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Touro Law Review

Volume 11 | Number 1

Article 14

1994

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Recommended Citation

Wallman, David J. (1994) "Employees' Admissions in New York: Time for a Change," *Touro Law Review*. Vol. 11: No. 1, Article 14.

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EMPLOYEES' ADMISSIONS IN NEW YORK: TIME FOR A CHANGE

INTRODUCTION

Imagine the following scenario: A truck driver for X corporation gets into an accident. Shortly thereafter, the driver tells a police officer that the brakes in his vehicle have given him nothing but trouble and that the company's mechanic never fixed them. In a subsequent action against X company, the police officer seeks to testify to what the driver told him. In New York, this testimony would be inadmissible hearsay, since the driver had no authority to speak for the corporation. However, under federal law, the statement would be received as an admission by the driver, since the operation of the truck is a matter concerning the scope of the driver's employment. Part I of this Comment will trace the origins of the common law speaking authority rule as applied in New York. Part II will explore the relaxation of the speaking authority rule under Federal Rule of Evidence 801(d)(2)(D). This Comment will conclude by arguing that New York should adopt the federal rule.

I. EMPLOYEES' ADMISSIONS IN NEW YORK

A. General Rule: Common Law Speaking Authority

Under current New York law, "the hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority."¹ New York thus adopts the traditional common law rule that the extra-judicial statements of an agent can be received against the principal only if the agent has what is often called "speaking authority." These "speaking agents" have the authority to bind the principal "in a

1. *Loschiavo v. Port Auth. of N.Y.*, 58 N.Y.2d 1040, 1041, 448 N.E.2d 1351, 1352, 462 N.Y.S.2d 440, 441 (1983).

legal evidentiary sense.”² A speaking agent’s authority may include an admission of the principal’s liability for injury to others “if the agent’s responsibility extends that far.”³

Since the authority to do an act does not always carry with it the authority to speak about it,⁴ the agent must have the authority to make binding statements on behalf of the principal in order for his statements to be deemed admissible. Additionally, the proponent must prove that the out-of-court statement was made during the continuance of the agency.⁵ Where proof of employment is absent, the statement will not be admitted.⁶

2. *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 252 (D. Kan. 1988).

3. *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 N.Y.2d 203, 206, 225 N.E.2d 527, 529, 278 N.Y.S.2d 826, 829 (1967). Although New York’s evidentiary rule permitting statements made by agents possessing “speaking authority” is most commonly applied in civil cases, it is equally applicable in the criminal context. *People v. Rivera*, 58 A.D.2d 147, 148, 396 N.Y.S.2d 26, 28 (1st Dep’t 1977). Statements made by attorneys, acting in their capacity as agents, in open court, have thus been held admissible against the defendant under the traditional common law rule, as well as the well settled principles of evidence. *See, e.g., Yannon v. RCA Corp.*, 100 A.D.2d 966, 475 N.Y.S.2d 107 (2d Dep’t 1984); *Bellino v. Bellino*, 75 A.D.2d 630, 427 N.Y.S.2d 630 (2d Dep’t 1980); *People v. Rivera*, 58 A.D.2d 147, 396 N.Y.S.2d 26 (1st Dep’t 1977).

4. *See* RESTATEMENT (SECOND) OF AGENCY § 288(2) (1957) (“Authority to do an act or to conduct a transaction does not itself include authority to make statements concerning the transaction.”); *see also Weldner v. Whitman*, 18 A.D.2d 765, 235 N.Y.S.2d 103 (4th Dep’t 1962) (holding that “the question is one of agency; an employee’s status as an agent must be shown before his statements would be binding upon his employer”); *Schner v. Simpson*, 286 A.D. 716, 146 N.Y.S.2d 369 (1st Dep’t 1955) (holding that “the agent’s authority to . . . make admissions or declarations must first be shown . . . the stated admission was not admissible solely on proof of employment”).

5. *See* MCCORMICK ON EVIDENCE § 267, at 788 (Edward W. Cleary ed., 3d ed. 1984) (“[W]hile the employment continues, the employee is not likely to make statements unless they are true.”); *see also Nokolny v. Painter*, 653 F.2d 1164, 1171-72 (7th Cir. 1981); *Martin v. Savage Truck Line*, 121 F. Supp. 417, 418 (D. D.C. 1954); *Loschiavo v. Port Auth. of N.Y.*, 86 A.D.2d 624, 627-28, 446 N.Y.S.2d 358, 362 (1st Dep’t 1982), *aff’d*, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983).

6. *See, e.g., Loschiavo v. Port Auth. of N.Y.*, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983); *Kelly v. Diesel Constr. Div. of Carl*

However, the agent's out-of-court statements may not be used as evidence of the existence of the agency relationship or his authority. According to Wigmore, "the *fact* of agency must . . . be somehow evidenced *before the alleged agent's declarations* can be received as admissions. . . . [T]he use of the alleged agent's hearsay assertions that he is an agent would for that purpose be inadmissible, as begging the very question."⁷

For example, in *Vangersky v. Moogan*,⁸ the plaintiff sought to introduce the out-of-court testimony of the employee of a veterinarian in order to show that the employee was on an emergency call on behalf of a sick dog when the accident occurred.⁹ The Appellate Division, Second Department held that the employee's extrajudicial statement "was not admissible [against the employer] under the admissions exception . . . for the purpose of establishing that [the employee] was performing a duty owed to his employer at the time of the accident."¹⁰

The determination of what is considered within the scope of authority is governed by the laws of agency rather than by the laws of evidence.¹¹ Section 286 of the Restatement (Second) of Agency limits the admissibility of an agent's¹² statements to

A. Morse, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974); *Kelleher v. F.M.E. Auto Leasing Corp.*, 192 A.D.2d 581, 596 N.Y.S.2d 136 (2d Dep't 1993); *McNerney v. New York Polyclinic Hosp.*, 18 A.D.2d 210, 238 N.Y.S.2d 729 (1st Dep't 1963).

7. 4 JOHN HENRY WIGMORE, EVIDENCE ON TRIALS AT COMMON LAW § 1078, at 176 (James H. Chadbourn ed., 1972). See *Boston Old Colony v. Trivedi*, 93 Misc. 2d 566, 403 N.Y.S.2d 169 (Civ. Ct. N.Y. County 1978).

8. 128 A.D.2d 699, 513 N.Y.S.2d 199 (2d Dep't 1987).

9. *Id.* at 700, 513 N.Y.S.2d at 200.

10. *Id.*

11. RESTATEMENT (SECOND) OF AGENCY § 286 (1957). Section 286 states: In an action between the principal and a third person, statements of an agent to a third person are admissible in evidence against the principal to prove the truth of 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.

Id.

12. RESTATEMENT (SECOND) OF AGENCY § 1 (1957). Section one defines an agent as follows:

those “concerning matters upon which the agent is authorized to speak.”¹³ Moreover, the question of an agent’s authority to make declarations is a factual determination to be made at trial.¹⁴

Whether or not someone is deemed a “speaking agent” will also depend on the situation. For example, the out-of-court declaration of a corporate officer acting in his official capacity can be received against the corporation.¹⁵ In a partnership, the statements of one partner regarding the partnership may be received in evidence as admissions against the other partner.¹⁶ However, the fact that a couple is married does not by itself make each spouse the agent of the other.¹⁷

The law in New York is especially vague regarding the authority of managers and supervisors to speak for their principals. Part of the confusion is caused by the use of the term *res gestae*.¹⁸

For example, in *Golden v. Horn & Hardart*,¹⁹ the plaintiff slipped and fell while entering a restaurant. At trial, the plaintiff testified that, after the accident, the assistant manager said to the busboy, “I thought I told you to take care of those stairs.”²⁰

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom the action is to be taken is the principal.

(3) The one who is to act is the agent.

Id.

13. RESTATEMENT (SECOND) OF AGENCY § 286 cmt. B (1957).

14. RESTATEMENT (SECOND) OF AGENCY § 286 (1957).

15. *See, e.g.*, *Fox v. Manchester*, 183 N.Y. 141, 75 N.E. 1116 (1905).

16. *See* N.Y. PARTNERSHIP LAW § 22 (McKinney 1988) (“An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership.”).

17. *See* *Le Long v. Seibrecht*, 196 A.D. 74, 75-76, 187 N.Y.S. 150, 152 (2d Dep’t 1921) (holding that neither the relationship of husband and wife nor the fact that husband acted as wife’s agent in sale of property was sufficient to establish that husband had authority to write letter to wife’s attorney).

18. *See infra* notes 33-52 and accompanying text.

19. 244 A.D. 92, 278 N.Y.S. 385 (1st Dep’t 1935), *aff’d*, 270 N.Y. 544, 200 N.E. 309 (1936).

20. *Id.* at 93, 278 N.Y.S. at 386.

However, the appellate division held that the assistant manager's statement was inadmissible since it was neither part of the *res gestae*, nor was it made within the scope of his authority to bind the principal.²¹

Yet, it is difficult to reconcile the holding in *Golden* with the later cases of *Bransfield v. Grand Union Co.*,²² and *Brusca v. El Al Israel Airlines*.²³ In *Bransfield*, the plaintiff was permitted to testify that shortly after she fell, the manager said to a clerk that he thought he told him to clean up a broken egg.²⁴ The court of appeals affirmed without opinion.²⁵ In *Brusca*, the Appellate Division, Second Department held that the statement of a job superintendent was admissible since it was within the scope of his authority "to inspect the job site to make certain that it was in safe condition."²⁶

The "speaking agent" rule was most recently affirmed in *Loschiavo v. Port Authority of New York*,²⁷ in which the New York Court of Appeals refused to change this "widely criticized rule."²⁸ In so doing, the court of appeals declined Judge Lazer's invitation to remedy the problems caused by strict adherence to the "speaking authority" doctrine.²⁹ Instead, the court preferred

21. *Id.* at 94, 278 N.Y.S. at 387.

22. 17 N.Y.2d 474, 214 N.E.2d 161, 266 N.Y.S.2d 981 (1965).

23. 75 A.D.2d 798, 427 N.Y.S.2d 505 (2d Dep't 1983).

24. *Bransfield*, 17 N.Y.2d at 474, 214 N.E.2d at 161, 266 N.Y.S.2d at 981.

25. *Id.*

26. *Brusca*, 75 A.D.2d at 800, 427 N.Y.S.2d at 508.

27. 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S. 2d 440 (1983).

28. *Id.*

29. In the appellate division case of *Loschiavo*, Judge Lazer in his dissenting opinion wrote:

Bransfield, *Brusca* and *Golden* . . . demonstrate the inherent incongruity of basing admissibility on the scope of an agent's authority to speak. Agents are rarely employed to make damaging statements on behalf of their employers, and judicial efforts to authorize the admission of such statements while pretending adherence to the outmoded traditional stricture constitute an intellectually unacceptable method of joining the modern rule to the constraints of *stare decisis*.

86 A.D.2d 624, 628, 446 N.Y.S.2d 358, 362 (2d Dep't 1982) (Lazer, J., dissenting).

to leave the matter in the hands of the state legislature which was contemporaneously considering a modification of the hearsay rule.³⁰

In contrast to the above situations, an agent's report to his employer can be received against the principal even if the report is not based on personal knowledge.³¹ Thus, "an admission by a party or the party's agent is receivable even though it was derived wholly from hearsay."³²

B. Res Gestae

If agency or authority cannot be shown, the statement may still be admissible under another hearsay exception.³³ This rule has

30. The 1983 Proposed Code of Evidence evolved from a draft form of 1981. In 1982, it was offered to the legislature where it was referred to codes committees to be considered. In 1983, the Senate and Assembly codes and Judiciary Committees held joint hearings and revisions were made through 1984. In 1985, it was introduced to the Senate and Assembly and remained there until 1988. In 1989, a new draft seeking to codify current law rather than change it, was reviewed and then, in 1990, with revisions, was submitted to legislature. It was redrafted again after public hearings, and resubmitted to the Governor in 1991. In the 1991-92 session of the legislature it was stated again in the Assembly Codes Committee. *See generally* Barbara C. Salken, *To Codify or not to Codify-That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992). *See also* C. Raymond Radigan, *Judicial Section Opposes Proposed Evidence Code*, 205 N.Y. L.J. 44 (Jan. 23, 1991); *Let's Think Before We Leap: Why Should the Law of Evidence Be Codified?*, 207 N.Y. L.J. 1 (May 13, 1992).

31. *See* *Georges v. American Export Lines*, 77 A.D.2d 26, 33, 432 N.Y.S.2d 165, 171 (1st Dep't 1980); *Brusca v. El Al Airlines*, 75 A.D.2d 798, 800, 427 N.Y.S.2d 505, 508 (2d Dep't 1980) ("The law does not distinguish for the purpose of admissibility and relevancy between hearsay statements based on knowledge and hearsay statements based on other hearsay."); *Cianci v. Board of Educ.*, 18 A.D.2d 930, 238 N.Y.S.2d 547, 550 (2d Dep't 1963) (holding that admissions made by an employer's authorized agent were admissible against the principal notwithstanding the agent's lack of personal knowledge). *But see* 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN ON EVIDENCE ¶ 801(d)(2)(C)[1], at 277-80 (4th ed. 1985).

32. *Georges*, 77 A.D.2d at 33, 432 N.Y.S.2d at 171.

33. Section 289 of the Restatement (Second) of Agency states: "Evidence of statements of agents, whether or not such statements are authorized, is admissible in favor of and against the principal, if admissible under the general

often led courts to consider, especially in personal injury cases, the question of whether the statement constitutes part of the *res gestae*. In Latin, *res gestae* literally means "things done."³⁴ However, its use in legal texts seems to defy definition³⁵ and has been criticized by many commentators.³⁶

The drafters of the federal rules wisely eliminated the term *res gestae* in favor of creating separate and distinct exceptions to the rule against hearsay.³⁷

In sharp contrast to the federal law, the New York courts do not effectively distinguish the several hearsay exceptions in this area. Rather, statements accompanying relevant acts,³⁸

rules of evidence as to the admissibility of such statements by persons not agents." RESTATEMENT (SECOND) OF AGENCY § 289 (1957).

34. BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

35. See *Williams v. Melton*, 568 F. Supp. 104, 107 (N.D. Ga. 1983) ("The difficulty of formulating a description of the *res gestae* [sic] which will serve for all cases, seems insurmountable.").

36. See, e.g., MCCORMICK, *supra* note 5, § 288 n.6, at 836 ("The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.'" (quoting Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922))).

37. See FED. R. EVID. 803(1) (present sense impressions); FED. R. EVID. 803(2) (excited utterances); FED. R. EVID. 803(3) (then existing mental, emotional, or physical condition); FED. R. EVID. 803(4) (statements for purposes of medical diagnosis or treatment). While some federal judges will occasionally use the disfavored phrase "*res gestae*," the Third Circuit in *Miller v. Keating*, 754 F.2d 507 (3d Cir. 1985), declared that as far as federal courts are concerned, "*res gestae*" is no longer part of the law of evidence." *Id.* at 509.

38. See, e.g., *Hine v. New York Elevated R.R. Co.*, 149 N.Y. 154, 162 (1896).

When the act or transaction is itself admissible, statements or declarations of the party at the time, calculated to explain and elucidate the character and quality of the act and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible as part of the *res gestae*.

Id.

statements of pain and suffering,³⁹ declarations of state of mind,⁴⁰ spontaneous declarations,⁴¹ and agents' statements⁴² have all been defined as part of the nebulous *res gestae* exception to the rule against hearsay.

For example, in *Schner v. Simpson*,⁴³ the plaintiff collided with one of the defendant company's employees and was seriously injured when she fell to the ground. At trial, Mrs. Schner testified that the employee said to her, "I'm sorry I knocked you down, but I think you will be able to get up." On appeal, the employee's statement was not considered an admission, since

39. See, e.g., *Kennedy v. Rochester City & Brighton R.R. Co.*, 130 N.Y. 654, 656, 29 N.E. 141, 143 (1891) ("Evidence of exclamations which are natural concomitants and manifestations of pain and suffering are . . . admissible Unless such complaints form a part of the *res gestae* they cannot be admitted.").

40. See, e.g., *Matter of Putnam*, 257 N.Y. 140, 177 N.E. 140 (1931) (holding that testimony of testatrix's feelings towards her attorney can be admitted to show state of mind, but not to prove the facts asserted).

41. See, e.g., *Swensson v. New York Albany Despatch Co.*, 309 N.Y. 497, 131 N.E.2d 902 (1956). In *Swensson*, the court of appeals held that a driver's statement that his brakes did not work was admissible as a spontaneous declaration. The court further held that the statement was part of the *res gestae*, since he "made the spontaneous statement in the course of, and within ten seconds of the final happening of, the startling event, and was made before he had either the time, opportunity or inclination to fabricate." *Id.* at 503-04. The spontaneous declarations exception to the rule against hearsay is also referred to as "excited utterances."; see *People v. Davis*, 610 N.Y.S.2d 63 (2d Dep't 1994) (holding that victim's statements, made fifteen minutes after he was shot, were admissible as excited utterances since he was still under the stress of the shooting); see also *Schner v. Simpson*, 286 A.D. 716, 146 N.Y.S.2d 369 (1st Dep't 1955). The court of appeals in *People v. Brown*, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993), recently expanded the scope of admissible statements by recognizing the "present sense impression" exception to the rule against hearsay. Under this exception, "spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence." *Id.* at 734, 610 N.E.2d at 373, 594 N.Y.S.2d at 700. In so holding, the New York Court of Appeals rejected the argument that "spontaneity and contemporaneity, without stress of nervous excitement, do not produce the requisite reliability." *Id.*

42. See, e.g., *Luby v. Hudson River R.R. Co.*, 17 N.Y. 131 (1858).

43. 286 A.D. 716, 146 N.Y.S.2d 369 (1st Dep't 1955).

“there was no proof that the employee had authority to bind his employer.”⁴⁴ As to whether the statement was part of the *res gestae*, the court held that it was not admissible because it was not a verbal act, but rather a statement made by an agent who had no authority to make confessions.

Specifically, the court in *Schner* held that the statement was not admissible under the spontaneous exclamation exception to the hearsay rule,⁴⁵ since it was considered to be an apology and an expression of opinion⁴⁶ rather than an exclamation. Yet this holding seems to beg several questions. How does one tell the difference between an opinion and an exclamation? What if someone exclaims an opinion? How much time must pass before the statement is no longer spontaneous? Rather than attempting to answer these questions, it would be far better to concentrate on the agent's authority to make the statement in question. Additionally, expanding the admissions exception to statements concerning matters within the scope of employment will avoid courts having to stretch the limits of the speaking agent rule in order to obtain a just result.

44. *Id.* at 718, 146 N.Y.S.2d at 371.

45. *Schner*, 286 A.D.2d at 719, 146 N.Y.S.2d at 373.

The general principal of the spontaneous-exclamation rule is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock.

Id. The court also noted the test that governs the spontaneous exclamation exception is “whether the declarations are shown to have been uttered spontaneously so that the declarant obviously had no time or opportunity to fabricate.” *Id.*

46. JEROME PRINCE, RICHARDSON ON EVIDENCE § 361, at 326 (10th ed. 1973) (“As a general rule witnesses must testify to facts and not to their opinions and conclusions drawn from the facts. It is the sole province of the jury to draw inferences from facts.”). However, the opinion rule is subject to numerous exceptions. Sometimes, there is simply no other way for the witness to explain the results of his observations. *See, e.g.,* *Collins v. New York Central & Hudson River R.R. Co.*, 109 N.Y. 243, 16 N.E. 50 (1888); *People v. Eastwood*, 14 N.Y. 562 (1856) (holding that lay witness may testify that in his opinion, the subject looked drunk).

New York should follow the federal model since the elimination of the term *res gestae* properly focuses the inquiry towards specific exceptions to the hearsay rule. This focus is especially important when dealing with an agent's out-of-court statement. Determining whether the statement was made within the scope of the agent's authority to make the statement is an entirely different matter than determining when a statement was made as is the case of a spontaneous exclamation.

As Professor Wigmore observed, the term *res gestae* has often been employed to define the limits of the spontaneous declaration exception and has also been incorrectly used to designate the scope of the agent's authority.⁴⁷ As a result, spontaneous exclamations are sometimes discussed together with admissions "as if they were but one principle."⁴⁸ However, the results of the application of the two principles are very different: spontaneous exclamations may be received against either party while an agent's admission can be received only against the employer.⁴⁹ The confusion caused by the dual use of the phrase "*res gestae*" is apparent in several New York cases.

For example, in the often-cited case of *Luby v. Hudson River R.R. Co.*,⁵⁰ the trial court admitted a policeman's testimony consisting of a statement made to him by the driver of the railroad car. The police officer testified that the driver told him that he could not stop the car because the brakes were out of order. In holding the statement inadmissible, the New York Court of Appeals discussed *res gestae* and admissions together and stated that:

The declarations of an agent . . . do not in general bind the principal. Where his acts will bind, his statement and admissions respecting the subject matter of those acts will also bind the

47. See WIGMORE, *supra* note 7, § 1078.

48. WIGMORE, *supra* note 7, § 1078. Wigmore went on to say: "That there are two distinct and unrelated principles involved must be apparent; and the sooner the courts insist on keeping them apart, the better for the intelligent development of the law of evidence." WIGMORE, *supra* note 7, § 1078. See, e.g., *Luby v. Hudson River R.R. Co.*, 17 N.Y. 131 (1858).

49. See WIGMORE, *supra* note 7, § 1078.

50. 17 N.Y. 131 (1858).

principal if made at the same time and so that they constitute part of the *res gestae*. . . . They must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time.⁵¹

Accordingly, the statement was not a part of the driver's act for which the defendant was sued.⁵²

II. EMPLOYEES' ADMISSIONS UNDER THE FEDERAL RULES

A. Origins

While the Federal Rules of Evidence incorporate the traditional "speaking authority" exception,⁵³ the rules depart from the common law by providing that a statement by an agent may also be admissible if it concerns "a matter within the scope of his agency or employment and [is] made during the existence of the relationship."⁵⁴ Thus, for example, in *Staheli v. University of Mississippi*,⁵⁵ a university professor seeking redress for the denial of his tenure application, sought to introduce a colleague's statements. The statements by the colleague were that the professor's prior actions⁵⁶ resulted in animosity between the professor and the university resulting in tenure not being granted.⁵⁷ The *Staheli* court held that because the declarant was

51. *Id.*

52. *Id.* at 133. The declaration was "not made at the time of the act, so as to give it quality and character." *Id.* In addition, the court of appeals treated the driver's statement as both an excuse for his actions and as an effort to place the blame on his principals. *Id.*

53. FED. R. EVID. 801(d)(2)(C) excludes from the definition of hearsay "a statement by a person authorized by the party to make a statement concerning the subject." *Id.*

54. FED. R. EVID. 801(d)(2)(D).

55. 854 F.2d 121 (5th Cir. 1988).

56. *Id.* at 122.

57. *Id.* at 127. "Dr. Staheli sought to introduce [the] statement as a non-hearsay admission of a party-opponent under FED. R. EVID. 801(d)(2)(D)." *Id.*

not involved in the tenure decision, the matter was not within the scope of the declarant's agency relationship.⁵⁸

The addition of Rule 801(d)(2)(D) reflects increased dissatisfaction with the common law rule.⁵⁹ Strict application of the "speaking authority" requirement often led to the exclusion of helpful and valuable evidence.⁶⁰ The decisions in *Martin v. Savage Truck Line*⁶¹ and *KLM Royal Dutch Airlines v. Tuller*⁶² assisted in the development of rule 801(d)(2)(D). In *Martin*, the driver of a truck, deceased at the time of trial, told a police officer that he was speeding when the accident occurred.⁶³ Under the traditional common law rule, the driver's admission would have been excluded because he did not have the authority to make such a statement. However, Judge Morris, writing for the District Court in the District of Columbia, held that the statement was admissible as an admission against the employer.

To say . . . that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck . . . and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer . . . seems to me to erect an untenable fiction 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 [c]orporation owning the truck; and trucks are not operated that way. . . . [The agency] exists regardless of whether the statement is made at the moment of the impact, or some minutes later to an investigating officer⁶⁴

58. *Id.* The court affirmed the district court's refusal to admit the statement.

59. FED. R. EVID. 801(d)(2)(D) advisory committee's note.

60. *Id.*

61. 121 F. Supp. 417 (D. D.C. 1954).

62. 292 F.2d 775 (D.C. Cir. 1961).

63. *Martin*, 121 F. Supp. at 418.

64. *Id.* at 419. This is also acknowledged in the advisory committee's note to Rule 801(d)(2)(D). "[F]ew principals employ agents for the purpose of making damaging statements." FED. R. EVID. 801 (d)(2)(D) advisory committee's note.

This holding was soon followed by *KLM Royal Dutch Airlines v. Tuller*.⁶⁵ In *KLM*, an airplane's radio operator told an inspector, eight to ten hours after the crash, that he did not send a distress message because "[he] first [thought] of [his] skin and then of the microphone."⁶⁶ Judge Burger upheld the receipt of the admission. He first noted that the radio operator was an employee of KLM when he made the statement in question. It was also the operator's duty to report to the Inspector of Accidents after the crash. Thus, consistent with Proposed Model Code of Evidence rule 508,⁶⁷ the statement "concerned a matter within the scope of the declarant's employment," since he could have sent the mayday signal had he been at his post. An explanation of his failure to send the signal was well within the scope of his duties.

In so ruling, Judge Burger noted the deficiencies of an application of the *res gestae* analysis. Had the operator made the same statement, within the hearing of another passenger upon emerging from the plane, the passenger would be permitted to testify as to what he heard as part of the *res gestae*. However, this testimony could very well come several years after the event. This recollection is less reliable than the operator's statement which was made within hours of the crash, and recorded in a formal reporting to Irish authorities. To have excluded the operator's statement would have been to prefer "the weaker over the stronger evidence."⁶⁸

65. *KLM*, 292 F.2d at 784 (citing *Martin v. Savage Truck*, 121 F. Supp. 417 (1954)).

66. *Id.* at 783.

67. MODEL CODE OF EVIDENCE Rule 508(a) (1942). This rule provides in relevant part: "Evidence of a hearsay declaration is admissible against a party to the action if the judge finds that the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment." *Id.*

68. *KLM*, 292 F.2d at 783.

B. Application of the Current Federal Rule

In order for the out-of-court statement of an agent to be admissible, normally the moving party must establish “(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency.”⁶⁹ If these elements are met, the out-of-court statement may be used to prove the truth of the matter asserted. However, just as under the common law rule, the statement to be introduced cannot itself be used to prove the existence of the agency relationship.⁷⁰

The question of whether these elements have been met is still governed by the law of agency.⁷¹ In determining whether an agency relationship exists, the federal courts look to various formulations of the common law “control test.”⁷² Whether certain conduct falls within the scope of employment is governed by section 229 of the Restatement (Second) of Agency.⁷³ For

69. *Pappas v. Middle Earth Condominium Ass’n*, 963 F.2d 535, 537 (2d Cir. 1992).

70. *Id.* at 538. *See* *U.S. v. Pacelli*, 491 F.2d 1108, 1117 (2d Cir. 1974).

71. *See* *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989) (stating that the absence in the Federal Rules of Evidence of definitions of the terms “agent,” “servant,” and “scope of employment” is evidence of Congress’ intent that common law agency principals should be applied).

72. *Sabel v. Mead Johnson & Co.*, 737 F. Supp. 135, 138 (D. Mass. 1990).

An agency relationship has three essential characteristics: 1) the power of the agent to alter the legal relationships between the principal and third parties and the principal and himself; 2) the existence of a fiduciary relationship toward the principal with respect to matters within the scope of the agency; and 3) the right of the principal to control the agent’s conduct with respect to matters within the scope of the agency.

Id. *See* *United States v. Young*, 736 F.2d 565, 568 (10th Cir. 1983); RESTATEMENT (SECOND) OF AGENCY § 12-14 (1957).

73. *See* *Edwards & Hanley v. Wells Fargo*, 458 F. Supp. 110, 125 (S.D.N.Y. 1978). The Restatement (Second) of Agency § 229 states:

In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered: (a) whether or not the act is one commonly done by such servants; (b) the time, place and purpose of the act; (c) the previous

example, statements by attorneys concerning a matter within the scope of their employment are often received as admissions under 801(d)(2)(D).⁷⁴

Under the traditional common law, internal statements to the principal were not considered admissions.⁷⁵ In this respect, the federal rule departs from the common law by permitting such statements to be received as admissions against the employer.⁷⁶ Rule 801(d)(2)(D), further extends the common law admissions doctrine to situations in which the agent does not have the

relations between the master and the servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (f) whether or not the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal.

RESTATEMENT (SECOND) OF AGENCY § 229 (1957).

74. *See, e.g., Harris v. Steelweld Equip.*, 869 F.2d 396, 403 (8th Cir. 1989) (holding that statements made by appellant's workers' compensation attorney to his expert witness admissible); *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984). *But see Blanchard v. People's Bank*, 844 F.2d 264 (5th Cir. 1988).

75. *See, e.g., Dille v. Chesapeake & Ohio Ry. Co.*, 327 F.2d 249, 251 (6th Cir. 1964) ("The mere fact that a railroad requires an employee to make a report to it of an accident is not sufficient to cause the report to become binding upon the railroad as its own statement."); *see Nuttall v. Reading Co.*, 235 F.2d 546, 550 (3d Cir. 1956); *see also* Restatement (Second) of Agency § 287 which states that: "Statements by an agent to the principal or to another agent of the principal are not admissible against the principal as admissions; such statements may be admissible in evidence under other rules of evidence." RESTATEMENT (SECOND) OF AGENCY § 287 (1957). *But see Chicago, St. Paul, Minneapolis & Omaha Ry. v. Kulp*, 102 F.2d 352, 356 (8th Cir. 1939).

76. *See, e.g., United States v. Young*, 736 F.2d 565, 568 (10th Cir. 1983), *cert. granted*, 465 U.S. 1021 (1984), *rev'd on other grounds*, 470 U.S. 1 (1985); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1221 (4th Cir. 1983); *Mahlandt v. Wild Canid Survival & Research Ctr.*, 588 F.2d 626, 630 (8th Cir. 1978).

authority to make damaging statements, but merely the authority to "take action about which the statements relate."⁷⁷

There is nothing in the plain language of the statute that requires that the admission be based on personal knowledge.⁷⁸ In fact, the Advisory Committee stated that this omission was intentional.⁷⁹ The absence of a formal requirement of personal knowledge has been severely criticized by Judge Weinstein of the Second Circuit.⁸⁰

According to Judge Weinstein, "[g]ossip does not become reliable merely because it is heard in an office rather than a home."⁸¹ The fact that the agent repeats statements that he has heard does not eliminate any of the evils that the hearsay rule has traditionally guarded against. This is especially true when dealing with intra-company reports. "[E]ven an employee well-disposed towards his employer may report rumors he has heard, not because of their truth, but because his employer may be interested in the fact that there are rumors."⁸² This is a classic

77. *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 535, 538 (2d Cir. 1992).

78. *See generally* *Brookover v. Mary Hitchcock Memorial Hosp.*, 893 F.2d 411 (1st Cir. 1990).

79. FED. R. EVID. 801(d)(2) advisory committee's note provides in relevant part:

No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Id.

80. *See* WEINSTEIN & BERGER, *supra* note 31, ¶ 801(d)(2)(D)[01], at 298 and ¶ 801(d)(2)(C)[01], at 277-80. *But see* *Mahlandt v. Wild Canid Survival and Research Ctr.*, 588 F.2d at 626 (8th Cir. 1978).

81. WEINSTEIN & BERGER, *supra* note 31, ¶ 801(d)(2)(D)[01], at 298.

82. WEINSTEIN & BERGER, *supra* note 31, at 278. Judge Weinstein also doubts the argument that the employee would not spread gossip out of fear of losing his job, pointing to the fact that we live in an "era of widespread unionization." Rather, he believes that it is a "fact of human nature that rumor, unsubstantiated by fact, is at all times widespread and virulent." WEINSTEIN & BERGER, *supra* note 31, at 279.

problem of hearsay upon hearsay or "double hearsay." Judge Weinstein wrote that this is only allowed, as required by Rules 403⁸³ and 805,⁸⁴ if both statements "conform to the requirements of a hearsay exception."⁸⁵

C. Rationale of 801(d)(2)(D)

1. Reliability

If an utterance is an out-of-court statement offered to prove the truth of the matter asserted, it would be hearsay, unless it fits into a hearsay exception. The hearsay exceptions under the federal rules are often justified in terms of reliability.⁸⁶ While there is no express requirement of personal knowledge under rule 801(d)(2)(D), employees' admissions are often received based on their purported reliability. Not only is the statement usually made shortly after the event, it is also often adverse to the interests of both the declarant and his employer. These admissions however, should not be confused with "declarations against interest."⁸⁷

83. FED. R. EVID. 403. This rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

84. FED. R. EVID. 805. This rule states: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." *Id.*

85. WEINSTEIN & BERGER, *supra* note 31, at 279-80. *See, e.g.*, Rule 805 advisory committee's note which states:

[A] hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances.

FED. R. EVID. 805 advisory committee's note.

86. *See* FED. R. EVID 803 advisory committee's note.

87. An "admission" is distinct from a "declaration against interest" in that it must be made by a party to the litigation as opposed to an "assertion by an

In *KLM*, for example the utterance was adverse to the operator's personal interest since it could have resulted in the loss of his job, impairment of future employment, and even the possibility of criminal sanctions. Thus, the employee was very careful as to what he said.⁸⁸ Of course, in order for the statement to be reliable, it must still be made during the existence of the employment or agency.⁸⁹ Additionally, since the statement must concern a matter within the scope of the declarant's employment, the declarant is likely to be well-informed.⁹⁰

2. The Adversary System

While admissions are often reliable,⁹¹ the party-admissions exception is best justified as being consistent with the adversary

out-of court declarant." Moreover, an "admission" is not subject to review under Rule 804(b)(3) and must be "adverse to a party's case at the time of introduction at trial." "Declarations against interest" which satisfy the admissibility requirements under Rule 804(b)(3) "must have had adverse consequences for the declarant at the time of its utterance." WEISSENBERGER'S FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 804.21, at 514-15 (1987); See MCCORMICK, *supra* note 5, § 263, at 777; see also *Shea v. City of Honolulu*, 692 P.2d 1158, 1165 (Haw. 1985); *Kekua v. Kaiser*, 601 P.2d 364, 370 n.3 (Haw. 1979) ("[P]arty admissions, unlike statements against interest, need not have been against the declarant's interest when made, need not be based on the declarant's personal knowledge, may be in the form of an opinion, and are admissible at trial regardless of whether the declarant is unavailable.").

88. See *Nekolny v. Painter*, 653 F.2d 1164, 1171-72 (7th Cir. 1981).

89. MCCORMICK, *supra*, note 5, § 267, at 788 ("[Employee's] statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make statements unless they are true."). See, e.g., *Japanese Elec. Antitrust Litig.*, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 723 F.2d 238, 300 (1979); *United States v. Summers*, 598 F.2d 450, 458-59 (5th Cir. 1979); *Securities & Exchange Comm'n v. Geon*, 531 F.2d 39, 43 n.3 (1976).

90. *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 535, 537 (2d Cir. 1992).

91. See CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 239, at 503 (1954) ("This notion that it does not lie in the opponent's mouth to question the trustworthiness of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason.").

system of litigation.⁹² According to Wigmore, a party's admission has a special value when it is used against him, since the admission acts to discredit the party's position.⁹³ The rule against hearsay normally requires that out-of-court statements be subject to cross-examination. However, since the admission is a party's own extra-judicial statement, "[the statement] does not need to cross-examine [it]self [at that time]."⁹⁴ Once in court, the party "now as opponent has the full opportunity to put himself on the stand and explain his former assertion."⁹⁵ Admissions are free from the usual demands of trustworthiness and may thus be received even when they are not based on personal knowledge.⁹⁶

The doctrine of *respondeat superior* renders the principal liable for wrongs committed by agents while carrying out their duties.⁹⁷ One would then logically assume that the principal should also be held accountable for an agent's statements relating to the event in question. The employee's statement should be treated as if the employer had made it himself. This extension has been criticized by some commentators. For example, McCormick wrote that "the assumption that the test for the master's responsibility for the agent's *acts* should be the test for using the agent's statements as *evidence* against the master is a shaky one. The evidence

92. FED. R. EVID. 801(d)(2) advisory committee's note. ("Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.").

93. See WIGMORE, *supra* note 7, § 1048; see also Edward R. Lev, *The Law of Vicarious Admissions-An Estoppel*, 26 U. CIN. L. REV., 17, 29 (1957) (stating that the receipt of admissions reflects "a judicial policy . . . that one's standing in court is lessened when he has, at another time, made statements inconsistent with his present position").

94. WIGMORE, *supra* note 7, § 1078, at 4.

95. WIGMORE, *supra* note 7, § 1078, at 5.

96. See WEINSTEIN & BERGER, *supra* note 31, § 801(d)(2)(c)[01], at 277-78; see also FED. R. EVID. § 801(d)(2) advisory committee's note.

97. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."); see also American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 565 (1982) ("[U]nder general rules of agency law, principals are liable when their agents act with apparent authority and commit torts.").

should be tested by its trustworthiness.”⁹⁸ Similarly, Morgan argued that “the mere fact that B has empowered A to do act X for him adds no whit of trustworthiness to A’s narratives about X.”⁹⁹ McCormick, however acknowledged that an agent’s statements are often reliable.¹⁰⁰

However, the attribution of an employee’s statement to his employer is justified by the current federal rules of evidence. As previously demonstrated, there is no need to show that even the principal’s *own* statements are reliable. Professor Falknor once questioned whether or not one should be able to employ a skilled truck driver who may also be a careless and unreliable talker without fear that the driver’s “casual utterances made long after an accident” will be used against him.¹⁰¹ Yet fairness dictates that in such circumstances, employers should be held accountable for not only for what their employees *do*, but for what they *say* as well.

If an employee has the authority to enter into contracts, the employer is bound by these contracts. That a contract may be

98. See MCCORMICK, *supra* note 5, § 244, at 519; see also Edmund M. Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 463-64 (1929). The article states in pertinent part:

[R]espondeat superior does not apply inter sese between principal and agent. . . . It is only where the principal brings himself in contact with the outside world through his agent or servant that he becomes responsible for the latter’s act. If the agent or servant in gathering the data violates some right of a third party, the principal . . . will have to answer for it. But where he merely transmits information to his superior, it is specious to say that it is as if the superior were speaking to himself If such statements are to be received, their reception must be justified not on any ground of representation but because of the existence of some independent guaranty of trustworthiness.

Id.

99. Morgan, *supra* note 98, at 464.

100. MCCORMICK, *supra* note 5, § 244, at 519 (“The agent is well informed about acts in the course of the business, his statements . . . are normally against the employer’s interest, and while the employment continues, the employee is not likely to make such statements unless they are true.”). See *KLM*, 292 F.2d at 784.

101. Judson F. Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 856 (1961).

formed by an employee's careless or uninformed statements is of no consequence. In such cases, the employee's words *can* bind the employer. Statements concerning a matter within the scope of employment made while employed should be treated similarly. In fairness, he "who undertakes to create an agency relationship should generally be made to reap the deleterious as well as the beneficial effects of what the agent sows."¹⁰²

CONCLUSION

A change in the current New York law of employees' admissions is long overdue. The introduction of the term "*res gestae*" is at best imprecise, and at worst misleading and confusing. Moreover, the strict application of the "speaking authority" rule has led to the loss of much valuable evidence. The majority of states have adopted the principles manifested in Rule 801(d)(2)(D), either by rule, statute or decision.¹⁰³ Statements concerning matters within an agent's scope of employment are often reliable. But perhaps the best argument is one of fairness that is part of the adversary nature of litigation; employers should sleep in the bed they make.

There is no need for the judges of the New York Court of Appeals to wait for the legislature to enact a Code of Evidence, since it is well within their power to change outdated law by decision. For example, in *People v. Caviness*,¹⁰⁴ the New York Court of Appeals rejected the rule that although spontaneous declarations made by participants in an event are admissible as an exception to the hearsay rule, spontaneous declarations made by bystanders are not. Writing for the court, Judge Cooke stated that, "[i]t is time that New York abandon this unjustifiable

102. See, e.g., *B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co.*, 596 A.2d 640, 646 (Md. 1991) (quoting LA. CODE EVID. 801(D)(3)(a) official comments).

103. See *id.* (adopting Rule 801(d)(2)(D) in place of a requirement that the agent have speaking authority or that the statement constitute part of the *res gestae*).

104. 38 N.Y.2d 227, 342 N.E.2d 496, 379 N.Y.S.2d 695 (1975).

evidentiary stance.”¹⁰⁵ Such is now the case with employees’ admissions. In *Loschiavo*, the court felt constrained by the doctrine of *stare decisis*.¹⁰⁶ Yet as Judge Fuchsberg wisely stated in his dissenting opinion in *Loschiavo*, “*stare decisis* is no obstacle to such self correction [A rule should not persist] for no better reasons than that ‘it was laid down at the time of Henry IV.’”¹⁰⁷

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105. *Id.* at 231, 342 N.E.2d at 499, 379 N.Y.S.2d at 700.

106. *Loschiavo v. Port Auth. of N.Y.*, 58 N.Y.2d 1040, 1041, 448 N.E.2d 1351, 1352, 462 N.Y.S.2d 440, 441(1983).

107. *Id.* at 1043, 448 N.E.2d at 1353, 462 N.Y.S.2d at 442 (Fuchsberg, J. dissenting). See *Loschiavo v. Port Auth. of N.Y.*, 86 A.D.2d 624, 628, 446 N.Y.S.2d 358, 363 (2d Dep’t 1982) (Lazer, J. dissenting) (“‘*Stare decisis*’ is intended, not to effect a ‘petrifying rigidity,’ but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive.” (quoting *Bing v. Thunig*, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957))), *aff’d*, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983) .