Chapter 3. Users’ experiences of ARM

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

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

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

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

| Table 3.1 Breakdown of interviews with solicitors and parties in ARM (n=214) |
|---------------------------------|----------------|----------------|----------------|----------------|
| Opted-out                       | Cl solicitor | Def solicitor | Claimant | Defendant | Total |
| Opted-out                       | 43           | 44            | 19       | 3           | 109   |
| Mediation booked                |              |               |          |            |       |
| Failed to settle at mediation   | 20           | 24            | 5        | 1           | 50    |
| Settled                         | 10           | 12            | 7        | 4           | 33    |
| Settled prior to mediation      | 7            | 12            | 3        | 0           | 22    |
| TOTAL                           | 80           | 92            | 34       | 8           | 214   |

Objecting to ARM

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

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

Solicitors’ reasons for advising clients to opt out of ARM

Interviews with solicitors about opting out of the ARM pilot revealed considerable variation in approach. Some stated that they had a general policy of opting out, while others tended to take the decision on a case-by-case basis. There was a clear difference between those solicitors with a predominantly personal injury practice and the rest, with personal injury solicitors being somewhat more likely to opt out of the scheme.
as a matter of course. The most common reasons given by solicitors for opting out of mediation were: that the referral had come too early in the life of the case; that the parties were too far apart; that the opponent was too intransigent; that the cost of the mediation would be disproportionate to the value of the claim; or that the case would settle in any case and therefore mediation was unnecessary.

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

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

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

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

**Opting out a formality**

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

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

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

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

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

Timing too early

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

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

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

**Cost**

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

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

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

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

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

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

Inappropriate for mediation

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

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

**No basis to claim**

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

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

**Intransigence**

A perception on the part of defendants that claims were “without any basis” was also interpreted on occasions by claimants and their lawyers as “intransigence”. Whatever label is given by the parties to this situation, it is clear where one side or the other genuinely rejects the stance of the opposing side, or adopts a strategy that involves
complete rejection of the opposing position, the prospects for successful mediation seem unpromising and this raises questions about the value of automatic referral to mediation.

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

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

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

**Type of case**

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

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

---


Users’ experiences of ARM

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

(Claimant rep, police action)

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

(Defendant insurance company, PI)

**Will settle anyway**

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

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

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

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

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

**Parties’ reasons for opting out**

“Opt out of what scheme?”

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

Interviews were also conducted with some parties to explore their reasons for opting out of the ARM scheme in cases where objections to automatic referral to mediation had been raised. There were notable differences in approach between individual ‘one-shot’ claimants or defendants and ‘repeat player’ defendant insurance companies in personal injury cases. Among insurance companies defending personal injury claims, the understanding of mediation and approach to dealing with automatic referral was very different from that of claimants or defendants in non-personal injury claims. Insurance companies are used to negotiating settlements and have developed their own strategies for dealing with claims. Although the vast majority of personal injury claims are
eventually settled out of court, insurers deal with cases in their own way and an automatic referral to mediation may not fit with the preferred approach. As described in Chapter 2, defendants were more likely than claimants to opt out of ARM and the approach of defendant solicitors to opting out of ARM, discussed above, reflects insurance company policy.

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

“What scheme? I’m not familiar with mediation. Nothing was sent to me.”  
(Claimant PI)

“Well I don’t think I have, have I? I don’t understand”. (Claimant non-PI RTA)

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

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

In a few cases, it was clear that parties were aware of the scheme, had discussed the possibility of mediation with their solicitors, and had taken a positive decision not to mediate for specific reasons. For example:
“Because I had specifically talked to [defendants] a number of times, you know they sent, already, one of their managers before to here, to talk to me and it got no place. So there was absolutely no reason to continue. Anything which would have happened in mediation was already discussed between us here, you know, between the parties, and so, there was absolutely no value for it”. [Claimant non-PI contract case]

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

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

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

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

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

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

**Experiences of mediation**

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

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

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

Feeling that mediation was a good idea – no pressure

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

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

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

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

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

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

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

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

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

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

**Feeling that there was no choice**

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

“And how did you feel about being automatically referred to mediation? I didn’t like it. Well because I am a practitioner of some twenty five years’ experience and regrettably I think I know more about my job than any mediator’s going to. And of course we can do what I take to be mediation, which is two people, one in one room, one in the other, and somebody wandering between saying 'Well you know, where is the middle figure?’ And so to that extent you know, I consider I can do my job…I said I was prepared to submit to mediation. I felt I had no choice. You know, the cost penalties nowadays.” [Def rep PI unsettled mediation]
“We were ordered to mediate by the Court. Obviously they can’t force us to mediate but they might hold it against us if we didn’t mediate, so although we were not very keen on the idea, we agreed to mediate as did the other side and basically it came to nothing.” [Def rep, non-PI, unsettled mediation]

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

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

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

Why didn’t the case settle?

As discussed in Chapter 2, the settlement rate at mediation among those cases where neither party objected to mediation was 55% overall. Where mediation took place after only the claimant objected, the settlement rate was the same, but where the defendant had raised an objection, the settlement rate fell to 44%. When mediation occurred after both parties had objected, the settlement rate was 48%. Very few cases that failed to settle at the mediation appointment went on to settle within 14 days of the mediation,
although, overall, the majority of mediated cases were eventually concluded by an out of court settlement rather than by trial. A key question for parties, mediators and policymakers is, therefore, why cases that went to the trouble of proceeding to mediation and went through three hours of assisted negotiation with a trained mediator, did not settle by the end of the mediation and even sometimes after a second attempt at mediation. Parties and solicitors who had attended unsettled mediations were asked in interviews about the factors that they felt had contributed to the failure to settle. Admittedly, although asking the participants why cases did not settle offers a perspective on the case rather than an explanation of failure to settle, the perspective is nonetheless useful as a guide to factors that might represent barriers to settlement.

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

**Party Behaviour**

*Intransigence – too far apart and unwilling to move*

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

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

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

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

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

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

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

“It wasn’t suitable for mediation...Because you have two people, two parties who are poles apart. It was a question of liability. We don’t think we are to blame for the accident and the claimant thinks that we are. How did you feel about being automatically referred to mediation? Oh it was a pointless exercise. Can you
**No basis for claim**

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

“We didn’t [opt out], but that was for considered reasons. Because we decided that there would be expense involved in making an application to avoid a mediation so there would be costs and legal fees involved with that, but more importantly we decided that if we were to make such an application, then we would look unreasonable, unwilling to listen, unwilling to try and settle and that we would perhaps incur procedural disadvantages…So for those reasons the decision was taken to go with the process. We were selected for this. We didn’t ask for it. Did you feel you had a choice then? No we didn’t. How did you feel about that automatic referral? We thought it was ridiculous. The clients for whom I was acting in that case has been involved in an enormous amount of litigation…so they know probably more about litigation than anyone else could know. If they had wanted to settle that case or thought it appropriate to settle that case then they would have done, but they were treated by that process as though they were new to litigation, as though they didn’t understand the process, they were obliged to have the mediation because otherwise they’d have incurred costs and looked unreasonable, but it was completely inappropriate that they were selected for it… We had no doubt whatsoever that the claim should never have been brought, that the claim against my clients was misconceived, that they sued the wrong party… but the claimants were good, nice people and they’d had an awfully long drive to come from some part of the country, which must have
cost them petrol money and so on, and been tiring for them and it was a hot day, and they came in there and through whoever’s fault, it’s not the mediation’s fault, perhaps it’s their own lawyer’s fault or what have you, but they came in there with really high hopes that we were going to give them some money. And we’d repeatedly said we wouldn’t. But I think on a human level it was terrible…I thought it was upsetting that they’d had this great long journey in the heat and we were never going to be able to offer them any money”. [Def rep non-PI case concerning lease]

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

**Going through the motions**

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

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

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

“To be cynical it may be just the other side’s lawyers racking up costs and they know they can charge their client, who’s always a lot richer than my client, the
money for going along to court and attempting to settle… they can go along and offer pence, you know, and we couldn't refuse, and they can say 'Well we did make an offer and it was refused', you know, so as far as I'm concerned that's their basic attitude.” [Claimant’s rep PI unsettled]

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

**No authority to settle**

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

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

**One side doesn’t turn up or leaves**

Occasionally the mediation failed because one party did not attend. An issue raised in relation to this situation was the lack of any penalties against parties who failed to attend
a booked mediation session, and similarly the apparent lack of consequences for parties who decide to abandon the mediation mid-appointment:

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

[Defendant rep, personal injury, claimant pulled out at the last moment]

**Defendant can’t pay**

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

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

**Poor mediators**

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

The comments made by disappointed participants in the mediation process highlight the need for mediators to manage expectations, as well as the need to gain respect by demonstrating a grasp of the issues, knowledge of the legal framework, and by having good communication skills.
“He didn’t seem to have any particular grasp of this area of law. He made some assumptions and a misunderstanding of where we were coming from.” [Defendant rep, police action]

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

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

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

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

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

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

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

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

**Time too short**

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

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

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

**Impact of unsettled mediation on costs**

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

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

“Increased dramatically because I had to explain to the client what the scheme was about and I also went along with counsel and of course counsel charged
because I didn’t want to be in a position of appearing less resourced than the defendant in those circumstances.”

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

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

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

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

Impact of unsettled mediation on time

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

Benefits even when not settled

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

“The fact that we failed in mediation didn’t mean that there was a failure of the mediation. Immediately afterwards I think that both parties recognised that we needed to actually deal with this claim.” [Claimant rep non-PI]
Even one or two tough personal injury defendants admitted that the mediation had altered their view about the case, which led to a subsequent change in approach to settlement. For example:

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

(Defendant personal injury £50,000+ unsettled mediation)

Settled mediations

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

Accepting the referral

There was some difference between claimants and defendants in the reasoning behind accepting the automatic referral to mediation. On the claimants’ side, solicitors occasionally said that they had accepted mediation because they felt they had no choice. But in the majority of cases, it was accepted relatively willingly in the hope of achieving a settlement. On the defence side, particularly in personal injury cases, acceptance was more often explained as being the result of pressure from the court. Some of the more reluctant accepters of the referral were pleasantly surprised by the impact of the mediation in bringing about a settlement. Occasionally, defendants had gone along with a cynical intention of ‘sussing’ out the other side and found that they settled the case because of something that they heard or saw at the mediation. When facing a convincing opponent in a mediation session, defendants may review their
position both in light of what they hear but also in anticipation of the impression that the opponent might make on the judge from the witness box. The majority of both parties and representatives interviewed about settled ARM mediations did not feel pushed into mediating, or certainly, their recollection following a successful mediation was that they had been content to enter the process.

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

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

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

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

“The Claimants indicated that they were prepared and obviously on that basis we were more than willing to give it a go on that basis, because up until that point they were only arguing for 100%. So as soon as they agreed to that, we knew that there was going to be some compromise on their part. [My client] was relieved that it didn’t actually go to a full trial. He was just happy to have it over and done with. We thought it was 50-50 and we felt quite confident that the most we were going to go to was 75-25 in the Claimant’s favour. We actually compromised. I think it was 85-15. Prior to mediation they stuck at their 100%. We’d agreed quantum, it was just liability. My client’s insurers were happy as well. 15% when you’re talking £18,000 was quite a bit to get off.” [Defendant rep, road traffic personal injury settled at mediation]
“Liability was the main problem. I felt there was something there that we could talk about and hopefully reach some percentages agreement on. I think the Court give you the option. I have previously said to the Court ‘I don’t think a case is suitable for mediation’ for whatever reason, so it all goes on automatically referred. You do get the opportunity to object if there’s a genuine reason and it’s just simply not going to help. In this particular case I thought it would be of benefit. We were quite confident. We were ready to go on to trial if needed.” [Claimant rep, PI settled]

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

**Initially reluctant but ultimately happy**

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

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

“Why did you decide to mediate? Because the court told us to. Did you feel that you had a choice? No not really no. Because if you say anything it’s frowned upon. It was okay because it turned out alright for us anyway. I didn’t think it was worth doing but I thought ‘There’s no harm giving it a go’. [Our clients] felt the same. They’re into mediation anyway. We have a look at mediation on most claims. It’s part of their code now where they look at mediation anyway...I expected some development. I didn’t think it would be a complete waste of space. I had authority to do something, some kind of settlement.” [Def PI settled 7 days after mediation]
“Were you aware that the mediation was at the recommendation of the Court? Yes I was. Yes. And did you try to opt out of that? No, not at all. I think it was a Direction of the Court that there be a mediation. I mean I thought perhaps at the time it was a bit premature as far as we were concerned, because we were just looking at the one medical report and it needed a bit of clarification, but we didn’t really have time to do that…There was no question about liability, we accepted our insured was responsible for the accident, but the medical evidence wasn’t entirely clear. **So what made you decide to mediate?** Well it was the Court that decided that. Obviously we could have said “No”, but if the Court says so then - unless it’s wholly inappropriate - we would go along with it. I mean it wasn’t a case I would say was totally unsuitable for mediation. In actual fact one of the benefits was actually seeing the Claimant, because sometimes you get a feeling for things and if you think perhaps someone’s not being entirely genuine or whatever, but when you’re faced with the Claimant…and this chap indeed, he’s worked for the insured for some thirty odd years and he came across as quite a genuine fellow really, so it was helpful from that point of view as well.” [Defendant employer’s liability]

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

**Factors leading to settlement**

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

**Willingness to negotiate**

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

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

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

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

Mediator skill

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

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

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

“She was very patient with everybody’s arguments and without being censorious she’d say ‘Yes I can hear that. On the other hand you were willing to pay this
before’ and sort of gradually I suppose we did the same. She was very patient, very courteous, she moved it along. She didn’t let it drag. We only had three hours.” (Defendant rep, debt case settled)

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

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

**Opportunity to see other side’s case**

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

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

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

**Unhappiness despite settlement**

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

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

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

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

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

Cost savings in settled mediated cases

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

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

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

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

“Saved £12-13,000 plus time.”

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

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

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

**Good: informal procedure**

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

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

**Good: mediation as a preview of trial…**

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

“The thing that I liked about it was the fact that we had the opportunity to sit around a table, my client and the claimant obviously sat there. With the five of us in there what was good was that fact that it made us realise both parties were actually very good, they would have made very excellent witnesses and I think it would have been difficult to choose between the two of them on their evidence,
which version of events would have been preferred. The Claimant’s version had the stronger argument and we knew that we were going to be conceding a proportion of liability, but having sat around the table and listened to the Claimant speak made us realise exactly how he was going to come across if it went to trial.” (Defendant rep, personal injury road traffic settled)

**Bad: giving away your secrets...**

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

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

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

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

**Bad: cost**

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

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

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

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

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

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

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

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

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

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

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

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

Cases that settled at mediation

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

Parties’ willingness to settle

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

“Both parties knew when they could do better elsewhere but did not need to go there. They shared some pain but accepted a reduced outcome for the sake of certainty. [...] In my evaluation both the claimant and the defendant in this case were extremely likeable and reasonable characters whereby they could discuss the issues without too much interference from me.”
Willingly submitting to the process of “Reality Testing” was often deemed to have contributed to the success of the mediation. In essence, the Reality Test works to highlight the unpredictable outcome of litigation against the certainty of settlement at mediation. Using the test, the mediator encourages the parties realistically to evaluate the strengths and weaknesses of their case, and then asks them to consider a few scenarios. For example, as this mediator explained:

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

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

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

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

**Parties’ wish to avoid trial**

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

**Settling despite reluctance**

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

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

“This case is a classic example of why there should be ARM. It has brought forward settlement appreciably and a sensible approach was taken to contentious litigation …I hope this mediation illustrated that parties with representatives experienced in and aware of the mediation process can with the help of a competent and experienced mediator achieve a swift and satisfactory outcome (1½ hours). Much of the current resistance to mediation by solicitors, suggested in the current review, is based on ill-judged reasoning and sheer ignorance of the process based in large part on a degree of self-interest (never admitted). I cannot help feeling that without a degree of compulsion such solicitors will never engage fully and properly in the process. There was absolutely nothing about this particular case being a compulsory ARM referral which created difficulty or prevented settlement – the absolute contrary is true.” (Personal Injury case)

**Lawyers’ contribution**

Where parties were represented by lawyers, mediators reported that they were always involved in the process, although the level of involvement varied from case to case. In some cases, the lawyers did all the talking, while in other cases they left it to the parties to discuss the details of the case, intervening only when the issue of costs arose. In one case, one of the lawyers also drafted the papers to confirm the agreement reached. In
other cases, lawyers attended without their client being present at the mediation and their approach in these cases was critical.

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

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

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

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

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

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

“The claimant’s solicitor gave sensible advice, and the defendant’s solicitor was willing to negotiate.”
Lawyers’ willingness to negotiate was also characterised by a commercial/realistic approach to the dispute:

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

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

**Obstructive lawyers**

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

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

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

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

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

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

**Mediator’s own skill**

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

“Without immodesty, skilful facilitative mediation.”

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

“ Asking the right questions.”

“My encouragement to them to think settlement and not argument.”

“My negotiation skills.”

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

“The PI knowledge of the mediator helped to focus the mediation.”

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

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

**Pre mediation contact**

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

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

However, this mediator also indicated that the pre mediation contact is generally proportionate to the complexity of the case, and that the practice is to vary the level of contact from one case to the next.
A few mediators felt that pre mediation contact helped break the ice and allowed them to build a rapport with the parties, thereby instilling a sense of trust. This was deemed valuable to securing a settlement, particularly in time-limited mediation.

“It’s a people thing…so any getting to know (on an informal basis) the parties is helpful.”

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

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

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

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

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

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

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

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

Overall, mediators found pre mediation contact useful, especially given the time constraints of the 3-hour ARM mediations. On the other hand, a small minority of
mediators felt that pre mediation contact did not anything much to the process. In one case, involving damages for wrongful arrest and an element of alleged discrimination, the mediator did not find helpful pre mediation contact instigated by the parties:

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

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

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

**Funding**

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

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

**Timing**

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

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

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

“A good stage in that (a) pleadings had (to some extent) defined the issues, and (b) costs had not escalated too much. The claimant’s solicitor commented that it was surprising the mediation occurred before the disclosure of documents. Not a problem is this case, but in other cases it might be better to mediate after disclosure.”
“It was helpful for each side to have the other’s witness statements. It enabled not just me, but the lawyers on each side too, to reality test.”

**Time, facilities and court administration**

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

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

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

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

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

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

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

—*The CLCC rooms are small, windowless and airless. With any more than one or two attending, this can really make for a difficult working environment.*
“The room used (3rd floor) was stiflingly hot which tended to lead to some stress on the parties. Comfortable surroundings could make reaching agreement easier.”

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

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

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

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

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

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

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

---

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

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

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

**Unsettled Mediations**

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

**Parties’ approach to mediation**

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

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

Where mediators found that the parties themselves had hindered the process, they often noted that one of the parties simply wanted to have their day in court. This was observed in both PI and non-PI cases. For example:
“Only money and principles were involved in this case and both parties effectively wanted a judgment on the case. I suggest it probably was not a candidate for mediation because of the extensive legal baggage the case carried.”

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

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

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

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

“Parties’ intransigence. The defendant said that they had to accept mediation because of the ARMS scheme.”

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

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

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

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

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

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

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

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

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

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

**Contribution of legal representatives**

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

**Lack of preparation by lawyers**

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

“Counsel for the claimant was extremely unprepared and prejudiced the mediation outcome with a grossly unrealistic assessment of the claim value.”
Mediators judged lawyers’ lack of preparation as a serious obstacle to the effective mediating of disputes. One mediator commented that:

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

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

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

**Lawyers unwilling to mediate**

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

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

**Lack of Authority**

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

“The claimant’s absence was crucial.”

“Barrier here: absence of claimant himself.”
“No insurer present for the defendant – limited the scope of the mediation to some extent.”

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

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

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

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

Timing of mediation

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

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

“This was a complex case and disclosure/exchange of witness statements might have clarified the strength of the positions.”
“Had evidence been exchanged each side would have had a better appreciation of what they had to meet.”

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

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

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

**Funding**

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

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

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

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

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

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

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

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

> "With more time this case probably would have settled."

> "There was insufficient time to resolve the costs issue."

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

**Facilities**

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

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

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

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

Mediators’ fees

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

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

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

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

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

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

There is a policy question about the appropriate level at which mediators’ fees should be set for such court-based mediation schemes. It is reasonable for mediators to wish to be appropriately remunerated for their skilled work. However, the economics of relatively
low-value county court litigation suggest that there may be a limit to what parties are prepared to risk on mediation unless the prospects for early settlement are very good.

**Summary**

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

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

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

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

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

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

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

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

Explanations for failure to settle ARM cases at mediation focused on reluctant parties’ unwillingness to compromise having been pressed into mediation, together with the problem of legal representatives failing to understand the mediation process and being unprepared to negotiate. There were also concerns about mediations occurring too early, the influence of legal aid and other costs indemnities reducing pressure to settle, the constraint of 3-hour mediations, and the uncomfortable facilities provided for mediation at the court.
Chapter 4. The Central London voluntary mediation scheme

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

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

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

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

Data collection
When the decision to conduct a further review of the scheme was taken in 2003, the basic information available on the VOL mediation database about the operation of the scheme since the 1998 evaluation was sparse and incomplete. The database contained
information relating to claim number, date of mediation, names of parties and mediation result. After a mediation had taken place, the court staff also generally recorded the name of the mediator and the provider organisation.

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

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

In autumn 2004, following the start of the ARM evaluation, it was decided to expand the information in the VOL database and, where possible, to include case type, case value and other information. This would have facilitated a fuller comparison with the 1998 evaluation and provided a basis for comparison with the later ARM pilot. Unfortunately, by autumn 2004, most of the hard copy court files relating to the years 1999–2001 had been destroyed and a number of files from the years 2001–2004 were missing from the file store. When no hard copy file was available, information to complete case details had to be extracted from the court CaseMan database. CaseMan is an administrative tool containing only limited information of value for research purposes. It generally records date of issue of claim, date of defence, date of mediation, and some details regarding final outcome of mediated cases where mediation had not been successful. There is scant information about case type, claim value, details of settlements or date of final conclusion of cases. Of the 984 cases in the 1999–2004 voluntary mediation database used in this analysis, additional information has been collected from CaseMan for 378 cases (38%) and from hard copy files for 606 cases (62%). In cases where no hard copy file was available, information such as case type or case value was not collected on this 700, plus a further 284 cases, so that information was obtained about mediations that took place up to the end of 2004.
always available from CaseMan and this occasionally led to different base numbers being used in the following analyses.

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

**Operation of the VOL mediation scheme since 1999**

**Demand for the VOL scheme**

Data recorded on the Central London mediation database show a significant increase in the number of cases entering the voluntary scheme and proceeding to mediation since its establishment in 1996, and since the time of the last evaluation in 1998. Information from the court mediation database for the period beginning January 1999 until the end of 2004 suggests that about 984 cases entered the VOL mediation scheme and 865 cases were actually mediated, as compared with 160 cases mediated between May 1996 and March 1998. Although the average number of cases mediated annually since 1999 was 144, the trend is apparently gathering momentum. In 1999, some 82 cases entered the VOL mediation scheme and 72 were actually mediated. In 2001, the number dropped to an all-time low, with only 68 cases entering the scheme and 57 being mediated. However, as Figure 4.1 shows, following the judgments in *Cowl* and *Dunnett*, the number of cases entering the scheme began to rise steeply, so that in 2003 some 247 cases entered the scheme with 225 being mediated, and in 2004, 345 new cases entered the scheme with 293 actually mediated. It is reasonable to infer that this steep increase in the number of cases entering the scheme can be largely attributed to judicial policy as expressed in the *Dunnett* case. Evidently, the decision had the desired effect in encouraging or frightening litigants and their lawyers into experimenting with the VOL mediation scheme. Demand prior to *Cowl* and *Dunnett* was certainly showing only a modest increase from a low base, and in 2001, the demand was actually beginning to fall. It is also likely that following *Dunnett*, and with experience of the new CPR, the judiciary were themselves directing parties to attempt to settle by mediation under CPR 26.4.
The most recent figures from Central London show no reduction in demand for the VOL scheme in 2004/05 following the establishment of the ARM pilot. In 2005, 368 new cases entered the VOL mediation scheme and 323 were mediated. Basic figures for the first 4 months of 2006 suggest that this level is likely to be maintained although possibly not increased, with an average of about 31 cases entering per month for the first 4 months of 2006, which would produce an annual total of around 370 cases.

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

Characteristics of cases entering VOL

Case type

Although between 1999 and 2004 the number of cases entering the VOL mediation scheme increased substantially, the number of personal injury cases attempting mediation remained very small. The tendency of personal injury cases to avoid mediation has been evident from the very beginning of the VOL scheme in 1996 and has changed little despite the increasing demand for mediation among non-personal injury
cases. The proportion of personal injury cases entering the scheme appears to have remained static at about 4% of all mediated cases, despite the high proportion of personal injury claims in the defended caseload at Central London.  

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

---

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

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

Information from case files and CaseMan, where available, suggested that most cases entering the VOL mediation scheme between 1999 and 2004 had values above the small claims limit (Figure 4.3) with only 9% falling below £5,000. A comparison with the 1998
The Central London voluntary mediation scheme evaluation shows that during 1999–2004, the proportion of cases entering scheme in the multi track range increased. In the 1998 evaluation of the scheme, only four percent of cases had a value of £50,000 or more, whereas between 1999 and 2004 eleven percent of cases fell within that claim value bracket. Between 1999 and 2004, about 43% of cases entering the VOL mediation scheme had a claim value within the multi track range of £15,000 or more, and 38% of cases had a value within the fast track range of £5,000–£14,999. The multivariate analyses discussed in Chapter 2 drew attention to the fact that, holding constant other factors, higher value claims appear to show a greater propensity to choose mediation in both the ARM and VOL schemes in Central London.

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

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

Courts of Issue

A consequence of Central London’s status as a trial centre is that the caseload of the court includes a significant number of cases transferred in from other courts. Although the mediation scheme at Central London was devised by the judiciary at the court, the scheme is available to cases issued in courts elsewhere. Figure 4.5 displays the number of cases entering the VOL mediation scheme that were issued in Central London and the number transferred into the scheme from courts elsewhere between 1999 and the end of 2004. The Figure shows that although in 1999 a majority of cases entering the VOL scheme were cases that had been issued in Central London itself, the proportion of cases from courts outside gradually increased over the period, so that by 2004 the majority of cases entering the Central London VOL mediation scheme had been issued in courts outside of Central London.
Looking at cases entering the scheme in 2004 and 2005 – the period during which the ARM pilot was in operation – it can be seen that the number of cases entering the Central London VOL scheme from courts outside Central London over the course of the two years was actually higher than the number entering that were issued in the Central London Court.

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

- That the breakdown simply reflects the normal practice by which cases are transferred in to Central London for trial;
- That the Central London voluntary mediation scheme is now well established so that cases issued elsewhere are being transferred to Central London on the advice of solicitors so that clients can have the benefit of the low-cost mediation scheme;
- That the judiciary in other courts are directing cases to transfer to Central London to take advantage of the scheme, or that courts are directing parties to mediate and the parties are then taking advantage of the low-cost Central London scheme.
It is also possible that in the period 2004–05 the ARM pilot affected the take-up of the VOL scheme. Central London cases that might otherwise have volunteered for VOL during the ARM pilot may have been referred to the ARM scheme. Since ARM was only taking Central London defended cases (not other courts in the south east) it is likely that ARM was ‘creaming-off’ some of the suitable non-PI cases during the 12-month period, thus affecting the total number of Central London cases entering the VOL scheme.

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

**Length of Dispute**

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

Settlement rate among mediated cases

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

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

---

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

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

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

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

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

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

Outcome and mediation provider

In the period 1999–2004, cases were distributed roughly evenly among the four organisations providing mediation services for the Central London VOL scheme. However, Figure 4.9 shows that the distribution of mediations actually conducted was somewhat uneven, with Provider 1 conducting about one-third of mediations and Provider 3 conducting only about one-fifth.
An analysis of outcome at mediation appointments for the period 1999-2004 showed no significant difference between providers in settlement rates, which varied from 38% to 48% (Figure 4.10).

**Outcome of cases with mediation dates booked**

Not all cases with a booked mediation date in the VOL scheme proceeded to mediation. A proportion of cases were cancelled prior to the mediation (about 12% over the review period), some because a settlement had been reached without the need for the mediation and others because the parties evidently had a change of mind. Occasionally, mediations were cancelled on the day because one or both parties did not appear. Figure 4.11 displays the outcome of cases with mediation dates booked (1999–2005).
and shows that, since 2001, there has been a reduction in the proportion of cases that
cancelled with no further mediation booked.

Figure 4.11 Outcome of cases entering the scheme 1999-2005

Factors explaining outcome of mediation appointment
As discussed in Chapter 2, a regression analysis was conducted on both ARM data and
VOL data (including cases from 1999 to 2004) to seek to establish what factors, if any,
were correlated with the likelihood of a settlement at mediation. Factors hypothesised
as being possible determinants of success or failure at mediation, and therefore included
in the regression analysis, were: case type, case value, configuration of parties,
representation at mediation, and the presence of a counterclaim (as a proxy for
complexity in non-PI cases). The analysis produced few statistically significant results.
The generally weak fit of the regression for the VOL sample suggests that the outcome
at mediation owes more to chance or to unobservable factors than to the
observable factors that could be included in the analysis, such as approach of the
parties, willingness to negotiate or compromise, or indeed the approach and skill of the
mediator.\textsuperscript{55}

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

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

\textsuperscript{55} It was not possible to compare the success rates between different individual mediators because a large
number of mediators have been used and only a small minority have conducted more than one or two
mediations.
the possibility of settlement at mediation, but are difficult to measure in a way that can be included in a regression analysis.

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

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

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

In unsettled mediated cases in the VOL scheme, some 47% went on to settle at various points after the mediation, and about one-fifth were decided at trial (Figure 4.12). Of the unsuccessfully mediated cases decided at trial, two-thirds of judgments were given in favour of the claimant. Excluding cases where the outcome was unknown, the eventual settlement rate for unsuccessfully mediated cases was 69%.
The eventual fate of cases unsuccessfully mediated between 1999 and 2004, as compared with 1996 and 1998, shows that the overall settlement rate was lower at 50% (as compared with about 70% between 1996 and 1998) with a much higher proportion of unsettled mediated cases going on to trial. This finding suggests that cases entering the VOL mediation scheme between 1999 and 2004 were more contentious and possibly less susceptible to settlement than those entering between 1996 and 1998. This is consistent with the emerging suggestion that a proportion of cases have been entering the scheme in recent years under some pressure and possibly to avoid the risk of cost penalties, rather than in the hope and expectation that the case might be settled.

**Summary**

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

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

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

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