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

Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa

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

Ministry of Justice Research Series 1/07
May 2007
Twisting arms: court referred and court linked mediation under judicial pressure

Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa

Faculty of Laws, University College London
University of Nottingham Business School
The Research Unit, Ministry of Justice, was formed in April 1996. Its aim is to develop and focus the use of research so that it informs the various stages of policy-making and the implementation and evaluation of policy.
Acknowledgments

The study would not have been possible without cooperation and assistance from a large number of people. First, we would like to thank the judiciary in Central London Civil Justice Centre who provided access to the court and permitted us to observe them in their work. We are particularly indebted to His Honour Judge Paul Collins CBE and to District Judge Langley. We were also given an enormous amount of help by the Court Manager Michael Burke and his staff, especially those involved in dealing with mediations, who made time in their busy work schedules to assist us with access to databases and arranged for us to sit with the judiciary. The court staff uncomplainingly accommodated the research team over several months while we collected information from databases and court files.

We are also grateful to Robert Nicholas, Jeremy Tagg, Keith Powell and Diane Flanders of the Department for Constitutional Affairs (now Ministry of Justice) Better Dispute Resolution Team for their liaison assistance, particularly in the early days of the study, and for commenting on drafts.

The research team also benefited from input by a Mediation Providers Forum, which included CEDR, the Chartered Institute of Arbitrators, the ADR Group and the Academy of Experts.

We would like to thank Cathy Brown and Keith Shore at UCL for their patient support of the research, in particular in assisting with human resource issues and financial procedures.

Finally, we are, of course, indebted to the many solicitors, litigants and mediators who generously gave their time to answer questionnaires and respond to telephone interviews, and who permitted us to observe mediations.

Authors

Hazel Genn is Professor of Socio-Legal Studies in the Faculty of Laws at University College London. She has a long-standing research and teaching interest in access to civil justice and dispute resolution and has published widely in those fields. She is author of companion volumes Paths to Justice: What People Do and Think About Going to Law (1999), and, with Alan Paterson, Paths to Justice Scotland: What Scottish People Do and Think About going to Law (2001), which report the findings of two major national surveys into public use of and attitudes to the legal system. She has conducted two previous evaluations of court-linked mediation schemes for the Ministry of Justice: Central London County Court Mediation Scheme: Evaluation Report (1998); Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court Appeal (2002). She has been a member of the Civil Justice Council’s Alternative Dispute Resolution Committee since 1999.

Paul Fenn is Professor of Insurance Studies at Nottingham University Business School. His background is in applied microeconomics, particularly in relation to the interaction between law, health, and insurance. He has written or edited four books and numerous articles in peer-reviewed journals (including the Economic Journal, Journal of Law and
Economics, and the Journal of Health Economics) on the general themes of liability insurance, medical negligence, and the economics of the legal services market. He has recently coordinated research projects on these issues for the UK Department of Health and the Department for Constitutional Affairs.

Marc Mason is Research Fellow in the Faculty of Laws at UCL
Andrew Lane is Research Fellow in the Faculty of Laws at UCL
Lauren Gray was a research assistant in the Faculty of Laws at UCL
Nadia Bechai was a research assistant in the Faculty of Laws at UCL
Dr. Dev Vencappa is a Teaching Fellow at Nottingham University Business School.

Disclaimer

The views expressed are those of the authors and are not necessarily shared by the Ministry of Justice.
## Contents

**Executive summary**

1. **Introduction**
   - The developing ADR policy environment 1996-2004
   - ARM pilot scheme
   - And then came *Halsey*
   - ARM evaluation
   - Voluntary mediation in Central London
   - Voluntary mediation scheme 1996-1998
   - Voluntary mediation scheme since 1998
   - The report

2. **Automatic referral to mediation (ARM)**
   - The scheme
   - Evaluation study
   - Referrals to mediation and responses
   - Opting out
   - Difference between personal injury and non-PI cases
   - Analysis of objections
   - Procedure following objections
   - Impact of objections conferences on take-up of mediation
   - Delay between automatic referral and mediation
   - Characteristics of cases mediated under ARM
   - Distribution of cases among mediation providers
   - Outcome of ARM mediation bookings
   - Outcome of mediations following objection
   - Final outcome of ARM cases
   - Final outcome of ARM cases with mediation bookings
   - Difference between PI and non-PI in outcome
   - Final outcome of cases involved in objection conferences
   - Type of settlement
   - Multivariate analysis of ARM data
   - Determinants of mediation choice
   - Settlement at mediation
   - Judicial and administrative time
   - Case duration from issue to outcome
   - The likelihood of a trial within 2 years of issue
   - Summary

3. **Users’ experiences of ARM**
   - Objecting to ARM
   - Experiences of mediation
   - Unsettled cases: Did you feel you had a choice?
   - Why didn’t the case settle?
   - Party behaviour
   - Impact of unsettled mediation on costs
4. The Central London voluntary mediation scheme
- Background
- Data collection
- Operation of the VOL mediation scheme since 1999
- Demand for VOL scheme
- Characteristics of cases entering VOL
- Outcome of mediations
- Factors explaining outcome of mediation appointment
- Final outcome of unsettled mediations
- Summary

5. Users’ experiences of the VOL mediation scheme
- The survey
- Dispute features
- Reasons for mediating
- Why cases had failed to settle pre-mediation
- Assessments of strength of case
- Previous experience of mediation
- Evaluation of the mediation scheme
- Confidence in the mediator
- Perceptions of neutrality and fairness
- Mediator control of mediation
- Formality of mediation
- Positive evaluations of mediation
- Negative evaluations of mediation
- Failure to settle at mediation
- Fairness of mediation outcome
- Impact of mediation on time and cost
- General assessments of mediation
- Mediators’ perspective on the VOL scheme
- Summary

6. Conclusion
- Outcome of ARM
- Settlement
- Explaining mediation decisions and settlement
Opting out 198
Users’ experiences of ARM 199
The VOL scheme 200
Users’ experiences of the VOL scheme 200
Learning from evaluation of mediation schemes 202
Explaining settlement 202
Demand for mediation in context 203
Demand for mediation and the role of advisers 203
Improving court-based mediation 204
Promoting mediation: sticks and carrots 204

Appendix 1 207
Results of Multivariate Analyses

Appendix 2 213
An illustrative calculation of the expected costs and benefits from mediation (non-PI cases)
List of Figures

Chapter 1

Figure 1.1 ADR schemes and evaluations in relation to policy developments 24

Chapter 2

Figure 2.1 Case mix of Ontario mandatory mediation scheme 33
Figure 2.2 Objections in personal injury and non-personal injury cases automatically referred to mediation 36
Figure 2.3 Objections to ARM 40
Figure 2.4 Reasons for objection between personal injury and non-personal injury cases 42
Figure 2.5 Proportion of ARM objections raised among solicitors’ firms 43
Figure 2.6 Orders made by the District Judge in ARM cases (April 2004-October 2005) 44
Figure 2.7 Delay from referral to mediation comparing cases with and without CMC 46
Figure 2.8 Delay from referral to mediation comparing PI and non-PI cases 47
Figure 2.9 Mediation bookings by case type 48
Figure 2.10 Case types of mediated cases compared with those referred to mediation in ARM pilot 49
Figure 2.11 Claim value of mediated cases compared with those referred to mediation in ARM pilot 50
Figure 2.12 Configuration of parties in mediated cases compared with those referred to mediation in ARM pilot 51
Figure 2.13 Mediation providers’ share of mediation bookings 51
Figure 2.14 Outcome of ARM mediation bookings 53
Figure 2.15 ARM mediated cases settling by month of referral 55
Figure 2.16 Cases settling at mediation in relation to initial objections 56
Figure 2.17 Final outcome of all ARM cases referred to mediation 58
Figure 2.18 Final outcome of ARM cases where mediation date booked 59
Figure 2.19 Final outcome of ARM cases by whether or not a mediation was booked 60
Figure 2.20 Final outcome of ARM cases comparing PI and non-PI cases 61
Figure 2.21 Outcome of cases going to objection conferences 62
Figure 2.22 Comparison of settlement type 63
Figure 2.23 Survival rates of non-PI cases in the ARM pilot 68
Figure 2.24 Survival rates of PI cases in the ARM pilot 68
Figure 2.25 Survival rates of all cases in the ARM pilot 69

Chapter 4

Figure 4.1 Cases entering the VOL mediation scheme 1996-2005 in relation to key policy milestones 135
Figure 4.2 Case type of cases entering the VOL scheme 1999-2004 compared with 1996-1998 137
<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Figure 4.3</td>
<td>Claim values of cases entering VOL comparing 1996-1998 with 1999–2004</td>
<td>139</td>
</tr>
<tr>
<td>Figure 4.4</td>
<td>Party Configuration in VOL scheme comparing 1996-1998 with 1999-2003</td>
<td>140</td>
</tr>
<tr>
<td>Figure 4.5</td>
<td>Cases entering voluntary scheme by court of issue 1999-2005</td>
<td>141</td>
</tr>
<tr>
<td>Figure 4.6</td>
<td>Period between issue date and date of mediation</td>
<td>143</td>
</tr>
<tr>
<td>Figure 4.7</td>
<td>Settlement rate 1996-2005 in VOL mediation scheme</td>
<td>144</td>
</tr>
<tr>
<td>Figure 4.8</td>
<td>Settlement rate at mediation of PI and non-PI cases 1999-2004</td>
<td>145</td>
</tr>
<tr>
<td>Figure 4.9</td>
<td>Share of mediations conducted among providers 1999-2004</td>
<td>146</td>
</tr>
<tr>
<td>Figure 4.10</td>
<td>Settlement rates at mediation by provider organisation</td>
<td>146</td>
</tr>
<tr>
<td>Figure 4.11</td>
<td>Outcome of cases entering the scheme 1999-2005</td>
<td>147</td>
</tr>
<tr>
<td>Figure 4.12</td>
<td>Final outcome of unsuccessfully mediated cases 1999-2004</td>
<td>150</td>
</tr>
</tbody>
</table>

**Chapter 5**

| Figure 5.1 | Number of questionnaires received for 165 of 218 cases mediated in 2003 | 153 |
| Figure 5.2 | “Did you have any advice from a solicitor about the case?” | 155 |
| Figure 5.3 | Reasons for mediating given by claimants and defendants | 157 |
| Figure 5.4 | Representatives’ reasons for advising mediation | 160 |
| Figure 5.5 | Representatives’ assessment of why cases had not settled prior to mediation | 162 |
| 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?” | 163 |
| Figure 5.7 | Representatives’ views on chances of winning in court | 164 |
| Figure 5.8 | Parties’ prior experience of mediation | 164 |
| Figure 5.9 | Parties’ prior experience of court proceedings | 165 |
| Figure 5.10 | Parties’ confidence in the mediator | 166 |
| Figure 5.11 | Representatives’ confidence in mediators | 167 |
| Figure 5.12 | Parties’ perceptions of mediator’s neutrality | 168 |
| Figure 5.13 | Representatives’ perceptions of mediator neutrality | 169 |
| Figure 5.14 | Representatives’ assessment of fairness of mediation | 170 |
| Figure 5.15 | Parties’ and representatives’ assessments of positive features of mediation | 172 |
| Figure 5.16 | Parties’ and representatives assessments of negative aspects of mediation | 174 |
| Figure 5.17 | Parties’ view of whether mediation saved legal costs | 178 |
| Figure 5.18 | Parties’ estimates of cost savings as a result of mediation | 179 |
| Figure 5.19 | Representatives’ views of cost savings | 180 |
| Figure 5.20 | Representatives’ estimates of cost savings | 180 |
| Figure 5.21 | Parties’ views of time saved by mediation | 181 |
| Figure 5.22 | Representatives assessment of time saved | 182 |
| Figure 5.23 | Representatives’ estimates of time savings as a result of mediation | 183 |
| Figure 5.24 | Representatives’ estimates of time increases as a result of mediation | 183 |
| Figure 5.25 | Parties’ views on whether they would try mediation again | 184 |
# List of Tables

## Chapter 2

| Table 2.1 | Automatic referrals to mediation month by month | 32 |
| Table 2.2 | Number of opt-outs April 2004 – March 2005 | 35 |
| Table 2.3 | Opt-out distributions for non-PI claims | 37 |
| Table 2.4 | Opt-out distributions for PI claims | 39 |
| Table 2.5 | Proportion of cases in which a CMC resulted in a mediation booking | 45 |
| Table 2.6 | Outcome of mediation appointments by month of referral | 54 |
| Table 2.7 | Unsettled mediated cases following objection | 57 |
| Table 2.8 | Resolution of claims at two years from issue (ARM data, non-PI cases) | 70 |
| Table 2.9 | Resolution of claims at two years from issue (ARM data, PI cases) | 71 |

## Chapter 3

| Table 3.1 | Breakdown of interviews with solicitors and parties in ARM | 76 |

## Chapter 5

| Table 5.1 | Breakdown of claimants and defendants responding to survey by whether settled at mediation | 153 |
| Table 5.2 | Breakdown of claimants’ and defendants’ representatives responding to survey by whether settled at mediation | 154 |
| Table 5.3 | “How long had the dispute been going on when you agreed to try mediation?” | 154 |
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.

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, 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.

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

---

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”).

---

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*, 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.” 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. 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.
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.
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.”

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* 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

---


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”. 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”, 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 1996. 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.

---

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:
Introduction

(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
Introduction

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…\textsuperscript{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 \textit{Halsey v Milton Keynes NHS Trust} and \textit{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. \textit{Halsey} was a clinical negligence case and \textit{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 \textit{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 “\textit{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.

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
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. 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.”

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. The case, concerning a building dispute in August 2000, was decided by Ward and Rix LJJ 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

---

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

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, 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, 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,\(^\text{27}\) 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;

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 staff\textsuperscript{28} 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.

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

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 CaseMan⁴⁰ 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.

⁴⁰ 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 cases\textsuperscript{31} 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)\textsuperscript{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;

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

\textsuperscript{32} In some cases, reply forms were missing from the file and occasionally whole files were missing.
Automatic referral to mediation (ARM)

- 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.
Automatic referral to mediation (ARM)

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

For the purpose of comparison, it is worth noting that in the Ontario mandatory mediation scheme for non-family disputes\(^4\), 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

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**

![Case Mix Diagram]

**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

<table>
<thead>
<tr>
<th>Opt-outs by:</th>
<th>None</th>
<th>Claimant</th>
<th>Defendant</th>
<th>Both</th>
<th>Settled before</th>
<th>Missing/Pending</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 2004</td>
<td>12</td>
<td>9</td>
<td>7</td>
<td>34</td>
<td>252</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>May</td>
<td>10</td>
<td>14%</td>
<td>5</td>
<td>19%</td>
<td>19</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>June</td>
<td>18</td>
<td>7%</td>
<td>19%</td>
<td>18%</td>
<td>47</td>
<td>4</td>
<td>14%</td>
</tr>
<tr>
<td>July</td>
<td>20</td>
<td>20%</td>
<td>6</td>
<td>18%</td>
<td>44</td>
<td>12</td>
<td>12%</td>
</tr>
<tr>
<td>August</td>
<td>29</td>
<td>23%</td>
<td>6</td>
<td>5%</td>
<td>27</td>
<td>21</td>
<td>14%</td>
</tr>
<tr>
<td>September</td>
<td>16</td>
<td>15%</td>
<td>12%</td>
<td>11%</td>
<td>23</td>
<td>21</td>
<td>14%</td>
</tr>
<tr>
<td>October</td>
<td>17</td>
<td>16%</td>
<td>12%</td>
<td>11%</td>
<td>21</td>
<td>20</td>
<td>16%</td>
</tr>
<tr>
<td>November</td>
<td>17</td>
<td>14%</td>
<td>4</td>
<td>3%</td>
<td>21</td>
<td>17</td>
<td>58%</td>
</tr>
<tr>
<td>December</td>
<td>8</td>
<td>9%</td>
<td>7</td>
<td>8%</td>
<td>18</td>
<td>20</td>
<td>31</td>
</tr>
<tr>
<td>January 2005</td>
<td>20</td>
<td>22%</td>
<td>5</td>
<td>5%</td>
<td>27</td>
<td>29</td>
<td>24</td>
</tr>
<tr>
<td>February</td>
<td>17</td>
<td>14%</td>
<td>10</td>
<td>8%</td>
<td>16</td>
<td>13</td>
<td>48</td>
</tr>
<tr>
<td>March</td>
<td>13</td>
<td>11%</td>
<td>7</td>
<td>6%</td>
<td>27</td>
<td>23</td>
<td>45</td>
</tr>
<tr>
<td>Total</td>
<td>197</td>
<td>16%</td>
<td>91</td>
<td>7%</td>
<td>239</td>
<td>19</td>
<td>504</td>
</tr>
</tbody>
</table>

### 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
Automatic referral to mediation (ARM)

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)

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

**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%.
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.

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. 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.

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

<table>
<thead>
<tr>
<th>Reason</th>
<th>PI (N=519)</th>
<th>Non PI (N=62)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlement negotiations planned/underway</td>
<td>25%</td>
<td>15%</td>
</tr>
<tr>
<td>Evidence needed</td>
<td>26%</td>
<td>5%</td>
</tr>
<tr>
<td>Judgment needed / No compromise possible</td>
<td>32%</td>
<td>9%</td>
</tr>
<tr>
<td>Liability disputed</td>
<td>18%</td>
<td>9%</td>
</tr>
<tr>
<td>Liability not disputed</td>
<td>10%</td>
<td>0%</td>
</tr>
<tr>
<td>Cost</td>
<td>8%</td>
<td>4%</td>
</tr>
<tr>
<td>Transfer needed / Distance from court</td>
<td>6%</td>
<td>4%</td>
</tr>
<tr>
<td>Quantum disputed</td>
<td>3%</td>
<td>0%</td>
</tr>
<tr>
<td>Complexity</td>
<td>2%</td>
<td>3%</td>
</tr>
<tr>
<td>Witness needed</td>
<td>2%</td>
<td>3%</td>
</tr>
<tr>
<td>Causation disputed</td>
<td>2%</td>
<td>0%</td>
</tr>
<tr>
<td>Too early for an unspecified/other reason</td>
<td>6%</td>
<td>1%</td>
</tr>
<tr>
<td>Other</td>
<td>3%</td>
<td>3%</td>
</tr>
</tbody>
</table>

**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.
**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)

<table>
<thead>
<tr>
<th>Order Type</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>CMC</td>
<td>550</td>
</tr>
<tr>
<td>Both to file NR</td>
<td>72</td>
</tr>
<tr>
<td>Claimant to file NR</td>
<td>91</td>
</tr>
<tr>
<td>Defendant to file NR</td>
<td>157</td>
</tr>
<tr>
<td>Stay for evidence</td>
<td>57</td>
</tr>
<tr>
<td>Stay for negotiation</td>
<td>103</td>
</tr>
<tr>
<td>Stay for mediation</td>
<td>262</td>
</tr>
<tr>
<td>File allocation questionnaire</td>
<td>32</td>
</tr>
<tr>
<td>Transfer out of court</td>
<td>153</td>
</tr>
<tr>
<td>Out of ARMS</td>
<td>126</td>
</tr>
<tr>
<td>Post med directions</td>
<td>18</td>
</tr>
<tr>
<td>Settled</td>
<td>71</td>
</tr>
<tr>
<td>Pay mediation fee</td>
<td>27</td>
</tr>
<tr>
<td>Other</td>
<td>64</td>
</tr>
<tr>
<td>Not known</td>
<td>11</td>
</tr>
</tbody>
</table>

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. 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. In the event, 46 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.

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 date.

### Table 2.5 Proportion of cases in which an objections CMC resulted in a mediation booking

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

![Graph showing delay from referral to mediation comparing cases with and without CMC](image-url)
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**

![Graph showing delay from referral to mediation](image)

**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**

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Mediation Booked</th>
<th>No Mediation Booking</th>
</tr>
</thead>
<tbody>
<tr>
<td>All referred cases (N=1232)</td>
<td>22%</td>
<td>78%</td>
</tr>
<tr>
<td>Non PI (n=216)</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>PI - Other (n=271)</td>
<td>17%</td>
<td>83%</td>
</tr>
<tr>
<td>PI - Employer liability (n=398)</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>PI - Clinical negligence (n=10)</td>
<td>10%</td>
<td>90%</td>
</tr>
<tr>
<td>PI - RTA (n=337)</td>
<td>12%</td>
<td>88%</td>
</tr>
</tbody>
</table>

**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 to 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)

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Referred to mediation</th>
<th>Mediated</th>
</tr>
</thead>
<tbody>
<tr>
<td>PI - Road traffic accident</td>
<td>27.4%</td>
<td>11.0%</td>
</tr>
<tr>
<td>PI - Clinical</td>
<td>0.8%</td>
<td>0.6%</td>
</tr>
<tr>
<td>PI - Employer</td>
<td>32.3%</td>
<td>25.0%</td>
</tr>
<tr>
<td>PI - Other</td>
<td>22.0%</td>
<td>12.8%</td>
</tr>
<tr>
<td>Non PI - Road traffic accident</td>
<td>0.3%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Non PI - Professional Negligence</td>
<td>0.4%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Non PI - General Negligence</td>
<td>0.3%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Non PI - Breach Of Covenant</td>
<td>0.9%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Non PI - Nuisance</td>
<td>0.2%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Non PI - Probate</td>
<td>0.1%</td>
<td>0.6%</td>
</tr>
<tr>
<td>Non PI - Possession</td>
<td>0.1%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Non PI - Contract/Debt/Goods&amp;Services</td>
<td>7.2%</td>
<td>25.0%</td>
</tr>
<tr>
<td>Non PI - Property (incl. Boundary)</td>
<td>0.2%</td>
<td>1.2%</td>
</tr>
<tr>
<td>Non PI - Other</td>
<td>1.0%</td>
<td>3.5%</td>
</tr>
<tr>
<td>Non PI - Not Known</td>
<td>6.7%</td>
<td>16.3%</td>
</tr>
</tbody>
</table>

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)**

<table>
<thead>
<tr>
<th>Value Range</th>
<th>Referred to Mediation</th>
<th>Mediated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to £4,999</td>
<td>6.4%</td>
<td>15.6%</td>
</tr>
<tr>
<td>£5,000-£14,999</td>
<td>34.3%</td>
<td>30.8%</td>
</tr>
<tr>
<td>£15,000-£49,999</td>
<td>43.6%</td>
<td>23.3%</td>
</tr>
<tr>
<td>£50,000+</td>
<td>20.0%</td>
<td>6.4%</td>
</tr>
<tr>
<td>Value not known n</td>
<td>7.0%</td>
<td>6.7%</td>
</tr>
</tbody>
</table>

**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 schemes, 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.

---

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.
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 1998\(^{41}\). 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

---


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

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

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

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%.
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 court\textsuperscript{44}. 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. \textbf{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

\footnotesize{$^{44}$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

<table>
<thead>
<tr>
<th>Category</th>
<th>Settlement Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both object (n=25)</td>
<td>48%</td>
</tr>
<tr>
<td>Defendant objects (n=18)</td>
<td>44%</td>
</tr>
<tr>
<td>Claimant objects (n=11)</td>
<td>55%</td>
</tr>
<tr>
<td>No one objects (n=118)</td>
<td>55%</td>
</tr>
</tbody>
</table>

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.

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

**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)**

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled at mediation</td>
<td>7%</td>
</tr>
<tr>
<td>Settled in 14 days of mediation</td>
<td>0%</td>
</tr>
<tr>
<td>Settled pre-mediation</td>
<td>6%</td>
</tr>
<tr>
<td>Settled post-mediation</td>
<td>3%</td>
</tr>
<tr>
<td>Settled (no mediation)</td>
<td>49%</td>
</tr>
<tr>
<td>Court (for claimant)</td>
<td>2%</td>
</tr>
<tr>
<td>Court (for defendant)</td>
<td>1%</td>
</tr>
<tr>
<td>Court (unspecified / for both)</td>
<td>0%</td>
</tr>
<tr>
<td>Default judgment</td>
<td>0%</td>
</tr>
<tr>
<td>Struck out</td>
<td>0%</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>1%</td>
</tr>
<tr>
<td>Transferred out</td>
<td>18%</td>
</tr>
<tr>
<td>Pending</td>
<td>10%</td>
</tr>
<tr>
<td>Unknown</td>
<td>0%</td>
</tr>
<tr>
<td>Other</td>
<td>0%</td>
</tr>
</tbody>
</table>

**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
Automatic referral to mediation (ARM)

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)

![Bar chart showing the final outcome of ARM cases where mediation date booked.

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**

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Mediation booked (n=273)</th>
<th>No mediation booked (n=959)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled at mediation</td>
<td>33%</td>
<td>0%</td>
</tr>
<tr>
<td>Settled in 14 days of mediation</td>
<td>0%</td>
<td>2%</td>
</tr>
<tr>
<td>Settled pre-mediation</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>Settled post-mediation</td>
<td>14%</td>
<td>0%</td>
</tr>
<tr>
<td>Settled (no mediation)</td>
<td>4%</td>
<td>6%</td>
</tr>
<tr>
<td>Court (for claimant)</td>
<td>0%</td>
<td>2%</td>
</tr>
<tr>
<td>Court (for defendant)</td>
<td>0%</td>
<td>2%</td>
</tr>
<tr>
<td>Court (unspecified / for both)</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Default judgment</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Struck out</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Transferred out</td>
<td>2%</td>
<td>23%</td>
</tr>
<tr>
<td>Pending</td>
<td>9%</td>
<td>15%</td>
</tr>
<tr>
<td>Unknown</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Other</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

**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.**
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.
**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.
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
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. 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).

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.

<table>
<thead>
<tr>
<th>Table 2.8 Resolution of claims at 2 years from issue ARM data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-PI cases</td>
</tr>
<tr>
<td>---------------</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>2 year outcome</td>
</tr>
<tr>
<td>Settled</td>
</tr>
<tr>
<td>%</td>
</tr>
<tr>
<td>Trial</td>
</tr>
<tr>
<td>%</td>
</tr>
<tr>
<td>Dropped</td>
</tr>
<tr>
<td>%</td>
</tr>
<tr>
<td>Pending</td>
</tr>
<tr>
<td>%</td>
</tr>
<tr>
<td>Total</td>
</tr>
<tr>
<td>%</td>
</tr>
</tbody>
</table>
Table 2.9 Resolution of claims at 2 years from issue non-ARM data

<table>
<thead>
<tr>
<th>2 year outcome</th>
<th>Mediation</th>
<th></th>
<th>Mediation</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>Yes</td>
<td>Total</td>
<td>No</td>
</tr>
<tr>
<td>Settled</td>
<td>36</td>
<td>303</td>
<td>339</td>
<td>54</td>
</tr>
<tr>
<td>%</td>
<td>47</td>
<td>60</td>
<td>58</td>
<td>87</td>
</tr>
<tr>
<td>Trial</td>
<td>31</td>
<td>35</td>
<td>66</td>
<td>4</td>
</tr>
<tr>
<td>%</td>
<td>40</td>
<td>7</td>
<td>11</td>
<td>6</td>
</tr>
<tr>
<td>Dropped</td>
<td>4</td>
<td>6</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>%</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Pending</td>
<td>6</td>
<td>160</td>
<td>166</td>
<td>4</td>
</tr>
<tr>
<td>%</td>
<td>8</td>
<td>32</td>
<td>29</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>77</td>
<td>504</td>
<td>581</td>
<td>62</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

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.