

# **INTERNATIONAL BAR ASSOCIATION**

**AUCKLAND, NEW ZEALAND**

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## **RECENT DEVELOPMENTS IN INTERNATIONAL MEDIATION**

### **LIABILITY OF MEDIATORS IN NEW ZEALAND**

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## **MEDIATOR LIABILITY IN NEW ZEALAND**

### **BACKGROUND**

There are generally two areas of mediator liability. The first (and the focus of my research) is legal liability. The second is professional liability. I imagine as mediation develops as a profession and accreditation becomes more widespread, professional liability under accrediting bodies will become a more pertinent issue.

There are a number of possible areas of legal liability for mediators. The central ones being negligence, breach of contract, and breaches of relevant statutes, such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993.

The issue of mediator liability in these areas has not been dealt with determinatively by the courts in New Zealand. However, it is widely recognised that there will be considerable difficulties in establishing proof of these actions against a mediator. Despite this, the issue of immunity is still an important one.

### **PROTECTIONS FROM LIABILITY**

#### **Statute**

Mediators working under a statutory framework within public sector agencies are generally afforded immunity from liability by the statute under which their mediation services are provided.

#### Residential Tenancies Act 1986

Section 76(9)(b) states that in the performance of their duties, functions and powers under the Act, Tenancy Mediators shall be entitled to immunity from suit in respect of any act or matter done or omitted to be done by them in good faith.

#### Te Ture Whenua Maori Act 1993 (Maori Land Act 1993)

Section 30D of the Act provides for the appointment of mediators. A mediator can be appointed by the parties or by the Judge, if the parties are unable to agree. There is no provision dealing with the liability of these appointed mediators. However, subsection 5 states that a Judge, other than the Judge addressing an application, may be a mediator and that in acting as a mediator they are to be treated as acting judicially and retain the same immunities as when they are acting as a Judge.

### Human Rights Act 1993 and Health and Disability Commissioner Act 1994

These two Acts contain the same immunity provision. Section 130(2) of the Human Rights Act and s65(2) of the Health and Disability Commissioner Act state that no proceedings, civil or criminal, shall lie against any person to whom the section applies (by virtue of subsection 1, this includes any person engaged or employed in connection with the work of the Commissioner) for anything he or she may do or report or say in the course of the exercise or intended exercise of his or her duties under the Act, unless it is shown that he or she acted in bad faith.

### Employment Relations Act 2000

This Act does not contain a clear or specific provision on mediator immunity. The closest section is s152(1), which states that no mediation services may be challenged or called into question in any proceedings on the ground that the nature and content of the services was inappropriate or that the manner in which the services were provided was inappropriate.

### Weathertight Homes Resolution Services Act 2002

Section 61(1) provides that a mediator is not under any civil or criminal liability for anything done, or omitted to be done, in the course of the exercise or intended exercise of any of their functions, duties or powers under the Act. Section 61(2) states that this does not exclude liability for anything done or omitted to be done in bad faith.

### The District Court Rules

These do not provide for mediation. They do provide for settlement conferences that can be convened by the court before a hearing commences for the purpose of negotiating a settlement. These are presided over by judges (Rule 438).

### High Court Rules

Rule 442 of the High Court Rules provides that the Court may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution agreed to by the parties. There does not appear to be specific protection.

### Family Court Rules 2002

Rule 52(1) provides that a party to proceedings or the judge may ask the Registrar to convene a Family Proceedings Act 1980 mediation conference or Children Young Persons, and Their Families Act 1989 mediation conference, chaired by a Judge.

Presumably when acting in this role, the judge will be protected from liability by the standard judicial immunities.

Following a recent Law Commission Report, a pilot of non-judge lead mediation is to be run in the Family Court next year. There are no details of how this will operate available at this stage.

## **Common Law**

Most private mediators use immunity clauses in their Agreements to Mediate to protect themselves against the possibility of legal liability.

One recent New Zealand case looked at the area of mediator liability and particularly these immunity clauses. This was the case of *McCosh v Williams* (CA, 12/8/03; Keith, Blanchard and Tipping JJ, CA275/02).

In the High Court, it was found that the particular immunity clause in the Mediation Agreement protected the mediator from negligence liability in respect to a summary determination he made under a clause in the settlement agreement following mediation. The Court stated that the negligence claim against the mediator failed because of the clause. They noted that this protection clause was not against public policy.

However, the Court of Appeal took a different approach. Although they dismissed the appeal, their view of the immunity clause reduced the blanket protection it was afforded by the High Court.

They found that the mediator exceeded his jurisdiction in making his summary determination. However, although they considered him in error in this respect, they said he did not depart from the standard of care expected of a reasonable careful mediator and was therefore not negligent.

The Court went on to say that because they hadn't found grounds for negligence, the mediator did not need to rely on the exclusion clause. However, they noted for the record that they did not agree with the High Court that the clause would have provided protection from liability for negligence in respect of the summary determination, as that action was not related to the mediation as the clause required. Rather, it occurred after the mediation was concluded by execution of the settlement agreement and in pursuance of the settlement agreement.

The Court further noted that clear and unambiguous language would be required to provide effective immunity beyond the scope of the mediation process. They said that on its natural meaning, the clause in question did not extend protection to a process of adjudication concerning a settlement agreement.

However, the Court went on to highlight some of the difficulties in establishing liability in the first place. They noted, in terms of duty of care and causation,

that even if a plaintiff could establish that a mediator's conduct fell short of the appropriate standard of care, they would still need to show that in the circumstances they were owed a duty of care to protect them from the particular losses that arose. The Court also pointed out that any proven breach of duty must then be proved to have caused the claimed losses. They identified these issues as matters of some difficulty.

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