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NOTES

THE PRESENCE OF A MOTIVE TO MISREPRESENT AS JUSTIFICATION FOR EXCLUDING EXCULPATORY DECLARATIONS OF MENTAL CONDITION

"The great characteristic feature of the common law of evidence is the group of rules requiring that testimony be limited to statements in court of witnesses who observed the facts at first hand and are produced for cross-examination."\(^1\) In aggregate we refer to these rules as the hearsay rule of evidence. The hearsay rule excludes "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."\(^2\)

Exclusion of hearsay evidence is justified upon several grounds. Among these are: the declarant was not under oath; there is no opportunity to observe his demeanor; there is danger of inaccuracy in reporting second-hand statements; and, finally, that there is no opportunity to cross-examine the declarant.\(^3\)

These ideals in the law of evidence must, of course, be compromised to meet the needs of reality. Rigid adherence to the hearsay rule would exclude too much evidence of obvious probative worth. The justification for admitting some hearsay evidence is the impossibility or prohibitive inconvenience of obtaining direct testimony. Thus, the death, absence, or insanity of the declarant may necessitate receiving otherwise inadmissible hearsay evidence;\(^4\) and the obvious difficulty of obtaining testimony of all the authors of learned treatises, business records, and affidavits similarly necessitates admission of the material though it is hearsay.\(^5\) The justification for admitting other hearsay evidence is its relatively great reliability. This is particularly true in the case of a party's spontaneous exclamations and declarations of physical or mental condition.\(^6\) Where mental condition is involved there is no danger of a lack of personal knowledge. Another factor which speaks for

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2. Id. § 225, at 460.
3. See id. § 224, at 458-59.
5. See McCormick § 296; Wigmore § 1631.
6. See 6 id. § 1714, at 58.
the veracity of these declarations is that they were made under circumstances indicating probable sincerity.7

The circumstantial guarantee of sincerity is particularly obvious in the case of a party's admissions, since there is no motive to misrepresent when the misrepresentation would only result in needless incrimination.8 Therefore, it is not surprising that under the admissions exception to the hearsay rule the prosecution may introduce any and every relevant out-of-court declaration of an accused person indicating a mental state which attaches guilt to the accused's acts.9

An accused's declarations tending to negative the mental state requisite for guilt are, of course, not receivable as admissions. Consequently, if the defense wishes to use the same type of hearsay evidence which is always available to the prosecution it must qualify this evidence for admission under the mental condition exception to the hearsay rule. Under this exception, whenever a person's mental state is in issue, his statements of a presently existing (1) design or plan, and (2) motive, reason or intent are admissible in evidence to prove that mental state, providing the statements were made under circumstances indicating apparent sincerity.10

However, since the mental condition exception is partly founded on the apparent reliability of the statements involved, the rationale of the exception weakens as the motive to misrepresent increases. Self-interest is one motive to misrepresent; thus an exculpatory statement of mental condition has less circumstantial guarantee of sincerity than an incriminating one. When courts have found that the relatively greater value of a hearsay statement of mental condition is negatived by a counter-motive to misrepresent in order to preserve the declarant's self-interest, they have tended to label that statement as "self-serving" and exclude it. The purpose of this Note is to examine and evaluate the reasoning of courts which exclude these exculpatory declarations of mental condition.

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8. See Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355, 361 (1921). Other generally stated reasons for receiving a party's admissions as an exception to the hearsay rule are that he will not be heard to complain that he was not under oath when he made the statement, and that he will not be heard to complain of lack of opportunity to cross-examine the declarant since he is the declarant and may take the stand to explain or qualify his declaration. Ibid.
9. 6 Wigmore § 1732.
10. Statements of emotion and of opinion or belief are equally admissible but problems concerning such statements occur less frequently in the case law. See McCormick § 268, at 567.
**The So-Called Rule of Exclusion of “Self-Serving Statements”**

The language of many courts suggests that there is a blanket rule of exclusion of all "self-serving statements." The difficulty with such a separate and distinct exclusionary rule is that it would seemingly exclude *any* exculpatory declaration irrespective of the exception to the hearsay rule under which it is sought to be admitted. However, an examination of the authorities shows that an overwhelming majority of all applications of the supposed exclusionary rule involve only declarations of mental condition. Thus, it is obvious that as a practical matter courts do not employ this blanket rule of exclusion of "self-serving statements."2

An apparently sounder reason for excluding exculpatory declarations of mental condition is expressed in *Lebrun v. Boston & M. R. R.*:

"The reason for their rejection, although not heretofore developed in the cases, is not, however, based upon an independent exclusionary principle of evidence, but upon the ground that, being extra-judicial statements, they do not come within the exceptions to the hearsay rule because they evidence a positive counter motive to misrepresent."3

Therefore, when this motive to misrepresent is obvious, the "self-serving" label is applied and the declaration excluded. The exclusion is the result, not of any separate exclusionary rule, but of a failure of the statement to qualify as an exception to the hearsay rule.

The broad language used by some courts to exclude an accused’s exculpatory declaration as "self-serving" has often been used by other courts to justify the exclusion of other exculpatory statements when the motive to deceive in the respective cases is in no way comparable. This blind observance of a rule without reference to the reason behind it has produced a body of case law which excludes *all* exculpatory declarations of an accused as to his mental condition, when the important consideration is not merely whether the declaration is exculpatory, but rather, to what extent its self-

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2. McCormick states that most courts will receive declarations made by a party and offered in his own behalf if these declarations fall within one of the established exceptions to the hearsay rule. However, when the exculpatory declaration deals with the declarant’s mental condition, courts often apply a supposed rule of exclusion of "self-serving statements." See McCormick § 275.

interested nature detracts from its probative worth. To understand properly the real meaning of this case law it is necessary to separate those cases dealing with various types of mental condition and to inquire as to the presence and effect of a motive to deceive in each type of declaration.

**Declarations Contemporaneous with the Act: Offered to Show the Intent With Which the Act Was Done**

Even courts which pay lip service to an apparently all-encompassing rule of exclusion of "self-serving statements" admit these statements if they also qualify for admission under the res gestae exception to the hearsay rule. The reason for admitting such declarations is not that they are less "self-serving" than declarations made prior or subsequent to the act, but rather that they were generated spontaneously by the extrinsic circumstances and are not the result of individual wariness seeking to manufacture favorable evidence. Since this circumstantial guarantee of sincerity effectively counterbalances the self-interested motive to misrepresent, courts have apparently felt no need to apply the "self-serving" label to the accused's contemporaneous declarations of mental condition.

The mental condition exception, unlike the res gestae exception, imposes no requirement that the declaration be contemporaneous with the act in question. But as a result of the rigid exclusion by courts of an accused's prior and subsequent declarations of mental state when offered under the mental condition exception, there is often an attempt to qualify these types of declarations as res gestae. This produces an undesirable result whether it succeeds or fails. If it fails, valuable evidence to show state of mind has been excluded. If, on the other hand, the defense succeeds in classifying a prior or subsequent statement as res gestae, the res gestae exception is thereby tortured out of all reasonable proportion and the real significance of the exception (the requirement of spontaneity) obscured.

If the real basis of reasoning behind the mental condition exception were understood, there would be no need to struggle with

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14. This proposition is usually stated in terms which exclude "self-serving statements" unless they are a part of the res gestae. See e.g., Moss v. State, 208 Ark. 37, 185 S.W.2d 92 (1945); Rabun v. Wynn, 209 Ga. 80, 70 S.E.2d 745, 747 (1952) (dictum).


16. See State v. Young, 119 Mo. 495, 523, 24 S. W. 1038, 1046 (1894), where the court referred to a statement made by the defendant one month before the act as part of the res gestae.
the res gestae concept when dealing with the statements of an accused or of anyone else. If the motive to misrepresent can be negatived or can be shown to be subordinate to other considerations, the declaration of mental condition should be admissible and its occurrence in point of time is irrelevant. Under such an interpretation the defense would not be forced to strain the logic of the classification systems to qualify its evidence under the favored res gestae exception.

**DECLARATIONS PRIOR TO THE ACT:**
—offered to show a design or plan of the accused

Courts seldom apply the "self-serving" label to exculpatory declarations of design or plan. The courts apparently reason that the relative value of this evidence out-weighs the potential harm which might be done if it were received though untrue. The probable absence of motive to falsify this sort of declaration may be seen from the following example: Assume that A is accused of fraud in the filing of his federal income tax return, and that to rebut this accusation he seeks to introduce into evidence a letter which he had written to his accountant before the return was filed and which expressed his desire that the return be a complete and honest one. This declaration is offered to show inferentially that the defendant's plan to file an honest return was carried through. Although this declaration is now offered in the defendant's own interest, its present "self-serving" nature does not relate back to affect the veracity of the declaration at the time it was made. Declarations of design or plan by their very nature are probably not made with a self-interested motive because they are, necessarily, prior in time to the main fact from which the litigation arose and have reference to it primarily to show a proposed mode of conduct which is either consistent or inconsistent with the part the accused is alleged to have played in the happening of that main fact. Under such circumstances, the danger of self-interested falsification seems remote enough to be discounted so far as the question of admissibility is concerned.

A second consideration which might influence courts to admit the posed hypothetical declaration of design is its indirect function in proof. A statement offered for a non-assertive purpose, i.e., to prove something other than the truthfulness of the matters asserted

18. See 6 Wigmore § 1732, at 99.
19. See White v. United States, 216 F.2d 1 (5th Cir. 1954).
20. See 6 Wigmore § 1725.
NOTES

therein, is not hearsay at all according to most legal writers. It is, rather, circumstantial evidence and should be freely admissible without regard to its out-of-court origin, so far as it is relevant.21 The classic example is that the declaration, “I am the Emperor Napoleon,” is admissible when offered to show the declarant’s insanity; but inadmissible as hearsay if offered to prove that the declarant really is the Emperor Napoleon. Similarly, in the tax fraud example, A seeks to show that he had no plan to defraud the government but the statement he offers into evidence is not, “I have no plan to defraud,” but rather the direction, “File a complete and honest return.”

The fact is that most courts do not make this distinction,22 and since this Note is concerned with the treatment courts give to exculpatory statements which they do consider hearsay (rightly or wrongly), no further consideration will be given to the hearsay-circumstantial evidence dichotomy. Nevertheless, it seems probable that the indirectness of such statements serves as one factor in negating the presence of a motive to misrepresent and thus helps justify the admission of exculpatory declarations of design or plan.

—offered to show the motive, reason, or intent with which the act was done—

Prior declarations of motive, reason, or intent are similar to declarations of design or plan to the extent that both occur prior, in point of time, to the main act which has given rise to the litigation. They are distinguishable from declarations of design or plan in that they are not merely evidence indicating that the proposed plan was subsequently consummated, but rather represent a state of mind which is itself in issue as a separate element of the legal situation.23 A homicide, for example, may or may not be murder depending on the intent with which it was done. The prior statement of motive, reason, or intent is connected to the main act which has given rise to the litigation because the statement of intent was made with reference to the main act and in some way qualifies that act.

Thus it can be seen that the distinction between a declaration of design or plan and a declaration of intent is a rather tenuous one resting only on the directness of the statement’s relation to the main act. Notwithstanding this substantial similarity, most courts apply the “self-serving” label and exclude the accused’s prior

21. See McCormick § 228, at 463, § 268, at 567.
22. See id. § 268, at 567.
23. See 6 Wigmore § 1727, at 88.
declarations which tend to show his desire to abide by the law, his affection for the deceased, his justifiable fear of the deceased, or, indeed, any prior declaration of intent with regard to the main act. Apparently the direct reference which these statements make to the main act is enough to convince most courts that the accused made the statement with some sort of anticipatory awareness that he would need evidence to show his good motives with relation to that act.

There exists an unsubstantial but persuasive line of authority which would admit an accused’s prior exculpatory declarations of intent. This is based on a recognition of the great need of the defense to secure the admission of these declarations since in most criminal cases the accused’s state of mind is all-important in determining guilt and there often is no way to prove a mental state which negatives guilt except by the accused’s own declarations as to that mental state. These courts usually simply avoid mentioning a separate exclusionary rule of “self-serving statements” and proceed to admit the statements under the mental condition exception. They apparently find no motive on the accused’s part to misrepresent, or at least they feel that the motive is not strong enough to require exclusion of the declaration and are therefore willing to let the jury evaluate the veracity of the declaration.

Among legal writers, the foremost advocates of admission of exculpatory declarations of mental condition are McCormick and Wigmore. McCormick treats the supposed exclusionary rule of “self-serving statements” as a sort of vestigial remnant of the ancient doctrine of interest, which excluded all testimony of interested parties. He suggests that when the doctrine of interest was abolished by statute, the supposed exclusionary rule of “self-serving statements” should have been abolished by implication, and that exculpatory declarations of any type should be admissible if they can qualify under any of the exceptions to the hearsay rule.

Wigmore argues that to exclude an accused’s exculpatory statements when his incriminating statements are receivable as admissions is to repudiate the concept of the presumption of innocence.

27. State v. Gadwood, 342 Mo. 466, 116 S.W.2d 42 (1937).
29. See McCormick § 275.
since in so doing the courts use the possible trickery of guilty persons as a ground for excluding evidence in favor of one who has not yet been proved guilty. However, it is the motive to misrepresent which militates against the admission of these prior declarations of mental condition and that motive does not necessarily hinge on guilt or innocence. A better reason for admitting these declarations is that it is improbable that the accused considered that his prior statements might be needed to exonerate him from a crime which had as yet not even materialized. The prior exculpatory declaration of mental state meets the general requirements of the mental condition exception to the hearsay rule, including the requirement of apparent sincerity; consequently, it would seem that such a declaration ought to be admitted.

**declarations subsequent to the act: offered to show the intent with which the act was done**

The case for excluding an accused's exculpatory declarations of mental condition is strongest with regard to those declarations made subsequent to the act. Here there is no doubt that the statement may have been made with full knowledge of the effect it would have in interpreting the main act. For instance, after a homicide any accused might be motivated to say that it was an accident, or self-defense, or that he had only the best of intentions with regard to the deceased. Since the motive to misrepresent looms so large, these declarations are almost universally excluded.

It is only in the field of wills that any subsequent declarations of mental condition are regularly admitted. This admission is justified partly out of necessity, since the testator is dead and was often the only one who had any knowledge of his intentions concerning the distribution of his estate. Also it has been urged that the testator has no self-interested motive to misrepresent. McCormick suggests that the practice of admitting the testator's subsequent declarations of mental condition may serve as a core for a wider exception to the hearsay rule whereby other subsequent declarations of mental condition may be admitted.

One argument in favor of admitting an accused's subsequent

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30. See 6 Wigmore § 1732, at 102. This argument is apparently persuasive but it assumes that only guilty persons have a motive to misrepresent. In reality, it seems at least possible that some innocent persons also might wish to impress the jury with their good intentions toward the deceased, even though these good intentions never existed, in order to insure their exoneration.

31. See Fortner v. State, 56 So. 2d 17 (Miss. 1952).

32. See McCormick § 271, at 577.

33. See id. at 578.
declarations of mental condition, in spite of the presence of a motive
to misrepresent, is that since the accused may be innocent and may
be telling the truth and since there is often no other way to prove
absence of an incriminating mental state, the accused is placed at too
great a disadvantage if these declarations are excluded. In this
general frame of reference Wigmore argues that since the ac-
cused's subsequent incriminating statements would be available for
the prosecution as admissions and since the accused may be telling
the truth, his subsequent exculpatory statements ought out of fair-
ness to be admitted under the mental condition exception. This line
of argument may seem to disregard the basic requirement of the
mental condition exception—that the declaration must be made
under circumstances indicating probable sincerity. But as a matter
of practical justice the argument has weight, since there is always
the possibility that the accused is not misrepresenting the intent
with which he did the act in question.

CONCLUSION

Any court confronted with an exculpatory declaration of mental
condition finds itself upon the horns of a dilemma. One horn of this
dilemma consists of the danger that the declarant may have been
lying and that admission of the declaration will only impede the
administration of justice. But if the court avoids this danger by
excluding the declaration it has done nothing more than impale
itself upon the other horn of that dilemma because the declarant may
have been telling the truth. Surely it is worse to exclude a declara-
tion which may be true than to admit one which may be false. The
danger of self-interested misrepresentation is mollified by the jury's
discretionary power to disregard the evidence if it appears to lack
credibility. Consequently, it seems more reasonable to allow the
jury to evaluate such exculpatory declarations in the light of all the
attendant circumstances than to exclude it arbitrarily because of a
possible lack of reliability. Mere admission of any exculpatory
declaration does not mean that the jury will necessarily, or even
probably, give credence to it. But such admission does provide the
accused with an argument for exoneration, which no possibly inno-
cent man ought to be denied. Since there is no independent exclu-
sionary rule of exculpatory declarations of mental condition, and
since the mental condition exception is flexible enough to serve as
a vehicle for their admission, these declarations can be received
without offense to the established rules of evidence.

34. See United States v. Matot, 146 F.2d 197, 198 (1944).
35. See 6 Wigmore § 1732, at 103-05.