

A plaintiff sued a water park for injuries that she and her son sustained from one of the park's waterslides. The plaintiff alleges that the accident occurred when a water park employee negligently let the plaintiff and her son use a two-person tube on a waterslide that accommodated only single-person tubes. At trial, the plaintiff's first witness testified that, although he did not see the accident, he heard his girlfriend say just before the accident, "I can't believe that employee just waved them through without looking." The water park seeks to cross-examine the witness about a prior incident in which the girlfriend lied on a job application.

Is the water park's proposed cross-examination proper?

- A. No, because it refers to hearsay not within any exception.
- B. No, because the girlfriend is not available to explain or deny the statement.
- C. Yes, as impeachment for a bad act probative of the girlfriend's character for truthfulness.
- D. Yes, as impeachment for prior inconsistency.

Explanation:

Hearsay is an out-of-court statement (eg, girlfriend's comment) offered to prove the truth of the matter asserted therein (eg, that the employee waved the plaintiff through without looking). Hearsay is inadmissible unless an [exclusion or exception](#) applies. One exception is a present sense impression—ie, a statement describing an event or condition made while or immediately after the declarant perceived it (as seen here).*

When a hearsay statement is admitted, the **hearsay declarant** can be impeached as if he/she were a witness **testifying** at trial. One method of [impeaching a witness](#) is by introducing evidence of **specific instances of conduct** (SICs) that are probative of the witness's **character for (un)truthfulness**. Only two types of SICs are admissible for this purpose:

convictions for a felony or [crime of dishonesty](#) and other **bad acts**.

Here, in response to the girlfriend's admitted hearsay statement, the water park seeks to question the witness about a prior incident in which the girlfriend lied on a job application. Since this bad act is indicative of the girlfriend's character for untruthfulness, it can be used to impeach her. Therefore, the water park's proposed cross-examination is proper.

*Another exception is an excited utterance—ie, a statement related to a startling event or condition that was made while the declarant was still under the stress of the excitement caused by the event or condition. This exception does not apply here because the event did not seem to shock or excite the girlfriend.

(Choice A) The job application is not hearsay because it is being offered to impeach the girlfriend—not to prove the truth of the matter asserted in the application.

(Choice B) The water park can cross-examine the witness about the girlfriend's statement on her job application regardless of whether she is available to explain or deny it.

(Choice D) A hearsay declarant can be impeached with an inconsistent statement—ie, a statement, regardless of when it was made, that is inconsistent with the declarant's hearsay statement.** Here, the job application is not an inconsistent statement since it is unrelated to the statement made at the water park.

**In contrast, a prior inconsistent statement would be admissible to impeach a testifying witness only if the witness is available to explain or deny, and be questioned by the opposing party about, that statement.

Educational objective:

When an out-of-court statement is admitted under a hearsay exception, the declarant can be impeached as if the declarant had testified at trial—eg, with a bad act that is probative of the declarant's character for (un)truthfulness.

References

Fed. R. Evid. 806 (attacking hearsay declarant's credibility).

Fed. R. Evid. 608 (attacking character for truthfulness).

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Impeaching hearsay declarant (FRE 806)



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