

USEFUL HEARSAY EXCEPTIONS FOR CRIME VICTIMS IN CIVIL LITIGATIONS

By Darrell L. Heckman, Esq.

I. INTRODUCTION

Hearsay is generally defined as a statement made by someone other than the declarant while testifying, offered to prove the matter asserted.¹ An admission by a party opponent would meet this definition except that such an admission is defined as non-hearsay.² The same is true of statements by co-conspirators in furtherance of the conspiracy.

The general rule is that hearsay is inadmissible where a timely objection is placed against the hearsay unless the hearsay fits within an exception under the Rules of Evidence or by Constitutional right.

There are additional barriers to the admission of hearsay testimony. Such evidence is not admissible where the unfair prejudice of the testimony outweighs its relevance.³ In criminal cases the Constitutional right of the accused under the Sixth Amendment to confront his accuser may exclude otherwise admissible evidence.⁴

Just as there are constitutional barriers to some otherwise admissible hearsay evidence, there are occasions where Due Process of Law forbids the mechanical application of evidentiary rules to exclude compelling evidence.⁵

II. COMMON HEARSAY EXCEPTIONS USED IN CIVIL CASES BY CRIME VICTIMS

A. EXCITED UTTERANCE

An excited utterance is defined as a statement about a startling event that the declarant

¹ Ev. R. 801

² Ibid

³ Ev. R. 403

⁴ Bruton v. United States, 391 U.S. 123 (1968)

⁵ Chambers v. Mississippi, 410 U.S. 284 (1973)

observed while under the nervous excitement of the event.⁶ Since crimes, especially violent crimes, are usually startling events, this exception is very common. In determining if a declarant was under the nervous excitement of an event, passage of time is a factor but is not determinative. Thus the following have been held admissible: Testimony by a child taken to the scene of his sibling's murder 3 days before⁷; a spontaneous statement by a child two weeks after being sexually abused triggered by watching a television show⁸; questioning which is not coercive or leading does not by itself destroy the necessary level of spontaneity.⁹

The majority rule is that the declarant need not be competent to make an admissible spontaneous declaration.¹⁰ This is so because the key to reliability of an excited utterance is the declarant's ability to receive and relate impressions, not the understanding of an oath or the importance of truthfulness. It is the absence of time of the declarant to reflect that makes these latter considerations unnecessary.

B. PRESENT SENSE IMPRESSION

Related to the excited utterance is the present sense impression. The elements of this exception¹¹ are the declarant was relating a state of mind or an event as it has just occurred. A slight lapse of time is permissible. The event itself need not be startling although if it is it may qualify as an excited utterance as well. This may be important. For example, in Ohio, but not in Federal Court, present sense impression requires evidence of trustworthiness¹² whereas an excited utterance does not require such corroboration.¹³ Examples of non-startling present sense impressions are: (1) "My back hurts."; (2) "The smoke detector is on the blink again."; (3) "I've

⁶ Ev. R. 803(1)

⁷ State v. Brown, 112 Ohio App. 3d 1583, 679 NE2d 583 (1996)

⁸ In re Michael, 119 Ohio App. 3d 112, 694 NE2d 538 (1997)

⁹ State v. Wallace, 37 Ohio St. 3d 87, 524 NE2d 466 (1988)

¹⁰ 15 ALR 4th 1043 sec. 3, State v. Wallace infra

¹¹ Ev. R. 803(2)

¹² Ev. R. 803(2)

¹³ Ev. R. 803(1)

got to get off the phone. My ex just pulled in the driveway." (If the statement were "I've got to get off the phone; my ex just pulled in the driveway and he's got a gun", the statement would be an excited utterance as well.)

The present sense impression will not be admissible if it is not relevant. For example, the statement, "I'm afraid of Ted", is of no relevance by itself to prove the fear was justified.

C. STATEMENTS OF MEDICAL CONDITIONS FOR DIAGNOSIS OR TREATMENT

The elements of this exception are self-explanatory. The statement must be for treatment or diagnosis. "I was hit by a car" is admissible. "I was hit by a car that ran a red light" is probably not admissible to prove the light was red.

The statement does not need to be made to a physician. It may be to a paramedic, nurse, psychologist, or even a family member.¹⁴ Likewise, the statement does not need to be made by the patient, assuming the declarant has knowledge.¹⁵

The identity of a sex abuser is disclosed for treatment since separating the abuser from the victim is necessary for proper treatment.¹⁶

Treatment includes treatment for psychiatric and emotional conditions such as child sexual abuse accommodation syndrome.¹⁷

As with excited utterances an incompetent's statement for treatment or diagnosis is admissible without regard to competency of the declarant.¹⁸

D. ADMISSION BY PARTY OPPONENT, AGENT, OR CO-CONSPIRATOR

As mentioned earlier, admissions by party opponents, or agents, or statements of

¹⁴ State v. Vaughan, 106 Ohio App. 3d 775, 667 NE2d 82 (psychologist); United States v. Tome, 61 F3d 1446; In re Curry M., 134 Ohio App. 3d 274, 730 NE2d 1047

¹⁵ Lovejoy v. United States, 92 F3d 628 (8th Cir. 1996) (parent related child's condition)

¹⁶ State v. Dever, 64 Ohio St. 3d 401, 596 NE2d 436 (1997); United States v. Pachero, 154 F3d 1236 (10th Cir. 1998); United States v. Renville, 779 F2d 430 (8th Cir. 1985)

¹⁷ United States v. Renville infra

¹⁸ State v. Wallace, 37 Ohio St. 3d 87, 524 NE2d 466 (1988)

co-conspirators are by definition under Ev. R. 801 not hearsay, but they are similar to hearsay statements and are appropriate for treatment in this article. Admissions by a party opponent or agent are straightforward concepts although where agency is claimed it is often a difficult matter of proof.

A statement of a co-conspirator must be in the course of and in furtherance of the conspiracy. A confession after the crime is complete is made too late to qualify under this exception. Independent proof of the conspiracy is required before the statement of the conspirator is admissible, however this can be accomplished by the same witness. Furthermore, a defect in the order of proof is harmless if the necessary proof is ultimately introduced.

E. STATEMENT AGAINST PENAL OR PECUNIARY INTEREST

Unlike the preceding exceptions to the rule generally prohibiting hearsay testimony, a statement against penal or pecuniary interest requires that the declarant be unavailable. If the declarant witness appears in court but refuses to testify, claims lack of memory, or asserts a valid testimonial privilege, the witness is unavailable. If the statement exposes the declarant to criminal liability there must be surrounding "circumstances of trustworthiness" but not necessarily "evidence" of trustworthiness. Of course some admissions may implicate both criminal and civil liability. ("The wreck's my fault. I drank 8 beers tonight.")

Importantly, admissions that also implicate others may well be admissible. THERE IS NO SIXTH AMENDMENT CONFRONTATION ISSUE IN A CIVIL CASE. The following are examples of clearly admissible statements implicating the declarant and someone else: (1) "John paid me \$5,000.00 to kill his wife." (admission of murder for hire also implicates the hirer); (2) "Pete and I agreed to rob the bank." (admission of conspiracy). Since the cornerstone to any hearsay exception is reliability, the following statement should also be admissible: "Turtle and I just killed Billy Blast." Turtle's name does not implicate the declarant but there is no need

to redact his name from the statement. The entire statement is reliable because it is against interest. See and read carefully Williamson v. United States (1994), 512 U.S. 594, 114 S.Ct. 2431, 129 LEd2d 476.

Where a statement involves blame shifting it is not admissible as against "Tony". An example of this kind of statement is: "The robbery was Tony's idea. He made me go with him."

III. SUBSTANTIVE EVIDENCE

"Substantive evidence is that which is given to prove a fact rather than merely to impeach." *Black's Law Dictionary, 4th edition*. This distinction can be critical in establishing a prima facie case. Where a witness recants a prior statement on the witness stand, his prior inconsistent statement can be used to impeach his trial recantation, but that statement is not evidence usable to establish a prima facie case. A hearsay exception is substantive evidence, however. If the same recanting witness made an excited utterance at the time of the crime, the auditing witness' testimony as to the declarant's spontaneous declaration is admissible and can establish a prima facie case.

IV. CONCLUSION

Admissible hearsay evidence can be very potent. Medical testimony should be used liberally. Health care professionals, especially physicians, are usually excellent witnesses. Neither statements to physicians nor excited utterances require the declarant to be competent. Excited utterances do not need to be strictly contemporaneous with the event to be admissible. Courts are increasingly liberal in allowing such statements from young children.

The Confrontation Clause does not apply to civil cases. Never allow your adversary to cite a criminal case as persuasive authority in a criminal case.

Use admissible hearsay testimony as substantive evidence to strengthen your case whenever possible.