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William T. Curtis

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LIABILITY OF EMPLOYERS FOR PUNITIVE DAMAGES RESULTING FROM ACTS OF EMPLOYEES

In the late eighteenth and early nineteenth centuries, the apparent inadequacy of compensatory damages to provide an adequate measure of justice in every case led to the development of punitive damages. At least three theories have been advanced to explain the advent of punitive damages. According to one theory, punitive damages resulted from the reluctance of English courts to overturn verdicts clearly in excess of the actual pecuniary loss when malice, oppression, gross fraud or reckless and wanton misconduct were present. Another theory posits that punitive damages arose from a perceived need to award damages for injury to feelings as well as to person or property. A third theory is that punitive damages arose as a method of justifying the award of damages for injuries such as pain and suffering which are inherently difficult to ascertain under normal compensatory theories.

Punitive damages are now awarded in all but four states in cases in which a tort is committed intentionally, willfully or maliciously, or with reckless disregard for the well-being of others. In most jurisdictions punitive damages are awarded for the dual purposes of punishment and deterrence. However, some courts have held that punitive damages are awarded to compensate for injured feelings, or to compensate for injuries which are aggravated solely because of the manner

1. For a general discussion of the policies underlying the assessment of punitive damages see I SEDGWICK, DAMAGES, §§ 347-388 (1912); STEIN, DAMAGES AND RECOVERY; PERSONAL INJURY AND DEATH ACTIONS, §§ 177-202 (1972); I SUTHERLAND, DAMAGES, §§ 390-412 (2d ed. 1916).
2. See, e.g., Earl v. Tupper, 45 Vt. 275 (1873). Apparently the early English courts chose to defer to the informed judgments of juries who were chosen because of their familiarity with the dispute. As a result, juries were able to give expression to their heightened feelings in particularly offensive cases.
in which they were inflicted. Thus, when individuals are acting on their own behalf, punitive damages are assessed for acts which are malicious, reckless, or wanton.

An issue which has frequently been raised is whether punitive damages will lie against an employer when an employee acts willfully while within the scope of his employment. This note will examine that question and the authorities which have permitted punitive damages to be assessed against an employer. The various theories under which employers have been held liable for punitive damages for torts committed by their employees will be analyzed; the rationale underlying these theories will be critically examined; and recommendations will be made as to when, and under what circumstances, punitive damages should continue to be assessed against employers for their employees' torts.

THEORIES HOLDING EMPLOYERS LIABLE FOR PUNITIVE DAMAGES

A large number of jurisdictions have adopted the position that an employer is not liable for punitive damages unless he has, by some intentional act, implicated himself in the tort of the employee. The Supreme Court decision most often cited for this proposition is Lake Shore & Michigan Southern Railway v. Prentice. The plaintiff in Prentice, a doctor who had traveled to Chicago from Ohio on the defendant railroad, was arrested shortly before his arrival in Chicago by a police officer who was also an employee of the railroad. The arrest was not authorized by a warrant and was carried out under circumstances which were humiliating to the plaintiff. Apparently, the plaintiff's only offense was to purchase return trip tickets for himself and members of his party while traveling on excursion tickets. The tickets which he purchased did not purport to be non-transferable and no offense against the railroad was committed. Nevertheless, upon his arrival in Chicago, the plaintiff was taken to a police station and charged with disorderly conduct. The charges were dropped for want of prosecution the following day, and the plaintiff then brought an action against the railroad in the Circuit Court for the Northern District of Illinois for trespass on the case to recover damages for the "wanton and oppres-

11. Id. at 102.
12. Id.
13. The old circuit courts were replaced by district courts pursuant to the Judicial Code of 1911, ch. 231, 36 Stat. 1152 (1911).
sive" acts of the railroad's employee.\textsuperscript{14}

The plaintiff's contention was that since the railroad's employees were acting within the scope of their employment, the railroad was liable for their acts and the damages resulting therefrom.\textsuperscript{15} The railroad admitted that the arrest was wrongful and that the plaintiff was entitled to damages, but objected to jury instructions which referred to the railroad, rather than its employees, as acting in an unlawful and oppressive manner.\textsuperscript{16} Judgment was entered upon a verdict for the plaintiff and the railroad appealed.

Applying federal law, the Supreme Court reversed the holding of the lower court, stating that since punitive damages are awarded to punish the offender and not to compensate the victim, they can properly be assessed only against "one who has participated in the offense."\textsuperscript{17} An employer may be liable for compensatory damages but "he is not liable to be punished by exemplary damages for an intent in which he did not participate."\textsuperscript{18} The jury instructions questioned by the railroad were held to be error because they failed to require proof by the plaintiff that "the defendant in any way participated in, approved, or ratified the conductor's treatment of the plaintiff. . . ."\textsuperscript{19} From this holding some thirteen states have developed the rule that unless an employer authorizes or subsequently ratifies the acts of his employee, thereby manifesting malicious or fraudulent intent, he cannot be held liable for punitive damages.\textsuperscript{20}

The rule enunciated in \textit{Prentice} established at least two voluntary acts for which an employer may be held liable for punitive damages: prior authorization and subsequent ratification. In addition, the \textit{Prentice} opinion alluded to a third act which has been expressly

\begin{itemize}
\item \textsuperscript{14} 147 U.S. at 101-02, 117.
\item \textsuperscript{15} \textit{Id.} at 111.
\item \textsuperscript{16} \textit{Id.} at 107.
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.} at 110.
\item \textsuperscript{19} \textit{Id.} at 117.
\item Similar rules have been adopted by at least four other states without express reference to \textit{Prentice}. See Jackson v. Smith, 75 Ala. 97 (1883); Williams v. Pullman's Palace Car Co., 40 La. Ann. 87, 3 So. 631 (1888); Ricketts v. Chesapeake & O. Ry., 33 W. Va. 433, 10 S.E. 801 (1890); and Milwaukee & Miss. R.R. v. Finney, 10 Wis. 330 (1860).
\end{itemize}
adopted in later decisions, namely the hiring or retention of an employee unsuitable for the position which he holds. In order to understand what constitutes an act sufficient to expose an employer to liability for punitive damages, it is necessary to examine each potential ground of liability in some detail.

**Prior Authorization**

An employer may be held to have authorized his employee's malicious or wanton act if there is evidence of some express instruction to do the act. In the case of a corporate employer, many states require that the instruction must be given by an officer of the corporation or someone with the power to act on behalf of the corporation, and must be given within the course of the officer's or agent's employment. If there is no evidence of express instruction or approval, authorization may be implied from conduct of the employer indicating an intent that the employee should commit the injury-causing act.

If authorization is to be inferred from the employer's conduct, the employer's intent to cause injury must be clearly evident before punitive damages will be assessed. Ownership of a business, absent any showing that the owner approved his salesman's questionable tactics, has been held insufficient to make an employer liable for punitive damages. In *Stewart v. Potter*, the defendant's salesman had sold the plaintiff a used and repossessed car, while representing to the plaintiff that the car was new. The trial court held that the employer was liable in punitive damages "since he owned the business." On appeal, the New Mexico Supreme Court, following the *Prentice* ruling, held that ownership alone did not constitute participation in the act of the employee. The missing element in *Stewart* was any showing that the employer in some way shared the wrongful motives clearly attributable to the employee.
Even the fact that the employer has authorized a particular act does not necessarily imply that he also intended that the act be carried out in a wrongful manner. In *Wright v. Crown*, the defendant owed the plaintiff a small sum for the purchase of certain merchandise. The plaintiff's employee made a number of telephone calls to the defendant in an effort to collect the balance due. The defendant testified that the calls were made in an abusive manner and resulted in mental and physical suffering on her part. When the plaintiff sued for the balance due, the defendant filed a counterclaim for damages for invasion of privacy, intentional infliction of mental and physical suffering, and for a violation of a state blackmail statute. The plaintiff received a directed verdict for the balance due and the jury returned a verdict of $125 for the defendant on the counterclaim. Among other issues on appeal, the defendant contended that the District of Columbia trial judge erred in refusing to submit the question of punitive damages to the jury. The appellate court affirmed, noting that "the mere fact that it [plaintiff/employer] had knowledge or even encouraged its employees to contact its debtors does not make [plaintiff] liable for punitive damages." The court held that such evidence was insufficient at law to permit presentation of the issue of punitive damages to the jury because there was no showing that the plaintiff was even aware of the actions of its employee. Despite the fact that the employer in *Wright* had admitted to authorizing the telephone calls made by its employee, there was no evidence that the employer had thereby intended the calls to be made in a malicious or abusive manner.

Even in the absence of instructions by an employer for an employee to undertake a specific act, authorization has been inferred from pre-existing policy statements issued by the employer. In *Allard v. Church of Scientology of California*, the corporate defendant had a formal, written policy that a person leaving the organization without permission was to become "fair game" and could be "tricked, sued . . . lied to or destroyed." When Allard actually left the organization, taking certain records with him to be turned over to the Internal Revenue Service, he was charged by an agent of the organization with grand larceny.

30. Id. at 348.
31. Id. at 347, 349.
32. Id. at 350.
33. Id.
34. Id.
35. See text accompanying notes 22-28 supra.
37. Id. at 443 n.1, 129 Cal. Rptr. at 800 n.1.
theft of a quantity of foreign currency and arrested. The charges were eventually dismissed "in the interests of justice," whereupon Allard sued the church for malicious prosecution. Judgment was entered on a verdict for Allard, awarding both compensatory and punitive damages, and the church appealed. Citing the aforementioned "fair game" policy, the California appellate court found ample evidence from which authorization could be implied. There was no evidence of any express authorization to falsely accuse the plaintiff, but authorization was inferred from the formally stated policy of the corporation.

Prior authorization of his employee's acts, therefore, may subject an employer to punitive damages when there is evidence of express instruction by the employer for the employee to act in a malicious or reckless manner. The express instruction to do a specific act may be insufficient if there is no evidence to indicate that the employer intended the act to be done in a wrongful manner. However, authorization may be found absent any express statement authorizing an employee to act. The key element is authorization, whether express or implied, by an employer, of the wrongful intent manifested by his employee's act.

Subsequent Ratification

Subsequent ratification of an employee's conduct is the second voluntary act specified in Prentice. Like authorization, ratification may also be express or implied, although few employers are likely to expressly ratify an act with the knowledge that ratification would make them liable for punitive damages. The two elements which are generally held to be necessary before ratification may be implied are knowledge and intent. As to the former, an employer must have knowledge of both his employee's act and its wrongful nature. In the case of a corporate employer, the act must be brought to the attention of an officer or agent who has the power to act on behalf of the corpora-

38. Id. at 444, 129 Cal. Rptr. at 800.
39. Id. at 439, 129 Cal. Rptr. at 799.
40. Id. at 452, 129 Cal. Rptr. at 805.
41. See text accompanying notes 22-24 supra.
42. See text accompanying notes 29-35 supra.
43. See text accompanying notes 36-40 supra.
44. 147 U.S. at 117.
In the absence of actual knowledge, it may be shown that the employer demonstrated an intent to assume the risk associated with the employment of a particular person without inquiry into the employee's acts and their consequences. Secondly, in addition to knowledge of the act itself, there must be a showing that the employer intended to ratify his employee's act. For example, retention of an employee after the commission of a wrongful act may be evidence from which ratification may be inferred if by such retention the employer manifests an intent to ratify the wrongful act. However, if another reason for retention may be shown, ratification may not be found.

Knowledge of the Act

Ratification may be found only when actual knowledge of the acts of his employee has been brought to the attention of the employer or his agent. In Bass v. Chicago & Northwestern Railway, the plaintiff, a crippled man, was summarily removed by a brakeman in a rude and violent manner from the ladies' car of the defendant's train. The brakeman's action was reported to the conductor at the time of the incident and that notice later was held to be sufficient notice to the defendant to support a finding of ratification. The Wisconsin Supreme Court had held, on an earlier interlocutory appeal, that a conductor was in charge of his train "as the corporation itself," and the railroad was fully responsible for his acts. As a result, notice to the conductor constituted sufficient notice to the railroad to indicate ratification when the offending brakeman was retained in the same capacity, despite the fact that the conductor had no power to discharge the offender. The Bass court also indicated that service of the plaintiff's verified complaint upon the railroad shortly after the incident would also have con-

50. Voves v. Great Northern Ry., 26 N.D. 110, 143 N.W. 760 (1913); Gulf, C. & S.F. Ry. v. Reed, 80 Tex. 362, 15 S.W. 1105 (1891).
51. 42 Wis. at 654 (1877). See also Garcia v. Samson’s, Inc., 10 Wis. 2d 515, 103 N.W.2d 565 (1960).
52. 42 Wis. at 667-68.
53. Id. at 668-69.
55. 42 Wis. at 669.
56. Id.
stituted knowledge adequate to indicate ratification.\textsuperscript{57}

In \textit{Rickman v. Safeway Stores},\textsuperscript{58} neither the corporate defendant nor its agent, the manager of one of its retail stores, had actual knowledge of the malicious nature of its employee's actions. However, the store manager was fully aware that the actions had been undertaken and actually participated to a certain extent.\textsuperscript{59} Adequate notice was found because a minimal investigation by the store manager would have indicated that the act in question was wrongful.\textsuperscript{60}

The plaintiff in \textit{Rickman} cashed a check at one of the defendant's stores. The check was returned by the drawee bank with an erroneous notation that there was no such account in that bank.\textsuperscript{61} Thereafter, the store manager assisted his employee in a feeble attempt at investigation, but he did not contact either the bank or the plaintiff. Eventually, the employee instituted criminal proceedings to collect the amount due.\textsuperscript{62} When these proceedings were dismissed, the plaintiff brought an action for malicious prosecution, seeking both compensatory and punitive damages. The defendants appealed from entry of a judgment for plaintiff and denial of motions for a new trial.\textsuperscript{63} The Montana court held that the store manager was chargeable with making a thorough personal investigation into the grounds for the charges prior to instituting the criminal action. Since he permitted, and even encouraged, the employee to institute the proceedings without personally verifying the grounds therein, he accepted responsibility on behalf of the corporation for liability if the charges were without probable cause. Therefore, he essentially "waived" the element of knowledge and ratified the act of his employee.\textsuperscript{64}

\textbf{Intent to Ratify}

The second essential element of ratification is the intent to ratify.\textsuperscript{65} In a few isolated cases, the employer, by act or by oral or written order, expressly ratifies the act of his employee,\textsuperscript{66} but such cases are rare. The more common situation involves an action by an employer from which ratification could be inferred. Most of the reported cases in-

\textsuperscript{57} \textit{Id.} at 669-70.
\textsuperscript{58} 124 Mont. 451, 227 P.2d 607 (1951).
\textsuperscript{59} \textit{Id.} at 458, 227 P.2d at 611.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 457, 227 P.2d at 609-10.
\textsuperscript{62} \textit{Id.} at 459, 227 P.2d at 612.
\textsuperscript{63} \textit{Id.} at 456, 227 P.2d at 609.
\textsuperscript{64} \textit{Id.} at 461-62, 227 P.2d at 613.
\textsuperscript{65} \textit{See} text accompanying notes 41-43 supra.
\textsuperscript{66} \textit{See} Norfolk & W.R.R. Co. v. Anderson, 90 Va. 1, 17 S.E. 757 (1893).
volve either retention by the employer of the benefits of the employee's wrongful act or retention of the employee himself after the receipt of notice of his wrongful act.

Retention of the benefits received as a result of an employee's wrongful act may be evidence of an intent to ratify sufficient to subject an employer to punitive damages. The key is whether the retention is with knowledge of the manner in which the benefits were obtained. In *Kilpatrick v. Haley*, the plaintiff was in possession of a hotel and its contents following a series of transactions involving chattel mortgages on the contents of the hotel. Defendant's agent forcibly entered the hotel and removed most of its contents in a violent manner, delivering the contents to the defendant's warehouse. The defendant retained the goods and appropriated them to his own use under a claim of right based upon the chattel mortgages. Construing Colorado law the Eighth Circuit Court of Appeals stated: "The conduct of the agent . . . was reckless, wanton, and unlawful, and the acts of that person he [the principal or employer] has approved and adopted by receiving and retaining the property with full knowledge of the manner in which it had been obtained." It should be noted that the retention of benefits alone was not the basis for finding ratification. The decisive factor was the retention of the benefits with the knowledge of the manner in which they were obtained. Thus the necessity of both knowledge and intent is underscored again.

Retention of an offending employee may also indicate an intent to ratify his offensive conduct and, if coupled with the element of knowledge, may expose an employer to liability for punitive damages. An additional element is necessary, though, an element which shows that the employer "participated in the motive which actuated the employee in the commission of the wrongful act for which exemplary damages are claimed." The exact nature of this additional element varies from case to case depending upon the factual setting.

In *Woodward v. Ragland*, for example, the only evidence of

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67. 66 F. 133 (8th Cir. 1895).
68. *Id.* at 134-35.
69. *Id.* at 140.
70. *Id.* See also *Will v. Hughes*, n. 48 *supra*.
73. 5 App. D.C. 220 (1895).
ratification was the fact that the employee had been criminally prosecuted for his wrongful act, his employer had retained him thereafter, and his employer was defending him in the case which was being appealed. While the District of Columbia court of appeals held that this evidence was admissible to prove ratification, it also indicated that other evidence should have been noted in the instruction in question in order to prevent undue weight being given to such evidence.\textsuperscript{74} The additional evidence mentioned by the court included the result of the criminal prosecution and some indication that the employer had really undertaken the employee's defense in the civil case.\textsuperscript{75} Thus the court seemed to be saying that the real question was the reason for the employee's retention and what the employer really intended his actions to mean.

A similar situation was present in \textit{Williams v. Pullman's Palace Car Co.}\textsuperscript{76} The plaintiff claimed that mere retention of the employee after the employer had learned of his alleged misconduct constituted ratification.\textsuperscript{77} In response to this contention, the court pointed out that the plaintiff and the employee differed greatly in their versions of the incident and that there were no eyewitnesses. Therefore, the employer's retention of the employee was not an indication of ratification, but an indication that it accepted its employee's version and believed that no wrongful act had been committed by him. Yet the court did point out that a subsequent willful act by that employee would probably subject the employer to punitive damages.\textsuperscript{78} The court impliedly commended the employer for attempting "to preserve the status quo until the judicial determination of the dispute."\textsuperscript{79} In this case, both knowledge of the wrongful act of the employee and some evidence of the employer's intent to ratify were present, but the employer did not accept the plaintiff's characterization of the employee's act as wrongful. As a result intent to ratify was found to be lacking where the employer reasonably believed that the employee's act did not constitute a willful act.

A similar policy consideration was present in \textit{Voves v. Great Northern Ry.}\textsuperscript{80} The employee in \textit{Voves} had been with the corporate defend-

\textsuperscript{74} \textit{Id.} at 236-37. The court indicated that such facts were admissible to prove ratification, but should be accompanied by "a statement by the court of its nature, purpose and weight. . . ." \textit{Id.} at 237.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} 40 La. Ann. 87, 3 So. 631 (1888).

\textsuperscript{77} \textit{Id.} at 93, 3 So. at 636.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} 26 N.D. 110, 143 N.W. 760 (1913). \textit{See also} Rickbeil v. Grafton Deaconess Hosp., 23 N.W.2d 247 (N.D. 1946).
ant for thirteen years and had a good work record with no previous reports of misconduct. He became involved in an altercation with the plaintiff which resulted in the employee's striking the plaintiff and causing minor injuries. The employee reported his version of the incident to the company the day after it occurred. Unspecified managers of the employer examined the incident and retained the employee, an act which the plaintiff claimed constituted ratification. The court held that the evidence did not establish ratification, pointing out the harsh effect such a ruling would have on employees if an employer were faced with liability for punitive damages whenever an employee was charged with a malicious act, unless the employer immediately discharged the employee.

Retention was found to constitute ratification in Coats v. Construction & General Laborers Local 185. The key to the decision appears to have been other activities of the employer which indicated an intent to ratify. The plaintiff in Coats was a union member who questioned the policies of the union leadership. As a result he was harassed, refused jobs, and eventually severely beaten by two employees of the union executive board. Plaintiff sought to hold the union liable for punitive damages as a result of the beating. Despite knowledge of the beating in question, and other beatings as well, the union board retained the employees. That retention, together with a continuing campaign of harassment, constituted ratification by the employer, according to the court. The key point to note is that additional evidence was introduced which clearly showed an intent to ratify on the part of the employer, coupled with evidence that the union board was well aware that the employees were likely to commit an assault.

Thus, retention by itself is generally not enough to hold an employer liable in punitive damages. In addition, it is necessary to show an intent to ratify by some additional evidence. In Coats the continuing harassment of the plaintiff by the defendant employer, coupled with the union's knowledge of previous acts of violence perpetrated by the employees, was sufficient to show intent. The Coats court was persuaded that these actions by the employer showed its approval of
the wrongful acts. On the other hand, in *Woodward*, *Williams*, and *Voves*, merely defending an employee or believing his version indicated only that the employer chose to support its employee until the act was shown to be malicious.

**Negligent Hiring of an Unfit Person**

The third voluntary act which, in addition to authorization and ratification, may subject an employer to liability for punitive damages is the negligent hiring of an unfit person. Negligent hiring differs from ratification by retention in that retention may result in liability regardless of the employee's prior knowledge of the employee's fitness, while an employer's negligent hiring may result in his liability principally because he had prior knowledge of the employee's unfitness but hired him nevertheless.

In *Woodward v. Ragland*, for example, the court stated that an employer had a duty to "show that he has been prudent and careful in selecting his subordinates . . ." and held that evidence regarding an employer's execution of his duty should be presented to the jury. Similarly, the Ohio appellate court in *Cleveland Railway v. Wiesenberger* stated that an employer could be liable for punitive damages if the employee who acted wrongfully "was known . . ., or ought to have been known . . ., to be an unfit person and a person likely to commit outrages . . ." Although there is a paucity of cases, it appears that at least some jurisdictions recognize a duty on the part of employers to use due care in hiring their employees, the breach of which duty could result in liability for punitive damages.

**Liability Without Intentional Act of Employer**

While some voluntary act by an employer is frequently required, the general rule in a significant number of states is that employers are liable for punitive damages for the acts of their employees regardless of

89. See text accompanying notes 73-75 *supra*.
90. See text accompanying notes 76-79 *supra*.
91. See text accompanying notes 80-83 *supra*.
92. Since most decisions based on this theory are from states which have adopted the position of the *Restatement of Torts* (1934), liability based upon negligent hiring will be discussed in that portion of this note. See text accompanying notes 112-21 *infra*. However, the theory warrants some attention here because there are cases decided prior to the publication of the *Restatement* which impose a duty to exercise care in hiring employees.
94. *Id.* at 234.
95. *Id.* at 237-38.
96. 15 Ohio App. 437 (1922).
97. *Id.* at 443.
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any voluntary act of their own either to authorize or to ratify the employee's actions. Under this broad rule of liability, punitive damages may be imposed upon an employer when an employee, acting within the scope of his employment, commits an act for which punitive damages could be assessed against him individually. In some states there is a further requirement that the act be done for the employer's benefit or in furtherance of his business.

In those states which require authorization or ratification for the assessment of punitive damages against employers, a major concern is whether the employer has shown some degree of fault or has somehow participated in the wrongful motive attributed to his employee. It is frequently stated that since punitive damages are intended to punish the wrongdoer, they should be allowed only against parties who are chargeable with some wrongdoing. In contrast, in the states which do not require ratification or authorization, the courts tend to assume that by hiring another person to assist in doing business with the public, an employer has accepted the possibility of being charged with his employee's wrongdoing. In Peterson v. Western Union Telegraph Co., the plaintiff, a state senator, sought to hold the defendant telegraph company liable in punitive damages for a libelous telegram


99. E.g., Schmidt v. Minor, 150 Minn. 200, 184 N.W. 964 (1921).

In many states this rule was first established in cases involving injuries sustained by passengers as a result of willful acts of employees of common carriers. See, e.g., New Orleans, J. & G.N. Ry. v. Bailey, 40 Miss. 395 (1866); Forrester v. Southern Pac. Co., 36 Nev. 247, 134 P. 753 (1913); Memphis St. Ry. v. Stratton, 131 Tenn. 620, 176 S.W. 105 (1915). These cases generally held that common carriers owed their passengers a special duty to exercise great care to avoid injury, and punitive damages were assessed when that special duty was violated. However, the rule established in these common carrier cases was not thereafter limited to such cases. See, e.g., Odom v. Gray, 508 S.W.2d 526 (Tenn. 1974). The special duty owed by common carriers still exists (see, e.g., McCoy v. Chicago Trans. Auth., 69 Ill. 2d 280, 371 N.E.2d 625 (1977)), but the rule regarding an employer's liability for punitive damages has been extended beyond the limited circumstances in which it was initially established.

100. E.g., Hairston v. Atlantic Greyhound Corp., 220 N.C. 642, 18 S.E.2d 166 (1942).


102. E.g., 147 U.S. at 107.

103. 75 Minn. 368, 77 N.W. 985 (1899).
which he received from a disenchanted constituent. The telegram had been accepted and transmitted by an agent of the company. The plaintiff argued that the act of the agent was sufficient to hold the company liable.\textsuperscript{104} The Minnesota Supreme Court agreed, largely because of the degree of control exercised by the agent and because the choice of agents belonged solely to the company. "One who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business."\textsuperscript{105}

While the policy most often mentioned for requiring ratification or authorization is punishment of the wrongdoer, the supposed deterrent effect of punitive damages is frequently cited by courts not requiring intentional acts. The concern for deterrence was central to the decision in \textit{Smith's Administratrix v. Middleton},\textsuperscript{106} a Kentucky case involving mislabeling of drugs which resulted in a young boy's death. In a wrongful death action, punitive damages were sought against the druggist for the gross negligence of the druggist's clerk. The plaintiff appealed the trial court's refusal to submit the question of punitive damages to the jury.\textsuperscript{107} The appellate court reversed and remanded, holding that evidence of the clerk's gross negligence was sufficient to require submission of the question of punitive damages against the druggist to the jury.\textsuperscript{108} In so holding, the court indicated that to do otherwise would induce other employers to "conduct [specially hazardous business] by the means of financially irresponsible agents . . ."\textsuperscript{109} Although this case dealt with a "specially hazardous business," the court did not expressly limit its holding to such situations alone. Therefore, it is clear that in the appropriate case the assumed deterrent effect of punitive damages will be persuasive to a court which does not require an intentional act by an employer.

In a sense the only real difference between the theory holding the employer liable if he is found to have the requisite intent and the theory that the employer may be liable even without intent is the point at which authorization or ratification is found to have taken place. The theory holding the employer liable even without intent merely infers authorization from the fact that an employer hires a person and gives him authority to carry out certain tasks. If, while the employee carries

\textsuperscript{104} \textit{Id.} at 371, 77 N.W. at 985.
\textsuperscript{105} \textit{Id.} at 373, 77 N.W. at 986.
\textsuperscript{106} 112 Ky. 588, 66 S.W. 388 (1902).
\textsuperscript{107} \textit{Id.} at 593-94, 66 S.W. at 388.
\textsuperscript{108} \textit{Id.} at 596, 66 S.W. at 389-90.
\textsuperscript{109} \textit{Id.} at 596, 66 S.W. at 389.
out his responsibilities—while he is acting within the scope of his em-
ployment—he becomes liable for punitive damages, his employer be-
comes liable also, by virtue of his prior authorization to do the tasks
from which the injuries arose. The group of cases holding an em-
ployer liable only if there is a finding of intent requires an additional
act of authorization, showing in effect, the employer's wrongful intent.
Under this approach, while the employee was authorized to act on be-
half of his employer by virtue of his employment, he is said to have a
duty to exercise due care and to act without malice or recklessness.
Authorization, then, results from an act subsequent to, rather than con-
temporaneous with, the hiring of the employee. The consequence of
this difference in viewpoint should not be overlooked. Under the ap-
proach not requiring intent, an employer may be assessed punitive
damages for no other reason than that he hired the wrongdoer in the
first place. Care in hiring does not necessarily obviate this liability.
The question is not whether the employer exercised due care in hiring
the employee, nor whether the employee has demonstrated any propen-
sity toward recklessness; the question is whether the specific act which
caused the injury is one which may give rise to punitive damages. If
no specific intentional act is required of the employer, the imposition
of punitive damages against him certainly becomes more probable.

The Approach of the Restatement of Torts

The drafters of the Restatement of Torts adopted an intermediate
position on the issue of whether an employer may be held liable for
punitive damages for an act of his employee absent a finding of intent.
The Restatement declares that the purpose of punitive damages is to
punish a person for his "outrageous" acts, a position seemingly more
in harmony with a requirement of intent. Yet the official comment to
this section states that punitive damages are also intended to "discour-
age" persons from repeating such outrageous acts. Therefore, the
deterrent effect of punitive damages, which receives greater emphasis
when intent is not required, is also recognized.

According to the Restatement, punitive damages may be awarded
against a principal only under certain specified conditions. Two of
these conditions are authorization and ratification by the principal or a

110. "When one person invests another with authority to act as his agent for a specified pur-
pose, all of the acts done by the agent . . . within the scope of his agency, are . . . regarded as
112. RESTATEMENT OF TORTS § 908 (1934).
113. Id., Comment a.
manager. The Restatement thus incorporates the two voluntary acts required by the rule requiring authorization or ratification. However, subsection (c) also recognizes the rule which does not require a voluntary action in situations in which the agent was employed in a managerial position by allowing punitive damages when the managerial agent was "acting in the scope of employment." Comment (a) clearly states that this subsection is intended to act as a deterrent to the careless hiring of persons who will be acting in the place of the employer.

The fourth condition under which an employer may be liable recognizes a duty on the part of an employer to exercise due care in hiring. Under subsection (b), a principal or employer may be liable if "the agent was unfit and the principal was reckless in employing him." This specific ground of liability has received minimal attention in the past from courts which have not applied the Restatement to cases involving punitive damages. However, in cases involving an employer's liability for compensatory damages this theory has received much more attention. It should be noted that, under this Restatement subsection, if the agent or employee is found to be unfit for his position and the principal or employer is found to have been "reckless" in hiring him, there is liability regardless of whether the wrongful act was within the scope of employment.

While clearly more limiting than the rule not requiring intent, as stated in its most unequivocal form, the Restatement recognizes that an employer may ratify the acts of his employee (1) merely by having the employee in his employ when the employer was reckless in hiring an unfit person or (2) when the employee was acting in a managerial capacity. In other words, the employer may be found to have author-

114. Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
(a) the principal authorized the doing and the manner of the act, or . . .
(d) the employer or a manager of the employer ratified or approved the act.
Restatement of Torts § 909(a), (d) (1934).
115. Id. § 909(c).
116. "Where a person acting in a managerial capacity either does an outrageous act or approves of such an act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions." Restatement of Torts § 909, Comment a (1934).
117. Id. § 909(b).
118. See text accompanying notes 92-97 supra.
120. Restatement of Torts § 909 (1934). In the tentative draft of this section for the Restatement (Second) of Torts, the drafting committee has questioned whether the position taken in this section is "right," or at least whether the examples given therein should be omitted. Restatement (Second) of Torts § 909 (Tent. Draft No. 19, 1973). Unfortunately, the objections
ized his employee's outrageous acts merely by authorizing the employee to act on his behalf.\textsuperscript{121} Thus, the \textit{Restatement} extends an employer's liability to acts which he probably would never be found to have ratified, but for which he is at least partially blameworthy by reason of his placing an unfit person in a position to do the act.

A New York court has utilized this subsection to uphold an award of punitive damages against the State of New York.\textsuperscript{122} At issue was whether the state should be held liable for hiring a known alcoholic as a "therapeutic aide" in a state hospital. The court held that the employee was unfit for the specific position for which he was hired, although he might have been fit for a less "sensitive" position.\textsuperscript{123} Clearly the state did not authorize or ratify the employee's assault upon a patient, nor was such an assault within the "scope of employment." Yet punitive damages were assessed in a situation in which the employer might have escaped punitive liability altogether under either of the other two theories.

To date the \textit{Restatement} has been adopted by six states.\textsuperscript{124} Its affinity to the rule requiring intent is exemplified by the fact that five of the six states which have adopted the \textit{Restatement} formerly followed this rule.\textsuperscript{125} In addition, the only states which have expressly rejected the \textit{Restatement}, are states which adhere to the rule which does not require intent.\textsuperscript{126} The courts which have adopted the \textit{Restatement} have generally done so without comment, a fact which is a further indication of the perceived affinity of the \textit{Restatement} to the rule already in force. The Oregon Supreme Court, however, altered the rule some-

\textsuperscript{121} See text accompanying notes 88-91, supra.
\textsuperscript{122} Hayes v. State, 80 Misc. 2d 498, 363 N.Y.S.2d 986 (1975).
\textsuperscript{123} Id. at 510, 363 N.Y.S.2d at 988.
what by removing the distinction between employees in a managerial capacity and so-called "menial" employees in the case of corporate employers. As a result, a corporate employer may be liable if any employee commits the requisite outrageous act within the scope of his employment. Presumably, the rule remains intact for non-corporate employers.

At least one court has recognized that the Restatement rule may well be the best way to balance the policies of punishment and deterrence. In Tolle v. Interstate Systems Truck Lines, Inc., an Illinois court questioned the effectiveness of the broad rule of liability in deterring employers from engaging in careless hiring and supervisory practices. The Tolle court pointed out that greater supervision is not always possible and not always effective to prevent certain torts from being committed. Since the Restatement allows recovery in situations involving some fault on the part of the employer, the court felt that the "institutional conscience" of the employer would be sufficiently aroused to exercise due care, while the employer would be protected from liability in cases involving little or no fault on his part.

RECOMMENDATIONS

To permit punitive damages against employers only in those cases in which the employer has authorized or ratified his employee's wrongful act is to emphasize the punitive effect rather than the deterrent effect of punitive damages. This narrow rule of liability also assumes that "guilt," or perhaps responsibility, for a particular act can arise only as a result of some act in addition to the actual hiring, instructing, and supervision of one's employees. The practical effect of this requirement is to place a heavy burden of proof upon a plaintiff seeking to implicate an employer in his employee's acts. The plaintiff must offer some proof of the employer's participation, not only in the wrongful act, but in the wrongful intent. Since evidence of authorization or ratification is likely to be within the exclusive control of the employer, proof may consist of a series of reasonable inferences, with recovery dependent upon the effectiveness of discovery and a sympathetic jury.

128. Id. at 793.
130. Id. at 773, 356 N.E.2d at 627.
131. Id.
132. Id.
133. See text accompanying notes 17-19, supra.
On the other hand, to assess punitive damages whenever the employee was acting within the scope of his employment and for his employer's benefit virtually eliminates any requisite showing of wrongdoing on the part of the employer. The emphasis here is on deterrence, forcing an employer to exercise greater care in his hiring practices and supervision of employees. Yet even the exercise of the greatest degree of care cannot assure that liability will not arise. Furthermore, even if it is assumed that an employer should be liable for all the acts of his employees in the scope of their duties, there is nothing to indicate that employers are generally aware of such liability, or that considerations of liability have any more effect upon hiring practices than do ordinary business considerations. This broad rule of liability could, however, significantly increase a plaintiff's chances of a larger recovery, since it is generally easier to establish liability when no voluntary act is required other than the initial hiring of the employee. A sizeable judgment for punitive damages, however, does not necessarily mean that the policy of holding employers responsible for their employees' conduct has had the intended effect. The prudent employer will insure against such losses, add the cost of the premiums to his cost of doing business, and thereby transfer the risk to the ultimate consumer of his product.

The question which arises, then, is whether it is realistic even to pay lip service to the policies of punishment and deterrence. Perhaps these are not so much policies as justifications for imposing liability according to a particular rule. A better course is to examine the role of the employer, determine at what points he exercises judgment which could affect third persons either directly or indirectly, and hold him liable for gross errors of judgment at those points.

The initial judgment made by an employer is in determining a person's fitness to serve in a specific capacity. This decision is actually a series of judgments relating to the person, the job, and relevant economic considerations. Ultimately, the employer determines that a person is fit and thereupon vests him with the requisite authority to perform his assigned job. At this point, the employer has subjected the public to the consequences of his judgment and he should be liable to the extent that his judgment is faulty. This liability should extend to


punitive damages where the fault results in appropriately outrageous conduct by the employee resulting in injury to a third person. However, under the approach requiring wrongful intent, it is doubtful that punitive damages would be awarded, unless there was a further showing of authorization by the employer.

In this regard an employer's error in judgment can manifest itself in several ways. For example, the employee may perform his job in a reckless or irresponsible manner, thereby causing an injury. The question remains, though, whether the employer should be liable for all such abuses of authority. Clearly, if the employee is in a position in which he has authority to act on behalf of the employer, his abuse of authority is, by implication, an abuse by the employer himself. On the other hand, the authority to perform menial labor, for example, is very limited authority. If in the exercise of that authority, but without the knowledge of the employer, the employee acts maliciously and thereby injures a third party, it is doubtful that there is sufficient justification to hold the employer liable for punitive damages. The approach which does not require intent would, nonetheless, impose liability for punitive damages in this situation.

If the employer expressly instructed the employee to perform his menial labor in a manner which endangered the public, the employer has now acted to authorize a malicious act. This act is the second point at which an employer exercises his judgment in such a way as to affect third parties. In giving specific instruction or in acting in such a way as to give rise to a reasonable inference that a particular act is desired, the employer is granting his employee additional authority to act in a specific manner. Clearly, the employer should be chargeable with the consequences of this exercise of judgment, and under all three approaches discussed in this note, the employer would, in fact, be liable.

Suppose that the employer has authorized his employee to act with ordinary care in performing his menial tasks. The employee has then maliciously engaged in tortious activity while he is working and the employer has been so informed. The employer has determined that the report is accurate and is faced with a decision. He must decide whether he should discipline the employee or possibly even terminate his employment to indicate his disapproval, or whether he should permit the incident to pass, hoping that there will be no repetition thereof. If the employer expresses his disapproval by disciplinary action or termination, he has done virtually all that he could reasonably have been expected to do. Regardless of the plaintiff's desire to recover as large
an award as possible, the employer has done nothing to warrant receiving the burden of punitive damages. Yet under the approach which requires no showing of wrongful intent, the employer would still be liable for punitive damages.

If, on the other hand, knowing of his employee’s conduct, he has retained the employee and has foregone disciplinary action, he has impliedly indicated that in his judgment, such behavior is acceptable despite the injuries which may result. This exercise of his judgment has indicated his intent to permit additional acts of this type by his employee, and therefore has subjected the public to the possibility of future injuries at the hands of his employees. In this case it would not be surprising if a jury found that he deserved to be punished so that he would realize that the public did not approve of such acts. Punitive damages would be appropriate for the manner in which the employer exercised judgment, and under all three approaches such damages would probably be assessed.

From the foregoing it can be seen that an employer’s judgment affects the public interest at the following points: when he hires a person and vests him with specified authority and responsibilities, when he places an employee in a managerial position in which the employee has authority to exercise judgment on behalf of his employer, when the employer directs an employee to perform a certain act or to perform an act in a specified manner, and when the employer either implicitly or explicitly approves an act already performed by his employee. If at any of these points an employer is properly chargeable with exercising his judgment in a malicious or reckless manner, he should be answerable for punitive damages.

Of the three theories discussed in this note, only that expressed by the Restatement clearly holds an employer liable in each of the above situations and only in these situations. If liability is imposed regardless of wrongful intent, punitive damages may be assessed in situations in which the employer has either exercised his judgment carefully or has had no opportunity to exercise judgment, as in a situation in which an employee hired with care acts maliciously while beyond the knowledge and control of the employer. If, on the other hand, a specific showing of intent is required, punitive damages may be avoided by an employer who exercised faulty judgment either in hiring or in vesting managerial authority. For these reasons the Restatement theory, by covering all the above situations, is preferable to the other two theories.
Conclusion

While some states impose liability for punitive damages upon employers without any showing of wrongful intent at the time of the injury, other states require a showing of an intentional act of authorization or ratification on the part of the employer. The drafters of the Restatement of Torts have developed a theory which, while tending toward the latter theory, also holds an employer liable for wrongful acts not strictly related to the actual injury suffered, but related to the degree of care exercised in choosing employees or placing them in positions of authority. This theory is more rational in its approach and provides for punitive damages in all appropriate situations.

William T. Curtis