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Is Necessity Alone Sufficient Basis For Hearsay Exception? - Moore v. Atlanta Transit System, Inc.

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Comments and Casenotes

Is Necessity Alone Sufficient Basis For Hearsay Exception?

By WILBUR E. SIMMONS, JR.

Moore v. Atlanta Transit System, Inc.[1]

To the present day attorney, and the well-informed layman, "hearsay" invokes mixed emotions. As defined by Professor Charles T. McCormick, "Hearsay evidence is 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] On the one hand the rule against hearsay "may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system [the Anglo-American law of evidence] to the world's methods of procedure;"[3] but on the other hand, the hearsay rule with its various exceptions has resulted in a great degree of confusion, and has undeniably caused injustice in some cases, by preventing an adequate investigation of all facts.

Originally there was no rule against hearsay, since prior to about the 16th century, the practice of having a jury obtain information by consulting with informed and qualified persons who were not called into court, was generally sanctioned. It was not until witnesses started coming into court to testify to the jury publicly that the hearsay rule gradually emerged. Its inception was slow and at first hearsay statements were readily received, though often objected to as of doubtful value. In its embryonic stage, the hearsay rule was qualified by the practice of allowing hearsay as confirmatory evidence, but by the beginning of the 18th century the rule, somewhat as we know it today, had definitely been formulated and had become settled doctrine.[4] But the development of the rule against hearsay has never reached a final form; numerous exceptions have been developed which have become as accepted as the rule

[1] 105 Ga. App. 70, 123 S.E. 2d 693 (1961), hereinafter referred to as the Moore case.

[2] MCCORMICK, EVIDENCE (1954) § 225, p. 460.

[3] 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1364, p. 27.

[4] A full discussion of the development of the hearsay rule is found in *id.*, § 1364; also see MCCORMICK, *op. cit. supra*, n. 2, § 223 for a more brief discussion of the history of the hearsay rule.

itself, while other exceptions have been devised which have received only partial recognition.

The *Moore* case was a personal injury action brought by plaintiff to recover for injuries sustained by her while attempting to board a bus belonging to the defendant, Atlanta Transit System. The original plaintiff died, and an amendment was filed setting out her death and substituting her temporary administrator as the plaintiff. Both sides in answers to interrogatories stated that they knew of no one who saw the occurrence complained of or who arrived at the scene immediately thereafter. The defendant Transit System moved for a summary judgment, as provided for by statute[5] on the basis that there were no eye-witnesses or persons who arrived upon the scene shortly after the event, and that the original plaintiff was now deceased. At the hearing on the defendant's motion for a summary judgment, the plaintiff sought to introduce a letter from a physician employed by the defendant to examine plaintiff's decedent, which related the history of the accident and the decedent's complaint, as told by the decedent to the defendant's physician.[6] The portion of the letter in controversy was as follows:

> " 'In July, 1956 I was boarding an Atlanta Transit bus on Moreland Avenue, S.E. The bus driver closed the door of the bus as I was entering. I was struck on the right chest and back. This caused me to fall on steps of bus. It knocked me out temporarily. On the same day of the accident, I saw Dr. Huie, Glenwood Avenue. He x-rayed my ribs and back, and I saw Dr. Huie twice after the accident. He put a brace on me. I stayed in bed most of the time for 4 weeks. I could not get up or down without much pain. I did and still have a thumping pain in my back'."[7]

The defendant objected to the admission of this letter into evidence on the grounds that it was " 'hearsay and irrelevant, immaterial and has no connection with any allegation of negligence set out in the petition, and that it was a

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[5] GA. CODE ANNO. (1959) § 110-1201 to 110-1209.

[6] There may have been a problem of double hearsay since the doctor who had written the letter was apparently not called as a witness. On the problem of double or multiple hearsay see MCCORMICK, *op. cit. supra*, n. 2, § 226, p. 461; and 2 JONES, EVIDENCE (5th ed. 1958) § 316, p. 593.

[7] *Supra*, n. 1, 694-695. Under modern theory self-serving declarations are not excluded as such under orthodox hearsay exceptions; however, the self-serving nature of such statements is significant in that required circumstantial guarantees of reliability for such hearsay exceptions as those for excited utterances may be missing. See, MCCORMICK, *op. cit. supra*, n. 2, § 275, pp. 588-589.

self serving declaration'."[8] The lower court sustained the defendant's objection and refused to allow the letter into evidence. When the plaintiff indicated that the only evidence he possessed consisted of statements made by the decedent to doctors and various other persons, the trial judge granted the motion for a summary judgment. It was from this ruling that the plaintiff took his appeal.

The Court of Appeals of Georgia, held:

> "[T]he declarations of a decedent . . . to whomsoever made are admissible in evidence if there are no other witnesses to the alleged occurrence. 'Other witnesses' within the meaning of this rule would include eyewitnesses, whether favorable or unfavorable to the party offering the evidence, but would exclude those who merely testify that they did not see the alleged occurrence. . . . Thus, we hold that the statement was admissible. . . . [A]nd it is for the jury, under appropriate instructions, to determine its weight and credibility."[9]

In discussing the purpose and reasons for the various exceptions to the hearsay rule, Wigmore considers two factors to be controlling: (1) a circumstantial probability of trustworthiness (reliability), and (2) necessity.[10] The

[8] *Supra*, n. 1, 695.

[9] *Supra*, n. 1, 701.

[10] 5 WIGMORE, *op. cit. supra*, n. 3, §§ 1420-1422.

"§ 1421. First Principle: Necessity. The scope of the first principle may be briefly indicated by terming it the Necessity principle. It implies that since we shall lose the benefit of the evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it. The reason why we shall otherwise lose it may be one of two:

(1) The person whose assertion is offered may now be *dead*, or out of the jurisdiction, or insane, or *otherwise unavailable* for the purpose of testing. This is the commoner and more palpable reason. * * *

(2) The assertion may be such that we cannot expect, again or at this time, to get *evidence of the same value* from the same or other sources. * * * Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same." (Emphasis by Wigmore).

"§ 1422. Second Principle: Circumstantial Probability of Trustworthiness. The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the value of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name.

orthodox hearsay exceptions, including those which are likely to be available in factual situations similar to that of the *Moore* case, require, to at least some degree, both *necessity* and *reliability*. For example, in the hearsay exception for declarations of present bodily condition[11] there is an element of necessity in that "though the person's testimony on the stand may still be both actually and conveniently practicable, yet the probability of there receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small. . . ."[12] The accompanying element of reliability is said to exist "by the spontaneous quality of the declarations, supposedly assured by the fact that the declarations must purport to describe a condition presently existing at the time of the declaration;"[13] though it is recognized that reliability is doubtful "since some of such statements purporting to describe present symptoms or the like are not spontaneous but are calculated mis-statements."[14] In the standard hearsay exception for statements made to physicians consulted for treatment, there is an element of reliability in that the declarant knows that the accuracy of the statements which he gives to the physician will to a large extent determine the value and usefulness of the treatment which he will receive.[15] In the exception to the hearsay rule recognized for excited utterances,[16] there is a factor of reliability "furnished by the excitement which suspends the powers of reflection and fabrication."[17] Even in the case of contem-

There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation."

[11] *E.g.*, in Munden v. Metropolitan Life Ins. Co., 213 N.C. 504, 196 S.E. 873, 874 (1938) a statement by the deceased that he "felt bad" was held to be admissible. The Court stated "'[i]t is very generally held that, when the physical condition of a person is the subject of inquiry, his declarations as to his present health, the condition of his body, suffering and pain, etc. are admissible in evidence'."

[12] 6 WIGMORE, EVIDENCE (3d ed. 1940) § 1714, p. 58. Also see MCCORMICK, *op. cit. supra*, n. 2, § 265, pp. 561-562.

[13] MCCORMICK, *op. cit. supra*, n. 2, § 265, pp. 561-562.

[14] *Id.*, 562.

[15] *Id.*, § 266, p. 563.

[16] *E.g.*, in the case of Lambrecht v. Schreyer, 129 Minn. 271, 152 N.W. 645, 646 (1915), the testimony showed that defendant struck the plaintiff's horse with a whip causing the plaintiff's team to strike a stump. The plaintiff, his wife, and three children were thrown or dragged from the carriage. One of the daughters while still frightened from the occurrence, told her mother: "Schreyer struck our horses." It was held that the evidence was admissible.

[17] MCCORMICK, *op. cit. supra*, n. 2, § 272, p. 579. Also see 6 WIGMORE, *op. cit. supra*, n. 12, §§ 1745-1764.

poraneous utterances, recognized in some jurisdictions as forming an exception to the hearsay rule, when there is no exciting event,[18] there is reliability in that: first, the declaration occurs at the time the event is perceived so that there is no doubt as to the memory of the declarant; secondly, there is no time to reflect upon the statement before it is made; and third, the statements are generally made in the presence of others who can act as a check upon any misstatement.[19] Declarations against interest clearly rest upon a theory of reliability in that, as stated by Wigmore, "The basis of the Exception [declaration against interest] is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and thus sufficiently sanctioned, though oath and cross-examination are wanting."[20] It would seem that the only standard exception to the hearsay rule which may be present in factual situations similar to that of the *Moore* case, that does not appear to require at least some element of reliability, is the exception recognized for admissions of a party-opponent. Although commonly admissions are against the interest of the party-declarant when made as well as contrary to his trial position, as stated by McCormick: "the party is not even required to have had first-hand knowledge of the matter declared, and the declaration may have been self-serving when it was made."[21] This exception ultimately rests upon estoppel and the feeling that "it does not lie in the opponent's mouth to question the trustworthiness of his own declaration. . . ."[22] In fact, he is generally able to take the stand and explain away the admission if he wants to. Thus it is fairly apparent that even though reliability may be doubtful in particular cases, by in large, in most of the standard exceptions, there is some element of reliability, in addition to necessity, which makes inaccuracy less likely to occur.

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[18] *E.g.*, Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W. 2d 474, 140 A.L.R. 868 (1942). In this case a declaration of an observer of erratic driving of another car, later involved in an automobile accident, made while the car in which the plaintiff was riding was passing, that "they must have been drunk, that we would find them somewhere on the road wrecked" was held to be admissible as a declaration of present sense impressions.

[19] McCormick, *op. cit. supra*, n. 2, § 273, p. 584. See Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 236-239 (1922).

[20] 5 Wigmore, Evidence (3d ed. 1940), § 1457, pp. 262-263.

[21] McCormick, *op. cit. supra*, n. 2, § 239, p. 502. See also Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 Yale L.J. 355 (1921).

[22] McCormick, *op. cit. supra*, n. 2, § 239, p. 503.

An examination of the *Moore* case clearly reveals that the declarations there in question did not fit under any of the orthodox hearsay exceptions discussed above. The declaration involved in the *Moore* case could not be considered a declaration of present bodily condition since the statement related to the past, how the accident occurred and the treatment the declarant had received, not merely the declarant's then present bodily condition.[23] The declaration could not be considered a statement to a physician for treatment, so far as that exception to the hearsay rule is concerned, since it was made to the defendant's doctor, apparently for purposes of litigation or to establish a claim against the defendant, not treatment.[24] It is beyond doubt that the declaration could not be considered an excited or contemporaneous utterance since the declarations were made well after the injury occurred.[25] Nor can the statement be considered a declaration against interest since it was clearly self-serving[26] or an admission since there were no words or acts of the declarant offered in evidence *against* her.[27] Thus it can be concluded that the declaration involved in the *Moore* case did not fit under any of the orthodox exceptions to the hearsay rule which are likely to be available in similar factual situations.

There are some cases in which, due to the fact that there is an element of both reliability and necessity, hearsay evidence has been received even though not falling under an orthodox exception. For example, in *Dallas County v. Commercial Union Assurance Co.*[28] the Court allowed a fifty-eight year old newspaper account of a fire to be received into evidence even though it was hearsay and did not supposedly come under any orthodox exception. The Court said:

> "We do not characterize this newspaper as a 'business record' nor as an 'ancient document', nor as any other readily indentifiable and happily tagged species of hearsay exception. It is admissible because it is *necessary and trustworthy,* relevant and material and its

[23] WIGMORE, *loc. cit. supra*, n. 12.

[24] MCCORMICK, *op. cit. supra*, n. 2, § 266. The Georgia Court of Appeals pointed out this factor: "The statement here offered, though made to a doctor, was not made with a view of obtaining treatment by him, but was made to one who was to examine the declarant and evaluate her condition for the Transit System, against whom she had a claim for damages." *Supra*, n. 1, 701.

[25] MCCORMICK, *op. cit. supra*, n. 2, §§ 272-273.

[26] WIGMORE, *loc. cit. supra*, n. 20.

[27] MCCORMICK, *op. cit. supra*, n. 2, § 265.

[28] 286 F. 2d 388 (5th Cir. 1961).

> admission is within the trial judge's exercise of discretion in holding the hearing within reasonable bounds."[29] (Emphasis added.)

When courts have gone outside the usual orthodox hearsay exceptions, to allow hearsay to be received into evidence, they almost invariably state that they do so because of necessity *and* because there is some element of reliability or trustworthiness present,[30] but the *Moore* case purported to rest on necessity alone. And in fact, it could not rest on any element of reliability, for there seems to be no reason for supposing that a self-serving statement made with an eye to litigation is especially likely to be accurate.

II

The above comment on the holding of the *Moore* case should not be taken to indicate that there is no room for relaxation of the hearsay rule in appropriate cases. There may well be occasions when, for reasons of policy, an exception to the hearsay rule should not require reliability in the sense of the orthodox exceptions to the rule. Arguably, the reliability requirement should be dropped altogether. It is the function of this section to examine some of the possible positions which might be taken in weakening or eliminating it. The doubtful propriety of basing an exception to the hearsay rule on necessity alone is suggested by the fact that even when courts say they recognize an exception primarily because of necessity, they have nevertheless hopefully looked for reassuring factors tending to give some promise of reliability.

One situation in which necessity has resulted in liberalization of the hearsay rule is where statutes have been passed to protect certain classes of persons under special circumstances. In such cases there are often strong reasons, based on both necessity and policy, why the common law rules of evidence with all their ramifications should not be applied. The clearest example would be workmen's compensation legislation. Although there is authority to the contrary, the usual view is that the strict common law rules of evidence, including the hearsay rule, should not be applied in workmen's compensation proceedings.[31] In such proceedings there is a legislative policy favoring liberalization of

[29] *Id.*, 397-398. (Emphasis added).
[30] *Infra*, part II.
[31] 12 SCHNEIDER, WORKMEN'S COMPENSATION TEXT (3d ed. 1959) § 2526, p. 276-277.

the rules of evidence to avoid defeating the purpose of the act, "which is to permit claims to be proven in a simple, direct and summary manner consistent with justice to both sides."[32] But this is not to suggest that in such administrative proceeding the hearsay rule can be disregarded.

> "While hearsay evidence is sometimes admissible in compensation proceedings, it may be given probative effect only if corroborated by a residuum of common law evidence. This rule governs when the party against whom the award is made does not question the sufficiency of the proof. The majority rule . . ., is 'Courts will not permit awards to stand which are based on hearsay evidence uncorroborated by facts, circumstances or other evidence.' A fact finding may not be based solely upon hearsay evidence."[33]

Thus even in regard to workmen's compensation cases, where there is a legislative policy toward liberalization of the rules of evidence, the hearsay rule is not to be relaxed to the extent that a finding can be based solely on hearsay, without corroborating evidence. This would seem to be simply a recognition that the trustworthiness or reliability requirement is present in some form even when a relaxation of the restrictions against hearsay is necessitated by public policy.[34]

An overlapping area in which an attempt can be made to base an exception to the hearsay rule upon necessity alone is found in the so-called solitary workmen cases. These cases, which are often workmen's compensation proceedings, usually involve fatal accidents to solitary workmen. The rationale of these cases is that there being no eyewitnesses, statements made by the workman prior to his death are the only means of determining how the accident occurred. Thus there is a high degree of necessity for receiving such statements into evidence even though they involve hearsay. One method which has been used to permit the admission of such evidence, is " 'a liberal interpre-

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[32] *Ibid.*

[33] *Id.*, § 2533, p. 317. *Cf.* 2 DAVIS ADMINISTRATIVE LAW TREATISE (1958), ch. 14, pp. 250-337, wherein the author maintains that the trend is away from the rigidity of the exclusionary rules, especially in non-jury cases.

[34] For examples of the operation of the hearsay rule in Maryland workmen's compensation cases see Standard Oil Co. v. Mealey, 147 Md. 249. 127 A. 850 (1925) and Beth. Steel Co. v. Ziegenfuss, 187 Md. 283, 49 A. 2d 793 (1946). Also see 23 M.L.E. WORKMEN'S COMPENSATION, § 214, p. 286.

tation of the res gestae rule'."[35] The leading case for this approach to a relaxation of the hearsay rule is *Jacobs v. Village of Buhl*,[36] wherein the court said:

> "In the larger cities of this state there are many policemen walking their beats alone, day and night. In every small city and hamlet there is a policeman working alone at night. Night watchmen work alone. Other employees work alone. These employees are subject to numerous possibilities of accidents which may cause conditions that may bring about their death. They do not have a witness with them to furnish proof as to the happening of an accident if the injuries they receive close their lips in death. The number of compensation cases which reach the courts of last resort where the only proof of the accident is the declaration of the injured employee give weighty proof of the truth of the declaration of the Pennsylvania court that to give a strict application of the res gestae rule in compensation cases would defeat the intent of the Workmen's Compensation Law."[37]

The exception sometimes made in the solitary workmen cases, however, may, at least in some instances, be justified

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[35] McCORMICK, *op. cit. supra*, n. 2, § 272, p. 584. But the use of the term "res gestae" probably does more harm than good. It includes, among other things, the hearsay exceptions for spontaneous and contemporaneous utterances, declarations of present bodily condition, and statements to physicians for purposes of treatment. *Supra*, § 274.

> "The discussion of several doctrines has been commonly carried on, in judicial opinion, with more or less use of the phrase 'res gestae' as the name of a doctrine under which certain kinds of evidence receive sanction. This phrase, as conceded on all hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine. . . ." 6 WIGMORE, EVIDENCE (3d ed. 1940) § 1767, p. 180.
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> "The term res gestae, which the court used to justify the admission of the evidence, originally arose as more or less of an historical accident. It is a vague expression which is now commonly used by courts through custom and habit, as a reason for permitting many varieties of subject matter to be placed in evidence. Condemned by leading writers and students of the law, the term lingers on to the annoyance of those persons who seek to explain the admission of items of evidence upon logical grounds, based on clearly defined reasoning." 22 Minn. L. Rev. 391, 392, in commenting on the case of Jacobs v. Village of Buhl, 149 Minn. 572, 273 N.W. 245 (1937).

It should be noted that the Georgia Court of Appeals in the Moore case expressly stated that it was not relying on the res gestae doctrine in reaching its decision, saying at page 702: "We do not bottom this ruling on the res gestae principle. While the utilization of this principle is often proper, its mere intonation has no magical effect and cannot be used as a catch-all for difficult cases."

[36] 149 Minn. 572, 273 N.W. 245 (1937). See also Butler v. Washington-Youree Hotel Co., 160 So. 825 (La. App. 1935) and Thompson v. Conemaugh Iron Works, 114 Pa. Super. 247, 175 A. 45 (1934).

[37] *Id.*, 247.

under one or more of the standard or "res gestae" exceptions discussed previously in part one. Thus if the statement of such a workman is made to a physician consulted by the employee for treatment purposes, the hearsay statement could be admissible as a statement to the physician made for purposes of treatment, so long as it did not go beyond bodily condition into the realm of liability.[38] Of course, if the statement was not self-serving or a mere neutral statement, it might be admissible as a declaration against interest,[39] but, because there is usually a lapse of time between the accident and the statement, the exceptions for excited utterances[40] or contemporaneous utterances,[41] would generally not be available in the solitary workmen cases. At first glance it might appear that the statements of such workmen may fit under the exception recognized for declarations of present bodily pain and condition,[42] but it is necessary to distinguish statements of present condition from statements as to past cause, and it is the latter with which we are herein interested.

While the hearsay rule is relaxed in the solitary workmen cases because of necessity, as previously intimated, the requirement of reliability through circumstantial evidence of trustworthiness, has not been ignored. As stressed in the *Jacobs* case:

> "A consideration not to be disregarded in passing upon this case is the fact that there was an entire lack of motive for the deceased to misrepresent at the time he told of having received the injuries. His injuries did not appear at that time to be serious. Death from his injuries was probably the last thing he was thinking about. It is doubtful if at that time he had the least thought in his mind that his injuries would even require an application for compensation."[43]

The assurance of reliability here is merely negative; in the court's opinion, there is no reason to suppose the declarant's statement is incorrect; it is neither significantly self-serving nor significantly against interest. Where the statement is neutral, it would seem wise to recognize an exception in the solitary workmen cases since, as stated previously, the

[38] MCCORMICK, EVIDENCE (3d ed. 1940) § 266.
[39] WIGMORE, *loc. cit. supra*, n. 20.
[40] MCCORMICK, *op. cit. supra*, n. 38, § 272.
[41] Morgan, *A Suggested Classification of Utterances Admissible As Res Gestae*, 31 Yale L.J. 229, 236-239 (1922).
[42] MCCORMICK, *op. cit. supra*, n. 38, § 265.
[43] *Supra*, n. 36, 249.

statements made by the workmen prior to their deaths may be the only means of determining how the accident occurred.

This idea might be extended to permit reception of such hearsay in any kind of case in which the only available evidence is the declaration of a neutral eyewitness who, for some reason such as death or insanity, is not later available to testify. In addition to the high degree of necessity there would be an element of reliability because of the non-interest of the witness. This situation could be regarded as an extension of the standard exception for declarations against interest[44] wherein a hearsay statement of a declarant is admitted if it is against his interest, due to presumed reliability, but is rejected if neutral or self-serving since the presumed reliability would not be present.

To go beyond this point, for example to allow the hearsay statements of the plaintiff's decedent to be received merely because the declarant is unavailable, apart from any special considerations, would reduce the hearsay rule to a mere rule of preference[45] rather than a rule of exclusion. Of course, if a rule of preference were adopted, there would be no need to find reliability since the only showing required would be that first-hand evidence was not available.

Another approach to the problem may lie in statutory liberalization of the hearsay rule.[46] For example, there has been a statute in Massachusetts since 1898 which in its present form provides:

> "Declarations of Deceased Persons. In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant."[47]

A similar statute has been enacted in Rhode Island:

> "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that

[44] WIGMORE, *loc. cit. supra*, n. 20.

[45] That is, evidence which is hearsay would be received if it was the only evidence available, but if non-hearsay evidence was available, it would be given priority over the hearsay. Under a rule of exclusion, hearsay is rejected unless it comes under a recognized exception, regardless of whether or not other evidence is available.

[46] 2 JONES, EVIDENCE (5th ed. 1958) § 274, p. 527; 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1567, p. 435.

[47] MASS. ANNO. LAWS (1956) ch. 233, § 65.

> it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."[48]

These statutes would attempt to solve the problem raised in the *Moore* case by receiving statements of deceased persons into evidence when there is a strong necessity, and the statements are found to have been made (1) in good faith and (2) upon the personal knowledge of the declarant. These statutes do not eliminate the reliability factor, since good faith and knowledge at least intimate an element of reliability. However, the class of problems presented in the *Moore* case can at least be alleviated by a proper statute in the case of the deceased declarant.[49]

Thus the difficulty of treating necessity in and of itself as sufficient to form an exception to the hearsay rule should be rather apparent. Even in cases where there is some special reason, such as public policy, for relaxing the application of the hearsay rule, to disregard the element of reliability, as the Georgia Court did in the *Moore* case, actually calls for a complete change in the basic structure of the hearsay rule.

III

The Court of Appeals of Georgia in the *Moore* case cited numerous cases in support of its holding, but seemed to rely mainly on six prior Georgia cases which had similar factual patterns, but which in light of the foregoing discussion could have been distinguished.[50] The *Mutual Life*

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[48] GEN. LAWS OF R.I. (1956) § 9-19-11.

[49] There is no apparent reason why such statutes cannot be extended to cover cases where the declarant is unavailable for some reason other than death.

> "With reference to the general advisibility of modifying the exclusionary rule so as to make some hearsay declarations admissible which do not now fall under any recognized common law exception, it is difficult to justify a distinction between unavailability of the declarant because of death, and unavailability because of insanity, or his absence in good faith, beyond the court's powers, or some other reason." JONES, *op. cit. supra*, n. 46, pp. 528-529.

[50] (1) Mutual Life Insurance Co. of New York v. Davis, 48 Ga. App. 742, 173 S.E. 471 (1934). The Court upheld the admission into evidence of a statement made by the decedent to his doctor, that he "had a shake-up in a Ford car" when suit was brought by the decedent's wife on an insurance policy to recover under a double indemnity clause. The Court, at p. 472, said "We think, however, that the statement was admissible as a matter of necessity *and* to show the basis of the testimony or the reasons for the expert evidence of the doctor in reference to the cause of death of the insured." (Emhpasis added).

(2) Lathem v. Hartford Accident & Indemnity Co., 60 Ga. App. 523, 3 S.E. 2d 916 (1939). Statements made by the decedent to his physician

Insurance Co.[51] case can easily be distinguished since it gave an alternative non-hearsay ground for admission of the statement involved. In regard to the other five cases it should be noted that all were workmen's compensation cases. The defendant in the *Moore* case attempted to persuade the court that these cases were distinguishable on the grounds that more liberal rules of evidence apply to workmen's compensation cases. But the Court expressly rejected "the idea that there is a distinction in the rules to be applied to workmen's compensation cases."[52] The failure to make this distinction would seem to be clearly contra to the usual view, even though workmen's compensation statutes do not always expressly provide for a liberalization of evidentiary rules.[53] Maryland, for example, has recognized that hearsay statements are admissible in the discretion of the court in workmen's compensation proceedings,[54] though they should be received with great caution.[55]

As has been previously shown, the authorities in the Anglo-American law of evidence generally base the various exceptions to the hearsay rule upon the grounds of necessity and reliability.[56] Though the concept is weakened in

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as to how he was injured were received into evidence because of necessity and because they were inseparable from the decedent's complaint with respect to his injury.

(3) City of Atlanta v. Crouch, 91 Ga. App. 38, 84 S.E. 2d 475 (1954). Various complaints of pain made by the decedent to his son-in-law and statements as to the cause of his pain were held to be admissible and competent evidence as to how the injury occurred.

(4) Flemming v. St. Paul-Mercury Indemnity Co., 91 Ga. App. 582, 86 S.E. 2d 637 (1955). This workmen's compensation case held that the evidence authorized a finding that an injury was compensable, even though the only evidence as to how the accident occurred was a statement by the deceased workman to his wife that he had stepped on a pipe where he was working.

(5) Orkin Exterminating Co. v. Wright, 92 Ga. App. 224, 88 S.E. 2d 205 (1955). A wife was allowed to testify as to her deceased husband's expressions of pain and his statement as to how the accident occurred.

(6) Smith v. U.S. Fidelity and Guaranty Co., 94 Ga. App. 507, 95 S.E. 2d 35 (1956). Decedent's wife and her friend were allowed to testify as to statements concerning the injury made to them by the decedent, although this evidence was found to be outweighed by a statement to a doctor by the decedent, that he was not injured.

[51] Mutual Life Insurance Co. of New York v. Davis, 48 Ga. App. 742, 173 S.E. 471 (1943).

[52] Moore v. Atlanta Transit System, Inc., 105 Ga. App. 70, 123 S.E. 2d 693, 697 (1961).

[53] SCHNEIDER, WORKMEN'S COMPENSATION TEXT (3d ed. 1959) § 2533, p. 317.

[54] Beth. Steel Co. v. Ziegenfuss, 187 Md. 283, 49 A. 2d 793 (1946): Standard Oil Co. v. Mealey, 147 Md. 249, 127 A. 850 (1925).

[55] Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1938).

[56] WIGMORE, *op. cit. supra*, n. 46, §§ 1420-1422. Even the Uniform Rules of Evidence, which are generally regarded as being liberal, impose a reliability requirement while recognizing an exception on the ground of necessity generally, in that they require that the deceased declarant

the workmen's compensation cases,[57] in the exception recognized for admissions of a party,[58] and even through "a liberal interpretation of the res gestae rule,"[59] these two factors are undoubtedly the backbone of the orthodox exceptions to the hearsay rule. Thus the uniqueness, and perhaps the fallacy of the *Moore* case is this: a self-serving statement as to cause, which was hearsay and which did not fit within any orthodox exception to the hearsay rule, was admitted into evidence solely on the basis of necessity, without regard to the fact that there was no direct or circumstantial evidence of trustworthiness or reliability, and such a statement, even though standing by itself, was considered sufficient to support a verdict for the plaintiff under appropriate instructions.

To permit hearsay statements to be received into evidence solely because of necessity, seemingly without regard to any element of trustworthiness or reliability, seems to make the hearsay rule a simple rule of preference, rather than a rule of exclusion[60] as it is generally regarded in the Anglo-American law of evidence. However, there may be some merit to such an approach, since some testimony may be better than none at all, and perhaps the jury can be trusted, under proper instruction, to be sufficiently cautious. After all, it is only the Anglo-American judicial system where a rule of exclusion is applied to hearsay evidence.[61] In most European countries the usual view is that

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had "recently perceived" the matter about which he made the statement in question, and that it be made "while his recollection was clear [and] in good faith prior to the commencement of the action."

> "Hearsay Evidence Excluded — Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: * * *
>
> (4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) *if the declarant is unavailable as a witness*, a statement narrative describing or explaining any event or condition which the judge finds was made by the declarant at a time when the matter had been *recently perceived* by him and *while his recollection was clear*, and was made in *good faith prior to the commencement of the action.*" (Emphasis added). UNIFORM RULES OF EVIDENCE, Rule 63.

[57] *Supra*, n. 31.

[58] MCCORMICK, EVIDENCE (3d ed. 1940) § 239, p. 502.

[59] *Supra*, n. 35.

[60] *Supra*, n. 45.

[61] "[I]t has long been customary in this country [England] to emphasize that the rule excluding hearsay is one peculiar to English law and finds no counterpart on the continent [*i.e.* Europe]." H. A. Hammelmann. *Hearsay Evidence, A Comparison*, 67 L.Q.R. 67 (1951).

hearsay may be received into evidence, although it seems that the judges are free to disregard it "or give it any little weight which it seems to deserve."[62]

There is a possible intermediate position between a pure exclusion rule and a pure preference rule; that is, make the hearsay rule one of preference, so that evidence such as that involved in the *Moore* case could be received, but require corroboration as to doubtful facts before permitting the court or the jury to decide for a hearsay proponent who has the burden of persuasion. Such a rule would prevent the harshness of blanket rejection of hearsay under the exclusion rule, but at the same time would not allow a verdict to be based solely on hearsay. It would prevent the rather unfortunate result in the *Moore* case where the verdict was rendered for plaintiff solely on uncorroborated, self-serving hearsay. Under such an intermediate position, the verdict in the *Moore* case would have to be rendered in favor of the defendant absent corroborating circumstances, but the evidence in question would have been received.

However, if the rule of exclusion is considered to be too deeply intrenched in Anglo-American jurisprudence to be uprooted, as it would seem to be, there is yet another solution which is quite simple but would appear to solve fairly the problem of allowing hearsay to be received when no other evidence is available. If the standard hearsay exception for declarations against interest were broadened to permit reception not only of statements against interest, but also unsuspicious neutral statements,[63] the general rule of exclusion of hearsay testimony could be maintained. At the same time the problem of receiving hearsay in some situations analogous to that of the *Moore* case would be alleviated. In conclusion, this modification would seem to be particularly desirable since in most situations it would fairly solve the problem under discussion, but at the same time would preserve the standards of necessity and reliability.

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[62] Lord Mansfield in the Berkeley Peerage Case, 4 Campbell, 401, 415, 171 Eng. Rep. 128, 135 (1811). Also see *supra*, n. 61.

[63] *Cf.* UNIFORM RULE OF EVIDENCE, 63(4)(c).