

QUESTION 1

Poe was the singer for the Ravens. During a rehearsal at the Nevermore Theater, Poe walked onto a bridge suspended 35-feet over the stage to get ready for a performance that night. Poe fell through an open trap door and suffered severe injuries to his right hip.

Hasty, a backstage operator for the theater, controlled the trap door. Hasty failed to look at the display monitors showing that the trap door had not been closed because he was playing a video game on his personal computer. Hasty heard Poe yell, "Help, I am hurt!" As he was helping Poe, Hasty said, "I am so sorry you are hurt. These bridge trapdoors are unsafe."

Poe sued the Nevermore Theater for negligence. The theater denies liability, on the grounds that the bridge trapdoor was operated and maintained by Trapper Company, a separate entity. Trapper denies liability alleging that that the actual cause of the accident was human error by Hasty.

Assume the following occurred in a jury trial in a California state court. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections if any, and the likely trial court ruling on the admissibility of the evidence. Assume proper objections were made.

Answer according to California Law. During the trial the following was offered by Poe:

1. Poe testified after he fell through the trap door, he yelled for help and Hasty assisted. Hasty told him that he was sorry, and the trapdoor was unsafe.
2. Then, Poe called the insurance agent for the theater to testify. The insurance agent testified that the theater was insured for all negligence claims that occurred within the theater's premises. Also, there were three other claims about the trapdoor in the last year. Further, the insurance agent testified that he offered Poe \$600,000 to settle the lawsuit. Poe had rejected the offer.
3. Next, Poe presents evidence that after he filed the lawsuit, the Nevermore Theater removed the bridge trapdoor from the premises.
4. Finally, Poe offers evidence of the Nevermore Theater premises insurance liability policy. The policy specifically stated that there was additional insurance coverage for the Trapper Company.

QUESTION 2

Windy sued the Wings Corporation for the wrongful death of her husband, Ace, a pilot. The theory was based on products liability due to the aircraft equipment malfunctioning. Windy alleged that the stabilizer trim jackscrew in the tail of the aircraft was defective and caused the accident. At the federal jury trial, the dispute was whether pilot error or equipment malfunction had caused the crash.

Skyler was an air traffic controller. He saw Ace’s aircraft losing altitude in a severe nose down position with the tail assembly in a locked down position. Ace’s radio transmission yelled, “I’ve got no control! Mayday!” Skyler saw the aircraft crash and burn. There were no survivors.

Chase, an aviation enthusiast, was at the end of the runway taking pictures. He saw Ace’s aircraft in a severe nose down position with the tail assembly in a locked down position. He took pictures. Chase testified at a deposition and authenticated the pictures. He died before trial.

The National Transportation Safety Board (NTSB) conducts civil aviation accident investigations. The NTSB team conducted a six- week long examination of the accident.

Goldie is an NTSB expert metallurgist. She analyzed the stabilizer trim jackscrew. Her vast experience includes how different metals react. Her findings concluded that the jackscrew was constructed from steel, but the acme nut housing was constructed with a softer copper alloy. This resulted in excessive wear to the nut ridges in the housing which had worn down and caused the accident. The softer copper alloy was inferior and should not have been used.

Based on the observations by Skyler and Chase, the pictures, the cockpit voice recordings, Goldie’s analysis and the examination of the wreckage, the NTSB investigatory report findings were that there was a product defect and no pilot error.

Discuss all the evidentiary issues and arguments that would likely arise in each section below, and the likely trial court ruling on the admissibility of the evidence. Assume proper objections were made. Apply the Federal Rules of Evidence.

- 1 At trial, Windy offers Skyler’s testimony about the aircraft’s severe nose down position, the locked down tail, the meaning of the Mayday transmission, and his observations.
- 2 Windy offers a properly authenticated deposition of Chase and the pictures he took.
- 3 Next, Windy offers the testimony of Goldie, the expert metallurgist, and her analysis of the stabilizer trim jackscrew. The parties have stipulated her qualifications.
- 4 Finally, Windy offers the NTSB investigatory report. The defense had been given reasonable notice that Windy was offering the report into evidence.

EVIDENCE EXAM

FALL 2023

Prof. J. O'Keefe

QUESTION 3

At 11:30 p.m. Dr. and Mrs. Oz returned to their home from a night out. As Dr. Oz entered the living room, he was attacked by a knife-wielding man coming from the dining room. Dr. Oz and the stranger struggled for some minutes, but the intruder escaped, leaving the doctor wounded on the floor. Mrs. Oz rushed to help her husband. She noticed that Dr. Oz had been stabbed and was bleeding. They got into their car to go to the hospital, with the doctor behind the steering wheel. Proceeding down the curvy road leading from the Oz house, the doctor noticed a man running along the side of the road. As the car drew even with the man, it swerved sharply to the right, striking the man and coming to rest in a ditch at the side of the road. Dr. Oz was slumped over the wheel unconscious. An ambulance called to the scene took both Dr. Oz and the injured pedestrian, Darren, to the hospital. Dr. Oz died of his knife wounds. Darren recovered from his injuries and was subsequently charged with attempted robbery and the murder of Dr. Oz. Darren's defense is mistaken identity.

Assume the following occurred in the jury trial of Darren. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Apply the Federal Rules of Evidence.

1. At Darren's trial the prosecution offers Mrs. Oz's testimony about the identity of the assailant. She testifies that she was so traumatized by the event, she cannot remember the description of the assailant even after reviewing the police officer's report who took down her statement at the hospital immediately after the incident. The prosecutor seeks to introduce her statement to the officer into evidence.

2. The prosecution offers Dr. Oz's properly authenticated hospital records which indicate Dr. Oz died as a result of his stab wounds. The defense objects to a notation included in the records written by Nurse Nan. The note reads:

Dr. Oz regained consciousness and is in great pain and gasping for air. Dr. Oz said he drove his car into the pedestrian because he thinks that is the man who stabbed him.

3. The prosecutor seeks to introduce evidence that in 2016, Darren was convicted of an unarmed robbery. The 2016 crime involved David breaking into a house at night. When the occupant of the home, an 80-year-old man, confronted Darren, he punched him in the face breaking his nose.

4. In Darren's case in chief, he calls Walter. Walter will testify that he was cellmates with Willie. Willie was in custody on a residential burglary charge that was ultimately dismissed. While they were cell mates, Willie told Walter he (Willie) stabbed the doctor at his house and got away with \$10,000 in gold coins. Willie died before Darren's trial. No other evidence connects Willie to this crime.

EVIDENCE - ANSWER OUTLINE
FALL 2023 EVIDENCE EXAM – SLO & MCL
PROFESSORS O'KEEFE & LIZARDO

QUESTION 1: POE ANSWER OUTLINE

Note: Students may argue for different outcomes so long as the rules and argumentation are solid. Below are the main issues.

4. POE'S TESTIMONY

Logical Relevance- evidence is logically relevant if there is a tendency to make the existence of a disputed fact more or less probable than it would be without the evidence. The testimony is that Hasty assisted Poe after the fall and said comments about the trapdoor being unsafe. This tends to show that Poe did in fact fall within the theater premises and the open trapdoor was part of causation. The acknowledgement by Hasty tends to establish the theater's duty of care to performers and breach on part of the theater by having an unsafe equipment.

The trial court will rule the testimony is logically relevant.

Legal Relevance-the trial court has the discretion under CEC 352 to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that this is a waste of the court's time or amount to juror confusion or misleading the jury.

Therefore, the trial court will rule Poe's testimony is legally relevant.

Hearsay- is an out-of-court statement or assertion offered for the truth of the matter asserted. The real problem with Poe's statements is that he is the declarant, who is repeating what Hasty said. This will be inadmissible absent an exception under the CEC.

Poe's Spontaneous Statement Exception, "Help, I am hurt!"

This exception applies when the declarant (Poe) makes statements under the stress of a startling event. The statement, "Help, I am hurt!" described an event, the fall through a trapdoor which resulted in a broken hip.

Here, Poe fall qualifies as a stressful event for this exception and is admissible.

Contemporaneous Statement Exception- when a declarant (Poe) is describing an event (like a fall) while the declarant (Poe) is experiencing the event. The statement will be admissible.

State of Mind Exception – the declarant (Poe) then existing physical or mental condition is admissible to show that condition (the fall.) Poe's yell for help and that he is hurt when he fell in and could not get up is an emotional response to falling down a trapdoor. The statement will be admissible.

Poe repeating Hasty's two statements, "I am so sorry you are hurt. These bridge trapdoors are unsafe."

Hasty is not on the witness stand. Poe is repeating two statements of what Hasty said to him. This is hearsay and may be admissible unless there is an exception or special relevancy policy exclusion.

Expression of Sympathy

The first statement said by Hasty, "I am sorry you are hurt," may qualify as CEC 1160, expression of sympathy regarding Poe's suffering from the fall. CEC recognizes that a declarant potentially at fault in an accident may show remorse without it being held against them. This is based on special relevancy principles and the goal of public policy. However, a statement of fault may be a different situation. See below.

Hearsay, see rule above.

Admission by a Party Exception; Authorized Admission

It may be argued that Hasty's statement, "These bridge trapdoors are unsafe," is a statement of fault which is attributed to the theater since Hasty is an employee. The argument may be more of an authorized admission. The theater may argue that Hasty was not an authorized person and did not speak on behalf of the theater.

It may be argued that since Hasty oversaw the backstage area, he was in charge and his statements about the unsafe trapdoor will be admissible. There may be an argument by Trapdoor Company is not liable because it was the sole negligence by Hasty that created the accident. If Hasty had been properly monitoring the trapdoor instead of playing video games, Poe would not have been injured.

2. INSURANCE AGENT'S TESTIMONY

Logical Relevance- defined above. The premise liability coverage tends to show that the theater does have "ownership and control" over all premises, including the bridge trapdoor. Part of the negligence claim includes duty and breach, so the liability coverage tends to negate what the theater argues- that it is Trapdoor Company's responsibility.

The insurance coverage has limited admissibility for "ownership and control, "but not to show for fault.

Legal Relevance- defined above. The court has the discretion to exclude evidence if the insurance coverage demonstrates a danger of unfair prejudice. Special relevance rules may mandate a Limiting Instruction. See below.

Settlement offer of \$600,000- offers to settle are inadmissible to prove liability or the amount of the disputed claim, or the validity of a claim. Any statements made during settlement negotiations are excluded as against public policy.

Here, the insurance agent's settlement offer to Poe is inadmissible to prove fault, damages, or medical expenses.

3. SUBSEQUENT REMEDIAL MEASURES & KNOWLEDGE- Removal of trapdoor

Logical Relevance – defined above. The evidence of the removal of the trapdoor has the tendency to establish that the theater knew of the problem with the bridge trapdoor since there were three prior claims. The decision to remove the trapdoor after Poe's lawsuit filing may be viewed as the theater being at fault. However, special relevance rules may exclude the evidence. See below.

Legal Relevance- defined above. The trial court has discretion to weigh the probative value of the other claims against the unfair prejudice to the theater.

Here, there is a great likelihood that the jury may weigh the three other claims as the sole basis of finding the theater liable for negligence. See below for special relevancy.

Special Relevancy- Similar Happenings (other claims)

The fact that the theater had three prior trapdoor claims does not by itself establish fault. However, the fact that there were prior complaints of trapdoor incidents may establish that the theater and Trapper Company had prior knowledge of the danger and the causation and breached the duty of care.

Limiting Instruction- *the court may instruct the jury that the three prior claims be used as putting the theater and Trapper on notice that there was a problem with the trapdoor. However, the claims cannot be used as a basis for fault.*

Subsequent Remedial Measures- *evidence of safety measures, repairs or a removal after an accident is inadmissible to prove negligence. This is due to public policy concerns. The fact that the theater removed the bridge trapdoor after the lawsuit is inadmissible to prove fault.*

Hearsay- defined *above. If the prior claims are offered to prove the truth of the matter, that the theater was negligent, the evidence is hearsay. However, if the proponent is offering the prior claims as a basis that the theater was aware of dangers with the trapdoor and injuries, the court may use a limiting instruction. See below.*

Business Records Hearsay Exception- *if there is a Custodian of Records, who has access to the prior claims of events in the “regular course of business” at the theater and is under a duty to record events at or near the time of the event. As such, the prior claims may be considered business records and admissible.*

Non- Hearsay: Prior Knowledge or Notice

The three prior claims against the theater may be admitted for the non-hearsay purpose of proving the theater’s knowledge.

4. NEVERMORE THEATER POLICY

Logical Relevancy- *see rule above.*

Legal Relevancy- *see rule above.*

Premises Liability – *Evidence of liability insurance is not admissible to prove negligence. However, it is admissible to prove “ownership or control” of the premises.*

*Here, the theater denied liability because the bridge trapdoor area is operated by another entity, Trapper Company. However, the insurance policy provides that **all premises** are covered against negligence claims and Trapper Company is listed. Since the theater is disputing the coverage for the bridge trapdoor, the policy is logically relevant because it established that Trapdoor is included.*

Limiting Instruction- The trial court will instruct the jury that they may consider the insurance coverage for the “ownership and control” issue, but not for the theater’s fault.

QUESTION 2: ANSWER OUTLINE (Ace)

PLEASE NOTE: in each section of the four- part answer, both **Logical Relevancy and Legal Relevancy** are issues to be discussed in full by the student. Below is a summary of the main issues. Some other hearsay exceptions were included but may be minor issued.

1. SKYLER’S TESTIMONY

LOGICAL RELEVANCE- defined under FRE 401 as having any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

Here, Skyler’s personal observations are based on of the aircraft’s nose down with the tail assembly in a locked position tend to establish an equipment malfunction. Further, as an air traffic controller, Skyler would be able to recognize an aircraft in distress. He would be familiar with the Mayday distress signal and the emergency procedures. Not only is he a percipient witness but hears the distress call by Ace.

LEGAL RELEVANCE- to be legally relevant, under FRE 402, the court must balance the probative value of the evidence must be weighed by undue prejudice, waste of time or jury confusion.

HEARSAY:

Hearsay- out of court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless there is an exception or exemption.

STATE OF MIND -declarant’s (Ace’s) then existing state of mind or emotion. Yells for mayday and emergency assistance may be argued.

ADMISSION EXEMPTION: “I’ve got no control! Mayday! Mayday!”

Under FRE, admissions are considered exemptions. Since there is a debate on whether the accident was due to pilot error or malfunctioning equipment, Ace’s statement be argued by the defense as Ace being at fault.

However, Windy will argue for the admission of her husband’s radio transmission for distress using the “Mayday” established her husband had no control and was plunging to his death due to malfunctioning equipment.

EXCITED UTTERANCE - under the FRE, the statement must be made while the declarant is under the stress of the startling event and be trustworthy. The May Day statement that Skyler heard Ace yell may qualify since a nosedive is a frightening experience.

Some students may include Present Sense Impression as an exception.

2. CHASE'S TRANSCRIPT TESTIMONY AND PICTURES

RELEVANCY DISCUSSION- both logical and legal relevancy

HEARSAY- *defined above*

FORMER TESTIMONY HEARSAY EXCEPTION

Chase did testify in a deposition where there was an opportunity to cross-examine. Depositions are given under oath. This is the same action for wrongful death based on product liability. He is not available due to death. The court is likely to admit the deposition. The declarant, Chase is now dead, so under the FRE, he is deemed unavailable. So long it is a certified copy.

PICTURES

Student should note there were authenticated by Chase at the deposition, so should be admissible here. Ok to discuss "writing" – but that is really a Spring topic.

3. GOLDIE'S TESTIMONY

RELEVANCY DISCUSSION

Logical Relevancy- *defined above.*

Goldie's expert testimony tends to establish there was an inferior metal being used that caused the accident. This testimony assists the trier of fact in the causation element and nullifies pilot error.

Note: *This was intended to be more of a discussion on her findings that the copper alloy was inferior. Stipulation- since the parties stipulated to her expert qualifications, this is not an issue.*

Findings of Fact as opposed to opinion.

Hearsay issues

4. NTSB INVESTIGATORY REPORT

RELEVANCY DISCUSSION

FRE RESIDUAL EXCEPTION – CATCH -ALL

Because of the damage to the aircraft and the lack of any survivors, the NTSB factual findings may be considered as the cause of the accident. The facts state that Windy gave the defense reasonable notice of her intention to introduce the report.

The requirements are: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than

any other evidence that the proponent can obtain through reasonable efforts; (4) admitting it will be in the interests of justice and reasonable notice must be given to the adverse party.

Portions of the NTSB investigatory report may be admissible if trustworthy. If the report conclusions are based on a factual finding from an extensive review of all the documents, it is more likely admissible if the court takes a broad view on this exception.

(Note: The “notice” placed in the question should alert the student that this is asking for the catch-all/residual exception. This exception was used in Beech Aircraft v Rainey. Students may discuss hearsay official records, public records, or business records. However, for business records, the “regular course of business” should be discussed.)

QUESTION 3

O’KEEFE

Dr. & Mrs. OZ

At 11:30 p.m. Dr. and Mrs. Oz returned to their home from a night out. As Dr. Oz entered the living room, he was attacked by a knife-wielding man coming from the dining room. Dr. Oz and the stranger struggled for some minutes, but the intruder escaped, leaving the doctor wounded on the floor. Mrs. Oz rushed to help her husband. She noticed that Dr. Oz had been stabbed and was bleeding. They got into their car to go to the hospital, with the doctor behind the steering wheel. Proceeding down the curvy road leading from the Oz house, the doctor noticed a man running along the side of the road. As the car drew even with the man, it swerved sharply to the right, striking the man and coming to rest in a ditch at the side of the road. Dr. Oz was slumped over the wheel unconscious. An ambulance called to the scene took both Dr. Oz and the injured pedestrian, Darren, to the hospital. Dr. Oz died of his knife wounds. Darren recovered from his injuries and was subsequently charged with attempted robbery and the murder of Dr. Oz. Darren’s defense is mistaken identity.

Assume the following occurred in the jury trial of Darren. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any, and the likely trial court ruling on the admissibility of the evidence. Apply the Federal Rules of Evidence.

- 1. At Darren's trial the prosecution offers Mrs. Oz’s testimony about the identity of the assailant. She testifies that she was so traumatized by the event, she cannot remember the description of the assailant even after reviewing the police officer’s report who took down her statement at the*

hospital immediately after the incident. The prosecutor seeks to introduce her statement to the officer into evidence.

Relevance – *The statement would assist in identifying Dr. Oz’s assailant.*

Hearsay – *out of court statement offered for the truth of the matter asserted. Here, the prosecutor is seeking to introduce Ms. Oz’s out of court statement to the police officer for its truth – the identity of the assailant.*

Past Recollection Recorded

A statement is admissible under the past recollection recorded exception to the hearsay rule if: the witness formally had personal knowledge of the fact or event recorded; the witness subsequently prepared a record of the fact (or the witness who did prepare the record can vouch that when he prepared the record, the record was accurate), the record was recorded while the events were still fresh in the witnesses memory; and at trial the witness cannot completely and accurately recall the facts even after reviewing the document.

Here, Mrs. Oz made a statement to the police officer about her personal knowledge of the incident and the identity of the assailant; a record was subsequently prepared of that fact by the police officer, the record was recorded when the events were fresh in Ms. Oz’s memory and at trial she could not completely and accurately recall the facts even after reviewing the police officer’s report.

Assuming the police officer could verify that he or she accurately transcribed the oral report and Mrs. Oz testifies that she gave an accurate oral report to the officer, this would be admissible. The report can be read into the record but would not be admitted into evidence.

- 2. The prosecution offers Dr. Oz’s properly authenticated hospital records which indicate Dr. Oz died as a result of his stab wounds. The defense objects to a notation included in the records written by Nurse Nan. The note reads:*

Dr. Oz regained consciousness and is in great pain and gasping for air. Dr. Oz said he drove his car into the pedestrian because he thinks that is the man who stabbed him.

Relevance – *Dr. Oz’s statement helps establish that Darren was the perpetrator of the robbery and murder.*

Hearsay – *Out of court statement offered for the truth of the matter asserted.*

Multiple Levels of Hearsay: *The hospital record can be admitted through the business records exception. However, the portions of the record that are attributed to Dr. Oz would need to be redacted unless there is a hearsay exception or exemption that applies.*

Hospital Record: Business Record Exception:

The business record exception will allow the admission of a business record if, 1. The declarant (the ultimate source of the report) had a business duty to report information, 2. The declarant had personal knowledge of the facts or events reported, 3. The record was prepared close in time to the events contained in the report while it was still fresh in the declarant's memory, 4. It was a routine practice of the business to prepare such reports, 5. The report was made in the regular course of business.

The hospital records are admissible hearsay under the business records exception. The record was made as a memorandum or record of the act; the record was made in the regular course of business; it is the regular course of the business to make such a record at the time of the act or within a reasonable time thereafter; the records are self-authenticating if it is accompanied by a certification from the record's custodian or a "qualified person" attesting to the three foundational requirements for business records described above. Nurse Nan has a business duty to the hospital.

Dr. Oz's Statement Contained in the hospital Records:

The Prosecution wants to introduce Dr. Oz's statement to for the truth of the matter asserted - that he believed the pedestrian was his assailant. Dr. Oz's statement would need to be redacted from the hospital records unless a hearsay exception applies.

Dying Declaration (FRE)

For a dying declaration to be admissible, the declarant must be unavailable, the case must be a prosecution for a homicide or a civil case, at the time the declarant made the statement, the declarant must have had a sense of impending death, the statement must relate to the event inducing the declarant's dying behavior and the statement must be factual in nature.

The big issues here are: did the declarant have a sense of impending death and is the statement factual in nature? The students can argue it either way as long as it is well reasoned.

Dr. Oz has died, so he is unavailable. The prosecution is for Dr. Oz's murder. The statement relates to the event inducing the defendant's dying condition – the identity of who stabbed him.

Sense of Impending Death – *fact pattern indicates Dr. Oz was in pain and gasping for air. However, no direct statement that he thought he was dying.*

Factual in Nature – Dr. Oz indicated that he believed that the pedestrian was the person who stabbed him. The word believed can be debated – it was dark, he was suffering from a stab wound. Best analysis is that it would meet this element.

3. The prosecutor seeks to introduce evidence that in 2016, Darren was convicted of an unarmed robbery. The 2016 crime involved David breaking into a house at night. When the occupant of the home, an 80-year-old man, confronted Darren, he punched him in the face breaking his nose.

Relevance – This evidence is being offered as circumstantial evidence of identity.

Prior Bad Acts. The basic rule is that when a person is charged with a crime, extrinsic evidence of his other crimes or misconduct is inadmissible if such evidence is offered by the prosecution solely to establish a criminal disposition. Although evidence that could lead to a conclusion about someone's character is kept out if offered to show action in conformity with that character on a specific occasion, it can be admitted if it is introduced for other purposes. FRE 404(b) states that such prior acts or crimes may be admissible for other purposes (such as to show motive, opportunity, intent, preparation, knowledge, identity absence of mistake or lack of accident) whenever those issues are relevant in either a criminal or a civil case. Upon request by the accused, the prosecution in a criminal case must provide reasonable notice prior to trial (or during trial if pretrial notice is excused for good cause shown) of the general nature of any of this type of evidence the prosecution intends to introduce at trial.

Identity. Here, the non-propensity theory of admissibility is identity. The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The students should argue for or against its admissibility.

403 Evaluation. Because past bad acts evidence is likely to involve a risk of undue prejudice, the trial judge will consider the relationship between its probative value and the risk of undue prejudice. The court will be strongly influenced by the proponent's need for the evidence.

Limiting Instruction. The defense counsel will have a right to a limiting instruction. Under Federal Rule 105, the judge must inform the jury that they may not use the evidence as general character evidence; rather the jury must use the evidence only in deciding the issue of identity.

4. In Darren's case in chief, he calls Walter. Walter will testify that he was cellmates with Willie. Willie was in custody on a residential burglary charge that was ultimately dismissed. While they were cell mates, Willie told Walter he (Willie) stabbed the doctor at his house and got away with \$10,000 in gold coins. Willie died before Darren's trial. No other evidence connects Willie to this crime.

Relevance – Walter’s testimony is relevant because it supports Darren’s mistaken identity defense - that Willie, not Darren, committed the robbery and murder.

Hearsay – out of court statement offered for the truth of the matter asserted.

Statement against Interest

For a statement against interest to be admissible the declarant must be unavailable, the statement must have been against pecuniary, proprietary or penal interest when made. This requires that the declarant subjectively believe that the statement was contrary to his or her interest. Each assertion must be tested to ensure it is disserving and in the case of a statement against penal interest, in a criminal case there must be sufficient corroboration to clearly indicate trustworthiness; the declarant must have personal knowledge of the facts.

Here, the main issue is trustworthiness and corroboration. Walter is deceased at the time of trial, so he is unavailable. The statement that he stabbed the doctor and got away with gold coins is clearly against penal interest and it would be clear to anyone making such a statement that it is contrary to that interest. In a criminal case, to ensure trustworthiness, there needs to be some corroboration.

The students should discuss the trustworthiness/corroboration element. Here, we don’t know what Walter’s relationship is, if any to Darren. If there is no relationship, then that would potentially bolster the credibility of Walter’s statement. The fact pattern indicates that no other evidence connects Willie to this crime.