Evidence -- Hearsay -- Admissibility of Declarations of Present Bodily Feelings

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On the other hand there are at least two North Carolina cases which differ radically from the result reached by a strict application of the doctrine. While it is true that in neither of these cases did the court expressly consider the doctrine, the problem was present on the facts and necessarily involved in the holding. In the case of Pettijohn v. Williams,12 the court, per Pearson, J., allowed a bill for rescission even after judgment had been recovered in the action for deceit, double recovery being prevented by an injunction against further proceedings in the law action pending the proceedings for rescission. Also, in Troxler v. Building Co.,13 the court was little worried by the technical inconsistency of the plaintiff's double-barreled request in the same complaint for damages for deceit and for rescission, even sending appropriate issues on both counts to the jury, though, of course, a recovery would finally be permitted on but one.

It is a commentary on the value of a strict application of the doctrine that the ultimate results obtained by these last two cases, in which it was not applied, seem far preferable to the results of those cases in which it was strictly applied. Furthermore, the problem which the doctrine was originally invoked to meet, i.e., prevention of a double satisfaction, was adequately met in these cases. Therefore, unless there has been a decision adverse to the plaintiff in the first action on the question of fraud, thus constituting res adjudicata,14 or unless the bringing of the first action has led to such a material change of position on the part of the defendant as to constitute an estoppel,15 it would seem the doctrine has little to recommend itself except mere compliance with formal logic.

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Plaintiff filed a claim before the North Carolina Industrial Commission for compensation, contending that the death of her husband resulted from an accident arising out of his employment by defendant

12 Pettijohn v. Williams, 55 N. C. 302 (1855) (Although speaking of an "election of remedies," the court is here considering an election between legal and equitable remedies rather than an election between affirmance and disaffirmance of a voidable transaction).
13 Troxler v. Building Co., 137 N. C. 51, 49 S. E. 58 (1904). This case seems to be contrary to the more recent case of Lykes v. Grove., 201 N. C. 254, 159 S. E. 360 (1931), cited note 9, supra.
14 Gutheil v. Goodrich, 160 Ind. 92, 66 N. E. 446 (1903). In some jurisdictions a prior suit to rescind is a final election only when it is res judicata on the merits of the subsequent action in deceit. Kramer v. Association of Almond Growers, 111 Cal. App. 595, 295 Pac. 873 (1931); Dooley v. Crabtree, 134 Iowa 465, 109 N. W. 889 (1907).
15 Comment (1925) 34 Yale L. J. 665.
NOTES AND COMMENTS

drug store. Deceased, after carrying two heavy boxes into the store, complained of a pain around his heart. Over plaintiff's objection, defendant was allowed to have a physician testify that shortly after the accident deceased told physician that he first felt the pain while returning from the post office previous to the accident. Judgment for the defendant was affirmed on appeal. The declaration was held competent as one of "bodily feelings" and therefore not within the hearsay rule.¹

Generally declarations of present existing bodily feelings are admissible as an exception to the hearsay rule on the theory that their spontaneity makes them trustworthy.² Some jurisdictions qualify this exception by holding declarations even of present pain inadmissible unless made to a physician.³ In nearly all jurisdictions the declaration, to fall within this exception, must be one of present existing pain. Those which allow declarations of past pain do so in cases where the declarant was under the influence of some exciting stimulus so strong as to minimize the possibility of reflective falsehood.⁴ This exception for excited utterances, often comprehended under the omnibus term "res gestae," is independent of the one under consideration and beyond the scope of the present discussion.

In North Carolina such declarations must relate to present bodily feelings. If this requirement is met, they are admissible whether made to a physician or not.⁵ This includes cases involving declarations made even to members of the declarant's family.⁶ It cannot be clearly ascertained from the facts in many of the North Carolina cases whether the declarations were of present or past bodily feelings. However, it is explicitly stated in the opinions that the exception in question saves

² Biles v. Holmes, 33 N. C. 16 (1850); Perkins v. Concord R. R. Co., 44 N. H. 223 (1862); Thomas v. Herrall, 18 Ore. 546, 23 Pac. 497 (1890); 3 WIGMORE, EVIDENCE (2d ed. 1922) §1718 et seq.; 1 GREENLEAF, EVIDENCE (13th ed. 1876) §102.
³ Reed v. N. Y. Central R. R. Co., 45 N. Y. 574 (1871); Roche v. Brooklyn City & N. R. Co., 105 N. Y. 294, 11 N. E. 630 (1887) (The court said: "But evidence of simple declarations of a party, made sometime after the injury, and not to a physician for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain ... is liable to gross exaggeration and is evidence of a most dangerous tendency.")
⁴ Traveler's Insurance Co. v. Moseley, 75 U. S. 397, 19 L. ed. 437 (1869); 3 WIGMORE, EVIDENCE (2d ed. 1922) §1745; Morgan, Suggested Classification of Utterances Admissible as Res Gestae (1922) 31 YALE L. J. 229.
⁵ Biles v. Holmes, 33 N. C. 16, 20 (1850) (The court said, "The declaration of a patient to his physician is strong evidence of the state of his health and only differs from his declaration to a third party because it is less probable that he will feign or state falsehoods to one by whom he hopes to be relieved; but this consideration only affects the degree of credit due to such declarations and does not affect their admissibility.") Lush v. McDaniel, 35 N. C. 485 (1852); Howard v. Wright, 173 N. C. 339, 91 S. E. 1032 (1917); Bryant v. Burns-Hammond Construction Co., 197 N. C. 639, 150 S. E. 122 (1929).
⁶ State v. Harris, 63 N. C. 6 (1868).
from the hearsay rule only declarations of present bodily feelings. Indeed some of them expressly exclude declarations of past pain. Hence it would seem that the North Carolina cases clearly permit declarations of present pain and exclude such evidence of past bodily feelings.

The ruling of the instant case advances beyond precedent by receiving a declaration of past pain. It is conceivable that our court intends only a slight modification of preexisting doctrine to the effect that declarations of past pain may be received where they are made to a physician for purposes of treatment. It is possible that the court intends a total abandonment of its former limitations by receiving declarations of past bodily feelings made to anyone. The language of the court suggests a third interpretation, namely: that where the time between the pain and the declaration thereof is of short duration (probably an half hour or less in this case), it is still to be considered a declaration of present pain. This interpretation is frustrated by the obvious inconsistency of calling past pain present pain. In any event, the court has not applied the well established rule borne out by a long line of North Carolina cases.

It is submitted, however, that the court in the principal case properly admitted the declaration, notwithstanding the consequent perplexity of the law on the subject. The declaration, although of past pain, was made to a physician for purposes of treatment and as such is a satisfactory testimonial of its own trustworthiness. Such a declaration meets the two requirements underlying recognized exceptions to the hearsay rule—that the declaration be necessary and trustworthy. It may thus be hoped that the instant ruling lays the foundation for a new exception to the hearsay rule for statements made by patient to physician.

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Evidence—Testimony of Interested Survivor in Accident Litigation.

While a married couple were riding together, the car skidded from a curve and turned over, the husband being killed and the wife injured. The wife sued her husband’s estate for injuries caused by his negligence. C. S. 1795 provides that in an action against the administrator

Bell v. Morrisett, 51 N. C. 178 (1858); Henderson v. Crouse, 52 N. C. 623 (1860); State v. Harris, 63 N. C. 6 (1868).


Wallace v. McIntosh, 49 N. C. 434 (1857); State v. Harris, 63 N. C. 6 (1868); Howard v. Wright, 173 N. C. 339, 91 S. E. 1032 (1917); Martin v. Hanes, 189 N. C. 644, 127 S. E. 688 (1925).

3 Wigmore, EVIDENCE (2d ed. 1923) §1718 et seq.