Be Not the First by Whom the New Are Tried, Nor Yet the Last to Lay the Old Aside: Is the Present Sense Impression Exception to the Rule Against Hearsay the Law of Pennsylvania?

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I. INTRODUCTION

The “heard said” or hearsay rule is probably the best known, and at the same time, the least understood, of the Anglo-American rules of evidence. The aversion to the hearsay rule is partially due to the numerous exceptions that have developed over the past three centuries. As a result of the numerous exceptions to the hearsay rule, some have called for the elimination of this rule of exclusion altogether. But the rule against hearsay remains alive and well, living in the law books, law school classes, on bar examinations and in the courts of the land. Seldom, if ever, is a trial conducted without counsel for one or all parties considering or actually making an objection to the admission of evidence based

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The law of evidence is undergoing major evaluation and modernization in the majority of jurisdictions. Much of the change is the result of Congress adopting the Federal Rules of Evidence for federal courts in 1975. Following the federal lead, the National Conference of Commissioners on Uniform State Laws patterned the uniform rules on the final draft of the proposed Federal Rules and recommended their adoption in all states. Twenty-nine states, the military and Puerto Rico now have rules similar to the Federal Rules of Evidence. Other jurisdictions are studying the rules and may adopt them. In jurisdictions that have not adopted the rules, several courts have nevertheless adopted individual rules during the process of deciding cases. The Federal Rules are having an enormous impact on the law of evidence in this country. The phenomenon is similar to the aftermath of the adoption of the Federal Rules of Civil Procedure in 1938 after which all states today pattern rules of civil procedure.

Rule 803(1) of the Federal Rules of Evidence sets forth an exception to the hearsay rule which embraces statements made by a declarant during or immediately following the event or condition that occasioned the statement. The formulation of this exception


9. *See, e.g.*, *State v. Flesher*, 286 N.W.2d 215 (Iowa 1979); Illinois, Ohio and Tennessee courts have also adopted individual rules. *See 1 J. Weinstein & M. Berger, supra*, at T-3 to -4.
10. Federal Rule of Evidence 803 reads in part as follows:
   The following are not excluded by the hearsay rule, even though the declarant is
is part of the trend toward permitting the finder of fact to weigh reliability in admitting certain types of testimony offered in court by one other than the declarant and offered for the truth of its content. Several times the Pennsylvania courts have indicated a willingness to follow the lead of the many states that have adopted the present sense impression exception to the rule against hearsay.¹¹

The main purpose of this article is to address the merits of the present sense impression exception to the rule against hearsay as an exception worthy of being included among other accepted exceptions to the hearsay rule in Pennsylvania. The case law used in this article will emphasize Pennsylvania cases that have discussed the present sense impression exception. The article will also discuss problems that have to be considered with this relatively new exception as it relates to the Confrontation Clause. In conclusion, the article will provide guidelines that may be followed to clarify the law of Pennsylvania as it relates to the present sense impression exception to the rule against hearsay.

available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.  

Fed R. Evid. 803(1).

II. A TIME TO LAY ASIDE "RES GESTAE"

Pennsylvania courts have not always analyzed the admission of hearsay evidence closely, but have instead admitted contemporaneous but unexcited utterances under the rubric of "res gestae." Often when this term is applied by courts, the evidence admitted is either not hearsay and thus needs no exception, or, if it is hearsay, it has some other rational explanation for its admission. "Res gestae" has flourished as a convenient "catch-all" and as words of magic to ease the conscience of courts in escaping the hearsay rule of exclusion when they feel certain telling evidence ought to be considered. Even today, trial courts admit evidence under the res gestae heading and require litigants to appeal for a determination if the evidence admitted is within one of the recognized categories.

The term res gestae means an exploit or deed. The literal translation of the phrase is "thing done." Originally, the phrase was used to indicate that an evidentiary fact was admissible as an integral detail bearing on the nature or existence of the litigated transaction. The term "res gestae" seems to have come into common usage in the early 1800's, at a time when the theory of hearsay was not well developed, and the various exceptions to the hearsay rule were not clearly defined.

The present sense impression exception to the rule against hearsay was probably first articulated by Professor Thayer in his examination of cases that admitted hearsay under res gestae. Thayer explained the exception as dealing with "statements, oral or writ-

15. In the most recent case in this area, Commonwealth v. Blackwell, 343 Pa. Super. 201, 494 A.2d 426 (1985), the trial court overruled the objections to the admission of the out-of-court declaration and admitted the evidence under the "res gestae exception to the hearsay rule." 494 A.2d at 430. See Comment, 81 DICK. L. REV. 347, 348.
17. MCCORMICK § 288, at 835 (3d ed.).
ten, made by those present when a thing took place, made about it, and importing what is present at the very time,—present, either in itself or in some fresh indication of it. . . .”19 The cases examined by Thayer all rely very heavily on the contemporaneity of the declarant’s statement with the event being described.20

Res gestae, a concept of cloudy origin, has existed in the law of evidence for more than a century, always evading clarification.21 This concept has been applied to evidence that is not hearsay and thus needs no exception for its admissibility,22 as well as to other evidence that would come within a recognized exception to the hearsay rule. McCormick stated that within the scope of res gestae there exist four distinct exceptions to the hearsay rule, all possessing different indicia of reliability: (1) declarations of present bodily condition; (2) declarations of present mental state and emotion; (3) excited utterances; and (4) declarations of present sense impression.23

One of the most complete, scholarly and discriminating dissertations upon the subject matter covered under the term “res gestae” was published by Professor M.C. Slough of the University of Kansas and entitled Res Gestae.24 Professor Slough was not ashamed of using a term that had been criticized by so many of his peers. He stated that “[i]t seems impractical, if not impossible, to turn our backs upon the phrase, because in doing so we only pretend that our difficulties are being met. Disparaging remarks will not stifle a thought so well entrenched.”25 He believed that if the phrase were used to include spontaneous and contemporaneous declarations as those terms were used by Wigmore and Thayer, and no more, a spark of certainty would result and most of the current ambiguity would disappear. He concluded that a well-defined and conservative use of the term is more realistic than would

19. Id. at 83.
22. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942) is often cited as a seminal case recognizing a present sense impression as an exception to the hearsay rule. The assertion in this case was not offered to prove the truth of the matter asserted; thus it could be argued that this was not a case of hearsay.
23. McCormick § 288, at 835 (3d ed.).
25. Id. at 281.
be absolute refutation. 26

But the term res gestae continues to be used and applied to several concepts, thus inviting confusion. 27 Since every rule of evidence to which the res gestae rule applies exists as a part of some other well-established principle and can be explained in terms of that principle, the underlying principle should be used. Permitting lawyers and courts to use the general term of res gestae leads to the harmful result of substituting one rule for another, and this in turn leads to uncertainty as to the limitations of both. 28 There are other significant terms in the law such as “res judicata,” “res ipsa loquitur,” “prima facie” and “presumptions,” which have challenged the imagination of many. Yet none of these have been permitted to spill over upon a legal area as broad and encompassing as that claimed by res gestae. 29

The law is often what the court says it is. The Superior Court of Pennsylvania, among others, has stated that there is no “res gestae exception” to the hearsay rule 30 of Pennsylvania. Nevertheless, references to the “res gestae exception” continue to occur, sometimes without an explanation of which of the distinct exceptions with reference to res gestae is meant. 31 Vagueness in the law of evidence is unacceptable, because it undermines the integrity of the system and fails to promote the public perception of fairness. The law of evidence should be exact and judges and lawyers should not be permitted to avoid the toilsome exertion of exact analysis and precise thinking by use of a trick term like “res gestae.” The reasoning involved in the decision to admit testimony should be the primary consideration. 32 Lawyers and judges should not be permitted to re-

26. Id.
27. Judge Learned Hand stated in United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944): “[A]s for ‘res gestae,’ it is a phrase which has been accountable for so much confusion that it has best be denied any place whatever in legal terminology; it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms.”
28. Wigmore was characteristically blunt, denominating “res gestae” as “not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated as a vicious element in our legal phraseology. No rule of evidence can be created or applied by the mere muttering of a shibboleth.” 6 WIGMORE § 177, at 255 (Chadbourn rev.).
29. Slough, supra note 11, at 281.
31. Id.
32. Slough, supra note 11, at 282.
fer to a particular exception by a generic designation. Rather, courts should discard the term "res gestae" in favor of the distinct exceptions which are involved.

III. PENNSYLVANIA CASELAW ON PRESENT SENSE IMPRESSIONS

On several occasions appellate courts of Pennsylvania have undertaken the task of stripping the concept of "res gestae" of the verbiage which has shrouded it for more than a century, and restating the concepts contained in it as reasonably definite principles with a sound psychological rationale by which to determine their scope and applicability. In 1978, the Pennsylvania Supreme Court recognized that within the "res gestae" analysis of Pennsylvania law there are actually a number of separate hearsay exceptions. The court included in its list the present sense impression exception to the rule against hearsay. By stating that the present sense impression is recognized under the "res gestae" rubric, the status of this exception has remained vague and obscure. Not only did the court discuss the exception as part of "res gestae," but the court's pronouncement as to this being the law of Pennsylvania was in the form of dictum.

Four years earlier, the Supreme Court of Pennsylvania first attempted to clarify the "res gestae" rubric and also attempted to change the law with the addition of the present sense impression exception as a decisional rule. In Commonwealth v. Coleman, the out-of-court statement made by the victim of a homicide to her mother over the telephone was considered for admission into evidence. The defendant was charged with aggravated assault and battery, assault with intent to kill, and murder as the result of the death of his girlfriend. The trial court admitted the testimony of the deceased's mother, who stated that she had received a tele-

33. In Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974) the court states: "The practice in many courts, including those of this Commonwealth, has been to refer to the particular exception by the generic designation." Id. at 116, 326 A.2d at 389.
34. See supra note 11.
35. In Commonwealth v. Pronkoski, 477 Pa. 132, 136-37, 383 A.2d 858, 860 (1978), the court stated, "As we have recognized, 'res gestae' is actually a generic term encompassing four discrete exceptions to the hearsay rule: (1) declarations as to present bodily conditions; (2) declarations as to present mental states and emotions; (3) excited utterances; and (4) declarations of present sense impressions."
36. Pronkoski held that the declaration made by the victim's young daughter that her Daddy shot her Mommy did not fall within the excited utterance "res gestae" exception to the hearsay rule. Id.
37. Id. at 137, 383 A.2d at 860.
phone call from her daughter on the day of the murder. In this conversation, the daughter begged her mother not to hang up because “as soon as the phone was hung up Coleman would kill her.”\textsuperscript{39} The mother testified that she could hear shouting in the background and the defendant himself testified that he and his girlfriend had argued loudly immediately prior to the telephone call. He was convicted on all charges, including second degree murder, and sentenced to a term of ten to twenty years imprisonment.\textsuperscript{40}

On appeal to the Supreme Court of Pennsylvania the conviction of the defendant was affirmed. The Court held that the admitted statements qualified as present sense impression declarations and were properly admitted by the court below. The Court stated:

Various courts throughout the United States have embraced the precepts underlying an exception to the hearsay rule for declarations of present sense impressions. Of particular pertinence to our considerations in this case is the decision of the Supreme Court of Texas in \textit{Houston Oxygen v. Davis}, 139 Tex. 1, 161 S.W.2d 474 (1942)\ldots . It found that the evidential value of the remark was more than merely reliability in that it was contemporaneous in time with the observation, was safe from any defect in memory or opportunity for calculated misstatement, and had been made to the testifying witness who had an equal opportunity to observe and hence to check a misstatement.\ldots Indeed, Rule 803(1) of the Federal Rules of Evidence provides for the admissibility of declarations of present sense impression made either during or immediately after perception of the event or condition.

\ldots [w]e do not consider the inability of the mother to have observed the situation in the apartment to be sufficiently persuasive in effect to disallow application of the exception. Verification has never been deemed an absolute prerequisite to admissibility of testimony under this Court's previous treatment of res gestae exceptions to the hearsay rule.\textsuperscript{41}

The decision by the Pennsylvania Supreme Court seems to be a proper application of Rule 803(1) of the Federal Rules of Evidence. But the decision did make and should have made experienced trial lawyers and judges uneasy by its result. Apprehension should arise because the Court did not give a clear and complete explanation of the exception, nor did it place limitations and safeguards on its application.\textsuperscript{42}

Only two justices joined in the main opinion written by Chief

\textsuperscript{39} Commonwealth v. Coleman, 35 Lehigh L.J. 90, 91 (1972).
\textsuperscript{40} The law of Pennsylvania has changed and murder is now classified into three degrees. Coleman's conviction today would be that of third degree murder.
\textsuperscript{41} 458 Pa. at 119, 326 A.2d at 391.
\textsuperscript{42} See infra notes 181 to 211 and accompanying text.
Justice Jones. Mr. Justice Pomeroy, in a separate opinion joined in by Mr. Justice Nix and Mr. Justice Roberts, said that while a present sense impression exception might be "a useful addition to the law of Pennsylvania," it was unnecessary to justify admission on that ground because the statement was an excited utterance. Coleman presented a situation where the present sense impression exception overlapped with the exception for excited utterances. Often these two exceptions do overlap; since the evidence in the case could have been admitted on other grounds, one wonders why the court was inclined to make new law in this area. It is quite possible that the court wanted to use this opportunity to join the ranks of the "new."

Mr. Justice Eagen and Mr. Justice Manderino concurred in the result of the case and did not join in either opinion. This raises an interesting question: can two justices change the law of the state? As a plurality opinion, the opinion in the case of Commonwealth v. Coleman does not change state law. Yet Coleman is cited, and continues to be cited, as the authority for the present sense impression exception as the law of the state.

In Commonwealth v. Farquharson, the Pennsylvania Supreme Court, in a majority opinion, stated that an exception to the hearsay rule for present sense impression is recognized as the law of Pennsylvania. The court used as authority a superior court case where the evidence was admitted under the "res gestae" heading.

43. 458 Pa. at 121, 326 A.2d at 391.
44. Mr. Justice Pomeroy noted in Commonwealth v. Coleman in his concurring opinion: "[T]his exception would be a useful addition to the law of Pennsylvania relative to hearsay evidence, it is not, in my view, applicable to the case at bar." 458 Pa. at 121.
45. Former Justice Roberts was a Mellon Lecturer at the University of Pittsburgh School of Law in October 1984. In a conversation with Justice Roberts prior to the Mellon Lecture, he stated that this was a plurality opinion and thus did not change the law of the state. He saw no problem with the court establishing this as a decisional rule so long as there were no constitutional limitations.
46. Commonwealth v. Coleman has been cited as authority in at least two dozen Pennsylvania appeals court cases. In no case has the court found that the present sense impression exception applied.
47. 467 Pa. 50, 354 A.2d 545 (1976). The Court stated in a footnote that present sense impression would support the admission of a hearsay statement. Id. at 68 n.12, 354 A.2d at 554 n.12.
48. Commonwealth v. Craven, 138 Pa. Super. 436, 11 A.2d 191 (1940). This case admitted the statements of inmates as they related to their sufferings and efforts to obtain relief. The statements were admitted against the warden, who was convicted of involuntary manslaughter, in that "[t]hese contemporaneous statements were voluntarily and spontaneously made at the time of the occurrence and under circumstances which dispel the idea of a design or motive for misrepresentation or invention, and were admissible as part of the res gestae." Id. at 442, 11 A.2d at 194.
The court also cited *Coleman* as authority for this new exception, but gave no explanation or guidelines as to how the exception would be applied. After announcing this new exception as the law of the Commonwealth, the court held that the testimony relating to an argument between the victim and his assailant and a subsequent conversation with the victim was not admissible as a present sense impression. Under the facts, the court believed the absence of retrospective mental action was not sufficiently clear to justify the admission of the evidence.49

The decision in *Coleman* is indicative of the court's desire to enact this new exception as the law of the Commonwealth. But in attempting to do so, the court selected a case in which the exception was not necessary and did not apply. As stated by Mr. Justice Pomeroy, "[f]rom the evidence in the case at bar it is manifest that both elements of the 'excited utterance' exception are present. . . ."50 The courts in Pennsylvania have long held that spontaneous exclamations or declarations uttered during or immediately preceding or following the actual infliction of wounds are admissible as an exception to the hearsay rule.51 An attack on the victim would surely qualify as "startling" and his or her statement would have the element of "spontaneity."52

Moreover, the declarations in *Coleman* would be admissible on other grounds. In defense of his conduct, the defendant testified that he had been struck on the head with a bottle by the victim and was attacked with a knife.53 The victim's statement represents a typical example of nonhearsay use of declarant's out-of-court statement to prove his or her mental state.54 The victim's out-of-court statement relating violent acts committed by the defendant is not offered to prove the truth of the statement—that the defendant actually struck her—but rather that the victim believed that the defendant was going to kill her. The fact of the victim's fear leads reasonably and logically to the inference that having

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49. 467 Pa. at 68, 354 A.2d at 554.
50. 458 Pa. at 122, 326 A.2d at 392.
52. 458 Pa. at 123, 326 A.2d at 392.
53. 35 Lehigh L.J. at 92.
54. This would be a case of nonhearsay because the truth of her belief is not important. But even if the truth was important, this would be admissible as an exception to the rule against hearsay. See Federal Rules of Evidence 801 and 803.
such fear of the defendant, the victim would not have acted in an aggressive manner toward him. The statement could have been classified as nonhearsay and admitted as relevant evidence to show the victim's state of mind.

As was stated in Coleman, "[o]f particular pertinence to our consideration in this case is the decision of the Supreme Court of Texas in Houston Oxygen Co. v. Davis." Not only was the Houston Oxygen case important to the Coleman decision, but the author of Coleman engaged in the same type of superficial analysis as did the Texas court.

IV. PENNSYLVANIA FOLLOWS HOUSTON OXYGEN'S LEAD

The Pennsylvania courts have engaged in the same superficial analysis that has plagued the present sense impression exception since its inception. The inclusion of the 1942 opinion of Houston Oxygen Co. v. Davis in leading evidence casebooks and many references to it in commentaries of legal scholars has led to much of the discussion that has been associated with the present sense impression exception. Even today, Houston Oxygen is cited as a seminal case recognizing the present sense impression as an exception to the hearsay rule. What is often not mentioned is that Houston Oxygen is a discernibly racist decision, produced by the Texas Commission of Appeals to reduce a judgment obtained by a black family.

Pearl Davis, a black woman, and her husband sued Houston Oxygen Company for damages sustained by her son in a vehicular collision. The defendant filed a cross-claim against the driver of the car in which the plaintiff was a passenger and alleged that the cross-defendant's negligence in operating the automobile at an excessively high speed was the proximate cause of the plaintiff's injuries.

The defendant attempted to prove his cross-claim at trial with the testimony of Sally Cooper and her two companions, Jack Sand-
ers and her brother-in-law M. C. Cooper. Sally Cooper and her two companions were driving down the road when they were passed by the decedent along with several passengers who were also black. This incident occurred some four to five miles in advance of the accident in question. At trial all three were called as witnesses, and counsel unsuccessfully attempted to elicit from each Sally's colorful statement that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." Commissioner Taylor reversed the decision of the trial court, which had been previously affirmed by the Court of Civil Appeals, and held the statement admissible. The Commissioner was undaunted by the lack of specificity of Sally's remark and its conjectural aspects, and determined that the remark was "sufficiently spontaneous to save it from the suspicion of being manufactured evidence [since] [t]here was no time for a calculated statement."

The remarks were treated as a present sense impression rather than as an excited utterance. In support, the Commission pointed to the description of the present sense impression declaration contained in a treatise on Texas evidence law. That treatise set forth, and the Commissioner quoted, three supposed safeguards surrounding a present sense impression: contemporaneity of the statement obviates any defect in memory; contemporaneity also militates against "calculated misstatement"; and "the statement will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement."

Significantly, the Houston Oxygen court admitted the statement, holding that it was not cumulative because the witness was alluding to an occurrence within her own knowledge in language calculated to make her meaning clearer to the jury than would expressions of opinion as to speed alone. The court noted the considerable value of such statements both in adding weight and emphasis to the testimony of the witness and as a valuable and

61. Id. at 5, 166 S.W.2d at 476.
62. Id.
63. The opinion was later adopted by the Texas Supreme Court. Id. at 7, 161 S.W.2d at 477.
64. Id. at 6, 161 S.W.2d at 476.
65. Id. The current version of the treatise is 1A R. Ray, Texas Law of Evidence § 916, at 158-60 (3d ed. 1980).
66. 139 Tex. at 6, 161 S.W.2d at 476-77.
67. Id. at 5, 161 S.W.2d at 476.
reliable way of proving the issue.  

There are several fallacies in the court's reasoning in the *Houston Oxygen* opinion. First, one questions whether the statements in the out-of-court eyewitness testimony are repetitious and time-wasting and should be excluded for these reasons alone. This is especially true in light of the fact that the jury in *Houston Oxygen* did not believe the witness on the stand and thus she should not be able to add credit to her statement by her own or others' out-of-court statements.

Second, the assertion that "we would find them somewhere on the road wrecked if they kept that rate of speed up" is not a statement of fact, but one of opinion by a witness who may not have been qualified as an expert to give such an opinion. This is the type of opinion evidence which would require scientific, technical or other specialized knowledge or which would amount to speculation on the part of the witness. But even as expert testimony, this evidence may be excludable, because watching a car on the highway is not the basis "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ."  

Third, the assertion that "they must have been drunk" was not something within Mrs. Cooper's personal knowledge and something that the other witness could reasonably corroborate. This raises a serious question of firsthand knowledge on the part of the witnesses. The statement was not that they were drunk, but that they must have been drunk by their conduct or actions. This is a situation in which the witness could give the jury the underlying facts and let them draw their own conclusion, rather than concluding for them.

Lastly and most important, Mrs. Cooper's assertion was not hearsay. The statement was not offered to prove the truth of the matter asserted. Thus, if the statement was not hearsay, there was no reason for the court to make an exception to the rule

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68. *Id.*

69. See Fed. R. Evid. 403. This Rule provides that relevant evidence may be excluded if its probative value is substantially outweighed by considerations of waste of time or needless presentation of cumulative evidence.

70. See Fed. R. Evid. 702; safeguards, *infra* notes 181 to 211 and accompanying text.

71. Fed. R. Evid. 703.

72. As to the question of firsthand, see *infra* notes 98 to 116 and accompanying text.

73. The Federal Rules of Evidence give the general definition of hearsay in Rule 801: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
against hearsay for the admission of this statement. In this case, the declarant was available and able to testify. This accords with one of the basic precepts of evidence law—the "best" most reliable evidence should be presented to the factfinder. This was done at the trial level and was not believed. The appeals court should not have worked so hard to reverse the judgment of the trial court by creating a new exception to the rule against hearsay.

*Houston Oxygen* has probably contributed to the misconception that is present today surrounding the present sense impression exception. The court in that case engaged in a type of reasoning similar to that which other courts have engaged in for such a long time with the use of the "res gestae" doctrine. The Commissioner felt that "telling" evidence should have been admitted and did so without clearly thought-out reasoning. A careful reading of *Houston Oxygen* should alert judges and legislators that much thought and consideration should be given before enacting the present sense impression as an exception to the rule against hearsay. Courts in other jurisdictions should not blindly perpetuate the imperfections of *Houston Oxygen*. Pennsylvania courts should make special efforts in the analysis of cases to ensure that sound reasoning and logic prevail—before following the holding of *Houston Oxygen*.

It would be appropriate at this time to review the foundational basis for present sense impressions. With an understanding of the foundational basis, one can better grasp the merits, if any, of the present sense impression exception, as well as an understanding of appropriate guidelines necessary if the exception is enacted.

V. THE BASIS FOR PRESENT SENSE IMPRESSIONS

The argument for admitting *unexcited statements* describing present sense impressions has usually been based on a comparison between statements of this kind and excited utterances, which are usually admissible. 74 The claim is that since excited utterances are admissible and since contemporaneous but unexcited utterances are likely to be more reliable than excited utterances, 75 it follows "a fortiori" that there should be an exception for spontaneous but

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75. Both clinical studies and real-life observation show that nervous stress produces demonstrably less accurate statements; excitement impairs the sensory apparatus so that what is gained in sincerity is lost in perception, memory and narration. See Hutchins & Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928) [hereinafter cited as Hutchins & Slesinger].
unexcited utterances. But people who react verbally to an unexpected, startling event are not, as a rule, exceptionally reliable observers. The introduction to a former television program clearly illustrates this:

"Look! It's a bird."

"No, it's a plane."

"No, it's Superman."

But the conclusion that unexcited utterances should be admitted because excited utterances are presently admitted does not clearly follow. One could just as easily conclude that neither of these utterances should be admitted as exceptions to the hearsay rule. But it is not the purpose of this paper to attack the long-established exception for excited utterances. The discussion of excited utterances is used to emphasize the thought that there should exist greater justification to adopt this new exception. That it is similar to the much-criticized excited utterance exception is not enough.

Professor Morgan stated that it is unfortunate, given the danger of unreliability caused by the emotional excitement required for excited utterances, that we exclude other statements which may have equal assurances of reliability. Under Morgan's leadership there was a movement afoot to recognize another exception to the hearsay rule for nonexciting events. This resulted in the present sense impression exception. There are several important safeguards affecting the reliability of present sense impressions. A discussion of these safeguards follows, whereby an evaluation of the merits of the exception, as well as the dangers associated with the exception, can be considered.

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76. See Fed. R. Evid. 802. An older Pennsylvania case takes the view that the "res gestae" exception is "a dangerous rule" which should not be extended beyond spontaneous utterances caused by the exciting event. Commonwealth v. Noble, 371 Pa. 138, 144-45, 88 A.2d 760, 763 (1952).

77. Dean Hutchins and Donald Slesinger pointed out long ago that psychological studies have demonstrated that perceptual accuracy and judgment are inversely proportioned to the startling nature of an event. They concluded that "[w]hat the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation." Hutchins & Slesinger, supra note 75, at 439.

78. See McCormick § 297, at 855, wherein Professor McCormick states that "[t]he entire basis for the exception is, of course, subject to question." Id. See also Hutchins & Slesinger, supra note 75.


80. McCormick § 298, at 860.
A. Spontaneity

Professor Morgan took the position that both the statement of present sense impression and the excited utterance are viable hearsay exceptions. He approved the former because of its spontaneity and contemporaneity, and the latter solely because of its spontaneity. He viewed the present sense impression exception as having essentially the same indicia of reliability as statements of existing mental or bodily condition: all are "spontaneously" uttered and therefore, in Morgan's opinion, probably truthful. He distinguished contemporaneity, indicating that statements which were made "contemporaneously" with an occurrence at the place of the occurrence "were open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand." Following Morgan's lead, other commentators have argued for the acceptance of the present sense impression as a more reliable exception than the excited utterance. Federal Rule of Evidence 803(1) excepts from the hearsay rule statements which describe or explain any event regardless of the identity of the actor or the time at which the statement is made.

The theory that spontaneity is sufficient as a guarantee of the declarant's sincerity is premised on the assumption that all distortion of what is accurately perceived is necessarily the product of deliberative thought. So long as an utterance occurs quickly enough upon perception of an event, is wrenched from the declarant by the episode and is relatively narrow in scope, simply describing or explaining that which is perceived, it is deemed spontaneous enough to assure sincerity and dispense with the need for

81. The present sense impression involves "[c]ases in which the utterance is contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it." Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 236 (1922).

82. The excited utterance involves "[c]ases in which the utterance is made concerning a startling event by a declarant laboring under such a stress of nervous excitement, caused by that event, as to make such utterance spontaneous and unreflective." Id. at 238.

83. Id. at 236.

84. See Hutchins & Slesinger, supra note 75.

85. Rule 803(1) of the Federal Rules of Evidence defines a "present sense impression [as a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Even a decedent's description of what was said at a meeting with his insurance agent, made immediately after the meeting ended, was admissible as a present sense impression under the federal rules. Wolfson v. Mutual Life Ins. Co., 455 F. Supp. 82, 87 (M.D. Pa. 1978), aff'd, 588 F.2d 825 (3d Cir. 1978).
in-court probing of the declarant. Reliance is placed on the single factor of complete spontaneity, assured by carefully defined circumstantial requirements, which furnishes evidence of the declarant's sincerity. In so doing, necessarily, there is always the obvious danger of inaccurate perception or faulty memory.

Several states have adopted the broader present sense impression exception by not requiring precise contemporaneity. The trial judge in his or her discretion may exclude comments made too long after an event to be reliable. This is because assertions made after the event or condition that they describe or explain have less indicia of reliability.

In Commonwealth v. Coleman, the court did not address the issue of spontaneity. The declarant stated that her boyfriend, the defendant, was exhibiting threatening behavior and that he claimed he was going to kill her. However, from her statement it is impossible to determine that spontaneity is actually present from the events observed, rather than jocularity, irony, sarcasm, self-interest or facetiousness on the part of the declarant that may have spurred the utterance. It is true that the swiftness with which an utterance ensues, in and of itself, is insufficient as a guarantor of the declarant's veracity. But it is some assurance of trustworthiness. Therefore, some time frame must be established as to the contemporaneity requirement. The Coleman court concluded that the statement was spontaneous without stating what factors led them to that conclusion and without giving guidelines for lower courts to follow.

86. The swiftness with which an utterance ensues, in and of itself, is insufficient as a guarantor of the declarant's veracity. Commentators cite psychological studies indicating that the interval which separates cognition from the deception reaction is minute, often a matter of fractions of seconds, and impossible to gauge without the aid of instruments. Hutchins & Slesinger, supra note 75, at 437; Quick, Hearsay, Excitement, Necessity and the Uniform Rules; A Reappraisal of Rule 63(4), 6 WAYNE L. REV. 204 (1960).
89. States such as Colorado, Kansas, New Jersey and Utah limit this exception to contemporaneous assertions, and Florida and Ohio give the trial judge discretion to exclude such an assertion if the circumstances indicate lack of trustworthiness.
90. 458 Pa. at 114, 326 A.2d at 389.
92. The majority, while acknowledging the presence of excitement in the situation, concluded that "the exception for excited utterances is not applicable to the present circumstances." 458 Pa. at 117, 326 A.2d at 389.
In Commonwealth v. Robinson, the Pennsylvania Superior Court found that the statement of the witness did not describe a present mental state or an event which she was witnessing as she spoke. In that case, the mother was charged with criminal homicide as the result of the death of her three-year-old caused by malnutrition and dehydration. The trial court admitted statements made by a five-year-old to her grandmother that her “mommy had gone out.” The child’s response to questions was, “[N]o, my mommy won’t be back. She always leave [sic] me and my brother.” The superior court found that the declarant was describing past actions and not an event which she was witnessing as she spoke. The court further stated that “the spontaneity which must be demonstrated is absent.” The courts require that the declaration be spoken contemporaneously with the event to which it refers. Also, statements made at a later time or in reference to past events are considered the product of reflective mental action, but the precise time frames or factors relating to reflective thought have yet to be defined.

B. Perception

In many cases, spontaneous statements have been excluded for lack of perception due to the requirement of the “res gestae” doctrine that the event perceived and described be the principal litigated fact. The present sense impression exception, however, covers not only statements inspired by the main event in issue, but also those describing contributing factors and circumstantially related events or conditions. Often there is no requirement that the declarant be a participant in the event which is the subject of the declaration.

94. Id. at 340, 417 A.2d at 680. The court could have found the statement not admissible based on the competency of the child witness.
95. Id. at 341, 417 A.2d at 681.
96. Id.
98. 452 A.2d at 510.
The perception requirement is no more than the basic requirement of firsthand knowledge or specific competency in qualifying a declarant to testify as to a condition or an event.\(^\text{101}\) As long as perception is established, an observation need not be expressed orally to qualify as a present sense impression, as, for instance, when a bystander copies a license plate number during a robbery and gives it to a police officer.\(^\text{102}\) Unless perception is made clear, however, the statement must be excluded.\(^\text{103}\)

The cases are divided on whether actual sight is required to establish perception.\(^\text{104}\) Some cases hold that one who hears but does not see cannot have a sufficient opportunity to observe, and that any statement as to the occurrence is an opinion or conclusion based on things not witnessed.\(^\text{105}\) Although this viewpoint may well be justified in some cases, there are many conceivable situations in which aural perception would be sufficient to establish the occurrence of an event. Visual observation is a factor to be considered in evaluating the validity of a statement; however, an absolute requirement of visual perception would lead to the exclusion of some evidence that may be more reliable than that currently admitted.

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\(^{101}\) A student comment advocates the incorporation of a requirement that the proponent of a present sense impression adduce independent corroborative evidence "either direct or circumstantial, that the declarant was in spatial and temporal proximity to the event he described." Comment, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 Nw. U.L. Rev. 666, 674 (1976).

\(^{102}\) An intriguing question concerning the construction of the present sense impression exception is whether the declarant's physical perception actually must be communicated to a listener in order to be admitted, or whether statements uttered within no one's hearing, or written down for personal use, likewise qualify. This was answered to a certain degree in *Commonwealth v. Dugan*, 252 Pa. Super. 377, 381 A.2d 967 (1977), where the court held that a pictorial representation of defendant made by an artist fulfilled the requirements of the "res gestae" exception to what otherwise would have been hearsay; thus the sketch was properly admitted. What about a tape recording?

\(^{103}\) The declarant must have first-hand knowledge of that which his utterances encompass. Rule 602 of the Federal Rules of Evidence states the personal knowledge requirement: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."


\(^{105}\) In Johnson v. Newell, 160 Conn. 269, 278 A.2d 776 (1971), the court held statements properly excluded where declarant did not see accident but only heard it, in a personal injury action arising out of alleged blowout of a tire recapped by the defendant. The witness said from the sound it was like a shot or blowout of a tire.
under other exceptions to the rule against hearsay.\textsuperscript{106}

The importance of spontaneity has often been emphasized by commentators and judges; but even where circumstances surrounding the statement imply spontaneity, the perceptual acuity of the declarant and the perceptual bases for his observation still pose problems.\textsuperscript{107} In fact, statements which fail to yield any guarantee whatsoever as to the perceptual acuity of the declarant are potentially more risky than those in which the primary flaw involves the declarant's sincerity. Factors affecting sincerity, such as bias, motives borne of self-interest, or general disposition may be evident to the finder of fact, or may be discovered by the adversary prior to trial, and exposed as impeachment of the hearsay declarant.\textsuperscript{108} Any existing perceptual defects of the declarant remain virtually impossible to detect and expose absent cross-examination, given the complexity of factors which impact upon perceptual processes.\textsuperscript{109}

The subject of the declarant's perception, an "event or condition," covers an extensive range of circumstances indicative of the potential breadth of this exception's utility.\textsuperscript{110} Much recent authority acknowledges that the condition or event which is the subject of comment need not be the event forming the subject matter of litigation.\textsuperscript{111} Often, proof of conditions existing or events occurring before or after the disputed incident elucidates circumstances existing at the time of the event in question. The probity of statements of present sense impression made prior or subsequent to the main or litigated event is a question of relevance to be determined by the trial judge.

Concern regarding perceptual acuity of witnesses not subject to cross-examination is warranted, yet it must be recognized that lack

\textsuperscript{106} There is always the obvious danger of inaccurate perception or faulty memory, just as the same risks are taken in the case of dying declarations.

\textsuperscript{107} Id. Personal experience and attitude can cause us to perceive what we expect to perceive and not necessarily what actually occurred. Garner, \textit{The Perception and Memory of Witnesses}, 18 \textit{Cornell L.Q.} 391, 395 (1933); M. Ladd, \textit{The Hearsay We Admit}, 5 \textit{Okla. L. Rev.} 271, 280 (1952).

\textsuperscript{108} \textit{Fed. R. Evid.} 806.

\textsuperscript{109} Foster, \textit{supra}, at 322.

\textsuperscript{110} Rule 803(1) of the Federal Rules of Evidence defines a "present sense impression [as a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." \textit{Fed. R. Evid.} 803(1). Even a decedent's description of what was said at a meeting with his insurance agent, made immediately after the meeting ended, was admissible as a present sense impression under the federal rules. Wolfson v. Mutual Life Ins. Co., 455 F. Supp. 82 (M.D. Pa. 1978).

\textsuperscript{111} See \textit{supra} note 109 and accompanying text.
of perceptual accuracy is a hearsay risk, one which hearsay exceptions are theoretically formulated to diminish but not eliminate.\textsuperscript{112} The way to ensure the hearsay declarant's perceptual acuity is to reformulate the contours of the hearsay exceptions to take human perceptual problems into account, rather than to utilize the personal knowledge requirement as a guise for excluding evidence deemed undependable regardless of whether it qualifies under a hearsay exception.\textsuperscript{113}

In Coleman, the victim's statement may not have been about events she was presently observing but rather about her judgment of future conduct of the defendant. There is a serious question as to whether the statements in the case were made with personal knowledge or whether they were the result of memory and reflection on the part of the declarant. It is true that present sense impressions cover not only statements inspired by the main event in issue, but also those describing contributing factors and circumstantially related events or conditions.\textsuperscript{114} But it is possible that all the statements of the victim were not based upon conditions and events being currently perceived.

In Commonwealth v. Robinson,\textsuperscript{115} the court excluded the statements made over the telephone of a child stating that "mommy had gone out." When asked if her mother would return soon, the child's additional statement excluded was: "[N]o, my mommy won't be back. She always leave [sic] me and my brother."\textsuperscript{116} The court held that the statements did not describe an event which the child was witnessing as she spoke; rather, they described past actions of her mother.\textsuperscript{117} Could not these same statements apply to Coleman when the defendant said that "he's going to kill me"? How does the statement explain a condition or event made while declarant was observing it? The courts should discuss in detail the requirements necessary for firsthand knowledge and not just conclude that perception is or is not present.

\textsuperscript{112} Foster, supra, at 310.
\textsuperscript{113} Id. at 311.
\textsuperscript{114} Shadowski v. Pittsburgh Ry. Co., 226 Pa. 537, 75 A. 730 (1919) (declarant's statement that the motor was about to hit the child would be admissible under present sense impression exception.). See supra note 10.
\textsuperscript{116} Id. at 340, 417 A.2d at 678.
\textsuperscript{117} Id. at 341, 417 A.2d at 679.
C. The Opinion Rule

To be admitted as a present sense impression, the statement made while perceiving an event or condition, or immediately thereafter, must also describe or explain the event or condition perceived.\textsuperscript{118} Most statements received under this exception will simply assert the existence of the condition or the occurrence of the event, and the term "describe" accurately captures the function of such statements. Some, however, interpret, assess or evaluate matters perceived, and these are clearly reached by the term "explain."\textsuperscript{119} The question arises as to whether the opinion evidence rule places qualifications or restrictions on evidence otherwise admissible as a present sense impression.\textsuperscript{120} Because it is necessary to achieve some substantial degree of specificity in spelling out the requisites of evidence admitted under the present sense impression exception, the opinion evidence rule must be considered. Professor McCormick concedes that most courts have limited the admissibility of this kind of evidence by an application of the opinion evidence rule.\textsuperscript{121}

Some courts have excluded otherwise admissible evidence on the basis of the opinion evidence rule.\textsuperscript{122} The modern trend is to view the "opinion rule" as a "rule of preference,"\textsuperscript{123} such that if, for example, specificity is possible, it is preferred to less descriptive conclusions. Where specificity is not possible, more conclusory statements will be allowed so long as they promise to aid the trier of fact.\textsuperscript{124} Thus, opinions in out-of-court declarations may be received in circumstances where the opinions of testifying witnesses would not be allowed. This is because the testifying witness can usually describe the more concrete facts that underlie his opinion. An out-of-court statement cannot be rephrased, so a court must choose

\textsuperscript{118} See Fed. R. Evid. 803(1).

\textsuperscript{119} 4 Louisell and Mueller, Federal Evidence § 438, at 491 (1980).

\textsuperscript{120} Witnesses who are not experts cannot ordinarily give opinions; they may only relate facts. Originally the doctrine barring opinion testimony was confined to testimony not based on the witness' personal knowledge. Witnesses are to give the "facts" and not conclusions drawn from the facts or opinions about the facts.

\textsuperscript{121} McCormick § 11, at 28. He would admit the evidence in that the rule often ignores the way people naturally talk. § 297, at 858.


\textsuperscript{124} J. Wigmore, Evidence § 1918, at 1014 (3d ed. 1940).
between receiving the opinion or doing without whatever the declarant has to offer. It is important that courts not apply this rule mechanically so as to exclude valuable evidence.

Clearly, a legitimate reason exists to admit opinions of lay witnesses to clarify the witness' testimony to the factfinder. This will often serve to round out the story and "to lend verisimilitude to an otherwise bald and unconvincing narrative." This was the view taken by the court in Houston Oxygen, for the statement by Sally Cooper that "we would find them somewhere on the road wrecked if they kept that rate of speed up" is not a statement of fact, but one of opinion. The statement was admitted since it "was alluding to an occurrence within her own knowledge in language calculated to make her 'meaning clearer to the jury' . . . ."

Even where witnesses, whether experts or nonexperts, are permitted to give opinions, some jurisdictions follow the common law rule that opinions are not allowed on ultimate issues. This approach is more or less restrictive depending on what the court views as an ultimate issue. Federal Rule of Evidence 704 abandons any restrictions on testimony on the ultimate issue in a case.

Courts must evaluate evidence that is in the nature of an opinion not only under the opinion evidence rule, but also using the rules relating to relevancy. In evaluating probative value under these rules, the judge in such situations weighs the prejudicial effects of such statements in the form of an opinion against probative worth to the jury. In criminal cases, greater scrutiny is required. There, the judge must also view the evidence in relation to the constitutional protections afforded criminal defendants.

Often, declarations of present sense impressions are inextricably bound up in evaluative judgments which involve elements of past memory or belief. This was true in the Coleman case in that the victim-declarant could have been describing present events or con-

125. Comment, 21 Tex. L. Rev. 298, 307 (1943) as it relates to the term "res gestae."
126. Houston Oxygen Co. v. Davis, 139 Tex. 1, 3, 161 S.W.2d 474, 476 (1942).
127. 139 Tex. at 7, 161 S.W.2d at 477.
128. The common law purported to apply a rule which prohibited testimony in opinion form on the "ultimate issue" in the case. The rationale was that to permit such testimony "usurped" the province of the jury, 7 Wigmore, Evidence § 1920, at 18, a ground which Professor Wigmore characterized as "empty rhetoric."
130. See Fed. R. Evid. 401-03.
ditions, or on the other hand, she could have been giving her opinion as to future conduct of the defendant by relying on his past action or conduct. Often, there is no clear line between a “fact” and an “opinion,” but a witness who states that “he’s going to kill me” does not seem to be stating facts.

Pennsylvania courts have not explained how the opinion evidence rule relates to present sense impressions. The supreme court has stated that an admission containing a conclusion or opinion will be excluded on the basis of the opinion evidence rule since the opinion evidence rule which excludes the opinion of third-party witnesses applies with equal force to an adverse party. One could conclude that the rule should apply with equal force to statements contained in declarations of present sense impressions.

The trial court has considerable discretion in ruling upon whether testimony is “fact” or “opinion” testimony, and if “opinion,” whether it should be admitted or excluded. The superior court has held that this latitude is particularly appropriate to a ruling on the admissibility of an excited utterance, for someone who is excited is especially likely to speak in conclusory terms.

In such a case the opinion rule should be applied sparingly, if at all. The question arises as to whether the same rule should apply in cases of present sense impression whereby opinion evidence is freely admitted. The Pennsylvania cases have not clearly addressed this issue.

D. The Corroboration Requirement

As with most hearsay exceptions, few problems arise when the out-of-court declarant offers his or her own testimony. In cases where the declarant can be cross-examined as to the statement, any defects in the witness’ memory, narration, perception and

135. Id., quoting from McCormick, at 858 (2d ed. 1972) and Advisory Committee’s Notes which state that “[p]ermissible ‘subject matter’ of the statement is limited under Exception [803] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther.” Id. “Someone who is excited, is especially likely to speak in conclusory terms. In such a case, therefore, the opinion rule ‘should be applied sparingly, if at all. . . .’ McCormick, supra, at 858.” 485 A.2d at 781.
sincerity should be revealed. Given the opportunity for cross-examination, the prior statement made by the testifying witness may be more trustworthy than any attempt at trial to elicit recollection of the event or condition. From the viewpoint of the declarant’s memory, the extrajudicial statement can be said to be more reliable than trial testimony. Problems arise in cases where the out-of-court statement is being repeated by an in-court auditor. Originally, there was a requirement of corroboration by the in-court auditor.

Both Thayer and Morgan can be read as supporting a requirement that the in-court witness have observed the event that is the subject of the declarant’s statement. They emphasize that the witness will probably have perceived the event and would be subject to cross-examination concerning the circumstances surrounding the declarant’s statement. In most cases, the auditor-witness will probably have perceived the event. But since this is a non-startling event, the auditor-witness may very well have had his or her attention directed elsewhere. In instances in which the testifying witness was in a position to observe the event or condition but failed to do so, there is a greater likelihood that the out-of-court declarant’s statement will be sincere. The mere presence of another person reduces the possibility that a falsehood will go unrecognized, and thus checks the potential for fabrication. In any case, the statement itself cannot be relied upon for its own accuracy.

As a practical matter, the testifying witness will often be in a position to corroborate the declarant’s statement if the declaration is truly contemporaneous with the event or condition. This pragmatic reasoning, however, fails to consider either electronic communications between declarant and witness or statements that are

136. Professor Morgan includes all the reasons expressed for the exclusion of hearsay: “Hearsay is excluded because of potential infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination.” Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 541 (1946).
139. Id.
made soon enough after the event or condition to satisfy the "substantial contemporaneity" requirement. 4

Professor Waltz poses the following hypothetical in which "[t]he witness testifies that she walks into the living room and her husband says, 'Clyde Bushmat, whose voice I'd recognize anywhere, called me on the telephone just seconds ago and offered me a bribe.'" 143 Professor Waltz argues that although this statement would appear to be admissible under rule 803(1) of the Federal Rules of Evidence, there is no guarantee that the husband received the phone call, that the voice was that of Bushmat and that Bushmat in fact made a bribe offer. Therefore, Waltz concludes, the absence of corroboration of the described occurrence by the witness to the declaration should bar its admissibility. 4

It has been recommended that in those instances in which the declarant is unavailable and the testifying witness had no opportunity to corroborate, the out-of-court declaration should be admissible if it comports with the substantial contemporaneity requirement. 4

This was the position taken by the Iowa courts in a murder case involving a telephone sense impression which tended to incriminate the accused. In State v. Flesher, 146 the victim's husband had been talking on the telephone with his wife when, over the telephone, he heard a knock at her door. The wife went off the line briefly and the witness heard conversation in the background. His wife then came back on the line and said, "It's Joan." (The accused's first name was Joan; she was the witness' lover and had made an otherwise uncorroborated "I did it" statement.). 147

The Iowa Supreme Court, in approving receipt of the telephone testimony as the narration of a present sense impression under the federal model, specifically addressed the requirement of corroboration. The court stated that the presence or absence of direct corroboration will affect the weight given the declaration, but found nothing "in either the wording of the exception or [sic] in its underlying rationale which requires corroboration as a condition of

142. For a modern commentator who unambiguously advocates the corroboration requirement, see Waltz, Present Sense Impression and the Residual Exceptions: A New Day for "Great" Hearsay, 2 Litigation 22, 22-24 (1975).
143. Id.
144. Id.
145. Comment, The Present Sense Impression, 56 Tex. L. Rev. 1053, 1073 (1978). Situations of this type arise when the testifying witness heard the declaration through an electronic medium as in the case of a telephone conversation or the listening to a recorded tape.
146. 286 N.W.2d 215 (Iowa App. 1979).
147. Id. at 219.
Courts have not insisted on actual corroboration or the opportunity of corroboration by the testifying witness of the event or condition described in a present sense impression statement. Uncritical application of the corroboration requirement could well lead to inconsistent and improper results. The corroboration requirement should not be discarded, but clear guidelines as to its requirements must be developed. If courts reject the corroboration requirement, they disregard the teaching of the evidence scholar whose perception gave birth to the present sense impression exception.

In Coleman, the declarant was unavailable and the testifying witness was separated from the event by a network of telephone lines. She was not in a position to visually corroborate the occurrence. Some cases have held that one who hears but does not see cannot have a sufficient opportunity to observe, and that any statement as to the occurrence is an opinion or conclusion based on things not witnessed. Although this viewpoint may well be justified in some cases, there are many situations in which aural perception would be sufficient to verify the occurrence of an event. In fact, verification was the exact word used by the Coleman court. However, the court in Coleman did not explain which elements are necessary for verification, versus which elements are necessary for corroboration.

In Commonwealth v. Blackwell, the Superior Court of Pennsylvania took a different view than that in Coleman. The court re-

148. Id. at 218. The court used Commonwealth v. Coleman as authority.
149. Comment, The Present Sense Impression, 56 Tex. L. Rev. 1053, 1074 (1978). A case that proves this point is Myre v. State, 545 S.W.2d 820 (Tex. Crim. App. 1977). In Myre the complaining witness stated that she had a person follow the robber while she phoned the authorities. The person gave her the license plate number of the alleged robber that led to the defendant's arrest. She was permitted to relate these facts to the jury including the license plate number. The Texas Court of Criminal Appeals held that the statement of the license plate number was inadmissible hearsay; the statement of the license plate number was not a present sense impression declaration "because the witness did not have an equal opportunity to observe and check a possible misstatement. . . ." 545 S.W.2d at 827.
150. Waltz, The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes, 66 Iowa L. Rev. 869, 898 (1981). "Again and again Thayer and those who followed him alluded to the availability of corroboration as a significantly reassuring aspect of the present sense impression's support structure." Id. at 897.
152. 458 Pa. at 119, 326 A.2d at 390.
quired a visual corroboration standard, stating that "[t]his exception requires that the declarant see the event and make an observation about it to another person also present at the scene. . . ." 154 The court seems to be establishing a rigid standard which will exclude valuable evidence from the factfinder. Such a standard may be most appropriate in criminal cases, but civil cases may well satisfy the reliability requirement with less than visual corroboration.

The court also stated that "[c]ases involving the present sense impression exception to the hearsay rule are infrequent." 155 Yet, present sense impressions are all around us and used daily in our lives. The reason that cases involving present sense impression are infrequent is that the courts of the Commonwealth have not established clear guidelines and analyses for lawyers and judges to make appropriate use of the exception.

VI. The Confrontation Clause and Present Sense Impressions

A great many of the spontaneous statement decisions have revolved around out-of-court identifications by victims of attack. 156 This may be the reason for the present day controversy, namely, whether out-of-court acts, including statements, of identification properly should be treated as original 157 or hearsay evidence. 158 An additional problem arises in that this evidence may violate the confrontation clause of the United States Constitution, 159 and sim-

154. 494 A.2d at 431.
155. Id.
157. See FED. R. EVID. 801.
158. Hearsay statements are frequently described as "out-of-court" or "extrajudicial" statements.
159. The complexity of reconciling the confrontation clause and the hearsay rules has triggered an outpouring of scholarly commentary. Ohio v. Roberts, 448 U.S. 56, 66-68 n.9 (1980), gives a complete discussion of this topic:

The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary. Few observers have commented without proposing, roughly or in detail, a basic approach. Some have advanced theories that would shift the general mode of analysis in favor of the criminal defendant. See F. Heller, THE SIXTH AMENDMENT 105 (1961); Seidelson, Hearsay Exceptions and the Sixth Amendment, 40 GEO. WASH. L. REV. 76, 91-92 (1971) (all hearsay should be excluded except, perhaps, when prosecution shows absolute necessity, high degree of trustworthiness, and "total absence" of motive to falsify); The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 237 (1968); Note, 31 VAND. L. REV. 682, 694 (1978).
ilar provisions under the state constitution.\textsuperscript{160} Although the trend in the law of evidence is toward greater admissibility of hearsay, the sixth amendment confrontation clause presents a countervailing consideration in the criminal law.\textsuperscript{161} The language is rather opaque, but read literally, the clause imposes an absolute bar against the presentation of testimony by an out-of-court witness against a criminal defendant.\textsuperscript{162} The United States
Supreme Court, however, although addressing the confrontation clause infrequently until 1965, has repeatedly refused to interpret the confrontation clause literally to exclude all hearsay. The modern era of confrontation clause analysis began with *Pointer v. Texas*, a case in which the Supreme Court held the sixth amendment right of confrontation to be a "fundamental right," applicable to the states under the fourteenth amendment. There are few subjects upon which the courts of this nation have been more nearly unanimous than in the belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial that is this country's constitutional goal.

*Ohio v. Roberts* represents the Supreme Court's most recent pronouncement on the confrontation clause. The defendant in *Roberts* was charged with forgery of a check drawn in the name of another and with possession of stolen credit cards belonging to the drawee and his wife. During a preliminary hearing, the drawee's daughter testified at the behest of defense counsel that she was acquainted with the defendant and that she assented to the defendant's use of her apartment for a few days while she was away. Lengthy questioning, however, failed to elicit an admission by the witness that she had given the defendant checks and credit cards without informing him that she did not have her parents' permission to use them.

At the trial before a jury, Roberts testified that the drawee's daughter had given him the checks and credit cards with the understanding that he was permitted to use them. In rebuttal, the prosecutor offered the transcript of the drawee's daughter's preliminary hearing testimony.

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163. The infrequency of confrontation clause decisions prior to 1965 is commonly explained by the inapplicability of the clause to the states prior to that date and the Supreme Court's control over rules of hearsay for the federal courts. See Fed R. Evid. Art. VIII Introductory Note: The Hearsay Problem.


165. 380 U.S. 400 (1965).
166. Id. at 403.
167. Id. at 425.
169. Id. at 58.
170. Id.
171. Id. at 59.
inary hearing testimony. Defense counsel objected that use of the transcript violated the defendant's sixth amendment right to confrontation. After concluding that the witness was unavailable,172 the trial court admitted the transcript into evidence and the jury convicted Roberts on all counts.173

Justice White, writing for a six-member majority, upheld the admission of the transcript, ruling that the confrontation clause had not been violated.174 Candidly observing that the Court's previous decisions in this regard had not stated an integrated theory of the relationship of confrontation to hearsay,175 Justice White set forth the general analytical principles to be applied to any confrontation issue:

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual cases (including cases where prior cross-examination has occurred) the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason for the general rule"

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.176

Most commentators agree that the Supreme Court has presented no clear and comprehensive theory of the confrontation clause upon which lower courts can rely for guidance.177 However, a read-

172. See infra notes 181-93 and accompanying text.
173. 448 U.S. at 60 (The Supreme Court of Ohio, by a 4-3 vote, held that the transcript was inadmissible.).
174. Id. at 77.
175. "The Court has not sought to map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions.' California v. Green . . . But a general approach to the problem is discernible." Id. at 64, 65.
176. Id. at 65-66.
ing of Roberts shows a two-part test for determining the admissibility of extrajudicial statements over a confrontation clause objection. The test first requires the prosecution to demonstrate that the hearsay declarant is unavailable to testify at trial and thus cannot be subjected to cross-examination.¹⁷⁸ Once found unavailable, the second part of the test requires a demonstration that the prior testimony bore sufficient "indicia of reliability"¹⁷⁹ to merit admissibility. Such reliability, according to the Court, can be "inferred without more" where a "firmly rooted hearsay exception" is involved.¹⁸⁰ Where such a "firmly rooted" exception is not involved, "particularized guarantees of trustworthiness" must be shown.¹⁸¹

Under Federal Rule of Evidence 803, the availability of the declarant is immaterial. However, in light of the confrontation clause, in criminal cases the declarant must be shown to be unavailable when extrajudicial statements are introduced against the accused.¹⁸² Although most Pennsylvania decisions have involved cases where the declarant was the victim in a homicide case, the courts have not clearly defined the need for finding that the declarant is unavailable, thereby meeting the requirements of the confrontation clause.

Also, the courts have not clearly established the "indicia of reliability" as they relate to present sense impressions. On the question of trustworthiness or reliability of declarations, a court must rule on what corroborating circumstantial evidence is sufficient to make the statement admissible. The trustworthiness of a statement must be based on more than corroborating facts contained in the statement being offered into evidence, a requirement now of most courts.

Clearly, the courts cannot permit hearsay law to define the right to confrontation. In criminal cases involving such an important right as confrontation, insistence upon reliable evidence as the basis of adjudication is of the highest priority. Therefore, the present

¹⁷⁸. 448 U.S. at 65. This has not been a problem with any of the criminal cases appealed in Pennsylvania. The cases have involved the statement of victims in homicide cases.

¹⁷⁹. Id.

¹⁸⁰. Id. at 66. Although there was no discussion of which exceptions are considered "firmly rooted," the Court, in a footnote, listed as examples the dying declaration, cross-examined pre-trial testimony, and business and public records. Id. at 66 n.8.

¹⁸¹. Id. at 66.

¹⁸². M. Graham, The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 56 Tex. L. Rev. 151, 195, would find the nonappearing but available hearsay declarant violating the confrontation clause "only if the circumstances surrounding the making of the declaration indicate that it was accusatory in nature when made."
sense impression must be defined in light of the confrontation clause.

VII. GUIDELINES FOR ADMISSIBILITY

A. The Availability Requirement

The Supreme Court has not given courts complete guidelines as to the admission of hearsay in compliance with the confrontation clause. But it has in Roberts given a two-prong test, the first prong of which requires that the declarant be unavailable. Therefore, prior to the admission of present sense impressions, courts must decide the status of the declarant in light of the requirement that the declarant be unavailable. When considering the admission of hearsay evidence in a criminal trial, a court must look at both the availability of the declarant to testify at trial and the impact of the evidence against the accused. If the declaration is not an integral part of the government's case, in that it is not to be used against the defendant, it may not be violative of constitutional rights.

Pennsylvania cases have not considered the availability of the out-of-court declarant in their discussions as to the admission of "res gestae" and present sense impression hearsay evidence. In most criminal cases reviewed by the appellate courts, the statements involved were made by victims of homicide; thus, the issue as to availability was moot. Still, lower courts are in need of guidelines when faced with confrontation clause issues challenging present sense impressions sought to be introduced against the accused. Trial judges must have a clear understanding as to the circumstances that excuse cross-examination due to the absence of the witness at trial.

A criminal defendant must be given an opportunity to put on a defense. The confrontation clause secures this right by giving the defendant notice of the evidence against him by requiring his pres-

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183. 448 U.S. at 66.
184. Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 128, 138-40 (1972); one commentator advocates a modification of Rule 801(1) to require either the declarant's availability for cross-examination concerning the statement or testimony by one who heard the statement and had a similar opportunity to observe the event or condition. Foster, Present Sense Impressions: An Analysis and a Proposal, 10 Loy. U. Chi. L.J. 299, 334 (1979). People v. Dement, 661 P.2d 675, 680-82 (Colo. 1983) (unavailability must be shown when evidence is sought to be admitted under the excited utterance exception to the hearsay rule).
ence at trial and opportunity to attack this evidence by requiring the state to: (1) produce witnesses in person; (2) call those witnesses and attempt to elicit their evidence directly; and (3) permit the defendant to cross-examine them. The confrontation clause functions as a preference rule. The state must produce available witnesses, call them and attempt to elicit testimony from them.

If a witness is unavailable, then the state, subject to the substantive standards of the due process clause, can present its evidence without the witness.

Federal Rule of Evidence 804(a) provides a convenient list of the generally recognized unavailability situations. It provides as follows:

(a) Definition of Unavailability. “Unavailability as a witness” includes situations in which the declarant—
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of his statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

A direct constitutional clash is avoided by the introductory wording of Federal Rule of Evidence 803, which does not state that evidence satisfying an exception listed therein is admissible, but merely that it is “not excluded by the hearsay rule.” The Advisory Committee’s note to article VIII of the Federal Rules of Evidence states:

In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hear-

187. Id.
188. Id.
189. The corresponding revised Uniform Rule (1974) is to the same effect. It should be noted that Fed. R. Evid. 804(a) does not purport to be an exhaustive listing of the grounds of evidentiary unavailability. If a court bases a finding of unavailability on an unlisted ground, such as the age of the potential witness, a separate constitutional analysis of the sufficiency of the grounds will be required.
say rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.\footnote{190}

Availability is also important in civil cases, even though it is not constitutionally mandated. If the declarant is available and the reporter had no opportunity to observe the event or condition described, the out-of-court declarant should not be excluded. This is in accord with one of the basic precepts of evidence law—the "best" most reliable evidence should be presented to assist the factfinder.\footnote{191} In addition, the calling of the available declarant will lessen the risk of opinion evidence and statements not based upon personal knowledge being accepted by the factfinder. Not only will cross-examination provide an opportunity to discover lack of personal knowledge, but it will also permit the testing of narration, as well as the witness' memory and sincerity.\footnote{192}

Closely associated with unavailability is the identification of the maker of the present sense impression statement. Because of the fear that the personal knowledge requirement may not be present, some courts exclude a present sense impression declaration made by an unidentified bystander or phantom witness.\footnote{193} Exclusion is properly justified by a suspicion that the dangers of fabrication on the part of either declarant or witness outweigh circumstantial guarantees of trustworthiness; the possibility that the personal knowledge requirement has been met is simply too remote. Nevertheless, the testifying witness need not be able to identify the declarant by name.\footnote{194} The rule requires only that the witness be able to testify about some external indicia of the declarant's personal knowledge or that the nature of the declarant's statement itself indicates personal knowledge. There, the proponent of the declaration must supply evidence of personal knowledge.\footnote{195}

Pennsylvania courts should make a clear distinction between civil and criminal cases and the requirements of availability of the declarant in present sense impression situations. Present sense impressions can provide valuable evidence to the factfinder and

\begin{footnotes}
\item[190] \textit{Fed. R. Evid. Art. VIII} advisory committee note.
\item[192] McCormick says that "cross-examination [is] an essential safeguard of the accuracy and completeness of testimony . . . ." McCormick § 19, at 47.
\item[194] Id.
\end{footnotes}
should be admitted in most cases where the declarant is available in civil actions. This is because constitutional restrictions will not bar the evidence and opposing counsel can be afforded an opportunity to cross-examine by procuring a subpoena and requiring the declarant to testify. On the other hand, in criminal cases, courts should be required to hold a brief hearing to determine if the proffered hearsay testimony comports with the requirements of the confrontation clause as to the declarant's unavailability.

B. The Corroboration Requirement

Commentators have disagreed about whether Rule 803(1) of the Federal Rules of Evidence retains the common-law corroboration requirements. The absence of a corroboration requirement in the wording of Rule 803(1) would imply a departure from the common-law exception. But a reading of the accompanying Advisory Committee's Note implies retention of the common-law corroboration condition. The fundamental concern underlying the corroboration issue is that, in the absence of corroborative evidence, there is no assurance that the event occurred. The Supreme Court in Roberts has indicated that corroboration is important in order to withstand a constitutional challenge. The second prong of the court's two-prong test stated that the "statement is admissible only if it bears adequate 'indicia of reliability'." To determine if the statement is reliable, the court said it is reliable only when it "falls within a firmly rooted hearsay exception" or when there exists a "showing of particularized guarantees of trustworthiness." Since the present sense impression is a relatively new exception, for its acceptance there must be evidence to show a guarantee of trustworthiness.


197. The Note states that Rule 803 is a synthesis of the common-law hearsay exceptions with revisions reflecting modern developments, which suggests that a departure from the common-law requirement of corroboration for admissibility of present sense impressions was not intended. Comment, The Need for a New Approach to the Present Sense Impression Hearsay Exception After State v. Flesher, 67 Iowa L. Rev. 179, 185 (1981).

198. 448 U.S. at 66.

199. Id.

200. Historically, corroboration is required. See supra notes 135-54 and accompanying
In *Coleman*, the declarant was unavailable and the testifying witness was separated from the event by a network of telephone lines. The court stated that the inability of the mother to observe the situation did not preclude application of the exception, and that verification was not a prerequisite to the statement’s admissibility.\(^\text{201}\) The mother was not in a position to corroborate the occurrence. There were, however, two pieces of evidence in *Coleman* that corroborated the defendant’s violent behavior: the mother’s testimony that as the declarant was referring to the defendant’s conduct, the mother could hear the defendant shouting in the background, and the defendant’s testimony that he and the declarant had engaged in a loud argument immediately prior to the phone call.\(^\text{202}\) The court specifically noted that it relied on the corroborative testimony of the defendant in its decision to uphold the admission of the hearsay statement.\(^\text{203}\) The court’s reference to the mother’s corroborative testimony suggests that this evidence also was considered to be important.\(^\text{204}\)

The court’s statement that “verification was not a prerequisite” for the admission of the hearsay statement suggests that verification and corroboratation were intended to have different connotations in the opinion.\(^\text{205}\) The *Coleman* decision, then, cannot be understood to dismiss the need for any corroborative evidence of the hearsay statement. The court’s distinction between verification and corroboratation is plausible, since verification implies a stricter degree of certainty regarding the facts of the event. There are many situations in which aural perception would be sufficient to establish the occurrence of an event.

In *Commonwealth v. Blackwell*,\(^\text{206}\) the Superior Court of Penn-
sylvania held that a hearsay statement was not admissible because the statement was not made in the presence of another person who was also at the scene. In Blackwell, the victim described events over the telephone to a police dispatcher as to his abduction, robbery, and abandonment in a park. The court took a strict construction approach to the corroboration requirement and held that the statement was not admissible due to lack of corroboration. But the statement may have been verified even though not corroborated. There was information from the police and medical evidence that the declarant was abducted and abandoned in a park, which caused emotional distress that led to his death. The court could have used this independent evidence for verification. Also, the statement could have been verified because it was admitted properly as a statement of present physical condition given to a nurse for diagnosis and treatment. A court should take into consideration the fact that when a statement comes within two or more exceptions to the hearsay rule, the exceptions should give support to each other for verification. A court should not look at each exception separately and independently for verification as to that particular exception alone.

The admissibility question concerning spontaneous statements and the requirement of corroboration has lead to judicial concern for two important reasons. First, there is concern that the statement was made without reflection and was not the product of the imagination of the declarant. Second, there is concern that the declarant adequately perceived the matter which forms the substance of the statement and thus had personal knowledge. The appropriate vehicle for resolving the corroboration issue is a preliminary fact determination hearing. Prior to the admission of a present sense impression statement, courts should balance the amount of detail of the corroborative evidence and the degree to which the statement appears to satisfy the spontaneity and contemporaneity requirement. In deciding upon the appropriate amount of corroboration in any particular case, the court should consider the extent to which the uncorroborated details of the declaration are, as a matter of common experience, consistent with the

207. Id. at 218, 494 A.2d at 434.
208. Id. at 222, 494 A.2d at 437. The court concluded that the statement to the nurse was admissible independently of its admission as an excited utterance. Id.
210. Id.
211. Comment, 67 Iowa L. Rev. at 201.
corroborated facts.\textsuperscript{212} Because the amount of corroborative evidence that is needed will vary from case to case, no precise conclusions can be stated regarding what should be necessary or sufficient.\textsuperscript{213}

The degree of corroboration must be at a higher level in criminal cases. Consideration of another fairly new hearsay exception will assist in the determination of the adequacy of a corroboration quantum of evidence. The penal interest exception\textsuperscript{214} is a modern day exception to the rule against hearsay. Using the rationale of this exception, it seems logical that statements used to incriminate the defendant (in criminal cases for present sense impressions) should have the same or greater degree of corroboration as statements offered to exculpate the defendant (in the case of declarations against penal interest). It has been suggested in the case of statements against penal interest that corroborating circumstances should “clearly indicate” the trustworthiness of the statement by evidence that demonstrates by a preponderance of the evidence that the declarant’s statement is true.\textsuperscript{215} Proof of the statement’s truth can be established in many ways including proof of motive or opportunity for truth telling,\textsuperscript{216} and by circumstantial evidence, including the contents of the statement.\textsuperscript{217} The trial judge must be especially careful to make an independent determination as to the degree of corroboration in criminal cases because fairness and justice demand that accusations be buttressed by additional corroborative evidence. In any case, present sense impressions as a matter of law should not be sufficient evidence on which to convict beyond a reasonable doubt.\textsuperscript{218}

\textsuperscript{212} Id.
\textsuperscript{213} Id. In In Re Japanese Electronic Products, 723 F.2d 238, 303 (3d Cir. 1983), cert. granted, ___ U.S. ___, 105 S. Ct. 1863 (1985), the court stated, “[R]ule [803(1)] is generally understood to require that, in addition to contemporaneity, there be some corroborating testimony.” In this case the internal memorandum and diary of defendant employee did not qualify under Rule 803(1) because under the circumstances, there was reason to be skeptical of the documents and the court refused to admit them solely on the basis of contemporaneity.

\textsuperscript{214} Fed. R. Evid. 804(b)(3).


\textsuperscript{216} Id. at 917-20.

\textsuperscript{217} The declarant must be shown to have firsthand knowledge. See supra note 102 and accompanying text.

\textsuperscript{218} Commonwealth v. Barnes, 310 Pa. Super. 480, 492-93, 456 A.2d 1037, 1043 (Popovich, J. dissenting). Arguments can be made for a ‘beyond a reasonable doubt’ standard for preliminary fact determinations with regard to the present sense impression in criminal
CONCLUSIONS AND RECOMMENDATIONS

The concept of spontaneous statements in the form of present sense impressions as a special class of evidence under the rubric of the doctrine of res gestae is an anachronism in the modern theory of proof. To speak plainly, there is no "res gestae exception" to the hearsay rule. The continued use of the phrase in modern day trials is inappropriate and the term should be rejected entirely and should not be used to explain the admission of hearsay evidence. The time has long passed to "lay the old aside" as it relates to "res gestae."

In the past, the Pennsylvania courts have not analyzed the admission of hearsay evidence closely. Courts in Pennsylvania should no longer discuss hearsay problems in superficially sophisticated terms; rather, courts should give hearsay problems the careful consideration that all evidentiary problems deserve. The present sense impression exception to the rule against hearsay offers a valuable addition to the probative evidence that can assist the triers of fact in their deliberations. The question arises as to what quantum of evidence should be required before a judge admits a present sense impression. The courts of Pennsylvania have not answered this question. Yet, there is case law to the effect that the present sense impression exception is the law of this Commonwealth.

Of the twenty-nine states that have enacted the Federal Rules of Evidence, at least seven states did not enact Rule 803(1) as stated in the federal rules. Ohio and Florida added an additional phrase to the end of the rule. The Florida Rules state that a present sense impression will be admitted "except when such statement is made under circumstances that indicate its lack of trustworthiness." Ohio adds the phrase "unless circumstances
indicate lack of trustworthiness” to the end of its rule.\textsuperscript{225} The Ohio staff note explains that this phrase serves to narrow the availability of the exception by vesting discretion in the trial judge.\textsuperscript{226} This seems like an appropriate limitation to be placed upon the enactment of the present sense impression exception as the law of Pennsylvania.

Colorado’s Rules of Evidence add the requirement of spontaneity and delete the words “or immediately thereafter” found in the Federal Rules of Evidence.\textsuperscript{227} Colorado’s comments explain that the additional requirement of spontaneity gives a greater guarantee of trustworthiness.\textsuperscript{228} Again, this seems to be another appropriate limitation because declarations relating to assertions of past fact are generally less credible. A declarant’s memory may fade and this gives statements made after an event less credence.

Kansas has limited this exception to civil cases.\textsuperscript{229} As long as the evidence proffered under the present sense impression exception demonstrates the requisite circumstantial guarantees of trustworthiness, it should be admitted to assist the triers of fact in their deliberations in both civil and criminal cases. This exception should be used to pave the way for greater liberalization and overdue simplification in the civil law area. Where the requirements of trustworthiness and necessity are met, an exception to the hearsay rule is applicable in criminal cases as well, with proper limitations.

Because of the requirement of the confrontation clause, a distinction must be drawn between civil cases and criminal cases. In civil cases, a hearsay statement falling within the present sense impression exception should be admissible without reference to the availability or unavailability of the declarant. However, as to criminal cases, there must be a requirement that the declarant is unavailable,\textsuperscript{230} so as to comport with the requirements of the confrontation clause.

In addition, there must be a showing of “reliability” as to the out-of-court declaration. In both civil and criminal cases, the trial judge must find that the statement meets the standard of reliability. As to civil cases, the standard is that of reasonableness, and

\textsuperscript{225} \textit{Ohio R. Evid.} Rule 803(1).
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Colo. R. Evid.} Rule 803(1).
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Kan. C. C. P.} § 60-460(d).
\textsuperscript{230} This would include refusal to testify, lack of memory, and inability to be present to testify. \textit{See Fed. R. Evid.} 804(a).
the requirements of reliability may be proven by the statement itself. But in criminal cases, reliability must be shown under the due process clause and the requirements of the confrontation clause.

The present sense impression exception permits the introduction of probative information for the trier of fact. For this reason, it is time for the courts of Pennsylvania to embrace this exception. Still, thoughtful consideration must be given to appropriate limitations and restrictions to be placed on the exception. This is an appropriate time for the legislature to review and codify the Rules of Evidence, including an objective evaluation of the present sense impression exception.


232. See supra notes 155-80 and accompanying text.