63 6/10/68

First Supplement to Memorandum 68-29

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

Attached as Exhibit I (pink) is another law review article that is critical of the decision of the California Supreme Court in Markley v. Beagle.

After further consideration of the problem involved in the Markley case, the staff has concluded that it would be undesirable to recommend legislation to change the rule announced in that case. The Markley case held that Evidence Code Section 1224 did not provide a hearsay exception under which the hearsay declaration of an employee could be admitted against his employer in a vicarious liability case. The employee was not a witness in the action against his employer and was not a party to the action.

The staff believes that the Evidence Code provides sufficient exceptions to the hearsay rule to make hearsay statements by employees admissible in all cases where they should be admitted. The following analysis should demonstrate the truth of this proposition.

EMPLOYEE'S STATEMENTS: THEORIES OF ADMISSIBILITY

Where Employee not a Witness at Trial and Hearsay Evidence of Employee's Statement Sought to be Admitted at Trial

A statement of an employee who is not a witness at the trial often is admissible at the trial under one or more theories:

(1) Authorized admission. Evidence Code Section 1222 regulates the admissibility of an agent's declaration in a suit against his employer according to the substantive law of agency. Admissibility turns upon the presence of "speaking authority," that is, whether the agent

was expressly or impliedly authorized to speak for his employer. Because the substantive law of agency regards an agent's statement as that of the principal when the statement is one that the agent was authorized to make on the principal's behalf, a statement of the agent within the scope of his authority to speak on behalf of his principal is admissible against the principal as an admission. Under Section 1222, the fact that an employee was authorized to act for an employer does not authorize that agent to make statements for the employer concerning the acts of the employee. Actual scope of authority to speak for the principal is the basis for admissibility.

(2) Spontaneous and contemporaneous statements. Evidence Code Sections 1240 and 1241 provide hearsay exceptions for spontaneous and contemporaneous statements. Where the statement was made spontaneously at or near the time of the accident, the hearsay exception for spontaneous statements frequently provides a basis for admission that is independent of the limitations on the exception for authorized admissions. In cases involving an employee's statement, the scope of his employment and his authority to speak become irrelevant if the statement was sufficiently spontaneous. If it was, the statement is admissible hearsay and can be used as evidence against the employer. Although exceptions can be found, the courts seem more inclined to admit self-implicating statements where spontaneity is dubious than they are self-serving statements made under similar circumstances.

(3) Declarations against interest. Evidence Code Section 1230 provides a hearsay exception (when the declarant is unavailable as a witness) for declarations against interest. The pertinent part of the section provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

(4) Statements of knowledge. Evidence Code Sections 1250 and 1251 provide hearsay exceptions for statements of knowledge that may be of limited significance insofar as these exceptions relate to statements of employees. Section 1250 provides an exception for statements of the declarant's then existing knowledge, while Section 1251 provides an exception for statements of the declarant's past knowledge. The principal difference between the sections is that statements are admissible under Section 1250 regardless of the availability of the declarant while statements are admissible under Section 1251 only if the declarant is unavailable as a witness. Thus, for an employee's statement of prior knowledge to be admissible under the terms of the Evidence Code, the proponent of the statement would have to show that the employee is unavailable as a witness.

(5) Admission of party. Evidence Code Section 1220 provides for an exception to the hearsay rule when evidence of the statement is "offered against the declarant in an action to which he is a party . . . ." The jury should be instructed that the evidence is admissible only against the employee, not against any other persons, when it is admitted under Section 1220.

Where Employee is a Witness at the Trial

Evidence Code Section 1235 provides a hearsay exception for a prior statement of a witness that is inconsistent with his testimony at the hearing, whether or not the witness is a party to the action. Thus, if

an employee has made a statement of fact that is damaging to his employer, the party who wishes to use this statement against the employer can do so merely by calling the employee as a witness. If the employee testifies in accordance with his prior statement, the prior statement itself may not be used, but the witness' testimony will provide the party with his desired evidence. If the employee testifies inconsistently, the prior statement may then be shown under the exception provided by Section 1235 and the prior statement can be used by the trier of fact as evidence of the matters stated therein (not restricted to use against the employee).

STAFF CONCLUSIONS AND RECOMMENDATIONS

The staff concludes that the Evidence Code exceptions discussed above provide a fair and reasonable basis for the admission of hearsay statements of an employee against his employer in an action where the employee is neither a party nor a witness in the action. Except for authorized admissions, there is no significant exception in such cases for the admission of hearsay statements of an employee that are not against the employee's interest and were not made "spontaneously." But there seems to be no reason to suppose that such a statement is a reliable one and, where the employee is not a witness, there is no opportunity for the employer to test the statement by cross-examination of the employee. Hence, the staff believes that there is no need for any change in the law under Markley where the action is against the employer and the employee is not a party to the action and is not a witness in the action.

Where the employee is a witness at the trial, whether or not he is a party to the action, the employee's hearsay statement is admissible unless the employee testifies at the trial in a way that is consistent

with the statement. In any event, the party seeking to use the hearsay statement of the employee has his evidence at the trial. No change is needed in the law as it applies in these circumstances.

The difficulty with the existing law is found in the case where the employee is a party to the action against the employer but not a witness at the trial. Since the employee is a party, his hearsay statement is admissible as an admission. However, the statement is admissible only against the employee-declarant, not his employer. The difficulty that results is in the instructions that are to be given in such a case: The jury must be instructed that the statement is admissible against the employee only, not against his employer. Yet, in a vicarious liability case, the employer is liable as a matter of substantive law if the employee is liable. Suppose the jury finds, based primarily or exclusively upon the employee's admission, that the employee is liable. How does the jury then handle the instruction that it cannot consider the employee's admission in determining the employer's vicarious liability when, at the same time, the jury also is instructed that if it finds that the employee is negligent and was in the scope of his employment, the employer is vicariously liable? This is the problem that concerns the writers of the law review articles and the Oregon Supreme Court in the case noted in the article attached to Memorandum 68-29 from the Oregon Law Review. The staff concludes that the law is far from satisfactory on this problem, but we believe that there are indications that the problem will be resolved by the courts in favor of vicarious liability under these circumstances and that the confusing instruction will be eliminated by judicial decision. Perhaps the best solution is to give no limiting instruction but to instruct the jury that there are two questions that must be determined in the affirmative if the employer is to be held

liable: (1) was the employee negligent and (2) was he in the scope of his employment. The employer's liability would follow as a matter of law if these two questions are answered in the affirmative. This is basically the Oregon reasoning. See the article from the Oregon Law Review. Accordingly, because of the great difficulty in attempting to deal with the instruction problem by drafting evidence rules, we recommend that the problem be left to future judicial decision.

Respectfully submitted,

John H. DeMoully
Executive Secretary

1st Supplement
Memorandum 68-29

Note from 19 Hastings Law Journal 1395 (May 1968)

EXHIBIT I

NOTES

ADMISSIBILITY OF AN AGENT'S DECLARATIONS AGAINST HIS EMPLOYER UNDER EVIDENCE CODE SECTION 1224*

Section 1224 of the California Evidence Code provides:

> 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, 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.

The first suggestion that Evidence Code section 1224 might constitute a basis for admitting the unauthorized declarations of an agent in a respondeat superior action against his employer came in *Markley v. Beagle*.[1] Markley, a refrigeration serviceman, was injured in a fall from a balcony due to a defective railing. Having the status of a business invitee, the serviceman sued the owner of the building for negligence. Markley also sued a contractor whose workmen had dismantled the railing in order to remove some equipment. The trial court admitted a hearsay declaration of Hood, one of the contractor's employees who worked on the removal of the railing, to the effect that the contractor's workmen had taken down the railing to remove the equipment and had replaced it in what Hood thought was its former condition. The jury returned a verdict for Markley against both the owner and the contractor.

The district court of appeal confirmed the propriety of admitting Hood's hearsay declarations.[2] Admissibility was justified under former Code of Civil Procedure section 1851[3] (recodified in Evidence Code sections 1224 and 1302) which provided that when the obligation or duty of a party is based upon the obligation or duty of a third person, evidence of a statement made by that person is admissible against the party if it would be admissible against the declarant in an action involving that obligation or duty. Hood's statements were admissible, because the contractor's obligation depended in part upon the obligation of Hood.

The California Supreme Court reversed Markley's judgment against the contractor on the basis that former Code of Civil Procedure section 1851[4] did not apply to the respondeat superior situation:

---

* The writer is indebted to Professor Judson Falknor, Hastings College of the Law, who generously gave his time, criticism and encouragement. Nevertheless, the conclusions reached below are those of the writer and do not reflect the views of Professor Falknor.

[1] 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

[2] 54 Cal. Rptr. 916 (1966), *vacated*, 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

[3] Cal. Stats. 1873-1874 (Code Amendments), ch. 383, § 216, at 380.

[4] And EVIDENCE CODE § 1224 by way of dicta.

> We conclude that the terms "obligation or duty" in former section 1851 and "liability, obligation, or duty" in Evidence Code sections 1224 and 1302 do not include tort liabilities of employees that are imputed to their employers under the doctrine of *respondeat superior*.[5]

Markley was decided under former section 1851 and the court's statements are only dicta as to section 1224. However, since section 1224 has now replaced section 1851, this note will be addressed to section 1224.

The following discussion is designed to demonstrate that section 1224 should be applied to the respondeat superior situation. Not only is such a construction logically supportable, but it would also establish criteria for the admissibility of agents' hearsay declarations which would implement the purpose of the hearsay rule by making admissibility turn on trustworthiness. The benefits to be derived from applying section 1224 to respondeat superior cases are best appreciated when contrasted with the present California law and the problems generated by having admissibility turn solely upon the agency concept of authority.

The Present Law

Evidence Code section 1222[6] regulates the admissibility of an agent's declaration in a suit against his employer according to the substantive law of agency. Admissibility turns upon the presence of "speaking authority," that is, whether the agent was expressly or impliedly authorized to speak for his employer. Under section 1222 the fact that an agent was authorized to act for an employer does not authorize that agent to make statements for the employer concerning his acts.[7]

Contrasted with the requirement of speaking authority in section 1222 is the more permissive rule promulgated by the Model Code of Evidence[8] and the Uniform Rules of Evidence.[9] Under this rule, even though the declarant lacked speaking authority, his declaration is admissible if it "concerned a matter within the scope of an agency or employment of the declarant . . . and was made before the termination" of the agency.[10] While Evidence Code section 1222 requires a showing of speaking authority, it must be remembered that it is within the court's power to create new exceptions to the hearsay

---

[5] Markley v. Beagle, 66 A.C. 1003, 1012, 429 P.2d 129, 135, 59 Cal. Rptr. 809, 815 (1967).

[6] CAL. EVIDENCE CODE § 1222 provides: "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."

[7] *See* CAL. EVIDENCE CODE § 1222, comment; *cf.* MCCORMICK, EVIDENCE § 244 (1954) [hereinafter cited as MCCORMICK].

[8] MODEL CODE OF EVIDENCE rule 508(a) (1942).

[9] UNIFORM RULE OF EVIDENCE 63(9)(a).

[10] MODEL CODE OF EVIDENCE rule 508(a) (1942); UNIFORM RULE OF EVIDENCE 63(9)(a).

rule.[11] Thus, despite the existence of section 1222, the court could adopt the Uniform Rules' position eliminating the requirement of speaking authority. This is due to the wording of Evidence Code section 1200: "Except as provided by law, hearsay evidence is inadmissible." But "law" includes decisional law in addition to statutory and constitutional law.[12] Two cases prior to the adoption of the Evidence Code apparently did adopt the Model Code-Uniform Rules' position.[13]

Whether the courts retain the requirement of speaking authority or not, there are problems with either alternative. The orthodox rule requiring speaking authority overlooks the possibility that some unauthorized statement may warrant an assumption of reliability:

> To the extent that need and probable reliability are acceptable criteria in fashioning exceptions to the hearsay rule, it seems that the principle of authorized admissions [i.e. the requirement of speaking authority] is not an adequate formula for the entire area of agents' statements. This formula is so narrow that it fails to furnish the basis for receipt into evidence of many trustworthy and needed statements made by agents.[14]

The alternative position advocated by the Model Code[15] and Uniform Rules,[16] eliminating the speaking authority requirement, runs the risk of admitting unreliable declarations. Any agent's statement about a matter within the scope of the agency would be admissible against the employer. But what guarantees the trustworthiness of such a statement? The Model Code of Evidence defends its position in the comment to rule 508:

> [T]he agent . . . in speaking about the transaction which it was within his authority to perform is likely to be telling the truth in most instances—much more likely than when later summoned to give testimony against his principal. . . .

However, one authority questions whether trustworthiness can be assumed from the mere circumstance that the declarant was speaking of authorized conduct:

> If an agent "is likely to be telling the truth" about a past authorized act, cannot it be said with equal correctness that any declarant . . . is "likely to be telling the truth" about his past act, if it was an act he had a right to perform . . . ?[17]

Both of the above tests of admissibility employ the agency concept of authority. One requires speaking authority, the other re-

---

[11] McDonough, *The California Evidence Code: A Précis*, 18 HASTINGS L.J. 89, 92 (1966).

[12] CAL. EVIDENCE CODE § 160.

[13] Shields v. Oxnard Harbor Dist., 46 Cal. App. 2d 477, 116 P.2d 121 (1941) (agent's admission of fault in causing collision admitted against his employer); Johnson v. Bimini Hot Springs, 56 Cal. App. 2d 892, 133 P.2d 650 (1943) (declarations of defendant's assistant manager as to the slippery condition of the floor admitted against defendant owner upon proof of agency, citing *Shields v. Oxnard Harbor Dist., supra*). *But see* 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 488 (1963) [hereinafter cited as CAL. L. REVISION COMM'N] (suggesting possible basis for distinguishment).

[14] 4 CAL. L. REVISION COMM'N 488 (1963).

[15] MODEL CODE OF EVIDENCE rule 508(a) (1942).

[16] UNIFORM RULE OF EVIDENCE 63(9)(a).

[17] Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 857 (1961).

quires only authority to do the act spoken about. Both tests fail as instruments for determining trustworthiness: the speaking authority test because it excludes all unauthorized statements regardless of their reliability; the Uniform Rules' test because it would let in too many unreliable statements. What is needed is the coupling of the speaking authority test (section 1222) with another independent basis of admissibility enabling the introduction of those declarations which —although lacking authority—justify an assumption of trustworthiness. Evidence Code section 1224, if applied to respondeat superior cases, would fill this need.

With this background, the following discussion will illustrate: (1) the propriety of bringing respondeat superior cases within the compass of section 1224; and (2) the salutary effect such a construction would produce by establishing reliability—instead of authority—as the basis for admissibility of agents' hearsay declarations.

Section 1224 and Respondeat Superior

Markley v. Beagle[18] held that former Code of Civil Procedure section 1851, the precursor of Evidence Code section 1224, did not embrace the respondeat superior situation; however, the court admitted that the language of section 1851 was "susceptible of [such] an interpretation . . . ."[19] The issue was one of first impression in that no court had ever applied or even discussed section 1851's application in a respondeat superior context.[20] Nevertheless, the court interpreted the dearth of authority as indicating that section 1851 did not apply to respondeat superior situations:

> We are convinced, however, that the failure of any case to consider that possibility was not the result of oversight, but reflected a tacit understanding that section 1851 did not change the settled and apparently universally followed rule that hearsay 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 employee that may be imputed to the principal or employer under the doctrine of *respondeat superior*.[21]

Such negative authority is, at best, weak. The validity of a legal argument should not be foreclosed by the fortuitous circumstance that it has never been raised previously. At any rate, a "tacit understanding" among the bar is less than an imposing legal precedent.

While no court has applied section 1224 (or former section 1851) in a respondeat superior case, various authorities have indicated the propriety of such an application. In its discussion of Uniform Rule 63(9)(c)—which is substantially the same as section 1224—the California Law Revision Commission states: "If the case is a respondeat superior case and if the statement inculpates the agent and was made during the agency, it is admissible under both Rule 63(9)(a) and Rule 63(9)(c)."[22] The Commission also states:

> Although it is difficult to discover a distinguishing principle, for some

[18] 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).
[19] *Id.* at 1011, 429 P.2d at 134, 59 Cal. Rptr. at 814.
[20] *Id.* at 1010, 429 P.2d at 134, 59 Cal. Rptr. at 814.
[21] *Id.* at 1011, 429 P.2d at 134, 59 Cal. Rptr. at 814.
[22] 4 CAL. L. REVISION COMM'N 490 (1963).

> reason Section 1851 has never been cited nor discussed in any of the cases dealing with the liability of an employer under the doctrine of respondeat superior. It would appear that a respondeat superior case would fall within . . . the language of Section 1851 . . . .[23]

Professor John McDonough, chairman of the California Law Revision Commission when the Evidence Code was prepared, states unequivocally that section 1224 is applicable in respondeat superior situations:

> [S]ection 1851 . . . has not, for some inexplicable reason, been applied in actions against employers for torts committed by their employees. Section 1224 makes it quite clear[24] that the admission of the employee is admissible against the employer when the latter's liability is based on respondeat superior.[25]

Rule 508(c) of the Model Code of Evidence was modeled after section 1851.[26] In the Model Code's example of the operation of 508(c), the authors presented a respondeat superior case. While seeing no reason for not applying 508(c) to respondeat superior cases, the reporter conceded that such an application would "make material changes in existing law."[27] However, it must be remembered that the ensuing "changes in the law" would not be the overruling of prior cases, but merely extending the application of the section to include a situation, *i.e.* the respondeat superior case, not previously covered.

Since the respondeat superior case falls within the wording of section 1224, the only basis for denying application of the section is the existence of a meaningful distinction between the situation to which section 1224 is currently applied and the respondeat superior situation. For the most part, section 1224's predecessor, section 1851, had been restricted to cases where the relationship between the declarant and the party against whom his statement was sought to be introduced had been one of principal and surety.[28] Some of these cases involved suretyship contracts imposing direct and unconditional liability upon the surety.[29] In such cases, the creditor-surety relationship is quite similar to the relationship between the plaintiff and the employer under respondeat superior. The creditor or plaintiff can proceed directly against the surety or employer without first attempting to recover from the person who is primarily liable.[30] The

---

[23] *Id.* at 494-95.

[24] Perhaps Professor McDonough is referring to the insertion of the word "liability" in section 1224 where the predecessor section 1851 only referred to "obligation or duty."

[25] McDonough, *supra* note 11, at 114.

[26] McCormick § 244.

[27] Model Code of Evidence rule 508(c), Comment (1942).

[28] 4 Cal. L. Revision Comm'n 494 (1963); *see, e.g.*, Butte County v. Morgan, 76 Cal. 1, 18 P. 115 (1888). The term "surety" is used in the broad sense and embraces the situation where the surety's obligation is conditioned upon the inability of the creditor to collect from the principal. *See* Cal. Civ. Code § 2787; Restatement of Security § 82; G. Osborne, Cases and Materials on Secured Transactions 10 (1967).

[29] *See, e.g.*, Butte County v. Morgan, 76 Cal. 1, 18 P. 115 (1888); Nye & Nissen, Inc. v. Central Surety & Ins. Corp., 71 Cal. App. 2d 570, 163 P.2d 100 (1945).

[30] *See* Wills v. J.J. Newberry Co., 43 Cal. App. 2d 595, 602, 111 P.2d 346, 349 (1941).

main difference between the liability of a surety and an employer is the source of their obligation: the surety's obligation is contractual[31] while the employer's is relational and nonconsensual in nature.[32] This is a difference to be sure, but it is not relevant to the issue at hand—the admissibility of evidence under section 1224. Rather, the one common denominator of both the surety and the respondeat superior cases—the fact that the liability of the surety or employer depends directly upon the liability of the principal or agent[33]—is the reason why section 1224 should apply equally to both situations. For in both cases "the liability, obligation, or duty of a party [whether surety or employer] . . . is based . . . upon the liability, obligation, or duty of the declarant [whether principal or employee] . . . ."[34] This is all that section 1224 requires.

In addition to the surety cases, where the obligation is contractual, the California courts have twice[35] applied former section 1851 to situations where the liability of the party against whom the declaration was sought to be introduced was noncontractual in origin. In *Ingram v. Bob Jaffe Co.*,[36] the statement of a person permitted to operate a vehicle was admitted against the owner of the vehicle in an action against that owner under the derivative liability established in Vehicle Code section 17150.[37] This situation, where the owner of a vehicle is made liable for damage caused by any person he permits to drive the vehicle, is very similar to the respondeat superior situation. In the language of the California Law Revision Commission: "It would appear that a respondeat superior case would fall within . . . the principle upheld in . . . *Ingram* . . . ."[38] The point sought to be made is that, as far as admissibility of evidence under section 1224 is concerned, respondeat superior is not significantly different from *Ingram* and the surety cases.

Consistency With Inferable Legislative Intent

In *Markley v. Beagle*[39] counsel for contractor Beagle argued that the admissibility of agents' unauthorized declarations via section 1224 would contravene legislative intent, because such an interpretation

---

[31] G. OSBORNE, *supra* note 28, at 10.

[32] Fernilius v. Pierce, 22 Cal. 2d 226, 233, 138 P.2d 12, 17 (1943); *see* CAL. CIV. CODE § 2338 (codifying the common law doctrine of respondeat superior).

[33] In a suit against the employer under respondeat superior, the liability of the employer is only partly dependent upon the liability of the employee. The plaintiff must also prove that the employee was in the scope of his employment. 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Agency and Employment* § 72 (7th ed. 1960). CAL. EVIDENCE CODE § 1224 carefully provides: "When the liability . . . of a party . . . is based in whole *or in part* upon the liability . . . ." (emphasis added).

[34] CAL. EVIDENCE CODE § 1224.

[35] Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335 (1921); Ingram v. Bob Jaffe Co., 139 Cal. App. 2d 193, 293 P.2d 132 (1956).

[36] 139 Cal. App. 2d 193, 293 P.2d 132 (1956)

[37] Formerly Cal. Vehicle Code § 402(a), Cal. Stats. 1935, ch. 27, § 402(a), at 153.

[38] 4 CAL. L. REVISION COMM'N 495 (1963).

[39] 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

would nullify section 1222's requirement of speaking authority.[40] This argument fails to take account of: (1) the statement of the California Law Revision Commission; (2) the wording of section 1222 itself; and (3) the interrelationship of sections 1222 and 1224. As mentioned above, the Law Revision Commission clearly envisioned the possibility of applying section 1224 to respondeat superior cases.[41] Secondly, the language of section 1222 is inclusionary: "Evidence of a statement . . . is not made inadmissible by the hearsay rule if . . . ." This section does not say that no unauthorized statement of an agent shall be admitted but merely that such statements are not admissible under section 1222. The result is that evidence of an unauthorized statement, while not admissible under section 1222, may still be admissible if it can qualify under another hearsay exception. Certainly, an unauthorized declaration of an agent will be admissible if it satisfies the requirements for a declaration against interest[42] or a spontaneous utterance.[43] Thus, the fact that an agent's declaration does not satisfy the "speaking authority" requirement for authorized admissions should not preclude its admission under another exception to the hearsay rule which will equally guarantee its trustworthiness.

The application of section 1224 to respondeat superior cases will not eliminate the speaking authority requirement of Evidence Code section 1222. It is true, however, that certain unauthorized declarations of agents will become admissible which would not be admissible under section 1222. But such a construction would not operate to confer "speaking authority" upon all agents. For example, suppose *X* corporation employs two truck drivers to make cross-country deliveries. The drivers alternate sleeping and driving to enable them to be on the road 24 hours a day. Driver 1 is involved in an accident. After the excitement of the accident is over, *D*1 and *D*2 both make statements to the effect that *D*1 was speeding. Neither of these statements could come in under section 1222 because of the lack of speaking authority. However, lack of speaking authority does not prevent admissibility under some other exception to the hearsay rule. The statement of *D*1 should come in under section 1224, because, in a respondeat superior suit against *X* corporation, X's liability turns in part upon that of *D*1. However, *D*2's statement would not be admissible under section 1224, because his liability is not in issue. Thus, application of section 1224 to respondeat superior actions would not eliminate the effect of section 1222's requirement of speaking authority, but it would provide an independent basis of admissibility on nonagency grounds.

Finally, even assuming without conceding that the argued-for application of section 1224 would be inconsistent with section 1222, it has been pointed out above that the Evidence Code empowers the courts to create new exceptions to the hearsay rule.[44] The foregoing arguments advocating the application of section 1224 to respondeat

[40] Brief for appellant at 8, Markley v. Beagle, 66 A.C. 1003, 429 P.2d 129, 59 Cal. Rptr. 809 (1967).

[41] *See* notes 22, 23 & 25 *supra*.

[42] CAL. EVIDENCE CODE § 1230.

[43] CAL. EVIDENCE CODE § 1240.

[44] *See* note 11 *supra*; CAL. EVIDENCE CODE §§ 160, 1200.

superior situations have necessarily assumed the validity of that section as an exception to the hearsay rule. While proof of such validity is beyond the scope of this note, the following discussion suggests that agents' declarations admitted under section 1224 would justify an assumption of trustworthiness.

Policy

In the words of the reporter of the Model Code of Evidence:

> [I]f a law suit includes a rational investigation of a dispute as to facts, it seems entirely reasonable to use the same evidence to establish the liability of X in an action between P and D as would be used to establish the same liability in an action between P and X.[45]

The law of evidence should admit all relevant evidence provided that it is trustworthy.[46] The hearsay rule and its exceptions are the tests of trustworthiness.[47] In a suit against an agent for his negligence, any relevant statements of that agent are admissible, because they are party admissions.[48] Thus, the agent's admissions would be reliable evidence (by virtue of satisfying the requirements for a hearsay exception) for proving his negligence in a suit against him. If such admissions are reliable evidence in a suit against the agent on the issue of his negligence, then the same declarations ought to be equally reliable in a suit against the agent's employer on the same issue. If the issue, i.e. the agent's negligence, remains the same, the reliability of the declaration is not diminished merely because the defendant is the employer instead of the agent.

As a practical matter, the trustworthiness of the agent's declarations is further assured by the fact that a statement which would be relevant in proving his liability would necessarily be against his interest.[49] This is not to say that the declaration would qualify for admission under Evidence Code section 1230 (declarations against interest). The agent's declaration would not be "against interest" under section 1230 unless the agent was unavailable as a witness, but this qualification has nothing to do with the trustworthiness of the statement.[50] Also, admissibility under section 1230 might be precluded by: (1) that section's requirement that the declaration be against interest *when made*; (2) the possibility that the declaration might not be against interest to the degree required by section 1230.[51]

---

[45] MODEL CODE OF EVIDENCE rule 503(c), Comment (1942).

[46] CAL. EVIDENCE CODE § 351 provides: "Except as otherwise provided by statute, all relevant evidence is admissible." One statutory exception is the trial judge's limited discretion. *See* CAL. EVIDENCE CODE § 352.

[47] *See* 5 J. WIGMORE, EVIDENCE §§ 1420, 1422 (3d ed. 1940); B. JONES, EVIDENCE § 269 (5th ed. S. Gard. rev. 1956).

[48] CAL. EVIDENCE CODE § 1220.

[49] *See* 4 CAL. L. REVISION COMM'N 489 (1963); *cf.* MCCORMICK § 244.

[50] "If she [declarant] was available, however, the credibility of her extrajudicial statements would not be lessened by that fact." People v. Spriggs, 60 Cal. 2d 868, 875, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845. The requirement of unavailability contained in Evidence Code section 1230 is largely illusory. If the declarant testifies inconsistently in court, the proponent can introduce the declarant's prior inconsistent statement as substantive evidence of the facts stated. CAL. EVIDENCE CODE § 1235.

[51] CAL. EVIDENCE CODE § 1230 requires that the statement be: "so far con-

Consider the situation where the injured plaintiff sues both the agent and his employer. The plaintiff seeks to introduce the agent's statement concerning the accident.[52] Unless section 1224 is applied, the court will admit the statement only against the agent, and the jury will be asked to perform the psychologically impossible task of considering the statement as evidence against the agent but not employing it in determining the liability of the employer.[53] Fortunately, the court has recognized that the liability of the employer follows automatically upon proof of the liability of the employee.[54] Thus, the plaintiff can recover a judgment against the employer on the basis of the employee's hearsay declaration (introduced against the employee) even though the declaration is not admissible against the employer.[55] But what if the plaintiff sues the employer without joining the employee? Unless section 1224 is applied, the employee's hearsay declaration will not be admissible. It seems rather unrealistic to deny admission when the suit is only against the employer but to permit the plaintiff to take advantage of the declaration by merely joining the employee as codefendant. Surely admissibility should turn on something more than joinder.

Scope of Admitted Declarations

If an agent's declarations are admitted under section 1224, care must be taken to limit the declarations admitted to those permitted by the statute. Section 1224 states that a declaration is only "as admissible against the party [*e.g.*, the employer] as it would be if offered against the declarant [*e.g.*, the agent]." In other words the test of admissibility under section 1224 in a respondeat superior suit against an employer is whether the declaration would likewise be admissible against the agent on the same issue. For example, in a respondeat superior suit against an employer, the declarations of an agent tending to prove his negligence should be admitted under section 1224, because they would be admitted in a suit against the agent.[56] How-

---

trary to the declarant's pecuniary or proprietary interest, or so far [subject] him to the risk of civil or criminal liability, or so far [tend] to render invalid a claim by him against another, or [create] such a risk of making him an object of hatred, or ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Chief Justice Traynor said in *Markley* that Hood's statement was not sufficiently against interest to meet the standard of section 1230. 66 A.C. at 1009 n.1, 429 P.2d at 133 n.1, 59 Cal. Rptr. at 813 n.1.

[52] Assume that his statements are not otherwise admissible under the hearsay exceptions for excited utterances or declarations against interest.

[53] Shaver v. United Parcel Serv., 90 Cal. App. 764, 266 P. 608 (1928) (Agent's declaration, "I could have stopped, but I thought the trailer was going to stop," was admitted against the agent but not against his employer).

[54] Gorzeman v. Artz, 13 Cal. App. 2d 660, 57 P.2d 550 (1936) (upheld judgment against employer despite fact that only evidence of employee's negligence was declarations of the employee which were admitted only as to the employee). Of course, the employee's negligent act must have been done within the scope of his employment. 1 B. WITKIN, *supra* note 33.

[55] *Id.*

[56] CAL. EVIDENCE CODE § 1220.

ever, declarations of the agent tending to show that he was in the scope of his employment at the time of the negligent act would not be admitted under section 1224. This follows because, if the suit were against the agent, it would not be necessary to prove that the agent was acting in the scope of his employment and, therefore, evidence to that effect would be irrelevant and inadmissible.

Conclusion

Section 1222 with its requirement of speaking authority is a valid test for the trustworthiness of agents' hearsay statements. But it should not be the only basis of admissibility. To make admissibility turn solely upon authorization results in the exclusion of some statements which justify an assumption of reliability. The construction of section 1224 to embrace respondeat superior cases would insure the admissibility of statements whose reliability stems not from authority, but from the fact that the declarant was speaking to his own liability as well as to that of his employer. "Indeed, it is the failure of the courts to adjust the rules of admissibility more flexibly and realistically to these variations in the reliability of hearsay that . . . constitutes one of the pressing needs for liberalization of evidence law."[57]

*William T. Weaver**

[57] McCORMICK § 224, at 459.

* Member, Third Year Class.