

A pedestrian sued a driver for injuries suffered in a hit-and-run accident.

At trial, the pedestrian called a witness who testified that he saw the accident and that as the car sped off he accurately dictated the license number into the voice recorder app on his cell phone. The witness has stated that he no longer remembers the number.

May the voice recording be played?

- A. No, because it is hearsay not within any exception.
- B. Yes, as a present sense impression and as a recorded recollection.
- C. Yes, as a present sense impression only.
- D. Yes, as a recorded recollection only.

Explanation:

Reasoning for common hearsay exceptions

Exception	Reason for reliability
Present sense impression Excited utterance	No time to fabricate statement
Past recollection recorded	Records made when fresh in person's mind
Then-existing mental/physical condition	Persons can perceive their own mental or physical state
Statement for medical diagnosis/treatment	Self-interest creates motive for truth
Business & public records Documents & statements on property interest Certificates of birth, marriage, baptism	Accuracy verified to preserve legal rights & reputation

Hearsay is an out-of-court statement (eg, the voice recording) offered to prove the truth of the matter asserted therein (eg, that the driver was responsible for the hit-and-run). These statements are **generally inadmissible** because they are considered inherently unreliable. But some out-of-court statements are **sufficiently reliable** to be **excepted** from the hearsay rule.

One hearsay exception applies to **present sense impressions**—ie, statements **describing an event** or condition that were made **while** or immediately after the declarant **perceived it**. These statements are inherently reliable because the declarant did not have time to reflect, distort, or fabricate prior to speaking. Here, the voice recording was made *while* the witness watched the car speed away from the accident. Therefore, the recording is admissible as a present sense impression.

Another exception applies to **recorded recollections**—ie, records that (1) concern a matter that a witness **once knew but cannot recall** at trial, (2) were made or adopted when the matter was **fresh in the witness's mind**, and (3) **accurately** reflect the witness's personal knowledge at that time. Here, the witness could not recall the license number at trial. And since his recording was made while the license number was fresh in his mind and was accurately dictated at that time, it is sufficiently reliable. Therefore, the recording is *also* admissible as a recorded recollection (**Choices A, C & D**).

Educational objective:

The present sense impressions exception applies to statements describing an event or condition that were made while or immediately after the declarant perceived it. The recorded recollections exception applies to records that (1) concern a matter a witness once knew but cannot recall, (2) were made or adopted when the matter was fresh in mind, and (3) accurately reflect the witness's personal knowledge.

References

Fed. R. Evid. 803(1) (hearsay exception – present sense impression).

Fed. R. Evid. 803(5) (hearsay exception – recorded recollection).

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