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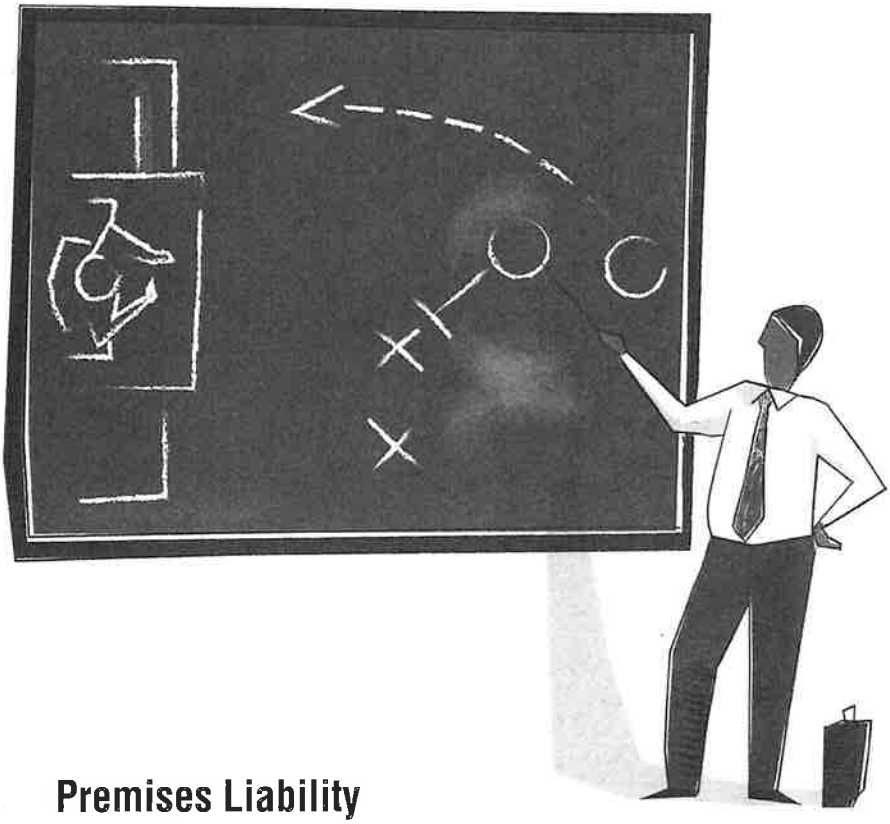

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Special Feature

Virginia's Deadman's Statute:

One hundred years old and very much alive in Virginia jurisprudence

by Thomas M. Hendell

"As such, Shumate's collection of misgivings on brief—that unless we adopt her interpretation of the statute, 'the party asserting the Dead Man's Rule could bring in a plethora of out of court, unreliable hearsay of what the decedent said to others to bolster unfairly the decedent's case'--is actually an accurate statement of the statute."

Shumate v. Mitchell, 822 S.E.2d 9, 16-17 (Va. 2018).

Virginia's Deadman's Statute comprises a medley of robust protections of persons incapable of testifying. The Deadman's Statute, codified in Virginia Code Section 8.01-397 and reproduced verbatim in Virginia Rule of Evidence 2:804(5), can permit or exclude dispositive evidence, and it comes up constantly in injury litigation. Understanding the statute's two related, but distinct threads, is an aid to issue spotting. The knowledgeable attorney can use the Deadman's Statute as a sword by introducing otherwise-inadmissible hearsay declarations of a person incapable of testifying, and as a shield by excluding damaging, self-serving testimony from a surviving opponent. This article explores the corroboration requirement, the hearsay exception, their historical development, and provides a few practical considerations for trial lawyers applying the statute.

The Statute

In its present form, little changed since it was enacted 100 years ago, Virginia's Deadman's Statute provides:

> In any action by or against any person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received in evidence in all proceedings including without limitation those to which a person under a disability is a party....

For simplicity, all parties incapable of testifying from any cause and their representatives will be referred to as "decedents", unless otherwise stated. The Deadman's Statute statute favors decedents in two distinct ways:

(1) Requiring corroboration of the adverse party's testimony; and

(2) Providing a major hearsay exception for the decedent's statements relevant to the issue made when he or she was not incapable of testifying.

One hundred years of corroboration

The corroboration requirement exists to "prevent a litigant from having the benefit of his own testimony, when, because of death or incapacity, the personal representative of another litigant has been deprived of the testimony of the decedent or incapacitated person." Consistent with this purpose, no corroboration is required when an interested party testifies on behalf of the decedent.

The Deadman's Statute relaxed Virginia's much harsher common law rule "exclud[ing] any witness who had any manner of interest in the result of the litigation, on the theory that a universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion." The common law exclusion of the testimony of interested persons applied in all trials, regardless of whether a party was incapable of testifying, and courts eventually extended it to interested nonparties. Over time, courts began to question whether the testimony of interested persons might be more valuable to correctly deciding cases than excluding all such testimony indiscriminately, and by the mid-19th Century, many jurisdictions had abolished the common law rule.

When the Virginia legislature abolished its prohibition on interested party testimony by statute in 1866, however, it kept an absolute bar to the testimony "of a survivor to a transaction with a decedent or otherwise incapacitated person." This blanket prohibition on survivor testimony was later relaxed to allow survivor testimony when an interested person testifies in behalf of the decedent. Finally, in the Code of 1919, the General Assembly enacted a Deadman's Statute with the corroboration requirement in its current form. The requirement of corroboration still does not apply to interested party testimony when someone testifies in behalf of the decedent because the exception to disqualification predated the Code of 1919, which largely removed disqualifications. This historical context also has bearing on the hearsay exception, below.

What constitutes corroboration is an open question. "In considering whether the testimony of an adverse or interested party has been corroborated pursuant to the requirement of the statute, it is not possible to formulate any hard and fast rule, and each case must be decided upon its own facts and circumstances."

> It is not necessary that the corroborative evidence of itself be sufficient to support a verdict.... Confirmation is not necessary for that removes all doubt, while corroboration only gives more strength than was had before.
>
> Corroborating evidence is such evidence as tends to confirm and strengthen the testimony of the witness sought to be corroborated—that is, such as tends to show its truth, or the probability of its truth. Such evidence need not emanate from other witnesses but may be furnished by surrounding circumstances adequately established. Nor is it essential that an adverse or interested party's testimony be corroborated on all material points.

"The corroboration to be sufficient under the statute, however, must at least tend, in some degree, of its own strength and independently, to support some essential allegation or issue, raised by the pleadings and testified to by the surviving witness, which allegation or issue, if unsupported, would be fatal to the case." Corroboration may be shown by circumstantial evidence. Expert testimony can provide corroboration. Physical evidence like skid marks, gouge marks, the condition of the roadway, vehicle position, debris, etc. can all serve as corroboration. A "higher degree" of corroboration is required when a confidential relationship exists between the parties at the time of the transaction, such as physician-patient or attorney-client.

"I must have done it because that is what I would normally do."

What cannot serve as corroboration, however, is any evidence that depends on the credibility of the witness seeking corroboration or circumstances under his control. The corroboration requirement would be rendered meaningless by the opposite rule, but adverse or interested persons have often attempted to circumvent this limitation. Similarly, the testimony of an adverse party may not be corroborated by an interested person and vice versa. Nor can the adverse party's own testimony regarding their habit or routine practice corroborate their other testimony on the essential issue that, if unsupported, would be fatal to their case. For example, in *Johnson v. Raviotta*, it was not harmless error to submit corroboration to the jury when the only evidence that the decedent's blood pressure was normal when she left the defendant doctor's office was his testimony that he always rechecked high blood pressures before sending patients home, with nothing in the medical chart to show the pressure had returned to normal. The result might be different if the physician can introduce evidence of habit or routine practice independent of his or her own testimony. But self-interested habit or practice

testimony by the adverse party is no corroboration and itself requires corroboration.

Although self-corroboration is in most cases forbidden, the Deadman's Statute expressly provides for corroboration by business records:

> For purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party.

Business records will, of course, often include previous notes or marks by the now-adverse party. Coupled with the higher degree of corroboration required when a physician testifies adversely to his patient, and the difficulty of finding other, independent corroboration, there is a great incentive for doctors to chart thoroughly. The doctor cannot testify to what he told the decedent if the statements are not corroborated in the chart. In a case my firm litigated recently, the defendant gastroenterologist stated in discovery and in his deposition that the decedent complained of constant fatigue and nausea versus the intermittent fatigue and nausea he described in his note, and which the decedent's daughter, who accompanied her to all appointments, remembered. The frequency of the decedent's complaints was a red herring issue as to the indication for the endoscopic procedure that killed the decedent, but the doctor's story diverged from the chart and merited early and frequent refutation.

Almost any evidence of probative value at all is enough to send the matter of corroboration to the jury. "In quantity this corroborative evidence must be more than a scintilla, but when it is, the issue is usually for the jury." Importantly, the trial court looks to the entire trial testimony in determining whether there is more than a scintilla of corroboration, and an objection to uncorroborated adverse testimony is not waived just because it is not made until the close of the evidence, an exception to the contemporaneous objection rule. Sometimes the court finds corroboration as a matter of law.

Who is an interested person?

Inquiring attorneys should investigate all the reasons the witnesses are or might be interested persons for purposes of the Deadman's Statute because, as in *Johnson v. Raviotta*, the testimony of an interested person in behalf of the decedent (in *Johnson*, the executor of the decedent's estate) may waive corroboration. Or, as also happened in *Johnson,* the testimony of a witness who lacks a pecuniary interest (the decedent's sister, who was not a statutory beneficiary) is not an interested person, and their testimony in behalf of the decedent does not waive corroboration. Maybe counsel represents a surviving plaintiff and must satisfy the corroboration requirement. One weighs the value of the interested person's testimony in behalf of the decedent against the value of holding the opponent to their burden of corroboration, or being held to that burden oneself. Because the extent of corroboration available is often beyond the attorney's control, issues of witness classification under the Deadman's Statute must be considered at the very outset of a case.

An interested person under the Deadman's Statute is someone with a direct pecuniary interest in the outcome of the litigation. Interests in litigation that qualify a witness as an interested party within the meaning of the statute include: "(a) being liable for the debt of the party for whom he testified, (b) being liable to reimburse such a party, (c) having an interest in the property at issue in the action, (d) having an interest in the money being recovered, (e) being liable for the costs of the suit, (f) being relieved of liability to the party for whom he testified if such party recovered from the incapacitated party." Some interested persons that may interest litigators include executors, statutory beneficiaries, and employees for whose negligence an adverse defendant may be held liable.

How much corroboration is enough?

An abuse of discretion standard applies to evidentiary questions generally, but a trial court's interpretation of the Deadman's Statute is a question of law that the Supreme Court of Virginia reviews *de novo*. Several instances of *de novo* review are to be found in the Virginia Reports. In *Penn v. Manns*, the Court found sufficient corroboration for the surviving defendant driver's account that the decedent's collapsing on him caused the subject collision from evidence of the decedent's bullet wound and expert testimony regarding the probable effects of gunshot injuries.

By contrast, the Supreme Court of Virginia has found corroboration to be insufficient many times. In *Rice v. Charles*, the essential issue raised by the survivor's testimony against his decedent passenger was whether she knew or should have known he was impaired from drinking and nonetheless chose to ride with him. The Court found that although the evidence at trial corroborated some aspects of the defendant's testimony, it failed to corroborate that the decedent knew the defendant was impaired, and it tended to support an opposite conclusion—that due to his heavy drinking history, the defendant would not have appeared drunk—, and the trial court properly struck the defense of contributory negligence.

In *Vaughn v. Shank*, when the claimant against an estate sought to establish a contract under which the decedent promised to will her a house in exchange for services, the Supreme Court affirmed the trial court's finding of no corroboration despite non-interested testimony that the decedent said she purchased the home for the claimant, wanted the

claimant to be "taken care of", and that the claimant worked long hours for the decedent's business. The Court found the evidence "equally consistent with an unenforceable promise...to make a gift of the house" as with the formation of a contract. The case illustrates how closely courts scrutinize corroboration, and it should encourage decedent's counsel to consider ways the evidence supports only peripheral matters and not essential elements. Counsel should also be wary of corroboration that is consistent with an alternative and mutually exclusively legal theory, which may not function as corroboration at all.

Some strategic questions regarding corroboration

1. Is the client a survivor or a deceased person? And who are the interested persons and how important is their testimony?

If one represents the adverse party and needs corroboration, none can be found from an interested person. The relationship of each potential witness to the decedent or adverse party is thus a key consideration at the outset of the case. Although plaintiff's attorneys will more frequently represent decedent plaintiffs than survivors against deceased defendants, the second scenario occurs with some regularity. Look for a pecuniary interest in the outcome and be prepared to argue that the witness is or is not an interested person and/or that the corroboration is waived or was not achieved. Counsel for the survivor may wish to seek documentary corroboration early in litigation. In deciding whether to present the testimony of an interested person, counsel for the decedent must weigh the value of the interested witness's testimony versus the value to the survivor of freedom from corroboration. Is the witness's testimony completely necessary to prove an element of the claim?

2. Is the client or opponent a person incapable of testifying from any cause?

The Deadman's Statute does not just protect the legal interests of deceased persons, despite its name, but all persons incapable of testifying from any cause. Maybe they were incapacitated by their injuries, retrograde amnesia, or from treatments and medications they were receiving. Many times the survivor of a fatal two-motor vehicle collision will have no recollection of the event. In a centerline collision where both drivers are incapable of testifying, neither party can prevail without corroboration, and one may wish to engage an accident reconstructionist with an engineering background to conduct a survey of the scene even if they represent a decedent. Even if the resulting accident reconstruction or causation opinions are ultimately excluded, the expert can still testify about dimensions, angles, the quality of the road surface, lighting conditions, markings, skid marks, gouges, possibly sight distances, and other attending circumstances providing corroboration.

In medical malpractice cases, understanding that the plaintiff was incapable of testifying while intubated and sedated, for example, is trivially obvious but can be the key to activating the corroboration requirement. Other evidence in the medical chart supporting incapacity might include delirium assessments and documentation of the use of patient restraints. In a pressure ulcer case, when a nurse charts that the patient refused repositioning, facts showing the patient was confused or belligerent do not just raise the question of consent, but they also invoke the corroboration requirement, and these issues are resolved in the context of the higher degree of corroboration required within the patient-doctor trusted relationship.

3. When to object: At the close of the evidence, or is it better to object contemporaneously?

Attorneys may reasonably disagree on when to object to the introduction of testimony within the purview of the Deadman's Statute. Waiting until the close of evidence provides an element of surprise, but moving earlier provides an opportunity for the court to weigh whether the purported corroboration speaks to an essential element and is sufficient in degree as the court considers the rest of the evidence. Motions *in limine* give the adverse party's counsel maximum time to prepare and find corroboration, but sometimes reminding the opponents of his or her corroboration problem can promote settlement and refocus negotiations on points of fact and law that will be before the court. Some judges discount and disfavor motions *in limine* that come in great number (and usually on the eve of trial) as obnoxious and/or mere efforts to obtain appellate leverage, and a motion to exclude uncorroborated testimony may not win the court's full attention.

Unbridled hearsay

The second half of the Deadman's Statute provides a hearsay exception for statements from the decedent made when he or she was not incapable of testifying. The exception is as broad as it sounds: "all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received in evidence," and it is available "whether such adverse party testifies or not."

Making the hearsay exception available regardless whether the adverse party testifies was an expansion of the exception under the 1919 statute, which only made the decedent's hearsay admissible "if such adverse party testifies". Virginia's Deadman's Statute is alone among the states in this extremely permissive approach and it has been roundly criticized for further tilting the evidentiary playing field in the decedent's favor even more than the original, 1919 language. As Justice Mims

remarked in *Shumate,* the criticism that "'the party asserting the Dead Man's Rule could bring in a plethora of out of court, unreliable hearsay of what the decedent said to others to bolster unfairly the decedent's case'--is actually an accurate statement of the statute." The wisdom of the Deadman's Statute's hearsay exception aside, it seeks to further redress the risk of the survivor's perjury by inviting into evidence all the decedent's untested hearsay, and it is a continuation of the enterprise of removing barriers to testimony for adverse parties while protecting decedents.

Conclusion

The Deadman's Statute presents both peril and opportunity and requires awareness of who is incapable of testifying, who the interested nonparties are and a sense of their value to the case and whether their testimony merits waiving corroboration. Corroboration is a porous concept, and disagreements over the sufficiency of corroboration are likely to continue unabated for the next 100 years. If the decedent happened to make statements on key issues while not incapable of testifying, the hearsay exception can be a powerful tool, as well.

Endnotes

1. Va. Code §8.01-397. The Deadman's Statute is also restated in Virginia Rule of Evidence 2:804(5).
2. *Diehl v. Butts,* 499 S.E.2d 833, 837 (Va. 1998).
3. *Paul v. Gomez,* 118 F. Supp. 2d 694, 695-96 (W.D. Va. 2000).
4. *Epes Adm'r v. Hardaway,* 115 S.E. 712, 713 (Va. 1923) (internal citations and quotation marks omitted).
5. *Shumate v. Mitchell,* 822 S.E.2d 9, 12-14 (Va. 2018).
6. *Shumate,* 822 S.E.2d at 14.
7. *Jones v. Williams,* 701 S.E.2d 405, 406, 280 Va. 635, 638-39 (2010) (although the "rigid common law rule that barred an adverse party from testifying in his own behalf in an action against an incapacitated litigant" and which the Deadman's Statute sought to replace was actually the 1866 statute disqualifying all survivor testimony.); see also *Shumate,* 822 S.E.2d at 14 (but the hearsay exception for the decedent's statements was limited to when the adverse party was permitted to testify).
8. *Epes Adm'r,* 115 S.E. at 716.
9. *Brooks v. Worthington,* 143 S.E.2d 841, 845, 206 Va. 352, 357 (1965).
10. *Id.* (internal citations and quotation marks omitted).
11. *Hereford v. Paytes,* 226 Va. 604, 608, 311 S.E.2d 790, 792 (1984).
12. *Keith v. Lulofs,* 724 S.E.2d 695, 699 (Va. 2012); *Virginia Home for Boys and Girls v. Phillips,* 688 S.E.2d 284, 291 (Va. 2010).
13. *Penn v. Manns,* 267 S.E.2d 126, 130, 221 Va. 88, 94 (1980) (expert testimony on effects that bullet wound to lung would have produced corroborated survivor's account that decedent caused wreck when he collapsed on driver).
14. *Whitmer v. Marcum,* 214 Va. 64, 68 (1973).
15. *Diehl v. Butts,* 499 S.E.2d 833, 838 (Va. 1998).
16. *Virginia Home for Boys and Girls v. Phillips,* 688 S.E.2d 284 (Va. 2010); *Hereford v. Paytes,* 226 Va. 604, 311 S.E.2d 790 (1984).
17. *Jones v. Williams,* 701 S.E.2d 405, 407, 280 Va. 635, 639 (2010).
18. *See Johnson v. Raviotta,* 563 S.E.2d 727 (Va. 2002).
19. *Id.* at 733-34.
20. Va. Code §8.01-397.
21. *Brooks v. Worthington,* 143 S.E.2d 841, 845, 206 Va. 352, 357 (1965).
22. *Id.* (quoting *Timberlakes Adm'r v. Pugh,* 163 S.E. 402, 404, 158 Va. 397, 402-03 (1932)).
23. *Johnson v. Raviotta,* 563 S.E.2d 727, 731-32 (2002); see also *Williams v. Condit,* 574 S.E.2d 241, 242-43 (Va. 2003).
24. *Whitmer v. Marcum,* 214 Va. 64, 68-69 (1973). In *Whitmer*, the trial judge submitted the issue of corroboration to the jury after he had already ruled as a matter of law that corroboration existed for plaintiff Whitmer's testimony. The jury returned a verdict for the defendant. The Virginia Supreme Court ultimately remanded the case for a new trial because the court could not determine to what extent the jury was influenced by the trial court's erroneous decision to submit the issue of corroboration to them after it had already established corroboration as a matter of law. *Whitmer*, at 68-69.
25. 563 S.E.2d at 733.
26. *Id.*
27. *Jones v. Williams,* 791 S.E.2d 405, 407, 280 Va. 635, 639 (2010) (citing *Ratliff v. Jewell*, 153 Va. 315, 325-26 (1929)).
28. *Johnson*, 566 S.E.2d at 733.
29. *Paul v. Gomez,* 118 F. Supp. 2d 694, 696 (W.D. Va. 2000)
30. *Johnson*, 566 S.E.2d at 734.
31. *Jones v. Williams,* 791 S.E.2d 405, 407, 280 Va. 635, 639 (2010).
32. 267 S.E.2d 126 (Va. 1980).
33. *See, e.g., Keith v. Lulofs,* 724 S.E.2d 695 (Va. 2012) (the style of the case uses the parties' first names) (nothing in record to corroborate testimony of will-challenging son regarding alleged conversations with deceased father or deceased stepmother-testator); *Hereford v. Paytes,* 226 Va. 604 (1984) (no corroboration found when there is nothing but survivor's account to support his claim).

34. 532 S.E.2d 318, 323 (2000).
35. *Id.* at 324.
36. 248 Va. 224, 445 S.E.2d 127 (1994).
37. *Vaughn*, 248 Va. at 229-30, 445 S.E.2d at 130.
38. *See, e.g., Shumate v. Mitchell,* 822 S.E.2d 9 (2018); *Williams v. Condit,* 574 S.E.2d 241 (Va. 2003); *Whitmer v. Marcum,* 214 Va. 64, 196 S.E.2d 907 (1973).
39. *See Brown v. Corbin,* 423 S.E.2d 176, 179 (1992) (accident reconstruction rarely admissible in Virginia because invades province of jury).
40. *But see Sexton v. Bowser,* Case No. CL14-5484 (Richmond City Cir. Ct. Mar. 16, 2017) (finding not even one scintilla of corroboration and granting the plaintiff's motion in limine).
41. Va. Code §8.01-397; *see also Martin v. Lahti,* 809 S.E.2d 644 (2018) (the decedent's hearsay still must be relevant to matter in issue, and statement that she thought operation would be easy was irrelevant to informed consent claim); *Gelber v. Glock*, 800 S.E.2d 800 (Va. 2017) (error to exclude decedent's statements not made contemporaneously with challenged deed of gift and bill of sale).
42. *Shumate v. Mitchell,* 822 S.E.2d 9, 15 (Va. 2018) (citing Professor Sinclair).
43. *Id.* at 16-17.

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