#63 3/4/68

Memorandum 68-29

Subject: Study 63 - Evidence Code (Evidence Code Section 1224)

The staff recommends that Evidence Code Section 1224 be amended to read:

> 1224. 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, including a liability based solely upon the doctrine of respondeat superior, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by 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, or breach of duty.

This revision of Section 1224 would make clear the original intent of the Commission and the Legislature in enacting the section. The amendment is necessary because in Markley v. Beagle, 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967), the California Supreme Court misinterpreted the plain language of the section.

The amendment would establish this rule: In a respondeat superior case, an employee's admission is admissible against the employer to the extent that the admission is relevant to show the employee's own liability and the derivative liability of the employer based thereon. This is the rule that the Commission and the Legislature believed was clearly stated in Section 1224.

For an excellent analysis of the problem, see the attached reprint of an article from the Santa Clara Lawyer written by the former Assistant Executive Secretary of the Law Revision Commission. The article provides you with the necessary background on this problem and clearly demonstrates that the California Supreme Court misinterpreted the Evidence Code section and that the court's interpretation is unsound.

It is essential that you read the article if you are to have a full understanding of the problem.

For another discussion of the problem, see the Note from the Oregon Law Review attached as Exhibit I (pink). (Note that the Oregon Supreme Court has adopted the substance of Section 1224 as proposed to be amended.)

See Exhibit II (yellow) for a letter from Professor Snedeker pointing out the need for the change recommended by the staff. Incidentally, this is the first letter we received as a result of our contacting the members of law faculties for suggestions for topics suitable for Commission study.

The California Supreme Court's opinion in Markley v. Beagle is set out as Exhibit III (green).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 68-29

EXHIBIT I

EVIDENCE—VICARIOUS ADMISSIONS—EMPLOYER'S LIABILITY ESTABLISHED BY EXTRAJUDICIAL ADMISSION OF AN EMPLOYEE. *Madron v. Thompson* (Or. 1966).

Thompson operates a service station. While Thompson's employee Riley was fueling the refrigeration unit of Madron's truck, the gasoline ignited, injuring Riley and damaging the truck. Later the same day, statements were made to an insurance investigator by Riley to the effect that he had neglected to turn off the motor of the refrigeration unit prior to fueling. In the litigation which followed both Thompson and Riley were defendants. During the trial the insurance investigator testified as to the prior statements by Riley. In directing a verdict for Thompson, the trial court was of the opinion that the insurance investigator's testimony related only to the credibility of the witness and was not admissible as substantive evidence. Without it there was no evidence of Thompson's liability. On appeal, Madron contended that the trial court erred in refusing to allow the insurance investigator's testimoney to establish Thompson's vicarious liability. The Oregon Supreme Court agreed and reversed and remanded. *Madron v. Thompson*, 83 Or. Adv. Sh. 331, 419 P.2d 611 (1966), *petition for rehearing denied*, 84 Or. Adv. Sh. 159, 423 P.2d 496 (1967).

The court based its reversal on what it called an interplay of the rules of evidence and substantive law. This note will consider the extent to which this case modifies prior Oregon vicarious admissions rules and will compare the court's approach with the UNIFORM RULES OF EVIDENCE.

By way of background and to provide a starting point in discussing the principal case it is useful to review briefly the rules of evidence germane to the problem. "It is a general rule, which is subject to many exceptions, that hearsay evidence is incompetent and inadmissible to establish a fact. 'Hearsay' has been defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person." 29 AM. JUR. 2d *Evidence* sec. 493 (1967). One of the exceptions to the hearsay rule is that admissions of a party himself, or through an agent authorized to speak for him, are admissible in evidence against such party. *Id.* sec. 597. Thus, if the agent's admission is made within the scope of his authority to act for the principal the admission may be admitted to establish the principal's liability. MCCORMICK, EVIDENCE sec. 244 (1954). Where the employee lacks the authority to make the particular out-of-court statement for the employer, the statement cannot be admitted as evidence against the employer under the admissions exception to the hearsay rule. And this is true whether the employer is sought to be held liable for his own act or omission or to be held vicariously liable for the act or omission of his

employee, as in the instant case. *Ibid.* The difficulty is to establish the existence of the agency relationship and to determine which statements were actually authorized. The fact or existence of the agency must be proved. It cannot be established by the agent's own prior extrajudicial statements but it may be established by independent evidence and by testimony of the agent and others. *Smith v. Campbell*, 85 Or. 420, 166 Pac. 546 (1917); *Meier & Frank Co. v. Mitlehner*, 75 Or. 331, 146 Pac. 796 (1915); RESTATEMENT (SECOND), AGENCY sec. 285 (1958); MCCORMICK, EVIDENCE sec. 244 (1954). Next, the scope of authority must be proved. The type of function performed by the supposed agent, as well as the relationship between the statement in question and the authorized function are important in determining whether a statement will be admissible against the employer. An employee found to have authority to speak or write for his employer is called a "speaking agent." *Hansen v. Oregon-Wash. R. & N. Co.*, 97 Or. 190, 218, 188 Pac. 963, 972, 191 Pac. 655 (1920); RESTATEMENT (SECOND), AGENCY sec. 287 (1958).

In the principal case the existence of an employment relationship was not an issue but there was little basis for a claim that Riley was a speaking agent in has capacity as a service station attendant. Thompson argued that Riley's admissions to the insurance investigater were made for Riley alone and not for Thompson.

If the statements were admissible to prove Riley's negligence because Riley was a party to the action, then the question remained whether these statements could be used against Thompson. It is at this point in the traditional mode of analysis that the court makes a significant detour. The traditional approach has been to work with the rules of evidence in deciding whether to admit particular statements against the employer. However, under the court's analysis, the evidence approach is claimed to be avoided by use of what the court calls "substantive" principles of agency law and the doctrine of *respondeat superior*. The agent's statement is admitted merely to determine the agent's own negligence. Once that is established, *respondeat superior*, and not the agent's statement visits liability on the principal. (But see Chief Justice McAllister's dissent in the present case and Boyce, *Rule (63) (9) (a) of Uniform Rules of Evidence—A Vector Analysis*, 5 UTAH L. REV. 311 [1957].) The court explains its approach as an interplay of the rules of evidence and substantive law and carefully delineates the situations in which this analysis would be appropriate:

> It is necessary to distinguish between (1) those actions in which the defendant employer is claimed to be liable, not because of any personal negligence or the negligence of some employees other than the employee making the admission, but solely because of the negligence of the admission-making employee; and (2) those actions in which the employer is sought to be held liable either because of his own personal negligence or the negligence of some employee other than

the employee making the admission. In the first category there is no issue of the employer's negligence; it is not claimed that he is negligent. The sole claim is that his admission-making employee is negligent and the employer is therefore liable only by reason of the doctrine of respondeat superior. [*Madrea v. Thompson*, 83 Or. Adv. Sh. 331, 334, 419 P.2d 611, 614 (1966).]

The result of the court's purported reliance on "substantive" principles is intriguingly similar to the result which would be likely under the UNIFORM RULES OF EVIDENCE. Rule 63 (9) provides:

> Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: ... As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or ... (c) one of the issues between the party and the proponent of the evidence is a legal liability of the declarant, and the statement tends to establish that liability.

It is clear that rule 63 (9) abandons the orthodox requirement that the statement of an agent to be admissible against the principal must have been made by a "speaking agent." There is merely the requirement that it be made while the agent is still in the principal's employ and that it relate to a matter within the scope of his employment. McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 624-25 (1956). In applying rule 63 (9) to the principal case then, it is evident that Riley's statements could be used against Thompson since they were in reference to acts within the scope of Riley's duties and Riley was still in Thompson's employ when the statements were made.

A comparison of the court's rule quoted above and rule 63 (9) shows a step by the court towards the purpose of the UNIFORM RULES, if not the means. The court has carved out a limited area for the operation of its rule, namely where the employee makes an admission regarding his own misconduct while in his principal's employ. Two questions might well be asked. Is the court's approach a back door to the position of the UNIFORM RULES? If so, will the door open wider in the future? See generally Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence*, 37 OR. L. REV. 287 (1958); Swearingen, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 62-66*, 42 OR. L. REV. 200 (1963).

An attempt to determine whether the UNIFORM RULES OF EVIDENCE were in the back of the court's mind in this opinion requires a brief analysis of the alternative approaches available within the framework of the law of evidence. If the court had been content to deal with the case solely on the basis of evidence rules, the result might well have been opposite to that actually reached in the case. The five-hour delay between the accident and the time Riley talked with the insurance in-

vestigator would probably have precluded admissibility as "res gestae." See *Alden v. Grande Ronde Lumber Co.*, 46 Or. 593, 81 Pac. 385 (1905). See also OR. REV. STAT. sec. 41.870 (1963); Swearingen, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 62-66*, 42 OR. L. REV. 200, 208-210 (1963). And it is difficult to conceive of a filling station attendant as a "speaking agent." Therefore, without resort to "substantive" principles outside the confines of evidence the court might have reached what probably would have been a less desirable result than it did. (But see Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855 (1961), commenting on the danger of holding an employer liable on the strength of a statement of a possibly disgruntled or not overbright employee.) If the court did not have the UNIFORM RULES themselves in mind, at least it seems that the court considered the same policy reasons which would have dictated a similar result under the UNIFORM RULES. In any case, regardless of the motivation or form, the court's result is a step towards the liberality in the hearsay rule which many commentators have been advocating for years. See *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958); Goodhart, *A Changing Approach to the Law of Evidence*, 51 VA. L. REV. 759, 779-80 (1965); McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 624-25 (1956); 8 VAND. L. REV. 645 (1955).

Further steps in this direction, in so far as vicarious admissions are concerned, seem unlikely for the present. The court strongly suggests that its approach applies only when the admission is that of an employee who is a party. The express limitation to this situation suggests an unwillingness by the court to go much further. The opinion seems to be significant largely because of the somewhat devious approach used to reach what probably was the most desirable result. Frank recognition that the decision was changing a rule of evidence might have made it difficult to justify this limitation and might have forced the court to go all the way to the position of rule 63 (9).

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February 29, 1968

Mr. John H. DeMoully
Executive Secretary
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Dear Mr. DeMoully:

Your letter of February 23, 1968, to Dean Robert K. Castetter, invited suggestions for legislative solutions to current problems.

It is suggested that section 1224 of the California Evidence Code be amended to include the phrase underlined and thus to read:

> Section 1224. Statement of declarant whose liability or breach of duty is in issue.
> 1224. 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, <u>including a liability based solely upon the doctrine of respondeat superior</u>, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by 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.

This suggestion is based upon the misinterpretation of the plain language of the section in Markley v. Beagle, 66 AC 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967), and upon the excellent reasoning of your Joseph B. Harvey in 8 Santa Clara Lawyer 59 (1967).

Sincerely,

James Snedeker

JAMES SNEDEKER
Professor of Law

JS:bc