

October 1964

## Witness - Attorney-Client Privilege - Insured's Statement to Insurer Remains Privileged Although Transmitted to Attorney Defending Insured on Criminal Charge

Thomas C. Rydell

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Thomas C. Rydell, *Witness - Attorney-Client Privilege - Insured's Statement to Insurer Remains Privileged Although Transmitted to Attorney Defending Insured on Criminal Charge*, 41 Chi.-Kent L. Rev. 212 (1964).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol41/iss2/4>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dgersberg@kentlaw.iit.edu](mailto:dgersberg@kentlaw.iit.edu).

And, certainly, there can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable or their provisions are impolitic or unjust.<sup>20</sup>

The decision reached by the majority, extending the Act of State doctrine to foreign acts which violate international law, is another step towards defining the role of domestic courts in the areas of foreign relations and international law.

T. F. LYSAUGHT

WITNESSES—ATTORNEY-CLIENT PRIVILEGE—INSURED'S STATEMENT TO INSURER REMAINS PRIVILEGED ALTHOUGH TRANSMITTED TO ATTORNEY DEFENDING INSURED ON CRIMINAL CHARGE—In *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964), the Illinois Supreme Court was confronted with the questions of (1) whether an insured's written statement given to her liability insurance carrier's investigator regarding the details of an accident she was involved in was within the attorney-client privilege, and (2) whether the transmittal of such statement, with her consent, to the attorney defending her on a criminal charge arising out of the same accident was a voluntary waiver of the privilege, thereby subjecting the statement to discovery by the prosecutor. On appeal, the Illinois Supreme Court reversed the Appellate Court<sup>1</sup> for the Third District and held that the insured's statement given to her insurer was within the attorney-client privilege and not subject to discovery by the State, while in control of the insurer, or even after transmittal, with the insured's consent, to her attorney for use in defending her in a criminal proceeding.

On February 18, 1961, Della Emberton was involved in an automobile-truck collision resulting in the death of two persons. At the time of the accident, Mrs. Emberton carried a public liability insurance policy, whereby her insurance carrier agreed to defend and pay all claims for personal

---

acts of state which do not conflict with the fundamental concepts of justice and morality prevailing in the international community." Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 852 (1959).

<sup>20</sup> Story, *Conflict of Laws* § 33 (3d ed. 1846).

---

<sup>1</sup> The Appellate Court said that the insured's statement would be privileged while in the insurance carrier's hands or if transmitted to the attorney of its choice in defending the insured. However, the court held that the privilege was waived when transmitted to Ryan for use in defending Della Emberton against the criminal charge, a use entirely different from that which the statement was originally intended. Ryan was considered to be a mere third party to whom a privileged communication was revealed with consent of the person entitled to assert the privilege (the insured), thereby waiving the privilege. *People v. Ryan*, 40 Ill. App. 2d 352, 189 N.E.2d 763 (3d Dist. 1963).

injury, wrongful death and property damage resulting from operation of her automobile. The policy required her to cooperate with the insurance company in their defense of any suits brought against her. On February 20, 1961, Della Emberton gave the insurance company's investigator a signed statement covering the details surrounding the accident in which she admitted that she had consumed several bottles of beer prior to the time of the accident. In February, 1961, an information was filed in the County Court of Douglas County, charging Mrs. Emberton with driving the automobile involved in the accident while under the influence of intoxicating liquor. On February 24, 1961, Willis P. Ryan, an attorney, was employed by Mrs. Emberton to defend her on the criminal charge. On June 21, 1961, Mr. Ryan, being acquainted with Mrs. Emberton's insurance company as a result of previous employment, requested and obtained the use of its investigation file (including Della Emberton's written statement) for use in the trial of the criminal case. On July 5, 1961, the State's Attorney subpoenaed Della Emberton's written statement and when Ryan refused to produce it, while acting upon his client's directions, he was adjudged in contempt of court and fined \$100. Ryan appealed his conviction directly to the Illinois Supreme Court<sup>2</sup> on an alleged constitutional ground but the case was transferred to the Appellate Court for the Third District. The Appellate Court affirmed the trial court and the Illinois Supreme Court granted leave to appeal.

Ryan was not engaged in defending any civil litigation for the insurance company arising out of the accident, either at the time he obtained the investigation file or at the time the statement was subpoenaed.

The protective cloak of the attorney-client privilege is granted to confidential communications in order to secure to the client freedom of mind in seeking legal advice. It is thought to be impossible for a layman to prosecute or defend his legitimate claims without securing the professional advice of an attorney. Of course, the attorney must be told all of the pertinent facts surrounding his client's legal problem in order to act in his best interests. Presumably, the client would be reluctant to divulge facts which he considered unfavorable to his cause if he thought that either he or his attorney could be forced to testify to such facts in any subsequent litigation. The attorney-client privilege is designed *only* to provide adequate protection to the client so that he will be unrestrained in seeking legal advice from an attorney, and it does not attempt to secure freedom of mind to third

<sup>2</sup> The only constitutional ground upon which Ryan relied pertained to a violation of the privilege against self-incrimination. The court held that the privilege against self-incrimination was a purely personal one available only to the client and not to the attorney. Since there was no other constitutional ground upon which the Illinois Supreme Court could take jurisdiction on a direct appeal, it transferred the case to the Appellate Court for a determination of the asserted attorney-client privilege. *People v. Ryan*, 25 Ill. 2d 233, 184 N.E.2d 853 (1962).

persons, nor is it designed to afford secrecy to the attorney's preparation of his client's case.

A trial is a search for truth and courts will generally admit all evidence which is competent, relevant, and material to the issue at hand. Since the exclusion of a witness' testimony has a tendency to prevent full disclosure of the truth, the scope of privileged communications is generally strictly confined.<sup>3</sup> Wigmore has stated that the following four conditions are fundamental to the establishment of any privileged communication:

- (1) The communications must originate in *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (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.<sup>4</sup>

In applying the above conditions, the court is necessarily always balancing the benefits to be derived from a full disclosure of all the pertinent facts against the benefits of a privileged communication.

The following general principles are necessary to give rise to the attorney-client privilege:

- (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.<sup>5</sup>

The privileged status of a communication between attorney and client is personal to the client, not the attorney, and may be asserted or waived by the client only.<sup>6</sup> The communication must be intended by the client to be confidential to be privileged from disclosure and the presence of a third person will ordinarily indicate a lack of intention that the communication be confidential.<sup>7</sup> However, since the attorney must of necessity use agents and clerks in conducting his business, a disclosure to the attorney's agent will not defeat the privilege,<sup>8</sup> nor will the privilege be defeated if the client uses his agent in communicating with the attorney, if there is a good reason for using an intermediary.<sup>9</sup> A client may waive the privilege by voluntarily

<sup>3</sup> *Foster v. Hall*, 29 Mass. (12 Pick.) 89 (1831).

<sup>4</sup> 8 Wigmore, *Evidence* § 2285 (3d ed. 1961).

<sup>5</sup> 8 Wigmore, *Evidence* § 2292 (3d ed. 1961).

<sup>6</sup> *People v. Marcofsky*, 219 Ill. App. 230 (1st Dist. 1920).

<sup>7</sup> *Champion v. McCarthy*, 228 Ill. 87, 81 N.E. 808 (1907).

<sup>8</sup> *In Re Estate of Busse*, 332 Ill. App. 258, 75 N.E.2d 36 (2d Dist. 1947).

<sup>9</sup> *Webb v. Lewald Coal Co.*, 214 Cal. 182, 4 P.2d 532 (1931).

testifying to confidential communications with his attorney.<sup>10</sup> If knowledge is obtained from a source other than the client, it is not ordinarily privileged.<sup>11</sup>

In *People v. Ryan*, Ryan contended that his client's written statement retained its privileged character when transmitted to the attorney representing the person entitled to assert the privilege. The People, although agreeing with the result reached by the Appellate Court, nevertheless argued that the decision should have been arrived at by holding that communications between an insurer and an insured are not privileged. Although the question of whether communications between an insured and an insurer are privileged had never been decided in Illinois, the weight of authority in other jurisdictions, with the exception of some Federal courts,<sup>12</sup> is that they are privileged.<sup>13</sup> A California court has held that a

. . . report or other communication made by an insured to his liability insurance company concerning an event which may be made the basis of a claim against him covered by the policy is privileged, as being between attorney-client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him.<sup>14</sup>

If the communication to an attorney serves a dual purpose, one of which is within the attorney-client privilege and the other without, then the court must determine which predominates.<sup>15</sup> This is the line of reasoning which the Illinois Supreme Court used in holding that Della Emberton's statement to her insurer was within the attorney-client privilege. The court said that:

. . . the insured effectively delegates to the insurer the selection of an attorney and the conduct of the defense of any civil litigation and . . . may properly assume that the communication is

<sup>10</sup> *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914).

<sup>11</sup> *Chillicothe Ferry, Road & Bridge Co. v. Jameson*, 48 Ill. 281 (1868); *Radio Corp. of America v. Rauland Corp.*, 18 F.R.D. 440 (1956).

<sup>12</sup> *Colpak v. Hetterick*, 40 F. Supp. 350 (E.D.N.Y. 1941); *Gordon v. Robinson*, 109 F. Supp. 106 (W.D. Pa. 1952). The scope of examination for deposition or discovery in Federal District courts allows the witness to "be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b). Illinois' statutory provision regarding discovery and deposition apparently recognizes the usual privileges as well as the attorney's "work product" privilege first enunciated in *Hickman v. Taylor*, 329 U.S. 495, 67 Sup. Ct. 385 (1947). The Illinois statute states: "All matters which are privileged against discovery upon the trial are privileged against disclosure through any discovery procedure. Disclosure of memoranda, reports, or documents made by or for a party in preparation for trial or any privileged communications between any party or his agent and the attorney for the party shall not be required through any discovery procedure." Ill. Rev. Stat. c. 110, 101.19-5 (1) (1963).

<sup>13</sup> *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567, 74 A.L.R.2d 526 (1959); *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949); *In re Klemann*, 132 Ohio St. 187, 5 N.E.2d 492, 108 A.L.R. 505 (1936); *Westminster Airways, Ltd. v. Kuwait Oil Co.*, [1951] 1 K.B. 134, 22 A.L.R.2d 648.

<sup>14</sup> *Heffron v. Los Angeles Transit Lines*, 170 Cal. App. 2d 709, 339 P.2d 567, 573, 74 A.L.R.2d 526, 534 (1959).

<sup>15</sup> *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954).

made to the insurer as agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.<sup>16</sup>

The Illinois Supreme Court stated “. . . that the same salutary reasons for the privilege exist whether . . . the communication is directly between client and attorney . . . or to an insurance investigator.”<sup>17</sup>

Having decided that a communication between an insured and an insurer was privileged, the Illinois Supreme Court next turned to the question of whether the transmitting of Della Emberton's statement, with her consent, from the insurer to Ryan was a waiver of the privilege, as being a disclosure to a third party. It is well settled that since the privilege against disclosure belongs to the insured, the insured may be shown to have waived it by disclosure to others.<sup>18</sup> In the present case, the court speaking through Justice Solfisburg said:

. . . . We think it clear that if Della Emberton personally repeated the identical communication to an attorney retained to defend her either in a civil or criminal proceeding, the second identical statement would also be privileged. If the required relationship between the parties existed in the first instance, it also existed in the second.

We see no logical reason for a different result when a transcription of the first confidential communication is transmitted with the consent of the insured to the second attorney. *In the absence of disclosure to a person not in an attorney-client relationship with the insured there is no waiver of the privilege.*<sup>19</sup> (Emphasis supplied.)

Therefore, the Illinois Supreme Court has followed an early New York case which held there was no “solid distinction between the oral statement of a fact and a communication of the same fact by delivering a deed or other written instrument”<sup>20</sup> to an attorney, so long as it is intended to be confidential.

The extension of the attorney-client privilege to statements transmitted to the client's attorney for use in another cause is not only logical, but in no way transgresses the four fundamental conditions laid down by Wigmore<sup>21</sup> as necessary to the establishment of any privileged communication. Although the insured contracts with an insurance company to defend her in any civil action brought against her and agrees in turn to cooperate with the insurance company in defending such claims (including the giving of her statement regarding the details of any accident), surely she cannot be said to have waived her right to use her same statement in another civil or

<sup>16</sup> *People v. Ryan*, 30 Ill. 2d 456, 460, 197 N.E.2d 15, 17 (1964).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Travelers Indemnity Co. v. Cochrane*, 155 Ohio St. 305, 95 N.E.2d 840 (1951).

<sup>19</sup> 30 Ill. 2d 456, 461, 197 N.E.2d 15, 18 (1964).

<sup>20</sup> *Coveny v. Tonnahill*, 1 Hill 33, 35 (N.Y. Sup. Ct. 1841).

<sup>21</sup> 8 Wigmore, Evidence § 2285 (3d ed. 1961).

criminal proceeding. It would be meaningless to require her *written* statement to remain in the insurance company files in order to retain its privileged status, whereas her *oral* statement to her attorney in another cause, disclosing the same information, would be privileged. The rule, that there is no waiver of the privilege so long as there is not a disclosure to a person not within the attorney-client relationship, adequately protects the client's freedom of mind in securing legal advice without unnecessarily restricting the courts' search for truth.

THOMAS C. RYDELL

**DEATH BY WRONGFUL ACT—AMENDMENT SUPPLYING NECESSARY ALLEGATION NAMING DECEDENT'S NEXT OF KIN AND THEIR PECUNIARY LOSS NOT BARRED BY EXPIRATION OF LIMITATION PERIOD PROVIDED BY THE WRONGFUL DEATH STATUTE.**—In *Waller v. Cooper*, 49 Ill. App. 2d 482, 200 N.E.2d 105 (1st Dist. 1964), the Illinois Appellate Court was confronted with the problem of whether an amendment to a complaint, supplying an allegation naming decedent's next of kin and their pecuniary loss, was barred by the two year period fixed by the Wrongful Death Act. The court held that an amendment of this type related back to the filing of the original complaint.

The decedent in the present case died on January 30, 1960. The plaintiff, as administratrix, filed a Statement of Claim on January 27, 1962, against defendant Cooper for wrongfully causing the death of plaintiff's intestate. This claim failed to allege the decedent's "next of kin" and their "pecuniary loss" as required by Section 2 of the Wrongful Death Act.<sup>1</sup> The plaintiff subsequently filed an amendment to her claim supplying these necessary allegations. However, this amendment was not filed until after the two year period for filing claims under the Wrongful Death Act had expired.<sup>2</sup>

The Municipal Court of Chicago dismissed the plaintiffs' action on the ground that the original claim failed to comply with the requirements of the Wrongful Death Act, because it failed to name the decedent's "next of kin" and their "pecuniary loss," and the amended claim which supplied these missing allegations was barred by the two year period prescribed by the Act. On Appeal, held: Reversed for plaintiff. The appellate court reasoned that an amendment to a claim under the Wrongful Death Act, supplying necessary allegations of decedent's next of kin and their pecuniary loss, filed more than two years after decedent's death, *related back* to the filing of the original claim. Under the original claim, the plaintiff sought

<sup>1</sup> Ill. Rev. Stat., Ch. 70, § 2 (1963) "Every such action shall be brought . . . in the names of the personal representative . . . shall be for the exclusive benefit of the widow and next of kin . . . jury may give damages . . . with reference to pecuniary injuries . . ."

<sup>2</sup> Ill. Rev. Stat. Ch. 70, § 2 (1963) ". . . Provided, that every such action shall be commenced within two years after the death of such person . . ."