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A ROADMAP THROUGH MALICE, ACTUAL OR IMPLIED: PUNITIVE DAMAGES IN TORTS ARISING OUT OF CONTRACT IN MARYLAND

Gary I. Strausberg†

The distinction between tort and tort arising out of contract is becoming blurred where awards of punitive damages are sought. The article analyzes torts arising out of contract and the present approach of the Maryland courts to malice, the key element governing the recovery of punitive damages. The author suggests that the conduct, and not the technical term of the wrongful act, should dictate whether a plaintiff may recover punitive damages.

I. INTRODUCTION

The right to recover punitive damages against a tortfeasor for his aggravated tortious conduct has long been recognized.¹ Equally well established is that punitive damages are prohibited in pure actions for breach of contract.² Between these two extremes lies the hybrid of torts arising out of contract, for which punitive damages may be recovered in certain circumstances.³ A tort arises out of a contract when the act of breaching an agreement gives rise to a separate cause of action in tort. To obtain punitive damages for these torts, however, the plaintiff must show that the defendant's conduct was motivated by hatred or a deliberate desire to injure the plaintiff.⁴

Because of the elusive nature of this hybrid, Maryland's courts have repeatedly attempted to define the circumstances under which punitive damages may be recovered when a tort arises out of a contract.⁵

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1. See *Philadelphia, W. & B. R.R. v. Hoeffich*, 62 Md. 300, 307-09 (1884); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 (1973); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-14 (4th ed. 1971).
2. See *H & R Block, Inc. v. Testerman*, 275 Md. 36, 44, 338 A.2d 48, 52-53 (1975); *Siegman v. Equitable Trust Co.*, 267 Md. 309, 313, 297 A.2d 758, 760 (1972); *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co.*, 262 Md. 192, 236-37, 278 A.2d 12, 33-34, cert. denied, 404 U.S. 857 (1971); 5 A. CORBIN, CORBIN ON CONTRACTS § 1077, at 438 (1964); D. DOBBS, *supra* note 1, § 12.4, at 818; RESTATEMENT (SECOND) OF CONTRACTS § 355 comment a (1981).
3. Obvious examples of this cause of action are conversion, tortious interference with contract, and fraud accompanying a breach of contract. See *infra* notes 39-60 and accompanying text.
4. For a discussion of the malice requirement, see *infra* notes 64-81 and accompanying text.
5. See, e.g., *General Motors Corp. v. Piskor*, 281 Md. 627, 381 A.2d 16 (1977); *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 366 A.2d 7 (1976); *Henderson v. Maryland Nat'l Bank*, 278 Md. 514, 366 A.2d 1 (1976); *Food Fair Stores v. Hevey*,

The cases have left a complicated set of rules and exceptions in their wake. This article will examine these decisions and the distinctions between the availability of punitive damages for torts, breaches of contracts, and torts arising out of contract to show the erosion of the boundaries and justifications for these conceptual subdivisions. Based on this analysis, the article concludes with a proposal that Maryland adopt a uniform standard to govern the award of punitive damages in all cases.

II. PUNITIVE DAMAGES: THE TRADITIONAL RULES

Although this commentary focuses primarily on Maryland appellate decisions, the development of punitive damages cannot be understood without exploring its origins. It is therefore necessary to trace the historical source of the reasoning behind the availability of punitive damages in tort actions and their non-availability in contract suits.

A. *Origin of Punitive Damages—The Genesis of the Dichotomy*

The concept of punitive damages was developed in early England⁶ as a means of justifying large jury verdicts.⁷ Because juries were witnessing bodies, composed of citizens who were often personally familiar with the facts of a given dispute, early appellate tribunals were reluctant to review jury verdicts.⁸ The judiciary would grant a new

275 Md. 50, 338 A.2d 43 (1975); *H & R Block, Inc. v. Testerman*, 275 Md. 36, 338 A.2d 48 (1975); *National Micrographics Sys. v. Oce-Indus.*, 55 Md. App. 526, 465 A.2d 862 (1983); *Aeropesca Ltd. v. Butler Aviation Int'l*, 44 Md. App. 610, 411 A.2d 1055, *cert. denied*, 287 Md. 749 (1980).

6. The earliest English punitive damages provision was the Statute of Westminster I, 3 Edw. 1 Ch. 1 (1275) (double damages for trespass against religious persons). For a discussion of the historical evolution under the Code of Hammurabi, Babylonian law, the Hebrew Code of Mosaic Law, Roman law, the Hindu Code of Manu, and ancient Greek writings, see Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2-3 (1980); Comment, *Punitive Damages in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 OHIO ST. L.J. 771, 771-72 (1981).
7. See, e.g., *Beardmore v. Carrington*, 95 Eng. Rep. 790 (K.B. 1764); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763). For a discussion of the historical development in England, see Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 213 (1977); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-20 (1957) [hereinafter cited as Note, *Exemplary Damages*]. Other commentators have advanced the theory that large jury verdicts were explained as a way to compensate the plaintiff for those damages that, at the time, were not legally compensable. MALLOR & ROBERTS, *Punitive Damages: Toward a Privileged Approach*, 31 HASTINGS L.J. 639, 643 (1980); Note, *Exemplary Damages*, *supra*, at 520 n.23.
8. See Sullivan, *supra* note 7, at 209-10 n.15; C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 6, at 24-25 (1935); Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345, 346-47 (1931); Zane, *The Attaint*, 15 MICH. L. REV. 1, 10 (1916). The earliest procedure used to review excessive jury verdicts was the writ of attaint, which involved the impaneling of 24 knights to review the case. For a thorough discussion of this procedure, see Sullivan, *supra* note 7, at 210-11; Washington, *supra*, at 346-51; Zane, *supra*, at 1-20, 127-48.

trial only when it could objectively assess the true measure of the damages.⁹ In tort actions this measure was often difficult to assess.¹⁰ Accordingly, large tort verdicts were frequently upheld as compensation for unquantifiable interests such as mental anguish or a sense of outrage engendered by the defendant's aggravated conduct.¹¹ Damages in contract, in contrast, were considered susceptible to objective assessment because they were calculated solely under the terms of the agreement.¹² Intangible damages, such as pain and suffering and emotional distress, were not recoverable in contract actions.¹³ This tort/contract distinction, which was based primarily on judicial convenience in measuring damages, foreshadowed the more sophisticated policy arguments that would later arise.

B. *Contemporary Approach—Theoretical Distinctions*

Modern courts continue to distinguish between tort and contract damages upon policy considerations. Central to the contemporary analysis are the perceived distinctions between the divergent remedial purposes of damage awards in tort and contract actions.

1. Availability of Punitive Damages in Tort Actions

Tort law bases liability on fault, and thus serves both reparative and admonitory functions.¹⁴ The reparative function serves to preserve economic stability by providing monetary compensation for losses.¹⁵

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9. *Wilford v. Berkeley*, 97 Eng. Rep. 472 (K.B. 1775); *Sharpe v. Brice*, 96 Eng. Rep. 557 (K.B. 1774). See generally *Washington*, *supra* note 8, at 363-64 (explaining the "rule of certainty").
 10. In 1763, one English court remarked: "[I]t is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763). In *Sharpe v. Brice*, 96 Eng. Rep. 557 (K.B. 1774), Chief Justice DeGray summarized the rule as follows: "[I]n torts a greater latitude [than in contract] is allowed to the jury; and damages must be excessive and outrageous to require or warrant a new trial." *Id.*; see also *Beardmore v. Carrington*, 95 Eng. Rep. 790, 792 (K.B. 1764) (emphasizing judicial reluctance to revise tort verdicts). Courts granted new trials only when it appeared that the jury had erroneously assessed the damages. See, e.g., *Bright v. Byron*, 97 Eng. Rep. 365 (K.B. 1757); *Wood v. Gunston*, 82 Eng. Rep. 867 (K.B. 1655); *Washington*, *supra* note 8, at 360.
 11. See, e.g., *Barlow v. Lowder*, 35 Ark. 492 (1880); *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814); *Tullidge v. Wade*, 95 Eng. Rep. 909 (K.B. 1769).
 12. See *Sharpe v. Brice*, 96 Eng. Rep. 557, 557 (K.B. 1774) (contract damages are a matter of "account"); *Beardmore v. Carrington*, 95 Eng. Rep. 790, 792 (K.B. 1764) (noting distinction between *assumpsit* and *trespass*).
 13. C. McCORMICK, *supra* note 8, § 145.
 14. *Morris*, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1173-76 (1931); RESTATEMENT (SECOND) OF TORTS § 901 comment c (1979); cf. C. McCORMICK, *supra* note 8, § 77, at 275-78 (discussing punitive damages as an admonitory exception to the compensatory function of damages).
 15. *Morris*, *supra* note 14, at 1173. See generally RESTATEMENT (SECOND) OF TORTS

The admonitory function discourages repetition of wrongful conduct by deterring others who are inclined to commit similar wrongs.¹⁶ Punitive damages emphasize the admonitory function, making tort judgments more effective than they would be if damages were limited to reparative compensation.¹⁷

Punitive damages are awarded in tort actions primarily to punish wrongdoers and to deter others from committing similar wrongs.¹⁸ Borrowing from the punishment-based concepts of criminal law,¹⁹ awards of punitive damages are generally aimed at the most reprehensible conduct. To identify those instances when this conduct exists, courts have formulated the malice requirement.²⁰ Absent proof that the defendant acted maliciously, a plaintiff cannot recover punitive damages.²¹

In addition to the above, the judiciary has also given other reasons for awarding punitive damages in tort actions. For example, courts may award punitive damages to protect the public interest. This policy, often referred to as the private attorney general theory,²² is premised upon the belief that punitive damages will encourage plaintiffs to bring actions against those wrongdoers who engage in serious misconduct and who might otherwise not be prosecuted.²³ Moreover, punitive damages preserve societal peace by acting as a form of vindication for the plaintiff.²⁴ This attractive judicial remedy discourages private ven-

§ 901 comment c (1979) (one of the original purposes of tort law was to encourage injured parties to resort to legal process, rather than to seek self-help).

16. Morris, *supra* note 14, at 1174.

17. *Id.* at 1187-88.

18. Embrey v. Holly, 293 Md. 128, 141, 442 A.2d 966, 973 (1982); Philadelphia, W. & B. R.R. v. Hoefflich, 62 Md. 300, 307-08 (1884). See generally Belli, *supra* note 6, at 5-7 (punitive damages justified on basis of revenge, public justice, compensation, punishment, and deterrence).

19. Indeed, the Court of Appeals of Maryland has reviewed an award of punitive damages in a tort case and held that the rules governing appellate review of criminal sentences should be applied by analogy. Embrey v. Holly, 293 Md. 128, 141-42, 442 A.2d 966, 973 (1982) (citing Logan v. State, 289 Md. 460, 480-87, 425 A.2d 632, 642-46 (1981)).

20. Rite Aid Corp. v. Lake Shore Investors, 298 Md. 611, 627, 471 A.2d 735, 743 (1984); H & R Block, Inc. v. Testerman, 275 Md. 36, 42-46, 338 A.2d 48, 52-53 (1975); Associate Discount v. Hillary, 262 Md. 570, 581-82, 278 A.2d 592, 597-98 (1971).

21. For an extensive discussion of the malice requirement, see *infra* notes 64-84 and accompanying text.

22. See Belli, *supra* note 6, at 7; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 879-80 (1976); Owen, *Punitive Damages in Product Liability Actions*, 74 MICH. L. REV. 1257, 1277-78 (1976).

23. See Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961); D. DOBBS, *supra* note 1, § 3.9, at 205; see also Morris, *supra* note 14, at 1183 (recovery of punitive damages motivates plaintiff to bring tort action when the actual injury is not great and thus serves to protect society's interest in general security).

24. Belli, *supra* note 6, at 5; Long, *supra* note 22, at 877.

geance.²⁵ Finally, punitive damages provide recourse for intangible and otherwise legally uncompensable injuries.²⁶ In these cases the injured party's actual monetary damages are minimal, but he has nevertheless suffered a wrong for which the defendant ought to be punished.²⁷

2. Prohibition of Punitive Damages in Contract

The central purpose of damages in actions for breach of contract is to place the plaintiff in the same position he would have occupied had the contract not been breached.²⁸ Consequently, punitive damages are not awarded for mere breach of contract,²⁹ regardless of the motives or conduct of the breaching party.³⁰ Several policy justifications underlie this rule.³¹ First, granting punitive damages in contract actions will introduce needless uncertainty and apprehension into commercial transactions.³² Since compensatory damages alone may adequately deter breaches of contracts,³³ they may alone support the security of business transactions. In short, imposing punitive damages may serve to

25. Belli, *supra* note 6, at 5.

26. See C. McCORMICK, *supra* note 8, § 77, at 275-78 (punitive damages serve as extra compensation for injured feelings and sense of outrage); Long, *supra* note 22, at 875-76 (noting several authorities state that punitive damages are exclusively compensatory); Owen, *supra* note 22, at 1295-99 (residual compensation).

27. Three jurisdictions expressly recognize compensation as the function of punitive damages. See *Doroszka v. Lavine*, 111 Conn. 575, 150 A. 692 (1930) (punitive damages awarded as compensation and cannot exceed amount of plaintiff's expenses of litigation less taxable costs); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922) (punitive damages may be assessed as compensation for intangible elements of a wrong); *Fay v. Parker*, 53 N.H. 342 (1873) (punitive damages awarded to compensate plaintiff for indignity and suffering caused by defendant).

28. See, e.g., A. CORBIN, *supra* note 2, § 992 at 5; D. DOBBS, *supra* note 1, § 12.1, at 786; C. McCORMICK, *supra* note 8, § 137, at 560-62; see also *Chamberlain v. Baltimore & Ohio R.R.*, 66 Md. 518, 529, 8 A. 267, 270-71 (1887) (court should endeavor to place injured party, as far as possible by monetary award, in position he would have been had the contract been performed). The compensatory award serves to restore the injured party's restitution, reliance, and expectation interests. The restitution interest is the value of the benefit the plaintiff conferred upon the breaching party; the reliance interest is the pecuniary loss the plaintiff incurred while preparing to perform the contract or accept its benefit; and the expectation interest is the profit the plaintiff would have received had the contract not been breached, i.e., the benefit of his bargain. D. DOBBS, *supra* note 1, § 12.1, at 786-88.

29. See *supra* note 2.

30. *General Motors Corp. v. Piskor*, 281 Md. 627, 638-39, 381 A.2d 16, 22 (1977); *Food Fair Stores, Inc. v. Hevey*, 275 Md. 50, 57, 338 A.2d 43, 47 (1975). See generally Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284, 286 (1959) (motive is irrelevant in a contract action).

31. For an extensive discussion of these policies, see *infra* notes 110-16 and accompanying text.

32. See *General Motors Corp. v. Piskor*, 281 Md. 627, 639, 381 A.2d 16, 22 (1977).

33. See, e.g., A. CORBIN, *supra* note 2, § 1002, at 33-34; Note, *Punitive Damages in Contract Actions—Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86, 91-92 (1980).

chill economic interaction. Second, if a party is apprehensive about the possibility of incurring punitive damages for contractual breaches, an inefficient allocation of resources may result by encouraging performance of unwise contracts.³⁴ Third, a failure to perform an obligation does not engender the type of resentment and mental distress found in most tort cases and, therefore, the sanctions imposed for these breaches need not be as severe.³⁵

The dichotomy between the availability of punitive damages in tort and contract actions may also be attributable to the nature of the duties imposed. Tort liability is based on the breach of a duty that society has imposed on its members. Liability arises from a breached duty to society as a whole. In contract, however, the nature and extent of the duty are derived from the agreement itself, which parties enter into privately.³⁶ Since a breach of contract is only a breach of a private duty to a single individual, it does not violate societal standards to the same extent as tortious conduct,³⁷ and thus the need for admonition is not as strong in contract as it is in tort.

III. TORT ARISING OUT OF CONTRACT—A UNIQUE MARYLAND HYBRID

While the tort/contract distinction functions well in a vacuum, problems arise when the two bodies of law are merged into a single lawsuit. Specifically, the act of breaching a contractual obligation can frequently give rise to a separate cause of action in tort. These hybrid cases force courts to determine whether to apply contract or tort principles. Maryland courts have attempted to resolve this problem by fashioning a complex set of rules to cover torts arising out of contracts. From their inception in 1908,³⁸ though, these rules have undergone numerous changes.

A. *Development of the Malice Standard*

Knickerbocker Ice Co. v. Gardiner Dairy Co.,³⁹ a 1908 Court of Appeals of Maryland decision, is the seminal case concerning the avail-

34. See *infra* notes 112-14 and accompanying text.

35. *General Motors Corp. v. Piskor*, 281 Md. 627, 638-39, 381 A.2d 16, 22 (1977).

36. See Sullivan, *supra* note 7, at 218-19; see also W. PROSSER, *supra* note 1, § 92, at 613 ("[C]ontract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.").

37. Sullivan, *supra* note 7, at 218-19.

38. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 A. 405 (1908); see *H & R Block, Inc. v. Testerman*, 275 Md. 36, 44-45, 338 A.2d 48, 53 (1975) (referring to *Knickerbocker Ice* as the landmark torts case arising out of contract). The *Knickerbocker Ice* court stated: "In a suit between the parties to a contract the general rule is that whether it be an action *ex contractu*, or an action of tort, founded on the breach of contract, the measure of damages is the same and under control of the court." *Knickerbocker Ice*, 107 Md. at 569, 69 A. at 410.

39. 107 Md. 556, 69 A. 405 (1908).

ability of punitive damages in torts arising out of contract. *Knickerbocker Ice* involved a claim that an ice manufacturer intentionally interfered with a contract between one of its customers and a distributor.⁴⁰ In denying the dairy's request for punitive damages, the court of appeals stated that the dairy could recover these damages only if it established that the ice manufacturer had breached the contract for the "sole purpose and with the deliberate intention of wrongfully injuring the plaintiff."⁴¹ Despite the dairy's inability to establish the requisite culpability, *Knickerbocker Ice* signaled that a cause of action existed for torts arising out of contract.

Sixty-six years later, the court of appeals again analyzed a case involving a tort arising out of contract. In the 1975 decision of *H & R Block, Inc. v. Testerman*,⁴² a married couple sought punitive damages from their tax preparer who negligently prepared an income tax return. The plaintiffs alleged that the preparer had acted in a negligent, wanton, and intentional manner. The trial court, dismissing the plaintiffs' request for punitive damages, limited the plaintiffs to the recovery of compensatory damages. Although the court of special appeals disagreed with this determination, the court of appeals ultimately affirmed the trial court.⁴³ The court of appeals found that a dismissal was appropriate because the plaintiffs had failed to establish that the tax preparer acted with "express malice," i.e., a deliberate intention to injure the plaintiffs.⁴⁴ Since the record merely revealed that the tax preparer had acted to benefit itself, the *Testerman* court determined that greed fell short of a showing of a deliberate intention to wrongfully injure the plaintiffs.⁴⁵

The *Testerman* formulation, though, failed to provide the definitive statement on the availability of punitive damages in torts arising out of contract. Indeed, one year later the court was again called upon to resolve the issue. In *Henderson v. Maryland National Bank*,⁴⁶ a purchaser of a new automobile entered into an installment sales agreement that was financed through the defendant bank. The case arose out of clerical errors that resulted in the bank sending several deficiency notices to the purchaser. Despite the purchaser's repeated efforts to inform the bank of its errors, the bank continued to assert that the loan

40. *Id.* at 558, 69 A.2d at 406. The plaintiff, a dairy, consumed large quantities of ice during the spring and summer. The ice was purchased from an intermediary who obtained the ice from the defendant ice manufacturer. When the ice manufacturer discovered the arrangement, it forced the intermediary to sever its relationship with the dairy. Subsequently, the ice manufacturer contracted to sell ice directly to the dairy at an inflated price. *Id.*

41. *Id.* at 569, 69 A. at 410.

42. 275 Md. 36, 338 A.2d 48 (1975).

43. *Testerman v. H & R Block, Inc.*, 22 Md. App. 320, 324 A.2d 145 (1974), *rev'd*, 275 Md. 36, 338 A.2d 48 (1975).

44. *Testerman*, 275 Md. at 47, 338 A.2d at 53-54.

45. *Id.* at 44, 338 A.2d at 53.

46. 278 Md. 514, 366 A.2d 1 (1976).

was in default. Following further internal blundering, and the purchaser's adamant refusal to bring all of his records to clarify the matter, the bank repossessed the purchaser's automobile.⁴⁷ The repossession was accomplished without a court order and without first notifying the purchaser of the action contemplated. The purchaser, who sued the bank for breach of contract and conversion, sought compensatory and punitive damages. After reciting the *Testerman* rule that the plaintiff must establish actual malice to recover punitive damages in a tort arising out of contract, the *Henderson* court noted that "[i]n the commercial sphere, . . . such emotions as anger or spite are not always vented in a direct manner."⁴⁸ Based on this recognition of commercial realities, the *Henderson* court permitted proof of actual malice by *inference* from the "facts and circumstances surrounding the tortious conduct."⁴⁹ Under this rule, a plaintiff could recover punitive damages through the use of circumstantial rather than direct evidence to establish actual malice on the part of the defendant. In affirming the jury's award of punitive damages against the bank, the *Henderson* court reasoned that the trier of fact could have inferred from the circumstances that the bank's decision to repossess the automobile was influenced by anger and a desire to punish the purchaser for his refusal to produce his records.⁵⁰

B. *The Scope of the Doctrine*

Once the court of appeals formulated the malice standard, it began to define the scope of the rules governing torts arising out of contracts. In a series of decisions, the court of appeals sought to define exactly when a tort arose out of contract. Under the *Testerman* standard, if the tort arose independently of the contract, a plaintiff would have to show implied malice⁵¹ to recover punitive damages. By contrast, if the tort arose out of the contract, the plaintiff would have to establish actual malice to recover punitive damages.

The court first analyzed this distinction in *Wedeman v. City Chevrolet Co.*⁵² In *Wedeman*, a purchaser bought an automobile that the seller had represented as never having been involved in an accident. When he later discovered the falsity of the seller's assertion, the purchaser brought an action for fraud. Based upon these facts, a jury awarded the purchaser punitive damages. The Court of Special Ap-

47. *Id.* at 515-17, 366 A.2d at 2-3.

48. *Id.* at 520, 366 A.2d at 4.

49. *Id.* at 520-23, 366 A.2d at 4-6.

50. *Id.*

51. Implied malice requires a showing of extreme recklessness or a callous disregard of the plaintiff's rights. *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731 (1972); *Conklin v. Schillinger*, 255 Md. 50, 71, 257 A.2d 187, 198 (1969). For a further discussion of the implied malice standard, see *infra* text accompanying notes 64-69.

52. 278 Md. 524, 366 A.2d 7 (1976).

peals of Maryland set aside the punitive damages verdict because the purchaser had failed to establish actual malice.⁵³ In a unanimous decision, the court of appeals reversed, holding that the case did not involve a tort arising out of contract.⁵⁴ Instead, the court analyzed all the cases upon which the *Testerman* court had relied⁵⁵ and concluded that all the cases "had in common one salient fact: the contractual relationship preexisted the tortious conduct."⁵⁶ Since the fraudulent representations had merely induced the contract, the *Wedeman* court found that the tort had arisen outside the boundaries of the sales agreement.⁵⁷ As a result, the court reinstated a jury verdict that was based on an implied malice instruction because the purchaser was not required to show actual malice.

In *General Motors Corp. v. Piskor*,⁵⁸ the court of appeals held that an employer's unlawful detention of an employee suspected of theft did not arise out of an employment contract. Although it cited various reasons, the *Piskor* court placed heavy reliance on what it termed a "collateral" connection between the tortious acts and the breach of the employment contract.⁵⁹ In articulating a "but for" test to govern the nature of this nexus, the court stated, "the tortious conduct and the contract [must be] so intertwined that one could not be viewed in isolation of the other."⁶⁰ Holding that this nexus requirement had not been met, the court held that the defendant's tortious acts had arisen outside of the contractual relationship. Accordingly, the trial court's use of an implied malice jury instruction was affirmed by the court of appeals.

IV. THE CONTOURS OF THE DOCTRINE

Using *Testerman*, *Henderson*, *Wedeman*, and *Piskor* as a basis, Maryland's courts have provided some guidance in determining when a tort arises out of contract and in measuring the appropriate level of malice. In general, three basic elements comprise a claim for punitive damages in actions involving torts arising out of contracts: (1) actual

53. *Wedeman v. City Chevrolet Co.*, 30 Md. App. 637, 643, 354 A.2d 185, 189, *rev'd*, 278 Md. 524, 366 A.2d 7 (1976).

54. *Wedeman*, 278 Md. at 553, 366 A.2d at 13.

55. *See, e.g.*, *Siegman v. Equitable Trust Co.*, 267 Md. 309, 297 A.2d 758 (1972) (conversion of checking account funds); *St. Paul at Chase Corp. v. Manufacturers Life Ins.*, 262 Md. 192, 278 A.2d 12 (breach of contract and negligent performance of contractual obligation), *cert. denied*, 404 U.S. 857 (1971); *Damazo v. Wahby*, 259 Md. 627, 270 A.2d 814 (1970) (tortious interference with contract); *Rinaldi v. Tana*, 252 Md. 544, 250 A.2d 533 (1969) (*per curiam*) (tortious interference with contract); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 569-70, 69 A. 405, 410 (1908) (tortious interference with contract).

56. *Wedeman*, 278 Md. at 529, 366 A.2d at 11.

57. *Id.*

58. 281 Md. 627, 381 A.2d 16 (1977).

59. *Id.* at 637-40, 381 A.2d at 21-22. For a discussion of these reasons, see *infra* notes 96-103 and accompanying text.

60. *Piskor*, 281 Md. at 637, 381 A.2d at 21.

malice; (2) a contract that precedes the tort; and (3) a nexus between the contract and the alleged tort. When the latter two elements are present, the first becomes applicable. One commentator would add the additional element of establishing that the contractual breach gave rise to a separate tort claim.⁶¹ Since punitive damages are never recoverable in pure contract actions,⁶² by definition the plaintiff must allege a separate cause of action in tort.⁶³

A. *Actual Malice: An Element and an Objective*

Nearly all torts arising out of contract disputes involve the level of malice the plaintiff must show to recover punitive damages. The two major categories of malice are actual malice and implied malice. The *Henderson* court may have added a third category — inferred actual malice. It is crucial to distinguish between these three categories because, without actual malice or inferred actual malice, a plaintiff cannot recover punitive damages in a case involving a tort arising out of contract.

In an ordinary tort action, the plaintiff can recover punitive damages upon proof that the defendant's conduct was motivated by either actual malice or implied malice.⁶⁴ Actual malice is "the performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but with an evil or rancorous motive influenced by hate; the purpose being to deliberately and wilfully injure the plaintiff."⁶⁵ Implied malice, a lesser standard, requires a showing of extreme recklessness or a callous disregard for the plaintiff's rights.⁶⁶ This distinction is crucial in cases involving torts arising out of contract because the plaintiff must shoulder the onerous burden of proving actual malice.⁶⁷ If the

61. McCadden, *Punitive Damages in Tort Cases in Maryland*, 6 U. BALT. L. REV. 203, 217 (1977).

62. See *supra* note 2.

63. See RESTATEMENT (SECOND) OF CONTRACTS § 355, at 154 (1981) (to obtain punitive damages in a contract action, the factual allegations must give rise to a cause of action in tort).

64. See, e.g., *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731 (1972) (wrongful death action attributable to driving while intoxicated); *Siegman v. Equitable Trust Co.*, 267 Md. 309, 316, 297 A.2d 758, 762 (1972) (conversion/wrongful dishonor); *D.C. Transit Sys. v. Brooks*, 264 Md. 578, 583-84, 287 A.2d 251, 254 (1972) (false imprisonment); *Drug Fair v. Smith*, 263 Md. 341, 351-52, 283 A.2d 392, 398 (1971) (false imprisonment/assault); *Associates Discount v. Hillary*, 262 Md. 570, 582, 278 A.2d 592, 598 (1971) (trespass); *American Laundry Mach. v. Horan*, 45 Md. App. 97, 115-16, 412 A.2d 407, 416 (1980) (products liability); *GAI Audio of N.Y. v. CBS*, 27 Md. App. 172, 203-04, 340 A.2d 736, 754-55 (1975) (unfair competition).

65. *Drug Fair v. Smith*, 263 Md. 341, 352, 283 A.2d 392, 398 (1971).

66. *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 168, 297 A.2d 721, 731 (1972); *Conklin v. Schillinger*, 255 Md. 50, 71, 257 A.2d 187, 198 (1969).

67. In a candid remark, the court of special appeals has referred to the actual malice standard as an "insurmountable roadblock." *Aeropesca Ltd. v. Butler Aviation Int'l*, 44 Md. App. 610, 626, 411 A.2d 1055, 1064, *cert. denied*, 287 Md. 749 (1980).

record lacks evidence of hate or spite,⁶⁸ a plaintiff will not be entitled to punitive damages as a matter of law.⁶⁹ For that reason alone, the burden may sometimes be insurmountable.

Actual malice is difficult to show because many cases involving torts arising out of contracts have developed in commercial settings.⁷⁰ First, while greed and a desire to profit at the plaintiff's expense are sufficient to establish implied malice, this conduct does not rise to the level of actual malice.⁷¹ Thus, for example, the desire to secure a more favorable contractual arrangement or a fraudulent representation concerning the value of an automobile does not rise to the level of actual malice.

Second, actual malice is established only when there is evidence of conduct that is inspired solely by a malignant desire to injure another wrongfully. Of course, parties to commercial dealings seldom articulate or record their animosity toward others.⁷² The court of appeals, though, has recognized these evidentiary problems. For example, the *Henderson* court permitted the plaintiff to establish actual malice by circumstantial evidence, stating that in a commercial setting a court

68. On appeal, some evidence of animosity must appear in the record. *See, e.g.*, *McClung-Logan v. Thomas*, 259 Md. 136, 149, 172 A.2d 494, 500-01 (1961) (evidence that the plaintiff's numerous complaints provoked a wrongful seizure of his tractor); *Rinaldi v. Tana*, 252 Md. 544, 250 A.2d 533 (1969) (*per curiam*) (evidence of intra-family animosity), *explained in Damazo v. Wahby*, 259 Md. 627, 639, 270 A.2d 814, 819-20 (1970); *see also Summit Loans, Inc. v. Pecola*, 265 Md. 43, 52, 288 A.2d 114, 118 (1972) (invasion of privacy charged against a collection company that engaged in persistent harassment and used vile and vicious language).
69. While motive is ordinarily a question for the jury, *e.g.*, *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 533, 366 A.2d 7, 13 (1976); *Staub v. Staub*, 37 Md. App. 141, 147, 376 A.2d 1129, 1134 (1977), when evidence of animosity is completely lacking, courts have prohibited punitive damages. *See Vancherie v. Siperly*, 243 Md. 366, 373-74, 221 A.2d 356, 360 (1966) (jury will not be allowed to speculate about malice when there is no ground to support this claim); *see, e.g.*, *Damazo v. Wahby*, 259 Md. 627, 638-39, 270 A.2d 814, 819 (1970) (upheld trial court's denial of punitive damages since no animosity appeared in the record); *Aeropesca Ltd. v. Butler Aviation Int'l*, 44 Md. App. 610, 626, 411 A.2d 1055, 1064-65 (no evidence of evil motive or animosity), *cert. denied*, 287 Md. 749 (1980).
70. *See, e.g.*, *Food Fair Stores, Inc. v. Hevey*, 275 Md. 50, 338 A.2d 43 (1975) (conversion arising out of a dispute over compensation due under an incentive bonus and retirement plan); *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co.*, 262 Md. 192, 278 A.2d 12 (construction financing), *cert. denied*, 404 U.S. 857 (1971); *Aeropesca Ltd. v. Butler Aviation Int'l*, 44 Md. App. 610, 411 A.2d 1055 (contract to repair a commercial aircraft), *cert. denied*, 287 Md. 749 (1980).
71. *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co.*, 262 Md. 192, 239, 278 A.2d 12, 34-35, *cert. denied*, 404 U.S. 857 (1971); *Damazo v. Wahby*, 259 Md. 627, 639, 270 A.2d 814, 819 (1970); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 569, 69 A. 405, 410 (1908); *National Micrographics Sys. v. Oce-Indus.*, 55 Md. App. 526, 545, 465 A.2d 862, 873 (1983); *Aeropesca Ltd. v. Butler Aviation Int'l*, 44 Md. App. 610, 627, 411 A.2d 1055, 1065, *cert. denied*, 287 Md. 749 (1980).
72. *Testerman v. H & R Block, Inc.*, 22 Md. App. 320, 340, 324 A.2d 145, 156 (1974) (citing *Geyser v. Holberg*, 185 Md. 642, 653, 45 A.2d 735, 737 (1945)), *rev'd on other grounds*, 275 Md. 36, 338 A.2d 48 (1975).

may infer actual malice.⁷³ This approach blurs the distinction between actual and implied malice and widens the scope of the evidence a jury may consider in finding the existence of malice.

Third, Maryland courts have recognized that the exercise of good faith business judgment negates malice.⁷⁴ On several occasions, defendants who would have been subject to punitive damages were able to escape liability by showing an "honest assertion of a known right."⁷⁵ In *Lawrence v. Graham*,⁷⁶ for instance, a defendant was able to defeat efforts to show actual malice by demonstrating that he had acted under an "honest but mistaken assertion of right when he had repossessed the plaintiff's car."⁷⁷ Similarly, in *Caruso v. Republic Insurance Co.*,⁷⁸ an insurer failed to pay a claim on fire-damaged property. The insurer, however, avoided punitive damages because the court found a colorable defense to the insured's claim,⁷⁹ which was an "absolute defense" to a finding of bad faith.⁸⁰ This preclusive rule permits all but the glaringly reckless defendants to avoid punitive damages. The holding in *Henderson* warns these individuals that the trier of fact may infer actual malice from an erroneous claim of right based upon unexplained blunders.⁸¹

In light of these considerations and in an effort to put the plaintiff to the higher standard of proof, defendants argue that the tort is one that arises out of contract. Conversely, plaintiffs who wish to avail themselves of the less rigorous implied malice standard contend that the wrongful conduct amounts to an independent tort.

B. *A Contract Preexists the Tort*

It is essential that the contract preexist the tort. Despite its seeming simplicity, this criterion may pose several problems. In obvious

73. *Henderson v. Maryland Nat'l Bank*, 278 Md. 514, 523, 366 A.2d 1, 6 (1976). For a discussion of *Henderson*, see *supra* text accompanying notes 46-50; see also *Stouffer v. Alford*, 114 Md. 110, 119, 78 A. 387, 390-91 (1910) (plaintiff may use circumstantial evidence to establish motive with which a party entered into a particular transaction).

74. See *Food Fair Stores, Inc. v. Hevey*, 275 Md. 50, 56, 338 A.2d 43, 47 (1975) (rational business judgment).

75. *Id.*; see *Siegman v. Equitable Trust Co.*, 267 Md. 309, 314, 297 A.2d 758, 761 (1972); *Heize v. Murphy*, 180 Md. 423, 430, 24 A.2d 917, 921 (1942); *Philadelphia W. & B. R.R. v. Hoeflich*, 62 Md. 300, 307 (1884).

76. 29 Md. App. 422, 349 A.2d 271 (1975).

77. *Id.* at 429, 349 A.2d at 275.

78. 558 F. Supp. 430 (D. Md. 1983).

79. *Id.* at 436.

80. *Id.*

81. See *supra* notes 46-50 and accompanying text; see also *Berkey v. Delia*, 287 Md. 302, 324-26, 413 A.2d 170, 180-81 (1980) (issue of actual malice inappropriate for summary judgment because it involves motive and feeling). *But see* *Wesko v. G.E.M., Inc.*, 272 Md. 192, 199, 321 A.2d 529, 533 (1974) (evidence of improper motive rebutted by a showing that "the whole affair was very obviously . . . a goof").

cases, such as in *Wedeman*,⁸² it is relatively easy to determine whether the fraud occurred before, and thus induced, the formation of the sales agreement. In contrast, this finding may not be so easily reached when the parties have an ongoing contractual relationship in which new agreements are continuously forged. For example, in *National Micrographics Systems v. Oce-Industries*,⁸³ the court of special appeals resolved this issue by finding an independent cause of action in tort. The court, citing *Wedeman*, reasoned that even though the parties had a prior ongoing contractual relationship, the fraudulent representations were attributable solely to the formation of new and separate contracts.⁸⁴ The *National Micrographics* holding makes clear that a party who contracts with another on a continuing basis risks greater exposure to punitive damages.

C. *The Scope of the Doctrine: Breach and Nexus*

Perhaps the most difficult aspect of this concept is determining when culpable conduct amounts to a tort arising out of contract. This determination is crucial because it controls the standard of malice that the plaintiff must meet. If a tort is deemed to have arisen out of a contract, the plaintiff must establish that actual malice motivated the defendant's conduct. Two central concepts have emerged from the judicial discussions of when a tort arises out of a contract. First, the nature of the plaintiff's complaint is critical. If the court characterizes the defendant's tortious acts as a breach of contract, it is likely that it will be considered a tort arising out of contract. Second, once a breach is established, the plaintiff must establish a proper nexus between the breach and the underlying agreement.

1. The Breach

The label affixed to the plaintiff's tort/contract cause of action may control whether the tort arose out of contract.⁸⁵ The most significant example is the manner in which the courts have distinguished between the availability of punitive damages in products liability suits and warranty claims. Since products liability is considered an action in tort,

82. *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 366 A.2d 7 (1976); *see also* *Thomas v. Ford Motor Credit Co.*, 48 Md. App. 617, 429 A.2d 277 (1981) (applying *Wedeman* to nearly identical facts).

83. 55 Md. App. 526, 465 A.2d 862 (1983).

84. *Id.* at 543-44, 465 A.2d at 862, 872-73 (citing *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 366 A.2d 7 (1976)).

85. *E.g.*, *General Motors Corp. v. Piskor*, 281 Md. 627, 639, 381 A.2d 16, 22-23 (1977) (false imprisonment and assault were deemed to have arisen separately from the contract because they were "torts in the purest sense of the term"); *Siegman v. Equitable Trust Co.*, 267 Md. 309, 313, 297 A.2d 758, 760 (1972) (rejecting argument that case arose out of a breach of contract because the "appellants . . . have . . . brought this suit in tort for conversion and wrongful dishonor.").

courts have applied the implied malice standard.⁸⁶ Conversely, because warranty violations are regarded as actions in contract, a plaintiff must satisfy the actual malice standard.⁸⁷

In addition to the contract/tort distinction, the court of special appeals has also relied upon contractual privity to justify the warranty/products liability dichotomy. In *American Laundry Machines v. Horan*,⁸⁸ the court cited the absence of privity in products liability suits as a justification for allowing plaintiffs to proceed under the less rigorous implied malice standard.⁸⁹ This reasoning, however, is difficult to understand in view of the General Assembly's abrogation of the privity requirement in warranty actions.⁹⁰ Either *American Laundry* fashioned a new privity rule to justify its distinction between warranty and products liability actions for purposes of deciding the availability of punitive damages, or its decision is limited to transactions that do not fall within Maryland's version of the Uniform Commercial Code. If the latter is correct, it is difficult to imagine a transaction that could give rise to a products liability claim without falling within the state's broadly termed warranty scheme.⁹¹

Another example of the important role that classifying a cause of

86. *Harley-Davidson v. Wisniewski*, 50 Md. App. 339, 437 A.2d 700 (1981), cert. denied, 292 Md. 596 (1982); *American Laundry Mach. v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980). See generally Owen, *supra* note 22, at 1257 (analyzing reasons for awarding punitive damages).

87. *Saval v. B.L. Ltd.*, 710 F.2d 1027, 1034 (4th Cir. 1983) (applying Maryland law); *Thomas v. Ford Motor Credit Co.*, 48 Md. App. 617, 627 n.6, 429 A.2d 277, 284 n.6 (1981); *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 475, 378 A.2d 1, 4 (1977). The *Sims* court reasoned that, since MD. COM. LAW CODE ANN. §§ 2-714 to -715 (1975) only provide for incidental and consequential damages, punitive damages would be inappropriate. *Sims*, 37 Md. App. at 475, 378 A.2d at 4. But see *Siegmán v. Equitable Trust Co.*, 267 Md. 309, 315 n.3, 297 A.2d 758, 761 n.3 (1972) (punitive damages allowed even though they were not authorized by MD. COM. LAW CODE ANN. § 4-402 (1975)).

88. 45 Md. App. 97, 412 A.2d 407 (1980).

89. The *American Laundry* court reasoned that:

the underlying contention in these cases is that a defective product capable (or likely) of producing injury was placed on the market; and that process of marketing normally involves a contract of some sort. In a very real sense, therefore, a product liability action is one that arises out of a contractual relationship. But it is not, in this case at least, a contractual relationship to which the plaintiff-appellees were parties. The tort here did not arise from any contract entered into by Horan and Jessop.

Id. at 116, 412 A.2d at 418-19.

90. MD. COM. LAW CODE ANN. § 2-314(1)(a)-(b) (1975) states: (a) "In §§ 2-314 through 2-318 of this title, 'seller' includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer; and (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer." Privity considerations are presently limited to situations when the plaintiff is a non-purchasing third party. *Id.* § 2-318.

91. Not only is the privity requirement abolished in warranty suits, *id.* § 2-314, but Maryland law prohibits disclaimers of implied warranties for consumer goods. *Id.* § 2-316.1 (Supp. 1983); see also *id.* § 2-314(4) (includes transactions in leasehold goods under the warranty scheme). See generally *Anthony Pools, Inc. v.*

action may have is contained in *General Motors Corp. v. Piskor*.⁹² The *Piskor* court stated that false imprisonment and assault, the tortious acts alleged in the plaintiff's complaint, were "torts in the purest sense of that term."⁹³ This concept, though, is ambiguous because the court of appeals has yet to draw a distinction between pure and impure torts. It is not the intentional nature of the acts that is determinative because conversion, which often is a tort arising out of contract,⁹⁴ is also an intentional tort. Rather, the *Piskor* court most likely looked to the malicious nature of the torts and viewed them as inherently more culpable.⁹⁵ Using a malice component to define the scope of torts arising out of contract, however, can only generate further confusion as advocates must somehow cull pure torts from impure torts.

The foregoing makes clear that the characterization of a cause of action can be decisive. If the plaintiff alleges claims that are essentially tort actions, he will most likely be allowed to proceed under an implied malice standard. By contrast, if he chooses to plead a contract or warranty claim, it is likely that he will have to surmount the actual malice requirement to be entitled to punitive damages.

2. The Nexus

Once a court determines that culpable conduct causes a breach of the agreement, there must be a simultaneous finding that the claimed tortious conduct arose "directly from performance or breach of the contract."⁹⁶ This nexus requirement, however, is irreconcilable with the decision that articulated it.

In *General Motors Corp. v. Piskor*,⁹⁷ an employee brought assault

Sheehan, 295 Md. 285, 455 A.2d 434 (1983) (broadly construing the warranty provisions in hybrid transactions involving sales of goods and services).

92. 281 Md. 627, 381 A.2d 16 (1977).

93. *Id.* at 639, 381 A.2d at 22.

94. *See, e.g.*, *Henderson v. Maryland Nat'l Bank*, 278 Md. 514, 366 A.2d 1 (1976); *Food Fair Stores, Inc. v. Hevey*, 275 Md. 50, 338 A.2d 43 (1975).

95. The *Piskor* court noted that actual malice had not been considered a prerequisite to recovery of punitive damages in any of its recent decisions involving false imprisonment or assault. *Piskor*, 281 Md. at 637-38, 381 A.2d at 21-22. None of the cases listed in support of this proposition, however, discussed the tort arising out of contract issue. *Montgomery Ward & Co. v. Cliser*, 267 Md. 406, 419-21, 298 A.2d 16, 24-25 (1972) (assault and false imprisonment of store patron; "wanton" conduct included in definition of malice); *D.C. Transit Sys. v. Brooks*, 264 Md. 578, 583-85, 287 A.2d 251, 254-55 (1972) (false imprisonment and malicious prosecution of bus passenger; actual malice not required when defendant "breached the contract for safe carriage by unlawfully depriving [plaintiff] of his liberty"); *Vancherie v. Siperly*, 243 Md. 366, 373-74, 221 A.2d 356, 360 (1966) (dictum) (assault and battery of restaurant customer; punitive damages justified when injury was "wantonly inflicted"); *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 617, 56 A.2d 813, 817 (1948) (false imprisonment of street car passenger; punitive damages recoverable on proof of "at least . . . reckless disregard of the rights of the person injured").

96. *General Motors Corp. v. Piskor*, 281 Md. 627, 637, 381 A.2d 16, 21 (1977).

97. 281 Md. 627, 381 A.2d 16 (1977).

and false imprisonment claims against his employer after he had been detained by company security guards and accused of stealing company property. The court assumed that an employment contract, together with collective bargaining agreements and company policies, was applicable to the accosting suffered by the plaintiff.⁹⁸ Rather than recognizing what appeared to be a tort that had arisen out of the various agreements, the *Piskor* court held that the tortious conduct was merely "collateral" to the underlying contract.⁹⁹ Because of this indirect relationship, the court indicated that the plaintiff would only have to show implied malice to recover punitive damages from his former employer.

Piskor creates uncertainty because it failed to explain why a tort arising out of an employment agreement should be treated differently from incidents involving carelessly prepared tax returns or converted automobiles. One plausible explanation is that the court recognized that the doctrine is inapplicable when the potential class of defendants extends beyond the parties to the agreement. This conclusion is buttressed by the *Piskor* court's reliance upon *Montgomery Ward & Co. v. Keulemans*.¹⁰⁰ *Keulemans* involved a stock manager who was falsely accused of shoplifting while shopping in his employer's store. The court of appeals, without alluding to whether the tort had arisen out of a contract,¹⁰¹ allowed the plaintiff to proceed under an implied malice standard. The *Piskor* court viewed the decision as support for its finding that the nexus requirement was lacking.¹⁰² Under the above explanation, one can presume that the nexus was lacking because anyone could have been subjected to the same unlawful detention; the contractual relationship did not create a set of protections that were unique to the employment relationship. Factually, *Piskor* is difficult to reconcile with this theory because the plaintiff was accosted in an automobile plant, an area where only employees were allowed. The court of appeals, however, has yet to give the precise meaning of *Piskor*.¹⁰³

D. Practical Considerations

The interrelationship between the laws governing the availability of punitive damages in torts, contracts, and torts arising out of contracts is subtle and often elusive. Successful recovery of—or defense

98. *Id.* at 634-35, 381 A.2d at 20.

99. *Id.* at 639, 381 A.2d at 23.

100. 275 Md. 441, 340 A.2d 705 (1975).

101. The *Keulemans* court had to decide whether a jury could award punitive damages when a store security guard lacked probable cause to detain the employee. In sustaining an award of punitive damages, the court applied an implied malice standard without ever considering whether the tort had arisen out of the contractual relationship between the parties. *Id.* at 448-49, 340 A.2d at 709-10.

102. *Piskor*, 281 Md. at 638-39, 381 A.2d at 22.

103. See *R.E. Linder Steel Erection Co. v. Wedemeyer, Cernick, Corrubia, Inc.*, No. 82-2836 (D. Md. Apr. 30, 1984) (conduct pertaining to collapse of a wall held "intertwined" to contract so that actual malice standard applies).

against—an award of punitive damages depends upon the ability of the litigants to master this interrelationship. The divergent positions advanced by the plaintiff and defendant illustrates how litigants should approach this task.

Generally, the plaintiff will urge that the tort did not arise out of a contract. In making this argument, the plaintiff must first determine whether the tortious conduct can be separated from the contractual relationship so that the conduct will be perceived as a tort that arose independently of the contract. The most common example is when the tort preceded the contract.¹⁰⁴ Provided the plaintiff can separate the tort from the contract, he may seek punitive damages under the less stringent implied malice standard. If, however, the tortious conduct has its source in the contract, the plaintiff will be required to establish actual malice. Although actual malice is difficult to prove, *Henderson* indicates that actual malice can be inferred in cases involving commercial relationships.¹⁰⁵

Defendants, by contrast, should contend that their alleged wrongdoing amounts to a tort arising out of contract. Defendants must show that the tortious conduct is so intertwined with the breached agreement that, but for the contract, the plaintiff would have no cause of action in tort. Provided the defendant is successful in this argument, the court will apply the stringent actual malice standard. Efforts to rely upon *Henderson* to temper the actual malice requirement should be rebuffed by a limited reading of the case. Only when the defendant's acts are so glaringly reckless as to defy any suggestion of proper motives should the trier of fact be permitted to infer actual malice. Moreover, any jury instruction involving inferred actual malice should direct that the trier of fact must infer animosity or hatred, not merely disorganized procedures, communication breakdowns, or reckless blundering.¹⁰⁶

The divergent nature of these strategies can best be illustrated by examining their interaction in an actual case, *Weston International v. Woodlawn Supermarkets*.¹⁰⁷ This case involved a cause of action that could have been characterized as a breach of contract, a tort, or a tort arising out of contract. The case arose out of a dispute over whether an agreement to obtain refrigeration equipment was a lease or a sale. The plaintiff-lessee contended that the agreement was a contract to sell the equipment, with the purchase price to be paid in eighteen installments over a four-year period. Under this theory, the plaintiff could recover the amount of a nineteenth payment that he had mistakenly tendered

104. See *supra* notes 82-84 and accompanying text.

105. See *supra* notes 46-48 and accompanying text.

106. See *supra* notes 64-81 and accompanying text.

107. No. 12556, fol. 954, docket 1977, Superior Court of Baltimore City [now the Circuit Court for Baltimore City], *appeal dismissed* 44 Md. App. 390, 408 A.2d 781 (1979). The facts have been gleaned from the appellate briefs of the respective parties.

to the defendant. The defendant responded that the agreement was a lease and therefore the nineteenth payment would not be reimbursed unless the equipment was returned.

Since the plaintiff alleged alternative claims for breach of contract and for conversion, the case could have been decided one of three ways. First, the court could have found that the action was solely for breach of contract. Under this finding, the plaintiff would have been denied access to punitive damages. Second, the court could have held that the tort arose out of the contract. This finding would have entitled the plaintiff to an instruction on punitive damages, albeit based on the actual malice standard. Third, the court could have adopted the plaintiff's argument that the tort, alleged conversion, arose independently of the contract. The tort occurred after the contract terminated and represented nothing more than an effort to withhold funds that the defendant had no contractual right to retain. The plaintiff ultimately recovered punitive damages under this theory.¹⁰⁸

V. ANALYSIS: TOWARD A MORE APPROPRIATE STANDARD

After considering for the past decade the standard for recovering punitive damages in torts arising out of contracts, Maryland's courts have yet to fashion a workable set of rules. Based on the complexity of the subject matter and the rationale for awarding punitive damages,¹⁰⁹ courts should adopt a more uniform standard that would apply equally to "pure" torts and torts arising out of contract. This standard would dispense with the necessity for deciding whether a tort arises out of contract by replacing the existing rules with a punitive damages standard that would apply equally to tort and contract actions.

A. *Problems with the Traditional Justifications for Prohibiting Punitive Damages in Contract Actions*

The contemporary debate on the availability of punitive damages in contract actions deals primarily with economic considerations. Those in favor of maintaining the current rule prohibiting the recovery of punitive damages in contract actions contend that the spectre of punitive damages will have a chilling effect on commercial transac-

108. The trial court actually instructed the jury that it could award punitive damages based on either actual or implied malice, thus apparently concluding that the plaintiff had established conversion and that the tort did not arise out of the contract because the tort was committed after the expiration of the contract. The defendant appealed and the court of special appeals dismissed the appeal on procedural grounds. The court remarked, however, that it would have affirmed the trial court on the merits. The jury had returned a verdict for the plaintiffs for compensatory and punitive damages. *Weston Int'l v. Woodlawn Supermarkets*, 44 Md. App. 390, 408 A.2d 781 (1979).

109. *See supra* notes 14-27 and accompanying text.

tions.¹¹⁰ These proponents argue that would-be contracting parties will be reluctant to enter into agreements that might ultimately result in unlimited liability.¹¹¹

Furthermore, the *Restatement (Second) of Contracts* posits that contract-related punitive damages would restrain persons who were already parties to an agreement from breaching agreements to pursue more profitable and economically efficient ventures.¹¹² To understand the societal interest in promoting profitable breaches, it is necessary to examine the efficient breach theory. This theory is based upon the premise that it is economically desirable to have resources devoted to their most profitable uses.¹¹³ To this end, limited contractual liability permits parties to remove themselves from one commercial relationship if they have found a more profitable market for their products.¹¹⁴

The traditional notion that contract damages should protect the nonbreaching party's expectation¹¹⁵ interest is consistent with the efficient breach theory. Ideally, a party to an unprofitable bargain can compensate the other parties and be free to pursue more profitable ventures.¹¹⁶ When commercial transactions function efficiently, consumers avoid subsidizing what are essentially bad bargains. Although efficient

110. See *General Motors Corp. v. Piskor*, 281 Md. 627, 638-39, 381 A.2d 16, 22 (1977).

111. See *id.*; K. REDDEN, PUNITIVE DAMAGES § 2.5, at 41 (1980); Note, *supra* note 33, at 91-92. The theory is premised upon the risks anticipated by a prospective contracting party. While the likelihood of an accidental breach or erroneous belief about the scope of the contractual obligation are always possible, the prospect of incurring unlimited liability is not. C. McCORMICK, *supra* note 8, § 81, at 291. It is the added risk that would produce "disasterous uncertainty." *Id.* § 81, at 289 n.41.

112. RESTATEMENT (SECOND) OF CONTRACTS introductory note at 100, reporter's note at 101 (1981).

113. The theory is predicated upon the belief that resources will be more efficiently allocated if a party can fully compensate the nonbreaching party and still make a profit by breaching. E. FARNSWORTH, CONTRACTS § 12.3 (1983); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977); Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 114 (1981). See generally Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEG. STUD. 277 (1972) (discussing the economics of breach theory); Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970) (general discussion of the theory).

114. Principles of economic efficiency function especially well in commercial transactions because the nonbreaching party is usually interested in securing his financial benefit. Once his expectation interest is compensated, he will not be concerned that the breaching party has failed to adhere to the terms of the bargain. Linzer, *supra* note 113, at 115-16.

115. *Pennsylvania Thresherman & Farmers' Mut. Casualty Ins. Co. v. Messenger*, 181 Md. 295, 301-02, 29 A.2d 653, 655-56 (1943); *Abott v. Gatch*, 13 Md. 314, 332-33 (1859); *Dialist Co. v. Pulford*, 42 Md. App. 173, 179, 399 A.2d 1374, 1379 (1979). The expectation interest is defined as the contemplated profit at the time of contracting. E. FARNSWORTH, *supra* note 113, at 812-13.

116. This assumes of course that the substitute contract is more profitable after compensatory damages have been paid. See *supra* note 113.

breach arguments frequently arise in situations involving specific performance,¹¹⁷ these arguments apply as well to claims for punitive damages.¹¹⁸ A fear of incurring liability beyond the expectation interest, it is argued, would destroy the economic incentive to search for more profitable ventures.¹¹⁹ As a result, parties would continue to perform inefficient agreements with the resulting unnecessary costs being borne by the consumer.

These theories, however, rest on the mistaken assumption that punitive damages will be available in all contract actions. No authority has yet taken this extreme position.¹²⁰ Rather, the availability of punitive damages is only urged when there is evidence that the defendant has acted maliciously.¹²¹ The malice requirement, common to all other actions,¹²² would not be eliminated; instead, only the dichotomy between the availability of punitive damages in tort and tort arising out of contract actions would be abolished. Only malicious conduct would be deterred, not the commercial freedom to escape disadvantageous relationships.¹²³ In sum, the societal interest in promoting freely escapable contracts is tempered only by the competing interest of discouraging conduct that amounts to a willful disregard for the rights of others.

Equally unpersuasive is the contention that parties will not contract for fear of being exposed to punitive damages. This contention fails to consider that Maryland has already expanded the scope of liability that can arise from commercial agreements.¹²⁴ First, in the area of products liability, courts have allowed recovery of punitive damages upon the less stringent implied malice standard.¹²⁵ Second, Maryland

117. See, e.g., Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 369-76 (1978); Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 274-78 (1979).

118. E. FARNSWORTH, *supra* note 113, at 818-19.

119. For example, one commentator contends that even a liquidated damages clause would deprive the breaching party of any excess profit that he might make by securing a more profitable deal. Linzer, *supra* note 113, at 562.

120. Cf. Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L. REV. 187, 206 (1982) (punitive damages should be available to those who can establish bad faith coupled with overreaching).

121. Sullivan, *supra* note 7, at 207. For example, the *Restatement* requires that all torts arising out of contracts must meet the malice standard that would apply in a non-contract tort case. RESTATEMENT (SECOND) OF CONTRACTS § 355, at 155 comment b (1981) (citing the malice standard that appears at RESTATEMENT (SECOND) OF TORTS § 908, at 464 (1979)).

122. See *supra* note 64.

123. Either actual or implied malice would apply. For an explanation of the application of the different malice standards, see *supra* notes 64-81 and accompanying text.

124. Some torts that arise in commercial contexts have been recognized as pure torts that require a finding of only implied malice to award punitive damages. See, e.g., *Carter Products, Inc. v. Colgate-Palmolive*, 214 F. Supp. 383, 412-14 (D. Md. 1963) (unfair competition); *GAI Audio, Inc. v. CBS*, 27 Md. App. 172, 201-06, 340 A.2d 736, 753-56 (1975) (misappropriation of trade secrets).

125. Although Maryland has adopted strict liability for manufacturing defects, courts thus far have been unwilling to allow punitive damages in cases involving strict liability. See *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692, 705 (D. Md.

courts have allowed the recovery of reliance damages when the non-breaching party's expectation interest cannot be calculated with the requisite degree of certainty.¹²⁶ Although these damages are a well recognized alternative to expectation damages,¹²⁷ they can result in a verdict that greatly exceeds the expectation interest. For example, in *Wartzman v. Hightower Productions, Ltd.*,¹²⁸ a plaintiff was permitted to recover all its start-up costs from an attorney who had defectively incorporated its venture.¹²⁹ These costs were substantially in excess of the bargain entered into between the attorney and his client. Consequently, those who contract in situations where the expectation interest is highly speculative risk having to pay the nonbreaching party's expenses, regardless of amount or what the contemplated benefit of the bargain might have been. Despite this liberal development, there has been no significant disruption of the state's economy.¹³⁰

1981) (citing four unreported cases from the United States District Court for the District of Maryland). The proclaimed reason for precluding these awards is that suppliers of chattels are liable, regardless of fault. *Id.* Punitive damages would, however, be allowed for a loss of consortium caused by the defendant's negligence. *Id.* at 705-06; *cf.* *Phipps v. General Motors Corp.*, 278 Md. 337, 353, 363 A.2d 955, 963-64 (1976) (third party beneficiary of seller's warranty can maintain a loss of consortium claim arising out of a breach of warranty). The availability of punitive damages in products liability cases has been the subject of considerable debate. Compare *Owen, supra* note 22, at 1361-70 (advocating the availability of punitive damages) with *Tozer, Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972) (arguing against allowing punitive damages). Many of the issues raised in this debate are analogous to those raised in torts arising out of contract. See *Owen, supra* note 22, at 1271-77 (advocating the adoption of punitive damages in product liability cases).

126. *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 456 A.2d 82, *cert. denied*, 296 Md. 112 (1983); *Dialist Co. v. Pulford*, 42 Md. App. 173, 399 A.2d 1374 (1979).
127. 5 A. CORBIN, *supra* note 2, § 1031 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 349 (1982). These damages include all preparation expenses. *Dialist Co. v. Pulford*, 42 Md. App. 173, 184, 399 A.2d 1374, 1380 (1979).
128. 53 Md. App. 656, 456 A.2d 82, *cert. denied*, 296 Md. 112 (1983).
129. The venture involved an effort to gain television publicity by setting a new world record for "flagpole sitting." The law firm that structured the transaction failed to prepare an offering memorandum or make the required disclosures in accordance with the Maryland Securities Act. MD. COM. CODE ANN. § 11-805 (1975). The attorneys involved refused to pay the \$10,000 to \$15,000 necessary to comply with the Act and, as a consequence, the shareholders withdrew from the enterprise. The jury returned a verdict against the law firm for \$170,508.43. *Wartzman*, 53 Md. App. at 657-61, 456 A.2d at 84-85.
130. In a related area those who oppose the availability of punitive damages in products liability actions have argued that the increased exposure to liability would bankrupt and "overkill" American industry. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839, 841 (2d Cir. 1967). *Contra Owen, supra* note 22, at 1324-25; Comment, *Punitive Damages Awards in Strict Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 OHIO ST. L.J. 771, 784-85 (1981) (detailing several surveys on the economic impact of awarding punitive damages in products liability cases).

B. Problems with the Maryland Approach to Torts Arising out of Contracts

The standards that have emerged in Maryland for awarding punitive damages in torts arising out of contracts represent an effort to fix the boundaries of commercial reasonableness by balancing the economic justifications for not awarding punitive damages in contract suits with the societal interest in deterring what is essentially reprehensible tortious conduct.¹³¹ Thus far, courts have identified actual malice as the appropriate boundary. In light of the well recognized purposes for awarding punitive damages in general,¹³² however, Maryland courts have made too much of the differences between actual and implied malice. This distinction is artificial and serves only to obscure the actual issue. Only rarely can a litigant prove, or even infer, the existence of evil motive, animosity, ill will, or spite.¹³³ Reprehensible conduct thus goes unpunished and undeterred solely because of the difficulty in proving actual malice.

Another problem with the Maryland approach is that it requires the existence of an independent tort as a prerequisite to collecting punitive damages in a contractual context.¹³⁴ While there is considerable authority in support of this proposition,¹³⁵ mandating an independent tort places complex obstacles in the plaintiff's path. It is often difficult to distinguish a tort arising out of a contract claim from a pure tort action. Separating the converging areas of law will add a complicated issue to any trial.¹³⁶ Also, it is difficult to conceive of a tortious breach of an agreement that would not state the elements of at least one independent tort. Wrongfully retained property would give rise to a

131. See *General Motors Corp. v. Piskor*, 281 Md. 627, 639, 381 A.2d 16, 23 (1977), where the court explained:

Recognizing that torts arising out of contractual relationships exhibit characteristics of both tort and contract actions, we sought in *Testerman* to fashion a workable rule governing the recovery of punitive damages which would be more stringent than that applied in pure tort cases, but which at the same time would allow the possibility of recovery where the particular conduct clearly warranted the imposition of such damages.

132. See *supra* notes 29-35 and accompanying text.

133. See *supra* notes 72-73 and accompanying text.

134. See *supra* notes 50-65 and accompanying text.

135. *E.g.*, *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982); *St. Anne's Home for the Aged v. Daniels*, 95 Ill. App. 3d 576, 420 N.E.2d 478 (1981); *Le Mistral, Inc. v. CBS*, 61 A.D.2d 491, 402 N.Y.S.2d 815 (1978); *R & H Trucking, Inc. v. Occidental Fire & Casualty Co.*, 2 Ohio App. 3d 269, 441 N.E.2d 816 (1981); *Smith v. Brown*, 283 Pa. Super. 116, 423 A.2d 743 (1980); RESTATEMENT (SECOND) OF CONTRACTS § 355, at 155 comment b (1981).

136. A. CORBIN, *supra* note 2, § 1077; Sullivan, *supra* note 7, at 238-39. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 355, at 155 comment b (1981) (relying on liberal pleading rules to overcome the problems associated with distinguishing torts from contracts). One commentator has characterized the independent tort requirement as inviting "result oriented judicial manipulation." Sullivan, *supra* note 7, at 239.

claim for conversion,¹³⁷ as would a refusal to make a payment.¹³⁸ A promise made by an individual who had no intention of performance could establish the elements of fraud or misrepresentation.¹³⁹ A contract involving the purchase of a defectively manufactured product would lead to a products liability claim.¹⁴⁰ Indeed, some authorities contend that a bad faith breach of contract should be recognized as an action in tort.¹⁴¹

When even the skilled plaintiff's attorney cannot state all of the elements of any tort, no action for punitive damages would lie because of Maryland's outright prohibition of these damages in contract actions.¹⁴² For example, in a case involving a fraudulent breach of contract, a cause of action in tort can only be stated if the fraudulent statements were made by a defendant who never had any intention of performing.¹⁴³ If it appears that the representations of future performance were made with an intent to perform some part of the obligation, no action in tort will lie.¹⁴⁴ In short, the plaintiff who is able to mold his contract action into an action in tort may recover punitive damages while the one who cannot is limited to actual damages. This is nothing more than an emphasis on artful pleading at the expense of the rights of the parties.

Assuming the existence of malice, it is difficult to understand why the purposes behind awarding punitive damages are furthered in pure tort actions but not in tort arising out of contract actions. The conduct involved is equally reprehensible and the societal interest in deterring this conduct is equally as pressing. Some authorities contend that tortious conduct is inherently more culpable than breaching a contract because torts involve conduct that is more distasteful.¹⁴⁵ But if the breach is accompanied by tortious conduct, assuming once again the

137. *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 366 A.2d 7 (1976).

138. *E.g.*, *University Nat'l Bank v. Wolfe*, 279 Md. 512, 369 A.2d 570 (1977) (bank's wrongful dishonor of a check gave rise to claims in contract and tort); *Food Fair Stores v. Hevey*, 275 Md. 50, 338 A.2d 43 (1975) (employer's refusal to pay pension benefits); *In re Williams*, 180 Md. 689, 23 A.2d 7 (1942) (attorney refused to turn over client's money).

139. *Delmarva Drill Co. v. Tuckahoe*, 268 Md. 417, 427, 302 A.2d 37, 41-42 (1973) (must be a representation of past or existing facts), *overruled on other grounds*, *Marten Chevrolet, Inc. v. Seney*, 292 Md. 328, 439 A.2d 534 (1982); *Tufts v. Poore*, 219 Md. 1, 10-11, 147 A.2d 717, 722-23 (1959) (promise made without a present intent to perform).

140. *See supra* notes 85-91 and accompanying text.

141. *Louderback & Jurika, supra* note 120, at 227.

142. *See supra* note 2.

143. *See supra* note 94.

144. *Council v. Sun Ins. Office*, 146 Md. 137, 151, 126 A. 229, 234 (1924) (promise of future performance is merely an opinion); *cf. Appel v. Hupfield*, 198 Md. 374, 379, 84 A.2d 94, 97 (1951) (failure to fulfill a promise only gives rise to an action in contract).

145. *General Motors Corp. v. Piskor*, 281 Md. 627, 638, 381 A.2d 16, 22 (1977) ("breaches of contract do not ordinarily engender as much resentment or mental or physical discomfort as do torts"); *A. CORBIN, supra* note 2, § 1077, at 438.

existence of malice, the distinction between "pure" torts and torts arising out of contract is meaningless. While malice may be easier to show in independent tort actions in general, the rarity with which it appears in tort arising out of contract cases does not mean that malice arising in a contractual context should not be deterred with equal force.

*C. A Proposal: A Unified Approach to Punitive Damages—
Redrafting the Rules of Commercial Reasonableness*

In place of the complicated theories that have been developed to accommodate torts arising out of contracts, a new uniform rule must be developed that focuses on the culpability of a defendant's conduct rather than on whether that conduct can be classified as a tort or as a tort arising out of contract.¹⁴⁶ This departure from antiquated precedent represents a logical development because it conditions the availability of punitive damages on the very reasons that punitive damages exist: to punish and deter opprobrious conduct.¹⁴⁷

Tort arising out of contract actions may further the goals behind awarding punitive damages, regardless of whether the plaintiff establishes a separate tort. First, because the limitations placed on contract damages create an environment where breach is encouraged, both economically efficient and socially undesirable breaches are encouraged.¹⁴⁸ For example, abuses of disparate bargaining power would go unpunished and undeterred, as would unscrupulous efforts to cheat consumers.¹⁴⁹ Second, contract disputes give rise to malicious conduct that is uniquely appropriate to an award of punitive damages. In contrast to the recklessness that permeates many tort actions,¹⁵⁰ allegations of malice in fraud arising in a contractual context normally involve willful or deliberate disregard for the rights of others.¹⁵¹ Although the actor's state of mind may not rise to the level of express malice, the

146. *See* *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551 (1969) (noting that the distinction is insignificant).

147. For a discussion of the general purposes for which punitive damages are awarded, *see supra* text accompanying notes 19-27.

148. Comment, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 687 (1975) (although changing society has created new opportunities for oppressive behavior, courts have developed new ways to control this behavior).

149. *See supra* note 64.

150. *See supra* notes 64-66.

151. The *Wedeman* court recognized this distinction:

Punitive damages are more likely to serve their deterrent purpose in a fraud case than in most other instances of tortious conduct. One who acts out of anger or hate in committing an assault, for example, is not apt to be deterred by a fear of punitive damages. Those who are tempted, however, to engage deliberately in fraudulent conduct for profit are more likely to pause and consider the consequences if made aware that they may be compelled to pay more than the actual loss sustained by the plaintiff.

Wedeman v. City Chevrolet Co., 278 Md. 524, 531-32, 366 A.2d 7, 12 (1976).

callous disregard for the rights of others is no less reprehensible than that found in "pure" tort claims.

A Maryland case illustrative of where a uniform standard would have furthered the deterrent and punitive purposes behind awarding punitive damages is *Aeropesca Ltd. v. Butler Aviation International, Inc.*¹⁵² *Aeropesca* involved an action for breach of contract, coupled with a claim for fraud, arising out of a breached aircraft maintenance agreement. The defendant, who had certified a defective airplane as airworthy, avoided punitive damages because this breach did not amount to actual malice. Rather, this conduct merely established "wanton, reckless disregard of the rights of others."¹⁵³

Had the *Aeropesca* court based its decision on the reasons for awarding punitive damages, it could have decided the case differently. Society does indeed have an interest in deterring breaches of contract that jeopardize human safety. An award of punitive damages would not only have punished the reckless defendant, but it would have served as an example to those who knowingly expose others to the threat of death and serious loss of property. The *Aeropesca* decision also illustrates a flaw in the arguments based on the efficient breach theory. The breach that occurred offers society no economic benefit. On the contrary, society has a compelling interest in ensuring that similarly situated defendants perform their contractual obligations. Had the defendant opted to repudiate the contract and seek a more profitable arrangement, no malice would have been established and the economy, as a whole, would have benefited from the efficient breach. Since the defendant chose knowingly to conceal that the aircraft was not airworthy, the public was recklessly exposed to unreasonable risks. As this example reveals, efficient breach arguments have no place in situations involving malice or its legal equivalent.

VI. CONCLUSION

The principal justification for imposing punitive damages is to punish and deter highly undesirable conduct. In Maryland, litigants may recover punitive damages in cases involving torts arising out of contracts only after establishing actual malice. Moreover, in a commercial context, actual malice may be inferred. The actual or implied malice distinction obscures the true issue. For punitive damages to be

152. 44 Md. App. 610, 411 A.2d 1055, *cert. denied*, 287 Md. 749 (1980).

153. The plaintiff, a South American air cargo hauler, entered into a repair contract with the defendant. The agreement required that the defendant bring the plaintiff's newly-purchased aircraft to the level of repair required for a Federal Aviation Administration Export Certificate of Airworthiness. Although the trial court, sitting as trier of fact, found that the finished product was neither airworthy nor in compliance with the export certificate requirements, it ruled that the defective performance did not amount to actual malice because the greed and callous disregard for human life was not motivated by spite or hatred. *Id.* at 627, 411 A.2d at 1065.

most effective, courts should not hesitate to impose them whenever they are presented with nefarious conduct of the type that society seeks to punish and deter.