

San Luis Obispo College of Law

EVIDENCE

Mid Term Examination

FALL 2023

Prof. S. Lizardo

General Instructions:

Answer All Three Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

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.

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.

I. 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.

FALL 2023 EVIDENCE EXAM QUESTION O'KEEFE

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.

05
0

1)

1. Poes testimony through the trap door

1a] POE YELLING FOR HELP

Logical Relevance

Logical relevance is the tendency to prove or disprove the consequence of the matter. Here, Poe will argue that when he yelled out for help and that it proves that he indeed fell through the trap door and immediately asked for help.

This is logically relevant and admissible.

Legal Relevance

The trial court is able to exclude evidence when the probative value substantially outweighs and becomes unfair prejudice, misleads the court, confuses the court or waste the courts time. Here, Poe yelling for help will not confuse the court and will be relevant to the court to discuss.

Hearsay

Hearsay is an out of court statement offered to prove the truth a matter asserted. Here, Poe was out of court because he was the theater when he yelled and his yelling will prove the fact that he fell down the trap door.

Poes statement is hearsay.

Hearsay Exceptions

Spontaneous Statement

A Spontaneous statement is an imminent and stressful statement made by the declarant from a conduct that had just occurred. Here, Poe will argue that he was not expecting to fall 35 feet from the stage through the trap door. The fall was instant and he was suffering from sever injuries, which for anyone is a stressful situation

Poes statement would be admissible in court.

Contemporaneous statement

~~A contemporaneous statement~~

A contemporaneous statement is a statement made by the declarant where he is able to explain or narrate a stressful conduct that just occurred. Here, Poes testified that he fell through trap door and yelled for help. Poe is able to explain that because he fell through the result door lead to him yelling Hasty for Help.

o State of mind #3 exception

The statement would be admissible.

1b) Hasty told him i was sorry.

Logical Relevance

Supra.

Hasty statement that "Im sorry and the trapdoor was unsafe" Is relevant because it proves the fact that he is aware that Poe fell through the door and that he was aware that the trapdoor was unsafe.

His statement is ^{Logically} relevant and admissible.

Legal Relevance

Supra

Hasty's statement will not confuse, or mislead the jury or the court. Hasty's statement is legally relevant to prove of how he saw Poe get injured and that trap door that he controls was unsafe.

His statement is ^{legally} relevant and would be admissible .

Special relevancy

Sympathy Belevance Expression

It is inadmissible when the declarant shows or states sympathy or concern. Here, Hasty says, "I am so sorry that your are hurt." Plaintiff will argue that they do want to bring this statment in because it shows hastys knowledge that the trapdoor is unsafe and that he is admitting fault to what happen to Poe. However, this statement will be inadmissible in court because it shows sympathy and the court will not want to discourage hasty or future persons to admit when they are sorry. *CEC only.*

Hastys statement is inadmissible

Hearsay

Supra

Hearsay exception

Present Impression.

*Under CEC
this is Contemp. Stat*

Here, Plaintiff will argue when Hasty said " These present bridge trapdoors are unsafe, shows that Hasty had personal knowledge that the trap doors were unsafe. Plaintiff will argue that not only knew that they were unsafe but that before Poe walked on stage, Hasty failed to display monitors showing that the door had not been closed.

Hasty second statement of the trapdoor would be admissible.

*— HS stmt. Exemptin:
authorized
admission*

2. Insurance

2a) Insurance Testifying

Logical Relevance.

Supra.

The Insurance agent testifying is logically relevant because it proves that insurance was a made aware that a claim has been made and to prove that someone has been hurt.

Insurance agent is ^{logically} relevant

Legal Relevance

Supra.

The insurance testifying does not substantially outweigh regarding the matter of negligence. There is no confusion or will mislead the jury. It is foreseeable that one will make a claim to an insurance agency when an incident has occurred.

~~Special relevancy~~

Witness Competency

A witness is competent to testify if they have personal knowledge of the matter. Here, the insurance agent is capable of testifying because he was made aware of the claim, he has personal knowledge of the policy and had made negotiations with Plaintiff to settle the matter.

Liability insurance

It is inadmissible for a party to use liability to prove that the party has the ability to pay or not pay. Liability insurance is admissible to prove of true ownership, Here, the plaintiff will argue that the insurance agent only testified that they were covered for all negligent claims. Defendant will argue that the testimony can be interpreted that they have the ability to pay claim.

This policy doctrine is to show fault - which is generally excluded.

Therefore, insurance agent testimony is inadmissible.

Subsequent Remedial Measures

Subsequent Remedial measures are not admissible to show that the person or company had fixed or changed immediate after they were noticed. Here, Plaintiff will argue to admit the insurers statement when he said, they were also three other claims about the trapdoor in the last year. This will show that the theater has been notified and are aware that the trapdoor is a hazard. T

his statement will be admitted to show the theater is negligent of not fixing a prior problem

It is to show similar happening & Knowledge not negligence.

Offer to compromise/settlement

It is inadmissible to bring any testimony of offers to settle or settlement negotiations to prove a party is at fault, Here, the defendant will argue to not all the insurance agent

testimony that he offered to pay Poe an amount of \$600,000 to settle and Poe rejected. Plaintiff will want to bring the statement to show that the theater is at fault. Defendant can also show that Poe is greedy and wanted more money. However, the insurance testimony about offer will not be admitted because been settlement negotiations are inadmissible and are confidential

Hearsay

Supra

NonHearsay

This is not hearsay because of the effective listener

(?) How does this apply?

3. Trapdoor was fixed

Logical Relevance

Supra

It is ^{logically} relevant because it has the tendency to show that the theater was aware and on notice that the trapdoor was dangerous.

Legal relevance

Supra

Plaintiff will argue that this evidence does not substantially outweigh unfair prejudice or misleading the jury and that it only shows that the theater was made aware of the incident. Defense will argue that it can be misleading to the jury because they may see that removing the trap door shows admission of guilt

→ fault (civil case)

The removal of the trapdoor is not relevant.

Subsequent Remedial Measures

Supra.

Plaintiff will argue to bring that the theater shows that they were at fault of poes injuries because they removed the trapped door. They will also argue that they should admit that the removed it because there has been noticed that they trapdoor is dangerous and that there are three claims regarding the trapdoor. Defense will argue that this does not show fault because they removed the trapdoor after the claim.

Due to the past three incidents of the trapdoor, this evidence will be admissible. *because it shows knowledge + similar happenings.*
4. *the 3 prior claims = Mensage Bus. Records Exaptin*

Logical relevance

Supra.

The policy of the additional insurance has the tendency to prove that the theater's connection with Trapper company and the amount that can be paid out.

the policy is relevant

Legal relevance

supra

This policy does not substantially outweigh the probative value of the matter. there is no unfair prejudice.

The policy is legally relevant.

Authentication.

A document must be authenticated prior to being admitted into evidence. The authentication must require that the parties have knowledge of the document and what is written has been reviewed and true.

The policy should be admitted to the court.

This was testing the rule that insurance preclude liability is inadmissible to prove up fault. However - exception: ownership/control. He then denied liability - blamed Tractor Co. Now, policy of add'l coverage can be admitted. Need kinship/direction

END OF EXAM

84

2)

1. Skyler's Testimony - Observations and Mayday transmission

Relevance

Evidence must be both logically and legally relevant to be admissible.

Logical Relevance - Tendency Test

Evidence is logically relevant if it tends to prove or disprove a material fact in dispute.

Here, Windy is offering the evidence of Skyler's testimony in her wrongful death suit. Skyler's observations are legally relevant because they tend to prove or disprove whether or not the plane malfunctioned. Skyler's interpretation of Ace's mayday transmission can also prove or disprove whether or not he died from his own error or if the plane malfunctioned. Because Skyler's testimony tends to prove material facts in dispute, it is logically relevant.

Legal Relevance - Balancing Test

Evidence is legally relevant if its probative value outweighs its prejudicial effect by not wasting the court's time, confusing the issue, or misleading the jury.

Here, Skyler's testimony has a high probative value. Skyler's testimony is not a waste of the court's time, will not confuse the issue or mislead the jury.

Thus, Skyler's testimony is legally relevant.

Relevance Conclusion: Skyler's testimony is logically and legally relevant and is likely to be admissible.

Percipient Witness

A witness can testify to events or acts they witnessed firsthand and have personal knowledge of.

Here, Skyler visually saw Ace's plane losing altitude, in a nose down position with the tail assembly in a nose down position. Skyler made these observations ~~himself~~ and has personal knowledge on what he observed. This testimony is admissible.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted (TOMA). Hearsay is generally inadmissible unless an exception ^{is exception} applies.

Here, Skyler's testimony about Ace's mayday transmission, "I've got no control! Mayday!" is a statement that was made out of court. If Windy is offering Skyler's testimony to prove the TOMA in her wrongful death/ product liability case Ace's statements are hearsay. Skyler's testimony on Ace's mayday transmission are inadmissible because they are out of court statements made to prove the TOMA. Windy must use a hearsay exception for Skyler's testimony to be admissible. (see below)

Hearsay Exception: Dying Declaration

Dying declarations are made by a declarant who is unavailable to testify at trial, at or near the time of the event where they believed death or serious bodily injury was imminent, these declarations describe the nature or circumstances surrounding their injury or death.

Here, Ace is unavailable due to death. Windy is offering Skyler's testimony on Ace's statement, "I've got no control! Mayday!" Ace's statement may be a dying declaration because he believed his death was imminent due to losing control of the plane at a high

ID

Exam Name: Evidence-SLO-F23-SLizardo-R

altitude. Ace's statement describes the circumstances leading to his death, and Ace is no longer available to testify because he is dead.

Skyler's testimony on Ace's mayday transmission is likely to be admissible as a dying declaration.

2. Chase's Deposition and Photos

Relevance

See above definition

Logical relevance

See above definition.

Here, Windy is offering Chase's photos and his deposition testimony for her wrongful death suit. Chase's photos are legally relevant because they tend to prove or disprove whether the aircraft was malfunctioning at the time of the accident. Chase's deposition testimony is logically relevant because it tends to prove or disprove whether or not he took the photos, whether or not he observed the plane malfunctioning and can prove then photos are authentic. Because Chase's photos and deposition can prove or disprove whether the plane malfunctioned, they are logically relevant.

Legal Relevance

See above definition.

Here, Chase's photos have a high probative value. the photos are not a waste of the court's time, confusing the issue or misleading to a jury. Thus, Chase's photos are legally relevant.

Here, Chase's deposition testimony has a high probative value. Chase's deposition testimony is not a waste of the court's time, confusing the issue or misleading to a jury. Thus, Chase's deposition testimony is legally relevant.

Relevance conclusion: Chase's photos and deposition testimony are logically and legally relevant and likely admissible.

Hearsay

See above definition.

Here, Chase's deposition testimony happened outside the wrongful death proceeding and Windy is offering Chase's deposition to prove the TOMA in the wrongful death case. The deposition is hearsay because it is an out of court statement offered for the TOMA and would be inadmissible unless a hearsay exception^{exception} applies.

Hearsay Exception: Prior Testimony

Prior testimony is admissible if the witness made these statements under oath and had an opportunity to be cross examined by the opposing party.

Here, Chase was under oath during his deposition and had a chance to be cross examined by the defense. Actual cross examination is not required, only the opportunity to cross examine is necessary. Chase is unavailable due to death and can no longer be cross examined, but he had the opportunity to be cross examined in the deposition. Thus, Chase's deposition is likely to be admitted under the prior testimony hearsay exception.

Overall conclusion: Chase's deposition and photos are admissible.

3. Goldie's Testimony

Relevance

See above definition.

Logical Relevance

See above definition.

Windy is offering Goldie's (G) testimony in her wrongful death suit. Goldie will testify on her analysis of the defective plane part. Goldie's testimony is legally relevant because it tends to prove or disprove whether or not the plane malfunctioned or whether it was a pilot error that killed Windy's husband Ace. Because G's testimony tends to prove or disprove a material fact in dispute, it is Logically relevant.

Legal Relevance

See above definition.

Here, G's testimony has a high probative value. G's testimony will not waste the court's time, confuse the issue or mislead a jury. Thus, G's testimony is legally relevant.

Relevance conclusion: G's testimony is both logically and legally relevant and likely to be admissible.

Expert Witness

Expert witnesses may testify about their opinions and must be qualified.

Here both parties have stipulated to (agreed) G's qualifications, meaning she is qualified to testify as an expert in this case. G is testifying on her opinions and analysis about the plane's stabilizer. Her testimony is not hearsay because she will be making statements in court about her analysis and observations of the plane stabilizer after the accident. G's

testimony will be admissible as expert testimony because she is a qualified witness who is testifying about her opinions based on experience and observation.

4. NTSB Report

Relevance

See above definition.

Logical Relevance

See above definition.

Windy is offering the NTSB report in her Goldie's testimony is legally relevant because it tends to prove or disprove whether or not the plane malfunctioned or whether it was a pilot error that killed Windy's husband Ace. Because the report tends to prove or disprove a material fact in dispute, it is legally relevant.

Legal Relevance

See above definition.

Here, the NTSB has a high probative value. the report will not waste the court's time, confuse the issue or mislead a jury. Thus, G's testimony is legally relevant.

Relevance conclusion: The NTSB report is both logically and legally relevant and likely to be admissible.

Hearsay

See above definition.

Here, the NTSB report contains written statements made outside of court. Windy is offering the report to prove that the plane malfunction caused the accident and her husband's death. Windy's case is a wrongful death case using negligence theory to establish whether the plane malfunctioned or the pilot, Ace, made an error. The report is being offered to prove the TOMA because it proves that the plane malfunction ultimately caused Ace's death. Defense will argue this is inadmissible hearsay because it is an out of court statement offered to prove the TOMA. The report is inadmissible hearsay unless an exception applies.

Hearsay Exception: Record by a Public Employee/ agency

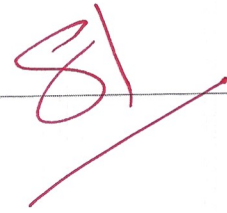
Records made by public employees in the regular course of business are admissible if it is a writing that was made during the regular course of the public agency's duties, an employee or custodian of records (doesn't need to be the author) can testify to its method of preparation and authenticity. The opponent of the evidence must be given notice that the report will be used and the report may be read into evidence, not admitted as a whole.

The NTSB is a public agency that conducts civil aviation accident investigations. Here, the NTSB conducted an investigation of Aces accident as a regular part of their duties, and Windy notified the defense she would use the report. Goldie may be able to testify on the method and mode of preparation for the report. The report is likely to be admitted as a public agency report and the court has the discretion to limit how much of the report can be read in as evidence.

*• This was FRE Residual/
Catch-all HS exception*

END OF EXAM

*overall - very good
did miss some issues*



3)

1. Q1 Mrs. OZ statement/description of assailant in the police report

Relevancy

Only relevant evidence is admissible. Relevant evidence must be logically and legally relevant.

LOGICAL RELEVANCE--A Tendency Test

Evidence is logically relevant if it tends to prove or disprove a material fact at issue or in dispute in the case.

Here, Mrs. Oz statement given to the officer immediately following the stabbing of her husband tends to prove the identity of the persona who killed Dr. Oz because she was at the home during the robbery and stabbing. This is logically relevant.

LEGAL RELEVANCE--A Balancing Test

Relevant evidence is admissible unless some exclusionary rule makes it inadmissible or the court makes a discretionary determination that the probative value is substantially outweighed by pragmatic considerations such as danger of unfair prejudice, undue waste of time, confusing the issues, or misleading the jury.

Here, the description is highly probative on the issue of who stabbed Dr. OZ. Defense will argue that the police report is adversarial and hearsay and thus highly prejudicial to Defendant because the jury may conclude their case based upon Mrs. OZ statement rather than properly weigh all facts.

On balance, the court will conclude the statement is logically and legally relevant.

Defendant will object to the statement as hearsay.

Exception
~~Exclusion~~--Hearsay

Hearsay is an out of court statemnt offered to prove the truth of the matter asserted. It is inadmissible unless an exception or exemption applies.

Here the statement was made outside of court--it was made to an officer at a hospital. It is bneing offered to prove the identity of the assailant. Thus , it is hearsay.

Exception, Past recollection recorded

Past recollection recorded applies when the proponent attempts to refresh the memory of the witness but is unsuccessful. The recollection must have been property authenticated and made while fresh in the witnesses mind, without time to reflect.

Here, the ~~witness~~ ^{declarant} made the statement immediatley following the accident, and there was no time to reflect. However, because of the adversarial nature of police reports, this ~~witness~~ ^{declarant} really need to be available for cross examination. Defense has a good argument that the office may have infkueded the ~~witness's~~ ^{declarant's} statement. Maybe the office saw the Defendant come into the hospital and somehow influenced the witness.

Dr. OZ is a declarant here - not a witness because he died.

CONCLUSION

Prosecution can try to get this in under a past recollection recorded, however, it is more likely a judge will rule inadmissible because the Defendant must be able to cross examine a witness.

• No so- under Past Recollection Recorded - statement may be admissible

2. Hospital Records and Notation

Relevancy

Only relevant evidence is admissible. Relevant evidence must be logically and legally relevant.

LOGICAL RELEVANCE--A Tendency Test

Evidence is logically relevant if it tends to prove or disprove a material fact at issue or in dispute in the case.

Here, the hospital records tend to show the instrumentality of Dr Oz's death and are thus logically relevant.

LEGAL RELEVANCE--A Balancing Test

Relevant evidence is admissible unless some exclusionary rule makes it inadmissible or the court makes a discretionary determination that the probative value is substantially outweighed by pragmatic considerations such as danger of unfair prejudice, undue waste of time, confusing the issues, or misleading the jury.

Here, the hospital records pose no danger to confusing the jury or wasting time about what caused the Dr's death...the stab wounds. The cause of death is highly probative in a murder as it also establishes the type of murder weapon. Defendant will argue the Dr's statement about who killed him is highly prejudicial to Defendant.

On balance, the court is likely to rule the records and statement are logically and legally relevant.

Exception
~~Exclusion~~--Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted.
Hearsay is inadmissible unless an exception applies.

Herer, the hospital records were made outside court and offered to prove cause of death.
The records are hearsay.

Here, the notation inside the records, the doctor's statement to the nurse about who caused his death, was made out of court. It is hearsay.

Exception, Business records

Business records are admissible so long as they are made in the regular course of business, by a person under a duty to maker the record, made a thr time of the occurrence, and presented by a person with personal knowledge or a CUSTODIAN OF THE RECORDS.

Here, the medical records were made by medical staff during the regular course of medical treatment by hospital staff. They satisfy the exception. However, the statement to the nurse is does not fall under this exception as it was not made in the regular course of treatment. However, it may be admittied as a dying declaration.

Dying declaration

A dying declaration is made by a ^{declarant} person who is under fear of impending death about the cause of death, during a homicide charge (FRE). The def^lclarant must be unavaailable.

Here, Dr oz temoprarily regained consciousness and told the nurse who he thought stabbed him. Because he was in great pain and gasping for air we can conclude that he thought he was dying and thus qualifies as dying declaration.

*(refrain from "we")
better: there is a r'ble inference that ...*

CONCLUSION

3. Prior Convictions, Darren

Relevancy

Only relevant evidence is admissible. Relevant evidence must be logically and legally relevant.

LOGICAL RELEVANCE--A Tendency Test

Evidence is logically relevant if it tends to prove or disprove a material fact at issue or in dispute in the case. *Fully discuss*

LEGAL RELEVANCE--A Balancing Test

Relevant evidence is admissible unless some exclusionary rule makes it inadmissible or the court makes a discretionary determination that the probative value is substantially outweighed by pragmatic considerations such as danger of unfair prejudice, undue waste of time, confusing the issues, or misleading the jury.

On balance, — ? *Fully discuss*

Exclusion--Character Evidence

Character evidence is inadmissible to show conduct in conformity on a particular occasion unless it is at issue in a civil case or if Defendant opens the door to his own character in a criminal case in his defense. Character evidence is in the form of reputation, opinion, or similar acts.

Here, Prosecution wants to admit evidence of prior felony convictions. Prosecution may admit prior felony conviction only if it is part of the criminal elements of the case or if used to prove something other than conduct in conformity. Here, prosecution may be able to offer evidence of prior similar acts, the prior felony, to establish the identity of the Defendant.

, Prior Bad Acts

CONCLUSION

The prior felony will be admitted but only to show something other than conduct in conformity, like identity in the prior robbery.

4. Statement against Interests, Criminal Case, Willie

Relevancy

only relevant evidence is admissible. Relevant evidence must be logically and legally relevant.

LOGICAL RELEVANCE--A Tendency Test

Evidence is logically relevant if it tends to prove or disprove a material fact at issue or in dispute in the case.

Here, this tends to prove who did the stabbing and motive. it is logically relevant. *Identity*

LEGAL RELEVANCE--A Balancing Test

Relevant evidence is admissible unless some exclusionary rule makes it inadmissible or the court makes a discretionary determination that the probative value is substantially outweighed by pragmatic considerations such as danger of unfair prejudice, undue waste of time, confusing the issues, or misleading the jury.

Here, this is highly ~~prob~~ative on who committed the stabbing and murder. It is not a confusing statement and will not mislead the jury.

CONCLUSION

The court will conclude it is logically and legally relevant

Excluded
~~Exclusion~~--Hearsay

This is an out of court statement made by Willie and is being offered to prove that Defendant did not commit the murder. It is hearsay.

Statement Against Interest

Pecuniary, penal, or proprietary. Must be unavailable. For criminal cases must have sufficient corroboration.

Here, The declarant is ~~unavail~~able. the statement made was against the declarant's penal interests because it is about the stabbing crime. However, without any evidence