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COURT OF APPEAL (ENGLAND) — CIVIL DIVISION

NEILSON v LAUGHARNE

Lord Denning MR, Oliver and O'Connor L JJ

17 December 1980 — [1981] QB 736; [1981] 1 All ER 829; [1981] 2 WLR 537

DISCOVERY – PRIVILEGE – PRODUCTION CONTRARY TO PUBLIC INTEREST – CLASS OF DOCUMENTS – STATEMENTS TAKEN BY POLICE IN STATUTORY INVESTIGATION INTO COMPLAINTS BY MEMBER OF PUBLIC – NO ASSURANCE OF CONFIDENTIALITY GIVEN TO MAKERS OF STATEMENTS – STATEMENTS USABLE IN DISCIPLINARY OR CRIMINAL PROCEEDINGS – DISCOVERY – LEGAL PROFESSIONAL PRIVILEGE – DOMINANT PURPOSE FOR WHICH DOCUMENTS COMING INTO EXISTENCE.

HELD:
(1) The Statements were not protected from disclosure by legal professional privilege because the dominant purpose of the police in taking the statements was to carry out the statutory duty under s49 of the 1964 Act to investigate the plaintiff's complaints and not to obtain legal advice in regard to his threatened action or for use in that action;
***Waugh v British Railways Board* [1979] UKHL 2; [1980] AC 521; [1979] 2 All ER 1169; [1979] 3 WLR 150; [1980] CR 521, applied.**

(2) Statements taken in a s49 investigation were, however, entitled to protection from disclosure as a class on the ground of public interest privilege for the following reasons—

(a) (per Lord Denning MR and O'Connor LJ) although the confidentiality attaching to the statements was not absolute, since no assurance of confidentiality was given and they could be used in certain proceedings, nevertheless sufficient confidentiality attached to them to make that one of the factors to be taken into account by the court, together with the need for candour by, and co-operation from, police officers in a s49 investigation, in balancing the competing public interests for and against disclosure;

(b) (per Oliver and O'Connor LJ) the test whether public interest privilege protected from disclosure statements taken in a s49 investigation was not whether the statements were absolutely confidential but whether the likely consequence of a general right to their disclosure in civil litigation, in the context of the statutory purpose of s49 that there should be full investigation of complaints against the police, would be to impede the carrying out of the statutory purpose of an investigation under s49 so that disclosure would be contrary to the public interest.

(3) Since the statements were of a confidential nature, their disclosure in civil litigation would be likely to impede the statutory purpose of s49 by inhibiting police officers from giving full and frank co-operation in an investigation; and, if the statements were merely entitled to 'contents' privilege, that would impose an unduly heavy burden on police authorities and would impede the statutory procedure. It followed, therefore, that the public interest in protecting the statements as a class from disclosure in civil litigation outweighed the public interest in disclosing them in such litigation and the appeal would accordingly he dismissed.

Per Lord Denning MR: In cases where 'class' privilege is claimed the courts themselves should very rarely inspect the documents.

LORD DENNING MR: (*inter alia*) George Neilson has brought an action against the police (alleging trespass, negligence, false imprisonment and assault). He wants to see some of their papers. Can he do so? If the chief constable had taken the ordinary course in litigation, if he had interviewed the witnesses and taken statements from them, all the statements would have been covered by legal professional privilege. They would be prepared for the dominant purpose of litigation (see *Waugh v British Railways Board* [1979] UKHL 2; [1980] AC 521; [1979] 2 All ER 1169; [1979] 3 WLR 150; [1980] CR 521. But the chief constable did not take that course. Instead he regarded himself as bound to cause an investigation to be held within the police force. This was done by reason of s49 of the *Police Act* 1964. Since the decision in *Waugh's case*, we have to look for the dominant purpose of the police in taking the statements. To my mind it is clear that there were two

purposes. One was to carry out the statutory duty to investigate required by s49 of the *Police Act* 1964. The other was to be able, in due course, to deal with the letter of complaint before action. Of these two, the dominant purpose was to carry out the duty under s49. After that was done, then, and then only, was the question of compensation to be considered. Seeing that litigation was not the dominant purpose, there is no legal professional privilege available here.

No one could suggest that these statements were so confidential that they could never be used in any legal proceedings. It was clearly contemplated that they might be used by the police in these ways. If one or both of the detectives was charged with a criminal offence, the statements could be used just as any other statements taken by the police are used in a prosecution. There would be no 'class' privilege in respect of them; although there might be a 'contents' privilege, as, for instance, to keep secret the name of an informer. There have been many cases lately on public interest privilege. They fall into two distinct categories.

(i) The old 'Crown privilege':

Until the year 1973 we spoke only of 'Crown privilege'. It was held that a government department could intervene in a suit between two litigants and claim, on the ground of public interest, that documents in the hands of one of the litigants should not be produced. The objection had to be taken by the minister himself or by the head of the department, or some highly placed official in an affidavit giving his reason. His affidavit was, as a rule, conclusive. It was often said that the privilege could not be waived by the Crown, even though it would be to its advantage to do so. And that the judge might take the objection himself. I do not think that that kind of 'public interest' privilege applies here. There is no affidavit by the Home Secretary as there was in *Conway v Rimmer* [1968] UKHL 2; [1968] AC 910; [1968] 1 All ER 874; [1968] 2 WLR 998 and *Rogers v Secretary of State for the Home Department*. There is here only an affidavit by the deputy chief constable. I should not regard him as 'highly placed' for the purpose.

(ii) The modern 'public interest'

Since 1978 there has been rapidly developed another 'public interest' privilege. This is a privilege which is asserted, not by a government department, but by one of the litigants himself. It need not be supported by any affidavit of any minister or highly placed official. And it can be waived. The seed of this modern public interest was sown by Lord Cross in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commrs* (No. 2) [1974] AC 405; (1973) 2 All ER 1169 at 1184; AC 405 at 433, when he said on behalf of himself and all the other Law Lords in that case:

> "Confidentiality" is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other.

The decision was ostensibly based on the rule that the court has a general discretion to order discovery, coupled with the qualification that 'discovery shall not be ordered if and in so far as the court is of opinion that it is not necessary either for fairly disposing of the proceedings or for saving costs'. In applying that rule, this court had regard to the public interests involved. Very recently we applied this principle in *Gaskin v Liverpool City Council* (1980) 1 WLR 1549. We held that a local authority was not bound to disclose the case notes and records relating to a child in care. We drew a parallel between child care privilege and legal professional privilege. This modern development shows that, on a question of discovery, the court can consider the competing public interests involved. The case is decided by the court holding the balance between the two sides. One of them is asserting that, in the interest of justice, the documents should be disclosed. The other is asserting that, in the public interest, they should not be disclosed. Confidentiality is often to be considered. So is the need for candour and frankness. So is the desirability of co-operation. As Lord Hailsham said in *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171 at 230; [1977] 1 All ER 589 at 605; [1977] 2 WLR 201; (1977) 76 LGR 5; "The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop." On the one hand we have a man who is suing the police for damages. He has got legal aid and demands to see all the statements taken by the police. He, or rather his solicitors, want to see the police statements so as to find out something, if they can, to back him up. On the other hand there are the police,

who, for aught that appears, apart from the plaintiff's complaint, have acted perfectly properly. Statements were taken on the basis that they were to be used for a private investigation, to see if the police had acted improperly in any way; and, if they had acted improperly, to be used in criminal or disciplinary proceedings against the police. No improper conduct by the police was disclosed at all.

Yet now the plaintiff wants to see the statements for another purpose altogether: to help him make out a case for damages. I cannot think it can be right to let him do this. Some of the statements may contain the names of informers which should be kept secret anyway. I cannot think it incumbent on the police, or the court, to go through all these statements, or to consider the contents of them, so as to assert a 'contents' privilege. It is in the public interest that the whole 'class' should be privileged from disclosure to the plaintiff.

If the plaintiff has any case at all, he must make it out on his own showing, supported by witnesses whom he can find himself. He should not be allowed to delve through these statements so as to make out a case, which he would not otherwise have. It is not necessary for us to inspect the documents ourselves. Nor is it desirable. The plaintiff might well feel a grievance if the court decided against him on its own view of the documents, without his seeing them. As Viscount Simon LC said in *Duncan v Cammell Laird & Co Ltd* [1942] UKHL 3; (1942) 1 All ER 587 at 594; (1942) AC 624 at 640-641:

> "...it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other."

In all 'class' cases, I think the court should very rarely inspect the documents themselves. *Ex hypothesi* there may be nothing in their contents to object to. At any rate, in this case, I do not think it would be proper to inspect the documents. In my opinion the statements taken in pursuance of s49 are privileged from production in a way analogous to legal professional privilege, and child care privilege. This case bears a striking resemblance to *Gaskin's case*. It looks like a 'fishing expedition'. Legal aid is being used by complaining persons to harass innocent folk who have only been doing their duty. The complainants make all sorts of allegations, often quite unjustified, and then use legal machinery to try to manufacture a case. We should come down firmly against such tactics. We should refuse to order production.
