

Mediator Liability 23 Years Later: The “Three C’s” of Case Law, Codes, & Custom

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Article abstract

In 2001, the *Ottawa Law Review* published my review of Canadian and American cases that considered and rejected negligence liability for mediator malpractice. Now, 23 years later, I have reviewed the case law from Canada, the United States, England, Australia, New Zealand, and South Africa and found that courts are still not holding mediators liable, even where their conduct is negligent. The case law states that mediators have a duty to act impartially, without conflicts of interest, without bias, and in a manner that allows parties' rights to self-determination. However, there are no decisions that definitively outline a duty of care for mediators. Instead, courts occasionally revoke agreements reached in mediations where the mediator behaved poorly. I advocate for standards of care to be created so that in the future, mediators whose practice is substandard can be found negligent. My argument is that by combining the “three C’s,” case law (case law), mediator codes of conduct (codes), and the tort law principle of custom (custom), a future common law court will be able to articulate legal standards of care for mediators.

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EN 2001, *LA Revue de droit d’Ottawa* a publié mon examen des décisions au Canada et aux États-Unis au cours desquelles la possibilité de la responsabilité pour négligence en cas de faute professionnelle du médiateur ou de la médiatrice [ci-après « médiateur »] a été examinée et rejetée. Aujourd’hui, 23 ans plus tard, j’ai fait l’analyse de la jurisprudence au Canada, aux États-Unis, en Angleterre, en Australie, en Nouvelle-Zélande et en Afrique du Sud, et j’ai constaté que les tribunaux ne tiennent toujours pas les médiateurs responsables, même dans les cas où leur comportement était négligent. La jurisprudence indique que les médiateurs ont le devoir d’agir impartialement, sans conflits d’intérêts, sans parti pris et de manière à respecter le droit à l’autodétermination des parties. Cependant, il n’y a aucune décision stipulant clairement une obligation de diligence pour les médiateurs. En revanche, les tribunaux révoquent parfois des accords conclus dans le cadre de médiations où le médiateur s’est mal comporté. Je plaide pour la création de normes en ce qui concerne la diligence afin qu’à l’avenir, les médiateurs dont les pratiques ne sont pas conformes aux normes puissent être jugés comme négligents. Mon argument est qu’en combinant les « trois piliers centraux », soit la jurisprudence actuelle, les codes de conduite des médiateurs, et le principe de la coutume en droit de la responsabilité civile délictuelle, un tribunal de common law à l’avenir sera en mesure de définir des normes juridiques de diligence pour les médiateurs.

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Mediator Liability 23 Years Later: The “Three C’s” of Case Law, Codes, & Custom

Jennifer L. Schulz*

I. INTRODUCTION

In 2001, I published an in-depth study of mediator liability in Canada and the USA in the *Ottawa Law Review*.¹ While there were cases where mediators were sued, none were successful and no mediators were held liable.² Halsbury’s Laws of Canada refers to my 2001 article under the heading “Mediator Liability” to describe the situations in which tortious liability could attach to mediators, noting it has not yet happened.³ Sarah R. Cole et al. came to the same conclusion in their book: “[a]lthough it has been over twenty years since the first edition of this treatise was published and noted no reported cases of mediator liability, there continue to be few cases even recognizing a cause of action for mediator malpractice.”⁴ James R. Coben and Peter N. Thompson’s 1999–2007 survey of American case law concluded, “[t]here were no successful mediator misconduct

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1 Jennifer L Schulz, “Mediator Liability in Canada: An Examination of Emerging American and Canadian Jurisprudence” 32:2 *Ottawa L Rev* 269.

2 Only one reported case described a verdict against a mediator for improper mediation conduct, but that jury verdict was overturned on appeal due to insufficient proof of proximate causation (see *Lange v Marshall*, 622 SW (2d) 237 (Mo App Ct 1981)).

3 Halsbury’s Laws of Canada (online), *Alternative Dispute Resolution*, “Private Dispute Resolution: Mediation: Mediator’s Liability” (II.2(4)(a)) at HDR-8 “Breach of Contract” (2022 Reissue).

4 Sarah R Cole et al, *Mediation: Law, Policy and Practice*, 2020–2021 ed (Thomson Reuters, 2021) at 191–92.

cases.”⁵ Similarly, in England, there were no cases “where a claim has been made against a mediator for breach of contract, misrepresentation, negligence or breach of fiduciary duty.”⁶

Now, 23 years later, I have decided to examine the case law again to see if there have been any significant developments. I initially hoped my re-evaluation of the law around mediator liability would happen 20 years later—a nice round number. However, the COVID-19 pandemic intervened, so this research came three years later. This time, I have widened my research beyond Canada and the US to include England, Australia, New Zealand, and South Africa. My method was simple. Together with student research assistants, I found every case in all six countries wherein a mediator or conciliator was sued. I did not include cases of lawyers being sued for their conduct in mediation or cases of arbitrators being sued. I read all of the cases and recorded the results in this article, highlighting the cases that were most instructive or had, to my mind, the most egregious facts. My work was made easier by the fact that there are not many cases and all six of the countries I researched employ the common law of torts and have similar systems of negligence liability. However, no court in any of these countries has ever outlined a duty of care for mediators, or a definitive standard of care to which mediators must adhere. In short, the courts have failed to describe mediator liability clearly. To this day, there are no cases of successful negligence liability claims against mediators. This is because four barriers to establishing mediator liability remain: (i) mediator immunity, both contractual and legislative, especially in the USA;⁷

5 James R Coben & Peter N Thompson, “Mediation Litigation Trends: 1999–2007” (2007) 1:3 World Arb & Mediation Rev 395 at 405.

6 Atkin’s Court Forms, vol 4, 2nd ed (London: LexisNexis, 2023) “Practice: Mediation: Mediation Training, Accreditation and Liability of Mediator” at 45. One interesting English case that settled out of court is *Clay v Lenkiewicz Foundation* (Plymouth County Court 9PL05124), where the plaintiff argued that the mediator misrepresented the value of a painting which was to be transferred by the disputant (see Alexander Learmonth & Stephen Trahair, “Can You Trust a Mediator?” (2011) 161:7482 New LJ 1288 at 1288).

7 See e.g. *Chodosh v Trotter*, 2017 Cal App Ct Unpub LEXIS 6237 (4th Cir 2017). In this case, the retired judge-mediator with JAMS, Inc., working with unrepresented parties, told the plaintiff (i) that the settlement being offered by the defendant was a gift, (ii) that he would personally tell the judge that the plaintiff refused to settle, and (iii) that the plaintiff was the reason why a settlement was not reached. The Court held that mediation confidentiality and California’s Evidence Code did not permit the judge to testify or properly deny the allegations. As a result, the Court extended absolute quasi-judicial immunity to the mediator and the mediator was protected from liability. Court-connected mediators in Saskatchewan also enjoy immunity (see *The Queen’s Bench Act*, RSS 1978, c Q-1, s 54.4, as re-enacted by *The Queen’s Bench Act*, 1998, SS 1998, c Q-1.01; see also *The Queen’s Bench Act*,

(ii) mediation confidentiality;⁸ (iii) no agreed upon standard of mediator care; and (iv) proving causation or damages make it very difficult to establish mediator malpractice. As David Jesser notes:

If a disgruntled party has had its own legal advisers or is told to seek independent legal advice on the proposed agreement and the mediator does no more than question the basis for entrenched positions, it will be next to impossible for an aggrieved party to satisfy the court that there has been any causal link between any alleged loss or damage sustained and the actions of the mediator.⁹

Additionally, as Michael Moffitt points out, “mediation parties dissatisfied with the quality of a mediator’s services retain a no-cost or low-cost, unilateral option of terminating the unsatisfactory mediation.”¹⁰ Ending mediation typically prevents (further) injury. In fact, disputants should be counselled to take steps to mitigate their damages by avoiding injury or continued injury by terminating mediation. Those who voluntarily choose mediation often do so to avoid the higher monetary and time costs of litigation. If they become unhappy with mediation and choose the low-cost option of terminating it, it is unlikely they would then pursue costly litigation. Moffitt

1998, SS 1998, c Q-1.01, s 44, as re-enacted by *The King’s Bench Act*, SS 2023, c 28). Court-appointed mediators in Queensland, Australia also enjoy immunity, where “[p]rivate mediators usually attempt to incorporate this same immunity contractually” (see David Jesser, “Mediator—Not Legal Advisor” (2003) 14:3 *Australasian Dispute Resolution J* 211 at 2018). Mediators who mediate human rights cases are immune from liability in Ontario (see *Hazel v Ainsworth Engineered Corp*, 2009 HRTO 2180 at para 96). There is no mediator immunity in England (see Penny Brooker, “Mediator Immunity: Time for Evaluation in England and Wales?” (2016) 36:3 *LS* 464 at 465).

- 8 Mediation confidentiality comes from the common law, statutes, and contract law. See e.g. *Cardillo v NN Life Insurance Company of Canada et al*, 2005 MBQB 281 (“[t]o conclude, discussions at and materials filed in the course of a mediation must be kept absolutely confidential. Any step away from this principle should be resisted” at para 36). See also *Provost v Regents of University of California*, 135 Cal Rptr (3d) 591 (Cal App Ct 2011) [*Provost*]. Here, the plaintiff contended that the mediator said that the Regents would file criminal charges if the stipulated settlement was not signed, so the plaintiff signed the settlement. The plaintiff argued mediator coercion or duress but was not allowed to provide evidence of coercion or duress because California mediation confidentiality prevents disclosure of what happens in mediation sessions.
- 9 Jesser, *supra* note 7 at 221. However, the fact that most mandatory mediators carry professional liability insurance is some evidence that errors and omissions can likely be defined (see Jennifer L Schulz, “Mediator Liability: Using Custom to Determine Standards of Care” (2002) 65:1 *Sask L Rev* 163 at 177 [Schulz, “Using Custom”]).
- 10 Michael Moffitt, “Suing Mediators” (2003) 83:1 *BUL Rev* 147 at 188.

convincingly argues that potential plaintiffs need to demonstrate one of three things to proceed in negligence actions against mediators:

The fact that a party remained in the mediation signals that the party deemed the mediator's conduct to be satisfactory—a contemporaneous judgment inconsistent with a subsequent assertion of negligence. In order to maintain an action for negligence in this circumstance, therefore, the complaining party should have to demonstrate one of three things: (1) the mediator's negligence was not perceivable at the time of the mediation, (2) the party's ability competently to assess the mediator's actions was somehow impaired, or (3) the mediator denied the party the ability to walk away from the mediation. Absent one of these factors, a party who remained in the mediation should be precluded from recovering on a [c]ustom-[b]ased negligence claim against the mediator.¹¹

In section three of this review of case law since 2001, several disputants have argued Moffitt's second and third points, namely that their ability to assess whether the mediator's actions were substandard was impaired by their own situation, or that the mediator forced them to continue the mediation.¹² However, those plaintiffs were still unsuccessful in their negligence suits.

My research demonstrates that courts are not holding mediators liable, even where their conduct is, in my opinion, negligent. Instead, courts are occasionally revoking agreements reached in mediations where the mediator behaved poorly. So, while mediators are not being reprovved, their agreed-upon settlements are sometimes being set aside. In this article, I therefore not only review the case law but also advocate for standards of care to be created for mediators so that in the future, mediators whose practice is substandard can be found negligent. My argument is that by combining what I call the “three C's,” case law, mediator codes of conduct (codes), and the tort law principle of custom (custom),¹³ a common law court will be able to articulate legal standards of care for mediators.

11 *Ibid* at 196.

12 *Ibid*.

13 Schulz, “Using Custom”, *supra* note 9. My argument that custom will help courts establish legal standards of care for mediators is cited with approval by Danish scholar, Andreas Ehlers, and Hong Kong scholar, AKC Koo. See Andreas Ehlers, “Blaming the Unblameable? On the Liability of Mediators” (2014) 1 *Nordic J Commercial L* 1 at 15–16; and by Hong Kong scholar AKC Koo, “Exploring Mediator Liability in Negligence” (2016) 45:2/3 *Comm L World Rev* 165 at 175.

II. WHAT WE KNOW

Due to research already conducted, we know some things about what mediators can and cannot do. These things are consistent across all six jurisdictions I researched. For example, we know that mediators should not be held to the same standard of care as lawyers, even if the mediator is a lawyer.¹⁴ In *Chang's Imports, Inc v Srader*, the United States District Court for the Southern District of New York noted that “[t]here is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties. However, a mediator cannot be held to a higher degree of skill and care than that commonly exercised by ordinary members of the relevant mediation community.”¹⁵ This accords with the negligence law principle that people providing services must exercise the same degree of skill and care that a reasonable service provider would and that service providers should be compared with like service providers when making assessments about breaches of the standard of care.¹⁶ Since there are so many different schools and styles of mediation, we know that there is no way to develop a single standard to measure effectively the performance of all mediators.¹⁷ Therefore, courts will have to employ evidence of custom to develop different standards of care for different mediation contexts.¹⁸

We also know problems arise when mediators wear more than one hat. I previously identified this in the Canadian context in the *Varghese v Landau* decision.¹⁹ In *Varghese*, the divorcing parents employed Landau, a registered psychologist, as a mediator.²⁰ Landau was also the court-appointed assessor in their case and the couple’s son’s counsellor.²¹ The Ontario court found it was highly problematic that Landau served in all three roles because mediators must respect confidentiality, whereas guardians and court assessors serve as officers of the court and must often

14 James R Coben & Peter N Thompson, “Disputing Irony: A Systemic Look at Litigation about Mediation” (2006) 11 Harv Negot L Rev 43 at 99 [Coben & Thompson, “Disputing Irony”].

15 216 F Supp (2d) 325 (SD NY 2002) at paras 9–10 [*Chang's Imports*].

16 *McCormick v Marcotte*, 1971 CanLII 52 (SCC).

17 Schulz, “Using Custom”, *supra* note 9 at 168.

18 *Ibid* at 169.

19 2004 CanLII 5084 (ONSC) [*Varghese*]; Jennifer L Schulz, “Civil Liability for Mediators” in AJ Stitt, ed, *Alternative Dispute Resolution Practice Manual* (Toronto: CCH Canadian Limited, 2007) at 8561–80.

20 *Varghese*, *supra* note 19 at para 9.

21 *Ibid* at paras 15, 28.

disclose.²² Similarly, in the United States, *Isaacson v Isaacson* found that “the roles of a court-appointed mediator and guardian *ad litem* are inherently incompatible.”²³ The same person cannot serve in such a dual capacity in the same litigation due to “concerns about mishandling of confidential information.”²⁴

In all six jurisdictions, we know that mediators have a duty to disclose conflicts of interest. All English language codes of mediator conduct stipulate this and case law reinforces this point. In *Lehrer v Zwernemann*, an American mediator had a pre-existing professional relationship with one of the lawyers and failed to disclose this to the plaintiff.²⁵ A breach of ethical requirements or mediator codes of conduct, such as failing to disclose a conflict of interest, may be considered persuasive evidence of negligence.²⁶ However, that was not the case in *Lehrer*. In this case, the plaintiff was unsuccessful despite the mediator’s breach because the plaintiff did not satisfy the burden of proving that damages were suffered as a result of the mediator’s actions.²⁷ In negligence law, the breach must cause damages to find liability. Thus, although this mediator did not disclose the conflict of interest, because no resulting damages could be proven, the mediator escaped liability.²⁸

Finally, we know that, in all six countries, mediators must report sexual abuse of children and must not engage in fraudulent behaviour. In *Campbell*

22 *Ibid* at para 69.

23 792 A (2d) 525 at 528 (NJ Super Ct App Div 2002).

24 Coben & Thompson, “Disputing Irony”, *supra* note 14 at 101. In the 2003 American case *Bowden v Weickert*, the Court dealt with what it construed as mishandling confidential information. The parties tried mediation but were unsuccessful. Their mediator was empowered to continue to act as their arbitrator. The arbitral award was in part based on the parties’ failed mediation. Confidential information obtained in the mediation was used to inform the arbitration award, which is contrary to Ohio’s mediation confidentiality statute. The Court found that the arbitrator “exceeded and so imperfectly executed [the] powers [of an arbitrator]” that a definite award was not made. As a result, the award was vacated and the case was referred back to the trial court (see *Bowden v Weickert*, 2003 WL 21419175 at paras 38–39 [Ohio Sup Ct App Div]). Now, in 2024, such a process in Canada would be characterized as mediation-arbitration, in which case the arbitrator could rely on information obtained during the mediation phase of the process, unless legislation or a contractual agreement stated otherwise.

25 14 SW (3d) 775 at 776 (Tex Ct App 2000) [*Lehrer*].

26 Further, under some circumstances, violation of statutory provisions enacted to protect the parties, such as those in the United States’ *Uniform Mediation Act*, could potentially be evidence of a breach of the standard of care (see *Uniform Mediation Act*, (2003)). However, this has not been litigated.

27 *Lehrer*, *supra* note 25 at 778.

28 *Ibid*.

v Burton, an American teacher acting as the peer mediation coordinator in a school had a duty, like others who work with children, to report sexual abuse even when that abuse was disclosed during a confidential mediation session.²⁹ Also, in *Everett v Morgan*, the Tennessee Court of Appeal found that a person who represented themselves fraudulently as part of the judicial system and conducted a mediation was guilty of fraud.³⁰

III. COERCIVE MEDIATORS

My review of case law since 2001 in six common law countries reveals the most common complaint disputants have about mediators is that their mediators coerced them to settle. Coercing or forcing agreements is bad mediation practice, which is supported in all the mediation literature.³¹ Coben and Thompson conducted an extensive study of reported American cases between 1999 and 2003.³² They found ten cases where mediators were alleged to have “exerted undue pressure or duress,” and what some disputants described as “reciting a list of ‘horribles’” if they went to court instead of settling.³³ The courts did not find any of those mediators liable, seeing nothing wrong with that type of mediator behaviour.³⁴ There are 12 cases since 2001 that cite coercion as the parties’ primary complaint, but zero cases where coercion actually led to the liability of a mediator.³⁵ The most important case is the 2001 Court of Appeal of Florida decision, *Vitakis-Valchine v Valchine*, where the Court held that court-ordered mediators are not allowed to coerce disputants into settlement.³⁶

In *Vitakis-Valchine 2001*, a divorcing husband and wife, who were both represented by counsel, attended a seven-and-a-half-hour mediation session which resulted in a 23-page marital settlement agreement.³⁷ The agreement also addressed “the disposition of embryos that the couple had

29 750 NE (2d) 539 at 542, 545 (Ohio Sup Ct 2001).

30 2009 WL 113262 at 3 (Tenn Ct App).

31 See e.g. Jennifer L Schulz, *Mediation and Popular Culture*, 1st ed (London: Routledge, 2020) at 24–38 [Schulz, *Mediation and Popular Culture*].

32 Coben & Thompson, “Disputing Irony”, *supra* note 14.

33 *Ibid* at 96.

34 *Ibid*.

35 From Australia, see *Pittorino v Meymert*, [2002] WASC 76 [Pittorino]. From the United States, see *Rodriguez v Hiday & Ricke, PA*, 2015 US LEXIS 41244 (SD Fla 2015); *Mardanlou v GMC*, 69 Fed Appx 950 (10th Circ 2003).

36 793 So (2d) 1094 at 1098–99 (Fla Dist Ct App 2001) [*Vitakis-Valchine 2001*].

37 *Ibid* at 1096.

frozen.”³⁸ A month after the mediation, the wife sought to set aside the mediation agreement, arguing, in part, coercion and duress on the part of the mediator.³⁹ The wife alleged that the mediator stated: (i) the judge would never give the wife custody of the embryos and would order them destroyed; (ii) the mediator would report to the judge that the settlement failed because of the wife; and (iii) that the wife was not entitled to any of the husband’s federal pensions.⁴⁰ The wife also alleged that the mediator rushed them to hurry up and finish in the last five minutes to be able to go home.⁴¹ The wife believed everything the mediator said and felt pressured to sign the settlement agreement.⁴² The Court correctly held that “any improper influence such as coercion or duress on the part of the mediator is expressly prohibited.”⁴³ The Court also held that “a line is crossed and ethical standards are violated” when the mediator’s conduct compromises the party’s right to self-determination.⁴⁴ Additionally, the Court cited rule 10.370(c) of the Florida Rules for Certified and Court-Appointed Mediators, which states “[a] mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.”⁴⁵ Regrettably, the Court did not make any findings about whether the mediator committed misconduct; instead, the Court remanded the case back for trial to determine whether the mediator violated the rules for mediators.⁴⁶ *Vitakis-Valchine 2001* is important because it is the American authority for the proposition that mediator coercion in court-ordered mediation can be sufficient to set aside a mediated agreement. However, like all the case law I reviewed, this case falls short of articulating a tort law duty and standard.

In Canada, in 2011, the Ontario Human Rights Tribunal decided a coercive mediator was not liable. In *King v Ontario (Health and Long-Term Care)*, the Tribunal said that “duress is a compelling reason for setting aside the

38 *Ibid.*

39 *Ibid.*

40 *Ibid* at 1097.

41 *Ibid.*

42 *Ibid.*

43 *Ibid* at 1098.

44 *Ibid.*

45 *Ibid* at 1099.

46 In the remand proceedings, the Circuit Court found no duress or pressure and upheld the mediation agreement (see *Valchine v Valchine*, 923 So (2d) 511 (Fla Dist Ct App 2006)). The District Court of Appeal affirmed and the requirement to transfer the frozen embryos was enforceable (see *Vitakis-Valchine v Valchine*, 987 So (2d) 171 (Fla Dist Ct App 2008)).

agreement.”⁴⁷ Duress is defined as “pressure that the law regards as illegitimate; and it must be applied to such a degree as to amount to ‘a coercion of the will....’”⁴⁸ The Tribunal said “the legal threshold for duress is a high one.”⁴⁹ In *King*, the applicant alleged that he entered into the settlement agreement under duress because the mediator said that his entitlement to disability support benefits would be compromised if the wording of the settlement was changed.⁵⁰ Mr. King felt intimidated, rushed, and “unduly pressured” by the mediator.⁵¹ Mr. King said “the mediator became angry and exasperated...and used foul language,” so Mr. King felt there was no other choice but to agree to the settlement.⁵² The Vice-Chair of the Tribunal stated, “[i]t is clearly not for me to determine whether the mediator’s alleged behaviour was appropriate.”⁵³ It is frustrating that courts and tribunals are so reluctant to rule or even opine on mediator misconduct given that such a ruling would be the first step in articulating mediator standards of care. Instead, the Tribunal said, “[i]n this case, even if the mediator badgered, rushed, or applied pressure to the applicant to enter into a settlement agreement, there is no basis to conclude that this met the high onus of duress and constituted a coercion of the applicant’s will.”⁵⁴ The Tribunal also held that “the allegations of swearing, even if true, do not support a finding of illegitimate pressure or coercion of will that constitutes duress.”⁵⁵ So, *King* suggests that badgering, applying pressure, and swearing are all permissible mediator behaviour. The Tribunal stated, “nothing the applicant has alleged in this regard goes beyond what one would normally expect to occur during mediated settlement discussions.”⁵⁶ I respectfully disagree, and so would most practising mediators.

The reason most mediators would disagree with the mediator’s conduct in *King* is because mediator codes of conduct prohibit such

47 2011 HRTO 2228 at para 19 [*King*].

48 *Ibid* at para 20, citing *Taber v Paris Boutique & Bridal Inc (Paris Boutique)*, 2010 ONCA 157 at para 9.

49 *Ibid* at para 23.

50 *Ibid* at para 6.

51 *Ibid* at paras 6–7.

52 *Ibid* at para 6.

53 *Ibid* at para 21.

54 *Ibid* at para 24.

55 *Ibid* at para 26.

56 *Ibid* at para 24. In 2011, an American mediator told a disputant that the other side would file criminal charges if the mediation agreement was not signed, but the mediator was not found to be coercive because mediation privilege in California protected the disclosure of the necessary evidence to prove coercion (see *Provost, supra* note 8 at 1302).

behaviour.⁵⁷ I submit that mediator codes of conduct, together with an understanding of what is customary in different types of mediation practice, can form the basis of legal standards of care for mediators.⁵⁸ In Canada, the ADR Institute of Canada's Code of Conduct for Mediators and Family Mediation Canada's Code both provide support for a standard of care that does not allow mediators to badger disputants, swear at them, or pressure them to settle.⁵⁹ In the United States, the American Bar Association, together with the American Arbitration Association and the Association for Conflict Resolution, put out Model Standards of Conduct for Mediators which also prohibit coercive mediator behaviour.⁶⁰ The United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on International Commercial Mediation.⁶¹ There is a European Code of

57 For example, art 7.4 of the ADR Institute of Canada's Code of Conduct for Mediators states at that "[t]he Mediator shall act professionally at all times, and the Mediator shall not engage in behaviour that will bring the Mediator or the Institute into disrepute"; thus, mediators who are angry, exasperated, or swear fall afoul of art 7.4 (see ADR Institute of Canada, *Code of Conduct for Mediators* (Toronto: ADR Institute of Canada, 2011), online (pdf): <adric.ca/wp-content/uploads/2016/04/Code-of-Conduct-for-Mediators.pdf> [ADR Institute of Canada, "Code of Conduct"]). Similarly, art 9.4 of Family Mediation Canada's Members Code of Conduct states "[t]he mediator has a duty to ensure balanced negotiations and must not permit manipulative or intimidating negotiating tactics" (see Family Mediation Canada, *Members Code of Professional Conduct* (Family Mediation Canada, 2023), online: <fmc.ca/code-of-conduct>).

58 Schulz, "Using Custom", *supra* note 9 at 169–70.

59 ADR Institute of Canada, "Code of Conduct", *supra* note 57, arts 3, 7; Family Mediation Canada, *supra* note 57, art 9.

60 American Arbitration Association, American Bar Association & Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005), standards I–II, VI, online (pdf): <adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf>.

61 This Model Law was established pursuant to the Singapore Convention, which, as of October 1, 2023, had 56 signatories, including the USA, UK, and Australia. However, New Zealand, South Africa, and Canada are not signatories (see United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*, 2018 (Vienna: UNCITRAL, 2022), online: <uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation>. See also Singapore Convention on Mediation, "Background to the Model Law" (2021), online: <singaporeconvention.org/model-law/about>. However, the UNCITRAL Model Law has been adopted in the Canadian provinces of Ontario and Nova Scotia through their respective provincial commercial mediation legislation (see *Commercial Mediation Act*, SO 2010, c 16, s 4; *Commercial Mediation Act*, SNS 2005, c 36, s 6).

Conduct for Mediation Providers,⁶² as well as English,⁶³ Australian,⁶⁴ New Zealand,⁶⁵ and South African⁶⁶ codes of mediator conduct. Every single one of these codes states that mediators must: enable party self-determination; be impartial; not have conflicts of interest; maintain confidentiality; and demonstrate competence or provide a good quality process.⁶⁷ In addition, virtually every province, state, and territory has its own mediator code of conduct, as do all court-connected and private mediation organizations, and they all stress the identical components of proper mediator behaviour.⁶⁸ Quite simply, there is a wealth of easily available, jurisdictionally-specific information about the expected conduct of mediators. These codes could be used to inform the creation of legal standards of care for mediators.

Codes of conduct, together with the reasonable practice of mediators in like situations, bolstered by expert testimony as to what mediation behaviours are customary in any particular field or jurisdiction, will establish standards of care for mediators.⁶⁹ “[A]lthough evidence of compliance with custom is not conclusive of reasonable care, evidence of what most people in a profession or business do is evidence of what is considered reasonable in the circumstances,”⁷⁰ and will therefore be helpful in establishing standards of care. This certainly would be preferable to the result in *King*, where the Tribunal reasoned that since the applicant could have ended settlement discussions or turned down the other side’s offer, the

62 European Commission for the Efficiency of Justice, “Mediation Development Toolkit: Ensuring Implementation of the CEPEJ Guidelines on Mediation” (4 December 2018), online (pdf): <rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6>.

63 IPOS Mediation, “Code of Conduct” (March 2022), online: <mediate.co.uk/code-of-conduct>.

64 Law Council of Australia, *Ethical Guidelines for Mediators* (Law Council of Australia, April 2018), online (pdf): <lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical>.

65 New Zealand Law Society, *Guidelines for Mediators* (New Zealand Law Society, November 2011), online (pdf): <lawsociety.org.nz/assets/Branches-Sections-and-Groups/Panel-of-Mediators/Guidelines-for-mediators/Guidelines-for-mediators.pdf>.

66 Mediation Training Institute East Africa, *Mediators Code of Conduct* (Mediation Training Institute East Africa, 19 January 2022), online (pdf): <mtieafrica.org/mediation-training/mediators-code-of-conduct>.

67 European Commission for the Efficiency of Justice, *supra* note 62; IPOS Mediation, *supra* note 63; Law Council of Australia, *supra* note 64; New Zealand Law Society, *supra* note 65; *ibid.*

68 The standards suggested by the Singapore International Mediation Institute, International Mediation Institute, American Bar Association, National Center for Technology and Dispute Resolution, and International Council for Online Dispute Resolution are all also similar.

69 Schulz, “Using Custom”, *supra* note 9 at 169.

70 *Ibid.*

applicant was not pressured.⁷¹ The *King* reasoning ignores the mediator's substandard behaviour and is also overly simplistic. Turning down the other side's offer or ending the mediation session is not always practicable for disputants, often does not make good financial sense, and does absolutely nothing to prevent coercive mediation.

A. Coercion and Racism

A disturbing subset of the coercion cases are those with racist dimensions. I found four cases in which coercion rooted in racism was likely or alleged, yet mediators were still not held accountable.⁷² Two cases are noteworthy. The first is *Karzi v Jones*, a 2011 decision of the Human Rights Tribunal of Ontario about Mr. Karzi's compensation claim, which proceeded to mediation, for injuries sustained in a car accident.⁷³ During the mediation, the mediator asked the applicant's uncle and brother, who attended the mediation for support, what kind of work they did.⁷⁴ The applicant's uncle and brother replied that they worked at a pizza restaurant and as a carwash operator, respectively.⁷⁵ On several occasions when leaving the room, the mediator said to Mr. Karzi's lawyer, "[l]et's get [this] done fast so we can have a free slice of pizza and a free car wash," which humiliated Mr. Karzi's uncle and brother.⁷⁶ Later, when Mr. Karzi found the offer to be insufficient, the mediator slammed the table and yelled, "Mohammed just remember where you are coming from. Don't forget that."⁷⁷ Mr. Karzi interpreted this to mean he came from a poor country.⁷⁸ The sum of everything that happened in the mediation led Mr. Karzi to allege that he was "subject[ed] to inappropriate and discriminatory behaviour from the mediator."⁷⁹ The Tribunal found that "the alleged statement was not obviously discriminatory."⁸⁰ The Tribunal said that, "[a]ssuming [Mr. Karzi's] allegations to be true, it may be that the mediator at times acted in a rude and

71 *King*, *supra* note 47 at para 24.

72 See *Devoux v Wise*, 2014 US LEXIS 51884 (MD Fla); *Zahariev v Hartford Life and Accident Insurance Co*, 2021 WL 115898 (SC Dist Ct); *Karzi v Jones*, 2011 HRTO 1957 [Karzi]; *Claiborne v City of Greenville, South Carolina*, 2018 WL 11275376 at 4 (SC Dist Ct) [Claiborne].

73 *Karzi*, *supra* note 72 at para 3.

74 *Ibid* at para 11.

75 *Ibid*.

76 *Ibid*.

77 *Ibid*.

78 *Ibid*.

79 *Ibid* at paras 11, 14.

80 *Ibid* at para 14.

insensitive manner towards the applicant's relatives and dealt with the applicant in a forceful manner during the session."⁸¹ However, the Tribunal found that none of the allegations were connected to a prohibited ground of discrimination.⁸²

The second case is *Claiborne v City of Greenville, South Carolina*, a 2018 American decision that came out of South Carolina where the Court again did not believe allegations of racism in a mediation session.⁸³ The self-represented African-American plaintiff, Mr. Claiborne, stated that during the mediation, the Caucasian mediator allegedly said, "white people got hung too," and did not advise Mr. Claiborne of his right to seek independent legal advice before signing the mediation agreement.⁸⁴ The Court found that the mediator's behaviour "fail[ed] to rise to the level necessary to...destroy [the] Plaintiff's free will."⁸⁵ The Court said that, "while [the] Plaintiff may have been offended or angered by such a comment, he failed to demonstrate...that the mediator coerced [him]."⁸⁶ The Court said that nothing prevented Mr. Claiborne from walking out of the mediation session.⁸⁷ Instead, Mr. Claiborne signed the agreement after the mediator's behaviour and cashed the settlement cheque.⁸⁸ Further, "[e]ven if the mediator failed to advise [the] Plaintiff of his right to consult" a lawyer, the settlement agreement advised "in bold, capital letters directly above the signature line: '...consult with an attorney in reviewing this agreement.'"⁸⁹ This, combined with Mr. Claiborne accepting the consideration by cashing the settlement cheque, led the Court to allow the settlement agreement to stand.⁹⁰

81 *Ibid.*

82 In an interim decision, Mr. Fidler, the mediator, submitted that the doctrine of judicial immunity applied to him (*Karzi v Jones*, 2010 HRT0 982). In *Hazel v Ainsworth*, as mentioned in footnote 7, it was decided that judicial immunity applies to protect Ontario mediators from human rights claims arising out of the exercise of their decision-making and dispute resolution functions. Although the *Karzi* mediation did not arise under the statutory framework that the *Hazel* decision was involved in, the *Karzi* tribunal was satisfied that the considerations which led to the application of the doctrine of judicial immunity in *Hazel* also applied to Fidler.

83 *Supra* note 72 at 4.

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid* at 2.

89 *Ibid* at 5.

90 *Ibid* at 2.

These cases are concerning because they suggest racist and coercive mediator behaviour, yet the mediators were not held accountable. I submit that making remarks based on a disputant's identity or familial characteristics, or making insensitive, culturally inappropriate remarks, falls below the standard of care expected of mediators. While remarks on their own may not amount to negligence, racist remarks that make disputants feel coerced into giving up aspects of party self-determination should not be permitted in mediation sessions and should be evidence of a breach of the standard of care.

IV. DISPUTANT INCAPACITY

Disputants have also argued that they were incapacitated and that their mediations should not have been allowed to continue, but the incapacity argument has only been successful on one occasion.⁹¹ Two interesting, unsuccessful cases come from the United States. In *Shepard v Florida Power Corporation*, the parties participated in court-ordered mediation to deal with claims of racial discrimination and retaliation at work under the American Civil Rights Act of 1964;⁹² the mediation was nearly seven hours long.⁹³ At the end, the parties reached a settlement agreement and a conditional dismissal order was entered.⁹⁴ Mr. Shepard subsequently “moved to set aside the settlement agreement on grounds of duress and lack of capacity.”⁹⁵ Mr. Shepard alleged improper influence by his former lawyer.⁹⁶ Mr. Shepard had a heart condition and experienced chest pain, faintness, and dizziness during the mediation.⁹⁷ During the mediation, Mr. Shepard took medication, but continued to experience chest pains, was crying, and

91 For the case that argued disputant incapacity successfully, see *Sejane v Commission for Conciliation, Mediation and Arbitration*, [2001] ZALC 156 (SAFLII), Revelas J [*Sejane*]. For examples of unsuccessful cases, see *Shepard v Florida Power Corporation*, 2011 WL 1465995 (MD Fla) [*Shepard*]; *Menaged v City of Jacksonville Beach*, 2013 WL 461999 (MD Fla) [*Menaged*]; *Keeler v Human Rights Tribunal of Ontario*, 2015 HRTO 851 [*Keeler*]. In *Keeler*, the Tribunal held that a represented plaintiff who was cognitively incapacitated could not sue the mediator because how the mediator chose to conduct the mediation is part of the dispute resolution process and is covered by immunity.

92 42 USC tit 7 § 2000e.

93 *Supra* note 91 at 1.

94 *Ibid.*

95 *Ibid.*

96 *Ibid* at 3.

97 *Ibid* at 1.

had difficulty speaking.⁹⁸ Mr. Shepard signed the agreement because the mediator said the defendant would leave the mediation session if the agreement was not signed.⁹⁹ The Court did not accept Mr. Shepard's assertions of incapacity and duress, holding that neither "[m]ere mental weakness" nor "stress created by the lengthy mediation conference" were sufficient to set aside an agreement.¹⁰⁰ The Court held that the settlement was binding for the primary reason that Mr. Shepard was "represented by counsel throughout the mediation conference."¹⁰¹

This decision disturbs me. Emotional distress that leads to crying and the consumption of medication during mediation is arguably sufficient to deprive a party of their capacity to exercise autonomy in mediation.¹⁰² *Shepard* did not lend these particular facts enough weight. Compromised or diminished mental health is a form of incapacity in my view. If a disputant is prevented from exercising true self-determination, mediators should not mediate in such situations.¹⁰³ *Shepard* did not take mental health into account and was ableist in its decision-making. However, it is important to note that the remedy being sought in *Shepard* was setting aside the agreement, not obtaining damages from the mediator.¹⁰⁴ "Indirect" rebukes of mediators, such as revoking or setting aside agreements, are easier for courts than outlining proper tort law tests to establish mediator liability.

Two years later, in 2013, the same Florida Court decided *Menaged v City of Jacksonville Beach*.¹⁰⁵ Again, the Court did not properly recognize mental health and coercion. Ms. Menaged argued she lacked the capacity to properly participate in the mediation session, but her complaints were found to be insufficient.¹⁰⁶ A mediation was held between Ms. Menaged, who was pulled over, issued a traffic ticket, punched in the face, and tasered by police officers.¹⁰⁷ Although Ms. Menaged signed a mediation agreement, she later argued that signing the agreement was not voluntary.¹⁰⁸ Ms. Menaged went

98 *Ibid.*

99 *Ibid.*

100 *Ibid* at 3-4.

101 *Ibid* at 4.

102 Moffitt, *supra* note 10 at 197.

103 Codes of conduct for mediators state that self-determination is crucial, see ADR Institute of Canada, "Code of Conduct", *supra* note 57, art 3.1; American Arbitration Association, American Bar Association & Association for Conflict Resolution, *supra* note 60, standard I.

104 *Supra* note 91 at 1.

105 *Supra* note 91.

106 *Ibid* at 4.

107 *Ibid* at 1.

108 *Ibid.*

into “shock mode” in mediation while sitting across from the male police officers who assaulted her.¹⁰⁹ Ms. Menaged “shut down completely” and “could not think and could barely talk.”¹¹⁰ The mediation session went from nine o’clock in the morning to five o’clock in the afternoon, with no break for lunch or snacks.¹¹¹ Ms. Menaged said the mediator was “‘pushy’ and was insistent that the settlement agreement was in [the] Plaintiff’s best interest.”¹¹² Ms. Menaged recalled the mediator stated that “[g]oing to court would be humiliating. They would be attacking you the whole time.”¹¹³ The Court noted that the *Vitakis-Valchine 2001* Florida decision set aside a mediated settlement in compelling circumstances involving a “mediator’s substantial violation of the rules of conduct for mediators.”¹¹⁴ However, the Court said the *Menaged* case did not reach such violations.¹¹⁵ There was insufficient evidence of duress or incapacity.¹¹⁶ The “[d]efendants’ mere presence at the mediation did not constitute duress,” and, while the plaintiff had “mental weakness,” there was no evidence that Ms. Menaged, who was represented by counsel, executed the agreement involuntarily.¹¹⁷

In my opinion, *Menaged* was also wrongly decided. The Court in *Menaged* did not take mental health, coercion, or gender into account. There is much research to support the fact that women who have been attacked by men seldom function at their best in the presence of their attackers.¹¹⁸ Ms. Menaged was in the same room as the two male officers who physically assaulted her, plus the mediator applied pressure.¹¹⁹ If this is not a situation

109 *Ibid* at 3.

110 *Ibid*.

111 *Ibid* at 4.

112 *Ibid* at 3.

113 *Ibid*.

114 *Supra* note 36 at 1099.

115 *Menaged*, *supra* note 91 at 3.

116 *Ibid*.

117 *Ibid* at 3–4.

118 See e.g. Juley Fulcher & Shaina Goodman, “Women’s Leadership in the Domestic Violence Movement” in Karen O’Conner, ed, *Gender and Women’s Leadership: A Reference Handbook*, vol 1 (Thousand Oaks: SAGE Publications, 2010) 252; Elizabeth A Swart, “Global Violence Against Women” in James D Wright, ed, *International Encyclopedia of the Social & Behavioral Sciences*, vol 10, 2nd ed, (Amsterdam: Elsevier, 2015) 192; Ruschelle M Leone & Dominic J Parrott, “Hegemonic Masculinity and Aggression” in Jane L Ireland, Philip Birch & Carol A Ireland, eds, *The Routledge International Handbook of Human Aggression: Current Issues and Perspectives*, 1st ed (London, UK & New York: Routledge, 2018) 41; Carolyn F Swift, “Surviving: Women’s Strength Through Connection” in Martha B Straus, ed, *Abuse and Victimization Across the Life Span* (Baltimore & London: Johns Hopkins University Press, 1988) 153.

119 *Menaged*, *supra* note 91 at 1.

where the plaintiff's argument of incapacity or shutting down is believable, what would be? Worse, not only was the mediator not found liable, but the Court also did not set aside the mediation agreement.¹²⁰

Better results come to us from the Labour Court of South Africa, in Braamfontein, which is the location of the only case where a plaintiff successfully argued incapacity such that the mediated agreement was set aside.¹²¹ Mr. Sejane was fired for alleged insubordination and the dispute was referred to the Commission for Conciliation, Mediation and Arbitration.¹²² Mr. Sejane and a human resources manager, represented by counsel, underwent conciliation,¹²³ which is a process very similar to mediation. Like mediation, conciliation is confidential, often involves private caucuses, is conducted without prejudice, and prohibits the conciliator being called as a witness. Mr. Sejane did not have representation and was illiterate.¹²⁴ The parties signed a settlement agreement requiring the applicant to be paid four months of remuneration.¹²⁵ Nearly a year after the agreement was signed, Mr. Sejane brought a review application alleging that the commissioner who acted as the conciliator had forced Mr. Sejane to sign the agreement.¹²⁶ The Court found that “[c]learly the playing fields were unequal.”¹²⁷ The Court found that the conciliator “was derelict in her duties for not properly considering the interests of the applicant in respect of representation.”¹²⁸ Ultimately, the agreement was set aside and the matter was sent to arbitration.¹²⁹ In South Africa then, as early as 2001, a conciliation agreement was set aside when the conciliator did not properly deal with power imbalance.¹³⁰ The Court recognized that it is unfair to mediate when one side does not have as much capacity to mediate as the other.¹³¹ However, the Court did not find the mediator negligent for continuing to mediate in such an unfair situation; instead, as is more common in the case law, the mediation agreement was set aside.¹³²

120 *Ibid* at 4.

121 *Sejane, supra* note 91.

122 *Ibid* at para 1.

123 *Ibid* at paras 4, 7.

124 *Ibid* at para 7.

125 *Ibid* at para 4.

126 *Ibid* at para 5.

127 *Ibid* at para 11.

128 *Ibid* at para 13.

129 *Ibid* at para 16.

130 *Ibid* at para 13.

131 *Ibid* at para 11.

132 *Ibid* at para 13.

V. NUMERICAL MISTAKES IN SETTLEMENT AGREEMENTS

The fact that mediators are not receiving consequences for mediating with incapacitated disputants makes it completely unsurprising to discover that there are also no consequences for mediators who make numerical errors in settlement agreements. My review of the case law reveals three cases where mediators are alleged to have made numerical mistakes in settlement agreements.¹³³ The most interesting case is *Tapoohi v Lewenberg*, where the Australian mediator made a mistake in the settlement agreement, and arguably applied some pressure to settle.¹³⁴

In *Tapoohi*, two sisters were fighting about their entitlements to their late mother's estate.¹³⁵ They attended mediation and were each represented by counsel, but the plaintiff was not physically present at the mediation; she was in attendance by telephone from Israel.¹³⁶ The Court, relying on affidavits filed by the solicitors (not the mediator), noted that at eight o'clock at night the sisters "reached [an] agreement in principle."¹³⁷ The solicitors were "hungry, tired and worn out" after a long day of mediating and "thought that they had done enough."¹³⁸ However, the mediator said, "you have got to do the terms of settlement tonight.... Given the acrimony between these two sisters we must go away with something that is written. It is in the interests of all the parties to sign tonight."¹³⁹ Although they were tired and wanted to leave, the parties stayed, and the mediator said, "[w]e will now put together the terms of settlement and I will dictate them."¹⁴⁰ When it came time to insert a number representing consideration for the deal, one of the lawyers said no figure could be provided until they had advice on the tax implications.¹⁴¹ The mediator inserted one dollar as the amount and the lawyer said "it is 'all subject to review.'"¹⁴² The lawyers thought it "was only an agreement in principle and not a legally binding settlement agreement," and maintained that they repeatedly informed the

133 From Australia, see *Tapoohi v Lewenberg*, [2003] VSC 410 (AustLII) [*Tapoohi*]. From New Zealand, see *McCosh v Williams*, [2003] NZCA 192 (NZLII) [*McCosh*]. From the United States, see *Gaskin v Gaskin*, 2006 Tex App Lexis 7689 (Tex Ct App) [*Gaskin*].

134 *Tapoohi*, *supra* note 133 at para 86.

135 *Ibid* at paras 1, 3.

136 *Ibid* at para 4.

137 *Ibid* at paras 15, 25.

138 *Ibid* at para 26.

139 *Ibid* at para 27.

140 *Ibid* at para 30.

141 *Ibid* at para 31.

142 *Ibid*.

mediator that they would not enter into a legally binding agreement until they had expert tax advice.¹⁴³ Nevertheless, the “[mediator’s] handwritten document entitled Terms of Settlement, was executed by or on behalf of the parties” that night and the settlement was not expressed to be conditional.¹⁴⁴ Mrs. Tapoohi, herself a lawyer, sent her signature, along with a notary’s seal, from Israel via fax.¹⁴⁵

The agreement mistakenly did not specify anything about tax advice.¹⁴⁶ The mediator did not put it in the document, the lawyers did not notice it was missing, and the figure of one dollar mistakenly remained in the agreement.¹⁴⁷ Later, Mrs. Tapoohi obtained advice that the one dollar figure would have undesirable tax consequences for her, so she sought to set aside the settlement agreement.¹⁴⁸ She argued that “the settlement was subject to an express oral term that the parties would seek taxation advice”; it was not a final settlement agreement.¹⁴⁹ Mrs. Tapoohi further argued that a mediator acting properly would not have allowed the parties to execute that night, or alternatively, would have advised the parties to take an appropriate period of time to review carefully the drafted terms of settlement and obtain professional tax advice.¹⁵⁰

The Court found that the mediator could not be expected to advise Mrs. Tapoohi, a qualified lawyer who was well represented, because the mediator had no duty to protect Mrs. Tapoohi’s interests.¹⁵¹ Just because the mediator dictated the terms did not mean that the lawyers could not have addressed the omission of the tax point.¹⁵² The Court suggested that when Mrs. Tapoohi was advised by her lawyer to sign, this was her lawyer’s mistake, not the mediator’s.¹⁵³ Significantly, for mediator liability purposes, the Court was prepared to say that this case could go to trial because there was the possibility of success against the mediator.¹⁵⁴ It could be found that the mediator applied undue pressure upon tired parties to execute a

143 *Ibid* at paras 32, 35.

144 *Ibid* at paras 5, 36.

145 *Ibid* at paras 5, 17.

146 *Ibid* at para 36.

147 *Ibid* at paras 31, 36.

148 *Ibid* at para 39.

149 *Ibid* at para 6.

150 *Ibid* at para 60.

151 *Ibid* at paras 71, 74, 76.

152 *Ibid* at para 80(d).

153 *Ibid* at paras 76, 80(a).

154 *Ibid* at paras 86–87.

final agreement where at least one of them wanted further expert advice.¹⁵⁵ Unfortunately, the Court did not so conclude, so again, we do not have a definitive statement on mediator liability.¹⁵⁶ The case was sent back for trial on this point, as well as the difficult tort point of causation,¹⁵⁷ but it settled before another trial ever occurred. John Wade says “[t]he [*Tapoohi*] case settled confidentially after more than two years of negotiation and thus no judicial policy on-the-run was forthcoming.”¹⁵⁸

It is possible that settlement remorse could be at play in cases where disputants allege mediator wrongdoing after a concluded agreement, such as in the *Tapoohi* case. The argument is that after reaching a mediated settlement, some parties may reflect upon their deal and then regret it. In those cases, in an effort to get out of the mediated agreement, the party sues the mediator.¹⁵⁹ For example, in *Sojka v Sojka*, the Canadian defendants wanted to renege on the settlement of a wills and estate matter.¹⁶⁰ The defendants argued that they were mistaken as to certain evaluations of property at the mediation.¹⁶¹ The Court, however, found that the minutes of settlement and the release were enforceable.¹⁶² *Sojka* is authority for the proposition that in British Columbia, Canada, a party’s attempt to renege on a mediated agreement by utilizing “settler’s remorse” will not work when both parties are represented by counsel.¹⁶³ The Court, correctly in my view, left the responsibility with the disputants’ lawyers to confirm the valuation and check for certainty; liability does not attach simply for an unwanted result.¹⁶⁴

155 *Ibid.*

156 *Ibid.*

157 *Ibid* at paras 87, 90.

158 See John Wade, “Liability of Mediators for Pressure, Drafting and Advice: *Tapoohi v Lewenberg*” (2003) 7 ALTA L Research Series 8, online: <austlii.edu.au/journals/ALRS/2003/7.html>. For more on *Tapoohi* see also Melinda Shirley & Tina Cockburn “When Will a Mediator Operating Outside the Protection of Statutory Immunity be Liable in Negligence?” (2004) 32:1 UWA L Rev 83; Koo, *supra* note 13 at 167.

159 See e.g. *Pittorino*, *supra* note 35 (“[i]n my view, after signing the mediation agreement in the presence of her solicitor and after going home and having a night’s sleep, the plaintiff decided that she had not received what she then considered was her fair share of her parents’ estate” at para 105).

160 2018 BCSC 562 at paras 18, 26 [*Sojka*].

161 *Ibid* at para 12.

162 *Ibid* at para 28.

163 *Ibid* at paras 18, 26. For an older American case on settlement remorse, see also *Olam v Congress Mortgage Company, et al*, 68 F Supp (2d) 1110 (ND Cal 1999).

164 Schulz, “Using Custom”, *supra* note 9 at 167.

VI. MISTAKEN ADVICE GIVEN BY MEDIATORS

Similar to how there are no consequences for making numerical errors in settlement agreements, incorrect advice given by mediators has also not led to liability.¹⁶⁵ This is particularly interesting because self-described facilitative mediators often eschew giving advice, viewing it as either contrary to party self-determination or too close to the practice of law. Mediators who practice in a more evaluative fashion do give advice, and this is permitted by mediator codes of conduct.¹⁶⁶ However, the fact that mediators who give advice are not held liable when that advice proves incorrect is astonishing. For example, in 2008, in *Foster v Orkin Pest Control*, a Florida mediator provided incorrect advice in answer to Ms. Foster's question during the course of a mediation session.¹⁶⁷ When Ms. Foster asked her lawyer the same question and the lawyer did not know the answer,¹⁶⁸ Ms. Foster followed the mediator's advice that a lawyer's fee judgment could not be discharged in bankruptcy and signed the mediation agreement.¹⁶⁹ Later, Ms. Foster discovered that the mediator was wrong; Ms. Foster could discharge the lawyer's fee judgment so she sought to set aside the mediated settlement.¹⁷⁰ Again, it is interesting to note that the remedy sought was setting aside the settlement. As a helpful anonymous reviewer of this article noted, "[t]his sort of thing is different from a negligence claim, and may even be the more common form of satellite litigation about mediation."¹⁷¹

The Court in *Foster* said that when Ms. Foster's lawyer did not know about the bankruptcy implications, it was Ms. Foster's decision to rely on

165 See e.g. *Som Nath Chitkara v NY Tel Com*, 45 Fed Appx 53 (2nd Cir 2002) [*Chitkara*].

166 See e.g. ADR Institute of Canada "Code of Conduct", *supra* note 57 ("[t]he Mediator shall not provide legal or professional advice to the parties. The Mediator may express views or opinions on the matters at issue, and may identify evaluative approaches, and where the Mediator does so it shall not be construed as either advocacy on behalf of a party or as legal or professional advice to a party" at art 3.3). However, the United Kingdom's College of Mediators rule on neutrality takes a different approach, see College of Mediators, *Code of Practice for Mediators* (COM, 2019), online: <www.collegeofmediators.co.uk/wp-content/uploads/2021/05/CoM-Code-of-Practice-V2-1.pdf> ("[m]ediators must remain neutral concerning the outcome of mediation. They must not attempt to move the participants towards the mediator's own preferred outcome or to predict the outcome of court or formal proceedings" at art 4.2).

167 2008 WL 11472149 (MD Fla) [*Foster*].

168 *Ibid* at 2.

169 *Ibid*.

170 *Ibid*.

171 Thank you to the reviewer who made this point.

what the mediator said.¹⁷² Since Ms. Foster was unable to prove fraud, duress, or coercion, the mediation agreement was not set aside.¹⁷³ Regrettably, the Court completely avoided opining on the following: (a) whether mediators should be giving advice; (b) whether it was negligent of the mediator to provide legal advice, or advice with legal implications; or (c) whether providing incorrect advice, on its own, is reason enough to find a mediator negligent or to invalidate a settlement agreement. The Court merely said the mediator's error did not amount to duress or coercion.¹⁷⁴

More recently, in 2021, in *Fono v Canada Mortgage and Housing Corporation*, the Canadian Federal Court of Appeal indicated some approval for advice-giving mediators or arbitrators when it held that it is common for labour mediators who later act as arbitrators “to express tentative views during mediation as to the potential strengths and weaknesses” of the case, especially when the parties are represented by counsel.¹⁷⁵ It is not clear, however, whether this ruling would apply: (a) to mediators who are “only” mediators and not also arbitrators, (b) to mediators outside the labour context, or (c) in cases with a mediator alone and no legal counsel. As with all areas of potential mediator liability, there is very little case law, and the cases that exist are not definitive. Canadian law schools teach students that mediators should not provide advice, but in practice, mediators are often chosen exactly for the relevant experience they bring to a particular dispute. In those cases, counsel and disputants welcome the mediator's advice.¹⁷⁶ David Jesser opines that “[a] potential plaintiff would have to show that someone professing to have the mediator's skill in the area could not reasonably have given that advice” in order to establish liability.¹⁷⁷

VII. MEDIATOR BIAS

There are three cases where mediator bias was alleged,¹⁷⁸ and importantly, in two of them, there were consequences for the bias. I will discuss all three. In 2002, the Labour Court of South Africa set aside a settlement

172 *Supra* note 167 at 4.

173 *Ibid* at 4–5.

174 *Ibid* at 4.

175 2021 FCA 125 at para 9 [*Fono*].

176 Schulz, *Mediation and Popular Culture*, *supra* note 31 at 28–33.

177 Jesser, *supra* note 7 at 216.

178 *Kasipersad v CCMA*, [2002] ZALC 89 (SAFLII) [*Kasipersad*]; *Furia v Helm*, 111 Cal App (4th) 945 (Cal Ct App 2003) [*Furia*]; *McClintock v Karam*, 2015 ONSC 1024 [*McClintock*].

agreement because the Commissioner, acting as conciliator, was biased.¹⁷⁹ In *Kasipersad v CCMA*, the Court said that, in reviewing the conduct of a conciliator, “[w]hat she said may be as important as how she said it.”¹⁸⁰ Mr. Kasipersad alleged that “the [conciliator] was not impartial and that she pressured and bullied him into agreeing to withdraw his dispute.”¹⁸¹ “The [conciliator] admits having told the applicant that he had a 50/50 chance of success; that it would take between two to three days before the matter would be heard in the Labour Court and that he might have to pay for legal representation and, if he lost, the [respondent’s] costs.”¹⁸² These comments all suggested to the applicant that it would be best to withdraw. Further, since the conciliator mainly sketched out negative outcomes for the applicant, the Court said that “manifested bias against the applicant.”¹⁸³ The conciliator ought to have presented all the consequences, both negative and positive. It was not unreasonable for Mr. Kasipersad, a layperson, to infer from what the conciliator said that he should withdraw his dispute. Although the conciliator denied advising Mr. Kasipersad to withdraw his case, the conciliator acknowledged that he withdrew based on the provided advice.¹⁸⁴ The conciliator also did not correct Mr. Kasipersad’s perception of withdrawing the dispute based on her advice, yet “ethically she was required to correct his perception, which she failed to do.”¹⁸⁵ The Court said, “[t]o attempt to compile a complete list of do’s and don’ts during conciliation is neither feasible nor desirable. Instead, jurisprudence should be developed incrementally, case by case, to guide conciliators as to what is acceptable and unacceptable conduct during conciliation.”¹⁸⁶ This is true, and it is now time, more than two decades later, for a court to name the unacceptable mediation conduct that falls below the standards of care expected of reasonable mediators. Mediators can be liable for negligence, and damages can be a suitable remedy for proven mediator malpractice which causes harm. The final order in *Kasipersad* set aside the conciliation proceedings and the settlement agreement.¹⁸⁷ The Court’s holding, that conciliators must be even-handed and should resist

179 *Kasipersad*, *supra* note 178 at para 38.

180 *Ibid* at para 10.

181 *Ibid* at para 12.

182 *Ibid* at para 13.

183 *Ibid* at para 20.

184 *Ibid* at para 14.

185 *Ibid* at para 29.

186 *Ibid* at para 18.

187 *Ibid* at para 38.

invitations to give advice because giving advice is counter-productive to the objectives of conciliation, is helpful as it outlines aspects of the mediator's duty of care.¹⁸⁸ The Court simply did not go far enough and find a breach of that duty. Future courts are encouraged to do so.

In 2003, the Court of Appeal of California addressed mediator bias in *Furia v Helm* but did not impose any consequences.¹⁸⁹ Mr. Furia, a general contractor, was in a dispute with his construction clients.¹⁹⁰ Mr. Helm, a lawyer representing the construction clients, served as mediator.¹⁹¹ Although the Court expressed misgivings about Mr. Helm's dual responsibilities, the Court agreed with the trial judge that Mr. Furia did not prove causation.¹⁹² That is to say, Mr. Furia was not able to show that Mr. Helm's alleged bias, even if present, caused Mr. Furia any compensable harm.¹⁹³ Mr. Helm wrote a letter to all parties that he would "attempt to fairly mediate [their] differences (rather than advocate [for his clients])," but that if an agreement was not reached, Mr. Helm's loyalty lay with his construction clients and he would continue to represent them.¹⁹⁴ Following this letter, Mr. Helm sent his construction clients a separate, private letter that stated, "I am not going to be truly neutral during our efforts to negotiate...."¹⁹⁵ Mr. Furia argued that this was a breach of Mr. Helm's professional and ethical obligations and that Mr. Helm should have disclosed his continuing representation to Mr. Furia.¹⁹⁶ Virtually all mediation scholars would agree. However, Mr. Helm "mediated" anyway, and during the mediation, Mr. Helm persuaded Mr. Furia to abandon the construction project, stressing that this was the "best course of action to resolve the dispute...."¹⁹⁷ Mr. Furia relied on the mediator's advice and withdrew from the project. Subsequently the clients sued Mr. Furia for wrongful abandonment of the project, so Mr. Furia sued Mr. Helm arguing he was not neutral and was biased.¹⁹⁸

188 *Ibid* at para 28.

189 *Furia, supra* note 178 at 959.

190 *Ibid* at 948.

191 *Ibid* at 948–49.

192 *Ibid* at 948, 957–59.

193 *Ibid* at 957.

194 *Ibid* at 949.

195 *Ibid* at 949–50.

196 *Ibid* at 950.

197 *Ibid*.

198 *Ibid*.

The Court found that Mr. Helm did not undertake to act as Mr. Furia's lawyer; Mr. Helm agreed to act as mediator.¹⁹⁹ In agreeing to act as a mediator, the Court found that Mr. Helm owed a duty toward Mr. Furia.²⁰⁰ That duty included "disclosing to Furia any facts that might reasonably cause Furia to believe that Helm would not or could not be impartial."²⁰¹ In this, the Court was absolutely correct. The Court further correctly held that Mr. Helm "assume[d] the duty of performing as a mediator with the skill and prudence ordinarily to be expected of one performing that role," and that the role requires full and complete disclosure.²⁰² The Court found that Mr. Helm did not provide this disclosure.²⁰³ The Court thought that Mr. Helm should have provided a full understanding of his role in writing to both parties, "with no undisclosed side understanding."²⁰⁴ The Court further found that Mr. Helm did not intend to be fully impartial. Mr. Helm misrepresented his intentions, and therefore breached the duty he owed to Mr. Furia to exercise reasonable care.²⁰⁵

Furia is therefore authority for the proposition that mediators have a duty of care toward disputants to be unbiased. Mediators breach their standard of care if they fail to disclose all circumstances that affect their impartiality. This is a finding of mediator duty and standard from a persuasive American court of appeal that could be used as a basis to assert mediator duties and standards of care in the future. Unfortunately, in *Furia*, causation, or damage resulting due to breach of the standard of care, was not established because Mr. Furia alleged in another administrative hearing that he did not abandon the project. In that hearing, the court agreed that Mr. Furia did not abandon the project, so there were no damages.²⁰⁶ Therefore, Mr. Furia was unable to prove causation and a biased mediator escaped liability.

The third mediator bias case was decided in 2015 in Canada.²⁰⁷ In *McClintock v Karam*, the Ontario Superior Court decided that a mediator-arbitrator was prohibited from proceeding any further, and was ordered to be replaced,

199 *Ibid* at 949, 952.

200 *Ibid* at 954.

201 *Ibid*.

202 *Ibid*.

203 *Ibid* at 955.

204 *Ibid*.

205 *Ibid*.

206 *Ibid* at 957.

207 *McClintock*, *supra* note 178.

due to a lack of fairness and reasonable apprehension of bias.²⁰⁸ The former husband and wife entered into a separation agreement.²⁰⁹ An amending agreement to their separation agreement stated that, if the parties could not resolve a conflict, they would be referred for mediation-arbitration.²¹⁰ The parties found a mediator-arbitrator and executed a written “MED/ARB Agreement” that allowed the mediator-arbitrator to rely on any information the parties disclosed during the mediation portion of the process.²¹¹ During the mediation, the mediator-arbitrator developed considerable sympathy for the husband’s position.²¹² The mediator-arbitrator told the mother that: the mother was undermining the daughter’s relationship with the father; the daughter was a “spoiled little princess”; and the mediator-arbitrator would “absolutely entertain [the father’s] request that [the daughter] go live with him....”²¹³ The mediator-arbitrator told the mother she needed to change her behaviour to reduce the concern that he might make a decision that changed the daughter’s custodial arrangement and provided no access to the mother.²¹⁴ The mediator-arbitrator further told the mother, “you must know what intervention I would be supporting if called to court.”²¹⁵

At the court proceeding, the wife claimed that the mediator-arbitrator prejudged the dispute and preordained the likely remedy.²¹⁶ This was compounded by correspondence from the mediator-arbitrator, which clearly suggested that “he had made up his mind what he [was] likely to do.”²¹⁷ The Court cited the classic test for reasonable apprehension of bias from the Supreme Court of Canada: “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [they] think that it is more likely than not that, whether consciously or unconsciously, [the person] would not decide fairly.”²¹⁸ The Ontario Superior Court of Justice concluded that an informed person would think there was a reasonable apprehension of

208 *Ibid* at para 2.

209 *Ibid* at para 4.

210 *Ibid* at para 7.

211 *Ibid* at para 14.

212 *Ibid* at para 16.

213 *Ibid* at para 21.

214 *Ibid* at para 21.

215 *Ibid* at para 26.

216 *Ibid* at para 38.

217 *Ibid*.

218 *Ibid* at para 66, citing to *Committee for Justice and Liberty v National Energy Board*, [1978]

1 SCR 369 at 394, 1976 CanLII 2 (SCC).

bias or that the mediator-arbitrator would not decide fairly.²¹⁹ The Court said that “at a bare minimum the parties are entitled to expect that the [mediator-arbitrator] will be open to persuasion, and will not have reached firm views or conclusions.”²²⁰ There was a reasonable apprehension of bias and the mediator-arbitrator did not treat the applicant fairly as required by section 19(1) of Ontario’s *Arbitration Act, 1991*.²²¹ Section 15(1) of the *Arbitration Act, 1991* allows an arbitrator to be removed if they do not conduct an arbitration in accordance with section 19, so the Court removed the mediator-arbitrator rather than finding him negligent.²²² That was the correct result in *McClintock*. Just as courts may use codes of conduct or custom to help establish legal standards of care for proper mediation practice, so too may statutory standards be consulted.

VIII. SUBSTANDARD MEDIATION PRACTICE

Finally, a 2019 case from the Québec Court of Appeal brings us a bit closer to a tort law standard of care for negligent mediation practice.²²³ In *Lapierre*

219 *McClintock*, *supra* note 178 at para 71.

220 *Ibid* at para 70.

221 SO 1991, c 17, s 19(1); *ibid* at para 80.

222 *McClintock*, *supra* note 178 at paras 86–87. The unauthorized practice of law is a situation in which courts have also removed mediators. However, this is because the mediators impersonated lawyers or practiced law, not because the court made a finding that they practiced beneath the standard of care for mediators. So, for example, in *The Florida Bar v Neiman*, American paralegal Brian Neiman appeared on behalf of a personal injury plaintiff at a mediation, conducted settlement discussions, and committed other infractions. Mr. Neiman was censured for engaging in the unauthorized practice of law (see *The Florida Bar v Neiman*, 816 So (2d) 587 at 599–600 (Fla 2002) [*Neiman*]). In Canada, Ontario paralegal-mediator Maureen Boldt was accused of carrying on the unauthorized practice of law in contravention of the *Law Society Act*, RSO 1990, c L.8, s 50(1), as it appeared on 26 November 2002. In *Law Society of Upper Canada v Boldt*, an injunction was awarded, prohibiting Ms. Boldt from engaging in the practice of law, but she continued to practice as a mediator (see *Law Society of Upper Canada v Boldt*, 2000 CarswellOnt 5644 at para 57 (ONSC)). In 2005, the Ontario Association of Family Mediators permanently revoked Ms. Boldt’s membership. Ms. Boldt was found in contempt of court in 2006 (see *Law Society of Upper Canada v Boldt*, 2006 CanLII 9142 at paras 32, 36, 74 (ONSC)) and sentenced to four months under house arrest (see *Law Society of Upper Canada v Boldt*, 2007 CanLII 41426 (ONSC)). So, like Mr. Neiman in Florida, Ms. Boldt lost her status as a mediator, but not because of subpar mediation practice, but due to the unauthorized practice of law.

223 *Lapierre c Comité d’inspection professionnelle du Barreau du Québec*, 2019 QCCA 1705 [*Lapierre* QCCA], leave to appeal to SCC refused, 39002 (23 April 2020). It is important to note that the province of Québec adheres to civil law, derived from the civil legal system of France. The rest of Canada follows common law principles, derived from England. This means that cases from Québec may not be as relevant to common law jurisdictions.

c Comité d'inspection professionnelle du Barreau du Québec, the Court took a lawyer's mediator status away for bad practice as a mediator.²²⁴ Consistent with the case law, the Court did not say that the mediator was negligent. The Québec Bar's Professional Inspection Committee (PIC) ordered a special investigation into Ms. Lapierre's professional competence.²²⁵ She was a member of the Québec Bar since 1996 and a certified family mediator since 2002.²²⁶ The PIC investigation found Ms. Lapierre lacked professional competence, and she was required to take a directed reading course in 2016 and participate in a 12-month program of supervised refresher training.²²⁷ Ms. Lapierre informed the Québec Bar that, for financial reasons, she would not comply.²²⁸ Another hearing was held, and in 2017, the Québec Bar completely restricted her right to engage in professional activities and withdrew her mediator certification.²²⁹ Ms. Lapierre applied for judicial review of the PIC's decision, but her application was dismissed. She appealed the decision, and the Québec Court of Appeal dismissed her appeal.²³⁰ The application for leave to appeal to the Supreme Court of Canada was also dismissed.²³¹

Regarding mediator liability, the interesting details of the *Lapierre QCCA* case come from the PIC investigation. The investigation revealed significant gaps in Ms. Lapierre's family mediation practice. Ms. Lapierre's substandard mediation conduct was outlined in an appendix to a factum filed before the Québec Court of Appeal.²³² The most relevant inadequacies in Ms. Lapierre's mediation practice were as follows:

- Ms. Lapierre was unaware of the Québec government's directive requiring a summary of mediation agreements to be prepared and

Additionally, this decision, and all other decisions related to Ms. Francine Lapierre, are reported entirely and only in French. I extend thanks and appreciation to Mr. Ramsay Hall for translating them for me.

224 *Lapierre c Comité d'inspection professionnelle du Barreau du Québec*, 2018 QCCS 904 at para 64.

225 *Ibid* at para 24.

226 *Ibid* at para 22.

227 *Ibid* at paras 27, 31.

228 *Ibid* at para 29.

229 *Ibid* at para 54.

230 *Supra* note 223.

231 *Ibid*. The author notes that all of the preceding case information was provided to her by her bilingual student research assistant, Mr. Ramsay Hall.

232 *Lapierre QCCA*, *supra* note 223 (Factum Appendix, Appellant) ("Recommendations from the Director of Professional Inspections following the investigation on the professional competence of Francine Lapierre," obtained from the Québec Court of Appeal and translated into English by Mr. Ramsay Hall).

included in family cases. Ms. Lapierre repeatedly failed to draft mediation agreement summaries. In a few of Ms. Lapierre's files, it was indicated that an agreement between the parents had been made. However, because the summaries were not prepared, it was not possible to know the substance of the agreements.

- Ms. Lapierre demonstrated a lack of knowledge of the *Regulation Respecting Family Mediation*,²³³ which is a cornerstone of the mediation process in Québec. For example, Ms. Lapierre inaccurately stated the number of hours of free mediation to which clients are entitled in various mediation consent forms.
- The PIC investigation revealed that Ms. Lapierre was not properly drawing up mediation agreements in accordance with the regulations in force at the time.
- Ms. Lapierre's approach at the start of the mediation sessions was deficient. Ms. Lapierre would explain in great detail all of the applicable laws (e.g. the difference between a separation and a divorce, and the notion of compensatory allowance), which created unnecessary confusion amongst the disputants.
- For example, Ms. Lapierre held a mediation session between *de facto* spouses who were the parents of a three-year-old and had few financial resources. Ms. Lapierre started the session by talking about various complex legal topics that had no application whatsoever to their situation, such as unjust enrichment, which was not applicable because the parents were not married. This illustrated Ms. Lapierre's ignorance of basic concepts of family law and proper mediation practice.
- In another file, Ms. Lapierre had married clients with children who wanted to settle all aspects of their separation. However, the agreement she drafted did not contain any details regarding child custody and the right of access to the children.
- In three other files, Ms. Lapierre did not prioritize issues relating to childcare and child support over other financial issues. It is proper mediation practice to deal with arrangements for the children before establishing spousal support payments.
- Ms. Lapierre did not properly work with one of the mothers. The mother was mentally frail and did not seem to want a beneficial

233 CCP, C-25.01, art 619, online: <www.legisquebec.gouv.qc.ca/en/document/cr/C-25.01,%20r.%20o.7>.

support arrangement. In this situation, Ms. Lapierre should have met individually with the mother, but Ms. Lapierre did not.²³⁴

The PIC concluded that Ms. Lapierre had not mastered the basic skills of family mediation.²³⁵ This compromised the rights of Ms. Lapierre's clients, especially the most vulnerable among them, so Ms. Lapierre could no longer act as a mediator unless she was supervised.²³⁶ *Lapierre QCCA*, when read in its entirety, including appendices, gives insight into the standard of care expected of Québec family mediators. It tells us that, in Québec, family mediators must: provide mediation summaries; know all relevant regulations; draft mediation contracts properly; prioritize arrangements for children before everything else; not explain irrelevant law; not suggest inappropriate approaches; and should work with vulnerable parties in private caucus to assist them. However, because Québec is a civil law province within common law Canada, and family law in Québec is particular to the province, it is unclear how significant *Lapierre QCCA* will be for mediator liability in other jurisdictions.

IX. CONCLUSION AND RECOMMENDATIONS

My 20-plus year review of reported cases where mediators have been sued in Canada, the USA, England, Australia, New Zealand, and South Africa reveals that no court has explicitly held a mediator liable for negligent mediation practice. There are no decisions that definitively outline the duty of care for mediators. However, the case law states that mediators have a duty to act impartially,²³⁷ without conflicts of interest,²³⁸ without bias,²³⁹ and in a manner that allows parties' rights to self-determination.²⁴⁰ All mediator codes of conduct repeat these identical duties. I submit that attempting to deal with power imbalances, and recognizing and addressing disputant incapacities, should also form part of the mediator's duty of care. Additionally, "any improper influence such as coercion or duress on the part of the mediator [should be] expressly prohibited."²⁴¹ Although we

²³⁴ *Supra* note 232 at 301–03.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Furia, supra* note 178 at 955.

²³⁸ *Chang's Imports, supra* note 15 at 330; *Lehrer, supra* note 25 at 776.

²³⁹ *McClintock, supra* note 178 at para 39.

²⁴⁰ *Vitakis-Valchine 2001, supra* note 36 at 1098.

²⁴¹ *Ibid.*

do not yet have a legal articulation of what constitutes a breach of mediators' standard of care, the aforementioned duties, if breached, could form actionable aspects of mediators' standard of care.

Rather than hold negligent mediators liable, the case law demonstrates that common law courts are prepared to set aside mediated agreements when they disapprove of mediator conduct. This disapprobation, coupled with the guidance provided by mediator codes of conduct and customary mediation practice, will work together, in future cases, to establish legal standards of care for mediators. The "three C's" of case law, codes, and custom will be the foundation upon which a common law court first articulates a breach of the standard of care for a mediator.

Case law from New Zealand, the USA, and Australia suggests it is not a breach of mediator standard of care to make numerical mistakes when drafting mediation agreements,²⁴² while case law from Québec suggests that mediators must draft mediation agreements properly.²⁴³ All that is necessary is for a future common law court to make a decision one way or the other.²⁴⁴ The situation is the same with respect to mediating with vulnerable or incapacitated disputants. A future court can take the American view that it is permissible to mediate when one party is experiencing chest pain and dizziness during mediation, crying, and taking medication,²⁴⁵ or the Canadian view that mediators should work with vulnerable parties in private caucus to assist them or ascertain if they are capable of proceeding.²⁴⁶ Similarly, regarding giving advice, a given court will need to decide, based on the particular facts of the case, if it prefers: (a) the American position that mediators are not negligent for giving disputants incorrect advice;²⁴⁷ (b) the South African view that mediators should resist invitations to give advice;²⁴⁸ or (c) a hybrid position where advice giving is allowed, provided that advice is accurate and does not cross over the line to the unauthorized practice of law.²⁴⁹ The combination of case law, codes, and custom will help common law courts establish mediator standards of care.

²⁴² *McCosh*, *supra* note 133 at paras 28–29; *Gaskin*, *supra* note 133 at 9; *Tapoohi*, *supra* note 133.

²⁴³ *Lapierre QCCA*, *supra* note 223.

²⁴⁴ As I noted decades ago, "without some judicial pronouncements, guidelines have neither the force of law nor the value of precedent" (see Schulz, "Using Custom", *supra* note 9 at 178).

²⁴⁵ *Shepard*, *supra* note 91.

²⁴⁶ *Lapierre QCCA*, *supra* note 223.

²⁴⁷ *Chitkara*, *supra* note 165; *Foster*, *supra* note 167.

²⁴⁸ *Kasipersad*, *supra* note 178.

²⁴⁹ For an American case in which the mediator lost their status due to their unauthorized practice of law, see *Neiman*, *supra* note 222. For a Canadian case, see *R v Boldt*, [1996] OJ

Mediators who also happen to be lawyers will be held to the standard of care of the reasonable mediator, not the standard of care of a lawyer.²⁵⁰ Nevertheless, mediators who are also lawyers should make sure disputants are completely clear that they are not acting as lawyers. Mediators must be neutral and should require disputants to sign off on holding them harmless. Mediators should always err on the side of disclosure for any potential conflicts of interest and always obtain written consent to proceed if there is any type of conflict. Independent legal advice should be recommended to every single mediation disputant. Mediators should also never mediate without offering disputants multiple breaks and opportunities to eat and drink. Coben and Thompson even recommend considering the impact of mediation agreements on third parties.²⁵¹

Jennifer Egsgard says, “[t]o avoid a dispute over the terms of a settlement, parties may stipulate that, to be valid, any settlement agreed to in the mediation must be immediately put into writing. Practically speaking, this task can be made easier if counsel arrives at the mediation with electronic copies of draft minutes of settlement and releases.”²⁵² Best practice would be to finalize settlement agreements in the mediation room completely. This is because a completely finalized, executed mediation agreement is a contract, and pursuing a contractual breach is much easier than attempting to hold a mediator tortiously responsible. If a finalized settlement cannot be reached at the end of the mediation session, mediators should be urged to stipulate when final documents need to arrive. Consequences can be outlined for documentation that is late or never submitted. It is important that mediators address their minds to the question of when the mediation concludes: is it at the end of the session, or can responsibility for a mediation continue even after it is over?

If parties are not ready to sign documents at the conclusion of the session, mediators should make much greater use of cooling-off or thinking periods. Building in thinking periods honours party self-determination by allowing disputants to reflect on their own time and decide whether their deal stands.²⁵³ Disputants should not cash their settlement cheques

No 4723 at para 23.

²⁵⁰ *Chang's Imports*, *supra* note 15 at 331.

²⁵¹ Coben & Thompson, “Disputing Irony”, *supra* note 14 at 142.

²⁵² Jennifer Egsgard, “How Confidential is Your Mediation, Anyway?” (2018) 37:3 *Adv J* 32 at 37.

²⁵³ Coben & Thompson, “Disputing Irony”, *supra* note 14 at 136. Also, for critics concerned about settlement remorse, thinking periods are likely to prevent claims against mediators that stem from remorse rather than mediator wrongdoing.

if there is any possibility that they may wish to sue their mediators.²⁵⁴ This is because cashing the cheque signals acceptance of the deal or agreement, and makes a subsequent complaint about the mediator harder for courts to believe. Similarly, disputants should be advised that if they allege incapacity after a mediation session, but were represented by counsel during mediation, they are less likely to prevail in court.²⁵⁵ Coben and Thompson caution that, given how much mediation evidence is finding its way into court decisions, mediators must be careful of how much confidentiality they promise.²⁵⁶ This is a valid concern given how much detail is provided in the decisions I reviewed. Lawyers advocating for their clients in mediation may wish to consider drafting confidentiality provisions beyond those offered by the common law.²⁵⁷ Finally, mediation rosters and organizations should keep a public record of mediators who have been removed from rosters, whose privileges have been revoked, or whose agreements have been set aside to better enable potential disputants to choose their mediators wisely.

The case law from Canada, the United States, England, Australia, New Zealand, and South Africa reveals that claims against all mediators are low. Twenty-three years after my first article with the *Ottawa Law Review*, there are still no cases of successful negligence liability claims against mediators. This is probably why mediator liability insurance is still very inexpensive to obtain.²⁵⁸ It also suggests that disputants are still generally satisfied with mediation services, especially in voluntary mediations.²⁵⁹ If disputants are

254 *Claiborne, supra* note 72.

255 *Shepard, supra* note 91.

256 Coben & Thompson, “Disputing Irony”, *supra* note 14 at 138.

257 For example, contracting for liquidated damages is allowed (see *ibid* at 139).

258 The ADR Institute of Canada offers mediator liability insurance through Trisura Guarantee Insurance Company in Toronto for \$254.16 per year, including taxes and fees. This provides \$1 million coverage per claim for a \$500 deductible (see ADR Institute of Canada, “ADRIC Sponsored Professional Liability Insurance Program” (2022), online: <adric.ca/membership/member-benefits/professional-insurance-program>).

259 Lawrence Boule and Kathleen 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. The parties indicate they would use mediation again and would recommend it to others (see Laurence Boule & Kathleen J Kelly, *Mediation: Principles, Process, Practice* (Toronto & Vancouver: Butterworths Canada Ltd, 1998) at 271–72). More than twenty years later, this is still true (see Ann C deDufour & Karlee M Naylor, “Mediating Parenting Solutions in the Age of Technology” (2021) Am U School Pub Affairs, Working Paper, online: <ssrn.com/abstract=3835515>; Institute of Social Studies and Analysis, *Satisfaction Research on Mediation and Arbitration Use* (Tbilisi: The European Union for Georgia, 2021); Jennifer L Schulz, “Evaluating Manitoba’s Automobile Injury Mediation Pilot Project” (2018) 41:1 Man LJ 21; Ciprian Sandu, “Measuring the Success of Mediation” (2013) 2

dissatisfied with the quality of a mediator's services, disputants may terminate the session, seek to have their mediated agreement set aside, or sue their mediator. However, negligence suits against mediators will continue to fail until a court combines the disapprobation found in case law with the principles outlined in mediator codes of conduct to create a custom-based standard of care for mediators. Until then, practising mediation will continue to remain nearly risk-free.

Conflict Studies Q 30; Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Victoria, Australia: Department of Justice, 2009), online: <ssrn.com/abstract=1395550>; Jacob Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria" (2006) 7 *Cardozo J Conflict Resolution* 289; E Patrick McDermott & Ruth Obar, "What is Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit" (2004) 9 *Har Negot L Rev* 75.