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Publication Information
John J. Kircher, Punitive Damages and Business Organizations: A Pathetic Fallacy, 67 Tenn. L. Rev. 971 (2000). This article was published originally at 67 Tenn. L. Rev. 971 (2000) and appears here by permission of the Tennessee Law Review Association, Inc.

Repository Citation
Kircher, John J., "Punitive Damages and Business Organizations: A Pathetic Fallacy" (2000). *Faculty Publications.* Paper 261.
http://scholarship.law.marquette.edu/facpub/261

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PUNITIVE DAMAGES AND BUSINESS ORGANIZATIONS: A PATHETIC FALLACY

JOHN J. KIRCHER*

I. INTRODUCTION

In the last two decades, I have devoted considerable time to studying the law of punitive damages.[1] The work has been interesting and rewarding. However, I have been nagged sometimes by the discovery of certain principles that seemed to defy logic, as would be expected with any in-depth study of such a vast body of law.[2] One such logically defiant incongruity is the fact that the entire doctrine stands as an anomaly in its attempt to employ criminal law principles of punishment and deterrence as adjuncts to the civil law.

The aspect of punitive damages doctrine that I have found most troubling is the imposition of those damages upon business organizations for the egregious conduct of their servants, agents, or employees. Obviously, plaintiffs seek punitive damages from business organizations because, by and large, they have deeper pockets than their employees. However, particularly with publicly held corporations, it appears incongruous for lawmakers and courts to espouse a doctrine of punishment and deterrence and then to disregard those goals by ignoring the actual wrongdoer and imposing the sanction in such a way that innocent stockholders, employees, and others who did not participate in the antisocial conduct may suffer.

In this Essay I will first examine the law pertinent to punitive damages on business organizations. Then, I will explore arguments advanced in justification of current rules. Next, I will attempt to state a case for the proposition that the rules are illogical and unprincipled. Finally, I will offer a suggestion for change.

II. STATUS OF THE LAW

As to purely compensatory damages, the purpose of which is to indemnify the accident victim, Prosser explained that vicarious liability of a principal for the tortious conduct of a servant is a doctrine of ancient origin.[3] Economic

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1. *See generally* JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE (2d ed. 2000).

2. Yes, I am aware of Holmes' observation: "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Publications 1991) (1881). I am also aware of the observation of Mr. Bumble: "If the law [says] that, . . . the law is a ass—a idiot." CHARLES DICKENS, THE ADVENTURES OF OLIVER TWIST 399 (Oxford University Press 1981) (1838).

3. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at

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reasons are ascribed for the initial development of the "primitive law" concept:[4]

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.[5]

Thus, the modern rule of strict liability is governed by purely economic policy: the master or principal creates a risk of harm to others by engaging in an enterprise that would employ servants; therefore, the principal should bear the cost of the harm caused to others by those servants. As a result, the vicarious liability of a principal for an accident victim's compensatory damages is enterprise related. The test is whether the servant was within the course and scope of employment at the time of the harm or in some way acting in furtherance of the principal's enterprise at that time.[6]

Unlike the economic purpose of compensatory damages, the purpose of punitive damages is to punish and deter egregious conduct.[7] Punitive damages, of course, assume the commission of a tort and a finding of the defendant's liability for compensatory damages. To establish vicarious liability for punitive damages, principles different from those employed with vicarious liability for compensatory damages are applied. The *Restatements of Torts and Agency* are in accord that a principal may be held vicariously liable for punitive damages occasioned by the egregious conduct of an agent or servant when:

> (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 managerial agent of the principal ratified or approved the act.[8]

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500 (5th ed. 1984).

4. *Id.*

5. *Id.* § 69, at 500-01 (citations omitted).

6. *See id.* § 70, at 502.

7. *Id.* § 2, at 9.

8. RESTATEMENT (SECOND) OF TORTS § 909 (1979); *see also* RESTATEMENT (SECOND) OF AGENCY § 217C (1958) (illustrating that the text of the two sections is almost identical).

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Some jurisdictions disdain the view of the *Restatements* and have decided instead that vicarious liability for punitive damages and compensatory damages requires only that the servant responsible for the egregious conduct was within the course and scope of employment at the time of the harm.[9]

Although the gulf between jurisdictions following the rule of the *Restatements* and those adopting the more liberal approach may appear broad, there is actually only one minor point of departure. It arises in situations in which an egregious act of a nonmanagerial agent was not authorized, ratified, or approved by the principal or a managerial agent. In all other circumstances, there should be no jurisdictional difference in the outcome of a case involving claimed vicarious liability for punitive damages. In other words, the jurisdictional stumbling block lies in subsection (c) of the rule of the *Restatements*.[10] In all else there is accord.

III. THE LAW'S JUSTIFICATION

The *Restatement of Torts* explains the rationale for its rule regarding vicarious liability for punitive damages as follows:

> The rule stated in this Section results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously. It is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic. . . . Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, with full knowledge of the act and the way in which it was done, he ratifies it, or, in cases in which he would be liable for the act but not subject to punitive damages, he expresses approval of it. . . . In these cases, punitive damages are granted primarily because of the principal's own wrongful conduct.
>
> Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.[11]

At the outset, it should be noted that it is not vicarious liability to impose

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9. *See, e.g.*, Sightler v. Transus, Inc., 430 S.E.2d 81, 81-82 (Ga. Ct. App. 1993) (holding that a servant's conduct in the course and scope of employment subjects a principal to punitive damages liability, regardless of any independent act of the principal, if the servant's conduct warrants punitive damages).

10. *See supra* note 8 and accompanying text.

11. RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1979).

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punitive damages upon a reckless employer who knowingly hired a vicious employee. The employer's conscious "disregard . . . of the safety of [those] exposed to" that employee would justify the imposition of punitive damages.[12] In other words, the employer's conduct itself would be characterized as outrageous or egregious.[13] Furthermore, punitive damages have been imposed upon an employer for recklessly hiring an employee who was not vicious but merely lacked the competence to properly perform a job.[14] The employer's conduct was egregious and the employee's was not. Likewise, an employer who uses an employee as a pawn to carry out an outrageous act should be directly, rather than vicariously, liable for punitive damages.[15]

The principal's subsequent ratification of egregious conduct presents a more difficult problem: The ratification may be ambiguous. For example, a store employee may be commended for apprehension of a suspected shoplifter immediately after the fact. If the apprehension is subsequently adjudged to be false imprisonment, the commendation by the principal may be asserted by the suspected shoplifter as ratification.[16] But what is the principal ratifying—the apprehension of a suspected shoplifter or the false imprisonment of a customer?

Of course, the foregoing discussion relates to principals who are individuals. A corporation, as a purely legal entity, cannot be guilty of egregious conduct. It cannot be reckless. Neither can it authorize or ratify egregious conduct. However, human beings who are associated with the corporation may do so. In those jurisdictions that follow the *Restatement* rule regarding punitive damages, imposition of vicarious liability would require that a corporation's managerial agent commit such an egregious act or give prior approval or subsequent ratification of the outrageous conduct of a lower-level corporate employee.[17] In contrast, in jurisdictions that follow a more liberal view, vicarious liability could attach if a nonmanagerial agent of a corporation acted alone in committing an egregious act.[18]

Some commentators claim that the imposition of punitive damages upon a corporation is justified;[19] however, the justification offered differs from the

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12. Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 764 (Fla. Dist. Ct. App. 1991).

13. *See id.*

14. *See* Wilson N. Jones Mem'l Hosp. v. Davis, 553 S.W.2d 180, 180 (Tex. Civ. App. 1977) (describing a situation where an orderly without experience or training attempted to remove a Foley catheter from a patient without deflating the bulb that held it in place).

15. *See* Denver & Rio Grande Ry. v. Harris, 122 U.S. 597, 599 (1887) (illustrating liability where officers of a corporation directed a large band of men to storm the property of a competing railroad).

16. *See* K-Mart No. 4195 v. Judge, 515 S.W.2d 148, 153 (Tex. Civ. App. 1974) (stating that the employer fully supported apprehension of suspected shoplifters by store security guards).

17. *See supra* Part II.

18. *See supra* Part II.

19. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV.

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previously discussed rationale behind vicarious liability for compensatory damages. For example, Professor Owen argues that even though corporate shareholders are morally blameless, their innocence does not justify eliminating punitive damages against the corporation.[20] He believes that if corner cutting by corporate personnel leads to more money in the corporate treasury, punitive damage awards would be appropriate to strip the treasury of the illicit income.[21] Echoing that view, the Wisconsin Supreme Court in *Wangen v. Ford Motor Co.*[22] stated that

> [T]he loss of investment and the decline in value of investments are risks which investors knowingly undertake, and investors should not enjoy ill-gotten gains. There is a public interest in encouraging shareholders and corporate management to exercise closer control over the operations of the entity, and the imposition of punitive damages may serve this interest.[23]

Similarly, in *Martin v. Johns-Manville Corp.*,[24] the court posited that punitive damages are justified against a corporation, and consequently its shareholders, because the shareholders selected the management that was responsible for the improper conduct.[25] *Martin* recognized that some shareholders are in fact "'innocent' in that they were not shareholders at the time of the [improper] acts, or [in fact] were shareholders at that time, but had no [conceivable] way of knowing about" the improper acts.[26] The court dismissed this seemingly inequitable situation, noting that the punishment objective of punitive damages is inapplicable to innocent shareholders.[27] Rather, the court's concern centered on its strong desire to produce a powerful deterrent effect on this corporation as well as others and the desired outcome that would result in the careful selection of the board of directors by shareholders.[28] A successor corporation, in some circumstances, should not be held liable for punitive damages that result from actions taken by its predecessors.[29] However, the court determined that

> [P]unitive damages are recoverable against a successor corporation when the plaintiff has shown such a degree of identity of the successor with its

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1257, 1304-05 (1976).

20. *See id.*
21. *See id.* at 1305.
22. 294 N.W.2d 437 (Wis. 1980).
23. *Id.* at 453-54 (footnote omitted).
24. 469 A.2d 655 (Pa. Super. Ct. 1983), *vacated*, 494 A.2d 1088 (Pa. 1985).
25. *Id.* at 664.
26. *Id.*
27. *Id.* at 664-65.
28. *See id.* at 666-67.
29. *Id.* (citing situations where the successor corporation has no links to the predecessor's "shareholders, officers, directors, and management personnel").

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> predecessor as to justify the conclusion that *those responsible for the reckless conduct* of the predecessor will be punished, and the successor will be deterred from similar conduct.[30]

The court held that punitive damages were proper because even though "the public is now safe from being injured by product x [it] does not mean the public is safe from the next reckless business practice these actors may undertake if not deterred."[31]

In *Fischer v. Johns-Manville Corp.*,[32] the New Jersey Supreme Court considered whether it is unfair to punish innocent shareholders through the vehicle of punitive damages.[33] Noting that the argument had been rejected in *Wangen* and *Martin*, the court stated that shareholders might suffer a reduction in value of shares as a result of compensatory damages as well:

> To the same extent that damages claims may affect shareholders adversely, so do profitable sales of harmful products redound to their benefit (at least temporarily). These are the risks and rewards that await investors. Also, we would not consider it harmful were shareholders to be encouraged by decisions such as this to give close scrutiny to corporate practices in making investment decisions.[34]

The *Wangen*, *Martin*, and *Fischer* courts appear to minimize the effects of punitive damages on the far-removed, innocent shareholder in favor of encouraging long-term, socially-desirable investment behavior on the part of the investing public.

Although the *Martin* court appeared somewhat confused regarding the punishment of those responsible for the reckless conduct, it is clear that the support for vicarious imposition of punitive damages against a corporate business entity centers not on punishment, but deterrence.[35] The thought appears to be that shareholders will react to the imposition of those damages in such a way that a message will be sent to corporate executives and underlings alike that similar egregious conduct will not be tolerated in the

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30. *Id.* at 667 (emphasis added). *But see* City of Richmond v. Madison Mgt. Group, Inc., 918 F.2d 438, 456 (4th Cir. 1990) (upholding an award of punitive damages, concluding that the "deterrence value of a punitive damage award is [not] lost [when punitive damages are] applied [against] a successor in interest [even though the successor in interest] no longer commits the wrongful act sanctioned by the award"); Schmidt v. Financial Resources Corp., 680 P.2d 845, 847 (Ariz. Ct. App. 1984) (explaining that Arizona law provides that the successor corporation is responsible for "'all' [the] liabilities and obligations of [the] merged corporation," including punitive damages).

31. *Martin*, 469 A.2d at 667.

32. 512 A.2d 466 (N.J. 1986).

33. *Id.* at 468.

34. *Id.* at 476 (footnote omitted).

35. See Owen, *supra* note 19 and accompanying text.

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future—heads will roll! However, the idea of stripping a corporate treasury of ill-gotten gains will not stand up to close scrutiny. First, punitive claims against corporations do not always arise in product suits. No money comes into a corporate treasury when the manager of a fast food store punches a customer in the mouth. Second, when a corporation has a financial gain from the sale of a defective product, the cost of compensatory damages, defense lawyer fees, and product recalls may offset any ill-gotten gains.

IV. REALITY CHECK

The view that vicarious imposition of punitive damages will somehow galvanize shareholders to seek changes in the corporate culture is naïve for several reasons. First, many investors today do not have money in individual equities, but in funds like Vanguard, Fidelity, Yachtman, and CREF. While there are some socially conscious investment funds, their concern centers on economic and social justice issues such as diversity, employee relations, the environment, and fair wages for foreign workers.[36] Second, if the average fund investor is anything like the author, it strains credulity to posit that he or she knows the names of the companies in which the funds invest money. Third, it is even more of a stretch to suggest that such an investor, seeing a news story that *X* Corporation has been hit with punitive damages, would check CREF's list of holdings to assess the impact, if any, on her fund. Finally, and more absurd still, is the notion that such an investor, seeing a tie between *X* Corporation and her fund, would demand that the fund take action to correct the problem that occasioned the punitive award.

Whether a fund, as a large institutional investor, would bring the deterrent message home to *X* Corporation's management is equally problematic. A fund's manager would first seek to answer a number of questions: Was the egregious conduct that precipitated the punitive award that of management or nonmanagement personnel? If the former, was the person involved in upper, middle, or lower-level management? What was the exact nature of the egregious conduct? Was it determined to be egregious in a plaintiff's paradise or a conservative jurisdiction? Was the conduct isolated or repeated? How much was awarded and what impact will it have on the company's future profitability? After all, a fund manager acts as a fiduciary for those who invest in the fund. Investors are concerned with their financial security and not with the well-being of the corporations represented by the individual equities held by the fund. Fund managers who view a punitive award as a harbinger of bad things to come are as likely to sell the corporate holding as they are to attend a stockholders' meeting to register complaints and push for new corporate management or a change in policy.

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36. *See, e.g.*, Domini Social Equity Fund, *The Social Criteria* (visited Aug. 31, 2000) <http://www.domini.com/SocCriteria.html> (describing Domini's portfolio as "socially responsible").

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Those who purchase shares of stock in a corporation instead of investing in a fund are ostensibly in a position to voice strong opposition to practices within the corporation that led to the imposition of punitive damages. Individual investors would be in such a position if they were aware of the damage awards. Not everyone reads the *Wall Street Journal* like the sports page, and relatively few punitive awards are deemed significant enough to merit national news coverage. Once aware of a punitive award against a corporate holding, a prudent investor would first seek answers to the previously noted questions. However, after receiving the answers, the individual investor might be at a distinct disadvantage as compared to the large institutional investor. One or two hundred shares of stock may not carry much clout with corporate management when thousands of shares are outstanding. It might not be prudent for small stakeholders to travel a great distance to a corporation's annual meeting to voice opposition to the policy or persons responsible for the punitive award. Small stakeholders, like institutional investors, would likely find it more prudent to cut their losses and sell the stock.

The foregoing discussion, of course, assumes that those at the corporate board level, or at least in upper management, were in some way responsible for the situation that led to the imposition of punitive damages. All of the talk about shareholders sending messages to corporate management is meaningless if the egregious conduct emanated from a low-level manager or, in jurisdictions that do not follow the *Restatement* approach, from a nonmanagerial employee.[37] In such a situation, there is no need for deterrence if those in the upper management chain take positive action because such action demonstrates a clear conviction that the offending conduct will not be tolerated in the future.

Further, the foregoing discussion assumes that the imposition of a punitive damage award against a corporation will have a direct economic impact upon the corporation. There is always the possibility that the corporation carries liability insurance. A split of authority has developed over the issue of whether it is contrary to public policy to allow one to escape liability for punitive damages by shifting those damages to an insurer.[38] The concern is that the goals of punishment and deterrence would be frustrated if an insurer, rather than the wrongdoing insured, foots the bill.[39] However, there appears to be accord with the view that insurance coverage of vicariously imposed punitive damages does not violate public policy when the principal was innocent of any egregious conduct.[40] Thus, it appears that in a corporate

37. *See supra* notes 8-10 and accompanying text.

38. *See* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1009 (1989) (summarizing the sharp conflicts among states regarding insurance coverage for punitive damage awards).

39. *See id.*

40. *See id.*; *see also* U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) (holding that public policy is not violated when the punitive damages of a vicariously liable

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setting vicariously imposed punitive damages may not impact the corporation at all. The award could be transferred to an insurer and spread among the insurance-buying public—possibly even to those who the deterrent effect of punitive damages was intended to protect.

Another problem associated with the vicarious liability of a business organization for punitive damages is the manner in which those damages are computed. As a general proposition, courts tell fact-finders that they may consider the financial circumstances of the defendant when computing punitive damages.[41] The courts' reasoning is simple and directly relates to punishment and deterrence: it takes much more money to punish and deter a multimillionaire than it would a law professor who works for the Jesuits. This approach, as applied to computing the proper amount for vicarious imposition, may be described as overkill. Simply stated, a corporation cannot be punished and deterred any more than one can punish and deter a brick. Nevertheless, when one looks at corporate assets to determine what amount will best punish and deter the corporation, the process personalizes something that does not have a personality, much like the child who becomes angry at a toy and throws it against a wall or a golfer who is angry about a bad shot and throws a club to the ground.[42] Vicarious liability forgets the person or persons who actually committed the egregious act. No consideration is given to what it would take to punish and deter them. Instead, plaintiffs' lawyers tell jurors to send *X* Corporation a message and to consider the sum in the corporate treasury to determine just how clear that message should be. Would the jury impose the same damage amount if it sought to punish or deter the human being within the corporation who actually committed the egregious act? Would the jury's approach be different if it knew that an insurer would pay the tab? Will the amount awarded against a corporation deter corporate management from similar conduct in the future? Will the managers who are actual wrongdoers simply breathe a sigh of relief and go on to new opportunities in other corporations?[43]

In addition to these questions, another problem presents itself that is peculiar to the area of products liability: a deterrent message may be unclear at best to a corporation or, more properly, to corporate executives. This is

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defendant who is not personally at fault is covered by insurance).

41. *See, e.g.*, MINN. STAT. ANN. § 549.20(3) (West 2000) (requiring that "[a]ny award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including . . . the financial condition of the defendant").

42. The fault, dear Bonnie, is in our swings and not our clubs.

43. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 388-90 (Cal. Ct. App. 1981) (upholding a punitive award remittitur from $125 million to $3.5 million in a case involving a Pinto fuel system fire). Although Lee Iacocca headed the Ford division of Ford Motor Company and was a corporate vice president during the era of fuel system problems with the Mustang and Pinto, he became president of Ford in 1970. 6 THE NEW ENCYCLOPEDIA BRITANNICA, *Lee Iacocca*, 211 (15th ed. 1998). In 1978, Iacocca was dismissed because of his "brash and unorthodox manner." *Id.* The following year, he was hired by Chrysler. *Id.*

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probably best illustrated by *Wangen v. Ford Motor Co.*[44] The case involved a serious automobile accident that took place in 1975.[45] Significantly, the Ford Mustang that was the subject of the litigation was a 1967 model.[46] The Mustang was struck from the rear by another vehicle, and then the Mustang struck a third vehicle before coming to rest.[47] The Mustang's gas tank ruptured, and the ensuing fire caused the injuries and deaths that were the subject of the litigation.[48] The essence of the plaintiffs' case was that the car was defectively designed because it did not provide an environment that was safe for passengers in the event of a collision.[49] Punitive damages were sought and awarded because evidence showed that the Ford personnel were aware that the fuel system was problematic in the event of a rear-impact collision, but did nothing to remedy the problem or warn users.[50]

The reason *Wangen* illustrates the lack of clarity in the deterrent message of punitive damages is simple; when the auto was made in 1967, and surely during the years when it was being designed, product liability law was much different than it was on the date of the accident or when *Wangen* itself was decided. At the time of the car's design and manufacture, an automaker had no duty to design a vehicle that provided passengers with a safe environment for collisions.[51] The rule requiring design of a safe environment for motorists did not first surface nationally until 1968[52] and was not adopted in Wisconsin until 1975, the year of the crash in *Wangen*.[53] Thus, punitive damages were imposed upon Ford for conduct that was not egregious when it was performed, but became egregious after the fact—much like an ex post facto law. The message is to avoid doing what is proper now, but which may be declared improper, and therefore egregious, at some later date. How does a manufacturer translate that into a product design?

The real problem with attempting to effectuate deterrence in this context is indirection. Imposing punitive damages upon a corporation for the wrongdoing of its employees renders anonymous those who actually engaged in the egregious conduct. While it may be good for the psyche of some to rail against a corporation, the effectiveness of the exercise is minimal.[54] The

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44. 294 N.W.2d 437, 440 (Wis. 1980); *see supra* notes 22-23 and accompanying text.

45. *See Wangen*, 294 N.W.2d at 440.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.* at 462. It is interesting, in relation to the theme of this essay, to note the fact that the court states that "Ford knew" when referring to the fuel system defect. *Id.* at 440.

51. *See* Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir. 1966).

52. *See* Larsen v. General Motors Corp., 391 F.2d 495, 501 (8th Cir. 1968).

53. *See* Arbet v. Gussarson, 225 N.W.2d 431, 437 (Wis. 1975) (adopting the rationale used in *Larsen* to impose a duty of care on automobile manufacturers).

54. This is much like authors and others who use the "pathetic fallacy" to endow nature, inanimate objects, etc., with human traits and feelings (angry sea, smiling sun, etc.). THE

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corporation is demonized, and principles of punishment and deterrence are muddied, if not lost altogether. If anything happens to those responsible for the egregious conduct, it is not as a direct result of our system of justice. Rather, it is because superiors in the corporation take action or because strident shareholders voice their dissatisfaction. If punitive damages are designed to send a message of punishment and deterrence, there must be a better way to send that message more clearly and more directly to those who deserve it.

V. THE MODEST PROPOSAL

I perceive the solution to be relatively simple. I realize that may be its undoing. What I propose is this: Punitive damages should be awarded only against individuals who are found to have actually engaged in egregious conduct. Furthermore, those individuals should not be indemnified for the punitive damages assessed against them, either by insurance or by the business entity that employs them.

If the purpose of punitive damages truly is to punish and deter those who engage in egregious conduct, then it makes eminent good sense to impose the punishment upon those who engage in the conduct. By imposing such punishment, wrongdoers hopefully will be deterred from engaging in similar conduct in the future. Rendering those people anonymous by imposing the punishment upon a corporate entity and hoping that punishment and deterrence will emerge from some extrajudicial process is, at best, wishful thinking. The desired result may occur. Then again, it may not. If punishment occurs, it will be fortuitous and only as the result of indirection.

If what I suggest is implemented, most likely it will not occur by judicial modification of the common law. My study of the subject of punitive damages leads me to believe that the courts view previously enunciated principles involving the subject as if they were written in some holy writ—not to be analyzed for relevance and meaningful purpose, but merely to be intoned from time to time as the occasion warrants. In certain areas, common-law courts treat stare decisis as a commitment to intellectual stagnation.

If it is to occur, change in this area will have to result from the legislative process.[55] This process, again, may doom the proposal to failure. As any

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RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1421 (2d. ed. 1987).

55. Such a statute might simply provide:

Punitive [exemplary] damages may be assessed in this state only against a natural person. When so assessed, it shall be unlawful for an insurer or other person to indemnify the person who incurred those damages or to otherwise pay the damages on that person's behalf. The natural person who violates the provisions of this section shall be subject to a fine of not less than twice and not more than four times the amount of the punitive [exemplary] damages that were assessed.

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objective observer of the current political process is aware, any legislation that may be characterized as favoring corporate interests is as likely to garner support as that which may be styled as favoring the rich. Discussion of the merits of most important issues today is often obscured with catchy sound bites featuring ad hominem arguments. Nevertheless, this proposal is offered in the hope that it may engender serious discussion and debate.

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