

8.45. Statement of Pain, Illness, or Physical Condition by an Unavailable Declarant

An out-of-court statement made to a third party by a declarant who is unavailable at the time of the proceeding describing the declarant's pain, illness, or physical condition at the time the statement is made, is admissible, provided the statement is made at a time not remote from the event that is alleged to have caused the pain, illness, or physical condition.

Note

This rule is derived from a series of cases. An early rationale for the rule was set forth in *Teachout v People* (41 NY 7, 13 [1869]):

“The natural and impulsive utterances of a person suffering under extreme illness, made to those who are in attendance, or present in the performance of offices of kindness, for the purpose of giving relief or alleviation, are proper evidence of the actual pressure of the symptoms which the sufferer describes. The universal consent of all mankind accords to them some credence, as indications of the state of the sufferer and they are acted upon in all ministrations for the relief of the distressed. It would be absurd to say . . . that complaints of pain, made in the usual and natural course, should not be accredited as proof of suffering.”

The leading case on the subject is *Tromblee v North Am. Acc. Ins. Co.* (173 App Div 174, 176 [3d Dept 1916], *aff'd* 226 NY 615 [1919]). In that case, the plaintiff's husband fell accidentally and suffered a concussion; the following morning he complained to his daughter of pain; and the following day he died. The Court held that the deceased's declaration of pain to his daughter was admissible in that proceeding (*see Jiminian v St. Barnabas Hosp.*, 84 AD3d 647, 648 [1st Dept 2011] [“Plaintiff's testimony concerning his wife's complaints of dizziness and shortness of breath are . . . admissible as simple expressions of suffering by the injured party, who is no longer available by reason of her death, which occurred less than 12 hours following her complaints”]; *but see Crawford v Washington*, 541 US 36 [2004]).

By contrast, a deceased's declarations of tiredness and pain to a neighbor were held not admissible in *Rosenberg v Equitable Life Assur. Socy. of U.S.* (148 AD2d 337, 337-338 [1st Dept 1989]). In that case, the declarations were made “weeks” after the event that may have caused the condition and in addition to the complaints of pain, “consisted of a narrative” regarding the event.

As the rule states, declarations of pain, illness, or physical condition made to a third party are not admissible if the declarant is available at the time of the proceeding (see *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294, 299 [1887] [“the evidence of (a third party) as to the plaintiff’s declarations of existing pain when they were walking in the street together long after the accident,” in addition to the testimony of the plaintiff, “should not have been received”]; *Davidson v Cornell*, 132 NY 228 [1892]). Declarations of pain, illness, or physical condition, may, however, be admissible, even though the declarant is available, where the statement is admissible as one made to a health care professional under Guide to New York Evidence rule 8.43 (see *People v Duhs*, 16 NY3d 405, 408 [2011]), or as an excited utterance under rule 8.17, or as a present sense impression under rule 8.29 (see e.g. *People v McCray*, 102 AD3d 1000, 1009 [3d Dept 2013]; *Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]; *Hyung Kee Lee v New York Hosp. Queens*, 118 AD3d 750 [2d Dept 2014]).