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KLM v. TULLER: A NEW APPROACH TO ADMINIS-
SIBILITY OF PRIOR STATEMENTS
OF A WITNESS

David Dow*

Within the past few years there have been a number of important cases decided by federal courts involving difficult points of evidence law, and suggesting a trend toward liberality in admission of evidence.¹ On the face of the opinions many of these decisions are influenced by the clear direction of the Federal Rules of Procedure, both civil² and criminal.³ Some are also obviously influenced by the discussion and study engendered by the Model Code of Evidence and the Uniform Rules of Evidence.⁴ These decisions show a strong desire to re-examine the old rules of exclusion. Courts today are consistently faced with the question of whether the reasons thought to support those rules still apply today in view of modern procedural devices such as discovery,

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¹ See, e.g., *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958) (admitting statements of an agent which were clearly not *res gestae*); *Shahid v. Gulf Power Co.*, 291 F.2d 422 (5th Cir. 1961) (similar facts); *Connecticut Fire Ins. Co. v. Ferrara*, 277 F.2d 388 (8th Cir. 1960) (admitting the criminal conviction for arson in civil action against insurance company and holding it conclusive); *Aluminum Co. of America v. Sperry Prods. Co.*, 285 F.2d 911 (6th Cir. 1960) (admitting prior letter of witness and relying on it for decision because it was relevant); *Campbell v. Clark*, 283 F.2d 766 (10th Cir. 1960) (expert evidence on point and angle of impact in auto accident case admitted as a matter of general evidence law); *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681 (2d Cir. 1961) (opinion admitted as to whom defendant referred to in alleged libelous publication because federal equity court probably would have admitted it); *Hambrice v. F. W. Woolworth Co.*, 290 F.2d 557 (5th Cir. 1961) (habit evidence admitted as a matter of general evidence law); *United States v. Annunziato*, 293 F.2d 373 (2d Cir. 1961) (state of mind and co-conspirator's admissions exceptions to hearsay rule given liberal interpretation).

² FED. R. CIV. P. 43(a).

³ FED. R. CRIM. P. 26.

⁴ UNIFORM RULES OF EVIDENCE, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, has not yet been adopted by any state, but they are being carefully studied in a number of states and recommendations for adoption are imminent in Utah and New Jersey.

which can and usually do take much of the element of surprise out of trials. The trend for liberality by the courts may be influenced by the feeling that juries are better educated today than they were 100 years ago when many of the evidence rules were being evolved, and that lawyers are better prepared to use the adversary system of litigation. Both of these considerations suggest that much relevant evidence could be admitted in modern trials without running the danger of its being erroneously evaluated by a jury.

One of the most interesting of these cases, because it raises a problem which involves a rather complicated analysis and at the same time one which is constantly recurring, is *KLM v. Tuller*.⁵ The litigation arose from the crash of one of defendant KLM's airplanes in shallow water shortly after taking off from Shannon Airport in Ireland. Tuller, a passenger, through a series of misfortunes was left on the tail of the airplane for more than four hours. He slipped and drowned just as help was finally coming. His widow sued in the District Court of Columbia, and the principal issue, on appeal, was the plaintiff's claim that the \$8,300 limitation on recovery for death contained in the Warsaw Convention did not apply, because defendant's agents were guilty of "wilful misconduct."⁶ It is pertinent to the consideration of the evidence problem to note that the court construed "wilful misconduct" to include the intentional performance of an act (or failure to act) with knowledge that the act will probably result in injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance.⁷

Among the acts which plaintiff claimed showed wilful misconduct was that the radio operator failed to send a distress message before or after the crash although he could have. The radio operator gave a deposition which was offered into evidence by plaintiff in which he first testified that he did not send a distress message before the plane crashed because he did not have time to do so. He then testified that he had given a statement to the Inspector of Airports at the Shannon Airport about twelve hours after the

⁵ *Koninklijke Luchtvaart Maatschappij N. V. v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961.)

⁶ Article 25 of the Warsaw Convention provides: "(1.) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." Warsaw Convention, 49 Stat. 3020 (1934).

⁷ 292 F.2d at 779.

accident at which various persons were present including one of defendant's chief flight engineers. A transcript of this statement was then offered by plaintiff and objected to by defendant as hearsay.⁸ The trial court received this statement as substantive evidence, and this was claimed as error on appeal. In the statement the radio operator stated that he did not think, when the crash occurred, to pick up the microphone in front of him and report that there was something wrong. "I could tell you that would never happen. You first think of your skin, and then of the microphone. That was my feeling, because it happened so fast."⁹

Traditionally, a prior statement of a witness may be used by proponent's counsel in one of the following ways:

(a) To jog the witness's memory, and thereby seek to get him to change his trial testimony or add to it. Mrs. Tuller's counsel apparently made no effort to do this.

(b) To impeach the witness. The great majority of jurisdictions do not permit this unless the proponent is both damaged and surprised by the trial testimony.¹⁰ And even if permitted, the prior statement cannot be given substantive effect unless the witness does change his mind at trial.¹¹ A few states by statute permit one to impeach his own witness, but the Federal Rules of Civil Procedure, Rule 43(b), only permit this if the witness is the adverse party or an officer, director or managing agent of the adverse party—which the radio operator obviously was not.¹² Mrs. Tuller's counsel did not seek to use the statement in this way as he wanted it for its substantive effect.

(c) To prove the proposition asserted, arguing that it is not hearsay because it was not offered to prove the fact directly asserted in the statement.¹³

(d) To prove the proposition asserted, arguing that it comes under one of the accepted exceptions to the hearsay rule.

(e) To prove the proposition asserted, arguing that the prior statement of a witness on the stand is not hearsay because the

⁸ It does not clearly appear from the opinion, but apparently the statement was identified by the radio operator at the time of his deposition and offered in evidence when the deposition was read at the trial. Letter from M. S. Madden, counsel for the plaintiff, to author, Dec. 12, 1961.

⁹ 292 F.2d at 782-83.

¹⁰ McCORMICK, EVIDENCE § 38 (1954).

¹¹ *Id.* § 39.

¹² *Johnson v. Baltimore & Ohio R.R.*, 208 F.2d 633 (3rd Cir. 1953).

¹³ McCORMICK, EVIDENCE § 228 (1954).

witness is now available for cross-examination and because it is the witness's own statement and not that of some third person. Whether this be called hearsay or something else with all the same incidents is a matter of definition only. Although appealing on its face, courts have almost always failed to adopt this distinction for either reason suggested.¹⁴

I will analyze briefly the arguments for admissibility of the radio operator's statement, under (c) and (d) above, and the court's decision which affirmed the trial court's admission of the statement on the ground that the statement had "the earmarks of reliability."¹⁵ The opinion appears to be carefully written to avoid classifying the holding under any of the standard exclusions from or exceptions to the hearsay rule.

The most obvious ground of admissibility involves the case in which the witness happens to be the opposing party. Whether this is properly classified as *not* hearsay or as an exception to the hearsay rule has been much debated, but to little practical effect.¹⁶ Certainly the radio operator's statement does not come within this rule, because he was not the opposing party.

The next obvious ground of admissibility involves the case in which the opposing party has somehow adopted a third person's statement after it was made. This was the alternative ground used in *Pekelis v. TWA*,¹⁷ where the defendant airline company

¹⁴ *United States v. Rainwater*, 283 F.2d 386 (8th Cir. 1960). A careful collection of the authorities. *But see* Judge Lumbard's careful attempt in *United States v. Murray*, 297 F.2d 812 (2d Cir. 1962), to revive the opposite view previously expressed by that court in *DiCarlo v. United States*, 6 F.2d 364 (2d Cir. 1925). In *Murray* the government was permitted to introduce a prior inconsistent statement of its own witness. The Court of Appeals affirmed saying: "The fact that the statement was used to cast doubt upon Miss Smith's negative testimony, and thus to build the government's case rather than merely to tear down testimony actually harmful to it, does not make it any less admissible." 297 F.2d at 816-17. [*DiCarlo* is then cited and quoted and *United States v. Block*, 88 F.2d 618 (2d Cir. 1937) distinguished.] Judge Lumbard continued: "Rather, here the presentation was giving the jury an opportunity to determine the truth of Miss Smith's negative response to a single question by noting her prior inconsistent answer and observing her attempt to reconcile her previous statement with what she now claimed to be the truth. Thus the jury was to draw its conclusion not from the out-of-court statement, but rather from the witness' in-court conduct when confronted with it. So considered, the statement was not hearsay."

¹⁵ 292 F.2d at 784-85.

¹⁶ See Hetland, *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 307, 308-09 (1961).

¹⁷ 187 F.2d 122 (2d Cir. 1951).

accepted the report and recommendations of its investigating board and put the recommendations into effect. The statement of the third party then became by adoption the defendant's own statement. In *Tuller*, KLM could hardly have adopted the radio operator's statement, unless its chief flight engineer's failure to challenge the statement at the time it was made could be so construed. Silence may, of course, be so construed, but usually only if made under such circumstances that a reasonable man would have been expected to challenge it if he thought or knew it to be false.¹⁸ There are several pitfalls in using this argument in the *Tuller* case. There were no facts to show that the chief flight engineer had the opportunity to challenge it if he had wanted to, he had no basis to know or believe one way or the other, and his authority to act for or bind KLM was not shown.

Such a statement may also be analyzed as the statement of an agent or servant of the opposing party, and the opinion in *Tuller* perhaps comes closer to this analysis than to any other. This is a basic area of the law of evidence in which courts and writers do not agree and which appears to be undergoing a change. Traditionally, the statements of an agent or servant have been admitted (if at all) under one of two theories: (1) as an act of an authorized agent, or (2) as a spontaneous exclamation. Typically if the first theory is used, it must be determined that the declarant was authorized to speak for the principal, and that a mere servant as opposed to an agent is not thus authorized.¹⁹ If the spontaneous exclamation theory is used, admissibility is customarily limited to a statement made close enough to the time of the occurrence described to exclude the inference that the statement was thought through.²⁰ Wider latitude is normally allowed, timewise, for statements of servants that are against his apparent interest or those of his master.²¹ Courts are apt to use the phrase "within the *res gestae*" or "not within the *res gestae*," sometimes meaning no more than a spontaneous exclamation—that is, an unthought immediate response to a shocking sight or to a thing immediately being perceived—and sometimes meaning a part of the transaction or occurrence necessary to round out the whole picture.²²

¹⁸ McCORMICK, EVIDENCE § 247 (1954).

¹⁹ *Id.* § 244.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Id.* § 274.

Some recent cases, including *Tuller*, have provided a much broader base of admissibility for these statements.²³ Neither relative immediacy in time, nor spontaneity, nor specific authorization is required. In *Martin v. Savage Truck Line, Inc.*²⁴ and in *Grayson v. Williams*²⁵ the courts relied on the premise that the statement was one which was made to an investigating officer, and therefore, one which was somehow impliedly authorized because it could have been foreseen.²⁶ Being against interest, it also had the earmarks of reliability. To these arguments the court in *Tuller* added the idea that an official investigation (as opposed to some chance discussion with an uninterested person) tends to support reliability, and the formal recording makes it more reliable in the sense of accurate reporting at the trial—it is not necessary to have to rely on the witness's memory as to precisely what was said. With all of these earmarks of reliability present in *Tuller*, the court held the statement "relating to his duties and acts within the scope of his employment" admissible "since reliability is the basic test for the admission of any hearsay statement."²⁷

Tuller also referred to, but did not rely on, the much broader rule of admissibility included in the Model Code of Evidence and adopted in the Uniform Rules of Evidence. This rule would admit the statement of an agent or servant against his principal or master "if the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship."²⁸ Such a statement is not only adverse to the interest of the agent-servant-declarant in the sense that it might be used against him at trial, but in the more immediate sense that it might result in his being disciplined or fired for being incompetent or for talking out of turn.

²³ *Shahid v. Gulf Power Co.*, 291 F.2d 422 (5th Cir. 1961); *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958).

²⁴ 121 F. Supp. 417 (D. Colo. 1954).

²⁵ 256 F.2d 61 (10th Cir. 1958).

²⁶ In *Tuller* the court referred to this idea: "His explanation of his failure to do this [radio a distress signal] was within the scope of his duties." 292 F.2d at 784.

²⁷ 292 F.2d at 784. The court also noted that defendant KLM also had the opportunity to cross-examine the radio operator when the deposition was taken. *Id.* at 784.

²⁸ MODEL CODE OF EVIDENCE rule 508(a) (1942). UNIFORM RULE OF EVIDENCE 63(9)(a). This rule was applied in *Montgomery Ward & Co. v. Rosenquist*, 112 So. 2d 885 (Fla. 1959), and followed by the United States Court of Appeals for the Fifth Circuit in *Shahid v. Gulf Power Co.*, 291 F.2d 422 (5th Cir. 1961).

As a matter of fact, both the Model Code of Evidence and the Uniform Rules of Evidence go even further and provide for admissibility of such a statement where "one of the issues between the (adverse) party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability."²⁹ This rule was applied as an alternative basis of admissibility in *Grayson v. Williams*,³⁰ and the reasons for it discussed at length, even though neither the Model Code of Evidence nor the Uniform Rules of Evidence were cited by the court.

This analysis would not be complete without reference to several other exceptions to the hearsay rule. The statement might have been argued to be a simple declaration against interest, an exception which disregards any relationship between the declarant and the parties to the law suit. The foundation requirements, as stated by McCormick in his treatise³¹ are: (1) that the declarant be unavailable at trial; (2) that the declaration be against his pecuniary or proprietary interest, and (3) that the declarant is speaking from personal knowledge. A fourth requirement often added is that there be no apparent motive to falsify.³²

Numerical weight of authority does not support absence from the jurisdiction as a ground of unavailability, nor does it support admission of possible tort liability as being against pecuniary interest, although modern cases have held both sufficient to admit evidence under the exception.³³ The true test of reliability of such a declaration should not be the mere fact of its being against the declarant's interest, but rather his awareness of that fact. On the other hand, there is much less need for a strong showing of reliability where the declarant is available for cross-examination and explanation. Certainly by modern case law,³⁴ the radio operator's statement might have been admitted under this exception, and the Uniform Rules of Evidence also would admit it.³⁵

²⁹ MODEL CODE OF EVIDENCE rule 508(c); UNIFORM RULE OF EVIDENCE 63 (9) (c).

³⁰ 256 F.2d 61 (10th Cir. 1958).

³¹ MCCORMICK, EVIDENCE §§ 253-57 (1954).

³² 5 WIGMORE, EVIDENCE § 1464 (3rd ed. 1940).

³³ Jefferson, *Declarations Against Interests, An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944). *Pennsylvania Ry. v. Rochinski*, 158 F.2d 325 (D.C. Cir. 1946).

³⁴ *Pennsylvania Ry. v. Rochinski*, *supra* note 33; *Neely v. Kansas City Pub. Serv. Co.*, 252 S.W.2d 88 (Mo. 1952); *Weber v. Chicago, Rock Island & P. Ry.*, 175 Iowa 358, 151 N.W. 852 (1915).

³⁵ UNIFORM RULE OF EVIDENCE 63(10).

It might also have been argued that this statement comes within the exception for statements evidencing the state of mind of the declarant. The usual situation involves a case in which the state of mind of the declarant at the time the statement was made is either in issue in the law suit (in terms of intent or knowledge), or is relevant as showing the declarant's intent or knowledge from which some future act may be inferred.³⁶ The radio operator's statement, of course, does not come within either of these situations since it looks backward. The only relevance that can be argued for the statement is that it implies a particular state of mind at a time prior to the statement—that is, a "reckless disregard of the consequences" of failing to report by radio the condition of the plane.

To admit this statement under such a theory clearly involves most of the dangers of hearsay. To permit a proper evaluation by the jury, it would be expected that opposing counsel might want to test the radio operator's perception (did he really think at all?), his memory (to what extent he rationalized his own conduct in his mind, or discussed it with others and hence been subject to suggestion?), his sincerity, and his communicative ability (did he intend to suggest the inference for which plaintiff argues, or did he rather intend something quite different?).

In will cases, where this theory is most often applied, the death of the testator-declarant supplies a very strong necessity and there may often be a complete lack of other significant evidence.³⁷ On the other hand, there are other indicia of reliability which the court in *Tuller* points out—the statement was made at a formal proceeding, it was against interest, and it did not involve matters of opinion calling for careful cross-examination. Moreover, its nearness in time to the fact reported makes the probability of its accuracy substantially greater than formal testimony taken much later.³⁸ It might also be pointed out that the use of the statement in showing the radio operator's previous material state of mind would not be confused with its possible use for any other nonpermissible purpose. That he actually did not report was not apparently controverted.

The opinion in *Tuller* makes a passing reference to *Pekelis v. TWA*³⁹ and the possibility of bringing this statement within the

³⁶ McCORMICK, EVIDENCE §§ 268-71 (1954).

³⁷ *Id.* § 270.

³⁸ See McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573, 577-78 (1947).

³⁹ 292 F.2d at 784.

business entries exception to the hearsay rule.⁴⁰ Quite properly the court refused to adopt this theory since it was not a report to KLM. A more pertinent suggestion might have been the official records exception,⁴¹ if the radio operator had been under a statutory duty to file a specific report.⁴² Courts have not, however, been ready to extend this exception very far in the area of accident investigation.⁴³ The exception makes no distinction between reports which are against interest and those which are for the interest of the reporter—historically the interest of the public officer-reporter was neutral and the modern extension to so-called *ad hoc* public officers, such as priests, physicians and undertakers, also comprises persons whose interests are neutral in so far as any litigation is concerned.⁴⁴

In conclusion it should be pointed out that the hearsay rule, as such, is usually justified on the ground that the declarant is not available for cross-examination; exceptions are justified on the ground that there is a real necessity for the use of such out-of-court statements *and* they were made under circumstances that provide a probability of trustworthiness. If this probability is not great, at least a court should be able to say that there is little likelihood that the jury will be misled in its effort to evaluate a statement's real worth. If, then, declarant is present and available for cross-examination, the objection that his prior statements are hearsay loses much of its force. And this is the position taken by the Uniform Rules of Evidence.⁴⁵ The fact that the prior statement was not under oath can be clearly pointed out to the jury and confrontation is preserved. The Uniform Rules of Evidence further provide that it shall not be per se objectionable to impeach or support one's own witness, though the judge may require that the usual foundation be laid.⁴⁶ The statement would still be subject to the objection that it was unduly prejudicial or confusing, unfairly surprising to the opponent or necessitated an undue consumption of trial time.⁴⁷

These provisions of the Uniform Rules of Evidence, however, should not necessarily be judged solely with relation to the hear-

⁴⁰ See McCORMICK, EVIDENCE §§ 281-90 (1954).

⁴¹ See *Id.* §§ 291-95.

⁴² *Id.* §§ 291-94.

⁴³ Wallace, *Official Written Statements*, 46 IOWA L. REV. 256, 263-69 (1961).

⁴⁴ Note, *Admissibility of Statements by Ad Hoc Public Officials*, 32 NEB. L. REV. 469 (1953).

⁴⁵ UNIFORM RULE OF EVIDENCE 63(1).

⁴⁶ UNIFORM RULES OF EVIDENCE 20, 22.

⁴⁷ UNIFORM RULE OF EVIDENCE 45.

say rule. If any prior statement of a witness is to be regularly admitted, the pressure to secure such statements, which is now substantial, will inevitably be increased. The trial will certainly tend to be cluttered with prior statement after prior statement, written and oral, drawn not with a view to preserving the memory of the witness or the lawyer but with a view to making the best case before the jury or to presenting the jury with a written brief. Perhaps this will not happen, but judges should be alert to the full intention of Rule 45 of the Uniform Rules of Evidence. Perhaps also, judicial discretion to exclude should be written into Rule 20 of the Uniform Rules of Evidence.⁴⁸

The decision in *Tuller* does not go as far as the Uniform Rules of Evidence—nor did it have to. It treated the statement as a problem of hearsay alone, not as a prior statement of a witness, and found sufficient reliability to avoid the exclusionary effect of calling it by that name, although it did conclude with an oblique reference to the fact that defendant had had an opportunity to cross-examine the radio operator when his deposition was taken. It seems clear, however, that the opinion was intended to extend the normal exceptions to the hearsay rule, to go beyond the old cubbyholes. It is a welcome addition to the legal literature in this complex area.

⁴⁸ UNIFORM RULE OF EVIDENCE 20 reads as follows: "Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility."