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"Without Prejudice"

In business, the use of the term "without prejudice" is right up there with "deliverables", "sustainable" and "awesome". It signals that you are getting legal, without the tedium and expense of involving a lawyer. It offers the romance of secret communications combined with the opportunity to say something cutting and clever in an off the record sort of way, in case it turns out not to be so clever after all.

The problem with this approach is that the rule is not that straight forward. If you get it wrong you may have made a statement against your interests in a legal world which is obsessed with not admitting anything without careful consideration in case it is wrong, or the goal posts shift.

The courts wish to encourage frank communications between parties to negotiate a settlement of a dispute without fear that admissions in such negotiations will be placed before a court as evidence against them. Therefore, communications made in a genuine attempt to negotiate a settlement are treated as "without prejudice" i.e. off the record. "Genuine" means that point scoring, threats, and assorted other abuse are not covered.

You cannot hide behind the words "without prejudice" to mislead the court. Therefore, it is a bad idea to admit that the other side is right in settlement negotiations and then try to deny it before the court. It will not allow you to cover up fraudulent activity or your misleading conduct

during settlement negotiations.

If you wish to produce a communication to the court on the question of costs, it is best to use the expression "Without prejudice save as to costs".

One judge identified a "superstitious 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 a Court." If you have such an obsession, I suggest that you get out more.

"Injurious falsehood" -classy but difficult to prove

Injurious falsehood is making a comeback. Its popularity lapsed after Victorian times, so most lawyers do not remember it.

Why accuse someone of defamation when you can accuse them of injurious falsehood which sounds so much better? Well, the reason is that it is harder to prove but in Australia, for corporations with more than 10 employees it is the only option as they are not allowed to sue for defamation, as such.

Injurious falsehood differs from the usual defamation actions in that you must prove that:

1. The statement is false. For

instance, in defamation it is assumed that you do not beat your wife. Whereas in injurious falsehood you must prove that you do not. This can be fairly straightforward if your wife gives evidence that you do not beat her (which she will do if she knows what is good for her).

2. It was made maliciously. It is sufficient for a defamatory statement to be the result of stupidity rather than with intent to injure. It is difficult to prove a person was malicious as they will deny that they intended any harm. Strong drink is a useful ingredient of many successful cases.
3. You suffered actual damage and not just hurt feelings. Individuals should be able to dig out a shrink to say there is something wrong with them. The difficulty is proving that this abnormality occurred as a result of an injurious falsehood. Corporations cannot claim hurt feelings or mental health issues; therefore, they must rely on lost profits or other measurable damage to the brand. It is difficult to prove that lost profits are the responsibility of one person unless it is the marketing manager.

So injurious falsehood is more difficult to achieve, however, alleging a company's beef is horse meat, or its business model is a Ponzi scheme is likely to be an injurious falsehood, if it is false and made maliciously. ●