
# Blaming the Unblameable? On the Liability of Mediators

by

Andreas Ehlers*

* Assistant Professor at the Faculty of Law Centre for Enterprise Liability (CEVIA) at the University of Copenhagen, Denmark.

**Nordic Journal of Commercial Law**
**Issue 2014#1**

## 1 Introduction

The purpose of the present article is to examine the legal basis for establishing claims for pure economic loss against persons acting as mediators in private (out-of-court) disputes.[1] Mediation can be defined as a voluntary process in which a neutral third party (the mediator) helps conflicting parties find a satisfactory solution to a given problem. The role of the mediator, who will often be a professional such as a lawyer, an architect, a psychologist, an accountant, a consultant or a medical doctor, is to lead the dispute resolution process by supporting the parties in developing and examining their own proposals for a settlement. During the course of mediation, the mediator usually performs a variety of different services ranging from the overall structuring of the mediation to concrete services pertaining to the substance of the conflict. *Inter alia* this involves deciding how meetings should be set up, who should be present at meetings, what should be discussed, what advice should be given, and what experts (if any) should be consulted. By interfering with disputes regarding the rights and duties of other parties, the mediator, like any other negotiator or advisor, risks that his conduct in some way causes detriment to one or more of the parties to the mediation. Several damage scenarios can be imagined but most importantly perhaps, the mediator's conduct may cause the parties to settle on unfavourable terms or not settle at all. Further, the mediator may cause damage to the parties by revealing their commercial secrets and he may also cause harm to their persons (e.g. emotional distress).[2] Furthermore, damage to parties not even involved in the mediation may ensue. In Danish law there are no special rules applicable to the liability of mediators acting out of court.[3] This means that the well known requirements of contract law and tort law need to be satisfied in order for the parties to recover against the mediator:[4] First, the mediator must have acted in contravention of the liability standard applicable to the mediation. This standard is

[1] At present pure economic loss is to be understood in what I understand to be its traditional sense, i.e. as a loss, which does not flow from initial injuries to the person or damage to property.

[2] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 182.

[3] Recently special rules have been adopted for mediations conducted at the Danish courts, cf. The Administration of Justice Act (Consolidated Act no. 1139 of 24 September 2013) chapter 27. In a recent article by Lise Dyrby Nielsen published in the Danish Law Report for Commercial Law (2013) (in Danish: Erhvervsjuridisk Tidsskrift) at 49 it is suggested that legislation on out-of-court mediation is being enacted as soon as possible in order to promote the practice of such mediation. In Sweden, for example, legislation on out-of-court mediation was enacted in 2011, see Lag (2011:860) om medling i vissa privaträttsliga tvister. For a commentary on this piece of legislation, see Dan Engström, *Lag om medling i vissa privaträttsliga twister – en kommentar* (2011).

[4] It has been argued by certain Anglo-American legal scholars that mediators can become liable for breach of fiduciary duties also, see e.g., (Anonymous author), 'The Sultans of Swap: Defining the Duties and Liabilities of American Mediators' (1986) 99 Harvard Law Review 1879ff and Arthur A. Chaykin, 'Mediator Liability: "A New Role for Fiduciary Duties?"' (1984) 53 University of Cincinnati Law Review 731ff. However, several scholars firmly reject that mediators can become liable as fiduciaries, see e.g. Andrew Lynch, '"Can I Sue My Mediator?" - Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 117-119. Liability for breach of fiduciary duties under common law will not be dealt with further in the article.

determined pursuant to the basic rule of *culpa*. Second, there must be a certain nexus between the negligent conduct of the mediator and the loss suffered by the aggrieved party. This requirement is traditionally split in a requirement for factual causation and a requirement for adequacy. The former requires that a factual causal nexus can be established, whereas the latter requires that certain normative criteria and policy considerations make it reasonable to award damages. For many good reasons said requirements have long standing in the law. Perhaps the most apparent one is their inherent flexibility, which enables them to adapt to developments and trends in society. The significant developments in the past 200 years evidence this very well and on that basis there are also goods reasons to believe that they are capable of dealing with mediation in a satisfactory way. However, this does not mean that the conduct of mediators is easily assessed according to above requirements. On the contrary each of them seems to pose serious difficulties to anyone contemplating suing a mediator. This should become apparent from the present examination. The article focuses on the liability of mediators under Danish law. Due to the lack of Danish case law (as well as other authoritative sources of law such as legislation) on the matter, also foreign law will be looked at in order to extrapolate pertinent arguments for and against imposing liability. This will make the article interesting to foreign lawyers also.

Part 2 offers a global outlook on court cases concerning the liability of mediators and in part 3 it is discussed on what legal basis liability claims against mediators can be raised. In part 4 it is examined what it takes to establish that the mediator has acted wrongfully. This makes it necessary to do two things: First, it must be determined what standard of care is applicable to mediators and second, it must be examined what it takes for the mediators' conduct to contravene this standard. In parts 5 and 6 respectively the feasibility of establishing factual causation and adequacy is examined and in part 7 it is discussed to what extent liability can be disclaimed by the mediator..

## 2 The Concept of Mediator Liability

### 2.1 Mediator Liability is *Sui Generis*

As adumbrated above mediation can be defined as a voluntary dispute resolution process in which a neutral third party, the mediator, helps disputants settle certain conflicts. In private mediations the conflicts may regard any issue which can be handled out-of-court, including, *inter alia*, commercial matters (concerning e.g. contracts, personal injury and relationships between landlord and tenant), matters pertaining to the relationship between employer and employee and disputes between public authorities and private persons or entities. Mediations may be conducted in several different ways but roughly it seems fair to say that the two most common and distinct ways are the so-called facilitative mediations and the substantive mediations. In the former way, the role of the mediator is to help the parties by, *inter alia*, leading the dispute resolution process, structuring the dialogue, and resolving dead locks by coming up with alternative solutions and employing empathy. In the latter way, in addition to

these measures, the mediator may to some extent interfere with the substance of the conflict. If, for example, the mediator is a practicing lawyer he may offer his opinion on matters of law and if he is an architect, he may explain how a certain structure, which has collapsed, should have been properly built. In the literature the said two ways of conducting mediations are correctly perceived as being fundamentally different but as will become apparent below, a mediator may well shift from one way or model of mediation to another during the mediation process.[5] Hence, the boundaries between said schools may be somewhat blurred in practice.

What makes mediation a special kind of dispute resolution is, first and foremost, its voluntary and collaborative nature. Thus, unlike court proceedings or in the performance of traditional advisory services, the disputants have voluntarily and explicitly agreed to solve the disputed matter by way of collaboration. Second, as already pointed out, mediations can be conducted by a variety of different professionals such as lawyers, accountants, consultants, architects, and doctors. Or even by non-professionals. This is, of course, also a *sui generis* feature of mediation. Third, in contrast to what applies to most other dispute resolution services, in most countries there is no legislation or other firm rules on how mediations should be conducted. The said special traits of mediation are exactly what make mediation particularly interesting in a liability context. How does one, for example, establish what the standard of care is when so many different kinds of professionals and non-professionals conduct mediations and when there is no legislation or other rules setting out what they should and should not do? And how much should be required of the breach of standard in order to establish blameworthiness when it – *inter alia* due to said heterogeneity of the mediators' backgrounds – is difficult to say whether mediation is to be regarded as a proper profession in a liability context? Further, how is it at all possible to establish causation between the conduct of the mediator and the loss suffered by a client when the hallmark of mediation is that it is the parties themselves who determine the outcome of the settlement? Thus, if it is indeed the parties' *own agreement* at least it will require a special structuring of one's argument to persuade a court that it was in fact the mediator who caused the relevant damage. Furthermore, when the principal role of the mediator is to help the parties find their own solution, generally it will not be an easy task to establish that the mediator should have reasonably foreseen that his conduct could cause detriment to one or more of the disputants. When assessing the liability of e.g. court judges and advisors such as lawyers and consultants one may face some of the above difficulties.[6] For example, the duties of said advisors are often difficult to ascertain.[7] However, in such cases it is uncommon that practically all of the basic liability requirements will give rise to problems as will most often be

[5] See e.g. the below mentioned Australian case in *Tapoohi v. Lewenberg* No 2 [2003] VSC 410 (21 October 2003) where the mediator himself gave legal advice on the substance of the conflict in question even though he had contracted with the parties to conduct a facilitative mediation.

[6] On the liability of Danish court judges, see Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd edn, 2010) at 279-286. For an illustration of the case law on this issue, see e.g. a case decided by the Danish Supreme Court in 1963 (published in the Danish Weekly Law Report the same year at 767).

[7] On the duties of lawyers under Danish law, see Mads Bryde Andersen, *Advokatretten* (2005).

the case with regard to claims made against mediators. To some extent this *sui generis* nature of mediator liability is also evidenced by that fact that e.g. lawyers and consultants are frequently sued and held liable for losses incurred by their clients, while no mediator has so far been held liable for damages in a court of law.

### 2.2 A Global Outlook on Court Cases Concerning Mediator Liability

Mediation is becoming increasingly popular and today a staggering amount of disputes are resolved in this way. In spite of this and the apparent potential of the mediators' conduct to cause loss not a single Danish court case deals with the liability of mediators and the same seems to be true in the other Nordic countries. The lack of judicial guidance in the case law of the Nordic legal family makes it relevant to look at the jurisprudence of other legal systems as well, but even on the global level the number of cases is extremely small.[8] Moreover, it seems that almost every case that does deal with the issue was decided on summary judgment and this of course reduces their value significantly. The most illuminating cases that could be found are three U.S. cases in *Lange v. Marshall,*[9] *Lehrer v. Zwernemann*[10] and *Chang's Imports, Inc. v. Srader*[11] and the Australian case in *Tapoohi v. Lewenberg*[12] (even though liability was not imposed in any of them).[13]

First, in *Lange*, a lawyer, Mr Marshall, had undertaken to mediate a dispute regarding the dissolution of a marriage between Mrs Lange and Mr Lange. He advised both parties that he would not represent one against the other but that he would represent them jointly and prepare the papers necessary to effectuate the dissolution.[14] At a time where the claimant, Mrs Lange, was admitted to the psychiatric ward at a hospital suffering from *lupus eryethemathosis*, the

[8] The little effort to sue mediators is rather surprising but on close scrutiny there seem to be at least a few good reasons for this. One seems to be that the parties do not really know what to expect of the mediator and this makes it difficult to assess whether he performed well. Another could to be the existence of a pro-settlement inclination on behalf of parties participating in mediation in the first place, cf. Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 152. The most important reason, however, seems to be that apparently it is very difficult to successfully sue a mediator.

[9] 622 SW 2d 237 Mo Ct App (21 September 1981).

[10] 14 SW 3d 775 (17 February 2000).

[11] 216 F. Supp. 2d 325 (20 August 2002).

[12] No 2 [2003] VSC 410 (21 October 2003).

[13] See also the U.S. case in re Joint Eastern and Southern Districts Asbestos Litig.737 F. Supp 735 (E.D.N.Y. 16 May 1990) and the New Zealand case in McGosh v Williams [2003] NZCA 19 (12 August 2003).

[14] In fact therefore, he seems to have acted as a mediator for the parties rather than as a lawyer for one of the parties. This appears also to have been accepted by the court: 'The parties disagree as to the nature of the obligation defendant undertook. It is clear that he advised both parties that he would not represent either as an advocate. Although the terms "arbitrator" and "negotiator" were used also in the parties' conversations, "mediator" would appear to be the proper term to apply to defendant's role.'

mediator helped the parties negotiate a settlement which was signed by both parties and filed to the court (together with a petition for dissolution). However, before the judgment was entered, Mrs Lange had second thoughts concerning the settlement and sought legal counsel. Mr Lange did the same and the mediator withdrew from the case. The matter was taken off submission from the court and 10 months later Mrs and Mr Lange entered into a settlement, which was more favourable to the former. Mrs Lange then sued the mediator alleging that he had failed to inquire as to the financial state of Mr Lange and negotiate a better settlement for her. Moreover, she alleged that he had failed to advice her that she could get a better settlement if she litigated the matter and that he had not fully and fairly disclosed her rights as to marital property, custody, and maintenance. The mediator contented that he had no duty to do either of the alleged things because he had undertaken to represent the parties as a mediator. The court found for Mr Marshall alleging that, even if he had acted negligent, Mrs Lange had failed to establish any damages proximately caused by Mr Marshall.[15]

Second, in the *Lehrer case*, Mr Lehrer had sued his former attorneys for malpractice. This dispute was mediated by Mr Zwernemann and a settlement agreement was subsequently entered into. However, Lehrer became dissatisfied with the settlement and sued Mr Zwernemann alleging that he had failed to disclose a certain conflict of interest. *Inter alia* Mr Lehrer based his claim on negligence, breach of contract, and breach of fiduciary duty. The court briefly held that Mr Lehrer had not produced sufficient evidence to establish that Mr Zwernemann had caused any 'legal injury'.[16]

Third, in *Chang*, a mediator,[17] Mr Rubin, had agreed to help settle a dispute between a trademark licensor, Chang, and a licensee, Srader. After signing the settlement agreement the parties consulted separate accountants to review the relevant records, in accordance with the terms of the settlement agreement, but they did not agree on the amounts owed between the parties. This led Chang to sue Mr Rubin for the amount he believed was due according to the settlement agreement.[18] Chang alleged first that Mr Rubin was in a position of conflict of interest and that he therefore should not have mediated the agreement.[19] Further, Chang alleged that the mediator's conduct fell below the standard of care owed by him. The court found that Mr Rubin had satisfied his duties as a mediator because he managed to bring the

[15] For more on the *Lange* case and the reasoning by the court, see below at 5.

[16] For more on the *Lehrer* case and the reasoning by the court, see below at 4.2.

[17] The mediator was also an attorney but the court found that he was not acting as such for either party in negotiating and drafting the settlement agreement. Rather, the court found that he was acting as a neutral mediator and therefore he had not violated New York law in representing two clients with conflicting interests.

[18] Chang also sued Srader but these proceedings were referred to arbitration.

[19] Even though both parties had in fact been informed about said conflict of interest and signed a letter agreeing to waive any claim in that respect.

parties together and successfully drafted an agreement which was executed by both of them. Chang's allegations were therefore dismissed.[20]

Fourth, in *Tapoohi*, the mediator was asked to settle a dispute between two sisters concerning the estate of their late mother.[21] During the mediation both sisters were represented by lawyers.[22] The meditator was appointed verbally by the parties and for that reason there was no firm or elaborate written basis on which his duties could be established. However, it did follow from his letter of acceptance that he was to assist the parties in reaching a result rather than dictating or imposing a settlement on them.[23] Dissatisfied with the settlement agreement reached between the sisters, Tapoohi first attempted to set it aside in court. Then she added a claim against her former solicitors whom by way of a third party notice sought contribution from, *inter alia*, the mediator pursuant to the Wrongs Act 1958 (Vic).[24] The claim made against the mediator, which he vigorously disputed, was based on breach of contractual and tortious duties. In its summary judgment the court found that it was 'not beyond argument that some at least of the breaches of the contractual and tortious duties might be made out' and allowed the case to proceed to trial.[25]

The said common law cases of course do not have an immediate precedential value for Danish law but for at least two reasons the arguments put forward here seem relevant to us also. First of all, out-of-court mediations seem to be practiced in largely the same way throughout the Western countries and therefore, the disputes, which ensue between the mediator and the clients must be expected to be similar also. Second, as will become apparent below, ascertaining what the law is on the present issue is most of all about extrapolating legal arguments from the basic normative structure of tort and contract law and on that level, the rules of common law and Danish law do not seem to differ much. This appears also from the fact that most of the legal reasoning of the common law courts in said cases could well be applied by Danish courts in future cases.[26]

[20] For more on the *Chang* case and the reasoning by the court, see below at 4.1. and 4.2.

[21] In this case the person sued was a queen's counsel but during the negotiations he acted as a mediator for both parties.

[22] As noted also by Melinda Shirley and Tina Cockburn it is a peculiar fact of this case that Mrs. Tapoohi was herself a qualified lawyer and that Mrs. Lewenberg was represented by a law firm (Lewenberg & Lewenberg) in which her daughter and husband were both principals, cf. Melinda Shirley and Tina Cockburn, 'When Will a Mediator Operating Outside the Protection of Statutory Immunity be Liable in Negligence' (2004) 32 University of Western Australia Law Review 84.

[23] The content of the letter of acceptance is discussed further below.

[24] See Section 23B of the Wrongs Act 1958 (Victoria).

[25] Unfortunately for present purposes, for other reasons the case never went to trial. For more on the *Tapoohi* case and the reasoning by the court, see below at 4.1., 4.2., and 5.

[26] All of the said common law cases are dealt with further below.

## 3 The Basis for Establishing Liability Claims Against Mediators

It is neither in Danish law, nor in any other legal system, entirely clear how claims against mediators for pure economic loss should be designated.[27] As regards Danish law this is hardly surprising given the fact that the boundaries among several different branches of the law are blurry. To foreign lawyers this lack of clarity may seem odd and in some respects perhaps it is. For example, to some extent it *is* odd that in Danish law it is still disputed whether claims for personal injury made by employees against employers should be regarded as contractual or tortious. However, to a Danish lawyer accustomed to the pragmatic Nordic approach to the law, the said lack of clarity is not necessarily perceived as a flaw or as a lack of stringency in the law. In fact, many modern commentators see this *open nature* of the Danish legal system as a way of promoting justice because care is taken to handle claims with due regard to the legal norms, which are most pertinent, instead of the norms applicable due to the designation of a certain claim under a certain heading.[28] Even though it is not clear on what specific grounds a mediator may be sued under Danish law, it *is* clear that the claim must be established in contracts or torts.

It is common for mediators to enter into a contract with the parties on how the mediation is to be conducted and sometimes the provisions of such contracts may themselves pave the way for establishing a claim. However, mediation contracts have certain characteristics which often make it difficult to base claims on the contracts as such. First of all, in the vast majority of the contracts the role of the mediator is only sparsely described and the provisions that actually do address what he should and should not do concern mostly procedural matters of a very general nature.[29] For example, it is often specified that the mediator should be impartial, lead the case without deciding it, and ensure that the parties are treated equally.[30] Further, clauses on disclosure of conflicts of interest and confidentiality are common. In certain circumstances some of these provisions may be relevant in a liability context but they do not deal with the duties of the mediator in regard to the substance of the mediation (i.e. the disputed issue). For example, it is rarely specified to what extent (if any) the mediator should give advice on the merits of the dispute (e.g. how he understands the facts of the dispute) or how a certain regulatory framework should be construed. The latter could, for example, concern the interpretation of rules on accounting, on building a bridge or some other rule relevant to the

[27] At common law this is e.g. reflected by the writings of Andrew Lynch and Melinda Shirley and Tina Cockburn, see the former author in '"Can I Sue My Mediator?" - Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 113. For the latter authors, see 'When Will a Mediator Operating Outside the Protection of Statutory Immunity be Liable in Negligence' (2004) 32 University of Western Australia Law Review 83.

[28] See e.g. Ole Hansen, *Det entrepriseretlige hjemmelsproblem* (2008).

[29] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 163-164.

[30] See further below part 4.1.

dispute.[31] Second, the provisions in mediation contracts are normally quite vague and this also makes it difficult to ascertain what the legal implications of the contracts are. The little focus on the duties of the mediator in the contracts probably owes to the fact that the parties often do not consider it relevant to sue him for damages. Perhaps most parties to mediations are not even aware of this feasibility.[32]

The failure to specify the duties of the mediator in the contracts may be problematic for an aggrieved party because it leaves merely a feeble contractual basis for raising a claim. However, it does not necessarily mean that the parties are precluded from raising claims in contract since such duties can be made clear by supplementing the contract with norms not expressly agreed upon by the parties. Roughly, such norms can be inferred from the (hypothetical) will of the parties (i.e. what the parties in the circumstances would have agreed to) or some external source of law.[33] The former way of inferring norms is most frequently used when there is something in the contracts (or in the prior negotiations) indicating what the intentions of the parties were, when they agreed upon them.[34] If, for example, there is a preamble to the contract it may contain useful interpretative guidelines as to how a certain ambiguity should be settled.[35] The same applies to the language of the contract, e.g. the parties' use of headlines or certain words in certain contexts.[36] The latter way of inferring norms is usually employed when there are no useful guidelines in the contract as to how a certain matter should be dealt with. In such cases the courts may apply norms, which do not stem from the parties themselves so to speak. This could be, for example, basic legal norms derived from legislation, case law, custom or literature.[37] In a mediation context custom and literature seem particularly important sources of

[31] The main reason for this is probably that most mediators (at least most Danish mediators) consider themselves to be merely facilitators and not advisors as the facts or the rules applicable to a certain dispute. However, as we shall see below, sometimes the mediator transgresses the facilitative role set out in the agreement with the parties and somehow interferes with the substance of the dispute, cf. below at 4.1. regarding the *Tapoohi case*.

[32] See further Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 151.

[33] Much has been written in Nordic literature about this fundamental issue of contract law, see e.g. Jan Ramberg og Christina Ramberg, *Allmän avtalsrätt* (8th edn, 2009) 153-156, Jo Hov og Alf Petter Høgberg, *Alminnelig avtalerett* (2009) 249ff, Geir Woxholth, *Avtalerett*, (7th edn, 2009) 395ff and Mads Bryde Andersen, *Grundlæggende Aftaleret*, (3rd edn, 2008) 315ff and 342ff.

[34] See Bernhard Gomard, *Forholdet mellem Erstatningsregler i og uden for Kontraktforhold* (1958) 64-65.

[35] Mads Bryde Andersen, *Grundlæggende Aftaleret* (3rd edn, 2008) 316.

[36] The use of headings and perhaps a special use of certain words may indicate what the common will of the parties was when entering into the contract. But when it is not possible to establish that, the courts may choose to rely on an interpretation of the general semantics of the words employed in the contract. Such interpretation is objective in the sense that it is based on what is commonly understood by the use of certain words as opposed what the parties meant by the them. On so-called linguistic interpretation, see Mads Bryde Andersen, *Grundlæggende Aftaleret* ( 3rd edn, 2008) 320-322.

[37] It is controversial whether literature is relevant in this respect. On the one hand, it is, of course, not a source of law in *sensu stricto*. But on the other hand it seems difficult to rule out that courts are sometimes persuaded by analysis or empirical research put forward in the literature. In the context of mediation, for example, it seems reasonable to assume that in order to ascertain what the customary behaviour of mediators is, the courts (to some extent) look at the existing literature on this particular issue.

law in this regard. With respect to custom evidence of how mediators act can be derived from e.g. the many rules and standards adopted by (particularly) private organisations, cf. e.g. the rules for mediation adopted by the Institute for Mediation (Danish: Mediationsinstituttet)[38] and the ethical guidelines of the Association of Danish Lawyers Acting as Mediators (Danish: *Danske Mediatoradvokater*).[39] Further, the extensive literature on how mediations are (and should be) conducted can be used to extrapolate relevant standards of behaviour.

In most cases claims against mediators will probably be regarded as contractual. However, due to the special nature of the relationship between the mediator and the clients (including the fact that the mediator represents the interests of both parties) and the fact that the contractual basis from which the relevant legal norms can be extrapolated is usually very feeble, claims against mediators will often resemble claims in tort more than claims in contract. Thus, for example, when the mediation contract (if there even is such a contract) is silent as to what the mediator should or should not do, the duties of the mediator will in most cases be determined in a way which is most familiar to tort law, i.e. on the basis of general societal norms of what good behaviour is. This is also reflected in below examination of the standard of care applicable to mediators which – due to the lack of pertinent norms in the contracts – is based on an approach which is most often used in torts (i.e. an approach where the relevant norms are inferred from different kinds of regulation and custom).[40] Due to the differences between contract law and tort law the question about the proper designation of claims raised against mediators (as either contractual or tortious) may be important in several respects.[41] This is true with regard to e.g. the remedies available to the aggrieved party and the question of who bears the burden of proof.[42] Also, as will be further developed below, in some cases it makes a difference how a claim is designated when disclaimers are assessed.[43] Moreover, it is reasonable to say that liability is generally assessed more strictly way when the claim is considered to be contractual as opposed to tortious.[44] However, due to said fact that normally only little relevant guidance on the duties of the mediator can be elucidated from the mediation contracts, in practice the precise designation of a certain claim will not make that much of a difference in

[38] See http://www.mediationsinstituttet.dk/files/pdf/DK/Mediationsinstituttets_regler.pdf. See further below at 4.1

[39] See http://www.mediatoradvokater.dk/foreningen/etiske-regler.html.

[40] See below at 4.1.

[41] Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd edn, 2010) 27-28.

[42] As a rule, in torts the burden of proof is on the claimant whereas in contracts it is often reversed, see e.g., Torsten Iversen, *Erstatningsberegning i kontraktsforhold* (2000) 103 and Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd edn, 2010) 28.

[43] Vibe Ulfbeck, *Erstatningsretlige grænseområder*, (2nd edn, 2010) 28.

[44] Mads Bryde Andersen, *Advokatretten* (2005) 761.

most cases. At least not with regard to the fundamental requirements of liability to be examined here.[45]

# 4 Mediator Conduct and Wrongfulness

## 4.1 The Standard of Care in Regulation and Custom

### *4.1.1 The Standard of Care*

If a claim against a mediator for pure economic loss is to succeed, first of all it is necessary to establish that he has somehow acted wrongfully. Whether this is the case is determined according to the basic rule of *culpa* applicable in Danish law. Essentially, this makes it necessary to determine two things: First, it must be determined what standard of care that applies to mediators and second, it must be determined what it takes for the mediators' conduct to contravene this standard in a way that triggers liability. As already pointed out, mediation contracts rarely specify the duties of the mediator in a way that affects how *culpa* is measured. This means that in most cases *culpa* will be determined pursuant to norms found in external sources of law rather than the contract.

It is commonly accepted that the applicable standard of care can be determined in a subjective and an objective way.[46] The two ways of measuring the standard are fundamentally different, but can be applied at the same time. In that way they can both support and contradict each other and the standard so set, may well be an eclectic product of the two.[47] The subjective test is based on an assessment of what a reasonable person would do (or refrain from doing) in a given situation. Thus, if a reasonable person would have anticipated that a certain conduct would cause damage such conduct is normally deemed wrongful.[48] In this way the subjective test for *culpa* is an introspective and retrospective examination of what an ideal person would have done in a certain situation. There is no allowance for inexperience or any other subjective

[45] However, as noted by Iversen the requirement for adequacy may be interpreted less strict when there is a contract between the parties involved in a certain dispute, cf. Torsten Iversen, *Erstatningsberegning i kontraktsforhold* (2000) 100-104. As rightly pointed out by Iversen the basic reason for this is that the existence of a contract adds a certain proximity to the relationship between the parties which makes it reasonable to extent the limits of liability further than in tort law.

[46] See Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011) 86-87 and 88-106.

[47] Earlier it was generally accepted that both the subjective and the objective requirement had to be met in order for the tortfeasor to be held liable. However, perhaps due to the fact that tort law and criminal law are not as intimately connected as they were previously, today the two requirements seem to be alternative rather than cumulative. This appears from e.g. Bo von Eyben og Helle Isager, *Lærebog i erstatningsret*, (7th edn, 2011) 86-87 where the authors speak of a traditional way of determining culpa as well as a modern way. See also Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 53-65.

[48] Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011) 86-87.

deficits for that matter.[49] However, if the mediator positively professes to be or acts as if he is an expert in a particular area, a higher standard may be expected.[50] Pursuant to the objective test the standard of conduct is fixed on the basis of norms laid down in some kind of regulation or custom.[51] Such regulation can be derived from norm-giving institutions (such as legislation, ministerial orders, and government circulars) or from private parties. Examples of the latter could be standards of conduct for mediators or ethical guidelines adopted by various organisations. In this way the standard of care is determined according to actual rules of conduct, which can be identified by examining said regulation. Sometimes rather detailed norms for what acceptable behaviour is, can be extrapolated on this basis. This appears from, for example, the Danish Road Traffic Act[52], which comprises meticulous rules on how e.g. motorised vehicles should be operated.[53] When said Act applies it is often uncomplicated to ascertain what is right and wrong behaviour. For example, it appears from Section 21(1) that normally cars should be overtaken from the left hand side and failure to observe this rule will in far the most cases be wrongful. When the norms are derived from legislation often the courts will apply them immediately (i.e. without inquiring whether they actually do express the relevant standard of behaviour). This is not the case when the norms are based on private regulation. In such cases the courts may well require more (or less) of the conduct of the promisor or tortfeasor. This shows that also the objective test is a legal standard and not a mere sociological product of certain norms applicable in society.

The basic rule of culpa does seem to offer some useful guidance for assessing the standard of care applicable to mediators. This applies particularly to the objective test, whereas the subjective test in many cases seems too vague to give concrete directions in practice.[54] The value of the objective test lies in its ability to explain how a variety of different norms stemming from different kinds of sources impact on how the standard of care is determined. As already said, in a mediation context the most important such sources seem to be regulation (either public or private) and custom (i.e. established practices of mediation). The feasibility of extrapolating relevant norms from these two sources is examined below.

[49] See e.g. Henry Ussing, *Skyld og Skade* (1914) 42 and Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 55.

[50] See Stig Jørgensen, *Erstatningsret* (2nd edn, 1972) 76.

[51] Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011) 88-106.

[52] Consolidated Act no 1047of 24 October 2011.

[53] See Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 60 and Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011) 89.

[54] On the difficulties of applying a subjective test to determine the limits of liability, see Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 118-147. Much of the critique launched here is applicable to the subjective test employed to determine the standard of care.

### *4.1.2 Regulation*

As already said, in Danish law there is no domestic legislation setting out rules of conduct for mediators acting out of court. However, there are several rules and codes of conduct, which can help determine the standard of care in accordance with the objective test. These rules emanate from the supranational level as well as the national level. With respect to the former the European Parliament and the Council of the European Union have adopted a directive on certain aspects of mediation in civil and commercial matters.[55] Further, a European Code of Conduct for Mediators has been adopted by the EU.[56] The purpose of the directive is to establish a predictable legal framework for mediation[57] and better access to justice by promoting adequate dispute resolution processes for individuals and businesses (in cross border disputes).[58] Article 3 (b) of the directive comprises a definition of what a mediator is and in Article 4 certain provisions for ensuring the quality of mediation is set out. With respect to the latter it appears, among other things, that 'Member States shall encourage, by any means (...) the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.'[59] Further, it appears that initial and further training of mediators should be encouraged in order to ensure that the mediation is conducted in an effective, impartial, and competent way in relation to the parties. The said code of conduct contains provisions regarding (i) the competence and appointment of mediators, (ii) their independence and impartiality, and (iii) the procedure. Section 1(1) sets out that mediators must be competent and knowledgeable in the process of mediation. This necessitates proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes. According to section 1(2) the mediator must verify that he has the appropriate background and competence to conduct a mediation before accepting the appointment. Upon request, any information concerning their background and experience must be disclosed to the parties. With respect to independence and neutrality it appears that if there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, he must disclose those circumstances to the parties. Such circumstances, it appears, may be a personal or business relationship with one or more of the parties or financial or other interests in the

[55] Directive 2008/52/EC Of the European Parliament and of the Council of 21 May 2008. The directive is not applicable to Danish law, cf. article 1(3) of the Directive. For further information see also the Ministry of Justice's paper of 23 February 2005 on the (then merely proposed) directive at http://www.euo.dk/upload/application/pdf/780271ac/20040718_1.pdf. Even though the directive does not apply to Danish law it is interesting that on the EU level also efforts are made to enhance access to justice by promoting mediation as a dispute resolution mechanism.

[56] See preamble of above Directive at 17. The Code of Conduct is available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

[57] See the preamble to said directive at 7.

[58] See Article 1 (1) of the directive.

[59] See Article 4 (1) of the directive.

outcome of the mediation. The same applies if the mediator (or a member of his firm) has previously conducted a mediation for any of the parties. Further, it is specified that a mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation. Regarding procedure, it is, *inter alia*, set out that the mediator must ensure that all parties have adequate opportunities to be involved in the process. Further, he must inform the parties (and he may terminate the mediation) (i) if a settlement is being reached that appears unenforceable or illegal or (ii) if the mediator considers that continuing the mediation is unlikely to result in a settlement. Furthermore, the mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement. The parties may withdraw from the mediation at any time without giving any justification. Last, the mediator must, upon request of the parties and within the limits of his competence, inform the parties as to how they may formalise the agreement and the possibilities for making the agreement enforceable.

With respect to the national level both private and public initiatives to furnish rules on the conduct of mediators can be identified. Among the former, the ethical guidelines of the Association of Danish Lawyers Acting as Mediators are important.[60] For present purposes the most relevant provisions concern (i) the role and neutrality of the mediator, (ii) the duty of confidentiality, (iii) the drafting of the agreement, and (iv) the termination of the mediation. Pursuant to Section 1 regarding the basic principles of the mediation the mediator's role is to help the parties resolve the dispute at hand without deciding about the case. Further, it appears that the mediator is not obliged to address strengths or weaknesses in the factual assertions or legal argumentation of the parties. Nor is he obliged to interfere if the parties reach a settlement, which does not correspond to the most likely outcome of court proceedings or arbitration.[61] All information received by the mediator during the mediation (including at separate meetings) is confidential.[62] From Section 5 it appears, *inter alia*, that the mediator must abide by the law and that he must have completed a certain special training in dispute resolution.[63] Moreover, in the organisation of the process the mediator must pay due consideration to making progress in resolving the dispute. Section 2 lays down certain provisions on neutrality, impartiality and independence. *Inter alia*, it appears that the mediator must inform the parties of any circumstances, which could influence his neutrality, impartiality or independence. Finally, Section 3 contains provisions concerning the parties' rights be assisted by their respective lawyers in the mediation. As a rule the parties may be assisted by lawyers and they may at any time consult with them. Among other private initiatives the rules

[60] See above at part 3 (fn 30).

[61] See Section 1 (5).

[62] See Section 1 (2).

[63] See Sections 4 (1) and 4 (5).

for mediation adopted by the above mentioned Institute for Mediation.[64] These rules largely contain provisions similar to above-mentioned ethical guidelines adopted by the Association of Danish Lawyers Acting as Mediators. The same applies to the public initiatives, which include the New Ethical Rules for Court Appointed Mediators[65] and the Rules on Mediation 2010 of the Danish Institute of Arbitration.[66]

The regulatory framework outlined above provides a good overall idea of what mediators are expected to do. Further, the high degree of convergence in the contents of the rules suggests that most of them are generally accepted in the mediation community and perhaps even society at large. This makes it likely that the courts will take them into consideration when laying down the applicable standard of care. For example, it seems clear that the prevalent rules on the mediator's role, competence, impartiality, and confidentiality will be taken into consideration. However, for several reasons the potential of the regulatory framework for determining the standard of care seems limited. First and foremost the scope of the rules is limited. This appears from the fact that they almost exclusively deal with the limited range of issues mentioned above. Thus, similar to the provisions of the mediation contracts, the rules mostly deal with procedural matters whereas the mediator's duties in respect of the substance of the conflict are ignored. For example, it is not specified in any detail how (and to what extent) he should interfere with the substance of the conflict e.g. by sharing his opinion on the facts of conflict or giving advice on pertinent rules. In at least some mediations the mediator will in some way (deliberately or not) deal with the substance of the conflict and therefore, an important part of what mediation is about is not dealt with.[67] This is of course problematic and as a consequence what the duties of the mediators are in this respect must be established on a different basis (i.e. primarily custom, cf. below). Second, the rules that actually do appear from the regulatory framework are defined rather vaguely. For example, it appears, from the ethical guide lines of the Association for Danish lawyers Acting as Mediators that the mediator's role is to help the parties resolve the dispute at hand and advance the resolution process as quickly as possible.[68] This very broadly stipulates what the role of the mediator is but it says little about his concrete duties. It appears that he should not decide the case but this merely reiterates the (obvious) fact that it is ultimately for the parties to agree on a settlement and therefore, it is difficult to see how it can

[64] See above part 3.

[65] This set of rules was drafted by a working group of court-appointed mediators. Thus, this set of rules, which applies to court mediation conducted in pursuance of Chapter 27 of the Administration of Justice Act (Consolidated Act no 1139 of 24 September 2013) only, also contains provisions on *inter alia* (i) the role of the mediator, (ii) neutrality and impartiality, (iii) duty of confidentiality, and (iv) termination of the mediation process.

[66] See http://www.voldgiftsinstituttet.dk/en/Menu/Mediation

[67] Mediators subscribing to the facilitative tradition will probably deny that such interference with the substance is taking place and in most cases perhaps rightly so. However, as evidence by the *Tapoohi case*, in which (as will become apparent below) the mediator claimed to be merely a facilitator in his letter of acceptance, at least in some cases it will be difficult even for facilitative mediators not to interfere with the substance of the dispute to some extent.

[68] See Sections 1(1) and 4(2).

contribute to setting the applicable standard of care. It seems that almost any way of conducting mediations may correspond with said rule. The same applies to several of the other rules. Third, some of the rules do not in any case appear relevant in a liability context. For example, it is doubtful if what is said about the mediator having to complete certain training is relevant.[69] Of course it indicates that he must possess a certain level of proficiency but failure to complete a certain training program will not itself give rise to liability. What is relevant in that respect is how he actually conducts himself in the mediation.[70] Last, even though the rules reflect duties that seem to be broadly accepted, it should be borne in mind that most of them stem from private organisations and not the legislature.

### *4.1.3 Custom*

The limited potential of regulation to specify the standard of care makes it necessary to look for other ways to establish what the mediator should and should not do. In the literature, it has been suggested that, when there is no firm regulation, the standard of care can be determined on the basis of how reasonable mediators actually behave (i.e. according to custom).[71] This way of determining the standard is of course well known but due to the stylistically varied and complex nature of mediation (including the many different schools of mediation) it seems difficult to extrapolate clear guidance on this basis.[72] To overcome this problem it has been suggested to differentiate or break down the standard of care to reflect the different models of mediation.[73] The rationale is that it is possible to ascertain the duties of the mediator more precisely by exploring the customary behaviour of each model. For example, it has been argued that the duties should be established taking into account whether the mediation is facilitative or evaluative.[74] Schulz gives the following example of this: 'If it is the custom of all mediators of a certain school, such as facilitative mediation, in a specific practice area, such as small claims court mediation, not to mediate cases involving violence between intimate partners and a mediator of that school and practice area mediates such a case, that mediator has breached the

[69] See Section 4(5) of the ethical guidelines of the Association for Danish Lawyers Acting as Mediators.

[70] See below at 4.2 regarding breach of the standard of care.

[71] Jennifer L. Schulz, 'Mediator Liability: Using Custom to Determine Standards of Care' (2002) 65 Saskatchewan Law Review 163ff.

[72] The stylistically varied and complex nature of mediation is evidenced well by the large amount of literature on what mediation is or should be, see e.g. Hans Boserup, *Konfliktvindere* (1993), Cyril Chern, *Dispute Resolution Guides. International Commercial Mediation* (2008), Hans Boserup og Susse Humle, *Mediationsprocessen i praksis* (2nd edn, 2012) and Vibeke Vindeløv, *Konfliktmægling. En refleksiv model* (3rd. rev. edn, 2013).

[73] See Jennifer L. Schultz, 'Mediator Liability: Using Custom to Determine Standards of Care' (2002) 65 Saskatchewan Law Review 163, 66, and 169.

[74] Very broadly it seems to be generally accepted in the literature that there are two major approaches to mediation; the facilitative and the evaluative. Roughly, the facilitative model is process-oriented and focuses on interest-based problem solving. In this model the main role of the mediator is merely to promote the negotiation process and to encourage the parties to create a settlement that reflects mutual interests. Conversely, the evaluative model is of a more substance-oriented nature in that the mediator interferes with the dispute as such.

customary standard of care.'[75] Breaking down the standard of care may certainly help clarify the duties of the mediator and therefore, this way of dealing with the issue deserves support.

That being said it should be borne in mind that it is difficult to establish what the customary behaviour of even a particular model of mediation is. In the abstract certainly useful distinctions can be made between e.g. facilitative and evaluative mediation but it seems folly to believe that clear guidelines can be extrapolated from this bipartition of the practice of mediation.[76] Further, there are many more models (or schools) of mediation and an even greater number of special settings in which mediations take place and this of course makes it even harder to lay down accurate standards. Schulz argues that this multiplicity of mediation is not problematic because it "is acceptable to have more than one standard of care when there is more than one practice being evaluated."[77] But this is not entirely persuasive. It is true that standards of care need to be differentiated according to the area of practice in question. Indeed this is a common place way of clarifying standards of care in tort law. For example, there are different standards for people working in the field of law and medicine and even within these fields differentiations are made. This is also pointed out by Schulz who notes that e.g. different standards apply to doctors and chiropractors even though they both work within the field of medicine. However, this does not cart off the fact that what is acceptable behaviour for professionals such as lawyers, doctors, and chiropractors is much better established than what is acceptable within certain kinds of mediation. Moreover, the demarcations among said professions seem much more robust than the corresponding demarcations among the different models of mediation. The most important reasons for this are probably the long standing of these professions and the strong body of regulation applicable to them.

Another reason why it is difficult to establish clear standards even within the different models of mediation is that in practice a competent mediator must be expected to always adapt his services to the circumstances of the actual dispute. All of his actions therefore, can rarely be fitted into a particular model or school of mediation. For example, some actions may be "facilitative", others may be "evaluative" and sometimes the mediator could probably even shift completely from one school to another. This is also a feature of mediation, which does not apply to the same extent to above professions. Not even within the same field. For example, a chiropractor may only perform a limited number of services also provided by doctors. The point in question is well illustrated by the facts of the *Tapoohi case*.[78] In an initial letter to the parties, the mediator explained the mediation process and his role as follows:

[75] Jennifer L. Schulz, 'Mediator Liability: Using Custom to Determine Standards of Care' (2002) 65 Saskatchewan Law Review 172.

[76] See also Andrew Lynch, '"Can I Sue My Mediator?" – Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 121.

[77] Jennifer L. Schulz, 'Mediator Liability: Using Custom to Determine Standards of Care' (2002) 65 Saskatchewan Law Review 173-174.

[78] No 2 [2003] VSC 410 (21 October 2003).

> 'I confirm that the aim of the Mediation Conference is to assist the parties in reaching a settlement of their dispute by the involvement of an impartial mediator. It is not the role or function of a mediator to impose a settlement on the parties. It is up to the parties to arrive at their own resolution of the dispute. The purpose of the mediator is to assist the parties to define the issues, eliminate obstacles to successful communication, explore settlement alternatives, and generally work with the parties to achieve a negotiated resolution.'[79]

This definition much resembles the definition of facilitative mediation, where the main role of the mediator is to conduct the process and to maintain a constructive dialogue between the parties. However, the mediator clearly exceeded the stipulated facilitative role by undertaking to dictate the terms of the settlement agreement and insisting that the agreement be signed before the mediation was adjourned. From the affidavit given by one of Ms Tapoohi's legal advisors, Mr Shiff, it appears that the mediator said such things as:

> 'You have got to stay, you have got to do the terms of settlement tonight.
>
> No, we are doing it now. We are signing up tonight as that is the way that I do it, that's how I conduct mediations.
>
> 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 up tonight.'[80]
>
> 'We will now put together the terms of settlement and I will dictate them.'[81]

Further, the mediator expressed his legal view on stamp duty issues relating to the transfer of certain properties and suggested that for tax purposes the consideration for certain shares to be transferred from Ms Tapoohi to Ms Lewenberg should be fixed at one dollar.[82] As it appears, due to, among other things, the acrimony between the sisters, the mediator deviated from the facilitative starting point expressed in his letter and adopted a highly evaluative approach by dictating the settlement agreement and giving advice on tax issues. Therefore, the *Tapoohi case* is a good example of how the stylistically varied nature of the mediator's role adds to the problems of laying down accurate standards of care. Some further attempts have been made to find a feasible way of specifying the duties of the mediator. For example, it has been sought to identify certain "core" duties applicable to mediators and to some extent this approach seems to have been employed in *Chang* where it was said that '[t]he role of a mediator is often that of the honest broker who must suggest a solution giving advantage to both sides and minimizing the

[79] No 2 [2003] VSC 410 (21 October 2003) at 16.

[80] No 2 [2003] VSC 410 (21 October 2003) at 27.

[81] No 2 [2003] VSC 410 (21 October 2003) at 29.

[82] No 2 [2003] VSC 410 (21 October 2003) at 24 and 31.

price that each must pay.'[83] However, this way of dealing with the problem seems susceptible to largely the same criticisms as above. This appears also from said quote of the *Chang* court, which basically merely reiterates what is quite obviously the overall role of the mediator. In fact what is said here seems to follow almost immediately from what is denoted by the word "mediation".

In sum, at least at this stage it does not seem feasible to lay down a predetermined and conclusive standard of care for mediators. Rather, in each case the courts must set the standard by taking into account the unique circumstances at play. This seems also to be the conclusion of the court in *Chang*, who 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."[84] Admittedly, this makes it difficult to assess and predict how the mediator should conduct himself in order not to be exposed to liability and of course this lack of transparency in the law is unsatisfactory.

### 4.2 Breach of the Standard of Care

What has been said about the standard of care pertains to what behavioural norms the mediator must observe. The problem to be examined here concerns what it takes for the mediator's conduct to contravene the applicable standard in a way that allows for liability to ensue. This problem is strictly speaking fundamentally different from the former. It is the firm rule of Danish law that the promisor or tortfeasor should somehow be to blame for contravening a certain norm in order to be liable. This applies to norms derived from the will of the parties (e.g. norms based on a contract) as well as norms derived from other sources such as regulation and custom. With respect to contraventions of the former norms this appears e.g. from Section 42 (2) of the domestic Danish Sale of Goods Act[85] which sets out that the seller is liable to pay damages, if the lack of conformity of specific goods was caused by his neglect or fraudulence.[86] The said rule constitutes a basic tenet of Danish contract law which is applicable by default, unless otherwise indicated by legislation or case law. Thus, it applies – mutatis mutandis - to many other areas than the sale of goods such as for example the liability of service providers and advisors. Due to the lack of special rules for mediators it will apply to this area also. With respect to violations of the latter norms, the requirement for blameworthiness (in shape of either negligence or intent) appears from the rule of *culpa* laid down in case law.[87]

[83] 216 F. Supp. 2d 325 (20 August 2002) at 333. The *Chang* court said this with reference to the decision in re Joint Eastern and Southern Districts Asbestos Litig., 737 F. Supp. 735, 739 (E.D.N.Y. 1990).

[84] 216 F. Supp. 2d 325 (20 August 2002) at 332.

[85] Consolidated Act no 237 of 28 March 2003.

[86] In said section it is also specified that the buyer can claim damages if the goods lacked qualities warranted by the seller.

[87] Se e.g. Andreas Bloch Ehlers: *Om adækvanslæren i erstatningsretten* (2011) 53-65.

Above it has been examined how the standard of care is laid down according to this rule, but this is not all it does. Also it contains a subjective requirement. This means that a mediator (in the outset) can be held liable only if (i) he has violated the applicable standard of care and (ii) such violation is somehow intended or negligent. What has just been said is still the firm rule of Danish law. However, in recent years (particularly with respect to violations constituting a tort) there has been a development in case law towards what is usually called an *objectification* of the rule of *culpa*.[88] Essentially, this means that the subjective requirement has been relaxed and in some cases even eliminated. Sometimes, therefore, the courts may require only little of the blameworthiness of the tortfeasor's behaviour and in rare cases they may require nothing at all. In the latter case the mere contravention of the applicable standard is sufficient to constitute liability.[89]

With respect to the liability of mediators what constitutes a breach of the standard of care first of all depends on how courts perceive the practice of mediation as such. More specifically it is important whether it is perceived as a proper profession (equivalent to e.g. lawyers, accounts, and doctors) or not. If the former is the case, as a rule the courts will not ask much, if anything, of the mediator's fault to find liability.[90] Thus, within this area the development towards an objectified rule of *culpa* has been prevalent. The areas in which the courts have relaxed the subjective requirement have several common features.

First, the professionals in question supposedly possess a certain knowledge or skill typically offering them a position which is superior to that of their clients.[91] For example, it is often difficult for the average patient to comprehend everything a doctor is saying or doing and this is a (good) reason to incite the doctor to make efforts not to cause damage. It is probably fair to say that to some extent mediators do hold such superior knowledge. At least with respect to what they are supposed to do and that is what is relevant here. Different people make use of mediation, but the average client probably does not know much about what a mediator is expected to do. Further, some of the time probably the client will not even know what the mediator is doing (e.g. when he is having a separate meeting with another party). This makes him even more inferior in the present respect.

Second, said areas are characterised by having a special tradition and often quite comprehensive and well defined standards of behaviour. With respect to doctors, for example, there is a long standing tradition of how certain operations should be performed and what medicine should

[88] See Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011) 88-89 and 105-106 and Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 59-65.

[89] In such cases the subjective requirement is completely eliminated, see Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 59-65.

[90] Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd. edn, 2010) 32.

[91] Bernhard Gomard, *Forholdet mellem Erstatningsregler i og uden for Kontraktforhold* (1958) 365 and Mads Bryde Andersen, *Advokatretten* (2005) 752.

be prescribed in certain situations. Further, there is a detailed web of express rules on how doctors should conduct themselves. Strictly speaking mediation is an old practice as well but it has not become popular as a method of dispute resolution in modern society until fairly recently. For that reason there has not been the same centripetal development in the understanding of how mediations should be conducted, as has been the case with e.g. the practice of medicine. Furthermore, in the area of mediation, there is not a strong institutional edifice similar to that of many other professional settings. In particular, there are no institutions with a mandate to issue binding rules or guidelines as to how mediations should be carried out. Neither is there one set of rules applicable to all kinds of mediation. This is not surprising since the practice of mediation is not as homogenous as for example above professions.

The existence of a firm tradition and a clear and generally applicable regulatory framework seems to be a necessary prerequisite for the courts to relax the requirements for blameworthiness and adopt an objectified interpretation of the rule of *culpa*. The main reason for this is that the justification for adopting such interpretation lies in the very existence of more or less firm rules clarifying what the professional should and should not do. Further, it seems difficult to even establish an objectified application if there is in fact no (or only few) appropriate rules with which the conduct of the professional can be compared. Due to the lack of both traits (i.e. a strong tradition and an appropriate regulatory framework) it seems unlikely that the court will transplant the objectified interpretation of the rule of *culpa* to mediation. Consequently, it must be assumed that the courts will require some amount of fault of behalf of the mediator to establish liability. In fact (as will be further developed below) probably in many cases the courts will be prone to require quite a lot in this regard.

What is required of the subjective element of the rule of *culpa* could depend also on what appears from the (potential) contract entered into by the mediator and the parties. Whether or not the contract is relevant in this regard depends first on how the pertinent claim is qualified. If it is qualified as a contractual claim, as a rule the parties will be entitled to agree on whatever the wish.[92] Save for, *inter alia*, when liability is attached to professionals but, as developed above, mediators are unlikely to be qualified as such. Conversely, if the claim in question is qualified as a claim in torts the legal rights and duties of the parties are determined according to external norms founded in e.g. regulation or custom. In such cases the rule is that liability is not subject to any contractual provisions.[93] Pursuant to what has been already said, if there is indeed a contract probably most claims will regarded as contractual. This means that in the outset mediators are able to contract on what should constitute a breach of a certain standard. However, it is important to note that many claims will not be based on violations of express contractual provisions, but externally founded norms characteristic to the normative framework of torts. Accordingly, a great deal of the rights and duties of the parties will be fixed not by the

[92] Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd edn, 2010) 37.

[93] Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd edn, 2010) 37.

will of the parties, but by said norms. This makes it likely that the courts will be somewhat hesitant to subject their interpretation of the rule of *culpa* to the contract. At least if the contract is not clear on this matter. Further, it should be borne in mind that the subjective element of the rule of *culpa* (notwithstanding the recent development towards objectification) represents a basic tenet of law. Thus, normally there will be an inclination to impose liability when a promisor or a tortfeasor has acted with fault. Of course, this inclination will vary with the pertinent amount of fault. It is important to take the above considerations into account when the effectiveness of contractual provisions are assessed.

As it appears the courts are not likely to transplant the objectified interpretation of the rule of *culpa* to the liability of mediators. Further, in many cases probably they will be likely to interpret any contractual provisions to the opposite effect, narrowly. This means that normally the courts will require some amount of blameworthiness on behalf of the mediator. Many different kinds of behaviour qualify as sufficiently blameworthy to this effect. For example, the mediator simply may not have made sufficient efforts to structure the negotiations and pave the way for a settlement. Or he may have lacked the skill to do this. Perhaps he did not have sufficient knowledge on a certain matter or he did not acquire the necessary information from someone else. Further, he may have lacked the skill to apply a certain knowledge or piece of information properly to the situation at hand[94] or he may have drafted the settlement agreement ambiguously. Exactly how much will be required of the mediators neglect is a difficult question to answer. It could be argued that even though mediation cannot be qualified as a proper profession, its quasi-professional nature (due to the mediator's supposed superior knowledge) still counts as argument for lowering the requirements for fault.

However, this argument is not a particularly good one and indeed there seem to be better arguments to the opposite effect. First, the significant doubts as to how mediators should conduct their business is likely to influence the courts. Thus, at least when the courts are uncertain as to how the mediator should have behaved in a certain situation they will be inclined to require a somewhat greater degree of fault. Second, it should be borne in mind that the claims in question are claims for pure economic loss. In contract law most claims are of this kind and it is of course not controversial that they can be recovered. However, as developed above, many claims against mediators have traits that resemble claims in tort more than claims in contract (first and foremost because of nature of the applicable normative framework) and this may prompt the courts to require more of the fault of the mediator than usual. The reason for this is that Danish courts, similar to most other civil law courts and indeed the common law courts, are somewhat reluctant to award damages for pure economic loss in tort. As in apparently most other jurisdictions this is based on a concern for not extending liability too far and to counter this, recovery for pure economic loss usually requires special reasons. With respect to mediators such a reason could well take the form of a greater requirement for fault. Third, there are certain considerations regarding particularly contributory negligence which

[94] See Bernhard Gomard, *Forholdet mellem Erstatningsregler i og uden for Kontraktforhold* (1958) 400.

may influence the courts assessment in said way but this discussion is better left to the below discussion about causation in fact.

For the said reasons, in most cases a breach of the standard of care must be somehow qualified in order for the mediator to become liable. This appears also from most of the cases on mediator liability. For example, in *Chang*, where the claimant alleged, *inter alia*, that the mediator had failed to investigate critical facts and drafted the settlement agreement in a way that allowed the defendant to contest the amounts owed according to, the court found that the mediator's duty was merely to find an amicable solution to the conflict at hand and the mediator did not fail to satisfy this duty as he brought the parties together and successfully drafted an agreement that was executed by them.[95] Thus, even though the mediator should have probably drafted the settlement agreement more clearly, the court required more than this. Also, the case is a good example of the importance of what the court considers to be the duties of the mediator. *Chang* seems to suggest that as long as the mediator brings the parties together and achieves a settlement, the parties will have a difficult time claiming damages. The same follows from *Lehrer* where the court noted that 'the evidence proves that Zwernemann fulfilled his primary obligation as a mediator to facilitate a settlement. In fact, as a result of the mediation, appellant entered into a voluntary settlement agreement, in which he agreed to dismiss his legal malpractice claims against his attorneys. In return, his attorneys dismissed their counter-claims against him for unpaid attorneys' fees.'[96] So in this case also, the mediator had performed his primary duty of achieving a settlement, which was signed by the parties.

However, as evidenced by the *Tapoohi* -case, the mediator does risk liability if he exceeds the role of the *facilitator* and somehow interferes with the substance of the dispute at hand. Thus, in *Tapoohi* the mediator interfered by (i) putting pressure on the clients to sign, (ii) dictating the settlement agreement, and (iii) expressing his views on stamp duty and how the agreement should be set up to minimise taxes. This led the court (Habersberger J) to conclude that it could not be ruled out that Mrs Tapoohi could claim against the mediator:

> 'I have reached the conclusion that it is not beyond argument that some at least of the breaches of the contractual and tortious duties might be made out. I consider that it is possible that a court could find that there was such a breach constituted by the imposition of undue pressure upon resistant parties, at the end of a long and tiring mediation, to execute an unconditional final agreement settling their disputes where it was apparent that they, or one of them, wanted to seek further advice upon aspects of it, or where it was apparent that the agreement was not unconditional, or where the agreement was of such

[95] See 216 F. Supp. 2d 325 (20 August 2002) at 332: '(...) The parties explicitly retained Rubin [the mediator] not to provide legal assistance but rather to "assist [the parties] in finding an amicable resolution to [their] differences relating to the trademark Margaret Jerrold (...). There can be no claim that Rubin failed to satisfy this duty because Rubin did assist in bringing these parties together and did successfully draft an agreement that was executed by both parties and that settled their dispute.'

[96] 14 S.W. 3d 775 (17 February 2000) at 777.

> complexity that it required further consideration. I emphasise that it is not for me to conclude that any of these things occurred in the present case and I do not do so. It is sufficient that I conclude, as I do, that on the evidence before me such a contention is not plainly hopeless.'[97]

Even though *Tapoohi* was merely decided in a interlocutory decision and never went to trial, the court's findings show that it is at least possible to claim against a mediator. However, it seems to show also that it will require the mediator to exceed the mandate given by the clients to a considerable extent.

## 5 Causation in Fact

To establish a claim, the client must demonstrate that there is a certain (normally referred to as factual) causal nexus between the mediator's breach of the standard of care and the loss in question. The point of departure for the causal assessment therefore is the breach of standard. As already said such breaches may occur in many different ways. For example the mediator may have made insufficient efforts or lacked the skill to structure the negotiations and pave the way for an amicable solution. Or he may simply have offered one or more of the parties poor advice or failed to obtain sufficient advice elsewhere. Of course any contravention of the mediator's duties may constitute a breach and thus many more examples can be conjured up. The mediator could e.g. exceed the mandate set out in the mediation agreement, as was the case in *Tapoohi*. He could make mistakes in the drafting of the settlement or fail to observe his duties regarding neutrality and confidentiality. The loss suffered by the client will usually be some kind of pure economic loss. For example (and perhaps most importantly) a client may suffer an economic loss due to non-settlement or settlement on unfavourable terms. Further, a client may suffer loss of earnings or good will (e.g. if the mediator leaks confidential information to someone).

As a rule, the establishment of a sufficient causal nexus between the breach of standard and the loss requires that the former was a necessary condition of the latter. There is (still) general agreement that this is decided pursuant to the *conditio sine qua non* -rule laid down in case law.[98]

[97] No 2 [2003] VSC 410 (21 October 2003) at 86.

[98] However, it is worth noting that the American scholar, Richard W. Wright, has formulated an alternative to the conditio sine qua non-test, the so-called NESS-test, which seems to be accepted in the literature to a still greater extent. On the NESS-test see Richard W. Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Prunning the Bramble Bush by Clarifying the concepts' (1987-1988) 73 Iowa Law Review 1001ff and 'Once More into the Bramble Bush: Duty, Causal Contribuiton, and the Extent of Legal Responsibility' (2001) 54 Vanderbilt Law Review 1071ff. In the Nordic literature the primary proponent of the NESS-test seems to be Mårten Schultz who has examined it at length in *Kausalitet: Studier i Skadeståndsrättslig Argumentation* (2007). Further, the NESS-test seems to appear more and more frequently in recent Nordic literature, see e.g. Mia Carlsson, *Arbetsskada* (2008) 386ff.

At the outset this means that acts (or omissions) are regarded as a relevant cause of a certain loss, if this loss would not have occurred but for said acts (or omissions). This was the central issue in *Lehrer* where the claimant merely stated that he would not have agreed to permit Mr Zwernemann to act as mediator had he been aware of the conflict of interest. However, he did not state that he would not have entered into the settlement agreement if he had been aware of said conflict and therefore, no causal nexus could be found between the alleged negligent conduct of the mediator and the alleged loss. As it appears the *sine qua non* -rule constitutes a counterfactual test, whereby the sufficiency of the causal nexus is assessed by testing the actual causal event against a hypothetical event. Further, the minimalist counterfactual requirement, which makes any cause having somehow contributed to the damage legally relevant, means that in most cases there may be several different causes to a certain event.

Strictly speaking, as observed by von Bar, a simple car crash may in principle – in addition to the driver's failure to break – be caused by 'the weather, the drivers' breakfast, the programme broadcast on the radio, or the drivers' spouse's tempers.'[99]Also, many different kinds of causes can be relevant in this way. This includes not only physical manifestations but also psychological factors such as instigation and advice.[100] The minimalist requirements of the *sine qua non* -rule means that, as a rule, the courts will not require much to find that a certain breach of standard is a relevant cause, for which the mediator may be held liable. However, for a couple of reasons to be explained further below, the idiosyncrasies of the mediation set up may often supply the client with good arguments to the contrary effect. For example, the *raison d'être* of mediation is that ultimately the settlement is reached by the parties themselves and of course this makes it relevant to consider whether the mediator's contribution to the loss in question should be deemed relevant in comparison with the parties' own contribution. The following analysis will focus on the two damage scenarios that seem most important and unique to mediation.

The first scenario is when the parties fail to reach a settlement and the second is when the parties settle on unfavourable terms. In the former scenario in order to establish causation, first a client must demonstrate that the mediator caused the parties not to settle (i.e. that the parties would have actually settled "but for" the negligent conduct of the mediator). At the outset to establish this causal link poses formidable problems as it involves constructing a hypothetical scenario on a highly speculative basis. Most importantly perhaps, some cases simply cannot be mediated.[101] For example the parties may have had better alternatives to a mediated agreement or perhaps the acrimony between the parties was too vocal to be overcome. In other cases, the failure to settle may be due to strategic or tactical decisions beyond the influence of the mediator.[102] In this regard it is important to remember that the hallmark of mediation is that

[99] Christian von Bar, *The common European Law of Torts* (2000) 459.

[100] See e.g. Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 47.

[101] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 176.

[102] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 176.

the settlement is reached by the parties – not the mediator.[103] This means that even a perfectly conducted mediation may result in a non-settlement. Notwithstanding said obstacles sometimes a party may successfully establish the required causal nexus. This could e.g. be the case when the mediator has acted extraordinarily incompetently by basing the negotiations on an incorrect assumption made by himself. The mediator may, for example, have wrongfully set off the negotiations on the assumption that a certain piece of legislation allowed the parties to do something – such as tearing down a building or deducting a certain expense in taxes – which later proved impossible. Another example of this could be neglect of the mediator's duties to remain impartial and keep information confidential. In such cases – for example if the mediator reveals an important business secret of one party to another party – it could well be imagined that a non-settlement could be traced back to the conduct of the mediator as set out by the *sine qua non* -rule. Thus, it is not impossible to establish that the mediator caused the non-settlement.

Establishing that the mediator somehow caused the parties not to settle is a necessary requirement for a party to recover. However, it is not sufficient. Also, the aggrieved party must demonstrate that the (hypothetical) settlement would have been economically advantageous to him. If not, he cannot be said to have suffered a relevant loss. This seems to involve even greater problems, because it requires the mediator to specify on what particular terms the (hypothetical) settlement would have been reached. Further, it involves a difficult comparison of the economy of the hypothetical settlement and the non-settlement. In this way a party could e.g. be required to show that "but for" the mediator's wrongful conduct the other party would have agreed to a particular price and that the (whole) economy of the hypothetical settlement therefore would have been more advantageous than not settling. Even when there are merely two parties to the mediation it would prove difficult to establish the exact terms of a hypothetical settlement, and when there are multiple parties involved in some cases it probably borders on the insurmountable.

In the scenario where a client is dissatisfied with the outcome of the settlement, it must be demonstrated that the mediator caused him to settle on less favourable terms than he could have settled on. Establishing such connection is also not uncomplicated. First of all, the fact that the party has agreed to the outcome makes it problematic to argue that the mediator should be responsible for it. Particularly, if the mediator has duly explained the contents of the settlement to the parties and invited them to read it before signing it. In such cases, the parties have consented to the agreement on a fully informed basis and any subsequent dissatisfaction will in most cases be at their own risk.[104] However, when this is not the case the client may have a chance to argue that the mediator was responsible for the unfavourable outcome. It could be

[103] Andrew Lynch, '"Can I Sue My Mediator?" – Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 120 and 123-124.

[104] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 178.

imagined, for example, that the mediator has somehow acted coercively or even fraudulently[105] by not informing one or more of the parties of a certain matter important to the settlement.[106]

If the mediator did not wrongfully influence a client's decision to settle, the argument must be structured differently. More specifically he must argue that the mediator had a duty to secure an outcome that was "fair".[107] However, this raises several issues. First, it is difficult to demonstrate that a settlement is unfair when the party has actually agreed to it. Second, "fairness" is a highly elusive concept, which means different things to different people in different contexts. For example, a settlement may include terms, which are valuable to a certain party but cannot be appreciated by the courts (e.g. an apology).[108] The present question was raised in *Lange*,[109] where the aggrieved party, Mrs Lange, claimed that the mediator had failed to negotiate an agreement that was "fair" to her. The court dismissed Mrs Lange's claim,because the necessary causal link between the mediators' conduct and the outcome could not be proved. Since the parties had freely agreed on the settlement, it could not be said that the damage was caused by the mediator. Further, it could not be proven that the other party to the mediation, Mr Lange, would have agreed to a more favourable settlement had the mediator performed his duties better at the mediation. The *Lange* court, *inter alia*, noted as follows:

> 'There is no evidence in the record that had defendant done the things plaintiff contends he did not do that these items of expense would not have been incurred in order for plaintiff to achieve the settlement she considered proper. There is no evidence that Ralph Lange would have voluntarily agreed to a settlement acceptable to plaintiff had the defendant done the things he admittedly did not do. (...) It is the rankest conjecture and speculation to conclude that Ralph Lange's willingness to settle the marital affairs without litigation on the basis of the original settlement established his willingness to settle without litigation at a higher figure acceptable to plaintiff. Plaintiff states in her brief that it is "obvious" that upon proper representation by defendant she would have received a far more beneficial settlement in a non-contested dissolution.'[110]

From what has been said it is clear that in most cases it will be difficult to establish a sufficient causal nexus between the mediator's breach of the standard of care and the loss in question. However, as has also been made clear, it is not entirely unfeasible. Further, the courts may be inclined to relax the requirements for causation if, for example, the mediator has acted grossly

[105] See further Michael Moffitt, 'Ten Ways to Get Sued: A Guide for Mediators' (2003) 8 Harvard Negotiation Law Review 122-225.

[106] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 178.

[107] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 178-179.

[108] See Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 180.

[109] *Lange v Marshall* 622 SW 2d 237 Mo Ct App (1981).

[110] 622 SW 2d 237 Mo Ct App (21 September 1981) at 239.

negligently or perhaps even intentionally.[111] At least the courts have done so in other areas of tort and contract law and there is good reason to believe that the inclination to find causation when policy considerations support such finding can be transferred to the mediation context. The significance of policy considerations is considered further below.

## 6 Adequacy

Elsewhere I have argued at length that the requirement for adequacy can be described best as a test of fairness.[112] Essentially, this involves perceiving the assessment as an argumentative process based on a variety of different criteria (rather than a deductive process based on one criterion such as foreseeability) founded in the normative framework applicable to tort and contract law. In addition to the traditional criteria such as foreseeability it involves considering several policy criteria, which do not (at least not in the first place) pertain to the causal nexus as such.[113] As is well known it is often very difficult to decide whether a certain loss is adequate in the present sense and the cases concerning mediation are certainly no exception to this. For that reason it is not an easy task to lay down clear guidelines for when this criterion is satisfied. However, as it appears from above cases concerning mediation also, it does seem clear that in general the claimants will struggle to convince the courts that their losses can be qualified as adequate.

As noted above, courts are reluctant to award damages when the loss in question is a pure economic loss. Of course it can be argued that this does not apply to damage claims in contracts, but the dominant tortious nature of most claims made against mediators is likely to make it difficult for the claimants recover. The main reason for the reluctance to accept claims for pure economic loss, is of course the concern that too many claims can be made by too many people in too many scenarios.[114] A concern that is deeply rooted in most civil law and common

[111] See e.g. two decisions by the Danish Supreme Court published in the Danish Weekly Law Report (2000) 521 and (2002) at 2000.

[112] See Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011).

[113] See Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) chapters 6, 8, and 9. In Swedish literature Andersson has developed an approach to adequacy whereby the limits of liability in torts are fixed on the basis of an interpretation of the scope of the rule of conduct, which has been violated, see Håkan Andersson, *Skyddsändamål och Adekvans* (1993). This approach may be helpful in many respects but it seems difficult to apply to the question of liability of mediators due the unclear nature of the applicable rules of conduct.

[114] In Anglo-American literature and case law as well as (fairly) recent literature from the Nordic countries this argument is know as the floodgate argument. For Nordic literature on the *floodgade* argument, see Bjarte Thorson, *Erstatningsrettslig vern for rene formuetap* (2011) 66, Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011) 329, Jan Kleineman, *Ren förmögenhetsskada* (1987) 377, Håkan Andersson, *Trepartsrelationer i Skadeståndsrätten* (1997) 38ff, Mårten Schultz, Kausalitet. Studier i skadeståndsrättslig *argumentation* (2007) 553ff, Morten Kjelland, *Særlig sårbarhet i personskadeerstatningsretten* (2008) 189 and 400 and Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 224-225.

law systems. Perhaps most clearly this is evidenced by the well-known "exclusionary rule" which applied even when the loss was perfectly foreseeable and could reasonably have been avoided.[115]

With the emergence of modern society, however, in most legal systems there has been a development towards an increased understanding of the need to impose liability for pure economic loss. In English law this development was instituted by the prominent case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[116] which deals with liability for misstatements in negligence, and since *Hedley* the courts have several times confirmed that in certain circumstances pure economic losses may be recovered. Despite the recent developments in society and law, it seems clear that the claimant in any case must convince the court that *special reasons* make it fair to award damages.

If the claimant can establish that the mediator *clearly* could foresee that his conduct would cause a certain loss, he may have a case. For example, this could be the case if the mediator in an evaluative mediation makes important assertions of fact which are untrue or if the fails to disclose a close personal connection with one of the parties. But in many cases the voluntary and unpredictable nature of the mediation process will probably make it difficult to establish foreseeability. This has been argued also by Lynch, who contends that foreseeing damage is an almost impossible task since the mediator has only very little idea as to how the mediation will proceed until it is actually underway.[117] Moreover, Lynch argues that a reasonable mediator will not be able to foresee any damage in most cases, as the whole idea of mediation is that it is the parties who are responsible for the mediated outcome.[118]

A claimant may also have a chance to recover if the conduct of the mediator can be qualified as grossly negligent (*culpa lata*). Thus, several Danish and foreign cases show that liability is more likely to ensue and is extended further when gross negligence can be established.[119] If the loss was inflicted intentionally it would seem to be the rule that the mediator would be held liable provided that the loss was a cause in fact of the intentional conduct.[120] Obviously, this is based

[115] See P. Benson, 'The Problem with Pure Economic Loss' (2009) 60 South Carolina Law Review 823.

[116] [1964] AC 465.

[117] See Andrew Lynch, '"Can I Sue My Mediator?" – Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 113.

[118] See Andrew Lynch, '"Can I Sue My Mediator?" – Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 113.

[119] See e.g. two cases from the Danish High Courts (Western and Eastern Division) published in the Danish Weekly Law Report (1963) 629 and (1967) 945 respectively. I discuss these cases in Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011) 239.

[120] See Christian von Bar in *The common European Law of Torts* (2000) 477 where he contends that 'vorsätzlich herbeigeführte Tatfolgen sind immer adäquat.' Moreover see PETL article 2:102 (5) which sets out that '[t]he scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.'

on the fundamental moral repugnance against such conduct and the commonly accepted aim of tort and contract law to deter losses.

## 7 Disclaimers

Probably the safest way for a mediator to avoid liability is to get the parties to the mediation to sign a disclaimer to that effect. As a rule such disclaimer will be upheld in court, but there are a number of things that the mediator should take note of in this respect.[121] First, as developed above,[122] many claims against mediators will be of a quasi-contractual or tortious nature and this may impact on the courts' readiness to accept the disclaimer. This is because the courts may in certain cases have doubts as to whether a tortious claim should be covered by the disclaimer or if it pertains exclusively to claims that are (clearly) contractual. Ultimately, this will depend on whether the mediator and the client can be said to have contemplated such claims when signing the disclaimer and therefore, it would be prudent to set out as clearly as possible what potential claims are disclaimed. And it should be expressly noted that it does not matter how such claims are designated (e.g. as contractual or tortious). In this way the mediator can also avoid other claims than the ones dealt with here such as claims for physical or mental harm to the person (e.g. emotional distress).

Second, the readiness to accept disclaimers will depend on the relative strength of the mediator and the client. If the relative strength is symmetrical the courts will be inclined to accept the disclaimer, whereas the opposite is true if it is asymmetrical. The clients are often medium or even large companies and when that is the case it can be argued that the mediator is the weaker party who deserves protection by the law. However, not only economic strength is relevant in this respect. Rather, what is probably more important are the criteria relevant to deciding whether mediation is considered a proper profession in the eyes of the law. As already said, in most cases the mediator is unlikely to be subjected to the rather strict form of liability attached to certain professionals such as lawyers[123] and accountants but the practice of mediation does have some of the same traits. E.g. the mediator is trained in what he does and possesses knowledge, which is (presumably) superior to that of the client.[124] These traits may make it somewhat more difficult for the courts to accept disclaimers by mediators. At least if it pertains to one or more of the basic duties of the mediator such as the duty to remain impartial and work for an agreement in the mutual interest of the parties.

[121] See Günther J. Petersen, *Ansvarsfraskrivelse* (1957) 28-32.

[122] See above at part 3.

[123] If the mediator *is* actually a lawyer he should carefully inform the parties that he is not acting as such during the mediation. Otherwise it may impact on the assessment of liability, including the feasibility of disclaiming liability. On the effect of disclaimers made by lawyers, see Mads Bryde Andersen, *Advokatretten,* (2005) 758-759.

[124] See further above at part 4.2.

However, as was the case in *Chang*, it *is* probably possible for the mediator to disclaim a conflict of interest as long as he is capable of working for a mutually beneficial agreement. In this judgment both clients had signed an agreement, which said, *inter alia*, that 'I have advised you that you should be represented by different attorneys. However, you have represented to me that you are both aware of the conflict of interest issue and still desire me to assist you in finding a common resolution of your difficulty and structuring a settlement. Please sign below to evidence your waiving any claim of conflict of interest, your request that I act for both of you and your consent to my doing so with regard to this matter.'[125] The court accepted the disclaimer finding that the letter of agreement clearly disclosed the fact that the mediator would be acting as a mediator and that the parties explicitly waived any conflict of interest issue by signing the letter.

Third, in order for a disclaimer to be upheld, it is important that it is carefully drafted and properly communicated to the parties (e.g. not written on the back side of the disclaimer with small letters) to satisfy the court that the parties actually were aware of what exactly was disclaimed. This appears also from *Chang* where the court explicitly noted that the agreement "clearly disclosed" the mediator's role and the conflict of interest in question.[126] With respect to the necessity for clarity in drafting and communication of the disclaimer it is important also how far reaching the disclaimer is. If it merely regards claims that would appear normal for the mediator to disclaim the courts will not require much in this respect while, of course, the opposite is true if he wishes to preclude claims that the reasonable client would always expect he could make.

Fourth, and last, the mediator should be aware that it is not possible to disclaim losses which have been inflicted intentionally and in the far most cases the courts will not allow disclaimers for losses inflicted grossly negligently either.[127] The reason for this is obviously that it is an important goal of the law to deter losses inflicted in that manner. Therefore, even with a clearly drafted and well communicated disclaimer, the mediator cannot guard himself from all kinds of claims.

## 8 Conclusion

In this article the legal basis for establishing claims against professional mediators for pure economic loss has been examined. The examination has shown that all the basic requirements of contract and tort law are difficult to satisfy when it comes to placing blame on mediators.

[125] 216 F. Supp. 2d 325 (20 August 2002) at 329.

[126] 216 F. Supp. 2d 325 (20 August 2002) at 332.

[127] In some cases even an unqualified degree of negligence (culpa levis) will be sufficient to set aside a disclaimer, cf. Vibe Ulfbeck, 'Fortolkning af ansvarsfraskrivelsesklausuler. Eksempler fra traditionel og utraditionel transportret', in Boel Flodgren et al (eds.) *Avtalslagen 90 år* (2005) 485-488.

First, it is difficult to say how claims against mediators are to be designated. Some seem to have a contractual nature whereas others are probably better designated as claims in tort. Second, it is difficult to determine what the applicable standard of care is since the sources of law relevant to answering this question do not yield clear answers. One can ask what the *reasonable mediator* would have done in a certain situation but this important standard does not apply well to the dynamic and stylistically varied practice of mediation. Further, one can examine the pertinent regulation and look at custom in order to ascertain how mediators should conduct themselves. These sources do give some answers but the sparse amount of regulation and the inherent difficulties in determining the customary behaviour of mediators are serious obstacles here.

Third, it is difficult to establish what is required of the breach of the applicable standard of care in order for the mediator to become liable. This depends, *inter alia*, on whether the practice of mediation can be qualified as a proper profession. It seems most likely that it cannot. Therefore, to find a breach of standard the courts will require more than they do of other professionals such as accountants and lawyers. This is also evidenced by the cases dealing with the liability of mediators. They show that even though the mediator could have performed better (e.g. drafted the settlement agreement more clearly), as a rule he will not be held liable as long as he has successfully brought the parties together and achieved a settlement agreement. If liability is to be imposed, in most cases the aggrieved party will have to show that the mediator has somehow put undue pressure of on the parties in the negotiation process or interfered wrongfully with the substances on the dispute.

Fourth, in most cases it poses formidable problems to establish the necessary causal link between the breach of standard of the mediator and the loss of the client. The main reason for this is that there can be numerous causes to a non-settlement and even a perfectly conducted mediation may not cause the parties to agree on how the disputed matter should be resolved. Further, if the client's claim is based on dissatisfaction with the outcome of the settlement, he will have a difficult time showing that the mediator caused him to settle on less favourable terms than could have been agreed upon.

Fifth, in order to establish adequacy, in most cases the client must to show that the mediator could clearly foresee that his conduct would cause a loss to him or that his conduct can be qualified as grossly negligent. Due to said difficulties the mediator rarely needs a disclaimer. However, if he wishes an even better defense against claims made by the clients, it may be prudent to invoke one even so. If the mediator choses to do this there are, however, a number of things he should take note of. Most importantly perhaps, in order to satisfy the courts that the clients are fully aware of what they are agreeing to, the disclaimer should be drafted carefully (taking into account that the potential claims may be of a contractual as well as a tortious nature) and communicated clearly.

As it appears neither of the requirements that are necessary to establish a claim in contract or tort is easily applied to mediation and at the end of the day it will be very difficult for a client to bring a successful claim against a mediator. Whether this is fair is a difficult question to answer. On the one hand, it can be argued that it would be a paradox to allow claims against mediators

to a greater extent because the very *raison d'être* of mediation is exactly the opposite of creating (more) litigation. Further, it could be argued that a greater exposition to liability will deter certain persons from acting as mediators and performing a service, which is beneficial to the parties involved and society as a whole. On the other hand, it can be argued that mediators interfere with the rights and duties of other people just like any other negotiator or advisor and therefore, the opportunity of claiming against them should be improved. These are, of course, political questions that are not to be answered here but this notwithstanding, I believe we can all agree that it would be helpful if the law on the liability of mediators was somehow clarified. By way of legislation, for example, at least some of the difficult issues could be settled.

## Bibliography


Mads Bryde Andersen, *Grundlæggende Aftaleret*, (3rd edn, 2008)
Mads Bryde Andersen, *Advokatretten* (2005)
Håkan Andersson, *Trepartsrelationer i Skadeståndsrätten* (1997)
Christian von Bar, *The common European Law of Torts* (2000)
P. Benson, 'The Problem with Pure Economic Loss' (2009) 60 South Carolina Law Review 823
Hans Boserup, *Konfliktvindere* (1993)
Hans Boserup og Susse Humle, *Mediationsprocessen i praksis* (2nd edn, 2012)
Mia Carlsson, *Arbetsskada* (2008)
Arthur A. Chaykin, 'Mediator Liability: "A New Role for Fiduciary Duties?"' (1984) 53 University of Cincinnati Law Review 731
Cyril Chern, *Dispute Resolution Guides. International Commercial Mediation* (2008)
Andreas Bloch Ehlers, *Om adækvanslæren i erstatningsretten* (2011)
Bo von Eyben og Helle Isager, *Lærebog i erstatningsret* (7th edn, 2011)
Dan Engström, *Lag om medling i vissa privaträttsliga tvister – en kommentar* (2011)
Bernhard Gomard, *Forholdet mellem Erstatningsregler i og uden for Kontraktforhold* (1958)
Jo Hov og Alf Petter Høgberg, *Alminnelig avtalerett* (2009)
Torsten Iversen, *Erstatningsberegning i kontraktsforhold* (2000)
Stig Jørgensen, *Erstatningsret* (2nd edn, 1972)
Morten Kjelland, *Særlig sårbarhet i personskadeerstatningsretten* (2008)
Jan Kleineman, *Ren förmögenhetsskada* (1987)
Andrew Lynch, '"Can I Sue My Mediator?" - Finding the Key to Mediator Liability' (1995) Australian Dispute Resolution Journal 113
Michael Moffitt, 'Suing Mediators' (2003) 83 Boston University Law Review 147
Michael Moffitt, 'Ten Ways to Get Sued: A Guide for Mediators' (2003) 8 Harvard Negotiation Law Review 81
Lise Dyrby Nielsen, 'Hvorfor ignorerer lovgiver udenretlig mægling?' (2013) Erhvervsjuridisk Tidsskrift 49
Günther J. Petersen, *Ansvarsfraskrivelse* (1957)
Jan Ramberg og Christina Ramberg, *Allmän avtalsrätt* (8th edn, 2009)
Melinda Shirley and Tina Cockburn, 'When Will a Mediator Operating Outside the Protection of Statutory Immunity be Liable in Negligence' (2004) 32 University of Western Australia Law Review 83
Jennifer L. Schulz, 'Mediator Liability: Using Custom to Determine Standards of Care' (2002) 65 Saskatchewan Law Review 163
Mårten Schultz, *Kausalitet: Studier i Skadeståndsrättslig Argumentation* (2007)
Bjarte Thorson, *Erstatningsrettslig vern for rene formuetap* (2011)
Vibe Ulfbeck, *Erstatningsretlige grænseområder* (2nd edn, 2010)
Vibe Ulfbeck, 'Fortolkning af ansvarsfraskrivelsesklausuler. Eksempler fra traditionel og utraditionel transportret', in Boel Flodgren et al (eds.) *Avtalslagen 90 år* (2005) 481
Henry Ussing, *Skyld og Skade* (1914)
Vibeke Vindeløv, *Konfliktmægling. En refleksiv model* (3rd. rev. edn, 2013).
Geir Woxholth, *Avtalerett*, (7th edn, 2009)
Richard W. Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Prunning the Bramble Bush by Clarifying the concepts' (1987-1988) 73 Iowa Law Review 1001
Richard W. Wright, 'Once More into the Bramble Bush: Duty, Causal Contribuiton, and the Extent of Legal Responsibility' (2001) 54 Vanderbilt Law Review 1071
(Anonymous author), 'The Sultans of Swap: Defining the Duties and Liabilities of American Mediators' (1986) 99 Harvard Law Review 1876