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Evidence - Exclusion of Written Statements In Personal Injury and Wrongful Death Accidents

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EVIDENCE—EXCLUSION OF WRITTEN STATEMENTS IN PERSONAL INJURY AND WRONGFUL DEATH ACCIDENTS

Plaintiff, injured in an automobile accident, having secured an unsatisfied judgment against the negligent driver of the truck in which she was a passenger, sues the insurance carrier of the corporation employing the driver. Under the Virginia statute the crucial question in the case is whether the driver had been instructed by his employer not to carry riders, thus removing the case from the coverage of the policy. The driver having testified that he had not received such instructions, counsel for the insurance company offered in evidence, to impeach his testimony, a written statement which he had made after the accident. The trial court refused to admit the statement, basing its action upon the Code provision: ". . . In an action to recover for a personal injury or death by wrongful act or neglect, no ex parte affidavit or statement in writing other than a deposition, after due notice, of a witness as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict him as witness in the case."[1] On appeal by the insurance company, *held* that the statement was not within the scope of the statute, and should have been admitted: first, because "action to recover for a personal injury or death by wrongful act or neglect" refers only to tort actions, and not to a contract action based upon an insurance policy; and second, because the statement did not relate to "the facts or circumstances attending the wrongful act or neglect," but to "facts or circumstances attending a conference prior to the accident," at which the instructions had been given. *Liberty Mutual Insurance Company v. Venable,* 194 Va. 357, 73 S.E.2d 366 (1952).

This case presents an interesting problem of statutory interpretation. The court quotes from an earlier opinion stating clearly the public policy which caused the Legislature to enact the statute:

> "The purpose of the . . . statute was to correct an unfair practice which had developed, by which claim adjusters would hasten to the scene of the accident and obtain written statements from all eye-witnesses. Frequently, these statements were neither full nor correct and were signed by persons who had not fully recovered from shock and hence were not in full possession of their faculties. Later

1. Va. Code Ann. § 8-293 (1950).

such persons, when testifying as witnesses, would be confronted by their signed statements and, after admitting their signatures, these statements would be introduced in evidence as impeachment of their testimony given on the witness stand."[2]

Judge Hutcheson has made a forceful statement of the importance of this public policy:

"If admissions in favor of the insurer contained in an ex parte statement it has procured from the claimed additional assured, the driver of the vehicle, are binding on the named assured, and on persons claiming to have been injured by the vehicle, the rights of the named assured and of third parties under such policies would be of small value. For it is unfortunately true that ex parte affidavits, which do not speak the truth, are easily procurable from willing persons, who, though they may not be corrupt, may be ignorant and easily led. If, to this effect against the affiant, there is added by the rule invoked, an effect against third persons, such affidavits will be at a premium, and the race for them will be on."[3]

The Virginia Legislature enacted the exclusionary rule of evidence in the light of the well-known pernicious activities of "ambulance chasers," prominent among which have been the pursuit with unseemly haste of prospective parties and witnesses, and the endeavor to tie them down to a particular view of the accident through such a written statement. The likelihood that any such statement will be unfair and unreliable is obvious. If nothing worse occurs, the selection of the facts set forth in the statement will be made from a biased and misleading standpoint.

Dean Pound has stated:

"Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude."[4]

The outstanding position of Justice Brandeis as one of America's greatest jurists is in large measure due to his leadership in this advance. It would seem that in this decision the court has failed to keep step with the procession.

The statute sets forth a rule of *evidence,* designed to remove what experience has shown to be an obstruction to efficient as-

2. Harris v. Harrington, 180 Va. 210, 220, 22 S.E.2d 13, 17 (1942).
3. Columbia Casualty Co. v. Thomas, 101 F.2d 151, 152 (5th Cir. 1939).
4. *Administrative Application of Legal Standards* Proc. A. B. A. 445, 449 (1919).

certainment of the truth. From the standpoint of the function of the statute, it is immaterial whether the action is one in tort or in contract—in suing the insurance company the action is still one "to recover for a personal injury or death by wrongful act". A legalistic interpretation of a statute should not be used, but the case does not even represent sound legalistic interpretation, as the court reads the word "tort" into an evidence statute.

In some jurisdictions such statements are not subject to special exclusionary rules, and are admitted for impeachment purposes like any other contradictory statements by a witness, subject, of course, as to credibility, to critical examination as to the circumstances under which they were given.[5] In other states the admission or rejection of such statements is left to the discretion of the trial judge.[6] Whatever may be the relative merits of these views (and there is a great deal to be said for leaving it to the discretion of the trial judge), the Virginia courts should give full effect to the legislative public policy of the state against the use of such statements.

As to the point that the statement was not "as to the facts or circumstances attending the wrongful act or neglect complained of", but to prior conference, the court adopts what may be termed a reified, or physical, concept, of what are the facts and circumstances, instead of what may be termed a mental concept, the latter considering logical relevance and not physical proximity in time or space to the crash of the automobiles or other misadventure. The use of such physical concepts has been productive of many errors in the development of the jurisprudence of this country.[7] As the vital fact in the case under consideration is the presence or absence of instructions to the driver, that fact, properly regarded, is the *most important* of the "facts or circumstances attending the wrongful act".

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5. Malone v. Gardner, 242 S.W.2d 516 (Mo. 1951); Salonen v. Paanenen, 317 Mass. 771, 59 N.E.2d 5 (1944); Blackman v. Coffin, 304 Mass. 379, 15 N.E.2d 469 (1938); Ferreri v. Webb, 210 App. Div. 400, 206 N.Y.S. 225 (1st Dept. 1924); Yound v. Avery Co., 141 Minn. 483, 170 N.W. 693 (1919); Hoagland v. Canfield, 160 F. 146 (2d Cir. 1908).
6. Saunders v. Hall, 176 Va. 526, 11 S.E.2d 592 (1940); American Nat. Insurance Co. v. Valencia, 91 S.W.2d 832 (Tex. 1936); Chesapeake & O. Ry. Co. v. Doffey, 37 F.2d 320 (4th Cir. 1930); Washington ex Old Dominion Ry. v. Weakley, 140 Va. 796, 125 S.E. 672 (1924).
7. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L. J. 221 (1931).