

**JULY 1998 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Evidence

QUESTION

A car driven by Dunn collided with Empire Trucking Co.'s truck driven by Kemper. Kemper died at the scene. Dunn and Dunn's passenger, Paul, were seriously injured. Paul sued Empire for personal injuries. Paul attempted to serve Sigel, an Empire mechanic who was on duty the day of the collision, with a subpoena to appear at the trial, but the process server could not locate Sigel. The following occurred at the jury trial.

3. Paul called the investigating police officer, Oliver, who testified that he talked to Wit at the scene a half hour after the collision. Oliver wrote down Wit's statement and attached it to his report. Oliver testified that Wit told him that he ran over to the scene from the curb and spoke to the driver of the car, Dunn, who told Wit: "I'm not going to make it and I want you to know the truth - the truck ran a red light."
4. Paul called a court reporter who properly authenticated the trial transcript of Sigel's testimony in *People v. Dunn*, a reckless homicide case relating to the same incident, in which Sigel testified that on the morning of the incident he warned Kemper that the brakes on the truck were defective, but Kemper drove the truck anyway. The transcript was admitted into evidence.
5. Paul called Dunn who testified that she had a green light and was driving below the speed limit when defendant's truck struck her car.
6. Empire offered into evidence a properly authenticated copy of the conviction of Dunn for reckless homicide based on this incident. Paul's objections to this offer were sustained.
7. Empire asked Dunn on cross examination: "Q. Isn't it true your insurance carrier reached a settlement with Paul and as part of that written agreement, you agreed to testify on Paul's behalf today?" Paul's objections to this question were sustained.

Assume that all appropriate objections were made. Was the evidence in items (1), (2), and (3), properly admitted, and were the objections in (4) and (5) properly sustained? Discuss.

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ANSWER A

1. Relevance - All evidence is relevant which tends to prove or disprove a fact in controversy and whose probative value is not substantially outweighed by its prejudicial effect.

The fact that Dunn would say that Kemper ran the light while seriously injured tends to prove that K was negligent and ET Company would be liable.

This is not to prejudicial.

Personal Knowledge

Officer is testifying from his personal knowledge not his record. Thus the Best Evidence Rule does not apply.

(Double) Hearsay

A hearsay statement is an out of court statement offered to prove the truth of the matter asserted. Here Wit's and Dunn's statements are offered to prove that K ran the light thus they are inadmissible unless same exception applies to both statements.

Dunn's Statement

Dying Declaration

It appears that Dunn is available because he is called to testify in #3. However, if he were unavailable, this statement was made under the fear of impending death - (serious injury) and related to the cause (truck ran light).

Excited Utterance

W ran to D right after the accident it appears. Although it is not certain, all we know is that W came from curb. D was seriously injured so he was (1) probably under the stress of an exciting event and his statement (2) related to that event (truck ran light). D's statement is probably an excited utterance.

Present Sense Impression

If W ran over to D immediately after the accident he might have made a present sense impression, however, we don't know how close in time W ran over to D.

This is a questionable exception and probably does not apply.

Wit's Statement

Even though D's statement was probably an excited utterance, unless W's statement qualifies, it is still inadmissible.

Excited Utterance

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Although O took W's statement 1/2 hour later, W may still have been under the stress of witnessing two people suffer a serious action.

Present Case Impression

Half hour is too far away in time.

Catch-All Exception

W's statement may be sufficiently reliable if the court finds that he did not have sufficient time or motivation to fabricate, misperceive or misremember. W was a non-interested party and his statement was fairly close in time to a cop so it may be sufficiently reliable.

Conclusion

The court probably erred because W's statement was hearsay verb within any exception.

2. Relevance

Testimony that K had notice of defective brakes would tend to prove negligence.

Personal Knowledge

Sigel was testifying about what he said, thus his testimony was hearsay.

Double Hearsay

Again this is a double hearsay problem Sigel's testimony and his statement to K are hearsay offered to prove that the brakes were defective and exceptions must apply to both.

Sigel's Testimony

Former Testimony

Here P must prove that S is unavailable and that he used reasonable efforts to find him which he did b/c he used [process server] to serve Sigel. P must also prove that Empire had a similar motive to cross-examine Sigel and opportunity - the facts suggest that the case did not ever involve Sigel there is no former testimony.

Vicarious Admission

Sigel's statement, however, is a vicarious admission b/c apparently he was a mechanic employed by Empire. This exception depends on whether he was still employed when he testified. If so, it applies.

Statement Against Interest

Sigel is unavailable, how[ever] his statement, probably would not expose him to pecuniary or criminal damage. Although he may have been sued for allowing K to drive so this may apply.

Sigel's Statement to K

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Vicarious Admission By Party Apparent

This exc[emption] certainly applies because S was def[initely] employed at that time.

Effect on Listener

Technically non-hearsay Sigel's statement can also be offered to show that K had notice of defect.

Conclusion

Sigel's statement to K was under an excited, however, his testimony depends on (1) his employment with Empire (2) whether he was exposing himself to any liability.

3. Relevance

Tends to prove that because D had a green light K had a red light and is very probative of E's liability while very prejudicial to E.

Personal Knowledge

Dunn was driving the car and thus presumably would have been aware of two facts to which he testified.

Lay Opinion

Dunn's opinions are common observations helpful to the jury.

Hearsay

The status of a light and the speed limit are not testimonial nor hearsay.

Conclusion - properly admitted

4. Relevance

This tends to prove that D was at fault and not K. While it could suggest merely that both were negligent the severity of the damage tends to disprove this. It is not too prejudicial and it is not improper character evidence because it was not a prior act it was the same act!!

Impeachment

Evidence of prior crimes less than 10 years old may be offered if they are felonies or if they are crimes of dishonesty. Here the crime was probably felonious and almost certainly took place less than 10 years ago. It is admissible to impeach Dunn. Evidence may be used to impeach a witness for a prior crime.

Hearsay

If it is offered to prove that K was not negligent because D was, then the record is an out of court statement offered to prove Dunn was reckless. However criminal convictions have a hearsay exception and thus the convictions may be introduced as substantive evidence of K's non-liability.

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Conclusion

The objection was improperly sustained. The evidence may be used for impeachment substantively.

5. Relevance

Dunn's motivation to lie is certainly relevant because it tends to prove his testimony meaningless and it is highly probative despite its prejudice to P's case.

Policy Exception

Normally evidence of offers to settle and settlement talk are excluded because of public policy. However, in this case the E attorney offered it to prove bias and motive to be which is a proper purpose and thus the policy exception does not apply.

Form of Examination

Leading questions such as the one asked here are permissible on cross-examination.

Conclusion

Whether based on form of examination or public policy, the P's objections were improperly sustained. The question was permissible to show bias or motive to lie.

ANSWER B

I. Was the Evidence in (1) Properly Admitted?

A. Purpose

(1) Logical Relevancy

The first issue is whether the evidence was logically relevant. Under the Federal Rules of Evidence, evidence is logically relevant where it has "any tendency" to make more probative a material fact. Here, the purpose of Oliver's testimony regarding Wit's statement was to show that Empire's driver was responsible for Paul's injury. The statement goes to fault and is thus highly relevant.

(2) Legal Relevancy

The next issue is whether the evidence was legally relevant. There are no applicable public policy objections to Oliver's statement. However, like all evidence under the Federal Rules, the probative value must not be substantially outweighed by a risk of misleading, confusing, or otherwise affecting the jury's ability to rationally decide the issues. Here, although the statement certainly raises some prejudice to Empire, because it gives no fault, the prejudice does not outweigh the highly probative nature of the statement.

B. Presentation

(1) Witness Testimony

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The next issue is whether Oliver may properly testify to Wit's statement. A witness must take an oath and have personal knowledge of the incident in order to testify. Here, Oliver was at the scene of the accident, but did not hear Dunn's statement to Wit. He did hear Wit's statement, however, and that is sufficient personal knowledge for the question of witness testimony.

(2) Applicability of Best Evidence Rule

The Best Evidence Rule does not ban Oliver's testimony. The Best Evidence Rule provides that where the contents of a document are in issue, that document generally must be produced. However, where a witness has independent knowledge of the information, the Rule does not apply. Here Oliver heard the statement himself, and thus there is no Best Evidence Rule issue over his report.

C. Hearsay

The next issue is whether the evidence was inadmissible hearsay. Under the hearsay rule, an out of court statement cannot be admitted for its truth unless an exception to the rule applies. Here, two statements are being brought forth for their truth – Dunn's statement to Wit and Wit's statement to Oliver. An exception must apply for each level of hearsay offered, although usually the declarant need not be present in court.

(1) Dunn's Statement to Wit

(a) Policy Declaration

Dunn's statement to Wit does not fit the hearsay rule exception for a dying declaration. A dying declaration is a statement made with knowledge of impending death that goes to the cause of death. The declarant must be unavailable and it is admissible only in civil or homicide cases. Here, Dunn thought he was about to die and stated the case. The case is civil. However, although a dying declaration does not actually require that the declarant die, Dunn is not unavailable. He is present at trial and testified, and thus the exception does not apply.

(2) Present Sense Impression

Dunn's statement was also not a present sense impression. That exception relies on statements made contemporaneously on observing an event, but do not include statements of memory of past events. Here, Dunn described a past event - the cause of the accident and thus the exception does not apply.

(3) Excited Utterance

Dunn's statement will qualify as an excited utterance. An excited utterance is one made under the stress of a startling event, while the stress lasts, and can include statements of fault. Here, Dunn was under stress and thus the exception applies to his excited statement of fault.

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(4) Wit's Statement to Oliver

Wit's statement to Oliver will not be admissible under any exception. It was not a present sense impression, because it was not made contemporaneously to the event. It was not an excited utterance, unless Wit was still under the stress of the event, even after 30 minutes.

Further, Oliver could not try to use his report either. It could not be on business record because it contains a statement by one not under a business duty. It could not be a public record for the same reason.

On the issue of Oliver's testimony, the court should not have admitted it unless it was shown that Wit was still under the stress of an exciting event.

II. The Trial Transcript

A. Purpose

(1) Logical Relevancy

Under the "any tendency" test described above, the trial testimony is logically relevant because it makes more probative the material issue of Empire's notice of a brake problem and thus the cause of the accident.

(2) Legal Relevancy

There are no public policy objections to this evidence. Under the relevancy test for prejudice described above, the evidence, although prejudicial to Empire, has its greatest value in its probative nature. Thus it is legally relevant.

(3) Presentation

(1) Authentication

It appears that the transcript was properly authenticated.

(2) Witness

The testimony related in the transcript was made under oath and with Siegel's personal knowledge. Thus, it is proper witness testimony.

(3) Hearsay

Under the Hearsay Rule described above, there are two out-of-court statements being used for their truth: the trial testimony and Siegel's statement to Kemper. Both must fit within an exception to be admissible.

A. The Trial Transcript - Former Testimony

The transcript does not fit the hearsay exception for former testimony. Former testimony must be under oath, involve the same party, the declarant must be unavailable, and the party must have had an opportunity for cross-examination. Here, Empire was not a party to the criminal action against Dunn and thus had no opportunity to cross-examine Siegel. Siegel spoke under oath and is unavailable, because he could not be located during trial, but the transcript is inadmissible as former testimony.

B. Siegel's Statement

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Had the transcript been admissible, Siegel's statement to Kemper would have come in as nonhearsay. It was used not for its truth, but for its effect on the hearer, Kemper, and was thus nonhearsay. It could also qualify as nonhearsay as the vicarious admission of a party-apparent, because Siegel was Empire's employee when he admitted the condition of the brakes.

III. Dunn's Statement

A. Logical and Legal Relevancy

Under the "any tendency" and prejudice test described above, the evidence is probative as to the cause of the accident and outweighs any possible prejudice to Empire.

B. Presentation

Dunn may properly testify. She took the oath and had personal knowledge of the accident. Further, a lay witness may give an opinion as to the speed of an automobile. Thus, Dunn's testimony was properly admitted.

IV. Copy of Dunn's Conviction

(1) Purpose

A. Logical and Legal Relevance

The conviction is logically relevant because it goes to fault. Despite its high prejudice to Dunn, and thus to Paul, its probative value outweighs its prejudicial impact.

(2) Presentation

A. Witness Impeachment

A witness may be impeached by extrinsic evidence of prior felony convictions within the last 10 years, at the court's discretion. Here, the conviction is being offered to impeach Dunn's statement that she was not the cause of the accident. It is highly relevant to the value of her testimony, and thus it was properly admitted by the court.

(3) Hearsay

Under the felony convictions exception to the Hearsay Rule described above, the felony homicide conviction of Dunn could be properly admitted.

(4) Cross-Examination

A. Form

Paul's objection was properly sustained. Empire's question to Dunn was a compound question because it asked two questions at once. It was misleading and confusing to the jury. However, it was not an improper leading question because leading questions are permissible in cross-examination.

B. Purpose

(1) The question was logically relevant because it went to witness bias.

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(2) Legal Relevance

The question was legally relevant because the existence of insurance, although generally inadmissible, can be used to reveal sins of a witness. Here public policy would not ban the question, even though it mentioned insurance, because it goes toward Dunn's bias. The question was also more probative than prejudicial.

(3) Presentation

A witness may properly be questioned as to bias.
Thus, the question was properly excluded for improper form.