PROFESSIONAL PRIVILEGE AND THIRD PARTIES

SCHNEIDER v. LEIGH, [1955] 2 Q.B. 195, [1955] 2 All E.R. 173.

Most readers will remember the security slogans of the war years. On every billboard one was enjoined to keep sealed lips, for, as we were told, "careless talk costs lives". This is not exactly the moral of Schneider v. Leigh, [1955] 2 Q.B. 195, but that case is at least a warning to solicitors to think twice before divulging information to an opposite party. Although the "careless talk" in Schneider's case did not cost a life, it did, at any rate, involve a doctor in litigation which, to say the least, could have caused him considerable concern. As Singleton L.J. points out (at p. 201):

> It is not so much the fear of the result, but the worry of proceedings . . . .

The facts of Schneider v. Leigh were as follows:

Schneider had been involved in a motor car accident with a vehicle owned by Pedigree Stock Farm Developments Ltd., and had sued the company for damages for personal injuries. Dr Leigh was instructed by the solicitors for the Pedigree Company to make an examination of Schneider and in due course the doctor made his report to the solicitors. They thereupon wrote to Schneider's solicitors offering terms of settlement and supported their offer with extracts from the medical report which (we may assume) were defamatory of Schneider. He, on being shown the report by his solicitors, commenced this action against Dr Leigh claiming damages for libel, and applied for an order for the discovery of the full medical report. This application having been refused by a master and by Donovan J., the plaintiff appealed to the Court of Appeal. The doctor contended that his report was protected from discovery, having been obtained for the purpose of the action between Schneider and the Pedigree Company. The Court of Appeal, however (per Hodson and Romer L.JJ., Singleton L.J. dissenting), held that the doctor could not claim privilege, that such privilege belonged only to the Company and its successors in title, and that it did not extend to a proposed witness (i.e. Dr Leigh) in a subsequent and different action.

The result was, of course, that the Pedigree Company's solicitor, through an unfortunate slip, had involved the doctor in an action for defamation. To make matters worse, the doctor could not claim "privilege" in respect of the report, extracts of which the solicitors had published to the other side.

Before entering into a discussion of Schneider's case a brief outline may be given of the law relating to professional privilege.

The cases establish that a client cannot be compelled to produce confidential communications passing between himself and his solicitor, or between his predecessors in title and their respective solicitors. Provided the solicitor-client relationship existed at the time, the client may claim "privilege" in respect of such communication. See Anderson v. Bank of British Columbia (1876), 2 Ch.D. 644.

In Calcraft v. Guest, [1898] 1 Q.B. 759, for example, the Court of Appeal refused to order production of documents by the plaintiff where those documents had come into existence for the purpose of an action defended by a predecessor in title of the plaintiff.

For a client to claim privilege it is in general not necessary for him to show that his or his predecessor's documents came into existence at a time when litigation was anticipated or pending: Minet v. Morgan (1873), L.R. 8 Ch.App. 361. But for a client to claim privilege in respect of communications made to his solicitor by a third party (even although made at the request or on the instructions of the client) it is necessary to show that the third party's statements were made when litigation was anticipated or pending. Provided, however, that this can be established, the client is entitled to refuse production or disclosure of such third party communications: Wheeler v. Le Marchant (1881), 17 Ch.D. 675.

Applying these principles to Schneider v. Leigh, it will be evident that as far as the original action is concerned the Pedigree Company could claim privilege in respect

of Dr Leigh's report. The report was a confidential communication passing between a third party (the doctor) and the Pedigree Company's solicitors under instructions from such solicitors at a time when litigation had actually commenced. None of the learned Judges in Schneider's case doubted that the Pedigree Company had this privilege; see also Friend v. London Chatham and Dover Railway Company (1876), 2 Ex.D. 437. But it is the writer's respectful contention that the Court of Appeal by compelling production of the report has, in effect, waived the Pedigree Company's privilege. The Court was not called upon to solve the problem of how to order production of the report and at the same time protect the privilege of the Pedigree Company, as a mere suspensory order was made against the doctor - the doctor was not required to produce the report until after the disposal of the action between Schneider and the Company. In this way the Court attempted to give effect to what the judgment implies, namely, that the Pedigree Company's privilege had not been waived. Had the Court considered that the Company's privilege had been waived, the suspensory order would have been pointless. No doubt this order worked justice between Schneider and the Company, but the danger lies in its application to the future. The order made by the Court for suspending discovery of the report was by consent. But as Romer L.J. points out, this was a concession to the Pedigree Company made by counsel for Schneider. What will be the position, however, when counsel in some future case are not so benevolent? If Schneider's counsel had not been prepared to consent to a suspensory order, presumably an order would have been made to take effect immediately. Schneider would then have been entitled to inspect the medical report before the disposal of the action between himself and the Pedigree Company. Even if the Court were prepared to make a suspensory order without consent of counsel, the result would still be ultimately to disclose to Schneider a document which is protected from discovery, not only during the continuance of litigation, but thereafter. Should a similar problem arise again, counsel may not be prepared to wait for the completion of the original litigation, which could conceivably last twelve months or longer, and which may not even have been commenced at the time discovery is sought. Will the Court still make a suspensory order, and if so, at

what stage is the original litigation "disposed of" - upon a decision of a court of first instance, or on the expiry of the period allowed for lodging appeal? And if one party does appeal, presumably it is necessary before the order for discovery takes effect to wait until the original action is disposed of by the appellate Tribunal? In the present case, assuming that the original action is eventually completed, the effect of the order, when it does operate, is to disclose to Schneider a document which, on the authority of Calcraft v. Guest, [1898] 1 Q.B. 759 and Minet v. Morgan (1873), L.R. 8 Ch.App. 361, neither the Pedigree Company nor its successors could ever be compelled to produce. See also Bullock v. Corry (1878), 3 Q.B.D. 356 (C.A.).

It has already been stated that a client may claim privilege in respect of "third party" documents only when litigation is anticipated or commenced. But once the claim of privilege is established for these documents the immunity from production remains, and does not cease on completion of the litigation in which the privilege was established. A client's right to refuse disclosure is not merely a right to withhold evidence in the action in which he happens to be involved. It is a right to refuse disclosure as against the whole world whether in the course of litigation or not. The reason why the question of privilege always resolves around litigation is, of course, that the claim of privilege is rarely asserted save in legal proceedings and even if it is asserted outside the courts, it will be a court which will ultimately decide whether there is privilege in the particular circumstances or not. In Commissioner of Inland Revenue v. West-Walker, [1954] N.Z.L.R. 191, for example, a claim of privilege which was not merely a right to withhold evidence in a particular action but an absolute right to withhold information from the Revenue Department regardless of court proceedings was successfully maintained. Were it not for the order of the Court in Schneider v. Leigh, the Pedigree Company (barring questions of crime and fraud with which we are not concerned) could claim privilege for the report for ever, and not merely until the disposal of the action brought against it by Schneider.

This may not be serious from the Pedigree Company's point of view, but the application of the doctrine in the

future could endanger the principle of unrestricted freedom of communication between solicitor and client which the rules of privilege are designed to protect. The Court has said that the Pedigree Company holds a privilege which has not been waived, and yet in spite of this, has ordered the document to be produced for inspection by the opposite party. It is submitted, with the utmost respect, that the Court has failed to appreciate that a client's privilege from production enures for all time, and does not come to an end when he ceases to be involved in the litigation in which his privilege is established.

It is submitted that it is immaterial whether the doctor is holding the original report or merely a copy. It is true that secondary evidence of privileged documents is admissible if secondary evidence (such as a copy) falls into the hands of the other side. But until that happens it is obvious that both the privileged document and any copies are within the privilege. Were it not so a client could claim privilege in respect of an original but could be forced to make discovery of any copies that may be in existence. In the action between Schneider and the Pedigree Company, the Company could not be forced to produce the report nor could the doctor be forced to produce a copy. If requested by Schneider to disclose the copy, the doctor would be entitled to say that until he was authorised by the Pedigree Company he must regard his report as confidential. Not only would he be entitled to say this, but he would be under a duty to the Pedigree Company to say so and refuse disclosure. Furthermore if the doctor was sufficiently foolish to disclose the report to Schneider prior to the hearing of the original action, it seems reasonable to suppose (in the absence of any authority to the contrary) that the Pedigree Company could bring action against the doctor for his neglect.

The disclosure of the report to Schneider will not prejudice the Pedigree Company in its action, which will be completed before discovery. But what happens if a similar question should come before the Courts in which the document concerned is highly confidential? It may be that a client has good reasons for wishing never to disclose a medical report, case history, survey report or whatever it may be.

In circumstances resembling those in Schneider v. Leigh, however, this must eventually be produced regardless of the client's privilege. But if the writer's submission is correct, the doctor is under a duty to the Pedigree Company in the original action not to disclose the report. Is there any reason why such duty should not attach in the second action and continue until the Company waives its privilege?

Lord Atkin in Minter v. Priest, [1930] A.C. 558, discussing the general principles of solicitor-client privilege, says (at p. 579):

> In the first place they are protected from disclosure whether by production of documents or in oral evidence. This protection is part of the law of evidence. It has no direct relation to the question whether the communication itself constitutes a cause of action. Neither the solicitor nor the client need be party to the action in which the question of evidence arises. Also it matters not whether the action be for defamation, fraud (subject to limitations to be discussed), breach of trust, breach of contract or otherwise; if the communication comes within the prescribed rule it is inadmissible in evidence. The object is no doubt to enable the persons concerned to communicate freely without fear of exposing themselves or others to actions. But the right to have such communications so protected is the right of the client only. In this sense it is a "privilege", the privilege of the client. If the client chooses to withdraw the veil, the law interposes no further difficulty. The communications are then available as evidence.

In the action between Schneider and Leigh the Pedigree Company has no standing. If any officer of the Company were called as a witness, he could refuse to give evidence as to the contents of the report. In the original action the doctor as a witness could also refuse to give such evidence. What difference is there between the doctor's position as a witness and his position as a party? And are not the words of Lord Atkin quoted above appropriate to this situation? It should be noted that Minter v. Priest

was not brought to the attention of the learned Judges in Schneider's case.

Hodson L.J., in his judgment says (at p. 202):

> The question is whether the privilege from production extends beyond the company, so as to protect the defendant in separate proceedings brought against him, although the privilege is not his, but that of the company.

The learned Lord Justice has viewed the problem on the footing that to bring the doctor within the protection would be to extend the scope of the privilege to an unwarranted extent. Later he states (at p. 203):

> What is being sought here is, in effect, to extend the umbrella of the protection which the privilege gives the company to the defendant, who is, on the hypothesis that he is the author of the libel, to be looked at for the purpose of this application as a proposed witness on behalf of the company. In this capacity not only has he no privilege of his own, but he is under no duty to assert the right of the company to resist the production of any documents.

It is respectfully submitted, however, that this statement cannot be sustained. It is submitted that to view the claim by the doctor as an extension of the scope of the privilege is not correct. As a witness in the action between Schneider and the Pedigree Company Dr Leigh has no privilege, but this does not mean that he can disclose the contents of the report; in fact, he will not be allowed to make disclosure if the Pedigree Company objects. It is submitted that once the Company signified its unwillingness to allow production the doctor would be under a duty to the Company not to disclose. If there is no such duty it is difficult to understand the application of the statement of Lord Atkin in Minter v. Priest (cited above) that neither the solicitor nor the client need be party to the action in which the question of evidence arises. The Pedigree Company is not a party to the action between Schneider and Leigh, but it is submitted that this is irrelevant. The

Company has a privilege in respect of a medical report and such privilege cannot be waived in this or in any other action, without the Company's consent. This is not an extension of the scope of the privilege, it is merely an application of it. The doctor is not entitled to protection in his own right, he has no privilege; it is the Company's privilege and the Company which, through the doctor, is entitled to protection. The result would be, of course, that the doctor would not be allowed to produce the report, but, it is submitted that this result is no extension of the rules of privilege to which the learned Lord Justice was referring.

It appears from the report of Schneider v. Leigh that the learned Judges who formed the majority were also concerned with the fact that the doctor was not a successor in title to the Pedigree Company. Romer L.J. (at pp. 205-206) said:

> The protection of privilege in relation to discovery extends only to a litigant and his successors.

The learned Lord Justice distinguished Calcraft v. Guest and Minet v. Morgan (both cited above) as being concerned with the question whether the privilege of a litigant extends to his successor in title. Although the privilege does so extend, Romer L.J. held that the privilege was that of the Pedigree Company and its successors and did not extend to protect the doctor who was merely a third and independent party.

In Calcraft v. Guest (supra) Lindley M.R. said (at p. 761):

> Now, as regards professional privilege, on looking at the authorities, it appears to me that this case is covered by the case of Minet v. Morgan . . . and that if there are any documents which were protected by the privilege to which I am alluding, that privilege has not been lost. I take it that, as a general rule, one may say once privileged always privileged.

In Minet v. Morgan (supra) Lord Selbourne L.C. had said (at p. 366):

> The only question is whether the Plaintiff has sufficiently claimed protection for these confidential letters . . . which passed between himself and his mother and their respective solicitors with reference to the subject matter in dispute. . . .

Lord Selbourne L.C. then went on to discuss the question which was discussed by Lindley M.R. in Calcraft v. Guest (supra), namely, whether privilege can only be claimed when litigation is anticipated or pending. In none of the nine cases referred to by the Lord Chancellor in Minet's case is there any reference to successors in title nor were successors in title at all involved; in fact every one deals with the question whether pending litigation is or is not a condition precedent to a claim of privilege.

Accordingly the comment of Romer L.J. that Sir Nathaniel Lindley M.R., in Calcraft v. Guest was addressing his mind merely to the question of successors in title is apparently (with respect) not supportable, and the learned Master's statement "as a general rule . . . once privileged always privileged" does not appear to be confined to successors in title only.

The weakness of the doctor's argument was that he claimed "pricilege" in respect of the report. The privilege is that of the Pedigree Company only, and is not the doctor's to claim. But it is respectfully submitted that the doctor should have received the protection of the Company's privilege not through any claim of his own, but as an incident of the fact that he was under a duty to the Company to protect the Company's privilege. As a witness in the action between Schneider and the Pedigree Company, he would not be permitted to disclose the report. It is submitted that as he was a party in the second action it is not a question of being permitted to claim privilege but of not being permitted to destroy the already established privilege of the Company.

A further difficulty in Schneider's case is that the

Court held by implication that the Company's privilege had not been waived. The dissenting Judge, Singleton L.J., expressly bases his judgment on the premise that the Company's privilege had not been waived. The learned Lord Justice was of opinion that the letter to Schneider's solicitors containing extracts from the report did not amount to a waiver and accordingly he held that the privilege continued. It should also be noted that Singleton L.J., supported his opinion by referring to the Master of the Roll's statement in Calcraft v. Guest "once privileged always privileged". That is to say, once it has been established that privilege has not been waived, it follows that the report is still protected from discovery in the second action. Unfortunately, the learned Lord Justice did not refer to any authority which establishes that partial disclosure of a protected document does not amount to a waiver of privilege. This point will be discussed later.

The real danger in Schneider's case seems to lie in the fact that serious inroads on the rules of privilege would be possible if the decision were carried to its logical conclusion. The Pedigree Company is not immediately prejudiced by the decision, because by the time Schneider inspects the report, his action against the Company will be concluded, so that no damage will be done to the Company in this respect. But if Schneider is later successful against Dr Leigh, the doctor may be able to recover his losses from the Company; for it seems reasonable that the blame should ultimately be laid at the feet of the Company (or its solicitors). The doctor, in making a report of a highly confidential nature, is surely entitled to assume that the Company would regard his statements as confidential and would not publish the material verbatim to the opposite party.

There is, however, this further question. If Schneider has in fact been defamed is he not entitled to redress? In other words, should the Courts zealously guard the rules of privilege to preserve the principles of unrestricted freedom of communication between solicitor and client or should they, in such circumstances as these, rather prefer to do justice to the person defamed by enabling him to establish his case?

It is respectfully suggested that there are two solutions to this problem. The first is to say that the Company's privilege has been lost and in this case the Company would only have themselves (or their solicitors) to blame. The second is to say that the privilege has not been waived, to adhere to the rule "once privileged always privileged" and to hold accordingly that the report remained protected. This, it is suggested, would be more in line with the purpose for which "privilege" is established, namely, to ensure freedom of communication between solicitor and client. In this case Schneider would not be without redress. He still has the letter from the Pedigree Company's solicitors and may therefore give secondary evidence of the contents of the original document. This letter is set out in full in the judgment of Singleton L.J., and appears to contain all that is essential for Schneider's claim.

Singleton L.J. in his dissenting judgment refers to the danger of making the order for discovery and says (at p. 202):

> To make an order of the kind now suggested would be a departure from the recognised practice, and would have the effect of deterring potential witnesses from giving statements to solicitors whose clients were concerned in, or faced with, litigation.

On the other hand, Hodson L.J. did not consider an order for discovery to be open to such objection. The learned Judge said (at p. 204):

> The law already provides the protection necessary to a witness whose proof is taken for the purpose of litigation, since the occasionson which statements are made in such cases are privileged. Whether the privilege is absolute or qualified is one of the matters raised in this action.

With all due respect to the learned Judge, however, it is submitted that this will apply only to actions based on defamation. If it is not proved that the doctor's report was made maliciously, Schneider will not recover against him. But actions are not based only on defamation.

For example, in an action for breach of a covenant in restraint of competition, brought by the purchaser of a professional practice against the vendor, the purchaser may seek production of a professional report made by the vendor as evidence of breach of the covenant. The defendant would not be a successor in title of the client for whom he prepared his report, and on the authority of Schneider v. Leigh will be compellable to produce it.

Schneider's case also invites comment in regard to the holding that the privilege of the Company had not been waived. Were it not for the mistake of the solicitors in publishing the report, no knowledge of the defamatory statements would have reached Schneider and no action would have been brought against the doctor. A more satisfactory basis for the decision, it is submitted, would have been on the grounds of waiver, that is to say, the Pedigree Company's solicitors by disclosing extracts of the report to the other side had waived the Company's privilege in respect of that document. In Welsh v. Roe (1918), 87 L.J.K.B. 520, it was held that after issue of a writ a solicitor has implied general authority to compromise the action on behalf of his client and the client cannot avail himself of any limitation by him of the implied general authority unless it has been brought to the notice of the other side. In Conlon v. Conlons Ltd., [1952] 2 All E.R. 462, the Court of Appeal held that the rule as to privilege did not extend to communications between a client and solicitor where those communications were repeated to the other side on instructions from the client to do so, for such communications are not confidential. There is, however, authority for the view that publication of extracts only of a report does not amount to a waiver. See for example, Caldbeck v. Boon, 7 I.C.L.R. 32, and Carey v. Cuthbert, 6 I.R. Eq. 559, and compare as to evidence from the witness box Reg. v. Garbett (1847), 1 Den. 236; 169 E.R. 227.

If, however, the Company's privilege has not been waived, the writer has attempted in the previous pages to show, with the greatest respect, that the order for discovery should not have been made on the grounds given in that case.
