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EVIDENCE: WHETHER THE SPONTANEOUS DECLARATION OF AN AGENT MAY BE USED TO PROVE THE AGENCY

It was one and one-half hours after his regular work day when James Murphy struck and injured Thomas Ball, a minor, with his automobile. Ball brought a personal injury action against Murphy and his employer, through his next friend and mother. The child's mother testified that immediately after the injury and at the scene of the accident, Murphy "told me that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry."

At the trial a prima facie case of negligence was established against Murphy. But it was soon apparent that the statement by driver Murphy during the heat of the occasion would be crucial in attaching liability to his employer. It was admitted that Murphy was employed as a clerk in his stepfather's business concern. But both Murphy and his employer insisted his duties were inside clerical work and denied he was authorized to use his personal car on company business. The record shows that some months after the accident Murphy made calls on customers using his own car. He flatly denied making any statement whatsoever immediately after the accident.

With these facts before it a federal district court in *Murphy Auto Parts Co.* v. *Ball*[1] rendered judgment for the plaintiff. The judgment was challenged on appeal and the Court of Appeals held that the alleged out-of-court utterance by driver Murphy was admissible to show that Murphy had in fact been engaged in his employer's business at the time of the collision with the plaintiff pedestrian. The statement was admitted in evidence because the court concluded it qualified as a spontaneous declaration or excited utterance.

There has been occasional confusion in the courts as to what theory was being employed to admit or exclude the extrajudicial declaration of an agent. This uncertainty has resulted from the failure in some courts to draw a clear distinction between the vicarious admissions doctrine and the spontaneous declarations doctrine—two unrelated exceptions to the hearsay rule of evidence. Though the *Murphy* case unmistakably distinguishes the two doctrines, the confusion has been especially evidenced in like cases involving tortious liability where the declarant was an agent and the utterance was prompted by some exciting occurrence. One reason for the uncertainty is the indiscriminate use of the term *res gestae* to describe and qualify both situations.[2]

According to the majority rule a spontaneous declaration is a statement made immediately after an exciting event by a participant or spectator asserting the circumstances of the event as they were observed by him.[3] If the statement is made under the stress of the event anything said concerning the event is admissible in evidence. Such a rule is applicable whether or not the declarant is an agent, the theory behind the rule being wholly independent of agency principles for support. If the utterer also happens to be an agent his declaration is introduced testimonially, not to show authority but as bearing upon the facts

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[1] 249 F.2d 508 (D.C. Cir. 1957).

[2] Coryell v. Clifford F. Reid, Inc., 117 Cal. App. 534, 537, 4 P.2d 295, 296 (1931) (concurring opinion).

[3] Keefe v. State, 50 Ariz. 293, 297–98, 72 P.2d 425, 427 (1937); WIGMORE, EVIDENCE § 1745, 1747 (3d ed. 1940); MODEL CODE OF EVIDENCE rule 512 (1942).

of the event in question.[4] However, it must be emphasized that while the agent's declaration, though unauthorized, may be admissible as a spontaneous declaration to establish the agent's liability (*i.e.*, the agent's negligence), it is almost universally inadmissible to prove the *fact* of agency because it simply fails under such circumstances to bear upon the facts of the exciting event and so does not qualify as a spontaneous declaration.

To be distinguished is the situation in which the utterer is an agent but no exciting event has prompted his statement. Here the statement cannot qualify as a spontaneous declaration but may qualify as a vicarious admission. Normally, an agent's declaration concerning his authority is inadmissible against his employer because it is hearsay.[5] But under the vicarious admissions doctrine, based upon agency principles, the employer is charged with liability for the agent's admissions made in the course of employment.[6] It is as if the agent's statements were made by the employer himself. Such a rule does not permit the alleged agent's declarations to be received as admissions until the fact of agency is first admitted or shown by independent evidence.[7] Thus, if it can be proved that the agent's statements were authorized, admissions made by him in the scope of employment may be introduced testimonially against the employer.

That there are two distinct principles which invariably become confused is pointed out by Justice Cothran in his dissenting opinions in *Snipes* v. *Augusta-Aiken Ry. & Electric Corporation*[8] and *Chantry* v. *Pettit Motor Co.*[9] After drawing a distinction between "the declarations of an agent which are a part of the *res gestae*," (*i.e.*, spontaneous declarations) and "declarations which were made in the course of employment and while the matter in controversy was pending" (*i.e.*, vicarious admissions), Justice Cothran states:[10]

> [I]t is misleading and incorrect, manifestly, to hold that, before the declarations of an agent can be received, they must be shown to have been both a part of the *res gestae* and within the course of employment. They may be either or both, and admissible for that reason.

In California, the general view that the declarations of an agent are not admissible to prove the fact of agency or the extent of his power as an agent without independent evidence of the agency, is clearly established.[11] This view is in accordance with the principle underlying application of the vicarious admissions doctrine. Nevertheless, uncertainty as to the theoretical basis for admissibility of an agent's extrajudicial statements is also apparent in California decisions, though the majority opinion written by Justice Carter in *Lane* v.

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[4] MECHEM, AGENCY § 1793 (2d ed. 1914); WIGMORE, EVIDENCE § 1078 (3d ed. 1940).

[5] MECHEM, AGENCY § 95 (4th ed. 1952); RESTATEMENT, AGENCY § 285 (1933); 3 A.L.R. 2d 598 (1949).

[6] Franklin Bank v. Pennsylvania D. & M.S.N. Co., 24 Md. (11 G. & J.) 28, 33 (1839); CAL. CODE CIV. PROC. § 1870, ¶ 5; WIGMORE, EVIDENCE § 1078 (3d ed. 1940); MODEL CODE OF EVIDENCE rule 508 (1942).

[7] MECHEM, AGENCY § 1774 (2d ed. 1914); WIGMORE, EVIDENCE § 1078 (3d ed. 1940); RESTATEMENT, AGENCY § 286 (1933).

[8] 151 S.C. 391, 403–04, 149 S.E. 111, 115 (1929) (dissent).

[9] 156 S.C. 1, 14, 152 S.E. 753, 757 (1930) (dissent).

[10] Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 582, 160 P.2d 21, 24 (1945), quoting from WIGMORE, EVIDENCE § 1756 a (3d ed. 1940), quoting from Snipes v. Augusta-Aiken Ry. & Electric Corporation, 151 S.C. at 403–04, 149 S.E. at 111.

[11] Swinnerton v. Argonaut Land and Development Co., 112 Cal. 375, 44 Pac. 719 (1896).

Pacific Greyhound Lines[12] has done much to dispel this confusion. Quoting from Justice Cothran's dissent in the *Snipes* case, and holding that the spontaneous declaration of an agent need not have been made in the scope of the agent's employment, the California court concludes the existence of the employer-employee relationship is immaterial where the utterance is admissible under the spontaneous declaration exception.

Manifestly to keep the two principles in different camps is to free the agent's *spontaneous declaration* from the requirements imposed by the vicarious admissions rule and allow his declaration the same respect in regard to admissibility as would be allowed a person not an agent.[13]

To obtain an adequate understanding of the spontaneous declaration doctrine as a separate and distinct exception to the hearsay rule of evidence an explanation of this rule is necessary. McCormick defines hearsay evidence as "testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[14] It should be noted that the reason for the rule is not to prevent a witness in court from telling a falsehood. The witness is already under oath and subject to prosecution for perjury. Rather, the reason for the rule is to compensate for the impossible task of checking the accuracy and truth of the one who made the statement. The rule excludes only such statements as are being offered to assert the truth of the assertions testimonially. Its purpose is to exclude testimony not likely to be very reliable or trustworthy since there is no opportunity to cross-examine when the statement was made.

The main purpose for exclusion of hearsay testimony is negated where the probability of substantial reliability and trustworthiness appears in the circumstances surrounding the utterance. Thus the spontaneous declaration arises as an exception to the hearsay rule, for under the stress of nervous excitement the reflective processes of the utterer may be stilled sufficiently for him to express his real belief or impressions.[15] In short, under certain circumstances of external shock, the utterance may be taken as trustworthy since the utterer had no time to reflect or contrive. However, the principle is not absolute, and herein lies the difficulty in applying it to a particular fact situation.

Wigmore lists three practical limitations of the principle allowing the admissibility of the spontaneous declaration: (a) There must be a startling occasion to produce the nervous excitement and render the utterance spontaneous and unreflecting; (b) the utterance must have been before there has been time to contrive or misrepresent, though it need not be strictly contemporaneous; and (c) the utterance must relate to the circumstances of the occurrence preceding it.[16]

Most litigation in decided cases is in regard to the proper application of limitation (b), but it is in regard to limitation (c) that this note must primarily concern itself. Though limitation (c) is cautionary rather than a logically neces-

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[12] 26 Cal.2d 575, 160 P.2d 21. See White v. Los Angeles Ry. Corp., 73 Cal. App. 2d 720, 167 P.2d 530 (1946).

[13] RESTATEMENT, AGENCY § 289, comment *d* (1933).

[14] MCCORMICK, EVIDENCE § 225 (1954).

[15] WIGMORE, EVIDENCE § 1745, 1747 (3d ed. 1940).

[16] *Id.* § 1750.

sary restriction, an *additional* limitation requiring the declaration to illuminate or explain the act or event has been added by most courts.[17] Wigmore describes this additional limitation as one of the several spurious offshoots from the "verbal act" doctrine.[18] There is no fundamental reason for the application of this spurious restriction to the general limitation (c) since it has little relevance to trustworthiness.[19]

By adopting the spontaneous declaration doctrine as justification for the admissibility of an alleged agent's statements to prove the agency, the *Murphy* case is illustrative of a liberal interpretation of Wigmore's limitation (c) to prove the agency. Nevertheless, the holding has but scant support in other American jurisdictions. The Supreme Court of South Carolina would tend to favor such logic, as evidenced by the decision in the *Chantry* case. In this personal injury action a statement was made by a chauffeur immediately after the accident. He stated he was working for the defendant company, and to telephone them and they would get him out of trouble. This was held admissible on the basis of the spontaneous declaration exception without reference to whether the agency had been proved by other evidence. Justice Cothran's dissent was based on the failure of the declaration to explain, describe or elucidate the character of the act.[20]

The *Chantry* decision was followed by the same court in *Lowie* v. *Dixie Stores*[21] where the question was whether the driver was the defendant's agent. Though theere was no independent evidence of an agency relationship, the court held admissible as a part of the *res gestae* the driver's statement immediately after the accident that he worked at the defendant's store and was out delivering groceries.

Another decision gives full support to the South Carolina view, at least in so far as proving the scope of employment by means of the hearsay exception. In *Mancuso* v. *Hurwitz-Mintz Furniture Co.*[22] the court held admissible as a spontaneous declaration a statement of a truck driver immediately upon the happening of the accident that he was going to the garage. The main issue was whether the driver, who had previously departed from his employer's work on a personal mission, had returned to the defendant's employ at the time of the accident. The court stated the driver's declaration was not a statement that he was acting as an agent. Rather, it was a statement of fact showing just what the driver was doing from which the court could draw the legal conclusion of agency.

One line of cases admits that where the activity is generally within the scope of authority as shown by independent evidence, the out-of-court utterances of an agent may be admitted under the spontaneous declaration exception.[23] Another

[17] *Id.* § 1750, 1754.

[18] *Id.* § 1752. The "verbal act" doctrine of evidence is based upon the assumption that where some act or conduct has no legal significance, or at most an ambiguous one, the statements accompanying the act are admissible in evidence for the purpose of removing the ambiguity and giving definite legal effect to the act or conduct. See generally WIGMORE, EVIDENCE § 1766–92 (3d ed. 1940) for full discussion of this doctrine.

[19] MCCORMICK, EVIDENCE § 272, n. 15 (1954).

[20] 156 S.C. at 16, 152 S.E. at 758.

[21] 172 S.C. 468, 174 S.E. 394 (1934).

[22] 183 So. 461 (La. App. 1938).

[23] Gardner v. Marshall, 56 Cal. App.2d 62, 132 P.2d 833 (1942); Smith v. Miller, 209 N.C. 170, 183 S.E. 370 (1936).

line of cases indicates that where there is independent evidence of agency, the out-of-court utterances of an agent are admissible under the exception to prove scope of employment.[24] But frequently such declarations are rejected by the courts because they fail to throw light upon or explain the exciting event and therefore do not qualify as spontaneous utterances.[25] The reasoning of the judges in this latter line of cases accompanies the idea that the spontaneous declaration exception can be a dangerous rule and should be strictly construed.

At least one case, while excluding evidence of an agent's statement because it failed to throw light upon the accident, suggested that even if it had qualified as a spontaneous utterance it would be to no avail because the rule prohibiting admissibility of an agent's declarations concerning the existence or extent of authority prevails over the spontaneous declaration exception.[26]

The California tendency is to follow the majority of courts elsewhere in regard to the application of the spontaneous declaration doctrine. This exception to the hearsay rule is incorporated generally into the Code of Civil Procedure to permit as admissible evidence the declarant's extrajudicial statements where the declaration forms a part of the transaction.[27] Existing California decisions tend to hold to the strict interpretation of the spontaneous declaration exception in regard to the spurious limitation requiring the utterance to illuminate or explain the exciting event.[28] Wigmore's list of general limitations for the spontaneous declaration exception, including the limitation requiring the statement to relate to the circumstances of the occurrence preceding them, has been quoted often as authority by the courts.[29]

Whether California has absolutely adopted the aforementioned spurious limitation is at least questionable, however, in the light of one recent decision by a district court of appeal. In *Dillon v. Wallace*[30] a store patron slipped on a piece of parsley. The store manager's statement upon finding the patron in pain at the scene of her fall that she should not worry about the injury and that "we" had insurance and would pay her bills, was admissible against the store owner as a spontaneous declaration. The court relied on the general limitation that the statement must be relevant to the occurrence but used no language characteristic of the spurious limitation that the statement must illuminate or explain the event. The statement held admissible here did not illuminate or explain the exciting event which led to the manager's spontaneous utterance,

[24] American Fidelity and Casualty Co. v. McWilliams, 55 Ga. App. 658, 191 S.E. 191 (1937); Piedmont Operating Co. v. Cummings, 40 Ga. App. 397, 149 S.E. 814 (1929); Barz v. Fleischmann Yeast Co., 308 Mo. 288, 271 S.W. 361 (1925); Western Union Telegraph Co. v. Brown, 297 S.W. 267 (Tex. Civ. App. 1927).

[25] Dudley v. Preston Motor Co., 51 F.2d 8 (6th cir. 1931); Jackson v. Goode, 49 A.2d 913 (D.C. Mun. App. 1946); Deeter v. Penn. Mach. Co., 311 Pa. 291, 166 Atl. 846 (1933); Adams v. Quality Service Laundry and Dry Cleaners, 253 Wis. 334, 34 N.W.2d 148 (1948).

[26] Myers v. McMaken, 133 Neb. 524, 276 N.W. 167 (1937).

[27] CAL. CODE CIV. PROC. § 1850: "Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction."

[28] People v. Mahoney, 201 Cal. 618, 258 Pac. 607 (1927) (criminal prosecution).

[29] Showalter v. Western Pac. Ry. Co., 16 Cal.2d 460, 468, 106 P.2d 895, 900 (1940). See Wilcox v. Berry, 184 P.2d 939, 940–41 (Cal. App. 1947). (Heard in the California Supreme Court where the evidence was held admissible on another ground and the spontaneous declaration question was not passed upon. 32 Cal.2d 189, 195 P.2d 414 (1948)).

[30] 148 Cal. App.2d 447, 306 P.2d 1044 (1957).

indicating a possible adoption of the liberal application of the spontaneous declaration exception.

In view of the recognition by many courts today of the true distinction between the vicarious admissions and the spontaneous declaration principles as separate theoretical bases for the admissibility of an agent's extrajudicial statements, it would seem appropriate for the courts to seek clarification of the requirements and limitations of the two principles. The court in the *Murphy* case clearly defines the true boundaries of the general limitations attached to the spontaneous declaration exception on a rational basis.

Where the courts have been ready to discard other spurious limitations borrowed from the "verbal act" doctrine, such as the requirement that the words must be by the actor himself[31] and the requirement that the words must be precisely contemporaneous with the act,[32] it seems reasonable that the limitation making it necessary for the words to explain or illuminate the act should also be rejected as an absolute restriction. The test for receiving the utterance should be true spontaneity—the reason for admissibility resting squarely upon its relevance as a trustworthy statement. "The purport of the statement and its relation to the exciting event should be merely matters to be considered in determining whether the declaration was spontaneous or was reflective."[33]

Though contrary to the existing law of evidence as propounded by most courts, the *Murphy* case might well serve notice of a possible change.

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[31] MODEL CODE OF EVIDENCE rule 512 (1942).
[32] Showalter v. Western Pac. Ry. Co., 16 Cal.2d 460, 465, 106 P.2d 895, 898 (1940).
[33] MCCORMICK, EVIDENCE § 272, n. 15 (1954).