JULY 2001 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Evidence

QUESTION

Walker sued Truck Co. for personal injuries. Walker alleged that Dan, Truck Co.'s driver, negligently ran a red light and struck him as he was crossing the street in the crosswalk with the "Walk" signal. Truck Co. claimed that Dan had the green light and that Walker was outside the crosswalk. At trial, Walker called George Clerk and the following questions were asked and answers given:

17. Would you tell the jury your name and spell your last name for the record, please?
A: George Clerk. C-l-e-r-k.
[1] Q: Where were you when you saw the truck hit Walker?
A: I was standing behind the counter in the pharmacy where I work.
[2] Q: What were the weather conditions just before the accident?
[3] A: Well, some people had their umbrellas up, so I'm pretty sure it must have been raining.
[4] Q: Tell me everything that happened.
[5] A: This guy rushed into my store and shouted, "Call an ambulance! A truck just ran a red light and hit someone."
Q: What happened next?
[6] A: I walked over to the window and looked out. I said, "That truck must have been going way over the speed limit." Then I called an ambulance.
Q: Then what happened?
[7] A: . I walked out to where this guy was lying in the street. Dan, the driver for Truck Co., was kneeling over him. A woman was kneeling there too. She spoke calmly to Dan and said, "It's all your fault," and Dan said nothing in response.

At each of the seven indicated points, what objection or objections, if any, should have been made, and how should the court have ruled on each objection? Discuss.

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ANSWER A

For ease of reference, D will be Truck Co., C will be Clerk, and W will be Walker.

"Where were you when you saw the truck hit Walker?"
The objections that can be raised to the question include: Argumentative, assumes facts not in evidence, and lack of foundation.

Assumes facts not in evidence.
A lawyer may not use his/her questions on direct examination to argue the facts or issues of a case. The lawyer must ask questions and allow the witness to testify. Although we have no background evidence, we know Clerk (C) has not yet testified that he saw the truck hit Walker. Thus, the question assumes facts not in evidence, and an objection should be sustained.

Lack of personal knowledge/foundation
A witness may only testify based upon his/her personal knowledge, and the lawyer must present the basis for the witness's knowledge before a witness may testify as to facts in the trial relating thereto. Here, all we know is the name of this witness. We do not know where he was, who he was, or even whether he observed any accident. This assumes not only that he saw the accident, but that the truck hit Walker - which has not yet been established. Thus an objection for lack of personal knowledge is sustainable.

Argumentative
A lawyer may not use his/her questions on direct examination to argue the facts or issues in a case. The lawyer must ask questions and allow the witness to testify. An argumentative question is one which argues the facts or issues of the case rather than just eliciting a direct response. This question is argumentative in that it assumes as the truck "hit" Walker rather than Walker "walking out in front of" the truck. Any objection should be sustained.

"What were the weather conditions like just before the accident?"
The statement could be objected to based on lack of personal knowledge. The attorney has not laid a foundation that C had an opportunity to observe the weather conditions on that day. However, it could also be argued that it is within a witness's personal knowledge to remember what the weather conditions were like that day, so it is arguable that the statement did not need a foundation to be laid. Thus, an objection may be proper here, but it is not likely to be sustained unless the witness actually does not have personal knowledge (see below).

The statement could also be objected to on the basis of relevance. A statement is relevant if it makes some fact more or less likely. Although the weather conditions do not appear to make a difference in the accident claims (red light/green light issue), it could be relevant to show the ability of each party to see one another. Thus, the weather conditions are probably relevant, and the objection should be overruled.

"Well, some people had their umbrellas up . . ."

Evidence

Here, a motion to strike should be made because the answer is speculation. A motion to strike must be made immediately after a witness's response, and can only be made when the original question did not obviously contemplate an objectionable response. If granted, the jury will be instructed not to consider that portion of the witness's answer. A witness must base his testimony on personal knowledge, and cannot speculate as to the conditions surrounding his/her answer. As discussed above, the weather conditions may be within C's personal knowledge. However, upon his answer, it becomes obvious that the questions actually led him to speculate and base his answer on something other than personal knowledge - he made an inference that it was raining because of the umbrellas. W's attorney may argue that this is not speculation but rather based on personal knowledge because he remembers the umbrellas, and as such if anything only the portion about the "must have been raining" must be stricken. The court will probably agree, and only strike the parts based solely on speculation. Thus, the failure to object in the first place is excusable, the motion to strike is proper, and it should be sustained in part.

"Tell me everything that happened."
An objection should be made that the question calls for the witness to give a narrative account. The lawyer interrogating the witness on direct examination must ask specific questions and lead the witness through his or her testimony. This question calls for a narrative by the witness, and as such it is an improper question. The objection should be sustained.

The "call an ambulance" statement
An objection should be made based on hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. A statement can be words or conduct. If a statement is found to be hearsay and does not fit into a hearsay exception, it must be excluded from evidence. Here, the statement is hearsay because it was made out of court by a "guy" - a declarant who is not testifying at trial and it is being offered for its truth - that a
truck ran a red light and hit someone. It could be argued that the statement is being offered for the nonhearsay purpose of showing its effect on the listener, C, in which case it would not be hearsay, because it would not be offered to show the truth that the truck ran the light but to show the effect the statement had on C. However, this argument will fail because what C did is not relevant in this case.

Likely, W's counsel will argue that the statement is a present sense impression or an excited utterance. A present sense impression is a statement that is made contemporaneous with an observation or a physical condition that is so trustworthy because there is not much time for contemplation to lie. It must be very contemporaneous, and very little time can lapse. Here, this statement would be admissible if it were made while the accident was happening, but the lapse of time between the declarant's coming in and the accident is not established as short and we do not know what he was doing at that time. Thus, it may not be contemporaneous enough to come in a present sense impression.

However, it will likely come in as an excited utterance. An excited utterance is a statement made under the stress of excitement of some event. Here, the time period can be longer than in a present sense impression so long as the stress of excitement remains. It seems apparent that the

declarant was still under the stress of excitement when he made the statement, as he was exclamatory in doing so. Also, a short period of time passed - as no ambulance had yet been called, so this makes it more likely that he was under the stress of excitement. Watching a car accident is definitely stressful and exciting. Thus, it is likely that the statement is trustworthy enough to come in under the excited utterance exception, and the objection should be overruled.

"That truck must have been going way over the speed limit."
Hearsay. D's counsel will object based on hearsay. This is an out-of-court statement made to prove the truth of the matter asserted. Even though the statement was made by the witness, the statement was made out of court, and as such it still is classified as hearsay. C can testify on the stand as to what he or she recalls of the events, but C cannot testify as to what he/she said about them then unless they fall into a valid hearsay exception. This statement could probably not be classified as an excited utterance because C did not observe the events and there is no indication that he was particularly excited about what occurred. Further, it cannot be classified as a present sense impression unless there would be some foundation laid as to why he thought that (e.g., what did you observe, etc.) and then it could be argued that the statement was made as a present sense impression of what it was that he saw. (However, this may still be an impermissible opinion; see below.) It could not be argued that it is an effect of hearsay scenario (see above) because it does not demonstrate why he called the ambulance, his action, but rather is being offered to show that the truck was speeding - the truth. Thus, the objection should be sustained based on hearsay grounds.

Calls for an opinion.
The statement itself is an opinion statement, and lay witnesses may not testify as to their opinions unless they have personal knowledge, the information in the opinion cannot be derived from a better source and will be helpful to the trier of fact, and it is not scientific or technical in nature. Here, the statement is not based upon personal knowledge (at least not from the foundation we have here), and as such it is an impermissible opinion. Not only could the hearsay statement not come in, but the statement made by the witness on the stand himself [sic] could not come in either. C did not observe the events; rather, C only observed the aftermath. Thus, he did not know that the truck was speeding and was basing this information on evidence not offered forth as a foundation. Thus, although his statement would be permissible if he actually saw the truck speeding, because he did not he has no basis for knowledge of this fact and his opinion is inadmissible. The objection should be sustained.

Woman's statement to Dan: "It's all your fault." Hearsay!
D's counsel is likely to claim that this is a hearsay statement. Woman's statement is an out-of-court statement offered to prove the truth of the matter asserted. As such, her statement itself is hearsay unless it can - fall into one of the exceptions. Here, the statement is not offered for a non-hearsay purpose, so it must fall into an exception. Because of the time lapse, present sense impressions and existed utterance exceptions are probably not viable. However, C's counsel can argue that D's response to the statement, his failure to respond, is an adoptive admission. An admission is deemed to be "not hearsay" by the Federal Rules of Evidence, and as such they are not subject to hearsay objections even though they go to the truth of the matter asserted. An

admission is a statement made by a party offered by his/her opponent in a case. Here, it must first be determined whether Dan is a party opponent in the case against Truck Co. Dan may be a party due to the doctrine of vicarious admissions. If an employee is acting within the scope and course of his or her employment, then all admissions made by that employee are imputed to the employer. Here, we do not have definite facts as to the activity that D was engaged in at the time of the accident; however, if it is found that D was acting in the scope and course of his employment then any statement he made concerning the accident can be considered an admission and be vicariously imputed to his employer, Truck Co.