In Search of Reasonably Competent Mediators at Common Law
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Abstract

Since 1990s, common law judges have turned to alternative approaches of dispute resolution in dealing with the serious problems that afflict the civil justice systems. The courts encouraged disputants to attempt mediation, holding out hope for more timely, cost-effective and just enforcement of civil rights. Chanting ‘mediation first’, professional mediators came on the scene. They received facilitative mediation training and obtained accreditation from service providers. They expressed concerns on the theoretical risk of professional liability lawsuits, which continues to loom large in the course of their practice.

Such threat materialized eventually, albeit on a small scale. As of today, the appellate courts of United States, Canada, England and Wales, Hong Kong, Singapore, Australia and New Zealand decided only four cases concerning mediators’ negligence. This paper undertakes a detailed examination of this kind of tortious liability. There are other mediation torts, such as deceit in advertising, defamation, invasion of privacy, breach of confidence, or even trespass to the person. They are not discussed here; the assessment of damages is independent of the mediation itself and therefore the legal analysis of liability requires no customization of common law principles. Because of the restricted focus, this paper aims to explore the judicial approaches and codes of conduct for mediators in major common law jurisdictions and to assess the extent to which they support the negligence argument.

Much has been written about the possible bases of mediator liability, and readers familiar with the literature will doubtless be wondering what more there is to say about them. There are two main grounds for embarking on a new assessment. One is that the negligence claim has never received a satisfactory resolution: there is no consensus in the literature on what a reasonably competent mediator should do. While this paper does not claim to offer a definitive solution, it progresses the debate by mapping the common law approach to the standard of care and suggesting reasons that consensus has been hard to achieve. A second reason for revisiting the negligence claim is that recent decisions and ethical codes for mediators have devoted considerable attention to situations that bear some similarity to what the minimum competent mediation practice entails and so provide new resources with which to explore them.