

A college student sued an amusement company for injuries he sustained when the amusement company's roller coaster allegedly malfunctioned so that the student fell out.

At trial, after the student presented his case, the amusement company called a witness who testified that just before the accident he had heard a bystander say to the bystander's companion, "That crazy fool is standing up in the car!" The student has offered the testimony of another witness who would testify that the day after the accident she was with the same bystander, and that in describing the accident, the bystander told her that the car had jerked suddenly and "just threw the guy out of his seat."

How should the court rule with respect to this offered testimony?

- A. Rule it admissible only to impeach the bystander's credibility.
- B. Rule it admissible to impeach the bystander's credibility and to prove the amusement company's negligence.
- C. Rule it inadmissible, because the bystander herself was not called as a witness.
- D. Rule it inadmissible, because the bystander was given no opportunity to deny or explain her apparently inconsistent statement.

Explanation:

Impeaching witness v. hearsay declarant

Method	Witness	Declarant
Character for truthfulness	Specific instance of conduct involving bad act or criminal conviction of felony/crime of dishonesty Reputation or opinion testimony on truthfulness	
Self-interest/bias	Motive to lie or partiality to party	
Specific contradiction	Evidence directly contradicting testimony on material issue	
Inconsistent statement	<i>Prior</i> statement admissible <i>if</i> witness can explain/deny & be questioned by opposing party (or if justice requires)	Admissible <i>regardless</i> of when statement occurred & whether declarant can explain/deny

When a hearsay statement is admitted under (1) *any* [hearsay exception](#) or (2) the [hearsay exclusion](#) for statements made by an opposing party's agent, employee, or coconspirator, the **declarant's credibility** may be **attacked** (and then supported) as though the declarant had testified as a witness. The *same* methods for impeaching a witness can therefore be used against the declarant. But unlike a *witness's* inconsistent statement, a *declarant's inconsistent statement* can be used for impeachment **even if**:

the inconsistent statement **occurred after** the hearsay statement *or* the declarant had **no opportunity to explain or deny** the inconsistent statement (**Choices C & D**).

Here, the bystander's hearsay statement was admitted at trial (likely as an [excited utterance](#)). As a result, the student can attack the bystander's credibility by offering testimony from another witness about the bystander's inconsistent statement that the car jerked and threw the student out of his seat. But this statement cannot be used as substantive evidence—eg, to prove the amusement company's negligence—because there is no indication that the statement falls within an exclusion or exception to the hearsay rule (**Choice B**).

Educational objective:

When a hearsay statement is admitted under any hearsay exception—or the hearsay exclusion for statements made by an opposing party's agent, employee, or coconspirator—the declarant's credibility may be attacked as though the declarant had testified (eg, by introducing the declarant's inconsistent statement).

References

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

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