

SUING MEDIATORS – A GATHERING STORM?

1. The title is taken from a comment in a journal article in 2000 that warned of a “gathering storm” of liability on the horizon about to strike mediators. The authors went on: “As lawyers, doctors, and indeed all professional stood for so long seemingly immune from blame and liability, before the harsh winds of change struck them, so now our arbitrators and mediators carry on from day to day while the barometer is falling”¹.
2. Alvin L Zimmerman, a former Texas district court judge suggested at a 2004 symposium: “I almost parallel where we are today to an infant or burgeoning profession, almost like doctors in the early days. As long as doctors charged very little, made house calls, were courteous, and listened to the complaint of their patients, there were not malpractice claims to speak of.... I submit to you that while we are infants, the public is putting up with us. As our fees increase, however, and as our obnoxiousness and independence grow more important, I believe that malpractice will become a more oppressive industry to those of us sitting in this room.”²
3. A review in America identified only 4 cases in the United States in which a mediator had been named as a defendant for “misconduct” in the years 1999 to 2003³. That is to be contrasted with a 95% increase in “mediation litigation” over the same period.

¹ Bristow & Parke *Gathering Storm of Mediator & Arbitrator Liability* 55 *Dispute Resoln J* 14, 16 (2000)

² *Mediator Accountability: Ethical & Legal Standards of the Profession* 28 *Am J Trial Advocate* 47, 61 (2004) footnoted in Clark fn73

³ Cobcn & Thompson *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 *Harvard Negot L Rev* 43, quoted by Clark – “*Writing on the Wall: The Potential Liability of Mediators as Fiduciaries*” *Brigham Young University Law Review* (2006) fn81

4. So far as I can discover⁴, no successful claim has yet been brought against a mediator. The plaintiff in the Missouri case of *Lange v. Marshall*⁵ came close but lost on appeal – the defendant mediator successfully argued that the plaintiff’s damage had not been proximately caused by the attorney-mediator’s alleged negligence. The defendant asserted that his actions did not constitute negligence as he owed no duty to perform the tasks the plaintiff claimed he negligently failed to perform. The Court of Appeal declined to resolve the nature of the defendant’s duties.
5. However, the decision of Habersberger J. in *Tapoohi v. Lewenberg (No. 2)*⁶ is a salutary reminder that such claims are not considered unarguable. The purpose of this paper is to re-explore⁷ the potential bases for a successful suit and the indemnities that may be available.
6. The topic is of particular concern to this group. Most of this group, in their mediation practices, plainly adopt the “evaluative” method with varying degrees of “facilitative” conduct⁸. We are each barristers, we are each of at least 20 years standing. We are called on to mediate generally because we have that practice and experience behind us. The greater one intervenes in the process the greater is the exposure to potential for suit.
7. Potential trigger mechanisms for suit against a mediator might include:
 - (i) a breach of confidentiality of information provided in separate session causing disclosure of confidential information without consent;

⁴ Extensive research of the internet and private conversations with mediators. Peter Steele advises that his organisation covers approx. 90% of the Bar in Qld and he has no knowledge of any claims.

⁵ 622 S.W. 2d 237, 239 (Mo.Ct.App. 1981)

⁶ [2003] VSC 410; BC 2003 06153

⁷ See Rob King-Scott’s paper of 30 August 2005 “*Liability of Mediators*”

⁸ For all I know some may indulge in therapeutic mediations as well.

- (ii) failing to draw to the attention of the parties some obvious precautionary condition⁹;
- (iii) behaviour amounting to inappropriate pressure bringing about a settlement;
- (iv) disclosure of confidential information to third parties;
- (v) bias;
- (vi) apprehended bias;
- (vii) undisclosed interest¹⁰;
- (viii) the breakdown of a presumed agreement by reason of “procedurally unrealistic and poorly drafted agreement”¹¹;
- (ix) potential claims of unprofessional conduct or professional misconduct.

Potential Bases of Liability

8. There are three principal areas that need to be considered – actions in tort, actions for breach of contract and breach of fiduciary duties.
9. One difficulty in founding any action, whatever be the basis, is to identify the standard of conduct that is to apply to a mediator. At its broadest, it can be said that mediators owe to the parties a duty to:
 - (i) exercise reasonable care and skill in the performance of the agreement to mediate (whether express or implied);
 - (ii) maintain impartiality towards the parties;
 - (iii) maintain the confidentiality of the mediation.

Commentators seem to think that these duties are obvious and basic.

10. It is one thing to assert that a mediator is required to exercise reasonable care and skill in the performance of the agreement to mediate but quite another to

⁹ As was suggested in *Tapoohi*

¹⁰ For example, see *Hadid v. Lenfest Communications Inc* [1999] FCA 1798

¹¹ See *Mediation Law and Practice* by Spencer and Brogan (2006) at p. 432

assert what the standard is that a mediator is to reach and whether a mediator has breached that standard. In one paper an American commentator suggested that there were more than 2,500 state and federal statutes “attempting to institutionalize mediation” and concluded that these statutes “contain almost no standardisation for such important issues as mediation certification requirements, ethical standards, confidentiality requirements, evidentiary privileges against disclosure in legal proceedings, immunity for mediators, and quality control”¹².

11. As barristers, the *Barristers’ Rules* 2004 apply to our work as mediators: Rule 77(g) recognises that a barrister’s work can consist of acting as a mediator. Rules 135 and 136 expressly regulate our conduct as mediators¹³.
12. The provisions of the *Civil Liability Act* 2003 apply to “any civil claim for damages for harm”¹⁴. Assuming that a mediator is within the definition of a “professional”¹⁵ as used in the *Civil Liability Act* 2003¹⁶, then the standard laid down for a professional, in actions where “harm”¹⁷ is claimed, is that the professional must act in a way that “was widely accepted by peer professional

¹² “*Writing on the Wall: The Potential Liability of Mediators as Fiduciaries*” by Rebekah Ryan Clark; Brigham Young University Law Review (2006)

¹³ 135 A barrister acting as a mediator must disclose to all parties to the mediation any interest or association, personal professional or commercial, which he or she has or may have in or with:

- (a) the outcome of the dispute the subject of the mediation; or
- (b) the parties to the mediation.

136 A barrister acting as a mediator has the same obligations of confidentiality, with respect to communications made in the course of a mediation, as he or she would have if such communications had been made by a client to him or her as a barrister.

¹⁴ Section 4(1)

¹⁵ There is debate about whether mediation is or should be considered a profession: See Moffat at p. 188 note 137, there seems to me to be little doubt that some of our members do practice mediation as a profession.

¹⁶ Section 20 helpfully defines “a professional” as meaning “a person practising a profession”

¹⁷ Defined in Schedule 2 as “harm of any kind including personal injury, damage to property, economic loss”

opinion by a significant number of respected practitioners in the field as competent professional practice”¹⁸.

13. Assuming that we represent “a significant number of respected practitioners in the field”, then we are in a position to set the standard that we expect of ourselves.
14. I point out that in this respect the Law Society Guidelines that have been laid down give little guidance. There is the usual acknowledgement of the need for impartiality, neutrality and confidentiality but how one is to conduct a mediation and what standards one should reach are nowhere defined.
15. Whilst a more or less standard approach has been adopted in mediation practice in this State of having a joint session where one side, usually the plaintiff or claimant, presents their case to which the defendants or respondents then respond, all in joint session with the parties, and then separating the parties for private caucus, virtually any approach to the mechanism of the mediation would find support in mediation theory. For example:
 - (i) a mediator could keep the parties entirely separate or bring them together constantly to seek common ground;
 - (ii) one could offer suggestions and evaluate the merits or refuse to do so;
 - (iii) one author has suggested that mediators “might cajole, strongarm, threaten, argue with, beg, or even bribe the disputants to reach a compromise”¹⁹. There are many who would argue that each of these actions would be entirely inappropriate.

¹⁸ Section 22(1) *Civil Liability Act* 2003

¹⁹ *Suing Mediators* by Michael Moffat, Boston University Law Review (2003) Vol 83 147 at 157

16. Whilst I have in mind an action based on a breach of the professional standards owed by a mediator, it has been pointed out that other tort based actions might well be available. For example, one commentator has suggested:

*“Beyond malpractice or simple negligence, a dissatisfied party could theoretically bring a number of tort claims against a mediator. Intentional infliction of emotional distress, false imprisonment, tortious interference with contractual relations and invasion of privacy each provide a possible basis for recovery from a mediator.”*²⁰

17. California has produced a case involving an allegation of intentional infliction of emotional distress in a custody and visitation dispute where a divorced couple had hired a psychologist to produce a report and recommendation: *Howard v. Drapkin*²¹. The court there afforded a form of immunity to the psychologist and did not consider the merits of the claim which apparently included allegations of being personally attacked, screamed at, ridiculed, accused of lying and fabricating evidence and threatening that she would lose custody if she persisted in allegations about the father.

18. I will return to the question of immunity later but I think it can be said, fairly safely, that there would need to be a very peculiar set of facts to enable any of these various torts to be established.

19. Whether a court will impose a duty of care on a mediator will depend on a number of factors. The plaintiff in *Tapoohi* based the claim in tort relying on the developing field of negligent advice causing economic loss and citing comments made in *Perre v Apand Pty Ltd*²² in support - the key requisite being reliance on the advisor and to the knowledge of the advisor.

20. It can, I think, be accepted that the necessary degree of proximity of relationship exists. Other relevant matters might include those mentioned by

²⁰ Moffat op cit at p. 159

²¹ 271 Cal. Rptr. 893 (Cal. CT App 1990)

²² (1999) 198 CLR 180

McHugh J in *Perre v Apand Pty Ltd*: “...reasonable foreseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability to risk and the defendant’s knowledge of the risk and its magnitude”²³.

21. It has been suggested that there are two major public policy implications against:
 - (i) that mediators will be discouraged by the prospect of civil liability;
 - (ii) that mediators work in a variety of institutional contexts and so should not simply have a blanket liability applied to them²⁴.
22. Neither policy seems to me to be likely to result in court declining to hold that duty of care exists.
23. I anticipate that there could well be arguments even about so basic a matter as foreseeability of harm in the context of parties represented by competent lawyers²⁵. So long as the mediator does not take on the responsibility of either advising either side nor of determining what agreement might be reached, there are considerable difficulties in conceptualising the “damage” that the mediator is supposed to reasonably foresee in considering what acts or omissions he ought reasonably to avoid²⁶.

Contract

24. The difficulty with any claim based in contract is that, at least so far as express promises are concerned, there are very few of them in any mediation agreement that I have seen. A promise to do one’s best to assist the parties to resolve their dispute or to make informed decisions about their dispute is hardly likely to give rise to any promise that could either be breached or enforced. An implied term to exercise reasonable care and skill in mediating

²³ at p220

²⁴ See *Mediation Law and Practice* by Spencer and Brogan (2006) at p. 434

²⁵ This avoids the question of what to do when you think one side is plainly incompetent?

²⁶ Cf. *Studer v Boettcher* [2000] NSWCA 263 – a case involving a claim against a solicitor who allegedly placed pressure on his client to settle

is no more likely to give rise to actionable rights than the equivalent claim in tort.

25. Typically, of course, mediation agreements contain liability waivers. As most exemption clauses seek to limit or exclude liability in respect of a breach that would otherwise arise under the contract, and given that most mediation contracts promise little or nothing, it may be that these clauses have little work to do. At the very least, however, they are likely to cause any potential litigant to think hard about whether there was any point to an action.
26. I note that the mediation agreement that Sir Laurence Street publishes provides: *“The making or using of any statement or comment, whether written or oral, by the parties or their representatives or the Mediator within the mediation shall not be relied upon to found or maintain, or be used in any way in, any action for defamation, libel, slander or any related complaint. This clause can be pleaded in bar to any such action.”*²⁷
27. In that regard, I remind you that in *Tapoohi*²⁸ it was pleaded that the terms of the retainer were that the mediator was retained “for reward to act for [the plaintiffs] and advise them as a mediator at the mediation”. It was further pleaded that there were implied terms of the contract that the mediator would:
- “(a) exercise all the due care and skill of a senior barrister specialising in commercial litigation and related matters;*
 - (b) exercise all the due care and skill of a senior expert mediator;*
 - (c) reasonably protect the interests of the parties;*
 - (d) not act in a manner patently contrary to the interests of the parties, or any of them;*
 - (e) act impartially as between the parties;*
 - (f) carry out his instructions from the parties by all proper means; and further or alternatively*
 - (g) not coerce or induce the parties into settling earlier proceeding when, at the relevant time or times there was a real and substantial*

²⁷ Sir Laurence Street – Mediation & Conciliation
www.laurencestreet.com.au/pub02.htm#05

²⁸ [2003]VSC 410

risk that settlement would be contrary to the interest of the parties, or any of them.”

28. Relying on the views expressed by Deane J. in *Hawkins v. Clayton*²⁹ concerning the implication of terms in a contract and on a passage from *Astley v. Austrust Ltd*³⁰ the applications judge accepted that these terms could be implied into the contract, on the basis of the retainer pleaded (which he was required to adopt as accurate for the purposes of the strikeout application).
29. The rather peculiar claim made in *Tapoohi* that the mediator was retained “to act for the parties and advise them”, which was said to be part of the oral retainer, was discussed by Habersberger J. at [76] as follows:

“... It is possible to imagine a case where the parties chose a mediator with particular expertise in the subject matter of their dispute to advise them as to the terms which they might adopt to settle it. It is possible, too, to imagine a case there the parties, lacking advice as to the legal aspects of their dispute, retain a lawyer to mediate it. In such a case it may be put that the mediator contractually assumes an obligation to proffer advice to them as to the legal implications of the settlement that they are minded to reach. I say nothing about the case where one party only lacks this legal advice, for this does not here arise. ...”

28. I have more to say about causation later but I merely note that it is difficult to see circumstances justifying an action in contract based on the usual written terms.

Fiduciary Duties

30. Academic commentators disagree on whether fiduciary duties are likely to attach to mediators. Moffat³¹ considered it highly unlikely. He pointed to the following problems:

- (i) there would need to be a degree of judicial adaptation which was unlikely to be forthcoming to extent fiduciary obligations into the realm of mediation;

²⁹ (1988) 164 CLR 539

³⁰ (1999) 196 CLR 1 at 22

³¹ Op cit at p. 167

- (ii) there are considerable difficulties in establishing that “mediation obligations” are “sufficiently fixed” to permit the application of fiduciary obligations;
- (iii) there is the structural difficulty of asserting that a mediator owes simultaneous fiduciary obligations to parties with opposing interests;
- (iv) there would be considerable difficulty in demonstrating that the mediator occupied not only a position of influence but of “superiority” sufficient to warrant fiduciary status.

31. He concluded that “fiduciary obligations constitute a sloppy mechanism for creating mediator obligations – one that is very unlikely to be available to prospective litigants”³².

32. More recently, another academic has argued directly to the contrary. In *“Writing on the Wall: The Potential Liability of Mediators as Fiduciaries”*³³ Rebekah Ryan Clark argues that:

“In at least some mediation proceedings a strong argument could be made that mediators owe some degree of fiduciary obligations to the parties – primarily confidentiality, disclosure of conflicts of interest, and good faith. While all mediation relationships will probably not rise to this higher level of duty, the analytical factors discussed provide a guide for determining the likelihood, in particular factual circumstances, that a court might find a mediator liable for fiduciary obligations in the future.”

33. Whilst that sounds fairly innocuous other commentators have suggested:

*“Mediators may violate the duty of trustworthiness by deceiving parties as to their credentials or by misinforming parties as to the kind of service that will be provided. Consequently, the failure to obtain the parties’ consent to the mediator’s provision of an evaluation may give rise to a cause of action for a breach of fiduciary duty. Where a court finds the existence of a fiduciary relationship between a mediator and a party, the fiduciary will be under a special duty of full disclosure.”*³⁴

³² Op cit at p. 169

³³ *Brigham Young University Law Review* 2006

³⁴ Lela P. Love and John W. Cooley *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary* 21 Ohio St J on Dispute Resolution 45, 63 (2005) cited in Rebekah Clark’s paper

34. The argument that mediators owe fiduciary duties is not new. In 1984 Professor Arthur Chykin put forward the hypothesis that they should owe fiduciary duties³⁵. Most commentators have dismissed his arguments. However, there have been strong arguments in support and, in some circumstances, it would seem clear that duties will be owed and potentially breached. For example, what if a mediator deliberately provides incorrect information in order to improve one party's position at the expense of the other?³⁶
35. Clark supports her argument with the observation that fiduciary duties have been found to be owing in respect of a travel agent to traveller, a member of the clergy to a member of the congregation, and university professors to students. Why indeed not mediators?
36. Aspects of the relationship that are said to support the fiduciary argument include:
- (i) the fact that trust is an essential element of mediation – there is a great deal of reliance, confidence and trust in the mediator on the part of the clients;
 - (ii) the confidentiality requirements;
 - (iii) the increasing professionalism of mediators, especially when accredited or licensed;
 - (iv) the adoption of standardised regulations for mediators;
 - (v) the employment of a professional mediator for a substantial fee brings with it a higher level of legal accountability;

³⁵ Arthur H. Aiken *Mediator Liability: A New Role for Fiduciary Duties?* 53 *University Cincinnati Law Review* 731, 733 (1984)

³⁶ An example given by Clark and attributed to Joseph Stulberg: *Mediator Immunity* 2 *Ohio State J on Dispute Resolution* 85, 85 (1986)

(vi) the degree of vulnerability in reliance on the clients would also be a potential factor.

37. There are American cases which have accepted that fiduciary duties are owed. In 2003, a Californian court found that mediators do owe duties of care and loyalty to the parties to the mediation and that they are in a position of potentially significant influence over those parties: *Furia v. Helm*³⁷. The “full dimensions” of that duty were not explored but were said to expressly include full disclosure of potential conflicts of interest or lack of impartiality. The court also accepted that the attorney mediator assumed the duty of performing with the skill and prudence ordinarily to be expected of one performing that role.
38. The court pointed out in *Furia* that “a party to mediation may well give more weight to the suggestions of the mediator if under the belief that the mediator is neutral then if that party regards the mediator as aligned with the interests of the adversary” and made it plain that if the attorney mediator failed to make complete disclosure of all facts and circumstances which may influence the party’s choice, then that attorney would be held civilly liable for loss caused by lack of disclosure.
39. There are two relevant matters which I think effects every one of us and that could well give rise to the imposition of fiduciary obligations. They are:
- (i) we generally conduct evaluative mediating – we do attempt to indicate, when necessary, our view of the case. This is very much within the normal parameters of the practise of the law where a court will have no difficulty in determining appropriate standards;
 - (ii) generally speaking, we are employed because we are considered to be highly qualified – the imbalance of position between ourselves

³⁷ 4 Cal. Rptr. 3d 357, 363-64 (Court of Appeal 2003)

and the clients could hardly be more pronounced. A clients' reliance on us and their vulnerability to being influenced is plain.

Causation of Loss

40. The essential claim that any plaintiff must assert against a mediator is that a better settlement should have resulted for that claimant (assuming the matter did settle) or, alternatively perhaps, the failure to reach a settlement is itself an actionable harm.
41. Moffat suggested that there were four different kinds of injuries that might result from mediator misconduct. They were:
 - (i) inappropriately causing a mediation to result in no settlement;
 - (ii) inappropriate behaviour producing a settlement with terms injuriously unfavourable to one party;
 - (iii) injuring the interests of a party absent from the mediation whose interest the mediator is obliged to protect;
 - (iv) injuring a party in ways not reflected in the outcome of the mediation³⁸.
42. The difficulty with each of these is in obtaining proof of the harm and causally relating it to any action of the mediator. It is one thing to argue fraud, lack of capacity or coercion and have an agreement set aside as between the parties³⁹ but it is quite another to establish that by reason of such matters there is demonstrable harm compensable by the mediator.
43. The arguments that seem to me to be strongly against causation ever being established in the ordinary course are:
 - (a) when the parties themselves put their names to an agreement, it is very hard for them then to argue that it is not their behaviour that has caused the damage in question, as opposed to the mediator's behaviour;

³⁸ Moffat op cit at p. 175-176

³⁹ for an example of an attempt see *Pittorino v Meynert* [2002] WASC 76

- (b) if the argument is that the mediator should have negotiated a better settlement for the plaintiff, then an essential element of that argument must be that the other side were prepared to accept some alternative arrangement than they in fact accepted and once more that they would have done so in the course of that mediation in the light of the knowledge that was then available to them which would have included the knowledge that certain offers were being made by the plaintiff in the course of that negotiation, no doubt indicating a view as to the resolution of the case;
 - (c) in the usual course one would think it would be difficult to obtain evidence from the other side that they would have settled on a more advantageous basis at any stage. This is especially so if one party is trying to set aside an agreement and re-litigate the matter;
 - (d) the ability of parties to change their position in the course of proceedings is well known and virtually impossible to prove or disprove – the onus, of course, being on the plaintiff;
44. What is to be the measure – the settlement that one party would argue they should have achieved or could have achieved or what might be considered to be a “fair” settlement. One fundamental and recurring problem is a need to demonstrate that the other side would have settled on the terms suggested.
45. As to Moffat’s third category it will be a rare case where a mediator was duty bound to consider interests of those other than the ones who were parties to the mediation. Moffat argues two examples, one of which is an everyday one – the interests of children for a mediator involved in a divorce matter. The difficulty in proof, however, in any such case must be that if the parties were prepared to settle in front of a mediator on certain terms and the mediator perceived it as adverse to the interests of the non-party, what then is the

mediator to do? At most he can only withdraw. The parties can then proceed, as they presumably would, to settle the matter as they intended.⁴⁰

46. The sort of injuries suggested in Moffat's fourth class are those that I have mentioned in my discussion of tortious claims above – for example, claims for emotional damage stemming from intentional and tortious outrageous behaviour. The factual situations that need to be assumed for such a claim are likely to be rare. The fact of injury, the question of causation, and the extent of harm will all be difficult areas for practical proof.

Immunity from Suit

47. Mediators acting under the auspices of a court order have statutory immunity around Australia. Examples include:

- Section 53C of the *Federal Court of Australia Act 1976* (Cth)
- Section 19M *Family Law Act 1975* (Cth)
- Section 12 *Mediation Act 1997* (ACT)
- Section 33 *Civil Procedure Act 2005* (NSW)
- Section 113 *Supreme Court of Queensland Act 1991* (Qld)
- Section 65(2) *Supreme Court Act 1935* (SA)
- Section 70 *Supreme Court Act 1935* (WA)
- Section 27A *Supreme Court Act 1986* (Vic)

48. The only Queensland case that I know of that mentions Section 116 of the *Supreme Court of Queensland Act 1991* is *Von Schultz v. Attorney General of Queensland*⁴¹. Suffice to say that the immunity was sufficient to protect the mediator in that case merely by citation of the section without discussion.

⁴⁰ See Moffat at pp. 180-181

⁴¹ [2000] QCA 406

49. Each of these provisions provides, in effect, that the mediator has “the same protection and immunity as a judge has in performing the functions of a judge”.
50. The judicial immunity is, of course, very wide. It has been said that a judge is immune from any action be it for costs or otherwise in respect of Acts performed in the exercise of his or her judicial function: *Rajski v. Powell*⁴²; *Yeldon v. Rajski*⁴³; *Sirros v. Moore*⁴⁴.
51. As is well recognised, the rule is based on public policy. In *Anderson v. Gorrie*⁴⁵ Lord Esher said this about the rule⁴⁶:

“... The ground alleged from the earliest times is that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice ... Compton J. in Fray v. Blackburn (3 B&S 576 at 578) said:

‘It is the principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly ... The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions.’”

52. Halsbury⁴⁷ suggests that the rule was established in *Bushell*'s⁴⁸ case.
53. Such immunity seems to be broad enough. However numerous Acts of Parliament throughout Australia provide for protection in a different form. Regulation 44 of the *Dust Diseases Tribunal Regulations 2007* (NSW) is an example:

“44 Liability of Mediators

No matter or thing done or omitted to be done by a mediator subjects the mediator to any action liability claim or demand if the matter or

⁴² (1987) 11 NSWLR 522

⁴³ (1989) 18 NSWLR 48

⁴⁴ [1975] QB 118 at 132

⁴⁵ [1895] 1 QB 668

⁴⁶ At 670-671

⁴⁷ 4th ed. Vol 26 Par 653 at 338

⁴⁸ (1670) Freem KB 1; 89 ER 2

thing was done or omitted to be done in good faith for the purposes of a mediation under this part.”

54. Examples of other Acts where similar provisions appear include:

- Those containing “good faith” immunity include:
 - Section 35 *Dispute Resolution Centres Act 1990*
 - Section 107 *Building and Construction Industry Payments Act*
- Acts which have the “judicial immunity” include:
 - Section 108 *District Courts Act 1967*
 - Section 74 *Land and Resources Tribunal Act 1999*
 - Section 114 *Retail Shop Leases Act 1994*
 - Section 246 *Residential Tenancies Act 1994*

This list is not intended to be exhaustive.

55. I don’t know of any case in Australia where a court has considered whether, for public policy reasons, such immunity should be afforded to mediators in cases where there is no legislative provision⁴⁹.

56. In *Najjar v. Haines*⁵⁰ the New South Wales Court of Appeal was called on to consider whether a referee appointed by the Supreme Court to report to that court in respect of a construction dispute was protected from liability as to costs or immunity from joinder as a party. In discussing the reasons against affording the referee immunity, Kirby P. (as he then was) summarised the arguments as follows⁵¹:

- (i) such immunity is wholly exceptional in our law. It is conferred upon judicial officers because by their training, by the availability of appellate review and otherwise, they are subject to legal conventional and other controls which ensure against abuse. The

⁴⁹ Note the decision from California mentioned earlier of *Howard v. Drapkin* 271 Cal. Rptr. 893 (Cal. CT App 1990)

⁵⁰ (1991) 25 NSWLR 224

⁵¹ at pp. 232-233

same cannot be said of the large range of individuals from whom referees are appointed and of the process in which they are engaged;

- (ii) referees are often selected by the parties, even though formally appointed by the court;
- (iii) the ordinary rule of our society is that if a person is wronged by another, that person should have the facility of legal redress. The “trend of modern authority” is not to enlarge exemptions;
- (iv) ensuring that those persons, including those exercising public offers, who do harm are made liable for the consequences of such harm has a tendency to diminish the doing of that harm;
- (v) referees receive fees for their services – they have an economic motivation to perform their duties. They can take out insurance;
- (vi) where Parliament has considered it appropriate to afford non judicial arbitrators, mediators and referees immunity, it is so provided in express terms – the absence of such provisions is telling.

57. There are American cases suggesting that quasi traditional immunity will extend to mediators. Moffat⁵² refers to two such cases: *Wagshal v. Foster*⁵³ and *Howard v. Drapkin*⁵⁴. In *Wagshal* the defendant was a case evaluator who was appointed after the case had been referred by a trial court judge to the District of Columbia Superior Courts’ ADR programme. The Court of Appeal’s determination, according to Moffat, treated the two terms of an evaluator and mediator interchangeably quoting the court as saying “that

⁵² Op cit at pp. 174 - 175

⁵³ 28 F.3d 1249 (B.C.CIR. 1994)

⁵⁴ 271 CAL. RPTR. 893 (CAL. CT. APP. 1990)

absolute quasi judicial immunity extends to mediators and case evaluators”⁵⁵.

In *Howard v. Drapkin* the defendant was a privately contracted neutral psychologist hired by a divorcing couple⁵⁶.

58. There is a useful collection of the relevant cases in the judgment of Rogers AJA in *Najjar* at pp. 269-275. See also the judgment of Kirby P. at p. 232.
59. The Court of Appeal afforded the referee in *Najjar* the same immunity as a judge would enjoy. The basic principle that was adopted was that the public policy that underlies the grant of absolute judicial immunity to judges justified the grant of that immunity to those “conducting activities intimately related to the judicial process”⁵⁷.
60. It seems to me that a mediator’s function is a very long way from that of a judge and cannot be described “as intimately related to the judicial process”.
61. Turning to the alternative form of immunity it can be said that the allowing of an action, liability claim or demand based on an absence of good faith opens the door, to some extent, to potential claims. But again, the protection seems very broad. Lack of disclosure of an interest and the favouring one side over the other are potential sources of suit despite such an immunity.
62. Our American cousins as usual have looked at the problem. Eight states apparently provide absolute immunity from civil liability – perhaps in relation to court appointed mediators⁵⁸. Colorado provides an immunity to mediators hired by the State unless they act “in bad faith, with malicious purpose, or in a manner exhibiting wilful and wanton disregard of human rights, safety or property”. Oklahoma: exhibiting “gross negligence with malicious purpose or in a manner exhibiting wilful disregard...” would be necessary to be liable.

⁵⁵ At p. 1254

⁵⁶ see fn 16

⁵⁷ Quoted by Rogers AJA in *Najjar* from *Ashbrook v. Hoffman* 617 F 2d 474 (1980) at p. 476

⁵⁸ My source is an article published by the Centre for analysis of Alternative Dispute Resolution Systems: see <http://www.caadrs.org/studies/liabilit.htm>

Arizona recommended: “Qualified immunity would apply to all acts or omissions of covered mediators except those acts or omissions that could be characterised as exhibiting reckless disregard of a substantial risk of significant injury to the rights of others, or intentional misconduct”.

63. Whether an analogous, law immunity for mediators under a consensual mediation exists is, in my view, highly doubtful. In *Tapoohi Habersberger J.* merely said that he was unable to conclude that such an immunity “must inevitably be held to exist”⁵⁹.
64. Moffat⁶⁰ argues for a “well crafted qualified immunity statute” that could effectively bar “Custom Based suits” against mediators. He defines custom based claims as one that would require a comparison of a mediator’s actions with the actions of other practitioners within the mediation community. These would include, by way of example, allegations that the mediator “failed to ask appropriate questions, constructed a useless agenda, wasted time on irrelevant matters, made unhelpful interventions, appeared biased, offered unhelpful suggestions, took lengthy catnaps⁶¹” and so on⁶².
65. These may be contrasted with claims based on contractual, statutory, constitutional or tort standards not dependent on customary or reasonable mediation practice. These Moffat calls “custom independent claims”. His analysis of the mediator’s exposure to liability is contained in a table which I reproduce below⁶³.

Appropriate Mediator Exposure to Liability

Custom-Based Claims (Professional negligence, malpractice)	Custom-Independent Claims (Breach of confidentiality, conflict of interest, infliction)
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⁵⁹ [2003] VSC 410 at para. [90]

⁶⁰ Op cit at p. 206

⁶¹ One of our number has told me of an occasion when, of the three lawyers present at the mediation, he was the sole one awake – he not being the mediator.

⁶² Moffat op cit at p. 193

⁶³ Moffat op cit at p. 194

		of emotional distress, fraud, breach of explicit contractual term, etc.)
Party Withdrew from the Mediation	<p>Liability: Traditional elements of a Custom-Based claim</p> <p>Damages: Insignificant because withdrawal likely causes the injury to cease.</p>	<p>Liability: Traditional elements of the specific Custom-Independent claim in question.</p> <p>Damages: Full traditional damages available under relevant claim, since withdrawal would not necessarily cure the injury from these claims.</p>
Party Remained in the Mediation	<p>Liability: Traditional elements, plus the complaining party's continued participation demands that the party demonstrate his incompetence, an inability to perceive the negligence, or a denial of autonomy that prevented the party's withdrawal.</p> <p>Damages: Traditional measures available in Custom-Based claims.</p>	<p>Liability: Traditional elements of the specific Custom-Independent claim in question.</p> <p>Damages: Full traditional damages available under relevant claim, except that failure to withdraw should prevent complete recovery if misconduct was visible, party was competent, withdrawal option was not impaired, and withdrawal would have mitigated damages.</p>

66. The arguments against the provision of such immunity include:

- (i) the availability of insurance;
- (ii) the permitting, if not fostering, of egregious mediator misconduct;
- (iii) the absence of any significant policy benefits;
- (iv) the lack of any true correlation between the work of a mediator and the judicial function.

67. My personal view is that a general immunity is not justified⁶⁴. I have four principal reasons for that view. First, fact situations are infinite and we need to wait and see what the potential pitfalls are. Secondly, there should remain a potential liability for mediators to ensure that their approach to their

⁶⁴ This is the view espoused by the Family Law Council of NADRAC in a letter to the Cwlth A-G dated 15 November 2005 on the requirement for immunity for family councillors: www.nadrac.gov.au/agd/WWW/rwpattach.nsf

profession and their conduct in it has at least the possible sanction of being examined by an independent tribunal with the consequent possibility of damages resulting. Thirdly, we are paid and can readily obtain insurance - which will not be expensive. Fourthly, there is no evidence to suggest that the arguments against - such as harassing law suits, intimidation, interference with the exercise of judgment - are of any significance.

Conclusion

68. The practical advice that I think emerges is this:

- (a) have a written agreement with the parties;
- (b) be careful what you promise in that written agreement;
- (c) do not advise in the course of the mediation;
- (d) have insurance;
- (e) maintain confidentiality during and after the mediation; and
- (f) although it hardly needs to be said to this group, treat all parties with respect.

DVC McMeekin