NOTES AND COMMENTS

THE ASSESSMENT OF PUNITIVE DAMAGES AGAINST AN ENTREPRENEUR FOR THE MALICIOUS TORTS OF HIS EMPLOYEES

Compensatory damages have long been assessed against corporations and other entrepreneurs for the negligent conduct of their employees without regard to the culpability of owners or responsible managerial agents. While entrepreneurial liability for compensatory damages has been widely accepted, such liability for punitive damages has engendered considerably more controversy, since many of the justifications offered in support of the former are of dubious applicability to the latter. The following justifications have traditionally been offered in support of entrepreneurial compensatory damages: the master is in “control” of the servant and should bear the responsibility for his conduct; the master has “chosen” the servant and should therefore suffer for his wrongs; since the master will “benefit” from the servant’s acts, he should bear their burden; although the master may be personally innocent so is the person injured, and between two equally innocent parties, the one who initiated the enterprise should bear the loss; and the master should be liable for the simple reason that he has the “deeper pocket.” More recent justifications, grounded in economic as well as ethical considerations, have gained wide acceptance. It is contended that damages arising out of the operation of a business should be regarded as a cost of doing business; and by requiring the enterprise which “produced” the damage, however innocently, to recompense the innocent victim, the risk will be most effectively allocated and the loss will be distributed through higher prices and increased liability rates, so that the burden on any one individual will be minimized. Although entrepreneurial liability for compensatory damages may

2. Ibid. See also authorities cited at note 5 infra.
4. See Baty, Vicarious Liability 154 (1916) for the origin of this “justification.”
5. See, e.g., 2 Harper & James, Torts § 11.2 (1956).
7. See Calabresi, supra note 6, at 500-01 & n.6.
9. See generally Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584, 720 (1929); Seavey, Speculations as to “Respondeat Superior,” in Harvard
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incidentally influence the future conduct of the party compelled to pay,10 the policies underlying this doctrine are focused primarily upon the recipient of such payment; a loss having been sustained, the courts seek to alleviate the burden on the initial loss bearer in the most expedient and equitable manner. Since punitive damages, however, are awarded in addition to compensatory damages11—after the victim has been “made whole”—the applicability of the above justifications to entrepreneurial liability for punitive damages cannot be assumed. An independent analysis of the justifications underlying the general doctrine of punitive damages must be undertaken before considering the extent to which liability for such damages should be imposed upon the entrepreneur for the malicious acts of his employees.

As a general rule, punitive damages may be awarded where the defendant has committed a malicious, wilful, or intentional tort, or has displayed a reckless indifference to the potentially harmful consequences of his conduct;12 such conduct is viewed as more reprehensible than mere negligence and sufficiently repugnant to society to warrant the imposition of more severe sanctions.13 Punitive damages have been justified on the grounds that they satisfy a public desire for revenge,14 that compensatory damages do not adequately recompense the victim of a malicious tortfeasor,15 and that deter-

LEGAL ESSAYS 433 (1934); Laski, The Basis of Vicarious Liability, 26 YALE L.J. 105 (1916).

13. Although punitive damages are awarded for each of the several types of conduct described above, this Note will not repeat the various grounds, but will employ the term “malicious,” in a somewhat conclusory manner, whenever conduct warranting assessment of punitive damages against the individual tortfeasor is discussed.
14. See, e.g., 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-45, 50-51 (4th ed. 1936); HOLMES, THE COMMON LAW 2-4, 39-42 (1881). Punitive damages have also been justified on the ground that, as a matter of moral necessity, the wrongdoer should be compelled to atone for his offense. Williams, THE AIMS OF THE LAW OF TORT, 4 CURRENT LEGAL PROBLEMS 137, 140 (1951).
15. See also BALLANTINE, CORPORATIONS § 110 (1946).
rence is increased by the imposition of punitive liability. But vengeance is a questionable objective of a civilized legal system, and the problem of inadequate recompense has been alleviated by the expansion of the scope of compensatory damages to include intangible, as well as tangible, losses. Thus, increased deterrence would seem to be the only tenable justification for assessing punitive damages.

Many criticisms have been leveled at the doctrine of punitive damages. It is argued that compensatory damages, themselves, have a punitive effect, that such damages reflect the jury’s sense of outrage in deliberate tort cases, that a jury is not qualified to determine the amount of punitive damages necessary to achieve the desired deterrent effect, and that evidence concerning the defendant’s financial position, admitted to determine effective “punishment,” may evoke irrational jury prejudices. In addition, the discretion of the jury remains largely unchecked since appellate review of such awards or damages is extremely limited. Although the imposition of

18. See PROSSER, TORTS § 37 (2d ed. 1955); MCCORMICK, DAMAGES § 88 (1935).
19. MCCORMICK, DAMAGES §§ 77 (1935); 2 MECH, AGENCY § 2014 (2d ed. 1914); PROSSER, TORTS § 2 (2d ed. 1955); 2 GREENLEAF, EVIDENCE §§ 253, 256, 265, 267, 272 (1st ed. 1842); see also HALE, DAMAGES §§ 87-88 (2d ed. 1912).
22. See Morris, supra note 20, at 1179, 1180.
24. See Morris, supra note 20, at 1179-80; (“... jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.”) Id. at 1191.
25. A jury’s discretion in awarding punitive damages is broader and freer than its discretion in awarding compensatory damages; see, e.g., Thomas v. Mickel, 214 Miss. 176,
civil "punishment"—which results in a private award rather than a public fine—may have the advantage of encouraging the victim to "prosecute" the offender in cases where the anti-social conduct would go unnoticed by public prosecutors, the civil trial has the serious disadvantage of denying to the defendant the traditional safe-guards surrounding the criminal process. He may be compelled to testify against himself; he may be denied the right of cross-examination; he may be punished without a finding of guilt beyond a reasonable doubt, and, since punitive damages may be assessed against a tortfeasor who is also amenable to criminal prosecution, he may be effectively subjected to "double jeopardy." While these general objections to punitive damages are relevant to the problem of imposing liability for such damages upon an entrepreneur for the malicious torts of his employee, such liability raises a variety of additional problems warranting separate analysis.

The difficulties of applying the doctrine of punitive damages to corporate and non-corporate entrepreneurs are reflected in the divergent judicial theories of liability. The broader rule, applied in several states, permits assessment of punitive damages in cases where the anti-social conduct would go unnoticed by public prosecutors, the civil trial has the serious disadvantage of denying to the defendant the traditional safe-guards surrounding the criminal process. He may be compelled to testify against himself; he may be denied the right of cross-examination; he may be punished without a finding of guilt beyond a reasonable doubt, and, since punitive damages may be assessed against a tortfeasor who is also amenable to criminal prosecution, he may be effectively subjected to "double jeopardy." While these general objections to punitive damages are relevant to the problem of imposing liability for such damages upon an entrepreneur for the malicious torts of his employee, such liability raises a variety of additional problems warranting separate analysis.

58 So. 2d 494 (1952); Scott v. Times-Mirror Co., 181 Cal. 345, 367, 184 Pac. 672, 681 (1919), McCormick, DAMAGES § 77 (1935).

26. See McCormick, op. cit. supra note 25, at § 77. See also Western Union Tel. Co. v. Eyser, 2 Colo. 141, 164 (1873).


28. Ibid.

29. Ibid.

30. Ibid.


A majority of jurisdictions hold that it is not a defense to the assessment of punitive damages that the defendant may also be liable to criminal prosecution, although such liability may be pleaded in mitigation of damages. See, e.g., Jackson v. Wells, 13 Tex. Civ. App. 275, 35 S.W. 528 (1896); Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668 (1888); Boetcher v. Staples, 27 Minn. 308, 7 N.W. 263 (1880). In states in which it is a defense to the assessment of punitive damages that the defendant may be liable to criminal punishment, difficult problems arise from the necessity of a civil court's determining whether or not a given act is a crime. See Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 Ind. L.J. 123 (1945); Bingaman v. Gordon Baking Co., 186 F. Supp. 102 (N.D. Ind. 1960).


33. Alabama, Kellite Prods., Inc. v. Binzel, 224 F.2d 131, 143-44 (5th Cir. 1955) (dicta—a jury may in its discretion assess punitive damages against a corporate defendant for oppressive acts of its agents done in the course of employment, regardless of actual authority or ratification); Alaska, Novick v. Gouldsberry, 173 F.2d 496, 500 (9th Cir. 1949); Arkansas, Louisiana Oil Ref. Corp. v. Yelton, 65 S.W.2d 537, 539 (Ark. 1933) ("Under a long line of decisions by this court, punitive damages are recoverable against a corporation for willful, wanton, and malicious conduct of their agents and servants in their line of duties"); Kentucky, Memphis & Cincinnati Packet Co. v. Nagel, 97 Ky. 9, 29 S.W. 743 (1895); Illinois, Algozino v. Welch Fruit Prod. Co., 345 Ill. App. 135, 102 N.E.2d 555 (1951); Minnesota, Schmidt v. Minor, 150 Minn. 236, 240, 184 N.W. 964, 966 (1921) (court held principal liable for punitive damages where an agent committed an assault in the
of punitive damages in any case in which the employee-tortfeasor acted "within the scope of his employment,"34 that is, whenever the employer would be liable for compensatory damages under the doctrine of respondeat superior. The narrower rule, applied in about the same number of states, forbids such liability, from being imposed against an employer in the absence of proof of some culpability of the employer or his responsible representatives.35 It is argued, course of performance of his duties of employment; the court stated that this "doctrine is too deeply implanted in the law to be uprooted for no better reason than that it is illogical"); Mississippi, Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954); D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 221, 16 So. 2d 770, 773 (1944) (although court did find implied authorization it stated "we have throughout our judicial history rejected the doctrine . . . that an employer, in order to be held in punitive damages, must have ratified the gross or willful breach of duty done by the person employed by him . . . "); Missouri, Simmons v. Kroger Grocery & Baking Co., 340 Mo. 1118, 104 S.W.2d 357 (1937); Oklahoma, Mayo Hotel Co. v. Danciger, 143 Okla. 196, 200, 288 Pac. 309, 313 (1930) (doctrine in Oklahoma is that "the legal malice of the servant is the legal malice of the corporation") South Carolina, Phillips v. Atlantic Coast Line R.R., 160 S.C. 323, 158 S.E. 274 (1931); Beauchamp v. Winsboro Granite Corp., 113 S.C. 522, 101 S.E. 856 (1920).

34. See 2 HARPER & JAMES, TORTS §§ 26.6-9 (1956) for a discussion of the "scope of employment" doctrine. Section 26.9 indicates that a master will be liable for compensatory damages for the willful wrongs of his servant whenever the servant's act was done "wholly or partly to further the master's business." This doctrine has often been liberally interpreted, so as to include willful wrongs resulting "from an impulse or emotion arising from the employment or in some way incident thereto." Note, 2 WILLIAM AND MARY L. REV. 485 (1960).

Where a servant's conduct deviates from that which he was employed to perform, it becomes necessary to distinguish those deviations which are still in the scope of employment from those which are not. For attempts to discover meaningful economic and social criteria for determining the circumstances under which an employer should be made to pay for damage caused by his employee, see Smith, Frolic and Detour, 23 COLUM. L. REV. 716, 720 (1923). See generally Douglas, Vicarious Liability and Adminstration of Risk, 38 YALE L.J. 584 (1929); Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L.J. 554 (1961). Professor Calabresi posits that to the extent that the objectives of enterprise liability are wide dispersion of the risk of loss and allocation of resources in a manner which most realistically reflects the true cost of an activity, "the 'scope of employment' rule of respondeat superior [should] be read as broadly as the 'arising out of and in the course of employment' test of workmen's compensation." Calabresi, Some Thoughts on Risk Distributions and the Law of Torts, 70 YALE L.J. 499, 544 (1961).

in justification of the broad rule, that the practical difficulty of proving employer authorization necessitates a presumption conclusive of such conduct.\textsuperscript{36} This evidentiary argument probably rests on the implicit assumption that, as a matter of fact, the type of tort which would result in the assessment of punitive damages is more often than not authorized by the employer. This assumption, however, is untenable since for the most part malicious employee torts are not committed for the purpose of enhancing employer profits.\textsuperscript{37} Employer authorization of such torts is therefore highly unlikely, especially since they jeopardize goodwill and subject the employer to compensatory liability. Thus, the broad rule, although allegedly based on the proposition that “in order that all of the guilty may be admonished, a few innocent must suffer,”\textsuperscript{38} is probably more consistent with the statement that “in order that the few who are guilty may be admonished, the many who are innocent must suffer.”

In justification of the broad rule it is also argued that assessment of punitive damages against an employer for the malicious torts of his employee without regard to entrepreneurial diligence will likely induce employers to exercise greater care in preventing future conduct of a similar nature than would a rule granting immunity on a showing of reasonable care.\textsuperscript{39} This argument is based on a two-staged assumption: that even where the employer

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\textsuperscript{36} One legal scholar has commented:

There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? \textit{Salmond, Jurisprudence} § 152 (11th ed. 1957). See also Simon, \textit{Administrative Behavior} 129-30 (2d ed. 1957).

\textsuperscript{37} Where it can reasonably be assumed that the tort was one likely to have been committed for the purpose of preserving or enhancing entrepreneurial profits, perhaps the difficulty of identifying the culpable authorizing official would warrant shifting the burden of proof and requiring the firm to establish that the conduct was disapproved.

\textsuperscript{38} Morris, \textit{Punitive Damages in Tort Cases}, 44 \textit{Harv. L. Rev.} 1173, 1205 (1931).

\textsuperscript{39} This theory has been given the indirect support by advocates of the broad rule. See Goddard v. Grand Trunk Ry., 57 Me. 202, 223-24 (1869); see also Edgerton, \textit{Corporate Criminal Responsibility}, 36 \textit{Yale L.J.} 827, 832-38 (1927); Note, 70 \textit{Harv. L. Rev.} 517, 526 (1957). Cf. Louis Fizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927), where the Supreme
has not been culpable, greater care is obtainable; and that such care should be
demanded. Since the preventive impact of punitive damages must be evalu-
ated in terms of its economic effect, the economic considerations motivating
increased employer screening and supervision must be investigated. Assuming
that such preventive policies are generally directed at profit maximization
(or more precisely, loss minimization), it appears that the entrepreneur will
ordinarily spend on prevention only that amount which when added to the
remaining risk cost will produce a lower total cost than any other combination
of prevention and risk costs. In this context risk cost may be defined as the

Court, ruling on the constitutionality of a state statute which imposed a penalty on an
employer whose employee’s mere negligence resulted in a death, stated:

... the aim of the present statute is to strike at the evil of the negligent destruction of
human life by imposing liability, regardless of fault, upon those who are in some sub-
stantial measure in a position to prevent it. We cannot say that it is beyond the power
of a legislature, in effecting such a change in common law rules, to attempt to preserve
human life by making homicide expensive. It may impose an extraordinary liability
such as the present, not only upon those at fault but upon those who, although not
directly culpable, are able nevertheless, in the management of their affairs, to guard
substantially against the evil to be prevented. ... Or it may impose on the business
or enterprise in which such loss of life occurs the economic burden of the protective
measure adopted ...

Id. at 116.

But see dissent in Goddard, which questioned the effectiveness, as well as the fairness, of
the broad rule:

... how shall the corporation avoid the constant recurrence of penalties for the offenses
of others? Can they, when they select another servant, exercise any more care or be
more watchful over him? Can they change the passions of men? What is their
fault if they have exercised all the care, wisdom, and prudence with which men are
invested? Must they be punished for not being omnipotent? ... If the punishment,
thus inflicted, is to serve as a warning to others, who must take warning? Evidently
the innocent as well as the guilty. The innocent are to be the greatest sufferers by
reason of the offense, and punished alone directly. It is to serve as a warning to all
innocent persons that they may be punished for the offenses of others, after having
fully compensated the injury done.

57 Me. at 266-67.

<table>
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<tr>
<th>Am't Spent on Preventive Measures</th>
<th>Resultant Prob-ability of Recurring Malicious Conduct</th>
<th>Estimated Am't of Punitive Dam- age Assessment per Malicious Tort</th>
<th>Resultant Risk Cost</th>
<th>Total Cost</th>
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So long as an additional expenditure will reduce the total cost, it will generally pay the
entrepreneur to make such expenditure. In the above example, the entrepreneur will reach
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probability of recurring malicious torts multiplied by the amount of anticipated punitive liability. If the employer, however, does not believe that his individual risk cost can be reduced to an amount below the statistical average risk cost, he may prefer to insure instead of taking preventive measures. Arguably, the average entrepreneur—who does not undertake such a refined analysis—may be prone to take greater precautions under the broad rule since he has a greater stake in preventing the occurrence of malicious torts for which he will be held liable regardless of his diligence. But, absent any empirical data, it may as reasonably be assumed that the broad rule will, in fact, result in less care than the narrow rule for the employer may well conclude that since diligence will remain unrewarded “it is far more simple to let things take their own course than it is to exercise care.” Even if the broader rule could induce a degree of care beyond the standard of reasonableness, such care may be undesirable under certain circumstances; for a

his optimum point with a total expenditure of $50. At that point, an additional $50 expenditure will reduce the risk of a $500 assessment by 10%. Since such expenditure will only bring about an equivalent savings at some future date, it is likely that it will not be made so long as the interest rate is not offset by a probable increase in the value of money (prediction of such a depressor effect is highly unlikely; at any rate, if such an effect did occur the amount of damages assessed would probably reflect the increased value of money). It will clearly not pay to spend $200 since the resultant total cost would increase. It must be remembered that there is considerable variation among entrepreneurs with regard to their adventurousness—i.e., the degree of risk which they are willing to undertake. This variation can be explained in terms of estimated opportunity costs. If an entrepreneur believes that he can employ $25 in such a way that it will bring a return of more than 100%, he will not make the second expenditure in the above example. However, the chart is a useful working model to examine the probable calculations of the average entrepreneur, whose opportunity costs are probably not much greater than 5%.

41. Although the cases are not unambiguous, it appears that an employer can recover punitive damages from his insurer under a standard provision for indemnification “against loss from the liability imposed by law upon the assured” where such liability resulted from an unauthorized tort by an employee. Where the tort was a result of gross negligence, recklessness or wantonness on the part of the employer or employee rather than an intentional wrong, see note 66 infra, employer recovery under a liability insurance contract is clearly permissible, since it has been held not to violate public policy to indemnify an insured who has himself been guilty of aggravated negligence. See General Cas. Co. v. Woodby, 238 F.2d 452 (6th Cir. 1956) (although Intentional torts are not within the scope of accident insurance, torts caused by gross negligence or wantonness are); Sheehan v. Goriansky, 321 Mass. 200, 72 N.E.2d 538 (1947) (“a harm which is only constructively intentional does not, for that reason, fall outside the category of an injury ‘caused by accident.’” Id. at 205); Rothman v. Metropolitan Cas. Ins. Co., 134 Ohio St. 241, 16 N.E.2d 417 (1938). See Annot., 173 A.L.R. 503 (1948); see generally Morris, Punitive Damages in Personal Injury Cases, 21 Ohio St. L.J. 216 (1960); Note, 46 Va. L. Rev. 1036 (1960).

Although intentional misconduct on the part of the insured invariably leads the court to declare indemnification to be against public policy, or in the alternative, to hold that the insurance contract did not cover liability for deliberate wrongs, see note 66 infra, an employer is apparently permitted to recover from his insurance company where damages have been assessed against him for the unauthorized deliberate conduct of his employee.

misallocation of resources may result from requiring an entrepreneur to expend huge sums of money to increase the degree of prevention by an insubstantial amount.

Furthermore, the broad rule implicitly assumes that if sufficient resources are expended the entrepreneur can effectively reduce the malicious torts of his employees. It is quite difficult, however, to predict or control human conduct, especially malicious behavior which is generally sporadic. Available methods of prevention include closer scrutiny of the background and character of potential employees and more careful supervision of present employees, such as warnings against intentional misconduct and strict punishment of offenders. The cost of these measures would vary from the price of printing a few notices to that of retaining a full scale detective agency and psychological testing service. The likelihood of effective prevention is difficult to ascertain. A more careful hiring program may weed out some potential miscreants, but certainly not all, given the present state of psychological knowledge and testing. Neither will any amount of warnings and sanctions guarantee complete success, for there may always be some individuals upon whom such measures will have scant effect. Indeed, an authoritarian atmosphere may nurture the very type of behavior it seeks to prevent.

The broad rule, which engrafts the doctrine of employer liability without fault upon the doctrine of punitive damages, should therefore be rejected. The imposition of liability without fault invariably raises serious ethical objections. Where such liability demonstrably fulfills a substantial societal need, these objections may be overcome. Compensatory liability without fault is warranted primarily because of its effect on the specific victim—it is the most equitable means of assuring adequate compensation—and only incidentally because of its deterrent effect upon the tortfeasor. The assessment of punitive damages, however, is justifiable solely because of its effect upon the future conduct of the tortfeasor and never because of its effect upon the specific victim—for, by definition, full compensation has already been rendered. Since liability without fault for punitive damages cannot be justi-

43. See Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1199-1205 (1931).
45. "The question is not whose mind is 'guilty,' but whose responsibility will serve this deterrent purpose (without disproportionate sacrifice of other social interests)." Edgerton, Corporate Criminal Responsibility, 36 YALE L.J. 827 (1927). See also M. R. Cohen, Moral Aspects of the Criminal Law, in COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 336 (1951). "Why should we not inflict pain on A if that is the only way of securing the safety of the society of which he is a part, or preserving the general conditions of desirable life...?" Id. at 338-39.
46. See notes 3-10 supra and accompanying text.
47. See notes 11 & 18 supra.
fied by the need for adequate compensation, and since the effect of such liability on deterrence and prevention is, at best, highly uncertain, the ethical objections to the broad rule must prevail.\footnote*{48}

Although the broad rule should clearly be rejected, the desirability of retaining the narrow rule must still be determined. Jurisdictions applying the narrow rule are in agreement that punitive liability will be imposed upon proof that an employer or his representative has authorized or ratified malicious conduct.\footnote*{49} Some cases have also suggested that mere negligence in hiring or retaining the malicious tortfeasor will be sufficient to establish employer punitive liability.\footnote*{50} But punitive damages are generally not assessed for mere negligence\footnote*{51} since such conduct is not considered sufficiently reprehensible to warrant so severe a sanction. It is questionable, therefore, whether a tortfeasor should be held liable for punitive damages on a showing of unaggravated negligence simply because he happens to be an entrepreneur. It may be contended, however, that negligence is more reprehensible when it ultimately leads to malicious conduct. But, in the absence of authorization, the employer's negligence is not the effective cause of the malicious conduct. There is no indication that vocational environments are, in general, conducive to the manifestation of antisocial malicious tendencies; it is at least equally likely that an atmosphere of forced unemployment will catalyze such propensities. Arguably, however, the narrow rule, which presumably would discourage the hiring of employees who have displayed malicious tendencies, would discourage individuals from committing malicious torts. But since the employer may be in the best position to channel malicious propensities into socially useful outlets, society may have an important stake in encouraging the employment of potentially malicious individuals.

Even if it were desirable to discourage the employment of potentially malicious tortfeasors, it is questionable whether employer liability for punitive

\footnote*{48. It is axiomatic that “if the evil of the punishment exceeds the evil of the offense, the legislator will produce more suffering than he prevents. He will purchase exemption from a lesser evil at the expense of a greater evil.” Bentham, \textit{Theory of Legislation} (1864), in COHEN & COHEN, \textit{READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY} 331 (1951).


The distinction between \textit{respondeat superior} in tort law and its application to the criminal law is obvious. In tort law, the doctrine is employed for the purpose of settling the incidence of loss upon the party who can best bear such loss. But the criminal law is supported by totally different concepts. We impose penal treatment upon those who injure or menace social interests, partly in order to reform, partly to prevent the continuation of the anti-social activity and partly to deter others. If a defendant has personally lived up to the social standards of the criminal law and has not menaced or injured anyone, why impose penal treatment?

\textit{Id.} at 580 n.l.

\footnote*{49. See note 35 \textit{supra}.

\footnote*{50. See, \textit{e.g.}, Union Transports, Inc. v. Braun, 318 S.W.2d 927 (Texas 1958).

\footnote*{51. See, \textit{e.g.}, Kroger Grocery & Baking Co. v. Waller, 208 Ark. 1063, 189 S.W.2d 361 (1945); Darrin v. Capital Transit Co., 90 A.2d 823 (D.C. Munic. Ct. 1952).}
damages is either a necessary or effective means. Generally, an employer is sufficiently motivated to exercise due care with regard to the hiring and retaining of malicious individuals by his desire to avoid compensatory damages and to maintain good will and labor morale, especially since malicious torts rarely result in employer profit. Even if employer punitive liability is necessary to encourage the exercise of due care, the availability of insurance severely limits the impact of such liability. The effect of punitive liability on an insured employer will be determined by the extent to which his insurance rates vary with the actual amount or frequency of his liability. But any variation will be insignificant since these rates are generally calculated with reference to the experience of a large number of firms. Thus, there is no justification for assessing punitive damages against an employer for his mere negligence; authorization or ratification, however, presents more difficult problems.

In the non-complex business unit—where ownership and management are merged—an employer who personally authorizes his employee to commit a malicious tort should clearly be treated as a joint malicious tortfeasor. However, in the more complex business unit—the corporation in which ownership and management are separate—the problem assumes additional dimensions. Initially, it must be realized that liability imposed upon a complex corporation does not fall directly on directors or other policy makers. Rather, the initial impact falls primarily on the shareholders. Thus, the liability should not be viewed as an abstract "corporate" liability but rather as that of the shareholders. Ethical considerations suggest that shareholders whose fault

52. See note 41 supra.

53. Firms having a sufficiently large number of claims per year may be designated by insurance companies as "credible." To the extent that a firm is "credible" its insurance rates will reflect its particular accident history. Few firms are sufficiently "credible" to have their own experience significantly reflected in the rates they are charged. See generally, Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L.J. 554, 560-74 (1961).

54. See Francis, Criminal Responsibility of the Corporation, 18 ILL. L. REV. 305, 315-23 (1924). BALLANTINE, CORPORATIONS § 114 (1946):

Customary judicial verbiage about imputing to the corporation the act and intent of the offender is entirely figurative and glosses over a defective analysis. The shareholders in their corporate capacity are treated as convenient hostages. Accordingly, it does not at all follow that the corporation should automatically be criminally punishable for the crimes of its employees acting in its business. . . .

Id. § 114, at 280.

55. The possibility of shareholder derivative suits might alleviate the burden of such a penalty. It is generally held that each director is liable to the shareholders for those damages which due care on his part would probably have prevented. BALLANTINE, CORPORATIONS § 636 (1946). Certain executive officers may come under a greater responsibility for the conduct of subordinates than do directors. Id. § 64. Derivative suits, however, are rarely undertaken. See LIVINGSTON, THE AMERICAN STOCKHOLDER (1958).
not be established should not be held liable for punitive damages, especially since, in the vast majority of cases, they do not benefit from the malicious tort. Since their power over corporate management is, both legally and effectively, limited, shareholder liability should be imposed only in the rare case of malicious misuse of this power. Shareholder punitive liability, in the absence of such personal misconduct, would violate deeply rooted traditions of our legal system which condemn the vicarious imposition of punitive sanctions.

56. Francis, *Criminal Responsibility of the Corporation*, 18 Ill. L. Rev. 305 (1914):

"Guilt is personal" in any system of law that calls itself civilized. So, where an agent, while engaged in the duties of his principal, commits a crime, as difficult as is the question of authorization or inducement, we do not saddle the crime on the principal unless we can in some way prove him a party to the crime.

Why should the rule be otherwise in corporations? ... As to the guilty members, our criminal law is adequate to take care of them, why punish the innocent?

Id. at 316-17. See also Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 702-08 (1930); Lee, *Corporate Criminal Liability*, 28 Colum. L. Rev. 1 (1928).

The principle against vicarious punishment is deeply rooted in fundamental morality. Thus, the Mosaic legislation lays down the express rule that "the fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin." Deuteronomy 24:16.

57. See *Ballantine, Corporations* §§ 42, 43, 185-88 (1946).

58. The actual power of shareholders may be considerably less than their legal power. See generally Berle & Means, *The Modern Corporation and Private Property* (1932) ("the shareholder is definitely made subservient to the will of a controlling group of managers." Id. at 277). *Burnham, The Managerial Revolution* (1941); *Livingston, The American Stockholder* (1958); *Berle, Power Without Property*, chs. II & III (1959). Livingston indicates that as a rule when a stockholder is dissatisfied with a company's management, rather than start a proxy fight, or sue, he simply sells his stock. *Livingston, supra* at 60. Berle states:

Nominal power still resides in the stockholders; actual power in the board of directors . . . . Essentially these stockholders, though still politely called "owners," are passive. They have the right to receive only. The condition of their being is that they do not interfere in management. Neither in law nor, as a rule, in fact do they have that capacity.

*Berle, supra* at 74.


60. Cf. Canfield, *Corporate Responsibility for Crime*, 14 Colum. L. Rev. 467, 427-80 (1914). But see *Commonwealth v. Koczwara*, 397 Pa. 575 (1959), which held an employer criminally liable for the unauthorized acts of his employee, where the employee sold liquor to minors, in violation of a state statute. Although the court admitted that "at common law, any attempt to invoke the doctrine of respondeat superior in a criminal case would have run afoul of our deeply ingrained notions of criminal jurisprudence that guilt must be personal and individual," id. at 579-80, it distinguished the case at bar on the ground that it involved an essentially non-criminal regulatory provision, that only a light penalty was involved, and that "statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt." Id. at 580. The differences between the doctrine of "public welfare offenses"—violations of pure food and drug laws, speeding ordinances, building regulations, child labor and minimum wage and maximum hour regulation—and the problems raised by the doctrine which is the
The extremely conceptual reasoning, which purports to justify shareholder liability without fault by attributing the acts and intent of directors and other corporate policy makers to the shareholders, is hopelessly circular; it must be rejected unless a positive showing can be made that such liability is an essential and effective method of deterring the authorization of malicious torts.

Although it is likely that fear of compensatory liability and loss of good will sufficiently motivates corporate policy makers to take steps against authorized non-acquisitive malicious conduct, it may be argued that shareholder liability without fault for punitive damages will induce corporate policy makers, concerned with the maximization of corporate profits, to expend some additional amounts to prevent the authorization of such conduct. But such liability is a circuitous and ineffective method of inducing prevention. Even in the absence of this Note, would seem to render the former doctrine inapplicable. Punitive damages are not necessarily a light penalty since, as previously indicated, the jury's discretion is substantially unlimited. Furthermore, the ultimate misconduct does involve "moral delinquency." Finally, the irrebuttable presumption of authorization may be warranted in cases of regulatory offenses, since such offenses are usually committed in furtherance of employer's profits; such is not the case with regard to malicious torts.

61. Under the narrow rule, and in the area of corporate crimes, a perplexing problem arises in seeking to determine which employees are corporate representatives for the purpose of assessing "corporate," i.e., shareholder liability. Mueller defines corporate representatives as those who "direct, supervise and manage the corporation within its business sphere and policy-wise..." Mueller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21, 41 (1957). See also Winn, The Criminal Responsibility of Corporations, 3 Camb. L.J. 398 (1929).

The following is an example of a judicial attempt to set forth criteria for identifying "corporate representatives" (whom it calls "vice-principals"):

(a) Corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of non-delegable or absolute duties of the master; and (d) those to whom a master has confided the management of the whole or a department or division of his business....

Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 145, 70 S.W.2d 397 (1934).

62. See, e.g., Mueller, supra note 61, at 41: (those "who direct, supervise and manage the corporation within its business-sphere and policy-wise... are the mens, the mind or brain of the corporation."). See also Winn, The Criminal Responsibility of Corporations, 30 Camb. L.J. 398, 406-08 (1929). The broad rule has frequently been "justified" by this corporate identification doctrine—i.e., that the acts and intent of any employee are the acts and intent of the "corporation." Mobile & O. R. Co. v. Seals, 100 Ala. 368, 13 So. 917 (1893); 3 Sutherland, Damages § 950 (4th ed. 1916); 10 Fletcher, Cyclopedia Corporations § 4906 (perm. ed. 1931); But see dissent in Goddard, 57 Me. 202, 240-42 (1869); Ballantine, Corporations §§ 109, 114 (rev. ed. 1946); Francis, Criminal Responsibility of a Corporation, 18 Ill. L. Rev. 305, 317, 321-23 (1924).

63. See note 39 supra.


of insurance there are several mechanisms whereby a business may mitigate the impact of liability. Depending upon the demand curves facing the firm and the industry, the burden of liability may be spread, to a greater or lesser extent, to customers, employees, creditors, and suppliers, through increased prices and lower output. Although it may be impossible for the firm to "pass on" the entire burden, any attempt to increase the residual impact by raising the total liability may place additional secondary losses on parties not in a position to prevent the tort and thereby create additional dimensions of liability without fault.

In light of the difficulties created by shareholder liability for punitive damages, the question arises whether the desired deterrence cannot be obtained at a lower social cost by limiting punitive liability to those individuals who actually authorized and executed the malicious, non-acquisitive conduct. Since, by the act of authorizing or executing such unprofitable and expensive conduct, these individuals have displayed a certain indifference to corporate profits, the imposition of personal liability on such individuals may be as effective a deterrent as the imposition of shareholder liability on the corporation. The exclusion of the corporation as a defendant may actually increase deterrence in states which disallow separate judgments of punitive damages against joint tortfeasors, since, under present practice, it is likely that the victim will seek and obtain satisfaction of his judgment from the corporate treasury rather

66. Where an employer or his representative has authorized the malicious tort, his intentional misconduct would probably preclude employer recovery under an insurance contract. See authorities cited at note 41 supra. See also Appleman, Insurance Law and Practice §§ 4312, 4900 (1943); Commonwealth Cas. Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928); Travelers Ins. Co. v. Reed Co., 135 S.W.2d 611 (1939). Cf. Jedasco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941) (refusing to permit indemnification of statutory punitive damages on grounds of public policy). But see dicta distinguishing common law punitive damages. Id. at 531-38, 18 A.2d at 359. However, this "distinction" is not inexplicable. Connecticut considers the latter assessment as "compensatory." See note 15 supra. See Arnold v. State ex rel. Burton, 220 Ark. 25, 245 S.W.2d 818 (1952) and Yesel v. Watson, 58 N.D. 524, 226 N.W. 624 (1929) (denying recovery under surety bonds).


68. Morris, supra note 67, at 585-86.

69. See, e.g., Pardidge v. Brody, 7 Ill. App. 639 (1880); McCarthy v. DeArmit, 99 Pa. 63 (1881); Leach v. Helm, 114 Ore. 405, 235 Pac. 687 (1925); For cases allowing separate exemplary damages awards (or apportionment)—apparently the practice of a majority of states—see Louisville & N. R.R. v. Roth, 130 Ky. 759, 114 S.W.2d 264 (1908); Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818 (1912); Thompson v. Catalina, 205 Cal. 402, 271 Pac. 198 (1928). See also Annot., 62 A.L.R. 239 (1929). It is, of course, possible that the corporation will exercise its legal right to recover the damages from the guilty official, note 55 supra. If such action is taken it is true that no additional deterrence is achieved by eliminating corporate liability; nevertheless, such a practice would indicate that corporate liability is an awkward and circuitous means of imposing penalties on culpable officials.
than from the authorizing individual, and it is unlikely that the corporation will
exercise its legal right to recover the damages from the authorizing official.
Only in the rare case in which the malicious tort was authorized for the specific
purpose of enhancing corporate profits, would shareholder liability be justified,
since such authorization would probably be effectively deterred once the acquis-
teive malicious conduct were rendered unprofitable.
An examination of entrepreneurial liability for punitive damages for mali-
cious, non-profitable torts of employees has revealed no demonstrably greater
deterrence than that obtained by limiting assessment to culpable individuals.
Therefore, the objections to the imposition of penal sanctions on possibly in-
ocent defendants and the general objections to the doctrine of punitive dam-
ages compel the conclusion that such damages should be assessed only
against individuals, on any level of employment, who expressly or impliedly
authorized, participated in, or committed a malicious tort.