

Summer 1995

Punitive Damages in Negligence Cases: The Conflicting Standards

Kevin L. Austin

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Kevin L. Austin, *Punitive Damages in Negligence Cases: The Conflicting Standards*, 60 Mo. L. REV. (1995)
Available at: <https://scholarship.law.missouri.edu/mlr/vol60/iss3/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Punitive Damages in Negligence Cases: The Conflicting Standards

*Haynam v. Laclede Electric Cooperative, Inc.*¹

I. INTRODUCTION

In Missouri, punitive damages are awarded for the purpose of inflicting punishment for wrongdoing, and are intended to serve as an example and deterrent to similar conduct.² They are distinguished from actual damages, which are awarded to compensate for actual injuries or loss sustained.³

While prevalent in intentional torts because of malice,⁴ Missouri also allows, under certain circumstances, punitive damages to be awarded in negligence cases.⁵ The issue then becomes identification of those certain circumstances. This Note will examine the reasoning and the specific fact situations which have supported punitive damages in negligence cases and then compare the decision in *Haynam* to this case law.

II. FACTS AND HOLDING

A. *Haynam v. Laclede Electric Cooperative, Inc.* [*Haynam I*]

Haynam I was an action brought against an electric utility alleging wrongful termination of service and seeking actual and punitive damages.⁶ The Haynams owned and operated a dairy farm and were members of the Laclede Electric Cooperative.⁷ The Haynams read their own meter each month, and based upon that reading, were billed by Laclede.⁸ In March 1986, Frank Haynam did the reading and, as required, reported it to Laclede.⁹ According to that reading, the Haynam's electric usage for the month was 13,299 kilowatt hours, an increase of six times their normal usage.¹⁰ Frank Haynam contacted James Snavely, the area foreman for Laclede, about this

1. 1994 WL 96608 (Mo. Ct. App. 1994).

2. *Chappell v. City of Springfield*, 423 S.W.2d 810, 812 (Mo. 1968).

3. *Id.*

4. *See, e.g., Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo. 1984).

5. *See, e.g., Reel v. Consolidated Inv. Co.*, 236 S.W. 43 (Mo. 1921).

6. *Haynam v. Laclede Elec. Coop., Inc.*, 827 S.W.2d 200 (Mo. 1992).

7. *Id.* at 202.

8. *Id.*

9. *Id.*

10. *Id.* This naturally resulted in an unusually large bill.

increased usage,¹¹ whereupon Snavelly visited the Haynam farm. Although Snavelly did not test the meter, he reported that he found nothing wrong with it, and suggested the usage could be due to an electrical surge.¹² Upon Snavelly's recommendation, the Haynams hired an electrician to inspect their appliances, but his inspection failed to disclose any defects.¹³

The Haynams protested the large bill, but Laclede refused to reduce the charges. Laclede claimed it was the Haynams' fraudulent reading of the meter during the previous year.¹⁴

In order to continue electrical service, the Haynams agreed to pay the bill, but made special arrangements with Laclede concerning the timing of the payments.¹⁵ Sondra Haynam testified that Laclede agreed to allow them to pay one half in April 1986, and the other half by May 30, 1986.¹⁶ However, Laclede's account manager recorded that the final payment would be due on May 16, 1986.¹⁷ In addition, the Haynams testified that they were told by several officials of Laclede, including Snavelly and general manager Kenneth Miller, that the electricity would not be disconnected without a personal visit from Laclede.¹⁸

On May 22, 1986, Laclede terminated electrical service.¹⁹ Miller testified that he authorized the disconnection of service without notice to the Haynams.²⁰ Reluctantly, the Haynams agreed to pay all reconnection fees, an additional security deposit, as well as the amount due on the bill.²¹

The Haynams plead their cause of action for actual damages based upon intentional conduct that was "malicious, wanton and willful."²² After a jury award to the Haynams for damages, the trial court granted Laclede's motion for a new trial.²³ The Missouri Court of Appeals for the Southern District set aside the order and remanded the case for entry of a judgment notwithstanding the verdict in favor of Laclede.²⁴ The Court of Appeals

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 202-03.

18. *Id.* at 203.

19. *Id.* A Laclede agent left a note that said, "When you pay your bill we will bring your meter back." *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 204.

23. *Id.* at 200.

24. *Id.* at 202.

found that the Haynams did not present sufficient evidence to conclude that Laclede's termination of services was malicious, willful or wanton.²⁵

The Haynams appealed to the Missouri Supreme Court. The court held that in the absence of a contrary provision in a contract, a plaintiff seeking recovery in tort for wrongful termination of electrical services need only show that defendant acted negligently in its failure to supply electrical service.²⁶ The court affirmed the trial court and remanded for a new trial.²⁷ However, in remanding, the court suggested that the Haynams could submit their claim for actual damages based upon a negligence theory.²⁸

In the same opinion, the Supreme Court also reviewed the trial court's award of punitive damages. In view of evidence that the remainder of the bill was not due until the end of the month with Laclede being aware of this,²⁹ the court found "the Haynams made a submissible case on the standard of conduct necessary to award punitive damages"³⁰

B. *Haynam v. Laclede Electric Cooperative, Inc. [Haynam II]*

On retrial, the Haynams followed the Supreme Court's suggestion and submitted their case for actual damages based on a negligence theory.³¹ Again, the harm alleged was pecuniary and included the disputed charges for electrical service, disconnection and reconnection fees, and an additional security deposit.³² The jury found for the Haynams awarding actual damages and \$50,000 in punitive damages.³³ Laclede appealed, challenging, among other points, the punitive damages award.³⁴ There was no significant change in the facts or the evidence; therefore, Laclede's "state of mind" and its alleged conduct was essentially the same at the second trial as was before the Supreme Court in *Haynam I*.³⁵ As Judge Parrish noted in his concurring opinion in *Haynam II*, "since the [S]upreme [C]ourt held, in *Haynam I*, that the evidence supported punitive damages when the underlying cause of action was based on an intentional tort, logic dictates that the same evidence will

25. *Id.*

26. *Id.* at 203-04.

27. The Court found reversible error in the admission of evidence of the plaintiffs' reputation, an issue not germane to this casenote.

28. *Haynam*, 827 S.W.2d at 204.

29. *Id.* at 205.

30. *Id.*

31. *Haynam*, 1994 WL 96608, at *1.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at *10.

support punitive damages when the underlying cause of action is based on negligence.³⁶

Thus, the Southern District affirmed the trial court concluding, as did the Supreme Court in *Haynam I*, that the Haynams presented sufficient evidence to merit punitive damages.³⁷

III. LEGAL BACKGROUND

A. *Punitive Damages in General*

In order to effectively understand the present status of punitive or exemplary damages as they pertain to negligence cases in Missouri, a brief examination of the history of punitive damages, in general, and the required mental state is required.

In *Goetz v. Ambs*,³⁸ the Missouri Supreme Court considered the imposition of punitive damages but did not award them.³⁹ It was not until fifteen years later in *Klingman v. Holmes*⁴⁰ that the Court first awarded punitive damages, relying on the justification stated in a prior case (*McKeon*).⁴¹ The Missouri Supreme Court in *McKeon*,⁴² stated: "Such damages may serve for an example [thus, exemplary damages] to others in like cases . . ."⁴³ Thus, while Missouri courts have cited other reasons for awarding punitive damages,⁴⁴ the most frequently cited purposes of punitive damages are to punish the wrongdoer and to deter him or her and others from like conduct.⁴⁵

36. *Id.*

37. *Id.* at *2, *9.

38. 27 Mo. 28 (1858).

39. The court permitted a jury instruction allowing punitive damages if the jury found the defendant's act wrongful and done intentionally. However, the jury did not make this finding. *Id.*

40. 54 Mo. 304 (1873).

41. *Id.*; See also W. Dudley McCarter & Robert L. Jackstadt, *Punitive Damages: Malice and Other Recent Developments*, 43 J. OF MO. B. 455, 456 (1987).

42. *McKeon v. Citizens' Ry. Co.*, 42 Mo. 79 (1867).

43. *Id.* at 87.

44. McCarter & Jackstadt, *supra* note 41, at 456 (citing *McKeon*, 42 Mo. at 87, holding that exemplary damages are "a round compensation or an adequate recompense for the injury sustained"); *Lampert v. Judge & Dolph Drug Co.*, 141 S.W. 1095, 1097 (Mo. 1911) (holding that exemplary damages are a "fine which society imposes on the offender to protect its peculiar interests").

45. *Lewis v. Envirotech Corp.*, 674 S.W.2d 105, 113 (Mo. Ct. App. 1984); See also MISSOURI APPROVED JURY INSTRUCTIONS 10.01 [1990 Revision] (Stephan H. Ringkamp ed., 4th ed. 1991).

To justify the imposition of this punishment on the wrongdoer, there must be the presence of malice on the part of the wrongdoer.⁴⁶ The concept of malice combines the wrongdoer's state of mind with his or her culpability.⁴⁷ As one commentator instructed, "When proving malice, one is not proving whether conduct occurred, rather one is proving what a person was thinking about when he or she performed that conduct."⁴⁸

More specifically there must be a certain degree, or type, of malice present. Historically, Missouri courts only recognized two degrees of malice.⁴⁹ However, since 1984, with the *Sanders* decision, Missouri law recognizes three degrees of malice: actual malice, legal malice and malice in law.⁵⁰

While Missouri courts have not fully assimilated *Sanders* and its degrees of malice into a unified theory of punitive damages, it can still be stated that the level of fault or culpability for punitive damages is greater than that required for compensatory damages.⁵¹ Also, deduced from *Sanders*' definitions of the degrees of malice, as well as malice defined before *Sanders*, is that some degree of knowledge, or scienter, is required.⁵²

Before considering how Missouri has applied the malice and scienter requisite for punitive damages in negligence cases, an examination of other jurisdictions will be helpful for comparison purposes.

Arizona courts maintain that "[p]unitive damages are not allowed for mere negligence."⁵³ They require a showing of a reckless or wanton disregard of the rights of others.⁵⁴ Punitive damages are not permissible in

46. See *Oster v. Kribs Ford*, 660 S.W.2d 348 (Mo. Ct. App. 1983); *Herron v. Wyrick*, 686 S.W.2d 56 (Mo. Ct. App. 1982).

47. *Sanders v. Daniel International Corp.*, 682 S.W.2d 803, 807 (Mo. 1984).

48. John T. Walsh, *The Evil That Men Do: Malice and Punitive Damages*, 51 Mo. L. Rev. 751, 752 (1986).

49. *McCarter & Jackstadt*, *supra* note 41, at 457; See, e.g., *Oster*, 660 S.W.2d at 356; *Stark v. American Bakeries Co.*, 647 S.W.2d 119, 123 (Mo. 1983).

50. The court defined actual malice as "ill will, spite, personal hatred, or vindictive motives," *Sanders*, 682 S.W.2d at 807; legal malice as "any improper or wrongful motive," *id.*; and malice in law as "a wrongful act done intentionally without just cause or excuse." *Id.* at 808.

51. *Racer v. Utterman*, 629 S.W.2d 387 (Mo. Ct. App. 1981); *Holcroft v. Missouri K.T. R.R.*, 607 S.W.2d 158 (Mo. Ct. App. 1980).

52. Actual malice being an attempt to injure shows scienter of the likelihood or probability that injury will result; legal malice incorporates a wrongful motive or such egregious conduct that intent will be implied; and malice in law is frankly defined as a wrongful act done intentionally.

53. *Hall v. Motorists Ins. Corp.*, 509 P.2d 604, 607 (Ariz. 1973).

54. *Id.*

a negligence case because the standard required for punitive damages is equivalent to intentional, wrongful conduct.⁵⁵

Similar to Missouri, Florida permits recovery of punitive damages in an ordinary negligence case,⁵⁶ however, in further defining the requisite conduct and intent, its courts have held that there must be a showing of atrocity, gross and flagrant character, and moral turpitude.⁵⁷

In *Larson v. Massey-Ferguson*,⁵⁸ Iowa permitted recovery of punitive damages in a case of gross negligence.⁵⁹ Gross negligence was defined as something substantially more than ordinary negligence, but falls short, however, of intending to injure or harm.⁶⁰ Prior to this case, and similar to Missouri, Iowa permitted punitive damages in a negligence case while maintaining no degree of care or of negligence.⁶¹

B. *Early Missouri Negligence Cases Not Allowing Punitive Damages*

Two lines of case law emerged in Missouri regarding the permissibility of awarding punitive damages in negligence cases. The requirement of scienter for punitive damages was the core issue of variance in the courts.

55. *Smith v. Chapman*, 564 P.2d 900, 903 (Ariz. 1977).

In addition, California courts do not allow punitive damage awards when only negligence is plead, or found by a jury; mere negligence, even gross negligence, is not sufficient to justify an award of punitive damages. *Ebaugh v. Rabkin*, 22 Cal. Rptr. 706, 708 (Cal. Ct. App. 1972). "[A] conscious disregard of the safety of others may constitute malice" and will support punitive damages if an intentional tort is plead. *Taylor v. Superior Court of Los Angeles County*, 598 P.2d 854, 856 (Cal. 1979).

Similar to California, it is well settled in Arkansas that mere negligence, no matter how gross, is not sufficient to justify awarding punitive damages. *Great American Ins. Co. v. Ratliff*, 242 F. Supp. 983, 989 (E.D. Ark. 1965). While intentional or malicious conduct will obviously support punitive damages, a less strict standard of conduct of a conscious disregard for foreseeable injuries will also support punitive damages. *Id.* Like California, the tort that is pled makes the difference.

56. *Richards Co., Inc. v. Harrison*, 262 So. 2d 258, 262 (Fla. Ct. App. 1972) (holding that "[p]unitive damages need not flow from an intentional course of conduct or intent to inflict damages but may also be allowed in such where there is that entire want of care which would raise the presumption of a conscious indifference to the consequences of one's action or inaction").

57. *Jacksonville Frosted Foods, Inc. v. Haigler*, 224 So. 2d 437, 439 (Fla. Ct. App. 1969).

58. 328 N.W.2d 343 (Iowa Ct. App. 1982).

59. *Id.* at 346.

60. *Id.* at 345.

61. *Hendricks v. Broderick*, 284 N.W.2d 209, 214 (Iowa 1979).

One line of case law would not allow the awarding of punitive damages, holding that negligence results in an unintentional injury.⁶² These courts noted that while negligence is generally predicated upon failure to employ a prescribed standard of care, willful, wanton or malicious injury is the result of another kind of tort which is the intentional doing of an act in utter disregard of the consequences.⁶³

There is a clear distinction between unintentional injury due to negligence, and injury, actually or impliedly intentional, due to willful, wanton or reckless conduct.⁶⁴ "Negligence, by its nature, implies wrongful inadvertence. Willful, wanton and reckless' conduct connotes some degree of wrongful, conscious intent."⁶⁵ Thus, an act cannot be both negligent and intentional at the same time.⁶⁶ Since an act is not willful, wanton or reckless where there is mere failure to exercise the due degree of care, then something more than negligence must be shown to warrant the imposition of punitive damages.⁶⁷ It follows that since there are no degrees of negligence recognized in Missouri,⁶⁸ the conclusion is that willful, wanton and reckless conduct is one tort, while negligence is another—hence, the difference is one not of degree but of kind.⁶⁹ It follows that a plaintiff's harm was either (1) the tort of negligence or (2) the tort of willful, wanton or malicious misconduct, but it can not have been both at the same time.⁷⁰

C. Early Missouri Negligence Cases Allowing Punitive Damages

Concurrently, a line of cases in Missouri did allow punitive damages when the plaintiff alleged only negligence. These courts reiterated the

62. *Ervin v. Coleman*, 454 S.W.2d 289, 291 (Mo. Ct. App. 1970); *Greene v. Morse*, 375 S.W.2d 411, 417 (Mo. Ct. App. 1964); *Voss v. American Mutual Liab. Ins. Co.*, 341 S.W.2d 270, 279 (Mo. Ct. App. 1960).

63. *Ervin*, 454 S.W.2d at 291; *Greene*, 375 S.W.2d at 411; *Voss*, 341 S.W.2d at 270.

64. *See Ervin*, 454 S.W.2d at 291; *Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1968); *Cosentino v. Heffelfinger*, 229 S.W.2d 546, 550 (Mo. 1950).

65. *Harzfeld's Inc. v. Otis Elevator Co.*, 116 F. Supp. 512, 515 (W.D. Mo. 1953).

66. *O'Brien v. St. Louis Transit Co.*, 110 S.W. 705, 707 (Mo. 1908); *Raming v. Metro. St. Ry. Co.*, 57 S.W. 268, 273 (Mo. 1900).

67. *Harzfeld's Inc.*, 116 F. Supp. at 514.

68. *Reed v. Western Union Tel. Co.*, 37 S.W. 904, 906 (Mo. 1896); *Ramel v. Kansas City Pub. Serv. Co.*, 187 S.W.2d 492, 498 (Mo. Ct. App. 1945); *Cumming v. Allied Hotel Corp.*, 144 S.W.2d 177, 181 (Mo. Ct. App. 1940); *Reeves v. Lutz*, 162 S.W. 280, 284 (Mo. Ct. App. 1914).

69. *Harzfeld's*, 116 F. Supp. at 514.

70. *Ervin*, 454 S.W.2d at 291.

proposition that in order to justify the infliction of punitive damages, the act complained of must have been done wantonly or maliciously.⁷¹ However, they found that malice could be attributed to a negligent defendant. The seminal case, *Reel v. Consolidated Inv. Co.*,⁷² explained:

But an act or omission, though properly characterized as negligent, may manifest such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted

. . . [o]r, there may be conscious negligence tantamount to intentional wrongdoing, as where the person doing the act or failing to act must be conscious of his conduct, and, though having no specific intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. In either case punitive damages are allowable for the resulting injury.⁷³

These courts admitted that negligent acts and wanton acts are distinguishable but nevertheless failed to find them necessarily repugnant to one another⁷⁴ because wanton and reckless conduct does not amount, in law, to intentional conduct.⁷⁵

D. Convergence at Sharp, and Its Ensuing Application

In *Sharp v. Robberson*,⁷⁶ the Missouri Supreme Court addressed the convergent views of the admissibility of punitive damages instructions in a negligence case. Defendant cited *Ervin* and its line of cases arguing that negligence and punitive damages instructions are incompatible and disprove one another.⁷⁷ The court distinguished *Ervin* from the case at hand. The Court noted that in *Ervin* the punitive damages instruction submitted the issue on the premise that defendant's conduct was willful, wanton or malicious,

71. See, e.g., *Reel v. Consolidated Inv. Co.*, 236 S.W. 43, 46 (Mo. 1921); *McKenzie v. Randolph*, 257 S.W. 126, 127 (Mo. 1923); *Eoff v. Senter*, 317 S.W.2d 666, 670 (Mo. Ct. App. 1958); *Zemlick v. A.B.C. Auto Sales & Investment Co.*, 60 S.W.2d 649, 650 (Mo. Ct. App. 1933); *Mason v. Kurn*, 145 S.W.2d 465, 467 (Mo. Ct. App. 1940); *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964).

72. 236 S.W. 43 (Mo. 1921).

73. *Id.*

74. *Eoff*, 317 S.W.2d at 670.

75. *Crull*, 382 S.W.2d at 21.

76. 495 S.W.2d 394 (Mo. 1973).

77. *Id.* at 396.

which is MAI No. 10.01.⁷⁸ In *Sharp*, however, punitive damages were submitted on MAI No. 10.02⁷⁹ under the premise that defendant's conduct showed complete indifference to or conscious disregard for the safety of others.⁸⁰

The *Sharp* court, citing *Reel*,⁸¹ stated that the submission of a punitive damages instruction without a finding that defendant intended to injure plaintiff did not require that plaintiff's actual damages be premised on conduct which would authorize punitive damages.⁸² A plaintiff may obtain actual

78. "[I]f you believe the conduct of defendant as submitted in Instruction Number ____ (*here insert number of plaintiff's verdict directing instruction*) was willful, wanton or malicious because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled . . . you may award plaintiff an additional amount as punitive damages" MISSOURI APPROVED JURY INSTRUCTIONS 10.01 (James W. Jeans ed., 2d ed. 1969).

79. "If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted under Instruction Number ____ (*here insert the number of plaintiff's verdict directing instruction*) showed complete indifference to or conscious disregard for the safety of others, then . . . you may award plaintiff an additional amount as punitive damages" MISSOURI APPROVED JURY INSTRUCTIONS 10.02 (James W. Jeans ed., 2d ed. 1969).

MAI 10.07 was drafted in response to *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. 1990), and is a modification of MAI 10.02.

If you find in favor of plaintiff under Instruction Number ____ (*here insert number of plaintiff's verdict directing instruction based on negligence*), and if you believe that:

First, (here describe the act or omission which justifies the submission of punitive damages), and

Second, defendant knew or had information from which defendant, in the exercise of ordinary care, should have known that such conduct created a high degree of probability of injury, and

Third, defendant thereby showed complete indifference to or conscious disregard for the safety of others,

then in addition to any damages to which you find plaintiff entitled under Instruction Number ____ (*here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

MISSOURI APPROVED JURY INSTRUCTIONS 10.07 [1991 New] (Stephan H. Ringkamp ed., 4th ed. 1991).

80. *Sharp v. Robberson*, 495 S.W.2d 394, 396 (Mo. 1973) (citing MAI 10.02).

81. *Reel v. Consolidated Inv. Co.*, 236 S.W. 43 (Mo. 1921).

82. *Sharp*, 495 S.W.2d at 397.

damages based upon ordinary negligence, and in addition, if the evidence supported the submission, to allow the award of punitive damages.⁸³

The court indicated there are situations where a base set of facts support a finding of negligence and additional facts support an award of punitive damages. These additional facts, though, do not go so far as to support a claim of an intentional tort.⁸⁴ The court cautioned that its opinion "is not to be construed as relaxing the criteria for the award of punitive damages which were required by the substantive law of Missouri prior to this case, and a punitive-damages instruction must not be given unless the evidence in the case supports punitive damages under the existing substantive law."⁸⁵

Thus, where a defendant's conduct showed complete indifference to or conscious disregard for the safety of others, a plaintiff need not elect between negligence and intentional tort, but he or she may submit and recover actual damages under the negligence submission and punitive damages under the punitive damages submission.⁸⁶

The court then defined complete indifference to or conscious disregard for the rights of others with respect to punitive damages to be when the actor (1) intentionally acts or fails to act, and (2) he knows or has reason to know his conduct (i) creates an unreasonable risk of harm, (ii) involving a high degree of probability (iii) resulting in substantial harm.⁸⁷

The cases following *Sharp* attempted to more clearly define situations where negligence and punitive damages are compatible. The particular situation to which *Sharp* is addressed is necessarily a factual one. Thus, the courts were left to decide whether their specific fact situations fall within the confines of the situation described by *Sharp*. However, courts have been cautioned that punitive damages are to be the exception rather than the rule.⁸⁸

While *Sharp* did not require a plaintiff to choose between allegations sufficient for punitive damages and allegations sufficient for negligence,⁸⁹ it did authorize a plaintiff to sue on a negligence theory and then prove an intentional tort in order to win punitive damages. This is a situation where the state of mind proven was too much to fall within the situation carved out by *Sharp*. For example, in *Ford v. Politte*,⁹⁰ a police officer was kicked by a prisoner. The officer sued on a negligence theory and asked for punitive

83. *Id.*

84. *Id.*

85. *Id.* at 399.

86. *Id.* at 395-96.

87. *Id.* at 398.

88. *Litchfield v. May Dept. Stores Co.*, 845 S.W.2d 596, 599 (Mo. Ct. App. 1992); *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. 1990).

89. *Sharp*, 495 S.W.2d at 399.

90. 618 S.W.2d 43 (Mo. Ct. App. 1981).

damages. Since all the evidence pointed to the fact that the kick was intentional, the court held that a submission on the theory of negligence was not justified by evidence of an intentional act—the two are inconsistent and mutually exclusive.⁹¹ The officer received neither compensatory nor punitive damages.⁹²

On the other end of the continuum is the situation where a plaintiff shows enough evidence to support his negligence allegation but fails to show enough culpability to warrant punitive damages.⁹³ The following cases exemplify this situation: *Litchfield v. May Department Stores Co.*⁹⁴ and *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*⁹⁵

In *Litchfield*, a child was injured when a furniture display fell on him. "Two days before the plaintiff was injured, another child had been hurt at the same store when a similar piece of display furniture [had fallen] on him." Defendant's manager directed an employee to secure the furniture, but it had not been done.⁹⁶ The defendant's manager testified that this had been a recurring problem at the store and had been discussed in 75% of the monthly safety meetings.⁹⁷ He also testified that safety measures had been implemented.⁹⁸ The court held that this evidence was insufficient to show that the defendant knew or had reason to know that its conduct was "substantially likely" to cause harm.⁹⁹

The court reasoned that since defendant had taken measures to address this safety problem, although this in itself may not always insulate a defendant from punitive damages, defendant's failure to secure the display was not the result of complete indifference or conscious disregard.¹⁰⁰ Rather, this constituted mere ordinary negligence.¹⁰¹

In *Hoover's Dairy*, plaintiff purchased an electrical milking machine. It was installed negligently resulting in the emission of "stray voltage" from the system giving plaintiff's cattle a disease called mastitis from which several

91. *Id.* at 46; See also *Miller v. Kruetz*, 643 S.W.2d 310 (Mo. Ct. App. 1982).

92. *Ford*, 618 S.W.2d at 46.

93. *Johnson v. Cowell Steel Structures, Inc.*, 991 F.2d 474, 478 (8th Cir. 1993) (holding that "punitive damages may be recovered in a negligence action when the plaintiff presents evidence of sufficiently egregious conduct").

94. 845 S.W.2d 596 (Mo. Ct. App. 1992).

95. 700 S.W.2d 426 (Mo. 1985).

96. *Litchfield*, 845 S.W.2d at 599.

97. *Id.* at 600.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

died.¹⁰² The agents of defendant who installed the equipment were ill-trained and did not check for any "stray voltage."¹⁰³

The court concluded that there had been insufficient evidence to show that defendant knew or had reason to know that leaving ill-trained personnel to finish the installation or failure to check for "stray voltage" created an unreasonable risk with a high probability that a substantial injury would occur.¹⁰⁴ The court emphasized that nothing indicated that defendant knew or had reason to know that there was "stray voltage" in the barn.¹⁰⁵ It likened this to a case where a mechanic failed to test the brakes on a car. Assuming that the examination of the brakes should have been conducted, the court analogized, the mechanic is negligent but not liable for punitive damages unless it can be shown that he or she knew or had reason to know that the brakes were in fact faulty, and thus a substantial likelihood existed that the brakes would fail and result in great harm.¹⁰⁶ This shows the required scienter for punitive damages beyond the scienter required for negligence.

However, in dicta, this court did note that the required scienter can be shown in other instructions beside the punitive damage instruction.¹⁰⁷

There have been several cases where the evidence fit the *Sharp* situation and punitive damages were awarded in a negligence action. Each case follows very closely the elements listed in *Sharp*.¹⁰⁸ In *Smith v. Courter*,¹⁰⁹ defendant-doctor failed to check X-rays of his patient before operating. The court found that defendant knew or should have known that there was a high degree of probability that substantial harm would result.¹¹⁰

In *O'Brien v. B.L.C.*,¹¹¹ the defendant-insurance company sold a salvaged car at double the market price to a person who knew it was salvaged. However, the defendant failed to title the car as salvaged as required by

102. *Hoover's Dairy*, 700 S.W.2d at 430.

103. *Id.* at 429.

104. *Id.* at 436.

105. *Id.*

106. *Id.*

107. *Id.* at 437.

108. *See Sharp*, 495 S.W.2d at 398. The actor (1) intentionally acts or fails to act, and (2) he knows or has reason to know his conduct (i) creates an unreasonable risk of harm, (ii) involving a high degree of probability (iii) that substantial harm will result. *Id.*

109. 575 S.W.2d 199 (Mo. Ct. App. 1978).

110. *Id.* at 207. Similarly, in *Arana v. Koerner*, the court found that the issue of punitive damages should be submitted where a jury could reasonably find that defendants knew an "improper" settlement of a lawsuit would result in substantial harm to plaintiff. *Arana v. Koerner*, 735 S.W.2d 729, 737 (Mo. Ct. App. 1987).

111. 768 S.W.2d 64 (Mo. 1989).

statute. Plaintiff subsequently bought the car from the third person.¹¹² The court found that defendant-insurance company knew or had reason to know the subsequent transaction would likely occur and that substantial harm would occur.¹¹³

IV. INSTANT DECISIONS

A. *Haynam v. Laclede Electric Cooperative [Haynam I]*

The Supreme Court's order to remand¹¹⁴ pertains to the issue of punitive damages in two respects: (1) the court held that a plaintiff seeking recovery for wrongful termination of electrical service can be shown on a theory of negligence¹¹⁵ and (2) the Haynams made a submissible case to merit punitive damages.¹¹⁶

As to the first point, the court did not elaborate on its finding, nor were any citations given.¹¹⁷ As mentioned earlier, in a footnote the court suggested the Haynams may seek to submit their claim for actual damages on retrial based upon negligence.¹¹⁸

When deciding the second point, the court, in view of the *Burnett*¹¹⁹ standard, noted the pertinent facts: the electricity would not be turned off without a personal visit from Laclede; Sandra Haynam testified that Laclede agreed that the Haynams had until the end of May to remit the final payment; a very unfriendly conversation between Sandra Haynam and Laclede followed the disconnection,¹²⁰ and the electricity was disconnected on May 22.¹²¹

112. *Id.*

113. *Id.*

114. *Haynam v. Laclede Elec. Coop, Inc.*, 827 S.W.2d 200, 208 (Mo. 1992).

115. *Id.* at 203-04.

116. *Id.* at 204.

117. *Id.* at 203-04.

118. *Id.* at 204.

119. *Id.* The "Burnett standard" to which the court refers, was stated in *Burnett v. Griffith*, a malicious prosecution and assault and battery case. *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989). The court reviewed the status of punitive damages as it pertained to assault and battery. *Id.* at 789. The court found MAI 10.01 applicable and that it included the requirement of a willful, wanton or malicious culpable mental state. *Id.*

120. *Haynam*, 827 S.W.2d at 204. The court noted that state of mind is a continuing condition that may be proved by statements evidencing the state of mind either before or following the relevant point in time. *Id.* (citing *Crampton v. Osborn*, 201 S.W.2d 336, 340-41 (Mo. 1947)).

121. *Haynam*, 827 S.W.2d at 203-04.

The court then reasoned that on this evidence a jury could have found that the remainder of the bill was not due until the end of the month, but Laclede nevertheless "intentionally terminated the electrical service."¹²²

B. Haynam v. Laclede Electric Cooperative, Inc. [Haynam II]

In *Haynam II*, the court of appeals addressed the issue of the Haynams' award of punitive damages. On remand, the Haynams stated their cause of action solely on negligence.¹²³ Again, the evidence offered by the Haynams was nearly identical as the evidence reviewed by the supreme court in *Haynam I*.¹²⁴

The court reasoned that since it was not necessary to show conduct in addition to or different in kind than that conduct which shows negligence,¹²⁵ the Haynams had met their burden of presenting evidence of Laclede's culpable mental state.¹²⁶

In finding the Haynams presented sufficient evidence to permit a jury to find this culpable mental state, the court relied on *Desalme v. Union Elec. Light & Power Co.*,¹²⁷ a case with facts remarkably similar to *Haynam I* and *II*. In *De Salme*, defendant-power company discontinued electrical service to plaintiffs after one of its agents allegedly found a "jumper", a device used to prevent the registering of electrical current used, on plaintiffs' terminal.¹²⁸ Plaintiffs alleged that defendant discontinued electric service to them without just cause, and that the defendant acted wrongfully and maliciously.¹²⁹

The court prefaced its holding by stating that punitive damages may be recovered when a defendant's act is wanton or malicious, not necessarily the product of spite or ill will, but intentionally done without just cause or excuse.¹³⁰ Nevertheless, the court therein affirmed the award of punitive

122. *Id.* at 205.

123. *Haynam v. Laclede Elec. Coop., Inc.*, 1994 WL 96608, *1 (Mo. Ct. App. 1994).

124. *Id.* at *2.

125. *Id.* (citing *Menaugh*, 799 S.W.2d at 74).

126. *Id.* at *2 (citing *Litchfield*, 845 S.W.2d at 599).

127. 102 S.W.2d 779 (Mo. Ct. App. 1937).

128. *Id.* at 780.

129. *Id.* at 782.

130. *Id.* at 783. The *DeSalme* court made its decision before there was a clear difference between punitive damages pertaining to intentional torts, with its different kinds of malice, and with punitive damages pertaining to negligence. Also, recall this decision was made when there were two lines of cases in Missouri—one allowing punitive damages in negligence, and the other allowing punitive damages in intentional tort cases only.

damages on the basis that defendant acted in "utter disregard" of plaintiffs' rights.¹³¹

The *Haynam II* court found nothing in the case to support Laclede's claim that *De Salme* was based on an intentional tort theory,¹³² and was therefore dispositive.

C. Concurring Opinion

In *Haynam II*, Judge Parrish reluctantly concurred.¹³³ In so doing, he stated that the majority's legal analysis was "technically and legally correct."¹³⁴ Although he did not agree that the evidence supported a punitive damages award,¹³⁵ he offered additional reasoning as to why the judgment should be affirmed. He observed that the evidence was essentially the same in *Haynam II* as in *Haynam I*.¹³⁶ Therefore, since the Supreme Court held in *Haynam I* that the evidence supported punitive damages when the underlying cause of action was based on an intentional tort, the same evidence will support punitive damages when the underlying cause of action is based on negligence.¹³⁷

V. COMMENT

The problem in this case lies not with evidence that is insufficient to show the required scienter for punitive damages, but with evidence of scienter supporting an intentional tort.

We must assume, as did the appellate court, that the jury, by its verdict in favor of the Haynams, resolved the question of the final payment's due date to be May 30.¹³⁸ Thereby, Laclede knew or had reason to know that the final payment was to be on May 30.

For the jury to find Laclede liable for both actual damages based on negligence and punitive damages, it must have found that Laclede acted, subsequently to the agreement, in one of two ways. First, if Laclede recorded the final payment to be on May 16, as it alleged,¹³⁹ then Laclede acted intentionally, knowing or having reason to know that it would subsequently

131. *Id.*

132. *Haynam*, 1994 WL 96608, at *6.

133. *Id.* at *9 (Parrish, J., concurring).

134. *Id.* at *10 (Parrish, J., concurring).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at *9.

139. *Haynam*, 827 S.W.2d at 202-03.

rely on this recording, with there being a high probability that the electricity would be discontinued resulting in substantial harm.

Second, if Laclede recorded the final payment on May 30 and subsequently discontinued the electrical services without checking their records, they would be negligent with conscious disregard to the Haynams' rights in the same way as the doctor in *Smith v. Courter*,¹⁴⁰ when he failed to check his patient's x-rays before operating.¹⁴¹

However, in *Haynam I*, the Supreme Court held the same conduct made a submissible case for punitive damages as set forth in *Burnett*.¹⁴² *Burnett* was an intentional tort case; therefore, the conduct of Laclede was not in "conscious disregard" but was "reckless and wanton" the standard of conduct required for punitives in an intentional tort. Relying on this and on the holding in *Ford*,¹⁴³ the Haynams could not recover under either their negligence cause of action or on their punitive damages claim if they submitted the same evidence in *Haynam II* as they submitted in *Haynam I*, which they did.

The Supreme Court, nevertheless, in effect was requiring an award of punitive damages if the Haynams chose to submit their cause of action on retrial under a negligence theory. It was leaving it up to the trial court to decide on remand if Laclede acted negligently, if the Haynams chose this cause of action, or if Laclede acted intentionally, if the Haynams chose that cause of action. The Supreme Court held that the evidence supported either cause of action. If the facts supported a negligence cause of action then there could be not the intentional conduct the court said supported punitive damages in *Haynam I*. If the facts supported punitive damages in an intentional cause of action, then there could be no negligence. However, the Supreme Court held that the same set of facts supported both. This is why the concurrence felt logically constrained to affirm.

This decision blurs the line dividing negligence and intentional tort as to the awarding of punitive damages. It allows plaintiffs to submit evidence to

140. *Smith*, 575 S.W.2d 199.

141. *Id.* There are two other inferences that the jury could draw from the evidence, but neither are consistent with their finding. The first one is if Laclede recorded the final payment to be on May 16, but the recording resulted from mere inadvertence, due to clerical error, for example. This would constitute only ordinary negligence and not satisfy the requirements for punitive damages. See, e.g., *Harzfeld's Inc.*, 116 F. Supp. at 515.

The second inference is that Laclede did record the final payment to be due on May 30, and before discontinuing electrical services checked their records. This would not be negligence, but, rather, would be an intentional tort. See, e.g., *Ford*, 618 S.W.2d at 46; *Miller*, 643 S.W.2d at 312.

142. *Haynam*, 827 S.W.2d at 204.

143. *Ford*, 618 S.W.2d 43.

show negligence and win, then submit additional evidence, sufficient to show an intentional tort, and be awarded punitive damages. This was not the situation contemplated in *Sharp*. *Sharp* posed the question of whether a plaintiff must submit their evidence to support either negligence and receive compensatory damages alone or to submit their evidence under an intentional tort theory, thus having a greater burden and risking a negligence award, in order to receive punitive damages.¹⁴⁴ However, the conduct contemplated in *Sharp* was not intentional, but rather was conduct that showed a "complete indifference or conscious disregard for the safety of others."¹⁴⁵

In so holding, the court has extended *Sharp*. It appears that plaintiffs may safely forego the risk of alleging an intentional tort and plead negligence, but still receive punitive damages under evidence of conduct constituting an intentional tort. The narrow situation carved by *Sharp* has been widened to the point that intentional conduct and negligent conduct are no longer separate theories but are commingled as if evidence of the latter also proves the former.

VI. CONCLUSION

The state of law concerning punitive damages in negligence actions is one of confusion and contradiction. Some states have attempted to clarify this problem by separating gross negligence from ordinary negligence.¹⁴⁶ Thus, one could not plead ordinary negligence and satisfy the requirement for punitive damages.

Judge Holstein has suggested that Missouri adopt a higher evidentiary standard for punitive damages.¹⁴⁷ While this was aimed at awarding punitive damages when there is no justification other than a defendant having "deep pocket[s],"¹⁴⁸ it would also be helpful to courts in discerning between conduct of conscious disregard and conduct that is, in fact, intentional.

KEVIN L. AUSTIN

144. *Sharp v. Robberson*, 495 S.W.2d 394, 395-96 (Mo. 1973).

145. *Id.* at 396.

146. *Larson v. Massey-Ferguson*, 328 N.W.2d 343, 345 (Iowa Ct. App. 1982).

147. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 377 (Mo. 1993) (Holstein, J., concurring).

148. *Id.* at 376.

