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THE PROBLEMS OF WITHOUT PREJUDICE

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Despite a legal history beginning before 1760 and despite continuous and frequent everyday use since then, there are many problems and uncertainties and some hidden dangers associated with without prejudice communications and with the rule that would exclude such communications from evidence. The rationale, the elements of the rule of evidence, the exceptions, and the nature of without prejudice communications outside of the law of evidence are not well understood. This article examines the theory and the law about without prejudice communications in detail and suggests some ways to solve the problems and reduce the dangers.

Les communications sans préjudice et la règle qui exclurait ces communications de la preuve présentent de nombreux problèmes et incertitudes et même certains dangers cachés, et ce en dépit du fait qu'elles existaient avant 1760 et qu'elles sont utilisées communément et fréquemment. Ni la justification, ni les éléments de la règle qui les exclut de la preuve, ni les exceptions à cette règle, ni la nature des communications sans préjudice en dehors du droit de la preuve, ne sont bien compris. Dans cet article l'auteur examine en détail la théorie et le droit des communications sans préjudice et suggère certaines façons d'en résoudre les problèmes et d'en réduire les dangers.

Introduction

Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressly or otherwise proved to have been made "without prejudice", cannot generally be admitted in evidence.¹

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¹ Halsbury's Laws of England (4th ed.), Vol. 17, Evidence (1976), para. 212.

The Canadian law about without prejudice communications is mangled and misunderstood. There is debate about whether the exclusion from evidence of without prejudice communications—often described as a privilege—is justified by a public policy of encouraging settlement, by a theory of relevancy, by a theory based on contract, or by some combination of these rationales. The case law is divided on such fundamental issues as: whether independent or collateral facts are outside the privilege; whether terms of settlement are required before communications purportedly made without prejudice may be treated as privileged; and whether a remote party may put into evidence a communication that is privileged between the immediate parties. As a consequence of these uncertainties, there are problems about when a communication not expressly made without prejudice will be privileged and problems about when a communication expressly made without prejudice will be prejudicial. There is general confusion and often miscalculation about the effect of without prejudice communications outside the law of evidence.

The purposes of this article are: to examine critically the law about without prejudice communications; to point out the problems, controversies and traps; and to suggest solutions. To do this, Part I introduces the rationales that have been suggested for the rule and also discusses the independent fact doctrine. Part II considers the role of terms of settlement. Part III explores the characteristics of without prejudice communications. Part IV considers the divided case law about the rights of remote parties. Part V considers the practical problems caused by the uncertainties in the current law and discusses the role of without prejudice communications outside the law of evidence. Part VI offers some practical suggestions.

I. *The Rationales for the Privilege*

A. *The Wigmore Theory—Relevancy*

The idea that a peace offering to settle a legal conflict should not be used as an evidentiary weapon has an ancient legal history. In a comprehensive essay, Professor David Vaver² traced the idea as it developed from before 1760 to 1974. He placed the development of the modern rule in the period from 1850 onwards.

² David Vaver, "Without Prejudice" Communications—Their Admissibility and Effect (1974), 9 U.B.C. Law Rev. 85. See also: J. Sopinka and S.N. Lederman, *The Law of Evidence in Civil Cases* (1974), pp. 196-202; R. Cross and C. Tapper, *Cross on Evidence* (7th ed., 1990), pp. 452-454; M.N. Howard, P. Crane and D.A. Hochberg, *Phipson on Evidence* (14th ed., 1990), pp. 551-556; The Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings) Cmdn. No. 3472 (1967); E.A.J., *Without Prejudice* (1894), L.T. 265; G.S. Holmstead, *Without Prejudice* (1895), 31 C.L.J. 627; G.M. Bell, *Admissions Arising Out of Compromise—Are They Irrelevant* (1952-53), 31 Tex. L. Rev. 239; K. Thompson, *Without Prejudice* (1967), 10 Can. Bar J. 389; R.R. Walsh, *Without Prejudice* (1974), 32 The Advocate 361.

For the period before 1850, the law reports show that the courts focused on the difference between an admission and an offer for peace. For example, in *Tennant v. Hamilton*,³ the plaintiff in a nuisance action alleged that his property was damaged by emissions from the defendant's factory. At the trial, the defendant called a witness who testified that properties close to the factory were unblemished. During cross-examination, the witness was asked whether he had knowledge of payments made by the defendant for damages to a property close to the factory. The House of Lords ruled that the trial judge had been correct in prohibiting this question. Lord Cottenham L.C. stated:⁴

If the witness had answered in the affirmative, that he had known of money being paid for alleged damage, it would be no evidence; because money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well founded; it is not, therefore to be given in evidence in support of the fact of the damage being sustained.

In *Cory v. Bretton*,⁵ trying to avoid a statute of limitations defence, the plaintiffs tendered a without prejudice letter about a debt. The plaintiffs argued that the expression of without prejudice ought not to prevent the letter being given in evidence. Tindal C.J., however, said he would not admit the letter into evidence since it clearly was a conditional statement.⁶

For another example, in *Wayman v. Hillard*,⁷ the plaintiff, a former farm tenant, claimed a share of the crop harvested by the defendant, the new tenant. Before the commencement of any action, the plaintiff demanded £40 for his share and the defendant offered to pay £17. Then the plaintiff sued and included a pleading of an account stated. The action was dismissed and the judgment was affirmed on appeal. The reasons of Bosanquet J. typified the reasoning of all the judges:⁸

In saying that this did not amount to an account stated, I do not controvert the principle that an absolute acknowledgement of debt may amount to an account stated. But there has been no acknowledgement of debt here; the Defendant merely makes an offer to purchase peace.

³ (1839), 7 Cl. & Fin. 122, 7 E.R. 1012 (H.L.).

⁴ *Ibid.*, at pp. 133 (Cl. & Fin.), 1018 (E.R.). See also *Gregory v. Howard* (1800), 3 Esp. 113, 170 E.R. 557 (Nisi Prius).

⁵ (1830), 4 Car. & P. 462, 172 E.R. 783 (Nisi Prius).

⁶ *Cory v. Bretton, ibid.*, may not be a good example of the difference between admissions and offers of peace. Since the plaintiff needed an unqualified statement to get outside the statute, Vaver, *loc. cit.*, footnote 2, at pp. 102-104, argues that Tindal C.J. meant that the letter was conditional in the sense of being qualified and did not mean conditional in the sense of hypothetical and for the purposes of settlement. This interpretation is possible and it is also possible that Tindal C.J. meant conditional in both senses. See: *Walker v. Wilsher* (1889), 23 Q.B.D. 335 (C.A.), discussed *infra*. Against Vaver's interpretation is the fact that the thrust of the plaintiff's argument was directed toward the without prejudice designation.

⁷ (1830), 7 Bing. 101, 131 E.R. 39 (C.P.).

⁸ *Ibid.*, at pp. 102 (Bing.), 39-40 (E.R.).

The judges in these early cases⁹ recognized that the probative value of a settlement offer is problematic. While it is possible that a settlement offer is an admission of the merits of the claim or of the demerits of the defence and relevant to the search for truth, it is also possible that a settlement offer has no or little evidentiary value and may be explained by altruism, pragmatism, uncertainty, cowardice or some factor other than concession.

The function of the relevance of the offer was recognized by Wigmore. The James H. Chadbourn revision of Wigmore¹⁰ makes the point as follows:

Whether an *offer to settle a claim* by a partial or complete payment amounts to an admission of the truth of the facts on which the claim is based, and is therefore receivable in evidence, is a question which has given rise to prolonged discussion and to varied but often unsatisfactory attempts at explanation.

The solution is a simple one in principle, although elusive and indefinite in its application; it is merely this, that a *concession which is hypothetical or conditional only can never be interpreted as an assertion* representing the party's actual belief, and therefore cannot be an admission; and conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it.

Wigmore's theory would receive into evidence unconditional assertions, even if made during settlement discussions. Conditional assertions would be irrelevant and not probative evidence. As conceded in the passage from the text, this approach presents a court with the very difficult task of classifying the assertion. While a declarant may make it clear that he or she is making an open statement or that he or she is making a statement conditionally for settlement purposes, the declarant may be indifferent or inattentive to the uses that may be made of the statement and only later submit that the statement was intended to be conditional and for the purposes of settlement. The Wigmore theory rationalizes the consequent treatment of a communication but is not particularly helpful in classifying a communication for treatment. So, a theory of relevancy presents practical problems.

More critically, the Wigmore theory has been challenged as inadequate to explain the exclusion of evidence.¹¹ The point of the criticism is that it is not possible to be categorical that every hypothetical or conditional statement is irrelevant. Placed in context even a conditional offer may be probative. To illustrate, offering to pay 90% of a hundred dollar claim may be no admission of liability, while offering to pay 90%, or even much lower percentages, of a million dollar claim may sometimes be taken to be probative of the soundness of the claim. Thus, a theory of relevancy

⁹ See also *Lofts v. Hudson* (1828), 2 Man. & Ry. 481, *sub nom. Loftus v. Hudson*, 7 L.J.O.S. 242 (K.B.), and later *Richards v. Gellatly* (1872), L.R. 7 C.P. 127.

¹⁰ J.H. Wigmore, *Evidence* (Chadbourn rev. 1972), para. 1061.

¹¹ The challenge is acknowledged and described in detail in the notes to the Wigmore text.

will provide a justification for excluding evidence in some but not all cases covered by the without prejudice rule. So, some other rationale must be found for the general rule.

B. *Public Policy and the Independent Fact Doctrine*

In the period after 1850, the courts in England and Canada developed a rationale that did not depend on relevancy as the reason for excluding evidence of settlement offers or evidence of what came to be described as "without prejudice" communications.¹² The courts relied principally on a public policy of encouraging settlement as the justification for excluding evidence. For example, in *Jones v. Foxall*,¹³ in deciding a case of an alleged breach of trust, Romilly M.R. refused to consider correspondence made without prejudice. He condemned the practice "of attempting to convert offers of compromise into admissions of acts prejudicial to the person making them"¹⁴ and stated:¹⁵

If this were permitted, the effect would be, that no attempt to compromise a dispute could ever be made. If no reservation of the person who made the offer of compromise could prevent that offer, and the letters containing or relating to it, from being afterwards given in evidence, and made use of against him, it is obvious that no such letter would be written or offer made.

Earlier in the same year, in *Hoghton v. Hoghton*,¹⁶ Romilly M.R. is reported as stating:

... communications made with a view to an amicable settlement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences.

In the 1882 Ontario case of *The Corporation of the County of York v. Toronto Gravel Road and Concrete Co.*,¹⁷ Proudfoot J. stated:

The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy.

Much more recently, in *Rush & Tompkins Ltd. v. Greater London Council*,¹⁸ which will be discussed below, the House of Lords confirmed that the underlying purpose of the rule was founded "on the public policy of encouraging litigants to settle their differences rather than litigate them

¹² This description appeared after English solicitors adopted the prudent practice of so labelling their correspondence so as to be able to invoke the privilege. See Vaver, *loc. cit.*, footnote 2, at pp. 89-94.

¹³ (1852), 15 Beav. 388, 51 E.R. 588 (M.R.).

¹⁴ *Ibid.*, at pp. 396 (Beav.), 591 (E.R.).

¹⁵ *Ibid.*

¹⁶ (1852), 15 Beav. 278, at p. 321, 51 E.R. 545, at pp. 561-562 (M.R.).

¹⁷ (1882), 3 O.R. 584, at pp. 593-594 (Ont. Ch. Div.), *aff'd* without reference to this point (1885), 11 O.A.R. 765 (Ont. C.A.), *aff'd* (1886), 12 S.C.R. 517.

¹⁸ [1989] A.C. 1280, at p. 1299, [1988] 3 All E.R. 737, at p. 739 (H.L.).

to a finish". In his leading judgment, Lord Griffiths quoted a portion of Oliver L.J.'s explanation for the rule in *Cutts v. Head*,¹⁹ another case that will be discussed below. The quoted portion read:²⁰

That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. . . . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

The public policy rationale accepts and responds to the fact that settlement offers and statements made during negotiations may be admissions or otherwise relevant. The operative rule sterilizes the statements and so removes any impediment to settlement discussions. This is a remarkable application of public policy since it overcomes the formidable countervailing public policy that in the administration of a just adversarial system, probative matter should not be suppressed and, rather, should be disclosed.

The countervailing public policy favouring disclosure, however, remains influential. First, in developing the without prejudice rule, the courts demanded that the communication have certain characteristics. These characteristics, which are discussed in Parts II and III, restrict the application of the exclusionary rule.

Second, the court recognized exceptions to the without prejudice rule. For example, evidence of settlement communications is admissible to rebut an allegation of laches. This exception was noted in *Jones v. Foxall*²¹ where Romilly M.R. pointed out that even though a without prejudice communication could be used to rebut laches, it could not be used for fixing the person with any admissions made during the communication.²² Other exceptions, noted below, concern cases of accepted offers, cases of fraud, and cases where the offer includes a prejudicial element or is made in bad faith. Sopinka and Lederman²³ suggest that these exceptions were

¹⁹ [1984] Ch. 290, at pp. 306, [1984] 1 All E.R. 597, at pp. 605-606 (C.A.).

²⁰ *Supra*, footnote 18, at pp. 1299 (A.C.), 739-740 (All E.R.).

²¹ *Supra*, footnote 13, at pp. 396-397 (Beav.), 591 (E.R.). See also: *The Corp. of the County of York v. Toronto Gravel Road and Concrete Co.*, *supra*, footnote 17; *Walker v. Wilsher*, *supra*, footnote 6; *Peel Condominium Corp. No. 199 v. Ontario New Home Warranty Plan* (1988), 30 C.P.C. (2d) 118 (Ont. Div. Ct.).

²² Evidence of settlement discussions is also frequently used to respond to motions to dismiss actions for want of prosecution. See: *Simaan General Contracting Co. v. Pilkington Glass Ltd.*, [1987] 1 W.L.R. 516, at p. 519, [1987] 1 All E.R. 345, at p. 347 (Q.B.D.).

²³ *Op. cit.*, footnote 2.

developed to restrict the ambit of the without prejudice rule within proper limits. They state:²⁴

The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

Third, it seems that the countervailing public policy favouring disclosure also underlies the independent or collateral fact doctrine, a doctrine that has the potential of considerably reducing the ambit of the privilege. This doctrine may be traced back to the period before 1850 and the case of *Waldridge v. Kennison*.²⁵ In that case, the plaintiff sued two defendants as joint acceptors of a bill of exchange. To prove one defendant's signature, the plaintiff relied on this defendant's admission of a hand-writing. Since the admission was made during settlement negotiations, the defendant objected, but the evidence was held to be admissible. The report of the case stated:²⁶

Lord Kenyon said, that certainly any admission or confession made by the party respecting the subject-matter of the action, obtained while a treaty was depending, under faith of it, and into which the party might have been led by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice; but he added that the fact of a hand-writing being a person's or not stood on a different foundation; it was matter no way connected with the merits of the cause, and which was capable of being easily proved by other means.

There are serious objections to the independent or collateral fact doctrine. First, it should be noted that the *Waldridge* case was decided long before the public policy rationale of encouraging settlement became dominant. Thus, it is arguable that the later recognition of the public policy rationale nullifies the independent fact doctrine because the doctrine may be shown to be contrary to the public policy. In other words, settlement is not encouraged and is actually made dangerous by the independent fact doctrine that puts negotiating parties on their guard about making statements that may be said to be unconnected to the merits of the cause.²⁷ In *Rush & Tompkins Ltd. v. Greater London Council*,²⁸ Lord Griffiths regarded the *Waldridge* case as an exceptional case and stated:

... it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose

²⁴ *Ibid.*, p. 201.

²⁵ (1794), 1 Esp. 143, 170 E.R. 306 (Nisi Prius).

²⁶ *Ibid.*, at pp. 144 (Esp.), 306-307 (E.R.).

²⁷ *Kirschbaum v. Our Voices Publishing Co.*, [1972] 1 O.R. 737 (Ont. H.C.), illustrates the dangers. In a defamation action, without prejudice correspondence was admitted as relevant to the issues of a refusal to apologize, malice, motive and aggravation of damages.

²⁸ *Supra*, footnote 18, at pp. 1300 (A.C.), 740 (All E.R.).

of the compromise should not be held against the maker of the admission and should therefore not be received in evidence.

It is arguable that the *Waldrige* case itself demonstrates the deficiencies and the illogic of the independent fact doctrine. In that case, it is difficult to understand how the proof of the signature could be said to be unconnected to the merits. As a matter of logic, if, in the context of settlement discussions, it is true that an independent fact is unconnected with the merits of a case, then the independent fact would be irrelevant in any event and ought perhaps to be excluded. If, in the context of settlement discussions, it is false that the independent fact is unconnected to the merits of the case, that is, it is connected, then it would be subject to the without prejudice rule and ought to be excluded.²⁹ Put simply, in the context of settlement discussions, the criterion of a fact being connected or unconnected to the merits is flimsy and does not work.

Another problem with the independent fact doctrine is that when using this doctrine, it is easy to slip into the misconception that the independent fact is admissible when it is unconnected to the settlement negotiations as opposed to unconnected to the merits of the case. An example of this slip may be seen in *Re Springridge Farms Ltd.*³⁰ In this case, one issue was whether there had been an act of bankruptcy within six months of the Royal Bank's petition that Springridge Farms be placed in bankruptcy. The Bank relied on a demand for payment made during a mediation meeting mandated under the Saskatchewan Farm Security Act.³¹ The chambers judge dismissed the petition and refused to recognize the demand because it had been made during settlement negotiation. This decision was reversed by the Saskatchewan Court of Appeal. Gerwing J.A. stated:³²

Assuming in the respondent's favour that this was truly a settlement meeting (which may be questionable based on the bank's demands) it is not every statement made at such a meeting which is protected. Clearly, offers of settlement and discussions which are conducive to arriving at a settlement are protected. However, a repetition of the original demand does not fall within this definition. Just as portions of documents headed "Without prejudice" may be admissible if they are severable from the negotiations and relevant on other matters, portions of a discussion, even if a settlement discussion, may contain other matters which are the legitimate subject of testimony. It is difficult to see how the bare repetition of a demand for payment is in any way in need of protection to foster the process of voluntary settlement of disputes.

²⁹ For example, in *Burns v. Kerr* (1856), 13 U.C.Q.B. 468 (C.A.), a without prejudice settlement letter was not admissible to prove the fact of the disputed identity of the assailant in an assault and battery action. In *Warren v. Gray Goose Stage Ltd.*, [1937] 1 W.W.R. 465 (Sask. C.A.) (rev'd on other grounds, [1938] S.C.R. 52, [1938] 1 D.L.R. 104), Mackenzie J.A., at p. 473, doubted whether the independent fact doctrine would allow a without prejudice letter to be evidence of recent invention of an injury since it had "too much to do with the merits of the claim for damages".

³⁰ (1991), 79 D.L.R. (4th) 88 (Sask. C.A.).

³¹ S.S. 1988-89, c. S-17.1.

³² *Supra*, footnote 30, at p. 92.

Gerwing J.A. does not cite authority, but his comments would seem to be based on an imprecise application of the independent fact doctrine. While it is true that a renewed demand would not likely deter settlement negotiations, this comment misses the point. The point is that effective communication for the purposes of settlement becomes improbable, if not impossible, when a party must guard against the prospect that any particular statement it speaks or hears may be severed as independent from the settlement negotiations. Perhaps the worst thing about the severability approach is that under it, a settlement communication becomes a trap and may be used by the unscrupulous as a way to secure admissions.³³ Moreover, there is the problem that this approach necessitates an adjudication not only of whether the parties were communicating for a settlement but of whether the communication may be severed as independent.

C. *The Contract Rationale*

The third rationale suggested for the without prejudice rule is associated with contract or a convention of agreement. In the case law, there is historically some support for relating the privilege to the law of contract and for justifying the privilege under the rationale of a notional agreement. The discussion below will review the case law and then evaluate the merits of the contract rationale.

The contractual aspects of without prejudice communications³⁴ were noted in *In re River Steamer Company, Mitchell's Claim*.³⁵ Mitchell sued the River Steamer Company for payment for three iron steamers. The defence was that the claim was statute barred. Mitchell attempted to get around the limitation period by relying on an acknowledgment in writing sufficient to take the case out of the statute. The alleged acknowledgment, however, was found in a letter from the River Steamer Company written without prejudice. The trial judge admitted the letter and treated it as an acknowledgment, but, on appeal, Mellish L.J. (James L.J. concurring) concluded that the letter was not an acknowledgment. On the issue of whether the letter should have been admitted into evidence, Mellish L.J. stated:³⁶

I am strongly of opinion, although it is not necessary to decide it in this case, that a letter which is stated to be without prejudice cannot be relied upon to take a case out of the *Statute of Limitations*, for it cannot do so unless it can be relied upon as a new contract. Now if a man says his letter is written without prejudice,

³³ This is a point made by Bell, *loc. cit.*, footnote 2.

³⁴ See Vaver, *loc. cit.*, footnote 2, at pp. 97-101.

³⁵ (1871), L.R. 6 Ch. App. 822 (L.J.J.).

³⁶ *Ibid.*, at pp. 831-832. *Cory v. Bretton*, *supra*, footnote 5, is also authority that a without prejudice letter cannot be used to circumvent the Statute of Limitations. See, more recently, *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, (1991), 80 D.L.R. (4th) 652.

that is tantamount to saying, "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all." It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted.

The relationship of without prejudice communications to contract was also examined in *Walker v. Wilsher*.³⁷ In this case, after the parties consented to judgment, the trial judge denied the plaintiff costs because, before the trial, the plaintiff had rejected a settlement offer proposed in without prejudice correspondence. The Court of Appeal held that the trial judge erred by admitting the correspondence. Lord Esher M.R. stated:³⁸

It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed.

Lindley L.J. stated:³⁹

What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given.

Mitchell and *Walker v. Wilsher* describe the meaning of the words "without prejudice" by using the language of contract. *Walker v. Wilsher* adds the element of mutuality, that both parties must waive the privilege.⁴⁰ These cases thus introduce a contractual quality to the general topic of without prejudice communications and this contractual quality is genuine for accepted without prejudice offers. It should be noted, however, that these cases do not purport to explain the exclusion of evidence as a matter of the law of contract.

The rationale of contract or notional agreement to explain a limitation on the use of evidence was a feature of *Rabin v. Mendoza*,⁴¹ although the case dealt only with disclosure for discovery and not admissibility at trial. In this case, the plaintiff hired the defendants, a firm of surveyors, to inspect a property. The plaintiff claimed that the inspection had been negligently performed. In a without prejudice conversation, the defendants offered to hire another firm of surveyors to reinspect the property. The

³⁷ *Supra*, footnote 6.

³⁸ *Ibid.*, at p. 337.

³⁹ *Ibid.*

⁴⁰ See also: *McTaggart v. McTaggart*, [1948] 2 All E.R. 754 (C.A.); *McLeod v. Pearson*, [1931] 4 D.L.R. 637, [1931] 3 W.W.R. 4 (Alta. T.D.); *Denovan v. Lee* (1990), 40 C.P.C. (2d) 54 (B.C. Master); *Sinclair v. Roy* (1985), 20 D.L.R. (4th) 748, 65 B.C.L.R. 219 (B.C.S.C.).

⁴¹ [1954] 1 W.L.R. 271, [1954] 1 All E.R. 247 (C.A.).

defendants hoped that the second surveyor's report would allow insurance coverage to be obtained for the property. If this was possible, then likely litigation could be avoided. The report was obtained but no settlement was reached. Later, in the negligence action, the plaintiff sought production of the second surveyor's report. A two-member panel of the Court of Appeal denied production. Denning L.J. stated:⁴²

It is said, however, that apart from legal professional privilege, there is a separate head of privilege on the ground that the documents came into existence on the understanding that they were not to be used to the prejudice of either party. "Without prejudice" does not appear as a head of privilege in the White Book, but in *Bray on Discovery*, p. 308, it is stated: "The right to discovery may under very special circumstances be lost by contract as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue in the suit on a stipulation that it should not be referred to or used to the defendant's prejudice in case of a failure to come to an arrangement."

That proposition is founded on *Whiffen v. Hartwright*, [(1848) 11 Beav. 111] where Lord Langdale, M.R. . . . there affirms the undoubted proposition that production can be ordered of documents even though they may not be admissible in evidence. Nevertheless, if documents come into being under an express, or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made.

Romer L.J.'s reasoning was similar. Both judges relied on *Whiffen v. Hartwright*.⁴³ The reliance on this case, however, to support a contract rationale for the exclusion of evidence is problematic. The report of Langdale M.R.'s judgment is a single cryptic sentence:⁴⁴

The Master of the Rolls declined ordering the production, observing, that he did not see how the Plaintiff could get over this express agreement, though he by no means agreed, that the right of discovery was limited to the use which could be made of it in evidence.

This sentence indicates that Langdale M.R. was not prepared to order production for the purposes of discovery because of an express agreement. The sentence is ambiguous about admissibility at trial, and indeed is ambiguous about whether production of without prejudice communications would in other cases be ordered for discovery while respecting the privilege for trial.⁴⁵

The report of the argument in *Whiffen* refers to *Cory v. Bretton*.⁴⁶ In that case, Tindal C.J.'s exclusion of evidence was grounded on the conditional nature of the statement, although he did remark that the plaintiffs

⁴² *Ibid.*, at pp. 273 (W.L.R.), 248 (All E.R.).

⁴³ (1848), 11 Beav. 111, 50 E.R. 759 (M.R.).

⁴⁴ *Ibid.*, at p. 112 (Beav.), 759 (E.R.).

⁴⁵ The *Rabin* case was considered in *Flegel Construction Ltd. v. Cambac Financial Projects Ltd.*, [1983] 3 W.W.R. 405, (1983), 24 Alta. L.R. (2d) 340 (Alta. Q.B.), where, on the facts, Veit J. concluded that the parties had not reached an agreement to keep evidence confidential.

⁴⁶ *Supra*, footnote 5.

could have sent the without prejudice letter back if they did not like it. This comment suggests a recognition of a tacit agreement binding the plaintiff. However, Tindal C.J.'s comment ultimately does not support a contract rationale for the privilege because, assuming the letter had been sent back, then its conditional nature still would have justified the same evidentiary treatment.

This review of the cases establishes that the case law does not provide a strong basis for any contract rationale for the privilege, although there is undoubtedly a contractual quality about the privilege. Contract law is useful in explaining the legal consequences of the acceptance of a without prejudice offer and justifies why, after acceptance of the offer, the communication may be introduced as evidence.⁴⁷ This admission into evidence is sometimes described as an exception to the without prejudice rule. For accepted without prejudice offers, it is only common sense that the court should be able to admit evidence of the agreement sought to be enforced. It may be noted that where the without prejudice settlement offer has been accepted, there is no longer any public policy reason to exclude the evidence, the goal of the policy having been achieved.

The case law establishes that the court may examine the alleged without prejudice communications to determine whether the communications are within the rules for exclusion and to determine whether the parties have reached an agreement. Where the examination shows that the parties have not reached a settlement, the privilege will persist and the court will ignore the communication in adjudicating the merits of the case.⁴⁸

Contract law also has some apparent utility explaining why a counteroffer, a negotiating response and related exchanges of correspondence should be privileged.⁴⁹ While the exclusion from evidence can be explained by the public policy rationale, the contractual rationale adds that the party

⁴⁷ *Vardon v. Vardon* (1883), 6 O.R. 719 (Ont. Ch. Div.); *Omnium Securities Co. v. Richardson* (1884), 7 O.R. 182 (Ont. Ch. Div.); *In re Daintrey*, [1893] 2 Q.B. 116 (C.A.); *Latimer v. Park* (1911), 2 O.W.N. 1399, 19 O.W.R. 776 (Ont. C.A.); *Pearlman v. National Life Ass'ce Co. of Canada* (1917), 39 O.L.R. 141 (Ont. H.C.); *Fischer v. Robert Bell Engine & Thresher Co. Ltd.*, [1923] 3 W.W.R. 320 (Sask. Q.B.), rev'd on other grounds, [1924] 3 D.L.R. 545, [1924] 2 W.W.R. 725 (Sask. C.A.); *McLeod v. Pearson*, *supra*, footnote 40; *Mills v. Far-Land Sales Ltd.*, [1974] 5 W.W.R. 646 (Sask. Q.B.); *Papineau v. Papineau* (1986), 8 C.P.C. (2d) 249 (Ont. H.C.); *Director of Assessment v. Begg* (1986), 33 D.L.R. (4th) 239, 186 A.P.R. 431 (*sub nom. Begg v. East Hants (Municipality)*) (N.S.C.A.); *Tomlin v. Standard Telephones and Cables Ltd.*, [1969] 1 W.L.R. 1378, [1969] 3 All E.R. 201 (C.A.).

⁴⁸ *Thibodeau v. Thibodeau* (1984), 147 A.P.R. 442, 47 C.P.C. 224 (N.S.T.D.).

⁴⁹ *Paddock v. Forrester* (1842), 3 Man. & G. 903, 133 E.R. 1404 (C.P.); *McLeod v. Pearson*, *supra*, footnote 40; *Phillips v. Rodgers* (1988), 62 Alta. L.R. (2d) 146, 29 C.P.C. (2d) 193 (Alta. Q.B.); *Denovan v. Lee*, *supra*, footnote 40, unless one of the parties gives notice that a particular letter is being written to break the chain: *India-Rubber Works Co. v. Chapman*, [1927] W.C. & I. Rep. 229 (C.A.).

responding to the without prejudice communication may be taken to have agreed to negotiate in the without prejudice manner. As Vaver points out, however, this explanation stretches contract theory and would not explain why the court should also participate and agree to exclude relevant evidence. Wigmore adds:⁵⁰

It is hardly necessary to point out that the analogies of a contract right can have no bearing on the probative use of such statements; since, conceding that an unaccepted offer amounts to nothing contractually, there may nonetheless remain for it an evidentiary value, over and above its defeated contractual purpose.

From the court's perspective, when the parties exchange without prejudice communications, the criteria of relevancy, the public policy of helping settlement, or a general concern for fairplay⁵¹ offer better explanations for why the exchange should be treated as privileged.

Contract law is unhelpful in explaining why an unsolicited, unreciprocated, or unaccepted without prejudice communication should be excluded from evidence. Contract law does not justify why one party should be able to unilaterally shield his or her unsolicited communications from disclosure as evidence. Contract law does not explain why a court should participate in one party's plan to avoid the dangers of an admission. Public policy must be called in aid of any successful plan to suppress evidence. So, contract law ultimately does not provide an adequate rationale for the rule for without prejudice communications.

The idea of a notional agreement or convention may, instead, be seen to be an effect of the without prejudice rule. Oliver L.J.'s judgment in *Cutts v. Head*⁵² supports this analysis. In this case, the dispute yielded a thirty-three day trial. Before the trial, the plaintiff made a without prejudice settlement offer but he reserved the right to refer to the offer later on the issue of costs. In hindsight, the defendant ought to have accepted the offer. In adjudicating costs, Foster J. refused to consider the offer and declined to follow the suggestion of Cairns L.J. in the matrimonial case of *Calderbank v. Calderbank*⁵³ that such hybrid offers should be a permitted practice.

The plaintiff was granted leave to appeal costs. By the time of the appeal, Megarry V.-C. had endorsed the practice of "Calderbank offers" for all types of cases in *obiter dictum* in *Computer Machinery Co. Ltd. v. Drescher*.⁵⁴ In responding to the appeal, the defendant relied on the

⁵⁰ *Op. cit.*, footnote 10, pp. 35-36.

⁵¹ See Vaver, *loc. cit.*, footnote 2, at pp. 96-97; *Rabin v. Mendoza*, *supra*, footnote 41.

⁵² *Supra*, footnote 19.

⁵³ [1976] Fam. 93, [1975] 3 All E.R. 153 (C.A.), applied in *McDonnell v. McDonnell*, [1977] 1 W.L.R. 34, [1977] 1 All E.R. 766 (C.A.).

⁵⁴ [1983] 1 W.L.R. 1379, [1983] 3 All E.R. 153 (Ch. D.).

direct authority of *Walker v. Wilsher*,⁵⁵ the similar case of *Stotesbury v. Turner*,⁵⁶ and on the body of case law that guarded against any intrusion upon the without prejudice privilege.

On the appeal, Oliver L.J., in the passage in his judgment quoted by Lord Griffiths in *Rush & Tompkins v. Greater London Council*,⁵⁷ recognized the public policy aspect of the privilege; however, in a part of the passage omitted by Lord Griffiths, Oliver L.J. argued that the privilege did not rest solely on the public policy of encouraging settlement but that the privilege also rested on a notional agreement. He stated:⁵⁸

If, however, the protection against disclosure rested solely upon a public policy to encourage out-of-court settlement of disputes, *Walker v. Wilsher* ... is not readily intelligible, for, although the court—and in particular Bowen L.J.—seem to have been prepared to assume that an inability to refer to the correspondence on a question of costs, after judgment, would encourage settlement, it is difficult to see, if one thinks about it practically, how that could do so. As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action.

Oliver L.J., and Fox L.J. in his concurring judgment, reasoned that the privilege existed to protect against admissions, but, once liability had been adjudicated, there was no longer a need to exclude evidence of the offer. Both judges reasoned that reserving the right to use the offer on the adjudication of costs would have a positive effect on settlement prospects. *Walker v. Wilsher* could be seen as a case adopting a conventional meaning to the words “without prejudice” that imputed agreement. But this conventional meaning could and should be refined to augment the public policy of encouraging settlement. It follows from Oliver and Fox L.J.’s arguments that the idea of an agreement to exclude evidence is an effect or implementing device but not the cause of the privilege.

This part may end by noting that the old Ontario case of *Boyd v. Simpson*⁵⁹ came to the same conclusion reached in *Cutts v. Head* and that the formal offer to settle procedure used in various Canadian jurisdictions also employs the methodology that a rejected settlement offer will have costs consequences. In *Cominco Ltd. v. Westinghouse Canada Ltd.*,⁶⁰ Bouck J. rejected *Boyd v. Simpson* and adopted *Walker v. Wilsher*⁶¹ as setting

⁵⁵ *Supra*, footnote 6.

⁵⁶ [1943] K.B. 370 (K.B.D.).

⁵⁷ *Supra*, footnote 18; and see the passage set out in the text, *supra*, at footnote 20.

⁵⁸ *Supra*, footnote 19, at pp. 306 (Q.B.), 605 (All E.R.).

⁵⁹ (1879), 26 Gr. 278 (Ont. Ch.).

⁶⁰ [1982] 1 W.W.R. 640, (1981), 33 B.C.L.R. 202 (B.C.S.C.).

⁶¹ *Supra*, footnote 6.

out the position at common law. Bouck J. held that a party must use the formal procedure provided by the rules of court if it wishes to use a without prejudice offer in its submissions about costs.

II. The Requirement of Terms of Settlement

The issue of whether terms of an offer of settlement are required for a without prejudice communication may now be considered.

In 1886, in *Pirie v. Wyld*,⁶² the Ontario Court of Appeal faced the issue of the elements of a without prejudice communication. In this case, Wink and Wyld were law partners. Wink endorsed his law firm's name to a promissory note payable to the plaintiff, Mrs. Pirie. Mrs. Pirie sued Wyld for payment. After being served with the writ, Wyld wrote a purportedly without prejudice letter to Pirie. In his letter, Wyld did not make any offer to settle. He denied liability, noted that in any event he had no funds to pay, declared that he was content "to fight the matter out",⁶³ and suggested that Mrs. Pirie was better advised suing Wink. Over Wyld's objection, the letter was admitted into evidence at trial. The jury found Wyld liable.

The Ontario Court of Appeal ordered a new trial.⁶⁴ In his judgment, Cameron C.J. (Galt and Rose JJ. concurring) noted that the authorities were clear that offers "for the sake of buying peace, or to effect a compromise are inadmissible in evidence".⁶⁵ He stated that the admission of without prejudice letters was against public policy as "having a tendency to promote litigation, and to prevent amicable settlements".⁶⁶ Cameron C.J. considered the particular issue of whether Wyld's letter qualified as a without prejudice communication and stated:⁶⁷

It may be said that no ground of public policy requires that a letter written by one litigant to another to intimidate that other, containing an admission against himself, should be held inadmissible; and if that is the only principle of rejection it might be that the letter written by the defendant in this case was of that character, and the admissibility or inadmissibility would entirely depend upon the circumstances for which the letter was written or communication made, making the rule thus uncertain and variable. The letter in question, however is deprecatory and complaining rather than abusive or minatory, and it seems to me should be held to be within the rule, which should be held to cover and protect all communications expressed

⁶² (1886), 11 O.R. 422 (Ont. H.C.).

⁶³ *Ibid.*, at p. 423.

⁶⁴ Where the admission of a without prejudice communication may have affected the verdict, an appellate court may order a new trial: *Cook v. Nova Scotia Light & Power Co.*, [1930] 1 D.L.R. 836 (N.S. App. Div.), unless there is other sufficient evidence on the point in issue: *Burns v. Kerr*, *supra*, footnote 29; *Ritchie v. Howard* (1857), 6 U.C.C.P. 437.

⁶⁵ *Supra*, footnote 62, at p. 427.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at p. 429.

to be without prejudice, and fairly made for the purpose of expressing the writer's views on the matter for litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and from wrong motives.

The *Pirie* test for a without prejudice communication requires that there be a dispute or litigation between the parties and then, provided there is good faith and that the communication is tied to the matter of the litigation or dispute, *Pirie* adopts a generally unrestrictive view of the discursive range of the communication.

Pirie was applied in the Ontario case of *Abrams v. Grant*⁶⁸ where the plaintiff indicated in a without prejudice memorandum that he would sue the defendant for professional negligence as a solicitor. The defendant replied by a without prejudice letter and denied any negligence. The defendant's letter did not contain any offer of settlement. Steele J. held that the letter was privileged as written for the purpose of expressing the writer's views on the matter of litigation or dispute.

Other Canadian courts have imposed a more restrictive test that requires terms of settlement.⁶⁹ The case of *Belanger v. Gilbert*⁷⁰ is illustrative. In this automobile personal injury action, the plaintiff's solicitor sent to the defendant's insurer a doctor's account for payment. The insurer wrote a letter returning the account stating that: "we would request that you include this in your special damages when we settle the claim". The Court of Appeal treated the letter as an acknowledgment sufficient to defeat the defendant's limitation period defence. The court held that the letter was not privileged because it failed the two-fold test of the existence of a dispute and the offering of terms of settlement.

This more restrictive test appears to be traceable to the much cited case of *In re Daintrey*.⁷¹ In this case, the appellant sued the respondent to recover a sum of money. In answer to the suit, the respondent wrote a letter headed "without prejudice" and he offered to settle the debt. In

⁶⁸ (1978), 5 C.P.C. 308 (Ont. H.C.). See also: *Eccles v. McCannell* (1984), 44 C.P.C. 43 (Ont. Div. Ct.); *Phillips v. Rodgers*, *supra*, footnote 49; *William Allan Real Estate Co. Ltd. v. Robichaud* (1987), 15 C.P.C. (2d) 109 (Ont. Master), *aff'd* (1987), 17 C.P.C. (2d) 138 (Ont. H.C.), leave to appeal granted (1987), 28 C.P.C. (2d) 47 (Ont. H.C.), but the appeal was abandoned; see *William Allan Real Estate Co. v. Robichaud* (1990), 68 D.L.R. (4th) 37, at p. 48, 72 O.R. (2d) 595, at p. 606 (Ont. H.C.).

⁶⁹ *Sherren v. Boudreau* (1973), 42 D.L.R. (3d) 627, 6 N.B.R. (2d) 701 (N.B.C.A.); *Lamoureux v. Smit*, [1983] 1 W.W.R. 37, (1982), 40 B.C.L.R. 151, 30 C.P.C. 287 (B.C.S.C.); *Flegel Construction Ltd. v. Cambac Financial Projects Ltd.*, *supra*, footnote 43; *Belanger v. Gilbert* (1984), 14 D.L.R. (4th) 428, [1984] 6 W.W.R. 474 (B.C.C.A.), *aff'g.* (1984), 8 D.L.R. (4th) 92, 52 B.C.L.R. 197 (B.C.S.C.); *Sidhu v. Grewal* (1986), 24 D.L.R. (4th) 476, 70 B.C.L.R. 128 (B.C.S.C.); *S.E. Johnson Mgmt. Ltd. v. Pigott Const. Ltd.* (1988), 57 Alta. L.R. (2d) 394 (Alta. Q.B.).

⁷⁰ *Ibid.*

⁷¹ *Supra*, footnote 47.

the letter, however, the respondent also stated that he was unable to pay his debts and would stop payment unless the settlement was accepted. The appellant responded with a petition to place the respondent into bankruptcy. The respondent relied on the letter as the sole evidence of an act of bankruptcy. The registrar refused to admit the letter into evidence and dismissed the petition. The registrar's decision was reversed by Vaughan Williams and Bruce JJ. Vaughan Williams J. stated:⁷²

The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document, which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to determine its character.

Vaughan Williams J. analysed the letter and added:⁷³

It seems to us that some of the conditions are complied with, but not all. There was a dispute, for there was an action pending between the parties. There was an offer, i.e., the offer of composition, which was intended to apply, amongst other things, to the petitioner's claim in the action; but the document, the letter of the debtor to the petitioner, was, in our opinion, more than this: it was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to us that a notice of an act of bankruptcy cannot be given "without prejudice" because the document in question was one which, from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby. For the reasons already given we think that such a document does not fall within the rule which excludes offers for peace written without prejudice, and ought to have been admitted in evidence.

The test for without prejudice correspondence used in *In re Daintrey* involved three factors: (1) a dispute; (2) an offer of settlement; and (3) that the communication itself not be prejudicial. The case law is consistent for the first and third factors. If there is no dispute or pending litigation, declaring a communication to be without prejudice does not establish any evidentiary privilege.⁷⁴

This, however, does not mean that, in the absence of any dispute, the words "without prejudice" are without legal effect. This is an important point that will be considered later when the discussion turns to without prejudice communications outside the law of evidence. For present purposes,

⁷² *Ibid.*, at pp. 119-120.

⁷³ *Ibid.*, at p. 120.

⁷⁴ *Warren v. Gray Goose Stage Ltd.*, *supra*, footnote 29; *Bank of Ottawa v. Stamco Limited* (1915), 22 D.L.R. 679, 8 W.W.R. 574 (Sask. T.D.).

it is sufficient to note that if a communication is expressly made without prejudice, then this expression may be legally significant to such matters as whether the declarant is liable for the tort of negligent misrepresentation⁷⁵ or subject to an estoppel.⁷⁶

As to the third factor, if the purportedly without prejudice communication is itself prejudicial or made in bad faith, the case law is consistent that the evidence is not protected by any privilege. This circumstance is sometimes included within the list of exceptions to the general rule. An example is *Underwood v. Cox*⁷⁷ where the plaintiff and his sister disputed their father's will. The plaintiff wrote a purportedly without prejudice letter to his sister in which he threatened to disclose that one of her children was the offspring of an adulterous relationship. Boyd C. stated:⁷⁸

On grounds of public policy, letters written *bona fide* to induce the settlement of litigation, are not to be used against the party sending them. But, when the offer embodies threats if the offer be not accepted, it is in the interests of justice that such tactics should be exposed and no privilege protects. . . .

In the same case, Middleton J. stated:⁷⁹

This rule, founded on public policy cannot be used as a cloak to cover and protect a communication such as the letter in question, which contains no offer of compromise, but a dishonourable threat.

It is only the second factor from *In re Daintrey*⁸⁰ requiring an offer of settlement that is controversial and upon which the cases divide. There are three observable approaches. In addition to the unrestrictive approach from the *Pirie v. Wyld*⁸¹ line of cases and the restrictive approach from the *In re Daintrey* line, there appears to be an intermediate response. The intermediate approach protects negotiations that do not include an offer of settlement but does not apparently go so far as *Pirie* in protecting other discourse.

An example of the intermediate approach is *Scott Paper Co. v. Drayton Paper Works Ltd.*⁸² where both parties claimed the right to a trade mark.

⁷⁵ *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

⁷⁶ *Maracle v. Travellers Indemnity Co. of Canada*, *supra*, footnote 36; *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61, (1991) 80 D.L.R. (4th) 670.

⁷⁷ (1912), 4 D.L.R. 66, 26 O.L.R. 303 (Ont. Div. Ct.). For other examples of this principle, see: *Greenwood v. Fitts* (1961), 29 D.L.R. (2d) 260 (B.C.C.A.); *Ussher v. Simpson* (1909), 13 O.W.R. 285 (Ont. Div. Ct.); *Kurtz and Co. v. Spence and Sons* (1887), 58 L.T. (N.S.) 438 (Ch. D.). See also: *Kitcap v. Sharp* (1882), 48 L.T. (N.S.) 64 (Ch. D.).

⁷⁸ *Ibid.*, at pp. 75-76 (D.L.R.), 315 (O.L.R.).

⁷⁹ *Ibid.*, at pp. 82 (D.L.R.), 323 (O.L.R.).

⁸⁰ *Supra*, footnote 47.

⁸¹ *Supra*, footnote 62.

⁸² (1927), 44 R.P.C. 151 (Ch. D.). *Warren v. Gray Goose Stage Ltd.*, *supra*, footnote 29, may be another example.

The plaintiff sent its American attorney to England to inquire whether the dispute could be amicably resolved. Clauson J. ruled that evidence of the conversations between the parties was privileged. He rejected the argument that the conversations should be admitted because no clear offer was made by either side. He stated:⁸³

It seems to me to be reasonably clear that Mr. *Stoughton* [the plaintiff's American attorney] went to this interview in order to carry out his instructions to endeavour to settle the matter, or at least, obtain the true facts of the case . . . I see no reason to doubt that Mr. *Dray* [the defendant's representative] at the interview must have thought having regard to what Mr. *Stoughton* states in his examination, that it was Mr. *Stoughton's* intention to endeavour to settle the matter, and he, Mr. *Dray*, I have very little doubt had in his own mind a desire to escape litigation with a firm with whom his firm had been on friendly terms. It appears to me that every element is present which makes it necessary for me to hold that these were negotiations for the settlement of pending litigation, each party hoping by these frank communications to prevent the anticipated litigation. It would, I think, be lamentable if admissions or statements made at an interview of that character were admissible.

In England, it appears that this intermediate approach now governs. In *South Shropshire District Council v. Amos*,⁸⁴ the Court of Appeal held that a document that merely initiates the negotiations may be privileged even if the document does not contain an offer. In *Buckinghamshire County Council v. Moran*,⁸⁵ the same court held that a letter that asserted the writer's legal position but that did not show a willingness to negotiate was not privileged. In this case, Slade L.J. said that the relevant question was whether the letter was a "negotiating document" and stated:⁸⁶

. . . the defendant was writing the letter in an attempt to persuade the council [the plaintiff] that his case was well founded. As I read the letter, it amounted not to an offer to negotiate, but to an assertion of the defendant's rights, coupled with an intimidation that he contemplated taking his solicitor's advice unless the council replied in terms recognizing his asserted rights. I cannot derive from the letter any indication, or at least any clear indication, of any willingness whatever to negotiate.

If, as is my view, the letter of 20 January 1976 cannot fairly and properly be read as an "opening shot" in negotiations, the attribution of the protection of "without prejudice" privilege would in my opinion go beyond the bounds of the privilege established by existing authority and would not in my opinion be justifiable. The public policy on which the privilege rests does not in my judgment justify giving protection to a letter which does not unequivocally indicate the writer's willingness to negotiate.

To resolve the controversy, the root problem is that of determining which approach strikes the right balance between the competing public policies. In his essay, Professor Vaver⁸⁷ criticizes the unrestricted approach

⁸³ *Ibid.*, at p. 157.

⁸⁴ [1986] 1 W.L.R. 1271, [1987] 1 All E.R. 340 (C.A.).

⁸⁵ [1990] Ch. 623, [1989] 2 All E.R. 225 (C.A.).

⁸⁶ *Ibid.*, at pp. 635 (Ch.), 231 (All E.R.).

⁸⁷ *Loc. cit.*, footnote 2, at pp. 160-163.

of *Pirie v. Wyld*.⁸⁸ He argues that the without prejudice rule should be confined to offers and negotiations. He contends that the *Pirie* articulation of the scope of the privilege goes too far in meeting the needs of the public policy encouraging settlement and encroaches on the public policy favouring the disclosure of probative evidence. The argument against the restricted approach is that it falls short in meeting the needs of the public policy encouraging settlement. This is also an argument that may be made against the intermediate approach.

Before a solution can be suggested, it is necessary to examine more precisely when the privilege is needed to advance the public policy of encouraging settlement. This was the methodology used by Oliver L.J. in *Cutts v. Head*.⁸⁹ As Oliver L.J. pointed out, the privilege is designed to negate admissions made in communications that further settlement. Since settlement offers further settlement, and since, as noted above, settlement offers may be probative as admissions, settlement offers need the protection of the privilege. Thus, the restrictive position is justified, as far as it goes.

But settlement offers are not the only type of communication that may further settlement and that may contain admissions. This suggests that the restrictive position is deficient unless there is something about settlement offers that makes them different from other kinds of communications, and this difference justifies restricting the privilege only to settlement offers. The only significant difference is that it is relatively easy to identify a settlement offer as encouraging settlement, but it is sometimes difficult to identify other communications as encouraging settlement. However, this difference would not justify extending the privilege only to offers. It follows that the restrictive position is deficient and one of the other positions would better implement the public policy.

It now remains to choose between the intermediate approach and the unrestricted approach of the *Pirie* case. There is, however, the possible preliminary objection that the difference between these approaches is semantic and not substantive. The objection based on semantics is that both positions include settlement offers and what is left is a difference only in language about defining the meaning of "negotiations". For present purposes, however, it will be assumed that the *Pirie* approach is substantially more liberal and will embrace a broader range of discourse.

To determine which approach best balances the competing public policies, it is helpful to explore further the larger question of defining the characteristics of without prejudice communications. Therefore, this Part may be ended by submitting that terms of settlement should not be a necessary element of a without prejudice communication. This submission

⁸⁸ *Supra*, footnote 62.

⁸⁹ *Supra*, footnote 19.

is supported by the developments in England where *In re Daintrey*⁹⁰ is no longer followed on this point.⁹¹ The larger issue of defining the characteristics of without prejudice communications is discussed in Part III.

III. *The Characteristics of Without Prejudice Communications*

To begin to explore the characteristics of without prejudice communications, it is worthwhile to review the characteristics already noted. For a communication to qualify as a without prejudice communication, there must be a dispute and the communication must not be prejudicial or made in bad faith. If the communication qualifies, it will be excluded from evidence. The exclusionary rule is justified by a public policy of encouraging settlement, although, in some instances, the communication would be irrelevant and excluded in any event. There is an aura or connotation of contract law associated with the exclusion of the communication from evidence, although contract law does not rationalize the exclusionary rule. There are exceptional cases that restrict the application of the exclusionary rule and an independent or collateral fact doctrine of dubious merit that circumvents the rule. Offers of settlement will qualify but in Canada there is uncertainty about the extent to which communications that do not include an offer will be privileged.

The exploration of characteristics may continue by parsing the definition of without prejudice communications from Halsbury⁹² that is set out at the beginning of the article. For convenience, it is repeated here:

Letters written and oral communications made during a dispute between the parties which are written or made for the purpose of settling the dispute and which are expressly or otherwise proved to have been made "without prejudice," cannot generally be admitted in evidence.

In this definition, the elements that without prejudice communications may be written or oral and that they generally will not be admitted in evidence are essentially descriptive elements. The word "generally" is needed to account that there are exceptional cases. These parts of the definition present no difficulties.

Also essentially descriptive in the Halsbury definition is the requirement that there must be a dispute between the parties. Since the existence of a dispute is rarely an issue, this requirement is not particularly helpful

⁹⁰ *Supra*, footnote 47.

⁹¹ In *The Corp. of the County of York v. Toronto Gravel Road and Concrete Co.*, *supra*, footnote 17, Proudfoot J.'s reference, at pp. 593-594, to "overtures of pacification" in addition to "offers or propositions" suggests that without prejudice communications need not contain terms of settlement. Similarly, in *Jones v. Foxall*, *supra*, footnote 13, Romilly M.R. referred, at pp. 321 (Beav.), 561-562 (E.R.), to offers "and the letters containing or relating to it".

⁹² *Op. cit.*, footnote 1.

in characterizing communications as without prejudice although, from time to time, this requirement will quickly disqualify a communication from being without prejudice for the purposes of the evidentiary rule.

More at the heart of the matter of defining the character of without prejudice communications are the requirements in the Halsbury definition that the communication be made for the purpose of settling the dispute and that the communication expressly or otherwise be proved to have been made without prejudice. These requirements tie without prejudice communications to the public policy rationale of encouraging settlement. There are, however, problems with these requirements, not the least of which is that the second requirement makes the definition circular.

*Cutts v. Head*⁹³ suggests a way to avoid the circularity of the Halsbury definition. Rather than defining without prejudice communications as for settlement and made without prejudice, they may be defined as for settlement and not intended as admissions. This part of the definition perhaps may even be shortened. Without prejudice communications are intended only for settlement purposes.

An illustration will assist the analysis of the remaining problems. Contracting parties may dispute whether a contract has been properly performed. They may take positions and disagree. They may exchange offers. Later, one of them may assert that his or her comments or offers were made without prejudice and out of a desire to settle the dispute and avoid litigation.

A problem immediately emerges. Is this late assertion of privilege believable? In truth, litigation might have been the remotest thing on the minds of the parties. If litigation was contemplated, then it might be for vindication and the communications about the dispute may be without thought of compromise, concession or settlement. The communications may have been uninhibited by any fear of admissions and in the particular circumstances there would be no public policy reason to suppress evidence of what was said.

Even if the declarant asserts contemporaneously that his or her comments are without prejudice, the difficulty of characterizing the communication is not lessened. The case law establishes that the express designation of a communication as without prejudice is not determinative of whether the privilege applies.⁹⁴ Conversely, the difficulty of classification is not lessened by the absence of a contemporaneous declaration. The case

⁹³ *Supra*, footnote 19.

⁹⁴ *Bank of Ottawa v. Stamco Ltd.*, *supra*, footnote 74; *Hartney v. Nor. Br. Fire Insurance Co.* (1887), 13 O.R. 581 (C.A.); *Sherren v. Boudreau*, *supra*, footnote 69; *South Shropshire District Council v. Amos*, *supra*, footnote 84.

law establishes that the absence of the words "without prejudice" is significant but not determinative of the character of the communication.⁹⁵

Further complications arise because it is also impossible to be categorical even about settlement offers. Sometimes, the party making the offer may wish to suppress evidence of the offer to avoid any suggestion of having made an admission. Other times, however, the party making the offer may wish to make an open offer with the actual intent that the offer become evidence. An open offer may be relevant to the quantum of damages, to the issue of mitigation, to show good faith or absence of malice. Or, the party making the offer may simply be indifferent or unaware of the evidentiary potential of the offer as an admission. Or, it may be that the settlement offer is part of the circumstances creating the dispute as in a wrongful dismissal case where an employer may offer money in lieu of giving notice.

These illustrations reveal that the problem of characterizing without prejudice communications is in part an issue of determining the intent of the speaker or writer and that this issue may turn on credibility. These aspects are also revealed in *William Allan Real Estate Co. v. Robichaud*.⁹⁶ In this case, the plaintiff was a real estate broker claiming a commission on the sale of the defendant's properties. Unfortunately for the plaintiff, the precise agreement that it had been instrumental in obtaining did not close and the transaction was restructured without the plaintiff's participation. The purchasers were concerned that the plaintiff might have a claim for commission from the arguably new transaction. The purchasers' concern prompted the defendant to meet with the plaintiff. The defendant offered to pay commission on part of the restructured transaction. This offer was refused and the plaintiff sued. During the trial, the defendant claimed that the offer was privileged.⁹⁷ Arbour J. disagreed because she found the defendant's evidence that the purpose of the offer was to buy peace unbelievable.

*Flegel Construction Ltd. v. Cambac Financial Projects Ltd.*⁹⁸ is another case which reveals that the court must determine the intent of the parties.

⁹⁵ *Signature Inns v. Carleton Homes Ltd.* (1978), 18 C.P.R. (3d) 124 (F.C.T.D.); *Dunlap v. Dunlap* (1985), 47 R.F.L. 247 (Man. Q.B.); *Hillesheim v. Hillesheim* (1974), 6 O.R. (2d) 647 (Master).

⁹⁶ (1990), 68 D.L.R. (4th) 37, 72 O.R. (2d) 595 (Ont. H.C.), the trial judgment. The interlocutory proceedings struggled with the without prejudice problem; see, *supra*, footnote 68.

⁹⁷ The vendor also took this position during the examinations for discovery and in interlocutory proceedings was upheld by Master Donkin and Campbell J. Reid J. granted leave to appeal because he felt that the assertion of privilege had to be tested. The appeal was abandoned with the onset of the trial; see, *supra*, footnote 68. At trial, Arbour J. concluded that the issue was not *res judicata* and addressed it afresh.

⁹⁸ *Supra*, footnote 45.

Here, Veit J. concluded that the communications at a meeting to discuss the performance of a construction contract were not privileged. She stated:⁹⁹

The issue of whether discussions are in fact compromise or settlement discussions depends upon the intention of the parties and it is clear to me, on the basis of the evidence presented on this motion, that the intention of the parties in holding this meeting was not to compromise or settle any claims, but rather, on the one hand, to insist that certain work be done and, on the other, to learn exactly what work was being insisted upon.

There is actually very little case law that looks at the problem that to characterize a without prejudice communication, the court must determine the intent of the speaker or the writer. It is rare that a court will question the without prejudice designation as establishing that the speaker or writer intended the communication for the purpose of settlement and intended that the communication not be an admission. Where communications are disqualified, it is usually for some reason not tied to the intent of the speaker or writer. For example, in *In re Daintrey*,¹⁰⁰ where a without prejudice offer to settle was made, the court denied any privilege because the communication was prejudicial. Similarly, when settlement offers are qualified for the privilege notwithstanding the absence of any without prejudice designation, the case law does not explore whether the offerer put his or her mind to how the offer should be treated as evidence.

Assuming that the public policy of encouraging settlement through without prejudice communications is a worthy policy, it is probably a good thing that courts, and also counsel trying cases, generally do not engage in any close scrutiny of the intent of the speaker or writer. Were the courts and counsel generally to do so, apart from probably prolonging trials, the effect would be to adopt a Wigmore theory of relevancy. This follows because the treatment of the communication would depend less upon public policy and more upon the conditional nature of the communication; that is, upon whether the declarant had intended the communication to be used only for settlement or whether the declarant had intended an unconditional assertion.

If these observations are correct, then there may now be an answer to the problem of choosing between the intermediate position or the unrestricted position of the *Pirie* case as establishing the range of discourse that will qualify as being for the purpose of settlement. Arguably, if the policy of encouraging settlement is to be encouraged, and if the theory of relevancy with its associated need for a possibly protracted adjudication of intent is to be avoided, the courts should not be overly scrupulous in examining whether the communication is for settlement. The courts should be satisfied that there is a dispute and that the communication is made in good faith and tied to that dispute. This argument favours

⁹⁹ *Ibid.*, at pp. 411 (W.W.R.), 346 (Alta. L.R.).

¹⁰⁰ *Supra*, footnote 47.

the *Pirie* approach, although, once again, it may be noted that it is also arguable that only semantics may separate the approaches.

IV. *The Privilege and Remote Parties*

This part considers the issue of whether a communication that is privileged between the immediate parties may be put into evidence by a remote party. This issue has been considered by courts in British Columbia, Ontario and England. It is necessary to review the cases before commenting about the current divided law in Canada.

The discussion may begin with *Schetky v. Cochrane*,¹⁰¹ a decision of the British Columbia Court of Appeal. In this case, the plaintiff, Acadia Company Ltd., sold its stock to twenty-seven individuals who paid for their subscriptions by promissory notes. The defendant Cochrane was one of the subscribers. The defendants Elston and Cornish arranged for Acadia to sell the notes, including Cochrane's note, to the defendant Union Funding Company. Schetky, the liquidator for Acadia, alleged that Elston and Cornish had perpetrated a fraud. Before any proceedings were commenced, Schetky and the Union Funding Company engaged in without prejudice communications for the purpose of reaching a settlement. No settlement was reached and an action was commenced. At Schetky's examination for discovery, the defendant Cochrane inquired about the settlement negotiations. Schetky claimed privilege and refused to answer. When Cochrane successfully moved for an order compelling him to answer, Schetky appealed.

The British Columbia Court of Appeal affirmed the order compelling Schetky to disclose his without prejudice communications with the Union Funding Company. Four judges heard the appeal. Of these, McPhillips J.A. dismissed the appeal without giving reasons. Eberts J.A. reasoned that Cochrane was entitled to answers because he was not a party to the negotiations or to any arrangements for without prejudice communications. The problems with Eberts J.A.'s judgment are that it appears to be based on the inadequate contractual rationale for the without prejudice rule and the judgment wants for any analysis of the other possible rationales. The judgment simply begs the question of why a remote party should be able to get around the exclusionary rule.

In his judgment, Martin J.A. viewed the claim against Cochrane as including an allegation that Cochrane was a party to the fraud. Martin J.A. stated:¹⁰²

I am unable to see how, in repelling a charge of fraud, a defendant can be prevented from proving, *e.g.*, laches, a waiver, or election, merely because the plaintiff advancing the charge acquired "without prejudice" from a third party the facts and information which affected him with notice and waiver of election or laches. As between the

¹⁰¹ [1918] 1 W.W.R. 821, (1917), 24 B.C.R. 496 (B.C.C.A.).

¹⁰² *Ibid.*, at p. 826 (W.W.R.). Martin J.A.'s judgment is not reported in B.C.R.

negotiators themselves the privilege of non-disclosure admittedly exists, but what authority is there for extending it to a stranger.

This passage may be read as recognizing an exception to the without prejudice rule to rebut allegations of fraud. This reading, however, is too restrictive. In the balance of his reasons, Martin J.A. referred to the independent fact cases of *Waldridge v. Kennison*¹⁰³ and *In re Daintrey*,¹⁰⁴ and he argued that these cases supported the view that a remote party was outside the rule. While Martin J.A.'s reasoning is not clear, the *Waldridge* case apparently supported this view because it showed how facts could be admitted as independent of the privilege. *In re Daintrey* supported the view because for the remote party there was not a dispute or the offer of terms of settlement.

The weaknesses in Martin J.A.'s judgment are that, like Eberts J.A., he does not address the various rationales for the rule and he does not consider the effect, on the public policy of encouraging settlement, of allowing remote parties to circumvent the exclusion of evidence. For example, is it reasonable to expect an immediate party to negotiations to be candid with one foe when doing so may strengthen other foes who may have more substantial claims? Further, Martin J.A.'s judgment is weak to the extent that it relies on the independent fact doctrine.

The fourth judgment, regarded as the leading judgment, was delivered by Macdonald C.J.A. In his reasons, Macdonald C.J.A. did not see any allegation of fraud against Cochrane, and so he did not see how the liquidator's negotiations with the perpetrators of the fraud that was pleaded could be relevant to Cochrane's right of discovery. Macdonald C.J.A. noted the rationale of public policy and the rationale of relevancy advanced by Wigmore and seemed to favour the latter; however, Macdonald C.J.A. did not decide which rationale should govern, and instead drew a distinction between evidence given on discovery and evidence given at trial. He stated:¹⁰⁵

The parties to the negotiations have equal knowledge of what took place but a third party might have none, and when he shows that the negotiations were in respect of a matter which is in issue in his action he is entitled I think to discovery of what it is that protection is claimed for. When it comes to trial I do not think the third party has any higher right to use the statements or admissions than that which would be accorded to parties to the negotiations seeking to introduce them in evidence.

Macdonald C.J.A. concludes, seemingly on grounds of fairness, that it is appropriate to allow a third party discovery of without prejudice communications. However, the privilege would be restored for the trial where the judge could rule on any arguments that the evidence was outside

¹⁰³ *Supra*, footnote 25.

¹⁰⁴ *Supra*, footnote 47.

¹⁰⁵ *Supra*, footnote 101, at pp. 285 (W.W.R.), 500-501 (B.C.R.).

the privilege.¹⁰⁶ Thus, Macdonald C.J.A.'s judgment provides authority only for the proposition that a remote party may obtain discovery of without prejudice communications.¹⁰⁷ The effect of this approach on the public policy of encouraging settlements was not considered.

The judgments in *Schetky* were considered in the Ontario case of *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*¹⁰⁸ In this case, the plaintiff purchased from United Steel Corporation a hydraulic press that exploded during repairs. The plaintiff sued, among others, Texaco Canada Ltd., the supplier of the oil used in the press. The plaintiff delivered an affidavit of documents that referred to without prejudice correspondence with United Steel Corporation. Texaco sought production of this correspondence. Affirming the decision of the Master, Fraser J. concluded that Texaco could not compel production.

In reaching his decision, Fraser J. examined the correspondence and concluded that it had not produced a settlement but was privileged as between Waxman and United Steel Corporation. He reviewed the Canadian and the English authorities and concluded that there was no binding case on the particular point of the rights of remote parties.¹⁰⁹ The point had to be decided on first principles. Fraser J. reasoned that the public policy that was designed to encourage settlements was served by not allowing a third party to compel disclosure at discovery or at trial.

In reaching his conclusion, Fraser J. both disagreed with parts of the judgments in *Schetky* and he distinguished the case. He criticized any possible reliance on the Wigmore theory. Fraser J. felt the theory was not supported by the authorities. He suggested that the *Schetky* decision might be explained as an example of an exception for fraud.

Fraser J.'s judgment was affirmed by the Ontario Court of Appeal which cryptically stated:¹¹⁰

We find ourselves in agreement with the conclusions reached by Fraser J., and also with his analysis, in the main, of the very numerous decisions referred to in his reasons for judgment. . . .

¹⁰⁶ It may be recalled that the possible distinction between disclosure at discovery and at trial appears in *Rabin v. Mendoza*, *supra*, footnote 41.

¹⁰⁷ As will be seen below, this proposition was rejected by the House of Lords in *Rush & Tompkins Ltd. v. Greater London Council*, *supra*, footnote 18.

¹⁰⁸ (1968), 67 D.L.R. (2d) 295, [1968] 1 O.R. 642 (Ont. H.C.), *aff'd* (1968), 69 D.L.R. (2d) 543, [1968] 2 O.R. 452 (Ont. C.A.).

¹⁰⁹ In his judgment, Fraser J., *ibid.*, at pp. 303 (D.L.R.), 650 (O.R.) (H.C.), notes *La Roche v. Armstrong*, [1922] 1 K.B. 485 (K.B.D.), which is at least close to the point of the issue of the rights of remote parties. In this case, the solicitor who wrote the without prejudice letter on behalf of his client was himself sued and was protected by the privilege. Fraser J. does not mention *Tennant v. Hamilton*, *supra*, footnote 3, where the plaintiff was the remote party that was not permitted to ask about the defendant's settlement negotiations with others.

¹¹⁰ *Supra*, footnote 108, at pp. 544 (D.L.R.), 453 (O.R.) (C.A.).

It is not clear what reservations, if any, the Ontario Court of Appeal had in endorsing Fraser J.'s judgment, and, thus it is not clear what view the court held of the Wigmore relevancy theory.

In any event, the *Waxman* case did not provide the finale for Wigmore's theory. It was next considered in British Columbia, in *Derco Industries Ltd. v. A.R. Grimwood Ltd.*¹¹¹ In this case, the plaintiff was the supplier of steel for a construction project. The plaintiff sued the owner, the contractor and the construction manager for negligence or for breach of contract. The plaintiff claimed that the defendants' misconduct had delayed the construction and caused damages. In separate proceedings, the contractor sued the owner, the construction manager and another party, alleging delays and claiming damages. The contractor's action was settled and the plaintiff sought to compel production of the settlement documents. Spencer J. ordered the production. He stated that there were two rationales for the treatment of without prejudice communications. The first rationale was the public policy of encouraging settlements and the second was the one advanced by Wigmore. Spencer J. appreciated that adopting the second rationale might lead to a trial of the issue of whether the statement was a conditional statement or an outright admission. Relying on *Schetky v. Cochrane*, Spencer J. concluded that British Columbia had adopted the second rationale and that the documents should be produced at the discovery stage, leaving relevance and admissibility to be determined at trial.

The defendants appealed. Lambert J.A. delivered the judgment of the British Columbia Court of Appeal. After identifying the competing rationales, he addressed the *Schetky* case and stated:¹¹²

In my opinion, no ratio decidendi emerges from the decision of this Court in *Schetky v. Cochrane*, that is binding on us in this case. I do not think it is either necessary or desirable, in the urgent circumstances in which this decision is required, to express any opinion on the theory that should be adopted in considering the producibility or admissibility, as between the parties to a concluded settlement, or as between the parties to inconclusive settlement negotiations, of documents or other evidence arising in the course of the negotiations or setting out the terms of the settlement itself. The answers to those questions depend on a balancing of competing legal interests. On the one hand, anything which may tend to the finding of the truth should be brought forward. On the other hand, litigants should be encouraged to settle their differences.

But the balance that should be reached between these competing legal interests may well be different in a case between a third party litigant, on the one hand, and the parties to the settlement, on the other hand, than that balance would be between the parties to the settlement themselves.

Lambert J.A. concluded that a remote party was not precluded from compelling production of the settlement documentation and stated:¹¹³

¹¹¹ [1985] 1 W.W.R. 541, (1984), 57 B.C.L.R. 390 (B.C.S.C.), aff'd, [1985] 2 W.W.R. 137, (1984), 57 B.C.L.R. 395 (B.C.C.A.).

¹¹² *Ibid.*, at pp. 141 (W.W.R.), 399 (B.C.L.R.) (C.A.).

¹¹³ *Ibid.*, at pp. 142 (W.W.R.), 400 (B.C.L.R.).

This decision is restricted to documents demanded by a third party to a settlement; it is restricted to documents arising in the course of settlement negotiations that have led to a completed settlement, including the settlement agreement itself; it is restricted to documents and does not extend to other forms of evidence; and it is restricted to production and not to admissibility.

But, I should add that in my view the question of admissibility, should it arise at trial, will depend only on the question of relevance, and not on any issue of privilege as between this plaintiff and these defendants.

It is necessary to make clear what Lambert J.A. decided and what he did not decide. Although he outlined the competing theories, he avoided deciding which theory governed the treatment of without prejudice communications between the immediate parties. He drew a distinction between communications leading to a concluded settlement and inconclusive communications. He did not make a decision for inconclusive communications. For concluded settlements, the settlement documents should be produced. This ruling, however, did not apply to other forms of evidence. In so far as third parties were concerned, once the settlement document was produced, its admissibility at trial was to be determined by relevancy. He left for another day the question of whether a remote party may obtain evidence of inconclusive settlement discussions, which was the factual problem of the *Schetky* case.

The *Derco* case was noted in the Ontario case of *Mueller Canada Inc. v. State Contractors Inc.*,¹¹⁴ but a somewhat different approach was used to decide that a remote party could compel production of settlement documentation. In this case, State Contractors built a factory for Kellogg Salada Canada Inc. and Kellogg U.S. The plaintiff Mueller was a subcontractor. State Contractors and Mueller severally complained that difficulties during construction were due to the negligence and breaches of contract of the Kellogg companies. Mueller alleged that State Contractors breached a fiduciary duty owed to Mueller when State Contractors settled its complaints with the Kellogg companies without protecting Mueller's position as it had allegedly promised to do. Mueller sought the production of the settlement documentation between State Contractors and the Kellogg companies.

In ordering production, Doherty J. distinguished *I. Waxman & Sons* and said that the immediate case fell within an exception recognized in that case. He stated:¹¹⁵

Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production. Fraser, J. recognized this limitation in the privilege in *I. Waxman and Sons* ...

¹¹⁴ (1989), 71 O.R. (2d) 397, 41 C.P.C. (2d) 291 (Ont. H.C.).

¹¹⁵ *Ibid.*, at pp. 401-402 (O.R.), 296 (C.P.C.).

when he referred . . . to the decision of Middleton J. in *Pearlman v. National Life Assurance Co. of Canada* . . . as standing for the proposition that "where a contractual relationship resulting from the correspondence is in issue, the correspondence is not privileged".

In other words, Doherty J. read *I. Waxman & Sons* as allowing an independent or collateral fact exception to the without prejudice communications rule for third parties. This, however, is a misreading of the case. Fraser J. supported a public policy basis for the privilege and rejected other approaches. Fraser J. does not discuss *Waldridge v. Kennison*,¹¹⁶ and *Pearlman v. National Life Assurance Co. of Canada*¹¹⁷ does not support a collateral or independent fact doctrine. The *Pearlman* case is consistent with the line of authority that the court may examine the without prejudice communications to determine whether a settlement has been reached. In *Pearlman*, there was a claim for rectification and this obviously required the court to examine the communications. The *Pearlman* case is about the common sense exception to the general without prejudice rule that enforces the settlement agreement between the immediate parties.

Mueller conflicts with *I. Waxman & Sons*. The conflict is not avoided by the distinction that *Mueller* involved a concluded settlement between the immediate parties while *I. Waxman & Sons* involved inconclusive negotiations. Such a distinction is hostile to the underlying public policy of encouraging settlement and would make it more dangerous to reach a settlement than to negotiate and fail to settle. Nor is the conflict avoided by the distinction that the remote party in *Mueller* made the settlement itself an issue, although this feature certainly greatly increased the tension between the public policies of disclosure of probative matter and of encouraging settlement. The remote parties in both cases were seeking information to prove their own cases; the fact that the settlement was itself an issue in *Mueller* is a difference in degree and not in type of disclosure.

This brings the discussion to the House of Lords' decision in *Rush & Tompkins Ltd. v. Greater London Council*,¹¹⁸ another case involving a construction project. In this case, Rush & Tompkins, general contractors, sued the defendant Greater London Council to recover losses and expenses incurred in constructing 639 houses. The action also sought declarations about the claims of subcontractors, one of which was PJ Carey Plant Hire (Oval) Ltd. (Careys), a defendant and plaintiff by counterclaim. Rush & Tompkins settled with the Greater London Council and under the settlement were responsible for the claims of the subcontractors, including Careys. In its counterclaim, Careys sought production of the settlement

¹¹⁶ *Supra*, footnote 25.

¹¹⁷ *Supra*, footnote 47.

¹¹⁸ *Supra*, footnote 18.

documentation because it might show the quantum attributed to Careys' claim within the global settlement. The House reversed the decision of the English Court of Appeal that the settlement documentation should be produced.

Lord Griffiths delivered the judgment for the court. He disagreed with the Court of Appeal that the privilege ceased once a settlement had been reached. As already noted above, he discussed the public policy rationale underlying the privilege and pointed out how that policy of encouraging settlement would be disturbed if remote parties could circumvent the rule. Using the example of a construction project he observed that the main contractor might be reluctant to settle minor claims if admissions made in that settlement could be used by other claimants with larger claims. Allowing remote parties information about the settlement would "run counter to the whole underlying purpose of the without prejudice rule".¹¹⁹

Lord Griffiths considered whether the settlement documentation might be produced for discovery while maintaining the privilege for trial. He noted the differing views on this point presented by *Schetky v. Cochrane*,¹²⁰ *Derco Industries Ltd. v. Grimwood Ltd.*¹²¹ and *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*¹²² and concluded that disclosure would fetter and damage negotiations and "the wiser course is to protect 'without prejudice' communications between parties to litigation from production to other parties in the same litigation".¹²³

It is perhaps unfortunate that Lord Griffiths added the words "in the same litigation" since this hints that remote parties might circumvent the privilege by separate proceedings. However, put into the context of his reasoning, it appears that he meant in the same dispute.¹²⁴ With this small caution, the position in England seems clear. In England, remote parties may not gain access to without prejudice communications at discovery or at trial because of the public policy of encouraging settlement. The same cannot be said for Canada. There is conflict between the case law in Ontario and British Columbia and now uncertainty about the law within Ontario. In British Columbia, a very complicated scheme appears to be developing that draws distinctions between concluded and inconclusive

¹¹⁹ *Ibid.*, at pp. 1301 (A.C.), 741 (All E.R.).

¹²⁰ *Supra*, footnote 101.

¹²¹ *Supra*, footnote 111.

¹²² *Supra*, footnote 108.

¹²³ *Supra*, footnote 18, at pp. 1305 (A.C.), 744 (All E.R.).

¹²⁴ This wider interpretation still leaves unexplored a factual problem involving remote parties that would seem to be outside the limits of the public policy rationale. If there was no possibility of remote party claims against the immediate parties to without prejudice negotiations, it would seem that remote parties involved in their own separate dispute could require the immediate parties to give evidence about their without prejudice communications.

settlement negotiations. In determining the rights of remote parties, the British Columbia scheme appears to rely on relevancy as its guide to the treatment of without prejudice communications, rather than on any public policy of encouraging settlement. The major problem with the emerging approach in British Columbia, and perhaps Ontario, is that this approach does not have an answer to the objection that settlement is not encouraged when a party must be vigilant about the claims of remote parties. This objection is not answered by suggesting that immediate parties could manifest that their offers and any admissions were conditional and solely for the purposes of settlement and thus irrelevant. Apart from the fact that this suggestion would necessitate an adjudication, it is not an answer because the court quite simply might not believe what the parties said. As already pointed out, it is not possible to be categorical that all without prejudice communications lack probative value. In some circumstances, merely discussing the claim may suggest that the claim has credence.

V. *Practical Problems In and Outside the Law of Evidence*

So far, the discussion has dealt with the law of evidence. The central issues have been that of determining when and why a communication will be treated as privileged in the sense that the communication will be excluded from evidence. But parties may communicate without prejudice in a different sense. In certain contexts, parties may intend that their without prejudice statements should be revealed and used as evidence. In other contexts, they may be indifferent to the evidentiary use of their communications and have other reasons for expressing their statements without prejudice. Given that parties may use the same language to mean diverse things, it is not surprising that there will be problems. Some of these problems are considered in this part that examines without prejudice communications outside the law of evidence.

The recent Supreme Court of Canada decision in *Maracle v. Travellers Indemnity Co. of Canada*¹²⁵ provides a convenient place to start. In *Maracle*, the plaintiff's building was destroyed by fire. The plaintiff's insurer paid into court the amount of the coverage for the destroyed equipment and the stock in trade. By letter dated February 23, 1983, the insurer offered \$84,000 for building damage and enclosed blank proof of loss forms. The letter stated: "The foregoing information and submission of these Proofs is to comply with the Insurance Act, Without Prejudice, to the liability of the Insurer." The offer was not accepted but the plaintiff did not commence action until after the expiry of the limitation period. The issue then was whether the insurer was estopped from relying on a limitation defence. Sopinka J., for the court, concluded that for there to be an estoppel, the

¹²⁵ *Supra*, footnote 36. See also: *Marchischuk v. Dominion Industrial Supplies Ltd.*, *supra*, footnote 76.

words or conduct of the insurer had to amount to a promise not to rely on the limitation period. Sopinka J. reasoned that an insurer's offer tied to settlement negotiations was not a promise that the insurer would not rely on a limitation defence, although the offer might be relevant to the adjudication of whether that promise had been made. Sopinka J. concluded that there was no estoppel in this case. He stated:¹²⁶

In . . . [settlement negotiations], the admission of liability is simply an acknowledgment that, for the purpose of settlement discussions, the admitting party is taking no issue that he or she was negligent, liable for breach of contract, etc. There must be something more for an admission of liability to extend to a limitation period. . . . Not only is there no evidence to suggest that the admission was intended to have this effect, but the letter of February 23, 1983 was made "without prejudice" to the liability of the insurer. The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations.

Sopinka J., notwithstanding his background as a co-author of a leading Canadian text on evidence, does not discuss the effect of without prejudice in the context of evidence. Rather, he describes without prejudice communications more generally and in terms of the assertion of rights. The general idea is that without prejudice communications are not to affect a party's rights or liabilities.

It is, in fact, quite common for lawyers and for lay persons to rely on the idea that they may communicate without prejudice to their rights and liabilities. It is also quite common for lawyers and lay persons to extend this idea to conduct. Lawyers acting in real estate and other commercial transactions typically respond to title and other requisitions without prejudice to later taking the position that the requisition was late or invalid.¹²⁷ The lawyers respond in this way because they wish to facilitate the completion of their clients' transactions and to avoid needless disputes. The lawyers anticipate that the without prejudice correspondence may come before the court as evidence under the Vendors and Purchasers Act.¹²⁸

A lay person may provide information without prejudice so as to avoid liability under the principles of *Hedley Byrne & Co. v. Heller & Partners Ltd.*¹²⁹ that impose responsibility for negligent misrepresentation. The person providing the information will wish to use the expression of without prejudice as a disclaimer and to have evidence to refute any submission that he or she had a duty of care to the recipient or to argue that it was unreasonable for the recipient to have relied on the information.

¹²⁶ *Ibid.*, at pp. 58-59 (S.C.R.), 658 (D.L.R.).

¹²⁷ See, *Sabem Developments Ltd. v. Dutchmen Homes Ltd.* (1977), 19 O.R. (2d) 70, at pp. 84-87 (Ont. H.C.).

¹²⁸ R.S.O. 1980, c. 520.

¹²⁹ *Supra*, footnote 75.

A mortgagor, a tenant, a licensee, a taxpayer may purport to pay without prejudice and under protest so as to later take the position that the payment was not owing.

Court proceedings are frequently adjourned without prejudice and deadlines in commercial transactions are frequently rescheduled without prejudice. The intent in either case is generally that the rights of the parties should be determined without regard to the further passage of time.

Judges frequently dismiss proceedings without prejudice meaning that the judgment or order will not raise the defence of *res judicata* and the applicant may return again to court for a decision on the merits of the point in issue.¹³⁰

In *Raymer v. Stratton Woods Holdings Ltd.*,¹³¹ the purchaser breached an agreement for the sale of land. The Court of Appeal rejected the purchaser's argument that the vendor's damages were limited to a deposit that was described in the agreement as liquidated damages. The court noted that this argument ignored that the agreement also provided that the forfeiture of the deposit was to be without prejudice to other remedies.

In *Ontario v. Kansa General Insurance Company*,¹³² an insurer, through without prejudice correspondence, broached the position that the insured was outside coverage. This led to a court application to determine the extent of the insurance coverage. The without prejudice correspondence protected the insurer from the allegation that it was repudiating the insurance contract by raising the issue of coverage.

Statutes also employ the language of without prejudice. In Ontario, for example, under the Sale of Goods Act,¹³³ the vendor's right upon the buyer's default to rescind the contract and resell the goods is without prejudice to a claim for damages. Under the Partnerships Act,¹³⁴ where a partnership contract is rescinded on the ground of fraud or misrepresentation, the party entitled to rescind is entitled to certain statutory rights "without prejudice to any other right". Under the Expropriations Act,¹³⁵ a claimant may accept the statutory offer of compensation "without prejudice to the rights conferred by this Act in respect of the determination of compensation".¹³⁶

¹³⁰ *Goulding v. Ternoey* (1982), 132 D.L.R. (3d) 44, at pp. 51-52, 35 O.R. (2d) 29, at pp. 36-37 (Ont. C.A.).

¹³¹ (1988), 65 O.R. (2d) 16 (Ont. C.A.).

¹³² (1991), 3 O.R. (2d) 543 (Ont. Gen. Div.).

¹³³ R.S.O. 1980, c. 462, s. 46(4).

¹³⁴ R.S.O. 1980, c. 370, s. 41.

¹³⁵ R.S.O. 1980, c. 148, s. 25.

¹³⁶ There are other examples. A computer-assisted search of the 1980 Revised Statutes of Ontario located 25 examples.

Sometimes the efforts to insulate communications or conduct by using the without prejudice concept fail. Courts frequently interpret documents in ways that may disappoint or even surprise at least one party. Disclaimers of without prejudice are ineffective to excuse fraud. Sometimes the words "without prejudice" are ineffective as inconsistent with the party's conduct. For example, it is not possible for a landlord to accept rent without prejudice to the position that the tenant has forfeited the lease. The acceptance of rent cannot be isolated from the continued existence of the lease and the expression of without prejudice will not assist the landlord who will be taken to have waived the forfeiture by the acceptance of rent.¹³⁷

Over and above the problem that a person may fail to achieve the particular purpose intended by without prejudice communications or conduct, there is the problem that the variety of meanings for "without prejudice" and the qualifications and disqualifications associated with the privilege sometimes cause confusion and miscalculation. Three examples will suffice.

In the first example, a purchaser breaches a contract of sale. The vendor's lawyer writes without prejudice treating the breach as grounds to end the contract and claiming damages for the breach. This letter is effectively meaningless. The lawyer should either write openly (that is, with prejudice) to end the contract and with the intention that the letter be evidence, or the lawyer should write without prejudice to demand that the breach be remedied or the breach will be treated as grounds to end the contract. The second choice may require further action since the vendor's lawyer will have to write an open letter should the breach not be corrected. Given the current state of the law, a better approach may be for the vendor's lawyer to write two letters from the outset, the first letter openly treating the breach as ending the contract and the second letter without prejudice indicating that the vendor is prepared to withdraw the termination and to settle the dispute by performance of the contract.

In the second example, a tenant has an option to renew a lease at a rent to be agreed upon or settled by arbitration.¹³⁸ The tenant must give notice within a specified period. Before the deadline, the landlord writes the tenant a without prejudice letter offering a new rental rate. The tenant responds with a counter-offer in a letter that is silent as to whether it is written without prejudice. The parties do not reach an agreement and

¹³⁷ *Chernev v. Smith*, [1946] 3 D.L.R. 765, [1946] O.W.N. 513 (Ont. C.A.); *Halifax-Dartmouth Bridge Commission v. Imperial Oil Ltd.* (1980), 73 A.P.R. 107, 14 R.P.R. 69 (N.S.T.D.); *B & R Holdings Ltd. v. Western Grocers Ltd.* (1982), 25 R.P.R. 121 (Man. Q.B.); *250669 B.C. Ltd. v. Popular Properties Ltd.* (1987), 48 R.P.R. 283 (B.C.S.C.); *MacMullin v. D'Addario* (1988), 225 A.P.R. 383, 2 R.P.R. (2d) 175 (N.S.T.D.).

¹³⁸ This example is a variation of *Petridis v. Shabinsky* (1982), 132 D.L.R. (3d) 430, 35 O.R. (2d) 215 (Ont. H.C.).

the deadline for exercising the option to renew passes. It is now a neat question whether the lease has been renewed subject to arbitration. Was the tenant's reply an open letter exercising the option or was the letter implicitly without prejudice and ineffective to exercise the option? (Courts have rejected the attempt to establish substantive ingredients of a claim from without prejudice communications. For example, in *In re Weston and Thomas' Contract*,¹³⁹ a notice of rescission was ineffective because it was marked without prejudice.) It is open to the landlord and the tenant respectively to take either side on these questions and economic considerations may motivate the choice. The only thing that is reasonably clear is that, if the matter goes to litigation, the correspondence will be evidence since the parties were engaged in negotiating an everyday commercial transaction, and it should be difficult for either side to argue that he or she was engaged in efforts to settle a dispute and concerned about making admissions.

In the third example, an employee is injured due to an employer's negligence. The employer and the employee exchange correspondence about the matter. In the first letter, the employer writes without prejudice and offers an amount to settle the employee's claim. The offer is based on the employer's understanding of the seriousness of the injuries. In the second letter of exchange, the employee rejects the offer writing that the injuries are worse than understood by the employer and that the employee is unable to return to work. The employee's letter is not expressed to be written without prejudice. In the third letter, the employer asks the employee to undergo rehabilitatory treatment. The third letter is not expressed to be written without prejudice. In the fourth and final letter of the exchange, the employee refuses to undergo the treatment. This letter is not expressed to be written without prejudice. The employee sues for damages and at the trial the employer wishes to introduce as evidence every letter of the exchange except the first letter.

It is problematic whether the employer may introduce the correspondence. Recalling that it is neither necessary nor sufficient for a letter to be expressed to be without prejudice, the court may decide that the whole exchange was privileged.¹⁴⁰

These examples show that there are problems about when a communication not expressed to be without prejudice will be privileged and problems about when a communication expressly made without prejudice will be prejudicial.

¹³⁹ [1907] 1 Ch. 244 (Ch. D.).

¹⁴⁰ This example is a variation of *India-Rubber Works Co. v. Chapman*, *supra*, footnote 49. In that case, the exchange of correspondence was not admitted because the employer did not clearly break the chain of the privilege.

VI. *Some Practical Suggestions*

The law of without prejudice communications confronts lawyers, and also lay persons, with many problems. The general meaning of a "without prejudice" communication as a communication intended not to affect rights and liabilities sometimes conflicts with the particular meaning of a "without prejudice" communication as a communication to be excluded from evidence. Lawyers and lay persons must focus precisely on what they wish to achieve by a without prejudice correspondence.

If the purpose is to exclude the communication from evidence, then there must be a dispute present or pending, and the lawyer or lay person should make it clear that the communication is for the purposes of settlement and not for any other purpose. The communication must not be prejudicial or made in bad faith. The lawyer or lay person must be aware that there are exceptions to the privilege.

Although, after hundreds of years of use, it is probably too late to abandon the short form of expressly describing the communication as without prejudice, the lawyer or lay person wishing to assert the privilege should not rely on this language. The language is neither necessary nor sufficient. The lawyer or lay person should articulate his or her intent. This will be helpful not only because the court may have to adjudicate on the issue of intent, but because, even if the communication fails to qualify as privileged, the lawyer or lay person may still argue that the communication had minimal probative value. In other words, while a theory of relevancy may not be adequate to rationalize any privilege, relevancy is available as a component in an argument that the communication should be given little weight. Minimizing the weight of the evidence may be particularly important if remote parties are allowed to introduce the evidence.

If the purpose is to communicate in a way that does not affect rights and liabilities while preserving the communication as evidence, then once again it is helpful for the lawyer or lay person to articulate this precise intent. For example, in the case of responding to a requisition letter, a lawyer should state that the letter is written without prejudice as to rights and liabilities of the parties but with the intent that the letter may be used as evidence. While this precision is probably unnecessary in the area of real estate transactions, in other circumstances there will be no custom or convention to fall back on.

If the purpose is to communicate to create evidence or in a way that affects rights and liabilities, then the lawyer or lay person should not expressly or implicitly make the communication without prejudice. For either purpose, it is simply a mistake to expressly assert that the communication is without prejudice, but this is an easy enough mistake to make when language is capable of diverse meanings. Unfortunately, it is also too easy to fall into the trap of implicitly communicating without prejudice, as the example above about the chain of correspondence shows.

The solution, once again, is to articulate the precise purpose of the communication. This may be done by asserting that the letter is written with the intent that it affect the rights and liabilities of the parties and with the intent that it be evidence.

In all events, lawyers and lay persons should guard against the belief that without prejudice has a precise meaning and usage.