Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana

H. Alston Johnson III
EXCITED UTTERANCES AND PRESENT SENSE IMPRESSIONS AS EXCEPTIONS TO THE HEARSAY RULE IN LOUISIANA

The 1928 Code of Criminal Procedure stipulated that "Hearsay evidence is inadmissible except as otherwise provided in this Code." No definition of hearsay evidence is provided statutorily, but it appears that Louisiana courts generally follow the rule that "an assertion made by a person not testifying at the hearing and offered as an assertion to prove the truth of the matter asserted, is hearsay evidence and inadmissible" unless it falls within various recognized exceptions to the rule. This definition corresponds substantially to that given in the Uniform Rules of Evidence.

Exceptions to the hearsay rule are numerous. The Uniform Rules, for example, list thirty-one separate exceptions. It is generally recognized that excited utterances and present sense impressions are admissible as two of these exceptions to the hearsay exclusionary rule. The Uniform Rules provide that statements made while the declarant was under the stress of a nervous excitement, caused by his perception of a certain event or condition, are admissible as excited utterances. And statements made while the declarant was perceiving the event or condition which the statement narrates, describes, or explains are said to be admissible as present sense impressions.

Wigmore carved out and articulated the exception for excited utterances. He was the first to point out the "necessary" nature of such statements and that the spontaneity, produced by the exciting event or condition, minimizes the risk of un-

1. This provision is now carried forward as La. R.S. 15:434 (1950).
4. The writer has purposely chosen to use the term "excited" rather than the term "spontaneous" in describing utterances of emotion which may be admitted as exceptions to the hearsay rule, although the two adjectives are often used interchangeably. This was done in an attempt to avoid confusion between spontaneous utterances and contemporaneous ones and to assure that the two requirements are not merged in the reader's mind as concomitant prerequisites to the admission of hearsay evidence under these exceptions. Merger of the two notions—each in itself supposedly a guarantee of trustworthiness—has occurred in some jurisdictions, making admission of hearsay evidence under the exception contingent on its contemporaneous nature as well as its spontaneity. See, for example, the discussion in Harper, Res Gestae in the Georgia Law of Hearsay, 5 Mercer L. Rev. 257 (1954).
6. Id. rule 63(4)(a).
reliability. The excited extra-judicial assertion is more valuable to the trier of fact than statements made at the time of trial by the declarant after he has had ample opportunity to reflect upon the exciting event or condition. The excitement prompting the utterance minimizes the risk that there will be a fabrication by the declarant. In the case of present sense impressions, the contemporaneous nature of the remark likewise reduces the danger of fabrication, since such statements are made while the declarant is observing the event. The admission of both excited utterances and present sense impressions is said to be necessary since it is impossible for the trier of fact to recreate the exciting condition and thus to recapture the moment at which the declarant spoke.

It is the purpose of this Comment to discuss the extent to which Louisiana recognizes these exceptions; and, if such statements are admitted, to discover the rationale used by Louisiana courts to admit them. Its scope is intended to encompass the admission of excited utterances and present sense impressions in both criminal and civil cases. Prior to 1928, Louisiana rules of evidence were said to be identical in both types of trials.

In that year, a code of criminal procedure was adopted, setting forth a number of evidentiary rules. The impact of this code

7. 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1748-1749 (3d ed. 1940) : "There must be some occurrence, startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting." It was further required that there be no time to recover from the startling event and thus little chance to fabricate details about it. Therefore in the case of remarks made subsequent to the exciting event, time was said to be a very important factor insofar as determination of spontaneity and thus of reliability was concerned. Later commentaries on the Wigmore analysis have pointed out that the guarantee of reliability through excitement may well be self-defeating. Most writers have concluded that as the mental stress or excitement of an observer or participant increases, the accuracy of perception through his senses decreases. What the statement gains in honesty, it may well lack in accuracy. See Hutchins & Slesinger, Some Observations on the Law of Evidence, 28 COLUM. L. REV. 432 (1928). Most courts, including those in Louisiana, appear to be unimpressed with such sophisticated arguments and have continued to admit excited utterances with very little regard for the nature of the excitement and its effect on accuracy. Apparently, it is felt that these statements are invaluable for the trier of fact and that deficiency of perception by the declarant is not much greater than that of the ordinary witness.

8. See, e.g., Emens v. Lehigh Valley Ry., 223 F. 810 (N.D.N.Y. 1915) (fatal accident at railroad crossing; declarant was wife, sitting in automobile with her husband, watching the train. Husband was permitted to report wife's question, "Why don't [sic] the train whistle?"). Present sense impressions are also often reasonably reliable because the declarant's perception of the event or condition can be verified by the perception of the reporting witness, who must have been at least within earshot of the declarant if not immediately at his side.


On evidentiary rules in civil cases is unclear. But this has not been a matter of great concern to Louisiana courts, probably because evidence rules are more liberally applied in Louisiana civil cases than in criminal cases. Since appellate courts in this state may review both the rulings of law and the findings of fact in civil cases, a request by either party for trial by jury in such cases is the exception rather than the rule. Thus there is less danger of prejudice or of uncorrectable error in the admission of hearsay evidence in Louisiana civil cases, and little reason to impose the strict common law evidence rules designed for use in jury trials. Most of the discussion of admissibility of evidence in Louisiana is found in the appeal of a criminal defendant, whose life or liberty is at stake.

Distinguishing Res Gestae

It would be impossible to discuss excited utterances and present sense impressions as separately recognized exceptions to the hearsay rule without first facing the problems surrounding the use of res gestae, the area from which both exceptions were apparently carved. There is probably no single legal term which has been more criticized than this broad and amorphous concept, used by courts to admit all kinds of evidence, testimonial as well as real. Without exception, authorities have roundly

13. See LA. CODE Civ. P. arts. 1731-1733, including the preliminary statement to Chapter 7, the chapter in which these procedural articles are to be found.

The rationale behind the more lenient evidence rules in workmen's compensation cases, in addition to the absence of jury trials, is the frequency of accidents in which little or no evidence is available apart from the workman's testimony at the time of trial and statements at the time of the injury or soon thereafter. LA. CODE Civ. P. art. 1733(2). For the best statement of this rationale, see Jacobs v. Village of Buhl, 199 Minn. 572, 577, 273 N.W. 245, 247-48 (1937): "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 bring about their death. They do not have a witness with them to furnish proof as to the happening of the accident if the injuries they receive close their lips in death...[To] give a strict application of the res gestae rule in compensation cases would defeat the intent of the Workmen's Compensation Law."

16. State v. Collins, 242 La. 704, 138 So.2d 546 (1962) (rape case; pictures of victim in hospital showing bruises and cuts where she was beaten held admissi-
condemned continued use of the phrase while noting its usefulness in previous development of evidence law.\textsuperscript{17}

The term might have maintained some integrity if it had been strictly confined to situations in which the out-of-court statement is a part of the "things done" and is thus not hearsay at all.\textsuperscript{18} But Louisiana courts as well as many other courts have often failed to distinguish carefully between hearsay and non-hearsay statements entering under the res gestae exception, and great confusion has resulted.\textsuperscript{19} And into the convenient hamper of res gestae has also gone evidence actually falling under the now recognized exceptions for excited utterances and present sense impressions—usually with no pause for discussion.\textsuperscript{20}

Through application of the discerning analysis of Professor

\textsuperscript{17} Wigmore calls the phrase "not only entirely useless, but even positively harmful." \textit{6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW} § 1767 (3d ed. 1940). Thayer was of the opinion that the term was first used by "Garrow and Lord Kenyon—two famously ignorant men" and that it was a "catch-all" for some things which belonged there and others which might be put there for "purposes of present convenience." Thayer, \textit{Bedingfield's Case}, 15 AM. L. REV. 1, 10 (1881) ; \textit{J. THAYER, LEGAL ESSAYS} 207, 245 (1908). Judge Learned Hand felt that res gestae was "a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology." \textit{United States v. Matot}, 146 F.2d 197, 198 (2d Cir. 1944).

\textsuperscript{18} \textit{See Comment, 42 ILL. L. REV.} 88, 93 (1947).

\textsuperscript{19} In Louisiana, the res gestae exception is covered by \textit{La. R. S.} 15:447 (1950), which states: "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence." \textit{And id. 15:448 provides:} "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction." For examples of non-hearsay evidence admitted under res gestae exception to the hearsay rule, \textit{see State v. DiVincenti}, 232 La. 13, 93 So.2d 676 (1957) (telephone call occurring in the process of a raid on gambling establishment admitted as res gestae without discussion of its character as hearsay or non-hearsay) ; \textit{State v. Rice}, 159 La. 820, 106 So. 317 (1926) (defendant on trial for liberation of prisoner; conversation between witness and prisoner asking if prisoner could speak to defendant as he drove by, admitted as res gestae without analysis). \textit{Cf. State v. Corcoran}, 38 La. Ann. 940 (1886) (deceased's request to friends to go with him to find defendant and beat him fifteen minutes before fatal struggle excluded as hearsay and not part of res gestae).

\textsuperscript{20} \textit{See, e.g.,} the recent case of \textit{State v. Reese}, 250 La. 151, 194 So.2d 729 (1967), which seems to contain both, entering under what the court calls an extended res gestae doctrine. It must be admitted that the Louisiana legislation encourages this by lumping res gestae and spontaneity in the same statute, \textit{La. R.S.} 15:447 (1950).
Edmund M. Morgan, it is now possible to suggest a return to the non-hearsay use of the term res gestae.\textsuperscript{21} Hopefully, this may serve as a means of removing some of the confusion presently surrounding the broad use of res gestae in Louisiana. This suggestion is not intended to narrow the scope of admissibility of relevant and otherwise competent evidence, but rather through more precise analysis generally to broaden admissibility by placing each form of evidence in the category in which it can best serve the interests of the trier of fact. In many instances, Louisiana already follows Professor Morgan’s analysis, as will be seen below.

Morgan suggests first that out-of-court statements which are themselves operative facts, creating legal relationships, should be admitted as res gestae since they are not admitted for the truth contained therein but merely to prove that they were in fact made. In an action for breach of contract, a statement of acceptance or repudiation of the offer would of itself alter the legal relationship between the parties; or in a libel action, the defamatory statement itself—if made—would alter the existing legal relationship between the parties.\textsuperscript{22}

Morgan suggests secondly that a statement which gives meaning to otherwise ambiguous conduct may be admitted, not for its truth, but as an intrinsic portion of that conduct necessary for its explanation to the trier of fact.\textsuperscript{23} If A testifies that he saw B give $100 to C, saying as he did so, “Here’s $100 as a loan, but I expect repayment when you are back on your feet,” his testimony is admissible to show that the transfer was a loan rather than a gift. The out-of-court utterance is not hearsay but actually a part of the act done.\textsuperscript{24}

\textsuperscript{21} Morgan, Res Gestae, 12 WASH. L. REV. 91 (1937); Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229 (1922).

\textsuperscript{22} For an example in Louisiana, see State v. Forsythe, 243 La. 460, 144 So.2d 536 (1962) (prostitution; conversations between girls and members of the vice squad prior to going upstairs to rooms where arrests were made held admissible as part of res gestae).

\textsuperscript{23} Some would call this the verbal part of an act, or simply “verbal act.” See, e.g., 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1772 (3d ed. 1940); Slough, Res Gestae, 2 KAN. L. REV. 246, 273 (1954). This phrase, like its Latin cousin res gestae, suffers from the burdens born of faulty analysis.

\textsuperscript{24} See Comment, 42 ILL. L. REV. 88, 91 (1947). In Louisiana, see State v. Fernandez, 157 La. 149, 153-54, 102 So. 186, 187 (1924) (statements by robbers to each other during robbery admitted; the court said: “This testimony was not hearsay, but clearly formed a part of the res gestae.”); State v. Terry, 128 La. 680, 55 So. 15 (1911) (sale of intoxicating liquor; conversation between witness and drugstore clerk as to how they could “manage” getting witness a bottle of liquor by sending him to defendant doctor for a prescription held admissible as res gestae); State v. Gessner, 44 La. Ann 93, 10 So. 404 (1892) (theft; accused’s
Morgan further suggests that a statement may be admitted as circumstantial evidence of other facts, not for its own truth. Usually such a statement is important in a case in which the material fact to be proved is the state of mind of the person to whom the statement is communicated. He gives the example of a defendant charged with bigamy whose defense is that his first spouse had been absent for seven years and that he contracted his second marriage in the good faith belief that his first wife was dead. Testimony by A that he heard B tell defendant, a few months prior to the second marriage, that C had recently seen his spouse, is clearly admissible on behalf of the State on the issue of defendant's good faith and as such is non-hearsay.25

Morgan's fourth category consists of statements which are circumstantial evidence of intent.

"Where a resident of X, while removing therefrom to Y, utters imprecations upon X and all its inhabitants, either reverently or blasphemously calling down upon them the condemnation of the Almighty [and] domicile is in issue, the hostility of the declarant is circumstantial evidence of his intent to abandon X as his residence, and his utterance is circumstantial evidence of his hostility."26

Limitation of the res gestae exception to these clearly non-hearsay utterances may help to clear the area around the exceptions of excited utterances and present sense impressions which, while hearsay because they are out-of-court utterances offered for the truth of the statements contained therein, should be admissible on the grounds of necessity and reliability. Res gestae as above outlined would not include two generally recognized exceptions to the hearsay rule: actual statements of intention as presently existing mental states27 and statements of representations that he was a gas inspector made in order to gain admittance to the house admissible because made within the crime and therefore a part of res gestae).28

25. Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229, 232 (1922). The same testimony would clearly be inadmissible if offered only to prove that the wife was alive or dead.

26. Id. at 233. Two Louisiana cases admitted statements either directly stating intent or circumstantial evidence of intent. In State v. Smith, 171 La. 452, 131 So. 296 (1930), a stabbing case, the trial court properly admitted defendant's remark to a witness as the victim approached, "I ought to kill him" as part of res gestae; and in State v. Vallery, 47 La. Ann. 182, 16 So. 745 (1895), a murder case, the defendant's statement that he would "put 14 buckshots" into the deceased was properly admitted as res gestae, preceding the killing by only "a short time." See also Comment, 14 LA. L. REV. 611 (1954).

27. UNIFORM RULES OF EVIDENCE rule 63(12) (a) (1953). It is of academic interest only that on this exception alone the analysis of the authors of the Lou-
presently existing physical conditions made to physicians for purposes of treatment or for diagnosis with a view toward treatment.\textsuperscript{28} Whether one treats such statements as non-hearsay and thus not subject to the exclusionary hearsay rule\textsuperscript{29} or as hearsay but admissible under these recognized exceptions, they should not be confused with res gestae statements as outlined above.

The proclivity of Louisiana courts for admitting non-hearsay statements, excited utterances and present sense impressions under the heading "res gestae" without analysis or discussion, indicates that the term is indeed too broad. Rather than add one small voice to the many cries raised in the past for the abolition of the term and its relegation to a spot on the musty shelves of interesting legal history, the author suggests a more realistic compromise. Since use of the term is so firmly embedded in Louisiana jurisprudence and not likely to be completely erased, it is suggested that its use be limited to those non-hearsay statements outlined above, when these are the res in issue.

**Excited Utterances**

Now that an attempt has been made to put to one side the statements admissible under the heading of res gestae, attention may be focused upon the treatment of excited utterances by Louisiana courts. It is clear from the very nature of the exception that there must be some excitement to prompt a reliable utterance. The nature of the excitement and the degree of emotion involved, however, are matters to which Louisiana courts have not paid a great deal of attention. The majority of Louisiana cases in which the matter is raised involve shootings, stabblings, and automobile accidents—certainly startling enough in themselves—but there is authority in Louisiana for accepting somewhat lesser degrees of excitement.\textsuperscript{30} The nature and degree of the excitement seems to be the most important among many

\textsuperscript{28} Anzene v. Gulf Public Serv. Co., 198 So. 512 (La. App. 1st Cir. 1939) (statement made after explosion of coke bottle in plaintiff's hand held properly admitted as part of res gestae).
factors considered by Louisiana courts to determine whether the risk of fabrication in the out-of-court utterances is so small that it can be admitted with little danger of prejudice. When our courts have found that the exciting event and other surrounding circumstances "were not such as to preclude the possibility of design, deliberation or fabrication," extra-judicial assertions prompted by that event have been excluded.\[31\]

Since it is felt that the excitement serves to produce reliability—or, better, to reduce the risk of fabrication—prolongation of the excited condition for some reason may well permit admission of statements so long after the event that they would otherwise be deemed inadmissible as untrustworthy.\[32\] In a recent Louisiana criminal case, the Supreme Court affirmed the admission of certain statements by an abortion victim during her twenty-four-hour period of intermittent pain before she died.\[33\] But where the prolongation of the excitement is not sufficient to reduce the risk of fabrication to an acceptable minimum, excited statements have been excluded. Statements made by an injured man after two hours in pain,\[34\] by another after being unconscious for fifteen minutes,\[35\] and by another after "an unknown period" of being unconscious\[36\] were all excluded, ostensibly on the ground that the excited condition might well have subsided and too great a risk of fabrication was once again present.\[37\]

Where the excited statement is made by a bystander rather than a participant in the exciting event, most courts have been

32. In an extreme case in the State of Washington, there was some question as to whether a boy stealing a ride on a street car fell off or was thrown off by the conductor. In either event, the boy was seriously injured and was unconscious for eight days. When the boy regained consciousness he turned at once to his mother and said that the conductor had kicked him off the car. That statement was admitted; the court said there had been no time for reflection or fabrication. Britton v. Washington Water Power Co., 59 Wash. 440, 110 P. 20 (1910).
34. Ellis v. Edwards, 183 So. 116 (La. App. 2d Cir. 1938).
37. In the Ellis case, the declarant seemed to be calm and deliberate when making his statements even though he was in great pain at the time. In that case, the court found certain discrepancies in the physical evidence which led it to disbelieve the plaintiff-declarant's version of the events. In the Holland case, plaintiff-declarant was a young boy injured in a taxicab accident. Plaintiff and the cab driver were the only witnesses for his side in the suit against the insurance company; all other witnesses gave a different version of the accident and of plaintiff's condition. The court apparently did not believe the plaintiff. In the Bionto case, the fact that declarant was the only witness to his accident and that he seemed calm and deliberate in his statements led the court to believe that the risk of fabrication in his statements was high.
more reluctant to admit it. Apparently, it is felt by some courts that disinterested onlookers will be less excited by the occurrence and thus the risk of fabrication will be increased.\textsuperscript{38} In very early cases, Louisiana adopted the more progressive position of admitting bystanders’ statements if there were few indications of fabrication.\textsuperscript{39} Later a series of cases excluded certain excited statements ostensibly for the very reason that bystanders had made them.\textsuperscript{40} But more recent cases have once again indicated that the fact that the statement sought to be admitted was made by a bystander is only one element to be considered by the trial judge in measuring the risk of fabrication.\textsuperscript{41}

One way in which some courts have sought to minimize the danger of fabrication in the admission of excited extra-judicial assertions is to exclude statements which appear to be purely narrative or those given in response to questions. These courts reason that since these statements tell about the event rather than permit the event itself to speak through the declarant, there is a greater danger of fabrication and exaggeration in the telling.\textsuperscript{42} It is submitted that such reasoning confuses the excitement prompting the statement with the element of spontaneity. The condition which is said to minimize the danger of fabrication is the excitement, and thus the form of the statement—whether it be purely spontaneous, narrative or in response to questions—should not bar its admission.\textsuperscript{43} Fortunately, the prevailing rule in Louisiana and elsewhere seems to be that

\textsuperscript{38} Wigmore, however, clearly rejects any limitation which would exclude excited utterances for the sole reason that they are made by bystanders. G. J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1755 (3d ed. 1940). New York, it has been stated, is one of the jurisdictions which excludes statements by bystanders, showing that it is “more willing to receive the declaration of a party to the accident, who has an interest in the outcome of the case, than the declaration of a bystander, who has no interest in the suit, but who may have been emotionally moved by the concurrence.” Mackston, \textit{Res Gestae} in New York, \textit{S INTRA. L. REV.} 115, 122 (1953).


\textsuperscript{40} State v. Bellerd, 50 La. Ann. 594, 23 So. 504 (1898); State v. Riley, 42 La. Ann. 995, 8 So. 469 (1890); State v. Oliver, 39 La. Ann. 470, 2 So. 194 (1887). \textit{Contra}, State v. Desroches, 48 La. Ann. 428, 19 So. 250 (1896). A number of these exclusions may have been based on the court’s belief that the bystanders’ utterances were opinions rather than statements of fact.

\textsuperscript{41} State v. DiVincenti, 232 La. 13, 93 So.2d 676 (1957); State v. Compagnon, 230 La. 657, 89 So.2d 158 (1956).

\textsuperscript{42} Some courts seem to have carried this to the extreme in automatically excluding statements which appear to have been made in response to questions propounded to the declarant by the reporting witness or by others subsequent to the startling event. Williams v. State, 188 So.2d 520 (Fla. App. 2d Dist. 1966).

\textsuperscript{43} Nor should the content of the statement be a reason to exclude it, if the statement is found to have been prompted by sufficient excitement. Some authorities have felt that the statement must elucidate the occurrence itself rather than
the fact that the statement was made in a narrative form or as an answer to a question is merely one factor to be considered by the judge in determining whether the risk of fabrication in the statement is so small that it can be admitted. According to where the danger of unreliability is found to be small because of the great excitement, Louisiana courts have admitted narrative statements or statements made in response to questions. Where the court finds little risk of fabrication, even the affirmative nod of a shooting victim unable to speak, given in response to the witness’s question supplying the name of the accused, can be admitted. Answers to questions given in a calm and deliberate manner some hours after the exciting event have been excluded, however, apparently because the danger of fabrication was great.

Refer to some prior matter. J. Wigmore, A TREATISE OF THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1750, 1754 (3d ed. 1940). But it has been pointed out that such a requirement confuses the content of the statement with its character. If excitement reduces the risk of unreliability, then the subject matter of the excited statement should not really be of great concern to the trier of fact. Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir. 1937) (plaintiff slipped and fell in grocery store; grocery clerk who came to her assistance said he was sorry, that the floor had been littered with vegetables for a couple of hours,” but he had been too busy to clean it up. The court of appeals said the statement was properly admitted). See Slough, Res Gestae, 2 KAN. L. REV. 246, 262 (1954). It does not appear that Louisiana courts require that the excited utterance elucidate the event itself. But see the recent case of State v. Reese, 250 La. 151, 194 So.2d 729 (1967), in which the court announced without reference to Louisiana cases that excited statements are admissible "provided they, in some way, illustrate, elucidate, qualify or characterize the act. . . ."


45. Criminal cases: State v. Williams, 158 La. 1011, 105 So. 46 (1925) (more than fifteen minutes after event); State v. Williamson, 153 La. 9, 81 So. 737 (1919) (probably five to ten minutes after event); State v. Foley, 113 La. 51, 36 So. 885 (1902) (fifteen seconds after event); State v. Carter, 106 La. 407, 30 So. 895 (1902) (very short time); State v. Robinson, 52 La. Ann. 541, 27 So. 129 (1900) (thirty seconds after event). Civil cases: Lanis v. Illinois Cent. R.R., 140 La. 1, 72 So. 788 (1916) (five minutes after event). The questions themselves, of course, are admissible as non-hearsay to make the answers intelligible.

46. State v. Maxey, 107 La. 799, 32 So. 206 (1902) (nod was made two minutes after the shooting; court said this was admissible as part of the res gestae).

47. State v. Bussey, 162 La. 393, 110 So. 626 (1927) (poisoning; questions to little girl in hospital twenty-eight hours after event and her answers excluded because they seemed to be calm, deliberate responses not provoked by excitement). Admission of statements in response to questions may be limited in some jurisdictions by the fact that the declarant is only a witness to the startling event rather than the actual victim. This is a further indication of the skepticism with which the courts view the degree of excitement present in a non-participant. See State v. Ramsey, 48 La. Ann. 1407, 20 So. 904 (1896), where the admission of the statement of the witness to a fatal shooting in response to questions from persons in another room was judged error. Q: "What is the matter back there?" A: "Nick Ramsey shot Jim Moffit, and shot him down for nothing." It appears the exclusion of this evidence, however, was based more on the fact that it expressed the declarant’s opinion as to the guilt of the defendant rather than the fact that it was given in response to a question.
Another factor considered by Louisiana courts and those in common law jurisdictions in weighing the risk of fabrication in an excited utterance is the elapsed time between the exciting event and the statement. It is not required that the excited utterance be contemporaneous with the startling event, either in Louisiana or in the majority of other jurisdictions. Nor is there an absolute time limit beyond which no statements will be admitted; each case must turn on its own facts, and the circumstances must be such as reasonably to minimize the risk of fabrication of details about the event. When the courts have found little opportunity to fabricate or little indication of design or deliberation, statements up to twenty-four hours after the event have been admitted. But when it appears that there is a substantial likelihood that statements made by an injured person may have been fabricated, as in State v. Chandler, utterances made as soon as ten minutes after the event may be excluded. If it should appear that the out-of-court declarant carefully chose the witness to whom he made his statement, there is an indication of reflection and of fabrication. Thus it is submitted that though most of the discussion in excited utterance cases centers around the time element, the passage of time is important principally because it bears on the question of the risk of reflection and fabrication, which is the real core of the problem of admissibility under this exception. In most

48. To do so would be to merge Wigmore's excited utterance exception with Thayer's contemporaneous impression exception, thereby making it difficult to get in statements of either kind and creating a "legal conglomeration which neither Thayer nor Wigmore would have countenanced." Slough, Res Gestae, 2 KAN. L. REV. 246, 258 (1954). But see State v. Willis, 241 La. 796, 131 So.2d 792 (1961), where it was said that the words must be "nearly contemporaneous" with the act. See also the discussion of present sense impressions as a separate exception to the hearsay rule in text accompanying note 80 infra.


52. State v. Estoup, 39 La. Ann. 223, 1 So. 448 (1887) (reporting witness found shooting victim ten minutes after the event, sitting next to his brother-in-law; but evidence did not show that the victim had made any statement to the brother-in-law such as that he made to the reporting witness).

53. One Louisiana case explicitly recognizes this principle. In State v. Foley, 113 La. 51, 57, 36 So. 885, 887 (1904), it is stated: "Deliberate design vel non is the test." Many other cases impliedly recognize the same principle by stating that there is no absolute time limit for reliability.
cases in which excited utterances have been admitted, the time element involved has been less than fifteen minutes and there was little difficulty in finding that there was only a minimal risk of fabrication about the startling event, when excitement and elapsed time were both considered.

In some cases, it appears that statements are admitted as excited utterances and then are used as tending to prove the occurrence of the event itself. It is clearly circuitous to say that a statement may enter because of the excitement—when the only proof of the excitement is the statement. But such a statement was admitted in *Travelers’ Ins. Co. v. Mosley* by the United States Supreme Court, and the practice is said to be quite common in many jurisdictions. In *Mosley*, however, there were at least some facts other than the statement from which the court could draw the conclusion that the exciting event had occurred—Mosley’s voice trembled and he appeared to be faint and in great pain.

In an early criminal case in Louisiana, the Supreme Court


Workmen’s compensation cases: Butler v. Washington-Youree Hotel Co., 160 So. 825 (La. App. 2d Cir. 1935) (plaintiff’s deceased husband worked the 7:00 p.m. to 7:00 a.m. shift and was injured sometime after 1:00 a.m.; statement in question was made to his wife sometime after his return home at the end of his shift). See also Temple v. Martin Veneer Co., 200 So. 676 (La. App. 1st Cir. 1941) (son told father of injury after returning home from work).

55. This most often occurs in workmen’s compensation cases where the employee was working alone. Professor Morgan says that in workmen’s compensation cases, the niceties of technical evidence rules such as this usually yield to the public policy regarding every injury that occurs while a man is employed as prima facie compensable. Morgan, *Res Gestae*, 12 Wash. L. Rev. 91, 100 (1937). Louisiana statutes expressly provide that in workmen’s compensation cases courts are not bound by “technical rules of evidence.” See text accompanying note 14 supra.

56. 75 U.S. (8 Wall.) 397 (1869).


held that the statement made by the deceased while suffering from the gunshot wound that caused his death was erroneously admitted because his statement, made to his roommate, was the only proof of the exciting condition. Deceased had come to their home between 2:00 a.m. and 4:00 a.m. after the shooting and stated that defendant had jumped from a slowly moving train and shot him. The witness could not verify deceased's statement as to the person who had inflicted the wound, but he could certainly testify from his own observations as to the wound. The court said:

"The facts by and from which the admissibility of the statements as res gestae are to be tested, have to be ‘testified’ to by persons cognizant of them. The admissibility itself of the statements being the very question at issue for decision, no part of them are to be used for the purpose of determining it."\textsuperscript{60}

It is submitted that there \textit{was} evidence other than deceased's statement of the exciting condition; there was the bullet wound itself. The only elements not clear were the identity of the assailant and the time elapsed since the shooting. It is submitted that the court should have found the excited nature of the utterances from the obvious condition of the deceased.

The issue does not appear to have been raised in any subsequent cases, and it is suggested that the admission of such statements should be at the discretion of the trial judge. Where he finds other circumstances which indicate that the exciting event did take place (as in \textit{Mosley}) so that the risk of unreliability is minimal, the statement should be admitted. And even where the statement stands alone as evidence of the exciting event, this should be only one factor in the balancing process by which the trial judge weighs the risk of fabrication.

The declarant making the excited out-of-court utterances must, of course, have had the opportunity to observe personally that of which he speaks in order for it to be admissible.\textsuperscript{61} Aside from this requirement, it seems that the excitement of the moment will overcome most defects of competency. The witness seems merely a human conduit through which the event makes itself known.\textsuperscript{62} Louisiana courts have admitted an excited state-

\textsuperscript{60} \textit{Id.} at 225-26, 32 So. 402, 404 (1901).
\textsuperscript{61} 6 J. Wigmore, \textit{A Treatise on the Anglo-American System of Evidence in Trials at Common Law} § 1751 (3d ed. 1940).
\textsuperscript{62} C. McCormick, \textit{Handbook of the Law of Evidence} § 272 (1954);
ment of a felon even when a felony conviction made one incompetent to testify; and building on that authority, admitted the excited statement of a wife for use against her husband in a case in which she could not be a competent witness against him. Excited utterances of children have also been admitted, either without mention of their age or without discussion of their competency if the age were mentioned.

However, Louisiana courts, in keeping with the practice in most jurisdictions, have continued to apply the opinion rule to excited utterances, at least nominally. McCormick is critical of this practice, pointing out that the opinion rule is designed for in-court use, where a question which asks for an opinion may be rephrased or simply withdrawn. “But applied to out-of-court declarations admitted under the hearsay exceptions the rule would run counter to the way people naturally talk, and it should not have a place there.” Louisiana application of the rule seems limited to those cases in which the statement clearly expresses an opinion formulated on the basis of facts observed by the declarant. In one criminal case, the defendant had been called upon by the sheriff to aid in making an arrest and was in charge of the prisoner when an escape was attempted. Defendant fired two shots, one of which fatally wounded the prisoner. A bystander immediately said, “I think Murphy has made a mistake.” The statement was excluded as opinion, though made seconds after the shot was fired.

In the absence of such a clear example of opinion, Louisiana courts have not found an undue risk of unreliability. Hybrid utterances which seem to be statements of fact and yet have elements of opinion have been admitted. The statement, “if I had not shown myself so plucky and willing to fight, I would never have been shot,” made by the victim after a shooting, was held improperly excluded, with no discussion by the Supreme

64. State v. Pilcher, 158 La. 791, 104 So. 717 (1925).
68. Id.
69. State v. Murphy, 170 La. 398, 127 So. 881 (1930).
70. It is important to note that the bystander who spoke had been clerk of court and sheriff, and the Supreme Court felt that he was familiar with the respective rights of law officers and prisoners. Therefore, the bystander’s statement was intended to announce his belief that the defendant had made a mistake as to his lawful powers as custodian of the prisoner when he shot the prisoner.
In another case, the statement, "I am shot through and through, and if I had listened to you this would not have happened" was given in evidence without objection by counsel. 72

It should be noted that in rape cases, Louisiana courts as well as courts elsewhere 73 seem to have accepted statements in which the risk of fabrication was more than minimal. Statements of the rape victim immediately after the event are generally held admissible, as well as particulars given by her to the officer who takes her complaint concerning the event. 74 An early Louisiana case limited admissible statements in rape cases to those made almost contemporaneously with the event, 75 but this holding was soon modified by throwing the broad cloak of res gestae over the problem. 76 Fortunately, there are some limitations; statements made by the victim two or three days after the alleged assault, in further explanation of the incident to the victim's mother, have been excluded. 77 The reasons behind the special treatment in rape cases are difficult to explain, but perhaps the courts feel that the event is so shocking and devastating to the victim that her excited condition is likely to last for a greater length of time; and the risk of fabrication may remain minimal because of the prolongation of the excited condition.

It is sometimes held elsewhere in the United States that an excited utterance which is "self-serving" in nature is to be automatically excluded. 78 But the prevailing view is that the self-serving aspect of the statement is not conclusive and should be used merely as a factor in the trial judge's measurement of

72. State v. Lively, 119 La. 363, 44 So. 128 (1907). Counsel objected 'only when the witness was asked to explain what the deceased meant by the statement. The Supreme Court said this objection was improperly sustained; the unobjected-to statement was useless without further explanation.
76. State v. Langford, 45 La. Ann. 1177, 14 So. 181 (1898). Cf. the statement by Justice McCaleb in his concurring opinion in State v. Watson, 247 La. 102, 112, 170 So.2d 107, 110 (1964), an aggravated rape case: "I think the objections to the testimony of the police officers were properly overruled as the statements of these persons, having been given within two or three hours of the commission of the offense, formed part of the res gestae."
77. State v. Cole, 145 La. 900, 83 So. 184 (1919); cf. State v. Collins, 242 La. 704, 138 So.2d 546 (1962), a rape case in which pictures of the victim in the hospital with her head shaved to reveal bruises and cuts from the struggle were admitted as part of the res gestae.
78. Fischer v. Chicago & N.W. Ry., 188 Minn. 73, 258 N.W. 4 (1934).
the risk of fabrication. The Louisiana courts do not appear to have taken a clear position on excited utterances which appear to be self-serving. It is submitted that Louisiana should follow the prevailing view elsewhere and treat the self-serving aspects of the statement as one more factor for the discretion of the trial judge in weighing the risk that the statement may be unreliable.

PRESENT SENSE IMPRESSIONS

The exception to the hearsay exclusionary rule recognized in a few jurisdictions of present sense impressions may be traced to the suggestions of Professors Thayer and Morgan. The suggested definition provided by the Uniform Rules of Evidence represents the prevailing view of the nature of the exception: a statement "which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains" may be admitted. There is no requirement that the event be of a startling nature.

Such statements are necessary and reliable for reasons very similar to those advanced in the discussion on excited utterances, but with slight differences. As with excited utterances, one cannot recapture the moment at which the declarant spoke and thus a witness's report of his statement at the time is necessary. And the risk of fabrication is low because such statements are made in the presence of the reporting witness "who would have equal opportunities to observe and hence to check a misstatement." This witness may then be cross-examined concerning the event itself as well as the utterance which he is reporting; and the truth of the out-of-court utterances would not depend solely upon the veracity of the declarant. The risk of fabrication is further minimized by the fact that there are no problems of defect of memory of the witness nor of elapsed time. It will be seen that unless absolute contemporaneity is

80. Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922); Thayer, Bedingfield's Case—Declarations as a Part of the Res Gestae, 15 Am. L. Rev. 71, 83 (1881). Wigmore insists on excitement as the guarantee of reliability and seems to reject the exception altogether. 6 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1757 (3d ed. 1940).
84. Id.
insisted upon, as is the case in the Uniform Rules, the foundations of minimal risk of fabrication are clearly weakened.\textsuperscript{85}

It should be noted that some writers feel the present sense impression presents a lower risk of unreliability and inaccuracy than the excited utterance. The impairment of perception produced by excitement is no longer present and yet spontaneity is. “With emotion absent, speed present, and the person who heard the declaration on hand to be cross-examined, we appear to have an ideal exception to the hearsay rule.”\textsuperscript{86} In light of this statement, it is remarkable that so few courts have discussed and directly accepted the exception.

The classic example of a statement admitted under this exception appears in the case of Houston Oxygen Co. v. Davis.\textsuperscript{87} In that case, an automobile filled with people including the plaintiff collided with defendant’s truck. On appeal, defendant challenged the exclusion by the trial judge of a statement made by a Mrs. Cooper before the accident occurred. Mrs. Cooper testified that the car in which plaintiff was riding passed her headed in the same direction, four or five miles from the scene of the later collision. Other evidence was offered to show that the car was going at a high rate of speed and was zig-zagging. As the car passed, Mrs. Cooper said to those with her, “they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up.” Her statement, as reported by another occupant of her car, was excluded by the trial court, but this was deemed error by the appellate court.

The reviewing court felt that the statement of Mrs. Cooper was “sufficiently spontaneous to save it from the suspicion of being manufactured evidence.”\textsuperscript{88} While the statement did not come within the traditional excited utterance exception because it did not have the safeguards of impulse, emotion or excitement, the court (citing a text by McCormick) felt there were

\begin{itemize}
\item \textsuperscript{85} Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 236-37 (1922). Accordingly, some courts have applied more rigid standards of elapsed time in these cases than in the excited utterance cases where it might be found that the excitement had been prolonged by unusual circumstances.
\item \textsuperscript{86} Hutchins & Slesinger, Some Observations on the Law of Evidence, 28 Colum. L. Rev. 432, 439 (1928). Further, “the best evidence of all is a statement made in immediate response to an external stimulus which produces no shock or nervous excitement whatever.”
\item \textsuperscript{87} 139 Tex. 1, 161 S.W.2d 474 (1942).
\item \textsuperscript{88} Id. at 6, 161 S.W. 2d at 476.
\end{itemize}
other safeguards—no defect of memory, no lapse of time, and verification by the reporting witness.\textsuperscript{89}

Similar statements have been admitted under the exception for present sense impressions in a limited number of jurisdictions since 1942.\textsuperscript{90} For example, the observation of a lineman on the condition of a particular circuit, that it was open, made before he anticipated injury and before he was electrocuted, was admitted.\textsuperscript{91}

The courts which have admitted present sense impressions as an exception to the hearsay exclusionary rule do not seem to have imposed any requirement that the declarant be a competent witness, other than that the declarant have had an opportunity to observe the event or condition of which he speaks.\textsuperscript{92} There would seem to be no reason for divergence here from the practice followed in admitting excited utterances without questioning the competency of the out-of-court declarant; once again, the event or condition provides the stimulus for the statement, and the declarant's competency does not seem to be a conclusive factor.\textsuperscript{93} The declarant's competency should be only one element of the trial judge's measurement of the risk of fabrication in the statement.

However, courts which recognize an exception for present sense impressions do not apply the opinion rule to the out-of-court utterance, as is true of the treatment by some courts of excited utterances. Present sense impressions very often an-

\textsuperscript{89} Id.; see Comment, 21 Tex. L. Rev. 298 (1943).

\textsuperscript{90} McCormick mentions some applications even prior to 1942: Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934) (bystander's statement that he heard car coming and that at the speed at which it was traveling it could not make the curve); Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 41 P.2d 44 (1935) (remarks by persons in burning building as to smell of smoke, indicating that the fire came from gas). He lists an equal number of cases which are contra. C. McCormick, Handbook of the Law of Evidence § 273 (1954).

\textsuperscript{91} Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942). See also Marks v. I. M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943) (statement made as two racing trucks passed the declarant more than two blocks from the scene of the subsequent accident, "Golly, look there; those trucks are going to kill somebody yet"); admitted as exception to hearsay exclusionary rule); see Morgan, The Law of Evidence, 1941-1945, 69 Harv. L. Rev. 481, 576 (1946); cf. Heg v. Mullen, 115 Wash. 252, 197 Wash. 252, 197 P. 51 (1921) (statement to others in speeding car, "I am in no hurry," admissible in testimony of declarant now in court on the stand), discussed in Slough, Res Gestae, 2 Kan. L. Rev. 246, 293 (1954).

\textsuperscript{92} Other competency questions should go to the weight of the evidence rather than its admissibility. Cf. C. McCormick, Handbook of the Law of Evidence § 226 (1954), and text accompanying note 61 supra.

\textsuperscript{93} 6 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1751 (3d ed. 1940).
nounce opinions, and the courts have not seen the opinion aspect of such statements as creating an undue risk of unreliability.\(^4\)

The writer could find no Louisiana cases rejecting a statement of a present sense impression as not being an exception to the hearsay exclusionary rule; there seem to be no cases which even discuss the matter.\(^5\) It is submitted that in a proper case, Louisiana should recognize a separate exception to the hearsay rule for statements made while the declarant was perceiving an event or condition, when the trial judge finds in his discretion that the contemporaneous nature of such statements, balanced with other factors such as the competency of the declarant and the expression of opinion in the statement, makes the risk of fabrication acceptably minimal.

**THE FUTURE OF THE EXCEPTIONS**

Despite the foregoing analysis, there will remain some hearsay statements which fall on the fringe of one of these exceptions or in between the two. Suppose two children, Tom and Dick, thirteen years of age, are out on a trick-or-treat expedition Halloween night. They are approached by a man who identifies himself as Tom's uncle from Mississippi, whom Tom has never seen. Tom's uncle says he just arrived in town and was sent by Tom's parents to bring him home because of the late hour. Tom gets into the "uncle's" car and his companion returns to his home. When Tom does not return to his home at the appointed hour, Tom's parents telephone Dick's home to locate Tom. Dick answers the telephone and repeats the incident to Tom's mother. The "uncle" is later arrested and charged with kidnapping. At the trial, the state seeks to introduce the testimony of Tom's mother as to what Dick (now deceased) told her about the incident. The state argues that Dick's statement is an excited utterance and thus an exception to the hearsay exclusionary rule. Under the circumstances, Dick's out-of-court statement is necessary. But is the risk of unreliability so great that it should be excluded?

\(^4\) Tampa Elec. Co. v. Getrost, 141 Fla. 558, 10 So.2d 83 (1942) (opinion of lineman that circuit was open); Marks v. I. M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943) (opinion that trucks would "kill somebody yet"); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942) (opinion that passengers in car were drunk, and that they would be found "wrecked" up the road); Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 576 (1946).

\(^5\) But in this regard, see State v. Pilcher, 158 La. 791, 104 So. 717 (1925) for an interesting discussion concerning an out-of-court statement made by a wife during the course of a search of her husband's premises.
One can hardly maintain that Dick's excitement at seeing Tom get into the car of someone believed by both Tom and Dick to be Tom's uncle was so great that it would not have abated one hour later.\textsuperscript{96} Thus the risk of fabrication in such a statement may well be unacceptably large. The statement is clearly not one of a present sense impression. There would appear to be no recognized exception to the hearsay rule under which Dick's statement may be admitted.

There are suggested exceptions, however, which might permit the admission of such statements at the discretion of the trial judge. If "the declarant is unavailable as a witness," the Uniform Rules would permit the admission of "a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter has been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action."\textsuperscript{97}

The broad range of such a proposed exception vests great discretion in the trial judge and may result in substantial liberalization of the hearsay exclusionary rule.\textsuperscript{98} But it is submitted

\begin{itemize}
\item \textsuperscript{96} And one cannot say that such an occurrence is so out of the ordinary that a child would be precluded from fabricating details about it. In State v. Hutchison, 222 Ore. 533, 353 P.2d 1047 (1960), the unusual character of the occurrence (sexual attack) and the very young age of the child involved were apparently the deciding factors in determining that the risk of fabrication was small.
\item \textsuperscript{97} UNIFORM RULES OF EVIDENCE rule 63(4) (c) (1953). The Uniform Rules do not limit the unavailability requirement only to death, but recognize "real unavailability for any cause." \textit{Id.} comment. Massachusetts has had a similar statute since 1898, providing that in civil cases "a declaration of a deceased person shall not be inadmissible in evidence as hearsay if the Court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." Mass. Acts 1898, ch. 535, now found in 8 MASS. ANN. LAWS ch. 233, § 65 (1956). See C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 303 (1954).
\item \textsuperscript{98} Such liberalization of hearsay exceptions seems very much in vogue. However, it is necessary to interject a brief caveat as to liberalization. In the recent case of Pointer v. Texas, 380 U.S. 400 (1965), the United States Supreme Court held that defendants in state court trials are protected by the sixth amendment's guarantee of confrontation of the witnesses against them. Specifically, the Court held that a statement given by a witness at a preliminary hearing at which defendant was not represented by counsel could not be introduced against him at the trial itself, even though the prior declarant be unavailable. The basis for the Court's decision seemed to be that to admit such statements would deny the defendant his right of cross-examination in court; and that this right was so fundamental to a system of ordered justice that to foreclose it would be to deny the defendant due process of law. \textit{Id.} at 405; cf. Turner v. Louisiana, 379 U.S. 466, 472-73 (1966): "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." It should be remembered that the major objection to all hearsay evidence is that the out-of-court declarant is not on the stand and not
that the same test of measurement of the risk of fabrication is at the core of this exception as well. The trial judge will have neither excitement nor absolute contemporaneity to minimize the danger of unreliability, and thus the balance may often tip toward exclusion. In a statement such as Dick’s the judge should consider Dick’s youth, the nature of the occurrence, and the time elapsed since the event. If under all the circumstances, the trial judge can still determine that the risk of fabrication is very small and the out-of-court declaration is validly unavailable, then the statement should be admitted.

The rules of evidence in Louisiana in the area of excited utterances and present sense impressions are largely judge-made, developed within the structure of applicable statutes. There would seem to be no reason why that development cannot continue its progress toward clarity and consistency by careful analysis of the recognized exceptions for excited utterances and present sense impressions.

H. Alston Johnson III*

LOUISIANA’S PROFESSIONAL CORPORATION ACTS

Professional corporations are of coming importance in Louisiana due to the passage of the Louisiana Legal and Medical Corporation Acts1 and to the significant tax advantages which gave impetus to their passage. Certain tax advantages accrue to professionals practicing as employees rather than as owners. These relate to (1) social security,2 (2) tax deferring pension...