the hospital could mediate early, before any detailed investigation is done. Dana may be seeking information or an apology, or she may consider that she requires some ongoing support or care. Importantly, she can hopefully find out what happened, and hear the hospital's genuine response to the accident. Objectively, one would think that resolution at this point is possible and desirable from a cost and timesaving perspective. However, the hip injury may be more complicated. Dana knows her hip hurts when she does a lot of walking or bending. She alone knows whether or not it was like that before. She can determine whether she wants to risk detailed investigation and commence proceedings to determine that point. The hospital may have a limited knowledge of the circumstances that Dana currently faces without some articulation of her claim and expert medical examination. Once this process starts, the hospital may play a minimal role when an insurer steps in, and the insurer is unlikely to be disposed towards settlement except for a sum that reflects its risk. If the medical evidence is ambivalent it may be very difficult for the hospital or insurer to frame any settlement offer.

In this example, the early mediation scenario is likely to be no more than a risk-based offer process. If Dana assumes that the injuries will resolve, this may meet her needs. If not, she must decide whether to accept any offers against the risk of ongoing disability, and the risk and costs of further litigation steps. It is less attractive for the hospital which might be prepared to settle the minor injuries, but not overpay on an unproven injury claim.

104 Sourdin, Muddle and Castles (n 10) 84 [5.32].

105 Ibid 139 [7.104].

If an early resolution is not achieved, the parties are likely to be engaged in the costly and time-consuming process of expert reports for months or years. Costs, particularly of independent medical experts, will escalate, which will place pressure on Dana who is not as well-resourced as the hospital.

This scenario is exponentially complicated if Dana's surgery was a hip replacement. Determining damages will turn on whether the operation was successful and the likely outcome of the operation without the complicating factor of the fall, all of which are uncertainties that are almost indeterminable. The resolution of this case may ultimately not turn on fact and evidence, but on risk and capacity to fund the case.

This scenario, simplistic as it is, suggests that there are different points where an ADR process might be useful. The first might be very early, the second after the pleadings and and some exchange of documents has taken place, and the third after all the evidence is obtained. However, there seems to be a natural 'no-go' zone between a settlement based on interests and expediency, and one based on detailed evaluation of merit. This accords with the research conducted by Patrick Regan and Allan Stam who suggest that the timing of ADR (early, mid, or late litigation) has a significant impact on the time taken to resolve the issues, with early and late ADR being the most influential.[106] Stories of applicants who aim high in litigation only to recoup little more than their legal costs abound in legal circles. What prevented those parties settling earlier? Might it be that lawyers are not prepared to propose an appropriate process this early? Are the applicant's lawyer thinking 'if the evidence is strong, she'll get $1.2 million, so we can't advise her to settle for $120,000'? Are the parties themselves naively holding out for a significant payout? Or are they frozen in indecision because of the complexity of the choices to be made? To the extent that psychological decision-making challenges are at play, perhaps support beyond that which a lawyer can provide would assist the parties. From a respondent's perspective, an insurer may take the view that a claim is less likely to be pursued if it is vigorously defended (particularly if an applicant has limited resources) or consider that delay could be advantageous as it might result in the claim not being pursued because of the applicant's health or other issues.

The attitude of parties, often driven by their legal representatives, is frequently shaped by the adversarial evidence-based tradition of civil justice in Australia. This requires some consideration of broader perceptions relating to justice delivery. For example, decisions about timing may rely on a presumption that the primary purpose of courts is the determinative resolution of disputes, and that the processes adopted will be geared for that purpose. However, changed perspectives about what comprises the 'justice system' are relevant in terms of mediation timing. The government, as well as theorists, have recognised that justice involves a broader concept than merely the adversarial court system and that adjudicative court processes form only a part of the justice system.[107] In this sense, ADR can be seen as complementary to judicial

106 Regan and Stam (n 33) 257.

107 Tania Sourdin, 'A Broader View of Justice?' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 25 ('A Broader View of Justice?').

adjudication, rather than a step in broader adversarial process. Whilst some concerns about this broader view of justice exist, and might be expressed in terms of ADR preferentially inhabiting a separate realm from the justice system,[108] the convergence debate has been strengthened by academics and prominent government reports which endorse the notion that ADR and the court system are co-dependent in their mutual goal of justice for all Australians.[109]

D *Locating Justice*

In Australia, justice is found within and outside of the court system and mandatory referral to ADR is relatively common.[110] Where commentators have raised the concern that ADR is at risk of displacing judicial adjudication, to the detriment of users, it might be noted that justice is delivered because 'ADR may simply remove some disputes from the queue that forms as people wait to litigate' and 'if they do not reach agreement, they can re-join the queue', and further that 'access to justice and the courts is enhanced through the use of ADR as those disputants that require judicial determination are able to access it'.[111] In addition, the broader view of justice includes the endorsement of 'personal obligations to resolve disputes before enabling access to judicial adjudication except where this is not appropriate'.[112] As such, the broader justice system necessarily implies the inclusion of pre-action protocols, requirements and schemes. However, this imposition of personal responsibility on litigants and their representatives may be compromised by a lack of understanding of processes and willingness to engage.

The authors note that pre-action approaches are not the only time to support mandatory referral to ADR. However, both courts and policymakers have gradually moved to identifying the pre-action area as a useful starting point for negotiation, based on the idea that bringing parties together early may bear fruit.[113] However, there is also the risk that the more processes are integrated into the traditional justice system, the more they may be seen merely as a step in that process rather than as a discrete model for resolving disputes. Concepts relating to the timing and location of ADR are important in discussing attitudes to mediation when litigation is anticipated or in train, but if mediation is co-opted as another legal process through court, its role and potential may be constrained by situating it in a predominantly legal evaluative dynamic.

---

108 See, eg, Hazel Genn, 'What is Civil Justice for: Reform, ADR, and Access to Justice' (2012) 24(1) *Yale Journal of Law and the Humanities* 397, 397.

109 Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009); Productivity Commission, *Access to Justice Arrangements* (Report No 72, September 2014) 1, 5.

110 Sourdin, 'A Broader View of Justice?' (n 107) 19.

111 Ibid.

112 Ibid.

113 See generally Sourdin, *Exploring Civil Pre-Action Requirements* (n 5).

There have been various approaches to embedding settlement attempts in pre-action stages, with differing degrees of complexity and compulsion. At the federal level, legislation requires parties to 'take genuine steps' to resolve a dispute at the pre-action stage, while retaining discretion to select the measures chosen.[114] Other states have varying (primarily rules-based) procedures, with a preference for pre or early action engagement in the first instance.[115] South Australia adopts a 'medium touch' approach, setting out detailed criteria and mandating particular opportunities for pre-action engagement.[116]

Whilst here are various protocols for different types of matters, in broad terms, the new uniform civil court rules adopted in 2020 mandate the exchange of pre-action letters of offer between parties,[117] and require parties and their representatives to meet face to face to discuss resolution before issuing proceedings.[118] There are also much more robust procedures requiring judicial officers to review compliance with pre-action steps, and to award costs penalties for non-compliance.[119] These reforms are valuable because they require in person communication in a negotiation setting and set consequences for failure to comply.

VI Systemic Reform and Perceptions of ADR

It is clear that limited, early ADR is not popular amongst some legal professionals, however it is unclear whether it is lawyers, courts, judges or parties such as insurers who are most oppositional. In this context, the authors note that legal practitioners may express in principle approval, while in practice may resist early ADR. Judges appear to be much more amenable to complex and detailed step-by-step processes that support early communication by parties, but so far seem less committed to enforcing early ADR engagement, relying on the parties to make these decisions.[120] Both groups draw on much the same sources of professional experience to inform their views. As previously suggested, there are strong cultural and professional ways of seeing the world in legal practice, which appear to have a visible influence in this context. Where the experience of mediation reflects an understanding of a mediation model that involves mediator evaluation, shuttle negotiation, or the legal and evidentiary analysis of the facts, there is likely to be little understanding or acceptance of mediation as a facilitative and open-ended process that encourages consideration of diverse options and opportunities. The authors question whether

114 *Civil Dispute Resolution Act* (n 39) s 4.

115 Tania Sourdin, Margaret Castles and Madeline Muddle, 'Pre-Action Requirements in Medical Negligence Matters' (2018) 7(2) *Journal of Civil Litigation and Practice* 77, 82–3.

116 Sourdin, Muddle and Castles (n 10) 81.

117 *UCR* (n 8) r 61.7.

118 Ibid r 61.12.

119 Ibid rr 61.13, 61.14, 61.15.

120 Sourdin, Muddle and Castles (n 10) 118.

such perceptions and experience are retarding change against the tide of research and positive experience around the use of ADR in other jurisdictions.[121] Whilst it is relevant that failure to adopt initiatives will likely spell their doom (as may be the case with the current iteration of pre-action protocols in South Australian courts) it is suggested that robust leadership and enforcement of reform by the courts may be valuable and necessary.

Sensitivity to the concerns of lawyers will be important in achieving cultural and structural change. Concerns that mediation may become an additional procedural hurdle in terms of access to justice, which may result in additional time and cost expenditure, warrants consideration. However, the increased use of pre-action requirements and growing data about multi-option systems suggests that early mediation process use can be effective even in very complex commercial disputes, particularly if mediation is used to support dispute management. That is, the mediation process may not be solely focussed on resolution, but on dispute management, dispute counselling and dispute analysis. Using mediation in this way can enable both ADR and litigation-focussed options to work in harmony so that these processes are effective, just, and do not impose undue cost or other burdens on litigants.

In order for pre-action processes to work well, it is suggested that they require: mechanisms for triaging and 'dispute counselling'; the use of (and growth of) resources such as educative agencies; legal centres and online resources; a shift in focus for stakeholders of the greater justice system; and stronger obligations on participants (disputants and their lawyers) to undertake these processes in a genuine way. In addition, it may be that cultural shifts are required in some jurisdictions so that client interests as well as legal rights can be explored within a broader dispute resolution framework, with an acceptance that mediation may have valid benefits as both a triage and a settlement-oriented process. Points at which ADR can be promoted can be flexible — if not early, then at a time when the preparation done will be useful in a negotiation context. In this regard, an option is to move the mediation style engagement to a point after pleadings are filed and key documents exchanged. This would not avoid the significant cost of those processes, with consequent negative impact on amenability to settlement, but may at least situate ADR at a point where some cost and time savings can be made. It might also equip lawyers with the supporting evidence that they need to be confident when making recommendations about settlement.

Multi-option justice systems are another possibility. South Australian civil courts are very far from a true multi-option system, although the Magistrates Court has made significant inroads with access to mediation and diverse court experts. Multi-option possibilities include lay 'triage' processes, focussing on finding a suitable ADR process for the parties,[122] as well as other court information services.[123]

---

121 See, eg, Douglas and Batagol (n 91).

122 Charles Ruhlin and Harry Scheiber, 'Umpiring the Multi-Option Justice System' (1996) 80(2) *Judicature* 58, 58.

123 Ibid.

Canada's multi-options justice system is centred in court facilities but not focussed on trials.[124] One Canadian task force recommended the need for a change in orientation on the part of stakeholders to justice, being lawyers, judges, court administrators and clients and an emphasis that the goals should be early problem solving and dispute resolution, with the trial is the last resort.[125] Whilst stakeholders in the South Australian justice system would not disagree with this proposition, the discussion in this article suggests that there are cultural and systemic barriers to achieving these goals.

In order for it to work efficiently and effectively, a multi-option justice system must be able to rely on objective referral. Whilst the ultimate decision might be left to the party and perhaps their lawyer, they need to be directed in some way, to ensure adequate consideration of issues and that the process pursued is fair and saves them time and money. However, currently the use of facilities is at the discretion and will of parties and their lawyers, and inaccurate understandings of what mediation entails may not reflect the breadth of processes available. Whilst traditionally lawyers have acted as 'gatekeepers', it is clear that this role might be more effectively serviced by a form of 'dispute counselling' or a Dispute Resolution Advisor ('DRA') process.[126] The National Alternative Dispute Resolution Advisory Council described 'dispute counselling' as

> a process in which a dispute resolution practitioner (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.[127]

This process might involve a face-to-face meeting, or may rely on the use of telephone or online processes.[128] The proliferation of pre-action processes adds emphasis to the notion that dispute counselling or DRA approaches will be important into the future.[129] Dispute counsellors might also investigate issues in dispute, contact other parties and act as advocates for parties seeking services. They may also provide advice about issues and options.[130] Dispute counsellors may also be mediators, and it is probable that 'early' mediation in this context, which includes dispute analysis components as well as management, can be effective in terms of reducing time and cost. Lay

---

124 Canadian Bar Association, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Report, 1996) 31.

125 Ibid 31.

126 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 197 ('*Alternative Dispute Resolution*').

127 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (Glossary of Terms, September 2003) 6, quoted in Sourdin, 'A Broader View of Justice?' (n 107) 198.

128 Sourdin, *Alternative Dispute Resolution* (n 126) 197.

129 Ibid.

130 Ibid.

triage advisors may be appropriate in smaller claims, with more experienced advisors allocated in bigger cases. This would greatly expand the resources available to parties and lawyers to make difficult decisions before they become overly entrenched, and overcome some of the narrower understandings of the options available.

VII Conclusion

There are interconnected threads woven through this discussion. Abstract support of ADR in principle requires proactive support to manifest in practice. More robust and explicit rules around the approach to pre-action negotiation, including expectations of bona fide participation and good faith, are clearly on the agenda in Australia,[131] as is the potential benefit of courts reviewing and assessing the adequacy of engagement with the pre-action steps. In state jurisdictions in Australia, there are various requirements that encourage would-be litigants to use courts as a 'last resort',[132] but research and experience suggest that litigants may need more proactive support and, in the case of lawyers, a different mindset to fully achieve this goal. There are barriers to the take-up of early processes, including cost, reluctance to commit to compromise without adequate information, risk aversion, and the cultural privileging of analytical, legally-focussed preferences in resolving disputes. The role of the courts in supporting and demanding compliance with early resolution processes is also an important factor. Review of literature and experience shows a diverse range of dispute resolution options across Australia, the United States and Canada, suggesting that lawyers may not be best placed to explore and select processes, the diversity of which may test lawyers' skill sets, given the predominant focus on legal adversarial analysis of cases in most litigation.[133]

There clearly are, and indeed have been for many years, a diversity of approaches to encouraging early resolution and managing access into the court system. The Review, and this article, provide a summary of some of the relatively cautious steps forward in South Australia. Early adopters of mandatory referral to mediation, the courts in South Australia have moved slowly since, and indeed, practice today is not to refer unless both parties agree. This suggests that mediation at any stage in the process is still viewed with caution, if not occasionally with mild alarm. What has changed is that the caution today reflects concern about the timing, utility and cost of mediation. If one guiding conclusion can be gleaned from the Review, it is that there are strong arguments for third party engagement with parties in the early stages of litigation or at a pre-litigation stage, not only to explore options, but in recognition of the deeply ingrained cultural and professional perspectives that lawyers might bring to these processes, and which might otherwise result in adversarial excesses.

131 See Tania Sourdin, 'Good Faith, Bad Faith: Making an Effort in Dispute Resolution' (2013) 2(1) *DICTUM*: *Victoria Law School Journal* 19. See also Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 35(3) *University of New South Wales Law Journal* 889.

132 Sourdin, *Exploring Civil Pre-Action Requirements* (n 5) 39–40.

133 Rachlinski (n 97) 172.