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978-0-521-51731-7 - Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties

Tamara Relis

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Perceptions in Litigation and Mediation

Tamara Relis is a Research Fellow at Columbia University Law School in New York and in the Law Department of the London School of Economics and Political Science (LSE). She holds a PhD in law and an LL.M. master's degree in law (*with Merit*) from the LSE law department, as well as an LL.B. law degree (*Hons*) from the University of London. She is a trial lawyer (barrister) with experience in trial court practice and has worked and qualified as an attorney in litigation (solicitor).

Dr. Relis is the recipient of various awards for her doctoral and postdoctoral research, including awards from the British Academy, the Economic & Social Research Council, Columbia University, and the LSE. She has been invited to speak about her research throughout North America, Europe (Italy, Germany, Spain, France, and Croatia), India, and South Africa. She was also invited to Japan through a Japanese government award to speak about her findings, culminating in this book.

Dr. Relis' work has been published in the *Harvard Negotiation Law Review* (2007), the *Pittsburgh Law Review* (2007), *Studies in Law, Politics and Society* (edited by Austin Sarat and Patricia Ewick, 2002), as well as in Japan in *Sociology of Law* (JASL – University of Tokyo, 2004). Her work was also translated into Japanese in Kyoto University's law journal (2004).

She is presently conducting a large-scale empirical study on the permeation of international human rights laws and norms in formal courts versus informal justice processing of violence-against-women cases throughout India. She uses victims', the accuseds', and legal actors' understandings, aims, and experiences as a lens to map, theorize, and critically analyze the theoretical ideas informing these processes (e.g., norm diffusion theory, universalism versus cultural relativism, restorative justice, and feminist critiques of mainstream human rights paradigms) and shows how these ideas are understood by those on the ground.

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*London School of Economics, Department of Law, and
Columbia University Law School*



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For Coby, my heart and soul

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Abstract

Grounded in interpretive theory, this book addresses the question, “How do professional, lay, and gendered actors understand and experience litigated case processing leading up to and including mediation in legal disputes?” Litigation and mediation processes are increasingly well described and understood through a fast-growing literature to which lawyers and other social scientists have contributed. Yet, rather little in-depth empirical data are available on what happens during case processing as well as what occurs prior to and inside mediation sessions, in terms of how these processes are understood and experienced by the actors involved. The different perceptions of professional, legal, and lay actors, and of males and females, particularly require further examination. These differences are explored here through data derived from 131 interviews, questionnaires, and observations of parties, lawyers, and mediators involved in 64 mediated fatality and injury cases in medical disputes (mandatory and voluntary; pre- and intra-litigation).

Attention to the discursive representations of the various actors on issues such as understandings of plaintiffs’ litigation aims, all actors’ mediation objectives and perceptions of what occurred during mediations reveals significant differences in terms of both language and agenda. It emerges that professional and lay actors, males and females, occupy largely parallel worlds of understanding affecting how conflict and its resolution are perceived. There is some evidence that mediation experience leads lawyers to reconceptualize their roles. This move away from conventional legal thought is further revealed through the discourse of lawyer-mediators, which was frequently distinct from practicing attorneys and more akin to that of non-lawyer-mediators. Nevertheless, in juxtaposing actors’ understandings and perceptions on all sides of the same or similar cases, the data reveal inherent problems with the core workings of the legal system, as stark similarities in the discourse of plaintiffs and defendants on the one hand, and lawyers of all camps on the other reveal unlikely conceptual alignments between legal and extralegal actors involved in case processing.

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List of abbreviations

ADR = alternative dispute resolution
CMPA = Canadian Medical Protection Association
College = College of Physicians and Surgeons of Ontario
Fieldwork Period = 17 months between May 2000 and October 2001 in and around
Toronto, Canada
Legal actors = all lawyer groups
Medmal = medical malpractice/medical negligence/medical injury
MMP = Ontario Court Mandatory Mediation Program
Non-disputants = all legal actors together with all mediators
The terms “claimant,” “plaintiff,” and “complainant” have been used synonymously.
The terms “disputant,” “litigant,” and “party” have been used synonymously.
The terms “lawyer,” “counsel,” and “attorney” have been used synonymously.

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