

Question 3

Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

(1) Mechanic commented to Helper, “Dave had better get these brakes fixed. They look bad to me.”

(2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: “Inspected brakes — repair?”, which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.

(3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, “I think your brakes are bad. You’d better get them fixed.”

(4) Dave responded, “I am not surprised. They’ve felt a little funny lately.”

(5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: “The sports car ran the red light and ran into the truck.”

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly’s complaint alleged that the accident was caused by the sports car running the red light because the sports car’s brakes failed. Polly’s theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items (1) through (5) above, and she also offered into evidence the work order referred to in item number (2). Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers (1) through (5), including the work order referred to in item number (2)? Discuss.

Answer A to Question 3

Polly v. Dave

(1) “Dave had better get these brakes fixed”

Logical Relevance

Only relevant evidence is admissible. Evidence is logically relevant when the evidence has some tendency to make a fact of consequence to the litigation more or less probable than it would be without the evidence.

Here, Polly alleges that her accident with Dave was caused by his car’s brake failure. Thus, a statement that the brakes looked bad would be relevant for purposes of establishing that the brakes were bad. However, because Polly’s theory of liability is negligence, and that Dave knew or should have known that the brakes were bad, anything that Mechanic said to Helper is irrelevant for showing that Dave had knowledge. Thus, the logical relevance of the statement is minimal.

Legal Relevance

Otherwise legal evidence may be inadmissible where the probative value of the evidence is substantially outweighed by the risk of unfair prejudice to the defendant, confusion of the jury or the issues, or waste of time.

Nothing about this evidence would be prejudicial. However, it may confuse the jury, again because Polly’s claim is in negligence and thus any statement that Dave did not hear would have no bearing on his knowledge of the defect of the brakes.

Personal Knowledge

A witness can only testify about that which they have personal knowledge. This is true for the testifying witness, as well as for the declarant in any hearsay statement.

Here, Mechanic had personal knowledge of the condition of Dave’s brakes, because he was conducting the inspection. Further, Helper heard Mechanic’s comment, and so had personal knowledge of what Mechanic said.

Hearsay

Hearsay is an out-of-court statement, admitted for purposes of the proving the truth of the matter asserted. Hearsay is inadmissible unless exempt or unless an exception applies.

Mechanic’s comment to Helper was made out of court, and is being introduced for purposes of showing that the brakes were bad. Thus, the statement is hearsay.

Present Sense Impression

A statement made concerning one's observations or impressions, made while or immediately after the observation or impression, is admissible as a hearsay exception.

Here, Mechanic made the statement while servicing Dave's sport car. Thus, the "They look bad to me" statement, which concerned his impressions of Dave's brakes, was made simultaneous to his visual inspection and thus admissible as a present sense impression.

State of Mind

A statement made concerning one's then present state of mind is admissible as a hearsay exception.

Here, because Mechanic was a mechanic, he was aware of the dangers posed by faulty brakes. Thus, when he said that "Dave had better get these brakes fixed, "he likely had the mental thought that they posed a risk to Dave and other drivers, and was speaking as to his knowledge that Dave needed to get the brakes fixed.

Thus, the statement should probably not be admitted, because the probative value is low because the statement has nothing to do with Dave's knowledge or lack thereof of the condition of his brakes.

(2) Work Order – "Inspected brakes – repair?"

Logical and Legal Relevance

Assuming that Dave received the work order, the "Inspected brakes – repair?" language would have a great tendency to make it more relevant that Dave had knowledge of the defective brakes than it would be without the work order. There is no risk of unfair prejudice to Dave, because there is nothing prejudicial about a work order. Further, given the highly probative value of the statement, there is no risk of confusing the jury or wasting judicial resources.

Totem Pole Hearsay

Where a piece of hearsay evidence contains other pieces of hearsay evidence, each statement must fall within an exception in order to be admissible. Here, because both the work order and Mechanic's statement to helper, which was recorded on the order, were made out of court and are being admitted for their truth, they are hearsay. If either statement is inadmissible, the whole piece of evidence is inadmissible.

Business Record Exceptions / Work Order

Information recorded in a business record is admissible under a hearsay exception where the information was recorded by somebody under a duty to record or report such

information, by somebody with personal knowledge of the information, and when the record was kept in the ordinary course of business (that is, the record may not be prepared in anticipation of litigation).

Here, Helper was assisting Mechanic, and Mechanic instructed Helper to write on the work order, “Inspected brakes – repair?,” and Helper did. Thus, Helper was under a duty to record such information. Given that this was a mechanic shop, preparing work orders is likely a part of the ordinary course of business. Further, Helper had personal knowledge of Mechanic’s statement, because he heard Mechanic say it himself and did himself record it in the work order.

Thus, if Mechanic’s statement meets an exception, the whole piece of evidence will be admissible.

Present Sense Impression / “Inspected Brakes – Repair?”

Because Mechanic made the statement as or immediately after his inspection of the brakes, it would fall under the present sense impression, because his impression was that the brakes needed repair.

State of Mind / “Inspected Brakes – Repair?”

Additionally, Mechanic would have been speaking as to his knowledge that the condition of Dave’s brakes was bad and that they required repair.

Recorded Recollection

A writing that was prepared by one with personal knowledge of the events contained in the writing, or at the instruction of the person with personal knowledge and adopted by them, and made soon after the event occurred and that was a true and accurate depiction of the events that transpired, is admissible as a recorded recollection.

Here, because Helper prepared the work order the same time as he heard Mechanic speak, the work order was likely a true and accurate record of what was said, and thus the writing will be admissible as a recorded recollection.

Best Evidence Rule

Where a witness is testifying as to the contents of a writing, and those contents are in fact at issue, the best evidence rule requires that the writing be admitted into evidence unless it has been lost or destroyed not due to any intentional misconduct of the party seeking to introduce the evidence.

Here, because Helper is testifying as to the contents of the work order, if the work order is available it should be admitted into evidence as the best evidence. If the work order that was provided to Dave is being introduced for purposes of showing that he knew or should have known that his brakes were bad, the best evidence rule is definitely

implicated. However, if it is unavailable, Helper would be permitted to testify as to the contents of the work order, if he remembered the words that were written (which he does not here remember).

Refreshing Recollection

If a witness did before have personal knowledge about something, and is simply unable to recall the specifics while on the stand, anything may be shown to the witness for the purposes of refreshing their recollection. Once the witness's memory is refreshed, the item that was shown to them must be taken away, and the witness must then testify from their refreshed memory. The item shown must be provided to the other party at their request.

Here, if the work order is available, it may be shown to Helper for purposes of refreshing his recollection as to the words that he wrote on the work order.

Thus, the work order should be admitted. Helper's testimony as to what Mechanic said should not be admitted, because it is not relevant for purposes of showing that Dave did or should have known of the condition of his brakes.

(3) "I think your brakes are bad."

Logical and Legal Relevance

Information that Mechanic told Dave that his brakes were bad would be extremely probative for purposes of establishing that Dave knew or should have known that his brakes were bad, which is the basis for Polly's complaint against Dave. Whether or not Dave had actual notice is very much a fact of consequence, because Polly's entire negligence claim will turn on Dave's knowledge of the conditions of his brakes. Thus, given the highly probative value, there is no likelihood of confusing the jury or wasting judicial resources.

Personal Knowledge

Because Helper heard the statement to Dave, he has personal knowledge of the contents of the statement.

Hearsay

Mechanic's statement to Dave is being admitted for purposes of establishing its truth, that Dave's brakes were bad. Thus, the statement is hearsay.

Effect on Hearer

One non-hearsay use for out-of-court statement is to show effect on the hearer – the statements are thus not admitted for the truth of the matter asserted. Here, even if

Mechanic's statement were not being admitted for its truth, it would be admissible as non-hearsay for purposes of demonstrating its effect on the hearer, or the effect on Dave, to show that he had been told that his brakes may be bad.

Thus, this statement should be admitted.

"I am not surprised. They've felt a little funny lately."

Logical and Legal Relevance

Against, because Polly's claim against Dave is in negligence, any evidence that Dave knew or should have known that his brakes were defective is highly probative of establishing that Dave was negligent, as the ordinary reasonable prudent person would either have their brakes inspected by another mechanic, have their brakes repaired, or cease driving the vehicle upon learning that their brakes were bad. Further, that Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the brakes felt funny himself, he had actual knowledge that they may be bad and thus any statement from Dave that they were bad should only have made it more apparent to Dave that he needed to have them repaired.

Although this statement is extremely bad evidence for Dave's position and extremely good for Polly, the mere fact that evidence is bad for one's case does not make the evidence unfairly prejudicial.

Personal Knowledge

Because Helper heard Dave's statement to Mechanic, he had knowledge of its contents.

Hearsay

The statement is hearsay because it is being admitted for its truth. If Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the breaks felt funny, he had actual knowledge that they were bad.

Admission of a Party Opponent

An admission is a statement made by a party to the litigation being admitted into evidence against the speaker, by the opposing party to the litigation. It is non-hearsay as an exemption under the Federal rules of evidence.

Here, because Dave is a party to the litigation, and because his adversary in the litigation, Polly, is admitting the statement against him, it is an admission of a party opponent.

Circumstantial Evidence of State of Mind

Circumstantial evidence of the speaker's state of mind, such as knowledge of circumstances, is non-hearsay under the Federal rules.

Here, the statement shows that Dave had knowledge that his brakes were or may be bad. Thus, the evidence is admissible for purposes of demonstrating Dave's state of mind at the time he made the statement to Mechanic.

Thus, this statement should be admitted.

(5) "The sports car ran the red light and ran into the truck."

Logical and Legal Relevance

That Dave ran the red light and crashed into Polly's truck is extremely probative for purposes of establishing that Dave was at fault in the accident. The evidence is extremely probative for that purpose. However, it does not appear to be a very important fact of consequence that Dave ran through the red light or crashed into Polly, because in fact it seems that these facts have been established. As the real issue here is Dave's negligence, and particularly whether he knew or did not know that his brakes were bad, it may confuse the jury to introduce evidence as to the cause of the accident.

Personal Knowledge

Because Helper heard the bystander's exclamation, he has personal knowledge of its contents.

Further, based on the contents of bystander's exclamation, it is apparent that he had personal knowledge of the facts exclaimed to.

Hearsay

Because of the bystander's exclamation is being admitted for purposes of showing that Dave ran through a red light and crashed into Polly's truck, it is hearsay.

Excited Utterance

A statement made while or immediately after an exciting event, while the declarant is still under the stress of the exciting event, is admissible under a hearsay exception.

Here, witnessing an accident is an exciting event, because it is extremely loud; whenever a person hears an automobile accident, they jump up to see if there is anything that they need to do to help those involved in the accident. As the statement was made immediately after Helper heard the sound of the collision, the declarant was likely under the stress of the event and thus is admissible as an excited utterance.

Present Sense Impression

Additionally, the bystander was attesting as to what he had visually witnessed moments before his exclamation, and the statement would be admissible as a present sense impression because it related to something that the bystander had just moments before witnessed.

Thus, this statement should be admitted, because although there is a chance of confusing the jury, Polly is entitled to prove that Dave did run into her with his car and not simply litigate the matter of his negligence with regard to the brakes.

Answer B to Question 3

Polly v. Dave

Proposition 8 is a Victim's Bill of Rights that is incorporated into the California Constitution. Therefore, in all criminal cases, all relevant evidence will be admitted, subject to a few exceptions. Here, because this is a civil case, the rules of Proposition 8 are inapplicable.

1. Mechanic's comment to Helper, "Dave had better get these brakes fixed. They look bad to me."

Relevance

In order for evidence to be admitted, it must be logically and legally relevant to the case.

Logical Relevance

Under the FRE, evidence is logically relevant if it tends to make any fact of consequence more or less probable than without the evidence. Thus, Mechanic's comment to Helper is logically relevant because it tends to show that the brakes were defective. Under CA rules, evidence is logically relevant if it tends to prove or disprove any fact in dispute. Here, it is unclear whether or not Dave disputes that the brakes were defective. If Dave does dispute that the brakes were defective, then Mechanic's comment to Helper does tend to prove that the brakes were defective. However, if Dave admits that the brakes were defective, but rather is arguing only that he did not know they were defective, then under California rules, this statement would not be logically relevant because it does not prove or disprove a disputed fact.

Legal Relevance

Evidence is legally relevant if its probative value outweighs undue prejudice or undue delay. Here, this evidence is probative to showing that the brakes were broken. And it outweighs any undue prejudice because, even if the brakes were defective, Dave may still argue that he did not know they were defective.

Lay Testimony

Here, Helper's testimony is being introduced as lay testimony rather than expert testimony, because he is testifying to what he heard, not to any observations or work he did on the brakes. Lay testimony must be helpful and based on personal observations. Here, this testimony is helpful to showing that the brakes were broken and Helper did personally hear Mechanic's comments. However, in order to admit this testimony, Helper must take an oath, and in California, this requires Helper to know that he has a legal duty to tell the truth.

Hearsay

Dave will argue that this is hearsay, not admissible under any exception. Hearsay is any

out-of-court statement offered for the truth of the matter asserted. This is hearsay because it is an out-of-court statement made from mechanic to helper, offered to prove that the brakes were broken.

Not for Truth of Matter Asserted

Out-of-court statements are not offered for the truth of the matter asserted, and thus admissible, when they are offered to show: a) effect on the hearer; b) the declarant's state of mind; c) impeach; d) legally operative language; or e) to refresh recollection. Here, there is no indication that Polly is introducing the evidence for any of these purposes.

Offered for Truth of Matter Asserted, but Hearsay Exception

Additionally, out-of-court statements may be offered for the truth of the matter, but be exempt hearsay (in California, all of these are hearsay exceptions, not exemptions): a) prior inconsistent statement, under oath; b) prior consistent statement; c) prior identification; or d) admission by party opponent. Here, none of these are applicable.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Furthermore, hearsay may be admissible if it falls into one of the many hearsay exceptions. One category of exceptions is when the out-of-court declarant is unavailable. "Unavailable" means that the out-of-court declarant (Mechanic) is a) beyond the subpoena power of the court; b) invokes privilege; or c) is dead. Under the FRE, there are two additional times when an out-of-court declarant is considered "unavailable": a) lack of memory; and b) refusal to respond to subpoena. Here, there is no indication that Mechanic is "unavailable", thus, these hearsay exceptions do not apply.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, there are categories of hearsay exceptions regardless of whether an out-of-court declarant is available. Here, Polly may argue that Mechanic's statement should be admitted as a present sense impression.

Present Sense Impression

An out-of-court statement is hearsay within an exception when it is a present sense impression. A present sense impression is a statement describing an event contemporaneously or immediately thereafter. In California, this exception is narrowly construed to only statements made by someone "engaging in" the activity. Here, Mechanic is not describing any event that he is engaging in or observing. Rather, he is making a comment regarding the state of Dave's brakes. Thus, it is not hearsay within any exception.

2. Mechanic's Instruction to Helper to write on work order: "inspected brakes – repair?"

Relevance

Here, the work order is logically relevant because it tends to show that the brakes were broken. Again, if this was in dispute, then in California this would also be logically

relevant. For the same reasons discussed above under section 1, this is also legally relevant.

Best Evidence

Here the best evidence is arguably the work order. This is especially true since Helper is having difficulty remembering what words he wrote on the work order.

Hearsay

Here, this is hearsay within hearsay because 1) Helper did not himself observe the brakes and therefore he was simply writing down what he was instructed to do; and 2) Helper's statement in the work order is an out-of-court statement.

Mechanic's instruction to helper

Again, there is no evidence that Mechanic was unavailable to testify.

Present Sense Impression

Polly may argue that this was a present sense impression. If this was made immediately following Mechanic's inspection of the brakes, they may qualify as a present sense impression. However, in California, they would not because this comment was not made while Mechanic was engaged in fixing the brakes.

Helper's writing in the work order

Helper's writing in the work order "Inspected brakes – repair?" is hearsay within hearsay.

Past Recollection Refreshed

Polly may be able to introduce this as past recollection refreshed. Parties can use anything to refresh the recollection of witnesses. Here, Polly could show Helper the work order to refresh Helper's memory. However, the work order could not be read into evidence. If Helper's memory is refreshed from looking at the work order, then he can testify independently and that will be introduced. However, if Helper's memory is not refreshed by looking at the work order, Polly's counsel may look to past recollection recorded.

Past Recollection Recorded

Past recollection recorded may be admitted if it was made at or near the time of the event while the event was still fresh. Here, it appears that the work order was made immediately after Mechanic inspected the brakes, and Helper immediately wrote it in the work order, and thus it was at or near the time of the event. Therefore, the work order can be read into evidence, but not introduced as evidence.

Business Record

If Polly's attorney wants to actually introduce the work order into evidence, the best way to do so is as a business record. A business record may be introduced if it is made by one with a business duty, it is recorded in the regular course/practice of business, at or near the time of the event, by someone with knowledge, and it is trustworthy. Here, this record was made by Helper, who has a business duty. Additionally, it is likely that these

work orders are made in the regular course and practice of the business. This work order was not made in anticipation of litigation. Helper made the work order per Mechanic's instructions, and therefore it was made by one with knowledge. And there is an overall element of trustworthiness, since neither Helper nor Mechanic were the negligent party.

Therefore, the work order should be admitted as a business record.

3. Mechanic to Dave, "I think your brakes are bad. You'd better get them fixed."

Relevance

Here, Mechanic's statement to Dave is relevant because it tends to prove that Dave knew about his defective brakes. And in California, it would be admitted because it is in dispute whether or not Dave was aware of his bad brakes. Additionally, this is legally relevant because its probative value is very high (it shows that Dave knew his brakes were bad) and its chance for undue prejudice or delay are low.

Lay Opinion

Here, Helper may testify regarding this because this is helpful to the jury and because Helper was present and contemporaneously overheard Mechanic make this comment to Dave.

Hearsay: Effect on Hearer

Here, Dave will argue that this is hearsay not within any exception. However, Polly will counter argue that this is not hearsay at all. Rather, Polly will argue that this is not offered to prove the truth of the matter asserted (that the brakes were in fact bad and that Dave should get them fixed). Rather, this is offered to show the effect on the hearer (Dave). Polly will argue that this is offered to prove that Dave knew (or should have known) that his brakes were defective, and was negligent in driving his car without fixing the problem. Thus, this testimony is not hearsay and should be admitted.

4. Dave to Mechanic, "I'm not surprised. They've felt a little funny lately."

Relevance

This comment is relevant because it tends to show that Dave knew that his brakes were defective and was therefore negligent in driving the car. Additionally, this is logically relevant in California, because it is likely disputed whether or not Dave knew his brakes were defective. Additionally, it is legally relevant because its probative value outweighs any prejudice.

Hearsay

Not for Truth of Matter Asserted

First, Polly will argue that this is not offered for the truth of the matter asserted, but rather to show the declarant's state of mind (that Dave knew that the brakes were defective). Additionally, Polly may want to introduce this later on as impeachment evidence against

Dave if he testifies that he did not have any idea that his brakes were defective.

Offered for Truth of Matter Asserted, but Hearsay Exemption/Exception

Additionally, Polly may try to argue that this is within a hearsay exemption (FRE)/exception (CA) of a) prior inconsistent statement or b) admission by party opponent.

Prior Inconsistent Statement

Here, if Dave testifies that he never knew that his brakes were acting up, Polly may be able to introduce this as a prior inconsistent statement. In California, this would be permitted as a hearsay exception because California does not require that the prior inconsistent statement be made under oath. However, under the FRE, this would not be admitted because it was not made under oath.

Admission by Party Opponent

Here, Polly will try to introduce this as an admission by a party opponent (Dave) that his brakes were defective. As such, it would fall under a hearsay exemption (or exception in California). Here, this is Dave's own admission that he knew that the brakes have been acting oddly, and therefore should be admitted as a hearsay exception.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Additionally, Polly may argue that this is a declaration against interest (against Dave's pecuniary, penal, or social interest (California only)). However, this hearsay exception is only available if the out-of-court declarant is unavailable, and here, Dave is available.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, this may be offered as current state of mind as a hearsay exception.

5. Bystander, "The sports car ran the red light and ran into the truck."

Relevance

Here, this statement is relevant because it shows that Dave was the one that ran the red light and hit Polly. This is likely an issue in dispute, so should also be logically relevant in California. Additionally, this is legally relevant because it has a high probative value that is not outweighed by any undue prejudice.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Present Sense Impression

A present sense impression is one that was made contemporaneously or immediately after an event that describes an event. In California, it is required that the out-of-court declarant be engaged in the event. Here, Bystander made the statement immediately after

the collision and the statement is describing what Bystander saw. However, in California this would not be admissible because the bystander was not engaged in the activity. However, under the FRE, this would be admitted.

Excited Utterance

An excited utterance is one regarding a startling event, relating to the startling event, and made while the out-of-court declarant is still startled. Here, the bystander was discussing a startling event (a car accident), and it was likely made while the bystander was still startled (certainly, it is startling to see a car accident and one would be startled immediately after observing one). Furthermore, the bystander's comments are related to the startling event – the bystander is saying what happened.

Therefore, this statement should be admitted as hearsay within an exception.