
Evidence - Declaration against Penal Interest Exception to Hearsay Rule - McGraw v. Horn, 183 N.E.2d 206 (Ind. 1962)

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Inevitably, the court's opinion will be sounded in search of admissible phrasing of a money-oriented argument. The opinion does not seem to preclude a breakdown of the alleged duration of past and future suffering into small time units and, where the evidence warrants, the introduction of life and expectancy tables.²⁰ A decision of this nature will generate research and an invigorating resourcefulness by those disgruntled attorneys whose interests are, for the moment, somewhat displaced. Novel and theatrical uses of demonstrative evidence will possibly ensue, fostering the "hollywood" trial which courts uniformly eschew. It would seem, however, that in the balance may be the ultimate integrity of judicial control of judicial affairs.

²⁰ Presumably counsel is free to use a per diem basis to calculate loss of future earnings in his final argument, provided there has been testimony as to plaintiff's past earnings and his diminished earning capacity. The prohibition in *Caley* appears to be limited to the amount demanded for pain and suffering.

EVIDENCE—DECLARATION AGAINST PENAL INTEREST EXCEPTION TO HEARSAY RULE

McGraw brought a negligence action against one Horn to recover damages for injuries that were sustained in an automobile accident. McGraw alleged she was a passenger in an automobile driven by one Smith, and that she was injured as a result of Horn's negligent operation of his automobile. At the trial a police officer was permitted to testify as to a conversation with Smith which took place in a hospital one-half hour after the accident. The officer testified that Smith told him he did not see Horn's car nor the Yield Right of Way sign. The jury returned a verdict for the defendant and the plaintiff appealed. On appeal it was urged by the plaintiff that the testimony of the officer was pure hearsay and came within no exception to the hearsay rule; that the officer's testimony did not fall within the declaration against interest exception because the statement by Smith could only have subjected Smith to penal or civil liability. The Indiana Appellate Court agreed with the contentions of the plaintiff and reversed the decision of the trial court. The Court held that to render such extrajudicial statements admissible, they must be against the pecuniary or proprietary interest of the declarant and not merely such as would subject him to criminal action or civil suit. *McGraw v. Horn*, 183 N.E. 2d 206 (Ind. 1962).

The decision of the Court recognized the well-established rule that any statement that is a narration of a past event by a person who is not a witness in the case constitutes hearsay.¹ Although the hearsay rule is deeply

¹ *State v. Labbee*, 134 Wash. 55, 234 Pac. 1049 (1925).

rooted in our legal system, the courts have made a number of exceptions to the rule. The *McGraw* case was concerned with only one of these exceptions, namely, a declaration by one not a party to the proceeding (a third party) that was against his interest. In formulating this exception, the courts reasoned that people do not ordinarily make false statements against their own interests. Therefore, statements made against interest must be true.²

An illustration of the declaration against interest exception will facilitate an understanding of the rules enunciated by the courts. A states to W that he owes his wife \$5000. Sixty days thereafter, A transfers Blackacre to his wife and then dies. The creditors of A bring suit to have the conveyance of Blackacre set aside as fraudulent. W then offers to testify regarding A's statement to him that he owed his wife \$5000. Since the statement of A, as to his indebtedness, could have subjected him to pecuniary liability to his wife, we shall see that it comes within the "against interest" exception and is admissible.

The early English cases³ that gave birth to the exception formulated a much more liberal rule than the one which was later developed. In fact, one case indicated that any statement by a person having no interest to deceive would be admissible.⁴ Under such a rule, the mere fact that the declarant had no reason to lie would render the statement admissible. In the 1829 case of *Middleton v. Melton*,⁵ the Court held it was no longer sufficient to merely have no reason to lie. The statement must be "against interest." Obviously, this was a more conservative position than that taken earlier, but it was merely a "sneak preview" of what was to come.

In the *Sussex Peerage Case*,⁶ decided in England in 1844, the Court departed from the liberal construction of the exception formulated by the early English cases. The plaintiff contended he was a decedent of George III and asserted the validity of a marriage performed in Rome. At the trial a clergyman's son offered to testify that his father, since deceased, told him of performing the marriage. The plaintiff urged that this testimony, though hearsay, should be received under the declaration against interest exception, since the clergyman realized he was committing a crime by

² CLEARY, HANDBOOK OF ILLINOIS EVIDENCE § 1319 (1956).

³ *Hulet's Trial*, 5 How. St. 1192 (1660); *Standen v. Standen*, Peake 45, 170 Eng. Rep. 73 (1791). Also see, *Powell v. Harper*, 5 Car. & P. 590, 172 Eng. Rep. 1112 (1833) where a confession of a third party to the effect that he had committed larceny was held admissible.

⁴ In *Doe v. Robson*, 15 East 32, 34, 104 Eng. Rep. 756, 757 (1812), Lord Ellenborough stated: "The ground upon which this evidence has been received is, that there is a total absence of interest . . . to pervert the fact. . . ."

⁵ 10 B. & C. 317, 109 Eng. Rep. 467 (1829).

⁶ 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844).

performing the marriage. The Court rejected the plaintiff's contention and held the testimony inadmissible. To qualify for the declaration against interest exception, the Court said, the statement offered must have been against the *pecuniary* or *proprietary* interest of the declarant, and not merely against a *penal* interest. The Court thereby constructed a wall around the exception that still stands and cast penal declarations in the scrap-heap outside of the wall.⁷

A majority of the courts, which have considered the question in the United States, have elected to follow the English rule as stated by the *Sussex Peerage Case*. In holding declarations against penal interest to be outside the scope of the declaration against interest exception, however, the American courts have stated three different rules. Some courts consider the exception and indicate in unmistakable language that the declaration must be against the pecuniary or proprietary interest of the declarant.⁸ Therefore, statements that may subject the declarant to a criminal prosecution are held inadmissible. A few other courts exclude penal declarations, *per se*, and do not mention either the hearsay rule or the fact that an exception exists for declarations against interest.⁹ A third rule is enunciated by a far greater number of courts than the first two. These courts find the disposition of penal statements an easy task by merely rejecting them as hearsay.¹⁰ When courts merely dismiss the offer of evidence as hearsay, especially without even discussing the exception, it displays a lack of analysis and reasoning that has caused at least one commentator to be extremely critical.¹¹

It is amusing to note the lengths to which the pecuniary or proprietary rule can be stretched by a willing court. In the case of *Weber v. Chicago, R.I. & P. Ry. Co.*,¹² the court admitted a declaration of a criminal act on the theory that the same act might also subject the declarant to a tort

⁷ *Id.* at 113-14, 8 Eng. Rep. at 1045, where Lord Campbell states: "I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence."

⁸ *Weber v. Chicago, R.I. & P. Ry. Co.*, 175 Iowa 358, 151 N.W. 852 (1915); *County of Mahaska v. Ingalls*, 16 Iowa 81 (1864).

⁹ *State v. Bailey*, 74 Kan. 873, 87 Pac. 189 (1906); *Robinson v. State*, 114 Ga. 445, 40 S.E. 253 (1901).

¹⁰ *Commonwealth v. Chin Kee*, 283 Mass. 248, 186 N.E. 253 (1933); *Flemming v. State*, 95 Vt. 154, 113 Atl. 783 (1921); *State v. Gonzales*, 19 N.M. 467, 144 Pac. 1144 (1914); *Mays v. State*, 72 Neb. 723, 101 N.W. 979 (1904).

¹¹ In a note in 37 L.R.A. (n.s.) 345, 350 it is said: "Most of the decisions, however, dispose of the question with little more than a shake of the head; and if, therefore, the rule is founded in reason, we must look elsewhere than to judicial opinion in order to find the reason."

¹² 175 Iowa 358, 151 N.W. 852 (1915).

action and consequent pecuniary liability. If this theory were applied to all statements against penal interest, the majority rule could do little harm, since nearly every crime against the person or property of another creates tort liability.

One rationale which is given for refusing to admit a declaration against penal interest is that to admit the declaration would create a danger of perjured testimony.¹³ The cry of perjury, however, is the ancient rusty weapon often advanced to oppose a reform in the rules of evidence. In fact, this would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie on the stand, and it is difficult to avoid being deceived by them.¹⁴

A minority of courts in the United States, considering the question, hold that the declaration against interest exception to the hearsay rule includes declarations against penal interest. The most frequent illustration occurs where A is being tried for murder, B confesses the same murder to W and later B dies. A offers W to testify as to the confession on the ground that the confession was a declaration against B's interest when made, since it could have subjected B to prosecution for the crime. The minority courts would hold such a statement admissible, although the specific requirements for admissibility vary between jurisdictions.

The Texas courts are in the minority, but have been reluctant to give vent to a full exception for penal declarations. They hold that if the evidence against the defendant is entirely circumstantial, and if there is also evidence pointing to the guilt of the third party declarant, then the latter's extrajudicial confession will be received, but not otherwise.¹⁵

The courts of Maryland have gone through three stages, finally arriving at a full exception. In 1920, Maryland was considered to be a staunch supporter of the majority position.¹⁶ A later case qualified the rule by admitting the confession of a third party, but limiting the holding as precedent to its particular facts.¹⁷ In a 1961 Maryland murder case, *Brady v. State*,¹⁸ the prosecution contended on appeal that an unsigned confession by a third party, withheld from the defense, was not admissible in any event. The Court held the state was in error, and that a confession of a third party is admissible.

In the case of *Hines v. Commonwealth*,¹⁹ Virginia adopted the view of

¹³ *Brown v. State*, 99 Miss. 719, 55 So. 961 (1911).

¹⁴ § WIGMORE, EVIDENCE § 1477 (3d ed. 1940).

¹⁵ *Stinson v. State*, 124 Tex. Crim. 52, 60 S.W. 2d 773 (1933); *Blocker v. State*, 55 Tex. Crim. 30, 114 S.W. 814 (1908).

¹⁶ *Baehr v. State*, 136 Md. 128, 110 Atl. 103 (1920).

¹⁷ *Brennan v. State*, 151 Md. 265, 134 Atl. 148 (1926).

¹⁸ 226 Md. 422, 174 A. 2d 167 (1961).

¹⁹ 136 Va. 728, 117 S.E. 843 (1923).

Mr. Justice Holmes²⁰ that declarations against penal interest should be admissible. Like Maryland though,²¹ the Court restricted the operation of the rule to the facts of that case. In the recent case of *Newberry v. Commonwealth*,²² Virginia removed the restriction. Both Maryland and Virginia, therefore, recognize a full exception for declarations against penal interest as a result of cases decided in 1961 and 1950, respectively.

The other states which support the minority position are Idaho,²³ and recently, Missouri²⁴ and Illinois.²⁵

It is evident from the foregoing that the modern tendency is to admit declarations against penal interest,²⁶ and that courts which were cautious with the admission of these declarations at first²⁷ are now dropping their reservations.²⁸ Notwithstanding this, however, South Carolina is retreating from its original minority stand. The case of *Coleman v. Frazier*,²⁹ decided in 1850, held penal declarations admissible. But a 1958 case, *McClain v. Anderson Free Press*,³⁰ has limited the effect of that decision. Although the Court in the *McClain* case indicated the 1850 decision was still the law, practically speaking this is questionable, since the case in-

²⁰ In *Donnelly v. United States*, 228 U.S. 243, 277 (1913), Mr. Justice Holmes said in dissenting: "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations which would be let in to hang a man . . . and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length."

²¹ *Brennan v. State*, 151 Md. 265, 134 Atl. 148 (1926).

²² 191 Va. 445, 61 S.E. 2d 318 (1950).

²³ *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014 (1901).

²⁴ *Sutter v. Easterly*, 354 Mo. 282, 189 S.W. 2d 284 (1945).

²⁵ *People v. Lettrich*, 413 Ill. 172, 108 N.E. 2d 488 (1952).

²⁶ *Ibid.* *Sutter v. Easterly*, 354 Mo. 282, 189 S.W. 2d 284 (1945).

²⁷ *Brennan v. State*, 151 Md. 265, 134 Atl. 148 (1926); *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923).

²⁸ *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E. 2d 318 (1950); *Brady v. State*, 226 Md. 422, 174 A. 2d 167 (1961).

²⁹ 16 S.C. 59 (1850).

³⁰ 232 S.C. 448, 102 S.E. 2d 750 (1958).

volved what was clearly a declaration against penal interest and it was held inadmissible.

A historical review of the Illinois cases, which have considered the exception, mirrors the position of nearly every jurisdiction. In the case of *Crain v. Wright*,³¹ decided in 1867, the Court held what was a declaration against the pecuniary interest of a third party to be admissible. The decision, however, made no reference to the hearsay rule or the declaration against interest exception. A later case, *Drabek v. Grand Lodge*,³² characterized what was in fact a declaration against interest, which would have subjected the declarant to both pecuniary and penal liability, as an admission against interest and admitted the declaration.³³

In *German Insurance Co. v. Bartlett*,³⁴ a 1900 case, the Supreme Court of Illinois was concerned with a suit brought by creditors to set aside an allegedly fraudulent conveyance by a husband to his wife. The Court held that a declaration by the husband, admitting he was indebted to his wife, was admissible. The Court stated the requirements of the declaration against interest exception to be that: (1) the declarant is dead; (2) the declaration was against the pecuniary interest of the declarant when made; (3) the declarant had competent knowledge of the fact declared; (4) the declarant had no probable motive to falsify. The language used by the Court in the *Bartlett* case would seem to preclude the admission of a declaration against penal interest in 1900.

More than 50 years after the *Bartlett* decision, the question of whether penal declarations, standing alone, were admissible in Illinois was presented on an appellate level for the first time. In the case of *People v. Lettrich*,³⁵ the Supreme Court added Illinois to the growing number of minority jurisdictions that admit declarations against penal interest as an exception to the hearsay rule. The Court held that the testimony of a director of a behavior clinic, to the effect that someone other than the defendant had confessed the same murder to him, was admissible and reversed the holding of the lower court. In a well-reasoned opinion the Court stated:

The general rule, supported by the great weight of authority, is that extrajudicial declarations of a third party, not made under oath, that he committed the crime; are purely hearsay, and even though they are declarations against interest, are inadmissible. . . . The rule is sound and should not be departed from except in cases where it is obvious that justice demands a departure.³⁶

³¹ 46 Ill. 107 (1867).

³² 24 Ill. App. 82 (1887).

³³ Apparently, the court confused the admissions exception, which is always made by a party to the proceeding or one in privity, with the declaration against interest exception.

³⁴ 188 Ill. 165, 58 N.E. 1075 (1900).

³⁵ 413 Ill. 172, 108 N.E. 2d 488 (1952).

³⁶ *Id.* at 178, 108 N.E. 2d 491-92.

The Court went on to say, that since the state was relying solely on the repudiated confession of the defendant, justice demanded that the third party's confession be received. It is also interesting to note that the declarant was not shown to be dead, as required by the *Bartlett* case. Since the only subsequent case that considered the exception in Illinois³⁷ was concerned solely with a declaration against a pecuniary interest, it is still a moot question whether the *Lettrich* case will be confined to its particular facts.

In conclusion, it is submitted that a declaration against penal interest cannot be treated in the same manner as a declaration against pecuniary interest. If the confession of every crackpot (and such are not uncommon in cases of wide notoriety) were held to be admissible, the issues before the jury would become a hopeless morass. However, the refusal of the majority jurisdictions to admit penal declarations, even where it would seem that justice demands a departure from the orthodox rule, is untenable. The rational rule, it would seem, is the minority rule.

³⁷ *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E. 2d 393 (1960).

INSURANCE—CHANGE OF BENEFICIARY BY WILL

Plaintiff's son brought an action against his mother claiming the right to the proceeds of two group life insurance policies. The policies, taken out by John Suga, father of the plaintiff and husband of the defendant, named the defendant as beneficiary. John Suga died testate, however, and his will bequeathed the proceeds of the life insurance to the plaintiff. The policies provided for a change of beneficiary by any written request filed at the headquarters of the employer or home office of the company; such change was to be effective as of the date of execution of the request, whether the insured be living or not at the time of the filing, but without prejudice to the insurer. The insurer, previously joined, was dismissed upon payment of the proceeds to the clerk for deposit. Plaintiff argued that the unique wording of the policy permitted change of beneficiary by will, and that the court effectuate his father's intent. The decision in the lower court for the defendant was affirmed by the Illinois Appellate Court. The basis of the decision was that where the policy regulates the method of change, such method is generally exclusive to that extent. Furthermore, it was held that the widow's rights vested upon the death of the insured; the request for change must be made during the lifetime of the insured, and the will was ineffective until after death. *Suga v. Suga*, 35 Ill. App. 355, 182 N.E. 2d 922 (1962).

Generally, if there is no restriction or exclusive method for changing