

**Problem VI-1.** Morgan Banker sues the Tabloid Press for publishing in an editorial in one of its daily newspapers the following alleged libel: "Banker's nefarious career began when he embezzled \$25,000 from the Macrosoft National Bank of which he was at the time cashier." **Can this statement be introduced by Banker over a hearsay objection?** Banker, alleging malice on the part of Tabloid in publishing the libel, seeks punitive damages. Tabloid's defense to the charge of malice is that at the time the statement was published, Tabloid reasonably believed it to be true. At trial, Banker produces a secretary who worked in Tabloid's editorial office at the time of the publication. She testifies, over Tabloid's objection, that the day before the editorial was published she overheard a conversation between the author of the editorial and Gates, the president of the bank in which Gates said: "I tell you, Banker did not steal the \$25,000: it was loaned to him by the bank on my authority." **On what issues, if any, is the evidence hearsay? On what issues, if any, is it not?**

**Problem VI-2.** One rainy day Eve slipped and fell on the floor of the Foxy-Loxy Supermarket, breaking a hip. Eve claims that the floor was dangerously slippery because of the rain and that the manager was negligent in not putting down some substance to soak up the water and improve the traction. The supermarket manager testifies that the floor always gets wet when it rains and that in twelve years at the same location no one has ever complained about the floor being slippery. Should a hearsay objection to this testimony be sustained? What arguments, if any, could be made that the evidence is not hearsay? If the manager testifies that in the twelve years she has worked at the Foxy-Loxy neither she nor any of the employees of the store has ever slipped when the floor was wet, would this

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**testimony be objectionable as hearsay? Would any other  
objection be available?**

**Problem VI-4.** Frank Farmer was driving his automobile south on First Street. Sue Smith was driving west on Second Avenue. Their vehicles collided in the intersection of First Street and Second Avenue. The intersection was not controlled by any traffic sign or signal, and is located in a jurisdiction in which a statute provides that upon simultaneous approach to an intersection in the absence of excessive speed, the vehicle on the right has the right of way. Smith brought an action against Farmer for personal injuries, alleging excessive speed and failure to maintain lookout or control. Farmer, in his answer to Smith's complaint, denied any negligence and alleged that Smith was contributorily negligent in failing to yield the right of way. Witnesses are available to testify as follows:

(a) A witness for Smith, who, like Farmer, was driving south, will testify that three miles north of the scene of the accident, Farmer passed her car at an estimated speed of 70 miles per hour, that Farmer's car rapidly disappeared, and that she saw it next a few minutes later badly damaged at the intersection of First Street and Second Avenue. **Is there any hearsay problem here?**

(b) A bystander will testify that after the accident she went to Smith's car. Smith was conscious and said, "I was already in the intersection when he came barging in." **Is this hearsay?**

(c) Suppose Smith dies and damages are sought for her pain and suffering during the brief period she remained alive after the accident. **Is there a nonhearsay purpose for which evidence of Smith's statement would be relevant?**

**Problem VI-3.** In the following vignettes **W** is always a witness testifying in court, **D** is a defendant in a civil or criminal action, **P** is the plaintiff in a civil action or the prosecutor in a criminal case, and **X** may

or may not be a hearsay declarant. Read each problem and determine whether W's testimony is objectionable as hearsay.

1. On the issue of whether D struck P, W's testimony that she saw D strike P.
2. On the issue of whether D struck P, W's testimony that X told her that he saw D strike P.
3. On the issue of whether D struck P, W reads the entry that she made in her diary on the day of the alleged fight, "Today I saw D strike P."
4. On the issue of whether D struck P in self-defense, W testifies that she heard X say to D shortly before the fight, "You better watch out, P is out to get you."
5. The same testimony as in #4 on the issue of whether P was the first aggressor in his fight with D. D offers W's testimony.
6. On the issue of whether X was a citizen, W's testimony that she saw X swear allegiance to the United States as part of the citizenship ceremony.
7. On the issue of whether Z was X's sole devisee, X's will in which it is written, "I leave all my worldly possessions to Z, who is the most loving and honest of my seven children."
8. The same will as in #7 on the issue of whether Z was more honest than his six siblings.
9. The same will as in #7 on the issue of whether X loved Z more than he loved his other children.
10. On the issue of whether X had drunk a fifth of whiskey before leaving the Happy Hour Bar, W's testimony that just before he left she heard X say in a very slurred voice, "I got to go now—ha, ha, ha—did pretty good, killed me a fifth of Mountain Jack in—ha, ha—45 minutes—ha, ha, ha."
11. The same testimony as in #10 on the issue of whether X was drunk when he left the Happy Hour Bar.
12. On the same issue as in #10, W's testimony that she saw X enter a booth alone with a fifth of Mountain Jack Whiskey, and that when she next passed the booth about 40 minutes later she noticed that there was only about an ounce or two left in the bottle.
13. On the same issue as in #10, W's testimony that as X stood at the cash register she heard the cashier ask him, "Are you the one who downed that whole fifth of Mountain Jack?"
14. On the issue of whether X, a child, was saddened when the cat knocked over his goldfish bowl, W's testimony that X cried as he picked up the dead goldfish.

15. On the issue of whether **P** had suffered a disabling back injury in an auto accident, a movie taken by one of **D**'s investigators two months after the accident. The movie shows **P** shoveling snow and changing the tire on a car.
16. On the issue of whether a burglar had entered a house before daybreak, testimony by **W**, a farmer, that she heard the cock crow about 15 minutes after she had been awakened by the sounds of an intruder and that her cock always crows when the sun rises.
17. On the issue of whether **X** and **Y** had been involved in some sort of wager, **W**'s testimony that she saw **X** and **Y** shake hands and heard **X** say, "It's a bet."
18. On the issue of **D**'s loyalty to the United States, testimony that the FBI, after a security check, had cleared **D** for access to top secret information.
19. On the issue of whether **X**, who had moved to Hawaii some 12 months before, had the requisite domiciliary intent to qualify as a resident for voting purposes, **W**'s testimony that **X** had once said to her, "The tropical breezes, the sun, the sand, the perfume of plumerias, I know of no place that is nicer."
20. On the same issue as in #19, **W**'s testimony that **X** had told her, "Because I love Hawaii so much, I intend to live here forever."