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Evidence

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EVIDENCE

by

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DURING the year under review the cases of greatest significance for those who seek to remain abreast of current developments were those dealing with impeachment by prior conviction, presumptions, and hearsay evidence.

I. Impeachment by Prior Conviction

The problem of the admission of prior convictions for impeachment of testimony in subsequent suits was dealt with by the supreme court in *Travelers Ins. Co. v. Landry.*[1] On February 4, 1964, Robert Landry pleaded guilty to charges of theft of postal money orders and the forgery of the payee's endorsements thereon. He was sentenced to confinement for three years and assessed a fine of $100. The sentence was suspended and he was placed on actively supervised probation, but he did pay the fine. About a year later, on the recommendation of his probation officer, the actively supervised probation was terminated.

On September 4, 1968, Landry filed a workmen's compensation suit, alleging that he had injured his back on May 28, 1968, while lifting a spandall onto a barge. Trial was held on March 4, 1969. The testimony on behalf of Landry was his own and that of a medical expert who based his opinion, in part, on Landry's statements to him. Defendant offered proof of the conviction as impeachment of Landry's testimony, but the trial judge refused to admit it. Judgment was rendered on a jury verdict of total and permanent incapacity.[2]

In the court of civil appeals there was no real dispute between the parties over many of the requirements for the admission of evidence of prior convictions for impeachment purposes. It was conceded that the conviction involved moral turpitude, and that it was properly offered during cross-examination of the plaintiff. The gist of the dispute was simply the remoteness *vel non* of the conviction. Landry contended that the trial court's action was not an abuse of discretion "since the conviction was too remote in time to affect the plaintiff's credibility."[3] The court of civil appeals agreed that the question of remoteness was one largely within the discretion of the trial judge, but disagreed on the issue of abuse.

The court cited several cases for the proposition that if the conviction antedates the trial by more than ten years, it is too remote.[4] It also dis-

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[1] 458 S.W.2d 649 (Tex. 1970).

[2] Travelers Ins. Co. v. Landry, 448 S.W.2d 230 (Tex. Civ. App.—Beaumont 1969).

[3] *Id.* at 232.

[4] *Id.*

cussed rule 6-09(b) of the Proposed Federal Rules of Evidence,[5] which generally agrees with the ten-year limitation. After a review of other Texas decisions,[6] which showed that the shortest period for which the evidence was excluded was nine years, it held that the trial judge had abused his discretion, and the case was reversed and remanded for a new trial.

Reversing this decision, the supreme court adopted the standard that "the conviction must have been 'sufficiently recent in time to have some bearing on the present credibility of the witness.' "[7] Disagreeing with defendant's contention that earlier cases had adopted a rigid policy of admissibility for convictions of less than eight to ten years prior to the civil trial, it approved the language in *Dallas County Water Control & Improvement District v. Ingram:*

> From a review of both civil and criminal cases it would appear that civil courts have generally held that such a matter depends upon circumstances presented and that the question should usually be left to the discretion of the trial judge. In exercising his discretion the trial judge has an opportunity to consider and weigh all the facts and circumstances in that particular case. Only for the abuse of discretion is it held that such testimony may call for a reversal.[8]

The court pointed out that there were some cases in which the conviction was so remote as to make the evidence inadmissible as a matter of law. On the other hand, there might be cases in which the conviction was so recent that it would be admissible as a matter of law. But for a case between the two extremes, the matter should be left to the trial court's discretion. The timing of Landry's conviction fell between the extremes, and the trial court having considered all of the circumstances, it should not be reversed.

The court of civil appeals noted that "[c]ounsel have not cited to us a case wherein a conviction of a felony involving moral turpitude so recent in point of time to the trial as here—slightly more than five years—has been excluded. Our independent research has not located such authority."[9] That notation appears to be accurate, but it is suggested that the search was directed toward an incorrect goal. Of sixteen cases examined, only one found that the trial judge had abused his discretion in refusing to admit evidence of the prior conviction,[10] and although the dates cannot be determined precisely, it is clear that the conviction was less than two

[5] Committee on Rules and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 296 (1969) [hereinafter cited as Proposed Federal Rules of Evidence].

[6] 448 S.W.2d at 233-34.

[7] Landry v. Travelers Ins. Co., 458 S.W.2d 649 (Tex. 1970).

[8] 395 S.W.2d 834, 840 (Tex. Civ. App.—Dallas 1956). *See also* Dallas County Water Control & Improvement Dist. v. Ingram, 425 S.W.2d 366 (Tex. Civ. App.—Dallas 1968).

[9] 448 S.W.2d at 233.

[10] Kennedy v. International-Great N. Ry., 1 S.W.2d 581 (Tex. Comm'n App. 1928), *judgment adopted.* The conviction was June 19, 1925, and the decision in the court of appeals was dated May 19, 1927. International-Great N. Ry. v. Kennedy, 296 S.W. 330 (Tex. Civ. App.—Texarkana 1927), *aff'd*, 1 S.W.2d 581 (Tex. Comm'n App. 1928), *judgment adopted.* Although the date of the civil trial is not given, it is obvious that less than 2 years was involved. In addition, it is shown that the conviction took place between the date of the occurrence giving rise to the civil trial and the trial itself.

years old at the time of the trial. On the other hand, four cases have held that there was abuse of discretion in admitting the evidence.[11] Nine cases held that there was no abuse of discretion in excluding the evidence,[12] while only two held that there was no abuse in admitting the evidence.[13]

This review indicates that the Texas courts have apparently followed the dictum of *Travelers Ins. Co. v. Dunn*, that "[s]ome courts even go farther and say that in a case where there is any doubt of the propriety in admitting the evidence of the conviction, the trial court should exclude it."[14] In other words, the discretion of the trial court should be weighted toward exclusion when remoteness is in question.

Proposed Federal Evidence Rule 6-09(b), discussed by the court of civil appeals, provides: "(b) Time Limit. Evidence of a conviction under this rule is inadmissible if a period of more than 10 years has elapsed since the date of the release of the witness from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date."[15] This rule raises two questions with respect to the Texas practice. First, the meaning of the flat ten-year limitation itself, and second, the dates from which the time is to be calculated.

It is suggested that the ten-year limitation would not be inconsistent with the result reached by the supreme court in *Landry*. As the court recognized, there may be cases in which the conviction is too remote as a matter of law.[16] The ten-year limitation of the federal rule could be taken as the outside limit of admissibility, that is, any conviction older than ten years is too remote as a matter of law. The federal rule does not say that a nine-year-old conviction would be admissible, it only considers directly those older than ten. It is not probable that the proposed rule would be construed to remove the discretion of the judge in other cases.

The federal rule measures the ten-year period from the completion of sentence, probation, parole, etc. At least some of the Texas criminal cases seem to use this approach also.[17] However, the civil cases seem to assume

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[11] Dallas County Water Control & Improvement Dist. v. Ingram, 395 S.W.2d 834 (Tex. Civ. App.—Dallas 1965), *error ref. n.r.e.* (28 years); Bunch v. Texas Employers' Ins. Ass'n, 209 S.W.2d 657 (Tex. Civ. App.—Texarkana 1948) (14 years); Miller v. Brand, 32 S.W.2d 874 (Tex. Civ. App.—San Antonio 1930) (30 years); Bernard's Inc. v. Austin, 300 S.W. 256 (Tex. Civ. App.—Dallas 1927), *error ref.* (14 years).

[12] Missouri Pac. R.R. v. Miller, 426 S.W.2d 569 (Tex. Civ. App.—San Antonio 1968) (9 years); Travelers Ins. Co. v. Buffington, 400 S.W.2d 800 (Tex. Civ. App.—Eastland 1966), *error ref. n.r.e.* (7 years plus no moral turpitude); Travelers Ins. Co. v. Dunn, 383 S.W.2d 197 (Tex. Civ. App.—El Paso 1964), *error ref. n.r.e.* (9 years); United Benefit Fire Ins. Co. v. Stock, 344 S.W.2d 941 (Tex. Civ. App.—Houston 1961) (9-10 years); Texas Employers' Ins. Ass'n v. Yother, 306 S.W.2d 730 (Tex. Civ. App.—Fort Worth 1957), *error ref. n.r.e.* (22 years); Transport Ins. Co. v. Cossaboon, 291 S.W.2d 746 (Tex. Civ. App.—El Paso 1956), *error ref. n.r.e.* (15 years); Pool v. Sneed, 173 S.W.2d 768 (Tex. Civ. App.—Amarillo 1943), *error ref. w.o.m.* (20 years); Carr v. DeWitt, 171 S.W.2d 388 (Tex. Civ. App.—Amarillo 1943), *error ref. w.o.m.* (10 years); Texas Motor Coaches v. Palmer, 97 S.W.2d 253 (Tex. Civ. App.—El Paso 1936), *rev'd on other grounds, this holding approved*, 132 Tex. 77, 121 S.W.2d 323 (1938) (19 years).

[13] Adams v. State Bd. of Ins., 319 S.W.2d 750 (Tex. Civ. App.—Houston 1958), *error ref. n.r.e.* (8 years); York v. Glenn, 242 S.W.2d 653 (Tex. Civ. App.—Fort Worth 1951) (8 years).

[14] 383 S.W.2d 197, 198 (Tex. Civ. App.—El Paso 1964), *error ref. n.r.e.*

[15] Proposed Federal Rules of Evidence 6-09(b), 46 F.R.D. 161, 296 (1969).

[16] 458 S.W.2d at 651. The court cites cases involving times of 28, 22, 14 and 14 years.

[17] *See, e.g.*, Couch v. State, 158 Tex. Crim. 292, 255 S.W.2d 223 (1953); Toms v. State, 150 Tex. Crim. 264, 200 S.W.2d 174 (1947).

that the time is measured from the date of conviction;[18] the only case to directly meet the question, *Bernard's Inc. v. Austin*,[19] so held. There the conviction was fourteen years old at the time of the civil trial. The appellee contended that time in the penitentiary should not be taken into account, because it would be unreasonable to assume that reformation had come about during the period of incarceration. The court disagreed, citing reformation as one of the purposes of punishment, saying "[w]e think the logic of the situation rather impels one to the conclusion that the infliction of punishment carries with it the presumption—disputable, it is true—that through the punishment inflicted on one for the commission of a crime that reformation during the period that punishment was being inflicted was set in motion by and continued throughout the punishment as result thereof."[20] The use of the federal measuring device in the instant case might well call for a different result, since the expiration of the suspended sentence occurred only two years before the civil trial. However, the logic of the quotation above seems valid, and the implicit acceptance of the date of conviction as the start of the time period by later cases lends weight to the conclusion that the Texas civil approach is contrary to that proposed by the federal rule.

It thus appears that the state of the law in Texas civil cases is this: If the conviction antedates the civil trial by ten years or more, it is likely to be held inadmissible as a matter of law. If only a two- or three-year period is involved, and there is no evidence of rehabilitation or reformation, it is likely to be admissible as a matter of law. However, the cases falling between the two extremes will be dependent on the exercise of discretion by the trial judge. His decision on admissibility will not be disturbed on appeal in the absence of severe abuse, and is less likely to be disturbed if the decision is to exclude, rather than to admit.

II. PRESUMPTIONS

The availability of the doctrine of *res ipsa loquitur* to the plaintiff in a plea of privilege hearing was the subject of *Southwestern Transfer Co. v. Slay*.[21] B. H. Slay was proceeding south in his automobile along a four-lane divided highway in San Jacinto County. As he was nearing a railroad underpass, a truck belonging to Southwestern Transfer Company was nearing the same underpass from the opposite direction. Suddenly, there appeared to be an explosion, and a fork-lift machine being transported upon the truck was thrown to the road behind the truck, bounced, hit the esplanade, bounced again, and landed in Slay's lane. In attempting to avoid the machine, Slay swerved to his left across the esplanade, and was struck by a piece of flying debris, either from the truck or the machine. In his suit in San Jacinto County against the Transfer Company, Slay

[18] *See* Adams v. State Bd. of Ins., 319 S.W.2d 750 (Tex. Civ. App.—Houston 1958), *error ref. n.r.e.* The claim by the party witness was that the time interval should start from the commission of the offense rather than from the date of conviction.

[19] 300 S.W. 256 (Tex. Civ. App.—Dallas 1927), *error ref.*

[20] *Id.* at 259.

[21] 455 S.W.2d 352 (Tex. Civ. App.—Beaumont 1970).

gave notice of intent to rely upon the doctrine of *res ipsa loquitur*.[22] The transfer company filed a plea of privilege to be sued in El Paso County. The controverting affidavit relied, *inter alia*, on subdivision 23 of article 1995.[23]

Through pre-trial procedures it was established that the driver of the truck was acting within the scope of his employment at the time of the event, and that the defendant was a corporation. The trial of the plea of privilege was to the court and only the plaintiff gave evidence. He established a case for the application of the doctrine of *res ipsa loquitur*, and the trial court overruled the plea of privilege. The court of civil appeals reversed, holding that the doctrine of *res ipsa loquitur* was not available to a plaintiff on a plea of privilege hearing.

The basis of decision seems to be that *res ipsa* only establishes a prima facie right to recover, and that more than that is necessary to establish venue. The court quotes from *Admiral Motor Hotel of Texas, Inc. v. Community Inns of America, Inc.*: "It is not sufficient under this Exception [No. 23] to show merely a prima facie case or merely to introduce enough evidence to raise an issue—the plaintiff must establish by a preponderence of the evidence that he has a 'cause of action' as alleged."[24] The court goes on to say that the filing of the plea of privilege created a prima facie right to transfer until the plaintiff overcame it by pleading and proof. By use of *res ipsa*, the plaintiff only proved a prima facie cause of action, and "in the case of an equal doubt between the right to the transfer and the exception, [the court must] resolve the doubt in favor of the transfer."[25]

Judge Stephenson, dissenting, pointed out that the position that the plaintiff must establish more than a prima facie cause of action is applicable only when the defendant has rebutted the plaintiff's evidence. He found that *Compton v. Elliott*,[26] relied on by many later cases for the proposition advanced by the majority, was decided in the context of a contention by plaintiff that evidence offered by defendant should be disregarded. The supreme court denied that contention, stating that the "plaintiff must prove the facts in the usual way, which means that the defendant is to be permitted by his evidence to dispute and contradict plaintiff's evidence . . . . On the hearing of the plea of privilege, the issue made is tried in the ordinary way and the truth as to the fact or facts in

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[22] There seemed to be no real dispute about the applicability of the doctrine under the facts of the case.

[23] TEX. REV. CIV. STAT. ANN. art. 1995, § 23 (1964).

[24] 389 S.W.2d 694, 698 (Tex. Civ. App.—Tyler 1965).

[25] 455 S.W.2d at 356. At this point, the court refers by way of footnote to the principle enunciated in 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 54 (1956) [hereinafter cited as MCCORMICK & RAY] that when two presumptions conflict, the one which rests upon the stronger and weightier reasons should prevail. It is suggested that this principle applies to the conflict of two evidentiary presumptions and has no effect on situations such as the one posed by the case at bar. The prima facie right to transfer is simply a rule for placing the burden of producing evidence in the trial on plea of privilege.

[26] 126 Tex. 232, 88 S.W.2d 91 (1935).

issue is ascertained by the introduction and weighing of evidence offered by both parties."[27]

If this approach is followed, then when the plaintiff establishes a prima facie case, and the defendant does not choose to rebut that case, the fact-finder is justified in finding the facts to be as the plaintiff has shown. Since there was no rebuttal in the case at bar, the trial judge was justified in finding as a fact that the defendant breached a duty to plaintiff in the county of suit, giving rise to a cause of action.

The court recognized that if the plaintiff had established facts giving rise to a "true presumption," and those facts were not rebutted by defendant, then the trial court would have been compelled to overrule the plea of privilege.[28] *Res ipsa*, it is recognized, is not a "true presumption."[29] However, it can be categorized as what Dean McCormick called a "permissive presumption,"[30] *i.e.*, the plaintiff has established facts which are sufficient to permit, but not to compel, a finding of the later fact, negligence. The court seems to recognize that if the same facts were proved by plaintiff at the trial on the merits and were not rebutted in any manner by defendant, then the fact-finder would be justified in finding negligence by the defendant.[31] Since this is so, it seems incongruous to say that this proof, "in the usual way," is insufficient to support the same fact finding at the plea of privilege hearing. At its worst aspect from the plaintiff's viewpoint, the doctrine of *res ipsa loquitur* represents a judicial policy decision that certain facts will be considered circumstantial evidence sufficient to reach the fact-finder on the issue of negligence.[32] Suppose the plaintiff had offered circumstantial evidence of some specific act of negligence on the part of the defendant, which was not rebutted. The court would certainly not say in such a situation that evidence of the plaintiff's right to venue in the county of suit was not sufficient to go to the fact-finder just because the plaintiff had not established the proposition as a matter of law.

It may well be that the appellate court might decide that the evidence is insufficient to support the finding of fact of negligence, but here the court did not do this. It decided, in effect, that there was no evidence of negligence.[33] The fact of the event itself does not give rise to an inference of negligence, it is true, but when the facts necessary for the doctrine of *res ipsa loquitur* are shown, more than the fact of the event is present.

The court pointed out that this was a case of first impression, and the presence of the dissent gave jurisdiction to the supreme court to determine

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[27] *Id.* at 240-41, 88 S.W.2d at 94-96.

[28] 455 S.W.2d at 357-58. The example given is that of the "branded vehicle."

[29] *Id.*

[30] C. McCORMICK, EVIDENCE §§ 308-09 (1954) [hereinafter cited as McCORMICK]; McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291, 297 (1927). *See also* McCORMICK & RAY § 51.

[31] *See* Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 761, 774 (1948).

[32] *See* Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 257, 258 (1948).

[33] The case was remanded for a new trial only because the evidence was not fully developed.

the question involved.[34] It is unfortunate that this course was not pursued, since the dissenting position seems much more reasonable.[35]

III. HEARSAY

The admissibility of a physician's testimony concerning information related to him during an examination of the decedent was dealt with in *Travelers Ins. Co. v. Smith.*[36] Elton Smith was a pumper for Gulf Oil Corporation. His duties included lifting various containers of chemicals and occasionally moving pumps. On March 27th, Smith left home for work around 6:45 a.m., was seen at a cafe having coffee at 6:50 a.m., left the cafe at 7:10 a.m. in his pickup containing supplies, and was seen at 9:00 a.m. going into a Gulf lease where there were wells to be treated. He was next seen by his wife at 10:00 a.m., appearing nervous, upset, and in pain. He went immediately to a Doctor Howard's office where he told the doctor that "he had been working on the job and was manipulating some equipment, and had this sudden onset of severe pains and he came home and directly to the doctor's office."[37] The doctor examined him and administered a narcotic and a tranquilizing drug. An electrocardiogram showed no apparent acute heart damage, but his blood pressure was high. Later that afternoon he died of an acute myocardial infarction. The doctor testified that in his opinion the damage to the heart occurred just prior to Smith's coming into the office on March 27th; that the stress or strain of moving the equipment brought it about; that if Smith had lifted a can of chemical it could have caused the attack. Smith had been treated for several years for complaints of high blood pressure and questionable heart trouble, but until March 27th there had never been found any definite evidence of any specific disease process within the heart.

The defendant objected to the relation by the doctor of the history given him by Smith on the grounds of hearsay, but the objection was overruled. On appeal the court of civil appeals first considered the exception to the hearsay rule based on statements made to a treating physician. The court held that the history was admissible for the non-hearsay purpose of explaining the basis of the doctor's opinion, but was not admissible to prove the truth of the history.[38] Since the non-hearsay use gave no help to the plaintiff, the court then considered another possible exception, that of excited utterances or "res gestae."

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[34] 455 S.W.2d at 358 n.9.

[35] There is no record of an application for writ of error being filed, and in fact, it appears that no motion for rehearing in the court of civil appeals was sought. The Amarillo court of appeals reached a different result in Bearden v. Lyntegar Elec. Coop., Inc., 454 S.W.2d 885 (Tex. Civ. App.—Amarillo 1970). That case involved an application of TEX. REV. CIV. STAT. ANN. art. 1995, § 9a (1964), and the court squarely held that res ipsa loquitur was available in order to establish venue. The text indicates this author's preference for the result reached by the Amarillo court.

[36] 448 S.W.2d 541 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*

[37] *Id.* at 542-43.

[38] *Id.* at 543-44. *See also* MCCORMICK & RAY §§ 842-43. The evidence would have been admissible to a certain extent under Proposed Federal Rules of Evidence 8-03(b)(4), 46 F.R.D. 161, 345-46 (1969). *See Advisory Committee's Note*, 46 F.R.D. 161, 355 (1969). The only exclusion would have been "on the job."

Based on the precedent of *Truck Insurance Exchange v. Michling*[39] and *Hartford Accident & Indemnity Co. v. Hale*,[40] the court held the evidence inadmissible since, as in *Michling*, there was no "independent proof that the deceased suffered any injury at approximately the time and place alleged, and the only evidence of the occurrence is the hearsay statement, the proof is attempting to lift itself by its own bootstraps."[41]

Judge Preslar dissented on two grounds. First, the basic policy question involving the lone worker, since the defendant is in a much better position if death ensues than if only an injury is present. In the latter situation, the testimony of the worker would be sufficient to satisfy the evidence requirements lacking in the present case. Second, even accepting the rationale of the Texas precedents, there was independent evidence of the occurrence under the facts of the case. It is submitted that the dissent is correct on one or both of the points, and they will be discussed in reverse order.

It is the position of the dissent that the startling occurrence was the heart attack. There was evidence other than his own out-of-court statement that he suffered a heart attack. Since that is true, and this occurrence was "startling enough to produce his nervous excitement" then the utterance was "spontaneous and unreflecting when he told the doctor 'he had come in from the job at which place he was working, and was manipulating some equipment and had this sudden onset of severe pains.' "[42]

In *Michling* the evidence that the employee had been injured on the job consisted solely of the testimony of his wife that when he came home " 'he sort of stumbled and caught himself and walked on up to the house and he said his head was hurting him terribly; he was batting his eyes and was very pale.' . . . [He said] 'he had hit his head on the bulldozer, the iron bar across the seat. It slipped off the hill and he hit his head.' . . . '[H]is head hurt so bad that he couldn't do anything else but had to put up the bulldozer and come home.' "[43] There was no visible mark of any injury upon his head. The medical testimony showed that Michling died of a cerebral hemorrhage resulting from a congenital weakness in one of the blood vessels in the brain, and that it could have been brought on by a cough, a strain, a blow to the head or may have occurred spontaneously. The distinction sought to be established is that in *Michling* there was no other evidence at all of the injury. In *Smith* there was testimony that the plaintiff had just suffered a heart attack. The problem with the distinction at this stage is that in *Michling* there was evidence that he suffered a cerebral hemorrhage, and it could be inferred that he was suffering from it at the time he made the statement.

The evidence in *Hale* consisted of testimony by a foreman that Hale arrived at the company's office in work clothes, said he had been hurt, and appeared in pain. The foreman had him remove his pants to see how

[39] 364 S.W.2d 172 (Tex. 1963).
[40] 400 S.W.2d 310 (Tex. 1966).
[41] 448 S.W.2d at 544.
[42] *Id.* at 547 (dissent).
[43] Truck Ins. Exch. v. Michling, 364 S.W.2d 172, 173 (Tex. 1963).

badly he was injured, and the examination revealed injuries to Hale's groin, buttocks and lower ribs. Later examination by a doctor revealed a "pressing" or "crushing" type of injury from the lower rib cage to the crest of the pelvis on the left side, with various other bruises, plus a broken rib. Hale stated a few minutes after entering the office that he was injured "at well No. 6 on the F. G. Perez lease; that the clutch was thrown on the pumping unit and he set the brake and then pulled the plug and found water in the crankcase; that to keep oil and water from getting on his clothes, he put the plug back in and stepped back in the line of the counterbalancing weights and they came down and mashed him against the A-frame."[44] The problem with the distinction is even greater in *Hale*. There was evidence of a crushing injury, just as there was evidence of heart attack in *Smith*.

Although the attempted distinction is difficult to maintain, it is submitted that the dissent is correct in saying that the injury itself should be considered as the exciting event. In *Hale* the court stated its rationale for the *Michling* decision as "to be admissible as res gestae the statements must be shown to have been a spontaneous reaction to an exciting event, and the statements themselves cannot be used to prove the exciting event."[45] Although it is true that the descriptive portion of the statement would not be admissible under the exception concerning statements to physicians for the purpose of treatment, it is true for a special reason. The theory behind that exception is that a patient usually tells his doctor the truth about those things the doctor needs to know in order to treat him properly.[46] The portion of the statement that the patient was manipulating equipment and suffered chest pains would be admissible, but the addition of "on the job" would not, since the doctor would not need to know where the equipment was being manipulated. The basis for the excited utterance exception is entirely different. The court in *Michling* quotes from *Wigmore* to show the theory:

> This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.[47]

If the statement "I had chest pains while manipulating equipment" would be admissible for the above reasons, it boggles the mind to say that

[44] Hartford Accident & Indem. Co. v. Hale, 400 S.W.2d 310, 312 (Tex. 1966).
[45] *Id.* at 311.
[46] McCORMICK & RAY §§ 842-43. *See also* note 2 *supra*.
[47] 6 J. WIGMORE, EVIDENCE § 1747 (3d ed. 1940).

the addition of "on the job" would convert the statement into one "brought fully to bear by reasoned reflection."

In both *Michling* and *Hale* there was evidence casting doubt on the truth of the hearsay statements. In *Michling* it appeared that there was no iron bar on the bulldozer seat, the time records of the employer showed that Michling did not work on the day of his injury, and the vehicle records indicated that none of the bulldozers operated by the company were in operation on that date. In *Hale* a later examination disclosed that the pumping unit was not running, the brake was not set, and that the counter-balances were all the way down. There were no traces of clothing, blood or skin. There were shoe prints at the unit, but not where Hale said he had been. In *Smith* there was no evidence to dispute the plaintiff's statements in any manner.

The evidence disputing the occurrence of the event *on the job* would surely be relevant to the issue of where the injury occurred, and might be so overwhelming as to require a reversal of a jury decision to the contrary, but should not have a bearing on the admissibility of the hearsay statement. However, if the various proven injuries were not the exciting events, that is, if the exciting events were "*injury on the job*," then the second distinction (disputing evidence) would have some bearing on admissibility. In such a case, the judge would have the preliminary fact question to decide, "did an exciting event occur?"

Rule 1-04(a) of the Proposed Federal Rules of Evidence provides that in making the determination of preliminary questions of the admissibility of evidence, the judge "is not bound by the rules of evidence except claims of privilege."[48] Therefore, the judge could consider the hearsay statement as to the occurrence of the event in deciding whether the event did occur. The evidence to the contrary would be relevant, and in fact, might lead the judge to the conclusion that no such event had occurred. Since there is no contrary evidence in *Smith* that decision would not be compelled, and since "it is generally held that in passing upon the admissibility of a statement offered as a part of the res gestae the trial court has considerable discretion," it would be reasonable to uphold his decision to admit.[49]

The other basis of the dissent is applicable also if the exciting event involved in this type of case is *injury on the job* rather than just *injury*, and the judge may not consider hearsay on the preliminary question of admissibility. The dissent stated that there is

> a basic weakness of the law in this area—where a man works alone and there are no witnesses to the cause of death. A phase of this law is wrong, because under it survivors of a man who works alone could have a perfect case, and yet recovery be denied because there were no witnesses. For all practical purposes under such circumstances, the man who works alone is denied death benefits and the employer is wasting his money in premium payments therefor. If the employee suffers an injury short of death, be it a broken finger or a totally disabling heart attack, he can tell about it and recover benefits. . . . Does it not come down to the trustworthiness of his account of

[48] Proposed Federal Rules of Evidence 1-04(a), 46 F.R.D. 161, 186 (1969).
[49] 448 S.W.2d at 547 (dissent).

his injuries? Is he more to be believed when seeking money benefits or when, as here, he is seeking to stay alive? Compensation benefits are for injuries received in the course of employment; the search here is for the truth of whether there was injury on the job. We have been told that there was such an injury by the man who suffered it. Under the circumstances by which the story comes to us, is it worthy of belief? Standing uncontradicted, should it be relied upon in a court of law as proof of the fact of injury?[50]

Proposed federal evidence rule 8-03(b)(2) provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,"[51] is not excluded by reason of the hearsay rule. The advisory committee's note for this section states: "Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred."[52] The note then cites several cases in which the evidence consists of the condition of the declarant,[53] and goes on to say: "Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as 'increasing,' . . . and as the 'prevailing practice . . . .' "[54] As stated earlier,[55] proposed federal rule 1-04(a) provides that the judge is not limited by the hearsay rule in passing upon preliminary questions of fact, so there would be no problem at all about the admissibility of the evidence in either *Michling*, *Hale*, or *Smith* under the federal practice.

It is suggested that one of the several possible approaches should be adopted in order to admit testimony such as that offered in *Smith*. One, the existence of the event should be considered as a preliminary question of fact, and the judge should not be limited as to his consideration of hearsay evidence of that existence. Two, the injury should be considered as the event, so that if the other requirements of the exception are met, the lone worker would not be penalized. Three, a special rule should be adopted applicable only in death cases in which there are no eyewitnesses, that special rule being merely a relaxation of the principle established in *Michling* for excited utterances generally.[56]

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[50] *Id.* at 545-46 (dissent).

[51] Proposed Federal Rules of Evidence 8-03(b)(2), 46 F.R.D. 161, 345 (1969).

[52] *Id.* at 352.

[53] Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397 (1869); Lampe v. United States, 229 F.2d 43 (D.C. Cir. 1956); Wetherbee v. Safety Cas. Co., 219 F.2d 274 (5th Cir. 1955); Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 1019 (1954). *See also* Jacobs v. Village of Buhl, 199 Minn. 572, 273 N.W. 245 (1937); Thompson v. Conemaugh Iron Works, 114 Pa. Super. 247, 175 A. 45 (1934).

[54] 46 F.R.D. 161, 353 (1969), citing McCORMICK 272; Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 246 (1961); and giving as illustrations Armour & Co. v. Industrial Comm'n, 78 Colo. 569, 243 P. 546 (1926); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926).

[55] *See* note 49 *supra*, and accompanying text.

[56] Adoption of either of the first two proposals would, as a practical matter, simply be the adoption of the third, since if the worker is alive, or if there were witnesses, the problem is an academic one.