MEDIATOR LIABILITY IN CANADA: AN EXAMINATION OF EMERGING AMERICAN AND CANADIAN JURISPRUDENCE

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Aucun médiateur à ce jour n'a été tenu responsable de pratique du droit impropre, d'atteinte à la loi, d'inexécution de contrat ou d'exécution négligente de services. Par contre, un examen attentif des nouvelles tendances jurisprudentielles aux États-Unis et au Canada, en particulier de la jurisprudence relative au Programme de médiation obligatoire de l'Ontario, nous éclaire sur les circonstances où la conduite des médiateurs sera jugée non conforme à la norme et ainsi nous renseigne sur ce qui pourrait constituer une faute professionnelle dans le contexte facilitant de la médiation au Canada.

No mediators have yet been held liable for the unauthorized practice of law, breach of statute, breach of contract, or negligently performing their services. However, a detailed examination of emerging American and Canadian jurisprudence, especially cases from Ontario's Mandatory Mediation Program, highlights when mediators have fallen below appropriate mediator conduct, and therefore indicates what might constitute mediator malpractice in the Canadian facilitative mediation context.

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I. INTRODUCTION

More and more Canadians are mediating. Are they making mistakes? What are mediator mistakes in the facilitative mediation[1] context? Do they constitute malpractice? If so, are mediators being held liable? Resoundingly, the answers appear to be "no". There is no real evidence in Canadian case law that mediators are making egregious mistakes. Disputants are generally satisfied with mediation services,[2] and thus, as lawsuits are the result of dissatisfaction, claims against mediators are almost non-existent. In the case of voluntary mediation, satisfaction is especially high because parties are keen, motivated and anxious to keep relationships positive. A Mediation is a relatively low risk activity, and anecdotal evidence suggests that no (or very few) claims have been made and pursued against any English mediators.[3] Even in the United States, where all claims experiences are generally higher than in Canada, the instance of suits against mediators is low.[4] There is no jurisprudential evidence that Canadian mediators are committing malpractice, and thus far, none have been held liable for any actions committed during a mediation session. Currently, there are only a few emerging complaints from which to begin to piece together a picture of what improper mediator practice might be.

Before legally relevant tests for mediator malpractice and liability can begin to be developed, the current position must be understood. This article is the first Canadian examination of all available cases, commentaries, and complaints in order to present a comprehensive analysis of mediator liability in Canada. An examination of emerging dispute resolution jurisprudence in the United States and Canada, and especially from Ontario's Mandatory Mediation Program, will highlight when mediators have fallen below appropriate mediator practice. Knowing what inappropriate mediator behaviour is will lead to an understanding of what might constitute mediator malpractice in Canada, and eventually, the development of legal tests for mediator liability. Existing complaints against mediators demonstrate that Canadian facilitative mediators could

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[1] Facilitative mediation refers to the process whereby a neutral third party (the mediator) guides or facilitates a conversation between competent adults who are voluntarily participating in a process of dispute resolution guided by consensus. Facilitative mediators do not provide their opinions or predictions in the mediation session, and the disputants retain full legal responsibility for any agreements reached. Moore's classic definition of (facilitative) mediation is also applicable: "[T]he intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." C. Moore, *The Mediation Process*, 2nd ed. (San Francisco: Jossey-Bass, 1996) at 15.

[2] L. Boulle & K.J. Kelly review a number of Australian, American and Canadian studies on mediation effectiveness. They note that all studies confirm that mediating parties report " 'high levels' " of user satisfaction with both the process and outcome of mediation, and the parties indicate they would use mediation again and would recommend it to others. *Mediation: Principles, Process, Practice* (Markham, Ont.: Butterworths Canada Ltd., 1998) at 271-272.

[3] H. J. Brown & A. L. Marriott, *ADR Principles and Practice*, 2nd ed. (London: Sweet & Maxwell, 1999) at 533.

[4] C.U.C. MacLeod, "Liability of ADR Neutrals" in A.J. Stitt, ed., *Alternative Dispute Resolution Practice Manual* (North York, Ont.: CCH Canadian Limited, 1998) at 8451.

attract civil liability for the unauthorized practice of law, breaching relevant statutes, breaching contracts, or negligently performing their services.[5]

II. MEDIATOR IMMUNITY

Before examining the emerging dispute resolution jurisprudence however, mediator immunity must be discussed. Many American states have statutes which provide some form of mediator immunity.[6] For example, in 1989, the Florida legislature passed a bill that grants absolute judicial immunity to court appointed mediators and arbitrators,[7] and in Oklahoma, a mediator is only liable if he or she exhibits "gross negligence with malicious purpose or in a manner exhibiting willful disregard...."[8] These statutes, and others like them, proceed under the presumption that mediators, like judges, should be free from civil liability when acting in their official capacities. The view appears to be that immunity for mediators recognizes the function of mediators to facilitate settlements, which is analogized to the judicial function. American courts have even extended common law judicial immunity to court employees when those employees perform work connected to the work of judges.[9] In Saskatchewan–the only Canadian jurisdiction that grants any type of immunity to mediators–no action can be commenced against mediators in the provincial mandatory mediation program if the mediators act in good faith in carrying out their duties or in exercising powers under the statute.[10] There is no immunity for non court-connected mediators in Saskatchewan.

Judicial immunity was originally granted to judges who made errors in the course of their judicial duties; immunity was a way to protect discretionary decision making by judges and arbitrators. However, Canadian facilitative mediators have no adjudicatory functions; the disputants make all final decisions. Since Canadian facilitative mediators do not have judicial duties, nor do they render decisions, affording them immunity is nonsensical, and runs counter to principles of accountability championed by most mediators. "Because mediators have no adjudicatory powers, the rationale that justifies immunity for arbitrators–the need to be free to engage in 'fearless

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[5] Mediators could also be sued for: conflict of interest, tortious interference with business relations, breach of neutrality, libel, giving incorrect advice, fraud, false advertising, and breach of fiduciary duty. See generally G. Hufnagle, "Mediator Malpractice Liability" (1989) 23 Mediation Q. 33.

[6] States with such legislation include: California, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Utah, Virginia, Washington, Wisconsin, and Wyoming. See L.R. Singer, "Immunity Imperils the Public and Mediator Professionalism" (1994) Nat'l L.J. C12, for a good brief summary of the relevant statutes in each state. Also, most modern Australian legislation providing for mediation contains either absolute or qualified immunity for mediators: Boulle and Kelly, *supra* note 2 at 269.

[7] Fla. Stat. Ann. tit. 5, § 44.107[formerly § 44.307 (1989)]. For a discussion of this legislation, see J.S. Richardson, "Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators" (1990) 17 Fla. St. U.L. Rev. 623.

[8] Okla. Stat. Ann. tit. 12, § 1805(E).

[9] See *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), 75 L. Ed. 2d 96, which discusses the immunity of persons who are integral parts of the judicial system.

[10] *The Queen's Bench (Mediation) Amendment Act, 1994*, S.S. 1994, c. 20, s. 54.4 [hereinafter *Queen's Bench Act*]; *The Queen's Bench Revision Act*, S.S. 1998, c. Q-1.01, s.44 [hereinafter *Queen's Bench Revision Act*].

and independent decision-making'–cannot support absolute immunity for mediators."[11] Immunity should not be extended to Canadian mediators because it is essential for mediation's credibility that mediators provide the best possible service to disputants and assume responsibility for their errors.[12] Nothing that Canadian facilitative mediators do resembles judging, and thus, there is no valid reason to extend immunity to non-judicial persons who do not perform any adjudicatory functions.

Some advocate for a compromise position, arguing that mediators should not be granted absolute immunity, but should receive qualified immunity.[13] Since mediators do not perform adjudicatory functions, the policy reasons for absolute immunity are not implicated for mediators. Therefore, qualified immunity is presented as a compromise solution; mediators would have to defend lawsuits for fraud and bad faith, but they would be immune from liability for erroneous acts or negligent practice. Under a qualified immunity scheme, if there was direct evidence of mediator misconduct, and that evidence demonstrated that the mediator violated rights of the parties, the suit would not be barred and the mediator could be held liable. Again, while qualified immunity is available to some American mediators, there are no pressing reasons why Canadian facilitative mediators should be immune from liability for their erroneous acts or negligent practice.

Courts and legislatures should be very careful before they absolve mediators of their misconduct because no other service providers are granted such immunity. Mediation is non-binding, and thus far the risks, if any, associated with mediator misconduct are low. Therefore, no policy justifies shielding negligent mediators from liability. Many mediators, whether their referrals are private or from a court-connected program, charge fees for their mediation services. Why should fee-charging mediators enjoy immunities that no other fee-charging service providers do? Immunity denies recourse to parties damaged by negligent practice, which is A especially invidious where the mediation is mandatory and the parties are required to fund it themselves."[14] In fact, without any fear of civil suit, mediators might be more likely to engage in risky, uninhibited behaviour that would not only be detrimental to disputants, but to the reputation of the facilitative mediation process as a whole. The goals of consumer protection and building legitimacy far outweigh the shielding of incompetent behaviour that immunity would engender. If incompetent service has been rendered, liability should attach.

It is said that immunity will encourage the participation of qualified mediators and alleviate pressures on the judicial system.[15] Another justification for statutory immunity is that mediators "operate under the control, or potential control, of the relevant agency or court, which provides some guarantee of standards, quality and accountability, and reduces the need for liability actions."[16] However, there is no

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[11] C. Turner English, "Stretching the Doctrine Of Absolute Quasi-judicial Immunity: *Wagshal v. Foster*" (1995) 63 Geo. Wash. L. Rev. 759 at 780.

[12] Note that mediation programs and mediators describe their services as confidential. A *de facto* immunity is granted to mediators if due to confidentiality provisions, evidence of their malpractice cannot be obtained.

[13] English, *supra* note 11 at 780.

[14] Boulle and Kelly, *supra* note 2 at 269.

[15] English, *supra* note 11 at 783-784; Note, "The Sultans of Swap: Defining the Duties and Liabilities of American Mediators" (1986) 99 Harv. L. Rev. 1876 at 1884.

[16] Boulle and Kelly *supra* note 2 at 269.

empirical evidence to support the notion that fear of being sued is discouraging people from working as mediators. Also, there has been no "real analysis of the impact that immunity will have on both ADR [alternative dispute resolution] providers and potential users of ADR services."[17]

Despite the fact that immunity legislation exists for mandatory mediators in Saskatchewan, the rest of Canada should not, and thus far, has not, followed suit. An examination of the mediator immunity jurisprudence from the United States highlights the problems inherent in granting immunity to mediators, and demonstrates why the potential policy reasons for mediator immunity are simply not implicated in the Canadian facilitative mediation context.

There are four American cases that demonstrate why Canada should not import mediator immunity. In *Wagshal* v. *Foster*,[18] Wagshal filed suit in the District of Columbia (D.C.) Superior Court and the assigned judge referred the case to alternative dispute resolution pursuant to Superior Court Civil Rule 16. The judge chose neutral case evaluation from among the available ADR options and appointed Foster as the case evaluator. Wagshal's participation in the case evaluation process was mandatory.

Before the first session, the parties signed a "statement of understanding," providing that the proceedings would be confidential, and that the evaluator would serve as a neutral party. Wagshal then attended his first session with Foster. After the session, Wagshal questioned Foster's neutrality and no longer wanted to proceed with Foster as case evaluator. Foster thus wrote to the judge and recused himself. In his letter, Foster also reported his efforts in the case and recommended that ADR proceedings continue. Foster wrote that the case was one "'that can and should be settled if the parties are willing to act reasonably.'"[19] Foster also wrote that the court should order Wagshal, "'as a precondition to any further proceedings in his case, to engage in a good faith attempt at mediation.'"[20]

After receipt of this letter the judge excused Foster as the neutral evaluator. Another case evaluator was appointed and Wagshal's case was settled. Wagshal then sued Foster because he thought Foster's letter indicated bias or lack of neutrality. Certainly Foster's letter stating the case could be settled if the parties were willing to act reasonably and engage in a good faith attempt at mediation indicates legitimate worries about Foster's neutrality.

> Foster' communication implicitly indicated that Wagshal was not cooperating or was holding up the mediation process in some other respect. There is an inherent inconsistency in requiring neutrals to keep the proceedings confidential, yet allowing the neutrals to make recommendations as to future action in the case or the assignment of costs.[21]

Wagshal brought his action against Foster and members of Foster's law firm, alleging his right to due process and a jury trial were denied by the appointment of Foster. He

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[17] K.C. Gray, "Torts - *Wagshal v. Foster*: Mediators, Case Evaluators, and Other Neutrals - Should They Be Absolutely Immune?" (1996) 26 U. Mem. L. Rev. 1229 at 1245.

[18] *Wagshal* v. *Foster*, 28 F. 3d 1249, 307 U.S. App. D.C. 382 (D.C. Cir. 1994) [hereinafter *Wagshal*].

[19] *Ibid.* at 1251.

[20] *Ibid.*

[21] Gray, *supra* note 17 at 1246.

also sued for intentional infliction of emotional distress. Wagshal claimed that Foster forced him to settle the case against his will. As a result, Wagshal argued that his recovery was far lower than if he had pursued his claim. The court assumed for the purpose of analysis that Foster breached his obligations of neutrality and confidentiality. However, despite "'Foster's announcing his recusal, reporting in a general way on the past course of mediation, and making suggestions for future mediation,'"[22] the court found that these "'were the sort of things that case evaluators would properly do.'"[23]

Moreover, the U.S. Court of Appeals for the District of Columbia held that absolute immunity extended to court-appointed mediators and case evaluators acting within the scope of their official duties. The court noted that in the United States absolute immunity has been extended to a range of persons playing roles in the judicial process,[24] and they followed the three step inquiry developed in *Butz* v. *Economou*[25] to determine that Foster should be protected by quasi-judicial immunity.

First, according to *Butz*, the court must determine whether the functions of the official in question are comparable to those of a judge. The court found that Foster's tasks as a case evaluator "appear precisely the same as those judges perform going about the business of adjudication and case management."[26] Thus, the functions of a case evaluator were equated to those of a judge. However, although case evaluators do assess the merits of a case, they do not adjudicate, and thus, their functions are not the same as judges'.

The first part of the *Butz* analysis was further confused by both Wagshal's counsel and the court using the terms "case evaluator" and "mediator" interchangeably. Case evaluation is not the same thing as mediation. While there is such a thing as evaluative mediation, there is a difference between mediation that is evaluative in style, and neutral case evaluation. The former is focused on conflict resolution, while the latter is focused on evaluation and/or valuation. Also, importantly, "true" mediation is purely facilitative in style, and is thus very different from case evaluation.

The confusion in terminology highlights how the court missed the mark in *Wagshal* and obfuscates the relevance of the court's holding. When Wagshal argued "that mediation is altogether different from authoritative adjudication,"[27] the court responded, "[h]owever true his point may be as an abstract matter, the general process of encouraging settlement is a natural, almost inevitable, concomitant of adjudication."[28] The court was wrong. While it is true that mediation is not adjudication, encouraging settlement is not inevitably part of adjudication. The two are diametrically opposed. "This disregard for the differences between ADR procedures is indicative of the surface analysis courts may apply"[29] when looking at questions of the liability of neutrals. Any adherence to the ratio of *Wagshal*, especially in Canada, where distinctions between processes are made, is rendered suspect due to this confusion in both terminology and meaning.

Second, the *Butz* analysis requires American courts to examine whether the

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[22] *Ibid.* at 1254.
[23] *Ibid.*
[24] *Wagshal, supra* note 18 at 1252.
[25] 438 U.S. 478 (1978), 57 L. Ed. 2d 895, 98 S. Ct. 2894 [hereinafter *Butz*].
[26] *Wagshal, supra* note 18 at 1252.
[27] *Ibid.*
[28] *Ibid.*
[29] Gray, *supra* note 17 at 1247.

nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect. The court found that:

> Although a mediator or case evaluator makes no final adjudication, he [*sic*] must often be the bearer of unpleasant news–that a claim or defence may be far weaker than the party supposed. Especially as the losing party will be blocked by judicial immunity from suing the judge, there may be great temptation to sue the messenger whose words foreshadowed the final loss.[30]

Being the bearer of bad news is simply not enough reason to shield an unregulated, paid practitioner from liability for any mistakes he or she makes. The D.C. Superior Court erred in *Wagshal* when it decided that the second part of the *Butz* analysis had been made out. Merely being the bearer of bad news does not suggest that future harassment is realistic, and therefore, mediator immunity was not warranted in this case.

Finally, *Butz* demands an answer to the question of whether the system contains safeguards adequate to justify dispensing with private damage suits. The court found that there were sufficient safeguards in this case; "the avenues of relief institutionalized in the ADR program and its judicial context provide adequate safeguards."[31] If Mr Wagshal did not like the case evaluator, he could have appealed to the judge who assigned the case evaluator. However, appealing to a judge is neither realistic nor a sufficient safeguard. "The creation of judicial safeguards does not adequately assure the quality of the ADR service nor do such safeguards clarify the mediator's role in the proceedings."[32] If mediator immunity was granted in Canada,[33] to whom would disgruntled or seriously aggrieved disputants turn? "[N]o procedures exist to review the conduct of mediation or the final agreement reached through mediation....[T]he complete lack of any opportunity for review in mediation certainly cannot support absolute immunity for the mediator."[34] The decision to recognize absolute quasi-judicial immunity in *Wagshal* for case evaluators has not gone unnoticed.[35] Despite the fact that American states with court-mandated ADR programs seem to be moving toward absolute immunity for mediators, Canadian provinces, especially in light of the lack of mediator-reviewing agencies, should not follow.

A second American case of note is *Mills* v. *Killebrew*.[36] The plaintiffs/appellants in this case were forced to mediate pursuant to Wayne County Circuit Court Rule 403. At the mediation the appellants "won". The "mediation panel awarded the appellants $18, 000, and the appellants failed to reject the award within the time period provided by Rule 403.7(e)."[37] This meant that the plaintiffs/appellants were deemed to have accepted the mediation award.

The appellants disagreed with the mediators' finding and filed an action in federal court against the three lawyers who comprised the mediation panel. The court

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[30] *Wagshal, supra* note 18 at 1253.

[31] *Ibid.*

[32] Gray, *supra* note 17 at 1247.

[33] Recall that Saskatchewan is the only Canadian province or territory that provides immunity for court-connected mandatory mediators: *Queen's Bench Act, supra* note 10 at s. 54.4; *Queen's Bench Revision Act, supra* note 10 at s. 44.

[34] English, *supra* note 11 at 792.

[35] See articles by English, *supra* note 11 and Gray, *supra* note 17.

[36] 765 F. 2d 69 (6th Cir. 1985)[hereinafter *Mills*].

[37] *Ibid.* at 71.

held that the lawyers "were entitled to absolute quasi-judicial immunity and therefore could not be held liable to the appellants for damages."[38] Because the lawyers served a quasi-judicial function they were absolutely immune from damages, and statute law in Michigan supported their jurisdiction to work as a mediation panel.

Again, this case is not relevant to the Canadian experience. Mediation in Canada is not a process wherein a panel doles out an award. Mediators do not make awards, and thus, the fact that the mediation panel in this case was granted immunity is irrelevant. This mediation panel was exercising a quasi-judicial function, and immunity may have been appropriate. For Canadian facilitative mediators who do not make awards, the point is moot.

More important than cases where immunity for mediators is irrelevant, are the cases where providing mediator immunity is actually dangerous. In *Howard* v. *Drapkin*,[39] the defendant, Robin Drapkin, was a psychologist. The plaintiff and her family were going through a child custody and visitation dispute. The defendant was hired by the plaintiff to perform an evaluation of the plaintiff and her family, and the plaintiff claimed that the defendant did so improperly.

The defendant psychologist stretched a one and a half hour session into a six hour session, accused the plaintiff of lying during the session, failed to include material information in her written report, misrepresented what the child's doctors had said, failed to disclose a prior professional relationship with the husband, and failed to disclose that she was a close personal friend of the wife of one of the partners in the firm that represented the husband in the underlying action.

The Court of Appeal, however, granted the psychologist common law immunity as a quasi-judicial officer participating in a judicial process. The psychologist, "acting in the capacity of a neutral third person engaged in efforts to effect a resolution of a family law dispute, is entitled to the protection of quasi-judicial immunity for the conduct of such dispute resolution services."[40]

> [A]bsolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court, or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes.[41]

This means that absolute quasi-judicial immunity was extended to a psychologist who was selected and compensated by the disputants, and was not in any way supervised by a court. Immunity was extended to a psychologist engaged in private work.

An important thing to note about *Howard* is that the California Court of Appeal based its decision "on both grounds";[42] that is to say, on both quasi-judicial immunity and statutory privilege. In California, statutory privilege extends to bar liability for communicative acts. Thus, even though the court acknowledged "alleged offensive and dishonest communicative acts"[43] on the part of the psychologist, the statutory privilege

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[38] *Ibid.* at 69-70.
[39] 271 Cal. Rptr. 893, 222 C.A. 3d 843 (Cal. App. 2 Dist. 1990) [hereinafter *Howard*].
[40] *Ibid.* at 894.
[41] *Ibid.* at 903.
[42] *Ibid.* at 896.
[43] *Ibid.*

protected the defendant psychologist from tort liability. Significantly, the dissent in *Howard* felt that California's statutory privilege alone was sufficient to absolve the mediator–there was no need to extend quasi-judicial immunity.

The majority in *Howard* believed that the extension of immunity to persons engaged in neutral dispute resolution was appropriate: "[I]n this day of excessively crowded courts and long delays in bringing civil cases to trial, more reliance is being placed by both parties and the courts on alternative methods of dispute resolution."[44] However, the opposite is true. Precisely because more reliance is finally being placed on alternative methods of dispute resolution, now is not the time to relax standards by extending immunity to Canadian mediators. Such an extension is simply not appropriate in Canada.

The fact that the neutral in this American case was a psychologist and not a mediator means that the holding is not immediately transferable to Canadian mediators in any event. The granting of absolute immunity in *Howard*, given the defendant's conduct, was dangerously overbroad. Practitioners who commit similar errors under the guise of helping parties resolve disputes should be required to defend their actions in Canada. If the dispute resolution community ever wishes to be taken seriously, mediators who act similarly to how this "dispute resolver" did must be held accountable for their actions.

Schaffer v. *AgriBank, FCB*[45] is the last important American case on the issue of mediator immunity. The Schaffers were the former owners of farmland in Minnesota. AgriBank, FCB held a mortgage on their property and Farm Credit Services of Southern Minnesota, ACA serviced the loan. On January 1, 1994 the Schaffers failed to make a balloon payment due on their mortgage so AgriBank and Farm Credit sent them notices of default and a notice of mediation rights available to them under the *Minnesota Farmer-Lender Mediation Act.*[46] The Schaffers requested mediation, and several mediation sessions were held.

At a mediation session held on April 20, 1994, a financial services executive with Farm Credit told the Schaffers that Farm Credit would accept the balance of the mortgage either in cash or with a letter of commitment from another lender who would finance the balance. If the Schaffers wanted this deal, they had to present the cash or letter of commitment by May 9, 1994. The Schaffers wanted the deal, but the mediator did not reduce Farm Credit's offer to writing.

On May 9, 1994 the Schaffers presented Farm Credit with a letter from the president of a Minnesota bank. The letter stated that "'it is safe to assume that the State of Minnesota would approve a loan.'" Because Farm Credit did not consider this to be a definite letter of commitment, they refused to accept it. The Schaffers said they would get another letter, but Farm Credit said there was no deal. The mediator at that point determined that no agreement could be reached between the parties and signed a termination document stating this decision. AgriBank foreclosed on the Schaffers on August 30, 1994.

The Schaffers sued all parties concerned, including the mediator. The Schaffers claimed the mediator was negligent for his failure to reduce the oral agreement of April 20, 1994 to writing. The trial court dismissed this claim on the principle of

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[44] *Ibid.* at 901.

[45] 1997 WL 40739 (Minn. App. 1997), online: WL (AL-CS)[hereinafter *Schaffer*].

[46] Minn. Stat. §583.26, subd. 6 (1996).

mediator immunity, finding the mediator and the mediator's supporting organization immune from liability. This conclusion was reached because of Minnesota's statutory provision making mediators immune from civil liability for actions within the scope of their positions as mediators.[47] The Schaffers argued the statute was inapplicable because the mistake the mediator made (not reducing the oral agreement to writing) was a ministerial error, and therefore should not be protected by an immunity created to shield judicial error. The court found that even if the recording of an agreement was a ministerial task, the mediator still escaped liability because his decision to terminate mediation was based upon "his independent judgment within the scope of his duties as a mediator....that no agreement could be reached between the parties."[48] The court found that the mediator's actions were discretionary, which the statute protected by granting immunity. Thus, Minnesota's statutory immunity provision was applied to shield a mediator from responsibility for his error in failing to accurately record the offer made in the session and potentially terminating mediation prematurely. There are no policy reasons why Canadian facilitative mediators should be granted immunity in similar situations.

As the foregoing cases demonstrate, American courts have granted various neutrals quasi-judicial status and quasi-judicial immunity, without any evidence demonstrating the need for such blanket protection, and in spite of evidence demonstrating negligent behaviour. Although American courts have granted immunity to neutrals working inside[49] and outside[50] court-connected mediation programs, Canadian courts and Canadian legislators should not follow suit. American immunity for case evaluators (as in *Wagshall*), award-granting "mediators" (*Mills*), negligent psychologists (*Howard*), and negligent mediators (*Schaffer*) should not be extended to Canadian facilitative mediators. Canadian facilitative mediators have sufficient protection from liability from "the limitation on liability provided by the level of proof required before recovery may be had through the common law."[51] "[M]ediation can flourish without special immunities. The common law leaves mediators exposed to liability in a very narrow range of circumstances."[52]

III. MEDIATOR LIABILITY IN CANADA

What are the circumstances in which Canadian mediators might be exposed to liability? As mentioned, mediators could attract civil liability for the unauthorized practice of law, breaching relevant statutes, breach of contract, or negligently performing their services.

A. *Unauthorized Practice of Law*

Drafting a mediation or settlement agreement may constitute the practice of law. If a mediator, in a purely facilitative fashion, captures the parties' own words of

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[47] *Ibid.*, subd. 7.

[48] *Schaffer, supra* note 45 at 3.

[49] *Wagshal, Mills* and *Schaffer, supra* notes 18, 36 and 45 respectively.

[50] *Howard, supra* note 39.

[51] *Gray, supra* note 17 at 1245.

[52] A. A. Chaykin, "The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation" (1986) 2 Ohio St. J. on Disp. Resol. 47 at 50.

agreement in written form, the mediator is not practicing law. The problem arises when mediators choose language and draft legally enforceable agreements themselves. "Once a facilitative mediator surpasses the secretarial role of memorializing the parties' agreement and makes editorial suggestions, the facilitative mediator is engaging in the practice of law."[53] Therefore, if a non-lawyer mediator drafts a mediation agreement, it is quite likely that the non-lawyer mediator has crossed the line into the arena of legal practice, and could be held liable for the unauthorized practice of law.

What if a mediator who is also a lawyer drafts a mediation agreement?[54] Lawyer-mediators who not only draft agreements, but also review them with an eye toward their legal sufficiency, have crossed the line and should be deemed to be practicing law.[55] In fact, because the participants to a mediation may expect such review from a lawyer-mediator, lawyer-mediators should exercise caution. All mediators should merely draft non-binding memoranda of understanding and allow counsel to use them as the bases for final, binding, mediation agreements.

In addition to drafting, advising can cause problems for mediators. If a non-lawyer-mediator provides legal advice during mediation it may constitute the unauthorized practice of law. "Laymen cannot practice evaluative mediation without practicing law and, therefore, should not be permitted to do so."[56] All mediators should ensure they do not dispense legal advice as that could be deemed the practice of law.

If a lawyer-mediator is deemed to be practicing law instead of mediating, for example, by advising disputants, all of the standards of practice, codes of ethics, duties to clients, and legal and fiduciary duties of lawyers can then be imputed to that mediator. Most mediators, and certainly all facilitative mediators, do not wish to be held to the

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[53] J. R. Schwartz, "Laymen Cannot Lawyer, But is Mediation the Practice of Law?" (1999) 20 Cardozo L. Rev. 1715 at 1746.

[54] Rule 4.07 of the *Rules of Professional Conduct* promulgated by the Law Society of Upper Canada discusses the duties of lawyers who function as mediators in Ontario. Rule 4.07 states: "A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue and (b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege." Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Canadian Cataloguing in Publication Data, 2000), Rule 4.07 at 73.
The Commentary to Rule 4.07 states: "In acting as a mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process.
Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of rule 2.04 (Avoidance of Conflicts of Interest) and its commentaries and the common law authorities.
Generally a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.
Where in the mediation process the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek a separate independent legal representation concerning the draft contract." *Ibid.*

[55] F. Furlan, E. Blumstein & D. N. Hofstein, "Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?" (1997) 14 J. Am. Acad. Matrim. L. 267 at 318.

[56] *Schwartz, supra* note 53 at 1746.

legal standards and duties of lawyers.[57]

At least one American psychologist and one Canadian paralegal have been accused of the unauthorized practice of law for work done in their mediation practices. In *Werle* v. *Rhode Island Bar Association*,[58] the court examined divorce mediation and civil rights in the context of the unauthorized practice of law in the United States.

Dr Werle was a psychologist and professor of psychology experienced in family mediation working on Rhode Island. Dr Werle's business was called "Werle Consultants Family Mediation Center" and its services were described in a brochure. According to the brochure, the Center provided "'impartial mediation and arbitration service for divorcing couples,' assisting them in reaching agreement 'upon division of property, support and child custody'."[59] The Rhode Island Bar Association and members of its former Committee on Unauthorized Practice of Law agreed that the brochure and the practice described probably violated Rhode Island's laws. They sent Dr Werle a letter requesting that he discontinue his divorce mediation business on the grounds that it involved him in the unauthorized practice of law. After reading the letter the Committee sent to him, Dr Werle believed that the Committee on Unauthorised Practice of Law would recommend prosecution if he did not cease his practice. The Attorney General for Rhode Island refused to issue an opinion as to whether Werle's practice constituted the unauthorized practice of law. So, Dr Werle stopped mediating and sued the Rhode Island Bar Association and members of the Committee claiming they violated his First and Fourteenth Amendment rights to earn a living.

The court held that even if it was the threat of prosecution that stopped Dr Werle from offering divorce mediation services, allegedly in violation of laws prohibiting the unauthorized practice of law by non-lawyers, the Bar Association and its Committee were absolutely immune from damage liability under statute. The court found that the defendants' conduct "fell within the scope of the immunity, whether absolute or qualified, that they must have enjoyed if they were the state actors that Dr Werle claims they were."[60] *Werle* demonstrates a clear intolerance in the United States for mediators who assist parties in tasks, such as division of property, traditionally done by lawyers.

The position in Canada is similar. In *R.* v. *Boldt*,[61] Ms Boldt, a paralegal working in Ontario, was accused of carrying on the unauthorized practice of law in contravention of the *Law Society Act*.[62] The court found that there was enough evidence to suggest that she may have been practicing law when she drafted a mediation agreement in a family dispute, and that it was proper to examine other alleged instances of her unauthorized practice of law to determine if a pattern existed.

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[57] Interestingly, mediators who work in association with lawyers in Ontario may start to be held to the legal standards and duties of lawyers. The Law Society of Upper Canada's updated *Rules of Professional Conduct* contain a new Rule. Rule 6.10 states: "A lawyer in a multi-discipline practice shall ensure that non-lawyer partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of his or her professional obligations.": *Law Society of Upper Canada, supra* note 53 at 101. In other words, if mediators and lawyers are associated together in multi-discipline practices, mediators will have to comply with the *Rules of Professional Conduct* governing lawyers in Ontario.

[58] 755 F. 2d 195 (1st Cir. 1985)[hereinafter *Werle*].

[59] *Ibid.* at 196.

[60] *Ibid.* at 200.

[61] [1996] O.J. No. 4723 (Ont. Ct. J.) online: QL (OJ) [hereinafter *Boldt*].

[62] R.S.O. 1990, c. L.8, s. 50(1).

> Now, it is completely appropriate for the crown [*sic*] to refer to other counts, where there may or may not have been convictions, to show a certain procedure being followed, to show a certain pattern, and say 'Look, Ms Boldt did it this particular time and we encourage the court to find her guilty of this particular count because here is what she has done, here is her practice over the years, using pamphlets and so on and so forth without getting into the details.' If it establishes a pattern, then the fact of course is relevant to shed some light on the situation which is currently before the court.[63]

Thus, similar fact evidence was used for corroboration in a case wherein the unauthorized practice of law was alleged. This case demonstrates that if a mediator is accused of the unauthorized practice of law, Canadian courts can examine the mediator's past behaviour and brochures in order to reach a decision. If a pattern of similar behaviour exists, a conviction for the unauthorized practice of law is more likely.

In *Boldt*, a new trial was ordered to determine "whether or not the conduct alleged is indeed the practice of law or acting as a lawyer."[64] As the decision of the court in the new trial is not yet known, Canadian non-lawyer mediators should operate under the assumption that drafting mediation agreements can constitute the unauthorized practice of law, which can lead to prosecution and liability.

B. *Statutory Breach*

One area of potential mediator liability that is rarely examined is statutory breach. While there are no reported complaints against Canadian mediators based upon statutory breach, there are provincial statutes, such as Ontario's *Business Practices Act*,[65] that could be relevant to the practice of mediation.[66] The *Business Practices Act* could be relevant because not only could a contravention of the Act lead to mediator liability, but breach of the *Business Practices Act* could be evidence of negligence.[67]

The *Business Practices Act* states that an unconscionable consumer representation is an unfair practice,[68] and that no person shall engage in an unfair

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[63] *Boldt, supra* note 61 at para. 13.

[64] *Ibid.* at para. 27.

[65] R.S.O. 1990, c. B.18.

[66] The *Consumer Protection Act* is also relevant to the practice of mediation. Section 38 of that Act stipulates that: "Where the Registrar believes on reasonable and probable grounds that a seller [mediators sell their services]...is making false, misleading or deceptive statements in any advertisement, circular, pamphlet or similar material, the Registrar may order the immediate cessation of the use of such material." *Consumer Protection Act*, R.S.O. 1990, c. C.31, s. 38. Section 39(1) stipulates that: "Every person who contravenes this Act...is guilty of an offence and on conviction is liable to a fine of not more than $25, 000 or to imprisonment for a term of not more than one year, or to both." *Ibid.* at s. 39(1). Thus, mediators who advertise in written form must be careful never to make false or misleading statements about their services, or they could face substantial fines.

[67] *Canada* v. *Saskatchewan Wheat Pool* [1983] 1 S.C.R. 205, (1983) 143 D.L.R. (3d) 9. In this case the Supreme Court of Canada held that breaching a statue, by itself, is not enough to found a tort action for negligence. However, proof of a statutory breach, causative of damages, may be *evidence* of negligence, because the statutory duty provides a handy test of what is reasonable in the circumstances.

[68] *Business Practices Act, supra* note 64 at s. 2.

practice.[69] In order to determine whether a particular consumer representation is unconscionable, and therefore an unfair business practice, regard must be had to whether the person making the representation:

> knows or ought to know,
>
> i. that the consumer is not reasonably able to protect his or her interests because of physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,
>
> ....
>
> v. that the proposed transaction is excessively one-sided in favour of someone other than the consumer,
>
> vi. that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable,
>
> vii. that he or she is making a misleading statement of opinion on which the consumer is likely to rely to his or her detriment,
>
> viii. that he or she is subjecting the consumer to undue pressure to enter into the transaction.[70]

Clearly, mediators could make unconscionable consumer representations and thereby engage in an unfair practice. For example, if a mediator knew that a disputant could not understand English, or ought to have known that the mediation agreement was one-sided, and that mediator concluded the mediation anyway, the mediator could be in breach of the *Business Practices Act.* If the transaction was inequitable, if the mediator made a misleading statement upon which the disputant relied, or if the mediator pressured a party to settle, that mediator could be liable to pay a large fine. "Every person who engages in an unfair practice....knowing it to be an unfair practice is guilty of an offence and on conviction is liable to a fine of not more than $25, 000 or to imprisonment for a term of not more than one year, or to both."[71]

The *Business Practices Act* also addresses what happens to an agreement entered into by a consumer induced to enter the agreement by an unfair practice:

> [A]ny agreement, whether written, oral or implied, entered into by a consumer after a consumer representation that is an unfair practice and that induced the consumer to enter into the agreement,
>
> (a) may be rescinded by the consumer and the consumer is entitled to any remedy therefor that is at law available, including damages; or
>
> (b) where rescission is not possible ...the consumer is entitled to recover the amount by which the amount paid under the agreement exceeds the fair value of the goods or services received under the agreement or damages, or both.[72]

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[69] S. 3(1).
[70] S. 2(2).
[71] S. 17(2).
[72] S. 4(1).

Thus, if a mediator facilitated a settlement between two parties, and it could be shown that one disputant settled due to reliance upon the mediator's opinion, that mediator would be in breach of the *Business Practices Act*, the settlement could be rescinded, and the disputant could receive damages. If a court of competent jurisdiction determined that the breach of statute also constituted evidence of negligence, the mediator could face tort liability as well. Clearly then, mediator liability for statutory breach, while yet untried, is an area worth further scholarly examination.

C. *Breach of Contract*

There have been no reported suits against Canadian or American mediators for breach of contract, despite the fact that " breach of contract claim has the best chances of success, but only if there is a contractual provision on point, and only if the plaintiff can show that the breach caused damage."[73]

"[L]egally enforceable standards for practice can be established by contract between the mediator and the mediation participants,"[74] and therefore, if mediators wish to escape liability, they should be sure to adhere to all of the terms in their contracts to mediate. "The greatest concern should be to ensure that parties are not promised more than the process can deliver.... Risks as well as benefits to the process should be clearly outlined in the mediation agreement and promotional material."[75] And, "[s]ince there can be no assurance that mediation will be better than the alternatives in any specific case, such representations should be avoided."[76] Simply stated, if a mediator makes an express or implied promise about the process or results of mediation, the mediator could be contractually liable if the process or results differ from what was promised.[77]

In addition to any promises mediators might make in their contracts to mediate, Canadian common law implies a term into all contracts that all services contracted for will be provided competently.[78] Esquibel notes that "even if it is not an explicit term of any such contract [to mediate], neutrality and impartiality are such a fundamental aspect of what the parties seek that they should be considered a part of the contract. It is akin to courts implying terms of good faith and fair dealing in contracts."[79] If a term to provide competent (or even impartial) service is implied in a contract to mediate, the mediator will be in breach of the contract if he or she fails to provide competent service. If a breach of a mediation contract occurs, the disputant, as always, is entitled to his or

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[73] Chaykin, *supra* note 52 at 76.

[74] A. E. Barsky, "A Lawyer's Guide to Mediation Use: An Unauthorized Sequel" (1993) 31 Fam. and Conciliation Cts. Rev. 376 at 378.

[75] MacLeod, *supra* note 4 at 8457.

[76] J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass Publishers, 1984) at 281.

[77] For example, with respect to confidentiality, many mediators promise, even in writing, that the mediation session will be completely confidential. This is simply not the case. See J. L. Schulz, "Mediation, Confidentiality, and Settlement Privilege: The Practitioner's Dilemma" (1999) 26:1 The Man. J. of Counselling 8.

[78] *Central Trust Co.* v. *Rafuse* [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481.

[79] A. K. Esquibel, "The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity" (1999) 31 Rutgers L. J. 131 at 168.

her provable damages.[80]

Finally, some mediation contracts seek to exempt mediators from liability. For example, waivers are used to protect acts and omissions unless the act or omission is fraudulent. However, it remains to be seen how effective a waiver of responsibility in a mediation contract might be.

D. *Negligence Liability*

Mediators, like any other Canadian service providers, can be liable in negligence if their conduct creates an unreasonable, foreseeable risk of harm to those to whom they owe a duty of care. There are three main elements of the tort of negligence: a duty of care must exist between the parties; there must be a breach of the standard of care; and provable damages must result.[81] Mediators are clearly in relationships of sufficient proximity to their disputants to ground a duty of care. There are also no policy reasons that would mitigate against establishing a duty upon mediators to take reasonable care not to injure disputants.[82] In fact, due to the reliance placed by disputants on mediators to help them, good policy strongly favours the establishment of a duty of care. However, due to the lack of uniform standards in the field, it is difficult to establish breach of the standard of care, as there is no agreement on what is *the* standard for proper mediation practice. Consequently, it can be difficult to prove a causal connection between breach of the standard of care and damages.[83] To date, no Canadian or American mediator has been held liable in negligence.

Despite the difficulties of standard and of proof, it is theoretically possible to hold mediators liable for their negligent conduct. Tortious liability for mediators could stem from a negligent act or from a negligent misrepresentation that caused economic loss. While tortious liability for mediator malpractice has yet to be successfully proved, grounding liability for mediator mistakes in negligence law is the best way to ensure quality of service and to compensate disputants for substandard mediator practice. Quite simply, civil liability may lead to improvements in mediation and in the quality of mediators.[84]

The best method of assuring the quality of the neutrals and the ADR services

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[80] If the disputant can prove that damages were caused by the conduct of the mediator, the disputant could obtain damages for expenses incurred as a result of the breach, out-of-pocket expenses incurred in preparing for the mediation, and any consequential losses. Boulle and Kelly, *supra* note 2 at 262.

[81] *M'Alister (or Donoghue)* v. *Stevenson* [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

[82] In *City of Kamloops* v. *Nielsen* [1984] 2 S.C.R. 2 at 10-11, 10 D.L.R. (4th) 641, Wilson, J. articulated the test to determine the existence of a duty of care: "(1) Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to [the plaintiff]? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?"

[83] Also, as economic loss alone has not traditionally grounded negligence liability, aggrieved disputants might have to show some sort of personal injury, emotional distress, or property damage, in addition to financial loss, in order to obtain recovery.

[84] See Chaykin, *supra* note 52 at 51. See also Boulle and Kelly, *supra* note 2 at 261 who note that civil liability would have a beneficial impact on the behaviour of mediators, on the quality of mediation services, and on the overall development of standards.

they provide is to make the neutrals civilly liable for their actions and allow them the common law defences that already exist. The alternative of simply including neutrals under the umbrella of absolute judicial immunity only adds to the confusion."[85]

Although American neutrals have been granted immunity for negligent conduct,[86] the existence of immunity has not stopped allegations of mediator malpractice in the United States nor complaints against mediators in Canada. An examination of emerging American and Canadian jurisprudence will begin to clarify what is and what is not acceptable mediator behaviour, and when a mediator might be held liable in negligence.

1. *American Jurisprudence*

The first American case to illuminate when a mediator might be held liable in negligence is *Lange* v. *Marshall*.[87] In that case, the defendant, a lawyer named Richard Marshall, was a close personal friend of the plaintiff, Elizabeth Lange, and her husband. The plaintiff and her husband decided to divorce after 25 years of marriage and each separately approached the defendant for legal advice. The defendant advised that he would not represent one against the other, but if they could agree on terms of dissolution, he would prepare the necessary papers to dissolve their marriage.

The plaintiff was ill with lupus and depressed due to her marital difficulties. She admitted herself to the psychiatric ward of a hospital. The defendant held a conference at the hospital with the plaintiff and Mr Lange and the terms of a settlement stipulation were agreed to. The plaintiff signed the stipulation the day she left the hospital, it was filed the next day, and the petition for dissolution was heard by a judge four days later. The judge took the matter under submission and stated that he would not enter judgment for thirty days. Within those thirty days the plaintiff had second thoughts and sought legal counsel. Ten months later, following considerable discovery, the matter was settled more favourably for the plaintiff. The plaintiff therefore sued the defendant in negligence. She alleged that the defendant failed to:

(1) inquire as to the financial state of her husband and to advise her;
(2) negotiate for a better settlement for her;
(3) advise her that she would get a better settlement if she litigated the matter; and
(4) fully and fairly disclose her rights as to marital property, custody and maintenance.[88]

The defendant admitted that he did none of the four things the plaintiff complained about and argued he had no duty to do them. He stated that because he undertook to work as a mediator, it would be improper for him to do any of the four things claimed to be negligence, as this would place him in the position of advocate for one party over

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[85] Gray, *supra* note 17 at 1249.

[86] See *Wagshal*, *supra* note 18 and *Howard*, *supra* note 39. See also *Schaffer*, *supra* note 45.

[87] 622 S.W. 2d 237 (Mo. App. 1981) [hereinafter *Lange*].

[88] *Ibid.* at 238.

the other.[89]

At trial, the jury rendered a verdict against the defendant mediator, holding him negligent and liable for $74,000. On appeal, the court neglected to decide whether or not the four allegations were evidence of negligence and whether they were duties owed by mediators. The court also did not address whether the defendant's role was even properly described as a mediator. Instead, the court assumed for the purpose of its decision that the defendant did have a duty to do the four things the plaintiff alleged and that he breached that duty. In other words, the court accepted that mediators must do the things Mrs Lange complained of, and that because the defendant did not, the defendant was negligent.

This is interesting from the perspective of liability for mediator malpractice. The fact that the Missouri Court of Appeal was prepared to say that those four failings on the part of someone purporting to be a mediator could be negligence runs counter to current understandings of proper facilitative mediation practice. The court's finding in *Lange* could mean that mediators are to advise disputants about financial issues, or about their legal rights. It even suggests that mediators might have a duty to help 'weaker' parties obtain better settlements. If mediators do not properly advise disputants or do not help disadvantaged parties, they could be held liable in negligence. These findings, if used as a starting point to help identify the legal duties of a mediator and what might constitute mediator malpractice, would radically alter the conventional understanding of facilitative mediation.[90]

Despite the fact that the court said in theory there was negligence, the court did not find that the plaintiff sustained any damage as a proximate result of the defendant's negligence[91]. Negligence alone does not mandate recovery–there must also be provable damages resulting from the negligence. In this case, the court said there were none. The plaintiff could not prove her damages: "There is no evidence in the record that had defendant done the things plaintiff contends he did not do, that these items of expense would not have been incurred in order for plaintiff to achieve the settlement she considered proper."[92] And, "[t]here is no evidence in the record that Ralph Lange would have voluntarily agreed to a settlement acceptable to the plaintiff had defendant done the things he admittedly did not do. If anything the evidence is to the contrary."[93]

Thus, because the plaintiff could not establish any damages proximately caused by the defendant's alleged negligence, she could not recover. Mrs Lange could not prove that 'but for' the mediator's alleged negligence, her litigation-related expenses would not have occurred. Chaykin has criticized this reasoning arguing that the court put the plaintiff to a more onerous burden of proof than tort law traditionally requires.[94] The court required Mrs Lange to prove her damages could not have resulted from any other cause. In most malpractice cases the plaintiff is only required to prove that her

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[89] A mediator who mediates a case where one party is not only receiving treatment for depression, but is actually in a psychiatric ward when the agreement is signed, is probably negligent in any event. Although this was not argued, "[i]t is arguable that a reasonably competent mediator would refuse to operate under such conditions and would instead postpone the mediation until the wife recovered." Chaykin, *supra* note 52 at 69.

[90] See *supra* note 1.

[91] *Lange, supra* note 87 at 238.

[92] *Ibid.* at 239.

[93] *Ibid.*

[94] Chaykin, *supra* note 52 at 69.

damages were reasonably likely to have resulted from the defendant's negligence. "It is one thing to prove that damages reasonably occurred as a result of a mediator's activity, it is another matter to demand proof that the damage did not result from any other possible cause. The *Lange* court exceeded traditional tort standards and required the latter."[95]

Although Mrs Lange was unable to meet her burden of establishing that the mediator's negligence caused her economic damages, *Lange* is important because it suggests four duties that, if not undertaken, could perhaps establish an action in negligence against a mediator. These four duties *might* be: (i) to inquire as to the financial state of both parties and to advise both parties accordingly; (ii) to negotiate for 'good' settlements for the parties; (iii) to advise a party when the mediator feels that party could obtain a better settlement if the matter was litigated; and (iv) to fully inform both parties of their legal rights. Further scholarly research and litigation will be necessary to determine not only whether these duties could exist in the Canadian mediation context, but *if* they could, what a 'good' settlement would be and how mediators could inform parties of their legal rights without committing the unauthorized practice of law.

Other suggestions of behaviour that could lead to tortious liability for mediators come from *Martino* v. *Family Service Agency of Adams County*.[96] In this case, the plaintiff and her husband sought marital counselling to improve their relationship. Illinois Family Service's chief executive officer, Ms Balke, contracted with the plaintiff to provide counselling services. However, Balke fell in love with the plaintiff's husband and engaged in a sexual relationship with him, which she failed to disclose to the plaintiff. Balke used confidential information obtained during the counselling sessions against the plaintiff's interests, and she did not terminate her counselling relationship with the plaintiff, despite the conflicts of interest.

The Appellate Court of Illinois noted that:

> Although the conduct alleged here was clearly improper, determination of the propriety of conduct of social workers and the relationship it might have to injury suffered by clients generally would be most difficult to ascertain. The damages a client might receive from the improper practice of social work are unlikely to be pecuniary in nature and extremely unlikely to be physical in nature....unintended "hurts" most of which we deem likely to be "slight hurts which are the price of a complex society."[97]

The Illinois Appellate Court was not prepared to find a tort of social worker malpractice. However, the court was willing to hold that the social worker was in breach of contract. The plaintiff had contracted for competent counselling but it was not provided. Transmitting confidential information revealed in counselling to others for use against the plaintiff's interests, and depriving the plaintiff of the opportunity to have an improved relationship with her husband were compensable breaches of contract.

While the *Martino* court was correct in providing recovery through contract law, it erred when it determined that no recovery was possible in negligence law. A

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[95] *Ibid.*

[96] 445 N.E. 2d 6, 112 Ill. App. 3d 593 (1982) [hereinafter *Martino*].

[97] *Ibid.* at 9.

determination of the propriety and reasonableness of social workers' conduct is no more difficult to ascertain than the reasonableness of any other service provider's conduct. Although the causal relationship between the conduct and the damages suffered might be difficult to prove, that does not mean a causal relationship does not exist. Equally, the reasonableness of a mediator's conduct and its causal relationship to damages may be ascertained. Finally, even if it were true that the damages sustained by a social worker's clients are unlikely to be pecuniary in nature, this is not true of the damages sustained by the disputants in a mediation. In mediation, damages are highly likely to be pecuniary in nature, and are thus more easily ascertainable.

Two years later, the same appellate court decided *Horak* v. *Biris,*[98] and it was then ready to go beyond contract law and find the tort of social worker malpractice. The scenario in *Horak* was remarkably similar to the scenario in *Martino*. In *Horak*, the defendant social worker held himself out as possessing expertise in counselling and in treatment of emotional and social problems. Yet the social worker mishandled the transference phenomenon common in counselling and had sexual relations with the wife during the course of the marital counselling. This time the Appellate Court felt that this stated a cause of action against the social worker for malpractice.

There was a duty owed to the plaintiff and subsequent breach of that duty. The nature of the therapist-patient relationship "gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity or conduct which carries with it a foreseeable and unreasonable risk of mental or emotional harm to the patient."[99]

The defendant was required to exercise the degree of skill and knowledge normally exercised by members of the social work profession practicing in the same field. The defendant did not do so. The defendant's conduct had a clear, foreseeable risk of causing the plaintiff harm. This conduct included: undertaking a course of treatment not in accordance with generally accepted standards of psychological, psychiatric and therapeutic care; failing to understand and guard against the transference phenomenon; allowing a course of treatment and conduct to continue that was of such a nature as to do great harm to the plaintiff's condition; failing to inform the plaintiff that a conflict of interest existed; and failing to terminate therapy as soon as he realized the conflict of interest. The court held that "[w]e have reviewed the *Martino* decision and agree with the circuit court that the tort of social worker malpractice should be recognized under the facts presented here."[100]

Interestingly, the court noted that although the defendant was a social worker, his field of practice closely resembled psychology. The court felt the defendant should have possessed "a basic knowledge of fundamental psychological principles."[101] When the defendant mishandled the basic psychological phenomenon of transference and became sexually involved with the plaintiff's wife, malpractice or negligence occurred. Arguing by analogy, should non-lawyer mediators possess basic knowledge of fundamental legal principles? If so, should non-lawyer mediators be liable in negligence if mishandling those principles leads to negative consequences and damages for disputants?

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[98] 474 N.E. 2d 13, 130 Ill. App. 3d 130 (Ill. App. 2 Dist. 1985) [hereinafter *Horak*].
[99] *Ibid.* at 17.
[100] *Ibid.* at 16.
[101] *Ibid.* at 18.

The *Horak* court noted that the Illinois legislature provides for revocation of social workers' licenses if they are incompetent and that there is a code of ethics adopted by the National Association of Social Workers that would abhor this social worker's conduct. Clearly then, certain minimum standards of professional conduct exist for social workers, contrary to the suggestion in *Martino* that the competence of a social worker's conduct would be difficult to ascertain. Similarly, mediator codes of conduct, such as the codes of the Society of Professionals In Dispute Resolution (SPIDR), the Arbitration and Mediation Institute of Canada (AMIC), Conflict Resolution Network Canada (formerly The Network: Interaction for Conflict Resolution) and the Canadian Bar Association (CBA), indicate that certain minimum standards of professional conduct exist for mediators. Thus, negligence liability could be provable in Canada.

Finally, the Illinois court noted that the public policy of the state could be gleaned from statute, and the statute suggested that mental health professionals should not be shielded from the consequences of their actions.[102] Neither should mediators be shielded from the consequences of their negligent actions, especially when disputants rely on them to help them resolve their disputes. More importantly, in fee-for-service mediation programs where attendance is mandated, such as in the Ontario Mandatory Mediation Program, mediators should not be able to escape liability for their negligent actions.

Statutory recognition of social work as a profession, coupled with policy reasons to avoid shielding social workers from the consequences of their negligence, led Illinois to recognize a tort of social worker malpractice. What is the Canadian position? Although there is no recognized tort of mediator malpractice in Canada, there are cases that point to behaviour expected from Canadian mediators.

2. *Canadian Jurisprudence*

Walters v. *Walters*[103] is reminiscent of the American case, *Lange*. In this case, Mrs Walters requested that Mr Carrier, an uncle and former business partner of her husband, act as mediator. Mr Carrier was to assist Mrs and Mr Walters to arrive at a final settlement of their property disputes. Mr Carrier agreed to act as mediator. Both parties signed and agreed to the draft agreement when it was brought to them individually by Mr Carrier. However, Mrs Walters argued that she only accepted the agreement because of representations made by Mr Carrier as to the value of Mr Walters' assets. Those values were incorrect.[104]

The court found that even if it accepted Mrs Walters' allegation that Carrier had undervalued Mr Walters' business by $150,000, other assets that were not real assets of the business had been included, to the extent of $250,000.[105] Therefore, the husband's business was not undervalued, but overvalued. The court found that Mr Walters did not hide or misrepresent the value of his assets to Carrier, and thus Carrier made no misrepresentations to induce Mrs Walters to sign the agreement. The mediated agreement between the parties was binding. "Nor did he [Mr Walters], as suggested by the plaintiff, sit silently by, knowing that his wife had executed an agreement which did not include a major asset. Indeed, he may well have overstated the value of his business

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[102] *Ibid.* at 19.
[103] (1985) 45 R.F.L. (2d) 245, [1985] O.J. No. 1159 (Ont. H.C.) [hereinafter *Walters*].
[104] *Ibid.* at 246.
[105] *Ibid.* at 247.

assets. It follows that Mr Carrier did not intentionally or innocently misrepresent to Mrs Walters the value of her husband's assets."[106]

This case suggests that if a mediator made misrepresentations to induce participation in mediation, that mediator would be negligent. However, the question of the mediator's duty is left unanswered. If Mr Walters had misrepresented the value of his business assets, would the mediator have had a duty to ascertain the correct value? If the mediator did not ascertain the correct value, but suspected the valuation was incorrect, would he be liable for malpractice if he mediated anyway? What is appropriate mediator behaviour?

As Canadian mediator liability jurisprudence is extremely limited, the answer to that question is difficult to ascertain. However, an examination of cases from the Ontario Mandatory Mediation Program begins to highlight mediator behaviour that courts will and will not tolerate. As dispute resolution jurisprudence grows and matures, the answers to the questions, 'what is inappropriate mediation behaviour?' and 'what is the standard of care for mediators?' will eventually become clear.

After a strong beginning in Ottawa, the Ontario Mandatory Mediation Program (OMMP) was instituted in Toronto on January 4, 1999, pursuant to Rule 24.1 of the Ontario *Rules of Civil Procedure.* The OMMP is a court-connected, case-managed, civil, non-family, fee-for-service mediation program.[107] It adopted the Canadian Bar Association - Ontario's (CBA-O) Model Code of Conduct for Mediators, and thus there is now a de facto 'standard' of conduct that mediators belonging to the OMMP roster must adhere to. Despite the fact that this 'standard-setting' was done indirectly, it is not as nefarious as it might seem. In mandated government mediation programs connected to the courts, at least minimal service and quality must be provided.[108]

Pursuant to Rule 24.1, a Local Mediation Committee is appointed in each jurisdiction where mandatory mediation is in place (presently only in Ottawa and Toronto). The Local Mediation Committee is responsible for selecting mediators to be on the roster, monitoring mediator performance, and handling complaints about mediators.[109] Complaints against OMMP mediators are to be made in writing to the Local Mediation Committee at any time during and up to 60 days after the last day of mediation.[110] The mediator is advised of the complaint and has 15 days to respond in writing to the complaint. The coordinator or chair of the Local Mediation Committee will try to facilitate informal resolution of the complaint and take appropriate action in

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[106] *Ibid.* at 248.

[107] According to Ms Heather Daley, Local Mediation Coordinator, OMMP, Toronto, for the period ending August 1, 2000 in Ontario (*i.e.* Toronto and Ottawa) there were 324 roster mediators and 2361 mediations concluded. Of those 2361 mediations, 944 (40%) were settled, 398 (17%) were partially settled, and 1019 (43%) did not settle.

[108] Cassondra E. Joseph, "The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity" (1997) 12 Ohio St. J. on Disp. Resol. 629 at 654 notes that the American *Federal Tort Claims Act* (FTCA) 28 U.S.C. § 1346(b), 2671 (1994) protects government employees from claims when they act within the scope of their employment. There is no equivalent Canadian legislation and OMMP mediators are not government employees. However, it would be interesting to discover whether OMMP mediators, who are independent contractors, would be assisted by the provincial government, for example through free legal representation, were they to be sued.

[109] Rule 24.1.07 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[110] "Complaints Procedure for Mandatory Mediation Program" (1999) 18 ADR Forum at 7.

a timely fashion.[111] If the problem persists after the complaint stage, disciplinary action is undertaken. As of yet, no disciplinary action against a roster mediator has been taken.[112] There have also been no complaints against Ontario lawyer-mediators made to the CBA-O.[113]

Some complaints against OMMP mediators have however reached the Ontario Superior Court of Justice. They have all been heard before Masters. These cases are the beginning of an Ontario dispute resolution jurisprudence and merit careful scrutiny for what they reveal about appropriate mediator behaviour. Over time, this jurisprudence may form the basis of a legal standard of care for mediators working in the OMMP or, perhaps, for all Ontario mediators.

An early case from the OMMP is *Royal Bank of Canada* v. *Karrys and Karatzoulis et al.*[114] This case recognizes that Local Mediation Committees are entitled to assume that when they place a mediator on the roster, "the mediator wishes to provide roster service in the judicial district for which the roster is maintained."[115] There is an obligation on mediators in the OMMP to provide mediation services where they are asked to, in cases where the mediator has been assigned. In other words, if the mediator is not selected, but rather randomly assigned to mediate a court-connected case, that mediator is required to mediate in that judicial district. The Master also made it clear that a mediator who is assigned to mediate is not entitled to charge any extra fees for expenses. It is assumed that the mediator will provide mediation services according to the Rule and the fee regulation. It is only when the mediator is selected by the parties that it is open to him or her to negotiate for extra reasonable expenses if the parties so consent.

In *Royal Bank of Canada* the mediator was not allowed to name Brampton, Ontario as the place for mediation when the judicial district was Toronto. "[U]nless the parties agree otherwise, the place named for the mediation should be in the judicial

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[111] 'Appropriate action' and 'timely fashion' are unfortunately not defined. The complaints procedure that the OMMP follows is currently being updated. A more detailed version of the procedure will be available later in 2001.

[112] On April 18, 2000, Ms Heather Daley, Local Mediation Coordinator, confirmed by telephone that no disciplinary action has been taken against any roster mediators in Toronto. However, in case of substandard practice, professional liability insurance coverage in the amount of $1 million is a requirement to be a roster mediator. Many roster mediators have obtained that coverage from an American insurance company called Complete Equity Markets. Ms Betsy Thomas of Complete Equity Markets indicated that the company has not handled any complaints against Canadian mediators. Complete Equity Market's Canadian counsel, Mr John Holding of Borden, Ladner, Gervais in Toronto, confirmed that there were no claims on any Canadian policies as of June 6, 2000.

[113] Ms Leslie Macleod, chair of the ADR subsection of the CBA-O, stated that as of June 2000 the CBA-O has not received any formal complaints about lawyer-mediators. Neither did any complaints against Ontario lawyer-mediators come up in the Law Society of Upper Canada's disciplinary database. However, Boulle and Kelly, *supra* note 2 at 260 claim that the CBA-O has received a number of complaints from both disputants and counsel about the conduct of mediators. Unfortunately, Boulle and Kelly do not provide any information or evidence to support this claim.

[114] (July 21, 1999), Toronto 99-CV-165461CM (Ont. S.C.J.), online: LEXIS (Canada, CANCAS) [hereinafter *Royal Bank of Canada*].

[115] *Ibid.* at 3-4.

district for which the roster is maintained."[116] The court noted that the parties were not in default for failing to attend the session. The naming of a place in another judicial district without the parties' consent was not reasonable and the mediator's notice was therefore invalid. "Under those circumstances, the defendants are not in default for failing to appear at the mediation and I decline to order them to pay the mediator's cancellation fee."[117] The mediator did not receive a cancellation fee because of his improper action in naming an out of jurisdiction city as the location of the mediation. While not labeled negligence per se, this represents censure of the mediator. Damages and liability were not assessed, but the Master did decide that a pecuniary consequence would attach to a mediator who acted inappropriately.

Riviera Properties Ltd. v. *The Royal Bank of Canada and 1013164 Ontario Ltd.*[118] is similar to *Royal Bank of Canada*, but stemmed from an action commenced in Ottawa. Mr Bhaloo was appointed to conduct the mediation. Bhaloo, although based in Toronto, was on the Ottawa roster of mediators, and was chosen from the Ottawa roster. However, Bhaloo scheduled the mediation session to take place in Toronto. The plaintiff indicated he would proceed in Ottawa provided that Bhaloo would not charge for his time and travel expenses. Bhaloo was not amenable to those terms and instead suggested that the mediation take place in Toronto by agent or that the mediation be conducted by telephone.[119]

The Master disagreed with the mediator's choice of location. The Master noted that Mr Bhaloo was chosen because he was on the Ottawa roster, and by choosing Toronto as the location of the mediation, Bhaloo chose a place outside the judicial district for which the roster is maintained.

> The proper and only place for mediation to be conducted for a proceeding commenced in Ottawa is the Regional Municipality of Ottawa-Carleton. A Toronto based mediator who wishes to appear on the roster of mediators in Ottawa does so on the basis of his or her preparedness to provide mediation services in Ottawa....In the absence of any consent by the parties, the court appointed mediator cannot name another place of mediation.[120]

While not finding the mediator liable for any recognised form of malpractice, the Master nevertheless indicated that the mediator's conduct was improper. The Master found that "[t]he notice given by Mr Bhaloo fixing the place of the mediation as Toronto is invalid. In addition, it was not open to the court-connected mediator to permit the defendant's client to appear with an agent or to allow the mediation to take place by telephone."[121]

Thus, the court determined that mediators cannot select alternative locations and cannot conduct mediation through agents or over the telephone. By explaining that the mediator had no authority to deviate from Rule 24.1.11(1), which mandates physical attendance, the court described improper mediator conduct. The more explications of inappropriate conduct articulated in cases, the closer we come to an understanding of what appropriate mediator conduct should be. Armed with this information, we will be

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[116] *Ibid.* at 4.

[117] *Ibid.*

[118] (October 28, 1999), Toronto 99-CV-9976 (Ont. S.C.J.), online: LEXIS (Canada, CANCAS) [hereinafter *Riviera Properties*].

[119] *Ibid.* at 2.

[120] *Ibid.* at 3

[121] *Ibid.* at 5.

able to determine when mediators fall below the appropriate standard of conduct.

In *Baliotis* v. *1093707 Ontario Ltd. et al.*,[122] mandatory mediation was ordered and a roster mediator, Mr Bazar, was assigned. The plaintiff submitted its list of issues to the mediator, but did not attach a copy of the pleadings. The mediator filed a certificate of non compliance pursuant to Rule 24.1.10(5), certifying that the plaintiff was in breach of the Rule for failing to file the statement of issues and pleadings seven days in advance of the scheduled mediation date. The mediator then contacted the plaintiff's lawyer to inform him of the omission. The plaintiff at that point sent pleadings to Mr Bazar. The mediator then required both parties to pay a deposit of $428 each. The defendant paid but the plaintiff did not. Finally, Mr Bazar required that the mediation be conducted in Oakville, Ontario, notwithstanding that he was chosen from the Toronto roster. The parties were not agreeable to holding the mediation in Oakville and the mediation was cancelled. The mediation agreement between Mr Bazar and the parties was silent with respect to cancellation fees, so Mr Bazar retained the $428 deposit he received from the defendant in lieu of a cancellation fee.

In her January 14, 2000 endorsement the Master found that, "it is inappropriate for a mediator on the Toronto roster to require the parties to travel out of Toronto to conduct a mediation, unless the parties consent to such other venue."[123] In light of the disagreements between the parties and the mediator, the Master ruled that the mediation "shall be conducted before a different mediator selected from the Toronto roster."[124] In her reasons of February 14, 2000, further to the January endorsement, the Master noted that:

> Counsel were concerned that the mediator may have lost neutrality. The parties were not prepared to proceed with mandatory mediation with a mediator with whom they had engaged in conflict. In the circumstances it is appropriate that a different mediator conduct the mediation in this matter and I so ordered in my endorsement of January 14, 2000.[125]

These reasons represent further censure of a Canadian mediator. The mediator was told that his actions were inappropriate, and he was removed from the case. Unfortunately, the Master did not elaborate on the alleged loss of neutrality. While mediators' procedural shortcomings are beginning to be censured, no Canadian court has yet addressed a key substantive issue such as mediator liability for lack of neutrality.

In *Baliotis,* the Master noted that the Code of Conduct in place for roster mediators stipulates that mediators shall "advise parties in advance of the mediation of any fees and expenses for services in excess of the services covered by the fee regulation."[126] Thus, in order for there to be a cancellation fee in any given case, "there must first be an agreement or obligation to pay cancellation fees in the event that the mediation does not proceed."[127] Mr Bazar made no contractual arrangements with the parties for a cancellation fee and never mentioned such a fee to either of the parties. Also, the defaulting party was the plaintiff, and as such, only the plaintiff would be

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[122] (January 14, 2000), Toronto 99-CV-162060CM (Ont. S.C.J.).

[123] *Ibid.* at 1.

[124] *Ibid.*

[125] *Baliotis* v. *1093707 Ontario Ltd. et al.* (February 14, 2000), Toronto 99-CV-162060CM (Ont. S.C.J.), online: LEXIS (Canada, CANCAS) at 3 [hereinafter *Baliotis*].

[126] *Ibid.* at 5.

[127] *Ibid.* at 6.

liable to pay any cancellation fee, had one existed. However, on the facts of the case, the mediator retained the defendant's deposit as his cancellation fee. This was clearly wrong as the plaintiff was the one who had not complied. The Master correctly held that:

> Mr Bazar is required to return the entire deposit to defendant's counsel and pursue the plaintiff for any cancellation fee to which the mediator could establish a contractual entitlement....[M]ediators who seek to be listed on the roster, and who agree to abide by the conditions of listing, must abide by the fee regulation.[128]

The decision in *Baliotis* highlights inappropriate mediator behaviour and suggests that mediators cannot normally obtain cancellation fees without a contract. However, despite the fact that the mediator's behaviour was inappropriate, the Master demonstrated that Ontario court support for roster mediators is high. The Master found that the mediator, despite his inappropriate behaviour, was still entitled to a cancellation fee. "In recognition of the efforts of mediators in circumstances where mediations are cancelled, the Court has, on numerous occasions, ordered the parties to pay costs even in circumstances where a mediator has failed to protect himself or herself with a cancellation policy clearly communicated in advance to the parties."[129] Mr Bazar was required to refund $228 of the $428 deposit to the defendant, and the plaintiff was ordered to reimburse the defendant $100, representing the plaintiff's portion of the cancellation fee. As a result, Mr Bazar received a $200 cancellation fee.[130]

Martins v. *Ali*[131] is the final OMMP case that provides insight into mediator liability for negligence. In *Martins,* the plaintiff's solicitor of record did not attend the mediation. Another lawyer attended instead, and that lawyer appeared neither briefed nor instructed. The mediator decided that this constituted default and raised the question

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[128] *Ibid.*

[129] *Ibid.* at 7.

[130] A month later, on March 30, 2000, Mr Bazar asked for a variation of the order (*Baliotis* v. *1093707 Ontario Ltd. et al.* (March 30, 2000)), Toronto, 99-CV-162060CM (Ont. S.C.J.). Although he was not a party to the action, the Master agreed to hear from him. (Interestingly, case conferences such as *Baliotis* are normally held in the absence of the mediator. Surely roster mediators would appreciate being included in court proceedings involving their performance as mediators?) Mr Bazar sought compensation at $180 per hour for 5.75 hours of preparation time, for a total of $1035 plus G.S.T. However, he did not provide any evidence to support a finding that there had been a contractual agreement between the parties providing for such compensation, nor that the parties had been advised of a cancellation fee in advance. As a result, the Master stated, "no new evidence has been provided by Mr Bazar that would lead me to change my previous findings." (*Baliotis*, March 30, 2000 at 2). The January order therefore remained unchanged. "Hopefully Mr Bazar has learned from this experience and is now more precise when making his arrangements with litigating parties in Rule 24.1 cases." *Ibid.* This can be compared to *Ionescu* v. *Harrison* (January 26, 2000), Toronto 99-CV-174626CM (Ont. S.C.J.). In *Ionescu* at 1, the Master simply ordered that a mediation scheduled for one date be adjourned to another and "the parties shall pay the mediator's reasonable cancellation fee as a term of this adjournment if it requested by the mediator." It might therefore be possible for a roster mediator to request a reasonable cancellation fee, even after cancellation, without a provision in the mediation agreement, and still obtain the fee.

[131] (December 17, 1999), Toronto 99-CV-170916CM (Ont. S.C.J.) [hereinafter *Martins*].

"as to whether or not the plaintiff participated in good faith in the mediation."[132]

It was argued that Rule 24.1 carries with it the obligation to negotiate or bargain in good faith. While the court found such a suggestion "interesting", the Master did not feel prepared "to rule on the extent of such a duty or to attempt to define it further."[133] Instead, the Master ordered each party to pay his or her share of the mediation since neither party was in default under Rule 24.1.

This decision raises the question whether a mediator has a duty to ensure that disputants participate in mediation in good faith. Does a mediator breach her required standard of conduct if she does not determine if all parties are participating in good faith? What if a mediator proceeds while suspecting less than good faith bargaining on one side? The court did not address these questions, but rather noted that:

> Allowances must be made for the rule being in its infancy. What is clear in this case is that neither party believed this particular mediation at this particular stage would be successful and neither party took steps which would have been necessary to have a successful mediation. This is unfortunate because the clients wound up paying for a proceeding which was futile.[134]

What does this suggest about the mediator's responsibilities? Does the mediator have a duty to ensure that mandatory mediation is not futile? Is it up to the mediator to persuade parties that mediation will be successful? Surely mediators set themselves up for liability if they convince parties that mediation will be successful, and then it is not? *Martins* and the other cases from the Ontario Mandatory Mediation Program demonstrate that it is easier to ground mediator liability in procedural matters such as attendance and cancellation fees, than it is to establish mediator fault or negligence in substantive matters such as neutrality and good faith participation.

IV. CONCLUSION

It is clear that there are no easy answers to the questions surrounding liability for mediator misconduct. While there is no real evidence in Canadian case law that mediators are making egregious mistakes, there is a small dispute resolution jurisprudence emerging. From the American and Canadian cases we can begin to piece together a picture of what improper mediator practice might be. Certainly, the unauthorized practice of law is not proper mediation practice in the Canadian facilitative mediation context[135] and mediators who make misrepresentations to induce disputants to sign agreements could be found negligent.[136]

Cases from the Ontario Mandatory Mediation Program also provide guidance. Several cases stipulate that it is inappropriate for roster mediators to provide roster services outside the judicial district for which the roster is maintained.[137] OMMP mediators who are assigned by the court to mediate must be prepared to go to the proper

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[132] *Ibid.* at 1.
[133] *Ibid.*
[134] *Ibid.* at 2.
[135] *Boldt*, *supra* note 61.
[136] *Walters*, *supra* note 103.
[137] *Royal Bank of Canada*, *supra* note 114; *Riviera Properties*, *supra* note 118; and *Baliotis* v. *1093707 Ontario Ltd. et al.*, *supra* note 122.

judicial district and conduct the mediation session at their own expense[138]. It is improper for a roster mediator to waive attendance requirements or allow parties to participate by telephone,[139] and roster mediators should not charge cancellation fees unless they have provided for such fees by contract.[140] The jurisprudence indicates that all of these behaviours fall below acceptable standards of practice for OMMP mediators.[141]

Certainly complaints mechanisms, beyond whatever is available in mediators' underlying professions, are needed; the "after the fact control method" of malpractice suits is not enough.[142] However, "[f]ollowing other professions, ethical mandates are often insufficient and, therefore, the additional safeguards provided by civil liability are necessary."[143] The most promising area of civil liability for mediator misconduct is negligence liability as it is the best way to hold mediators responsible for errors committed in the facilitative mediation process. However, in order to prevent the stifling of the field that civil liability might engender, and to encourage the creativity that is the hallmark of mediation, it is crucial that those who regulate or adjudge mediators do so with imagination. "[A] modest threat of liability may represent a salubrious middle ground between permitting unbridled mediator discretion on the one hand and chilling mediation entirely on the other."[144]

This article critically examined emerging American and Canadian dispute resolution jurisprudence with a view to determining what Canadian courts might deem inappropriate mediator behaviour. Though minimal, this jurisprudence will foreshadow future decisions on mediator liability for the unauthorised practice of law, breach of statute, breach of contract, and negligence. Many questions remain however. Who will determine the appropriate standard of care for mediators? Upon what theoretical basis will such a standard be created? Will it be determined in accordance with customary practice? Or, since mediator codes of ethics and codes of conduct abound, will they form the basis of any legal standard of care? Ethics and liability are not the same thing however, and thus it seems probable that emerging dispute resolution jurisprudence together with custom will provide the map for mediator liability in Canada. Who will regulate this and who will pay for it remain, along with many other questions, unanswered.

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[138] Only if the parties *choose* their own mediator and establish a contractual relationship with her or him may the mediator recover her or his expenses in excess of the fee regulation.

[139] *Riviera Properties*, *supra* note 118 at para. 8.

[140] *Baliotis*, *supra* note 122 at para. 33

[141] Cases from the OMMP also suggest the possibility of holding the OMMP's Local Mediation Committee and Local Mediation Coordinators vicariously liable for roster mediators' negligence. For example, could the Committee and Coordinators be held liable for defects in individual mediation sessions that are a result of program priorities, such as goals of quantity over quality of settlement? It is more likely, however, that the provincial government's endorsement of mediation will incline the law to protect Local Mediation Committees and Coordinators

[142] K. K. Kovach, *Mediation: Principles and Practice* (St. Paul: West Publishing Co., 1994) at 218.

[143] Esquibel, *supra* note 79 at 172.

[144] "The Sultans of Swap" *supra* note 15 at 1894.