Marquette Law Review

Volume 47
Issue 1 *Summer 1963*

Article 6

Vicarious Admissions and Utterances

Jerome E. Gull

VICARIOUS ADMISSIONS AND UTTERANCES

The subject of vicarious admissions and utterances has been the topic of much comment and controversy. The courts and text writers are often in conflict as to the effect to be given these types of statements. It is the author's hope that this article will present some of the problems encountered and solutions offered in, perhaps, the most difficult field of extra-judicial admissions, that of agent's statements regarding tortious liability.

Perhaps, the best illustration of the whole problem can be shown through a simple hypothetical fact situation which will be referred to throughout this article as a means of showing the application of the various theories of law proffered as governing the circumstances. The fact situation involves a truck driver, agent, who made the following statement after an intersectional collision; "I'm sorry lady, I didn't see you coming." An attorney engaged by this woman faced the question as to what value this statement of supposed carelessness has in substantively binding the corporate principal.

At the outset it appears apparent that the admissibility of a statement of this nature in a suit against the principal would be of great import in proving the negligence of the agent. But upon closer examination there seems to be a conflict as to whether principles of agency or rules of evidence apply in ultimately determining the admissibility of this declaration. Excepting Wisconsin, many courts have failed to distinguish between the evidentiary hearsay exception of spontaneous declarations, which constitute part of the res gestae, and the agency rule scope of authority, treating them as a single principle in making their determination as to admissibility.[1] Professor Wigmore points out this fallacy in stating:

> . . . 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 development of the law of Evidence. Practically, the result of the two principles in application are decidedly different; for upon the principle of the Hearsay exception such statement may (if admissible) be received against either party; but on the principle of agency against the employer only.[2]

Thus, the declaration *may* be admissible under two distinct theories: either as an exception to the hearsay rule or under a principle of agency. An excellent statement as to the treatment and separability of these two concepts is offered by Professor Mechem:

---

[1] 4 WIGMORE, EVIDENCE §1078, at 121 (1940).
[2] *Ibid.*

> . . . although they (admissions) thus cannot be regarded as *authorized,* the declarations and admissions of an agent may often be put in evidence upon an entirely different ground, namely, that they constitute a part of what is called the *"res gestae."* . . . It does not necessarily depend upon the law of agency at all. It is a rule of evidence and is just as applicable in a proper case to one who was not an agent at all as to one who was an agent. . . .[3]

Before further analysis of these two principles, the uses of which are generally determined by the facts of the particular case, it should be noted that before an admission or utterance of this vicarious nature may be allowed in evidence against the principal, the party offering the alleged admission must lay a proper foundation. The foundation must show both the fact and scope of the agency; this is usually accomplished by testimony of the alleged agent while he is under oath, or testimony of any party who knows him to be the agent of the principal, or circumstantial evidence.[4] However, under no circumstances may agency be proved by past extra-judicial assertions or admissions of the alleged agent.[5]

Res Gestae

Under the res gestae rule of evidence, an utterance which is inadmissible under the hearsay rule is saved and allowed because the facts surrounding the declaration afford it credibility. The rule of res gestae is based on the premise that, in the experience of mankind, statements made at the time of the happening of the event itself are apt to be truthful.[6] The test of admissibility of such declarations as constituting part of the res gestae laid down in *Kressin v. Chicago & N.W. Ry. Co.*[7] requires the occurrence of an event so shocking or startling as to produce nervous excitement, which in turn renders the declaration to be spontaneous, natural, impulsive, instructive and generated by an excited feeling which extends unbroken from moment of event which it illustrates. A further requirement is that the statement must be made before there has been time to contrive and misrepresent.

The Wisconsin court has not definitely limited the time during which the utterance must be made to constitute a part of the res gestae,[8] but the court looks to the facts and circumstances surrounding the declaration in each particular case. However, it appears that in cases of this sort time becomes a very important element.[9] With the passage of time between act and declaration, the inference that the utterance was a

---

[3] 2 Mechem, Agency §1793, at 1369 (1914).
[4] McCormick, Evidence 519 (1954).
[5] Mechem, Agency Outlines §484 (1923.)
[6] Shiefel v. State, 180 Wis. 186, 192 N.W. 386 (1923).
[7] 194 Wis. 480, 215 N.W. 908 (1928).
[8] Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170, 148 N.W. 37 (1914).
[9] Klein v. Montgomery Ward & Co., 263 Wis. 317, 57 N.W.2d 188 (1953).

product of the speaker's mind prompted solely by the startling event[10] is negated because the elements of possible deliberation and contrivance have now entered the picture. Thus, in those instances where the lapse in time before the alleged admission was made is appreciable, the tendency of the courts is to treat the agent's declaration as a "mere narrative" of a past event.[11] Under these circumstances it is not admissible or binding on the principal. Applying this rule to the hypothetical fact situation, it appears that if the declarations were made when the driver was alighting from the cab of his truck or within a short period thereafter, his spontaneous declaration or excited utterance would be admissible as part of the res gestae. Here, the statement in question concerns some main act (the accident), and the proponent is present and affected by its influence. Therefore, it may be said that the statement was a part of the act—a part of the res gestae—in that the events were speaking for themselves through the instinctive words and acts of the participants. As a result of being part of the res gestae, the declaration or utterance is competent not only against the agent, but also serves as original evidence against the principal.[12]

Authorized Admissions

If the proponent of the alleged admission does not meet the necessary qualifications to come within the res gestae exception, then principles of agency apply in determining the admissibility of the declaration. In most instances these rules[13] serve to exclude rather than admit[14] such statements into evidence, for in the area of tortious liability, the agent's declarations are deemed not to be made within the scope of his authority, that is, his ability to speak for his principal on such matters.[15] Taking the hypothetical fact situation as an example, it can be seen that under the rules of agency the mere fact that the agent has authority to drive the truck does not imply that he has the authority to make state-

---

[10] Scrafield v. Rudy, 266 Wis. 530, 64 N.W.2d 189 (1954).
[11] McCormick, Evidence 518 (1954).
[12] Levandowski v. Studney, 249 Wis. 421, 25 N.W.2d 59 (1946).
[13] Restatement (Second), Agency §286 (1954) reads;

> In an action between the principal and a third person, statements of an agent to a third person are admissable in evidence against the principal to prove the truth of the facts asserted in them as though made by the principal, if the agent was authorized to make the statement or was authorized to make on the principal's behalf, any statements concerning the subject matter.

[14] There are a number of cases holding such statements admissable, regardless of want of authority, if the agent was employed for the purpose of giving information. Included among this group of cases are the following: Arenson v. Skouras Theatres Corp., 131 N.J.L. 303, 36 A.2d 761 (1944) (report of theatre employee to manager as to condition causing injury, in presence of plaintiff); Home Ins. Co. of N.Y. v. Hall, 192 Ark. 283, 91 S.W.2d 609 (1936) (admission of insurance adjuster seeking to settle claim, that policy had not been cancelled); See McCormick, Evidence 518 (1954).
[15] Hamilton v. Reinmann, 233 Wis. 572, 577, 290 N.W. 194 (1940).

ments concerning his manner of driving.[16] Thus, upon showing a lack of express or implied[17] authorization, the principal is in the position to claim that such declarations in no way bind him and that, standing alone, they do come within the hearsay rule because:

> . . . The agent may make admissions which will charge himself, and the principal may make admissions to bind himself, but usually one man can not *admit* things to charge another. An agent may confess his own negligence or default so far as his own liability is concerned, but he cannot ordinarily be deemed *authorized* to confess his principal's negligence or defaults. So far as the principal is concerned, if he does not care to admit matters affecting his liability or interests, he is entitled to have the question tried by the regular and established methods of determining liability. . . .[18]

Given the hypothetical fact situation and excepting it from the res gestae qualification, the third party, under present law,[19] seems to fail at getting the agent's declaration admitted into evidence, because the truck driver's authority to speak for his principal on tort matters is unusual and highly unlikely. At best, the declaration could serve only for purposes of impeachment[20] in the event that the truck driver, upon being called to the stand by his principal, should happen to give testimony inconsistent with his prior declaration. Under these circumstances the declaration's sole use would be limited to affecting the witness's credibility rather than affecting the substantive liability of the principal.

Criticism of the Authorized Admission Doctrine

A close examination of this doctrine has brought a rash of criticism from several text writers[21] and a number of courts.[22] The principal objection stems basically from the inequitable and illogical results that occur upon the application of the doctrine. A noteworthy example of this appears in *Rankin v. Brocton Public Market.*[23] In that case the

---

[16] Restatement (Second), Agency §288 (1954) states:
(1) Authority to do an act or conduct a transaction does not of itself include authority to make statements concerning the act or transaction.
(2) Authority to make statements of fact does not of itself include authority to make statements admitting liability because of such facts.

[17] Rudzinski v. Warner Theatres Inc., 16 Wis.2d 241, 114 N.W.2d 466 (1962).

[18] 2 Mechem, Agency §1792, at 1368 (71914).

[19] *Supra* note 17.

[20] Burton v. Brown, 219 Wis. 520, 263 N.W. 573 (1935); Hamilton v. Reinmann, 233 Wis. 572, 290 N.W. 194 (1940).

[21] 4 Wigmore, Evidence §1078 (1940); McCormick, Evidence 519 (1954); See also Morgan, *The Rationale of Vicarious Admissions,* 42 Harv. L. Rev. 461 (1929).

[22] Examples of such criticism can be found in the following: Myrick v. Lloyd, 158 Fla. 47, 27 So.2d 615 (1946); Whitaker v. Keough, 144 Neb. 790, 14 N.W.2d 596 (1944); Slifka v. Johnson, 161 F.2d 467 (2d Cir. 1947); Martin v. Savage Truck Lines Inc., 121 F.Supp. 417 (D.D.C. 1954).

[23] 257 Mass. 6, 153 N.E. 97 (1926).

court excluded a saleslady's admission that she had tossed the bottle that hit the plaintiff, customer, on the head on the premise that the saleslady "had no authority to bind the defendant." Professor Wigmore in discussing this case finds it hard to draw this narrow line between the doing of the act and the relating of how one acted:

> . . . she had authority to sell goods and make a profit for defendant; then why not the authority to say how she sold them? Such quibbles bring the law justly in contempt with laymen.[24]

There is merit in such criticism when one looks to the basic premise of the principal's liability under the doctrine of *respondeat superior,* which:

> . . . by legal intendment, the act of the empoyee becomes the act of the employer, the individuality of the employee being identified with that of the employer. The latter is deemed constructively present; the act of the employee is his act, and he becomes accountable as for his own proper act or omission. The law imputes to the master the act of the servant, and if the act is negligent or wrongful proximately resulting in injury to a third person, the negligence or wrongful conduct is the negligence or wrongful conduct of the master for which he is liable. . . .[25]

Thus, it seems illogical to place liability on the principal for the negligent acts of his agent, and then fashion a doctrine that restricts the use of statements which patently show knowledge of carelessness in performance of the authorized act. This outlook is especially puzzling, because of necessity in modern times principals, such as corporations, can only function through the acts entrusted to their agents. Yet, as a result of the application of this doctrine, the agent's accident or mishap allows the principal, in effect, to sever the relationship when the agent is duly required to give an explanation concerning what transpired in carrying out the entrusted act.[26] Having such protection under the doctrine, it becomes unrealistic to assume that any principal will place

---

[24] 4 WIGMORE, EVIDENCE §1078, at 121 (1940).

[25] 35 AM. JUR. *Master and Servant* §543, at 973 (1941).

[26] An enlightening discussion of this point appears in Martin v. Savage Truck Lines Inc., 121 F.Supp. 417, 419 (D.D.C. 1954). In holding a truck driver's admission to an investigating officer as binding upon the principal, the court states:

> . . . to say in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer on the scene shortly thereafter, seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy. It is almost like saying that a statement against interest in the instant case could only have been made had the truck been operated by an officer or the board of directors of the corporation owning the truck; and trucks are not operated that way. . . .

authority in his agent to speak on tort matters which might be detrimental to the principal's own interest.[27]

Another criticism of the authorized admission approach relates to the weak basis of ultimate exclusion of such statements under the hearsay rule. In light of the relationship of principal and agent, with its apparent unity of interest in performance of the authorized act, it appears illogical to exclude the statement of the agent regarding the act. This same statement would be admissible if made by the principal and possibly would have been made by him had he been confronted by the same circumstances.[28] Granted, the application of the hearsay rule may be theoretically sound if we look only to the mere physical absence of the principal at the time the statement was made, but upon adopting a broader view based on the relationship, exclusion seems illogical. If the law deems the principal constructively present in the agent's acts, then why should not the same approach be followed as to declarations directly explaining its performance? It is not normal for an employee to make statements against his employer's interest;[29] this is especially true in reference to false statements. An employee realizes the dangers and repercussions that such statements may have on his employment.

The basic reason for excluding hearsay statements rests on the inherent doubt as to their trustworthiness. When the character and circumstances surrounding these types of statements are considered, it becomes difficult to realistically argue the issue of untrustworthiness contemplated by the rule. The human tendency for one involved in an accident or mishap is to deny, rather than to admit, fault for the event's occurrence. In such instances, if considerations of truth are to be paramount, to reason that a party will question himself as to the affect his declarations will have on his principal and then go on to make an untrue statement seems to be incongruous. It seems obvious that a party's reaction would be one of fear and concern as to what will happen to him as a result of the mishap. This fear for personal interests would induce an agent to think twice before making any statement that could have possible adverse effects and thus would negate the idea of the declarations being untrue. Realistically, absence of admissions is generally the case. This absence serves both to protect the agent's individual interest and the principal's interest. Conversely, why should the admission, if made, lack the characteristic of trustworthiness? This exclusion by the court serves as an unmerited protection to the principal's interest when the declaration is adverse to it. In effect, the authorized admission approach is inequitable, and serves to exclude relevant evidence because

---

[27] *Supra* note 17, at 257, 114 N.W.2d at 471.
[28] Myrick v. Lloyd, 158 Fla. 47, 27 So.2d 615 (1946).
[29] See McCORMICK, EVIDENCE 519 (1954).

the jury is placed in a position where it can merely draw inferences from occurrences on issues subject to actual explanation.

In light of this, it is noteworthy to mention the possibility that the Wisconsin court will liberalize the test as to admissibility of vicarious statements in the future. Justice Gordon in his concurring opinion in *Rudzinski v. Warner Theatres, Inc.*[30] took cognizance of the inequitable results that occur when the authorized admission doctrine is applied. His approach, though new to Wisconsin jurisprudence, is similar to past remedial proposals on the subject.[31] Under his test, the equities would be more readily balanced in that blanket exclusion of such declarations would become a thing of the past, while still providing the principal with adequate safeguards against the incompetent and untruthful statements of agents. The test offers the trial court a workable standard in determining the admissibility of declarations in that it would exclude the admissions of agents when:

a) He purports to speak on a subject beyond the scope of his duties or personal knowledge, or

b) He is shown to have an *animus* against his principal which negatives the trustworthiness of his declaration, or

c) His admission is made after his employment has been terminated.[32]

Analyzing this test, it can be seen that the principal change lies in the fact that *scope of duties,* rather than authorization to speak, becomes the criteria for determining the admissibility of these types of statements. This concept would encompass a view of the agent's position as well as its correlative duties in determining whether the agent was in fact qualified to comment on the happenings. The prime question becomes whether the act or omission, which is subject to litigation, naturally arises or flows out of the scope of his employment.

Applying this test to the hypothetical situation, the driver of the truck would be able to bind his principal with admissions about his careless driving, for such declarations naturally flow from the acts entrusted to him by his employer. Conversely, the truck driver would not be in the position to bind his principal on subjects such as corporate

---

[30] 16 Wis.2d 241, 114 N.W.2d 466 (1962). Justice Fairchild joined in the opinion.

[31] UNIFORM RULES OF EVIDENCE 63(9) provides:

> As against a party a statement would be admissable if made by the declarant at the hearing if, (a) the statement concerned a matter within the scope of agency or employment of the declarant for the party and was made before the determination of such relationship . . . or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant and the statement tends to establish that liability.

[32] *Supra* note 17, at 257, 114 N.W.2d at 474.

policy or operation, for these matters bear no relation to the scope of his employment.[33]

The other tenets encompassed in the test are self-explanatory. Elements such as personal knowledge, hostility towards one's employer, or termination of employment are additional factors to be examined to insure the needed trustworthiness of the agent's extra-judicial admission, before they would be allowed in evidence. On the whole, this test with its realistic premises would broaden the strict common law approach to a position more consonant with happenings in modern times.

CONCLUSION

The present legal tests of admissibility in the area of vicarious admissions seem unable to cope with the problem adequately. This is especially true where tort liability is concerned. The hearsay exception, which allows admissibility of spontaneous declarations or excited utterances under the res gestae doctrine, is a limited concept. In many of these cases, the stringent qualifications embodied in the rule cannot be met by the agent's statement. Absent these qualifications the authorized admission approach is the only avenue to admissibility of the statement. This avenue, in most cases, is virtually a dead-end, for few agents have the ability to speak for the principal regarding their torts or negligence. This narrowness makes the test one of exclusion. Relevant evidence, therefore, becomes inadmissible under rules of law that appear weak and unrealistic when applied to the facts of the case.

When one looks to the relationship of principal and agent, one finds a relation in which the law deems the principal constructively present in the acts of his agent. But why, upon mishap, should the principal be in the position effectively to sever this relationship as to admissions of negligence in the performance of the act?

Reflecting on these concepts, the opinion of the author is that the test offered by Justice Gordon should be adopted. This test presents a more realistic and equitable approach to the problem by tending to admit relevant testimony of what transpired while preserving a protection for the principal against the incompetent and untruthful statements of agents.

If a question remains as to whether, in fact, the alleged admission was made, the determination should be left to the trier of fact. Matters of credibility and weight of testimony truly rest within their province.

JEROME E. GULL

---

[33] *Supra* note 17, at 251, 114 N.W.2d at 471.