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update

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Friday Facts: "Without prejudice" explained

Quite often the words "without prejudice" are used when trying to settle a dispute. It is a common misconception not only amongst clients but also amongst lawyers that if correspondence or discussions are prefaced by the words "without prejudice" they can not be used against a party later in Court.

However it is not the use of the words "without prejudice" which make the communication one that may not be used later.

Words or conduct of a party in the course of genuine negotiations to settle an existing dispute is privileged. That is, a confidential communication between the parties which can not be used in evidence in Court, unless all parties to the negotiations agree to waive the privilege in the communication.

The actual use of the words "without prejudice" is neither necessary nor sufficient to attract the privilege. Whether communications are covered by privilege depends upon the party's intentions and the nature of the communications. There must be settlement negotiations for the privilege to operate and the privilege only applies to statements or offers which constitute admissions.

A mere reference to settlement negotiations is not enough. The privilege only applies to words or conduct made in the course of, or in connection with, settlement negotiations.

That said, objective facts which may be ascertained during settlement discussions may not necessarily be protected by the without prejudice privilege. For example, in the High Court case of Field v CMR for Railways NSW, the plaintiff claimed damages for being thrown from a train while it was still moving.

During a without prejudice meeting that the plaintiff had with a doctor, the plaintiff admitted to stepping out of the train while it was still moving rather than being thrown as was alleged. This statement of fact whilst made by the plaintiff during a without prejudice meeting was admitted by the Court into evidence.

Therefore it is important to remember that use of the words "without prejudice" will not necessarily result in the unavailability of facts or admissions made from evidence which may ultimately be considered by the Court in a final determination of any dispute.

As Justice Wells said in Davies v Nyland: "in some quarters of the community there is a belief, amounting to a superstition or obsession, that the expression 'without prejudice" is possessed of virtually magical qualities, and that anything done or said under its supposed aegis is everlastingly hidden from the prying eyes of the Court".

That is clearly not the case.

Thank you to Toniel Paton, Articled Clerk for her assistance in preparing this edition of Friday Facts.

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