Implications of the term "without prejudice"

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Re: Implications of the words "without prejudice" in final offers made pursuant to Section 104 (9) of the Accident Compensation Act 1985 as amended, and the effect of such offers when marked "without prejudice" for the purposes of costs under Section 50 A subsections 1, 2, 3 and 4 of the Act.

The matter of *Nikolic v Wodonga Meats Pty Ltd* proceeded before Mr O'Dwyer Magistrate at Wangaratta on 12 August 1997. By letter headed "without prejudice" and dated 23 April 1997, the defendant made a final offer of $26,096.08 pursuant to Section 104(9) of the *Accident Compensation Act*. The Magistrate, on hearing evidence from the plaintiff and medical reports submitted both by the plaintiff and defendant, awarded compensation pursuant to Section 98 and Section 98A of the Act for injuries to the plaintiff's right arm, of $16,496.

The defendant then sought to rely on a letter dated 23 April 1997 making a final offer pursuant to Section 104 (9) of the Act.

Counsel for the plaintiff then argued that the document was clearly marked "without prejudice" and was therefore inadmissible as to its contents and as such the court would be precluded from looking at the figure included in the document. The defendant argued on the other hand that the words "without prejudice" related to the issue of substance only, and that the letter could be used and should be used to determine the question of costs pursuant to Section 50A of the Act. After hearing arguments from both counsel, the Magistrate accepted the rule stated in *Cross on Evidence*, and determined that the defendant was not entitled to treat the offer as "without prejudice" save as to costs. The Magistrate ruled that the offer was expressly without prejudice and in circumstances where such an offer was made, the Magistrate stated that:

"I can see no reason why this should not follow the basic rule relating to without prejudice offers."

The magistrate further ruled that the sections of the Act (Section 55A and Section 104 (9)) are designed to force settlements by adding a degree of "terrorum" but in order to be effective must be made in such a form that the court can consider. A final offer should not have "without prejudice" on the top."

The magistrate went on to order costs in favour of the plaintiff on the scale applicable to the judgement sum with the defendant's request for a costs order being refused.

The ruling has important implications for all plaintiffs in claims under Section 98/Section 98A who have received letters purporting to be final offers under Section 104 (9) of the *Accident Compensation Act* where such letters were headed "without prejudice". The full text of the magistrate's decision has been included but members are notified of the decision as we expect this may be of significance in a large number of matters.

We anticipate that there may be an appeal against the magistrate's decision and if this takes place we shall keep members informed of what occurs.

An interesting footnote is that since 13 August 1997, we have had a number of Section 104 (9) final offers from the same insurer with the workers "private and confidential" appearing instead of "without prejudice".

We have just learned that the magistrate's decision has been appealed to the Supreme Court of Victoria. We shall keep members advised as to the outcome.

Mr O'Dwyer made the following observations:

Final offer is not defined by the Act but it means what it says. Once that name is given to an offer that offer has certain repercussions. A document was received by the plaintiff from the defendants which described itself to be a final offer. The document is clearly marked "without prejudice" and therefore is inadmissible as to its contents. That would prohibit the court from looking at the figure included in the document. Not being aware of the figure there is nothing in evidence to compare against the court's finding. Examining *Cross on Evidence* the rule is stated that settlements made as part of an attempt to settle a dispute on a without prejudice basis results in joint privilege which can only be waived by both parties. The plaintiff has categorically objected to the offer being put in evidence.

The court accepts the rule stated in *Cross* - it is a rule countenanced by the highest courts in the land. The document discussed clearly seems to be a document served as an attempt to settle a dispute although it may have its genesis in a statutory obligation set out in Section 104 (9) wherein the statue requires the insurer to make a final offer in writing in settlement of the claim. The defendants sought to have this offer treated as "without prejudice save as to costs" but it is not. It is an offer expressly made "without prejudice". There is no suggestion that this document is specifically made as "save to costs". The offer here made in settlement was headed "without prejudice" and I can see no reason why this should not follow the basic rule relating to "without prejudice" offers. The sections of the Act are designed to force settlements by adding a degree of "terrorum" but in order to be effective must be made in such a form that the court can consider. A "final offer" should not have "without prejudice" on the top. ■

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