

An Evaluation of the Effectiveness of Court-based Mediation Processes in Non- Family Civil Proceedings at Exeter and Guildford County Courts

**Final Report Prepared for the Department of Constitutional
Affairs (Revised September 2006)**

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Executive Summary

- The purpose of this research is to provide an analysis of the effectiveness of court-based mediation by comparing the impact of the mediation schemes in operation at Exeter County Court and Guildford County Court.
- The mediation scheme at Exeter County Court was launched in March 2003 and in Guildford in April 2003. The schemes at both courts deal with defended cases allocated to either the fast-track or the multi-track, where either the parties, or the court, have determined that attempting to settle the case by using mediation would help to achieve the over-riding objective of the Civil Procedure Rules.
- Each scheme operates a very similar system of time-limited mediation in which an independent mediator, from an organisation called a mediation provider, appointed to a rota at the court, conducts a three-hour mediation on the court premises. Court officials carry out the administration of the scheme.
- Parties taking part in the mediation pay a set fee for the mediation. The cost at Exeter is £450 for a fast-track mediation and £650 for a multi-track. At Guildford there is a flat fee of £500. These costs are generally split between the parties participating in the mediation. There is no administration fee for the court included in the cost of the mediation, so the fees go to the mediator, although at Guildford, £50 goes to pay for a security guard for the time of the mediation.
- The main aim of both schemes was to try to reduce costs for the parties and the workload of the court and to generally increase the effectiveness of the court process. The parties would still pay an issue fee and an allocation fee but if the case settled at mediation they would not have to pay a listing fee or the costs of preparing for or attending the trial.

- Both schemes were instigated by members of the judiciary based at the respective courts who were very supportive of establishing such a scheme.

Methodology

- The aim of this project is to contribute to the emerging body of knowledge on court-based mediation to ensure that its continued use is both efficacious and cost-effective.
- This research project began in August 2004 and ended in March 2005. The cases analysed in this report are those which were referred to mediation between the launch of each scheme and the end of February 2005.
- The research considers the perceived costs of mediation and the impact of mediation on judicial and administrative resources and it also contributes towards a cost profile of mediation.
- It also looks at the impact of mediation on settlement and the type of case and amount of the claim and whether there is any correlation between these and settlement at mediation for mediation. It asks whether parties, legal representatives and mediators are satisfied with the mediation process and how they would improve it.
- 156 case files were analysed which represented 88% of all the files on referred cases. This total includes 116 files from Exeter and 54 from Guildford. The information in the case files was supported by using Caseman which is an IT system onto which data is logged for the day-to-day administration of civil cases.
- 718 questionnaires were given out in total to participants in mediation. These were given or sent to mediators, parties and legal representatives. The overall response rate was not high at 24% overall. However it was difficult at times to contact relevant litigants and there was an extremely low response rate from legal representatives. Often this was because although a representative was listed on the court file this person had not had any

input into the mediation and therefore felt that they did not want to take part in the research. This was particularly the case at Guildford.

- In addition 40 mediations were observed and follow-up telephone interviews were conducted with a total of 24 parties, 19 legal representatives and 19 mediators.
- At Exeter semi-structured, face-to-face interviews were conducted with 3 District Judges, 2 mediation clerks and the Designated Civil Judge for Devon and Cornwall who was instrumental in the establishment of the Exeter scheme. At Guildford County Court face-to-face interviews were conducted with two District Judges and one mediation clerk. An email-based interview was conducted with the District Judge who set up the scheme but who has now moved to the High Court.

Key Findings

- Since the launch of each scheme there have been 135 cases referred to mediation at Exeter. 126 of these had either taken part or avoided the mediation process at Exeter whilst 9 cases were since waiting for a mediation appointment.
- At Guildford there have been 59 cases referred to mediation since the launch of the scheme. 54 of these had either taken part or avoided the mediation process and there are a further 5 cases awaiting mediation appointments at the end of the research period.
- The Exeter scheme seems to have maintained similar numbers of mediations since its inception whereas there are only a few mediations now coming through Guildford. It seemed to be crucial at both Exeter and Guildford that there was an enthusiastic and active judiciary supporting the scheme and this was illustrated by the decline in the use of mediation at Guildford once the judge who had established the scheme left the court.

- At Exeter the settlement rate at mediation of 40% was lower than at Guildford where the rate was 53%.
- It is suggested that one of the main reasons for the difference in settlement rate is the voluntary or involuntary nature of the mediation. A distinction was drawn between cases which went to mediation because the parties had volunteered to mediate at allocation and those where a judge was encouraging the parties to mediate following a case management conference or directions hearing. Those cases, which were classified as court advised at Guildford, had a settlement rate of 90% at the mediation or within 14 days. This compares to only 30% settlement at mediation, or within 14 days for those cases that are classified as court-advised at Exeter. This seems to suggest that there is a difference in the nature of what court-advised means as between the two different courts. At Guildford there is likely to be less difference between court–advised and voluntary because of a difference in attitude of the judiciary.
- There was a distinct prevalence of breach of contract cases referred to mediation at both courts and very few cases in any other one particular category although a broader spread of case types at Exeter than at Guildford. 48% of cases referred to mediation at Exeter were breach of contract and 74% at Guildford. The majority of PI cases referred to mediation at Exeter did not make it to a mediation appointment being either cancelled in advance or settled prior to the mediation taking place. There is no indication that breach of contract cases are more likely to settle than any other case type.
- In Guildford claimants who were companies were more likely to settle their case at mediation whilst at Exeter they were more likely to be individuals. In Exeter defendants were more likely to settle if they were an individual whilst at Guildford they were more likely to settle if they were a company. In addition, whilst there was little difference as between cases when considering the amount of the claim at both courts fast track cases were more likely to settle without judicial intervention (this includes cases that settled prior to mediation) than multi track.

- There is a high cross-over of mediators between Exeter and Guildford and some mediators are linked to more than one provider. The number of settlements per organisation is therefore not a clear indication of the success of individual mediators. There is little correlation between the expertise of the mediator and their ability to settle a particular case. It is clear however that the mediator and their approach to the mediation does have a large impact on whether or not the case settles.
- There was an unerringly positive view of the process of mediation coming from litigants involved in the mediation process even if the parties have failed to reach a settlement themselves. Yet those parties who responded to the questionnaires were divided over whether they were happy with the outcome of the mediation. The outcome does not always leave both sides content although they might agree with a solution as it is something they can live with and means that the case is finished at an early point than it would be if they had had to go to trial. Yet most - 74% of respondents - would be happy to recommend mediation to a friend. When this is broken down between claimants and defendants there is little difference between them.
- There was a low response from legal representatives many of which do not attend the mediation appointment with their clients. The majority blamed the other side's intransigence or inability to compromise. 46% thought this was the reason the case had not settled and 38% thought it was because the parties were too far apart and therefore it was difficult to negotiate a settlement.
- The judges interviewed who were involved in the schemes were very enthusiastic about mediation. The value of judicial involvement in the mediation scheme cannot be underestimated. One district judge stated that it was impossible to have a mediation scheme without the bench behind it as the role of the judge is to encourage parties to mediate.

1.0 Introduction

The purpose of this research is to provide an analysis of the effectiveness of court-based mediation by comparing the impact of the mediation schemes in operation at Exeter County Court and Guildford County Court.¹

The schemes at both courts deal with defended cases allocated to either the fast track,² or the multi track,³ where either the parties or the court have determined that attempting to settle the case at mediation would help to achieve the over-riding objective of the Civil Procedure Rules.⁴

The mediation schemes in operation at both courts are examples of a new development in civil justice in which mediation processes are integrated into the legal process to create a system of 'court-based' mediation. The characteristics of such schemes are that the mediation takes place, usually in the precincts of the court, for a defended claim, which has been stayed by the court for the purpose of mediation. The mediation is 'time-limited' in that it usually lasts no longer than 3 hours. The administration of the mediation is generally conducted at the court, by court officials, who rely on mediators, provided by organisations appointed by the court, to conduct the mediations. This type of mediation first took place at Central London County Court following a pilot in January 1996, but since the introduction of the Civil Procedure Rules in 1999,⁵ a number of other courts including Birmingham, Exeter, Guildford, and Cardiff have launched their own independent mediation schemes.

Both Exeter and Guildford are examples of regional courts and many of the issues relating to mediation which arise at these courts, and with court-users, may be found to be replicated in other similar regional courts.

¹ The small claims scheme at Exeter County Court, which has been in operation since June 2002, is not the subject of any research in this report.

² Cases with a claim value of between £5,000 and £15,000 (including claims for personal injury that exceed £1,000).

³ Generally cases with a claim value exceeding £15,000.

⁴ Civil Procedure Rules 1.1.

⁵ See H Genn, "The Central London County Court Pilot Mediation Scheme Evaluation Report' (LCD Research Series, 1998)

There may be a local legal culture in operation in regional court areas which may be different to that discernable in larger conurbations.⁶ For example, there may be greater informality observed between solicitors, judges and barristers because of their regular appearances in court. This report questions whether the approach of the courts and the judiciary towards mediation can have an important impact on the success or failure of a court-based mediation scheme. It may be that their enthusiasm transfers to local solicitors or that the local profession realises that it might be in their interest more generally to support an innovation which has the enthusiasm of the court. This observation is perhaps likely to be more pertinent in regional courts than it is in larger metropolitan courts.

The report also considers the differences between Exeter and Guildford. Guildford is forty miles from Central London and is within the suburban commuter conurbation surrounding London. As a result Guildford has particular issues with regard to staffing and administration generally and in relation to the mediation scheme which are discussed later in this report.

The Exeter scheme was launched in March 2003 and the Guildford scheme in April 2003. Both schemes were based substantially on a model already in operation at Birmingham County Court.

By the end period of this research project, the end of February 2005, both schemes had been in operation for a reasonable length of time - two years at Exeter and 23 months at Guildford - and the assumption was made that by this time they both were established in their respective courts and thus able to provide a solid basis for a research project.

Cases are usually referred to mediation by a district judge. This is the point at which the parties either ask for the case to be stayed to enable them to mediate or the judge stays the case to enable mediation to take place. A total of 194 cases were referred to mediation during the period of the research. This is broken down by individual courts as follows:

⁶ See J Macfarlane, "Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program" (Law Commission of Canada, 2003). In Canada, Prof Macfarlane found such a local legal culture made a difference in approach to mediation between the Toronto, the larger conurbation and the smaller city of Ottawa.

Court	All cases referred to mediation	Cases where parties attended mediation	Cases where mediation was cancelled for whatever reason	Cases pending at end of research
Exeter	135	86	40	9
Guildford	59	49	5	5
Total	194	135	45	14

1.1 Research goals

The research goals of this project are to analyse the effectiveness of court-based mediation at Exeter and Guildford County Courts. The use of mediation as a method of formal dispute resolution in the UK is increasing,⁷ and an unreasonable refusal to mediate may result in cost penalties following trial.⁸ The aim of this project is to contribute to the emerging body of knowledge on court-based mediation to ensure that its use is both efficacious and cost-effective.

The main areas for research which were analysed for this project:

- The case type and values most suitable for mediation;
- Perceived costs of mediation;
- Impact of mediation on judicial and administrative resources / cost profile of mediation;
- Impact of mediation on settlement;
- Satisfaction of parties;
- Role of mediators and legal representatives.

⁷ CEDR reported an 8% year-on-year increase in 2004. (CEDR, 2005)

⁸ See further, *Dunnett v Railtrack* [2002] 2 ALL ER 850, *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, and most recently *Burchell v Bullard and others* [2005] EWCA Civ 358.

1.1.2 Limitations of the research

The conclusions in this report are limited by the low number of cases referred to mediation and consequently, the low number of mediations which have taken place at Exeter and, particularly at, Guildford County Courts.

Another limitation is the lack of responses for the survey data, especially from legal representatives. It is felt that the low number of responses for legal representatives is due to the fact that few attend the mediation appointment with their clients.⁹

⁹ This view is based upon the observation of 40 mediations at both Exeter and Guildford courts.

1.2 Methodology

The Exeter mediation scheme was launched on 10th March 2003. The Guildford scheme began on 2nd April 2003. This research project comprises of data collected from both schemes since their launch until 28th February 2005.

This research project began in August 2004. The original aim was for it to end in November 2004 but the relocation of the Exeter Crown and County Court to a new building in the city during that month and therefore, lack of access to files etc, were the basis of an extension granted until March 2005. During the course of the research project we were also asked to consider the cost of a 'typical case' in comparison to mediation. The contribution made to this project is reflected in some of the observational and Business Management Systems (BMS) cost-effectiveness timing data included in this report.¹⁰

1.2.1 Quantitative data

In order to demonstrate whether mediation has been effective the following quantitative data has been collected:

- (a) case types most likely to settle at mediation;
- (b) the voluntary or involuntary nature of the mediation;
- (c) the value of the claim;
- (d) relationship between settlement and the qualifications of mediators;
- (e) whether the timing of mediation affects the likelihood of settlement;

1.2.2 Qualitative data

- (a) factors that parties like about mediation;
- (b) factors that the parties do not like about mediation;
- (c) reasons stated by parties who do not wish to mediate.
- (d) the role of the mediator;

¹⁰ Business Management System (BMS) is a performance monitoring system used by the courts to allocate costs to administrative tasks carried out by court staff. It does this by allocating an 'event code' to each task performed and then assigning a unit of time to be spent on each task given such a code.

In order to consider any sort of cost profile for the mediation schemes the following information is considered:

- the steps taken in administering the mediation schemes analysing 25% of cases from each mediation scheme;
- the analysis of Business Management System (BMS) data to identify costs of administrative tasks;
- the input of District Judges into the mediation process;¹¹
- the time taken by the court in running the mediation scheme;
- the costing of administrative time taken.

1.3 Data collection

Data for this report comes from four main sources:

- (i) Case Files / Caseman;
- (ii) Questionnaires,
- (iii) Observations; and
- (iv) Interviews.

The cost-benefit analysis data is provided by an analysis of a sample of BMS data on a random selection of cases referred to mediation.

1.3.1 Case files

The main source of data for the collection of statistics on the cases referred to mediations comes from case files. All of the case files for scheduled mediations during the life of the project which it has been possible to access have been read.

Court	Number of cases (total)	No of case files read	Percentage read
Exeter	135	116	86%
Guildford	59	54	92%
Total	194	170	88%

¹¹ This was difficult to gauge as there are limited and vague records kept of what the judge is doing whilst they have the file in front of them and so it is difficult to allocate a length of time or any sort of costing on a consistent basis.

Of the total number of files the researchers wished to read 12% were unavailable. This was because the cases were live and the file was with the District Judge or simply because the file was missing. Where the file has not been accessible we have relied on available data from the Caseman IT system onto which data is logged for the day-to-day administration of civil cases. If it has not been possible to ascertain the answer to certain questions from either the file or Caseman, this has been recorded within the data analysis as '*unknown*'.

The court files have generally provided the following data:

- the date that the claim and defence were filed;
- the nature of the parties, ie business or individual;
- the reason why the case did not go to mediation (if this was applicable);
- the reason why the case did not settle at mediation (if applicable);
- the routes for referral to mediation;
- the date that the case was referred to mediation;
- the date of the mediation;
- the total amount of the claim;
- the nature of the settlement if the case settled at the mediation;
- the date the case will go to trial if it does not settle at mediation; and
- the name of the mediator.

This data provides a framework for the quantitative aspects of the research.¹² It was consolidated into a database for each court, which was used in conjunction with SPSS software, in order to generate much of the data in this report.

1.3.2 Questionnaires

Questionnaires were given to parties where possible at the end of each mediation.¹³ Each questionnaire had a pre-paid envelope to enable the responder to return it to us by post. Where it has been possible to obtain this information soon after the mediation this has been considered preferable to sending out the

¹² The mediation clerk at Exeter County Court kept a computerised database of cases which had been referred to mediation. However this was not considered reliable enough to be used as a data source but was instead utilised as a method of cross-checking occasional data. No such database was kept at Guildford County Court.

¹³ This was when mediations were observed.

questionnaires a long time after the process has been completed. If it was not possible to give the questionnaire to the participant at the end of the mediation it was sent in the post with a pre-paid envelope. The response rate for these questionnaires was much lower than for those given out at the end of the mediation.

Questionnaires were either given or sent to all parties involved in a mediation at each court. The table below shows the number of questionnaires that were sent, given out at mediations and returned to the researchers.

Table 3: Questionnaire data	Number of questionnaires sent	Number of questionnaires given out at mediations	Number of responses	Response rate
Legal Representatives				
Exeter Scheme	203	32	43	18%
Guildford Scheme	72	6	3	4%
Total Representatives	275	38	46	15%
Parties				
Exeter Scheme	100	72	45	26%
Guildford Scheme	90	8	29	27%
Total Parties	190	80	74	28%
Mediators				
Exeter Scheme	50	36	39	45%
Guildford Scheme	45	4 ¹⁴	13	27%
Total Mediators	95	40	52	39%
Total Number	560	158	172	24% ¹⁵

Where there was no response to the questionnaire either given at the mediation or through the post another one was sent. There was a markedly low response rate from legal representatives in Guildford.¹⁶

The response rate to the questionnaire was as follows:

¹⁴ As this figure was so low two questionnaires were sent and a more general email questionnaire which was sent to a number of local solicitors. Neither received much response. It is posited that this represents the general malaise towards mediation in Guildford.

¹⁵ This response rate is considered to be a little lower than might be expected although a number of parties had moved house or were uncontactable for other reasons. For example, it was difficult to find some contact names or addresses for those taking part in the mediation or responsible for the litigation.

¹⁶ As a result of a second mailing to legal representatives in Guildford only 1 response was received.

Table 4: Response to questionnaires	Claimants	Defendants	Legal Reps	Mediators	Total
Exeter	24	21	43	39	127
Guildford	19	10	4	13	46
Total	43	31	47	52	173

The aim of the questionnaire was to obtain data from the parties about their knowledge, understanding and feelings about mediation to discern the benefits and disadvantages of mediation.

1.3.3 Observations

The research team observed as many mediations as possible during the period of the research project. The aim of the observation was to be able to describe the mediation process and the contributions made by each of the participants (the district judge, the mediator, the parties and any observers to the mediation). At Exeter County Court the researchers have been observing mediations since the launch of the scheme. A total of 36 mediations have been observed at Exeter. This accounts for 42% of all cases mediated at Exeter.

The observation of the mediation allows us to provide a detailed description of the process. The similarities and differences of approaches of the individual mediators was also useful to observe as well as the nature and character of the participants.

Observation allows the researcher to get an overall picture of the mediation and the issues. Fewer mediations were observed at Guildford. A total of 4 mediations were observed from 8 which were conducted during the period of the research study.

1.3.4 Interviews

There were two types of interviews conducted. The first were semi-structured, face-to-face interviews conducted with judges and court staff. More structured telephone interviews, based on a pre-prepared questionnaire were conducted with parties, legal representatives and mediators who gave their consent to further research on the questionnaire returned to us.

The aim of the interviews with these principal actors in the mediation process is to inform the analysis of the processes involved in the mediation and give the parties an opportunity to comment on developments since the mediation and provide a more objective statement of their views of the procedure they have undertaken.

The table below shows the breakdown of telephone interviews by class of respondent.

Table 5: Telephone interviews	Parties	Legal reps	Mediators	Total
Exeter	20	18	n/a	38
Guildford	4	1	n/a	5
Total	24	19	19 ¹⁷	62

At Exeter County Court, semi-structured, face-to-face interviews were conducted with 3 District Judges, 2 mediation clerks and the Designated Civil Judge for Devon and Cornwall who was instrumental in the establishment of the Exeter scheme.

At Guildford County Court, face-to-face interviews were conducted with two District Judges and one mediation clerk. An email-based interview was conducted with the District Judge who set up the scheme but who has now moved to the High Court.

Telephone interviews were conducted with a total of 24 parties, 19 legal representatives and 19 mediators.

¹⁷ There is quite a large cross-over of mediators travelling between Exeter and Guildford courts and so mediators responses have not been allocated specifically to individual courts.

Table 6: Telephone interviews - breakdown of parties by type	Claimant	Defendant	Total
Exeter	12	8	20
Guildford	4	0	4
Total	16	8	24

Very few parties were available when we tried to contact them after the mediation which accounts for the very poor response rate. Some of the phone numbers did not work, some had moved and some were just constantly not available for us to talk to.

1.4 Costs Profile

The aim of this section on cost profile is to provide the DCA with the relevant data on a sample of cases referred to mediation across the schemes at Exeter and Guildford to contribute to a wider project on cost modelling being conducted by Paul Fenn at the University of Nottingham. For this reason we have focused on collecting data on the cost of cases to help inform the overall cost-benefit analysis being carried out by Paul Fenn.

The aim of the cost profile is to consider the cost of both judicial and administrative input into the mediation process. Data has been collected during the course of this project on the timing and cost of the mediation process and a contribution is made to the larger project of considering all of the associated costs in an average¹⁸ case.

For this reason there are two stages to the costs profile:

1.4.1 Cost of a mediation

The time taken on administrative as well as judicial contributions to the mediation process has been analysed and is recorded in the form of flow charts and a diagram later in this report. This has been achieved through the costing of the

¹⁸ The definition of an 'average' case is not determined in this research project.

tasks carried out by the mediation clerk and the judges. BMS data has been used to form the basis of the costing of the administrative input. Judicial input has been recorded through asking the judges to determine the time taken on a number of tasks associated with mediation and comparing these with time estimates given in the case files. We have observed the mediation clerk and the judges in order to verify what they do when dealing with matters which concern mediation. This has provided us with a general hypothesis as to the time taken in organising the mediation.

1.4.2 Costs of the case

In order to provide information as to the general costs of those cases which have been referred to mediation and to contribute to the broader project on this matter we have costed the BMS codes on all administrative tasks on 25% of all cases in our total sample.

We have experienced a lot of difficulty with this task as many of the event codes do not correlate automatically with BMS data and there is often very little commentary as to what the judge might be doing in a particular instance.

1.4.3 Cost profiling methodology

Our analysis of the cost of a mediated case initially involved the selection of a stratified random sample,¹⁹ across all cases referred to mediation from May 2003 to March 2005 in Exeter and Guildford. This type of stratified sample was selected in order to allow for an even chronological spread across the lifetime of the schemes, whilst maintaining an indiscriminate selection of cases. Thereby allowing the researchers to identify any significant changes that may have occurred since the schemes' inception yet ensuring the data was as representative as possible. The sample constituted 25% of all cases referred²⁰ in each court, 57 in Exeter (out of a total of 126 cases) and 17 in Guildford (out of a total of 54 cases).

¹⁹ This was a stratified sample as cases were included in the sample over a chronological period in the life of the project.

²⁰ Not including those which still had an appointment pending as they were generally very early in the total progress of a case.

Once the sample had been selected a District Judges print out was made for each case and this was cross referenced with the BMS coded administrative task log found in Caseman in order to ensure the accuracy of task analysis. For example if a case was transferred in then the log would show task numbers but provide no BMS coding. This data was then collated on a case by case basis so that for each case analysed the following information was available

- A list of administrative tasks undertaken;
- A list of judicial tasks undertaken;
- A BMS coding for each of those tasks where available;
- The total administrative time expended;
- The total administrative cost.

Following this process a number of administrative tasks were identified for which no BMS code was available (this was established in negotiation with the DCA).

Table 7: Administrative tasks	
Number	Task
555	Telephone Message
999	Miscellaneous
200	Hearing
772	Cash Recovery
208	N172 Notice Trial Date
6	File Moved
5	File Sent
56	N* Alloc Referral
205	N244 Notice Hearing App
226	N* Listing Reference
7	File to filing

Therefore, for each case there are a small number of additional un-coded tasks (largely tasks 555 & 999), and these were logged for each case. Nonetheless, with regard to comparison to the control sample this should not prove to be problematic as it can be assumed that the absence of these un-coded cases will be reflected in fast and multi track cases in general.

2. The Establishment of the mediation schemes

2.1 The establishment of the Exeter mediation scheme

In response to a public meeting, instigated at the behest of the Designated Civil Judge for Devon and Cornwall, DCJ Overend, where there was overwhelming support for the establishment of an ADR/ mediation scheme at Exeter County Court, a steering group was set up in March 2002 to discuss the possibility of such a scheme. The main aim was to try to reduce costs for the parties and the workload of the court: to generally increase the effectiveness of the court process. The parties would still pay an issue fee and an allocation fee but if the case settled at mediation they would not have to pay a listing fee or the costs of preparing for or attending the trial.²¹ This should represent a significant saving for litigants.

The first steering group meeting was held in March 2002 and was attended by representatives of mediation providers, the local law society (DELS), the Court Service and the judiciary. District Judge Wainwright, who is the main mediation judge at Exeter, chaired the meeting. It was initially agreed that the steering group would look at other court-based mediation schemes, especially Birmingham which had been in operation since December 2001, but that the Exeter scheme should be based upon the following principles:

- Court-led scheme referred by judge at allocation or by the parties volunteering for mediation;
- Time-limited mediation to 3 hours but conducted on court premises;
- Each mediator to come from a pool of nominated mediation providers on a rota basis;
- As a court-led scheme the court would oversee the fees collection;
- Judges to actively pursue a policy of imposing cost consequences where parties could not persuade the court that their case was not suitable for mediation but that they still refuse to mediate;

²¹ In one case observed at Exeter County Court the claim was for £3000 and the costs in the case (which had been going on for 2 years) had already exceeded £7000.

- The fee structure to follow the division between fast-track and multi-track cases and once set to be divided between the parties equally but then to be paid in total to the mediator with no contribution to be paid to the court.

Over the course of the year leading up to the launch of the scheme the steering group considered the following issues:

- the documentation from other existing court-based mediation schemes and how it could be utilised on the Exeter scheme;
- the fees which should be charged to the parties;
- the organisation of the providers;
- the launch and publicity – the design of a mediation brochure;
- the evaluation and monitoring of the scheme.

The fees set for the scheme were based upon the equivalent practitioners rates. The cost of a senior grade 1 fee earner, at the time, was £145 per hour and so the costs of the mediation were set at £450 for fast-track mediations and £650 for multi-track.²²

Providers who were interested in being on the rota for the mediation scheme were required to give details of

- (i) insurance;
- (ii) qualifications & experience required of mediators;
- (iii) ongoing monitoring.

There were 7 providers who wished to be part of the rota: Centre for Effective Dispute Resolution (CEDR), ADR Group, Academy of Experts, Chartered Institute of Arbitrators, ADR Chambers, Devon Mediation and Devon & Exeter Law Society (DELS). These organisations all offer commercial mediation services except DELS and Devon Mediation. These are local organisations which are each part of a larger body. DELS is the local branch of the Law Society and Devon Mediation is the local branch of Mediation UK. All of these providers are still on the rota for the Exeter mediation scheme.

²² These costs to be divided equally between the claimants and the defendants.

Devon & Exeter Law Society (DELS) – the local law society who offers potential mediators their own training. The training is principally for the small claims mediation service also run at Exeter County Court, although DELS also state that their training is also geared for the fast-track/multi-track scheme.²³ Once the DELS trained mediator has run independently a minimum number of small claims sessions they are qualified to mediate on the fast-track/multi-track scheme.

Devon Mediation – part of the umbrella organisation, Mediation UK, which is a national voluntary organisation providing mediation services. The mediations are run by volunteers to resolve issues in the local community.

There was much discussion during the steering group meetings, prior to the scheme being established, about the compulsory nature of the mediation. At the time decisions on cases such as *Dunnett v Railtrack*²⁴ and *Hurst v Leeming*²⁵ were increasing the pressure on parties, representatives and the judiciary to consider the cost consequences of a refusal to mediate. After this discussion it was agreed that parties would be told that their case ‘had been selected for mediation’. It would not be appropriate in some cases, for example if the parties were based out of the area. This type of process was described as: ‘selective compulsory mediation’ by the steering group. At the time of the establishment of the scheme this was considered appropriate as the judges would be encouraging parties to mediate during case management conferences where appropriate as well as distributing a leaflet which encouraged parties to volunteer independently for the mediation scheme.

The pilot mediation scheme at Exeter was approved by LJ May on 25th October 2002. The launch on 10th March 2003 was attended by Baroness Scotland. The first mediation took place in June 2003. Between the launch and the end of February 2005 86 cases have physically gone through the mediation process.²⁶ The Steering Group now meets on an ad hoc basis to discuss issues which have arisen in relation to the running of the mediation scheme. The present subject for

²³ The training of mediators is beyond the remit of this research.

²⁴ [2002] E 1 WLR 2434.

²⁵ [2003] 1 Lloyd's Rep 379.

²⁶ See Table 8 on page 36 for a complete breakdown year-by-year. This figure does not include any cases which, although the parties were referred to mediation, did not take part in a mediation session.

discussion is how the mediation providers can help to ease the administration of the mediation scheme and speed up the process for court users.

2.1.2 Main changes since the launch of the mediation scheme:

- Agreement that fees would not be refunded to parties if the case settles within 24 hours prior to the mediation.
- The court file is no longer available to mediators and they should instead rely on the statement of issues prepared for them.
- The timing of the mediations – 4.30pm to 7.30pm had to be changed due to problems with providing security guards for the mediations. The mediations were conducted earlier in the day – between 2.30 – 5.30pm and in order to accommodate them they were moved to The Lodge, an outbuilding in the car park of the court, which also housed the law library. Once the court moved premises the mediations were conducted in a court room with adjoining meeting rooms but remained at the same time 2.30pm – 5.30pm.

2.2 The establishment of the Guildford mediation scheme

The Guildford scheme was established on 2 April 2003 and was based on the existing schemes at Exeter, Central London and Birmingham. Even though Exeter had only launched its scheme a month or so previously the paperwork used at Guildford was mainly based upon the Exeter scheme. Similarly to Exeter it began with the instigation of a District Judge – District Judge Williams and the work of a committee meeting over the course of a few months. The difference with Exeter is that this committee was established to discuss the instigation of the scheme. It did not continue to meet once the scheme was established.

DJ Williams wished to refer fast-track and multi-track cases to mediation at case management stage but there was no process in place to enable this to easily happen. She began discussions with a local mediator, and a member of ADR Group, in August 2002. The judge relied upon a draft of the scheme being devised at Exeter for the scheme being created.

The original rota of mediation providers consisted of ADR Group, CEDR, Academy of Experts and the Chartered Institute of Arbitrators. There are now 5 providers as Intermediation, an organisation who had been involved in the Birmingham scheme, were also added to the rota.

At Guildford all mediations are scheduled to take place on a Wednesday evening between 4.30pm – 7.30pm at the court. The cost of a mediation at Guildford is a flat fee of £500 regardless of the track. This cost is divided between the parties taking part in the mediation. Of the total fee, £475 is paid to the mediation provider and £25 is paid to the security guard who stays on duty whilst the mediation is in progress and the court building is closed.

Main changes since the scheme began at Guildford:

- Change in Mediation District Judge in June 2004;
- Change in Mediation Clerk in March 2004.

2.3 Conclusions about the establishment of the scheme

Both Exeter and Guildford schemes are based upon the original model set up at Central London County Court in 1996 which was then modified by Birmingham which launched its scheme in December 2001. Essentially the schemes at Exeter and Guildford are the same in style as Exeter slightly modified the paperwork from Birmingham and this was then utilised by Guildford.

Both schemes offer litigants a three hour, time-limited mediation which is conducted at the court. The cost is similar as between the courts for fast-track cases. Multi-track cases at Exeter are on a higher rate because at Exeter there is a staggered rate depending upon the value of the claim.

Both schemes work on a rota basis with approved mediation providers. There are 7 providers on the Exeter scheme and 5 on the Guildford scheme. All of the providers on the Guildford scheme are the same as at Exeter except for one which is local to London and Guildford.

3. The organisation of the mediation schemes

3.1 The organisation of the mediation scheme – Exeter

Over the period March 2003 – February 2005 there have been 1142 cases allocated to the fast and multi tracks: 637 fast track cases and 505 multi track cases.²⁷

It will be seen that many of these are not even considered for mediation. This report is primarily concerned with those cases which are referred to mediation. The route to referral is via two routes:²⁸

(a) Parties have volunteered to take part in the mediation

If the parties have volunteered to take part in mediation this would usually happen before allocation stage when the parties return their Mediation Reply Form (Med 2). If both parties agree, at this stage, to take part in the mediation they are deemed to have volunteered for the mediation.

(b) Referral by judge

The judge may refer the case to mediation at allocation stage or later in the case at a case management appointment after discussion with the parties and / or their representatives. This may be because events or circumstances in the life of the case have made mediation a relevant option when perhaps it was not considered so at allocation stage.²⁹ At the point of referral the judge will ask the mediation clerk to stay the case to allow time for the mediation to take place. Depending upon the speed of the administration this may take days or months to arrange.

Even if a case is referred to mediation this does not guarantee it will proceed to an actual mediation appointment because cases may settle in advance of the

²⁷ Data provided by Exeter County Court (March 2005).

²⁸ Some cases are transferred especially for mediation but these cases tend to have been referred by a judge. See Section 7, *supra*, on page 84.

²⁹ It may be felt by legal representatives that some types of case, for example, personal injury may not become suitable for mediation until the liability of the parties has been agreed.

mediation or be withdrawn for a variety of reasons. This has been recorded in Table 21.

3.1.2 Number of cases referred to mediation

Since the inception of the mediation scheme in March 2003 there has been a gradual increase in the number of mediations taking place:

- From March 2003 until the end of February 2005 135 cases had been referred to mediation. Of these 126 had been 'set down' by the end of the research period.³⁰
- 40 of these cases had either settled prior to the mediation taking place or cancelled their mediation appointment;
- The remaining 86 cases have mediated at Exeter County Court.³¹
- The total number of cases referred to mediation therefore represents 12% of all cases allocated to the fast and multi tracks at Exeter.³²

A year-by-year breakdown of the 86 cases which have mediated at Exeter County Court is provided in Table 8. The table shows the average number of mediations by month.

Table 8: Yearly breakdown of mediations at Exeter		
Year	Total number of mediations	Average number of mediations per month
Mar-Dec 2003	18	1.8
Jan-Dec 2004	58	4.8
Jan-Feb 2005	10	5

³⁰ These cases have not been included in the data tables in this report.

³¹ All of these cases have attended a mediation appointment at Exeter County Court. See Figure 6 on page 59 for more information.

³² This figure is slightly distorted as the total of fast track and multi track cases only refers to Exeter whereas some of the mediated cases were transferred in from other courts. It is not possible to separate the cases which were transferred in purely for mediation as they might have been transferred for other reasons and this is quite difficult to discern from the files.

This Table shows that there has been regular use of the mediation scheme over the period of the study but that the number of mediations rose significantly during the second and third years of the scheme.

The number of mediations rose in general until the autumn of 2004 as shown by Figures 1 and 2 below. The drop in numbers at this time is most likely to be related to the move of the court to new premises on November 15th 2004,³³ well as changes in the administration of the scheme.³⁴ The graphs below in figures 1 and 2 show how these factors can cause fluctuations in the number of mediations taking place.

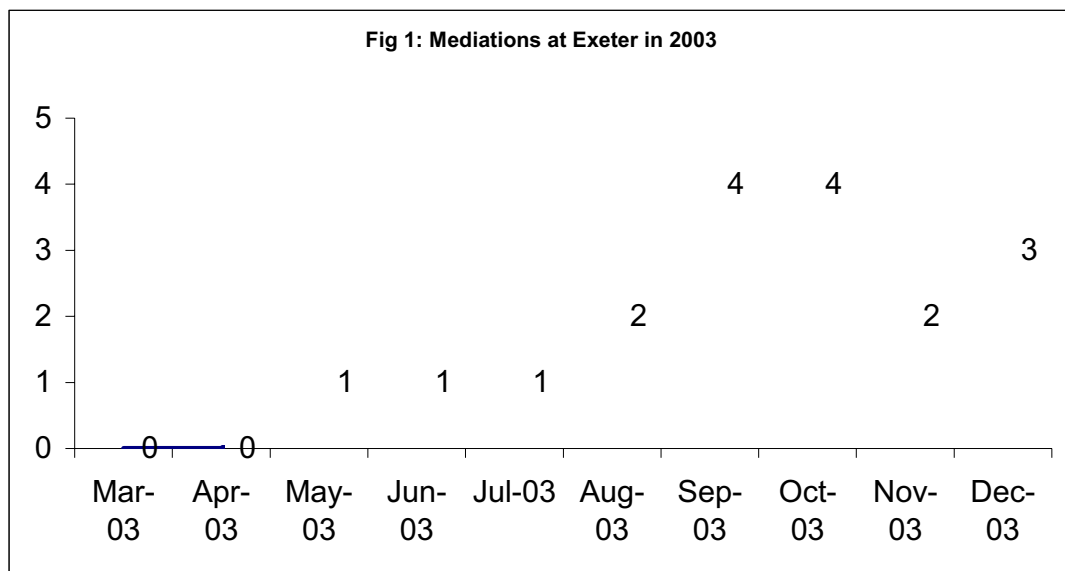


Figure 1, above, shows the number of mediations which took place during the first 10 months of the scheme. Cases began to be referred to mediation immediately after the launch of the scheme on 10th March 2003 and the first mediation took place in June 2003.

³³ This resulted in a period of a week long closure for the court.

³⁴ The mediation clerk left in the summer of 2004 and was not directly replaced at this time. This lack of specific administrative support meant that the process was delayed as cases were not assigned to the mediation rota at this time and therefore although the parties were prepared for mediation the dates of the sessions were not being arranged.

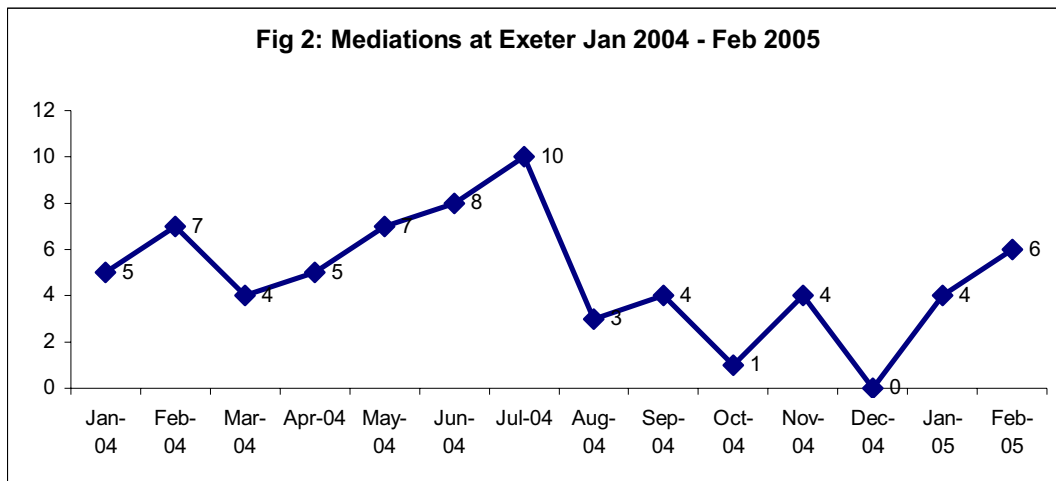


Figure 2, above, shows the steady rise in mediations once the scheme began to become established. At its peak, during the July 2004 there were 10 mediations at the court. The numbers dropped off during the late summer and autumn but began to rise again in early 2005 and at the end of the research period in February 2005 there were 9 mediations pending awaiting dates to be assigned to them.

3.1.3 Mediation procedure

The procedure for a mediation at Exeter County Court is as follows:

All cases:

- 1) Issue of Claim and Defence filed;
- 2) Allocation Questionnaire sent to all parties along with a mediation brochure (Med 1) and a mediation reply form (Med 2) on which the parties should state whether they are agreeable to mediation;
- 3) Referred to District Judge for allocation.

Allocation Stage:

- 4) The DJ has the following options at this point:
 - a) case not suitable for mediation so normal case management directions to be given;
 - b) both parties agree on the Med 2 to take part in the court mediation scheme so a stay for mediation is granted;
 - c) stay to be granted to parties to try to resolve the issue themselves;
 - d) if one or both of the parties do not agree to mediation and the judge still thinks the case is suitable an allocation hearing (by telephone or in person) can be ordered. If mediation is agreed a stay is granted.

Post-referral to mediation:

- 5) If the case is referred to mediation the parties are each sent an agreement to mediate form (Med 9) to sign and are required to pay fees in advance of the mediation. They are also required to supply a statement of issues for the mediator.
- 6) The parties are then notified of the date of the mediation on a Med 5,³⁵ and the rota mediation provider is notified on a Med 6.³⁶
- 7) The mediation appointment then takes place at the court and the mediator is required to record the outcome on a report (Med 7) which the mediator and the parties must sign.
- 8) The fee for the mediation is then sent to the provider (Med 8).

The relevant court forms for the mediation process are provided in Table 9 below:

Document	Title	Function
Med 1	Invitation to Mediate	General information about the mediation process
Med 2	Mediation Reply Form	This form needs to be returned to the court by both parties stating whether or not they wish to mediate.
Med 3 /4/5	Form completed by DJ giving mediation directions	Directs that parties are to complete Med2 or Med9 or fee not paid, etc.
Med 6	Rota ADR provider notified	Provider selected from rota and notified about date of mediation.
Med 7	Mediation report form	This is the report stating the result of the mediation process: signed by all of the parties at the end of the mediation.
Med 9	Agreement for mediation form	Agreement signed by both parties to say they agree to participate in mediation

³⁵ Steps 6, 7 and 8 were relevant before the changes made in February 2005 (see below for further details).

³⁶ When the scheme originated the mediator was allowed access to the court file on the day of the mediation but that facility was later removed when there were doubts about security.

3.1.4 Transferred cases

Some cases are transferred into Exeter from other courts for a variety of reasons. The main reason for the transfer is likely to be that the defendant is based close to Exeter court. At the point of transfer the parties are sent a Med 2 and invited to mediate. Alternatively, the district judge, at a case management conference, or a directions hearing subsequent to the transfer, may suggest the use of mediation.

Occasionally cases have been transferred to Exeter especially for mediation. This tends to be from other courts on the Western Circuit on the basis that a judge has recommended mediation to the parties and then suggested that they make use of the mediation scheme at Exeter. Conversely, it may be that the parties (or more usually their representatives) have heard about the scheme and have asked to be transferred to Exeter for mediation. Therefore the cases that have been analysed in particular are those which are transferred specifically for mediation.³⁷

3.1.5 Role of mediation clerk

The role of the mediation clerk at Exeter has changed since the scheme was introduced. The clerk is now expected to take a more minimal role than was originally envisaged. The clerk now refers the organisation of the mediation to the mediation provider rather than organising it herself so the main co-ordination role is now with the provider rather than the parties or the legal representatives. This is because the organisation of the scheme was difficult when the arrangements for the mediation were not straight-forward such as cancellations or delays which require extra time in re-organising dates or extending stays.

The difficulty with the mediation scheme is that it involves the mediation clerk in 'peaks and troughs' of work rather than a consistent and planned workload. This is because, for example, a mediation might be delayed or cancelled which requires telephone calls and the mediation clerk may also be fielding long and involved calls from parties asking questions about the mediation process. For this reason it is difficult to say how much time an individual mediation might take up outside the time allowed under the BMS.

³⁷ See Table 30, page 86.

Any order or correspondence that mentions mediation gets passed to the mediation clerk even a request to send out forms. In the past she also had to chase up mediation fees as, until they have been received, a provider could not be instructed.³⁸ When a case is transferred in for mediation they are referred directly to the District Judge for allocation and the mediation clerk then creates an order for a stay. The mediation clerk also maintains a database record of all the cases that are referred to mediation and the outcome of the mediation session.³⁹

The main difficulty is that in order for work to be BMS accredited slower administrative processes are used – such as having to create an additional word file to be able to inform the parties as to who the mediation provider should be.

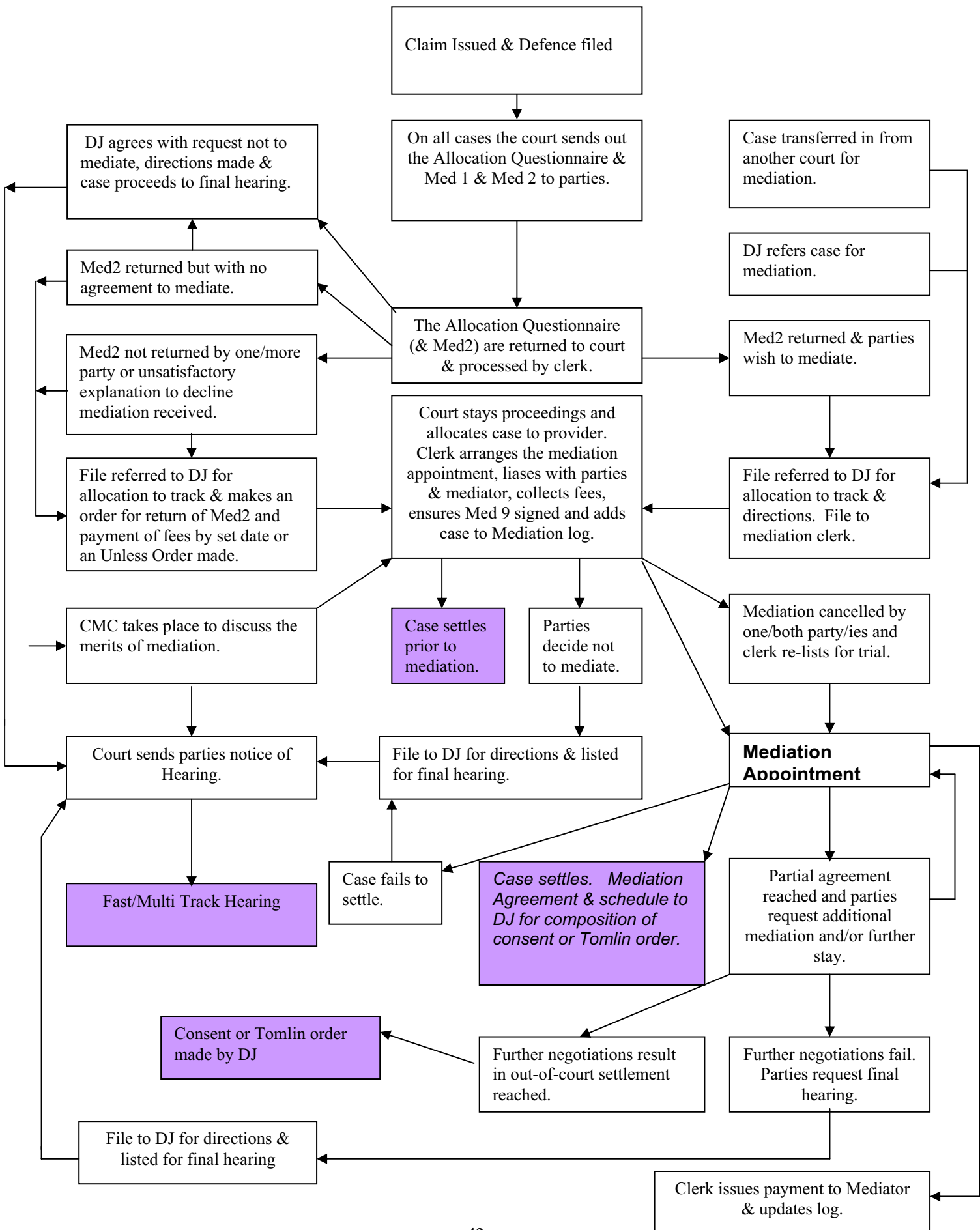
Many of these tasks will be removed by a new system to be introduced in February 2005 which places more emphasis on the mediation provider organising the date of the mediation as well as requiring judicial consent in order to change the date of the mediation once it has been set.

A flow chart showing the administrative and judicial input into the process of the original mediation scheme is provided overleaf.

³⁸ In the last few months this system has changed as now the provider is instructed at much earlier point.

³⁹ This data was used as a reference point by the research team but contained a number of inconsistencies and so it did not form an official part of the research project.

Table 10: Exeter fast & multi track mediation flow chart (pre- 1st February 05)



In early 2005, it was decided at a meeting of the Mediation Steering Group that the administration of the mediation scheme was no longer appropriate given the lack of time that the mediation clerk was able to devote to the task and the number of parties who were cancelling mediations, etc which made for greater administration. A less onerous administrative scheme was agreed which placed the burden for organising the mediation onto the mediation provider. The mediation clerk was to telephone the relevant provider and ask them to contact the parties, arrange the payment of the fees and to let the court know the date of the mediation that had been agreed. The aim is to speed up the time between the referred to mediation and the date that the mediation takes place. The current mediation clerk is the second person to have held that post. She has not attended a mediation herself.

The new administrative structure looks like the one on the flow-chart over the page:

The administrative timing for the tasks in the mediation process described above are as follows:

Table 12: BMS Data for Exeter FT/MT mediation scheme⁴⁰			
Action / task description	Event code	BMS code	Time
Issue of claim		IS1	8.66
Defence filed: Part 7 claim for £5001 or more (& log onto caseman)		JH24	5.55
If there is a counterclaim: defence and c/c filed		JH58	5.68
Send out AQ with Med Info Sheet/ Med brochure and Med 2 (all included in uplift)	53	JH77	14.60
On return of AQ log into Caseman and account for fee in Book G	54	JH59	4.56
Log Med 2 into Caseman – Med accepted or refused	120/130	LS8	3.37
If DJ orders parties to reply to Med2 (eg case transferred in from elsewhere):			
Code 332 Order (with standard paras)	332	JH12	8.54
Send parties info about Med scheme	(included in uplift for above)		
Create obligation for Med 2 return date	(included in uplift above)		
Log on Med2 reply	120/130	LS8	3.37
Referred to mediation:			
Referred to mediation (FT) / Stayed for mediation	218	JH61	28.33
Referred to mediation (MT)/ Stayed for mediation	220	JH62	26.73
Order for stay – monitor obligations	103	JH67/68	8.17 / 7.54
General order with mediation directions & Med9 & details of mediation provider	332	JH12	8.54
Complete new entry in Mediation Log on Excel	(included in uplift for above)		
Select mediator & send letter to mediation provider – copies of 332 orders, Med 7 Med report	100 (and uplift from above)	JH55	3.37
If necessary to send a Proper Officer Order	332	JH12	8.54
When mediator has agreed date and received fees, etc do 332 order with Med5LET insert	332	JH12	8.54
Update Excel spreadsheet with mediation date	(included in uplift from JH12)		
To set Med date on Caseman	202	JH11	5.59
Update Window for trial screen	(included in JH67 uplift)		
After mediation:			
Complete mediation log with details of outcome	(included in uplift)		
Update WFT screen if appropriate	(included in uplift)		

⁴⁰ Data compiled with assistance from the Office Manager and Mediation Clerk, Exeter County Court, February 2005.

3.1.6 Administrative input

Table 12 above gives the timings for the various administrative tasks associated with mediation. As can be seen many of the tasks can utilise existing BMS codings and all of the additional tasks can be absorbed by the uplift included in some of the major tasks. The additional timing is added to the administration where the parties cancel mediations or delay payment but under the new administrative scheme at Exeter the intention is that much of this work will now be conducted by the mediation provider.

3.1.7 Judicial input

The timings given by the district judges at Exeter for tasks associated with mediation are provided below:

Table 13: Exeter DJ task description	Timings⁴¹
Refer to mediation when both parties wish to mediate	2 mins
Making Unless Order for return of Med 2 or when fees not paid	1 min
Telephone conference with parties to discuss mediation if fees not paid or Med 2 not returned, etc	11 mins
If transferred in from elsewhere judicial decision as to whether to refer	2 mins
Usual time allocated to telephone case management conference to discuss mediation, where appropriate ⁴²	20 mins
After mediation file back to DJ for consideration of schedule to consent order if settled	6 mins
After mediation file back to DJ for directions if not settled	6 mins

It may be that a case goes back before a District Judge 2 – 3 times before it is referred to mediation. This may not purely be linked to the mediation but the parties may suggest that the case is not yet ready for mediation, or there may be other issues needing discussion on the file not directly related to whether or not the case should go to mediation.

The actual point of referral is considered to be the point at which the judge orders a stay for mediation. This applies regardless of the route taken to get to mediation, ie

⁴¹ These are an average of the times given by two of the District Judges at Exeter County Court.

⁴² Taken from time estimates provided in case files at Exeter County Court. If the case is scheduled for a telephone case management conference to discuss the possibility of mediation this may be one amongst a number of issues raised at the same case management conference so it may not be possible to distinguish this as time completely set aside for mediation.

whether the parties volunteered or whether the judge suggested mediation to the parties.

Observations of the District Judge at work show that they may raise the issue of mediation at directions hearings on a variety of cases. Those cases which might usually not be considered suitable for mediation are those which raise the following issues:

- public law or human rights;
- legal precedent;
- vexatious litigants.

Over the course of a morning observation of a District Judge at Exeter the issue of mediation was raised regularly with parties who attended whether in person or during telephone case management directions hearings. Whilst none of these hearings was specifically organised to discuss mediation the table below shows that the subject of mediation was raised when the District Judge thought that it might be a useful option for the parties.

Table 14: Observation of directions hearings at Exeter			
Case No	Type of hearing	Mediation scheme raised	Response of parties
1	Telephone CMC	Yes	Lawyers say no as the case will almost certainly settle anyway
2	CMC	Yes	Insurer agrees it might be useful
3	Telephone CMC	Yes	Parties have already arranged to meet to discuss issues together so in effect a mediation
4	Telephone CMC	No – case seemed about to settle	
5	Telephone CMC	No – discussion based on expert witnesses	
6	CMC	Yes	Not opposed to mediation in principle but not appropriate at this stage
7	Telephone CMC	No – issues of causation in dispute	

3.2 The organisation of the mediation scheme – Guildford

Between the launch of the mediation scheme in April 2003 and the end of this research at the end of February 2005 there have been 300 fast track cases and 241 multi track cases, which originated in Guildford.⁴³ It should also be taken into account that as Guildford is also part of the Surrey Group district judges tend to move around all of the courts in the area and can refer cases to mediation from other courts in the Group. When the scheme originated it was common for judges at other courts in the Surrey Group to refer cases to Guildford for mediation. This practice seems to have declined since new judges have taken up posts in the Group and are less aware of the mediation scheme.⁴⁴ Invitation to mediate forms, however, are only sent to defended claims emanating from Guildford County Court.

Since the inception of the mediation scheme in April 2003 there has been a marked decrease in the number of mediations:

From April 2003 until the end of February 2005, 59 cases have been referred to mediation.

- Of these 5 cases were still awaiting mediation appointments at the end of the research period;⁴⁵
- 5 of these cases have either settled prior to mediation taking place or cancelled their mediation appointment;
- The remaining 49 cases have mediated at Guildford County Court.

The diagram below shows that the number of mediations has dropped substantially in recent months and have not maintained the levels achieved during the first year of the scheme. One reason given for this reduction is that the judge who instigated the mediation scheme at Guildford has now moved away from the court and new judges are not familiar with the mediation scheme and are therefore not as robust at encouraging mediation as was perhaps the case in the past. Additionally,

⁴³ Information from Guildford County Court.

⁴⁴ Please refer to the section on judicial interviews at section 12 of this report for further information on judicial knowledge of the scheme in the Surrey Group.

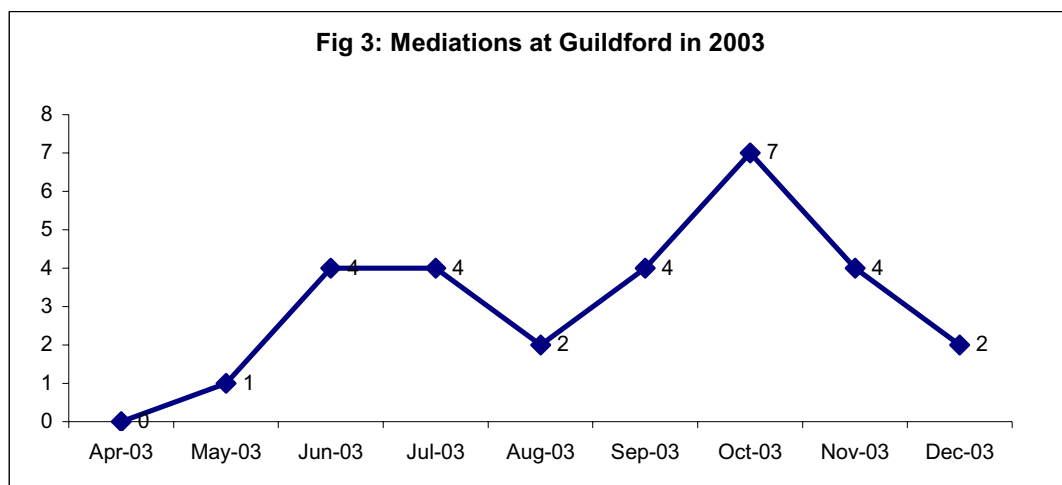
⁴⁵ These 5 cases have not been included in the research project.

building work at the court since December 2004 has affected the number of cases referred to mediation and the actual mediation sessions over the last couple of months of the project.⁴⁶

Year	Total number of mediations	Average number of mediations per month
Apr-Dec 2003	28	3.1
Jan-Dec 2004	19	1.6
Jan-Feb 2005	2	1

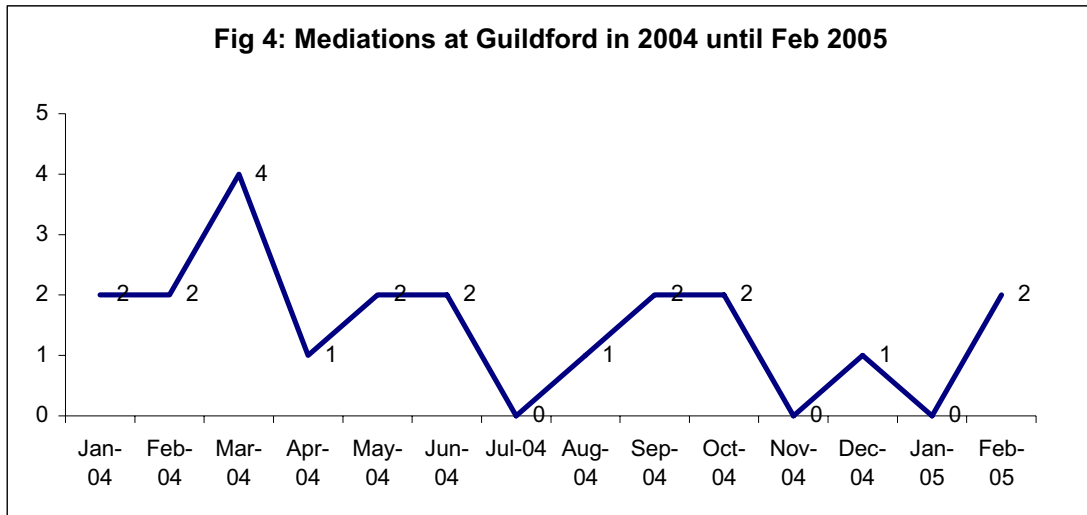
These figures show that the mediation scheme started very strongly with a mediation taking place almost once a week on average over the first year and dropping significantly after this point.

The graph below further illustrates that the number of mediations peaked at 7 in October 2003 then decline from this point dropping to a maximum of two per month from the Spring of 2004 until the end of the research period.

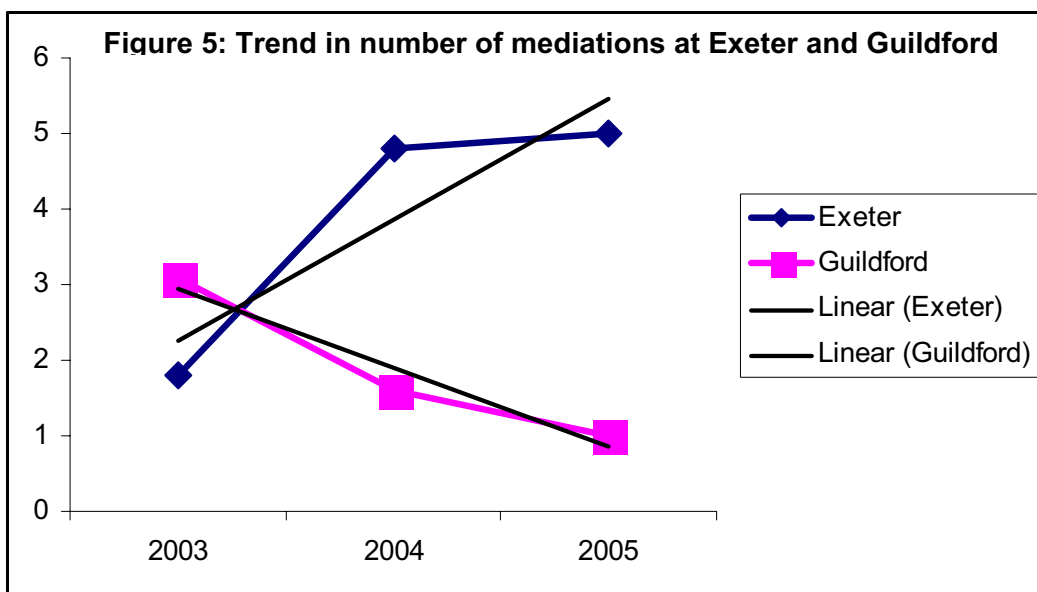


⁴⁶ Limited facilities have led to a delay in dates being scheduled for mediation sessions.

Figure 4 shows that the numbers of mediation sessions declines regularly from April 2004 onwards. By this time the District Judge who began the scheme had left Guildford as well as the original mediation clerk and so there was a gap in knowledge and understanding about the mediation scheme at the court.



There is a noticeable difference in the pattern of the development of the mediation schemes at Exeter and Guildford. At Exeter the trend over the time of the research was for the number of mediations to increase significantly whilst at Guildford the trend showed the number of mediations to decrease significantly. This is demonstrated clearly in Figure 5, below.



3.2.1 Mediation procedure - Guildford

The documentation for the mediation scheme at Guildford is very similar to Exeter. The procedure is as follows:

All cases:

- 1) Issue of Claim and Defence filed;
- 2) Allocation Questionnaire sent to all parties along with a mediation brochure and a mediation reply form (Med 2) on which the parties should state whether they are agreeable to mediation.

Allocation stage:

- 3) District Judge will stay the case for mediation or give directions for an allocation hearing. The DJ will only tend to stay for mediation those cases where both parties have returned the Med 2 stating that they wish to mediate. So the options would be as follows:
 - a) case not suitable for mediation so normal case management directions to be given;
 - b) both parties agree on the Med 2 to take part in the court mediation scheme so a stay for mediation is granted;
 - c) stay to be granted to parties to try to resolve the issue for themselves;
 - d) the mediation clerk may contact one party if the other one agrees to mediation – this is not usually a job for the District Judge.⁴⁷ If mediation is then agreed a stay is granted by the District Judge.

Post-referral to mediation:

- 4) If the case is referred to mediation the parties are each sent a mediation agreement (Med 9) and are required to pay fees in advance of the mediation. They are also required to supply a statement of issues for the mediator.

⁴⁷ The mediation clerk at Guildford is much more active in this respect than the mediation clerk at Exeter.

- 5) The parties are then notified of the date of the mediation on a Med 5 and the rota mediation provider is notified on a Med 6.
- 6) The mediation appointment then takes place at the court and the mediator is required to record the outcome on a report (Med 7) which the mediator and the parties must sign.
- 7) The fee for the mediation is then sent to the provider (Med 8).

The forms are the same in kind as those in use at Exeter.⁴⁸

3.2.2 Role of mediation clerk

The mediation clerk at Guildford is more closely involved than at Exeter in encouraging parties to mediate where one party agrees to do so on the Med2 and the other says no or does not return the Med 2.⁴⁹ The phone call to the parties is seen as a job for the mediation clerk at Guildford rather than being part of the case management role of the District Judge which is the case at Exeter.

The most likely route to mediation at Guildford is the parties indicating on the allocation questionnaire that they want to try mediation. At this point the case is stayed until the mediation is finished. When the scheme was first established it was more likely that judges would be referring cases themselves but this has been more infrequent recently.

At present the mediation clerk spends about half a day a week on the mediation scheme. The mediation clerk estimates that it takes 3 – 4 hours preparing the files, liaising with the parties, and after the mediation drawing up the Tomlin order and paying the mediator.

⁴⁸ See Table 9 on page 39 for further details.

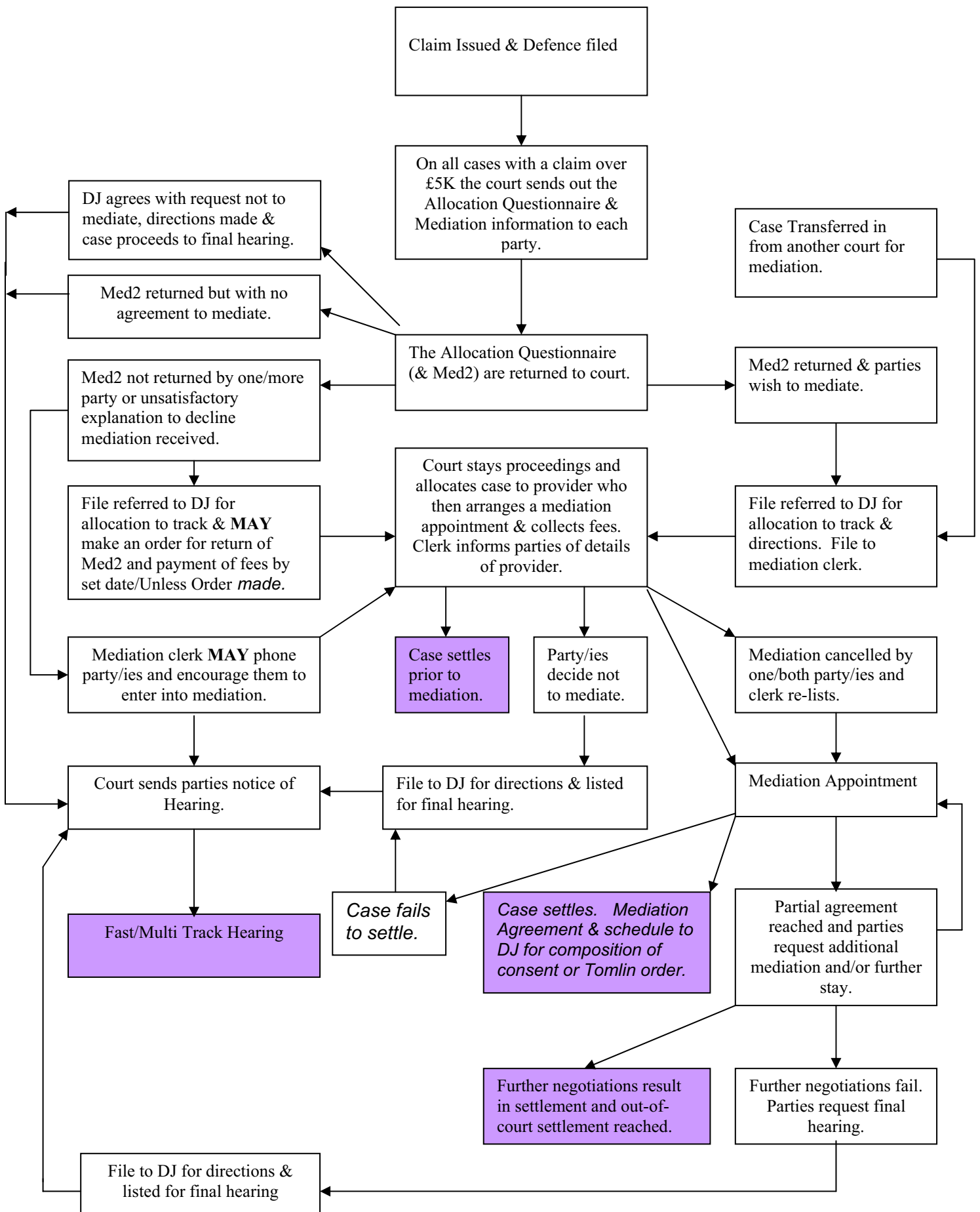
⁴⁹ There is a qualitatively different aspect to the job of the mediation clerk at Exeter and Guildford. At Exeter the clerk spends more time on processing the mediations whereas at Guildford the mediation clerk spends more time on actively promoting mediation to parties where one has already agreed to do so.

At Guildford the current mediation clerk is the second person to have been in that post since the start of the scheme. The mediation clerk has not attended a mediation as yet and is keen to do so in the future.

The lack of judicial input into the scheme represents a significant difference between the Exeter and Guildford schemes.

A flow-chart outlining the judicial and administrative mediation processes involved demonstrates this difference overleaf.

Table 16: Guildford fast & multi track mediation flow chart



3.2.3 Judicial time

The timings given by the district judges at Guildford for tasks associated with mediation are provided below:

Table 17: Guildford DJ task description	Time taken on task
Refer to mediation when both parties wish to mediate	1 min
Making Unless Order for return of Med 2 or when fees not paid	2 mins
Telephone conference with parties to discuss mediation if fees not paid or Med 2 not returned, etc	Never done
If transferred in from elsewhere - judicial decision as to whether to refer to mediation	Would only refer if both sides agree, see 1 above
After mediation file back to DJ for consideration of schedule to consent order if settled	7 mins
After mediation file back to DJ for directions if not settled	Depends on case, often would list for CMC, so 5 mins to consider listing.
Explaining scheme to potential users	5 mins
Times a case goes back to a DJ before referred to mediation	Any number

The task description above shows that the approach of the district judges at Guildford is different to that taken at Exeter. Although as with Exeter the judge may ask the parties to consider the use of mediation there will not be a specially convened case management conference to discuss the possibility of mediation if one or both parties disagree with taking part. If one party agreed to mediation and the other party did not the mediation clerk may telephone the dissenting party to see if they could be persuaded to mediate but this is not a role taken by the district judge. For this reason we have not included observations of the judiciary at Guildford as most of the tasks associated with mediation are administrative and therefore not discernible through observation.

3.3 BMS data summary

Once the relevant data was compiled into a spreadsheet format it was possible to calculate the average administrative time expended and cost of a mediated case, along side the average amount of judicial referrals. The analysis will be broken down into the judicial and administrative cost respectively.

3.3.1 Judicial input

It seems to be the case that the amount of judicial input in the sample cases was broadly similar at Exeter and Guildford courts.⁵⁰ It seems that mediation only has a small impact on District Judge referrals – the average number of referrals to the District Judge per case is the comparable even though judges at each court have different approaches. In fact the average shows that judges spend less time referring to cases in Exeter than they do at Guildford.

Table 18: Average referrals per case	Exeter	Guildford
Average referrals to DJ per case	2.77	2.81
Average referrals to CJ per case	0.07	0.06

3.3.2 Administrative time

However, the analysis of the administrative cost of a case required a more sophisticated approach as wider differences emerged between Exeter and Guildford. In order to calculate the administrative cost for each case the researchers applied the formula provided by the DCA that equated one minute of administrative work to a cost of £0.1906666 to the court service (or £11.44 per hour). The calculations were undertaken in minutes so as to achieve best fit with the BMS coding.

This data shows that the cost of a mediated case at Exeter is administratively more time consuming and therefore more expensive than at Guildford.

Table 19: Administrative time per case	Exeter	Guildford
Administrative time per case in minutes (median)	260.25	199.61
Administrative cost per case in £ (median)	49.61	38.05

⁵⁰ NB These referrals are not necessarily associated with mediation but may be associated with the case for other reasons.

Yet these figures alone provide only a crude account and there are a number of other factors that serve to further clarify and explain why this may be the case. Firstly, an influence on the administrative cost of cases referred to mediation at Guildford may be the fact that a proportion of the cases are of low claim value. Some 12.96% (or 7 of the 54) are actually in the small claim track, with an additional large proportion of fast track cases having a sum in dispute at the lower end of the scale. These smaller, often less complex cases, may require less filing of documentation and less contact with the parties to their claim, who in turn are less likely to be represented.

Secondly, looking across the duration of the research at cases referred in Exeter it soon becomes apparent that over the period of the research the administrative time expended has decreased. This could be explained by reference to both practical and procedural reasons. For example, a significant proportion of cases referred to mediation in the initial period of the scheme at Exeter were both long standing and complex, so these were, therefore, already costly cases. Once the scheme became an intrinsic part of due process the potential arose for cases to be referred at an earlier stage in the litigation process and therefore at a lesser administrative cost. Potentially, greater experience of the scheme may have also led to an improved competency of administrative and judicial staff over time, coupled with the on-going refinement of procedure.

Thirdly, and finally, a median figure has been used rather than an average to illustrate the differences at the request of the Department of Constitutional Affairs as they suggested that this might be less prone to being skewed by the odd large case. This is because the data was significantly affected by two extremely large cases referred to mediation at Exeter.

4. Cases referred to mediation and outcome

The proportions of fast-track to multi-track cases at both Exeter and Guildford are broadly the same in that the total number of multi-track cases represents 80% of the overall total of fast-track cases at both courts.⁵¹ At both courts the percentage of cases referred to mediation over the period of the research was also broadly similar:

- 135 out of a total number of 1142 at Exeter = 11.8%, and
- 59 out of a total of 541 at Guildford = 10.9%.

4.1 Cases referred and outcome: Exeter

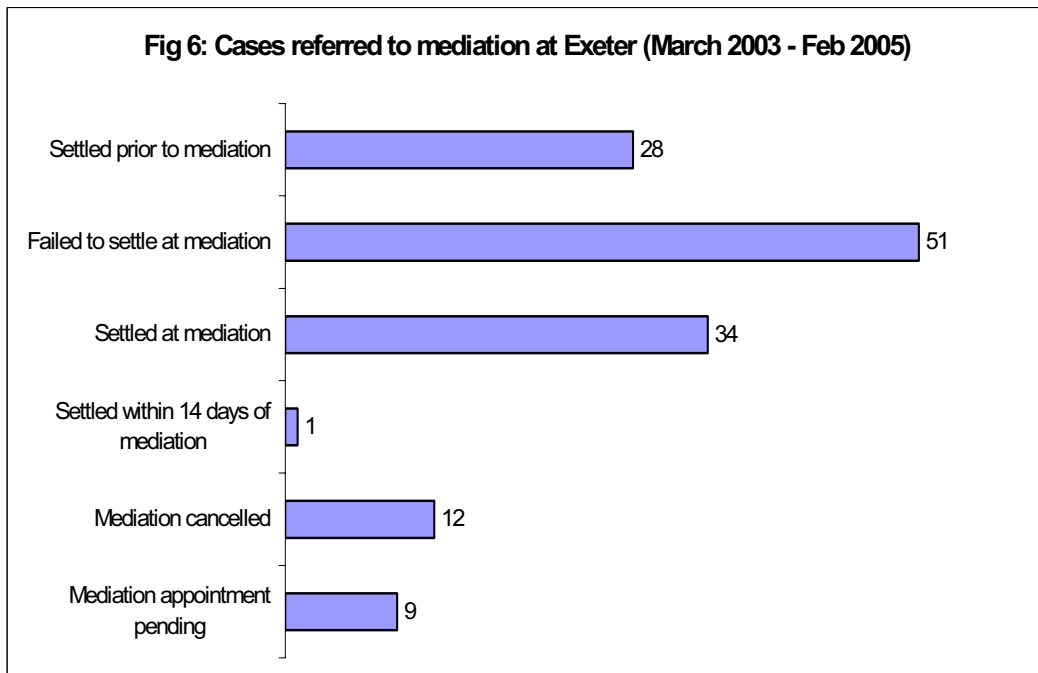
There have been a total of 135 cases referred to mediation on the Exeter Mediation Scheme from its launch in March 2003 until the end of February 2005. Many of these failed to reach a mediation appointment, either because the parties reached an agreement before the date of the mediation or because the mediation was cancelled.

<u>Basic case data</u>	
<i>Cases referred to mediation during the research period:</i>	135
<i>Cases included in research data:⁵²</i>	
126	
<i>Number of cases in which the parties attended a mediation session during the period of the research:</i>	86
<i>Number of cases with no mediation date assigned at the end of the research period</i>	9

The outcome of those cases which were referred to mediation during this period is provided in Figure 6 below.

⁵¹ See figures quoted on page 35 (Exeter) and page 48 (Guildford).

⁵² This is the total number of cases minus those which have not yet received a mediation appointment.

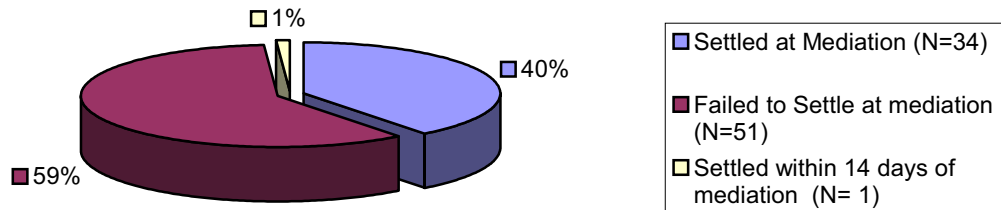


Of the cases in the table above, 86 have mediated. An additional 40 cases did not reach a mediation appointment, either because the case settled before the mediation appointment date, or because the mediation was cancelled (see below for further information on these cases). There were another 9 cases outstanding at the end of the research period still awaiting a date for mediation.

4.1.1 Mediation appointments at Exeter

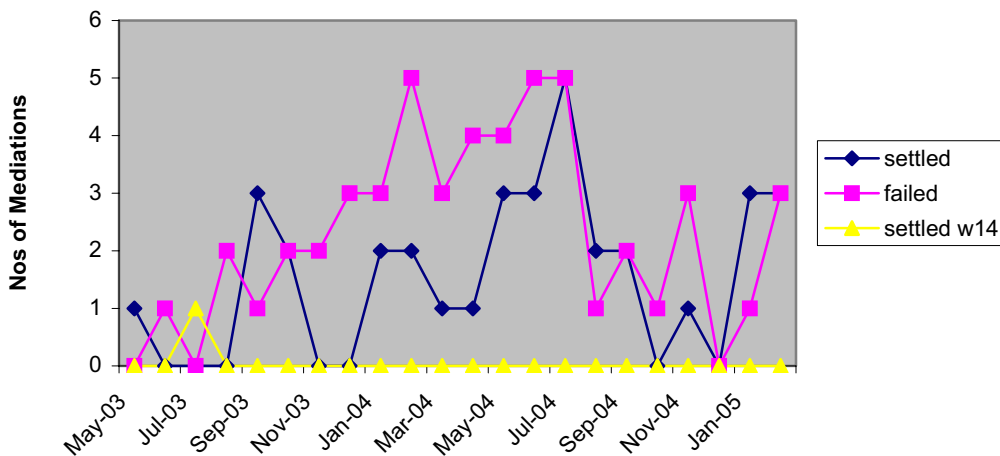
This section looks specifically at rates of settlement of those cases where the parties attended a mediation appointment. Figure 7, below, shows that, of the 86 cases which were referred to mediation, 40% settled at the mediation appointment. If those cases which settled within days of the mediation are also included the total settlement rate rises to 41%. A breakdown of those cases which failed to settle at mediation is included in section 4.5 below.

Fig 7: Outcome of Mediation Appointments at Exeter County Court (Mar 2003 - Feb 2005)

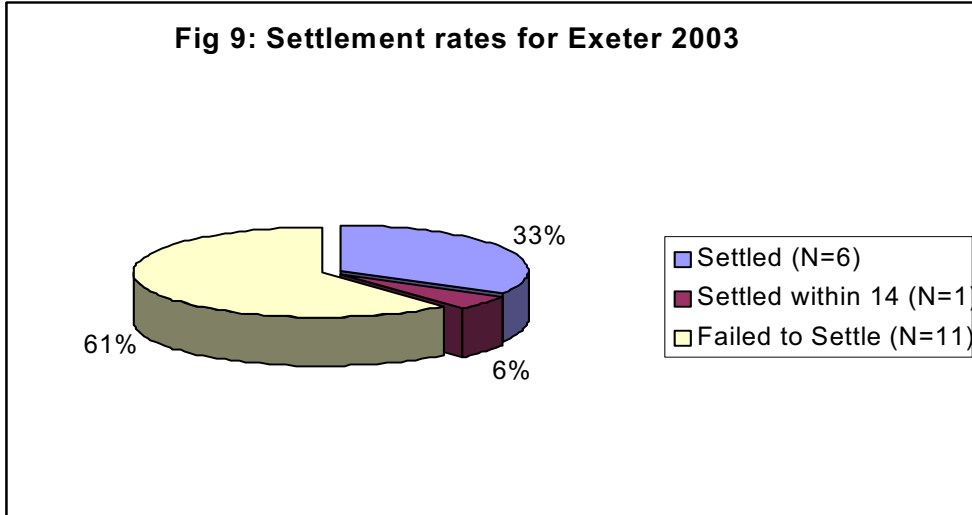


The rate of settlement at mediation appointments has been consistently lower than failures to settle over the duration of the period of the study. There are only 7 months during the whole 24 month period of the study when the number of settlements at, or within 14 days following a mediation appointment, either equals or exceeds the number of failures to settle. This is demonstrated more clearly by the line graph in Figure 8 below.

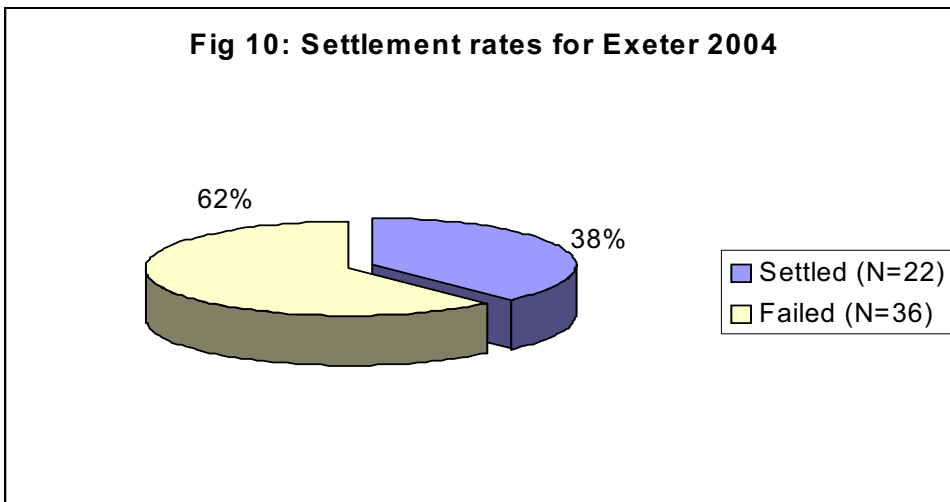
Fig 8: Outcome of Mediation appointments at Exeter (Mar 03 - Feb 05)



The rate of settlement at Exeter has stayed fairly static at Exeter since the start of the scheme. The settlement rate was 33% during 2003, the first year of the scheme although there has been a marked increase in the number of cases.⁵³



In 2004, there were significantly more mediations: 58 compared to 18 the year before. Yet the rate of settlement was still just over a third of all cases which mediated.



Although the research for this report ended in February 2005 and there had only been 10 cases between Jan - Feb the indications of an increased rate of settlement are good. The settlement rate for these mediations is 60% - although it must be

⁵³ Not including one case which settled within 14 days of the mediation.

borne in mind that this two month period can only be a hint of a possible trend rather than a definitive increase in the settlement rate.

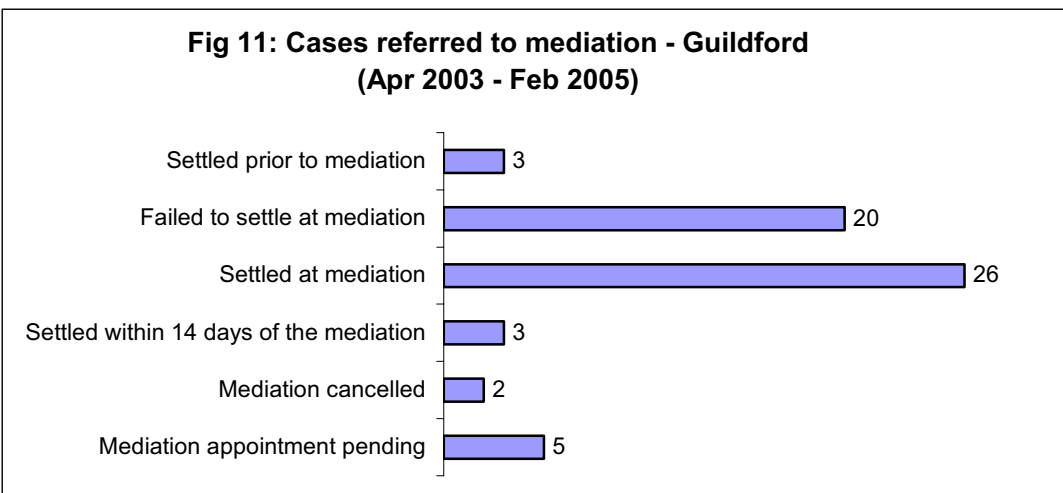
Although the scheme at Exeter has only been in existence for 2 years the indications seem to be that the numbers of settlements are staying static or increasing over time.

4.2 Cases referred and mediated: Guildford

There have been a total of 59 cases referred to mediation on the Guildford Mediation Scheme from its launch in April 2003 until the end of February 2005. Most of these reached a mediation appointment and very few mediations were either cancelled or settled prior to the date of the mediation.

<u>Basic case data</u>	
<i>Cases referred to mediation during the research period:</i>	59
<i>Cases included in research data:⁵⁴</i>	54
<i>Number of cases in which the parties attended a mediation session during the research period:</i>	49
<i>Number of cases with no mediation date assigned at the end of the research period</i>	5

The outcome of cases referred to mediation during this period is given in Figure 11 below.



⁵⁴ This is the total number of cases minus those which have not yet received a mediation appointment.

Of the cases in Figure 11 above, 49 have mediated and 10 did not reach a mediation appointment either because the case settled before the appointment date or because the mediation was cancelled. An additional 5 cases were outstanding at the end of the research period and were awaiting a mediation appointment.

4.2.2 Mediation appointments at Guildford

Fig 12, below, shows that 53% of mediations conducted through the Guildford mediation scheme settled at the mediation. If those which settled within 14 days of the mediation are also included as settled the total settlement rate rises to 59%.

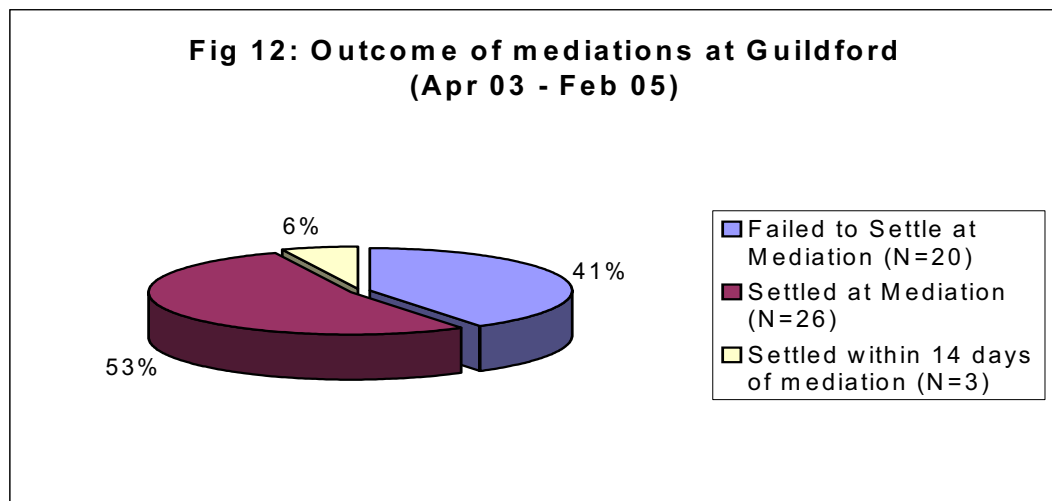
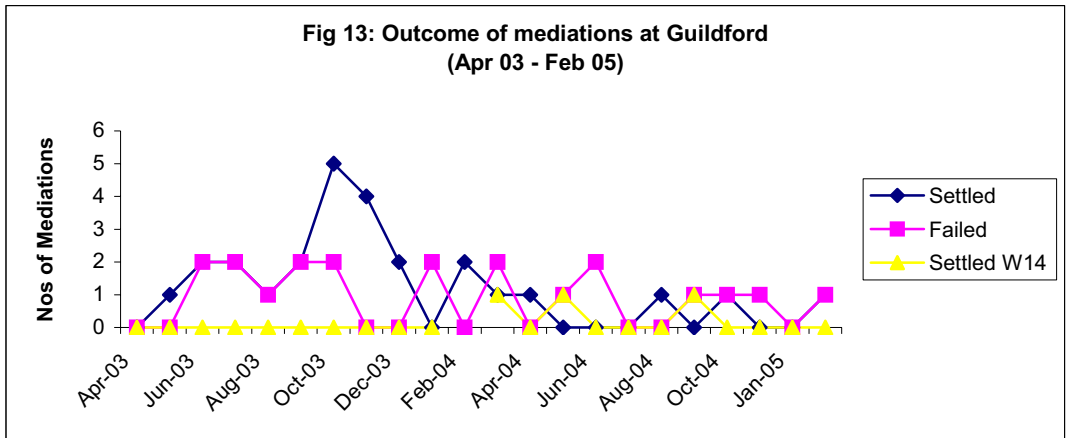
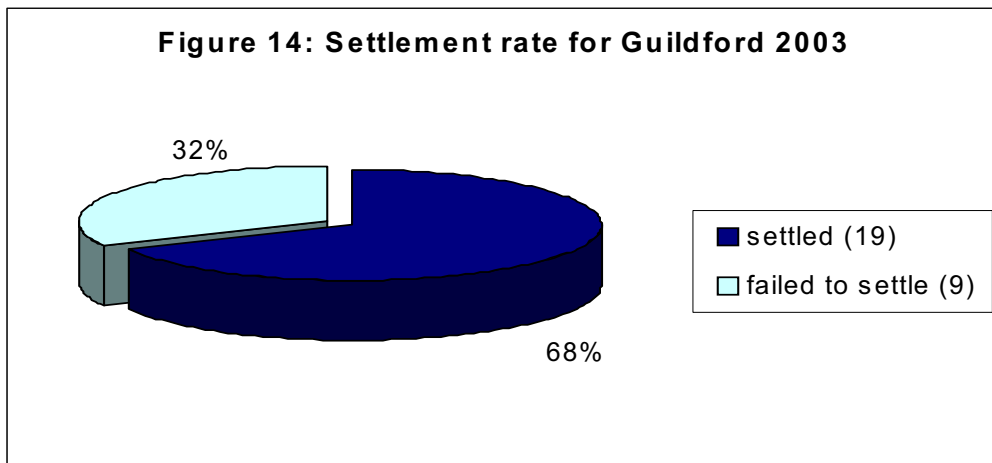


Fig 13 indicates that the rate of settlement increases during the first year of the scheme and then begins to drop as the scheme continues. The last few months have seen a large decrease in the number of settled mediations compared to those which failed to settle. It also shows clearly how few mediations have taken place over the last few months.



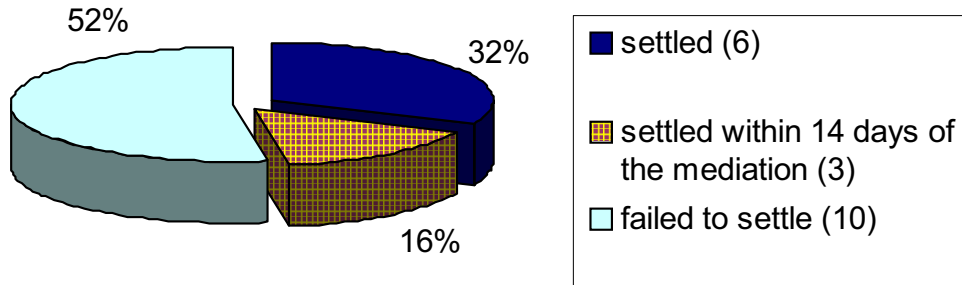
The rate of settlement at Guildford has slowly decreased since the launch of the scheme as is demonstrated in Figure 14 below.



As can be seen from Figure 14 above, the settlement rate was 68% during the first year of the scheme.⁵⁵

⁵⁵ Including one case which settled within 14 days of the mediation.

Figure 15: Settlement rates for Guildford 2004



The settlement rate decreased to 32% during 2004 – less than half as many cases settling over this period than had settled in the previous year.⁵⁶ There were only two mediations during 2005 and of these, one case settled and one case failed to settle.

4.3 Comparison between Exeter and Guildford schemes: number of settlements

Both Exeter and Guildford mediation schemes were launched in the spring of 2003 within one month of each other. Although the Exeter scheme was launched first considerably more mediations took place at Guildford during that first year 28 compared to 18 at Exeter. However since the end of 2003 the number of mediations taking place at Guildford has declined markedly.

However, at Guildford the overall settlement rate is higher than Exeter. It is 53% at Guildford compared to 40% at Exeter – comparing the outcomes of mediations which settle at the mediation appointment.

⁵⁶ This includes cases which settled within two weeks of the mediation.

Yet as with the number of mediations taking place the number of settlements has declined markedly since the launch of the scheme. The settlement rate over the first months of the scheme was at 70% but has decreased since that time. At Exeter the settlement rate has stayed static at between 33% - 40%.

The lack of cases being referred to mediation at Guildford is linked to changes in the judiciary at that court. It does seem that the enthusiasm for mediation shown by the judiciary at Guildford in the early days of the scheme can be linked to the high settlement rate. There does not seem to be such a connection at Exeter where the judiciary remain enthusiastic about mediation but the settlement rate remains fairly static.

4.4 Cases which settled prior to mediation and cancelled cases

This analysis is really only relevant to mediation cases at Exeter as it was at this court that there were a significant number of cases which fell into this category. At Guildford only 3 cases settled prior to the mediation and 2 cases were cancelled.

4.4.1 Settlement prior to the mediation appointment at Exeter

There were 28 cases which settled prior to the date of the mediation or, in some cases, prior to the mediation appointment being made by the mediation clerk. Solicitors for parties in each of these cases were contacted to try to determine whether the fact that a mediation appointment was arranged or was being arranged was an important factor, or indeed a factor at all, in the early settlement.

Replies were received in relation to 11 cases. Of these, 5 said that the mediation appointment had no bearing on the reason for early settlement. The reasons given for prior settlement were as follows:

- One case involved a marital dispute. The parties had subsequently reconciled and therefore dropped the case;
- One case had been to a small claims mediation and had then settled in advance of being scheduled for a further fast-track mediation;
- One party did not have the funds to pay her half of the mediation fee. The claimant then dropped the claim due to difficulties faced ‘...in even arranging mediation’;
- In two cases the parties settled irrespective of mediation and in fact the parties had objected to the mediation.

There were 5 cases where representatives said that mediation had had an influence on the early settlement. In one of those cases no reason was given. The other reasons provided were:

- In one case the parties knew that if they could settle the case themselves they would not face the costs of the mediation;
- In two cases the mediation ‘...concentrated their minds.’;

- In one case the fact that the parties were going to have to talk to each other at the mediation forced one to make a direct approach to the other side which resulted in settlement.

"The impending mediation was certainly influential because it forced the parties to evaluate their claims and litigation risks at an early stage rather than allow the claim to drift on to trial where both sides having incurred more costs would have found the recovery of costs makes settlement less attractive than trial. I think the Claimant having to travel to the defendants home court for the mediation also encouraged them to be more realistic."

Solicitor, Exeter, May 2005

There was no consensus between the respondents as to whether the impending mediation had been influential although there is evidence that in some cases it was a factor. The amount of influence appears to depend on the nature of the parties and their attitude towards the claim. There is some indication that the impending mediation concentrates the minds of those who are about to take part.

4.4.2 Cancellation of the Mediation Appointment

There were 12 cases at Exeter in which the mediation appointment was cancelled. The definition of a cancelled case is taken to be a case in which the case is referred to mediation and then for some reason the mediation does not take place.

The reasons for the cancellations were as follows:

- 2 cases involved a vexatious litigant who was intent on pursuing the case to trial so the mediation appointment was cancelled;
- Three cases involved one party who did not wish to mediate and so the stay for mediation was lifted;
- Three cases involved one party who refused to pay the mediation fee so the mediation was cancelled;
- One mediation was cancelled as the claimant was unwell;
- One mediation was cancelled due to on-going last minute negotiations;
- One defendant did not turn up to the mediation;

- One claimant refused to mediate unless she was accompanied by her son to which the defendants objected.

There is no obvious pattern to be discerned in the eventual outcome of these cases. Of all of them, 4 are still on-going at the end of February and the rest have now been resolved. Only one of these cases actually went to trial where the result was to find for the claimant and remaining case was struck out.⁵⁷

"To me [the decision to cancel the mediation] showed a deficiency in the whole system support of alternative dispute resolution. It was a case I was particularly keen to take to mediation because apart from the legal claim mediation had a real chance of achieving some emotional healing and closure for my client. Both [parties] were prepared to attend mediation, but [the defendant] said she did not have the funds to pay her half of the mediation fee and that she had not been able to get legal aid to defend the claim or pay for mediation because it was a personal injury claim."

Solicitor, Exeter, May 2005

4.4.3 Conclusion on cases settled prior to mediation or cancelled

Although not conclusive there is some indication that in some of those cases which settled prior to mediation the fact that there was an impending mediation has encouraged the parties to resolve the issues themselves.

There are no clear parallels between those cases for which the mediation was cancelled except that there were several cases where it seems that at least one party did not want to mediate because they did not turn up to the mediation; or because they did not pay the mediation fee; or because they could not attend the mediation with someone who was objectionable to the other side. These reasons seem to suggest that perhaps some of these parties did not really want to mediate in the first place and that it was something advised by the court. This is a situation more prevalent at Exeter than Guildford, explaining the higher number of cancelled mediations at Exeter.

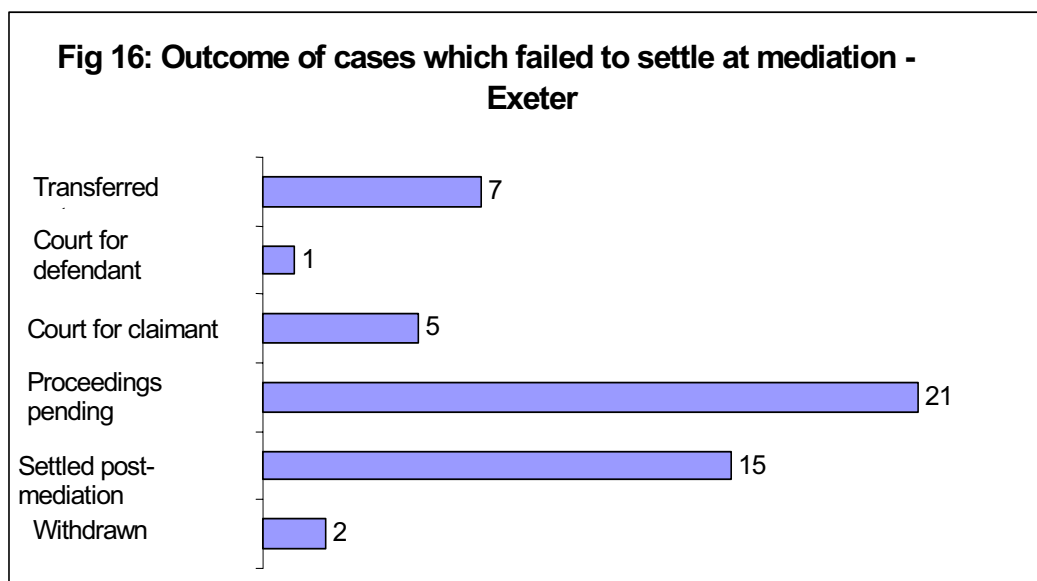
⁵⁷ See Table 20 on page 71 for a breakdown.

4.5 Result of Cases at Exeter which did not settle at mediation

Of the cases referred to mediation at Exeter those that settled achieved a decisive result at the time of the mediation. There was also one case which settled 14 days after the mediation appointment. The question is what has happened to those cases which did not settle at, or within 14 days of the mediation appointment, and those cases where the mediation appointment was cancelled. There were a total of 63 cases of this type at Exeter.⁵⁸

4.5.1 Outcome of cases which failed to settle at mediation

There were 51 cases which failed to settle at mediation. Fig 16 shows what has happened to them since the mediation.



29% of these cases settled post-mediation and 41% are still involved in ongoing proceedings. There were 6 cases which went to trial, of which only received judgment in favour of the defendant. Two cases were withdrawn after the mediation hearing. In one case the defendant went into liquidation and so the claimant had no choice but to discontinue the claim.

⁵⁸ This does not include those cases which settled in advance of the mediation appointment.

“I certainly notice some cases where a part of the case has settled so its either narrowed the issue ... it tests to an extent the strength of each parties case and I think... it must give the parties a bit of an inkling as to what it is going to be like if they go to trial – somebody just probing into what they think is a cast iron case as everyone always thinks It injects some realism. [Also] strengths and weaknesses are explored ... who knows what impact that has on a settlement two weeks or three weeks later or how much that enables a party to bluff or counter-bluff. I think it is dangerous to look at whether it settles as the sole success or failure of the scheme.”
DJ, Exeter County Court, November 2004.

4.5.2 Outcome of Cases with cancelled mediations

There were 12 cases in which the mediation appointment was cancelled. The status of the cases is recorded in the table below.

Table 20: Status of cancelled mediations at Exeter	Number of Cases
Proceedings pending ⁵⁹	4
Settled pre-trial	6
Struck out	1
Court for claimant	1
Total	12

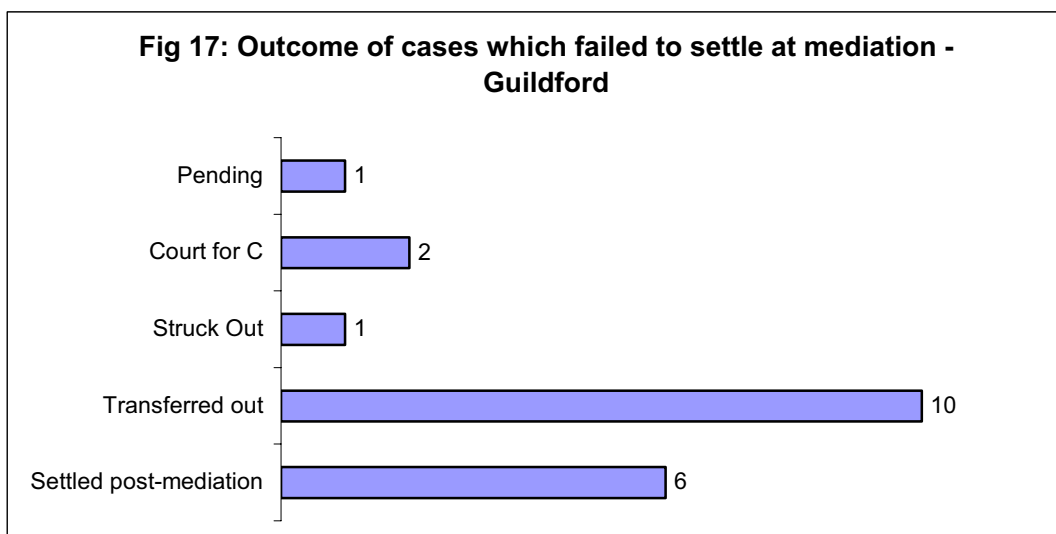
4.6 Status of Cases at Guildford which did not settle at mediation

4.6.1 Outcome of cases which failed to settle at mediation⁶⁰

At Guildford there were 20 cases which failed to settle at mediation detailed in Figure 17 below.

⁵⁹ Two of these cases are pending at the Court of Appeal.

⁶⁰ This does not include those 3 cases which settled within 14 days of the mediation appointment.



Half of the cases which failed to settle were transferred out to other courts for resolution. This is in keeping with the way the Surrey Group works, in that cases will be transferred in to Guildford expressly to make use of the mediation scheme, and then transferred back to their originating courts if they fail to settle at mediation.

4.6.2 Outcome of cases - cancelled mediation appointments

There were only two cases which cancelled mediation appointments. One of those went to trial and found for the claimant and the resolution of the other is unknown.

4.7 Disposal of cases

4.7.1 Disposal at Exeter County Court

At the end of the research period, of the 126 cases which were referred to mediation at Exeter County Court, 94 of these had reached some sort of final resolution by the end of the research period,⁶¹ and 32 were still ongoing. The breakdown is given below:

⁶¹ This includes those cases which settled in advance of the mediation.

Table 21: Final outcome of referred cases at Exeter	Number of cases
Settled prior to mediation	28
Settled at mediation	34
Settled within 14 days of mediation	1
Parties settled themselves post-mediation /pre-trial⁶²	22
Court in favour of claimant	6
Court in favour of defendant	1
Case withdrawn	2
Total	94

Of the remaining 32 cases 25 are still proceeding to trial and 7 have now been transferred to other courts.

4.7.2 Disposal at Guildford County Court

At Guildford, a total of 41 out of the 49 cases, which actually mediated, have now reached a final resolution.⁶³ The outcomes are provided in the table below:

Table 22: Final outcome of referred cases at Guildford	Number of cases
Settled post-mediation⁶⁴	6
Struck out	1
Settled within 14 days of mediation	3
Settled at mediation	26
Settled prior to mediation	3
Court for claimant	2
Total	41

⁶² But later than within 14 days of the mediation.

⁶³ This does not include those pending cases which have not mediated by the end of the research period.

⁶⁴ But not within 14 days of the mediation appointment.

Of the remaining 13 cases:10 have been transferred out to other courts, two have proceedings pending and the result of one is unknown.

4.8 Conclusions on resolution of cases

At both Exeter and Guildford courts approximately 75% of cases which were originally referred to mediation, since the launch of the scheme in March 2003, had reached a form of resolution by the end of the research project.

At Guildford 13 of the 54 cases originally referred to mediation proceeded to trial which equates to 28% of the overall sample. At Exeter, 39 of the 126 cases referred reached trial (31%).

It is interesting to note that although Guildford had a higher settlement rate at mediation than Exeter the number of cases resolved without reaching trial is similar.

5. Nature of settlement at mediation

The table below gives some idea of the agreements made at mediation. As can be seen from Table 23, although quite a few cases have an unknown outcome, an overwhelming number settled in favour of the claimant. There are also some examples of parties agreeing some form of specific performance, ie agreeing to mend a fence or replace a pipe but these cases make up a small minority of the whole.

In a number of the mediations the parties agreed to a more complex monetary arrangement whereby the money was agreed to be paid in stages etc.

The majority of parties involved in these cases have agreed some form of monetary settlement or to a more complex monetary arrangement.

Table 23: Nature of settlement outcome of mediated cases at Exeter	No of cases
Settlement for defendant	1
Settlement for claimant	16
Complex monetary arrangement ⁶⁵	6
Performance of action	4
Unknown	8
Total	35⁶⁶

Settlements at Guildford have achieved similar results (table 24 below). There were 20 cases which settled in favour of the claimant compared to one case which settled for the defendant. There were 6 settlements which were a combination of monetary and non-monetary values. These included amending the wording in a lease plus payment of a sum of money and altering the wording of a clause in a

⁶⁵ This category may involve, for example, different amounts of money being paid over time.

⁶⁶ Total includes cases which settled at mediation or within 14 days of the mediation.

contract and payment of money. Another case settled for a payment of money to charity and a payment to the claimant.

Table 24: Nature of settlement outcome of mediated cases at Guildford	No of Cases
Settlement for Defendant	1
Settlement for Claimant	17
Combined Monetary & Non-Monetary Settlement	4
Complex Monetary Arrangement	2
Performance of Action	1
Unknown	4
Total	29

5.1 Conclusions on nature of settlement

The majority of mediations which resulted in settlement at both Exeter and Guildford courts resulted in an outcome in favour of the claimant in the case. There were a few examples of creative settlements ie distribution of goods between parties, etc. However these were limited and the majority of settlements at both courts revolved around some form of compromise on the initial claim.

Although it is argued that one of the benefits of mediation is that mediators can help parties to make creative settlements there is little evidence that this happened on a large scale at either Exeter or Guildford. Most of the settlements were purely financial in outcome.

6. Case types referred and mediated

This section looks at the different types of cases referred to mediation and case types cross-referenced with settlement rates in order to determine which type of case is most appropriate for mediation.

Case types are defined below:

Case Type	Description
Personal Injury (PI)	Includes road traffic accidents (RTA), Clinical PI, Employee injuries and any other types of PI. Examples include a claimant slipping on a path and accidents at school and in the workplace.
Negligence	Includes both professional and general negligence. Examples include failure to make provision for the special educational needs of a child and a failure to repair a water pipe.
Road Traffic Accident (RTA)	These are cases where there has been a road traffic accident but the claim is for general damage rather than PI.
Breach of Contract	Includes all types of breach as well as general debt and disputes over goods and services. They type of case is encompasses includes plumbing and building disputes, as well as non-payment and general debt.
Property	Property disputes including equitable and marital disputes, boundary and trespass disputes and nuisance. Includes disputes over ownership of property and neighbour disputes.
Landlord and Tenant	Tenancy disputes. Examples include termination of tenancy agreements, etc.
Probate	Will disputes.

6.1 Case types referred to mediation: Exeter

The categories of cases types provided above have been applied in Table 26 below to show the number and different types of cases which have been referred to mediation at Exeter.⁶⁷ The reason that this section is important is that it shows the sorts of cases that either district judges decide to refer to mediation at allocation or those where the parties volunteer to mediate.

⁶⁷ Each case has been allocated to one category so those cases which may fall into more than one category have been given the category which applies to the main focus of the claim.

Table 26: Breakdown of case type for referred cases at Exeter	Total	Percentage
PI	23	18%
Negligence	5	4%
RTA	0	0
Breach of Contract	60	48%
Property	24	19%
Landlord & Tenant	7	6%
Probate	4	3%
Unknown	3	2%
Total	126	100

The most prevalent category is breach of contract which accounts for 48% of all cases referred to mediation. These sorts of cases may seem at allocation to have more room for the parties involved to compromise, or for creative settlements, as they involve unpaid professional fees, unpaid accounts for supply of goods, or unsatisfactory work done. A similar number of personal injury and property cases are referred. Personal injury accounts for 18% of the total and property cases account for 19%. The other case types comprise too few cases to be significant.

b) Status of cases in relation to mediation by case type – Exeter

6.1.1 Cases which did not mediate

This section looks at the outcome of all cases in order to determine if there are any patterns in settlement in each particular type.

32% of the total number of cases which were referred to mediation did not result in a mediation taking place.

Table 27: Outcome by case type Exeter	Total number of cases referred to mediation	Settled prior to mediation	Cancelled prior to mediation	Settled at mediation	Settled within 14 days of mediation	Failed to settle at mediation	Combined total number of cases referred but not mediated
PI	23	10	3	3	0	7	13
Negligence	5	1	0	0	0	4	1
RTA	0	0	0	0	0	0	0
Breach of Contract	62	12	7	18	0	25	19
Property	25	3	1	9	1	11	4
Landlord & Tenant	7	2	1	3	0	1	3
Probate	3	0	0	1	0	2	0
Unknown	1	0	0	0	0	1	0
Total	126	28	12	34	1	51	40

- 57% of PI cases did not end in a mediation.
- 32% of breach of contract cases did not end in a mediation.
- Only 17% of property cases did not end in a mediate.
- All probate cases mediated.

6.1.2 Mediated cases

The largest number of cases which went to mediation is breach of contract which account for over 50% more cases than any other category. However a third of all of the breach of contract cases did not end in a mediation. 39% of breach of contract cases settled at the mediation which is similar to the overall settlement rate for the Exeter scheme.

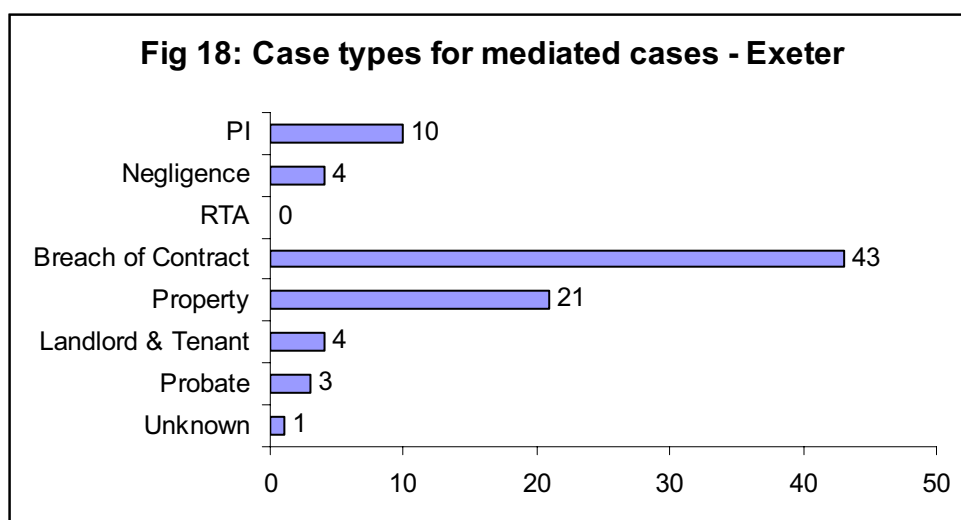


Table 28, below, shows a breakdown of those cases in which parties attended a mediation broken down by case type. The table shows whether or not the cases settled at the mediation, or within 14 days, or alternatively, did not settle at the mediation. It also shows the case type as a percentage of the overall total number of cases.

Table 28: Breakdown of case type for mediated cases at Exeter	Settled at Mediation		Settled within 14 days of Mediation		Failed to Settle		Total Mediated	Case type as % of total
	No	%	No	%	No	%		
PI	3	30	0	0	7	70	10	12
Negligence	0	0	0	0	4	100	4	5
RTA	0	0	0	0	0	0	0	0
Breach of Contract	16	39	0	0	25	61	41	48
Property	8	40	1	5	11	55	20	23
Landlord & Tenant	3	75	0	0	1	25	4	5
Probate	2	50	0	0	2	50	4	5
Unknown	2	67	0	0	1	33	3	3
Total	34	40	1	1	51	59	86	

This table demonstrates that the categories which had a higher number of cases which settled at mediation were:

- Landlord and tenant as 75% of those cases which mediated settled at the mediation;
- Breach of contract where 39% of mediated cases settled at mediation;
- Property (45%),⁶⁸ and
- Probate (50%).⁶⁹
- None of the negligence cases settled at mediation.

Although breach of contract formed the largest number of cases on the list (almost half) they were not more likely to settle than any other category.

⁶⁸ This includes one case which settled within 14 days of the mediation appointment.

⁶⁹ However, landlord and tenant and probate had such small numbers of cases that their significance can be easily overstated.

6.2 Case types referred to mediation: Guildford

The main difference between Exeter and Guildford is that the vast majority of cases referred to mediation at Guildford are self-selecting. Many of these involve disputes with builders or over payment of invoices, etc. Table 29 shows the breakdown of categories.

Table 29: Breakdown of case type for referred cases at Guildford	Total	Case type as % of total
PI	1	2
Negligence	3	6
RTA	0	0
Breach of Contract	40	74
Property	8	15
Landlord & Tenant	2	4
Probate	0	0
Unknown	0	0
Total	54	

At Guildford, as with Exeter, the most prevalent case type is breach of contract which accounts for 74% of all cases referred to mediation. Typically, many of these cases involve disputes with builders, decorators, plumbers or heating engineers or other forms of construction work. The remaining few cases fall into the property category although there are one or two PI, negligence and landlord and tenant cases.

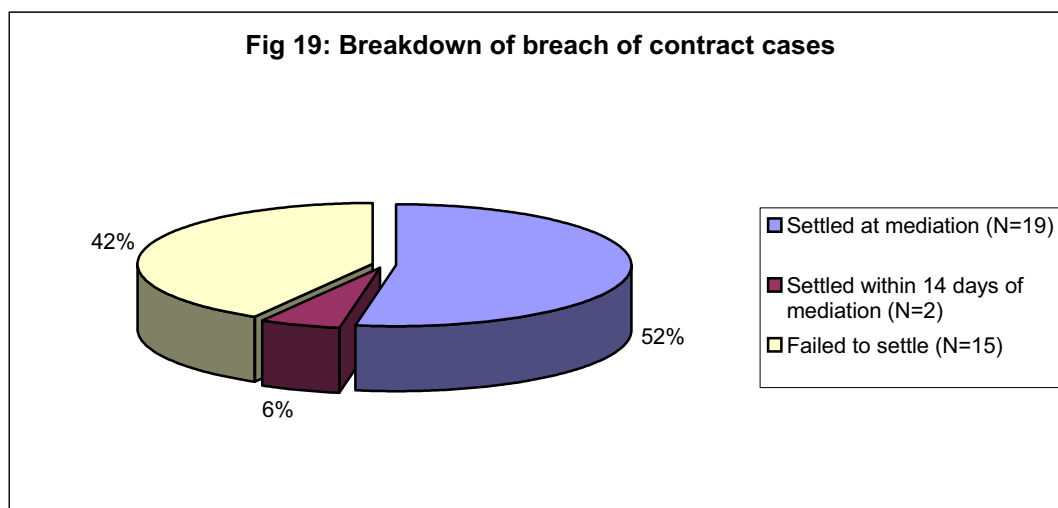
6.3 Status of cases in relation to mediation by case type - Guildford

6.3.1 Cases which did not mediate

There were only 5 cases at Guildford which did not result in a mediation. Four of these were breach of contract cases: three of these cases settled prior to the mediation appointment taking place. One was a negligence case.

6.3.2 Mediated Cases

Unsurprisingly, the largest group of cases going to mediation were breach of contract cases as these make up the majority of the overall population at Guildford. A breakdown of these cases shows that 58% settled either at mediation or within 14 days of the mediation taking place.



In addition, half of the property and landlord and tenant cases settled at Guildford. The one PI case settled at mediation.

6.4 Conclusions on case types

There is a prevalence of breach of contract cases at both Exeter and Guildford both referred to mediation and being mediated. Breach of contract cases at Exeter were no more likely to settle than the other categories. Indeed in most instances they were less likely to settle.

Although there were very few personal injury cases, and these were mainly at Exeter, the majority of these did not result in a mediation appointment because they were either settled prior to the mediation taking place, or because the parties cancelled their mediation appointment. Of those 10 that did mediate, 7 did not settle at the mediation appointment. One mediation provider complained that this

type of case was not suited to a time-limited, 3 hour mediation because the details of the case were too complex to be resolved in such a limited time-frame.

There is a consensus in much of the research on civil, court-based mediation that there is no one category of case which is more suited to mediation than any other.⁷⁰ This view may be attributable to the difficulty of determining which category individual cases are placed in as the boundaries between categories often tend to blend together.

At Exeter and Guildford it is difficult to comment upon which case types were suitable for mediation because the overwhelming bulk of cases which were referred to mediation were breach of contract cases. Most of the cases were referred to mediation by the judges because they 'intuitively thought' that the case was suitable. This may say more about the type of cases which are referred to mediation than the type of cases which are likely to settle at mediation.

⁷⁰ See, for example, Roselle L Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St J on Disp Resol 641 (2002). Hazel Genn, 'Central London County Court Pilot Mediation Scheme Evaluation Report (LCD Research Programme, July 1998)

7. Route to mediation: court advised or voluntary

As part of the active management of a case under the Civil Procedure Rules, both the judiciary,⁷¹ and the parties,⁷² are required to consider the use of alternative dispute resolution if it is considered appropriate to help to resolve the dispute. This section considers those cases which reached a mediation appointment from one of two routes.

Route 1: Voluntary:

Parties have volunteered to mediate, usually by returning a completed invitation to mediate (Med 2) to the court.

Route 2: Court-Advised

- Either a district judge or mediation clerk discusses with the parties whether or not they should mediate. This route to mediation is clearly illustrated by using the example of Exeter County Court. Here the actions of the district judges and the Designated Circuit Judge who are keen to encourage parties to mediate where it is appropriate -
 - The district judges may use an 'unless order' to require the parties to return their Med2 form, stating whether or not they agree to mediation;
 - They may ask the parties to attend a Case Management Conference (CMC) either in person or on the telephone to discuss any objections to mediation in a particular case;
 - Mediation may be raised by a district judge or the Designated Civil Judge at a directions hearing later on during the process of a case.⁷³

A small number of cases originated from different sources such as the Court of Appeal or the High Court, see the example given in the box below.

⁷¹ Under CPR r1.4(2)(e) and CPR r1.2 (f).

⁷² CPR r1.3.

⁷³ It was possible to determine the method by which the parties arrived at the mediation by looking at the documentation in the case files.

Parties in one case originating from Exeter County Court were advised to mediate by the Court of Appeal. In giving leave to appeal to the Court of Appeal in the case of Devon County Council v Clark, LJ May made a note to the parties to say that they should ‘...make serious efforts to compromise this appeal...’ in order to save the disproportionate costs of the hearing. He suggested that the mediation service at Exeter might be the best available and suitable method of achieving this. Unfortunately the case then failed to settle at mediation.

Cases which are classified by the researchers in the court-advised category have usually involved a discussion about mediation between the judge and the parties or their representatives at a case management conference or a directions hearing. As a result of this discussion the judge stays the case and refers it to mediation. It is likely that the litigants or their representatives in this category have chosen to mediate because the judge has recommended it.

In one example of such a case the judge stated,

- *“I have ... told the parties in very strong terms that this is a case for mediation”.*

At this point in such a case it becomes difficult for the parties to decide not to mediate as they may believe that there is a high chance that they might be penalised in costs for refusing to attend a mediation.⁷⁴

7.1 Transferred cases

These cases originated at a court in the vicinity of either Exeter or Guildford and have been transferred to the court specifically to make use of the mediation scheme. If the case does not settle at mediation it is then transferred back to its originating court.⁷⁵

⁷⁴ See *Dunnett v Railtrack [2002] 2 ALL ER 850*, *Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002*.

⁷⁵ Where a case has been transferred following a case management conference but without any information that one or other or both parties requested transfer for mediation the case has been marked as court advised.

Court	Volunteered	Court Advised	Total
Exeter	1	9	10
Guildford	2	14	16
Total	3	23	26

The table demonstrates that the majority of cases, which were transferred expressly for mediation, were recommended to do so following a case management conference.

7.2 Route to mediation: Exeter

Figure 20, below, shows the route to mediation for cases at Exeter. Where there is no judicial input and the cases are classified as voluntary this is because:

- both parties have expressed a wish to mediate on their Med2 forms or by writing to the court,
- the case has been transferred in from another court;⁷⁶ or
- the data available to the researchers is ambiguous (there were 4 cases where it was very unclear which route the case had taken).

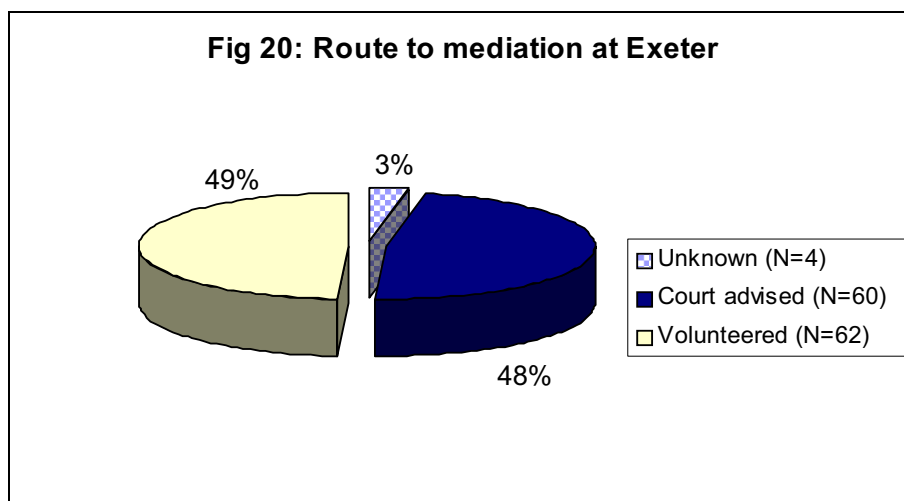


Figure 20 shows that there is a fairly equal split between cases which were referred to mediation voluntarily by the parties and those where the parties were advised to

⁷⁶ See Table 30 on page 86 for a breakdown of those cases transferred directly for mediation.

mediate by the court. Table 31, below, shows that breakdown of outcomes of mediations analysing them by route to mediation.

Table 31: Route to mediation at Exeter	Settled prior to mediation	Settled at mediation	Settled within 14 days of mediation	Failed to settle at mediation	Mediation Cancelled	Total
Court Advised	11	13	1	27	8	60
Volunteered	17	19	0	22	4	62
Unknown	0	2	0	2	0	4
Total	28	34	1	51	12	126

The above table shows that:

- 34% of court advised cases that mediated (41 cases) settle at or within 14 days of the mediation;
- 46% of cases where the parties volunteered for mediation (41 cases) settle at mediation;
- 18% of court advised (11 cases) and 27% of volunteered (17 cases) settled prior to the mediation date.

At Exeter there is a lower settlement rate for cases where the court has advised the parties to mediate. This is partly due to an enthusiasm for mediation on the part of the judges who referred some on-going, difficult, complex cases to mediation in the anticipation that mediation might provide a solution for the parties.⁷⁷ Yet some of these cases were found to be too complex for the mediators to consider over a limited, three hour period.

7.3 Route to Mediation: Guildford

The same two routes to mediation have been used to analyse parties using mediation at Guildford County Court.

Here the District Judges are far less active in encouraging or advising parties to mediate. The District Judge said that, for example, there would never be a

⁷⁷ This applies especially to three large cases referred to mediation at Exeter.

telephone conference with parties to discuss the use of mediation. This does not mean that a district judge would not suggest that parties consider the use of mediation as an option at a directions hearing, etc. There are cases, therefore, which have come to mediation via judicial encouragement. This sort of encouragement to mediate was used following the inception of the mediation scheme.

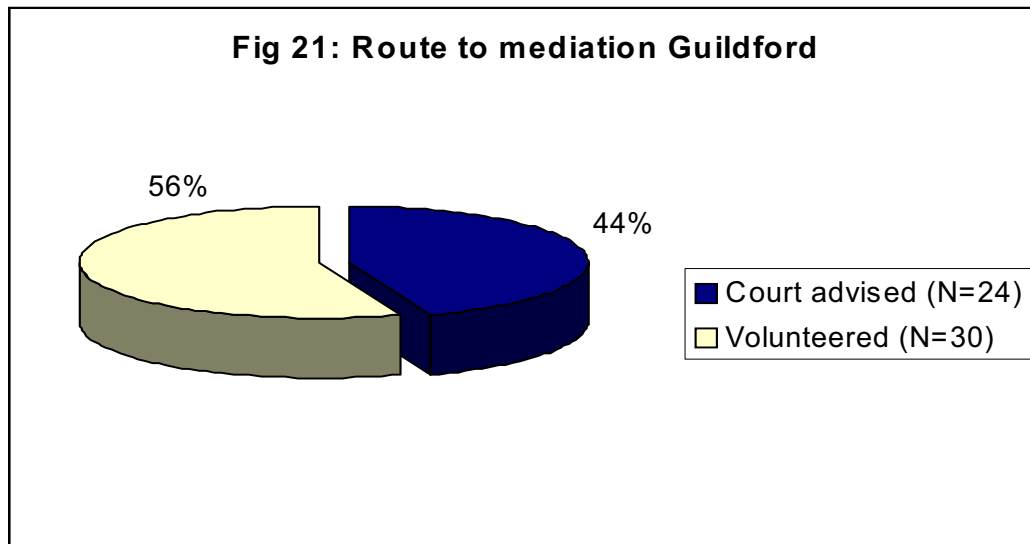


Figure 21 shows that in just over half of the cases referred to the mediation scheme at Guildford the parties volunteered to mediate. A third of cases were transferred to Guildford for mediation and most of these were volunteers. Guildford County Court is part of the Surrey Group and other cases within the Group will make use of the mediation scheme at Guildford by advising parties to transfer to Guildford to mediate or responding to requests from parties. Table 32 below shows the breakdown of outcomes of mediations analysing them by route to mediation.

Table 32: Route to mediation at Guildford	Settled prior to mediation	Settled at mediation	Settled within 14 days of mediation	Failed to settle at mediation	Mediation Cancelled	Total
Court Advised	1	14	1	7	1	24
Volunteered	2	12	2	13	1	30
Total	3	26	3	20	2	54

The above table illustrates that:

- 68% of court advised cases that mediated (22 cases) settled at or within 14 days of the mediation.
- 52% of volunteered cases that mediated (27 cases) settled at or within 14 days of the mediation.
- 4% of court advised (1 case) and 7% of volunteered (2 cases) settled prior to the mediation date.

The route to mediation is not as relevant at Guildford as at Exeter. This is because it is clear from the comments of the judiciary that the nature of being advised to mediate by the court is a significantly different, and more consensual, process at Guildford than takes place at Exeter County Court.

7.4 Conclusions on route to mediation

Guildford has a higher settlement rate than at Exeter. Those cases, which were classified as court advised at Guildford, had a settlement rate of 68% at the mediation or within 14 days. This compares to only 34% settlement at mediation, or within 14 days for those cases which are classified as court-advised at Exeter.

There is a difference in the nature of what court-advised means as between the two different courts as the judges at Exeter are far more proactive in recommending mediation than at Guildford.⁷⁸

At Exeter the judges are keen to recommend that parties use mediation. Some cases are recommended for mediation at Exeter even when they appear, *prima facie*, to be too complex or involved for a mediator to be able to settle in a three hour time-limited mediation. For example, at the start of one, notable mediation, the defendant told the mediator that there was an injunction against her being in the same room as the claimant. There was some question about whether they were, in fact, able to be in the same building, or in adjoining rooms, together. This

⁷⁸ Yet most of the research at Guildford was conducted, in the main, retrospectively as research at Guildford did not begin until August 2004. This is noteworthy because at the time of the research the Guildford scheme was in a period of decline and new district judges at the court were rarely recommending mediation to parties that came before them. It was therefore not possible to observe the sort of case management conference or directions hearing where any discussion of mediation took place.

took some time in the mediation for the mediator to resolve before the mediation itself could begin.

Although slightly higher at Guildford both courts have a similar settlement rate for cases classified as voluntary (46% at Exeter compared to 52% at Guildford), usually where the parties have agreed to mediation on the invitation to mediate sent with the allocation questionnaire.

However, Exeter also has a significant number of cases that settle in advance of the mediation appointment and there is some evidence that the discussion conducted with the judges about mediation has focussed the parties on the idea of settlement and therefore contributed to an early settlement in these cases. There are 28 cases which settled in advance of the mediation: 18% of these were court advised and 27% voluntary. There is no sizeable comparison at Guildford.

It is logical that there will be a higher settlement rate for cases where the parties have volunteered to mediate at Exeter.⁷⁹ This is because once litigants have made the commitment themselves to go to mediation they are likely to have a greater understanding of what the process involves and what is required of them. What is not taken into account when settlement rates are looked at in isolation is what effect the mediation itself has on the rest of the process of the litigation and so this can be hard to note except in individual cases through observation and discussion with those involved.

It is consequently hard to measure some of these more qualitative factors. It does appear that if the parties are focussed on the realities of their case at an early stage in the litigation it is likely that, even if the mediation does not result in a settlement, the parties may have a greater likelihood of settling the case before it reaches trial, than through traditional routes where mediation is not offered.

⁷⁹ This is not clear at Guildford where the distinction between volunteered and court-advised was not as clear.

8. Parties: type of party

The type of party for both those cases referred to mediation and those who attended mediation has been analysed against the following categories:

Party Type	Description
Individual (Ind)	Private party with a claim which is not linked to a business or with business connections.
Company (Co)	Small, medium-sized or large business enterprise.
Local Authority (LA)	Regional or local council.
Health Authority (HA)	NHS health care trust.
Government (Gov)	National authority or branch of national authority.
Other	Usually individual traders or farmers, etc
Charity	A registered body which promotes public good.

8.1 Party types referred to mediation

The categories of cases types have been used to show the different types of parties who have been referred to mediation at both Guildford and Exeter County Courts.

8.2 Party types – claimants at Exeter

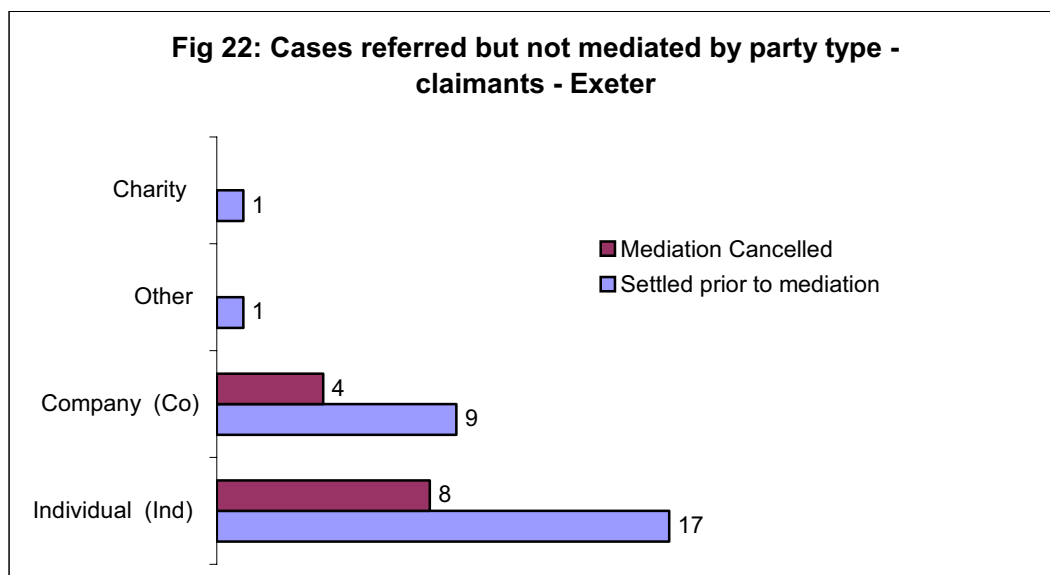
The table below shows the total numbers of claimants by party type in each category at Exeter.

Table 34: Party types – claimants at Exeter	Total
Individual (Ind)	71
Company (Co)	35
Local Authority (LA)	2
Health Authority (HA)	0
Government (Gov)	0
Other	15
Charity	3
Total	126

The majority (56%) of claimants are individuals and 28% are companies. There were a number (12%) which were individual traders and fell into the other category. There were hardly any claimants in any of the other categories.

8.2.1 Cases referred but not mediated: claimants at Exeter

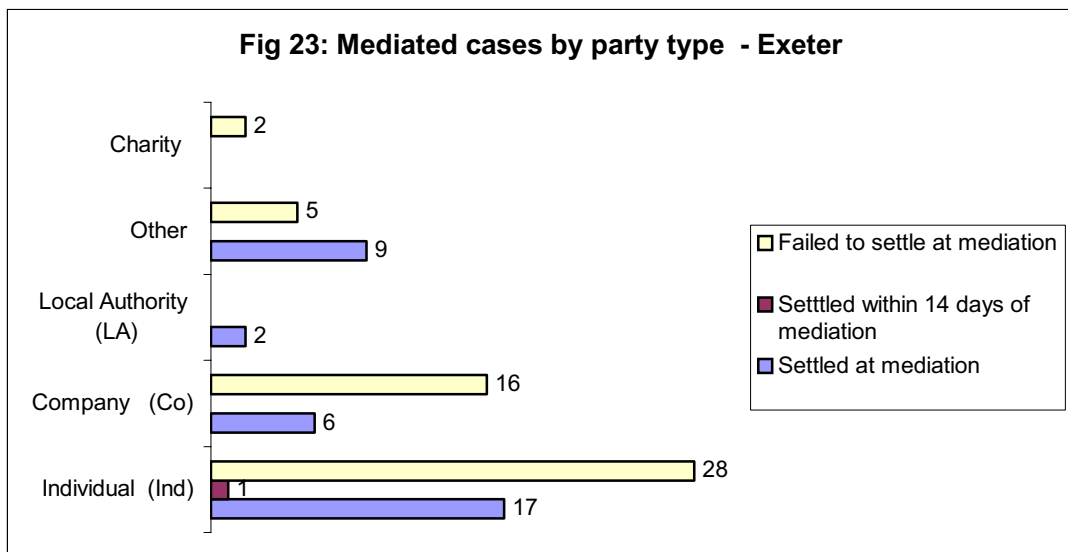
Of those claimants whose cases were referred to mediation but who did not actually mediate a breakdown by party type is provided in Figure 22 below.



24% of individuals and 26% of companies settled their cases prior to the mediation taking place. 11% of individuals and 11% of companies cancelled the mediation. There was little difference between the type of party in this respect.

8.2.2 Mediated cases by party type: claimants at Exeter

Of those claimants who attended a mediation, a breakdown by party type is given in Figure 23, below.



Of the cases that mediated, 39% of individuals and 27% of companies settled their cases at the mediation.⁸⁰ Of those who fell into the category of other 64% settled their case at mediation. These individual traders seemed more likely to settle than other party types. Where a company was a claimant they seemed less likely to settle their case at mediation than the other party types.

8.3 Party Types – defendants at Exeter

The table below shows the total numbers of defendants by party type in each category at Exeter.

⁸⁰ This includes cases which settle within 14 days of the mediation.

Table 35: Party types - defendants at Exeter	Total
Individual (Ind)	48
Company (Co)	58
Local Authority (LA)	5
Health Authority (HA)	1
Government (Gov)	2
Other	12
Total	126

The table gives a breakdown which displays a broader range of party types as defendants in the total population of cases referred to mediation. 38% are individuals and 46% are companies. There are far more companies as defendants than as claimants. 10% fall into the category of others and the rest are divided between local authority, health authority and government.

8.3.1 Cases referred but not mediated: defendants at Exeter

Of those defendants whose cases were referred to mediation but who did not actually mediate a breakdown by party type be seen in Figure 24, below.

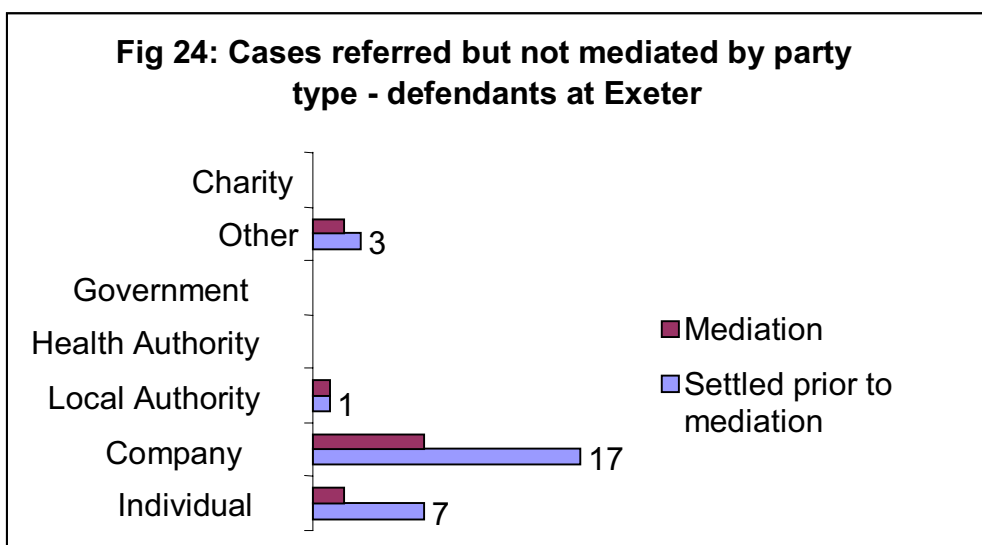
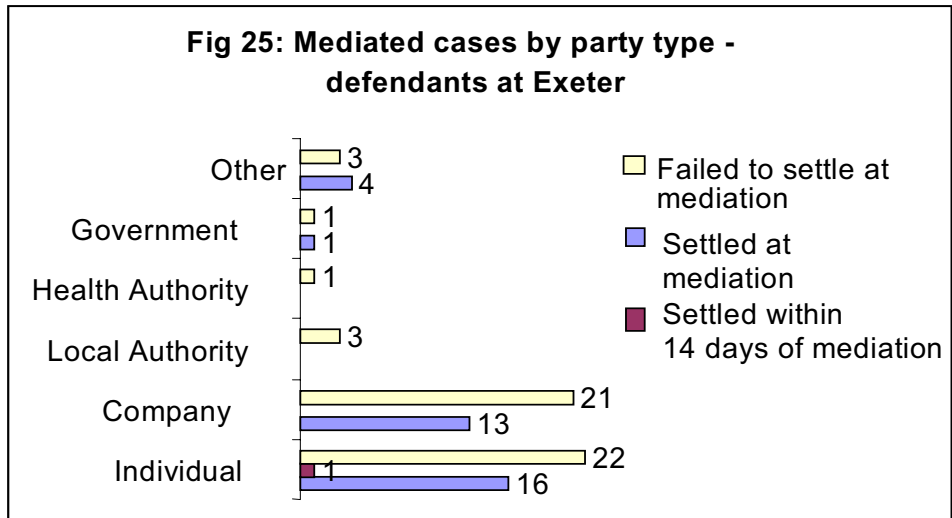


Figure 24 shows that for 15% of individuals, and 29% of companies, their cases were settled prior to the mediation taking place. Only 4% of individuals cancelled the mediation compared to 29% of companies.

8.3.2 Mediated cases by party type: defendants at Exeter

Of those defendants, who attended a mediation, a breakdown defined by party type is given in Figure 25, below.



Of the cases that mediated, 44% of individuals, and 38% of companies settled their cases at the mediation.⁸¹ Of those which fell into the category of 'other', 57% settled their case at mediation. Where a company was a defendant they seemed more likely to settle their case at mediation than if the company was a claimant at Exeter.

8.4 Party types – claimants at Guildford

The table below shows the totals for claimants by party type in each category at Guildford.

⁸¹ This includes cases which settle within 14 days of the mediation.

Table 36: Party types - claimants at Guildford	Total
Individual (Ind)	16
Company (Co)	30
Local Authority (LA)	0
Health Authority (HA)	0
Government (Gov)	0
Other	7
Charity	1
Total	54

At Guildford, in contrast to Exeter, the majority (56%) of claimants are companies and 30% are individuals. There were a number (13%) which were individual traders and fell into the 'other' category, similar to Exeter. There was one claimant charity but none in the other categories.

8.4.1 Cases referred but not mediated: claimants and defendants at Guildford

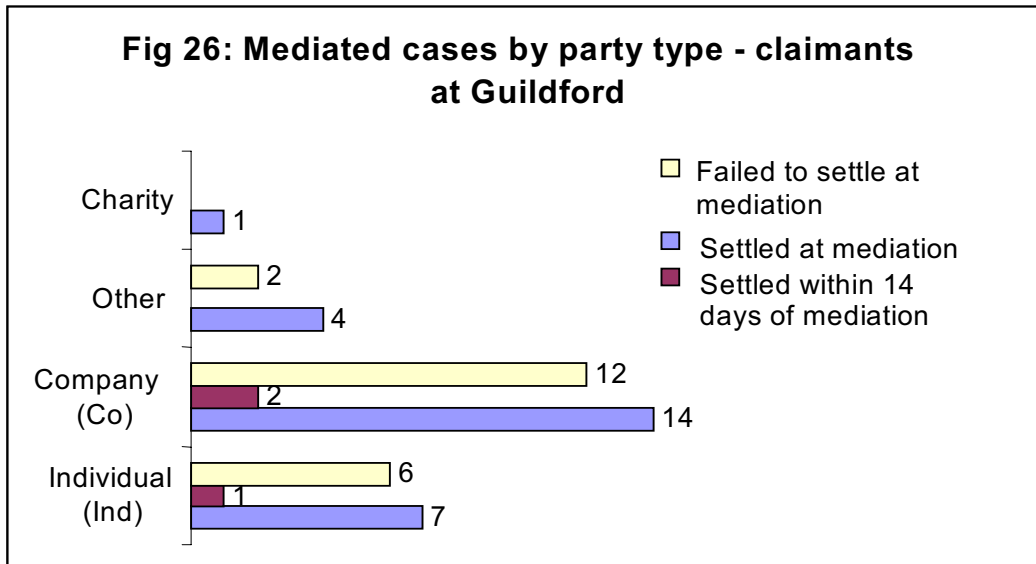
There were only 5 cases which did not mediate at Guildford. Two out of the five involved cases brought by companies against other companies and there are no regularities between the others.

The results are as follows:

Table 37: Case types referred but not mediated - Guildford		
Party Type	Claimant	Defendant
Company	2	2
Individual	1	0
Local Authority	0	1
Other	1	1

8.4.2 Mediated cases by party type: claimants at Guildford

Of those claimants who attended a mediation a breakdown by party type can be seen on Figure 26, below.



An analysis of figure 26 above, shows that of the cases that mediated, 57% of individuals and 57% of companies settled their cases at the mediation.⁸² Of those who fell into the category of other 67% settled their case at mediation. These individual traders seemed a little more likely to settle than other party types. There is a consistency in settlement rates as between categories of claimants at Guildford.

8.5 Party Types – defendants at Guildford

The table below shows the totals for defendants by party type in each category at Guildford.

⁸² This includes cases which settle within 14 days of the mediation.

Table 38: Defendant by case type at Guildford	Total
Individual (Ind)	18
Company (Co)	25
LA	1
Other	9
Charity	1
Total	54

There are more companies referred to mediation as defendants in the total population of cases. 33% are individuals and 47% are companies. 17% fall into the category of 'others' which is higher than at Exeter and there is one charity and one local authority.

8.5.1 Mediated cases by party type: defendants at Guildford

Of those defendants who attended a mediation a breakdown by party type is illustrated below, in Figure 27.

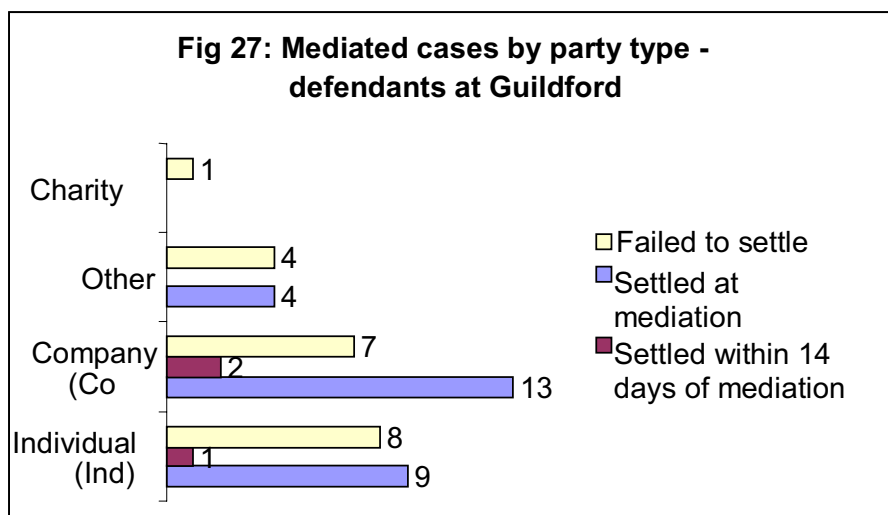


Figure 27 shows that, of the cases that mediated, 56% of individuals and 68% of companies settled their cases at the mediation.⁸³ Of those who fell into the category of 'other', 50% settled their case at mediation. Similarly to those cases at

⁸³ This includes cases which settle within 14 days of the mediation.

Exeter, where a company was a defendant there seemed to be more likelihood of a settlement at mediation than if the company was a claimant.

8.6 Conclusions on type of party

With respect to claimants there is juxtaposition between companies and individuals as, at Exeter, 56% of claimants are individuals, compared to 56% of companies as claimants in Guildford. Companies account for 28% in Exeter and individuals for 30% in Guildford.

However with respect to defendants there is little discernible difference between Exeter and Guildford.

With regard to those cases which went to mediation individual claimants are more likely to settle at Exeter than at Guildford whilst at Guildford there was no difference between individuals and claimants.

In Exeter, defendants are more likely to settle if they are an individual (44%) whilst in Guildford they are more likely to settle if they are a company (68%).

9. Amount of claim and mediation

The amount of the claim may be a significant factor in determining whether a party settles their case at mediation. This section looks at whether there is a correlation between the amount of the claim and reaching a settlement at mediation.

9.1 Amount of claim and mediation at Exeter

The table below shows the amount of the claim compared to outcome at mediation at Exeter County Court.

Table 39: Outcome of referral to mediation by sum in dispute at Exeter	Unknown	Unspecified	up to £15,000	£15-£60,000	£60-£100,000	£100,000+	Spec Perf/Property value	Total
Settled at Mediation	0	3	12	11	3	1	4	34
Settled Prior to Mediation	1	1	18	5	1	0	2	28
Settled within 14 days of Mediation	0	1	0	0	0	0	0	1
Failed to Settle	4	5	20	14	1	2	5	51
Cancelled	0	2	4	5	0	0	1	12
Total	5	12	54	35	5	3	12	126

The largest number of cases had a value of up between £15,000 – £60,000. 42% of cases fell into this category and over half of these settled either at mediation or prior to mediation. There is no obvious conclusive evidence of a link between amount of claim and settlement.

9.2 Amount of claim and mediation at Guildford

At Guildford it is also possible to see that there are a larger number of cases with smaller claims and a number of small claims included on the mediation scheme.

Table 40: Outcome of referral to mediation by sum in dispute at Guildford	Unknown	up to £15,000	£15-60,000	£60-£100,000	Total
Settled at Mediation	1	19	5	1	26
Settled Prior to Mediation	0	1	2	0	3
Settled within 14 days of Mediation	0	2	1	0	3
Failed to Settle	3	8	9	0	20
Cancelled	0	1	1	0	2
Total	4	31	18	1	54

At Guildford 62% of claims with a value of up to £15,000 were settled at mediation. This compares to 28% for claims with a value of up to £60,000.

9.3 Fast track and multi track

The claims can also be broken down by classification into fast track and multi track cases dependant upon which track they were allocated into. The disparity between the number of cases with a claim value and those allocated to fast track and multi-track is that some cases do not state the amount of the claim but are still allocated to track and also some cases may be allocated to multi-track even though they are lesser amounts because of the complexity of the case.

9.3.1 Fast track and multi track cases at Exeter

At Exeter there were 67 fast track and 58 multi track cases referred to mediation.

Table 41 below shows a breakdown of these cases.

Table 41: Outcome of mediation by sum in dispute at Exeter	Fast track	Multi track	Unknown	Total
Settled at mediation	19	15	0	34
Settled prior to mediation	19	8	1	28
Settled within 14 days of mediation	0	1	0	1
Failed to settle	25	26	0	51
Cancelled	4	8	0	12
Total	67	58	1	126

Table 41 shows that 61% of fast track cases at Exeter settled either prior to mediation or at mediation yet only 38% of multi track cases settled at mediation or prior.⁸⁴ Therefore it is possible to see that the highest disposal of cases lies in the fast-track range.

9.3.2 Fast track and multi track at Guildford

At Guildford there were 20 fast-track cases and 27 multi-track cases. 58% of fast-track cases settled at mediation compared to 46% of multi-track cases. This is demonstrated in the table below:

Table 42: Outcome of mediation by sum in dispute at Guildford	Fast track	Multi track	Small claims track	Total
Settled at mediation	11	11	4	26
Settled Prior to mediation	1	2	0	3
Settled within 14 days of mediation	3	0	0	3
Failed to settle	5	13	2	20
Cancelled	0	1	1	2
Total	20	27	7	54

⁸⁴ These figures include cases which settled within 14 days of the mediation.

It is observable that there are also a number of cases referred to mediation, which are small claims cases that do not fall into the original intended monetary limits of the mediation scheme. However these cases have a high settlement rate of 57%.

9.4 Conclusion on sum in dispute

The settlement rate for lower or higher value claims or for fast-track and multi-track cases do not clearly show that this is a method of determining which cases should settle at mediation.

However it is possible to see that at Exeter the highest concentration of cases that settle are in the fast track range as are the highest disposal of cases (ie those that settle prior to mediation). Thus it is possible to say that at Exeter and at Guildford fast track cases are more likely to settle without judicial intervention than multi-track cases.

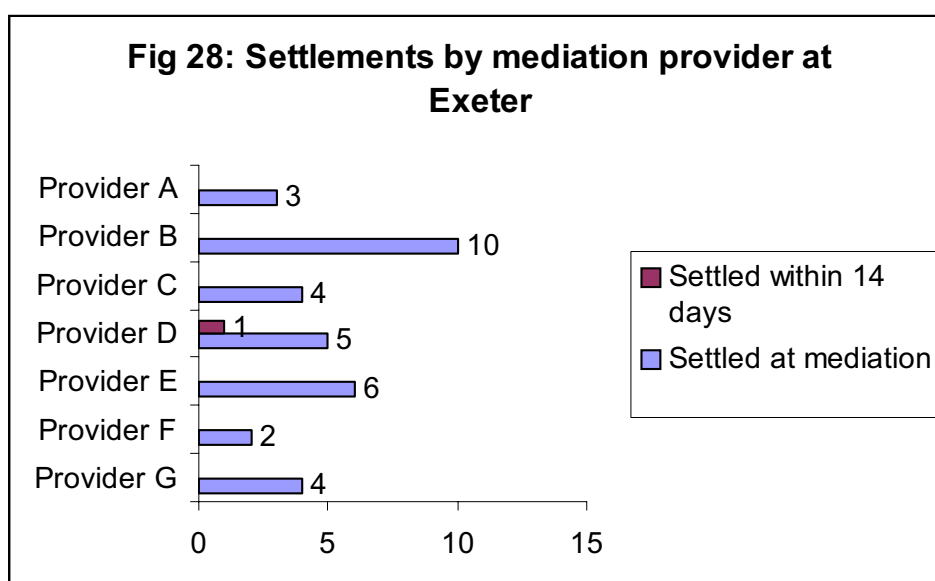
10. Mediators and mediation providers

Both mediation schemes have a rota of different mediation providers who offer individual mediators. The mediation clerk assigns each provider to individual mediation appointments. The provider organisations themselves then assign an individual mediator who will attend the mediation.

10.1 Mediators and mediation providers at Exeter

The number of settlements for each provider is given in figure 28, below:

Each provider at Exeter has conducted between 10 – 14 mediations. The mediator with the most settlements at mediation is Provider B and the one with the least is Provider F.

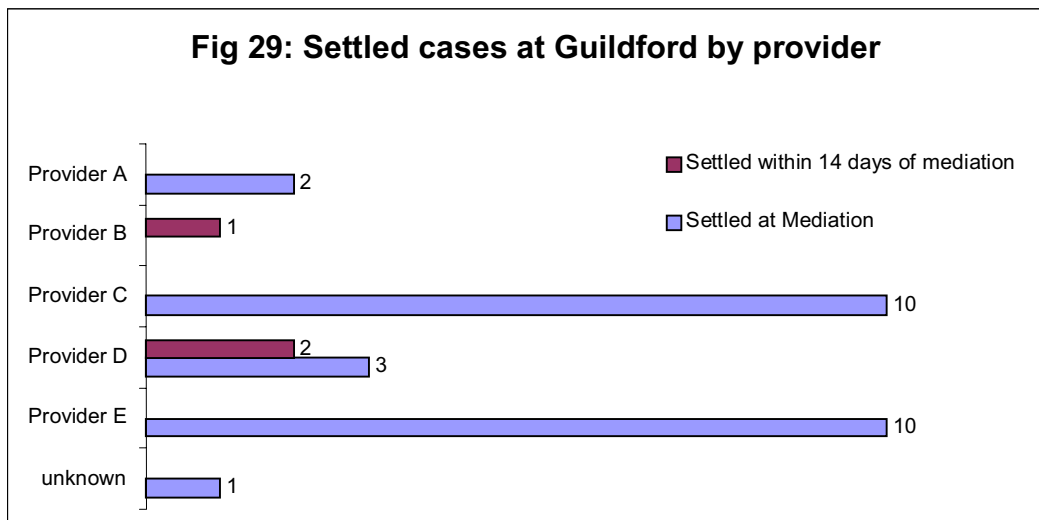


There is a lot of overlap of individual mediators travelling between Exeter and Guildford. Some mediators are linked to more than one provider and are therefore likely to be assigned to conduct a mediation more often than others only linked to one provider. The number of settlements per organisation is therefore not a clear indication of the success of individual mediators.

“Rapid progress was made at the mediation but it did not prove possible to deal with all the issues in the time available. Despite my pre-mediation encouragement, the parties had not fully thought through their objectives prior to the mediation and much of the mediation was spent exploring options with a view to getting both parties to commit to the same form of settlement structure. It was nonetheless a useful exploration of the options from which the parties clearly benefited. It ended with an express commitment to continue direct negotiations in the next few days.”
Mediation Provider, Exeter County Court, January 2005.

10.2 Mediation providers - Guildford

There are 5 mediation providers serving Guildford County Court, 4 of which also provide mediators at Exeter. The figure below shows the breakdown of settlements by provider at Guildford County Court.



At Guildford providers C and E have secured the highest number of mediators. The comments about duplication of mediators between organisations in relation to the Exeter scheme also apply at Guildford.

10.3 Expertise of mediators

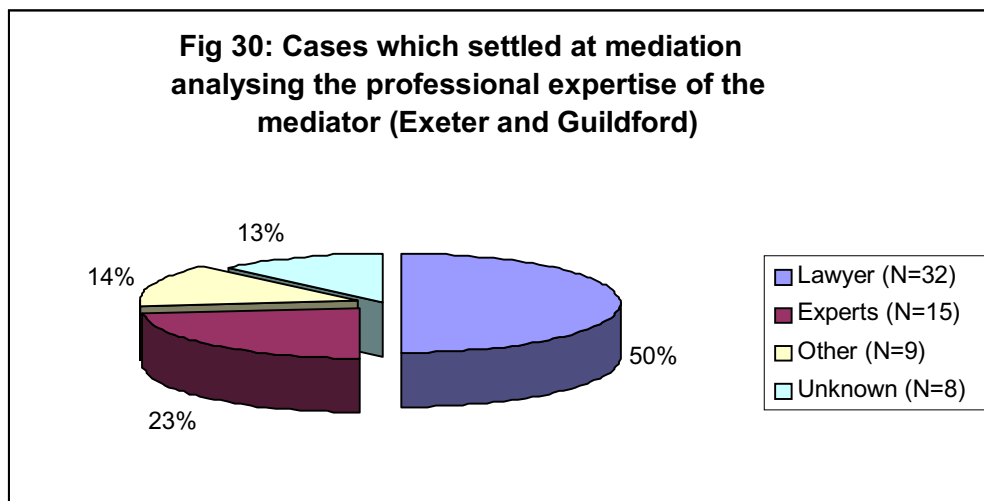
There is no requirement at either scheme that individual mediators are lawyers or indeed have any legal training. The qualifications of individual mediators were analysed. The graph below gives a breakdown of settled cases showing the profession of those that settled cases at mediation.⁸⁵

The category of lawyers includes barristers, solicitors and a legal executive.

Experts include surveyors, engineers, accountants etc.

'Other' includes counsellors, researchers and professional mediators.

There are also a number of mediators whose professional qualifications could not be determined. These were classified as 'unknown'.



Even though half of the settled mediations were conducted by lawyer mediators, as indicated above, the other categories together make up the remaining 50% and so there is no suggestion that having a lawyer mediator makes the cases any more likely to settle.

⁸⁵ These figures include those cases which settled within 14 days of the mediation appointment.

10.4 Conclusion on mediators and mediation providers

Mediators on both the Exeter and Guildford schemes tend to encourage the parties to focus on the issues in the dispute and think about settlement at an early stage in the proceedings. This is because the mediation is time-limited and so there is little room to allow too much discussion of the detail of a particular case.

There is little consistency between different mediation providers and rates of settlement in mediations. Some of the most established mediation providers have not achieved high rates of settlement at mediations at either Exeter or Guildford.

Settlement is not obviously consistent between different providers of mediation or between mediations which take place at Exeter and Guildford. This differential may be related to the skill of different individual mediators rather than any particular difference between organisations. It is clear though from the observations made of a range of mediators that there is a lot of difference in approach. It is not even clear that mediators from the same providers have a similar style or approach which may emanate from their particular training style. For example, some mediators did not want their parties to spend long together in the same room before holding a series of separate meetings with each side. Other mediators held the whole session in the same room.

An additional factor is that some mediators are registered with more than one provider which makes it hard to consider the providers systematically and it is easier to look at individual mediators.

For this reason the profession of individual mediators was analysed to see whether there was any consistency between, in particular, lawyer mediators and those with other qualifications. Looking at individual settlements at Exeter and Guildford and comparing these to the professional qualifications of individual mediators there was no indication that lawyer mediators were more successful at court-based mediations.

It is apparent and more important to note, however, that the individual characteristics of a mediator and their approach to the mediation does have a large impact on whether or not the case settles.

11. Participants in mediation: views of those who took part in the mediation process

The qualitative research conducted in this study aims to ascertain participants' views of the mediation process and its effectiveness. One aim of this research project is to ascertain the cost-benefit of the mediation schemes at both Exeter and Guildford. This section of the report looks at the benefits to those who are involved in the mediation scheme. Research was conducted with parties, representatives, and mediators. Individual interviews were also conducted with representatives from the judiciary and court staff.

A breakdown of number of questionnaires by type of respondent can be found in Table 4.

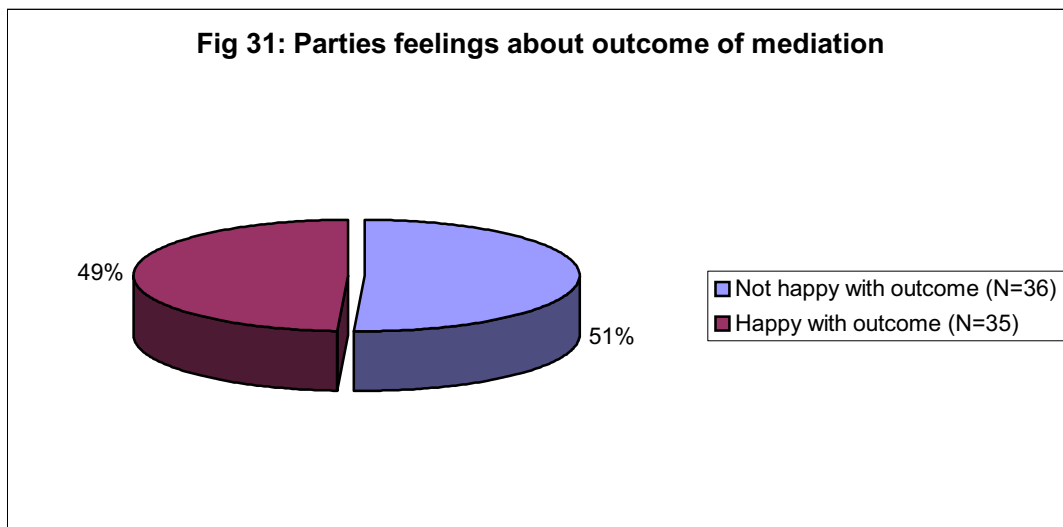
11.1 Parties – claimants and defendants

74 parties, who had taken part in a mediation at Exeter, or Guildford, replied to our questionnaire. 45 parties responded from Exeter and 29 from Guildford. In order to produce the most valuable results the numbers have not been broken down as between individual courts unless there is a significant difference in the data. The breakdown of parties who responded looks like this:

- 43 responses were received from claimants and 31 from defendants;
- 37 of those who responded had settled their dispute at mediation;
- 27 of those who responded had failed to settle their dispute at mediation.

11.1.1 Outcome of mediation

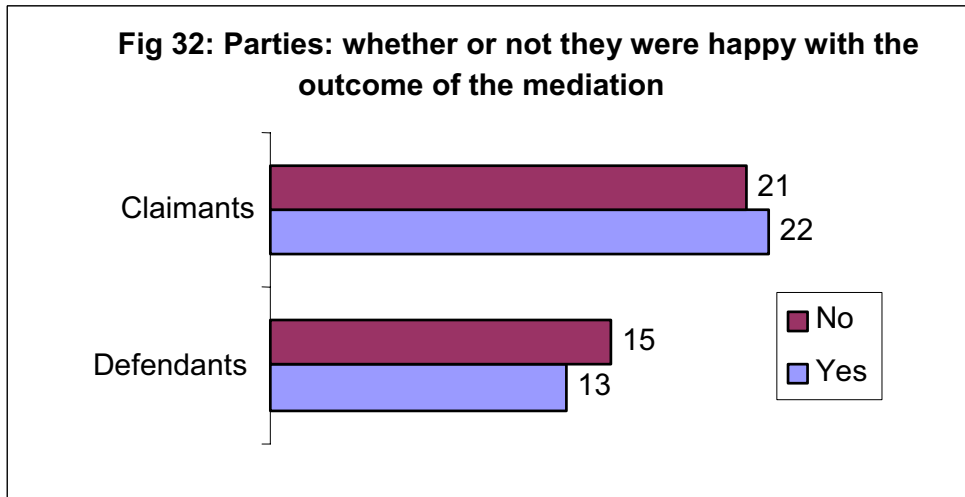
The aim of court-based mediation is to try to achieve an early settlement so that the parties do not have to go through the stress, cost and time involved in going to a trial. The parties were asked whether they were happy with the outcome of the mediation. Figure 31 shows that approximately half of those who replied were happy with the outcome and half were not happy.



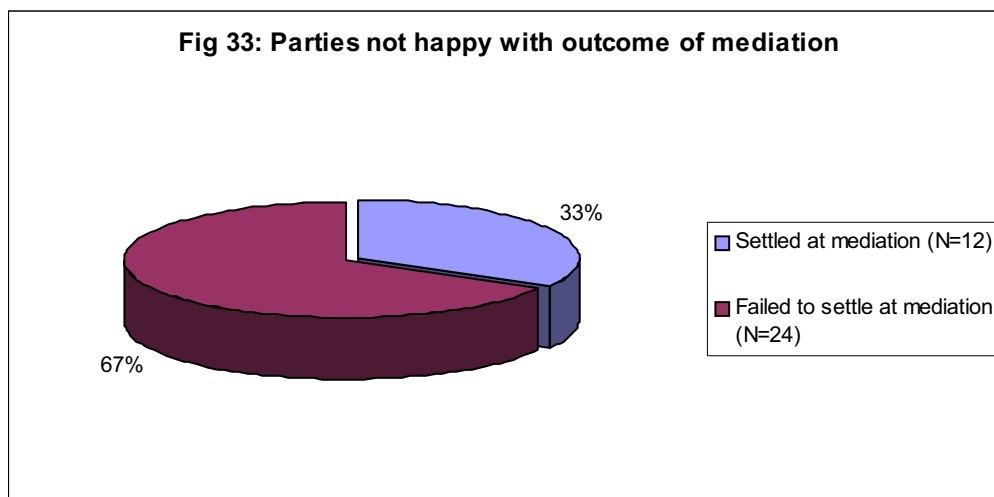
Not surprisingly those who had had a good experience and settled their claim at the mediation were very positive about using mediation as the quote below demonstrates.

"We were pleased to have the opportunity to use the mediation scheme in Exeter, and we were able to resolve our case. I would definitely recommend other people to use the process rather than litigation at a lot more cost."
Claimant, Exeter Mediation Scheme, 2004.

There is little ascertainable difference in perceptions of the scheme as between claimants or defendants.



There is no real perceivable difference as between the parties in respect of whether or not they were happy with the outcome. However, when the parties feelings about the outcome of the mediation are cross-referenced against whether or not they achieved settlement at the end of the mediation they generally tend to reflect the result of the mediation (ie settlement or failure to settle) as can be seen from Figure 33, below.



When this data is broken down between claimants and defendants it seems there is little difference between types and their level of satisfaction when they are not happy with the mediation process (Figure 34 below).

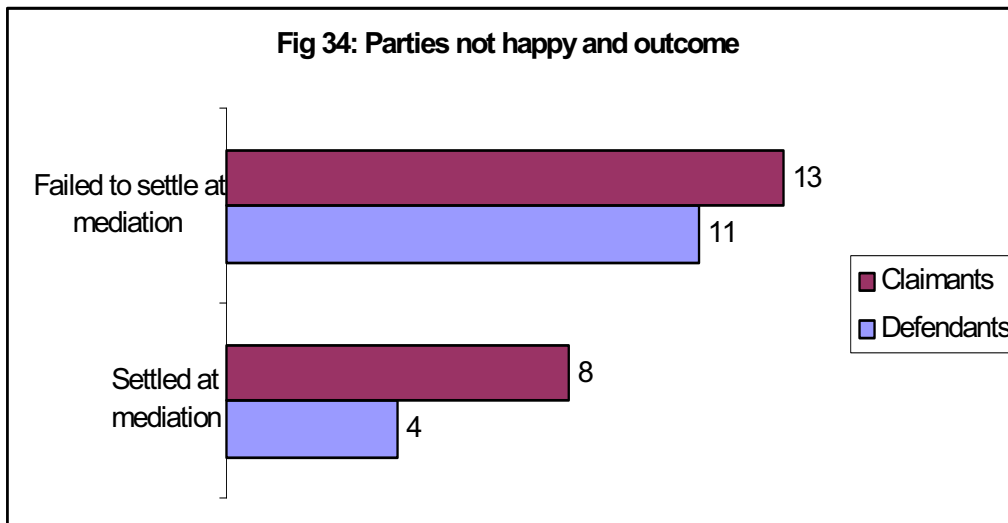


Figure 34 provides that 33% of those who settled at mediation were not happy with the outcome of the mediation. These parties may have settled but perhaps feel that they settled for a result that they would not have achieved in court or were generally unhappy with the sort of process characterised by court-based mediation or by the nature, or style of the mediator;

- *“Merely for the mediator to have a desire to broker a deal between parties, to the risk of losing in court is unacceptable, as this tends to benefit the party with 'monies to bully'.”*
- *“ [The] mediator needs to be assertive to ensure time [is] used effectively. Mediator needs to ensure impartiality. Procedure should be less pressurised.”*
- *“[We needed] to have a mediator with sound background knowledge & experience of the case he is handling. Also for the mediator to understand people and be less opinionated!”*

Figure 35, below, refers to those parties who are happy with the outcome of the mediation. It can be seen overwhelmingly that these parties settled their disputes at mediation.

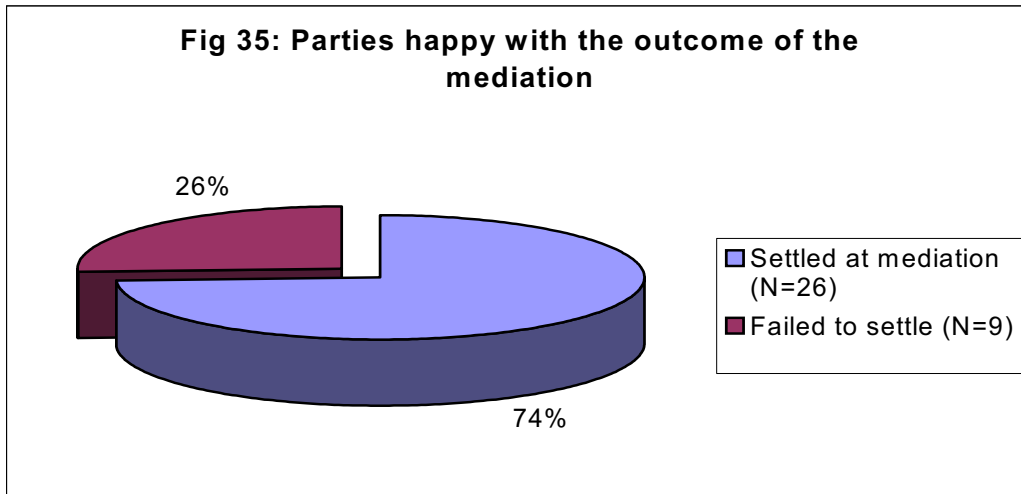
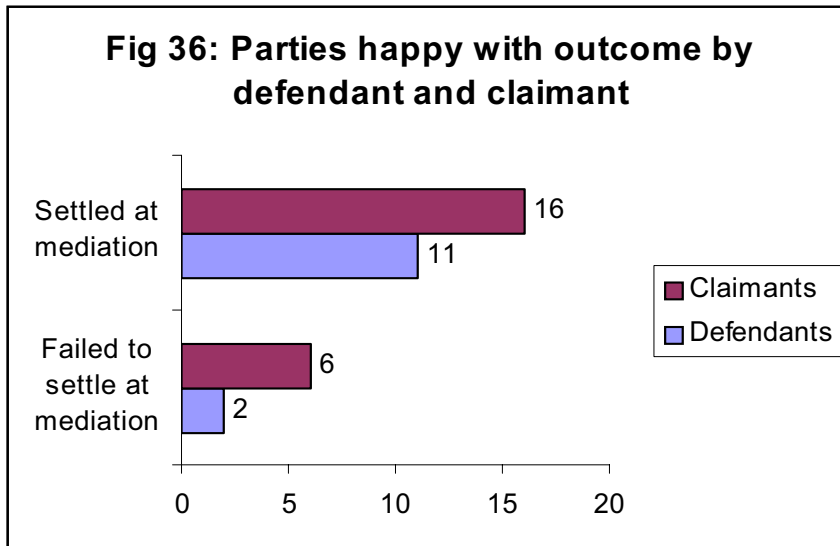


Figure 35 illustrates that 26% of those who did not settle at mediation were happy with the outcome. When this is broken down between claimants and defendants there is little difference between their perceptions. This is demonstrated more clearly in Figure 36 below.



Those who did not settle but were still happy with the outcome reflected a feeling that the mediation should be a positive experience but it just did not work in this instance. Some reactions were:

- *“It could be of use in other cases – perhaps if we had gone to mediation 4 years ago it would have worked.”*

- *“It was useful but a little early.”*
- *“As a result of the mediation we hope to settle.”*
- *“We settled two weeks after the mediation.”*

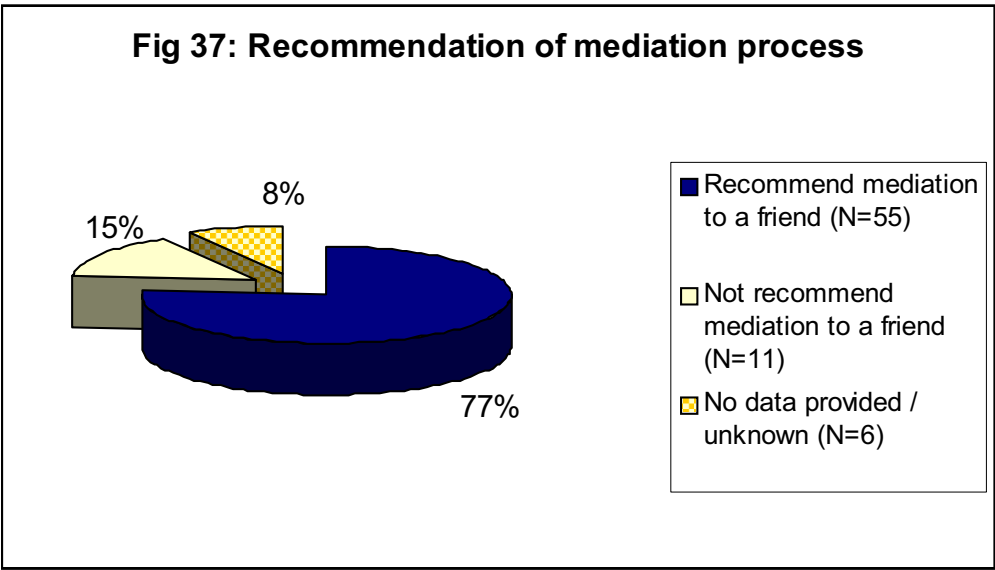
A third of those who settled at the mediation and responded to the questionnaire were not happy with the outcome of the mediation and a quarter of those who did not settle were happy. In some of the latter cases this was because the mediation process had given them a hope that there was the possibility of settlement in the near future. Yet those who settled but were still unhappy with the process seemed to think that they were being asked to settle at any cost. These parties highlighted the point that it is important that the process is conducted in a fair and impartial manner.⁸⁶

There is however an unerringly positive view of the process of mediation coming from these respondents which exists even if the parties have failed to reach a settlement themselves.

“The system seems well thought out but will only work if both parties are prepared to compromise.”
Claimant, Guildford Mediation Scheme, 2004

Figure 37 shows that the parties who responded to the questionnaire are keen on the idea of mediation even if they feel their own particular experience was not as satisfactory as it might have been.

⁸⁶ There were 5 parties from Guildford who responded and fell into this category. Some of these parties seemed to have clear issues with either the mediator or the other party not acting impartially.



74% of respondents would be happy to recommend mediation to a friend. When this is broken down between claimants and defendants there is little difference between them.

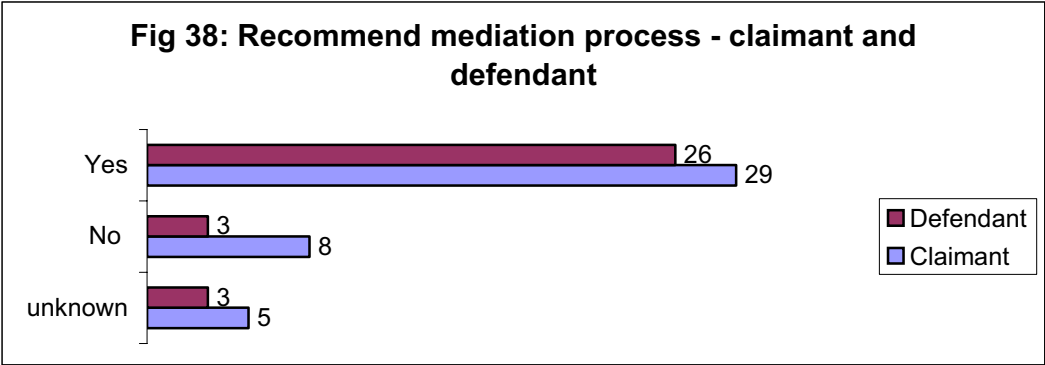
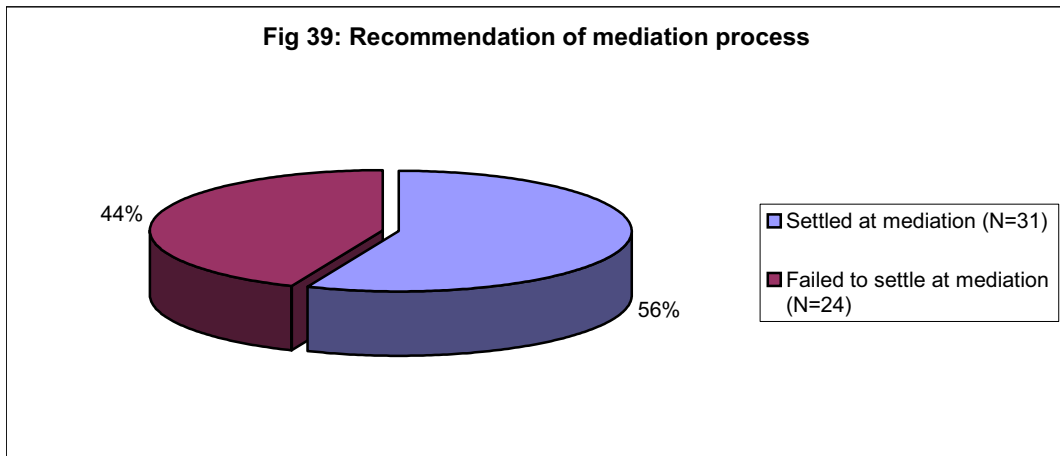
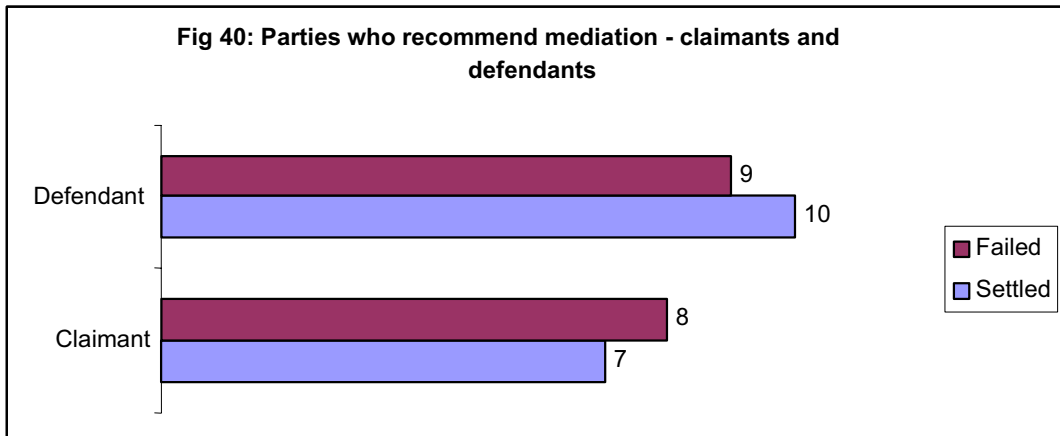


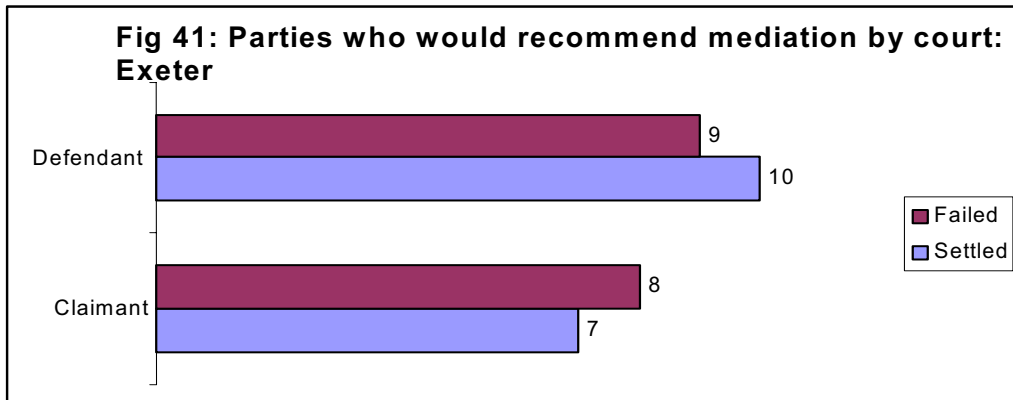
Figure 39, below, shows that the total number of those who would recommend the mediation process is composed of a significant number of parties who failed to settle their own dispute at mediation.



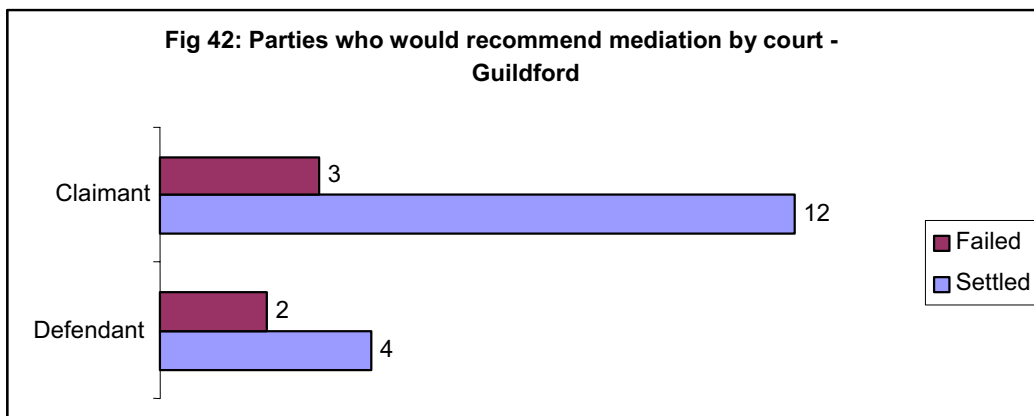
44% of those who failed to settle would still recommend the mediation process. Of those who would not recommend mediation half had settled their case at mediation but did not feel able to commend the process to a friend. Figure 40, below, shows that there is little difference as between claimants and defendants.



However, when these figures are broken down by court there is a difference as is demonstrated in figures 41 and 42, below.



There is a much greater balance between the views of the parties at Exeter than at Guildford. At Guildford far more claimants than defendants were recommending mediation (Fig 42, below).



Those who did not settle but still recommended mediation believed the process could be a positive one – or at least might be a lesser evil than litigation:

- *“It is important that mediation is suggested and undertaken at an early stage. In this particular case it was late in the day.”*
- *“I’m afraid my initial experience of mediation was not a positive one - but maybe this isn’t always the case.”*
- *“This could be excellent, but for myself stripped already of any assets and money I had it was just another way for my former husband, vindictive in the extreme, being allowed legally to put me in further debt.”*

Those who did settle but would not recommend mediation tended to think they had had a bad experience of the process generally or needed more explanation of what to expect in advance of the mediation:

- *“I was told that the mediation was just a discussion to try to sort out our differences. Only 2 hours before it started I found that I had to produce a case to argue the amount I had to pay - not the principal argument that the claimant was not entitled to anything at all.”*
- *“Our claim was for about £6,000 + £3,000 costs. We received £3,500 so clearly we were not pleased with the outcome although I agree that we were not bound to accept the offer. It seemed that all the benefits were to the other party.”*

11.1.2 Follow up Interviews with Parties

Many of the follow-up interviews corroborated the parties' earlier accounts especially where the parties felt that their experience of mediation had been positive. The parties were more able to explain the reasons why they felt mediation had not worked for them where this was the case due to the nature of the follow-up interview being on the telephone.

Reasons given were:

- the case was too complex for mediation;
- the mediation came too late in the day for it to be successful;
- the mediator was poor;
- the other party was intransigent.

When the parties had had some time to reflect on the mediation process there were some comments that claimants felt that the settlement afforded to them may not have been as financially rewarding as it could have been in court.

One said:

'[I was] advised by the solicitor that we would have received more if we had gone to court'

“Mediation does not always get to the truth but it can help litigants resist temptation to pursue cases to ultimate conclusion - which may not get to the truth either.”
Defendant, Exeter Mediation Scheme, 2004

11.1.3 Conclusion on parties views of mediation

Many of the parties seem to have a pragmatic attitude to the mediation process. They accept that the process itself gets a result and may reduce delay etc. It was clear however from a number of respondents that either they or the other side did not understand what the process of mediation involved; the time limited nature of court-based mediation or the emphasis on settlement rather than issues.

One claimant husband and wife arrived for their mediation appointment with their legal representative and three 'witnesses'. They became visibly distressed when the mediator informed them that witnesses were not necessary at a mediation and the emphasis would be on resolution rather than discussing the evidence. They explained that the reason for their distress was that they were sure that the defendants would be bringing more witnesses than them! They had not understood the purpose of mediation and the mediator had not contacted them in advance to explain to them the characteristics of the process or what was expected.

The issue of informing and educating parties as to the nature and process of mediation resonates through the responses received to the questionnaires and the follow-up interviews. Mediation represents a culture change which needs to be clearly explained to parties who perhaps have assumptions about what to expect from a court system which may affect their approach to mediation.

"In view of the long delays if matters have to proceed all the way to the courts it can be less stressful, as my wife and I found out, if matters can be settled by mediation, as I am sure most people would agree. We cannot offer suggestions as to how it can be improved but wish it success in the future."

Claimant, Exeter Mediation Scheme, 2004.

11.2 Views of legal representatives

Responses to the questionnaire were only received from 46 legal representatives. There were 42 respondents from Exeter and only 4 from Guildford. The low response rate from Guildford was quite notable as questionnaires were sent out on two separate occasions to 72 legal representatives in Guildford. The low response rate is likely to be affected by the following factors prevalent in the Guildford scheme:

The proportion of parties who were acting in person on the Guildford mediation scheme is listed in the diagram below. There is a higher proportion of these at Guildford than Exeter. It is difficult to draw conclusions on this in relation to the mediation scheme because many parties do not bring representatives to the mediation even if they are represented in their litigation. A breakdown is given below:

Litigants-in-person	Number	% of cases on scheme
Guildford Claimants	13	24%
Guildford Defendants	17	31%
Exeter Claimants	17	13%
Exeter Defendants	20	16%

There are more low value claims on the Guildford scheme which may mean that even represented parties may not feel that the claim warrants the cost of the legal representative attending the mediation;

It may characterize a general lack of interest or knowledge of the mediation scheme amongst legal representatives in Guildford.⁸⁷

Only 3 of the representatives who had responded were attending their first mediation. Most others had had previous experience of more than 2 mediations in the past.

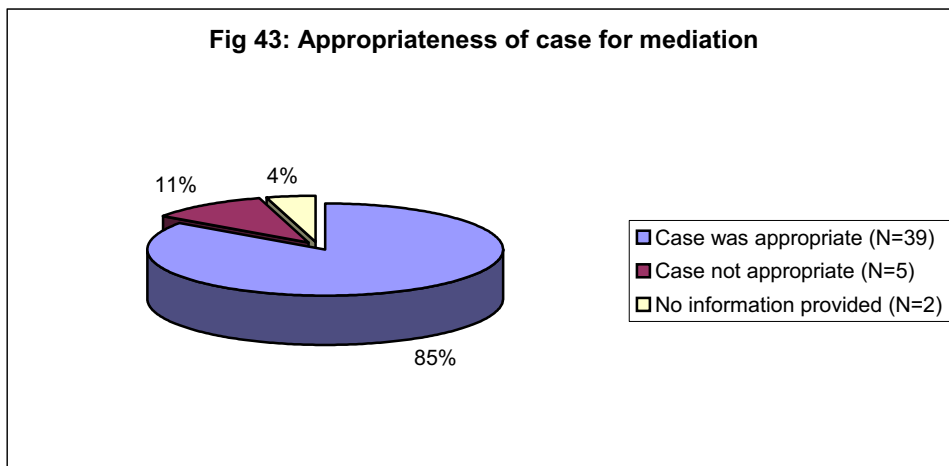
It has not been possible to ascertain how many of those who attended the mediation were represented at the mediation itself. There is no formal record kept on the court file as to who actually attended the mediation. Our observation of some of the mediations showed that many parties, although represented by a solicitor for their litigation, did not bring them to the mediation. It seems that this

⁸⁷ In order to ascertain the reason for the lack of response a general email questionnaire was sent to a broad and general selection of 34 solicitor members of the Law Society in the Guildford area who specialised in litigation. The questionnaire asked for general feelings about mediation and court-based mediation in particular but only two responses were received.

might be due to the fear of raising additional costs or because the mediation is essentially portrayed as an informal process.

11.2.1 Appropriateness of case for mediation

The majority of legal representatives at both Exeter and Guildford felt that the case had been an appropriate one for the mediation process.



Where it was not considered appropriate the reasons were given as the following:

- Poor facilities;
- Both parties need to want settlement and not be intransigent;
- Mediator needs to ensure parties negotiate on settlement not on issues;
- Mediation should be voluntary and not imposed by the court.

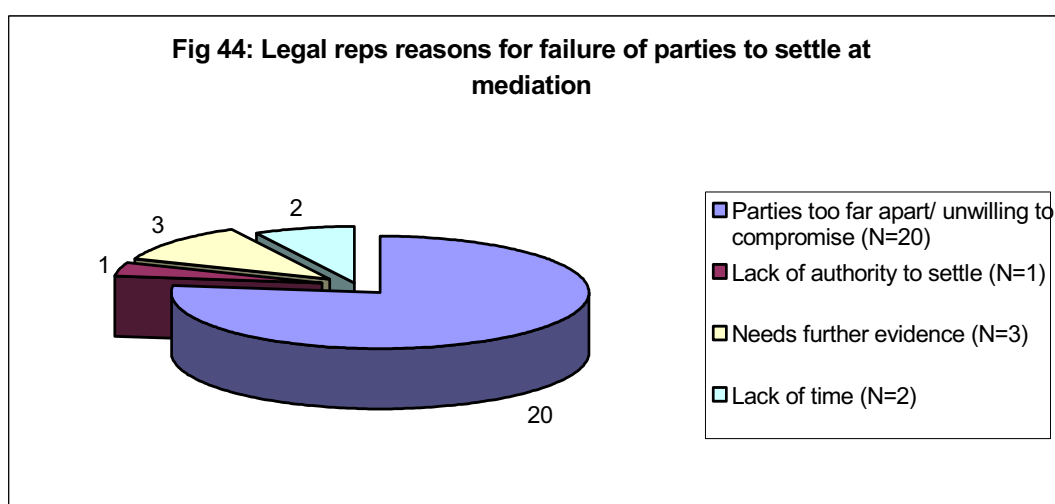
This response is typical of those received by the few representatives who did not feel mediation had been appropriate.

“The scheme would be improved if mediation was not imposed on reluctant participants. That said, the mediator was a good one, and the process was relatively inexpensive, so I would certainly consider it in other cases.”

Legal Representative for Claimant, Exeter Mediation Scheme, 2004

11.2.2 Reasons for failure to settle

Of those who responded whose cases had not settled they were clear as to the reasons why the case did not settle.⁸⁸ The majority blamed the other side's intransigence or inability to compromise. 46% thought this was the reason the case had not settled and 38% thought it was because the parties were too far apart and therefore it was difficult to negotiate a settlement.⁸⁹



Over three-quarters of legal representatives blamed the reason for the failure of the mediation to settle on the intransigence of the other party or said that the parties were both too far apart to reach a conclusion. Typical comments include:

- *“The other party was not fully engaged in the mediation - just going through the motions.”*
- *“My client was looking at creative methods of resolving problem ie. assistance with a new wheel chair but the claimant was advised by her solicitor that only a cash settlement should be accepted.”*
- *“[The mediation failed to settle due to the] unwillingness of the claimant to compromise or accept defendants point of view.”*

⁸⁸ Responses to this question were only received from 26 legal representatives.

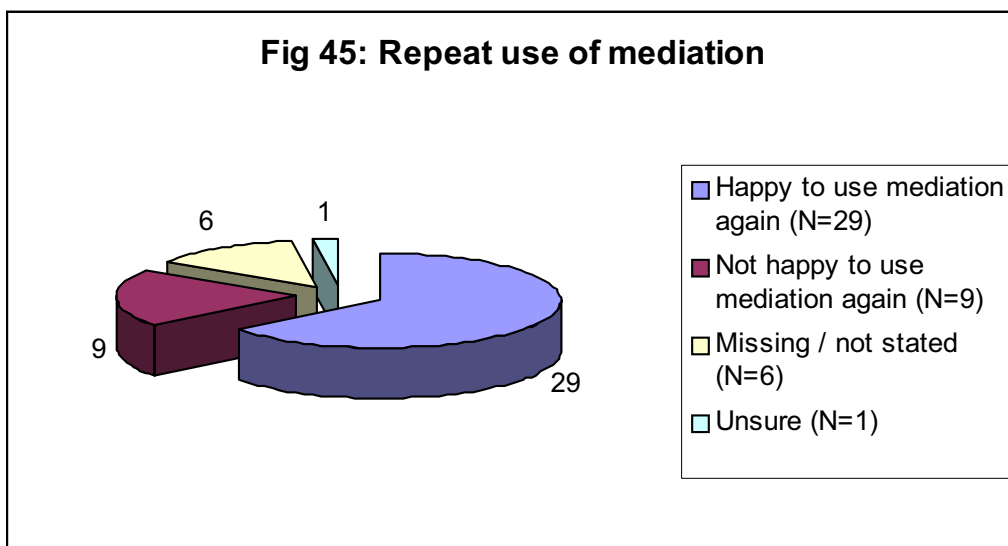
⁸⁹ Figure 44 and 45 both show the actual numbers rather than percentages due to the low response rates of legal representatives.

Some comments show that the legal representatives are trying to find a compromise or settlement but many others reveal that mediation is just another stage in the litigation process which may be used to a party's advantage where the other side is weak or where their client might be weak in some regard.

Other reasons given for failure to settle were that the other side lacked authority to settle, the case needed further evidence (without which neither side was prepared to compromise); or the mediation ran out of time.

11.2.3 The use of mediation

65% of legal representatives said that they would be happy to use mediation again as is demonstrated in Figure 44 below. 13% did not respond to the question and 20% said no. Of the four responses received from Guildford only 1 representative was happy to use mediation again. Yet, although the majority of legal representatives stated they were happy to use mediation again, one third were against the process, did not comment, or were unsure.



Comments from those who were not happy to recommend mediation include:

- “*[The] mediators need to be more robust in asking the parties to assess the possible weaknesses or risks in their cases. They should also be able to display a knowledge of legal issues and procedures.*”
- “*...it may be worth having some flexibility in the timing of mediation.*”

- *“Mediators [should be] prepared to mediate on issues rather than just an amount.”*

Most of these comments appeared to be criticising the individual mediator or mediation process they had attended rather than mediation *per se*. Many seemed to think that with some improvements the process might still be appropriate.

11.2.4 Follow up interviews with legal representatives

The legal representatives view changed little between the responses received to the questionnaire and the telephone follow-up interviews. More than half of those interviewed hoped that the mediation would have been able to achieve settlement of the case with only a few mentioning narrowing or clarification of the issues as a consideration. The respondents were split over whether the mediation had saved money – 12 of the 19 who responded said that they thought that the mediation had not saved the parties any money.

11.2.5 Conclusion on views of legal representatives

The legal representatives have a crucial role to play in the mediation process as they are instrumental in advising their clients as to the viability of using mediation to help to settle their case. Yet fewer responses were received from legal representatives than any other category. This is likely to be because it was noted from our observations of some of the mediation appointments that even if parties were represented often this person did not attend the mediation itself.

Those who did respond generally felt mediation had been appropriate but criticised the administration of the scheme or the mediator or the other party for any problems which arose.

There were a number of criticisms of the poor facilities for the mediation appointment at Exeter. This did not affect the legal representatives' decision to use mediation but affected the process of the mediation itself. Another area of criticism was the lack of legal knowledge displayed by some of the mediators. Some of the

legal representatives felt that the mediator should have specialist knowledge of the area of law covered by the case. A typical comment was:

- *“...the mediator was effectively redundant in the process and his contribution was unhelpful. He was out of his depth and as a result was completely by-passed.”*

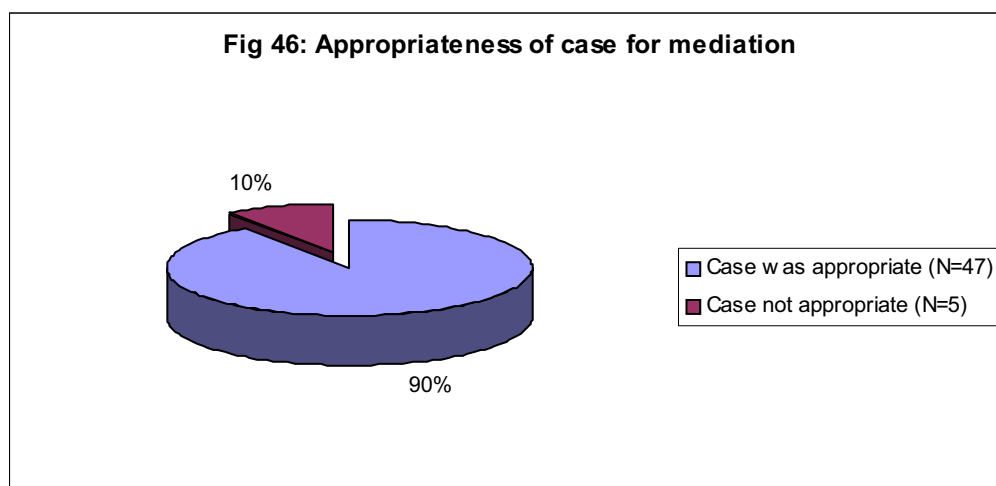
It was clear in their responses to the questionnaire that the legal representatives who responded had clear views of mediation and what should be achieved in each case.

“I feel that the opportunity to have all representatives and their mediator should be given to enable a frank discussion to narrow the issues and fully appreciate their case and reasoning. I felt that I was not aware of all parties' 'bottom lines' or position during the afternoon. If I had it my way well have affected my approach and advice.”

Legal Representative, Exeter Mediation Scheme, 2004

11.3 Response of mediators

52 mediators responded to the questionnaire. 90% thought that the case they mediated had been suitable for mediation.



Overwhelmingly, mediators thought that the cases they were mediating were appropriate for mediation. Interestingly there were a couple of cases which were not thought to be appropriate. These included:

- *“Generally in favour of parties being strongly encouraged to mediate but here it was evident that both parties were reluctant because they wanted a trial (and were fully prepared for it). One party said it was only there because it had been ordered to attend.”*
- *“Careful selection of cases - a straight up and down contractual money dispute between a large London firm of solicitors and a sophisticated former client was never likely to be mediated successfully. I could have predicted this outcome.”*

“There needs to be a good ‘triage’ of cases so that ‘mediatable’ cases are directed to the scheme as there is a danger that disputing parties wish to be seen to have tried mediation before going to court as it makes them seem conciliatory - even if they have no intention of reaching an agreement.”

Mediator, Exeter County Court, 2004

11.3.1 Reasons for Settlement

The mediators were generally happy to comment upon the reasons why they thought that the mediation had either settled or had failed to settle. These are some of the reasons given, by the mediators who responded, when the mediation had achieved a settlement:

Reason	Number
Time Limit	1
Power of one party	4
Suggestion of a creative solution by mediator	4
Clear scope for compromise	10
Other reason	3

Most of those who replied believed that because there had been clear scope for compromise in the case this had enabled the parties to reach a settlement. This is likely to be the case where there has been a financial disagreement and it is possible to resolve the dispute by one side paying the other a negotiable sum of money.

Of those cases that did not settle the mediators offered the following reasons:

- parties were unable to agree about settlement;
- case was too emotionally complex for the time allowed;
- the gap between the parties was too large;
- the parties had an unequal perception about the strength of their case;
- distrust between the parties.

“Despite [lawyers] education on mediation they only understand ‘the war of litigation’.”
Mediator, Guildford Mediation Scheme, 2004.

This reasoning points to the different attitudes of individuals attending the mediation as being key to reaching a settlement rather than the type of case, or the amount in dispute etc.

11.3.2 Follow-up interviews

19 mediators were contacted in follow-up interviews. The response to questions was quite disparate. It seemed that many mediators had different ways of approaching mediation and different processes for conducting the session.

As many parties seemed unaware of how to prepare for mediation or what would be expected of them we asked the mediators whether they had contacted the parties in advance of the mediation. Of the 19 respondents, 9 never contacted parties in advance, 4 contacted them sometimes and 6 frequently contacted parties prior to a mediation. Many of the legal representatives and parties we spoke to thought that it would be good practice to contact claimants and defendants in advance of the mediation.

There was also no consensus as to whether the presence of a legal representative at the mediation was beneficial or not. Only 6 mediators were positive about the presence of a lawyer at the mediation and the rest were either negative, neutral or had no feelings either way. One mediator pointed out that their view was influenced by the attitude of the representative themselves.

11.3.3 Conclusions on views of mediators

Many mediators praised the administration of the Exeter scheme but criticised the poor facilities. This was in advance of the scheme moving to new facilities at the new court in November 2004. Prior to this time the facilities at the old court had been, in some instances, extremely poor with, for example, a lack of space and little or no heating. The mediators complained that poor facilities were:

- *“...not really conducive to the process”.*

This was seen as especially relevant in high value claims. One mediator complained:

- *“You cannot expect parties who are staking £100,000 including costs to be comfortable in these rooms with basic facilities”.*

Some of the mediators expressed the view that the facilities might improve in the new court. Unfortunately they did not seem impressed with the new building either. One commented,

- *“It is a pity that in building a new court building it did not include a room suitable for mediation”.*

The mediators also seemed unimpressed with the mediation rooms available at the court in Guildford and commented on the fact that they were small – although better than other courts.

The mediators were also disappointed with the lack of knowledge of the mediation process which was displayed by the parties. One observed:

- *“I do not know what information is given by the court prior to the mediation. I would be very interested to know this - is it standard in every case or does it vary? I would think however, that providing a clear rationale as to the mediation and parties being advised of an expectation on entering the mediation would assist successful outcomes.”*

A point which emerges from questionnaires and interviews with the mediators and the legal representatives is that it is important that the parties are informed in advance of the mediation of exactly what they need to expect and that they should not prepare by looking at the issues but instead by focussing on being forward-looking and concentrating on solutions.

One mediator stated,

- *“There was little information for users of what mediation was.”*

This needs to be taken into account by mediators when introducing litigants attending their first mediation.

11.4 General conclusions from all participants in mediation

The response to the questionnaires was generally positive and most respondents seemed to think the system worked well on the whole - although there are aspects of the mediation process which need to be resolved.

There is a concern that there is little consistency in briefing the parties in advance and providing a clear explanation of the mediation process and expected outcomes. This is likely to be the responsibility of the court through supplying relevant and clear information; the responsibility of the legal representatives in dealing with their own clients and contact by the mediator in advance of the mediation appointment. Whether or not the parties were contacted by the mediator seemed to depend more on the style of individual mediators than any particular direction from the court or guidance given to mediators by their providers.

Yet the point about briefing does not only apply to parties or legal representatives. There are also issues about who decides whether a case should be mediated at all which need to be resolved by the court and whether the mediator should have appropriate qualifications for resolving a particular case, or not.

The question of facilities arises because the mediator feels that appropriate facilities may affect a positive outcome rather than mediation seeming to be a second class provision to litigation itself.

It may be that the local culture of the legal profession may itself lead to a greater acceptance of using mediation as a method of settling disputes. In Exeter the local branch of the Law Society helped to establish the Exeter scheme and also act as the sole provider for a small claims mediation scheme running at the same court. Their enthusiasm for mediation is sure to encourage a more positive approach in the environment in which their members operate.

There is no link between the expertise of the mediator and the nature of the case. There is no connection made at the court when organising the mediator to ask for a particular mediator with specific expertise to mediate on any case. At both Exeter and Guildford the mediation clerk operates on a strict rotational basis between mediation providers.

12. Interviews with the judiciary

Interviews with the judiciary at both Exeter and Guildford were conducted because the judges have a very important part to play in both establishing the mediation scheme and maintaining momentum which ensures that the scheme has a fundamental role in day-to-day case management.

At Exeter three district judges all involved in allocating and referring cases to mediation were interviewed as well as the Designated Civil Judge, Sean Overend, who was involved in the establishment of the scheme and has referred several cases to the mediation.

At Guildford two district judges were interviewed, one of whom is the main referring judge for the scheme.

Since the introduction of the Civil Procedure Rules the role of the judge in a dispute has been to encourage the parties to use alternative methods of dispute resolution to try to find a solution to the problem rather than resort to traditional forms of litigation.⁹⁰

All of the district judges that were interviewed believed that their role in the mediation scheme was to determine which cases might be assisted by using mediation.

12.1 Selecting cases for mediation

All of the judges agreed that all cases were potentially suitable for mediation. There was no definitive judgement about the type of case that was suitable.

At Guildford we were told that it was “cases which are not the run-of-the-mill” which are not personal injury or landlord and tenant cases but disputes between employers and ex-employees about commission or family disputes relating to land

⁹⁰ See CPR r1.4(2)(e).

and trusts; cases which don't involve insurance companies on both sides or cases where there are likely to be huge costs.

At Exeter the emphasis was also on recommending cases for mediation where there were on-going issues or on-going relationships, such as neighbour disputes, business relationships or on-going complications. Also cases which involve a business contractual dispute or some form of "accounting exercise". In a technology or construction dispute which may get very expensive they would be encouraged to mediate straight away. Two judges said that they were able to determine which cases 'cry out' for mediation and would point this out to the respective parties and the lawyers.

"I was doing a case management conference in a construction case and the value of the claim was only worth £40,000. By the time they got to see me..., the claimants' solicitors had spent £40,000 and the defendants' solicitors had spent £40,000 so they had already doubled the value of the claim.... They had complied with protocols, they had got experts' reports, they had got experts to meet, they'd amended their pleadings, they had asked for further particulars. They had done everything possible, except at an early stage get together and mediate... I would say this is a case which cries out for mediation. You know, as well as I do, you lawyers will have spent more money than the claim is worth. How can you justify that to your clients?"

DCJ, Devon and Cornwall, 2005.

The district judges at Exeter had all been working on the mediation scheme since its inception and had not yet developed their knowledge of the types of cases suitable for mediation with experience. For instance, we were told by a DJ at Exeter that if a PI claim was at its very early stages it would not be referred to mediation immediately but it would still be considered, although at a later stage, usually once the medical evidence had been concluded. So these sorts of cases were not suitable for referral at allocation stage as the parties would not yet be in a position to discuss quantum. However, in these types of cases, parties would need to file either a mediation reply form, or a letter, to say what efforts have been made to go through ADR at a certain stage in the proceedings.

The Designated Civil Judge for Devon and Cornwall is also very enthusiastic about mediation and has referred a number of cases to mediation at Exeter from other courts on the Western circuit.

At Guildford County Court, a large proportion of cases do not start in Guildford but are transferred in from other courts on the circuit. These cases would not be automatically sent mediation packs and the judge would only suggest mediation if the “case screamed out for it” or if it arose at a case management conference. This was an issue because there was not a system in place to ensure that every case received information about the mediation scheme. The DJ believed that the scheme at Guildford really needs a leaflet or some sort of information which could be easily given to parties by a judge or picked up from the court to publicise what is available.

The judges all tended to agree that any case was suitable for mediation but at times the difficulty was getting the solicitors to be convinced it was in their interests to mediate.

“...all cases are capable of mediation if... both parties would like to settle before trial. I think that’s the simple test.”
DJ, Exeter County Court, 2005.

12.2 Encouraging parties to mediate

One of the clear differences between Exeter and Guildford, which emerges from this research, is that the district judges at Exeter are more likely to be involved in encouraging the parties to mediate than at Guildford.

At Guildford the emphasis is on the process beginning once the parties have volunteered to mediate. It is also unlikely that the district judge at Guildford County Court is involved in the process at this stage as the mediation clerk will pick up on those cases where only one party agrees to mediate, or where the parties have given a conditional, or ambiguous answer. This is a procedural problem which needs to be addressed as generally, the only parties who get to mediate are those who volunteer at a very early stage.

The usual route to mediation is the parties indicate that they would like to use ADR on the allocation questionnaire and the invitation to mediate form so the case will then be stayed until the mediation process is over but this only happens with claims which are issued at Guildford court rather than at any other courts in the Surrey Group although the DJ's in this area tend to move frequently between courts. The number of cases being referred directly by the District Judge has reduced over the last year of the scheme because two new district judges have been appointed who are not as familiar with mediation as were those who set up and established the scheme initially.

At Exeter the district judges are keen to try to encourage the parties to use mediation in order to prevent the costs mounting early on in the case. During the first year of the scheme there were a number of long-standing cases, involving vexatious litigants or highly complex issues which were referred but did not settle. One district judge admitted that at the outset of the scheme the judges might have been "...pushing ... to encourage people to go into mediation" whereas more recently the approach had been gentler. A lot of this had to do with the education of the local profession and if the district judge kept mentioning mediation this would help to educate the local solicitors. Also the point was made that if the judges were enthusiastic about mediation this would be passed on to the local solicitors who would be keener to suggest mediation to their clients.

"What you are trying to do is kick start more of them to settle or settle earlier in a more cheap, economical way."
DCJ, Devon and Cornwall, 2005.

The judges at Exeter were divided on whether the recent judgement in *Halsey v Milton Keynes*⁹¹, in which the Court of Appeal said that the courts had the ability to encourage mediation rather than force parties to mediate, had influenced the Exeter scheme. One said it had led the judges to encourage parties more gently but on the whole the approach was to encourage the parties by telling them that it

⁹¹ *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002

would be cheaper and better to mediate. One judge at Guildford, who was not directly involved in the mediation scheme, had not heard of the *Halsey* decision which implies that it had made no impact on their work.

Thus, whilst neither court imposed mediation, the judges at Exeter were more likely to discuss it with the parties at a directions hearing, or CMC, than at Guildford where there was only one judge who might refer cases in this way occasionally.

"I have found when you do have both parties present with their solicitors at a directions appointment for whatever reason then you have got more of a chance of getting a mediation on line and also settled because the parties themselves have heard from the judge that it is a good idea."

DJ, Exeter County Court, 2005

12.3 Views on workload / costs of mediation

At both Exeter and Guildford the judges were keen to stress that the impact of mediation on their day-to-day workload is minimal. There is no time programmed into the week for mediation but it arises during the course of normal case management because the role of the judge was to encourage parties to think of alternative methods of dispute resolution. At Guildford the main difficulty for the new district judges there was that there was no time given to change or review the existing procedures. Only one district judge was aware of the mediation scheme and that was why she was the main judge referring cases. Thus the issue of time was not related to mediation, *per se*, but to the administration of the mediation scheme itself. Without the time of the judges being devoted to the scheme it was beginning to peter out because of the change of personnel.

At allocation stage the judge also has to look at the reply to the invitation to mediate and if the parties do not file the forms the judge has to spend time looking through the file for them but that was a minimal addition to the workload.

"It is impossible to have a mediation scheme without the bench behind it as we have to try to encourage people that way."

DJ, Guildford County Court, 2005

Thus the judges did not see that mediation had any impact on their day-to-day workload but in order to manage the scheme appropriately it was necessary to have some dedicated time to give to the scheme. As one district judge told us this was a change in the civil law which loaded the system with more work but it was purely to enable the development of much needed reforms. Of course, the judges acknowledged that if high value cases with long time estimates were able to settle at mediation there were infinite benefits to the system.

The judges found the workload for mediation was difficult to quantify as it was part of the overall case management process.

12.4 Views on administration of scheme

The judges at Exeter and Guildford emphasised that the court office was very stretched and that everything else tended to take priority over mediation. At Exeter one district judge stated that this led to more problems because a mediation might have to be cancelled if one party had not come back to confirm that they would be attending and the mediation clerk had no time to check in advance.

“If one of the parties says yes and one says no then we’ll try and pick up on those cases. They may say, “We may agree if the other side agrees” - conditional answer then the mediation clerk will refer them up and occasionally I have made an order that the DJ thinks this case is suitable for mediation and wants to know why they have not considered mediation. Haven’t heard about any replies. There is no time programmed in for it....”

DJ, Guildford County Court, 2005

At Guildford the concern was that the district judge and the mediation clerk needed to be given more allotted time to select appropriate cases for mediation. There were real resource implications in the role of the mediation clerk as it was difficult to be hands-on with the scheme.

The aim in both courts was to try to somehow streamline the administration in order to enable the scheme to function more effectively. At Exeter they had already begun to try to give the mediation providers more responsibility for organising the

mediations and the hope was that in the future the court might be able to subcontract the administration of the scheme which would lead to earlier and more effective settlements.

“If we could sort out – streamline the administration then it would achieve more of what we would like it to achieve – that is not to interfere with the timetable of the case.”

DJ, Exeter County Court, 2005.

12.5 Views on the future of the mediation scheme

The value of judicial involvement in the mediation scheme cannot be underestimated. At Guildford one district judge stated that it was impossible to have a mediation scheme without the bench behind it as the role of the judge is to encourage parties to mediate. The judges all felt that the parties should be encouraged to mediate wherever possible and all parties should be aware of mediation. At Guildford the current information given to parties was long-winded and not of the kind which could easily be handed out by a judge. The court required some form of leaflet, poster or ‘friendly document’, which could be given out to enable parties to take it away and think about mediation as a real possibility as is currently the case in family mediation. At Guildford both judges interviewed agreed that the mediation scheme needed to be expanded and it was not pushed enough. It needed to be promoted by both the district judges and the court staff.

“I just think you need to give it time, give it support and keep talking about it and thinking about it to get a change of culture....”

DJ, Exeter County Court, 2005

At Exeter one district judge acknowledged that it was very hard to measure the success of the mediation scheme because success at mediation was an intangible thing it was just a feeling,

- *“... that those parties who walk away with a settlement are going to be more content with the process than two parties who come to court where one is*

going to be an outright winner and the other is going to be an outright loser...”

For this reason it was also difficult for the judges themselves to determine whether the scheme had directly contributed to a reduction in last minute settlements or cancelled mediations as they did not necessarily have an overview on all of the cases going through the court.

At Exeter the main issue for the future was the enhancement of the administration of the scheme so that it operated more quickly and more efficiently than it had done in the past.

12.6 Conclusions on views of judiciary

The judges interviewed who were involved in the schemes were very enthusiastic about mediation. Only one judge interviewed at Guildford knew only a little about mediation. The judges were keen to support the initiative because they thought that the benefit to the parties in terms of potentially reduced costs as well as a reduction in the stress of going through a trial which could be ‘daunting’.

At Guildford the district judges who were interviewed were new to the court and it was clear that they needed a system to be developed to enable more parties to receive information about the mediation scheme as well as a way of educating the new district judges about the scheme.

The judges stressed that both schemes were still under development and changes were needed before they became part of the culture of the court or the local profession. These would develop and happen over time.

One of the main concerns was the administration of the scheme at both courts as mediation clerks only worked on these cases on a part-time basis and it was therefore difficult to control the rate of flow of work so the system did not operate as efficiently as it might.

At Guildford the mediation scheme is not seen as a priority. The information which is sent out is just typewritten sheets and not all of the judges are properly aware of the scheme and the documents and forms required.

13. Main conclusions and recommendations

This report, although dealing with a small number of cases, represents the totality of referred cases at both courts during the research period. Therefore it is possible to draw conclusions about the two different schemes and as between each scheme. As the data is limited in number it is not possible to go further and make any conclusive statements about mediation more generally.⁹²

Both Exeter and Guildford mediation schemes were established on a similar basis and with similar administrative systems: mediations conducted at the court; time-limited with mediators taken from a rota of providers.

The Exeter scheme seems to have maintained similar numbers of mediations since its inception whereas there are only a few mediations now coming through Guildford. It seemed to be crucial at both Exeter and Guildford that there was an enthusiastic and active judiciary supporting the scheme and this was illustrated by the decline in the use of mediation at Guildford once the judge who had established the scheme left the court.

An active judiciary at Exeter are also supported by a steering group which acts to modify the scheme in response to issues which emerge over time. At Guildford there was no such group which could keep the scheme alive when there was a change of both judiciary and mediation clerk at the court. Thus although the Exeter scheme has evolved since it was launched this has not happened at Guildford and at the end of the research project it seemed that the mediation scheme was a very low priority at Guildford County Court. One important factor to have emerged from this research is that a court with a mediation scheme needs to have a judiciary who are keen to support and promote mediation. At Guildford the lack of support for the scheme led to it ceasing to operate effectively. There was a general lack of knowledge about the scheme amongst both court staff and the judiciary. Since the original judge left Guildford after establishing the scheme the number of cases going to mediation and the number of settlements had both diminished. For this reason the scheme itself was beginning to peter out. It was clear from the research

⁹² A comparison with the Birmingham and Central London ARMS scheme data should help to provide more conclusive and decisive conclusions.

that the enthusiasm of the judge was the most important factor in developing and maintaining the mediation scheme. It is recommended that this enthusiasm is developed with the aid of a steering group made up of mediators and other interested parties.

13.1 Cost profile of the mediation

Although mediation seems to be a new initiative many of the administrative costs associated with the mediation scheme can be costed using existing measures. Standard BMS timings can be utilised for many of the tasks associated with mediation with extra tasks, such as keeping the spreadsheet up-to-date being accounted for in the uplift. Judicial time spent on mediation is more difficult to quantify as many of the tasks involved are included in the day-to-day case management of proceedings. For this reason it was very difficult to try to cost a mediation specifically. The positive aspect of this is that it is possible to integrate mediation effectively into the general administration of the court.

13.2 Settlements

The aim of encouraging parties to use mediation as an alternative to traditional methods of resolving disputes is to save both money and time and to provide a process which is more satisfactory than going to court. Yet mediation is most effective if the parties are able to make an agreement and reach a settlement in the case. For this reason the number of cases being referred to mediation needs to be balanced against the settlement rate. If the parties do not reach a settlement at mediation they will have spent more money and added extra time to their litigation. There are some positive benefits even if the parties do not settle as they may have been able to focus some of the issues or even just begun to communicate with the other party which may not have been possible prior to the mediation.

At Exeter the settlement rate at mediation of 40% was lower than at Guildford where the rate was 53%. It may be that at Exeter an over-enthusiasm for mediation led to cases being referred which were more complex and hence unlikely to settle at a time-limited mediation. Far more noticeable is the difference in

whether the route to mediation was voluntary or court advised. More cases were court-advised at Exeter than at Guildford. In fact, the percentage of settlements at Exeter has increased since the inception of the scheme and it seems that this is likely to be due to a reduction of the number of cases where parties are 'encouraged' to mediate by judges more enthusiastic for mediation than the parties.

At Exeter there was clearly more pressure and encouragement from the judiciary for parties to take part in mediation. This pressure seems to have decreased more recently and the settlement rate at Exeter at the start of 2005 was gradually increasing. It seems likely that there has been a change in attitude when judges are discussing mediation options with parties since the *Halsey* judgment.

In addition, over the period of the research, there were a number of difficult and long-standing cases which were referred to mediation at the beginning of the scheme and which did not settle. Court-based mediation is strictly time limited and it is recommended that there is a distinction to be made between long-standing and complex cases which should be recommended to mediate at a private, commercial mediation session. Such a session can be scheduled for longer than three hours and would give time to the mediator to tease out more difficult issues. This does not mean that multi-track cases, *per se*, are not suitable for court-based mediation but only those cases which have been in the court system for a number of years and for one reason or another are likely to be intractable.

District Judges at both Exeter and Guildford are able to raise the question of mediation with parties at CMC's or at directions hearings where they consider it to be relevant. There is no general consensus from judges as to the type of case which is most suitable for mediation. At Guildford they are unlikely to use any further encouragement or to discuss mediation at such a CMC. The judiciary at Guildford prefer parties to volunteer for mediation. Mediation generally has a lower profile at Guildford than at Exeter.

Unsurprisingly, there is a clear hint that parties are more likely to settle if they volunteer for mediation. Yet at Guildford the settlement rate is higher for those cases where the court advised mediation. It has been difficult to determine why this was the case as there were no court-advised cases whilst the actual research

was being conducted. Yet it is likely that this is due to a difference in what court advised means at each court.

Yet, in addition, at Exeter there was an indication that in some cases an impending mediation led the parties to settle their cases prior to the mediation taking place. At Exeter, 22% of cases originally referred to mediation settled in advance of the mediation taking place. This suggests that the impending mediation date helped to focus the minds of the parties upon the idea of settlement. At both courts 75% of the cases, which had originally been referred to mediation, had been reached some sort of resolution at the end of the research period.

Approximately, 30% of cases from both courts proceeded to trial, which means the rest settled before trial either at mediation or by the parties themselves. Interestingly, even though Guildford has a higher settlement rate at mediation both courts had a similar proportion of cases settle in advance of the trial.

Despite one of the advantages of mediation being that it is possible for parties to make creative settlements there is little evidence of this being the case at either Exeter or Guildford. Most cases involve some sort of financial resolution and any creativity is most likely to revolve around the monetary amount of the agreement of when and how it should be paid rather than whether an alternative to money can be agreed. It seems likely that this is because the amount in dispute is part of the court process with all of the additional cost implications that this entails and it is difficult to move away from these strong financial limitations. Parties who responded to questionnaires were divided over whether they were happy with the outcome of the mediation. The outcome does not always leave both sides content although they might agree with a solution as it is something they can live with and means that the case is finished at an early point than it would be if they had had to go to trial.

13.3 Suitable cases for mediation

This research did not find that any one type of case was more suitable for mediation than any other. This was mainly because of a prevalence of breach of

contract cases referred to mediation and very few cases in any other particular category. The majority of PI cases referred to mediation at Exeter did not make it to a mediation appointment being either cancelled in advance or settled prior to the mediation taking place. The fact that one mediation provider complained about a complex PI case being referred to mediation seems to support the idea that some cases may be more suited to a different form of mediation and should not necessarily be part of a time-limited, court-based scheme.

Overwhelmingly, however, the view coming from mediators was that it was the nature of the parties rather than the nature of the claim which affected the outcome of the case. 84% of legal representatives thought that the other side's intransigence or the fact that the parties were too far apart was the reason the case had not settled. If parties were seen as intractable the case was unlikely to settle. The mediators also criticised the lack of information given to the parties in advance of the mediation. At Exeter the parties did have the benefit of a leaflet whilst at Guildford they were just given a photocopied sheet. The fact that one party arrived at a mediation accompanied by witnesses is not conducive to a settlement. This is because they clearly have very little idea of what the mediation process involves and are prepared for a trial rather than a more co-operative process. Good practice has been in evidence at both courts when the mediator telephones all the parties in advance of the mediation and checks their level of knowledge and goes through what will be discussed and who will be attending. When this has happened not only do the parties appear more aware but they also seem to trust the mediator and the mediation process accelerates which is important in a time-limited mediation.

One difference between Guildford and Exeter was the juxtaposition between claimants in mediated cases. In Guildford, claimants who were companies, were more likely to settle their case at mediation whilst at Exeter they were more likely to be individuals. In Exeter, defendants were more likely to settle if they were an individual whilst at Guildford they were more likely to settle if they were a company. In addition, whilst there was little difference as between cases when considering the amount of the claim at both courts fast track cases were more likely to settle without judicial intervention than multi track.

There was also little consistency between mediators or providers in establishing what was likely to promote a settlement. It seems that, as stated by the mediators, that the nature of the party may be a more important factor than the nature of the claim. Mediators did not seem to fully support the view that any case was able to be mediated – especially when there was a time-limit placed on the mediation.

Yet, mediation represents a change in culture from an adversarial process, focusing on issues, to a more co-operative process which focuses on outcomes. If there is little, or poor, information provided to the parties as to how to prepare for the mediation it is unlikely that they will be able to make best use of the time given in the mediation.

This change of culture is also evident in the attitude of legal representatives. Very few responded to this research and there seemed, especially in the Guildford area, a real lack of interest in the mediation scheme. Some of the legal representatives criticised those mediators who did not have knowledge or expertise of the legal process. This view sees mediation as an aspect of an adversary legal process rather than something which is an 'alternative' to the legal process. The lack of general knowledge about mediation itself is shown in the responses of legal representatives. In fact, our analysis of the profession of mediators who have achieved settlements shows that those with legal qualifications are no more likely to settle than other mediators at Exeter or Guildford. It does seem likely that if it were possible to match individual mediators to the facts of a case so that an engineering expert is able to mediate a dispute over a building, rather than a matrimonial dispute over the division of assets, that this would likely promote more settlements. Even if this change did not promote more settlements, such an expert might be able to engender discourse amongst the parties over detailed issues in the case, which might lead to a settlement at a later date, essentially prior to the trial taking place.

13.4 Effectiveness of the schemes

There is generally a lot of support for the mediation process at both courts. Even those parties who did not settle their case at mediation felt that the process was a

positive one. There was little difference in views as between claimants and defendants at both Exeter and Guildford except when it came to recommending mediation when there were more claimants at Guildford than defendants in support of this. All of the judges involved were generally enthusiastic about mediation but in Guildford the district judges were new and had not had time to 'take ownership' of the scheme.

One of the main outcomes of this research is that more information and education needs to take place for all the participants as well as those involved in the mediation. Without an enthusiastic judiciary to drive the scheme forward there is little change of such a culture change taking place.

Yet neither scheme can be described as being, on the whole, effective because there are so few cases going to mediation and therefore it is very difficult to measure the overall impact on the general work of the court from each mediation scheme. This is particularly the case at Guildford where the number of cases has reduced year-on-year since the launch of the scheme.

It is hoped that if the level of knowledge amongst the local profession as well as litigants is increased through better and more informative leaflets etc that this will help to generate a culture change in favour of a system more co-operative dispute resolution.

References:

H Genn, “The Central London County Court Pilot Mediation Scheme Evaluation Report’ (LCD Research Series, 1998)

J Macfarlane, “Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program” (Law Commission of Canada, 2003)

Roselle L Wissler, ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio St J on Disp Resol 641 (2002)

Cases referred to:

Dunnett v Railtrack [2002] 2 ALL ER 850

Hurst v Leeming [2003] 1 Lloyd’s Rep 379

Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002

Burchell v Bullard and others [2005] EWCA Civ 358

APPENDIX

APPENDIX A - Court Documentation

APPENDIX B – Data Collection

GUILDFORD COUNTY COURT

MEDIATION

The Defendant has indicated an intention to defend his claim. Court fees will be payable as the case progresses and costs will increase over time as the case progresses towards trial when a judge will impose his or her decision on the parties. The loser may have to pay both parties' costs.

THERE IS A BETTER WAY

MEDIATION is a meeting of the parties chaired by a professionally trained mediator who will invite the parties to explore all the issues surrounding a case. Anything said to the mediator is in total confidence and it will only be disclosed if you authorise it. No witnesses attend, evidence is not heard and no judgments are made. The role of the mediator is simply to help the parties reach agreement.

GUILDFORD COUNTY COURT provides accommodation and the introduction of an independent mediator for all types of claim where the sum in dispute exceeds £5,000. This takes place within the court building on Wednesdays between 4.30pm and 7.30pm. Arrangements for the meetings are made by the court staff subject to availability of the parties. It will be in less than two months, sometimes much sooner.

A significant number of parties reach a final agreement in this way which can then be concluded in a written agreement or a consent order. In almost every case the parties gain a clearer understanding of the issues in the case, so that costs can be saved later if the case still proceeds.

You do not have to choose to try mediation, but if you are unwilling to try it, you may be required to explain why not. Alternatively, the judge at any future hearing when considering costs will have the right to consider whether your refusal to mediate should be taken into account in attributing costs.

Please complete the enclosed Mediation Reply Form and send it to the Guildford
County Court, The Law Courts, Mary Road, Guildford, Surrey GU1 4PS by

day the

day of

2004

GUILDFORD COUNTY COURT
Mediation reply

Case No.

Claimant:

Defendant:

Please tick the appropriate box to indicate whether you wish to try the mediation service

I want to try the mediation service

I do not want to try the mediation service

- please explain why

(You may be required to attend court to explain your reasons for not wanting to try mediation).

I can come to the Guildford County Court any Wednesday between 4.15pm - 7.30pm in the next two months except:

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

For legal representatives only - indicate as appropriate

I confirm that I have/have not consulted my client about the mediation service (if not, why not?)

My client is legally aided Yes/No

SIGNED

Claimant/Defendant (Solicitor for Claimant/Defendant)

Print name in block capitals

Date

Please return this form to: Guildford County Court

The Law Courts
Mary Road
Surrey GU1 4PS
Attn. Mediation Clerk

THE GUILDFORD COUNTY COURT
Mediation Scheme

The Judge has looked at the papers and the Allocation Questionnaires in this case and

has decided that you would benefit from alternative dispute resolution at this stage. A

brochure explaining the Mediation Scheme is enclosed.

The benefits of mediation include:-

- The fact that over 80% of defended cases settle before a court hearing in any event by which time a great deal of money has been spent in legal costs and court fees, which may or may not be recoverable.
- The respective strengths and weaknesses of evidence are rarely fully tested until final hearing, which will be several months away.
- Mediation offers you the chance to sort out your case quickly and at a lower cost in a way that suits you, possibly also preserving your business or personal relationship with your opponent.
- Mediation is without prejudice to your legal rights and only binding on you if a settlement is achieved.

A significant number of parties reach a final agreement in this way which can then be concluded in a written agreement or a consent order. In most cases the parties gain a clearer understanding of the issues in the case, so that costs can be saved later if the case still proceeds.

If you are unwilling to try it, you may be required to explain why not at a specially arranged court hearing, which may incur additional costs.

Please complete the enclosed Mediation Reply Form and sent it to the Guildford

County Court, The Law Courts, Mary Road, Guildford, Surrey GU1 4PS by

day the

day of

200

ALTERNATIVE FORMS OF ORDER ON ALLOCATION
(OR ON JUDICIAL REFERRAL AT OTHER TIMES)

Delete relevant Part

Part 3.3(5) order

Part 23.9 order (court staff to endorse accordingly)

Without an attendance of either party, and upon considering the

Claim; Defence; Claimant's Allocation Questionnaire; Defendant's Allocation Questionnaire; Request from the Claimant; Request from the Defendant; Other

IT IS DIRECTED THAT

The parties shall attend a case management hearing at am/pm ont/e..... At the hearing the parties must satisfy the court that Mediation has been canvassed and/or attempted, or that there is a good reason why mediation is unsuitable for the case. Parties shall file an agreed summary of issues in not more than words by

By this direction, the court encloses the invitation and reply documentation for completion by each party, for the completion and return by 4.00pm on[14 days]. Failure to return this document by either party may result in the District Judge striking out the party's case.

To enable the parties to complete the forms, and give further consideration to mediation, the action is hereby stayed until [.....] and it is directed that until this date, neither party take any further steps in the action without the permission of the court.

This action is stayed for a period of days to enable mediation to take place. Parties file the following:

a case summary by

The parties pay the mediation fee of £500. Equally between them by

The case is stayed until[14 days after the mediation appointment] to enable mediation to take place

.....
District Judge

.....
Date

And it is further directed that the parties may jointly apply to extend the stay referred to in this order to enable them to engage the Guildford County Court Mediation Scheme.

Value of case £5000-15000
 £15000-50000
 over £50000

Case Type

J : Commercial

K : Personal Injury/Clinical Negligence

L : Neighbour Dispute/Domestic

M : Professional Negligence

N : Other

EXETER CIVIL JUSTICE CENTRE

Mediation reply

Case No.

Claimant:

Defendant:

Please tick the appropriate box to indicate whether you wish to try the mediation service

I **want** to try the mediation service

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

(You may be required to attend court to explain your reasons for not wanting to try mediation).

I can come to the Exeter Combined Court Centre any weekday between 4.15 – 7.30 pm in the next two months except:

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

For legal representatives only – indicate as appropriate

I confirm that I have/have not consulted my client about the mediation service (if not, why not?)

My client is legally aided Yes/No

SIGNED
Claimant/Defendant (Solicitor for Claimant/Defendant)

Print name in block capitals

Date

Please return this form to: Exeter Combined Court Centre
The Castle
Exeter Devon
EX4 3PS

APPENDIX B Main Scheme Mediation Observation Sheet

Date of Mediation:	
Time of Mediation:	
Name of Mediator:	
Mediator Observer (if any):	
Case Number:	
Subject Matter of Dispute:	
Value of Dispute:	
Represented/ Unrepresented (inc. name, position and phone no if poss)	Claimant: Def:
Any evidence mediator spoke to parties prior to mediation?	
Any evidence that parties know what mediation is?	
What did mediator say in intro to mediation?	
Did the mediator raise the following (in intro):	Nature of Mediation Confidentiality Objectivity Role of Mediator
Style of Mediator:	
Did the mediator put parties in different rooms? What stage? What happened?	
Comments about Parties: Claimants: Defendants:	
Comments about representatives:	C: D:

**Comments / Observations
from Mediation Process:**

*Please record incidents /
examples*

*Please give as much detail as
possible
(including any gaps between
stated and actual behaviour)*

Length of Mediation:

Nature of Settlement:

Please write up as a case study as soon as possible following observation.

GUILDFORD MEDIATION SCHEME 2004

Date of Mediation _____

Claim Number _____

Any information given in this questionnaire which identifies the parties or individuals concerned is strictly confidential.

A: General Information

<p>1. In this mediation are you:</p> <p>a) the claimant <input type="checkbox"/> or</p> <p>b) the defendant <input type="checkbox"/></p> <hr/> <p>2. Are you here as:</p> <p>a) private individual <input type="checkbox"/></p> <p>b) business <input type="checkbox"/></p>	<p>2. If you are representing a business, are you:</p> <p>a) an employee of a private business <input type="checkbox"/></p> <p>b) self-employed <input type="checkbox"/></p> <p>c) a small business owner (up to 20 employees) <input type="checkbox"/></p> <p>d) a large business owner (20 or more employees) <input type="checkbox"/></p> <p>e) a government official <input type="checkbox"/></p> <p>f) other (please specify) _____</p>	<p>3. What is the nature of :</p> <p>a) your organisation _____</p> <p>b) your own responsibilities _____</p>
<p>4. At the time of the mediation do you, or your organisation, have a personal, or business relationship with the other party?</p> <p>a) yes <input type="checkbox"/></p> <p>b) no <input type="checkbox"/></p> <p>c) If the answer is yes, please state how long you have had this type of relationship eg 1 month, 6 months, 1 year etc</p> <p>d) What is the nature of the relationship? _____</p>	<p>5. Have you / your organisation been a party to a civil action in the past 5 years?</p> <p>a) no <input type="checkbox"/></p> <p>b) yes <input type="checkbox"/></p> <p>If yes, how many? <input style="width: 50px;" type="text"/></p>	
<p>6. Are you represented by a solicitor?</p> <p>a) yes <input type="checkbox"/></p> <p>b) no <input type="checkbox"/></p>		

B: The Mediation

<p>1. Why did you agree to mediate?</p> <p>a) Advised by solicitor <input type="checkbox"/></p> <p>b) Cost <input type="checkbox"/></p> <p>c) Time Factors <input type="checkbox"/></p> <p>d) Seemed less stressful <input type="checkbox"/></p> <p>e) Confidentiality <input type="checkbox"/></p> <p>f) Informality <input type="checkbox"/></p> <p>g) Other (please specify) _____</p>	<p>2. Were the fees for the mediation reasonable?</p> <p>a) Yes <input type="checkbox"/></p> <p>b) No <input type="checkbox"/></p>	<p>3. Did you reach a settlement?</p> <p>a) Yes <input type="checkbox"/></p> <p>b) No <input type="checkbox"/></p> <p>c) No but, as a result of the Mediation, we hope to settle <input type="checkbox"/></p>
<p>4. If you did not settle did it help resolve some of the disputed issues?</p> <p>a) Yes <input type="checkbox"/> b) No <input type="checkbox"/></p>	<p>7. If you did not settle or only partially settled please give reasons:</p> <p>_____</p> <p>_____</p> <p>_____</p>	<p>8. Were you happy with the outcome of the mediation?</p> <p>a) Yes <input type="checkbox"/> b) No <input type="checkbox"/></p>

C. The Process

Please indicate whether you agree or disagree with the statements below.

Please circle Y for yes if you agree with the statement or N for no if you disagree with the statement and give reasons for your answer where possible:

1. My case was suitable for mediation	Y	N	Reasons: ----- -----
2. The information I received in advance of the mediation process was useful	Y	N	Reasons: ----- -----
3. The mediator clearly understood the factual issues in the dispute	Y	N	Reasons: ----- -----
4. The mediator clearly understood the legal issues in the dispute	Y	N	Reasons: ----- -----
5. The mediator applied pressure to settle the dispute	Y	N	Reasons: ----- -----
6. My views were taken into account during the mediation	Y	N	Reasons: ----- -----
7. The mediator spent the right amount of time with each party	Y	N	Reasons: ----- -----
8. The mediation provided a creative solution to the problem	Y	N	Reasons: ----- -----
9. I was satisfied that we settled because of the mediation process	Y	N	Reasons: ----- -----
10. I would recommend others try mediation	Y	N	Reasons: ----- -----

D. Advantages and Disadvantages of the Process

1. Do you consider the advantages of mediation in this case to have been.....

- a) the face-to-face discussion of issues
- b) gaining more understanding of the other side's case
- c) the ability to compromise
- d) better communication with my representative
- e) other _____

- f) there were no advantages

2. Do you consider the **dis**advantages of mediation in this case to have been.....

- a) the face-to-face discussion of issues
- b) not gaining a better understanding of the other side's case
- c) the ability to compromise
- d) **no** better communication with my representative
- e) other _____

- f) there were no disadvantages

E. Your Overall Assessment

1. Do you have any suggestions as to how the Guildford Mediation Scheme could be improved?

2. Would you be happy to take part in further research? If so, please give your name, address and contact phone number:

Name: _____

Address _____

Phone No _____ Email Address _____

Thank you very much for taking the time to complete this questionnaire.

Legal Representatives Questionnaire

GUILDFORD MEDIATION SCHEME 2004

Date of Mediation _____

Claim Number _____

Any information given in this questionnaire which identifies the parties or individuals concerned is strictly confidential.

A: About You

1. Your Name: _____	2. Your Firm's Name: _____
3. How many times have you been involved in a mediation during the past 12 months? <input type="checkbox"/>	4. How many times have you represented an individual as part of the Guildford Mediation Scheme? <input type="checkbox"/>

B: About the Mediation

1. Would you classify the dispute as: a) contractual <input type="checkbox"/> b) personal injury <input type="checkbox"/> c) negligence <input type="checkbox"/> d) money owed <input type="checkbox"/> e) faulty goods/ services <input type="checkbox"/> f) other (please specify) _____ _____	2. Please state the financial sum which is in dispute: _____ _____ 3. Please state any non-financial remedies sought by the parties: _____ _____	4. Did the other party bring legal representatives to the mediation? a) Yes <input type="checkbox"/> b) No <input type="checkbox"/> Details
5. Did the parties reach a settlement at the end of the mediation? d) Yes <input type="checkbox"/> e) No <input type="checkbox"/>	6. If the parties did not settle or only partially settled please give reasons: _____ _____	
7. If the parties DID settle was there any particular factor that seemed significant? a) the mediation was time limited <input type="checkbox"/> b) the power of one party <input type="checkbox"/> c) mediator suggested a creative solution <input type="checkbox"/> d) clear scope for compromise <input type="checkbox"/> e) other _____ _____	8. Was the time allowed for the mediation sufficient? a) Yes <input type="checkbox"/> b) No <input type="checkbox"/> If no, why not _____ _____ _____	
9. If the parties did not settle during the mediation, did the mediation continue out-of-court? a) Yes <input type="checkbox"/> b) No <input type="checkbox"/>		

The questions below are designed to give you the opportunity to give your opinions about the mediation and the procedure itself.

C. About The Process

Please indicate whether you agree or disagree with the statements below.

Please circle Y for yes if you agree with the statement or N for no if you disagree with the statement and give reasons for your answer where possible:

1. This case was appropriate for mediation	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
2. I felt well prepared for the mediation session	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
3. The facilities for the mediation were adequate	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
4. From the outset both parties were positive about the mediation process	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
5. I was satisfied that the mediation was held at the right point in the litigation process	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
6. During the mediation the law and legal remedies were discussed by the mediator.	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
7. The individual meetings with the parties and the mediator were the most important aspect of the mediation	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
8. The mediator applied pressure on the parties to settle.	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
9. You as a legal representative were allowed a voice during the mediation.	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
10. My clients would be happy to use the mediation process again	<input checked="" type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----

D. Advantages and Disadvantages of the Process

4. Do you consider the advantages of mediation in this case to have been.....

- a) the face-to-face discussion of issues
- b) the parties gaining more understanding of the other side's case
- c) the settlement
- d) better communication between your client and yourself
- e) other _____
- f) there were no advantages to my client

3. Do you consider the **disadvantages** of mediation in this case to have been.....

- a) the face-to-face discussion of issues
- b) the parties not gaining a better understanding of the other side's case
- c) the settlement
- d) no better communication between your client and yourself
- e) other _____
- f) there were no disadvantages to my client

E. Your Overall Assessment

3. Do you have any suggestions as to how the Guildford Mediation Scheme could be improved?

4. Would you be happy to take part in further research? If so, please give your name, address and contact phone number:

Name: _____

Address _____

Phone No _____ Email Address _____

Thank you very much for taking the time to complete this questionnaire.

Mediators Questionnaire

EXETER MEDIATION SCHEME 2004

Date of Mediation _____

Claim Number _____

Any information given in this questionnaire which identifies the parties or individuals concerned is strictly confidential.

A: About You

10. Your Name: _____	11. Your Accreditation Body: _____
12. How many times have you conducted an unsupervised mediation during the past 12 months? <input type="checkbox"/>	13. How many times have you conducted a mediation as part of the Exeter Mediation Scheme? <input type="checkbox"/>

B: About the Mediation

1. Would you classify the dispute as: a) contractual <input type="checkbox"/> b) personal injury <input type="checkbox"/> c) negligence <input type="checkbox"/> d) money owed <input type="checkbox"/> e) faulty goods/ services <input type="checkbox"/> f) other (please specify) _____	3. Please state the financial sum which is in dispute: _____ 4. Please state any non-financial remedies sought by the parties: _____	4. Did the parties bring legal representatives to the mediation? a) Yes <input type="checkbox"/> b) No <input type="checkbox"/> c) One Party <input type="checkbox"/>
14. Did the parties reach a settlement at the end of the mediation? f) Yes <input type="checkbox"/> g) No <input type="checkbox"/>	15. If the parties did not settle or only partially settled please give reasons: _____ _____	
16. If the parties DID settle was there any particular factor that seemed significant? a) the mediation was time limited <input type="checkbox"/> b) the power of one party <input type="checkbox"/> c) mediator suggested a creative solution <input type="checkbox"/> d) clear scope for compromise <input type="checkbox"/> e) other _____ _____	17. Was the time allowed for the mediation sufficient? c) Yes <input type="checkbox"/> d) No <input type="checkbox"/> If no, why not _____ _____ 18. If the parties did not settle during the mediation, did the mediation continue out-of-court? a) Yes <input type="checkbox"/> b) No <input type="checkbox"/>	

The questions below are not designed to judge you on your abilities but to generate your opinions about the mediation procedure itself.

C. About The Process

Please indicate whether you agree or disagree with the statements below.

Please circle Y for yes if you agree with the statement or N for no if you disagree with the statement and give reasons for your answer where possible:

11. This case was appropriate for mediation	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
12. I felt well prepared for the mediation session	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
13. The facilities for the mediation were adequate	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
14. From the outset both parties were positive about the mediation process	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
15. I was satisfied that the mediation was held at the right point in the litigation process	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
16. During the mediation I referred the parties to the remedies which could be granted by the legal system	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
17. The individual meetings with the parties were the most important aspect of the mediation	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
18. The mediation session would have benefited from being longer	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
19. I allowed the parties to have their legal representatives present during the mediation.	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----
10. I think that both parties would be happy to use the mediation process again	<input type="radio"/> Y	<input type="radio"/> N	Reasons: ----- -----

D. Advantages and Disadvantages of the Process

6. Do you consider the advantages of mediation in this case to have been.....

- a) the face-to-face discussion of issues
- b) the parties gaining more understanding of the other side's case
- c) the ability to compromise
- d) better communication between the parties
- e) other _____

5. Do you consider the **disadvantages** of mediation in this case to have been.....

- a) the face-to-face discussion of issues
- b) the parties not gaining a better understanding of the other side's case
- c) the lack of compromise
- e) no better communication between the parties
- e) other _____

f) there were no disadvantages

E. Your Overall Assessment

5. Do you have any suggestions as to how the Exeter Mediation Scheme could be improved?

6. Would you be happy to take part in further research? If so, please give your name, address and contact phone number:

Name: _____

Address _____

Phone No _____ Email Address _____

Thank you very much for taking the time to complete this questionnaire.

Interviews with District Judges

- How does the scheme affect your workload?
- How much time do you devote to mediation?

How the scheme works

- How do YOU select a case for mediation, are YOU looking for any key characteristics?
- Do you think mediation should only be offered to parties with AQ's or should DJ's encourage parties to mediate if the case seems suitable? How much and what sort of encouragement should be offered? Any examples?
- Has the *Halsey* judgement had any impact on the Exeter mediation scheme?
- Have you noticed any pattern/s with regard to the likelihood of settlement? Does the type of case make any difference? Are there other factors?
- What do you think are the main strengths and weaknesses of the FT/MT scheme at Exeter?
- What do you think are the main strengths and weaknesses of mediation in general?
- What is the aim of the scheme at Exeter?
- How do you think that mediation benefits the parties? Is there any benefit if the case does not settle at mediation?
- The costs of mediation at Exeter are £450 for FT and £650 for MT. Do you believe that these rates are correct? Would you make any changes to the amount charged or the way charges are applied?
- How successful do you believe the scheme is? What are the cost benefits of mediation as against a straight-forward trial?
- How can the success of the scheme best be measured, what is the benchmark for the success of the scheme?
- How do you envisage the scheme developing in the future?
- What is the role of the Mediation Steering Group in the future of the scheme?

The mediation experience

- How significant is the amount of time allowed for the mediation?
- Do you think mediators on a court-based scheme should ideally be lawyers?
- Have you come across any compliance issues with parties following successful mediations conducted at Exeter?
- What key points /recommendations would you make to DJ's wishing to introduce a mediation scheme at other courts?
- What are the current main difficulties with the scheme at Exeter?
- Would you define court-based ADR as mediation?

To conclude

- Is there anything else you would like to add to our discussion?