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EVIDENCE-PRIVILEGE-USE OF PRIVILEGED ACCIDENT REPORT TO REFRESH OFFICER'S RECOLLECTION

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EVIDENCE—PRIVILEGE—USE OF PRIVILEGED ACCIDENT REPORT TO REFRESH OFFICER'S RECOLLECTION*—Plaintiff, a passenger in an automobile, recovered a judgment for injuries received in a collision. Defendants' motion to exclude testimony of the police officer investigating the accident as to admissions of the driver was overruled by the trial court. Defendants contended that the required accident report[1] filed by the defendant driver was privileged by

* For discussion of a much different judicial attitude in another accident report case, see p. 1061 supra.—Ed.

[1] Mich. Comp. Laws (1952 Supp.) §257.622: "The driver of every motor vehicle involved in an accident resulting in a vehicle or vehicles becoming so disabled as to be incapable of being propelled in the usual manner, or resulting in personal injury or death of any person shall forthwith report such accident to the nearest or most convenient police station or police officer. The officer receiving such report shall forthwith forward the same to the commissioner of state police on forms to be prescribed by him."

statute,[2] and therefore the testimony of the officer was inadmissible. On appeal, *held,* reversed on other grounds. It was proper for the officer to testify as to the defendant driver's admissions even if it was necessary for him to refresh his recollection of these admissions by using the statutory report filed by the defendant. *Wallace v. Skrzycki,* 338 Mich. 165, 61 N.W. (2d) 106 (1953).

Judicial interpretation of statutes making automobile accident reports unavailable for use in litigation has varied considerably. A majority of the courts seem inclined to follow the interpretations of the Michigan court in construing the privilege quite narrowly, with the result that the privilege is often of little consequence.[3] Furthermore, in the Michigan decisions[4] a distinction is made between the "statutory" report and the "police" report, with only the former receiving the benefit of the privilege. The basis of this distinction, which in some cases will be decisive,[5] is not clear though language in one case indicates that the form and content of the report may be controlling.[6] The other jurisdictions are in accord with Michigan that the statutory report itself is inadmissible as evidence,[7] but that the officer who investigates the accident and receives or files the statutory report can nevertheless testify in court as to physical facts at the scene of the accident, e.g., conditions of the road and positions of the cars.[8] The principal controversy of the interpretation of this statutory privilege relates to admissibility of the officer's testimony regarding admissions of the driver when the testifying officer has either received or filed the report. Where the officer's testimony is the product of his memory unaided by any reference to the report, a majority of the decisions agree with Michigan that the privilege does not prohibit this testimony.[9] The decision in the principal case that the officer may utilize the

[2] Mich. Comp. Laws (1952 Supp.) §257.624: "The reports required by this chapter shall not be available for use in any court action, but it shall be for the purpose of furnishing statistical information as to the number and cause of accidents."

[3] Ritter v. Nieman, 329 Ill. App. 163, 67 N.E. (2d) 417 (1946); Airlines Coaches v. Howell, (Tex. Civ. App. 1946) 195 S.W. (2d) 713; Carpenter v. Gibson, 80 Cal. App. (2d) 269, 181 P. (2d) 953 (1947); Garey v. Michelsen, 227 Minn. 468, 35 N.W. (2d) 750 (1949).

[4] See Delfosse v. Bresnahan, 305 Mich. 621, 9 N.W. (2d) 866 (1943); Baumgarten v. Tasco, 312 Mich. 161, 20 N.W. (2d) 144 (1945); Heiman v. Kolle, 317 Mich. 548, 27 N.W. (2d) 92 (1947); Trafamczak v. Anys, 320 Mich. 653, 31 N.W. (2d) 832 (1948); Germiquet v. Hubbard, 327 Mich. 225, 41 N.W. (2d) 531 (1950); Jakubiec v. Hasty, 337 Mich. 205, 59 N.W. (2d) 385 (1953); and the principal case.

[5] Baumgarten v. Tasco, note 4 supra.

[6] See Germiquet v. Hubbard, note 4 supra, at 231, where the court states: "Because of the form and contents of the exhibit it may fairly be inferred that it was not considered, either by the trial court or by this Court, as a report required, in certain instances, to be made to a police officer by one who is involved in an accident. It was, rather, a summary of the information that the investigator had received, not only from the defendant but also from others."

[7] Delfosse v. Bresnahan, note 4 supra; State v. Williams, 238 Iowa 838, 28 N.W. (2d) 514 (1947); Stevens v. Duke, (Fla. 1949) 42 S. (2d) 361.

[8] Delfosse v. Bresnahan, note 4 supra; State v. Williams, note 7 supra; Scott v. Torrance, 69 Ga. App. 309, 25 S.E. (2d) 120 (1943).

[9] Heiman v. Kolle, note 4 supra; Ritter v. Nieman, note 3 supra; Rockwood v. Pierce, 235 Minn. 519, 51 N.W. (2d) 670 (1952). *Contra,* State v. Williams, note 7 supra.

statutory report to refresh his recollection[10] of the driver's admissions marks a significant inroad upon the statutory privilege.[11] With this decision it is now apparent that in Michigan the only forbidden uses of the statutory report are as hearsay or as past recollection recorded.[12] Moreover, if the Michigan court should decide that the report in question is not a statutory report but a police report, it may be admissible as past recollection recorded.[13] It could be argued that the Michigan interpretation, which permits the use of the report for refreshing the officer's recollection, violates the intention of the legislature, for the statute specifically states that no use shall be made of the report in any court action.[14] To allow the officer to refresh his recollection with the report is to make actual use of the report. Furthermore, the present application of the privilege may well serve to trap the unsuspecting motorist who, when informed of this statutory privilege, is unguarded in his report, with the result that his interests suffer in subsequent litigation. To argue that all such admissions, whether true or false, should be aired in the subsequent litigation is to ignore the desire of the legislature to secure accurate statistics for safety studies by making accident reports confidential.[15] However, the position of the Michigan court is apparently unequivocal; dissatisfaction with this judicial interpretation can be remedied only by the legislature.

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[10] See Trafamczak v. Anys, note 4 supra, in which the court is quite insistent that the witness' testimony must show clearly that he has, in fact, a recollection to be refreshed.

[11] Lowen v. Pates, 219 Minn. 566, 18 N.W. (2d) 455 (1945), denied the use of the report to refresh the officer's recollection. Subsequently the Minnesota legislature amended the statutory privilege, Minn. Stat. Ann. (1946, Cum. Supp. 1953) §169.09, subd. 13, which then stated in part: ". . . Nothing therein shall be construed to prevent any person who has made a report pursuant to this chapter from testifying in any trial, civil or criminal, arising out of an accident, as to facts within his knowledge. It is intended by this subdivision to render privileged the reports required but it is not intended to prohibit proof of the facts to which such reports relate." Following the amendment, in Garey v. Michelsen, 227 Minn. 468, 35 N.W. (2d) 750 (1949), the Minnesota court ruled that the investigating officer could use his personal notebook to refresh his recollection as to admissions of the driver, but did not decide whether the report itself could have been used for this purpose.

[12] This in effect would be placing the report in toto in evidence. 3 WIGMORE, EVIDENCE, 3d ed., §754(5) (1940).

[13] Baumgarten v. Tasco, note 4 supra.

[14] Note 2 supra.

[15] See 8 WIGMORE, EVIDENCE, 3d ed., §2377 (1940).