

Impact case study (REF3)

Institution: University of Leicester		
Unit of Assessment: 18: Law		
Title of case study: Promoting Alternative Dispute Resolution within Civil Procedure in England and Wales		
Period when the underpinning research was undertaken: 2013 – ongoing		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Masood Ahmed	Role(s) (e.g. job title): Associate Professor	Period(s) employed by submitting HEI: 2013 - present
Period when the claimed impact occurred: 2013 – 2020		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>Ahmed's research and expertise led to a central role in reforms in the justice system in England and Wales promoting alternative dispute resolution (ADR) in civil procedure. His research concerning whether ADR was obligatory led to his involvement in changes to the General Pre-action Protocol, and the drafting of the Media and Communications Pre-action Protocol. His assessment of the Professional Negligence Adjudication Scheme led to changes to the corresponding Guidance and Pre-action Protocol aimed at the promotion of ADR. His advocacy of mediation led to his membership of the Online Civil Money Claims sub-committee, with a particular responsibility to promote mediation within the online courts scheme. Together, these changes have promoted the use of mediation in civil claims to the benefits of all parties.</p>		
2. Underpinning research		
<p>The cost, complexity and delay of legal action are common problems for civil litigants, especially after the availability of civil legal aid was restricted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Ahmed's research focuses upon parties' options at the pre-action stage, with the aim of enhancing the role of alternative dispute resolution (ADR), so that disputes may be resolved in a timely and cost-effective manner. This is of critical importance to those with limited means and/or who are acting without legal representation.</p> <p>Ahmed's research initially examined the extent to which civil litigants are obliged to engage with ADR, i.e., settlement mechanisms such as mediation and adjudication, which are separate from court proceedings. Ahmed's research shows that there were two divergent judicial approaches to mediation in England, Canada and Scotland: while one merely encouraged engagement with mediation by the parties, the other impliedly compelled it through the threat of costs consequences [R2; also R6]. His analysis differed from the conventional view that the civil courts had not made mediation an obligatory step in the civil process. He argued that these divergent approaches sent out contradictory messages to lawyers and litigants and recommended formal recognition that the courts have the power to compel parties to attempt mediation and other forms of ADR, and to use cost sanctions where parties refuse to do so [R1, R2, R3].</p> <p>In his research, Ahmed went on to examine the place of ADR within the Pre-action Protocols which are annexed to the Civil Procedure Rules for England and Wales [R1, see also R3]. These Protocols indicate the steps normally expected of civil parties before commencing proceedings, with parties required to comply either with a specific Protocol covering the given practice area (e.g. personal injury claims) or else the General Pre-action Protocol. In a report published in 2010, entitled Reform of Civil Litigation Costs: Final Report, Lord Justice Jackson had proposed a reform of the General Pre-action Protocol to state simply that "In all areas of litigation to which no specific protocol applies there shall be appropriate pre-action correspondence and exchange of information." Ahmed's research [R3] led him to argue that such an approach would insufficiently promote ADR, especially for litigants in person. He argued for an alternative approach to reform, with the following elements: promotion of early settlement through ADR; a concise procedural</p>		

framework for the early exchange of key documents; an obligation on the parties to avoid incurring disproportionate costs; an obligation on the parties to narrow the issues between them, in order to facilitate settlement and to promote efficient case management.

In 2016-2017, Ahmed assessed a pilot of the Professional Negligence Adjudication Scheme, linked to his membership of the ad hoc working group on the Scheme [E5], (discussed in section 4, below). Separately, he published an account of the development of the Scheme [R5]. This set out the key finding of his research that there was confusion among legal professionals as to whether the Scheme was obligatory or not. Consistent with his earlier research on implied compulsory mediation, Ahmed argued for clarity on that point, and for the use of cost sanctions by the courts to encourage parties to engage positively with the Scheme.

Ahmed's research also addressed the provision of information to self-represented parties at the pre-action stage as to the potential effectiveness of ADR in resolving disputes [R3]. That led him to make recommendations concerning the place of ADR within the online courts scheme: the provision of information concerning ADR at an early stage, and a pre-action procedural framework which encouraged co-operation and settlement [R4].

3. References to the research

[R1] Masood Ahmed 'An Alternative Approach to Repealing the General Pre-action Protocol' (2013) 32(2) Civil Justice Quarterly 257-274.

[R2] Masood Ahmed (with Barbara Billingsley), 'Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada' (2016) 45(2) Common Law World Review 186-213.

[R3] Masood Ahmed 'An investigation into the nature and role of non-settled ADR in the English civil justice system' (2017) 7(2) International Journal of Procedural Law 216-249

[R4] Masood Ahmed 'A Critical View of Stage 1 of the Online Court' (2017) 36(1) Civil Justice Quarterly 12-22

[R5] Masood Ahmed 'A Novel ADR Procedure for Professional Negligence Disputes' (2019) 35(1) Journal of Professional Negligence 54-70

[R6] Masood Ahmed 'Critical Reflections on the Proposal for a Mediation Act for Scotland' (2020) 83(3) Modern Law Review 614-636

4. Details of the impact

Ahmed's research and proposals concerning civil procedure aimed at promoting effective pre-action behaviour, led to his central involvement in four developments in the census period:

- the redrafting of the Practice Direction – Pre-Action Conduct and Protocols (known as 'the General Pre-action Protocol') (2013-2015);
- the drafting of the Media and Communications Pre-action Protocol (2018-2019);
- the redrafting of the Guidance Notes and Pre-action Protocol relating to the Professional Negligence Adjudication Scheme (2014-2018);
- the work of the Online Civil Money Claims Sub-Committee (2017-ongoing).

The General Pre-action Protocol

As a result of the publication of his journal article in March 2013, arguing for an alternative to Lord Justice Jackson's recommendations concerning the General Pre-action Protocol [R1], Ahmed was invited to join the Pre-action Protocol sub-committee responsible for implementing the Jackson

reforms [E1]. His work on this sub-committee lasted from April 2013 to April 2014. At the invitation of the sub-committee, from June 2013, he then took the lead in drafting the paragraphs of the General Pre-action Protocol relating to the exchange of documents, proportionality, ADR, and the narrowing of the issues between the parties [E1]. These proposed changes were then reflected in the revised General Pre-action Protocol published in April 2015 [E2]. The changes were welcomed by Lord Justice Jackson in his book on The Reform of Civil Litigation, published in 2016, where he stated that the revised protocol “gives concise guidance about sensible pre-action correspondence, proportionality, expert evidence, the need to consider ADR and to narrow issues in dispute” [E3, Chapter 8, para. 8-018].

The Media and Communications Pre-action Protocol

Following on from his work on the General Protocol, in November 2018 Ahmed was invited to join a sub-committee concerned with a planned Pre-action Protocol on Media and Communications Claims. From December 2018, he was responsible for drafting key sections of this Pre-action Protocol on behalf of the sub-committee. The Pre-Action Protocol came into effect on 1 October 2019 [E4]. Mr Justice Birss, who chaired the sub-committee, has written that Ahmed’s contribution “helped ensure that the Pre-action Protocol promotes effective pre-action behaviour” [E5]. In his words, “Masood was responsible for drafting significant aspects of the Pre-action Protocol including: the aims and objectives, a statement of what is expected of the parties by the courts; para 3.9 on ADR (in light of recent ADR case law); and introducing a ‘stocktake’ to assist the parties to narrow the issues to assist judicial case management. His work helped ensure that the Pre-action Protocol promotes effective pre-action behaviour.” [E5].

The Professional Negligence Adjudication Scheme

Due to his research on civil procedure, and his work on the General Pre-Action Protocol, in October 2014 Ahmed was appointed to an ad hoc working party concerned with the Professional Negligence Adjudication Scheme. The Scheme is a novel ADR procedure, established in 2018, with the aim of efficient resolution of professional negligence disputes. It is a voluntary process, provided for by amendments to the Professional Negligence Pre-action Protocol of March 2018.

The ad hoc working party was chaired by two High Court judges (Mrs Justice Carr and Mr Justice Fraser), and included representatives of the Ministry of Justice, the Professional Negligence Bar Association, the Professional Negligence Lawyers Association and the Association of British Insurers. Ahmed’s specific remit was to assess a pilot Scheme which was launched in February 2015. Ahmed collated feedback through interviews with claimant and defendant solicitors using the scheme, and with adjudicators participating in it.

The key finding in Ahmed’s report on the pilot was that there was confusion among users as to whether adjudication was compulsory [E6]. In line with his analysis of the question of ‘implied compulsory mediation’ [R2], his report to the working party recommended the amendment of the user Guidance Notes published by the Professional Negligence Bar Association, to clarify that cost sanctions could be imposed if the parties failed to engage with adjudication and other forms of ADR, and that recommendation was accepted by the working party. To give effect to this recommendation, Ahmed then drafted paragraph three of the Guidance Notes, to state that “Although ADR is not compulsory, the court will expect the parties to have considered ADR” and that “A party’s refusal to engage with ADR (including its failure to respond to an invitation to participate in ADR) might be considered unreasonable by the court and could lead to the court ordering that party to pay additional costs” [E7].

Ahmed’s report and the revised Scheme were approved by the judiciary’s Deputy Head of Civil Justice, Lord Justice Coulson, and the Civil Procedure Rule Committee, on the 2nd February 2018. Ahmed’s recommendation is also reflected in paragraphs 6.2(i) and 12.2(d) of the amended version of the Professional Negligence Pre-action Protocol published in May 2018 [E8].

Ahmed's assessment report, and the related changes to the Guidance Notes and Protocol, made a significant difference to the Scheme. In the words of Mrs Justice Carr, co-chair of the working party on the professional negligence adjudication scheme "Masood Ahmed played a central role in the successful development of the Scheme. In the context of his interest in 'implied compulsory mediation', Masood collected data which revealed uncertainty within the profession... He made recommendations to address these areas within the Scheme which were accepted by the Working Party and are now reflected in amendments to the Guidance Notes" [E9]. Similarly, the President of the Professional Negligence Lawyers Association stated that Ahmed's "appointment and contribution has been critical to the impact of the scheme" [E10], and Simon Wilton, another member of the Working Party agreed that "Masood's input and support has been of great assistance...the Scheme as it now stands is much the better as a result." [E11].

The Online Civil Money Claims Scheme

The Online Civil Money Claims Scheme - also known as the online courts project - aims to make justice more accessible, particularly to those who cannot afford representation. Because of his research and expertise on ADR and civil procedure, in March 2017 Ahmed was appointed to the Online Civil Money Claims sub-committee responsible for overseeing the procedural aspects of the scheme. Consistent with his analysis in [R3], Ahmed has advised on the contribution of mediation to the scheme. Ahmed worked with Her Majesty's Courts and Tribunal Service (HMCTS) to design the evaluation criteria for a pilot of mediation within online courts, which commenced in April 2020 and is ongoing as of December 2020. Mr Justice Birss, chair of the sub-committee, has written of Ahmed's role that the scheme "has the potential to revolutionise aspects of civil justice. That includes in particular the mediation aspect. Masood's work in the sub-committee has had and will continue to have a direct effect on civil justice and its future" [E5]. The Online Civil Money Claims service has demonstrated improved resolution speed averaging 5.2 weeks per case as opposed to 13.7 weeks using previous systems [E12]. By May 2020, 137,157 claims had been issued through the system and 343 out-of-court settlements had been reached [E13] and by December 2020 ~90% of all money claims up to the value of £100,000 were made using the online service [E14].

5. Sources to corroborate the impact

[E1] Testimonial: Qasim Nawaz, former member of the Jackson Pre-action Protocol Sub-committee, email dated 20 December 2020 (attached)

[E2] Ministry of Justice, Practice Direction – Pre-action Conduct and Protocols (April 2015) http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct

[E3] Lord Justice Jackson The Reform of Civil Litigation Thomson Reuters (London) Reference to the amended Practice Direction – Pre-action Conduct and Protocols ('PDPAC') at Chapter 8, para. 8-018 (attached)

[E4] Ministry of Justice, Pre-action Protocol for Media and Communications Claims (1 October 2019) https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def

[E5] Testimonial: Mr Justice Birss, High Court Judge, Chair of the OCMC Sub-committee and previously of the Media and Communications Pre-action Protocol Sub-committee, letter dated 19 June 2020 (attached)

[E6] Professional Negligence Adjudication Pilot Group, Summary Sheet for Lord Justice Coulson (8 December 2017), including Masood Ahmed, Preliminary Review of the Professional Negligence Adjudication Pilot Scheme (28 November 2017) (The whole text attached.)

[E7] Testimonial: Mrs Justice Carr DBE, High Court Judge, Queen's Bench Division, Head of the Adjudication Scheme Working Party, email dated 17 March 2020 (attached)

[E8] Professional Negligence Bar Association - Professional Negligence Adjudication Scheme Rules and Guidance Notes <https://pnba.co.uk/pnba-adjudication-scheme/> (5 February 2019)

[E9] Pre-Action Protocol for Professional Negligence) https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_neg#Letter (May 2018)

[E10] Testimonial: Katy Manley, President of the Professional Negligence Lawyers Association, email of 21 February 2020 (attached)

[E11] Testimonial: Simon Wilton, barrister and adjudicator, Head of Professional Negligence at Hailsham Chambers (London), member of the Professional Negligence Adjudication Scheme Working Party, Professional Negligence Bar Association, letter dated 10 March 2020 (attached)

[E12] HMCTS [Annual Report 2019](#)

[E13] Law Gazette article '[Shock to the System](#)' July 2020

[E14] Ministry of Justice '[Proposal for Reform: Alignment of Fees for Online and Paper Civil Money and Possession Claims](#)' December 2020