Legal Studies, 2016
DOI: 10.1111/lest.12120

Mediator immunity: time for evaluation in England and Wales?

Penny Brooker
University of Wolverhampton

In England and Wales, the issue of mediator immunity has not been considered by the courts or via legislation. Mediator immunity is constructed by analogy to that given to judges, but the role of the judiciary is different to that of mediators, who do not determine cases and, it is argued, do not require protection from litigation because the parties are responsible for the final settlement outcome. In Australia and the USA, mediators are usually provided with immunity in mandatory, 'court-annexed' programmes, although this varies from an absolute to a qualified level that is constrained by bad faith or dishonesty. In the English jurisdiction, mediation is court-connected and parties are dissuaded from accessing the courts through the risk of costs penalties or automatic referral schemes. Therefore, the time is opportune for a review of many issues involved in mediation development, including immunity. This paper considers the reasoning for extending immunity to mediators, before concluding that the subject should not be determined through legal action until after a comprehensive review of mediation developments and after a consideration of mediator standards and regulation of practice.

Dr Penny Brooker, Reader in Law, School of Law, Faculty of Social Sciences, University of Wolverhampton, Wulfruna Street, Wolverhampton WV1 1LY, UK. Email: P.J.Brooker@wlv.ac.uk

INTRODUCTION

In common law countries where the 'modern mediation movement'[1] has a longer history than in England and Wales, there has been considerable debate about mediator immunity. Scholarly articles deliberate on the appropriateness of mediators being afforded protection from legal action, which is analogous to immunity given to judges acting in their official capacity in the formal system of litigation.[2] In some federal jurisdictions, mediators are protected from litigation claims, but this varies from absolute

1. N Alexander *Global Trends in Mediation* (Dordrecht: Kluwer Law International, 2nd edn, 2006) p 1.

2. See eg R Carroll 'Mediator immunity in Australia' (2001) 23 Sydney L Rev 185; R Carroll 'Trends in mediation legislation: "all for one and one for all" or "one at all"?' (2001–2002) 30 U W Aust'l L Rev 167; A Chaykin 'The liabilities and immunities of mediators: a hostile environment for model legislation' (1986–1987) 2 Ohio St J Disp Resol 47; A Esquibel 'The case of the conflicted mediator: an argument for liability and against immunity' (1999–2000) 31 Rutgers L J 131; J Stulberg 'Mediator immunity' (1986–1987) 2 Ohio St J Disp Resol 85; Yun Zhao and AKC Koo 'Revisiting the issue of mediator immunity: the way forward for prospective mediation legislation in Hong Kong' (2011) Hong Kong L J 677; C Turner 'Mediator immunity stretching the doctrine of absolute quasi-judicial immunity: *Wagshal v Foster*' (1994–1995) 63 Geo Wash L Rev 759.

immunity in some court-annexed programmes to partial immunity in others, although private mediators usually, but not always, practise without legal safeguards other than those provided through contract, insurance or confidentiality agreements.[3]

In the English jurisdiction mediators do not have immunity; nor has the subject raised substantial debate despite the increasing legal pressure from the Civil Procedure Rules (CPR), which permit costs against successful litigants when they unreasonably refuse to use ADR or mediation.[4] This paper examines whether policy makers and stakeholders in England and Wales should review mediator immunity when there are calls from some 'quarters', including part of the judiciary, to compel even reluctant parties to mediate.[5]

Mediator immunity in Australia and the USA is, on the whole, concerned with 'court-annexed' programmes, which permit mandatory referral to mediation, and it can be argued that there is no pressing need for immunity in jurisdictions where mediating remains in the 'private' arena. There are, however, court schemes in England and Wales where the parties are 'automatically referred' to mediation, such as in the Court of Appeal and the Small Claims Mediation Service (SCMS), although these court programmes operate on the basis of opting in, to which either party can object.[6] Mediation is also closely connected to the Technology and Construction Court

3. In California, private mediators have been afforded immunity. See R Cole et al *Mediation: Law, Policy and Practice* (Westlaw International Database, 2013) (hereinafter, 'Cole et al') at s 11.12. The authors cite *Goad v Ervin*, 2003 WL 22753608 (Cal App 4th Dist 2003), unpublished/non-citable. See also NADRAC (2006) *Legislating for Alternative Dispute Resolution: A Guide for Government Public Policy-Makers and Legal Drafters*, available at https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF (accessed 27 April 2016); NADRAC (2011) *Maintaining and Enhancing the Integrity of ADR Processes*, available at https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Maintaining%20and%20enhancing%20the%20integrity%20of%20ADR%20processes%20%20From%20principles%20to%20practice%20through%20people.PDF (accessed 27 April 2016).

4. *Civil Procedure Rule* (CPR) 44.4(i), (ii).

5. Norris J in *Bradley v Heslin* [2014] EWHC 3267 recommends that judges should issue a two-month stay in neighbour and boundary disputes even if both parties disagree about mediating (para 23); available at https://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf (accessed 23 June 2015). See T Allen 'Requiring mediation in intractable cases: a note on *Bradley v Heslin*' CEDR Article, available at http://www.cedr.com/articles/?item=Requiring-mediation-in-intractable-cases-a-note-on-Bradley-v-Heslin (accessed 2 March 2015). Sir Alan Ward in *Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234 at 3; *Lord Justice Clarke 'The future of civil mediation'* (2008) 74(4) Arbitration 419. See P Brooker 'Mediating in good faith in the English and Welsh jurisdiction: lessons from other common law countries' (2014) 43 Comm L Rev 120 at 151.

6. CPR 26(4)A(2)(b). Small claims (less than £10,000) can be referred by the court to the Small Claim Mediation Service (SCMS) if the parties have not refused to use the facility; see https://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf (accessed 17 July 2015). *The SCMS is managed by Her Majesty's Court and Tribunal Service (HMCTS)*; see http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part26 (accessed 27 April 2016). The Court of Appeal Mediation Scheme is organised by the Centre for Dispute Resolution (CEDR); see https://www.justice.gov.uk/courts/rcj-rolls-building/court-of-appeal/civil-division/mediation (accessed 17 July 2015).

(TCC), which permits judges to act as mediators at the parties' requests.[7] Legal policies that stray towards mandatory mediation or induce or influence the choice of mediating should lead to dialogue on how to guarantee the quality of mediators, but consideration should also be given to whether mediators are entitled to be protected from unhappy participants, who perhaps would not have chosen that route without pressure – but this should be balanced against the users' rights to seek a remedy when there has been misconduct or a lack of skills.

Definitional issues

'Court-annexed mediation' is usually taken to mean programmes where disputants are mandated to attend before accessing the court.[8] In the USA and Australia, mediators in these schemes are often court-approved and are required to have reached specific standards, experience and training, which are frequently set down by court rules.[9] 'Private mediation' is sometimes referred to as voluntary or 'community mediation' when it signifies that the parties have freely engaged a mediator external to a mandatory court scheme. 'Court-connected mediation' is a broader categorisation and it can be understood to include court-annexed mediation, but it has also been taken to comprise private or voluntary mediations that are linked to the courts through rules requiring litigants to consider or attempt mediation before litigating, or when they have commenced mediation voluntarily during the phases of litigation.[10]

This paper distinguishes between 'court-annexed mediation', which is used in relation to mandatory schemes, and 'court-connected mediation', when the process is voluntary but undertaken by litigants because of requirements from civil procedures rules or court protocols.[11] The significance of the distinction is that in England and Wales, mediation is private and voluntary, but if the parties subsequently litigate then court rules on ADR and mediation will apply and penalties for failing to mediate can be used by the court.[12] The question of mediator immunity is therefore not confined to a distinction between 'private' or 'court-annexed mediations' but also 'court-connected mediation', which some commentators say 'coerces' participation.[13]

7. See the *Technology and Construction Court Guide* (2nd edn, 3rd rev, 2014). Litigants in the TCC may ask the judge to act as an Early Neutral Evaluator, which may be through mediation (7.6.1).

8. See eg NADRAC (2006), above n 3, ss 42–44.

9. See eg K Kovach 'The evolution of mediation in the United States: issues ripe for regulation may shape the future of practice', in Alexander, above n 1, pp 429–430.

10. See eg the USA 'National Standards for Court-Connected Mediation Programs' (NSCCMP), which apply to '*any program or service, including a service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court*' (NSCCMP, Definitions, iv).

11. See CPR r26.4. See eg Pre-Action Protocol for Construction and Engineering Disputes 1.3 (ii), 2(vi) and 5.2.

12. CPR s44(i), (ii).

13. M Brunsdon-Tully 'There is an A in ADR but does anyone know what it means anymore?' (2009) 28 Civ Just Q 218 at 232; see also Hong Kong Civil Justice Rules (CJR). For a discussion of the developments in Hong Kong, see eg G Weixia 'Civil justice reform in Hong Kong: challenges and opportunities for development of alternative dispute resolution' (2010) 40(1) Hong Kong L 43; S Cheung 'Construction mediation landscape in the civil justice system in Hong Kong' (2010) 2(3) J Legal Aff & Disp Resol in Engng & Construct 169.

This paper will explore the policy reasons behind judicial immunity before considering the theories underpinning the expansion of absolute or partial immunity to third-party neutrals acting as mediators in court-annexed programmes and sometimes in private contexts. An examination is made of the potential legal liabilities that mediators face as growing numbers mediate before recommendations are made for future action in England and Wales.

JUDICIAL IMMUNITY

Lord Justice Holdsworth was one of the first modern legal historians to review judicial immunity in England.[14] Prior to medieval times, a party could raise a 'complaint' against a member of the judiciary, but judges in 'courts of record' were given 'sanctity' for both acting outside their jurisdiction or for abuse of jurisdiction.[15] The common law drew a distinction between 'superior' and 'inferior courts of record', which do not have absolute immunity because of the opportunity for appeal to the higher courts for jurisdictional errors.[16] Common law legal scholars argue that cases on judicial immunity are not based on clear criteria or precedent, which casts doubt on the legitimacy of the rule.[17] Murphy, for example, reviews English case-law and maintains that judicial reasoning is '*couched in obviously exaggerated terms* (*and therefore bogus), empirically ungrounded (and therefore dubious) or entirely spurious*'.[18]

The basis of judicial immunity explicated by jurists such as Coke during the sixteenth and seventeenth centuries was grounded on 'public policy' when the prestige of judges was 'magnified' and immunity was given because they were accountable only to 'God and the King'.[19] Most common law countries recognise a number of public policies underpinning judicial immunity, but the key reasons are to protect the 'independence' of judges from 'coercion in their decision-making function',[20] bring litigation to an end,[21] support the 'administration of justice'[22] and prevent 'scandal' that could 'damage public confidence' in the court system.[23] The judiciary to this day restate these policies and highlight the importance of judicial 'impartiality and independence' on the

14. Lord Justice Holdsworth 'Immunity for judicial acts' (1924) Soc Pub Teachers L 17.
15. Ibid.
16. Ibid, pp 18–19. LJ Holdsworth notes that from the sixteenth to the nineteenth century, immunity did not cover judges acting 'without jurisdiction'.
17. See eg J Murphy 'Rethinking tortious immunity for judicial acts' (2013) 33(3) Legal Stud 455 at 458–459; S Hughes 'Mediator immunity: the misguided and inequitable shifting of risk' (2004) 83 Or L Rev 107; A Nicol 'Judicial immunity and human rights' (2006) Eur Hum Rts L Rev 558; D Thompson 'Judicial immunity and the protection of justices' (1958) 21 Mod L Rev 517 at 517.
18. Murphy, ibid, at 457.
19. LJ Holdsworth, above n 14, at 18–19, citing *Coke* para 25.
20. Ibid, at 19, citing *Coke* para 25. For a review of judicial immunity in the common law, see eg Murphy, above n 17, at 455–477; Hughes, above n 17.
21. LJ Holdsworth, above n 14, at 19, citing *Coke* 1606 12 Co Rep 23 para 25. For a review of judicial immunity in the common law, see eg Murphy, above n 17, at 455–477; Hughes, above n 17; Turner, above n 2.
22. See Hughes, above n 17, at 114.
23. Ibid, at 114; Murphy, above n 17, at 463–464.

grounds that judges must be protected from 'improper pressure' from '*litigants*'.[24] Present-day views are critical of 'unconvincing' policy reasons given for judicial immunity, which Murphy states was 'crafted by judges for judges', where the judiciary is 'seen to be above the law' because if people are 'equal in law', then where there is harm there should be a 'remedy'.[25]

Limitations on 'absolute' judicial immunity

There are restrictions in the English jurisdiction to 'absolute immunity' and judges have no defence for 'extrajudicial' conduct such as causing damage to a person or their property, or creating doubts about another's credibility when acting in a personal capacity.[26] Nor are judges immune when acting outside their jurisdiction.[27] Case-law implies that judges, in exercising decisions on jurisdiction, must do so in 'good faith', although there is uncertainty about whether this test is an objective or subjective standard, but it does confirm that 'excess of jurisdiction' may result in a 'loss of immunity'.[28]

The claims that judges have 'absolute immunity' are therefore over-expansive and there are persuasive arguments for greater limitations. For example, Murphy would restrict immunity to a 'qualified' level constructed on the basis that the judiciary exercise 'administrative power', which should be carried out 'for public good not for improper purposes', and that when they use their position in a 'malicious', 'reckless' or 'corrupt way', the parties should have redress through the 'tort of misfeasance'.[29] Notwithstanding arguments for limiting judicial immunity, some common law countries have extended protection to other neutrals who act in a 'judicial capacity'.[30]

ARBITRATORS' IMMUNITY

In England and Wales, arbitrators have had a form of 'quasi-immunity' since the early seventeenth century.[31] The basis of arbitral immunity is that, like judges, arbitrators have a decision making role that requires safeguarding in order to preserve their impartiality, prevent court 'intrusion' and bring disputes to an end, but 'quasi-

24. Judiciary website, available at http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/independence#headingAnchor7 (accessed 27 March 2013).
25. Murphy, above n 17, at 455. See also Esquibel, above n 2, at 172; Nicol, above n 17, at 558.
26. See Murphy, above n 17, at 485; Zhao and Koo, above n 2, at 679–680.
27. Murphy, above n 17, at 458, citing *Sirros v Moore* [1975] QB 118 para 134.
28. Ibid, citing *Sirros* para 137.
29. Ibid, at 459, citing Lord Steyn in *Three Rivers DC v Governor and Company of the Bank of England (No 3)* [2003] AC 1; see Esquibel, above n 2.
30. See eg Esquibel, above n 2, at 142, 130; C Joseph 'The scope of mediator immunity: when mediators can invoke absolute immunity' (1996-1997) 12 Ohio St J on Disp Resol 629 at 633.
31. Other common law countries have followed this direction. See eg T Stipanowich 'The arbitration penumbra: arbitration law and the rapidly changing landscape of dispute resolution' (2007–2008) 8 Nev L J 427; H Hebaishi 'Should arbitrator immunity be preserved under English Law?' (2014) 2 NE L Rev 45; D Nolan and R Abrams 'Arbitral immunity' (2014) 11 Berkeley J Emp & Lab L Article 2, 228 (reproduced); D Bristow and J Parke 'Canada – the gathering storm of arbitrators' and mediators' liability' (2001) Intern ALR 135; Yu-Hong Lin and L Shore 'Independence, impartiality, and immunity of arbitrators – US and English perspectives' (2003) 52(4) Int'l & Comp L Q 954; R Carroll 'Quasi-judicial immunity: the arbitrator's shield or sword?' (1991) J Disp Resol 137.

arbitrators' such as architects or evaluators will only be immune if there is a 'formulated dispute' between the parties that they have to determine.[32]

Under s 29 (1) of the Arbitration Act 1996 (AA 1996), arbitral immunity prevents liability '*unless the act or omission is shown to have been in bad faith*'.[33] The insertion of 'good faith' into the AA 1996 raised substantial debate because of the abstruseness surrounding the concept, which encompassed 'dishonesty', 'malice' 'or knowledge of absence of power to make the decision in question'.[34] Arbitral immunity is not without its critics, particularly on the grounds that arbitrators do not have an identical role to judges, because they are appointed by the parties and ought to be accountable to them for their negligence or misbehaviour, but also because of the problems surrounding how good faith is evaluated by the courts.[35]

THE EXTENSION OF IMMUNITY TO OTHER DISPUTE-RESOLUTION NEUTRALS

Common law in the USA

In spite of cogent arguments for limiting both judicial and arbitral immunity where there is malicious conduct or an absence of good faith, a number of common law countries have taken substantial steps to shield third-party neutrals from legal action, particularly in court-annexed programmes.[36] Four key contentions have been identified for endorsing immunity.[37] First, mediators need 'protection against defamation' to encourage the parties to mediate with 'candour', which is essential for moving the parties towards settlement.[38] Secondly, immunity supports the 'finality' of disputes, without endless appeals to uphold mediation settlements. The foundation for this assertion is that 'facilitative' mediators are not accountable for the outcome of the mediation, which is the preserve of the parties,[39] and that immunity prevents the participants trying to go back on their agreements by suing the mediator.[40] Thirdly, it is argued that the 'integrity' of mediation is put at risk when claims are made about mediators, which thereby require evidence in court from a process promoted as being 'confidential'.[41] Exponents

32. *Arenson v Arenson* [1977] AC 405; *Sutcliffe v Thackrah* [1974] AC 727. See eg T Oyre 'Professional liability and judicial immunity' (1998) 64(1) Arbitration 45 at 46; C Mulcahy 'Arbitrator's immunity under the new Arbitration Act' (2006) 62(3) Arbitration 202; ibid. For a discussion on arbitration in the USA, see Stipanowich, above n 31.

33. Section 29(1) Arbitration Act 1996; Oyre, above n 32, at 49. Oyre notes that the Arbitration Act sought to 'close loopholes' by extending immunity to 'employees or agents of the arbitrator' under s 29(2) and to 'Arbitral Institutions' under s 74.

34. See Hebaishi, above n 31, at 24–25; Oyre, above n 32, at 46; See also Mulcahy, above n 32, at 202. Mulcahy cites Megaw J in *Cannock Chase Council v Kelly* [1978] 1 WLR 1 para 6D–E.

35. Hebaishi above n 31; arbitral good faith is discussed later when mediators' good faith is raised. Mulcahy, above n 32, at 204; See also J Li 'Arbitral immunity: a profession comes of age' (1998) 64(1) Arbitration 51.

36. See eg Joseph, above n 30.

37. See Department of Justice, the Government of the Hong Kong, Special Administrative Region *Report of the Working Group on Mediation* (2010) (hereinafter 'Hong Kong Report').

38. Ibid, ch 7.154. See also Carroll (2001), above n 2, at 206.

39. See eg Stulberg, above n 2; NADRAC (2011), above n 3, s 5.4.

40. See eg Hong Kong Report, above n 37, ch 7.156.

41. Ibid, ch 7.154; P Brooker *Mediation Law: Journey through Institutionalisation to Juridification* (London: Routledge, 2013) ch 5, p 187; R Toulson and C Phipps *On Confidentiality* (London: Sweet & Maxwell, 2006); A Koo 'Confidentiality of mediation communications' (2011) 30(3) Civ Just Q 192.

of mediation view confidentiality to be the 'catalyst' that enables the parties to discuss their dispute, and make 'disclosures' or 'admissions of liability' while working towards settlement.[42] When information from mediation is produced in court, this 'undermines confidence in the confidential nature of mediation' and diminishes the 'trust' between the mediator and participants.[43] Fourthly, concerns are voiced about the effect that a want of immunity will have on mediation, because mediators may elect to mediate in ways to avoid litigation, which could result in the process becoming 'too prescriptive' or 'legalistic'.[44] Advocates for immunity consider that mediators should be able to decide the best approach to mediation without anxiety about being sued.[45]

A further apprehension is that without protection there will be an inadequate supply of mediators for the 'efficient' running of court-annexed programmes,[46] which was also used in the debate for affording arbitrators' immunity prior to the AA1996.[47] If the same justifications for judicial and arbitrators' immunity apply to mediation, then Chaykin argues that mediators should be invulnerable but doubts that there is sufficient 'empirical evidence' to support the claim that the role of judges, arbitrators or mediators will not be carried out without protection.[48] Arbitrators have acted for centuries when the issue of immunity was less clear-cut; and there is little evidence that a lack of immunity will deter mediators in England and Wales at this juncture, as there are reports of a glut of newly trained practitioners who are unable to gain a foothold in the emerging profession.[49]

Immunity for third-party decision makers

Commentators in the USA have noted the common law advancing a form of 'quasi-judicial immunity' to 'hearing officers'; 'state prosecutors' or 'parole officers' when they are appointed through the judicial system.[50] The basis for this extension is that they are appointed to assist 'court administration' and often have a decision making role akin to judges, which means that they are involved in 'judicial acts',[51] which Thompson observes has led some commentators to 'assume' that immunity is extended to neutrals who have a 'judicial function'.[52] The theoretical justification for expanding absolute

42. A Bevan *Alternative Dispute Resolution* (London: Sweet and Maxwell, 1992) p 19. See eg Kovach, above n 9, p 439; Toulson and Phipps, above n 41, s 15.016: '*... it would destroy the basis of mediation if, in the case of the mediation failing, either party could publicise matters which had passed between themselves or between either of them and the mediator*'.

43. Kovach, above n 42, pp 438–439.

44. Carroll (2001), above n 2, at 209; see also Hong Kong Report, above n 37, ch 7.152.

45. Carroll (2001), above n 2, at 208.

46. Hong Kong Report, above n 37, ch 7.162.

47. See Hebaishi, above n 31; Lord Donaldson of Lymington stated that if he had to insure himself as an 'occasional' arbitrator. he would 'cease' to undertake this role in the future. See *Hansard, Official Report of the Committee on the Arbitration Bill* [H.L.], HL Deb 28, vol. 569, cc1–30GC 1GC, February 1996 (accessed 13 October 2015).

48. A Chaykin 'Mediator liability: a new role for fiduciary studies' (1984) 53 U Cin L Rev 731 at 762.

49. CEDR Mediation Audit 2014, available at http://www.cedr.com/about_us/modeldocs/ (accessed 25 February 2015) at 10. The Audit reports that there is an 'over-supply' of new mediators, who cannot break into a limited market.

50. See eg Hughes, above n 17; Esquibel, above n 2; Cole et al, above n 3.

51. Hughes, above n 17, at 125.

52. N Thompson 'Enforcing rights generated in court-connected mediation--tension between the aspirations of a private facilitative process and the reality of public adversarial justice' (2004) 19 Ohio St J on Disp Resol 509 at 517.

immunity to neutrals involved in determining cases in the USA is based on safeguarding their 'quasi-judicial functions' rather than the 'individual', which Turner asserts is grounded on 'policy considerations'.[53]

Extension of common law immunity for mediators who do not make decisions

In the USA, the common law has also extended absolute immunity to third-party neutrals who do not decide cases.[54] In *Howard v Drapkin*, the Appeal Court in California held that immunity could be given to 'mediators, conciliators and evaluators' on the basis that 'they are *connected* to the judicial process' and their role entails 'attempt(*ing*) to resolve disputes' which is 'similar to a judge who handles a mandatory settlement conference'.[55] The court feared that without this protection, neutrals would be either 'reluctant' to undertake this work or anxious that they would face litigation that could influence the way in which 'they perform their jobs', but the court was also swayed by the benefits that the court system and the parties gain from using ADR neutrals:[56]

> Besides relieving court congestion and speeding up the conclusion of cases, these less-traditional alternative dispute resolution procedures are often less expensive and less stressful than seeing a case through its normal trial path. Like the more formal dispute resolution procedures, they are critical to the proper functioning of our increasingly congested trial courts.

In *Wagshal v Foster*, a federal court acknowledged that immunity existed for a case evaluator but used the label 'interchangeably' with a court-appointed mediator, who the plaintiff claimed had 'forced' him to settle at a 'disadvantageous or lower figure'.[57] Immunity was granted because the neutral undertook 'tasks' such as 'identifying factual and legal issues, scheduling discovery and motions with the parties and coordinating settlement effort', which were 'precisely' the same that judges undertake 'going about the business of adjudication and case management'.[58] The court refined a threefold test for immunity:[59] first, the role of the neutral must be 'comparable to those of a judge'; secondly, consideration must be given to whether the dispute may lead the parties to 'harassment or intimidation' of the neutral; and, thirdly, immunity will only be given where the scheme for appointing neutrals provides 'safeguards' that 'justify' removing the right to litigate. The court concluded that the mediation programme operating in *Wagshal v Foster* had 'adequate safeguards' in place because the plaintiff could have approached the judge for 'relief from any misconduct' or, if concerned that the judge

53. Turner, above n 2, at 765–768, citing *Butz v Economou* (1978) 438 US 478.
54. See eg Hughes, above n 17; Esquibel, above n 2; Cole et al, above n 3.
55. Esquibel, above n 2, at 149–150 cites the California Court of Appeal in *Howard v Drapkin* 222 Cal App 3d 843 2nd Dist, 3rd Div (Ct App 1990), which concerned immunity for a psychologist appointed by both parties in a child 'custody' dispute.
56. Ibid, *Howard v Drapkin* ss (d) and (e). See Turner, above n 2, at 853.
57. *Wagshal v Foster*, 28 F 3d 1249 (DC Cir 1994). The court affirmed that the difference between mediators and evaluators is that mediators help the parties 'explore settlement' whereas evaluators assist them to 'assess their cases' (at 2). For an analysis of *Wagshal v Foster*, see eg Hughes, above n 17; Turner, above n 2; R Burnley and G Lascelles 'Mediation confidentiality: conduct and communications' (2004) 70(1) Arbitration 28 at 31–32; Esquibel, above n 2, at 150; Hughes, above n 17, at 132–141.
58. Ibid, *Wagshal v Foster* s 2.
59. *Wagshal*, above n 57, at 4; Turner above n 2, at 772–774.

had been biased by the mediator's 'communications', could have applied for judicial disqualification.[60]

Mediator function

Extending immunity to mediators who do not issue decisions is based on the analogy that they share a '*similar function*' to that of judges.[61] As 'administrators of justice', they provide a substitute for the judiciary, particularly in 'court-annexed programmes', where the process is deemed to be part of 'case management'.[62] This analysis is disputed by many opponents of immunity. For example, Chaykin observes that 'primarily' the mediator's relationship to the participants is as a 'confidant' or 'counsellor' who helps them to 'identify issues, clarify applicable law, and explore areas of compromise'.[63] Turner summarises mediator 'tasks' as those of organising the setting and the structure of mediation to enable the parties to achieve a consensual settlement while assisting them to evaluate their dispute.[64] Although some of these 'tasks' may be comparable to those undertaken by a judge, Turner states that this does not mean that they share the same responsibility as the judiciary who rule on cases, and therefore that immunity is not justified:[65]

> The important question in comparing mediators to judges is not whether they share some similar tasks or have similar goals, but whether mediators perform functions sufficiently to the function that originally justified the judge's immunity: the adjudicatory 'function'.

Although some legal scholars recognise that mediators in 'court-annexed' schemes perform a 'quasi-judicial *function*', many others suggest that it is difficult to justify immunity for facilitative ADR processes because facilitating settlement is not the foundation of judicial immunity.[66] Moreover, critics argue that when mediators only facilitate settlement, they make 'procedural (not substantive decisions)', which is not a 'judicial or quasi-judicial' role, and provides little potential for legal claims against them.[67] Practitioners and researchers, however, recognise that the mediator's role involves more than facilitating settlement, because it may also involve giving advice or protecting parties who are not legally represented.[68] Sometimes, mediators provide an evaluative role when they offer 'special or expert information', which may make them more 'vulnerable' to litigation.[69] There is now substantial empirical evidence that mediators who work in court-annexed programmes, court-connected mediation and in

60. *Wagshal,* above n 57, at 6.
61. See Turner, above n 2, at 775–783.
62. NADRAC (2006), above n 3, s 8.30.
63. Chaykin, n 48, at 735. See also Turner, above n 2, at 776: Turner bases her analysis of the mediator's role on Chaykin.
64. Turner, above n 2, at 776. It is noted that the case management role for judges involves facilitative tasks such as encouraging mediation, and s 34(2)(g) of the Arbitration Act permits arbitrators to take a 'inquisitorial role' with the parties' permission.
65. Turner, above n 2, at 777–778.
66. Ibid.
67. NADRAC (2011), above n 3, s 5.4.
68. Chaykin, above n 48, at 762; see eg L Riskin 'Understanding mediators' orientations, strategies and techniques: a grid for the perplexed' (1996) Harv Negot L Rev 1.
69. NADRAC (2011), above n 3, s 5.4. See also NADRAC (2006), above n 3, s 8.23; Hong Kong Report, above n 37, ch 7.149.

private work do adopt evaluation into their practice.[70] Chaykin observes that when mediators evaluate, they should have a higher duty in relation to that advice, particularly when it involves legal issues, and that immunity should not be afforded when wrong information disadvantages the parties:[71]

> … mediators are not hired merely to be objective decision makers; they are expected to provide advice, to structure discussion, and attempt to ensure a durable agreement. The judge generally has no duty to the litigants except to decide the case. To the extent that people rely on and trust a mediator in a way that they do not with judges, there is a strong argument that the immunity should not be extended.

Regardless of these challenges to immunity in the literature, a California Appeal Courts extended 'absolute' protection to mediators employed in the private sector following a court order to mediate[72] and immunity to an ADR organisation after the claimant alleged that the recommended mediator had not carried out the mediation adequately.[73] However, Cole et al doubt that the common law in the USA will find a new 'absolute' immunity for mediators who do not decide cases, following the Supreme Court decision in *St. Paul Fire & Marine Ins. Co. v Vedatech Intern*., *Inc*., which held that they do not require protecting from litigation.[74]

The Australian court in *Taphooi v Lewenberg* took a different approach to the USA common law by suggesting that there might be a case to answer on the standard of care owed by the mediator who had been appointed by two sisters in a dispute over property that had been jointly left to them.[75] The mediation had gone on into the evening, with the mediator pushing the participants for a signed agreement before leaving, and although Ms Taphooi's representatives claimed to have drawn attention to the necessity for further consultation on the tax issue, this was not drawn up as an 'express' term in the settlement agreement.[76] Basing his decision on the English case of *Arenson v Arenson*, Habersberger J. held that immunity for negligence should only 'exist where there were strong public policy grounds' because those who '*breach a legal obligation to take reasonable care should be answerable to the court to compensate those to whom they have caused damage by their negligence*'.[77] *Taphooi v Lewenberg* did not proceed

70. See eg Riskin, above n 68. The literature on the evaluative/facilitative divide is extensive in the USA: see eg K Kovach and P Love '"Evaluative" mediation is an oxymoron' (1996) 14 Alt High Cost Litig 31; K Kovach and L Love 'Mapping mediation: the risks of Riskin's grid' (1998) 3 Harv Negot L Rev 71 at 109; J Stulberg 'Facilitative versus evaluative mediator orientations: piercing the grid' (1997) 24 Fla St U L Rev 985. For an overview of the debate and developments in England and Wales, see eg P Brooker 'An investigation of evaluative and facilitative approaches to construction mediation' (2007) 25(3/4) Struct Surv 220.

71. Chaykin, above n 48, at 762.

72. Cole et al, above n 3, s 11.12, citing *Goad v Ervin*, 2003 WL 22753608 (Cal App 4th Dist 2003), unpublished/non-citable.

73. Cole et al, above n 3, s 11.12, citing *Simpson v JAMS/Endispute*, LLC, No A110634, 2006 WL 2076028 (Cal App 1 Dist 26 July 2006), unpublished/non-citable.

74. Cole et al, above n 3, s 11.12, citing *St. Paul Fire & Marine Ins. Co. v Vedatech Intern., Inc*., 245 Fed Appx 588 (9th Cir, 2007).

75. *Taphooi v Lewenberg* [2003] (No 2) VSC 410 Supreme Court of Victoria, Commercial and Equity Division (21 October 2003) para 86. For an analysis of the case, see eg Zhao and Koo, above n 2; NADRAC (2001), above n 3, s 5.4.

76. *Taphooi*, above n 75, paras 35, 36.

77. *Arenson v Arenson* [1977], above n 32.

further in litigation; therefore, the matter was left unresolved by the common law in Australia.[78]

It is emphasised in the literature that immunity, particularly in its absolute form, is 'exceptional'[79] and should not be extending to mediators who do not need the same protection that judges require in performing their role independently, without pressure from the parties.[80] Chaykin bases his opposition on the dissimilarity of mediation to litigation and arbitration, because the latter procedures are founded on the 'force of the law', whereas mediation is built on 'trust' between the parties and the mediator.[81] He asserts that endowing mediators with immunity potentially leads to cynicism and, furthermore, '*encourages carelessness by removing the incentive of cautiousness*'.[82]

Hughes' criticism is based on the contention that it represents an 'inequitable shifting of risk' from the mediators' deficiencies to the 'unlucky' parties who experience such conduct, and claims that academics have not addressed the problem of the 'economic impact' of protecting mediators from legal action.[83] He maintains that future parties will not mediate if they have to take on this 'risk', although Cole et al disagree with this inference, on the grounds that there is insufficient evidence in the USA that immunity reduces the likelihood of mediating.[84]

The main argument against immunity is that injured parties have no solution when they have suffered loss through the shortcomings or misconduct of mediators.[85] Carroll considers that the public receives a 'collective benefit' when those who harm others have to make recompense to those who have been wronged, and that mediator immunity removes an important goal in the 'avenue of social regulation'.[86] By the same token, it is argued that it is a 'fundamental fairness' that mediators are able to 'defend' themselves by responding to 'allegations'.[87] These two lines of reasoning lead to support for partial immunity, which creates a balance between protecting parties in order that they can bring evidence to court to prove incompetency or bad behaviour while still providing mediators with a defence in litigation.[88]

Partial or qualified immunity

The provision of partial immunity has largely evolved through statutory provisions in the USA and Australia. Hughes reveals that by 2004, 38 states in the USA had over 96 statutes or rules covering immunity and, more recently, Cole et al noted an inconsistent approach across federal jurisdictions from matching 'absolute' judicial immunity to that of 'qualified immunity'.[89] Limitations to full immunity include where the mediator has acted in 'bad faith' or where there has been 'wanton or wilful

78. *Taphooi*, above n 75, para 69. See Zhao and Koo, above n 2.
79. See eg Carroll (2001), above n 2, at 195; Chaykin, above n 2, at 81; Turner, above n 2, at 776.
80. See eg Hong Kong Report, above n 37, para 7.149; Hughes, above n 17; NADRAC (2011), above n 3, s 5.4.
81. Chaykin, above n 48, at 732.
82. Chaykin, above n 2, at 77.
83. Hughes, above n 17, at 111.
84. Ibid; Cole et al, above n 3, s 11.12.
85. Carroll (2001), above n 2, at 205.
86. Ibid, at 211.
87. Ibid, at 195.
88. Carroll (2001–2002), above n 2, at 214.
89. Cole et al, above n 3, s 11.11, See also Hughes, above n 17, at 145.

misconduct' or 'maliciousness';[90] moreover, a number of provisions 'create a presumption' requiring 'clear convincing evidence that the mediator has not acted in good faith'.[91] Despite bestowing immunity on mediators operating in court-annexed schemes, there are very few provisions at state or federal level providing either full or partial immunity for mediators acting in a 'private capacity'.[92]

The Uniform Mediation Act in the USA

The Uniform Mediation Act 2003 (UMA) was introduced to provide consistency of mediation law across federal states in the USA, but the drafters did not legislate for immunity, which Laflin asserts was because it ensured a way of preserving their 'accountability'.[93] The UMA is concerned with privilege that attaches to 'mediation communications' and various sections limit evidence from the mediation process, thereby maintaining confidentiality.[94] Commentators point to the 'express exception' in s 6(a)(5), where evidence can be brought to 'disprove a claim of professional misconduct or malpractice',[95] which Burnley and Lascelles believe provides mediators with an 'effective defence' while allowing the parties the opportunity for complaint.[96] Furthermore, it is noted that claims of impartiality may be a cause of action under s 9, which requires a mediator to make a 'reasonable inquiry' about potential conflicts of interests and permits disclosure of evidence that a 'reasonable individual' might perceive indicates bias,[97] and the Act permits disclosure of mediation information where there is a 'serious risk of injury' or where 'duress' has been used, which includes mediator misconduct on these issues.[98]

The statutory approach to mediators' immunity in Australia

Like the USA, Australia is a common law jurisdiction with a correspondingly long experience of mediation, where many federal and state courts have adopted a mandatory approach to mediating. Although there is no 'general immunity from legal action' in Australia, various state and federal legislation provide either full or 'qualified immunity' in court-annexed programmes.[99] For example, NADRAC observe that s 53C of the Federal Court of Australia Act 1976 affords 'ADR practitioners' 'referred' by the Federal Courts the same immunity as magistrates and judges, but only 'partial

90. Cole et al, above n 3, s 11.11, citing the Iowa Code Ann. s 679C.115 (2005): 'A mediator or a mediation program shall not be liable for civil damages for a statement, decision, or omission made in the process of mediation unless the act or omission by the mediator or mediation program is made in bad faith, with malicious purpose, or in a manner exhibiting willful or wanton disregard of human rights, safety, or property.'

91. Ibid, citing Hughes, above n 17, who discusses the presumption of good faith in Maine, Pennsylvania and Wisconsin.

92. Ibid.

93. M Laflin 'Preserving the integrity of mediation through the adoption of ethical rules for lawyer-mediators' (2000) 14 Notre Dame J L Ethics & Pub Pol'y 479 fn 149. See also M Moffitt 'Ten ways to get sued: guide for mediators' (2003) 8 Harv Negot L Rev 81; Cole et al, above n 3, s 11.13.

94. See eg Cole et al, above n 3, s 11.13.

95. Carroll (2001–2002), above n 2, at 188. See also Laflin, above n 93; Cole et al, above n 3.

96. Burnley and Lascelles, above n 57, at 31–32. See also Cole et al, above n 3, s 11.13.

97. Cole et al, above n 3, s 11.13, citing UMA ss 7(a), 10.

98. Cole et al, above n 3, s 11.13.

99. NADRAC (2006), above n 3, s 8.12.

immunity' when practising in 'Community Justice Centres' when acting in 'good faith'.[100] The Australian report recommended that when the courts refer people to ADR (including mediation) '*as part of a continuum of case management*', then mediators should be protected because it could be seen as '*an extension of the judicial role*' and the settlement might be open to attack through litigation.[101] In contrast, where ADR procedures are on a 'community basis', NADRAC did not support immunity because of the legislation covering 'professional standards', which restricts 'civil liability' in other spheres of work.[102]

The 2006 report expressed specific concerns about the pressures facing mediation if there were no immunity: first, on the grounds that the parties expect the process to be confidential and that negotiations could be compromised if the communications were allowed in 'evidence'; and, secondly, that if mediators worry about litigation, this could affect how they conduct the process by making it 'more formal and legalistic'.[103] Furthermore, NADRAC identified that 'community' or private mediators would be disinclined to mediate if they were not given immunity, although the report felt that this worry would lessen as the incidence of mediation escalates.[104]

In 2011, NADRAC was asked to review immunity again and although the report revealed no consensus on the issue, some practitioners believed there was a need for 'blanket immunity' except for 'fraud'.[105] NADRAC once again distinguished between 'private and mandatory ADR processes' and recommended the continuance of partial immunity for 'court or tribunal staff' when 'acting in good faith',[106] but there was no recommendation for immunity for mediators practising privately because of the availability of 'contractual indemnity and liability insurance'.[107]

Good faith

Many of the statutory immunity provisions in Australia and the USA provide qualified protection that permits the parties to seek a remedy when the mediator has acted in 'bad faith', which has been defined as 'palpable bias' or acting 'fraudulently'.[108] Chaykin observes that this standard may excuse a mediator who has furnished 'foolish' but not 'malicious' advice, and argues against immunity for 'information-giving' because this resembles the lawyers' role, which is not protected.[109] Hughes queries the difficulties of determining where the level of liability should lie for mediators between 'negligence', 'recklessness or intentional behaviour', or whether the difference between 'wanton', 'wilful' or 'malicious' should be used: '*This is an inquiry to which scholars surrendered many years ago. Even embarking on such a journey of comparison and analysis is absurd and would only amount to pure speculation*.'[110]

Case-law in the USA shows that the concept of mediators acting in good faith has not been easy to define, and Hughes believes that inconsistencies in interpretation will lead

100. Cited by ibid, ss 8.14, 8.17.
101. Ibid, ss 8.30, 8.12.
102. Ibid, s 8.31.
103. Ibid, ss 8.2, 8.4.
104. Ibid, ss 8.5, 8.25.1.
105. NADRAC (2011), above n 3, ss 5.1, 5.5.
106. Ibid, s 5.9.3.
107. Ibid, s 5.5.1.
108. Chaykin, above n 48, at 763.
109. Ibid.
110. Hughes, above n 17, at 155.

to 'incessant litigation'.[111] There have also been problems with establishing the meaning of good faith in the context of arbitration in the English jurisdiction, despite observations by the Departmental Advisory Committee on Arbitration (DAC) and commentary in *Hansard*, which suggested that the term was 'well established' in the case-law prior to the enactment of the AA 1996.[112] Nearly 20 years later, clarity has not been achieved and Hebaishi contends that the courts create 'confusion' by using different 'thresholds' for arbitral 'good faith'.[113]

It is suggested that dishonesty is a better yardstick for demarking mediator bad faith because it suggests a higher standard, but others note that this requires an understanding of whether or not a mediator's conduct is judged objectively, which has also led to an inconsistent approach in the USA case-law.[114] This lack of clarity about good faith or dishonesty has led writers to propose diverse systems for limiting immunity. For example, Moffitt recommends that qualified immunity should be based on the distinction between 'Custom-Based Claims', constructed on a common understanding of mediator standards such as 'unhelpful suggestions' or 'interventions' or providing a 'useless agenda' – or even taking a 'long cat-nap' – and 'Custom-Independent Claims', involving conduct such as 'fraud' or 'duress', or intentionally not revealing 'conflicts'.[115] Moffitt concludes that mediators should have no immunity for 'Custom-Independent' complaints, but that statutory provision should be designed to 'bar only Custom-*Based* suits', which will prevent 'harassing litigation' by the parties while maintaining the possibility of compensation when there is serious misconduct.[116] The advantage of this approach, he suggests, is that it will ensure that the practice of mediation will retain its flexibility without 'rigid' guidelines.[117]

The problems with defining good faith or dishonesty or establishing set criteria in relation to mediators' conduct may be more evident in federal legal systems that have many different court-annexed mediation programmes, but should the English jurisdiction move further towards mandatory rules, which some proponents sponsor,[118] a consistency of approach and clearly understood concepts on where liability should lie are essential. The ambiguity experienced by the USA or that of arbitral good faith in England and Wales might be avoided or reduced for mediator immunity if lessons can be learnt from other jurisdictions.

The need for mediator immunity should be carefully reviewed by policy makers in the English jurisdiction. Hughes believes that the formal system in the USA has mistaken the necessity for shielding mediators and also exaggerated the evidence that without protection there will be insufficient practitioners in court-connected schemes.[119] Furthermore, he maintains that mediators have been 'instrumental' in generating legislation in the USA and, not wishing to strive for absolute immunity, have

111. Ibid, at 145.
112. Departmental Advisory Committee on Arbitration (DAC) *Report on Arbitration Bill* (1996). See also *Hansard* HL Deb, above n 47.
113. See Hebaishi, above n 31, at 24–25, 55; Oyre, above n 32, at 46. See also Mulcahy, above n 32, at 202, citing Megaw J. in *Cannock Chase Council v Kelly* [1978] 1 WLR 1 para 6D–E.
114. Cole et al, above n 3, s 16.6.
115. M Moffitt 'Suing mediators' (2003) 83 BU L Rev 147 at 195 *et seq*.
116. Ibid, at 198.
117. Ibid.
118. See above n 3.
119. Hughes, above n 17, at 155–156.

'settled' for its limited form.[120] His analysis of the USA common law cases is that they 'misconstrue' a similarity between the 'function' of judges and mediators, 'ignore the standard tests applied to judicial immunity' and have leapt to a 'needs-based argument that is clearly self-interested and poorly informed': '*In the final measure, there is nothing to support immunity for mediators other than the naked self-interest of the courts and mediators*.'[121]

MEDIATOR IMMUNITY IN ENGLAND AND HONG KONG

Both Australia and the USA have taken major steps to move disputes out of litigation and into court-annexed mediation programmes, which has been accompanied by implementing statutory immunity to augment the process and elevate the status of mediators. England has not gone as far down this route, nor has Hong Kong, and although mediation has a long history in Chinese culture,[122] neither country has implemented mandatory 'court-annexed programmes as yet, but mediation is 'court-connected' in both jurisdictions. Hong Kong has designed court rules similar to CPR, which places requirements on the parties to consider ADR and provides courts with the power to sanction successful litigants for unreasonably refusing an offer to mediate.[123] Hong Kong, however, has taken more 'affirmative action' by introducing a mediation practice protocol, which obligates the parties and their lawyers to lodge 'mediation certificates' with the court, but also provides judges with the power to order a stay on their own cognisance.[124]

In contrast to the English jurisdiction, Hong Kong has given careful consideration to the approaches taken to immunity by other common law countries. Following a report from the Hong Kong Department of Justice, action was taken in the form of a 'Mediation Ordinance' in 2013, but although recommendations were made for a 'statutory framework', which set in place rules governing confidentiality, the review did not advocate immunity for mediators except conceivably on a partial basis for those working 'pro-bono' in the community.[125] The report took into consideration a number of other jurisdictions but concluded that there was insufficient evidence that mediators required immunity at that time for three reasons.[126] First, mediators in the province mostly used facilitative mediation and were not involved in 'a judicial function'; nor was the process compulsory or 'court-annexed'.[127] Secondly, the review did not indicate that there was a significant likelihood that mediators in Hong Kong would

120. Ibid, at 155.
121. Ibid, at 169.
122. Zhao and Koo, above n 2, at 677–678.
123. Mediation Ordinance CAP620 2013; see also Mediation Practice Ordinance, PD 31 pt B9. See eg Weixia above n 13, at 43.
124. Brooker, above n 41, pp 78–81. For a discussion on developments in Hong Kong, see eg ibid; Weixia, above n 13, at 78–81; Cheung, above n 13, at 169; C Wall 'Mediation in the civil justice system in Hong Kong' (2009) 73(3) Arbitration 425; C Wall 'The framework for mediation in Hong Kong' (2009) 75(1) Arbitration 78–85; H Yu 'The draft Mediation Bill' (2012) 1 Hong Kong L J 351.
125. Mediation Ordinance CAP620 2013, above n 123; see Hong Kong Report, above n 37, ch 8, Recommendation 39.
126. Hong Kong Report, above n 37, ch 7.163 (2).
127. Ibid, ch 7.163.

face rising litigation.[128] Thirdly, the report suggested that mediators could use 'contractual immunity', which was already widespread in Hong Kong, and that they could take out insurance to protect themselves.[129] All of these arguments could be raised in England and Wales to argue against immunity, but in contrast to assertions about mediators' styles, in Hong Kong there is evidence that mediators evaluate and that some parties prefer this.[130]

Before continuing with the discussion on whether mediators should be given partial or even absolute immunity in England and Wales, it is necessary, first, to review the existence of any evidence of misconduct or poor mediation skills; and secondly, what, if any, potential liabilities mediators face from dissatisfied participants.[131]

THE LACK OF CASES AGAINST MEDIATORS

To date in England and Wales, there have been no reported cases against mediators on the grounds of their conduct; nor are there noteworthy numbers in other common law countries, even where there is a substantial mass of mediations taking place each year. In 2006, Coben and Thompson reported that there was a 'dearth' of cases involving 'mediator misconduct or ethical violations'.[132] This research was confirmed in 2013 by Cole et al, who observed how few cases there had been during the 20-year period of the publication *Mediation Principles and Practice*; moreover, the authors noted that even when parties sue mediators, the courts are unlikely to set aside agreements.[133] In Australia, NADRAC reported the occurrence of litigation against mediators to be negligible apart from *Taphooi v Lewenberg*.[134] Similarly, the Hong Kong Report found little evidence of cases from its own jurisdiction or others to support legislation for general immunity at that point in time.[135]

A number of reasons have been highlighted to explain how few cases have been brought against mediators. One suggestion is that the parties have already tried to circumvent litigation and therefore are more likely to turn to another mediator, leaving only the most 'determined party' to litigate.[136] Another possible cause of the rarity of cases is confidentiality, which commentators believe hinders successful litigation because it precludes evidence being permitted at trial unless certain requirements are met.[137]

The effect of confidentiality and without prejudice negotiation

Mediator immunity is connected to the rules of confidentiality because it concerns balancing whether a party can use evidence from the mediation in order to prove a

128. Ibid.
129. Ibid.
130. Above n 70.
131. See Moffitt, above n 115, at 130–131. Moffitt counsels that if mediators are aware of potential liability, this will help them to avoid claims and assist them in explaining their liabilities.
132. J Coben and P Thompson 'Disputing irony: a systematic look at litigation about mediation' (2006) 11 Harv Negot L Rev 43 at 95.
133. Cole et al, above n 3, s 11.13.
134. NADRAC (2011), above n 3, s 5.4, citing *Taphooi*, above n 75.
135. *Hong Kong Report*, above n 37, ch 7.148. See also Zhao and Koo, above n 2.
136. Carroll (2001), above n 2, at 193.
137. See eg Carroll (2001, 2001–2002), above 2; Hughes, above n 17; Cole et al, above n 3.

deficiency 'of skill or acceptable behaviour', but also whether the mediator should be able to bring evidence to refute such a claim or to show that the 'mistake was an honest one'.[138] In England, the courts accept that mediation is a 'form of negotiation' and negotiation settlement discussions are protected through the common law rules of 'without prejudice', which encourage parties to make concessions or admissions in the belief that these cannot be used in later litigation.[139]

The leading authority on without prejudice in mediation in the English jurisdiction is *Farm Assist (2)*, which held that the rules only apply to the parties and, therefore, if all parties agree to waive this, the mediator can be called to give evidence.[140] The exceptions to without prejudice in negotiations have been extended to mediation; therefore, the parties may bring evidence to show that an agreement has been reached;[141] that there has been an 'estoppel';[142] that the agreement is void or voidable because of 'misrepresentation, fraud or undue influence',[143] that 'perjury, blackmail or other unambiguous impropriety' has been perpetrated;[144] to 'explain delay or apparent acquiescence';[145] to show 'whether the claimant has acted reasonably as to his loss';[146] to prove that the 'offer was expressly made without prejudice as to costs';[147] or – the most recent addition – to help the court 'interpret the construction' of the settlement agreement.[148]

Farm Assist (2) also held that confidentiality may arise either through an express term of the mediation contract, which all the parties including the mediator are bound by, or by 'analogy' with arbitration through an implied term, when all parties including the mediator have to give consent to evidence being produced in court, which means that a mediator could refuse.[149] Ramsey J held that 'absolute confidentiality' was not available when there has been 'serious harm' or a 'threat of serious harm' or when it is 'in the interests of justice'.[150]

Despite the arguments made in a number of cases in England, the courts have not been prepared to accept that there should be a specific mediation or mediator privilege

138. See Carroll (2001), above 2, at 187.
139. *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 para 5.
140. *Farm Assist (2) Ltd v Secretary of State for the Environment Food and Rural Affairs* (DEFRA) [2009] EWHC para 44(2). For an analysis of confidentiality in England and Wales, see eg Brooker, above n 41, ch 5; Burnley and Lascelles, above n 57; M Kallipetis 'Mediation privilege and confidentiality and the EU Directive' in JC Goldsmith, A Ingen-Housz and GH Pointon (eds) *ADR in Business: Practice and Issues Across Countries and Cultures, Volume* 2 (Dordrecht: Kluwer Law International, 2011); D Cornes 'Mediation privilege & the EU Directive: an opportunity?' (2008) 74(4) Arbitration 384; Toulson and Phipps, above n 41; Koo, above n 41.
141. *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 1378.
142. Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178 para 191.
143. *Unilever Plc v The Proctor and Gamble Co* [2000] WLR 2436.
144. *Forster v Friedland* (unreported), 10 November 1992; CA (Civil Division) Transcript No 1052 of 1992.
145. *Walker v Wilsher* (1889) 23 QBD 335.
146. *Muller v Linsley & Mortimer* [1996] PNLR 74.
147. *Cutts v Head* [1984] ch 290; *Rush & Tomkins & Tompkins Ltd v Greater London Council* [1989] AC 1280.
148. *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2011] 1 AC 662; Brooker, above n 41, pp 192–193; M Ahmed 'Reinforcing the need to protect the without prejudice rule' (2010) 29(3) Civ Just Q 303 at 306; E Suter 'The Devil's in the detail: interpreting compromise agreements after Oceanbulk' (2011) 77 Arbitration 274.
149. *Farm Assist (2)*, above n 140, para 23. See Brooker, above n 41, pp 200–205.
150. *Farm Assist (2)*, above n 140, para 28.

other than that recognised for family conciliation.[151] Legal counsel have utilised the views of commentators, arguing that the relationship between the mediator and the party is 'unique' because during the caucus, 'secrets' are given that enable the mediator to work towards a consensual outcome,[152] which does not usually happen in negotiations even when there are intermediaries. The court in both *Brown v Rice & Patel* [2007] and *Cattley & Anor v Pollard* [2007] declined to accept that such a privilege exists, preferring to leave this to the appeal courts or legislation, although Ramsey J in *Farm Assist (2)* did recognise that it might be necessary to extend privilege in the future.[153]

Commentators observe that there may be a 'mismatch' between information given on confidentiality at the beginning of the process by the mediator and the legal position should this be raised at a later stage in court, which raises questions about the level of the parties' informed consent.[154] For the foreseeable future, it is unlikely that there will be radical change to the rules of confidentiality or without prejudice as they apply to mediation, but it is recommended that the situation should be reviewed in much the same way as the consultations undertaken in Australia, the USA and Hong Kong.

POTENTIAL CLAIMS AGAINST MEDIATORS

The evidence from the common law countries examined in this paper does not establish a substantial number of cases where mediators have faced litigation, but this section will review potential avenues of legal action that may be addressed by the courts in the English jurisdiction as stronger measures are taken to encourage the use of mediation. It is likely that common law countries that adopt costs penalties for refusing to mediate such as used in England and Hong Kong will see an increase in grievances against mediators, as pressurising parties in this way may provoke dissatisfaction with their experience.[155] Parties have the right

151. Per Sir T Bingham MR 238 *In Re D* (Minors) 'Conciliation: disclosure of information', citing Lord Hailsham of St Marylebone and Lord Simon of Glaisdale in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 paras 231, 238. The court recognised a 'new category of privilege based on the public interest in the stability of marriage'.

152. See eg Mr Justice Briggs 'Mediation privilege' (2009) 159 New L J Issue 7363, 506; Mr Justice Briggs 'Mediation privilege' (2009) 159 New L J Issue 7363, 550.

153. See eg R Field and N Wood 'Marketing mediation ethically: the case of confidentiality' (2005) 5 Qld U Tech L & Just J 143 at 145–146; *Brown v Rice & Patel* [2007] EWHC 625 paras 19–20; *Cattley & Anor v Pollard* [2007] ECHC 3130 (Ch) paras 9–10; *Farm Assist (2)*, above n 140, para 43.

154. P Brooker 'Towards a code of professional conduct for construction mediators' (2011) 3 (1) Int'l J L Built Envt 24; J Nolan-Haley 'Informed consent in mediation: a guiding principle for truly educated decision-making' (1999) 74 Notre Dame L Rev 775; S Imperati 'Mediator practice models: the intersection of ethics and stylistic practices in mediation' (1997) 33 Willamette L Rev 703; N Alexander 'Mediation and the art of regulation' (2008) 8(1) Qld U Tech L & Just J 1–23; T Sourdin 'Australian National Mediator Accreditation Scheme: report on the project' (2007), available at http://www.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf (accessed 3 March 2010).

155. See eg M Brunsdon-Tully, above n 13, at 218; Brooker, above n 41; H Genn 'The privatisation of civil justice is a rule of law issue' 36th FA Mann Lecture Lincoln's Inn, 19 November 2012; H Genn et al *Twisting Arm: Court Referred and Court Linked Mediation under Judicial Pressure* Ministry of Justice Research Series 1/07 May 2007; NADRAC 2011, above n 3, s 5.4. The NADRAC report also warns of the likely increase of cases in Australia as the number of mediations rises.

to leave mediation[156] but once the process has started, substantial costs for preparing to mediate and lawyers' fees if used will have amassed and, moreover, pursuing settlement through the courts after a failed mediation will in all probability lead to sizeable litigation costs.

Liabilities in fiduciary duties, contract, tort of negligence and misconduct

Claims against mediators are likely to centre on issues of 'competency, care or misconduct',[157] which can involve 'breach of contract, tortuous liability or even criminal liability in serious cases'.[158] Other 'causes of action' may involve breaches of 'professional obligations', 'discrimination and harassment' or 'fiduciary duties'.[159] Commentators have drawn up specific lists of complaints that mediators might face, including: misleading parties about the 'purpose or nature' of mediation or their 'qualifications'; 'breaches of confidentiality';[160] failing to identify that the dispute is inappropriate for mediation; using 'duress, undue influence or undue pressure' to force a settlement; 'negligence in drafting the settlement agreement', 'defamation'; 'bias'; or 'failing to disclose conflicts of interest'.[161]

Explicit mediator activities that may lead to grievances could be failing to arrive on time, stopping the process at the wrong point or not bringing the process to a close when circumstances indicate that it should be terminated.[162] Unacceptable levels of care may focus on 'incorrect professional' or 'legal advice', not disclosing potential threats of violence, making 'unauthorised disclosures' or not preventing the parties from signing an 'illegal agreement'.[163] Moreover, allegations against mediators have involved '`unprofessional and overbearing' behaviour or 'deceptive' conduct, or even 'fraud'.[164]

Liability through fiduciary duty

Scholars in the USA have promoted the extension of fiduciary duties to mediators in order to provide parties with a cause of action and a remedy.[165] In the English jurisdiction, fiduciary duties are established when one party has 'assumed responsibility' for the 'affairs' of another person, which involves 'normally a duty of care' but

156. Some countries' state or court rules require parties to remain in mediation for a specified time. For example, Hong Kong's Mediation Practice Directive PD31 requires 'a minimum level of participation', which is suggested 'might be at least one substantive session' (at App C). See eg Brooker, above n 5, at 147–148.

157. Carroll (2001), above n 2, at 190.

158. See eg Zhao and Koo, above n 2, at 681; Moffitt, above n 93; Carroll (2001, 2001–2002), above n 2; Coben and Thompson, above n 132; Cole et al, above n 3.

159. NADRAC (2011), above n 3, s 5.4. NADRAC lists potential liability, which includes 'misleading and deceptive conduct under the Trade Practices Act 1974 (Cth) or state/territory fair trading laws'.

160. Moffitt, above n 93, at 81. Moffitt identifies that mediators can breach confidentiality 'internally' by revealing information to the other side without consent, as well as 'externally', to people outside the process.

161. See NADRAC (2011), above n 3, s 5.3. See also Carroll (2001), n 2, at 189–192; Cole et al, above n 3, s 7; Coben and Thompson, above n 132; Zhao and Koo, above n 2.

162. Carroll (2001), above n 2, at 190.

163. Ibid.

164. Carroll (2001, 2001–2002), above n 2.

165. See eg Hughes, above n 17; Chaykin, above n 48.

importantly does not require either 'mutual dealings' or even a contractual 'relationship' to exist.[166] This equitable relationship is one of 'trust and confidence', which has a 'distinguishing obligation of loyalty'.[167]

Chaykin believes that the relationship between mediators and the parties is 'flexible enough' to provide circumstances in which a party may need 'protection' and, moreover, the advantage of a fiduciary duty is that it can be 'imposed' without any contract being in existence.[168] He contends that a mediator need not fear the extension of fiduciary duties because it only requires that they '*act in good faith, be diligent, honest, and unbiased, and not seek to profit at the expense of his clients*'.[169]

Cases in the USA demonstrate that parties have claimed, often with other causes of action, that a mediator has breached a fiduciary duty;[170] moreover, the relationship was acknowledged in *Furia v Helm*.[171] Other common law jurisdictions are yet to determine this point but may be persuaded by Moffitt, who maintains that there are difficulties in finding that a mediator owes '*simultaneous fiduciary obligations to participants with opposing interests*'.[172] Other scholars contend that there are sufficient remedies through contractual or tortious obligations; or that as mediation use increases, so will the professionalism of mediators, which will be accompanied by a standardisation of practice against which practitioners' conduct can be judged.[173]

The contractual basis of liability

When the basis of complaint by the parties is in breach of contract, NADRAC 2006 observes that future litigation is likely to be about the failure to 'exercise reasonable care and skill' or about 'impartiality and confidentiality' issues, which can be through either 'implied or express terms'.[174] However, the Australian report indicates that claims on this basis will be difficult to prove and financial compensation is not 'punitive'.[175] Furthermore, there are difficulties in establishing liability because the

166. Lord Justice Brown-Wilkinson in *White v Jones* (1995) 2 AC 206 at 271. Two daughters sued a solicitors firm that had failed to change their father's will on his request before his death. See S Worthington 'Fiduciaries: when is self-denial obligatory?' (1999) 58 Camb L J 500 at 500. Fiduciary duties are similarly described in the Australian jurisdiction; see Worthington, ibid, at 505–506, who cites *Products v United States at Surgical Corporation* (1984) HCA 64.

167. Lord Justice Millett in *Mothew v Bristol and West Building Society* [1996] EWCA Civ 533. See Worthington, above n 166, at 502.

168. Chaykin, above n 48, at 764; see also Chaykin, above n 2, at 70–71.

169. Chaykin, above n 48, at 749.

170. See Cole et al, above n 3, s 11.14, citing *Jaufman v Levine*, 2007 WL 2891987 (NDNY 2007), where a claim of breaches of 'contract negligence and breach of fiduciary duty' was allowed to continue.

171. NADRAC (2011), above n 3, s 5.4.3, citing *David Furia v Hugh N. Helm III*, Court of Appeals of California, 1st District, 3rd Division, Rehearing Denied, 24 September 2003; 4 Cal Rptr 3d 358.

172. Moffitt, above n 115, at 147, 167; NADRAC (2006) s 5.4.3, which highlights the debate on imposing fiduciary duties on mediators.

173. See eg Carroll (2001, 2001–2002), above n 2; Cole et al, above n 3.

174. NADRAC (2011), above n 3, s 5.4.1. See also Hong Kong Report, above n 37, ch 7.144.

175. NADRAC (2011), above n 3, s 5.4.1.

'standard of care' that the contractual parties agreed to may contain a '*variety of terms and expressions that can be written, implied or orally agreed*'.[176]

Contractual defences to avoid enforcement of settlement

In the USA, Coben and Thompson drew up a database of 1223 mediation cases but found that only 17 concerned the enforcement of the settlement agreement involving claims about the conduct of the mediator.[177] The researchers found ten challenges based on mediators' conduct that involved the contractual defence of duress or undue influence and highlighted some of the alleged '*horribles*' occurring during the process.[178] Most of these allegations comprised of using pressure tactics by warning of the unlikely success at court or the interpretation that the judge may take if there is no settlement, and in one case using the mediator's success rate to try to coerce the party to settle.[179] However, their analysis of these cases found that the courts viewed such behaviour as legitimate 'reality testing' rather than misconduct.[180] The authors reported one successful case of undue influence involving a claim that the mediator, during an 'eight hour mediation', 'threatened' to inform the judge that the failure to reach settlement was the fault of the claimant, told her she would not succeed at court, used scare tactics about future legal costs and, furthermore, warned her that she risked a reduction of her 'pensions'.[181] Coben and Thompson state that the court had to '*invent a legal theory based on mediator misconduct*', because undue influence must emanate from the other contractual party, not a third person.[182]

Mediator conduct: bias and conflicts of interest in settlement enforcement

Coben and Thompson's database had 12 cases concerning claims of bias (or conflicts of interest); the 'majority' of which were settled by disclosure of evidence, but in some cases this was not sufficient; for example, where the mediator was also the 'guardian *ad litem*', which was found to be a conflicted role.[183] Esquibel argues forcibly against giving immunity to 'conflicted mediators' because of their interest in settlement, which jeopardises mediation's core principles, thereby nullifying the process and eventually leading to a loss of confidence in mediating:[184]

> With respect to the specific participants, a conflicted mediator threatens the parties' self-determination and the voluntary nature of the process. Without these features, mediation is an empty process.

176. Ibid.
177. Coben and Thompson, above n 132, at 95; Moffitt, above, n 93, at 81. Moffitt estimated in 2003 that 'hundreds of thousands or even millions' of mediations had taken place but that there were very few cases against mediators.
178. Coben and Thompson, above n 132, at 96–97.
179. Ibid, at 96–97
180. Ibid, at 96.
181. Ibid, citing *Vitakis-Valchine v Valchine*, 793 So 2d 1094, 1096–1097 (Fla Dist Ct App 2001) 4th Dist.
182. Coben and Thompson, above n 132, at 97.
183. Ibid, at 98, citing as an example *Isaacson v Isaacson*, 792 A.2d 525 (NJ Super Ct App Div 2002) NJ Super Ct 560.
184. Esquibel, above n 2, at 160.

Mediator liability in tort

Mediator liabilities in tort may occur for 'negligence, defamation or statutory torts' such as 'discrimination' or 'harassment'.[185] Claimants must establish that a duty of care exists, that it was breached and that the breach caused 'foreseeable losses to the client', but successful litigants also have to prove that they have 'genuinely suffered damage' caused 'solely' by the mediator's conduct.[186] Doubt is expressed about the likely success of such a claim because of the difficulties in proving a 'causal link' between the mediator's conduct and the final mediated outcome, for which the parties are responsible.[187] Moreover, Stulberg argues that mediators should not be 'held liable' when the parties decide to settle at a point that is not necessarily the 'optimal outcome', as there could be other factors influencing the decision.[188]

One issue that creates problems with finding liability in tort in many common law countries is that there little conformity over training, standards of practice and competency, which makes it problematic to demonstrate that the mediator has breached a duty of care to those participating in the mediation.[189] When a mediator has been negligent, Cole et al maintain that to succeed in the USA the claimant must prove that the mediator was 'inept' and '*failed to exercise or have the special skills, knowledge or training that a mediator in good standing in the community should have*'.[190] Where states have implemented rules on qualification for mediators operating in court-annexed programmes or other bodies have developed standards of practice, these could act as a benchmark for competency, but Cole et al observe that court rules in the USA are usually too 'vague' to determine when they have been breached and that courts 'struggle' to establish a standard of care.[191]

'The Model Standard of Conduct for Mediators' in the USA does not offer a benchmark of competent skills, though it sets out in s 4a that 'A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively'.[192] 'The Model Standards' leave it to the parties to be 'satisfied' with 'the mediator's competence and qualification' and state that mediators should attend continuing education to 'enhance those skills', but otherwise there is no further clarification to aid when standards have been breached.[193]

Coben and Thompson's study only found four cases where the mediator was the 'defendant' in a tort claim.[194] In one cited case, *Lehrer v Zwernemann*, there were a number of claims concerning '*negligence or legal malpractice, breach of contract, breach of fiduciary duty, Texas Deceptive Trade Practices Act violations, fraud, and*

185. NADRAC (2011), above n 3, s 5.4.2.
186. Ibid; see also Stulberg, above n 2.
187. See also Carroll (2001), above n 2, at 193.
188. Stulberg, above n 2, at 85.
189. See for example; Cole et al, above n 3. s 11.13, Carroll (2001–2002), above n 2, at 195.
190. Cole et al, above n 3, s 11.13.
191. Ibid, citing *Chang's Imports Inc. v Strader* 216 F Supp 2d 325 (SDNY 2002), which found that 'there is almost no law on what the appropriate standard of case is, if any, for a mediator who helps negotiate a settlement between parties'.
192. 'The model standard of conduct for mediators', available at http://www.mediate.com/articles/model_standards_of_conflict.cfmhe_updated (accessed 20 April 2015). See also Cole et al, above n 3, s11.13; Moffitt, above n 93, at 85–86.
193. 'The model standards of conduct for mediators', ibid, s IV A.
194. Coben and Thompson, above n 132, at 98.

conspiracy to commit fraud'.[195] When analysing the case, the authors found that the court did not consider a 'standard' of practice for mediators but, rather, deliberated on their role as 'facilitators' of settlement and concluded that this had been achieved; furthermore, the plaintiff could not identify the 'injury caused by the mediator'.[196]

The avenues of redress may be relatively wide but available case-law in the USA, which has experienced more cases against mediators than most countries, indicates that there are problems in establishing causation and also difficulties in determining a standard of care that against which the mediator can be judged. This is particularly problematic in countries that have yet to address or finalise the regulation of mediators or their official accreditation. Mediation is still a relatively new development in the English jurisdiction, but there is now a growth industry in training mediators and an evolving debate on how to appropriately regulate practice, which is connected to the question of immunity because legal action against mediators will depend on accepted standards of practice.[197] This issue will be addressed in the following section before considering what action, if any, England and Wales should take about mediator immunity.

THE REGULATION OF MEDIATOR PRACTICE

The problems of finding a standard of care against which mediators can be judged is highlighted when there are calls for professionalising mediation practice. The development of a profession is accompanied by regulating standards of practice and controlling entrance to membership through establishing training requirements.[198] One of the key difficulties faced by countries that have introduced regulation has been the problem of establishing a 'standardised' definition of mediation that incorporates different models of practice but, specifically, one that acknowledges the distinction between facilitative and evaluative mediator techniques.[199] The use of a narrow classification of mediation such as a facilitative process potentially bars some mediators from practising.[200] Common law countries that have already begun or completed a regulation regime witnessed an 'intense debate'[201] between two competing groups: those arguing for 'consumer protection' and practitioners who want to keep 'flexibility' over how they mediate, which Alexander calls the 'consistency–diversity dilemma'.[202]

As discussed above, one of the major contentions for not providing mediators with immunity is that it is a facilitative process and not a decision making one, which therefore does not require protection against legal action. Yet 'pure' facilitative

195. Ibid, citing *Lehrer v Zwernemann*, 14 SW 3d 775 (Tex App Houston 1st Dist 2000).
196. See Coben and Thompson, above n 132, at 98.
197. NADRAC (2006), above n 3, s 8.26.
198. C Menkel-Meadow 'Are there systematic ethics issues in Dispute Systems Design?' (2009) 14 Harv Negot L Rev 195; B Clark *Lawyers and Mediation* (London: Springer, 2012) ch 3; Alexander, above n 1.
199. Alexander, above n 154, at 2. See for example, Riskin, above n 68, at 7; K Mills 'Can a single ethical code respond to all models of mediation?' (2005) 21 Bond Disp Resol News 5.
200. Alexander, above n 154; A Boon, R Earle and A Whyte 'Regulating mediators?' (2007) 10 (1) Legal Ethics 26 at 43; J South 'Development of mediator training in England and Wales' (2009), available at http://www.mediate.com/articles/southJ1.cfm (accessed 30 May 2009).
201. Brooker, above n 41, p 253.
202. Alexander, above n 154, p 2.

mediation appears to be relatively rare in practice, and many empirical studies, including those in England and Wales, indicate that mediators do utilise evaluative techniques and should at the very least obtain the parties' 'informed consent' to furnishing such advice.[203] Australia, which introduced a National Mediator Accreditation Scheme (NMAS) in 2008, put in a voluntary system to manage the 'consistency–diversity' issue, which requires mediators who evaluate or provide opinions to show that they have the relevant 'professional qualifications' to offer this advice and that they are gaining the parties' 'consent' to this.[204]

In theory, mediators can still work without qualifications in England and Wales, which is also true for arbitrators, although the parties have statutory protections under the AA 1996, which allows limited 'challenges' to an award or permits the court to remove an arbitrator under specified circumstances.[205] There is now considerable interest from mediators to increase work opportunities by professionalising practice.[206] In some areas, practice is overviewed by professional bodies; for example, solicitors or barristers or chartered surveyors can register on their professions' mediator panels if they have the requisite training requirements and qualifications.[207] However, mediators are not overseen by any central body, although regulation is being championed by the Civil Mediation Council (CMC), which sets criteria for training, continuing professional development, complaints systems and insurance; furthermore, each member must adopt a code of practice equivalent to that of the European Code of Practice for Mediators.[208] The CMC has many affiliated UK training organisations and now accepts voluntary registration by individual members, which will lead to a normalisation of practise as established levels of competency are met and should provide a standard of care against which mediators may be judged in future litigation.[209]

The CMC accreditation scheme in England and Wales has no prescriptive requirements on acceptable mediation models or the 'orientation' mediators must adopt, and nor do other professional bodies; therefore evaluative, facilitative or some other

203. See for example, Riskin, above n 68; Kovach and Love, above n 70; Stulberg, above n 70; in England and Wales, see eg Brooker, above n 70; Clark, above n 198.

204. Australia National Mediator Standards (2007, 2008); *Australian National Mediator Standards: Commentary on Approval Standards*, available at http://www.nswbar.asn.au/docs/professional/adr/documents/Commentaryonpracticestndrds.pdf (accessed 3 March 2010). Brooker, above n 41, pp 255–256; Sourdin, above n 154. Since 1 July 2015, the NMAS has been included in the National Mediator Accreditation System; see http://www.msb.org.au/mediator-standards (accessed 27 April 2016).

205. Oyre, above n 32, at 49–50. Oyre suggests that examples of 'bad faith' are illustrated in s 24(1), which permits the court to 'remove an arbitrator' under identified circumstances such as when there has been a failure to 'properly conduct proceedings', subsection (d)(i), or when delay will cause 'substantial injustice', (d)(ii), or where 'circumstances exist' that cast '*justifiable doubts as to his impartiality*'. See also Mulcahy, above n 32, p 204, who observes that the parties are not provided with redress for 'wasted costs or delay'.

206. CEDR Mediation Audit 2014, above n 49, at 10.

207. See eg Brooker, above n 41, pp 250–252; Boon et al, above n 200.

208. See eg Brooker, above n 41; Boon et al, above n 200; A Bucklow 'The 'everywhen' mediator: the virtues of inconsistency and paradox: the strength, skills, attributes and behaviours of excellent and effective mediators' (2007) 73(1) Int'l J Arbit, Mediat & Disp Mgmt 40.

209. In March 2015, the CMC launched its registration scheme for individual members; see http://www.civilmediation.org/about-cmc/15/accredited-mediation-providers (accessed 8 March 2015).

type of mediation practice is acceptable.[210] The facilitative/evaluative debate has been raised in England and Wales, but little attention is given to it in what is a relatively quiet regulation movement where support is not unanimous and many insist that there is little proof of poor standards warranting action, or that 'market demand' by 'repeat users' will exclude incompetent practitioners from future work.[211] Nevertheless, it is probably heartening to those who wish to regulate mediation practice to find that CEDR's Mediator Audit in 2014 reported that 64% of respondents approved the action taken by the CMC to implement registration for 'individual mediators' with a 'basic standard of competency', and that there was a consensus that increasing mediation should be through professionalising practice.[212] It is likely that any future action taken by the CMC to set down competency standards will be supported by practitioners if it leads to the recognition of a mediator profession and subsequent growth of their mediation practices.

DISCUSSION

As yet, England and Wales are in the early stages of regulation, professionalism and competency debates, but these are mutually connected and inextricably linked to the question of immunity. The concept of immunity goes beyond protecting the parties from mediator misconduct, negligence or the rules governing confidentiality, because it concerns the policy reasons given to support the expansion of mediation and its relationship to the formal system of litigation.[213] The main purpose behind immunity is the role that mediators play in the 'administration of justice', on the grounds that the 'process' of mediation has become an integral part of the provision of settlement opportunities, which relieves resourcing pressures on the courts but also brings advantages to the parties.[214] Carroll suggests that immunity is given in order to preserve the 'attractiveness and integrity' of mediation as well as supporting 'the finality of disputes'.[215] If the principal reason is to protect the 'process', commentators contend that mediators should only be given immunity when they work in 'court-annexed' programmes and not in the private sector.[216]

In England and Wales, mediation has been a strategic part of the reforms of litigation since the implementation of CPR, and although the process remains voluntary, there are prominent calls for a change in policy that would permit judges to refer the parties to mediation without their consent.[217] Moreover, as noted above, there are several automatic referral programmes and judges mediate in the TCC; therefore, the argument could be made out by those favouring immunity that mediation is already 'part of the

210. Brooker, above n 41, pp 258–259; Brooker, above n 154; Riskin, above n 68, at 7.
211. Boon et al, above n 200, at 48–49; N Gould, C King and A Hudson-Tyreman *The Use of Mediation in Construction Disputes: Summary Report of the Final Results* (London: King's College London, May 2009) p 27, available at http://www.fenwickelliott.com/files/Summary%20Report%20of%20the%20Final%20Results.pdf (accessed 7 November 2010); above n 163, p 66.
212. CEDR Audit, above n 49, at 10.
213. Carroll (2001), above n 2, at 205.
214. See eg Esquibel, above n 2, at 149–150.
215. Carroll (2001–2002), above n 2, at 182–183.
216. See eg NADRAC (2006, 2011), above n 3.
217. See eg above n 4; Sir Alan Ward in *Wright v Michael Wright Supplies Ltd & Anor*, above n 5, at 3; Lord Justice Clarke, above n 4; Brooker, above n 5, at 151; Allen, above n 4.

judicial process' through court-connection and that the mediators' 'performance' or the settlement 'outcome' could be in jeopardy if there is a risk of litigation.[218]

Although at present in England and Wales it is unlikely that statutory steps will be taken in relation to immunity, the matter could be in the hands of the judiciary in the near future and policy makers may find it constructive to review the approaches taken in other countries. The incidence of small claims mediation is now estimated to involve many tens of thousands of cases, although other schemes promoted by the courts are not well documented.[219] As the numbers increase, the probability of litigation against mediators escalates and the question of immunity could become a live issue for the common law.

The judiciary in England and Wales may decide, if the opportunity arises, to keep the status quo, particularly as several High Court judges remain obdurate that a 'special privilege' for mediators should be the domain of the legislature.[220] On the other hand, a 'pioneering' judgment, particularly in the Court of Appeal, could be influenced by a judge's 'ideological'[221] stance about mediation, or even by an 'anti-litigation' attitude,[222] where support for mediator immunity is seen as a necessary concomitant to legal reform. If left to the common law, the decision may be influenced by policy and resource considerations, as the review of Australia and USA shows, but there is little justification to give immunity at the expense of protecting the parties who may have had substantial pressure put on them by the judicial system to mediate and might have limited resources to sue mediators, should a qualified immunity be found to exist. Any level of immunity should be founded on carefully considered justifications, and the right that the parties have to seek a remedy should not be eroded by competing policies that are based on resource implications for the courts.

Cole et al recommend 'reflection' before the introduction of any new mediation law, because ad-hoc measures may result in 'unintended consequences'; for example, the authors note that mediator immunity may diminish 'public confidence' in the process if it denies a remedy to those who have been 'wronged' by mediators:[223]

> The parties' confidence in mediation depends in part on their belief that mediation will 'do no harm' and stands a good chance of improving their situation. Some laws designed to achieve other aims might unwittingly undermine this confidence … There is also some question about whether too broad a mediation privilege might undermine public confidence in mediation, if it shields attorneys or mediators by precluding liability for malfeasance during mediation.

The purpose of this paper is not to advocate mediator immunity – not least because mediation remains a voluntary, albeit a court-connected, process in England and Wales, which weakens any argument for its extension – but to raise awareness of the conceivable negative impact on mediation if the question comes before the

218. See discussion above. See eg NADRAC (2006), above n 3, ss 8.20, 8.30; Hong Kong Report, above n 78, para 7.149.
219. See http://www.justice.gov.uk/news/press-releases/moj/cheaper,-quicker-and-less-daunting-justice (accessed 17 July 2015). The government plans to divert 80,000 cases into the SCMS.
220. See eg *Brown v Rice & Patel,* above n 153, para 20; *Cattley & Anor v Pollard*, above n 153, paras 9, 10; *Farm Assist (2)*, above n 140, para 43.
221. S Shipman 'Court approaches to ADR in the civil justice system' (2006) 25 Civ Just Q 181 at 211.
222. H Genn *Judging Civil Justice* (Cambridge: Cambridge University Press, 2008) pp 119–121.
223. Cole et al, above n 3, s 16.6.

courts. Keeping the current position may be satisfactory at this time, but when legal reforms drift towards reducing the parties' self-determination about whether to mediate or which mediators to use, particularly when some automatic schemes are organised by the HMCTS or by court-sponsored providers, the process could be become discredited.

Currently, there is only an emerging voluntary regulation system and common law developments or court rules could take place without review of the 'consequences' of immunity.[224] Where the process has become an adjunct to the court, either through rules nurturing engagement or as part of judicial case management, then mediators must have a clear understanding of their responsibilities, and appropriate standards of practice should be in place in order that parties with little choice about mediating are protected from the conceivable existence of poor-quality mediators or those that act fraudulently or maliciously.

CONCLUSION

English law has not yet engaged in extensive debate on the standard of care owed to parties by mediators or whether mediators have immunity from legal action. At present, there is little evidence to suggest that there is concern about the quality of mediators or that there are cases implicating misconduct, but as mediation numbers multiply, inevitably some parties will be unhappy with their experience. Parties who are increasingly pushed towards mediation through court rules, case management or court schemes deserve to have a means of redress and an expectation that the mediators dealing with their case have reached an acceptable standard of practice.

To overlook the immunity debate until there are more cases against mediators without first assuring the quality of practice may produce unnecessary disquiet from users. It would be undesirable that the public lose confidence in either the process of mediation or mediators when it does provide an alternative to litigation and can put the parties in 'control' of their settlement options.[225] Future developments in any of these spheres should be taken with an all-encompassing review of the issues.

Having reviewed the debate on mediation immunity and the problems involved in regulating a developing mediation profession anxious to extend their practice, it is recommended that future policies that might involve further compulsion to mediate or create benchmarks by which to evaluate mediators' competencies or deliberate on immunity should not be left to the vagaries of the common law. Those who are concerned with mediation policy in England and Wales should be obliged to engage in a review of the consequences of such developments, because it would be regrettable if there was a failure to give sufficient regard to whether a framework is in place to safeguard participants who may be injured by indeterminate mediator standards; or that rules are developed which result in protecting incompetent or malicious practitioners. England and Wales has the advantage of learning from other common law countries before law is instituted, which may in the long run reduce the risk of damage to the reputation of mediation and mediators.

224. Ibid.
225. See Turner, above n 2, at 776.