Consideration of Three Medical Negligence Mediation Program Evaluations

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Consider and discuss three evaluations of ADR programs. What were the primary findings?

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A. Introduction

“Well, what have you got to lose? You spend a few hours sitting together talking about the case and seeing whether you have got common ground. I would be surprised if nothing was achieved after that.” Plaintiff Lawyer

Mediation is an alternative dispute resolution process characterised by the parties engaging in a private and informal intervention facilitated by a neutral third party. Though not always voluntary, either party can usually opt out if a solution cannot be reached. Mediation has been increasingly popular in healthcare disputes both abroad and in Australia.

The potential benefits of mediation in medical negligence claims include confidentiality, lower costs with fewer demands on court resources, better access and fewer delays, equivalent or higher rates of resolutions (either at or immediately after mediation), parties owning the decision making process, a less antagonistic and adversarial process, creative

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3 Kim Forrester, “I want you to listen to my side of this”: is there a role for mediation early in the healthcare complaints process?” (2011) 18 Journal of Law and Medicine 701, 701.
7 Mulcahy, above n 1, 14-17.
8 Metzloff, above n 6, 117.
9 Ibid.
and nonmonetary solutions, opportunities to apologise or expression regret or sympathy, opportunities to offer full and detailed explanations of medical care, addressing emotion such as anger, gain closure or receive forgiveness, and rebuild relationships, especially if ongoing.

However, what is the empirical evidence that mediation provides any of these benefits? This essay will review the evaluation of three mediation programs for medical negligence claims and outline their primary findings. While these programs occurred in different times and contexts, a number of challenges emerged and will need to be addressed in the future if mediation is to be successful in these types of complex, and quite emotive, disputes

B. The North Carolina Study

This was a major empirical study of court-ordered mediation for malpractice cases in North Carolina in the early 1990s. The aim was to assess mediations’ suitability for medical malpractice cases, given the lack of major studies in this area. The state had already

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11 Metzloff, above n 6, 117.
15 Galton, above n 10, 321.
16 Ibid.
17 Metzloff, above n 6, 109.
adopted an extensive program of "mediated settlement conferences" (MSC), conducted by certified and neutral mediators for most civil cases, and extended it to medical malpractice cases.

**Methodology**

The study focused on all malpractice cases, identified through court records, ordered to mediation in the initial pilot of the North Carolina MSC program, which was piloted in certain districts between early 1992 and 31 December 1995. Despite no accurate state wide list of malpractice cases, data on 318 cases ordered to mediation was captured. This data allowed the authors to also identify attorneys and mediators involved in upcoming MSCs. Permission was granted for the authors to observe 42 mediations out of 43 requests, and free access was allowed for all parts of the MSC in 41. The observer documented a narrative of the mediation as well as coded certain key issues such as coverage of certain topics, mediator style and individual participation.

The authors also conducted a review of closed insurance files to assess objective information relating to case closure, including the possible impact of an ‘unsuccessful’ MSC on subsequent case resolution. Data was obtained on an opportunistic sample of 47 mediated

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18 Metzloff, above n 6, 110.

19 Metzloff, above n 6, 111. Mediators were initially required to be lawyers but this rule was relaxed in 1994. The authors noted that the mediators’ experience and qualifications had the potential to be highly variable: “Other than having to observe two MSCs prior to certification, mediators are not required to have any particular level of experience in facilitating mediation sessions. No efforts are made to create areas of specialization among mediators; any certified mediator is available to be appointed to mediate any type of case.”

20 Metzloff, above n 6, 113-4. This was estimated to be approximately 85% of all cases ordered to mediation during the study period.

21 Metzloff, above n 6, 115.
Finally surveys were sent to all attorneys and mediators involved in at least one MSC. Response rates were 70% for defence lawyers (72/103), 31% for plaintiff lawyers (45/145) and 40% for mediators (32/78).  

**Results**

Based on data from 202 cases, 94% of MSCs involved only a single session, with an average of seven different participants. Based on data from 162 cases, the average MSC length was 3.7 hours; close to 89% took under 6 hours. The authors estimated the cost of a “simple” case of mediation at approximately $5,000, compared to a historical figure of trial costs of $35,000. It was estimated that one third of cases ordered for mediation never got to mediation, though the reasons, such as settling before mediation, were not clear.  

Studying annual filing dates and records, there was no evidence that compulsory MSCs promoted earlier settlements. Fifty of the 202 MSCs were fully or partially resolved at the conference itself, a low rate compared to the resolution rates of MSCs for all types of civil
cases. Of the remaining 152 cases, 45 went to trial, 36 went to verdict and defendants prevailed in thirty cases (83.3%). There was no evidence MSCs reduced trial rates. The authors studied the cases not resolved at MSC to determine whether or not the MSC actually played a significant and objective role in case resolution before trial. Using a number of variables, the authors determined another 37 cases (35 settled and 2 dropped after MSC) were “successfully” resolved due to the MSC, bringing a total “success” rate of 44.1% (87/197).

Despite the above resolution rates, When surveyed, 73.5% of attorneys believed all malpractice cases should be routinely referred for mediation; however, only 6% believed they were more likely to settle compared to other types of mediated cases, with 45.3% thinking it was less likely to settle. Almost 70% of attorneys wanted an evaluative function from mediators. Many attorneys supported the potential for more meaningful resolution in a less adversarial forum.

**Was it Mediation?**

MSCs were conducted in “good faith”, though the details of this were not explicit. The mediator was in control of the process and there was confidentiality. Observed MSCs in this study began with an opening session with all parties and the mediator, consisting of attorney

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30 Metzloff, above n 6, 134.
31 Metzloff, above n 6, 135.
32 Ibid. The authors noted that mediators did not know what happened subsequently to their efforts and any response or opinion offered by them was likely to be biased and possibly self serving.
33 Metzloff, above n 6, 137-9. The authors considered variables such as the time length of the MSC, time elapsed between MSC and case resolution (more than six months after MSC was suggestive that the MSC played no major role in resolution), subsequent court activity that was closer to the date of resolution, and proximity of resolution date to a trial date.
34 Metzloff, above n 6, 141.
35 Metzloff, above n 6, 144.
36 Metzloff, above n 6, 142-3.
presentations. This was followed by private caucuses on each side with the mediator, the latter undertaking “shuttle negotiations” before a settlement was reached or an impasse was declared. There was little innovation or creative session structuring and parties remained separated after the opening without further direct discussion. Mediators only met with a plaintiff without their attorney once in 42 observed cases; meeting between mediators and plaintiff attorneys without their clients were far more common. Some mediators offered an opinion on issues such as the merits of the case and likely jury verdicts; half of them gave an opinion about appropriate offers. However, it was also common for mediators to have both a passive and exploratory role. There was the opportunity for future sessions, though this was rare.

In all observed cases the plaintiff was present, but few actively participated, with only one substantially involved in the joint session. Their participation was slightly greater in private sessions. In approximately one out of seven MSCs did the plaintiff directly and substantially vent their feelings. Physicians were often absent and when present, they were often passive or participated minimally.

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37 Metzloff, above n 6, 119.
38 Metzloff, above n 6, 120.
39 Metzloff, above n 6, 121-2.
40 Metzloff, above n 6, 113.
41 Metzloff, above n 6, 123. The authors noted “In about one-third of the cases observed, the plaintiffs had substantial involvement in the private sessions. In another fifty percent of the cases, they had minor involvement (such as responding to a question by the mediator or raising one or two concerns), while in about fifteen percent, the plaintiffs did not participate at all even in the private sessions.”
42 Metzloff, above n 6, 124.
43 Metzloff, above n 6, 124-5. The authors noted at 125 “Of twenty-eight observed cases in which a defendant physician was present, in fourteen the doctor did not participate at all in the joint session. Of those that did participate, only three participated substantially in the joint session.”
**Conclusions**

The study concluded that parties were generally satisfied with the MSC program and cases were being settled sooner with some financial savings and no evidence of detriment or disadvantage.\(^{44}\) However, the term "mediation" was questioned, as MSCs resembled “nothing more than a structured, traditional settlement conference conducted by a neutral third party. The parties themselves participate only infrequently and creative solutions are rarely considered.”\(^{45}\) There was the difficult issue of mediators offering opinions and whether or not they were qualified to do so.\(^{46}\) Yet, many attorneys desired these opinions.\(^{47}\) While plaintiffs did not actively participate, other benefits from their involvement in the process could not be discounted.\(^{48}\) However clients, patients and physicians were not surveyed and their opinion of the process was not captured.

**C. The NHS Medical Negligence Pilot Scheme**

In the early 1990s there was interest by the British National Health Service in setting up an alternative way in mediating medical negligence claims, given the inaccessibility, costs, delays and unsatisfactory outcomes of existing litigation.\(^{49}\) After deciding against arbitration, the above scheme was launched in April 1995 in two English regions, initially for two years,

\(^{44}\) Metzloff, above n 6, 151.

\(^{45}\) Ibid.

\(^{46}\) Metzloff, above n 6, 146.

\(^{47}\) Metzloff, above n 6, 144.

\(^{48}\) Metzloff, above n 6, 124.

\(^{49}\) Mulcahy, above n 1, 7. Given this was a pilot scheme, the research team conducted literature reviews and conducted extensive qualitative review of traditional litigation with parties involved in medical negligence claims. This was to objectively outline any advantages and disadvantages of both traditional litigation and proposed mediation.
and then for a third year.\textsuperscript{50} While not suitable or successful in every case, it was hoped mediation would resolve some cases or narrow the issues in dispute.\textsuperscript{51}

Two external mediation agencies were selected to conduct the scheme, in liaison with regional coordinators who referred cases and promoted the scheme.\textsuperscript{52} Initially it was expected 32-40 cases would be mediated over two years, but there were very low referrals, resulting in the extension of the scheme by one year. Eventually only twelve cases were mediated over three years\textsuperscript{53} and it is the evaluation of those cases which will be the focus of this section.\textsuperscript{54}

\textbf{Methodology}

Data was collected on twelve mediations between 1995 and 1998. The report was scant in exact methodologies used in evaluating the pilot scheme.\textsuperscript{55} Sixty in-depth interviews were conducted with parties involved in mediation, but who exactly was interviewed, whether unstructured or semi-structured interviews were used, and who conducted the interview were not clearly outlined. Participation observation of mediations was included after the original proposal; only three mediations were observed. Finally current and historical data for the

\begin{itemize}
\item \textsuperscript{50} Mulcahy, above n 1, 21-22. The two regions were the Anglia and Oxford Region, and the Northern and Yorkshire region.
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} Mulcahy, above n 1, 22-23. Initially only medical negligence cases in the two regions were accepted, but one region later began to accept cases from outside its boundaries.
\item \textsuperscript{53} Mulcahy, above n 1, 22-27.
\item \textsuperscript{54} Mulcahy, above n 1. Other chapters included a literature review of alternate dispute resolution in medical negligence claims and the situation in the United Kingdom, which has a very different medical system to the United States and Australia (Chapter 2) and qualitative data on opinions of various stakeholders about mediation (Chapter 4).
\item \textsuperscript{55} Mulcahy, above n 1, 5.
\end{itemize}
regions were analysed for potential cases that could have gone to mediation and for estimations of costs of mediation compared to traditional litigation.

**Results**

Half of the mediated cases involved female claimants and obstetrics was the most involved specialty.\(^{56}\) Court proceedings had already been issued in court for four cases and five had already been through hospital complaints procedures.\(^{57}\) All mediations took one day in a neutral venue, with an average of seven hours (range 4-11 hours); eleven cases had an additional co- or pupil mediator.\(^{58}\) Eleven of the claimants had an accompanying person and ten had a solicitor present.\(^{59}\)

Eleven cases (92%) reached financial settlement with an average of £34,500 (range £5,000-80,000). Some cases had non-monetary agreements, including full explanations of medical decisions and mistakes in a claimant’s treatment, referral to another hospital and a public apology.\(^{60}\) The last case was later abandoned.\(^{61}\)

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\(^{56}\) Mulcahy, above n 1, 30. Five of the twelve cases were related to obstetrics, three involved general surgery and two were related to oncology. Other specialties were involved in one case. More than one specialty could be involved in a single case.

\(^{57}\) Mulcahy, above n 1, 31.

\(^{58}\) Mulcahy, above n 1, 32-33. Having a second person involved in mediation was considered a distinct advantage.

\(^{59}\) Mulcahy, above n 1, 33. Power inequalities were quite noticeable when a solicitor was not with the claimant and it was noted the defence lawyers tried to ensure that the claimants did have access to some type of legal advice if needed.

\(^{60}\) Mulcahy, above n 1, 31-32. These were only some of the solutions; others included a tour of the hospital to see improvements made as a result of the claim, and ensuring a claimant’s partner had ongoing secure employment at the hospital. The exact number of cases with such agreements was not specified.

\(^{61}\) Mulcahy, above n 1, 34.
While there was a great deal of variability, a general model emerged, of opening and closing joint sessions followed by private caucuses with individual parties and the mediator shuttling between the two parties. Adherence to the outlined model, as well as mediator pressure and bias, were issues noted by observers. In a comparison of the mediated cases to similar non-mediated cases, the costs of mediation were calculated to be higher due to defence legal costs, medical staff time, the hire of a mediator and neutral venue expenses.

Interviewees agreed that mediation allowed the cases to settle sooner with an earlier focus on the issues. It was flexible, encouraged participation and apologies, and was efficient in case disposal. Private caucusing allowed non-financial solutions to emerge, the management of unhelpful emotions and allowed the claimants to be ‘heard’ in a safe environment. Interviews with lawyers suggested some confusion about the mediation process despite education and briefing of the pilot scheme and some were uncomfortable with the lack of control and dealing with non-monetary issues.

Doctors were present in six of the ten cases where medical negligence was an issue. There was divided opinion on the usefulness or desire of their presence in mediation and it was

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62 Mulcahy, above n 1, 35-7. It was not clear how the authors came to this conclusion, as few mediations were directly observed. It was unclear if the mediation model described correlated with what claimants and solicitors recalled in later interviews or if mediators were asked to given an account of the mediation.

63 Mulcahy, above n 1, 67-70.

64 Mulcahy, above n 1, 97-99. It was noted that the increased costs sat with the NHS, and it was difficult to consider the money saved by other government departments, such as the courts or legal Aid Office, due to mediation. Give that all of this money came from the public purse, actual savings were possible but not readily apparent.

65 Mulcahy, above n 1, 34.

66 Mulcahy, above n 1, 72-80.

67 Mulcahy, above n 1, 37-9.

68 Mulcahy, above n 1, 64-66.
decided on a case by case situation. Nevertheless, there were some mediations that made substantial progress with doctor participation, because of full explanations, apologies or acknowledgment of responsibility.

The authors noted a wide variety of political and administrative issues that impaired the mediation scheme, leading to low referral numbers and mediated cases. Interviews with solicitors also suggested that they were reluctant to refer their own cases to the pilot scheme, even though they may appear suitable and believed it was a good idea in principle. However the authors collected data suggesting 44 outstanding or dormant cases that might have benefitted from mediation.

Conclusions

Mediation was generally considered satisfying, especially with claimants and their representatives, with resolution of issues, not just a financial settlement. Doctors generally expressed less satisfaction as it was confrontational, distracting and time consuming; however, their participation at times was very important. There were encouraging remarks from the legal profession about mediation. The major drawback of this study was the lack of mediated cases- hence the data was more qualitative than quantitative.

Mulcahy, above n 1, 61-64.
Mulcahy, above n 1, 77-78.
Mulcahy, above n 1, 55-58.
Mulcahy, above n 1, 58-59.
Mulcahy, above n 1, 39-40.
Mulcahy, above n 1, 104-5.
Mulcahy, above n 1, 106.
Mulcahy, above n 1, 107.
D. The HHC and MeSH Studies

The following two observational studies explored the use of voluntary mediation to resolve medical disputes. They will be considered together because they shared the same investigators and geographical area, had similar methodologies and were conducted within three years of each other.

Methodologies

The New York City Project for Mediating Malpractice Cases (the HHC Study) involved three organisations who referred 29 cases to the investigators. Twenty-four referrals were accepted and 19 went to mediation between 5 May and 15 October 2004.

Mediators used a conference call with attorneys to schedule and prepare for the mediation. Participants included the plaintiff, any support person, the plaintiff’s attorney, city representatives and the defendant’s attorney. There were two mediators in all cases and all, except one, involved the principal investigator. While mediation, and its different approaches, was described by the authors, there was no objective measurement or neutral

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77 Chris Hyman and Clyde Schechter, ‘Mediating medical malpractice lawsuits against hospitals: New York City’s Pilot Project’ (2006) 25 Health Affairs 1394, 1394. The study is also known as the New York City Health and Hospitals Corporation Study (HHC Study). Cases were brought against the New York City Health and Hospital Corporation.

78 Hyman, above n 77, 1394. The organisations were New York City Health and Hospitals Corporation (HHC), the New York City Law Department, and the New York City Office of the Comptroller

79 Hyman, above n 77, 1394-5. There were strict inclusion criteria: a written medical review had to be conducted, the case was not a candidate for the city’s existing medical malpractice early settlement program, the estimated liability was less than $400,000 (though this was relaxed halfway through the study), the case did not include an HHC physician or HHC affiliate physician as a named defendant and any nonmonetary remedy agreed to by the parties would be able to be accomplished within one year.

80 Hyman, above n 77, 1395. There was one representative each from HHC and the comptroller’s office, and a translator, if needed.

81 Ibid. The other co-mediator was one of experienced three mediators assigned on a rotating basis.

82 Hyman, above n 77, 1396-7. The authors described mediation as follows:
observation of the process. Mediators encouraged the defendant’s attorney, to offer an apology to plaintiffs during the first joint session, if it was appropriate. Data was gathered through telephone structured interviews by telephone from trained law student assistants. Most questions were done on Likert 5 point, or similar, scales (1, being most favourable/very satisfied to 5 least favourable/very dissatisfied) with some open ended questions.

The “Mediating Suits against Hospitals” (MeSH) study included thirty-one cases from a potential pool of sixty-seven lawsuits referred to the investigators over eleven months. The disputes involved eleven private non profit hospitals in New York City. Mediation was

“Mediation is a confidential, voluntary process in which an impartial mediator helps the participants negotiate their differences and either craft a mutually acceptable resolution for their dispute or decide to deal with their problems in some other manner, including litigation. Mediation is based on three core values: autonomy, informed decision making, and confidentiality. Participants may end the mediation at any time without adverse consequences. If, however, a resolution is reached, it is memorialized in writing, signed by the participants, and becomes a binding contract.”

Comparisons are often made between evaluative and facilitative styles in mediation. The former typically is directive and focuses on the strengths and weaknesses of the parties’ positions, proposes a value range for the case, predicts an outcome in court, spends little time in joint session, and spends more time meeting privately with the parties in caucus. The latter helps the parties negotiate without evaluating, encourages clients’ participation in the mediation, and takes time to discuss feelings and facts that enrich the focus beyond the amount of money that will settle the case. In practice, facilitative mediators often incorporate evaluative approaches by asking both parties questions to test the strength of their positions or to suggest a weakness and, when asked by the parties, by providing a “mediator’s proposal” to break an impasse.”

83 Hyman, above n 77, 1397.
84 Hyman, above n 77, 1395.
85 Hyman, above n 13, 797-798 and 801-2. These hospitals were represented by three organisations that handled their risk management and legal matters. The sizes of the hospitals ranged from 369 to 1171 beds, average 741 beds.
86 Hyman, above n 13, 798-9. Similar to the HHC study, the authors defined mediation as follows:

“Mediation is a voluntary, confidential conflict resolution process in which an impartial third party, the mediator(s) (or co-mediators), assists the disputants in negotiating a mutually acceptable resolution. Unlike arbitration, in which the third-party arbitrator imposes a resolution, the parties are the decision makers in mediation. The parties are not required to settle and are free at any point to return to litigation. Mediators use their communication expertise to guide the negotiations and help participants identify interests, exchange information, and explore and evaluate options. Mediation soon after the harm that is the subject of the complaint typically offers greater emotional and financial benefits to the parties. Interest-based mediators encourage participants to discuss all issues that are important to them, not just those relevant to proving the legal case or resolving claims for financial compensation. Mediation participants, including the mediator, sign an agreement that what they say during the mediation will be confidential. These mediation confidentiality agreements are binding contracts.”

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voluntary and agreed by both sides.\textsuperscript{87} There were no exclusion criteria and the defendants had to be interested in settling.\textsuperscript{88} Sixty seven cases were referred, but only 31 proceeded to mediation\textsuperscript{89} between 15 Dec 2006 and 4 Oct 2007.\textsuperscript{90}

The initial screening was similar to the HHC Study.\textsuperscript{91} One of two principal investigators was a mediator in all but three cases;\textsuperscript{92} there were nine other experienced co-mediators involved.\textsuperscript{93} The structured interviews for primary data, conducted after mediation, were similar to the HHC Study.\textsuperscript{94} There was no objective measurement of the fidelity of the mediation process.

\textbf{Results}

In the HHC Study, the time in mediation ranged from 1-4.5 hours (average 2.34). Thirteen cases settled (13/19; 68.4%); 11 had an apology of sympathy or responsibility and 10 of those settled; 8 had no apology and only 3 settled.\textsuperscript{95} Monetary settlements ranged from $17,500-400,000 (median $111,000).\textsuperscript{96} While there were multiple plaintiff attorneys, there was only

\textsuperscript{87} Hyman, above n 13, 800.
\textsuperscript{88} Hyman, above n 13, 802.
\textsuperscript{89} Hyman, above n 13, 804. Of the 67 cases referred, 10 withdrew; 57 were contacted and 51 of plaintiff attorneys agreed to mediate; only 37 defence attorneys agreed to mediate; 34 cases were scheduled mediation after 3 withdrew, only 31 proceeded to mediation after 3 settled before mediation.
\textsuperscript{90} Hyman, above n 13, 807. Of note: "Three of the 34 scheduled mediations settled before mediation and attorneys attributed this to planned mediation."
\textsuperscript{91} Hyman, above n 13, 802.
\textsuperscript{92} Hyman, above n 13, 806. One investigator mediated 23 cases, the other 5 cases.
\textsuperscript{93} Hyman, above n 13, 802.
\textsuperscript{94} Hyman, above n 13, 802-3.
\textsuperscript{95} Hyman, above n 77, 1395. This was a statistically significant association but no causality was implied (p=0.4).
\textsuperscript{96} Ibid.
one defendant attorney for all 19 cases. Attorneys estimated 3.49 hours (SD 3.06) preparing for mediation compared to 36.29 hours (SD 29.17) for trial.\textsuperscript{97} The table below outlines the satisfaction ratings (1 being very favourable).\textsuperscript{98}

In the MeSH Study, sixteen cases (16/31; 51.6\%) settled at mediation, with five (16.1\%) settling afterwards for amounts identified during mediation. The overall resolution rate was 67.7\% (21/31), increasing to 70.6\% (24/34) if the three cases settled just before mediation were included.\textsuperscript{99} The time in mediation ranged from 1.5 to 9.5 hours (mean 3.7 hours) and settlement amounts ranged from $35,000- $1.7 million.\textsuperscript{100} Attorneys spent a median of 6 hours preparing for mediation, in contrast to the estimated median of 100 hours for trial preparation.\textsuperscript{101}

Satisfaction with the process was high overall, with an average score of 1.98 (SD 0.62) on an 8 item scale rated by plaintiffs (n= 23 from 18 cases), 1.9 (SD 0.7) on a 5 item scale rated by attorneys (n=56, plaintiff attorneys 31, defence 25, with no difference between subgroups) and 2.5 on a 5 item scale rated by hospital and insurer representatives.\textsuperscript{102} However, some lawyers expressed a preference for the mediator to provide a case evaluation and prediction of outcome.\textsuperscript{103}

\textsuperscript{97} Hyman, above n 77, 1396. This was statistically significant [p<.00005].
\textsuperscript{98} Ibid.
\textsuperscript{99} Hyman, above n 13, 807.
\textsuperscript{100} Ibid. The median settlement amount was $250,000 and the inter quartile range was $100,000 to $500,000.
\textsuperscript{101} Hyman, above n 13, 809. Indeed, this was statistically significant; “Every attorney in every case reported a greater number of hours expected for trial preparation than spent preparing for mediation (p < 0.00005)”.
\textsuperscript{102} Hyman, above n 13, 808-9.
\textsuperscript{103} Hyman, above n 13, 818-9.
Table 1. Average Ratings in the HHC Study

<table>
<thead>
<tr>
<th></th>
<th>Plaintiff (n=12)</th>
<th>Attorneys (n=18)</th>
<th>Other participants (numbers not noted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Satisfaction with process</td>
<td>2.22 (SD 1.03)</td>
<td>1.95 (SD 0.78)</td>
<td>2.14 (SD 0.62)</td>
</tr>
<tr>
<td>Satisfaction with outcome</td>
<td>2.54 (SD 0.81)</td>
<td>2.56 (SD 0.55)</td>
<td>2.65 (SD 0.48)</td>
</tr>
<tr>
<td>Inclination to use or recommend mediation in the future</td>
<td>1.85 (SD 1.27)</td>
<td>1.82 (SD 1.09)</td>
<td>2.40 (SD 1.17)</td>
</tr>
<tr>
<td>Felt pushed into settlement</td>
<td>3/12 strongly agreed/agreed</td>
<td>5/12 disagreed/strongly disagreed</td>
<td>1/12 neutral</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3/12 no response</td>
</tr>
</tbody>
</table>

Conclusions

Both studies concluded mediation was a fair and satisfying process that was responsive to party interests. There were substantial monetary savings, from reducing time spent in
discovery and trial preparation as well as emotional benefits from avoiding a trial and its uncertainty.\textsuperscript{104, 105}

In the HHC Study, there was a small sample of government cases and cases with a named physician as defendant were excluded.\textsuperscript{106} Therefore the results could not be generalised. Selection bias was also a problem in the MeSH Study due to the nature of private voluntary mediation.\textsuperscript{107} Therefore success rates in both studies, though high, were hard to compare. Both studies could not exclude challenges in process measurement and investigator bias. Satisfaction ratings might have suffered from recall or error bias, as they were administered several weeks after the mediation.\textsuperscript{108}

Physicians were not defendants in the HHC Study, but were in the MeSH Study. No physician participated in mediation in this study, so there were potentially lost opportunities for enhancing health care and preventing future mistakes.\textsuperscript{109} Without them, the authors noted discussions became more legal and money focused and “apologies were rare and often hollow.”\textsuperscript{110} Physicians themselves lost opportunities to address their own possible feelings of guilt or remorse.\textsuperscript{111}

\textsuperscript{104} Hyman, above n 77, 1399.
\textsuperscript{105} Hyman, above n 13, 810-11.
\textsuperscript{106} Hyman, above n 77, 1399.
\textsuperscript{107} Hyman, above n 13, 810.
\textsuperscript{108} Hyman, above n 13, 824.
\textsuperscript{109} Hyman, above n 13, 814.
\textsuperscript{110} Hyman, above n 13, 817.
E. Conclusions

While this essay has only concentrated on three programs, one can draw some general positive conclusions. There appears to be no disadvantage with mediation; participants appear satisfied and the resolution rates are not significantly lower than traditional legislation. Some programs have calculated significant financial savings.

However there are a number of challenges. The need for education about mediation appears ongoing, as well as addressing resistance. There is a need to ensure what is being promoted is actually what is conducted. Processes proclaimed as mediation in only name will give it a poor reputation as ineffective and a barrier to the courts. This problem has been noted, including one earlier evaluation of a Wisconsin scheme. The role of doctors in mediation remains controversial- while many advocate their presence, others have questioned the utility of their presence. Finally, there is a need for research in individual states and countries; mediation will have different challenges from country to country, depending on the health environment and legal system. While encouraging, there is plenty of scope for mediation to prove itself as an effective tool in resolving medical negligence claims.

113 Catherine Meschievitz, ‘Mediation and medical malpractice: problems with definition and implementation’ (1991) 54 Law and Contemporary Problems 195, 211-2. The mandatory mediation panels were closer in resemblance to early neutral evaluations and indeed bared very little resemblance to a typical mediation process.
114 Galton, above n 10, 321.
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116 The author thanks the library staff at the Gold Coast Hospital for finding and quickly ordering the only copy of Linda Mulcahy’s book in any academic library in Australia.


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