Negligence At Work: Employee Admissions In California And Federal Courts

Late one afternoon, a delivery truck owned by the Kepon Trucking Company (a hypothetical California corporation) struck and killed a child who had darted out in its path. The truck driver admitted to a bystander, "It was my fault! I never should have had that last beer." Another Kepon employee, riding in the truck to assist with unloading, exclaimed, "I told that driver to be more careful! She was going too fast." The local press contacted the public relations director for Kepon, who said that the company had been considering firing the driver even before the accident. Kepon's vice-president expressed her regret to the bereaved parents and assured them that the company's insurance would cover everything. In the parents' wrongful death action against Kepon Trucking Company, which employee statements will be allowed into evidence? The out-of-court statements are hearsay if offered to prove the truth of the matter asserted. But since employees are considered to be agents of their employer, the statements might be admitted against Kepon under the vicarious admissions exception[1] to the hearsay rule.

The admissibility of an employee's[2] statements depends to a great extent on the employee's duties. In California, if employees are authorized to speak on an employer's behalf, their statements are almost always admissible against that employer, whether authorization is express or implied.[3] If authorized only to act on the employer's behalf, the question arises as to whether their authority encompasses statements made about the actions. Such statements often

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[1] The vicarious admissions exception, codified in CALIFORNIA EVIDENCE CODE sections 1222 and 1224 (West 1968), will be explained and discussed in this article. The declarant under the admissions exception need not be unavailable as a witness, may have spoken from opinion rather than personal knowledge, and need not have spoken against interest at the time of the statement. *See* Comment, *An Advocate's Guide to Personal, Adoptive and Judicial Admissions in Civil Cases in California and Federal Courts*, this volume.

[2] For purposes of this article, "employee" and "employer" are used to refer to the broader category of "agent" and "principal."

[3] *See* text accompanying notes 21-39, *infra*.

involve an employee's own negligence, and the employer's liability arises under the substantive law of *respondeat superior*.[4] Under present interpretations of California Evidence Code sections 1222 and 1224,[5] many employee admissions are inadmissible, despite their probative value and trustworthiness. Under the Federal Rules of Evidence,[6] on the other hand, most employee admissions are admissible whether the employee's duties are to speak or only to act.

The thesis of this article is that section 1222 should be expanded to admit statements of employees who are authorized either to speak or to act on behalf of their employer and who subsequently make admissions concerning acts within their duties. That expansion would bring California into conformance with the position of the federal rules. If section 1222 were so expanded, section 1224 would no longer be needed, at least as it applies to employee admissions. Until section 1222 is revised, however, section 1224 should be construed to apply to statements regarding actions arising out of employee torts.[7] This article will explore the legal and policy justifications for this position, as it addresses the issues raised in the hypothetical accident and others like it.[8]

I. VICARIOUS ADMISSIONS — BACKGROUND

Hearsay testimony is excluded from evidence because it does not allow for the administration of an oath to the speaker, for the observation of the speaker's demeanor, and, most importantly, for cross-examination.[9] When the speaker is also the party against whom the statement is being offered, these objections cannot rationally be raised.[10] Disagreement exists about whether admissions of a party

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[4] "Let the master answer." This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. BLACK'S LAW DICTIONARY 1475 (4th ed. 1968).

[5] *See* text accompanying notes 21 and 120, *infra*, for the texts of sections 1222 and 1224, respectively.

[6] 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

[7] Section 1224 is commonly applied to contract actions involving sureties and guarantors. See cases collected in CAL. EVID. CODE § 1224, Law Rev. Comm'n Comment (West 1968). The authors' position on statements of employee tortfeasors is supported by a new California appellate case, Van Oosting v. Duber Industrial Security, Inc., 57 Cal. App. 3d 376, 129 Cal. Rptr. 173 (2d Dist. 1976). *See* note 130, *infra.*

[8] This article will examine cases involving torts of employers and of employees.

[9] E. CLEARY, *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 245 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]; 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362 (Chadbourn rev. 1974) [hereinafter cited as 5 WIGMORE]; B. WITKIN, CALIFORNIA EVIDENCE § 448 (2d ed. 1966) [hereinafter cited as WITKIN].

[10] MCCORMICK (2d ed.), *supra* note 9, § 262; 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048 (Chadbourn rev. 1972) [hereinafter cited as

opponent are an exception to the hearsay rule or outside of its scope, but under either theory they are always admissible.[11] Unlike other hearsay exceptions, admissions need not be made under circumstances ensuring trustworthiness, and in fact may have been manifestly self-serving when made.[12] Their admissibility is not predicated on their inherent reliability, but rather on their inconsistency with the position of the party in the litigation and the opportunity afforded the party-declarant to explain such inconsistency.[13] Such statements are admitted into evidence to undermine the credibility of the party who made the statements. Thus admissions are never admitted on behalf of party declarants but only against them.[14]

When the out-of-court statement which is being challenged as hearsay was made by an agent of a party to the action, it may be admissible in court as a vicarious admission.[15] As long as it is established by independent evidence that the speaker is an agent,[16] with the authority to speak on the party-employer's behalf about the subject in controversy, the declaration may be used in court against the employer.[17] This result derives from the substantive law of

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4 WIGMORE]; WITKIN, *supra* note 9, § 496.

[11] "May it not be that we need not worry about the Hearsay rule at all, because admissions are *sui generis* and rest on a deep-rooted human instinct antedating common law rules of Evidence? . . . What is said by a party or by a person closely linked with him in respect to the transaction at issue is considered of such especial value that the usual rules are simply disregarded." Chafee, Book Review, 37 HARV. L. REV. 513, 518-19 (1924). *Compare* Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L. J. 355, 361 (1921) with Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 573-79 (1937). *Also see* 4 WIGMORE, *supra* note 10, § 1048.

[12] 4 WIGMORE, *supra* note 10, § 1048; WITKIN, *supra* note 9, § 498.

[13] An admission is merely a position taken by the adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention now being made in the litigation. Cox v. Esso Shipping Co., 247 F.2d 629, 632 (5th Cir. 1957). MCCORMICK (2d ed.), *supra* note 9, § 262; 4 WIGMORE, *supra* note 10, § 1048, at 7.

[14] One commentator has interpreted this policy as a type of estoppel, in which the party is prevented from excluding contradictory representations made at another time as a "punishment" for inconsistency. Lev, *The Law of Vicarious Admissions — An Estoppel*, 26 U. OF CIN. L. REV. 17, 29-30 (1957).

[15] A vicarious admission can be defined as speech or conduct offered against a party to the action because made by some person whose statements or acts are treated as those of the party through the operation of substantive law. *See* WITKIN, *supra* note 9, §§ 496, 517.

[16] "It is well established that, as against the principal, the admissions, statements, and declarations of an alleged agent, other than his own testimony as a witness . . . are inadmissible to prove agency." Annot., 3 A.L.R. 2d 598 (1949). *Accord*, Frank Pisano & Assocs. v. Taggart, 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 (1st Dist. 1972); Syar v. United States Fidelity & Guaranty Co., 51 Cal. App. 2d 527, 125 P. 2d 102 (3d Dist. 1942).

[17] A partner in any formally constituted enterprise is an agent of the partnership for the purpose of conducting the business of the association. CAL. CORP. CODE § 15009 (West Ann. 1955). Therefore the rules that govern the admissions of agents also apply to the declarations of a partner within the scope of the partner-

agency, which treats any act of the agent within the scope of the agency and during its existence as that of the principal.[18] This is done because the two have a privity of interest while the agency is in force, so that the agent is actually a mouthpiece for the principal.[19] Thus, the out-of-court statement of the employee is considered to have been made by the employer, and the rationale for admitting it then becomes the same as that for admissions of a party opponent.[20]

The reasoning behind the admissions exception is not wholly applicable to vicarious admissions, since the employer is now being required to accept or explain inconsistencies created by someone else. If the employee has said something that contradicts the employer's position in court, the employer might well want to cross-examine the speaker in an attempt to discredit the statement. Employer and employee are considered to have an identity of interest, but since they are not actually the same person, agency law to the contrary notwithstanding, the employer may need to question the employee to resolve the apparent contradiction. The burden is then on the employer to bring the declarant into court, but the employer is estopped to contend that failure to do so has made the statement inadmissible.

II. AUTHORIZED STATEMENTS

In California, Evidence Code Section 1222[21] states the vicarious admissions exception applicable in agency cases:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
> (a) the statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
> (b) the evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

An employee's statements are admissible under this exception only

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ship. The existence and scope of the partnership must first be proved, after which the declarations of any partner may be admitted in evidence against any other partner or against the partnership itself. After a partnership has been dissolved, admissions have been held binding only if they are in connection with acts reasonably necessary to winding up the firm's affairs, or in some cases if they are in regard to business of the firm transacted previously. 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, § 112 (13th ed. 1876) [hereinafter cited as GREENLEAF], and cases cited therein.

[18] *In re* Cliquot's Champagne, 70 U.S. 114 (1865).

[19] GREENLEAF, *supra* note 17, § 114.

[20] *See* Comment, *An Advocate's Guide to Personal, Adoptive and Judicial Admissions in Civil Cases in California and Federal Courts*, this volume.

[21] CAL. EVID. CODE § 1222 (West 1968).

if the employee has been authorized to speak by the employer, who is a party to the action. Determination of this seemingly straightforward requirement becomes complex in many instances because of the ambiguity of the word "authority," and the fact that the authority need not be express, but may be implied.

A. EXPRESS AUTHORIZATION

The most clearcut type of vicarious admission is one which is made by an employee who is expressly authorized by the employer to speak for him or her. Such a "speaking agent" need not have been told to make the particular statement in question, and indeed will usually not have been, since a person is unlikely to appoint another an agent for the purpose of making damaging remarks. As long as the job for which the employee was hired necessarily and explicitly requires statements of the type made, the declaration will not be excluded as hearsay.

A speaking agent may derive express authority in two different ways. First, the duties for which one is hired may include making statements or conducting negotiations on behalf of the employer, as would be the situation for an attorney, press agent, or corporate spokesperson.[22] For example, in a prosecution for tax evasion, information offered to a government agent by the defendant's accountant, who had been given a power of attorney to represent him in tax matters, was found to be admissible against the defendant.[23] Second, even if speaking in general is not a part of the declarant's duties, the particular statement in question may have been authorized, either generically or specifically. In *Bundy v. Sierra Lumber Co.*,[24] the defendant's foreman said that a railroad trestle, which subsequently gave way causing plaintiff's injury, was in poor condition and needed to be repaired. This statement was generically authorized and so admissible, because the foreman's duties expressly included reporting trestles in need of repairs.[25] Thus he was not only permitted, but required, to make that type of statement as part of his employment. In *Guberman v. Weiner*,[26] the statement was an employee's report to the employer's insurance company about an

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[22] Hayes v. United States, 407 F.2d 189 (5th Cir. 1969), *cert. denied* 395 U.S. 972 (1969) (accountant); United States v. Dolleris, 408 F.2d 918 (6th Cir. 1969), *cert. denied* 395 U.S. 943 (1969) (attorney); Slifka v. Johnson, 161 F.2d 467 (2d Cir. 1947), *cert. denied* 332 U.S. 758 (1947) (insurance broker); Skyways Aircraft Ferrying Service, Inc. v. Stanton, 242 Cal. App. 2d 272, 51 Cal. Rptr. 352 (2d Dist. 1966) (insurance agent); Dastagir v. Dastagir, 109 Cal. App. 2d 809, 241 P.2d 656 (2d Dist. 1952) (attorney).

[23] Hayes v. United States, 407 F.2d at 192.

[24] 149 Cal. 772, 87 P. 622 (1906).

[25] *Id.* at 777-78, 87 P. at 624.

[26] 10 Cal. App. 2d 401, 51 P.2d 1141 (2d Dist. 1935).

accident he had while driving a car on company business, and was admissible because he made the report at the specific direction of the employer.[27] Whether the employer has authorized the agent broadly to speak about the employment, or merely to discuss a specific incident or type of incident, the employer has consented to be bound by anything said within the limits of the authorization. Such a statement will be treated as if the employer had made it personally.

In the Kepon Trucking Company hypothetical, the statement made by the public relations man would clearly be admissible under the vicarious admissions exception of section 1222 as an expressly authorized admission, since the purpose of a public relations agent is to talk to the public about the affairs of the corporation.

B. IMPLIED AUTHORIZATION

Sometimes the authority of the employee to speak on behalf of the employer is implied rather than express. Only infrequently will a principal specify minutely what the agent is to do, and thus most authority is created by implication. Such authority is inferred from words, customs, and the relations of the parties.[28] Section 1222 includes impliedly authorized statements within the scope of its authorization requirement. The official Law Revision Commission Comment says that "the authority of the declarant to make the statement need not be express; it may be implied. It is to be determined in each case under the substantive law of agency."[29] There are some situations in which implied authority to speak is easily recognized; for example, a university president is authorized to speak on behalf of the school even though the official job description may not say so, since such a position could not be fulfilled otherwise. But in other instances the answer is not so clear, and several factors must be considered to determine whether the declarant qualifies as a "speaking agent." These include the position of the declarant in a company hierarchy, the declarant's duties, and the time at which the statement is made.

1. FACTORS DETERMINING IMPLIED AUTHORIZATION

a. Declarant's Position in the Hierarchy

One consideration in determining authorization to speak is the position of the employee in the hierarchy of the employer-company. The declarant in *Johnson v. Bimini Hot Springs*[30] was the resident

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[27] *Id.* at 404, 51 P.2d at 1142.
[28] RESTATEMENT (SECOND) OF AGENCY, § 7, Comment (1958).
[29] CAL. EVID. CODE § 1222, Law Rev. Comm'n Comment (West 1968).
[30] 56 Cal. App. 2d 892, 133 P.2d 650 (2d Dist. 1943).

assistant manager of a public bathhouse, which was held to be a high enough position that he could bind the defendant corporation by acknowledging the slipperiness of the floor on which plaintiff fell. Conversely, in *Crawford v. County of Sacramento*[31] an intern's statement that plaintiff's decedent had been given too much anesthetic could not be admitted against the county hospital, because he was only "an ordinary agent."[32] The California Law Revision Commission recommended that the hierarchy factor be eliminated as a means of determining authorization, and that declarations be admitted as long as they concerned matters within the scope of the agency. This recommendation was eventually withdrawn, and the section suggested by the Commission was not adopted in the 1966 Evidence Code.[33] Therefore, although there are no cases decided under section 1222 which address the issue, it can be assumed that hierarchy is still an important factor in finding authorization.

b. Declarant's Duties

Even at the upper end of a business hierarchy, an examination of the duties of a declarant-employee may be relevant to the admissibility of the employee's statements. In an action for injuries sustained by a patron of a store when she tripped and fell down the stairs of the store's cafeteria, the court held that a statement by defendant's floor manager that the lighting was poor and others had fallen there should have been admitted.[34] This was because his duty to oversee the floor was considered to include responsibility for the lighting. The manager's further statement that defendant would take care of plaintiff's medical bills was held properly excluded, however, in the absence of a showing that the declarant was authorized to bind defendant to pay medical bills.[35]

c. Time at which the Declaration is Made

This is an important factor in determining authorization in two respects. First, at the time the declaration is made, the agency must still be in force. This is one point on which the cases are all in agreement, for if the employee's ability to bind the employer is premised on the unity of interest between them, the termination of that unity negates the reasons for allowing in the employee's statement. Thus in *Birch v. Hale*,[36] plaintiff sued to recover payment for the con-

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[31] 239 Cal. App. 2d 791, 49 Cal. Rptr. 115 (3d Dist. 1966).
[32] *Id.* at 800, 49 Cal. Rptr. at 121.
[33] *Id.*, 49 Cal. Rptr. at 122.
[34] Westman v. Clifton's Brookdale, Inc., 89 Cal. App. 2d 307, 200 P.2d 814 (2d Dist. 1948).
[35] *Id.* at 311, 200 P.2d at 817.
[36] 99 Cal. 299, 33 P. 1088 (1893).

struction of an elevator, and defendant's defense was that it was put up negligently and caused the building to shake, necessitating repairs that cost more than the balance due plaintiff. The court held that it was error to admit the statement of defendant's architect that he had given instructions to build the elevator in such a manner, because he was no longer in the employ of defendant when the admission was made, and thus had no stake in the outcome of the case.[37]

Secondly, under the common law, the transaction about which the statement is made must still be pending at the time of the declaration.[38] For example, the admission of a salesperson that a piece of merchandise was flawed or of inferior quality would not be admissible if made after the sale of that item was completed. An agent must not only continue in the employ of the principal, but must still be engaged in the activity that is the basis of the action when the statement is made. How this rule applies in negligence cases is difficult to understand, since the activity about which the statement is made is the accident that caused the plaintiff's injury, which is unlikely to be ongoing. The courts still use the phrase, however, although without explaining its relevance to the facts. For example, when a truck driver, prior to the accident in which he was killed, made statements about his poor physical condition, the statements were admitted because "declarations of an agent made within the course of his employment and while the matter in controversy was pending are admissible in evidence."[39] The court did not make clear what matter in controversy was still pending, but nonetheless apparently found it a decisive factor in the case.

Applying these tests to the introductory hypothetical, the vice-president of Kepon Trucking Co. would probably be considered to have implied authority to speak on its behalf, and so her statement would be admitted under the vicarious admissions exception of section 1222. She is high in the company hierarchy, her duties very likely include some communication with the public, and at the time of her statement the agency was still in force and the matter presumably still pending. Her expression of sympathy to the parents of the dead child would unquestionably be admissible under this analysis, as circumstantial evidence of the company's responsibility. Her further comment about the insurance, however, might be excluded if it were not shown that she had the authority to bind the trucking

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[37] *Id.* at 301, 33 P. at 1089.

[38] GREENLEAF, *supra* note 17, § 113; Manson v. Wilcox, 140 Cal. 206, 210, 73 P. 1004, 1005 (1903); Handley v. Guasco, 165 Cal. App. 2d 703, 708, 332 P.2d 354, 357 (1st Dist. 1959); Brumley v. Barney O'Hern Trucking Co., 152 Cal. App. 2d 514, 518, 314 P.2d 200, 203 (2d Dist. 1957).

[39] Brumley v. Barney O'Hern Trucking Co., 152 Cal. App. 2d at 518, 314 P.2d at 203, citing Lane v. Pacific Greyhound Lines, 26 Cal. 2d 575, 582, 160 P.2d 21, 24 (1945), which was citing Wigmore.

company in the application of its insurance coverage.

III. AUTHORIZED ACTS

A. CONSTRUCTIVE AUTHORIZATION[40]

Often an employee who is not a speaking agent will make a statement concerning an act specifically authorized by the terms of the employment. Traditionally these statements have fallen outside of the vicarious admissions exception and have not been admitted against the employer. In California, section 1222 reflects this requirement that to be admissible the statement itself must be authorized rather than just the act about which the statement was made; statements made merely in the course of carrying out authorized duties do not logically qualify as "authorized" under the language of the section. Yet, when an out-of-court declaration is made by an employee who was not expressly or impliedly authorized to speak, courts will often find a constructive authorization and admit the statement. The term "constructive authorization" is not used by the courts, but has been coined by the authors of this article to designate the category of cases in which the courts find a statement made by a declarant who is not a speaking agent to be authorized and admit it into evidence against the employer.

There are no clear rules to distinguish a constructively authorized statement from an unauthorized one, which means that the standard for admissibility is a very discretionary one. Since it is the authority to act that leads to the finding of authority to speak, the speech must relate to the activity, but it is not clear how closely. Furthermore, the matter of what, precisely, an employer has authorized an employee to do may not be well articulated, so that even the parties themselves might have difficulty determining where the authorization ceases. Greenleaf suggested that "wherever what [the agent] did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it."[41] Under this view all statements about authorized acts would be admissible. According to the Restatement Second of Agency, "authority to do an act or to conduct a transaction does not *of itself* include authority to make statements concerning the act or transaction."[42] Having thus warned that limitations exist, the authors of the Restatement do not specify when the authority to make statements *should* be found from the

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[40] In any of the three authorization situations, express, implied, or constructive, the admission will usually concern a tort of the employer rather than the employee-declarant, and will be limited to such in this article's discussion. *See* text accompanying notes 89 through 91, *infra*, for rationale.

[41] GREENLEAF, *supra* note 17, § 113, at 141. *See also* § 114.

[42] RESTATEMENT (SECOND) OF AGENCY, § 288(2) (1958) (emphasis added).

authority to act.

An examination of the cases suggests that when the court in any given case wanted to admit the statement, it found a constructive authorization, and when it did not want to do so, it found none. Thus in one case, the master of a steamboat was found to be authorized to admit defendant's liability for destruction of a crop by sparks that blew onto the shore from the chimney of the boat,[43] while in another case the master of the vessel was found to be unauthorized to explain why he had been unable to avoid collision with another ship.[44] Likewise, an employee's statement about an accident in which he was involved while driving defendant-employer's car on company business was held admissible against the employer in one case,[45] but not in another.[46]

All of these cases were decided prior to the adoption of the Evidence Code,[47] when the controlling statute was Code of Civil Procedure section 1870(5). Section 1870(5) was somewhat broader than Evidence Code section 1222, allowing as evidence against the principal any act or declaration of an agent within the "scope of the agency."[48] This language apparently required that the statement only pertain to authorized duties, not that the statement itself be authorized.[49] The legislature, in writing section 1222, declined to use the language of section 1870(5) so that the admissibility of out-of-court statements could be limited to those made by traditionally-defined "authorized" speaking agents. By changing the wording, the legislature thought it could reduce the number of statements being admitted against employers and other principals, and thus limit

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[43] Gerke v. The California Steam Navigation Co., 9 Cal. 251 (1858).

[44] Innis v. The Steamer Senator, 1 Cal. 459 (1851).

[45] Shields v. Oxnard Harbor District, 46 Cal. App. 2d 477, 116 P.2d 121 (2d Dist. 1941).

[46] Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649 (1923).

[47] The California Evidence Code became operative on January 1, 1967. CAL. EVID. CODE § 12 (West 1968).

[48] CAL. CODE CIV. P. § 1870(5) (1872), *repealed by* Stats. 1965, c. 299, § 1222: Evidence may be given on trial of the following facts: 5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence.

[49] "Scope of agency," apparently a broader standard than "authorized," is not easily definable, because courts have differed on its interpretation. The traditional view is that the parameters of the scope are determined by the nature of the agency, and only a "speaking agent" can make an admissible statement. The liberal view is that any matter on which the declarant is authorized to act is within the scope of the agency and includes authorization to speak as well. *E.g.*, Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775, 785 (D.C. Cir. 1961), *cert. denied* 368 U.S. 921 (1961); Grayson v. Williams, 256 F.2d 61, 67 (10th Cir. 1958). The conservative view is that since employers do not employ agents to make injurious statements about them, such statements can never be within the scope of the agency. MCCORMICK (2d ed.), *supra* note 9, § 267 and cases cited therein at 641, n. 96.

their liability.[50] However, post-1966 cases still reflect the language of section 1870(5), so the use of a narrower phrase in section 1222 seems to have made no difference in actual practice.[51] Therefore, despite legislative intent to the contrary, courts often admit statements made while the speaker was acting within the scope of employment, even though the statements are not "authorized" within the meaning of section 1222.

1. FACTORS DETERMINING CONSTRUCTIVE AUTHORIZATION

Constructive authorization bears some resemblance to implied authorization, since in the latter the employee is impliedly authorized to speak, and in the former authorization to speak is inferred from authorization to act. Indeed, all three factors that are used to find implied authorization—hierarchy, duties, and time—are applicable in constructive authorization cases as well,[52] and an additional factor, foreseeability, may become important in the future.[53] Hierarchy is only infrequently significant in finding constructive authorization, because if the agent is in a high enough position to be able to bind the principal, an implied authority to speak is usually found.

Determining the precise duties of the speaker is helpful in predicting whether a judge is likely to find constructive authorization in a given case. If the act that is the basis of the declaration is not something included in the responsibilities of the declarant, the court will not admit it.[54] Even if the statement does pertain to the declarant's authorized duties, there may be a conflict over whether it has been constructively authorized. The duties may not exactly coincide with the content of the statement to a literal-minded judge. In *Peterson Brothers v. Mineral King Fruit Company*,[55] the declarations of defendant's employee were not admissible against defendant to show

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[50] Interview with Jon D. Smock, former Associate Counsel, Law Revision Commission, in Sacramento, California, November 6, 1975.

[51] In Markley v. Beagle, 66 Cal. 2d 951, 957, 429 P.2d 129, 133, 59 Cal. Rptr. 809, 813 (1967), the court rejected the declaration as not being "a vicarious admission within the scope of his employment," citing section 1222; and in W.T. Grant Co. v. Superior Court, 23 Cal. App. 3d 284, 286, 100 Cal. Rptr. 179, 180 (2d Dist. 1972), the statement was found admissible because "it set forth what amounted to an admission by an agent made while acting within the scope of his employment. (Evid. Code, § 1222.)"

[52] *See* text accompanying notes 30-39, *supra.*

[53] *See* text accompanying notes 61-63, *infra.*

[54] *See e.g.*, Wills v. Price, 26 Cal. App. 2d 338, 344, 79 P.2d 406, 409 (4th Dist. 1938) (in action for injuries sustained when roll of linoleum toppled over and struck plaintiff, admission of store employee that rolls of linoleum had toppled over before was inadmissible because she did not appear to have any connection with handling the linoleum or keeping in order the room where it was handled).

[55] 140 Cal. 624, 74 P. 162 (1903).

that prunes sold to plaintiff were unmerchantable. Although the agent was employed to superintend the preparation of prunes for sale, he had not been shown to have any authority connected with the actual sale of the prunes or to have been directly involved in the transaction with plaintiff. In contrast, in *W.T. Grant Co. v. Superior Court*,[56] a repairman who serviced television sets for defendant confronted the manager of one of defendant's stores with the fact that the television department was selling used sets as new sets. The manager's reply, that the practice was company policy and none of the repairman's business, "qualified as an exception to the hearsay rule in that it set forth what amounted to an admission by an agent made while acting within the scope of his employment."[57] In other words, the court chose to find a constructive authorization to discuss company policy, since the statement concerned an act by the employee in the management of the store.

The repairman in *Grant* was an independent contractor who dealt with the defendant only when there were televisions in need of repair. Would his testimony as to the manager's statement have been admissible if he had been an employee of the company? Probably not, although the answer to this question remains unclear in California. According to the Restatement Second of Agency, "statements by an agent to the principal or to another agent of the principal are not admissible against the principal as admissions."[58] The rationale for this rule is that while an employee may speak on behalf of the employer in a conversation with a third party, the employee does not speak on the employer's behalf when talking directly to that employer.[59] A number of California cases, however, have admitted intraorganizational statements as being within the scope of employment.[60]

a. Foreseeability

One factor uniquely applicable to the finding of constructive authorization is foreseeability. A California appellate court in 1975 liberally defined "scope of employment" in *Rodgers v. Kemper Construction Co.*[61] In deciding whether an employer would be held liable for the act of an employee under *respondeat superior*, the court found that the mere fact that the act took place after working hours "does not compel the conclusion that it occurred outside the

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[56] 23 Cal. App. 3d 284, 100 Cal. Rptr. 179 (2d Dist. 1972).
[57] *Id.* at 286, 100 Cal. Rptr. at 179-80.
[58] RESTATEMENT (SECOND) OF AGENCY § 287 (1958).
[59] *Id.*, Comment a.
[60] *E.g.*, Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622 (1906); Knarston v. Manhattan Life Insurance Co., 140 Cal. 57, 73 P. 740 (1903).
[61] 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (4th Dist. 1975).

scope of employment."[62] The court applied a test of foreseeability, but not the same foreseeability applied in negligence cases. This foreseeability "means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business."[63] If this definition is widely adopted, the admissibility of statements as constructively authorized might be vastly increased. Any declaration made by an employee in the course of conduct that was not "unusual or startling" would be admissible.

b. Res Gestae

In determining whether a statement is constructively authorized, courts have often turned to the concept of *res gestae* as grounds for admitting the statement. Professor Jones, in 1938, stated as the "general rule" that an agent's declarations are not admissible against a principal unless made "during the transaction of business by the agent for the principal and in relation to such business and while within the scope of the agency; in other words, unless the representations may be deemed a part of the *res gestae.*"[64] This differs from the usual definition of *res gestae* as "acts and words which are spontaneous and so related to the transaction or occurrence in question as reasonably to appear to be evoked and prompted by it."[65] This latter definition is embodied in the modern hearsay exception for spontaneous declarations, which admits such statements in the belief that they are made so quickly and in such stressful situations that there is no time to premeditate untruthfulness and so they are likely to be reliable.[66] This is distinct from any concept of party opponents or agency, and applies to *any* person's spontaneous declaration. As Professor Wigmore observes, however, since "the much-abused phrase *res gestae*" is used to define the limits of the spontaneous declarations exception, as well as to designate the scope of an agent's authority, it is not surprising that courts have sometimes applied the two principles interchangeably.[67] In practical applica-

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[62] *Id.* at 621, 124 Cal. Rptr. at 150.

[63] *Id.* at 619, 124 Cal. Rptr. at 149.

[64] 1 B. JONES, THE LAW OF EVIDENCE IN CIVIL CASES, § 255 at 484 (4th ed. 1938). This statement no longer appeared in the 5th and 6th editions of the treatise, published in 1958 and 1972, respectively.

[65] BALLENTINE'S LAW DICTIONARY 1102 (3d ed. 1969).

[66] MCCORMICK (2d ed.), *supra* note 9, § 297; 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1747 (3d ed. 1940).

[67] 4 WIGMORE, *supra* note 10, § 1078, at 169-70. He goes on to say: "That there are two distinct and unrelated principles involved must be apparent; and the sooner the courts insist on keeping them apart, the better for the intelligent de-

tion, the two yield quite different results. A spontaneous declaration may be made by anyone, and may be used against either party to the action. A vicarious admission may be used only against the employer, and only after the agency relationship has been proved.[68]

The confusion engendered by the dual use of the phrase has shown itself in many opinions.[69] A typical formulation of the rule as misunderstood is that "the admissions of an employee which are not prompted by the excitement of the occasion and are no part of the *res gestae* cannot bind the principal and are incompetent."[70] One court based its exclusion of disputed testimony on the fact that the agent-declarants had not made the statements until long afterwards. "It is a well-established general rule that only those representations, declarations, and admissions of an agent . . . will bind the principal, which are made *at the same time*, and constitute a part of the *res gestae*."[71] Several cases have held that an "agent's admissions, not a part of the *res gestae*, are not competent evidence against his employer."[72]

In *Dillon v. Wallace*,[73] the court stressed that the amount of time elapsed between the event and the declaration will determine whether the statement of an employee is admissible. When the plaintiff in that case slipped on a piece of parsley on the floor of defendant's grocery store, the store manager made a statement at the scene of the fall about the store's insurance taking care of her. That statement was admitted as *res gestae*. Then he took the plaintiff to a storage room where she could wait more comfortably for the ambulance, and there he said the store was at fault and would pay her bills. The second statement, made only minutes after the first, and virtually identical in content, was inadmissible because the manager did not have authority to settle or negotiate a customer's claim, and it was no longer under the aegis of *res gestae*.[74] Yet in *Lane v. Pacific*

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velopment of the law of evidence." *Id.* at 170.

[68] *Id.*

[69] Coryell v. Clifford F. Reid, Inc., 117 Cal. App. 534, 537, 4 P.2d 295, 296 (2d Dist. 1931) (concurring opinion). A federal circuit judge, wanting to admit testimony of a police officer as to what a streetcar operator said to him about twenty minutes after the streetcar struck a pedestrian, but uncertain of the appropriate rationale, found it to be part of the *res gestae, or* an admission against interest, *or* a vicarious admission. Wabisky v. D.C. Transit System, Inc., 309 F.2d 317, 318-19 (D.C. Cir. 1962).

[70] Shaver v. United Parcel Service, 90 Cal. App. 764, 770, 266 P. 606, 609 (1st Dist. 1928).

[71] Umstead v. Automobile Funding Co., 44 Cal. App. 16, 22, 185 P. 1011, 1014 (1st Dist. 1919) (emphasis added).

[72] *E.g.*, Crawford v. County of Sacramento, 239 Cal. App. 2d at 800, 49 Cal. Rptr. at 121.

[73] 148 Cal. App. 2d 447, 306 P.2d 1044 (1st Dist. 1957).

[74] *Id.* at 451-53, 306 P.2d at 1046-47.

Greyhound Lines,[75] a bus driver made statements two or three minutes after the accident involved in the suit took place, and again fifteen or twenty minutes later, and both were admitted against the bus company as within the *res gestae*. The court explained that "a spontaneous declaration made by an employee may be admissible against his employer . . . separate and apart from the question of whether it was made in the scope of employment."[76]

In the words of Sir James Stephens, "the term *res gestae* seems to have come into use on account of its convenient obscurity."[77] Its vagueness has been helpful to courts seeking broader admissibility of out-of-court declarations, and while scholars may advocate the jetisoning of the phrase,[78] it can still be a useful tactic for getting the desired declaration admitted.

2. *ADMISSIBILITY OF CONSTRUCTIVELY AUTHORIZED STATEMENTS: ARGUMENTS FOR AND AGAINST*

The legal fiction of constructive authorization makes it possible to admit the declaration of an employee who has not actually been authorized to speak. Logically, the theories of contradiction and estoppel[79] are equally applicable to any principal-agent relationship, whether or not the principal's intention was to have the agent make statements. An employer, by delegating responsibility to an employee, consents to be bound by any acts or statements that the employee makes which are necessary to carry out the task assigned.[80] If an employee has the authority to bind the employer by acts, it seems that the employer should not be protected from statements about such acts. As Professor Wigmore says:

> It is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can even be listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing stock of court methods.[81]

An employee cannot reasonably be expected to remain mute while performing a task if it is likely to require interaction with other people. Whenever it is foreseeable that an authorized activity will

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[75] 26 Cal. 2d 575, 160 P.2d 21 (1945).
[76] *Id.* at 582, 160 P.2d at 24.
[77] Quoted in Note, *Extrajudicial Admissions in the District of Columbia*, 47 GEO. L. J. 560, 570 (1959).
[78] *E.g.*, MCCORMICK (2d ed.), *supra* note 9, § 288.
[79] *See* text accompanying notes 13-14 *supra*.
[80] MCCORMICK (2d ed.), *supra* note 9, § 267; J. STORY, COMMENTARIES ON THE LAW OF AGENCY § 135 (4th ed. 1851); 4 WIGMORE, *supra* note 10, § 1078.
[81] 4 WIGMORE, *supra* note 10, § 1078 at 166, n. 2, commenting on Northern Central Coal Co. v. Hughes, 224 F. 57 (8th Cir. 1915).

lead to speech, a constructive authorization to speak should be found. Authorization to act logically includes statements necessary to the performance of the act. The privity of interest between employer and employee with regard to the performance of the task is sufficient justification for treating such statements as if they were made by the employer. Therefore, when an employee in the course of fulfilling duties makes a statement that is inconsistent with a position later taken by the employer in court, the employer should be estopped to object to its admittance, regardless of the limits of the express authorization given. The employer has a right to explain away the seeming contradiction, or to impeach the credibility of the statement, but should not be allowed to exclude it from evidence. Furthermore, the burden of producing the declarant in court should be on the employer rather than on the adverse party, because it is the employer who exerts control over and derives benefit from the agent's employment.

There are two other reasons for finding a constructive authorization so that agent declarations may be admitted. The first is their utility and necessity. Without a finding of constructive authorization, many valid statements which could be helpful in the effective disposition of litigation will be lost. Often the only way to establish the liability of the employer is through the employee's declaration, since the employee may be the only one who knows what has happened.[82] Calling the employee as a witness will not achieve the same result, since, as a result of common interests with the employer, an employee is likely to "forget" exactly what occurred, or be unwilling to express an opinion in court. Thus, the interests of fair litigation require that such statements be admitted.

The second reason to admit agent declarations is their trustworthiness. As long as the agency remains in force, any harm done to the employer by a false statement will also have a negative impact on the employee. An employee who makes a damaging admission, regardless of its veracity, might risk termination of employment as a result either of insufficient job security or the destruction of the business enterprise. For this reason, the employee is unlikely to make a damaging statement unless it is true.[83] Trustworthiness, a prerequi-

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[82] *E.g.*, Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958).

[83] MODEL CODE OF EVIDENCE rule 508, comment b (1942). This is admittedly less accurate in reference to a large corporation than to a small business, but the risk is still present. In fact, it has been suggested that agents' admissions be characterized as declarations against interest, the interest being the stake in their job. Hetland, *Admissions in the Uniform Rules: Are They Necessary*, 46 IOWA L. REV. 307, 328 (1961). Employee job security and the survival of business enterprises threatened by damaging admissions present complex problems respectively in labor-management relations and in the predictability and insurability of business risks, both of which are beyond the scope of this article.

site for other hearsay exceptions, is not a part of the underlying theory of admissions, but it is often an element in a court's decision about whether a statement is considered authorized.[84] In instances of express authorization there is no need to examine the trustworthiness of the statement, since the applicable law is that of party admissions and of agency. But when it is necessary to determine whether agency law is operative at all, *i.e.*, when the extent of authorization is ambiguous, a statement made in circumstances tending to ensure its reliability is more likely to be admitted than one whose reliability is not assured.

The argument most frequently made against constructive authorization is that statements made by non-speaking agents are untrustworthy. Courts and commentators continually raise the spectre of a disgruntled or unthinking employee who makes either malicious or erroneous statements which injure the employer.[85] In practice, however, this threat does not seem to have materialized; such an aberrant employee cannot be found in any reported vicarious admissions case in California. Furthermore, such a disgruntled employee is likely to have been fired before making the statement; if so, the statement would not be admissible.[86] A more realistic attitude is that the retaliatory employee is the rare exception rather than the rule, and that the great majority of admissions will be trustworthy and of such great probative value that it would be inequitable to exclude them.[87]

The situation posed by the Kepon Trucking Company hypothetical is a good illustration of the inequities of the California rule. The statements that are clearly admissible are those of the public relations man and the vice-president, neither of whom had personal knowledge of the accident. The statement of the assistant does not qualify as a vicarious admission and would not be admitted even though he was an uninvolved witness to everything that happened, before and during the accident. He was not high in the hierarchy, did not have speaking or driving included in his duties, and his statement was not foreseeable. The statement of the driver is not as clearly unauthorized as that of the helper, but her statement would probably not be admissible under section 1222. The only argument

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[84] *See* MCCORMICK (2d ed.), *supra* note 9, § 267, at 641; Note, 52 TEXAS L. REV. 593, 598 (1974).

[85] Big Mack Trucking Co., Inc. v. Dickerson, 497 S.W. 2d 283 (Texas, 1973); P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 377 (1973); Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 856 (1961); Harvey, *Evidence Code section 1224 — Are an Employee's Admissions Admissible Against his Employer?*, 8 SANTA CLARA LAW. 59, 82 (1967) [hereinafter cited as Harvey].

[86] *See* text accompanying notes 35-36, *supra*.

[87] *See* 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(D) [01] at 801-139 (1975).

that could be made to include it under the statute is that her authorization to drive makes it foreseeable that she will speak about anything that happens while she is driving. Under the present state of the law, however, it is unlikely that a California court would accept that argument.

B. NON-AUTHORIZED STATEMENTS: EMPLOYEE TORT ADMISSIONS

If the employer were to be found liable in the hypothetical situation just discussed, it would be through the doctrine of *respondeat superior*. *Respondeat superior* allows both employer and employee to be held liable for negligent employee actions made within the scope of the employment.[88] Yet when a non-speaking agent admits personal negligence, courts traditionally have excluded the admission from evidence in a *respondeat superior* suit against the employer.[89] Employee admissions of personal negligence, when not expressly authorized, are seldom found to be impliedly or constructively

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[88] RESTATEMENT (SECOND) OF AGENCY §§ 216, 219 (1958); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 69 (3d ed. 1964); CALIF. CIV. CODE § 2338 (West 1970).

[89] *See* RESTATEMENT (SECOND) OF AGENCY § 286, Comment b (1958); Annot., 27 A.L.R. 3d 966 (1969); *e.g.*, Dillon v. Wallace, 148 Cal. App. 2d 447, 306 P.2d 1044 (1st Dist. 1957). The practitioner should be aware that the agent's statement might well be admissible under other hearsay exceptions. For example, the principle of spontaneous declarations, within the concept of *res gestae*, allows a statement to be admitted when it is made close to the time of the incident, when the speaker is excited and the remarks possess a high level of reliability. *See* Lane v. Pac. Greyhound Lines, 26 Cal. 2d 575, 582, 160 P.2d 21, 24 (1945); Showalter v. Western Pac. R.R. Co., 16 Cal. 2d 460, 106 P. 2d 895 (1940); Miller v. Anson-Smith, 185 Cal. App. 2d 161, 166, 8 Cal. Rptr. 131, 133 (3d Dist. 1960). However, this exception does not guarantee admissibility; courts have held statements made short minutes after an accident to be not part of the *res gestae* and inadmissible. *E.g.*, Kimic v. San Jose-Los Gatos etc. Interurban Ry. Co., 156 Cal. 379, 391, 104 P. 986, 991 (1909); Durkee v. Central Pac. R.R., 69 Cal. 533, 535, 11 P. 130, 131 (1886); LeMire v. Queirolo, 250 Cal. App. 2d 799, 805, 58 Cal. Rptr. 804, 808 (3d Dist. 1967). Once a statement qualifies as a spontaneous declaration, the declarant's agent status becomes irrelevant for admission purposes. *See* Note, 47 CALIF. L. REV. 939 (1959).

The declaration may also be admitted as a statement showing the employee's knowledge, in cases in which the knowledge may be imputed to the employer under substantive law. Van Horn v. Southern Pac. Co., 141 Cal. App. 2d 528, 535-36, 297 P.2d 479, 483-84 (1st Dist. 1956); Dressel v. Parr Cement Co., 80 Cal. App. 2d 536, 540, 181 P.2d 962, 964 (2d Dist. 1947).

Admissibility may also be gained if the statement qualifies as a declaration against interest, if the statement was against interest when made, the declarant is unavailable, and the statement qualifies as personal knowledge rather than opinion. CAL. EVID. CODE § 1230 (West 1968).

The practitioner may also wish to call the declarant employee as a witness. The agent might then confirm the admission in testimony. If the prior statement is contradicted, it may still be admitted into evidence as the prior inconsistent statement of a witness. CAL. EVID. CODE § 1235 (West 1968).

authorized.[90] Such admissions are very different from the declarations previously focused on in this article, in which an employee speaks about the negligence of the company or of another employee. Employers never want employees to speak to third parties about personal negligence imputable to the company; more probable is an admonition for employees to avoid such admissions of negligence.[91] Most courts agree that finding an employee to be authorized to make admissions of personal negligence is stretching the concept of "authorization" too far for any rationale to reach.

The reason generally given for excluding tort admissions of nonspeaking agents is the ever-present concern about the disgruntled or unthinking employee.[92] A recent Texas case echoing traditional California law on the subject[93] is *Big Mack Trucking Company v. Dickerson*,[94] which was a wrongful death action arising when a truck's brakes failed while it was parked outside a Texas cafe, causing the truck to roll forward and crush a man standing in front of it. The driver of the truck admitted to a police officer and to the vice-president of Big Mack that he had been having "air pressure troubles" with his braking system and had not been maintaining the brakes properly.[95] The trial court admitted the driver's statements in an action against the company. The Texas Supreme Court reversed, holding the driver's statement inadmissible. The court expressed the traditional view that agent admissions must be specifically authorized to be admissible against the principal; otherwise, "the master loses the protection of the hearsay rule."[96]

The *Big Mack* court was concerned that an employer might be held liable because of an unreliable employee admission; yet the circumstances surrounding that particular employee statement ensured its reliability. The employee was speaking about actions within the scope and time of agency. Further, if the employee's trustworthiness was questionable he could have been impeached by the employer in court.[97] The employee admission was merely an inconsistency

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[90] *See, e.g.*, Innis v. The Steamer Senator, 1 Cal. 459, 461 (1851) (concurring opinion); Crawford v. County of Sacramento, 239 Cal. App. 2d, 791, 800, 49 Cal. Rptr. 115, 121 (3d Dist. 1966); Ayres v. Wright, 103 Cal. App. 610, 621, 284 P. 1077, 1081 (1st Dist. 1930); *see also* WITKIN, *supra* note 9, § 519.

[91] *E.g.*, official vehicles designated for the use of employees of Sacramento County have decals on the glove compartments which say: "In case of accident—DO NOT admit blame!"

[92] *See* note 85 *supra*.

[93] *E.g.*, Kimic v. San Jose-Los Gatos etc. Interurban Ry. Co., 156 Cal. 379, 104 P. 986 (1909); Durkee v. Central Pac. R.R. Co., 69 Cal. 533, 11 P. 130 (1886).

[94] 497 S.W. 2d 283 (Tex. 1973).

[95] *Id.* at 286.

[96] *Id.* at 287.

[97] The credibility of a witness may be attacked or supported by any party, including the party calling him. *E.g.*, CAL. EVID. CODE § 785 (West 1968).

which should have been explained by the employer. Reasoning such as that in *Big Mack* allows the employers of admittedly negligent employees to escape liability altogether, thereby frustrating the purpose of *respondeat superior*.[98]

The rationale behind *respondeat superior* is generally thought to be that an employer should be held responsible for all accidents reasonably related to the business, since the employer can best spread the cost of accidents through prices, rates, or liability insurance.[99] Furthermore, the employer is benefiting from the employee's acts and theoretically has control over them.[100] A California court[101] recently noted, however, that reaching the "deep pocket" of the employer is not the primary reason for applying *respondeat superior;* rather it is simply that businesses should be responsible for accidents resulting from their activities.[102] Since companies commit torts only through the activities of their agents, tort liability must be traced through the agency relationship to attach to the company at all. The rationales underlying the doctrine of *respondeat superior* should likewise justify an evidence rule facilitating the doctrine's use.

The rule of agent indemnity is also relevant in justifying an evidence rule in support of *respondeat superior*, for it is well established that if an employee's negligence forms the basis of the employer's liability, the employee will be held liable to indemnify the employer for any judgment rendered as a result of imputed negligence.[103] *Respondeat superior* does not just shift all liability from employee to employer. When an employee makes an admission of negligence while acting within the scope of the employment, the employer is entitled to indemnity whether or not the employee is a named party to the action.[104] This indemnity rule is therefore a further safeguard against the self-exculpatory employee. In *Mascarin Professional Pharmacy v. Hart*,[105] a pharmacy sued a former employee for indemnification after a judgment was rendered against the pharmacy when the employee negligently furnished a chemical compound. The court up-

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[98] Restrictions on the operation of *respondeat superior* may relate back to the beginnings of industrialization, when a policy of *laissez faire* gave employers almost total freedom in the promotion of business. One can speculate that any law which subjected employers to liability for employee negligence would not have been welcomed. And the employers, as possessors of both money and power, had the means to discourage legislation expanding the rights of consumers.

[99] Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 960, 88 Cal. Rptr. 188, 190, 471 P.2d 988, 990 (1970).

[100] RESTATEMENT (SECOND) OF AGENCY § 216 (1958).

[101] Rodgers v. Kemper Construction Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (4th Dist. 1975).

[102] *Id.* at 618, 124 Cal. Rptr. at 148.

[103] J. STORY, COMMENTARIES ON THE LAW OF AGENCY § 217c (4th ed. 1851).

[104] *Id.*

[105] 13 Cal. App. 3d 462, 91 Cal. Rptr. 560 (2d Dist. 1970).

held the principle that an employer may be indemnified by the negligent employee in a *respondeat superior* case.[106] Case law is in accord on this point,[107] but the issue of getting the agent's admission into court remains open and a real problem. There are several possible solutions which will be discussed in the section following.

1. PROCEDURAL TACTICS

Although an employee's admission of personal negligence is not usually admissible against the employer in actions to which the employee is not a party, the declaration would be admissible against that employee in any action in which the employee is named as a party.[108] Such an admission of negligence could be offered to prove the employee's personal liability. A few jurisdictions outside California now hold that, in *respondeat superior* cases in which the employee is a named party, it is only the employee's negligence which is in issue. Once the negligence and the fact that the employee was acting in the scope of employment are established, the employer is liable as a matter of law.[109] Since the employer is not negligent, but only the employee, no question arises concerning the admissibility of the employee's admissions of negligence against the employer. Courts which follow this procedure require that both employer and employee be named parties to the action, allowing both to defend the negligence charge asserted against the employee.[110] Although the plaintiff still must show that the employee's act was in the scope of employment, the vicarious admissions exception does not come into play at all; the employee's statements are admitted as admissions of a party-opponent.

The Oregon Supreme Court adopted this approach in *Madron v. Thomson*,[111] in which an employee and employer were named defendants in a suit for fire damages. A gas station employee had attempted to fill the gas tank of a motor connected to the refrigerator unit of a truck, while the motor was still running. A witness for the

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[106] *Id.*

[107] *E. g.*, Popejoy v. Hannon, 37 Cal. 2d 159, 173, 231, P.2d 484, 492 (1951). Bradley v. Rosenthal, 154 Cal. 420, 424, 97 P. 875, 876 (1908; It must be pointed out, however, that indemnity liability may be meaningless when the liable employee is without assets to satisfy a judgment against him or her.

[108] CAL. EVID. CODE § 1220 (West 1968); *see* WITKIN, *supra* note 9, § 497; 4 WIGMORE, *supra* note 10, § 1048.

[109] Annot., 27 A.L.R. 3d 966 (1969).

[110] *Id.* An argument could be made, however, to open this procedural avenue to actions in which only the employer is named, since the employee is still a real party in interest due to indemnity rules.

[111] 419 P.2d 611 (Ore. 1966). The Tenth Circuit in Grayson v. Williams, 256 F.2d 61, 67 (10th Cir. 1958), also used such an approach: "The liability of [employee] Grayson depended on the facts; that of the company depended upon the applicable law when the facts were once established."

plaintiff truck-owners testified that the employee admitted negligence while in the hospital after the accident. The employee testified that he had made no such statement.[112] The supreme court admitted the statement solely to prove the employee's negligence, since the negligence of the employer was not directly in issue. Once the employee was found negligent, the employer was held liable as a matter of law. In the language of the court:

> This is not an instance of an unauthorized attempt to speak for and bind someone else. The employee's admission is not with reference to any conduct of his employer. The employee's admission relates to his own conduct . . . [A]ny evidence of the employee's negligence is, by operation of the doctrine of respondeat superior, relevant to the issue of the employer's liability.[113]

In California, this procedural approach may be workable, although it is not supported in case law,[114] through joinder of parties. If both employer and employee are joined as parties, California jury instructions reflect the acceptance of *respondeat superior* doctrine, dictating that if the defendant-employee is found liable, the defendant-employer must also be found liable.[115] If defendant-employee is not found liable, defendant-principal cannot be found liable.[116] Even if the agent admission is the crucial factor in determining negligence, it would be insupportable to find the employee alone liable, and both employee and employer would have to be found liable to afford the plaintiff a remedy.[117] Thus if (1) employee and employer are both named as defendants, (2) the employee is proved negligent, and (3) the agency relationship between employee and employer is shown, then the employer would probably be liable under *respondeat superior.*

Many lawyers, however, would prefer not to join an employee upon whose negligence an action is based, since the individual employee's presence as a party may cause "more sympathetic considerations of his contentions or a more conservative verdict as to damages."[118] Further, California courts have not expressly approved this procedural solution to the agent admission problem,[119] and it cannot be guaranteed except as a way to get in the admission against the employee alone, as the admission of a party-opponent.

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[112] 419 P.2d at 613.
[113] *Id.* at 615 and 618.
[114] *See* Harvey, *supra* note 85, at 77 ff.
[115] CAL. JURY INSTRUCTIONS CIVIL 13.03, 13.06 (West 1969).
[116] *Id.*
[117] Quoting Grayson v. Williams, 256 F.2d at 68, "To hold otherwise would be to make a mockery of the law, because it would mean that the agent had been found guilty of actionable negligence, upon competent evidence, while acting withing the scope of his employment, yet his principal had escaped."
[118] R. KEETON, TRIAL TACTICS AND METHODS 358 (2d ed. 1973).
[119] *See* Harvey, *supra* note 85, at 77 ff.

2. USE OF SECTION 1224

Even if this procedure is approved by the courts for situations in which employer and employee are joined, it does not provide for the situation in which the cause of action is brought against the employer alone. California Evidence Code section 1224 seems on its face to solve the problem:

> When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, . . . evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.[120]

This rule superseded section 1851 of the California Code of Civil Procedure, which stated the same basic principle:

> And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.[121]

The major difference between the two sections is the inclusion of the word "liability" in section 1224. The California Law Revision Commission's study prior to the release of the new Evidence Code in 1966 indicates that the inclusion of the word "liability" was an attempt to make explicit the application of the section to the admissions of tort liability by employees.[122]

In *Markley v. Beagle*,[123] however, the California Supreme Court rejected this interpretation. In *Markley*, a refrigerator serviceman was injured after a fall from a balcony, caused by a defective railing, and sued the building owner and contractor, whose employees had installed the railing. The contractor's employee, who was not a party, had stated that he and his fellow employees had replaced the railing prior to the accident. The statement, made almost a year after the accident had occurred and after the declarant had left the contractor's employ, was held inadmissible.[124] The court said that the language of section 1851 and the new section 1224 were inapplicable to *respondeat superior* actions.[125] The court observed:

> [H]earsay statements of an agent or employee not otherwise admissible against the principal or employer are not made admissible merely because they may tend to prove negligence of the agent or em-

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[120] CAL. EVID. CODE § 1224 (West 1968).

[121] CAL. CODE CIV. P. § 1851 (1872), *repealed by* Stats. 1965, c. 299, § 1224.

[122] The Commission noted that although § 1851 had never been applied to *respondeat superior* actions in the past, "it would appear that a respondeat superior case would fall within . . . the language of § 1851." 6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES APP. 494-95 (1964).

[123] 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

[124] *Id.* at 957, 429 P.2d at 133, 59 Cal. Rptr. at 813.

[125] *Id.* at 960, 429 P.2d at 135, 59 Cal. Rptr. at 815.

> ployee that may be imputed to the principal or employer under the doctrine of *respondeat superior*.[126]

The language concerning section 1224 is dictum, since at the time of the *Markley* decision the new Evidence Code was not in effect. Still, the precedent was regrettable because it indicated the court's view that California should adhere to the traditional view of employee admissions, whereby only authorized statements are admissible in any action against the employer.

Three years after *Markley*, California's First District Court of Appeals approved the admission of an unauthorized employee statement of negligence in *Labis v. Stopper*,[127] a *respondeat superior* case. In *Labis*, a workman admitted to a policeman that while on a painting job, he moved a canvas drop cloth and "didn't realize anybody was standing on it at the time."[128] The statement was held admissible to establish the employee's negligence in a personal injury suit, and liability was imputed to the employer. The court relied heavily on the facts of the case to justify its holding: the statement just gave the facts, was clear and precise, was made three hours after the accident, was made to a policeman discharging his public duty, and was made while the workman was still employed.[129] The court compared the facts to *Markley*, saying, "We conclude it would be an unfair extension of the true rule of *Markley* to broaden its language beyond its holding."[130] The reliability of the admission in *Labis* appears overwhelming, as does its utility in litigation. The *Labis* court therefore distinguished *Markley* on its facts and ignored the *Markley* construction of section 1224.

Section 1224 should be construed to apply to *respondeat superior* cases such as *Labis*. When an employee and employer have a substantial identity of interest because of potential tort liability, and the em-

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[126] *Id.* at 959, 429 P.2d at 134, 59 Cal. Rptr. at 814.

[127] 11 Cal. App. 3d 1003, 89 Cal. Rptr. 926 (1st Dist. 1970). The case was not appealed.

[128] *Id.* at 1004, 89 Cal. Rptr. at 926.

[129] *See* B. WITKIN, CALIFORNIA EVIDENCE § 520 (2d ed. 1974 Supplement).

[130] 11 Cal. App. 3d at 1005, 89 Cal. Rptr. at 927 (1st Dist. 1970). As this article goes to press, the authors have taken notice of a new California Court of Appeal case, Van Oosting v. Duber Industrial Security, Inc., 57 Cal. App. 3d 376, 129 Cal. Rptr. 173 (2d Dist. 1976), which supports the *Labis* interpretation of section 1224 and rejects the *Markley* dictum. In the words of the court, "*Markley's* analysis of Evidence Code section 1224 is faulty and not well conceived." *Id.* at 397, 129 Cal. Rptr. at 188. The court held section 1224 clearly to apply to *respondeat superior* actions such as are discussed in this article, noting that the reason for the admissions exception is not reliability, but fairness to the adversary. "[I]f a party's liability is based on the liability of a declarant such as a declarant-employee, . . . [that] party ought not to be permitted to contend that he didn't have an opportunity to cross-examine the declarant since the employer is in effect standing in the shoes of the declarant employee." *Id.* at 398, 129 Cal. Rptr. at 188.

ployee makes an out-of-court statement which is strong evidence of negligence, the trier of fact should be allowed to examine that statement. The employee admission has a high probability of trustworthiness since the admission is against personal interest: it creates the possibility of personal tort or indemnity liability and it jeopardizes continued employment.[131] The declarant's motives for making the statement should go to the weight of the evidence, rather than to its admissibility.

The growing importance and use of *respondeat superior* suits also mandates the admission of employee statements under the appropriate language of section 1224. Use of *respondeat superior* is necessarily increasing in these times of great concern over the rights of those injured by the operation of business and industry. Without the use of such admissions, the injured plaintiff may well be left not only without access to the "deep pocket" of the employer, but without any remedy at all.

The truck driver in our Kepon Trucking hypothetical is within the class of employees discussed in this section, since Kepon's liability for her actions will derive from the doctrine of *respondeat superior.* The treatment her admission of personal negligence will receive in a California court is uncertain under present law. If the truck driver and Kepon are joined, her statements may be admissible. If only Kepon is sued, however, the admissibility of the truck driver's statement hinges upon application of section 1224. If the supreme court's dictum in *Markley* is followed, section 1224 would be inapplicable to the case and her admission would not be allowed into evidence. The trial attorney should try, therefore, to align the facts of the case with those in *Labis*, stressing any factors which would indicate the statement's reliability, *e.g.*, that the admission was made shortly after the accident and while the driver was still in Kepon's employ. The use of section 1224 in this situation is the best way to admit this useful and reliable employee admission.

IV. FEDERAL RULES OF EVIDENCE

Federal Rule of Evidence 801(d)(2) encompasses both authorized admissions and authorized acts:

> (d) A statement is not hearsay if
>
> (2) the statement is offered against a party and is
>
> (C) a statement by a person authorized by him to make a statement concerning the subject, or
>
> (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.[132]

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[131] *See* note 83, *supra.*

[132] FED. R. EVID. 801.

Clause (C), seemingly a repetition of the "speaking agent" rule, also includes admissions made by one agent to another, or to the employer, both of which are excluded under the substantive law of agency.[133] The most significant element of rule 801(d)(2), however, is clause (D), which eliminates the need to determine whether a statement is authorized, by requiring the statement merely to "concern" a matter within the scope of agency. This means that a statement need only be relevant to the declarant's duties, not expressly within them. The rule appears to be a response to the reliability and importance of agent admissions in litigation.[134]

Although clause (D) seems a dramatic change from the traditional law, in fact it reflects a growing trend of authority, in the courts if not in the legislatures. In recent years, before enactment of the Federal Rules of Evidence, a number of federal courts[135] had followed the lead of the Nebraska Supreme Court in *Whitaker v. Keogh*.[136] This 1944 case involved statements made by defendant's chauffeur after an accident. The court admitted the statements, even though the chauffeur was not a speaking agent and was not joined as a party, holding that "where the acts of an agent or employee will bind the principal, his representations, declarations, and admissions respecting the subject matter will also bind him."[137] Following *Whitaker*, some federal cases continued to expand the definition of authorized admissions to include statements made by various types of non-speaking agents. In *Martin v. Savage Truck Line Co.*,[138] decided in 1954, a truck driver admitted to a police officer that he had been speeding at the time of the accident. The truck driver's admission was imputed to his employer, although the driver was not a speaking agent. In *Grayson v. Williams*,[139] another truck driver's admissions concerning the cause of an accident were imputed to the employer. The company was found liable since the employee was acting negligently and within the scope of employment, although not specifically authorized as a speaking agent. The *Grayson* court declared it unconscionable to allow an employer to escape liability while the employee admitted negligent action in the scope of employment and was him-

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[133] *See* RESTATEMENT (SECOND) OF AGENCY, § 287 (1958); United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 352 (D. Mass., 1950); Rudzinski v. Warner Theatres, Inc., 16 Wis. 2d 241, 114 N.W. 2d 466 (1962).

[134] REPORT, NEW JERSEY SUPREME COURT, COMMITTEE ON EVIDENCE 165-67 (1963).

[135] *E.g.*, Northern Pacific Ry. v. Herman, 478 F.2d 1167, 1171 (9th Cir. 1973); Outlaw v. Louisville & Nashville R.R. Co., 448 F.2d 1284, 1286 (6th Cir. 1971); Zurlnick v. International Brotherhood of Electrical Workers, Local 98, 360 F. Supp. 1197, 1200 (E.D. Pa., 1973).

[136] 144 Neb. 790, 14 N.W. 2d 596 (1944).

[137] 14 N.W. 2d at 600.

[138] 121 F. Supp. 417 (D.C.D.C. 1954).

[139] 256 F.2d 61 (10th Cir. 1958).

self liable.[140]

Opponents of the position codified in the federal rules worry about the reliability of admissions which merely concern the employment, rather than those which are authorized by it. The California Law Revision Commission apparently declined to adopt a rule like the present federal rule for that reason.[141] The presence or absence of authorization, however, is not the determinative factor in motivating an employee's actions and statements. Even a non-speaking agent is very unlikely to jeopardize employment by making false statements which would injure the employer.[142] And an employee irrevocably determined to implicate an employer can appear as a witness and make false statements on the stand, avoiding the hearsay question altogether.[143] The general trustworthiness of most employee admissions justifies their admittance. The small risk of false admissions is outweighed by the utility of the evidence admitted under this rule. The alternative is the situation already decried, in which the employee is found liable and the employer is not.[144] Rule 801(d)(2)(D) is a commendable liberalization of the vicarious admissions doctrine and a codification of existing case law.

Under the federal rules, the result in the case of our hypothetical wrongful death action is not in doubt. The admissions of all the employees would be admissible as vicarious admissions against Kepon Trucking Company, since they concerned acts within the scope and time of employment. Without these admissions there would very likely be no way for the plaintiffs to be compensated, if the statements were the only evidence of negligence. The necessity of admitting the statements, as well as their inherent reliability, militate in favor of admissibility, as the authors of the federal rules recognized. Rule 801(d)(2)(D) allows the admissions to be introduced without the use of a legal fiction like "constructive authorization," which would probably be required in a California court.

V. CONCLUSION

The California Evidence Code's treatment of the admissions of employees is unsatisfactory. Under section 1222, admissions of an

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[140] *Id.* at 68.

[141] 6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES, APP. 491-96 (1964).

[142] *See* note 83, *supra.*

[143] *See* Madron v. Thomson, 419 P.2d at 616 (Ore. 1966); REPORT, NEW JERSEY SUPREME COURT, COMMITTEE ON EVIDENCE: "If the employee is bent on making false statements against his employer, he can testify to that effect, and avoid the hearsay problem entirely. Nor is cross-examination likely to expose him in such a case. The likelihood is that his is not the predominant fact pattern with which we should be concerned."

[144] *See* note 117 *supra.*

employee may be offered against the employer only if expressly or impliedly authorized, as determined under the substantive law of agency. There is no apparent reason why the standards for determining authority under agency law should be the same as those for evidence questions, since the contexts in which they are applied are different. Many useful and trustworthy statements are presently excluded, creating a situation in which an employer who is personally or vicariously negligent may be allowed to escape liability because of the lack of admissible evidence. Employee admissions about matters within the scope of employment should be admissible in a suit against the employer. This will place the burden of producing the employee for impeachment or further explanation on the party in the best position to insure such an appearance—the employer.

The authors of this article recommend that section 1222 be expanded to the scope of federal rule of evidence 801(d)(2)(C) and (D), admitting any statement concerning a matter within the scope of the agency which is made while the agency is still in force. The federal view allows the court to admit a declaration which pertains to the employment in general, even if made by someone with no special knowledge of or responsibility for the subject matter of the statement. The federal rule codifies emerging case law, which in turn reflects a growing social concern that employers be responsible for negligent operation of their businesses.

Adoption of the federal rule would obviate the need for section 1224 as a vicarious admissions exception, since employee tort admissions would be within the scope of section 1222. As long as section 1222 remains in its present form, however, the *Labis* interpretation of section 1224, which applies that section to *respondeat superior* actions, should be followed.

Considering the unsettled state of California law in this area, the practitioner should always attempt to establish express, implied, or constructive authorization for an employee's admission. The admission should be presented as a logical extension of the employee's prescribed duties; establishing authorization will ensure admission of the statement. If the statement is unauthorized and concerns an employee's tort, the practitioner should attempt to apply section 1224 by aligning the facts of the case with *Labis* and stressing the statement's trustworthiness. In addition, the *Madron* procedural strategy, joining the parties and applying evidence law to the employee and substantive law to the employer, should not be overlooked.

California has always been a trailblazer in liberalizing the law. Much of the language of the Federal Rules of Evidence was taken from the California Evidence Code because it was considered the most enlightened codification of evidence law. In the area of vicarious admissions, however, Congress, in enacting rule 801(d)(2), recognized the need for greater admissibility than California allows. Rather

than continuing to force California courts into elaborate analyses of "authorization," California should follow the federal example.

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