

## Small claims mediation – does it do what it says on the tin?

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### **Abstract**

Mediation schemes are '*quicker, cheaper, less adversarial and provide a better outcome for the court user*'. These claims by the Ministry of Justice<sup>1</sup> are based on research into three pilot schemes at Manchester, Exeter and Reading county courts, commissioned by the Department for Constitutional Affairs (now the Ministry of Justice), and published at the end of last year<sup>2</sup>. The scheme based at Manchester had the highest settlement rate and showed the highest user satisfaction: schemes based on this model are already being established in ten court districts throughout England and Wales, with more to come.

If you search for the phrase '*does what it says on the tin*' on Google, you are offered 607,000 web links. At the top is the website of a well-known wood preservative, which is famously advertised as doing exactly what it says on the tin. If we conceptualise mediation as a tinned product, there are two key questions we can ask:

1. Should the Manchester model of small claims mediation actually be marketed as 'mediation'?
2. Are the Ministry of Justice claims for the success of this product justified?

In this paper, we explore whether the model of 'mediation' offered in these court schemes reflects the core principles of mediation, and whether the claims made for its success are supported by the research data. This leads on to a debate which is urgently needed; what is the appropriate measure of success for alternatives to the litigation process?

### **Background**

The small claims procedure was introduced in England and Wales in 1973. It has been described as '*designed specifically with litigants-in-person in mind*', and is intended to be '*a cheap and simple mechanism by which people unfamiliar with legal procedures can bring straightforward civil actions to the courts, whether they are legally represented or not*'.<sup>3</sup> The track is for claims with a monetary value of £5,000 or less (or, in personal injury and some housing cases, for those of £1,000 or less). It is worth noting that in Scotland, the small

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<sup>1</sup> The Department of Constitutional Affairs (DCA) which commissioned the research discussed in this paper became the Ministry of Justice on 9<sup>th</sup> May 2007.

<sup>2</sup> Evaluations of the 2005-06 schemes at Manchester, Exeter and Reading county courts can be found in the Proportionate Dispute Resolution Team section of the DCA website at [www.dca.gov.uk/civil/adr/index.htm](http://www.dca.gov.uk/civil/adr/index.htm). They are: Prince, Sue, "An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court" (2006) (hereinafter "Prince"); Doyle, Margaret, "Evaluation of the Small Claims Mediation Service at Manchester County Court" (2006) (hereinafter "Doyle"); and Craigforth, "Evaluation of the Small Claims Support Service Pilot at Reading County Court" (2006) (hereinafter "Craigforth"). See also the report of research conducted by the DCA's Research Unit, *An Evaluation of the Exeter Small Claims Mediation Scheme* by Jill Enterkin and Mark Sefton, DCA Research Series 10/06 [www.dca.gov.uk/research/2006/10\\_2006.htm](http://www.dca.gov.uk/research/2006/10_2006.htm) (hereinafter "Enterkin and Sefton"). The Enterkin and Sefton research took place in 2003-04 when the Exeter small claims mediation scheme "involved definite elements of compulsion" (p.22), both explicit and implicit, although the procedure was later modified to reflect a more voluntary approach.

<sup>3</sup> Baldwin, John, "Monitoring the Rise of the Small Claims Limit: Litigants' Experiences of Different Forms of Adjudication", DCA Research Series No. 1/97, December 1997, p.4; see also Baldwin, John, "Lay and Judicial Perspectives on the Expansion of the Small Claims Regime", DCA Research Series No. 8/02, September 2002.

claims limit has remained at £750 for many years. Around 70,000 defended cases are allocated to the small claims track every year in courts in England and Wales.<sup>4</sup>

Generally, satisfaction with the small claims process is high<sup>5</sup>. Parties in small claims cases are commonly unrepresented, which may contribute to the relatively small proportion of claims that settle before hearing: in small claims, only about 50% do not proceed to a hearing, whereas in fast-track and multi-track cases this figure is closer to 95%.

The DCA piloted three different small claims mediation schemes in three county courts, Exeter, Reading and Manchester, from June 2005 to May 2006. Although each scheme was different, the research was coordinated among the researchers. All the research studies included observation, questionnaires and interviews with court users, judges and court staff. The questionnaires covered both those who used mediation, and those who were referred to mediation but refused.

The model used in Manchester County Court involved a full-time mediation adviser, funded by the DCA. His role included:

- providing information and advice on mediation to court users
- making referrals to external mediation providers for fast-track and multi-track cases
- offering a free mediation service in small claims cases

During the pilot there were a number of routes for court users to gain access to the scheme. The court sent all parties issuing a small claim a leaflet explaining the mediation procedure and inviting them to tell the court if they were interested, using a tear-off reply slip. The same leaflet was also sent to both parties at the allocation stage. At either stage, if one or both parties expressed an interest, their slip was attached to the issue documents and seen by the judge at the allocation stage. The judge would then issue a direction that the case be referred to the mediation service. Even if no party informed the court of their willingness to use mediation, the judge could refer the case using the following direction:

*'The judge has considered your case is suitable for mediation and you are therefore invited to use the free Small Claims Mediation Service. The Court Mediator will be notified of your case. If you do not wish to use this service, please contact the Court Mediator on [number].'*

Mediation took place within the relatively tight timescales of the small claims process (the Court Service target was 15 weeks): all cases had a hearing date set before being referred, and the case was not adjourned or stayed for the parties to attempt mediation.

The mediation session was conducted either as a face-to-face meeting of up to one hour in the court mediator's office, or as a telephone-based negotiation facilitated by the court mediator. The telephone option was found to be popular with those parties who used it, because it avoided the need to travel to court, and by the end of the pilot the majority of cases were being dealt with by telephone.

During the research period, 121 cases were mediated or dealt with by telephone-based negotiation, of which 104 settled.

The other two small claims mediation pilots operated on different models.<sup>6</sup>

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<sup>4</sup> Gosling, Ruth, "Survey of litigants' experiences and satisfaction with the small claims process", DCA Research Series 9/06, December 2006.

<sup>5</sup> Baldwin, John, "Lay and Judicial Perspectives on the Expansion of the Small Claims Regime", DCA Research Series No. 8/02, September 2002.

<sup>6</sup> Briefly, in Exeter, parties received an invitation to mediate with their allocation questionnaire. Few parties took up this invitation. At allocation, district judges identified suitable cases, and suggested the parties should try mediation. Mediations were conducted on court premises, by mediator/lawyers who were members of the local

### Should the Manchester model of small claims mediation actually be marketed as 'mediation'?

One of the issues raised by the research is whether what is offered by the court is actually mediation, and indeed whether there is a consensus on what 'mediation' is. What does it say on the mediation tin, what promises are made, what explanations are given?

Is there, indeed, just one mediation 'product'? There is a commonly held understanding of the core values of mediation, but a high proportion of members of the public, including court users, are unaware of what they are. The process that small claims parties are offered appears to be a useful settlement tool, and it gets results. But the values of mediation appear to be significantly compromised, so is it misleading to call it mediation?

Mediation has been said to offer '*an alternative conceptualisation of justice*', one that is '*based on an alternative set of values in which formalism is replaced by informality of procedure, fair trial procedures by direct participation of parties, consistent norm enforcement by norm creation, judicial independence by the involvement of trusted peers.*'<sup>7</sup>

The core values of mediation are generally agreed to be<sup>8</sup>:

1. voluntariness
2. the impartiality of the mediator
3. the empowerment of the parties to decide the outcome themselves
4. confidentiality<sup>9</sup>
5. the flexibility for the parties to explore their underlying interests and reach creative settlements

#### 1. Voluntariness

A classic criterion for mediation has always been its voluntariness. Parties choose whether or not to mediate. However, it could also be argued that the true 'voluntariness' of mediation in the context of litigation is open to question. A debate about the nature of this voluntariness has been carried on since the Woolf reforms through the Civil Procedure Rules, the Legal Aid Funding Code, and the decisions of judges in key cases such as *Halsey*<sup>10</sup>.

The Civil Procedure Rules introduced cost sanctions for parties deemed to have unreasonably refused to mediate, and the Funding Code allowed the LSC to refuse Legal Aid for representation where appropriate ADR schemes had not been tried. The increasing tendency of judges to assume that pressurising parties into mediation for their own good was the right thing to do, was halted (at least temporarily) by Lord Justice Dyson's statement in

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Law Society. The mediations were expected to last no more than 30 minutes. During the research period 136 cases were mediated, of which 88 settled at mediation.

In Reading, a different pilot was run which involved providing advice and information to litigants-in-person in small claims cases. The Small Claims Support Service offered mediation-type settlement meetings and discussions, with the designated court officer acting as a "go-between", but the main focus of the pilot was to assist litigants-in-person in understanding the small claims process. During the research period the service assisted in 49 settlements out of 204 cases it dealt with. The researcher found that the greatest success of the Small Claims Support Service was to make the small claims experience less daunting and confusing.

<sup>7</sup> Boule, Laurence and Miryana Nestic, *Mediation: Principles, Process, Practice*, (Butterworths, London, 2001), p.69.

<sup>8</sup> For example, see the definition and explanation of mediation on the CEDR website <http://www.cedr.co.uk>

<sup>9</sup> The issue of confidentiality was not addressed specifically in the DCA pilot research questions, and will not therefore be discussed here.

<sup>10</sup> *Halsey v Milton Keynes NHS Trust* [2004] EWCA (Civ) 576.

*Halsey: 'It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.'* In the light of this trajectory, it was interesting to hear both a county court judge, and a Ministry of Justice policymaker, argue for compulsory mediation at the launch of Professor Dame Hazel Genn's research into the Automatic Referral to Mediation pilot at Central London County Court in May 2007.

The small claims mediation pilots at both Manchester and Exeter county courts were set up to be voluntary. However, the research indicated that this was a somewhat flexible concept. In both schemes, most parties who used mediation said that they did so because the judge had recommended it. Some parties interviewed in the research appeared to have misconceptions about whether or not they had a genuine choice to use mediation. One respondent said they tried mediation because *'the mediation officer explained it 'was the usual procedure''*; another said they were directed by the court to do so.

## **2. The impartiality of the mediator**

Another key principle of mediation is the impartiality of the mediator. Impartiality is generally understood to mean that the mediator is expected to treat both parties equally; to be unbiased in their treatment of the parties; to not favour a particular outcome. Although mediators may be impartial in their behaviour and actions, just as important is the parties' perception of this impartiality. In both the Exeter and Manchester pilots, researchers questioned whether the mediators did indeed appear impartial to the parties. In the Enterkin and Sefton report on Exeter, there was evidence that the mediators sometimes slipped into their familiar role as solicitors and gave advice to the parties, or negotiated on their behalf, which clearly compromised their impartial role. The researchers also found a competitive element among the Exeter mediators, who saw failure to achieve a settlement as a slight on their reputation.

James Rustidge, the mediation officer in the Manchester scheme, has claimed that his past experience with the CID *'may have something to do with his attitude and success'*<sup>11</sup>. He also described his role as a 'mediation champion'. There is a potential conflict in the roles of impartial mediator and mediation champion: parties might perceive that he has a vested interest in obtaining settlements as a measure of his own professional success. Two parties expressed concern about this, saying that *'the mediator actually wanted the issue settled there and then'* and *'his interest was to find a settlement'*. Indeed, the mediation officer explained that although his role was not to give legal advice, he did tell parties what he considered to be the advantages of mediation over court hearings. He himself identified the difficult balance to be struck: *'There is a fine line between putting pressure on people but also giving them enough information to make an informed choice.'*<sup>12</sup>

On the other hand it is important to remember that this is a risk in any mediation, in that the mediator may have, or be perceived as having, an interest in the parties settling. This is one reason why using settlement rates as a measure of success of a mediation scheme is questionable.

## **3. The empowerment of the parties to decide the outcome themselves**

When training, one of the fundamental principles mediators are taught is that while they as mediators retain responsibility for the process, the parties take responsibility for any outcomes. However, the indication from the research into small claims pilots is that this is not

<sup>11</sup> Law Society Gazette, *'Smooth Operator'*. 11 January 2007, pg 26

<sup>12</sup> Doyle, p.26.

as straightforward as it might sound. In Manchester, for example, just over 1 in 5 people felt under pressure during the mediation. This pressure came from the other side, from the financial circumstances of the case, from the time limit, and from the mediator himself.

It is fair to say that some people felt that this pressure was positive – they needed to be put under pressure in order to settle the case. On the other hand, the research at Exeter by Enterkin and Sefton identified some quite critical views amongst the participants. One litigant in that pilot called it a '*mild form of bullying*', and another '*a form of blackmail*'. Even one of the mediators in the Exeter scheme referred to the mediation process as '*a thirty-minute hustle*', and another mediator called it '*sophisticated head-banging...and I'm not sure it's that sophisticated either*'. Another of the mediators in the scheme referred to his role not as a mediator, but as a '*manager of negotiations*'.<sup>13</sup>

It is clear that in a number of cases the parties felt coerced rather than empowered. On the other hand, there was evidence that some litigants took a pragmatic approach to settlement, and viewed compromise on their part as a worthwhile price to pay for having achieved a settlement and avoided the perceived time, trouble and costs of a small claim hearing. One defendant in Manchester said:

*'I expected to have to pay some money but probably paid a little bit more than I'd anticipated beforehand. ... I was happy at the end of the day, it was a settlement and the thing was put to bed, which was fine.'*<sup>14</sup>

## **5. The flexibility for the parties to explore their underlying interests and reach creative settlements**

Another claim made for mediation is that it produces outcomes that are tailored to the parties and their circumstances and address what they want to achieve.

### *Creative settlements?*

Courts are very limited in the remedies they can provide; often money has to serve as a proxy for some other, more appropriate redress. This is because litigation is backward looking, where mediation is intended to be forward looking. Consider the contrast, for example, between the award a court can make, and the terms of a mediated agreement in a claim of disability discrimination by a consumer against a service provider. A judge can only make a financial award – for compensation, or for injury to feelings. The terms of a mediated agreement, however, can (and often do<sup>15</sup>) involve apologies, explanations, changes in policy and procedure, equalities training for staff, and a range of remedies that are future focused and benefit other service users.

One civil mediation provider describes mediation as '*a guided negotiation, helping the parties to communicate with each other, exploring the issues which are of real importance to them, which often differ from their 'rights'. The parties are encouraged to find ways to address their present and future needs, rather than dwelling upon who may have been right or wrong in the past.*'<sup>16</sup>

However, this idealism about the way in which mediation can offer a wide range of personalised and flexible outcomes was not borne out by the research data in the small claims mediation pilots. In Manchester only 12% of mediated settlements included an outcome that could not have been ordered by the court. In Exeter, the proportion was even

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<sup>13</sup> Enterkin and Sefton, p.71

<sup>14</sup> Doyle, p.90.

<sup>15</sup> See, for example, the case studies of the Disability Conciliation Service, on [www.dcs-gb.org](http://www.dcs-gb.org).

<sup>16</sup> [www.consensusmediation.co.uk](http://www.consensusmediation.co.uk)

smaller. Enterkin and Sefton found *'little evidence that mediation in small claims cases addressed underlying issues, or led to non-monetary outcomes'*.<sup>17</sup>

On the other hand, as noted by Prince in her research on the Exeter pilot, the focus on financial settlements may be linked to a number of factors. Making a court application encourages claimants to define their claim in solely monetary terms, and the fact that the mediators in the Exeter pilot were all lawyers meant that they tended to focus on the stated claim, rather than on the needs of the parties<sup>18</sup>. The time restrictions also left little room for exploring creative settlements.

#### *A creative process?*

Instead of feeling that they were able to explore their underlying interests and reach individually tailored solutions, a number of parties felt that the focus was on compromise and bartering. It is possible this feeling was reinforced by the short time available – only thirty minutes in Exeter, and an hour in Manchester. There was also an emphasis on 'shuttle' mediation, in which the parties are in different rooms and the mediator goes back and forth between them conveying messages and offers. This process involves chipping away at both parties' positions until the gap between the two is close enough to reach a settlement. This focus appears to place less emphasis on finding creative solutions, and more on achieving a compromise settlement. The parties feel pressured into agreeing because the alternative – the risk of an unfavourable judicial ruling, and the time and cost involved in getting one – is worse. Some parties felt this was a positive as it reduced the likelihood of a *'shouting match'*. Others, however, would have preferred to be in the same room as their opponent:

*'...the only negative thing is I felt I should have perhaps heard a little bit more from the other side and possibly...disagree with some of the points they raised. If they raised any, I don't know. ... I would have been quite happy to have answered my questions in front of the other person and I would have preferred to hear the other person answer his questions in front of me. ... I was asked questions and I just wondered what the other party had said.'*<sup>19</sup>

It is interesting to consider these comments in the light of the telephone-based negotiation, which was offered in the Manchester pilot with increasing frequency. This was an attempt to meet the needs of those court users who were not based in Manchester or who otherwise wished to avoid travelling to court for a meeting or hearing. The process involved the mediation officer acting as a broker, speaking with parties separately on the telephone, and attempting to facilitate a settlement, sometimes over the course of days or weeks. Although this was a popular settlement tool, it was not clearly defined during the pilot. In fact, the very same process was used in the pilot at Reading County Court but was called 'shuttle diplomacy'.<sup>20</sup>

In the Manchester pilot, it was not always evident when the process began, as telephone discussions are part of the mediation officer's initial pre-mediation contact with parties in most cases. Indeed, for the first several months of the pilot only those telephone negotiations that resulted in a settlement were actually recorded; the others were treated as unresolved negotiations and thus not recorded as 'mediations' by the mediation officer. This was corrected midway through the pilot, however. A crucial difference between this process and mediation is that at no point did the parties speak with one another, nor did the mediation officer speak with them jointly. This seems to fit uneasily with the claims that mediation helps the parties to communicate with each other and to jointly explore their needs and interests.

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<sup>17</sup> As noted by Enterkin and Sefton, p.14.

<sup>18</sup> Prince, p.76.

<sup>19</sup> Doyle, pp.85-86.

<sup>20</sup> Craigforth, p.18.

The mediation officer in Manchester was himself wary of calling the process 'mediation':  
*'I use some of the same techniques that you would expect in a mediation, although it can never be exactly...the same as having two parties together ...'*<sup>21</sup>

### **Are the Ministry of Justice claims for the success of this product justified?**

The Ministry of Justice press release accompanying the publication of the small claims mediation research at the end of 2006 placed great emphasis on the 'success' of the Manchester model. In particular, it described mediation as quicker and cheaper than court, and claimed a 'better outcome' for the user.

None of the empirical research on mediation has found conclusive evidence that mediation is always quicker or cheaper than the court. Further, we need to examine the concept of a 'better outcome'. The two key measures used by the Ministry of Justice to demonstrate a 'better outcome' for the user are the high settlement rates and the high levels of satisfaction at the Manchester pilot. These claims need to be examined. The headline percentages for settlement mask a worryingly small proportion of all cases which were resolved through mediation. The 'satisfaction' expressed by users of the mediation service also needs to be challenged, especially in light of the research findings on litigants' lack of understanding and familiarity with both mediation and the court process.

## **1. Is mediation quicker and cheaper than the court?**

### *Quicker?*

The research into the small claims mediation pilots did not specifically address the issue of whether the mediation process was quicker, although it did track the length of time between referral and mediation, using a fairly crude estimation arrived at by subtracting the date of the scheduled mediation from the date of allocation by the court. On average, the time between the two was just over 34 days. At Manchester, because the hearing date was set before mediation took place, cases which were not settled at mediation but went on to a hearing were not delayed. Cases which settled at mediation were resolved sooner than those which went to a hearing, and, crucially, there is significant evidence that in mediated cases the money agreed in settlement is paid sooner (see below). But it is worth noting that around half of the small claims cases were settled before the hearing date even without the intervention of mediation. It is therefore legitimate to ask what added value mediation offers when measuring speed of settlement.

### *Cheaper?*

Saving costs is one commonly cited advantage of mediation. Cost savings are assumed to apply both to the mediating parties, and to the court.

### *The cost to the parties*

Where parties pay for mediation as an additional cost to litigation, there is no evidence that it is cheaper than litigation. In fact, there is considerable evidence that the overall cost is

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<sup>21</sup> Doyle, p.29.

greater where parties attempt mediation, but fail to reach a settlement<sup>22</sup>. In the wake of the civil justice reforms in England and Wales, more costs are now front-loaded – that is, they occur at the start of the litigation rather than later, primarily because of requirements that parties exchange evidence much earlier than before. Where mediation takes place late in the litigation process, parties might well have already incurred high costs. Where it takes place earlier, parties might not feel they know enough to mediate successfully.

In the small claims pilots this was not a factor, as the mediation was free and, especially when conducted by telephone, involved little or no additional expense on the parties' part. Most parties who mediated were satisfied with the amount of time they spent on the case, and although most had incurred costs, these were costs that would have been incurred in preparing the claim or defence or attending a hearing anyway, such as obtaining copies of documents and taking time off work.

*The cost to the court*

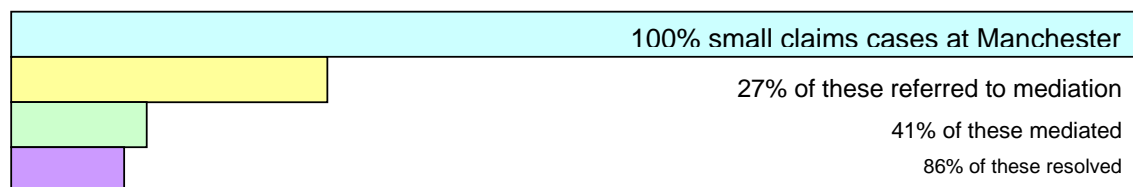
Where mediation is offered free to parties, in effect absorbed in their court fees, there is no clear evidence that the courts service achieves cost savings. In the Manchester research, it was estimated that 172 hours of judicial time were saved over 12 months, but the researcher readily admits that this is a 'broad brush' figure created by simply adding up the time estimated for hearings in those cases that settled at mediation. This rough estimate does not allow for cases which might not have led to a hearing anyway (around 50%), or for judicial time spent on allocating cases to mediation or granting consent orders where an agreement was reached. Prince's research at Exeter concluded, on the same 'broad brush' basis, that 121 judicial hours had been saved in a year. Neither report takes the cost of the mediators into account.

One of the public service agreement (PSA) targets for the Ministry of Justice is to reduce the proportion of disputes going to court. Even though policymakers cite the 'softer' benefits of mediation, such as greater party satisfaction with outcomes, the underlying driver is to save public money. Yet mediation's ability to deliver public cost savings is by no means proven.

**2. How do we measure a 'better outcome'?**

**Settlement rates**

When mediation scheme pilots are evaluated, one key measure traditionally used is the 'settlement rate'. At Manchester, the settlement rate for cases that actually ended up at mediation was an impressive 82%, or even 86% if telephone mediation is included. However, only 27% of all the small claims cases at Manchester were referred to mediation in the first place. Of these, only 41% of referred cases proceeded to face-to-face or telephone mediation. It was 86% of the small proportion of cases that got to mediation that settled to the parties' satisfaction.



<sup>22</sup> See, for example, Genn, Hazel, "The Central London County Court Pilot Mediation Scheme: Evaluation Report", Departmental of Constitutional Affairs Research Series No. 5/98 (1998); and Astor, Hilary and Christine Chinkin, *Dispute Resolution in Australia*, 2<sup>nd</sup> ed., Butterworths (2002).



If you take all these figures into account, you end up with a much less impressive 10% of all small claims cases being resolved through mediation.

The settlement rate masks two significant differences between mediated outcomes and judgments: settlement amounts, and compliance.

#### *Settlement amounts*

In Manchester, cases settled at mediation for about 55% of the original claim value – a finding that was consistent with the Exeter pilot scheme<sup>23</sup>. It is impossible to draw any firm conclusions from this as to whether parties get a worse deal in mediation than in a hearing – there are, of course, many variable factors in what makes a case settle, and for how much. However, claimants using mediation can clearly expect to settle for significantly less than those going to court. One explanation given by the researcher at the Exeter scheme was the mediator's role in 'reality testing'; based on her observations of mediations, she found that the most common reason for a substantial discrepancy between claim and settlement values was '*the mediator explaining the reality of the court system and claimants realising that it might be difficult to obtain punitive damages in small claims cases.*'<sup>24</sup> Do these variances – of between 50% and 63% – represent a lack of justice, or a realistic trade-off between the delay, cost and stress of hearings and the compromise of settlement?

#### *Compliance*

On the other hand, compliance with mediated settlements is much greater than compliance with court awards. In Manchester, all the mediated agreements were complied with. In Exeter, only 4% of mediated cases required enforcement action, compared with 19% in the control sample of cases where a judicial order was made. This is another of the benefits often attributed to mediation. Indeed, this has been cited as the primary difference between mediation and court hearings in a small claims context, where the informality of the hearings mirrors that of mediation. Over twenty years ago it was argued that: '*mediation can be distinguished from adjudication by the degree to which the disputants can shape the settlement process and the need for them to consent to outcomes of the dispute.*'<sup>25</sup> The data from the recent small claims pilot research does seem to support this argument. This is in contrast to court judgments, where a claiming party can 'win' their case, but not receive the payment, leading to costly and potentially futile enforcement proceedings.<sup>26</sup>

As an example, consider a case that went to mediation in the Manchester pilot scheme but did not settle. At the hearing, the claimant received judgment in her favour. In fact the judgement was less than she had claimed, and the judge ordered payment in £50 monthly instalments. Subsequently the defendant ceased trading, and did not pay anything beyond the first instalment. This experience is borne out by other data. Research into satisfaction with the small claims process conducted for the MOJ by Ruth Gosling, published in 2006<sup>27</sup>, found that only 27% of parties awarded a sum of money in settlement had received their award in full by the time of her first interview, which took place shortly after the hearing. At the time of the second interview – a minimum of four weeks after the hearing – a further 32%

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<sup>23</sup> Prince's research into the Exeter pilot scheme in 2005-06 found a similar variance in claim value and mediated settlement. Enterkin and Sefton's earlier research into the Exeter pilot scheme found that the mean value of mediated settlements was 63% of the claim value, and in a control group where a judgment was issued it was 83%.

<sup>24</sup> Prince, p.77.

<sup>25</sup> McEwen, Craig A. and Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance through Consent", *Law & Society Review*, vol.18, no.1 (1984).

<sup>26</sup> Baldwin has noted that enforcement problems in small claims threaten to undermine the credibility and integrity of the process. In several studies he found that at least one-quarter of successful claimants had received no payment several months after the conclusion of the case. See Baldwin, John, "Is There a Limit to the Expansion of Small Claims?", *Current Legal Problems*, vol.56, p.337 (2003).

<sup>27</sup> Gosling, p.32; see also John Baldwin, in evidence to the House of Commons Constitutional Affairs Committee, "The courts: small claims", First Report of Session 2005-06, 22 November 2005.

had received their money. This means that, at least a month after the judgement, over 40% had not received any of the money they were awarded.

### **Customer satisfaction**

The other key factor in persuading the MOJ to roll out the Manchester model in small claims courts throughout England and Wales was the high satisfaction ratings which the research demonstrated. Well over 80% of respondents who mediated in the Manchester pilot were satisfied or very satisfied with the information they received about the service, and with the helpfulness of the mediator. Percentages were even higher for satisfaction with the mediator's competence, and 87% were satisfied or very satisfied with the opportunity to participate and express their views. This demonstrates the need to distinguish between satisfaction with aspects of the process, which is high, and satisfaction with the outcome, which was more mixed. Those that were dissatisfied with the process tended to be unhappy with the 'cramped', 'scruffy' and 'dirty' mediation facilities at the court.

However, there are some questions which should be asked about the significance of these findings.

*Did people know enough about mediation and the small claims process to make a meaningful comparison?*

A theme across all the small claims mediation research is that people need information on both mediation and the small claims process<sup>28</sup>. The Manchester research showed that many parties' satisfaction with the mediation process was linked to relief at avoiding what they feared would be a daunting court hearing. However, most had no actual experience of the small claims process, so their view was based on a perception that was often unrealistic.

Among interviewees there was a general underlying feeling that courts and judges are to be avoided if possible. Some views were explicitly negative about courts: that judges and courts are 'scary' or 'intimidating', and that lay people are at a disadvantage. One claimant, after a hearing at which the defendant failed to turn up, told the researcher:

*'That wasn't as bad as I thought it would be, no it wasn't, it wasn't anything like my imagination but you know when you've never been in a court and you get this court appearance, you're imagining it being like Judge Judy or something. Everybody I'm sure gets a different vision of what a court appearance is going to be like but my vision was after being a juror in the crown court it was gonna be something similar to that, and it was nothing like that at all.'*<sup>29</sup>

The parties also had minimal experience of mediation. The majority had never even heard of mediation: those that had heard about it, often knew little or nothing about what was involved. This lack of information about both small claims hearings and the mediation process made it hard for most parties to make a realistic and informed decision about the best way forward.

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<sup>28</sup> See Baldwin, (1997).

<sup>29</sup> Doyle, p.96.

### Does small claims mediation deliver access to justice?

A comparison between satisfaction with small claims mediation and the 'normal' small claims process raises some questions about what users are looking for when they bring a claim to the small claims court. There are wider policy issues about 'access to justice' which need to be addressed, especially what is meant by 'justice'.

### What are the users of the small claims process looking for?

Although the small claims mediation process received high customer satisfaction ratings, it is worth comparing these with Ruth Gosling's evaluation of satisfaction with the small claims process itself. Gosling shows that, when the outcome of their hearing was disregarded, 83% were satisfied with the process. Her research also suggests that a high proportion of litigants felt that they had an opportunity to say everything (or almost everything) that they wanted at their small claims hearing (80%), and that the judge listened to what they had to say (82%).

These are similar to the satisfaction rates found with the mediation process offered in the Manchester pilot. However, in spite of their lack of awareness and understanding about mediation, most parties in the Manchester pilot scheme felt that mediation is qualitatively different from judgement, particularly in terms of the process used and the role of the mediator compared with that of the judge. Judgement was described as '*black and white*,' about '*answering set questions*', '*being judged*', '*formal*', '*concerned with the law*', '*decided in favour of one side of the other*', '*strict*', '*harder to put across one's position*'. One respondent indicated that he believed a judge, basing a decision on the laws, would have been on his side and recognised that he was legally in the right. Another felt that an advantage of going before a judge would have been having witnesses called.

A number of the interviewees in the Exeter scheme, particularly where the case was about the non-payment of a debt, felt aggrieved that no legal arguments were accepted, and that often the mediators didn't seem to know anything about the case at the start of the session. The apparent compulsion to use the scheme, the short time available, the pressure to settle applied by some of the mediators, and the lack of '*a legalistic approach*' meant that some felt that they were having their arm twisted in order to arrive at a compromise agreement, and that justice was not being done. Enterkin and Sefton question whether '*too much emphasis is put on expediting cases, and too little on the safety of outcomes in terms of "justice"*'.

There is a sense in which the parties' satisfaction with the process of dispute resolution is as important as whether they are happy with the outcome. If they feel that they have been bullied, blackmailed or hustled, then even if they end up with most of the money they are owed, they may not feel that justice has been done. Conversely, even if they have difficulty in enforcing an award made at a small claims hearing, if they feel that the judge has heard and understood their case, and has been fair in judgment, then they may well still end up expressing satisfaction with the court system. As one researcher has noted:

*'Litigants may express satisfaction with a process that gives them the opportunity to tell their story, even if it does not produce just outcomes. ... Because evaluations of the outcome depend less on the outcome received and more on subjective assessments of the outcome (i.e. relative to others' outcomes and to one's own expectations), litigants' satisfaction may*

*reflect not objectively fair outcomes but their lowered expectations or lack of awareness of what they are entitled to receive or what other procedures might offer.*<sup>30</sup>

### **So what should it say on the small claims mediation tin?**

The evidence from these mediation pilots seems to make a positive case for a small claims court-facilitated settlement process which is cheap and cheerful. You may well get less than you are owed – indeed, less than you think is fair – but you will get it promptly, without any need for stressful, irritating and costly court enforcement processes. Many people may be happy to settle for this.

Is there a problem if we call this process ‘mediation’? Or is this debate about terminology just an academic debate for mediation anoraks?

We believe it is important that there is clarity about what is being offered, and enough information and advice for parties to make an *informed* decision about what they are choosing, and why, and what the advantages and disadvantages of each option might be. Although it is clear that at present many people do not know much, if anything, about mediation, it is the hope and intention of the policymakers that it will become much better understood. If we call the small claims court-sponsored settlement negotiations ‘mediation’ when it shares few of the characteristics of mediation, people will be less able to make that informed decision.

Unlike Ronseal, there is no trademark for mediation. Is there such a thing as an authentic mediation product, which can be clearly distinguished from unsatisfactory imitations? And who, if anyone, has the right to speak with authority on the criteria for the real thing? As Boule and Nestic comment:

*‘Government demands for efficiency are likely to manipulate mediation into forms not countenanced by those for whom it is an expression of an alternative philosophy of conflict management. This is not to suggest that government-initiated services are not worthwhile or that services developed by professional associations do not provide high-quality mediation. However, the possible conflicting motivations highlight the fact that mediation is in the crucible of politics, economics, professional interests and ideological debate. In this context it is no surprise that it takes on many shapes, forms and value orientations.’*<sup>31</sup>

In the court-sponsored schemes that the Ministry of Justice is setting up in county courts throughout England and Wales, parties are being offered ‘mediation’ as an alternative to a judicial determination. They are being offered this process by a judge, and in some cases they even believe they are being directed to use this process by the judge. The ‘mediation’ takes place on court premises. Parties will inevitably, therefore, see the small claims ‘mediation’ process as an alternative route to justice. If, at the end of the process, they feel they have got (some of) their money, but have not got justice, they may feel justifiably aggrieved.

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<sup>30</sup> Wissler, Roselle L., “Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics”, *Law and Society Review*, vol.29, no.2 (1995), p.352.

<sup>31</sup> Boule and Nestic (2001), p.75.