When Will a Mediator Operating Outside the Protection of Statutory Immunity be Liable in Negligence?

MELINDA SHIRLEY & TINA COCKBURN†

A recent interlocutory decision, Tapoohi v Lewenberg (No 2), *raises interesting questions regarding the potential liability of a mediator in negligence.*

THERE is currently no binding Australian authority setting out the extent of the legal obligations owed by a mediator to the parties in dispute. Whilst there has been speculation about potential liability on contractual, tortious and equitable grounds,[1] there remains no clear judicial guidance on the issue. Where mediation takes place outside the protection of statutory immunity,[2] the potential for liability is increased and the situation is further complicated by the emergence of various models of mediation practice which challenge the traditional definition of the mediator's role.

In the recent interlocutory decision in *Tapoohi v Lewenberg (No 2),*[3] it was alleged that a mediator operating outside the court referral system was in breach of various contractual and tortious duties. In jurisdictions where court-annexed mediation is funded by the disputants and mediation outside the court system is common, it is becoming increasingly important that the potential liability of such mediators is clarified. If *Tapoohi v Lewenberg* proceeds to trial, it may well become the first Australian authority on the common law liability of mediators practising without the benefit of statutory immunity.

---

† Lecturers in Law, Queensland University of Technology.

1. For a discussion of equitable obligations, see T Cockburn & M Shirley 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability' (2003) 31 UWAL Rev 70.
2. Legislation throughout Australia confers immunity on mediators operating within the court system: Supreme Court Act 1970 (NSW) s 110R; Supreme Court of Queensland Act 1991 (Qld) s 113(1); Supreme Court Act 1935 (SA) s 65(2); Alternative Dispute Resolution Act 2001 (Tas) s 12; Supreme Court Act 1986 (Vic) s 27A; Supreme Court Act 1935 (WA) s 70.
3. [2003] VSC 410 (21 Oct 2003).

In the context of the continuously evolving role of the modern mediator, this article will review the decision in *Tapoohi v Lewenberg* using the case as a springboard to examine the complex question of a mediator's potential liability in negligence.

TAPOOHI v LEWENBERG: THE FACTS

The plaintiff, Mrs Tapoohi, was in dispute with her sister in relation to the estate of their late mother. The estate included real property owned by companies in which the sisters were directors and equal shareholders. Litigation was pending in relation to the conduct of those companies.

The parties elected to attend mediation, not pursuant to any court order, but with a view to resolving their dispute. A senior Queen's Counsel was selected to act as mediator. Each party was represented by counsel and solicitors throughout the process. A unique feature of this case lies in the fact that the plaintiff was herself a qualified solicitor whilst her sister, Mrs Lewenberg, was represented by Lewenberg & Lewenberg, a firm in which her husband and daughter were both principals.

The mediator was appointed by verbal agreement, but his letter of acceptance confirmed that his role in the process was not to impose a settlement on the parties but to assist them to arrive at their own solution. Whilst all lawyers were present at the mediation, Mrs Tapoohi participated by telephone from Israel. At the conclusion of the mediation session, all parties signed the Terms of Settlement, Mrs Tapoohi by way of facsimile transmission.

The original legal proceedings sought to set aside the agreement reached at mediation on the following grounds:

(a) that the settlement was subject to an express oral term that the parties would seek taxation advice and would thereafter negotiate in good faith as to the form of any settlement reached;
(b) alternatively, that the parties had not reached a concluded agreement;
(c) alternatively, that the term about taxation advice was a condition precedent to a concluded agreement being reached;
(d) alternatively, that this term was a collateral contract;
(e) alternatively, that this term gave rise to an estoppel or the right to rectification of the agreement for mutual mistake.

Mrs Tapoohi subsequently added a claim against her former solicitors alleging a breach of retainer or negligent advice in relation to whether the agreement reached at mediation was legally binding.

The solicitors then lodged a third party notice seeking contribution from the mediator and from the QC who had represented Mrs Tapoohi at the mediation, pursuant to section 23B of the Wrongs Act 1958 (Vic). In those proceedings it was alleged that

contractual and tortious duties had been breached by the QC and the mediator, should the Terms of Settlement be found to constitute an agreement binding on the plaintiff.

The mediator subsequently filed for summary judgment on the third party claim on the ground that no contractual or tortious duties were owed by him[4] and that the claim ought therefore to be struck out. It is the interlocutory decision of Habersberger J in relation to the application for summary judgment which considers the potential liability of the mediator in negligence.[5]

LIABILITY OF MEDIATORS IN NEGLIGENCE

Where mediation occurs pursuant to specific legislative provisions,[6] varying levels of protection from civil liability are afforded to the mediator, ranging from the same immunity that is afforded to judges[7] to more qualified levels of protection which limit immunity to acts done in good faith in the execution of statutory duties.[8]

As stated, there is currently no binding Australian authority which sets out the nature and extent of a mediator's liability in negligence where mediation occurs outside the protection of statutory immunity. In order to establish liability in

---

4. In addition to the negligence claim, the third party statement of claim pleaded that the mediator held himself out as an expert, which meant that the following terms ought to be implied or imputed into his contract of retainer:
   '(a) to exercise all the due care and skill of a senior barrister specialising in commercial litigation and related matters;
   (b) to exercise all the due care and skill of a senior expert mediator;
   (c) to reasonably protect the interests of the parties;
   (d) not to act in a manner patently contrary to the interests of the parties;
   (e) to act impartially between the parties;
   (f) to carry out his instructions from the parties by all proper means, and further or alternatively –
   (g) not to coerce or induce the parties into settling the earlier proceeding when, at the relevant time or times, there was a real and substantial risk that settlement would be contrary to the interests of the parties or any of them.'
   His Honour concluded that the propositions were arguable. Thus, he could not make an order for summary judgment on this issue without a full examination of all the evidence at trial. The allegation of coercion arose from evidence that the mediator had been made aware that the parties required advice on the taxation implications of any settlement that might be reached before finalising the terms but that the mediator had insisted that terms of settlement be executed on the night of the mediation. The allegation of coercion did not receive detailed examination in Habersberger J's judgment as the alleged implied term was conceded, although His Honour commented that whilst it was not suggested that it was part of a mediator's function to coerce the parties to settle, that was not to say that 'some encouragement from the mediator would always be out of place': ibid, para 49.
5. *Tapoohi v Lewenberg* above n 3.
6. See above n 2.
7. Family Law Act 1975 (Cth) s 19M; Federal Court of Australia Act 1976 (Cth) s 53C.
8. Community Justice Centres Act 1983 (NSW) s 27.

negligence, it is necessary to establish that the mediator owed a duty of care to the plaintiff, that there was a breach of this duty, and that the breach resulted in damage to the plaintiff. These will be examined in turn.

Duty of care

In *Tapoohi v Lewenberg,* the mediator argued that there was no duty of care on the part of a mediator. The court was referred to the judgment of Chesterman J in *Natcraft Pty Ltd* v *Det Norske Veritas,*[9] which outlines salient features in the relationship between a defendant's action and a plaintiff's loss which may give rise to the existence of a duty of care, including:

(a) whether the loss suffered was reasonably foreseeable or actually foreseen;
(b) whether the imposition of a duty of care would impose indeterminate liability on the defendant;
(c) whether the imposition of a duty would impose an unreasonable burden on the freedom of action of the defendant;
(d) whether the plaintiff was vulnerable to loss from the defendant's conduct;
(e) whether the defendant knew that his or her conduct could cause harm to a person such as the plaintiff; and
(f) whether the defendant was 'in control' of the activities which caused the loss.

In addition, it was argued that, as the class of cases that may be subject to a general duty of care at common law is not closed, the court should be extremely careful about shutting out a case summarily, particularly when the proceeding involved a claim for economic loss as the result of the provision of professional services.

In support of the proposition that the existence of a duty of care by a mediator was at least arguable, the court was referred to *Perre* v *Apand Pty Ltd*[10] and in particular to passages from the judgments of Gleeson CJ,[11] Gaudron J[12] and McHugh J.[13]

After considering these authorities and acknowledging the uncertainty of the relevant law, Habersberger J said that he was 'loath to strike out a pleading on the basis that the mediator owed no duty at all to the parties in the mediation'.[14] The question then became: in what circumstances, if any, might a mediator owe a duty of care in negligence?

In *Sullivan v Moody,*[15] the High Court identified the appropriate approach to be taken when determining whether a duty of care is owed in novel situations. The

9. [2000] QSC 348, para 45.
10. (1999) 198 CLR 180.
11. Ibid, 193.
12. Ibid, 197.
13. Ibid, 220.
14. *Tapoohi v Lewenberg* above n 3, para 54.
15. (2001) 207 CLR 562.

court endorsed an approach whereby new cases are determined by reference to the principles identified in earlier analogous cases.[16]

The loss suffered by the plaintiff as a consequence of negligence by the mediator will generally be purely economic, as was the case in *Tapoohi v Lewenberg*. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd,*[17] the most recent decision of the High Court to consider liability for pure economic loss, Gleeson CJ, Gummow, Hayne and Heydon JJ noted that:

> Claims for damages for pure economic loss present peculiar difficulty.... As Brennan J said in *Bryan v Maloney*:
>
> > If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would destroy commercial competition, sterilise many contracts and, in the well-known dictum of Cardozo CJ, expose defendants to potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.
>
> That is why damages for pure economic loss are not recoverable if all that is shown is that the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable.[18]

In *Woolcock Street Investments,* McHugh J reiterated the following principles (which he had previously set out in *Perre v Apand Pty Ltd*),[19] which are relevant considerations in determining whether a duty of care is owed in cases of pure economic loss:

(a) reasonable foreseeability of the loss;
(b) indeterminacy of liability;
(c) autonomy of the individual;
(d) vulnerability to risk; and
(e) knowledge of the risk and its magnitude.[20]

His Honour went on to state:

> In particular cases, other policies and principles may guide and even determine the outcome of the case, but the principles concerning these five categories must always be considered.[21]

---

16. Ibid, 579-580.
17. [2004] HCA 16 (1 Apr 2004).
18. Ibid, Gleeson CJ, Gummow, Hayne & Heydon JJ para 21 (footnotes omitted). See also McHugh J para 37; Kirby J para 154.
19. Above n 10.
20. *Woolcock* above n 17, para 74.
21. Ibid, para 75. See also Callinan J para 205; Kirby J paras 164–168. Although the majority approach in *Woolcock* focused on the vulnerability aspect of McHugh J's principles, it is submitted that their approach is also consistent with McHugh J's: paras 23–24.

The considerations set out by McHugh J in *Woolcock Street Investments*[22] are not easily applied in the context of claims against mediators in negligence, because there is not one definitive model of mediation in Australia but several.

(a) Reasonable foreseeability of the loss

In *Tapoohi v Lewenberg,* the mediator argued that foreseeability of harm alone was not sufficient to establish any duty in relation to conduct causing pure economic loss. Recently, in *Woolcock Street Investments,* McHugh J said: 'Reasonable foreseeability of damage, however, is a necessary but not sufficient condition of a cause of action in negligence'.[23]

There is more than one model of mediation in use in Australia. The two major approaches to mediation practice identified in the literature have been categorised as 'process-oriented' (facilitative) and 'substance oriented' (evaluative).[24] There is much debate about whether evaluative mediation can be defined as mediation because it involves an evaluation by the mediator, rather than a solution from the parties[25] and therefore does not fall within the National Alternative Dispute Resolution Advisory Council definition.[26]

For the purpose of this analysis, Boulle's distinction between four paradigm models of mediation will be adopted in an attempt to deal with some of the definitional problems and to give a more realistic perspective on the range of mediation styles that exist.[27] Boulle differentiates between the settlement, facilitative, therapeutic and evaluative models of mediation, setting out the different roles of the mediator in each and the most common areas of application for each model.

According to Boulle, *settlement mediation* has as its main objective to encourage incremental bargaining towards a central compromise. The mediator's main role in

22. Ibid. Nor those to similar effect as set out by Chesterman J in *Natcraft Pty Ltd* v *Det Norske Veritas* [2000] QSC 348, para 45 and referred to in *Tapoohi v Lewenberg* above n 3
23. Ibid, para 76, citing *Sullivan v Moody* above n 15, 576.
24. RN Amadei & LS Lehrburger 'The World of Mediation: A Spectrum of Styles' (1996) 5 Dispute Resolution Journal 62.
25. See T Sourdin & T Matruglio 'Evaluating Mediation: New South Wales Settlement Scheme 2000' (Sydney: NSW Law Soc, 2004).
26. The Australian Standard guide to the prevention, handling and resolution of disputes (AS 4608:1999) defines mediation by reference to the National Alternative Dispute Resolution Advisory Council definition as follows: 'A process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identifies the disputed issues, develops options, considers alternatives and endeavours to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.'
27. L Boulle *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996) 29.

this model is to determine the parties' fundamental objectives and then, by persuasion, to move them off their positions to a point of compromise. Boulle's research suggests that this model of mediation is most commonly practised in the resolution of commercial, personal injury and industrial disputes.

Facilitative mediation is closest to what is commonly labelled the 'pure' model of mediation, involving a process which focuses on interest-based problem solving. The mediator's main role in this model is to enhance the negotiation process and to encourage the parties to create an outcome around mutual interests. According to Boulle, this model of mediation is currently being practised in community, family, environmental and partnership disputes.

The *therapeutic model* aims for reconciliation of the disputants with a view to improving an ongoing relationship. The mediator's role incorporates the use of professional therapeutic techniques. Boulle claims that it is used in the resolution of family and matrimonial disputes.

By way of contrast, *evaluative mediation* has the objective of reaching a settlement according to the legal rights of the disputants. The mediator's role is described by Boulle as 'highly interventionist'. He questions the blur this creates between the mediator and arbitrator roles. This model is currently used in the resolution of commercial, personal injury, trade practices, anti-discrimination and matrimonial property disputes.

If mediation is being conducted as a facilitative process to assist disputants to reach their own agreement, it is difficult to see how loss could be foreseeable as a consequence of the mediator's function. As the mediator serves to enhance the negotiation process and to encourage the parties to create an outcome around mutual interests, there is no advice given or assessment made. In this model, the mediation process is not about fact-finding, but rather about perceptions. The mediator focuses on taking the parties through the process of problem-solving without making assessments about legal rights or substantive outcomes. If parties are legally represented in this process, any potential liability for loss suffered is even more unlikely to be found to rest with the mediator as the lawyers are specifically engaged to advise the parties regarding their legal rights and obligations and are likely to be held primarily responsible for advice of that nature.

Similarly, in the therapeutic model where the mediator engages in 'relationship therapy', it is difficult to envisage foreseeable loss arising as a consequence of the mediation. As the likelihood of legal representation in this model is diminished, the counselling nature of the mediator's role suggests that any liability is more likely to arise from negligence as a professional therapist than as a mediator.

Where settlement mediation is being conducted, there may be a stronger case for arguing that a loss was reasonably foreseeable, arising from the fact that the mediator is more likely to have an appreciation of the potential loss that may be suffered by

a party if they are persuaded to compromise to the extent that they make irrational concessions to the other side. On the other hand, if the parties are legally represented, it would seem unlikely that loss would be foreseeable as a consequence of any act of the mediator, but rather that a duty of care would lie with the lawyers engaged to advise the disputants as to their legal rights throughout the process.

Subject to the argument already canvassed (viz, that a substance-oriented process may not come within the definition of mediation), it is Boulle's evaluative model which appears to present the most likely process that would give rise to a duty of care in negligence. If a mediator uses his or her substantive expertise to advise the parties erroneously on their likely range of legal outcomes, the loss may be reasonably foreseeable.

(b) Indeterminancy of liability

Indeterminate liability is a factor which will ordinarily defeat a claim that a defendant owed a duty of care to a person such as the plaintiff.[28] In the event that the loss is held to be foreseeable, then, at least in the case of a claim by a party to the mediation, there is no real issue of indeterminacy. The position might be different if a third party to the mediation attempted to claim damages for economic loss arising out of the mediation – eg, a subcontractor or creditor of a party to the mediation.[29]

(c) Autonomy of the individual

Autonomy is most relevant in cases where a party is protecting or pursuing his or her commercial business interests and reflects the common law's concern with the autonomy of the individual and freedom of choice.[30]

In the case of mediators, autonomy may be relevant in determining whether a duty should exist. The term 'mediation' is extremely broad, generally describing a 'structured process involving a third party who is impartial as between the parties and who strives to remain as neutral as possible'.[31] Mediation theory recognises that a single definition of the process is difficult because of the varying models in use and accepts that the role of the third party (the mediator) may vary considerably. For these reasons, a court is likely to be reluctant to impose limitations on the potential flexibility of the mediation process by finding that a generalised duty of care will arise irrespective of the facts and circumstances of the individual case.

28. *Woolcock* above n 17, para 77.
29. Ibid.
30. Ibid, para 78.
31. H Astor & C Chinkin *Dispute Resolution in Australia* 2nd edn (Sydney: Butterworths, 2002) 135.

(d) Vulnerability to risk

In *Woolcock Street Investments,* McHugh J said:

> In this context, vulnerability to risk means not that the plaintiff was exposed to risk but that by reason of ignorance of social, political or economic constraints, the plaintiff was not able to protect him or herself from the risk of injury.[32]

Thus, where the parties to a mediation are legally represented, as in *Tapoohi v Lewenberg,* it is unlikely that they will be held to be 'vulnerable'. This is especially so in the process-oriented models of mediation as opposed to substance-oriented models. Furthermore, it may be that it is possible to exclude liability in the mediation agreement. It is likely that this form of protection is subject to limitations. For example, a court would be unlikely to uphold such a clause in the face of fraud or misleading or deceptive conduct on the part of the mediator.[33]

(e) Knowledge of the risk and its magnitude

The court is more likely to impose a duty in cases were the defendant actually knew of the risk and its magnitude.[34] The model of mediation used will again be of critical importance in this determination.

It is difficult to see how loss could be foreseeable as a consequence of the mediator's function in the facilitative and therapeutic models of mediation. However, where settlement or evaluative mediation are being practised, there may be a stronger case for arguing that the loss was reasonably foreseeable. This is because in the second two models the mediator is more likely to have an appreciation of the potential loss that may be suffered by a party if they are persuaded to compromise unwisely.[35]

(f) Other policy arguments

It is in the public interest that disputes be settled wherever possible. In *Studer v Boettcher,*[36] the court commented that:

> [Practitioners] should not be unduly inhibited in making a decision to settle a case by the apprehension that some judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the bench, may tell him he should have done otherwise.[37]

---

32. *Woolcock* above n 17, para 80.
33. R Carroll 'Mediator Immunity in Australia' (2001) 23 Syd L Rev 185, 194.
34. *Woolcock* above n 17, McHugh J para 87.
35. For a more comprehensive analysis, see 'Reasonable foreseeability of loss' above pp 88-90.
36. [2000] NSWCA 263 (24 Nov 2000).
37. Ibid, para 62 quoting *Karpenko v Parvian, Courey, Cohen and Houston* (1981) 117 DLR (3d) 383, 397.

Despite suggestions that mediators ought to be afforded the same immunity that judges have in the performance of their judicial functions, the closest example of such a case is the extension of immunity to a referee appointed under the rules of the Supreme Court of New South Wales in *Najjar v Haines*.[38] The major point of distinction is clearly that a referee, like an arbitrator or judge, performs a determinative, not a facilitative, role. As Carroll has argued:

> By definition, a mediator does not sit in judgment on the parties or determine the outcome of the mediation so there should be no need for immunity; and to the extent that the mediator does perform quasi-judicial functions, can they be said to be a mediator at all?[39]

It is ironic that the model of mediation that would seem to most closely align with the determinative role of a judge or arbitrator is the evaluative or substance-oriented model which, as Carroll suggests, is not a form of mediation at all.

Other policy arguments against finding that a duty of care arises focus on judicial efficiency, the need for finality in litigation and the concern that potential liability in negligence would be a crippling disincentive for mediators .[40]

Where mediation has been incorporated into a judicial framework, it is likely that it is intended to divert disputes from the court. To enable parties to re-open issues that have been dealt with in mediation creates what Astor calls 'satellite litigation',[41] that is, litigation arising from a process intended to avoid litigation. It could also be argued that if mediators were exposed to potential liability in negligence, those mediators who work outside the judicial process in neighbourhood and community centres, and who may have no legal training, would not be in a position to afford professional indemnity insurance and might therefore discontinue practice in this very important but unprofitable area of community service. The balancing public interest concern is, of course, the need for those who have suffered injustice at the hands of a mediator to have a right of redress.

Whilst judges and barristers have traditionally been afforded immunity from civil action, it is clear that other legal practitioners have not. A possible analogy may lie, therefore, in those cases where the parties have sought an extension of the limitation period and the courts have not granted the extension but sent them off to sue their lawyers for missing a time limit.[42] From comments made in such cases, it appears that the courts have been influenced against expanding the circumstances in which an

38. (1991) NSWLR 224. For a more detailed discussion, see Carroll above n 33; Astor & Chinkin above n 31.
39. Carroll above n 33, 207.
40. For a more detailed discussion, see Astor & Chinkin above n 31, 190.
41. Astor & Chinkin ibid.
42. See eg *Tsiadis v Patterson* [2001] VSCA 138, paras 26–27.

extension would be granted on the basis that the applicant would not be left without a remedy but would have an alternative claim against their lawyers who are covered by professional indemnity insurance. In cases where legally represented parties have suffered loss in mediation, it is arguable that the same line of reasoning may be applied.

Breach of duty

In the event that a duty of care on the part of the mediator is established, the plaintiff must prove that the mediator's conduct failed to meet the requisite standard. The general standard of care required is that of a reasonable person in the defendant's position.[43] In some jurisdictions, legislation enshrines the traditional common law position that a person who professes to have a certain skill will be compared with a reasonable person with that skill.[44] Hence, where a mediator holds himself or herself out as an expert in a particular area, as was alleged in *Tapoohi v Lewenberg,* a higher standard will be expected.[45]

So far as professionals are concerned, recent legislative changes generally provide that no liability will arise if the professional was acting in accordance with accepted standards of professional practice in the field[46] unless that practice is determined to be irrational.[47] For example, the Civil Liability Act 2002 (NSW) states:

> **s 5O: Standard of care for professionals**
>
> (1) A person practising a profession ('a professional') does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

43. Civil Law (Wrongs) Act 2002 (ACT) s 43(1); Civil Liability Act 2002 (NSW) s 5B(1); Civil Liability Act 2003 (Qld) s 9(1); Civil Liability Act 1932 (SA) s 31; Civil Liability Act 2002 (Tas) s 11(1); Wrongs Act 1958 (Vic) s 48(1); Civil Liability Act 2002 (WA) s 5B(1).
44. Civil Liability Act 1932 (SA) s 40; Wrongs Act 1958 (Vic) s 58. Although this is not expressly provided in other jurisdictions, this is probably the correct interpretation of 'reasonable person *in the position of* the person' in the sections referred to above.
45. Boulle above n 27, 250; *Woodridge v Sumner* [1963] 2 QB 43, 68; discussed by A Stickley 'Pinning Civil Liability Upon a Mediator: A Lost Cause of Action?' (1998) 19 Queensland Lawyer 95, 97.
46. Civil Liability Act 2002 (NSW) s 5O(1); Civil Liability Act 2003 (Qld) s 22(1); Civil Liability Act 1932 (SA) s 41(1); Civil Liability Act 2002 (Tas) s 22(1); Wrongs Act 1958 (Vic) s 59(1). In Western Australia and the Australian Capital Territory there are no specific provisions concerning the liability of professionals.
47. Civil Liability Act 2002 (NSW) s 5O(2); Civil Liability Act 2003 (Qld) s 22(5); Civil Liability Act 1932 (SA) s 41(2); Civil Liability Act 2002 (Tas) s 22(2); Wrongs Act 1958 (Vic) s 59(2). Different wording is used in the exceptions in Victoria and Queensland: Wrongs Act 1958 (Vic) s 59(2) ('unreasonable); Civil Liability Act 2003 (Qld) s 22(5) ('irrational or contrary to written law').

> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

It is not clear whether mediators would be regarded as 'professionals' for the purposes of these provisions as the legislation does not define a 'professional' other than to state that he or she is a person practising a profession.[48] As Ipp J has commented:

> And what is a profession? Should, for example, psychologists, herbalists, acupuncturists, chiropractors, osteopaths, podiatrists and other groups on the fringes of the medical profession have the benefit of this rule? What about other professions, such as engineers, architects, quantity surveyors, lawyers? And how is a profession to be defined? It is of interest that in New South Wales the panel's recommendation has been made applicable to all professions but the statute does not define a profession.
>
> One may also ask why the rule should only apply to professions. Should it not also apply to trades? Why should neurosurgeons have the benefit of the rule and not electricians. One answer may be that only those occupations governed by strict self-regulatory disciplines, which have strong ethical requirements and a tradition of service to the community, should be able, to the limited degree proposed, to set their own standards. There can be little doubt that, in all jurisdictions, these issues will require resolution in the near future.[49]

As previously noted, there is not one definitive model of mediation in Australia, although general principles as to the conduct of mediations can be stated.[50] This makes the determination of what constitutes competent professional practice more complex. Boulle has commented:

> At this stage in the development of mediation practice, it could still be difficult to say whether a mediator had fallen below the accepted minimum level of professional practice expected of reasonably competent professionals.[51]

Legislative changes which cap the liability of professionals were passed by the Commonwealth parliament in June 2004. These changes require professionals to hold insurance, undergo professional education and have in place complaints and disciplinary mechanisms, in return for access to capped liability for economic loss. If mediators are regarded as professionals for the purposes of this legislation and wish to take advantage of the caps on liability, regulation will be necessary.[52]

---

48. Wrongs Act 1958 (Vic) s 57 defines a professional as 'an individual practising a profession'. See also Civil Liability Act 2003 (Qld) s 20 ('person practising a profession').
49. D Ipp 'Negligence: Where Lies the Future?' (2003) 23 Aust Bar Rev 158.
50. Discussed H Astor & C Chinkin 'Mediator Training and Ethics' (1991) 2 ADRJ 205, 216.
51. L Boulle 'Liability of Mediators' (paper presented at the First International Conference in Australia on Alternative Dispute Resolution, Sep 2003) 8.
52. L Boulle 'Emerging Standards for Lawyer Mediators' (1993) QLSJ 575, 586.

Damage

The plaintiff must establish causation, both in fact and law. The tests of causation are now enshrined in legislation. For example, the New South Wales provision states:

> **s 5D: General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm ('factual causation'), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ('scope of liability').[53]

Pursuant to section 5E, the plaintiff bears the onus of proving causation on the balance of probabilities.[54]

In *Ruddock v Taylor,*[55] Ipp J noted that at common law there are 'two fundamental questions involved in the determination of causation in tort':[56]

> The first relates to the factual aspect of causation, namely, the aspect that is concerned with whether the negligent conduct in question played a part in bringing about the harm, the subject of the claim.... The second aspect concerns 'the "appropriate" scope of liability for the consequences of tortious conduct.' In other words, the ultimate question to be answered when addressing the second aspect is a normative one, namely, whether the defendant *ought* to be held liable to pay damages for that harm.[57]

His Honour noted that this approach to causation formed the basis of section 5D of the Civil Liability Act 2002 (NSW).[58]

In most cases, the first limb essentially requires an application of the 'but for' test.[59] The second limb requires a balancing of relevant factors to determine whether the defendant should be liable. These factors might include:

---

53. Similar provisions have been enacted in other jurisdictions. See Civil Law (Wrongs) Act 2002 (ACT) s 45; Civil Liability Act 2002 (NSW) s 5D; Civil Liability Act 2003 (Qld) s 11; Civil Liability Act 1932 (SA) s 34; Civil Liability Act 2002 (Tas) s 13; Wrongs Act 1958 (Vic) s 51; Civil Liability Act 2002 (WA) s 5C.
54. Civil Law (Wrongs) Act 2002 (ACT) s 46; Civil Liability Act 2002 (NSW) s 5E; Civil Liability Act 2003 (Qld) s 12; Civil Liability Act 1932 (SA) s 35; Civil Liability Act 2002 (Tas) s 14; Wrongs Act 1958 (Vic) s 52; Civil Liability Act 2002 (WA) s 5D.
55. (2003) 58 NSWLR 269.
56. Ibid, 85
57 Ibid (footnotes omitted).
58. Introduced by Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW) s 5D.
59. *Ruddock v Taylor* above n 55.

(a) the significance of other contributing causes;[60]
(b) social and moral considerations;[61]
(c) conforming with legislative policy restricting liability in new areas of negligence;[62] and
(d) availability of other remedies.[63]

In determining causation, the relevant model of mediation is likely to be a critical factor and the policy considerations identified above in the discussion as to whether a duty will be imposed will also be relevant.

Where the parties are also independently legally represented, as in *Tapoohi v Lewenberg,* the causation question becomes more clouded. This is demonstrated by the case of *Studer v Boettcher.*[64] In that case, the appellant had compromised litigation in a mediation on the advice of his solicitor (the respondent) and had subsequently sued the solicitor for damages in negligence. The appellant claimed that he had been unduly pressured into accepting a compromise and/or that the respondent had been negligent in preparing for the mediation because he had failed to make a proper assessment of the respective cases and caused the appellant to compromise on improvident terms. The appellant's case required him to establish both that the respondent had given him bad advice and that he had been negligent in doing so.

The New South Wales Court of Appeal held that the respondent had acted with proper care and skill in the preparation for and the conduct of the mediation and that his advice to compromise on the available terms was sound and in the best interests of the appellant. In addition, it was not established that the respondent had overlooked any relevant document, fact or legal argument in his client's favour.

In considering the appropriate test of negligence, the Court of Appeal stated that advice to compromise litigation will not be considered negligent merely because a court may subsequently decide that a more favourable outcome might have been obtained at a later stage in the proceedings or at judgment. The court also acknowledged that a wide range of factors may need to be considered in giving such advice, including the fact that disagreements on the law occur even in the judgments of the High Court, that it is often impossible to predict the outcome of litigation with a high degree of confidence, the difficulty in predicting the performance of witnesses at trial, and the various costs of litigation in terms of time and money.[65]

Fitzgerald JA went on to consider the role of the lawyer in advising on a compromise in some detail:

60. *Harvey v PD* (2004) 59 NSWLR 639.
61. Ibid.
62. *Harriton v Stephens* (2004) 59 nSWLR 694, Ipp JA; cf Mason P.
63. Ibid.
64. Above n 36.
65. Ibid, para 63.

> Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interests. The respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision.[66]

In anticipating the duty of care which might be attached to a mediator this decision is helpful in three ways. First, as it is the lawyer's duty to give his or her opinion on their client's case, any opinion given by a mediator in an evaluative mediation should be either supported or balanced by the legal practitioners' views. In an evaluative mediation involving legal representation there would therefore be at least three views as to the likely legal outcome and the persuasiveness of those views would be likely to be affected by many factors. The experience and reputation of the mediator, whether the mediator has been chosen by the legal representatives of the parties (which is most likely in mediations occurring outside the court-annexed system), the prior experience of the parties and the complexity of the case are all likely to be factors which may weaken the chain of causation between comments made by the mediator and the ultimate decision of the parties to compromise. If the mediator is acting as an impartial facilitator and the disputants are in control of the outcome, then, as Chaykin states, the 'decision to enter into an agreement and resolve the dispute ultimately rests with the parties, not the mediator'.[67]

Secondly, since a lawyer representing a party in mediation is entitled to persuade their client to compromise in accordance with their opinion of the likely outcome, any persuasion offered by the mediator is less likely to be causative. Recent case-law suggests that it is not uncommon for mediations to span many hours in the quest for a negotiated settlement.[68] Thus, from a practical perspective, the task of proving that the persuasive comments that lead to the parties' decision to compromise came from the mediator alone is likely to be a daunting one.

Thirdly, the Court of Appeal's reference to the extreme difficulties faced by a legal advisor in attempting to predict the outcome of litigation is, in the writers' view, the task that is likely to be at the heart of a negligence action against a mediator.

---

66. Ibid, para 75.
67. A Chaykin 'The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation' (1986) 2 Ohio State Journal of Dispute Resolution 47, 65; discussed in Stickley above n 45, 98.
68. See *Pittorino v Meynert* [2002] WASC 76.

Where the plaintiff alleges loss as a result of negligent mediation, very clear evidence as to what the plaintiff would have done in the absence of negligence will be necessary. The civil liability legislation now specifically provides for this scenario. For example, in New South Wales, the relevant section states:

> **s 5D: General principles**
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
>
> (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.[69]

The difficulties of establishing what the plaintiff would have done if the mediator had acted differently are highlighted by *Lange v Marshall.*[70] In that case, it was held that the plaintiff failed to establish causation and in particular that any other settlement would have been accepted had the mediator acted differently.

CONCLUSION

The factors relevant to a determination of whether a mediator operating outside the protection of statutory immunity will be liable in negligence are numerous and complex. The identity and professional status of the mediator, the model of mediation being used, the terms of the retainer agreement between the parties and the complexity of the case are all likely to affect the outcome. Policy considerations will also play a significant role. In particular, the impact of recent parliamentary legislation limiting liability in negligence in response to a perceived 'insurance crisis' remains to be seen. The divergence of views in this regard is well illustrated by the judgments of Ipp J and Mason P in *Harriton v Stephens,*[71] a wrongful life case.

Ipp J stated:

> Generally speaking, at the present time, when legislatures throughout the country have legislated or have foreshadowed legislation restricting liability for negligence

69. See also Civil Law (Wrongs) Act 2002 (ACT) s 45; Civil Liability Act 2003 (Qld) s 11; Civil Liability Act 1932 (SA) s 34; Civil Liability Act 2002 (Tas) s 13; Wrongs Act 1958 (Vic) s 51; Civil Liability Act 2002 (WA) s 5C.
70. 622 SW 2d 237 (1981) Mo Ct App; discussed in Stickley above n 45, 98.
71. Above n 62.

> ... it would be quite wrong to expand, by judicial fiat, the law of negligence into new areas.[72]

This approach was rejected by Mason P:

> Ipp J suggests that acceptance of the appellants' claims involves the common law going beyond the 'keep out' signs erected by Parliaments throughout the country in their recent response to the pressures on insurance funds said to stem from the march of tort law. This, with respect, is extra-legal analysis. I do not deny that legislation may exercise a gravitational pull upon the development of legal principle in particular fields.... But I know of no legal principle that directs the common law to pause or to go into reverse simply because of an accumulation of miscellaneous statutory overrides. Parliaments have frequently overridden or modified fundamental legal doctrines such as legal client privilege, self-incrimination privilege and natural justice. But the common law has stood resolute to its fundamental principles except when clearly expressed legislation indicates that they must be abandoned in particular contexts.[73]

> New categories of wrong may generate novel remedial responses. The maxim that the law will not permit a wrong to go without a remedy is not a licence to write a blank cheque, but it reflects the way that the law has often responded when faced with the need to decide whether to accept or reject a novel claim.[74]

When is a mediator not a mediator? Perhaps the answer is when the role of the mediator is extended beyond a purely facilitative one to include obligations to advise and protect disputants, as was alleged in *Tapoohi v Lewenberg*.

When will a mediator operating outside the protection of statutory immunity be liable in negligence? If the plaintiff's case in *Tapoohi v Lewenberg* is ultimately proved at trial, the third party proceedings may provide some guidance in relation to this issue. The writers await the outcome of that trial, but also acknowledge that it would no doubt be considered to be in the public interest for a compromise to be reached through mediation.

---

72. Ibid, para 337 referring to JJ Spigelman 'Negligence and Insurance Premiums: Recent Changes in Australian Law' (2003) 11 Torts LJ 291; Commonwealth *Reform of Liability Insurance Law in Australia* (Canberra: AGPS, Feb 2004).
73. Ibid, para 164.
74. Ibid, para 167.