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Rule 803(3): Then Existing Mental, Emotional, or Physical Condition

RULE 803(3): THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.

Federal Rule of Evidence 803(3) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to execution, revocation, identification, or terms of declarant's will.[1]

Federal Rule of Evidence 803(3) provides a hearsay exception for a declarant's statements of his presently existing physical conditions, as well as for his present mental or emotional condition. Further, statements showing the declarant's presently existing state of mind may constitute evidence of a declaration of plan, reason, motive, design and intent of subsequent conduct.

Federal Rule 803(3) requires that a declaration concerning either a physical condition or a mental or emotional state must be directed at a present condition.[2] The hearsay rule does not apply to statements of a past event or condition, since such statements are formulated after a period of reflection.[3] The rationale behind this hearsay exception is that statements concerning the declarant's then existing physical or mental condition may be more trustworthy and reliable than statements and explanations of

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1. FED. R. EVID. 803(3).

2. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(3)[01], at 114 (Joseph M. Mclaughlin ed., 1995).

3. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(3)[01], at 116 ("[D]escriptions of past pain or symptoms, and explanations of how an injury occurred, are not admissible pursuant to Rule 803(3)"). *But see* Meany v. United States, 112 F.2d 538, 540 (2d Cir. 1940) (holding that patient's description of past medical condition was admissible, since the "patient ha[d] an equal motive to speak the truth; what he ha[d] felt in the past [was] as apt to be important in his treatment as what he [felt] at the moment").

past conditions.[4] These declarations are likely to be trustworthy because the current testimony of a witness as to his prior physical or mental condition may suffer from an impairment in memory or present a risk of fabrication.[5] Therefore, under Federal Rule 803(3), these contemporaneous hearsay statements "are considered of greater probative value than the present testimony of the declarant."[6]

One aspect of Federal Rule 803(3) allows for the admittance of currently existing physical conditions.[7] A person describing his or her present physical condition significantly aids a doctor in understanding the extent of injuries, particularly when they are internal.[8] Similarly to Federal Rule 803(4), Rule 803(3) .allows into evidence statements of a person's present pain and suffering, even if they were not made to a physician.[9] However, only declarations of present, not past, pain and suffering are admissible, since "contemporaneity is the guarantee of trustworthiness, statements indicative of reflection rather than spontaneity are excluded."[10] The underlying rationale for admitting statements showing the declarant's present state of mind, namely that statements of then existing mental condition are more reliable than statements describing a past mental state, is similar to admitting statements of present pain and suffering.[11]

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4. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(3)[01], at 114.

5. *See id.*

6. MCCORMICK ON EVIDENCE, § 273, at 480 (John William Strong ed., 4th ed. 1992).

7. *See* FED. R. EVID. 803(3); FED R. EVID. 803(4).

8. *See* Northern Pac. R.R. v. Urlin, 158 U.S. 271, 274 (1895) ("Every one knows that when injuries are internal and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination.").

9. *See* Mabry v. Travelers Ins. Co., 193 F.2d 497, 498 (5th Cir. 1952) (holding that declarations of present pain and suffering made to husband admissible).

10. WEINSTEIN & BERGER, *supra* note 2, ¶ 803(3)[01], at 116.

11. *See id.*

In *United States v. Cardascia*,[12] the Second Circuit stated that the 803(3) exception "[was] a specialized application of the present sense impression and excited utterance exceptions."[13] The court stated that the reasons behind the 803(3) exception to the hearsay rule "focus[ed] on the contemporaneity of the statement and the unlikelihood of deliberate or conscious misrepresentation."[14] The court noted that when a statement falls within the exception, the court must determine whether the statement relates, on the one hand, to a then existing state of mind or, on the other, a statement of memory offered to establish a fact believed to be true.[15]

Statements of present intent may be relevant evidence to show that the declarant acted in accordance with his intent. The seminal case illustrating this aspect of the rule was *Mutual Life Insurance Co. v. Hillmon*.[16] In *Hillmon*, the plaintiff, Sallie Hillmon, sued several insurance companies to recover on her husband's death benefit insurance policies.[17] The insurance companies refused to pay the policies, alleging that plaintiff and her husband conspired to defraud the insurance companies by falsifying John Hillmon's death.[18] Sallie Hillmon claimed that the body which was found in a creek was that of her husband, John Hillmon. The insurance companies, however, alleged that the body which was found was that of John Hillmon's traveling partner, Frederick Walters.[19] The insurance companies introduced letters, written by Walters to his sister and fiancee, which indicated his intention to go with Hillmon on a trip.[20] The

12. 951 F.2d 474 (2d Cir. 1991) In this case, the defendants appealed convictions on grounds of bank fraud and other offenses based on a letter indicating that the defendant did not intend to defraud the bank. *Id.* at 482.

13. *Id.* at 487.

14. *Id.*

15. *Id.* at 488.

16. 145 U.S. 285 (1892).

17. *Id.* at 285.

18. *Id.* at 286.

19. *Id.* at 287-88.

20. *Id.*

United States Supreme Court held that the letters should have been admitted. As statements of plan or intent they could be used to demonstrate that Walters acted in accordance with his declared intent.[21] The Supreme Court stated:

> [W]hile he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.[22]

According to Federal Rule 803(3), statements of intent which are introduced to show that a declarant had taken a certain action are admissible to prove that the intention was carried out by the declarant.[23] The Advisory Committee's Notes to Federal Rule of Evidence 803(3) states that "[t]he rule of *Mutual Life Insurance Co. v. Hillmon* . . . allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed."[24] However, the House Judiciary Committee's Notes to Federal Rule of Evidence 803(3) limited the *Hillmon* doctrine to only those statements which are directly related to the intended future conduct of the declarant and not the conduct of a third party.[25]

In *United States v. Pheaster*,[26] the United States Court of Appeals for the Ninth Circuit examined the *Hillmon* doctrine with respect to the contrasting interpretations of the Advisory Committee's Notes and the House Judiciary Committee's Notes. In *Pheaster*, the Ninth Circuit upheld the admissibility of a

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21. *Id.* at 299.

22. *Id.* at 295. "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony." *Id.* at 296. (quoting Insurance Co. v. Mosley, 75 U.S. 397, 404 (1869)).

23. *See* FED. R. EVID. 803(3).

24. *See* FED. R. EVID. 803(3) advisory committee's note (emphasis added).

25. *See* FED. R. EVID. 803(3) House Committee Judiciary Report.

26. 544 F.2d 353 (9th Cir. 1976)

statement that was made by a teenage victim to his friends.[27] The victim stated his intention to meet a man named "Angelo" in the parking lot, in order to obtain a pound of free marijuana.[28] The statement was introduced as evidence to show that the victim actually met "Angelo," the alleged kidnapper.[29]

The *Pheaster* court rejected defendant's arguments that the statements should have been admitted only to show the victim's state of mind, rather than the actions of the defendant.[30] The court noted that the House Judiciary Committee's Note states that "the Committee intends that the Rule be construed to limit the [*Hillmon*] doctrine . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."[31] However, the court "read the note of the Advisory Committee as presuming that the *Hillmon* doctrine would be incorporated in full force . . . ."[32]

In *United States v. Cicale*,[33] the United States Court of Appeals for the Second Circuit explained that statements of an intention to engage in an action can be used to demonstrate the actions of a third party.[34] Although the *Cicale* court did not have to address the *Hillmon* controversy, the court, in footnotes and dicta, noted its willingness to draw an inference from the declarant's statements to the action of another person.[35] The

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27. *Id.* at 380.
28. *Id.* at 375.
29. *Id.*
30. *Id.*
31. *Id.* at 379.
32. *Id.*
33. 691 F.2d 95 (2d Cir. 1982).
34. *Id.* at 104.
35. *Id.* at 103-04. The *Cicale* court stated:

> On several other occasions we have recognized that *Hillmon* allows the implication to be drawn from a declarant's statement that he had "relations" with the other persons implicated which made his criminal plan "feasible," thereby rendering such statements admissible "to show the existence of a conspiracy" from which a third party's participation may be inferred.

Id. at 104.

court stated that a declarant's statements indicating the intent to "carry out a plan," are admissible pursuant to 803(3) and "the *Hillmon* issue does not arise" if the participation of a third party can be proven by independent means.[36]

New York follows the common law rule, which was derived from *Mutual Life Insurance Co. v. Hillmon*.[37] In New York, statements of intention to prove a subsequent act are admissible. For instance, in *In re Newcomb*,[38] the court of appeals held that written statements indicating Newcomb's plans to move her domicile were relevant to her existing intent.[39] Since Newcomb's intention was a material fact to be proved, the court allowed admission of her written declarations as evidence of her intent.[40] The court explained that Newcomb's good faith, as well as the weight of the statements, established her intention.[41]

Moreover, in *People v. Conklin*,[42] the court held that declarations which tended to show an intent to commit suicide, which were made three years prior to the death, should have been admissible at trial.[43] The court explained that "this testimony, although quite remote, was admissible on an issue of fact involving the question of whether the deceased took her own life or her death was caused by the act of the defendant."[44] Thus, the court's holding demonstrates that the question of remoteness is for the trial court to determine.

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36. *Id.*

37. 145 U.S. 285 (1892). "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be." *Id.* at 295.

38. 192 N.Y. 238, 84 N.E. 950 (1908). In *Newcomb*, the issue concerned domiciliary intent. Newcomb, prior to executing her will, mailed letters to her friends and associates announcing her intention to make New Orleans her future permanent domicile. *Id.* at 240, 84 N.E. at 951.

39. *Id.* at 252, 84 N.E. at 955 ("Such declarations are not self-serving in an improper sense, unless they are made with intent to deceive.").

40. *Id.*

41. *Id.*

42. 175 N.Y. 333, 67 N.E. 624 (1903).

43. *Id.* at 343, 67 N.E. at 627.

44. *Id.*

Further, New York common law parallels Federal Rule 803(3) in the area of admitting declarations of reason, motive or feeling when relevant to evidencing the declarant's state of mind. In *Shultz v. Third Avenue R.R. Co.*,[45] the court found that declarations of hostility by the witness towards the other party to the action were admissible to show the witness' credibility.[46] In *People v. Dixon*,[47] the Appellate Division, Fourth Department, held that error occurred when the lower court refused to allow the defendant's girlfriend to testify regarding threats made by the victim against the defendant.[48] The court concluded that the lower court erred because it "disallowed that testimony in the mistaken belief that the victim's threats were admissible only if communicated to defendant."[49] The court explained that the victim's threats showed the state of mind of the victim.[50]

Although the common law rule adopted by the New York courts has followed the *Hillmon* doctrine, the New York interpretation of the hearsay rule differs from Federal Rule 803(3) with regard to a declarant's expression of pain and suffering. In *Roche v. Brooklyn City & Newton R.R. Co.*,[51] the court distinguished evidence of declarations of pain and suffering made to a physician from such declarations simply stated to a third party witness, but not made to the third party for purposes of gaining professional medical attention.[52] The court held that a declaration of pain and suffering to a third party witness was not

45. 89 N.Y. 242 (1882).

46. *Id.* at 248-49. *See also* Loetsch v. New York City Omnibus Corp., 291 N.Y. 308, 310-11, 52 N.E.2d 448, 448-49 (1943) (finding admissible statements in decedent's will showing certain emotional feelings between decedent and her husband were admissible as relevant to understanding their relationship).

47. 138 A.D.2d 929, 526 N.Y.S.2d 269 (4th Dep't 1988).

48. *Id.* at 930, 526 N.Y.S.2d at 270.

49. *Id.*

50. *Id.*

51. 105 N.Y. 294, 11 N.E. 630 (1887) Here, a third party witness offered evidence of the plaintiff's complaints of pain long after the happening of the accident. *Id.* at 296, 11 N.E.2d at 630-31.

52. *Id.* at 298, 11 N.E. at 632.

admissible unless made for purposes of obtaining treatment.[53] The court also concluded that involuntary expressions such as moans and screams were more trustworthy than ordinary statements of pain, since they were truly narrative of the present condition.[54] Further, in *Davidson v. Cornell*,[55] the New York Court of Appeals held that declarations of present, not past, pain and suffering are admissible only when made to a physician for the purpose of obtaining treatment.[56]

In sum, Federal Rule 803(3) and the New York courts have held that relevant declarations of reason, motive or feeling are admissible when evidencing the declarant's existing intent or his existing state of mind. It is in this respect that New York most closely adheres to Federal Rule 803(3). However, New York's rule is distinguishable from Federal Rule 803(3) regarding declarations of pain and suffering of present physical conditions. New York limits the admissibility of declarations of pain and suffering to those made to a physician for purposes of diagnosis

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53. *Id.* at 299, 11 N.E. at 632.

54. *Id.* at 298, 11 N.E. at 631. "Evidence of exclamations, groans and screams is now permitted more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way." *Id. See also* Hagenlocher v. Coney Island & B.R. Co., 99 N.Y. 136, 136 N.E. 1 (1885).

55. 132 N.Y. 228, 30 N.E. 573 (1892).

56. *Id.* at 237, 30 N.E. at 576. The court of appeals noted that the hearsay exception does not apply when made to a physician who has examined the patient, not for treatment, but only to prepare for testimony as an expert for trial. *Id.*

or treatment. In contrast, Federal Rule 803(3) does not require the statement to be made to a physician.