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EVIDENCE-ADMISSIBILITY OF EXPRESSIONS OF PAIN AND SUFFERING

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EVIDENCE—ADMISSIBILITY OF EXPRESSIONS OF PAIN AND SUFFERING—Notwithstanding medical achievements, the human being has not yet been immunized from physical injury and the pain customarily attending such injury. This fact coupled with the ill-controlled fury of modern life has led to an enormous amount of personal injury litigation. Such litigation, with rare exceptions, presents an evidentiary feature of pain and suffering of the victim. Most often the problem arises where pain and suffering are an element of the damages, although it may likewise be involved in showing the nature or the extent of the physical injury.

While the objective physical condition of the person, and other evidence of the nature of the injuries, may provide an indication of the degree of pain undergone, still the most direct and reliable evidence of the location, nature, and intensity of the pain for litigation purposes as well as for medical diagnosis may come from the verbal expressions and conduct of the victim.¹ Reacting to necessity, the common law courts developed during the 1800's a loose, broad doctrine of admitting descriptive declarations of a person's own contemporary pain or other physical sensation as an exception to the hearsay rule.² It is fundamental that whenever an utterance is used testimonially to prove the truth of the fact asserted it is within the prohibition of the hearsay rule,

¹ MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 136 (1947). See also 64 A.L.R. 567 (1929).

² 6 WIGMORE, EVIDENCE, 3d ed., §1718 (1940); RICHARDSON, EVIDENCE, 5th ed., §334 (1936).

absent an applicable exception. The commonly asserted basic requisites which will justify the contrivance of a hearsay exception are necessity and a probability of trustworthiness created by the circumstances. The necessity is generally described in terms of the impossibility of producing the declarant in court as a witness because of his unavailability. The necessity here is not in this strict sense but rather is in the form of an expediency stemming from the deemed superior trustworthiness of the plaintiff's extrajudicial statements.³ While the testimony of the plaintiff is usually available and might be sufficient, its susceptibility to falsification without any real means of testing it by cross-examination leads to a preference for hearsay statements made under non-litigious circumstances.⁴ Further, the testimony of other persons may be more effective and of relatively greater value than that of the plaintiff. But, as will be seen, there is much confusion regarding the circumstances under which the statement or conduct must occur in order to be admitted as evidence.

I. *As an Exception to the Hearsay Rule*

A. *Kind of fact stated.* Statements of *past* suffering, pain, or symptoms are generally excluded.⁵ It is the usual premise that the trustworthiness is impugned because the statements are simply reflective accounts of past occurrences not evoked by any contemporary malady.⁶ However, Massachusetts and a few other jurisdictions prevent unanimity on this point by making no distinction between statements of past and present suffering and symptoms when made to a physician in the course of consultation for treatment.⁷ As stated by Learned Hand in *Meaney v. United States*,⁸ "If his narrative of present symptoms is to

³ 6 WIGMORE, EVIDENCE, 3d ed., §1714 (1940).

⁴ *Ibid.*

⁵ *Id.*, §1722. For a collection of cases see 67 A.L.R. 22 (1930); 80 A.L.R. 1529 (1932); 130 A.L.R. 982 (1941).

⁶ *Cashin v. New York, New Haven and Hartford Railway Co.*, 185 Mass. 543, 70 N.E. 930 (1904); *People v. Bray*, 42 Cal. App. 465, 183 P. 712 (1919). Cf. *Wilkins v. Missouri Valley*, 121 Iowa 429, 96 N.W. 868 (1903), where a physician was allowed to testify as to *how long* the plaintiff suffered pain. 6 WIGMORE, EVIDENCE, 3d ed., §1722 (1940), indicates that statements as to the duration of an illness are in effect statements of past feelings and symptoms and should on principle be excluded in the same way, but have usually been admitted without an awareness of this consideration.

⁷ See WIGMORE, EVIDENCE, 3d ed., §1722 (1940). An early stage of this modification is obscurely presented in *Barber v. Merriam*, 93 Mass. 322 (1865). See also *Chicago R. I. and P. R. Co. v. Jackson*, 63 Okla. 32, 162 P. 823 (1917); *People v. Wilson*, 25 Cal. (2d) 341, 153 P. (2d) 720 (1944); *Kraettli v. North Coast Transportation Co.*, 166 Wash. 186, 6 P. (2d) 609 (1932). This modification is generally said to extend only to past suffering and symptoms and not to include past external events attending the injury or illness. See 64 A.L.R. 565 (1929).

⁸ (2d Cir. 1940) 112 F. (2d) 538 at 540.

be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment."⁹

B. *To whom must statement be made.* There is considerable conflict as to whether declarations of present malady may be testified to by any witness who heard them or whether such accounts must have been made by the patient in consultation with a physician for the purpose of obtaining treatment. Wigmore considers that the rule followed in most jurisdictions is that assertions of present pain may be testified to by any competent witness.¹⁰ However, New York has established the physician-limitation approach, which is followed in several states. Apparently, the origin of this limitation can be traced to the language of an oft-quoted early Massachusetts case¹¹ that statements to a physician for the purpose of treatment or medical advice are less open to suspicion than ordinary party declarations because they are made "to be acted on in a matter of grave personal concernment. . . ."¹² It has been argued that this loose language was applied in that case only to statements of past suffering.¹³ New York removed this limitation and established the doctrine that *all* declarations of pain and suffering are inadmissible except when made to a physician for the purpose of treatment.¹⁴ Early

⁹ Generally see 13 N.C.L. REV. 228 (1935). See *Chicago and N. W. Railway Co. v. Garwood*, (8th Cir. 1948) 167 F. (2d) 848, where case history pertaining to past suffering excluded when the physician's examination was not for the purpose of treatment.

¹⁰ 6 WIGMORE, EVIDENCE, 3d ed., §1719 (1940). For cases admitting testimony of wife as to complaints of present pain, see *Frangos v. Edmunds*, 179 Ore. 557, 173 P. (2d) 596 (1946); *Sligh v. Newberry Electric Cooperative, Inc.*, 216 S.C. 401, 58 S.E. (2d) 675 (1950); *Jacobson v. Mutual Ben. Health and Accident Assn.*, 70 N.D. 566, 296 N.W. 444 (1941). See also, *Keys v. Cedar Falls*, 107 Iowa 509, 78 N.W. 227 (1899) (admissible regardless of person to whom made); *Smith v. Wilson*, (Mo. App. 1927) 296 S.W. 1036 (statements of present pain made to various persons admitted); *Fishburn v. Burlington and N. W. R. Co.*, 127 Iowa 483, 103 N.W. 481 (1905) (allowed testimony of mother as to child's suffering). See 64 A.L.R. 557, 571 (1929); RICHARDSON, EVIDENCE, 5th ed., §334 (1936); 12 OKLA. B.A.J. 1454 (1941). See *Dewitt v. Johnson*, 170 Okla. 625, 41 P. (2d) 476 (1935), for a succinct statement of approval of the orthodox rule.

¹¹ *Barber v. Merriam*, 93 Mass. 322 (1865).

¹² *Id.* at 325.

¹³ 6 WIGMORE, EVIDENCE, 3d ed., §1719 (1940). Apparently a general limitation to physicians is not recognized today in Massachusetts, but only as regards assertions of past pain. But see *Arabia v. John Hancock Mutual Life Ins. Co.*, 301 Mass. 397, 17 N.E. (2d) 202 (1938).

¹⁴ For a summary of the present day New York law, see RICHARDSON, EVIDENCE, 5th ed., §334 (1936). See also 64 A.L.R. 565 (1929) (cases collected). 6 WIGMORE, EVIDENCE, 3d ed., §1719 (1940), suggests that the development of this limitation rests on an apparent misconstruction of the widely quoted language of *Barber v. Merriam*, 93 Mass. 322

New York decisions followed the general rule,¹⁵ but later decisions changed it after the disqualification of a party as a witness was removed.¹⁶ The theoretical explanation for this change was that such removal destroyed the necessity on which the early decisions were based.¹⁷ Such reasoning is not persuasive and apparently rests on a misunderstanding of the necessity principle. A sounder analysis is that the impracticability of acquiring better evidence from the plaintiff on the stand than his own extra-judicial expressions of pain, and not his unavailability, constitutes the necessity here.¹⁸ Wigmore says, "the New York limitation is inconsistent alike with precedent, with principle, with good sense, and with itself."¹⁹ Other courts, however, have accepted the physician limitation of the modern New York cases, although it is not always clear whether the rule has been expressly adopted.²⁰ In a few jurisdictions the limitation has been expressly repudiated.²¹ Basically, the justification for the general rule lies in the greater trustworthiness engendered by a statement prompted by an existing feeling which can not be shown to exist in any other way. Thus, as a generalization of the approach in all jurisdictions, the most that can be said is that statements of present pain are admissible (as

(1865). For an extreme restriction, see *Williams v. Great Northern Ry. Co.*, 68 Minn. 55, 70 N.W. 860 (1897), where it was said in obiter dictum that descriptive statements of present pain are admissible only when the physician to whom they were made for the purpose of medical treatment is called to give an expert opinion based in part upon them.

¹⁵ *Caldwell v. Murphy*, 11 N.Y. 416 (1854).

¹⁶ See *Hagenlocher v. Coney Island and B. R. Ry. Co.*, 99 N.Y. 136, 1 N.E. 536 (1885), and *Roche v. Brooklyn City and Newton R. Co.*, 105 N.Y. 294, 11 N.E. 630 (1887), which recognize that inarticulate exclamations of pain, such as screams, groans, moans, etc. are admissible without this limitation. Also, simple statements of present pain that are part of the *res gestae* are not subject to this limitation. See *Kennedy v. Rochester City and Brighton R. Co.*, 130 N.Y. 654, 29 N.E. 141 (1891).

¹⁷ However, simple statements of present pain are admitted in New York on the ground of necessity when the declarant is dead, without the physician limitation. See *Tromblee v. North American Accident Insurance Co.*, 173 App. Div. 174, 158 N.Y.S. 1014 (1916), *affd.* 226 N.Y. 615, 123 N.E. 892 (1919) (daughter of deceased allowed to testify that on the morning after the accident he complained of pain in the back of his neck).

¹⁸ 6 WIGMORE, *EVIDENCE*, 3d ed., §1719 (1940), criticizes the New York rule in always admitting inarticulate exclamations as less liable to simulation on the grounds that falsehood can be expressed with equal ease through screams, groans, cries, etc. as with articulate assertions of pain. One objection to such a strict distinction between mere words describing present existing suffering and exclamations is expressed by dissenting opinion in *Williams v. Great Northern Ry. Co.*, 68 Minn. 55 at 65, 66, 70 N.W. 860 (1897), "the expression of suffering may be one-half groans and exclamations and one-half words, or nine-tenths of the former, and one-tenth of the latter, or vice versa."

¹⁹ See note 13 *supra*.

²⁰ *Ibid.* for a collection of cases. See also 36 MICH. L. REV. 142 (1937); 67 A.L.R. 34 (1930); 80 A.L.R. 1530 (1932); 130 A.L.R. 987 (1941).

²¹ See *Dewitt v. Johnson*, 170 Okla. 625, 41 P. (2d) 476 (1935).

independent evidence of the facts stated) as an exception to the hearsay rule when made to a physician for the purpose of treatment.

C. *Other limitations.* Judicial authority decisively asserts that the time of making the statement with reference to bringing the suit does not affect its admissibility,²² thus rejecting application of the *post litem motam* rule. Today, in the personal injury situation, thoughts of legal redress occur to the injured party soon after the event, if not almost immediately. A strict application of the *post litem motam* limitation would result in an almost complete abolition of this class of evidence, including completely unfeigned statements of pain. Wigmore suggests that inasmuch as the fictitious and untrustworthy nature of such evidence is not exactly unknown in personal injury litigation the power to exclude it should be left to the discretion of the trial court, to depend on the circumstances of each case.²³

A corollary of this question is presented where the statements are made to a physician for the purpose of qualifying him to testify. The genuine hearsay use of such statements, both of past and present suffering, is commonly denied because of the unusually strong temptation to feign suffering, or to imagine or exaggerate it,²⁴ but the statements may be admitted otherwise, though made *post litem motam*. The absence of the fact that the patient's treatment may partially depend on his own expressions bars their hearsay use. It is doubtful, or at least uncertain, whether spontaneous, involuntary exclamations will be accorded a different treatment when offered as proof of the fact stated.²⁵

²² For discussion and case references, see ABBOTT ON FACTS, 5th ed., 1185 (1937); 6 WIGMORE, EVIDENCE, 3d ed., §1721 (1940); ROGERS, EXPERT TESTIMONY, 3d ed., §134 (1941); 67 A.L.R. 21 (1930); 64 A.L.R. 568 (1929). To the effect that such statements are not rendered inadmissible when made after commencement of suit, see Indianapolis S.R. Co. v. Tucker, 51 Ind. App. 480, 98 N.E. 431 (1912); Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 71 N.E. 28 (1904) (statement made during treatment, but after action begun, admitted).

²³ 6 WIGMORE, EVIDENCE, 3d ed., §1721 (1940).

²⁴ See Nashville, C. and St. L. Ry. Co. v. York, (6th Cir. 1942) 127 F. (2d) 606 at 611 (testimony of physician who had examined plaintiff primarily for the purpose of testifying excluded); Chicago and N. W. Ry. Co. v. Garwood, (8th Cir. 1948) 167 F. (2d) 848 at 858 (history of case as it pertained to past suffering excluded as doctor did not examine patient for the purpose of effecting a cure). See also Willoughby v. Zylstra, 5 Cal. App. (2d) 297, 42 P. (2d) 685 (1935); Southeastern Greyhound Lines v. Webb, 313 Ky. 71, 230 S.W. (2d) 99 (1950); Slack v. Yellow Taxi Corp., 260 App. Div. 1046, 24 N.Y.S. (2d) 490 (1940). For a collection of cases see ABBOTT ON FACTS, 5th ed., 1187 (1937); ROGERS, EXPERT TESTIMONY, 3d ed., 311 (1941); 67 A.L.R. 37 (1930); 130 A.L.R. 978 (1941).

²⁵ For a review of conflicting cases see ABBOTT ON FACTS, 5th ed., 1189 (1937). To the effect that non-vocal indications of pain, such as flinching, twitching, wincing, and writhing made in the course of an examination to qualify the physician are inadmissible, see Comstock v. Township of Georgetown, 137 Mich. 541, 100 N.W. 788 (1904); Norris v. Detroit

Early decisions in a few states indicate that statements made to qualify the testifying physician will be admitted as substantive evidence of the facts stated despite the hearsay rule.²⁶ The law in these jurisdictions is apparently unsettled today; whether the early decisions will be followed is speculative. An added complication arises when it is not clear whether the plaintiff's statements were made for the purpose of aiding the physician to diagnose the case for purpose of treatment or to qualify him to testify. The best test of admissibility in this situation is simply whether the party went to the physician primarily for treatment.²⁷

II. *As Basis for Expert Opinion*²⁸

One of several available non-hearsay uses of extrajudicial statements of pain is to lay a foundation for the testifying physician's opinion,²⁹ rather than to prove the truth of the fact asserted. Although the opinion of an expert is generally not admissible when based on statements made outside the courtroom,³⁰ but rather must be based on facts contained in proper hypothetical questions or on his own personal knowledge of the facts from observation, still a medical expert may base his opinion, in part, on the expressions of the patient. The reason for this deviation is that medical diagnosis is almost always at least partially based on the patient's own statement or conduct reflecting subjective symptoms known only to him; thus the exclusion of such evidence would automatically bar medical opinion based on a personal examination.³¹ In formulating testimonial rules courts are cognizant of this common and reliable practice of medical diagnosis and allow the opin-

United Railway, 185 Mich. 264 at 279, 151 N.W. 747 (1915); *Hintz v. Wagner*, 25 N.D. 110, 140 N.W. 729 (1913). *Contra*: *Jones v. Niagara Junction Ry. Co.*, 63 App. Div. 607, 71 N.Y.S. 647 (1901).

²⁶ *Kent v. Lincoln*, 32 Vt. 591 at 598 (1860) (statements made *post litem motam*, and in order to qualify the testifying physician admitted); *Stone v. Chicago, St. Paul, Minn. and Omaha Ry. Co.*, 88 Wis. 98 at 105, 59 N.W. 457 (1894) (excluded only if made after action commenced). See also *Shenandoah Valley Loan and Trust Co. v. Murray*, 120 Va. 563 at 578, 91 S.E. 740 (1917).

²⁷ *Chicago Rys. Co. v. Kramer*, (7th Cir. 1916) 234 F. 245; *Coghill v. Quincy, O. and K. C. Ry. Co.*, (Mo. App. 1918) 206 S.W. 912.

²⁸ For a discussion of expert testimony based on hearsay of patient and others, see 3 WIGMORE, EVIDENCE, 3d ed., §688 (1940).

²⁹ For a careful explanation of such use see *Lowery v. Jones*, 219 Ala. 201, 121 S. 704 (1929).

³⁰ JONES, EVIDENCE, 3d ed., §376 (1924).

³¹ 3 WIGMORE, EVIDENCE, 3d ed., §688 (1940).

ion to be based, at least in part, on the patient's statements of past³² or present³³ malady, although the hearsay source may affect the weight thereof.³⁴ Non-admission of medical opinion based entirely on the patient's hearsay statements might be proper, but such a case would indeed be rare.³⁵ An instruction to the jury that such statements are admitted only to show the basis of the physician's opinion is of doubtful value,³⁶ consequently, where it is apparent that statements otherwise inadmissible are offered under the pretense of forming a basis for expert opinion and would actually be considered by the jury as proof of the fact stated, they should be excluded.³⁷

There is, however, a significant body of authority that the opinion of a physician is inadmissible when it is based wholly or partly on the injured person's statements of subjective feelings, past or present, made in the course of an examination for the purpose of qualifying such physician as an expert medical witness, rather than for the purpose of obtaining treatment.³⁸ The opposing considerations supporting the admission of such testimony are the need for giving recognition in legal administration to ordinary medical practices and the desire to get at the facts.³⁹ The basis for excluding such opinion testimony is not solely the supposed contamination of the value of the opinion but also the inherent infirmities of expert testimony based on extrajudicial statements. The fact that the expert is selected because of his ability to express a favorable opinion, the possibility of error when the opinion is based on facts not within the personal observation of the expert, and

³² For a lucid opinion see *Johnson v. Bangor Railway and Electric Co.*, 125 Me. 88, 131 A. 1 (1925). *Contra*: *Nagel v. Thompson*, 237 Mo. App. 1061 at 1077, 170 S.W. (2d) 416 (1943), and *Corbeth v. Terminal R. Assn.*, 336 Mo. 972, 82 S.W. (2d) 97 (1935), where it was held that a physician in giving his opinion may testify as to the patient's statements of present symptoms but not past matters. For a collection of cases see 67 A.L.R. 18 (1930); 80 A.L.R. 1528 (1932); 130 A.L.R. 979 (1941).

³³ *Eagle-Pitcher Lead Co. v. Black*, 164 Okla. 67, 22 P. (2d) 907 (1933).

³⁴ 6 WIGMORE, EVIDENCE, 3d ed., §1720 (1940).

³⁵ *Baltimore and Ohio R. Co. v. Mangus*, (6th Cir. 1924) 294 F. 761 at 764 (admitted, unless based in "substantial part upon other than objective symptoms").

³⁶ *Tierney v. Charles Nelson Co.*, 19 Cal. App. (2d) 34, 64 P. (2d) 1150 (1937).

³⁷ 6 WIGMORE, EVIDENCE, 3d ed., §1720 (1940).

³⁸ 3 WIGMORE, EVIDENCE, 3d ed., §688, note, p. 5 (1940), where such a position is said to commit "the exploded fallacy of totally prohibiting weak evidence instead of merely ensuring the exhibition of its weakness." See also, *Reid v. Yellow Cab Company*, 131 Ore. 27, 279 P. 635 (1929); *Henderson v. U.P. R.R. Co.*, 189 Ore. 145, 219 P. (2d) 170 (1950); *Peterson v. The Department of Labor and Industries*, 36 Wash. (2d) 266, 217 P. (2d) 607 (1950); *Nashville, C. and St. L. Ry. Co. v. York*, (6th Cir. 1942) 127 F. (2d) 606; *Hardy-Burlingham Mining Co. v. Baker*, (6th Cir. 1926) 10 F. (2d) 277; *Lee v. Kansas City Southern Ry. Co.*, (D.C. Ark. 1913) 206 F. 765. Cf. *United States v. Roberts*, (10th Cir. 1932) 62 F. (2d) 594.

³⁹ *Willet v. Johnson*, 13 Okla. 563, 76 P. 174 (1904).

the natural tendency of a physician to identify himself with the cause of the injured party and give his opinion with the zeal of an advocate, illustrate the fallibility of such expert opinion.⁴⁰ These inherent dangers are similarly present with respect to medical opinion based on statements made by the patient during the course of an examination for treatment. Indeed, the ultimate distinguishing factor seems to be the trustworthiness of the facts on which the opinion is based. In accord with the expedition of judicial administration and with the purpose to obtain all the facts, it seems that little harm is done to the plaintiff by the exclusion of testimony of such diminutive value.

It is to be observed, apart from the above considerations, that the medical expert is of substantial legal utility in the exposure of malingering in so far as he may express an opinion as to whether the expressions of pain by one he has examined are real or feigned,⁴¹ and to what extent expressions resulting from tests could be controlled by the patient.⁴²

III. *Circumstantial Evidence*

Expressions of pain and suffering are likewise amenable to admission as circumstantial evidence, another non-hearsay use. Because of a judicial disposition not to notice this aspect of such evidence, but to account for it as a hearsay exception, there is a dearth of decisions dealing with statements of pain and suffering as circumstantial evidence. The hearsay prohibition extends only to extrajudicial verbal assertions or conduct intended to be assertive which are offered as direct testimonial evidence of the fact asserted.⁴³ Verbal utterances or conduct properly may be used circumstantially as a basis for inference of a person's physical condition or the existence of pain, rather than as assertions to be believed,⁴⁴ but they are rarely so used.⁴⁵

Articulate assertions of pain, of course, have a dual character. They are statements of a fact; but also the mere fact that the assertion was made and the manner in which it was made are facts having distinct probative force.⁴⁶ As already seen, the admissibility of statements of this character, viewed as hearsay, depends on the special reliability

⁴⁰ JONES, EVIDENCE, 3d ed., §391 (1924).

⁴¹ ROGERS, EXPERT TESTIMONY, 3d ed., §150 (1941); MUNDO, THE EXPERT WITNESS 187 (1938); 28 A.L.R. 362 (1924); 97 A.L.R. 1284 (1935).

⁴² ROGERS, EXPERT TESTIMONY, 3d ed., §150 at p. 111 (1941).

⁴³ 6 WIGMORE, EVIDENCE, 3d ed., §§1715, 1788 (1940).

⁴⁴ MCKELVEY, EVIDENCE §208 (1944).

⁴⁵ 6 WIGMORE, EVIDENCE, 3d ed., §1790 (1940).

⁴⁶ MCKELVEY, EVIDENCE §208 (1944). See also *Williams v. Bus Co.*, 47 Cal. App. 568, 190 P. 1036 (1920).

derived from the circumstances of their utterance. McKelvey⁴⁷ indicates that similar standards are applicable to determine their admissibility as circumstantial evidence, the absence of special truth-provoking circumstances resulting in the exclusion of the evidence. When the assertion thus directly states the fact in issue, there is a sound reason for such a result since it is a practical impossibility to distinguish between proving the simple fact of *making* a statement which indicates the existence of pain or suffering, and proving the facts asserted in the statement. In this connection it is apparent that the statement would possess no legal relevance unless its details were revealed.

However, involuntary conduct or acts, as squirming, twisting, contortions, etc. caused by existing pain, and found not intended to be assertive, should be received as a basis for inferring the fact of pain or the nature of the injury when testified to by an observer. Similarly, inarticulate expressions of pain provoked by existing pain and not intended to be assertive should be governed by the same principles. Because they are non-hearsay, no exception to the hearsay rule need be invoked. While non-assertive conduct and inarticulate expressions are not subject to the same judicial safeguards governing the admissibility of hearsay statements, still their credibility, and thus their probative value as evidence depends primarily on the circumstances.

IV. *Spontaneous Exclamations*

The entanglement of diverse principles which pervades the area of spontaneous exclamations and *res gestae* does not create the usual confusion in respect to their application to expressions of pain. Because of the continuing nature of the physical condition to which the statements relate, an utterance falling within the principle of the spontaneous exclamation hearsay exception will also, generally, be within the rule of the true *res gestae* doctrine as *applied* in this area, although the reverse will not necessarily be true.

The generally stated limitations controlling the admissibility of statements as spontaneous exclamations are simply that some external exciting occasion, which is a material issue, must paralyze the reflective faculties, making the utterance, which must relate to the occurrence, spontaneous and non-reflective.⁴⁸ The superior trustworthiness thus

⁴⁷ MCKELVEY, EVIDENCE 395 (1944).

⁴⁸ 6 WIGMORE, EVIDENCE, 3d ed., §§1747, 1749, 1750 (1940).

created makes it expedient to welcome such reliable testimony.⁴⁹ Spontaneous exclamations typical here are inarticulate utterances, as groans, moans, cries, screams, etc.; these plainly are not within the prohibition of the hearsay rule at all, being simply verbal conduct used as an evidential fact indicating the existence of pain. Spontaneous exclamations may also be articulate utterances of the natural and instinctive variety which normally accompany existing pain, it being clear, however, that the pain itself is not an external occurrence independently established but rather is the very fact in issue sought to be proved by the exclamation. Thus, it would be ludicrous to view the pain as the exciting occurrence guaranteeing reliability. It is observed generally that spontaneous articulate utterances, made while in a nervous state caused by an accident, may properly be admitted as spontaneous exclamations when testified to by any competent witness who heard them.⁵⁰ Such an exclamation is produced by an external shock, it being necessary only that the statement be made prior to the dissipation of the exciting influence.⁵¹ But spontaneous utterances elicited by the tests and proddings of a physician sometime after the accident, which are not material facts in issue, are not properly admissible as spontaneous exclamations.⁵² Also, a physician who examined the injured party for the purpose of testifying may testify to spontaneous exclamations as a foundation for his opinion, but such statements are not admissible to establish their truth.⁵³ A definitive appraisal of judicial authority here encounters some difficulties. Some few courts may accurately distinguish between *res gestae* and spontaneous exclamations and correctly apply the principles thereof.⁵⁴ Other courts may use the phrase *res gestae* indiscriminately.⁵⁵ Still

⁴⁹ *Id.*, §1748 at p. 138.

⁵⁰ See note 56 *infra*.

⁵¹ 6 WIGMORE, EVIDENCE, 3d ed., §1750 (1940).

⁵² *Shaughnessy v. Holt*, 236 Ill. 485, 86 N.E. 256 (1908).

⁵³ ROGERS, EXPERT TESTIMONY, 3d ed., §139 (1941) (cases collected). See also note 25 *supra*.

⁵⁴ See *Aldine Trust Co. v. National Ben. Accident Assn.*, 222 Iowa 20, 268 N.W. 507 (1936), where court admitted statement of pain by deceased two hours after the accident as a spontaneous statement.

⁵⁵ See *Montgomery Street R. Co. v. Shanks*, 139 Ala. 489, 37 S. 166 (1903), where testimony of third person that the plaintiff cried all the afternoon of the accident and complained of pain the next morning was admitted as part of the *res gestae*. See also *Shaughnessy v. Holt*, 236 Ill. 485, 86 N.E. 256 (1908), where the court held that *res gestae* relates only to the accident itself and not to the experiments as to the injured person's physical condition many months after.

other courts simply admit such statements without clearly defining the ground.⁵⁶ Thus, it may be concluded that, while a confusion in legal terminology prevails, a proper result has been achieved in most cases.

The true *res gestae* doctrine likewise has been resorted to in a few cases as a basis for admissibility. An utterance coming within the scope of this doctrine which is offered without reference to the truth of the matter asserted is classified by Wigmore as the verbal part of an act to which the hearsay rule does not apply.⁵⁷ The limitations attending the use of utterances as verbal acts as asserted by Wigmore⁵⁸ and frequently adopted by judicial opinion, are that the words must be precisely contemporaneous with an equivocal act or conduct of the speaker which is a material issue, and must serve to complete the act or conduct and aid in giving it legal significance. With respect to the condition of pain, the time element is shifted from the injury to the pain, and so long as the declarations are spontaneous and refer to existing pain they have on occasion been admitted under the *res gestae* doctrine on the theory that the pain is the *res*.⁵⁹ Some courts prescribe, however, that *res gestae* relates only to the accident itself and not to the subsequent pain of the injured party.⁶⁰ Since *res gestae* is not within the hearsay prohibition, a limitation to statements made to physicians would be improper and has in fact not been imposed by the courts.⁶¹ However, the admission of such statements as part of the *res gestae* appears to be an improper extension of the doctrine. Viewing the internal feeling of pain as

⁵⁶ See *Hall v. American Accident Assn.*, 86 Wis. 518, 57 N.W. 366 (1893), where testimony of third persons of complaints of suffering the same day of the injury admitted to prove the cause of death of the insured. To the same effect, *Great West Mill and Elevator Co. v. Hess*, (Tex. Civ. App. 1926) 281 S.W. 234. See also *Duran v. Yellow Aster Min. and Mill Co.*, 40 Cal. App. 633, 181 P. 395 (1919) (admitted third party's testimony of exclamation, "My God, it hurts," made after the accident); *Hines v. Johnson*, 145 Ark. 592, 224 S.W. 989 (1920) (mother's testimony of child's exclamation, "Oh mamma, Oh mamma," after the accident admitted on the issue of suffering). See generally 64 A.L.R. 571 (1929).

⁵⁷ 6 WIGMORE, EVIDENCE, 3d ed., §1766 (1940).

⁵⁸ *Id.*, §1772.

⁵⁹ *Wheeler v. Tyler Southeastern R. Co.*, 91 Tex. 356, 43 S.W. 876 (1898) (physician's testimony of patient's complaint of roaring head pain admitted as part of *res gestae*); *Georgia R. and E. Co. v. Gilleland*, 133 Ga. 621, 66 S.E. 944 (1909) (complaints of pain and suffering during an examination by a physician held admissible as part of the *res gestae*). See also *Kinney v. Cadillac Motor Car Co.*, 199 Mich. 435, 165 N.W. 651 (1917). See generally MCKELVEY, EVIDENCE 504 (1944); 67 A.L.R. 31 (1930); ROGERS, EXPERT TESTIMONY, 3d ed., §139 (1941).

⁶⁰ *Shaughnessy v. Holt*, 236 Ill. 485, 86 N.E. 256 (1908).

⁶¹ *Montgomery Street R. Co. v. Shanks*, 139 Ala. 489, 37 S. 166 (1903).

equivocal physical conduct which the accompanying words of pain explain, a situation is presented where the very existence of the res on which the doctrine depends is sought to be established by the expressions of the injured party. In addition, it would seem reasonable to conclude that articulate utterances are in fact offered as proof of the facts stated and not as part of the *res gestae*. Although the use of *res gestae* here may be a misapplication of legal phraseology and principle, the admitted statements are receivable anyway under an exception to the hearsay rule, either as spontaneous exclamations or as declarations of present pain.

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