

1983

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Recommended Citation

Barbe, J. Kenneth (1983) "Recovering Punitive Damages from Employers: The Practical Application of the Restatement (Second) of Torts 909," *Land & Water Law Review*. Vol. 18 : Iss. 2 , pp. 671 - 692.
Available at: https://scholarship.law.uwyo.edu/land_water/vol18/iss2/9

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COMMENTS

RECOVERING PUNITIVE DAMAGES FROM EMPLOYERS: THE PRACTICAL APPLICATION OF THE RESTATEMENT (SECOND) OF TORTS § 909

When a plaintiff is injured through the wrongful conduct of another, he may seek compensation for his loss from the guilty party. In addition to compensatory damages, the plaintiff may seek punitive damages because of the outrageous nature of the defendant's conduct. If punitive damages are assessed, the plaintiff may recover, and consequently the defendant may pay, an amount of money in excess of the actual loss suffered. For this reason, the law of punitive damages will be very important to both parties. If the person causing the injuries was employed and working for another at the time of the incident, the plaintiff might also seek compensatory and punitive damages from the employer. At this point, the law of punitive damages will also become very important to the employer.

The purpose of this comment is to shed some light on the law of punitive damages as it relates to employers. The scope of the discussion and analysis will be limited to the situation where an employee injures a third person rather than the case where one employee injures another employee.

There are generally two different theories upon which punitive damages might be assessed against employers for the injurious acts of their employees.¹ The theory providing the easiest case for plaintiffs is that of "strict vicarious liability." Under this theory, an employer will be held liable for punitive damages whenever his agent, while acting within the scope of employment, has committed an act for which punitive damages could be assessed.² The other, more restrictive, theory is reported in section 909 of the Restatement (Second) of Torts.³ The Restatement rule limits the circumstances under which

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1. See generally J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE §§ 5.06-5.07 (1981).

2. See generally 5 DAMAGES IN TORT ACTIONS § 40.51[3] (M. Minzer, J. Nates, C. Kimball, & D. Axelrod ed. 1982) [hereinafter cited as Minzer].

3. RESTATEMENT (SECOND) OF TORTS § 909 (1979). See 5 Minzer, *supra* note 2, at § 40.51[2].

an employer may be liable for punitive damages to those in which he has in some way participated.⁴

The Restatement theory of liability was adopted by the Wyoming Supreme Court in the case of *Campen v. Stone*.⁵ The specific purpose of this comment will be to aid the Wyoming practitioner in understanding the Restatement rule, by illustrating how other courts have applied it and by suggesting other possible interpretations of the rule. Before reaching an analysis of the rule, however, a brief discussion of the history of punitive damages might be helpful in understanding the policies underlying the doctrine.

THE HISTORICAL DEVELOPMENT OF PUNITIVE DAMAGES

Punitive damages owe their origins to old English law and the days when juries were considered the sole judges of damages in a law suit.⁶ When a particular wrong was attended by aggravating circumstances, juries were likely to return large awards against defendants.⁷ Courts, noting that the parties had agreed to put their case to a jury and that juries are not supposed to give verdicts inconsistent with their conscience, would dismiss defendant's objections to awards given in excess of actual damages.⁸

Toward the end of the eighteenth century English courts began taking a different view toward damages, conceding that such awards might not always be purely compensatory in nature.⁹ Lord Chief Justice Pratt is reported to have said, "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as a proof of the detestation in which the wrongful act is held by the jury."¹⁰

4. RESTATEMENT (SECOND) OF TORTS § 909 (1979). Section 909 allows punitive damages against an employer where he, or his managerial agent, authorized, ratified or approved the agent's outrageous act, or was reckless in employing or retaining the employee who committed the act. See 5 Minzer, *supra* note 2, § 40.15[2], at 40-125.

5. 635 P.2d 1121, 1125 (Wyo. 1981).

6. HALE, HANDBOOK ON THE LAW OF DAMAGES 302 (2d ed. 1912).

7. *Id.*

8. SEDGEWICK, 1 A TREATISE ON THE MEASURE OF DAMAGES § 349, at 688 (9th ed. 1920).

9. *Id.* at 688-89.

10. LORD CAMPBELL, *Lives of the Chancellors*, VOL. v., at 249, quoted in 1 SEDGEWICK, *supra* note 8, § 350, at 690.

The principle of awarding damages for the sake of punishment was established early in America. A New Jersey court in the late 1700's instructed a jury not to award damages based upon particular proof of actual loss, but rather to award damages for "example's sake," in order to discourage similar conduct by others.¹¹ Toward the end of the 1800's the Illinois Supreme Court stated: "In vindictive actions the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrongdoer."¹² This language is a relatively accurate statement of the modern principal of punitive damages.

THE MODERN THEORY OF PUNITIVE DAMAGES

Today, many jurisdictions allow punitive damages for a defendant's outrageous conduct, as a means of punishing and deterring similar conduct by others.¹³ The general rule followed by those jurisdictions is simple when the defendant is also the one who committed the injurious act. Generally, punitive damages will be awarded where the defendant's conduct is found to be aggravated or outrageous.¹⁴ Where the party against whom punitive damages are sought did not himself commit the injurious act, but rather is only an employer of the one who did, the rule for assessing punitive damages may be slightly different.

THE VICARIOUS LIABILITY RULE

Some jurisdictions follow a rule of strict vicarious liability in suits where punitive damages are sought against employers for the outrageous acts of their employees.¹⁵ In those jurisdictions, the outrageous conduct of an employee acting within the scope of his employment will be imputed to the employer, making him liable for punitive damages whether or not he author-

11. *Coryell v. Colbaugh*, 1 Coxe 90, 91 (N.J. 1791).

12. *Grable v. Margrave*, 4 Ill. (3 Scam.) 372, 373, 374 (1842), quoted in 1 SEDGEWICK, *supra* note 8, § 352, at 697.

13. 5 Minzer, *supra* note 2, § 40.10. Not all jurisdictions, however, allow plaintiffs to recover punitive damages. *Id.* at § 40.02. Some of the objections to the doctrine are that it allows defendants to be punished without having the offense proved beyond a reasonable doubt, and that juries who are untrained in determining the amount of punishment that is proper often assess the damage at an amount far greater than any punishment that might be criminally imposed for the same act. 1 SEDGEWICK, *supra* note 8, § 353, 699.

14. 5 Minzer, *supra* note 2, § 40.20.

15. See, e.g., *Stroud v. Denny's Restaurant, Inc.*, 271 Or. 430, 532 P.2d 790 (1975).

ized the act.¹⁶ The rationale of this rule is that when an employer vests in his agent authority to act on his behalf, all of the acts done within the scope of employment are really the acts of the employer.¹⁷ Another theory underlying the strict vicarious liability rule is that it serves the deterrent purpose of punitive damages by encouraging employers to carefully select and supervise all employees.¹⁸

Under the strict vicarious liability rule, however, an employer who has exercised the utmost care in supervising or hiring employees could nonetheless be liable for punitive damages. Realizing the possibility of unjust awards under such a rule, many courts have adopted another theory of employer liability to assure that only those who deserve to be punished are in fact punished.¹⁹ Under this theory, an employer will be liable for punitive damages only when he or a managerial agent has actually participated²⁰ in a wrongful act. This theory of employer liability was adopted by the American Law Institute and is published in the Restatement (Second) of Torts at section 909, and in the Restatement (Second) of Agency at section 217C.²¹

THE LIMITED LIABILITY RULE

The rationale behind the more limited theory of employer liability is that, since the purposes of punitive damages are punishment and deterrence,²² such damages should be assessed only in situations where they would accomplish those purposes.²³ This theory attempts to take into account that there may be situations where employers are in no way responsible for the outrageous acts of their agents, and that to punish an

16. *Forrester v. Southern Pac. Co.*, 134 P. 753, 764 (Nev. 1913). See also 5 Minzer, *supra* note 2, § 40.51[3].

17. *Forrester v. Southern Pac. Co.*, 134 P. 753, 764 (Nev. 1913).

18. 5 Minzer, *supra* note 2, § 40.51[3].

19. *Campen v. Stone*, 635 P.2d at 1125 (Wyo. 1981). RESTATEMENT (SECOND) OF TORTS § 909, comment b (1975).

20. See *supra* note 4.

21. The rule of employer liability for punitive damages was first adopted in 1939 by the American Law Institute and was published in the Restatement. The Restatement was not, however, the first time that the theory of limited employer liability for punitive damages was introduced into the law. The theory has actually been applied by courts for quite some time. Hale, in the 1912 edition of his treatise on damages, stated a rule very similar to the Restatement's as that applicable to suits seeking punitive damages from employers. HALE, *supra* note 6, § 91.

22. *Campen v. Stone*, 635 P.2d at 1125 (Wyo. 1981).

23. RESTATEMENT (SECOND) OF TORTS § 909, comment b (1979).

employer in such situations would not fulfill the purposes of punitive damages. Thus, under the Restatement,

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 or a managerial agent authorized the doing and the manner of the act or,

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.²⁴

While the Restatement rule has many advocates, it is not without its critics. The general arguments against the rule are laid out in Chief Justice Rose's dissenting opinion in *Campen v. Stone*, where he states that the Restatement's philosophy lacks "any logical validity in the distinction which [it] seeks to make . . . between the acts of a menial versus a managerial employee."²⁵ The Restatement theory is "flawed," according to Chief Justice Rose, in its "assumption" that a corporation can act willfully and wantonly only through its managerial employees.²⁶

Legally speaking, the act of an agent within the scope of his employment is the act of his principal and, thus, when an agent commits an outrageous act, arguably the principal has also committed an outrageous act. It is also true that a corporation can only act through its agents, and therefore the act of each of a corporation's agents is an act of the corporation. However, this sort of analysis misses the point. The focus in the employer-punitive damage debate should not be on legalistic notions of agency, but rather on practical considerations of what rule will best serve the purposes of punitive damages.

24. RESTATEMENT (SECOND) OF TORTS § 909 (1979). The same rule is contained in the Restatement (Second) of Agency § 217C (1958), except under the rule the phrase "or retaining" is not included in part (b).

25. 635 P.2d at 1113 (Rose, C.J., dissenting).

26. *Id.*

It is fundamental to the doctrine of punitive damages that their purpose is *not* compensatory.²⁷ Their purpose, rather, is to punish the *wrongdoer* for his outrageous conduct, and to deter similar conduct by others by making an example of the *wrongdoer*.²⁸ The rule of employer liability for punitive damages should be one that accomplishes those purposes. Since managers, directors, and officers of a business are the ones ultimately responsible for directing the conduct of lower-level employees toward the general public, the rule should give them incentive to be responsible in carrying out their duty. It should also recognize, however, that there may be instances where the conduct of an agent could not have been prevented, even by the utmost care and responsibility on the part of management, and that to award punitive damages in such a situation would serve neither a punitive nor a deterrent function. By requiring some participation by those in control of a business before assessing punitive damages against the business, the Restatement rule seems to be the better rule for carrying out the policies underlying the doctrine of punitive damages.²⁹

The Restatement has also been criticized as not providing an incentive to "corporations to control the acts of their lower-level employees."³⁰ While this is a legitimate concern, this author feels that the Restatement can be read and applied in such a way that it will provide an incentive for all employers to control the conduct of their lower-level employees. First of all, part (b) of section 909 of the Restatement allows punitive damages where the agent is unfit and the principal or a managerial agent was reckless in employing or retaining him.³¹ Thus, section 909(b) provides employers with an incentive to use care in choosing employees. Other parts of the Restatement may also be read to allow punitive damages where employers are careless in supervising or training their employees.³² Later, under the heading "A Closer Look at The

27. *Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979). Some jurisdictions do award punitive damages as compensation. See generally GHIARDI, *supra* note 1, §§ 4.02-4.06.

28. *Danculovich v. Brown*, 593 P.2d at 191 (Wyo. 1979).

29. See Comment, *The Assessment of Punitive Damages Against An Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961) (the author advocates the Restatement Rule for the same reason).

30. *Campen v. Stone*, 635 P.2d at 1134 (Wyo. 1981) (Rose, C.J., dissenting).

31. RESTATEMENT (SECOND) OF TORTS § 909(b) (1979).

32. See *infra* note 63 and accompanying text.

Restatement", this comment will explain how some courts have applied the Restatement rule, and will provide some suggestions as to how it might be applied to best serve the policies of punitive damages. Before that, however, an explanation of the basic prerequisites to an award of punitive damages is in order.

PREREQUISITES TO RECOVERING PUNITIVE DAMAGES

In almost every action where punitive damages are sought, whether it be from employers or any other defendant, two preliminary elements must usually be established. The first is that the conduct causing the injury be so outrageous that it should be punished.³³ Such conduct on the part of the defendant may be that "which [is] malicious, wanton, reckless, willful, grossly negligent, in reckless disregard of the rights of others, or with criminal indifference to the rights of safety of others."³⁴

Not all of these types of conduct, however, will be sufficient to warrant punitive damages in every jurisdiction. In Wyoming, for example, punitive damages may not be awarded for a defendant's "gross negligence."³⁵ The defendant's conduct must be done "intentionally, maliciously, or with wanton disregard for safety."³⁶

33. See generally 5 Minzer, *supra* note 2, § 40.20.

34. *Id.* at § 40.21.

35. *Danculovich v. Brown*, 593 P.2d at 191 (Wyo. 1979). In *Danculovich*, the court held that "gross negligence" and "ordinary negligence" are types of conduct which vary in degree (i.e. gross and ordinary negligence are the same kinds of conduct with "gross" constituting a greater degree of negligence). *Id.* "Gross negligence" and "willful and wanton misconduct", on the other hand, are not even the same kind of conduct. Thus, the court held that while a plaintiff's negligence must be compared with a defendant's negligence for purposes of reducing damages "proportionate to the degree of negligence," *id.* at 192, a plaintiff's negligence can not be compared with a defendant's willful and wanton misconduct. *Id.* at 194. Therefore, when a defendant's conduct is found to be willful and wanton, comparative negligence will not be an issue in the case and the plaintiff's damages will not be reduced due to his own negligence. *Id.*

36. *Campan v. Stone*, 635 P.2d at 1134 (Wyo. 1981) (Rose, C.J., dissenting) (citing *Hall Oil Co. v. Barquin*, 33 Wyo. 92, 232 P. 255 (1925)). The exact degree of outrageous misconduct required beyond gross negligence in order to assess punitive damages may depend upon the type of case in which such damages are being sought. In *Danculovich v. Brown*, where the plaintiff was seeking punitive damages for wrongful death, the court held that punitive damages could be awarded "only if the jury finds willful and wanton misconduct on the part of the defendant." 593 P.2d at 192 (emphasis added). In *Sears v. Summit, Inc.*, 616 P.2d 765 (Wyo. 1980), on the other hand, where the plaintiff sought punitive damages for trespass, the court held that such damages could be recovered "upon a showing 'that the acts, constituting the trespass, were committed with reckless disregard for, or a willful indifference to, the rights of the plaintiffs'". *Id.* at 770 (emphasis added) (quoting *Hall Oil Co. v. Barquin*, 237 P. at 271 (1925)). Whether the court intended there

The other prerequisite to an award of punitive damages, or at least a prerequisite in Wyoming, is that there be proof of actual damages.³⁷ Some jurisdictions, however, allow punitive damages where there has been no award of compensatory damages, if there has been an award of nominal damages,³⁸ and some federal courts allow punitive damages without an award of either actual or nominal damages.³⁹

Although it has not reached the status of being a prerequisite to punitive damages, evidence of the defendant's wealth should be introduced when seeking such damages.⁴⁰ The defendant's wealth is important because of the theory that if such damages are going to serve their punitive function, the defendant must be able to feel their impact.⁴¹ Conversely, evidence of the defendant's wealth is also important in avoiding his financial ruin with an excessive award.⁴² Thus, in order to reduce the risk of having an award of punitive damages reduced on appeal, plaintiffs will want to introduce evidence of the defendant's wealth.⁴³

An additional element that must be proved before any damages may be recovered from an employer for the act of his agent is that the agent was acting in the scope of his employment at the time of the incident. This point is discussed later in this comment and therefore an explanation will be avoided here.⁴⁴

A CLOSER LOOK AT THE RESTATEMENT

Now that a general understanding of the policies and prerequisites of punitive damages has been established, the

to be a difference in the manner of misconduct required to warrant punitive damages in a wrongful death, as opposed to trespass, case is not clear. The riddle may, however, be purely academic since it is doubtful that anyone, especially juries, even knows the difference between "gross negligence" and "outrageous misconduct" let alone the difference between "willful and wanton misconduct" and "reckless disregard".

37. *Cates v. Barb*, 650 P.2d 1159, 1161 (Wyo. 1982).

38. *Rushing v. Hooper - McDonald, Inc.*, 293 Ala. 56, 300 So.2d 94, 98 (1974).

39. *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128, 133 (D.D.C. 1973).

40. *Sears v. Summit, Inc.*, 616 P.2d 765, 772 (Wyo. 1980).

41. *Town of Jackson v. Shaw*, 569 P.2d 1246, 1255 (Wyo. 1977).

42. *Id.*

43. *See Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981) (the Wyoming Supreme Court mandated a bifurcated trial procedure for introducing evidence of a defendant's wealth when punitive damages are sought).

44. *See infra* note 96 and accompanying text.

focus will shift to the specific provisions of the Restatement rule. As previously mentioned, the Restatement rule was adopted in Wyoming in *Campen v. Stone*. The question that will probably haunt most practitioners now is how to apply the rule. The following discussion will address, individually, each of the four parts of section 909, with illustrations of how some courts have applied them and with suggestions of other possible interpretations.

(a) The Principal or a Managerial Agent Authorized the Doing and the Manner of the Act

Under section 909(a), an employer who participates in his agent's outrageous conduct by *authorizing* it will be liable for punitive damages.⁴⁵ The key elements necessary to establish liability under section 909(a) are that an agency relationship exist between the actor and the employer, and that the principal or a managerial agent authorize the agent's outrageous misconduct.⁴⁶ Each of these elements will be separately discussed below.

Agency Relationship

In order to assess punitive damages against an employer under part (a), or any other part of section 909, it must be shown that the one who committed the wrong was an agent of the employer. The term "agent" includes servants and employees but is not limited to them.⁴⁷ An agency relationship exists when a principal intends the agent to act on his behalf and the agent accepts with the understanding that the principal is in control of the undertaking.⁴⁸ The right of the principal to control the physical conduct of the agent is what transforms an ordinary agent into a servant or employee.⁴⁹ The term "agent" thus includes, but is not limited to, servants and employees.⁵⁰

In Wyoming, it is not clear whether the term "agent", as it is used in the Restatement, will be given its broad meaning. In

45. RESTATEMENT (SECOND) OF TORTS § 909(a) (1979).

46. *Id.*

47. See generally W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 6 (1964).

48. RESTATEMENT (SECOND) OF AGENCY § 1, comment b (1958).

49. SEAVEY, *supra* note 47, § 6.

50. The terms "servant" and "employee" are synonymous. See BLACK'S LAW DICTIONARY 471 (5th ed. 1979).

Stockwell v. Morris,⁵¹ a case involving employer liability for compensatory damages, the Wyoming Supreme Court found the distinction between agents and servants to be important. In *Stockwell*, the plaintiff sued Maytag Intermountain Company for compensatory damages when his car collided with a car driven by one of Maytag's salesmen. The court held that, while the salesman was undoubtedly an *agent* of Maytag,⁵² he was not a *servant* because the company did not expressly reserve any control over the manner in which he operated his car.⁵³ Therefore, Maytag was not held liable for compensatory damages because an "agent who is not at the same time acting as a servant cannot ordinarily make his principal liable for incidental negligence. . . ."⁵⁴

Whether the strict line drawn in *Stockwell* between servants and other agents with respect to an employer's liability for compensatory damages will be carried over to liability for punitive damages is unanswered. In light of the theory behind the Restatement rule, however, it makes sense to give the word "agent" its broader meaning when assessing punitive damages. The Restatement is founded upon a belief that it is unjust to assess punitive damages against an employer unless he has in some way participated in the wrongful conduct.⁵⁵ An employer's participation in the outrageous acts of a mere agent would seem no less culpable than his participation in the outrageous acts of a servant. Arguably, then, the employer should be liable in either situation.⁵⁶

51. 46 Wyo. 1, 22 P.2d 189 (1933).

52. *Id.* at 191.

53. *Id.* at 194. In *Combined Ins. Co. of Am. v. Sinclair*, 584 P.2d 1034 (Wyo. 1978), the employer was held liable in compensatory damages for injuries suffered by the plaintiff, a salesman for the company, when he was involved in an automobile accident while riding in a car driven by a sales manager for the company. The company argued that it could not be liable for damages because the sales manager was not an "employee". *Id.* at 1042. The Wyoming Supreme Court, in holding that Combined could be liable for compensatory damages, distinguished *Stockwell* because in the instant case the employer had expressly issued rules and regulations which the sales manager was required to follow while operating his car. *Id.* at 1045. While the court did not rely exclusively upon the existence of these rules and regulations in finding that the sales manager was an agent, their existence was important to the court's decision. *Id.* One might question the distinction the court made between *Stockwell* and *Combined Insurance* because it would seem to discourage rather than encourage employers to control the conduct of their agents so that they might avoid possible liability for compensatory or punitive damages due to the torts of their agents.

54. 22 P.2d at 191. See the Restatement (Second) of Agency § 1, comment e (1958), where it is likewise stated that "the liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant."

55. See RESTATEMENT (SECOND) OF TORTS § 909, comment b (1979). See also 5 Minzer, *supra* note 2, § 40.51[2], at 40-125.

56. See *infra* note 66 where there might be an exception for treating the term "agent" in its broad sense.

Managerial Agent Authorized the Doing and the Manner of the Act

In order to recover punitive damages from an employer under part (a) of section 909 it also must be shown that the principal or a managerial agent authorized the outrageous conduct.⁵⁷ A "principal" is generally defined as "one who has permitted or directed another to act for his benefit and subject to his direction and control."⁵⁸ The meaning of the term "principal" is relatively straightforward and has not seemed to cause the courts any trouble in applying the Restatement. The term "managerial agent", on the other hand, is not so easily defined and has been an issue in some decisions under the Restatement.

Many courts have defined "managerial agent" differently. One court, for example, held that "To be entitled to an award of punitive damages against a corporation the complaining party must show that . . . its *directors and managing officers* participated in or authorized or ratified the agent's acts."⁵⁹ Another court has said, "It is the nature of the authority conferred upon an agent that determines whether the agent is employed in a managerial capacity."⁶⁰ But perhaps the best test of whether an agent is a "managerial agent" for purposes of part (a) is whether the agent is responsible for supervising the acts of other employees.⁶¹

As previously noted, the underlying theory of the Restatement is that an employer should not be liable for punitive damages unless he, or a managerial agent, participated in the misconduct.⁶² The "participation" which warrants punitive damages under part (a) of section 909 is the employer's, or managerial agent's, *authorization* of the outrageous conduct. Since "supervisory employees" will generally be the ones responsible for authorizing or prohibiting an employee's conduct, the term "managerial agent", as it is used in section 909(a), should be defined to include such employees.

57. RESTATEMENT (SECOND) OF TORTS § 909(a) (1979).

58. SEAVEY, *supra* note 47, § 3, at 4.

59. *Openshaw v. Oregon Auto. Ins. Co.*, 94 Idaho 334, 487 P.2d 929, 932 (1971) (emphasis added).

60. *Egan v. Mutual of Omaha Ins. Co.*, 63 Cal. App. 3d 659, 133 Cal. Rptr. 899, 913 (1976).

61. *See Smith v. Little, Brown & Co.*, 273 F. Supp. 870, 873 (S.D.N.Y. 1967).

62. *See supra* note 4 and accompanying text.

Whether the outrageous conduct has in fact been *authorized* will also be an issue under section 909(a). The obvious case of authorization is where the agent is directed to do the outrageous act. There are, however, other acts short of an actual directive that may constitute an authorization of the doing and the manner of an employee's conduct. In the Colorado case of *Fitzsimmons v. Honaker*,⁶³ for example, the employer, Aqua Soft, which was in the business of selling water softeners, was held liable for punitive damages when one of its salesmen fraudulently induced the plaintiffs to sign an installment lien note upon their property. In holding that the outrageous conduct had been authorized, the court relied on evidence that Aqua Soft furnished its salesmen with sales agreements which referred to them as "authorized agents" of Aqua Soft.⁶⁴ Exactly why this constituted an authorization of the salesman's conduct is never fully explained by the court. However, one senses that perhaps Aqua Soft left the manner of selling water softeners totally up to its salesmen and that the court felt the employer should be given some incentive to control the sales tactics of its employees. One of the criticisms of the Restatement rule is that it fails to provide an "incentive for corporations to control the acts of their lower-level employees."⁶⁵ If the rule does in fact produce this result, then the critics have a legitimate concern. However, *Fitzsimmons* illustrates that there is no reason why, under the Restatement, employers could not be liable for punitive damages for failure to control the acts of their employees.⁶⁶

Plaintiffs might also argue that an employer's failure to adequately train employees assigned to perform potentially

63. 485 P.2d 923 (Colo. 1971).

64. *Id.* at 926.

65. *Campen v. Stone*, 635 P.2d at 1134 (Wyo. 1981) (&Rose, C.J., dissenting).

66. *See, e.g., Roginsky v. Richardson - Merrell, Inc.*, 378 F.2d 832, 844 n.21 (2d Cir. 1967) (the court suggests that widespread misconduct by subordinates might indicate authorization). Employers should, however, be able to expect that their employees will behave in a responsible manner. Therefore, implying an authorization from an employer's failure to control his agent's conduct should probably be limited to cases where there is a considerable lack of control or direction by an employer. Furthermore, it would seem that imposing punitive damages upon an employer due to his failure to control the acts of an agent should be limited to his failure to control *employees* or *servants* rather than *all* agents. As an agency relationship moves from master-servant to principal-independent contractor the employer has less ability to control the manner of the agent's conduct. Therefore, an employer should not be liable for punitive damages due to his failure to control an agent who is more like an independent contractor because, by the very nature of such an agency relationship, the employer is not able to control the details of the agent's acts. For a discussion on when an agent might be considered a servant or independent contractor, see F. R. MECHEM, *OUTLINES OF THE LAW OF AGENCY* §§ 432-452 (4th ed. 1952).

dangerous tasks constitutes an authorization of the employee's conduct.⁶⁷ In *Leslie v. Jones Chemical Co., Inc.*,⁶⁸ punitive damages were allowed against the defendant chemical company where there was evidence that it "had consciously and deliberately disregarded known safety procedures regarding the handling of chlorine cylinders. . . ."⁶⁹ It is not clear from the court's opinion which rule of employer liability it was applying.⁷⁰ The dissent, however, expressly applied the Restatement, but concluded that punitive damages could not be assessed against the chemical company because there was no evidence that any managerial staff had "authorized . . . the acts which led to the injury."⁷¹ In the opinion of the dissenting judge "the contrary [was] true because there were certain written instructions available to employees that cautioned them in handling chlorine gas."⁷²

An employer who has provided his employees with adequate safety instructions on potentially dangerous jobs should not be held to have authorized the employees' wrongful conduct. Where, on the other hand, the employer has not done so, plaintiffs might have an argument that the agent's misconduct has been authorized. The failure to provide adequate safety instructions or the failure to see that each employee understands and follows the instructions in connection with potentially dangerous activities is something which society should deter.

It was explained earlier in this comment that punitive damages may be awarded only when the act complained of was done in an outrageous manner.⁷³ An employee who has failed to perform in a safe manner merely because he is unaware of the dangers or proper safety procedures of his job may only be guilty of ordinary negligence. In such a case, the imposition of punitive damages might seem improper. The outrageous con-

67. See *King v. McGuff*, 149 Tex. 432, 234 S.W.2d 403 (1950), and *Samules v. Checker Taxi Co. Inc.*, 65 Ill. App. 3d 63, 382 N.E.2d 424 (1978), where plaintiffs lost on a similar theory. *King* and *Samules*, however, were decided upon the grounds of inadequacy of proof, 234 S.W.2d at 405, and defective pleadings, 382 N.E.2d at 427, respectively.

68. 92 Nev. 391, 551 P.2d 234 (1976).

69. *Id.* at 235.

70. Nevada appears, however, to follow the strict vicarious liability rule for punitive damages against employers. In *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 P. 753 (1913), the Nevada Supreme Court followed a rule of strict vicarious liability.

71. 551 P.2d at 238.

72. *Id.*

73. See *supra* note 33 and accompanying text.

duct which warrants punitive damages, however, may be that of the employer. Common sense dictates that a potentially dangerous activity requires certain precautions to minimize the risk. The greater the risk involved, the greater the need for adequate precautions. When there is a gap between the risks involved and the precautions employed there is an increased chance of error and injury. Arguably, then, the larger the gap, the closer the failure to provide adequate safety measures comes to being outrageous. Thus, in a case where an authorization is implied from a lack of adequate safety instructions, the outrageous conduct that supports the award of punitive damages may not be that of the employee who directly caused the injury, but rather that of the employer who failed to minimize the risks of injury.

(b) The Agent Was Unfit and the Principal or a Managerial Agent Was Reckless in Employing or Retaining Him⁷⁴

Part (a) of section 909, which was discussed above, allows punitive damages against an employer who has authorized the agent's outrageous misconduct. Part (b) of section 909, which will now be discussed, provides another basis upon which such damages may be awarded—where the employer, or his managerial agent, recklessly hires or retains the agent who committed the outrageous act.⁷⁵ The typical cases under section 909(b) are those where the employer hires or retains an agent whom he knows is unfit for the job. For example, in *Hayes v. State*⁷⁶ punitive damages were allowed against the State of New York when an intoxicated employee at Brooklyn State Hospital assaulted one of the patients. The employee had a history of alcoholism of which hospital officials were aware before he was hired, as well as a history of intoxication and asocial behavior at the hospital.⁷⁷ The New York Court of Claims held that the hospital might not have been liable for punitive damages if the employee had been hired to work in nonpatient areas, but hiring him to work in sensitive patient care areas, with full knowledge of his problem, was reckless.⁷⁸

74. The RESTATEMENT (SECOND) OF AGENCY § 217C (1957) sets forth substantially the same rule as RESTATEMENT (SECOND) OF TORTS § 909 (1979) except that part b of the Agency rule does not contain the phrase "or retaining".

75. RESTATEMENT (SECOND) OF TORTS § 909(b) (1979).

76. 80 Misc. 2d 498, 363 N.Y.S.2d 986 (1975).

77. *Id.*, 363 N.Y.S.2d at 996.

78. *Id.* at 998.

Punitive damages have also been awarded under section 909(b) for an employer's recklessness in failing to assure the fitness of its employees. In *Wilson N. Jones Memorial Hospital v. Davis*⁷⁹ the plaintiff, while a patient at the hospital, was injured when one of the orderlies attempted to remove a Foley catheter without first deflating the balloon. The hospital's normal hiring procedure was to get four employment references and three personal references, and to check at least one personal and one employment reference.⁸⁰ In the case of the orderly, however, the court found the hospital's reference checks to be less than adequate. As a prior medical employment reference, the orderly listed eight months served as a medical corpsman in the United States Navy, a reference which the hospital failed to check. The evidence showed that had they inquired they would have discovered that the orderly was expelled from the Navy Medical Corps School after only a month of training and that he had a serious drug problem as well as a criminal record.⁸¹ Thus, the court held that in hiring the orderly, the hospital had shown an entire want of care and conscious indifference to the rights, welfare and safety of the patients, and therefore would be liable for punitive damages.⁸²

The court's holding in *Wilson* is notable for another point. There the orderly who caused the injury was guilty only of *ordinary negligence*, yet punitive damages were allowed against the employer.⁸³ Normally, punitive damages may not be awarded for mere negligence.⁸⁴ The *Wilson* court expressly applied section 909(b) but did not explain how punitive damages could be assessed where the agent's conduct is

79. 553 S.W.2d 180 (Tex. Civ. App. 1977).

80. *Id.* at 181.

81. *Id.* at 182.

82. *Id.* at 183. The rule in *Wilson* (i.e. assessing punitive damages against an employer for his failure to assure the fitness of an employee) should probably be limited to situations where the employee's special skills are important to safely carry out the tasks he is employed to perform. For example, a hospital's failure to take reasonable steps in assuring that its new doctors are qualified to practice medicine might be a proper case for the *Wilson* rule. But a construction company's failure to discover that its new employee lost his last job because he assaulted a co-employee might not be a proper case for the *Wilson* rule. Employers should be expected to take reasonable steps to see that those they hire are adequately qualified to safely perform their jobs, but they should not be charged with being personal investigators of each employee they propose to hire.

83. *Id.* at 180. See also *Go Int'l, Inc. v. Lewis*, 601 S.W.2d 495, 499 (Tex. Civ. App. 1980) (punitive damages awarded against an employer for being reckless in employing or retaining an unfit employee where the employee's acts were found only to constitute ordinary negligence).

84. See *supra* notes 33, 34 and accompanying text.

merely negligent. The result reached by the court, however, seems logically consistent with the policy behind the Restatement.

The focus of the Restatement is directed more toward the acts of the employer than the employee, with the intent that employers will not be liable for punitive damages unless their own conduct warrants it.⁸⁵ Section 909(b) imposes liability upon an employer for punitive damages when he is *reckless* in employing or retaining an unfit agent. Thus, an employer who is liable under section 909(b) is liable not because of his agent's acts, but rather because of his own outrageous conduct. It would seem consistent, then, with the policy of the Restatement to award punitive damages based on an assessment of an employer's conduct, rather than his employee's.

(c) The Agent Was Employed in a Managerial Capacity and Was Acting in the Scope of Employment

Section 909(c) of the Restatement seems equivalent to the strict vicarious liability rule mentioned earlier,⁸⁶ except that here the scope of liability is limited to the acts of managerial agents. Basically, under section 909(c), an employer may be liable for punitive damages whenever an agent acting in a managerial capacity commits an outrageous act.⁸⁷ The key elements necessary to impose liability upon an employer under section 909(c) are "managerial capacity" and "scope of employment".

Managerial Capacity

The best test for determining "managerial capacity" under section 909(c) might be to look at the degree of discretion the agent is allowed to exercise.⁸⁸ When an agent is given

85. See *supra* notes 22, 23 and accompanying text.

86. See *supra* notes 15-21 and accompanying text.

87. See *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 631 (Tex. 1968) (no authorization of the manager's acts need be shown).

88. Earlier, in conjunction with the discussion of section 909(a), it was suggested that the term "managerial agent" should be defined to include "supervisory employees". See *supra* note 61 and accompanying text. Under section 909(a), punitive damages may be assessed against an employer where he or a "managerial agent" *authorizes* the outrageous act. Because "supervisory employees" will often be the ones immediately responsible for prohibiting or authorizing the acts of lower level employees, it was suggested that "supervisory employees" be included as managerial agents under section 909(a). Under section 909(c), however, a different definition is suggested for the term "managerial capacity" because under section 909(c) it is the managerial agent's *own* conduct that makes the employer liable for punitive damages, rather than his *authorizing* the misconduct of another.

discretion, he becomes more responsible for directing the conduct of the business toward the general public, and consequently his position in the business becomes more important. The Restatement authors espouse a rule of strict vicarious liability for agents in managerial capacities with the hope of deterring "the employment of unfit persons for important positions."⁸⁹ Thus, in keeping with the policy of the Restatement, whether an agent is employed in a managerial capacity should, perhaps, be a function of his importance in the business which is a natural result of the discretion he is allowed.

The California Supreme Court adopted such a test in *Egan v. Mutual of Omaha Insurance Co.*⁹⁰ There the plaintiff sued Mutual of Omaha for breach of his disability insurance policy when two of Mutual's adjusters, claiming that plaintiff was merely sick and not disabled, refused to pay his disability benefits. Mutual of Omaha argued that it could not be held liable for punitive damages under section 909(c) because the adjusters were not involved in "high-level policy making", and thus could not be deemed managerial agents.⁹¹ The court, however, found the adjusters to be managerial agents, stating that "the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy."⁹²

While defining "managerial agent" in terms of the discretion bestowed upon an agent may be consistent with the Restatement's theory of deterring "the employment of unfit persons for important positions," the question of employer liability for punitive damages under part (c) should not stop there. Employers⁹³ should be able to expect that those in whom they vest discretionary power will exercise it in a responsible manner. Therefore, it may be improper to assess punitive damages against an employer merely because he has

89. RESTATEMENT (SECOND) OF TORTS § 909, comment b (1979).

90. 157 Cal. Rptr. 482, 598 P.2d 452 (1979).

91. *Id.*, 598 P.2d at 459.

92. *Id.* Section 909(c) has also been applied to hold employers liable in punitive damages for the outrageous acts of their franchisees, *Kuchta v. Allied Builders Corp.*, 21 Cal. App. 3d 541, 98 Cal. Rptr. 588 (1971), and independent contractor agents, *Pedernales Elec. Coop., Inc. v. Schultz*, 583 S.W.2d 882 (Tex. Civ. App. 1979).

93. In the case of a corporation the term "employer", as it is used here, is synonymous with officers, directors and upper-level managers. These persons are responsible for delegating power within the corporation and thus their irresponsibility in making such delegations should be deterred by imposing punitive damages upon the corporation.

given one of his agents discretionary power. Perhaps punitive damages should be assessed under part (c) of the Restatement only where the employer has been careless in hiring, retaining or placing the agent in a managerial position.⁹⁴ Putting an employer who has been reasonable in delegating discretionary power to an agent, but whose agent has abused that power, on the same footing with an employer who has been unreasonable in his delegation, would not serve to deter the employment of unfit persons for important positions. If such a purpose is going to be accomplished, the rule must distinguish between the two situations.

Scope of Employment

Section 909(c) also requires that an act be done "in the scope of the agent's employment" before punitive damages may be assessed against the employer.⁹⁵ In *Beard v. Brown*,⁹⁶ the Wyoming Supreme Court stated,

Before an employee may be held to be acting within the scope of his employment, it must be demonstrated that the activity is (1) activated in part by a purpose to serve the employer; (2) done with the intention to perform it as a part of or incident to a service on account of which the employee is employed; and (3) performed to further the business interests of the employer in some part.⁹⁷

The purpose of the employee's acts, however, need not be solely to serve the employer. "The rule is that one will be held to be within the scope of his employment when the employee is engaged in an activity which has a multiple purpose, and it is sufficient that one of the purposes is employment-related."⁹⁸ The factors that seem to have some bearing on the issue of scope of employment are whether the agent is performing the kind of act he was employed to perform, whether the act was accomplished during a time reasonably connected with the

94. Requiring some fault on the part of the employer before assessing punitive damages against him for the acts of a managerial agent is in conflict with comment (b) to section 909 which states that punitive damages may be assessed against an employer for the outrageous act of a managerial agent "[a]lthough there has been no fault on the part of [the] corporation or other employer. . . ." RESTATEMENT (SECOND) OF TORTS § 909, comment b (1979).

95. RESTATEMENT (SECOND) OF TORTS § 909(c) (1979).

96: 616 P.2d 726 (Wyo. 1980).

97. *Id.* at 735.

98. Combined Ins. Co. of Am. v. Sinclair, 584 P.2d 1034, 1041 (Wyo. 1978).

authorized period of employment, and whether it was accomplished in an area or locality not unreasonably distant from the area authorized for performance of the employment.⁹⁹

It is also generally recognized that an agent's intentional, reckless, or malicious acts will not, standing alone, take his conduct beyond the scope of employment.¹⁰⁰ Likewise, it has been held that an agent's disregard of an employer's instructions or performance of his duties in a manner prohibited or even expressly forbidden by the employer will not, taken alone, remove the agent's acts from the scope of employment.¹⁰¹

While such conduct might not remove the agent's acts from the scope of employment for purposes of assessing compensatory damages against an employer, they should be considered in assessing punitive damages. The policy of the Restatement is that punitive damages should not be assessed against an employer unless he has participated in the outrageous conduct. Where an employer has forbidden the agent's conduct or given instructions contrary to the agent's actual conduct, he has not participated in the agent's acts, but rather has done just the opposite, and therefore should not be liable for punitive damages.¹⁰²

(d) The Principal or a Managerial Agent of the Principal Ratified or Approved the Act

Under the final part of the Restatement provision, section 909(d), an employer will be liable for punitive damages for his after-the-fact participation in his agent's outrageous conduct.¹⁰³ The obvious case under section 909(d) is where the employer expressly ratifies or approves the agent's conduct. Thus, in illustration number two in the comments to section

99. *Gill v. Schaap*, 601 P.2d 545, 547 (Wyo. 1979). See *Beard v. Brown*, 616 P.2d 726 (Wyo. 1980). "The mere fact that an employee is remunerated or paid by employers for time traveling to and from work does not place that employee within the 'scope-of-employment' rule." *Id.* at 736.

100. See *Sage Club v. Hunt*, 638 P.2d 161, 162 (Wyo. 1981); PROSSER, *LAW OF TORTS* § 70 (4th ed. 1971).

101. PROSSER, *supra* note 100.

102. An argument that the employer participated in the conduct might be made where there is evidence that he knows the forbidden act is being done or that his instructions are being disregarded. See *supra* note 66.

103. RESTATEMENT (SECOND) OF TORTS § 909(d) (1979).

909, it is stated that A, the owner of a theatre, could be liable for punitive damages when he expressed his approval upon learning that a special officer employed to keep order cruelly abused a small boy while ejecting him from the theater. An employer's ratification or approval may also be implied in some situations. For instance, in *Hale v. Farmers Insurance Exchange*,¹⁰⁴ an insurance company was held liable for punitive damages on the theory that it had ratified its agent's wrongful refusal to pay the plaintiff insurance benefits when, after having an opportunity to learn of the facts, it also failed to pay the benefits.¹⁰⁵

While the employer's mere failure to dismiss an employee who has committed an outrageous act will not generally constitute an approval of his conduct for purposes of section 909(d),¹⁰⁶ retaining the employee together with some other act of approval may constitute a ratification. In *Safeway Stores v. Gibson*,¹⁰⁷ for example, where the plaintiff was seeking punitive damages for false arrest, the court held that evidence of the defendant's retaining the security guard who made the arrest in conjunction with statements by the corporate officers to the guard that he "did right", was sufficient evidence to raise a question of ratification for the jury.¹⁰⁸

An employer's attempt to enforce a contract entered into by his agent has also been held to constitute a ratification of the agent's outrageous conduct. In *Security Aluminum Window Manufacturing Corp. v. Lehman Associates, Inc.*,¹⁰⁹ a real estate agent working for Lehman Associates induced the plaintiff to sell some property to Minkowitz, a friend of the agent's, at a price only half that of the highest bid. When the plaintiff learned of the fraud he instituted an action seeking injunctive relief as well as compensatory and punitive damages from Lehman Associates. Lehman countersued for commis-

104. 42 Cal. App. 3d 681, 117 Cal. Rptr. 146 (1975).

105. *Id.*, 117 Cal. Rptr. at 154. See also *Farvour v. Geltis*, 91 Cal. App. 2d 603, 205 P.2d 424, 425 (1949) (employer held to have impliedly ratified his agent's acts through his inaction).

106. *Campen v. Stone*, 635 P.2d at 1126 (Wyo. 1981).

107. 118 A.2d 386 (D.C. 1955).

108. *Id.* at 389. See *Hardman v. Shell Oil Co.*, 68 Cal. App. 3d 240, 137 Cal. Rptr. 244, 250-51 (1977) (a lack of any evidence that the employee was discharged or even reprimanded was some evidence of the employer's approval of the conduct). See also *McChristian v. Popkin*, 75 Cal. App. 2d 249, 171 P.2d 85 (1946).

109. 108 N.J. Super. 137, 260 A.2d 248 (1969).

sions due on the sale by plaintiff to Minkowitz.¹¹⁰ The Supreme Court of New York held that Lehman could be liable for punitive damages on the theory that it had ratified the agent's acts when it filed a counterclaim seeking to enforce the agent's commission agreement.¹¹¹

While a principal will normally be liable for his agent's wrongs only when they are committed in the scope of employment, it has been held that the principal's ratification of an agent's acts done outside of his scope of employment will make him liable for those acts. In *Henry v. Carpenter*,¹¹² an agent of National Trailer Inc. assaulted the plaintiff, a former employee of National, and recovered from him a check which had previously been issued to the plaintiff by National. Upon recovering the check, the agent delivered it to the treasurer of National, who accepted and retained it for the corporation.¹¹³ National argued, and the court agreed, that the agent had acted outside of his scope of employment in recovering the check, but National was nonetheless held liable for punitive damages on the theory that it had ratified the agent's wrongful acts when it accepted the benefits of those acts with full knowledge of their outrageous nature.¹¹⁴

A common thread running through ratification cases is that the employer had knowledge, or could have easily learned of the outrageous nature of the agent's misconduct. When punitive damages are sought from an employer on a theory of ratification, some knowledge on his part should be established before such damages may be assessed. Employers should be able to expect that their agents will not behave oppressively in conducting their business. Therefore, an employer's mere attempt to enforce an agent's contracts or to retain the benefits of an agent's acts or to fail to repudiate or remedy an agent's acts should not, without some evidence that the employer knew or should have known of the outrageous nature of the agent's acts, constitute a ratification which makes the employer liable for punitive damages.

110. *Id.*, 260 A.2d at 250.

111. *Id.* at 254.

112. 366 P.2d 928 (Okla. 1961).

113. *Id.* at 930.

114. *Id.*

CONCLUSION

The primary purpose of punitive damages should be to punish wrongdoers, with the hope of deterring similar conduct by others. Therefore, regardless of the deterrent effect hoped to be gained through an award of punitive damages, they should not be assessed unless the party against whom they are levied is responsible for the conduct or could have prevented it. The Restatement rule provides the best means of carrying out the policy of punitive damages with respect to employers. As illustrated in this comment, the Restatement rule is flexible and can be molded to serve the purposes of punitive damages under varying circumstances.

J. KENNETH BARBE