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EVIDENCE-PRIVILEGE-RIGHT OF THIRD PERSON TO ASSERT PRIVILEGE AS TO ACCIDENT REPORT MADE CONFIDENTIAL BY STATUTE

Richard W. Young S.Ed.
University of Michigan Law School

EVIDENCE—PRIVILEGE—RIGHT OF THIRD PERSON TO ASSERT PRIVILEGE AS TO ACCIDENT REPORT MADE CONFIDENTIAL BY STATUTE*—Plaintiff brought a negligence action for injuries sustained when the automobile in which she was a passenger collided with that operated by the defendant. Defendant questioned a police officer, who had filed the accident report, concerning statements made to him by the driver of the vehicle in which the plaintiff was riding. The trial court permitted this testimony over the plaintiff's objection that these statements were privileged under an Iowa statute purporting to make written accident reports confidential and inadmissible in evidence.[1] On appeal after a verdict was returned in favor of the defendant, *held,* reversed. The statute can be the basis for objection by one who is not a party to the report. The statutory prohibition of the accident report as evidence does more than create a personal privilege; it is not for the sole benefit of the party reporting but is for the benefit of the public at large. *Sprague v. Brodus,* (Iowa 1953) 60 N.W. (2d) 850.

* For discussion of a much different judicial attitude in another accident report case, see p. 1063 infra.—Ed.

[1] Iowa Code (1950) §321.271 provides: "All accident reports shall be in writing and the written report shall be filed without prejudice to the individual so reporting and shall be for the confidential use of the department. . . . A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based."

Statutes requiring the filing of accident reports often contain provisions that such reports shall not be admissible in litigation arising out of the facts on which the report is based.[2] An analogous privilege existed at common law for communications by informers to the government, based on a policy that persons possessing information needed by the government for the conduct of its functions should be accorded an assurance of privacy in order to induce disclosures.[3] While the Iowa statute in terms makes only the written report inadmissible, it has consistently been construed to mean that statements made to the officer by the reporting motorist are privileged as well.[4] The court in the principal case extends the privilege even further in holding that any person is entitled to invoke the statutory protection.[5] The rationale warranting suppression of evidence derived from accident reporting is said to rest on the clear legislative purpose of enabling the government to secure statistical data as a basis for safety recommendations.[6] It is sometimes stated that only the communicant can assert the privilege accorded a confidential communication,[7] but this rule may not control in the area of privileges which were unknown to the common law. Since rules of nondisclosure or privilege covering matters required by law to be reported to administrative officials are essentially statutory in origin, it would seem that courts must look to the statutes themselves for the dimensions of the privilege thus created.[8] Where the statute clearly

[2] 58 AM. JUR., Witnesses §533 (1948); 165 A.L.R. 1315 (1946). Many states have adopted literally or in substance the Uniform Highway Traffic Regulation Act §16 (1930), which so provides. See text of accident reporting provision and list of statutes in 8 WIGMORE, EVIDENCE, 3d ed., §2377, n. 3 (1940; 1953 Supp.).

[3] 8 WIGMORE, EVIDENCE, 3d ed., §2377, p. 761 (1940): ". . . many situations exist where the information can best be obtained only from the person himself whose affairs are desired to be known by the Government. An attempt to do so by mere compulsion might be tedious and ineffective. And where the ultimate purpose to be served is *administrative*, and not penal, it may well be that the Government can afford to promise secrecy in respect to purposes penal or litigious, as the price for readily achieving its administrative purpose when it demands a report of the truth."

[4] Vandell v. Roewe, 232 Iowa 896, 6 N.W. (2d) 295 (1942); Bachelder v. Woodside, 233 Iowa 967, 9 N.W. (2d) 464 (1943); State v. Williams, 238 Iowa 838, 28 N.W. (2d) 514 (1947). *Contra:* Ritter v. Nieman, 329 Ill. App. 163, 67 N.E. (2d) 417 (1946); Rockwood v. Pierce, 235 Minn. 519, 51 N.W. (2d) 670 (1952), noted 36 MINN. L. REV. 540 (1952) and 26 TEMPLE L.Q. 77 (1952).

[5] Stevens v. Duke, (Fla. 1949) 42 S. (2d) 361, and Henry v. Condit, 152 Ore. 348, 53 P. (2d) 722 (1936), relied on in the principal case, seem to recognize inferentially the right of a third person to assert the privilege, but in these cases a privity relation existed between the persons reporting and those objecting to the use of the report in evidence and the opinions did not discuss this question.

[6] 8 WIGMORE, EVIDENCE, 3d ed., §2377, p. 766 (1940): "Here the main object is to investigate conditions and causes with a view to future administrative action; hence the State can afford to abdicate the use of such reports for purposes of punishment or of private litigation, in case the facts reported reveal a legal liability or a commercial secret on the part of the person reporting." Quoted with approval in Lowen v. Pates, 219 Minn. 566 at 569, 18 N.W. (2d) 455 (1945), and relied on in the principal case.

[7] 70 C.J., Witnesses §619 (1935); 34 KY. L.J. 213 (1946); 8 WIGMORE, EVIDENCE, 3d ed., §§2321, 2386 (1940). See generally 30 COL. L. REV. 686 (1930); 22 CALIF. L. REV. 667 (1934).

[8] Connecticut Importing Co. v. Continental Distilling Corp., (D.C. Conn. 1940) 1 F.R.D. 190; 165 A.L.R. 1308 (1946); 8 WIGMORE, EVIDENCE, 3d ed., §2377 (1940).

and unequivocally forbids a given disclosure, this must be given full effect as judicial construction is appropriate only to resolve ambiguity.[9] But a clear legislative mandate should be necessary to justify the suppression of pertinent testimony on the ground of privilege,[10] and any provision operating to limit the scope of judicial inquiry by removing evidence from the court's consideration and affecting the substantial rights of litigants should be cautiously applied.[11] By permitting strangers to the communication to assert the privilege, the Iowa court here applies a literal interpretation of the accident reporting statute and ignores the common law antecedents which underlie the recognition of privileged communications. The court instead treats the statute as a mandatory disqualification of the accident report and the statements on which it is based.[12] Although the court faced a sweeping statutory prohibition, it would appear that it was not precluded from weighing the benefits accruing from nondisclosure against the injury to the correct disposal of the litigation,[13] thus possibly avoiding some of the onerous effect of the provision in excluding material evidence. It may be questioned whether strangers to the communication constituting the accident report need be accorded the right to raise the question of its confidential nature as a necessary means of inducing persons to make such reports. Had the court in the principal case made this inquiry, it might well have denied the right of the plaintiff to invoke the privilege of nondisclosure.

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[9] Hickok v. Margolis, 221 Minn. 480, 22 N.W. (2d) 850 (1946).

[10] Marceau v. Orange Realty, Inc., 97 N.H. 497, 92 A. (2d) 656 (1952). See also Hawthorne v. Delano, 183 Iowa 444, 167 N.W. 196 (1918); 165 A.L.R. 1308 (1946).

[11] 58 AM. JUR., Witnesses §533 (1948).

[12] See 20 UNIV. CIN. L. REV. 76 at 79 (1951); McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 (1938).

[13] Professor Wigmore has established four fundamental conditions necessary to the establishment of a privilege against disclosure of communications. One of these is: ". . . (4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." 8 WIGMORE, EVIDENCE, 3d ed., §2285, p. 531 (1940).