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Twisting arms: court referred and court linked mediation under judicial pressure

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Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa**

Faculty of Laws, University College London
University of Nottingham Business School

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Executive summary

This report presents evaluations of two mediation programmes in Central London County Court within the context of the changing Alternative Dispute Resolution (ADR) policy environment. ADR is an umbrella term that is generally applied to a range of techniques for resolving disputes other than by means of traditional court adjudication. The range of dispute-resolution procedures covered by the term ADR includes mediation, conciliation, early neutral evaluation, arbitration, med-arb, and ombudsmen. Mediation – one of the principal ADR methods – is a process in which a neutral person assists parties to reach a consensual solution to their dispute. The mediation programmes evaluated in the study comprise:

- an experiment in quasi-compulsory mediation (ARM) which ran in the court between April 2004 and March 2005; and
- a voluntary mediation scheme (VOL) which has been operating in the court since 1996 and was last evaluated in 1998.

The results provide lessons about the impact of automatic referral and judicial pressure on the uptake of mediation, about user experiences, and about the potential of mediation to offer savings to the justice system in administrative and judicial time.

ARM pilot

The Automatic Referral to Mediation (ARM) pilot involved early random allocation by the court of 100 defended cases per month to mediation, with an opportunity to opt out. Where objections were raised, a District Judge reviewed cases and tried to persuade the parties to agree to mediation. The ARM pilot was inspired by a successful Canadian mandatory mediation programme for civil disputes. But it coincided with a Court of Appeal ruling in May 2004, that the courts have no power to order parties to mediate, and that to do so might be an infringement of the right to a fair trial under Article 6 of the Human Rights Act 1998.

The evaluation of ARM involved: tracking the course and outcome of all cases referred to mediation; interviewing parties and representatives who had opted out of ARM and those who had attended mediations; analysis of the impact of ARM on the outcome and

length of cases and of factors predicting settlement at mediation; and estimating the cost or savings in administrative and judicial time of ARM. Data were collected as follows:

Characteristics and progress of 1,232 ARM cases from April 2004 to January 2006

- Administrative and judicial time spent on ARM based on observation and interviews, and case data on 317 ARM cases referred to mediation during 2004-2005 (160 mediated cases and a similar number (157) of cases referred in June and July 2004 which did not mediate but followed the normal litigation route).
- Objections to mediation in 249 cases (381 objecting parties).
- Information from mediator report forms about 104 ARM cases.
- Telephone interviews (214 relating to 178 cases) with objecting and mediating parties and lawyers.
- Orders made by the District Judge in ARM cases (1,794 orders relating to 954 cases).
- Multivariate analyses compared outcomes in the following disputes: 1,232 ARM cases; 1,059 cases in the VOL mediation scheme between 1999 and 2004; a control sample of 196 pre-ARM non-mediated cases; and a further control sample of 214 non-mediated cases from 2002.

Outcome of the ARM pilot

During the ARM pilot, 1,232 defended civil cases were randomly referred to mediation, of which 82% were personal injury cases. By the end of the evaluation (10 months after termination of the pilot), only 22% of ARM cases had a mediation appointment booked and 172 cases – or 14% of those originally referred to mediation – had been mediated. There was a high rate of objection to automatic referral throughout the pilot. In 81% of cases where the court received a reply, one or both parties had objected to the referral, although after the first few months there was a slight decline in the number of cases in which both parties objected. Case management conferences dealing with objections did not generally result in mediation bookings and tended to delay the progress of cases.

Defendants were more likely than claimants to object to referral in both personal injury (PI) and non-PI cases. A stark and persistent finding, consistent with the 1998 evaluation of the Central London voluntary mediation scheme, was the overwhelming tendency of personal injury cases to object to mediation. The strategy of PI cases was

to object to mediation or to settle before replying, whereas in non-PI cases objections to ARM were raised less often. In 45% of non-PI cases, no objection to the referral to mediation was raised, indicating the potential for mediation in non-PI civil disputes. The settlement rate of mediated ARM cases followed a broadly downward trend over the course of the pilot, from a high of 69% among cases referred in May 2004, to a low of about 38% for cases referred in March 2005. The settlement rate over the course of the year was 55% where neither party objected to mediation, but only 48% where the parties were persuaded to attend having both originally objected to the referral. However, the majority of cases in the ARM scheme settled out of court without ever going to mediation. Statistical analysis of mediation outcomes revealed no simple factor that predicted the likelihood of settlement. The explanation is more likely to be found in the attitude or motivation of parties, the skill of the mediator, or some mix of these factors, than in case type, complexity, value, or legal representation.

Analysis of ARM cases showed that mediation in non-PI cases significantly reduced the likelihood of trial as compared with non-mediated cases. The analysis also showed that while judicial time spent on mediated ARM cases was lower than on non-mediated cases, administrative time was higher.

Opting out

ARM was not interpreted by most solicitors as compulsory and many regarded opting out as a mere bureaucratic hurdle. Considered justifications for opting out included the timing of the referral, the anticipated cost of mediation in low-value claims, the intransigence of the opponent, the subject matter of the dispute, and a belief that mediation was unnecessary because the case would settle.

Experiences of ARM

Those involved in unsettled ARM mediations were more negative in their assessments than those whose cases settled. Explanations for failure to settle focused on the intransigence of opponents and unwillingness to compromise; poor mediator skills; and time pressures. There was a general view that unsettled mediation increased legal costs by around £1,000 to £2,000. Where cases settled at mediation explanations for the outcome focused on the skill of the mediator, the opportunity to exchange views and to reassess one's own position and the willingness of opponents to negotiate and

compromise. Successful mediations were generally thought to have saved legal costs, especially where a trial had been avoided.

Mediators thought that key factors contributing to ARM settlement were the willingness of the parties to negotiate and compromise, the contribution of legal representatives, their own skill as mediators, and administrative support from the court. The significance of the parties' willingness to negotiate and compromise as an explanation both for success and for failure in mediation sits uncomfortably with the evident support shown by some mediation organisations for experimenting with compulsory mediation.

Central London voluntary mediation scheme

Demand for the voluntary (VOL) scheme at Central London increased significantly following the case of *Dunnett v Railtrack* in 2002, which confirmed the power of the court to impose costs penalties on a successful party deemed to have acted unreasonably in refusing to mediate. Since the 1998 review of the VOL scheme, the range of non-personal injury cases entering the scheme has become more varied. On the other hand, personal injury cases continue to shun the Central London VOL scheme, accounting for only 40 of over 1,000 cases mediated between 1999 and 2004. Despite the significant increase in the uptake of the VOL mediation scheme since 2002, the settlement rate at mediation has declined from the high of 62% in 1998 to below 40% in 2000 and 2003. Since 1998, the settlement rate has not exceeded 50%. This is important, given the potential cost impact of unsettled mediation.

Users' experiences of the VOL scheme

Court direction, judicial encouragement, or fear of costs penalties was given as the principal reason for mediating by one in four survey respondents involved in VOL mediations in 2003. Parties and lawyers were generally positive about their mediation experience, displaying confidence in mediators and their neutrality. Parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common complaints made were failure to settle, rushed mediation, facilities at the court, and poor skills on the part of the mediator. In accounting for failure to settle at the end of mediation, survey respondents most commonly mentioned inappropriate court direction, unwillingness to compromise, the intransigence or personality of the opposing side, time constraints, and failings on

the part of the mediator. Parties and lawyers generally felt that successful mediation had saved costs and time, but about half of those involved in unsettled mediations thought that legal costs had been increased. The proportion of lawyers who reported having recommended mediation to their clients once or more than once was virtually identical to the findings of the 1998 review, suggesting no significant growth in the profession's enthusiasm for mediation.

Learning from mediation schemes

- Information from both the ARM and VOL schemes suggests that the motivation and willingness of parties to negotiate and compromise is critical to the success of mediation. Facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate.
- Historically, the principal use of mediation in the VOL scheme at Central London (and now the ARM pilot) has concerned non-personal injury cases. Given the persistent rejection of mediation in personal injury cases, a question arises about the value of investing resources in attempting to reverse this entrenched approach. The lack of interest in mediation on the part of defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation.
- While the legal profession has more knowledge and experience of mediation than was the case a decade ago, it clearly remains to be convinced that mediation is an obvious approach to dispute resolution.
- There is a policy challenge in reaching out to litigants so that consumer demand for mediation can develop and grow. Courts wanting to encourage mediation must find imaginative ways of communicating directly with disputing parties.
- The evaluation of the ARM and VOL schemes, together with recent evaluations from Birmingham and Exeter, establish the importance of efficient and dedicated administrative support to the success of court-based mediation schemes, and the need to create an environment conducive to settlement.
- Where there is no bottom-up demand for mediation, demand can be created by means of education, encouragement, facilitation, and pressure accompanied by sanctions, or incentives. The evidence of this report suggests that an effective mediation-promotion policy might combine education and encouragement

through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications for a positive outcome. A critical policy challenge is to identify and articulate the incentives for legal advisers to embrace mediation on behalf of their clients.

Chapter 1. Introduction

This report presents evaluations of two court-annexed mediation programmes in the Central London County Court, comprising:

- an experiment in quasi-compulsory mediation, involving automatic referral of cases to mediation (ARM), which ran for a year in the Central London Court between April 2004 and March 2005; and
- a review of the operation of the Central London voluntary mediation scheme (VOL), which has been running continuously since 1996 and was previously evaluated in 1998.¹

The evaluation of the two programmes is discussed within the context of a changing Alternative Dispute Resolution (ADR) policy environment. ADR is an umbrella term that is generally applied to a range of techniques for resolving disputes other than by means of traditional court adjudication. The range of dispute-resolution procedures covered by the term ADR includes mediation, conciliation, early neutral evaluation, arbitration, med-arb, and ombudsmen. Mediation – which is the subject of this report – is one of the principal ADR methods. It can be described as a process in which a neutral person assists parties to reach a consensual solution to their dispute. The advantages of mediation over court adjudication are often said to be that:

- it is a flexible procedure applicable to a wide range of disputes;
- it can achieve creative solutions not available in court adjudication;
- it can reduce conflict;
- it can achieve a reconciliation between parties;
- it is less stressful for parties than court procedures;
- it can save legal costs and lead to speedier settlements when compared with litigation procedures.

¹ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98.

The developing ADR policy environment 1996–2004

The evaluation of the Automatic Referral to Mediation (ARM) pilot scheme and the review of the voluntary mediation scheme at Central London must be set within the context of developing government and judicial policy on ADR – and particularly mediation – since 1996. The history of mediation policy for non-family civil disputes in the last decade reveals a gradual and then accelerating progression through phases of interest, facilitation, enthusiasm, and then determination on the part of both government and sections of the senior judiciary.

Civil Procedure Rules and protocols

An important starting point in the development of mediation policy in the courts is Lord Woolf's review of the Civil Justice system and his *Access to Justice* Reports of 1995 and 1996, which signalled a minor revolution in court procedures for civil disputes. In the 1995 *Interim Report*, Lord Woolf stated that the courts had an important role in providing information about ADR and encouraging its use in appropriate cases. This encouragement was strengthened in the 1996 *Final Report*,² which stated that:

"[T]he court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR."

Since 1999, under the new Civil Procedure Rules (CPR), judges may order a break in proceedings for the parties to attempt to settle their dispute by mediation or some other form of dispute resolution process. In addition, a failure to co-operate with judicial suggestions regarding mediation can result in cost penalties being imposed on the recalcitrant party.³

The emphasis on ADR in court rules was reinforced by the publication of nine pre-action protocols,⁴ each of which encourages parties to attempt to settle their dispute, including

² The Rt Hon the Lord Woolf, *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, July 1996.

³ CPR R1.4 (2) and CPR R26.4: stay of proceedings for settlement at the court's instigation. Factors to be taken into account when deciding costs issues include "the efforts made, if any before and during the proceedings in order to try and resolve the dispute." (Parts 1 and 44 Civil Procedure Rules). Full text of CPR incorporating 42nd update available at http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm.

⁴ Protocols lay down guidance for parties about attempts to settle the dispute and disclosure of documents. There are currently nine protocols covering: Construction and Engineering Disputes; Defamation; Personal Injury Claims; Clinical Disputes; Professional Negligence; Judicial Review; Disease and Illness Claims; Housing Disrepair Cases; Possession claims based on Rent Arrears. The full text of the protocols is available at: http://www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm.

by consideration of ADR, before beginning court proceedings. The most recent update of the Civil Procedure Rules includes the requirement that parties to any dispute should follow a reasonable pre-action procedure intended to avoid litigation, before making any application to the court. This should include negotiations with a view to settling the claim and, again, cost penalties can be applied to those who do not comply.

Government policy on ADR

Interestingly, government policy on ADR in England during the late 1990s and turn of the 21st century rather lagged behind judicial enthusiasm and activism. In its landmark White Paper, *Modernising Justice* published in 1998⁵, the government made clear that it was seeking to improve the range of options available for dispute resolution and that it would consider the contribution that ADR could make to the civil justice system, including mediation, arbitration and ombudsman schemes. However, aside from speeches from the Lord Chancellor, one or two discussion papers and facilitation of court-annexed mediation schemes, few significant measures were introduced. This changed with the Access to Justice Act 1999, when reform of the legal aid system offered the government an opportunity to manifest its commitment to supporting the growth of ADR. Under the 1999 Act, the Community Legal Service Fund (administered by the Legal Services Commission) replaced the old legal aid scheme and introduced a new set of rules governing eligibility for legal aid support. The rules (contained in the Funding Code and Funding Code Guidance December 2003 R11)⁶ include the cost of mediation within the legal aid system and a condition that an application for legal aid for representation may be refused if there are ADR options that ought to be tried first. The most recent version of the funding code published in June 2005 indicates that according to Criterion 5.4.3, “*an application for funding may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued.*” In essence, this means that citizens hoping for public funding for representation in non-family civil actions must have attempted mediation or be able to show why it was not possible to do so.

⁵ Lord Chancellor's Department, 1998. Available at <http://www.dca.gov.uk/consult/access/mjwpindex.htm>

⁶ The 2005 Legal Services Commission Funding Code and Guidance is available at: http://www.legalservices.gov.uk/civil/guidance/funding_code.asp

Strategic objectives and PSA targets

Following the ‘Machinery of Government’ changes in June 2001, responsibility for issues relating to the constitution, freedom of information and human rights moved to the Lord Chancellor’s Department. At this time, the Department reviewed its aims and strategic objectives and articulated a series of new Strategic Objectives, which included:

To protect and promote the rights and responsibilities of all by ensuring a fair and effective civil and administrative justice system, and the resolution of disputes in a way proportionate to the issues at stake.

This was supported by PSA 3, which was “to reduce the proportion of disputes which are resolved by resort to the courts”.

These objectives and PSA targets were incorporated into the strategy of the new Department for Constitutional Affairs (now Ministry of Justice) when it was established in July 2003. The DCA 5-year strategy (2004–09) states that during the current Spending Review period, the Department aims to achieve “*earlier and more proportionate resolution of legal problems and disputes*”.⁷ This will be done by increasing advice and assistance, increasing opportunities for those involved in court cases to settle their disputes out of court and reducing delays in court. The ambition is, by March 2008, to reduce by 5% the proportion of disputed claims in the courts that are ultimately resolved by a hearing. A key element in the strategy for achieving this target is the encouragement, both in and outside the court structure, of the use of ADR. The DCA has supported the establishment of a number of court-based mediation schemes in various parts of the country, and has been experimenting with other initiatives to encourage the use of mediation.⁸ Most importantly, as part of these initiatives the DCA established the ‘Automatic Referral’ to mediation pilot, which operated alongside the voluntary scheme at Central London and is the main subject of this report.

Other initiatives

Outside of court-based pilot schemes, since March 2001 the government has reinforced its commitment to mediation by stating that it would attempt to resolve all disputes involving government departments through ADR wherever possible (“the Pledge”). All

⁷ PSA 5. *Delivering Justice, Rights And Democracy* DCA Strategy 2004 – 2009 available at: <http://www.dca.gov.uk/dept/strategy/index.htm>.

⁸ For example, Birmingham, Exeter, Guildford, South and West Wales; Manchester mediation advice service, the Mediation Telephone Helpline.

Government contracts now include a mediation option in the procedure for resolving disputes. An evaluation of the government's progress in this respect in 2005 shows that over the period 2004/05, ADR has been used in 167 cases with 125 leading to settlement. The Treasury Solicitor's Department estimated that this had led to an overall saving of legal costs of £28.8m.

In its White Paper on *Transforming Public Services*,⁹ the government again underlined its commitment to encouraging ADR. This time the focus was on alternative or proportionate dispute resolution in the field of citizen/state disputes. The White Paper emphasised the interest of citizens' in accessible procedures for the resolution of administrative disputes and asked tribunal and ombudsman services to consider whether and how ADR might be incorporated into their processes.

Case law on mediation since 2002

Perhaps the most important development relating to mediation of civil and commercial disputes has been the strategy of the senior judiciary in seeking to create pressure to mediate through decisions in high-profile court cases. There have been a number of landmark cases in which the senior judiciary have sought to clarify the approach of the courts to the role of ADR in civil disputes. Since Lord Woolf's Access to Justice Report, the Courts have accepted his assertion that ADR has the advantage of saving scarce judicial resources, but that more significantly "*it offers a variety of benefits to litigants or potential litigants. ADR is usually cheaper than litigation and often produces quicker results.*"¹⁰ The strength of Lord Woolf's conviction was given expression in CPR 26.4, which confers on the court the power at its own instigation, to order a stay of proceedings for settlement by ADR. The power behind the conviction is contained within CPR 44 under which the courts have discretion to disturb the normal costs rule – that the unsuccessful party bears the successful party's legal costs in the litigation – if, in the court's view, the successful party has behaved unreasonably during the course of the litigation.¹¹ This discretion is of considerable significance in a litigation system where legal costs are often equal to, and may dwarf, the amount of money at stake in the dispute. The effect of CPR 44 in relation to ADR is not to provide a direct incentive for

⁹ *Transforming Public Services: Complaints, Redress and Tribunals*, July 2004, Cm 6243.

¹⁰ The Rt Hon the Lord Woolf, *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995, Lord Chancellor's Department, Chapter 18.

¹¹ In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties before and during the proceedings.

parties to settle disputes by mediation, but to impose a future threat of financial penalty on a party deemed to have unreasonably refused an offer of mediation.

A series of landmark decisions beginning with that of *Cowl*¹² in 2002 and reaching a high-water mark in May 2003, has established the significance that the courts attach to an “unreasonable” refusal to mediate civil disputes. In *Cowl*, Lord Woolf held that there was a duty on parties to consider ADR prior to entering the judicial process, particularly if the case involved public money. This was followed more significantly by *Dunnett v Railtrack*¹³ in which the court dismissed Mrs Dunnett’s appeal against Railtrack, but nonetheless refused to order Mrs Dunnett to pay Railtrack’s costs in the appeal. Applying Part 44 of the CPR and taking into account the overriding objective of the CPR to deal with cases “justly”, Railtrack’s refusal to contemplate mediation prior to the appeal (after it had been suggested by the court) was sufficient, in the court’s view, to deny them their legal costs.

The message of *Dunnett v Railtrack* was reinforced in the later case of *Hurst v Leeming*¹⁴ in which Mr Justice Lightman held that it is for the judge to decide whether a refusal to mediate was justified. In a frequently repeated statement the judge argued that “*mediation is not in law compulsory, but alternative dispute resolution is at the heart of today’s civil justice system*” and went on to say that where there had been an unjustified failure to give proper attention to the possibilities of mediation “*adverse consequences may be attracted.*” While judges will accept valid reasons for not wanting to proceed with ADR, such reasons must be fully justifiable if the party wishes to avoid being penalised by the court.

In 2003, two further cases confirmed the risks for parties if they unreasonably refused to try ADR or withdrew unreasonably from an ADR process.¹⁵ In *Leicester Circuits Ltd v Coates Brothers plc* decided in March 2003, it was held that withdrawal from mediation is contrary to the spirit of the Civil Procedure Rules. However, the high-water mark in

¹² *Cowl and Others v Plymouth City Council*, Time Law Reports, January 8 2002.

¹³ *Dunnett v. Railtrack plc* [2002] EWCA Civ 2002.

¹⁴ [2001] EWHC 1051 Ch, but judgment given May 9 2002 after the *Dunnett* decision.

¹⁵ *Leicester Circuits Ltd v Coates Brothers PLC* – withdrawal from mediation is contrary to the spirit of the Civil Procedure Rules (March 2003); *Royal Bank of Canada Trust Corporation v SS for Defence* – refusal to use ADR even where need to establish point of law may be deemed unreasonable by court [2003] EWHC 1479 (Ch).

the line of cases came in May 2003 when the High Court made another significant decision in relation to the use of ADR. The case of *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence* (2003), centred on a point of law relating to a lease. The claimant was willing to try to resolve the dispute by ADR, but the Ministry of Defence rejected the suggestion on the ground that the dispute involved a point of law that required a “black and white” answer. In the High Court, the Department was successful on the point of law, but the judge refused to award the Department its legal costs as a result of its refusal to mediate. The judge stated that the reason given for refusing mediation (i.e. that the case involved a point of law) did not make the case unsuitable. Mediation providers greeted this decision with considerable satisfaction. CEDR, a leading commercial mediation provider, commenting on the decision said that it “follows in a direct line from *Dunnett v Railtrack*, *Hurst v Leeming* and *Leicester Circuits v Coates Industries*, providing further examples of failed arguments to avoid mediation. More specifically, the case makes it clear that it is dangerous for a government party to ignore its own public undertaking to use ADR.”¹⁶

By mid-2003, the courts had therefore indicated clearly that refusing an offer of mediation carried with it a significant danger that costs might be denied to the refusing party, even when they had been successful in the litigation. However, in 2004 the tide appeared to turn somewhat. In May 2004, the Court of Appeal handed down its judgment in the case of *Halsey v Milton Keynes General NHS Trust*¹⁷ that again concerned the question of when the court might impose a costs penalty following a refusal to attempt mediation. The case had been the subject of discussion for some time before the judgment was issued on May 11 because the Court of Appeal judges, unusually, had requested opinions from the Civil Mediation Council, the ADR Group and CEDR (two of the largest commercial mediation providers) about the value of mediation. The Law Society had also submitted an opinion. In its judgment, which sought to lay down guidelines for the courts in dealing with costs in situations where mediation has been refused, the Court of Appeal did not accept the Civil Mediation Council's argument that there should be a general presumption in favour of mediation. Instead, the Court accepted the Law Society's submission that the question of whether mediation had been “unreasonably” refused should depend on a number of factors, which would be

¹⁶ CEDR Newsletter, June 9 2003.

¹⁷ *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576.

evaluated by the court in each case. Lord Justice Dyson significantly and evidently deliberately, held that the courts have no power to order mediation and raised the question of whether a court order to mediate might infringe Article 6 of the Human Rights Act 1998. He further held that the court has jurisdiction to impose a costs sanction on successful parties who unreasonably decline to mediate. But in deciding whether or not to do so, factors to consider include whether the successful party reasonably believed they would win, cost-benefit, and whether the unsuccessful party can show that mediation had a reasonable prospect of success. The decision in the case (discussed further below) was viewed by some commentators as representing a departure from the direction in which recent court judgments about ADR had been moving. It took a more cautious line and in doing so appeared to represent something of a retreat from the relentless escalation of judicial pressure on litigating parties to mediate their disputes.

Automatic Referral to Mediation (ARM) pilot at Central London

Between 1996 and 2002, a number of court-based and court-annexed voluntary mediation schemes were set up in courts around England, principally on the initiative of the judiciary. In 1996, the Central London County Court established its voluntary mediation scheme, and in the same year, the Commercial Court in London published a Practice Statement announcing its intention to issue ADR Orders in commercial disputes. In 1997, the Court of Appeal established its own voluntary mediation scheme and several regional county courts established experimental mediation schemes. Despite the growth in court-annexed ADR initiatives during this period, the experience of the voluntary scheme in Central London in its early years and the voluntary mediation scheme in the Court of Appeal was of only a modest uptake. The evidence around the country and from mediation providers suggested that litigating parties were displaying only a weak interest in mediation. The DCA's own evaluation of the impact of the Woolf reforms in August 2002 reported that, although there had been a rise in the number of mediations taking place in the first year following the introduction of the new Civil Procedure Rules, the number of mediations had then levelled off. Figures reported by CEDR in their newsletter for spring 2002 showed that during the preceding year, there had been a 26% **reduction** in the number of commercial mediations over the previous year, and other mediation providers reported a similar reduction. The Department's conclusion was that the figure on the number of mediations taking place was evidence of *"a return to the steady growth trend that was distorted by the significant 141% increase*

in mediations in the first full year after the reforms were introduced".¹⁸ The report omitted to mention, however, that the initial post-Woolf "significant increase" had been from a rather low base. The DCA evaluation also recorded evidence from the Association of Northern Mediators that while in 2000 it had monitored 214 mediations, there had been only 93 in 2001. The ADR Group also reported an increase in the number of mediations in the year following the introduction of the Woolf reforms, which subsequently levelled out.

As a result of the low uptake of voluntary court-annexed schemes – and possible frustration on the part of mediation providers at the slight demand for mediation compared with the significant growth in trained mediators – pressure gradually began to build for the government to experiment with compulsory mediation. Compulsory or mandatory mediation has always been a controversial subject that promotes strong feelings and more than a little confusion, if not "doublethink"¹⁹, in mediation rhetoric. The purist definition of mediation is that of a *voluntary, consensual* process in which the parties are assisted to reach settlement. Although accepting that at first sight the concept of mandatory mediation appears contradictory, some of the leading mediation providers began to press the case with the Civil Justice Council and the DCA that an experiment in compulsion should be attempted. It was argued that even if disputing parties were forced into a mediation experience, they would be likely to settle the case because of the dynamics of the mediation process. Compulsion would rapidly expose a large number of people to the positive experience of mediation, thus leading to the kind of "take-off" that had to date been elusive. The publication in March 2001 of an evaluation of a large mandatory mediation programme for non-family civil disputes in Canada gave some credence to the argument that even though parties might be forced against their preference to mediate, mediation could nonetheless be successful and that parties could be satisfied with the process.

¹⁸ *Civil Justice Reforms: Further Findings*, August 2002, Department for Constitutional Affairs. <http://www.dca.gov.uk/civil/reform/ffreform.htm>

¹⁹ Doublethink means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them. The origin is in George Orwell's *1984*, Chapter 3. "*Winston sank his arms to his sides and slowly refilled his lungs with air. His mind slid away into the labyrinthine world of doublethink...to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them.*"

Ontario Mandatory Mediation Programme

In January 1999, on a test basis, a common set of rules and procedures mandating mediation for non-family civil case-managed cases was introduced in the Ontario Superior Court of Justice in Ottawa and Toronto, Canada. Continuation of the rule past July 2001 was to be largely dependent on the results of a thorough and independent two-year evaluation of the programme. The evaluation was based on data collected from over 3,000 mediations conducted under the programme and comparison with around 23,000 non-mediated cases commenced since 1996²⁰. Under the court rules, cases could only be exempted from mediation if a court order was obtained. The evaluation report suggests that only a small number of cases were exempted from mandatory mediation. Between January 1999 and December 2000, out of around 2,500 cases mandated to mediate in Ottawa, there were only 25 exemptions, and of around 3,000 cases in Toronto, some 69 were exempted, suggesting a very low rate of exemption from mediation at around 1–2%.

The evaluation of the Ontario scheme established that mandatory mediation had led to:

- significant reductions in the time taken to dispose of cases;
- decreased costs to the litigants;
- high proportions being completely settled earlier in the litigation process; and
- considerable satisfaction expressed by litigants and lawyers with the mandatory mediation process.

The report also stated that these findings generally applied to all types of cases.

The very positive results from the evaluation of the Ontario scheme stimulated interest within the Department for Constitutional Affairs in attempting a similar experiment in England, and added weight to the external pressure being exerted on DCA by mediation providers and by the Civil Justice Council.

²⁰ Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months*, 2001.

ARM pilot scheme

On March 24 2004, the DCA announced the establishment of a pilot scheme to be established in Central London County Court involving the automatic referral of selected cases to mediation. A press release issued on the same day stated that:

“The new pilot – based on an automatic referral scheme in Ontario, Canada – will start on 1 April and run for 12 months. If it is successful it will be introduced in other major court centres in England and Wales.”

The pilot was scheduled to run for one year from April 2004 to March 2005. The design of the scheme involved random allocation to mediation of 100 cases each month at the point at which a defence had been entered in the case. Trained mediators from one of four mediation organisations were to be allocated, on rotation by the court, to mediate the cases in the ARM scheme. In common with the Central London voluntary mediation scheme and other court-annexed mediation schemes operating elsewhere in England, the mediations would be time limited and last for three hours. The cost of the mediation to the parties was set at £100 per party. Although cases were automatically referred to mediation, parties were given the opportunity to object to referral and to request that the case be allocated to the normal court process. Parties were required to reply to the court accepting referral to mediation or objecting to the referral. For a mediation to take place, both parties were required to accept referral. Where one or both parties raised an objection to the mediation referral, a District Judge would review the case.

ARM Practice Direction

A Practice Direction was issued to support the quasi-compulsory nature of the scheme supplementing CPR, Part 26. The Practice Direction entitled “Pilot Scheme for Mediation in Central London County Court” provided, among other things, as follows (emphasis added):

- 1.2 This practice direction enables the Central London County Court to:
 - (1) **require** the parties to certain types of claims **either to attend a mediation** appointment or to give reasons for objecting to doing so; and
 - (2) stay the claim until such an appointment takes place.

- 4.1 If one or more of the parties state in his reply that he objects to mediation, the case will be referred to a District Judge who may:

- (1) direct the case to be listed for a hearing of the objections to mediation;
- (2) **direct that a mediation appointment should proceed;**
- (3) order the parties to file and serve completed allocation questionnaires; or
- (4) give such directions as to the management of the case as he considers appropriate.

The issue of compulsion

The intended element of compulsion underpinning the pilot scheme was further reinforced by the press notice issued on the day of the launch of the scheme, indicating that a failure to mediate following referral where the judge did not accept the reasons for objection, would lead directly to costs sanctions under Part 44 of the CPR:

“If one or both parties object to mediation they would need to give their reasons. The case will be referred to a District Judge who will decide whether mediation should take place or whether the case should proceed. If one of the parties still declines to mediate, even though their reasons do not satisfy the judge, they risk being liable to costs under existing case law and Civil Procedure Rule 44.5.”

At the launch event on March 29 2004, Professor Martin Partington, Chair of the Civil Justice Council’s ADR Sub-Committee, gave the keynote speech. He stated that his Committee had written to the Lord Chancellor in 2003 *“urging him to initiate an experimental pilot scheme, based on an idea that had been tried out in Ontario for the use of court-based compulsory mediation. We were delighted to learn in the autumn that the Lord Chancellor/Secretary of State had decided to launch the present pilot.”*

Professor Partington explained that a key unanswered question in the development of ADR in the post-Woolf reformed civil justice system was: *“to what extent should parties who wanted to litigate in court be **required** to pursue alternative modes of dispute resolution?”* He pointed out that opinions within the membership of the Civil Justice Council, within his ADR committee and in the ADR community at large were very divided on the issue. He continued:

“Many argued cogently that use of ADR was essentially a question for the parties to determine...Others argued, equally compellingly in my view, that ADR would never become part of the mainstream of our litigation/dispute-resolution culture unless courts were more actively involved in promoting the use of ADR...Of course we cannot anticipate the outcome of this experiment. But it is only by running the experiment that we will be able to find out whether the arguments against compulsion are borne out or whether those in favour are supported. This

is a key stage therefore in the development of any policy for the introduction of a national court-based ADR scheme.”

In keeping with the quasi-compulsory intention of the pilot, it was intended that any objections raised to referral to mediation by parties would be dealt with by a single District Judge in the court. In the course of planning meetings at the court prior to the introduction of the pilot, although the judge did not indicate the types of objections that would be acceptable, it was emphasised that the acceptance of objections would be rare.

The intended evaluation

Following the launch of the ARM pilot scheme in May 2004, the DCA commissioned an evaluation of the scheme. The broad objectives were to establish the effect of the pilot on settlement rates and length of cases; satisfaction levels among users; the extent to which the pilot met users’ needs; the impact of the pilot on administrative and judicial time; and areas for improvement.

The proposed evaluation of the ARM pilot was designed specifically to compare the outcomes of cases effectively compelled to mediate with those mediated through the voluntary scheme at Central London and with a control sample of litigated cases. The proposed evaluation anticipated that by the end of the data collection period in autumn 2005 around 1,000 cases mediated under the ARM scheme would be available for analysis (on the basis that 100 cases per month would be referred to mediation), involving a large number of parties and legal representatives pressed into mediation whose views would be sought. It was anticipated that the evaluation would offer a rich source of information about the impact of compulsion to mediate on attitudes to mediation, on experiences during the mediation session, and on the outcome of mediations. The research questions of greatest interest were precisely those addressed in the evaluation of the Ontario scheme and of concern to policy-makers, the judiciary and mediation providers: put simply, if you force people to mediate civil disputes, will the mediations be successful in promoting settlement? Will the parties be happy with the process? Will it speed up case disposal and will it save costs to the parties? Additionally, the DCA was interested in the question of whether pressing litigants into mediation led to any costs or savings in both administrative and judicial time.

And then came Halsey...²¹

As mentioned above, on May 11 2004 – some five weeks after the establishment of the ARM pilot scheme – judgment was handed down in the conjoined appeals of *Halsey v Milton Keynes NHS Trust* and *Steel v Joy*. The issue at stake in the appeals was the question of when the courts might deprive a successful party of their costs as a result of refusal to mediate. *Halsey* was a clinical negligence case and *Steel* involved successive injuries to a person with a pre-existing spinal condition. In both cases, the parties had lost at trial and their argument – that they should not be required to pay the defendant’s costs on the ground that the defendant had refused their offer to mediate – had been rejected by the court. The appeals solely concerned the costs issue, and the Court of Appeal’s decision in the case had been eagerly and anxiously awaited by mediation providers and by the Law Society.

In the event, the Court of Appeal (Ward, Laws and Dyson LJJ) unanimously dismissed both appeals, refusing to impose any costs sanctions on the successful defendants. In a relatively lengthy leading judgment, expressed in notably less bullish and more measured tones than say Lightman J in *Hurst v Leeming*, Lord Justice Dyson set out with some deliberation the court’s views on a number of key issues. In relation to costs, he started from the position that the normal costs rule in litigation is that the unsuccessful party pays the costs of the successful party and that if there is to be a departure from the general rule, the burden is on the unsuccessful party to show why there should be such a departure. He went on to say that the fundamental principle is that such a departure is “*not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR.*”

Dyson LJ held that the courts have jurisdiction to impose a costs sanction on successful parties who unreasonably decline to mediate. In deciding whether or not to do so, factors to consider include whether the successful party reasonably believed they would win, cost-benefit, and whether the unsuccessful party can show that mediation had a reasonable prospect of success. There is, he said, a considerable risk of a costs sanction where a judge’s recommendation to mediate is ignored.

²¹ *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576.

However, for the prospects of the ARM pilot scheme, the key section of Dyson LJ's judgment came sufficiently early and prominently in the judgment as to be difficult to overlook by even the most cursory reading. At paragraph 9, Dyson LJ stated that the court had considered arguments on the question of whether it had power to order parties to submit their disputes to mediation against their will. On this point, Dyson LJ was clear. He said (emphasis added):

*“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. **It is another to order them to do so.** It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court... **it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6** [of the Human Rights Act 1998]. **Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.** We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:*

‘The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.’

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.”

Thus, whatever else it says, *Halsey* clearly states that courts have no power to order cases to go to mediation. It is arguable whether, in fact, a direction to attempt mediation prior to a hearing would infringe Article 6. Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not **exclude** access to the courts and to require parties to attend a three-hour low-cost mediation session does not **order** them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.

Leaving aside the concerns relating to the impact of the judgment on the ARM pilot, the *Halsey* decision caused a blizzard of articles and commentary from opposing perspectives and interests. In accordance with the best legal traditions, the interpretation of the significance of the decision varied considerably depending on the perspective of the commentator. It has to be said that the judgment, containing a little of something for everyone, facilitated precisely these kinds of conflicting interpretations. Mediation providers focused on the parts of the case that appeared to give continuing support for pressure to mediate and penalties for failure to do so. For example, at paragraph 11:

“The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.”

However, mediation commentators often omitted the final part of the sentence, which goes on: *“But we reiterate that the court’s role is to encourage, not to compel.”* Indeed, in almost every sentence apparently confirming the value of mediation, Dyson LJ adds a qualifier. For example, at paragraph 15 Dyson LJ talks about the benefits of mediation and the results that it can achieve. He goes on to quote an enthusiastic paragraph from Brooke LJ’s judgment in the *Dunnett* case and says that these advantages of mediation must be borne in mind in considering whether a party who refuses to mediate has acted unreasonably. However, he then delivers a killer punch by continuing:

“But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case.”

This consideration led the Court of Appeal crucially to the view that it **did not accept** the submission made on behalf of the Civil Mediation Council **that there should be a presumption in favour of mediation**. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case and that the burden here falls on the unsuccessful party who must show that the mediation would have had a reasonable prospect of success.

“In our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse a mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is

struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful.” (Para 28)

Mediation observers picked up the shift in the tide immediately. Those opposed to the increasing pressure from the courts to mediate extracted from the judgment all of Dyson LJ’s concerns and caveats about mediation and the fact that not all cases could be deemed to be appropriate for mediation. They heralded the finding that the courts have no power to order mediation and noted the fact that there was no “presumption” in favour of mediation. The decision was branded by some as a “major setback” for mediation.²² These conclusions did not escape the attention of the mediation providers who were quick to seek damage-limitation. Thus, for example, CEDR in a letter to the Law Society said that: *“Anyone who thinks that Halsey somehow reduces the need to understand and embrace ADR is seriously mistaken.”*

The competing analyses of the case in the press and specialist journals were noted in an article by Tony Allen of CEDR Director who felt compelled to write that:

“Some of the journalism to date on Halsey v Milton Keynes NHS Trust is remarkable for appearing to be based on reading an entirely different case, or perhaps on not reading the case at all. A proper analysis of Halsey and Steel suggests that some of what these journals have asserted at best overlook or skew important points and at worst mislead readers as to what the cases really decide.”²³

Post-Halsey guidance

Although not strictly relevant for discussion of the impact of *Halsey* on the ARM pilot, the most recent Court of Appeal decision of significance on the subject of costs penalties for unreasonable refusals to mediate, is *Burchell v Bullard*²⁴. The case, concerning a building dispute in August 2000, was decided by Ward and Rix LJ in April 2005. The case had been heavily disputed, and in May 2001 the claimant builder suggested mediation to the householders. The response from the householders’ surveyor was that the matters were “technically complex”, and so mediation was not an appropriate route to settlement. In 2002, the builder issued proceedings for about £18,000 and the defendants counterclaimed over £100,000 and further unspecified damages. At trial, the builder was awarded £18,327 and the owners £14,373 on their counter-claim, with the

²² ‘When Will the Courts Penalise Refusal of Mediation? New Court of Appeal Guidance’, Paul Hughes, Crutes Law Firm, 2004.

²³ ‘A Closer Look at Halsey and Steel’, June 2004 by Tony Allen, CEDR.

²⁴ [2005] EWCA Civ 358.

owners required to pay a net sum of £5,025. The judge at trial noted that at around £185,000 the costs had “swamped” the litigation. The builder subsequently appealed against the costs order and again offered the householders the opportunity to use the Court of Appeal mediation scheme to seek to settle the issue. Again, the householders declined to mediate, saying that they did not think that it would be “necessary or appropriate”. On appeal, the court considered the issue of costs in light of the decision in *Halsey*. It confirmed that, in deciding whether or not a refusal to mediate was unreasonable, the court had to take into account the nature of the dispute, the merits of the case, whether the costs of ADR would be disproportionately high, and whether the ADR had a reasonable prospect of success. The Court held that a building dispute is “*par excellence*” the kind of dispute that lends itself to ADR and that the merits of the case favoured mediation. The householders were held to have behaved unreasonably in believing that their case was watertight and in pressing a very large counterclaim. The suggestion that the matter was too complex for mediation was rejected by the Court of Appeal as “plain nonsense” and the costs of ADR would have been “*a drop in the ocean compared with the fortune that has been spent on this litigation*”. Finally, the Court of Appeal was influenced by the way that the builder had presented his claim and that he was “transparently honest” and felt that these factors “augured well for mediation” and that it would have had a reasonable prospect of success. However, despite the fact that the Court of Appeal held that the *Halsey* factors had been established and that the court should mark its disapproval of the householders’ conduct by imposing some costs sanction, in the event it did not do so. This is because the offer was made in 2001 and:

“[T]he law had not become as clear and developed as it now is following the succession of judgments from this court of which Halsey and Dunnett v Railtrack plc are prime examples. To be fair to the defendants one must judge the reasonableness of their actions against the background of practice a year earlier than Dunnett. In the light of the knowledge of the times and in the absence of legal advice, I cannot condemn them as having been so unreasonable that a costs sanction should follow many years later.”

ARM pilot in the light of Halsey

Although the judgment in *Burchell* appears to be consciously seeking to re-establish the firm line that was somewhat shaken by *Halsey*, and the future may well see a re-establishment of the *Dunnett/Hurst* climate, the *Burchell* judgment was handed down in April 2005, **after the end** of the ARM pilot. Effectively, therefore, the ARM pilot –

running from April 2004 to March 2005 – operated entirely within the context of the *Halsey* judgment. There is little doubt, as reasonably inferred from an opt-out rate of around 80% and evidenced by interviews conducted with solicitors during the course of the evaluation, that the judgment had a significant effect on the course of the pilot and inevitably on its evaluation. Indeed, it may not be an exaggeration to suggest that, whatever the precise intention of the court and the interpretation of the case by observers from different camps, the mood or tenor of the *Halsey* judgment and its representation in the professional press, effectively undermined both the object and operation of the automatic referral to mediation pilot. It is impossible to say what the response of the profession to the ARM pilot would have been absent the *Halsey* judgment, but it must be the case that those who were inclined to opt out of mediation would have felt more confident about their decision post-*Halsey*. It is also true that the decision had an impact on the approach of the judge in Central London County Court responsible for dealing with objections to ARM whose view, once the pilot had commenced, was that she could not “order” parties to mediate.

ARM evaluation

“As I understand it, it’s [ARM] not going to happen any more because I think the pilot scheme is dead and buried. The understanding I have is that because of the decision in the [Halsey] case the parties can’t be required to mediate.”
(Interview with a defendant representative in a personal injury case referred to ARM)

The evaluation of the ARM pilot in practice was, therefore, rather different from its conception. The number of cases mediated during the course of the evaluation was about one-quarter of what had been predicted and, in the perhaps naïve expectation that the scheme would mirror the Ontario scheme, the volume of objections was completely unanticipated. As a result, considerably more time was spent collecting information about objections than about mediations and the planned comparison of cases “compelled” to mediate under ARM with cases entering the voluntary scheme becoming questionable. Given the high rate of objection to mediation, those cases that were mediated under ARM could not reasonably be viewed as cases under “compulsion” but rather as cases that were effectively very similar to those entering the voluntary mediation scheme. Although this is a disadvantage in terms of the ARM evaluation, the similarity between the VOL-mediated cases and the ARM-mediated cases means that

for some analyses in this report it has been possible to compare and combine the two samples of mediated cases. This has been done to conduct statistical analyses of factors associated with propensity to settle at mediation, the final conclusion of mediated cases, and the time taken to conclusion.

Voluntary mediation in Central London

Voluntary mediation (VOL) scheme 1996 – 1998

The Central London County Court has been a testing ground for court-annexed mediation for a decade. A voluntary mediation scheme has been continuously in operation in the Court since April 1996 when the court judiciary,²⁵ with the agreement of the Lord Chancellor, established the first pilot mediation scheme in the wake of Lord Woolf's interim report on Access to Justice. The original impetus for the pilot scheme was judicial concern about the lack of proportion between legal costs and recoveries in low-value civil claims. Mediation was seen as a way of reducing litigants' legal costs and speeding up settlements through a process that litigants might prefer to court proceedings.

The 1996 pilot scheme's design involved sending personalised letters to litigating parties as soon as the defence had been entered,²⁶ offering them the opportunity of having their case mediated at the court by a trained mediator. The scheme was entirely voluntary and mediations would only take place when both parties to the dispute accepted the court's offer. The personalised mediation offer letter was sent to disputing parties' legal representatives or to the parties themselves if they were not represented. The letter, explaining the scheme, was accompanied by information about mediation. It invited legal representatives to discuss the offer with their client and inform the court within 14 days whether or not they proposed to take up the offer of mediation. If a rejection were received from either party, the court would write to both parties saying that the mediation could not go ahead since one party had rejected the offer. The decision whether or not to mediate was voluntary and no pressure was brought to bear on the parties or their representatives to accept the offer of mediation, although they were asked to give reasons for rejecting the offer on the reply form, which was returned to the court.

²⁵ The force behind the initial scheme was His Honour Judge Neil Butter QC.

²⁶ The pilot scheme was limited to cases above the small claims limit (£3,000 at the time).

If the offer of mediation was accepted by both parties, mediation staff at the court set about arranging a mutually convenient date for mediation and appointed a mediator from lists of names submitted by mediation providers, or invited one of the mediation groups involved in the scheme to nominate a mediator.

Mediations were conducted in the basement of the court building and were time-limited to three hours (4.30 – 7.30 pm). Parties paid a token fee of £25 each to cover expenses, and mediators from five leading mediation providers conducted the mediations on a virtual pro bono basis.

The scheme was initially well resourced in administrative terms. The day-to-day administration of the scheme was carried out by specially trained court staff. A bespoke database was designed for the scheme that would generate administrative material. It was also designed to collect data that would be used in the evaluation, such as case characteristics, details about the mediation and mediator, who attended the mediation, length and outcome of mediations.

The court began sending out mediation offers in mid-May 1996. By the end of the initial review study period in March 1998, offers of mediation had been sent out by the court in around 4,500 cases. In the first few weeks of the scheme, there was no take-up at all and the first mediation was not held until July 12 1996. Between July 1996 and the end of the evaluation study period in March 1998, 160 cases had been mediated in the Central London VOL pilot scheme.

A comprehensive evaluation of the VOL scheme was completed in 1998,²⁷ based on 160 mediated cases together with a large number of control cases and cases where mediation had been rejected. The evaluation revealed that:

- Both parties volunteered for mediation at a rate of about five percent of offers throughout the two years of the pilot, with virtually non-existent demand among personal injury cases;
- Acceptance of mediation was highest among disputes between businesses;

²⁷ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98.

- The majority of cases settled at the mediation appointment (62%) and settlement at mediation was highest (76%) when neither party had legal representation;
- Compared with non-mediated cases, mediated cases had a higher settlement rate overall, whether or not settlement was achieved at the mediation appointment;
- Average levels of recovery were lower in mediated cases than non-mediated cases, suggesting discounting of mediated claims;
- Mediated settlements occurred earlier than non-mediated settlement;
- Successful mediation was perceived by solicitors and litigating parties to reduce legal costs, while unsuccessful mediation tended to increase costs;
- Parties and solicitors expressed high levels of satisfaction with the mediation process.

As a result of the evaluation, the Lord Chancellor decided that the voluntary mediation scheme should be placed on a permanent footing.

Voluntary mediation (VOL) scheme since 1998

Following the end of the evaluation of the VOL scheme in 1998, some significant changes were made to the administration of the scheme. Most importantly, the court stopped sending out personalised mediation invitation letters to representatives or parties. Instead, since 1998 material relating to the Court's mediation scheme has simply been included in mailings sent out to parties or their solicitors from the court once the defence has been received. Small claims are no longer excluded from the scheme and the court's fee for mediation has been raised from £25 per party to £100 per party. Although there is no longer a team of mediation staff in the Court, there is still a dedicated mediation telephone number and mediation 'desk' in the court office where enquiries about mediation are handled and where mediations are arranged by the court. The court continues to conduct liaison between the parties, mediation providers and individual mediators and this work is quite different from the normal administrative flow within the court administration.

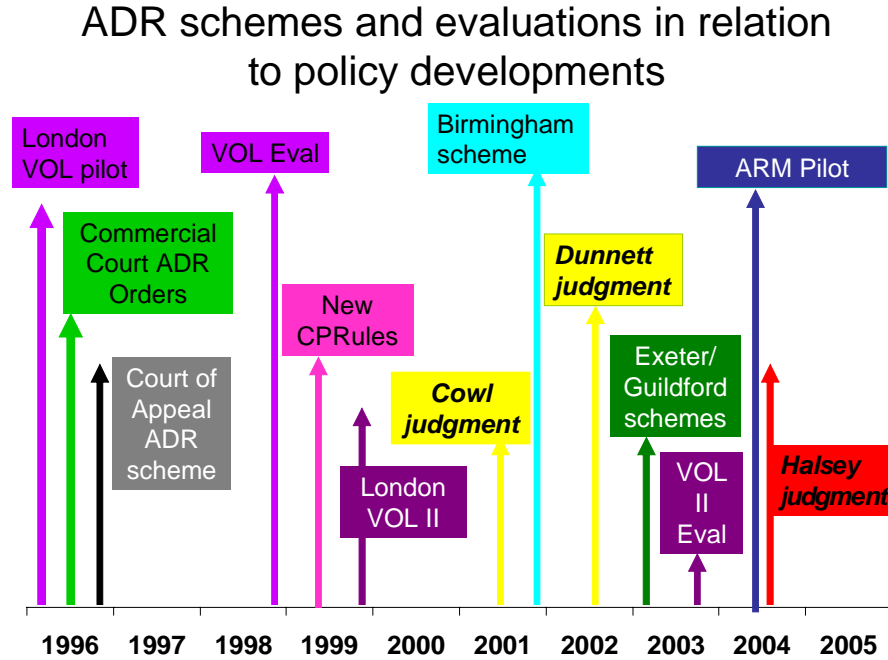
The mediation database designed for the 1998 evaluation has been maintained by the court, albeit with a much-reduced quantity of information about mediations being entered, and the total administrative resources expended on the mediation scheme at the Court have been considerable. These include the time of the court staff²⁸ for dealing with the administration of mediation enquiries, overtime payments for staff clerking mediations, and the cost of keeping the building open until around 8.00 pm on days when mediations take place. The impact of mediation on administrative and judicial time is discussed in Chapters 2 and 4 of the report.

Policy environment for the VOL scheme

Although the *Halsey* case had a dramatic impact on the ARM pilot at Central London, the review of the voluntary scheme covers the period 1999 – 2004 which includes the period of sustained judicial pressure in relation to mediation. The review of the voluntary scheme in this report, therefore, offers the opportunity to compare its operation under conditions that were rather different from the 1998 evaluation. Between 1996 and 1998, parties were being offered the opportunity to mediate on a voluntary basis. The CPR had not yet come into effect so there was no possibility of a sanction being imposed against parties who refused to mediate and the evaluation period ended more than three years before *Cowl* was decided. The 1998 evaluation is therefore the evaluation of a completely voluntary mediation scheme. By contrast, the review discussed in Chapters 4 and 5 of this report evaluates the voluntary mediation scheme under the rather different conditions of the CPR rules and, from 2002 onwards, under the pressures created by *Cowl*, *Dunnett* and *Hurst*. In addition, data from the VOL scheme have been used for comparative purposes in the evaluation of the ARM pilot. Figure 1.1 plots the introduction of various schemes in relation to the introduction of the Civil Procedure Rules and landmark mediation cases.

²⁸ Until 1998, this involved one full-time post and part of the time of one (and sometimes two) other members of staff.

Figure 1.1 ADR schemes and evaluations in relation to policy developments



The Report

The Report is divided into two sections, the first dealing with the evaluation of the ARM scheme at Central London and the second dealing with a review of the VOL scheme at Central London between 1999 and 2004. While the two different court-linked programmes have been separately evaluated, information about mediations undertaken under both the ARM and VOL programmes have occasionally been combined to provide robust evidence about determinants of choice to mediate; predictors of success at mediation appointments, and of the extent to which mediation may offer savings to the justice system in administrative and judicial time.

Chapter 2 describes the research objectives and methods of data collection for the ARM scheme. It then analyses the characteristics of cases referred to mediation under ARM, the response of parties to referral, and the outcome of cases at mediation and through the court process. The Chapter also presents the results of multivariate analyses relating to the propensity to choose mediation in the ARM and VOL schemes; the propensity to settle at mediation; and estimates of the impact of ARM and VOL mediation on administrative and judicial time as compared with non-mediated cases.

Chapter 3 provides the perspective of solicitors, parties and mediators on the ARM pilot, obtained through telephone interviews and mediators' written reports. The interview material offers insights into the pervasive tendency by solicitors to advise their clients to opt out of the ARM scheme and of the experience of mediation among those who attended. The Chapter also provides subjective interpretations of why cases did or did not settle at mediation as well as perceptions of the cost and time implications for cases that were mediated in the ARM pilot.

Chapters 4 and 5 present the results of the review of the voluntary mediation scheme at Central London between 1999 and 2004. In Chapter 4, the characteristics of cases entering the VOL scheme and the outcome of mediations are discussed and compared with the previous evaluation in 1998. Chapter 5 presents data from self-completion questionnaires returned by parties and lawyers involved in VOL mediations during 2003.

The concluding Chapter summarises the key findings on the ARM and VOL schemes and, drawing on earlier evaluations of court-based mediation schemes and two recent evaluations of court-based mediation schemes in Exeter and Birmingham, seeks to identify some broad conclusions that might inform future policy development on mediation in non-family civil disputes.

Chapter 2. Automatic referral to mediation (ARM)

The scheme

The ARM pilot ran for one year from April 2004 to March 2005. The design of the scheme involved random allocation of 100 cases per month to mediation at the point at which a defence had been entered in the case. Trained mediators from one of four mediation organisations were allocated, on rotation by the court, to mediate the cases in the ARM scheme. Mediations lasted for three hours and the mediation fee was £100 per party.

Although cases were automatically referred to mediation, parties were given an opportunity to object to the referral and to request that the case be allocated to the normal court process. Each side was therefore required to reply to the court about the referral to mediation. For a mediation to take place, both sides had to accept. Where one or both parties raised an objection to the mediation referral, the case was reviewed by a District Judge at the court. During the pilot, the Judge's normal practice, after objection, was to review the file and, in many cases, to hold a case conference, either in person or by telephone, in order to hear why there was an objection to mediation and, if possible, to persuade the parties to agree to mediation. As a result, the Judge made a variety of different orders, which included permitting a delay for the parties to obtain reports or other necessary evidence, permitting a stay for the parties to negotiate, or where the parties agreed to mediate, ordering a stay for mediation. Where the judge accepted the objection, an order would be made for the case to be transferred out of the ARM pilot either to another court or to the normal litigation process (see later discussion on procedure following objections).

Evaluation study

The evaluation of the ARM pilot began in June 2004 and data continued to be collected about the fate of ARM cases until January 2006. This evaluation provides a description of the cases entering the scheme and the course that cases took once they had been referred to mediation. It also provides a comparison of the course of ARM cases with two control samples of comparable non-mediated court cases, and cases entering the voluntary mediation scheme at Central London. In some places, comparisons have also

been made with data from the voluntary mediation scheme in Birmingham civil justice centre.²⁹

The evaluation was originally designed to assess the impact of compulsory or quasi-compulsory mediation on the course and outcome of cases. In the event, the scheme experienced a high rate of objections throughout the course of the pilot. This had several implications for the original design of the evaluation. First, the total number of mediated cases in the ARM sample was smaller than had originally been anticipated and this limited the range of analyses that could confidently be conducted. Second, because of the high objection rate, those cases proceeding to mediation constituted a biased sub-sample that did not reflect the mix of cases referred to mediation. Nor could they properly be conceptualised as cases that were mediating under compulsion. The following results must therefore be interpreted in this context.

Data collection

Information about all cases referred to mediation under the ARM scheme was entered on to a specially designed EXCEL database at the court by a trained mediation clerk. Although key items of information were entered by the clerk, this information had to be supplemented and regularly updated by the research team in order to follow up cases and ensure that all information required for analysis was available. Information was collected about 1,232 cases referred to mediation under the ARM pilot between April 2004 and March 2005 and this information was updated and amended until January 2006. The information from the EXCEL database was subsequently transferred to a SPSS file.

Administrative and judicial time

An objective of the research was to estimate the administrative and judicial costs of operating the mediation scheme and the potential for savings to the administration of justice. The calculation of administrative and judicial time involved in mediated and non-mediated cases was not straightforward, since this exercise had never been done before and it was necessary to experiment with approaches to estimating time spent. In the end, the following approaches were taken:

²⁹ Lisa Webley, Pamela Abrams and Sylvie Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme, Report to Department for Constitutional Affairs*, September 2006, <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf>.

Administrative time

To estimate administrative time, interviews were carried out with those administering the ARM pilot to get a clear picture of the administrative steps involved in the process. Full detailed information from CaseMan³⁰ was collected about every step taken by the court in a sample of mediated cases and a control sample of non-mediated litigated cases. Against each step taken in every case, a time estimate was allocated by the research team, based on Court Service Business Management System (BMS) data which allocates an average time to administrative steps (e.g. letter = 2 minutes), or on the basis estimates derived from observation and interviews. For each case, then, it was possible to produce a total administrative time figure constructed from the addition of time spent for each individual administrative step taken in the case from beginning to end.

Judicial time

Estimating the judicial time spent on mediated and non-mediated cases was even more challenging than estimating administrative time, since there is no standardised equivalent to BMS data for judicial activity. In other words, no-one knows or estimates how much time judges spend dealing with cases, whether they are mediated or non-mediated. In order to make even the roughest of estimates, the research team interviewed and observed the District Judge dealing with ARM cases and interviewed a small number of judges dealing with non-mediated cases in the Central London Court. Judges were then observed dealing with files, dealing with case management conferences, and presiding over hearings and full trials. Time records were kept and estimates made of average time for procedures and the extent to which time estimates for, say, telephone case management conferences were accurate. Using the CaseMan records of steps taken in the samples of mediated and litigated cases, an estimate of judicial time was allocated to each step and a total judicial time per case was then calculated.

³⁰ CaseMan is a Court Service computer-based system for maintaining records of cases being dealt with in the county courts. The system began in 1997 and was designed to help with case management following the Woolf reforms. Administrative information about steps taken in individual cases is logged on to the CaseMan system by court staff.

Administrative and judicial time estimates were made using material from court files and CaseMan on a total of 317 ARM cases, comprising 160 mediated cases³¹ and a similar number (157) of cases referred during the months of June and July 2004 that did not mediate, but followed the normal litigation route. The months of June and July 2004 were selected for the sample of non-mediated cases in order to maximise the opportunity that cases would have had a chance to run their normal course and conclude by the end of the data collection exercise. This was important so that information about administrative and judicial time could be estimated for cases involving late settlements or trials.

Objections

Reasons for objecting to ARM referral were not noted by the court on the ARM database. Only the fact of objection and by whom the objection had been raised were recorded. In order to analyse reasons for opting out of ARM, detailed information about reasons (submitted by parties in their replies to the court) were extracted by the research team from court files, using objections raised in cases referred to mediation between May and October 2004 (replies from 381 parties relating to 249 cases)³². Reasons given in replies were noted, coded and entered on to a separate database.

Mediator case reports

Specially designed mediator report forms were passed by the court to those mediating ARM cases from July 2004 onwards. Forms relating to 104 cases were returned out of around 200 distributed by the Court. The forms collected information about the case, the outcome, the mediator's views on the approach of legal representatives, and mediators' views on the factors leading to settlement or failure to settle at mediation.

Interviews with parties and representatives

Some 214 telephone interviews (relating to 178 cases) were conducted with parties and representatives covering:

- Case and party characteristics;
- Representation, funding of legal costs;
- Prior knowledge/experience of court and/or mediation;
- Attitude toward referral to mediation;

³¹ Those that had been completed by the time this process of data collection began.

³² In some cases, reply forms were missing from the file and occasionally whole files were missing.

- Reasons for opting out or mediating;
- Experience and perception of process;
- Nature of settlement or final outcome;
- Where no settlement – prospects for settlement;
- Perceptions of costs/time (including savings/increased costs/time for mediation);
- Perceptions of fairness of process and outcome;
- Willingness to use similar procedures in future.

Telephone interviews were conducted between October 2004 and July 2005. During the early months, interviews were conducted almost exclusively with parties objecting to mediation (see further below)³³.

Court Orders

Information about 1,794 orders (relating to 954 cases) made by the District Judge allocated to the ARM pilot was entered on the ARM database for analysis.

Data from court files and CaseMan

Data were collected from four sources in order to conduct various multivariate analyses.

The data sources were:

- Data collected on the ARM database by the ARM clerk supplemented by information from court files and CaseMan (1,232 cases);
- Data relating to the VOL mediation scheme between 1999 and 2004 (1,059 cases);
- Control sample of non-mediated cases drawn from court records immediately prior to the introduction of ARM (196 cases);
- Additional control sample of non-mediated cases issued in 2002 and 2003 (214 cases).

Multivariate analyses were conducted to determine:

- Case types, case values, and party configurations most suitable for mediation;
- Factors associated with participation in court-based mediation;

³³ See Chapter 3 for full breakdown of telephone interviews.

- Settlement rates between 1999 and 2004 reflecting the operation of the voluntary scheme under the background influence of the new Civil Procedure Rules, giving the courts the power to impose sanctions where parties have unreasonably refused to mediate;
- Settlement rates in the ARM pilot reflecting the operation of a notionally mandatory scheme with explicit threat of cost sanctions;
- Whether mediation reduced case-disposition time compared with control samples of non-mediated cases;
- Costs of ARM, VOL and non-mediated cases in terms of judicial and administrative time.

Referrals to mediation and responses

From the inception of the ARM pilot in April 2004 until the end of the pilot in March 2005 a total of 1,232 cases received a notice of referral to mediation from the court. By the end of the data collection period in January 2006, some 273 cases had been given a date for mediation representing 22% of the cases referred to mediation.

The cases referred to mediation were overwhelmingly personal injury cases, with 82% of referred cases concerning personal injury (PI) (1,016 cases), reflecting the distribution of allocated defended cases at Central London. Of the personal injury cases automatically referred to mediation under the ARM scheme, the largest category was employer liability cases representing 39% of PI cases referred and 32% of all cases referred to mediation. One-third of the PI cases referred to mediation were road-traffic accidents, and 27% were “other” types of accidents. A handful of PI cases (10%) involved clinical negligence.

Table 2.1 shows the number of cases referred to mediation each month, the proportion of cases that were personal injury cases, and the number of cases for which a mediation date had been set by the end of data collection in January 2006. The Table shows that the number of cases referred to mediation each month varied from a low of 66 in April 2004 to a high of 126 in August 2004. The median number of cases automatically referred to mediation each month over the year of the pilot was 105 (mean 103). Variation in numbers referred month by month was related to the number of new cases coming to the court. In some months, there were insufficient cases within scope to refer the required 100 to mediation.

Table 2.1 also shows the high proportion of personal injury cases coming into the court month by month, although there was some variation from month to month with a low of 74% in April 2004 and January 2005 and a high of 92% in December 2004. The volume of personal injury cases in Central London has had a significant impact on the operation of the ARM pilot because of the high rate of objections to referral among PI cases. This is discussed further below.

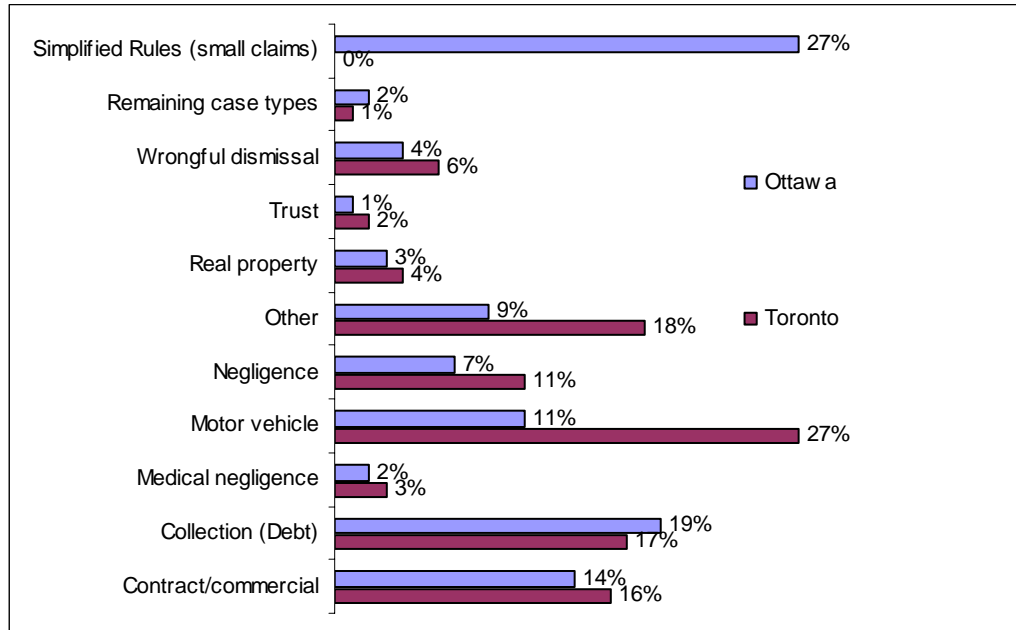
Table 2.1 Automatic referrals to mediation month by month			
Month defence filed	Number of referrals	Number of referrals which were PI cases	Number of cases with mediation date set down (as at January 2006)
April 2004	66	49 (74%)	15 (23%)
May	78	62 (80%)	19 (24%)
June	107	87 (81%)	30 (28%)
July	100	81 (81%)	24 (24%)
August	126	102 (81%)	48 (38%)
September	108	93 (86%)	24 (22%)
October	105	85 (81%)	24 (23%)
November	121	104 (86%)	22 (18%)
December	88	81 (92%)	16 (18%)
January 2005	93	69 (74%)	18 (19%)
February	120	97 (81%)	17 (14%)
March	120	106 (88%)	16 (13%)
Total	1232	1016 (82%)	273 (22%)

For the purpose of comparison, it is worth noting that in the Ontario mandatory mediation scheme for non-family disputes³⁴, the mix of cases from which referrals to mediation were made was significantly different from that in Central London. While the caseload of contentious non-family cases at Central London, above the small claims limit, is dominated by personal injury cases, this was not the case in Ontario. In Ottawa – where negligence and medical malpractice cases together represented less than ten percent of

³⁴ Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months*, 2001.

cases referred to mediation – the mandatory mediation scheme has been highly successful, experiencing a negligible opt-out rate. In Toronto, the figure for negligence and medical malpractice was about 14%, and although the results of the mandatory mediation programme were somewhat more equivocal than in Ottawa, nonetheless opting out was also minimal.

Figure 2.1 Case mix of Ontario mandatory mediation scheme



Opting out

Table 2.2 displays the result of the automatic referral for the 12 months of the ARM pilot scheme from, April 2004 to March 2005. Table 2.2 shows that at the beginning of the pilot in April 2004, in three-quarters of the cases referred to mediation (76%) one or both parties objected to the referral. In 18% of cases neither party objected to mediation and 6% of cases referred to mediation settled prior to responding to the mediation referral. This high rate of objection, with some variation, persisted throughout the life of the pilot. Put another way, in only 19% of cases where a reply was received was there no objection from either party, whereas in 81% of cases (where a reply was received) one or both parties objected to the automatic referral to mediation.

Insofar as there was some fluctuation in the pattern of objections, it seems that over the 12 months of the pilot, the rate at which **both** parties objected to the mediation declined slightly after the first few months. In April 2004, both parties objected to mediation in

52% of referred cases, but this figure showed a slight downward trend to a low in January 2005 of 26%. However, in February and March 2005 the figure began to increase again, possibly in anticipation of the end of the pilot.

The figures show that, overall, defendants were more likely than claimants to object to referral to mediation, with 60% of all referred defendants objecting compared with 48% of all claimants objecting. Defendants were more likely to raise objections to mediation in both personal injury and non-PI cases, although the difference in non-PI was not statistically significant. Among defendants in non-PI cases, some 27% objected to the ARM referral as compared with 24% of claimants, while in PI cases 68% of defendants objected as compared with 54% of claimants in PI cases. The significant tendency of defendants in PI cases to object to referral to mediation is interesting and is discussed further in the next section.

The proportion of cases overall in which only the defendant objected to referral to mediation was consistently and significantly higher than the proportion of claimant-only objections (with the exception of the first month of the pilot). A further pattern that emerges from Table 2.2 was the tendency of cases to settle prior to returning a response to the mediation referral. In April 2004, these cases accounted for 6% of those referred to mediation, and by December 2004, the figure had climbed to a high of 27%. However, there is some indication that this was beginning to drop back at the beginning of 2005, again possibly in anticipation of the end of the pilot.

Table 2.2 Number of opt-outs April 2004 – March 2005

	Opt-outs by:												
	None		Claimant		Defendant		Both		Settled before		Missing/Pending		Total
April 2004	12	18%	9	14%	7	11%	34	52%	4	6%	0	0%	66
May	10	13%	5	6%	15	19%	42	54%	6	8%	0	0%	78
June	18	17%	8	7%	19	18%	47	44%	15	14%	0	0%	107
July	20	20%	6	6%	18	18%	44	44%	12	12%	0	0%	100
August	29	23%	6	5%	27	21%	50	40%	14	11%	0	0%	126
September	16	15%	12	11%	23	21%	43	40%	14	13%	0	0%	108
October	17	16%	12	11%	21	20%	38	36%	16	15%	1	1%	105
November	17	14%	4	3%	21	17%	58	48%	21	17%	0	0%	121
December	8	9%	7	8%	18	20%	31	35%	24	27%	0	0%	88
January 2005	20	22%	5	5%	27	29%	24	26%	17	18%	0	0%	93
February	17	14%	10	8%	16	13%	48	40%	27	23%	2	2%	120
March	13	11%	7	6%	27	23%	45	38%	22	18%	6	5%	120
Total	197 ³⁵	16%	91	7%	239	19%	504	41%	192	16%	9	1%	1232

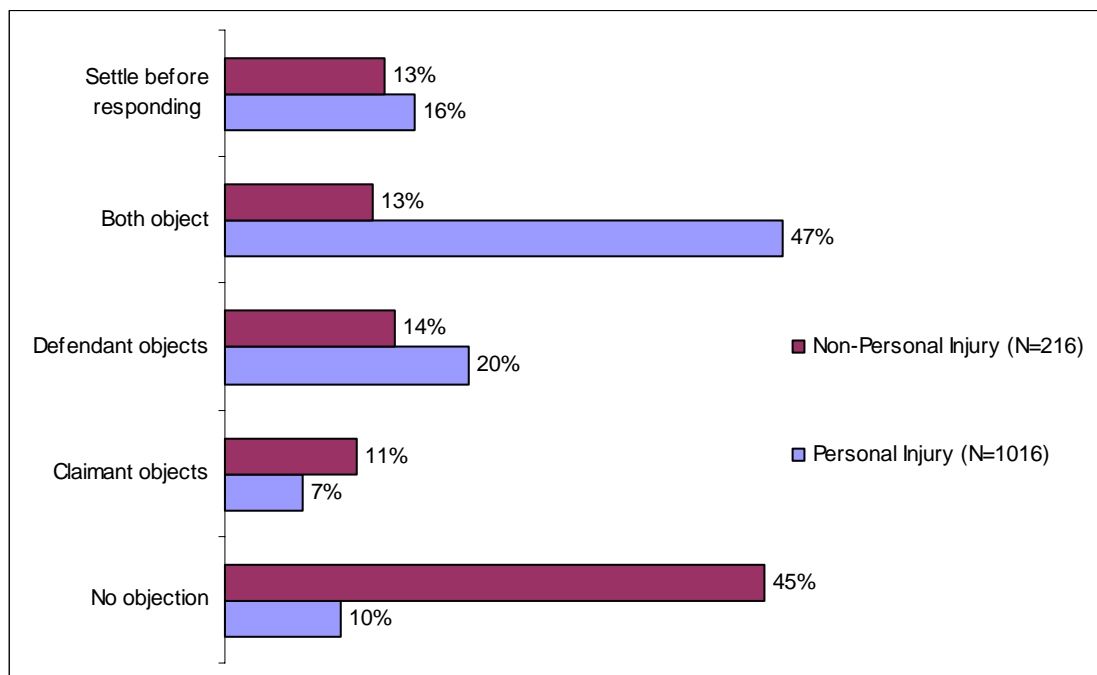
Difference between personal injury and non-personal injury cases

One of the starkest findings of the ARM pilot, which persisted throughout the life of the pilot, was the significant difference in response to referral to mediation between personal injury and non-personal injury cases. From Figure 2.2 it can be seen that only a small proportion of personal injury cases referred to mediation responded favourably to the referral, while among non-personal injury cases there was a more positive response. Among the 216 non-PI cases automatically referred to mediation, in a little under half (45%) neither party offered any objection to mediation; in 11% of cases only the claimant objected; in 14% of cases the defendant objected; and in 13% of non-PI cases both parties objected to the mediation. In a further 13% of non-PI cases, the parties settled the case prior to responding to the ARM referral. Overall, **in some 38% of non-PI cases referred to mediation, an objection to the referral to mediation was raised by one or both parties.**

³⁵ Of these, there were 36 cases where although there was no objection, a mediation was not subsequently booked. While it is not clear from the database why this was, most of these cases settled quite quickly and it is possible that the cases settled after the parties had returned their mediation response forms, but before a mediation date was booked

The picture among personal injury cases was very different. Of the 1,016 PI cases referred to mediation during the year of the pilot, in only 10% of cases did neither party object to the referral (99 cases). In 7% of PI cases referred to mediation the claimant only objected; in 20% of cases the defendant objected; and in 47% of cases both parties objected. In a further 16% of PI cases, the case settled prior to a response to the referral being returned to the court. **Thus in three-quarters (74%) of personal injury cases automatically referred to mediation in the ARM pilot, an objection to the referral was made by one or both parties.** A detailed discussion of reasons for objection is given later in this Chapter and in Chapter 3.

Figure 2.2. Objections in personal injury and non-personal injury cases automatically referred to mediation



Response in non-personal injury cases

Table 2.3 provides the complete range of responses among non-PI cases month by month during the year of the pilot. From the Table it can be seen that over the life of the pilot, among non-PI cases the pattern of objections was rather inconsistent. During the year, there was a reasonably steady reduction in the proportion of cases in which both parties to the litigation raised objections. On the other hand, the proportion of claimants objecting appears to have been on an upward trend until a little before the pilot ended, and the proportion of cases in which neither party objected appeared to be gradually

falling. On the other hand, the small number of non-PI cases from month to month leads to rather large percentage shifts. The figures are, therefore, indicative rather than robust.

Table 2.3 Opt-out distributions for non-PI claims (n=216)

	Objections from:						Total
	None	Claimant	Defendant	Both	Settled before NR	Missing/Pending	
April 2004	8 47%	4 24%	1 6%	3 18%	1 6%	0 0%	17 100%
May	6 38%	0 0%	2 13%	6 38%	2 13%	0 0%	16 100%
June	11 55%	1 5%	3 15%	4 20%	1 5%	0 0%	20 100%
July	8 42%	1 5%	4 21%	3 16%	3 16%	0 0%	19 100%
August	16 67%	1 4%	3 13%	2 8%	2 8%	0 0%	24 100%
September	7 47%	4 27%	3 20%	1 7%	0 0%	0 0%	15 100%
October	9 45%	3 15%	3 15%	1 5%	3 15%	1 5%	20 100%
November	6 35%	1 6%	3 18%	3 18%	4 24%	0 0%	17 100%
December	4 57%	2 29%	0 0%	0 0%	1 14%	0 0%	7 100%
January 2005	9 38%	4 17%	4 17%	1 4%	6 25%	0 0%	24 100%
February	9 39%	3 13%	4 17%	2 9%	3 13%	2 9%	23 100%
March	5 36%	0 0%	1 7%	1 7%	3 21%	4 29%	14 100%
Total	98 45%	24 11%	31 14%	27 13%	29 13%	7 3%	216 100%

Response in personal injury cases

Table 2.4 below presents the pattern of objections to mediation among PI cases during the life of the pilot. From the Table it can be seen that the pattern of objections did not remain static. The rate at which both parties objected was on a downward trend until January 2005 when it began to climb again, possibly in anticipation of the end of the pilot. Similarly, the rate at which only the claimant objected appeared to be on a downward trend until January 2005 when it appeared to climb a little. The tendency for cases to settle *prior* to returning their response form showed a steady upward trend from

the beginning of the pilot beyond January 2005 when there was a dip in settlements before response. The rate at which defendants in PI cases objected to ARM showed a steady upward trend, despite a dip in objections in February 2005. **Overall, the high volume of personal injury cases in the caseload of Central London, and the consistently high rate of objections to mediation among personal injury cases, account for the relatively modest number of ARM mediations conducted during the 12 months of the pilot.**

The persistent tendency among PI defendants to opt out of the ARM pilot raises questions about the strategy adopted by institutional defendants in such cases. The vast majority of PI claims are defended by insurance companies and had insurance companies showed a greater willingness to attempt mediation, the results of the pilot scheme might have looked somewhat different. As Table 2.4 shows, in 477 of the 1,016 personal injury cases referred to mediation both parties to the case objected, representing 47% of referred PI cases. However, in another 208 cases only the defendant objected to the mediation as compared with 67 cases where only the claimant objected. In total then, excluding those cases that settled prior to replying to the referral, objections to mediation were entered by defendants in 80% of PI automatic referrals where a reply was received. The equivalent objection figure for claimants was 64%.

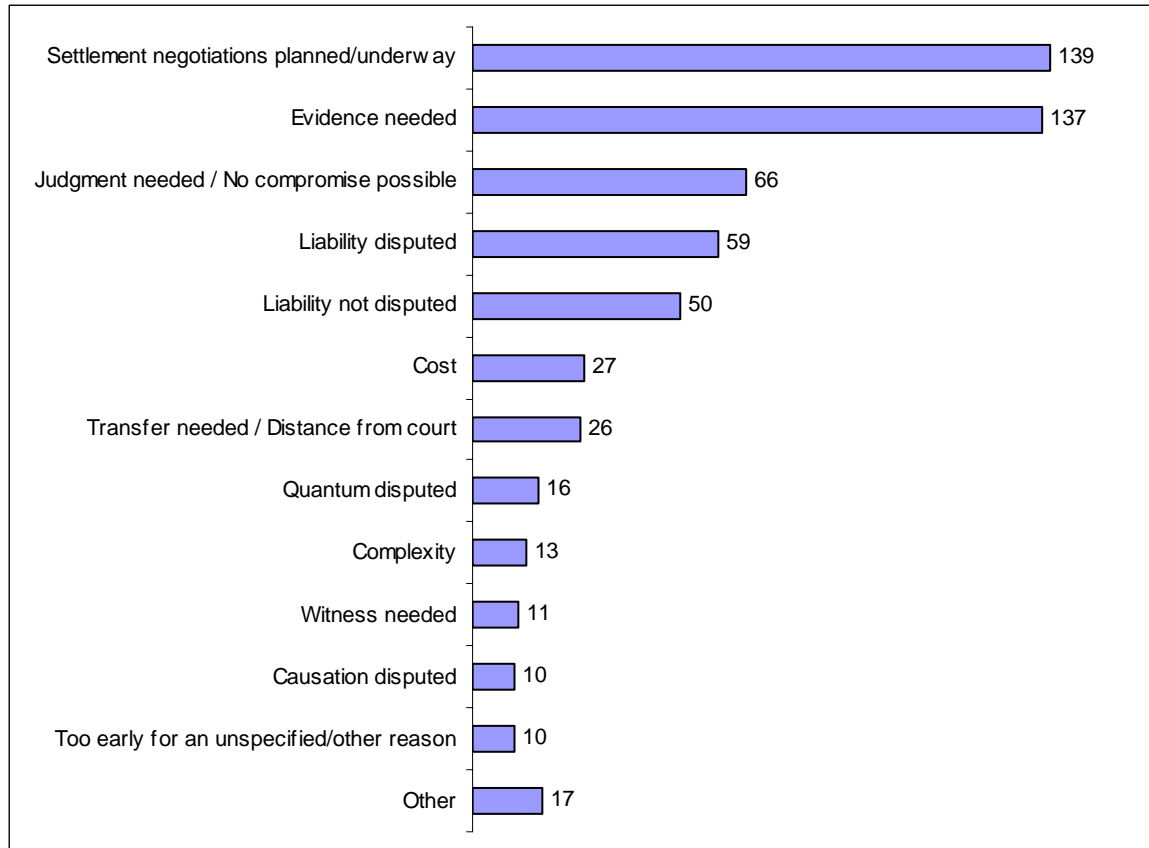
	Objections from:						
	None	Claimant	Defendant	Both	Settled before NR	Missing/Pending	Total
April	4 8%	5 10%	6 12%	31 63%	3 6%	0 0%	49 100%
May	4 6%	5 8%	13 21%	36 58%	4 6%	0 0%	62 100%
June	7 8%	7 8%	16 18%	43 49%	14 16%	0 0%	87 100%
July	12 15%	5 6%	14 17%	41 51%	9 11%	0 0%	81 100%
August	13 13%	5 5%	24 24%	48 47%	12 12%	0 0%	102 100%
September	9 10%	8 9%	20 22%	42 45%	14 15%	0 0%	93 100%
October	8 9%	9 11%	18 21%	37 44%	13 15%	0 0%	85 100%
November	11 11%	3 3%	18 17%	55 53%	17 16%	0 0%	104 100%
December	4 5%	5 6%	18 22%	31 38%	23 28%	0 0%	81 100%
January	11 16%	1 1%	23 33%	23 33%	11 16%	0 0%	69 100%
February	8 8%	7 7%	12 12%	46 47%	24 25%	0 0%	97 100%
March	8 8%	7 7%	26 25%	44 42%	19 18%	2 2%	106 100%
Total	99 10%	67 7%	208 20%	477 47%	163 16%	2 0%	1016 100%

Analysis of objections

A detailed analysis of the types of objections made to referral to mediation was conducted in 249 objecting cases, of which the vast majority (88%) were personal injury cases. Figure 2.3 shows that the most common reasons given for objection to mediation were that settlement negotiations were already underway, or that more evidence was needed before the case would be ready to be settled by mediation or otherwise. Each of these reasons for objections individually constituted about one-quarter of all objections and to some extent reflects the preponderance of PI cases within the objecting sample. The next most common reason offered (representing about 11% of all objections) was that judgment was necessary in the case or that no compromise was possible. Similar proportions of objections were based variously on the fact that liability was being disputed, or that liability was not being disputed (10% each of reasons given for

objections). Other reasons given in relatively small numbers were that the cost of mediation would be disproportionate (5%), that mediation would be inconvenient because of travelling distance to the court (4%), that quantum was in dispute (3%), or that the case was too complex to be appropriate for mediation (2%). A more detailed discussion of reasons for objecting to mediation is provided in Chapter 3, based on tape-recorded telephone interviews with objecting solicitors and parties.

Figure 2.3 Objections to ARM (n=581 reasons from 249 cases)

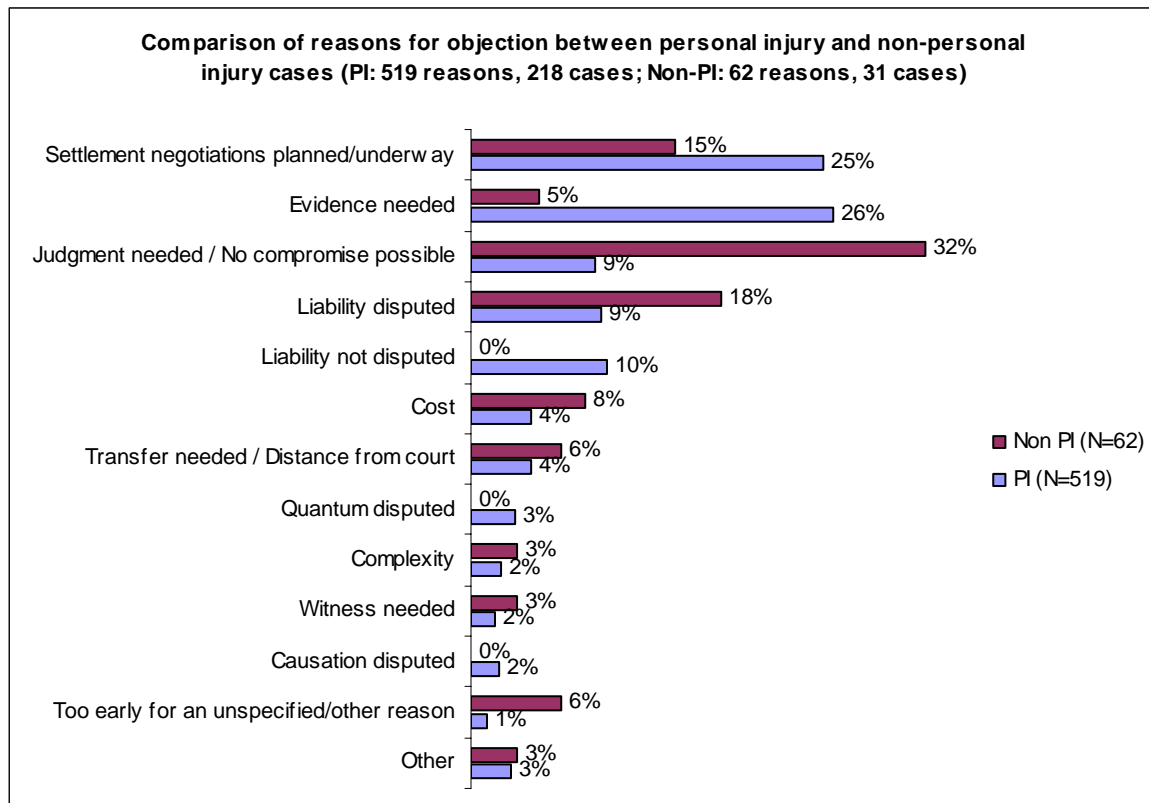


More objections were raised by defendants than claimants, but a comparison revealed few differences of any significance between claimants and defendants in the type of objections raised. **Indeed, there was a remarkable consistency in the pattern of objections from defendants and claimants.**

As mentioned earlier, most of the cases referred to mediation in the ARM pilot were personal injury cases, where objections to mediation were more likely to be raised than in non-PI cases. The tendency of PI cases to object to mediation is consistent with the findings of the 1998 evaluation of the Central London scheme, which found that “PI

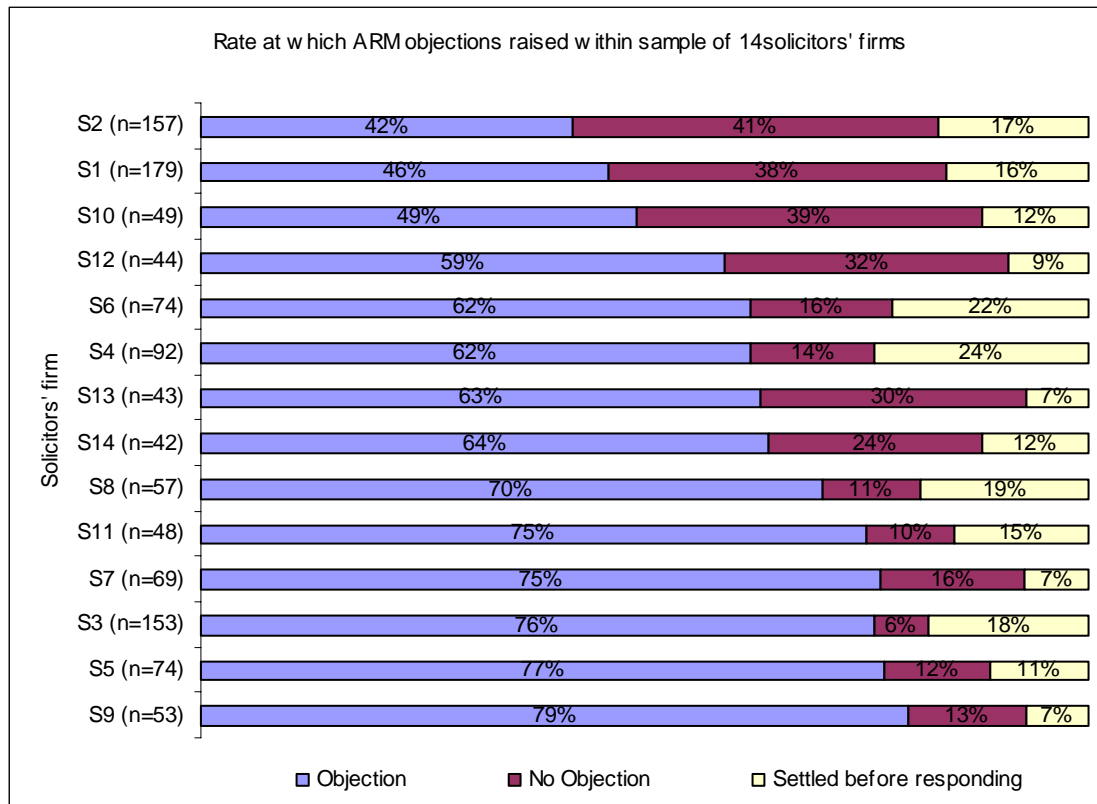
*cases overwhelmingly and persistently rejected mediation offers.*³⁶ Figure 2.4 compares the reasons for objecting to ARM among personal injury and non-PI cases. The Figure shows a distinct and significant difference in the pattern of objections related to case type. In personal injury cases, the most common reasons given for objecting to mediation were that settlement negotiations were already underway or that more evidence was needed. In non-PI cases, however, the most common reason for objecting was that judgment was needed or that there was no possibility of compromise. The next most common reason for objecting among non-PI cases was that liability was disputed. These differences are consistent with later findings of multivariate analyses that non-personal injury cases are more likely to lead to trial than personal injury cases. Given the generally higher propensity of non-personal injury cases to agree to mediation, this suggests that those non-PI cases (where objections were raised) reflected a greater contentiousness and perhaps genuine sense that compromise might not have been possible at mediation.

³⁶ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, MoJ Research Series 5/98, p147.

Figure 2.4 Reasons for objection between personal injury and non-PI cases

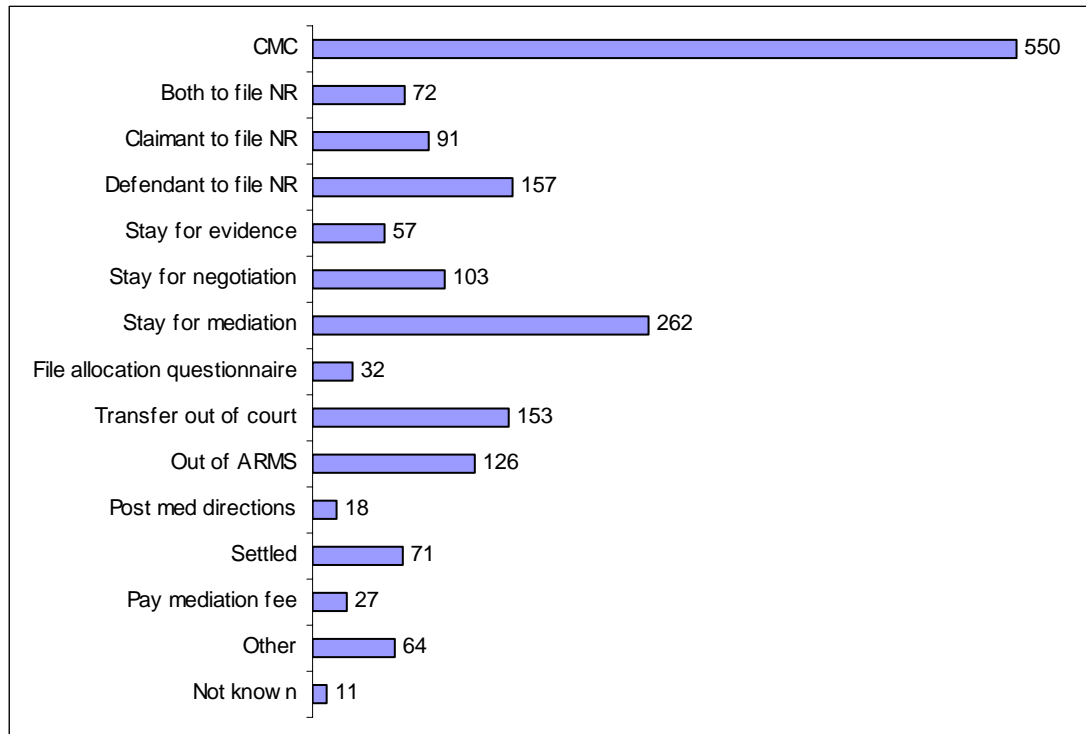
Approach of the legal profession to ARM

In order to assess the extent to which firms of solicitors were making individualised decisions about cases and the extent to which they might be entering blanket objections to mediation, an analysis was conducted of 14 firms which had a significant number of cases referred to mediation in the ARM pilot. Figure 2.5 shows that although firms tended to enter objections in the majority of their ARM cases, it also shows some differences between firms in the rate at which objections were entered. For example, firms S3 and S5 entered an objection in about three-quarters of the cases that were referred to mediation under ARM and firm S9 entered objections in about 80% of cases that were referred under the ARM pilot. Firms S1 and S2, on the other hand, entered objections in a little under half of the cases referred to mediation. The discussion in the next Chapter provides more insights into solicitors' attitudes toward ARM and their reasons for raising objections to mediation. The majority of those interviewed had little hesitation in objecting to mediation, did not see the ARM referrals as "compulsory" and did not appear to engage in lengthy discussions with clients about the possibility of mediating.

Figure 2.5 Proportion of ARM objections raised among solicitors' firms

Procedure following objections

During the ARM pilot, objections to referral were dealt with by a single District Judge assigned to the pilot scheme, who had responsibility for reviewing objections and making decisions as to how cases should proceed thereafter. The normal practice was for the judge to consider the objection in the context of the material on the court file and then make an appropriate order. Between April 2004 and October 2005 when data collection on orders ceased, the District Judge had made 1,794 orders in relation to ARM cases. Some 374 of these were made after case management conferences (either in person or by telephone with parties and/or their representatives) and 1,420 followed an examination of the papers. Figure 2.6 shows the type and volume of orders made by the District Judge between April 2004 and October 2005. If parties did not object to mediation the judge would in any case have sight of the file to grant the required stay for the mediation to proceed, which explains the large number of cases in which a stay for mediation was ordered.

Figure 2.6 Orders made by the District Judge in ARM cases (April 2004-October 2005)

Impact of objections conferences on take-up of mediation

During the 12-month pilot, the District Judge at Central London responsible for dealing with ARM objections held case management conferences in 331 cases, 321 of which involved cases in which one or more party had raised an objection to the ARM referral.³⁷ This resulted in a total of 92 mediation bookings following a case management conference. Of these bookings, 85 involved objections to ARM, representing some 26% of objecting cases dealt with at conferences.³⁸ In the event, 46³⁹ mediations actually took place as a result of objection case management conferences, representing 14% of case management conferences dealing with objections. Table 2.5 shows that the proportion of cases in which a CMC dealing with objections resulted in a mediation booking fluctuated during the course of the year. The high point occurred in August

³⁷ There were 26 cases for which objections were received but although there was no CMC, a mediation was booked. For these cases, there may have been discrepancies in the database e.g. CMCs could have occurred in these cases but the fact was not recorded by the court, or before a CMC took place the parties may have withdrawn their objection, although again this may not have been recorded.

³⁸ This 85, plus the 197 cases where there were no objections leads to a total of 282. A total of 273 mediation bookings is discussed in this chapter as there are nine cases for which the information on whether there were objections or not was missing from the case file and CaseMan.

³⁹ Eight cases where objections were raised appear to have proceeded to mediation without a case management conference taking place. Thus the total number of mediations occurring after an objection was raised was 54.

2004, when CMCs led to mediation bookings in 21 out of 46 objecting cases (46%). However, from August 2004 onwards, the trend was downward reaching a low of 6% in February 2005. In the majority of cases each month, and over the pilot as a whole, **case management conferences dealing with objections did not tend to result in mediations taking place**. This suggests that the District Judge had limited success in persuading parties to attempt mediation or that she did not seek to do so, having heard the objections and arguments supporting the objection. Alternatively, following the case management conference, the parties simply settled the case without ever booking a mediation.

Referral month	Cases with CMC hearings	Mediation booking following CMC	Percentage of CMC cases in which a mediation booking followed
April 2004	16	6	38%
May	22	7	32%
June	35	13	37%
July	29	8	28%
August	46	21	46%
September	31	8	26%
October	34	8	24%
November	39	7	18%
December	14	3	21%
January 2005	25	2	8%
February	16	1	6%
March	14	1	7%
Total	321	85	26%

The most common orders made after a CMC were the transfer of the case out of ARM (20% of orders), a stay of proceedings for the parties to negotiate (20%), a stay of proceedings for the parties to mediate (19%) or a stay of proceedings for evidence to be gathered (14%). The nature of the orders made suggests that the judge was accepting arguments variously that the case was unsuitable for mediation (ordered out of ARM); the parties were close to settlement in any case (stay for negotiation); or that the referral to mediation was too early and that it was necessary for some or further evidence to be collected (stay for evidence to be gathered). **In about one in four case management conferences, the judge either persuaded or coerced the parties to book a mediation date. But only 14% of objection conferences resulted in a mediation**

actually taking place. There is therefore a policy question as to whether the activity devoted to case management conferences dealing with objections was time well spent. If measured in terms of the number of cases subsequently proceeding to mediation, the reward for the effort was certainly modest. From the point of view of parties and their solicitors, attending a case management conference, either in person or on the telephone, might be seen as an additional cost, the benefit of which is unclear if the objection was merely accepted by the District Judge.

Delay between automatic referral and mediation booking

An analysis of delay between referral to mediation under ARM and the date of the mediation booking (where one was made) comparing cases with and without objection conferences, shows that objections to mediation and subsequent case management conferences introduced considerable delay into the process. For cases without a CMC, the median delay between the notice of referral to mediation being sent to the parties and the date booked for mediation was 86 days, ranging from 41 to 381 days. However, where there was a CMC the median number of days from the date of referral to the date of the mediation booking was 242, ranging from 47 to 497 days (Figure 2.7).

Figure 2.7 Delay from referral to mediation comparing cases with and without CMC

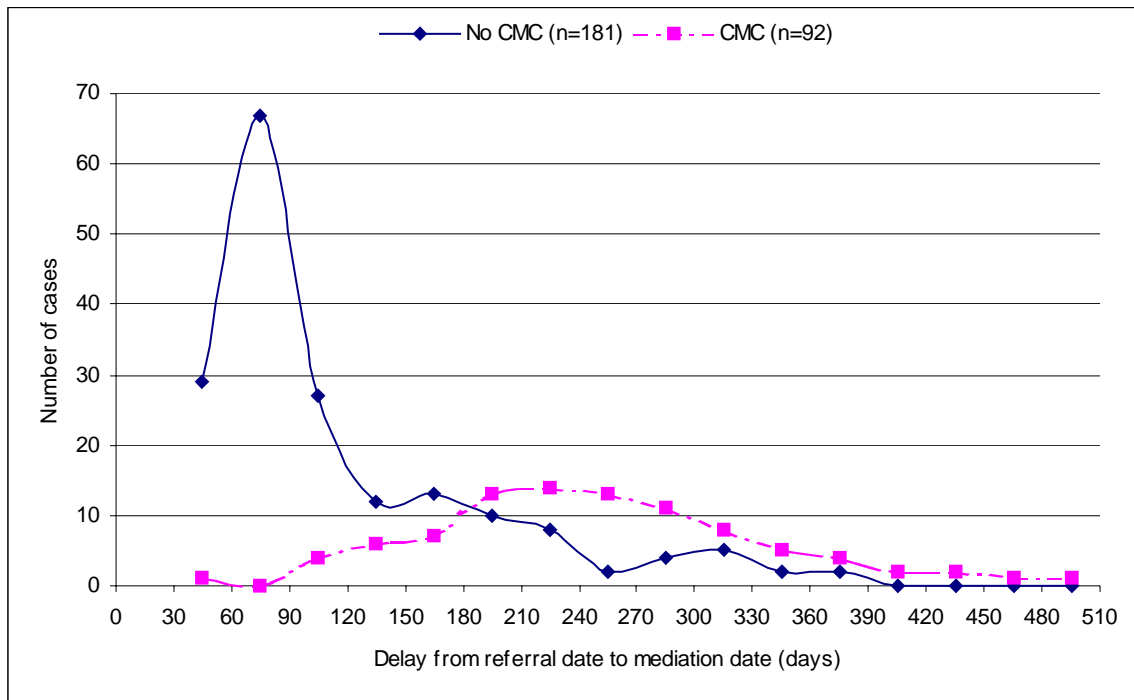
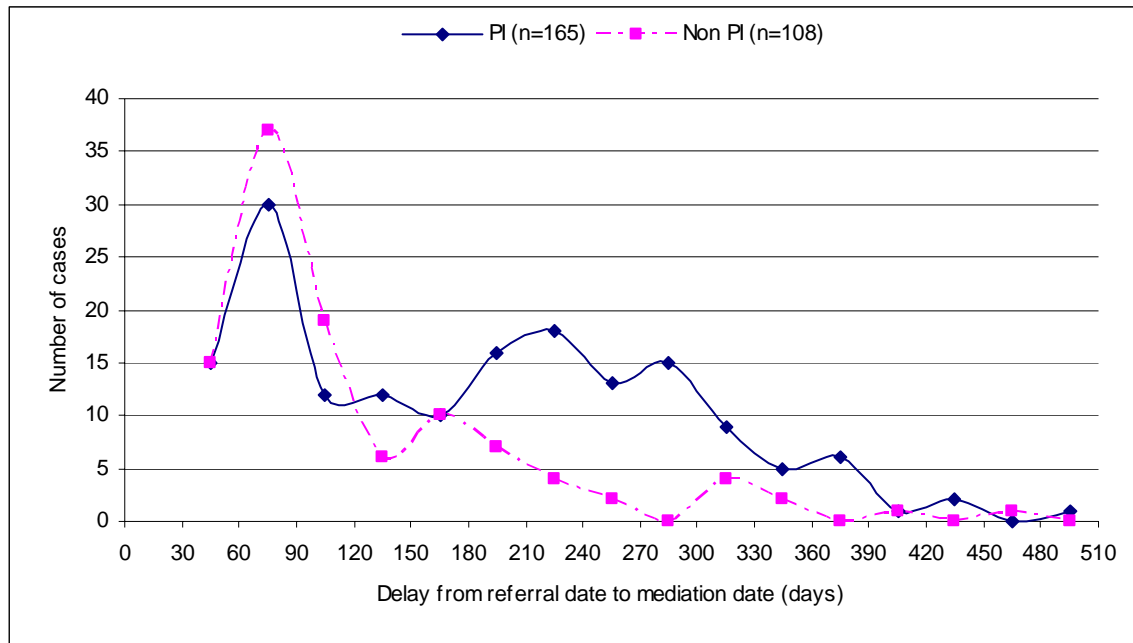


Figure 2.8 repeats the analysis of delay from date of referral to mediation booking, comparing personal injury and non-PI cases. The graph shows that in a relatively high proportion of personal injury cases there was a significant delay between referral and mediation booking and that this occurred in a higher proportion of PI cases than non-PI cases. Those non-PI cases that proceeded to mediation tended to do so, on the whole, more quickly after referral than personal injury cases. The estimate of the delay that appeared to arise in the processing of mediated cases is discussed further at the end of the Chapter, in connection with the results of multivariate analysis of the impact of mediation case-disposition times.

Figure 2.8 Delay from referral to mediation comparing PI and non-PI cases



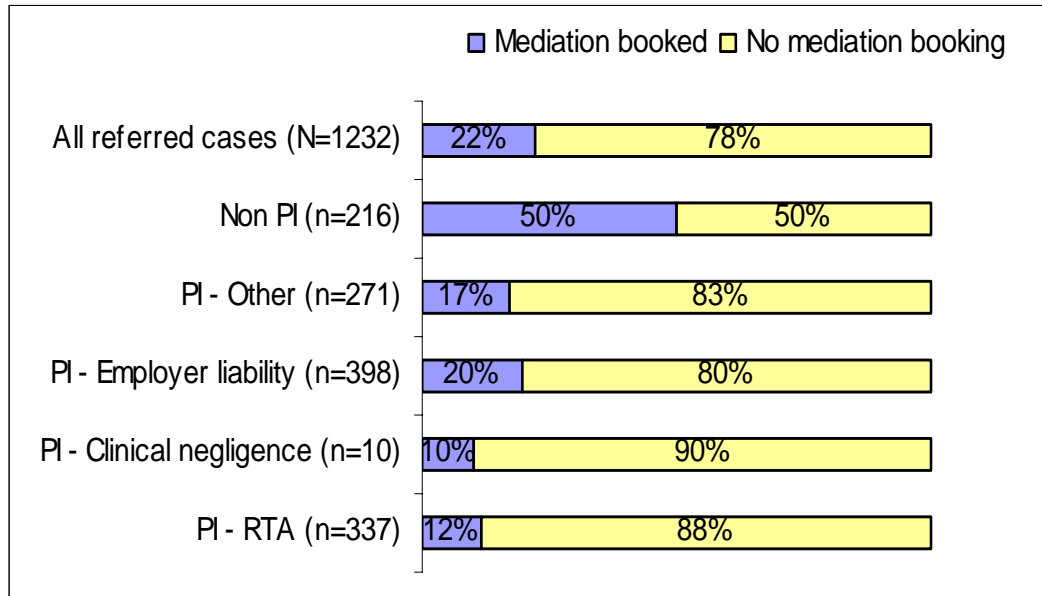
Characteristics of cases mediated under ARM

Case type and mediation bookings

The proportion of mediations booked in the ARM pilot varied significantly depending on case type, as shown in Figure 2.9. About 16% of the 1,016 personal injury cases referred to mediation had a mediation date booked by the end of the data collection period. This can be compared with 50% of non-PI cases referred under the ARM pilot. There was, however, a small difference between the various categories of personal injury cases. Employers' liability cases were the most likely category of personal injury

case to book a mediation (20%) as compared with 17% among PI-other and 12% of road-traffic personal injury cases.

Figure 2.9 Mediation bookings by case type

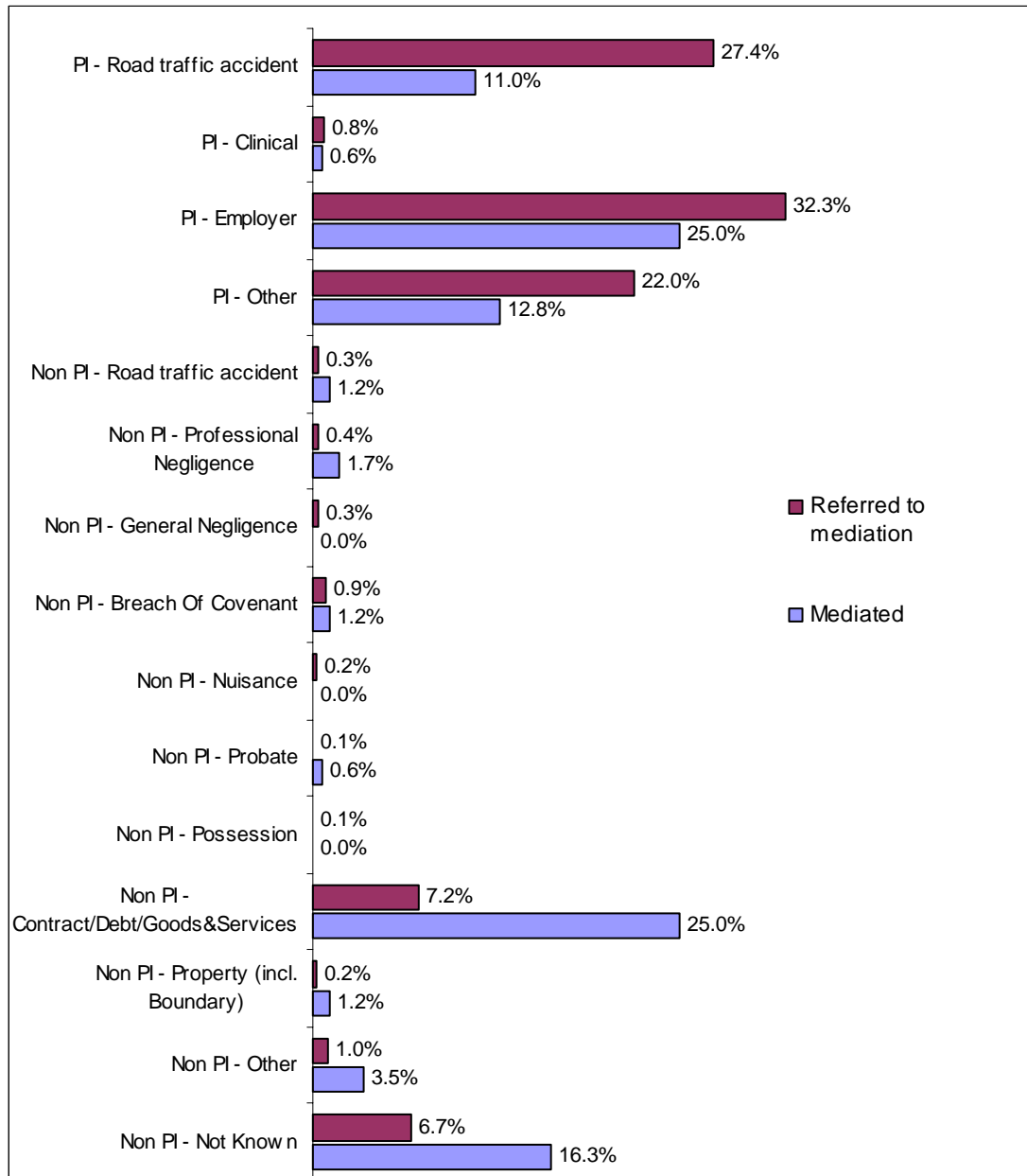


Case type of mediated cases

Even after mediations had been booked, there was an attrition of ARM cases, with some cases cancelling before the mediation for various reasons and some cases settling before attending the mediation session. Figure 2.10 shows the final breakdown of the case types of mediated cases in relation to the proportion of cases initially referred to mediation. The Figure shows the variation in response to ARM between different categories of personal injury case. For example, referred cases involving employers' liability were the most likely category of personal injury case to proceed with mediation, whereas road traffic accident cases were much less likely mediate.

Although the numbers are small, the variation in response between different categories of non-PI case is also shown in Figure 2.10. This suggests that, aside from breach of contract and debt, most other types of non-PI case were more inclined to proceed to mediation than personal injury cases. For example, boundary disputes and professional negligence cases were over-represented among mediated cases as compared with the proportion referred to mediation under ARM.

Figure 2.10 Case types of mediated cases (n=172) compared with those referred to mediation in ARM pilot (n=1,232)

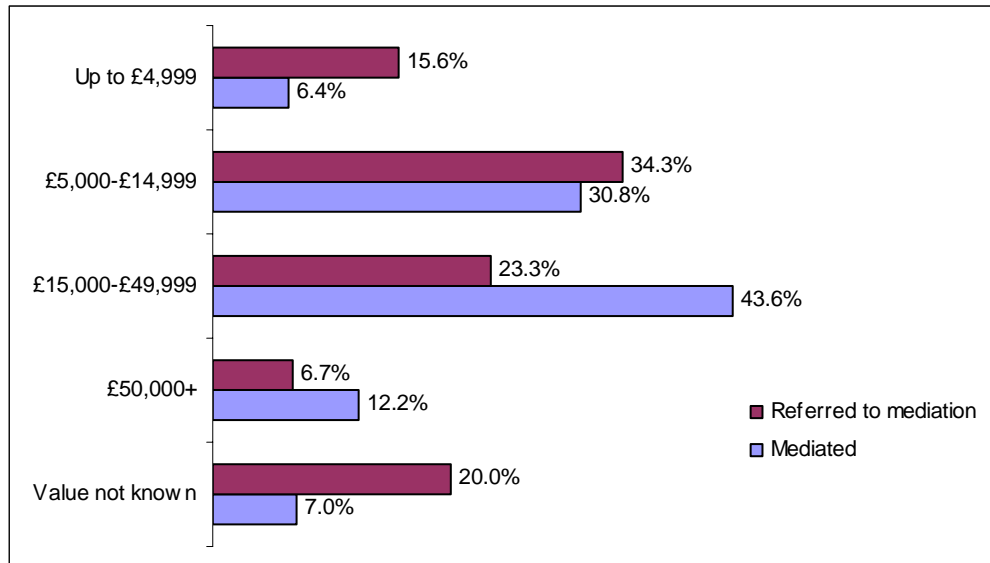


Claim value of mediated cases

There was also variation in the tendency of cases with different claim values to proceed to mediation. Figure 2.11 shows that high-value cases were disproportionately likely to proceed to mediation as compared with the proportion referred to mediation. While cases with a value below the fast track (under £5,000) represented about 16% of those referred to mediation under ARM, they accounted for only 6% of cases eventually

mediated. On the other hand, while cases with a multi track value over £15,000 represented less than one-third of cases referred to mediation under ARM, they constituted about 56% of mediated cases. The propensity of cases with high values to opt for mediation is discussed later in the Chapter in relation to the results of multivariate analysis.

Figure 2.11 Claim value of mediated cases (n=172) compared with those referred to mediation in ARM pilot (n=1,232)

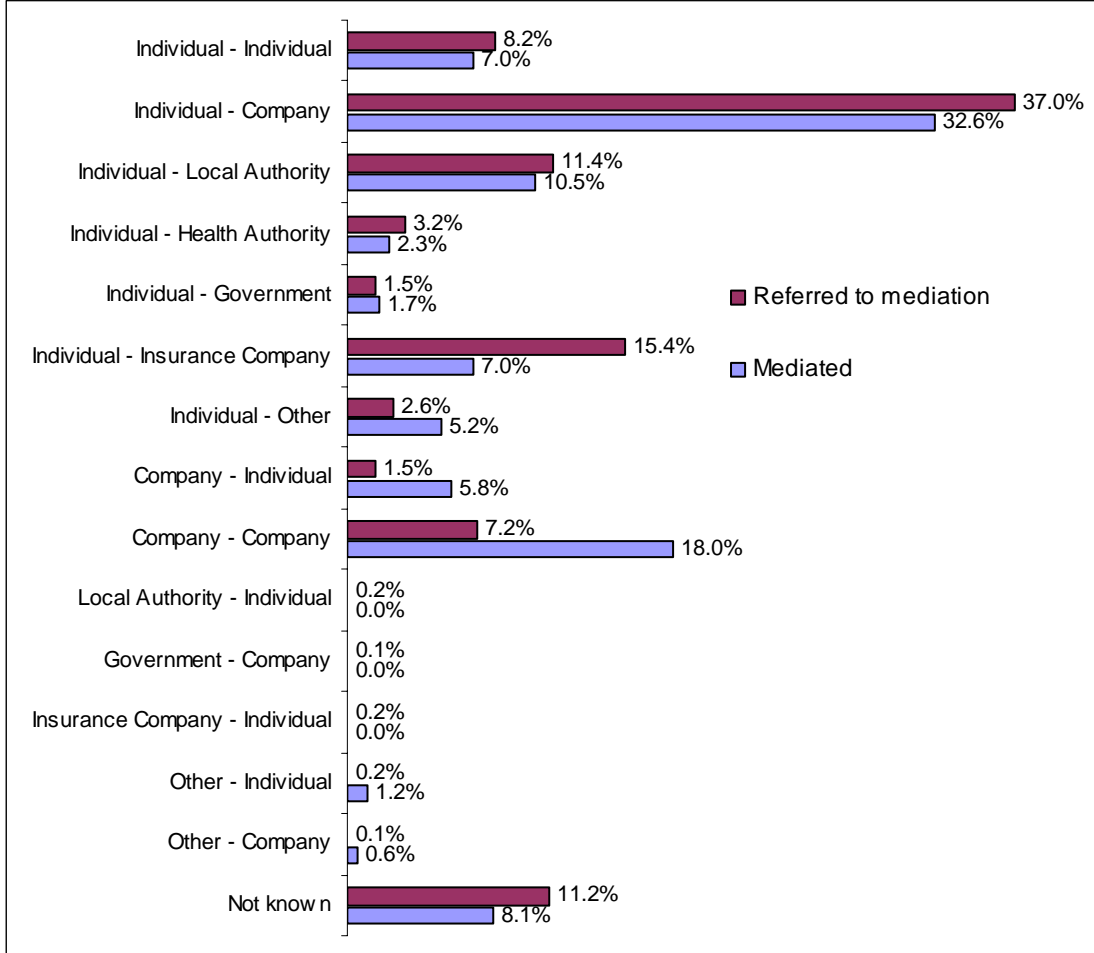


Configuration of parties in mediated cases

The configuration of parties involved in mediated cases reflects the pattern of case types proceeding to mediation (Figure 2.12). Consistent with other evaluations of court-related mediated schemes⁴⁰, company v company disputes were disproportionately likely to proceed to mediation as compared with the proportion referred to mediation under ARM, while cases involving individuals suing insurance companies were disproportionately **unlikely** to proceed to mediation.

⁴⁰ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98; Lisa Webley, Pamela Abrams and Sylvie Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme, Report to Department for Constitutional Affairs*, September 2006, <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf>; Sue Prince and Sophie Belcher, *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* <http://www.dca.gov.uk/civil/adr/fast-track-mediation-guildford-exeter.pdf>.

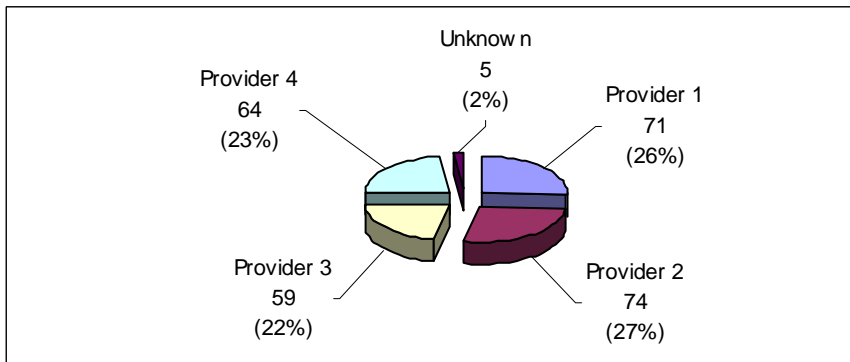
Figure 2.12 Configuration of parties in mediated cases (n=172) compared with those referred to mediation in ARM pilot (n=1,232)



Distribution of cases among mediation providers

The system of allocating bookings to provider organisations within the ARM pilot resulted in a roughly equal share, as shown Figure 2.13. There was no difference in the case mix between personal injury and non-PI cases dealt with by the four providers.

Figure 2.13 Mediation providers' share of mediation bookings (n=273)



Outcome of ARM mediation bookings

Between April 2004 and January 2006, 273 ARM mediation bookings were made, although only 172 mediations eventually took place (Figure 2.14). Of the 172 cases that were actually mediated between April 2004 and January 2006, 91 cases (or 53% of mediated cases) settled at the mediation and 81 cases failed to settle (47% of mediated cases). The settlement rate obtained among ARM mediated cases was lower than the 62% obtained in the Central London voluntary mediation scheme between 1996 and 1998⁴¹. On the other hand, it compared favourably with the settlement rate in the Central London voluntary mediation scheme since 1998, which has hovered at just below 50% for several years, plunging to a low of 39% in 2003. In 2004, the VOL mediation settlement rate was 45% and for the period January to November 2005 was 40%. The fact that the settlement rate in the ARM pilot during 2004–5 actually **exceeded** that in VOL scheme lends some support to the contention in Chapter 1 that the ARM cases going forward to mediation had more in common with VOL cases than cases being compelled to mediate. It is also possible that a **lower** proportion of cases were being pressed unwillingly into mediation in the ARM pilot than was the case in the VOL scheme between 1999 and 2004–5. The evidence discussed later in Chapters 4 and 5 suggests that many VOL cases had been directed to mediate by judges in Central London or elsewhere, or were unwillingly mediating to avoid possible costs penalties under the *Dunnett/Hurst pre-Halsey* judicial policy climate. The mediation settlement rate among ARM cases at 53% was, however, lower than that found in the recent evaluation of the mediation scheme in Birmingham, where 64% of 282 cases mediated between 2001 and 2004 settled at the mediation and where cases appeared to be entering the scheme more often on the basis of self-referral rather than judicial suggestion.⁴² Comparing the ARM settlement rate with that reported in the recent evaluation of the mediation schemes in Exeter and Guildford, it appears that the ARM settlement rate at mediation was higher than that at Exeter, which had a settlement rate of 40% (out of 86 cases mediated between March 2003 and February 2005), and lower

⁴¹ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98, p44.

⁴² Lisa Webley, Pamela Abrams and Sylvie Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme, Report to Department for Constitutional Affairs*, September 2006, p.44; <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf>.

than that at Guildford, where the settlement rate was 56% (out of 49 cases mediated between March 2003 and 2005).⁴³

Not all of the cases where a mediation booking was made actually resulted in a mediation taking place. In 68 ARM cases (25% of mediation bookings), the mediation was cancelled before the mediation took place, with an indication that the case had settled prior to the mediation. In another 25 cases (9% of mediation bookings), the mediation was cancelled for some reason other than settlement, and in eight cases (3% of mediation bookings) the case was still pending or the outcome was unknown at the completion of the research.

Figure 2.14 Outcome of ARM mediation bookings (n=273)

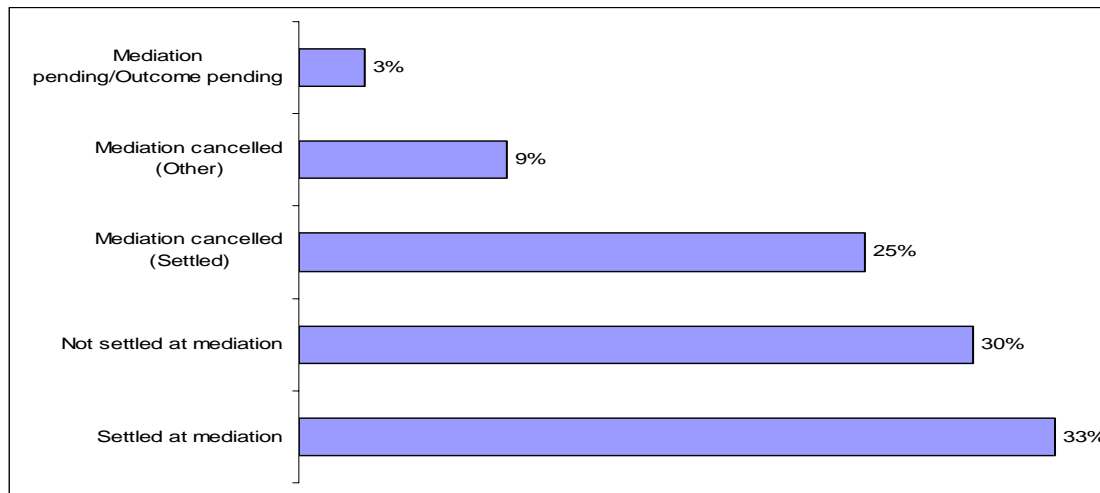


Table 2.6 displays the outcome of mediation bookings month by month for the 12 months of the ARM pilot. The Table shows that there was some increase in the number of mediations booked between June and November 2004, but then the number declined again toward the end of the mediation pilot. This fall-off in the number of mediation bookings may reflect in part the delay between the date of referral and setting the mediation date. Some of the cases referred to mediation in the latter months of the pilot might have had mediation dates booked after the end of the data collection period. Certainly, however, **the distribution of mediation bookings during the year of the pilot scheme does not suggest any significant increase in the take-up of**

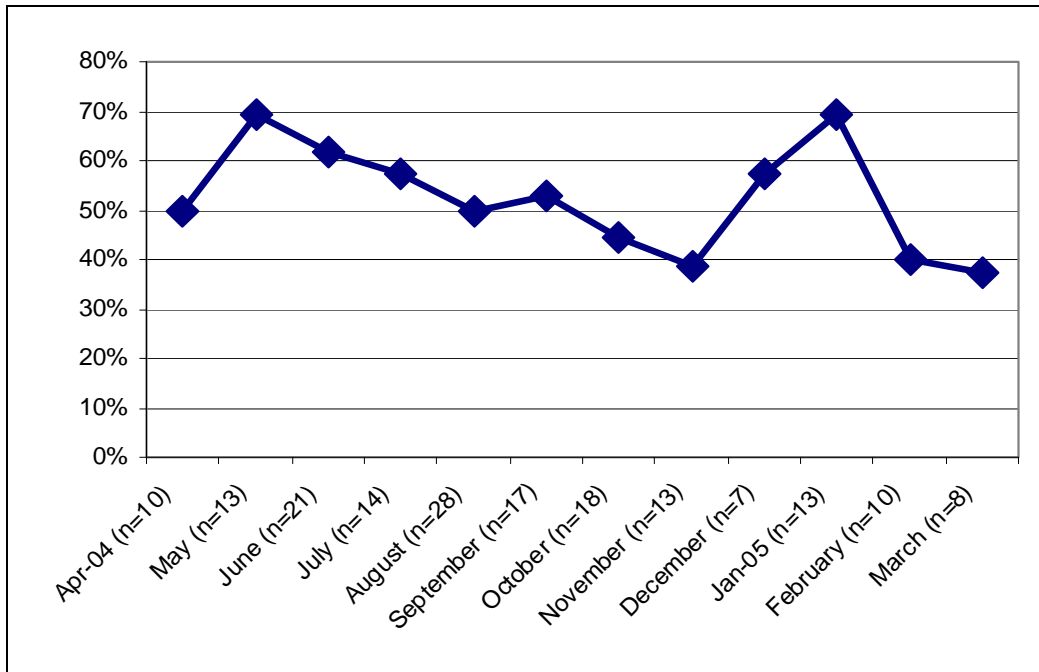
⁴³ Sue Prince and Sophie Belcher, *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* <http://www.dca.gov.uk/civil/adr/fast-track-mediation-guildford-exeter.pdf>.

mediation or acceleration in the speed with which mediation dates were set after the initial referral to mediation.

Table 2.6 Outcome of mediation appointments in January 2006 by month of referral

Month in which case referred to mediation	Total number of mediation bookings	Settled at mediation	Not settled at mediation	Mediation pending	Mediation cancelled due to independent settlement	Mediation cancelled for other reason
April 2004	15	5	5	0	4	1
May	19	9	4	0	5	1
June	30	13	8	0	8	1
July	24	8	6	0	6	4
August	48	14	14	1	18	1
September	24	9	8	0	4	3
October	24	8	10	2	3	1
November	22	5	8	0	5	4
December	16	4	3	0	5	4
January 2005	18	9	4	1	2	2
February	17	4	6	2	4	1
March	16	3	5	2	4	2
Total	273	91 (33%)	81 (30%)	8 (3%)	68 (25%)	25 (9%)

Figure 2.15 displays the percentage of cases mediated that settled at mediation by month of referral. The Figure show that, with some variation as a result of small numbers in some months, **the settlement rate at mediation over the course of the 12 months was on a broadly downward trend** from a high of 69% for cases referred to mediation in both May 2004 and January 2005, to a low of just below 38% for cases referred to mediation in March 2005. The month in which the largest number of mediations referred took place was August 2004, when the settlement rate at mediation was 50%.

Figure 2.15 ARM mediated cases settling by month of referral

Outcome of mediations following objection

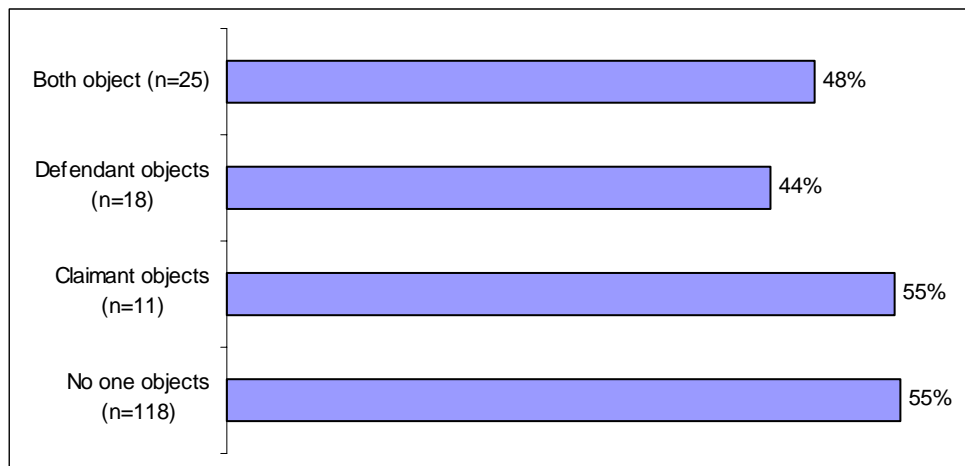
Despite objections to ARM being entered by one or more parties, some cases nonetheless went on to book mediation appointments, generally as a result of persuasion by the District Judge at the court⁴⁴. Of the 273 mediation bookings, 111 or 41% involved cases where at least one objection to referral had initially been entered. Mediation bookings were made in 21 cases where the claimant alone had objected; 45 cases where the defendant alone had objected; and 45 cases where both parties had initially entered an objection to the referral to mediation. **In the event only 54 of these cases actually proceeded to a mediation appointment.** Of the remainder, 34 settled the case prior to the mediation appointment, 15 cancelled for another reason, and eight cases were still pending at the end of data collection.

Among those cases that proceeded to mediation following an initial objection, the overall settlement rate was 48%, some 5% lower than the overall settlement rate for ARM cases of 53%. Among the 54 mediations where objections had been raised, 45 were PI cases, which had a success rate of 53% and nine cases were non-PI, where the settlement rate was only 22%. Although the numbers are rather small, a comparison of outcome at

⁴⁴ Of the 111 objecting cases in which a date for mediation was booked, a case management conference was held in 85. 26 objecting cases booked a mediation date, apparently without a case management conference occurring.

mediation related to which side in the dispute raised the objection, shows that where the objection was raised only by the claimant, the settlement rate at mediation was 55%. Where the initial objection was raised by the defendant the settlement rate at a subsequent mediation was 44%. **Where a mediation followed objections by both parties, the settlement rate at mediation was 48%** (Figure 2.16). The settlement rate at mediation following objections is interesting. On the one hand, it shows that **when people are forced to mediate against their preference a little under half eventually settle at the mediation**. On the other hand, a little over half did **not settle** and this is relevant in policy terms unless it appears that some benefit was gained from the mediation that could be offset against the potential cost of the unsuccessful mediation and any consequent delay.

Figure 2.16 Cases settling at mediation in relation to initial objections



Of the 26 cases originally objecting to ARM which ultimately proceeded to mediation and settled at the mediation appointment, the majority (15) were employers' liability personal injury cases, nine were other personal injury cases and only two were non-personal injury cases

Among the 28 originally objecting cases that did **not** settle at mediation, one case was ultimately withdrawn, one case settled within 14 days of the mediation, four cases had gone to trial by the end of the data collection period, 11 cases settled at some time later than 14 days after the mediation, eight cases were still pending in January 2006, and three cases had been transferred out of the court. The high proportion of cases within this group that went on to trial (14%) or were still pending at the end of the data

collection (28%) is suggestive of contentiousness, perhaps reflected in the original objection to mediation. Table 2.7 shows the date of referral, case type, value and outcome of the 12 objecting cases that went to mediation, but which were not settled by the end of data collection in January 2006. The Table shows that eight of these 12 cases (67%) were personal injury cases.

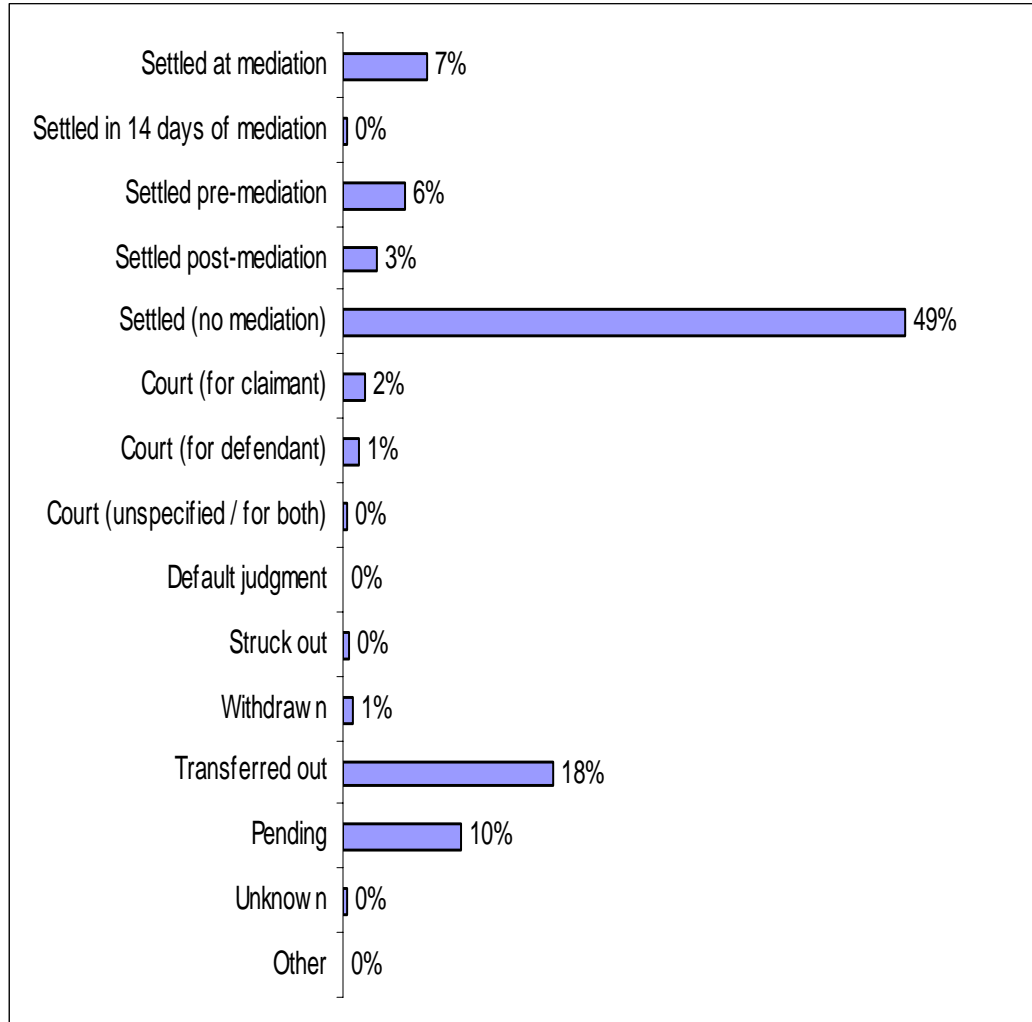
Referral month	Case type	Value band	Final outcome
May 2004	Non PI - Not known	£15,000-£50,000	Court for defendant
June 2004	Breach of covenant	£15,000-£50,000	Pending
July 2004	PI - Clinical negligence	£5,000-£15,000	Court for claimant
August 2004	PI - Employer liability	£5,000-£15,000	Court for claimant
August 2004	PI - Employer liability	£15,000-£50,000	Pending
August 2004	Non PI - Not known	Up to-£5,000	Pending
August 2004	PI - Employer liability	£15,000-£50,000	Pending
September 2004	Contract/Goods & services	£5,000-£15,000	Court for unspecified
October 2004	PI - Employer liability	£15,000-£50,000	Pending
October 2004	PI – RTA	£5,000-£15,000	Pending
December 2004	PI – RTA	Up to £5,000	Pending
March 2005	PI - Employer liability	Not Known	Pending

Final outcome of ARM cases

Figure 2.17 presents the final outcome of all cases referred to mediation under the ARM pilot as at January 2006. The Figure shows that 10% of referred cases were still pending in January 2006. In order to establish the final outcome of ARM cases with greater precision a longer follow-up period is necessary. However, on the basis of the information available, **among concluded cases, the vast majority of ARM cases settled without ever going to mediation**, representing about half (49%) of all ARM cases. Some 18% of cases automatically referred to mediation were transferred out of the ARM pilot by the District Judge. Ninety-one cases or 7% of all ARM referrals settled at mediation, with a further five (less than 1%) settling within 14 days of the mediation and another 37 cases (3%) settling some time later post-mediation. Sixty-eight cases that had been given a date for mediation settled prior to the mediation date (6% of all referrals). Forty-four cases went on to trial (4% of all referrals) and a handful of cases

were withdrawn or struck out. The impact of mediation on final disposition of cases in terms of time to conclusion and method of resolution is discussed in the section below on multivariate analysis.

Figure 2.17 Final outcome of all ARM cases referred to mediation (n=1,232)



Final outcome of ARM cases with mediation bookings

Of 273 ARM mediation bookings, one-third (33%) settled at the end of the mediation, 2% settled within 14 days of the mediation, and another 14% settled some time after that (Figure 2.18). In about one-quarter of ARM mediation bookings the case settled prior to the mediation appointment. In 4% of ARM mediation bookings the case ultimately went on to trial and a handful were transferred out of the court or struck out. However, 15% of

ARM cases (where a mediation date had been booked) were still pending at the end of data collection in January 2006.

Figure 2.18 Final outcome of ARM cases where mediation date booked (n=273)

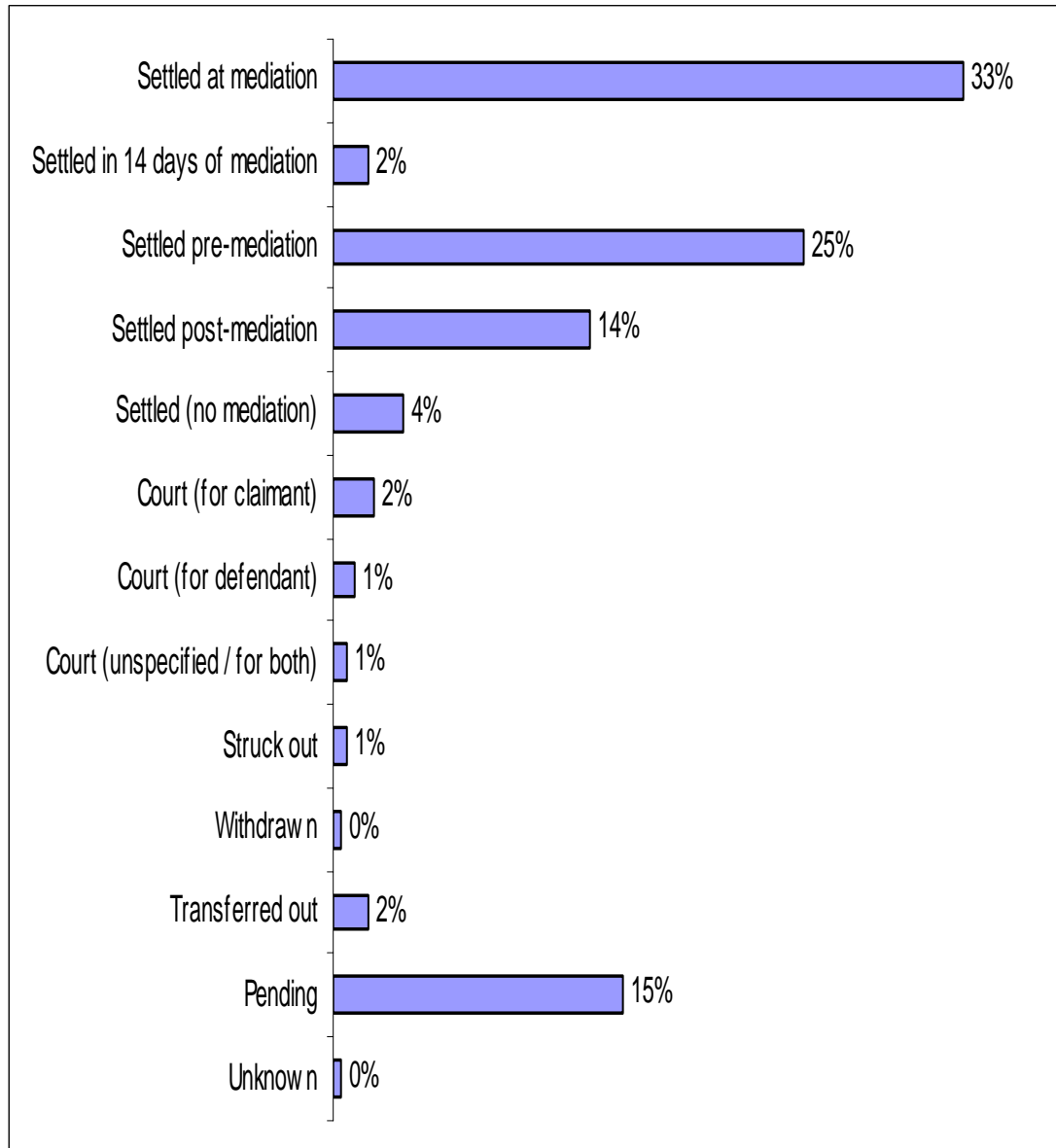
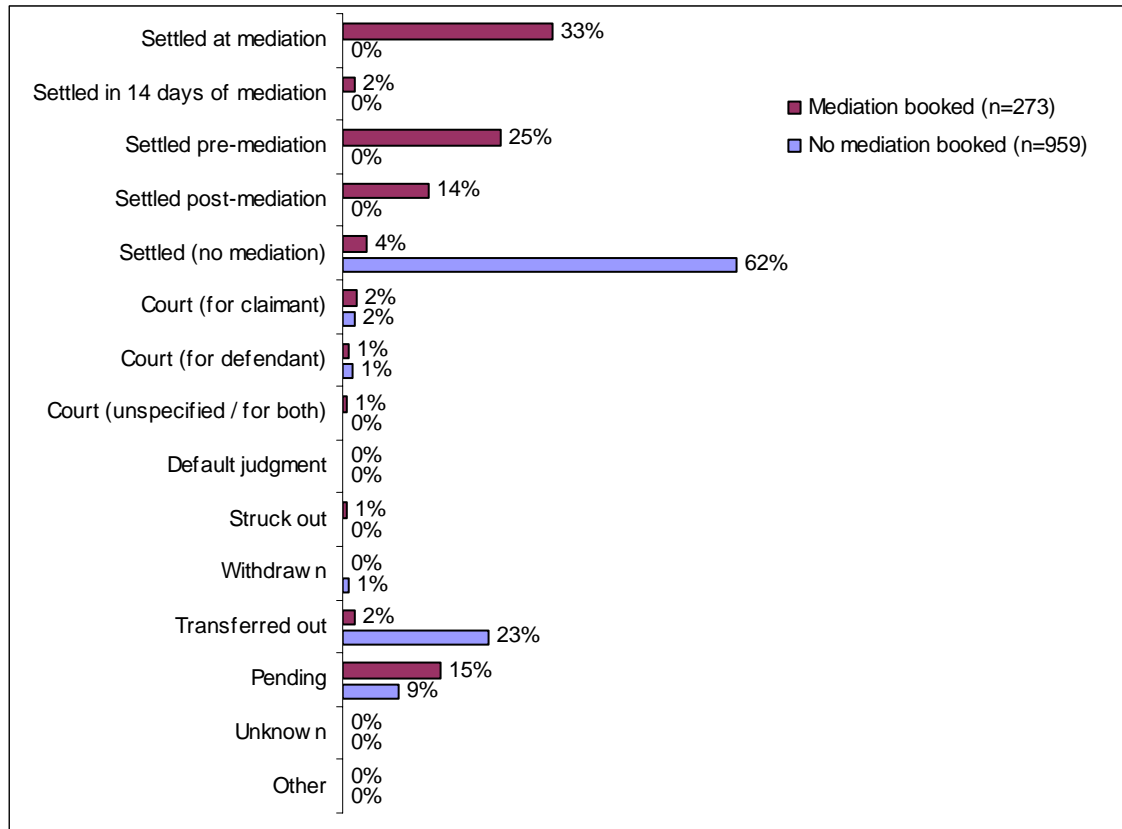
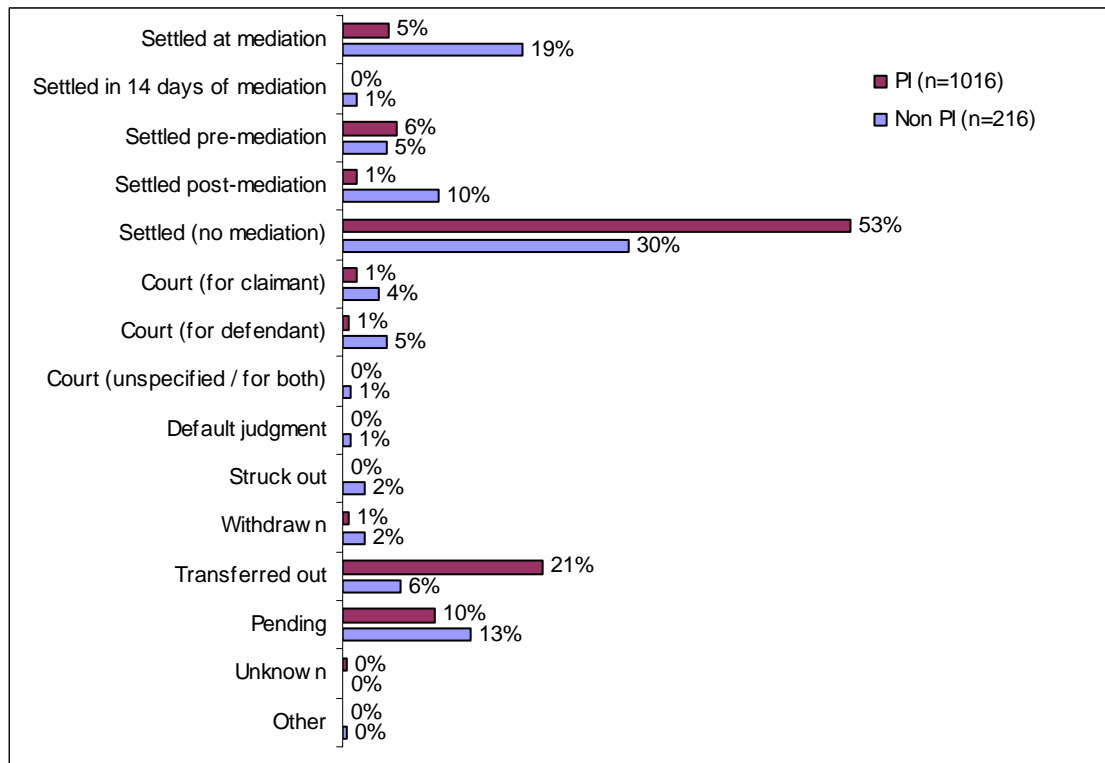


Figure 2.19 displays the final outcome of ARM cases comparing those where a mediation had been booked and those where no booking was made. Aside from the obvious difference in whether or not a mediation occurred, there is little difference in the final outcome, although a significant number of cases were still pending at the end of data collection (including those cases that were transferred out of the court), and it is possible that some of those would eventually have gone to trial.

Figure 2.19 Final outcome of ARM cases by whether or not a mediation was booked

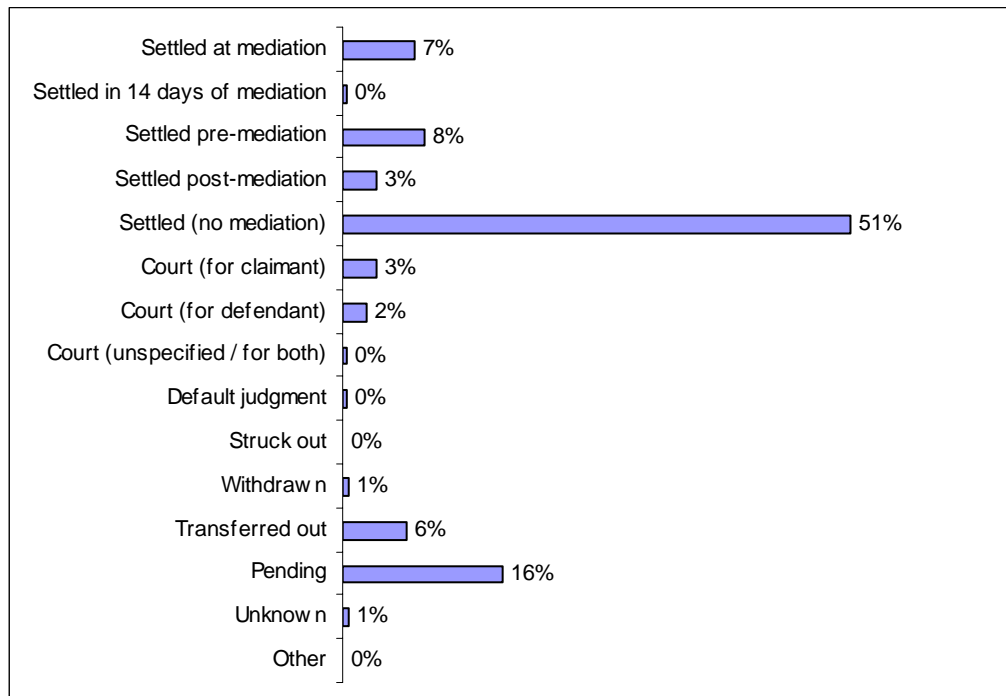
Difference between PI and non-PI in outcome

Figure 2.20 compares the final outcome between personal injury and non-personal injury cases. The most striking difference is in the proportion of cases transferred out of the ARM pilot among personal injury cases. This appears to be the result of the District Judge either accepting that the case was not suitable for ARM or the result of the parties arguing that the case should be transferred to another court. The other significant difference, to be expected from the course of the pilot, is the proportion of cases that settled at mediation among non-PI cases and the proportion settled without mediation among personal injury cases. The Figure confirms the high settlement rate among personal injury cases and suggests that the ARM pilot has had relatively little impact in shifting the traditional pattern. **The response of personal injury cases to the automatic referral to mediation and the final outcome of such cases raise policy questions about the value of the ARM referral to the very substantial number of personal injury cases defended in Central London.**

Figure 2.20 Final outcome of ARM cases comparing PI and non-PI cases

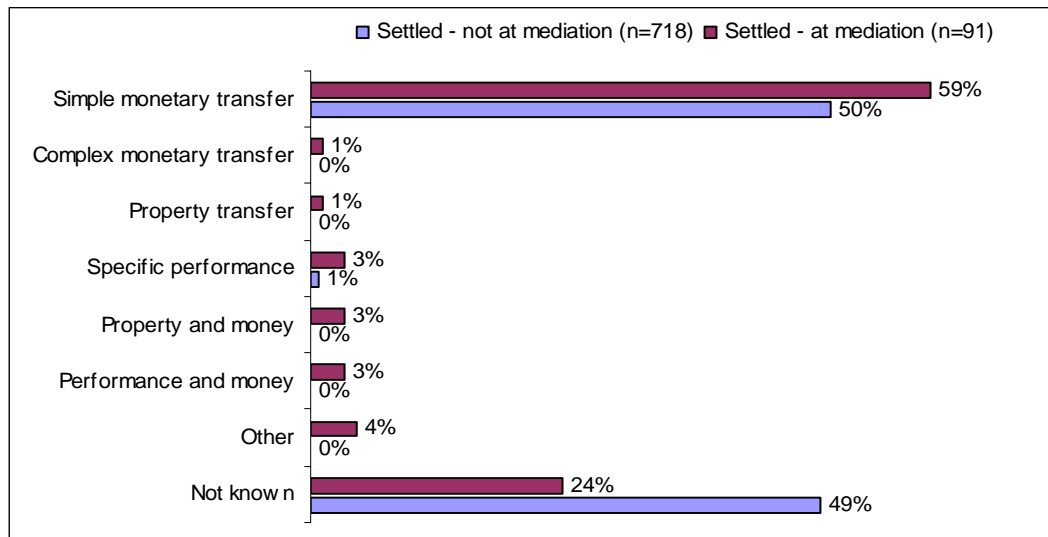
Final outcome of cases involved in objection conferences

Among the ARM cases, 321 were involved in Case Management objection conferences with the District Judge and, of those, 85 cases went on to book mediation dates of which 46 were eventually mediated. An analysis was conducted of the final outcome of all of cases attending objection conferences to establish how they were finally concluded. Figure 2.21 gives the final breakdown. The Figure shows that settlement was the most common outcome of these cases. However, the Figure also shows that a higher proportion of cases than in the non-objecting group continued to trial. This, again, suggests that objecting cases might have been more contentious than those where no objection was raised. The large proportion of cases in this group still pending at the end of data collection in January 2006 means that these findings are somewhat limited. A longer follow-up period would provide a clearer picture of final outcome and the impact or lack of impact of referral and CMC directions on outcome. The disposition of cases in the ARM sample is dealt with further in the discussion of multivariate analyses of the ARM and VOL data.

Figure 2.21 Outcome of cases going to objection conferences (n=321)

Type of settlement

To explore the extent to which mediations were leading to more complex or creative settlements than might normally be found in non-mediated cases, an analysis was conducted of agreements reached at the end of mediation sessions and compared with non-mediated settlements. Figure 2.22 shows that, whether cases were mediated or otherwise settled, the most common type of settlement was a simple transfer of money between the parties. On the other hand, settlements involving something other than a simple money transfer were to be found almost exclusively among cases that had been mediated.

Figure 2.22 Comparison of settlement type (n=809 settlements)

Multivariate analysis of ARM data

In order to explore some of the research questions in more detail, multivariate analyses were conducted relating to parties' choice to attend mediation, factors associated with settlement at mediation, impact of mediation on case duration and impact of mediation on administrative and judicial case processing times. Several sets of data were available for these analyses:

- ARM data comprising 1,232 cases referred to mediation, split between those that eventually mediated and those that did not;
- Cases mediated under the VOL scheme between 1999 and 2004 comprising 1,059 mediated cases;
- Two control samples that were taken from court files for comparative purposes, comprising 214 cases issued in Central London in 2002 and 2003, and a smaller control sample of 196 non-mediated cases which had been issued immediately prior to the introduction of ARM;
- Data relating to mediated cases from the Birmingham voluntary court annexed mediation scheme.

Determinants of mediation choice

A probit regression analysis was undertaken in order to attempt to identify the factors most likely to discriminate between those cases that accepted the automatic referral to

mediation in the ARM trial and those that did not. Out of 1,232 ARM cases referred to mediation, mediation bookings were eventually made in 273 cases, with the remainder pursuing their claim through the normal means. Factors included in the analysis were case type, claim value, configuration of parties, and a rough proxy for case complexity (i.e. the existence of a counterclaim). The results of the analysis (see full details in Appendix 1) indicated that **case value** and **case type** (i.e. whether personal injury or a non-personal injury case) **were the only significant determinants of the likelihood of cases accepting the automatic referral. Higher value claims and claims not involving personal injury were those most likely to accept the automatic referral to mediation and to lead to a mediation booking.**

Settlement at mediation

Not all mediated cases achieved a settlement of the dispute at the conclusion of the mediation. The original objectives of the research design included providing evidence about the impact of compulsion through automatic referral to mediation on settlement rates at mediation, and identifying case characteristics that were predictive of success at mediation. It was thought that this type of analysis would be helpful in providing guidance, for example to the judiciary, in deciding whether or not a particular case should be directed to mediation or whether it might be better to let a case run its course through normal litigation processes. The high opt-out rate from the ARM pilot, however, meant that cases proceeding to mediation had more in common with those in the VOL scheme rather than proceeding under compulsion. The emphasis was therefore placed on searching for determinants of settlement at mediation within both ARM and VOL samples.

Factors included in the analysis were: case type (whether personal injury or not), claim value, case complexity (whether there was a counterclaim), party configuration, and representation at the mediation session. The full results of the analyses for the ARM and the VOL mediation samples are given in Appendix 1. The analysis showed that there were few statistically significant results and the weak fit of the regressions suggest that **the outcome at mediation owes more to chance or unobservable factors than to the observable factors used in the analysis.** In other words, the explanation for success or failure at mediation is likely to be found in individual characteristics of the case, or the parties, or the mediator, or some complicated mix of these factors. The

question of why particular cases do or do not settle at mediation is interesting. It is also important, for policy reasons, to gain a better understanding of the factors that contribute to settlement. If litigants are to continue to be pushed firmly toward mediation, then clues as to the cases that are least likely to succeed are necessary in order to spare expense and unnecessary delay in reaching a conclusion.

Judicial and administrative time

The research also included an attempt to estimate the ways in which referring cases to mediation appears to impact on administrative and judicial costs within the courts.

Judicial time

An Ordinary Least Squares (OLS) regression was conducted on the ARM data to explain variations in judicial time recorded on cases where an outcome was known (i.e. excluding pending or transferred out cases). The total number of observations available on judicial time for these cases was 241. The regression results indicated that the strongest determinants of the amount of judicial time spent on cases were the **case duration from issue to outcome, and whether the outcome involved a trial** (see Appendix 1 for full results). It was estimated that a 10% increase in case duration leads to a 7% increase in judicial time, and a trial increases judicial time by 130%. After controlling for these factors as well as case value and the presence of a counterclaim, **there was a significant reduction in judicial time attributable to mediation. Cases mediated in the ARM trial required some 41% less judicial time than non-mediated cases.** However, since it was possible that this difference could have been due to mediated cases being of a different, but unobservable “type”, this possible “selection bias” was tested for explicitly by modelling the decision to mediate (as discussed above), and testing whether the residuals from the mediation regression and the judicial time regression were correlated. The result of this analysis suggests that it is appropriate to draw the inference that **mediation is associated with lower judicial time** (although there may be special factors surrounding the use of judicial time in ARM, which need to be taken into account when interpreting this result).

The same analysis was repeated with non-ARM data, comprising a pooled dataset in which the London and Birmingham voluntary mediation samples were combined with the London control sample. Again it was found that **case duration and the occurrence of**

a trial affected the level of judicial time spent on cases; a 10% increase in case duration increased judicial time by 10.5%, and the occurrence of a trial increased judicial time by 144%. After controlling for case duration, year of issue, the presence of a counterclaim and the presence of a trial, the judicial times of mediated cases in the non-ARM sample were 23% higher as compared with the judicial times of non-mediated cases in the non-ARM sample.

Administrative time

The same analysis was repeated in relation to administrative time, and again, case duration and the presence of a trial were the main significant determinants, although the effect was not as strong as in relation to judicial time (see Appendix 1 for full results). **A 10% increase in delay increased administrative time by 2.3%, and the occurrence of a trial increased administrative time by 29%. After controlling for these factors, the effect of mediation was found to be both positive and significant. It can, therefore, be inferred that mediation resulted in approximately 19% higher administrative costs than in non-mediated cases.**

The analysis was repeated for the non-ARM data (see Appendix 1). This result shows that a 10% increase in case duration increased administration time by 4.4%, whereas the occurrence of a trial increased administrative time by 17%. The test for the presence of correlation between the residuals from a mediation choice regression and the regression on administrative times was again insignificant. **The results show again an increase in administrative time that is attributable to mediation (in this case approximately 18%).**

Overall, the analyses strongly indicate an increase in administrative time associated with mediation. The findings on judicial time are, however, more mixed: the ARM data appear to support a significantly **lower** level of judicial time for mediated cases relative to non-mediated cases, whereas the non-ARM data appear to suggest the opposite.

Certainly, mediation appears directly to increase administrative time in the courts by around 20%, and this needs to be set against any gains from reduced delay and/or fewer trials. As demonstrated above, our findings suggest a strong and quantifiable relationship between court time, case duration and the occurrence of trials. Any effect

that mediation has on these factors will therefore have a predictable effect on court costs that can be set against the direct increase in administration costs arising from the mediation process itself. The following section, therefore, looks at the impact of mediation on case duration and the likelihood of a trial.

Case duration from issue to outcome

In order to assess the impact of mediation on the overall length of cases from issue of proceedings to final conclusion, a “survival analysis” was conducted. Survival analysis is a statistical method for studying the occurrence and timing of events. It is also known as duration analysis. The name derives from the fact that the methods were originally designed for the study of deaths. The technique has been used for studying many different kinds of events in both the social and natural sciences and is very useful for answering questions such as: “How long is the typical spell of unemployment, or of benefit receipt?”, and “Do generous unemployment benefits lengthen unemployment spells?” The method involves observing a set of cases at a well-defined point in time, and following them for some substantial period of time, recording the times at which the events of interest occur. In this case, mediated and non-mediated cases were followed from beginning to end in order to identify the impact of mediation on length of case.

Figures 2.23 to 2.25 below show the rate at which the cases in the ARM trial were resolved at varying intervals from issue. The graphs show the proportion of cases remaining unresolved at each point in time after issue. This is shown separately for non-PI cases, PI cases, and all cases respectively. As can be seen, most cases reached some kind of resolution within two years of issue.

Each graph shows separate survival curves for mediated and non-mediated cases. The pattern in each graph is for the mediated cases to be subject to a slow initial rate of resolution, due, presumably to the waiting time required for the mediation to be set up. Subsequently, in each case the rate of resolution for mediated cases accelerates until the two curves coincide. After 12–18 months, the mediated curve has “caught up” with the non-mediated curve, implying that the proportion of cases resolved at, say, 2 years after issue, is roughly the same for all types of claim. So, **apart from the initial stalling effect, there seems little suggestion from the graphs that mediated cases experience more or less delay to resolution than non-mediated cases.**

Figure 2.23 Survival rates of non-PI cases in the ARM pilot

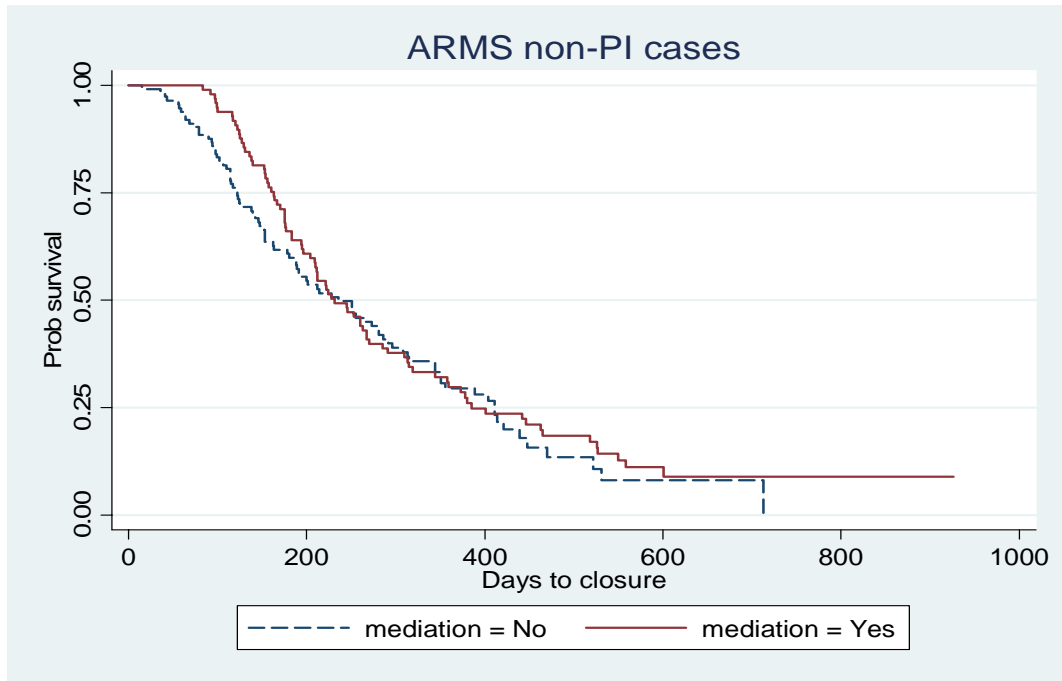


Figure 2.24 Survival rates of PI cases in the ARM pilot

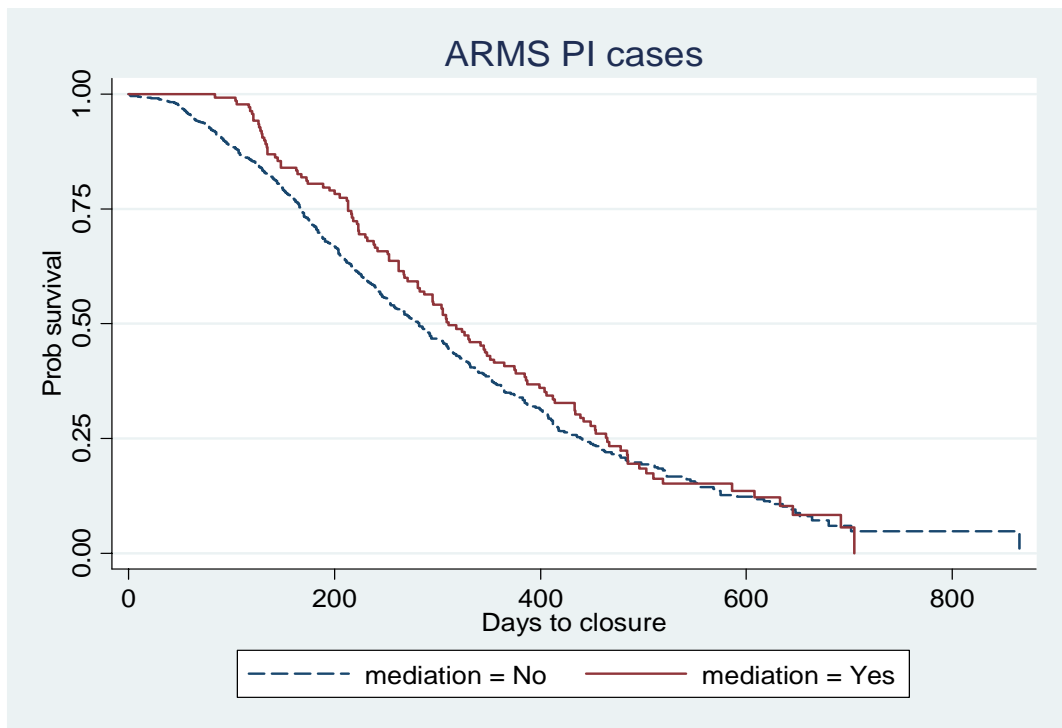
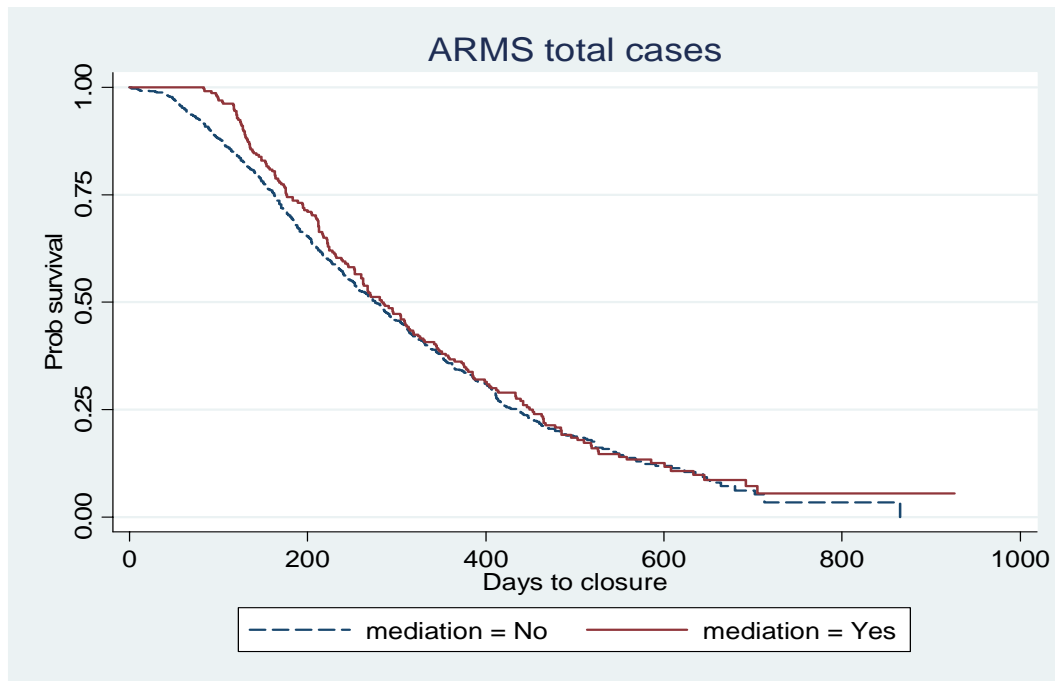


Figure 2.25 Survival rates of all cases in the ARM pilot



It is, of course, possible that the types of case that opted for mediation in the ARM pilot were different from those that did not, and a regression equation was therefore estimated, explaining the duration from issue to resolution, controlling for case value, case type, and the presence of a counterclaim. Because of the presence of unresolved (“pending” or “transferred out”) claims in the ARM trial, survival analysis was used to estimate the equation.⁴⁵ The results of this regression for the ARM data (all cases see Appendix 1) showed that **high case value strongly increased case duration**, and **if the defendant was an individual (as opposed to a company or organisation) this significantly reduced case duration**. After controlling for these factors, **the presence of mediation did not significantly affect the overall likelihood of earlier closure** (the estimated 11% increase in delay for mediated cases was significant at the 10% level of confidence, but not at the 5% level). The regression was then replicated, comparing pooled mediation data from the London and Birmingham voluntary mediation schemes and comparing them with the control sample (cases issued in 2002 and 2003 only). **Again, the coefficient on mediation showed no significant effect of mediation on case duration** (see Appendix 1 for regression results).

⁴⁵ Assuming a Weibull distribution for the baseline hazard.

The main finding from this analysis is that there is **no strong evidence to suggest any difference in case durations between mediated and non-mediated cases. Similar proportions of each type of case were resolved within 2 years of issue.** However, it is clearly important to determine *how* these cases were resolved, since resolution through the courts is more costly than resolution through an out-of-court settlement. The following section explores this question.

The likelihood of a trial within 2 years of issue

Tables 2.8 and 2.9 show the final disposition of cases at 2 years from the date of issue. Some cases were still not resolved at 2 years and these are defined as “pending” cases. Some were known to have been dropped within the two-year period, and others were known to have settled out of court or at trial respectively within the 2–year period. In each table, these proportions are broken down by whether or not the case was mediated.

It is evident from the tables that, among **non-PI cases, the proportion of cases resolved in court was very much lower among the mediated sample**, both in the ARM trial and when comparing the London/Birmingham voluntary mediation samples with the control. **However, this does not appear to be true for PI cases.**

	Non-PI cases			PI cases		
	Mediation			Mediation		
2 year outcome	No	Yes	Total	No	Yes	Total
Settled	65	74	139	531	107	638
%	74	83	79	92	90	92
Trial	17	6	23	21	6	27
%	19	7	13	4	5	4
Dropped	4	2	6	6	0	6
%	5	2	3	1	0	1
Pending	2	7	9	17	6	23
%	2	8	5	3	5	3
Total	88	89	177	575	119	694
%	100	100	100	100	100	100

2 year outcome	Non-PI cases			PI cases		
	Mediation			Mediation		
	No	Yes	Total	No	Yes	Total
Settled	36	303	339	54	17	71
%	47	60	58	87	71	83
Trial	31	35	66	4	2	6
%	40	7	11	6	8	7
Dropped	4	6	10	0	0	0
%	5	1	2	0	0	0
Pending	6	160	166	4	5	9
%	8	32	29	6	21	10
Total	77	504	581	62	24	86
%	100	100	100	100	100	100

The figures in Tables 2.8 and 2.9 are illustrative, but they do not take into account the fact that there may be a difference in nature between the mediated and non-mediated cases that could affect the outcomes. For this reason, probit regressions were conducted, which attempted to test for the impact of mediation on the likelihood of a trial within 2 years of issue, controlling for case value and case type.

The results of the probit regression (Appendix 1) suggest that the estimates of **the probability of a trial within 2 years of issue was significantly lower for mediated non-PI cases, after controlling for case value and case type.** In the ARM trial, the probability of a non-mediated non-PI case being resolved at trial within 2 years of issue is estimated at 0.21, and the presence of mediation is estimated to reduce this to 0.07. Using the non-ARM data (London/Birmingham/control cases issued 2002/2003), the probability of a non-mediated non-PI case being resolved at trial within 2 years of issue is estimated at 0.28, and the presence of mediation is estimated to reduce this to 0.05.

Conclusions of multivariate analyses

The key findings arising from the results of the multivariate analyses can be summarised as follows:

1. The cases that were most likely to be mediated were the relatively high-value, non-PI claims.

2. For those cases that decided not to opt out of referral to mediation, there were very few systematic factors explaining success at the mediation itself.
3. The mediation process initially tended to “stall” the resolution of claims while the mediation was arranged, but there was a catching up process afterwards such that the same proportion of mediated and non-mediated cases were resolved within 2 years of issue.
4. There was a significantly lower proportion of mediated non-PI cases resolved in court than among those non-PI cases that were not mediated; this was, however, not true for PI cases.
5. There was a significantly higher amount of court administration time devoted to mediated cases.

From the policy perspective, the relevant cost benefit trade-off involves balancing the savings from conclusion 4 against the costs of conclusion 5. The estimates reported in this chapter should allow a calculation of this kind to be made, although it will, of course, be necessary to subject the results to sensitivity analysis given the uncertainty around some of the findings. An example of such calculations is presented in Appendix 2.

Summary

During the 12-month experimental ARM scheme, 1,232 civil disputes were randomly referred to mediation, of which 82% concerned damages for personal injuries. By the end of the evaluation period (some 10 months after the end of the pilot scheme), 22% of the cases referred to mediation had been listed for mediation and 172 cases – or 14% of those originally referred to mediation – had been mediated.

There was a high rate of objection to automatic referral throughout the year of the pilot scheme. In 81% of cases where a reply was received, one or both parties had objected to the referral, although after the first few months there was a slight decline in the number of cases in which *both* parties objected. Defendants were more likely than claimants to object to referral in both personal injury and non-PI cases, but a stark and persistent finding, consistent with the 1998 evaluation of the Central London voluntary mediation scheme, was the overwhelming tendency of personal injury cases to object to mediation. The strategy of personal injury cases was to object to mediation (74%) or to

settle before replying (16%), whereas in non-personal injury cases objections to referral to mediation were raised in 38% of cases and 13% settled before replying. No objection to the referral to mediation was raised in 45% of non-personal injury cases, indicating the potential for mediation in non-PI civil disputes. However, in Central London, in common with county courts around the country, personal injury cases account for more than half of the defended caseload.

The most common reasons for objecting to mediation, given by both defendants and claimants, were that the case would settle anyway, that more evidence was needed, that judgment was necessary, that liability was in dispute, or that liability was *not* in dispute. The majority of case management conferences where a District Judge sought to persuade objecting parties to change their minds did not result in mediation bookings and tended to introduce delay into the processing of cases.

The minority of cases that proceeded to mediation following automatic referral comprised largely company v company disputes, involving breach of contract or recovery of money owed. Among personal injury cases, the category that showed the greatest propensity to mediate was employers' liability cases.

Of the cases actually mediated under the ARM pilot scheme, the settlement rate over the course of the year followed a broadly downward trend, from a high of 69% among cases referred in May 2004 to a low of just below 38% for cases referred in March 2005. The average over the year was 53%, with a handful settling within 14 days after the mediation session. When neither party objected to mediation the settlement rate was 55%. When both parties originally objected to mediation, but were then persuaded to go ahead with mediation, the settlement rate was lower at 48%. However, the vast majority of cases referred to mediation under the ARM scheme concluded on the basis of an out-of-court settlement without ever going to mediation, although among those cases involved in objections conferences, a higher proportion continued to trial.

Multivariate analysis seeking to identify the factors most likely to discriminate between cases accepting automatic referral to mediation and those that did not showed that the only significant determinants were claim value and case type. Higher value claims and those not involving personal injury were the most likely to accept automatic referral.

A further multivariate analysis of determinants of settlement at mediation, which included case type, claim value, case complexity, party configuration and legal representation at the mediation, revealed few statistically significant results. This suggests that the explanation for success or failure at mediation is likely to be found in some individual characteristics of cases or in the attitude and motivation of parties or the approach, skill and knowledge of the mediator, or some complicated mix of these factors.

Estimates of the impact of mediation on judicial time showed that in the ARM pilot there was a significant reduction in judicial time attributable to mediation with mediated cases in the ARM trial requiring some 41% less judicial time than non-mediated cases. However, a similar analysis of the impact of mediation on administrative time showed that mediation resulted in higher administrative costs than non-mediated cases. Both analyses suggest a strong and quantifiable relationship between court time, case duration and the occurrence of trials.

A final statistical analysis, therefore, explored the impact of mediation on case duration and the likelihood of trial. The analysis found no strong evidence to suggest any difference in case duration between mediated and non-mediated cases, with similar proportions of each type of case being resolved within 2 years of issue. However, it was evident that the probability of a trial within 2 years of issue was significantly lower for mediated non-PI cases, after controlling for case value and case type. This was not true of personal injury cases.

Chapter 3. Users' experiences of ARM

This Chapter presents an analysis of interviews carried out with solicitors and parties whose cases were allocated to mediation in the ARM pilot, and with mediators who conducted mediations under the ARM scheme. The Chapter begins with lawyers and parties' accounts of their decision to opt out of the ARM scheme, since this was such a pervasive phenomenon. It then moves on to look at the experience of mediation in both unsettled and settled cases. The final section focuses on users and mediators' explanations for the outcome of mediations their overall evaluations of the process in light of those outcomes. The interviews were conducted by telephone and, with permission, tape-recorded. The extracts presented in the Chapter are drawn from verbatim transcriptions of the interviews.

In total, some 214 interviews (relating to 178 cases) were conducted with solicitors and parties whose cases had been referred to mediation under the ARM pilot scheme. The breakdown of interviews is shown in Table 3.1.

About three-quarters of interviews with opting-out solicitors related to personal injury cases and a quarter to non-PI cases. The balance was similar in interviews with opting out parties. Since PI cases comprised about 90% of objections, those cases were slightly under-represented and non-PI cases were slightly over-represented in opt-out interviews. The slight over-representation of non-PI cases was deliberate since they were less likely to opt out of the scheme and interviews probing variations in approach and reasoning about ARM might have been more revealing than personal injury cases.

The case type breakdown for interviews with solicitors and parties who had accepted the referral to mediation was somewhat different. Interviews with mediating parties were divided roughly half-and-half between personal injury and non-PI cases, while interviews with mediating solicitors comprised a little under two-thirds personal injury and just over one-third non-PI. There is thus a slight over-representation of PI cases among the interviews since only 47% of all mediated ARM cases involved personal injury.

Table 3.1 Breakdown of interviews with solicitors and parties in ARM (n=214)

	CI solicitor	Def solicitor	Claimant	Defendant	Total
Opted-out	43	44	19	3	109
Mediation booked					
Failed to settle at mediation	20	24	5	1	50
Settled	10	12	7	4	33
Settled prior to mediation	7	12	3	0	22
TOTAL	80	92	34	8	214

Objecting to ARM

As discussed in Chapter 1, the Central London County Court randomly allocated cases to the ARM scheme during the pilot and informed legal representatives or unrepresented parties about the referral to mediation. Under the terms of the scheme, lawyers or parties were required to submit a 'reply' to the Court referral. The reply form offered the opportunity to raise an objection to the mediation referral – in effect to opt out of the scheme – and to request that the case be allocated to the normal court process. Where one-or-both parties raised an objection to the mediation referral, the case was reviewed by the District Judge at the court. For a mediation to take place, both parties had to accept the referral.

An analysis of the objections to mediation recorded on the ARM reply forms by lawyers and parties was discussed in Chapter 2. However, given that the ARM pilot was intended to be an experiment in something close to compulsion, a more searching investigation was made into the motivation of lawyers and parties who objected to the automatic referral to mediation scheme. Because of the very high level of opt-outs over 100 telephone interviews were conducted with objecting solicitors and parties to obtain some insights into the reasoning behind the opt-out decisions.

Solicitors' reasons for advising clients to opt out of ARM

Interviews with solicitors about opting out of the ARM pilot revealed considerable variation in approach. Some stated that they had a **general policy** of opting out, while others tended to take the decision on a **case-by-case** basis. There was a clear difference between those solicitors with a predominantly personal injury practice and the rest, with personal injury solicitors being somewhat more likely to opt out of the scheme

as a matter of course. The most common reasons given by solicitors for opting out of mediation were: that the referral had come too early in the life of the case; that the parties were too far apart; that the opponent was too intransigent; that the cost of the mediation would be disproportionate to the value of the claim; or that the case would settle in any case and therefore mediation was unnecessary.

It was also clear that in most cases solicitors simply formed a view about whether to opt out of mediation and advised their clients accordingly, fully expecting their clients to take their advice, which they generally did. This approach applied whether solicitors were representing claimants or defendants. Lawyers acting for insurance companies on personal injury cases often operate with a wide delegated discretion, at least in fast track cases. In those situations, there would be no question of discussing the referral to mediation with their client – the insurer of the defendant. The extent to which parties appeared to take their lawyer's advice to opt out of mediation with apparently little discussion was confirmed in interviews with parties about opt out decisions discussed in the next section. **In common with other evaluations of court-based mediation schemes, interviews with solicitors advising clients about the ARM pilot underscored the critical role of legal professionals as gatekeepers to mediation.**

“My client's views? To be honest with you my client hasn't really got a view on mediation. He doesn't really know in detail what it entails.” (Claimant rep, PI)

“They were like me. They knew I was negotiating and a potential agreement was imminent... I don't think I advised them it was automatic.” (Def ref PI)

“I'd had the discussion with the claimant's solicitor before and we both felt it wasn't the kind of case where it was going to be of assistance, and was going to be likely to increase costs more than anything. I told my client that was my view, and they accepted it.” (Def rep PI)

Opting out a formality

The ARM experiment was specifically designed to communicate a sense of serious pressure, if not near compulsion, on parties to attempt to mediate their dispute. It is difficult to know whether absent the *Halsey* judgment, solicitors and their clients might have taken the automatic referral more seriously. But it was clear from interviews with solicitors **that many, and particularly defendant solicitors in personal injury actions, regarded the automatic referral to mediation simply as an additional**

bureaucratic hurdle, but not something significant that needed to be considered seriously. For example:

"It's an additional burden on me, but nothing major. It's just an extra form to fill out." (Def rep)

"I understand the courts are entitled to do it, and as long as we can opt out it's fine." (Def rep)

*"It wasn't appropriate for mediation. It was a quantum only matter and mediation isn't, as far as we are concerned, appropriate for this. It was just for damages to be agreed...We've had requests for matters to be referred to mediation, but each time we decline. That's our only experience of mediation. **How did you feel about being automatically referred to mediation?** It's just one of those things that occur. It does happen quite often and we just decline it. It's not an issue. It's just another form to complete for the court."* (Defendant rep personal injury)

This attitude is interesting since other solicitors, whose cases proceeded to mediation, felt at least some degree of pressure and some were evidently concerned about potential cost consequences of failing to agree to mediate if they were to proceed to trial.

Timing too early

Not all solicitors by any means raised knee-jerk opt out objections to the ARM referral. Many offered reasons based specifically on the facts of the case and the situation of the party whom they were representing. A regular reason given for opting out of ARM by solicitors involved in personal injury cases, whether acting for defendants or claimants, was that the referral to mediation had come too early in the life of the case. In personal injury cases the problem of timing related to the need to be certain about the medical condition of the claimant, and the question of the extent to which the claimant's condition had stabilised sufficiently confidently to value the claim. Defendants appeared to recognise this issue as well:

"The whole thing about mediation is that you really have to have evidence. It would be very difficult to mediate in a vacuum... you know, you can't mediate until you've identified what the issues are and you've got your own evidence in relation to the issues...In this case, it wasn't worth getting ready for mediation and mediation would have been pointless because we would have got there and they would have said 'this is what it's worth' and I would say 'I don't know what it's worth because I don't know what it going to happen if this deterioration occurs. When I get the report, I think I will know'." (Claimant rep, PI case)

"We felt that at the time of the referral we didn't have enough evidence, so it would be a waste of the parties' time, but that as soon as the evidence came in, we actually made an economic decision, not to fight it, on the basis of economics"

*that the claim wasn't worth enough money to fight and our risk was such that we felt it was better to settle than fight liability. As soon as we got the evidence that we needed we handled the claim quickly. **How did you feel about being automatically referred to mediation?** I think it is generally a good idea because I think mediation can really help, but I think it might be worth, a system put in place by the court whereby mediation is referred on a case by case basis rather than automatic because I've actually had automatic referral, I think on three cases now, and none of them are actually ready. There is not enough evidence, there is just no point, and the parties are forced to say no. It may be that if the court could have a process where they actually consider the case and the evidence, and then say, actually this is one that is right for mediation, then that would be a lot more sensible because it would save wasting time of parties, sort of having to consider an automatic referral. Although I agree that the automatic referral is good because it actually forces the parties to think about referral to mediation rather than you know, going on to a court process. So it has its pros and cons I'm afraid." (Def rep, PI case)*

Cost

Cost considerations did appear to be a genuine concern that led to a decision to opt out in a number of cases. Many of those interviewed about opting out had some experience of mediation and so were not raising uneducated objections. Preparing for mediation involves a cost (as the discussion below indicates, generally assessed at around £1,000–£2,000) and where the value of the case was relatively modest, it was felt that the cost of mediation would actually be disproportionate. This is particularly so in low-value personal injury cases and low-value debt cases, but for different reasons. In personal injury cases there is a strong expectation on both sides that most cases will settle. PI traditionally has a high settlement rate and even though defendants might hope to wear down the claimant before making an offer, the shadow of the looming trial is weaker in personal injury cases than in non-personal injury cases where trials are more common. In low-value non-PI cases, particularly where the outcome is uncertain, the cost of mediation was occasionally seen as disproportionate:

"We did have a choice about whether to mediate or not. Initially it was so straightforward I actually turned down mediation for this case. I thought we'd get summary judgment instead...I don't have a problem with automatic mediation but I think with small cases where one the costs are disproportionate to the amount that's due, it's usually the case that parties take a more commonsense attitude the closer they get to trial...And the expense of going to mediation in straightforward cases of low value may be as much as preparing for trial...In debt collection cases where the amount that's due is very small, where issues were very clear cut, where it's not particularly complicated, it takes little legal time to prepare, I think a much better remedy is just to fast track the cases to trial." (Claimant rep non-PI)

“The downside is that I think it is very expensive and only certain cases are suitable. Well, by the time you get counsel involved and your clients there, and more often than not, the ones I’ve been on have lasted a day if not longer. It would have been cheaper for me to have gone to court.” (Claimant rep non-PI)

One rather jaundiced personal injury claimants’ solicitor pointed to the cost of mediation and the practice of the court in pressing parties to attend mediation where, in his view, people were achieving settlements that would have been obtained in any case, at possibly a greater cost than normal settlement. This raises the problem of comparing cost savings at mediation with those of trial. For the majority of personal injury cases, the trial is a remote possibility and so the more appropriate cost comparison to be made is between settlement at mediation and settlement as a result of solicitor negotiations:

“Personally I try to opt out of all mediations...because they are very costly. You are pressed into going to mediation by the court...my experience is that they will order that in whatever the circumstances, whether it is an elderly claimant with a heart condition who has a strong liability dispute case, and you don’t want to drag her off to a mediation and where you know it’s not going to settle, and the court will make a declaration that it is appropriate and if you refuse to go to mediation, it will be raised as a cost issue at the end of the case. So the defendants will say, ‘Well you refused to go to mediation and the court said it was appropriate, we shouldn’t have to pay all of your costs, it would have settled had it gone to mediation’. So you are never going to take that risk, so you’re always going to be pressed into going to mediation... Most of the cases that go to mediation, settle. But most of the cases that go to mediation and settle would have settled before the trial anyway. And they would settle just on the responses, whereas when you go to mediation, you spend three hours doing a mediation hearing, another two and half preparing for it, which is eight hours work... and it is almost like a little mini-trial cost in itself. So, although I am quite happy to go to mediation, it is a costly process and I think it is probably more costly than having a couple of cases end up at trial, that may have settled at mediation beforehand than to force every case into mediation almost”. (Claimant PI Rep)

The cost of mediation is clearly an issue that needs to be considered in policy discussions about promoting mediation, especially in relation to low-value personal injury claims where settlement is highly likely in any case.

Inappropriate for mediation

A common reason given in interviews for opting out of ARM was that the case was “inappropriate” for mediation. Cases were deemed to be inappropriate for different reasons, relating to the type of claim and the issues involved, the type of parties involved, the merits of the case, and the history of the case up to the point of referral. For example, in some cases solicitors felt that the legal or factual complexity of the case

ruled out mediation. By contrast, others thought mediation was inappropriate where the case was straightforward. When the opponent was viewed as “intransigent”, mediation was thought to be fruitless. When, from the defendant's perspective, the claim was deemed to be ‘without merit’, mediation was again thought to be inappropriate. A common thread running through many of the “inappropriate” objections was a sense that for mediation to have any prospect of success there must be scope for compromise and some willingness on either side to move toward such a compromise. In the absence of such willingness, automatic referral to mediation was an unwelcome hurdle in the course of the litigation.

No basis to claim

It is interesting that while some defendants justified opting out of the ARM scheme on the ground that the claimant's claim was entirely unfounded, this was not universal and, as is discussed in a later section, the explanation for some failures to settle at mediation was that the claim was without substance:

“Why did you decide to opt out of mediation? Because it wasn't suitable (in the end he settled by paying all of our costs at the door of the court). In our view it was entirely spurious, a complete try-on. This was never something we were going to pay up on because it was just ridiculous. In our view, no evidence, completely spurious claim, absolutely not what the courts are there for. There is no point in going to a mediation where you are pushed towards offering him £2-3-4-5,000. He wanted £13,500 and we could have just given him £5,000 to start with to see if he'd go away. I mean we don't need a mediation to do that. We were adamant that we weren't going to pay him anything. How did you feel about being automatically referred to mediation? Well I was a bit cross actually. Not least because I didn't know about the scheme, although I thought the scheme was a commendable idea. But I called up the court and asked them what the basis was... I was a little bit disgruntled because clearly the girl that works there and answers the phone doesn't really know. And I wondered if there had been any thoughts as to which cases were sent automatically for mediation or was it just random? I just wrote in a little letter saying I didn't think it was appropriate. I thought it was rather giving credence to the claimant's ridiculous claims by sending it to mediation.” (Defendant rep, non-PI)

Intransigence

A perception on the part of defendants that claims were “without any basis” was also interpreted on occasions by claimants and their lawyers as “intransigence”. Whatever label is given by the parties to this situation, it is clear where one side or the other genuinely rejects the stance of the opposing side, or adopts a strategy that involves

complete rejection of the opposing position, the prospects for successful mediation seem unpromising and this raises questions about the value of automatic referral to mediation.

“The question of mediation didn’t arise! The other side quite refused to give a penny. I mean if they would have said ‘Alright we’re prepared to give you something’, then I would be prepared to sit down. But they said ‘No, we don’t owe you a penny’, so where is the mediation?” (Claimant rep, non-PI same case as above)

*“We decided to opt out on the basis that we were fighting this, no matter what...we weren’t going to concede...we might have agreed quantum subject to liability but we were not going to concede on liability...And also the claimant was quite adamant that he wasn’t going to withdraw. So you know, if we’d gone to mediation there would have been a stalemate situation. So we might as well crack on to the trial... **And how did you feel about being automatically referred on this one?** Somewhat random. I understand that this is the new thing isn’t it? And this was the first one I think I’d been automatically referred to but I’ve had several since... This one (defendant clients) they were fighting it, full stop. Our case was there was no liability whatsoever and in fact we were subsequently vindicated at trial.”* (Defendant rep non-PI)

Certainly there are other jurisdictions where willingness to negotiate is regarded as a fundamental requirement for a referral to mediation.⁴⁶ On the other hand, the evaluation of the Ontario experiment in mandatory mediation, in Ottawa at least, demonstrated that in a wide range of cases mediation was successful, even when parties were apparently compelled to mediate and irrespective of any pre-existing inclination toward compromise.⁴⁷

Type of case

In one or two cases, the particular features of the subject matter of the case were thought to be inappropriate for mediation, for example, in some police actions and in the case below which concerned a claim by a prisoner against the Home Office:

“They’ve obviously put a lot of money into this mediation scheme. Every case I’ve [issued] has been picked to go into the scheme and I don’t know what information the court is keeping but it certainly doesn’t seem to be working for me in relation to inmates, because I think if there’s any unusual factors in your case, the defendant will be listened to whether the reasons are valid or not. So I think we’re just having to jump through more hoops and at some point the LSC will turn round and say, ‘You won’t be able to apply for funding until mediation has taken place’. And for most people doing actions against the police and the Home

⁴⁶ Bert Niemeijer and Machteld Pel, *Court-Based Mediation in the Netherlands: Research Evaluation and Future Expectations*, Paper presented to Ministry of Justice Expert Meeting on Mediation, The Hague, June 2006.

⁴⁷ Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months*, 2001.

*Office, where we're representing extremely vulnerable clients, many with poor education, nearly always there's some sort of credibility issue so they're on to a bit of an uphill struggle anyway. They are being made to go through this process that hasn't been tested in relation to their type of case. And so already the LSC has jumped on mediation as another reason to refuse funding until you've used this procedure. **How hard then do you think it is to opt out?** There's no penalty at all...I can vaguely remember there was a court case recently where there was a cost implication where someone had said they would mediate or not and I don't think the court was particularly favourable to it. They said there wasn't really any cost penalty for not mediating. That it was a voluntary scheme." (Claimant rep, police action)*

*"It's a personal injury claim arising out of a road traffic accident. Liability was not in dispute it was purely about quantum. However, there was a significant dispute between the parties as to the genuineness of the claimant's evidence and she's saying of course, she's a nice genuine lady. Our impression was she's a lying little madam, out to get the maximum of the claim. That may be putting it a bit strongly, but you get the general gist...At the time we were referred to mediation, it was really just too early. There was more evidence to be obtained. The parties were so far apart mediation, certainly from our perspective, held little attraction. **Did you tell the Court you wished to opt out of the scheme?** We did. Yes. We didn't hear any more from the Court about mediation and the case was just listed for trial...I mean the problem with personal injury claims is mediation is useful if both parties want to retain a relationship...In personal injury claims we generally just don't like each other...The reality is, it's an insurance company against an individual...I don't think there's any goodwill toward each other...It doesn't matter if they hate each other at the end of it, because it's not making any impact on anybody's lives afterwards. It's all about who can get the most money or gets the least money." (Defendant insurance company, PI)*

Will settle anyway

A common reason for opting out, particularly in personal injury cases, was that the case would settle anyway and so mediation was unnecessary. In some cases parties were actively negotiating at the time of the ARM referral. The high level of settlement activity in personal injury cases, even at a relatively early stage, is evidenced by the proportion of cases which settled prior to returning the ARM response form and the proportion of cases that settled prior to mediation taking place, when a mediation date had been booked (Chapter 2).

*"Well yeah, I mean, it was a straightforward case. It was just a matter of sorting out quantum. You know, the parties could sort that out between themselves without actually going to mediation...I think we filled in the allocation questionnaires I think we had a form to fill in and we just put that on the form. **And was that accepted by the Court?** Yeah. There was no problem with that. **You didn't have to go to a case management conference or anything like that?** No, we agreed Directions and the Court ordered the Directions that we'd agreed to...basically if it wasn't going to be settled then I would have said we'll*

have to refer it to mediation. How did you feel about the case being automatically referred to mediation? I don't particularly like it really because you can sort the case out yourself without actually going to mediation. I suppose maybe if liability's an issue, then possibly you could...maybe refer it to mediation, but at the end of the day you know, it does get sorted out one way or the other and if liability is in dispute then obviously it's down to the Judge to decide who's at fault. Did you actually consult your client on mediation? No I didn't. On this particular claim I had delegated authority. But obviously if it's a multi track case where I need to get instructions and mediation comes along, then obviously I would refer it. But I would advise them not to bother." (Def rep PI claim)

In the previous Chapter, it was seen that a relatively high proportion of cases settled either prior to mediation taking place or even before a reply to the automatic referral to mediation had been returned to the court. In one-or-two cases, solicitors described the way that the automatic referral to mediation itself had acted as a catalyst to settlement.

For example:

"[The case] had been referred to mediation by the court and I think if we refused to mediate without really strong grounds, you leave yourselves open, even if you win, to adverse costs consequences. We only had a 30-40% chance of winning...[The mediation appointment] was a mile stone. I don't want to go down to the Court. I know it is going to settle. Me and my clients going to a three hour mediation in Central London would cost £1,500 all round. So, you know. It is worth another £1,000 on the offer to get rid of it, and the other side know that as well. So, yes. This was a definite incentive to settle before the mediation." (Non-PI contract case. Defendant's rep)

Parties' reasons for opting out

"Opt out of what scheme?"

"What's a mediation scheme? We haven't had any of that."
(Claimant in ARM opted-out cases)

Interviews were also conducted with some parties to explore their reasons for opting out of the ARM scheme in cases where objections to automatic referral to mediation had been raised. There were notable differences in approach between individual 'one-shot' claimants or defendants and 'repeat player' defendant insurance companies in personal injury cases. Among insurance companies defending personal injury claims, the understanding of mediation and approach to dealing with automatic referral was very different from that of claimants or defendants in non-personal injury claims. Insurance companies are used to negotiating settlements and have developed their own strategies for dealing with claims. Although the vast majority of personal injury claims are

eventually settled out of court, insurers deal with cases in their own way and an automatic referral to mediation may not fit with the preferred approach. As described in Chapter 2, defendants were more likely than claimants to opt out of ARM and the approach of defendant solicitors to opting out of ARM, discussed above, reflects insurance company policy.

Individual litigants, on the other hand, appeared during interviews to have little knowledge of the ARM scheme and often seemed to have no recollection of any discussion with their solicitor about the scheme or the issue of opting out. Although it is possible that some solicitors did not even mention the referral to their clients, it is likely that only perfunctory mention of the automatic referral was made, accompanied by advice that the client should opt out. It is unsurprising that a brief exchange along those lines might subsequently fail to be recalled by parties interviewed some time later, particularly when many clients would be unfamiliar with mediation, would not recognise the term 'automatic referral', or understand the significance or the purpose of the scheme. Some typical examples of responses to the question, "**Why did you decide to opt out of the ARM scheme**", are as follows:

"What scheme? I'm not familiar with mediation. Nothing was sent to me."
(Claimant PI)

"Well I don't think I have, have I? I don't understand". (Claimant non-PI RTA)

"Did they? Well I wasn't aware of that and I wasn't informed. That was not discussed with me at all. I didn't even know that that was there." (Claimant non-PI RTA)

*"It was an accident that I had. I was going out for lunch (in my car) and I was stationary and I got hit right up the back...They were saying that I was putting it on actually. That I wasn't hurt. They sent me for an MRS and they found something wrong with my shoulder... **What made you decide to opt out of the mediation scheme? Mediation scheme? Are you aware that your case had been referred to mediation? No. Do you know what mediation is? No. It is basically a situation where two parties get together with a neutral third person who would help each side come closer together and negotiate a settlement. So it is kept out of the courts. No we haven't had any of that.**"*
(Claimant PI, case ongoing for 4 years)

In a few cases, it was clear that parties were aware of the scheme, had discussed the possibility of mediation with their solicitors, and had taken a positive decision not to mediate for specific reasons. For example:

“Because I had specifically talked to [defendants] a number of times, you know they sent, already, one of their managers before to here, to talk to me and it got no place. So there was absolutely no reason to continue. Anything which would have happened in mediation was already discussed between us here, you know, between the parties, and so, there was absolutely no value for it”. [Claimant non-PI contract case]

“Because it was on the advice of my solicitor. He spoke to me about everything.” [Claimant non-PI case]

However, in one or two cases it was clear that the final outcome for the opting-out party had been less than satisfactory and in light of that, they felt that an opportunity to mediate might have been more beneficial:

*“I slipped, and I ended up with a broken elbow, a replacement elbow and everything and a 15 inch scar on my arm and now with restricted movement. So I knew I was going to win the case... I'm still employed with the same company. I am restricted at work, I can't do certain things at work, I had a two hour medical by the DHSS in November last year and they put me down as 60% disabled. So it wasn't a small claim, like, you get people who sprain their ankle and get £4000. I am disabled and disfigured for life, and I get £1,800, and what can I do? I just made a mistake going to see the wrong solicitor... They said that if I don't take this offer, I won't get nothing. That is what they said. **Now that I have told you a little bit of what mediation is about, do you think you might have wanted to use it?** I think if it is behind closed doors, you should be allowed to go, you should be informed that you are allowed to go! If I had the opportunity to have gone in my place, I would have gone. Because if the third party would have seen the injury to my arm, I think the circumstances would have been different.” [Claimant PI case]*

In another case, the claimant had been anxious about the possibility of trial and, although apparently assured that this would not happen, the claimant still was required to attend court, presumably for the settlement to be approved. Again, this claimant – apparently very nervous of court proceedings – did not appear to have any knowledge that the case had been referred to mediation under the ARM pilot nor that an objection had been raised to the referral:

*“I fell down a man hole at work. **What was the value of the case?** £4,000. **What made you decide to opt out of the scheme?** Opt out of what scheme? **Were you aware that your case had been referred to mediation?** No. [Case went to court] It was terrifying...because they had made me an offer, and I accepted it on the understanding that I wouldn't have to go in the witness box, and I still had to go in the witness box. **And why was that?** I don't really know. I know my barrister said 'would you accept this?', and I said as long as I don't have to go in the witness box, because I've never been through anything like that before and I was nervous. And I still went in the witness box... they really did question me. I felt like the villain and not the victim. I don't know why I had to go to court. But then they called me in, and they said it would only be for a minute*

and it wasn't. I didn't like it. I'm glad it's finished, because I didn't feel that I was the injured party. I felt that I had done something wrong, you know, but I haven't".
[Claimant PI]

The reactions of parties to questions about opting out suggest that there is a need to ensure that adequate and comprehensible information about mediation reaches the parties themselves. This is not a simple task, however, since a high proportion of parties to litigation have legal representation and traditionally communications from the court go directly to parties' representatives rather than to the parties themselves. This practice reinforces the position of the legal profession as gatekeeper to mediation decisions. The critical role of the legal profession in parties' decision-making about dispute resolution alternatives presents a significant policy challenge to all those interested in increasing the uptake of mediation. This is discussed further in Chapter 6.

Experiences of mediation

Eighty-three interviews were conducted with solicitors and parties who had undertaken mediation in the ARM pilot about their motivation for mediating and about their experience of the mediation itself. Very few parties had any prior experience of mediation. On the other hand, some solicitors were fairly knowledgeable about mediation and one or two were themselves trained mediators. This familiarity with mediation is sometimes reflected in the comments about the ARM mediations attended.

In general, the views expressed during telephone interviews about ARM mediations were coloured by whether or not a settlement was reached at the end of the mediation. The following discussion is therefore structured to reflect this divide. It begins with an assessment of ARM mediations by those involved in unsettled mediations, focusing particularly on the views of lawyers and parties about why the case had failed to settle at mediation and the perceived impact of unsettled mediations on the length and cost of cases. The discussion then moves on to an assessment of ARM mediations among those whose cases settled, focusing on reasons for accepting the referral, the factors leading to a successful outcome, and the perceived impact of mediation on the length and cost of cases.

Unsettled cases: “Did you feel you had a choice?”

A substantial proportion of parties and representatives interviewed about **unsettled** mediations in the ARM scheme felt that they had been pressed into mediating, although mediating claimants and their lawyers were less likely than defendants to feel that they had been pushed into mediating. About 40% of interviewed claimants, whose cases had not settled at mediation, felt that they had been forced to mediate; whereas about two-thirds of defendants and their representatives, who had not settled, felt that they had had no choice about mediating.

Feeling that mediation was a good idea – no pressure

Among those parties who believed they had a choice about the ARM referral, several said that in the end they had simply taken the advice of their lawyer to go ahead and mediate. However, there were also some who believed that they had a choice. They had mediated because they wanted to and felt there was something positive to be gained from the process. This feeling was more prevalent among claimants and their representatives who attended ARM mediations than among defendants and their representatives.

“Why shouldn't I? It's doing me a favour. My representative recommended it. I've been waiting so long for this case, about 6 years.” [Claimant PI]

“I always wanted to mediate, it was very common sense. The reason I went, rather than going to court, even though I felt I had a very strong case, was my solicitor advised me to try and settle, so I followed his advice, he's a professional, so that was the reason we went to mediation, because of my professional legal advice rather than any personal one.” [Claimant non-PI]

“It seemed the most sensible thing because had it gone to court the costs involved would have been totally disproportionate to the amount we were suing the defendants for.” [Claimant non-PI]

“Because for nearly a year I'd been trying to just speak to the people involved and say 'Why won't you pay it? Why haven't you paid it?' I wrote to them, I emailed them, you know, I rang them, they never, ever responded and it was incredibly frustrating because they gave no reason ever for not paying me. So I thought after all this time... by this stage I didn't want to go to mediation because I thought 'Why? I've spent all this time, and now money, and gone to all this effort, I want to see them in court and I want to make them pay' and then I suddenly thought, 'Don't be like that, you were trying for months and months and months just to get some response from them, and now they're saying let's go and sit down in a room and talk', then you've got to sort of take that really. Plus, I'd

been advised by my solicitor that it was a good thing to do, to be seen to be doing everything that you can to, not to waste the court's time." [Claimant non-PI]

"Yes - I thought there was no harm in going to mediation because it could have been a benefit to my clients, so I didn't feel I was forced into it, no." [Claimant rep PI]

"I think the other side invited me to come to mediation because they'd been denying liability all along. I thought it was a good case, and I said to them I didn't want to mediate if they were going to take that line, and then they said 'Well there's no harm. How did you feel about the automatic referral? Because I'd asked for it, I didn't mind you know. It didn't feel like automatic. I did feel I had a choice, yeah.'" [Claimant rep PI]

"The predominant reason [to mediate] was because you think there's a decent chance of a settlement emerging from it, either on the day or shortly afterwards. That was the main reason...I felt we could have said no if we wanted to...There are cases where a very big push towards mediation is required. I think one might argue with the terms automatic referral or compulsory-ish. I think the language might be a bit clearer, but I think there's a lot to be said for a very heavy shove towards mediation." [Def rep non-PI – Mediator solicitor]

One or two interviewees were more negative about the decision to mediate, indicating that although there was a choice, the choice was rather limited given the practicalities of the process so that opting out might actually increase delay in settlement. For example:

"There was no point in trying to opt out because the delay in opting out would be longer than the delay involved in going to mediation." [Claimant non-PI]

Feeling that there was no choice

On the other hand, there were some robust statements made about ARM among mediating parties and representatives whose cases had not settled and who had felt that they had been pushed into mediating by the court. Where interviewees felt that there had been no choice about whether to accept the referral to mediation, this tended to be expressed as concern about costs penalties that might subsequently be imposed as a result of resisting the referral from the court. For example:

"And how did you feel about being automatically referred to mediation? I didn't like it. Well because I am a practitioner of some twenty five years' experience and regrettably I think I know more about my job than any mediator's going to. And of course we can do what I take to be mediation, which is two people, one in one room, one in the other, and somebody wandering between saying 'Well you know, where is the middle figure?' And so to that extent you know, I consider I can do my job...I said I was prepared to submit to mediation. I felt I had no choice. You know, the cost penalties nowadays." [Def rep PI unsettled mediation]

"We were ordered to mediate by the Court. Obviously they can't force us to mediate but they might hold it against us if we didn't mediate, so although we were not very keen on the idea, we agreed to mediate as did the other side and basically it came to nothing." [Def rep, non-PI, unsettled mediation]

"We felt the courts would take a dim view of us refusing to mediate basically. If we refused to mediate the court could order us to mediate in any event. We thought we'd rather jump than be pushed." [Claimant rep, PI unsettled mediation]

"The Court was operating the scheme and sort of pushed in that direction so I think that was the principal reason. I guess we did have a choice, but we would have had to justify why it wasn't appropriate and because it was the first occasion I thought it was not a bad idea to see whether it was going to resolve matters... A lot of cases are being subject to this and a lot of them aren't appropriate...My own view is that there should be some form of sifting out, which would hopefully eliminate automatic referral of some cases that just aren't going to be resolved in that way". [Claimant rep Police action, unsettled mediation]

"Why did you decide to mediate in this case? Because the Court told us we had to. And did you feel that you had a choice about whether or not to mediate? No...The client didn't want to mediate because he couldn't see the point of doing it, but because the Court had ordered us to go to mediation we had to do it... I thought it was not the best way because the better way would be to identify cases which were likely to settle, as opposed to automatically picking one of out ten which I understand, or what the Courts have told us they do, they don't look at the cases, it's just number crunching and they're picked out automatically...My client had been claims handling litigation for twenty two years and he didn't agree with it, but said he would give it a go because the Court had ordered us to do it .I'd been to mediations at Central London County Court before, so I did know what to expect. You're given three hours, you're put in a stuffy room and you're very much bullied into trying to settle it with the Security Guard outside at 7 o'clock... Did you go to the mediation expecting to settle this case? No. So what were you hoping to achieve? I wasn't hoping to achieve anything. I was doing it because the Court had ordered me to do it and I didn't want to get a costs Order against my client if we refused to mediate...The only advantage I could see from that mediation was I got to see the Claimant in person, so I know in advance what she's going to be like in the witness box...It wasn't going to settle. It still hasn't settled. It was a bit pointless really."
[Defendant rep, PI case, unsettled at mediation and proceeding to trial]

Why didn't the case settle?

As discussed in Chapter 2, the settlement rate at mediation among those cases where neither party objected to mediation was 55% overall. Where mediation took place after only the claimant objected, the settlement rate was the same, but where the defendant had raised an objection, the settlement rate fell to 44%. When mediation occurred after both parties had objected, the settlement rate was 48%. Very few cases that failed to settle at the mediation appointment went on to settle within 14 days of the mediation,

although, overall, the majority of mediated cases were eventually concluded by an out of court settlement rather than by trial. A key question for parties, mediators and policy-makers is, therefore, why cases that went to the trouble of proceeding to mediation and went through three hours of assisted negotiation with a trained mediator, did not settle by the end of the mediation and even sometimes after a second attempt at mediation. Parties and solicitors who had attended unsettled mediations were asked in interviews about the factors that they felt had contributed to the failure to settle. Admittedly, although asking the participants why cases did not settle offers a perspective on the case rather than an explanation of failure to settle, the perspective is nonetheless useful as a guide to factors that might represent barriers to settlement.

The responses to the question of why cases had not settled at mediation covered a range of issues that often echoed the reasons given by parties who had objected to ARM – intransigence, an unbridgeable gulf between the parties, no merit to the claim, or a history of unwillingness to compromise. In addition, there were factors relating to the mediation itself such as poor skills demonstrated by the mediator, the time constraint of a three hour mediation and the physical conditions within which the mediations were held (discussed later in the Chapter).

Party Behaviour

Intransigence – too far apart and unwilling to move

A common complaint and explanation for failure to settle at mediation was the unwillingness of the opponent to negotiate or move toward compromise. This occurred when parties took a different view of the merits of the case, or when relations were such that parties were reluctant to shift their position, or simply when one side adopted a negotiating strategy of not budging from the original position. Occasionally, there was a suggestion that this situation occurred when one side was unrepresented.

“Why did you decide to mediate? *Because the Court told us to. My experience with mediations with the police is not a particularly happy one, because they take very entrenched positions. It's like negotiating with a brick wall. Given that I'd been told by the Court [to mediate] I had the kind of choice that a poor man has in dining at The Ritz. I think it would have been rather foolish for me to have said 'No'...I think mediation is a very useful tool in the right case. I don't think every case should automatically be referred to mediation. I'm not entirely convinced on personal injury claims where there are experienced lawyers on both sides. I do take the view that if two experienced lawyers can't negotiate a settlement between them, the chances of a mediator being able to influence matters is fairly*

small. That is my experience of mediation so far". [Claimant rep personal injury road traffic case, not settled]

"We both had an entrenched view. We both believed we were right on the law, and we both felt it was an all or nothing thing, so I think one of the first things to do is rather than automatically refer everything to mediation, is to see from the actual documents lodged at Court whether this is a case where liability is not really an issue. If it's a damages claim then yes go for mediation. This is just a matter of negotiating a figure." [Claimant rep non-PI]

"The intransigence of the other party. He wasn't willing to make enough moves to compromise here. He wasn't prepared to settle at a slightly lower figure. We made several offers. He only made one and it wasn't particularly good. [If he had been represented] he'd be more worried about how he was going to pay for his legal costs if he carried on." [Claimant rep, non-PI unpaid fees]

"They had their entrenched positions on it; my client wanted something out of it and got no offer whatsoever. They conceded from that attitude that they would fight him all the way. I did feel that [the mediator] was sort of taking their side to some extent. I don't know what he said to the other side or perhaps he was just relaying what they were saying... think maybe he was a bit partisan, but you know to be quite frank he was only trying to, you know, put the other side's view to us." [Claimant rep non-PI contract]

"My personal opinion was that ordering mediation in this case was ludicrous. There were two parties, there was a clear conflict, every effort have been made before the case started to settle it and there was no shift in position during the mediation either, which is what we expected. We don't mind automatic referral if it's done in sensible situations. We didn't think this was a sensible situation to refer...We weren't very impressed with the mediator himself and we didn't think the other side would have any intention of behaving appropriately...There was a massive gulf between us, so we ended going home with no move forward The driving force of the decisions to mediate was that it can affect costs ultimately if you don't...if you refuse, so we were not really wanting to face that." [Def rep, non-PI]

It was clear from interviews following unsettled mediations that there needed to be some scope for compromise. The following extract is illustrative of the negative view taken by some representatives to automatic referral in cases where there appears to be little common ground between the parties on liability issues. The interview was particularly telling since the interviewee was himself a trained mediator who felt that personal injury cases were, in principle, amendable to mediation but only where there was the prospect of compromise:

*"It wasn't suitable for mediation...Because you have two people, two parties who are poles apart. It was a question of liability. We don't think we are to blame for the accident and the claimant thinks that we are. **How did you feel about being automatically referred to mediation?** Oh it was a pointless exercise. **Can you***

see any virtue in it at all? No. Did you discuss the possibility of mediation with your client? No because it is not suitable. You wouldn't have mentioned it? No...It is a strong case - about 75%...We were just given a mediation day and we had a mediation process. The problem is you've got a case where we think we are not to blame and they think we are to blame, so the only way it can be resolved is by a court. The case wasn't suitable for mediation...The mediator went through the A-Z of mediation and tried to mediate, but as I say, it is just not appropriate. The other side were making various offers to settle and we were saying 'Well, we don't care what you offer us, we aren't going to pay anything'. So I mean, it might sound like I am being very inflexible but if you've got a case where you don't think you are to blame, you aren't to blame! Well [the mediator] just did it, he went through the mediator's handbook and just did it virtually verbatim to what I received when I was trained. **So did you take the full three hours? Yes. It was quite frustrating. I said to the mediator that we weren't going to accept their offers. They made it clear that they weren't going to walk away, so I actually said to the mediator 'you might as well call it a day'. I am a firm believer in mediation, but when a case isn't suitable... I mean if you can't mediate then you can't mediate can you?" [Defendant rep, trained mediator, personal injury value around £5,000]**

No basis for claim

Some of the interviewees most irritated by the ARM referral were those who felt that their opponent's claim or defence was completely without merit. In those circumstances, since there was no scope for compromise, the referral to mediation had been inappropriate. It involved what was seen as a pointless waste of cost and time on all sides and the unrealistic raising of expectations about possible settlement. This represents the downside of costs penalties. For example:

*"We didn't [opt out], but that was for considered reasons. Because we decided that there would be expense involved in making an application to avoid a mediation so there would be costs and legal fees involved with that, but more importantly we decided that if we were to make such an application, then we would look unreasonable, unwilling to listen, unwilling to try and settle and that we would perhaps incur procedural disadvantages...So for those reasons the decision was taken to go with the process. We were selected for this. We didn't ask for it. **Did you feel you had a choice then?** No we didn't. **How did you feel about that automatic referral?** We thought it was ridiculous. The clients for whom I was acting in that case has been involved in an enormous amount of litigation...so they know probably more about litigation than anyone else could know. If they had wanted to settle that case or thought it appropriate to settle that case then they would have done, but they were treated by that process as though they were new to litigation, as though they didn't understand the process, they were obliged to have the mediation because otherwise they'd have incurred costs and looked unreasonable, but it was completely inappropriate that they were selected for it... We had no doubt whatsoever that the claim should never have been brought, that the claim against my clients was misconceived, that they sued the wrong party... but the claimants were good, nice people and they'd had an awfully long drive to come from some part of the country, which must have*

cost them petrol money and so on, and been tiring for them and it was a hot day, and they came in there and through whoever's fault, it's not the mediation's fault, perhaps it's their own lawyer's fault or what have you, but they came in there with really high hopes that we were going to give them some money. And we'd repeatedly said we wouldn't. But I think on a human level it was terrible...I thought it was upsetting that they'd had this great long journey in the heat and we were never going to be able to offer them any money". [Def rep non-PI case concerning lease]

It is interesting that in some cases unwillingness to compromise led solicitors to opt out of the ARM scheme (see earlier section), while others appeared somewhat grumpily to proceed with mediation, albeit with low expectations.

Going through the motions

One of the negative aspects of bringing unwilling parties to mediation under the threat of costs penalties is that, although the parties comply with the requirement to attend mediation, they do not enter the spirit of the proceedings in a frame of mind conducive to settlement. Although there were occasions when such a stance was in fact transformed during mediation (see discussion below in relation to settled cases), there were a number of interviews when parties accused their opponent of simply "going through the motions" with no intention to attempt settlement. This was to some extent confirmed by the number of interviewees who frankly admitted that they attended mediations without any intention of settling, but simply to avoid cost penalties and possibly to conduct a fishing exercise to find out more about their opponent's case.

"I would say the major factor is with the other side's mind set effectively. They made a derisory offer pre-issue. They've made slightly increased offers during mediation but they were poles apart from what the claim's originally worth. I think they were going along with the mediation process and were just using it as a fact finding exercise, rather than a way to actually resolve matters." [Claimant rep, non-PI]

"The driving force of the decision to mediate was that it can affect costs ultimately if you don't...if you refuse, so we were not really wanting to face that...I think probably both of us decided to go along because when a Court asks for mediation if you refuse that can have cost implications and we didn't want those cost implications to be found against us. But frankly...we don't think they had any intention of discussing it or being reasonable about it, they just kept re-stating their position. So I think personally, we were there from 4.30 to seven o'clock and it was a complete and utter waste of time and I think if [the mediator] had actually had control of the situation, he could have assessed that himself right from the outset and could have let us all go home." [Non-PI unsettled Def rep]

"To be cynical it may be just the other side's lawyers racking up costs and they know they can charge their client, who's always a lot richer than my client, the

money for going along to court and attempting to settle... they can go along and offer pence, you know, and we couldn't refuse, and they can say 'Well we did make an offer and it was refused', you know, so as far as I'm concerned that's their basic attitude." [Claimant's rep PI unsettled]

"I was optimistic at first, but very quickly it became apparent that they weren't going to budge and they weren't going to say anything, or make any concessions. That was the worst thing. I just felt 'this is all a big waste of time.' That was the worst thing, it's just like 'Okay, here we all are', and I've built my hopes up and this is a total waste of everybody's time. They were just going along with it. Perhaps the lawyer's thinking 'Yeah, well why not? I'll get a bit more on my bill for that, so long down, go down to London, sit in a room for 10 minutes, have a cup of coffee, then I'll go back and I'll charge for travel as well', you know." [Claimant non-PI unsettled mediation]

No authority to settle

A strategy that appeared to be adopted by some parties to constrain the possible outcome of mediation was to attend the mediation session without authority to settle. Some solicitors and parties present at mediations apparently came with only limited authority to settle and then refused to move beyond that point. Whether the limitation was genuine or was used as a negotiating strategy, the effect was to inhibit the possibility of settlement.

"It was part of the CLCC scheme...It was forced on us...In this case really what the parties all needed to do was have their heads knocked together anyway, so I did feel that I had no choice, but I didn't think it was a bad thing in the circumstance. There wasn't a lot I could do about it really. It's fairly clear in the CPR that we've got to go along with it really. I wouldn't have chosen the mediation case because the guy on the other side is less than co-operative...We're dealing with a dummy who will just not face up to his responsibilities...After about an hour and a half [at the mediation] he said that he had a set figure at which he was authorised to settle, which was woefully inadequate and it soon became apparent he was wasting everybody's time...If he'd have said at the outset he didn't have authority we would have left. He told us quite the opposite. He told the mediator he was fully authorised to settle... Very disappointing. It was really an insult to everybody in the way that it was conducted...The worst feature is that there's no cost consequences. This guy should have been hit with a costs Order, having behaved like that...I do think if there were cost consequences for people wasting other people's time I'd feel a lot happier about it." [Claimant rep, goods and services claim unsettled mediation]

One side doesn't turn up or leaves

Occasionally the mediation failed because one party did not attend. An issue raised in relation to this situation was the lack of any penalties against parties who failed to attend

a booked mediation session, and similarly the apparent lack of consequences for parties who decide to abandon the mediation mid-appointment:

*"I mediated primarily because the Court gave us the option I suspect I wouldn't have formally mediated this had the Court not pushed us down that road. And it was very much a presumption on their part that we would have a mediation unless we could think of a good reason not to, and I'm quite a fan of mediation so I was quite happy to tick the box and send off the cheque. **And did you feel that you had a choice about whether or not to mediate?** Well I do now, because clearly the claimants were able to kybosh the whole thing...I think there should be something to trigger the question in the parties' minds but whether it should be as strong as an automatic referral to mediation, I don't know, because that rather presumes that mediation's a panacea and unhappily it isn't. Far from it."*
[Defendant rep, personal injury, claimant pulled out at the last moment]

Defendant can't pay

In cases involving non-payment of monies owed, there are different reasons for defendants litigating claims. They may genuinely believe they are not liable for the debt, or they may believe they are partly or wholly liable for the debt, but they wish to delay paying or reduce the amount they have to pay, or they may not have the funds to pay the money owed. The first two situations might be amenable to mediation, but where the defendant does not have the funds to pay what is owed mediation may be inappropriate. For example:

"The defendants don't have any money. They couldn't make a good offer, and was adamant that the money wasn't due but the reason they gave wasn't supported by any other evidence at all and I think if you had a rather desperate defendant with no money, mediation is not going to work." [Claimant rep, non-PI debt]

Poor mediators

Some interviewees attributed the failure to settle more to the shortcomings of the mediator than to any particular behaviour of the opponent. Complaints about mediators tended to focus on lack of preparation, insufficient understanding of the subject matter of the case, not being legally qualified and, therefore, lacking experience in the day-to-day realities of litigation, and generally poor mediation skills, in terms of interpersonal relations, manner and approach.

The comments made by disappointed participants in the mediation process highlight the need for mediators to manage expectations, as well as the need to gain respect by demonstrating a grasp of the issues, knowledge of the legal framework, and by having good communication skills.

"He didn't seem to have any particular grasp of this area of law. He made some assumptions and a misunderstanding of where we were coming from."

[Defendant rep, police action]

"I thought we were more likely than not to settle it and therefore disappointed that we didn't. Not the best of mediators I've come across. He knew the basic facts, he knew the process...He didn't appear to me to take on board or give any weight to the difficulties which a Claimant firm would have in going through the evidence, proving it, the hassle factor, publicity risk and so on. I thought he was a bit more narrowly focused than he could usefully have been." [Defendant rep, non-PI]

"I don't want to freeze out people who aren't lawyers but I think in legal mediation...it's better to have a lawyer because the lawyer has that extra clout which a non-legal mediator doesn't have." [Claimant rep, non-PI]

"We had somebody who was an accountant...and I think that was not ideal, but in this case it probably wouldn't have made any difference...It's not a question of legal training. One of the things in the skills of mediation is to have experience day to day, current experience of litigation, how it's conducted and what can go wrong, and the cost of it, and somebody who isn't a practising solicitor or barrister won't have that experience." [Def rep, non-PI unsettled mediation]

"I thought he was utterly hopeless...He called himself doctor something or other. He had no conception of the issues in dispute. He kept saying, 'Settle it for me. I'll feel better.' and we thought 'Well what on earth have your feelings got to do with it?' He had no sort of gravitas at all. He had no conception of the case. He hadn't really read any of the papers. An utter waste of time...This madman just asking us to do it, settle it for him." [Claimant rep, non-PI]

"No - we didn't think he was particularly good, neither did the other side. He just wasn't particularly efficient or... just didn't do the process very well. I suppose he was only doing it for training purposes, so... well I assume that's why they do this system [Central London Mediation Scheme] so they can do it so cheaply and that they get people in for free who want to get experience as mediators. The overall impression and feel of the way he dealt with it was not very good." [Claimant rep – PI unsettled]

"The process of it all took me by surprise. What I'm talking about here is not paper, but the actual comments from the mediator. I felt he didn't tell me enough about what was going to happen. I won't make any bones about it, I thought he was terrible right the way through from the preparation to the actual day's work and what happened on the day. ..I thought he was absolutely awful. He was not impartial. He made jokes about the firm I work at. I feel he knew about information about the other side's case which was to my detriment and didn't fairly tell me that it existed...and he didn't seem to have any grasp of the relevant law. I thought 'I'm in the hands of someone who doesn't understand his subject'. He told me he came from a Defendant firm and then started making disparaging remarks about my firm, so one way and another I left with a very bad taste in my

mouth. He then ended up by telling me what he earned...so I just thought he was a bit of an idiot". [Claimant rep, PI]

"He didn't admit to us that he had no previous experience of [subject area]. You've got to have a mediator who's good at negotiating and a mediator who's had experience in the area and who can actually understand both points of view, understand the issues and really assess, drawing the parties together, because that's the purpose of mediation." [Non-PI unsettled Claimant rep]

Time too short

There was no consensus about the three-hour time constraint on mediations. As discussed below, some mediators and parties who settled at mediation felt that the time pressure had helped to focus minds and thus generate settlements. However, among those whose cases did not settle at mediation, occasionally there was a complaint that the time limit was too short and a frustration that, with a little more time, cases might have achieved a settlement on the day. Of course, in some cases settlements were achieved fairly soon after the mediation, although the analyses in Chapter 2 show that in fact this only occurred in a small number of cases.

"Having a mediation at 4.30 in the afternoon is nobody's cup of tea really. My client was outside of London. He had a busy day in the office, nobody's giving it their full attention by that time so it definitely needed to be earlier. And the fact that the time was limited." [Def rep PI unsettled]

"I think one of the difficulties was the time constraints. I've been to a mediation where they've lasted ten hours and I think the CLCC scheme – you don't have time to come out of mediation. You're there for a couple of hours and if you don't settle within three hours then you're out." [Non PI Claimant rep unsettled]

Impact of unsettled mediation on costs

In almost every interview with representatives and parties in cases that did not settle at mediation, there was a perception that the mediation had increased the legal costs of the case. Although the amount was not always quantified, the most common figure given was that an unsuccessful mediation added around £1,000 to £2,000 to the case, based on time to read papers, time attending the mediation and travelling time. There was, in fact, remarkable consistency in the estimates given for the additional cost of an unsuccessful mediation.

"Increased - It undoubtedly added to the legal costs. Mediation always does when it is unsuccessful because you go down a route for which you pay this money, but for which you get no result."

"Increased dramatically because I had to explain to the client what the scheme was about and I also went along with counsel and of course counsel charged

because I didn't want to be in a position of appearing less resourced than the defendant in those circumstances."

*"As my best guess for the future is that it will settle, then my best guess is that it saved him money. I might be wrong. The cost of the mediation would have been about a thousand in preparation time and travelling and the cost of trial would be twice that so you may be a thousand better off if it settles. **And if it doesn't settle? A thousand worse off.**" [Def rep non-PI unsettled at mediation]*

In some cases interviewees felt that although costs had been increased there was some benefit in obtaining a better understanding of the case or clarifying issues somewhat which might help to lead toward settlement.

"It didn't increase costs ridiculously. I do know that I would absolutely be able to justify the costs of this. I would say it was money well spent, for that crystallisation and because it was actually very in line with the overall objectives of proportionality and I do believe that this mediation was proportionate, in this particular case.

It definitely saved costs (although unsettled at mediation. At the trial we would probably have incurred costs of about £30,000 whereas we settled costs for about five grand...[through the mediation] he could actually see face to face the strength of their claim, how they felt about this claim and that you're not going to get any offers of any substantial sum. So he then took the view that 'I'm not going to fight them, I'll settle', and yes I think there was a saving in the cost." [Claimant rep non-PI]

Impact of unsettled mediation on time

Views were somewhat more divided on the question of time than on the question of costs. While most interviewees felt that costs had been increased, there was not a clear sense that the failed mediation had necessarily delayed the case (see the discussion in Chapter 2), although there were some interviewees who felt that both costs and time had been increased.

Benefits even when not settled

Not all of those interviewees whose cases were unsuccessfully mediated felt negative about the experience or the process. One or two interviewees thought that the mediation had helped to change the perspectives of one or both parties and there was a feeling that settlement was more likely in the future.

"The fact that we failed in mediation didn't mean that there was a failure of the mediation. Immediately afterwards I think that both parties recognised that we needed to actually deal with this claim." [Claimant rep non-PI]

Even one or two tough personal injury defendants admitted that the mediation had altered their view about the case, which led to a subsequent change in approach to settlement. For example:

*“I think from memory the Court actually spearheaded the mediation...There probably wasn't too much choice...How did we feel? I think cases should be looked at on merit rather than automatic referral because (a) it increases the cost and (b) I think the parties become a little more disassociated with the mediation process. **What did you expect from this mediation?** Probably a little more information about the claim, both liability and quantum and also really bringing the issues to the forefront really. Try to stimulate discussions between the parties. **Did you expect to settle?** Not at this particular mediation. No. No. We had instructions from the client that they wanted to defend...It acted as a catalyst to get instructions. At mediation our clients wanted to defend. Following the mediation there was additional pressure on them to consider settlement.”*
(Defendant personal injury £50,000+ unsettled mediation)

Settled mediations

Interviews showed a relatively high level of familiarity with mediation among solicitors who had accepted ARM mediation referrals. Of the 39 solicitors interviewed, 25 (64%) said that they had previous experience of mediation and four of the interviewees were themselves trained mediators (10%). This was sometimes reflected in interviews when those trained as mediators took the opportunity to expand on the benefits of mediation generally, rather than necessarily focusing specifically on the case in hand. Among parties interviewed who had attended an ARM mediation, five claimants had had previous experience of mediation and two of these were themselves trained mediators.

Accepting the referral

There was some difference between claimants and defendants in the reasoning behind accepting the automatic referral to mediation. On the claimants' side, solicitors occasionally said that they had accepted mediation because they felt they had no choice. But in the majority of cases, it was accepted relatively willingly in the hope of achieving a settlement. On the defence side, particularly in personal injury cases, acceptance was more often explained as being the result of pressure from the court. Some of the more reluctant accepters of the referral were pleasantly surprised by the impact of the mediation in bringing about a settlement. Occasionally, defendants had gone along with a cynical intention of 'sussing' out the other side and found that they settled the case because of something that they heard or saw at the mediation. When facing a convincing opponent in a mediation session, defendants may review their

position both in light of what they hear but also in anticipation of the impression that the opponent might make on the judge from the witness box. The majority of both parties and representatives interviewed about settled ARM mediations did not feel pushed into mediating, or certainly, their recollection following a successful mediation was that they had been content to enter the process.

Common explanations for accepting the referral without objection were that the party was keen to settle, that they wanted to get the case over with quickly, or that there was a need to get some movement in the cases where parties had become 'stuck' or positions were polarised.

“Why did you decide to mediate? *In order really to try and reach a quick resolution in order to save costs. There were problems I think on both sides with proceeding to trial so we were keen to mediate. It was actually automatically referred to mediation. We were happy to in the circumstances. It was fine. It's a good scheme. A very good scheme. I think it's very useful especially at an early stage...The parties can reach a quick settlement rather than having to wait for a trial date. [My clients] are very keen on mediation because it's just a more informal way of settling claims, rather than a disputed action which can take a long time to resolve if it goes to trial.”* [Claimant rep, non-PI settled]

“The court referred it for mediation. I wanted to, so I didn't really mind. My main reason was I thought it would get things done more quickly. My client was just advised by me. He went along with what I thought.” [Claimant rep, asbestos case, CFA]

In some cases, representatives admitted frankly that they were keen to try mediation because they felt that their case was, in fact, rather weak and they were hoping to achieve some sort of compromise. In other cases, representatives said that there were specific difficulties with the case and that mediation might be a constructive way of dealing with those difficulties.

“The Claimants indicated that they were prepared and obviously on that basis we were more than willing to give it a go on that basis, because up until that point they were only arguing for 100%. So as soon as they agreed to that, we knew that there was going to be some compromise on their part. [My client] was relieved that it didn't actually go to a full trial. He was just happy to have it over and done with. We thought it was 50-50 and we felt quite confident that the most we were going to go to was 75-25 in the Claimant's favour. We actually compromised. I think it was 85-15. Prior to mediation they stuck at their 100%. We'd agreed quantum, it was just liability. My client's insurers were happy as well. 15% when you're talking £18,000 was quite a bit to get off.” [Defendant rep, road traffic personal injury settled at mediation]

“Liability was the main problem. I felt there was something there that we could talk about and hopefully reach some percentages agreement on. I think the Court give you the option. I have previously said to the Court ‘I don’t think a case is suitable for mediation’ for whatever reason, so it all goes on automatically referred. You do get the opportunity to object if there’s a genuine reason and it’s just simply not going to help. In this particular case I thought it would be of benefit. We were quite confident. We were ready to go on to trial if needed.”
[Claimant rep, PI settled]

Those representatives who were experienced in mediation often referred to the fact that they had used mediation before and felt that it worked well.

Initially reluctant but ultimately happy

In a minority of settled, cases interviewees said that they had felt that there was no choice about accepting the automatic referral to mediation, but most of those in this group said that they were content to mediate, even if they would not necessarily have thought of the idea themselves. There were several reasons for wanting to mediate. Some wanted to try to settle the case where it was felt that this was a possibility. Others were less optimistic about settlement, but felt that mediation offered the opportunity to talk face-to-face to the other side, to get the measure of the case, to see what kind of witness the claimant might make in court, and, perhaps, to clarify some of the issues in dispute.

“We were happy that there was an Order compelling both parties to mediate. I felt very positive. Even if the parties seem wide apart at the outset, I think it does focus minds. It does bring you together and you can actually meet the other side face to face. If that had proceeded to trial we would never have had a face to face discussion, and so I think at an early stage it does help you to reduce the barriers between the parties and get them talking...My clients were always very positive about mediation. They are commercial clients and they want to get on with their lives and they cannot afford the waste of management time they spend on litigating.” [Claimant rep non-PI]

“Why did you decide to mediate? Because the court told us to. Did you feel that you had a choice? No not really no. Because if you say anything it’s frowned upon. It was okay because it turned out alright for us anyway. I didn’t think it was worth doing but I thought ‘There’s no harm giving it a go’. [Our clients] felt the same. They’re into mediation anyway. We have a look at mediation on most claims. It’s part of their code now where they look at mediation anyway...I expected some development. I didn’t think it would be a complete waste of space. I had authority to do something, some kind of settlement.” [Def PI settled 7 days after mediation]

“Were you aware that the mediation was at the recommendation of the Court? Yes I was. Yes. And did you try to opt out of that? No, not at all. I think it was a Direction of the Court that there be a mediation. I mean I thought perhaps at the time it was a bit premature as far as we were concerned, because we were just looking at the one medical report and it needed a bit of clarification, but we didn’t really have time to do that... There was no question about liability, we accepted our insured was responsible for the accident, but the medical evidence wasn’t entirely clear. So what made you decide to mediate? Well it was the Court that decided that. Obviously we could have said “No”, but if the Court says so then - unless it’s wholly inappropriate - we would go along with it. I mean it wasn’t a case I would say was totally unsuitable for mediation. In actual fact one of the benefits was actually seeing the Claimant, because sometimes you get a feeling for things and if you think perhaps someone’s not being entirely genuine or whatever, but when you’re faced with the Claimant...and this chap indeed, he’s worked for the insured for some thirty odd years and he came across as quite a genuine fellow really, so it was helpful from that point of view as well.” [Defendant employer’s liability]

Of course, it has to be recognised that those parties in settled cases who felt they had been pressed into mediating and were positive about the experience might well have made far more negative comments about the referral had the case not settled at mediation.

Factors leading to settlement

All interviewees who had settled their case at mediation were asked what factors they felt accounted for the outcome. There was a large measure of agreement about the important factors, principally the willingness of the other side to negotiate, the taking of a reasonable stance by the opponent, preparedness to compromise, having authority to settle and close the deal on the night, and the skill of the mediator.

Willingness to negotiate

One of the most common and important reasons for cases achieving settlement at mediation was thought to be the attitude of the parties coming to the table. If parties attended mediation in a spirit of willingness to negotiate and compromise, then the chances of achieving a settlement, even within the three-hour time limit, appeared to be good.⁴⁸ Although mediations had often involved some strong and long negotiation, many interviewees had a fundamental will to settle in order to end the litigation and

⁴⁸ See Bert Niemeijer and Machteld Pel, “Court-Based Mediation in the Netherlands: Research Evaluation and Future Expectations”, 110 *Penn St. L. Rev.* 345 (2005).

move on. This was far more common in cases where there had been no initial objection to mediation and parties were open to the possibility that the mediation might lead to settlement.

“What factors would you say contributed most to the outcome? Just the fact that both parties came along and were willing to negotiate. We were willing to give a bit, rather than just expecting the other party to do all the giving. There was a bit of give and take on both sides, which you need if you’re going to get anywhere. Both parties came along with a view to trying their best to get something sorted out.” [Claimant rep, personal injury]

“Probably the mediator putting pressure on us to top up our original offer. We previously gave them a lower offer than that and... just at the mediation process generally, if you went back and conveyed that and then came back and it became a sort of haggling process. And probably the time pressure, you know, knowing that it could all be sorted out within a matter of three hours rather than dragging out.” (Claimant rep, non-PI)

Mediator skill

Interviewees whose cases had settled often expressed appreciation of the skill of the mediator and a ready willingness to accept that the mediator had been important in helping the parties to achieve a settlement. Factors mentioned with approval were: mediators making pre-appointment contact; reading the papers and showing that they were familiar with the issues; knowing the law; taking a proactive stance; and working through shuttle diplomacy to test out the strengths and weaknesses of cases on both sides.

“He was very good indeed. He was very proactive and in our experience probably a lot depends on the quality of the mediator and they do vary a lot. When it was clear that it wasn’t going to be possible for [opponent] to get authority to settle it on the day, he was very firm in saying ‘It’s just not worth pursuing today, but what we’ll do is postpone and have a second mediation session.’ He got us back together and we drafted a Consent Order in order to keep the actions stayed until the second mediation.” (Claimant rep, non-PI case settled after mediation)

“The mediator was particular good and he’d made contact with the parties in advance of the mediation and that was extremely helpful because obviously under the scheme there’s only a limited amount of time... Making contact early, getting to the issues seeing what people wanted to achieve. He didn’t waste a lot of time with lengthy opening sessions with people saying this and other people saying that. It was good. His shuttle diplomacy worked well.” (Claimant rep, personal injury)

“She was very patient with everybody’s arguments and without being censorious she’d say ‘Yes I can hear that. On the other hand you were willing to pay this

before' and sort of gradually I suppose we did the same. She was very patient, very courteous, she moved it along. She didn't let it drag. We only had three hours." (Defendant rep, debt case settled)

"The mediator winkled out of us pretty quickly that we had a weak case and we knew it because there was a missing witness. And he winkled that out of us fairly quickly. He got to the nub of our problems pretty quickly." (Claimant rep PI)

"He was excellent. I think it is a shame that there are not more non-lawyers and I thought he brought something extra to it by not being over-focused on the legal side of it. He was good." (Claimant rep non-PI, settled at mediation)

Opportunity to see other side's case

One aspect of mediation mentioned by some solicitors, especially defendants, was that mediation could lead to settlement through an exchange of views, seeing documentation, and having an appreciation of how the other side might come across in court. The process could change the party's view of the strength of their case and thus generate a willingness to compromise that might not previously have been present.

"The good thing about mediation is that everything's without prejudice. The documents disclosed are privileged and confidential and you can't refer to them in subsequent proceedings, but having seen those documents at an early stage, we could see that there was nothing in what they had to say...so that was the advantage as well." (Claimant rep non-PI)

However, this 'previewing' of cases through mediation can be viewed as having both a negative and positive side. It was clear from the statements made by some defendants that mediation sessions were occasionally used as an opportunity to see the other side and hear what they have to say rather than as an opportunity to settle (see further below).

Unhappiness despite settlement

Of course, not all parties were happy with the outcome. Generally, respondents were relieved that the case had been settled and content with the terms, but one or two expressed considerable disgruntlement. For example, one defendant representative in a personal injury case that ultimately settled expressed himself forcefully on the disadvantages of ARM in terms of the cost of the mediation and the pressure to settle above one's comfort zone:

"I wasn't happy about it. I think cases get referred at too early a stage. It wasn't a case where we would have opted for mediation if we'd been given the choice, but having been told to mediate, we had to do it. I could have probably settled it for

less if I could have dealt with it by payments into court. I'm not overly sold on mediation I have to say. If I hadn't been immediately sent to mediation we would have put money in court and fought it out on those issues, but it was an early stage really. Mediation's a damned expensive exercise which I'm not sure the court appreciates. We went in the hope we would settle. I mean once you've invested an afternoon of a lawyer's time there is pressure to settle because otherwise you've completely wasted that money. So you end up paying too much just to get out of there. The worst feature is that they are expensive. The first mediation I did the opposition turned up with a solicitor, his assistant and a barrister. I mean God, by the time you've paid for all that you might as well have a trial. You haven't saved anything. And the justice that you get. I mean they achieve settlement but they never achieve a settlement that you're very happy with because you feel that you have to pay too much just not to waste the day. You are being forced into conducting the case in a way which you do not think is the most cost effective way of dealing with it. If you actually did what you really think you ought to do which is just to tell them to get lost, you would have completely wasted the money. I'm not sure that personal injury cases are particularly good for mediation except for the very large scale ones. Personal Injury cases – especially if you're dealing with a Fast Track case which you'd get on to trial for two and sixpence anyway – what the hell are you saving by having a mediator?" (Defendant rep, personal injury case, settled at mediation)

On the other hand, for defendants who believe that their opponent's case is weak, mediation may offer an opportunity to get that point across and lead to the claimant significantly shifting their position. Among defendant representatives interviewed, this experience was mentioned on several occasions with some satisfaction. An example was in a police action where the mediation led to the claimant literally caving in and accepting an offer that had actually been rejected prior to the mediation:

"Everything was in dispute. We often try mediation and we were happy to try in this case. We felt that we had a pretty good defence at least 60% probably higher. They had made an offer to settle. We had put a small sum into court to cover a minor aspect of the claim. We didn't have any great expectations [of the mediation]. We hoped we might be able to persuade the claimant of the weakness of his case and that the whole thing would collapse, and as it turned out that's pretty much what happened. We had Counsel representing us at the mediation, as indeed did the claimant...The claimant eventually accepted the amount that we had already paid into court which I believe was about (trivial sum). I think we had good counsel representing us. We took a very firm view on this particular case that we had paid him what was reasonable and actually we weren't going to go any further which didn't sit particularly well with the mediator because he thought that we should be prepared to move from where we were and we didn't do that. We played very firm and the claimant came down from his opening gambit which was effectively the Part 36 offer that he'd made, and he came down and down and down until he met us at the point where we started." (Defendant rep, police action, settled)

One party who settled was unhappy about the procedure, feeling that he would have had a proper 'hearing' in court.

"I would never like to do one of those again. Because you don't stand a chance really, do you? You know, if you want something to be heard you have to go like... to an actual court. A Crown Court or whatever. And everything comes out there. So in the mediation it's like 'Oh right, I'll hear something from your side and then I'll go in the next room and hear from that side'... and then they come to some conclusion but I wasn't too happy on it, honestly love." [Claimant non-personal injury]

Cost savings in settled mediated cases

The majority of interviewees involved in cases that settled at mediation felt strongly that the successful mediation had saved legal costs. This was most obvious where it was felt that a trial had been avoided. In those cases, solicitors often estimated very large savings in legal costs. However, cost savings were not estimated in relation to the likely cost of settlement through normal solicitor negotiations, which is why the estimated cost savings often appeared so significant. There was also a common view that successful mediation had saved time. In fact, in almost all cases where solicitors said that they had saved costs, they also said that they had saved time by bringing the case to a more rapid conclusion. Parties also tended to perceive both cost and timesavings where mediation led to settlement.

"Saved, both time and costs, a considerable length of time, certainly 6 months."

"It saved about £100,000. It was a good result for us." (Def rep on personal injury claim worth £100,000+, settled soon after mediation as result of mediation)

"I imagine in a case like this off the top of my head our costs to take the matter to trial would have been about £10,000 so we saved £10,000." [Claimant rep for business client, debt case settled after two mediations]

"Saved £12-13,000 plus time."

One solicitor in a personal injury mediation, however, was very unhappy that he had been made to agree that the costs of the mediation would be borne by his client rather than by his opponent. This led to a loss in revenue to his firm by having to share the costs, when the normal arrangement on settlement would have been that his opponent would meet all of the legal costs:

"Saved costs, but my firm lost out by having to split the costs. My firm lost out my fee earning time for the three hours of mediation. Whereas if I had negotiated on the telephone, they would have been paid." (Claimant rep, PI)

Good and bad features of mediation

Interviewees were asked what they considered the best and worst aspects of mediation. The most common positive attributes of mediation mentioned by representatives and parties during interviews were the **informality** of the proceedings by comparison with trial; the **speed** of proceedings and the possibility of achieving early settlement; having **everyone around the table**, which is seen to be conducive to settlement; and saving the client the **cost** of going to trial. Cost savings were almost always calculated in relation to potential trial costs rather than considering what the saving might be from bringing forward a settlement that was likely in any case. Trial tended to be mentioned more often in non-personal injury cases where, as seen in Chapter 2, trials are factually more likely to occur than in personal injury cases where the overwhelming majority settle before trial.

Good: informal procedure

The informality of mediation was valued for the lack of legal technicality and because it offered parties the chance to become centrally involved in the settlement process. It also permitted exploration of a wider range of settlement options than would be available through court adjudication.

“It’s informal rather than having a more formalised court procedure. It allows the parties to discuss other options which the court can’t order, so for example, in our case the possibility of future business even if we’re successful at trial – that’s not something the court can order in its own right. Also the speed element of it. It enabled us to reach a settlement at an early stage rather than having to wait six months for trial...and the costs consequences. We haven’t had to incur the cost of prosecuting our claim all the way to trial.”

Good: mediation as a preview of trial...

A number of interviewees mentioned the benefit of mediation in providing advance knowledge of matters that would be valuable if the case were to proceed to trial. In some cases, parties were frank about using mediation as a strategy for increasing their pre-trial knowledge, but on the other hand, the opportunity to see the opposing side and hear what they had to say, on occasion, led parties to review their position and thus helped to bring about a settlement.

“The thing that I liked about it was the fact that we had the opportunity to sit around a table, my client and the claimant obviously sat there. With the five of us in there what was good was that fact that it made us realise both parties were actually very good, they would have made very excellent witnesses and I think it would have been difficult to choose between the two of them on their evidence,

which version of events would have been preferred. The Claimant's version had the stronger argument and we knew that we were going to be conceding a proportion of liability, but having sat around the table and listened to the Claimant speak made us realise exactly how he was going to come across if it went to trial." (Defendant rep, personal injury road traffic settled)

Bad: giving away your secrets...

Some interviewees were, however, concerned that if the mediation was unsuccessful they would have been forced into revealing more of their hand than might otherwise have been the case, thereby weakening their subsequent bargaining position. This was a particular concern when parties were not optimistic about the chances of settlement and anticipated the possibility that the case might proceed to trial.

"The downside is that if it doesn't settle you've perhaps given more away about your case as it were. If you've got a more difficult case and it doesn't settle, they will have been open which is obviously the aim of mediation so you may well have said more than perhaps you would have normally." (Claimant rep, PI settled)

"I think my client presents as being disorganised which made the claimant think 'We're going to win' and I suppose one might add that to the list of reasons why some cases aren't right for mediation, because you want to hide your client away. And I think that was one of the features [that led to a failure to settle at the mediation]." (Def rep non-PI)

"I hoped that the matter could be resolved. I thought it was going to be sensible for everyone if it could be and was hopeful that it could, but unfortunately it couldn't...I thought it might either settle or at least narrow some of the issues and it did neither really. My concern was that the other side were using it as a method to find information about my client, which wasn't really the purpose." (Claimant rep Police action unsettled)

Bad: cost

There were many concerns about the cost of mediation in the context of automatic referral. Mediation is not a cost-free exercise for parties. As was made clear by the responses of representatives, the cost of mediation to a party seems to be around £1,000–£2,000, leaving aside the mediator's fee. The preparation time, travelling time and attendance at mediation all attract legal costs. Three hours of the time of a solicitor attending mediation is not insignificant. Where there is a strong prospect of settlement, the investment in mediation might be seen to be proportionate and valuable in relation to the cost and time saved by concluding the case at an early stage. However, where the prospect of settlement is more dubious, and where mediation fails to achieve a settlement or any significant acceleration of settlement, then the cost of the mediation

becomes significant and a source of dissatisfaction if the parties feel that they have been pressured into mediation by the threat of cost sanctions.

"I just prefer the judicial system more in that people get up to give their story and one person makes a decision. The fact is that if people have to get to court, they are not likely to be in a frame of mind to settle, if they've got to that stage... Usually negotiations have taken place before hand and the last resort is to issue proceedings. Well, so you've got to get into a room and start arguing about it again. It is fairly pointless. They've done that in correspondence probably before hand, which is what has necessitated the issue of proceedings and it is a step backwards rather than a step forwards. But, I've not had particularly good experience with mediation, so perhaps I am bit biased. ...I just think they take an awful lot of time and involve an awful lot of people and only very few cases are truly suitable for mediation. I mean the one that I've been on before, there had been something like, maybe 20 of us involved, there were a number of different parties and just went on and on and on... you take the cost of counsel for a whole day plus the cost of the mediator plus the cost of the solicitors there.... It is just astronomical and probably would have been better decided in a court in one day." [Claimant rep, PI opted out of mediation]

"I think the worst feature of mediation is simply the expense of actually preparing and attending, sitting down for three hours when you're not going to get an agreement... I think if one's going to have mediation, it should apply to higher value cases than lower value cases. In that same four hours I can practically completely prepare a debt claim for ten thousand quid" (Claimant rep non-PI, unsettled mediation)

"The worst aspect [of mediation] is that there are feelings amongst certain influential people that mediation is a panacea and they fail to realise that mediation in itself can, on occasion, be quite expensive... There's quite a lot of preparation needs to go into it so if it fails you've effectively done an awful lot of preparation for nothing and that's the cost that your client has to incur." (Defendant PI)

The settlement rate for the ARM mediations was around 55% where no objection to ARM referral was made, 44% where the defendant objected and 48% where both parties had originally objected. As will be seen in Chapter 4, the settlement rate in the VOL mediation scheme under the *Dunnett v Railtrack* regime has stabilised at 49% or lower. There is, therefore, a policy question about the most appropriate way of encouraging parties to engage in mediation. If the cost of an unsuccessful mediation is around £1,000–£2,000 per party, then the total cost of failed mediations is significant, leaving aside the fact that mediators are providing the service at an uneconomic rate.

Bad: physical environment

Not a single interviewee, whether they had been involved in a successful or unsuccessful mediation had anything good to say about the conditions under which mediations take place at Central London. Where cases settled at mediation, interviewees would occasionally comment that the settlement occurred in spite of the physical surroundings rather than being facilitated by the environment. Those who failed to settle were often vitriolic in their comments. Key issues were temperature (generally too hot, but occasionally too cold), cramped conditions, with people sometimes having to stand during caucus meetings; rooms being too close together so that it was possible to overhear conversations next door; and the absence of facilities for refreshments – particularly when conditions were hot. It is possible that with mediations in Central London starting at the end of the working day, parties and representatives have a lower threshold for discomfort than might be the case earlier in the day. Moreover, if those attending mediation have had to hurry from the office, it is likely that by 7p.m. people are becoming hungry as well as tired.

“Oh God – the rooms are awful...really cramped. Maybe that is the idea that you try to quickly come to some agreement because you are in these grotty rooms for hours. It is not very nice. The rooms are very hot, there is not a lot of space and it is not very comfortable...whether that is intended I don't know. But there are no windows in these rooms – but it might be a reason that it is not the nicest surroundings.” (Claimant rep non-PI)

“One particular issue I have is the facilities. The Central London County Court where we were is absolutely terrible. It was boiling in there. Your inclination was just to get out as soon as possible, rather than stay there and negotiate. In fact it makes you want to get out rather than sit through the mediation. I felt slightly embarrassed for the client, because it was this idiot going between us in these horrendous facilities. And you know they are sitting there with the clock running on my time and obviously we were getting absolutely nowhere.” (Claimant rep, non-PI)

“You want to have dialogue, you want to create the environment for dialogue, so you want people to be comfortable, and I think the room could have been a little more comfortable. The room where we were all in together was too small, it was dark because the rooms are in the basement and so you know, you don't get the whole thing of feeling air in the room. It doesn't assist the process if you can't have water.” [Claimant rep non-PI]

“It was like being in a prison cell, so hot as well. Really, it's like hardly any windows. The rooms are the worst feature. And also the court can't accommodate an earlier time.” [Claimant rep PI]

Mediators' perspectives on ARM

To explore the experiences and perspectives of mediators conducting mediations within the ARM pilot, self-completion report forms were sent to all mediators who had conducted mediations during the first 9 months of the pilot. The forms collected information about the case, the mediator's views on the factors that had contributed to the outcome of the mediation, views about the role representatives played in the outcome of mediations, practical details about contact prior to the mediation and an opportunity for the mediator to raise any issues.

Of the 200 or so report forms distributed, completed forms concerning 104 mediated cases were returned, representing a response rate of about 50%. The report forms returned were divided roughly equally between cases in which a settlement had been reached at the mediation (48% of returned mediator questionnaires) and those where a settlement had not been reached (52% of returned mediator questionnaires).

Cases that settled at mediation

Mediators wrote more expansively about the process in settled mediations than when describing cases that failed to reach an agreement at the end of the mediation. Where the case settled, not only did mediators tend to describe the factors that contributed to the successful outcome, but they were also forthcoming about their general beliefs concerning influences on mediation outcomes. Key factors mentioned as critical to a successful mediation were: the party's willingness to settle and a desire to avoid trial; the approach of legal representatives, and the mediator's own skill.

Parties' willingness to settle

Mediators considered the approach of parties to the mediation to be critical to outcome. "Sensible" and "realistic" parties, particularly those who would recognise the weaknesses of their case, were seen to be more willing to negotiate constructively and likely to settle. This willingness was observed by mediators across different types of cases. Sometimes the approach of parties was so constructive that it required only a light touch from the mediator to facilitate settlement.

"Both parties knew when they could do better elsewhere but did not need to go there. They shared some pain but accepted a reduced outcome for the sake of certainty. [...] In my evaluation both the claimant and the defendant in this case were extremely likeable and reasonable characters whereby they could discuss the issues without too much interference from me."

Willingly submitting to the process of “Reality Testing” was often deemed to have contributed to the success of the mediation. In essence, the Reality Test works to highlight the unpredictable outcome of litigation against the certainty of settlement at mediation. Using the test, the mediator encourages the parties realistically to evaluate the strengths and weaknesses of their case, and then asks them to consider a few scenarios. For example, as this mediator explained:

“I asked both sides to consider what would happen if they went to court under three different scenarios: good day, bad day and middle day. What would their net cash position be? When this exercise was done it was clear that it was going to cost each side money to go to court and win. Since the money only guaranteed them a place in the courtroom and did not guarantee them a successful outcome they might as well consider using that pot of money to buy certainty now. [...] Both sides were encouraged to compare the likely outcome at trial with what was on offer, i.e. price the risk of doing better.”

One-quarter of mediators reporting on settled mediations attributed the settlement to the ‘spirit’ of the mediation. Necessary or valuable features identified were an atmosphere of constructive dialogue that provided an opportunity for the parties to focus on the case in each other’s presence and on the key disputed issues. The neutrality of the mediator and their objective view of the case were thought to be important in allowing the opposing sides to make good use of their will to settle – where that existed. The skill of the mediator was considered important in creating and maintaining a constructive and non-confrontational atmosphere.

“Mediation was needed to get through the points pleaded, and to get to the real issue, in non-confrontational structured way.”

“Mediation, providing a forum for open discussion between the parties, allowed the parties to recognise their true positions by unveiling key information.”

Parties’ wish to avoid trial

Where parties willingly submitted to Reality Testing or approached the mediation having carefully weighed the costs and benefits of proceeding to trial, mediators occasionally commented that one or other side of the dispute was weary of litigation or particularly willing to compromise rather than proceed to trial and that this had contributed to the success of the mediation. Factors that had been worrying parties in some of the mediated ARM disputes were the fear of having to be personally questioned in court and concern about subjecting their own witnesses to cross-examination in court. In other

cases, parties had become acutely aware of the cost implication of proceeding to trial and were keen to settle rather than continue with the litigation.

Settling despite reluctance

Several mediators, clearly enthusiastic about the idea of compulsory mediation, took the opportunity to note that some mediations, involving reluctant ARM recruits, had nonetheless ended in successful settlement. This outcome was taken as evidence that pressing unwilling parties to mediate is not necessarily inconsistent with the philosophy of mediation, nor is it necessarily a barrier to settlement. The following extracts also underline the fact that reluctance to mediate may derive more from the inclinations from solicitors than the parties themselves:

“Both sides were sceptical. I was not sure how much each of the solicitors really knew about the process. Neither side was enthusiastic – they were there because the ‘judge told them they had to be’ summed up their approach. But they were fully engaged once we got going. Keeping the parties together for a long opening session was important: each side had to understand what the other was saying – once they realised they didn’t have to agree with what they were hearing, and that I certainly wasn’t going to give a view, they listened, saw the uncertainties, and bought off those uncertainties by settling.” (Personal injury case)

“This case is a classic example of why there should be ARM. It has brought forward settlement appreciably and a sensible approach was taken to contentious litigation ...I hope this mediation illustrated that parties with representatives experienced in and aware of the mediation process can with the help of a competent and experienced mediator achieve a swift and satisfactory outcome (1¾ hours). Much of the current resistance to mediation by solicitors, suggested in the current review, is based on ill-judged reasoning and sheer ignorance of the process based in large part on a degree of self-interest (never admitted). I cannot help feeling that without a degree of compulsion such solicitors will never engage fully and properly in the process. There was absolutely nothing about this particular case being a compulsory ARM referral which created difficulty or prevented settlement – the absolute contrary is true.” (Personal Injury case)

Lawyers' contribution

Where parties were represented by lawyers, mediators reported that they were always involved in the process, although the level of involvement varied from case to case. In some cases, the lawyers did all the talking, while in other cases they left it to the parties to discuss the details of the case, intervening only when the issue of costs arose. In one case, one of the lawyers also drafted the papers to confirm the agreement reached. In

other cases, lawyers attended without their client being present at the mediation and their approach in these cases was critical.

In nearly three-quarters of the settled cases about which report forms were completed, mediators attributed part of this success to the contributions made by the legal representatives. Mediators commented favourably on the competence of legal representatives, whom they found helpful, and on lawyers' willingness to negotiate. They also commented favourably on lawyers' approach to settlement – particularly where they had clear authority to settle.

“Two solicitors got on professionally. They both said to me they did not think the mediation would last more than 20 minutes and neither thought that the other's clients really wanted to settle. Apparently, the defendants were indicating an offer of £500 and the claimant was looking for 100 times that plus costs. The claimant's solicitor in his opening said this – ‘My client is a man of principle. He has the money to take this all the way to trial. He will make it all the way to trial unless you make a substantial payment today.’ He told me that he had the litigator's dream: a client who had money and was a man of principle. What was interesting was that over the next couple of hours or so he and his clients were in a steady retreat from that position...Without doubt the presence of two experienced seasoned solicitors contributed greatly to the successful outcome. I suspect, but do not know that if both sides had been unrepresented the mediation might not have settled on the day. [...] There is no doubt in my mind that the presence and active involvement of solicitors on both sides helped the mediation process significantly.” (Contract case)

Mediators always defined “competent” lawyers as those with experience of mediation and therefore familiar with the process. Positive qualities referred to also include a flexible approach to settlement discussions.

Where lawyers appeared willing to negotiate, mediators always found this helpful in reaching a settlement and the ways in which lawyers participated indicated to mediators their willingness to reach an agreement. For example:

“Solicitors on both sides were keen to achieve a settlement of the long-running dispute. Solicitors on both sides took a practical – and non-antagonistic – approach to the case, and both seemed keen to see the mediation process succeed. [...] Unusually – in my experience – the lawyers were very helpful in a settlement being reached.”

“Parties were represented by competent reasonable solicitors willing to work.”

“The claimant's solicitor gave sensible advice, and the defendant's solicitor was willing to negotiate.”

Lawyers' willingness to negotiate was also characterised by a commercial/realistic approach to the dispute:

"The respective solicitors being realistic; it enabled the parties to focus on the issues."

"The commercial attitude of both solicitors [was a factor that contributed to the outcome]."

Obstructive lawyers

"Representatives, who do not understand the process, can be obstructive."

In about a quarter of the mediator report forms relating to settled cases, mediators suggested that legal representatives had been in some way obstructive to the achievement of a settlement. Unhelpful characteristics noted were lack of confidence in mediation, antagonism toward the mediation process and toward the other side during the mediation. For example:

"The principal defendant did not attend. He was represented by his solicitor who said he was not a believer in mediation."

"There was an unusually high degree of personal antagonism between the solicitors – which I was able to diffuse a bit. The defendant's solicitor was a very experienced canny insurance solicitor: he knew his stuff and was very well prepared. The claimant's solicitor was inexperienced and not well prepared; although he knew the facts of the case very well. He reacted by being extremely aggressive. The lawyers were totally involved: there was no one else."

Although the above examples are from cases where one or both parties were absent from the mediation, mediators did find lawyers sometimes obstructive when their clients were present. From the mediator's perspective, this obstructive approach was sometimes characterised as the representative's antagonism to the mediation process, or simply by being inappropriately prepared for the event. For example:

"One piece of evidence for the defence was an hour long video. I decided to exclude this as one hour would have taken up a third of the time available to make a debatable point."

Mediator's own skill

In about one-quarter of settled cases where a mediator report form was received, the mediator indicated that his or her skill had contributed significantly to this success. For example, responses to the question **"What factors do you think contributed most to the outcome?"** were:

"The skill of the mediator!!!"

"Without immodesty, skilful facilitative mediation."

A few mediators provided more specific responses, highlighting which skills were particularly valuable in securing a settlement.

"Asking the right questions."

"My encouragement to them to think settlement and not argument."

"My negotiation skills."

Some mediators believed that their legal knowledge in general and familiarity with the legal framework of the disputed matter made them particularly appropriate as a mediator for the case.

"The PI knowledge of the mediator helped to focus the mediation."

"Thorough preparation and my skill in mediation and experience at insolvency law and debt rescheduling and litigation procedures. Lawyer mediators have more experience."

"I think it helped the process that I was legally trained. (Able to test legal arguments; comment on how trial would proceed; and help on terms/form of settlement agreement)."

Pre mediation contact

In half of the settled cases where mediators had returned a report form, mediators had made some sort of contact with the mediating parties or their solicitors before the mediation appointment. This pre mediation contact took many forms: in some cases, it was merely a brief introduction about 15 minutes beforehand in the reception. In other cases, the mediators exchanged several phone calls, emails, and documents with the parties' solicitors' in the weeks preceding the event. In the majority of cases, the pre mediation contact consisted of a 15–20 minutes telephone conversation to each side, at some point within the week before the mediation. In such a case, one mediator noted:

"For a fee of £200 you really cannot expect much pre mediation contact."

However, this mediator also indicated that the pre mediation contact is generally proportionate to the complexity of the case, and that the practice is to vary the level of contact from one case to the next.

A few mediators felt that pre mediation contact helped break the ice and allowed them to build a rapport with the parties, thereby instilling a sense of trust. This was deemed valuable to securing a settlement, particularly in time-limited mediation.

"It's a people thing...so any getting to know (on an informal basis) the parties is helpful."

Essentially, breaking the ice allowed mediators to set the tone of the mediation event. One mediator who made one phone call to each solicitor the day before the mediation stated:

"It's important to break the ice. And the lawyers feel better on the day. It makes it easier to get the mood music right for the mediation – if a mediator gets this right, you travel a long way."

Pre mediation contact also allows mediators to provide the parties with guidelines for the mediation so that they arrive prepared, i.e. having thought through their positions and the costs implications of continuing with the litigation.

"Two telephone calls to each party – essential information gleaned. Neither solicitor had mediated before, and neither knew what to expect or how to prepare. [...] Much time would have been wasted at court without this and the mediation might well have got off on the wrong foot. As it was, both solicitors were well prepared and I was aware that there was much relevant information that had not been provided to me by the court."

Other mediators contacted the parties before the event to collect more information relating to their case, because they felt that the information provided by the court was insufficient. This occasionally involved a request for further documentation from the parties (discussed again below). It was also used to inform the mediator about any developments since the mediation date had been set by the court, to make advance preparations where necessary, and to explore parties' approach to the mediation.

"[The contact] produced crucial documents so giving me a better understanding of the strengths and weaknesses of each party's case."

"[Pre mediation contact] is very useful in time-limited mediation. You can start to establish rapport/trust, find out about experience and attitude toward mediation, any issues not reflected in papers, whether previous settlement offers."

"I had 2-3 telephone conversations with each solicitor. This enabled issues to be narrowed, a draft Tomlin Order to be prepared and the right people to attend with the appropriate authority."

Overall, mediators found pre mediation contact useful, especially given the time constraints of the 3-hour ARM mediations. On the other hand, a small minority of

mediators felt that pre mediation contact did not anything much to the process. In one case, involving damages for wrongful arrest and an element of alleged discrimination, the mediator did not find helpful pre mediation contact instigated by the parties:

“Both sides telephoned me before the mediation. The claimant’s solicitors particularly wanted to know about me and my experience. I do not know if the parties found it helpful. I did not.”

Indeed, a handful of mediators strongly opposed pre mediation contact on the grounds that it was largely unnecessary for time-limited mediations or that it could lead to an allegation of bias:

“None needed [pre mediation contact]: I prefer no contact, so no allegation of bias can be made.”

Funding

In a small number of cases, mediators commented on the parties' funding as an influence on the approach to mediation and the eventual outcome. Supporting the discussion of the influence cost indemnities earlier in this Chapter, mediators reported that where funding was problematic, or where there was a serious costs risk, the parties were more willing to settle at mediation. For example:

“The defendant could not recover costs from the publicly funded claimant and wanted to get out early.”

Timing

Mediators were asked to say whether they felt that the timing of the mediation had been appropriate. Although there was considerable variation in responses to this question, it was clear that the timing was considered a significant factor in the outcome of cases. If the timing was too early, the mediation might not only fail, but might also intensify the conflict between the parties.

“The mediation came somewhat early, thereby giving the defendant the opportunity to hide under lack of clarity to present a non-compromising posture.”

Some mediators felt that the optimal time to hold mediation is after the exchange of pleadings, when the issues are defined and the costs incurred are still reasonable relative to the dispute.

“A good stage in that (a) pleadings had (to some extent) defined the issues, and (b) costs had not escalated too much. The claimant’s solicitor commented that it was surprising the mediation occurred before the disclosure of documents. Not a problem in this case, but in other cases it might be better to mediate after disclosure.”

"It was helpful for each side to have the other's witness statements. It enabled not just me, but the lawyers on each side too, to reality test."

Time, facilities and court administration

Around one-quarter of mediators returning forms about settled mediations commented on the 3-hour time limit on the ARM mediations, the facilities provided for the event, and the administrative support provided by the court.

In common with the views of participating lawyers and parties, there were conflicting views among mediators on the effect of the time limit in settled cases. Some mediators thought that the limit provided a necessary sense of urgency to reach agreement, while others felt a more satisfactory agreement could have been reached with more time. For example:

"We managed to reach agreement in 3 hours. On this occasion the time limit was all right. On other occasions it carries problems."

"The ticking of the clock – the knowledge that as 19:30 approached, the chance to close the files was drifting away."

"The timing – running beyond the working day delayed this settlement and could have lost it. The insurer was not willing to provide active participation, which made it necessary to hold the matter over for two days for further instructions to be obtained."

"The final offer was accepted at 19.10 so that the process was drawn out to the last minute and almost didn't succeed due to the time constraint of finishing by 19.30."

On the other hand, there was a high degree of consensus about the facilities at the court. All mediators returning report forms on settled cases who commented on the facilities felt that they were not conducive to the mediation process. When cases succeeded in settling at mediation, this was often reported as being in spite of the facilities, rather than that the facilities were conducive to settlement. Comments from mediators in this respect confirmed those made by solicitors and parties. This underlines the importance of the physical environment in which mediations are held and the need for parties to be comfortable during sometimes intense and difficult negotiations.

"The CLCC rooms are small, windowless and airless. With any more than one or two attending, this can really make for a difficult working environment."

“The room used (3rd floor) was stiflingly hot which tended to lead to some stress on the parties. Comfortable surroundings could make reaching agreement easier.”

“The facilities are intimidating. We had to use a courtroom as our joint meeting room; the parties' rooms were adjoining, reducing sense of privacy and security. And no coffee or food was available for 3 hours – just a broken machine.”

“The mediation process would benefit from the parties' rooms being away from each other, not adjacent to each other, so that one party's caucus does not get overheard by the other party.”

“Room space for the parties (in caucus) and the mediator (in joint sessions) was small. Members of one party had to stand up.”

Administrative support was also thought to be important by mediators. Those who commented on report forms about successful mediations felt that more support from the court's staff was needed. One mediator said:

- *“There is no time to build rapport or gather information once the mediation starts – this all has to be done in advance. It would be helpful to have more support from the court.*
- *Information – we are sent the bare minimum in advance and handed the whole court pile only minutes before the mediation, so time is taken out of the already short time reading it.*
- *Facilities – airless, hot basement rooms with harsh lights and no refreshments not conducive to a positive attitude at the end of a long day.*
- *Timing – because offices closed within an hour of starting, no access to information or authority which limits options.”*

The importance of strong administrative support to the success of court-based mediation schemes has been identified in a number of other research evaluations.⁴⁹ Mediators reporting about their experiences of the ARM scheme recorded some complaints about lack of support from administrative staff at the Court and lack of understanding about what was involved in conducting and successfully concluding mediations.

“Court staff and judiciary would benefit from learning about mediation and be trained for it. It would help if the courts can perform simple but time-consuming tasks such as filling in the forms in advance with the parties' names, case number, etc.”

⁴⁹ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98; H. Genn (2002) *Court Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, LCD Research Series 1/02; Lisa Webley, Pamela Abrams and Sylvie Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme, Report to Department for Constitutional Affairs*, September 2006, <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf>; Sue Prince and Sophie Belcher, *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* <http://www.dca.gov.uk/civil/adr/fast-track-mediation-guildford-exeter.pdf>.

"The preparation/information provided by the court was slender. The parties had not been told (until I telephoned them) how to prepare for mediation. I had not been made aware that both had been ordered to attend against their will and that offers had been made and updated evidence served."

"Consideration should be given to ensure that documents issued by one party to the mediator through the court, is also occupied simultaneously to the other party so that a balanced picture is given to the mediator, should the second party decide to respond."

There is no doubt that administrative support contributes to increasing the number of cases that proceed to mediation. It also appears from some of the comments made by ARM mediators, that it may contribute to the success of the mediation by ensuring that necessary information is provided both to the parties and the mediator in good time for the mediation.

Unsettled Mediations

Where cases had failed to settle at mediation, mediators were far less forthcoming in their comments on mediator reports about the factors contributing to the outcome. Key factors mentioned with some regularity by mediators, however, were the approach of the parties and their willingness to compromise, the approach of legal representatives and understanding of the mediation process, the timing of the mediation and availability of evidence, funding issues, and the facilities at the court.

Parties' approach to mediation

Mediators felt that parties themselves sometimes created an obstruction to the mediation process, when they had heavily invested emotions in their case. Mediators commented that personal feelings, predominantly in non-PI cases, could hinder the settlement process. Mediators commented that feelings of pride and anger were capable of preventing parties from moving their positions and negotiating towards settlement. These feelings also appeared to contribute to parties' having a negative approach to the mediation process.

"The parties (particularly the defendant) started with a very negative attitude to the possibility of settlement."

Where mediators found that the parties themselves had hindered the process, they often noted that one of the parties simply wanted to have their day in court. This was observed in both PI and non-PI cases. For example:

"Only money and principles were involved in this case and both parties effectively wanted a judgment on the case. I suggest it probably was not a candidate for mediation because of the extensive legal baggage the case carried."

"The claimant simply wanted to have his day in court. The claimant had lost confidence in his solicitors and his union."

"On the one hand, there was a defendant very much led by his lawyer and over-exaggerated optimism at the strength of his case. On the other hand, a defendant who felt he was being 'tapped for money' because he was a man of means and he would rather defend himself in court to show that he was a fair man. The issue of costs was not a factor for the defendant."

'Forced' to mediate

There was clear evidence from the forms returned by some mediators that they had encountered obstructive behaviour as a result of parties and their lawyers feeling that they had been compelled or pushed into mediation through the ARM pilot. In such cases failure to settle was principally attributed to reluctance and negativity about the mediation process. The link with automatic referral is made explicit in the following extracts:

"A very inflexible approach by the claimant and its legal advisers. The claimants were not prepared to consider a settlement. The claimant was not prepared to give mediation a realistic prospect of succeeding. No doubt this is because it was an automatic referral to mediation."

"Parties' intransigence. The defendant said that they had to accept mediation because of the ARMS scheme."

"Rightly or wrongly, the defendants felt they'd been ordered to mediate. In a court-based scheme it would be better to make it feel a bit more positive!"

"The defendant's unwillingness to make an offer. NOTE: The defendant applied unsuccessfully to the court to prevent mediation from taking place."

"Defendants refused to proceed after a while. They had expressed unwillingness to mediate to the plaintiff and I believe to the court."

Parties too far apart

Mediators also noted that failure to settle was sometimes caused by the parties being too far apart in their assessment of the value of the case, or where, in personal injury cases, they had different approaches to the calculation of future loss. Similarly, where the parties exhibited a deep conviction in their respective cases and were not ready to

understand the realities of their positions, they were unable to compromise in order to reach an agreement.

“The parties had different perspectives on the case. Both were prepared to move but not enough.”

“The defendant was ‘interested’ only within a narrow band.”

“The parties were not ready to settle and were only able to narrow their differences slightly.”

In a few cases, mediators indicated that the particular dispute before them was simply not suitable for mediation. This occurred where the facts were too complex or where the parties were unwilling to compromise because the dispute had become too adversarial.

“Extremely complex facts and totally unsuitable for mediation – unlike any other mediation I have had. I am a big advocate of mediation. However in this case I believe it was the wrong thing to do as the parties were using it as a fishing exercise, to evaluate their opponent’s case with no intention whatsoever of settling.”

“This was a mediation with no substance. There was no real debate over the move for convergence.”

Contribution of legal representatives

In about one-third of the cases where mediators returned report forms about unsettled cases, mediators blamed legal representatives for obstructing the settlement process. Legal representatives attending mediation sessions were, according to mediators, generally involved in the process. Some of this involvement was considered helpful by mediators, for example, when lawyers spoke on their clients' behalf about the merits of their case and matters relating to costs. On the other hand, mediators also reported that in some cases the approach of lawyers had been unhelpful. Unhelpful behaviour tended to be characterised by lack of preparedness for the mediation, unwillingness to negotiate, and an approach that suggested they were simply “going through the motions”.

Lack of preparation by lawyers

Mediators noted that if lawyers had not done sufficient preparation, for example by providing poor estimates of damages, they were not able to negotiate constructively.

“Counsel for the claimant was extremely unprepared and prejudiced the mediation outcome with a grossly unrealistic assessment of the claim value.”

Mediators judged lawyers' lack of preparation as a serious obstacle to the effective mediating of disputes. One mediator commented that:

"This shows the need in such schemes for the judge or the system to order that both parties be ready and prepared for the mediation. There should be a penalty if they are not."

Although lack of preparation by lawyers might be an indication of a failure to take mediation seriously, it is also possible that it derives from a general lack of familiarity with the mediation process.

"It would be helpful for guidance notes to be provided to the parties on how to prepare, the process, etc... The claimant's solicitor in this case was totally unfamiliar with the process despite advance telephone discussions."

Lawyers unwilling to mediate

In some cases mediators felt that legal representatives for both parties had not shown a readiness to reach settlement during the course of the mediation. When this occurred, it was most often attributed to the lawyers' focus on the legal issues and their strengths, or their preference for dealing with the case through litigation. This approach was noted particularly by mediators in non-PI cases, ranging from contract disputes, to those concerning civil actions against the police for assault, false imprisonment and malicious prosecution. In a case where race discrimination by the police was at issue, the mediator believed the lawyers' perceived unwillingness to mediate impeded settlement. This is an example of cases where there is little scope for compromise and where automatic referral to mediation may simply represent an unproductive additional hurdle.

"This was a highly polarised dispute. All lawyers (solicitors and counsel) indicated that the mediation was hopeless. Such claims never settle through mediation. They were only attending because they had to under the scheme. All indicated to me in advance that they were really only going through the motions."

Lack of Authority

In some cases, the absence of the claimant, defendant, insurer, or other relevant third party from the mediation was found by mediators to be an obstacle to settlement. Even where parties were available at the end of the phone, their absence from the negotiating table was considered a hindrance to the process.

"The claimant's absence was crucial."

"Barrier here: absence of claimant himself."

“No insurer present for the defendant – limited the scope of the mediation to some extent.”

“Pensions provider who made the original incorrect estimate was not present at mediation. [He] could have contributed to the settlement pie.”

The absence of a crucial party meant that in some cases solicitors did not have authority to settle, thus preventing what might otherwise have been a successful outcome to the mediation. The absence of a key party also meant that lawyers were occasionally unable to deal with new issues that arose at mediation. Mediators sometimes felt that this tactic in the course of mediation was suggestive of rather hollow compliance with the ARM scheme, rather than a real willingness to mediate.

“The defendant’s solicitor was one hour late. This solicitor had no authority to settle at any level but was only authorised to prove the claimant wrong. The defendant did not turn up to the mediation.”

“There was willingness to compromise on both sides, but the claimant’s solicitor was restrained from further (and potentially final) compromise by inability to deal with important issues (raised late by the defendant) in the claimant’s absence. The claimant’s solicitor made it clear he could compromise on vital issues and had a bottom line to settle.”

Timing of mediation

In common with cases that settled at mediation, mediators in unsettled cases varied in their views as to whether the timing of the mediation had been optimal. In unsettled mediations, mediators often felt that the mediation had occurred too early in that necessary evidence was unavailable at the time of the mediation appointment. This obstacle was particularly evident in personal injury cases where it was argued that further medical evidence was necessary in order to arrive at a settlement. In a few cases, mediators reported that there was simply no evidence available to determine liability. In other cases, where the medical evidence was too raw and incomplete, it prevented the parties from reaching an agreement. In some cases, the non-disclosure of evidence meant the parties were uncertain as to the strength of their positions and as a result, felt unable to negotiate.

“[The mediation occurred] far too early: the defendant had not yet provided full statement of reply so (disputed) factual matrix not established – its absence hindered constructive negotiation and factual dispute dominated the discussion.”

“This was a complex case and disclosure/exchange of witness statements might have clarified the strength of the positions.”

“Had evidence been exchanged each side would have had a better appreciation of what they had to meet.”

“Failure to provide background information meant that time was wasted at the outset of the mediation clarifying the issues.”

Where the timing of the mediation was deemed appropriate, despite lack of evidence, it remains unclear why the mediator deemed the timing to be so appropriate.

“Although it [timing] was about right I think that mediation might also be helpful once further expert testimony has been secured, particularly that of the defendant.”

Funding

Mediators reporting on unsettled cases offered an interesting perspective on the impact of legal costs indemnities. Where at least one of the parties' legal costs were covered by Legal Aid, a union, or an insurer, mediators tended to feel that this contributed to the failure of the mediation. In such situations, one party is not subject to the litigation costs risk which mediation aims to reduce and may therefore be less anxious about holding out for a higher offer.

“Union insurance meant no cost of going to court. With legal costs covered, the claimant had no disincentives for further legal proceedings.”

“The fact that the claimant was on full legal aid made settlement less urgent.”

In the case of Conditional Fee Agreements, in professional negligence for example, mediators felt that there was a positive incentive to litigate. As a result, parties represented under such agreements were unwilling to compromise at the mediation and their legal representatives were often described by mediators as obstructive to the process. Furthermore, their costs tended to be disproportionate to the claim value, which further supported the incentive to litigate.

“One of the parties' solicitors was on a contingency fee agreement. [...] The solicitor's costs were out of proportion to potential amount of damages. After trial both parties' costs will be circa £20-25k. Amount of potential damages £750 - £1,500. Contingency fee arrangement a determining feature [in failure to settle].”

“The claimant's solicitor claimed her costs under the conditional fee agreement were around £25,000! The defendant's costs to date were only £6,000. The claimant's solicitor insisted on a large contribution to her costs, which the defendant refused to pay. I believe that agreement would have been reached on a sum payable to the claimant, but there was insufficient time to resolve the costs issue. [...] The claimant's costs on a conditional fee agreement were totally disproportionate.”

Time limit on mediation

In a range of cases, mediators believed that the mediation had failed as a result of the 3-hour time limit. Mediators would complain that there was insufficient time for some parties to deal with all of the issues and move towards an acceptable compromise. For example, where evidence remained undisclosed until the mediation, the time constraint limited the possibility of reaching an agreement. One mediator explained:

“Both parties were keen to settle and the main reason for failure to reach a final settlement was that the mediation ran out of time. The broad outline of an agreement was reached but a settlement agreement could not be signed in the time available since the defendants needed to check a number of facts and consult third parties. In this case it would have been helpful to have been given more than three hours to complete the mediation.”

“With more time this case probably would have settled.”

“There was insufficient time to resolve the costs issue.”

The issue of the effect of the time limit is, however, complex. In some settled cases, mediators felt that the pressure of time assisted in focusing minds and creating a momentum toward settlement. Thus, where the outcome was agreement, time pressure was felt to be either a neutral or positive factor in success, so the attribution of failure to the time limit must be interpreted as case-dependant rather than as a general principle. What mediators were saying is that *in this particular case* there did not seem to be enough time to reach agreement, although it is impossible to know whether with more time *that particular case* would, indeed, have reached agreement. It is also true that under the terms of the scheme, it was possible to fix a second mediation appointment if insufficient time was available to reach settlement in one session and there was a willingness to continue negotiating. In a small number of cases a second mediation session was fixed and this occasionally, although not invariably, resulted in settlement.

Facilities

In common with the feedback from solicitors, parties and mediators in settled cases, many reports about unsettled cases noted that the facilities were far from ideal and not conducive to negotiating a settlement. A consistent complaint was that the rooms being used for mediation in the court were hot and cramped.

The value of unsettled mediation

Despite failing to reach an agreement at mediation, some mediators believed that the ARM mediation had, nevertheless, contributed to the ultimate resolution of the dispute and that the case was unlikely to proceed to trial. The mediation process was seen as an opportunity for the parties to re-assess their positions and reflect on the scope for compromise.

“Whilst it did not settle I still feel it was of great benefit to both parties as it certainly made them stop and evaluate their cases. Still might settle I think!”

“Best part – far and away – was a lengthy meeting between 3 complainants and 2 senior police officers, in course of which both realised that their demonisation of the other had been misplaced. This led police to consider how proceedings could be brought to an end without trial. [...] I think there is a good chance of a deal being arranged that may well lead to a resolution of this action. No guarantee that it will settle; but I am encouraged.”

Mediators' fees

A few mediators took the opportunity in completing their report forms to comment on the fees paid to mediators under the ARM scheme. When comments were made they were always couched in negative terms. For example:

“Mediators should not be allowed to proceed unless the courts make sure that both the parties paid the appropriate fees. Do something about the mediators' fees both in amount and for payment on time!”

“It would encourage parties to produce a settlement if the mediation fee is increased.”

“The fee paid to the mediator is totally uneconomic in light of the work/time involved! But I regard it as essentially a pro bono activity.”

“It is good value for money for the parties, particularly if the dispute settles. The mediation fee is low and in many cases they are getting experienced mediators.”

“Two hours reading, four hours mediation, plus travel of two hours (train, taxi and tube), and out of pocket expenses is far too good in value terms and the mediator's fee should be a minimum of £500 given the huge court fees now being charged and the easy cheap option which solicitors are now being provided with for their clients.”

There is a policy question about the appropriate level at which mediators' fees should be set for such court-based mediation schemes. It is reasonable for mediators to wish to be appropriately remunerated for their skilled work. However, the economics of relatively

low-value county court litigation suggest that there may be a limit to what parties are prepared to risk on mediation unless the prospects for early settlement are very good.

Summary

In common with other evaluations of court-based mediation schemes in England, interviews with solicitors advising clients in the ARM pilot highlighted the critical role of the legal profession as gatekeeper to mediation. Solicitors advise and parties, generally, accept that advice. Although it is difficult to assess the impact of the *Halsey* judgment on attitudes to mediation, many solicitors who raised objections to ARM, particularly on the defence side in personal injury cases, regarded automatic referral as a minor bureaucratic hurdle, rather than as a serious issue.

Considered justifications for opting out of the ARM scheme included the timing of the referral, the anticipated cost of mediation in low-value claims, the intransigence of the opponent, the subject matter of the dispute, and a firm belief that the case would settle anyway and that mediation was therefore unnecessary.

Individual parties, other than repeat-player defendants, often seemed bemused by questions about ARM, having little or no recollection of discussion with lawyers about mediation. When discussions were recalled, parties generally indicated that they had simply followed their solicitor's advice to opt out of mediation.

Evaluations of mediation experiences in the ARM scheme were substantially influenced by whether or not the case had settled at mediation. Those involved in unsettled mediations were considerably more negative in their assessments than those attending mediations that led to settlement. A substantial proportion of parties and representatives interviewed about unsettled ARM mediations felt that they had been pressed into mediating. Explanations for failure to settle at mediation focused on the behaviour of the opponent, including intransigence and unwillingness to compromise; opponents who were merely 'going through the motions' and were not mediating seriously; and opponents turning up without authority to settle. Some interviewees felt that their mediator had demonstrated a lack of skill and others felt that the three-hour time limit was too short.

Interviewees who felt that they had been compelled to attend unsuccessful mediations frequently expressed discontent about the ARM scheme, arguing that bringing unwilling parties to the mediation table was inappropriate and costly. In almost every interview with representatives involved in unsettled mediations, the view was that the mediation had increased the legal costs of the case, most commonly by around £1,000 to £2,000.

Where mediations had been successful, evaluations were more positive. Common explanations for accepting the referral without objection were keenness to settle, speed, cost, or the need to avoid a logjam in negotiation. Where cases had settled at mediation, explanations for the outcome tended to focus on the skill of the mediator, the opportunity to exchange views and reassess one's own position and the willingness of opponents to negotiate and compromise. Successful mediations were generally thought to have saved legal costs, especially where a trial had been avoided.

Key positive features of mediation were said to be the informality of the procedure, the speed of proceedings, potential for settlement, and the opportunity to make cost savings. Negative experiences of mediation were said to be the danger of giving away too much about the case, the cost of mediation – especially where there was no settlement – and the physical environment at Central London, which was universally seen as a significant impediment to settlement.

Mediators asked to account for the outcome in mediations conducted under the ARM scheme suggested that key factors contributing to settlement were the willingness of the parties to negotiate and compromise, the contribution of legal representatives, their own skill as mediators, and administrative support from the court.

Explanations for failure to settle ARM cases at mediation focused on reluctant parties' unwillingness to compromise having been pressed into mediation, together with the problem of legal representatives failing to understand the mediation process and being unprepared to negotiate. There were also concerns about mediations occurring too early, the influence of legal aid and other costs indemnities reducing pressure to settle, the constraint of 3-hour mediations, and the uncomfortable facilities provided for mediation at the court.

Chapter 4. The Central London voluntary mediation scheme

Background

As discussed in Chapter 1, after the formal evaluation of the original Central London voluntary mediation pilot scheme published in 1998, the Lord Chancellor placed the scheme (VOL) on a permanent footing. An Advisory Committee continued to oversee the scheme and keep its operation under review, making modifications from time to time, and undertaking promotional activities and outreach work with the legal profession and user groups in an attempt to educate and build demand for the mediation service. Shortly after the end of the pilot period, a number of significant changes were made to the scheme in order to reduce the administrative cost of running the scheme. The court ceased sending out personalised invitations to litigants to enter the VOL scheme, and the comprehensive mediation database designed for the pilot evaluation was downgraded so that only the most rudimentary details were recorded about mediated cases.

In 2003, prior to the decision to set up the ARM experiment, the Advisory Committee decided that a limited review of the VOL scheme should be undertaken. The decision was prompted by policy developments since the 1998 evaluation and suspicions about falling settlement rates in the VOL scheme. The purpose of the review was to establish:

- the number and type of cases mediated since the 1998 evaluation;
- the outcome of cases;
- whether there had been a decrease in the settlement rate at mediation and, if so, what might be the explanation.

A two-part review was therefore undertaken. It comprised an analysis of data held on the voluntary mediation database, supplemented by data drawn from court case files and the CaseMan system; and a survey of parties and lawyers involved in VOL mediations during 2003 (discussed in the next Chapter).

Data collection

When the decision to conduct a further review of the scheme was taken in 2003, the basic information available on the VOL mediation database about the operation of the scheme since the 1998 evaluation was sparse and incomplete. The database contained

information relating to claim number, date of mediation, names of parties and mediation result. After a mediation had taken place, the court staff also generally recorded the name of the mediator and the provider organisation.

The mediation database obtained from the court in February 2004 contained rudimentary information about approximately 700 cases mediated between 1999 and December 2003. To undertake a meaningful review of the voluntary scheme post-1998, extra information was collected from court case files as follows⁵⁰:

- Address of parties (for the purpose of sending questionnaires)
- Name of representative (where represented)
- Address of representative
- Representative's case reference
- Mediation provider and contact details
- Final outcome (if not settled at mediation)
- Date of final outcome.

In autumn 2004, following the start of the ARM evaluation, it was decided to expand the information in the VOL database and, where possible, to include case type, case value and other information. This would have facilitated a fuller comparison with the 1998 evaluation and provided a basis for comparison with the later ARM pilot. Unfortunately, by autumn 2004, most of the hard copy court files relating to the years 1999–2001 had been destroyed and a number of files from the years 2001–2004 were missing from the file store. When no hard copy file was available, information to complete case details had to be extracted from the court CaseMan database. CaseMan is an administrative tool containing only limited information of value for research purposes. It generally records date of issue of claim, date of defence, date of mediation, and some details regarding final outcome of mediated cases where mediation had not been successful. There is scant information about case type, claim value, details of settlements or date of final conclusion of cases. Of the 984 cases in the 1999–2004 voluntary mediation database used in this analysis, additional information has been collected from CaseMan for 378 cases (38%) and from hard copy files for 606 cases (62%). In cases where no hard copy file was available, information such as case type or case value was not

⁵⁰ Extra information was collected on this 700, plus a further 284 cases, so that information was obtained about mediations that took place up to the end of 2004.

always available from CaseMan and this occasionally led to different base numbers being used in the following analyses.

The detailed review discussed in this and the next Chapter concerns the operation of the VOL scheme from the years 1999-2004. For the sake of comparison, simple results for the years 2005 and 2006 have occasionally been included in Figures and Tables to indicate the most recent trend in demand for the VOL mediation scheme and the settlement rate at mediation appointments.

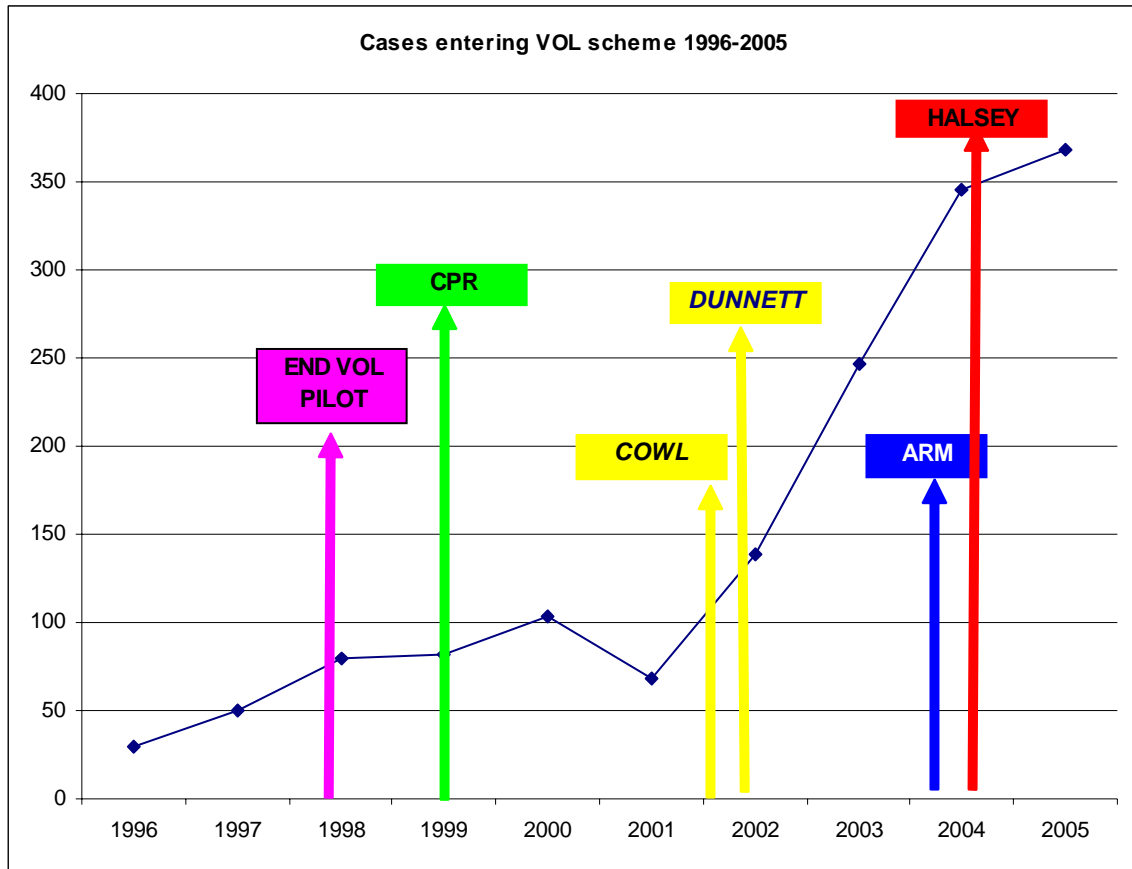
Operation of the VOL mediation scheme since 1999

Demand for the VOL scheme

Data recorded on the Central London mediation database show a significant increase in the number of cases entering the voluntary scheme and proceeding to mediation since its establishment in 1996, and since the time of the last evaluation in 1998. Information from the court mediation database for the period beginning January 1999 until the end of 2004 suggests that about 984 cases entered the VOL mediation scheme and 865 cases were actually mediated, as compared with 160 cases mediated between May 1996 and March 1998. Although the average number of cases mediated annually since 1999 was 144, the trend is apparently gathering momentum. In 1999, some 82 cases entered the VOL mediation scheme and 72 were actually mediated. In 2001, the number dropped to an all-time low, with only 68 cases entering the scheme and 57 being mediated. However, as Figure 4.1 shows, following the judgments in *Cowl* and *Dunnett*, the number of cases entering the scheme began to rise steeply, so that in 2003 some 247 cases entered the scheme with 225 being mediated, and in 2004, 345 new cases entered the scheme with 293 actually mediated. It is reasonable to infer that this steep increase in the number of cases entering the scheme can be largely attributed to judicial policy as expressed in the *Dunnett* case. Evidently, the decision had the desired effect in encouraging or frightening litigants and their lawyers into experimenting with the VOL mediation scheme. Demand prior to *Cowl* and *Dunnett* was certainly showing only a modest increase from a low base, and in 2001, the demand was actually beginning to fall. It is also likely that following *Dunnett*, and with experience of the new CPR, the judiciary were themselves directing parties to attempt to settle by mediation under CPR 26.4.

The most recent figures from Central London show no reduction in demand for the VOL scheme in 2004/05 following the establishment of the ARM pilot. In 2005, 368 new cases entered the VOL mediation scheme and 323 were mediated. Basic figures for the first 4 months of 2006 suggest that this level is likely to be maintained although possibly not increased, with an average of about 31 cases entering per month for the first 4 months of 2006, which would produce an annual total of around 370 cases.

Figure 4.1 Cases entering the VOL mediation scheme 1996–2005 in relation to key policy milestones (n=1,512)



Characteristics of cases entering VOL

Case type

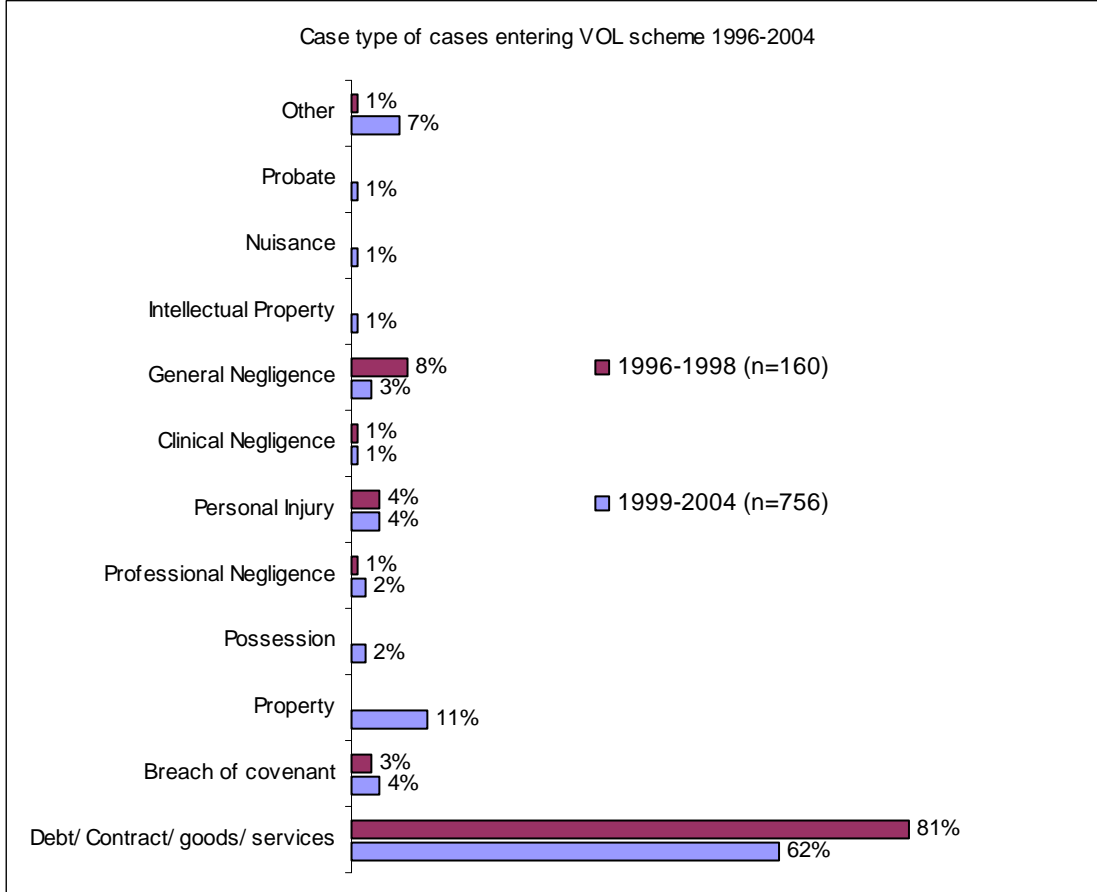
Although between 1999 and 2004 the number of cases entering the VOL mediation scheme increased substantially, the number of personal injury cases attempting mediation remained very small. The tendency of personal injury cases to avoid mediation has been evident from the very beginning of the VOL scheme in 1996 and has changed little despite the increasing demand for mediation among non-personal injury

cases. The proportion of personal injury cases entering the scheme appears to have remained static at about 4% of all mediated cases, despite the high proportion of personal injury claims in the defended caseload at Central London.⁵¹

On the other hand, Figure 4.2 shows that a relatively wide range of non-personal injury cases entered the VOL scheme. Debt, breach of contract and goods and services remain the largest categories of cases entering the scheme, but a range of other non-family disputes has also entered the mediation scheme. When the 1999–2004 breakdown of case types is compared with figures in the 1998 evaluation of the VOL scheme (Figure 4.2), it can be seen that **a broader range of cases have entered the scheme**. In the 1998 evaluation, mediated cases were almost entirely concentrated among debt, breach of contract and goods and services. Since 1998, property disputes and possession proceedings have accounted for a greater proportion of cases entering the scheme. Among the “other” category were cases involving nuisance, partnership agreements, declarations, and race discrimination.

⁵¹ See Chapter 2 for discussion of ratio of personal injury to non-personal injury cases in the Central London caseload.

Figure 4.2 Case type of cases entering the VOL scheme 1999–2004 (n=756 for which case type available) compared with 1996–1998 (n=160)⁵²



Claim value

Describing the claim value breakdown of cases entering the mediation scheme is not straightforward since there is considerable variation in the information available about claim value. Among non-personal injury claims, the value of claims is generally quantified in case files or on CaseMan, while among personal injury cases the value of the claim is generally indicated in broad bands.

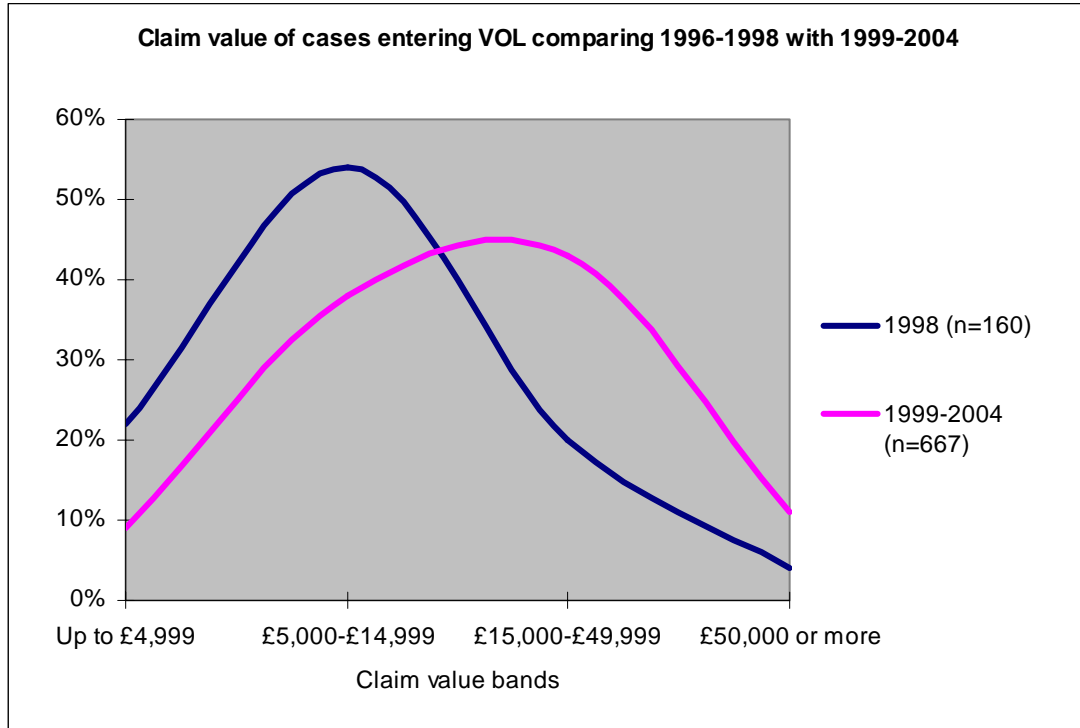
Information from case files and CaseMan, where available, suggested that most cases entering the VOL mediation scheme between 1999 and 2004 had values above the small claims limit (Figure 4.3) with only 9% falling below £5,000. A comparison with the 1998

⁵² Case type data for the VOL scheme were obtained at different stages during the review from CaseMan and hard copy files where these were available. Missing data are the result of missing case files or inadequate case type information on CaseMan. The category debt/contract/goods/services has been combined since 1998 on the ground that the distinction between the different categories (used by the court 1996–1998 to classify mediated cases) is often unclear and inconsistent.

evaluation shows that during 1999–2004, the proportion of cases entering scheme in the multi track range increased. **In the 1998 evaluation of the scheme, only four percent of cases had a value of £50,000 or more, whereas between 1999 and 2004 eleven percent of cases fell within that claim value bracket.** Between 1999 and 2004, about 43% of cases entering the VOL mediation scheme had a claim value within the multi track range of £15,000 or more, and 38% of cases had a value within the fast track range of £5,000-£14,999. The multivariate analyses discussed in Chapter 2 drew attention to the fact that, holding constant other factors, higher value claims appear to show a greater propensity to choose mediation in both the ARM and VOL schemes in Central London.

The very high value claims were mostly disputes about contracts/debt/goods and services, with this category comprising over half of the large value claims (52%). Other case types involving high value claims were property disputes, including boundary disputes (14% of the highest value claims), professional negligence (14% of the highest value claims), and breach of covenant (6%). There were also a handful of PI cases among the high value claims. In fact, almost all of the PI cases entering the VOL scheme between 1999 and 2004 were specified as multi track value cases. Among the 24 PI, cases for which case value information was available, 19 were specified as being multi track cases and five of these had values estimated at over £50,000.

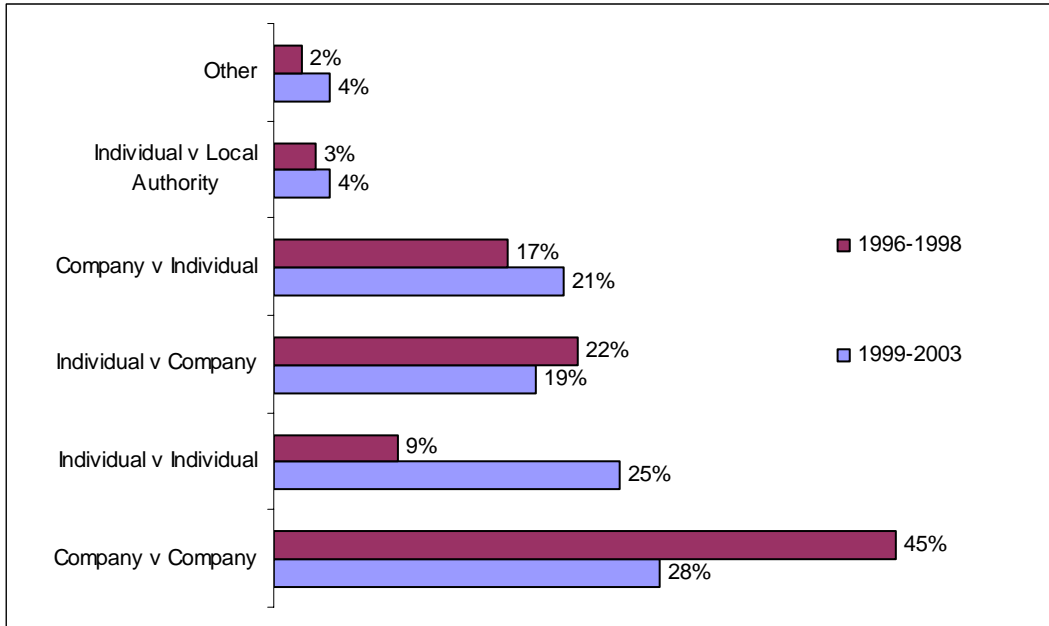
Figure 4.3 Claim values of cases entering VOL comparing 1996–1998 with 1999–2004



Party configuration

In the early days of the VOL mediation scheme, company v company disputes accounted for almost half of the 160 cases mediated between 1996 and 1998. Since 1999 a higher proportion of mediated cases have involved individuals bringing actions against other individuals, and also companies bringing actions against individuals (Figure 4.4). Company v company disputes accounted for only about one-quarter of cases entering the VOL mediation scheme between 1999 and 2003 as compared with 48% in the period 1996–1998. The shift in the balance of party configuration is consistent with the wider range of non-personal injury disputes that is currently being dealt with via the scheme.

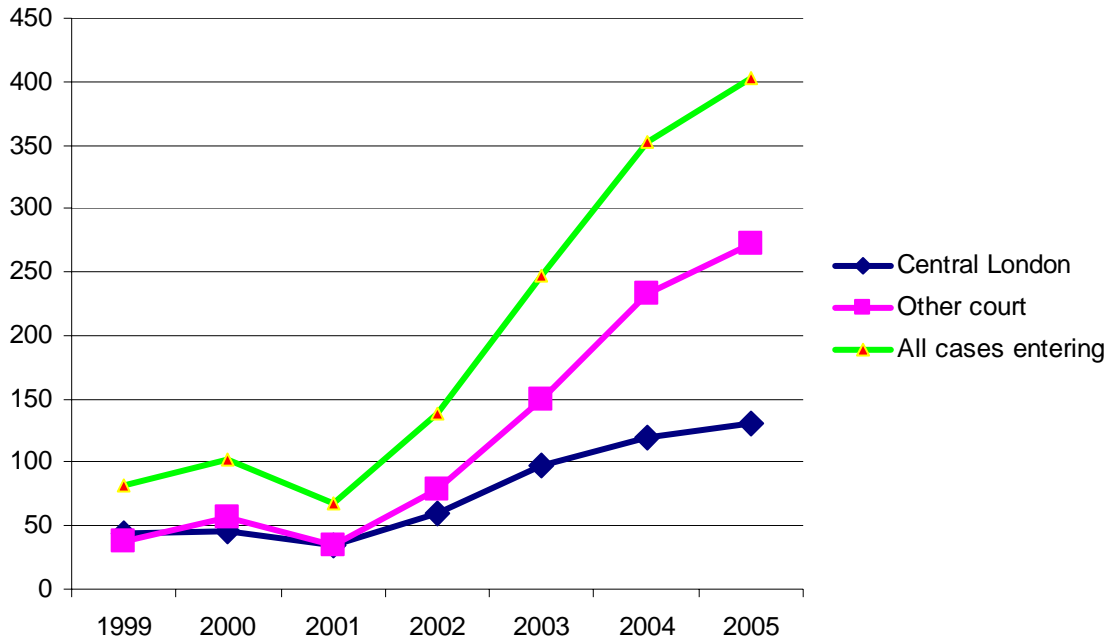
Figure 4.4 Party configurations in VOL scheme comparing 1996–1998 with 1999–2003



Court of Issue

A consequence of Central London’s status as a trial centre is that the caseload of the court includes a significant number of cases transferred in from other courts. Although the mediation scheme at Central London was devised by the judiciary at the court, the scheme is available to cases issued in courts elsewhere. Figure 4.5 displays the number of cases entering the VOL mediation scheme that were issued in Central London and the number transferred into the scheme from courts elsewhere between 1999 and the end of 2004. The Figure shows that although in 1999 a majority of cases entering the VOL scheme were cases that had been issued in Central London itself, the proportion of cases from courts outside gradually increased over the period, so that **by 2004 the majority of cases entering the Central London VOL mediation scheme had been issued in courts outside of Central London.**

Figure 4.5 Cases entering voluntary scheme by court of issue 1999–2005



Looking at cases entering the scheme in 2004 and 2005 – the period during which the ARM pilot was in operation – it can be seen that the number of cases entering the Central London VOL scheme from courts **outside** Central London over the course of the two years was actually **higher** than the number entering that were issued in the Central London Court.

The changing balance between cases issued in Central London and those issued elsewhere may reflect a number of non-exclusive factors:

- That the breakdown simply reflects the normal practice by which cases are transferred in to Central London for trial;
- That the Central London voluntary mediation scheme is now well established so that cases issued elsewhere are being transferred to Central London on the advice of solicitors so that clients can have the benefit of the low-cost mediation scheme;
- That the judiciary in other courts are directing cases to transfer to Central London to take advantage of the scheme, or that courts are directing parties to mediate and the parties are then taking advantage of the low-cost Central London scheme.

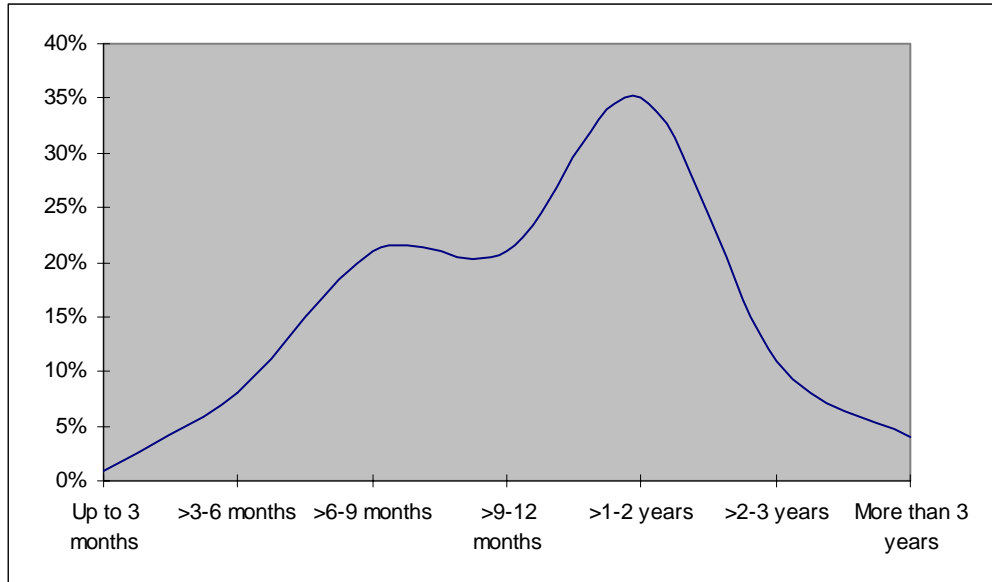
It is also possible that in the period 2004–05 the ARM pilot affected the take-up of the VOL scheme. Central London cases that might otherwise have volunteered for VOL during the ARM pilot may have been referred to the ARM scheme. Since ARM was only taking Central London defended cases (not other courts in the south east) it is likely that ARM was ‘creaming-off’ some of the suitable non-PI cases during the 12-month period, thus affecting the total number of Central London cases entering the VOL scheme.

As will be seen in Chapter 5, questionnaires returned by parties and their representatives revealed that, although many parties were mediating in a genuinely constructive spirit for positive reasons, cases were also entering the VOL scheme as a result of direct encouragement or pressure from the courts or an opponent, where the motivation for mediating was more a desire to avoid cost consequences than any positive expectation of reaching settlement.

Length of Dispute

Where it was possible to obtain information about issue dates, the period between issue and mediation date was calculated. For the 509 cases mediated between 1999 and 2003 (where this information was available), the average period between issue and date of mediation was 448 days, with a median of 364. The maximum number of days recorded was 4,275. In about one-third of the cases mediated in the VOL scheme between 1999 and 2003 the period between issue and mediation was less than 9 months, with another one-fifth mediated within 9 months to 1 year of the date of issue. About one-third mediated between 1 and 2 years after issue, and about 15% were mediated more than 2 years from the date of issue (Figure 4.6).

Figure 4.6 Period between issue date and date of mediation (n=509 mediated cases for which both dates available)



Outcome of mediations

Settlement rate among mediated cases

Of the cases actually mediated during the period January 1999 to December 2005, the proportion of cases that reached a settlement at the end of the mediation session was 44%.⁵³ The settlement figure does not include cases cancelling before mediation or those where settlement occurred after mediation. Most cases that settled at the mediation appointment did so at the first attempt with only a handful settling after a second attempt (20 cases). There were a similar number of cases in which mediation failed after two attempts (20).

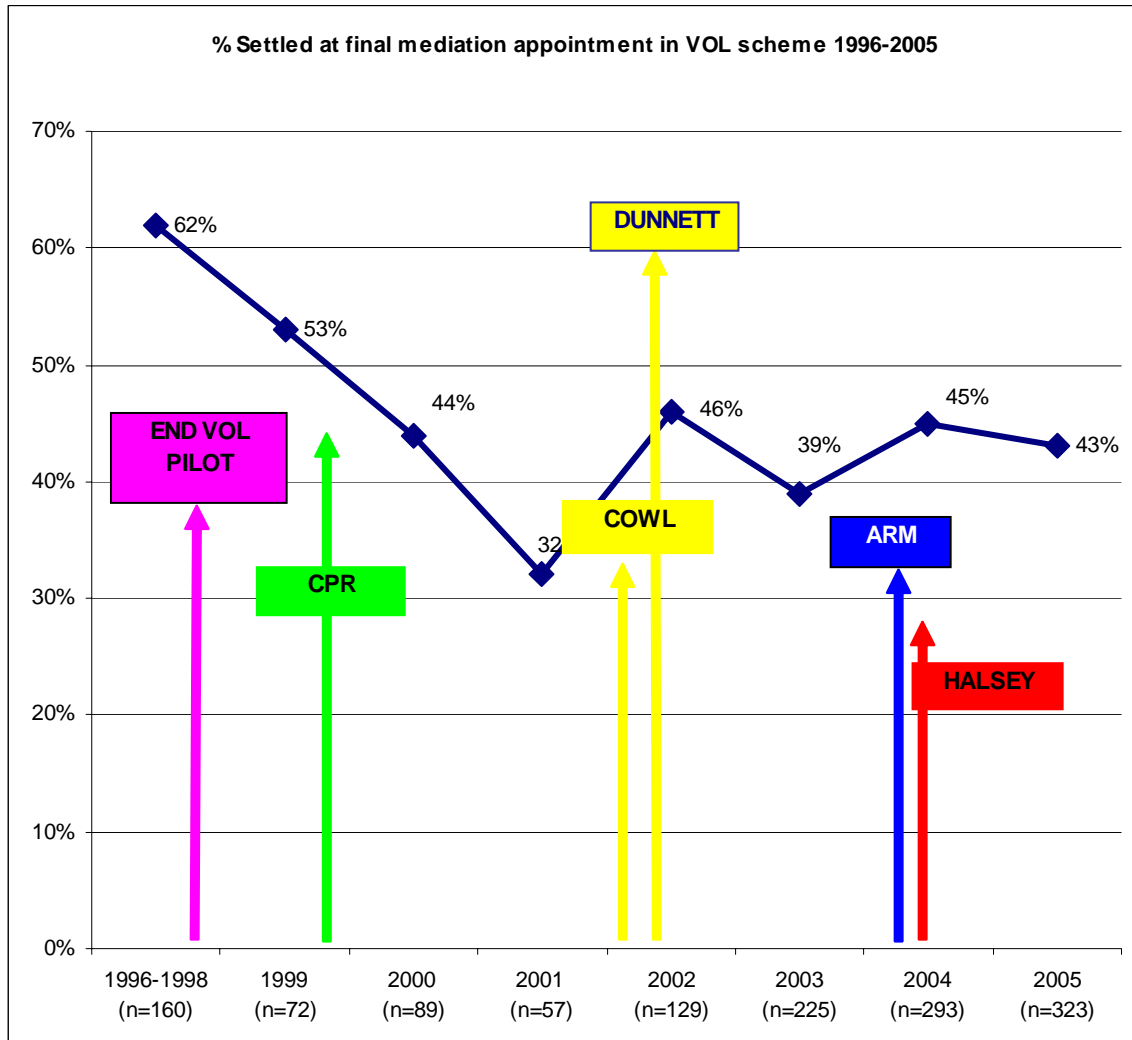
Figure 4.7 shows that the settlement rate fluctuated over the course of the review period, but the overall trend has been downwards. In each year since 1999, the settlement rate has been considerably lower than the settlement rate of 62% achieved during the period May 1996 to March 1998,⁵⁴ falling below 50% in 2000 and remaining below 50% from 2000 onwards.

⁵³ In addition to these outcomes there were also three cases (0.5%) that part-settled at the end of the mediation session.

⁵⁴ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98.

Figures 4.1 and 4.7 taken together show clearly that **since 2001, there has been a steep rise in the rate at which cases have entered the VOL mediation scheme at Central London, but the settlement rate at mediation has been low, relative to the early years of the scheme. Although the settlement rate seems to have recovered somewhat in 2004–05, it remains well below 50%.** This finding is discussed further below.

Figure 4.7 Settlement rate 1996-2005 in VOL mediation scheme (Base = 1,348 mediated cases)

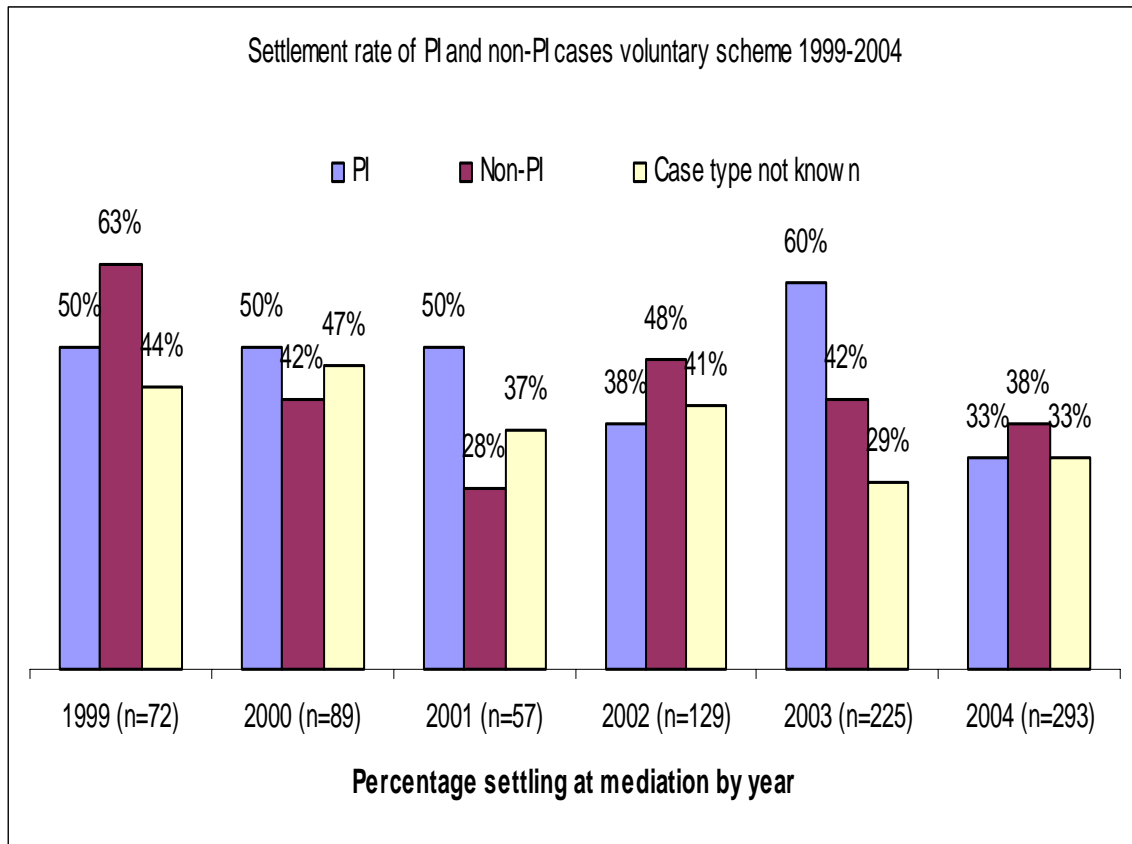


Outcome by case type

Figure 4.8 compares the settlement rate at mediation between personal injury and non-personal injury cases over the period 1999–2004. The Figure shows that there were few significant differences in the settlement rate. In 1999, non-PI cases had a higher

settlement rate than PI cases while in 2001 and 2003 PI cases seemed to be somewhat more likely to settle than non-PI cases. However, the differences were, overall, small and the multivariate analysis reported in Chapter 2 confirmed that case type was barely significant as a predictor of outcome of mediation appointments.

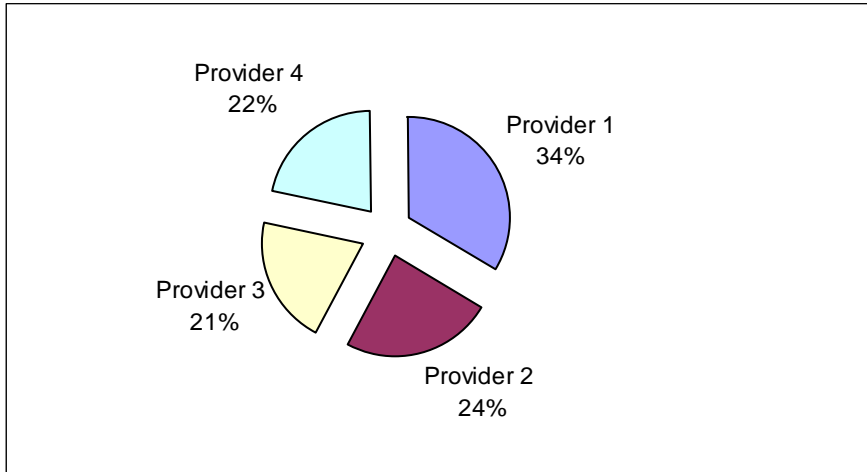
Figure 4.8 Settlement rate at mediation of PI and non-PI cases 1999–2004



Outcome and mediation provider

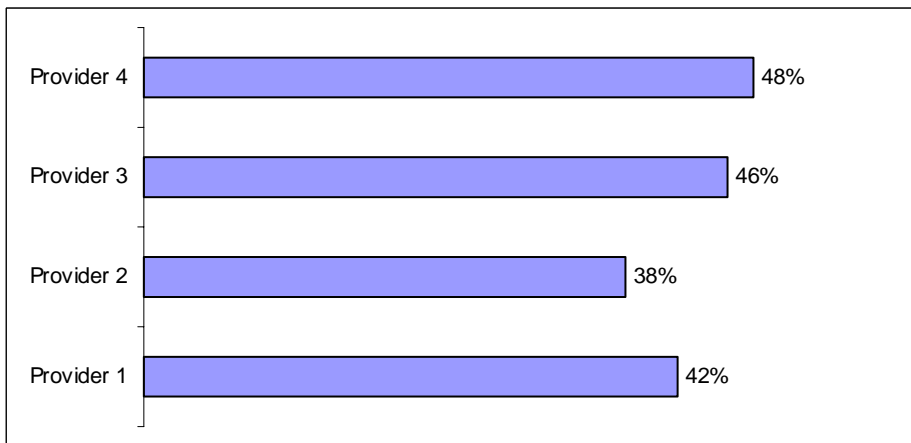
In the period 1999–2004, cases were distributed roughly evenly among the four organisations providing mediation services for the Central London VOL scheme. However, Figure 4.9 shows that the distribution of mediations actually conducted was somewhat uneven, with Provider 1 conducting about one-third of mediations and Provider 3 conducting only about one-fifth.

Figure 4.9 Share of mediations conducted among providers 1999–2004



An analysis of outcome at mediation appointments for the period 1999-2004 showed no significant difference between providers in settlement rates, which varied from 38% to 48% (Figure 4.10).

Figure 4.10 Settlement rates at mediation by provider organisation (n=831 mediated cases)

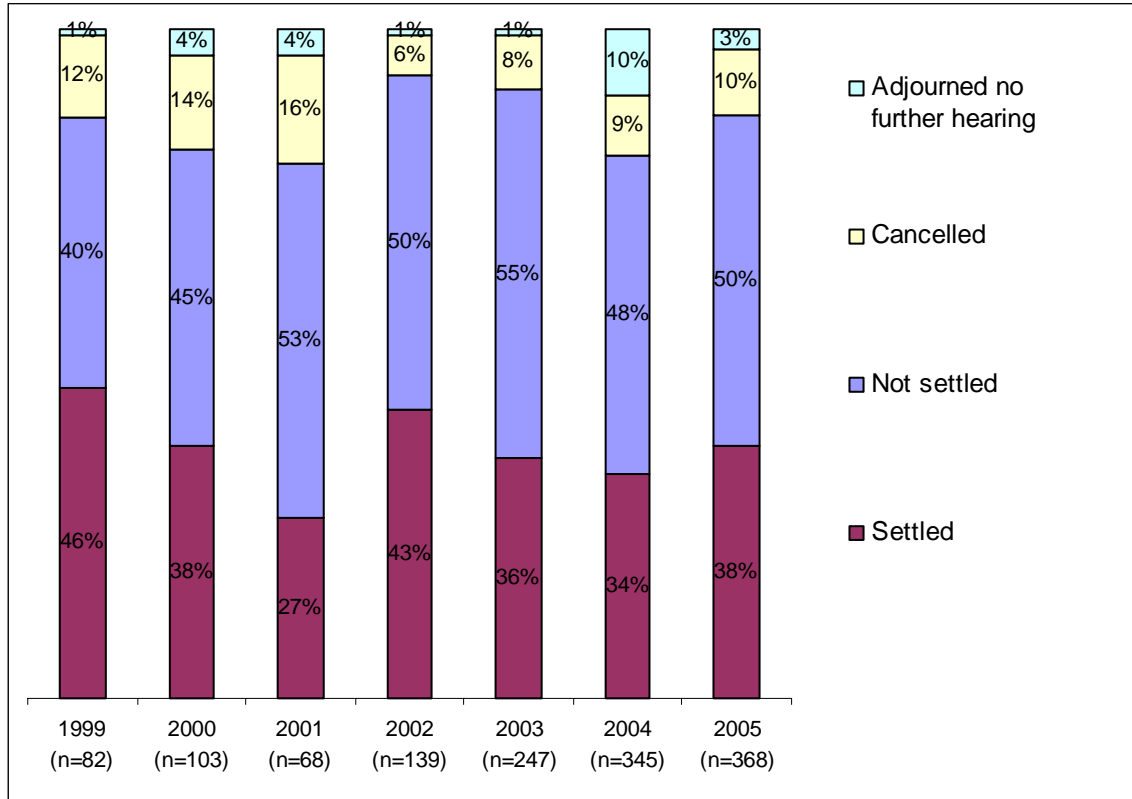


Outcome of cases with mediation dates booked

Not all cases with a booked mediation date in the VOL scheme proceeded to mediation. A proportion of cases were cancelled prior to the mediation (about 12% over the review period), some because a settlement had been reached without the need for the mediation and others because the parties evidently had a change of mind. Occasionally, mediations were cancelled on the day because one or both parties did not appear. Figure 4.11 displays the outcome of cases with mediation dates booked (1999–2005)

and shows that, since 2001, there has been a reduction in the proportion of cases that cancelled with no further mediation booked.

Figure 4.11 Outcome of cases entering the scheme 1999-2005



Factors explaining outcome of mediation appointment

As discussed in Chapter 2, a regression analysis was conducted on both ARM data and VOL data (including cases from 1999 to 2004) to seek to establish what factors, if any, were correlated with the likelihood of a settlement at mediation. Factors hypothesised as being possible determinants of success or failure at mediation, and therefore included in the regression analysis, were: case type, case value, configuration of parties, representation at mediation, and the presence of a counterclaim (as a proxy for complexity in non-PI cases). The analysis produced few statistically significant results. The generally weak fit of the regression for the VOL sample suggests that the **outcome at mediation owes more to chance or to unobservable factors than to the observable factors that could be included in the analysis**, such as approach of the

parties, willingness to negotiate or compromise, or indeed the approach and skill of the mediator.⁵⁵

A possible explanation for the decreasing settlement rate in the VOL scheme, which gains some force from the findings of the ARM analysis discussed in Chapter 2, is the changed policy environment in which VOL mediations have been taking place. If judges have been directly pressing parties into mediation, or if parties are unwillingly accepting opponents' offers to mediate in order to avoid potential costs sanctions, this may be having a depressing effect on the scheme's settlement rate. This explanation is to some extent supported by the discussion in the next Chapter, which reports parties and representatives' reasons for mediating and their own explanations for failure to settle.

Evidence from questionnaires and interviews shows that where cases settled at mediation parties, representatives and mediators tended to attribute the success of the mediation to the willingness of the parties to negotiate and compromise, and to the skill of the mediator. Where cases failed to settle, explanations were somewhat more varied. The most common explanation related to the intransigence of the opponent, suggesting that in a proportion of unsettled cases, at least, one side was coming to the table reluctantly. A second explanation was that the gulf between the parties was too great, suggesting that even with some degree of willingness to compromise, the parties viewed the case very differently and that the mediator was unable to shift conflicting views of the strengths and weaknesses of the case. A third explanation, given by parties and representatives rather than mediators, was some failing on the part of the mediator. Most commonly this was seen as a lack of skill in bringing parties closer together, a lack of understanding or experience of the subject matter of the dispute (particularly so for non-lawyer mediators), or a poor fit between the mediator's approach to the mediation and the expectation of one or both of the parties. Other factors variously mentioned were time constraints (the 3-hour limit), the personality of the opponent, the absence of a key player in the dispute or one with authority to settle, and the physical conditions in which the mediation took place – with the rooms being too hot, too small, too close together and no facilities for refreshments. Any of these factors might combine to inhibit

⁵⁵ It was not possible to compare the success rates between different individual mediators because a large number of mediators have been used and only a small minority have conducted more than one or two mediations.

the possibility of settlement at mediation, but are difficult to measure in a way that can be included in a regression analysis.

A different but non-exclusive explanation might be that there has been a change in the type and quality of mediators being used at Central London. If this is the case, then it is true across mediation organisations since there was no significant difference in settlement rate between mediating organisations

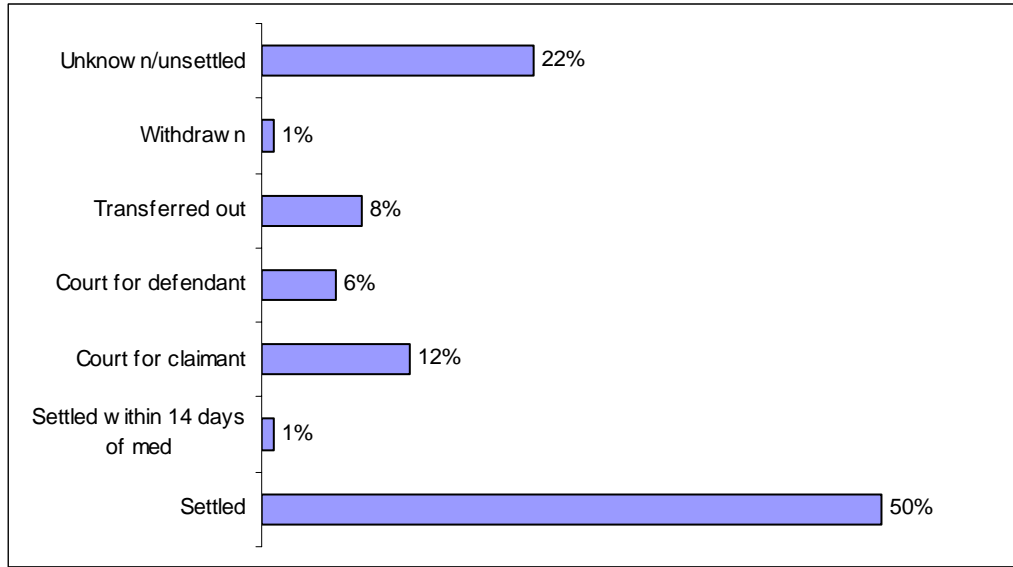
What is clear from the regression analyses conducted on a large body of mediated cases from both the ARM and VOL mediation schemes at Central London, however, is that it is difficult to say that any particular **category of case** in terms of type or value was either significantly more or less likely to settle at mediation. **In the end, it may be that genuine willingness to enter the process and motivation to settle is one of the most important factors in determining outcome.**

Final outcome of unsettled mediations

In order to discover the eventual fate of cases that had failed to settle at mediation, cases were tracked using CaseMan. When considering the results for final outcome it should be noted that data were not available for 132 cases (18%). For example, some cases had been transferred for mediation to Central London from other courts and were subsequently transferred back to the originating court following the unsuccessful mediation.

In unsettled mediated cases in the VOL scheme, some 47% went on to settle at various points after the mediation, and about one-fifth were decided at trial (Figure 4.12). Of the unsuccessfully mediated cases decided at trial, two-thirds of judgments were given in favour of the claimant. Excluding cases where the outcome was unknown, the eventual settlement rate for unsuccessfully mediated cases was 69%.

Figure 4.12 Final outcome of unsuccessfully mediated cases 1999–2004 (n=548)



The eventual fate of cases unsuccessfully mediated between 1999 and 2004, as compared with 1996 and 1998, shows that the overall settlement rate was lower at 50% (as compared with about 70% between 1996 and 1998) with a much higher proportion of unsettled mediated cases going on to trial. This finding suggests that **cases entering the VOL mediation scheme between 1999 and 2004 were more contentious and possibly less susceptible to settlement than those entering between 1996 and 1998**. This is consistent with the emerging suggestion that a proportion of cases have been entering the scheme in recent years under some pressure and possibly to avoid the risk of cost penalties, rather than in the hope and expectation that the case might be settled.

Summary

In the immediate period after the end of the successful pilot and the establishment of a permanent VOL mediation scheme at Central London, demand for the scheme showed a modest increase up to about 103 cases in 2000, and then a fall in demand in 2001, when the number of cases entering the scheme dropped to an all-time low of 68. However, following the landmark judgments in *Cowl* and *Dunnett*, the demand began to rise steeply, so that in 2005 some 368 cases entered the scheme of which 333 were actually mediated during the year.

The characteristics of cases entering the scheme also showed some development. Personal injury cases continued to shun mediation at Central London, with only around 40 cases entering the VOL scheme between 1999 and 2004, but the range of non-personal injury cases mediated became more varied. Although contract, goods and services and debt cases still dominate the mediation caseload, disputes concerning inheritance, nuisance, intellectual property, real property, professional negligence and discrimination have also been mediated. The review also shows that, as compared with the period 1996–1998, more litigants in high-value claims are choosing to try mediation, and the mediation caseload in the VOL scheme is somewhat less dominated by company v company disputes than was the case in 1998.

On the more negative side, however, despite the significant increase in the uptake of the VOL mediation scheme, there has been a relatively steady decline in the success rate, in terms of the proportion of cases settled at the end of the first or second mediation attempt. In the period 1996–1998, the settlement rate was roughly steady at around 62%, but it fell to 44% in 2000 and to a low of 39% in 2003. In 2004 and 2005, the rate appears to have recovered somewhat at 45% and 43% for each year respectively, but since 1998, it has not been above 50%. Multivariate analysis of factors that might predict success or failure at mediation, including case type, case value, representation, and case complexity, drew a blank. This suggests that the outcome of mediation is more likely to be determined by chance or by unobservable factors such as the approach of parties to mediation and their willingness to compromise, or the approach and skill of the mediator.

Judicial pressure has been successful in propelling disputing parties towards mediation. But it is possible that such pressure has drawn in unwilling parties who have participated through fear of costs' penalties rather than as a result of positive interest in the mediation process and a desire to negotiate toward settlement. These issues are explored in more detail in the next chapter, which presents lawyers and parties' accounts of their motivation for entering the VOL scheme and their explanations for failure to reach agreement at mediation.

Chapter 5. Users' experiences of the VOL mediation scheme

The survey

As part of the review of the VOL mediation scheme since 1999, in spring 2004 self-completion questionnaires were sent to the parties and representatives involved in 218 of the cases mediated in the Central London VOL scheme during 2003. Names and addresses were obtained from the mediation database or CaseMan and questionnaires intended for parties were sent directly to them rather than via solicitors in an effort to maximise response. Each questionnaire to a party or lawyer was mailed with a personalised letter containing the case reference number, together with a stamped, return envelope. The first mailing was despatched in the week of March 1 2004. After 2 weeks, a reminder letter was sent to non-respondents and after a further 2 weeks, another reminder letter was sent together with a fresh questionnaire. Questionnaires were returned rather slowly, with the last questionnaire from a solicitor being received in the office in May 2005.

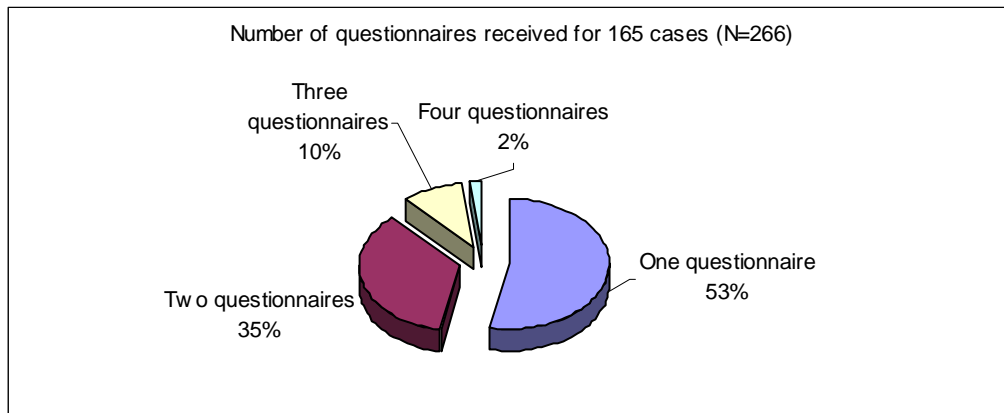
The questionnaires used for claimants, defendants and their representatives in this review were a truncated form of the questionnaires used for the 1998 evaluation of the Central London VOL mediation pilot scheme. Where relevant, comparisons of responses with the 1998 findings have been made. The questionnaires covered the following issues:

- Characteristics of the case
- Reasons for trying mediation
- Previous experience of mediation and court proceedings
- Representation
- Evaluation of the mediation including
 - Confidence in mediator
 - Likes and dislikes
- Outcome of mediation and settlement details
- Eventual outcome of unsettled cases
- Perceptions of savings in cost and time.

Survey response

In all, 266 questionnaires were returned relating to 165 of 218 cases mediated during 2003 (Figure 5.1). This means that some information from either parties or lawyers is available for three-quarters of cases mediated during 2003. In 87 cases mediated in 203, one completed questionnaire was returned; in 58 cases, two completed questionnaires were returned; in 17 mediated cases, three questionnaires were returned; and in three cases, all four questionnaires were returned by claimant, defendant, claimant's representative and defendant's representative.

Figure 5.1 Number of questionnaires received for 165 of 218 cases mediated in 2003



67 claimants, 63 defendants, 74 claimants' representatives and 62 defendants' representatives returned questionnaires. These questionnaires related to 165 cases of which 44% had settled at mediation and 56% had not settled. Although the response rate to the survey was relatively low, the breakdown of settled to unsettled cases is similar to the overall breakdown of settled and unsettled cases during the year 2003 (39% settled and 61% unsettled) (Table 5.1 parties and Table 5.2 representatives). Moreover, the case type distribution of returned questionnaires reflected that of the sample of mediated cases as a whole, as discussed in the previous Chapter.

Table 5.1 Breakdown of claimants and defendants responding to survey by whether settled at mediation (n=130)

	Defendant	Claimant	Total
Unsettled	49%	58%	54%
Settled	51%	42%	46%
Total	100%	100%	100%

Table 5.2 Breakdown of claimants and defendants' representatives responding to survey by whether settled at mediation (n=136)

	Defendant	Claimant	Total
Unsettled	53%	58%	56%
Settled	45%	42%	43%
Total	100%	100%	100%

Questionnaires were also sent to a sample of mediators who had mediated cases in the VOL scheme during 2003, asking them to provide some feedback on the mediations. In particular, mediators were asked to say why they felt that cases had settled or failed to settle at the mediation appointment, and their responses on this issue are presented in the final section of the Chapter.

Dispute features

As a preliminary to obtaining feedback on motivation for mediating and the mediation experience, parties and lawyers were asked for some information about cases in order to assess the point at which cases were being mediated and the contentiousness of the case.

Length of dispute

Mediating parties and representatives were asked how long the dispute had been going on at the time that they agreed to attempt mediation through the Central London VOL scheme (Table 5.3). About one in five respondents said that the dispute had been going on for more than three years when they agreed to try mediation, and overall around two-in-three respondents were involved in disputes that had been going on for more than 1 year at the time of agreeing to mediate.

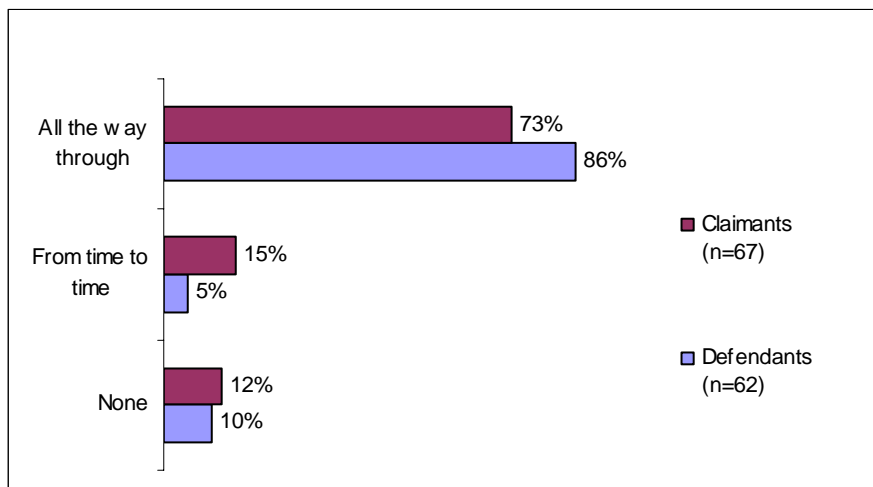
Table 5.3 "How long had the dispute been going on when you agreed to try mediation?" (n=129)

Less than 6 months	5%
More than 6 months, less than 1 year	12%
More than 1 year, less than 2 years	43%
More than 2 years, less than 3 years	21%
More than 3 years	19%
Total	100%

Legal representation

In common with the 1998 evaluation of cases entering the VOL mediation scheme, the majority of parties responding to the 2004 survey had received legal advice during the course of their dispute. Only one in ten parties did not have legal about their dispute advice at any time. Over three-quarters of responding parties had been advised by a solicitor all the way through their disputes (79%). Figure 5.2 shows that there was some difference in this respect between claimants and defendants, with claimants being somewhat less likely to have received legal advice all the way through their dispute.

Figure 5.2 Did you have any advice from a solicitor about the case? (n=129)



In about three-quarters of cases where parties had received legal advice, their solicitor attended the mediation session (73%). In a minority of cases where a solicitor did not attend the mediation with clients, the most common reason given by parties was to save costs (44%) or because they were “not needed” (25%). Other reasons given were that they or their solicitor had not considered it appropriate for the solicitor to attend (13%) or that the respondent had not been aware that the solicitor was needed (6%).

Reasons for mediating

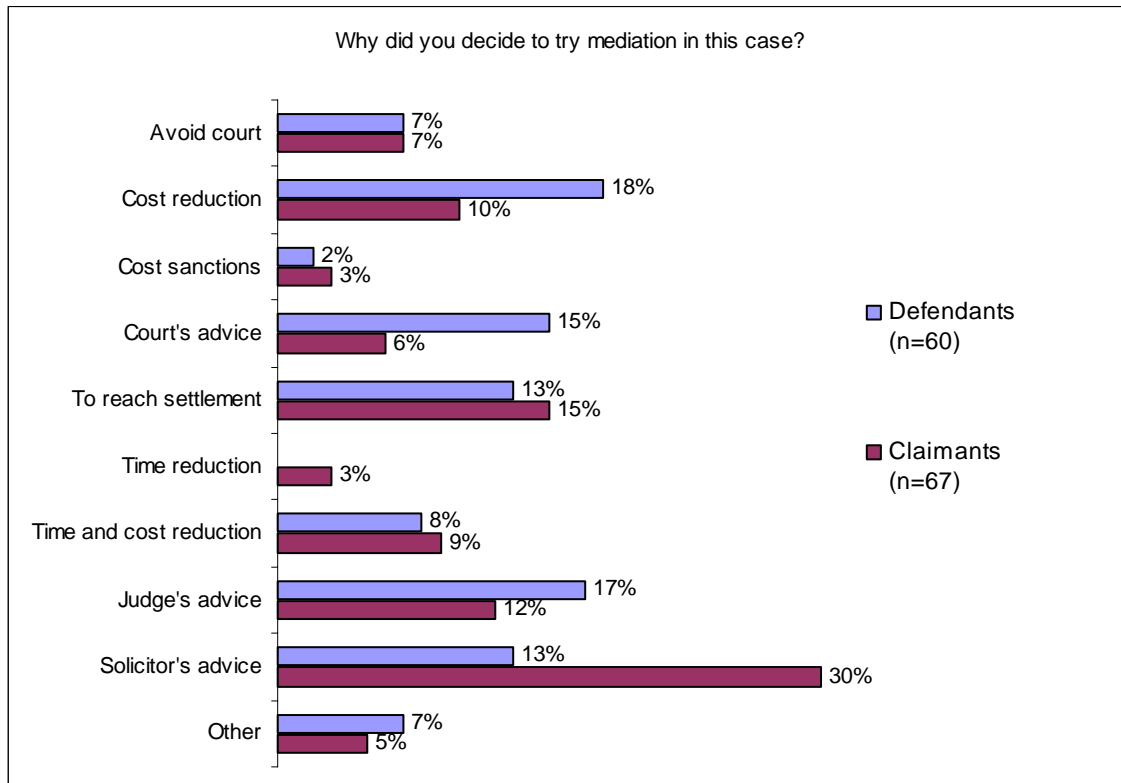
Parties

All claimants and defendants were asked why they had decided to try mediation in this particular case (Figure 5.3). Overall, the most common reasons given were that they had been advised to do so by their solicitor (22% of all respondents), to reduce costs (14%), to reach a settlement (14%), or because a judge had advised them to do so

(18%). There were, however, some notable differences between claimants and defendants. Claimants were more likely than defendants to say that their solicitor had advised them to mediate (30% of claimants as compared with 13% of defendants). Among defendants, the most common reasons given for deciding to mediate was to reduce costs (18%) or because a judge had advised them to do so (17%).

In comparison with the findings of the 1998 review, the role of the courts in encouraging or pressing parties to mediate is notable. Among the reasons for mediating in the 2004 survey, the “courts and the judiciary” were mentioned in over one in four cases (fear of costs sanctions (2%), the court’s “advice” (10%), and advice from a judge (14%)). In the 1998 survey only 4% of claimants said that they had mediated because they had been told to do so by a judge and about 7% of defendants gave the same response. There was no reference to cost sanctions or to advice from the court in the 1998 evaluation of the VOL mediation scheme, which, of course, was conducted prior to the implementation of the Civil Procedure Rules in 1999 and the cases of *Cowl* and *Dunnett* in 2002.

Figure 5.3 Reasons for mediating given by claimants and defendants (n=127)



The free text on questionnaires was analysed to provide more detail of how parties and representatives explained their reasons. This was considered important in seeking explanations for the falling settlement rate in the Central London VOL scheme. Some of the questionnaire material provided insights into decision-making about entering the VOL mediation scheme and evidence of increasing pressure from the courts on parties to mediate. Questionnaires also demonstrated that in some cases mediation had been attempted reluctantly.

Cost savings

Cost saving was clearly a principal motivation for some mediating parties. This included the legal costs of continued litigation and the possible costs of a trial. In some cases respondents referred to the cost to their business of management being caught up in litigation.

“In order to resolve the matter early and keep the cost down.”

"To save further wasting of my and management time, to avoid further costs, little likelihood of achieving counterclaim should we be successful in full court, i.e. actually receiving the money."

"Because of the potential length and cost of trial balanced against cost of mediation."

"We only found out about this possibility when the claimant offered mediation. It seemed an eminently sensible way to proceed and we accepted immediately. We feel we owed the claimant nothing and saw a way to come to an agreement that didn't cost the earth."

Breaking deadlock in negotiations

There were also cases where negotiations between the disputing parties had become stuck, or communication had broken down and mediation was seen as an opportunity to move on the process of working towards a settlement. Often this was accompanied by expressions of weariness of litigation and a desire to see an end to the dispute.

"My solicitor suggested that it might speed up the fairly fruitless negotiations between ourselves and the defendant's solicitors."

"We believed that a settlement could be achieved and it gave the opportunity to discuss face to face with the defendant as we had been having trouble communicating with him."

"It seemed a very reasonable avenue to try. Perhaps face-to-face discussion with a third party would introduce some sense and logic to an absurd and ultimately trivial argument. It certainly seemed more suited to this matter than wasting court time."

"To try and avoid expensive litigation in the court. Also use an independent and neutral expert to find a solution to the problem. To move the case on as it had reached a vexatious situation."

Court-directed/suggested mediation

As mentioned above, by comparison with the 1998 evaluation, the reasons given for attempting mediation in the 2004 survey more often referred to suggestions or directions from the Court to attempt mediation. This indicates the greater proactivity of the judiciary in relation to mediation and, in some cases, a feeling on the part of parties or lawyers that such suggestions ought not to be ignored. Others were happy to accept the court's suggestion, feeling that the scheme was worth trying.

"It was suggested by the court. In fact we were made to feel this was not optional."

"The court directed in December 2002 that both parties should attempt mediation."

“Suggested by court and approved in principle by my solicitor.”

“Mediation recommended by Circuit Judge owing to complexity of the case.”

“The defendant finally agreed following encouragement from the judge. We heard of the service some months before and had been keen to use it.”

Avoiding costs sanctions

On the other hand, there was evidence that both claimants and defendants were trying mediation principally to avoid the threat of costs sanctions, rather than because of any particular positive interest in mediation or any particular hopes of a successful outcome. For example:

“Because the judge at one of the hearings recommended it and said he would take a dim view if either party did not try this route.” (Defendant non-PI)

“Because our solicitor advised us that if we did not attempt mediation we may not have been awarded costs in court.”

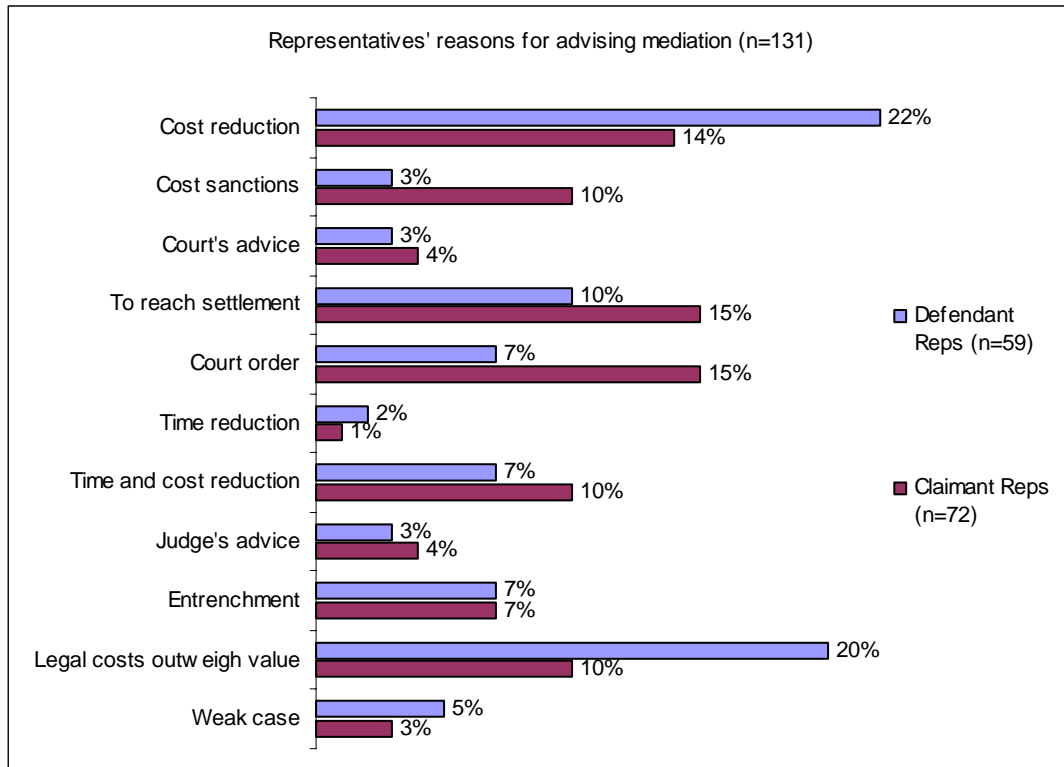
“We were slowly getting nowhere. Our solicitors informed us that we would have to proceed to court but that this would be very expensive and that the court would not look favourably on us if we had not exhausted all possible routes to settlement.” (Claimant boundary dispute)

Representatives

Cost containment was the most frequent reason given by both claimants and defendants' representatives for advising clients to mediate (Figure 5.4). Claimants' representatives were slightly more inclined to say that their advice had been based on a desire to reach settlement.

In common with parties' reasons for mediating, representatives often said that they had advised mediation in response to court encouragement or a court order. Cost sanctions were another concern.

Figure 5.4 Representatives' reasons for advising mediation



Looking at the outcome of mediations by reasons for mediating there is some suggestion that cases in which parties and/or representatives mentioned pressure from the court or fear of cost pressure were somewhat less likely to settle than those cases where this was not given as a reason for mediating. Where court pressure to settle was mentioned by survey respondents as a reason for mediating, the settlement rate at mediation was 38%. Where some other reason was given for mediating, the settlement rate was 47%. There was evidence in questionnaires of the impact of judicial encouragement or pressure on decisions to mediate. For example, the following 'reasons' for mediating were given by **representatives**:

"I did not recommend mediation. It was forced on us by the court imposing costs penalties if the claimant did not agree to mediation."

"Because the Circuit judge insisted upon it and the other side was also required to go through the process."

"The Court ordered it. The claimant had twice asked the defendant to mediate but she refused before this time."

"It was recommended by the other party, then ordered by the court."

"The court strongly suggested mediation in directions and sanction on costs indicated in directions if mediation not attempted."

"The Court contacted us about it and I was able to persuade my client that if she didn't agree to mediation it would not help her case because the respondent was appearing eager to mediate." Claimant rep)

"Because of Dunnett v Railtrack." (Claimant rep)

"To avoid an adverse costs order; there was a remote possibility of settlement; to understand the defendant's case." (Claimant rep)

"I did not recommend it; the court ordered it. I was always very doubtful about the value of mediation in this case."

There was a high degree of consensus among representatives about what they hoped mediation would achieve. Settling the case was the most common objective cited, with 94% of representatives giving this as an objective. The next most common objective given was narrowing of issues, with about one-third of representatives citing this as an objective. One-quarter of representatives hoped for clarification of factual issues, and about 16% hoped for clarification of legal issues.

"The costs of pursuing the matter to trial would have far outweighed the amount in dispute. Mediation is an effective means of allowing the parties to reach a resolution amongst themselves as opposed to having a decision imposed." (Defendant rep probate)

"The value of the case was not high in relation to the costs of preparing the case and dealing with the issues and evidence. The client had a positive experience of mediation from a previous case where we had recommended it and was persuaded of the benefit." (Defendant rep breach of covenant)

"This was a low value case, with messy issues which was not cost effective to run to trial under the Fast Track." (Defendant rep debt)

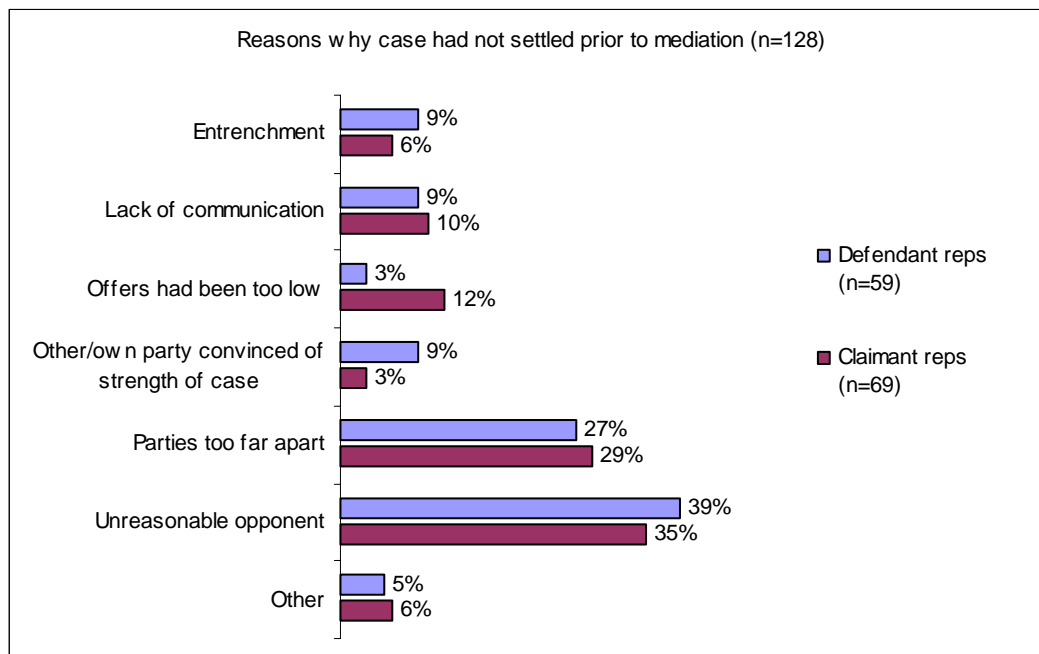
"We, as the defendants, wanted to dispose of the expense and inconvenience of litigation which was effectively in this case conducted by the claimant personally. It was though that a strong and able mediator would bring some common sense to bear on this problem." (Defendant rep breach of covenant)

Why cases had failed to settle pre-mediation – representatives' views

Representatives were also asked why their client's case had not settled prior to mediation (Figure 5.5). The most common reasons given for failure to settle were that the opponent was unreasonable (37%) or that the parties were too far apart (28%). There was little difference between defendant and claimant representatives in their

analysis of obstacles to settlement, with both groups most often believing that their opponent was being unreasonable. Given the preponderance of these reasons and the frequency with which either a gulf between the parties was perceived or unreasonableness on the other side, it is perhaps less surprising that settlement rates were not particularly high. On the other hand, in the 1998 evaluation, solicitors often cited a gulf between the parties or polarisation of positions as a reason for mediating.

Figure 5.5 Representatives' assessment of why cases had not settled prior to mediation



Offers

According to representatives, prior to the agreement to mediate, claimants had made offers in 21% of cases; defendants had made offers in 29% of cases; both sides had made offers in 18% of cases; and in the remaining one-third of cases, no offers of settlement had been made by either side.

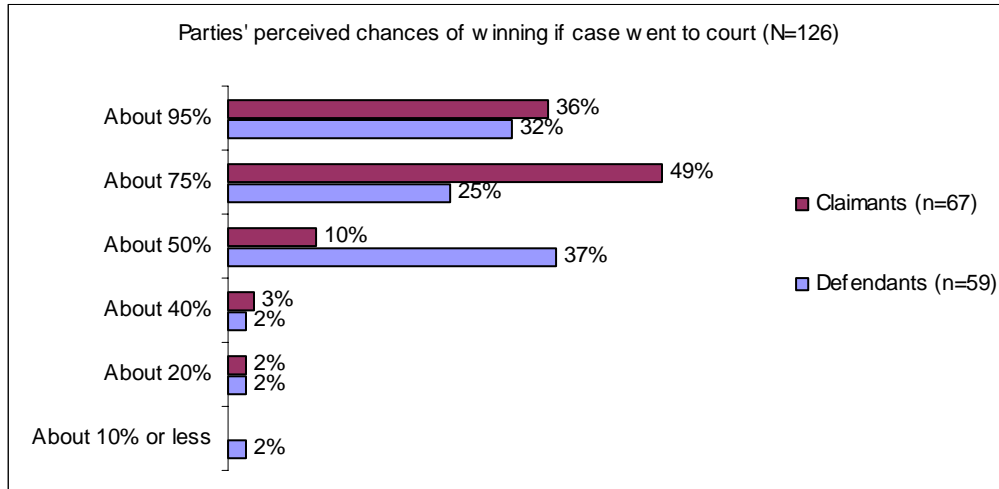
Assessments of strength of case

Parties

Parties were asked what they felt their chances of winning would have been at trial at the time they took the decision to mediate their dispute. The responses showed a significant difference in perception between claimants and defendants, with claimants being more optimistic about their chances of succeeding at trial (Figure 5.6). The vast majority of claimants (85%) believed that their chance of winning was 75% or better, as

compared with a little over half of defendants who thought their chances of winning were that strong. Therefore, defendants with somewhat weaker cases might be more prepared to mediation. These findings are roughly consistent with those of the 1998 review of the scheme.

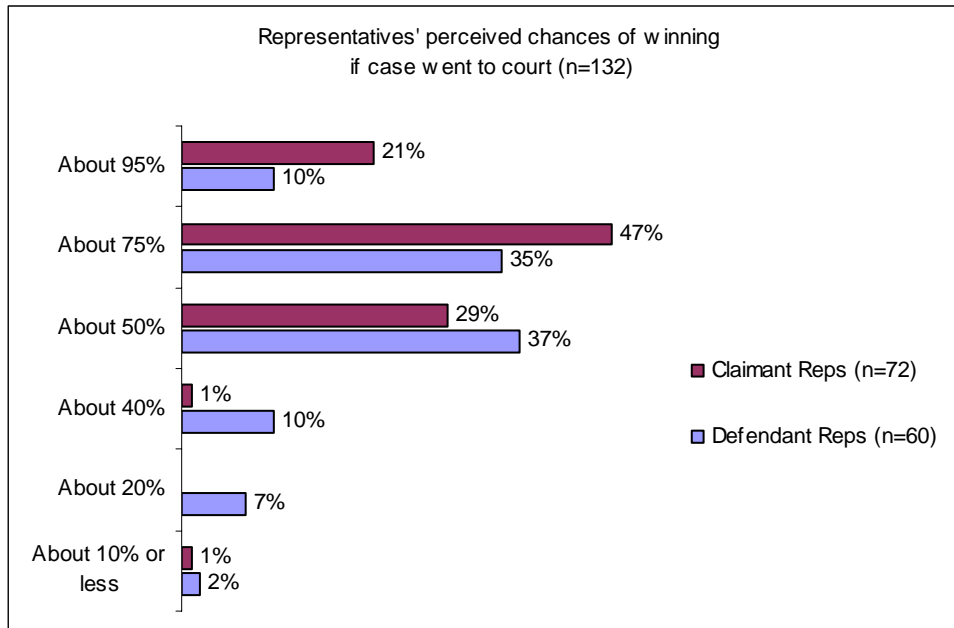
Figure 5.6 “At the time that you accepted the offer to mediate the case, how good did you think your chance was of winning your case if it went to court?” (n=126)



Representatives

As with parties' views, claimants' representatives were more optimistic about the chances of winning the case at trial than defendants' representatives. Figure 5.7 shows that while one in five claimants' representatives thought that they would have a 95% chance of winning at trial, only one in ten of defendants' representatives put their chances that high. It appears that claimants' representatives are mediating cases that they feel are relatively strong. Defendants, on the other hand, are mediating cases where they feel that the chances of outright success are relatively weaker.

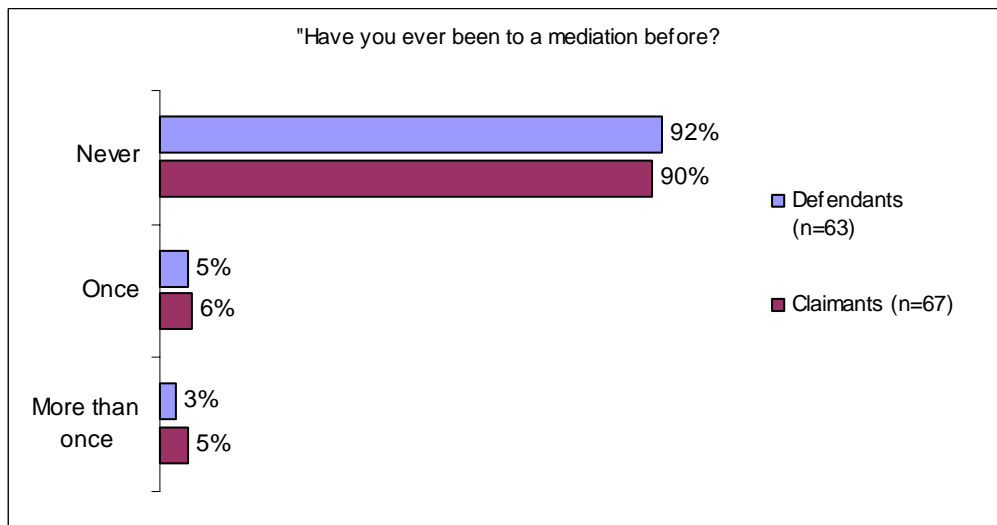
Figure 5.7 Representatives' views on chances of winning in court



Previous experience of mediation

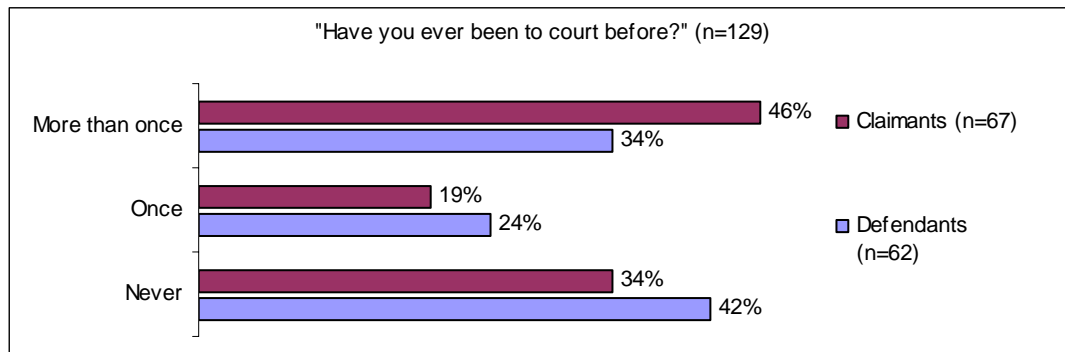
At the time of agreeing to mediate the majority of parties responding to the survey (91%) had never been to a mediation before, and there was no significant difference between claimants and defendants in this respect (Figure 5.8).

Figure 5.8 Parties' prior experience of mediation



On the other hand, as indicated in Figure 5.9, a substantial proportion of both claimants and defendants had been to court before, with claimants more likely to have been to court more than once. The frequency with which parties had previously attended court is a reflection of the number of business disputes dealt with in the VOL mediation scheme.

Figure 5.9 Parties' prior experience of court proceedings



Among the representatives responding to the survey, one in three said that they had no previous experience of mediation (34%), a little over half said that they had some experience of mediation (55%) and about one in ten said that they had extensive experience of mediation (10%). These figures are somewhat different from comparable data in the 1998 review and reflect greater familiarity with mediation. For example, in the 1998 review three-quarters of representatives said that they had no previous experience of mediation and only 25% said that they had some experience of mediation.⁵⁶ Overall, representatives regarded the information about mediation received from the court as helpful, with about four in ten saying that it was very helpful, a similar proportion saying that the information was quite helpful (43%) and the remaining 17% finding the information not very helpful.

Evaluation of the mediation scheme

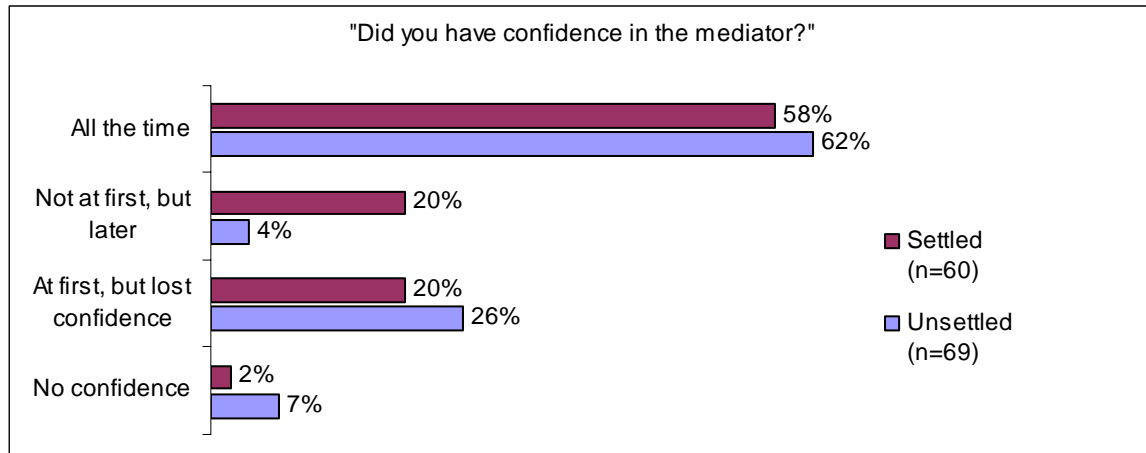
Confidence in the mediator

Parties were asked whether they had had confidence in their mediator during their mediation session and the questionnaires revealed no difference between defendants and claimants in terms of their levels of confidence in their mediator. Around 60% of

⁵⁶ H Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98, page 100.

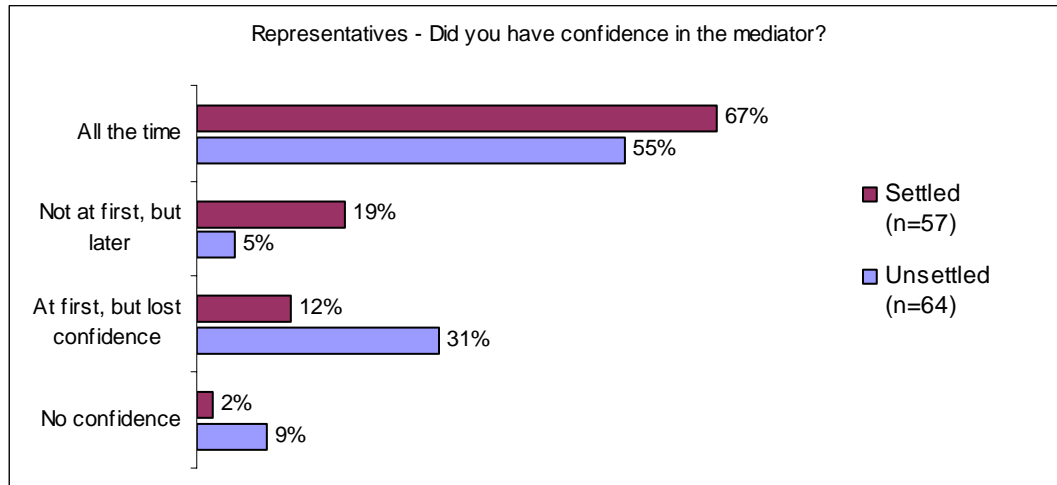
respondents said that they had had confidence in their mediator at all times. There was, however, some difference depending on whether or not the case had settled. Although there was some loss of confidence in mediators after initial impressions among both settled and unsettled cases, this loss of confidence was expressed more frequently among parties whose cases had not settled.

Figure 5.10 Parties' confidence in the mediator



Representatives were also asked about their confidence in the mediator (Figure 5.11). Of those who attended mediation, a little over half of the representatives said that they had confidence in their mediator all the time (54%) and there was no difference in perception, depending on whether the mediators had been barristers, solicitors or non-lawyers. However, there was a significant difference in perception associated with the outcome of the mediation. Among representatives whose cases did not settle at mediation, around one in ten said that that they had not had confidence in their mediator, and a further one-third said that they had lost confidence in the mediator during the course of the mediation. On the other hand, over half of those whose cases did not settle said that they had had confidence all the time, as compared with two-thirds of those whose cases had settled.

Figure 5.11 Representatives' confidence in mediators

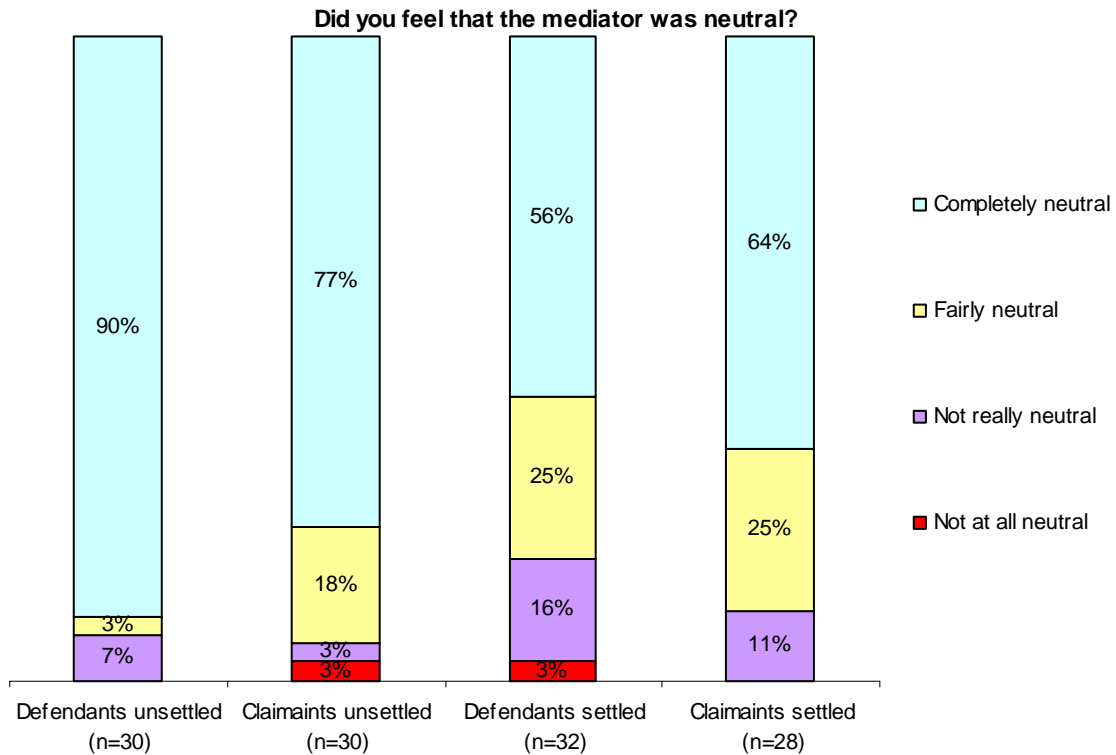


Perceptions of neutrality and fairness

Parties' perceptions

Perceptions of mediator neutrality also varied depending on the outcome of the mediation and whether the respondent was a claimant or a defendant. Figure 5.12 shows that defendants whose cases did not settle were *more* likely to say that the mediator had been completely neutral than claimants whose cases did not settle. This suggests that claimants were less happy than defendants about failure to settle. However, even when cases did settle, there were perceptions of a lack of neutrality. A little over half of defendants who settled thought that the mediator was completely neutral (56%), while two-thirds of claimants who settled thought that the mediator was completely neutral (64%).

Figure 5.12 Parties' perceptions of mediator's neutrality



“I felt the mediator was very much pushing for me to settle when I was not entirely convinced. She would say they are ready to settle – which to me implied I was less ready – also when she went to the other room I could hear laughter.” (Claimant)

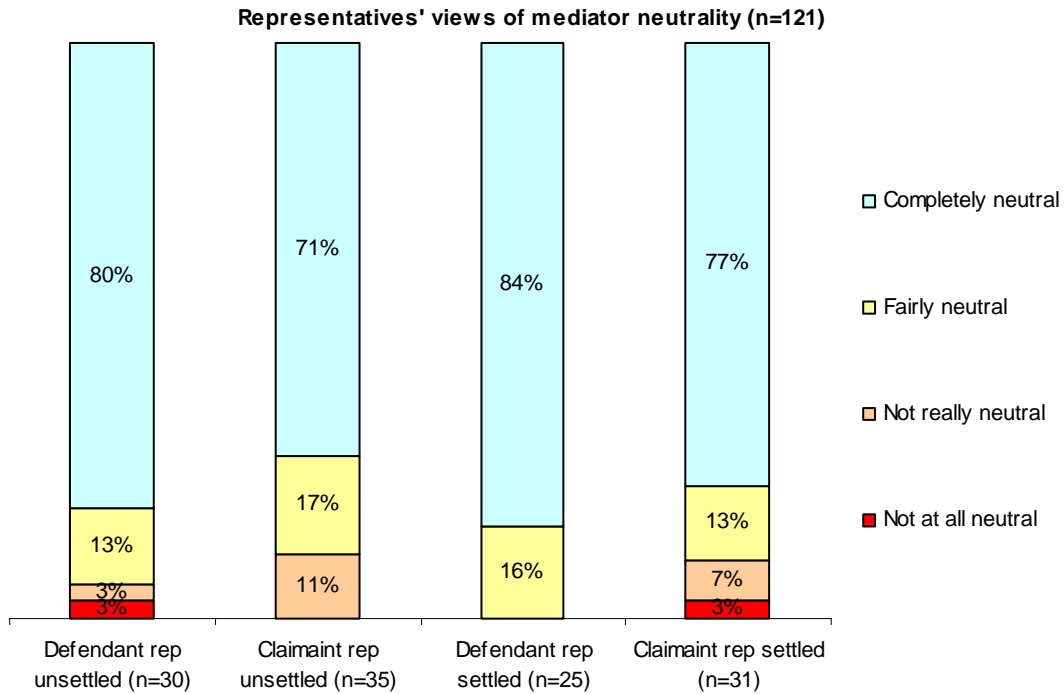
“His main target appeared to be to reach mediation between the parties disregarding which party is right, which party is wrong. I wish he would be on the side of the right party.” (Claimant)

“The mediator was not biased but clearly had his own agenda, i.e. to conclude the case within the time frame. The claimant brought no evidence, whilst I did. The claimant did not revisit their position until the very end. I felt I came under undue pressure to settle at all cost.” (Defendant)

Representatives' perceptions

There were no significant differences overall between representatives' perceptions of neutrality associated with settling or not settling cases at mediation. However, in common with parties' views, claimants' representatives were more likely to doubt mediator neutrality where cases had failed to settle (Figure 5.13).

Figure 5.13 Representatives' perceptions of mediator neutrality

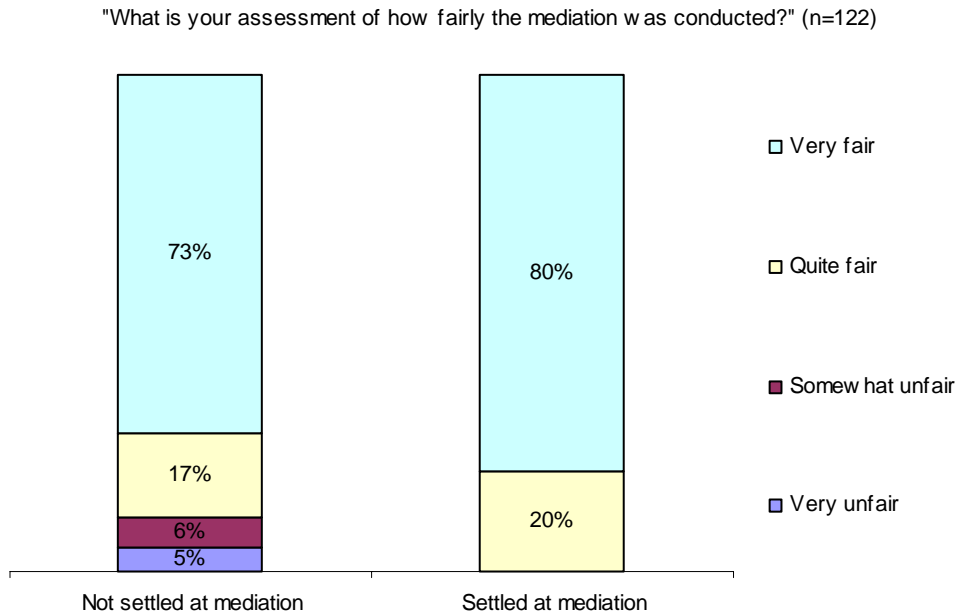


Among those who thought that the mediator did not appear to be neutral, the chief complaints related to putting pressure on the party, general bias, and time issues.

“He was VERY sympathetic to the applicant even though she clearly owed money to my client. Very much coercing my client to accepting a sum of money without any real consideration of the level of that sum. She felt at one point that she had no choice.” (Def rep)

Representatives were also asked for their assessment of how fairly the mediation was conducted (Figure 5.14). Overall, the response was very positive with over three-quarters saying that the mediation was conducted very fairly (76%), some 18% thought the mediation was conducted quite fairly and only six percent felt that it was either somewhat unfair or very unfair. There was no difference between claimants and defendants' representatives in perceptions of fairness or mediation. Perceptions of fairness were, however, associated with outcome of mediation. Those representatives whose cases had not settled at the mediation were *less* likely to say that the mediation was very fair. It should also be noted that one in five of those representatives whose cases *had* settled, said that the mediation was “quite fair” rather than “very fair”.

Figure 5.14 Representatives' assessment of fairness of mediation



Where there were complaints about unfairness these most frequently related to the mediator's behaviour (68%). A minority felt that their client had been rushed into settlement (14%) and a similar proportion complained about the other party's behaviour (14%).

"Time was wasted on marginal points by the mediator, who seemed to work on the basis that he did very little in two and a half hours and then put great pressure on during the last half hour." (Def rep)

"Mediator not interested in exploring claimant's position. Did not give any appreciable time to doing so. Did not allow either side to explain their positions to the other. Called a halt to the procedure of his own volition and not at request of parties." (Claimant rep)

"At the time I believed him to be totally non-neutral but speaking to the other side afterwards they found him likewise to be disorganised, rude and unprofessional." (Def rep)

"The mediator did not seem to control the whole process, in that there was confusion over who should be in what room when. Further, the M's lack of legal background meant he was unable to express any view about the form in which the outcome was expressed." (Claimant rep)

"The mediator did not appear to consider any of the issues in the case at all, but stressed simply the costs aspect." (Claimant rep)

Mediator control of mediation

About six in ten of parties thought that the level of control exerted by the mediator was about right. However, about one-third of parties said that they would have liked the mediator to exert more control (37%) and only a handful would have preferred less control. Those parties whose cases did not settle were more likely to express a desire for more control than those whose cases did settle (44% of those who did not settle thought there should have been more control compared with 28% of those who settled at mediation).

Formality of mediation

It seems that, overall, parties' expectations of the level of formality of mediations were met, with 59% of respondents saying that the level of formality was as expected. Where there was a mismatch between expectations and experience, the mediation was felt to have been *less* formal than expected (34% of respondents), with only a handful finding the mediation more formal than expected (7%). This suggests that more could be done to manage expectations.

Positive evaluations of mediation

All parties were asked whether there were any things about the mediation process that they particularly liked. The features most frequently mentioned with approval (Figure 5.15) were the informality of the process (24%), mediator's skills (12%), and effective participation (11%). There were few differences between claimants and defendants in perceptions, although claimants were more likely than defendants to mention the value of informality.

"I liked the fact that the atmosphere was informal, that I was able to come and put my point forward and present my case."

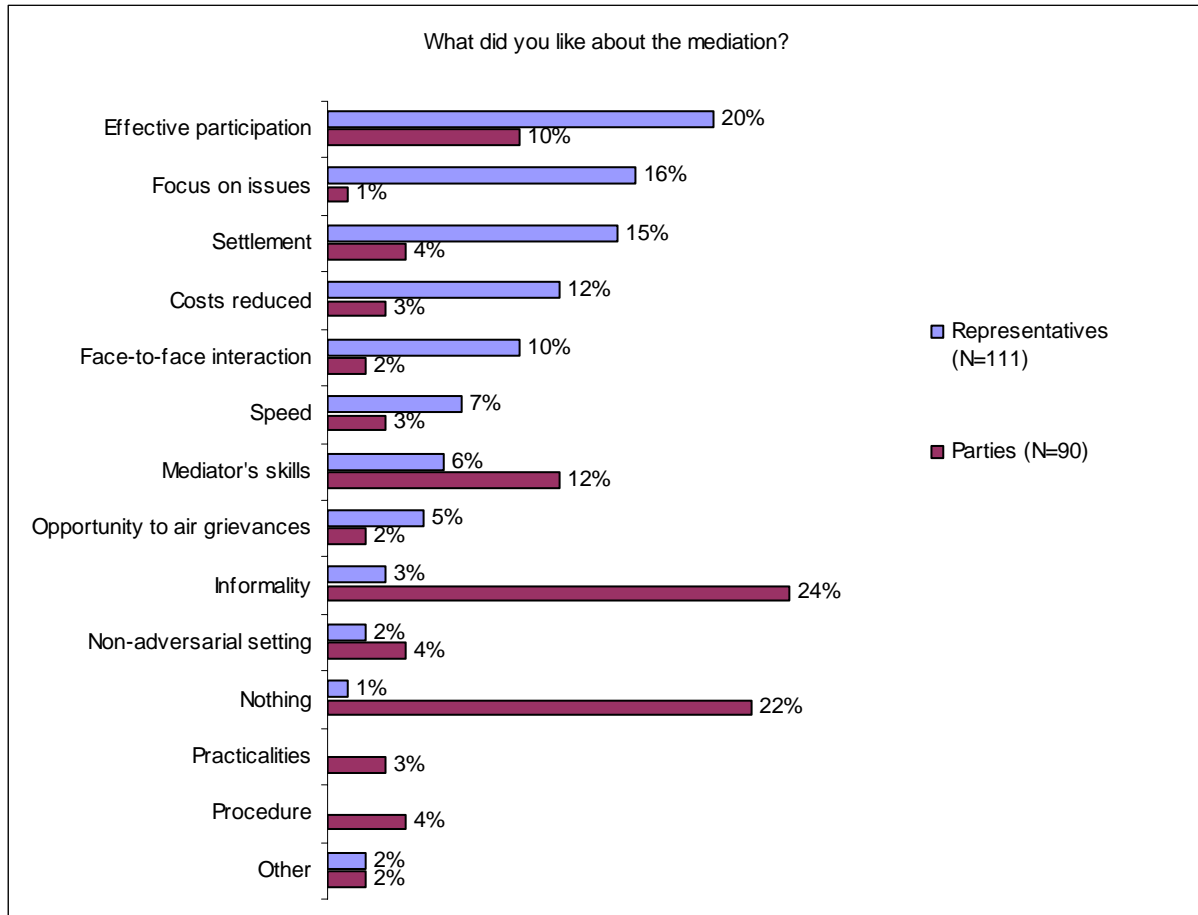
"I found it much more relaxed than I thought it would be. Much to my surprise it was rather enjoyable. And the mediator was excellent. I only wish that all solicitors had such a sense of purpose to resolve their case."

"The informality and friendliness of the proceedings. I was very nervous initially, but was very soon put at my ease."

There was, however, a marked difference between parties and representatives in their feelings about mediation. Parties stressed their approval of the informality of the

mediation, their ability to participate in the procedure and the mediator's skills. Representatives tended to emphasise the scope for effective participation, the focus on issues, reaching settlement and reduction in costs. Only one representative asserted that there was "nothing" that they liked about the mediation process (Figure 5.15).

Figure 5.15 Parties' and representatives' assessments of positive features of mediation



Negative evaluations of mediation

One in five respondents (22%) said that they liked nothing about the mediation. This was most common among those respondents whose cases had not settled at mediation. One in three of those who had not settled and who answered this question said that they had liked nothing about the mediation, as compared with 12% of those who had settled. One-third of defendants said there was "nothing" they disliked about the mediation, while only one-quarter of claimants said there was "nothing" they disliked.

The most common features disliked by parties were that the mediation was rushed (11% overall), failure to settle (7%), the mediation facilities (9%), the focus on settlement (10%), the procedure (11%), that the mediation was too long (7%), or that the mediator was poor (8%). Examples of comments made in relation to these issues on the questionnaire are as follows:

"I felt that the mediator had no knowledge of this type of dispute. Whilst he was very fair he had no background regarding the dispute or issues involved. I would not suggest the involvement of a lawyer, but rather someone with some relevant commercial knowledge."

"The mediator did not shed any light on who had the stronger case. He did not know who had the stronger case. He gave no direction in this respect. He did not know the law. This disappointed me."

"There was no use of justice. Rules were imposed which should not have been. - There was no time for considering consequences. My solicitor did not seem to have experience of procedure."

"Room was not particularly clean. No ability to obtain refreshments. Nothing works at the Central London Court."

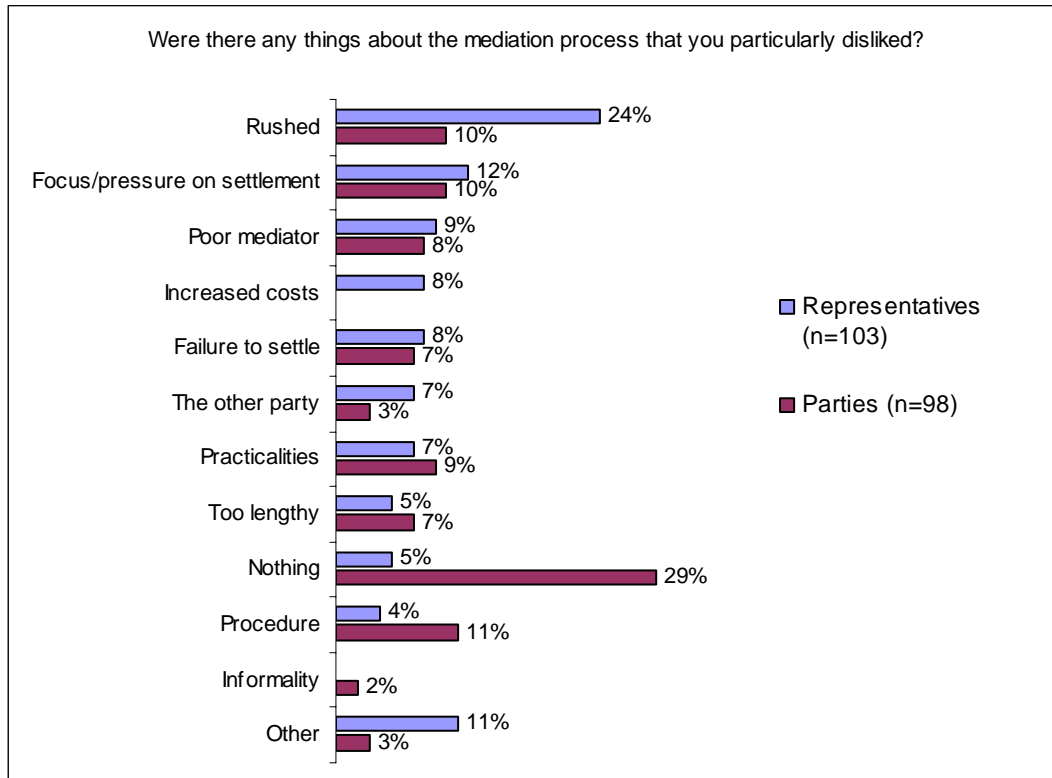
"Very drawn out. Rooms cold, no warm refreshments. Both other parties allowed to join forces by mediator."

"Accommodation was cramped, uncomfortable and dirty. Maybe this is deliberate to speed things along. Time was limited."

Those parties who had settled their dispute at the mediation appointment were most likely to mention that the mediation had been rushed and that they had disliked the focus on settlement. Among those who failed to settle, the most common complaint was the failure to settle itself, poor mediator skills, practicalities and procedure. Of those respondents who settled their case at mediation, 38% said that there was nothing they disliked about the mediation, as compared with 21% of those whose cases did not settle.

Again, there were stark differences between parties and representatives in their assessment of the mediations in which they were involved. Representatives were more likely than parties to note that there *were* things about the mediation they particularly disliked and, specifically, more frequently mentioned that the mediation had been rushed and that costs had been increased (Figure 5.16).

Figure 5.16 Parties' and representatives assessments of negative aspects of mediation



“In this case the mediator leaving us alone and waiting for most of the three hours with little happening. No real negotiation was even started until the last half hour when undue pressure was put on both parties by the mediator, who became agitated and rude.” (Def rep)

“I believe in mediation in all cases if possible. But this experience was terrible. The mediation was handled extremely poorly and unprofessionally.” (Def rep)

Failure to settle at mediation

Those parties and solicitors whose cases failed to settle at mediation often expressed considerable dissatisfaction, particularly when they felt that they had been directed to mediate by judicial recommendation. Although some of the comments made by parties and representatives in unsettled cases were more positive in seeing that the mediation had been constructive, these were in the minority.

The most common reason given for failure to settle was the intransigence or personality of the opposing side, often coupled with a sense that there had never been any optimism that the case might settle. In a minority of cases, and this was true of the more constructive attitudes towards failure to settle, the failure was attributed to time

constraints, mediator shortcomings, and occasionally the physical surroundings of the court, which were felt to be not conducive to settlement (see further below).

Court recommended

Attempting mediation as a response to judicial pressure rather than personal choice, was a common complaint. As discussed at various points in the report, it seems clear that excessive pressure can be counter productive, with parties 'going through the motions' to avoid a cost order. Paradoxically, it is possible that a proportion of parties attempting mediation as the result of a judicial direction in the VOL scheme may have been feeling a greater degree of compulsion than some of those who entered the ARM scheme, and this may account for the lower settlement rate in the VOL scheme in recent years

"I did not recommend mediation, it was forced on my client by the District Judge at Watford...The defendant intended to use whatever means to move the boundary...The mediation wasted 6 months of time and greatly increased the costs of the action. The mediation should not have been held...Where the cost of litigation is being used by one relatively wealthy party as a tool to defeat an (elderly party) of limited means, mediation is inappropriate. A DJ should be alive to such matters and not blindly order mediation...The mediation process is an effective way of settling a wide variety of disputes. If one party strongly resists the process because there is, in the view of his legal advisers, no prospect of success, a DJ should not enforce the process. This claimant was failed miserably by the court process at virtually every stage of what should have been a short and efficient action." (Claimant rep, boundary dispute)

"We recommended mediation (to our clients) to avoid an adverse costs order. There was only a remote possibility of settlement. The Court should not push parties to mediate. It is an expensive process, but there should be a positive duty on legal advisers to have considered it. It is a good tool for parties that are sensible and genuinely want to end litigation." (Claimant's rep, claim for professional fees)

"It was recommended by the judge. The mediation was accepted by the other side only to secure their costs in case they won...Mediation is used by larger companies only to intimidate the small-private defendant. Despite the fact the Judge told us that mediation will be with the company directly, only their solicitor turned up who said he was not authorised to settle!!! THIS WAS NOT GOING TO BE REPORTED TO THE JUDGE. This issue created complete mistrust in court systems and afterwards. I settled later on because I saw COURTS CANNOT BE TRUSTED." (Defendant. Subsidence claim blamed on defendant's tree.)

Intransigence

The importance of parties' willingness to negotiate and their openness to the possibility of settlement was underlined by complaints from some who felt that the failure to reach

settlement in the mediation was the result of their opponent's intransigence. As we have seen, unless parties are prepared to give some ground, or at least reconsider their position, then mediation is unlikely to achieve a settlement.

"Mediation does not work if the parties are not willing to give some ground. No one was prepared to budge...It was ordered by the court. The other side just seemed to use it to try and keep fighting the litigation." (Claimant rep. Dispute over family business. Increased costs by about £2500-3000 and increased time)

The comments made by dissatisfied parties and representatives underline the importance of willingness to negotiate and to compromise in reaching a successful outcome in mediation.

Failings in the mediator

Failure to reach agreement by the end of the mediation was also sometimes attributed to lack of skill or lack of legal knowledge on the part of the mediator. Certainly, expectations of mediators were relatively high.

"This was an unfortunate situation where the claimant did not understand the law and the mediator could not advise/express an opinion. I have no idea how the mediator dealt with the claimant during their meetings, but I feel he allowed the claimant to continue to be unrealistic." (Defendant rep, damages for breach of contract for £80,000)

"The mediator is crucial to the outcome. I consider a major factor in this case was that the mediator was neither legally trained or a member of the construction industry and therefore he was unable to help progress any issues." (Claimant's rep, construction case)

Time constraints

Evidence from parties, mediators and representatives on the impact of time limits in the Central London VOL scheme was rather mixed and to some extent was influenced by the mediation outcome. Where cases were successfully mediated, the time constraint was sometimes seen as a contributing factor to maintaining momentum during the session that led to settlement. On the other hand, where agreement was not reached by the end of the mediation session, the time limit was identified as a constraint, as in the following example:

"It is very difficult to make an obstinate person, poorly advised by an out of touch solicitor agree to settle. The mediator achieved this. However, the closing of the building at the time of drafting the disclosure terms wrecked the agreement...It added £2,000 to our legal costs immediately as we sought to reach agreement, and uncertainty to the future result. It may result in the case going to the

courtroom door, with an extra £100,000 in legal costs spent between the two parties.” (Defendant debt case)

It has to be said, however, that if agreement is very close by the end of the mediation session, it is difficult to understand why a second mediation session was not arranged to complete the settlement discussions or why the parties and their representatives might not continue negotiations themselves, without the need for a further mediation session. In fact, the data reported in the previous chapter show that the number of cases settling within 14 days of an unsuccessful mediation was relatively modest.

Fairness of mediation outcome

Parties were asked whether they felt that, considering everything, the outcome of the mediation had been fair. Responses to this question showed little difference between claimants and defendants in their perceptions of fairness, although claimants in settled cases were slightly more likely than defendants in settled cases to feel that the outcome had been *unfair* (35% of claimants settling as compared with 27% of defendants).

Among those who said the outcome was unfair, the most common reasons given were: that the amount of the settlement was wrong (64%); that the mediator's behaviour was unfair (21%); and that there was no justice in the settlement (14%).

“The process felt pressurised, due to time and the mediator. My sense of it is that I have managed to keep my home (Thank God) but I have lost £18,500 total in legal costs – of which I will get back £3,500. I will have to pay for the legal costs towards the transfer of the property even though I have nothing to gain from the process.” (Claimant property dispute settled)

Impact of mediation on time and cost

Parties' views on costs savings

Parties who had attended mediation were asked whether they felt that the mediation had made any difference to their costs. Overall, a little over one-third of respondents said that the mediation had saved costs (38%) and about one in five thought that the mediation had made no difference to costs (21%). Some 12% said that there had been no costs involved and 29% said that costs had been increased. The replies revealed little difference between claimants and defendants in their perception of the impact of mediation on costs.

However, there was a significant difference in perception between those respondents whose cases had settled at mediation and those whose cases did not settle (Figure 5.17). Almost two-thirds of those whose cases settled felt that they had saved costs and 7% thought that mediation had increased their costs; these figures are consistent with those found in the 1998 review. Among those respondents whose cases had not settled, 45% thought that their costs had increased, almost one in five thought that they had saved costs (19%), and a little over one-quarter thought that the mediation had made no difference to their costs (28%). In the 1998 review of the scheme, parties whose cases were unsettled were somewhat less likely to perceive an increase in costs and somewhat more likely to think that costs had been saved despite failure to settle.⁵⁷

Figure 5.17 Parties' view of whether mediation saved legal costs

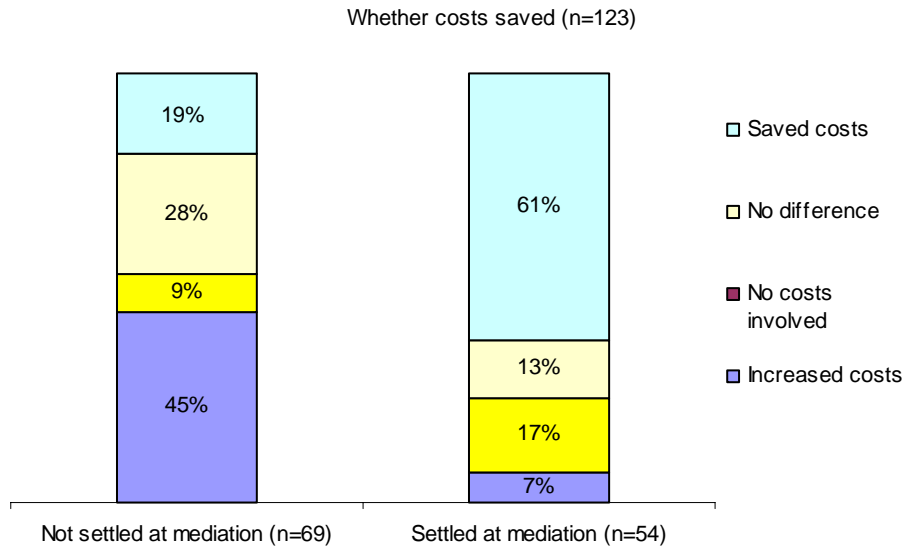
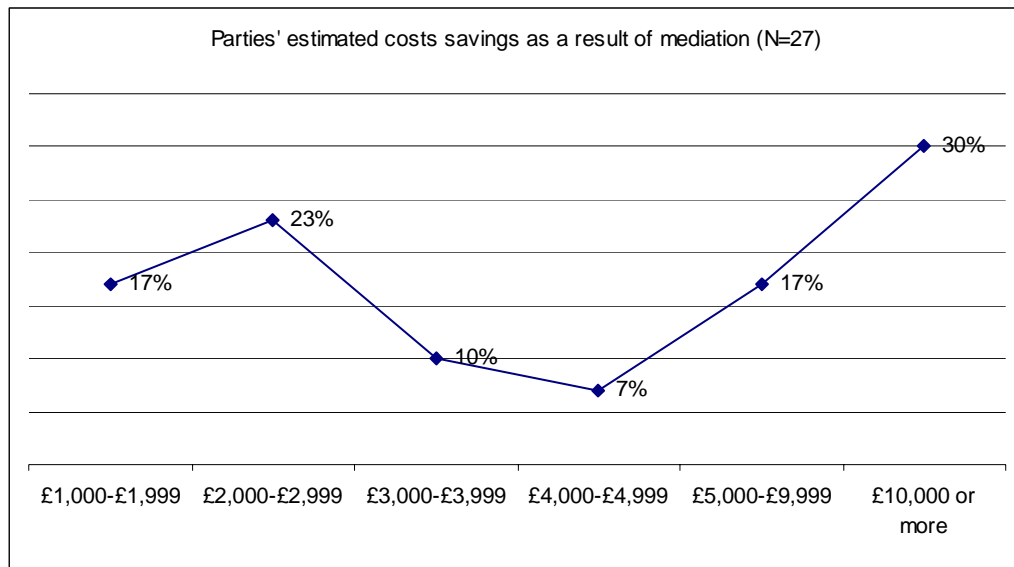


Figure 5.18 shows that among those who felt that costs had been saved, and were able to place a figure on the amount saved, a relatively high proportion of respondents thought that the saving made had been quite substantial. Almost one in three thought that they had saved £10,000 or more.

⁵⁷ Figure 4.1, op cit, p.81, Genn 5/98.

Figure 5.18 Parties' estimates of cost savings as a result of mediation.

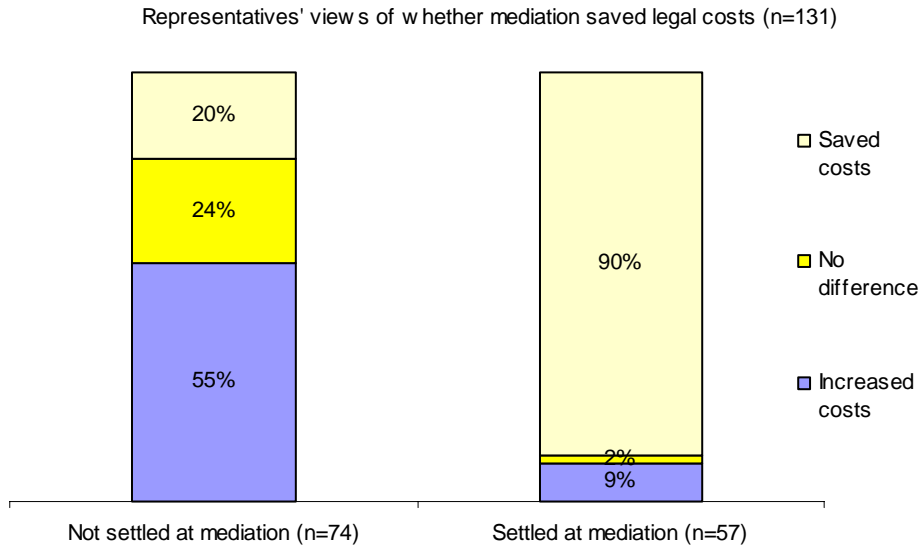
Among those who thought that costs had increased (22% of respondents), and who were able to estimate a figure, the median extra cost was estimated at £750 with a minimum extra cost of £100 and a maximum additional cost estimated at £5,000.

Representatives' views on cost savings

About half of those representatives replying to the survey said that mediation had saved legal costs (Figure 5.19). About 15% said that the mediation had made no difference to legal costs and a little over one-third (35%) said that the mediation had increased legal costs. There was no significant difference between claimants and defendants' representatives in this respect. However, again, representatives' views varied significantly depending on whether or not cases had settled at mediation. Where cases had settled at mediation, 90% of representatives believed that legal costs had been saved and only around one in ten thought that costs had been increased by the mediation. On the other hand, where the case had not settled at mediation, over half of the representatives believed that costs had been increased (55%), although one in five still felt that costs had been saved. These findings are again consistent with the 1998 review of the scheme, although at that time a lower proportion of representatives felt that unsettled mediations had increased costs.⁵⁸

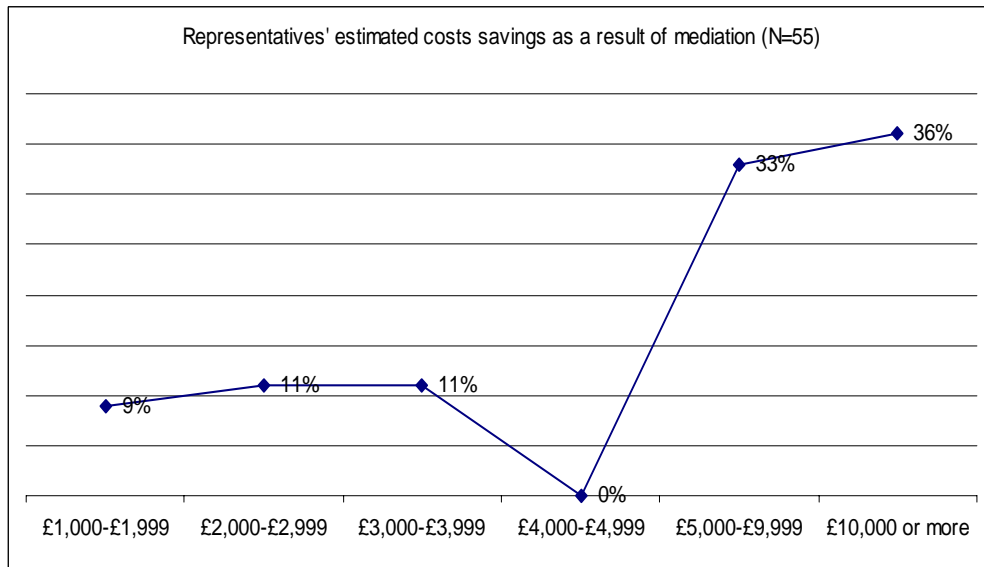
⁵⁸ Figure 4.7 p94, 5/98 op cit.

Figure 5.19 Representatives' views of cost savings



Consistent with the perceptions of parties, representatives who were able to estimate the amount of cost savings frequently thought that substantial savings had been made. Figure 5.20 indicates that two in three of those who felt that costs had been saved estimated savings to be in excess of £5,000.

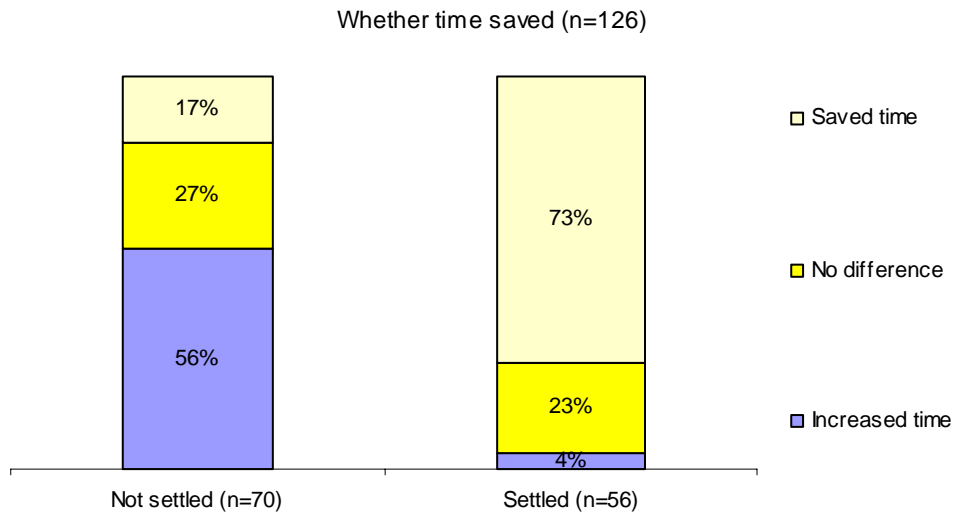
Figure 5.20 Representatives' estimates of cost savings



Parties' views on time savings

Parties and representatives were asked slightly different questions about the impact of mediation on time spent resolving the dispute. Parties were asked, "In trying to sort out this dispute did mediation save you time, or did it increase the time you spent, or did it make no difference to the amount of time you spent on the dispute?" Taking the responses from parties as a whole, Figure 5.21 shows that about one-quarter of respondents thought that the mediation had made *no difference* to the time involved in dealing with their dispute. One-third thought that the time had been *increased*, and 42% thought that time had been *saved*. Again, there were no significant differences between claimants and defendants, but there were significant differences in perception of timesavings depending on whether or not the case had settled. Almost three-quarters of respondents who had settled their case thought that the mediation had saved time (73%), while only 17% of those whose cases did not settle thought that mediation had saved time. When cases did not settle at mediation, a little over half thought that mediation had increased time spent on the case (56%).

Figure 5.21 Parties' views of time saved by mediation



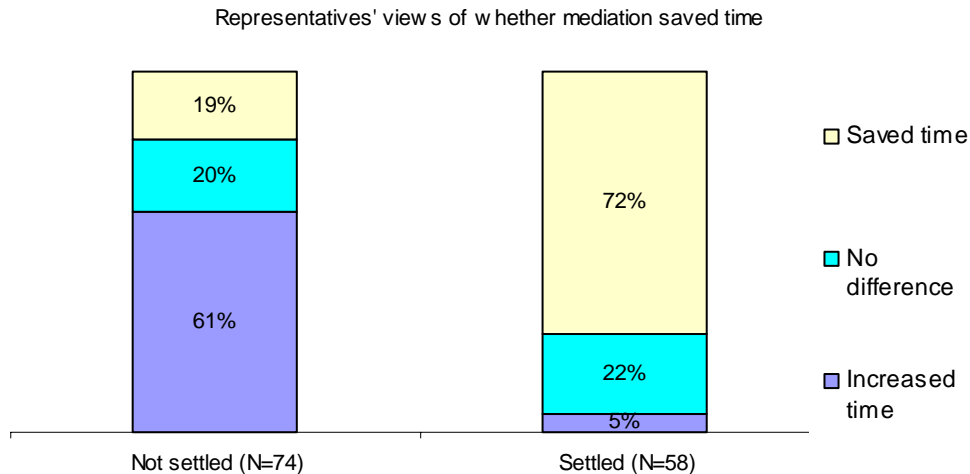
Most of those who perceived that mediating had saved some time measured the saving in days (46%), although over one-third thought that they had saved months or years (Figure 5.22). Some of this difference, however, appears to stem from varying interpretations of the question by respondents. Some respondents clearly measured

time saving in terms of the number of hours spent dealing with the dispute as opposed to the amount of time that might have otherwise elapsed before the dispute was finally settled by agreement or had been tried in court.

Representatives' views of time savings

Representatives were asked to say whether, considering everything, mediation had reduced, increased, or made no difference to the amount of time that they had spent on the case. Some 42% of representatives said that mediation had saved time, a little over one-third of representatives (37%) thought that mediation had increased time and about one in five thought that the mediation had made no difference to the amount of time that they had spent on the case. Unsurprisingly, however, there was a significant difference in response associated with whether or not the case had settled at mediation (Figure 5.22). When cases had not settled, about three-fifths of representatives thought that the mediation had increased the amount of time spent on the case and only one in five thought that time had been saved. About three-quarters of representatives whose cases had settled felt that mediating had saved time and only 5% thought that time had been increased.

Figure 5.22 Representatives' assessment of time saved



Generally, representatives expressed timesavings and extra time spent on cases in terms of hours. Figures 5.23 and 5.24 show the distribution of estimated hours saved and extra hours expended on mediated cases.

Estimates of time saved as a result of mediation show a very wide range with 28% of those responding estimating savings to be no more than 8 hours and 25% thinking that the saving had been 30 hours or more.

Three-quarters of those who thought that they had spent extra time on the case estimated the additional time spent to be no more than 1 day; 27% of those responding thought that the extra time had amounted to no more than 4 hours. However, one-quarter of those who thought that they had spent more time on the case as a result of mediation felt that the extra time amounted to more than 1 day.

Figure 5.23 Representatives' estimates of time savings as a result of mediation

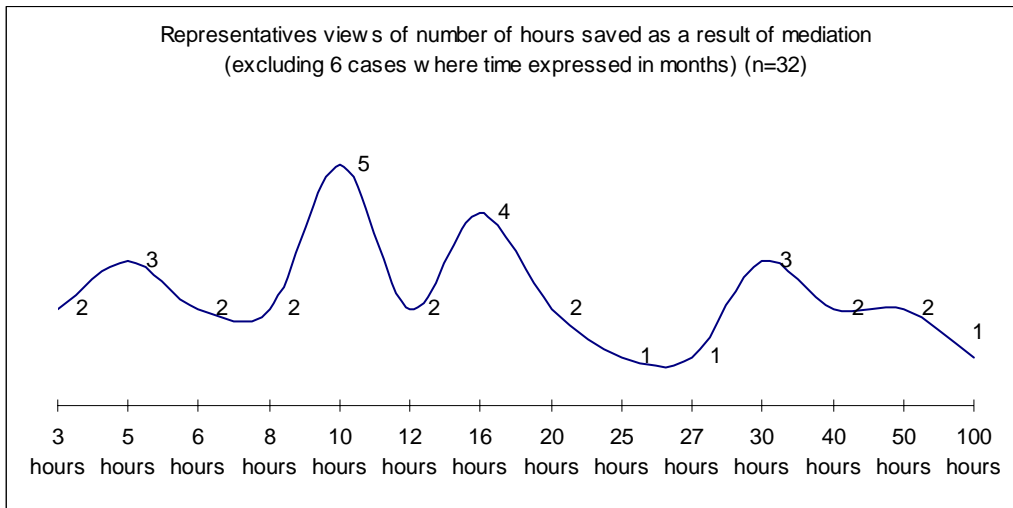
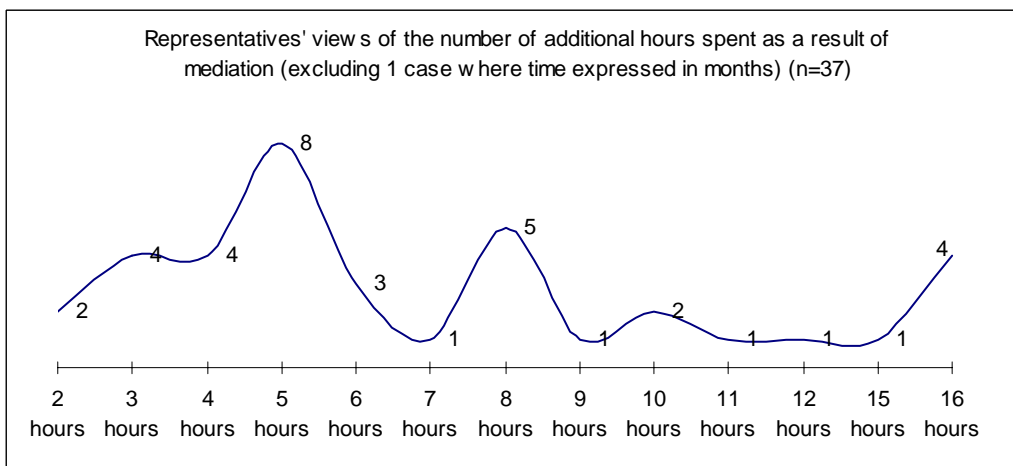


Figure 5.24 Representatives' estimates of time increases as a result of mediation

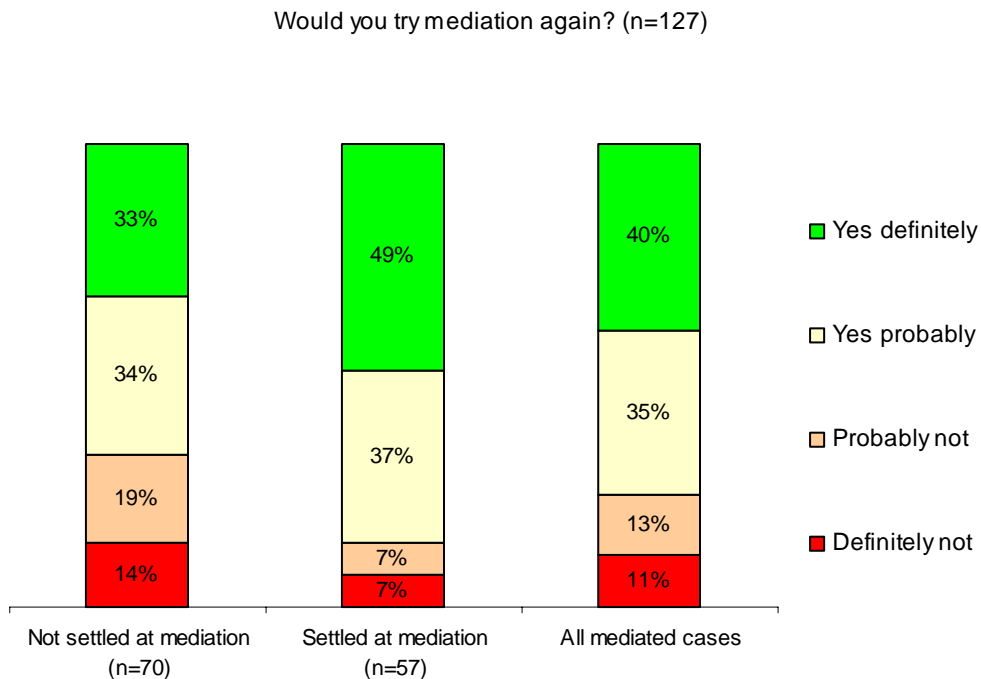


General assessments of mediation by parties and representatives

Would you mediate again?

Overall, about three-quarters of parties said that they would probably, or definitely, try mediation again, and only about one in ten said that they would definitely not try mediation again (Figure 5.25). Although there was little difference between defendants and claimants on this question, unsurprisingly there was a significant difference in response depending on whether or not the case had settled at mediation. About one-third of those parties whose cases had not settled said that they would probably or definitely not try mediation again, as compared with around one in ten (11%) of those whose cases settled at mediation. This indicates clearly the impact of settlement at mediation on perceptions of the process, apparently, irrespective of whether the party was a claimant or a defendant. On the positive side, however, two-thirds of parties who had unsuccessfully mediated said that they would probably, or definitely, try mediation again.

Figure 5.25 Parties' views on whether they would try mediation again



Would definitely mediate again

Those who said that they would definitely mediate again often expressed considerable enthusiasm for the process, and focused on success in achieving a settlement, the skill and qualities of the mediator, the attractions of an informal process and the speed of the procedure.

"I think all disputes should automatically go to mediation and any side not willing to go and actively attempt to settle at the mediation should be noted so at the court case made to pay all costs and compensation to the other party if they lost the case." (Claimant settled large property claim at mediation)

"We think mediation is the best thing since sliced bread. We believe that if such a system was widespread and well known, the number of court cases could be drastically reduced. We were impressed and cannot recommend mediation highly enough." (Defendant breach of contract case, settled)

Would mediate again despite reservations

When there were reservations about mediation, for example, where a case had failed to settle or where there had been pressure to mediate, respondents were often able to see the potential in the process. Sometimes the failure to achieve a settlement, or reservations about the particular mediation stemmed not from perceived weaknesses in the process itself, but in some aspect of the particular mediator or opponent or opponent's representative.

"Unfortunately the defendant was initially against mediation and when pressed by the judge he mediated. Since the defendant's strategy had been to delay payment, he did not put much effort into mediation. Despite the above, I would certainly use the process again and I would heartily recommend it. In a normal dispute I can see it significantly reducing both costs and time." (Claimant in debt case)

"[Would mediate again:] But only if the mediator was a very experienced lawyer or barrister or judge who could give guidance on legal/contractual matters, and also the likely outcome in court. We and the defendant were further apart at the end of the mediation than before." (Claimant debt case)

"My dissatisfaction with the process stems from my solicitor who had no previous experience of mediation. He persuaded me that a barrister was required to attend. Due to the informal nature of the process the barrister was totally unnecessary and I could have easily attended on my own. The legal pressure cost me dear! The process was useful as it made the defendant realise he owed me money, a fact he failed to appreciate before. It was very helpful that the mediator was an architect who advised me not to accept the sum offered at mediation. Victory in these cases is always hollow as we have now settled for £9000 but approximately £7500 are costs! The process would be improved if the mediator could act as a judge!" (Claimant unsettled debt case)

Probably would not mediate again

When respondents said that they would probably not mediate again, this was often an expression of frustration at feeling that they had been pushed into a process that they had not chosen and which had ultimately not succeeded in bringing an end to the dispute. There were cases where people had reluctantly agreed to mediate, only to find that their opponent was completely intransigent during the mediation session, or behaved in a way that left the respondent feeling that the session had been a charade or a fishing exercise on the part of their opponent. Occasionally, people had reluctantly agreed to attend mediation, only to find that their opponent had failed to attend, wasting their time and the cost of preparation for the mediation session.

“It was a waste of time if there is no reason to settle you have an impasse. If the Judge was to be told that one party or the other had refused to work with, or mediate, and just wasted time it may help to make mediation worth trying. Mediation for me just ran up my cost. I was very unhappy when I found out the other party had no intention of mediating.” (Claimant – not settled at mediation but won at trial)

“If both parties were held to greater responsibility for their behaviour at mediation, a better outcome would be achieved. There is some tendency for parties to ‘have a good time’ and practice for court appearance.” (Defendant, unsettled debt case)

Other explanations for respondents feeling that they would not be keen to repeat the mediation experience could be found in unhappiness with the mediator, particularly where cases did not settle. As discussed in various parts of this report, the skill and approach of the mediator is perceived as a critical factor not only in the success of mediation in terms of settlement, but in the lingering impression of the experience with which mediating parties are left – especially when they have not been able to achieve a settlement by the end of the mediation session. The mediator, although only a facilitator, is in fact central in the mediation session and his or her skill is observed and evaluated carefully by the participants in the mediation.

“The efforts of the mediator were well intended, but his lack of legal knowledge on this subject left him unable to discuss the subject in an informed manner, with the other party. This resulted in the mediator asking my solicitor to advise the other party on the subject. This advice they ignored and refused at the meeting to offer any settlements or agree to mine. As a result the mediator decided to abandon the meeting early as the other party was unwilling to negotiate.” (Defendant unsettled dispute)

Representatives' views on timing of mediation

Most representatives felt that the mediation had been held at the right time in the life of the dispute (59%), although over one-third of representatives said that the mediation had occurred too late (38%) and only three percent thought that the mediation had occurred too early. This finding can be compared with the complaints in the ARM pilot of cases being referred to mediation too early (above Chapters 2 and 3).

Representatives' assessments of the value of mediation

Representatives who had attended mediations with or on behalf of clients were asked some general questions about their views of the potential of mediation. About three-fifths of representatives (60%) said that they thought mediation was a good way to handle a significant number of cases, about one-third (35%) thought that mediation could be helpful in a minority of cases, and five percent thought that mediation was a complete waste of time. These findings are slightly more negative than those obtained in the 1998 review where no representative had thought that mediation was a complete waste of time.

When asked whether they had recommended mediation to other clients almost one-half reported that they had recommended mediation more than once (49% of respondents); about 17% reported that they had recommended mediation once to another client, and just over one-third (34%) said that they had not recommended mediation to any other clients. These figures are virtually identical to the findings of the 1998 review of the mediation scheme.

On the question of the kinds of cases for which mediation is most appropriate, one-quarter of representatives said that "all" cases were appropriate. The kind of civil cases most often mentioned as being particularly appropriate for mediation were commercial cases, 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, and cases where disputes relate to issues of fact rather than law. Those cases most often mentioned as being *inappropriate* for mediation were those with complex factual and legal issues, personal injury cases, and large commercial claims.

Mediators' perspective on the VOL scheme

Mediators who had conducted mediations during 2003 were also sent questionnaires seeking feedback on their cases. They were asked what, in their view, had contributed to successful mediations and, where unsuccessful, what factors they felt helped to explain the failure. Fifty-four questionnaires were sent out and 32 questionnaires were returned, representing a response rate of a little under 60%.

What contributes to successful mediation?

Where mediations had been successful, key factors mentioned by mediators when accounting for success appeared to be the mediator's ability to facilitate negotiation, skill in reality testing, in the context of the parties' willingness to cooperate and compromise and ultimately their motivation to settle.

Perhaps unsurprisingly, success at mediation was often attributed to simple negotiations, and mediators saw 'reality testing' as important in achieving settlement. Mediators explained how encouraging parties to focus on the risks of continued litigation created the conditions within which parties could reflect on their interests and see the advantages of compromise. In this way, reality testing leads to more 'realistic' expectations and greater willingness to give ground:

"During the mediation and before the mediation, parties were forced to allocate sufficient management time to the problem; also mediation highlighted the risk of continued litigation for a low value dispute."

"The sudden realisation that the dispute could spiral out of control and involve unjustifiable costs and time consequences."

"I managed to reduce their expectations and to see the potential outcome if they did not settle."

"Both sides were faced with a mutually unpleasant alternative; i.e. the proceedings continuing with varying degree of uncertainty of outcome and preferred to reach their own deal."

"The parties were asked to focus on the wider issue – did they want the association to survive, or for there to be two rival associations. They both agreed that one association would be better."

On the other hand, 'reality testing' depends on the parties having the motivation to enter into the spirit of mediation, willingly accepting the opportunity to reflect on the weaknesses as well as the strengths of their position and to take a realistic approach to

the downsides of litigation. In the view of mediators, success at mediation depends on a co-operative stance from the parties and their legal advisers, as well as on the skills of the mediator:

"The common sense and integrity of the claimant's legal advisor."

"Willingness of the claimant to be flexible in the seeking of a resolution."

"I believed I was persuasive in encouraging both parties to settle."

"The mediator's persistence."

That the motivation and will to settle is critical in the outcome of mediation was underlined by some vivid examples of sessions that had started unpromisingly, but in the end had succeeded in reaching agreement.

"This case began with a VERY angry joint session which didn't seem likely to lead to a settlement, but a settlement was reached after the first hour. Clearly both sides had come to the meeting with two aims: - to have a huge row; and – to dispose of the case; and they both achieved both objectives. Without the framework of the mediation meeting this wouldn't have been possible."

"Parties need to understand that mediation is about need and interests going forward not simply re-hearing legal and moral arguments. Guidance on this might be helpful. This was a difficult mediation due to the initial intransigence of all parties, once a little movement was made however it became a little easier, but was touch and go until the very last minute."

Value of pre mediation contact

The majority of mediators made some form of contact with solicitors or parties before the mediation itself. This strategy was often thought to be important in increasing the chance of a successful outcome to the mediation. According to mediators, pre-mediation contact offers the opportunity to establish a relationship with the disputing parties and familiarise them with the process. It also provides a useful initial opportunity to explore the issues that are likely to be the focus of discussion and to encourage the parties to prepare for the mediation in order to make the most of the limited time available:

"In many cases it first starts to build a rapport with the mediator and second helps the parties understand the process...giving reassurance to an unrepresented party (the claimant)."

Accounting for failure at mediation?

In response to the opportunity to account for failure to settle at the end of the mediation, mediators tended to blame the attitude of the parties, entrenchment, lack of preparation

by the parties, and time constraints. This is consistent with their views on the factors that are important in achieving a successful outcome at mediation.

Attitude and entrenchment

The stance of the parties was clearly seen as an important factor in determining the outcome of mediation. Lack of motivation to settle, an interest in continuing conflict rather than reaching an accommodation and general entrenchment were all seen as major obstacles to settlement.

“Parties came to the mediation saying they wanted to settle, but they seemed to want to continue the dispute.”

“Both sides believed that had a strong case. The claimant, in particular, who was not legally represented, considered that he would be likely to do better by proceeding with the case, even though he was aware that if he lost he could be liable for the defendant costs.”

“Neither party was of a mind to reduce their expectations. Both parties were pursuing untenable claims/counterclaims.”

“There was too large a discrepancy between what the claimant was demanding and what either of the defendants were prepared to pay.”

In some cases, the factors that, in the mediator's view, had obstructed settlement at mediation were part of the history of the case and were the cause of failure to settle prior to mediation. This was sometimes the case where the dominant factor in failure to settle at mediation was the unreasonableness of one or both parties:

“[The reason the case did not settle at mediation was] a difficult client with unrealistic expectations whose solicitor had had difficulties in obtaining instructions; e.g. despite agreeing to send me copies of papers by phone his client then countermanded but I was not told until the day of the mediation. Broadly, however it seemed as though the client, who was struggling financially, was content to allow the case to run. The solicitors could not get progress through negotiation which had failed and had no option but to bring proceedings.”

This analysis from the professionals of how entrenchment and unwillingness to compromise obstructs settlement sits rather uncomfortably with the support shown by some mediation providers for compulsory mediation, discussed in Chapter 1 in relation to the ARM pilot in Central London.

“The success of mediation depends on both sides being willing to settle the case. In the cases in which I have been involved where there has been no settlement, the failure to settle is usually attributable to one side or the other being “bloody-minded” and not sufficient disincentives to the case proceeding to trial.”

Poor legal advice

Lack of legal advice, poor legal advice, and lack of preparation by lawyers for mediation sessions was also seen as a problem both prior to mediation and sometimes at mediation sessions. Occasionally, poor preparation was simply a function of unfamiliarity with mediation processes on the part of lawyers accompanying clients.

“The respective lawyers took an over legalistic and adversarial approach and racked up considerable costs which far outweighed the value of the claim.”

“External solicitors acting for each party saw this as a straight claim for unpaid invoice. The business people attending the mediation could understand better the nuances and actions behind the unpaid invoice.”

“The claimant (a large company) sent a junior member of their in house legal team who had no knowledge whatsoever of mediation; more importantly she had no delegated authority to negotiate and was very conscious of her own (v. junior) position within the company.”

Solicitors' contributions

To gauge mediators' perceptions of the role of solicitors in mediation, mediators completing feedback forms were asked if the presence of lawyers might affect the outcome of mediation. Representatives were often seen as an asset by mediators, particularly in helping their clients to take a realistic view of the strengths and weaknesses of their case. Where solicitors were familiar with, or understood the mediation process, they could also support their client and assist in seeking creative solutions to the dispute.

“A good adviser is always positive.”

“The contribution of solicitors varies, but it is generally positive in encouraging the party to understand the other side's point of view and hence to settle. It is necessary for the mediator to be positive towards the representative.”

“Positive - It is not meaningful to discuss the legal merits with lay people. More pressure can be brought to bear on parties who are represented.”

“They help the parties examine options and understand risk, strengths and weaknesses.”

However, mediators also indicated that the contribution of solicitors in some cases had been at best neutral, and at worst detrimental to the mediation process.

“The two parties did all the running in the case. As far as I was aware the representatives played no role in the outcome of the mediation.”

[The contribution of representatives was] negative in that the reps had already argued the case in a point-scoring manner for a year and held to their positions."

"He showed little energy before or during the mediation and was slow to respond to calls etc."

"Whilst the defendant's solicitor was helpful, the claimant's solicitor tended to support the claimant's inflexible attitude."

Timing of Mediation

Mediators were also asked whether the mediation had occurred at an appropriate time in the life of the dispute. While the majority of mediators felt that timing of the mediation had been about right, a significant number of mediators thought that the mediation had occurred too late. They believed that a more appropriate time would have been before the parties had become entrenched and before high legal costs had been incurred. Some mediators thought that the mediation should have occurred as early as at the exchange of initial papers. The sense that a proportion of mediations had occurred rather late reflects the fact that about 40% of respondents said that their dispute had been going on for more than two years when they agreed to try mediation.

"Should have been before the claimant had begun to accumulate significant costs in the recovery of the debt. The defendant was resistant to these costs."

"The mediation should have occurred 2 years earlier when (a) the [claimant's] information was current and (b) the defendant had not had the time to become embittered and entrenched."

"At the very beginning. The court file was quite thick. The case should have been referred at the outset – all the parties needed was some coaching in how to communicate in a non-confrontational manner. The court system simply gave them the tools and environment to continue down the adversarial path."

Only one mediator felt that the mediation had occurred too early and that the accumulating cost and delay of litigation had yet to impact on the attitude of the disputing parties:

"The parties were still at the early stage of their 'personal' dispute. Court time and costs might improve their attitudes."

Time limitation

As discussed in Chapter 3, there are conflicting views about whether the time limit of 3 hours on Central London mediations contributes to settlement or acts as a constraint. Those mediators returning feedback forms about VOL mediations in 2003 frequently

referred negatively to the time limitation on mediation sessions. Three hours was thought to be too short where cases were complex, highly contentious, or where positions were entrenched. For example:

“The time limit of three hours is too short for complex cases. Four hours or half a day would be better.”

“All commercial court mediations that I have been involved in are [too] short... This is not helped by the fact that you know that someone is waiting to lock up... we started seriously talking ½ hr before the scheduled end and ended up ¼ hr late i.e. all the business was done in ¾ hr under pressure.”

“I am extremely pro-mediation. This type of scheme, however, gives me reservations due to the ‘one size fits all’ approach. I have found the time limit a serious constraint for several reasons:

- 1) Usually there are side issues that take time to identify.*
- 2) Parties are seldom adequately prepared.*
- 3) Parties/lawyers discussions are crucial, especially as many lawyers only pay lip service to mediation. It takes time to separate them from their clients.*
- 4) The atmosphere at the CLCC for mediations is unhelpful, with only security staff available – The imputation of lack of support is clear.”*

However, there were some who felt that the time limit helped to maintain momentum and that it was a positive factor in successful outcomes.

“When I started doing these mediations I thought that 3 hours was too short. With experience and improved techniques have changed my mind. 2 hours is generally sufficient or I expect the parties will settle during the next few days.”

“I find having a time-limited mediation is helpful in concentrating the minds of the parties. However its success depends on both sides being willing to settle the case.”

Mediator's fee

A concern raised by mediators about the VOL scheme at Central London was the level of the fee, echoing some of the complaints made by mediators who returned report forms for the ARM pilot. Some mediators felt that the current fee was inadequate and that remuneration arrangements were unsustainable in the long term. For example:

“The fee paid to the mediator (£150 inclusive of VAT) is woefully inadequate, bearing in mind that in addition to the 3 hours allocated for the actual mediation, at least another 3 hours is spent in preparing for the case and in pre mediation contact with the parties.”

“Because the payment of £200 flat fee to mediators is quite low what will happen is experienced mediators will eventually move on to more rewarding things. For now most mediators will only contemplate accepting these nominations for purposes of gaining experience and fulfilling CPD requirements. May I humbly

suggest the introduction of sliding scale of fees, depending on the value of the dispute, as is the case in Exeter and Birmingham.”

While there is no doubt that the current remuneration for mediators providing services in the Central London VOL scheme is extremely modest, the cost of mediation for parties is a critical policy issue. There is a limit to the extent to which mediators' fees can rise if court-based schemes are to remain attractive for low-value cases, particularly in a climate of declining settlement rates.

Summary

Since 1999, users and representatives' explanations for entering the VOL mediation scheme have indicated the increased role of the courts in encouraging or pressing parties to mediate. Encouragement or directions by a judge, or fear of potential costs sanctions, were mentioned as the reason for mediating by one-quarter of those responding to questionnaires. By contrast, in the 1998 review of the VOL scheme, only a handful of respondents gave court encouragement as a reason and there was no reference to cost sanctions. Other reasons for mediating included the possibility of saving cost and time and the opportunity to get past logjams in negotiations.

The majority of parties attending mediation had no previous experience of mediation. Most respondents displayed high levels of confidence in mediators and confidence in the neutrality of the mediator. Representatives generally assessed mediations to have been fair, although there was some evidence of more negative evaluations where the mediation had not achieved a settlement. In general, parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common features disliked were that the mediation was rushed, failure to settle, facilities, focus on mediation, or poor skills on the part of the mediator. The survey of mediating parties and representatives again underlines the fact that the skill and approach of the mediator are seen as critical factors in the success of mediation. Such skills also have an important influence on the impression of the process as a whole, especially among those parties who are not able to achieve a settlement during mediation. Although mediators are not judges and their role is to facilitate settlement, not to preside over proceedings, they are absolutely central in the mediation process and their performance is important in evaluations of that process.

In accounting for failure to settle at the end of mediation, common reasons given by respondents to the survey were: court direction when parties were unwilling to compromise, the intransigence or personality of the opposing side, failings in the mediator and time constraints.

Where mediation had been successful, both parties and representatives felt that costs had been saved. On the other hand, where mediation had not been successful about half of parties and 55% of representatives thought that costs had been increased, although about one in five still felt that some costs had been saved. These findings are fairly consistent with the 1998 review; in the current survey, however, unsuccessful parties and representatives were more likely to feel that unsuccessful mediation had increased the cost of the case. Both parties and representatives felt that successful mediation had saved time and conversely, where mediation was unsuccessful there was a tendency to feel that the mediation had increased the time taken to conclude the dispute. The majority of parties felt that they would try mediation again, whether or not their case had settled at the mediation. The proportion of lawyers who reported having recommended mediation to their clients once or more than once in the past was virtually identical to the findings of the 1998 review, suggesting no significant growth in the enthusiasm of the profession for mediation.

Successful mediation, as gauged by mediators' analyses, is influenced by the skill of the mediator and motivation and willingness of parties to compromise. Mediators attributed failure at mediation to the attitude of parties, entrenchment, lack of preparation by the parties, and the time constraints of the Central London scheme.

Chapter 6. Conclusion

The ARM pilot was devised as an experiment in quasi-compulsory mediation. Some enthusiasm for the experiment had been generated by the apparent success of a mandatory mediation programme in Canada where 3,064 cases were dealt with over a 23-month period (1,110 in Ottawa and 1,954 in Toronto). The evaluation of the Ontario mandatory mediation programme⁵⁹ records that: *“a small number of cases have been exempted from mandatory mediation. Between January 1999 and December 1 2000, pilot project staff report 25 exemptions in Ottawa and 69 in Toronto.”*⁶⁰ The report goes on to note: *“Mandatory mediation is an article of faith in Ottawa, a part of the fabric of litigation. Toronto is only beginning – both with case management and with mandatory mediation.”*⁶¹ Reporting on a focus group discussion with lawyers undertaken as part of the evaluation, the report noted: *“The general experience of participants was that motions to exempt from mediation were very rarely used, although some participants had had them granted.”*⁶²

Clearly, the response to the ARM pilot in London was somewhat different. Over a period of 12 months, some 1,232 cases were referred to mediation under ARM. Of these about 70% sought to opt out of the scheme. In the end, mediation dates were fixed for about 47% of referred non-personal injury cases and for about 12% of personal injury cases. The high rate of objections and small number of cases proceeding to mediation mean that the minority of cases referred to mediation under ARM can hardly be regarded as a body of mediations “under compulsion”.

Outcome of ARM

During the 12-month experimental ARM scheme, 1,232 civil disputes were randomly referred to mediation, of which 82% concerned damages for personal injuries. By the end of the evaluation period, only 22% of the cases referred to mediation had been listed for mediation and ultimately only 14% of those cases originally referred to mediation had been mediated. In a caseload dominated by personal injury cases, the pilot scheme

⁵⁹ Robert G. Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months*, 2001.

⁶⁰ *Ibid*, p.28.

⁶¹ *Ibid*, p.54.

⁶² *Ibid*, p.56.

experienced a high rate of objection to automatic referral throughout its life. The strategy of personal injury cases was to object to mediation or to settle before replying, whereas in non-personal injury cases objections to referral to mediation were raised less often. Following the *Halsey* judgment, the District Judge assigned to hear objections to the scheme felt that her powers were limited to persuading rather than ordering reluctant parties to change their minds. Hearings to consider objections did not generally result in mediation bookings and tended to introduce delay into the processing of cases.

The broad figures from the ARM experiment suggest that quasi-compulsion in the London context has not been particularly successful. The overall opt-out rate commenced at around 80% and, although there was some reduction in the number of objections in the last third of the pilot, nonetheless, by the end of the pilot only a minority of cases had been mediated. On the other hand, this report has repeatedly referred to the significant difference in take-up of mediation between personal injury and non-personal injury cases. Among the personal injury cases referred to mediation, objections were raised in about 90% of cases. However, the opt-out rate for non-personal injury cases was much lower and the settlement rate at mediation was actually better than that obtained in the voluntary scheme. This suggests that there may be a benefit in automatically referring non-personal injury cases to mediation, so long as judicial time is not spent trying to persuade those who opt out to change their minds. The pilot has shown that this is an ineffective use of time and may impose inappropriate pressure on parties to mediate.

Settlement

Of the cases actually mediated under the ARM pilot scheme, the settlement rate over the course of the year followed a broadly downward trend, from a high of 69% among cases referred in May 2004 to a low of just below 38% for cases referred in March 2005. The average over the year was 53% with a handful settling within 14 days of the mediation session. Where neither party objected to mediation the settlement rate was 55%. Where both parties originally objected to mediation, but were then persuaded to go ahead with mediation, the settlement rate was lower at 48%. The majority of cases referred to mediation under the ARM scheme concluded by means of an out-of-court settlement without ever going to mediation, although among those cases involved in objections hearings, a higher proportion continued to trial.

Explaining mediation decisions and settlement

Multivariate analysis, seeking to identify the factors most likely to discriminate between cases accepting and objecting to automatic referral, showed higher value claims and those not involving personal injury were most likely to accept automatic referral.

Analysis seeking to identify determinants of settlement at mediation – including case type, case value, party-configuration, representation and case complexity – found that none of the variables used were good predictors of outcome. It is therefore likely that the explanation for success or failure at mediation is to be found in some mix of individual characteristics of cases, the attitude and motivation of parties, and the approach, skill and knowledge of the mediator. This is a subject worthy of further research.

Analyses of the impact of mediation on judicial and administrative time suggest that while ARM mediations reduced judicial time by decreasing the likelihood of trial, they increased administrative costs. The analysis demonstrated a strong and quantifiable relationship between court time, case duration and the occurrence of trials.

The study found no strong evidence to suggest any difference in case duration between mediated and non-mediated cases. Similar proportions of each type of case were resolved within two years of issue. It was, however, evident that the probability of a trial within two years of issue was significantly lower for mediated non-PI cases, although this was not true of personal injury cases.

Opting out

In common with other evaluations of court-based mediation schemes in England, interviews with solicitors advising clients in the ARM pilot highlighted the critical role of the legal profession as gatekeeper to mediation. The pilot scheme was not interpreted by most solicitors as compulsory in any sense and many regarded opting out as a mere bureaucratic hurdle. Considered justifications for opting out included the timing of the referral, the anticipated cost of mediation in low-value claims, the intransigence of the opponent, the subject matter of the dispute, and a firm belief that the case would settle anyway and that mediation was therefore unnecessary.

Users' experiences of ARM

Evaluations of mediation experiences in the ARM scheme were substantially influenced by whether or not the case had settled at mediation. Those involved in unsettled mediations were considerably more negative in their assessments than those attending mediations that had settled. Explanations for failure to settle at mediation focused on the behaviour of the opponent, including intransigence and unwillingness to compromise. Some felt that their mediator had demonstrated a lack of skill and others felt that the 3-hour time limit was too short. Those who felt that they had been compelled to attend unsuccessful mediations frequently expressed discontent about the ARM scheme, arguing that bringing unwilling parties to the mediation table was inappropriate and costly.

In almost every interview with representatives involved in unsettled mediations, the view was that the mediation had increased the legal costs of the case, most commonly by around £1,000 to £2,000.

Where mediations had been successful, evaluations were more positive with explanations for the outcome focusing on the skill of the mediator, the opportunity to exchange views and reassess one's own position and the willingness of opponents to negotiate and compromise. Successful mediations were generally thought to have saved legal costs, especially where a trial had been avoided.

Key positive features of mediation were said to be the informality of the procedure, the speed of proceedings, potential for settlement, and the opportunity to make cost savings. Negative experiences of mediation were said to be the danger of giving away too much about the case, the cost of mediation – especially where there was no settlement – and the physical environment at Central London, which was universally seen as a significant impediment to settlement.

Mediators' views of ARM

Mediators confirmed that key factors contributing to settlement in the ARM scheme were the willingness of the parties to negotiate and compromise, the contribution of legal representatives, their own skill as mediators, and administrative support from the court. Explanations for failure to settle ARM cases at mediation focused on parties'

unwillingness to negotiate or compromise. The significance of the parties' willingness to negotiate and compromise as an explanation for success and failure in mediation sits uncomfortably with the evident support shown by some mediation organisations for an experiment in compulsory mediation. If mediators believe that motivation to settle is critical to outcome, then an appropriate mediation policy must surely be one of facilitation, education, encouragement and possibly incentives, rather than the threat of penalties, which simply creates the conditions for going through the motions.

The VOL scheme

Demand for the VOL scheme at Central London increased significantly following the case of *Dunnett v Railtrack* in 2002. This case confirmed the power of the courts under the CPR to deny a successful party in litigation their legal costs if they are deemed to have acted unreasonably in refusing to attempt to settle their dispute by mediation. Since 1998, the range of non-personal injury cases has been more varied and the mediation caseload less dominated by company v company disputes. On the other hand, in Central London, personal injury cases have continued to shun mediation. Only 40 of the 1,000 cases mediated in the VOL scheme between 1999 and 2004 concerned personal injury.

More important, despite the significant increase in the uptake of the VOL mediation scheme, the settlement rate at mediation has been gradually declining from the high of 62% in 1998 to below 40% in 2000 and 2003. The most recent figures show some recovery; but since 1998, the settlement rate has not exceeded 50%. This finding is of significance given the potential cost impact of unsettled mediation.

Users' experiences of the VOL scheme

A survey of users and representatives mediating in the VOL scheme during 2003 highlighted the increased role of the courts in encouraging or pressing parties to mediate. In explaining their reasons for attempting mediation, about one-quarter of respondents mentioned encouragement or directions by a judge, or fear of potential costs sanctions. By contrast, in the 1998 review of the VOL scheme, only a handful of respondents gave court encouragement as a reason and there was no reference to cost sanctions.

Overall, reaction to mediation was positive, with users and representatives displaying confidence in mediators and their neutrality. Parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common features disliked were that the mediation was rushed, failure to settle, facilities, or poor skills on the part of the mediator. The user survey again underlines the critical importance of the skill and approach of mediators. Although mediators are not judges and their role is to facilitate not preside, they are central in the mediation process and their performance is important in users' overall evaluation of that process.

In accounting for failure to settle at the end of mediation, common reasons given by respondents to the survey were: court direction when parties were unwilling to compromise, the intransigence or personality of the opposing side, failings on the part of the mediator and time constraints.

In general, where mediation had been successful parties and representatives felt that costs had been saved. Conversely, where mediation had not been successful, about half of parties and representatives thought that costs had been increased, although about one in five still felt that some costs had been saved. These findings are fairly consistent with the 1998 review, although users are now more likely to say that unsuccessful mediation increased the cost of the case. Both parties and representatives felt that successful mediation had saved time. Conversely, where mediation was unsuccessful, there was a tendency to feel that the mediation had increased the time taken to conclude the dispute. The majority of parties felt that they would try mediation again, whether or not their case had settled at the mediation.

The proportion of lawyers who reported having recommended mediation to their clients once or more than once in the past was virtually identical to the findings of the 1998 review, suggesting no significant growth in the enthusiasm of the profession for mediation.

Mediators' analyses of factors contributing to success at mediation suggest that the motivation of the parties and willingness to compromise and skill of the mediator are critical to the outcome. Failure to settle tended to be attributed to the attitude of parties,

entrenchment, parties' failure to prepare adequately for the mediation, and the time constraints of the Central London scheme.

Learning from evaluation of mediation schemes

Explaining settlement

It was not possible statistically to identify key determinants of settlement in mediation, but the qualitative information from both the ARM and VOL schemes from parties, representatives and mediators, suggests that the motivation and willingness of parties to compromise is critical. In this context, it is reasonable to infer from the declining settlement rate since 1999 that judicial pressure has been successful in propelling disputing parties towards mediation, but has drawn into the VOL scheme a proportion of unwilling parties. These parties, presumably, have participated through fear of costs' penalties, rather than as a result of a genuine desire to negotiate toward settlement. As has been noted in the Netherlands, where several experiments in court-encouraged mediation have been evaluated, those referring cases to mediation must ensure that the case in question is suitable for mediation. In arriving at such a judgement, the attitude of the parties is, perhaps, the most important factor:

*"The key indication seemed to be the willingness of the parties to negotiate. Experienced mediators agree that it is not the type of case that determines the chances of successful mediation, but the attitudes and insights of the parties. They have to be prepared for and capable of discussing a solution to their conflicts while also being able to develop an eye for their mutual interests."*⁶³

The evidence from the ARM and VOL schemes suggest that facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly efficient than blanket coercion to mediate. Evidence from recent evaluations of court-based mediation schemes in Exeter, Guildford and Birmingham support this conclusion. In Birmingham,⁶⁴ a purely voluntary scheme enjoyed a 60% settlement rate during the period 1999-2004. In Guildford,⁶⁵ the settlement rate for the voluntary scheme was 53% between 2003 and 2004. In the same court, some cases

⁶³ Bert Niemeijer and Machteld Pel, *Court-Based Mediation in the Netherlands: Research Evaluation and Future Expectations*, Paper presented to Ministry of Justice Expert Meeting on Mediation, June 2006, p353.

⁶⁴ Lisa Webley, Pamela Abrams and Sylvie Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme, Report to Department for Constitutional Affairs*, September 2006, <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf>.

⁶⁵ Sue Prince and Sophie Belcher, *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* <http://www.dca.gov.uk/civil/adr/fast-track-mediation-guildford-exeter.pdf>.

were selectively referred to mediation by the judiciary and among those cases, the settlement rate at mediation was as high as 75%. By contrast, in Exeter, where the judiciary exerted considerable pressure to mediate, the settlement rate was about 40% and only 30% for cases that had been judicially referred. The author of the evaluation suggests that the explanation for the lower settlement rate at Exeter, as compared with Guildford, might be an “over-enthusiasm for mediation” which led to cases being referred that were more complex and, therefore, unlikely to settle at time-limited mediations. The author also notes that the judiciary in Exeter were exerting more pressure on parties than at Guildford and that this might account for the depressed settlement rate. Apparently, settlement rates have been gradually recovering since a decrease in judicial pressure following the *Halsey* judgment in 2004.

Demand for mediation in context

Historically the principal demand for mediation in the VOL scheme at Central London (and now the ARM pilot) has been among non-personal injury cases, largely for disputes over contracts between businesses. Individuals in modest numbers have also used the schemes to sue companies for poor workmanship, spoiled holidays, possession proceedings, boundary disputes, and intellectual property. These cases have tended to lead more often to trials than personal injury cases where settlement is pervasive. Given the persistent rejection of mediation in personal injury cases, there is a significant policy question about the value of expending energy and resources attempting to persuade parties and lawyers in such cases to experiment with mediation. Lack of interest in mediation on the part of defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation. But unless the defence side of the personal injury equation changes its strategy, it is hard to see how a large proportion of the current caseload of the county courts can be encouraged to embrace mediation. On the other hand, given the greater volume of trials in non-personal injury cases referred to in Chapter 2, success in encouraging non-PI cases to mediate could yield significant benefits to the administration of justice in terms of savings in judicial time.

Demand for mediation and the role of advisers

Information from the ARM evaluation, in particular, reinforces the significant gatekeeper-role of the legal profession and other advisers in relation to mediation. As indicated in

the 1998 review of the Central London VOL scheme and subsequent evaluations,⁶⁶ the majority of litigants are legally represented and defer to the advice offered by their lawyer. When most litigants do not have personal knowledge, let alone experience of mediation, it is not surprising that they do not challenge perfunctory discussion and brisk advice about the value of mediation in their particular case. The legal profession has more knowledge and experience of mediation than was the case a decade ago – especially within large commercial firms. Nevertheless, it is clear that in the majority of personal injury cases and in most standard non-personal injury cases, the profession remains to be convinced that mediation is the obvious or even an appropriate approach to dispute resolution. In the absence of any discernible incentives for the grass roots of the profession to opt for mediation on behalf of their clients, there is a policy challenge in reaching out to litigants so that consumer demand for mediation can develop and grow. This also implies that if courts want to encourage litigants to consider mediation, imaginative ways need to be found for promotional material to be communicated directly to parties.

Improving court-based mediation

Evaluation of the ARM and VOL schemes, together with earlier evaluations and recent evaluations from Birmingham and Exeter, establish the importance of efficient and dedicated administrative support to the success of court-based mediation schemes, and the need to create an environment conducive to settlement. Most court-based schemes use the court building for mediation, which means that appointments take place at the end of the day from around 4.30 p.m. - 7.30 p.m. Evidence from ARM and VOL suggests that if parties are tired and possibly hungry this may work against settlement. Tired, hungry and thirsty people, confined to cramped and hot rooms are likely to be more focused on escape than settlement, content to abandon proceedings rather than prolong an uncomfortable experience. If courts wish to encourage mediation through the provision of facilities and if they want to maximise the effectiveness of that service, then serious attention has to be paid to the facilities provided.

Promoting mediation: sticks and carrots

In policy terms, where there is no bottom-up demand for mediation, demand can be created by means of facilitation, education, encouragement, pressure and pressure

⁶⁶ Genn (1998) and (2001).

accompanied by sanctions, or incentives. The evidence of both the ARM and the post-1999 VOL scheme at Central London indicates that, while in the English context the recent policy of judicial pressure to mediate accompanied by the threat of sanctions is capable of propelling cases into mediation this is not necessarily particularly effective in terms of settlement rates. Furthermore, settlement rates matter because unsettled mediation may increase the cost and the delay that mediation is intended to reduce. The indications from these evaluations are that a more effective mediation policy would combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications for a positive outcome. The ultimate challenge in policy terms is to identify and articulate where the incentives might lie for the grass roots of the legal profession to embrace mediation on behalf of their clients.

Appendix 1 Results for Multivariate Analyses

Table 1: Probit regression on mediation choice (ARMS data only)

Depvar=mediation	Coef.	Std. Err.	t
PI claim	-0.82008	0.237386	-3.45
Negligence claim	-0.20475	0.278049	-0.74
Contract claim	0.226384	0.273426	0.83
Def=individual	0.096204	0.137108	0.7
Clmt=individual	0.125167	0.136906	0.91
Counterclaim	0.185325	0.231832	0.8
Value=£5k-15k	0.542881	0.151469	3.58
Value=£15k-50k	0.799831	0.157713	5.07
Value>£50k	0.895127	0.197102	4.54
Constant	-0.81734	0.291612	-2.8
Number of obs =	1007		
Wald chi2(9) =	103.21		
Prob > chi2 =	0.0000		

Table 2: Mediation configurations in ARMS (N=245)

Claimant	Defendant	Percentage of mediated claims (ARMS)	Percentage of mediated claims (Voluntary)
Company	Company	16.73%	22.61%
Individual	Insurer	8.16%	0.00%
Individual	Company	32.65%	15.07%
Company	Individual	4.08%	15.17%
Individual	Individual	8.16%	25.46%

Table 3a: Regression of settlement at mediation (ARMS data only)

	Coef.	Std. Err.	t
PI claim	-0.51955	0.254285	-2.04
Value=£5k-15k	0.052698	0.390767	0.13
Value=£15k-50k	0.277116	0.393241	0.7
Value>£50k	0.244179	0.447134	0.55
Counterclaim	0.057852	0.40967	0.14
Ind v Ind	0.504698	0.360672	1.4
Co v Co	-0.29262	0.348154	-0.84
Ind v Co	0.199631	0.237857	0.84
Co v Ind	0.767096	0.513343	1.49
Ind v Ins	0.713091	0.364385	1.96
Def represented	0.009068	0.403807	0.02
Clmt represented	-0.86704	0.601236	-1.44
Constant	0.299273	0.702177	0.43
Number of obs =	214		
Wald chi2(12) =	16.51		
Prob > chi2 =	0.1691		

Table 3b: Regression of settlement at mediation (non-ARMS data)

	Coef.	Std. Err.	t
PI claim	0.2592185	0.3583337	0.72
Value=£5k-15k	-0.2224103	0.2267035	-0.98
Value=£15k-50k	-0.4016504	0.2283046	-1.76
Value>£50k	-0.3664133	0.296311	-1.24
Counterclaim	-0.0774944	0.1307837	-0.59
Ind v Ind	0.037824	0.2277738	0.17
Co v Co	0.3591756	0.2137528	1.68
Ind v Co	0.0492418	0.2331285	0.21
Co v Ind	-0.0434152	0.2354468	-0.18
Def represented	-0.2756597	0.1992849	-1.38
Clmt represented	0.0612101	0.1983297	0.31
Constant	0.0941175	0.3429858	0.27
Number of obs =	435		
Wald chi2(12) =	11.12		
Prob > chi2 =	0.4334		

Table 4a: OLS regression on judicial time (ARMS data only)

Depvar=lnjudicetime	Coef.	Std. Err.	t
Value=£5k-15k	0.2274721	0.151559	1.5
Value=£15k-50k	0.4442208	0.1685341	2.64
Value>£50k	0.3315602	0.2295067	1.44
Counterclaim	0.3236494	0.1970101	1.64
Ln(Delay)	0.7197556	0.1026083	7.01
Trial	1.30885	0.3054638	4.28
Mediation	-0.4133332	0.1150446	-3.59
Constant	-1.066581	0.5577902	-1.91
Number of obs =	241		
F(7, 233) =	15.62		
Prob > F =	0.0000		
LR test of indep. eqns. (rho = 0):			
chi2(1) =	0.02		
Prob > chi2 =	0.8989		

Table 4b: OLS regression on judicial time (non-ARMS data)

Depvar=lnjudicetime	Coef.	Std. Err.	t
Value=£5k-15k	-0.2105961	0.1027198	-2.05
Value=£15k-50k	-0.0778743	0.1035248	-0.75
Value>£50k	-0.1452354	0.1396536	-1.04
Counterclaim	0.2526887	0.0852276	2.96
Ln(Delay)	1.054802	0.1052973	10.02
Trial	1.44152	0.1280215	11.26
Mediation	0.2304706	0.1180495	1.95
Issued in 2000	0.0887537	0.2055611	0.43
Issued in 2001	0.0020105	0.1896828	0.01
Issued in 2002	-0.0272379	0.1759485	-0.15
Issued in 2003	0.0011361	0.1701709	0.01
Constant	-2.708465	0.6151579	-4.4
Number of obs = 432			
F(7, 420) = 33.35			
Prob > F = 0.0000			
LR test of indep. eqns. (rho = 0):			
chi2(1) = 0.05			
Prob > chi2 = 0.8253			

Table 5a: OLS regression on administrative time (ARMS data only)

Depvar=lnadmintime	Coef.	Std. Err.	t
Value=£5k-15k	0.0124694	0.0483845	0.26
Value=£15k-50k	0.0971319	0.0547806	1.77
Value>£50k	-0.0112591	0.0576924	-0.2
Counterclaim	0.1262739	0.0662616	1.91
Ln(Delay)	0.2302793	0.0350225	6.58
Trial	0.2905295	0.0597001	4.87
Mediation	0.1887082	0.0348805	5.41
Constant	3.658129	0.184573	19.82
Number of obs = 254			
F(7, 246) = 26.09			
Prob > F = 0.0000			
LR test of indep. eqns. (rho = 0):			
chi2(1) = 0.25			
Prob > chi2 = 0.5095			

Table 5b: OLS regression on administrative time (non-ARMS data)

Depvar=lnadmintime	Coef.	Std. Err.	t
Value=£5k-15k	-0.0738744	0.0436524	-1.69
Value=£15k-50k	-0.0882443	0.0481685	-1.83
Value>£50k	0.0144036	0.0554514	0.26
Counterclaim	0.0251905	0.0390257	0.65
Ln(Delay)	0.4431134	0.0416018	10.65
Trial	0.173748	0.0496378	3.5
Mediation	0.1816635	0.0377362	4.81
Constant	2.772923	0.2644661	10.48
Number of obs = 459			
F(7, 451) = 20.32			
Prob > F = 0.0000			
LR test of indep. eqns. (rho = 0):			
chi2(1) = 0.36			
Prob > chi2 = 0.5512			

Table 6a: Weibull regression for case duration (ARM data)

	Coeff.	Std. Err.	t
Value=£5k-15k	0.0731	0.0937	0.78
Value=£15k-50k	0.2725	0.0945	2.88
Value>£50k	0.5327	0.1141	4.67
PI claim	0.1798	0.0706	2.55
Def=individual	-0.3471	0.0724	-4.79
Clmt=individual	0.0796	0.0659	1.21
Counterclaim	-0.0031	0.1284	-0.02
Mediation	0.1112	0.0635	1.75
Constant	5.4868	0.1034	53.05
Number of obs = 983			
LR chi2(12) = 87.46			
Prob > chi2 = 0.0000			

Table 6b: Weibull regression for case duration (non-ARM data)

	Coeff.	Std. Err.	t
Value=£5k-15k	0.1225	0.0661	1.85
Value=£15k-50k	0.2730	0.0639	4.27
Value>£50k	0.2548	0.0937	2.72
PI claim	0.0132	0.0978	0.14
Def=individual	0.1347	0.0552	2.44
Clmt=individual	0.1015	0.0551	1.84
Counterclaim	0.1243	0.0553	2.25
Mediation	0.0393	0.1151	0.34
Constant	5.8161	0.1142	50.91
Number of obs =	560		
LR chi2(12) =	41.94		
Prob > chi2 =	0.0000		

Table 8a: Probit regression predicting trial within two years (ARM, non-PI cases)

Depvar=trial	dy/dx	Std. Err.	t
Value=£5k-15k	-0.0941	0.1174	-0.8
Value=£15k-50k	-0.1112	0.1159	-0.96
Value>£50k	0.0218	0.1571	0.14
Def=individual	0.0453	0.1022	0.44
Clmt=individual	-0.0492	0.0729	-0.67
Counterclaim	0.0470	0.1260	0.37
Mediation	-0.1424	0.0545	-2.62
Pr(trial no mediation) =	.2104		
Number of obs =	162		
LR chi2(12) =	7.94		
Prob > chi2 =	0.3382		

Table 8b: Probit regression predicting trial within two years (ARM, PI cases)

Depvar=trial	dy/dx	Std. Err.	t
Value=£5k-15k	0.0200	0.0215	0.93
Value=£15k-50k	0.0363	0.0330	1.1
Value>£50k	0.0006	0.0379	0.02
Def=individual	0.0218	0.0247	0.88
Clmt=individual	-0.0728	0.0529	-1.38
Counterclaim	0.1102	0.0991	1.11
Mediation	0.0094	0.0201	0.47
Pr(trial no mediation) =	.0327		
Number of obs =	605		
LR chi2(12) =	10.92		
Prob > chi2 =	0.1419		

Table 8c: Probit regression predicting trial within two years (non-ARM, non-PI cases)

Depvar=trial	dy/dx	Std. Err.	t
Value=£5k-15k	0.3591	0.1287	2.79
Value=£15k-50k	0.3303	0.1345	2.46
Value>£50k	0.4960	0.1406	3.53
Def=individual	0.1314	0.0707	1.86
Clmt=individual	0.1173	0.0747	1.57
Counterclaim	0.0666	0.0634	1.05
Mediation	-0.2370	0.0768	-3.09

Pr(trial|no mediation) = .2831

Number of obs = 504

LR chi2(12) = 38.47

Prob > chi2 = 0.0000

Appendix 2 An illustrative calculation of the expected costs and benefits from mediation (non-PI cases)

The results reported in the main text allow us to estimate with statistical confidence the impact of mediation on the administrative and judicial time incurred by the courts for cases settled out of court, and for those resolved at a trial. They also allow us to estimate with statistical confidence the impact of mediation on the likelihood that a case will be resolved at trial within two years of issue.

We can summarise our key findings in relation to non-PI cases as follows:

Mean administrative time, mediated cases, no trial: 248 minutes

Mean judicial time, mediated cases, no trial: 58 minutes

Mean administrative time, non-mediated cases, no trial: 204 minutes

Mean judicial time, non-mediated cases, no trial: 54 minutes

Mean additional administrative time associated with trial: 100 minutes

Mean additional judicial time associated with trial: 338 minutes

Probability of trial within 2 years of issue, mediated cases: 0.07

Probability of trial within 2 years of issue, non-mediated cases: 0.21.

The *expected* court time over a two-year horizon for non-mediated cases estimated at time of issue would therefore be $0.79 \times [204 + 54] + 0.21 \times [204 + 54 + 100 + 338] = 337$ minutes. That is, the probability of an out-of-court settlement multiplied by the court time (administrative and judicial) involved with such settlements, plus the probability of a trial multiplied by the total court time involved with trials.

The *expected* court time over a two-year horizon for mediated cases estimated at time of issue would be $0.93 \times [248 + 58] + 0.07 \times [248 + 58 + 100 + 338] = 350$ minutes. That is, the probability of a mediated out-of-court settlement multiplied by the court time (administrative and judicial) involved with such settlements, plus the probability of a trial after mediation multiplied by the total court time involved with trials.

From the courts' perspective, the trade-off implicit in the above is one between the lower chance of a time-consuming trial after mediation against the higher pre-trial judicial and administrative costs as a consequence of the mediation process. In the illustration

above, the trade-off works in favour of mediation – the expected court time at the time of issue is lower for a case that is expected to go to mediation. However, it should be emphasised that this is an illustrative calculation only. We have not taken into account the uncertainty surrounding our estimates; the horizon is fixed at two years; we have used estimates for non-PI cases only; and we have not taken into account the relative cost of judicial and administrative time.

Finally, it should be noted that the above calculation of expected costs and benefits is purely from the court's perspective; it takes no account of any gains to the claimant from improved satisfaction, nor of any consequences for legal costs incurred by either side.

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Twisting arms: court referred and court linked mediation under judicial pressure

This report presents evaluations of two mediation programmes in Central London County Court within the context of the changing Alternative Dispute Resolution (ADR) policy environment. The first programme was an experiment in quasi-compulsory mediation, the second a voluntary mediation scheme. The results presented here provide lessons about the impact of automatic referral and judicial pressure on the uptake of mediation; about user experiences; and about the potential of mediation to offer savings to the justice system in administrative and judicial time.

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