

In a jurisdiction without a dead man's statute, a man's estate sued the man's neighbor claiming that the neighbor had borrowed from the man \$10,000, which had not been repaid as of the man's death. The man was run over by a truck. At the accident scene, while dying from massive injuries, the man told an officer to "make sure my estate collects the \$10,000 I loaned to [the neighbor]."

Is the officer's testimony about the man's statement admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because it is more unfairly prejudicial than probative.
- C. Yes, as an excited utterance.
- D. Yes, as a statement under belief of impending death.

## Explanation:

Hearsay is an out-of-court statement (eg, statement made at the accident scene) offered to prove the truth of the matter asserted therein (eg, that the neighbor owed the man \$10,000). Because these statements are inherently unreliable, they are only admissible if they fall within an **exclusion** or **exception** to the **rule against hearsay**.

One hearsay exception applies to **excited utterances**—ie, statements relating to an **exciting event or condition** that were made while the declarant was **under the stress** of excitement caused by that event or condition. But here, the man's statement did not relate to the accident (an exciting event), nor was it made under the stress of any such event. Therefore, this exception is inapplicable (**Choice C**).

Another hearsay exception applies to **dying declarations**—ie, statements made under the **belief of impending death** that relate to the **cause or circumstances** of the declarant's impending death. But here, the man's statement concerned his estate—not the cause of the accident (**Choice D**). And since no other hearsay exclusion or exception is raised or applies here, the man's hearsay statement is inadmissible.

**(Choice B)** Evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice—eg, the risk that the jury will decide the case based on pure emotion. Here, the man's statement about the loan is highly probative since it goes to the key issue in dispute. But that probative value is not substantially outweighed by a danger of unfair prejudice, so this is not a basis for excluding the statement.\*

\*Neither the Federal Rules of Evidence nor this jurisdiction has a dead man's statute—ie, a statute that applies in civil cases and bars the use of testimony from an interested party about communications with a dead party against the dead party. But even if this jurisdiction had such a statute, it would not bar the officer's testimony because he is not an interested party.

## Educational objective:

An out-of-court statement may only be offered to prove the truth of the matter asserted therein if it falls within a hearsay exclusion or hearsay exception (eg, excited utterance, dying declaration).

## References

Fed. R. Evid. 803(2) (excited utterances).

Fed. R. Evid. 804(b)(2) (dying declarations).

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## Admissibility of out-of-court statements

