

A pedestrian died from injuries caused when a driver's car struck him. The pedestrian's executor sued the driver for wrongful death. At trial, the executor calls a nurse to testify that two days after the accident, the pedestrian said to the nurse, "The car that hit me ran the red light." Fifteen minutes thereafter, the pedestrian died. As a foundation for introducing evidence of the pedestrian's statement, the executor offers to the court a doctor's affidavit that the doctor was the intern on duty the day of the pedestrian's death and that several times that day, the pedestrian had said that he knew he was about to die. May the affidavit be properly considered by the court in ruling on the admissibility of the pedestrian's statement?

- A. No, because it is hearsay not within any exception.
- B. No, because it is irrelevant since dying declarations cannot be used except in prosecutions for homicide.
- C. Yes, because the judge may consider hearsay in ruling on preliminary questions.
- D. Yes, because, though hearsay, it is a statement of then-existing state of mind.

Explanation:

Common preliminary questions

(FRE 104)

Evidence	Preliminary questions on admissibility
Expert testimony	Expert's qualifications
Lay witness testimony	Competency
Physical evidence	Chain of custody Legality of search/seizure
Existence of privilege	Foundational facts for application of privilege
Out-of-court statement	Foundational facts for hearsay exclusion or exception
Criminal defendant's confession	Miranda rights given Voluntariness of confession

FRE = Federal Rule of Evidence.

Under Federal Rule of Evidence 104, a **court is *not* bound by evidentiary rules***—except those relating to privilege—in deciding **preliminary questions of fact** relating to the admissibility of evidence. As a result, a court may consider otherwise inadmissible hearsay when determining the existence of a fact necessary to admit the proffered evidence.

For example, the [dying declaration](#) hearsay exception requires the proponent to establish that the declarant made the statement under the belief that death was imminent. The doctor's affidavit provides evidence regarding this fact. Therefore, it can be considered by the court in *ruling* on the admissibility of the pedestrian's statement—regardless of whether the affidavit would be barred by the hearsay rule at trial **(Choice A)**.

With some [exceptions](#), the Federal Rules of Evidence apply to all civil and criminal proceedings before U.S. district courts, U.S. courts of appeal, U.S. bankruptcy courts, the U.S. Court of Federal Claims, and U.S. magistrate judges.

(Choice B) Dying declarations may be admitted in both homicide prosecutions *and* civil cases (as seen here). Therefore, this is not a basis to bar the court from considering the doctor's affidavit.

(Choice D) Out-of-court statements concerning a declarant's [then-existing state of mind](#) (eg, motive, intent, plan) are excepted from hearsay. However, this exception does not apply to later statements of memory, belief, or reflection—eg, the doctor's recital of past events contained in the affidavit.

Educational objective:

A court is not bound by evidentiary rules, except those on privilege, in determining preliminary questions of fact relating to the admissibility of evidence.

References

Fed. R. Evid. 1101 (applicability of federal rules of evidence).

Fed. R. Evid. 104 (preliminary questions).

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