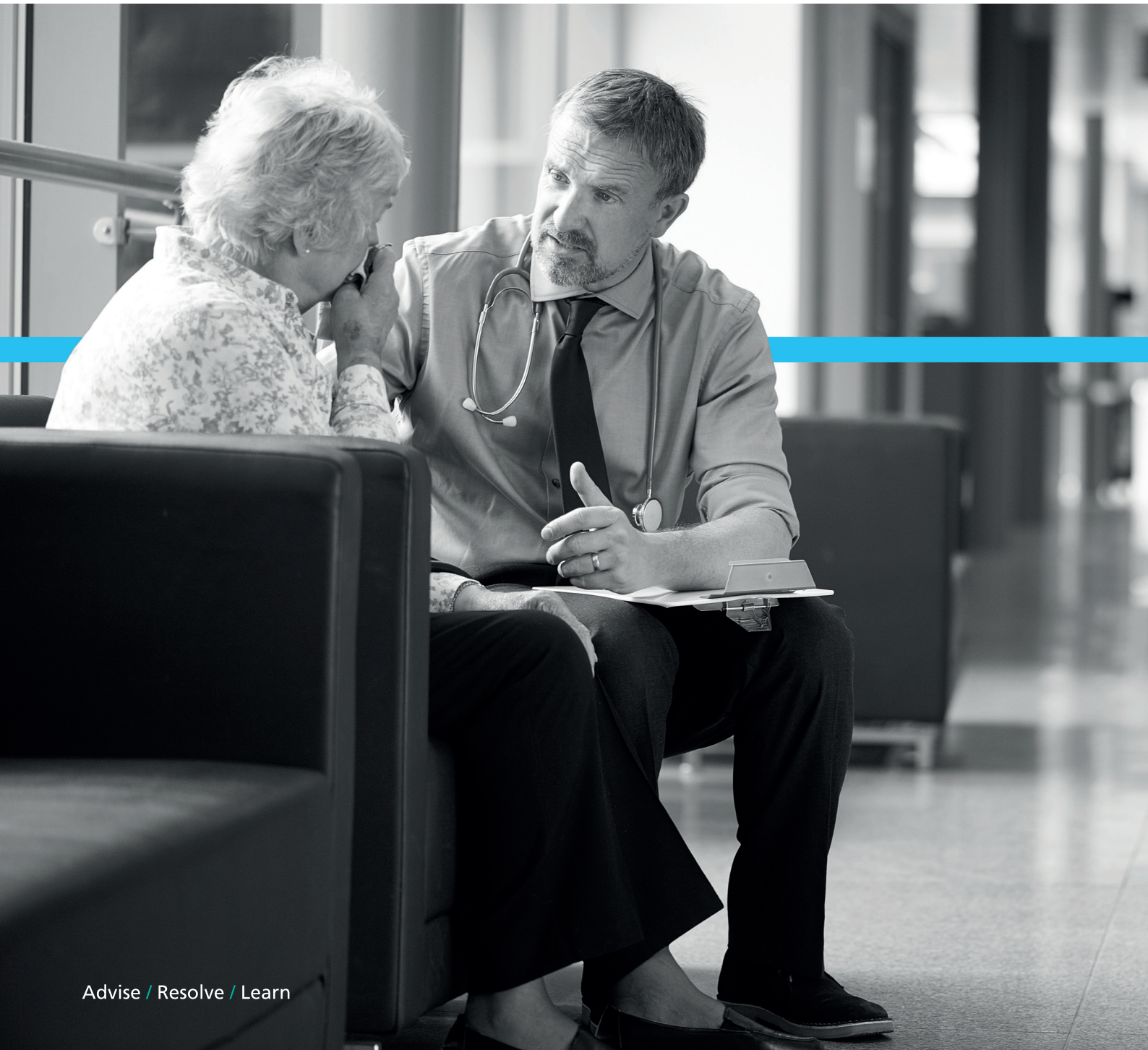


Mediation in healthcare claims – an evaluation



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Foreword

In December 2016, NHS Resolution (known at the time as the NHS Litigation Authority) took the ground-breaking step of becoming one of the first indemnifiers in the UK to establish a mediation panel with the focus of resolving clinical negligence and personal injury compensation claims. The market heralded this revolutionary move in a series of positive articles¹ and other indemnifiers followed suit by establishing their own mediation panels.

In 2017, we changed our name from the NHS Litigation Authority to NHS Resolution and launched a five-year strategy²; as an organisation, we are more focused than ever before on prevention, learning, and early intervention. There is also a focus on improving the patient's experience by addressing concerns in ways other than by litigation.

Mediation and alternative dispute resolution (ADR) are fundamentally aligned with NHS Resolution's strategy to deliver fair and cost effective resolution, by getting to the right answer quickly, safely, and reducing the number of claims going into formal litigation by keeping patients and healthcare professionals out of court.

Julienne Vernon / Head of Dispute
Resolution and Quality
NHS Resolution
February 2020

¹ <https://www.truthlegal.com/nhs-litigation-authority-new-mediation-scheme/>

<https://www.co-oplegalservices.co.uk/media-centre/articles-jan-apr-2017/nhs-rolls-out-clinical-negligence-mediation-service/>

<https://practicebusiness.co.uk/mediation-is-a-win-for-all-in-clinical-negligence/>

<https://www.kingsleynapley.co.uk/insights/blogs/blog-medical-negligence-law/mdus-6-point-plan-to-reform-the-clinical-negligence-system-a-claimant-lawyers-response>

² <https://resolution.nhs.uk/wp-content/uploads/2017/04/NHS-Resolution-Our-strategy-to-2022-1.pdf>

Executive summary

This report discusses the findings of an evaluation of NHS Resolution's Claims Mediation service, which was undertaken to address the following issues:

- **determine mediation's efficacy as a resolution tool;**
- **understand when mediation is most effective as an intervention; and**
- **inform the next mediation procurement exercise.**

The following findings were made from the evaluation:

- Mediation is proven to be an effective forum for claims resolution by providing injured patients and their families with the opportunity to receive face-to-face explanations and apologies. Time can be spent listening and responding to the particular concerns of a patient and their family. The process provides a platform to claimants, patients and their families to articulate concerns that would not ordinarily be addressed in other forms of ADR.
- 74% of cases mediated are settled on the day of mediation or within 28 days of the mediation date³. Positive and compelling

feedback has been received from participants of the process⁴ and there is a heightened awareness of the benefits of mediation for claims resolution and demand for its use by members and other stakeholders.

- NHS Resolution through its strategy and use of mediation is driving cultural change.
- There is overwhelming evidence of the benefits of mediation, for patients, families and NHS staff.
- Whilst mediation can be employed for all types of claims, the use of mediation should be tailored for greater effect. The analysis of the data revealed that a significant number of mediations took place after legal proceedings had been commenced and a directions timetable set by the court. The case costs invariably become more expensive after proceedings are commenced. Mediation as an intervention can be more effective if carried out at an earlier stage in the lifecycle of the claim.
- There is an underuse of mediation for personal injury claims and costs disputes. The promotion of the benefits of mediation in these areas should be explored further.

³ See page 9 - analysis of mediation outcomes for 2018/19

⁴ See pages 14-16

1. The Claims Mediation service: The background and methodology for analysis

The background

1. Mediation is an independent, voluntary and confidential process in which a trained neutral, the mediator, helps the parties to resolve their dispute. Mediation is usually conducted by discussions 'off the record' both in meetings with all parties which the mediator will chair and in private and confidential meetings between individual parties and the mediator alone. The mediator does not act like a judge or arbitrator and makes no decision on who is right or wrong, but acts as a facilitator to help the parties reach settlement. As an organisation, NHS Resolution has undertaken a significant number of mediations throughout its 25-year history, often in high profile cases and group actions.

were made in 91 cases and 49 cases were accepted into the pilot. One case settled before mediation and one case was withdrawn, and there were 47 completed mediations. Of the 47 completed mediations, 81% settled, of these 61% of the settlements were achieved on the day of the mediation and a further 20% a short time thereafter.
2. In July 2014, NHS Resolution launched a pilot to test the effectiveness of mediation and how it could be better deployed as part of the case handler's "toolkit" for claims resolution. Under the pilot, mediation was offered in a small cohort of cases involving a fatality or elderly care. The pilot ran for 12 months and came to an end on 1 August 2015. Offers of mediation

The contracts were awarded to the Centre for Effective Dispute Resolution (CEDR)⁵ and Trust Mediation Limited⁶ to mediate disputes arising from personal injury and clinical negligence incidents and claims. Costs Alternative Dispute Resolution (CADR)⁷ was appointed to mediate disputes arising from the recoverability of legal costs.
3. Following the success of the pilot, NHS Resolution launched its Claims Mediation service on 5 December 2016. The service was designed to support patients, families and NHS staff in working together towards the resolution of incidents, legal claims and costs disputes and to avoid the need, expense, and potential emotional stress of going to court.

⁵ www.cedr.com/solve/services/?p=33

⁶ <https://www.trustmediation.org.uk/nhs-resolution/>

⁷ <http://www.costs-adr.com/nhs-resolution-mediation-service>

Fees

5. Under the service for the mediation of substantive issues of liability and quantum, the mediator's fees, travel/accommodation expenses and any supplier costs will be paid equally by the parties except in the following cases when the costs will be borne solely by NHS Resolution:
 - Where liability is admitted in full.
 - Partial admissions have been made and/or it is the intention to settle the case.
 - The claimant is unrepresented.
6. For the mediation of costs disputes, the legal costs of mediation are not recoverable from NHS Resolution; each party will share the costs of the mediator's fees equally and will bear their own costs of preparation and attending the mediation.

The process

7. Mediation is offered in all suitable costs, clinical negligence and personal injury cases irrespective of the value.
8. Following each mediation the feedback is requested from the participants in order to understand and gauge their experience of the process, outcome and performance of the mediator. The mediation service providers are also requested to report on the number of completed mediations and the barriers identified, if any, to a successful mediation outcome.

9. In order to facilitate engagement with the Claims Mediation service a continuous programme of training, presentations and publication of articles has been undertaken to promote mediation to NHS Resolution claims staff, legal panel, members, claimants and wider stakeholders.

The methodology for analysis

10. The impact and effectiveness of the mediation service has been measured with reference to the feedback received from participants, NHS Resolution members and a quality review of case outcomes.
11. For the purposes of the evaluation, 606 cases were reviewed where there was a completed mediation from 5 December 2016 to 31 March 2019. There were 22 costs mediations in this cohort, which have been excluded from the main analysis.

2. Evaluation of mediation findings by numbers

Case volumes

12. Since the inception of NHS Resolution's Claims Mediation service, from December 2016 to 31 March 2019, 606 completed mediations have taken place. In 2017/18, NHS Resolution set a target to mediate at least 50 cases and this was exceeded threefold by the completion of 189 mediations. The identified trend year on year has been a significant increase in the overall number of mediations.
13. There was a 110% increase in the use of mediation, up from 189 cases in 2017/18 to 397 cases in 2018/19. NHS Resolution mediated more cases than ever before in its entire history.

Total number of completed mediations per month

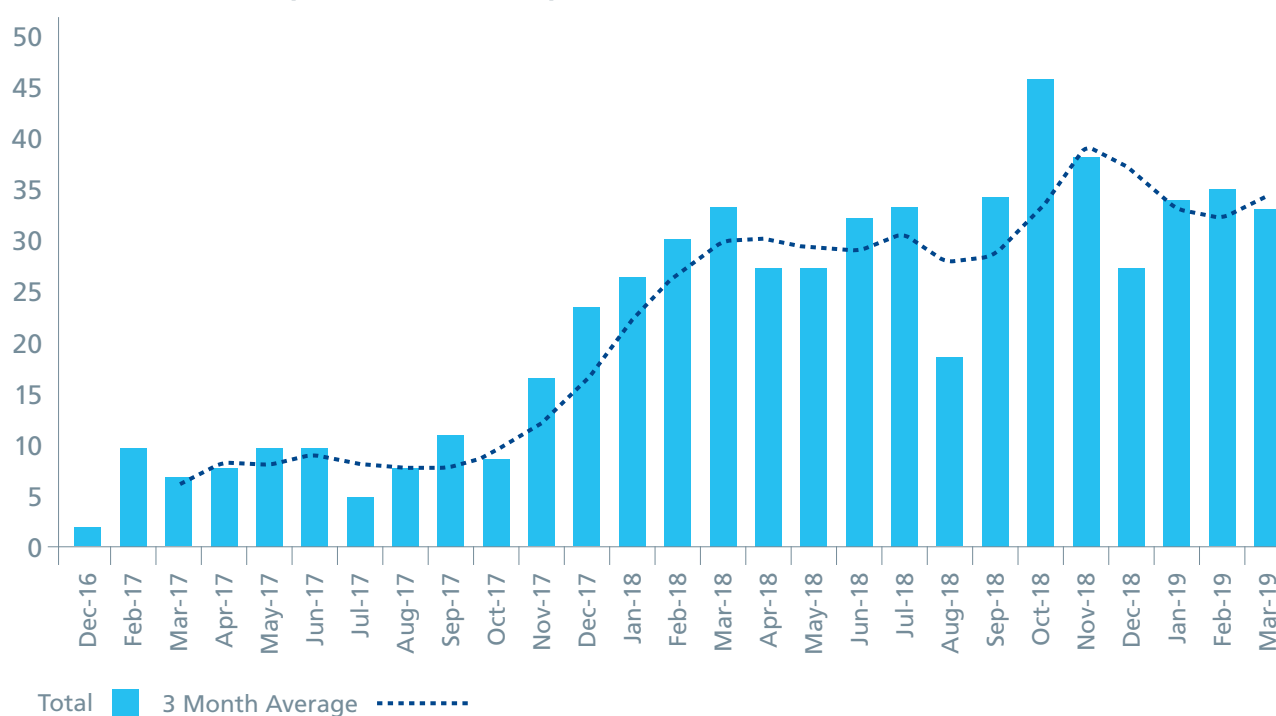


Figure 1: All types of mediations by month from 5 December 2016–31 March 2019.

Claim type mediated

14. The impact of mediation on case settlement has followed the experience of the 2014 pilot, with 74% of cases settling on the mediation day or within 28 days of the mediation date. The majority of cases mediated under the service are clinical claims. A breakdown of mediations by scheme for 2018/19 is set out in the chart below at Figure 2.
15. There was an overall increase in the number clinical negligence mediations by 119%, up to 380 from 173 in 2017/19.
16. There have been a limited number of personal injury and costs mediations. There were 22 costs mediations during the period 5 December 2016 - 31 March 2019. The mediation of costs disputes is discussed separately at page 18.

Mediations 2018/19	
Clinical	380
Non-clinical	10
Costs	7
Grand Total	397

Figure 2: Numbers of mediations by claim type from 1 April 2018–31 March 2019

Mediation outcomes

17. The following chart sets out the mediation outcomes for all cases mediated in 2018/19. The highlighted narrative explains the outcomes of cases settled on the day of the mediation or within 28 days of the mediation date. Six cases taken to mediation subsequently proceeded to trials. The claimants were successful on three occasions, with the trusts also successful in defending three claims at trial.

No of Mediations 2018/19		Mediation type
Outcome	Costs	Substantive issues liability /damages
Settled-claim discontinued at mediation		1
Settled-claim discontinued post mediation after 28 days		3
Not settled at mediation and proceeded to trial. Judgment for claimant at trial		3
Not settled at mediation and proceeded to trial - successful defence at trial		3
Settled at mediation - damages agreed		264
Settled within 28 days - damages agreed		21
Settled at mediation - liability issues only		3
Liability issues only settled within 28 days of mediation		2
Settled post mediation after 28 days - damages agreed		18
Settled at mediation-costs mediation	3	
Not settled - costs mediation	4	
Not settled		72
Grand Total	7	390

Figure 3: Mediation outcomes for all mediations from 1 April 2018–31 March 2019

Claim stage

18. Analysis of the completed mediations demonstrated that a significant number of mediations were undertaken after proceedings had been commenced, a directions timetable set by the court, and mediated within three months of the trial date.

Claim stages of matters that went to mediation

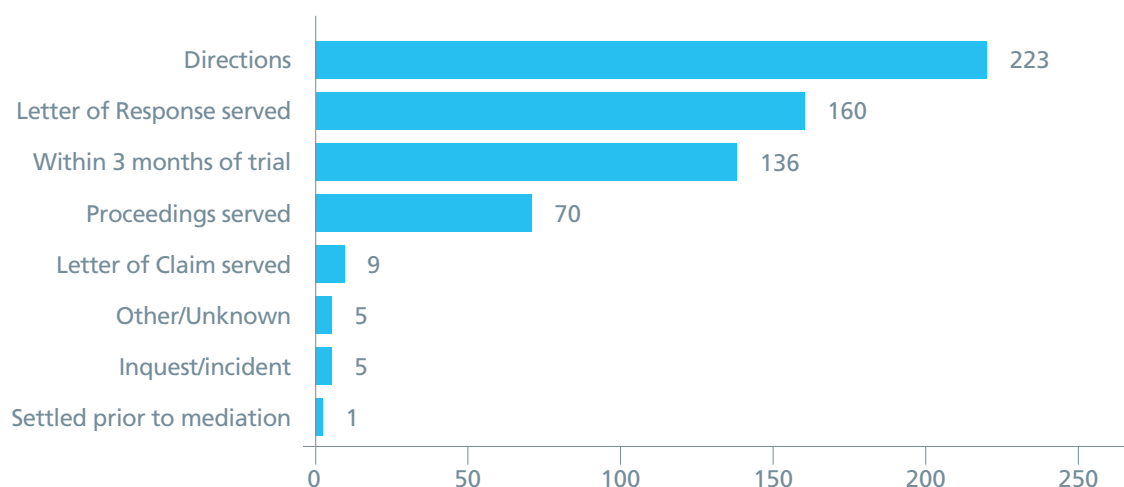


Figure 4: Claim stage – mediations December 2016–31 March 2019

19. The analysis of the mediation outcomes indicates that cases settled at the pre-action letter of response stage are more likely to settle on the day of the mediation, with a 71.1% success rate, than at any other stage in the life cycle of the claim. See Figure 5 below.

Outcome by top four claim stages

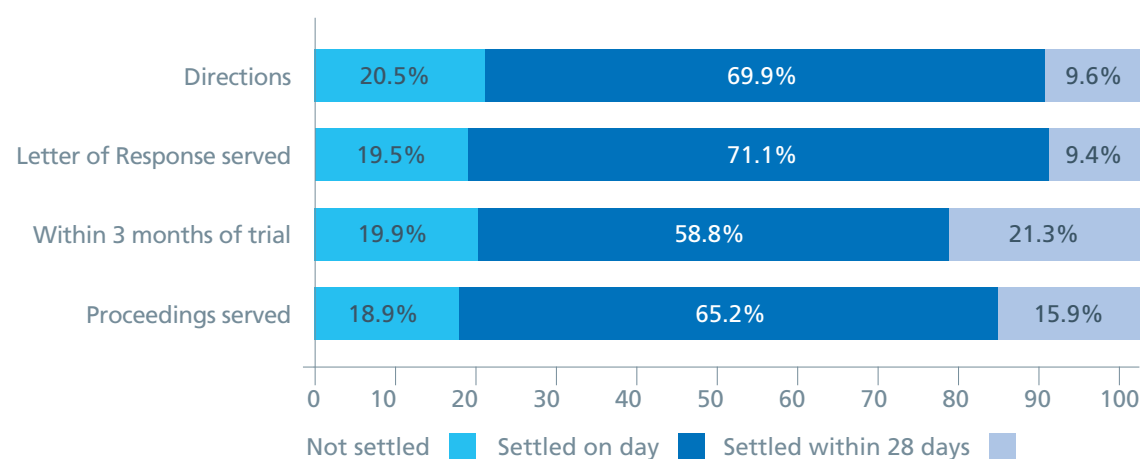


Figure 5: Mediation outcomes by top four claim stages
- all clinical mediations December 2016–31 March 2019

Claim value

20. Mediation is offered for all types of claims across the value spectrum. The graph below (Figure 6) captures the value of the claim (excluding costs) at the date of the mediation, reflecting that the majority of claims mediated fall within the damages tranche £50,001 - £250,000.

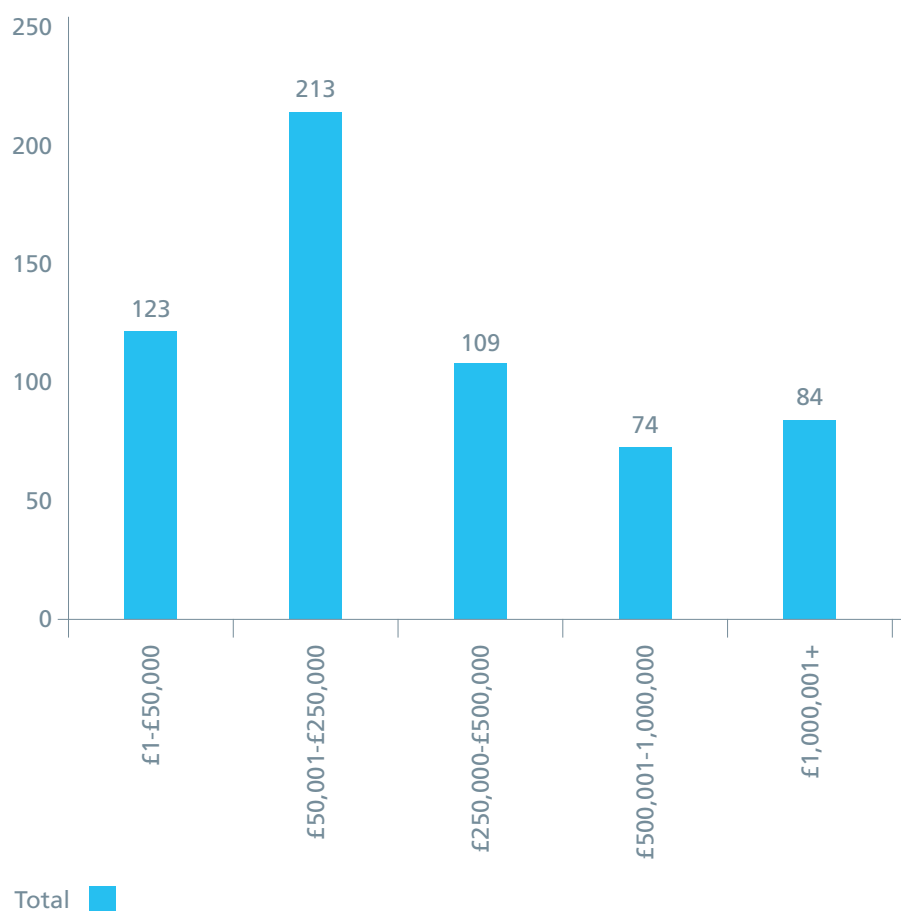


Figure 6: Damages tranche at date of mediation- all clinical/non-clinical mediations 5 December 2016–31 March 2019

The parties at mediation

The claimant:

21. The analysis of mediation outcomes indicates that when the claimant is unrepresented the claim is less likely to settle on the day of mediation, with 50% of cases achieving a resolution compared to 68.5% of cases where the claimant is represented. Claimants proceeding to mediation without lawyers represent a very small cohort in the claims mediated.

Outcome by whether claimant was represented

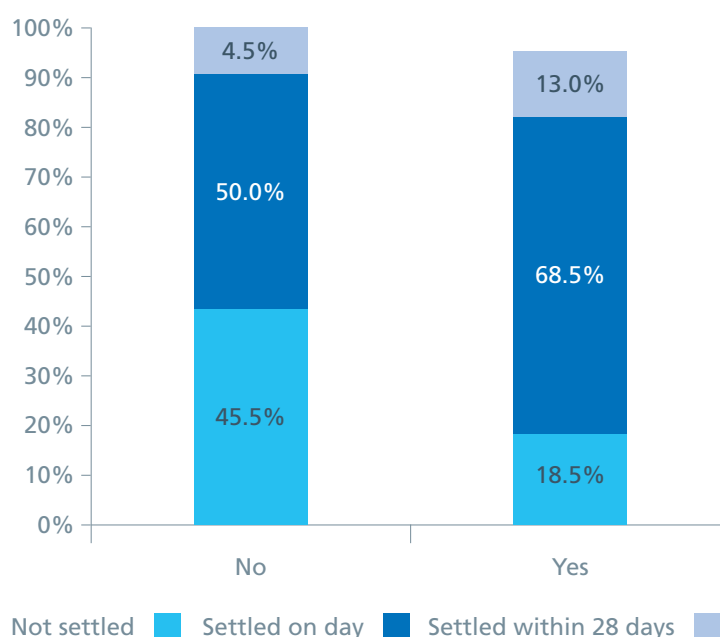


Figure 7: Mediation outcome by claimant legal representation

Counsel

22. Analysis of mediation outcomes interestingly reveals that the highest probability of settling **on the day** is when neither claimant nor defendant counsel attend, which appears to give credence to the view that the attendance of counsel is not necessary for every mediation. However, it remains appropriate to instruct counsel to attend complex, high value, and multi-party mediations.

Mediation outcome, based on whether claimant and/or defendant counsel attended

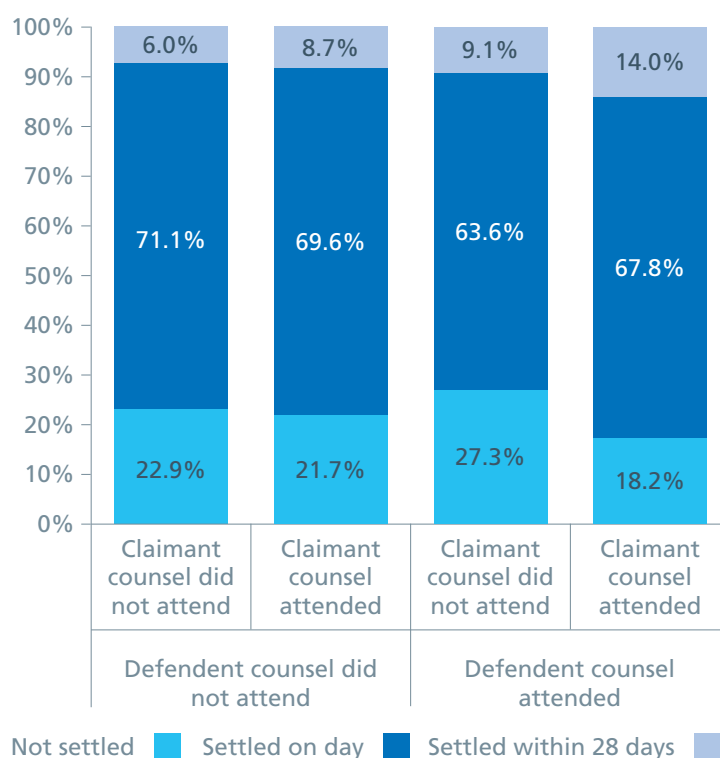


Figure 8: Mediation outcome by parties' representation by counsel

Member (trust or other healthcare provider) representative

23. The chances of settling appear to increase marginally when a representative for the member attends.

Outcome by member representative attendance

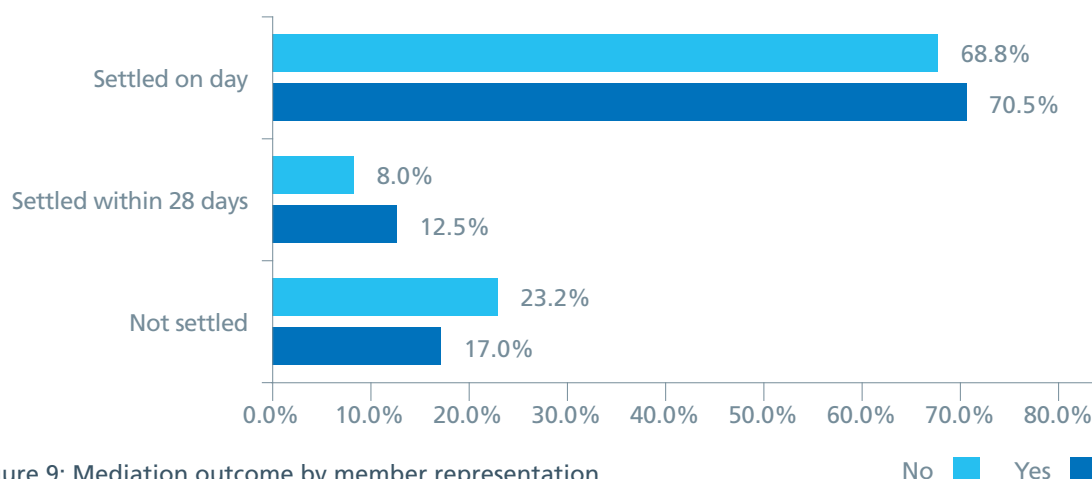


Figure 9: Mediation outcome by member representation

Healthcare professional representative

24. The chances of settling appear to increase when a healthcare professional attends.

Outcome by healthcare professional attendance

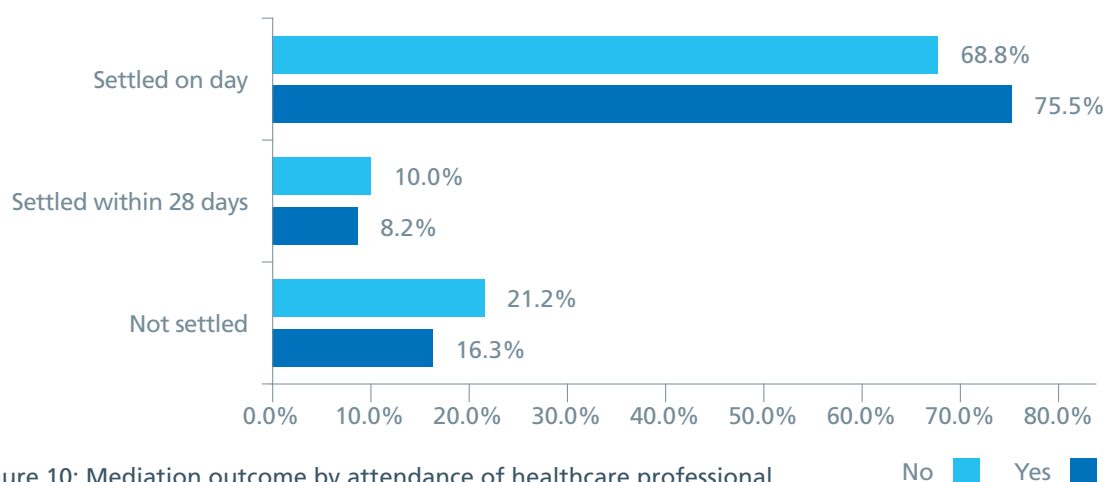


Figure 10: Mediation outcome by attendance of healthcare professional

25. The most common scenario is for the parties attending mediation to be legally represented and the analysis of the data demonstrates that the probability of achieving a successful resolution on the day increases when a healthcare professional also attends. This finding would appear to support the “non-tangible benefits” of mediation, discussed on pages 14-16, which allow the claimant/patient to speak directly to the member/healthcare professional and receive direct apologies/explanations.

3. The benefits of mediation: “What the participants say”



26. The analysis of the claims mediated has established what can be described as “non-tangible benefits of mediation”, e.g. giving the opportunity to injured claimants, patients or relatives of deceased patients to speak to trusts/healthcare professionals to explain what changes, if any, have been made, and to offer direct apologies. These non-tangible benefits and the impact of the mediator are frequently described by the participants of mediation as the positive benefits of the process that cannot be replicated with other forms of ADR, such as a round table meeting with lawyers.

27. A sample of anonymised feedback from mediation participants is set out below.

	“The mediator was very personable, good at keeping the parties motivated, helped assist the Claimant in listening to the Trust, helped the Trust through the process - our contact went into the mediation very sceptical about the process, but left as a total convert.”
	“This was my first experience of mediation and I had come to it somewhat cynically. I was very impressed by the whole process and can now see how a good mediator can achieve settlement.”
	“[mediator was] very helpful and put client at ease. Had an excellent understanding of the issues.”
	“The mediator facilitated an exchange of information, which may not have been forthcoming but for his involvement and without which the claim may not have settled.”
	“I actually thought that [the mediator] was excellent. He explained everything to the client in as clear terms as possible, ensured that she knew what was happening as the day progressed and was completely aware of how difficult and stressful she had found the litigation process. His questions to our barrister were insightful and relevant, and I suspect that he played a key part in settlement being achieved. It was a complex case and, given that he had not been involved in it before, he clearly had a good grasp of the issues involved.”
	“She was very calm and impartial throughout but encouraged my client to take part which I think helped a lot.”

	"[the mediator] was brilliant. He took the time to speak to me before the mediation and was willing to speak to my client as well. He listened to what we said and gave guidance when he could."
	"I would recommend it if you have complex issues / entrenched parties / multiple defendants."
	"We did not get the settlement we wished for but we narrowed down the issues which we felt was an achievement."
	"Client focused process, much better for my client than a JSM." (Joint settlement meeting)
	"Whilst we did not settle on the day of the mediation as we had hoped, settlement was agreed about two months later and the mediation certainly helped the parties to make progress towards settlement."

28. As well as receiving feedback on the positives, it is equally important to understand what, if any, barriers there may be to the mediation process, and what the participants say about this is set out below from the anonymised comments provided by the mediation service providers.

	"I thought the process was helpful in terms of providing a framework for discussions. However, I wasn't keen on the pressure placed on my client to meet with the legal advisors for the opponent. My client had made it clear at the outset that this wasn't something they wanted to consider but that if we reached a settlement, they would give it some thought. However, the mediator did continue to press this point throughout the day despite my client making her thoughts on it known. I appreciate that the mediator would be pushing this point so we could try and achieve the most out of the process. In the end, my client did meet the opponents and found this quite upsetting. Unfortunately we were unable to reach a settlement."
	"I did not find it helpful that when we made offers, the Mediator kept asking if we had any more "in the pot" to offer to the other party."

▶	<p>"I would recommend the process in certain circumstances. From a Claimant's perspective, mediation comes into its own where Defendants are difficult and/or will not engage with the case and/or do not appear to know what their own case is (a prerequisite for a reasonable negotiated settlement). As a means of facilitating sensible engagement in a constructive atmosphere, mediation is a reasonable option."</p>
▶	<p>"I'm not sure that saying at the outset that the mediator would stay involved if the case didn't settle on the day helped. I was concerned this might be taken as an indication that settlement was not possible."</p>
▶	<p>"We did wonder whether the mediator had approval from the other side to tell us the information she did about their negotiating position in particular the fact that they were willing to go lower."</p>
▶	<p>"A more assertive approach was needed in this case as the mediation ended without the parties even agreeing a timetable for trial."</p>
▶	<p>"The claimant and/or her grandparents did not attend the mediation; rather the claimant's deputy and litigation friend was in attendance. There was no Trust representative in attendance either (the treating clinicians were not traceable given the historic index events). Given that all representatives in attendance were lawyers, the role of the mediator was more limited than in some cases."</p>

Member engagement

29. The analysis of the mediation outcomes found that the likelihood of a settlement on the day of the mediation is significantly increased if there is representation from the NHS provider of care and attendance by healthcare professionals. The lack of attendance by the member is definitely seen as a negative to the process by claimants. Indeed, the positive experiences for claimants receiving face-to-face apologies and explanations of changes in process are enhanced by member engagement of mediation as resolution process. However, It is acknowledged that there is a cost and a resource to both the member and healthcare professional attending a mediation and it may not be warranted and/or be appropriate in every case.
30. Training has been delivered to explain the benefits of mediation to members and the importance of attending a mediation. NHS Resolution's 2019 customer survey has established that there is heightened awareness of the claims mediation service by members, with very positive feedback received on the effectiveness of the service.

Summary

31. Mediation puts the patient/claimant at the heart of the claim, focusing on concerns, which are very often not “all about the money”, and it would not be possible to address those concerns in any other ADR setting, such as a meeting with just the lawyers.
32. The feedback obtained from the participants is very positive. The quality review of cases proceeding to mediation has consistently documented the impact of a face-to-face apology or explanation from a member in facilitating resolution of the claim. Mediation outcomes have included agreements for claimants to attend trusts to share their stories with frontline staff to learn from mistakes and prevent future harm, or to be involved in the drafting of proposed changes in procedure. Accordingly, the power of mediation as a resolution tool cannot be overestimated.

4. Mediation of costs disputes

33. There has been very low take-up of the service for mediation of costs disputes, with only 22 completed mediations having taken place from December 2016 to 31 March 2019. These low figures may be attributable in part to the recovery of the costs of mediation. Under the service, in contrast to mediations for substantive issues such as liability and quantum, the legal costs associated with the mediation are not recoverable for the mediation of costs disputes. Each party will share the costs of the mediator's fees equally and will bear their own costs of preparation for and attending the mediation.
34. While there is a place for mediation for high value and complex costs disputes, "traditional without prejudice" discussions on the telephone or by a round table meetings have also proven to be effective in resolving costs disputes. The experience of NHS Resolution is that the parties find these processes often to be more conducive to settlement compared to the formal mediation approach where the structure is managed by the mediator. Unlike mediations of substantive issues, costs mediations will usually only involve the parties' legal and costs teams, and are limited to discrete costs issues and the "non-tangible benefits of mediation" are not a key feature of the mediation of costs disputes.
35. In line with the desire of the market for more flexible ADR processes to resolve costs disputes, NHS Resolution is exploring different initiatives to circumvent the delays in the current costs assessment process to target the resolution of costs claims as quickly as possible from settlement of the main action.

Summary

36. With respect to the resolution of costs disputes, informal ADR is generally preferred and employed to good effect. However, there is a place for costs mediation for complex and high value disputes. The re-appointment of specialist costs mediation service providers is therefore recommended.

5. Conclusion: Driving cultural change

37. NHS Resolution is driving cultural change within the market - mediation is no longer seen as novel. The impact of the claims mediation service in improving the experience of patients and their families bringing claims against the NHS has been supported by patient groups and claimant lawyers.

151 Buckingham Palace Road
London SW1W 9SZ
Telephone 020 7811 2700
Fax 020 7821 0029
DX 6611000
Victoria 91 SW

Arena Point, Merrion Way
Leeds
LS2 8PA
Telephone 0113 866 5500

www.resolution.nhs.uk

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