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Casenotes: Torts — Master and Servant — Negligent Hiring — Employer Owes a Duty to the General Public to Use Reasonable Care in Hiring and Retaining Employees. Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978)

Marianne Jeannette Schmitt
University of Baltimore School of Law

TORTS — MASTER AND SERVANT — NEGLIGENT HIRING — EMPLOYER OWES A DUTY TO THE GENERAL PUBLIC TO USE REASONABLE CARE IN HIRING AND RETAINING EMPLOYEES. *EVANS v. MORSELL,* 284 Md. 160, 395 A.2d 480 (1978).

I. INTRODUCTION

In *Evans v. Morsell,*[1] the Court of Appeals of Maryland held that an employer ordinarily has no duty to inquire into the criminal record of a prospective employee. The court concluded that the tavern owner in *Evans* was not liable under the theory of negligent hiring for injuries sustained by a patron who had been assaulted by a bartender because the owner had conducted a reasonable investigation into the bartender's fitness for employment and otherwise had possessed a sufficient basis for relying upon the employee. The significance of the specific holding in *Evans* is underlined by the fact that it is the first reported Maryland decision to recognize that under the theory of negligent hiring an employer may be liable to a member of the general public for damages occasioned by an employee.[2] Prior to *Evans,* an employer who breached his duty to use due care in the selection and retention of employees was potentially liable only to his own employees who were injured by negligently hired co-employees. This casenote discusses the salient characteristics of Maryland's recently expanded tort of negligent hiring and analyzes the court of appeals' holding that an employer's investigation into a job applicant's criminal background is ordinarily unnecessary.

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1. 284 Md. 160, 395 A.2d 480 (1978).
2. The theory of negligent hiring was recognized by Judge Shearin in Blum v. National Servs. Indus., Law No. 37,669 (Cir. Ct. Mont. Co., Md. 1975). See note 94 *infra.* In overruling the defendant's demurrer to the plaintiffs' cause of action alleging negligent hiring, the trial court in *Blum* noted that, at that time, Maryland only recognized an employer's liability for negligent hiring in the case of a serious, willful tort committed by an employee against a fellow servant. Judge Shearin, however, acknowledged the theory of negligent hiring as a proper avenue for Blum, a non-employee, to pursue and stated that, because this was a case of first impression in Maryland, the parties should test the theory on appeal in order to clarify this area of the law. The jury returned a verdict of over thirteen million dollars for the plaintiffs. Over two million dollars of this recovery was based on the alleged theory of negligent hiring. The defendant filed an appeal to the Court of Special Appeals of Maryland and petitioned for a writ of certiorari to the Court of Appeals of Maryland. The court of appeals issued a writ of certiorari for the September Term 1975. A consent decree was signed before oral argument, noting that the case had been "agreed, settled, and satisfied." Therefore, the court of appeals did not address this issue until it was raised for consideration in *Evans v. Morsell.*

II. THE EVANS FACTS

The controversy in *Evans v. Morsell* stemmed from a suit against a tavern owner by a customer seeking compensatory and punitive damages for personal injuries sustained when he was shot, while in the tavern, by a bartender who had been hired by the owner.[3] When the bartender, Hopkins, was hired in 1972, he had a significant criminal record, including several convictions in the 1950's and 1960's for assault. The defendant, Morsell, was unaware of Hopkins' convictions and made no inquiry concerning a possible criminal record.[4] The plaintiff, Evans, contended that because a bartender necessarily has frequent contact with the public, a proprietor has a duty to investigate whether such an employee has a criminal record.[5] The suit was premised on the ground that Morsell's failure to conduct this investigation rendered him liable for his customer's injuries under the theory of negligent hiring.[6]

At the time Morsell purchased the tavern and in the course of looking for suitable employees, he questioned the former owner about the qualifications of his prior workers. In response to this inquiry, he was told that Hopkins was a "good worker and a person whom [Morsell] should employ."[7] Hopkins had worked for the former owner for eighteen months, and during that period he had neither fought with nor assaulted any person in the tavern.[8] In addition, the defendant, in his previous position as a police officer, had known Hopkins and had never experienced any difficulty with him.[9] Furthermore, from the time Morsell hired Hopkins until the day of the shooting, over four months later, the defendant was unaware of

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3. 284 Md. 160, 161, 395 A.2d 480, 481 (1978). Plaintiff returned to defendant's bar after being asked to leave and, apparently without further provocation, the bartender shot the plaintiff numerous times with a shotgun that the tavern owner kept on the premises. The tortfeasor was convicted of assault and sentenced to 12 years imprisonment. *Id.* at 162, 395 A.2d at 481.
4. Brief for Appellant at E-44, E-51, Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978).
5. 284 Md. 160, 164, 395 A.2d 480, 482 (1978).
6. Because the plaintiff did not allege that the defendant was vicariously liable under the doctrine of respondeat superior or liable under the doctrine of negligent entrustment with respect to the shotgun, only the theory of negligent hiring was considered by the court. *Id.* at 164 n.2, 395 A.2d at 482–83 n.2.
7. *Id.* at 163, 395 A.2d at 482.
8. *Id.* The former owner said that, although Hopkins would occasionally "go on a drunk," he never got drunk in the tavern. *Id.*
9. Morsell had been a police officer in Baltimore City for 17 years. *Id.* He knew Hopkins personally inasmuch as his post included the area in which the bar was located. Brief for Appellant at E-46, Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978).

any actions on the part of his employee that indicated he posed a threat to persons entering the tavern.[10]

At trial, the defendant's motion for a directed verdict was granted at the close of all evidence.[11] Evans appealed the decision, whereupon the Court of Appeals of Maryland issued a writ of certiorari prior to a hearing in the court of special appeals.[12]

III. BACKGROUND: EMPLOYER'S LIABILITY TO THIRD PERSONS FOR ACTIONS OF EMPLOYEES

There are three possible theories whereby an employer may be liable for the wrongful acts of his employee:[13] negligent entrustment,[14] negligent hiring,[15] and respondeat superior.[16] In order to identify which doctrine is applicable to a particular set of circumstances, it is necessary to highlight the differences among these three concepts. Under the theories of negligent entrustment and negligent hiring, an employer's liability is based upon his own primary negligence.[17] Negligent entrustment arises as a result of supplying a chattel to a person who the supplier knows or has reason to know is likely to use the chattel in a manner involving

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10. The plaintiff testified that on previous occasions he had seen Hopkins drunk and arguing with other customers. He did not testify, however, to any facts indicating that Morsell was present on such occasions or that Morsell had any knowledge of these alleged arguments. 284 Md. 160, 162, 395 A.2d 480, 481–82 (1978). Morsell testified that he had never had any or known of any difficulty with Hopkins. *Id.* at 163, 395 A.2d at 482.
11. *Id.* at 164, 395 A.2d at 482. Because the trial court granted the defendant's motion for a directed verdict, the court of appeals considered the evidence, to the extent that it was conflicting, in a light most favorable to the plaintiff. *Id.* at 161 n.1, 395 A.2d at 481 n.1. *Accord,* Le Pore v. Gulf Oil Corp., 237 Md. 591, 592, 207 A.2d 451, 452 (1965). *See generally* Lynch, *Directed Verdict In Maryland: Less Obvious Applications Of A Simple Rule,* 9 U. BALT. L. REV. 217 (1980).
12. 284 Md. 160, 164, 395 A.2d 480, 482 (1978). The court of appeals granted certiorari in advance of oral arguments in the court of special appeals pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1980).
13. *See* Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion,* 52 OR. L. REV. 296 (1973) [hereinafter cited as *Negligent Hiring and Negligent Entrustment*].
14. *See, e.g.,* Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability,* 20 ARK. L. REV. 101 (1966). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 308, 390 (1965).
15. *See generally* RESTATEMENT (SECOND) OF AGENCY § 213 (1958); RESTATEMENT (SECOND) OF TORTS § 307 (1965); 53 AM. JUR. (SECOND) *Master and Servant* § 422 (1970); 57 C.J.S. *Master and Servant* § 559 (1948).
16. *See, e.g.,* Brill, *The Liability of an Employer for the Wilful Torts of His Servants,* 45 CHI.-KENT L. REV. 1 (1968). *See generally* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).
17. *See* Rounds v. Phillips, 168 Md. 120, 123, 177 A. 174, 175 (1935) (negligent entrustment); Porter v. Grennan Bakeries, 219 Minn. 14, 22–23, 16 N.W.2d 906, 909–10 (1944) (negligent hiring).

unreasonable risk of physical harm to others.[18] Negligent hiring also creates an unreasonable risk of physical harm to others as a result of an employer hiring or retaining an employee with dangerous propensities.[19] Because of these similarities, courts often fail to distinguish the two theories and occasionally label negligent hiring as negligent entrustment.[20]

The doctrine of respondeat superior is the most well-established theory of employer tort liability.[21] Under this doctrine, liability results as a consequence of an employer's responsibility for the wrongful acts of employees that occur within the scope of employment.[22] Although actions for negligent hiring and those brought under the doctrine of respondeat superior involve the same three parties — plaintiff, employer, and employee — there are significant differences between the two theories of recovery.[23] The most salient distinction is that under respondeat superior the employer is vicariously liable for the employee's tort.[24] In contrast, under negligent hiring the employer is primarily liable for the tort of hiring an unfit employee.[25] One consequence of this distinction is that although an award of punitive damages against an employer who is vicariously liable under the doctrine of respondeat superior is

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18. Curley v. General Valet Serv., Inc., 270 Md. 248, 253, 311 A.2d 231, 235 (1973). In *Curley,* a vehicle owner entrusted his van to an employee with knowledge that the employee was driving it on personal business, that his past driving record was "bad," and that he had ignored traffic control devices. The court held that the evidence was sufficient to go to the jury on the issue of whether the employee's driving violations were so habitual as to constitute incompetence and thus render the vehicle owner liable for negligent entrustment. *Id. Accord,* State *ex rel.* Weaver v. O'Brien, 140 F. Supp. 306 (D. Md. 1956); Snowhite v. State *ex rel.* Tennant, 243 Md. 291, 221 A.2d 342 (1966); Round v. Phillips, 168 Md. 120, 123–27, 177 A. 174, 175–76 (1935).
19. Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951).
20. *Negligent Hiring and Negligent Entrustment, supra* note 13, at 301–05. *See, e.g.,* Elliott v. A.J. Smith Contracting Co., 358 Mich. 398, 100 N.W.2d 257 (1960); Tuite v. Union Pac. Stages, Inc., 204 Or. 565, 284 P.2d 333 (1955).
21. Annot., 34 A.L.R.2d 372, 379 (1954).
22. Drug Fair, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Lewis v. Accelerated Transport-Pony Express, Inc., 219 Md. 252, 148 A.2d 783 (1959); Rusnack v. Giant Food, Inc., 26 Md. App. 250, 337 A.2d 445 (1975).
23. *See* Loftus, *Employer's Duty to Know Deficiencies of Employees,* 16 CLEV.-MAR. L. REV. 143, 145 (1967); 6 AM. JUR. PROOF OF FACTS (SECOND) *Lack of Care in Hiring* 609, 614–15 (1974) [hereinafter cited as AM. JUR. POF].
24. *E.g.,* Lewis v. Accelerated Transport-Pony Express, Inc., 219 Md. 252, 148 A.2d 783, 785 (1959); *see* Brill, *The Liability of an Employer for the Wilful Torts of His Servants,* 45 CHI.-KENT L. REV. 1, 15–16 (1968).
25. *E.g.,* Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 367, 388 P.2d 824, 829–30 (1964) (employer's liability for retaining a servant likely to commit an assault rests upon personal fault in exposing others to unreasonable risk of injury in violation of employer's duty to exercise care for the public's protection); Porter v. Grennan Bakeries, 219 Minn. 14, 20–23, 16 N.W.2d 906, 909–10 (1944) (same).

unwarranted,[26] such damages may be awarded against an employer charged with gross negligence in the employment of an incompetent individual.[27] The doctrines of respondeat superior and negligent hiring can be further differentiated in that unlike respondeat superior, negligent hiring does not require the act of the employee that triggers liability to occur within the scope of employment.[28] In addition, when the plaintiff's injury is occasioned by an employee's intentional tort, and the action is brought under the theory of negligent hiring, the plaintiff usually will enjoy a longer period under the statute of limitations.[29] Another important distinction between the two theories lies in the area of evidence. In an action based upon the doctrine of respondeat superior, evidence of the employee's reputation and prior specific acts of negligence is inadmissible.[30] On the other hand, where the basis of the proceeding is the employer's alleged negligence in hiring or retaining an employee, the fitness and capacity of the employee are material issues and evidence bearing on such matters is admissible.[31]

Respondeat superior, negligent entrustment, and negligent hiring are three distinct theories of liability available to a plaintiff seeking damages against an employer for injuries sustained as a result of an employee's tortious conduct.[32] Not all jurisdictions, however, have acknowledged negligent hiring as an independent legal avenue by which a member of the general public may proceed

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26. Curtis v. Siebrand Bros. Circus & Carnival Co., 68 Idaho 285, 194 P.2d 281 (1948).
27. *E.g.*, Eifeit v. Bush, 51 Misc. 2d 248, 272 N.Y.S.2d 862, *modified on other grounds*, 27 A.D.2d 950, 279 N.Y.S.2d 368 (1967), *aff'd*, 22 N.Y.2d 681, 238 N.E.2d 759, 291 N.Y.S.2d 372 (1968); Wilson N. Jones Memorial Hosp. v. Davis, 553 S.W.2d 180, 183 (Tex. 1977). *See* 53 AM. JUR. (SECOND) *Master and Servant* § 422 (1970).
28. La Lone v. Smith, 39 Wash. 2d 167, 234 P.2d 893 (1951). *See, e.g.*, North, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717 (1977) [hereinafter cited as North].
29. *See, e.g.*, Murray v. Modoc State Bank, 181 Kan. 642, 645–46, 313 P.2d 304, 307 (1957). *Compare* MD. CTS. & JUD. PROC. CODE ANN. § 5–105 (1980) (an action for assault, battery, libel, or slander shall be filed within one year from date it accrues) *with* MD. CTS. & JUD. PROC. CODE ANN. § 5–101 (1980) (a civil action must be filed within three years from date it accrues).
30. *E.g.*, Parkinson v. Syracuse Transit Corp., 279 A.D. 848, 109 N.Y.S.2d 777 (1952); Saunders v. Williams & Co., 155 Or. 1, 7, 62 P.2d 260, 263 (1936) (liability of the master rests on the negligence of the servant at the time of the incident, and therefore prior incidents are not elements in the case).
31. *E.g.*, Broadstreet v. Hall, 168 Ind. 192, 204, 80 N.E. 145, 149 (1907) (evidence regarding employee's actions on prior occasions is admissible to prove the employee's incompetence and the employer's knowledge of such); Guedon v. Rooney, 160 Or. 621, 641–42, 87 P.2d 209, 217 (1939) (same).
32. Indiana has taken the unique position that the theories of respondeat superior and negligent hiring are mutually exclusive. *See* Lange v. B & P Motor Express, Inc., 257 F. Supp. 319 (N.D. Ind. 1966); Tindall v. Enderle, 162 Ind. App. 524, 320 N.E.2d 764 (1974). Therefore, if the parties stipulate that the

against an employer.[33] Therefore, it is important to note at the outset that, through *Evans,* Maryland has now aligned itself with the majority position, which recognizes the theory of negligent hiring as an appropriate cause of action for any injured person to pursue against an employer.[34]

IV. ANALYSIS

A. The Theory of Negligent Hiring

Negligent hiring is predicated on the negligence of an employer in placing a person with certain known propensities in an employment position in which it should have been foreseen that the individual posed a threat to others.[35] Upon the initiation of an action for negligent hiring, the plaintiff faces the rebuttable presumption that the employer used due care in hiring the employee.[36] Thus, in order to recover, the plaintiff must prove by a preponderance of the evidence that the employer breached his duty to use due care in the selection or retention of the servant.[37]

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doctrine of respondeat superior is applicable, the theory of negligent hiring is no longer available as an appropriate cause of action. In light of the court's notation in *Evans* that it was not considering the doctrines of respondeat superior and negligent entrustment only because neither had been raised by the plaintiff, it does not appear that Maryland has adopted Indiana's narrow approach to alternative pleading. Evans v. Morsell, 284 Md. 160, 164 n.2, 395 A.2d 480, 482–83 n.2 (1978).

33. *See, e.g.,* Lewis v. Southern Pac. Co., 102 Ariz. 108, 425 P.2d 840 (1967); Denver City Tramway Co. v. Cowan, 51 Colo. 64, 116 P. 136 (1911); Black v. Hunt, 96 Conn. 663, 115 A. 429 (1921); Carlson v. Connecticut Co., 94 Conn. 131, 108 A. 531 (1919); Everingham v. Chicago, B. & Q. R. Co., 148 Iowa 662, 127 N.W. 1009 (1910); Central Truckaway Sys., Inc. v. Moore, 304 Ky. 553, 201 S.W.2d 725 (1947); Mandel v. Byram, 191 Wis. 446, 211 N.W. 145 (1926).
34. *See, e.g.,* Becken v. Manpower, Inc., 532 F.2d 56 (7th Cir. 1976); Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Texas Breeders & Racing Ass'n v. Blanchard, 81 F.2d 382 (5th Cir. 1936); Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Najera v. Southern Pac. Co., 191 Cal. App. 2d 634, 13 Cal. Rptr. 146 (1961); Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954); Nines v. Bell, 104 Ga. App. 76, 120 S.E.2d 892 (1961); Abraham v. S.E. Onorato Garages, 50 Hawaii 628, 446 P.2d 821 (1968); Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964); Strawder v. Harrall, 251 So. 2d 514 (La. App. 1971); Priest v. F.W. Woolworth Five & Ten Cent Stores, 228 Mo. App. 23, 62 S.W.2d 926 (1933); Bennett v. T & F Distrib. Co., 117 N.J. Super. 439, 285 A.2d 59 (1971), *cert. denied,* 60 N.J. 350, 289 A.2d 795 (1972); Vanderhule v. Berinstein, 285 A.D. 290, 136 N.Y.S.2d 95, *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (1954); Wegner v. Delly-Land Delicatessen, Inc., 270 N.C. 62, 153 S.E.2d 804 (1967); Mistleton Express Serv., Inc. v. Culp, 353 P.2d 9 (Okla. 1959); Guedon v. Rooney, 160 Or. 621, 87 P.2d 209 (1939); Wishone v. Yellow Cab Co., 20 Tenn. App. 229, 97 S.W.2d 452 (1936).
35. *See, e.g.,* Henderson v. Nolting First Mortgage Corp., 184 Ga. 724, 731–32, 193 S.E. 347, 353 (1937); Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 367, 388 P.2d 824, 829 (1964).
36. Evans v. Morsell, 284 Md. 160, 165, 395 A.2d 480, 483 (1978) (citing Norfolk & W. R.R. v. Hoover, 79 Md. 253, 263, 29 A. 994, 995 (1894)).
37. Bradley v. Stevens, 329 Mich. 556, 562, 46 N.W.2d 382, 384 (1951). *See* North, *supra* note 28, at 721–26.

In order to establish a prima facie case for negligent hiring, the plaintiff must substantiate the existence of five elements.[38] It is axiomatic that it must be shown that an employment relationship existed between the defendant and the person whose act or omission caused the plaintiff's injury.[39] Second, the plaintiff must prove that the employee was unfit,[40] considering the nature of the employment and the risk posed by the employee to those who would foreseeably associate with him.[41] An employee may be incompetent for his task due to a lack of training and experience,[42] a physical or mental infirmity,[43] frequent intoxication,[44] constant forgetfulness,[45] habitual carelessness,[46] continual inattentiveness,[47] a propensity for horseplay,[48] recklessness,[49] or maliciousness.[50] Third, the plaintiff must prove that the employer knew or should have known of the employee's incompetency.[51] Fourth, the employee's act or omission

38. AM. JUR. POF, *supra* note 23, at 609.
39. *Id.* at 615. *See, e.g.*, Pascoe v. Meadowmoor Dairies, 41 Ill. App. 2d 52, 57, 190 N.E.2d 156, 158 (1963); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887, 895–98 (1934).
40. *Negligent Hiring and Negligent Entrustment, supra* note 13, at 298–99.
41. *See* Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. App. 1980); RESTATEMENT (SECOND) OF AGENCY § 213, Comment d (1958).
42. *E.g.*, Mezyk v. National Repossessions, Inc., 241 Or. 333, 405 P.2d 840 (1965); Galveston, H. & S.A. Ry. v. Davis, 45 S.W. 956 (Tex. Civ. App.) (locomotive engineer with only four months experience assigned to engine propelling "wild" train), *rev'd on other grounds*, 92 Tex. 372, 48 S.W. 570 (1898).
43. *E.g.*, Bensman v. Reed, 299 Ill. App. 531, 20 N.E.2d 910 (1939). *But see* Texas & P. Ry. v. Harrington, 62 Tex. 597 (1884) (employment of man who is nearsighted as locomotive engineer is not necessarily negligence because his defect might be remedied by using eyeglasses).
44. *E.g.*, Layzell v. J.H. Sommers Coal Co., 156 Mich. 268, 117 N.W. 179 (1908), *aff'd on rehearing*, 156 Mich. 268, 120 N.W. 996 (1909); Guedon v. Rooney, 160 Or. 621, 87 P.2d 209 (1939); El Paso & S.W. Ry. v. Smith, 50 Tex. Civ. App. 10, 108 S.W. 988 (1908) (intemperate foreman of switching crew).
45. *E.g.*, Ledwidge v. Hathaway, 170 Mass. 348, 49 N.E. 656 (1898).
46. *E.g.*, Houston & T.C. Ry. v. Patton, 9 S.W. 175 (Tex. 1888); Johansen v. Pioneer Mining Co., 77 Wash. 421, 137 P. 1019 (1914).
47. *E.g.*, Yazoo & M.V. Ry. v. Hare, 104 Miss. 564, 61 So. 648 (1913); Walters v. Durham Lumber Co., 163 N.C. 536, 80 S.E. 49 (1913); Ragley Lumber Co. v. Parks, 46 Tex. Civ. App. 539, 103 S.W. 424 (1907).
48. *E.g.*, Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964) (employee's act consisted of a prank involving rude, boisterous play with no intention to do bodily harm).
49. *E.g.*, Rosenstiel v. Pittsburgh Rys., 230 Pa. 273, 79 A. 556 (1911); Serdan v. Palk Co., 153 Wis. 169, 140 N.W. 1035 (1913).
50. *E.g.*, Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957) (quarrelsome and dangerous person is "unfit" for employment); Kelly v. Oregon Shipbuilding Corp., 183 Or. 1, 189 P.2d 105 (1948).
51. *See, e.g*, Sixty-Six, Inc. v. Finley, 224 So. 2d 381 (Fla. App. 1969); Abraham v. S.E. Onorato Garages, 50 Hawaii 628, 632, 446 P.2d 821, 824 (1968) (citing Stumper v. Harris, 136 A.2d 870 (D.C. 1957)); Bennett v. T & F Distrib. Co., 117 N.J. Super. 439, 442, 285 A.2d 59, 60 (1971). *But see* R.J. Reynolds Tobacco Co. v. Newby, 145 F.2d 768, 771 (9th Cir. 1944) (plaintiff must establish that employer had *actual* knowledge of employee's incompetence); Hines v. Bell, 104 Ga. App. 76, 83, 120 S.E.2d 892, 897 (1961) (same).

must be the cause-in-fact of the plaintiff's injuries.[52] Finally, the plaintiff must establish that the hiring of the employee was the proximate cause of his injuries.[53]

The most frequently litigated issue in an action for negligent hiring is the third element: whether the employer had actual or constructive knowledge of the servant's incompetence. The employer is required to make an adequate inquiry or to have some other sufficient basis for relying upon the employee as suitable for the position.[54] A foundation for determining an applicant's fitness may be secured through an investigation of his background or references, previous work experience with the applicant, or other personal knowledge.[55] The character and extent of the inquiry will vary with the circumstances of each case.[56] One factor in determining the requisite scope of the investigation is the nature of the employment involved.[57] This is illustrated in *Kendall v. Gore Properties*[58] in which the United States Court of Appeals for the District of Columbia Circuit stated,

> Slight care might be expected as to the employment of a yard man, not ordinarily to be sent into a tenant's apartment. But a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant, living alone.[59]

Similarly, if the plaintiff is unusually dependent upon the competence of the defendant's employees, for instance where the defendant is a common carrier or hospital, the employer is required to conduct an exhaustive investigation before hiring an employee.[60] Although the owner of a place of public accommodation also owes a duty of

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52. AM. JUR. POF, *supra* note 23, at 615.
53. *E.g.*, Kendall v. Gore Properties, 236 F.2d 673, 681–82 (D.C. Cir. 1956); Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941); Annot., 48 A.L.R.3d 359, 361 (1973); 57 C.J.S. *Master and Servant* § 559 (1948).
54. Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. App. 1980); Evans v. Morsell, 284 Md. 160, 166–67, 395 A.2d 480, 484 (1978).
55. *E.g.*, Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956).
56. *Id.* at 678; Evans v. Morsell, 284 Md. 160, 167, 395 A.2d 480, 484 (1978).
57. *Negligent Hiring and Negligent Entrustment, supra* note 13, at 299; *see* RESTATEMENT (SECOND) OF TORTS § 307, Comment a (1965).
58. 236 F.2d 673 (D.C. Cir. 1956).
59. *Id.* at 678. *Cf.* McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947) (when a patrolman who is required to carry a revolver at all times is known to have vicious proclivities, it is a factual determination as to whether his retention in police service involved a reasonably foreseeable danger to the public).
60. *See* Loftus, *Employer's Duty to Know Deficiencies of Employees*, 16 CLEV.-MAR. L. REV. 143, 143–44 (1967).

protection to his patrons, the nature of this duty is different in degree from that imposed upon a hospital or common carrier. This distinction arises because a patron, unlike a patient or passenger, is not completely subject to the control of the owner of the enterprise. In this respect, an innkeeper will have satisfied his obligation to exercise reasonable care when hiring employees if he has conducted a less sweeping investigation than that required of a hospital or common carrier.[61] A second criterion involved in the determination of the requisite scope of an employer's inquiry is the degree of risk to persons who will foreseeably come into contact with the employee should he prove to be incompetent.[62] The employer is required to examine each particular employment situation to determine whether it subjects persons to an unreasonable degree of harm. In filling positions that involve a great risk of harm, an employer will be held to a high level of care and will be expected to conduct an exhaustive inquiry.[63] On the other hand, if the risk is minimal, the duty imposed upon the employer is satisfied by a minimal inquiry.[64] At the very least, however, an employer will be bound by an irrebuttable presumption of knowledge of his employee's general reputation.[65]

It is unreasonable for an employer to fail to conduct a pre-employment investigation, and such failure automatically constitutes a breach of the employer's duty.[66] In *Kendall,* the court held that the employer's failure to make even a cursory inquiry represented an almost purposeful refusal to discover anything about the employee, and the employer would be liable for those injuries occasioned by characteristics of the employee that a reasonable investigation would have revealed.[67] If a reasonable investigation

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61. *See* Vanderhule v. Berinstein, 285 A.D. 290, 294, 136 N.Y.S.2d 95, 100, *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (1954). *See generally* Annot., 34 A.L.R.2d 372 (1954).
62. *See* RESTATEMENT (SECOND) OF AGENCY § 213, Comment d (1958); RESTATEMENT (SECOND) OF TORTS § 307, Comment a (1965).
63. *E.g.,* Hipp v. Hospital Auth., 104 Ga. App. 174, 121 S.E.2d 273 (1961).
64. *See* Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951); Tyus v. Booth, 64 Mich. App. 88, 235 N.W.2d 69 (1975) (gasoline station employer not required to conduct in-depth background investigation of his employees; only required to use reasonable care to assure that employees do not unreasonably expose the public to danger).
65. Norfolk & W. R.R. v. Hoover, 79 Md. 253, 29 A. 994 (1894). In *Norfolk,* the Court of Appeals of Maryland stated:
> If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his the master's negligence in not informing himself — if he could have been ignorant of it only because he failed to make investigation — then, it is obvious that he had not used the care and caution which the law demands of him in selecting his employees.

Id. at 263, 29 A. at 996.
66. *E.g.,* Weiss v. Furniture in the Raw, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (1969).
67. 236 F.2d 673, 678 (D.C. Cir. 1956).

would not have revealed that the employee was incompetent, a plaintiff may be unable to recover even though the employee was unfit for the job.[68] Furthermore, when an employer conducts an investigation and discovers that the applicant is incompetent or has vicious proclivities, if the employer hires the individual, the employer will be responsible for any damages proximately caused by characteristics disclosed to the employer as a result of the inquiry.[69] Recovery is precluded if an investigation reveals that an employee has a history of committing one type of offense and the employee subsequently commits an offense of a different type. For example, employment of a person known to have been convicted of intoxication does not render an employer liable when the employee commits a theft.[70] Nor is an employer liable when a male employee known to have been convicted of nonsupport sexually assaults a female customer.[71]

Another frequent source of litigation is the fifth element of the prima facie case: whether the hiring of the employee was the proximate cause of the plaintiff's injuries. This issue is best dealt with in the form of the question, "was the defendant under a duty to protect the plaintiff against the event which did in fact occur?"[72] When there is no duty owed by the employer to another, there can be no negligence in retaining a servant with known vicious propensities because the hiring of such an employee is not the proximate cause of any injury sustained.[73] In *Hansen v. Cohen,*[74] for example, an action was brought by a patron against parking lot operators for damages resulting from an assault allegedly committed by the attendant in charge of the lot. The plaintiff alleged that the operators were negligent in hiring an employee with vicious propensities. The court concluded that, because the plaintiff had been playing dice with the employee when the assault occurred, he had lost the status of invitee and had become a mere licensee to whom the employer only owed a duty to avoid inflicting willful or wanton injury, and therefore, the

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68. *E.g.,* Stevens v. Lankard, 31 A.D.2d 602, 297 N.Y.S.2d 686 (1968), *aff'd,* 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969) (employer not negligent when routine check would not have revealed employee's prior sodomy conviction in another jurisdiction).
69. *E.g.,* Svacek v. Shelley, 359 P.2d 127 (Alaska 1961).
70. *E.g.,* Argonne Apartment House Co. v. Garrison, 42 F.2d 605, 608 (D.C. Cir. 1930) (prior conviction for intoxication did not put employer on notice that employee might be dishonest).
71. *E.g.,* Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951); *cf.* Strawder v. Harrall, 251 So. 2d 514, 518 (La. App. 1971) (employer who hired a man he knew was on parole was not liable when the employee shot a customer).
72. W. PROSSER, THE LAW OF TORTS 244 (4th ed. 1971).
73. *E.g.,* Vanderhule v. Berinstein, 285 A.D. 290, 294, 136 N.Y.S.2d 95, 100, *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (1954); Hansen v. Cohen, 203 Or. 157, 163, 276 P.2d 391, 394 (1954).
74. 203 Or. 157, 276 P.2d 391 (1954).

plaintiff's action premised upon negligent hiring was untenable.[75] In *Insurance Co. of North America v. Hewitt-Robbins, Inc.*,[76] the defendant loaned a car to his employee for the employee's personal use. Although a subsequent collision with the plaintiff's vehicle was caused in fact by the employee's negligence, the court found that the connection between the employment relationship and the collision was too tenuous to support the defendant's liability.[77] Employing a "staleness" doctrine, courts have also found a break in the chain of proximate causation when the passage of time serves to vitiate the significance of an employee's earlier action with regard to his present tendencies.[78] This is illustrated in *Abraham v. S.E. Onorato Garages*[79] in which the court held that a single hit and run conviction, which occurred four years before the employee's promotion, was insufficient to permit the jury to conclude that the employee was so incompetent that his retention constituted negligent hiring.[80]

B. *Application of the Theory of Negligent Hiring—The* Evans *Decision*

Since 1894, it has been well established in Maryland that a master owes a duty to his servants to use reasonable care in the selection and retention of fellow servants.[81] An employer is obligated to provide reasonably safe working conditions for his employees and this duty includes "avoiding the employment or retention of a servant who is known to be dangerous or vicious where such propensities are calculated to expose co-employees to greater dangers than the work necessarily entails."[82] In *Evans*, the court noted that this duty to use reasonable care exists not only with regard to other employees, but also with regard to the general public.[83] Therefore, it

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75. *Id.* at 163, 276 P.2d at 394.
76. 13 Ill. App. 3d 534, 301 N.E.2d 78 (1973).
77. *Id.* (court refused to extend negligent hiring theory to employee engaged in a "collateral" act to employment at the time of the incident). *Accord,* Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941) (court denied plaintiff's claim under negligent hiring for damages sustained as a result of an assault by agent of defendant, holding that because plaintiff was not a customer of defendant taxi cab company, but merely a redcap assisting defendant's passengers, the tortfeasor's employment was not the proximate cause of plaintiff's injuries).
78. *E.g.,* Abraham v. S.E. Onorato Garages, 50 Hawaii 628, 446 P.2d 821 (1968); *accord,* R.J. Reynolds Tobacco Co. v. Newby, 145 F.2d 768, 771 (9th Cir. 1944).
79. 50 Hawaii 628, 446 P.2d 821 (1968).
80. *Id.*
81. Norfolk & W. R.R. v. Hoover, 79 Md. 253, 29 A. 994 (1894) (railroad liable to engineman in its employ for injuries he sustained when co-employee, a brakeman who drank heavily, failed to heed signals warning him to slow the train); *accord,* Northern Pac. R.R. v. Mares, 123 U.S. 710 (1887). *See also* 1 C. LABATT, LAW OF MASTER & SERVANT 177 (1904).
82. Country Club of Jackson v. Turner, 192 Miss. 510, 514, 4 So. 2d 718, 719 (1941).
83. 284 Md. 160, 164–65, 395 A.2d 480, 483 (1978).

is clear that the perimeter of the doctrine of negligent hiring in Maryland was extended in *Evans* to encompass suits by members of the general public who have been injured by incompetent employees.

The facts in *Evans* reveal that of the five requisite elements of negligent hiring, four were present. It is evident that an employment relationship existed between the defendant, Morsell, and the tortfeasor, Hopkins. Because of the bartender's several convictions for assault, it is also evident that the tortfeasor possessed vicious propensities and therefore was unfit for the position. In addition, the facts indicate that Hopkins' actions were both the cause-in-fact and the proximate cause of the plaintiff's injuries. The questions of cause-in-fact and proximate causation would only arise if the court found that the defendant had been negligent in the selection and retention of Hopkins.[84] The query would then be whether that negligence was causally connected with the assault. On that issue there could be little doubt because the risk of assault upon a patron is well within the range of the foreseeable consequences of retaining a potentially dangerous bartender. Thus, an analysis of the elements that must be established in order to recover in an action based upon the theory of negligent hiring indicates that the court in *Evans* focused its attention upon the third element. The court stated that in cases, such as *Evans,* in which an employee has committed an intentional tort upon a member of the public, the critical standard is "whether the employer knew or should have known that the individual was potentially dangerous."[85]

The employer's duty to use reasonable care in hiring and retaining employees was interpreted by the court as requiring the employer either to make an adequate inquiry into the employee's competence *or* to have some other sufficient basis for relying upon the employee.[86] In *Evans* an inquiry was made. The inquiry did not, however, reveal any facts that placed or should have placed the tavern owner on notice that the bartender was potentially dangerous.[87] Thus, it was necessary to determine whether the scope of this investigation was sufficient to avoid a breach of duty. The court held that, based upon the recommendation of Hopkins' former

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84. Because the court in *Evans* concluded that Morsell was not negligent in the hiring and retention of Hopkins, it did not address the issues of cause-in-fact and proximate causation. *Accord,* Vanderhule v. Berinstein, 285 A.D. 290, 294, 136 N.Y.S.2d 95, 100, *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (1954).

85. 284 Md. 160, 165, 395 A.2d 480, 483 (1978). *Accord,* Vanderhule v. Berinstein, 285 A.D. 290, 293, 136 N.Y.S.2d 95, 100, *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (1954) (ultimate duty of employer is to refrain from hiring or retaining anyone who he knew or, in the exercise of reasonable care, should have known was potentially dangerous).

86. 284 Md. 160, 166–67, 395 A.2d 480, 484 (1978). See text accompanying notes 54–71 *supra.*

87. 284 Md. 160, 168, 395 A.2d 480, 484–85 (1978).

employer and the defendant's prior personal knowledge of Hopkins, the defendant had satisfied his duty to make a reasonable inquiry and had a sufficient basis for relying on the employee.[88] The court concluded that there was no evidence that Morsell knew or should have known that Hopkins was potentially dangerous and, therefore, the defendant was not liable under the doctrine of negligent hiring.[89]

The court rejected the plaintiff's contention that a tavern owner has a duty to inquire into a potential employee's criminal record when the employee is to deal regularly with the public.[90] In support of this conclusion, the court noted that there was no custom among bar owners in the area of investigating the criminal history of job applicants.[91] Following the majority of jurisdictions,[92] the court stated that an employer who deals with the public is bound to use only reasonable care in the selection of his employees,[93] and that this obligation is satisfied without an investigation of the applicant's criminal history when the employer makes an adequate inquiry or

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88. *Id.*

89. *Id.* In Blum v. National Serv. Indus., Law No. 37,669 (Cir. Ct. Mont. Co., Md. 1975), the trial court instructed the jury on the issue of negligent hiring as follows:

> The question is did the company owe any duty to the general public to use reasonable diligence to see that those who are in its employ and to whom the general public is exposed shall not be guilty of any act which might reasonably be called dangerous and liable to result in injury to persons who are exposed to such employees as a result of their employment, when by the exercise of reasonable diligence on the part of the defendant it could have prevented the acts. . . .
>
> A principal may be negligent because he has reason to know of a dangerous quality of an agent which quality may be his vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. . . .
>
> You are instructed that simply because a person has a record of conviction of a felony it is not negligent to hire him. There must be proof that at the time he was hired he was, in fact, a person of known vicious and dangerous propensities so that the particular injury should have been foreseen as reasonably likely to happen if he were hired.

90. 284 Md. 160, 167, 395 A.2d 480, 484 (1978). *See generally* Annot., 48 A.L.R.3d 359 (1973).

91. 284 Md. 160, 163, 395 A.2d 480, 482 (1978).

92. *E.g.*, Abraham v. S.E. Onorato Garages, 50 Hawaii 628, 633, 446 P.2d 821, 825–26 (1968); Bradley v. Stevens, 329 Mich. 556, 562–63, 46 N.W.2d 382, 384–85 (1951); Stevens v. Lankard, 31 A.D.2d 602, 603, 297 N.Y.S.2d 686, 688 (1968), *aff'd*, 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969).

93. *But cf.* Hipp v. Hospital Auth., 104 Ga. App. 174, 176–77, 121 S.E.2d 273, 275 (1961) (hospital must take special precautions, selecting only competent employees, because a patient is under complete control of employee and a patient's right of privacy must necessarily be invaded in order to provide treatment and care); Vanderhule v. Berinstein, 285 A.D. 290, 296–97, 136 N.Y.S.2d 95, 103, *modified*, 284 A.D. 1089, 136 N.Y.S.2d 349 (1954) (common carrier must be certain to select only competent employees because a passenger entrusts his safety to the carrier and has very little ability to control the risks involved in his transportation).

otherwise has a sufficient basis for believing that the employee is competent.[94]

The court provided three justifications for its holding that an employer ordinarily has no duty to inquire into the criminal record of a prospective employee. One reason was that "when one has completed a criminal sentence or has been paroled, the employer to some extent is entitled to rely upon the determination of the government's criminal justice system that the individual is ready to again become an active member of society."[95] Although this proposition has been relied upon by other courts,[96] the United States Supreme Court[97] and numerous scholars have acknowledged that in actual practice rehabilitative achievement is almost nonexistent.[98]

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94. 284 Md. 160, 167–68, 395 A.2d 480, 484–85 (1978). *Accord,* Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. App. 1980). See text accompanying notes 54–65 *supra.* Because the defendant was found to have satisfied his duty to exercise reasonable care in the selection of Hopkins, the court in *Evans* had no need to analyze the remaining factors necessary to establish a cause of action based upon negligent hiring. *But see* Blum v. National Serv. Indus., Law No. 37,669 (Cir. Ct. Mont. Co., Md. 1975). In *Blum,* the defendant, National Service Industries (NSI), hired Watson as a furniture mover merely on the recommendation of another employee whose name was not recalled or recorded and without conducting any pre-employment screening. If NSI had done an employment check, it would have discovered that Watson was on parole from a conviction of armed robbery, that he had never held any job over six months, and that according to his parole officer he was having some trouble with alcohol. While on the job, Watson was sent into an apartment building to pick up furniture. The employee, who was in an extremely intoxicated state, forced entry into the adjacent apartment where he violently assaulted and murdered the tenant, Mrs. Blum. Because the tortfeasor in *Blum* had strayed from the physical location of his employment, and because the plaintiff's decedent was neither a customer nor an invitee of the employer, the case would have posed an interesting query for the court of appeals — whether the plaintiff had established that the employer's negligence in hiring or retaining Watson was the proximate cause of the plaintiff's injuries? The case was settled, however, before oral argument in the court of appeals.

95. 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

96. *E.g.,* Strawder v. Harrall, 251 So. 2d 514 (La. App. 1971); *see* Comment, *Employment of Former Criminals,* 55 CORNELL L. REV. 306 (1970). *But see* Hersh v. Kentfield Builders, 385 Mich. 410, 189 N.W.2d 286 (1971) (concern for ex-criminal's welfare must be balanced against the community's welfare).

97. In Barker v. Wingo, 407 U.S. 514 (1972), Justice Powell noted that an individual's exposure to overcrowded penal institutions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." *Id.* at 520. Furthermore, it is estimated that 45% of all parolees "are subjected to revocation and return to prison." Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

98. *See, e.g.,* ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE, A PROGRAM FOR PRISON REFORM: THE FINAL REPORT (1972) (the conference credited the lack of rehabilitation to the fact that the penal system is a "major national chronic blight").

Thus, this rationalization for the court's conclusion lacks foundation.[99]

Another justification for the court's finding that there is ordinarily no duty to check a job applicant's criminal history was that to make such an investigation mandatory would impose a significant burden upon employers.[100] This rationale was employed in the New York case of *Stevens v. Lankard,*[101] in which the court concluded that such a requirement would place an unfair burden upon the business community.[102] Application of this line of reasoning in *Evans* does not withstand scrutiny, however, because at the time Hopkins was hired, only the employee could have obtained a certified copy of his police record.[103] Therefore, the prospective employee would have had to bear the burden of securing the information, not the employer.

Finally, the *Evans* court noted that "it may today be quite difficult to obtain criminal records."[104] This statement appears to be an allusion to recent Maryland legislation entitled The Criminal Justice Information System Act,[105] which governs the dissemination of criminal history record information.[106] This law, which was passed in 1976 pursuant to The Federal Criminal Justice Information System,[107] provides that it is unlawful for any employer to require a person to furnish a copy of his criminal history record in order to qualify for employment.[108] The Federal Criminal Justice Information System mandates that such information may be disseminated by appropriate state law, executive order, local ordinance, or court rule, decision, or order.[109] The responsive Maryland legislation inexpli-

99. The *Evans* court acknowledged the limitations of its reasoning and noted that there are overriding considerations such as "the sensitivity of the position, the nature of the past criminal conduct, and the surrounding circumstances." 284 Md. 160, 167 n.5, 395 A.2d 480, 484 n.5 (1978).

100. *Id.* at 167–68, 395 A.2d at 484.

101. 31 A.D.2d 602, 297 N.Y.S.2d 686 (1968), *aff'd,* 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969).

102. *Id. Accord,* Tyus v. Booth, 64 Mich. App. 88, 235 N.W.2d 69 (1975).

103. Brief for Appellant at E-30 to E-32, Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978).

104. 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

105. MD. ANN. CODE art. 27, §§ 742–755 (1976).

106. The court's opinion in *Evans* did not expressly refer to this Act. One possible explanation is that, although the statute was in effect at the time the court rendered its decision, it was not to be applied retroactively and therefore was inapplicable to the facts in *Evans.*

107. DOJ Criminal Justice Information Systems, 28 C.F.R. §§ 20.1–.38 (1979). These regulations were promulgated pursuant to §§ 501 & 524(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by 42 U.S.C. § 3789(g) (Supp. 1979).

108. MD. ANN. CODE art. 27, § 754(a). This section provides: "It is *unlawful* for any employer or prospective employer to require a person to inspect or challenge any criminal history record information relating to that person for the purpose of obtaining a copy of the person's record in order to qualify for employment" (emphasis added).

109. DOJ Criminal Justice Information Systems, 28 C.F.R. § 20.21(b) (1979).

cably affords no guidance with respect to dissemination. Rather, section 749 of Maryland's Criminal Justice Information System Act provides in a circuitous manner that dissemination of criminal history record information is to be in accordance with the applicable federal law and regulations. It is important to note that the court qualified its holding in *Evans* by stating "that an employer *ordinarily* has no duty to inquire concerning the possible criminal record of a prospective employee."[110] Therefore, although Maryland to date has not designated any grounds for allowing the dissemination of criminal record information to employers, it is possible that such authorization could arise in the future. In the final analysis, it is evident that the *Evans* decision, which concerned a 1975 incident, was rendered so as to be consistent with Maryland's Criminal Justice Information System Act of 1976.[111]

V. RAMIFICATIONS OF *EVANS*

The *Evans* decision is best viewed as one that balances the competing interests of employees, employers, and the general public.[112] In the wake of the court's holding that an employer ordinarily need not inquire into an applicant's criminal record before hiring him and the recently enacted Maryland Criminal Justice Information System Act, it is clear that at the present time the employee is given the most protection. Maryland enacted The Criminal Justice Information System Act[113] in response to the Federal Criminal Justice Information System, which was promulgated "to assure that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy and security of such information and *to protect individual privary*."[114] The explanatory comments to the federal regulation note that it is imperative that employers be prohibited access to a prospective employee's criminal record in order to prevent applicants from having the unenviable choice between invasion of privacy or loss of possible job opportunities.[115]

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110. 284 Md. 160, 167, 395 A.2d 480, 484 (1978) (emphasis added).
111. MD. ANN. CODE art. 27, §§ 742–755 (1976).
112. *See, e.g.*, Bennett v. T & F Distrib. Co., 177 N.J. Super. 439, 285 A.2d 59 (1971).
113. MD. ANN. CODE art. 27, §§ 742–755 (1976). See text accompanying notes 105–08 *supra*.
114. DOJ Criminal Justice Information Systems, 28 C.F.R. § 20.1 (1979) (emphasis added).
115. *Id. Commentary on Selected Sections of the Regulations on Criminal History Record Information Systems*, 28 C.F.R. app. §§ 20.21(b), 20.21(c) (2) (1979); *see also* The Daily Record, May 1, 1979, at 1, col. 1.

With regard to the employer's interest, while *Evans* broadens the scope of employer liability, the narrow holding that an employer ordinarily need not inquire into a job applicant's criminal record serves to limit the employer's duty to investigate. It is obvious that the court considered the time and expense that an exhaustive background investigation would impose upon the business community. In this respect, although a person has a right to be secure in his business transactions[116] and to feel confident that the employer has hired competent employees,[117] the courts have held that in most circumstances an employer satisfies his duty of reasonable care by conducting only a minimal inquiry into the background of employees he selects or retains.[118]

Finally, the public's interest has also been fostered through the *Evans* decision. It is now clear that an employer must have a sufficient basis for believing that an applicant is competent and fit for employment before hiring the prospective employee. If an employer violates this duty and a third person is injured, the negligent employer must answer for compensatory and, possibly, punitive damages. The public may enjoy another benefit as a result of the court of appeals' decision. One commentator has asserted that the difficulty ex-offenders encounter in the job market is "the chief causative factor" of recidivism.[119] It is further noted that "each refusal to hire an ex-criminal contributes to a massive barrier to employment and thus encourages recidivism, which in turn justifies the next refusal to hire."[120] Because members of the public are the victims of crime, the breaking of this vicious cycle would clearly inure to the public welfare. The court of appeals' decision diminishes the likelihood that ex-offenders who would make fit employees will be denied jobs merely because of the stigma attached to having a criminal record.

VI. CONCLUSION

Evans v. Morsell marks the first recognition by a Maryland appellate court that an employer owes a duty to the public to use reasonable care in the selection and retention of employees. In accordance with *Evans*, an employer must ascertain the fitness of persons he employs, and if he is negligent in this task, he may be

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116. North, *supra* note 28, at 729.
117. *See* Bennett v. T & F Distrib. Co., 117 N.J. Super. 439, 285 A.2d 59 (1971).
118. *E.g.*, Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Weiss v. Furniture in the Raw, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (1969); North, *supra* note 28, at 726.
119. Comment, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 317 (1970).
120. *Id.*

liable for injuries that result from the actions of the negligently hired servant. The question of what constitutes a reasonable inquiry, however, has not been adequately answered by the court. Because the requisite investigation varies with the facts and circumstances of each case, only through future court decisions and legislation will the requirements necessary to satisfy this nebulous duty take form. Nonetheless, the court in *Evans* explicitly held that ordinarily this duty does not include an inquiry into the employee's criminal record and, in fact, as a result of recent Maryland legislation, an inquiry that directs an employee to provide a copy of his criminal record is at present expressly forbidden by statute.

Marianne Jeannette Schmitt