

Liability of Mediators for Pressure, Drafting and Advice: Tapoohi v Lewenberg

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Lawyers, mediators, judges and professional peacemakers know that many complex tensions occur during negotiations and decision-making. These complexities have come under a flickering spotlight in the decision of Justice Habersberger in the Supreme Court of Victoria in the case of *Tapoohi v Lewenberg* [2003] VSC 410 (21 October 2003).

Almost every paragraph of the case raises an important policy and practical topic. Only some of these topics will be dealt with in this summary and commentary.

Alleged Facts

1. This is a brief summary of the summary of the facts alleged in the reported case. No doubt, multiple other versions and additional alleged facts will emerge as “historical research” continues in this dispute. Reported case law rarely reports what “really” happened.
2. The case involved a conflict over a deceased estate. The deceased mother left her assets by the terms of her 1998 will to her two daughters, Mrs Tapoohi (the plaintiff) and Mrs Lewenberg (the first defendant). However, by the time of the mother’s death, four blocks of land named in her will had either been sold, or were under contract to sell, and/or were registered in the name of a family company.
3. The two sisters, Mrs Tapoohi (Mrs T) and Mrs Lewenberg (Mrs L) began to compete inter alia over who should receive the blocks of real estate, and/or the proceeds of sale. In July, 2001, Mrs T commenced proceedings in the Supreme Court of Victoria against Mrs L, who was also the executrix of her mother’s will, to decide the division of the estate assets.
4. In August 2001, the sisters agreed to go to mediation. The mediation did *not* occur pursuant to a court order. (Arguably, a court order to mediate would be normal practice in Victoria once legal proceedings have commenced.) This is an important fact, as strong statutory immunity attaches to mediators who mediate pursuant to court orders under s.27A of the *Supreme Court Act 1986* (Vic).

5. The mediator chosen was a Queen's Counsel who was a very experienced mediator and barrister. Present at the mediation was Mrs L with her two barristers and two solicitors; and acting for Mrs T, a senior barrister and two solicitors. Mrs T herself was in Israel but was accessible by fax and phone during the mediation.
6. The mediation meeting led to an agreement late at night whereby Mrs T agreed to pay \$1.4 million to Mrs L, and to resign from the family company, in return for two of the pieces of real estate being transferred to her. The settlement document was faxed by Mrs T's lawyers to her in Israel. After discussion with her lawyers over the telephone, Mrs T signed, notarised and faxed back a copy.
7. Ten months later, in June 2002, Mrs T commenced legal proceedings against ten Lewenberg companies and individuals to set aside the mediated settlement. It appears that the net value of the settlement to her had diminished substantially due to a large capital gains tax liability on the value of the shares in the family company transferred away by her.
8. Mrs T used a shotgun full of legal claims in an attempt to set aside the mediated settlement. Perhaps the most important was that the settlement was subject to an unwritten term that it was not binding unless and until taxation advice was obtained. (These particular claims to set aside the agreement have since been withdrawn by Mrs T.)
9. Predictably, in September 2002, Mrs T also claimed damages against her solicitor for negligently failing to obtain taxation advice and/or include an express condition precedent in the written terms of settlement. Also predictably, her solicitor then sought to spread his own liability by claiming against his own barrister. More importantly for the purposes of the mediation industry, Mrs T's solicitor also joined as a third party defendant, the senior mediator in the hope of assigning or spreading any of his damages for professional negligence to the mediator. That is, the mediator was blamed by the lawyer for producing a final settlement instead of an agreement conditional on further tax advice.
10. The mediator applied to the Supreme Court of Victoria for a "summary judgment" against Mrs T's solicitor's claim that he had been negligent or in breach of the express or implied terms of the mediator's contract. A summary judgment is not a full hearing of all the alleged facts, evidence and law. Rather

it is a preliminary threshold decision about “whether the allegations are manifestly without prospect of success?”

11. If the facts alleged about the mediator’s behaviour by Mrs T’s lawyers can be proved, is there a chance that the mediator could be liable to contribute to Mrs T’s losses? The judge answered affirmatively that there is at least an arguable case. That is, there is a prospect of success in spreading the legal blame to the mediator. If the lawyer’s claim against the mediator is not settled, this case will go on to a complete hearing where evidence of the detailed events at the mediation will be presented, cross-examined, and decided upon; and then new legal rules and boundaries about acceptable mediator behaviour will be promulgated. These “new” rules will be developed from the vague existing contractual and tortious obligations resting upon professional advisers in Australia.

12. **Familiar Negotiation and Mediation Dynamics**

The facts alleged in the case of *Tapoohi v Lewenberg* provide a microcosm of events familiar to evaluative and other kinds of mediators, and to lawyers negotiating at the door-of-a-court around the planet. For example:

- Big dollar disputes attract groups of lawyers to share the work and spread the professional risks.
- Ironically, often an essential person (e.g. accountant) or key piece of information (e.g. potential tax liabilities) is missing at early mediation meetings.
- Having assembled so many key people, negotiations tend to go on into the night. Usually, the costs and emotions of adjourning and “meeting again” are daunting. In this case, “night” negotiations had been arranged for the convenience of Mrs T who was in Israeli time zone.
- Mediators (and usually lawyers) make insistent speeches about the necessity of recording any agreements before “ending” the meeting.
- Nevertheless, several participants depart before the final document is signed (in this case, two people left “early” – paras 25, 32).
- Drafting and amending the terms of settlement occurs when people are tired; and in a hurry to go home (though no “tiredness” was alleged by anyone in this initial reported case).
- Inevitably, every written settlement overlooks certain contingencies.

- Invariably, those present have different memories of what was said. A memory-battle lurks.
- Large numbers of people present mean that there are numerous conversations occurring, especially during the focussed work of drafting (e.g. para 34). Potential “side-bar” or collateral contracts can proliferate.
- All mediated conflicts require some degree of “pressure” or “risk analysis” in order to settle. Without the “pressures” of escalating legal and investigative costs, late hours, inconvenience of missed work, peer disapproval, the fear of post-settlement regrets, the door of the court, uncertain judicial behaviour, delay, adverse publicity etc., someone in the room can procrastinate and plead for “more time to think it over” indefinitely. That is, the concept of “free” consent is illusory. But when does inevitable (and desirable) decision-making pressure cross the line to become “improper”? These judgments about what is “improper” pressure vary between individuals and fact situations. What useful guidelines can emerge on what is “appropriate” pressure from lawyers, judges and mediators in the thousands of different door-of-the-court or mediated settlements which take place around the country each day?
- How much pressure, advice and risk analysis should a mediator offer? Competing answers to this question can be based upon habit, personal ethics, social utility, organisational ethics, market expectation, market reputation and legal risks for the mediator.¹
There is no such thing as an “adviceless mediator”.
- For mediators, organising meetings with multiple people present is often like herding cats. How far is the mediator (or lawyer at the door of the court) being hired to drive the acrimonious, wavering personalities and agendas to an outcome? (e.g. para 27).
- When should the mediator take the lead and dictate or write the first draft, or assist by suggesting wording to be first draft, of any settlement? It is common practice in many parts of Australia, US A, Asia and New Zealand for mediators to assist with drafting. Moreover, in the majority of

¹ See J.H. Wade, “My Mediator Must be a QC” (1994) *Aust Disp Res J* 161; “Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows?” (1998) 12 *Aust J of Family Law* 256.

mediations which take place around Australia and the world, there are no lawyers or professional wordsmiths present. The multi-skilled mediator has no realistic choice but to draft or dictate the first, and often the final draft. To do otherwise would usually disenfranchise the poor and middle class from *any* dispute resolution services. It is folly to suggest that everyone can choose to dine at the Ritz. A few mediators in California dictate settlement terms for unrepresented parties themselves to write out. This appears to be a vain attempt to transfer liability for omissions or commissions from the dictator to the secretary. Nor will reversing the scribe-dictator roles absolve an experienced secretarial mediator from *allegations* or conclusions of blame for scribing “holey” settlements. Nor will exiting the room and leaving inexperienced parties to draft alone create a bright line of moral or legal righteousness for a defensive though experienced mediator.

- When a mediator makes procedural suggestions, younger lawyers and less-experienced clients are often reluctant to assertively question or oppose those suggestions (para 27, 28, 29).

13. **Mediator Behaviours Which May Attract Some Legal Liability**

For a settlement, facilitative, therapeutic, or evaluative mediator to be liable in contract or tort, (s)he must be proven to have:

- (a) a duty of care to the client
- (b) breached that duty of care
- (c) caused foreseeable losses to the client.

In this case, the four behaviours of the mediator which individually or cumulatively allegedly breached his duty of care were as follows. (Again it is essential to emphasise that these mediator behaviours were only *alleged* in the summary hearing. No doubt, all will be *denied* vigorously in a full hearing):

- (i) He dictated the first draft of the settlement to one of the lawyers in the presence of all parties. This first draft omitted any reference to the agreement being conditional or unenforceable unless and until taxation advice was obtained (para 36).
- (ii) All parties allegedly had stated in written “position papers” (para 21) and orally (para 18, 24, 35) during the mediation that tax advice was essential before the agreement could be concluded. Therefore, if such allegations could be

proved, the mediator arguably should not have “missed” this key clause in his first dictated draft.

(iii) The mediator insisted firmly that some written document must be signed before the meeting ended (paras 25-29).

(iv) The mediator “suggested” that a nominal figure of \$1 could be inserted in the settlement document as nominal consideration for the transfer of shares in the family company.

14. **Mediator Defences?**

Do these behaviours in *Tapoohi v Lewenberg* breach the mediator’s duty of care? Obviously a mediator could argue in any full hearing that they do *not* because:

(i) Every lawyer knows that it is normal for a first draft, or an agreement in principle, especially if dictated orally late at night, while supervising a room full of people, will have various loopholes and omissions.

(ii) It is normal and good practice for mediators (and lawyers) to insist on a written record before a negotiation meeting ends. This often requires firmness and cajoling. Such “pressure” is entirely proper, and arguably in some cases it is negligence to allow disputants to go home without copies of the same signed document in their hands, especially when post-agreement regrets are predictable.

(iii) A more important line of mediator defence is foreshadowed in the reported case at paras 82, 85. While the mediator dictated the first draft of the settlement, the gaggle of senior and junior lawyers sitting in the same room had ample opportunity to amend (para 30), actually did recommend some alterations which were incorporated (para 32), and had further opportunity to amend when reading one of the photocopies of the draft together in private (para 32); likewise when both were discussing the draft over the phone with Mrs T in Israel before she signed the settlement (para 33); and the client Mrs T was herself a trained lawyer. Moreover, Mrs T’s lawyers withdrew her court action ten days after the mediation; and only cried “wolf” to the mediator fifteen months after the mediation. That is, arguably the mediator did not *cause* the client’s loss. The client’s expert lawyers (and client) had sufficient time and opportunity to insert a condition precedent clause, and to clarify the conditional nature of the

agreement. That is, one reason why opposing experts are hired to be present at mediations and negotiations – namely to stay clear-headed at the end of the confusing to-and-fro of negotiations; and to ensure that their own client’s key interests are recorded in any signed settlement. Moreover, Mrs T’s lawyers seem to be caught in a dilemma – if the tax advice clause was as vital as they allege (paras 18, 21, 24, 35), why did they overlook it completely when reading and re-reading the first draft?

(iv) It is common in negotiations for one party to *begin* with several proposals in an offer. However, hours later, parts of that opening proposal are often dropped during the give-and-take of bargaining. It is unlikely that a mediator has a positive “legal” obligation to verify personally whether every opening proposal has been dropped accidentally or intentionally, especially when expert representatives are present.

15. Possible Consequences of the Decision

Around the world, there have been surprisingly few attempts to attach legal liability to mediators, of whatever variety or school. Nevertheless, some lawyers have been able to intimidate particularly non-lawyer mediators with dire threats of “legal liability” for giving erroneous advice, drafting incompletely or breaching confidentiality. These threats ring hollow, based both on statistics and on lawyers usually being unwilling to fill the mediation gaps in conflicts involving the poor or middle class or violence. Nevertheless, the publicity accorded to this single case and its occasional successors, could have some of the following consequences:

(i) Some mediators will more carefully include standard exclusion clauses both in their mediation contracts *and* in every settlement agreement (para 46). For example – “The clients agree that they will not rely upon any advice from the mediator; that they will not rely upon any draft documents produced by the mediator, but will always obtain their own legal advice etc etc”. Apart from exemption clauses in his *engagement contract*, one Texas mediator includes the following clauses in every *settlement* agreement:

- “1. All parties and their attorneys have read and signed this Agreement.
 2. Each signatory to this settlement has entered into this Agreement freely and without duress, having first consulted with professionals of his or her choice.
- The parties affirm that they have read the entire Agreement and understand its

content. The parties further affirm that any questions that they may have had concerning the Agreement's content were explained to them by their counsel prior to signing below.

3. This Agreement is signed voluntarily and with the advice and consent of counsel on the dates set forth below....

4. Although the Mediator has provided the basic terms of this Settlement Agreement to the parties' counsel as a courtesy to facilitate the final resolution of this dispute, the parties and their counsel have thoroughly reviewed such terms and have, where necessary, modified it to conform to the requirements of their agreement. All signatories to this Settlement Agreement hereby release the mediator from any and all responsibility arising from the drafting of this Settlement Agreement.”²

(ii) In the *Tapoohi* case, the formal claim against the mediator included in startling fashion an allegation that the mediator had not only been hired in the limited role specified in his written mediation contract, (para 16) but also based on an alleged implied term that he would “advise both parties at the mediation” as an expert barrister. Two roles for the price of one (para 72-77), one express, one presumably implied by custom. This is common worldwide practice amongst some evaluative mediators and provides some extra comfort level for clients and lawyers. Evaluative mediation has become the “new arbitration”³ and is a global workhorse for settling construction and personal injury disputes. Given the widespread use of this double mediator-advisory role⁴, mediators who want to preclude any implied or customary terms are advised to exclude, in writing, *both* in the mediation and settlement contracts, any liability for accidental or intentional advisory roles undertaken.

(iii) Mediators in big money or high conflict cases may insist upon the disputants both filing a claim in court, and obtaining a court order referring the parties to mediation. These prerequisites will usually give those mediators statutory immunity in the shadowlands of common settlement behaviours.

² Personal correspondence with Reed Leverton, mediator and former judge, Texas.

³ R.A. Baruch Bush, “Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field” (2002) 3 *Pepperdine D R L J* 111; M. Levin, “The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion” (2000) 16 *Ohio St J D R* 267; M. Moffitt, “Ten Ways to Get Sued: A Guide for Mediators” (2003) 8 *Harvard Negot L Rev* 81.

However, if this becomes common practice, court lists may become clogged with tactical filings.

(iv) Some evaluative mediators may change their behaviour by reducing advice, late night meetings, or willingness to mediate without the presence of, and initial drafting by, two sets of lawyers.

(v) The cost of mediation for the poor and middle class may increase as nervous mediators take out insurance, or drop out of the industry, or wait for widened statutory immunity.

(vi) Gradually, the currently diverse mediation industry may become dominated by a fraternal club of lawyers (rather than engineers, architects or builders) if “file first, mediate second” becomes a preferred self-defensive option for mediators.

(vii) Differentiated ethical codes and legal standards of care will gradually emerge for different schools of mediators – such as settlement, facilitative, therapeutic and evaluative mediators.

Conclusion

Many different practices, processes and skills exist under the simplistic term “mediation”.⁵

Allowing this diversity to blossom gradually without top-down regulation by legislators has been the preferred option in Australia, New Zealand and USA. However, judges do not have the luxury of deferring difficult policy decisions. Occasional cases like *Tapoohi v Lewenberg* (if they proceed to final hearing) place judges in the unenviable position of making decisions about “proper mediator behaviour” (and indirectly about proper judicial and lawyer settlement practices), and of making major policy decisions about professional diversity and standards on-the-run.

Hopefully mediators can add some defensive practices (mentioned in this commentary) to their tool-boxes to minimise legal risks attached particularly to big money evaluative, or high conflict, mediation. In these kinds of disputes, parties and

⁴ See references in notes 1 and 3.

⁵ eg NADRAC *A Framework for ADR Standards* 2001.

their constituents with post-settlement blues will occasionally search for professional helpers to blame.