THE CENTRAL LONDON COUNTY COURT
PILOT MEDIATION SCHEME

EVALUATON REPORT

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The Research Unit, Department for Constitutional Affairs, was formed in April 1996. Its aim is to develop and focus the use of research so that it informs the various stages of policy-making and the implementation and evaluation of policy.

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Disclaimer

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EXECUTIVE SUMMARY

In 1996 Judges in the Central London County Court (CLCC) established a pilot mediation scheme for non-family civil disputes with a value over £3,000. The scheme's objective was to offer virtually cost-free court-annexed mediation to disputing parties at an early stage in litigation, involving a three hour session with a trained mediator assisting parties to reach a settlement, with or without legal representation. The scheme's purpose was to promote swift dispute settlement and a reduction in legal costs through an informal process that parties might prefer to court proceedings. It was also thought that mediation would achieve savings in Legal Aid.

This report is an evaluation of the CLCC mediation scheme based on:

- data collected from hundreds of court files of mediated and non-mediated cases;
- interviews with litigants, solicitors and mediators;
- observation of mediation sessions.

The data collection system for the evaluation has been in place since the beginning of the scheme and has continued throughout its two-year life. The evaluation offers an assessment of:

- the demand for mediation and causes of the prevalent rejection of mediation offers;
- the kinds of cases for which mediation is an appropriate form of dispute resolution;
- the extent to which mediation can promote settlement in civil cases;
- the extend to which mediation can reduce the time taken to settle civil cases and reduce the cost of resolving disputes;
- the extend to which mediation succeeds in achieving acceptable and lasting settlement of disputes;
- the extend to which mediation is perceived by parties and their representatives as a satisfactory method of dispute resolution.

Demand

The rate at which both parties accepted mediation offers remained at about *five percent* throughout the life of the scheme and despite vigorous attempts to stimulate demand. Demand was virtually non-existent among personal injury cases, although these comprised almost half of the cases offered mediation. Contract, goods/services disputes and debt cases had the highest levels of demand although the joint acceptance rate was less than ten percent. The joint demand for mediation was *lowest* when both parties had legal representation. Acceptance of mediation was highest among disputes between businesses. Interviews with solicitors rejecting mediation revealed:

- lack of experience and widespread ignorance of mediation among the legal profession;
- apprehension about showing weakness through accepting mediation within the context of traditional adversarial litigation;
- evidence of litigant resistance to the idea of compromise, particularly in the early stages of litigation.

Outcomes

The majority (62%) of mediated cases settled *at the mediation appointment* and this settlement rate remained constant between case types, indicating that mediation can be used across a wide spectrum of cases. Other findings on outcome were that:

- where the plaintiff had legal aid the settlement rate was lower than average;
- the settlement rate at mediation was highest (72%) when neither party had legal representation at the mediation;
- mediated cases had *a much higher settlement rate overall than non-mediated cases,* whether or not settlement occurred at the mediation appointment, supporting the contention that mediation promotes settlement even after an unsettled mediation.

Plaintiffs settling at mediation appointments appear to be prepared to discount their claims heavily in order to achieve settlement, with average levels of settlement in mediated claims being about £2,000 *lower* than in non-mediated settlements.

Time and cost

Even on a very *conservative* estimate, mediated settlements occurred *several months earlier* than among non-mediated cases. Most parties whose cases settled at mediation believed that the mediation had saved time, although those whose cases did *not* settle often felt that the mediation had involved them in *extra* time. Solicitors felt strongly that mediation saved time. There was much more equivocation on the question of cost savings. Only half the plaintiffs settling at mediation believed they had *saved* costs. Solicitors tended to be more likely to think that costs had been saved. There was a common view that failure to settle at the mediation appointment led to *increased* costs.

Evaluation of mediators and mediation process

The overwhelming motivation for mediating was to save time and legal costs. Few parties or solicitors had any experience of mediation or any knowledge of the process. The vast majority of litigants and solicitors made positive assessments of the mediation process. Confidence in mediators was generally high, although less so when cases failed to settle.

The characteristics most valued by litigants were:
- the opportunity to state their grievance and focus on the issues in the disputes;
- fully to participate in a process relatively free from legal technicality’
- the qualities of the mediators.

Solicitors particularly welcomed:
- the speed of the process;
- the opportunity to review the case with a neutral party;
- the concentration on commercial realities;
- the opportunity to repair damaged business relationships.

Most mediated settlements were perceived by litigants to have been fair, although fairness was often assessed against the cost and time of continued litigation.

Negative assessments by parties centred on:
- deficiencies in mediator's knowledge of the law and issues in dispute;
- undue pressure to settle and bullying by mediators;
- mediators being *insufficiently* directive.

Mediators

Mediators in civil disputes require a wide repertoire of interpersonal and professional skills as well as sound legal knowledge. Flexibility and adaptability are crucial qualities. A 'counselling' or 'therapeutic' approach, stressing communication and reconciliation, seems less well-suited to non-family civil disputes than a more directive, interventionist approach emphasising the value of settlement. There was great variation in the skill displayed by mediators and many were very inexperienced. Some of the most successful mediators were barristers, many of whom were prepared to be explicitly evaluating during the course of mediations. Mediators exert considerable power in mediation, controlling the flow of information, the use of evidence and the architecture of settlements. There was no consistent view among mediators on the question of ethics or the nature of the mediator's responsibilities in mediation.

Conclusions

- Mediation is capable of promoting settlement in a wide range of civil cases when parties have volunteered to accept mediation.
- Personal injury cases are amenable to mediation even when both liability and quantum are in issue.
- Mediation offers a process that parties to civil disputes on the whole find satisfying.
- Conflict can be reduced and settlements reached that parties find acceptable.
- Mediation can promote and speed-up settlement.
- It is unclear to what extent mediation saves costs and unsuccessful mediation can increase costs.
- Mediation can magnify power imbalances and works best in civil disputes when there is some rough equality between the parties or in representation.
- Mediators require special personal qualities, good training and experience.
- Demand for mediation is very weak and the legal profession has a crucial role in influencing demand.

Issues requiring attention are:
- The impact on weak demand of an increase in mediation fees to an economic level.
- Mediation procedures, especially in relation to the use of documentary evidence.
- Training of mediators.
- Quality control of mediators.
- Accountability and ethics of mediators.

Mediation currently operates in the shadow of normal litigation procedures and the disadvantages of those procedures provide much of the incentive for parties to settle during mediation. Procedural changes could strengthen or weaken the existing low-level of demand. Education of the profession and a change of litigation culture could also strengthen demand. In seeking to stimulate some enthusiasm among the grass roots of the profession, it is important for mediation proponents to focus on the value that mediation adds to normal settlement negotiations between solicitors, rather than simply setting-up mediation in opposition to trial. The experience of the profession is that most cases are not, in the end, tried. Mediation *can* add value to the normal claims settlement process in civil disputes. It offers a cathartic pseudo 'day in court' to parties; it gets cards on the table and all the parties around the table; and, with the help of a skilled mediator, it introduces some authoritative objectivity into the assessment of the strengths and weaknesses of the parties' claims.

1. INTRODUCTION

1.1 Alternative Dispute Resolution and Mediation in Civil Cases

1.1.1 Alternative Dispute Resolution is an umbrella term which is generally applied to a range of techniques for resolving disputes other than by means of traditional court adjudication. The term "alternative" in this context is somewhat misleading, since courts do not "resolve" disputes, but rather deliver binding judgments in win/lose situations. Moreover, the use of the word "alternative" in pro-ADR discourse is also somewhat deceptive since the benefits of ADR are generally set in opposition to characteristics of court adjudication when, in civil cases at least, a very high proportion of cases settle out of court, but within the context of court litigation procedures. The range of dispute-resolution procedures that are variously included under the umbrella of ADR are processes such as mediation, early neutral evaluation, arbitration, private judging, neutral expert fact-finding, med-arb, mini-trial and ombudsmen.

1.2.2 Mediation, which is the subject of this evaluation, can itself take different forms. The basic definition of mediation is that of a process in which a neutral third party assists disputing parties to reach a consensual solution to their dispute. This characteristic distinguishes mediation from partisan negotiations carried out between lawyers on behalf of their clients. In classic 'facilitative' mediation, the mediator has no authority to impose a solution on the parties and the aim of the mediation is to achieve a settlement, or at least a clarification, of the issues in dispute. Mediation is said to be distinct from litigation processes by virtue of its focus on problem-solving, rather than an emphasis on strict legal rights. Mediation is often said to be capable of producing 'win/win' situations rather than the win/lose situations characteristic of court adjudication.

1.1.3 The frequently asserts advantages of mediation over court adjudication are:

- that it is a flexible procedure applicable to a wide range of disputes;
- it is capable of achieving creative solutions to disputes that would not be available in court adjudication;

- that is it capable of reducing conflict;
- that it can achieve a reconciliation between parties;
- that it is less stressful of parties than court procedures;
- and that it can save legal and other costs and lead to speedier settlements than would be achieved through litigation procedures.

1.1.4 Although mediation is not a contemporary phenomenon, there has been a growth in its use in the United States since the 1960s. Over the last decade there has been increasing interest in many jurisdictions in the potential of ADR for cutting court caseloads and avoiding the perceived disadvantages of traditional civil litigation. In this country, the discussion surrounding the Woolf Report on Access to Justice and concern about delay and cost in the civil courts has created more receptive conditions for the promotional activities of ADR providers. In a climate of apparent consensus about the need to "fix" the civil justice system, a number of special local ADR initiatives have been established for civil cases, with varying degrees of success. A pilot civil mediation scheme was established in Bristol in 1994, but failed for want of interest, although it has recently been re-activated. A pilot mediation scheme for medical negligence cases was established two years ago by the Department of Health, but has also been dogged by lack of take-up (about eleven cases have been mediated in two years). The Commercial Court has been issuing ADR orders at the interlocutory stage in appropriate commercial cases in recent years and although anecdotal evidence suggests that these orders have been successful in preventing cases returning to the Commercial Court to continue with litigation, the number of orders issued is under 100. The Court of Appeal has recently launched a pilot ADR scheme and about ten cases have been mediated to date, of which about half were settled as a result of the mediation. The Patents County Court has also established a mediation scheme, but that too has suffered from lack of interest.

1.1.5 It was within this general context of interest in the possibilities of ADR (and in spite of weak demand) that Judges at the Central London County Court decided to take the initiative in establishing a pilot mediation scheme for ordinary civil cases in that court.

1.2 The Central London County Court Mediation Scheme

1.2.1 In January 1996 Judges of the Central London County Court (CLCC), with the agreement of the Lord Chancellor, decided to devise and implement a pilot mediation scheme within the CLCC which would initially run for up to one year. The scheme was later extended for a further twelve months.

1.2.2 The original impetus for the pilot scheme was concern about the lack of proportion between legal costs and amount recovered in low value claims and a perception of increasing numbers of litigants in person appearing in the county courts. It was believed that the introduction of mediation in the CLCC would result in reduced legal costs to litigants, swifter resolution of disputes and a dispute resolution process that parties would find preferable to court proceedings. It was also presumed that if mediated cases could be settled at an early stage in the life of the case, this would result in savings to the Legal Aid Board and, from the court point of view, reduce the number of cases requiring trial and associate court costs.

1.2.3 The scheme was designed with the help of an Advisory Committee comprising mediation experts, representatives of the Lord Chancellor's Department and Law Society, court administrators, a lay representative and the researcher.

1.2.4 The basic idea of the CLCC mediation scheme was to offer to litigating parties, at an early stage in the litigation, the opportunity of having their case mediated at the court by a trained mediator in an attempt to settle the dispute. The scheme has always been entirely *voluntary* and mediations will only take place if both parties to the dispute accept the court's mediation offer.

1.2.5 In order to provide mediation at a low cost to litigating parties, the CLCC secured the co-operation of five leading mediation organisations who agreed to provide trained mediators to conduct the CLCC mediations for a token fee of £50 per case to cover expenses. Although many of the mediators were lawyers, some were other professionals such as surveyors, and most of the mediators from one organisation were non-lawyers with a background in counselling, family and neighbourhood mediation.

1.3 The administration of the scheme

1.3.1 The day-day-day administration of the mediation scheme has been carried out by specially trained court staff. Most money claims entering the court with a claim value exceeding £3,000[1], in which proceedings have been issued and a defence entered, are sent a letter by the court's mediation service offering the opportunity to come to the court to have the case mediated for a fee of £25 per party. The letter is sent to the disputing parties' solicitors, or to the parties directly if they are not represented. Certain categories of case have been excluded from the scheme, for example cases involving an application for an injunction, cases involving minors, and cases where the estate of a deceased was being sued. As a result of the exclusion of these groups of cases, all files had to be read by court staff to check that they were 'in-scope' before mediation offer letters were sent out by the court.

1.3.2 The mediation offer letter explains that the court is operating an experimental scheme to try and assist parties to settle their dispute. The letter is accompanied by information about mediation and invites legal representatives to discuss the offer with their client and inform the court within 14 days whether or not they propose to take up the offer of mediation. The CLCC operates an automatic timetable and the parties are informed in their mediation invitation letter that if they accept the mediation offer, the court timetable will be suspended until the date of mediation. If the mediation fails to settle, the timetable will again begin to run.

1.3.3 If a rejection is received from either party, the court will write to both parties saying that the mediation cannot go ahead since one party has rejected the offer. Only where the offer has been accepted by *both parties* can a mediation take place. The scheme is entirely voluntary and no pressure is brought to bear on the parties or their representatives to accept the offer of mediation, although they are asked to give reasons for rejecting the offer on the reply form which is to be returned to the court.

1.3.4 Once the offer of mediation has been accepted by both parties, the mediation staff at the court set about arranging a mutually convenient date for mediation and appoint a

[1] The £3,000 lower limit was adopted in order to avoid overlap with the small claims jurisdiction.

mediator from lists of names submitted by mediation organisations, or invite one of the mediation groups involved in the scheme to nominate a mediator. All mediations take place at the CLCC between 4.30 p.m. and 7.30 p.m. In the early days of the scheme, some of the mediations were allowed to run over the 7.30 deadline, but as mediations became more frequent and the security staff felt the pressure, the deadline was enforced more rigorously by the court, to the extent of turning out the lights soon after 7.30 p.m.

1.3.5 The mediations have been held in meetings rooms in the basement of the court building. There are sufficient rooms to hold two (and occasionally three) mediations on the same day, although in the majority of cases only one mediation was held on any afternoon. Three rooms were made available for each mediation: one large room for meetings of all parties with the mediator; and two private rooms for plaintiff and defendant to use as a 'base-camp' and for private meetings with the mediator.

1.3.6 On each afternoon when a mediation was taking place, a member of the court staff would act as a clerk for the mediation. The parties would be met at between 4.00 p.m. and 4.30 p.m., taken to their meeting room and shown the available facilities. The clerks would remain in the court building until the mediation had ended so that the court file could be collected and returned to the court office and so that the mediators' report to the court on the outcome of the mediation could be collected.

1.3.7 In addition to the court staff dealing with the mediation, security staff were also required to remain late in order to lock the building after the mediating parties had left.

1.3.8 The CLCC began sending out mediation offers in mid-May 1996. By the end of the study period in March 1998, offers of mediation had been sent out by the court in around 4,500 cases. Every letter of invitation was personalised and addressed to the solicitor, or to the disputing party if they were unrepresented. In the first few weeks of the scheme there was no take-up of the scheme at all and the first mediation was not held until 12 July 1996. Between May 1996 and the end of the evaluation study period in March 1998, 160 cases had been mediated in the CLCC pilot scheme.

1.4 Resources

1.4.1 The mediation scheme at the CLCC has benefited from the labours of a dedicated group of court staff, very much committed to the objectives of the mediation scheme and keen to see it succeed. In addition to the huge daily task of reading files, entering information about cases onto a special database (see further below) and sending out offers of mediation, the staff in the mediation section also dealt with many enquiries regarding mediation, liaised with the mediation organisations, checked availability of parties and mediators in order to book mediation appointments, dealt with the payment of mediation fees, and dispatched limited information about the cases to the mediators. This information usually consisted of the statement of claim and other documentation available on file.

1.4.2 The total resources expended on the mediation scheme have been considerable. These include the time of the court staff[2] on dealing with the administration of the mediation offers, the extra postage costs, overtime payments for staff clerking mediations, and the cost of keeping the building open until around 8.00 p.m. on days when mediations were taking place.

1.5 The Evaluation

1.5.1 The evaluation of the mediation scheme was assisted by the appointment of the researcher to the scheme's Advisory Committee at the early planning stages of the pilot. As a result of this involvement from the beginning of the pilot, it has been possible to influence the design of the scheme and to establish a special data collection system for cases offered mediation in order to track the progress of both mediated cases and cases rejecting mediation.

1.5.2 The broad objective of the evaluation research was to provide both quantitative and qualitative assessments of the impact of the CLCC mediation scheme in relation to several key outcome indicators. The quantitative indicators were: final outcome of cases (settled, tried, withdrawn, abandoned); case duration from date of entry of defence

to date of final conclusion of case; amount of settlement/award; and legal costs. The evaluation of the scheme is based on a comparison of these outcome indicators in mediated cases with two samples of non-mediated cases.

1.5.3 The evaluation also incorporates an analysis of information collected from litigants and their legal representatives about their motivation for agreeing to mediate their disputes, their own evaluations of the mediation process and their perceptions of the fairness of the outcome of the mediation sessions.

1.5.4 An additional objective was to provide, through observation of mediation sessions, an impressionistic account of the dynamics of the mediation process and the approach to mediation adopted by mediators.

1.5.5 An important aspect of the evaluation was an assessment of patters of demand for mediation in different kinds of cases. In order to accomplish this assessment, analyses have been conducted of the characteristics of cases in which mediation was accepted and those in which mediation was rejected and information gathered about reasons for declining the court's offer of mediation.

1.5.6 On the basis of these analyses the evaluation has sought to provide an assessment of:

- the kinds of cases for which mediation is an appropriate form of dispute resolution;
- the extent to which mediation can promote settlement in civil cases;
- the extent to which mediation can reduce the time taken to settle civil cases and can reduce the cost of resolving disputes;
- the extent to which mediation succeeds in achieving an acceptable and lasting settlement of disputes;
- and the extent to which mediation is perceived by parties and their representatives as a satisfactory or preferable method of dispute resolution as compared with litigation.

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[2] Until recently, this ha involved one full-time post and part of the time of one (and sometimes two) other members of staff.

1.6 Research design

1.6.1 In order to assess the impact of mediation on case outcomes it was necessary to compare mediated cases with non-mediated cases. There were three separate groups of cases included in the evaluation as follows:

(a) Cases in which mediation was offered and accepted by both parties;

(b) cases in which mediation was offered by the court but was declined and which ran their normal course;

(c) cases in which mediation was *not* offered and which ran their normal course.

1.7 Data collection procedures

1.7.1 The information used in the evaluation was obtained by means of data collected and recorded by court staff; data collected from court files by the researcher and research assistants; interviews and postal questionnaires with litigants and solicitors; and from observation of mediations and discussions with mediators.

Comparison of outcome indicators

1.7.2 Case outcomes in terms of final outcome, case length, nature of settlement, and costs were compared in mediated and non-mediated cases. In all cases where mediation was offered and accepted, information was recorded first on specially designed data sheets (see Appendix) and subsequently on to a special mediation database designed in collaboration with a software consultant. The information collected for all mediated cases include the following:

Name of parties and representatives (if present)
Case type
Case value
Date of defence
Legal Aid – plaintiff/defendant/both
Date of reply re mediation
Identity of mediator, organisation, lawyer/non-lawyer
Date of mediation

Those present at mediation (parties/representatives/others)
Outcome of mediation: settled/not settled
Nature of settlement
Agreements about costs, if any, and nature of agreement
Length of mediation
Costs (information obtained from parties and solicitors by research team)

If the mediation did not result in settlement, then the following information was subsequently recorded:
Interlocutory applications/hearings and dates
Adjournments of trial and dates
Money paid into court
Date of trial/settlement/withdrawn/abandoned
Length of trial
Outcome of trial/settlement
Amount of settlement
Orders on costs/agreement on costs.

1.7.3 Comparable information was collected for a sample of 500 cases where mediation had been offered and refused. Similar information was also collected for a 'control' sample of 400 cases which were issued in the court in the three months *prior* to the commencement of the mediation scheme and which would have been in-scope to be offered mediation had they entered the court several months later (see Chapter 4 for further explanation of samples).

1.7.4 Although the preliminary information about case type, claim value, parties and representatives was easy to record, the process of data collection became increasingly difficult when cases had to be tracked in order to discover whether or not the case had settled, and to discover the nature of the settlement reached and the legal costs (see Chapter 4). This was achieved by repeated scrutiny of outstanding cases files, use of CASEMAN (court database), and finally by means of letters and telephone calls to solicitors.

INTERVIEWS AND QUESTIONNAIRES

1.7.5 Interviews were conducted with parties by telephone before mediations took place, face-to-face at mediations when observation of mediation was conducted, and by telephone following mediations. These interviews were semi-structured, using a topic guide and a proportion were tape-recorded and transcribed (see further Chapter 5). Postal questionnaires were also devised for plaintiffs, for defendants and for solicitors who attended mediation sessions. The postal questionnaires were sent out in waves following mediations. Reminder letters were sent out to those who failed to respond after about three weeks and the final response rate was about 60% (see Chapter 5).

Interviews and Questionnaires in Mediated Cases

Litigants:

1.7.6 The purpose of the interviews and questionnaires to litigants was to establish the objectives of litigation; litigants' reasons for accepting the offer of mediation; their expectations of the process, their perception of the process; their satisfaction with the process; their satisfaction with the outcome of the mediation; and their views of the mediator. In case which had not settled at mediation, the questionnaire asked for information about whether the case had settled subsequent to the mediation and whether the mediation had been helpful in promoting settlement.

Representatives:

1.7.7 Interviews and questionnaires were designed to ascertain the reasons for advising parties to accept the offer of mediation and to explore representatives' expectations of mediation, their experience and assessment of the process and the mediator, and their perception of the outcome of the mediation.

Interview in cases where mediation was rejected

1.7.8 Interviews were conducted by telephone with solicitors rejecting mediation. The purpose of the interviews was to explore reasons for rejecting the offer of mediation, knowledge and experience of mediation on the part of rejecting solicitors, whether or

not the matter was discussed with the client before rejection, whether and in what type of cases representatives would consider mediation in the future for their clients.

Observation of mediations

1.7.9 Mediations were observed and the mediator was shadowed in order to gain insights into the process and varying approaches to mediation on the part of mediators. This means that the focus of the observation was on the mediator's activities and how the mediator managed the mediation rather than on, say, relationships between the parties and their representatives. It was found that observation was acceptable to the parties (although it clearly made some mediators nervous at the outset) and was helpful in conducting subsequent effective interviews with parties about their mediation experience.

1.8 Limitations

1.8.1 One of the chief limitations of the study is the small number of mediations (160) available for analysis and comparison with non mediated cases, and the fact that there were only seven mediations of personal injury cases, despite the fact that personal injury cases comprised about one-half of all cases to which mediation was offered. This was not anticipated at the outset of the evaluation and has meant that some adjustment has had to be made in the analysis. The most important limitation is the inability to conduct comparisons of outcome within fine case types. Much of the analysis in this evaluation, therefore, is based on a broad comparison between non-personal injury cases and personal injury cases. For some analyses, no comparisons can be made between non-mediated personal injury cases and mediated personal injury cases, because the size of the mediated sample is too small for sensible comparisons.

1.8.2 The second limitation was the inability to secure reliable information about legal costs (see Chapter 4). This has meant that the assessment of the extent to which mediation has an impact on legal costs is very limited.

1.8.3 Finally, the data collection procedure for the control sample and the rejected sample was undertaken before it became clear that there would be a wholesale and continuing rejection of mediation by personal injury cases. As a result, the random samples of rejected and control cases contain a large amount of information about personal injury cases which is fascinating in its own right, but which has limited use for the purposes of comparison with mediated cases. Broad comparisons between all mediated and non-mediated cases would be unhelpful because this would mask the very clear differences in outcome rates between, for example, personal injury cases which have a very high settlement rate, and disputes regarding goods and services which have a much lower settlement rate and a much higher rat eof cases simply lying fallow (see Chapter 3). Some effect was made to boost numbers of cases of goods/services and breach of contract cases in both the rejected sample and the control sample in order to provide sufficient cases to undertake comparisons with mediated cases.

1.9 Structure of the report

1.9.1 Chapter 2 comprises a detailed analysis of the take-up of the mediation scheme and the pattern of demand for mediation among cases of different types, different claim values, and different ages of case measured from the date of entry of defence. The chapter also looks at demand for mediation in relation to legal representation of the parties, party configuration, and whether either of the parties had legal aid. The chapter concludes with a discussion of the reasons for rejecting mediation given by solicitors on their replies to the court and in telephone interviews.

1.9.2 Chapter 3 describes the settlement rate at mediation, and analyses the 'success' rate of mediations in relation to: case type, age of case, value of claim, which organisation was conducting the mediation, party configuration, legal representation at the mediation session, and whether one or other party had legal aid. The Chapter then goes on to compare the final outcome of mediated cases with the final outcome of those cases that rejected mediation and the control sample of cases that were never offered mediation. The Chapter concludes with a comparison of amounts recovered in mediation settlements with amounts recovered in out of court settlements among cases

rejecting mediation and the control sample, and ends with a final comment on enforcement issues.

1.9.3 Chapter 4 deals with the thorny issues of time and cost. The Chapter first compare average case length in mediated settlements with average case length among cases which rejected mediation but went on to settle out of court and also with case length among the control sample to whom mediation was not offered. The Chapter then reports subjective assessments of time savings as a result of mediation on the part of mediating parties and their solicitors. The Chapter ends with an analysis of the extent to which mediation appears to save or increase costs and is based on limited information obtained from case files and direct from parties, and on the subjective assessments of parties and their solicitors.

1.9.4 Chapter 4 is concerned with the expectations and experiences of mediating parties and their solicitors. It discusses motivations for mediating, barriers to settlement, objectives in mediating, perceptions of mediators and of the mediation process. The Chapter also provides a summary of assessments of the fairness of the settlements achieved at mediation and general evaluations of the potential of mediation. The Chapter concludes with a discussion of the potential for mediation in personal injury cases.

1.9.5 Chapter 6 offers a description of the mediation process, impressions of mediators, and an account of the strategies adopted by mediators to achieve settlement, on the basis of observation of mediation sessions.

1.9.6 Chapter 7 contains a summary of key findings and some concluding comments.

2. THE DEMAND FOR MEDIATION

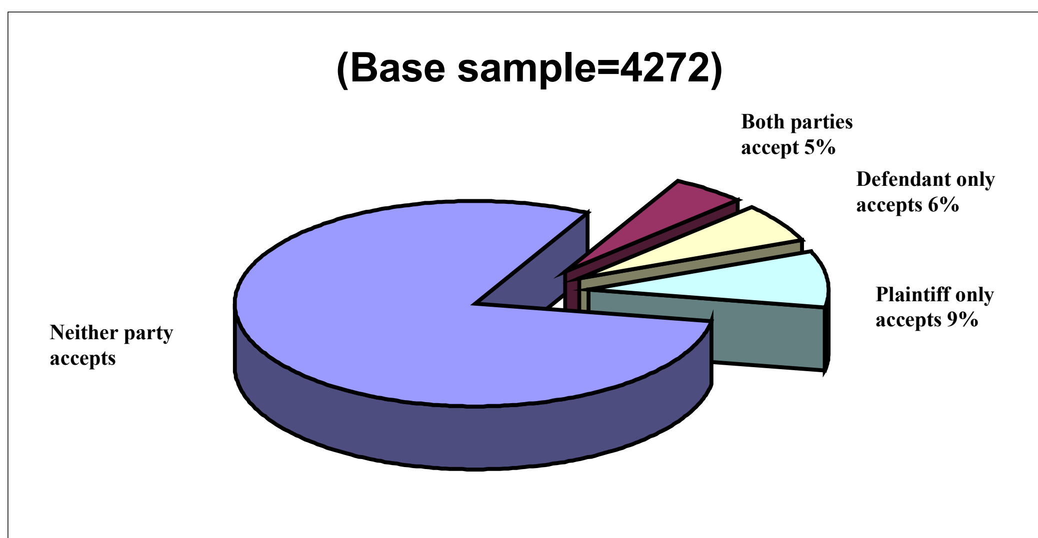
2.1 Take-up of the CLCC pilot mediation scheme

2.1.1 Throughout the two year period of the mediation pilot scheme at CLCC a persistent and important concern was the relatively low level of take-up of the scheme by litigants. During the study period, which commenced in May 1996, offers of mediation were sent out to both sides of the dispute in over 4,500 defended cases, but by the end of the study period (march 1998) only 160 cases had been mediated. Every mediation letter dispatched by court staff was personalised and addressed to the litigants or their legal representatives. The letters offering mediation were accompanied by comprehensive literature about the scheme and about the potential advantages of mediation (See Appendix A). During the life of the mediation scheme the Advisory Committee worked hard to promote the scheme by publicising it in newspapers, on radio, television, and in professional and trade journals. After the scheme had been running for a few months the Advisory Committee organised a seminar for members of the profession during which a video was shown of a realistic mock mediation; participants were addressed by the Chair of the Advisory Committee (HHJ Butter), by mediators taking part in the scheme and by one or two satisfied litigants and one or two solicitors who had accompanied their clients at mediations. This seminar format was repeated on several occasions during the pilot period in an attempt to raise awareness of the scheme. In addition, members of the Advisory Committee held meetings with representatives of the profession, local law societies, insurance companies and other interested parties and themselves attended and contributed to seminars about ADR organised by the profession.

2.1.2 Despite these efforts to raise awareness of the mediation scheme at CLCC and to educate the local profession and institutional litigants, the demand for mediation remained remarkably stable between 1996 and 1998. In only about five percent of cases did both parties agree to mediate their dispute. In about a further nine percent of cases the plaintiff accepted the offer of mediation, but the defendant rejected the offer or failed to reply, and in six percent of cases the defendant accepted the mediation offer, but the plaintiff rejected the offer or failed to reply (Figure 2-1). Among the

remaining 80% of cases, both parties to the dispute either rejected the offer of mediation sent out by the court, or they simply failed to respond. These figure indicate, however, that the potential demand for mediation is considerably higher than is reflected in the number of mediations taking place under the scheme. In one-fifth of cases where mediation was offered, one or more parties to the dispute accepted the mediation offer.

Figure 2-1 Demand for mediation



2.1.3 Because the mediation scheme was entirely voluntary, mediations could only take place if both parties to the dispute agreed to mediate. Thus if the first response back to the court was an acceptance, a mediation would only take place if the other party also accepted. On the other hand, if the first response received at the court was a rejection, the court would write to the opposing side and inform them that the mediation cold not go ahead because their opponent had rejected the offer. There may therefore be a further hidden demand among the high level of non-replies, particularly in cases where a rejection was rapidly returned to the court and the court informed the opponent in the case before they had had time to submit a reply.

2.1.4 As part of the evaluation of the mediation pilot scheme, various analyses have been conducted in order to identify patterns in the demand for mediation. The information used in these analyses is based on data drawn from case files held at the

court relating to case and party characteristics, as well as information obtained directly from parties and their representatives in interview and through postal questionnaires.

2.1.5 In order to identify those types of case where the demand for mediation seems to be greatest, responses to mediation offers were analysed in relation to:

- case type;
- claim value;
- age of case at the time the offer of mediation was sent out by the court;
- the patters of legal representation in the case;
- the party configuration in the case;
- and whether or not either party was in receipt of Legal Aid.

2.1.6 The results of these analyses of the demand for mediation form the basis of this chapter.

2.2 Demand for mediation and type of case

2.2.1 Although the disappointingly low overall level of acceptance of mediation offers remained fairly constant throughout the period of the mediation pilot, there were clearly some differences in demand between different case types. Although the court does not itself record details of different case types, apart from very broad categories, the data collection process established in the court for the purpose of evaluating the mediation scheme used about thirteen different case categories. The allocation of cases to these categories was undertaken by the court staff assigned to the mediation pilot scheme on the basis of a review of the file. In most cases the allocation of a case to a case type was fairly straightforward, but for some categories the allocation was more difficult, particularly where claims involved more than one allegation and where counterclaims were involved. In light of these inconsistencies in allocation of cases to specific case type categories, analyses in later chapters of this report often utilise a broad classification of case which simply distinguishes between personal injury cases and other types of cases. However, in order to undertake a detailed analysis of the demand for mediation, this chapter looks at ten different case types: personal injury (including employers' liability, road traffic accidents,

occupiers' liability and other personal injury); medical negligence; professional negligence; breach of contract; breach of covenant; goods and services; debt; general negligence; road traffic – non personal injury; and actions for specific performance.

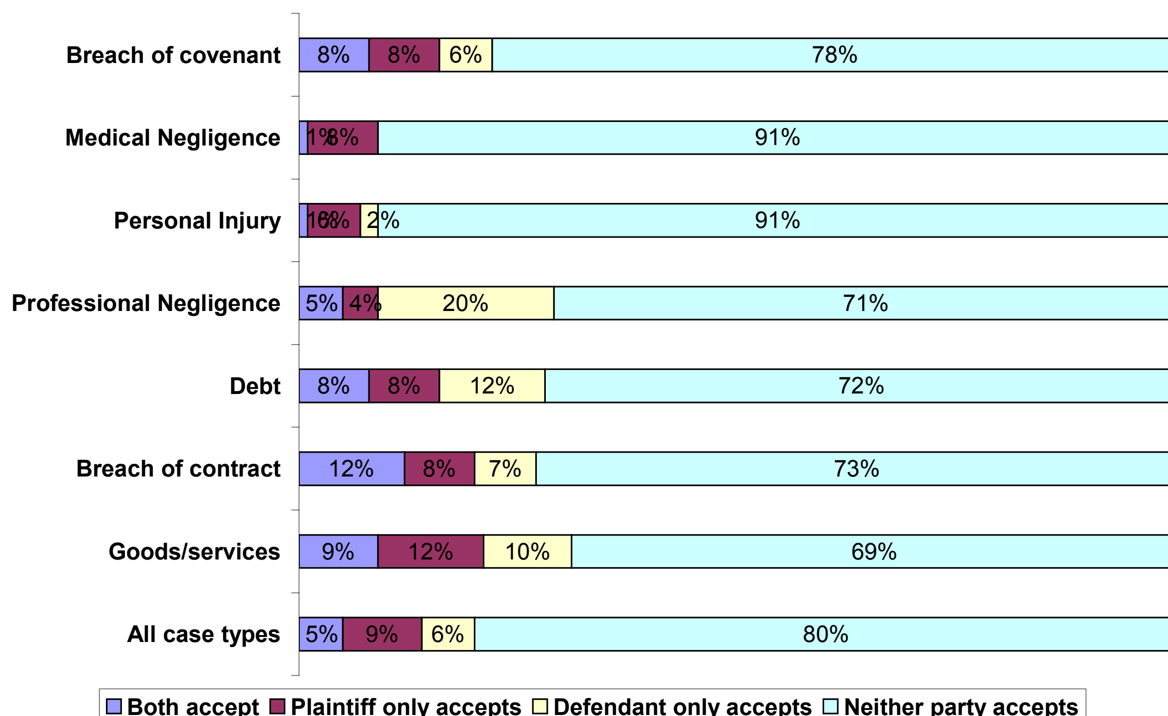
2.2.2 One important factor which had a substantial impact on the take-up of the scheme (and which posed some problems for the evaluation of the scheme) was the overwhelming rejection of mediation in all types of personal injury cases (road traffic, employers' liability, occupiers; liability, medical negligence). The universal failure to accept offers of mediation by parties and/or their representatives in personal injury actions exerted a substantial impact on the operation of the CLCC pilot mediation scheme, since personal injury litigation accounted for almost half (47%) of all the in-scope defended cases being offered mediation by the court (Figure 2-3).

2.2.3 Figure 2-2 displays the level of demand for mediation within different case types. From this Figure it can be seen that types of dispute where demand for mediation was highest were those concerning breach of contract and disputes over the delivery of goods or supply of services. Among breach of contract cases, both parties to the dispute accepted mediation in 12% of cases. This can be compared with a nine percent joint acceptance rate among goods; services cases, and an eight percent acceptance rate among both debt and breach of covenant cases. Among personal injury cases and medical negligence cases the acceptance rate was barely one percent.

2.2.4 In addition to the cases where both parties accept, there are also differences between case types in the rates at which one party only accepts. For example, Figure 2-2 also shows that among goods and services disputes, in addition to the nine percent of cases where both parties accepted mediation, the plaintiff alone accepted the court's offer in a further 12% of cases and the defendant alone accepted the offer in 10% of cases. Thus in almost one-third of goods and services disputes (31%) one or more of the parties to the dispute accepted the offer of mediation, although mediations actually took place in less than 10% of those cases. Similarly, among breach of contract cases, the plaintiff alone accepted the offer to mediate in eight percent of cases and the defendant alone accepted the offer in seven percent of cases. Thus one or more parties

to breach of contract cases accepted mediation in over one-quarter of cases (27%), although mediations took place in around only 12% of that case type group.

Figure 2-2 Demand for mediation within case type



2.2.5 Professional negligence cases show an interesting pattern of demand. Both parties accepted the mediation offer in about five percent of professional negligence cases and the plaintiff alone accepted the offer in a further four percent of cases. However, in one-fifth of professional negligence cases the defendant accepted the offer of mediation, but the plaintiff rejected or failed to reply to the offer. Thus although among professional negligence cases mediations were conducted in only around five percent of the cases to which it was offered, in fact, one or more parties had accepted the offer of mediation in over one-quarter (29%) of cases.

2.2.6 Personal injury and medical negligence cases also have some interesting features, despite the wholesale rejection of mediation. Among personal injury cases as a whole, the court's offers of mediation were accepted by both parties in barely one percent of cases. However, in a further six percent of cases the plaintiff alone accepted the offer of mediation. In only two percent of cases did the defendant alone accept the offer. Thus although both sides in personal injury limitation appear to be reluctant to experiment with mediation, these figures suggest that slightly more plaintiffs than defendants are willing to try mediation[1].

2.2.7 Among medical negligence cases, the demand for mediation is similar to that among personal injury cases, with both parties accepting the court's mediation offer in only one percent of cases. However, among medical negligence disputes, there were no instances where the defendant alone accepted the mediation offer, although the plaintiff alone accepted in some eight percent of cases. This again suggests that there is a greater demand for mediation among plaintiffs, at least than is reflected in the number of mediations actually conducted.[2]

2.2.8 As a result of the varying levels of demand for mediation among different types of disputes, the case type breakdown of mediated cases looks rather different from the case type breakdown of the population of cases to which mediation offers were sent. Figure 2-3 provides a comparison of these two groups. The Figure shows clearly that personal injury cases comprise the largest category of cases to which offers of mediation were sent (47%), but one of the smallest categories of mediated cases (4%). In fact mediated cases are dominate by disputes relating to delivery of goods and

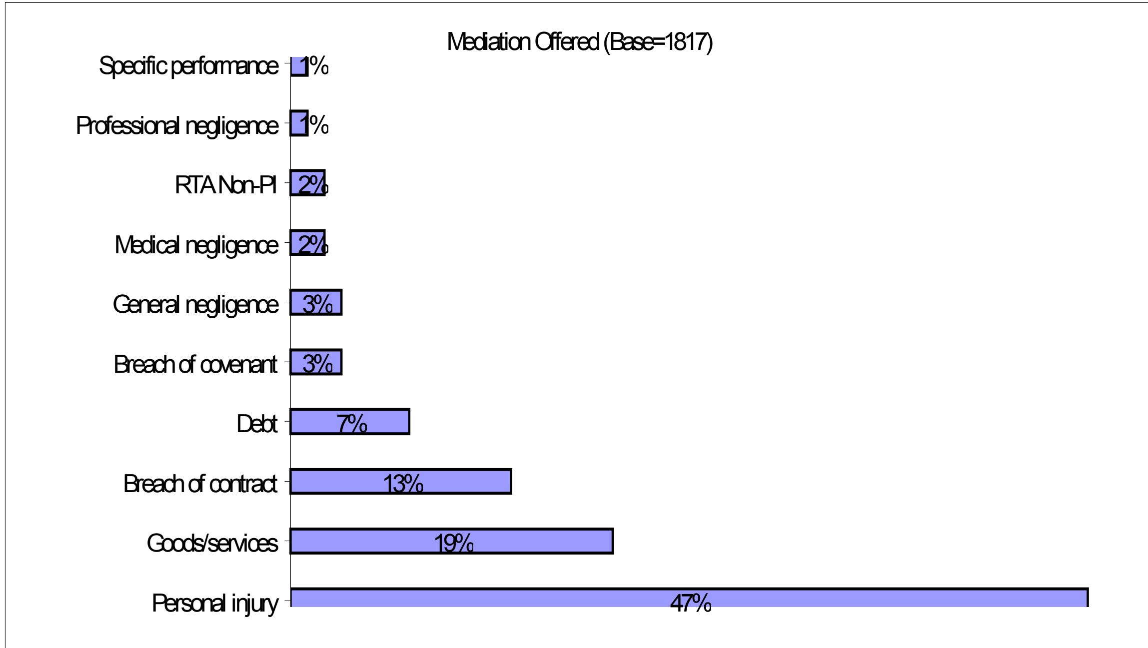
[1] Anecdotal evidence, however, suggests that these figures may be influenced by the activities of one specialist plaintiff personal injury firm which issues a large number of personal injury actions in the CLCC and which adopted a very positive policy of accepting mediation offers during the scheme. There was also at least one other large issuer personal injury plaintiff firm which wrote to the court at a relatively early stage in the life of the pilot mediation scheme to say that they and no intention of referring any cases to the mediation scheme and would therefore advise the court to stop sending offers. The court did cease sending offers of mediation to this particular firm.

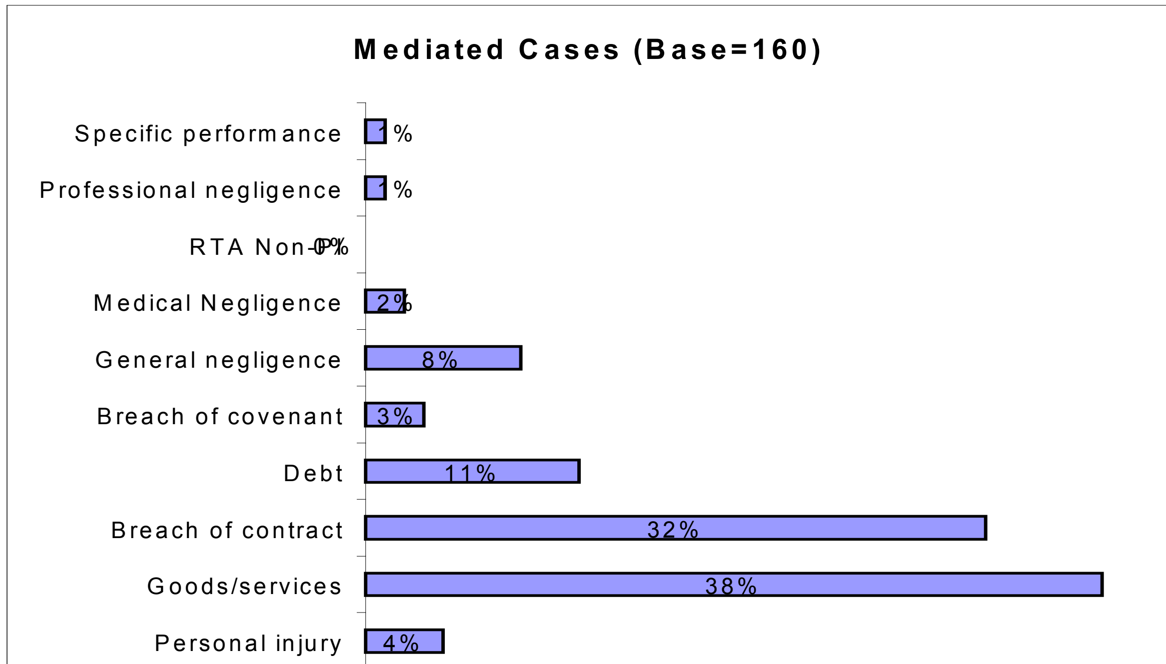
[2] The demand for mediation among medical negligence cases is in line with the wholesale failure in demand for a recent medical negligence pilot mediation scheme established by the Department of Health, apparently with the co-operation of a number of Health Authorities.

services (38% mediated cases) and breach of contract (32%) of mediated cases). Among the total population of cases to which offers of mediation were sent, goods and services disputes accounted for 19% of the total, while breach of contract cases accounted for 13%. Defended debt actions are slightly over-represented among mediated cases where they represented 11% of all mediated cases, as compared with seven percent of cases offered mediation. General damages/general negligence cases are also somewhat over-represented among mediated cases where they comprise eight percent of mediated cases compared with three percent of cases offered mediation.

2.2.9 Some two percent of offers of mediation were sent out to cases where the dispute related to property damage following a road traffic accident, but not a single case of this type was mediated during the CLCC pilot scheme.

Figure 2-3 Comparison of case type among cases offered mediation and mediated cases





2.3 Demand for mediation and claim value

2.3.1 A comparison of claim of values among liquidated claims[1] where mediation was offered and those where mediations took place (Figure 2-4) shows very similar claim value distributions. The distribution for cases offered mediation reflects the pattern of claim values of defended cases coming into the CLCC: approaching two-thirds of liquidated claims have values below £10K (61%), one-fifth have values of between £10K and £20K, and 15% have values of between £20K and £50K. In 4% of these defended cases the claim value exceeded £50K.

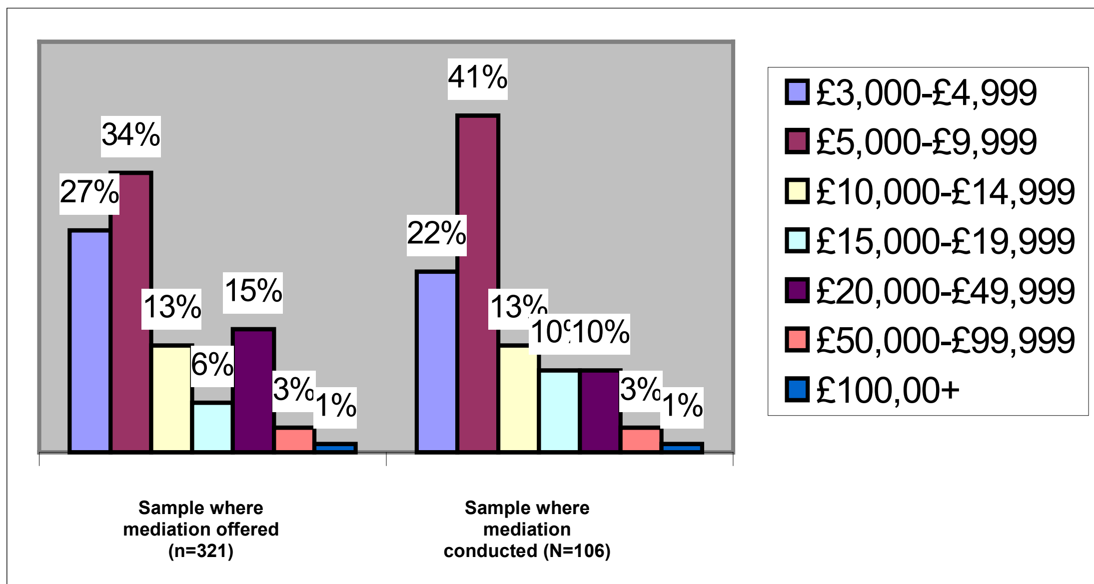
2.3.2 Among mediated cases a proportion virtually identical to that in the population of cases offered mediation had a claim value of below £10m000 (63% and 61% respectively), although within this claim value band, mediated cases had a higher proportion of claim values over £5,000 (41% as compared with 34% among the complete sample of those offered mediation). This is interesting in light of discussion in Chapter 3 which indicates that *settlements* among mediate cases cluster below £5,000. At the higher end of the claim value spectrum the pattern of values among mediated claims is very similar to that of all cases offered mediation. There were identical proportions of cases in both samples with values between £15K and £50K (21% in each sample), although medicate claim values were spread evenly across this band while the population of cases offered mediation had a higher proportion of cases within the £20K-£50K range.

2.3.3 The date in Figure 2-4 suggest that claim value did not appear to be important in determining whether or not parties were likely to accept mediation offers. Although some solicitors suggested that lack of proportion between case value and likely legal costs influenced their advice to clients to accept the Court's offer of mediation (see discussion later in this Chapter) it does not appear that mediated cases

[1] Among the sample of cases upon which mediation was offered, 40% of cases were liquidated and 60% were unliquidated. Among the unliquidated claims the spread of values was as follow: Limited to £5k = 21%; Exceeds £5K=12%; Limited to £10K=22%; Limited to £25K=2%; Limited to £50K=21%; Limited to £100K=2%; Unspecified amount=20%. Among mediated claims almost three-quarters were liquidated (74%). This reflects the fact that there were so few mediated personal injury cases in which claims are normally unliquidated.

are disproportionately clustered at the lowest end of the claim value spectrum, but have a spread which roughly mirrors that of the population of cases to which mediation was offered.

Figure 2-4 Comparison of claim values of liquidated claims: Mediated cases and cases offered mediation



2.4 Demand for mediation and age of case

2.4.1 The original plan for the CLCC mediation pilot scheme was that it would provide an early opportunity for parties to seek to settle their disputes. In order to achieve this, the scheme was designed so that offers would be dispatched to all cases above £3,000 as soon as the defence in the case had been entered, ie as soon as it was clear that the case was to be litigated. In the event, the range of cases on which mediation was offered was somewhat wider. For example, because the Central London County Court is a trial centre, many cases are referred to the court for trial; other cases are transferred from their home court on receipt of the defence, and a further sub-category of migrant cases are those that were originally issued in the High Court, but subsequently transferred down to the CLCC. As a consequence, cases

transferred to the CLCC from other county court or from the High Court may have had a relatively long history and this is clear from the fact that many of the mediated and non-mediate cases were quite elderly.

2.4.2 An analysis of replies to mediation offers revealed that the proportion of cases referred for trial among mediations was identical to the proportion among those rejecting mediation (8%) which suggests that referred cases were not more likely than other cases to accept the offer to mediate.

2.5 Demand for mediation and legal representation

2.5.1 Demand for mediation was also analysed in relation to the presence of legal representation. Contrary to the expectations of the Court when the scheme was established, the vast majority of defended cases in-scope for mediation offers had legal representation *on both sides* of the dispute (83%), at least at the point at which the court file was established. In an additional five percent of defended cases, the defendant was legally-represented but the plaintiff was not; in eight percent of cases the plaintiff was legally-represented but the defendant was not; and in four percent of cases neither party had legal representation at the time the defence was entered. Thus in 96% of cases where mediation was offered by the court, one or both parties to the dispute had legal representation.

2.5.2 Although the overall low-level of demand for mediation remained a constant feature throughout the period of the study, the analysis in Figure 2-5, in common with other analyses in this chapter, indicates that there was some variation in demand associated with certain factors. From Figure 2-5 it can be seen that the demand for mediation was *lowest* when both parties to the dispute were legally represented. The acceptance rate among this group was five percent, compared with an acceptance rate of 12% when neither party was legally represented, and an acceptance rate of 11% when only the defendant was legally represented.

2.5.3 When both parties were legally represented, the mediation offer was sent from the court to the parties' legal representatives, placing a responsibility on solicitors to

discuss the offer with their client and to advise them. The overwhelming rejection of mediation when both parties were legally represented reflects solicitors' reluctance, for various reasons, to recommend mediation (see discussion later in this Chapter). It probably also reflects the fact that once parties have obtained legal representation they may genuinely doubt whether a new procedure, about which they know little, can offer a great deal over traditional litigation processes.

2.5.4 An analysis of demand for mediation was carried out among only non-personal injury disputes in which both parties were represented. The analysis revealed an identical pattern of acceptance and rejection of mediation to that in personal injury cases when both side had legal representation: in five percent of breach of contract, goods/services etc. disputes, both sides accepted the mediation offer; in seven percent only the plaintiff accepted the mediation offer; and in a further five percent of cases only the defendant accepted the mediation offer. Thus among non-personal injury cases in which both side had legal representation, the rate of rejection of mediation offers was 83%.

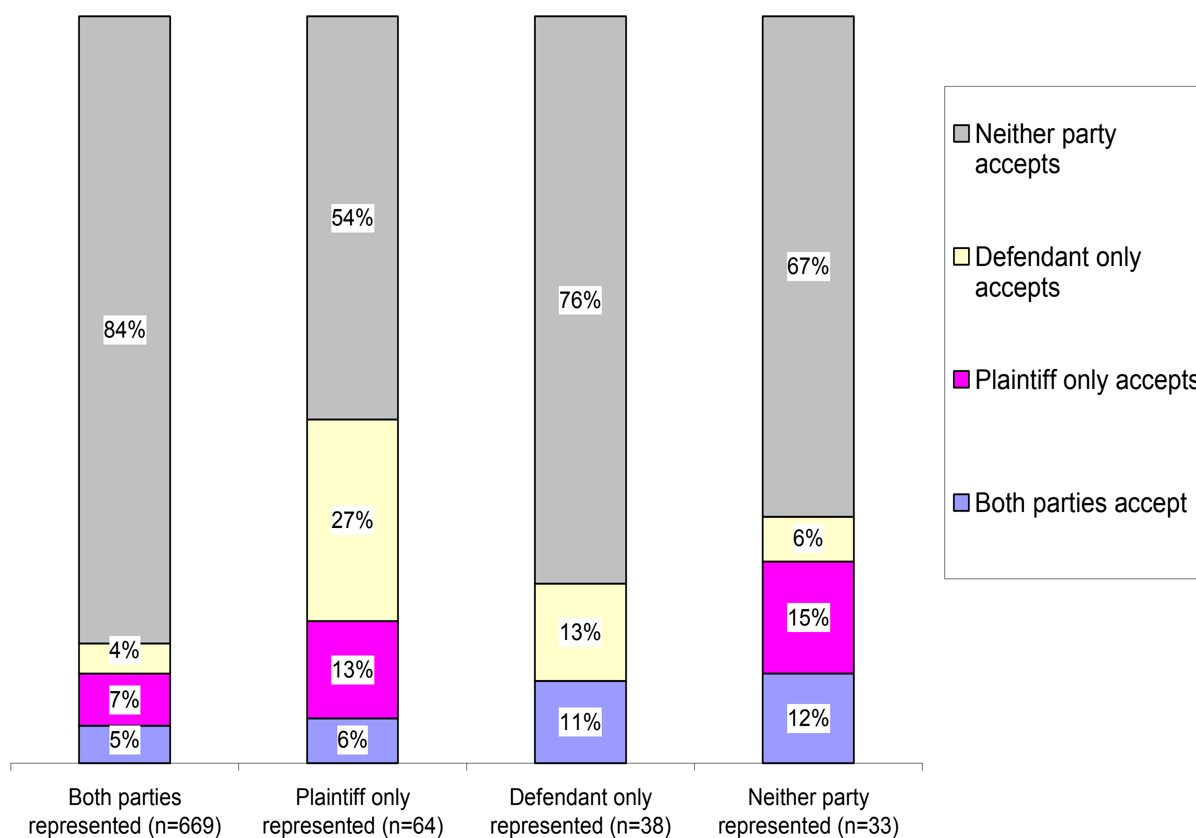
2.5.5 There were, however, some differences in demand when legal representation was uneven or absent. Figure 2-5 shows that when only the plaintiff had legal representation, although the joint acceptance rate of mediation offers was only 6%, the rate at which unrepresented defendants were willing to accept mediation was much higher – at over one-quarter (27%), and even the rate at which the legally-represented protagonists accepted mediation was relatively high at 13%. Among cases in which only the plaintiff had legal representation, therefore, one or both parties accepted the offer of mediation in almost *one-half* of cases (46%), although mediations took place in only 6% of disputes in this category. This finding is supported by material from interview and questionnaire responses from litigants and solicitors to the effect that an imbalance in representation was influential in the decision to mediate.

2.5.6 When only the defendant was legally represented, the joint acceptance rate was relatively high at 11% and the acceptance rate by legally-represented defendants themselves was also fairly high at 13%. Among this group of cases, however, there was no instance in which the plaintiff alone accepted the mediation offer. The low

demand for mediation among plaintiffs in this group probably reflects the fact that without legal representation plaintiffs do not feel themselves to be under the same costs pressure as their legally-represented opponent and may feel that the balance of power is therefore tilted somewhat in their favour.

2.5.7 Among those cases where neither party had legal representation, the joint acceptance rate was highest of all at 12% and the acceptance rate by plaintiffs alone was even higher at 15%. In addition, in the absence of representation on either side, defendants alone accepted in six per cent of cases. Therefore in *one-third* of cases where neither party had legal representation, one or both sides to the dispute accepted the offer of mediation. An obvious 'anti-profession' interpretation of this finding is that in the absence of legal representation, the mediation offer and information about the scheme would have been received directly by the disputing parties, rather than being filtered through a possibly unenthusiastic explanation given by a legal representative. It is also true that in the absence of legal representation the parties would actually receive the offer, whereas not all solicitors felt obliged even to inform their clients that the offer had been made by the court (see further below). However, another factor which may account for some of this difference is that many of the disputes in which there was no representation on either side involved companies, who were in any case disproportionately inclined to accept mediation offers (see the following section).

Figure 2-5 Demand for mediation in relation to legal representation



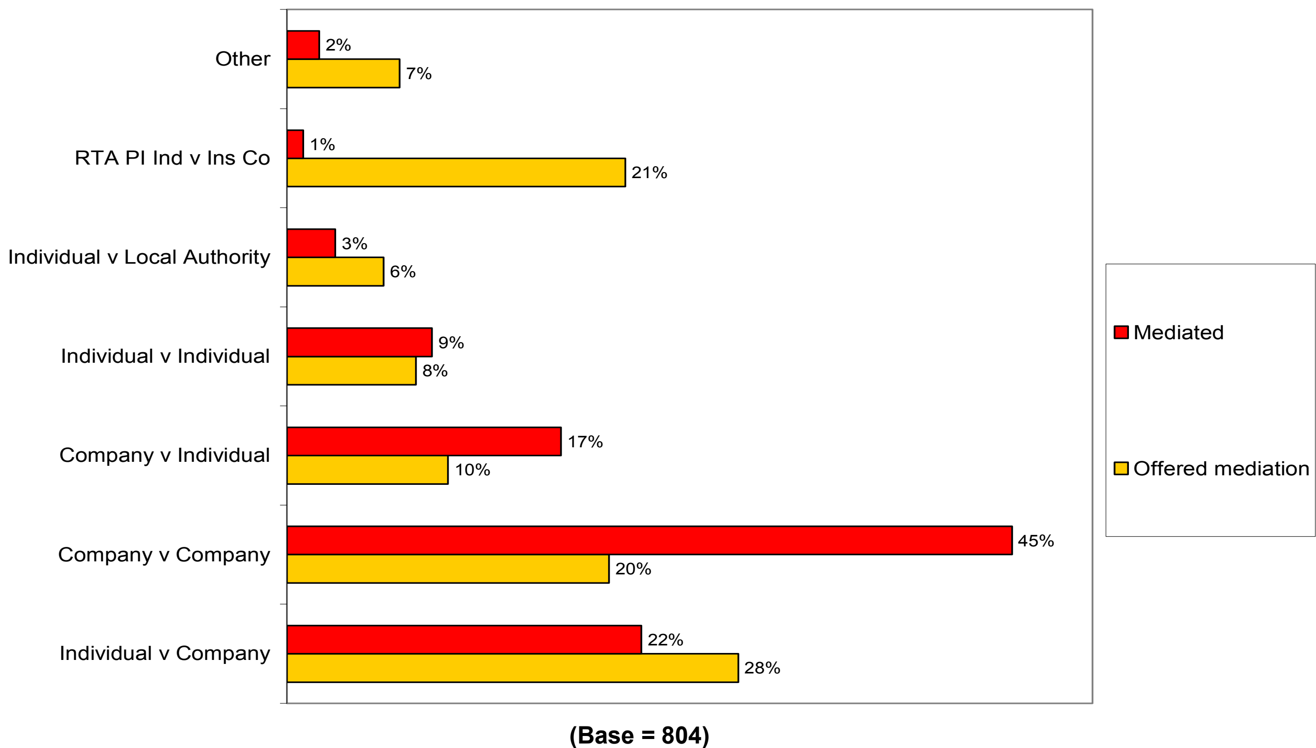
2.6 Demand for mediation and party configuration

2.6. A comparison of party configuration between cases on which mediation was offered and those where mediations were conducted (Figure 2-6) reveals very different patterns and this is accounted for, primarily, by the absence of personal injury cases among mediations. Whereas a breakdown of party configuration among cases coming into the court indicates similar proportions of disputes involving companies suing other companies (20%), individual issuing companies (25%) and individuals litigating against insures in road traffic personal injury cases (24%), the failure of personal injury litigants to accept mediation produces a very different patterns of party configuration among mediated cases. Figure 2-6 reveals that the most common party

configuration among mediated cases was company v company (45%), followed by individual v company (22%) and company v individual (17%).

2.6.2 Looking at the overall demand for mediation among non-personal injury cases only, the rate at which both parties accepted mediation was highest among company v company disputes (12%), followed by company v individual disputes (9% both parties accepting) and individual v individual, and individual v company disputes, where the proportion of cases in which both parties accepted mediation was 7%.

Figure 2-6 Comparison of party configuration among cases offered mediation and those where mediations were conducted



(Base = 804)

2.7 Demand for mediation and legal aid

2.7.1 Although a substantial proportion of solicitors and litigants provided written reasons for rejecting mediation (see further below), in the early days of the scheme, telephone interviews were conducted with solicitors in order to gain a better insight into the overwhelming tendency of litigant and their representatives to reject the court's offers of mediation. One issue which emerged during interviews was concern

on the part of solicitors acing for assisted parties that the costs of preparing for and attending mediations might not be recoverable under the legal aid rules. After protracted discussions between the Lord Chancellor's Department and the Legal Aid Board, a decision was taken to introduce special provisions for the remainder of the mediation pilot scheme in order to overcome this potential barrier to take-up of mediation offers.

2.7.2 Under these provisions, introduced in August 1997, solicitors acting for assisted parties were able to recover the costs of preparation for mediation as if for normal settlement discussions, and a flat fee of £230 plus VAT for attendance at a mediation session, irrespective of the outcome of the mediation. The introduction of these provisions was accompanied by considerable publicity including a press release from the Lord Chancellor's Department, articles in the professional press and newspaper and radio coverage. However, between the introduction of the new legal aid rules in August 1997 and the end of the study period in March 1998, the legal aid special payment provisions had been used in only *one case* and there had been no discernible impact on the overall demand for mediation. The inevitable conclusion must be that the absence of legal aid provision for mediation had been used to legitimate the rejection of mediation on other grounds, rather than constituting a genuine ground in itself.

2.7.3 In order to assess the influence of legal aid on demand for mediation a limited analysis of legal aid was carried out. This analysis is, however, extremely tentative since it was difficult accurately to identify from court files cases whether either the plaintiff or the defendant had legal aid. Although information was present about legal aid on some files when offers of mediation were sent out by the court, an absence of information about legal aid did not mean that a party did not have, or did not subsequently obtain legal aid during the course of the case.

2.7.4 An analysis of 804 cases to whom mediation was offered suggests that in nine percent of cases the plaintiff had legal aid and in another one percent of cases the defendant had legal aid. There was no case in the sample in which both parties had legal aid. Among cases where the plaintiff definitely had legal aid, the court's

mediation offer was accepted by both parties in only one percent of cases; in seven percent of those cases, the plaintiff alone accepted the offer of mediation; and in another seven percent of cases, the defendant alone accepted the offer of mediation. Mediation was therefore rejected by both parties in 85% of cases when the plaintiff had legal aid.

2.7.5 Although these figures suggest that when the plaintiff has legal aid the joint acceptance rate of mediation is lower than average, the figures should be viewed with caution given the unreliability of the information in court files about the presence of legal aid.

2.8 Reasons for rejecting offers of mediation

2.8.1 Attached to the mediation offer letter sent out by the court was a mediation reply form. On this form parties or their solicitors were asked to say whether they would accept the mediation offer and if they rejected the offer they were invited to give their reasons for rejecting the offer. The written reasons returned by rejecting parties therefore provide one source of information about why mediation was so often rejected. In addition, telephone interviews were conducted with a sample of solicitors who had rejected offers of mediation.

2.8.2 The reasons cited on a sample of 404 reply forms returned to the court cluster into a number of categories, summarised in Table 2-1. Two of the most common reasons given for refusing the offer of mediation were simply that mediation was considered "inappropriate" for the particular case, or that the case involved complex matters of evidence that would require oral evidence to be given in court, cross-examination of witnesses etc (17% of plaintiffs and 18% of defendants gave this reason). Other common reasons for rejecting mediation were that there was a dispute over fact, law or both, although this was cited more often by plaintiffs than defendants, and that the case would settle in any case so that mediation was unnecessary (11% of plaintiffs and 10% of defendants). Another fairly frequent reasons for rejecting mediation was that there was no common ground between the parties or that the case would not be capable of settlement at mediation (14% of

plaintiffs and 12% of defendants gave this reason). It is interesting, however, that lack of common ground, intransigence and poor prospects of settlement were also quite often cited as reasons for *agreeing* to mediate (see analysis and discussion of motivation to mediate in Chapter 5).

2.8.3 Table 2-1 also shows that a perception that the case would be likely to settle in any case was also given as a justification for refusing mediation. This was reinforced during discussions in interviews, particularly with personal injury litigators, when solicitors argued that there was no point in sending sure-fire winners to mediation, since those cases could be settled perfectly well between solicitors. It is therefore possible that many cases being referred to mediation are those with inherent weaknesses or difficulties, or high costs risks relative to claim value. The motivation for recommending cases for mediation is discussed further in Chapter 5.

2.8.4 Although on the whole the pattern of reasons for rejecting mediation was similar among plaintiffs and defendants, there were some areas of difference. For example, some 15% of defendants rejected the offer of mediation on the ground that the offer had arrived too early in the litigation process. This reasons was given by only three percent of plaintiffs. It is likely that in personal injury cases, in particular, agreeing to early settlement discussions does not fit in with defence strategy of making plaintiffs wait before offers of settlement or payments into court are made[2]. Another response given exclusively by a minority of defendants was that mediation was inappropriate because the defendant intended to have the case referred to the small claims arbitration procedure. It is clear from comments on forms returned to the court that defendants often believed that the plaintiff's claim was inflated and defendants' success in cutting down these claims is reflected in the data on settlement amounts presented in Chapter 3.

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[2] Information gathered from court files in the court of the study indicates that in a high proportion of personal injury cases relatively late payments into court are made by defendants which are then accepted by plaintiffs. This information will be analysed and presented in later publications.

Table 2-1 Reasons given to the Court by plaintiffs and defendants for rejecting mediation

Reason for rejecting mediation given on mediation reply form sent to court	Plaintiffs (n-207)	Defendants (n=197)
Mediation "inappropriate" (no explanation)	17%	10%
No common ground/case won't settle	14%	12%
Complex evidence/expert evidence	17%	18%
Dispute over fact/law/both	11%	4%
Case will settle in any case	11%	9%
Need a court ruling/want to go to trial	9%	8%
No merit in claim/defence	6%	8%
Offer of mediation too early in litigation	3%	15%
Not appropriate for personal injury cases	6%	7%
Too expensive to mediate	4%	1%
Want case transferred to arbitration	0%	4%
Just don't want to do it	1%	5%

2.9 Case studies in rejection

2.9.1 The following mini-case studies have been selected from the vast range of cases in which mediation was rejected. They are necessarily selective, but offer a cross-section of typical responses and outcomes to disputes where mediation was rejected.

2.9.2 PLAINTIFF REJECTS

Personal Injury. Case value limited to £5,000. Solicitors on both sides. Plaintiff had Legal Aid. Defence entered on 26 July 1996. On 27 August 1996 the plaintiff rejected the offer of mediation saying: *"The case is not suitable for mediation there being issues of liability and quantum that need to be dealt with at a full trial."* In February 1997 the plaintiff made an application to the court for interrogatories to be dealt with. The trial date was set for 18 June 1997. On 13 February 1997 the plaintiff settled the claim by consent with the defendant paying the plaintiff £1,400 in final settlement plus the plaintiff's legal costs.

Breach of contract case. Case value unspecified. Solicitors on both sides. Defence entered 23 May 1996. The plaintiff rejected mediation on 24 June 1996 saying *"We*

have legal insurance cover and feel that as we are not paying, we would like to put as much pressure on the defendant as possible." Interlocutory applications were made during October 1996. On 22 July 1996 the defendant paid £9,000 into court. On 25 October 1996 the case settled by consent with details of settlement not disclosed to any third party, but the defendant paid the plaintiff's legal costs.

Professional negligence case. Case value limited to £5,000. Solicitors on both sides. Defence entered 6 June 1996. The plaintiff rejected mediation on 12 July 1996 saying: *"Our client is grateful for the mediation service. However, for tactical reasons and because of the nature of the dispute the client considers the matter would more appropriately be determined through court proceedings."* On 29 October 1996 the action was struck out at the pre-trial review.

Professional negligence case. Case value £5,000-£9,999. Solicitors on both sides. Defence entered 10 October 1996. The plaintiff rejected the mediation offer on 21 November 1996 saying: *"This case arises out of the defendant's alleged professional negligence and as such complex issues of law and fact are likely to arise. We do not believe that this case is suitable for mediation."* In December 1996 the plaintiff applied to strike out the defence. On 15 July 1997 the case settled by consent. The defendant paid the plaintiff £10,000 with no order as to legal costs.

Personal Injury – Employer's Liability. Case value unspecified. Solicitors on both sides. Defence entered 30 May 1996. The plaintiff rejected the offer of mediation on 15 July 1996 saying: *"The case is too serious and complex involving a large amount of expert evidence."* In October 1996 the plaintiff applied to the court for an 'unless order'. On 22 October 1997 the defendant paid "150,000 in to court. On 20 November 1997 the plaintiff settle the claim by accepting the £150,000 in court. The defendant paid the plaintiff's legal costs.

2.9.3 Defendant Rejects

Road traffic non-PI case. Case value £5,000-£9,000. Solicitors on both sides. Defence entered 12 December 1996. In response to the offer of mediation the defendant's solicitor wrote: *"There are no prospects of settlement in this case and it is felt that no useful purpose will be served by mediation."* The case went to trial on 4 April 1997. The plaintiff was awarded £5,252.33 plus £322.32 interest and his legal costs.

Personal injury – Employer's liability. Case value unspecified. Defence entered 7 October 1996. Solicitors on both sides. The defendant rejected the mediation offer saying: *"There appears to be no room for compromise between the parties. We fear that our attending for mediation with a genuinely held belief that no liability will attach to the defendant and with no offers to make would not be a constructive use of the mediator's or the party's time.* On 1 July 1997 the defendant paid £5,000 in to

court. On 16 July 1997 the plaintiff accepted the defendant's payment-in plus legal costs.

Medical negligence. Individual suing Health Authority. Case value unspecified. Solicitors on both sides. Plaintiff had Legal Aid. Defence entered 5 June 1996. The defendant rejected mediation on 26 June 1996 saying *"We believe that this case is completely defensible and our professional reputation is at stake."* In July, September and December 1996 the plaintiff made various interlocutory applications to the court. On 4 February 1997 the defendant paid £7,500 in to court. The trial was listed for 23 April 1997. On 12 February 1997 the plaintiff accepted the £7,500 in court and his legal costs.

2.10 Interviews with solicitors who rejected mediation

LACK OF KNOWLEDGE ABOUT MEDIATION

2.10.1 Telephone interviews with a sample of solicitors who had rejected offers of mediation provided further insights into the prevalent unwillingness to recommend mediation. One of the most important impressions gained from talking to solicitors on the telephone was the level of ignorance about mediation. It was clear that many of those solicitors rejecting mediation had little idea of what would be involve in a mediation, assuming that it would be no different from ordinary negotiations between solicitors. This explains, in part, why many solicitors were bemused by the suggestion that where parties had legal representation they might nonetheless benefit from attempting to mediate their dispute. Indeed when asked about the kinds of cases for which mediation might be appropriate, many solicitors suggested that it would be most appropriate for litigants in person, for example.

> "I've only had it offered tome once and I turned it down on the basis that we are a firm of solicitors and we don't really need an independent mediation service. If we can't sort things out ourselves we go before the judge. ..I don't think we really need them for lawyers. For litigants in person – that's one thing, but for firms of solicitors I think it is ridiculous." **Q: From that I assume that you haven't ever been involved in a mediation?** A: "No". (High street firm).

> "I have had two cases where the offer of mediation has arrived and I have advised the client to reject it. ..A council tenant suing the council where it was a total waste of time trying to sit down with housing officer to mediate because they are just not interested. The other was a personal injury case and it has got to the stage where negotiations have completely broken down and the only way

> was to issue proceedings at the outset, so it's a waste of time there as well. There is absolutely no change whatsoever that mediation could have helped." **Q: Can mediation ever be useful?** A: "I would think that once proceedings have been issued it is too late. That's my view and I will tell Lord Woolf that if I see him. I think the only way that mediation is going to be of any use is in small claims where we are not supposed to get involved any way – but we do, of course, because the client doesn't know what they are doing." **Q: Have you ever been involved in a mediation?** A: "No." (Specialist plaintiffs' firm)

> "There are solicitors on both sides in this case. I am in negotiations with the other side so I do not think it is appropriate to involve the court. If the other side was not represented, then mediation might be appropriate. If I was having trouble with the case I would just contact the solicitor on the other side. If a case is going to be resolved at all, it can be done through solicitors where both sides are represented." (Defendant's solicitor in a property damage claim where the plaintiff had accepted the offer of mediation)

2.10.2 The result of lack of knowledge about mediation is that solicitors tend to prefer to depend on their normal, known litigation strategies rather than experimenting with the unknown, particularly if they fear that the unknown might lead to a less satisfactory outcome for their client. If mediation and other forms of ADR are to become more widely accepted and used in appropriate cases, there is a genuine challenge in the need rapidly to educate the grass roots of the legal profession. The fact that the litigation departments of commercial megafirms are beginning to speak the language of 'dispute resolution' will not have any immediate effect on the approach to litigation in the High Street.

LOOKING TOUGH

2.10.3 Another issue that emerged in conversation with solicitors, but which was not given to the court as a reason for rejecting mediation, was the feeling that to accept an offer of mediation from the court, or indeed, even to suggest the possibility of trying mediation to the other side, would be a sign of weakness in the context of litigation. Since solicitors are conventionally trained in adversarial tactics, it is hardly surprising that they often feel they serve their client's interests best by adopting a tough stance in litigation and negotiation. Being the first to accept the mediation offer was seen by a number of solicitors as a dangerous strategy.

2.10.4 Among some defence lawyers, particularly those specialising in personal injury litigation, the tough stance has been refined virtually to an art form:

> "I'm acting for an insurance company. I have to use any tactic that I can, to pay as little as possible to the plaintiff. I intend to put the plaintiff to as much trouble as possible, in order to pay as little as possible. I always pay money into court. I want to get an order for costs. I don't think that mediation would assist in these sort of cases. The plaintiffs are running their cases on legal expenses insurance, so you have legal expenses insurance companies fighting other insurance companies. We are interested in reducing costs, but mediation wouldn't make any difference to costs in our particular case. Mediation is simply not appropriate where you have institutions involved like insurance companies." (Specialist personal injury defence solicitor).

> "Our clients do not consider that this is a claim appropriate for mediation. This is an employer liability personal injury claim where both parties are legally represented. The claim will either settle if the plaintiff will agree terms acceptable to the Defendant or else the matter will proceed to a full hearing. We cannot see how mediation will assist in this particular case." (Specialist personal injury defence solicitor)

> "Almost exclusively my instructions come from insurance companies, and I think in most cases my insurance clients would want the matter dealt with by a judge in the usual way rather than going to a mediation service." **Q: But in fact most cases don't go before a judge, do they?** A: "Most cases settle, well that in part is the reason we didn't want to mediate on this particular case. We would anticipate trying to settle it and therefore we were keen to keep our options open on payment into court and I wouldn't have wanted to go for a quick mediation hearing." (Specialist personal injury defence solicitor)

2.10.5 An uncompromising approach to litigation was also expressed by some specialist personal injury firms who act exclusively for plaintiffs. Moreover, telephone interviews and some fact-to-fact conversations with solicitors provided evidence that this sort of approach meant that mediation offers sent by the court to solicitors did not always reach the client. One or two solicitors remarked that they simply put the material from the court in the dustbin and others reported that although they sent the material to their client they always advised rejection of the mediation offer. In some cases the practice within firms was inconsistent, for example:

> "I have been sending off the information pack to the client, but advising them not to take it up basically. Although we are not too concerned that we have to. I don't think that there is any obligation on us and actually there is a difference of view ([in this firm]. Some of us have said that we have got to send it to the client and some of us have said no we haven't. We are not under any rule

anywhere to show the client anything of that kind. **Q. Have any of your clients shown any interest in the mediation offer?** No they haven't. They have just accepted my advice" (Specialist personal injury plaintiffs' solicitor)

One firm wrote to the court at a relatively early stage in the scheme announcing that they had no intention of recommending acceptance of the CLCC's mediation offers to any of their clients and, after discussion, the court subsequently ceased sending offers to that firm. On the other hand, a specialist plaintiffs' personal injury firm routinely advised some of their personal injury claimants to accept the court's mediation offer and that particular firm represented plaintiffs in almost all of the personal injury claims mediated during the scheme. The firm complained during telephone interviews that although they frequently recommended mediation to their own client, the defendants almost never accepted the offer.

2.10.6 Scepticism about mediation among hard-line litigators in the personal injury field was often combined, however, with an appreciation of the economic and strategic realities of litigation. For example:

> "I don't think the defendant insurers will be interested in mediation anyway because they want to discourage claims… I think the quickest way to sort out the number of personal injury case in the CLCC is to list the buggers early. Watch them disappear. Anything less than £10,m000 at the point of issuing, unless the prognosis isn't clear, and I am ready for trial. The front loading is huge so I am ready for trial… The focus on getting the case settled is determined by the trial date instead of being concentrate earlier – so bring the trial date forward. The defendants still won't make the right payments into court, so you have got to run to trial. They consistently pay too little. They know who we are. They know that we are Legal Expenses Insurance supported and they still pay the wrong money in." (Specialist personal injury plaintiffs' solicitor)

LOSING MONEY

2.10.7 Discussions during telephone interviews also provided some insights into concerns about whether solicitors would be able to recover their costs through mediation in the say way as in ordinary settlement discussions or at trial. For example:

> **Q "If you have a simply running-down case would you want to try mediation?** A. I suppose so, but the way legal aid pays these days I would rather fight and win or settle and get my costs paid. From a personal point of view I need the money. **A But if you went to mediation, costs could form**

> **part of the final agreement.** A. It's possible. But that would certainly worry me from a lawyer's point of view. It's my job."

2.10.8 Although some solicitors were clearly concerned about the potential of mediation for reducing the profits on individual cases, particularly when they felt confident that they would be able to settle the case in any event through normal negotiations, there was a tiny handful of solicitors who took a different view. This view, which tends to be popular among large City firms who are making ADR a selling point, is that although mediation has the potential for reducing income on a particular case, it leads to more satisfied clients and that these satisfied clients will come back with future cases. Moreover, since clients are becoming more interest in and knowledgeable about mediation, clients will begin to expect firms to be able to advise on and offer ADR as part of the batter of approaches to dispute resolution:

> "Of course it is in solicitors' interests to proceed to litigation. But as things are getting more competitive we must provide a good service. Everyone is getting interested in ADR so we ought to be offering that to our clients. At the end of the day we would lose out if everyone mediated, but at the end of the day I have to put the interests of the client first. I can see ADR becoming popular. It's quicker as well. Even with automatic directions it is quicker for clients and that appeals to them. …I haven't been involve din a mediation, but from what I've seen from the leaflet sent by the court it looks as though it should be quicker and cheaper for the client." (Solicitor in small local firm)

CLIENT RESISTANCE TO MEDIATION

2.10.9 Since the court's offers of mediation were filtered largely through solicitors, and since those parties who accepted mediation often did so on the advice of their solicitor, the role of the solicitor as a gatekeeper to the mediation process appears to be, and certainly is, very important. One should not forget, however, that litigation commences as a result of the action of one litigating party, not the unprompted action of a solicitor. The issue of client approach to litigation and client resistance to compromise is also very important. It is clear from interviews with solicitors and from the responses to postal questionnaires that, in some cases, solicitors suggested to their clients that they might try mediation, but the clients were themselves reluctant to experiment. In the early stages of dispute there is often considerable bad feeling between the parties and many plaintiffs are not keen to compromise. Although the

decision to litigate represents the beginning of a serious and often tortuous process, it also marks the end *and failure* of another process by which the plaintiff, with or without the help of a solicitor, has attempted to obtain what s/he wants from the opponent. Pre-litigation dispute settlement activities are characterised by negotiation and persuasion backed-up by the threat of litigation. They are also often dogged by non-communication or stone-walling which leads to frustration and anger on the part of plaintiffs and sometimes the same emotions on the part of an affronted defendant. The emotional overlay and belief in the justice of the cause at the early stages of litigation can represent a substantial barrier to mediation with its explicit emphasis on compromised settlement. These factors were mentioned in interviews by some solicitors who had recommended mediation to their clients, for example:

> "Personally, I think judges might usefully suggest mediation in front of clients at an early stage of litigation so that clients are reassured that their legal representative are not 'wimping out'! Client perception is an obstacle to mediation which can easily be addressed in this manner."

> "The number of my clients who want mediation is quite spectacularly small. They don't want it because they think it is a sign of weakness. In fact they think either that it is too soon or later they think it shows weakness. In the commercial court they give such a huge hint that even though clients don't want to do it they are forced to go along with it. …We often strongly suggest mediation but clients don't want to show weakness. …They should try compulsion. It gets over the 'looks like weakness' problem. It is difficult to get the other side to talk. If foisted on you there might be a row but it might get things moving."

2.11 Conclusion

2.11.1 Although the rate at which *both* litigating parties accepted the CLCC's offers of mediation remained static at around five percent during the two years of the pilot scheme, there was considerable variation in demand for mediation between different case types *and* there was a significant minority of cases of all types in which one party alone accepted the mediation offer. Although both plaintiffs and defendants in personal injury clams almost universally rejected the mediation offers, parties to breach of contract or goods and services disputes were much more likely to be willing to mediate, and this was particularly so where the disputing parties were both business litigants.

2.11.2 The role of the legal profession as gatekeepers to mediation is important. Since levels of legal representation in civil disputes over £3000 appear to be high, the profession will exert a crucial influence over demand for mediation. This influence will remain constant whether mediation offers are sent to solicitors or direct to the parties. Whether or not a litigant displays an initial preference for glorious victory over pusillanimous compromise, he should be in a position to make an informed choice about available dispute resolution processes and his solicitor plays a critical role in that choice.

2.11.3 The evidence of the research indicates that, at the grass roots, the profession lacks knowledge and experience of mediation. As a result, solicitors are generally unenthusiastic, frequently apprehensive and occasionally positively hostile to a dispute resolution technique that is not well understood and does not fit well with conventional adversarial litigation strategy. These are facts rather than criticisms and are matters that can be partly addressed through education. However, the enormity of the culture change that would be necessary to achieve even a modest shift from traditional litigation strategy to mediation, especially among personal injury litigators *and* their clients, should not be underestimated.

3. MEDIATIONS: CHARACTERISTICS AND OUTCOMES

3.1 Introduction

3.1.1 This Chapter is concerned with a detailed analysis of mediations and includes a description of the characteristics of mediated cases, the characteristics of mediation sessions, an analysis of the outcome of mediations and a comparison of the outcome of mediated cases with the outcomes in two samples of non-mediated cases included in the evaluation.

3.1.2 There are some features of the scheme at the CLCC which need to be borne in mind when considering the data in this chapter. First, all of the mediations were held in the Court building between the hours of 4.30pm and 7.30pm in the afternoon/evening. The time limits on mediations were strictly enforced, to the extent that in some mediations which overran the deadline of 7.30pm the parties found themselves plunged into darkness when the lights in the building were switched off.

3.1.3 Second, the mediations were conducted by trained mediators drawn from five different mediation organisations participating in the pilot scheme. The mediators provided their services for a nominal fee of £50, split between the parties. Throughout the period of the pilot mediation scheme, many of the mediations were conducted by relatively inexperienced mediators. Indeed, some were conducting their first "real" mediation and to that extent the pilot scheme was often operating as a training ground for new mediators. The lack of experience on the part of mediators is a function of the number of newly trained mediators in circulation who are keen to cut their teeth on real cases and the paucity of cases available for mediation in general, despite the current 'noise' surrounding the subject of ADR. The settlement or 'success' rate at mediation sessions must therefore be considered in this context.

3.2 Settlement rate among mediated cases

3.2.1 One of the key issues in assessing the ‘success’ of the CLCC mediation scheme is the settlement rate at mediations. Although mediators argue that mediation is valuable in narrowing issues even though settlement may not be achieved, the CLCC mediation scheme Advisory Committee were keen to achieve a high settlement rate. It was also clear from conversations with mediators that many measured their own success as a mediator on the basis of whether or not a high proportion of their cases settled at the mediation appointment.

3.2.2 Of the 160 cases mediated by the end of the study period, the proportion of cases that settled at the end of the mediation was 62% overall (99 cases settling and 61 cases not settling at the end of the mediation). This figure is lower than that generally quoted by mediation organisations. There are, however, some differences in the way that the success rate has been calculated in this study and the way that mediation providers tend to calculate their success rate. First, the settlement figure does not include those settlements that occurred before the mediation took place but after a date for mediation had been set (of which there were eight cases). We have also not included, at this stage, cases settling after the mediation, although mediation organisations may do this if the settlement occurs relatively soon after the mediation. Post-mediation outcomes among cases that did not settle at mediation are analysed below (see Figure 3-11).

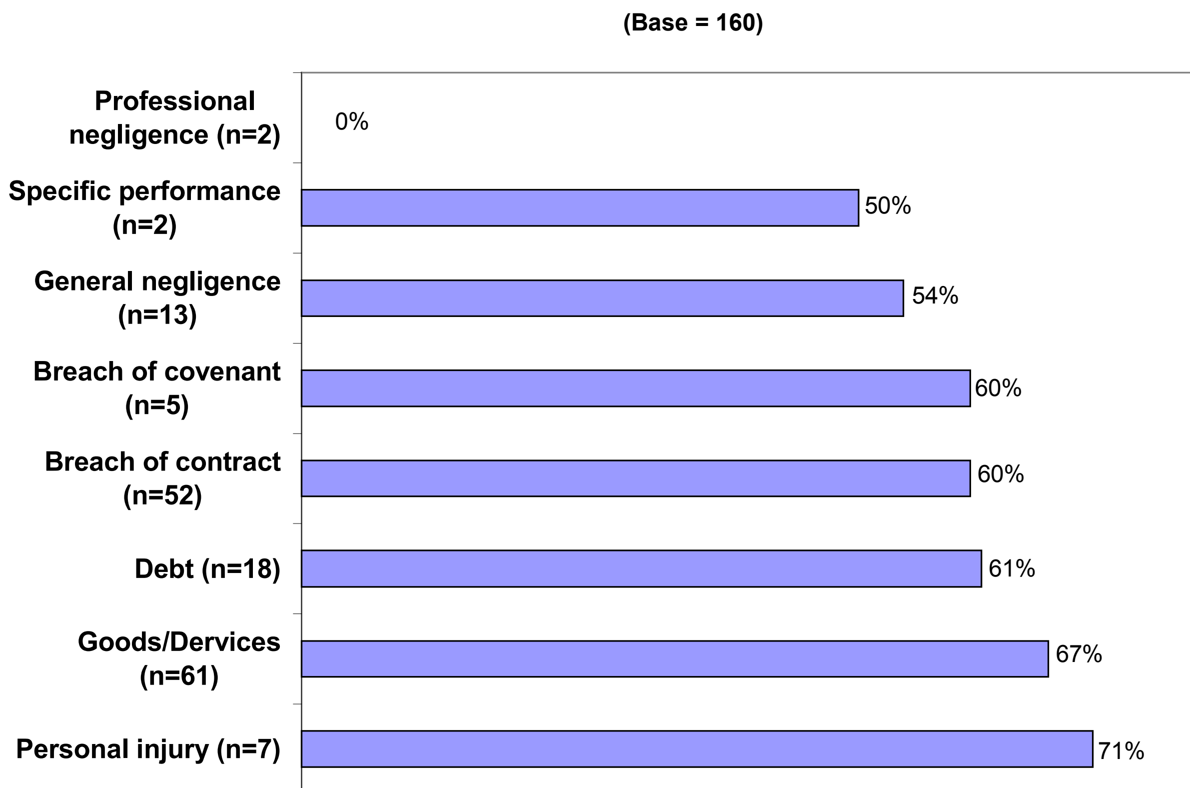
3.2.3 An analysis of the settlement rate in mediations over the life of the mediation scheme indicated that the rate remained fairly constant throughout. This consistency is interesting, since disappointment with the success rate during the first year of the scheme, and the fact that many mediations were being conducted by novice mediators, led to a request by the court that mediation organisations should seek to send more experienced mediators[1]

[1] Following this request one organisation began sending a pupil mediator to accompany the mediator and a higher proportion of experienced mediators as the principal mediator.

3.3 Settlement rate at mediation appointment and case type

3.3.1 The analysis in Figure 3-1 shows the relative settlement rate at mediations among cases of different types. Although many categories have very few cases in them, the indication from the Figure suggests that the settlement rate at mediation appointment remained fairly consistent between different case types, apart from the two professional negligence cases. Although caution must be used in drawing firm conclusions about casetypes with very small and highly-selective numbers, Figure 3-1 suggests that once the decision to attempt mediation had been taken, the different case categories had a roughly equal likelihood of achieving a settlement at mediation. The information in Figure 3-1 therefore tends to support the view that mediation can be used successfully across a wide spectrum of case types.

Figure 3-1 Settlement rate at mediation appointment by case type

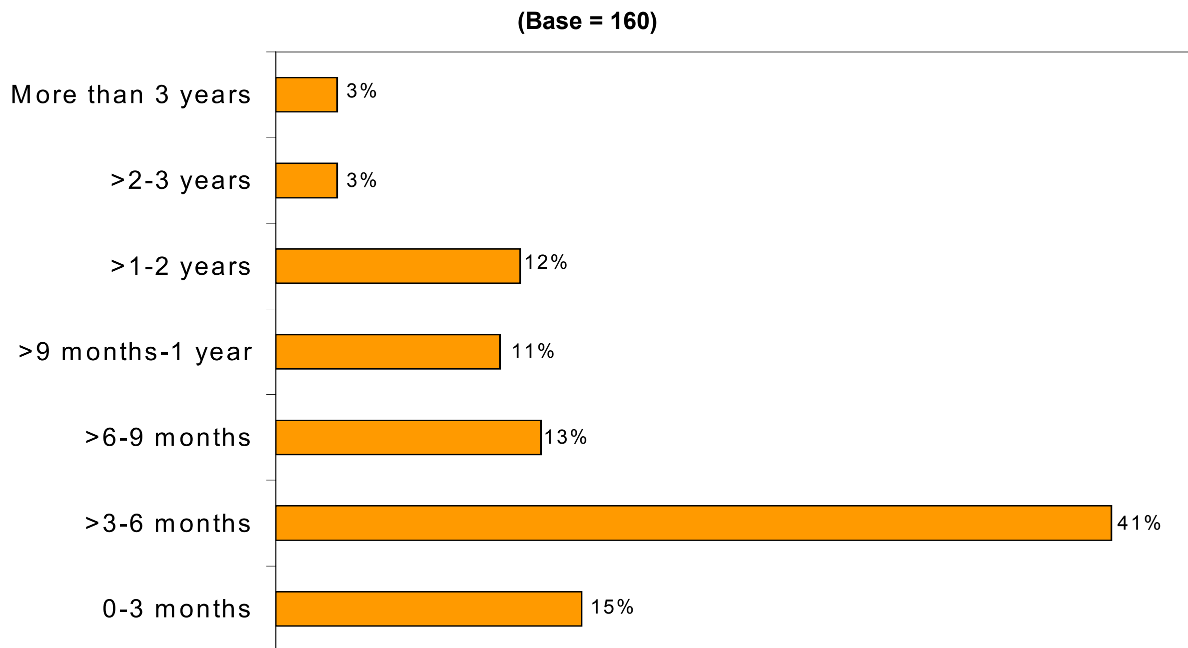


3.4 Settlement rate at mediation appointment and age of case

3.4.1 Although the original intention of the mediation scheme was to offer mediation at an early stage in the life of defended cases coming into the court, a substantial proportion of cases coming into the CLCC had been referred from other courts for trial at CLCC, or had been transferred down from the High Court. As a result, mediation was offered and accepted in a minority of cases where the date of entry of defence was well before the commencement of the pilot scheme (see Chapter 2 above). Among mediated cases, over one0-quarter (27%) had a date of defence *earlier* than the beginning of the pilot scheme. In some six percent of mediated cases the date of defence was prior to January 1995; in a further 12% of cases the date of defence was between January and December 1995; and another nine percent of cases had a date of defence that was in the first quarter of 1996. Although having a proportion of elderly cases in the population of mediated case created difficulties in carrying out direct comparisons between the length of mediated and non-mediate cases, it nonetheless offered the possibility of comparing the outcome of mediation sessions across cases with a relatively wide age spectrum.

3.4.2 Figure 3.2 shows the age distribution of cases that were mediated, from which it can be seen that the most common age of cases mediated was between three and six months since the entry of the defence (41% of mediated cases fell within this age range).

Figure 3-2: Period between entry of defence and date of mediation

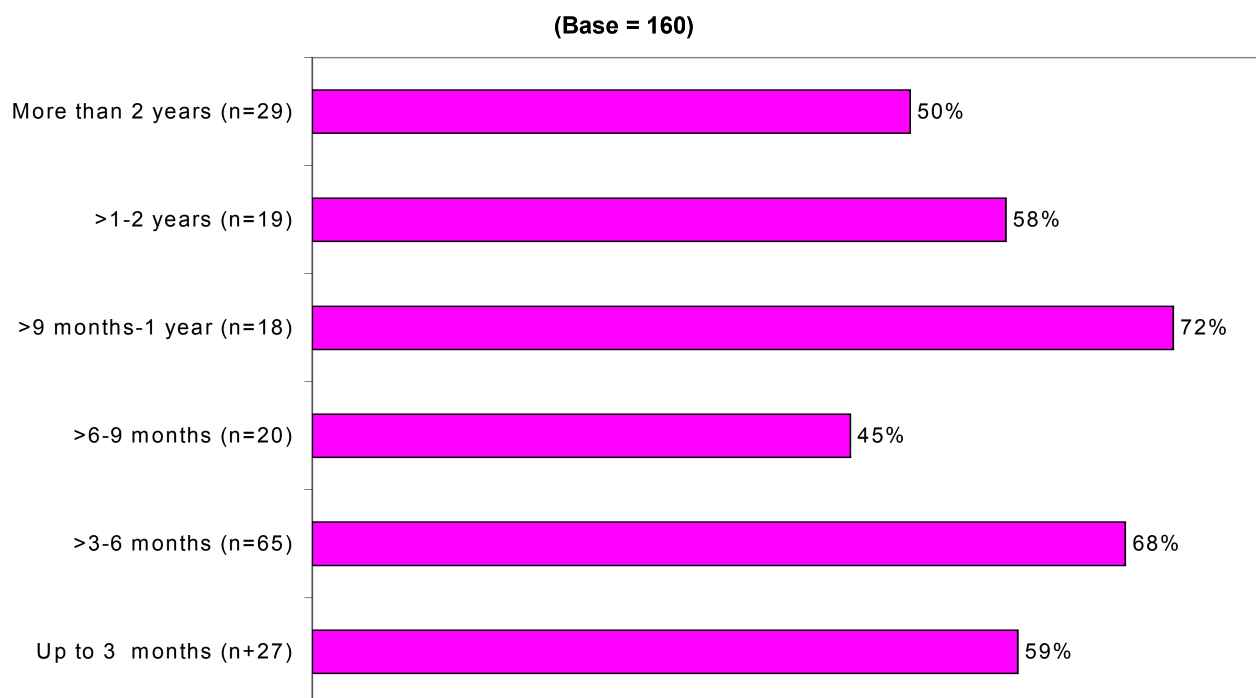


3.4.3 The information in Figure 3-3, which analyses outcome of mediation in relation to the period since the defence was entered, shows a somewhat irregular pattern. There was no huge variation in the rate at which more or less elderly cases achieved a settlement at mediation, although the highest settlement rate was found among cases where between nine months and one year had elapsed since entry of the defence (72% settled at mediation). The next highest settlement rate was found among cases where between three and six months had elapsed since the defence was entered. The lowest settlement rate was among cases where between six and nine months had elapsed since the entry of the defence, although the numbers in this group are rather small. In fact, ignoring the dip at the six to nine months category, the pattern suggests that settlement is *less* likely at the two extremes of the case-life spectrum, ie the very young and the rather old cases.

3.4.4 There are a number of possible explanations for this finding, for example, that at the earliest stage in the life of a case the parties have not yet reached a state of mind in which they are prepared to compromise, or they are not sufficiently exhausted, or legal costs have not yet begun to guild. An explanation for very elderly cases failing

to settle could be almost exactly the opposite: that parties are so entrenched and legal costs so high that settlement becomes difficult. Moreover, the mere fact that cases have failed to settle over a very long period of time suggests that the case is likely to be particularly litigious or that there is little scope for compromise.

Figure 3-3 Settlement rate at mediation appointment in relation to period since defence entered

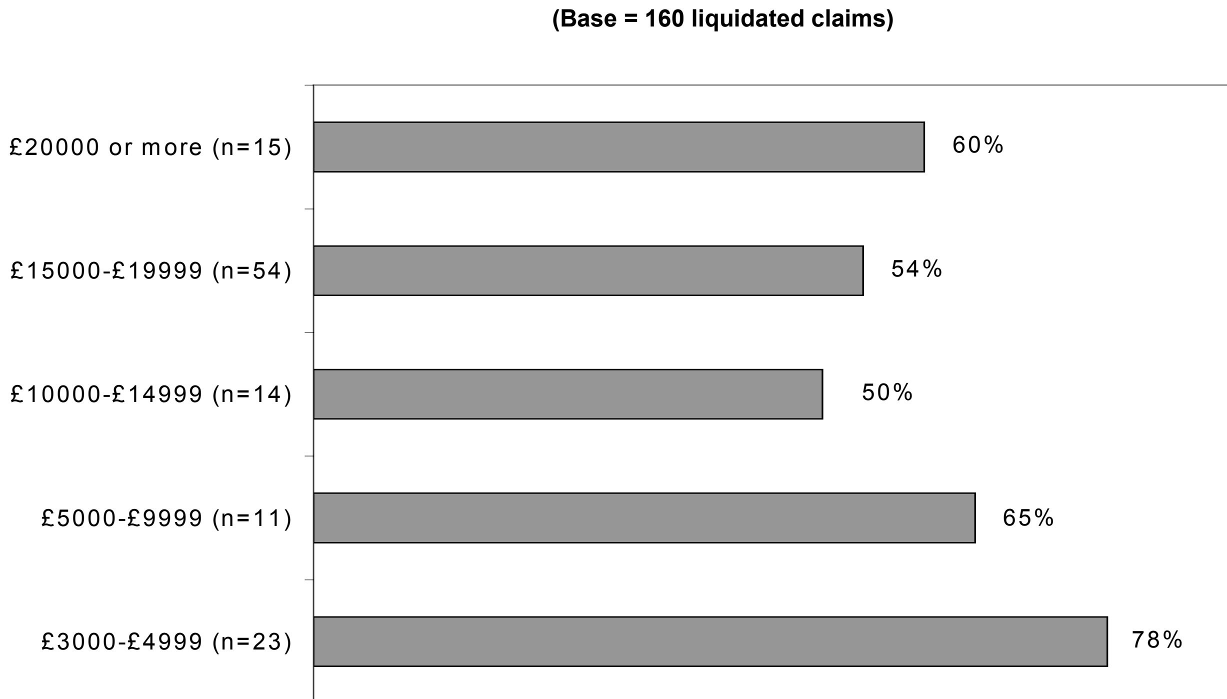


3.5 Settlement rate at mediation and claim value

3.5.1 An analysis of outcome of mediation in relation to the value of claims where claims were liquidated (Figure 3-4) shows a somewhat higher settlement rate among lower value claims than among higher value claims, although the difference is not great. Among claims with a liquidated value of below £5,000 the settlement rate was above average at 78%. The next highest settlement rate was among cases with a liquidated value of between £5,000 and £10,000. At the highest end of the claim-value spectrum (over £2-,000) the settlement rate was 60%.

3.5.2 The higher settlement rate among lower value claims may reflect the fact that at this level, the costs risks for parties, even in the county court, are disproportionate to the claim value and the pressure or incentive to settle rather than proceed with costly litigation is likely to be greatest.

Figure 3-4 Settlement rate at mediation in relation to claim value



3.6 Settlement rate at mediation and mediation organisation

3.6.1 Figure 3-5 shows the distribution of mediations among the five participating organisations, indicating that the bulk of the work was roughly evenly distributed among four of the five participating organisations.

3.6.2 Figure 3-6 indicates the settlement rate at mediations in relation to the organisation from which mediators were drawn. This shows that there was some variation in settlement rate between the four organisations which dealt with the bulk of cases, with organisation D achieving the highest settlement rate (72% of mediated cases settled at mediation appointment) and organisation B the lowest settlement rate (50% of mediated cases settled at mediation appointment).

Figure 3-5: Distribution of work among participating mediation organisations

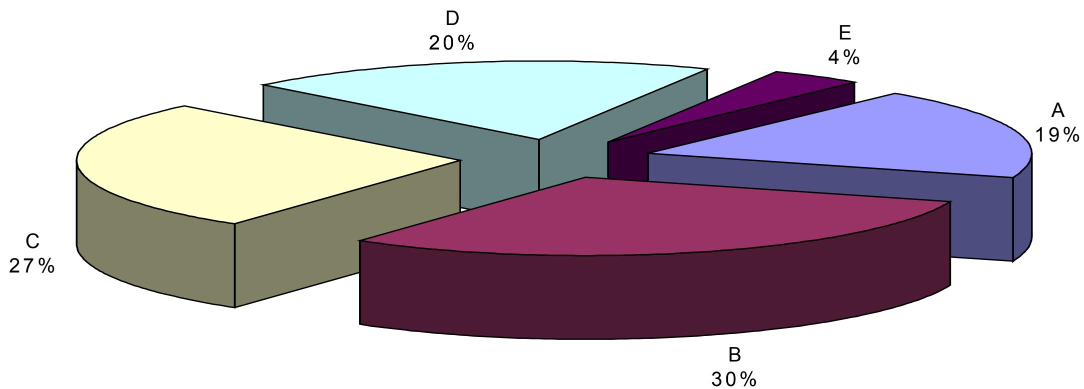
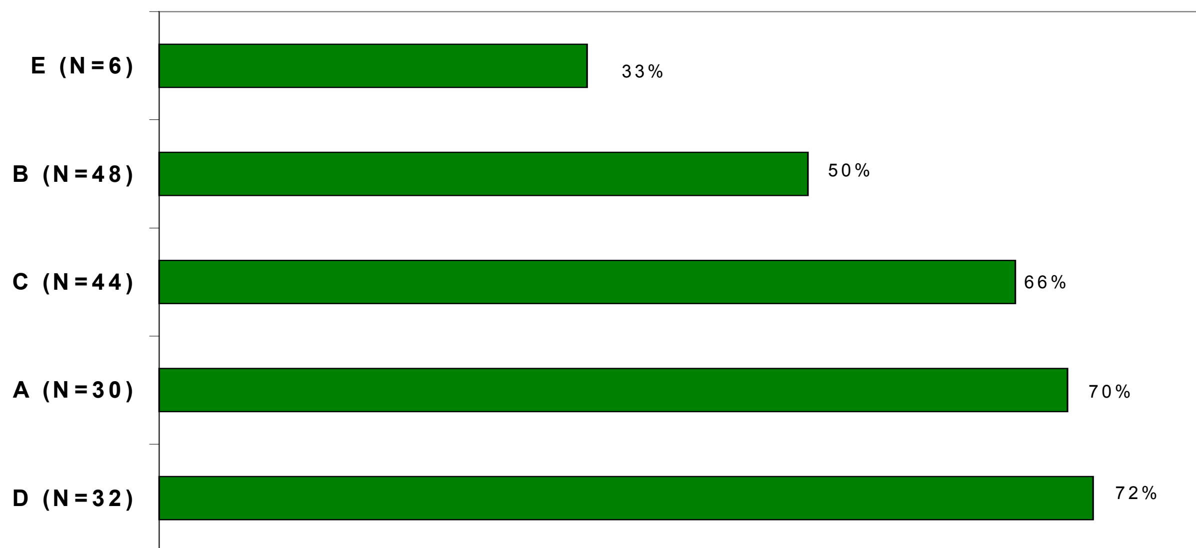


Figure 3-6: Settlement rate at mediation appointment among mediation organisations



3.7 Settlement rate at mediation and party configuration

3.7.1 Almost half of the mediations conducted during the pilot scheme involved disputes between two companies (45%) and almost one-quarter of cases (23%) involved an individual suing a company. Companies were suing individuals in just under one-fifth of mediated cases (18%) and in just under one-tenth of mediated cases (9%) individuals were suing other individuals. The remaining cases involved

individuals suing local authorities (3%), government bodies, health authorities or other organisations (4%).

3.7.2 Analysis of outcome in different configurations of disputing parties revealed no particular patterns. The success rate in company v company disputes was virtually identical with that of company v individual and individual v company disputes (62%, 61% and 60% respectively). There was a slightly higher success rate in cases where individuals were suing other individuals (67%) and a slightly lover success rate where individuals were suing local authorities (50%), but the numbers in this last category are very small.

3.7.3 The consistency of success rate among different party configurations suggests that mediation can be used across a wide range of cases, but it also suggests that it is not especially appropriate for any particular party configuration, although there was a very slightly higher success rate among individual v individual disputes (see the discussion in the following section regarding legal representation and party configuration).

3.8 Settlement rate at mediation and legal representation at mediation

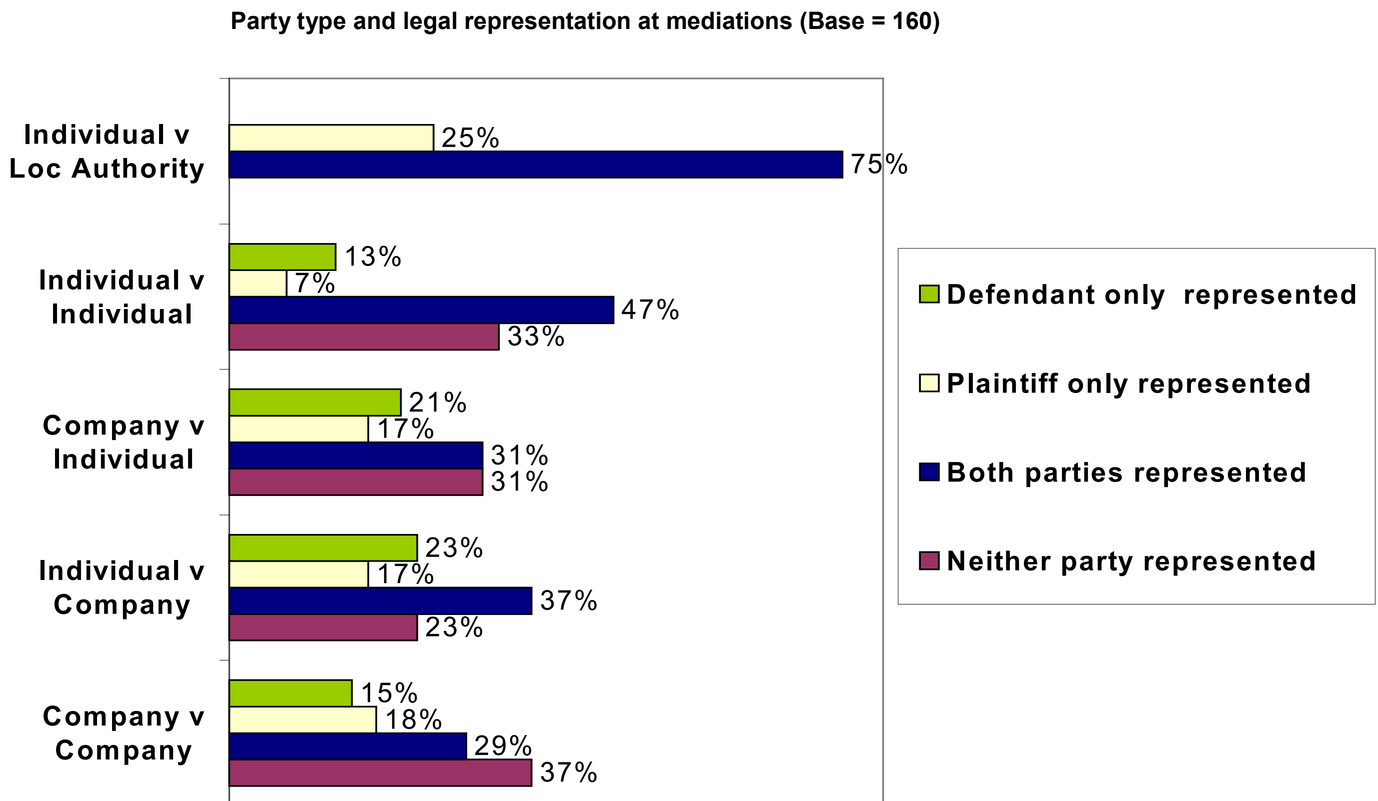
3.8.1 The presence of one or more legal representatives was a common feature of mediations. Although during the planning stages of the pilot, the architects of the mediation scheme had imagined that it would appeal particularly to litigants in person, in the vast majority of defended cases issued in the CLCC with a claim value over £3,000 the litigants are legally-represented. The prevalence of legal representation is reflected in the following analysis of representation and outcome of mediations sessions.

3.8.2 Among the 160 mediations conducted during the study period, less than one-third (31%) took place without any legal representatives present. In over one-third of cases (37%) both parties were legally represented at the mediation; the plaintiff alone had legal representation in 16% of cases and the defendant alone was represented in an identical proportion of cases (16%). Thus in over two-thirds of all mediations

conducted in the pilot scheme, one or both parties to the dispute were legally-represented at the mediation appointment. Equally importantly, in almost one-third of mediations conducted (32%) there was an imbalance of legal representation during the mediation, with the plaintiff alone or the defendant alone legally-represented.

3.8.3 The patter of legal representation is explored in more detail in Figure 3-7 which shows the pattern of representation at mediations in relation to party configuration. The figure shows that both parties were most likely to be represented in disputes where an individual was suing a local authority (although this is a very small group of cases) and where an individual was suing another individual. In the latter group, nearly half of the mediations (47%) took place with legal representatives present on both sides. Where disputes were between companies, legal representatives were present on both sides in only 29% of mediations, but in over one-third of mediations between companies, the parties attended without legal representation (37%). Mediations in which only the defendant was represented most often involved disputes in which individuals were suing companies. Almost one-quarter of individual v company mediations (23%) took place with the defendant legally-represented and the plaintiff unrepresented at the mediation session.

Figure 3-7 Legal representation at mediation appointments in relation to party configuration



3.8.4 An analysis of the outcome of mediations in relation to legal representation during the mediation session shows that settlement was achieved in over three-quarters (76%) o the mediations which took place in the absence of any legal representation (Figure 3.8). This compares somewhat unfavourably with a success rate of 55% when both parties were legally represented at the mediation session. The lowest settlement rate of all occurred when only the plaintiff was legally-represented (52% of these cases settled at the mediation). When only the defendant was accompanied by a legal representative, the settlement rate was 61%.

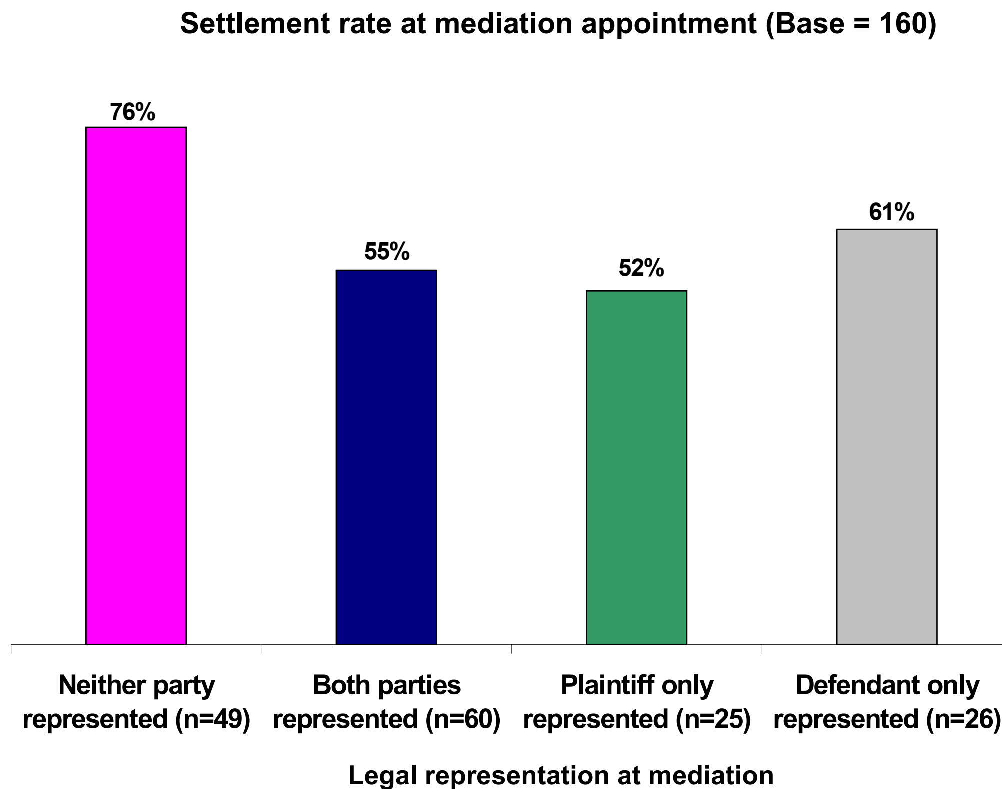
3.8.5 Closer analysis of these figures reveals that among the group of cases where there was no legal representation on either side during the mediation, over half (55%) were company v company disputes of which 78% settled, and the remainder were split

roughly evenly between company v individual disputes (18%), individual v company disputes (16%) and a small proportion of individual v individual disputes (10%). Among cases in which both sides were legally represented at the mediation session, authorities or other government bodies, and the proportion of company v company disputes in this group was lower than among the cases in which both sides were represented (35%) at the mediation.

3.8.6 The difference in settlement rate between mediations which occurred with and without legal representation is worthy of a more detailed analysis than is feasible with a total sample of only 160 mediated cases. Although it is possible to speculate on the reasons for the observed difference in settlement rates, it is difficult to offer firm conclusions. One obvious explanation would be that in the absence of legal representation, mediators have a freer hand to "knock heads" together and produce a compromise settlement by the end of the mediation session. Another is that the absence of legal representation at mediation sessions could be taken, at least in some cases, as a reflection of the fact that parties were already feeling the pressure of legal costs and these circumstances would increase the likelihood that a settlement could be achieved.

3.8.7 However, when reflecting on the influence of legal representation on the outcome of mediation sessions, it is necessary to consider the whole context of the mediation sessions. In some cases where legal representatives appeared for both sides, this was not in addition to the parties themselves, but in substitute for the parties themselves. In these circumstances it might be harder for mediators to achieve a settlement and, indeed, harder for representatives themselves to negotiate a compromise without their client present to agree settlement terms. Moreover, in some cases mediations were conducted with an unrepresented party on one side and a lawyer representing the other side without his client present. These rather unbalanced situations are not ideal for achieving a compromise and do not confirm with the classic mediation model.

Figure 3-8 Settlement rate at mediation in relation to legal representation at mediation



3.9 Settlement rate at mediation and Legal Aid

3.9.1 It was noted earlier that information about legal aid contained on court case files was very unreliable. It was also noted that despite the fact that special legal aid provisions were introduced in August 1997 in order to try and improve the take-up rate of the CLCC mediation scheme, no increase in demand was detected following the introduction of the special provisions. Only one case made use of the new legal aid provisions between the time of their introduction and the end of the study period in March 1998.

3.9.2 Despite the deficiencies of court files in relation to legal aid information, the evidence about legal aid is somewhat more reliable and comprehensive for cases that were mediated than for cases that rejected mediation offers. This is because among mediated cases, case file data was supplemented by information offered when mediation appointments were being arranged with the court, by information obtained

during observation of mediation sessions when it was occasionally revealed that the plaintiff or defendant had the benefit of legal aid, and also from postal questionnaires returned by plaintiffs, defendants and their legal representatives following mediations which requested information specifically about whether the parties had any assistance with legal costs.

3.9.3 Responses to postal questionnaires indicted that the majority of parties who accepted mediation had no assistance of any kind with their legal fees. Among plaintiff respondents four percent said that they had legal expense insurance, six percent said that they and legal aid funding, six percent said that they had a conditional fee arrangement with their solicitor and the remaining, one percent had trade union assistance and the remaining 83% said that they and no assistance from any source with legal bills. Among defendant respondents, four percent said that they had legal expenses insurance, six percent had legal aid, and the remaining 90% said that they had no assistance with legal bills.

3.9.4 Looking specifically at legal aid cases, in 15 of the case where mediation offers were accepted the plaintiff had legal aid (9%). Four of these cases concerned breach of covenant (usually actions against local authorities for disrepair), three involved breach of contract, two concerned disputes over the supply of goods and services, and there was one case each of personal injury at work (employers liability), general damages, general negligence, professional negligence, personal injury resulting from a road traffic accident and one case of an action for specific performance. Of these 15 cases, three actually cancelled the mediation after the date had been set. Thus in only twelve of the 160 mediated cases did the plaintiff have legal aid. Of these twelve cases one0-half settled and one-half did not settle at the mediation session. The settlement rate in this small group is therefore *lower* than among mediated cases as a whole and although the numbers are very small, the settlement figure suggests that when the plaintiff is legally-aided the pressure to settle at mediation might be less strong because costs anxieties for the plaintiff are reduced.

3.9.5 In addition to the 15 cases in which the plaintiff had legal aid, there were six cases in which the defendant had legal aid (there were no cases when both plaintiff

and defendant had legal aid). Of these six cases, two concerned a breach of contract, two concerned general damages, one was a breach of covenant and one related to the supply of goods and services. In one of these six cases the mediation was cancelled after the date had been set. Four of he remaining five cases settled at the mediation, a success rate of 80% which is considerably higher than for the population of mediated cases as a whole.

3.10 Comparison of final outcome in mediated and non-mediated cases

3.10.1 In order to address the question of the extent to which mediation promotes settlement in civil cases, a comparison was undertaken of the outcome of mediated cases with the final outcome of a sample of cases that rejected mediation and a control sample of cases to whom mediation was not offered.

Final outcome in non-mediated cases

3.10.2 Figure 3-9 presents an analysis of the final outcome of non-mediated cases based on information obtained from court files and, in a very few cases, directly from solicitors when the information on the case file was not clear. Information about final outcome was collected on two groups of cases: first, a random sample of over 700 cases coming into the court during June/July/August 1996 where mediation had been offered by the court but was rejected (rejected sample); and second, on a random sample of almost 400 cases coming into the court in the four months before the mediation scheme commenced (January-April 1996) and to whom mediation was not offered (control group).

3.10.3 Information about the two samples of cases was extracted from case files during Summer 1997. Those cases that had not concluded by Summer 1997 were periodically re-examined and the case data updated until the end of the study period in Mach 1998. Thus the last opportunity for the outcome of the case to be checked was March 1998. Those cases that had not concluded either by settlement, trial or by being withdrawn or struck out were designated as “still unsettled”. Among the

rejected sample, the minimum time lapse since the case came into the court[2] would be about 18 months and the maximum time lapse would be around 22 months. Among the control group the minimum time lapse between entry to the court and final checking of outcome would be around 24 months and the maximum time lapse would be around 27 or 28 months.

3.10.4 Comparisons have been made between two broad case categories dividing personal injury from non-personal injury cases. Although preliminary analysis using more detailed case categories indicated that this categorisation masks some differences between case types, the broader categorisation has been used for two reasons: first, because the assignment of cases to the categories "goods/services", "breach of contract" and "debt" by the court was somewhat inconsistent, and second, because some of the find case type categories had very small numbers[3].

3.10.5 From Figure 3-9 it can be seen that the pattern of final outcome is virtually identical among those cases that rejected mediation and within the control group that was not offered mediation. Among non-personal injury cases (breach of contract, goods/services, debt etc) just under one-half of the sample rejecting mediation and just under one-half of the control sample concluded on the basis of an out of court settlement (48% and 47% respectively). The comparable settlement figure among personal injury cases was considerably higher, at 78% among cases rejecting mediation and 77% among the control group. The high settlement rate among personal injury cases has been noted in previous studies of personal injury litigation and may account for the lack of enthusiasm for mediation shown by plaintiffs' lawyers at least.

3.10.6 Non-personal injury cases concluded much more often than personal injury cases on the basis of a court adjudication, with 15% of rejected cases and 17% of the

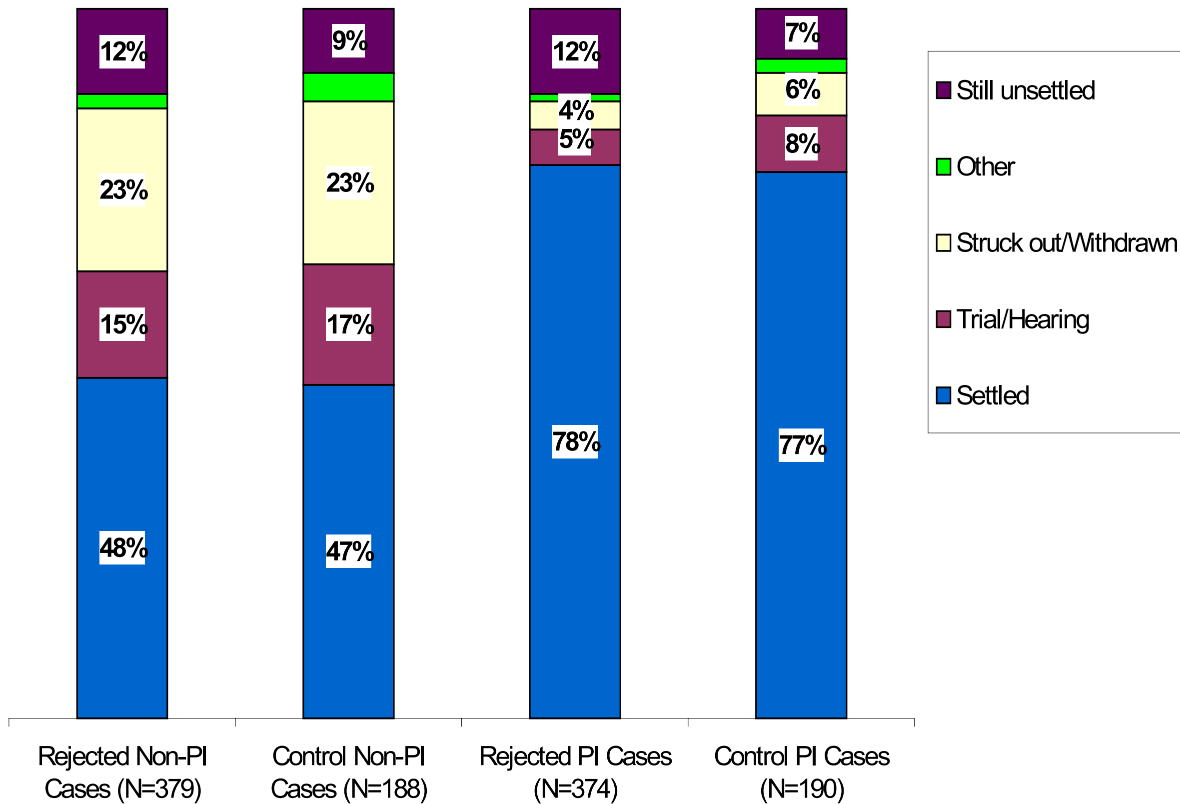
[2] The time lapse is expressed as the time "since the case came into the court" since, as noted earlier in the Chapter, a number of cases were referred to CLCC from other courts and from the High Court and some of these cases has a date of defence that pre-dated January 1996.
[3] Analysis within more detailed case categories indicates, for example that cases classified as "debt" are somewhat more likely to end by being struck out or withdrawn.

control group concluding in this way. Among personal injury cases the adjudication rates are much lower at 5% among rejected cases and 8% in the control group.

3.10.7 Another difference between personal injury and non-personal injury cases is the rate at which cases conclude on the basis of a withdrawal or by being struck out by the court. Almost one-quarter of non-personal injury cases ended in this way (23% in both samples) as compared with 4% and 6% of personal injury cases in the rejected sample and control samples respectively.

3.10.8 There was little difference between non-personal injury and personal injury cases in the proportion remaining unsettled at the end of the study period (around 12% for both case categories in the rejected group). The lower proportion of unsettled cases within the control group is accounted for by the longer time span of control sample cases.

Figure 3-9 Outcome of non-mediated cases: where mediation rejected or not offered



Final outcome in mediated cases

3.10.9 Among the population of mediated cases, the rate at which cases settled was about 62% overall, with little difference between case types – although the handful of mediated personal injury cases had a higher settlement rat than other case type categories (see above section 3.3.). Thus the simple comparison of outcome in mediated and non-mediated case lends some weight to the argument that mediation promotes settlement since the 62% settlement rate among mediated cases compares favourably with the settlement rates of around 48% in the rejected and control samples.

3.10.10 However, the comparison between final outcomes in mediated and non-mediated cases can be made in a number of ways and it is difficult to be sure which basis of comparison is the most legitimate. For example, if one were to base the comparison only on cases that had concluded during the study period this might have a slightly distorting effect since although some of the cases still unsettled at the end of the study period are likely to go on and settle and some may go on to be tried, at least a proportion of the unsettled cases in the rejected and control sample at the end of the study period were effectively dead cases that simply remained on the court's 'books'. However, if the unsettled cases are excluded from the comparison of mediated and non-mediated cases and final outcome calculations based only on those cases that had been concluded by the end of the study period, the outcome figures look slightly different. This is shown for non-personal injury cases only in Figure 3-10[4].

3.10.11 The pattern of case outcomes for non-personal injury cases in the rejected sample and the control sample is, once again, virtually identical (Figure 3-10). However, by removing unsettled cases from the breakdown, we find that the settlement rate among cases concluded during the study period was 57% in the sample of rejected cases and 52% in the control sample. The proportion of cases decided at trial was 17% in the rejected sample and 19% in the control sample. In both samples of non-mediated cases, around one-quarter were struck-out by the court or withdrawn.

3.10.12 A comparison of the settlement rate at mediation sessions with the settlement rate of only those non-mediated cases that concluded during the study period shows that the simple mediation settlement rate (62%) was still higher than the settlement rate of 57% among those cases that rejected mediation and those that were not offered mediation (52%).

[4] Only non-personal injury cases are analysed here because there were too few mediated personal injury cases to undertake a sensible comparison.

3.10.13 However, a more striking comparison can be made between the final outcome of all non-personal injury mediated cases (whether or not they settled at the mediation appointment) and the final outcome of cases that rejected mediation or were not offered mediation. In the first column in Figure 3-11 (which includes cases still unsettled at the end of the study period) we find that by the end of the study period, the overall settlement rate among non-personal injury mediated cases was 80%, with 62% settling at the mediation session and another 18% settling some time after the mediation session. Among those mediated cases that settled after the mediation the median delay between the unsuccessful mediation and settlement was 70 days (mean 90 days, range 5-295 days).[5] The proportion of unsettled mediated non-personal injury cases ending on the basis of an adjudication was four percent and the proportion of unsettled mediated cases finally struck-out or withdrawn was three percent. Some 13% of unsettled mediated cases remained unsettled at the end of the period, although some of these cases might have had a very short timeline by the end of the study period[6].

3.10.14 The second column in Figure 3-11 (which analyses the outcome of only those nn-personal injury mediated cases concluded during the study period) is more clearly comparable with the analysis in Figure 3-10. This shows that among mediated cases, the total proportion concluding on the basis of an out of court settlement was 92% with 73% settling at the end of the mediation session and 19% settling some time after the mediation session but during the study period. Some four percent of non-personal injury mediated cases concluded on the basis of a court adjudication and another four percent were struck out or withdrawn.

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5 A little over one-fifth (22%) of this group settled within one month of the mediation date; the same percentage settled between one and two months after the mediation date; an identical percentage settled between two and three months after the mediation; and a further 22% settled between three and six months after the mediation. Some 11% of unsettled mediated cases finally settled over six months after the mediation had taken place.

6 Although the information about the rejected cases is largely based on those with defence dates during 1996 and the early part of 1997, information about mediated cases was collected throughout the period of the study. As a result some of the mediated cases have dates of defence in late 1997. If these did not settle at mediation there would have been only a relatively short time lapse before information ceased to be collected in March 1998 and unsettled mediated cases that had not concluded would have been designated as “unsettled” at that time.

3.10.15 The comparisons in Figures 3-10 and 3-11 can be taken as providing strong support for the argument that mediation is capable of promoting settlement, and that settlement is more likely following mediation even when cases fail to settle at mediation. It is naturally arguable that the population of mediated cases is highly self-selected and that the mere fact of agreeing to mediation indicates that the case is ripe for settlement. However, the stated reasons for accepting offers of mediation provide an alternative view (see Chapter 5 for an extended discussion of this issue), and suggest that for a proportion of cases at least, the motivation for accepting the court's offer of mediation was that the case was difficult to settle, the parties had become entrenched and that communication between the opposing sides was poor. Moreover, one of the most common reasons for rejecting offers of mediation (see Chapter 2) was that the case was likely to settle in any case.

Figure 3-10 Outcome of non-mediated non-personal injury cases concluded during study period

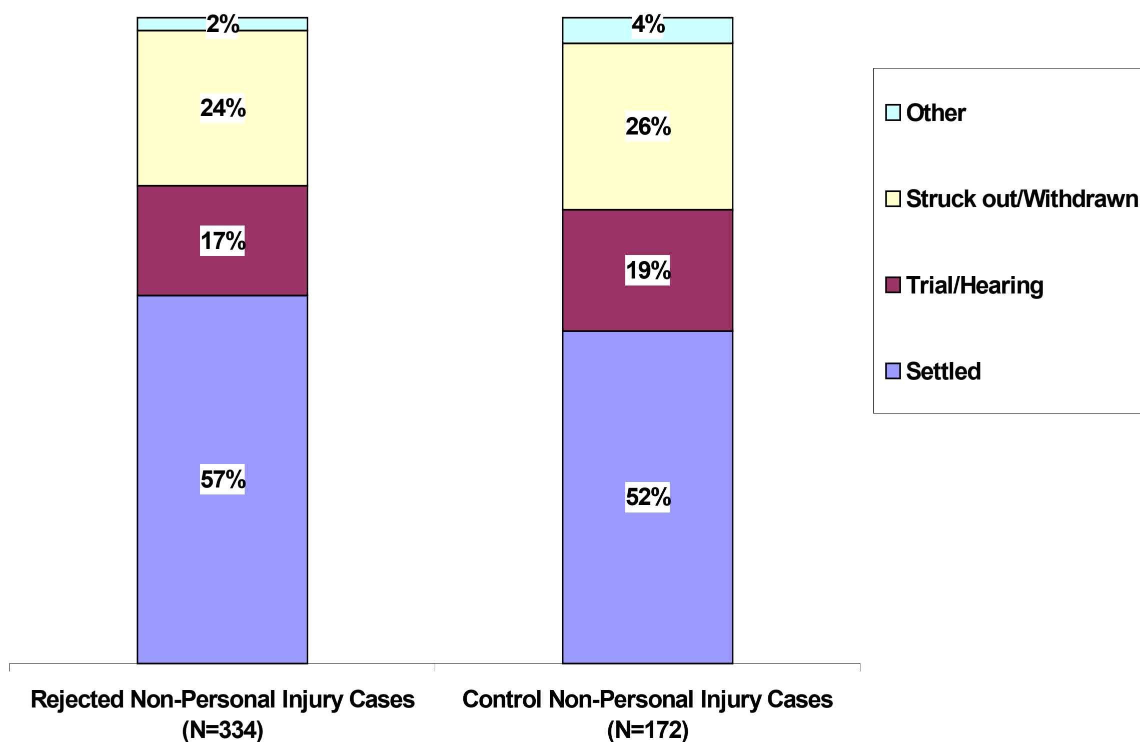
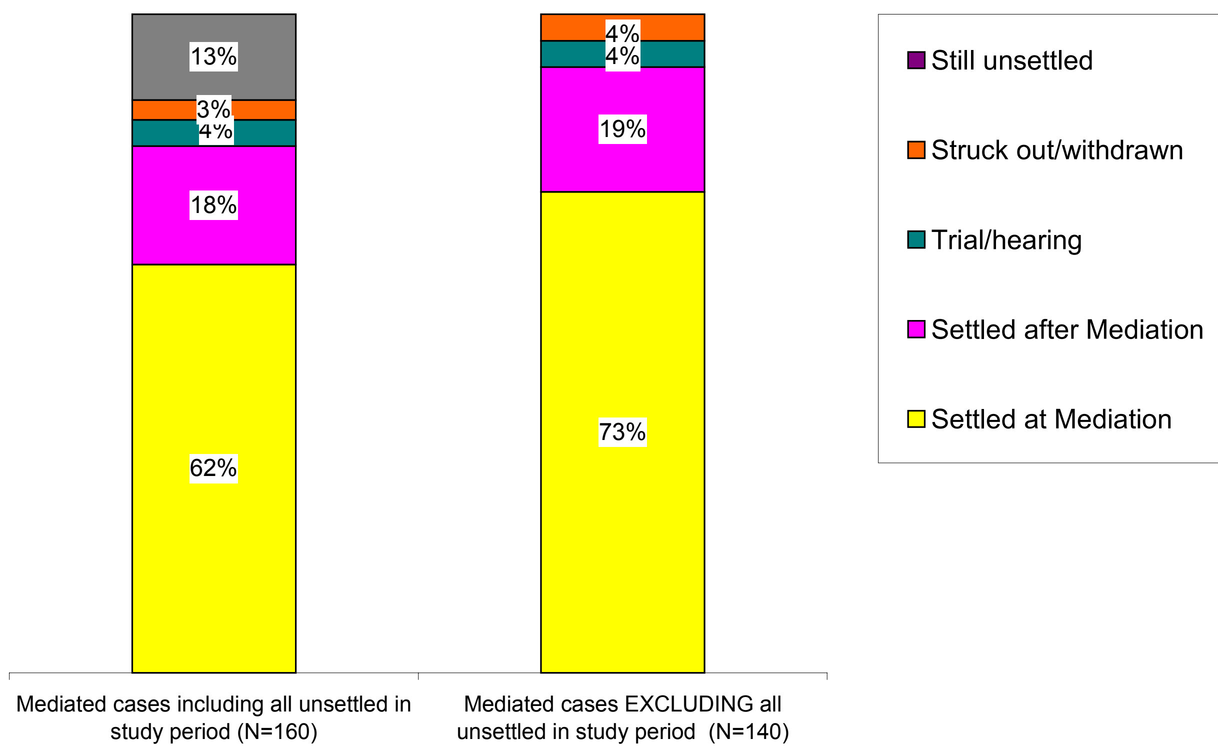


Figure 3-11 Final outcome of non-personal injury mediated cases



3.11 Settlements achieved in mediated and non-mediated cases

3.11.1 One issue that may be of importance in assessing the benefit of mediation in civil cases concerns the nature of the settlements achieved. A fundamental principle stressed by mediation organisations and, indeed, by mediators during mediation sessions, is that any settlement reached at the end of a mediation session should be consensual and not imposed on the parties by the mediator. The consensual nature of settlements is presumed to have benefits in terms of bringing the dispute to a close in a way that parties can accept, that the settlements are more likely to "stick" and that there is less likely to be a need for enforcement procedures.

3.11.2 As part of the evaluation of the mediation scheme, information was collected from court files, from parties and from legal representatives about the nature of

settlements reached at mediations. In addition, postal questionnaires sent to parties and their representatives following mediation asked whether any payments agreed under mediated settlements had been received and whether any other non-money terms of settlements had been complied with.

3.11.3 An analysis of agreements reached at mediations shows that in over three-quarters of the settled cases (79%) the basis of the settlement was that the defendant would pay a sum of money to the plaintiff. In seven percent of cases the agreement was that the plaintiff would pay a sum of money to the defendant; in eight percent of cases the case settled on the basis of an agreement that did not involve the payment of money; in four percent of cases the case settled with a simple withdrawal of the claim and any counterclaim; and in the remaining case there was a cross-payment between the parties.

3.11.4 In addition to information about money settlements among mediated cases, data were collected from court files about settlements among the sample of cases that had rejected mediation and the control sample, for the purposes of comparing the levels of settlements achieved in mediated cases with those achieved in non-mediated cases. Although the detail of settlements was not always available on court files, information was gathered about money settlements in 78 successfully mediated non-personal injury cases and five successfully mediated personal injury cases.

3.11.5 For the purposes of comparison information was obtained about out of court money settlements in 478 cases that rejected mediation (196 non-personal injury cases and 282 personal injury cases); in a further 52 non-personal injury cases where mediation was rejected and an award was made at trial; and in 14 personal injury cases where mediation was rejected and an award was made at trial. Information was also obtained about settlements and awards among the control group not offered mediation as follows: 78 out of court money settlements in non-personal injury cases and 133 settlements in personal injury cases; 29 non-personal injury awards at trial and 14 personal injury awards at trial.

3.11.6 Although the lack of mediated personal injury cases makes it difficult to draw any firm conclusions from comparisons with non-mediated personal injury cases, the information about settlements in on-mediated cases provides useful background material of a type that is not available elsewhere.

3.11.7 The comparison of average settlements in Table 3-1 suggests that the average settlements achieved in mediated cases are somewhat lower than the average settlements achieved among the sample of cases where mediation was rejected and among the control sample where mediation was not offered. Among settlements in non-personal injury cases, the median settlement achieved in mediations was about £2000 less than the median out of court settlement achieved among cases where mediation was rejected. It was also lower than the median out of court settlement achieved among the control sample.

3.11.8 Table 3-1 also shows the average settlement among mediated cases that failed to settle at mediation, but went on to settle out of court at a later stage. The median settlement figure among this group is almost twice that of the median figure for cases settling at mediation.

3.11.9 The lower average settlement figure for mediated cases could be interpreted in a number of ways. An obvious interpretation is that the 'real' claim value of those cases that settled at mediation was, on average, lower than that of those cases that did not settle at mediation and of those that rejected mediation. This interpretation is supported to some extent by the data in Figure 3-4 above which shows that liquidated claims with a value of under £5000 had a higher settlement rate than other claim value bands. It is also, however, possible that plaintiffs were prepared to discount their claims more during mediations as a trade off for an earlier settlement and the possibility of reduced legal costs. However, when the information about settlements provided here is combined with the information provided in Chapter 4 about levels of legal costs and that fact that the majority of mediated settlements involved each side paying their own legal costs, it seems that many plaintiffs would have been leaving their mediation sessions having extricated themselves from their litigation, but having achieved little financial benefit.

3.11.10 By way of comparison, Table 3-1 shows that among the small group of mediated personal injury cases settling at mediation, the median settlement figure is identical to that of the sample of cases where mediation was rejected and very close to the median settlement figure among the control sample.

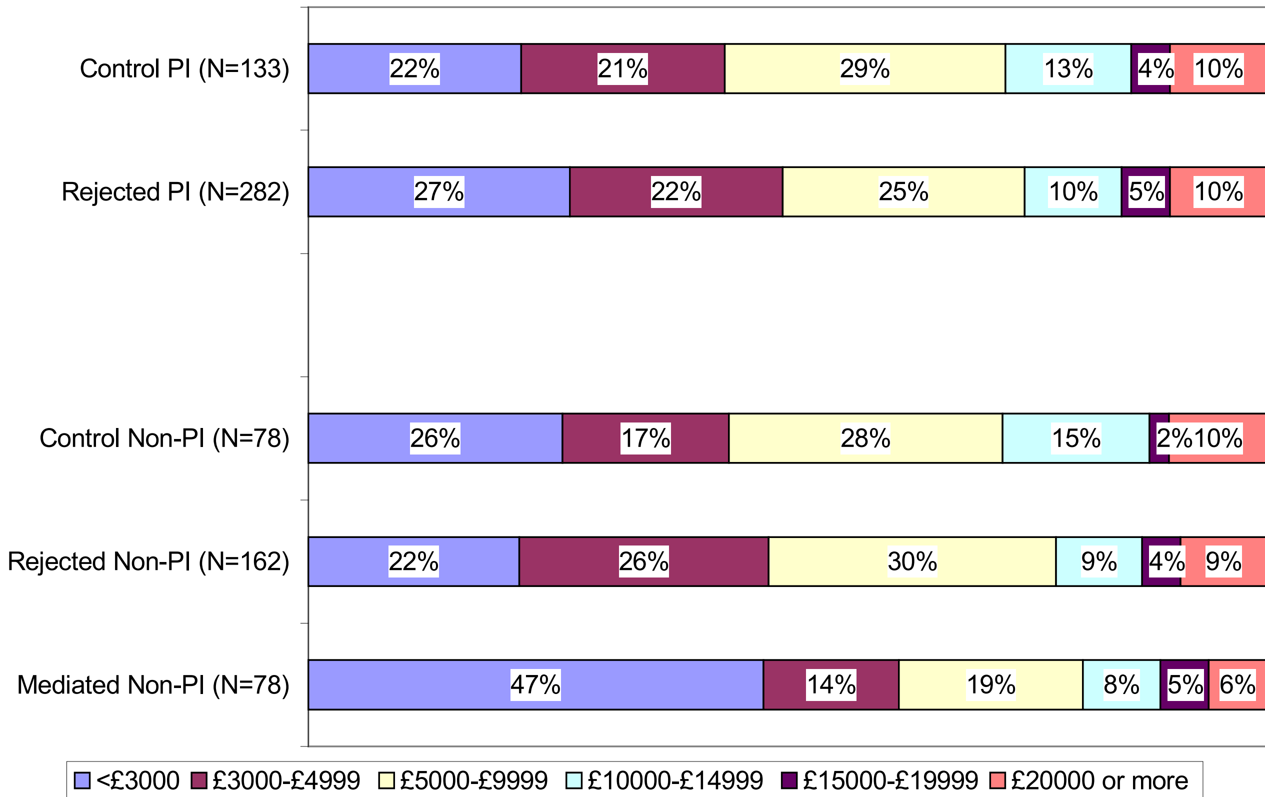
Table 3-1 Average settlement amounts in mediated and non-mediated cases

Case Group	Mean settlement	Median settlement
Mediated Non-Personal Injury Cases (n=78)	£5,816	£3,118
Rejected Non-Personal Injury Cases (n=162)	£8,003	£5,000
Control Non-Personal Injury Case (n=78)	£9,624	£6,367
Unsettled mediated Non-Personal Injury Cases (n=22)	£10,268	£6,100
Mediated Personal Injury Cases (n=5)	£7,002	£5,000
Rejected Personal Injury Cases (n=282)	£9,088	£5,000
Control Personal Injury Cases (n=133)	£9,582	£5,395

3.11.11 Figure 3-12 shows the distribution of settlements among mediated cases, rejected cases and the control group. From the Figure it can be seen that non-personal injury mediated settlements clearly bunch at under £3000, with 47% of mediated cases settling for under £3,000. The comparable figure for rejected non-personal injury cases was 22% and among the control group just over one-quarter of cases settled for less than £3,000 (26%).

3.11.12 It is difficult to carry out the same analysis for personal injury cases, since there were so few mediated personal injury cases. The distribution is given, however, for rejected cases and the control group in order to see the pattern of settlements among personal injury cases. The final two columns in the table indicate almost half of all personal injury cases in the sample of cases rejecting mediation and in the control sample settled out of court for sums of less than £5,000, and that between one-fifth and one-quarter of personal injury cases were concluded on the basis of a payment of less than £3,000.

Figure 3-12 Pattern of settlements among mediated and non-mediated cases



3.11.13 For the purposes of further comparison, Table 3-2 presents the average amounts awarded at trial in non-personal injury and personal injury cases. The first line in the table relates to only three non-personal injury cases that did not settle at mediation and went on to settle at trial. The Table indicates that median awards achieved at trial are, unsurprisingly, somewhat higher than settlement amounts.

Table 3-2 Average awards at trial in mediated and non-mediated cases

Case Group	Mean settlement	Median settlement
Unsettled Mediated Non-Personal Injury Cases (n=3)	£12,178	£8,000
Rejected Non-Personal Injury Cases (n=52)	£10,982	£6,944
Control Non-Personal Injury Case (n=729	£11,041	£5,625
Unsettled Mediated Personal Injury Cases	[only 1 case]	
Rejected Personal Injury Cases (n=14)	£7,929	£5,048
Control Personal Injury Cases (n=13)	£15,243	£6,000

3.12 Amount of settlement and claim value

3.12.1 In order to explore mediated settlements a little further, a limited analysis was undertaken of liquidated claims. The amount recovered in mediated settlements and the amount recovered in out of court settlement among rejected cases was compared with the claim value specified in the pleadings. Table 3-3 shows average settlement figures among mediated and rejected case within those claim-value bands that had the largest number of cases in the samples. From Table 3-3 it can be seen that the pattern of settlements in mediated case being around £2000 less than in rejected cases remains consistent. Among non-personal injury mediated cases with a claim value of £3000-4999 the median settlement figure if £1350 compared with £3000 for rejected cases in the same claim value band. The same pattern exists among cases in the £5000-9999 band. Although the number sin each group are relatively small the consistency of the pattern seems rather telling. It appears that plaintiffs who mediated non-personal injury claims were prepared (or forced) to accept quite a heavy discount on their claims, an addition to bearing their own legal costs (see Chapter 4.)

Table 3-3 Comparison of settlements with liquidated claim value among mediated settlements and settlements among rejected cases

Case Group	Claim Value	Mean settlement	Median settlement
Mediated Non-PI (n=14)	£3000-£4999	£1,492	£1,350
Rejected Non-PI (n=25)	£3000-£4999	£3,338	£3,000
Mediated Non-PI (n=26)	£5000-£9999	£3,392	£3,018
Rejected Non-(n=38)	£5000-£9999	£5,118	£5,000

3.13 Enforcement

3.13.1 Although it was originally intended that a check would be made of enforcement activity among mediated cases and among cases rejecting mediation and among the control sample, in the event it was found to be too difficult to attempt to link sampled cases with information about enforcement within the court. This part of the analysis was therefore abandoned. Nonetheless, the postal questionnaires sent to plaintiffs, defendant sand their legal representatives requested information about whether or not the agreed settlement amount had been paid. Among the questionnaires returned by plaintiffs who had settled their dispute at the mediation 88% stated that all of the settlement money had been paid; about nine percent said that some of the money had been paid and three percent stated that none of the money had been paid. Only four respondents stated that they anticipated any difficulty in obtaining their money from the defendant. The types of difficulty anticipated were as follows:

> "A cheque for £1,000 has been paid but the defendant is delaying the final payment".
>
> "The defendant has gone into liquidation."
>
> "I am anticipating some trouble".
>
> "I have been told that my solicitor has the money but will not pay me until the Council have paid the costs, which I have been told may take u to 9-12 months."

3.13.2 In addition to these problems, there was one case (concerning a dispute over double glazing) which settled at mediation on the basis of an excruciatingly complicated and highly contingent settlement agreement. At the mediation session the plaintiffs were represented by the solicitor and the defendants attended without representation. The defence had been entered in August 1996 and the mediation took place in October 1996. A postal questionnaire completed by the Plaintiff and a telephone call to the researcher from the Defendant some time after the mediation indicated that this apparent "settlement" unravelled fairly soon after the mediation and that the parties had resumed litigation. In November 1997 the Plaintiffs made an application to the court to strike out the defence and in the same month the defendants paid £200 in to court. In December 1997 the case settled when the plaintiffs accepted the defendant's payment into court of £200. In the questionnaire returned by the Plaintiffs' solicitors it emerged that the Plaintiffs had paid their solicitor £2,500 in legal costs.

3.14 Conclusion

3.14.1 The analyses of mediation outcomes shows that the majority of cases volunteering for mediation, across a wide spectrum of case types and claim values, reach a settlement at the end of the mediation appointment. Settlement appears to be more likely where the parties attend the mediation without lawyers. A particularly important finding is that mediated cases have a much higher overall settlement rate than non-mediated cases, whether or not the parties reached agreement at the end of the mediation session, thus lending support to claims that mediation promotes settlement generally.

3.14.2 A substantial proportion of settlements, among both mediated and non-mediated cases, were for sums of less than £3,000 indicating the modest recoveries achieved in county court litigation outside of the small claims jurisdiction. Despite the generally low level of recovery, it seems clear that those plaintiffs who agree to mediate, in non personal injury cases at least, appear to be prepared to discount their claim quite heavily in order to achieve settlement.

4. TIME AND COST

4.1 The importance of time and cost in ADR discourse

4.1.1 One of the most important issues in the debate about the value of mediation as an alternative form of dispute resolution is the alleged ability of mediation to shorten the life of a case beyond normal expectations. Mediation providers and others involve din promoting mediation as a valuable alternative to traditional litigation and negotiation processes often stress not simply the qualities of the process – that it is a consensual, informal and problem-based approach to resolving conflict – but also the quantitative benefits in bringing disputes to a more rapid and less costly conclusion than might be achieved following normal court litigation procedures. In fact the issues of time and cost are inextricably linked in these discussion, as indeed they have been in the general debate surrounding proposals for reform of the civil justice system. The underlying common-sense assumption is that if the timeline to the conclusion of a case can be reduced, or if an early settlement can be achieved, this will naturally and inevitably reduce legal costs. The truth of this assumption has yet to be established in any systematic way and trenchant arguments have been mounted in recent months that the assumption may be mistaken.[1]

4.1.2 As a result of the emphasis on time and cost saving in the discourse accompanying the promotion of ADR in general, it is unsurprising that many of the evaluations of experimental court-annexed and other mediation schemes have attempted to evaluate these claims.[2] The difficulties of reliably accomplishing this kind of assessment are profound even when objective measurements are available. In many cases, objective measures of cost and time have been unavailable and the

[1] See for example the arguments of Prof Michael Zander.

[2] Many of the evaluations have been conducted in the United States and Canada although there have been a few limited studies in the UK. Examples are: the Rand Corporation Study (1997); J Rosenberg and H J Folberg, 'Alternative Dispute Resolution: An empirical Analysis', *Stanford Law Review,* Vol 46, No 6, July 1994, 1487; J Macfalane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre,* University of Windsor, Ontario, November 1995; D Stienstra, M Johnson and P Lombard, *Report to the Judicial Conference Committee on Court Administration and Case Management. A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990,* The Federal Judicial Center, Washington, January 1997.

evaluation of whether ADR has saved parties time and cost in settling disputes has depended largely on the subjective perceptions of parties and/or their legal representatives.

4.1.3 In the present study, the assessment of the extent to which mediation could be said to reduce the length of cases from defence to conclusion is based both on relatively robust objective date drawn from court files and on the subjective views of parties to disputes and their legal representatives offered in interviews and postal questionnaires.

4.1.4 A similar assessment of cost savings was also attempted, but as a result of the difficulties of obtaining reliable factual information about costs, the objective analysis of the impact of mediation on legal costs is weak and the discussion of costs in this chapter focuses primarily on subjective assessments of the impact of mediation on legal costs by parties and their legal representatives.

4.2 Case length in mediated cases and non-mediated cases

4.2.1 Making comparisons between the length of mediated and non-mediated cases was extremely complicated. There were several factors that had to be taken into account in the analysis: first, not all cases offered mediation were concluded during the period of study, whether or not they were mediated; second, in a proportion of both mediated and non-mediated cases the date on which the defence was entered pre-dated (and sometimes by a substantial amount) the beginning of the mediation scheme (see Chapter 2). This is because some cases are routinely transferred tot he CLCC from other courts; some are *referred* to the CLCC for trial from other courts because the CLCC is a trial centre; and some cases originally issued in the High Court are transferred down to the CLCC by the High Court. Thus although cases in these special categories would technically have been *new* cases coming into the CLCC during the study period and were therefore offered mediation along with all of the other 'in-scope' case issued in the CLCC during the pilot scheme, the presence of these transferred and referred cases causes complications for assessing the extent to

which mediation is capable of shortening, or indeed lengthening, the average life of a case from date of defence to date of eventual conclusion.

4.2.2 An additional complication concerns the control sample. When the evaluation of the scheme was originally designed, the need for a randomised control sample was accepted by the CLCC. The design involved offering mediation to in-scope cases only in alternative weeks. This would have produced a relatively unbiased control sample of cases not offered mediation. In the first month of the scheme, mediations were offered to all in-scope cases every week in order to get the scheme off the ground. However, when there was no take-up whatsoever in the first few weeks of the pilot scheme, the Court was reluctant to adopt the 'one week on/one week off' evaluation design for fear of depressing even further the negligible take-up of the scheme. As a result, an alternative strategy for obtaining a control sample was adopted. A random sample of cases that would have been in-scope for offers of mediation was drawn from among cases coming into the court during the quarter before the mediation scheme commenced (January 1996 – April 1996). Although this procedure provided a relatively satisfactory control group, it has added to the complexity of making case-length comparisons.

4.2.3 The analysis of data in Tables 4-1 and 4-2 seeks to compare average case lengths of mediated cases with those cases where mediation was rejected and also those cases where mediation was never offered (control group). Following the practice adopted in the analyses in Chapters 2 and 3, cases have been divided into two broad categories: claims involving personal injuries[3] and all others. This broad case categorisation is necessary for several reasons: first there were very few mediated personal injury cases; second, the designation by the court of the largest categories of non-personal injury cases to different case type groups was inconsistent; and finally,

[3] Within the 'personal injury' are cases involving personal injury arising from road traffic accidents, accidents at work (employers liability) accidents on premises (occupier's liability) and those in the street etc. Medical negligence cases have not been included because there were very few and because they tend to have different characteristics from other personal injury cases, for example longer case lengths and higher costs.

because a preliminary analysis of case lengths indicated that personal injury cases appear to have longer case lengths overall than non-personal injury cases.

4.2.4 Tables 4-1 and 4-2 compare timelines from the date on which the defence was entered at the court to the date of settlement among case that concluded on the basis of an out of court settlement only. Table 4-1 compares the timeline from date of defence to date of settlement among non-personal injury cases. Table 4-2 compares the timeline from date of defence to date of settlement among personal injury cases.

4.2.5 The groups of cases included in the comparisons are as follows:

a) mediated cases that accepted mediation and settled at mediation with a date of defence after 30 April 1996 (thus excluding old referred and transferred cases that were successfully mediated);

b) a sample of cases where mediation offers had been rejected, where the case concluded on the basis of an out of court settlement and where the defence was entered after 30 April 1996 (thus excluding old referred and transferred cases that settled).[4];

c) a sample of cases that were not offered mediation (control group), which concluded on the basis of an out of court settlement and where the defence was entered in the few months before the mediation scheme commenced (ie between 1 January 1996 and 30 April 1996).

d) cases that accepted mediation, *did not settle* at the mediation appointment, but concluded on the basis of an out of court settlement some time afterwards and before the end of the study period.

4.2.6 The comparison in Table 4-1 between non-personal injury mediated, rejected and control cases shows that cases settled at mediation had a *shorter* mean and median timeline between entry of defence and settlement than settled cases which had rejected

[4] Among the sample of rejected settled case used for comparison, the earliest date of defence was 9 May 1996 and the latest was 9 October 1996.

mediation, or settled cases to whom mediation was not offered. The best comparison is actually that between mediated cases and the control sample. This is because at the time the study ended, some 12% of rejected cases remained unsettled, whereas only 9% of the control sample remained unsettled. The effect of comparing only settled rejected and control cases is that rejected and control cases with especially long timelines to settlement will not be included, because they would not have settled by the cut off point of the study in March 1998. Had the study continued until all unsettled cases had been settled, the difference between mediated and non-mediated cases would be more extreme, in that the mean and median length of rejected and control cases would be considerably *longer* than appears in Table 4-1.

4.2.7 The final line in Table 4-1 shows the case length to settlement for those cases that failed to reach a settlement during the mediation, but then went off to settle afterwards. The mean and median timelines to settlement in this group of cases are also shorter than the median timeline to settlement among the control cases and the same as the median for rejected cases, although the median for rejected cases is almost certainly artificially low because cases that take a very long time to settle would have remained unsettled at the end of the study. These figures therefore suggest that even where agreement is not achieved at a mediation, the overall length of the case to settlement is shorter than might be expected on the basis of a comparison with the control sample.

Table 4-1 Comparison of case lengths in mediated and non-mediated cases: date defence entered to date of settlement[5]. Non-personal injury cases where defence entered during study period.

Group of cases	Mean days	Median Days	Range
(a) Settled at mediation – Non PI (n=93)	158	131	53-483
(b) Rejected mediation – Non PI settled (n=143)	205	181	13-560
(c) Not offered mediation – Non-PI settled (n=84)	252	251	9-734
(d) Unsettled mediations-Non PI settled late (n=14)	196	181	92-327

Table 4-2: Comparison of case lengths in mediated and non-mediated cases: date defence entered to date of settlement. Personal injury cases where defence entered during study period.

Group of cases	Mean days	Median Days	Range
(a) Settled at mediation – PI settled (n=5)	176	182	89-310
(b) Rejected mediation – PI settled (n=254)	247	261	4-623
(c) Not offered mediation – PI settled (n=142)	275	240	9-1143

4.2.8 Table 4-2 compares case-lengths in personal injury case which in general appear to have longer average timelines from defence to settlement than non-personal injury cases. This is reflected in the fact that the median case length among the very small group of successfully mediated personal injury is longer than that for successful mediations among non-personal injury cases. Nonetheless, the median case length for mediated settled cases is shorter than that for settled cases in the rejected and control samples.

4.2.9 The analyses in Tables 4-1 and 4-2 tend to support the assertion that mediation, when successful, is capable of bringing cases to a more rapid conclusion than if cases are settled during the course of normal litigation procedures. The data in the final

[5] This is rather a difficult date to ascertain with precision other than for mediated cases. Among mediated settlements, the date of settlement is taken as the date of the mediation where a settlement was concluded at the mediation. For other cases the date of settlement is either that contained on a consent order, or failing that, the date on which a letter was sent to the court informing the court of the settlement; or in some cases, the date of settlement recorded on CASEMAN. For the last two categories,

line of Table 4-1 also tend to support the assertion that even when settlement is not reached at mediation, the length of time to eventual settlement is shorter than among non-mediated settled cases.

4.2.10 Another small group of cases that should be mentioned are those that accepted mediation, but subsequently cancelled the mediation because the case settled prior to the mediation date. There were eight cases where this situation was known to have occurred. Among this group of cases (all of which had dates of defence after May 1996) the mean number of days from entry of defence to settlement was 120 days and the median number of days was 133. These are the shortest average case lengths of all and although the group of cases is small, the finding supports the assertion that simply communicating with the opposing side in order to arrange a mediation date can itself promote early settlement.

4.2.11 A comparison was also made of the length of successfully mediated cases and cases that run their normal course and conclude on the basis of a court hearing or the withdrawal of the case. Among non0personal injury cases, those that were struck-out by the court or withdrawn by the plaintiff had relatively shorter timelines than those that were settled or those that went on to a court hearing. Among cases where mediation was rejected or where mediation was not offered, the median number of days to the case being struck-out or withdrawn was 169 and 160 days respectively. Among cases that rejected mediation, the median timeline to a court hearing was longer than for rejected that ended on the basis of an out of court settlement (see above Table 4-1). Among cases not offered mediation the mean timeline to a court hearing was 224 days but the median timeline was only 182 days. This figure is lower than one might expect looking at the comparable timeline among rejected cases and is probably a reflection of the fact that the control group not offered mediation had a somewhat higher proportion of debt cases in which cases often come to a hearing relatively quickly in the absence of the defendant.[6]

[6] The figures for breach of contract and goods and services are median 179, mean 250. For debt, non-PI RTA and others the figures are median 174 and mean 224 days.

4.2.12 The final two lines (shaded) in Table 4-3 give the timelines for case conclusion in unsuccessfully mediated cases that *did not* settle out of court at a later date. The figures are presented tentatively because the number sin this group (ie where the defence was entered after 30 April 1996) are small (four cases where the cases were ultimately adjourned or withdrawn and three cases that eventually went on to trial). The average timelines, however, suggest longer timelines than for cases that were not mediated.

Table 4-3: Case lengths among cases concluding other than by out of court settlement. Defence entered during study period.

Case Type	Mean days	Median Days	Range
Rejected mediation non-personal injury Struck-out/withdrawn (n=73)	187	169	12-480
Not offered mediation – non personal injury Struck-out/withdrawn (n=33)	188	160	17-637
Rejected mediation non-personal injury Trial/concluding hearing (n=45)	277	286	56-498
Not offered mediation = non PI Trial/concluding hearing (n=31)	224	182	96-521
Unsuccessfully mediated cases – non PI Struck-out/withdrawn	244	219	178-362
Unsuccessfully mediated cases – non PI Trial/concluding hearing	384	384	321-492
Rejected mediation PI Struck-out/withdrawn (n=10)	273	313	36-484
Not offered mediation PI Struck-out/withdrawn (n=9)	271	187	17-637
Rejected mediation PI Trial (n=45)	335	323	163-619
Not offered mediation PI Trial (n=15)	272	323	23-500

4.3 Subjective Perceptions of Time Savings

4.3.1 All litigants and legal representatives completing postal questionnaire were asked whether they believed that the mediation had saved time in resolving the dispute, whether it had increased time on the dispute, or whether it had made no different to the amount of time spent on dealing with the dispute. The information in

Figures 4-1 to 4-3 shows fairly unequivocal responses on the issue of time savings, although whether or not the case settled at mediation appears to have a considerable influence on responses. Among all respondents to the postal questionnaire, 60% thought that the mediation had reduced the amount of time spent on the dispute. Among those whose cases had settled at mediation, however, over three-quarters (77%) believed that the mediation had saved time while among those whose cases had not settled at mediation, only one-third (32%) felt that the mediation had saved time and about the same proportion (36%) thought that the mediation had increased the amount of time spent on resolving the dispute.

Figure 4-1 Perceptions of time savings resulting from mediation: All respondents to postal questionnaires

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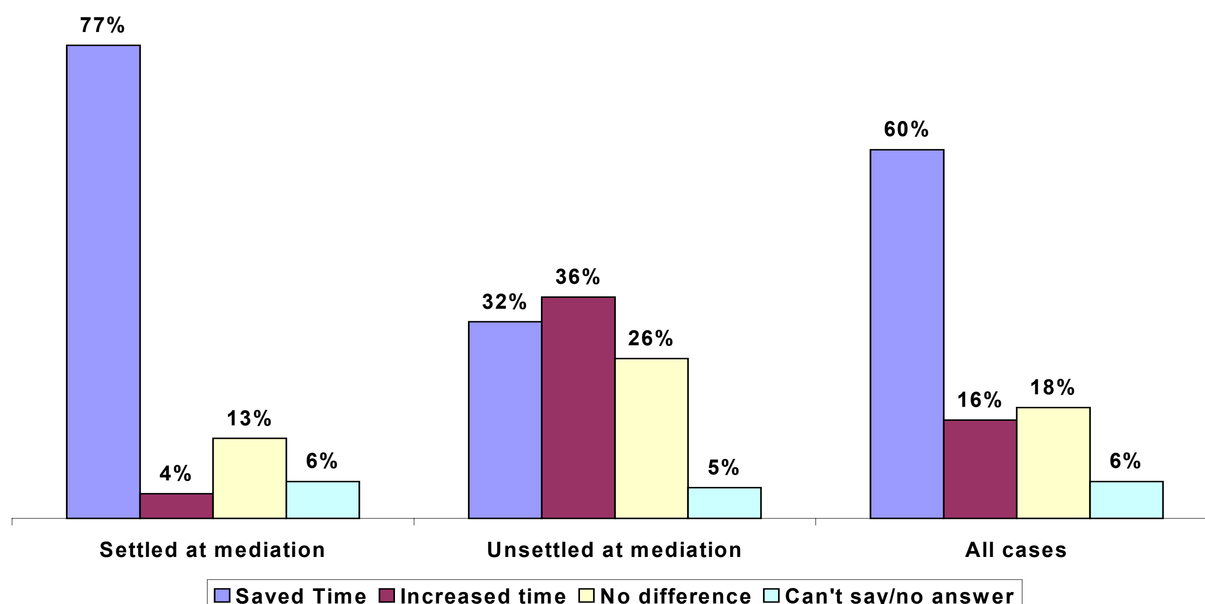
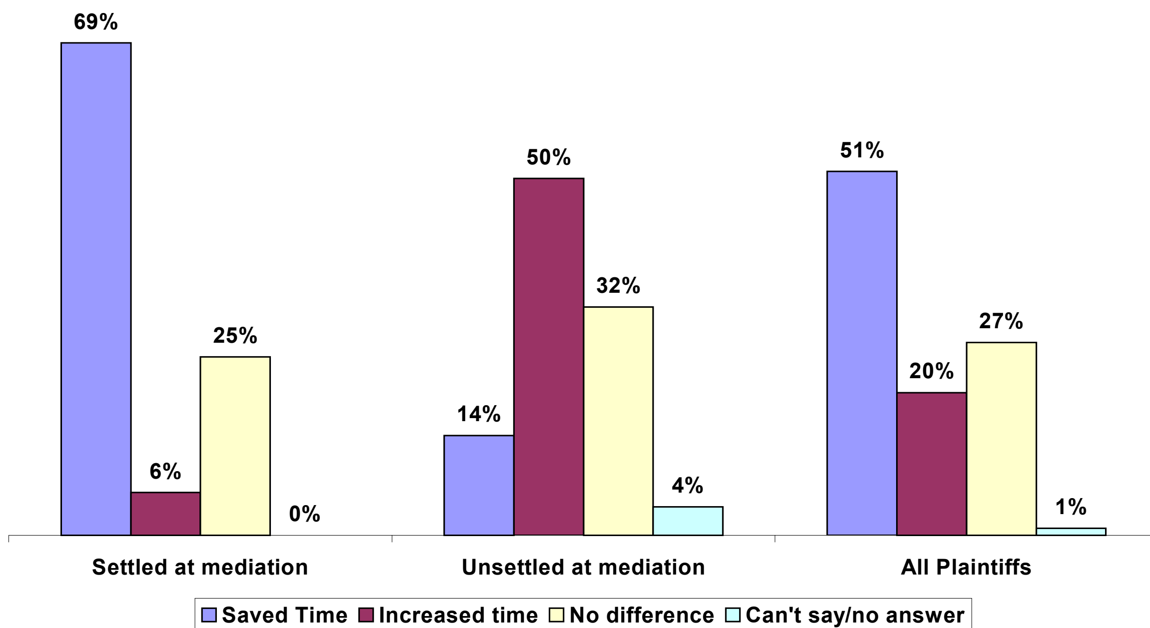


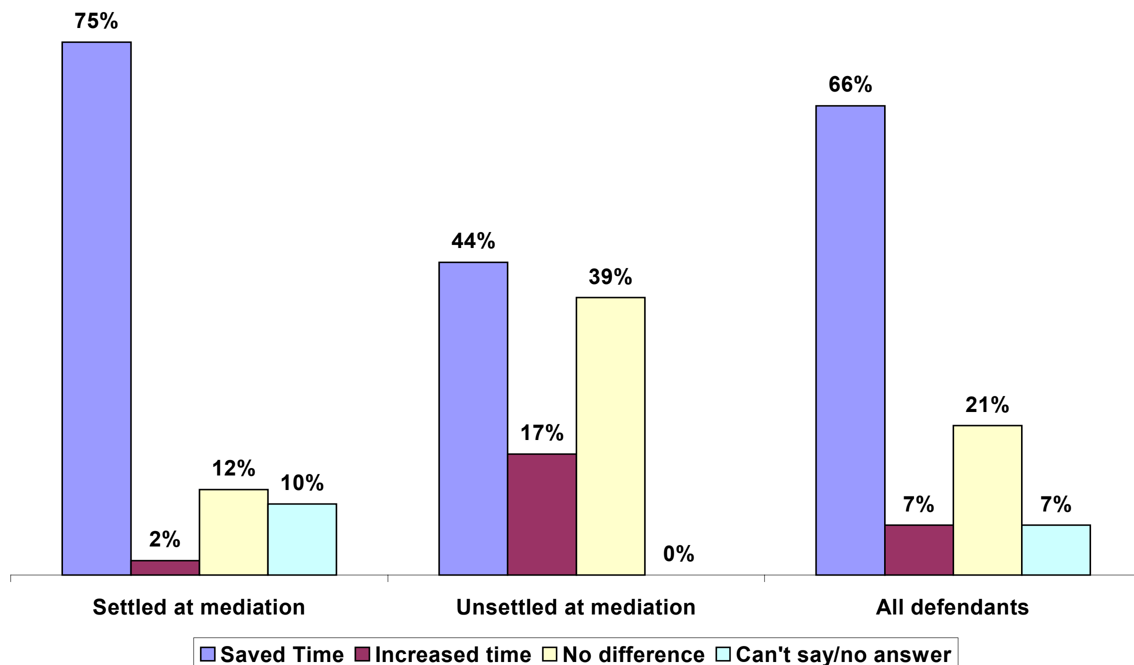
4.4 Differences in Perceptions Between Plaintiffs and Defendants

4.4.1 In common with responses to the issue of cost savings (see below), there were some differences between the perceptions of plaintiffs and defendants on the question of whether mediations had resulted in time saving (Figure 4-2). Among those parties whose cases settled at the mediation, 75% of defendants believed that the mediation had resulted in time saving as compared with 69% of plaintiffs. A more marked difference in perception, however, emerges among those whose cases did not settle at

mediation. While 44% of these defendants believed that the mediation had saved time despite the failure to settle at the mediation appointment, only 14% of plaintiffs had the same view and half of these plaintiffs thought that the mediation had *increased* the time spent on the dispute.

Figure 4-2 Litigants' perceptions of whether mediation saved time

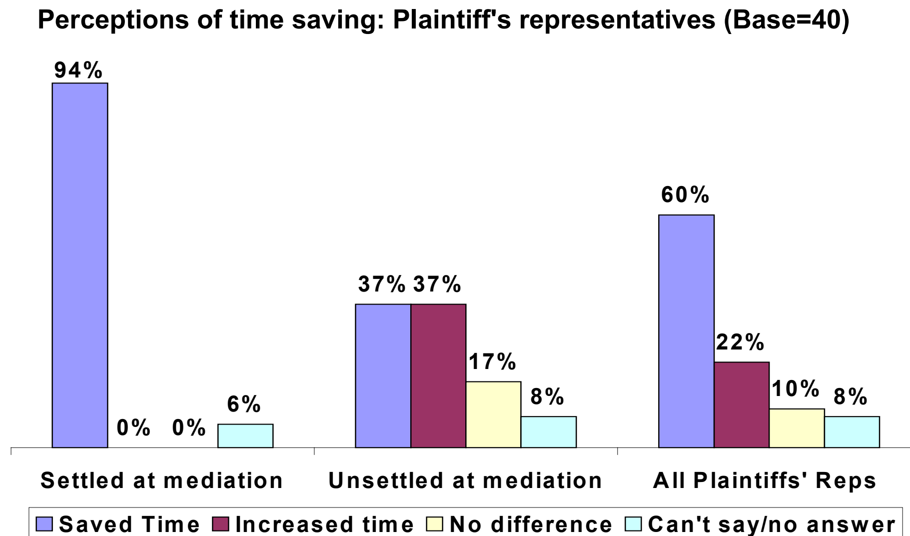


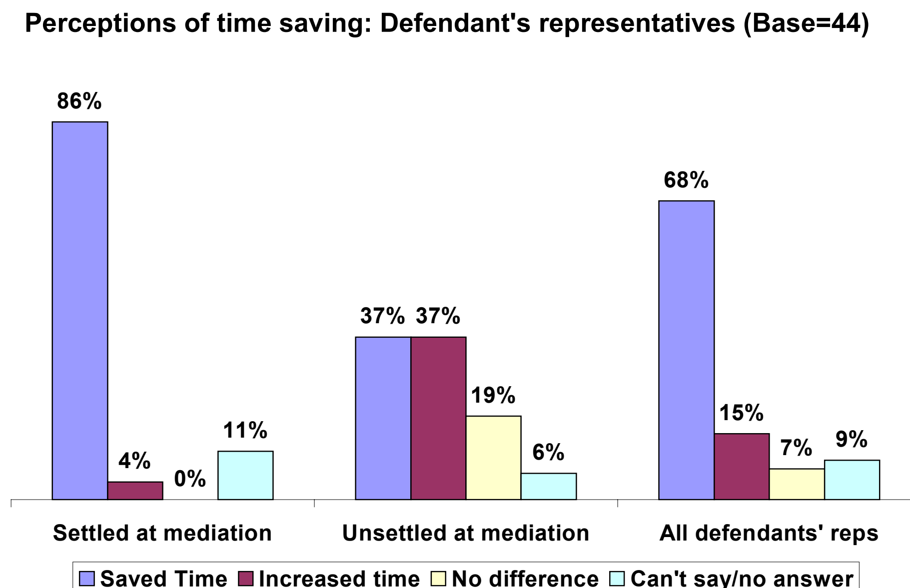


4.5 Perceptions of Representatives

4.5.1 Views of representatives on the question of the extent to which mediations saved time on disputes show relatively consistent pattern (Figure 4-3). Where cases settled at mediation, the overwhelming weight of opinion was that the mediation had saved time on the case. However, where cases failed to settle at mediation, opinions were split with just over one-third (37%) of both plaintiffs' and defendants' representatives feeling that the mediation had nonetheless saved time, but an identical proportion in both groups of representatives (37%) believing that the mediation had increase the amount of time spent on the dispute.

Figure 4-3 Representatives' perceptions of time savings resulting from mediation





4.6 Estimates of the amount of time saved

4.6.1 Where respondents had indicated that they believed that the mediation had resulted in a time saving on the dispute, they were asked how much time they felt had been saved. Both litigants and their representatives clearly found this difficult to assess. Among defendants, only 17 respondents were able to put a figure on the amount of time saved, ranging from one day to one year. Some 22 plaintiffs were able to provide a figure for the estimated time saving on their case, ranging from one day to two years. The distribution of time saving offered by defendants and plaintiffs is given in Table 4-4 below.

Table 4-4 Plaintiffs' and defendants' estimates of time saved by mediation

Number of days saved	Defendants	Plaintiffs
Up to three days	6	10
4-7 days	7	3
8-14 days	2	3
2-6 weeks	1	1
More than 6 weeks	1	5

4.6.2 Litigants' legal representatives found similar difficulty in providing estimates and clearly interpreted the question asked rather differently from litigants. Some representatives sought to estimate the length of time by which they believed settlement of the case had been accelerated. Others sought to estimate the number of hours of their own legal work that had been saved as a result of the mediation. Several mentioned the fact that they had largely saved the time that they would have spent preparing for trial, for example:

> "30 to 40 hours on the assumption that the matter went to trial."
>
> "The hours through to trial."
>
> "Two days for trial and preparation. No waiting. No delay."
>
> "One day in court, two to three days preparing."
>
> "Time that could have been spent preparing for a court case."

“Two to three day trial plus two days preparing for exchange; preparing brief for barrister.”

“Difficult to estimate: avoided discovery, witness statements, trial.”

“Trial preparation of three to four hours pus court time of half a day.”

4.6.3 Among those representatives who were able to put a figure on the number of hours saved, the breakdown was as follows: two representatives thought that they had saved about 5 hours work; 6 representatives thought that they had saved between 5 and 10 hours of legal work; another four representatives thought that they and saved between 10 and 20 hours of legal work; and about 9 representatives thought that they had saved over 20 hours of legal work. Others simply said that they and saved several days of work.

4.6.4 Although these estimates are often unhelpfully vague, they nonetheless indicate that representatives perceived a sometimes very substantial time saving, which presumably translated into the estimates made of costs savings discussed below.

4.7 Increased Time

4.7.1 Although some plaintiffs and defendants stated that mediations resulted in extra time being spent on dealing with the dispute, most were unable to provide any kind of estimate. Nine plaintiffs were able to provide a figure. Two said that the mediation had added half a day to the dispute (presumably the time spent at the mediation). Five plaintiffs thought that the mediation had increased the time spent on the case by one day and another two plaintiffs thought that the mediation had cost two extra days.

4.7.2 Among defendants, only three were able to provide an estimate of the amount of extra time that had been spent on the case as a result of the mediation. One defendant thought that the mediation had cost an extra half day and two others thought that the mediation had cost two extra days.

4.7.3 Legal representatives also found some difficulty with this question but several were able to give a fairly precise number of hours as follows:

Table 4-5 Representatives' estimates of extra time spent as a result of mediation

Number of hours	Number of responses
3-4 hours	2
4-5 hours	3
5-10 hours	7

4.7.4 These figures largely cover time spent accompanying clients at the mediation and the time spent preparing for the mediation appointment (see further discussion in Chapter 5 on lawyers' preparation for mediations).

4.8 Cost savings

4.8.1 Obtaining information about legal costs in order to assess the impact of mediation on costs was one of the most difficult aspects of the evaluation of the mediation scheme. The problems arise from the fact that unless an award of a specific amount of costs is made by the court in case that go to trial, there is virtually no information on case files about legal costs, other than information contained in consent orders. Even where information about costs is available in consent orders, there is rarely a specified amount of costs and only a statement that the defendant will pay the plaintiff's costs to be taxed if not agreed, or that each side will bear their own costs.

4.8.2 In the event, the meagre information obtained about costs had to be laboriously constructed from several sources. For cases which rejected mediation, some limited information about costs was extracted from court files and from the small number of useable replies to forms that were sent out during the course of the study to about 300 rejected cases as part of a 'mediation audit' I order to obtain information about progress of cases and costs[7]. Information about mediated cases is slightly better since those responding to postal questionnaires were asked to provide information about how much they had paid in legal costs, or in the case of solicitors, how much they had received in costs from their client. Although this should have provided a relatively

[7] We received back about one hundred of these forms. In some cases, even though solicitors had sent back information about the progress of the case they failed to provide information about costs.

rich source of information about costs many respondents were reluctant to say what their costs had been, although for some cases we have been able to piece together costs from information contained in parties' and representatives' questionnaires.

4.8.3 Among the control sample, the only information about costs available was that contained on court files and in general this only occurred where the case had gone to trial and the court had made an award of costs. It did not seem feasible to write to solicitors tin the control group demanding information about costs since, unlike those in the rejected sample, they had not turned down an offer of mediation from the court and there was little legitimate pretext for requesting information about costs.

4.8.4 The information obtained about costs is summarised in Table 4-6. Information about settled non-personal injury mediated cases is taken from postal questionnaires completed by plaintiffs, defendants, and plaintiff and defence solicitors who attended. The figures provided are based on what parties paid to their own solicitors, or the amount that representatives received from their own client. The information about rejected cases is taken from court files and the special audit forms returned by plaintiffs' solicitors.

4.8.5 Although the information in Table 4-6 has some interest value, it is difficult to draw any particular conclusion either about levels of costs in general, or about whether there is evidence that the cost sin mediated cases are, on average, lower than the costs in non-mediated cases. Among mediated cases, the median amount reported by plaintiffs to have been paid to their solicitor appears lower than the median amount paid by plaintiffs among those cases that rejected mediation. However, the median amount reported as having been received by plaintiffs' solicitors is higher than that reported by plaintiffs and higher than that among rejected cases.

4.8.6 No conclusion can therefore be drawn from the objective data available about the extent to which mediation can be said to lead to cost savings in civil disputes. Subjective perceptions of cost savings among mediating parties and their lawyers are discussed later in the Chapter.

Table 4-6 Comparison of average costs in mediated and rejected cases

Type of cases	Mean costs	Median costs
Settled non-PI mediated cases (n=30) Plaintiffs' report of amount paid to solicitor	£2100	£1050
Settled non-PI mediated cases (n=23) Plaintiffs' reps' report of amount received by plaintiff	£3383	£2500
Settled non-PI mediated cases (n=25) Defendants' report of amount paid to own solicitor	£3004	£1500
Settled non-PI mediated cases (n=23) Defendants' reps' report of amount received from defendant	£5596	£3500
Rejected non-PI cases settled (n=37)	£4084	£1857
Rejected personal injury cases settled (n=37)	£3772	£2900

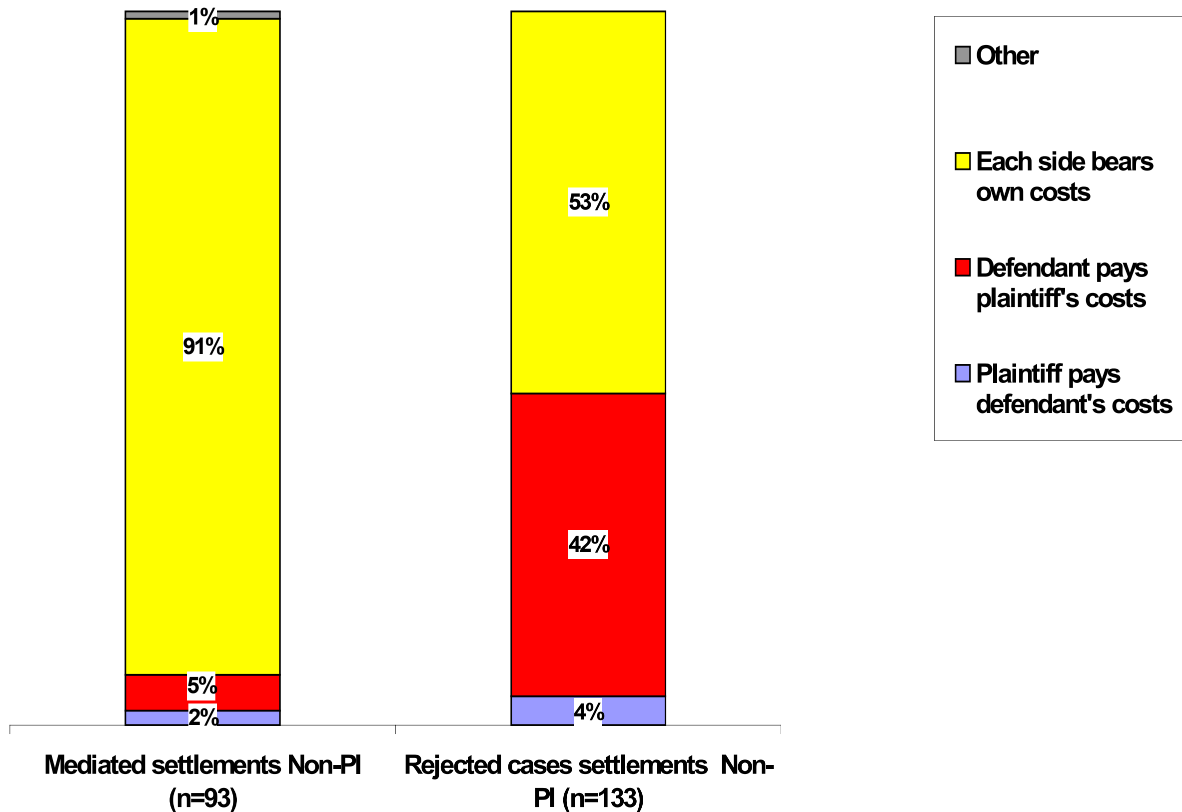
4.9 Who pays whom?

4.9.1 One issue relating to costs that does seem to merit attention is the question of who pays legal costs when cases are mediated. It became clear at an early stage in the mediation pilot scheme that the majority of cases settling at mediation did so on the basis that each side was to bear their own costs. An analysis of non-personal injury mediation settlements (Figure 4-4) indicates that in 90% of cases each side was to bear their own costs. This means that any allowance for legal costs made by paying defendants would be rolled up into the settlement amount. Given the relatively low level of settlements in most cases, the relatively high levels of legal representation and the average level of costs among those mediated cases for which we have costs information, this suggests that many of the parties would have walked away from the mediation with a very small sum of money. Among the five personal injury cases that settled at mediation, all ended on the basis that the defendant would pay the plaintiff's legal costs.

4.9.2 Figure 4-4 compares the agreements in relation to costs among mediated settlements with that obtained about rejected cases from court files or solicitors letters.

The Figure suggests that a far higher percentage of mediated cases than rejected cases settled on the basis that each side would bear their own costs. Among rejected cases some 42% of out of court settlements were concluded on the basis that the defendant would pay the plaintiff's legal costs, whereas among mediated settlements only five percent specified that the defendant would pay the plaintiff's legal costs. If this is put together with the information in Chapter 3 about the higher average level of settlements among rejected cases, it begins to suggests that those plaintiffs who rejected the mediation offer and concluded their case on the basis of an out of court settlement, rather than on the basis of a mediated settlement received a greater financial benefit overall, including the increased settlement figure and the arrangement about payment of legal costs. If this finding is correct, it leads to the conclusion that while both parties may benefit from any savings in time and stress offered by mediation, the defendant who eventually pays, may also achieve a financial saving while the plaintiff actually loses financially. On the other hand, if many of the cases going to mediation are cases with difficulties and disproportionate costs risks for plaintiffs, as will be suggested in the next Chapter, this may be a price that plaintiffs and their solicitors are happy to pay.

Figure 4-4 Agreements regarding costs in non-personal injury mediated settlements and settlements among cases rejecting mediation.



4.10 Subjective perceptions of cost savings

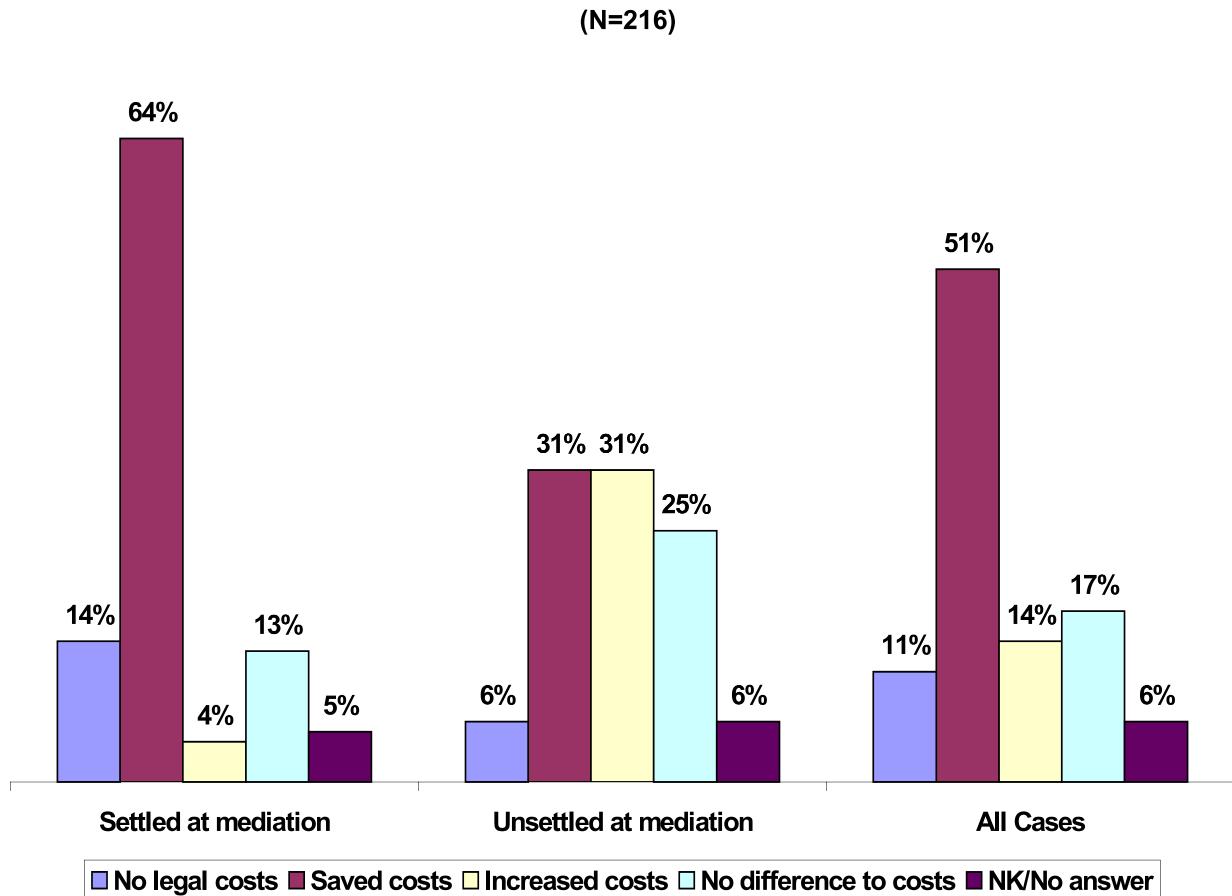
4.10.1 Parties and their representatives were asked whether in trying to resolve their dispute they felt that the mediation had saved money in legal costs, increased legal costs or made no difference to legal costs. Among those parties who returned postal questionnaire, some 82% of legally-represented plaintiffs and 85% of represented defendants said that they had had to pay legal costs to their own solicitor.

4.10.2 Analysis of responses to the question of whether respondents felt that the mediation had saved, increased or made no difference to their costs, suggests that answers are influenced by whether or not the case settled at mediation. Taking all responses to the question together, Figure 4-5 shows that *about half* the respondents to the questionnaires said that they believed the mediation had saved legal costs. Some

17% thought that the mediation had made no difference to legal costs and 14% said that they believed the mediation had increased the legal costs involved in resolving the dispute. However, Figure 4-5 also indicates that these responses are heavily influenced by whether or not the case settled at the mediation. Among respondents whose case had settled at mediation, almost two-thirds believed that the mediation had saved legal costs, while 4% thought that the mediation had increased costs. Among those whose case had *not* settled at mediation, one-third believed that the mediation had still saved costs while the same proportion thought that the mediation had increased the legal costs of resolving the dispute. However, one-quarter of respondents felt that although the mediation had not resulted in settlement of the case, it had not increased their legal costs.

4.10.3 This analysis indicates, unsurprisingly that parties most frequently perceive cost savings following settlement at mediation, although there still appear to be cost savings in about one-third of cases where cases did not settle. The analysis also indicates, however, that mediation has the potential for increasing costs. Although this was most evidence among cases that failed to settle at mediation (where about one-third of respondents perceived increased costs) there was also a small minority of cases where respondents perceived increased costs despite the settlement of the case at mediation.

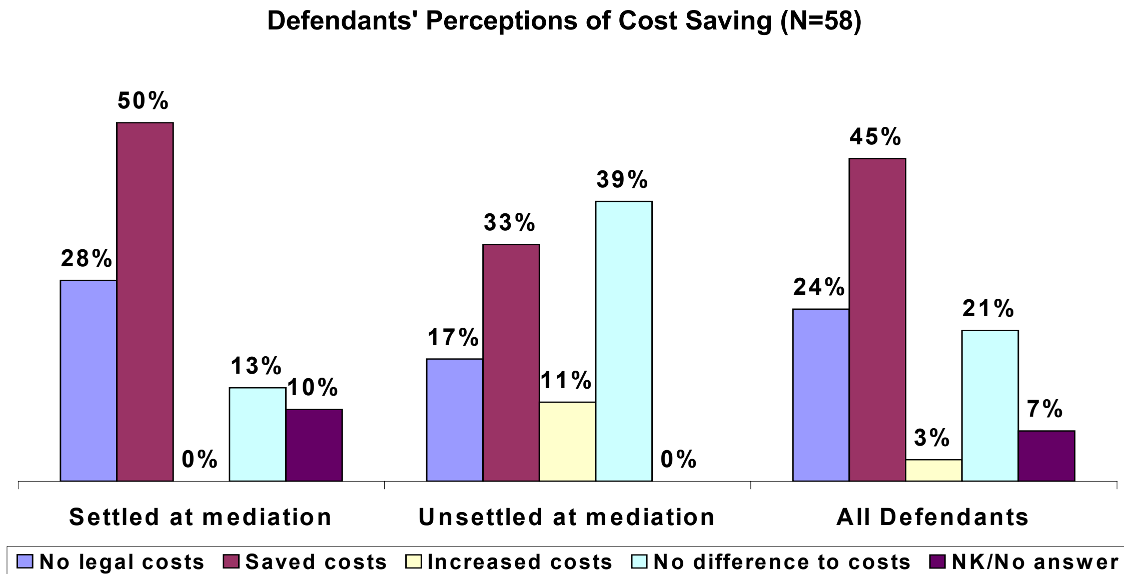
Figure 4-5 Perceptions of cost savings resulting from mediation: All respondents to postal questionnaire

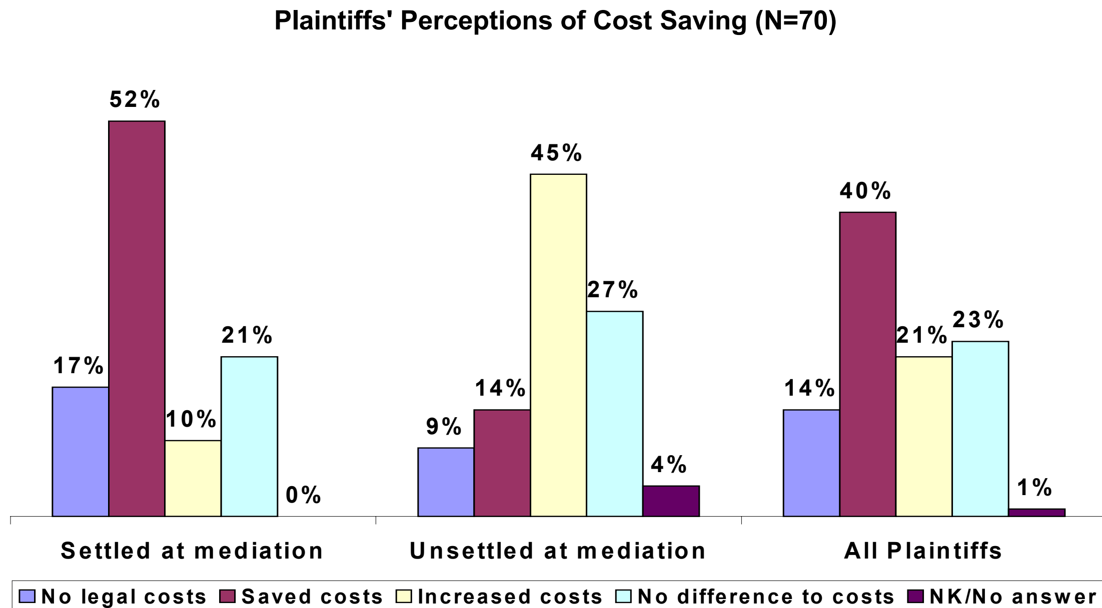


4.11 Differences in perceptions between plaintiffs and defendants

4.11.1 Figure 4-6 compares response of plaintiffs and defendants on cost savings. Among cases that settled at mediations about half of both plaintiffs and defendants felt that they had saved legal costs, although 10% of plaintiffs felt that their costs had increased as a result of the mediation. None of the defendants whose cases settled at mediation thought that their costs had increased. Where cases failed to settle at mediation, about 45% of plaintiffs thought that the mediation had increased costs as compared with 11% of defendants whose cases did not settle at mediation. Overall plaintiffs were more likely than defendants to feel that mediation had led to an increase in legal costs.

Figure 4-6 Litigants' perceptions of cost savings as a result of mediation



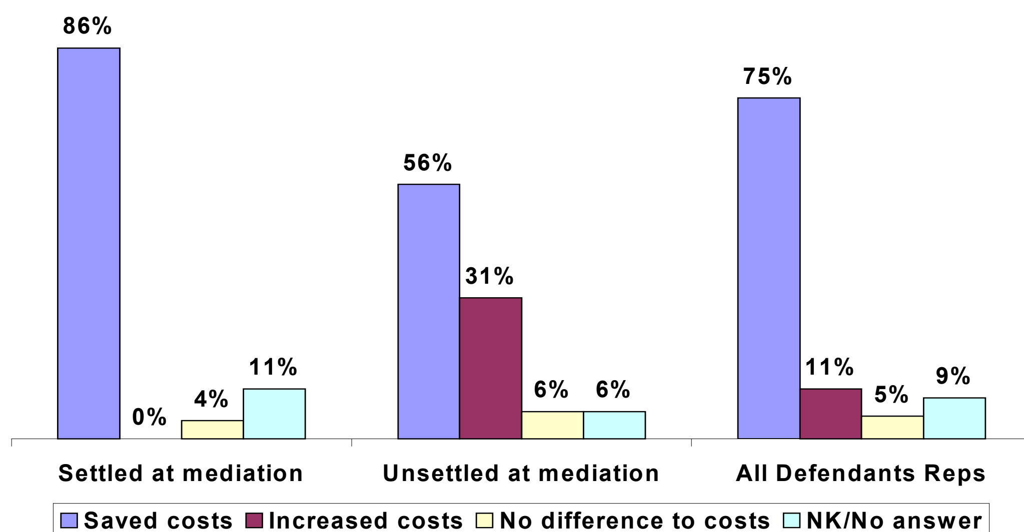


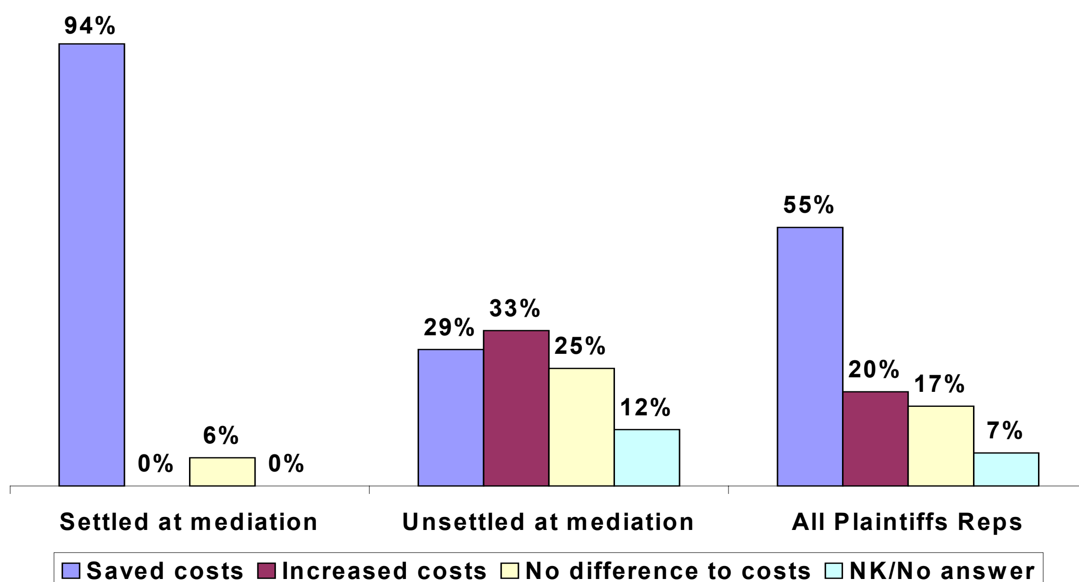
4.12 Representative's perceptions

4.12.1 Representatives were asked on the postal questionnaire "Taking everything into account, would you say that the mediation saved your client money in legal costs, or did it increase the legal costs, or did it make no difference to the legal costs?" On

the whole, where cases had settled at mediation representatives overwhelming perceived cost savings. However, where cases had failed to settle at mediation, about one-third of both plaintiffs' and defendants' representatives perceived that the mediations had led to increased legal costs. It should be noted, however, that among representatives of defendants, more than half believed that even unsuccessful mediations had led to cost savings.

Figure 4-7 Representatives' perceptions of cost savings





4.12 Amount saved

4.13.1 All respondents who suggested that the mediation had led to a cost saving were asked how much they thought had been saved in legal costs. Most were unable or simply failed to provide an answer to the question. Among the few who did, however, there was substantial variation.

4.13.2 Among representatives, only 19 respondents were prepared to offer a figure. These figures ranged from about £1000 to £15,000. Four respondents said that they thought their client had saved about £1,000. Three suggested that savings were about £2000- £3000. Seven representatives thought that the savings would have been around £5,000. About four representatives thought that savings would have been around £10,000 and one though the saving would have been as much as £15,000.

4.13.3 Among defendants, 15 respondents offered a figure ranging from £250 to £50,000. Two suggested sums of under £1,000; another two suggested £1,000; two respondents thought the saving was around £2,000-£3,000; two suggested savings of £5,000; two suggested £6,000 to £7,000; three defendants though that their savings were £10,000; one defendant thought that the had saved £30,000 and one thought the saving was £50,000.

4.13.4 Among plaintiffs who believed that the mediation had resulted in cost savings, 23 respondents were able to estimate their savings and these figures ranged from £300 to £15,000. While only one respondent thought that he and saved less than £1,000, nine plaintiffs though that they had saved between £2,000 and £4,000; three plaintiffs thought that they had saved £5,000; three plaintiffs suggested that they had saved between £10,000 and £12,000; and one plaintiff thought that he and saved £15,000.

Table 4-7 Respondent's Estimates of Amount of Costs Saved by Mediation

Amount Saved	Plaintiffs	Defendants	Representatives
Under £1000	1	2	0
£1,000	9	2	4
£2,000 - £3,000	6	2	3
£4,000 - £5,000	3	2	7
£6,000 - £7,000	0	2	0
£10,000 - £12,000	3	3	4
£15,000 - £20,000	1	0	1
Over £20,000	0	2	0
All responding	23	15	19

4.14 Increased costs

4.14.1 Those respondents who said that they believed the mediation had resulted in extra costs were also asked by how much they thought their legal costs had been increased. There were few responses to this question, although one defendant maintained that his costs had been increased by £1,000 and some twelve plaintiffs were able to put a figure on the increase as follows:

Table 4-8 Plaintiffs' Estimates of Increased Cost Resulting from Mediation

Amount of extra Cost	Number of Responses
£500	1
£1560	2
£500	1
£600	2
£750	1
£1,000	4
£1,500	1
£2,500	1
All responding	13

4.14.2 The only representatives to provide figures for the perceived increase in costs as a result of mediations were those representing plaintiffs and only four were able to suggest a figure. The responses given by these three were as follows: £500; £1500; £2,500; and "I was too embarrassed to charge an economic rate. Otherwise it would have been £1,000."

4.15 Conclusion

4.15.1 It seems then that even on a conservative estimate, settlement at mediation appointment occurs at least two to four months earlier than settlements occurring among non-mediated cases. Most parties settling at mediation seemed to believe that the mediation had saved them time, although a proportion of those who settled and of those who did not settle at mediation believed that the mediation had cost extra time. Certainly solicitors appeared to feel strongly that time had been saved by settling through mediation.

4.15.2 The impact of mediation on legal costs is much harder to assess objectively and the assessments of cost savings made by litigants and their representatives were more equivocal than for time saving with only about one-half of mediating parties believing that the mediation had saved legal costs. Moreover, objective information about responsibility for legal costs indicates that in a very high proportion of mediated settlements the plaintiff bears his own legal costs. Solicitors, on the other hand, held a strong view that settled mediations had saved their client legal costs. This was particularly true on the defence side.

5. EVALUATION OF THE MEDIATION PROCESS BY LITIGANTS AND LAWYERS

5.1 Introduction

5.1.1 Although a considerable amount of objective quantitative data was collected during the course of the evaluation of the scheme about comparative timelines, costs and settlements in mediated and non-mediated cases, an important element in the broad evaluation of the CLCC mediation scheme was parties' and lawyers' reaction to the mediations in which they had been involved. In order to offer a relatively comprehensive assessment of consumer response to the mediation process, information was collected from mediating parties and their solicitors in a number of different ways: telephone interviews prior to and after mediation sessions; face to face interviews before and after mediation sessions when mediations were observed; and postal questionnaires dispatched after mediations to mediating parties and solicitors who had attended mediations. The material in this Chapter is based on information obtained in 212 postal questionnaires, interviews with parties and solicitors before and after 30 observed mediations and around 50 telephone interviews conducted with parties and solicitors, some of which were tape-recorded and transcribed. The body of information collected from these various sources provides a rich seam to mine.

5.2 Motivation for mediating

5.2.1 Reactions to a dispute resolution process are likely to be influenced by expectations of that process and the parties' objectives in becoming involved in the process. Evaluations are also likely to be influenced by the substantive outcome of the process. Thus in order to set assessments of mediations by parties and lawyers representing parties in meditation within the broader context of expectations and objectives, questions were asked during interviews and in the postal questionnaires about respondents' reasons for accepting the court's offer of mediation. Questions were also asked about specific objectives when attending mediation sessions; and

finally, respondents were asked during interviews and in the postal questionnaires about their expectations of the mediation process.

5.2.2 It was clear from both interviews and responses to postal questionnaires that the decision to try mediation was rarely the result of previous experience. Only a handful of litigants had had any previous knowledge or experience of mediation prior to receiving the offer from the court. Among litigating parties, 94% of plaintiffs and 96% of defendants stated that they had never been to a mediation before agreeing to take part in the CLCC pilot mediation scheme. The explanations given for attempting mediation or recommending mediation largely reflected the information received from the court which stressed the potential of mediation to achieve early settlement of cases and to save legal costs. Many litigants had simply accepted their solicitor's advice to make use of the scheme offered by the court. In this respect it is important to bear in mind that the overwhelming majority of solicitors receiving mediation offers from the courts themselves lacked knowledge or direct experience of mediation. This was clear from interviews with solicitors who had advised clients to reject the offer to mediate, from interviews with those who had advised clients to try the mediation scheme and accompanied their clients at the mediation, and from solicitors who completed postal questionnaires. Among those solicitors who accompanied their clients to mediations and completed questionnaires, nearly three-quarters stated that they had had no previous experience of mediation.

5.2.3 However, the explanations given by litigants for attempting mediation also reflect some of the frustrations of litigation: the fear of disproportionate costs; defendants who believed that they had made reasonable offers; perceptions of intransigence; complaints about the refusal of the opposing side to enter into negotiations to try and achieve a settlement; a perception that the parties and become deeply entrenched in their battle positions; an imbalance between the parties, for example where one side was not legally represented and was perceived by their opponent to be unrealistic, or where one side had legal aid and was perceived by the opponent to be impervious to reasonable offers. The following extracts were typical of the reasons given by plaintiffs for trying the mediation scheme:

> “Because I thought it would allow the case to be settled in a less formal atmosphere, more quickly and consequently less expensively than a court hearing.”
>
> “My solicitor recommended we try mediation, saving time and costs for both her and me and also getting to speak to the defendant as he had not made any effort at previous correspondence.”
>
> “It was suggested by my solicitor as an alternative to court proceeds and was much cheaper.”

5.2.4 An example of a typical response among plaintiffs came from a solicitor who was the plaintiff in an action. His reason for accepting the offer of mediation was as follows: “I am a solicitor and I detest the legal process!”

5.2.5 Among defendants there was also a concern with saving time and costs, and occasionally from business litigants, a desire to seek a dispute resolution process that would avoid the need to use solicitors. Typical examples of reasons for mediating given by defendants were as follows:

> “We would have more control of the settlement of the dispute by the company. We (the directors) knew the facts very well. We had no confidence in solicitors. We would have no legal fees to pay (if settled by mediation).”
>
> “We felt that we had made a reasonable offer to settle which the plaintiffs had not accepted out of pique. There did not seem to be much doubt about the law and we felt that an independent skilled negotiator would resolve the deadlock without recourse to lawyers.”
>
> “We considered our opponent arrogant, self-centred and unable to objectively assess the situation. Any way of resolving the issue was worth investigating and trying.”
>
> “Because the plaintiffs had legal aid. This gave them an unfair advantage. We had made them a number of offers to settle but they were being vindictive and were insisting on going to court. This would have meant that I would have incurred expensive legal fees. They only agreed to mediation after their solicitor relented to the pressure from my solicitor to reach a settlement as he had heard about your services.”

5.2.6 Only a very small minority of litigating parties made any reference, either during interviews or on the postal questionnaires, to particular features of the mediation process itself. When respondents did make a reference to the presumed

attractions of the mediation process, this focussed on the anticipated informality, lack of technicality, and the absence of lawyers. For example:

> "Because this could be settled after office hours and it is easier... because I find that when I go to the courts everyone is focussing on points of law rather than the substance of the whole case. In a mediation you can talk to people. It's not going to be about points of law. I haven't at all been to a mediation. I read from the leaflet and what really struck me was that there would be no solicitors there and people would be actually talking about he substance of the case instead of arguing about the White Book and the Green Book. I have handled quite a few of these cases within the Company and I know what I am looking for. These solicitors – I have prepared it all and all they do is to put in into legal jargon." (Company Accountant – Dispute over delivery of equipment)

> "I am trying to avoid legal costs because they could exceed the cost of the claim. I've got no respect for the legal system. 90% of he time I don't pursue debt because the legal system is hopeless. Solicitors take liberties – asking for money on account all the time. You end up paying three or four times the value of the claim. The judges are a lottery. I would rather write off bad debts than get involved in the legal system…. I know nothing about mediation – I think it is more like arbitration. I am hoping that the other party will come to their senses. They are a huge company and we are only small. What happens in arbitration or court is that the judges don't like lay people coming into court and the judges try to make you feel so small. With mediation at least there is no big brother sitting there saying 'This is my court, my world and you do what I say.' Sometimes I feel like walking out. The judges always want to show their authority. It's very aggravating. Hopefully the mediation won't be that sort of dictatorship." (Owner of small business – dispute over non-payment for services)

5.2.7 Table 5-1 summarises the pattern of responses given in postal questionnaires in answer to the question "Why did you decide to try mediation in this case?" The Table shows clearly that, after the simple statement that litigants had been advised by their solicitor to accept the mediation offer, the dominant interest in mediation was to avoid the cost and time involve din litigation. Among defendants, the key objective was simply to achieve a settlement of the dispute and put an end to the litigation.

Table 5-1 Summary of litigants' reasons for agreeing to mediate

Reason for trying mediation	Plaintiffs (N-72)	Defendants (N=58)
Solicitor recommended	33%	20%
To save costs	15%	9%
To save time	9%	4%
To save costs and time	18%	9%
To get a settlement	8%	25%
Relieve stress	1%	7%
Avoid court hearing	8%	4%
Told to by judge	4%	7%
To establish communication	3%	2%
Save relationship	-	2%
East/informality	-	2%
Show weakness in other's case	-	2%
Party had legal aid	-	4%

5.3 Representatives' reasons for recommending mediation

Plaintiffs' representatives

5.3.1 One of the most common reasons offered by plaintiffs' solicitors for recommending mediation was concern about lack of proportion between legal costs and claim value, within the context of the normal uncertainties and vagaries of litigation. Given that a great deal of litigation in the county courts concerns claims with relatively modest values (see Chapters 2 and 4 above), this reasoning is unsurprising. Typical answers relating to lack of proportionality between costs and claim value were as follows:

> "Given the amount of the claim (approximately £5,000) and the nature of the dispute and the likely cost of going to trial and the inherent risks of litigation, it was considered that a mediated settlement, if possible, would be ideal." (Dispute concerning non-payment of services charges under a lease)

> "The costs of litigating to trial would have been very expensive. The facts and disputes were complicated legally. Mediation may have provided a more commercial and less legalistic result." (Breach of contract)

> "It was a suitable case. My clients were privately funding the case. They could not afford a long contested action. They needed a quick resolution to the dispute which they got." (Dispute over installation of kitchen)

> "I felt it was an appropriate case for mediation – a straightforward road traffic accident. There were disputes on liability and quantum and we would achieve a quicker settlement than waiting for a trial date." (RTA personal injury –collision between motorcycle and van)

5.3.2 In addition to concern about costs and a somewhat lesser concern about achieving a speedy settlement of the action, other factors that seemed to be important to plaintiffs' solicitors related to the dynamics of the dispute itself. Although one might hypothesise that cases opting for mediation would be those where settlement seemed most easily achievable, the responses of solicitors, and to some extent the parties themselves, suggest that the opposite is often true. Many solicitors suggested that the cases they recommended for mediation had particular difficulties, for example complicated issues, entrenched positions, lack of communication, intransigence on the part of clients and/or opponents, and imbalance between parties. In some cases opponents were unrepresented and had failed to seek legal advice; in some commercial cases there was a struggle between large and small business enterprises; in others there was personal animosity and a desire for a day in court in order to achieve vindication. Mediation was seen as an attempt to break log-jams where negotiations between solicitors or the parties had failed, or as a creative solution to resolving the dispute. For example:

> "Both parties had quickly become entrenched and it was clear that they wanted their day in court. Mediation provided an opportunity to parties to air their grievances without the expense and delay of going to trial." (Breach of covenant in restraint of trade).

> "The defendant has never sought legal advice and the counterclaim is a nonsense. Mediation seemed the most cost-effective means of seeking a compromise." (Action for debt)

> "This was a case where the parties needed to 'knock heads' together round a table. They needed to understand each other's view point." (Dispute between manufacturer and retailer over quality of goods)

Defendants' Representatives

5.3.3 In common with plaintiffs' solicitors, those lawyers acting for defendants also offered cost savings and the possibility of a speedy settlement of actions as important reasons for recommending mediation to their clients. Defendants' representatives also mentioned matters to do with the particular dynamics of he dispute and the problem

of being pursued by litigants in person or plaintiffs who had the benefit of legal aid. For example:

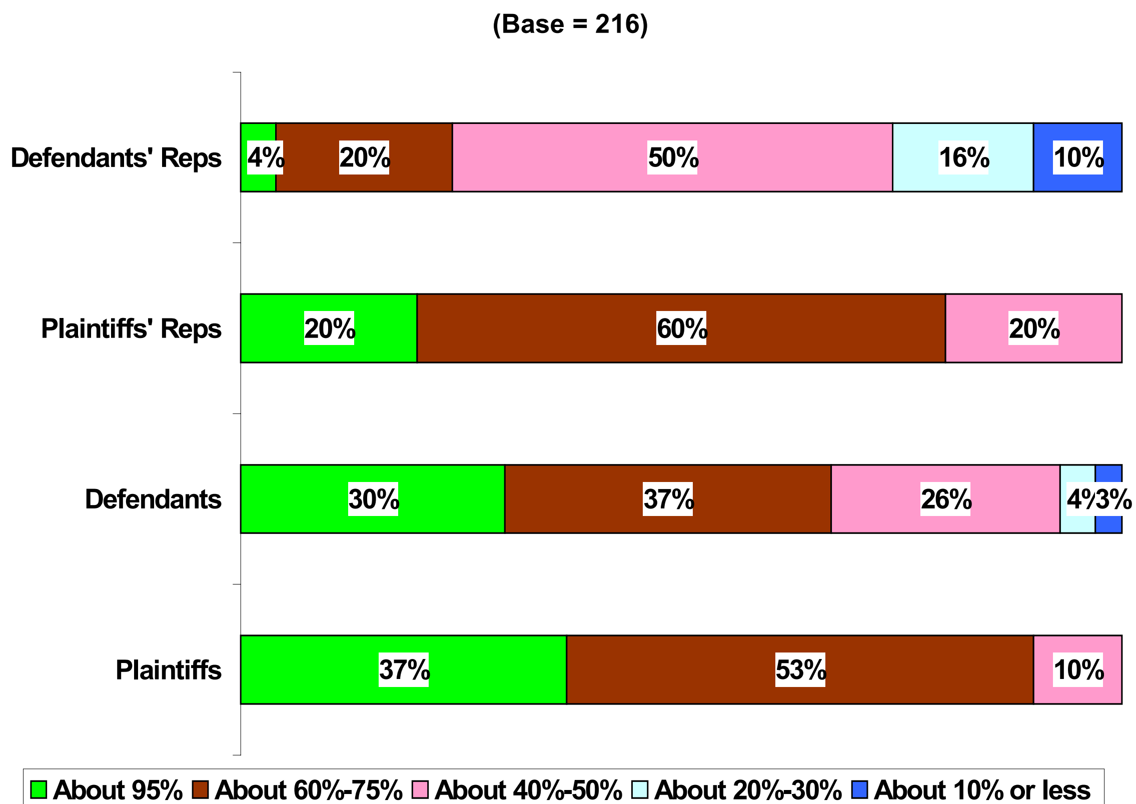
> "The size of the claim was less than £10,000. The plaintiff was a litigant in person. We felt we had a good case, but the unrepresented plaintiff had taken criticism of his services very personally and would not listen to reason. The amount he ultimately settled for was no more than we had already offered. However mediation (1) gave him his day in court and (2) meant he had no axe to grind against the mediator." (Dispute over non-payment for service rendered.)

> "We had nothing to lose. The plaintiff was representing herself and was therefore determined not to settle for less than her claim. We wanted a more rapid resolution and an opportunity to put a reasonable offer to the plaintiff." (Personal injury claim)

5.3.4 Another factor influencing defence lawyers to advise trying mediation which was *not offered* by plaintiffs' solicitors, was the perception that the defendant's case had important weaknesses. The use of mediation as a possible strategy for cutting anticipated losses is borne out by defence solicitors' perceptions of the chance of winning at trial at the time the mediation offer was accepted. Figure 5-1 indicates that those defence solicitors who advised their clients to try mediation (and to a slightly lesser extent defendants themselves) were considerably less sanguine about their chances of winning at trial than their opponents. While over one-third of plaintiffs (37%) and one-fifth of plaintiffs' representatives believed that they had a 95% chance of winning their case in court at the time of agreeing to mediation, the equivalent figure among defendants was 30% and as little as 4% among defendants' representatives. On the other hand, no plaintiff or plaintiffs' representative estimated their chance of winning at trial at below 40%, whereas some six percent of defendants did so and as much as one-quarter of defendants' representatives did so.

5.3.5 This tends to suggest that among defendants who accepted the opportunity to mediate cases, a significant minority felt that their defence was relatively weak.

Figure 5-1 Perceptions of chances of winning in court at time of accepting offer of mediation: mediating parties and their legal representatives[1]



5.3.6 Some defendants' representatives were fairly frank about the weaknesses in their client's case, for example:

> "The cost of defending to a full trial would have outweigh the amount in dispute. In addition there were weak parts of my client's defence." (Breach of contract)

> "It seemed the best option for the client as she did not seem to have a good chance of winning the case." (Debt)

5.3.7 There were also one or two cases where the defendant's solicitor saw the offer of mediation as an opportunity to make his own client take a more realistic approach to the dispute, for example:

[1] The information is based on responses to two different questions: Plaintiffs and Defendants were asked: At the time that you accepted the offer to mediate the case, how good did you think your chance was of winning your case if it went to court?"; Representatives were asked: "At the time the parties agreed to mediate the case, how did you assess your chances of winning the case if it went to court?"

> "Because we were going to lose and it was a good way for me to confront my client with the reality of mounting costs and the inevitability of losing the case." (Housing disrepair case – solicitor for local authority)

5.3.8 This quotation highlights the fact that robust adversarialism in civil litigation is not necessarily a contrived strategy that solicitors impose on their clients, but reflects both a traditional orientation towards litigation that runs deep within the legal profession *and* the inclinations of many litigating parties. Some parties to litigation, both individuals and business, take a very hard line, particularly in the early stages of a dispute. Despite the fact that their legal advisers may feel that a compromise would be the best solution, the parties themselves may not agree. In such circumstances, offers from the court to experiment with mediation may be received with more distaste by litigants by their legal representatives.

5.3.9 Another factor influencing the advice to try mediation, which was mentioned by defendants' representatives but not by plaintiffs' representatives, was the possibility that mediation would assist in preserving or re-establishing a business relationship. For example:

> "The case was not of particularly high value and the issues raised were likely to incur substantial legal costs to pursue to trial. The mediation was essentially costs driven, but there was also the possibility of salvaging a continuing business relationship." (Dispute over supply of building materials)

> "The costs of litigation on the points in dispute were high and there was some hope for renewed relationship between the parties." (Dispute regarding termination of agency agreement)

5.3.10 Interviews conducted with parties at the court before mediation sessions began, confirmed the importance of anticipated time and cost saving. The overwhelming majority of plaintiffs and defendants interviewed prior to their mediation stated that the primary motivation for attending the mediation was to save legal costs and their own or management time. Only one or two people expressed the slightest qualm about the possibility of attending court, or displayed any particular interest in the special characteristics of the mediation process. Indeed, since most parties appeared to be relatively ignorant of what was likely to occur during the mediation, their agreement to mediate could hardly have been influenced by a passion for the process. The key purpose in attending the mediation session was to try and

end the litigation at a relatively early stage; and the chief source of the belief that mediation was capable of producing such a result, was the information that parties and/or their representatives had received from the CLCC telling them that this was likely.

5.4 Why cases had failed to settle

5.4.1 Solicitors who attended mediation were asked in postal questionnaires to say whether any offers to settle the case had been prior to mediation and to explain why, in their view, the dispute that had been mediated had failed to settle at an earlier stage in the litigation ("In your opinion, what were the main reasons why the case had not settled prior to the mediation?")

5.4.2 Although the explanations offered by plaintiffs' solicitors differed somewhat from those of defence solicitors, several common threads run through the responses: for example, that the parties were very far apart; that the plaintiff, or the defendant was absolutely convinced of the strength of their claim/defence and therefore unwilling to compromise; that there had been a lack of communication between the parties or that there was bad feeling between the parties. Defence solicitors were more likely than plaintiffs' solicitors to say that their opponent was being wholly unreasonable in their demands or taking an unrealistic approach to the merits of the case. Examples of response given on postal questionnaires are as follows:

> "The plaintiff and her solicitors failed to respond at all to settlement approaches. This suggest a lack of sophistication on their part (at best) or ignorance/pig headedness at worst!"

> "Neither side was prepared to accept that they both made mistakes. The defendant would not pay a small outstanding invoice. My client issued proceedings without seeking legal advice. When a counterclaim was made he took advice, but both parties had taken entrenched positions."

> "Both parties felt very strongly and were not prepared to make any concessions."

> "The parties became increasingly polarised as the litigation continued and costs built up."

> "The solicitors were corresponding about 'legal' issues only. No one was addressing the relationship between plaintiff and defendant."

5.4.3 What is interesting about solicitors' descriptions of the barriers to settlement in cases accepting meditation, is that they often convey the impression that cases accepting the court's mediation offer were those that were going to be *difficult* to settle through normal litigation/negotiation processes, rather than being a self-selected group of cases where settlement could easily be achieved. In this context, the relatively high settlement rate at mediation and also the high settlement rate following mediation noted in Chapter 3, appears to be a considerable achievement.

5.4.4 Among plaintiffs' solicitors' accounts of the barriers to settlement, reference was sometimes made to resource problems in pursuing the case. For example:

> "There was a clear conflict of evidence. The defendant was backed up by indemnity insurance involving insurers. The plaintiff was unable to pursue the case as vigorously as one would normally wish on the tactical side of things due to lack of funds."

5.4.5 A frequent complaint made by plaintiffs' solicitors was imply that offers made by the defendant had been unacceptably low or that the defendants were taking an aggressive line and had 'dug in'. There was also evidence that plaintiffs themselves had sometimes taken an entrenched view and were unprepared to consider settlement offers.

5.4.6 It should also be mentioned that a relatively common reason given for failure to settle before the time of the mediation offer was that the claim was at a very early stage and that until investigations had been completed it was not realistic to expect settlement negotiations to occur.

5.4.7 Some litigants were asked during interviews why their claim had not settled prior to the mediation and their responses largely reflect the views expressed by representatives: lack of communication, entrenched positions, unwillingness to give ground. One rather frank defendant expressed himself as follows:

> "Basically the case didn't settle earlier because I wasn't prepared to pay anything. It was as simple as that. I wouldn't, under normal circumstances have been prepared to pay a thing. It was only actually coming along to the mediation that I thought 'Oh well, he's not a bad guy". (Defendant owner of a small business. Settled the case at mediation)

> "It was one of those things that really should never have gone to court. We should have been able to sort this out. We had had a long relationship and I have one meeting with the plaintiff and after that meeting I sent him a letter which was probably a pretty firm expression of what we were going to do as we understood the agreement and that included not paying them until they performed, but that's as far as our discussion went. The next thing we knew we got the writ." (Defendant – breach of contract case)

5.5 Specific objectives

5.5.1 Solicitors who completed postal questionnaires were asked what they had hoped that the mediation would achieve. About one-half of the respondents simply said that they wanted to achieve a settlement of the case. About one-fifth said that they hoped to achieve a settlement of the case or a narrowing of the issues. The remainder stated that they hoped to achieve a settlement of the case, a narrowing of the issues, a clarification of factual issues and/or a clarification of legal issues.

5.5.2 During interviews with litigants prior to their mediation the overwhelming majority stated that their purpose in coming to the mediation and their hopes for the evening were that they would leave the court having achieved a settlement.

5.5.3 There was, however, a handful of litigants who attended the mediation without any great desire to achieve a settlement. A relatively extreme example is provided by the following response from a plaintiff given during an interest at the court just before the mediation session started:

> "I accepted the mediation offer because as I understand it, it is expected (the plaintiff had Legal Aid and attended without his solicitor). There is nothing to be lost. My solicitor suggested that I was expected to go to mediation and that if I didn't it would be known at the trial and that the judge maybe could have a costs sanction. I'm legally-aided so I don't have the same costs stress. I am not concerned about trauma in court. Once one party gets legal aid it's very lopsided. The legal bill is going up and this has been going on for two years. I am not optimistic about the mediation." (Cases did not settle at mediation and eventually went to court. The plaintiff lost at the trial.)

5.6 Expectations

5.6.1 Since perceptions of process are likely to be influenced by expectations, plaintiffs and defendants were asked in postal questionnaires whether they and ever been to court before their mediation, and parties and their lawyers were asked whether

they had even been to a mediation before coming to mediate their own case. Among plaintiffs responding to the postal questionnaire almost one-half (46%) had never been to court before. One-quarter (26%) and been to court once before and slightly more than that (29%) had been to court more than once before. Among defendants a little over one-third had never been to court before (37%), about 16% had been to court once before and nearly one-half of defendants (46%) had been to court more than once before. The population of mediating parties therefore appeared to have rather more experience of court than one might expect and this is a reflection of the fact that so many parties were representing businesses involved in disputes.

5.6.2 None of the respondents to the questionnaires, however, had much experience of mediation. Among plaintiffs, four respondents said that they had been to a mediation once before and none had been more than once. Among defendants, one had previously been involve din a mediation and one had been to mediations on more than one occasion.

5.6.3 Among solicitors returning postal questionnaires there appeared to be somewhat more experience of mediation than among the parties. Just under three-quarters of those solicitors who had attended the mediation with their client and returned a postal questionnaire reported that they had had no previous experience of mediation an done-quarter said that they had had some previous experience of mediation. Only five percent of solicitors who had accompanied their clients to mediation said that they had extensive experience of mediation.

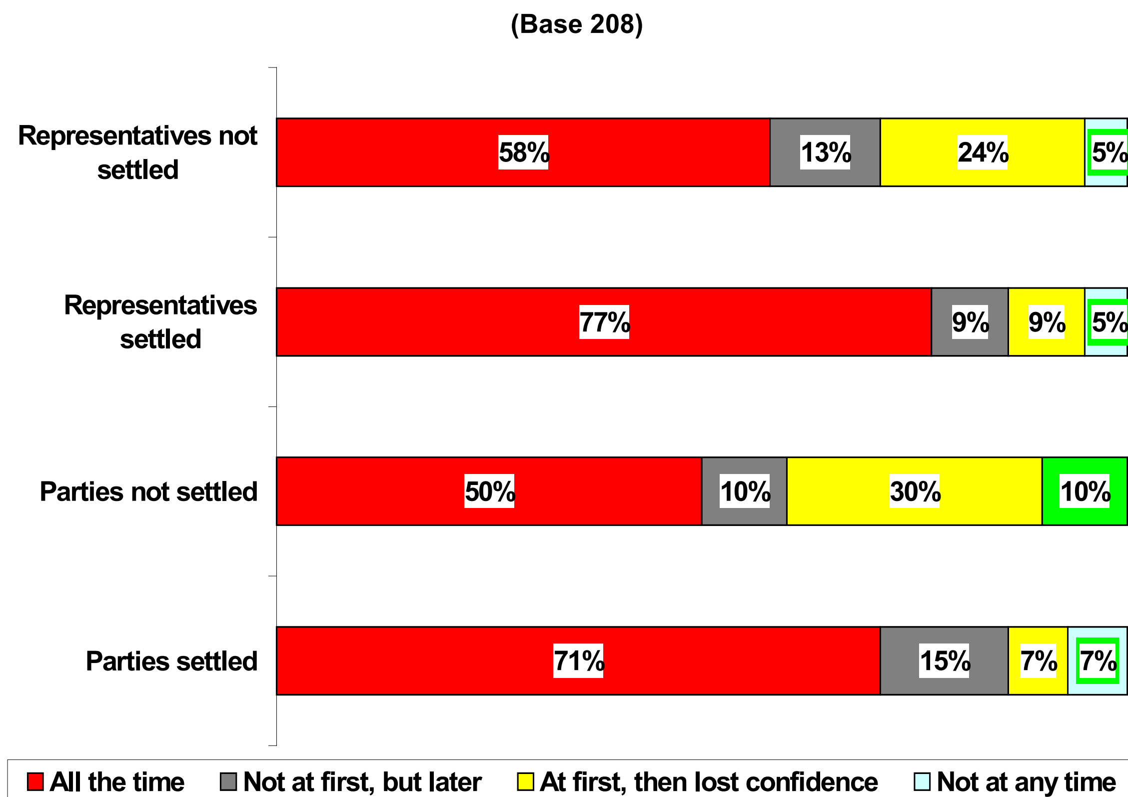
5.6.4 Respondents to questionnaires were also asked whether the mediation process had been more or less formal than they had expected. Although nearly three quarters of parties (70%) said that the mediation was about as formal as they and expected, just over one-fifth (21%) found it *less* formal than they had expected and just under ten percent found it more formal than they had expected. Among solicitors responding to questionnaires the pattern of response was virtually identical. 70% found the mediation as they had expected it, 23% thought it less formal than expected and six percent thought it more formal than expected.

5.7 Perceptions of mediators and the mediation process

Confidence in the mediator

5.7.1 Plaintiffs, defendants and representatives responding to postal questionnaires were asked whether they had had confidence in their mediator during the mediation session. On the whole, levels of confidence were relatively high, although as Figure 5-2 indicates, among those whose cases did not settle at the mediation, there were lower levels of confidence. Among litigants whose cases did not settle, some 40% stated that they either never had any confidence in their mediator, or that they lost confidence during the mediation. Representatives overall expressed slightly higher levels of confidence than litigants, but among representatives of cases that did not settle, the expressed level of confidence was somewhat lower than among representatives whose cases had settled.

Figure 5-2 Levels of confidence in mediators: Responses to postal questionnaires



Neutrality of mediator

5.7.2 Both parties and representatives in general believed that their mediator was neutral, although once again, among parties at least, there was less confidence among those whose cases had not settled at the mediation. Almost three-quarters (73%) of parties who settled felt that their mediator was completely neutral, as compared with two-thirds (64%) of parties whose cases did not settle. Among representatives, the pattern is oddly reversed. Among those representing in unsettled cases 82% felt that the mediator was neutral, as compared with just over two-thirds (67%) of representatives whose cases did not settle.

5.7.3 Face to face and telephone interviews with parties after mediation tended to support the responses to the questionnaires. Indeed, to a remarkable extent parties put their faith in mediators and assumed their neutrality and good faith. It is possible that the fact that the mediations took place within the court building rather than in an hotel or other venue, and the fact that the choice of mediator was in the hands of the court, led parties more readily to attribute judicial qualities of impartiality to their mediators.

5.7.4 There were, however, some significant exceptions to this general rule. Respondents who felt that their mediator was less than wholly neutral were asked in what ways the mediator did not appear to be neutral. The responses provide important training points for mediation organisation. Common complaints raised in relation to the issue of neutrality related to the amount of time that the mediator spent with the other side during private sessions, a sense that the mediator was putting more pressure on the respondent to settle than his opponent, and a perception that mediators were willing to push parties into settlements irrespective of the "rights and wrongs" of the case. This final complaint appeared both in relation to specific questions about the neutrality of the mediator and in answer to general evaluations of the mediation process as a whole.

> "He was only interested in obtaining a result, not justice."

> "He seemed to spend longer with the other side and was more intent on pushing our client into a settlement on the other side's terms."

> "The other side appeared in person and asked persistent confusing questions on which the mediator spent quite a long time. The advice he gave was somewhat legal in its nature which my client did not appreciate at all.
>
> "His aim above all seemed to be to reach a settlement."

5.7.5 However, in two or three cases the allegation of bias related to the fact that respondents felt the mediator was more sympathetic to their case and therefore unfair to the opponent. For example:

> He twisted the plaintiff's arm to achieve a settlement. The plaintiff was not represented."

5.8 Control of mediations

5.8.1 Most parties to mediations felt that the mediation was controlled by the mediator (71%). When asked whether they would have liked more control of the process themselves, a little under one-half of respondents (44%) said that they would have liked more control. When asked whether the mediator should have taken more or less control of the mediation session, although most respondents thought that the mediator's level of control was about right, one-fifth of parties (22%) said that they would have preferred the mediator to take greater control of the mediation. When this frustration occurred, it seemed to result from a poor fit between the parties' expectations of the mediator and the mediator's own view of their role. For example:

> "I thought the mediators were a bit too soft. They needed to be more energetic, more pushing things along from the word go. There was an awful lot of time wasted with all the niceties and it needed someone a bit more tough and energetic doing it. I think that's important. I felt that there wasn't enough time, although the case was quite simple. If you are going to run it in the toing and froing way with those sort of mediators it needs more time." (Representative of plaintiff small business)

5.8.3 Developing this issue further, a complaint that emerged on the part of some litigants during interviews, was that mediators had been *insufficiently interventionist* and that their refusal to be overtly evaluative was frustrating. This is an interesting complaint given that the mediators generally point out to the parties that they were acting as non-evaluative facilitators of settlement. However, at least some of those parties attending mediations were clearly seeking, and indeed expecting, an early

neutral evaluation of the strengths and weakness of their case. This to some extent reflects the character of the disputes and the types of parties accepting mediation offers. For example:

> "The mediator should be able to offer an opinion at the end of the proceedings. Particularly in a case such as mine where I believe our case was so strong. This would have benefited me – speedier resolution and the defendant would have saved on his costs. The mediator should have been able to give an honest opinion rather than remain impartial." (Individual plaintiff – goods and services dispute)

> "I thought the process was very good. Excellent. Bringing the two parties together in a fairly informal atmosphere, so one felt much more relaxed… I suppose the only weakness in the system was that it felt like going to the Samaritans – the idea is to listen and listen and never given any advice. There was a lot of listening, but no direct advice or indication of what you ought to do. I think it would have been nicer if [the mediator] had come clean and said something, rather than saying 'what do you think the outcome would be if it actually went to court?' I think it was just all a bit too subtle." (Unrepresented Defendant – small business)

5.8.3 A minority (6%) of respondents to postal questionnaires said that they would have preferred the mediator to have exerted *less* control over the mediation session. This tended to occur when parties felt that they were being pushed around by mediators, or pressured into a settlement at a point when they did not feel ready to compromise, or to compromise to the extent being asked of them.

5.8.4 The response to postal questionnaires by parties, however, indicates that a large majority of parties felt that the mediator's level of control was about right.

5.9 Solicitors contribution to mediations

5.9.1 Those solicitors who and accompanied clients to mediations were asked how much time they had spent preparing for the mediation session. The average amount of time mentioned by both plaintiffs' and defendants' solicitors was three hours. Most felt that the kind of preparation that they had undertaken was similar to that for settlement negotiations and the majority felt that if they were to attend a future mediation they would prepare in the same say. Among the minority of solicitors who thought that they would prepare differently, there was a tendency to feel that in future they might focus less on legal issue and more on the facts. For example:

"I would prepare a more "slick" presentation, concentrating on the main strengths of this case, rather than a more conventional legal analysis."

Less legal, more practical view of the case. More of an analysis of the case in the round."

"I would do less. It is a matter of being knowledgeable about your case, rather than the finer points of the law."

5.9.2 There were, however, one or two who thought that they might concentrate more on the law, for example:

"I would concentrate slightly more on legal issues as the arbitrator, who was counsel, used these to identify the areas of weakness/strength and therefore where there may be areas for further negotiation on the offer."

"I would prepare a written statement dealing with the facts, the legal issue and common areas beforehand."

5.9.3 Although most solicitors thought that the information they and received prior to the mediation session was quite helpful, some mentioned that they could have been better prepared for the way in which the mediation would run and that they could have been given a better feel for the fact that the mediation would focus heavily on factual issues and the dispute in the round, rather than on narrow legal issues.

5.9.4 When asked whether they felt that their involvement in the mediation process had met their expectations, the majority of solicitors (two-thirds(said that they had been involved by the mediator about as much as they had expected. About 13% said that their involvement had been greater than expected, and about the same proportion (11%) said that they had been involved less than expected. About 12% said that they had not known what to expect. The majority (89%) thought that their level of involvement was about right, although the remainder all felt that they would have liked more involvement in the mediation process.

5.9.5 On the question of the timing of the mediation in relation to the life history of the case, over two-thirds of solicitors thought that the mediation had been held at the most appropriate time, a tiny minority thought that it had been held too early (2%) and a little over one-quarter of solicitors (28%) thought that the mediation had been held too late in the life of the case. Among those who thought that the mediation had

occurred at too late a stage, the majority thought that the most appropriate time for the mediation would have been after the close of pleadings. The next most common response was that the mediation should have been held immediately after the notice of defence had been entered (which of course was the design of the scheme), and a small minority said that mediation should be arranged prior to issue of proceedings.

5.10 Fairness of outcome

5.10.1 Those plaintiffs and defendants who had settled their dispute at the mediation session were asked in interviews and on postal questionnaires whether they felt that the settlement they had reached was fair in the circumstances. The majority of respondents, to both interviews and postal questionnaires, said that they felt that, taking everything into account, the outcome of the mediation had been fair. Among both plaintiffs and defendants, about three-quarters said that they thought the outcome had been fair (77% among plaintiffs and 75% among defendants). However, during interviews with plaintiffs and defendants after mediations and concluded, it was clear that assessment of fairness were taken in the round, and within the context of the risk of cost of further litigation. Many of those interviewed, and some in responses on questionnaires, continued to assert that they should have been entitled to the full amount that they were claiming and that they had only agreed to the settlement because the risks of time and cost in proceedings were so great. This, of course, is the main focus of mediators' strategy for achieving settlements (see further Chapter 6).

5.10.2 Those who said that the outcome had not been fair were asked in what ways the outcome was unfair to them. Among plaintiffs, the chief reason for feeling that the result was unfair was that plaintiffs continued to feel that they had been owed the full amount, and that they felt they had been forded to settle for less than they were entitled. For example:

> "The defendant delayed payment and paid only 75% of what they owed."
>
> "We accepted an offer which we would almost certainly have declined had it been made prior to a court hearing.
>
> "We did not get the full amount owing to us."

> “I agreed to a lower settlement, but the defendant still got away cheap. If the mediation had happened a year or two earlier it would have assisted an earlier settlement which I would have found fairer.

5.10.3 One plaintiff felt that the settlement agreed had been unfair because:

> “The defendants lied. They produced false documents. Money prevailed.”

5.10.4 Virtually all plaintiffs whose actin was based on a claim for money from the defendant, said that they had compromised their claim and accepted less than they were originally claiming. In answer to a question about why they had agreed to accept less than they originally claimed, it was clear that compromises had been made in order to end the dispute and move on; to save further expense, because the money was needed badly at that point; or because plaintiffs were not always sure that the defendant actually had any money to offer, or that the defendant would still be in business by the time the case were to reach a court hearing. For example:

> “I was anxious to resolve the mater to that I could direct my efforts to my business. In past experience, legal costs have resulted in hollow victories and I did not want to incur costs and be uncertain of the outcome.”

> "We were desperate to settle.”

> “To save the expense of going to court.”

> “Fear of legal costs. The value of the claim was disproportionate to the costs.”

> "We needed the money and were not sure we would get it in court.”

> “It was a commercial decision to save legal costs and to preserve our relationship with the defendant.”

5.10.5 A proportion of plaintiffs said that they accepted a reduced amount because they accepted that they might have been partly at fault in the dispute or that they felt that their claim was not all that strong. Given the fact that many plaintiffs had rated their chance of success as being very high when agreeing to mediate, it is clear that some adjustment in perception had occurred during the course of the mediation. This had evidently happened in some cases because the mediator had made it clear to the plaintiff, either explicitly or by subtle implication, that there were weaknesses in the plaintiff’s case (see Chapter 6 for further discussion of evaluative mediators). For example:

> “We were faced with the expense and logistical problems of getting witnesses and legal representatives to London for probably two days. The advice from the mediator was that our case was not 100% and we had to make a commercial judgement.”
>
> “Because I didn’t want to go to court in case I lost the case.”
>
> “Because the counterclaim, being a grey area, could have cost considerably more if it went to court and with no obvious outcome. Plus the whole thing had taken a considerable toll on my health.”

5.10.6 Defendants who settled their case were also asked whether they felt that the settlement had been fair in the circumstances. Among the one-quarter who thought that the settlement had been unfair in the circumstances, the reasons given for this view are somewhat similar to those of plaintiffs – that a good defence was compromised because of fear of legal costs and concern about the likelihood of wining at trial. There were also concerns about the plaintiff’s ability to cover legal costs even if the defendant were to win. For example:

> “I believe that I paid £16,000 to the plaintiffs because they had legal aid and the mediator pushed their case.”
>
> “We had gone to mediation only to avoid the costs of a lengthy case (solicitors costs etc) and because the plaintiff was an individual from whom we wouldn’t have recovered costs if we succeeded with the case.”
>
> The whole thing was biased due to concern about legal costs.”
>
> “We don’t feel that our side of the case was given a fair hearing because the mediator seemed to have pre-judged that our case was a scam. This attitude also weighted heavily in our agreement to settle, for we felt that if such a learned man could do this, then the same could happen in court.”

5.11 Positive general evaluations by parties

5.11.1 It was clear from the analysis of parties; motivations for attempting mediating, that the principal interest was in outcome rather than the special characteristics of the mediation process, the parties were primarily seeking a settlement that would bring the litigation to an end and to keep legal costs and the time expended on the dispute to a minimum. However, despite the fact that little knowledge of, or interest in the mediation process was displayed by parties prior to their mediation, the overwhelming majority of mediating parties expressed general satisfaction with the process. Key

features to which litigants frequently referred with approval were the informality of the process, the ability to participate effectively in the process, and the focus in mediations on the issues in the case rather than on legal technicalities. They also approved of the fact that it was quick and cheap. Many parties greatly valued the cathartic effect of being able to state their grievances in an unconstrained way in a semi-public forum, even when their view of the outcome of the mediation was more negative.

5.11.2 Typical examples of the features of mediation most appreciate by plaintiffs were as follows:

> "The opportunity to state and hear both sides of the argument without interruption or adversarial questioning and the dispassionate, disinterested assessment of the chances of my case (were it to proceed to court) that came from the mediator."
>
> "It enabled a face to face discussion of the problems with a "referee" to take out any heat generated."
>
> "It was a lot less frightening the television scenes that you see – that was my only knowledge of legal matters."
>
> "Face to face discussion with the defendant without having to go through a barrister judge."
>
> "It was a very good alternative to court action… It enabled both parties to consider their position and that of the other parties whilst having the benefit of a legal representative to ask direct questions to and to seek their opinion."
>
> "Lack of adversarial atmosphere."
>
> "It was a speedy no-nonsense approach to trying to get two parties to reach a compromise."

5.11.3 One or two plaintiffs, however, said that the only thing that they liked was the result:

> "It settled – otherwise nothing."
>
> "The result – we got paid."

5.11.4 Some parties specifically mentioned the qualities of the mediator as being a great strength of the process. Among the qualities frequently mentioned with approval was the ability of the mediator to understand the context of the dispute:

> "The speed at which the mediator grasped the matters in dispute."
>
> "The mediator because of his background readily grasped the circumstances of the case.
>
> "The mediator was very polite and understanding."
>
> "I actually liked all of things that the mediator did."

5.11.5 Defendants also commented on the speed of the process and the benefits in reduced legal costs. There was also, among defendants, an emphasis on the value of the mediation session in actually bringing the parties together so that the issues could be discussed face to case. Some commented on the fact that it was a process that could be used without recourse to lawyers. Many also commented on the good qualities of the mediator and in one or two cases the ability of the mediator to handle a situation in which there was an imbalance of representation:

> "The mediators handled the plaintiff, who was not legally represented, in such a way that he felt that he could compromise, whereas prior to mediation because we were legally represented, he felt threatened and therefore unwilling to compromise."

5.12 Negative general evaluations by parties

***"How can I get my rights in a democratic country?"* (Plaintive plaintiff)**

5.12.1 As the above quotation illustrates, not everyone was wholly happy with their mediation experience. Among plaintiffs, there was a disgruntled minority who felt that the mediation had not lived up to their expectations. Sometimes, dissatisfaction with the mediation process was simply an expression of frustration at the fact that the mediation had failed to settle and that the plaintiff or the defendant had failed to achieve the result for which they had been hoping, for example:

> "The whole legal process is so long, with the dispute going on for four years. It is two years since the writ was issued. Mediation was seen as almost a last desperate attempt to get out of the terrible process with at least some hope of

salvaging something. The Defendant has used the long drawn out process to his advantage to whittle down the settlement amount."

"As an ordinary person who has never been outside the law and never been in court, I thought a friendly chat would solve the dispute. The people I had the dispute with (a multi-national company) were very cold and unfriendly. For mediation to work a mediator should have some power. This experience just left me cold. I have no faith in justice any more. It is all about due process and who can afford what. This is not civilisation when a solicitor just keeps prolonging the process to wear us out. Lawyers should respect the law, not milk it."

"Mediation is a complete waste of space. I feel no weight was given to my claim at all."

5.12.2 However, in other cases the complaint related to specific aspects of the process, and in particular, to the sense that the mediator was only concerned with achieving a settlement at any cost. For example,

"I felt the mediator was just trying to sort the dispute with no interest in my case or my costs, as long as it was settled. At the time of the mediation my costs were approximately £14,000. The mediator asked me if I would drop my claim if the defendant dropped the counterclaim, even though I had spent £14,000. This said it all. Their best offer was £7000."

"As our mediation took place outside normal court hours there seemed undue pressure to settle quickly. The mediator kept solely to legal arguments when we felt that the broader picture of the upset and distress caused by our holiday should have been considered in the settlement, which it might have been had the case been heard in court. WE paid £1,000 to our solicitor, but we would have hoped to have had our costs paid by the defendant." (Individual suing company. Settled claim. No agreement about costs)

5.12.3 An imbalance in representation at mediation sessions was also a cause of complaint among some plaintiffs. For example:

"We were plaintiffs in person. The defendant arrived with his solicitor. The mediator seemed sympathetic towards us at first, then he went to speak to the defendant solicitor. His attitude changed and then he said he's spent enough time and that it was getting late!"

"Mediation is a good idea if the mediator acts fairly and understands the law and how solicitors act for clients. Bearing in mind that we are experienced in court work, we could maintain a certain stance and not be brow-beaten by the mediator as a lay person would be. We would therefore not arise a lay person to proceed, since in this case, if the original suggestion had been accepted by a lay person, a gross injustice would have followed." (Unrepresented Plaintiff – small business)

> "The other side were being advised by their solicitor and the agreed sum would have been possibly £700-£800 more if he had not attended."

> "The representation by solicitors needed to be clear and either both sides to be represented or none."

5.12.4 Defendants, on the whole seemed to have few general complaints about the mediation. Those that did complain tended to focus on practical matters – lack of space, lack of refreshments, unsociable hours – than on any particular aspect of the process. Some felt that mediations had been somewhat rushed by the end, but almost the same amount thought that the mediation had been too long and drawn out. Where derogatory comments were made about mediators, complaints concerned their lack of knowledge of either the law or the particular context of the dispute and, occasionally, mediators' failure to be sufficiently directive.

> "The fact that the mediator was just that. I think he should have more say and bearing on the outcome of the dispute. Otherwise why bother?"

5.13 Positive evaluations by representatives

5.13.1 The overwhelming majority of representatives were enthusiastic about the mediation process. On the whole their comments reflected an appreciation of the speed and informality of the process and, most particularly, the opportunity that the mediation provided for their client to air their particular grievance directly to the opposing side. The catharsis involve din expressing grievances in a relatively public forum may, in some cases, both increase the likelihood of settlement, and also increase the acceptability of compromise.

5.13.2 Solicitors, interestingly, also commented with approval on the lack of legal technicality involve din mediations, feeling that it provided clients with the opportunity to participate effectively in the procedure. They also welcomed the focus in mediations on the commercial realities of the litigation. Examples are as follows:

> "Concentration on solutions rather than the legalities of the dispute. Opportunities to address plaintiff's non-legal concerns."

> "It brought the case to a head. We concentrated on the real, commercial issues, not the law."

"It is a relatively speedy process in an informal and relaxed atmosphere (most of the time). The parties understand better what is going on and there is a chance for them to participate and really get their say, which my client found very satisfying."

"Clients feel involved in the negotiation process and are happier with settlements."

"The best aspects were the informality and the opportunity it gave to my client to say exactly what she wanted, without interruption or the intimidation of a court setting."

"Forcing the parties to focus on real areas of dispute and to confront the commercial realities of being in a dispute. The short time period available to resolve matters also cut through previous lengthy delays."

"The fact that each party gets a chance to air their grievances. This means that even if the settlement is not wholly favourable, it is still acceptable to the client as they feel they have had a chance to speak their mind and let the other side know how they feel."

"It gave a real opportunity for both advocates to be frank. To express 'economic' views, rather than just merits of the litigation. To take account of the emotional effect of the trial on the parties and the practicalities of the settlement offer."

"The ability of the parties to express what is really troubling them and why they feel their case is strong. This is not reflected in pleadings. If you know why the other side feel as they do, it is the starting point for putting together a settlement. Also it offers the ability and involvement of the clients to broker a settlement they can live with rather than having one imposed by a judge, usually with whom they disagree."

5.13.3 Another point raised by one or two representatives was the ability of the mediation to repair a damaged business relationship.

"They weren't on good terms prior to the mediation. There was a great deal of suspicion and that was only broken down really buy discussions at the mediation. It was a tremendous process really… If they could manage to get over their distrust of each other, which they managed to do, there is no reason why they can't trade successfully in the future. The clients were absolutely delighted. They felt it was a tremendous step to take and make huge progress in such a short space of time." (Defendant's solicitor – Breach of contract)

5.13.4 There was a very clear view among representatives that the quality of mediators is crucial to the success of mediations and one or two of those

representatives who felt that they had been lucky in their allocation of mediator made a pout of mentioning their particular qualities, for example:

> "The mediator at our particular mediation was obviously **very** skilled at negotiation. He obviously managed to win the confidence of both parties and this was a major factor which led to settlement."

5.13.5 The general impression gained from representatives accompanying clients to mediation was that they were, on the whole, impressed with the potential of mediation. This favourable impression was reinforced during interviews when some solicitors, who had no previous experience of mediation, said that they felt there were aspects of the mediation processes that they could incorporate into normal settlement negotiations. One or two were so enthusiastic that they felt mediation should be made compulsory – although this was not a common view.

> "Prior to this mediation I was sceptical about the process. Both Counsel involve din the case are robust by nature and the circumstances of the litigation made settlement highly unlikely (high costs; one legally-aided plaintiff; wide discrepancy in valuation of the claim; delay in arranging the mediation). However, given that this case was resolved to the reasonable satisfaction of both parties, I now believe that it would be helpful to refer almost any case to mediation."

> "I believe mediation out to be compulsory in the vast majority of civil litigation cases. Local authorities such as this would save enormous amounts of money paid out in costs. Litigants would have their say and obtain quick and less costly remedy/justice. There would be enormous savings to the taxpayer and to the Legal Aid bill. It would also substantially reduce the number of solicitors firms who make a living running up large costs bills, many of which are paid by local authorities."

5.14 Negative evaluations by representatives

5.14.1 Although representatives were on the whole, very positive about the process, there were some complaints. These complaints concerned practical issues such as the amount of time that solicitors were left 'hanging-around' while mediators spent time with the other side and the time of day at which mediations were held. There were, however, other important issues raised by representatives of both plaintiffs and defendants. Some related to the mediation process and others to the quality of the mediator.

5.14.2 As far as the mediation process was concerned, representatives commented that there was often too much pressure to settle placed on their client. There were also concerns about the fact that mediation could be abused as a time wasting strategy by defendant sand that it could be abused as a means for learning more about the other side's case and assessing how the other side is likely to come across in court. There was also a legitimate concern that during mediation there is no opportunity to test the truth of statements made. Moreover, there was concern that if a dispute is not settled at the end of the mediation, the process merely serves to increase the costs of he case.

> "The process should be continued, but it does have its limitations. There remain temptations to gain useful information during the process which could advance a party's position at trial ie disingenuous use of process for ulterior motives. If a party commits to the process and then feels cheated by having shown his hand, then the process may fall into disrepute."

> "Mediation should **not** be made compulsory. If it is, it will be treated by litigators as simply a further stage in the process before trial."

5.14.3 Although many representatives had good things to say about mediators, there were also a number of very negative comments. As far as representatives were concerned, the quality of mediators was judge din terms of their legal knowledge and their familiarity with the issues of the case, as well as the personal qualities and strategies of the mediator during the mediation. Some representatives felt that the mediations were reduced to little more than horse-trading and that mediators were too keen to settle and too prepared to adopt a bullying approach to the parties. Examples are as follows:

> "The mediator should be a lawyer who can quickly identify the issues and talk on a level to both parties' advisers which earns their respect. The personality of the mediator is very important and he/she needs to be very positive and creative, as well as having the skills to break an impasse. Simply shuttling between the parties pleading with them to pay more or accept less is not helpful except in those cases that were always going to settle anyway."

> "The mediator needs to be trained. The emphasis should be less on the factual issues and disputes and more on finding a compromise solution."

> "He had an inadequate grasp of the issues and his "shuttle diplomacy" declined into "Chinese whispers" because he misunderstood and so misrepresented arguments on both sides."

> "The mediator appeared to have a brief to obtain a settlement at any cost."
>
> "In this particular case the overall impression was that the mediator concerned was unduly anxious to achieve a settlement and was prepared to adopt a bullying approach with the parties to achieve that end."
>
> "In this case there was a limited time period, and the mediator did not instil confidence or really mediate in any true sense (such as trying to get things moving when there were blocks). The same could have been achieved minus the mediators, but with the parties' solicitors taking a sensible negotiating stance."

5.15 Potential value of mediation in civil disputes

5.15.1 All parties who had attended mediations were asked on postal questionnaires whether they would use mediation again if faced with a similar dispute in the future. One-half of litigants responding to the questionnaire (49%) said that they would definitely use mediation again and just over one-third (36%) said that they would probably use mediation in the future if faced with a similar dispute. Just under one in ten (8%) said that they would probably not use mediation in the future and a similar proportion (7%) said that they would definitely not use mediation again. Those who said that they would probably or definitely not use mediation again were roughly split between those whose cases had settled at mediation (42%) and those whose cases had not settled at mediation (58%).

5.15.2 Representatives who and attended mediations with or on behalf of clients were asked on postal questionnaires some general questions about their views of the potential of mediation, based on their experience of being involve din a mediation. About two-thirds of representatives said that they thought mediation was a good way to handle a significant number of cases and the remaining one-third thought that mediation could be helpful in a minority of cases. No representatives said that mediation was a complete waste of time.

5.15.3 When asked whether they had recommended mediation to other clients, almost one-half reported that they had recommended mediation more than once (48% of respondents). About 17% reported that they had recommended mediation once to

another client, and just over one-third (35%) said that they had not recommended mediation to any other clients.

5.15.4 The kinds of civil cases most often mentioned as being particularly appropriate for mediation were those where the claim value was low (and costs would be out of proportion), straightforward debt cases, cases where one party is not legally-represented, cases where disputes relate to issues of fact rather than law.

5.15.5 Those case most often mentioned as being inappropriate for mediation were those with complex factual and legal issues, personal injury cases, and large commercial claims.

5.16 Mediation and personal injury cases

5.16.1 Given the volume of personal injury litigation in the county court, the relatively modest sums involve din many of those claims (see Chapter 3), and the overwhelming rejection of mediation by disputing parties in personal injury actions, it is worth devoting some space to an examination of the very small group of personal injury cases mediated during the CLCC pilot scheme and reflecting on the potential of mediation in personal injury actions.

5.16.2 During the study period between May 1996 and March 1998 only seven cases involving personal injury were mediated. Two of these cases were injuries sustained during road traffic accidents, one was an accident at work, one was a medical negligence case, and three were injuries sustained elsewhere (for example, one during a holiday abroad). Of the seven mediated cases, five settled at the mediation appointment. The five that settled comprised the two road accidents, the accident at work and one of the 'other personal injury cases. In at least three of the five cases both liability and quantum were in dispute. The sums agreed by way of settlement were £2000 (no legal costs because the plaintiff was unrepresented); £3,8750 plus the plaintiff's legal costs in the action; £11,250 plus the plaintiff' legal costs; £5,000 plus the plaintiff's legal costs, £12,000 plus the plaintiff's legal costs.

5.16.3 It is worth noting that in all four of these settled cases where the plaintiff had incurred legal costs, the mediated settlement included an agreement that the defendant would pay the plaintiff's legal costs in the action, thus reflecting the normal settlement practice in personal injury cases.

5.16.4 The evidence of this small group of personal injury cases therefore suggests that it is possible to mediate personal injury cases, where both liability and quantum are in dispute, at least when the medical situation is clear. It is also worth noting that two of the settlement were for relatively substantial amounts of money.

5.16.5 The medical negligence case and one of the other personal injury cases did not settle. Of these two case, one settled out of court about three months after the mediation for a sum of £6,000 plus costs, the medical negligence case went to trial some 14 months after the date of the mediation and the plaintiff was awarded £12,000 plus costs.

5.16.6 Parties and solicitors in the personal injury cases interviewed following mediations, and those who returned postal questionnaires, expressed general satisfaction with the mediation process and contentment with the settlements. The chief benefits of the mediation were seen as: acceleration of normal negotiation processes; speedier settlement leading to more satisfied plaintiffs; and a reduction of legal costs if preparation for trial is avoided. Another 'benefit' mentioned was that the mediation offered the opportunity for a 'dry run' whereby both sides could obtain the feel of how the injured plaintiff might come across in a court hearing.

5.16.7 The perceived dangers were that mediation could be used as a tactical ploy to obtain information that might be useful subsequently if the case went to trial and that an injured plaintiff could be upset by exchanges during face-to-face discussions in the mediation.

5.16.8 The following extracts from interviews conducted after observation of two personal injury mediations provide insights into the approaches taken by legal representatives and perceptions of the mediation process in personal injury cases.

1. **Personal injury arising from road traffic accident. Liability admitted. Plaintiff had legal expenses insurance.**

Plaintiff's solicitor:

Timing

…"We couldn't have mediated this until the medical evidence was settled. No opinion could be given until the long term medical conditions had been settled. If they have continuing symptoms it leaves us open to negligence claims if we settle too early."

The mediator

. "I thought it started fairly slowly because we had this long speech about mediation. The mediator obviously kept confidential the information we had given him, particularly as far as what we thought the bottom line was. That was important. I actually felt that I trusted him to keep the information confidential. It was very important to me because I was in two minds. He did say, 'Be honest with me' – and I thought 'Well let's give it a go'."

The process

…"It was a mediation, but with tactics that are used in everyday practice. Basically, the mediation could have been me meeting with the insurance rep in my office that I do on a regular basis. The only different thing was that there were other people there. **Q. What did the mediator contribute?** I think he speeded up the process because he was going backwards and forwards whereas normally you would to away and think about an offer and then in two weeks time get back to them once you have taken your client's instructions. It happened a lot more quickly."

Tactics:

"The hole thing was tactics. I start off higher than I valued the claim. They start off lower than they value the claim and we met in the middle. I started off at £18,000;' they started off at £6,000 and we met in the middle at £12,000. It's tactical. Knowing that they probably wouldn't be bale to shed their cloak of being insurance people and being defendant biased, I knew that if I said outright first of all 'I'll put my cards on the table. We want £12,000 and we'll go away', they wouldn't have accepted that. They wouldn't have come up. I don't think you can have true cards on the table approach."

…"The basic fact of the matter was that we were not going to suddenly just drop being litigators and suddenly be bosom pals because the thing is we are going to come up against these people again and if we are seen to be weak in the negotiating they will remember that for the next time. And so we can't drop the litigation stance. It's just impossible. It's true. We come up against (the defendant's solicitors) on a regular basis. So it's all very well for the mediator to say 'Forget about being litigators. Forget about what you do all day'. You can't suddenly drop it because it might rebound on you at a later date and that's why we were all still employing tactics."

The outcome

…"My client was happy and I was happy with the outcome. It would have been the same result if we had just been negotiating between solicitors. I wasn't intending for my client to go to mediation and come away with less just because it was a mediation. That wasn't the view I went in there for. I wanted to do my best for him to make sure he got an adequate settlement for the injury he sustained. So, in my opinion mediation wouldn't mean I would let the other side off and say 'Oh well, you don't have to pay as much since you have agreed to mediation or you can undervalue the claim."

Pros and Cons

…"I would do another one. Our firm's policy is, if its it appropriate, if medical evidence is complete and we feel that we are really quite ready for it, we tell the other side we are happy to mediate if they are. And they either ignore us or come back and say 'Yes, we are happy to'. Most don't even bother replying."

…"Although it cuts down your fees, it enables you to take on more cases because you are shutting down more cases more quickly. By the time you get to this stage you have done an awful lot of work anyway. You have got everything on line really and you are just waiting for that court date. At the end of the day if you get rid of cases more quickly you've got happier clients and you can take on new ones and I think it can only be good for everyone really. This case had been going on for two-and-a-half years. £12,000 is a huge sum of money for him and the ridiculous thing is that our costs are half of that. But the other side could have paid up on this a long time ago."

The Insurance Company:

Tactics

"I was very enthusiastic about the whole process of mediation. It really does suit the plaintiff and the insurers in that the quicker you can dispose of an action, the better. What I expected was for both parties to go there with a realistic view of quantum, really looking to settle it… we thought the plaintiff's solicitor in his opening gambit was wholly unrealistic in his assessment of quantum and I think that then caused a problem in that it raised the client's expectations and he saw this sum dangled in front of him… It was all very cloak and dagger still and there was still a lot of tactical play going on."

…"It would be interesting to try it with a different firm of solicitors, because some solicitors you tend to find are more realistic than others. In my experience those solicitors were at the unrealistic end of the scale. They are very difficult to negotiate with in my experience and I was in a state of disbelief when I saw their authority. But I think that is par for the course with that firm. I think that's where you get a lot of these actions taking up court time. They run the distance.

If both sides can get together and take a realistic view – and I think fixed costs will really concentrate the mind on that[2] - then these cases will go a lot faster."

…"Unfortunately a lot of the time, because of legal aid and legal expenses insurance, the cost pressure is more on us than on the actual plaintiff. If we had had a privately-funded plaintiff there is would have been very different. I suspect that it would have settled perhaps even prior to mediation and I think then they would have had to take a more realistic view because I don't think there was any chance of getting anything in the region of £10,000 on that claim. But they had nothing to lose in that particular instance, because if we were to pay-in say the £10,000 and that was the level of the award at trial, OK we would get our costs, but it would be the legal expenses insurance that would have paid that. The plaintiff would still get his £10,000. He wouldn't be penalised at all. We are really up against the wall with legal expenses insurance. At least with legal aid you can make an application to have costs offset against damages and that's always really the level there. I've never seen a claim where legal expense insurance has withdrawn funding. Unfortunately not."

The outcome

..."I felt I yielded more ground than I wanted to, but the cost of going away and getting our own expert's evidence, then running on with the litigation procedures – it would have very very quickly knocked up a bill for the extra £2,000 that we paid on top of the £10,000 that we saw as the top bracket figure. For the sake of killing it there and then I took the commercial decision that we may as well chip that extra £2,000 into the damages just to see an end to it. It always pains me to have to do it."

Defendant's solicitor

Timing

…"The problem is that mediation is kicking in very early. The first time the defendant sees what the case is about is when proceedings are issued, so we don't have time between serving the defence and being offered mediation."

Tactics

"We felt it was a worthwhile exercise. The difficulty always is that it's very difficult for someone who has been litigating for twenty odd years to detach himself from that sort of rationale because in essence the whole way in which PI damages are calculated is on the basis that you get X pounds for certain bits. The difficulty with mediation is that it assumes that you are all coming to the table with clean hands – to mediate and that you are leaving this baggage of litigation tactics to one side. Certainly in our case I don't think that happened. The litigation tactics were still there. One could see that mediation could be used for tactical purposes and that would be a bit sad."

[2] Reference to Lord Woolf's proposal to introduce fixed legal costs in the new fast-track procedures.

…"Both parties should be forced to put their cards on the table before the mediation so that you know what you are mediating about, because no one actually does know what a PI claim is worth. …There is a tactical ploy in relation to these things where you literally do think of a number of double it and get the defendants to beat you down… "It was a classic mediation because we settled exactly in the middle. It was exactly as I expected it to be."

The process

…"The major benefit for me was that it was the first time that I had been able to see a plaintiff before a trial. Now that may sound bizarre, but that is one of the difficulties one always has – unless we have them followed by an inquiry agent which is often the case when cases are a bit dodgy – I don't ever get to see them. And one of the problems is you are dealing with an individual who has needs and who has wants and half the problem is that most of the evidence we see is from experts who deal with the matter in a very cold and impersonal way and it's very difficult to actually gauge from the medical report what the plaintiff is actually like. I think mediation is an opportunity where you can see the plaintiff. You can assess how he is going to come across… and to a certain degree whether he is being genuine in relation to what he is saying about his injuries… So it is certainly a worthwhile procedure."

2. Personal injury arising from a road traffic accident. Liability and quantum in dispute. Plaintiff had conditional fee arrangement with solicitor.

Plaintiff's solicitor

"The mediation has been interesting and I think that mediation could be of benefit in large cases. But in smaller cases the same result could be achieved through correspondence of through meetings between solicitors themselves. They just didn't discuss it with us. Mediation is a good idea if parties cannot come to an agreement but it seemed a bit of a waste here.

The process

It was quite non-confrontational which is a good idea. It is best if the mediator has an understanding of personal injury work. This mediator was very good. He grasped the concepts very well. He had a good working knowledge. He was very good… The process is less daunting than going before a judge in chambers. You can put the case in simple terms. It was less adversarial. If I had a choice between mediation or arbitration or court I would choose mediation every day. I feel with judges you have to impress, but the mediator is not making a judgement. He is just assisting you and he gives the same impression to each party. He pitched it well. He inspired confidence. It would be different if you didn't feel comfortable with the mediator.

General assessment

"There hadn't been any offers to settle this case before the mediation. The mediation was OK, but it could all have been done on the telephone just as

> easily. Negotiation is a game. I felt the mediation was wasted here because he was not offering solutions, just shuttling back and forth between the parties. I know that this insurance company is keen on mediation and as soon as we issued proceedings and accepted the mediation offer they jumped at it. Our firm automatically offers mediation to the other side and 99% of defendants turn us down."

5.17 Conclusion

5.17.1 The low rate of acceptance of the court's mediation offers means that those cases which did mediate comprise an atypical group. The reasons given by parties and their lawyers for agreeing to mediate suggest that anticipated *difficulty* in reaching settlement was as important, if not more important, than prospects of swift settlement. Lack of common ground, failure of communication, intransigence and disproportionate costs risks all featured frequently among the reasons for mediating. Most parties attending mediation did so with the explicit intention of trying to achieve a settlement and in the hope that it would save time and cost. Knowledge or experience of mediation was rare.

5.17. On the whole the evaluations of the mediation process were extremely positive among parties and among solicitors attending mediations. Those aspects most valued by parties were the opportunity to participate fully in the process and the lack of legal technicality and vocabulary. Representatives saw the benefit of an opportunity for parties to state their grievances in anon-threatening arena, to focus on commercial realities and, occasionally, the potential for repair of damaged business relationships. Criticisms centred on the qualities of mediators in terms of skill and knowledge, and a perception of undue pressure to settle.

5.17.3 For many solicitors attendance at a mediation provided something of a revelation. There was a widespread view that mediation had potential across a broad range of disputes, although there was considerable scepticism about its role in complicated cases, especially in the personal injury field. However, the evidence of the small number of personal injury cases successfully mediated in the CLCC pilot scheme suggests that this scepticism may not be well-founded.

6. MEDIATION IN ACTION

6.1 Introduction

6.1.1 An interesting element of the evaluation of the CLCC mediation scheme was the observation of a relatively large number of mediation sessions. This was essential not primarily in order to assess whether mediators were good, bad or indifferent – although it was impossible not to make those kinds of private judgements – but in order to gain insights into the mediation process, some knowledge about mediator strategies in action, and an impression of the strategies adopted by parties and legal representatives during the course of mediation sessions. Although it would be useful to be able to identify a particular strategy or approach as 'best' in mediations, the infinite variety of individual personalities and tactics, the unpredictability of group dynamics and the way in which the ground can rapidly shirt during a mediation session, renders illusory such an ambition. Indeed, one of the clearest impressions gained from watching many mediators in operation was the importance of flexibility in approach. Mediators need to be able to respond cleverly to the personalities, principles and strategies of those with whom they are dealing during the mediation session. They need to be able to cope with a huge range of response sand rapidly changing emotions, even among relatively hard-nosed business people. In addition, and most importantly, they need to be able to see through the often refined and polished negotiating performances displayed by some litigants during the course of mediations. It is not surprising that mediators varied in how successfully they performed these various aspects of the mediator's role.

6.1.2 During the first year of the mediation pilot scheme, some thirty mediations were observed, involving over 100 hours of mediation time. Although no party refused to allow me to observe their mediation or to interview them prior to the mediation, a small number of mediators tried quite hard to dissuade me from observing and one or two were mildy hostile. During the course of the mediation sessions, the mediators were shadowed as they went from room to room. This means that although it was possible to watch mediators throughout the mediation session and

to observe their dealings with the opposing sides, no information was collected about the private discussion that took place in the absence of the mediator, while parties were waiting for the mediator to return.

6.1.3 Hand-written note were taking during the mediations and sometimes verbatim records of exchanges. These notes provide a record of the various stages in the process: for example, information gathering, clarifying, revealing positions, adjustment of positions and expectations, haggling, closure or abandonment.

6.2 The mediation process

Openings

6.2.1 Virtually all mediations observed began with the parties meeting together around a table. Some mediators organised complicated seating arrangements which they felt might improve the dynamics of the session, although the majority simply seated the parties and their lawyers on either side of the table with themselves at the head. The introduction given by the mediators varied in length, but covered the same sort of content. All mediators stressed their role as a facilitative neutral, whose role was to assist the parties in achieving their 'own' settlement. In virtually every mediation observed, mediators were at pains to stress that they would not be making any evaluation of the case and they would not deliver any decision on the case. Thus the introduction to the mediations reflected the underlying philosophy of facilitative mediation. Some stated explicitly that they did not propose to focus on the 'rights and wrongs' of the case, but were seeking to assist the parties in finding a solution to the dispute.

6.2.2 Some mediators took the opportunity in their introduction to emphasise the benefits of mediation over litigation, to attack the litigation system as costly, time-consuming and capricious and some, rather extraordinarily in the presence of legal representatives, took the opportunity to attack the legal profession for their role in adversarial litigation. To their credit, none of the legal representatives observed reacted to this mild vilification, although one or two reported subsequently that they

had not particularly appreciated the lecture especially since they had been responsible for recommending mediation to their client.

6.2.3 Some mediators had a printed crib sheet of introductory statements and procedures from which they read (and occasionally clutched in the early stages of the mediation, rather like a comfort-blanket). Some of the less experienced mediators appeared rather nervous and tentative until they got into their stride. The best mediators, and not always the most experienced, managed to create a comfortable atmosphere at a very early stage, defusing initial discomfort and hostility and earning respect rapidly. This accomplishment derived from a combination of excellent interpersonal skills, courtesy, confidence, familiarity with the facts of the dispute and a good knowledge of the relevant legal framework of the dispute.

6.2.4 From the parties' point of view, the commencement of the mediation was often a tense time. Many parties had not communicated, let alone been face to face, since the dispute began. As a consequence, when parties first entered the meeting room for the opening session there was a sense of anxiety and awkwardness. Often parties were unable to meet each other's eyes and in these situations many clearly found it comforting to be accompanied by their legal representative with whom they could talk and shuffle papers as a distraction from the tension of the situation. Legal representatives, unsurprisingly, managed these opening moments much better than their clients. They were invariably professional and courteous both to the opponent and to any representative that might be accompanying them. In a small number of mediation sessions, the bad feeling between the parties was such that they refused to meet together in one room and mediations were conducted with the mediator simply shuttling between rooms and carrying messages. Although these situations were difficult to handle, at least one or two did succeed in settling.

6.2.5 After the introduction had been concluded, in all mediations observed, the mediator asked the parties to make an opening statement focusing on how they saw the dispute from their perspective and what their grievance was. Whether or not parties attended with legal representation, mediators always asked the parties to make this opening statement. In most cases the parties themselves did so, but in some cases

observed, parties who were represented asked their solicitor or barrister to make the opening statement. Mediators always insisted that parties should be allowed to make their statement without interruption. As a result, parties were able to relate, in their own words the background to the dispute and what issues in the dispute were most important to them. Although it was reported in Chapter 5 that this opportunity to air grievances was greatly valued by parties, it emerged during private discussions in some mediations that the content of opening statements, at least temporarily, caused anger and sometimes distress to the opponent. Some of the opening statements were quite emotional and mediators often had a difficult time in the first private sessions overcoming reactions to the opening statements.

6.2.6 When solicitors made the opening statement, they often worked from prepared notes and occasionally there was a tendency to offer a statement that might have been better-suited to a court hearing. However, those solicitors who began the mediation sessions adopting a rather formal and adversarial approach, seemed able gradually to adapt to the different emphasis and rhythm of the mediation. Their role was principally that of adviser rather than advocate and most appeared to be willing to take a back seat and allow their client to be the focus of the mediation.

Adjusting positions

6.2.7 Once the opening joint session had ended the parties retreated to their own private rooms and the mediator began the process of shuttling back and forth between the parties. The purpose of these private meetings appeared to be to probe further into the factual background of the case, to get a clear feel for what were the parties' most important concerns and to get an early sense of what each side's bottom line or sticking point might be. With some mediators this process took an extremely long time. Others would get to the bottom-line question very rapidly. By establishing each side's bottom-line at an early stage, the mediators were able to get a feel for the distance between the parties and how much work there was to be done in order to find a meeting place. It was absolutely clear that most mediators were simply seeking to find a compromise between the two figure an that there were two fundamental aspects to this strategy. The first, was to raise doubts on each side about the strength

of their case and the second was to ram home the disadvantages of a failure to settle ie the direct and indirect costs of future litigation.

6.2.8 In operating the first part of the strategy, mediators often formed a rapid assessment of which side had the strongest legal case, and in operating the second part of the strategy they also formed a view of which side was the most likely to give ground. Both of the facts were recognised by the parties:

> "The mediators necessarily have to make what amounts to a snap judgement as to the merits of the arguments of the opposing parties. They then have to convince the parties of the need to make concession. Neither are easy."

> "I think what he did was, he weighed up the position reasonably quickly and went in to try and convince the party that was most likely to settle. It was obvious that we weren't going to back off the case and so I think that he went to some trouble to explain our position to them."

> "Learning on people is the only way that you will get a settlement. If you lean on two halves of a see-saw it is usually the weaker half that will break and that is where you should apply your effort.

Closings

6.2.9 It is worth making a brief mention about the closing phases of mediations. Although some ended after a terrific rush to close deals and agree the terms of the settlement, most mediators made a point of bringing the parties back together for a formal closure. When there had been a settlement, mediators would congratulate the parties on achieving a settlement, thank them for their hard work and offer the opportunity to shake hands. In many mediations, observed, the contrast between the final session and the opening session was intense. Parties who had been unable to meet each other's eye would often shake hands and address each other by their first name. The relief among the parties was palpable and occasionally parties left the building together in conversation. In these circumstances, the potential of mediation for genuine dispute resolution and reconciliation seemed clear.

6.2.10 Even when mediations had not achieved settlement, mediators would often bring the parties back together, thank them for their hard work and focus on the positive achievements of the evening in terms of narrowing issues. Although these meetings

were rather less happy affairs, the final session was often helpful in defusing some of the tension of the closing moments of negotiations. In some circumstances, however, parties refused to meet for a closing session and left the building.

6.3 Mediating styles

6.3.1 Although there was considerable individual variation in style among mediators, it was possible to identify certain broad prevailing approaches to the business of mediation. First was the 'counselling/therapeutic' approach which was characteristic of some non-lawyer mediators. This involved focusing on encouraging communication between the parties and seeking to achieve reconciliation. Mediators who favoured this approach tended to be the most non-directive and the least evaluative. The rhythm of these mediations was relaxed, even slow and the mediators would expend effort in establishing rapport, gaining the confidence of the parties and seeking to improve the information flow between the parties. There was an emphasis on feelings, on acknowledgement of grievance and of counselling parties to think about solutions. Inevitably, legal considerations were unimportant in this approach and some non-lawyer mediators were at pains to stress their lack of legal knowledge. On the whole, this approach was least well suited to the types of disputes, the types of parties and the expectations of parties in the mediations in the CLCC. It occasionally led to frustration and to the accusation that the mediators had allowed the mediation to drift.

> "I think when you are dealing with commercial dealings I think you can grab it by the throat. When you are dealing with emotions – things like divorce proceedings, personal problems, that might be a bit different and need a different approach. I think when you are just dealing with hard facts like commecialism and money and what's the bottom line, I think businessmen just want to reach some sort of a compromise if there is one and for a mediator to take the bull by the horns and give his opinion. I did expect when I came that there would be a more positive approach rather than being left to make the decision yourself."

6.3.2 Dissatisfaction with the therapeutic approach was not only expressed by business litigants. Many of the mediations involved individual litigants and, like business people, by the time that individuals have issued their proceedings or entered their defence they have formulated their arguments and position in the language of

legal rights and responsibilities. Although they may be interested in achieving a resolution through a problem-solving approach they often demand an acknowledgement and understanding of the legal issues which establish starting and finishing points. Moreover, since some costly and traumatic hypothetical trial is often used by mediators to increase the pressure to settle, it is possibly a little unrealistic to expect parties completely to abandon consideration of, and conversation about, what they see as their legal position.

6.3.3 The second broad approach to mediation was the bargaining approach. This approach emphasised the important of achieving settlement, tended to focus on the commercial realities of litigation and the disadvantages of continuing with the dispute. This was by far the dominant approach in the mediations observed at the CLCC but there was a spectrum of styles within this approach ranging from 'cool authority' to 'scruff of the neck head-banging'. Most mediators, although often modifying their own behaviour, naturally fell towards one or other end of this particular spectrum. The cool authoritative approach tended to work best when the mediator was very experienced, had a natural authority, was knowledgeable about the relevant area of law an managed to convey familiarity with the facts of the case. Some of the best proponents of this style were barristers who were very adaptable and quick-witted. Mediators of this breed use charm, apparent sympathy and expert knowledge to gain the confidence of parties and legal representatives. Many of these, however, were most willing to cross the line between probing strengths and weaknesses of the parties' cases, to communicating subtly or even directly their own view of the parties' chances of succeeding at trial. When these types of mediators had established their authority, the communication of such a view would often be highly influential in achieving settlement. A danger, however, is that the view if formed rapidly and often on the basis of meagre information.

6.3.4 The following exchange, from the late stages of a mediation about a breach of contract, is an example of a mediator of the expert/authoritative variety, offering a view on the strengths of the plaintiff's position in order to achieve movement in negotiations after quite a long sticking point. The mediator in this case had formed a

view early on that the plaintiff's case was less strong than he thought and that he was being particularly intransigent. In the extract it can be seen that the mediator clearly advises the plaintiff that he is likely to have trouble in court. The plaintiff rapidly takes the point and even says "I bow to your advice". He agrees to compromise.

Plaintiff	He's trying to play games with our offer and chisel at the sides.
Mediator	But you are trying to settle?
Plaintiff	We are more than happy to defend the principle.
Mediator	But you have to consider the possibility of losing.
Plaintiff	This isn't about £20k in our pocket. We can easily get £20K back in our pocket.
Mediator	But if you lose you will get a bloody nose. That doesn't help the principle.
Plaintiff	But it tells the marketplace you can't make an agreement with us and walk away without a fight. Our stance is about much more than money.
Mediator	**Perhaps I need to be a little frank with you. It is far from clear that you would be able to divorce the later contract from the pattern of the earlier ones.**
Plaintiff	**I bow to your advice.**
Mediator	**I only say that because it is right that you shouldn't go away with illusions of success that might not be right.**
Plaintiff	**OK. The deal is that I am prepared to pay [.....] and I'm not interested if he gets within $£200 of my last offer.**
Mediator	Posturing is not a good idea.
Plaintiff	He's nickel and diming.
Mediator	**He feels very strongly and he thinks his oral evidence will stand up. You shouldn't assume he does not feel very strongly.**

6.3.5 At the other end of the "bargaining approach" spectrum are the head-knockers who metaphorically and sometimes literally roll up their sleeves at an early stage in the mediation and get "stuck-in". They move rapidly to bottom-line questions, focus heavily on the disadvantages of litigation and emphasise the act that no legal case has a 100% likelihood of succeeding at trial. These were the mediators who tended to be criticised subsequently for creating too much pressure to settle and seeming uninterested in questions of justice and fair outcomes in the light of the legal strengths of the parties' case. In fairness, however, most mediators of this type attempted to bully both sides relatively evenly, although the impact of bullying and the response to pressure depends on the parties and on the configuration of representation. In some of

the mediations observed, the negotiations became virtually frantic towards the end, with mediators desperate to settle, rushing panting from room to room. This approach actually suited some disputes very well and the parties did not mind the pressure to close the deal. As it was reported in Chapter 5, however, this type of behaviour was a cause of complaint and led parties sometimes to reflect that they had been pushed into a compromise to which they might not otherwise have agreed.

6.4 Power and ethics in Mediation

6.4.1 Observation of mediators revealed a range of experience and aptitude. The repertoire of personal skills required of mediators is immense, and the success and acceptability of mediation depends to a great extent on the talent of the mediator as well as their training. Some mediators that were observed were brilliant. Many were good. Others were unimpressive and still others were positively bad.

6.4.2 If mediation is to be promoted at the policy-level there are important questions to be addressed in relation to the quality of mediators. The behaviour of mediators is crucial for a number of reasons. Most importantly, because whether the mediators are lawyers or non-lawyers, mediations are controlled by the *mediators* and *not* by the parties. Despite the rhetoric of the mediation organisations and despite the conventional introduction given by mediators at the outset of mediations stressing their facilitative role and the parties' control of the proceedings, it is invariably the case that the mediator decides the rules by which the mediation will proceed: for example, who will be permitted to speak and when; what evidence is relevant and what can be produced and discussed. The mediator sets the criteria of relevance and shapes expectations.

6.4.3 There is thus considerable scope for the exercise of covert power. The evidence of observation strongly indicates that evaluation is *not* absent from mediation; it is simply communicated with more or less subtlety depending on the personality and individual philosophy of the mediator. The role of the mediator therefore requires close examination since the activities of mediators are currently unregulated. They are unaccountable; the nature and extent of their responsibility to the parties is

unclear; and their ethical standards are unarticulated. For example, when asked what a mediator would do if he felt that one party was agreeing to a compromise that was extremely unfair in light of the party's legal position, a mediator responded as follows:

> "It's the big moral question. When I was doing my [-] course I posed the question to those teaching that if I have got a mediation between one little old widowed lady who is unrepresented and a very large corporation with lots of muscle behind it and you see that the little old lady has some great legal case that she hasn't brought on, but she is prepared to settle for a relatively minuscule sum of money – what do you do? Are you obliged to draw to her attention the fact that she has a better case than she thinks or are you really only there as facilitator to help the parties reach such settlement as they want. Nobody can really answer that question when it gets to the extreme." (Mediator)

6.4.4 Mediators inevitably make quick decision s about the strength of each side's case, but they are also influenced, like any other decision-maker, by appearance, by personality and by the approach taken in negotiations. For example:

"He was a rather personable man who came over as frightfully honest, very frank and therefore one tended to feel more sympathetic toward him than the other party which can often happen, but at the end of the day he was more than happy…. [discussion about nature of settlement] and I suspect that his case was nothing like as strong as I at one stage perceived it to be. On the other hand I think that the people on the other side drove a very hard bargain." (Mediator)

> "I thought the mediator was biased in the first instance – just on the basis of appearances. If you get a bunch of businessmen in their 50s and 60s and a builder then they think 'Hello. A cowboy builder here been up to his tricks again. And from our initial discussion that was very much the feeling I got from him. I felt he took the approach of 'OK what have you been up to?'… It was after our second round that he said, 'Yes I can see what the problem is and they don't seem to have a defence let alone their counterclaim for £25,000'." (Defendant builder)

6.4.5 There is therefore scope for discussion about the training of mediators and the way that mediators use the considerable power that they have during mediation sessions. These issues are particularly important when parties attend mediation without representation or when there is an imbalance of representation during mediation sessions.

6.5 Conclusion

6.5.1 One of the strongest impressions drawn from observation of mediation sessions was the formidable repertoire of personal qualities and skills required of mediators and the wide variation in performance displayed by mediators, many of whom involve din the CLCC pilot scheme lacked experience in conducting mediations. Observation revealed the need for flexibility in approach both between different types of disputes and within a single mediation session. Some of the best mediators combined excellent personal skills with natural authority, familiarity with the relevant law and a confident grasp of the issues relevant to the dispute being mediated.

6.5.2 In civil disputes mediation clearly has the potential for achieving acceptable outcomes and for facilitation reconciliation where the parties have, or would like, a continuing relationship. There are, however, important questions to be addressed about procedures, training, ethics and accountability.

7. SUMMARY OF KEY FINDINGS AND CONCLUSION

7.1 Introduction (Chapter 1)

7.1.1 This report comprises an evaluation of a pilot mediation scheme at the Central London County Court which has been in operation since May 1996. The scheme was designed with the objective of offering litigating parties the opportunity to come to the court at an early stage in the case to be assisted by a trained mediator to reach an early settlement of the dispute. The evaluation of the pilot mediation scheme is based on data collected between May 1996 and March 1998. During the period of the research, over 4,500 offers of mediation were dispatched by the court, but only 160 cases were mediated.

7.1.2 The evaluation involves a comparison of the characteristics and outcome of these 160 cases with the characteristics and outcome of cases which declined to take part in the mediation scheme and a control sample of comparable cases in the CLCC to which mediation was not offered. In addition to analyses of the pattern of demand for mediation, the report provides a comparison of the outcomes of mediated and non-mediated cases. The report also discusses the reaction of mediating parties and solicitors to mediators and the mediation process.

7.2 Demand for mediation (Chapter 2)

7.2.1 Despite repeated efforts to raise awareness of the mediation scheme, the rate at which both parties to disputes accepted the offer of mediation remained fixed at around 5% overall. However, in another 15% of cases either the plaintiff or the defendant alone accepted the mediation offer. There was substantial variation in demand by case type. Personal injury cases overwhelmingly and persistently rejected mediation offers, despite the face that they comprised almost one-half of the cases to which mediation offers were sent. Breach of contract and goods and services cases had the highest joint acceptance rate. In almost one-third of goods and services cases one or both parties accepted the mediation offer, but the joint acceptance was no more than nine percent.

7.2.2 Claim value did not appear to be important in determining whether or not parties were likely to accept mediation offers. The spread of claim values among mediated case is very similar to that among the population of cases to which mediation was offered. The joint demand for mediation was *lowest* when both parties had legal representation and *greatest* when neither party had legal representation. However, when only the plaintiff had legal representation, over one-quarter of defendants accepted the mediation offer. Acceptance of mediation was also high among company v company disputes and in company v individual disputes. When the plaintiff had legal aid, the joint acceptance rate seemed to be lower than average.

7.2.3 Reasons for rejecting mediation given in writing to the court included the fact that there was no common ground between the parties, that complex evidence was involved in the case, that there were difficult disputes over fact and/or law, that the case would be likely to settle in any case, that there was a need for a court ruling and that the mediation offer had come too early in the litigation. Telephone interviews with solicitors rejecting mediation, however, indicated a widespread ignorance about the nature of mediation, conservatism about the best approach to litigation, fear of showing weakness by accepting mediation, fear of losing income on the part of some solicitors, and evidence of client resistance to mediation.

7.3 Mediation characteristics and outcome (Chapter 3)

7.3.1 The overall settlement rate at mediation appointments was 62% and there was little variation in the rate between different case types. *It appears, therefore, that mediation can be used successfully across a wide spectrum of case types.* The settlement rate was highest among cases that were between nine months and one year old. Settlement appeared to be less likely at the two extremes of the case-life spectrum ie the very young and the rather old cases. The settlement rate was also higher than average among cases with a claim value of less than £5000. There was some variation in settlement rate at mediation appointment between the five participating mediation organisations, ranging from a high of 72% to a low of 50%. The settlement rate did not vary much between different party configurations – so that company v company disputes were not more likely to settle than individual v

company or company v individual disputes. When the plaintiff had legal aid the settlement rate was lower than average (50%) and when the defendant had legal aid the settlement rate was higher than average (80%). The settlement rate was, however, *highest in mediations that took place in the absence of legal representation* and lowest when only the plaintiff was accompanies by a legal representative at the mediation.

7.3.2 Comparing final outcome in mediated and non-mediated cases, it was found that among non-personal injury cases, the proportion of non-mediated cases that settled out of court during the study period was bout 48% and among personal injury non-mediated cases the settlement figure was about 78%. A comparison of all mediated and non-mediated non-personal injury cases that conclude during the study period revealed that *92% of mediated cases were settled either at he mediation or after the mediation.* The comparable figure for cases that rejected mediation was 57% and in the control group it was 52%. *This provides strong support for the argument that mediation promotes settlement and increase the likelihood of settlement following an unsettled mediation.*

7.3.3 A comparison of settlements in mediated and non-mediated cases revealed that the median settlement figure in mediated cases was more than £2,000 less than that in non-mediated cases. Almost one-half of mediated non-personal injury case settled for less than £3,000 as compared with around one-quarter of non-mediated non-personal injury cases. About one-quarter of non-mediated personal injury cases also settled for less than £3,000. Some evidence obtained from questionnaires suggests that there was a very low level of defaulting on mediated settlements.

7.4 Time and Cost (Chapter 4)

7.4.1 A comparison of average timelines from date of entry of defence to date of conclusion of case indicates that *even on a very conservative estimate, settlements of mediated cases occur at least two to four months earlier than among nn-mediated cases.* The comparison also suggests that cases failing to settle at mediation, but settling sometime afterwards, do not take any longer than non-mediated cases to settle and may still have a somewhat shorter than average case length.

7.4.2 Most parties whose cases settled at mediation believed that the mediation had saved them time on the dispute and, although some parties thought that the mediation had made little difference to time, others, particularly those whose cases did not settle, believed that the case had involved them in extra time. Representatives felt strongly that time had been saved by reaching mediated settlements. A minority of those whose case settled and some of those whose cases did not settle, felt that the mediation had cost extra time. It was difficult to dray any firm conclusions about the effect of mediation on legal costs from objective information about costs.

7.4.3 The vast majority of mediated settlements (91%) concluded on the basis that the plaintiff would pay his own legal costs. This compares unfavourably with the situation for those who rejected mediation and settled out of court, where almost one-half of defendants paid the plaintiff's legal cost.

7.4.4 The evaluation did not produce any clear evidence on the question of whether mediation saves legal costs, although defendants and their solicitors appeared to be more likely than plaintiffs to feel that costs had been saved and less likely to feel that costs had been increased. Only about one-half of parties who settled their case at the mediation appointment believed that the mediation and saved legal costs. Among plaintiffs who se cases *did not settle* at mediation, almost one-half thought that the mediation had *increased* their legal costs. On the other hand about one-third of defendants whose cases did not settle at mediation believed that the mediation had *saved* legal costs. Solicitors were strongly of the view that settled mediations had saved legal costs and over one-half of defence solicitors thought that even *unsettled* mediations had saved legal costs. However, one-third of plaintiffs' solicitors in unsettled cases thought that costs had been increased by the mediation.

7.5 Evaluation of Mediation by Litigants and Lawyers (Chapter 5)

7.5.1 Important among the various motivations for agreeing to mediate, appeared to be a recognition that cases had *inherent difficulties,* or a perception of lack of common ground, intransigence of the parties or a failure of communication. Disproportionate costs risk were also very important. *The key objectives in attending mediations were*

to save time and legal costs and to settle the case. Few parties or solicitors had any experience of mediation and were not knowledgeable about the process. *The vast majority of parties and lawyers made positive assessments of the mediations.* Parties on the whole found the mediation process somewhat less formal than they and expected.

7.5.2 A majority of parties and solicitors had confidence in the mediator, believed that the mediator was neutral and felt that the mediator exerted an appropriate amount of control over the mediation session. However, about *one-quarter of parties* would have preferred the mediator to have taken a *greater degree of control.*

7.5.3 Most parties felt that, taking everything into account, including the risks of continuing with litigation, the settlement that they reached was fair. However, some parties felt that they had been bullied into settling their claims.

7.5.4 The aspects of the mediation process of which parties most approved, were the opportunity to state their case and to participate in a non-legalistic process. Many were also impressed with the qualities of the mediators. A minority, however, felt that the mediator was uninterested in questions of fairness or justice and was only concerned to achieve a settlement at any cost.

7.5.5 Representatives valued the opportunity for their client to get their grievance off their chest, to focus on commercial realities rather than legal technicalities and for the occasional opportunity to repair damaged business relationships. Some representatives were, however, critical of mediators' lack of familiarity with their case, lack of knowledge of the law and willingness to push parties into settlements.

7.6 Mediation in Action (Chapter 6)

7.6.1 Observation of mediation revealed that mediators require a huge repertoire of interpersonal and professional skills. There is also a need for mediators to be highly flexible in order to adapt to the differing personalities, principles and strategies of mediating parties. There was great variation among mediators in the success with

which they performed their role and many participating in the pilot scheme were very inexperienced.

7.6.2 Mediation sessions followed a similar pattern, involving joint meeting at which parties had an opportunity to state their case without interruption. Following the joint meeting, parties met with mediators in private. During these confidential discussions mediators tested the strength of each side’s case, established 'bottom-lines', and carried messages between the parties. Most mediators sought to bring the parties towards a compromise through emphasis on weaknesses in their case and the disadvantages in cost and time of continuing with the litigation.

7.6.3 Although there was a *wide range* of mediating styles, there was a difference between the ‘counselling/therapeutic’ approach, which was non-directive and stressed communication and reconciliation, and the ‘bargaining approach’ which emphasised settlement. Within the bargaining approach there was a spectrum of styles ranging from expert, detached authority, to highly proactive head-knocking. The response to the different styles varied depending on the parties and the configuration of legal representation. The counselling approach was the *least successful* in terms of meeting parties’ needs and expectations.

7.6.4 Many mediators were explicitly evaluative during the course of mediations, despite their introductions which stressed their merely facilitative role. Mediators have a great deal of power during mediation sessions, since they control the flow of information between parties, what evidence can be produced and used, offer evaluations of chance of winning at trial and shape settlement agreements. There is no clarity or consistency among mediators on the question of ethics or to whom, if anyone, the mediator owes a responsibility in mediations.

7.7 Conclusion

7.7.1 Mediation is clearly capable of promoting early settlement in a wide range of civil cases when parties have *volunteered* to attend mediation sessions. Mediation appears to offer a process that parties on the whole find satisfying and, handled carefully, can lead to a situation in which a sense of grievance is reduced and acceptable settlements reached. There is also strong evidence in this report that mediation at an early stage can reduce the length of cases, even when cases do not actually settle at the mediation appointment. Whether mediation reduces legal costs cannot reliably be ascertained from the data available, although if a link is assumed between case length and legal costs, it is arguable that mediation might lead to a reduction in legal costs.

7.7.2 These broad findings, however, must be viewed within the wider context of the existing system of the adjudication of civil claims and against which the benefits of mediation are being assessed. Some of the benefits of mediation, much of the incentive to settle, and part of the acceptability of mediation compromises, derive directly from flaws in the existing system of adjudication.

7.7.3 Interviews with mediating parties and their solicitors and responses given on postal questionnaires, indicate that in the CLCC scheme, the primary motivation for agreeing to mediate was the desire to end the litigation as quickly and cheaply as possible. Mediation was seen as a way out of a litigation system that was viewed as expensive, time consuming and risky. To that extent, the interest of mediating parties was primarily in *outcome*, not in the mediation *process.*

7.7.4 However, even within the current climate of dissatisfaction with the cost and delay of the civil courts, the proportion of cases in which both parties volunteered to mediate was pitifully small, an the self-selecting group of parties that agreed to mediate seemed to be dominated by cases that were going to be difficult to settle and where the costs risks were out of proportion to the claim value. Cases where parties were more sure of their ground, even given the disadvantages of the litigation system, were extremely reluctant to mediate, either because their solicitors advised them that their

interests would be better served by sticking to traditional litigation procedures, or because they were unwilling to compromise in a situation in which they believed they were likely to win or at least do better by sticking with the existing system. Procedural changes could therefore strengthen or weaken further the existing low-level of demand.

7.7.5 Aside from the question of the demand for mediation, the chief doubts that emerge from the evaluation of the mediation process concern the power, ethics and quality of mediators and the capacity of mediation to magnify imbalances of power between the parties. Successful mediation requires a formidable combination of natural talent, honed skills and accumulated experience on the part of the mediator. When this combination is present, mediation seems to offer opportunities for genuine dispute resolution that even the best designed litigation procedure and best run adjudication process might not be able to offer. However, when those qualities are absent, mediation has the potential for degenerating into rather squalid horse-trading in which parties with a genuine grievance may be bullied into capitulation and an imbalance of power is magnified in away that might not occur in private settlement negotiations between solicitors or in open court adjudication.

7.7.6 In this context, mediation seems to work well when there is some rough equality of representation, since mediators, given their philosophy and approach, are relatively-ill equipped to redress power imbalances.

7.7.7 It remains unclear whether mediation is to be valued for itself, for the special qualities of the process and its capacity for reducing rather than exacerbating conflict, or whether it will continue to be sold as an alternative to a system that fails to deliver what parties want – which seems to be a fair, inexpensive and rapid *adjudication* of their claims. Whatever the answer, if mediation remains a voluntary alternative to litigation, the demand for mediation is unlikely to increase until the legal profession and the population of future litigants become educated about its nature and potential.

7.7.8 This programme of ‘re-education’ will need to establish the benefits of mediation not simply in relation to the cost and vagaries of court-based adjudications;

but *it will have to demonstrate the superiority of mediation over bipartisan negotiation between solicitors* which is, after all, how the vast majority of civil disputes are concluded once proceedings have been issued.

7.7.9 Whether or not litigants display an *initial* preference for victory over compromise, they should be in a position to make an informed choice about available dispute resolution processes, and the profession has a pivotal role in that choice.

7.7.10 Even if the proponents of mediation meet these educational challenges, an important cultural shift will be required on the part of lawyers and litigants in the approach to litigation. Medication, as a potential *intermediate* stage in litigation, does not fit well within the secretive, combative tradition of English civil litigation.

7.7.11 Moreover, the real cost of mediation must be addressed and made clear. The scheme at the CLCC was offered at virtually no cost to parties. This situation is unlikely to prevail in the future unless mediators are prepared to offer their services for nothing. While some might to so for low value for civil claims as a public service, it is unlikely that large numbers of mediators would be prepared to mediate for nothing in the long-term. If mediators begin to charge an economic rate for mediations (likely to be several hundreds of pounds even for small claims), then the fragile demand for mediation that emerged in the CLCC scheme might collapse.

7.7.12 If mediation is to become *compulsory*, or if the judiciary begin to take more initiative in pressuring parties to attempt mediation, there are other fundamental issues that must be addressed. For example, there needs to be clarity about which cases are appropriate for mediation and *why* those cases are being diverted away from the courts. There are also crucial issues concerning standards in mediation process, the training and quality of mediators and the ethics of mediators.

7.7.13 One aspect of mediation practice that requires attention is the role of documentary evidence in mediations. Codes of practice need to be established relating to the amount an nature of material that can be legitimately produced at mediation and some discussion needs to take place about the approach of mediators to

the use of documentary material at mediations. The danger here is that with too much emphasis on documentation, mediations will simply slide into mini-trials. On the other hand, in the absence of guidance bout documentation, and lack of clarity about mediators' practices in relation to the use of documents in mediation, clever parties and lawyers can steal an advantage in mediation simply on the basis of what they bring in their briefcase.

7.7.14 As far as mediators are concerned, it is unclear whether there are sufficient mediators of an appropriate standard to conduct mediations in civil cases on a large scale. Although there currently appears to be a large body of trained mediators available who are frustrated at the virtual absence of cases to mediate, that position could change if a compulsory mediation stage were introduced into civil proceedings, or even if creeping compulsion was introduced by stealth through local initiatives on the part of the judiciary.

7.7.15 Whatever the future holds in terms of formal policy in relation to compulsory mediation, the growing emphasis on the value of mediation and the development of grass-roots ADR initiatives in courts, suggests that discussion about the training of mediators and mediator quality control would be timely. There is also a need for ADR to be planted firmly within the law curriculum.

Appendix

A. Mediation Documents

MD1	Introduction to mediation for all cases except referred actions
MD2	Introduction to mediation for referred actions only
MD5	Mediation leaflet for parties
MD6	Agreement to mediate
MD8	Introduction to mediation for mediators
MD8A	Checklist for mediators
MD9	Report to the court following mediation
MD11	Legal Aid information leaflet

CENTRAL LONDON COUNTY COURT MD1

A VOLUNTARY MEDIATION SERVICE AVAILABLE AT THIS COURT

What is a mediation service?

- This court is offering a voluntary service for people with disputes involving sums of money over £3,000. You are being given the chance to try to settle your dispute by mediation. The Judges at this court consider that in most cases the parties are likely to be helped by mediation.

- In mediation, an independent person, known as a mediator, helps people in a dispute to reach agreement themselves bout how to settle it. The advantages of mediation are that it is usually quicker, cheaper and less formal than a trial before a judge. It allows the parties in a dispute to look at a number of ways of resolving things and a wider range of solutions than would be available from a trial.

- The majority of mediations end in agreement but if no agreement is reached, the parties can still continue with the court action. What has been said during the mediation is confidential and cannot be mentioned later if the case continues.

What happens in a mediation?

- The mediation will take place in private in small conference rooms in the court building, not in a courtroom. At the start, the mediator will explain the process to both parties together and ask them to state their point of view. They will then go to separate rooms with the mediator moving between the rooms trying to help the parties to reach an agreement both can accept. The role of the mediator is not to propose a solution but to help the two parties come to their own agreement on how to settle the dispute.

- Mediation involves informal discussion of the problem. It is not like a trial and there is no need to bring witnesses. You can come along by yourself or with a friend or adviser. You do not have to be legally represented but a solicitor will be helpful, particularly if the dispute is complicated or if there seem to be difficult legal problems.

- The court has made an arrangement with five of the leading national organisations which train and provide mediators. They will make available qualified mediators, independent of the court, at a very low cost.

How does the mediation service work?

- It can only work if both you and the other party agree to us the mediation service by ticking the first box in the attached Mediation Service Reply document and returning it to the court within 14 days. If only one party wants mediation, it cannot be held and the case will go ahead for trial. This document is being sent to both parties today.

- On receiving a reply from both parties agreeing to mediation, the court will then write to you telling you the date of the mediation, which will usually be within 4 weeks. The automatic directions timetable will continue to run unless or until you hear from this court that a date as been fixed for the mediation. Once this date is fixed, the timetable will be suspended until that date. If you have a legal aid certificate, special funds are available to pay your solicitor for attending the mediation and the £25.

- The court will at the same time send you both a leaflet explaining how to prepare for mediation and the agreement which you will late be asked to sign. You and the other party will each be asked to pay £25 for the mediation and to send this back to the court within 7days.

- The mediation is liable to be cancelled if the court does not receive £25 from both parties. You must let the court know immediately if you and the other party have reached agreement between yourselves and no longer want mediation.

- Mediations will take place at this court building at 26 Park Crescent, London W1 at 4.30 on the date fixed. The mediation session may last p to 3 hours.

- If you and the other party reach an agreement, the mediator may help you to put into writing what you have agreed. The mediator will inform the court either that no further action is necessary or that the parties want the agreement made into a court order. Each party will bear its own costs relating to the mediation unless otherwise agreed.

- If you do not reach agreement, the mediator will inform the court immediately that the case is going ahead for trial. The normal timetable will then be applied from the day after the mediation session.

What should I do not?

- Please tick one of the boxes in the attached Mediation Service Reply document and send it to the court as soon as you can in the pre-paid envelope, quoting the main number of the case and a new number:

  MED

  You must return the Mediator Service Reply document within 14 days.

- If you feel you need more information at this stage, you can obtain the leaflet MD5 by calling in at the court at the 1st floor Issue section counter between 10am and 4pm from Monday to Friday (except bank holidays) or by telephoning 0171 917 5053 and asking for the leaflet to be sent to you. Remember, however, that the court needs to have your written answer to the Mediation Reply document within 14 days from today.

CENTRAL LONDON COUNTY COURT MD2

A VOLUNTARY MEDIATION SERVICE AVAILABLE AT THIS COURT

What is mediation service?

- This court is offering a voluntary service for people with disputes involving sums of money over £3,000. You are being given the chance to try to settle your dispute by mediation. The Judges at this court consider that in most case the parties are likely to be helped by mediation.

- In mediation, an independent person, known as a mediator, helps people in a dispute to reach agreement themselves about how to settle it. The advantages of mediation are that it is usually quicker, cheaper and less formal than a trial before a judge. It allows the parties in dispute to look at a number of ways of resolving things and a wider range of solutions than would be available from a trial.

- If at the end of the mediation, the parties cannot reach agreement, they can still continue with the court action.

What happens in a mediation?

- The mediation will take place in private in small conference rooms in the court building, not in a courtroom. At the start, the mediator will explain the process to both parties together and ask them to state their point of view. They will then go to separate rooms with the mediator moving between the rooms trying to help the parties to reach an agreement both can accept. The role of the mediator is not to propose a solution but to help the two parties come to their own agreement on how to settle the dispute.

- Mediation involves informal. discussion of the problems. It is not like a trial and there is no need to bring witnesses. You can come along by yourself or with a friend or advisor. You do not have to be legally represented but a solicitor will be helpful, particularly if the dispute is complicated or if there seem to be difficult legal problems.

- The court has made an arrangement with five of the leading national organisation which train and provide mediators. They will make available qualified mediators, independent of the court, at a very low cost.

How does the mediation service work?

- It can only work if both you and the other party agree to the use the mediation service by ticking the first box in the attached Mediation Service Reply document and returning it to the court within 14 days. If only one party wants mediation, it cannot be held and the case will go ahead for trial. This document is being sent to both parties today.

- On receiving a reply from both parties agreeing to mediation, the court will then write to you telling you the date of the mediation, which will usually be within 4 weeks. If you have a legal aid certificate, special funds are available to pay your solicitor for attending the mediation and the £25.

- The court will at the same time send you both a leaflet explaining how to prepare for mediation and the agreement which you will later be asked to sign. You and the other party will each be asked to pay £25 for the mediation and to send this back to the court within 7 days.

- The mediation is liable to be cancelled if the court does not receive £25 from both parties. You must let the court know immediately if you and the other party have reached agreement between yourselves and no longer want mediation.

- Mediations will take place at this court building at 26 Park Crescent, London W1 at 4.30 on the date fixed. The mediation session may last up to 3 hours.

- If you and the other party reach an agreement, the mediator may help you to put into writing what you have agreed. The mediator will inform the court either that no further action is necessary or that the parties want the agreement made into a court order. Each party will bear its own costs relating to the mediation unless otherwise agreed.

- If you do not reach agreement, the mediator will inform the court immediately that the case is going ahead for trial. The normal timetable will then be applied from the day after the mediation session.

What should I do now?

- Please tick one of the boxes in the attached Mediation Service Reply document and sent it to the court as soon as you can in the pre-paid envelope, quoting the main number of the case and a new number:

  MED

  You must return the Mediator Service Reply document within 14 days.

- If you feel you need more information at this stage, you can obtain the leaflet MD5 by calling in at the court at the 1st floor Issue section counter between 10am and 4pm from Monday to Friday (except bank holidays) or by telephoning 0171 917 5053 and asking for the leaflet to be sent to you. Remember, however, that the court needs to have your written answer to the Mediation Reply document within 14 days from today.

CENTRAL LONDON COUNTY COURT MD5

MEDIATION

LEAFLET FOR PARTIES

1. In a mediation, each side to a dispute has a chance to put its case and to hear what the other side has to say. A mediator helps both sides reach agreement about how a dispute should be settled. To get the best out of the process it is important that the parties understand it and come prepared.

2. **What does it involve?**

As both sides have agreed to mediation, the court has appointed a mediator who has been trained to help people to settle their disputes.

The mediator is not a judge. He or she will not take sides or decide who is right or who is wrong. There is no need to call witnesses.

You will be asked to come to the Court Building at 26 Park Crescent W1 at 4.30pm. Please arrived at about 4.15pm. You will then be directed to small conference rooms where the mediation will take place. 3 hours is the maximum time available.

Before the mediation begins, the parties will be required to sign a formal Agreement to Mediate. If you do not understand this agreement or are not happy with it, take

advice now. Each party will agree to bear its own costs relating to the mediation unless otherwise agreed.

3. What happens at mediation

Mediators have different ways of helping but what usually happens is that everyone involved will first meet in one room. The mediator (sometimes there may be two mediators) will make sure that everyone knows who is present and will explain what the process is about. Then each side will be given the chance to tell the mediator and the other side what their case is about and what they are looking for. Each side may take 10 to 15 minutes to pt their point of view.

After the open session, each side will go to separate rooms and the mediator will visit each in turn. These are private sessions. The mediator must not tell the other side what he or she has been told unless given permission to do so. During the private sessions the mediator will discuss the case with you. The mediator will be looking for solutions to problems and will be interested in what each side needs as well as what their rights may be.

By moving between both sides, carrying information, suggestions, ideas, explanations or offers, the mediator will seek to help everyone to reach solution to their dispute.

If agreement is reached the mediator will bring everyone together again and an agreement will be drawn up and signed. If the parties want, this can be made into a court order.

4. Before the mediation

You can go to the mediation by yourself or with a friend or adviser. You do not have to be legally represented but a solicitor will be helpful, particularly if the dispute is complicated or if there seems to be a difficult legal problem. If you have a legal aid certificate, your solicitor can be paid out of a special fund for attending the mediation with you. If you are a company or a partnership or a person who needs approval from somebody else (such as insurers) before you can settle the dispute, make sure you either bring the other person along or have something in writing from them showing that they have given you their permission.

If you have any particular disability or language problem, let the court know in advance. Always quote the special MED number when you get in touch with the court.

Before the day of the mediation you should try to be prepared. You want the mediator and the other side to understand your case. Decide what is the best way of explaining your position. It may be helpful for you to make a list of the strengths and weaknesses of your case and, if you can, the strengths and weaknesses of the other side's case. Bring along any really important document or documents, for example, receipts to show that you have paid money which is being disputed.

5. Remember that the mediator will be looking for a solution which is in your best interest. The mediator will not tell you what your rights are. Mediation is not a substitute for legal advice. If you need advice, try to take it before the day fixed for the mediation.

The mediator might ask for a short statement of your case before the day fixed for the mediation; otherwise he or she will have read the particulars of claim and the defence.

6. **At the mediation**

Remember that the mediator is not a judge. When you are asked to present your case in the open session, try to get across to the other side what you think the dispute is about. Do not worry about details, the mediator can find out about those in the private sessions. Be brief. If you feel difficulty in talking about the case when the other side is present, tell the mediator who may decide to start private sessions straightaway.

In the private sessions, try to work with the mediator to find a solution. Be frank. What you say is confidential: you may know something which will help the mediator in talking to the other side.

Whilst the mediator is with the other side, use your time. Think about what has been discussed. Consider what you might be able to offer. Decide exactly what your needs are.

If you reach agreement, remember that it will be binding on you and the court proceedings will be ended. Make sure you can live with it.

If agreement is not reached, the mediator will notify the court. The normal timetable will then continue and the action will go ahead.

Even if the mediation does not end with agreement between the two sides, you may find it was helpful and that each side understands the other's point of view more clearly. You can always try to settle the case late but remember that once the action continues, costs are likely to build up on both sides.

Agreement to Mediate

We

and

agree to the mediation of the dispute between us (Case No). We agree to the following terms and conditions:

1. **Mediator**

   The parties (both sides to the dispute) agree will be the mediator. The parties understand that the mediator is independent and is not employed by or acting as a representative of the Court Service. The parties understand that the mediator does not give legal advice and agree that they will not make any claim against the mediator in connection with this mediation.

2. **Private Sessions**

   During the mediation, the mediator may speak to the parties separately in order to improve the mediator's understanding of each party's views. Information given to the mediator during such private talks will be confidential unless the party involved allows the mediator to give the information to the other party.

3. **Confidentiality**

   Other than a final written agreement, any information – whether written in a document prepared for the mediation or written or spoken during the mediation – can only be used for the purpose of mediation and cannot be referred to in any court action. The parties agree that they will call the mediator to give evidence in any court action.

4. **Costs**

Each party agrees to bear its own costs relating to the mediation unless otherwise agreed.

5. **Ending the mediation**

The mediator, or either of the parties, may end the mediation at any time without giving a reason.

Name	Name
Address	Address
Signed	Signed
Date	Date

CENTRAL LONDON COUNTY COURT PILOT

MEDIATION SCHEME

A NOTE FOR MEDAITORS

Introduction

Welcome to this pilot scheme.

The background is that in the latter part of 1995 the Lord Chancellor agreed that a scheme for mediation should be set up at the Central London County Court. This is the largest County Court in the UK. It deals with all types of civil cases except divorce and family work. Its ‘catchment area’ includes the London Borough of Camden, Kensington and Chelsea and Westminster. It is also a civil trial centre which means that other County Courts in the main London area refer their cases here if the case is expected to last for a full day or more.

There are two buildings. The court offices are at 14 Park Crescent, W1N 4HT and the District Judges sit here dealing with arbitration (case up to £3,000), application of all kinds and other matters. The building which you will be coming to, however, is the main court house at 26 Park Crescent. Here the Circuit Judges, assisted by Recorders or Assistant Recorders, sit in 12 court rooms.

The court hearings normally end at about 4.15pm and so most, though not all, of the judges, barristers, solicitors, litigants and witnesses will have left the building by the time the mediation sessions are due to start.

The Pilot

The pilot scheme is flexible but at this stage it is limited to dealing with cases where a defence has been filed in a money claim over £3,000. Most of the cases where the parties have agreed to mediation will have started only a short time ago within the 'catchment area' referred to above. Some of the referred cases will also be included in the scheme, however, and in relation to these the preliminary stages will have been completed, substantial costs may already have been incurred and the list office will be in the process of fixing a date for trial.

In respect of cases started in this court, a so-called 'Automatic Directions' timetable is sent out to the parties when a defence is filed. This means that the parties have to take various steps towards preparation of the case. Once both parties agree to mediation, the timetable is stopped until the date fixed for mediation. It will resume the following day if the mediator notifies the court that an agreement has not been reached. A trial date will normally be arranged 20 weeks ahead in most cases, 40 weeks ahead in personal injury cases. Adjournments are often requested and granted, however, particularly if expert witnesses are involved and there is difficulty in getting them together on a particular date or dates. Delays are often caused also by the failure on one or other party to comply with directions which may result in various applications being made to the court.

The majority of cases do in fact settle at some stage before trial. Often, however, very large costs have been incurred by one or both of the parties by the time of settlement. Such costs are often out of all proportion to the amount of the claim or counterclaim in question. This problem is exacerbated if the case remains fully fought out.

Thus, the potential advantages of mediation within the court environment are clear.

The practicalities

The mediations are due to start at 4.30pm. When you arrive at 26 Park Crescent, please identify yourself to a court official who should be present in the reception area. You will then be shown to the relevant consultation rooms which are comparatively small. There is a drinks vending machine on the lower ground floor. You will be introduced to the parties when they arrive. (You are respectfully asked not to introduce yourself as a partner of any particular firm). You can then have up to 3 hours for the session. The building is being kept specially open for the mediation sessions and will have to close at 7.30pm. A photocopying machine is also available.

It is hoped that by the end of the session, agreement will be reached and put into writing. You will be asked to fill in a short form (MD9) stating whether or not agreement has been reached or whether the action is to proceed. If agreement is reached, the parties may decide that they do not want the court to make any order. They may, however, agree to a court order being made by consent. If the consent order involves judgement for a sum of money, the party who has obtained it can later enforce it or try to enforce it like any other judgement.

Whatever agreement is reached, it should deal with the question of costs. It is to be hoped that each party will agree to bear its own costs. Alternatively, the agreement may be that one side should pay the other a specific sum by way of costs. If necessary, a District Judge can tax the costs, in other words decide whether to allow or disallow the sums set out in a detailed bill. A special fund has been made available to cater for the costs of attendance by a solicitor whose client has a legal aid certificate. If a party has such a certificate, bear in mind that the Legal Aid Board will exercise its "charge" over any sums recovered by a legally aided person so that, for example, a settlement by which the Defendant pays the Plaintiff £1500 with no order as to costs will be valueless to the Plaintiff if he costs are already £1500 or more. Similarly, an effective order for costs cannot usually be made against a legally aided person.

You should endeavour to conclude the mediation session in one of three ways:

(1) If the parties have not agreed, the court should be notified on MD9 and the action will proceed.

(2) If the parties have reached agreement but do not wish details of it to be incorporated in a court order, they should be required to reduce their agreement into writing and to sign MD9 stating that by consent, the claim (or counterclaim) is withdrawn.

(3) If the parties wish their agreement to be the subject of a court order, they should sign MD9 and agree that by consent, either judgment is given for a money sum or the proceedings are stayed on the terms of the agreement.

Professor Hazel Genn is taking an active part in monitoring the scheme and will probably be speaking to you personally about your views of the mediation process at this court.

Enclosures

We enclose a set of the literature prepared for the Pilot Scheme (MD2 and MD4A have been prepared for cases referred from other courts), including a checklist for your assistance.

Conclusion

Thank you for agreeing to take part in this pilot scheme. It is the intention of the committee which is responsible for organising it here to keep in regular contact with the organisations concerned.

"Feedback" and suggestions for improvement will be welcome at all times.

The people to contact with any queries you may have are Miss Ginny Melville or Miss Vickie Roe (Tel: 0171 917 5053).

CHECKLIST

POINTS FOR CONSIDERATION WHEN DRAFTING MEDIATION SETTLEMENT TERMS

1. Payments

If the agreement involves the payment of money, consider

- how much?
- by whom?
- to whom?
- by when?
- in what instalments?
- carrying interest?

2 Other terms

- Does the agreement reached include terms other than paying money?
- If so, are these clearly set out?
- Is there a timetable for them to be carried out?

3. Contingent agreement

- Is this agreement meant to take effect now, or at some future time?
- Does either party really need a "cooling-off period", to think about, or take advice on, the agreement before it becomes binding?

4. Costs

- What agreement have the parties reached as to the costs of the litigation and the mediation?
- Is either party legally-aided?
- If so, are they aware of the implication of that on any settlement money received?

5. Ending the litigation

- Is this settlement intended o bring to an end all relevant litigation between the parties?
- If so, does the agreement expressly state this?
- Has each party got the necessary authority to settle?

MD9

Name of parties

Case No.

MED No.

REPORT TO THE COURT

This mediation took place on (date)

and last from until

The parties have reached agreement and request that by consent the claim [and counterclaim*] is withdrawn*

The parties have reached agreement and request that by consent, there be judgment for the Plaintiff/Defendant* for the sum of £[ ] with no order as to costs*/
costs agreed at £[ ]*/ to be taxed if not agreed.*

The parties have reached agreement and request that, by consent, all proceedings are stayed upon the terms set out in the schedule to this report*

The parties have not reached agreement*.
[*Delete as appropriate]

(Signed)
Mediator ………………………………..

Plaintiff ………………………………..

Defendant ………………………………..

Dated ………………………………...

SCHEDULE [If appropriate]

MD11

CENTRAL LONDON COUNTY COURT

Legal Aid for the Pilot Mediation Scheme

1. The Lord Chancellor's Department and the Legal Aid Board have made special arrangements with effect from 1 August 1997 to provide funds for the payment of solicitors attending mediations on behalf of assisted persons under this scheme.

2. The fee which will be paid is £230 plus VAT, making £270.15 plus £25 to be paid to the mediator, producing a total payment of £295.25. Solicitors can therefore be sure that they will be paid regardless of the outcome of the mediation.

3. At the conclusion of the mediation, the solicitor may complete a special application form to apply immediately to the Legal Aid Head Office for payment. Such payment will ordinarily be made within 7 days.

4. The formal Agreement to Mediate which the parties are required to sign specifies that each party agreed to bear its own costs relating to the mediation unless otherwise agreed. There is no reason, however, why the parties should not reach agreement beforehand to the effect (for example) that if a settlement is not reached at the conclusion of the mediation, the costs will be costs in the cause.

5. Fees paid under the special arrangements do not count towards the legal aid statutory charge. However, legal aid solicitors will be expected to recover costs when cases settle to the same extent as they would in private cases. A separate application form is available which sets out the terms under which the money is paid.

6. At the end of a mediation, the parties can, if appropriate, ask for a court order to be drawn up making an order for legal aid taxation.

7. Further information can be obtained from the Mediation Service, 13-14 Park Crescent, W1 or by telephoning 0171 917 5053.

INDEX TO MEDIATION LETTERS

LETTER A	Explanatory letter to Solicitors
NOTICE B	Reply to mediation offer
LETTER C	Letter to parting informing them of rejection of mediation by at least one party for all cases **except** referred actions
LETTER D	Letter to parties informing them of rejection of mediation by at least one party for referred actions only
LETTER E	Letter informing parties of mediation date for all cases **except** referred actions
LETTER F	Letter informing parties of mediation date for referred actions
NOTICE G	Acknowledgement of date fixed and enclosing fee for mediation
LETTER H	First letter to mediator confirming agreement to act as mediator
LETTER I	Second letter to mediator enclosing full details of mediation
LETTER J	Letter to parties informing them of re-commencement of automatic directions following unsuccessful mediation
LETTER K	Letter to parties informing them of return of referred action to Listing section for trial following unsuccessful mediation
LETTER L	Letter to parties informing them that mediation cannot proceed because both parties did not agree in all cases **except** referred actions
LETTER M	Letter to parties informing them that mediation cannot proceed because both parties did not agree in referred action sonly

LETTER A

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> Mediation No: <**MED NO**>

MEDIATION SERVICE

You will see from the enclosed documents that your client's dispute can be considered under the new voluntary mediation service available at this court. The main document has been drafted in a way which it is hoped litigants in person will understand.

The committee which is responsible for implementing the pilot scheme here, however, feels strongly that if a party is legally represented such representative should immediately refer this document to the client. As Chairman of the committee, I would be most grateful if you would ensure that your client is made aware of the scheme and of the advantages of mediation. Experience is showing that in some cases lay clients are not being told about it. We believe that the client has the right to be consulted and to reach a decision.

Quite often, the court receives replies declining mediation for reasons which do not appear to be satisfactory, for example, "we do not consider this case to be suitable for mediation", "the parties are miles apart", a claim for personal injuries and therefore medical experts will be involved". It is the strength of the mediation scheme that amicable settlements and a high degree of satisfaction by the client can often be achieved whatever the nature of the claim.

Special arrangements have been made by the Lord Chancellor's Department and the Legal Aid Board to make funds available to pay solicitors for attending mediations in respect of legally aided clients plus the mediator's fee. Further information is contained in a separate document (MD 11) which, if not enclosed, can be obtained from the Mediation Service.

I would therefore be grateful if you would be good enough to consider the mediation service with your client and to endorse the enclosed Mediation Reply.

Yours faithfully

His Honour Judge Butter QC

(Any reply should be sent directly to the Mediation Service who can be contacted on 0171 917 5053)

NOTICE B

To: The Court Manager
Central London County Court
13-14 Park Crescent
London, WN 4HT

MD3

MEDIATION REPLY

Plaintiff <PLTF NAME>

Defendant <DEFT NAME>

Case number <CASE NO> MED number MED <MED NO>

I **want** to try the mediation service ☐

I do **not** want to try the mediation service ☐

(If not, would you like to explain why?)

For legal representatives only – please tick box or indicate as appropriate

I confirm that I have consulted my client about the mediation service ☐

My client is legally aided YES/NO

I can come to 26 Park Crescent W1, any weekday afternoon at <MED TIME> in the week beginning <NOTE B PROMPT 1> or <NOTE B PROMPT 2> except

I expect to attend alone */with a friend or adviser*/with a legal representative*

(*Delete as appropriate)

Signed Plaintiff/Defendant*

Name (Block Capitals)

Date

LETTER C

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**>

Mediation No: <**MED NO**>

The mediation cannot proceed because one or more parties has declined the offer.

Accordingly, the automatic directions timetable which began on <TIMETABLE DATE PROMPT> has not been suspended and continues to operate.

Yours faithfully

<SIGN>
Mediation Scheme

LETTER D

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**>

Mediation No: <**MED NO**>

The mediation cannot proceed because one or more parties has declined the offer.

Accordingly, the file in this matter has been returned to the Listing Section at the Court and the case will therefore be heard on <**TRIAL DATE PROMPT**> as previously notified.

Yours faithfully

<SIGN>
Mediation Scheme

LETTER E

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> MED No: <**MED NO**>

The court has received replies from both parties saying that they wish to try the mediation service.

Enclosed is a leaflet which tells you more about mediation and how to prepare for it and the formal agreement to mediate. The mediation can only take place if you and the other party each within 7 days send to the court the sum of £25 and say that you will be willing to sign the Agreement to Mediate before the mediation begins. Cheques or postal orders should be made payable to "HMPG".

As both parties have agreed to mediate, a Judge has directed (under Order 13, Rule 11(4) of the County Court Rules 1981) that the automatic directions timetable will be suspended until the date fixed for the mediation. This means that in the meanwhile you need not go on preparing the case for trial.

The time and date fixed for your mediation is <**MED TIME**> **on** <**LATEST MED DATE**>

This will take place at 26 Park Crescent, London, W1

Please send to the court within 7 days the £25 and the enclosed letter saying that you will sign the agreement to mediate before the mediation begins.

Yours faithfully

<SIGN>
Mediation Scheme

LETTER F

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> MED No: <**MED NO**>

The court has received replies from both parties saying that they wish to try the mediation service.

Enclosed is a leaflet which tells you more about mediation and how to prepare for it and the formal agreement to mediate.

The mediation can only take place if you and the other party each within 7 days send to the court the sum of £25 and say that you will be willing to sign the Agreement to Mediate before the mediation begins. Cheques or postal orders should be made payable to "HMPG".

The time and date fixed for your mediation is <**MED TIME> on <LATEST MED DATE**>

This will take place at 26 Park Crescent, London, W1

Please send to the court within 7 days the £25 and the enclosed letter saying that you will sign the agreement to mediate before the mediation begins.

Yours faithfully

<SIGN>
Mediation Scheme

NOTICE G

To: The Court Manager
Central London County Court
13-14 Park Crescent
London, WN 4HT

MD7

Plaintiff <PLTF NAME>

Defendant <DEFT NAME>

Case number <CASE NO> MED number MED <MED NO>

I enclose £25 Cheque/Postal orders* (*Delete as appropriate)

I paid the mediation fee of £25 on:

I will sign the Agreement to Mediate before the mediation begins.

I will come to 26 Park Crescent, W1 at <MED TIME> on <LATEST MED DATE>

*by myself/with (names please) (*Delete as appropriate)

I agree to let the court know immediately if I am not able to attend or if I reach agreement with the other party before the date of the mediation. I agree that otherwise I will not cancel the mediation.

Signed Plaintiff/Defendant*

Name (Block Capitals)

Date

LETTER H

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Date: 24 October 1997
Our ref: <MED NO>

Dear <MED NAME>

Re: Mediation at Central London County ?Court, 26 Park Crescent, W1

Thank you for agreeing to act as mediator on <**LATEST MED DATE**> at <**MED TIME**>

I will let you have further information as soon as I received the sum of £25 from each of the parties.

If you have any queries at this stage please do not hesitate to contact me.

Your sincerely

<SIGN>
Mediation Scheme
<SIGN TEL>

LETTER I

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<MED NAME>
<MED ADDR 1>
<MED ADDR 2>
<MED ADDR 3>
<MED ADDR 4>
<MED ADDR 5>
<MED ADDR 6>
<MED ADDR 7>

Date: 24 October 1997

Dear <MED NAME>

Re: <PLTF NAME> -v- <DEFT NAME>
Case number: <CASE NO> Mediation number: MED <MED NO>

I am please to confirm that this mediation is due to take place on **<LATEST MED DATE> at <MED TIME> at 26 Park Crescent, London, W1.**

I have pleasure in enclosing payable order in the sum of £50 and enclose herewith:

a) a leaflet showing where the Court is situated,
b) form MD1 or MD2 which was the first relevant document sent to the parties,
c) MD3,
d) MD4 or MD4A,
e) MD5,
f) MD6,
g) MD7,
h) MD8 & MD8A – these documents are for your own benefit and have not been sent to the parties,
i) MD9 – this document is for your use at the end of the mediation and has not been sent to the parties.
j) MD11 – this is a new document regarding the availability of legal aid for solicitors attendance on a mediation appointment.

I also enclose a copy of the particulars of claim and the defence filed in this case.

The committee which is responsible for the pilot mediation scheme requests you to come to 26 Park Crescent shortly before <MED TIME> on the day. Please ensure that the parties both sign our MD6 "Agreement to Mediate" before the mediation starts. AT the end of the mediation, please hand the signed MD6 to the Court official together with the completed form MD9 "Report to the Court" and the attendance list which will be supplied to you on the day. Any comments and suggestions for improvements to the scheme are welcome and will be placed before the committee.

Thank you very much. If you have any queries in the meanwhile please telephone me on the number below.

Yours sincerely

<SIGN>
<SIGN TEL>

LETTER J

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> MED No: <**MED NO**>

The Court has been informed by the mediator that the parties have not been able to reach agreement.

Please remember that, accordingly, the automatic directions timetable which was sent to you earlier continue to operate as from this date and you should therefore continue to prepare for trial.

Yours faithfully

<**SIGN**>
Mediation Scheme

LETTER K

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> MED No: <**MED NO**>

The Court has been informed by the mediator that the parties have not been able to reach agreement.

Accordingly, the file in this matter has been returned to the Listing Section at the Court and the case will therefore be heard on <**TRIAL DATE PROMPT**> as previously notified.

Yours faithfully

<**SIGN**>
Mediation Scheme

LETTER L

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> MED No: <**MED NO**>

The mediation cannot proceed <LETTER REJECT TEXT>.

Accordingly the automatic directions timetable which began on <TIMETABLE DATE PROMPT> has not been suspended and continues to operate.

Yours faithfully

<**SIGN**>
Mediation Scheme

LETTER M

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014

<REP NAME>
<REP ADDR 1>
<REP ADDR 2>
<REP ADDR 3>
<REP ADDR 4>
<REP ADDR 5>
<REP ADDR 6>
<REP ADDR 7>

Your ref: <REP REF>

Date: 24 October 1997

Dear Sir

Re: **<PLTF NAME>** -v- **<DEFT NAME>**

Case No: <**CASE NO**> MED No: <**MED NO**>

The mediation cannot proceed <LETTER REJECT TEXT>.

Accordingly, the file in this matter has been returned to the Listing Section at the Court and the case will therefore be heard on <**TRIAL DATE PROMPT**> as previously notified.

Yours faithfully

<SIGN>
Mediation Scheme

B. Court Data Collection Forms

Case No: | Log No: | Mediation No: | Referred Action: | Date:

Plaintiff

Name:

Address:

Plaintiff Representative

Name:

Address:

Telephone No:

Reference:

Legal Aid:

Reply: Date:

Defendant

Name:

Address:

Defendant Representative

Name:

Address:

Telephone No:

Reference:

Legal Aid:

Reply: Date:

Case Type: Defence Filed: Case Value:

Case

Defendants

Accepted

Settled

Rejected

Not Settled

Outcome

Previous

Next

Ok

Cancel

FORM 1 – TO BE COMPLETED FOR ALL CASES

Case number	Mediation number	Log number

Plaintiff name & address:-	**Defendant name & address:-**
Name – Address -	Name – Address – If more than 1 Defendant tick box ☐ and complete form 1A
Plaintiff representative:- Name – Address – Telephone no – Reference – Legal Aid – Yes/No* (*Delete as appropriate)	**Defendant representative:-** Name – Address – Telephone no – Reference – Legal Aid – Yes/No*
Case type	**Case value**

Date defence filed

Date of reply (re: mediation)

Plaintiff:- Defendant:-

REFERRED ACTIONS

FORM 1A – TO BE COMPLETED FOR CASES WITH MULITPLE DEFENDANTS

Case number	Mediation number	Log number

2nd Defendant name & address-	**3rd Defendant name & address:-**
Name – Address -	Name – Address –
2nd Defendant representative:- Name – Address – Telephone no – Reference – Legal Aid – Yes/No* (*Delete as appropriate)	**3rd Defendant representative:-** Name – Address – Telephone no – Reference – Legal Aid – Yes/No*
Date defence filed	**Date defence filed**

FORM 2 – TO BE COMPLETED FOR CASES ACCEPTING MEDIATION

Case number	Mediation number	Log number

Details of Mediator:-

Name -

Lawyer/Non Lawyer *

(* Delete as appropriate)

Address –

Organisation attached to:-

Telephone number –

Date of Mediation

Name of persons present at Mediation:-

	Name	Identifier
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		

Outcome of Mediation:-

Settled/Not settled * (* Delete as appropriate)

Length of Mediation

IF SETTLED – CONTINUE ON FORM 2A

IF NOT SETTLED – CONTINUE ON FORM 4

FORM 2A – TO BE COMPLETED FOR CASES SETTLED BY MEDIATION

Case number	Mediation number	Log number

Nature of settlement:-
Agreement about costs (if any):-
Specified amount of costs:-

NOW ENSURE FORMS 1, 1A (IF APPROPRIATE), 2 AND 2A

ARE ALL FULLY COMPLETED FOR THIS CASE

FORM 3 – TO BE COMPLETED FOR CASES WHERE MEDIATION REJECTED

Case number	Mediation number	Log number

Plaintiff reply:-	**Defendant reply:-**
Accept/Reject *	Accept/Reject *
(* Delete as appropriate)	

Reasons for rejection

Defendant -

FORM 4 – TO BE COMPLETED FOR CASES NOT SETLED AT MEDIATION OR NON-MEDIATED CASES

Case number	Mediation number	Log number

Interlocutory applications/hearings:-

	Type of application	Made by	Date of hearing
1.			
2.			
3.			
4.			
5.			
6.			
7.			

Applications for adjournment of trial:-

	Date of hearing	Application by
1.		
2.		
3.		
4.		
5.		
6.		

Money paid into Court – Yes/No * (*Delete as appropriate)

Date paid	Amount	Paid by	Insat/Order

Date of trial

Length of trial

FORM 4 - CONTINUED

Case number	Mediation number	Log number

Length of trial **0.00**

Outcome/Order Made:-

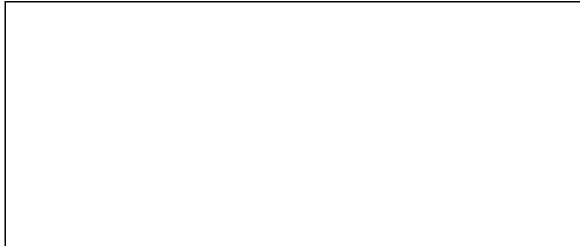
Specified amount of order/settlement
0.00

Costs order/Agreement on costs:-

Specified amount of costs
0.00
Enforcement proceedings Date: Type:

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
13-14 Park Crescent
London
W1N 4HT

Telephone 0171-917 5053
Fax 0171-917 5014



August 1997

Dear Sirs

MEDIATION SCHEME – CASE AUDIT

Case No: ___________________________________ Your Ref: ___________________________

The Court is conducting an audit of cases offered mediation during the last year as part of the court's mediation scheme. The audit is part of the evaluation of the mediation scheme that is being undertaken by the Lord Chancellor's Department. In order to establish whether mediation offers genuine benefits to litigants, we are collecting information about settlement and costs in both mediated and non-mediated cases.

We would therefore be very grateful if you would take a moment to provide us with the information requested on the following page about the above-mentioned case. The information will remain anonymous and be used only for statistical purposes.

We are grateful to you for your assistance with this exercise.

Your sincerely

Mediation Service

				/	6

CENTRAL LONDON COUNTY COURT MEDIATION SCHEME
CASE AUDIT

1. CASE LENGTH AND OUTCOME

Please complete one of he four boxes below:

CASE WITHDRAWN/ABANDONED

Date of Withdrawal/abandonment: ____________________/__________
month year

CASE SETTLED

Date of settlement: ____________________/1996
month year

Amount of Settlement: £9,500 plus £6,410 costs
[Approximate NET amount
received by client)

Paid By: ~~PLAINTIFF~~/DEFENDANT*
*delete as appropriate

CASE DECIDED AT TRIAL

Date of Trial: ____________________/__________
month year

CASE STIL ONGOING

Stage reached:

2. COSTS

PLEASE INDICATE YOUR OTAL COSTS **INCLUDING**
DISBURSEMENTS AND VAT: £12,290.29__________

WHO WERE THE COST PAID BY?→

My Client	~~ALL~~/PART*
The other side	~~ALL/~~PART*
My Client's Trade Union	ALL/PART*
Legal Aid:	ALL/PART*
Legal expenses insurance:	ALL/PART*
Conditional fee (Costs write-off)	ALL/PART*
Pro Bono	ALL/PART*

* delete as appropriate

FORM 4 - CONTINUED

Case number	Mediation number	Log number

Length of trial **0.00**

Outcome/Order Made:-

Specified amount of order/settlement
0.00

Costs order/Agreement on costs:-

Specified amount of costs
0.00
Enforcement proceedings Date: Type:

THE COURT SERVICE
CENTRAL LONDON COUNTY COURT
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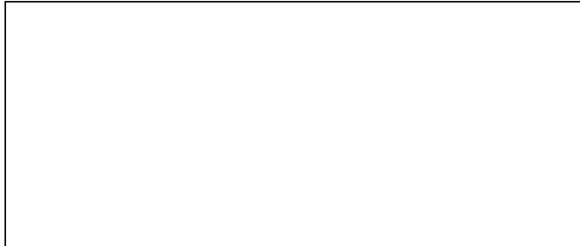

August 1997

Dear Sirs

MEDIATION SCHEME – CASE AUDIT

Case No: ___________________________________ Your Ref: ___________________________

The Court is conducting an audit of cases offered mediation during the last year as part of the court's mediation scheme. The audit is part of the evaluation of the mediation scheme that is being undertaken by the Lord Chancellor's Department. In order to establish whether mediation offers genuine benefits to litigants, we are collecting information about settlement and costs in both mediated and non-mediated cases.

We would therefore be very grateful if you would take a moment to provide us with the information requested on the following page about the above-mentioned case. The information will remain anonymous and be used only for statistical purposes.

We are grateful to you for your assistance with this exercise.

Your sincerely

Mediation Service