"What We Do is Probably a Bastardised Form of Mediation": (Mis) Understanding the Role and Potential of Mediation in Resolving Medical Negligence Disputes in Ireland

Author: Mary-Elizabeth Tumelty, School of Law, University College Cork

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Abstract

In line with international developments, both the judiciary and the legislature in Ireland have strongly supported the use of mediation in civil matters and have taken steps to encourage litigants to engage in mediation as a means of resolving their dispute(s). In the context of medical negligence claims, mediation has been recognised as particularly suitable given its potential to ameliorate the costs and duration of these cases, as well as its capacity to address the emotional components which are frequently present in these cases where harm and/or loss has occurred. Although mediation has been an option available to disputants in Ireland for some time, the Mediation Act 2017 introduced a formal framework for the integration of mediation in the civil justice system in 2018. However, little is known about the operation of mediation in these disputes in practice. Against this backdrop, this research examines the use of mediation in the resolution of medical negligence disputes, through an exploration of attitudes to the process, drawing on the findings of a qualitative study (interviews with Barristers). Though focused on Ireland, the findings underscore important considerations for policymakers internationally, including the impact of legal culture on dispute resolution processes, and the necessity for a more considered mediation model in medical negligence disputes.

Introduction

Governed by the law of tort, medical negligence litigation in Ireland is adversarial. The principles which apply to claims of medical negligence in Ireland are similar to those in other common law jurisdictions.[1] However, procedural differences exist. While space prohibits a detailed discussion,[2] it is useful to briefly note that in Ireland, medical negligence claims are a category of personal injury action, and the Civil Liability and Courts Act 2004 is the governing piece of legislation in this regard. Reform discussions have been ongoing in this jurisdiction for several decades. Despite recommendations to introduce pre-action protocols and case

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[1] *Dunne v. National Maternity Hospital* [1989] IR 91(diagnosis and treatment); *Geoghegan v. Harris* [2000] 3 IR 536 (informed consent). In the UK, a similar approach can be seen in *Bolitho v. City and Hackney Health Authority* [1996] 4 All ER 771 and *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11.

[2] For a full discussion see, Simon Mills and Andrea Mulligan, *Medical Law in Ireland* (3rd edn, Bloomsbury Professional, 2017).

management, made by High Court Working Groups,[3] as well as various other expert groups,[4] such measures are yet to be implemented. Change in this area of the law has therefore been slow and to-date, the pace of litigation has largely remained at the discretion of the parties involved.[5]

In response to the limitations of litigation,[6] mediation, a facilitative, voluntary, and non-contentious form of dispute resolution, has been increasingly promoted as an expedient, cost efficient, and humanising method of dispute resolution.[7] Mediation has been an option to parties to medical negligence actions in Ireland for a number of years,[8] but gained formal recognition within the Irish civil justice system more recently, due to the commencement of the Mediation Act 2017 in January 2018. However, the practical application of mediation in medical negligence disputes remains underexplored.[9] What we do know is that, despite the potential of the process to ameliorate some of the burdens associated with traditional litigation, the uptake of mediation in this context has been slow, reasons for which are unknown.[10]

This article seeks to address this gap by presenting the findings of a qualitative study (interviews) into the attitudes and experiences of Barristers, who specialise in medical negligence litigation, to the mediation process. What emerges is a nuanced picture of the intricacies of this particular type of litigation and the discreet nature of these disputes. The paper will proceed as follows. Part I will briefly discuss the growth of mediation in medical negligence disputes in Ireland, and the methodological approach of the study. Part II explores the dynamic of mediation in medical negligence disputes in Ireland, and Part III investigates

[3] High Court Working Group on Medical Negligence Litigation and Periodic Payments 2010-2013 available at
[4] See for example, Expert Group on Tort Reform and the Management of Clinical Negligence Claims 2020.
[5] Two recent practice directions suggest that change in this area is afoot. The President of the High Court has issued two new practice directions in medical negligence actions HC131 'Clinical Negligence Actions – Applications for Trial Dates' which will come into effect on 25th April 2025, and HC132 'Clinical Negligence List' which will come into effect on 28th April 2025. The stated purpose of HC131 is to facilitate the earlier resolution of cases and to enhance case management of these claims, it sets out to achieve this by the imposition of conditions which must be me in order to apply for a trial date. HC132 establishes a dedicated clinical negligence list within the Dublin Personal Injuries List "to ensure that such cases receive focused attention and enhanced case management generally by experienced judges". For further detail see, https://www.courts.ie/content/clinical-negligence-actions-applications-trial-dates and https://www.courts.ie/content/clinical-negligence-list <last accessed 16/04/2025>.
[6] Chris Stern Hyman and others, 'Interest-based mediation of medical malpractice lawsuits: a route to improved patient safety?' (2010) 35(5) Journal of Health Politics, Policy and Law 797; Jonathan Todres, 'Toward healing and restoration for all: Reframing medical malpractice reform' (2006) 39 Conn. L. Rev. 667.
[7] David H Sohn and Sonny B Bal, 'Medical malpractice reform: The role of alternative dispute resolution' (2012) 470(5) Clinical Orthopaedics and Related Research 1370; Donal Cott, 'Bad medicine and worse resolutions: Why the HSE should embrace mediation as a response to medical negligence claims' (2012) 12 University College Dublin Law Review 89.
[8] Civil Liability and Courts Act 2004, s 15.
[9] Arran Dowling-Hussey, 'Irish Medical Professional Negligence Claims and ADR: Still Under-used?' (2016) 22(2) Medico-Legal Journal of Ireland 88.
[10] Rates of mediation in medical negligence claims have slowly increased over the past decade. For example, in 2014, the State Claims Agency reported that out of 488 medical negligence claims resolved, only 13 were resolved via mediation. National Treasury Management Agency, *Annual Report and Accounts* (2014) 31. It should be noted that no figures are provided in relation to mediation in Annual Reports for the years 2019, 2018, 2017, 2016, or 2015. However, in the most recent Annual Report (NTMA, *Annual Report and Accounts* (2023)) it is reported that 41% of claims resolved "involved" a mediation process, compared with 34% in 2022, 37% in 2021, and 25% in 2020.

attitudes to mediation in this context. The article concludes by arguing that whilst measures such as the Mediation Act 2017 may assist in encouraging uptake, existing legal culture needs to change if mediation is to reach its full potential.

Part I

1.1 The Growth of Mediation in Medical Negligence Litigation in Ireland

Mediation has been recognised as being particularly suitable to medical negligence cases due to its capacity to provide efficient, economical, and humanising alternatives to traditional adversarial litigation.[11] Thus, while the traditional boundaries of the law mean that courts are limited to 'black and white' solutions, mediation has the capacity to tend to the extra-legal aims of the plaintiff such as an apology, and to ameliorate the emotional harms caused and exacerbated by litigation in an expedient and financially efficient way. While often promoted for its time and cost savings abilities,[12] the primary role of mediation is to focus disputants on the needs and interests underlying their position. In this way mediation can allow for more creative and satisfying solutions than a court could award,[13] and disputants may emerge from the claim feeling that they received what they needed, rather than the court's assessment of what was required. Waldman comments to this effect '…mediation… continues to encourage disputant voice, participation, respect and dignity'[14] and therefore, can be categorised as dispute resolution in a 'therapeutic key.'[15] The humanising potential of mediation has also been recognised by Galton, who observes:

> 'Good resolutions are not always found through the prism of relevancy and admissibility. Often, in medical negligence cases, resolutions are found in the hearts, minds, and interests of the participants… The enhanced communication provided by mediation allows for conciliation, healing, restoration of relationships, settlement and the avoidance of a destructive process that may adversely affect the emotional and physical well-being of all the participants.'[16]

The recognition of mediation as a formal method of dispute resolution began several decades ago in the United States, in what Auerbach refers to as the 'legalisation of informal

[11] Jacqueline Nolan-Haley, 'Lawyers, Clients and Mediation' (1997) 73 Notre Dame L Rev 1369; Eric Galton, 'Mediation of medical negligence claims' (2000) 28(2) Capital University Law Review 321; Scott Forehand, 'Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate the Problems of Medical Malpractice Litigation' (1998) 14(3) Ohio State Journal on Dispute Resolution 907.

[12] Craig McEwen, 'Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation' (1998) 14 Ohio State Journal on Dispute Resolution 1; David Sohn and Sonny Bal, 'Medical Malpractice Reform: The Role of Alternative Dispute Resolution' (2012) 470(5) Clinical Orthopaedics and Related Research 1370; Sheea Sybblis, 'Mediation in the Health Care System: Creative Problem Solving' (2006) 6 Pepperdine Dispute Resolution Law Journal 493.

[13] Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 The Marquette Law Review 155; Mark Bennett and Michele Hermann, *The art of mediation* (Nita Publications, 1996).

[14] Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 The Marquette Law Review 155.

[15] Ellen Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 The Marquette Law Review 155.

[16] Eric Galton, 'Mediation of medical negligence claims' (2000) 28(2) Capital University Law Review 321, 330.

alternatives'.[17] Mediation gained further prominence internationally following Lord Woolf's report on the civil justice system in the England and Wales, where he famously argued that litigation was to be 'avoided wherever possible'.[18] Echoes of the Woolf reforms were gradually felt in Ireland; however, these changes emerged slowly, and until recently, were largely limited to the commercial and family law sectors.[19] Although mediation has been encouraged in other areas of law in Ireland, and its suitability to medical negligence disputes has been recognised, its introduction in a medical negligence context has been slow. The first provision directly relevant to medical negligence disputes was introduced by section 15 of the Civil Liability and Courts Act 2004, where upon application of a party to a personal injury action, the court can 'direct' the parties to attend a 'mediation conference'.[20] Mediation gained significant recognition within the civil justice system more recently, due to the passage of the Mediation Act 2017 (which was commenced in January 2018). The Act was designed to encourage the use of mediation to resolve commercial, family, and civil disputes (including medical negligence).[21] The 2017 Act aims to achieve this by placing an obligation on solicitors to inform their clients about the possibility of using mediation prior to issuing court proceedings,[22] and the threat of cost sanctions where there is unreasonable refusal to engage in or consider engaging in mediation following an invitation by the Court.[23] Additionally, the Act enables the court to direct the parties to mediation on its own motion or on the application of one of the parties to a dispute.[24] Though the 2017 Act had increased uptake as a central aim, a recent practice direction issued by the President of the High Court suggests that the introduction of the 2017 Act has not necessarily correlated with an increased uptake of mediation in medical negligence cases.[25] Practice Direction HC131 sets out '[a]s a condition of applying for a trial date, the applicant must provide an undertaking to offer mediation to the opposing party or parties within three weeks of the date on which the trial date is fixed, to engage in such mediation within six weeks of the offer being accepted and, in the event that the initial offer is not accepted, to engage in mediation within six weeks of any subsequent offer of mediation

[17] Jerold Auerbach, *Justice without Law?* (Oxford University Press 1983) 123.
[18] Lord Woolf, 'Access to Justice Part II: Final Report' (1996) Lord Chancellor's Department, para 10.
[19] Provisions governing mediation in these contexts can be found in Statute and in the Rules of the Superior Courts, see for example, RSC Ord 63A r6; Family Law Reform Act 1989, s 6; the Family Law (Divorce) Act 1996, s 6; the Children Act 1997, s 20; Child and Family Agency Act 2013, s8.
[20] It is noteworthy that section 15 can only be invoked at the request of one of the parties,[20] and although the court has no power to compel parties to mediate, section 16 of the 2004 Act expressly provides for cost sanctions for failure to comply with a direction under section 15(1).[20]
[21] Department of Justice and Equality, 'Mediation Bill 2017') www.justice.ie accessed 20 May 2017.
[22] Mediation Act 2017, s14 (1); Mediation Act 2017, s14: '(2) If a practicing solicitor is acting on behalf of a client who intends to institute proceedings, the originating document by which proceedings are instituted shall be accompanied by a statutory declaration made by the solicitor evidencing (if such be the case) that the solicitor has performed the obligations imposed on him or her under *subsection (1)* in relation to the client and the proceedings to which the declaration relates, (3) If the originating document referred to in *subsection (2)* is not accompanied by a statutory declaration made in accordance with that subsection, the court concerned shall adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the practicing solicitor concerned to comply with *subsection (1)* and provide the court with such declaration or, if the solicitor has already complied with *subsection (1)*, provide the court with declaration.'; Mediation Act 2017, s 15: '(1) *Subsection (2)* applies where, under another enactment or instrument made under another enactment, it is lawful for a practicing barrister to issue proceedings on behalf of a client who is not represented by a practicing solicitor.'
[23] Mediation Act 2017, s16.
[24] Mediation Act 2017, s21.
[25] https://www.courts.ie/content/clinical-negligence-actions-applications-trial-dates <last accessed 14/04/2025>.

made by the opposing party or parties prior to trial.' It is further noted that this provision will not apply to an applicant who has satisfied the court that mediation will not assist in achieving settlement.[26] Notwithstanding the efforts to increase uptake of mediation in medical negligence disputes, anecdotal evidence suggests that issues remain, namely, the pervasiveness of the adversarial system.[27]

1.2 Methodology

In order to gain useful insights into the dynamic of medical negligence mediation in Ireland, and to ascertain the meaning ascribed to mediation by legal practitioners in Ireland, qualitative methods (interviews) were employed.[28] Two primary research questions were explored. First, how do lawyers engage with mediation in medical negligence disputes in Ireland. Second, what factors are at play in this context.

Using a purposive sampling framework,[29] 12 Barristers (senior and junior counsel) with expertise in medical negligence disputes were identified and invited to interview.[30] The viewpoint of barristers is particularly interesting as they are typically at the coalface when a case reaches the point of settlement talks or trial, where decisions to make resolution are made. Data collection took place over a four-month period, and a total of twelve interviews were conducted with legal practitioners. Interviews lasted between 40 and 60 minutes, depending on the willingness of the individual participant to elaborate beyond the standard interview questions. Interviews were then transcribed and thematically coded by identifying recurring patterns and coding them into key themes that captured participants' experiences and perspectives.[31] Subsequently a narrative informed by the literature was developed. Anonymity was guaranteed to all legal practitioners, by assigning each participant an alpha-numeric code e.g. B1 = Barrister 1 and by removing any identifying details from the interview transcripts.[32]

It is important to note that data collection took place prior to the commencement of the Mediation Act 2017 (commenced in January 2018), which is recognised as a limitation of this

[26] *Ibid.*
[27] Niamh Griffin, 'Adversarial system pits medics and patients against each other' (Irish Examiner, 19th March 2024); Eoin English, 'Barrister calls for overhaul of medical negligence cases, claiming 'some die waiting' for hearing' (Irish Examiner, 25th January 2021).
[28] John Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (3rd edn, Sage 2013).
[29] Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2015).
[30] The sampling framework in this research involved junior counsel and senior counsel who self-identified as specialists in medical negligence litigation on the Bar Council website. From this sample (thirty-four), practitioners were chosen at random using a generator tool, to be included in the study, as this represented one-third of the population under study.
[31] Victoria Clarke and Virginia Braun, 'Thematic analysis' (2017) 12(3) The Journal of Positive Psychology 297; Greg Guest, Kathleen M MacQueen and Emily E Namey, *Applied Thematic Analysis* (Sage Publications 2012).
[32] Due to the small nature of the jurisdiction, if barristers were to be categorised as 'male or 'female, or 'senior' or 'junior' counsel, participants would be potentially identifiable. Similarly, the analysis did not differentiate between barristers acting for the plaintiff or defendant, as a number of barristers undertook work from both plaintiffs and defendants and therefore, would be easily identified. Thus, whilst these categorisations would have been an interesting mode of analysis, in order to ensure anonymity, these distinctions were not made when reporting the research findings.

study. However, it is argued that the findings are still instructive given the focus of the study is on attitudes to mediation in this context. To address this limitation, the potential impact of the Act is discussed where relevant throughout, and recent research which has explored the plaintiff experience of medical negligence litigation in Ireland (including mediation)[33] and the uptake of mediation in these disputes[34] is also considered where relevant.

Part II Research Findings

1.3 The Dynamic of Medical Negligence Mediation in Ireland

This section of the paper explores the current dynamic of medical negligence mediation through an exploration of key features of the process as it operates in medical negligence disputes in light of the empirical findings, and the relevant literature. Dynamics of the process identified as significant included: (1) the mediation community, which explores the attributes of mediators in these disputes; (2) mediation style, which investigates the type of mediation (facilitative/evaluative) typically employed; (3) the timing of mediation, which refers to when mediation takes place; and (4) the format of mediation, which explores amongst other things, the issue of mediation attendance.

1.3.1 The Mediation Community

Although mediation has established itself as a profession insofar as training is a typical requirement,[35] it is generally not viewed as a profession in its own right. Speaking on the growth and role of mediation in legal education, Menkel-Meadow notes that mediation is a second career for many people.[36] This is particularly true in Ireland, where the recognition of mediation by the courts and legislature has resulted in an increasing number of Irish legal practitioners becoming dual-qualified, and also practicing as accredited mediators.[37] Thus,

[33] Suzanne McCarthy and others, 'Plaintiff experiences of the medico-legal environment in Ireland' (2024) a Report prepared for the Interdepartmental Working Group on the Rising Cost of Health-Related Claims 2024, available at:

[34] Breda Mitchell, 'Look who's (not) talking: The use of mediation in medical negligence claims in Ireland' (2021) 7(1) Journal of Mediation and Applied Conflict Analysis 1.

[35] Mediation Act 2017, s8 (1)(b): 'The mediator shall, prior to the commencement of the mediation – furnish to the parties the following details of the mediator that are relevant to mediation in general or that particular mediation: (i) qualifications; (ii) training and experience; (iii) continuing professional development training'; Although the 2017 Act provides for the establishment of a Mediation Council, who would have responsibilities for the maintenance of professional standards, this has not yet been established. Currently, "mediator" is not a protected title and there is no regulatory body for mediators in Ireland although mediators may be members of various professional bodies (e.g. Irish Professional Mediators Organisation (IPMO), the Mediators Institute of Ireland, Bar Council of Ireland, Law Society of Ireland etc.) and thus be subject to individual codes of professional practice.

[36] Carrie Menkel-Meadow, 'Mediating in a world of serious conflicts' (The Mediator's Institute of Ireland Annual Conference, Dundalk, October 2016).

[37] The Bar Council of Ireland website lists 206 accredited mediators out of a total 2,139 barristers listed on their site see www.lawlibrary.ie; similarly, www.lawsociety.ie reports that over 180 solicitors are also accredited mediators <last accessed 20th November 2024>.

legal practitioners' experiences of mediation are two-fold: representing clients in mediation, and acting as the mediator.[38]

The findings of this qualitative study suggest that significant importance is placed on the choice of mediator within the medical negligence mediation dynamic in Ireland. As legal practitioners are recognised as process experts,[39] they are often responsible for identifying and appointing a mediator. In this respect, legal practitioners are 'repeat buyers' for mediation services. As Lande explains:

> 'in a large, diverse, and somewhat impersonal market of mediation services, buying those services considered appropriate for particular cases is an important and difficult task, which is often performed by the principals' lawyers. The lawyers are repeat players who become familiar with the disputing practices and practitioners in their community and thus are usually in a better position than their clients to serve as expert shoppers for mediation services.'[40]

Adding to this dynamic is the fact that medical negligence is recognised as a specialised area of practice which translates into the field of mediation. Significant weight is placed on the expertise and experience of the mediator in this particular area. In this research, a large majority of barristers revealed that the choice of mediator was important. Barristers also reported that they would expect the mediator to be a legal practitioner, normally a Senior Counsel, within the medical negligence specialisation:

> 'I don't believe that the theory of mediation can be applied to a particular dispute absent of an understanding of that particular area of specialisation… [the mediator] also has to have an understanding of where the true value of these claims actually is and that's not something that you can learn coming from outside or pick up, it's something you learn over the years working within the area…. [So] I'm not accepting that a mediator absent of experience within medical negligence litigation is of benefit because it's a particularly complicated area.' (Barrister 7)

> 'The way that mediations happen in medical negligence here, it's way down the road before you get an accredited mediator who's not a barrister or solicitor dealing with medical negligence cases… it's going to be a long time given the Irish way of doing things, that there's going to be anybody other than a barrister involved in a High Court case and at that, a Senior Counsel…. they use someone who is twenty years in law so there's a select few that mediate.' (Barrister 2)

[38] It is important to note that although many legal practitioners may also qualify as mediators, an academic or professional legal qualification is not required in order to train and qualify as a mediator, and mediators may come from a variety of backgrounds and disciplines.
[39] Stephen Ellmann, 'Lawyers and clients' (1986) 34 UCLA Law Review 717, 718.
[40] John Lande, 'How will lawyering and mediation practices transform each other?' (1997) 24 St UL Rev 839, 847.

These findings are in keeping with a body of international research which asserts that the majority of legal practitioners prefer 'expert lawyer-mediators'.[41] For example, in Metzloff et al.'s study of mediation in medical negligence disputes, it was found that the majority of lawyers place value on the background of the mediator.[42] Many legal practitioners are highly skilled mediators, and bring to the role significant experience and expertise. However, it has also been recognised that lawyer-mediators can have a negative impact on the mediation process as they are likely to focus on the legal merits of the case rather than explore opportunities for creative resolution of the dispute. Previous research has indicated that legal practitioners engage in dispute transformation, whereby they shape the aims of the plaintiff to what they perceive as 'legally realistic' outcomes.[43] Similarly, in the context of mediation, Clark notes a frequent result of the involvement of a lawyer-mediator is a loss of opportunity for creativity in settlement, which is a key advantage of the mediation process.[44]

1.3.2 Mediation Style

In addition to the value placed on the experience and background of the mediator, considerable importance was also placed on the style of mediation practiced by the mediator. Styles mediators may adopt include 'facilitative' and 'evaluative', with such terms deriving from the seminal work of Leonard Riskin, who presented a taxonomy illustrating variations in mediation practice.[45] According to Riskin, mediators who take a facilitative approach employ strategies 'simply to allow the parties to communicate with and understand one another.'[46] At the other end of the spectrum, the evaluative model involves the use of techniques 'intended to direct some or all of the outcomes of the mediation.'[47] The grid has since been revised,[48] and the facilitative vs evaluative debate continues in several jurisdictions.[49] The statutory definition of mediation in the Mediation Act 2017 has provided clarity in the context of the process in Ireland, defining mediation as a:

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[41] Rita Lowery-Gitchell and Andrew Plattner, 'Mediation: A viable alternative to litigation for medical malpractice cases' (1997) 2 DePaul J. Health Care L 421, 447; Linda Mulcahy, 'Can leopards change their spots? An evaluation of the role of lawyers in medical negligence mediation' (2001) 8(3) International Journal of the Legal Profession 203; Thomas Metzloff, Ralph Peeples and Catherine Harris, 'Empirical Perspectives on Mediation and Malpractice' (1997) 60(1) Law and Contemporary Problems 107, 144.

[42] Thomas B Metzloff and others, 'Empirical Perspectives on Mediation and Malpractice' (1997) 60(1) Law and Contemporary Problems 107, 145.

[43] Tamara Relis, 'It's not about the money: A theory of misconceptions of plaintiffs' litigation aims' (2006) 68 U. Pitt. L. Rev. 701.

[44] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012) 117.

[45] Leonard Riskin, 'Understanding mediator's orientation, strategies and techniques: A grid for the perplexed' (1996) 1 Harvard Law Review 7.

[46] Leonard Riskin, 'Understanding mediator's orientation, strategies and techniques: A grid for the perplexed' (1996) 1(7) Harvard Law Review 7, 24.

[47] Leonard Riskin, 'Understanding mediator's orientation, strategies and techniques: A grid for the perplexed' (1996) 1(7) Harvard Law Review 7, 24.

[48] Leonard Riskin, 'Decisionmaking in mediation: the new old grid and the new new grid system' (2003) 79(1) Notre Dame L. Rev 3.

[49] Space prohibits a detailed discussion on the continuum of mediation styles. For more, see, Kenneth M Roberts, 'Mediating the evaluative-facilitative debate: Why both parties are wrong and a proposal for settlement' (2007) 39 Loy. U. Chi. LJ 187; Carole J Brown, 'Facilitative mediation: The classic approach retains its appeal' (2003) 4 Pepp. Disp. Resol. LJ 279; John Lande, 'Toward more sophisticated mediation theory' (2000) J. Disp. Resol. 321.

> 'Facilitative voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.'[50]

As such, the 2017 Act envisages the model in Ireland as facilitative.[51] This is somewhat unsurprising,[52] as Lande argues, facilitation is the 'stated orthodoxy' of mediation, not just an approach per se.[53] In the context of the present study, all legal practitioners recognised the facilitative nature of mediation:

> 'It's not a mediator's role to settle [the case]' (Barrister 9)

> 'The mediator has no adjudicative function whatsoever... A mediator is more of a facilitator of negotiations between the parties.' (Barrister 10)

Although all barristers clearly recognised the facilitative nature of mediation, when describing features of mediation which they perceived to be useful, the majority of barristers described evaluative methods. This is in keeping with a body of literature which has evidenced that legal practitioners typically favour evaluative methods for a variety of reasons, whereas non-legal practitioners lean towards a facilitative approach.[54] For instance, in Relis's study on mediation in medical malpractice disputes in Canada she uncovered that parties' legal representatives valued lawyer-mediators due to their evaluative skills and legal expertise.[55] In their study of medical negligence lawyers in Victoria, Australia, Popa and Douglas also report that 'the mediation model used in medical negligence disputes strays from the purely facilitative model…' to a more evaluative approach, and as a result often failing to address the emotional components inherent in these disputes.[56] Similarly, Clark argues that legal representatives favour evaluative methods 'in the quest to get to the meat of the issue quickly'.[57] Echoing these international findings, when discussing attributes of mediation they perceived to be useful, a number of barristers described evaluative methods:

[50] The Mediation Act 2017 pt 1, s2 (1)(o).
[51] However, s8(4) of the 2017 Act provides for an evaluative model on the request of the parties.
[52] In its Advisory Report in 2010, the Law Reform Commission (LRC) opined on the approach Irish practitioners of mediation should employ referring to the facilitative-evaluative debate. It recommended that mediation should be defined as facilitative and that no evaluative role should be employed by the mediator. Law Reform Commission, Alternative Dispute Resolution: Mediation and Conciliation [LRC 98-2010] para 2.35 p22.
[53] John Lande, 'Toward More Sophisticated Mediation Theory' (2000) 2 Journal of Dispute Resolution 321, 328.
[54] John Lande, 'Toward more sophisticated mediation theory' (2000) 2 Journal of Dispute Resolution 321; Robert Bush, 'Substituting mediation for arbitration: The growing market for evaluative mediation, and what it means for the ADR field' (2002) 3 Pepperdine Dispute Resolution Law Journal 111.
[55] Tamara Relis, *Perceptions in litigation and mediation: lawyers, defendants, plaintiffs, and gendered parties* (Cambridge University Press, 2009) 12.
[56] Tina Popa and Kathy Douglas, 'Best for the Protagonists Involved': Views from Senior Tort Lawyers on the Value of Mediation in Victorian Medical Negligence Disputes' (2019) 45(2) Monash University Law Review 333,360.
[57] Bryan Clark, *Lawyers and Mediation* (Springer 2012) 121.

> 'That was a case that probably would not have been concluded in the manner in which it had been, were it not for the mediator essentially banging heads together…' (Barrister 6)

> 'What can be beneficial in mediation is where you've two sides which… are quite polarised and each has a strong view as to the strength of their case… sometimes a mediator can… break the impasse by going into the plaintiff and their legal advisors and discussing with them what they think might be some of the weaknesses of their case and at the same time go into the defendants legal team and discuss what in fact might be the risks for the defendant…' (Barrister 5)

It is interesting that although barristers clearly displayed an understanding of the facilitative nature of mediation, in practice they lean towards an evaluative approach. For example, although Barrister 9 asserted 'It's not a mediator's role to settle [the case]' when identifying the 'value add' of mediation, methods which were evaluative in nature were described:

> 'So they can come in and say: "I've read all the expert reports and I think you've a very good argument in this, but you might have difficulty there or the money for that is good".' (Barrister 9)

Accordingly, the findings of this research indicate that legal practitioners prefer expert-lawyer mediators who practice mediation with evaluative elements in medical negligence disputes. Although the Mediation Act 2017 endorses a facilitative model in defining the process, it also provides for the use of evaluative mediation. Section 8(4) provides that '[t]he mediator may, at the request of the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals.' McRedmond notes that this provision recognises the large number of mediator lawyers who 'practice a more evaluative method of mediating.'[58]

Whilst there are merits and demerits to both facilitative and evaluative approaches, research has indicated that evaluative methods tend to encourage 'positioning and polarization.'[59] Additionally, the focus of the mediation is likely to be on legal arguments and parties may be unlikely to 'reveal their hand' when the mediator is evaluating arguments and evidence.[60] These features of evaluative mediation are unlikely to be conducive to creative solutions such as an apology, which is disappointing given the capacity of the process to address the extra-legal aims of the plaintiff, and the emotional nature of these disputes.[61]

[58] Penelope McRedmond, *Mediation Law* (Bloomsbury 2018) 46.
[59] Lela P Love, 'The top ten reasons why mediators should not evaluate' (1996) 24 Fla. St. UL Rev. 937, 944.
[60] Kimberlee Kovach and Lela P Love, 'Mapping mediation: The risks of Riskin's Grid' (1998) 3 Harvard Negotiation Law Review 71.
[61] Mary Elizabeth Tumelty, 'Exploring the emotional burdens and impact of medical negligence litigation on the plaintiff and medical practitioner: insights from Ireland' (2021) 41(4) Legal Studies 633.

1.3.3 Timing of Mediation

Although mediation is heralded for its financial savings and temporal efficiency, substantial cost savings may only be achieved if the process takes place at an early stage in the dispute, where significant legal costs have not yet been incurred.[62] Interestingly, all barristers reported that medical negligence mediations, similar to settlement negotiations, are most likely to occur once a trial date has been obtained:

> 'In all but one [mediation] we had a trial date, and in the last one the invitation to mediation came about 10 days before we had a [trial date]' (Barrister 6)

> 'Traditionally the mediation takes place, in my experience, when a trial date has already been obtained.' (Barrister 7)

Though the readiness of a case for mediation will vary, and each party must be afforded adequate time to prepare their case, the reported timing of mediation in these disputes is of concern.If mediation is to achieve cost savings, it must take place at an earlier stage in the litigation process. Where mediation takes place shortly ahead of trial significant legal costs are likely to already have been incurred. As such, if mediation is to reach its full potential, the process must take place at an earlier stage in the litigation process. The Mediation Act 2017 may address issues with time, as s14(1) places an obligation on solicitors to advise their client to consider mediation as a means to resolving the dispute before issuing proceedings.[63] However, in a 2024 Report published by the Interdepartmental Working Group on the Rising Cost of Health-Related Claims it was noted that '[m]ediation options need to be developed and used increasingly to shorten the time frame of claims resolution and to avoid costly court proceedings.'[64] The Group recommended the facilitation of earlier mediation as a strategic priority.[65] This suggests that s14, although well intentioned, has not had the practical effect of expediting mediations in this context. McRedmond has commented that a continuing duty to assess the appropriateness of litigation rather than mediation would have been preferable.[66]

[62] Natasha Meruelo, 'Mediation and medical malpractice: the need to understand why patients sue and a proposal for a specific model of mediation' (2008) 29(3) The Journal of Legal Medicine 285.
[63] In the recent case of *Byrne & Ors v Arnold* [2024] IEHC 308 a cost penalty was imposed for a failure to comply with this provision of the 2017 Act.
[64] Department of Health, Interdepartmental Working Group on the Rising Cost of Health-Related Claims (2024) p23 available at https://assets.gov.ie/298156/1b6aef4d-cd1b-4c3b-b56f-ac6f3ecb4b67.pdf <last accessed 20th November 2024>.
[65] Department of Health, Interdepartmental Working Group on the Rising Cost of Health-Related Claims (2024) p29 available at https://assets.gov.ie/298156/1b6aef4d-cd1b-4c3b-b56f-ac6f3ecb4b67.pdf <last accessed 20th November 2024>.
[66] Penelope McRedmond, *Mediation Law* (Bloomsbury 2018) 95.

1.3.4 Format of Mediation

Another feature of the medical negligence mediation dynamic in Ireland is the format of the mediation conference. Mediation may consist of joint sessions, where the disputants meet together with the mediator or it may consist of 'caucus' sessions, where the mediator meets in private with the individual disputants.[67] A caucus approach commences with both parties meeting together with the mediator for opening remarks and statements; the parties are then separated with the mediator moving between each, practising 'shuttle diplomacy'.[68] In contrast, non-caucus mediation keeps the parties together whilst the mediator facilitates discussion.[69] Friedman and Himmelstein have commented on the utility of the non-caucus model, noting that joint sessions allow parties to reach a resolution which meets their emotional and practical needs, encouraging closure.[70] Similarly, in the context of their study on mediation in the United States, Szmania et al. noted that significant 'importance is placed on open, in-person communication'.[71] Despite the potential for non-caucus mediation to tend to the emotional and extra-legal needs of disputants, Hoffman has argued that 'lawyers fear the rigours of the non-caucus model because it brings them more directly into contact with the parties' intense emotions'.[72] Echoing the international experience, the majority of barristers in this research described experiences of the caucus model alone:

> '[The parties] may be in the mediator's room at the start of it for a very brief period and after that it's simply the legal teams shuttling back and forth and the mediator perhaps going in to each party's rooms… [parties meeting] must be either neither non-existent or extremely rare. I've never been involved in anything, for example, where a plaintiff and a doctor met.' (Barrister 8)

The Mediation Act 2017 does not provide any guidance in relation to the format of the mediation conference itself; therefore, parties and the mediator will be free to engage in either caucus or non-caucus mediation. A body of international literature suggests that caucus mediation is generally preferred by the legal profession, [73] due to the level of control over the

[67] Richard Calkins, 'Caucus Mediation – Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace and Healing' (2006) 54 Drake Law Review 269.
[68] David A Hoffman, 'Mediation and the art of shuttle diplomacy' (2011) 27(3) Negotiation Journal 263.
[69] Richard M Calkins, 'Caucus mediation – putting conciliation back into the process: The peacemaking approach to resolution, peace, and healing' (2005) 54 Drake L Rev 259.
[70] Gary J Friedman and Jack Himmelstein, *Challenging conflict: Mediation through understanding* (American Bar Association, 2008).
[71] Susan Szmania, Addie Johnson and Margaret Mulligan, 'Alternative Dispute Resolution in Medical Malpractice: A Survey of Emerging Trends and Practices' (2008) 26(1) Conflict Resolution Quarterly 71, 79.
[72] David A Hoffman, 'Mediation and the art of shuttle diplomacy' (2011) 27(3) Negotiation Journal 263, 300.
[73] James H Stark, 'The ethics of mediation evaluation: Some troublesome questions and tentative proposals, from an evaluative lawyer mediator' (1997) 38 Southern Texas Law Review 769; Jacqueline Nolan-Haley, 'Lawyers, Clients, and Mediation' (1997) 73 Notre Dame Law Review 1369; Leonard L Riskin, 'Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed' (1996) 1 Harvard Negotiation Law Review 7; Jaqueline Nolan-Haley, 'Lawyers, non-lawyers and mediation: rethinking the professional monopoly from a problem-solving perspective' (2002) 7 Harvard Negotiation Law Review 235.

process that is retained in this model.[74] Whilst a non-caucus model may not be suitable for every dispute, it is unfortunate that the most common form of mediation employed in medical negligence disputes in Ireland is caucus mediation, given the extra-legal aims of the plaintiff, and the centrality of emotion to these disputes. As Hoffman asserts, 'joint sessions may provide a more powerful opportunity for the parties to feel heard and understood than caucus session, regardless of how empathic and effective a listener the mediator may be.'[75] Recent research with plaintiffs in Ireland has demonstrated the devastating impact the format of the mediation can have, with one participant noting that "…even with the mediation… the HSE [Health Service Executive] were in one room, our legal team were in one room and we were in one room. So while we were supposed to be the centre of it, we were still very much on the outside of it… So like this was about us and about us having mediation and we were very much, I suppose, bystanders and spectators in this."[76] Linked to the format of the mediation was the issue of attendance at the mediation, namely the attendance of the medical practitioner(s) involved in the dispute, which will now be considered.

1.3.4.i Medical Practitioner Attendance at Mediation

A key advantage of mediation is its capacity to provide a confidential setting wherein needs and interests can be discussed and addressed between the parties to the dispute. The findings of this research suggest that a hospital representative rather than an individual medical practitioner will often attend the mediation. While the attendance of a hospital representative may be more appropriate in cases involving a systemic failure or a multitude of errors, it is argued that where appropriate, the attendance of medical practitioner would be beneficial. Despite this, international research has evidenced that attendance of medical practitioners at mediation in medical negligence disputes is rare.[77] Similarly, in this research, the majority of barristers reported that the medical practitioner does not typically attend the mediation. A number of barristers explained that the medical practitioner would only attend if specifically requested by the plaintiff. However, in most instances, the legal team for the medical practitioner attended alone or sometimes accompanied by the insurance and/or hospital representatives:

> 'Rarely has the doctor been there, just the plaintiff. Somebody from the hospital yes, but not necessarily the doctor.' (Barrister 9)

[74] Christopher W Moore, 'The caucus: Private meetings that promote settlement' (1987) 16 Mediation Quarterly 87; Carrie Menkel-Meadow, 'To caucus or not to caucus that is the question!' (The Mediator's Institute of Ireland Annual Conference, Dundalk, October 2016).
[75] David A Hoffman, 'Mediation and the art of shuttle diplomacy' (2011) 27(3) Negotiation Journal 263, 304.
[76] Suzanne McCarthy and others, 'Plaintiff experiences of the medico-legal environment in Ireland' (2024) a Report prepared for the Interdepartmental Working Group on the Rising Cost of Health-Related Claims 2024 p44, available at: https://www.medrxiv.org/content/10.1101/2024.09.16.24310069v1.full.pdf <last accessed 27/11/2024>.
[77] Thomas B Metzloff and others, 'Empirical Perspectives on Mediation and Malpractice' (1997) 60(1) Law and Contemporary Problems 107; Tamara Relis, 'Consequences of Power' (2007) 12 Harvard Negotiation Law Review 445; Jay L Hoecker, 'Guess who is not coming to dinner: Where are the physicians at the healthcare mediation table' (2007) 29 Hamline Journal of Public Law and Policy 249.

> '…certainly in the mediations that I have been involved in, we haven't done the face-to-face…' (Barrister 7)

A core value of the mediation process is to enable open and frank discussion between disputants.[78] The issue of attendance is also relevant from the perspective of the extra-legal aims of the plaintiff, such as the desire for an apology and/or explanation. As the non-attendance of the medical practitioner was considered to be standard practice by legal practitioners, views on the rationale for not having medical practitioners present were explored. Despite the potential for mediation to tend to emotional harm, the majority of legal practitioners in this research posited the argument that medical negligence cases are too emotionally fraught to allow face-to-face communication:

> '…to be honest in the mediation it can be a bit difficult to have the clinical staff present…it can get quite emotional and upsetting for all involved, so the solicitors for both sides tend to be a bit careful...' (Barrister 2)

> 'Usually though you will find that none of the legal advisors think that that is a particularly good idea, and it's out of a sense of protectiveness of both the plaintiff and the doctor and just not wanting things to get very augmented in terms of emotion...' (Barrister 12)

Relis has argued that lawyers frequently engage in dispute transformation, whereby legal practitioners transform the aims of their clients into legally realistic goals, due to the restrictions imposed by the legal system.[79] Interestingly, in the context of mediation, despite its flexibility, the findings of this research also indicate that legal practitioners also impose restrictions on the mediation process. Similar to the rationale proffered for the employment of the caucus mediation model, the absence of medical practitioners at mediation appears to be altruistic, in that legal practitioners want to protect their clients. However, it is argued that the reported routine absence of the medical practitioner, coupled with the caucus model, is problematic. If medical practitioners are not present for mediation, many of the plaintiffs' extra-legal aims cannot be met in a meaningful way.[80] Liebman has also argued that 'patients interpret non-participation as an indication of indifference, lack of respect and shirking of responsibility'.[81]

Whilst the majority of legal practitioners in this research failed to recognise the potential of mediation to tend to emotional harm and provide remedies suited to the extra-legal aims of plaintiffs, a small number of barristers spoke about the benefits of mediation to tend emotional

[78] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009) 153.
[79] Tamara Relis, *Perceptions in litigation and mediation: lawyers, defendants, plaintiffs, and gendered parties* (Cambridge University Press, 2009) 12.
[80] Natasha Meruelo, 'Mediation and medical malpractice: the need to understand why patients sue and a proposal for a specific model of mediation' (2008) 29(3) The Journal of Legal Medicine 285.
[81] Carol Liebman, 'Medical malpractice mediation: benefits gained, opportunities lost' 74 (2011) Law & Contemp Probs 135, 147.

harm. However, it was recounted as being unusual or an outlier to their traditional experience of the process:

> 'I do remember somebody telling me about a case, but it was so unusual that it was kind of like a conversation piece and they said "God we had this fantastic mediation the other day"… (the mediator) managed to get the doctor and the plaintiff into the room together and there was a very frank discussion…there were tears and apologies, and apparently it was incredibly therapeutic for everybody when this boil burst sort to speak…' (Barrister 1)

> '…in fact one of the doctors actually met with the (plaintiff) not in our presence at the end and we were very happy for that… and I think that is important and I think that is the one thing that is good about mediation in that kind of circumstance is that it tells the lawyers "you know you're not in control, you have to let go at some point". Whereas in trial and settlement it's "I'm the lawyer, I'm in control. You may instruct me what to do and I have to do it, but it goes through me" and when all of a sudden when somebody starts talking to somebody else and I don't hear what's going on "Jesus you know woah!" But that makes for a very effective mediation, to me it may mean ultimately that mediation shouldn't be all for lawyers either, even legal mediations, there should be people involved at some point…' (Barrister 4)

These experiences highlight the suitability of mediation to medical negligence disputes and the potential of the process to address the aims of the plaintiff, as well as ameliorating the emotional burdens of litigation. Experienced mediators are competent to guide difficult conversations and minimise distress; therefore, legal practitioner's discouragement of participation is unfortunate. As previously noted, in the context of medical negligence mediation in Ireland significant importance is placed on the background and legal expertise of the mediator in these disputes. However, as Forehand argues, 'hardened litigators may forget that many disputes can be resolved by simply having the parties talk to each other'. [82] Although legal practitioners have a key role to play in mediation, it is suggested that a co-mediation model may be appropriate in this context with a therapeutic background, who has skills and experience in dealing with emotionally charged disputes would serve to minimise the risks in this context.

The findings of this research indicate that the operation of the medical negligence mediation dynamic in Ireland is largely governed by the legal profession. Accordingly, having established that legal practitioners are, by and large, gatekeepers to mediation, part III explores attitudes to mediation in medical negligence disputes.

[82] Scott Forehand, 'Helping the Medicine Go Down: How a Spoonful of Mediation can Alleviate the Problems of Medical Malpractice Litigation' (1998) 14 Ohio St. J. on Disp. Resol. 907, 921.

Part III

1.4 Attitudes and 'Resistance' to Mediation

In Ireland, legal professionals work from client instructions. However, as process experts, the interlocutory steps of the litigation process are often determined by legal practitioners.[83] It is therefore argued that legal practitioners have a gatekeeper role to mediation in medical negligence disputes, as they can influence clients to either use mediation or not.[84] As MacFarlane surmises:

> 'lawyers assimilation, acceptance, rejection, integration, or other response to alternatives to established norms of litigation practice is critical to both the practical consequences and the impact of civil justice reform and innovation'.[85]

Uptake of mediation in medical negligence disputes in Ireland, although has steadily increased in the past decade, remains relatively conservative and as previously noted little is known about its operationalisation in practice.[86] International research has evidenced that resistance to mediation exists amongst the legal profession. For example, in the context of civil justice reform and mediation in England and Wales, Genn found:

> 'the profession is cautious about advising mediation and on the whole is not routinely recommending mediation' due to unfamiliarity with the process and failure to recognise its benefits 'in a system that is in any case settlement dominated'.[87]

The findings of this research also suggest that resistance to mediation exists. This research has identified that at present, legal practitioners are gatekeepers to mediation, as they are often responsible for determining the pathway for dispute resolution. As such, understanding why resistance exists is important. This section of the paper examines why resistance to mediation exists, given the suitability of the process to medical negligence disputes. In exploring attitudes to mediation in medical negligence disputes, this research reveals insights into dominant adversarial legal culture. Employing Clark's theoretical framework, two types of resistance to mediation were identified: legitimate and illegitimate,[88] which will now be explored through the lens of the literature and the empirical research findings.

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[83] Stephen Ellmann, 'Lawyers and clients' (1986) 34 UCLA Law Review 717, 718.
[84] Eric R Galton, 'The Mediation Witches' (2015) 16 Cardozo Journal of Conflict Resolution 825, 827.
[85] Julie Macfarlane, 'Culture change? Commercial litigators and the Ontario mandatory mediation program' (2002) Canadian Law Reform Commission Paper 1.
[86] The State Claims Agency, which manages the clinical indemnity scheme providing indemnity to all clinical staff in public hospitals in Ireland, reported that 41% of medical negligence cases resolved in 2023 "involved a mediation process". The phrasing makes it unclear as to whether or not those claims were ultimately resolved via meditation or simply mediation was attempted at some stage during litigation. Another limitation is the limited detail provided in these reports e.g. no information is given on timing of mediation or case durations.
[87] Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) 110.
[88] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012) 30.

1.4.1 'Legitimate' Resistance

Clark notes that legitimate resistance arises where concerns expressed by legal practitioners in relation to engaging with mediation will appear to be 'altruistic in their nature'.[89] Legal practitioners must act in the best interests of their clients,[90] and accordingly, if they do not perceive mediation to beneficial it is unlikely that they will encourage clients to engage with the process. The findings of this research suggest that legitimate resistance exists amongst legal practitioners in Ireland. Instances where legal practitioners expressed that they genuinely felt mediation would not be beneficial to their client's case were coded as 'legitimate' resistance. 'Legitimate' concerns included: (i) the disingenuous use of mediation i.e. the perception that mediation was being employed as a tactical device; (ii) the temporal and financial inefficiency of mediation; and (iii) a reported lack of client demand.

1.4.1.i Concerns about the Disingenuous Use of Mediation

The efficiency and success of mediation is dependent on genuine engagement with the process.[91] Disingenuous use of mediation may occur where a party to the dispute engages in mediation with no intention to resolve the conflict, but instead to use the process to gain information about their opponents' case, identify weaknesses, or to negotiate the settlement down.[92] Del Ceno has recognised that whilst legal practitioners may engage with the process, they:

> 'might be using mediation… for the interests of their clients within a litigious contextual framework rather than engaging with the rather different view of justice that tends to be enshrined with mediation'.[93]

Where legal practitioners experience mediation as a tactical device, they are unlikely to view the process as a legitimate means to resolve a dispute. Accordingly, it is doubtful whether they will engage fulsomely with the process or recommend the process to clients.[94] In this study, several participants spoke about the disingenuous use of mediation:

> 'They want to know what your case is. Say you've a trial date on the 1st of February and you might get a call for mediation sort of on the 15th January. All they're doing is … starting the war of attrition two weeks beforehand; you go in and they start and say "what's your claim"… and they start cutting you, cutting you down… and halfway

[89] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012) 30.
[90] Law Society of Ireland, *A guide to good professional conduct for solicitors* (3rd edn 2013) 37; Bar Council of Ireland, *Code of Conduct for the Bar Council of Ireland* (2014) 5.
[91] Charles Bahn and Maria Volpe, 'Resistance to Mediation: Understanding and Handling it' (1992) 10(1) Sociological Practice 27.
[92] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012) 62.
[93] Julian Sidoli del Ceno, 'An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales' (2011) 3(2) International Journal of Law in the Built Environment 182, 185.
[94] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012) 62.

> through the day you say "oh to hell with this, I'd rather have a judge standing over this than a mediator".' (Barrister 1)

This element of distrust was recognised by participants as being a significant roadblock to mediation. It was also posited that the adversarial environment that legal practitioners are accustomed to can sometimes spill into the mediation process, making it difficult to foster trust:

> 'There's distrust there that if they give away anything in mediation it'll come back to haunt them…So no-one lets their mask slip and perhaps that is what has to happen for mediation to be proper… [But] I mean we're an adversarial system, regardless of mediation it's still going to be an adversarial system when they come out of that room.' (Barrister 4)

The findings suggest that parties may employ strategic concealment fearing that openness and honesty may give up their advantage and subsequently be exploited by their opponent. This is notwithstanding the fact that confidentiality is a principle enshrined in the mediation process.[95] However, the findings indicate that negative experiences with mediation, where the process has been deployed to meet tactical goals, has fostered a suspicion of the process. Given the potential of mediation to ameliorate the financial, temporal, and emotional burdens of medical negligence mediation, it is disappointing that experiences to date suggest that the process has been employed as a tactical device. While the Mediation Act 2017 is likely to encourage uptake of mediation in this area, given the obligations it imposes on legal practitioners,[96] the findings of this study suggest a wider, cultural change is required. This is further supported by the Interdepartmental Working Group's recent findings which noted "… a sense that people were playing games and using dirty tactics to reduce liability."[97]

1.4.1.ii Concerns about the Temporal and Financial Efficiency of Mediation

Several participants expressed doubts about the capacity of mediation to resolve disputes efficiently and expediently. As previously discussed, if mediation is unsuccessful, the cost of the dispute will increase as parties will have to pay for the failed mediation as well as on-going litigation costs. Noting this, one participant commented:

> 'I have been involved in mediations where it hasn't settled at mediation and then has moved onto the trial… So what happens there is that's an extra layer of costs then that ultimately the defendant has to pick up, so not only the costs of the mediator but

[95] David Spencer and Michael Brogan, *Mediation Law and Practice* (2nd edn, Cambridge University Press 2012); Mediation Act 2017, s10: '(1) Subject to *subsection (2)* and *section 17*, all communications (including oral statements) and all records and notes relating to the mediation shall be confidential and shall not be disclosed in any proceedings before a court or otherwise.'

[96] As previously discussed, once commenced, the Act will place an obligation on both solicitors and barristers to advise their client of the potential of mediation to resolve their dispute prior to initiating proceedings; Mediation Act 2017, s14 – s15. However, s.15 which places obligations on barristers has not yet come into force. For a full discussion see, Penelope McRedmond, *Mediation Law* (Bloomsbury Publishing 2018).

[97] Department of Health, *Interdepartmental Working Group on the Rising Cost of Health-Related Claims 2024* available here p35 <last accessed 27/11/2024>.

> potentially the costs of a failed mediation and then the trial costs thereafter.' (Barrister 7)

Linked to the concern of increased costs where mediation fails was the belief that legal practitioners could achieve a settlement more expediently than a mediation process. Similar to the international statistics in this area, only a small percentage of medical negligence cases result in a contested court hearing in Ireland.[98] Mediation scholars such as Baruch-Bush have argued that mediation should be compared to settlement rather than trial, given the high rates of settlement in civil litigation.[99] As the majority of civil litigation is resolved via settlement negotiations, he argues 'lawyers frequently cannot understand… what a mediator will contribute to their case – besides another bill'.[100] The belief that settlement negotiations could resolve disputes more efficiently and expediently than mediation was expressed by a large majority of barristers. All participants recounted their ability to efficiently resolve a dispute before trial and questioned the need for mediation in this context:

> 'Many of the mediations that I've been involved in, I mean my impression is that I just cannot see why that could not have simply been done between the lawyers in a normal settlement meeting…' (Barrister 8)

> 'I think that I could settle most cases without having a mediator there. I think most of my experienced colleagues feel the same.' (Barrister 9)

A number of participants felt that mediation was frequently unnecessary in resolving disputes and could sometimes prolong negotiations. One participant reflected on this and stated:

> 'I settled a case two evenings ago and we discussed it for two and half hours, back and forth to our clients and we resolved it… in the law library. If that had gone to mediation it probably would have prolonged the negotiations. I find that mediation is much more drawn out and what you can achieve in the law library in two hours… you're probably talking about a day for mediation.' (Barrister 7)

These findings suggest a fundamental misunderstanding of the mediation process, whereby barristers perceive mediation as a settlement-aide rather than a fundamentally different process. Similarly, findings of a recent study conducted by McCarthy et al. with medical negligence plaintiffs found that 'even when mediation was attempted, the process described by participants did not fully embrace the full potential of that medium, appearing to be nothing more than settlement talks facilitated by a third party.'[101] Mediation has a much broader purpose than

[98] Courts Service Annual Report 2023 available here <last accessed 27/11/2024>.
[99] Robert Baruch-Bush, '"What do we need a mediator for?": Mediation's "value-added" for negotiators' (1996) 12(1) Ohio State Journal on Dispute Resolution 1, 5.
[100] Robert Baruch-Bush, '"What do we need a mediator for?": Mediation's "value-added" for negotiators' (1996) 12(1) Ohio State Journal on Dispute Resolution 1, 5.
[101] Suzanne McCarthy and others, 'Plaintiff experiences of the medico-legal environment in Ireland' (2024) a Report prepared for the Interdepartmental Working Group on the Rising Cost of Health-Related Claims 2024

settlement negotiations, and there are key differences between a traditionally negotiated settlement and mediation. Cloke distinguishes settlement as 'communicating superficially to settle… conflicts' and argues that resolution is 'communicating deeply to resolve or learn from them'.[102] Furthermore, Fiss, in his seminal article famously argued, 'settlement is for me the civil analogue of plea bargaining: consent is often coerced; the bargain may be struck by someone without authority'.[103] In a similar fashion, Genn argues that settlements are often conceded to due to the lack of 'psychological, social and economic ability to endure litigation.'[104] In contrast, mediation has the capacity to address extra-legal aims which often arise in medical negligence disputes, and enables the parties to the dispute to discuss the issues that they perceive to be important. In this way, parties can reach a mutually satisfactory agreement.[105] However, Nolan-Haley has argued, 'many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it and the creative outcomes which are possible'.[106] Similarly, the findings of this research indicate that the efficiency of mediation is largely assessed by legal practitioners in terms of economic value alone and there is a failure to acknowledge and/or value the transformative potential of the process.

1.4.1.iii Client Demand

Low uptake of mediation in medical negligence cases is often attributed to a lack of client demand.[107] Similarly, in this research a number of barristers attributed the low uptake of mediation to lack of client demand. Although solicitors and barristers operate from client instructions, in complex medical negligence cases it is contended that the legal practitioners have significant influence over how the dispute is handled due to their legal expertise.[108] Legal practitioners have a significant role in informing clients about the opportunities presented by mediation and legitimising the process of mediation to their clients.[109] The perceived lack of client demand may also be attributable to the relative unfamiliarity of the public with mediation, its potential benefits and suitability to medical negligence claims, and the success rate of the process. Illustrating the need for public awareness, one barrister argued:

p34, available at: https://www.medrxiv.org/content/10.1101/2024.09.16.24310069v1.full.pdf <last accessed 27/11/2024>.

[102] Kenneth Cloke and Joan Goldsmith, *Resolving Conflicts at Work: Eight Strategies for Everyone on the Job* (Jossey-Bass 2nd edn 2003) 51.

[103] Owen Fiss, 'Against Settlement' (1984) Yale Law Journal 1073.

[104] Hazel Genn, 'Understanding Civil Justice' (1997) 50 Current Legal Problems 179.

[105] Robert Baruch Bush and Joseph Folger, 'Mediation and social justice: risks and opportunities' (2012) 27 Ohio Journal on Dispute Resolution 49.

[106] Jacqueline Nolan-Haley, 'Lawyers, Clients, and Mediation' (1997) 73 Notre Dame Law Review 1369, 1373.

[107] Bryan Clark and C Dawson, 'Scottish commercial lawyers and ADR awareness, attitudes and experience' (2007) 26 Civil Justice Quarterly 228; Andrew Agapio and Bryan Clark, 'Scottish construction lawyers and mediation: an investigation into attitudes and experiences' (2011) 3(2) International Journal of Law in the Built Environment 159.

[108] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012).

[109] Julie Macfarlane, 'Culture change – A tale of two cities and mandatory court-connected mediation' (2002) 2 Journal of Dispute Resolution 241.

> 'They're confidential and the outcomes are confidential so nobody really will ever really know how good they are unless you're involved in one.' (Barrister 2)

Despite increased publicity following the commencement of the Mediation Act 2017, mediation in medical negligence disputes still may not be a concept with which the public is familiar and it is therefore evident that increased promotion about mediation and its utility in this context may be required to increase client demand. As legal practitioners have significant influence over the handling of these disputes, it is argued that the promulgation and promotion of mediation as an effective medium to resolve these disputes is required amongst this group and will be key to future success. As the Mediation Act 2017 now places a statutory obligation on solicitors to advise clients of the possibility of resolving their dispute via mediation,[110] as well as enabling the court to impose cost sanctions where there has been an unreasonable refusal to mediate following invitation by the court,[111] the issue of client demand may not be as significant. However, it is likely the broader cultural issues, namely the pervasiveness of the adversarial system, will remain.

1.4.2 'Illegitimate' Resistance

Clark explains that 'illegitimate' resistance occurs where legal practitioners 'resist' engaging in mediation as a method to resolve a dispute due to selfish motivations, and ignorance of the potential utility of the process.[112] The findings of this research indicate that in addition to the existence of 'legitimate' resistance, 'illegitimate' resistance to medical negligence mediation also exists in Ireland. Two primary themes emerged in relation to 'illegitimate' resistance: (i) financial concerns and (ii) dominant legal culture. These were identified as 'illegitimate' resistance as such issues centre on the interests of the legal practitioner rather than the needs and interests of the client.

1.4.2.i Financial Concerns of Legal Profession

It is sometimes suggested that mediation has not been embraced by the legal profession due to the 'instinct for self-preservation'[113] and the fact that 'many lawyers… see mediation as an economic threat.'[114] Thus, the issue of mediation as an economic threat was explored with all participants. However, only a minority of responses provided evidence of some financially-induced resistance to mediation:

[110] Mediation Act 2017, s14-s15. See also, *Byrne v Ireland* [2024] IEHC 308 where failure to comply with this provision resulted in a cost penalty.
[111] s16 and s21 of the 2017 Act.
[112] Bryan Clark, *Lawyers and Mediation* (Springer Science & Business Media 2012) 30.
[113] Giuseppe DePalo and Penelope Harley, 'Mediation in Italy: exploring the contradictions' (2005) 21(4) Negotiation Journal 470; Don Peters, 'Understanding why lawyers resist mediation' 2nd AMA Conference (Kuala Lumpur, Malaysia 2011) 2.
[114] Leonard Riskin, 'Mediation and Lawyers' (1982) 43 Ohio State Law Journal 48.

> 'There has definitely been a lot of resistance with solicitors and some barristers, mainly I think solicitors because of a perception that it's not as lucrative from a fee earning point of view…' (Barrister 10)

> 'I suppose, we'll have to be realistic with this, the longer a case goes on the more costs that are accrued, so there's vested interests in litigation continuing…' (Barrister 2)

Whilst the ideology of financially-induced resistance to mediation certainly featured, it was not the dominant view, suggesting that the majority of barristers did not view mediation as an economic threat. Interestingly, it was noted that the current timing of mediation, in that it typically takes place close to trial, means significant costs will already have been incurred, and therefore, mediation typically will not affect legal fees in any meaningful way. This was highlighted by a number of participants, with one barrister surmising:

> 'I don't think that costs are ever an issue, certainly from my experience… in a lot of these cases they're actually having the thing listed for trial, so trial costs are incurred and then mediation [or settlement is suggested] at fairly short notice before the trial date…' (Barrister 8)

Thus, although the majority of participants asserted that legal fees were not a factor in deciding whether or not to mediate, it should be noted that the majority of barristers reported that mediation typically took place when a date for trial had already been obtained. If this is the case, significant costs will have already been incurred, and mediation is therefore unlikely to be successful as a 'cost-cutting' tool.[115] This may be mitigated by the Mediation Act 2017, which as previously noted, places an obligation on solicitors to inform clients about the potential of mediation *prior* to issuing proceedings.[116] However, a recent study of solicitors attitudes to medical negligence mediation in Ireland found that 'mediations typically happen just before the trial date – participants said they need to know the strengths and weaknesses of each other's case before considering mediation.'[117]

It should also be noted that mediation was not viewed as a threat to the livelihood of legal practitioners, as suggested by one barrister, 'provided that there's a role for the lawyers in relation to it'.[118] As previously discussed, the mediation community involved in medical negligence disputes currently comprises of lawyer-mediators, and legal practitioners who represent clients. As legal practitioners currently enjoy a significant involvement in mediation it is credible that they do not view the process as an economic threat.

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[115] It should be noted that these views may change when the Mediation Act 2017 is commenced, as legal practitioners will be required to inform clients about the possibility of engaging with mediation prior to initiating proceedings and therefore, mediation is likely to take place at an earlier stage in the dispute; Mediation Act 2017, s14, s15.
[116] S14(1).
[117] Breda Mitchell, 'Look who's (not) talking: The use of mediation in medical negligence claims in Ireland' (2021) 7(1) Journal of Mediation and Applied Conflict Analysis 6.
[118] Interview with Barrister 9.

1.4.2.ii Legal Culture

Legal culture emerged as a core theme of this research when exploring resistance to mediation, which as Nelken observes, 'can be seen as manifested through institutional behaviour, as a factor shaping and shaped by divergences in individual legal consciousness, as a pattern of ideas which lie behind behaviour'.[119] Legal practitioners may resist engaging with mediation due to a lack of understanding of its wider potential, and the findings suggest that at present, are likely to only engage with the process for tactical purposes or where it can assist in achieving monetary settlement. As Barrister 7 explained, 'I suppose that if you were to have the checklist of what formally constitutes a mediation, what we do is probably a bastardised form of mediation…'

Two key sub-themes emerged in this context. First, medical negligence disputes are about money, and mediation is viewed as simply another mechanism to achieve a monetary settlement, ignoring its wider potential. As settlement negotiations are viewed as the traditional way of resolving these disputes, mediation is viewed as unnecessary and therefore, resisted. Second, mediation is only useful if it is somehow tactically beneficial to the case, accordingly, the process is resisted save in certain limited circumstances.

As previously noted, mediation is particularly suitable to medical negligence disputes due to its capacity to address the emotional harm suffered, whilst resolving the dispute in an expedient and financially efficient manner.[120] Meruelo notes that plaintiffs often litigate to receive an explanation and to ensure that what has happened will not recur.[121] Litigation is typically unable to provide such remedies, whereas the flexibility of mediation lends itself to these disputes, and as such, these extra-legal needs can be tended to. Notwithstanding this, the transformative potential of mediation seems to have been largely ignored by the Irish legal profession. A large majority of barristers spoke to this:

> 'Ultimately in Ireland there will be 15 to 20 minutes of playing along with the mediation… but then within 5 or 10 minutes boom we're talking about numbers. In virtually every mediation… that is what happened.' (Barrister 3)

> 'It seems to me that in medical negligence there are very few cases where you actually get a mediation that mediates anything other than money.' (Barrister 8)

Barristers displayed a lack of appreciation for the transformative potential of mediation and maintained that damages are the primary aim of these disputes, with other issues such as explanations, and apologies being 'the bonus that emerges' (Barrister 6). Relis describes this

[119] David Nelken, 'Using legal culture: purposes and problems' (2010) 5 J. Comp. L 1, 9.
[120] Gerard Clay and James Hoenig, 'The Complete Guide to Creative Mediation' 52 (1997) Dispute Resolution Journal 2.
[121] Natasha Meruelo, 'Mediation and medical malpractice: the need to understand why patients sue and a proposal for a specific model of mediation' (2008) 29 (3) The Journal of Legal Medicine 285; Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009) 42.

as 'system conditioning',[122] whereby legal practitioners' experience of the legal system and its capabilities can result in the transformation of client's aims into their own expectations, viewing financial goals as the primary objective:

> 'In assisting disputants to understand their cases and what can be done about them, lawyers as gatekeepers to legal institutions virtually always transform disputes… Litigants' experiences and extralegal aims are translated, reconstituted, and coerced by lawyers to fit into legal and monetary compartments, ignoring aspects deemed irrelevant in law and ultimately translating them into money'.[123]

'System conditioning' was evidenced in the present study, and is highlighted in the following excerpt where a barrister spoke about the need to manage client expectations:

> '…a lot of time, even in mediation you have to explain to people and temper their expectations, explain to them that they're not going to get justice out of the system, they're going to get a determination of liability, a determination of quantum, they're not going to get justice out of the system…as I say, 'it's not a tribunal of investigation into what went wrong in the hospital or how something happened'' (Barrister 9)

As legal practitioners are used to dealing within the boundaries of the legal system, it is somewhat unsurprising that they encourage clients to 'to aim for what they view as legally realistic' even in the context of mediation.[124] However, failing to recognise the wider capabilities of mediation in this context has led to resistance as legal practitioners perceive mediation to have only limited benefits.

The second sub-theme this research uncovered related to the adversarial mindset of legal practitioners. In this context, participants reported that mediation will only be invoked if it is viewed as being somehow beneficial to the case. For example, the more formal structure can be beneficial in achieving a financial settlement in complex cases which would be difficult 'on the steps of the court'. In this regard, the majority of participants viewed the process as useful in complex cases. For instance, one participant explained:

> 'The benefit of the mediation process for me is in the particularly complex or difficult cases, where there are multiple issues… in the catastrophic injuries cases… you have potentially 10 or 12 headings, even if you set aside the liability issues… on quantum you might have 10 or 12 headings… it extends to the general damages, but under the special damages you can have things like "cost of care, assisted technology, speech and language therapy, aids and appliances", you know there's a whole list of headings… so there's lots of different experts feeding in… and it can be difficult to reach a conclusion

[122] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press 2009) 62.
[123] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press 2009) 53.
[124] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press 2009) 52.

> in an informal setting [settlement negotiation] on all of those headings, but a mediator and an experienced mediator can often be of assistance'. (Barrister 7)

The view that mediation would only be employed if it were strategically beneficial to the case was supported by a number of barristers:

> 'We will only invoke mediation on a one-off basis and if it's somehow beneficial…' (Barrister 3)

> 'Unless you're going to get an indulgence for going to mediation…an express advantage or refusing to go to mediation will invoke a penalty of some description, it's difficult to see how relying on the natural inclination of lawyers is going to result in a cultural change. Lawyers are very limited in their thinking, the reason why we have precedents...which we use all the time is because they worked before and therefore, they will work into the future as well.' (Barrister 6)

The Mediation Act 2017 may assist in addressing culture-induced resistance, through the provisions previously discussed. While the 2017 Act and the newly issued High Court Practice Directive may address the issue of resistance in this context, it is likely that the issues of 'dispute transformation' and 'system conditioning' will still remain, as the findings of this research indicate that mediation is largely deployed as a device to achieve settlement by legal practitioners, rather than a fundamentally alternative process. Thus, it is argued that until the mediation model in medical negligence disputes is reconceptualised, little may change. As McCarthy et al. assert, 'mediations as described, are mediations in name rather than spirit.'[125] It is argued therefore, that it is time to reconceptualise the mediation model used in these cases. A detailed discussion on what that model might look like is outside the scope of the current article, however, it is useful to briefly note that consideration has been given to the role of therapeutic jurisprudence in mediating medical treatment disputes.[126] This approach may hold potential in developing a mediation framework for medical negligence disputes.

1.5 Conclusion

This paper has provided insights into the operationalisation of mediation in medical negligence disputes in Ireland. Though lawyers have engaged with mediation and rates of mediation in these disputes are increasing, the process and format of mediation has been shaped to one that is adjacent to the adversarial framework of litigation. In doing so, the transformative potential of the process is being widely overlooked. Thus, it is argued that the current understanding and practice of mediation is restrictive, and mediation is largely employed as a means to achieve settlement. As such, the research findings question whether the term 'mediation' in this context

[125] Suzanne McCarthy and others, 'Plaintiff experiences of the medico-legal environment in Ireland' (2024) a Report prepared for the Interdepartmental Working Group on the Rising Cost of Health-Related Claims 2024 p43, available at: https://www.medrxiv.org/content/10.1101/2024.09.16.24310069v1.full.pdf <last accessed 27/11/2024>.

[126] Jaime Lindsey, Margaret Doyle, and Katarzyna Wazynska-Finck, 'Securing therapeutic justice through mediation: the challenge of medical treatment disputes' (2025) 45 Legal Studies 40.

is a misnomer. Whilst mediation can and should be utilised to achieve settlement, it has a much broader purpose. The findings underscore the need for a more nuanced approach to integrating mediation into the resolution of medical negligence claims. Further research into the development of a mediation model for the resolution of medical negligence claims would be beneficial. It is argued that such a re-conceptualisation is necessary in order to promote a learning culture, and to address the holistic needs of disputants. In the Irish context, it is clear for this to take effect, existing dominant adversarial legal culture needs to be addressed.

Anonymous Peer Review

Editor's Note: This article was reviewed in accordance with the CJQ's peer review policy in which reviewers are advised that, if accepted for publication, their anonymous review will be published alongside the article. Please note this review relates to an earlier version of the article, which the author/s subsequently revised including to take account of the reviewer's comments. Comments in the review identifying typographical errors have been removed.

Review

The piece represents a very important enquiry into the area of medical negligence and the use of mediation in Ireland gathering the views and experiences of barristers. It is well written and structured and draws on relevant literature in the area. There are some excellent insights into the lawyer control of mediation in this sector and the consequences for style of mediation, caucus heavy process and late timing.

The weaknesses of the article are the relatively low sample size and the age of the data which predates the recent Mediation Act in Ireland. However, this latter point is recognised, and the analysis does engage with the provisions of the Act and other relevant material.

The analysis of the data is sound and well organised. I think perhaps from a methods point of view a little more could have been said re sampling and timing and more said about the method of data analysis.

On pp.8–9 the author could perhaps have better substantiated the stated preference arising from the data for evaluative mediation

The author might also find the work of Jaime Lindsey useful to refer to including
J. Lindsey, M. Doyle and K. Wazynska-Finck, "Navigating Conflict: The Role of Mediation in Healthcare Disputes" (2023), *Clinical Ethics* ISSN: 1758-101X, *https://centaur.reading.ac.uk/113223/.*