PLAINTIFFS' SATISFACTION WITH DISPUTE RESOLUTION PROCESSES:

TRIAL, ARBITRATION, PRE-TRIAL CONFERENCE AND MEDIATION

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January 1997

JUSTICE RESEARCH CENTRE

ISBN 0 909136 63 7

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January 1997

Published by the Law Foundation of New South Wales
on behalf of the Justice Research Centre.

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The Justice Research Centre would like to thank
all the plaintiffs who participated in the survey.

Acknowledgement

This research is based on a major American study of tort litigants' perceptions of justice conducted by the RAND Corporation's Institute for Civil Justice in 1989. We are indebted to that study for both details of research design and analysis, as will be evident to any reader familiar with the Institute for Civil Justice report. We are also grateful for the advice and other assistance provided to us by three of its authors — Patricia Ebener, Deborah Hensler and Rob MacCoun, and for advice from Dan McCaffrey also of the RAND Corporation. The responsibility for any errors of design or analysis is, of course, ours alone.

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1

Introduction

1 The Chief Justice of Australia has declared the administration of justice to be in crisis —

> The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; Governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis. Ordinary people cannot afford to enforce their rights… To that extent, the coercive force of the law is undermined. If the burden of litigation will increase, some solutions must be found and practical solutions are likely to be radical.[1]

The sense of crisis is shared by others,[2] and several Australian jurists, along with colleagues throughout the Common Law world, are advocating radical solutions.[3] Civil process reform has emerged as

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1 The Hon Sir Gerard Brennan, "Key issues in judicial administration" paper delivered at 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington, 20–22 September 1996 at 3–4.

2 cf. The Hon Duncan Kerr MP (then Commonwealth Minister of Justice), "Address to the Annual Regional Conference of the Law Society of New South Wales", 28 October 1993, at 6; The Hon D A Ipp, "Reforms to the adversarial process in civil litigation — Part I" (1995) 69 Australian Law Journal 705; and in England and Wales, cf. The Rt Hon Lord Woolf, Access to Justice: Interim Report (HMSO, 1995) at 5.

3 The Hon G L Davies and J S Lieboff, "Reforming the civil litigation system: Streamlining the adversarial framework" (1995) 25 Queensland Law Society Journal 111 at 128; The Rt Hon Lord Woolf, Access to Justice: Interim Report (HMSO, 1995), at 18 (Lord Woolf's final report, Access to Justice: Final Report (HMSO, 1996) speaks of "fundamental change" to "the landscape of civil litigation".

one of the most significant legal issues in this decade.[4] We are engaged in a renewed quest for the means to resolve civil disputes — in the plain talk of one of Australia's leading proponents of reform — "by the cheapest and quickest means consistent with reasonable fairness."[5]

2 If the objective of the civil process is to resolve civil disputes "by the cheapest and quickest means consistent with reasonable fairness"[6], understanding how litigants experience fairness will provide some direction along the path of significant — radical, if need be — reform.

3 This report describes a major study of personal injury plaintiffs' evaluations of their experiences of the civil process in disputes that were resolved by one of four different procedures — trial, arbitration, pre-trial conference and mediation (the first two are adjudicative, although arbitration is frequently described as an alternative form of adjudication; pre-trial conference and mediation are examples of

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4 Civil process reform was a significant focus of the work of the Queensland Litigation Reform Commission (chaired by The Hon G L Davies) until it was, surprisingly, abolished in 1996. The Commission was the organiser of major conference on "Civil Justice Reform: Streamlining the Process" in Brisbane, 6–8 March 1996. Civil process reform was also a topic of the 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington, 20–22 September 1996, and is the subject currently of a large reference to the Australian Law Reform Commission. In addition to the "Woolf Inquiry" (note 3) in England and Wales, civil justice has been the subject of two recent reports in Canada (Task Force on Systems of Civil Justice (Canadian Bar Association, August 1996) and the Civil Justice Review First Report (1995) and Supplemental and Final Report (1996) (Ontario Court of Justice and Ministry of the Attorney General), while in the United States it has been the subject of several initiatives including, most recently, the large scale American Bar Association Action Commission to Reduce Court Costs and Delays. All of these initiatives will be the subject of an international conference of common law jurists convened by the U.S. National Center for State Courts in Bellagio, Italy, in March 1997.

5 The Hon G L Davies, "A blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale" (1996) 5 Journal of Judicial Administration 201 at 202.

6 The formulation in terms of "reasonable" fairness may be somewhat controversial but we think this otherwise accords with other generally accepted formulations of the aims of the civil process.

non-adjudicative processes[7]). It seeks to identify the factors which influenced plaintiffs' perceptions of fairness with the process of the litigation procedure, satisfaction with the outcome of litigation, and satisfaction with the legal system generally.

4 This study adds to our understanding of how factors such as the costs and delays of litigation, and its outcomes, influence plaintiffs' perceptions of justice. It also explores the influence of a number of other factors that might be expected to influence plaintiffs' satisfaction and perceptions of fairness of the civil process. These other factors include plaintiffs' evaluations of the outcome, cost and delay of the litigation, and their subjective evaluations of the process, such as evaluations of the level of control and participation, the level of comfort and evaluations of legal representatives.

5 A study of plaintiffs' satisfaction with dispute resolution procedures is particularly timely. One of the most significant reforms, already being progressively implemented throughout Australia, is the incorporation of voluntary, or in some courts mandatory, alternative dispute resolution (ADR) procedures into court processes.[8] The 'ADR Movement' has, in a very short time, gathered tremendous

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7 As the Access to Justice Committee noted, ADR "is an expression susceptible to many definitions" and can "embrace any mechanism for resolving disputes other than court-based adjudication, including non-judicial adjudication (arbitration and expert determination) as well as consensual resolution mechanisms." We have followed the Committee's preference for the narrower definition which focuses on ADR being consensual or non-adjudicative. Access to Justice Committee, Access to Justice: An Action Plan (1994) para.11.1.

8 In addition to being arguably the most significant reform, it is also the most immediately relevant to the scope of our study. We should note, however, that other proposals are being advanced for greater judicial involvement in the management of cases (including their formation, development and presentation as well as their progress) and for streamlining adjudicative procedures: See for example, in addition to Davies and Lieboff, (note 3), Davies, (note 5), and Ipp, (note 2), The Hon G L Davies and S A Sheldon, "Some proposed changes in civil procedure: Their practical benefits and ethical rationale" (1993) 3 Journal of Judicial Administration 111; The Hon D A Ipp, "Reforms to the adversarial process in civil litigation — Part II" (1995) 69 Australian Law Journal 790; and The Hon D A Ipp, "Judicial intervention in the trial process" (1995) 69 Australian Law Journal 365. As we discuss in the conclusion, our findings on some of the factors influencing litigants' perceptions of justice are relevant to these proposals as well.

official,[9] and judicial[10] support. However, some of the larger implications of incorporating alternative dispute resolution procedures into courts still need to be addressed. As Chief Justice Brennan also observed in his keynote address to the Australian Institute of Judicial Administration —

> [I]n the enthusiasm for diversionary techniques, there should be no misunderstanding of the sea-change in attitudes and outcomes involved. Lawyers brought up in the adversary system [are] expected to temper adversarial zeal with the sweetness of compromise; litigants claiming an entitlement to their rights [are] sent on a detour on arrival at the courthouse; solutions reached by diversionary procedures may deliver cheaper but also a less satisfying form of justice. [11]

6 The enthusiastic and somewhat uncritical reception that ADR has had in the courts has in part been due to the dissatisfaction with conventional processes, from which ADR has seemed to offer salvation. In the early days of the movement, many claims were made for the virtues of ADR, some of which now seem extravagant.[12] Outside of the United States, where the debate has been characteristically vigorous, criticism of the move by courts to incorporate ADR has been largely confined to academic circles.[13] Recently, however,

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9 The present Commonwealth Attorney-General (Daryl Williams QC) has suggested that adjudication should be a "long-stop option" and that present policy favours greater use of ADR in federal courts: cf. "A-G lists reforms to parry crisis" The Australian Financial Review, 1 October 1996, 4. The previous government's policy was also to "encourage the shift from litigation" to ADR: Justice Statement (Attorney-General's Department, May, 1995) at 23.

10 Brennan (note 1) at 4–10; Davies (note 5) at 209–210.

11 Brennan (note 1) at 10.

12 It is often asserted that ADR increases settlements, reduces delays and lowers costs; a revisionist version of the dogma is that ADR produces earlier settlements, and therefore reduces delays and costs. So far as we know, there is no research in Australia which subjects these claims to rigorous testing. American research is, at best, inconclusive: cf. J Resnik, "Alternative dispute resolution and adjudication: A glimpse at changes in the United States" paper delivered at the Litigation Reform Commission Conference on Civil Justice Reform: Streamlining the Process, Brisbane, 6–8 March 1996, which summarises the American literature at 4–5.

13 cf. H Astor and C Chinkin, Dispute Resolution in Australia (Butterworths, 1992); R Ingleby, In the Ball Park: Alternative Dispute Resolution and the Courts (Australian Institute of Judicial Administration, 1991).

supporters as well as critics have acknowledged that ADR needs "considerably more examination and consideration than [it has] so far received to merit the [largely] unqualified support that now seems… near universal."[14]

7 One claim made by some of its more forceful proponents is that ADR is, in some circumstances at least, superior to adjudication because participants find the process fairer, and its outcomes more satisfying.[15] The claim assumes heightened significance where courts are requiring or actively directing litigants to alternative processes such as mediation, early neutral evaluation and pre-trial conferences.[16] The legitimacy of courts diverting litigants to alternative processes depends to a great degree upon the quality of those processes and concerns arise when, or if, those processes are perceived to give second class justice.

8 Of course, litigant satisfaction is not the only goal of the civil process nor indeed is simply the resolution of disputes. Civil litigation serves both the interests of litigants and of society. Thus litigants' perceptions cannot be the sole criteria by which the administration of justice should be judged.[17] Nevertheless, as others have pointed out, "it would be difficult to contend that a procedure is good policy if most of those whom it is designed primarily to serve believe it to be unfair."[18]

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14 A Grosskurth, "Mediation: forming a view" in R Smith (ed), Achieving civil justice: Appropriate dispute resolution for the 1990s" (1996) 176 at 179; also cf. Sir L Street, "Occasional address at the law graduation at Sydney University" (1987) March Sydney Law Review 189; R Ingleby (note 13); O Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073; M Kirby, "Mediation: Current controversies and future directions" (1992) 3 Australian Dispute Resolution Journal 139; J David, "Urgent change in courts is needed" (1992) May Australian Law News 19.

15 cf. C Menkel-Meadow, "Will managed care give us access to justice?" in R Smith (note 14) 89 at 105.

16 Its full implications for courts are discussed in J Resnik, "Many doors? Closing doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio State Journal on Dispute Resolution 211. See also Resnik (note 12).

17 This point is principally about the relevance of evaluative measures to system goals. It should also be noted that, for related reasons, litigant perceptions may to some extent be unreliable measures, for example, where they are affected by systemic power imbalances.

18 E A Lind, R J MacCoun, P A Ebener, W L F Felstiner, D R Hensler, J Resnik and T R Tyler, The Perception of Justice: Tort litigants' views of trial, court-annexed arbitration, and judicial settlement conferences (RAND: The Institute for Civil Justice, 1989) at 5.

9 Litigant satisfaction is, arguably, the only relevant and certainly the only practical criterion by which the quality of non-adjudicated outcomes can be evaluated.[19] Moreover, satisfaction can no longer be assumed merely from the fact of settlement, although this might at one time have been a passable assumption.[20] In these times the courts are being heard to say, in effect, that many litigants cannot reasonably expect to have their rights always determined according to law, and in some cases at least, ought to be required to use non-adjudicative procedures to resolve their disputes.[21] This may suggest that ADR is seen as a means, resorted to from necessity rather than preference, to fix a system in crisis. Or it may amount to judicial endorsement[22] of the view that non-adjudicative outcomes can be superior to adjudicative ones.[23] Either way, it is important to know how litigants feel about different procedures, and more about the factors that influence their satisfaction with the civil process.

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19 Adjudication produces outcomes determined in accordance with the legal prescription applying to the factual relationship of the litigants; hence the historical concern of all procedure was to ensure that the relevant facts could be accurately determined, and the relevant law accurately applied. 'Quality' if one can put it this way, was, on the traditional adjudicative model, simply an issue of 'correctness'. Although it can be suggested that another way of evaluating non-adjudicated outcomes is to assess their correspondence with legal prescription (ie. what would have been the outcome of an adjudication) this is, on most views of settlement in the civil context, irrelevant, and in any event would attended by enormous methodological difficulty.

20 It was, presumably, precisely on this basis that historically courts viewed settlement merely as a 'by-product' of their processes — no doubt convenient, and possibly even essential to the efficient operation of the courts, but a by-product nevertheless, for which the courts took no responsibility. Of course, it was always recognised that the legal process should be neither so costly or slow that potential litigants would rather suffer an unjust settlement than pursue their legal rights, but the idea that the "means of assisting [litigants] to reach an agreement [should be] as much an institutionalised part of our system as are the means of litigating" is modern. Cf Davies (note 5) at 206.

21 cf. Brennan (note 1) at 6; Davies (note 5) at 7; Davies and Sheldon (note 8) at 112.

22 cf. Davies (note 5) at 205–206; Davies and Sheldon (note 8) at 117. The most famous judicial exponent of this view was, of course, the former United States Chief Justice, Warren Burger: cf. W Burger, "Isn't there a better way?" (1982) 68 American Bar Association Journal 274.

23 Although not one for empirical researchers, it seems to us that this ambiguity in how courts as institutions view the relationship between ADR and adjudication is an important one to recognise and has not yet been adequately addressed by Australian jurists. cf. Resnik (note 16); Resnik (note 12); J A Jolowicz, "'General ideas' and the reform of civil procedure" (1983) 3 Legal Studies 295; J A Jolowicz, "The active role of the court in civil litigation" in M Cappelletti and J A Jolowicz, Public Interest Parties and the Active Role of the Judge in Civil Litigation (1975) 155 at 167–181.

Organisation of this report

10 The remainder of this report is organised in the following way:

- Section 2 describes the background to the research and each of the four dispute resolution procedures. It defines the objectives and describes how the research was conducted and some of its design limitations.
- Sections 3, 4 and 5 describe the results of the research. Section 3 examines plaintiffs' perceptions of fairness, satisfaction with the outcome and satisfaction with the legal system across the four dispute resolution procedures.
- Section 4 looks at relationships between plaintiffs' perceptions of fairness, satisfaction with the outcome and satisfaction with the legal system and two sets of objective factors: characteristics of plaintiffs and, the outcome, cost and duration of the claims.
- Section 5 similarly examines plaintiffs' perceptions of fairness, satisfaction with the outcome and satisfaction with the legal system, but with two sets of subjective factors: plaintiffs' evaluations of the outcome, cost and duration of their claims and plaintiffs' subjective impressions of the litigation process including, perceptions of control, participation, understanding and comfort, formality, bias, dignity, and evaluations of their legal representatives. In addition to looking at whether each of the factors are related to plaintiff perceptions, Sections 4 and 5 examine relationships between the factors and the four dispute resolution procedures. A summary of these relationships concludes Section 5.
- Conclusions from the research are presented in Section 6.

2

Research issues and design

11 This section describes the background to the research, its focus and how it was conducted. We define our objectives and describe each of the four dispute resolution procedures used in the study. Finally there is a discussion of the research design and some of the limitations inherent in it.

Researching satisfaction

12 This study, following the example of previous research, asked plaintiffs three distinct questions.[24] First, did the plaintiff believe the procedure was fair? Second, was the plaintiff satisfied with the outcome? And third, was the plaintiff satisfied overall with the performance of the legal system?

13 The conceptual relatedness of these questions, and their distinctiveness, are obvious. Similarly, while it is to be expected that litigants' responses to each will tend to be related, it is in fact a major premise of the legal system, confirmed by psychological research, that they can distinguish between them.[25] Thus a plaintiff may think the procedure was fair and still be dissatisfied with the outcome. Satisfaction with the legal system may be part of a person's more general attitude, a product of diffuse life experience, and therefore be less affected by a single contact with the legal system.

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24 cf. Lind et al (note 18) at 8–11.

25 cf. Lind et al (note 18) at 8; A Lind and T Tyler, The Social Psychology of Procedural Justice (1988) at 61–127.

Research objectives

14 Our study was designed to address three objectives. First, we sought to examine whether plaintiffs' perceptions of fairness and satisfaction are related to the dispute resolution procedures, that is, trial, arbitration, pre-trial conference and mediation.

15 Second, to identify, which of a number of other factors are related to plaintiff satisfaction or dissatisfaction with their experience. We examined four sets of factors, in addition to the procedures, two objective and two subjective —

- personal characteristics of the plaintiffs, for example, age, education and employment
- the objective consequences of the litigation, that is, its outcome, cost and duration
- plaintiffs' subjective evaluations of outcome, cost and duration
- plaintiffs' impressions of the process itself, for example, whether they thought the procedure was careful and unbiased.

Understanding the influence of these factors we hoped would tell reformers what is, and what is not, important to plaintiffs' satisfaction. Analysing plaintiffs' subjective impressions in particular would contribute to a fuller, more precise understanding of what fairness and satisfaction means to plaintiffs.

16 The final objective was to examine the relationships between some of these factors and the differences, if any, between plaintiffs' perceptions of and satisfaction with the four dispute resolution procedures. This knowledge may direct attention to aspects of the procedures which enhance or diminish litigant satisfaction, and to help focus the reform process.

Research sample

17 Two hundred and fifty-five plaintiffs were interviewed for this study. These were plaintiffs whose personal injury claim was resolved (finalised) at one of four dispute resolution procedures[26] — trial, arbitration, pre-trial conference in the New South Wales District Court's Sydney registry, and private mediation through the New South Wales Law Society mediation program. The trials and arbitrations occurred in the latter part of 1994, and the pre-trial conferences occurred then and in the early part of 1995. For reasons explained below, the mediations occurred from 1992 through 1994. The following section describes each of the dispute resolution procedures.

18 The study was confined to personal injury claims only in order to reduce the statistical variation that mixing causes of action might have produced in our results. Personal injury claims, in fact, make up almost two-thirds of civil claims filed in the New South Wales District Court's Sydney registry. Because the litigation did not directly affect an individual defendant, and the defendants were corporate entities (insurers), no attempt was made to survey defendant perceptions.

A description of the four dispute resolution procedures

Trial

19 Trial, of course, involves the hearing and authoritative adjudication of a claim by a judge or sometimes a jury. In 1994, 801 matters were tried to judgement in the Sydney registry of the District Court. Plaintiffs whose claims went to trial may have attempted to settle at a pre-trial conference and may also have received an arbitrator's decision, in which case their claim is re-heard before a judge.

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26 As we discuss later several of the plaintiffs had experienced another dispute resolution procedure within the same proceeding. We examine the influence of using more than one procedure on their perceptions of the final procedure in paragraph 50. We did not ask plaintiffs about their perceptions of the earlier procedures.

*A*rbitration

20 Arbitration is an adversarial process relying on a third party, the arbitrator, to decide the outcome of the claim. In other words, it is an adjudicative process. What distinguishes arbitration from trial is that a judge does not decide, the rules of evidence are more relaxed, there is less formality, and the arbitrator's decision is not automatically binding. Plaintiffs whose claims went to arbitration in the New South Wales District Court's Sydney registry during the study period, may have already attempted to settle at a pre-trial conference. No record of the arbitration, except the arbitrator's decision, is kept and either party may request a 'trial de novo' within 28 days of the hearing. If neither party does so, the decision becomes a judgement of the Court.

21 Plaintiffs for the study had been through the 'Philadelphia' arbitration scheme operated by the District Court since 1990 (and so called because it is adapted from an arbitration scheme operating in the American city of the same name). In 1994, there were 740 awards made under this scheme in the Court's Sydney registry, and in 390 (53%) of these an application was made for re-hearing (or trial de novo), although a number of these would have settled prior to the re-hearing.[27]

Pre-trial conference

22 As the term implies, the pre-trial conference is a meeting held at the court before a trial, or before an arbitration hearing. The aim of the conference in the New South Wales District Court was to settle the claim, or at least to define and narrow the issues, with the assistance of a third party (from 1990). Pre-trial conferences began unsupervised in the New South Wales District Court's Sydney Registry in 1980 and were supervised by court registrars from 1990. They were abolished in 1996.

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27 New South Wales District Court, Annual Review 1994, at 10–11.

23 The registrar, as the third party, took a proactive role in helping the parties to settle, but did not evaluate the claim.[28] Generally the solicitor for each party, and sometimes their barrister, attended. Plaintiffs and defendants rarely attended, although plaintiffs were usually present within the Court's waiting area. A reason given for this by a Court official was that "it can be counter-productive to have clients in the room as practitioners do not negotiate as freely, which may reduce the potential to settle."[29]

24 When it was in operation, the pre-trial conference was generally the first dispute resolution procedure used in an attempt to resolve the claim.[30] Claims that did not settle at a pre-trial conference were assigned to an arbitration or trial. In 1994, 736 claims were settled at a pre-trial conference.[31]

Mediation

25 Mediation is the archetype form of alternative dispute resolution. It has been defined as —

> A voluntary process in which a mediator independent of the disputants, facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issues in the dispute, to develop options for their resolution and reach an agreement which accommodates the interests and needs of all disputants.[32]

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28 "District Court: Guidelines for Registrars"(1990) August, Law Society Journal at 26.

29 M Delaney, "Plaintiffs' perceptions of procedures: Perceptions of trial, arbitration and pre-trial conference in the New South Wales District Court and private mediation" Civil Issues No.5 (Justice Research Centre, 1994) at 5.

30 For a description of the process and outcomes of 15 pre-trial conferences observed at the court in 1993 see Delaney (note 29).

31 Note 27 at 10–11.

32 Mediation Information Kit (1995) The Law Society of New South Wales.

26 Mediation is private and confidential. Mediation (except in relation to Family Court proceedings) is unregulated, although there are guidelines developed by the New South Wales Law Society for legal practitioners acting as mediators.[33] The plaintiff usually attends along with her or his legal representatives. In personal injury claims a representative of the defendant's insurance company is often present along with legal representatives. It has been noted that the distinctions between pre-trial conferences and mediation are not always clear in practice.[34] This may be especially so with personal injury claims.[35]

27 The New South Wales Law Society's mediation program began in 1991 with Settlement Week. A second Settlement Week was held in 1992 and in 1993 it became a continuing program with mediation available throughout the year. The 1991 Settlement Week targeted cases awaiting trial in The New South Wales Supreme Court. In 1992 this broadened to include cases in the New South Wales District Court and Family Court.[36] The Law Society sent letters of invitation to all parties involved in the cases targeted. When the parties to a case agreed to mediate, and had paid the fee of $800, the Law Society engaged a mediator who facilitated a preliminary conference and the mediation itself. The mediators selected from a Law Society panel were legal practitioners who had completed a mediator training course approved by the Law Society.[37]

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33 Ibid.

34 Astor and Chinkin (note 13) at 159.

35 Note 29 at 5.

36 M Dewdney, B Sordo and C Chinkin, Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992–93 Settlement Week Program (The Law Society of New South Wales, 1994) at 2.

37 Settlement Week October 1991 Evaluation Report (The Law Society of New South Wales, 1991).

Data collection

28 Information for the research was collected from two sources — New South Wales District Court case inquiry records and telephone interviews with plaintiffs. The information from Court case inquiry records included the dates the Statement of Claim and Praecipe for Trial were filed, and the date the claim was finalised. All dispute resolution procedures experienced by the plaintiff (pre-trial conference, arbitration and trial) were recorded. The amount of award or settlement was also recorded where this appeared on the case enquiry record. Court file information was available in fewer than half of the mediation cases.[38]

The sample of plaintiffs

29 Most plaintiffs attend the Court on the day their claim comes before it. With the assistance of Court staff, relevant plaintiffs and their solicitors were approached in person on the day, the plaintiff was given a card which explained the purpose of the study, and asked to return their contact details if they were willing to participate in the study.[39]

30 The New South Wales Law Society gave us access to the files of claims that had finalised at mediation during the 1992–93 Settlement Week or as part of the Ongoing Mediation Program from 1993 to

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38 Either because they were filed in the Supreme Court or were no longer available on the District Court's Case Enquiry System as they were not active cases.

39 One research assistant was in trial courts from 5 September through to 16 December 1994, a total of 15 weeks. A second research assistant was located in the Court's Windeyer Chambers where Philadelphia arbitrations and pre-trial conferences were held. There, the period of recruitment was 29 August–2 December 1994 (14 weeks) for Philadelphia arbitration matters and 29 August–10 February 1995 (20 weeks, excluding a three-week break over the Christmas period when no conferences were held), for pre-trial conference matters. As fewer claims finalised at a pre-trial conference in the same period, additional time was required to increase the sample size.

1995.[40] A letter was sent to the solicitors for each plaintiff, explaining the purpose of the research and asking them for contact details for their clients. When these were provided[41] contact was made by telephone directly with clients asking for their participation. The chance to win a $100 gift voucher was offered to all plaintiffs who participated in the study.[42]

31 Of the 255 plaintiffs interviewed for the study, 92 were arbitration plaintiffs (36%), 82 were trial plaintiffs (32%), 52 were pre-trial conference plaintiffs (20.5%) and 29 were mediation plaintiffs (11.5%). These figures represent, in the case of the mediation plaintiffs, 27% of personal injury plaintiffs whose mediation occurred in the survey period, and in the case of the other three procedures approximately 40% of the population.[43]

32 The average age of plaintiffs in the study was 41 years, 56% were women, 44% men. Almost half the plaintiffs (44%) stated they had education to the level of the School Certificate, 13% the Higher School Certificate, 20% TAFE and 22% college or university degrees. At the time of interview, 24% of plaintiffs were not in the labour force. Of those in the labour force, 20% were unemployed, 13% were professionals, 19% clerks/sales persons, 11% trade persons, and 7% machine operators /labourers. Plaintiffs were asked their annual income, 55% had incomes of $25,000 or less, 32% between

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40 For the 1992–93 Settlement Week, 61 District Court personal injury claims were identified and from the Ongoing Mediation Program, 53 personal injury claims from both the District Court and Supreme Court were identified. Nine of the plaintiffs interviewed had proceedings in the Supreme Court.

41 The letter was followed up with a phone call one week later. Up to five follow-up phone calls were made to the solicitor requesting the information.

42 A pilot study was conducted to identify the most suitable methods for recruiting plaintiffs in the New South Wales District Court and in private mediation, and to test the questionnaire. A summary of the pilot study is available from the Justice Research Centre upon request.

43 Based on our count of relevant mediation files and, for the other procedures, unpublished figures provided by the District Court. A detailed account of the method used to calculate these response rates is available from the Justice Research Centre on request.

$26,000 and $50,000 and 13% over $50,000. Twenty-eight percent of plaintiffs spoke a language other than English at home. Information about the type of injury was not collected.

33 Comparing plaintiffs' gender, age, education, employment, income, and preferred language other than English across the four procedures, we found two statistically significant differences between groups.[44] A greater proportion of plaintiffs at mediation (39%) described themselves as professionals or managers, compared to 25% at pre-trial conference, 17% at arbitration and 11% at trial.[45] We also found the proportion of motor vehicle accident claims, as opposed to other claims (combining occupier/public liability, work related and medical negligence) was greater at arbitration (88%) and trial (87%) than at pre-trial conference (73%) and mediation (69%).[46]

Interview procedure and questionnaire

34 Telephone interviews were conducted with most of the plaintiffs not less than six weeks after their District Court procedure, with most (80%) interviewed within four months of their procedure, to allow time for finalisation of solicitor fees, and for reserved judgements. Interviews with mediation plaintiffs however, were conducted anywhere from 6 months to 3 years following finalisation of their claim. Interviews took an average of 25 minutes. If requested, an interpreter was employed for plaintiffs from a non-English speaking background.[47]

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44 Chi-square test (gender by procedure) ${}^2_3=1.18$ n=255, p=.757
Kruskal-Wallis (age by procedure) ${}^2_3=2.28$, n=254, p=.515
Chi-square test (education by procedure) ${}^2_6=3.74$, n=251, p=.712
Chi-square test (income by procedure) ${}^2_6=10.79$, n=236, p=.095
Chi-square test (language other than English by procedure) ${}^2_3=6.16$, n=253, p=.104.

45 Chi-square test (employment by procedure) ${}^2_9=21.40$, n=254, $p<.05$.

46 Chi-square test (cause of injury by procedure) ${}^2_3=9.72$, n=255, $p<.05$.

47 The Australian Interpreter Service provided a three way link-up telephone interview.

35 A copy of the questionnaire used in the study is included in this report as Appendix 1. It addressed several aspects of the plaintiffs' experience of the particular procedure finally used to resolve their litigation. The major categories of questions sought information about —

- plaintiff characteristics and details of the claim, including the amount received and legal costs
- perceptions of fairness and satisfaction with the outcome of the claim and the legal system
- plaintiffs' expectations of the outcome, and evaluations of the duration of their litigation and what they paid to their lawyers
- plaintiffs' subjective impressions of the procedure.

Limitations of the research

36 The conclusions which can be drawn from our results, in common with all empirical studies of the justice system, are limited by features of the research design and the inescapable vicissitudes of carrying out social science research.[48] The 'generalisability' of our findings is limited by design. The reliability of our results is limited by these vicissitudes.

37 The main limitation was that the study was restricted to —

- personal injury litigation, largely in the NSW District Court's Sydney registry
- plaintiffs
- disputes that had been resolved at the relevant dispute resolution procedure.

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48 For further information on research issues see D Hensler (1988) Researching Civil Justice: Problems and Pitfalls (RAND: The Institute for Civil Justice); Ingleby (note 13) at 5–8, and R J MacCoun, E A Lind and T R Tyler, Alternative Dispute Resolution in Trial and Appellate Courts (RAND: The Institute for Civil Justice, 1992) at 103–104.

38 In personal injury litigation, plaintiffs are generally 'winners' in the sense that some compensation is usually recovered.[49] Litigated disputes are often only about quantum (the amount of compensation) and not liability. It is generally believed that speculative fee arrangements are more common in this jurisdiction than any other. The plaintiff and defendant are not in a continuing relationship. The plaintiffs' perspective is only one side of the story. Had litigants whose claim did not settle as the result of taking part in a procedure been asked for their perspective, the results might have been quite different.

39 Research of this kind is necessarily conducted in the field rather than in the laboratory. Consequently there are always problems with data collection — data quality tends to be poorer, with lower response rates, more missing data and less reliable measures than in controlled laboratory research.[50]

40 We have already noted above that plaintiffs were selected from different procedural groups (as opposed to being randomly assigned to procedures) and the groups differed in two characteristics (plaintiff occupation and cause of action). There is a possibility that what appear to be procedural differences are actually attributable to these differences. Moreover, plaintiffs were self-selected by agreeing to participate, and they might have different perceptions from those who refused. This is a particular concern where, as in this study, the response rates were low — 40% for the three court based procedures and a much lower 27% for the mediation group.

41 Furthermore, in order to include sufficient numbers of mediation plaintiffs[51], it was necessary to recruit a number whose experience

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49 In our study, only 10 out of 255 plaintiffs recovered nothing.

50 MacCoun et al (note 48) at 99.

51 Because of the small number of plaintiffs in our mediation sample, we might have combined pre-trial conference and mediation plaintiffs into a "non-adjudicative" group. But because of the very great interest in mediation as a procedure, and because there were observable differences among the four groups, we decided not to combine the two groups.

occurred a considerable time before the interview. In the other groups, most of the plaintiffs were interviewed within four months of finalising their claim. Mediation plaintiffs were interviewed up to three years after their claim was finalised. This factor may have affected the results of the study if, as is possible, perceptions change appreciably over time. For both of these reasons we are reluctant to draw any definite conclusions about personal injury plaintiff satisfaction with mediation relative to other procedures.

42 A little over one-third (34%) of plaintiffs in the study experienced multiple procedures prior to finalising their claim. For example, 14.5% of plaintiffs had had a pre-trial conference prior to their case being resolved at arbitration. Plaintiffs were asked questions about the final procedure used to resolve their claim. However, their experiences of other procedures may have influenced their perceptions.

43 Despite these limitations, we are encouraged to think that our research findings do identify real phenomena since they, for the most part, replicate the results of the American litigants' experiences of civil processes study. Where appropriate we compare these findings in the discussion of our results.

3

Procedures and plaintiffs’ perceptions of fairness and satisfaction

44 This section examines how plaintiffs in each of the four groups judged the fairness of their procedure used to resolve the claim, how satisfied they were with the outcome of their claim, and how satisfied they were with the legal system generally. As expected, plaintiffs’ responses to questions about fairness, and satisfaction with their outcome and the legal system were related.[52] The results for all three measures are nevertheless presented, because of their conceptual distinctiveness, and the indications from this and previous research that shows that litigants are able to discriminate between them.[53]

Procedural fairness judgements

45 Seventy-five percent of all plaintiffs thought that the procedure used to resolve their claim was fair, while 25% thought it was unfair. However, as Figure 1 shows, plaintiffs’ perceptions of fairness varied significantly across the four dispute resolution procedures.[54] Most pre-trial conference plaintiffs (98%) rated the procedure as fair, followed by 76% of mediation plaintiffs, 72% of arbitration plaintiffs, and 62% of trial plaintiffs.

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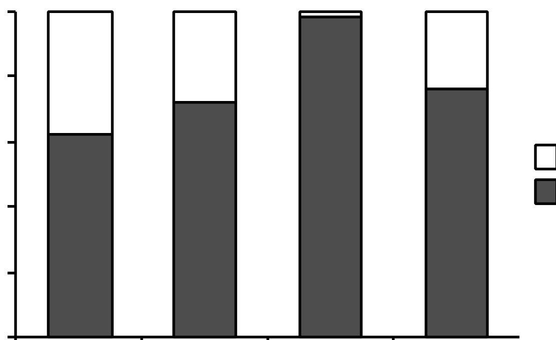
52 Perceptions of of fairness and satisfaction were found to be statistically related.
Chi-square test (fairness by satisfaction with outcome) $^2_1$=74.73, n=249, p<.001
Chi-square test (fairness by satisfaction with legal system) $^2_1$=70.17, n=250, p<.001
Chi-square test (outcome satisfaction by satisfaction legal system) $^2_1$=71.90, n=252, p<.001.

53 Lind et al (note 18) at 8 and 41.

54 Chi-square test (procedural fairness judgements by procedure) $^2_3$=22.11, n=251, p<.001.

Figure 1. Plaintiffs' fairness judgements by dispute resolution procedure



Satisfaction with the outcome

46 Overall, 60% of plaintiffs said they were satisfied with the outcome of their claim, while 40% said they were dissatisfied. As with perceptions of fairness, satisfaction with the outcome varied significantly across the four dispute resolution procedures.[55] Figure 2 shows that 85% of pre-trial conference plaintiffs were satisfied with the outcome, followed by 65% of mediation plaintiffs and 54% of arbitration plaintiffs. Only half of trial plaintiffs were satisfied with the outcome of their claim.

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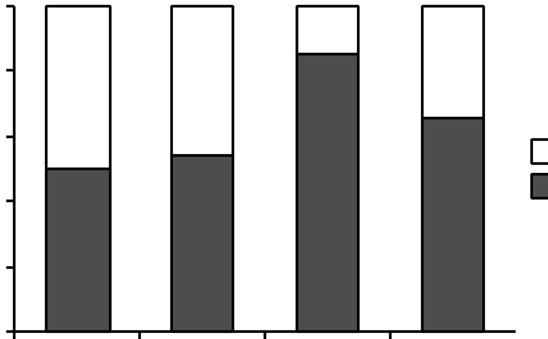
55 Chi-square test (satisfaction with outcome by procedure) ${}^{2}_{3}=18.10$, n=253, $p<.001$.

Figure 2. Plaintiffs' satisfaction with the outcome by dispute resolution procedure

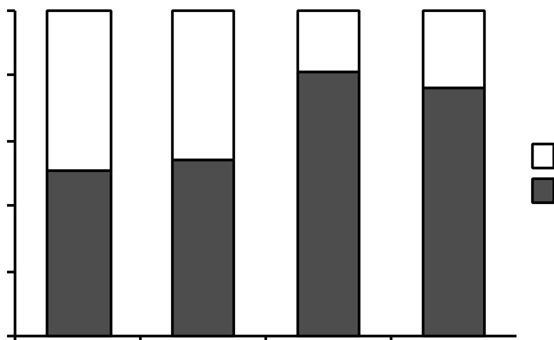


Satisfaction with the legal system

47 Plaintiffs were also asked how satisfied they were with the way the legal system handled their claim. Overall, 61% of plaintiffs said they were satisfied, and 39% were dissatisfied. Again, as Figure 3 shows, plaintiffs' satisfaction with the legal system varied across procedures.[56] The proportion of pre-trial conference and mediation plaintiffs who were satisfied with the way the legal system handled their claim (81% and 80% respectively) was greater than the proportion of satisfied arbitration and trial plaintiffs (54% and 50% respectively).

56 Chi-square test (satisfaction with the legal system by procedure) $^{2}_{3}=16.84$, n=253, p<.001.

Figure 3. Plaintiffs' satisfaction with the legal system by dispute resolution procedure



48 In summary, it is clear from these results, as from other research,[57] that plaintiffs' perceptions of justice are related to the dispute resolution procedures they experience. The pattern of results was found to be similar across each of the measures of satisfaction. It was found that most pre-trial conference plaintiffs felt the procedure to be fair, were satisfied with the outcome and with the legal system. Somewhat fewer mediation plaintiffs, and fewer still arbitration and trial plaintiffs, spoke positively about their experience.[58]

Multiple procedures

49 A consequence of the way in which the sample groups were chosen was that appreciable numbers (36.5%) of plaintiffs had in fact experienced more than one dispute resolution procedure in the life of their claim (for example, they had attended a pre-trial conference

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57 Lind et al (note 18).

58 The results of Lind et al (note 18) were for the most part the opposite. Litigants at settlement conferences were the least satisfied with the outcome of the claim and thought the procedure less fair than litigants at trial or arbitration. Arbitration litigants were the least satisfied with the outcome of the claim, followed by settlement conference, and trial litigants were the most satisfied.

preceding an arbitration or trial), and they were more likely to be plaintiffs who had their claims resolved at arbitration or trial. Table 1 below summarises the different procedural paths for the plaintiffs in the study.

Table 1. Procedural paths in resolving claims

Procedural Path	**n**	**%**
Pre-trial conference	52	20.5
Pre-trial conference — mediation	4	1.5
Pre-trial conference — arbitration	37	14.5
Pre-trial — arbitration — trial	10	4
Pre-trial conference — trial	35	13.5
Arbitration	56	22
Arbitration — trial	7	3
Trial	28	11
Mediation	25	10
Totals	**254**	**100**

50 An analysis of this variable showed that it was also statistically related to plaintiff perceptions.[59] On closer examination of the results, it was found that more plaintiffs who had been through a pre-trial conference before their dispute was resolved by arbitration or trial judged their arbitration or trial to be fair, and more of them were satisfied with the outcome and the legal system, than those who did

59 As there were only four plaintiffs whose claim had been through a pre-trial conference prior to their mediation we decided to eliminate this group from the analysis.
Chi-square test (procedural path by fairness) $^{2}_{7}$=26.11, n=246, p<.001
Chi-square test (procedural path by satisfaction with outcome) $^{2}_{7}$=18.37, n=248, p<.01
Chi-square test (procedural path by satisfaction with legal system) $^{2}_{7}$=19.69, n=248, p<.01.

not have a pre-trial conference before their arbitration or trial. It is possible that these results reflect a positive effect of participation in a pre-trial conference which did not resolve the dispute.[60] In fact we found a significant relationship between participation in pre-trial conferences, and trial and arbitration plaintiffs' evaluations of the time taken to resolve their dispute,[61] although this participation apparently had no effect on their expectations as to outcome and cost[62] (we discuss below the relationships of these expectations and plaintiffs' perceptions). Alternatively, it may suggest that, as a group, trial and arbitration plaintiffs who did not participate in a conciliatory procedure differed in some way from plaintiffs who did.[63]

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60 cf. R Cranston, "'The rational study of law: Social research and access to justice" in A Zuckerman and R Cranston (eds), Reform of Civil Procedure: Essays on 'Access to Justice' (1995) at 35 refers to research that found a "fairly definite improvement in the quality of trials… which had been to a settlement conference but had not settled".

61 Chi-square test (procedural path by evaluation of duration) $^{2}_{1}=5.38$, n=165, $p<.05$.

62 Chi-square test (procedural path by expectation as to outcome) $^{2}_{1}=1.47$, n=155, p=.225 Chi-square test (procedural path by evaluation of legal costs) $^{2}_{1}=.032$, n=148, p=.859.

63 Although it appears that the decision about whether a case would not be pre-tried before an arbitration or trial hearing was generally made by the Court, in circumstances having nothing to do with the characteristics of individual cases or parties.

4

Objective factors related to perceptions of fairness and satisfaction

51 The previous section examined the relationships between procedures and plaintiffs' perceptions of fairness, and their satisfaction with outcomes and with the legal system. This section examines the relationships between a number of objective factors and plaintiffs' perceptions including both characteristics of plaintiffs and the actual consequences of their disputes. In addition to looking at whether each factor is related to plaintiffs' perceptions, we also examine whether the factor might contribute to the procedural differences reported in the previous section, by testing for relationships between factors and procedures.

Plaintiff characteristics

52 It seemed more than likely that some personal characteristics of individual plaintiffs might affect their experience of the justice system. We therefore thought it important to examine whether gender, preferred language, age, education, employment and income affected plaintiffs' perceptions of fairness and satisfaction. It was

found, in fact, that only one of these characteristics — their preferred language — was statistically related to their perceptions.[64]

53 Twenty-eight percent of plaintiffs interviewed stated that they spoke a language other than English at home.[65] A smaller proportion of this group perceived their procedure as fair and were satisfied with the outcome and the legal system than the proportion of plaintiffs whose preferred language was English.[66] (The proportion of non-English speaking plaintiffs in each procedural group was similar.[67])

54 We attempted to follow up this difference by organising a discussion group with respondents. While we were only successful in convening a group of four Arabic speaking plaintiffs, two themes emerged from the discussion which we think are quite revealing — communication

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64 Chi-square test (language other than English by fairness) $^{2}_{1}=29.03$, n=249, p<.001
Chi-square test (language other than English by satisfaction with outcome) $^{2}_{1}=20.23$, n=251, p<.001
Chi-square test (language other than English by satisfaction with legal system) $^{2}_{1}=7.78$ n=251, p<.01
Chi-square test (gender by fairness) $^{2}_{1}=.324$, n=251, p=.569
Chi-square test (gender by satisfaction with outcome) $^{2}_{1}=2.05$, n=253, p=.152
Chi-square test (gender by satisfaction with legal system) $^{2}_{1}=1.41$, n=253, p=.236
Mann-Whitney U Test (age by fairness), z=-1.05, n=251 p=.293
Mann-Whitney U Test (age by satisfaction with the outcome) z=-.78, n=252, p=.438
Mann-Whitney U Test (age by satisfaction with the legal system) z=-.189, n=253, p=.849
Chi-square test (employment by fairness) $^{2}_{6}=9.27$, n=250, p=.159
Chi-square test (employment by satisfaction with outcome) $^{2}_{6}=12.14$, n=252, p=.059
Chi-square test (employment by satisfaction with legal system) $^{2}_{6}=11.41$ n=252, p=.077
Chi-square test (education by fairness) $^{2}_{2}=.942$, n=247, p=.624
Chi-square test (education by satisfaction with outcome) $^{2}_{2}=.207$, n=249, p=.901
Chi-square test (education by satisfaction with legal system) $^{2}_{2}=1.02$ n=249, p=.601
Chi-square test (income by fairness) $^{2}_{2}=4.87$, n=233, p=.088
Chi-square test (income by satisfaction with outcome) $^{2}_{2}=4.09$, n=234, p=.129
Chi-square test (income by satisfaction with legal system) $^{2}_{2}=3.63$ n=235, p=.162.

65 The main language groups other than English were in order of frequency, Italian, Greek and Arabic.

66 The Lind et al study (note 18) at 67, found weak correlations between age and race/ethnicity and litigants' satisfaction with the outcome, and between employment and litigants fairness judgements and satisfaction with the court system. Their study used correlations to test for relationships between the three perceptions (fairness, satisfaction with the outcome and satisfaction with the legal system) and the factors. The present study uses the chi-square test as it is the most commonly accepted test for the relationships between categorical data.

67 Chi-square test (language other than English by procedure) $^{2}_{3}=6.16$, n=253, p=.104.

difficulties and apprehension about prejudice. The notes of the reporter suggest the two themes are interconnected —

> The first was the language barrier — they felt it was much harder for them to communicate about the case, and that their lawyers did not always make the effort to explain things fully to them. Language had been a problem for some, also, in the course of medical examinations. Not speaking English made everything more complicated, it was said.
>
> Two of the participants commented that people of Lebanese background appeared to "have a bad name" within the court system and that this tended to count unfairly against the individual. Another participant had been told by his barrister that the result would to a large extent depend on the judge whom he happened to get; he interpreted this [as referring to a] possibility that the judge might be racist.

Objective consequences of the litigation

55 The objective consequences of the litigation — its outcome, cost and duration, are each generally assumed to be important factors affecting litigants' satisfaction with the legal system. We attempted to test these assumptions statistically.

Outcome of the claim

56 It is easy to understand why outcome, in the sense of "winning" versus "losing" should affect satisfaction. However, it was not possible to analyse this effect because so few of the plaintiffs recovered nothing. We did attempt to analyse the relationship between the amount recovered and plaintiffs' perceptions. We could not analyse the influence of the amount of award or settlement on plaintiffs' perceptions across all four groups, because the trial and arbitration amounts were more likely to be exclusive of legal costs, while the

mediation and pre-trial conference amounts were more likely to have included legal costs. However, it was possible to test for the effect of outcome on plaintiffs' perceptions within the two award groups (trial and arbitration) and within the two settlement groups (mediation and pre-trial conference).

57 The median award for trial claims was $49,930 and for arbitration claims, $30,000. With trial and arbitration plaintiffs there were statistically significant relationships between the amount of the award and perceptions of fairness, satisfaction with the outcome and with the legal system.[68] The median settlement amount for pre-trial conference claims was $39,250 and for mediation claims $56,250. The relationships between amount of settlement and plaintiffs' perceptions however were not significant within the mediation and pre-trial group.[69] It is possible that the lack of statistical significance was due to the small numbers of plaintiffs who thought these processes were unfair, or were dissatisfied with the outcome or the legal system.

We calculated the median[70] amount of the awards for trial and arbitration plaintiffs who thought their procedure was fair, or unfair, were satisfied or dissatisfied with the outcome, and satisfied or dissatisfied with the legal system. These are shown in Table 2. Table 3 shows the equivalent figures for the pre-trial conference and mediation plaintiffs.

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68 Mann-Whitney U Test (amount by fairness) z=-3.79, n=168, p<.001
Mann-Whitney U Test (amount by satisfaction with the outcome) z=-4.39, n=169, p<.001
Mann-Whitney U Test (amount by satisfaction with the legal system) z=-3.99, n=169, p<.001.

69 Mann-Whitney U Test (amount by fairness) z=-.819, n=75, p=.412
Mann-Whitney U Test (amount by satisfaction with the outcome) z=-1.29, n=76, p=.194
Mann-Whitney U Test (amount by satisfaction with the legal system) z=-1.44, n=76, p=.149.

70 The median provides a measure of the mid-point in a frequency distribution. The median is generally considered to be a more appropriate measure of duration than the mean, or arithmetic average. Because the distributions reported are often skewed, and the mean is pulled in the direction of the more extreme scores.

Table 2. Median award (trial and arbitration) by plaintiffs' perceptions

Perception	Median award ($)	n
Fair	48332	113
Unfair	23704	55
Satisfied with outcome	61996	88
Dissatisfied with outcome	27528	81
Satisfied with legal system	50674	88
Dissatisfied with legal system	27079	81

Table 3. Median settlement (pre-trial conference and mediation) by plaintiffs' perceptions

Perception	Median settlement ($)	n
Fair	48500	68
Unfair	30800	7
Satisfied with outcome	50000	61
Dissatisfied with outcome	35000	15
Satisfied with legal system	49500	60
Dissatisfied with legal system	35000	16

58 These results suggest that there is a simple relationship between the amount recovered and plaintiffs' satisfaction. Although, as we have already observed, it is easy to understand why there would be a relationship between winning or losing and satisfaction, an apparently simple relationship between the amount won and satisfaction is somewhat surprising.[71] Logic would suggest that the relationship

ought to be between what was expected and what was received, that is, if a plaintiff's injury is minor, he or she should expect and be satisfied with a small amount of compensation, while conversely if a plaintiff has a major injury, he or she will expect a great deal. Two possible explanations for the apparent relationship occur to us. The first is that, in fact, as we discuss further below, there is a relationship between the amount recovered and whether this amount was as much as the plaintiff expected. The second is that there is a relationship between the amount of the award, and the proportion that legal costs represent of that award. We discuss the relationship between this proportion and satisfaction in further detail below.

Legal costs

59 The median amount paid for legal costs was $9,352 with a range from $0 to $160,000. The amount paid varied significantly across procedures.[72] The median amount paid for claims that went to trial was $14,525, while for claims that received an award at arbitration it was $9,000. For claims that settled at a pre-trial conference, the median was $7,000, and for claims that settled at mediation, the median amount paid was $8,000.

60 Nevertheless, there was no statistically significant relationship found between the amount paid for legal costs and plaintiffs' perceptions of fairness, satisfaction with the outcome of their claim, and with the legal system.[73] This result is somewhat surprising, even though the

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71 Although, Lind et al (note 18) at 50–54, expected and found a relationship between award amount and satisfaction with the outcome, and described the absence of a relationship between award amount and fairness judgements as "rather remarkable". A modest relationship between award amount and satisfaction with the outcome was also found in another study of plaintiffs' satisfaction with their personal injury litigation, in this case in the New South Wales Supreme Court, cf. T Matruglio, Plaintiffs and the Process of Litigation (Justice Research Centre,1994) at 29–30. This study did not test for a relationship with fairness judgements.

72 Kruskal-Wallis (legal costs by procedure) $^{2}_{3}=32.76$, n=222, $p<.001$.

same result had been found in previous research,[74] and despite the fact that successful plaintiffs generally recover a contribution towards their legal costs from defendants.

61 Lind et al speculated that the apparent lack of a relationship between costs and plaintiff satisfaction[75] in their study may have been due to the use of percentage contingency fee arrangements which, as they put it, "mean that the absolute amount [plaintiffs] pay is in a sense 'hidden' by their outcome: they pay more when they get more."[76] In light of this suggestion, our data was examined for any relationship between satisfaction and perceptions of fairness, and the proportion that legal costs represented of the amount recovered.

62 This analysis was again carried out separately within the two award groups (trial and arbitration) and within the two settlement groups (mediation and pre-trial conference). There was a significant relationship between the proportion that legal costs represented of the award, and the satisfaction of trial and arbitration plaintiffs with their award.[77] The test for the pre-trial conference and mediation plaintiffs yielded a p-value of exactly.05 — although strictly speaking this is not significant (the conventional threshold being a value of less than .05), it is tempting to suggest that the data indicates a

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73 Mann-Whitney U test (legal costs by fairness) z=-.506, n=219, p=.613
Mann-Whitney U test (legal costs by satisfaction with the outcome) z=-1.33, n=220, p=.182
Mann-Whitney U test (legal costs by satisfaction with the legal system) z=-1.27, n=221, p=.205.

74 Lind et al (note 18) at 56.

75 They also found that there was no relationship between defendant costs and satisfaction but, they noted, the legal costs of most of the defendants in their study were met by insurers: Lind et al (note 18) at 57.

76 Lind et al (note 18) at 57. Nearly 94% of the plaintiffs in that study were represented by lawyers on a contingency fee; 70% of them had negotiated the standard rate of 33%, and only 8% had rates less than 33% and 22% had rates greater than that amount. The report indicates that the range of rates was between 10% and 60% but gives no other descriptive statistics (at 38).

77 Mann-Whitney U test (proportion of costs to award (arbitration/trial) by satisfaction with the outcome) z=-3.26, n=145, p<.01
Mann-Whitney U test (proportion of costs to settlement (pre-trial/mediation) by satisfaction with the outcome) z=-1.96, n=71, p=.05.

relationship between the proportion of legal costs and the amount recovered, and plaintiffs' satisfaction with the outcome of their litigation. However, there is a reason to expect that the relationship is weaker for the settlement groups than the award groups because, as previous research suggests, the defendants' contribution towards plaintiffs' legal costs is systematically higher in settlement cases than in award cases.[78]

63 There was also a significant relationship between the proportion that legal fees represented of the amount of compensation and plaintiffs' satisfaction with the legal system, for both the award (trial and arbitration) and settlement (pre-trial conference and mediation) groups.[79] In contrast, however, the relationships between the proportion of legal fees and the amount of compensation, and plaintiffs' perceptions of fairness were not significant for either group.[80] We calculated the median amount paid in legal costs for trial and arbitration plaintiffs who thought their procedure was fair, or unfair, were satisfied or dissatisfied with the outcome, and satisfied or dissatisfied with the legal system. These figures are shown in Table 4, and the corresponding results for pre-trial conference and mediation plaintiffs in Table 5.

Table 4. Median legal costs as a proportion of award (trial and arbitration) by plaintiffs'

78 D Worthington and J Baker, The Costs of Civil Litigation (Justice Research Centre, 1993) at 19–20.

79 Mann-Whitney U test (proportion of costs to award (trial/arbitration) by satisfaction with the legal system) z=-3.03, n=146, p<.01
Mann-Whitney U test (proportion of costs to settlement (pre-trial/mediation) by satisfaction with the legal system) z=-2.00, n=71, p<.05.

80 Mann-Whitney U test (proportion of legal costs (trial/arbitration) by fairness) z=-1.84, n=145, p=.07
Mann-Whitney U test (proportion of legal costs (pre-trial/mediation) by fairness) z=-.705, n=70, p=.481.

perceptions

Perception	Median proportion (%)	n
Fair	23.5	100
Unfair	32.5	45
Satisfied with outcome	21	80
Dissatisfied with outcome	33	65
Satisfied with legal system	21	79
Dissatisfied with legal system	33	67

Table 5. Median legal costs as a proportion of settlement (pre-trial conference and mediation) by plaintiffs' perceptions

Perception	Median proportion (%)	n
Fair	14	63
Unfair	17	7
Satisfied with outcome	14	56
Dissatisfied with outcome	20	15
Satisfied with legal system	14	56
Dissatisfied with legal system	21	15

64 These results demonstrate the capacity of plaintiffs to discriminate between their assessments of the fairness of the procedure used, their satisfaction with the outcome of their claim and their overall satisfaction with the legal system. They also suggest that plaintiffs' evaluations of procedural fairness are driven by more than what they win and what the costs are to them.

65 The findings of relationships between the proportion that legal costs

represent of amounts recovered, and satisfaction with the outcome of litigation and the legal system would conform to the expectations of economists, and for that matter, most of us, that the return on investment matters to people. We should then be noting that Lind et al attempted to analyse the effect of differences in the contingent fee rate and still found no significant relationships. It is possible that this was due to the small numbers of plaintiffs in their sample who had negotiated rates other than the standard one-third.[81] However, their finding might also conform to a simple economic model, consistently with the results of the present study. Contingency fee arrangements allow lawyers and clients to negotiate and fix the proportion of legal fees to the amount recovered. Negotiated variations in the contingency fee rate may not affect plaintiffs' satisfaction because they, presumably, reflect their assessment of the contingencies of winning and losing. This is a further dimension of the relationship between their "investment" and their "return".

Duration of the case

66 The duration of claims from accident to finalisation ranged from less than one year to 16 years, the median was six years. Not surprisingly, there were significant relationships between the duration of the case and plaintiffs' perceptions of fairness, outcome satisfaction and satisfaction with the legal system.[82] As Table 6 shows, the duration of the case for those plaintiffs who thought the procedure was fair, and were satisfied with the outcome and the legal system, was significantly shorter than for plaintiffs who thought the procedure was unfair and

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81 Lind et al (note 18) at 38. See also note 76.

82 Because we had difficulty in finding information about the date proceedings were commenced in the mediation claims, duration was measured from the year of the accident to the year of finalisation. However, we checked our results using only the data from the three other procedural groups, and it did not matter whether the accident date or the date of the Statement of Claim was used. Test results are for duration from accident to finalisation.
Mann-Whitney U (duration by fairness) $z=-2.41$, $n=248$, $p<.05$
Mann-Whitney U (duration by satisfaction with the outcome) $z=-2.46$, $n=250$, $p<.05$
Mann-Whitney U (duration by satisfaction with the legal system) $z=-2.53$, $n=250$, $p<.05$.

were dissatisfied with the outcome and with the legal system.[83]

Table 6. Median duration of claims by plaintiffs' perceptions

Perception	Median duration (years)	n
Fair	5.0	184
Unfair	7.0	64
Satisfied with outcome	5.0	150
Dissatisfied with outcome	6.5	100
Satisfied with legal system	5.0	151
Dissatisfied with legal system	7.0	99

67 Duration was also found to vary significantly across the four procedures.[84] The median duration for cases that went to trial was seven years, six years for arbitration cases, five years for mediation cases and three years for cases settled at a pre-trial conference. This suggested the possibility that the apparent relationship between the kind of dispute resolution procedure and plaintiffs' perceptions might simply be an effect of duration.

68 To investigate the matter further, the data was re-analysed in two ways. First we categorised all cases as "long" if they took more than four years, or "short" if they took four years or less. We found some indication of an effect of procedure on judgements of fairness, but

83 Lind et al (note 18) at 55 found there was no relationship between duration of the claim and litigants' judgements of fairness, satisfaction with the outcome or satisfaction with the court system.

84 Kruskal-Wallis (duration by procedure) $^{2}_{3}=53.14$, n=252, $p<.001$.

the statistical tests were unreliable because of the number of small groups.[85]

69 We then categorised cases within each procedural group, according to whether they took longer than the median, or were finalised within the median time or less, reasoning that what plaintiffs experience as long or short may be related to the norm for the particular procedure. For example, what may be perceived as a short time to trial may be perceived as a long time to a pre-trial conference. Controlling for duration in this way, we still found statistically significant relationships between procedure and plaintiffs' perceptions.[86]

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85 Chi-square test (procedure by fairness for claims >4 years duration) ${}^2_3$=7.79, n=151, p=.051
Chi-square test (procedure by satisfaction with the outcome for claims >4 years duration) ${}^2_3$=6.07, n=152, p=.108
Chi-square test (procedure by satisfaction with the legal system for claims >4 years duration) ${}^2_3$=6.25, n=152, p=.099. The tests of procedure by fairness, satisfaction with outcome and satisfaction with the legal system for claims <4 years were unreliable because of the number of small groups (proportion of cells with expected frequencies <5 was equal to or greater than 25%).

86 The only exception was for procedure by satisfaction with the legal system in the long duration group:
Chi-square test (procedure by satisfaction with the legal system for claims — long duration) ${}^2_3$=4.39, n=105, p=.222. The results of the other tests were:
Chi-square test (procedure by fairness for claims-short duration) ${}^2_3$=12.57, n=143, p=.005
Chi-square test (procedure by satisfaction with outcome for claims-short duration) ${}^2_3$=10.13, n=145, p=.017. Chi-square test (procedure by satisfaction with outcome for claims-long duration) ${}^2_3$=7.99, n=101, p=.046. Chi-square test (procedure by satisfaction with the legal system for claims-short duration) ${}^2_3$=12.09, n=145, p=.007. The test of procedure by fairness for the long duration group was unreliable because of the number of small groups (proportion of cells with expected frequencies <5 was equal to or greater than 25%).

5

Subjective factors related to perceptions of fairness and satisfaction

70 The previous section examined the relationships between plaintiffs' perceptions of fairness, and their satisfaction with outcomes and with the legal system and two sets of objective factors, plaintiff characteristics and consequences of the litigation. This section examines the relationships between plaintiffs' perceptions and two sets of subjective factors, namely evaluations of those consequences and, impressions of the litigation process. We also look at relationships between these two sets of subjective factors and the dispute resolution procedures. The results show that a number of factors are related to plaintiffs' perceptions of fairness and satisfaction, and vary across procedures. We conclude this section with a brief summary of the relationships between the procedures and all these other factors.

Subjective evaluations of litigation outcome, duration and cost

71 Other research has shown that litigants' expectations about the outcome are as important, if not more important to their satisfaction as the actual outcome. That is, "the absolute level of outcomes matters very little — it is where an outcome falls in relation to expectation that is important in determining whether that outcome is satisfactory."[87] Similarly, their relative evaluations of delay and cost may be as important to their perceptions as the actual delay and actual cost.

87 Lind et al (note 18) at 18; T Matruglio (note 71) at 37.

Evaluation of outcome

72 Plaintiffs were asked whether they felt that the outcome of their claim was better or worse than they had expected at the time their claim was filed. Forty-nine percent of plaintiffs felt that the outcome was as good, or better than expected, while 42% felt it was worse.[88] As Figures 4a, 4b and 4c show, significantly more plaintiffs who felt the outcome of their claim was as good as or better than expected, also felt that the procedure was fair and were satisfied with the outcome of the claim and satisfied with the legal system[89] than the proportion of plaintiffs who felt that the outcome of their claim was worse than they expected.[90]

73 As might be expected, given that pre-trial conference and mediation outcomes are settlements and trial and arbitration outcomes are awards, there were also significant procedural variations.[91] A significantly higher proportion of the pre-trial conference (72%) and mediation plaintiffs (63%) received an amount which was as good or better than expected than the proportion of arbitration (44%) and trial plaintiffs (49%).

74 It is possible to indicate the relative importance of evaluation of outcome and the actual outcome in terms of plaintiffs' satisfaction by analysing the relationship of these two factors within the trial and arbitration groups and the pre-trial conference and mediation groups.[92]

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88 9% said they didn't know what to expect when the case was first filed.

89 Lind et al (note 18) at 59 found substantial correlatations between evaluation of case outcome and litigant perceptions.

90 Chi-square test (evaluation of case outcome by perceptions of fairness) $^{2}_{1}=50.26$, n=225, p<.001
Chi-square test (evaluation of case outcome by satisfaction with the outcome) $^{2}_{1}=82.96$, n=228, p<.001
Chi-square test (evaluation of case outcome by satisfaction with the legal system) $^{2}_{1}=64.07$, n=227, p<.001.

91 Chi-square test (evaluation of case outcome by procedure) $^{2}_{3}=11.05$, n=229, p<.05.

92 As noted in para. 56, we cannot compare the four groups because the outcome amounts are not comparable across the four groups.

Figure 4a. **Evaluation of outcome by fairness**

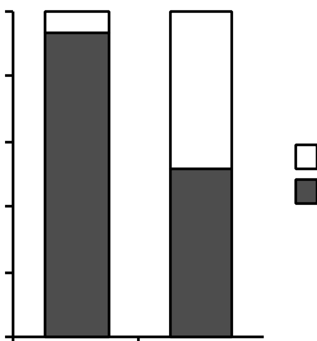


Figure 4b. **Evaluation of outcome by satisfaction with the outcome**

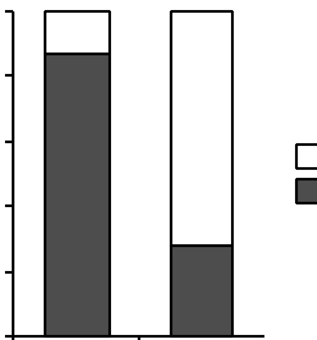
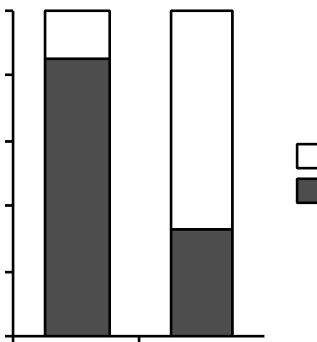


Figure 4c. **Evaluation of outcome by satisfaction with the legal system**



Although the average actual award received by trial and arbitration plaintiffs was significantly higher for those who said the award was as good as or better than they expected, there was no such relationship for the pre-trial conference and mediation plaintiffs.[93] Moreover as noted in our discussion of actual outcomes and plaintiffs' perceptions, the relationships between settlement amount and pre-trial conference and mediation plaintiffs' perceptions of fairness and satisfaction were not significant. Our tests, however, for the relationship between their expectations and their satisfaction with the outcome, were significant.[94] These results lend support to the view that conformity with expectations as to outcome may be a more important determinant of plaintiff satisfaction than the actual outcome.

Evaluation of duration

75 Plaintiffs were asked whether, given what had to be done, they thought the time taken to resolve their claim was reasonable. Forty-two percent of plaintiffs felt the amount of time taken to resolve their claim was reasonable, while 58% felt it was unreasonable. Not surprisingly, statistically significant relationships were found between plaintiffs' evaluations of duration and their perceptions of justice.[95] Figures 5a, 5b and 5c show that a greater proportion of plaintiffs who felt that their case was resolved in a reasonable time perceived the procedure to be fair, were satisfied with the outcome, and with the

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93 Mann-Whitney U test (amount of award by evaluation of outcome) z=-4.29, n=153, p<.001
Mann-Whitney U test (amount of settlement by evaluation of outcome) z=-.929, n=70, p=.352.

94 Chi-square test (evaluation of outcome by satisfaction with the outcome) $^{2}_{1}$=21.23, n=74, p<.001 for pre-trial conference and mediation. The tests for the relationships between expectations and fairness, and satisfaction with the legal system were unreliable because of the number of small groups (proportion of cells with expected frequencies <5 was equal to or greater than 25%). The relationships between expectations and perceptions within the trial and arbitration groups were also significant, but within this group this factor is confounded with actual outcome.

95 To some extent, satisfaction is implicit in the assessment that the time taken was reasonable.
Chi-square (evaluation of case duration by perceptions of fairness) $^{2}_{1}$=10.06, n=241, p<.01
Chi-square test (evaluation of case duration by satisfaction with the outcome) $^{2}_{1}$=9.30, n=243, p<.01
Chi-square test (evaluation of case duration by satisfaction with the legal system) $^{2}_{1}$=23.62, n=243, p<.001.

Figure 5a. **Evaluation of duration by fairness**

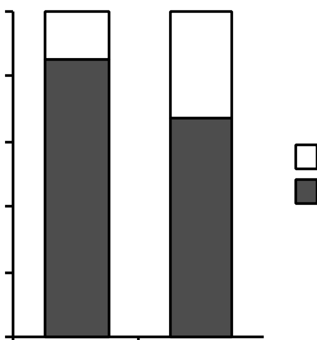


Figure 5b. **Evaluation of duration by satisfaction with the outcome**

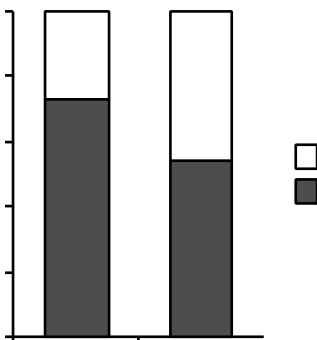
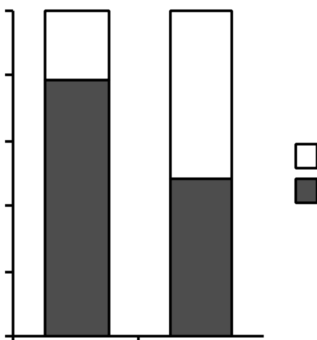


Figure 5c. **Evaluation of duration by satisfaction with the legal system**



legal system, than the proportion of plaintiffs who thought that the time taken to resolve their claim was unreasonable.[96]

76 In addition, we found a significant relationship between procedures and evaluations of duration, with a greater proportion of plaintiffs at pre-trial conference (80%) who felt their case was resolved in a reasonable time, than at trial (24%), arbitration (36%) or mediation (43%).[97] There was also a statistically significant relationship between plaintiffs' evaluations of duration and the actual durations of their claims. As might be expected, they were more likely to think the duration of their claim was reasonable, the shorter it actually was.[98] Because both the actual duration and plaintiffs' evaluations of duration were related to procedure it is not possible to determine which has the greater effect upon their perceptions.

Evaluation of cost

77 Plaintiffs were asked whether they felt they had got their "money's worth" from their lawyers. Sixty percent of plaintiffs said that they had got their money's worth, while 40% said they had not. Statistically significant relationships were found between plaintiffs' evaluation of cost and their perceptions, and there were procedural variations.[99] It was found that 81% of plaintiffs at pre-trial conference felt they got their money's worth followed by 69% at mediation, 60.5% at arbitration and 42% at trial. As Figures 6a, 6b and 6c show, a greater

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96 Lind et al (note 18) at 59, also found statistically significant correlations between the perceived fairness and satisfaction measures.

97 Chi-square (evaluation of duration by procedure) $^2_3$=42.75, n=245, p<.001.

98 Mann-Whitney U test (evaluation of duration by duration) z=-6.23, n=242, p<.001.

99 Again, this is not especially surprising, given that satisfaction is implicit in the assessment of 'value for money'.
Chi-square (evaluation of case cost by perceptions of fairness) $^2_1$=35.61, n=219, p<.001
Chi-square (evaluation of case cost by satisfaction with the outcome) $^2_1$=78.66, n=220, p<.001
Chi-square (evaluation of case cost by satisfaction with the legal system) $^2_1$=53.91, n=221, p<.001
Chi-square (evaluation of case cost by procedure) $^2_3$=20.04, n=222, p<.001.

Figure 6a. Evaluation of cost by fairness

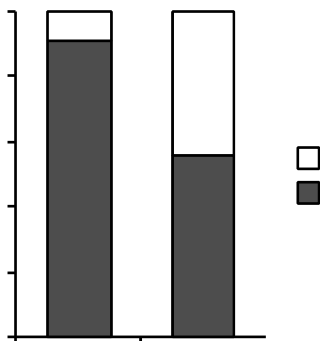


Figure 6b. Evaluation of cost by satisfaction with the outcome

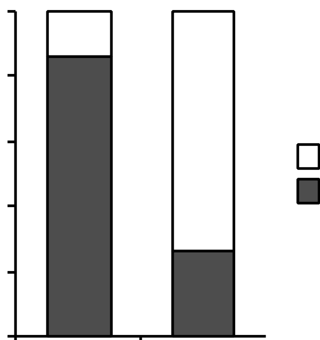
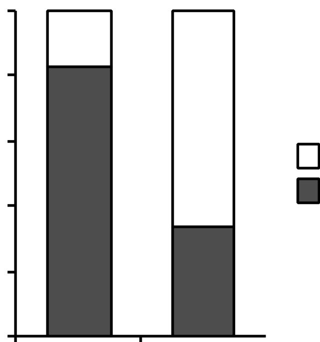


Figure 6c. Evaluation of cost by satisfaction with the legal system



proportion of plaintiffs who felt that they got their money's worth from their lawyer regarded the procedure as fair, were satisfied with the outcome of the claim and with the legal system, than the proportion of plaintiffs who felt that they did not get their money's worth.[100]

78 Unlike duration, however, there was no statistical relationship between the amount plaintiffs paid, and their evaluation of whether they got their money's worth.[101]

Plaintiffs' subjective impressions of the litigation process

79 In addition to the objective consequences of litigation and litigant's evaluations of those consequences, there are several other aspects of a plaintiff's litigation experience that might be expected to be, and other research confirms is,[102] related to their satisfaction. These include such things as whether the proceedings are (or rather, are seen to be) dignified and conducted with care, whether plaintiffs feel that they have some control over and involvement in the process, whether they understand what was going on, whether they had previous litigation experience and the relationship they have with their lawyer.

Control and participation

80 Proponents of ADR frequently stress that one of its advantages is that the outcomes are determined by the parties themselves rather than being imposed on them.[103] However, even where the parties vest

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100 Lind et al (note 18) at 60 did not find statistically significant relationships between evaluation of case cost and litigant perceptions.

101 Mann-Whitney U (legal costs by evaluation of case cost) $z=-1.83$, $n=204$, $p=.067$.

102 Lind et al (note 18) MacCoun et al (note 48) T Matruglio (note 71).

103 cf. Access to Justice Committee (note 7) para 11.4.

responsibility for deciding their dispute in a third party, they can exercise a degree of control over the process.[104] Other research has shown that control over the decision or control over the process leads to greater perceived fairness and satisfaction.[105] We examined the notion of control from both of these perspectives.

81 Participation is a similar concept although theoretically distinct from control. It can connote merely a sense of involvement in a process without, necessarily, the sense that the involvement has any practical effect on the outcome. Nevertheless, this kind of participation may matter to litigants.

82 Control. Plaintiffs were asked how much control they felt they had over the way the claim was handled and how much control they felt they had over the outcome of their dispute. Similar statistically significant relationships were found for both measures. That is, control over the outcome and control over the process were related to the same factors, and the two measures were themselves related.[106] As a convenience then, we have reported only the findings in relation to control over the outcome.

83 Forty-five percent of plaintiffs reported having some or a lot of control over the outcome of their claim, while 55% reported having little, not much or none.[107] Statistically significant relationships were found between plaintiffs' feelings of control and their perceptions of fairness and satisfaction with the outcome and satisfaction with the

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104 J Thibaut and L Walker, "A Theory of Procedure" (1978), 66, California Law Review 546.

105 MacCoun et al (note 48).

106 Chi-square test (outcome control by process control) $^{2}_{1}$=35.43, n=249, p<.001.

107 The categories of control are combined to assist with analysis of data. The first category combines 'a lot' and 'some control', the second combines three responses: 'a little'; 'not much'; and, 'none'.

legal system.[108] Figures 7a, 7b and 7c show that a greater proportion of plaintiffs who felt they had some or a lot of control over the outcome of their claim thought their procedure was fair, and were satisfied with the outcome and with the legal system, than the proportion of plaintiffs who felt they had little to no control.[109]

84 We also found that plaintiffs' feelings of control were significantly related to the procedure.[110] The proportion of plaintiffs who felt they had some or a lot of control over the outcome of their pre-trial conference (65%) or mediation (61%) was much higher than the proportion of trial (32.5%) and arbitration (41%) plaintiffs who felt they had some or a lot of control over the outcome of their claim. This result is, of course, expected, given that our pre-trial conference and mediation plaintiffs had settled their dispute at the procedure, and their consent to the settlement might have been withheld. In contrast, the final resolution of trial and arbitration plaintiffs' disputes was in the hands of a third party.

85 Participation. Plaintiffs were asked how much they felt they participated in the whole process of resolving their dispute.[111] Seventy-one percent of plaintiffs felt they had participated some or a lot of the time and 29% felt they had participated a little or not much. Plaintiffs' participation level was found to be significantly related to

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108 Chi-square test (outcome control by perceptions of fairness) $^{2}_{1}=33.95$, $n=247$, $p<.001$
Chi-square test (outcome control by satisfaction with the outcome) $^{2}_{1}=41.92$, $n=249$, $p<.001$
Chi-square test (outcome control by satisfaction with the legal system) $^{2}_{1}=27.31$, $n=249$, $p<.001$.

109 Lind et al (note 18) at 61 also found moderate correlations between control and litigant perceptions of fairness, satisfaction with the outcome and satisfaction with the legal system.

110 Chi-square test (outcome control by procedure) $^{2}_{3}=16.31$, $n=251$, $p<.001$.

111 We should emphasise that this question directed plaintiffs' attention to the whole of the proceeding rather than just the procedure at which it was finalised. In fact, 81% of pre-trial conference plaintiffs, while they may have been within the Court precincts, did not actually attend the conference hearing. Nevertheless, most of this group felt they had participated in the process of resolving their claim.

Figure 7a. Control over the outcome by fairness

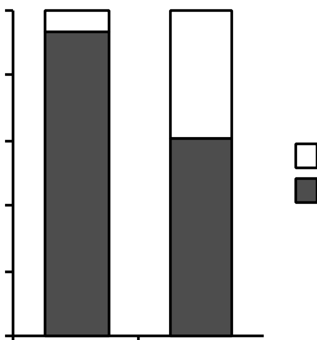


Figure 7b. Control over the outcome by satisfaction with the outcome

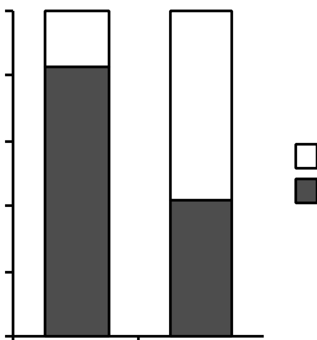
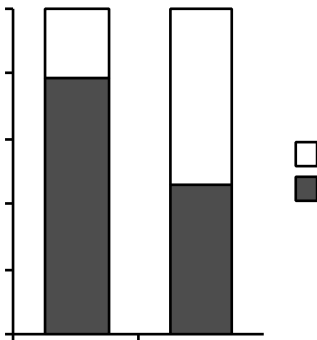


Figure 7c. Control over the outcome by satisfaction with the legal system



their perceptions.[112] Figures 8a, 8b and 8c show that the more plaintiffs felt they had participated in the process of resolving their claim, the greater the proportion who perceived the procedure as fair. Similarly, the greater the participation in the process, the more likely were the plaintiffs to report they were satisfied with the outcome and satisfied with the legal system.[113]

86 Unlike control there was no difference between procedures in terms of the degree to which plaintiffs felt they had participated.[114] This suggests that plaintiffs themselves distinguished between the concepts of control and participation. It may also challenge the common assumption that factors like understanding, comfort and informality of the procedure are important to litigant satisfaction because they are related to their feelings of participation. We turn now to a discussion of these factors.

Understanding, comfort and formality

87 Understanding is, logically, a pre-condition of a sense of participation and control. If litigants do not understand the litigation process, one would expect them to feel alienated by and, therefore, dissatisfied with it. It is generally assumed that the technical and arcane nature of trials excludes lay litigants from understanding what is happening during them. In contrast, one of the alleged advantages of alternative procedures is that their less formal nature makes them less intimidating and mystifying, so that the parties feel more comfortable and more able to participate in the process. These assumptions, however, have not been extensively tested empirically. As we have already foreshadowed, our results throw up a few surprises.

112 Chi-square test (participation by perceptions of fairness) $^{2}_{1}$=39.00, n=248, p<.001
Chi-square test (participation by satisfaction with the outcome) $^{2}_{1}$=25.86, n=250, p<.001
Chi-square test (participation by satisfaction with the legal system) $^{2}_{1}$=13.49, n=250, p<.001.

113 Lind et al (note 18) at 62 did not find statistically significant relationships between litigants' feelings of participation and their perceptions.

114 Chi-square test (participation by procedure) $^{2}_{3}$=.48, n=252, p=.922.

Figure 8a. Participation by fairness

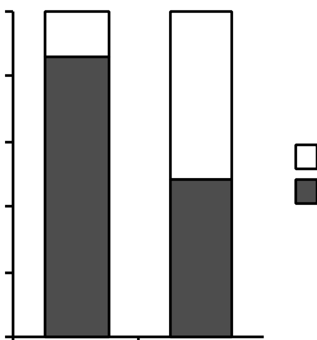


Figure 8b. Participation by satisfaction with the outcome

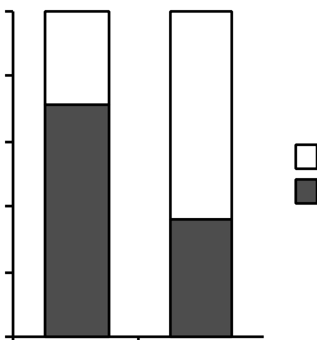
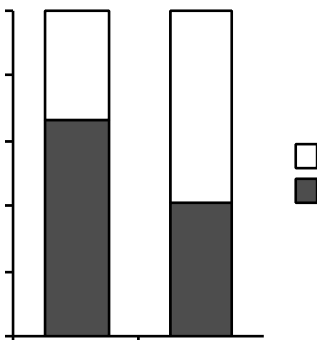


Figure 8c. Participation by satisfaction with the legal system



88 Understanding. Plaintiffs were asked how much they felt they had understood what was going on during the life of their claim. A majority of plaintiffs (79%) felt they understood what went on, while 21% felt they had understood little or nothing at all. As Figures 9a, 9b and 9c show, more plaintiffs[115] who felt they had some or a lot of understanding while their case was proceeding thought the procedure was fair, and were satisfied with the outcome and with the legal system, than the number of plaintiffs who felt that they had little or no understanding.[116] Contrary to our expectations, however, there was no significant variation across the four dispute resolution procedures in the proportions of plaintiffs who felt they understood their experience.[117]

89 We also asked plaintiffs a different but related question about the clarity of the dispute resolution procedure itself. Overall 60% of plaintiffs said that their procedure was clear, while 40% felt that it was confusing. There were significant differences across procedures: 7% of mediation plaintiffs described it as confusing, compared with 33% of pre-trial conference plaintiffs, 45% of arbitration plaintiffs, and 52% of trial plaintiffs.[118] As might be expected, significantly more plaintiffs who found their procedure confusing thought it was unfair, and were dissatisfied with the outcome and with the legal system.[119]

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115 Lind et al (note 18) at 64 found small statistically significant correlations between litigants understanding and their perceptions of fairness and satisfaction with the court system, but there was no relationship between understanding and litigant satisfaction with the outcome.

116 Chi-square test (understanding by perceptions of fairness) $^{2}_{1}=13.68$, n=250, $p<.001$
Chi-square test (understanding by satisfaction with the outcome) $^{2}_{1}=9.29$, n=251, $p<.01$
Chi-square test (understanding by satisfaction with the legal system) $^{2}_{1}=11.49$, n=252, $p<.001$.

117 Chi-square test (understanding by procedure) $^{2}_{3}=6.18$, n=253, $p=.103$.

118 Chi-square test (clarity of procedure by procedure) $^{2}_{3}=19.13$, n=244, $p<.001$.

119 Chi-square test (clarity of procedure by perceptions of fairness) $^{2}_{1}=23.25$, n=241, $p<.001$
Chi-square (clarity of procedure by satisfaction with the outcome) $^{2}_{1}=26.27$, n=243, $p<.001$
Chi-square (clarity of procedure by satisfaction with the legal system) $^{2}_{1}=24.37$, n=242, $p<.001$.
Lind et al (note 18) did not ask this question.

Figure 9a. Understanding by fairness

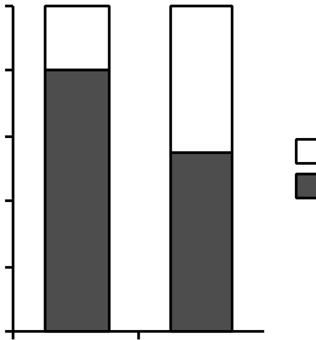


Figure 9b. Understanding by satisfaction with the outcome

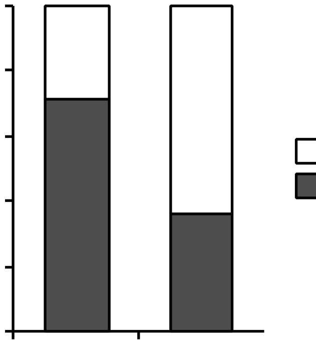
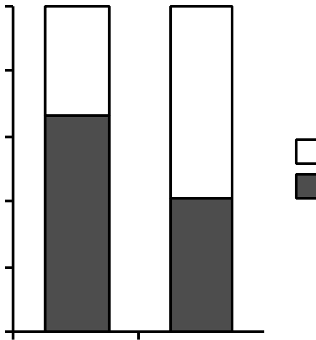


Figure 9c. Understanding by satisfaction with the legal system



90 Our data on plaintiffs' understanding revealed a somewhat curious result which should be noted. Fourteen percent of the plaintiffs said they had previous litigation experience in a personal injury matter.[120] It might well be expected that litigants who had previous experience would understand the process better, and would have more realistic expectations (also related to satisfaction). In fact, litigants with previous experience were not more likely to see the process as fair or to be satisfied with the legal system than novice plaintiffs.[121] Instead we found that plaintiffs who had previous litigation experience were disproportionately dissatisfied with the outcome of their claim.[122] Contrary to our expectations, more litigants with previous experience expected to receive more than they did receive, and said that they did not understand the process, than the number of plaintiffs who had no previous litigation experience.[123]

91 Comfort. There was an almost equal division between those plaintiffs who perceived the procedures as comfortable (47%) and those who found their procedure uncomfortable (53%). Plaintiff comfort was significantly related to perceptions of fairness and satisfaction.[124] Figures 10a, 10b and 10c illustrate that a greater proportion of plaintiffs perceived the procedure as fair, were satisfied with the outcome and with the legal system when they felt comfortable with their procedure.[125] We also found that feelings of

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120 There were no significant differences across procedures: Chi-square test (prior litigated claim by procedure) $^{2}_{3}$=7.16, n=253, p=.067.

121 Chi-square test (prior litigated claim by perception of fairness) $^{2}_{1}$=3.24, n=249, p=.071 Chi-square test (prior litigated claim by satisfaction with the legal system) $^{2}_{1}$=1.84, n=251, p=.176.

122 Chi-square test (prior litigated claim by satisfaction with the outcome) $^{2}_{1}$=12.69 n=251, p<.001.

123 Chi-square test (prior litigated claim by evaluation of outcome) $^{2}_{1}$=13.52, n=227, p<.001 Chi-square test (prior litigated claim by understanding) $^{2}_{1}$=9.10, n=252, p<.01.

124 Chi-square test (comfort by perceptions of fairness) $^{2}_{1}$=10.82, n=249, p<.01
Chi-square test (comfort by satisfaction with the outcome) $^{2}_{1}$=7.52, n=251, p<.01
Chi-square test (comfort by satisfaction with the legal system) $^{2}_{1}$=6.38, n=251, p<.05.

125 Lind et al (note 18) at 64 also found strong correlations between litigants' comfort and their perceptions of fairness, satisfaction with the outcome and satisfaction with the legal system.

Figure 10a. **Comfort by fairness**

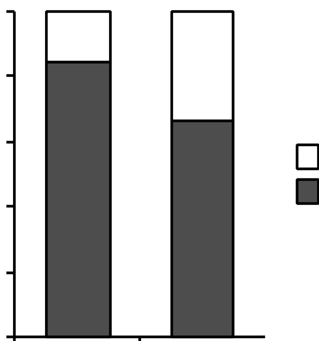


Figure 10b. **Comfort by satisfaction with the outcome**

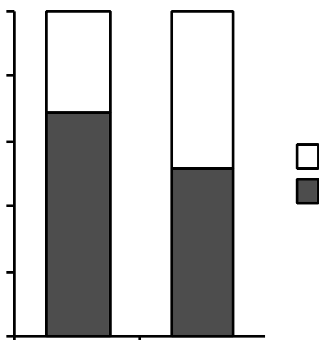
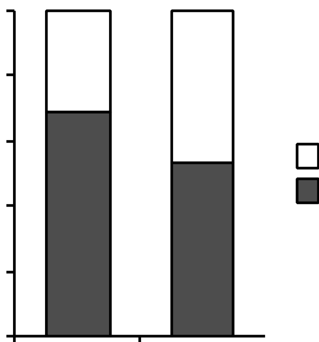


Figure 10c. **Comfort by satisfaction with the legal system**



comfort were significantly related to procedure — a greater proportion of mediation plaintiffs (82%) felt comfortable than did their counterparts in any other group: pre-trial conference, 56%, arbitration, 37% and trial, 39.5%.[126]

92 Formality. We asked plaintiffs whether they thought that their procedure was casual or formal, and we asked them if they thought that strict rules applied to how people should behave during it. Forty-one percent of plaintiffs felt that the procedure was casual, while 59% felt that it was formal. Predictably we also found that perceptions of formality varied significantly across procedures with a much higher proportion of pre-trial conference (64%) and mediation plaintiffs (58%) describing their procedure as casual than in the arbitration (38%) and trial groups (24%).[127]

93 Surprisingly, there was no relationship[128] between perceived formality and plaintiffs' perceptions of fairness, their satisfaction with the outcome or with the legal system.[129] Similarly, there were no statistically significant relationships between plaintiffs' views of strictness and their satisfaction with the outcome and the legal system.[130]

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126 Chi-square test (comfort by procedure) $^{2}_{3}$=21.05, n=253, p<.001.

127 Chi-square test (formality by procedure) $^{2}_{3}$=21.91, n=231, p<.001.

128 Lind et al (note 18) at 63 also did not find any "strong" relationships between litigant views on the formality of the procedure and their perceptions.

129 Chi-square test (formality by perceptions of fairness) $^{2}_{1}$=.731, n=228, p=.393
Chi-square test (formality by satisfaction with outcome) $^{2}_{1}$=.379, n=229, p=.538
Chi-square test (formality by satisfaction with the legal system) $^{2}_{1}$=.031, n=229, p=.859.

130 Forty-nine percent of plaintiffs felt the rules were strict, 43% felt they were loose or there were none, and 8% gave other responses. We excluded the "other" responses from the statistical analysis.
Chi-square test (rule strictness by fairness) $^{2}_{1}$=.433, n=182, p=.51
Chi-square test (rule strictness by satisfaction with outcome) $^{2}_{1}$=.032, n=183, p=.86
Chi-square test (rule strictness by satisfaction with legal system) $^{2}_{1}$=.937, n=183, p=.33.
The test of procedure by rule strictness is unreliable because of the number of small groups (proportion of cells with expected frequencies <5 was equal to or greater than 25%).

94 As noted above, there is a tendency to view formality as a barrier between litigants and their understanding of, comfort with, and participation in the litigation process. On the other hand, many regard formality as a positive attribute of court processes, adding to their dignity, impartiality and carefulness. Given these opposing views, we tested for relatedness between formality and other subjective impressions of the process. Our results indicated that perceptions of formality were unrelated to control, understanding, comfort, participation, dignity and care.[131] The only factor found to be related was procedural bias, discussed in the following section.[132]

Bias, carefulness and dignity

95 The importance of impartiality and, indeed, the appearance of impartiality is so obvious that we need not explain why we asked plaintiffs about their perceptions of bias. Beyond impartiality, procedures can be evaluated in terms of whether they are likely to produce quality — or accurate — outcomes, that is, in terms of their carefulness and thoroughness. Yet another way of viewing a process is in terms of how litigants experience it as persons. Other researchers have shown that dignity of treatment has a powerful effect on people's perceptions of justice. In other words, "undignified treatment by the justice system is viewed as a personal affront and stimulates the same strong reaction that an insult would provoke in daily social life."[133]

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131 and, for that matter, evaluation of lawyer.
Chi-square test (formality by control) $^{2}_{1}=.000$, n=227, p=.986
Chi-square test (formality by understanding) $^{2}_{1}=.055$, n=229, p=.814
Chi-square test (formality by comfort) $^{2}_{1}=1.97$, n=230, p=.161
Chi-square test (formality by participation) $^{2}_{1}=.548$, n=228, p=.459
Chi-square test (formality by dignity) $^{2}_{1}=3.13$, n=222, p=.077
Chi-square test (formality by care) $^{2}_{1}=3.55$, n=222, p=.059
Chi-square test (formality by evaluation of lawyer) $^{2}_{1}=.384$, n=227, p=.535.

132 Chi-square test (formality by bias) $^{2}_{1}=4.83$, n=200, $p<.05$.

133 Lind et al (note 18) at 22–3.

96 Bias. Seventy-eight percent of plaintiffs perceived their procedure to be unbiased, compared with the 22 percent who described it as biased. There was no significant variation across procedures.[134] However, as expected, more plaintiffs who saw their procedure as biased tended to rate it as unfair, were dissatisfied with its outcome and with the legal system than those who saw it as unbiased[135], as Figures 11a, 11b and 11c show.[136]

97 The relatively high percentage of plaintiffs who described their process as biased gave us some concern.[137] We wondered if this might simply be attributed to disappointment with the outcome of their claims. While there was a significant relationship between plaintiffs' expectations as to outcome and their perceptions of bias,[138] this is not the whole story. In fact, a number of plaintiffs whose outcome was worse than expected thought that the procedure was unbiased (38%). However, 33% who got what they had expected, or better, nevertheless thought the procedure was biased.

98 As noted above, there was a significant relationship between informality and perceptions of bias. Although the majority of plaintiffs thought that their procedure was unbiased, the proportion who thought the procedure was casual, and also thought it was biased, was significantly greater than the proportion of plaintiffs who thought it was formal and biased (28% vs 16%). Given that the results showed a relationship between informality and perceptions of bias, and procedural variation in plaintiffs' impressions of formality, we might have further expected to find significant procedural variations in perceptions of bias. Yet, as previously noted, the procedural differences were not significant.

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134 Chi-square test (bias by procedure) $^{2}_{3}$=3.01, n=218, p=.390.

135 Lind et al (note 18) at 65 found a strong correlation between procedural bias and perceived fairness and satisfaction.

136 Chi-square test (bias by perceptions of fairness) $^{2}_{1}$=49.06, n=218, p<.001
Chi-square test (bias by satisfaction with outcome) $^{2}_{1}$=27.39, n=216, p<.001
Chi-square test (bias by satisfaction with the legal system) $^{2}_{1}$=20.31, n=217, p<.001.

137 This is not to say that their views were necessarily reasonably held, cf. note 17.

138 Chi-square test (bias by evaluation of case outcome) $^{2}_{1}$=11.19, n=196, p<.001.

Figure 11a. Bias by fairness

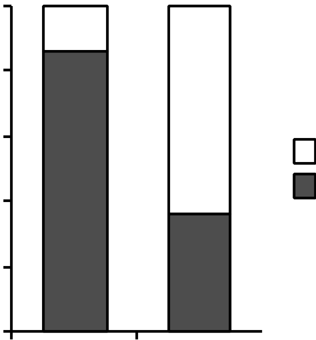


Figure 11b. Bias by satisfaction with the outcome

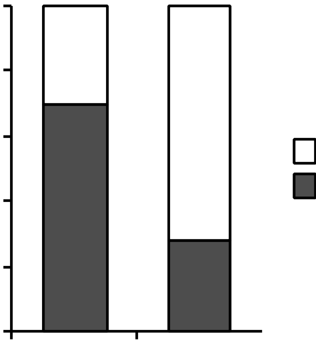
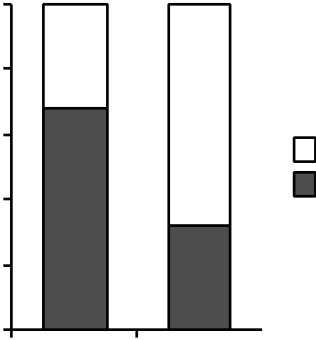


Figure 11c. Bias by satisfaction with the legal system



99 In fact, on the raw data only slightly more trial and arbitration plaintiffs than mediation and pre-trial conference plaintiffs thought their procedure was biased. However, upon reanalysing the data controlling for perceptions of formality, we found that 46% of arbitration plaintiffs and 33% of trial plaintiffs who thought that the process was casual also thought that it was biased. This is compared to 17% of the pre-trial conference plaintiffs and 13% of the mediation plaintiffs who thought that the process was both casual and biased.[139] Although the small numbers in these groups precluded a valid statistical test, these results may suggest that plaintiffs who see informality in conventionally formal processes tend to perceive it as bias. This suggestion is consistent with other research which emphasises the importance of litigant expectations, and conformity with expectations, to their perceptions of justice.[140]

100 Procedural care. We asked our plaintiffs whether they would describe their procedure as careful or careless. Eighty percent of plaintiffs described their procedure as careful, while 20% viewed it as careless. Not surprisingly, the plaintiffs who thought that their procedure was careless were significantly less likely than other plaintiffs to see it as fair, or to feel satisfied with the outcome and the legal system[141], as Figures 12a, 12b and 12c show.[142]

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139 Among those who thought their procedure was formal, only 17% of arbitration, 16% of trial, 18% of pre-trial conference and 9% of mediation plaintiffs thought the procedure was also biased.

140 Lind et al (note 18) at 60, and T Matruglio (note 71) at 37. The same conclusion is implicit in the strictures on personal or other informal exchanges between bench and bar in court performance standards: See eg. B Condie, H Gamble, R Mohr and T Wright, Client Services in Local Courts: Standards and Benchmarks (Centre for Court Policy and Administration, University of Wollongong, 1996).

141 Lind et al (note 18) at 65 found a strong relationship between perceived carefulness and litigant perceptions.

142 Chi-square test (procedural care by perceptions of fairness) $^{2}_{1}=49.69$, n=240, $p<.001$
Chi-square test (procedural care by satisfaction with the outcome) $^{2}_{1}=44.70$, n=241, $p<.001$
Chi-square test (procedural care by satisfaction with the legal system) $^{2}_{1}=44.70$, n=241, $p<.001$.

Figure 12a. **Procedural care by fairness**

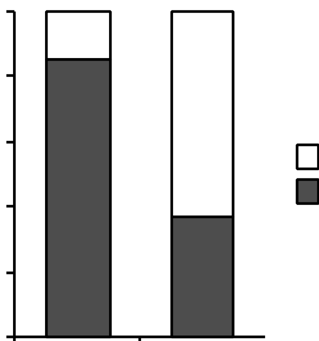


Figure 12b. **Procedural care by satisfaction with the outcome**

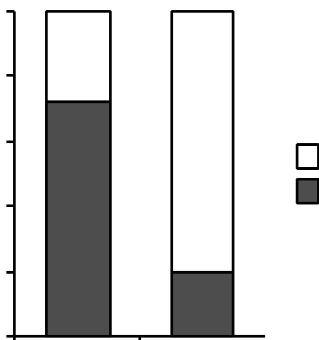
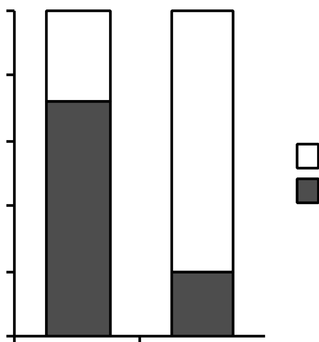


Figure 12c. **Procedural care by satisfaction with the legal system**



101 We also asked plaintiffs a related question, namely whether they thought that their procedure was thorough. Sixty-seven percent of plaintiffs perceived their procedure as thorough while 33% saw it as superficial. Again, and not surprisingly, we found that plaintiffs who thought that their procedure was thorough were much more likely to feel it was fair, and to be satisfied with the outcome and with the legal system, than other plaintiffs.[143]

102 Perhaps more interesting is the finding that the proportion of pre-trial (90%) and mediation (93%) plaintiffs who thought that their procedure was careful was significantly greater than the proportion of trial (75%) and arbitration (75%) plaintiffs who thought their procedures were careful.[144] However, the significance of this difference is diminished by the apparently contradictory finding that there was no difference in the perceived thoroughness of each procedure.[145]

103 Dignity. We asked our plaintiffs whether they would describe their experience as dignified or undignified. Most of the plaintiffs (82%) felt that their procedure was dignified. There was significant variation across procedures: 100% of mediation plaintiffs felt the procedure was dignified followed by pre-trial conference plaintiffs (87.5%), arbitration plaintiffs (79%), and trial plaintiffs (77%)[146]. As Figures 13a, 13b and 13c show, perceived dignity of the procedure was

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143 Chi-square test (thoroughness by perceptions of fairness) $^{2}_{1}=20.41$, n=225, $p<.001$
Chi-square test (thoroughness by satisfaction with outcome) $^{2}_{1}=23.92$, n=226, $p<.001$
Chi-square (thoroughness by satisfaction with the legal system) $^{2}_{1}=23.92$, n=226, $p<.001$.

144 Chi-square test (procedural care by procedure) $^{2}_{3}=8.66$, n=243, $p<.05$.

145 Chi-square test (thoroughness by procedure) $^{2}_{3}=.425$, n=228, $p=.935$. It is drawing a long bow, but it is possible that some plaintiffs in our survey responded to the subtle differences in connotation between our choice of antonyms for ‘careful’ and ‘thorough’ which were, respectively, ‘careless’ (without attention and insensitive) and ‘superficial’(cursory and shallow), respectively.

146 Chi-square test (dignity by procedure) $^{2}_{3}=9.16$, n=244, $p<.05$.

Figure 13a. **Dignity by fairness**

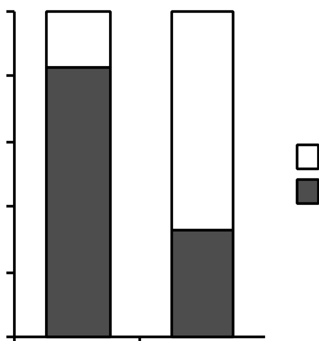


Figure 13b. **Dignity by satisfaction with the outcome**

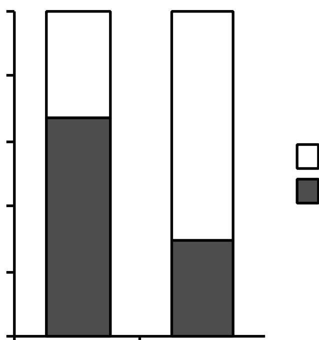
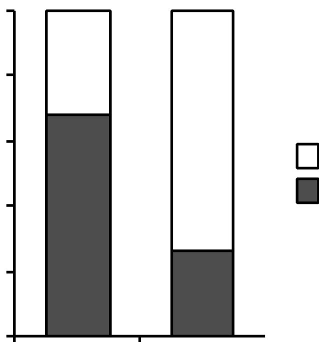


Figure 13c. **Dignity by satisfaction with the legal system**



significantly related[147] to plaintiffs' perceptions of fairness and satisfaction with the outcome and with the legal system.[148]

Evaluation of legal representatives

104 Most litigants, or potential litigants, are only able to access the litigation process through the agency of a professional. Lawyers are, in effect, the interface between their clients and the justice system. It follows that litigants' experiences and perceptions of justice are greatly influenced by their relationships with their lawyers.

105 Plaintiffs were asked how much they trusted their lawyer to make decisions in their best interest. Fifty-six percent of plaintiffs felt they could trust their lawyer a lot, while 44% felt they could only trust their lawyer to some extent. Significant relationships[149] were found between plaintiffs' trust in their lawyers and their perceptions of fairness, and their satisfaction with the outcome and with the legal system.[150] There was also a significant relationship between plaintiffs' trust in their lawyers and the procedures in which they were involved, with a greater proportion of pre-trial conference plaintiffs (92%) who had at least some trust in their lawyer, followed by mediation (82%), arbitration (81%) and trial (69%) plaintiffs.[151]

106 Figures 14a, 14b and 14c show that more plaintiffs who trusted their lawyers to make decisions in their best interest, perceived the

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147 Lind et al (note 18) at 62 found a strong correlations between the perceived dignity and litigant perceptions of fairness and satisfaction with the court, and moderate correlation with outcome satisfaction.

148 Chi-square test (dignity by perceptions of fairness) $^{2}_{1}$=47.67, n=241, p<.001
Chi-square test (dignity by satisfaction with the outcome) $^{2}_{1}$=19.79 n=242, p<.001
Chi-square test (dignity by satisfaction with the legal system) $^{2}_{1}$=27.11, n=242, p<.001.

149 Lind et al (note 18) at 61 found moderate correlations between attorney evaluations and litigant perceptions.

150 Chi-square test (trust lawyer by perceptions of fairness) $^{2}_{1}$=28.39, n=248, p<.001
Chi-square test (trust lawyer by satisfaction with the outcome) $^{2}_{1}$=50.06, n=250, p<.001
Chi-square test (trust lawyer by satisfaction with the legal system) $^{2}_{1}$=39.26, n=250, p<.001.

151 Chi-square test (trust lawyer by procedure) $^{2}_{3}$=11.28, n=251, p<.05.

Figure 14a. Evaluation of lawyer by fairness

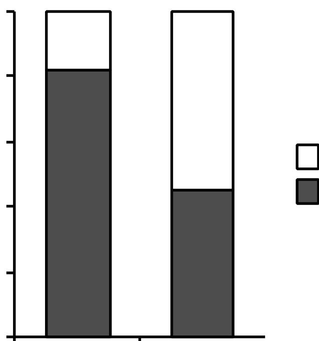


Figure 14b. Evaluation of lawyer by satisfaction with the outcome

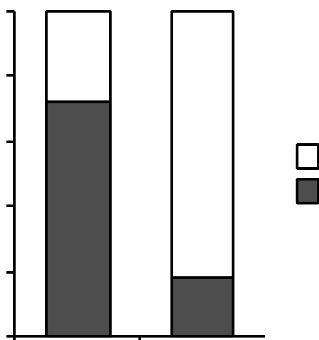
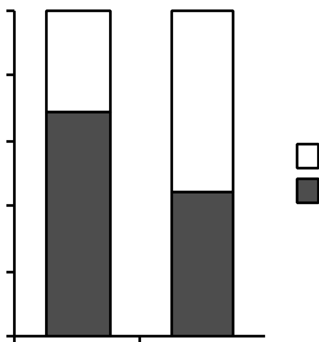


Figure 14c. Evaluation of lawyer by satisfaction with the legal system



procedures as fair and were satisfied with the outcome and the legal system, than the proportion who only a little, or not much, trust.

107 We also found a very similar pattern of results in response to a question about how well plaintiffs felt their lawyers had understood the facts of their cases. Eighty-three percent felt that their lawyers had adequate or more than adequate knowledge, while 17% felt that their lawyer's knowledge was not adequate. As might be expected, more plaintiffs who thought their lawyer's knowledge was inadequate regarded the process as unfair, and were dissatisfied with the outcome and the legal system, than the proportion who thought their lawyers had adequate or more than adequate knowledge.[152] There was also a relationship between plaintiff evaluations of lawyer knowledge and the procedures.[153] It was found that 96% of pre-trial conference plaintiffs felt their lawyers knowledge of the facts of the case was adequate or more than adequate, 86% of mediation plaintiffs, 84% of arbitration and 72% of trial plaintiffs felt this.

108 As we have already reported, there was a significant relationship between the level of plaintiffs' understanding of the process and their satisfaction. The most common reasons given by plaintiffs for their lack of understanding were failure on the part of their lawyer to communicate adequately (30%) and the complexity and terminology of the system (45%). Plaintiffs' reasons for their lack of understanding obviously may not represent the objective reality — but what they indicate is that lawyers have difficulty explaining what is going on to

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152 Chi-square test (lawyer knowledge by perceptions of fairness) $^{2}_{1}=48.57$, n=248, $p<.001$
Chi-square test (lawyer knowledge by satisfaction with the outcome) $^{2}_{1}=34.26$, n=249, $p<.001$
Chi-square test (lawyer knowledge by satisfaction with the legal system) $^{2}_{1}=28.86$, n=249, $p<.001$.

153 Chi-square test (lawyer knowledge by procedure) $^{2}_{6}=15.14$, n=251, $p<.05$.

their clients, either because the subject matter is difficult to explain or because of their lack of skills as communicators.[154]

109 On occasion, lawyers are heard to blame courts, and courts to blame lawyers, for public dissatisfaction with themselves. Our data does not indicate whether either view is accurate. However, it would seem that the truth lies somewhere in between, that is, litigant perceptions of each are influenced by their perceptions of both. We have already said that there was a significant relationship between the procedure used and plaintiffs' trust in their lawyers. It was found that plaintiffs who received less than they expected, or whose proceeding took longer than average were more likely to have distrusted their lawyer.[155] We also found that plaintiffs who did not completely trust their lawyers were more likely to feel that they hadn't participated in the process and lacked control over the outcome.[156] Moreover, there were significant relationships between plaintiffs' trust of their lawyer, their perceptions of bias and their understanding of the process.[157]

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154 The importance of lawyer communication skills to their client relationships is also indicated by discussion of the changes in the conduct requirements of legal professionals; cf. John K de Groot Producing a Competent Lawyer: Alternatives Available (Centre for Legal Education, 1995) at 32–33; A Review of Aspects of the Specialist Accreditation Program of the Law Society of New South Wales (Centre for Legal Education 1995/96) vol.1, at 91.

155 Chi-square test (trust lawyer by evaluation of outcome) $^{2}_{1}=16.89$, n=225, p<.001
Chi-square test (trust lawyer by evaluation of duration) $^{2}_{1}=14.93$, n=241, p<.001.
We have used the technically inaccurate "plaintiffs who received less than they expected were more likely to distrust their lawyer" here for ease of expression. Our statistics in fact test for relatedness by comparing the proportions of plaintiffs who 'were x and also y' as distinct from testing the probability that a plaintiff who 'was x was also y', so that strictly speaking we should say, for example "more plaintiffs who received less than they expected, trusted their lawyer only some or not much, than the proportion of plaintiffs who received as much or more than expected who trusted their lawyer only some or not much."

156 Chi-square test (trust lawyer by control over outcome) $^{2}_{1}=27.65$, n=247, p<.001
Chi-square test (trust lawyer by participation) $^{2}_{1}=30.72$, n=248, p<.001.

157 Chi-square test (trust lawyer by bias) $^{2}_{1}=9.08$, n=215, p<.01
Chi-square (trust lawyer by understanding) $^{2}_{1}=14.34$, n=249, p<.001. Their perceptions of comfort however were not related to trust in their lawyer: Chi-square (trust in lawyer by comfort) $^{2}_{1}=.181$, n=249, p=.671.

The relationships of procedures and other factors to plaintiffs' satisfaction[158]

110 In Section 3 we described the relationships between procedures and plaintiffs' perceptions of fairness, satisfaction with their outcomes and satisfaction with the legal system. In Section 4 we examined the relationships between these perceptions and objective factors and in this section we examined the relationships between the perceptions and subjective factors. In the course of doing so, we noted relationships between factors and procedures. We can summarise the significant procedural variations in factors which were related to perceptions, very briefly.

111 On average, pre-trial conference claims resolved in the least amount of time, followed by mediation, arbitration and trial. Pre-trial conference plaintiffs and mediation plaintiffs were more likely to have settled for an amount that they had expected, or better, than were trial and arbitration plaintiffs.[159] They were also more likely to feel that the cost was good value for money.[160] More pre-trial conference plaintiffs, and then mediation plaintiffs, trusted their lawyer and felt that they had control over the outcome, than the arbitration and trial plaintiffs.

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158 Although we have made some tentative observations about the relative importance of these factors in influencing plaintiff perceptions, (for example, that the expectations about case outcome appear to be more important than the actual outcome of the claim), it would have been desirable to use a multivariate procedure to test statistically which of these factors matters most to plaintiffs' fairness judgements and satisfaction. However, one assumption of these procedures is that the factors analysed are independent and because most of the factors in this study were statistically related (that is, not independent) no such analysis was possible. Instead, we provide a summary of the relationships between factors and procedures.

159 We note above (para.72) why this is not particularly surprising, but it is nevertheless an important difference. Again, we are here using the technically incorrect "plaintiffs who were x were more likely to be y" for ease of expression (see note 155).

160 Because, as we noted above (note 95), this factor is implicitly a measure of satisfaction, this finding does not add greatly to our understanding of the procedural variations in plaintiff satisfaction. The same can be said of plaintiffs' evaluations of duration and, moreover, this factor was confounded with actual delay.

112 More mediation plaintiffs, followed by pre-trial conference plaintiffs, thought that their procedure was comfortable, careful and dignified, than the number of arbitration and trial plaintiffs. Mediation plaintiffs were most likely to find their procedure easy to follow ("clear"), followed by pre-trial conference plaintiffs, arbitration and trial plaintiffs.

113 These findings may give us some understanding of why more plaintiffs were satisfied with one procedure than another. However, we should caution that procedures no doubt blend relevant qualities that we have not identified, in addition to the factors we have considered. We should also note that while we may be confident that factors like perceived dignity are related to satisfaction, and to procedural differences, we do not know why more plaintiffs thought, for example, that their pre-trial conference was dignified, than the number of plaintiffs who thought this of their trial. We can however conclude with the suggestion that the major differences in plaintiffs' perceptions lay between the two consensual procedures, on the one hand, and the two adjudicative procedures on the other. This may provide some clues.

6

Conclusion

114 A number of our findings call for some concluding remarks. First, they show that plaintiff satisfaction with the legal process is in fact related to dispute resolution procedures. For example, less than two-thirds of our trial plaintiffs thought that the process was fair, and only half expressed satisfaction with the outcome and the legal system. The figures, which were only slightly better for arbitration plaintiffs, perhaps confirm current apprehensions about litigant dissatisfaction with the civil process.

115 On the other hand, the proportion of satisfied pre-trial conference and mediation plaintiffs was much higher. This finding may go some way towards vindicating the moves by courts to direct litigants to use alternative dispute resolution procedures,[161] and may help foster the "sea-change in attitudes" required, perhaps especially on the part of lawyers more than their clients, to encourage even greater use of non-adjudicative forms of dispute resolution.[162] We should, however, emphasise again that our study was limited to personal injuries plaintiffs who had resolved their disputes at one of the four procedures we compared. Whether their attitudes are also indicative of the perceptions of plaintiffs who went through a pre-trial conference or mediation and did not settle, or how far the results can be generalised to other types of disputes, or whether the views of defendants would be similar, are things we simply do not know.

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161 Although we think some of the other empirical, as well as the more theoretical, issues we alluded to in the introduction still need to be addressed.

162 cf Brennan (note 1).A topic included in the 1996 NSW Legal Convention may indicate the currently prevailing attitude in the profession. Entitled "Lawyers in ADR: Are we turkeys voting for an early Christmas?" it is directed to lawyers who "have seen ADR as an unwelcome intrusion" and will offer advice on "how to integrate ADR into your practice and offer 'full service' dispute resolution."

116 The finding of greater satisfaction among plaintiffs whose dispute was resolved through a consensual as opposed to adjudicative process is, in general terms, the reverse of the findings of the Lind et al study on which the present study was based. It is possible to speculate as to why Australian litigants should differ from their American counterparts, drawing from, among other things, the different socio-legal cultures of the two countries. However, we think that the most important point to observe is that the results of this American research could not be generalised to Australia. Comparatively little empirical research on justice issues has been done, and there is still not a strong tradition of using empirical research as a tool for developing justice policy in this country; but when research is referred to in debate it is frequently American. There is a critical need to develop our own body of empirical understanding of the justice system.

117 The actual outcome and duration of the claim were both related to plaintiff satisfaction. We also found that the amount of legal costs paid by plaintiffs was not related, while the proportion of this amount to their award or settlement was related to outcome satisfaction (at least in the trial and arbitration groups) and satisfaction with the legal system generally. Lind et al found no relationship between the amount of legal costs and plaintiff satisfaction, but, unlike our results, found that differences in negotiated contingency fee rates were unrelated. We can suggest that these findings are consistent with ours, as they also conform to a simple economic model of the relationship between legal costs and plaintiffs' satisfaction. This area warrants further research. If our account of these findings is correct, it suggests that the problem of costs can be addressed, in addition to changing features of the process which make it expensive, by exploring the forms of financing available to its users.

118 We also found that whether the outcome conformed to a plaintiff's expectations, whether plaintiffs felt their litigation took only as long as it should have, and whether the cost was good value for money,

were all important factors affecting their level of satisfaction. To some extent it is unremarkable that, for example, a plaintiff who thought her legal fees were poor value was also dissatisfied with the outcome, as this relationship is implicit in the notion of poor value. Nevertheless, these results are consistent with other findings that conformity with litigant expectations about the outcome, delay and cost of their litigation are more important than the actual outcome, delay and cost.[163] Thinking about civil process reform has tended to focus on the influence that processes might have on the cost of resolving a dispute, and the time taken to resolve it. Our findings suggest that the possibility that processes might also affect litigant expectations is another worthwhile focus.[164]

119 The importance of litigant expectations also draws attention to the important role their legal advisors have in ensuring that their client expectations about outcomes, delays and costs are realistic.

120 We should not fail to emphasise that 40% of the plaintiffs thought their lawyers had not provided good value for money, and 44% felt they could not completely trust their lawyer to act in their best interests. These findings ought to create a sense of discomfort in the profession. The research also found that a plaintiff's satisfaction with her or his lawyer was one of a number of factors affecting their satisfaction with the litigation process. It is a commonplace that legal practitioners frequently feel they are blamed by their clients for the failings of the court system, and similarly, that the courts feel they are often wrongly accused of the faults of the profession. These findings suggest a co-dependency which might encourage a higher level of concerted co-operation between the courts and the legal profession towards improving client satisfaction.

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163 Matruglio (note 71); Lind et al (note 18).

164 cf para 50.

121 Finally, the study has found that a number of factors — in addition to the 'twin evils' of cost and delay which have commanded so much attention to date — are significantly related to plaintiffs' satisfaction. These findings direct the attention of reformers to features of dispute resolution procedures that might enhance factors associated with satisfaction, or diminish factors associated with dissatisfaction.[165]

122 It matters a great deal to people that they feel they have some control over, and participation in, the process of resolving their dispute, and that they are treated in a dignified manner. They also need to understand the process and perceive it as careful and thorough. While we know that these factors are related to satisfaction, and to procedural differences, we do not know what it is about the procedures themselves that causes litigants to attribute these qualities to them. This is something that needs to be explored carefully in the reform process.

123 These observations lead to two final comments. The first is that it should be recognised, in the pursuit of reducing costs and delays, that it is possible for the courts to take control, streamline or so alter the process that they may "deliver cheaper [and faster] but also a less satisfying form of justice."[166] The second point arises from the observation that Australian courts engaged in reforming their processes have so far only evaluated the impact of their reforms on the numbers and types of finalisations, and to a lesser extent, on reducing delays. To the extent that litigant satisfaction is an important goal of process reforms — and it seems to us that it is universally agreed to be important — it should be measured. This research provides some experience on how this can be done.

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165 cf Lind et al (note 18) at 3.

166 Brennan (note 1) at 10.1.

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The Justice Research Centre was founded by the Law Foundation of New South Wales in 1989, as the Civil Justice Research Centre. The Centre acquired its new name in 1996, when the Board of Governors of the Foundation decided that its work should be expanded from civil to justice system issues more generally.

Our mission is to support effective justice system reform, through high quality research. Today, the Centre is recognised nationally and internationally for influential research characterised by an interdisciplinary, empirical approach to public policy issues, and rigorous standards of quality, objectivity and independence.

The Centre's research program is broadly focussed, examining issues such as the delivery of legal services and the operation of the legal services market, court processes and dispute resolution, accident compensation, and court and justice system performance.

The Justice Research Centre receives core funding from the Law Foundation of New South Wales. The additional revenue it needs for its operations comes from grants and donations from government and private sector organisations.

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