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Corporate Vicarious Liability for Punitive Damages

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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.[1]

I. INTRODUCTION

Punitive damages "are awarded to punish the wrongdoer for his malicious, vindictive, willful or wanton invasion of the injured person's rights. They also serve as an example to restrain and deter others from the commission of such wrongs."[2] Courts are split regarding when corporate vicarious liability for punitive damages meets the goals of punishment and deterrence.[3]

Some courts follow a "course of employment" rule and impose corporate vicarious liability for punitive damages whenever the employee acts within the scope of his employment[4] and would be personally liable for punitive damages.[5] Other courts follow a narrower "complicity" rule, which requires not only that the employee act within the scope of employment but also that the corporation authorize or ratify the act, the corporation recklessly retain or employ the employee, or the act be committed by a managerial employee.[6] Eighteen jurisdictions follow the course

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1. *Deuteronomy* 24:16 (King James).

2. Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 989, 666 P.2d 711, 713 (1983); *see also* Williams v. City of New York, 508 F.2d 356, 360 (2d Cir. 1974); Parris v. St. Johnsbury Trucking Co., 395 F.2d 543, 545 (2d Cir. 1968); Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 772-73, 356 N.E.2d 625, 626 (1976); Embrey v. Holly, 293 Md. 128, 141, 442 A.2d 966, 973 (1982) (quoting Wedeman v. City Chevrolet Co., 278 Md. 524, 531, 366 A.2d 7, 12 (1976)); Detling v. Chockley, 70 Ohio St. 2d 134, 136, 436 N.E.2d 208, 209 (1982); Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980); Campen v. Stone, 635 P.2d 1121, 1124 (Wyo. 1981); Town of Jackson v. Shaw, 569 P.2d 1246, 1252-53 (Wyo. 1977).

3. However, courts are unanimous in holding employers liable for compensatory damages. *See, e.g.*, Embrey v. Holly, 293 Md. 128, 134, 442 A.2d 966, 969 (1982) ("[T]he master's liability for compensatory damages in the usual case is beyond question . . . .").

4. Defining "scope of employment" is beyond the scope of this comment.

5. Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983); *see also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 13 (5th ed. 1984) [hereinafter cited as PROSSER].

6. Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983). The complicity rule is based

of employment rule,[7] twenty-five follow the complicity rule,[8] four do not award punitive damages,[9] and four have not addressed the issue.[10]

Neither rule correctly imposes corporate vicarious liability for punitive damages. The complicity rule addresses corporate involvement, an irrelevance under the doctrine of respondeat superior, and the course of employment rule imposes liability when punitive damage awards serve no societal purpose. This comment analyzes the weaknesses of both rules and recommends an approach that discards punishment concerns and limits liability to situations involving tortious conduct likely to recur.

II. Weaknesses of the Complicity Rule

Complicity proponents contend that the purpose for awarding punitive damages is best served by limiting liability to situations involving corporate participation. The requisite corporate

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on Restatement (Second) of Torts § 909 (1979):

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
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> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
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> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
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> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
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> (d) the principal or a managerial agent of the principal ratified or approved the act.

See also Restatement (Second) of Agency § 217C (1958).

7. Briner v. Hyslop, 337 N.W.2d 858, 864 (Iowa 1983), lists the following eighteen jurisdictions as having adopted the course of employment rule: Alabama, Arizona, Arkansas, Delaware, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Pennsylvania, South Carolina, and Tennessee.

Briner also suggests that Kansas and Oregon have adopted the course of employment rule. However, Kansas recently adopted the complicity rule in Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983), and Oregon adopted a modified complicity rule in Stroud v. Denny's Restaurant, Inc., 271 Or. 430, 532 P.2d 790 (1975) (ignoring the managerial employee requirement).

8. Briner v. Hyslop, 337 N.W.2d 858, 864-67 (Iowa 1983), lists the following twenty-three jurisdictions as having adopted the complicity rule: California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Rhode Island, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. Kansas and Oregon have also adopted the complicity rule. *See supra* note 7.

9. Louisiana, Massachusetts, Nebraska, and Washington. Briner v. Hyslop, 337 N.W.2d 858, 865 (Iowa 1983).

10. Alaska, New Hampshire, South Dakota, and Utah. *Id.*

participation can be established by proof that the corporation authorized or ratified the employee's act, the corporation recklessly retained or employed the employee, or the act was committed by a managerial employee. The rationale for requiring corporate participation is simple: "Unless the employer is himself guilty . . . an award punishing the employer . . . makes no sense at all."[11] As the United States Supreme Court stated in *Lake Shore & Michigan Southern Railway v. Prentice:*

> Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.[12]

Complicity proponents further point out that blameless shareholders bear the financial burden if a corporation is held vicariously liable for punitive damages.[13] Investors are innocent of any personal misconduct and are also "incapable of wielding any effective restraints over actions by corporate employees."[14]

The rationale behind the corporate participation requirement is without merit. Under basic principles of respondeat superior corporate participation is irrelevant to vicarious liability. Under the doctrine of respondeat superior, corporations are liable for injuries proximately resulting from the acts of employees

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11. Williams v. City of New York, 508 F.2d 356, 360 (2d Cir. 1974); *see also* Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 773, 356 N.E.2d 625, 626 (1976) ("[A]n assessment of punitive damages is more difficult to justify where an otherwise innocent principal is held liable solely on the basis of *respondeat superior.*"); Goddard v. Grand Trunk Ry., 57 Me. 202, 247 (1869) (Tapley, J., dissenting) ("The idea of punishing one who is not *particeps criminis* in the wrong done is so entirely devoid of the first principles and fundamental elements of law, that it can never find place among the rules of action in an intelligent and virtuous community."); RESTATEMENT (SECOND) OF TORTS § 909 comment b (1979) ("The [complicity] rule . . . results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.").

12. 147 U.S. 101, 107 (1893).

13. *See* PROSSER, *supra* note 5, at 12; Morris, *Punitive Damages in Personal Injury Cases,* 21 OHIO ST. L.J. 216, 218 (1960).

14. Courtney & Cavico, Jr., *Punitive Damages: When Are They Justifiable?,* 18 TRIAL, Aug. 1982, at 52, 54.

committed within the scope of their employment.[15] Whether the doctrine is founded on public policy, convenience, or justice, an employee's acts should be imputed to the corporation because

> [a] corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands.[16]

The corporate participation requirement suggests that imposing corporate vicarious liability for punitive damages hinges on the level of corporate involvement in the tortious act. However, the doctrine of respondeat superior has never based vicarious liability on the level of the corporation's participation. The focus is on the employee's act, not on the level of corporate involvement. The corporation is liable if the employee's tortious act was "committed in the course and scope of the agent's employment even though [the corporation] does not authorize, ratify, participate in, or know of, such misconduct."[17] Because the degree of corporate involvement is immaterial under the doctrine of respondeat superior, arguments regarding when punishment is appropriate miss the point: punitive damages are awarded against the corporation because the employee's acts are the corporation's acts.

The complicity rule's weaknesses are further illuminated by examining each of its three standards for determining corporate involvement. The first requirement, that the corporation authorize or ratify the conduct, is often meaningless. Rarely, if ever, would a corporation authorize its employees to beat, insult, or outrage third parties; nor would a corporation ratify or participate in such conduct.[18] "Indeed, it would be a startling event if any [corporation] sanctioned the intentional tort of its agent

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15. *See* 57 C.J.S. *Master and Servant* § 570 (1955).

16. Goddard v. Grand Trunk Ry., 57 Me. 202, 223 (1869).

17. 3 AM. JUR. 2D *Agency* § 267 (1962).

18. *See* Pullman Palace-Car Co. v. Lawrence, 74 Miss. 782, 803, 22 So. 53, 58 (1897) ("Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct."); West v. F.W. Woolworth Co., 215 N.C. 211, 215, 1 S.E.2d 546, 549 (1939) ("Employers seldom, if ever, instruct or directly authorize their employees to wrongfully invade the personal or property rights of others.").

when the result would be to expose itself to liability for punitive damages."[19]

Similarly, the requirement of corporate authorization evaluates the tortious act out of context. The pivotal issue in determining corporate liability for an employee's tortious act is not whether the tortious act itself was within the ordinary course of business, but whether the tortious act was committed by an employee while engaged in the ordinary course of employment.[20]

The complicity rule's third requirement, that the tortious act be committed by a managerial employee, is also problematic. This requirement suggests that corporate liability hinges on employment status. A managerial employee's acts will initiate liability but a menial employee's acts will not. However, while the scope of duties varies among employees, each employee has duties entrusted to him by the corporation. A menial employee is as fully authorized to act for the corporation in performing his entrusted duties as is a managerial employee.[21] Agency alone

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19. Hale v. Farmers Ins. Exch., 42 Cal. App. 3d 681, 703, 117 Cal. Rptr. 146, 161 (1974) (Kerrigan, J., concurring and dissenting); *see also* Pullman Palace-Car Co. v. Lawrence, 74 Miss. 782, 803, 22 So. 53, 58 (1897) ("If corporations . . . can never be held liable in punitive damages for the acts of their servants unless expressly authorized . . . or . . . ratified by them . . . we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations."); Note, *Exemplary Damages Against Corporations,* 30 GEO. L.J. 294, 300-01 (1942) ("Since a corporation will rarely authorize the commission of a tort and ordinarily will not ratify one, the protection and safety of the public from tortious acts of omnipresent corporate employees should not depend on these improbable contingencies.").

20. *See* Wilkinson v. Gray, 523 F. Supp. 372 (E.D. Va. 1981), *aff'd sub nom.* Wilkinson v. United States, 677 F.2d 998 (4th Cir.), *cert. denied,* 459 U.S. 906 (1982); Scott v. Allstate Ins. Co., 27 Ariz. App. 236, 553 P.2d 1221 (1976); United Bhd. Of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962), *cert. denied,* 371 U.S. 954 (1963).

21. *See* Mobile & O.R.R. v. Seals, 100 Ala. 368, 375, 13 So. 917, 919 (1893):

> The president of a railway corporation is no more or less its agent than a brakeman on one of its trains. His agency is broader, but it is not boundless, and a matter which lies beyond its limits is as thoroughly beyond his powers as any matter beyond the very much smaller circle of a brakeman's duties; . . . a brakeman is as fully authorized to act for the company, within the range of his employment, as the president is within the limits of his office. It can no more be said that the corporation has impliedly authorized or sanctioned the willful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity.

See also Stroud v. Denny's Restaurant, Inc., 271 Or. 430, 437, 532 P.2d 790, 793 (1975) ("If the employee was acting within the scope of his employment, the corporation will be liable for punitive damages regardless of whether that employee may be classified as 'menial.'").

cannot justify the fluctuation of liability between employee classes.

Complicity proponents distinguish managerial and menial employees on two grounds. First, they argue that the nature of the act fluctuates with employee status. However, injuries resulting from acts of managerial employees are no different from injuries resulting from the same acts of any other employee.[22] "No matter who the actor may be, it does not alter the character of the act itself."[23] Second, the complicity proponents argue that managerial acts reflect corporate intent. However, the doctrine of respondeat superior merely requires that the tortious act be committed in the employee's scope of employment. Corporate intent is not relevant.[24]

Under respondeat superior, no justification exists for the complicity rule's requirements of corporate authorization or ratification, reckless retention or employment practices, or an act committed by a managerial employee. Stripped of these additional requirements, the complicity rule mirrors the course of employment rule and can be rejected in its entirety.

III. Weaknesses of the Course of Employment Rule

Proponents of the course of employment rule "have been concerned primarily with the deterrent effect of the award of [punitive] damages, and have said that if such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them" even in the absence of corporate approval, ratification, or involvement.[25] A corporation facing the threat of punitive damages will exercise greater care over its employees and recurrence of similar tortious conduct will thereby be avoided.

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22. Campen v. Stone, 635 P.2d 1121, 1134 (Wyo. 1981) (Rose, C.J., dissenting).

23. *Id.*

24. Note also that requiring an employee to be a managerial agent undercuts the deterrence goal. Corporate employers may assume that "liability for punitive damages will only be assessed when an unfortunate plaintiff is 'lucky' enough to be injured by the wanton misconduct of an employee in its management hierarchy." *Id.* Such an assumption "provides no incentive for corporations to control the acts of their lower-level employees." *Id.* In fact, "if prevention be the purpose of exemplary damages against corporations, the threat and hence the prevention would seem to be lessened substantially by a rule which imposes upon the plaintiff the difficult task of showing wrongdoing by those 'higher up.' " C. McCormick, Handbook on the Law of Damages § 80, at 285 (1935).

25. Prosser, *supra* note 5, at 13.

This theory is problematic for several reasons. First, it assumes that a corporation will always expend the funds necessary to prevent the act from recurring. However, a corporation "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."[26] Simply stated, a corporation may find paying punitive damages cheaper than implementing costly risk-reducing controls.

Second, the course of employment rule assumes that if funds necessary to exercise stricter control over employees are expended, future occurrence of similar tortious conduct will be deterred. Complicity proponents correctly point out, however, that "there can be no effective deterrence unless there is some conduct which can be deterred."[27] They note that "[t]he ability to better control the actions of the employee through greater supervision is often illusory. . . . [E]mployees may perform their duties where direct supervision is impossible. Further, increased supervision may well be ineffective to prevent the occurrence of certain torts . . . ."[28]

Strictly applying the course of employment rule may impose vicarious liability for punitive damages despite corporate inability to avert future tortious conduct. Awarding punitive damages in such situations cannot be justified, for in the absence of any deterrence the award fails to fulfill any substantial societal in-

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26. Comment, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1302 (1961). For example, if no money were expended on preventive measures and a 90% probability existed that $500 in punitive damages would be awarded, the resultant risk cost would be $450 (90% x $500) and the total cost would be $450. If $50 were expended to reduce the probability of assessment to 60%, the resultant risk cost would be $300 and the total cost would be $350. If $200 were expended to reduce the probability to 40%, then the resultant risk cost would be $200 and the total cost would be $400. Because the lowest total cost ($350) to the corporation exists when it spends only $50, it will probably spend no more. However, the control actually necessary to prevent future similar conduct might cost $250. The course of employment rule assumes that the corporation will expend the necessary $250 when faced with the threat of punitive damages. However, the prudent corporation will not spend the necessary $250 because its total cost will not be lowest if more than $50 is spent on prevention. Accordingly, the corporation will not spend the funds necessary to exercise greater control if doing so is not economically feasible. *See id.* at 1302 n.40.

27. Briner v. Hyslop, 337 N.W.2d 858, 865 (Iowa 1983).

28. Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 773, 356 N.E.2d 625, 627 (1976); *see also* Briner v. Hyslop, 337 N.W.2d 858, 865-66 (Iowa 1983); Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 992, 666 P.2d 711, 715 (1983).

terest. Therefore, the course of employment rule in its present state should be rejected.

IV. Proposal of a New Rule

For a rule imposing corporate vicarious liability for punitive damages to be acceptable, the following two inquiries must be answered affirmatively: (1) Does the rule focus solely on whether a tortious act was committed within the scope of employment? and (2) Would awarding punitive damages deter future tortious conduct of a similar nature?

Because liability is imposed under the doctrine of respondeat superior, any new rule of law must focus on whether the tortious act was committed within the scope of an agent's employment. The rule need not concern itself with the level of corporate participation in the act, nor address any intent on the part of the corporation. The first inquiry is answered affirmatively if the course of employment rule is adopted because it requires only that the tortious act be committed within the scope of the agent's employment.

The purpose of awarding punitive damages under the doctrine of respondeat superior is to deter future tortious conduct of a similar nature. Punitive damages are awarded under the course of employment rule in its present state, however, even in situations when future tortious conduct cannot be deterred. The course of employment rule, therefore, must be modified to satisfy the second inquiry.

The following proposed rule reflects such a modification: A corporation is vicariously liable for punitive damages if an employee commits a tortious act while engaged in his scope of employment and imposing vicarious liability for punitive damages may deter future tortious conduct of a similar nature. This new rule requires affirmative answers to the two necessary inquiries in determining whether imposing corporate vicarious liability for punitive damages is justified.

The impact of the proposed rule is illustrated by applying it to an existing case. In *Campen v. Stone*,[29] Edward Campen was driving from Billings, Montana, to Casper, Wyoming, to give a speech on behalf of his employer, Schlumberger Well Services. On the morning of his travels, he took a prescribed valium tablet and an Allerest tablet. At lunch he consumed three martinis. In

29. 635 P.2d 1121 (Wyo. 1981).

the late afternoon he collided with the rear end of Stone's pickup on Interstate 90. Campen refused to submit to a blood alcohol test but later pled guilty to driving too fast for conditions.[30] The Wyoming Supreme Court adopted "the [complicity] test as set forth in the Restatement as the one to be used in determining when an employer may be held liable for punitive damages as a result of the misconduct of the employee."[31] After reviewing the record, the Wyoming Supreme Court concluded that it could not "find that sufficient evidence supporting such a judgment for punitive damages against Schlumberger existed as a matter of law."[32]

The *Campen* result may have been different had the Wyoming Supreme Court applied the proposed rule. Under the proposed rule, the Wyoming Supreme Court would first have asked whether Campen was acting within the scope of his employment when the collision occurred. The court answered this question affirmatively: "In the present case Schlumberger, as the employer, conceded that at the time of the accident Campen, its employee, was acting within the scope of his employment."[33]

The court's second inquiry would have been whether imposing vicarious liability for punitive damages would deter future conduct of a similar nature. An examination of the facts indicates that such conduct could be deterred in the future. The risk of collision increases as Schlumberger's employees travel. Imposing vicarious liability for punitive damages may prompt Schlumberger not only to inquire about its employees' physical health prior to traveling, but also to forbid its employees from consuming alcohol when traveling. Schlumberger's actions would be relatively inexpensive and would probably help prevent future collisions. Imposing vicarious liability for punitive damages would therefore be justified.[34]

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30. *Id.* at 1122.

31. *Id.* at 1125.

32. *Id.* at 1126.

33. *Id.* at 1123-24.

34. Applying the proposed rule will not always provide results contrary to those obtained when the complicity rule or the scope of employment rule is employed. The proposed rule and the complicity rule provide different results only when evidence indicates no employer authorization, ratification, or participation, no managerial tortfeasor, and no reckless hiring or retention practices, but does indicate imposing vicarious liability for punitive damages will deter future tortious conduct of a similar nature (or vice versa). The proposed rule and the scope of employment rule provide different results only when evidence indicates vicarious liability for punitive damages will not deter future tortious conduct of a similar nature.

V. Conclusion

Modifying the course of employment rule results in a new rule that addresses the only inquiry demanded by the doctrine of respondeat superior—whether the act occurred within the scope of employment. The new rule also limits vicarious liability to situations in which the deterrent justification for awarding punitive damages is fulfilled. The court must still determine whether the agent was acting within the scope of his employment when the tortious conduct was committed and whether imposing corporate vicarious liability for punitive damages will deter future tortious conduct. Although both issues may raise application problems, the new rule at least provides the courts with a proper starting point when deciding whether to impose corporate vicarious liability for punitive damages awarded for an employee's tortious act.

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