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Bond Dispute Resolution News Volume 16

BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

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Recent Activities of Bond University Dispute Resolution Staff

Professor John Wade taught a five day mediation course at Pepperdine University, California 19-23 May 2003, see evaluations below:

http://www.bond.edu.au/law/centres/drc/feedback/usa2.htm

Professors John Wade and Laurence Boulle led the following courses, click the link to read the evaluations:

Basic Mediation Course in conjunction with Leo Cussen Institute, Melbourne, 17–19 October 2003.

http://www.bond.edu.au/law/centres/drc/feedback/melbourne.htm

Basic Mediation Course at the Marriott Resort Surfers Paradise, 4–6 December 2003.

http://www.bond.edu.au/law/centres/drc/feedback/goldcoast.htm

LAURENCE BOULLE

	Prepared a paper for the 13th Commonwealth Law Conference in Melbourne in 2003 entitled, 'If we can't take mediation out of the court, should we take the courts out of mediation'. The paper was presented on his behalf in a session chaired by Henry Jolson QC and included Professor Tania Sourdin of La Trobe and Justice Doubell of the South Australian Supreme Court.
28 November	The Council of the National Alternative Dispute Resolution Advisory Council held its November meeting at Bond University under the chairmanship of outgoing chair Laurence Boulle. A lunch was attended by the new Chair, Justice Murray Kellam of the Victorian Supreme Court, DRC staff and members of the Bond Law School, and a number of ADR practitioners from the Gold Coast and Brisbane, including Ray Rinaudo, Nadja Alexander, Bernadette Rogers, John Hertzberg, Julie Walker and Mieke Brandon.
	Laurence Boulle has been appointed a part-time member of the National Native Title Tribunal for a period of three years and will be sworn in by Justice Martin

	Moynihan of the Queensland Supreme Court on 3 March 2004.
January semester	The Bond Law School is offering a post-graduate course in On-line Dispute Resolution for the first time. The course will examine the technological, dispute resolution and legal aspects of the newest form of dispute resolution. Students will be involved in two international competitions, one in e-negotiation and the other in e-mediation, will undertake a practicum with a soft-ware company on the Gold Coast, and as part of their assessment will development a design proposal for an on-line DR system in a chosen area. Course co-ordinate is Laurence Boulle.
	A member of the organising committee for the Third Annual U N Forum on On-line Dispute Resolution to be held in Melbourne from 5-6 July.

PAT CAVANAGH

December 2003	Delivered an address on "How different is mediating for the World Bank to recover loans, and for Legal Aid in family cases? Answer – not much", Marriott Hotel, Gold Coast.
January 2004	Returned to Australia temporarily from mediating for the World Bank in Jakarta, Indonesia.

JOHN WADE

11 October	Advanced Mediation skills workshop; Legal Aid, Sydney.
28 November	Presented Negotiation workshop at Freehills Lawyers, Melbourne.
8 January	Was interviewed on National Public Radio, Dallas, Texas together with Tony Picchioni and Tom Blackwood.
8 January	Delivered public lecture at SMU on "Bargaining in the Shadow of the Tribe" for the Southwest Texas Conflict Resolution Organisation.
6-10 January	Led a five day mediation course at SMU, Dallas, Texas.

BEE CHEN GOH

8-10 January	Attended 'The Ideal Human Environment' Seminar, organized by the IHE Foundation, Adelaide.
11 January	Attended 'The Ideal Family Environment' Seminar and Workshop, organized by the IHE Foundation, Adelaide.
	Bee Chen has been invited by the IHE Foundation to be part of their research team into conflict solving.

Recent and Forthcoming Publications

- **Laurence Boulle** has contributed a chapter to a forthcoming book in the 'Law in Society' series, to be edited by Tania Sourdin of La Trobe University, entitled *A Partnership of Systems - Litigation and Alternative Dispute Resolution.* Publication by Federation Press in November 2003.
- **Laurence Boulle** has a chapter in a recent book published by Victoria University, Melbourne, and the Department of Justice of the PRC. The book is based on the presentations of the first Sino-Australian Conference on ADR and the Rule of Law hosted by the Chinese Minister of Justice in Beijing 2002.
- **J H Wade,** "Arbitral Decision-Making in Family Property Disputes - Lotteries, Crystal Balls and Wild Guesses" (2003) 17 *Aust J of Family Law* 224-246.

- **J H Wade,** "Duelling Experts in Mediation and Negotiation" (2004) *Conflict Resolution Q* (forthcoming).
- **J H Wade,** "Bargaining in the Shadow of the Tribe and Limited Authority to Settle" 2004 *Bond Law Rev* (forthcoming).

Forthcoming Activities

February – April 2004, Negotiation workshops led by John Wade at Blake Dawson Waldron, Brisbane, Sydney, Melbourne and Canberra.

April, ADR Training for Judiciary, Fiji.

13-14 May 2004, Sydney Family Law Masterclass, Case study on Mediation of High Conflict Family Disputes – John Wade together with Susan Purdon.

23-28 May 2004, Mediation Course, Law School, Pepperdine University, Malibu, California.

6-9 June 2004, The International Association of Conflict Management Conference (IACM), Pittsburgh, USA
http://www.andrew.cmu.edu/org/IACM2004/

30 June–2 July 2004, 7th Annual Mediators' Conference "True Talking, Forward Walking", Darwin, Australia. Email: info@thebestevents.com.au

Forthcoming Courses of the Dispute Resolution Centre

Bond University Short Courses				
Revised date **22-24 April**	**Marriott Resort, Surfers Paradise**	**Short course – 3 days**	**Basic Mediation Course*** **Download registration form**	**Boulle, Wade**
24-26 June 2004	**Marriott Resort, Surfers Paradise**	**Short course – 3 days**	**Basic Mediation Course***	**Boulle, Wade**
5-8 August	**Sheraton Noosa**	**Short course – 3 days**	**Advanced Mediation Course***	**Boulle Wade**
*** This course also has a Foundation Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)**				

Thoughts and Themes

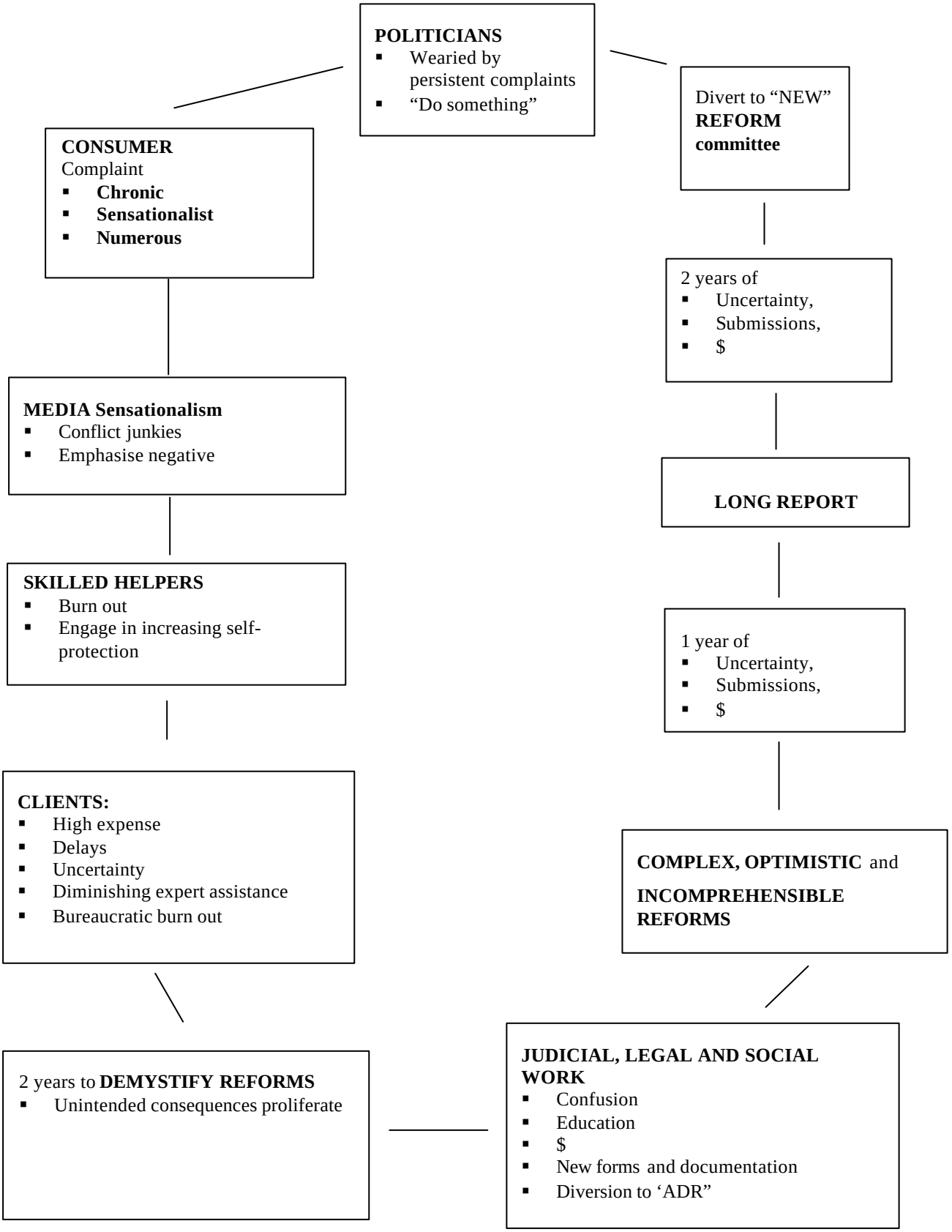
COLLABORATIVE LAWYERING - SOME PRELIMINARY THOUGHTS FOR AUSTRALIA

J H Wade

(A) Collaborative Lawyering – Sociological and Historical Contexts in Australia

Unceasing Change

In Australia and elsewhere, private and public responses to family conflict have been changing constantly over the last 45 years. The attached diagram illustrates the increasing cycle of change. Many lawyers suffer from “reform fatigue”.


POLITICIANS
Wearied by persistent complaints
"Do something"
CONSUMER
Complaint
Chronic
Sensationalist
Numerous
Divert to "NEW" REFORM committee
2 years of
Uncertainty,
Submissions,
$
MEDIA Sensationalism
Conflict junkies
Emphasise negative
LONG REPORT
SKILLED HELPERS
Burn out
Engage in increasing self-protection
1 year of
Uncertainty,
Submissions,
$
CLIENTS:
High expense
Delays
Uncertainty
Diminishing expert assistance
Bureaucratic burn out
COMPLEX, OPTIMISTIC and INCOMPREHENSIBLE REFORMS
2 years to DEMYSTIFY REFORMS
Unintended consequences proliferate
JUDICIAL, LEGAL AND SOCIAL WORK
Confusion
Education
$
New forms and documentation
Diversion to 'ADR"

As legislation, funding and courts change, so do the dispute resolution products, in new or recycled forms. These have included a variety of forms of counselling, home reports, round table conferences, case appraisal, legal aid conferences, arbitration, a variety of forms of mediation, case management, pathways to justice, court annexed conciliation etc.

Each new product tends to go through a predictable "product" cycle as follows:

Multiple horror stories and even statistics about the disadvantages of "old" dispute resolution services; design of new product in USA; wonder stories from USA; charismatic presenters at the multiple Australian family law conferences; no systematic surveys to back up any wonder stories; disorganised anecdotal resistance by older practitioners; zealots and disciples for government funding of a new product; training, training, training; books, tapes, videos; accreditation debates; charismatic pioneers advertising the product and writing articles which footnote each other; false comparisons of worst "old" practices to best "new" service; little or no research; many anecdotal success stories; gradual disillusionment of clients and practitioners as horror stories, expense, delay, unsatisfied customers emerge; subspecies of the product emerge; law reform commission questions; a few judges are asked to rule on procedure in the new product; nervousness and insurance emerges; less charismatic scientific researchers begin to publish the traditional questions about definitions and evidence; quality management guidelines and regulations emerge; a few hard working and respected practitioners remain in business; the new product and its subspecies become "old"; its alleged advantages and disadvantages become part of orthodox literature, research and gossip; practitioners revert to more traditional services; universities begin to teach about the product; the charismatic pioneers die, disappear or move onto another product; the conference circuit looks for new products; the critiques of the now "old" products escalate in newspapers, media and gossip; (repeat the cycle).

This cycle of change is normal, inevitable and has some helpful features.

Collaborative lawyering comes to Australia in this historical, sociological and psychological context. Presumably it will follow a similar cycle and collaborative lawyering and its offspring will find a modest place in the catalogue of dispute resolution services. A few respected and hard-working legal practitioners will eventually regularly provide the service of collaborative lawyering in some corners of this country.

(B) What is "Collaborative Lawyering"?

Like all new or old movements, processes or ideas, collaborative lawyering has a "core", and then a huge number of potential variations. Like mediation, psychology, lawyering and plumbing, it has an ABACUS of variables.[1]

One possible description of collaborative lawyering is a diplomatic process of joint problem-solving by lawyers and clients which includes the necessary requirement that the lawyers and other helping experts contract never to act as litigators if the diplomacy is unsuccessful.

[1] Every "new" process has multiple steps which can be varied occasionally, frequently or never like beads on an abacus based on habit, ideology, marketing or diagnostic choice. See J H Wade, "Mediation – The Terminological Debate" (1994) 5 *Australian Dispute Resolution J* 204.

The core element, to which many variations can be attached, is that by contract or court order, the lawyers and other experts are precluded from further involvement or income-earning if the conflict is not resolved by diplomacy.[2] They are employed only as skilled diplomats, and cannot switch hats to another role as advocates or warriors. In Australia, this would be a unique structural experiment by limiting the role of lawyer to an exclusive negotiator-problem solver.

(C) Alleged Advantages and Disadvantages

This core structural limitation on the role of lawyers and helpers, **potentially** has the following advantages and disadvantages:

Alleged Advantages for Clients, Lawyers and Society

(1) Places pressure on collaborative lawyers to upgrade their skills and processes in relation to communication, problem solving and diplomacy.

(2) Removes **one** conflict of interest between lawyers and clients, namely that even if a lawyer manages negotiations badly or clumsily, (s)he is not sacked. Rather, (s)he is paid well as a consequential litigator.

This profitable sequential multi-skilling is like a doctor saying: "Even if I poison you with inappropriate drugs, I still get the well-paid job as your stomach-pumping restorative surgeon".

[N.B. However collaborative lawyering brings new lawyer-client conflicts of interests of its own, familiar to the mediation movement. For example, "as long as I keep negotiating, I keep getting paid".]

(3) Assists to market lawyering services to clients who are suspicious of "churning" and inflammatory profit-making by aggressive lawyers. A collaborative lawyer can honestly market himself/herself by saying "I will lose my client/my income/my reputation if I am aggressive. Moreover, I will lose all of these if I cannot respond very skilfully and manage any aggression from other lawyers, their experts and clients".

(4) Like mediation and negotiation, some training and role modelling in collaborative lawyering will have a spill-over effect into other areas of legal practice. Lawyers will incorporate some of the diplomacy skills back into their traditional negotiation-problem solving-litigation practices.

(5) All new movements have a series of important benefits including enthusiasm, publicity, hard work, colleagiality, skill development, reinvigoration of jaded practitioners, increase in competition, research, self reflection, and conference euphoria. All of these benefits also have dark sides.

(6) Ideally, a collaborative lawyer might be the "first stop" for a person in conflict. (Similar hopes are expressed by specialised lawyers and mediators). Therefore there may be less escalation of the conflict at the time of this early diplomatic intervention.

(7) All the other alleged benefits and skills of collaborative lawyering appear to be similar to the claims and skills of the various kinds of negotiation, round table conferences, specialist family law accreditation, counselling, mediation, conciliation, early neutral evaluation and arbitration. These benefits include

[2] See P Tesler, *Collaborative Law*, ABA, 2001; *Family Mediation News*, Summer 2003.

client control, client empowerment, preservation of long term relationships, less expense, less delay, less uncertainty, less stress, more focus on the interests of children, less publicity, more creative outcomes, sense of being listened to, more informed decision-making, early rather than late intervention, early rather than late resolution, higher compliance rates, more job-satisfaction for skilled-helpers etc.; and standard skills include preparation, planned ritual, active listening, reframing, care with language, structured meetings with key players present, coaching of clients, etc.

Only a few of these predictable anecdotal claims have been confirmed by extensive research in relation to certain types of structured counselling and problem-solving models of mediation.[3] It is likely that the skilled "collaborative lawyers" who are regularly employed exhibit the same outstanding communication skills shown by other skilled and regularly employed lawyers and mediators.

The anecdotal success stories related to collaborative lawyering raise the classic questions attached to any new euphoric service product. "Success" – compared to what? What control groups? How is "success" defined? How is "success" measured? What factors apart from the new process are possibly/probably causing "success"? Are the worst of the old products being compared with the best of the new? How will the new product survive the normal ageing and institutionalisation processes?

(8) Who previously did the dispute resolution work for the small niche of families who now employ collaborative lawyers? Is the answer that they employed no lawyers, but rather acted for themselves? If so, then collaborative lawyering is skilfully marketing dispute resolution services to a new group, who formerly exited the pyramid of conflict without professional services.

(9) Disciples of collaborate law will bring some refined diplomacy skills into certain geographical areas and cultures which have been relatively untouched by various waves of mediation and mandatory early conferencing.

(D) Alleged Disadvantages of Collaborative Lawyering for Clients, Lawyers and Society

The core structural limitation on lawyers and other experts from "changing hats" from diplomat to formal advocate potentially has the following disadvantages.

(1) It is arguably only suitable for a very small client group (see "diagnostic factors" later).

(2) It therefore self-selects those conflicts which are "easier" to settle, and leaves more difficult or escalated conflicts to other service providers.

(3) It has a risk that some collaborative lawyers will negotiate for too long, or in diagnostically inappropriate cases, in order to earn fees.

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[3] Eg see Kelly, J. "A Decade of Divorce Mediation Research – Some Answers and Questions" (1996) 34 *Family Conciliation Court Review* 373; *Federally-Funded Family Mediation in Melbourne – Outcomes, Costs and Client Satisfaction* (1995); *Federally-Funded Family Mediation in Sydney – Outcomes, Costs and Client Satisfaction* (1996).

(4) It can be used as a tactic to delay, or to disqualify involved expert lawyers, valuers or psychologists from subsequent litigation.

(5) It raises expectations unrealistically that negotiators will suddenly be generous, skilled, problem-solving, interest based bargainers. Nearly all interest based negotiations make skilful or clumsy transitions to packaged solutions (or "positions").

(6) Like highly skilled barristers, valuers, counsellors or mediators, there will be an inevitable shortage of highly skilled collaborative lawyers. This will cause waiting lists for clients (particularly in remoter areas), and will cause the less skilled to practise thereby discrediting the name of "collaborative lawyering" (compare lawyers, doctors, mediators, counsellors). It requires very uncommon skills to be a respected diplomat.

(7) Horror stories and judicial supervision will slowly emerge in relation to the diverse behaviours conducted under the title "collaborative lawyering".

(8) Many lawyers will be reluctant to be labelled "collaborative lawyers" as the market will move towards a skilled few; and because there is more stable money to be made by being a traditional multi-skilled negotiator-litigator-problem solver.

(9) Despite the many attempts to educate clients and other lawyers, there will be ongoing market confusion about what are the various models of collaborative lawyering (compare "mediation" confusion also).

(10) Collaborative lawyering will never be mandatory for clients in conflict, and therefore widespread education and confidence is unlikely. (Again, compare how common some form of mandatory mediation has become in all areas of conflict in Australia.)

(11) The ideas of peace and harmony, coupled with wonder-stories and litigation trauma, will attract some zealous ideological practitioners who will bring the movement into disrepute.

(12) In the narrow group of clients who try collaborative lawyering process, and yet do not settle reasonably quickly, there will be the shock of hiring and paying for a second set of lawyers and experts. These horror stories will inevitably lead to blaming and claiming against the "deceitful" and "unreasonable" opposition, and possibly against disappointed lawyers.

(13) The raw legal costs attached to the multiple meetings in the collaborative lawyering model and practice seem to be high.

(E) Diagnosis

Which clients/conflicts is collaborative process suitable for? Arguably, all the following criteria need to be satisfied:

(1) **Both** clients want to settle, and have some flexibility and problem-solving skills.

(2) **Both** clients are trustworthy and are **perceived** to be trustworthy.

(3) **Both** clients are confident that the other will make "full disclosure".

(4) **Both** clients have enough money to hire two new sets of lawyers and experts if no settlement occurs.

(5) **Both** clients hire available, experienced, dedicated, collaborative lawyers.

(6) **Both** clients have strong interests in good future relationships with each other and with children.

(7) **Neither** client suffers from deep grief; psychiatric disorder; drug or alcohol problems; desire to win or punish; domestic violence; history of dishonesty.

(8) There is no history of **persistent** conflict between the parties.

Questions

(1) What percentage of your current files would be suitable for collaborative lawyering, if the above criteria are correct?

(2) How would you try to persuade that percentage of clients to try this process?

(F) "Success" of Collaborative Lawyering Compared to X?

Like all new or rediscovered dispute resolution services, collaborative lawyering claims to be "better" than what has gone before (X). "Better" includes more settlements; less expensive, faster, more-creative settlements; more preserved relationships; more client control; etc. Moreover, it predictably makes unhelpful contrasts with "litigation", when the most important comparison should be with negotiated family settlements, either pro se or lawyer-assisted.

However, it is unlikely that any of these predictable anecdotal claims will ever be validated by systematic studies. This is at least because:

- The standards and competence of collaborative lawyers will vary greatly.
- Collaborative lawyering is "suitable" to only a small range of disputes and clients
- It is impossible to create random control groups from this small range of clients to be serviced by equally competent psychologists, lawyers, registrars, various types of mediators, doing nothing etc.
- With the passage of time, collaborative lawyering will be subjected to a number of standard institutionalised, post-pioneer, post-charisma transitions which will change the nature of collaborative behaviour (see the following chart of analogies in the mediation movement).

Meanwhile, like the early 1980s handbooks on mediation, beware of the propaganda and over-selling contained in early collaborative law handbooks.

In Australia, collaborative lawyering is likely to be a minor wave in the important ongoing movement of multi-skilling lawyers and their clients to be diagnostically wise Dobermans and diplomats.

FORMALISATION OF A NEW MOVEMENT (e.g. MEDIATION; ARBITRATION COLLABORATIVE LAWYERING??)

-	INFORMAL	**?**	FORMAL
-	RISK TAKING	**?**	RISK AVERSE
-	FLEXIBLE	**?**	RIGID
-	ANTICIPATE SUCCESS	**?**	ANTICIPATE FAILURE
-	FEARLESS	**?**	FEARFUL
-	UNINSURED	**?**	HEAVILY INSURED
-	FEW/NO SANCTIONS OUTSIDE MARKET	**?**	SUBJECT TO MULTIPLE SANCTIONS
-	FREE TRADE	**?**	MONOPOLISTIC
-	NO PRINT	**?**	FINE PRINT
-	MULTI DISCIPLINARY	**?**	DOMINATED BY LAWYERS
-	GRASS ROOTS	**?**	EXPERT DOMINATED
-	GRASS ROOTS	**?**	UNIVERSITY CONNECTED
-	INEXPENSIVE WONDER STORY	**?**	EXPENSIVE, HORROR STORY AND RESEARCH
-	RECOMMENDED DUE PROCESS	**?**	OBSESSIVE DUE PROCESS
-	CHARISMATIC	**?**	BUREAUCRATIC

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

J H Wade

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 commended.) 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 commended 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, USA, 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 role[4], 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.

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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.

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