1968
*Mar. 21
May 22

HELEN BELL, JAMES E. BELL and DAVID GREY BELL and MARJORIE BELL, infants under the age of twenty-one years, by their next friend, Kenneth Bell, and the said KENNETH BELL and THE ONTARIO HOSPITAL SERVICES COMMISSION (*Plaintiffs*) ....APPELLANTS;

AND

WILLIAM SAMUEL SMITH and JOHN WILLIAM CHARLES SMITH (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Evidence given by plaintiffs' former solicitor on behalf of defendants—Duty of solicitor to refrain from disclosing confidential information unless client waives privilege—Impropriety of putting to solicitor questions involving disclosure of confidential information without evidence of proper waiver—Evidence in violation of privilege should not be received.

Trial—Plaintiffs interviewed by judge in chambers without counsel being present and without reporter—Interference with clients' rights to benefit of advice of counsel—Departure from rule of judicial conduct.

The defendants brought an application for judgment in accordance with an alleged settlement with the plaintiffs for claims made in an action arising out of a motor vehicle accident. The motion came on for hearing on February 10, 1966, and the proceedings continued throughout that day and again on May 27, 1966. Judgment for the adult plaintiffs was granted on May 27 in terms of the settlement alleged and judgment for an infant plaintiff was reserved. On appeal, the Court of Appeal dismissed the plaintiffs' appeal and an appeal was then brought to this Court.

At the hearing on February 10, 1966, the solicitor who had acted for the plaintiffs until February 8, 1966, appeared under subpoena and gave evidence on behalf of the defendants. Conflicting sworn statements as to whether the then counsel for the plaintiffs objected to the giving of evidence by the former counsel were subsequently made.

On May 27, 1966, after the plaintiffs had given evidence, the judge requested that he interview the plaintiffs in his chambers, and he asked counsel to consent that this be done without the presence of counsel. Such consent was given, and the interview was held but without a court reporter being present.

Held: The appeal should be allowed; new trial ordered.

It was improper for a client's former solicitor not to claim the privilege of refusing to disclose confidential information without showing that it had been properly waived. Also, doubt was expressed about the propriety of putting to a solicitor questions that involve the disclo-

* PRESENT: Martland, Judson, Ritchie, Spence and Pigeon JJ.

sure of confidential information without first bringing in evidence of a proper waiver. In any case, because the client's privilege is a duty owed to the Court, no objection ought to be necessary and the evidence in violation of the privilege should not be received.

As to the plaintiffs having been interviewed by the judge of first instance in his chambers without counsel being present and without a reporter, this was a serious interference with the clients' rights to the benefit of advice of counsel and was also a departure from the rule of judicial conduct that a judge ought never to put himself in a situation where one of the parties is apt to be induced to look upon him as an adviser rather than an impartial arbitrator.

An acceptable record as to what happened in the judge's chambers was lacking, and in view of the state of confusion as to whether there had been consent on which to base the judgment of the first instance, this Court was of the opinion that the plaintiffs should have a right to have their action tried in open court.

Beer v. Ward (1821), Jacob 77, applied; *Majcenic v. Natale* [1968] 1 O.R. 189, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Richardson J. Appeal allowed.

R. N. Starr, Q.C., for the plaintiffs, appellants.

John J. Fitzpatrick, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on June 6, 1967. By that judgment, the Court dismissed an appeal from Richardson J. who had given judgment on May 27, 1966. The appeal was carried in the aforesaid style of cause but it appears that Marjorie Bell, one of the plaintiffs, attained the age of 21 years during the course of the litigation. It also appears that the proper name of the infant plaintiff is David Guy Bell. These changes should be reflected in the style of cause and the formal order of this Court should be issued showing the plaintiffs as HELEN BELL, JAMES E. BELL, MARJORIE BELL and DAVID GUY BELL, infant under the age of twenty-one years, by his next friend Kenneth Bell and the said KENNETH BELL and THE ONTARIO HOSPITAL SERVICES COMMISSION.

The circumstances involved are rather intricate and of the most unusual nature and it is, therefore, necessary to relate them in some detail. On August 27, 1962, the plain-

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tiff James Bell, was operating a motor vehicle owned by the plaintiff Kenneth Bell, his father, and with passengers the plaintiffs Helen Bell, his mother, and David Grey Bell (properly called David Guy Bell) and Marjorie Bell. The vehicle came into contact with one owned by the defendant John William Charles Smith due, to what was alleged by the plaintiffs, to be the negligence of the said defendant Smith. One Commiski, an employee of the Pilot Insurance Company, recommended that the plaintiffs consult either Mr. Henry Schreiber, Q.C., or Mr. John Agro, Q.C., to act on their behalf. The plaintiffs chose to consult Mr. Henry Schreiber. Due, it was said, to the continued serious physical conditions of the various plaintiffs, a statement of claim was not issued until November 12, 1965. A statement of defence was issued on December 21, 1965, and issue was joined on December 22, 1965.

On January 6, 1966, the various plaintiffs were examined for discovery, and on January 11, 1966, the solicitors for the defendants gave notice of motion of an application for leave to make a payment into court in full satisfaction of the claims of the plaintiffs. These examinations for discovery and this notice of application for leave to pay into court seem to have very much increased the tempo of the discussions for settlement of the action between the solicitors for the plaintiffs and for the defendants. The solicitor for the plaintiffs conferred with his client Mrs. Helen Bell by telephone almost immediately after the examinations for discovery and then the various plaintiffs attended his office on January 10 and on January 12. During these latter occasions there were telephone conversations between the solicitors for the plaintiffs and for the defendants, and the amounts of the settlements were discussed in great detail. The record contains many long memoranda setting out how various amounts were arrived at.

The plaintiff Helen Bell has testified that, after a very long conference on January 12, 1966, she and her co-plaintiffs agreed to the settlement which was proposed and which her then solicitor, Mr. Schreiber, said was the utmost he could obtain from the solicitor for the defendants. Mr. Schreiber seems to have been greatly concerned at the possible penalty in costs which the plaintiffs would have incurred had the application for leave to pay into court been

granted and then the payment made thereunder have exceeded what the plaintiffs would have recovered at trial.

So soon as the plaintiffs had, with great reluctance, expressed their agreement to settle in the amounts outlined by Mr. Schreiber in this conference, he telephoned at once to Mr. Agro, the solicitor for the defendants, to inform him of such agreement, and on the same day wrote a letter in which he set out the matter in these terms:

> This will confirm the settlement in the above action on the following terms:
>
MARJORIE BELL	—inclusive of special and general—	$15,550.00
HELEN BELL	—inclusive of special and general—	10,700.00
GUY BELL	—inclusive of special and general—	6,900.00
JAMES BELL	—inclusive of special and general—	4,250.00
COSTS	—	3,740.00
		$41,140.00

It will be noted that the figure of $3,740 for costs is 10 per cent of the total amount which was payable to the four different plaintiffs. That amount of $3,740 was to be paid by the defendants to Mr. Schreiber. It is the evidence of Mrs. Helen Bell, one of the plaintiffs, that having agreed to this settlement then for the first time Mr. Schreiber informed the plaintiffs that in addition to that amount of $3,740 which Mr. Schreiber was to receive from the defendants the plaintiffs would have to pay another 10 per cent to him on account of solicitor-and-client costs and further that since the court would not approve of the deduction of any amount from that which was to go to the infant Guy Bell the other plaintiffs would have to divide the 10 per cent deduction on his account from their shares. This evidence Mr. Schreiber denies, although he does admit that it was his ordinary practice to charge a solicitor-and-client bill if he had to prepare for trial and in this case he certainly would have had to prepare for trial very shortly as the conversation took place on January 12 and the trial was to take place within a couple of weeks thereafter. It was further the evidence of Mrs. Helen Bell, and this was also corroborated by the other plaintiffs, that the whole basis of the settlement was that it should be accepted and approved in complete form and in fact that one of them could not settle without the others settling. This was not denied by Mr. Schreiber and it becomes important when one considers the judgment of the learned judge of first instance.

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The plaintiff Helen Bell testified that having attempted on that very day, January 12, 1966, to telephone to Mr. Schreiber to say that the plaintiffs had recanted from their agreement to settle on the basis outlined, she succeeded, on January 13, 1966, in giving that message to Mr. Schreiber's secretary who undertook to pass it on to her employer. She continued that then they were telephoned by the said secretary on January 14 and asked to come down to Mr. Schreiber's office immediately. Helen Bell continued in her testimony to outline a conference in Mr. Schreiber's office on January 20 and her letter later of the same date to Mr. Schreiber in which she demanded an increase in her claim in the amount of $75,000 and then her reattendance on Mr. Schreiber on January 21. At that time, Mr. Schreiber asked her to sign and have her co-plaintiffs sign a document which I quote hereunder in full:

TO: HENRY L. SCHREIBER, Q.C.
288 OTTAWA STREET NORTH
HAMILTON, ONTARIO

RE: BELL vs SMITH S.C.O. ACTION #653/63

After having all matters of the settlement fully explained to us and we understanding the same; and after having all matters fully explained to us with reference to the matter of "Payment into Court" by the Defendants of the said sums herein, and also with reference to all matters pertaining to our non-acceptance of the same and we fully understand the same.

We now hereby authorize and instruct you to rescind our original instructions of acceptance of the offers of settlement in this action hereinbefore given to you and upon which you acted pursuant to our instructions.

We hereby authorize and instruct you not to accept the offers of settlement in this action which offers were as follows, namely

HELEN BELL KENNETH BELL	inclusive of general and special damages and including O.H.S.C. expenditure	$10,700.00
MARJORIE BELL	inclusive of general and special damages and including O.H.S.C. expenditure	15,550.00
JAMES E. BELL	inclusive of general and special damages and including O.H.S.C. expenditure	4,250.00
DAVID GREY BELL KENNETH BELL	inclusive of general and special damages and including O.H.S.C. expenditure	6,900.00
COSTS		3,740.00

We also authorize and instruct you to so advise John L. Agro Esq. Q.C., solicitor for the defendants of the aforementioned.

We further authorize and instruct you that it the solicitor for the defendants shall pay the said sums of money hereinbefore set forth into Court in payment of the above claims, you are not to accept the same in settlement of this action and file the necessary documents to so indicate.

We further authorize and instruct you to proceed to trial with this action and this shall be your authority for carrying out the above-mentioned instructions.

Dated at Hamilton this 21st day of January, 1956.

Witness:

.....
Kenneth Bell

.....
Helen Bell

.....
Marjorie Bell

.....
James E. Bell

Mrs. Bell testified that she did not understand that document and that she refused to sign it. It was never signed by any plaintiff.

On February 4, 1966, Mr. Schreiber wrote to the plaintiff Mrs. Helen Bell in the following words:

Please be advised that your case is No. 10 on the peremptory list of the Supreme Court.

I have told you on numerous occasions the position you now find yourself in and have asked you on numerous occasions to sign the document of instruction which I have prepared and which you have had in your possession for the past two weeks. I must insist you give me your instructions not later than Monday afternoon, February 7th, 1966, at 4:00 p.m.

On February 7, 1966, a notice of motion was served on the various plaintiffs. This was for an application to be presented on February 10, 1966, at 10:00 a.m. for judgment in accordance with the settlement purported to have been made on January 12, 1966. So soon as the plaintiff Helen Bell received service of notice of that application, she wrote to Mr. Schreiber. The last two sentences of that letter read:

The notice of motion contains an affidavit of John L. Agro setting out certain facts we believe to be incorrect.

The matter is of serious interest and unless we receive a reply of your intentions by telephone (No. 772-3224) arrangements will be made to have counsel defend the motion and have you removed as solicitor on the record.

On February 8, 1966, that is, the next day, Mr. Schreiber served a notice of motion on the solicitor for the defendants

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to be heard at the same time as the motion for judgment. The relief asked in Mr. Schreiber's motion was for an order to set aside the settlement in the action and to restore the said action to the list of actions to be tried at this sitting of the Court. Also on that 8th day of February Helen Bell and the other plaintiffs signed a notice of change of solicitors from Mr. Schreiber to Messrs. Ballachey, Moore and Hart. I should add that by a document entitled "Notice of Dispute" and dated February 4, 1966, the various plaintiffs had given notice to both Mr. Schreiber and Mr. Agro that "out of court settlement offered in full satisfaction of each of their claims is not acceptable and is refused and further take notice that it is their desire to proceed to trial by judge and jury for proper and just assessment for specific and general damages". On February 10, 1966, the motion for judgment in accordance with the settlement came on for hearing before Richardson J., in Hamilton. Mr. Agro appeared for the applicants and Mr. Ballachey for the respondents.

It would appear that the first witness called by the applicants on the application was Henry L. Schreiber, the solicitor who had acted, until February 8, 1966, for the plaintiffs. It is Mr. Ballachey's recollection that he objected to Mr. Schreiber's giving evidence. Mr. Ballachey so testified on examination upon an affidavit which he had filed and to which reference will be made hereafter. The record in the appeal case shows no such objection but that record purports to be only "Extract from Proceedings viva voce evidence submitted on the motion". Mr. Agro executed an affidavit on June 2, 1967, and he states in para. 5 thereof:

> H. L Schreiber, Esq., the former counsel for the Plaintiffs, appeared under subpoena and gave evidence on behalf of the Defendants. Mr. Ballachey raised no objection to giving of evidence by Mr. Schreiber.

"Counsel should not give a proof of evidence of what occurred at a hearing in which he was professionally engaged." This quotation is from Halsbury's Laws of England, 3rd ed., vol. 3, p. 68, referring to the Annual Statement of the General Council of the Bar, 1937, p. 7. Under the circumstances of this case, counsel for both parties no doubt felt that they could not properly discharge their duty to their clients without submitting to the Court of Appeal evidence by affidavit followed on one side by cross-examination. I am not suggesting that this was improper under the

circumstances. However, this shows how important it is to have all court proceedings conducted in such way that there can be no justification for such a course of action. That this resulted in the Court being invited to choose between conflicting statements made under oath by distinguished members of the Bar clearly demonstrates the wisdom of the aforementioned rule and the desirability of taking every precaution to ensure that the paramount interests of the clients will not require it to be broken.

This regrettable occurrence was occasioned by insufficient concern for a fundamental rule, namely, the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege.

It is rather astounding that Mr. Schreiber should be subpoenaed to give evidence on behalf of the defendants as against his former clients and that he should produce his complete file including many memoranda and other material all of which were privileged as against the plaintiffs and whether the plaintiffs' counsel objected or not that he should be permitted to so testify and so produce without the consent of the plaintiffs being requested and obtained.

Lord Chancellor Eldon said, in *Beer v. Ward*[1], at p. 80:

> ...it would be the duty of any Court to stop him if he was about to disclose confidential matters...the Court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege; or that if he does not, the Court will make him claim it.

Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived. Especially is this so when, as here, the circumstances are such as to make it most unlikely that a waiver would be given. Also, because it is improper to induce a breach of duty, I have serious doubts about the propriety of putting to a solicitor questions that involve the disclosure of confidential information without first bringing in evidence of a proper waiver. In any case, because the client's privilege is a duty owed to the Court, no objection ought to be necessary and the evidence in violation of the privilege should not be received.

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[1] (1821), Jacob 77, 37 E.R. 779.

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The proceedings continued throughout February 10 and again on May 27, 1966. Mr. Ballachey, in his affidavit, to which reference has been made above, has testified:

> 5. That the matter came on again on the 27th of May 1966 and after considerable evidence, had been given by the plaintiffs, the learned judge requested that he interview the plaintiffs, in His Chambers, and asked counsel to consent that this be done without counsel being present, and such interview did take place, but to the best of the writer's recollection, the infant, David Guy Bell, was not present at the said interview.
>
> 6. That to the best of my knowledge, information and belief, no Court reporter was present during the interview in the learned Judge's Chambers between the learned trial judge and the Plaintiffs.

In *Majcenic v. Natale*[2], Evans J.A., giving judgment for the Court of Appeal for Ontario, was dealing with a case where certain conversations with counsel had taken place in judge's chambers and were not recorded. At p. 200, he said:

> The necessity for filing in this Court the material to which I have referred would have been eliminated if the procedure recommended in *Berends et al. v. Taylor,* an unreported decision of this Court dated April 5, 1966, had been followed. The procedure recommended therein (in which the propriety of striking out the jury notice was in question) was that the trial Judge should either hear argument in open Court in the absence of the jury panel or have the reporter in Chambers to record the discussion on the question of whether or not he should dispense with the jury.

That injunction is even more applicable in such a case as the present where not the counsel but the clients themselves were interviewed by the learned judge in his chambers without counsel being present and without a reporter. Indeed it is difficult to understand why counsel should ever be excluded from the judge's chambers when their clients are being interviewed by the judge. Counsel is thereby put in an impossible situation. He cannot object without risk of offence to the Court and perhaps raising suspicion in the minds of his clients. Also such a request is apt to reflect adversely against him, or to be considered in this light by his clients. Even more serious is the fact that it makes it practically impossible for him to discharge his duty to advise his clients: how can he tell them that they should refuse the Court's invitation? On final analysis, this is nothing less than a serious interference with the clients' rights to the benefit of the advice of counsel besides being a depar-

[2] [1968] 1 O.R. 189, 66 D.L.R. (2d) 50.

ture from the rule of judicial conduct that a judge ought never to put himself in a situation where one of the parties is apt to be induced to look upon him as an adviser rather than an impartial arbitrator. Even if the trial judge was convinced that the proposed settlement was in the plaintiffs' best interests and they were apt to suffer great detriment by refusing it, a commendable concern for the interests of the infant plaintiff could not justify a departure from the rules of judicial behaviour with respect to the plaintiffs of full age. The importance of the regrettable lack of any acceptable record as to what occurred in the learned judge's chambers is made plain immediately hereafter.

From what appears in the record in the appeal case, upon such conference having been completed counsel for the defendants turned to the question of the quantum of damages of the infant. That was discussed for several pages and then the learned judge inquired "anything else?" to which Mr. Ballachey replied, "It is unnecessary to deal with the motion of the matter of the amendment to the statement of claim under these circumstances". His Lordship agreed and then Mr. Ballachey requested "Will Your Lordship give consideration to the carriage of the matter of the issue of the judgment?" The learned judge replied "I think the record is here, let Mr. Agro draft the judgment and send it to you ... and it is here in Hamilton ..."

It would appear therefore that at some time after the recess and conference to which I have referred the learned judge must have endorsed the record. That endorsement was in these words:

> On consent of parties and without prejudice to the right of the plaintiffs judgment to issue for the adult plaintiffs ...

The formal judgment dated May 27, 1966, but not issued until June 8, 1966, in para. 1 provides:

> 1. THIS COURT DOTH ORDER AND ADJUDGE that the action herein was settled by the solicitors for the parties so far as it respects the plaintiffs Helen Bell, James E. Bell and Marjorie Bell, who is now of the full age of twenty-one years, in accordance with the aforesaid minutes of settlement filed.

A search of the appeal case and also the original papers shows that the only consent minutes of settlement deal with the proposed judgment to be given in relation to the claim of the infant David Guy Bell which, of course, was subject

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to the approval of the Court and approval of which was reserved by Richardson J. in his judgment of May 27, 1966.

When one considers the wording of the formal judgment which I have recited above and compares it with the wording on the endorsement of the record signed by the learned trial judge, it seems quite plain that the formal judgment is simply an error. There were no consent minutes filed and the evidence plainly was that the plaintiffs had never signed any consent. The consent of the then plaintiffs' solicitor, Mr. Schreiber, had been in the form of his letter of January 12, 1966, which I have quoted above. I am of the view that that letter could not, on May 27, 1966, be accepted as a consent to judgment by the solicitors for the plaintiffs when counsel for the plaintiffs, who had come upon the record by a notice of change of solicitors as early as February 8th previous, was in court opposing any judgment on consent and insisting that the trial should go on. This is not one of the many cases where a solicitor, either acting without instructions or contrary to his instructions, had consented to an order which had been made and then his clients sought, in further proceedings, to have that order set aside. There had in this case been no judgment of the Court prior to the judgment of Richardson J. on May 27, 1966, and any consent to such a judgment as was given by that learned judge was being strongly opposed by the person who was then counsel, on the record, for the plaintiffs.

If one accepts as final the form of the endorsement made by the learned judge on the record then, as pointed out, that endorsement reads: "On consent of the parties..." The import of those words is not that it was on the consent of Mr. Schreiber but on the consent of the appellants here Helen Bell, James E. Bell and Marjorie Bell. So understood, those words avoid what, in my view, is the quite untenable inference that the learned judge purported to act on the consent of a solicitor when the clients were in court denying that they consented and doing so through the mouth of a different counsel. The difficulty is to find the consent of those parties to such settlement. There is not one word in the record as printed in the appeal case which would indicate that either the parties or the then counsel, Mr. Ballachey, made any consent whatsoever. If the consent occurred when the learned judge conferred with the clients in his chambers, neither counsel nor reporter being

present, then certainly the conduct of the plaintiffs in carrying an appeal, first to the Court of Appeal for Ontario and then to this Court, indicates that they do not understand that they consented before His Lordship in his chambers to any such judgment.

When the disposition in the Court of Appeal for Ontario is considered, there arises a similar difficulty in understanding what occurred. The Court gave no written reasons. Among the material filed in this Court was the appeal book used by McLennan J.A., and on the face of that appeal book there are written these words: "Appeal dismissed without costs on grounds that Mr. Ballachey was representing his clients in open court. 6th June 1967." If those words represent the ground upon which the appeal was dismissed, and there can be no certainty of this, then they give rise to another basis for understanding the judgment of the first instance. The inference from those words must be that the judgment of the learned judge was based not on any consent minutes signed by Mr. Schreiber, not on any consent made by the parties in the judge's chambers, but on Mr. Ballachey's consent in court. Mr. Ballachey, in his affidavit, has denied that he gave such consent. Mr. Agro, who appeared as counsel for the defendants, has testified in his affidavit that Mr. Ballachey did consent. In the "Extract from Proceedings viva voce evidence submitted on the motion", there appear no words of consent attributed to Mr. Ballachey and certainly he signed no such consent.

In view of this state of most regrettable confusion, I am of the opinion that the plaintiffs should have a right to have their action tried in open court and that the appeal must be allowed.

I would award to the appellants the costs in this Court and in the Court of Appeal for Ontario. The costs of the new trial and of the application for judgment from which this appeal arises should be reserved to the judge presiding at such new trial.

Appeal allowed with costs; new trial ordered.

Solicitors for the plaintiffs, appellants: Ballachey, Moore & Hart, Brantford.

Solicitors for the defendants, respondents: Agro, Cooper, Zaffiro, Parente & Orzel, Hamilton.