

MEDIATOR'S LIABILITY — IS IT AN ISSUE?

Is the liability of a mediator a matter which should concern us? Is it simply an academic question? Do we need to worry about it at all?

In asking whether mediator's liability is an issue we raise questions which can be posed on more than one level. I do not intend to explore them in detail or to supply very many answers — indeed, it is far from clear what some of the answers are — but I do want to make a preliminary reconnaissance of the territory and suggest some matters which we as mediators ought to be considering. If what I say seems provocative, so much the better.

At the very threshold we may ask whether mediators should be under any kind of legal liability for the way in which a mediation is conducted, or for the outcome. There are respectable arguments for saying that a mediator should not — at least in the absence of some kind of impropriety — have to face the risk of claims by disaffected parties who have come to regret the agreements that they have reached. In court-mandated or court-annexed mediations, for example, it can reasonably be said that mediators should have the same immunities that judges enjoy.

In New Zealand, mediators appointed under statute (such as the Employment Contracts Act and the Residential Tenancies Act) usually have complete or at least very substantial immunity from suit. Similar immunity may be given to mediators in the event of the High Court being empowered to refer cases to mediation. If these mediators are safe from being sued, no matter how careless or inept they are, we may logically ask why the same should not apply to all mediators.

This philosophical debate could engage us for some time. My personal view is that, if mediators expect — as we do — to be regarded as professionals offering specialised skills to the community, and looking to be paid by those who engage us, we must also accept that we are accountable for the mistakes that we make. If we depart from the standards which people can reasonably expect of us, we must be prepared to face the consequences — including the possibility of legal liability if we act in ways that cause harm or loss.

Looking at the matter in practical terms, it is increasingly likely that private mediators — by which I mean those not appointed under statute — will have to deal with the prospect of liability, as the ingenuity — misplaced or otherwise — of the legal profession is brought to bear on some of the issues which I intend to discuss with you. It may be merely a matter of time before these issues take concrete shape.

On another level, therefore, we may ask "What are the situations in which a mediator may be liable to others?" One difficulty in grappling with this question is that the broad question whether a mediator may incur legal liability to others (whether or not they are parties to the mediation) has hardly been considered seriously in New Zealand. The enthusiasm of the mediation movement and the apparent success of mediation has masked this possibly darker side of mediation practice. As far as I know, no Court in Britain, Australia or New Zealand has yet been asked to rule on the liability of the mediator. Even in the United States, where litigation may be thought to be at its most imaginative, there have been few claims against mediators and, as far as I know, none has yet resulted in a Court judgment against a mediator.

Mediators operating in the private sector, whether or not under formal mediation agreements, cannot in my view afford to be complacent. They have no statutory protection and — if mediators can be made liable at all — they are open to any claims which can be clothed with a legal framework and which are not or cannot be excluded by contract.

Our territory seems pretty well bereft of any Court decisions which might serve as landmarks. In this unmapped desert, what then are the features which might tell us how mediators could incur legal liability?

They may include cases where the mediator deviates from contractual obligations or ethical standards; where the mediator fails to perform to a reasonable standard of competence; or where the strategy adopted by the mediator pays insufficient regard to legitimate interests. In any of these situations, it is possible that legal liability could be imposed on the mediator if an aggrieved person is able to satisfy a Court that the impugned conduct has resulted in some loss or detriment.

A number of possibilities can be suggested — there are no doubt others — and I have grouped these very roughly under three headings, which I have labelled skill deficiencies, disclosure issues, and structural problems.

Skill deficiencies

The mediator has inadequate training, competence or experience, leading to an unfavourable outcome for one party which would otherwise have been avoided.

The mediator fails properly to manage the intake process, with the result that mediation proceeds when it was contra-indicated, for example in the case of a persisting abusive relationship, leading to an unfair outcome.

The way in which the mediator manages the mediation itself leads to an unfair outcome.

The mediator does not provide the parties with an opportunity to obtain professional advice.

It is now well established that a lawyer may be liable to a party other than his or her own client, if the task which the lawyer is instructed to carry out affects the interests of a third party and the solicitor negligently fails to have proper regard for those interests. Logically, we could argue that the same reasoning should apply to mediators. If the mediator should have appreciated that the negotiations would affect the interests of absent parties, does he or she not have a responsibility to structure the mediation so that the absent parties are included or at least their interests are represented? If that is not done, should not the mediator bear at least a share of the responsibility for the problems suffered by absent parties and which would have been avoided had they been involved in the mediation?

Although I do not have the answers to these questions, you will gather from the way in which I have asked them that I have a view about what some of the answers should be. I raise them simply as examples of the kinds of issues of which we should be aware. There is little doubt in my opinion that, as the community uses mediation more, questions such as those which I have raised with you this morning will loom larger. It is, I suggest, only a matter of time before liability issues assume concrete form.

All this is not to say that we should be avoiding mediation or that we should be afraid to act. Nor should we be overwhelmed by these problems. After all, they are likely to arise in only a small minority of cases. Doctors, accountants, lawyers and people in many other professions have had to live with liability issues all their working lives. Mediators may have to as well. I say simply that we must act as professionals and that we must be vigilant to protect the interests of those whom we serve. The issues that I have raised with you today — and others like them — are ones which we brush aside at our peril.

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instance, by trying to secure the agreement of the party in question to making a voluntary disclosure, but that may not always be successful. Until these matters come before a New Zealand Court, issues such as these must necessarily be in some doubt. It is of course always possible for a mediator in the mediation agreement to exclude his or her liability for disclosure in the kinds of situations which I have outlined but that may be a disincentive to the parties to mediate at all.

The mediator may then have a dilemma: if the mediator discloses confidential information in order to protect some third person, will he or she be liable to a party who thus sustains loss? And if the mediator does not disclose, and the threatened harm — which could have been avoided by disclosure — then occurs, will the mediator be liable to the person who is harmed? I leave you to discuss what the answers may be.

The third group of issues which I identified — those which I call structural or process issues, for want of a better label — raises some extremely difficult questions, the answers to which one can only grope for as yet.

What is the mediator's responsibility to persons who are not participating in the mediation? Can the mediator be under a legal liability if their interests are affected? I touched on these questions a moment ago, but now we must confront them more directly.

It is not difficult to imagine cases where non-parties are placed at a serious disadvantage, for example —

A child custody dispute leads to a mediated outcome in which the child is exposed to the continuing risk of physical or emotional abuse.

A product supplier is permitted to conceal the fact that the product is dangerous.

The mediated settlement involves a collusive fraud by the parties on some absent third party.

The list could easily be extended.

The ethical issues which arise in these cases may give rise to fierce debate. But I am not discussing here whether the mediator should disclose information — I am concerned at this point with more subtle matters: for example, is the mediator liable for exposing the child to abuse when, had the child been represented at the mediation, the risk might have been averted? What is the mediator's legal responsibility to a person injured by the dangerous product, if a different mediation structure might have resulted in the product being recalled.

The last case in this group, where the mediator fails to document or record the outcome accurately, is perhaps the simplest. However, it raises the question whether it is the responsibility of the mediator or the parties to record the outcome. My preference is for that responsibility to lie firmly with the parties — it is after all their agreement — but in reality, at least where the parties do not have their lawyers in attendance, the mediator can hardly escape the job of recording what has been agreed. The dangers that lie in wait, if this is not done properly, can be illustrated by a simple anecdote. In a commercial mediation in which I was acting for a party, we were short of time and the mediator decided to record the essential points of agreement overnight and fax them to the parties and their lawyers the following day. There was immediate disagreement about whether the mediator's note accurately recorded the agreement or, in respect of some items, whether agreement had been reached at all. It took a further month of hard negotiation to resolve this. As the case involved several parties and some hundreds of thousands of dollars were at stake, it seems to me that the mediator might well have faced a substantial liability had a settlement not ultimately been reached, particularly as the agreement recorded by the mediator was significantly more favourable to one party than the eventual settlement.

My second group of potential liability issues relates to disclosure. In the first situation which I gave — the mediator makes an unauthorised disclosure of confidential information — the position will normally be comparatively clear-cut. Usually there will have been a contractual or statutory requirement of confidentiality and disclosure will be a breach of that. If the disclosure results in damage or loss to one party, the basis for a claim against the mediator will probably be that there has been a breach of contract or of statutory duty.

There may, however, be situations where a mediator is entitled or even obliged to breach confidentiality. To my knowledge, no New Zealand Court has considered this in relation to mediators, but there are some useful analogies to be drawn with similar problems which affect other professionals such as doctors and lawyers. For example, courts in both England and the United States have held that doctors may have a right and indeed a duty to disclose information received from a patient if failure to disclose would create a serious risk of physical harm to another person. New Zealand courts have at least suggested that a similar duty could arise here. It has also been held here that a doctor may have a duty to disclose to a third party if non-disclosure would result in financial loss. Similarly, it is fairly well established that a lawyer may be required to disclose what would otherwise be privileged information where he or she knows or has strong reason to believe that his client is committing or is about to commit a crime, especially where questions of personal safety of others may be at risk.

There is certainly some attraction in the argument that similar rules should apply to mediators, and that breach of confidentiality should be excused where another person's safety may be endangered or the mediator becomes aware, for instance, that a fraud is being perpetrated. Most mediators no doubt will try to overcome these problems, at least in the first

The first group of situations which I listed — what I have called skill deficiencies — are examples of failure to apply, or apply adequately, skills of a kind which can fairly be expected of a competent mediator. One obvious difficulty here is that mediators' styles vary considerably, so that it may be difficult to tell in any objective sense whether a particular mediator's behaviour is appropriate. Another obvious problem is to prove a causative link between the mediator's deficiencies and some measurable detriment — for example, an unfair outcome — to the dissatisfied party. It is, after all, possible to argue that the agreement which was reached was a voluntary one into which the party need not have entered if he or she felt it was unfair.

It seems to me that much may depend on the party's level of understanding of the process, his or her ability to make a proper assessment of a proposed settlement, the opportunities provided to get additional information or advice, whether on an objective basis it can be said that mediation was inappropriate in the particular circumstances, and so on. These are recognisably situations in which there may be a significant power imbalance and the failure by the mediator to recognise and deal with that carries a high risk of an unfair outcome. As we know, the mere fact that the disputing parties join in seeking mediation does not make it sensible or appropriate.

If we imagine a case where a mediator proceeds with a mediation in which there is a continuing abusive relationship, in which the weaker party has no adequate opportunity to obtain advice, and where a legally binding mediated agreement results in a clearly lopsided result, it may not be difficult for a Court to hold that the mediator — by allowing the mediation to proceed at all or by failing manage the process appropriately — has substantially contributed to the result and is liable to pay damages. Although this may seem an extreme case, I suggest that it is not very far fetched and that, on the contrary, it may be waiting for us just round the corner.

The danger is more apparent when one realises that mediators do not agree amongst themselves whether the mediator has any responsibility for the outcome.

Many mediators hold that their function is to control the process and that they have no business to attempt to influence the outcome. Others argue that issues of the kind which I discussed a moment ago impose a duty on the mediator to see that the outcome, if agreement is reached, is not unfair.

It is for reasons like these some American states such as Oklahoma and California have introduced statutory rules that require the mediator to ensure that mediated agreements are "consistent with the law" or to terminate the mediation if the mediator cannot ensure balance between the parties.

The mediator fails to record or document the outcome accurately.

Disclosure issues

The mediator fails to disclose a conflict of interest.

The mediator discloses to one party or to a third party information given in confidence in the course of the mediation.

The mediator fails to disclose information of which the public interest required a disclosure, such as a threat to commit a crime, the continuing abuse of a child, the existence of a dangerous product.

Structural problems

The mediator fails to ensure that all parties affected by the dispute are represented at the mediation (for example environmental disputes and child custody issues).

The mediator fails to ensure a fair outcome for non-parties such as children.

Some of the answers are more obvious than others. In some cases it may be comparatively easy to say that a mediator is or should be liable for harm caused to another person. In others, the answers are much less obvious and — for the moment — provide room for debate. As I have said, I do not have many of the answers — I simply raise the questions for you to consider.

In all of the cases which I have postulated, the mediator will be legally liable — at least in a monetary sense — only if the conduct complained of results in some quantifiable loss or detriment to the person affected. That should not, however, be the sole reason to avoid these kinds of conduct. Whether or not any legal liability results, failure to manage the process adequately, unauthorised disclosures, unfair outcomes and other such problems will inevitably damage the credibility of mediation. It should not be thought that these problems are necessarily academic. Mediators should not forget that they will certainly be under close scrutiny from lawyers acting for disputing parties, and more than one lawyer has said recently that he or she would not contemplate appointing a mediator who did not have adequate liability insurance cover.

The kinds of scenario which I have outlined raise problems which have hardly been explored and the question whether legal liability could arise must in most of these cases be as yet a matter for prediction. In some cases it may be extremely difficult for an aggrieved party to satisfy a Court that an unfavourable outcome resulted from a failure on the part of the mediator rather than some other cause.