THE TRUTH ABOUT HEARSAY AND NON-HEARSAY

Thomas P. Franczyk

Mentor-at-Large to the

Assigned Counsel Program

December 2024

INTRODUCTION

Anyone who has been to law school and paid attention in Evidence class can recite the Hearsay Rule that an out-of-court statement offered to prove the truth of the matter asserted therein is inadmissible unless it meets some hearsay exception (*Nucci v Proper*, 95 NY2d 597 [2001]).

"Out-of-court" means the statement was made by a declarant at a time and place other than from the witness stand in the present proceeding (*People v James*, 93 NY2d620 [1999]). So, if a testifying witness states that he approached an accident scene and heard a bystander frantically exclaim that "the blue car ran the red light, hit the pedestrian in the crosswalk and just kept going," that statement would be hearsay if offered to prove the truth of its content.

The proponent of such statement might well argue that it should be admitted as an excited utterance made while the eyewitness' senses were stilled by the excitement of the startling event, thus stifling the opportunity for reflection and possible fabrication (*People v Johnson*, 1 NY3d 302 [2003], citing *People v Brown*, 70 NY2d 513 [1987]).

A similar exception is the present sense impression wherein the declarant describes an occurrence as it is taking place or immediately thereafter. If, before blurting out at the scene what she had observed, the witness called 911 and said, "a car just blew through the light and hit a pedestrian in the crosswalk and took off, call an ambulance," that statement would likely be admissible because its timeliness tends to ensure reliability, assuming there is also some corroborating evidence to support the timing and happening of the event described (*People v Brown*, 80 NY2d 729 [1993]).

If the pedestrian/victim is taken to the hospital and tells the triage nurse, "I was hit by a car as I was at the intersection in the crosswalk," that statement, while not admissible to prove negligence of the driver, could well be admitted as a statement for medical diagnosis and treatment, on the theory that people generally don't lie when talking about matters of their own health and well-being (*Davidson v Cornell*, 132 NY 228 [1892]).

Savvy defense counsel might move to redact the part about the crosswalk (which suggests that the plaintiff was walking in the right place, and thus, was not negligent) since the location of the accident arguably has little bearing on the medical intervention needed to diagnose and treat the plaintiff's injuries.

In a criminal case involving domestic violence or sexual assault, by contrast, statements describing the injury-producing event and identifying the assailant may be admitted on the theory that

treatment involves not only mending broken bones but creating a safety plan which typically requires information about the person whom the victim needs to avoid (*People v Benston*, 15 NY3d 610 [2010], *People v Spicola*, 16 NY3d 441 [2011]).

WHAT MAKES HEARSAY, HEARSAY?

The answer is found not in the content of the statement so much as in the purpose for which it is offered (*People v Steiner*, 30 NY2d 762 [1972]). So, if a statement is offered not for its truth but rather, for example, to explain its effect on the listener, or to show only that the defendant was not part of others' plan to commit a crime, (*People v Becoats*, 17 NY3d 643 [2011]), it may be admitted for that other, non-hearsay purpose.

In the hit-and-run case described above, if a police officer arrives and asks the bystander, "which way did the driver go," and the bystander points in a particular direction and says, "that way," such statement and gesture may not be received to prove the driver's direction of travel but rather, to explain why the officer went in that direction as part of his/her investigation. This non-hearsay purpose is often referred to as "narrative completion" (*People v Vazquez*, 28 AD3d 1100 [4th Dept 2006]).

HEARSAY CAN BE SPOKEN OR UNSPOKEN

As just suggested, hearsay is not limited to spoken words offered to prove what they say. A non-verbal assertion (e.g., pointing in a direction) can be just as assertive as an oral utterance.

For example, while white smoke billowing from the chimney of a country cottage may bespeak bucolic bliss, it affirmatively asserts nothing, compared to white smoke emanating from the Sistine Chapel during a papal interregnum.

THE HEARSAY DECLARANT CAN ALSO BE THE TESTIFYING WITNESS

The problem with hearsay is often thought to reside in the inability to cross examine the declarant. While true, it does not mean that prior statements of a testifying witness do not constitute hearsay if offered for their truth. If the bystander, after testifying about the accident is asked, "what did you tell the officer at the scene, that prior statement would be hearsay, and admitting it would arguably constitute improper bolstering on the theory that a story does not become more credible by mere force of repetition (*People v McClean*, 69 NY2d 426 [1987]).

In contrast, a rape victim's prior statement about being sexually assaulted, if timely made, would be admissible as evidence of a prompt outcry to corroborate the claim that the assault took place. (*People v McDaniel*, 81 NY2d 10 [1993]). The purpose of admitting such testimony is to offset time-worn disbelief of victims who keep such crimes to themselves out of fear or embarrassment. (*People v Rice*, 75 NY2d 929 [1990]).

If a witness' trial testimony is attacked as a recent fabrication, his/her prior consistent statement, if made before there was any motive to fabricate, could be admitted, rebutting such claim (*People v*

Singer, 44 NY2d 269 [1978]). Otherwise, prior consistent statements are deemed to be inadmissible hearsay (*Crawford v Nilan*, 289 NY 444 [1943]).

RIGHT OF CONFRONTATION

In a criminal case, the Confrontation Clause of the 6th Amendment to the US Constitution adds another layer of analysis such that hearsay, even if reliable, may not be admitted if the out-of-court statements is testimonial, offered for its truth, the declarant is not unavailable (e.g., due to death, illness or refusal to testify), and there was no prior opportunity for cross examination (*Crawford v Washington*, 541 US 346 [2004]).

As noted in *Crawford*, hearsay is testimonial if it consists of prior testimony (e.g., at a felony hearing, in the grand jury or at a former trial), or was obtained (usually by law enforcement interrogation) with an eye toward introducing it against the accused in an ensuing trial. However, if the primary purpose of such inquiry is to help the police meet an on-going emergency (e.g., to locate and apprehend the suspect who fled the scene), then there is arguably no confrontation issue (*Davis v Washington*, 547 US 813 [2006], *People v Nieves-Andino*, 9 NY3d 12 [2007]).

The rule also applies to written documents such as autopsy reports, (*People v Ortega*, 40 NY3d 463 [2023]), and other forensic reports pertaining to DNA (*People v Jordan*, 40 NY3d 396 [2023]), and drug and alcohol analysis (*People v Hai Lin*, 28 NY3d 701 [2017]). It does not apply to statements for the purpose of medical diagnosis and treatment (*People v Duhs*, 16 NY3d 405 [2011]).

THE KEY TO ADMISSIBILTY IS RELIABILITY

If evidence is shown to be reliable, (i.e., likely to be true), it should generally be admitted if it is also relevant (i.e., tends to prove or disprove a material fact) and its probative value is not outweighed by its potential to prejudice the other side by creating confusion, unnecessary delay or inviting a decision based on prejudicial considerations (e.g., the defendant's criminal history that shows a propensity toward criminality (*People v Davis*, 43 NY2d 17 [1977]).

In the case of hearsay, the exceptions, whether statements of a party opponent, declarations against interest, dying declarations, statements of pain or other sensations, entries in business records made by declarants under a busy duty to report information timely and accurately, to name but a few, are deemed admissible because they have their own indicia of reliability.

GUIDE TO NEW YORK EVIDENCE

Of course, the proponent of the evidence must lay a proper foundation for its admission for the jury's consideration (*Walmart v Tyrell Industries*, 97 NY2d 650 [2001]). One of the best ways to start building proper foundations (or knocking them down) is to consult the GUIDE TO NEW YORK EVIDENCE (GUIDE) which is accessible at nycourts.gov.

While some evidence rules are codified (e.g., CPLR 4518 and Penal Law Article 60), most evidentiary rules in this state are derived from common law, the key cases from which can be found in the Notes and Commentaries of the Guide.

FINAL THOUGHT

It is worth remembering that virtually all disputed evidentiary issues are addressed to the sound discretion of the trial judge whose rulings one way or the other will not be reversed absent a showing that such exercise of discretion was abused, and the evidence was not otherwise overwhelming.

Waltzing into a courtroom for trial without the rules within easy reach is like walking blindfolded into a mine field. Better to identify the likely objections (most commonly, hearsay and relevance), and arguments beforehand rather than step blindly onto the wrong spot and find your case scattered in a million pieces.