

1  **Problem 2-G**

- 2 car sideswipe wreck, question is which car failed to maintain proper lane. Driver vehicle 2 said at scene: "Whoever screws up her insurance pays. I'm sure my insurance will cover it."
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- At trial, counsel for driver of vehicle 1 offers statement. Counsel for driver of vehicle 2 objects on basis of FRE 411.
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- FRE 411: Insurance inadmissible to prove negligence or other wrongful conduct. However, rule does not require the exclusion of evidence of insurance when offered for another purpose, such as:
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 - proof of agency, ownership, or control,
 - or bias or prejudice of a witness.
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- On what basis admissible, and what remedies if any to opponent if admitted?
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2  **Problem 2-H**

- Rainey's wife, a Navy flight instructor, was killed in a plane crash while she was training a new pilot. Question was whether the crash was caused by product defect or pilot error. Commander Morgan performed investigation into cause (routine), and concluded pilot error in the report. Surviving husband Rainey wrote a letter to Morgan, in the file, explaining why Rainey believed it was a product problem. At trial against aircraft manufacturer, Rainey was not called to testify in plaintiff's case. Defense called him as an adverse witness and asked him about two statements in his letter which supported theory of pilot error. Plaintiff's counsel then attempted to ask Rainey about the conclusions he came to and presented in the letter. Objection made as to opinion, sustained.
- Was it error to exclude the remainder of Rainey's statements in letter?
- Any other problems with Rainey's testimony.
- Case is actually more well known for another point -- admissibility of Morgan's opinions in report – which will be revisited later.
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3  **Problem 2-I**

- Glaner, who runs a wrecker yard, charged with stealing a truck. Theory is that he steals trucks, breaks down for parts, and sells. Det. Medina finds at the lot a frame and glove box from the stolen truck. Medina also finds a backpack and 3 library books, reported in another stolen truck 3 years earlier, a theft investigated by another detective, Ogden. Ogden wants to testify about that theft and the fact that when investigating it he was told by someone that a Toyota Tundra truck was seen going into the lot around the same time a Toyota Tundra truck had been reported stolen.
- How does judge rule on admissibility? Recall Rules 104(a) and 104(b).
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4  **FRE 104(a). Preliminary Rulings**

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by

the rules of evidence except those with respect to privileges.

5 **FRE 104(b). Conditional Relevance**

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

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- Also keep in mind Rules 404(a): Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion... (with 3 exceptions covered later); and 404(b):
- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

7 **Truck problem, cont.**

- What is the condition that must be proved to make the evidence of the backpack and books admissible?
- Who decides whether that condition was met, the judge or the jury?
- In determining whether the condition was met, what standard of proof is – or should be -- applied?

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- In a Texas *criminal case*, proof of the extraneous acts beyond a reasonable doubt is required: *See, Fisher v. State*, 268 S.W.3d 552 (Tex.Crim.App. 2008) (“standard of admissibility of rule 404(b) evidence ... is proof beyond a reasonable doubt requiring trial court to “determine, as a predicate to admissibility of such evidence in the first place, whether a rational jury *could* conclude, to a level of confidence beyond a reasonable doubt, that the accused committed the extraneous misconduct”).

9 **People v. Collins – Mathematical Probability Proof**

- Prosecutor gets mathematician to testify to odds of another couple fitting same description in same area committing crime. Problems?
- Would convictions w/o probability evidence have held?
- Why is DNA and paternity testing not subject to same standards?

10 **Problem 2-J – The Exploding Tire Case**

- Worker injured by defective tire.
- Attempts to prove manufacturer of tire by fact that 80% of tires in shop made by defendant.
- What of enterprise liability?
- What of probabilistic evidence of causation? Will revisit under expert testimony.

11 **FRE 403**

- Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence.

12 **FRE 403 – Advisory Committee Note**

- The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.

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13 **Rule 403 Balancing Test**

- When conducting a Rule 403 balancing test, the trial court should analyze:
- How probative is the evidence;
- The potential the evidence would have to impress the jury in some irrational, but nevertheless indelible way;
- The time the proponent will need to develop the evidence;
- The force of the proponent's need for the evidence to prove a fact of consequence, considering:

14 **Rule 403 Balancing Test**

- The availability of other evidence;
- The strength of other evidence; and
- Whether a fact of consequence is related to an issue that is in dispute.
- Important note: Rule 403 rulings virtually never reversed on appeal. Abuse of discretion standard.

15 **Rule 403 Balancing Test**

- It is important to keep in mind that this is not an equal balancing test. The probable prejudice must substantially outweigh the probative value for the judge to have the discretion to exclude.

16 **FRE 802**

- 1 • Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

17 **Hearsay**

- 1 • Rule 801. (a) Definitions. Statement.
 - A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
 - "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

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18 **What is hearsay?**

- A "statement"
- Not current testimony
- Offered to prove the "truth of the matter asserted" (TOMA)
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19 **Protections, absent hearsay rule**

- Testimony is under oath, with penalties of perjury attaching
- Factfinder can assess witness demeanor, eye contact, etc.

- Cross-examination

20 **Importance of Witness Observation by Jury:**

- Factfinder is unable to judge of the declarant:
 - Perceptivity
 - Qualifications
 - Sincerity
 - Expression
 - Bias, etc.

21 ***Perry v. Leeke, 488 US 272 (1989)***

The age-old tool for ferreting out truth in the trial process is the right to cross-examination. “For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law.” ... Cf. 5 J. Wigmore, *Evidence* § 1367 (calling cross-examination “the greatest legal engine ever invented for the discovery of truth”); 4 J. Weinstein, *Evidence* § 800[01] (“cross examination... sheds light on the witness’ perception, memory and narration, and can expose inconsistencies, incompleteness, and inaccuracies in his testimony.”).

22 **Negatives of hearsay rule**

- Excludes good evidence
- Increases costs. How?
- Applied to other important decisions (e.g., voting)?
- Makes some issues unprovable
- Often opted out in contractual ADRs
- Creates confusion as to missing testimony and odd prove-ups to meet exceptions
- Is it needed or can jury sort out value of hearsay on its own?

23 **Problem 3-A – Bank Robbery Case**

- Statement 1: Witness proposes to testify that another witness said: “Higgins is the one who did it.”
- He heard another witness say: “Higgins left here with money bags.”
- He heard final witness say: “Higgins deserves to go to jail for this.”

24 **Non-verbal assertive conduct**

- FRE 801(a) defines a statement as including non-verbal conduct intended by the declarant as an assertion.
- Examples?
 - Teacher asks question and student raises hand. Is that intended as an assertion by the student? If so, is it hearsay for someone to testify he saw that occur?
 - What if the student only raised his hand to swat at a fly?

25 **Non-assertive conduct as hearsay.**

- Prob. 3-B. Two cars at intersection, Maserati pulls out into lane because he could not see the light or traffic to his right and Kenworth truck to his right started to pull out.
- Is the act of the Kenworth driver hearsay?
- Is it non-hearsay for any other reason?
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26 **Wright v. doe d. Tatum**

- Will contest, question is mental competence of testator. Beneficiary wants to introduce 3

letters to testator from deceased parties, showing that they thought testator was mentally competent.

- Hearsay under British law?
- Why might this not be hearsay under Texas law?
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27  **Non-hearsay/operative statements or documents**

- Is a written contract hearsay?
 - Is it an out of court statement?
 - Then why not hearsay?
 - Is it offered to prove the truth of the terms of the contract, e.g., whether Thompson could indeed produce 200 tons of coal?
 - Does the document itself have legal significance, e.g., create status of the parties to it?

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- Is it important to cross-examine the parties as to what they wrote in the contract?
 - No, because they are bound by the words of the contract as written.
 - Can they be examined as to fraud in the inducement, mistake, etc.?
- Does it make any difference if the contract is oral?
- Another way to look at it is that the contract is not a statement about the facts, it is the fact over which suit is brought. Statements about the facts would be those concerning breach, damages, attorneys' fees, etc.
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- *Prob. 3-E.* Lord owns a farm, Cartwright is his tenant farmer.
- Bank forecloses on Cartwright's crop and sells it, including Crib 1. Claim is conversion of Lord's corn by the bank.
- Lord wants to testify that Cartwright told him earlier "This is your corn. This corn in the double crib belongs to you, Mr. Lord."
- Teller wants to testify that at time of sale, Cartwright said: "that corn is Lord's."
- Are Cartwright's comments hearsay? Why or why not?

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- Important to keep in mind that designation is a legally significant event.
 - It creates status as owner
 - It has nothing to do with whether the designor will actually deliver the corn
 - It vests ownership in that corn to the designee when the designation is made
 - Therefore, the statements of the designor are not offered for the TOMA, but rather they are the operative facts of the case; i.e., the facts giving rise to Lord's ownership
 - If Cartwright had said "I am going to designate some corn for you when the crop is in," would that be hearsay? Would it be relevant?

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- Slander case. Is plaintiff's testimony that she heard defendant say "she stole my watch" hearsay?
 - No, because it is operative conduct – not offered for TOMA.
- Lawn mowing case. Witness testifies that he heard defendant say: "I will pay you \$10 to mow my lawn." Is it hearsay?
 - No, because not offered to prove TOMA.
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- Statements that are not hearsay, *i.e.*, Verbal Acts, Operative Conduct, other statements not offered for the Truth of the Matter Asserted [TOMA].
- *Note: These are all different categories. However, all are essentially premised on the concept that the evidence is not offered to prove the truth of the statement itself, but rather as circumstantial evidence of another fact to be proved.*