

**ASSESSING THE EFFECTS OF CASE
CHARACTERISTICS AND SETTLEMENT
FORUM ON DISPUTE OUTCOMES
AND COMPLIANCE**

NEIL VIDMAR

McEwen and Maiman (1986) have disagreed with my claim that the case characteristic of admitted liability explains more variability in dispute outcome and compliance than whether the case was resolved through a mediation or adjudication forum. Those authors re-analyzed some of my data from an Ontario small claims court and concluded that forum type is the stronger variable. I take issue with them on a number of conceptual and methodological points. In my own reanalysis of the Ontario data I am able to demonstrate statistically that admitted liability is the stronger predictor of outcomes. I also discuss why this should be so and raise some questions about compliance. Whether we can generalize to McEwen and Maiman's data from Maine courts is a matter of speculation, but I am inclined to infer that we can. Our debate raises important issues in the assessment of dispute resolution.

I. INTRODUCTION

In a study of small claims disputes in Maine, McEwen and Maiman (1981; 1984) concluded that in comparison to adjudication, mediation is more likely to produce accommodative rather than binary outcomes and to produce greater degrees of compliance. After conducting a study of small claims disputes in Ontario (Vidmar, 1984; 1985), I argued that a case characteristic, namely whether the defendant admits partial liability, is more important than effects produced by the type of procedural forum. McEwen and Maiman recently took a different look at my data. Their reanalysis led them to conclude that "forum type remains a stronger predictor of case outcome and compliance than any case characteristic" (1986: 439).

Research for this paper was supported by grants from the Donner Canadian Foundation and the Social Sciences and Humanities Research Council of Canada. I am indebted to Michael Atkinson and Regina Schuller for their help on the statistical analysis and to Richard Lempert and Craig McEwen for their comments on an earlier draft of this paper.

LAW & SOCIETY REVIEW, Volume 21, Number 1 (1987)

I disagree with their conclusion, particularly with respect to outcomes. I will support my alternative position with a statistical analysis as well as by some conceptual and theoretical arguments. Before turning to this task, however, I should observe that while our debate is a friendly one and that the disagreement is only over the *relative* effects of case characteristics and forums, it raises important issues that transcend the confines of our particular two studies.

II. DISPUTE OUTCOMES

My most vigorous objection to McEwen and Maiman's reanalysis of my data is their failure to include those cases that were settled after the mediation hearing¹ along with those that were settled in the hearing itself.² I made the distinction between cases settled in the hearing and those settled afterward to further elucidate some of the dynamics of dispute settlement. Nevertheless, the after-hearing settlements almost invariably closely followed resolution suggestions made in the hearing, and in post-trial interviews litigants told us that the hearing was responsible for the settlement.³ In short, both in- and after-hearing settlements should be ascribed to mediation and thus should be combined for any comparison with adjudication.

Table 1 reports the results of my recalculations on outcomes using approximately the same format as that presented by McEwen and Maiman (1986: 442, Table 1). For the reader's convenience the data for the in-hearing settlements only, as calculated by McEwen and Maiman, are presented in parentheses. First, consider outcome computed with reference to the total claim, a criterion that I argued is inappropriate but that nevertheless allows comparison with McEwen and Maiman's (1981) data from Maine. While combining in- and after-hearing medi-

¹ In the Ontario court the mandatory pretrial hearing is actually called a "resolution hearing" and the neutral third party is called a "referee." Nevertheless, this fits a definition of mediation about which McEwen and Maiman and I agree; thus I will use the label "mediation" throughout the rest of this commentary.

² Because Ontario cases do not proceed immediately from mediation to adjudication, as they do in Maine, there is flexibility as to the timing of settlement. Consequently, one party often opts *not* to settle immediately. Sometimes this is because the party attempts to save face by not conceding in person to her adversary that the fight is lost. Other times it is because one or both litigants, or their legal representatives, must receive authorization from someone not at the hearing before a settlement can be officially made.

³ This point was made in one of the original drafts of the 1984 manuscript but was unintentionally omitted in a subsequent revision. However, I did make the point in a subsequent article (Vidmar, 1985: 135-137).

Table 1. Percentage of Binary and Accommodative Outcomes As a Function of Liability Characteristics and Settlement Forum

	Ontario		Maine	
	Mediation	Adjudication	Mediation	Adjudication
Outcome: Total claim^a				
Binary	N = 89 33%	(41) (27%)	N = 73 69%	N = 232 66%
Accommodative	67%	(73%)	31%	34%
Outcome: Amount disputed^b				
A. All cases				
Binary	N = 89 53%	(41) (37%)	N = 73 75%	
Accommodative	47%	(63%)	25%	
B. Partial liability cases				
Binary	N = 50 36%	(29) (27%)	N = 23 69%	
Accommodative	64%	(73%)	31%	
C. No liability cases				
Binary	N = 39 74%	(12) (58%)	N = 50 78%	
Accommodative	26%	(42%)	22%	

^a Calculated with reference to the total claim.

^b Calculated with reference to the amount actually in dispute (see Vidmar, 1984: 516–522).

ation settlements slightly increases the number of binary outcomes ascribed to mediation over those produced by in-hearing settlements alone (i.e., 33% versus 27%), we see that the data sets for Maine and Ontario are still roughly comparable. This comparison is useful to the extent that we might wish to speculate that the conclusions that may be reached from the more detailed Ontario analyses might also apply to those from the Maine study.

The remainder of Table 1 contains the data from Ontario bearing on the conceptually appropriate criterion, namely outcomes computed with reference to the amount of the claim that is actually in dispute. These figures paint quite a different picture than the reanalysis presented by McEwen and Maiman (1986). Considering all cases combined (Variable A), we see that mediation in fact produced slightly more binary than accommodative outcomes (53% versus 47%). To be sure adjudication produced even more binary outcomes (75%), but this fact does not detract from the conclusion that the majority of mediated settlements were binary.

Variables B and C in Table 1 disaggregate the cases according to whether they involved a Partial or a No Liability dispute. We see that for Variable B (Partial Liability cases), mediation produced more accommodative (64%) than binary (36%) outcomes, whereas adjudication produced more binary (69%) than accommodative outcomes (31%). The data for Variable C show that in roughly three out of four No Liability cases the outcome was binary rather than accommodative for both mediation and adjudication.

The data in Table 1, I think, make apparent the binary nature of many mediated settlements, but Variables B and C do suggest that to some extent forum type matters. Thus we are still left with the disagreement between McEwen and Maiman and myself over the relative contributions of case characteristics and forum. A statistical analysis, however, can shed light on the issue. Think of the problem as involving three questions: 1. How strong is the association between forum type and outcome when we ignore case liability characteristics? 2. How strong is the association between liability characteristics and outcome when we ignore forum type? 3. What is the combined, or interaction, effect of liability characteristics and forum on outcomes? By comparing the answers to these questions we can determine matters of relative contribution. Since the data are nonparametric and since we wish to test for an interaction effect, the appropriate method of analysis is by means of log linear modeling for categorical data (see SAS Institute, Inc.,

1985). This analysis yields a Chi-square statistic from which we can calculate w , a measure of strength of association between variables (see Cohen, 1977).⁴ First, consider the effect of forum type. The resultant Chi-square is 4.73, which, with one degree of freedom, is significant at the .03 level of probability. The w , or measure of strength of association, is .17. Forum type therefore has a statistically significant impact on outcomes. Next, consider the impact of case characteristics. The resultant Chi-square is 7.96, which, with one degree of freedom, is significant at the .005 level of probability. The strength of association, as determined by w , is .22. Liability characteristics thus not only have a statistically significant impact on outcomes but the impact is larger than that produced by forum type! The interaction effect of forum and liability is not statistically significant, although there is a trend: The Chi-square value is 2.66, which reaches the .10 level of probability.

The data in Table 1 and the statistical analysis indicate that both forum type and case characteristics have independent effects on outcomes. They also suggest that I was extravagant in my original claim that “case characteristics dwarf procedures in their importance for outcomes” (Vidmar, 1984: 548), but they also clearly refute McEwen and Maiman’s counterclaim that “forum type remains a stronger predictor of case outcome . . . than any case characteristics” (1986: 439). Admitted liability effects may not dwarf forum effects, but they are demonstrably larger.

The above discussion addresses the issue of *what* the data show. Now consider the issue of *why* they show what they show. Close inspection of the Partial Liability cases indicates that in many of them the legal issues were binary in nature.⁵ For example, in a case involving two small businessmen the defendant claimed that the plaintiff had not delivered all of the order and was willing to pay for only what he believed had been received; however, at the hearing the plaintiff produced a receipt signed by one of the defendant’s employees showing that the allegedly missing materials had indeed been delivered in a later shipment. In another case a claim was made regarding an automobile accident in a private parking lot. The defendant agreed to pay three-fourths of the damages but as-

⁴ Tests of the main effects of the two factors by ordinary Chi-square analyses provide similar results. For forum type the Chi-square value is 8.74, $p < .01$, and the w is .23. For case liability the Chi-square value is 15.39, $p < .001$, and the w is .31.

⁵ I actually made this point in a couple of sentences in my original article (Vidmar, 1984: 541–542).

serted that the plaintiff's contributory negligence required that she assume the burden of the remaining one-fourth; thus the dispute involved the issue of whether the rule of contributory negligence applied or whether it did not. Both of these cases, and many others, were correctly classified as Partial Liability cases in that the defendant acknowledged an obligation to pay part of the claim. However, the legal issue in contention was binary: In the first case it was whether the additional materials had been delivered and in the second it was whether a rule of contributory negligence applied. In each instance it is clear that if the appropriate evidence can be produced (in the business case) or the appropriate law determined (in the automobile case), in legal terms one party will be totally in the right. In response to McEwen and Maiman's commentary I have gone back to my files in an attempt to discover how many times the issue in Partial Liability cases involved an "all-or-none" situation; I find that this was true in 67 percent of the cases. Thus binary issues are pervasive in Partial as well as No Liability cases. This insight can be pushed further.

In their analysis of the work of Gluckman and others, Starr and Yngvesson (1975) argue that even in societies in which the cultural ideal and procedural processes of dispute resolution forums are oriented toward accommodation, in the majority of cases the outcomes of the specific issues in dispute are likely to be binary. Recently, Lempert and Sanders (1986) have pushed Starr and Yngvesson's analysis further. Their discussion suggests that binary outcomes are associated with one party being more in the right than the other, with disputants who are strangers or who are involved in one-time uniplex relationships, and with a legal framework that is oriented toward a narrow *res gestae* (i.e., a narrow conception of the matter in dispute). In such instances accommodative outcomes are unlikely except when the factual and legal issues are complex or muddled or when the transaction costs for one or both parties are large relative to the costs of litigation.

The vast majority of the cases in the Ontario court fit the conditions that, according to Lempert and Sanders, should be conducive to binary outcomes. Some 88 percent involve strangers or persons in a uniplex relationship. The parties themselves define the *res gestae* very narrowly and in all-or-none terms about 85 percent of the time.⁶ Under the *res gestae* there

⁶ This estimate is derived in the following manner: Of the total 162 cases in Table 1, 89 were No Liability cases and thus conceived in binary terms; of the 73 Partial Liability cases, 49, or 67%, involved a binary issue, as

is often a clear legal answer to the dispute. In many instances the mediation session makes it clear to the mediator that an accommodative outcome is inappropriate, and this conclusion is then conveyed to the parties. In light of the new information, even the "losing" party sees that accommodation is inappropriate, or at least not worth pursuing through adjudication when the outcome is virtually preordained in favor of the other party. In brief the finding that in 53 percent of the mediated settlements one party received everything should not be surprising, for case characteristics, the evidence or law adduced in the hearing, and basic considerations of justice combine to promote binary outcomes.

This is not to say that forum type has no effect on case outcomes. Rather, the statistical analysis presented above suggests that forum has an effect on outcomes that is independent of case characteristics. Indeed, in a number of instances the mediator was able to fashion an accommodative outcome despite the fact that the parties had defined the issues in binary terms. An examination of the content of the resolution hearings and post-settlement interviews with litigants (Vidmar, 1985; 1987) suggests that accommodation was sometimes the result of coercion or the unwillingness of one party to incur further transaction costs by going to court, but that there were other instances, particularly when case characteristics made it conducive, in which the mediator managed to expand the *res gestae* sufficiently to be able to fashion a compromise. This was true for cases settled both in and after the hearing. The conceptual and methodological conclusions that I draw from all this is that we must examine the process by which the settlement is fashioned to understand why outcomes occur. Further, while forum type appears to have an effect on process, case characteristics have an important influence on the direction of that process.

III. COMPLIANCE

I am not so definitive about the effects of case characteristics and forum type on compliance, but there are several matters that should be discussed. The first is that the data sets used by both me and McEwen and Maiman are inadequate to determine whether greater compliance in mediated cases, when it occurs, is a result of consensual processes arising from case characteristics or from the forum itself. The Ontario data set is too small for statistical analysis, particularly when coerced and

noted two paragraphs above; combining 89 and 49 yields a figure of 138, which, divided by the total of 162, results in a figure of 85%.

voluntary compliance are disaggregated. The Maine data, on the other hand, do not distinguish between types of liability. However, given the inherent plausibility of my hypothesis that a prehearing sense of obligation might explain compliance and the demonstrated association between liability characteristics and settlement, it remains, in my view, a very plausible alternative explanation.

The second matter involves McEwen and Maiman's (1984) report that compliance is greater with "consensual" decisions than with authoritative decisions even in cases in which payment arrangements were not made. In systematic observations of 204 mediated hearings I and the members of my research team uncovered the fact that defendants owing money were given subtle and not-so-subtle hints about the need for compliance and the possible sanctions if compliance was not forthcoming. This occurred even when specific payment arrangements were not made by the referee. Interestingly, these kinds of pressures were more likely to be exerted in Partial Liability cases than in No Liability cases (see Vidmar, 1984: 541; 1987).⁷ In contrast, observations of 73 trials yielded not a single instance of discussions of payment; judges dealt only with liability and damage assessment. Thus while I cannot rule out the possibility that defendants owing money derived a sense of obligation through consensual processes, there is evidence suggesting that in mediation obligations were emphasized in an authoritative, coercive way while in adjudication payment obligations were completely ignored.⁸

This raises the third matter, namely what one wants to consider as "consensual" processes. McEwen and Maiman (1986) argue that if disputing processes differ and produce differing effects on compliance, this finding tells us only how these processes differ, not that process is unimportant. I submit that if the mediation process that results in compliance is authoritative and coercive we should not ascribe consensual

⁷ I suggest that this may have occurred because the mediators are sensitive to case characteristics and seize upon the opportunity to apply such pressure.

⁸ Robert L. Kidder, Editor of the *Law & Society Review*, raised a related interpretation that might occur to other readers: Even supposing that mediated cases end in binary settlements, the forum effect could still be operating to make the loser feel better about the outcome and thus more willing to comply. I did in fact conduct a number of correlations between measures of perceived fairness of the hearing and the trial (if the case went to trial) and compliance. I found no significant correlations and the results were never reported. My data are not definitive on this matter, however, because of the relatively small sample sizes, particularly when voluntary and coerced compliance (Vidmar, 1984: 544) are disaggregated and treated as a separate factor in the analyses.

characteristics to it. The methodological lesson is that we need to examine each mediation (or adjudication) session to determine what occurred; only then can we assess the relative contributions of coercive versus consensual processes.

In summary, an argument can be made that the apparently greater compliance associated with mediated settlements might be ascribed to a preexisting sense of obligation or to coercive pressures within the hearing, although consensual processes may also play a part. Possibly some combination of all of the above explains compliance.

IV. CONCLUSION

Working from the Ontario data I draw a different conclusion than do McEwen and Maiman with respect to the relative contributions of forum and case liability characteristics. Whether my findings can be generalized to the Maine data is a matter of speculation. There are a number of substantive and procedural differences between the two settings. On the other hand we do concur that there are many similarities in our data sets. There are also good theoretical reasons for predicting that case characteristics virtually compel binary outcomes in many disputes. I am tempted to infer that if McEwen and Maiman's cases had been categorized according to liability characteristics and if the processes of settlement had been more systematically scrutinized, the effects of case characteristics would have loomed much larger in their results.

McEwen and Maiman and I agree, I think, that both forum type and case characteristics play their part in contributing to dispute outcomes and compliance, so the real issue for future research should be how and when these factors combine with one another. The methodological message of my reply to the reanalysis by McEwen and Maiman is that just because a procedure is labeled as mediation or adjudication that does not necessarily make it so. We must examine the process of resolution and do so on a case-by-case basis. A satisfactory resolution of the issues raised in our debate will require some new data sets.

REFERENCES

- COHEN, J. (1977) *Statistical Power Analysis for the Behavioral Sciences*, Rev. ed. New York: Academic Press.
- LEMPERT, R., and J. SANDERS (1986) *An Invitation to Law and Social Science*. New York: Longman.
- MCEWEN, C., and R. MAIMAN (1986) "The Relative Significance of Disput-

- ing Forum and Dispute Characteristics for Outcome and Compliance," 20 *Law & Society Review* 439.
- (1984) "Mediation in Small Claims Court: Achieving Compliance through Consent," 18 *Law & Society Review* 11.
- (1981) "Small Claims Mediation in Maine: An Empirical Assessment," 33 *Maine Law Review* 237.
- SAS INSTITUTE, INC. (1985) *The Users' Guide: Statistics*. Cary, NC: SAS Institute.
- STARR, J., and B. YNGVESSON (1975) "Scarcity and Disputing: Zeroing-in on Compromise Decisions," 2 *American Ethologist* 553.
- VIDMAR, N. (1987) "The Mediation of Small Claims Court Disputes: A Critical Perspective," in R. Lewicki, B. Sheppard, and M. Bazerman (eds.), *Research on Negotiation in Organizations*, Vol. 1. Greenwich, CN: JAI Press.
- (1985) "An Assessment of Mediation in a Small Claims Court," 41 *Journal of Social Issues* 127.
- (1984) "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation," 18 *Law & Society Review* 515.