

# Lagniappe Liability: Limiting Employer's Vicarious Liability for Punitive Damages in Louisiana

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### Repository Citation

Thomas C. Naquin, *Lagniappe Liability: Limiting Employer's Vicarious Liability for Punitive Damages in Louisiana*, 79 La. L. Rev. (2019)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol79/iss4/12>

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# Lagniappe Liability: Limiting Employer’s Vicarious Liability for Punitive Damages in Louisiana

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## INTRODUCTION

On October 14, 1995, Phillip Lacoste was driving his car with his wife and two children down Old Gentilly Road in New Orleans when a truck traveling in the opposite direction attempted to turn and instead struck Lacoste's vehicle.<sup>1</sup> Barry Crochet was driving the truck, smelling of alcohol and visibly intoxicated.<sup>2</sup> Crochet told Lacoste that he was working and that he would not wait for the police to arrive because police had previously cited him for driving while intoxicated ("DWI").<sup>3</sup> The question the court had to answer was whether Crochet's employer, Kelley Completion Services, was vicariously liable for any punitive damages the tortfeasor owed to the Lacoste family.<sup>4</sup>

In 2015, the same issue of vicarious liability for punitive damages arose from a starkly different situation.<sup>5</sup> Steven and Leslie Gillespie sued the School Board in which their young daughter was a student.<sup>6</sup> The Gillespie's daughter had sexual encounters with her teacher, Lance Duhon.<sup>7</sup> Duhon had a questionable past, yet the School Board still employed him in a position of authority over young children.<sup>8</sup> The court in *Gillespie* had to determine whether the School Board was vicariously liable for the punitive damages Duhon owed to the Gillespie family.<sup>9</sup>

Both the *Lacoste* and *Gillespie* courts decided the issue of vicarious liability for punitive damages, but both decisions seem incompatible with the facts.<sup>10</sup> In *Lacoste*, the court held an employer, who did not appear to be at fault, vicariously liable for punitive damages.<sup>11</sup> In *Gillespie*, however, another court did *not* hold an employer who exercised poor judgment vicariously liable for punitive damages.<sup>12</sup> These two cases highlight the circuit split between Louisiana appellate courts as to whether

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1. *Lacoste v. Crochet*, 751 So. 2d 998, 1000–01 (La. Ct. App. 2000).
2. *Id.*
3. *Id.*
4. *Id.*
5. *See generally* *Gillespie v. Calcasieu Par. Sch. Bd.*, 179 So. 3d 966 (La. Ct. App. 2015), *writ denied*, 187 So. 3d 470 (La. 2016).
6. *Id.* at 970.
7. *Id.*
8. *Id.* Duhon had been previously investigated for sexual misconduct with a student.
9. *Id.*
10. *Lacoste v. Crochet*, 751 So. 2d 998 (La. Ct. App. 2000). *But see Gillespie*, 179 So. 3d 966.
11. *See generally Crochet*, 751 So. 2d 998.
12. *See generally Gillespie*, 179 So. 3d 966.

a court may hold an employer vicariously liable for compensatory damages and punitive damages arising from the same incident.<sup>13</sup> The Louisiana Supreme Court has not expressed its view on the issue,<sup>14</sup> and the laws that separately provide for vicarious liability and punitive damages make no mention of one another, resulting in ambiguity as to whether an employer can be vicariously liable for punitive damages.<sup>15</sup> Despite the circuit split, however, several Louisiana appellate courts and federal district courts have found employers not vicariously liable for punitive damages.<sup>16</sup>

The current circuit split creates ambiguity in the law, causing confusion for both individuals and employers questioning potential rights or liability.<sup>17</sup> To remedy this ambiguity, the Louisiana Supreme Court should clarify the issue of vicarious liability for punitive damages but continue to adhere to the traditional civilian viewpoint that disfavors punitive damages.<sup>18</sup> The Louisiana Supreme Court should find that Louisiana courts generally cannot hold employers vicariously liable for punitive damages. In certain scenarios in which the employer is especially complicit in the injury-causing activity, however, it would be appropriate

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13. See discussion *infra* Part II.

14. Berg v. Zummo, 786 So. 2d 708, 718 n.6 (La. 2001).

15. See LA. CIV. CODE art. 2320 (2019) (making no mention of punitive damages); see also *id.* art. 2315.4 (making no mention of vicarious liability).

16. See, e.g., Smith v. Zurich Am. Ins. Co., No. 95-3004, 1996 WL 537746 (E.D. La. Sept. 20, 1996); see also Romero v. Clarendon Am. Ins., 54 So. 3d 789 (La. Ct. App. 2010), *writ denied*, 62 So. 3d 96 (La. 2011) (Third Circuit finding no vicarious liability for punitive damages); Lankford v. Nat'l Carriers Inc., No. 12-01280, 2015 WL 518736 (W.D. La. Feb. 6, 2015); Phelps v. Daimler Trucks N. Am., LLC, No. 13-6685, 2015 WL 12564180 (E.D. La. June 26, 2015); Gillespie, 179 So. 3d at 970 (Third Circuit finding no vicarious liability for punitive damages). *But see* Curtis v. Rome, 735 So. 2d 822, 826 (La. Ct. App. 1999), *writ denied sub nom.* Rambo v. Rome, 748 So. 2d 441 (La. 1999) (Fourth Circuit finding the employer vicariously liable for punitive damages); see also Levet v. Calais & Sons, Inc., 514 So. 2d 153, 159 (La. Ct. App. 1987) (Fifth Circuit assessing punitive damages against the employer, but not addressing the issue directly since the employer stipulated vicarious liability for all damages).

17. See Lacoste v. Crochet, 751 So. 2d 998 (La. Ct. App. 2000). *But see* Gillespie, 179 So. 3d 966.

18. John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages - A Conflict of Traditions*, 70 LA. L. REV. 579, 580 (2010) (“The prevailing and longstanding rule in modern civil law is that punitive damages violate the purpose behind the law of damages, which is to ‘repair the harm sustained by the victim of a wrong, and not to punish the wrongdoer.’”).

for employers to be vicariously liable for both the compensatory and punitive damages assessed as a result of the employee's direct actions.

Part I of this Comment generally discusses punitive damages and vicarious liability in Louisiana. Part II demonstrates the nature of the circuit split and the confusion surrounding the issue of vicarious liability for punitive damages. Part III of this Comment explores the potential solutions that the Louisiana Supreme Court could implement to address the issue of vicarious liability for punitive damages. Part IV lays out a clear direction for the Court to take when making its decision and defines an approach that would typically find employers not vicariously liable for punitive damages, but reserves a more nuanced analysis for particularly culpable employers.

### I. PUNITIVE DAMAGES AS LAGNIAPPE LIABILITY IN LOUISIANA

In actions arising from tortious conduct, damages can be divided by purpose:<sup>19</sup> (1) to give compensation; and (2) to punish wrongdoers and deter wrongful conduct.<sup>20</sup> Courts award compensatory damages to compensate and restore a person to the financial position that he "would have occupied had no tort been committed."<sup>21</sup> Punitive damages,<sup>22</sup> by contrast, are designed to "punish the person doing the wrongful act" and to prevent similar conduct in the future.<sup>23</sup>

#### A. *The Restrictive Nature of Punitive Damages in Louisiana*

Louisiana statutory and codal authorities that allow recovery of punitive damages share the goal of deterrence.<sup>24</sup> Punitive damages are a "supra-compensatory remedy," meaning that courts award them *in*

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19. RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979).

20. *Id.* See also *id.* § 901 cmt. a ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."). See also *id.* § 901 cmt. c ("Finally, unlike the law of contracts or of restitution, the law of torts, which was once scarcely separable from the criminal law, has within it elements of punishment or deterrence. In certain types of cases punitive damages can be awarded . . .").

21. *Id.* § 903 cmt. a.

22. Punitive damages are also known as exemplary damages, as they mean to make an example of the culpable party. *Id.* § 908 cmt. a.

23. *Id.*

24. See, e.g., *Bourque v. Bailey*, 643 So. 2d 236, 238–39 (La. Ct. App. 1994), *writ denied*, 648 So. 2d 392 (La. 1994).

*addition to* compensatory damages.<sup>25</sup> Although most states allow for punitive damages in situations involving malice or recklessness,<sup>26</sup> other states restrict punitive damages to specific and narrow circumstances.<sup>27</sup> Louisiana falls into the latter category, allowing for punitive damages only in the narrowest of circumstances.<sup>28</sup> Louisiana law allows an award of punitive damages expressly authorized by statute.<sup>29</sup> Moreover, when awarding punitive damages in Louisiana, courts must narrowly construe statutes providing for punitive damages.<sup>30</sup>

In Louisiana, courts may assess punitive damages against a defendant only when a statute so authorizes,<sup>31</sup> such as when a defendant does any of the following: (1) causes damage to another as a result of his intoxication while operating a motor vehicle;<sup>32</sup> (2) causes damage to another as a result of criminal sexual activity when the victim was seventeen years old or younger;<sup>33</sup> (3) “intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use [the] communications” of another;<sup>34</sup> (4) sells,

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25. Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 486 (Jennifer Allen ed., 2013).

26. See CHAD MARCHAND & MEADE MITCHELL, DAMAGES: A STATE BY STATE SUMMARY 158 (2014). For example, Michigan does not allow for the recovery of punitive damages to punish defendants but does allow exemplary damages in certain scenarios. See also *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (1980) (“An award of exemplary damages is considered proper if it compensates a plaintiff for the ‘humiliation, sense of outrage, and indignity’ resulting from injuries ‘maliciously, wilfully [sic] and wantonly’ inflicted by the defendant.”).

27. See, e.g., N.H. REV. STAT. ANN. § 507:16 (2018) (“No punitive damages shall be awarded in any action, unless otherwise provided by statute.”); *Boott Mills v. Boston & M.R.R.*, 106 N.E. 680, 683–84 (1914) (“It is only by express statute that [punitive] damages may be awarded.”); *McCoy v. Ark. Nat. Gas Co.*, 143 So. 383, 385–86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932) (“There is no authority in the law of Louisiana for allowing punitive damages in any case, unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty.”).

28. See *McCoy*, 143 So. at 385–86.

29. See *id.* See also, e.g., *Bailey*, 643 So. 2d at 238.

30. See *McCoy*, 143 So. at 385–86; *Bailey*, 643 So. 2d at 238.

31. See *McCoy*, 143 So. at 385–86; *Bailey*, 643 So. 2d at 238. See also LA. CIV. CODE art. 2315.4 (2019); *id.* art. 2315.7; *id.* art. 2315.3; LA. REV. STAT. § 15:1312 (2019); *id.* § 9:2800.76.

32. LA. CIV. CODE art. 2315.4.

33. *Id.* art. 2315.7.

34. LA. REV. STAT. § 15:1312.

distributes, or “participate[s] in the marketing of an illegal controlled substance . . . in wanton or reckless disregard for the rights, health, and safety of others”;<sup>35</sup> (5) causes injuries to another through an act involving juvenile pornography;<sup>36</sup> or (6) causes death “by a wanton and reckless disregard for the rights and safety of the victim through an act of hazing . . . .”<sup>37</sup>

Louisiana law also offers recovery through statutes that provide double or treble damages beyond the actual loss sustained.<sup>38</sup> As double and treble damage statutes provide damages greater than mere compensation, double or treble damage statutes may be punitive in nature<sup>39</sup> but are not a “supra-compensatory remedy” like standard punitive damages.<sup>40</sup> Because double or treble damage statutes are not a “supra-compensatory remedy,”<sup>41</sup> one should not consider double or treble damage statutes traditional sources of punitive damages.

Louisiana’s hesitance to embrace punitive damages is apparent in the discretionary nature of awarding punitive damages.<sup>42</sup> Even if the plaintiff proves all of the elements of a statute providing punitive damages, the trier of fact has complete discretion in awarding punitive damages.<sup>43</sup> Louisiana’s restriction of punitive damages also reflects civil law jurisdictions’ general disfavor of punitive damages.<sup>44</sup> “[T]he prevailing and longstanding rule in modern civil law is that punitive damages violate the purpose behind the law of damages,” which is not to punish the wrongdoer, but merely to repair the damage caused to the victim.<sup>45</sup> Continental European countries with civilian legal traditions generally reject punitive damages as a source of recovery.<sup>46</sup>

35. *Id.* § 9:2800.76.

36. LA. CIV. CODE art. 2315.3.

37. *Id.* art. 2315.10.

38. *See, e.g.*, LA. REV. STAT. § 3:4278.1 (providing damages for landowners whose trees were intentionally cut down in the amount of three times market price).

39. *Id.*

40. Sharkey, *supra* note 25, at 486.

41. *Id.*

42. *See* deGravelles & deGravelles, *supra* note 18, at 596 (discussing that Louisiana Civil Code article 2315.4 allows punitive damages to be awarded but at the discretion of the trier of fact); *see also* LA. CIV. CODE art. 2315.7 (providing that punitive damages *may* be awarded); LA. REV. STAT. § 9:2800.76 (providing that punitive damages *may* be awarded); *but see id.* § 15:1312 (providing that plaintiffs under this statute are *entitled* to recover, among other things, punitive damages).

43. *See supra* note 42.

44. deGravelles & deGravelles, *supra* note 18, at 580.

45. *Id.*

46. *See* Helmut Koziol, *Punitive Damages-A European Perspective*, 68 LA. L. REV. 741, 750 (2008) (“The Principles of the Study Group on a European Civil Code, the Swiss and the Austrian draft, also do not accept punitive damages.”);

Article 10:101 of the Principles of European Tort Law states: “Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been if the wrong complained of had not been committed.”<sup>47</sup> Further, the European Group on Tort Law rejects punitive damages because they disproportionately reward the injured compared to his loss.<sup>48</sup> Indeed, the civilian tradition’s disfavor of punitive damages is so strong that European rulings have even influenced the United States Supreme Court to restrict punitive damages domestically.<sup>49</sup>

### *B. Louisiana Vicarious Liability Under Article 2320*

The doctrine of vicarious liability allows courts to hold parties responsible for the acts of third parties over whom they possess a certain level of authority.<sup>50</sup> Vicarious liability often arises under the theory of respondeat superior, that is, an employer–employee relationship.<sup>51</sup> An employer may be responsible for the acts of his employees because an employer acts through its principals and employees.<sup>52</sup> Respondeat superior liability attaches to the employer when the employee breaches a duty to a third party while acting in the course and scope of his employment.<sup>53</sup>

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BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, translation at [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0027](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0027) [<https://perm.a.cc/3QAB-VLNL>] (“A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.”).

47. EUROPEAN GROUP ON TORT LAW, *PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY* 8 (Springer-Verlag/Wien 2005).

48. *Id.* at 150–51.

49. Michael L. Wells, *A Common Lawyer’s Perspective on the European Perspective on Punitive Damages*, 70 *LA. L. REV.* 557, 559 (2010). *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (“[T]his Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive.’”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 408–09 (2003) (“Compensatory damages are intended to redress a plaintiff’s concrete loss, while punitive damages are aimed at the different purposes of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”).

50. RICK J. NORMAN, *Louisiana Employment Law*, in *LOUISIANA PRACTICE SERIES* § 14:3 (2017).

51. *Id.*

52. *Id.*

53. *Id.*



Louisiana Civil Code article 2320 establishes vicarious liability for employers.<sup>54</sup> During a vicarious liability analysis, a court determines whether an employee was in the course and scope of employment when the damage occurred;<sup>55</sup> if so, the court may hold the employer vicariously liable for the damage that occurred.<sup>56</sup> To determine whether an employee was in the course and scope of his employment, the court considers whether an employee's conduct is "so closely connected in time, place and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business . . . ."<sup>57</sup> If the course-and-scope requirement is met, the employer is solidarily liable for any compensatory damages that the employee may owe to the plaintiff.<sup>58</sup> As vicarious liability is a type of strict liability, the culpability of the employer is irrelevant.<sup>59</sup> An employer's liability is predicated solely on whether an employee committed an act within the course and scope of employment.<sup>60</sup>

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54. Louisiana Civil Code article 2320 provides, in pertinent part:

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed . . . . In the above case[], responsibility only attaches, when the masters or employers . . . might have prevented the act which caused the damage, and have not done it.

See also LA. REV. STAT. 9:3921 (2019) ("[E]very master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed.").

55. A court determines whether an employee was in the course and scope of employment as follows:

An employer is liable for the negligence of his employee which is committed in the course and scope of his employment. Such negligence is in the course and scope of employment if it is so closely connected in time, place and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely outside the employer's business.

H. ALSTON JOHNSON, III, CIVIL JURY INSTRUCTIONS, *in* 18 LOUISIANA CIVIL LAW TREATISE § 16:4 (3d ed. 2017).

56. *Id.* § 14:3.

57. *Id.* § 16:4 (emphasis omitted).

58. *Sampay v. Morton Salt Co.*, 395 So. 2d 326 (La. 1981) (finding that employers and employees are not joint tortfeasors but solidary obligors). When multiple obligors are solidarily liable for a single debt, each of the obligors is liable for the whole amount of the debt. For a discussion on solidary liability, see JOHNSON, III, *supra* note 55, § 7.41.

59. JOHNSON, III, *supra* note 55, § 14:3.

60. See *Morton Salt Co.*, 395 So. 2d at 328 (finding that vicarious liability is imposed upon an employer without regard to the employer's negligence or fault).

The relationship between punitive damages and vicarious liability arises when an employee causes injury by an act that is proscribed by one of the several punitive damages statutes while in the course and scope of his employment.<sup>61</sup> In the resulting lawsuit, the plaintiff may seek punitive damages from the employee as provided by statute, but may also seek to recover punitive damages from the employer through vicarious liability.<sup>62</sup>

## II. THE CIRCUIT SPLIT: A GUMBO OF ANALYSES

The Louisiana Supreme Court has not directly addressed whether Louisiana Civil Code article 2320, which provides for vicarious liability, applies to punitive damages.<sup>63</sup> The Court has acknowledged the issue of vicarious liability for punitive damages, but it has declined to comment on the merits of either side of the argument, expressing “no view on whether punitive damages can be imposed against [an employer] who is vicariously liable for general damages resulting from the conduct of an [employee].”<sup>64</sup> In the absence of a Louisiana Supreme Court determination, Louisiana circuit courts of appeal and federal district courts have reached inconsistent results when deciding whether employers are vicariously liable for punitive damages.<sup>65</sup>

### A. *The Louisiana Fourth and Fifth Circuit Courts of Appeal*

Two state appellate courts have found employers vicariously liable for punitive damages under Louisiana Civil Code article 2315.4, which permits punitive awards when a defendant’s intoxicated driving causes damage.<sup>66</sup> One such case is *Levet v. Calais & Sons, Inc.*, decided by the Louisiana Fifth Circuit Court of Appeal in 1987.<sup>67</sup> In *Levet*, the Fifth Circuit assessed whether punitive damages should be imposed on the

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61. See *McCoy v. Ark. Nat. Gas Co.*, 143 So. 383, 385–86 (La. 1932); *Bourque v. Bailey*, 643 So. 2d 236, 238 (La. Ct. App. 1994). See also LA. CIV. CODE art. 2315.4 (2019); *id.* art. 2315.7; *id.* art. 2315.3; LA. REV. STAT. § 15:1312 (2019); *id.* § 9:2800.76.

62. See, e.g., *Lacoste v. Crochet*, 751 So. 2d 998, 1000–01 (La. Ct. App. 2000).

63. LA. CIV. CODE art. 2320.

64. *Berg v. Zummo*, 786 So. 2d 708, 718 n.6 (La. 2001) (“We express no view on whether punitive damages can be imposed against a party who is vicariously liable for general damages resulting from the conduct of an intoxicated person, such as an employer.”).

65. See *supra* note 16.

66. LA. CIV. CODE art. 2315.4.

67. *Levet v. Calais & Sons, Inc.*, 514 So. 2d 153 (La. Ct. App. 1987).

employer, but was precluded from directly deciding the issue because the employer had stipulated vicarious liability for all damages, including punitive damages.<sup>68</sup> The Fifth Circuit did observe, however, that the employer's liability was justified because the employer purchased the alcohol that the employee consumed on his drive home from work.<sup>69</sup> The court thus gave credence to using employer's culpability as a factor when deciding whether to impose punitive damages on the employer.<sup>70</sup>

In *Curtis v. Rome*,<sup>71</sup> the Louisiana Fourth Circuit Court of Appeal found an intoxicated defendant's employer vicariously liable for punitive damages arising from a car crash the employee caused.<sup>72</sup> In *Curtis*, the defendant was intoxicated at least in part because he consumed alcohol his employer provided, which weighed in favor of the court finding vicarious liability for punitive damages.<sup>73</sup> Thus, the Fourth Circuit incorporated a factual inquiry into its analysis of the culpability of the employer in order to determine whether the employer was vicariously liable for punitive damages.<sup>74</sup>

One year later, the Fourth Circuit in *Lacoste v. Crochet* held that "an intoxicated driver's employer, when held vicariously liable for damages caused by the driver, may be cast for [punitive] damages under article 2315.4."<sup>75</sup> The members of the Lacoste family were injured in the accident and filed suit against Crochet, the tortfeasor, and his employer, Kelley Completion Services, to recover compensation for injuries sustained and punitive damages because an intoxicated driver-employee caused the injuries.<sup>76</sup> The trial court held Kelley Completion Services vicariously liable for the punitive damages that arose from Crochet's conduct.<sup>77</sup> In *Lacoste*, the Fourth Circuit affirmed the lower court's ruling even though

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68. *Id.* at 158 ("As we view our duty in the present case, it is not to judge, as we are urged by the defendants, the philosophical pros and cons of assessing exemplary damages against one whose only liability for the injuries sustained is vicarious.").

69. *Id.*

70. *See id.*

71. *Curtis v. Rome*, 735 So. 2d 822 (La. Ct. App. 1999) (Fourth Circuit finding the employer vicariously liable for punitive damages), *writ denied sub nom.* *Rambo v. Rome*, 748 So. 2d 441 (La. 1999).

72. *Id.* at 826.

73. *Id.* at 824 n.3.

74. *Id.* at 826.

75. *Lacoste v. Crochet*, 751 So. 2d 998, 1003–04 (La. Ct. App. 2000).

76. *Id.* Punitive damages are allowed in cases in which an intoxicated driver caused the damage. LA. CIV. CODE art. 2315.4 (2019).

77. *Crochet*, 751 So. 2d at 1006.

the employer had no part in the employee's action.<sup>78</sup> Although the employee had a previous DWI, the facts of the case do not state if Crochet committed the DWI offense while employed for Kelley Completion Services.<sup>79</sup>

In *Lacoste*, the employer lacked culpability for the actions of its employee, but the court, relying on *Curtis*, nevertheless found vicarious liability for punitive damages.<sup>80</sup> The *Lacoste* analysis is distinguishable from the Fourth Circuit's analyses in *Levet* and *Curtis* because in *Lacoste*, the court conducted no factual inquiry into the culpability of the employer.<sup>81</sup> Instead, the court relied on the precedent set in *Curtis* and found vicarious liability using a strict liability standard.<sup>82</sup>

*B. The Louisiana Third Circuit and the United States District Courts for the Eastern and Western Districts of Louisiana*

Opposite the Fourth and Fifth Circuits, one Louisiana appellate court and two federal district courts in Louisiana have not extended vicarious liability to punitive damages.<sup>83</sup> When the issue of vicarious liability for punitive damages came before Louisiana's Third Circuit, the court took a unique approach.<sup>84</sup> In *Gillespie v. Calcasieu School Board*, Steven and

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78. *Id.* at 1000–01. The court does not relay facts that suggest the employer was aware of the employee's conduct. *See id.*

79. *Id.*

80. *Id.*

81. *See id.* (finding vicarious liability based upon precedent). *But see* *Levet v. Calais & Sons, Inc.*, 514 So. 2d 153 (La. Ct. App. 1987) (observing the culpability of the employer in the specific instance); *Curtis v. Rome*, 735 So. 2d 822 (La. Ct. App. 1999) (reasoning that the employer deserved to be held vicariously liable for punitive damages because of the specific conduct of the employer).

82. *Crochet*, 751 So. 2d at 1003–04.

83. *See* *Smith v. Zurich Am. Ins. Co.*, No. 95-3004, 1996 WL 537746, at \*2 (E.D. La. Sept. 20, 1996) (“Considering these general principles, and the lack of any relevant Louisiana jurisprudence holding an employer liable under this particular statute, [Defendant] is entitled to summary judgment, dismissing the claims for exemplary damages as provided in Article 2315.4.”); *Lankford v. Nat'l Carriers Inc.*, No. 12-01280, 2015 WL 518736, at \*3 (W.D. La. Feb. 6, 2015) (“Thus, [article 2315.4] does not allow the imposition of punitive damages against persons who are vicariously liable such as the employer in this case.”); *Phelps v. Daimler Trucks N. Am., LLC*, No. 13-6685, 2015 WL 12564180, at \*1 (E.D. La. 2015) (noting that a recent decision “supports the finding that employers may not be held vicariously liable under art. 2315.4”); *Gillespie v. Calcasieu Par. Sch. Bd.*, 179 So. 3d 966, 970 (La. Ct. App. 2015), *writ denied*, 187 So. 3d 470 (La. 2016).

84. *Gillespie*, 179 So. 3d 966.

Leslie Gillespie filed suit on their own behalf and on behalf of their minor daughter against a teacher who engaged in sexual conduct with their daughter, and against the School Board that employed the teacher.<sup>85</sup> The suit they filed against the School Board sought both compensatory and punitive damages under the theory of vicarious liability.<sup>86</sup>

When the minor child was a student at Sam Houston High School, teacher Lance Duhon engaged in a sexual relationship with her.<sup>87</sup> Duhon allegedly sent sexually explicit text messages to the child, soliciting her to “meet him in his classroom to engage in improper, illegal and sexual acts including, but not limited to, having her perform oral sex on him.”<sup>88</sup> The teacher’s solicitations and the subsequent acts allegedly occurred on an “almost daily basis for a number of months.”<sup>89</sup> In addition to compensatory damages, the Gillespies sought punitive damages under Louisiana Civil Code article 2315.3, which allows punitive damages in cases of child pornography.<sup>90</sup>

Prior to his employment at Sam Houston High School, Duhon worked at Barbe High School in Calcasieu Parish.<sup>91</sup> In 2007, the Calcasieu School Board launched an investigation into Duhon’s conduct with a student at Barbe, resulting in the decision not to renew Duhon’s contract.<sup>92</sup> Duhon, when applying to work at Sam Houston High School in 2012, disclosed the prior investigation for sexual misconduct to the principal of Sam Houston.<sup>93</sup> The principal of Sam Houston contacted the principal at Barbe, who confirmed that the Calcasieu School Board investigated Duhon for sexual misconduct with a 15-year-old female student and that “she would not rehire him as the result of those incidents.”<sup>94</sup> The principal of Barbe, concerned about the possibility of Duhon being hired at another school within the same school district, called the Head of High Schools for the Calcasieu Parish school system to inform him of Duhon’s sexual

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85. *Id.* at 967.

86. *Id.* at 966.

87. *Id.* at 967.

88. *Id.*

89. *Id.*

90. *Id.* See also LA. CIV. CODE art. 2315.3 (2019) (“[E]xemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles . . . regardless of whether the defendant was prosecuted for his acts.”).

91. *Gillespie*, 179 So. 3d at 968.

92. *Id.*

93. *Id.* at 974 (Cooks, J., concurring).

94. *Id.*

misconduct.<sup>95</sup> Nevertheless, the principal of Sam Houston hired Duhon, and the School Superintendent personally approved the hiring decision.<sup>96</sup> Despite the evidence of the School Board's recklessness and culpable behavior in the hiring of Duhon, the Third Circuit found that the Calcasieu Parish School Board was not vicariously liable for the punitive damages arising out of Duhon's conduct.<sup>97</sup>

In *Gillespie*,<sup>98</sup> the Third Circuit held that the Calcasieu School Board was not vicariously liable for its teacher's sexual misconduct and that Louisiana Civil Code article 2320 was completely inapplicable to punitive damages—meaning that vicarious liability for punitive damages does not exist in Louisiana.<sup>99</sup> The *Gillespie* court reasoned that because vicarious liability under article 2320 imposes solidary liability,<sup>100</sup> the court should interpret the article similarly to article 2324, which imposes solidary liability on co-conspirators.<sup>101</sup> The court determined that because solidary liability under Louisiana Civil Code article 2324 is inapplicable to the disposition of punitive damages,<sup>102</sup> the solidary liability imposed under article 2320 should be inapplicable to punitive damages as well.<sup>103</sup> In applying its reasoning, however, the *Gillespie* court did not consider the individual culpability of the employer.<sup>104</sup>

In *Romero v. Clarendon American Insurance*, the Third Circuit again found no vicarious liability for punitive damages under Civil Code article

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95. *Id.*

96. *Id.* (“Duhon intentionally falsified, under oath, the required statement on the sexual misconduct disclosure form required by the School Board. Having previously investigated Duhon, the School Board knew the statement was false but re-hired Duhon anyway.”).

97. *Id.* at 966 (Amy, J., majority op.).

98. *Id.* at 970; *see also* LA. CIV. CODE art. 2315.7 (2019) (providing that punitive damages may be awarded in cases where the damages were caused by criminal sexual activity when the victim is seventeen years of age or younger).

99. *Gillespie*, 179 So. 3d at 970.

100. *Sampay v. Morton Salt Co.*, 395 So. 2d 326 (La. 1981) (finding that employers and employees are not joint tortfeasors but solidary obligors). When multiple obligors are solidarily liable for a single debt, each of the obligors is liable for the whole amount of the debt. For a discussion on solidary liability, *see* SAUL LITVINOFF & RONALD J. SCALISE JR., *LAW OF OBLIGATIONS*, in 5 *LOUISIANA CIVIL LAW TREATISE* § 7.41 (2d ed. 2017).

101. *Gillespie*, 179 So. 3d at 971. *See also* LA. CIV. CODE art. 2324 (“He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.”).

102. *Ross v. Conoco, Inc.*, 828 So. 2d 546, 553 (La. 2002).

103. *Gillespie*, 179 So. 3d at 971.

104. *See id.*

2315.4 for an accident caused by an intoxicated driver.<sup>105</sup> The court's analysis, however, was more nuanced than merely finding article 2320 inapplicable to punitive damages.<sup>106</sup> The court held that the employer could not be vicariously liable for any punitive damages unless the employer contributed to the wrongful conduct.<sup>107</sup> Thus, the Third Circuit observed that vicarious liability for punitive damages should depend, at least partly, on the culpability of the employer.<sup>108</sup>

The United States District Courts for the Eastern and Western Districts of Louisiana have produced outcomes similar to the Third Circuit, but for different reasons.<sup>109</sup> In *Lankford v. National Carriers Inc.*, the Western District of Louisiana found no vicarious liability for the employer of an intoxicated driver because of Louisiana's strong public policy against punitive damages.<sup>110</sup> Later in the same year that *Lankford* was decided, the Eastern District of Louisiana decided *Phelps v. Daimler Trucks North America L.L.C.*, a case also involving the employer of an intoxicated driver.<sup>111</sup> The court in *Phelps* cited *Lankford* and, using the same reasoning, found no vicarious liability for punitive damages.<sup>112</sup> The reasoning in *Lankford* and *Phelps* would not allow vicarious liability for

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105. *Romero v. Clarendon Am. Ins.*, 54 So. 3d 789 (La. Ct. App. 2010); see also LA. CIV. CODE art. 2315.4.

106. See *Clarendon Am. Ins.*, 54 So. 3d 789. But see *Gillespie*, 179 So. 3d 966.

107. *Clarendon Am. Ins.*, 54 So. 3d at 792.

108. *Id.*

109. See *Smith v. Zurich Am. Ins. Co.*, No. 95-30004, 1996 WL 537746, at \*2 (E.D. La. Sept. 20, 1996) ("Considering these general principles, and the lack of any relevant Louisiana jurisprudence holding an employer liable under this particular statute, [Defendant] is entitled to summary judgment, dismissing the claims for exemplary damages as provided in Article 2315.4."); *Lankford v. Nat'l Carriers Inc.*, No. 12-01280, 2015 WL 518736, at \*3 (W.D. La. Feb. 6, 2015) ("Thus, [article 2315.4] does not allow the imposition of punitive damages against persons who are vicariously liable such as the employer in this case."); *Phelps v. Daimler Trucks N. Am., LLC*, No. 13-6695, 2015 WL 12564180, at \*1 (E.D. La. June 26, 2015) (noting that a recent decision "supports the finding that employers may not be held vicariously liable under art. 2315.4").

110. *Nat'l Carriers Inc.*, 2015 WL 518736, at \*3 ("Thus, [article 2315.4] does not allow the imposition of punitive damages against persons who are vicariously liable such as the employer in this case.").

111. See *Phelps*, 2015 WL 12564180, at \*1.

112. *Id.*

punitive damages in any situation<sup>113</sup> because of the traditional disdain that civilian jurisdictions have for punitive damages.<sup>114</sup>

Because of the lack of relevant legislation addressing whether courts may assess punitive damages vicariously,<sup>115</sup> the Louisiana Supreme Court's reluctance to rule squarely on the issue,<sup>116</sup> the differing interpretations of article 2320, the various sources of law that provide avenues for recovery of punitive damages,<sup>117</sup> and the inclusion of policies for and against punitive damages,<sup>118</sup> Louisiana courts have rendered inconsistent decisions based upon a wide array of reasoning.<sup>119</sup> The current circuit split concerning whether a court may hold an employer vicariously liable for punitive damages has created an ambiguous area of the law.<sup>120</sup>

### III. LAISSEZ LES BONNES IDÉES ROULER:<sup>121</sup> POTENTIAL SOLUTIONS FOR THE CIRCUIT SPLIT

The Louisiana Supreme Court could solve the current circuit split regarding vicarious liability for punitive damages by rendering a clear decision on the matter. When doing so, the Court should adopt a standard

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113. See *Nat'l Carriers Inc.*, 2015 WL 518736. *But see Daimler Trucks N. Am., LLC*, 2015 WL 12564180.

114. See deGravelles & deGravelles, *supra* note 18, at 580 (“The prevailing and longstanding rule in modern civil law is that punitive damages violate the purpose behind the law of damages, which is to ‘repair the harm sustained by the victim of a wrong, and not to punish the wrongdoer.’”).

115. See LA. CIV. CODE art. 2320 (2019) (making no mention of punitive damages); *see also, e.g., id.* art. 2315.4 (making no mention of vicarious liability).

116. *Berg v. Zummo*, 786 So. 2d 708, 718 n.6 (La. 2001) (“We express no view on whether punitive damages can be imposed against a party who is vicariously liable for general damages resulting from the conduct of an intoxicated person, such as an employer.”).

117. See *supra* notes 36–39.

118. See, *e.g., Nat'l Carriers Inc.*, 2015 WL 518736; *Daimler Trucks N. Am., LLC*, 2015 WL 12564180. *But see Curtis v. Rome*, 735 So. 2d 822 (La. Ct. App. 1999), *writ denied sub nom. Rambo v. Rome*, 748 So. 2d 441 (La. 1999).

119. See *supra* note 16.

120. See *Lacoste v. Crochet*, 751 So. 2d 998 (La. Ct. App. 2000). *But see Gillespie v. Calcasieu Par. Sch. Bd.*, 179 So. 3d 966 (La. Ct. App. 2015), *writ denied*, 187 So. 3d 470 (La. 2016).

121. This phrase, translating to “Let the Good Ideas Roll,” is a play on the popular Louisiana phrase “laissez les bons temps rouler,” or “let the good times roll.” See Bailey Johnson, *Laissez les bons temp rouler!: Learn your Mardi Gras history*, CBS NEWS (Mar. 8, 2011), <https://www.cbsnews.com/news/laissez-les-bon-temps-rouler-learn-your-mardi-gras-history/> [<https://perma.cc/8YKG-FGKY>].



that all Louisiana courts could apply during a vicarious liability analysis for the assessment of punitive damages.

### A. A Strict Liability Standard

Some jurisdictions in the U.S. use a strict liability approach for vicarious liability, holding employers vicariously liable for punitive damages regardless of the employer's culpability.<sup>122</sup> The strict liability approach is identical to the one courts use to determine vicarious liability for compensatory damages.<sup>123</sup> The strict liability analysis is permissive of the allowance of punitive damages, allowing vicarious liability any time the employee commits the wrongful act during the course and scope of employment.<sup>124</sup>

A strict liability approach to vicarious liability for punitive damages punishes an employer for employing an individual.<sup>125</sup> Conducting a vicarious liability analysis for punitive damages without considering the individual culpability of the employer is misguided because the aim of punitive damages is to punish the wrongdoer and deter bad conduct.<sup>126</sup>

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122. W. PAGE KEETON, PROSSER AND KEETON ON TORTS 13 (1984). The following states use a strict liability standard when assessing vicarious liability for punitive damages: Alabama, *Avondale Mills v. Bryant*, 63 So. 932 (Ala. Ct. App. 1913); Arizona, *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 115 (Ariz. 2001) (en banc); Arkansas, *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518 (Ark. 1972); Georgia, *Piedmont Cotton Mills, Inc. v. General Warehouse No. 2*, 149 S.E.2d 72 (Ga. 1966); Indiana, *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845 (Ind. 1977); Kentucky, *Liberty Nat. Bank & Tr. Co. v. Gruenberger*, 477 S.W.2d 503, 505 (Ky. Ct. App. 1972); Maine, *Goddard v. Grand Trunk Ry.*, 57 Me. 202 (Me. 1869); Michigan, *Lucas v. Michigan Cent. R. Co.*, 56 N.W. 1039 (Mich. 1893); Mississippi, *Sandifer Oil Co. v. Drew*, 71 So. 2d 752 (Miss. 1954); Missouri, *Johnson v. Allen*, 448 S.W.2d 265 (Mo. Ct. App. 1969); Montana, *Rickman v. Safeway Stores*, 227 P.2d 607 (Mont. 1951); North Carolina, *Hairston v. Atlantic Greyhound Corp.*, 18 S.E.2d 166 (N.C. 1942); Oklahoma, *Bierman v. Aramark Refreshment Servs., Inc.*, 198 P.3d 877, 879 (Okla. 2008); Oregon, *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790 (Or. 1975) (en banc); Pennsylvania, *Philadelphia Traction Co. v. Orbann*, 12 A. 816 (Pa. 1888); South Carolina, *Hooper v. Hulto*, 158 S.E. 726 (S.C. 1931); Tennessee, *Odom v. Gray*, 508 S.W.2d 526 (Tenn. 1974).

123. NORMAN, *supra* note 50, § 14:3.

124. *Id.*

125. A strict liability analysis has no bearing on culpability. *See, e.g.*, *Sampay v. Morton Salt Co.*, 395 So. 2d 326 (La. 1981) (finding that vicarious liability is imposed upon an employer without regard to the employer's negligence or fault).

126. KEETON, *supra* note 122, at 9.

Holding an employer vicariously liable regardless of culpability does not punish the *wrongdoer*, but rather the *employer* of the wrongdoer solely because of his employment.<sup>127</sup> Most actions in employment scenarios that result in punitive damages stem from an employee's personal decision, which usually is not in furtherance of the employer's interest.<sup>128</sup> A court should not hold an employer responsible for the punitive damages arising from strictly personal decisions that an employee makes, especially when a court will hold the employer vicariously liable for compensatory damages of the plaintiff.<sup>129</sup>

A strict liability approach, however, would force employers to "exercise closer control" over employees, which would ideally result in more responsible employees.<sup>130</sup> Although a strict liability standard would incentivize employers to carefully select employees based upon character, it loosens the control that employers have over potential liability employees cause.<sup>131</sup> Under a strict liability standard, if an employee commits an act within the course and scope of employment, the employer has no way to avoid liability, no matter the employee's motivation or the employer's culpability for the action.<sup>132</sup> As a result of the employer's blanket liability under the strict liability approach, punitive damage awards are no longer consistent with the penal purpose of punishing the culpable party.<sup>133</sup> Additionally, such punishment may have negative economic repercussions.<sup>134</sup> For businesses, especially corporations, large punitive awards can translate to financial harm for companies and shareholders.<sup>135</sup> Although punitive damages are insurable

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127. See OLIVER W. HOLMES, THE COMMON LAW 84 (1881) ("[T]he party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it.").

128. See, e.g., LA. CIV. CODE art. 2315.4 (2019) (punishing defendants who make the personal decision to drive while intoxicated and ultimately cause injury to another).

129. KEETON, *supra* note 122, at 9.

130. *Id.* at 13.

131. Under a strict liability standard, an employer would be vicariously liable for punitive damages in every single instance that the employee causes damages. Language in Louisiana Civil Code article 2320 places liability on the employer only if he could have prevented the harm, but courts have generally read that language out of the article. Moreover, Louisiana Revised Statutes § 9:3921, which addresses vicarious liability and follows Louisiana Civil Code article 2320, makes no mention of the "might have prevented" language. NORMAN, *supra* note 50, § 14:3.

132. See *generally id.*

133. RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1979).

134. Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & ECON. 527 (1999).

135. *Id.*

when vicariously assessed in Louisiana, they are often subject to exclusion clauses in insurance policies.<sup>136</sup> As a result, some employers may be left with no way to insure against an assessment of punitive damages.<sup>137</sup>

### B. *The Restatement of Torts Solution*

Although some jurisdictions use strict liability to determine vicarious liability and give no weight to an employer's culpability, the majority of jurisdictions in the U.S. hold employers vicariously liable for punitive damages only if the employer meets specific criteria of culpability.<sup>138</sup> The Second Restatement of Torts provides the criteria such jurisdictions use.<sup>139</sup> All of the criteria of culpability provided in the Restatement are not intended to "apply to the interpretation of special statutes such as those giving double damages, as to which no statement is made."<sup>140</sup> The Second Restatement of Torts states that a court can properly award punitive damages against an employer for damages an employee causes if:

- (a) the principal or a managerial agent authorized the doing and

136. See, e.g., *Taylor v. Lumar*, 612 So. 2d 798 (La. Ct. App. 1992).

137. *Id.*

138. KEETON, *supra* note 122, at 12. The following states follow the Restatement of Torts when assessing vicarious liability for punitive damages: California, *White v. Ultramar, Inc.*, 981 P.2d 944, 952 (Cal. 1999); Colorado, *Frick v. Abell*, 602 P.2d 852 (Colo. 1979); Connecticut, *Maisenbacker v. Society Concordia of Danbury*, 42 A. 67 (Conn. 1899); Florida, *Mercury Motors Exp., Inc. v. Smith*, 393 So. 2d 595 (Fla. 1981); Hawaii, *Lauer v. YMCA*, 557 P.2d 1334 (Haw. 1976); Idaho, *Openshaw v. Oregon Auto Ins. Co.*, 487 P.2d 929 (Idaho 1971); Illinois, *Holda v. Kane Cty.*, 410 N.E.2d 552 (Ill. App. Ct. 1980); Iowa, *Briner v. Hyslop*, 337 N.W.2d 858 (Iowa 1983); Kansas, *Smith v. Printup*, 866 P.2d 985, 990 (Kan. 1993); Minnesota, MINN. STAT. ANN. § 549.20(2) (West Supp. 2018); Nevada, *Summa Corp. v. Greenspun*, 607 P.2d 569 (Nev. 1980); New Jersey, *Security Aluminum Window Mfg. Corp. v. Lehman Assoc. Inc.*, 260 A.2d 248 (N.J. Super. Ct. App. Div. 1970); New Mexico, *Robertson v. Carmel Builders Real Estate*, 92 P.3d 653, 659 (N.M. Ct. App. 2003); New York, *Craven v. Bloomingdale*, 64 N.E. 169 (N.Y. 1902); North Dakota, *John Deere Co. v. Nygard Equip., Inc.*, 225 N.W.2d 80 (N.D. 1974); Ohio, *Tracy v. Athens & Pomeroy Coal & Land Co.*, 152 N.E. 641 (Ohio 1926); Rhode Island, *Conti v. Winters*, 136 A.2d 622 (R.I. 1957); Texas, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967); Vermont, *Shortle v. Central Vt. Pub. Serv. Corp.*, 399 A.2d 517 (Vt. 1979); Virginia, *Freeman v. Sproles*, 131 S.E.2d 410 (Va. 1963); West Virginia, *Addair v. Huffmann*, 195 S.E.2d 739 (W. Va. 1973); Wisconsin, *Garcia v. Sampson's, Inc.*, 103 N.W.2d 565 (Wis. 1960); Wyoming, *Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981).

139. RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979).

140. RESTATEMENT (SECOND) OF AGENCY § 217 cmt. c (AM. LAW INST. 1958).

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.<sup>141</sup>

A court must individually examine the four criteria of culpability provided in the Restatement to assess the functionality and fairness of each.

Part (a) of the Restatement provides that a court can hold employers that explicitly authorize the “doing and the *manner* of the act” vicariously liable for punitive damages.<sup>142</sup> For example, in *Denver & R G R Co. v. Harris*, a railroad company directed its employees to launch an assault on the property of a competing railroad company.<sup>143</sup> As a result of the employer’s direct authorization of the wrongful act, the court held the employer vicariously liable for punitive damages.<sup>144</sup> Part (a) of the Restatement is the most functionally sound and fair of all of the factors because an employer that authorizes an act is the most culpable party for the act other than the actor himself.<sup>145</sup>

Under the criteria of part (b) of the Restatement, an employer can be vicariously liable for punitive damages if he knowingly employs or retains an employee that possesses a character trait causing the injury that gave rise to the punitive damages.<sup>146</sup> The Restatement uses the term “characteristic,”<sup>147</sup> in explaining the criterion. In application, however, the criterion is based upon past conduct rather than a true character trait.<sup>148</sup> The case *Cates v. Darland* illustrates the “characteristic” criterion, a case in which an unhappy customer sued a car dealership because of an employee misrepresenting the mileage on a vehicle by turning back the odometer.<sup>149</sup> The same employee had previously engaged in the same

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141. RESTATEMENT (SECOND) OF TORTS § 909.

142. *Id.* (emphasis added).

143. *Denver & R G R Co v. Harris*, 122 U.S. 597, 605–07 (1887).

144. *Id.* at 610.

145. *See, e.g., id.* at 605–07 (finding a railroad company employer vicariously liable for punitive damages for directing its employees to storm the property of a competing railroad company).

146. RESTATEMENT (SECOND) OF TORTS § 909.

147. *Id.* § 909 cmt. b.

148. *See, e.g., Cates v. Darland*, 537 P.2d 336 (Okla. 1975) (finding a car salesman employee’s past conduct of turning back odometers a characteristic that, when known by the employer, allowed the employer to be held vicariously liable for the punitive damages arising from that characteristic).

149. *Id.* at 337.

conduct by turning back the odometer on other vehicles.<sup>150</sup> The court in *Cates* found the employer was aware of the employee's previous conduct and thus held the employer vicariously liable for punitive damages.<sup>151</sup> A "characteristic"<sup>152</sup> under part (b) of the Restatement is therefore not necessarily a character trait, but rather a specific instance of previous conduct similar to the conduct giving rise to the award of punitive damages.<sup>153</sup>

The most straightforward application of this criterion to Louisiana law is demonstrated in the following hypothetical:

An employer hires or retains an employee who the employer knows to be a recovering alcoholic. If, during a work errand, that employee caused damage to another while driving under the influence of alcohol, Louisiana Civil Code article 2315.4 would allow recovery of punitive damages.<sup>154</sup>

Under the criterion of culpability part (b) of the Restatement outlines, the employer in the above hypothetical would be vicariously liable for punitive damages resulting from injury the employee caused while driving intoxicated.<sup>155</sup>

Although the criteria in part (b) encourages employers to be especially diligent in hiring employees, it de-incentivizes employers from employing persons suffering from alcoholism, drug addiction, and other physical and mental issues.<sup>156</sup> Moreover, an employee would become seemingly "unfit" for retention if convicted of a DWI.<sup>157</sup> Under the criteria in part (b), employers that seek complete insulation for liability would be forced to deem whole groups of people unemployable, creating unnecessary

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150. *Id.* at 337–38.

151. *Id.* at 336.

152. RESTATEMENT (SECOND) OF TORTS § 909 cmt. b.

153. *Darland*, 537 P.2d at 336.

154. LA. CIV. CODE art. 2315.4 (2019).

155. RESTATEMENT (SECOND) OF TORTS § 909. *See also* *Kurn v. Radencic*, 141 P.2d 580, 582 (1943) (holding that an employer was vicariously liable for punitive damages arising from an employee that had a history of aggression and caused damages to another because of that aggression).

156. A broad application of part (b) would likely hold an employer vicariously liable for punitive damages if the employer was aware of an employee with alcoholism and that employee caused damage as a result of driving while intoxicated. Consequently, the employer, to limit liability, would likely avoid employing individuals with such characteristics.

157. *Darland*, 537 P.2d 336.

financial burdens on the state.<sup>158</sup> Some jurisdictions follow part (b) of the Restatement to force employers to “exercise closer control” over their employees.<sup>159</sup> Because the approach in part (b) incentivizes employers to select employees carefully and based upon past conduct,<sup>160</sup> it would be difficult for employers to assess with a great degree of accuracy whether a potential employee would later cause an injury allowing an award of punitive damages, as past conduct is not necessarily indicative of future behavior.<sup>161</sup> If a court were to include part (b) of the Restatement in a vicarious liability analysis, the court should consider the specific facts of the case to determine the employer’s culpability rather than broadly apply part (b).

If an employee acting in a managerial capacity commits an act that gives rise to punitive damages, his employer would be vicariously liable under part (c) of the Restatement.<sup>162</sup> An employer’s culpability differs, however, when a low-level manager commits a bad act versus a senior executive.<sup>163</sup> A court would understandably hold a company vicariously liable for the acts of a high-level executive, but not necessarily a local assistant manager, because the former speaks and acts for the company in

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158. Employers often consider potential liability when deciding whether or not to hire employees. See Kenneth I. Sondik, *Ban the Box Leaves Employers Liable for Negligent-Hiring Lawsuits*, N.Y. TIMES (Apr. 13, 2016), <https://www.nytimes.com/roomfordebate/2016/04/13/should-a-jail-record-be-an-employers-first-impression/ban-the-box-leaves-employers-liable-for-negligent-hiring-lawsuits> [<https://perma.cc/HGF8-J3Q8>]. If a court held an employer liable for punitive damages arising from every action of an employee because of a characteristic of the employee of which the employer was aware, the employer would be more likely to forego hiring the employee to limit liability.

159. KEETON, *supra* note 122, at 13.

160. *Darland*, 537 P.2d 336.

161. For example, even if an employer conducted thorough and rigorous background checks, it is possible that an employee could pass all preliminary checks and then subsequently make a poor decision that causes damage to another.

162. The Restatement provides the following as an illustration of this criterion of culpability:

A, a corporation owning a series of retail stores, employs B as operations manager to supervise the management of the units. While visiting a unit B discovers facts that lead him to believe erroneously that one of the clerks has been stealing. He directs the local manager to imprison the clerk. In the ensuing interview, he permits the local manager to use outrageous means of intimidation. In the clerk’s action against the corporation, punitive damages can properly be awarded.

RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979).

163. *White v. Ultramar, Inc.*, 981 P.2d 944, 952 (1999).

a way that the latter cannot.<sup>164</sup> In *White v. Ultramar*, the Supreme Court of California addressed the issue of whether a lower-level managerial employee should qualify as a managerial employee for the purposes of part (c) of the Restatement.<sup>165</sup> The *White* court reasoned, “A rule defining managing agent as any supervisor who can hire or fire employees, but who does not have substantial authority over decisions that ultimately determine corporate policy, effectively allows punitive damage liability without proof of anything more than simple tort liability, which we have long recognized is insufficient.”<sup>166</sup> As the court in *White* observed, holding an employer vicariously liable for punitive damages for the actions of *any* employee in *any* managerial capacity would create far too broad a standard.<sup>167</sup>

Like part (b), part (c) of the Restatement incentivizes employers to avoid retaining or hiring unfit employees.<sup>168</sup> The criterion provided in part (c) uses fear of potential punitive damage liability to incentivize employers to exercise higher levels of caution and care when hiring managers and promoting employees to managerial status.<sup>169</sup> Nevertheless, part (c) imposes an even higher burden on employers for evaluating candidates for managerial positions, no matter what level of authority the managerial position may involve.<sup>170</sup> Employers, however, likely would not spend the same amount of time, effort, and resources evaluating the character and background of a candidate for a position as a local assistant manager as they would for a position as the chief financial officer of a company.<sup>171</sup>

Part (d) of the Restatement is the last consideration under the Restatement approach, providing that courts may hold employers vicariously liable for punitive damages in situations in which the employer ratifies or expresses approval for the act that gave rise to the punitive damages.<sup>172</sup> “Expresses approval” is analogous to the retroactive “authorization” part (a) of the Restatement explains.<sup>173</sup> As in part (a), this criterion serves the purpose of punitive damages: to punish and deter bad conduct.<sup>174</sup> Upon ratification, the one ratifying is subject to tort liability to the person the purported agent

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164. *See id.* at 952–53.

165. *Id.*

166. *Id.*

167. *Id.*

168. RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1979).

169. *See generally id.*

170. *See generally id.*

171. *See generally id.*

172. *Id.*

173. *See discussion supra* Part III.B.

174. KEETON, *supra* note 122, at 9.

harmed.<sup>175</sup> An overt act expressing approval or affirmation of the employee's act would typically perfect ratification;<sup>176</sup> however, silence may constitute ratification.<sup>177</sup> The Restatement goes on to explain that merely failing to dismiss an employee does not amount to ratification of the bad act.<sup>178</sup> Nevertheless, the Restatement does not consider whether failing to reprimand an employee or express disapproval for a bad act is considered ratification through inaction.<sup>179</sup> Because the criteria of ratification aligns with the aim of punitive damages and does not extend vicarious liability for punitive damages to employers without culpability, courts should use the criteria in every vicarious liability analysis for punitive damages. With respect to a question of ratification by silence or inaction during a vicarious liability analysis, the court should have the discretion to make such a judgment.

### *C. No Vicarious Liability for Punitive Damages*

Although a hardline rule precluding vicarious liability for punitive damages truly embraces the restrictive civilian view on punitive damages, it allows employers like the Calcasieu Parish School Board to avoid all instances of vicarious liability for punitive damages, even in situations in

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175. RESTATEMENT (SECOND) OF AGENCY § 218 cmt. a (AM. LAW INST. 1958).

176. RESTATEMENT (SECOND) OF TORTS § 909 cmt. b.

177. The Restatement describes ratification through silence as such:

Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent can be inferred. Such inference may be made although the purported principal had no knowledge that the other party would rely upon the supposed authority of the agent; his knowledge of such fact, however, coupled with his silence, would ordinarily justify an inference of assent by him. Whether or not such an inference is to be drawn is a question for the jury, unless the case is so clear that reasonable men could come to but one conclusion.

RESTATEMENT (SECOND) OF AGENCY § 94 cmt. a.

178. *Id.* § 217 cmt. b.

179. Consider the following scenario: An employee works for a retail store and apprehends a suspected shoplifter. Upon apprehension, the employer watches the employee bring the suspect to an office for questioning. The employee questions the suspect, finds no wrongdoing and releases him. The suspected shoplifter then files suit for false imprisonment, which, for the purposes of this scenario, allows recovery for punitive damages. The employer may have ratified the employee's action through silence or inaction.



which the employer was overtly complicit in the wrongdoing.<sup>180</sup> If Louisiana wishes to embrace a true civilian approach to punitive damages, it should repeal all statutes that provide for recovery of punitive damages rather than merely restrict plaintiffs' recovery through vicarious liability.<sup>181</sup> If the aim of punitive damages is to punish wrongdoers and deter bad behavior,<sup>182</sup> and Louisiana intends to allow plaintiffs to pursue punitive damages under certain statutes, then Louisiana should adopt an approach that allows courts to assess punitive damages against employers through vicarious liability when employers are especially culpable for the injury that gave rise to the punitive damages. Although the strict liability standard applies to employer liability for compensatory damages,<sup>183</sup> vicarious liability for punitive damages should involve a more nuanced approach.

#### IV. LOUISIANA'S SOLUTION: A NOVEL, TWO-STEP BASELINE TEST

The ideal test for punitive damages in a vicarious liability analysis would completely ignore any notion of strict liability. Instead, the test would incorporate all of the criteria from the Restatement of Torts, but not use the criteria in their broadest application as an automatic trigger for vicarious liability.<sup>184</sup> Using this novel test, a court would conduct the vicarious liability analysis for punitive damages in two separate steps.

In the first step, the four criteria from the Restatement would act as a baseline for a vicarious liability analysis.<sup>185</sup> If an employer meets any of the criteria, then the employer would meet the baseline. Once an employer meets the baseline—the minimum threshold of culpability—then the court could proceed to the second step to determine the employer's individual fault and whether vicarious liability for punitive damages is warranted in that particular case.

The second step would determine whether vicarious liability is applicable based upon how culpable the employer was in the specific instance that caused the plaintiff harm. The court would conduct this inquiry

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180. *See supra* Introduction. Although this hardline approach would preclude the recovery of punitive damages through vicarious liability, a plaintiff could still recover compensatory damages from the employer through vicarious liability and the plaintiff could still bring a direct action against the employer for negligent hiring, training, retention, or supervision.

181. *See discussion supra* Part I.A.

182. RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1979).

183. NORMAN, *supra* note 50, § 14:3.

184. *See supra* Part III.B.

185. *See generally* RESTATEMENT (SECOND) OF TORTS § 909.

on a case-by-case basis, applying the specific facts of the case to determine how culpable the employer was based upon the employer's acts or omissions. Courts would conduct the second step using their discretion in determining whether or not the employer's acts or omissions contributed to the plaintiff's injuries such that the employer's culpability warrants an assessment of vicarious punitive damages.

This two-step solution would not prevent plaintiffs from becoming whole because punitive damages are a "supra-compensatory remedy,"<sup>186</sup> and courts award them not *in place of*, but *in addition to* any award of compensatory damages.<sup>187</sup> Similar to the Restatement's criteria, which do not apply to double or treble damage statutes,<sup>188</sup> the solution should not apply to instances of liability arising from double or treble damage statutes,<sup>189</sup> which are not "supra-compensatory" in nature.<sup>190</sup> Although the baseline test will restrict vicarious liability for punitive damages, such a restriction will not decrease or eliminate a plaintiff's ability to be fully compensated for his injury through compensatory damages.<sup>191</sup> Perhaps most importantly, this solution would serve the purpose of punitive damages—to punish and deter—since only the most culpable employers would be vicariously liable for punitive damages.<sup>192</sup>

#### A. Using the Restatement Criteria as a Baseline Test

Under part (a) of the Restatement, courts would hold employers vicariously liable for punitive damages when employers explicitly authorized the doing and the *manner* of the employee's act.<sup>193</sup> For example, an application of Louisiana Civil Code article 2315.4 would resemble the following: An employer hosts a work event that involves alcohol for employees' consumption. After the work event, the employer instructs the employee to complete a work-related errand that involves

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186. Sharkey, *supra* note 25, at 486.

187. KEETON, *supra* note 122, at 9.

188. RESTATEMENT (SECOND) OF AGENCY § 217 cmt. c (AM. LAW INST. 1958).

189. For examples of fixed amount punitive damage statutes, see, e.g., LA. REV. STAT. § 46:2163 (2019) (providing that individuals subject to human trafficking may recover treble damages); *id.* § 3:4278.1 (providing damages for landowners whose trees were intentionally cut down in the amount of three times market price).

190. Sharkey, *supra* note 25, at 486.

191. See KEETON, *supra* note 122, at 9.

192. See generally RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979).

193. See *id.*

vehicular travel.<sup>194</sup> The employer, knowing that the employee has consumed alcohol, has explicitly authorized the doing and the manner of the act. If in this scenario the employee causes injury to another as a result of his driving while intoxicated, this criterion would allow the employer to be held vicariously liable for any resulting punitive damages.<sup>195</sup> As the behavior outlined in part (a) of the Restatement is the express authorization of the doing and the manner of the bad act, it is likely that a court would find the employer culpable enough to be held vicariously liable for punitive damages whenever the baseline test for part (a) is satisfied.<sup>196</sup>

Part (b) of the Restatement would allow a court to hold an employer vicariously liable for punitive damages if he knowingly employed or retained an employee who possessed a character trait that caused the injury giving rise to the punitive damages.<sup>197</sup> Part (b) in its broadest application would allow a court to hold an employer vicariously liable if the employee had a history of behavior similar to the behavior that caused the damage.<sup>198</sup> Using the criterion as a baseline for a vicarious liability analysis, a court, finding that an employer met the requirements of part (b), should further make a determination of the culpability of the employer.<sup>199</sup> Such a case-by-case determination would allow courts to hold culpable employers liable for punitive damages but protect employers who did not commit wrong acts.

Part (c) would allow a court to hold an employer vicariously liable for punitive damages in situations in which the employee who caused the injury was in a managerial capacity.<sup>200</sup> Again, using a baseline test, when the employee was in a managerial capacity, a court would proceed with a determination of the employer's culpability. A court should consider the level of authority a supervisor or managerial employee possessed, allowing a better determination of whether the employee's status allowed him to act as the employer.<sup>201</sup> Just as the court in *White* observed, the mere presence of a person in holding *any* managerial capacity does not itself justify holding an employer vicariously liable for the individual's

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194. This hypothetical is loosely based off of the facts of *Curtis v. Rome*, 735 So. 2d 822, 826 (La. Ct. App. 1999), *writ denied sub nom. Rambo v. Rome*, 748 So. 2d 441 (La. 1999) (finding an employer that provided alcohol that intoxicated the defendant vicariously liable for punitive damages).

195. *See generally* RESTATEMENT (SECOND) OF TORTS § 909.

196. *See generally id.*

197. *Id.*

198. *Cates v. Darland*, 537 P.2d 336 (Okla. 1975).

199. *See generally* RESTATEMENT (SECOND) OF TORTS § 909.

200. *Id.*

201. *See generally White v. Ultramar, Inc.*, 981 P.2d 944 (1999).

actions.<sup>202</sup> Using the baseline test, a court should distinguish between the culpability of an employer when the employee was a low-level manager and when the employee was a senior executive.

Part (d) of the Restatement would allow a court to hold employers vicariously liable for punitive damages when the employer ratifies or expresses approval for the act.<sup>203</sup> It is unlikely that in a scenario similar to the DWI hypothetical, the employer would express approval for the acts of the employee; however, if an employer ratifies or expresses approval for a bad act, it is appropriate for the employer to be vicariously liable for punitive damages.<sup>204</sup> As the behavior outlined in part (d) is the ratification or approval of the bad act, a court would likely find the employer culpable enough to be held vicariously liable for punitive damages whenever the baseline test for part (d) is satisfied.<sup>205</sup>

The baseline test would allow employers to be punished for bad conduct, such as authorizing or ratifying an employee's bad act, and overly reckless behavior, such as retaining an employee who has been convicted of several DWI offenses since beginning employment in a position that involves vehicular travel. It would not allow, however, vicarious liability for punitive damages to extend to employers who are not culpable in some way for the bad act. Using the Restatement criteria as a baseline for a vicarious liability analysis would significantly restrict vicarious liability for punitive damages, and employers could more easily limit liability for punitive damages through protective measures.<sup>206</sup>

#### *B. Application of the Two-Step Baseline Test to Lacoste v. Crochet*

The court in *Lacoste* found the employer, Kelley, vicariously liable for the intoxicated truck driver, Crochet, whose actions gave rise to punitive damages.<sup>207</sup> Under the proposed baseline test, the outcome of *Lacoste* would depend on certain facts not clearly explained in the court's opinion.<sup>208</sup> Crochet was previously convicted of a DWI.<sup>209</sup> It is unclear, however, whether Kelley knew of the previous conviction, and if so, when it took place.<sup>210</sup> If Kelley knew of Crochet's previous DWI, then that

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202. *Id.*

203. RESTATEMENT (SECOND) OF TORTS § 909.

204. *See generally id.*

205. *See generally id.*

206. *See generally id.*

207. *Lacoste v. Crochet*, 751 So. 2d 998 (La. Ct. App. 2000).

208. *See supra* Introduction.

209. *Crochet*, 751 So. 2d at 1000–01.

210. *Id.*

would satisfy the criterion in part (b) and the baseline of step one.<sup>211</sup> The court would proceed to step two and conduct a fact-based consideration to determine Kelley's culpability based upon its acts or omissions. The court could consider factors such as whether Kelley ensured that Crochet received court-ordered or volunteer counseling as a result of the DWI, or whether Kelley administered alcohol tests to Crochet as a result of the previous offense. Taking factors such as these into consideration, the court, in its discretion, could determine the level of culpability that Kelley had in Crochet's acts, and whether, if at all, Kelley's culpability contributed to the plaintiff's injuries warranting vicarious liability for punitive damages.

### *C. Application of the Two-Step Baseline Test to Gillespie v. Calcasieu School Board*

In *Gillespie*, the court found that the Calcasieu School Board was not vicariously liable for punitive damages.<sup>212</sup> Using the baseline test, the court likely would have held the Calcasieu School Board vicariously liable for punitive damages. The Calcasieu School Board's awareness of Duhon's previous sexual misconduct with a student would satisfy the criterion set forth in part (b) of the Restatement and meet the baseline of step one.<sup>213</sup> The court would then proceed to step two and use its discretion when considering the School Board's acts or omissions to determine the School Board's culpability.<sup>214</sup> Given the School Board's knowledge of Duhon's previous activity,<sup>215</sup> and the School Board's disregard of the opinion of Duhon's former principal,<sup>216</sup> a court using the baseline test would likely determine that the School Board's culpability contributed to the plaintiff's injuries and hold the School Board vicariously liable for the punitive damages arising from Duhon's conduct.

## CONCLUSION

Tort law in Louisiana is one of the most complex parts of Louisiana's mixed legal system.<sup>217</sup> Use of the two-step baseline test proposed in Part

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211. RESTATEMENT (SECOND) OF TORTS § 909.

212. *Gillespie v. Calcasieu Par. Sch. Bd.*, 179 So. 3d 966 (La. Ct. App. 2015), *writ denied*, 187 So. 3d 470 (La. 2016).

213. RESTATEMENT (SECOND) OF TORTS § 909.

214. *See generally id.*

215. *Gillespie*, 179 So. 3d at 967.

216. *Id.*

217. For example, vicarious liability and punitive damages, both the focus of this Comment, derive from Common Law doctrine rather than Civilian principles.

IV would embrace this mixed law system by allowing courts to remain mindful of the civil law's restrictive nature on punitive damages but still provide a balanced version of the criteria of the Restatement, a common law standard.<sup>218</sup> Adopting the baseline test modeled on the Restatement of Torts would provide Louisiana courts with a streamlined test courts could use during vicarious liability analyses for punitive damages.<sup>219</sup> This solution would resolve the current contradicting circuit precedent and generally restrict the availability of punitive damages through vicarious liability, adhering to Louisiana's civilian heritage and providing an avenue of recovery when employers were complicit in or considerably culpable for the wrongful conduct.

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*See generally* Christina M. Mann, *Torts: Respondeat Superior and the CDA: Letting the Superior off the Hook—Urban v. American Legion Department of Minnesota*, 34 WM. MITCHELL L. REV. 1489, 1516 n.218 (2008) (noting that “vicarious liability is a common-law theory”); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND L. REV. 1117, 1119–20 (1984) (discussing early English common law development of punitive damages).

218. *See generally* RESTATEMENT (SECOND) OF TORTS § 909.

219. For the sake of clarity and for ease of application, here is the Two-Step Baseline Test in rule form: An employer may be held vicariously liable for punitive damages that arise out of the actions of his employee if:

(1) one of the four following criteria is met:

(a) the principal or a managerial agent authorized the doing and the manner of the act

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

(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; and

(2) the employer's acts or omissions contributed to the plaintiff's injury such that vicarious liability for punitive damages is warranted.

\* J.D./D.C.L., 2019. Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to the Author's wife, Gwen Naquin, whose constant love, patience, and support made this Comment possible. The Author also thanks Professor William R. Corbett, Ben Wallace, and the entire Volume 79 Board of Editors for their assistance and guidance throughout.