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THE EVIDENTIARY USE OF ACCIDENT REPORTS IN VIRGINIA

According to the Virginia Code, the driver of a vehicle involved in an accident which resulted in property damage in excess of fifty dollars or injury to any person must file with the Division of Motor Vehicles a report of the circumstances of the accident.¹ Any investigating police officer who interviews participants or witnesses in regard to such an accident must also file a report with the Division.² The reports are not required for the purpose of prosecuting law breakers, but are used solely for statistical purposes in planning accident prevention programs.³ To assure that the reporter will give full and accurate information for the files of the division of Motor Vehicles, the Virginia Code specifically excludes the accident reports from use as evidence.⁴ The exclusion is designed to abrogate any fear by the reporter that he will incriminate himself by reporting the complete details of the accident.

In interpreting the Virginia accident report statutes, the courts have developed practices which seemingly reduce the effectiveness of the accident report privilege. At present, there is good reason for participants in motor vehicle accidents to fear that the information contained in accident reports will be used against them in any subsequent trial.

ACCIDENT REPORTS AS SUBSTANTIVE EVIDENCE

Virginia exemplifies the majority⁵ of states in not allowing accident reports as substantive evidence on any grounds. The Virginia Supreme Court of Appeals has ruled that it was prejudicial error⁶ to consider the ex-parte statements contained in the accident report since the report was clearly inadmissible as evidence under the mandate of the statute.

In a few cases an accident report has been admitted into evidence as an admission against interest. The Kansas Supreme Court ruled that the admissions contained in an accident report were admissible as any other oral or written admission.⁷ The difference between this case and cases

1. VA. CODE ANN. § 46.1-400 (1950).

2. VA. CODE ANN. § 46.1-401 (1950).

3. VA. CODE ANN. § 46.1-407 (1950).

4. VA. CODE ANN. §§ 46.1-407, 408, 409. ". . . All accident reports made by the persons involved in accidents, shall be without prejudice to the individual so reporting. . ."

5. *Ippolito v. Brewer*, 89 So.2d 650 (Fla., 1965); *People v. Mesner*, 134 Cal. App. 2d 377, 285 P.2d 938 (1955); *Savende v. Vila*, 247 Iowa 1139, 78 N.W. 2d 41; *Vandell v. Rowe*, 232 Iowa 96, 6 N.W.2d 295 (1942); *Leebove v. Roven*, 363 Mich. 569, 111 N.W. 2d 184 (1961).

6. *Wills v. Commonwealth*, 190 Va. 294, 56 S.E.2d 222 (1949).

7. *Cooper v. Sorenson*, 182 Kan. 560, 322 P.2d 748 (1958).

which refuse to admit the report as an admission against interest is that Kansas has a limited statutory exclusion for accident reports. Since the Virginia Code specifically excludes the reports,⁸ the fact that they contained admissions against interest would not be grounds for admitting them into evidence.

In states which bar the accident report for any purpose, a lawyer could bring the report to the attention of the jury and possibly affect the jury's thinking by demanding, in the presence of the jury, that the accident report be admitted into evidence. The fact that such requests are denied or that the jury is instructed to disregard counsel's demands cannot assure that the lawyer's dramatics have not prejudiced the jury. This situation was presented in an Illinois trial court when plaintiff's counsel called defendant as an adverse witness.⁹ Referring to a police accident report, plaintiff's counsel asked defendant certain questions which defendant answered over the vehement objections of defendant's counsel. Defendant's counsel then insisted that the police report be admitted and read to the jury as the best evidence. His request was denied and when the investigating officer was examined in the same manner by plaintiff's attorney, counsel for the defendant again insisted that the police report should be admitted to avoid confusion. The Supreme Court of Illinois ruled that the accident report was not admissible into evidence and that the incessant demands by defendant's counsel that the report be admitted were prejudicial.

Whether Virginia would grant a mistrial because counsel insisted that a police report be admitted into evidence is an open question. One thing to be considered is the fact that Virginia will not allow accident reports into evidence even for impeachment.¹⁰ Illinois, which allows the report for impeachment, will not allow improper demands by counsel. Also to be considered is the tight construction which has been given to the Virginia statute.¹¹ Since the Virginia courts exclude the actual accident report, it would seem to be improper and prejudicial for counsel to demand that the accident report be admitted into evidence. If the question ever arises in Virginia, it would appear that such demands are valid grounds for appeal or at least a request for mistrial.

8. VA. CODE ANN. §§ 46.1-408, 409, (1950).

9. *Smith v. Johnson*, 2 Ill. App.2d 315, 120 N.E.2d 58 (1954).

10. *Krizak v. W. C. Brooks*, 320 F.2d 37 (4th Cir. 1963).

11. *Ibid* at 45.

IMPEACHMENT

The cases are divided on whether accident reports which are barred from substantive evidence may be used for impeachment. An example of the problems inherent in admitting the report for impeachment is the Arizona case, *Welch v. Medlock*.¹² There, the lower court had admitted the statement of a highway patrolman contained in a highway fatality report to impeach the testimony of the officer. The case was reversed because the court committed prejudicial error in failing to instruct the jury that the report could only be used for impeachment. Admitting the report for impeachment, even with proper instructions as to the report's use, is not a satisfactory procedure, since there is no certainty that the contents of the reports will not be considered substantively by the jury.¹³ Another reason for not using the accident reports for impeachment is that presented in the Oklahoma case, *Smith v. Wilkins*.¹⁴ The Court reasoned that if the report was admitted, the very thing could be accomplished under the guise of impeachment which could not be done otherwise.

The better rule is proposed by the Virginia courts which will not allow accident reports to be used for impeachment. As evidenced by *Lee v. Artis*,¹⁵ the Virginia rule has resulted from a strict reading of two sections of the Virginia Code.¹⁶ The decision in that case makes it clear that the reports may not be used for impeachment in a personal injury suit. But, there is some doubt as to whether this same rule would apply in a criminal case.

Although the Va. Code Ann. §§ 46.1-408, 409 (1950) provides that the accident report shall not be used as evidence in any trial, civil or criminal, the Court, in *Lee v. Artis*,¹⁷ relied on this particular statute to bar the report as substantive evidence. In refusing to allow the report for impeachment, however, the Court seemed to place greater emphasis on Va. Code Ann. § 8-293 (1950), which pertains to civil suits only. Therefore, whether sections 46.1-408, 409 would prevent the accident reports being used for impeachment in a criminal case is a question which remains to be answered.

12. 79 Ariz. 247, 286 P.2d 756 (1955).

13. MCCORMICK ON EVIDENCE, § 39 (1954): "The distinction [between impeachment and substantive evidence] is not one most jurors would understand. If they could understand it, it seems doubtful they would attempt to follow it."

14. 403 P.2d 485 (Okla., 1965).

15. 205 Va. 343, 136 S.E. 2d 868 (1964).

16. VA. CODE ANN. § 46.1-408, 409; § 8-293 (1950).

17. *Supra* note 15.

Until this issue is ruled on in Virginia, the investigating officer as well as the defendant *in a criminal case* may be subject to impeachment by statements contained in accident reports. Such impeachment, if allowed, would seriously weaken the statutory privilege impressed on accident reports, with the result that information would be less freely disclosed, and less accurate.

DIAGRAMS PREPARED BY THE INVESTIGATING OFFICER

Even in civil cases, Virginia has not barred all evidence prepared by the investigating officer. In *Moore v. Warren*,¹⁸ the defendant was allowed to introduce a diagram of the automobile accident which had been drawn by the investigating officer. The diagram was introduced for the express purpose of impeaching a similar diagram prepared by the same officer and offered by plaintiff. The Court ruled that while the exhibit was identical to the one filed by the investigating officer in his official report to the Division of Motor Vehicles, it was not such a report as would violate section 46.1-409.

Therefore, in Virginia, the accident report filed with the Division of Motor Vehicles is the thing which is not admissible as substantive evidence or for impeachment. The above case states that subsequent reproductions of diagrams would not be excluded under section 46.1-409. Since a diagram of skidmarks, automobile position, etc., is merely the observation of the officer, it would not be such a writing or ex-parte affidavit as would be inadmissible under section 8-293.

The admission of diagrams independently made by the investigating officer is not contrary to the purpose of the accident report exclusion, since the accident victim had no hand in drawing the diagram. On the other hand, if the aid of the accident victim was solicited in drawing the diagram, this would necessitate barring the diagram from evidence. The Virginia rule¹⁹ however, does not make this distinction. It appears from the Court's language that any diagram, even if made with the accident victim's help, is admissible as evidence in Virginia, as long as it is not the actual accident report. While this ruling does not contradict the express language of the statute²⁰ which says no "report" shall prejudice the reporter or be used in evidence, the spirit or innate intent of the statute is contravened by this rule in that it admits indirectly that evidence which is barred from direct admission.

18. 203 Va. 117, 122 S.E.2d 879 (1961).

19. *Krizak v. W. C. Brooks*, *supra* note 10.

20. VA. CODE ANN. § 46.1-407, 408 (1950).

Although a diagram of the personal observations of the officer would be admitted under the statute, the diagram would nevertheless be subject to exclusion as hearsay.²¹

TESTIMONY OF THE INVESTIGATING OFFICER

The court's attempt to provide for the statutory privilege relating to accident reports while at the same time presenting the whole truth and the best evidence for the jury's consideration is the crux of the accident report problem. As illustrated above, some states admit the accident report for impeaching a witness while Virginia does not. However, the Virginia rule has been considerably expanded by the *Krizak* case.²² In that case, the court held that while the report itself was not admissible for any purpose, "the statements made in the report may be used in the manner suggested for purposes of cross-examination." And, in order to fully carry out the intended purposes of the statutory privilege, no mention of the existence of the report as such may be made.²³ The case holds that the accident report itself may not be used as evidence nor may the report be mentioned, but any other information, whether or not related to the accident report, may be used as evidence. On this basis, accident victims in Virginia, when questioned by a police officer, will have good cause to be evasive or not answer at all until they have been advised by counsel. This is because anything they say may be brought out at the trial by the oral testimony of the investigating officer. Such a consequence would certainly defeat the purpose of requiring the accident reports. Professor McCormick has said that "if statements may be used against reporters, they may be discouraged from making a full report."²⁴ In any case, the usefulness of the Courts decision, in regard to impeachment, "would seem to be severely limited, since without the freedom to mention the report, counsel would be unable to lay adequate foundation for showing that prior inconsistent statements had been made."²⁵

21. *Davis' Adminx. v. Gordon*, 309 Ky. 121, 216 S.W.2d 409 (1948). The Kentucky Supreme Court held that the trial court erred in admitting into evidence a copy of a diagram contained in the accident report. The report was made of the investigating officer who arrived at the scene of the accident five or ten minutes after it had happened and was based upon what others had told the officer about the accident. As such, the diagram was clearly inadmissible as hearsay.

22. *Krizak v. W. C. Brooks*, *supra* note 10.

23. *Ibid.*

24. McCORMACK ON EVIDENCE § 149 (1954).

25. 50 VA. L. REV. 1309 (1963) comment.

The Minnesota Supreme Court, in accord with Virginia's view, has ruled that what an officer hears as well as what he observes is a fact within his knowledge and that the statute²⁶ does not prevent an investigating officer from testifying as to such facts.²⁷ This decision had the effect of removing the immunity from statements given in connection with the officer's accident reports. Thus reporters again had cause to fear that the accident reports would be used against them.²⁸

In interpreting a statute²⁹ almost identical to Virginia's, the Supreme Court of Maine has developed a better solution to this problem.³⁰ In recognizing the difficulties of a rule such as Virginia's, the Maine Court stated that: "We can see that the driver of a vehicle involved in an automobile accident might, and doubtless should be, protected as to oral statements made in the course of and as a part of the preparation of the written report required of him by statute. One cannot be permitted to do indirectly what he is forbidden to do directly."³¹ The Maine Court would, however, allow the officer to testify to information other than that gained while he was making his accident report.

The statute³² in Iowa regarding the confidential nature of accident reports as identical in most respects to that of Maine and Virginia. In *Goodman v. Gouse*,³³ the Iowa Supreme Court held that an investigating officer may testify in a civil case to observations made by him at the scene of the accident, and to statements made in his presence which were not received as a part of an accident report. However, under the Iowa rule, admissions or statements to an investigating officer intended as part of the accident report are privileged.

Thus, while Maine and Iowa consider inadmissible the statements taken by the investigating officer in preparing his accident report, Virginia allows the officer to testify to these same statements.

An interesting question of constitutional law is presented by the Virginia rule. Under the U.S. Supreme Court's ruling in *Escobedo v. Illinois*,³⁴ an accused in a criminal investigation must be informed of his right to counsel and to remain silent, or any admissions gained from

26. MINN. STAT. ANN. § 169.09 (13).

27. *Rockwood v. Pierce*, 235 Minn. 519, 51 N.W.2d 670 (1956).

28. 36 MINN. L. REV. 540 (1957) comment.

29. 29 MAINE R.S.A. § 891.

30. *State v. Libby*, 153 Me. 1, 133 A.2d 877 (1957).

31. *Ibid.*, at 883.

32. 15 IOWA CODE ANN. § 321.261.

33. 247 Iowa 1091, 76 N.W.2d 873 (1956).

34. 378 U.S. 478 (1964).

the accused's interrogation will be inadmissible. If a person were killed as a result of an automobile accident in which the driver was drunk, the driver of the motor vehicle would necessarily be the accused for a possible manslaughter prosecution. If such trial did result, it would follow that the investigating officer would not be allowed to testify to statements made in the preparation of the accident report unless the prosecution could prove that defendant had been afforded the constitutional rights provided in *Escobedo*. While the above question has never been presented in a reported case, it would appear that a defendant could make this constitutional argument and prevent the investigating officer from testifying against him regardless of the allowances of the Virginia rule. If this were found to be a valid argument, the ridiculous situation would be presented of a police officer attempting to obtain accurate information for the files of the Division of Motor Vehicles, after informing the accident victim that he had a right to counsel and to remain silent. Whether or not such an argument would be valid, it points up the difficulties inherent in allowing the officer to testify to information obtained while completing his accident report.

EFFECT OF IMPROPER ADMISSION OF ACCIDENT REPORT

Although all states bar the accident reports as substantive evidence and many will not admit the reports for impeachment of witnesses, several jurisdictions have refused to consider the improper admission of accident reports such error as by itself would necessitate the case being reversed.³⁵ Thus, where the trial court permitted a police officer to read directly from the accident report, the Illinois Appellate Court, noted that plaintiff's timely objection should have been sustained.³⁶ But, the Court held that a new trial would not change the judgment since the error did not result in prejudice to the plaintiff.

In holding that the improper admission of accident reports is reversible error, the Virginia Supreme Court has developed a rule which in this respect appears to offer the maximum protection for accident reporters.³⁷ But there are no grounds for a reversal in Virginia unless

35. *Davis Transport v. Balstad*, 156 Tex. 455, 295 S.W.2d 941 (1956). The Texas Supreme Court conceded that the admission into evidence of a diagram from an accident report was a technical error. However, the Court ruled that in light of other evidence the error was not so prejudicial that the case would have to be reversed.

36. *Redding v. Schroeder*, 54 Ill. App.2d 306, 203 N.E.2d 616 (1964).

37. *Wills v. Commonwealth*, 190 Va. 294, 56 S.E.2d 222 (1949). In an action to revoke defendant's driver's license, the Court ruled that the accident report was clearly

timely objection to the admission of the accident report is made in the lower court.³⁸

SUMMARY

Under the Virginia Code, accident reports may not be used in evidence in any trial, civil or criminal. The courts have construed this to mean that only the accident report itself is privileged. As far as section 46.1-409 is concerned, the investigating officer may testify to anything he sees or hears during the course of his investigation, but may not mention the accident report in his testimony.

Accident reports have been barred from use for impeachment in civil cases on the basis of Va. Code Ann. § 8-293 (1950). However, there is some uncertainty as to whether or not they can be so used in criminal cases.

Improper admission of the accident report in Virginia does constitute reversible error, if timely objection is made.

By a restrictive interpretation of sections 46.1- 408, 409, the courts have greatly reduced the effectiveness of the accident report privilege. Reporters in Virginia can be actually prejudiced by the contents of accident reports since by copy and oral testimony the accident reports may be presented for consideration by the court or jury.

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inadmissible under the statute and that it was prejudicial and reversible error to consider the ex-parte statements contained in the report.

In *Lee v. Artis*, 205 Va. 343, 136 S.E.2d 868 (1964), the court ruled that although the trial court admitted the accident report "not to prove the truth or falsity of the content of the statement but as to whether . . . such a statement was made," the use of the accident report was a violation of the Virginia Code and reversible error.

38. *Carter v. Nelms*, 204 Va. 338, 131 S.E.2d 401 (1963).