

SUBJECT: Inadmissibility of communications of sympathy for proof of liability

COMMITTEE: Civil Practices — favorable, with amendment

VOTE: 6 ayes — Bosse, Goodman, Hope, Nixon, Smithee, Zbranek
1 nay — Dutton
1 present, not voting — Alvarado
1 absent — Janek

WITNESSES: For — John Charles Fleming, Center for Public Policy Dispute Resolution,
UT School of Law
Against — None
On —Hartley Hampton, Texas Trial Lawyers Association

DIGEST: HB 512, as amended, would prohibit a court from admitting as evidence to prove liability any communication that expresses sympathy or a general sense of benevolence relating to the pain, suffering or death of an individual. Excluded communications would be those made directly to the individual involved or any family member related within the second degree. Communications could include statements, writings, or gestures conveying a sense of compassion or commiseration emanating from humane impulses.
HB 512 would permit the admission of excited utterances under Rule 803(2) of the Texas Rules of Evidence, regardless of whether it would be a communication of sympathy under this bill.
HB 512 would take effect September 1, 1999, and apply to admissibility in proceedings begun on or after that date.

SUPPORTERS SAY: By making certain communications of sympathy inadmissible in court, HB 512 would promote civility and decency between people involved in accidents. In today's litigious society, people are often wary of expressing any sympathy relating to an accident because of the possibility that such an

expression may later be used against them in court to prove liability. Oftentimes, if they had communicated some expression of sympathy, it may have helped to diffuse some of the hostility and perhaps helped to avoid litigation over the accident. Injured persons who pursue litigation frequently say they are just looking for an apology.

Only those statements relating sympathy would be inadmissible under HB 512. Expressions admitting liability, such as “I’m so sorry I never got around to having those brakes fixed,” still could be admitted even though they included a statement of sympathy.

The committee amendment exempting excited utterances would ensure that the communications of sympathy rendered inadmissible would include only those that are made after careful consideration, not those made in the heat of the moment, which are more likely to prove liability under well-established rules of evidence.

While this revision could be included in the Rules of Evidence adopted by the Texas Supreme Court, the Legislature should make this needed change to evidence law to make it clear that communications of sympathy should not be used to prove liability. Additionally, by placing this evidentiary change in statute rather than in a rule, more people may learn about this exception and feel free to express sympathy in those situations that call for it, without fear of admitting liability.

OPPONENTS
SAY:

The boundaries of this legislation would likely be uncertain over a number of years as Texas courts attempt to clarify which statements constitute sympathy and which constitute excited utterances or admissions of liability. During that period of time, people may attempt to communicate sympathy believing it would be inadmissible in court, then have that statement used against them to prove liability.

OTHER
OPPONENTS
SAY:

The Supreme Court of Texas is generally charged with creating rules of evidence governing the admissibility of evidence in court. This legislation would more properly be included in the Texas Rules of Evidence rather than in statute.

NOTES:

The committee amendment to HB 512 would permit the admission of excited

utterances under Rule 803(2) of the Texas Rules of Evidence, regardless of whether such communications would be a communication of sympathy.