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Experiences of family mediation in the UK. Implications for mediator training and practice.

Janet Smithson, University of Exeter, UK

Mediation research undertaken as part of **Mapping Paths to Family Justice** Research team

Anne Barlow (University of Exeter)

Rosemary Hunter (Queen Mary University)

Janet Smithson (University of Exeter)

Jan Ewing (University of Exeter)



Outline of talk

- ▶ Family Mediation: the UK context
- ▶ The research project. Mapping Paths to Family Justice
- ▶ Findings from the study: Process and Outcomes
- ▶ Examples of Good Practice
- ▶ Ideas for mediator training and policy



Family Mediation in the UK

- ▶ Family mediation is the policy makers' dispute resolution process (DR) of choice in England and Wales.
 - ▶ Rejects an adversarial stance, it aims to facilitate better communication and co-operation between separating parties (Walker et al, 1994).
 - ▶ The goal is to make agreements about financial arrangements and about child contact.
 - ▶ Relatively cheap and fast compared to courts or using lawyers in other processes.
 - ▶ Mediators may be trained lawyers, or counsellors
 - ▶ However, there is little evidence about whether and how well it works, and for whom.
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Family mediation in the UK – who pays?

- Until 2012, people on low incomes or social security benefits were eligible for legal aid, which paid for some Mediation sessions.
- Mediation Information and Assessment Meetings (MIAMs) are supposed to assess suitability for the process and explain the process to both parties (separately). Then the parties have a session, or several, with a trained mediator.
- The reduction of legal aid led to a decline in use of publicly funded mediation services over last few years.
 - Now most people pay for mediation sessions.
 - Only people with a background of domestic violence get free Mediation sessions.
 - It is much cheaper than going to court but still not cheap.



3 year UK study aimed:

- To provide an up-to-date picture of awareness and experiences of three forms of out of court family dispute resolution:
 - solicitor negotiations
 - mediation
 - collaborative law
- To produce a 'map' of family dispute resolution pathways and consider which pathway(s) is/are most 'appropriate' for which cases and parties?
- To consider which (if any) norms are embedded in these processes
- To provide research evidence to inform policy and practice.

Study design and methods

- **Phase One – Two National Surveys – 2011 - 2012**
 - 6,647 adults – nationally representative sample.
- **Phase Two – Semi-structured Interviews – 2011 - 2013**
 - Practitioners: nationally spread range of solicitors, mediators (40).
 - Parties (96) (45 men; 51 women) recruited nationally
 - 56 had experienced mediation
 - 44 had experienced solicitor negotiation, 8 had experienced collaborative law
- **Phase Three – 13 Recorded sessions – 2013 - 2014**
 - Recording and analysing lawyer-client interviews, mediation sessions (9) & collaborative law meeting session.
- Today I only focus on family mediation but we have publications describing and comparing all three processes.



Analysis of data

We made a distinction between what people – both practitioners and parties - thought of:

- The **Process of Mediation** (how it feels to be in this process)
- The **Outcomes of Mediation** (agreements made about finances or child arrangements).

The Process of Mediation: satisfaction

- ▶ Almost three quarters of our party sample were satisfied with the process of mediation.
- ▶ Those who were not satisfied were most often those who felt pressured into mediation.
- ▶ Perceived quality of the practitioner was key.
- ▶ Positive features of mediation included the structure it provided, the fact that it was generally quicker and cheaper than other options, and its ability to open communication, present parties with new angles and help them to move forward.
 - ▶ *“I wouldn’t say they gave us anything new. I would say maybe a different angle or a different way of looking at things because we were unable to because of our emotional involvement in that particular topic” (Stan)*
 - ▶ *“It helped us step along the way.” (Norah)*

The process of mediation: an uncomfortable process

- ▶ Some parties found the process extremely hard.

“It was extremely traumatic. It’s a very, very unpleasant memory indeed...I remember certain terrible moments in it, you know, some of the worst moments of my life.” (Monica)

- ▶ Some expressed concerns about power imbalances, and perceived lack of mediator impartiality.

“He was all for my husband. I felt like a little naughty school kid sat in a corner.” (Kathy)

“And the mediators sort of work it like that. They seem to stand together with the wife, or with the girl. ‘Cos the mediators were all ladies. There weren’t any men.” (Charlie)

- ▶ Parties were also frustrated by the cost of multiple sessions.

Process of Mediation: information and advice

- ▶ The distinction between legal information and advice appears to be well maintained by mediators but is not always appreciated by parties.
- ▶ Some felt they had to participate even though they did not expect the process to work;
“It was a stepping stone to get out the way, to jump over that hurdle to get to court.” (Stan)
- ▶ Some felt they suffered from a lack of legal advice.

Process of Mediation: conflict and emotions

- ▶ For any process to be successful, parties need to be emotionally ready to cooperate and cope with negotiations
- ▶ Many people found Mediation to be an emotionally fraught process even if in hindsight it was positive.

“I did find that quite helpful, but I also found it just hugely painful as well.” (Tilda)

- ▶ Conflict between the parties was a frequent cause of Mediation breaking down.

“My ex-husband was very antagonistic. Didn’t provide information, became very aggressive during the Mediation sessions, so I called an end to that.” (Lorna)

The process of Mediation: how to focus on the Child's Welfare

- ▶ The mediation process aims to focus on children's welfare, and participants said that mediators often focused explicitly on this:

“They were very clear with me that it was about the children and not about either of us. It was all about them and responsibility of care, yeah.” (Tilda)

- ▶ However, such a focus can be difficult to maintain in practice and requires conscious effort.

“I expected us to be talking about what was best for my son but it turned out to be, in my opinion, what was best for his mum.” (Leo)

“It was not child-focused because, maybe we were both unable to see what actually the best outcome was for the child.” (Stan)

- ▶ Inclusion of the direct views of children was extremely rare.

Good practice in mediation: talking about the Child's wishes and needs

- Among our practitioner sample, focusing on the child in children or all issues cases was seen as a fundamental tenet linked with improving communication between the parties as parents for the sake of the children.
- Party experience overall confirmed that this was attempted by most practitioners to put children at the centre of negotiations:

“Did she get you both focused on your child’s wellbeing?”

“Yeah, she did. It were obvious that her main goal was to- I mean, she’d never met my daughter, but her main goal were to get something sorted between pair of us for her.” (Kathy)

The process of Mediation: blaming the Other

- ▶ There is a strong tendency from parties and also practitioners to blame the other side – the other party, the other solicitor, the court processes- for failures in mediation.
- ▶ Practitioners tend to encourage the client's account of the ex-partner's mental instability or unreasonable behaviour, which may be a tactic for suggesting a course of action, but also validates entrenched views of the "other" being the problem.

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Mediation Process: What could be done better

1. Avoid the impression of alignment with one party before the first joint session.
2. Better screening for abuse and conflict – many complaints about lack of impartiality occurred when there was high conflict between the couple which the mediator could not contain.
3. Anticipate and respond to parties' need for legal advice by encouraging them to obtain legal advice before commencing mediation.
4. More frequent use of gender-balanced co-mediation would help to address some parties' concerns about partiality.
5. Provide greater opportunities for children's voices to be heard in mediation.

The Outcomes of Mediation: Key findings

- ▶ Satisfaction with Mediation outcomes is generally low.
- ▶ Partial or subsidiary outcomes were identified even where mediation failed, in around half of the cases in each process, although partial outcomes were often a source of dissatisfaction.

"Some progress...some better communication, some better understanding of each other's positions, some interim arrangements, some better understanding of children's needs. So short of... what you might call a successful outcome, I think there are lots of little victories that can be won." (Henry Sanderson, Mediator)

Dissatisfaction with outcomes

- ▶ The lack of enforceability of a mediated agreement other than through court order was a source of dissatisfaction by the majority in mediation.

“At the time, I felt it was a good thing as we came up with something which we could work to. Since then... everything we agreed to at the time has been dismissed... It makes me wonder whether I should have gone to a solicitor and got it confirmed in court but I didn’t do that, it was my mistake.” (Andy)

Reasons for settlement in mediation: Key messages

- ▶ Agreed fairness of outcome by both parties was the best settlement trigger, but often hard to achieve.
- ▶ There were more levers to achieve financial pragmatism in mediation than to settle disputes about children with shared perceived satisfaction.
- ▶ A process of general exhaustion and desire for closure, as well as a strong desire to avoid court or an inability to afford court proceedings, all play a role in settlement for some parties.

“I feel I got the absolute minimum. I didn’t really have a lot of choice in that unless I wanted to go to court, which would cost me more.” (Tilda)



Unresolved cases (with no outcome) in Mediation: Key messages

- ▶ Not all cases can be resolved by mediation or other dispute resolution processes. For some, pursuit of 'justice' or what they perceive to be the right outcome is critical and trumps the expediency of a compromise settlement.
- ▶ For example, some fathers would not agree to anything less than 50:50 shared care and were still pursuing this.

Longer term outcomes : Communication

- ▶ The ‘success’ of mediation processes may be measured both in terms of immediate resolution of the particular dispute(s) and/or in terms of longer term benefits.
- ▶ Overall in our sample, Mediation was seen as improving communication in around 40% of cases.

“We still have the odd niggle, but it’s taught me to...You can’t go over the top having every little minor detail. It’s made it easier. We don’t argue like we used to, and I think it just stems from Mediation.” (Kathy)

- ▶ Good communication outcomes were highly correlated with successful resolution.

When mediation doesn't work: Emotional readiness

- *"If they come right at the outset very often it's all a bit raw and it can be a bit difficult then. I mean one of them is almost certainly in a different place on the separation reaction scale to the other one. (Melanie Illingworth, Mediator)*
- *"My overall feeling, even looking back now, that it was all too soon to mediate... I feel looking back there should be a temporary [children] arrangement made quickly, and then you need a minimum of, I don't know, three to six months before you can start talking about anything else. Because when you're an emotional wreck obviously you can't make good decisions, and that was really the position that I was in." (Rebecca)*
- *"...when emotions are running high... certain people are not ready to negotiate, especially my ex, who was very bitter and very sore. I think initially she wouldn't have listened to sense... it would have certainly suited me if we could have negotiated sooner and an outcome had happened sooner, but as far as getting anything out of my ex, I don't think so." (Jason)*

When mediation doesn't work: A process that needs both parties to be willing

- If parties are *"friendly towards each other, wanting the best for the child, and are almost mutual to all suggestions, you know, not wanting it all one way and all the other, then mediation would work perfectly"* (Stan)
- *"I think it's good to have that option [mediation] there because not everybody is angry and bitter"* (Alison)
- *"[W]hat you need to see in the client is an ability to appreciate the other person's point of view and listen... there needs to be an openness to it and a willingness to want to do that... [otherwise] they wouldn't be suitable for mediation"* (Rachel Matthews, Mediator)

When mediation doesn't work: Conflict and domestic violence in mediation

- ▶ *“I’ve met a lot of people now through all this and everyone that has...been in an abusive relationship ends up going to court because they’re not going to get... He’s not a decent person you’re dealing with... He can’t do the mediation. ...And the thing is, when they come across, these types of men, they’re very charming and polite and they’re very...you know...so...Yeah. You just should never be put in that situation, anything like that, basically. No.”
(Sara)*

Good practice: Enabling informed and appropriate choice

- ▶ Clients should receive clear, accurate, neutral information and advice on mediation and other options, and with sufficient opportunity to discuss concerns and reservations.

“They [mediation service] were very good – they checked sort of every step of the way that we were happy with it, and what the limitations were, just to make sure that we had no false expectations, and very much emphasised that it was to help us sort things out” (Norah)

- ▶ In reality many clients are constrained by cost, and by the other party’s wishes.

▶ “I didn’t feel I had a choice, it was either mediation or... I felt it was my only real choice to, kind of, get things sorted, especially to do with my child. Because I basically got told in terms of solicitor’s time, it was too expensive; there wasn’t enough legal aid to do it.” (Sonia)

Good practice: Assessing Emotional Readiness for mediation

- ▶ Clients' emotional state needs to be factored into information delivery about options.

“I don't want to do [solicitor] a disservice. He could have explained it incredibly well, but at that point in time.. it's really hard to know what the hell's going on.” (Glenys)

“I didn't know who to go to, what to do, and then he started talking about the collaborative thing. At the time I felt like I was being completely bamboozled because he was saying, ‘This is what we've got to do, you've got to do this, you've got to do that.’” (Pauline)

- ▶ Parties were particularly unclear about whether they had had a Code of Practice, and what this information consisted of.

Good practice: Effective screening for domestic violence and mental health issues

- ▶ Effective screening for client and case suitability is needed in all processes, combined with appropriate responses to the situation.
- ▶ As well as screening for risk in domestic abuse and child abuse cases, practitioners should be alert to other factors which affect mediation suitability, including mental health issues;

“Did you feel that your lawyer took into account your emotional state during the process?”

“Yeah. That was the main thing that he did do. He knew I had mental health problems and he made sure I understood everything crystal clear.”
(Richard)

- ▶ Screening could also include considering the potential strategic use of mediation by a dominant or controlling partner.



Good practice around Voice of the Child

- We found that good practice, where mediators were skilled at reframing questions around children, was appreciated by parties –

“One of my husband’s objectives was to spend as much time with the children as possible and so the mediator said, ‘Well, why don’t we phrase it as to be able to build meaningful relationships with the children?’” (Tracy)

What could be done better? Child-inclusive Mediation

- ▶ Mediation offers a ‘child-inclusive’ (as opposed to ‘child-focused’) process.
- ▶ Although a high number of the mediators in our practitioner sample had trained to undertake child-inclusive mediation, we found this to be very rare in practice –
- ▶ A typical practitioner response was,
“It is done very occasionally in this practice, say one or twice a year. [T]he only difficulty with it is that, generally speaking, it is the more difficult cases that you would involve direct child consultation.”
(Gordon Russell, Mediator)

Child-inclusive Mediation

Some practitioners felt that Child-inclusive mediation could -

- ▶ help parents view matters from their children's perspective
- ▶ be useful for older children

Practitioner reasons given as to why it is so rare include,

- ▶ Neither or only one parent would consent
- ▶ The child was not willing to participate
- ▶ It places pressure on the child
- ▶ Cost

Some practitioners indicated a lack of confidence around undertaking the child-inclusive process:

- ▶ *“One of the mediators who work for me has done the course and we have done it once I think but neither she nor I are actually particularly keen on it as a principle and so I don't see children so we don't. We can offer it in very unusual circumstances but it is very rare.” (Melanie Illingworth, Mediator)*

Child-inclusive Mediation

- ▶ Within our party sample, a few people had considered and rejected child-inclusive mediation, with concerns about the possible emotional impact on the children:

“I think [mediator] said, ‘Perhaps I could invite [daughter] along to get her involved.’ But she didn’t want to go. I was trying to make it the least stressful for her as possible. So yeah, that wasn’t really good.” (Lynn)

- ▶ One father had experienced child inclusive mediation, and still had reservations, although it had enabled them to agree on one issue around choice of secondary school:

“I think mediation has to be child focused. Rather than child inclusive. ... I think there’s better ways of focusing on the child than actually bringing them to mediation. I think it puts them in a very difficult position.” (Ernest)

Mediator training: understanding and improving the process of mediation

- ▶ Our findings provide a lot of information about about what participants and practitioners thought worked well, and what needed improving, from analysis of the survey and interviews.
- ▶ The findings have been disseminated via various reports, presentations, articles and a book.
- ▶ We have also been developing two approaches to Mediator training from this study.
 1. Analysis of the interactions in mediation session data to help understand what works, how it works, and how to develop ways of improving mediation.
 2. Information videos using actors to highlight experiences of mediation for possible participants, and for mediators and trainers.

Using Discourse Analysis (DA) to understand the process of mediation

- DA is a “**talk-based approach**” which attends to the fine details of talk in interaction. It has links with Conversation Analysis, Narrative Analysis.
- These contrast with other qualitative approaches which may e.g. ask therapists and practitioners **ABOUT** their experience, e.g. our interviews with parties and practitioners.
- In our 3rd phase of the study, we looked at the **mediation process as it takes place**, by recording series of family mediation sessions.
- We used DA to explore how parents and mediators deal with trying to move from disagreement to agreeing an outcome, and to also look at how mediation breaks down.
- This might give information for mediator training. What works in the room? How does a successful mediator manage conflict and build consensus?
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Features of Mediation Talk

- ▶ “Institutional talk” is studied in DA and CA and highlights shared features of counselling, therapy, clinical, mediation talk. These shared features include:
 - Expected ways of **turn-taking**.
 - **Interactional asymmetry** between practitioner and participant(s), lay versus professional.
 - **Goal-oriented**, with some forms of talk permitted and others discouraged.
- The mediators are trained to adhere to a **code of practice**, which includes a set of explicitly laid out ideals and norms, as well as implicit assumptions.
- Assumption of mediator neutrality or objectivity is challenged – **each participant, both parties and mediators, are assumed to have an agenda**. So, for example, mediators need to get outcomes from the session, to demonstrate success of the approach and value for money.

Mediation extract, Kerry and Jack: “Rebuilding trust”

DA analysis of extract

1. Kerry [I suppose more lies are going to keep coming out
2. Med2 [It's great that you have taken a step forward but **most couples find** it takes a while to rebuild trust [and so trust
3. Kerry [I don't trust him
4. Med1 And so **trust is obviously a big issue** for both of you isn't it and (.) **most couples find** it does take a while [to reach that
5. Kerry [I don't know why he can't not trust me I have never ever given him one reason not to ever not trust me ever, never
6. Med2 And what most people find is that they actually have to see things working (.) that they actually have to see arrangements working and that they actually have to see the communication taking place (.) in a different way

Reframing of participants' concerns: Mediator 2 starts by congratulating, but then repackages Kerry's mistrust of Jack as not realistically based on Jack's conduct but rather as a phase that “most couples” go through.

Normalisation: Kerry's mistrust is thus **normalised and generalised**, repeat of “most couples find,” rather than being seen as a particular mother's reaction to an unreliable father.

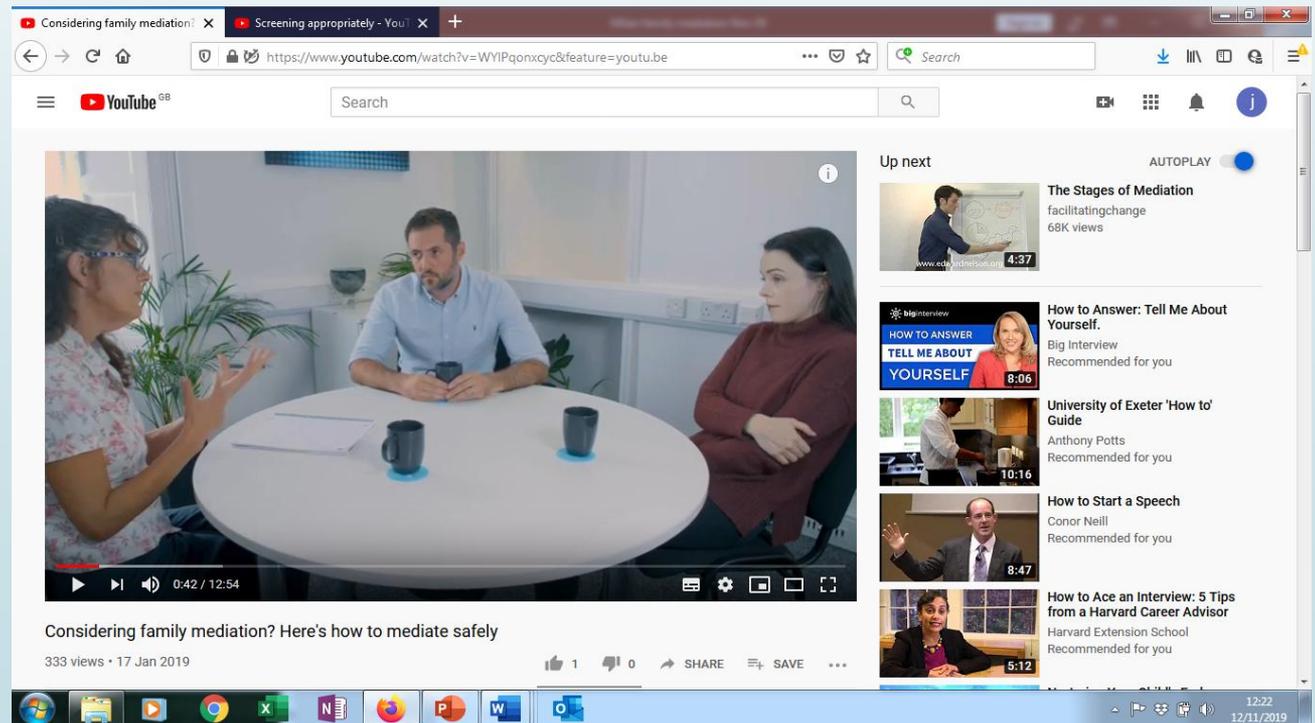
Trust redefined as a practice that develops over time.

“Rebuilding trust” DA analysis

- **Reframing of participants’ concerns:** Mediator 2 repackages Kerry’s mistrust of Jack as not based on Jack’s conduct but rather as a phase that “most couples” go through.
- **Normalisation:** Kerry’s mistrust is thus **normalised and generalised**, rather than being seen as (possibly) a particular mother’s understandable reaction to an unreliable father.
- **Competing Discourses of Trust:** While Kerry views “trust” as an absolute quality, or as a personal attribute, already proved or not in the relationship, the mediator talks about it as a practice to be encouraged and worked on in post-separation parenting.
- **Doing Mediation:** The mediator uses this reframing of trust as a way of mitigating the couple’s disagreement. This attempts to make them more mutually accountable, adhering to mediation values of developing mutually acceptable solutions, and avoiding moral blaming.
- We can consider whether this is good mediator “nudging” or a minimisation of participant experience and feelings?

From research to practice: information for participants

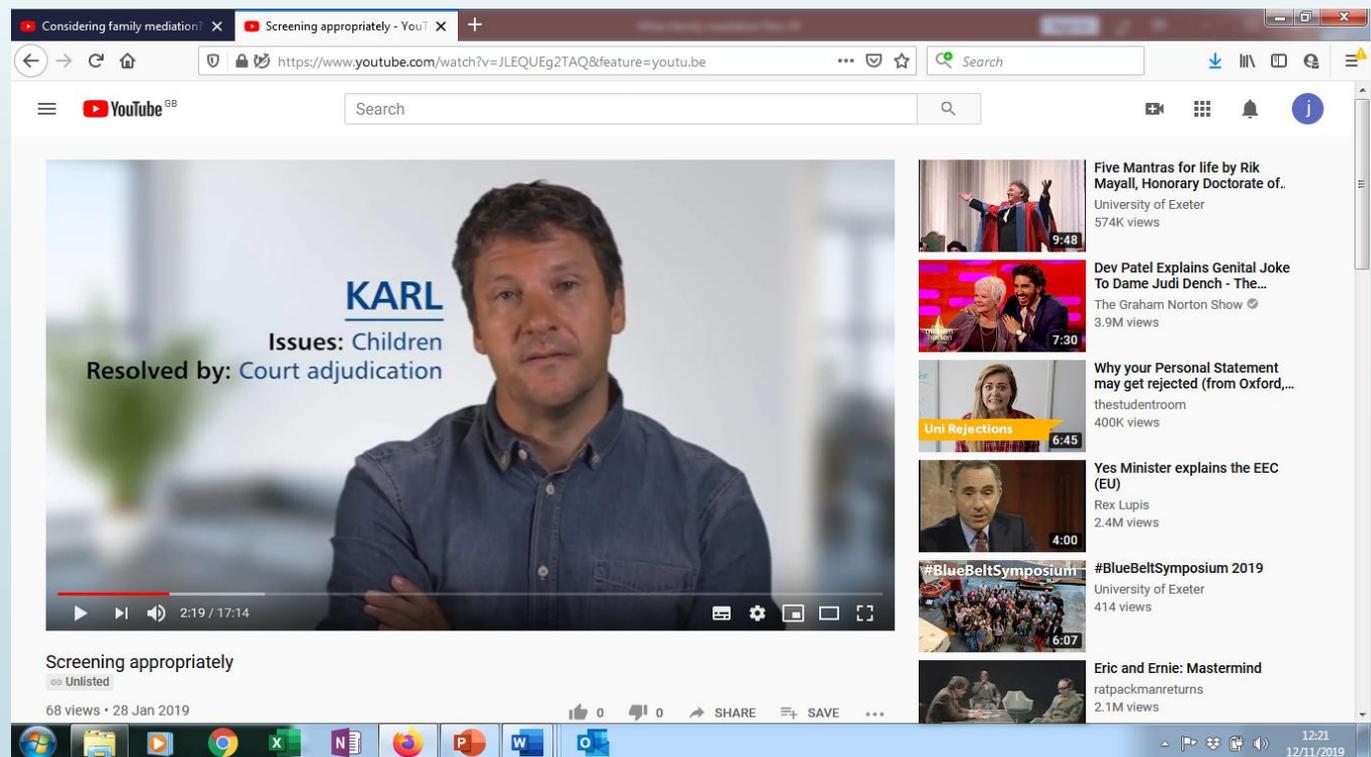
We produced some videos and “Talking heads” about the Mediation experience, stories taken from the Mapping project participants but voiced by actors. You can watch the video for people considering mediation at <http://socialsciences.exeter.ac.uk/law/research/groups/frs/projects/creatingpathstofamilyjustice/>



The screenshot displays a YouTube video player interface. The main video shows three people seated around a round white table in a mediation session. A woman on the left is speaking, a man in the center is listening, and a woman on the right is also listening. The video player includes a progress bar at 0:42 / 12:54 and standard playback controls. Below the video, the title reads "Considering family mediation? Here's how to mediate safely" with 333 views and a date of 17 Jan 2019. To the right of the video is a "Up next" sidebar with several recommended videos, including "The Stages of Mediation" (4:37), "How to Answer: Tell Me About Yourself" (8:06), "University of Exeter 'How to' Guide" (10:16), "How to Start a Speech" (8:47), and "How to Ace an Interview: 5 Tips from a Harvard Career Advisor" (5:12). The browser's address bar shows the URL "https://www.youtube.com/watch?v=WYIPqonxyc&feature=youtu.be". The Windows taskbar at the bottom shows various application icons and the system clock indicating 12:22 on 12/11/2019.

From research to practice: training materials for mediators

We also produced a video for practitioner training only in which we had actors voicing the real experiences of the Mapping interviewees who had mediated when it was not appropriate to do so.



The screenshot shows a web browser window displaying a YouTube video. The video player is the central focus, showing a man in a blue shirt with the text 'KARL' and 'Issues: Children Resolved by: Court adjudication' overlaid. Below the video, the title 'Screening appropriately' and the channel 'Unlisted' are visible, along with '68 views · 28 Jan 2019'. To the right of the video player is a list of recommended videos, including 'Five Mantras for life by Rik Mayall, Honorary Doctorate of...', 'Dev Patel Explains Genital Joke To Dame Judi Dench - The...', 'Why your Personal Statement may get rejected (from Oxford,...)', 'Yes Minister explains the EEC (EU)', and '#BlueBeltSymposium 2019'. The browser's address bar shows the URL 'https://www.youtube.com/watch?v=JLEQUe2TAQ&feature=youtu.be'. The Windows taskbar is visible at the bottom, showing various application icons and the system clock indicating 12:21 on 12/11/2019.

Conclusions

Key study findings

- Mediation has surprisingly high levels of dissatisfaction for participants.
- Often leads to unresolved outcomes.
- When it works, it can be effective, quick and cheap.
- Children rarely involved directly despite recommendations of this.

Key messages for mediators

- Assessing suitability for mediation and screening for domestic violence and emotional readiness is crucial to success.
- Recognise that different processes suit different parties and issues.

Key ideas for training

- Use of participant feedback in training e.g. with training videos.
- Analysis of session data to understand how the discussion works and what might be improved on.

References: Mapping project publications

Barlow, A., Hunter, R., Smithson, J. and Ewing, J. (2017), *Mapping paths to family justice. Resolving family disputes in neoliberal times*. Basingstoke: Palgrave Macmillan.

Ewing, J., Hunter, R., Barlow, A. and Smithson, J. (2015), Children's voices: Centre-stage or sidelined in out-of-court dispute resolution in England and Wales? *Child and Family Law Quarterly*. 27/1: 43-62.

Hunter, R., Barlow, A., Smithson, J. and Ewing, J. (2018), Law, Discretion, Gender and Justice in Out-of-Court Financial Settlements. *Australian Journal of Family Law* 32(1)

Hunter, R., Barlow, A., Smithson, J. and Ewing, J. (2017), Access to What? LASPO and Mediation. In A. Flynn and J. Hodgson (eds.) *Access to Justice and Legal Aid Comparative Perspectives on Unmet Legal Need*. Hart: Oxford. Pp239-254.

Hunter, R., Barlow, A., Smithson, J. and Ewing, J. (2015), Paths to justice in divorce cases in England and Wales. In *'Delivering Family Justice in the 21st Century*. Hart: Oxford. Pp 145-162.

Smithson, J., Barlow, A., Hunter, R. and Ewing, J. (2017), The moral order in family mediation: how do mediators and participants negotiate competing values? *Conflict Resolution Quarterly*. DOI: 10.1002/crq.21195

Smithson, J., Barlow, A., Hunter, R. and Ewing, J. (2015), The 'child's best interests' as an argumentative resource in family mediation sessions. *Discourse Studies* 17/5: 1-15.