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Torts—Recognition of Negligent Hiring Expands Employer Liability—Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983)

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jury's participation in the process. "The jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress . . . . From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct." 103

The Hubbard court discarded the jury's determination of UPI's outrageous conduct and Hubbard's severe distress. 104 The Restatement's standard, the exclamation "outrageous!" by an average member of the community, 105 supports substantial deference to a jury's findings. Jurors are average members of the community, presumed to have knowledge of that which is deemed intolerable conduct in a civilized society. 106

The Minnesota Supreme Court has belatedly joined the ranks of the majority in recognizing the independent tort of intentional infliction of emotional distress. Regretably, the court's application of the "new tort" fails to provide clear guidance. Yet, despite its rather inhospitable debut, Minnesota's "new tort" offers protection against emotional distress in an increasingly pressure-packed society. Although not every injured feeling can be compensated, the societal requirement of a "toughened mental hide" is no longer a barrier to a claim of intentional infliction of emotional distress.


At common law, the tort liability of an employer to his employee was limited to certain minimum obligations. 1 The fellow servant rule imposed liability when an employer's own negligence injured his employee, but precluded employer liability when a fellow servant's negligence in-


104. See supra notes 79-80 and accompanying text.

105. Restatement, supra note 4, § 46 comment d.

106. But see Appellant's Brief at 136. "Tort liability cannot be pegged to notions of decency or morality which are subject to the same sort of vicissitudes as hemlines or hair length." Id.

1. The common law duties of the master for the protection of his servants were as follows: 1) to provide a safe workplace; 2) to provide safe tools and equipment; 3) to give warnings of dangers probably unknown to the servant; 4) to provide sufficient numbers of suitable fellow servants; and 5) to issue and enforce rules for the conduct of employees to make the workplace safe. W. Prosser, Handbook of the Law of Torts § 60 (4th ed. 1971). The injured worker's recovery was further limited in cases of employer negligence by the defenses of contributory negligence, assumption of risk, and the fellow servant rule. Id.
jured an employee. Critics attacked this rule as contrary to the established policy holding employers vicariously liable to third persons for servants' torts committed within the scope of employment. As its hardship on employees became apparent, the fellow servant rule gradually deteriorated and greater relief was provided for injured employees.

2. The fellow servant rule stated that an employer was not liable for injuries to a co-worker caused by an employee. Id. Employers who knowingly employed or retained unfit and dangerous employees were excepted from the rule. Compare Lunderberg v. Bierman, 241 Minn. 349, 356, 63 N.W.2d 355, 360 (1954) (fellow servant rule absolves employer from liability to his employees for injuries suffered solely because of a co-employee's negligence) with Ryan v. Chicago & Northwestern Ry., 60 Ill. 171 (1871) (exceptions to fellow servant rule based on employment of knowingly incompetent servants).

3. W. PROSSER, supra note 1, at § 60. This “established policy” is known as the agency doctrine of respondeat superior. The doctrine has long been recognized in Anglo-American law. See generally Brill, The Liability of an Employer for the Willful Torts of His Servants; 45 CHI.-KENT L. REV. 1 (1968) (defining doctrine of respondeat superior and liability imposed on employers).

Justice Holmes traced the doctrine’s origin to ancient Greek and Roman law where a master either surrendered the tortfeasing agent or provided just compensation. O. HOLMES, THE COMMON LAW 8-10 (1881). Under respondeat superior, the employer’s liability is not dependent in any way upon the fault of the master. Brill, supra, at 1; see Porter v. Grennan Bakeries, Inc., 219 Minn. 14, 21, 16 N.W.2d 906, 909-10 (1944). In Porter, the court said, “Proof of personal fault of the master is not permissible under allegations predating liability under the doctrine of respondeat superior.” Id. at 23, 16 N.W.2d at 910. For an analysis of respondeat superior as a cause of action, see Laski, The Basis of Vicarious Liability, 26 YALE L.J. 105 (1916).

The master’s liability for injuries resulting from a servant’s negligence rests upon the proposition that the master is responsible for wrongful acts of his servant committed while the servant is acting under his implied authority, and not for the servant’s acts when the latter is engaged exclusively in his own affairs. Ploetz v. Holt, 124 Minn. 169, 144 N.W. 745 (1913); Sina v. Carlson, 120 Minn. 283, 139 N.W. 601 (1913) (master is liable for torts of servant committed in the course and scope of his employment). See generally W. PROSSER, supra note 1, § 70. One author criticized the agency theory of liability as contrary to notions of common sense because of the absence of the principal’s ratification of the agent’s act. Holmes, The History of Agency, 5 HARV. L. REV. 1, 14 (1891).

In Minnesota, an employer was once liable under respondeat superior if the tortious act was requested by the employer or incident to the employee’s duties. Liability may now be imposed for acts related to the employee’s duties and occurring within work-related limits of time and place. Lange v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 763 (1973). See generally RESTATEMENT (SECOND) OF AGENCY §§ 219 (1958) (master’s liability for torts of his servants).

Respondeat superior and fellow servant law are based on different theories of liability. Respondeat superior holds the employer liable, not for his own acts, but vicariously for those of his employees. A cause of action based on fellow servant law places liability on the employer for his own acts of negligence in retaining or hiring incompetent employees. See infra notes 5-7 and accompanying text. See generally Note, The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability, 53 CHI.-KENT L. REV. 717 (1977).

4. Originally, the employer’s duty was to provide a safe workplace for his employees. See supra note 1; see, e.g., Missouri K. & T. Ry. v. Day, 104 Tex. 237, 136 S.W. 435 (1911) (emphasizing duty to provide safe conditions on the railroad).

This duty was later expanded to require the employment of safe co-employees. See,
A further development in fellow servant law allowed employees who were injured by co-employees to recover from their employers when the latter failed to exercise reasonable care by retaining a dangerous or incompet ent employee. Over the past fifty years, the scope of an employer's responsibility gradually has been extended beyond fellow servants to include business invitees, persons having a special relationship with the employer, and the general public. The majority of jurisdictions also have expanded the employer's duty to include the exercise of reasonable care in hiring employees. Today, in most states, employ-

5. See, e.g., Najera v. Southern Pac. Co., 191 Cal. App. 2d 634, 13 Cal. Rptr. 146 (1961) (employer liable to employee for injuries proximately caused by employer's negligent hiring and retention of violent co-employee); Fleming v. Bronfin, 80 A.2d 915 (D.C. 1951) (employer liable for employee's attack on plaintiff even though attack was outside scope of employment because employer had duty to hire only safe and competent employees).

6. See, e.g., Pullaman v. Bangor Mining Co., 121 Minn. 216, 141 N.W. 114 (1913) (employer negligent in retaining an unfit servant with knowledge of servant's incompetence); Kundar v. Shenango Furnace Co., 102 Minn. 162, 112 N.W. 1012 (1907) (plaintiff's injuries caused by master's negligence in failing to exercise reasonable care to employ a competent engineer). See generally Loftus, Employer's Duty to Know Deficiencies of Employees, 16 CLEV.-MAR. L. REV. 143 (1967); RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958) (employer's liability for employing improper persons).


8. See, e.g., Fleming v. Bronfin, 104 A.2d 407 (D.C. Mun. Ct. App. 1954) (plaintiff alleged negligent hiring against employer of deliverermy who injured her while delivering groceries); Coath v. Jones, 277 Pa. Super. 479, 419 A.2d 1249 (1980) (plaintiff recovered on theory of negligent hiring against employer of electrician). In Coath, the court held that if an employer was negligent in hiring the alleged rapist and, if it was foreseeable that such employee, even after his discharge, could attack a customer because he had previously entered her home while on the employer's business, there would exist a special relationship between the employer and injured customer. Id.

9. See generally Note, supra note 3, at 720-21 (development of fellow servant law).

ers are liable to third persons for all injuries proximately resulting from their negligent hiring and retention of employees.\footnote{See supra note 10.}

In \textit{Ponticas v. K.M.S. Investments},\footnote{Id. at 911.} the Minnesota Supreme Court recognized negligent hiring as a new cause of action in Minnesota tort law.\footnote{Id. at 907, 915.} Minnesota employers now have a duty to exercise reasonable care in hiring individuals who, because of their employment, represent a possible threat of injury to others.\footnote{Id. at 915.}

The \textit{Ponticas} court sustained a jury verdict finding that defendant Skyline Builders (Skyline) breached its duty by not investigating a job applicant more thoroughly,\footnote{See infra notes 83-88 and accompanying text.} and that the breach was the proximate cause of plaintiff's injuries.\footnote{Id. at 915.} The majority also held the "inherent nature"\footnote{See infra notes 83-88 and accompanying text.} of negligent hiring precluded a defense of superseding intervening cause of plaintiff's injuries.\footnote{331 N.W.2d at 915-16.}

In June 1978, Skyline\footnote{In addition to Skyline Builders, defendants to the suit included K.M.S. Investments. Skyline Builders managed the apartment complex that K.M.S. Investments owned. Skyline's agents hired Graffice. \textit{Id.} at 909-10.} hired Dennis Graffice and his wife as resident managers of an apartment complex owned by defendant K.M.S. Invest-


12. 331 N.W.2d 907 (Minn. 1983).
13. \textit{Id.} at 911. The \textit{Ponticas} court chose to align itself with the majority of jurisdictions recognizing negligent hiring and the authors of the \textit{Restatement of Agency} who state, "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper person or instrumentalities in work involving risk of harm to others." \textit{Restatement (Second) of Agency} § 213 (1958).

\textit{See} Becken v. Manpower, Inc., 532 F.2d 56 (7th Cir. 1976) (establishing negligent hiring cause of action in Illinois when employer hired two known felons to move contents of jewelry store); Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956) (cause of action recognized where incompetent painter was allowed to work unsupervised and only superficial investigation was made before hiring); Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964) (liability imposed where employee possessed known proclivities toward dangerous practical jokes); Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954) (incompetent caretaker shot a tenant outside his scope of employment); Strawder v. Harrall, 251 So. 2d 514 (La. App. 1971) (employee on parole from penitentiary shot customer during argumentative sale of cigarettes); \textit{cf. Restatement of Torts} § 317 (1934) (employer has duty to exercise reasonable care in controlling employee when employer knows or has reason to know of employee's proclivity and the necessity to control).

15. \textit{Id.} at 908-09, 915.
16. \textit{Id.} at 915.
17. \textit{See infra} notes 83-88 and accompanying text.
18. 331 N.W.2d at 915-16.
ments. Mr. and Mrs. Graffice received a passkey permitting entry to all apartments in the complex. The action arose when Dennis Graffice sexually assaulted Stephanie Ponticas after using his passkey to enter her apartment.

Before hiring Graffice, defendant interviewed him and checked his credit rating. Skyline contacted the owner of an apartment complex where the Graffices had been resident managers for a short time and the car wash where Graffice had worked for three months. In addition, Graffice completed an application form inquiring into his past employment, military service, criminal record, and references.

Graffice had been convicted of receiving stolen property in California and of armed robbery and burglary in Colorado. When he applied for

20. Id.; see infra note 30. The managerial duties included showing and renting apartments, doing minor repairs, taking care of other tenant complaints, and overseeing other employees. 331 N.W.2d at 909.

21. Id. There were 198 units in the complex.

22. Id. Two days earlier, Graffice had repaired the Ponticas' refrigerator at the request of Stephanie Ponticas. Upon questioning Mrs. Ponticas, Graffice learned that Mr. Ponticas was in northern Minnesota performing in a band and would be gone for a week. With this knowledge, Graffice entered the Ponticas' apartment in the early morning hours. Id.

While sexually assaulting Mrs. Ponticas, Graffice attempted to strangle her. She escaped and reported the incident to the police. Mrs. Ponticas alleged that she suffered physical and emotional injuries, and her husband alleged loss of consortium damages. Graffice was later arrested and convicted of first degree criminal sexual conduct. Id.

23. Id. at 910. Delores Swanson, Skyline Builder's property manager, interviewed the Graffices and was the primary agent involved in the hiring. Id.

24. Id. Defendants checked Graffice's credit rating in Minnesota and in California where he previously resided. Id.

25. Id. at 914. Graffice and his wife had worked for appellants for over five weeks before the Ponticas incident occurred. They were doing an acceptable job. Based on Graffice's job performance up to that time, appellants apparently had no reason to question Graffice's suitability for the job. Appellant's Brief And Appendix at 5, Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983).

26. 331 N.W.2d at 914. Graffice's application showed that he had resided in Minnesota for about six months; he had received a general discharge from the Army after only fourteen months—a time period shorter than the normal term; and he had no work history other than for three months in Minnesota during the five years following his discharge. Graffice listed his mother and sister as references, and indicated he had criminal convictions for "traffic tickets." The agent conducting the interview did not consider traffic violations to be crimes and did not investigate further. Id.

27. Id. at 909. In California, Graffice was charged with burglary and receiving stolen property. He was convicted of the latter and served four and one half months in jail. Shortly after being released from jail, Graffice moved to Colorado where he was charged with two counts of armed robbery, two counts of burglary, three counts of theft, and one count of theft of auto parts. After plea negotiations, he was convicted of armed robbery and burglary and was sentenced to prison. Id.

In June 1977, Graffice was released from prison. He returned to California where he worked as a self-employed operator of a tree service. In January 1978, he, his wife, and child moved to Minnesota. Graffice worked as a bus driver when he first came to Minne-
the job with Skyline, Graffice was on parole and under the supervision of the Minnesota Department of Corrections. He did not disclose this information to defendant. Skyline hired Graffice rather hurriedly when its chosen applicants refused the position. One month later, Graffice entered Stephanie Ponticas' apartment and raped her at knife point. Mr. and Mrs. Ponticas brought suit against Skyline Builders and K.M.S. Investments alleging negligent hiring.

On appeal, the Ponticas court addressed three issues. First, whether Minnesota recognized a cause of action for negligent hiring, and if so, what duty is imposed on the employer. Second, whether the evidence supported the verdict that Skyline breached this duty. Third, whether Graffice's criminal actions were a superseding intervening cause of plaintiff's injuries.

The majority adopted negligent hiring as a cause of action and defined the employer's duty as set forth below. It affirmed the jury verdict against Skyline and held that negligent hiring precluded application of a superseding intervening cause.

In recognizing an independent tort action for negligent hiring, the court imposed a duty on employers "to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public." Writing for the majority, Justice Kelley reasoned that this duty parallels the employer's duty in a negligent retention action. As early as 1898, Minnesota...
has recognized the negligent retention tort. In its present form, the tort creates a duty of reasonable care employers owe to third parties for negligently retaining dangerous or incompetent employees, and a resulting personal liability for employers who breach the duty. 40

In formulating the elements of negligent hiring, the Ponticas court found support from other jurisdictions that recognize the tort. 41 It expressly relied on two of three elements of negligent hiring common to other jurisdictions. 42 First, the plaintiff must come in contact with the employee as a direct result of the employment. 43 Second, the employer must receive a benefit, even though potential or indirect, from the contact between plaintiff and the employee. 44 The court summarily disliable for the acts of an incompetent employee when the employer knowingly retained or employed the careless worker. Jensen v. Great N. Ry., 72 Minn. 175, 75 N.W. 3 (1898); see Nutzmann v. Germania Life Ins. Co., 78 Minn. 504, 81 N.W. 518 (1900) (a prima facie case is made against the employer by demonstrating unfitness and incompetence of employee at the time of hiring); see also Porter v. Grennan Bakeries, 219 Minn. 14, 21 N.W.2d 906, 909-10 (1944) (negligent retention action was recognized, but recovery disallowed because case was pleaded under doctrine of respondeat superior); Travelers' Indem. Co. v. Fawkes, 120 Minn. 353, 358, 139 N.W. 703, 705 (1913) (employer has duty to "prevent damage by dissolute or reckless employees" and to take proper steps when having knowledge of employee's dangerous proclivities); Pullaman v. Bangor Mining Co., 121 Minn. 216, 141 N.W. 114 (1913) (employer negligent in retaining employee known to be incompetent).

40. See supra notes 6 and 39.
41. 331 N.W.2d at 911; see supra notes 10 and 13.
42. Generally, jurisdictions recognizing negligent hiring have required three elements. They are: (1) the third party must meet the employee as a result of the employment; (2) the employer must be the potential recipient of a benefit, direct or indirect, arising from the meeting between the third party and the employee; and (3) the employee and the third party must be rightfully at the meeting's location at the time of the injurious act. When any one of these elements is absent, liability has not been imposed on the employer. See Note, supra note 3, at 721-26.
43. 331 N.W.2d at 911. See Insurance Co. of N. Am. v. Hewitt-Robbins, Inc., 13 Ill. App. 3d 641, 301 N.E.2d 78 (1973) (employee's personal use of company automobile beyond scope of employment sufficiently removed him from employment making his meeting with third party extraneous to that employment and absolving employer from liability); see also Olson v. Staggs-Bilt Homes, Inc., 23 Ariz. App. 574, 534 P.2d 1073 (1975) (employee, hired only to patrol building subdivisions of employer, who shot third party was acting outside scope of his employment freeing employer from liability for negligent hiring). See generally supra notes 6 and 39.
44. 331 N.W.2d at 911. The benefit to be received by the employer must be sufficient. In Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941), the employee, a taxi driver, became enraged upon losing a fare and attacked the red-cap who had directed the potential passenger to another car. There the court stated:

Had [employee's] act constituted merely an over-zealous attempt to get patronage it may be that his misplaced zeal could be accounted for . . . by [the employer's] encouragement of active competition and its payment of such a low wage scale as would compel such competition. Here, however, the act was wholly unconnected with the discharge of his duties that no intent to further his employment can be inferred and the employment contributed only to his presence at the place of assault. Concededly this is not enough. This was simply a tort committed during the time of this employment.
posed of these two issues finding that Graffice’s responsibilities as apartment manager brought him into direct contact with plaintiff-tenant and conferred a benefit on defendant.\(^{45}\)

The court did not expressly adopt a third element common to other jurisdictions,\(^{46}\) the requirement that the plaintiff and employee had a legal right to be at the location where and when the injury occurred.\(^ {47}\) This element limits an employer’s liability to persons whom the employer could foresee his employee would encounter.\(^ {48}\) Notwithstanding the absence of an express adoption of this element, Justice Kelley may have impliedly adopted it by stating that Stephanie Ponticas, as a tenant in defendant’s apartment complex, was a “foreseeable plaintiff.”\(^ {49}\)

Having established the duty to exercise reasonable care in hiring employees and the elements of negligent hiring, the majority examined the evidence to determine whether defendant breached this duty.\(^ {50}\) The standard of review employed by the court permitted the verdict against Skyline to stand unless it was “manifestly and decidedly contrary to the evidence as a whole.”\(^ {51}\) As a preliminary matter, Justice Kelley stated that the evidence must show the employee was “unfit” given the type of employment and the risk posed to persons who would foreseeably encounter the employee.\(^ {52}\)

The Ponticas court analyzed breach of duty in terms of foreseeability

\(^{45}\) 331 N.W.2d at 911. The Ponticas court found that K.M.S. received a benefit from Graffice’s employment because he helped in the upkeep of the property and aided the tenants with their complaints of “property malfunctions.” \(^{Id.}\)

\(^{46}\) \(See\ supra\) note 42.

\(^{47}\) \(See\ Hansen v. Cohen, 203 Or. 157, 276 P.2d 391 (1954)\) (plaintiff’s unlawful use of employer’s premises—playing craps in employer’s parking lot—exempted employer from liability for assault committed by employee attendant).

\(^{48}\) \(See\ Parry v. Davison-Paxton Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952)\). In Parry, two deliverymen of defendant broke into plaintiff’s house intending to rob her. They used defendant’s company truck and pretended to be delivering furniture for which they had forged a sales receipt. They planned to use their employment as deliverymen to justify their act if caught. The court upheld a demurrer to plaintiff’s complaint, reasoning that such an act could have been performed by any two persons, regardless of their employment, and as such, defendant’s alleged negligence in hiring the employees was not the proximate cause of plaintiff’s injuries. \(^{Id.}\)

\(^{49}\) 331 N.W.2d at 912-13; \(see\ also\ infra\) notes 57-59 and accompanying text.

\(^{50}\) 331 N.W.2d at 912-15.

\(^{51}\) \(Id.\) at 912. The Ponticas court relied on Flom v. Flom, 291 N.W.2d 914 (Minn. 1980), and Smith v. Carriere, 316 N.W.2d 574 (Minn. 1982). The Flom and Smith courts held that a jury verdict must not be overturned unless no evidence reasonably supports it.

\(^{52}\) 331 N.W.2d at 912. K.M.S. admitted Graffice’s unfitness for the position as apartment manager. The employee’s unfitness was evidenced by the commission of the injurious act. \(^{Id.}\)

The employee’s incompetence may be demonstrated by “a lack of training and experience, a physical or mental infirmity, frequent intoxication, constant forgetfulness, habitual carelessness, continual inattentiveness, a propensity for horseplay, recklessness, or maliciousness.” \(Note, 9 U. Balt. L. Rev. 435, 441 (1980)\).
and standard of care. Justice Kelley first stated that the employer need not foresee plaintiff's particular injury. He found it foreseeable that someone like Graffice, with a history of violent crimes, could commit another violent crime although he had not previously committed the particular type of offense causing the injury. Thus, the court concluded that Graffice's violent sexual crime against Stephanie Ponticas was foreseeable.

Based on the determination that the risk of injury was foreseeable, the majority found it clear that Stephanie Ponticas was a foreseeable plaintiff. The court reaffirmed the common law test of duty, as expressed by Justice Cardozo: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Accordingly, the Ponicas court concluded it was foreseeable that Stephanie Ponticas, as a tenant in defendant's apartment building, would encounter Graffice, the apartment manager.

The most troubling issue in Ponicas was whether Skyline knew or should have known of Graffice's incompetence when it hired him. The court stated that employers are not liable for failure to discover informa-

53. 331 N.W.2d at 912-15.
54. Id. at 912; see Connolly v. Nicollet Hotel, 254 Minn. 373, 95 N.W.2d 657 (1959) (convention hotel liable for injuries suffered by passing pedestrian struck by object falling from a conventioner's window); Albertson v. Chicago, M., St. P. & Pac. R.R., 242 Minn. 50, 64 N.W.2d 175 (1954) (particular injury suffered as a result of a fall from stairs of railroad car not foreseeable).
55. 331 N.W.2d at 912. Other jurisdictions have indicated there must be a logical connection between the information available to the employer and the harm suffered by plaintiff. See, e.g., Note, supra note 3, at 727 (citing Argonne Apt. House Co. v. Garrison, 42 F.2d 605, 608 (D.C. Cir. 1930) (court held prior convictions for intoxication did not indicate employee would steal jewelry)).
56. 331 N.W.2d at 912.
57. Id.
58. Austin v. Metropolitan Life Ins. Co., 277 Minn. 214, 217, 152 N.W.2d 136, 138 (1967) (citing Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928)). In Austin, a cleaning lady unsuccessfully sued for injuries resulting from a fall in a hallway where a pile of waste was located. Id. at 215, 152 N.W.2d at 138. The Austin court held that "it would not be reasonable to say that the manner in which defendant set aside its waste paper involved a danger to one whose duty it was to remove it." Id. at 217, 152 N.W.2d at 138. "The duty to exercise care is dictated by the exigencies of the occasion as they are or should be known, and if no harm should be anticipated as a consequence of the act, there can be no negligence." Id.
59. 331 N.W.2d at 912. A foreseeable plaintiff is a person with whom the employer could anticipate the employee would come in contact by virtue of his employment. See Baugh v. A. Hattersley & Sons, Inc., 436 N.E.2d 126, 128 (Ind. App. 1982) (employer owed no duty to third party raped by employee because employee did not come in contact with victim by virtue of employment). See generally Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (duty owed only to those plaintiffs within scope of danger).
60. 331 N.W.2d at 412 n.6. Several jurisdictions have indicated that based on the circumstances presented, an employer need only have constructive knowledge of an em-
tion that could not have been discovered by reasonable investigation; however, they must make a reasonable investigation. The majority stated that the scope of the investigation relates directly to the severity of risk employees pose to third parties.

In evaluating the severity of the risk, the court distinguished among the potential threats presented by the activities of a yardperson and a production line worker, compared with those of an apartment manager. Only slight care may be required in hiring a yardperson or production line worker whose employment involves no access to others' living quarters. The majority found that Kendall v. Gore Properties involved a risk analogous to that posed by Graffice's activities. In Kendall, a painter who had access to a tenant's apartment, strangled her. The Kendall court imposed liability on the apartment owner for failing to exercise reasonable care in hiring the painter. The owner had neglected to make even a cursory investigation of the painter whose employment involved direct contact with the tenant.

The Ponticas court emphasized that regardless of the employment circumstances, employers have no independent affirmative duty to investigate an applicant's criminal record. The majority indicated, however, that a criminal record investigation is reasonable if other factors advise employee's unfitness. See Note, supra note 52, at 441 n.51 and accompanying text. A few jurisdictions have required actual knowledge. Id. at 912-13. A reasonable investigation is that which would have been made by the average employer for a particular job. Whether an employer has satisfied his duty of reasonable care depends on whether he has conducted an investigation commensurate with the risk to the public inherent in the employment. Id.

While the standard of reasonable care is objective, the conduct necessary to meet the standard is not. The conduct of the reasonable man will vary with the situation confronting him. See W. PROSSER, supra note 1, § 32. Consequently, employers must use care in hiring employees commensurate with the risk of injury posed to third parties by the employment. See, e.g., Kendall v. Gore Properties, 236 F.2d 673 (D.D.C. 1956) (employer must exercise more care in hiring painter to work after hours in single woman's apartment than in hiring yardperson); Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980) (employer must use more care in hiring employee to work in residential building than in hiring employee to work in yard).

61. 331 N.W.2d at 912-13. A reasonable investigation is that which would have been made by the average employer for a particular job. Whether an employer has satisfied his duty of reasonable care depends on whether he has conducted an investigation commensurate with the risk to the public inherent in the employment. Id.

62. Id.; see Comment, Negligent Hiring and Negligent Entrustment: The Case Against Exclusion, 52 OR. L. REV. 296, 299 (1973) (sliding scale standard of care varies according to type of employment and likelihood of injury to third parties).

63. 331 N.W.2d at 913.

64. Id. The employer would not foresee the injurious act of a yardperson nor would its occurrence be sufficiently aided by the employment. See supra note 48.


66. Id.

67. Id. at 678. The painter was allowed to work after hours in the tenant's apartment without supervision. Id.

68. Id. at 679.

69. Id. at 678.

70. 331 N.W.2d at 913. Justice Kelley stated that an investigation on an otherwise
it. Whether an employer exercised reasonable care given the totality of circumstances surrounding the hiring is a fact question for the jury. The majority discussed at length the evidence before the jury. Graf-fice's application disclosed his early discharge from the Army, contained only a three month work history, and listed two relatives as "work references." According to the Ponticas court, the jury could have concluded that inquiry into these facts would have alerted an employer making a reasonable investigation of a possible criminal record. Since the suspicious facts on Graffice's application had not led Skyline to inquire into his criminal record, the majority affirmed the jury's conclusion that defendant breached its duty of care by failing to make a reasonable investigation when hiring Graffice.

The court next concluded that defendant's negligent hiring was the proximate cause of plaintiff's injuries. It emphasized that the foreseeability of threat of injury imposed liability on the employer for "any injury" proximately resulting from the employment. The majority relied on Christianson v. Chicago, St. Paul, Minneapolis & Omaha Railway, in which the court held that "if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not." Again, a par-

"sufficient basis [that] . . . conclude[s] the employee is reliable and fit for the job" eliminates an affirmative duty to research the candidate's criminal history. Id.

In several jurisdictions the failure to discover the applicant's criminal record was inadequate to impose liability when the applicant's work record indicated competence for the job. See Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978) (employee's work references established competency for job as bartender); Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Civ. App. 1979) (recommendation from the respected Texas Rangers established employee's competency for employment as armed guard); Strawder v. Harrall, 251 So. 2d 514 (La. App. 1971) (employee's work record established competency for job as gas station attendant). See generally Annot., 48 A.L.R.3d 359 (1973) (noting significance of employer's knowledge of employee's criminal record as effecting cause of action).

71. 331 N.W.2d at 913. If Skyline had researched Graffice's named references and discovered that they were his mother and sister, this information would have alerted K.M.S. to a series of incomplete application responses which should have triggered a criminal record investigation. See supra notes 26-27 and accompanying text.

72. 331 N.W.2d at 913.

73. Id. at 913-14.

74. Id. at 914. Graffice's references were his mother and sister. These persons are considered inappropriate employment references. Id.; see supra note 26.

75. 331 N.W.2d at 914. Had defendant asked the Minnesota Department of Corrections for information on Graffice, it would have learned he had committed an offense. Id.

76. Id. at 915.

77. Id.

78. Id.

79. Id.

80. 67 Minn. 94, 69 N.W. 640 (1896).

81. Id. at 97, 69 N.W. at 641. Proximate cause is defined in Minnesota as consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act. For such consequences the wrongdoer is responsible, even
ticular foreseeable injury need not have occurred. The essential element is that the employment provide the contact between the employee and the injured third party. 82

Finally, the court held that the inherent nature of a negligent hiring cause of action precludes the application of a superseding intervening cause. 83 For an act to be considered intervening, it must neither result from the original negligence nor be reasonably foreseeable to the original wrongdoer. 84 Justice Kelley wrote that once the duty, its breach, and the proximate cause of injury are established, a superseding intervening cause is precluded. 85 A finding of proximate cause means, in this context, that the negligent hiring caused the injury. 86 By definition, a breach of duty is established where the employer could foresee that the employee would commit the injurious act. 87 The Ponticas court, having found proximate cause and breach of duty, concluded that a jury instruction on superseding intervening cause was unnecessary. 88

Justice Scott, joined by Justice Wahl in the dissenting opinion, acknowledged that negligent hiring was a feasible cause of action, but expressed concern because the particular decision was "extremely far-reaching." 89 Since Graffice's criminal act was best characterized as an "unforeseeable intervening efficient cause," 90 the dissenting Justices concluded that defendant's hiring was not the proximate cause of plaintiff's injuries. 91 They relied on the principles that ordinarily one can assume though he could not have foreseen the particular results. Id. at 97, 69 N.W. at 641; see also In re Polemis, 3 K.B. 560 (1921) (first case to state that direct cause is proximate cause).

82. 331 N.W.2d at 915. Justice Kelley stated that the negligence in hiring was the only reason Graffice was on the property and had contact with Stephanie Ponticas. Id.

83. Id. at 915-16.

84. Id. The Ponticas court stated that four elements are required for the defense of superseding intervening cause. First, the act's harmful effects must have occurred after the original negligence. Second, the act must not have been brought about by the original negligence. Third, the act must have actively resulted in consequences not otherwise following from the original act. Fourth, the act must not have been reasonably foreseeable by the original wrongdoer. Id.; see Kroeger v. Lee, 270 Minn. 75, 78, 132 N.W.2d 727, 729-30 (1965).

85. 331 N.W.2d at 915-16.

86. Id. at 916. The essence of the cause of action is that the negligent hiring provided the employee with the circumstances to commit the wrongful act. See supra notes 43, 44 and 48.

87. 331 N.W.2d at 915-16; see supra notes 54-59 and accompanying text.

88. 331 N.W.2d at 916-17.

89. Id. at 916. In criticizing the majority opinion, Justice Scott said, "The decision is extremely far-reaching and the ramifications suggested are extensive. All types of scenarios can be imagined where an employer would be liable for the crimes of another, including homicide, under this decision." Id.

90. Id.

91. Id. The dissent quoted Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 69 N.W. 640 (1896). Christianson was also cited by the majority. See supra notes 79-81 and accompanying text.

The two opinions agreed on the rule of law—that a wrongdoer is responsible for the
people will obey the criminal laws, and that any unforeseeable criminal act of a third party creates an intervening cause breaking the chain of causation.92

The dissent rejected the majority's assertion that Graffice's criminal proclivities were foreseeable.93 Specifically, it objected to the majority's grouping of all violent crimes into one "foreseeable" category,94 implying that Graffice's past convictions for violent theft did not sufficiently foreshadow his sexual assault.95 The dissent further stated that employers should be able to rely on the criminal justice system's efforts to rehabilitate convicted criminals.96

Finally, Justices Scott and Wahl expressed concern for the potential reduction in the employment of past criminal offenders.97 They opined that employers would be unwilling to employ individuals with criminal records for fear of incurring liability,98 and that the inability of past offenders to obtain employment would only lead to greater recidivism be-

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92. 331 N.W.2d at 916.
93. Id.; see supra notes 54-56 and accompanying text (majority's reasoning). The dissent relied on Hilligoss v. Cross Cos., 304 Minn. 546, 228 N.W.2d 585 (1975), which held that a criminal act was not reasonably foreseeable, and therefore, was an intervening cause. Id. at 548, 228 N.W.2d at 586. In Hilligoss, a landlord posted a notice on a tenant's door indicating that the lock had been changed. The tenant was in the hospital and remained there four days after the posting. Id. at 546, 228 N.W.2d at 585. On his return, several items of personal property were missing. The tenant alleged that the posting of the notice alerted the criminal third party to his absence and resulted in the subsequent theft. Id. at 547, 278 N.W.2d at 585. The court held that the theft was not reasonably foreseeable to the landlord. Id. at 548, 228 N.W.2d at 586.
94. 331 N.W.2d at 916; see supra note 54 and accompanying text. The dissent indicated that there must be a direct connection between the information available to the employer and the employee's injurious act. 331 N.W.2d at 916.
95. 331 N.W.2d at 916. The dissent quoted section 364.03 of the Minnesota Statutes as an important consideration. Id. The statute, as quoted, provides that "no person shall be disqualified from public employment . . . because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought . . . ." Id.; see MINN. STAT. § 364.03 (1982).
96. 331 N.W.2d at 916. But see Note, supra note 52, at 448 (citing ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE, A PROGRAM FOR PRISON REFORM: THE FINAL REPORT (1972)) (the United States Supreme Court and numerous scholars have noted the almost nonexistent rehabilitative achievement of the criminal justice system).
97. 331 N.W.2d at 916-17. The Ponticas majority also expressed this concern. It reasoned that by not mandating a criminal record investigation, past offenders would not be discriminated against. Id. at 913.
98. Id. at 916-17. The dissent stated that the majority decision will stifle the work of such organizations as Amicus and PORT which help find jobs for former convicts. Id.
cause of incomplete rehabilitation. The dissent reasoned that a more narrowly drawn negligent hiring cause of action would ease the burdens on employers, past offenders, and the public at large.

The adoption of a negligent hiring cause of action in *Ponicas* is consistent with prior Minnesota case law. During this century, the Minnesota Supreme Court has become increasingly concerned with protecting the general public from risks of injury beyond the public's control. This attitude has encouraged the court to create liability where none previously existed, in order to shift the financial burden for risks of injury from the general public to other parties who can more effectively reduce the risks.

The *Ponicas* decision increases the employer's burden of reasonable care in hiring. Employers are now required to make thorough investigations of job applicants when their employment places third parties in potential danger. This increased burden may lead to more extensive investigations into and greater reliance on employment applicants' criminal records. In view of all the circumstances, however, the social benefits of adopting a negligent hiring action outweigh its social costs. Although a negligent hiring tort may make it more difficult for some former convicts to obtain certain types of jobs, it will provide the general public with additional protection against dangerous employees and irresponsible employers. Nevertheless, the standard of care should be narrowly defined to avoid placing an undue burden on employers.

The ruling in *Ponicas* should not be applied to all employment positions. The court's distinctions between the responsibilities of an apartment manager and a yardperson illustrate the ruling's proper application. The tort of negligent hiring, as defined in *Ponicas*, should be read to include the requirement that both plaintiff and defendant have a legal right to be where the injury occurs. For instance, an employer should not be responsible for the harm caused by a yardperson who burglarizes someone's home. In the wake of *Ponicas*, two issues need further clarification: whether and when an employer has a duty to investigate a

99. Id. at 917.
100. Id. at 916-17.
101. See supra notes 38-40 and accompanying text.
102. For example, in Dean v. St. Paul Union Depot, 41 Minn. 360, 43 N.W. 54 (1889), the court held that plaintiff, who was assaulted by defendant employee, stated a cause of action for negligent retention. Id. at 362-63, 43 N.W. at 55. The court stated that employers were required to maintain their premises in a "safe condition for those who legitimately came there." Id. at 363, 43 N.W. at 55. Since Dean, the court has increased legal protection of the public by imposing liability on used car dealers who fail to test used cars for defects before reselling them, and on manufacturers who place defective products on the market. See McLeod v. Holt Motors, Inc., 208 Minn. 473, 294 N.W. 479 (1940); McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).
103. See supra notes 62-69 and accompanying text.
104. See supra notes 42-48 and accompanying text.
potential employee's criminal record\(^{105}\) and which crimes are foreseeable.\(^ {106}\) A minor property crime, for example, should not necessarily indicate a proclivity toward a serious crime against a person. Liability for negligent hiring based on an employer's knowledge of a candidate's criminal history is justified only if the employer's duty is sufficiently defined. Further definition of the employer's duty of investigation and scope of foreseeable crimes will create a just balance between the rights of the employer, the employee, and the public.

\(^{105}\) See supra notes 70-72 and accompanying text.

\(^{106}\) See supra notes 54-60 and accompanying text.