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Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions

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CONTORTS: PATROLLING THE BORDERLAND OF CONTRACT AND TORT IN LEGAL MALPRACTICE ACTIONS

The merger of traditional rules of tort and contract is a phenomenon well recognized by legal scholars.[1] Yet in the legal malpractice area, where actions frequently lie in what has been called the "borderland of tort and contract,"[2] courts often have disagreed on the underlying theory of the action. Some courts view it as a contract action that arises from the attorney's breach of an implied promise to use a reasonable degree of skill and care in the exercise of his professional duties.[3] Other courts, however, view it as a tort action that results from the attorney's breach of duty to use due care — a duty, created by the attorney-client relationship.[4] Although their situations may be similar, different plaintiffs may be precluded from bringing an action, or denied full relief, because of their decision to bring the suit in one form or the other.

Of particular importance to a plaintiff in a legal malpractice action are different rules of tort and contract regarding the length of the statute of limitations;[5] accrual of the cause of action for statute of limitation purposes;[6] survivability of the action;[7] and types of damages recoverable.[8] Distinctions between the rules of tort and contract often are based on anachronistic principles of law. Hence, courts faced with the prospect of denying a worthy plaintiff appropriate relief, or at least a trial on the merits, have often resorted to manipulating both facts and doctrine to reach a desired result. This manipulation seems preferable to the alternative of barring an injured party's claim, but it is not the most rational or effective means of distributing justice, because a plaintiff's chance of success depends less on the merits of his claim than on the resourcefulness of counsel and the willingness of the court to read the facts and the law in a favorable light. A just resolution of a legal malpractice claim is better insured by a greater concern for the worthiness of the plaintiff's claim than for the traditional distinctions between tort and contract.

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[1] G. GILMORE, *The Death of Contract* (1974) [hereinafter cited as GILMORE]; Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975); Kaufman, *The Resurrection of Contract*, 17 WASBURN L.J. 38 (1977); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); Holmes, *Is There Life After Gilmore's Death of Contract?*, 65 CORNELL L. REV. 330 (1980).

[2] W. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS (1953).

[3] *See, e.g.*, Riddle v. Driebe, 153 Ga. App. 276, 279, 265 S.E.2d 92, 94 (1980); Winslow Inc. v. Scaife, 219 Va. 997, 1000, 254 S.E.2d 48, 60 (1979). *See generally* Wade, *The Attorney's Liability for Negligence*, 12 VAND L. REV. 755, 756, 756-57 n.11 (1959); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292-93 (1963).

[4] Christison v. Jones, 83 Ill. App. 3d 334, 336, 405 N.E.2d 8, 9 (1980); Johnson v. Gold, 71 A.D.2d 1056, 1056, 420 N.Y.S.2d 816, 817 (1979). *See generally* Casenote, 63 MINN. L. REV. 751, 752-53 (1979).

[5] See text and notes at notes 9-22, 54-65, & 102-12 *infra*.

[6] See text and notes at notes 27-40, 66-81, & 113-22 *infra*.

[7] See text and notes at notes 41-53, 82-99, & 123-34 *infra*.

[8] See text and notes at notes 136-203 *infra*.

This note will analyze the action of legal malpractice as it relates to the merger of tort and contract. First, the article will examine cases in which strict adherence to traditional theories has either denied the plaintiff access to the courts or limited his recovery. The note then will present cases in which the courts have ignored distinctions between tort and contract to avoid such results. Next, the reasoning of these cases will be analyzed to determine the correct approach to the problem. Finally, this note will discuss the problem of damages and the manner in which distinctions between tort and contract have affected recoveries in legal malpractice cases. It will be submitted that courts should not be bound by artificial distinctions between tort and contract in legal malpractice suits, but instead should look behind form to the gist of the action. The heading under which the suit is brought should not determine its outcome.

I. THE EFFECT OF TRADITIONAL DISTINCTIONS BETWEEN TORT AND CONTRACT

A. *The Statute of Limitations*

The decision to bring a legal malpractice action in either tort or contract is often a crucial one, because the statute of limitations governing a tort action is usually shorter than the statute governing a contract action.[9] This difference in statutory periods becomes significant when the plaintiff is not permitted to elect between a tort or contract action. In such cases, the court must determine whether the nature of the action is essentially tort or contract. It is a distinction not easily made. The legal malpractice action is a two-headed creature, one head born of the breach of an implied contractual relationship, the other growing from a violation of the fiduciary duty owed by an attorney to his client. The ability of counsel to emphasize one aspect of the suit at the expense of the other plays a major role in the outcome of the case. Differences in the skill of counsel, as well as in the predelictions of the court, have led to inconsistent results in this area of the law.[10] Decisions regarding which statute of limitations governs the legal malpractice suit illustrate this phenomenon.

Because the line between tort and contract is so difficult to draw in actions of attorney malpractice, courts have at times based their decisions on arbitrary, unconvincing factors. In *Nickerson v. Martin*,[11] for example, a Connecticut

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[9] *See, e.g.*, CONN. GEN. STAT. § 52-576 (1979): "No action on any simple or implied contract, or upon any contract in writing shall be brought but within six years next after the right of action accrues." *Id.* CONN. GEN. STAT. § 52-577 (1979) provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." *Id.*

[10] M.A. GLENDON, OBSERVATIONS ON THE RELATIONSHIP BETWEEN CONTRACT AND TORT IN CIVIL AND COMMON LAW 4-5 (1980) [hereinafter cited as GLENDON]. In reference to cases decided in the borderland of tort and contract, it has been noted:

> There is probably no more barren and unrewarding group of decisions to be found in the law. They turn almost entirely upon the details of language, which of course vary from case to case. They are in what only can be described as a snarl of utter confusion, from which no generalization can be derived except that there is total disagreement.

W. PROSSER, *supra* note 2, at 432-34. Nevertheless, distinctions made within this "snarl of utter confusion" can determine success or failure for a legal malpractice suit.

[11] 374 A.2d 258 (*Conn. Super.* 1976).

superior court's unexplained reliance on a tort statute of limitations prevented the plaintiff from bringing a legal malpractice action. The defendant/client in *Nickerson* answered his attorney's action to recover legal fees and expenses with a counterclaim for malpractice.[12] The client argued that the attorney was negligent in the preparation of a trust instrument and in the execution of a sale of real estate owned by the defendant.[13] In deciding that the attorney's action to recover legal fees was timely, the court applied the contract statute of limitations.[14] Nevertheless, the court maintained, rather cryptically, that legal malpractice actions were governed by the tort statute of limitations, even though that statute did not refer specifically to actions against attorneys.[15] Thus, in *Nickerson*, the attorney could bring a timely action in contract for the recovery of the value of his legal services, but the client, under tort theory, could not counterclaim that those services were negligently performed.[16]

The question of which statute of limitations to apply proved crucial for the plaintiff in *Box v. Karam*[17] as well. The attorney/defendant in *Box* rendered a title opinion on which the plaintiff relied in the purchase of real estate.[18] The attorney failed to discover, however, that neither the plaintiff's deed nor the plaintiff's grantor's deed had been recorded.[19] Thus, the plaintiff delivered the purchase money for the land without knowing that title still rested in a remote grantor. Before the plaintiff had been able to perfect his title to the land, the remote grantor sold the property to a third party who prevailed in an action against the plaintiff to quiet title to the land.[20] Three years after the negligently performed title search, the plaintiff brought a legal malpractice action against his attorney.[21] The Louisiana court of appeals dismissed the action, holding that all malpractice actions are tortious in nature and are governed by a one year statute of limitations.[22] The court also noted that although counsel for the plaintiff contended the suit was within the longer statute of limitations for contract actions, there was no alternative allegation in the petition alleging breach of contract.[23] Had the court been more flexible in its interpretation of the plaintiff's pleadings, the plaintiff's claim would have survived.[24]

The choice of applicable statute of limitations for a case in the borderland of tort and contract does not always result in the plaintiff's action being

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[12] *Id.* at 258-59.

[13] *Id.* at 259.

[14] *Id.* at 258. The attorney brought his action for legal fees less than six years after the client refused to pay. Connecticut's contract statute of limitations provides the plaintiff with six years in which to bring an action. CONN. GEN. STAT. § 52-577 (1979). See note 9 *supra*.

[15] 374 A.2d at 259.

[16] *Id.* at 260.

[17] 271 So. 2d 289 (La. App. 1972).

[18] *Id.* at 289.

[19] *Id.* at 289-90.

[20] *Id.* at 290.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] For similar cases, *see, e.g.*, Yazzi v. Olney, Levy, Kaplan and Tenner, 593 F.2d 100 (9th Cir. 1979); Johnson v. Gold, 71 A.D.2d 1056, 420 N.Y.S.2d 817 (1979); Goodstein v. Weinberg, 219 Va. 105, 245 S.E.2d 140 (1978).

dismissed.[25] *Nickerson* and *Box*, however, illustrate the arbitrary nature of many of the decisions, as well as the potential for abuse of judicial discretion.[26] Closely related to the question of which statute of limitations to apply is the question of when the cause of action accrues for statute of limitations purposes. In this area too, the courts struggle to decide which head — contract or tort — will rule the legal malpractice creature.

Since most statutes of limitations provide that the period within which an action can be brought is to be computed from the time when the cause of action accrues,[27] the date of accrual is as crucial as the length of the statutory period. Traditionally, a contract action accrues at the time of breach.[28] Upon violation of the rights established by the contract, the plaintiff may bring an action for at least nominal recovery without proof of actual damages.[29] Thus, if the court views a legal malpractice action as contractual, the statutory period will have begun to run at the time of the defendant's wrongful conduct. The result may be that before the plaintiff has suffered actual harm from the attorney's malpractice, or perhaps before he is even aware of the attorney's malpractice, his action will be barred by the statute of limitations.[30]

Should the court decide the action sounds in tort, however, the statutory period cannot commence until the plaintiff has suffered an actual loss or damage from the defendant's misconduct.[31] Yet this approach also can lead to a plaintiff's suit being barred before he learns of his injury. For instance, the injury to a plaintiff whose attorney negligently allows the statute of limitations to run on his claim occurs at the date of the claim's dismissal. Consequently, the legal malpractice suit would accrue at that date under the injury rule, not when the plaintiff learns of the negligent act.[32] As a result, an increasing number of tort cases have adopted the "discovery rule," holding that a cause of action does

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[25] *See, e.g.*, Alter v. Michael, 50 Cal. Rptr. 533, 413 P.2d 153 (1966); Carney v. Finn, 145 N.J. Super. 234, 367 A.2d 458 (1976); Schirmer v. Nethercutt, 157 Wash. 172, 179-80, 288 P. 265, 268 (1930). See also cases discussed in text at notes 54-65 *infra*.

[26] For cases holding the contract statute of limitation is applicable to legal malpractice actions, *see*, Sittons v. Clements, 385 F.2d 869 (6th Cir. 1967); Jackson v. Zito, 314 So. 2d 401 (La. App. 1975); Tel-Twelve Shopping Center v. Sterling Garrett Constr. Co., 34 Mich. App. 434, 191 N.W.2d 484 (1971); Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (1968).

[27] *See, e.g.*, CONN. GEN. STAT. § 52-577 (1979); MO. ANN. STAT. § 516.100 (Vernon 1949); WIS. STAT. ANN. § 893.52 (West 1966). *See generally* Note, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950) [hereinafter cited as *Statutes of Limitations*].

[28] *See* J. MURRAY, MURRAY ON CONTRACTS § 233 (2d rev. ed. 1974).

[29] *Id.*

[30] *See, e.g.*, Wilcox v. Plummer, 29 U.S. (4 Pet.) 172, 180 (1830) (Attorney committed "fatal misnomer" in handling of his client's claim which resulted in dismissal of the suit. Held, the client's cause of action accrued at the date of the negligent act, not when the damage became discoverable.) *See also* Hoffman v. Insurance Co. of North America, 241 Ga. 328, 245 S.E.2d 287 (1978) (dicta); Dolce v. Gamberdino, 60 Ill. App. 3d 124, 376 N.E.2d 273 (1978); Troy's Stereo Center, Inc. v. Hodson, 39 N.C. App. 591, 251 S.E.2d 673 (1979).

[31] *Statutes of Limitations*, *supra* note 27, at 1201; W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 30 at 144 (4th ed. 1971) [hereinafter cited as PROSSER].

[32] *See, e.g.*, Hood v. McConemy, 53 F.R.D. 435 (D.C. Del. 1971). *See also* Cordial v. Grimm, 346 N.E.2d 266 (Ind. App. 1976); Jepson v. Stubbs, 555 S.W.2d 307 (Mo. 1977).

not accrue until the negligence is discovered or should reasonably have been discovered by the plaintiff.[33]

The decision whether a legal malpractice suit sounds in tort or contract can thus have a profound effect on the accrual issue. If the action is viewed as tortious in nature, the court could apply the discovery rule to postpone the accrual date and preserve the suit. If the court views the suit as contractual, however, the action will accrue at the time of the breach. In *Master Mortgage Corporation v. Byers*,[34] for example, a Georgia court of appeals held that because a particular action in legal malpractice was grounded in contract, it accrued at the date of the negligent act.[35] The plaintiff in *Byers*, a mortgage company, sued its former attorney in contract for defectively performed title searches.[36] The attorney contended that the statute of limitations had run on the plaintiff's claims.[37] The *Byers* court agreed, stating that whether Master Mortgage knew of the defendant's error at the time of the breach was irrelevant to the issue of when the contract statute of limitations began to run.[38] Application of tort law's discovery rule would have preserved the plaintiff's claim, and allowed him a trial on the merits.

In summary, the form in which the legal malpractice plaintiff brings his suit may be the sole basis for the dismissal of the claim if the court adheres to traditional rules of tort and contract regarding the operation of statutes of limitation. The contract statute of limitations is likely to provide the plaintiff with more time in which to bring his claim.[39] The application of the tort discovery rule, however, will postpone the accrual of the cause of action until the plaintiff is aware of the injury, or reasonably is able to ascertain such injury.[40]

B. *Survivability of the Action*

The same historical distinctions between tort and contract that plague the legal malpractice plaintiff regarding the application of statutes of limitations, exist in the area of survivability of the action as well. Were courts to adhere to traditional distinctions between tort and contract, a legal malpractice action brought in contract would survive the death of either party,[41] but one brought in

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[33] Yazzie v. Olney, Levy, Kaplan, & Tenner, 593 F.2d 100 (9th Cir. 1979); Sorenson v. Povlikowski, 94 Nev. 440, 581 P.2d 851 (1978); McKee v. Riordan, 116 N.H. 729,366 A.2d 472 (1976).

[34] 130 Ga. App. 97, 202 S.E.2d 566 (1973).

[35] *Id.* at 98, 202 S.E.2d at 568.

[36] *Id.* at 97, 202 S.E.2d at 567.

[37] *Id.*

[38] *Id.*, 202 S.E.2d at 568.

[39] *Statutes of Limitations*, *supra* note 27, at 1193; Note *Tort in Contract: A New Statute of Limitations*, 52 OREGON L. REV. 91, 92 (1972) [hereinafter cited as *Tort in Contract*].

[40] Should a court fail to apply the discovery rule to tort cases as well, the tort and contract plaintiffs are in identical, undesirable predicaments. *See, e.g.*, Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970).

[41] Price v. Holmes, 198 Kan. 100, 106, 422 P.2d 976, 982 (1967). *See generally* Pollard v. United States, 384 F. Supp. 304 (M.D. Ala. 1974).

tort would not.[42] Statutes in many states, however, provide for the survival of all but certain specified tort actions.[43] In these states, then, it would appear that a legal malpractice action brought in tort would survive the death of either party, unless such actions were specifically excluded from the operation of the statute. Yet, until recently, some courts preserved the traditional distinctions regarding survivability through creative interpretations of the statutes.

In *Connors v. Newton National Bank*,[44] for example, the Massachusetts Supreme Judicial Court held that a legal malpractice action grounded in tort did not survive the death of the defendant.[45] The plaintiff in *Connors* brought a tort action against the estate of her attorney for negligence in pursuing a personal injury claim.[46] The applicable statute provided in part that, in addition to actions which survive under common law, certain intentional torts and actions "for damage to real or personal property" survive.[47] The *Connors* court viewed the plaintiff as seeking to recover for the negligence of the deceased in pursuing her claim, but not for injury to her personal property.[48] Because the court failed to view the action as coming under a statutory exception, the common law rule that tort actions abate at the death of a party barred the plaintiff's claim.[49]

The *Connors* rationale formed the basis for the decision of an Illinois court of appeals, *Butterman v. Chamales*.[50] The defendant attorney in *Butterman* was sued for negligence in failing to pursue pending litigation in state court and for allowing the statute of limitations to run on the plaintiff's suit in federal court against a stock brokerage firm.[51] Applying a survival statute like that applied by the Massachusetts court in *Connors,* the *Butterman* court reached a similar conclusion, finding that a tort action for legal malpractice was not an action for injury to personal property, and thus did not survive under the statute.[52] The court also rejected the plaintiff's contention that the suit was based on a breach of contract and dismissed the claim without a trial on the merits.[53]

Thus, for a legal malpractice action to survive the death of a party, it must either be based on a breach of contract, or be within the scope of the state's survival statute. *Connors* and *Butterman* illustrate how a court can preserve tradi-

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[42] Connors v. Newton Nat'l Bank, 336 Mass. 649, 650, 147 N.E.2d 185, 186 (1958). *See generally* Chiagouris v. Jovan, 43 Ill. App. 2d 220, 193 N.E.2d 205 (1963); Briggs v. Cohen, 603 S.W.2d 20 (Mo. App. 1980); PROSSER, *supra* note 31, § 126 at 899.

[43] *See, e.g.*, DEL. CODE ANN. tit. 10, § 3701 (1974) which provides: "All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive. . . ." *Id. See also* S.C. CODE § 15-5-90 (1976).

[44] 336 Mass. 649, 147 N.E.2d 185 (1958).

[45] *Id.* at 650, 147 N.E.2d at 186.

[46] *Id.* at 649, 147 N.E.2d at 186.

[47] *Id.* (quoting MASS. GEN. LAWS ANN. ch. 228, § 1 (1958)). MASS. GEN. LAWS ANN. ch. 228, § 1 provides in relevant part: "In addition to the actions which survive by the common law, the following shall survive: . . . (d) for damage to real or personal property. . . ." *Id.*

[48] 336 Mass. at 650, 147 N.E.2d at 186.

[49] *Id.* at 649, 147 N.E.2d at 186.

[50] 73 Ill. App. 2d 399, 220 N.E.2d 81 (1966).

[51] *Id.* at 401, 220 N.E.2d at 82.

[52] *Id.* at 403, 220 N.E.2d at 83. ILL. REV. STAT. ch. 110½, § 27-6 (1978) provides in part: "In addition to the actions which survive by the common law, the following also survive: . . . actions to recover damages for injury to real or personal property . . . ." *Id.*

[53] 73 Ill. App. 2d at 403-04, 220 N.E.2d at 83.

tional distinctions between tort and contract through manipulative statutory interpretation in order to bar a plaintiff's action of legal malpractice. Just as in the areas of statute of limitations and accrual date, strict adherence to the traditional rules of tort and contract regarding survivability can result in the legal malpractice plaintiff finding his action barred because of the form in which it was brought.

II. APPLICATION OF CONTORT PRINCIPLES IN LEGAL MALPRACTICE ACTIONS

Because of the recognized similarity between actions of legal malpractice brought in tort and those brought in contract, courts are showing a tendency to overlook distinctions in doctrine by applying the principle that recurring fact situations deserve similar treatment. As a result, rules regarding the length and accrual dates of statutes of limitations and survivability of the action all have undergone changes.

A. *Statute of Limitations*

The preceding discussion of the choice of statute of limitations in legal malpractice actions demonstrated that courts sometimes read a complaint strictly as one of tort or contract, thus barring the plaintiff's claim. Not all courts, however, act in such rigid accordance with the traditional rules of tort and contract. In *Registered Country Homebuilders, Inc. v. Stebbins*,[54] the plaintiff sued his attorney for damages resulting from a negligently performed title search.[55] The defendant argued that the action was in tort for negligence and consequently barred by the tort statute of limitations.[56] The New York supreme court disagreed and applied the longer contract statute of limitations, even though the plaintiff's complaint did not formally state a claim for breach of contract.[57] The court noted: "Though the complaint does not expressly allege that the defendant impliedly undertook to make a complete and accurate title search and certificate, a reading of the complaint as a whole leads to the inference that such an undertaking on the part of the defendant was implied."[58] Unlike the Louisiana court of appeals in *Box v. Karam*,[59] the *Stebbins* court was flexible in its interpretation of the pleadings, thus enabling the plaintiff's claim to be heard.

More recently, courts have gone further than merely characterizing the specific facts of a legal malpractice case as tortious or contractual for the purpose of preserving the plaintiff's claim. The fundamental similarity between contract and tort cases of legal malpractice has led some courts to rule that such plaintiffs have a legitimate claim under either heading. In *Jackson v. Zito*,[60] the plaintiff brought an action of legal malpractice in tort against his attorney for failure to prosecute the plaintiff's workmen's compensation claim.[61] The trial court ruled

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[54] 14 Misc. 2d 821, 179 N.Y.S.2d 602 (1958).
[55] *Id.*, 179 N.Y.S.2d at 603.
[56] *Id.*
[57] *Id.* at 823, 179 N.Y.S.2d at 605.
[58] *Id.*
[59] 271 So. 2d 289 (La. App. 1972). See text at notes 17-24 *supra*.
[60] 314 So. 2d 401 (La. App. 1975).
[61] *Id.* at 403.

the one-year tort statute of limitations barred the plaintiff's legal malpractice claim.[62] The Louisiana court of appeals agreed that the plaintiff's tort claim was barred, but noted that "one set of circumstances can give rise to more than one cause of action, and each of those causes has its own prescriptive period."[63] Consequently, although the plaintiff's tort claim was properly barred, the existence of the attorney client relationship meant there was an action in contract open to the plaintiff which he deserved to have litigated.[64] The court was empowered to ignore the plaintiff's original theory of the case in order to reach a result which was "just, legal, and proper upon the record."[65]

The concern of the *Jackson* court for a just and proper resolution of a legal malpractice claim can also be seen in recent decisions regarding accrual of the cause of action. In *Hendrikson v. Sears*,[66] for example, the Massachusetts Supreme Judicial Court ruled that tort law's discovery rule of accrual should be applied to all actions of legal malpractice under the principle that "limitation statutes should apply equally to similar fact patterns regardless of the form of proceeding. . . ."[67] The plaintiffs in *Hendrikson* purchased land in 1961 in reliance upon a title search negligently performed by their attorney.[68] Nine years later, prospective purchasers refused to buy the property from the plaintiffs because of a recorded easement on the land.[69] The plaintiff suffered a loss both in modifying the easement and in the ultimate sale of the property.[70] In 1971, the plaintiffs commenced a legal malpractice action against the attorney.[71] Because the action was commenced ten years after the attorney's malpractice, the crucial issue was the time of accrual. Under a contractual analysis, the cause of action would have accrued at the time of the breach.[72] Under the discovery rule of tort theory, however, the date of accrual could be postponed until the plaintiff discovered or reasonably should have discovered his injury — that is, at the date of the prospective sale.[73] The *Hendrikson* court held that the cause of action did

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[62] *Id.* at 404.

[63] *Id.* at 408.

[64] *Id.*

[65] *Id. See also* Johnson v. Daye, 363 So. 2d 94 (La. App. 1978), where the court noted: "A malpractice action against an attorney may state a claim both *ex delicto* and *ex contractu*. . . . This is true even though the petition be couched in language asserting a claim based on the negligence of the attorney." *Id.* at 941; Neel v. Magana, Olney, Levy Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971), where the court stated:

> Legal malpractice consists of the failure of an attorney "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. . . . When such failure proximately causes damage, it gives rise to an action in tort. Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract.

Id. at 180-81, 491 P.2d at 422-23; 98 Cal. Rptr. at 838-39.

[66] 365 Mass. 83, 310 N.E.2d 131 (1974).

[67] *Id.* at 85, 310 N.E.2d at 132.

[68] *Id.* at 84, 310 N.E.2d at 132.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 86, 310 N.E.2d at 133.

[73] *Id.* at 83, 89, 310 N.E.2d at 132, 135.

not accrue until the malpractice was discovered, or reasonably should have been discovered by the plaintiff.[74]

In reaching its conclusion, the *Hendrikson* court expressly refused to determine whether the legal malpractice action was essentially an action in tort or in contract.[75] Instead, the court examined the practical consequences of applying the contract accrual rule to legal malpractice actions.[76] The opinion emphasized the fiduciary relationship between an attorney and his client,[77] as well as the client's reliance on the attorney's skill.[78] The court observed that an attorney does much of his work outside the client's view and that, consequently, the client is not likely to recognize professional negligence even if he should see it.[79] For these reasons, the court found it unfair for the client's cause of action to accrue at such an "inherently unknowable" date, regardless of whether the suit was brought in tort or in contract.[80]

Cases like *Hendrikson* which adopt the discovery rule of accrual for legal malpractice actions have stressed the similarity of contract and tort suits of this kind.[81] A similar analysis has recently been applied by courts which in the past had adhered to traditional rules of survivorship in legal malpractice cases.

B. *Survivability of the Action*

An examination of the results of adhering to traditional rules of tort and contract on survivability of actions has led some courts to reevaluate the usefulness of such an approach. In like manner, where statutory enactments have replaced the common law of survivability, courts are striving to reach consistent results in both tort and contract cases. In *McGill v. Lazzaro*,[82] for example, an Illinois appeals court reconsidered the strict approach to survival of actions previously taken in that jurisdiction in *Butterman v. Chamales*.[83] The plaintiff in *McGill* brought an action against his attorney for professional negligence, fraud, and breach of fiduciary duty.[84] Following the death of the attorney, the trial court dismissed the action, finding that the suit abated at the defendant's death.[85] The court of appeals reversed the trial court's decision.[86] The court recognized that *Butterman* had held that legal malpractice actions were not covered by the Illinois survival statute, which provides for survival of actions for injury to personal property.[87] Nevertheless, the *McGill* court found a subsequent

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[74] *Id.* at 91, 310 N.E.2d at 136.
[75] *Id.* at 86, 310 N.E.2d at 133.
[76] *Id.* at 90-91, 310 N.E.2d at 135-36.
[77] *Id.* at 90, 310 N.E.2d at 135.
[78] *Id.* at 91, 310 N.E.2d at 136.
[79] *Id.* at 90, 310 N.E.2d at 135.
[80] *Id.* at 90, 310 N.E.2d at 136.
[81] *See, e.g.*, Mumford v. Staton, Whaley and Price, 254 Md. 697, 714, 255 A.2d 359, 367 (1969); Peters v. Simmons, 87 Wash. 2d 400, 404, 553 P.2d 1053, 1055 (1976).
[82] 62 Ill. App. 3d 151, 379 N.E.2d 16 (1978).
[83] 73 Ill. App. 2d 399, 220 N.E.2d 81 (1966). See text at notes 50-53 *supra*.
[84] 62 Ill. App. 3d at 152, 379 N.E.2d at 17 (1978).
[85] *Id.*
[86] *Id.* at 154, 379 N.E.2d at 18.
[87] 62 Ill. App. 3d at 153-54, 379 N.E.2d at 18.

decision, *Jones v. Siesennop*,[88] to be more persuasive. In *Jones*, the court had expanded its definition of an injury to personal property to include a legal malpractice suit.[89] The *Jones* court held that the word "property" as used in the survival statute is a generic term "and its meaning in any case must be determined by the sense in which it is used."[90] Consequently, according to the *Jones* court, the statute should not be given a narrow, technical construction, but should be construed with reference to conditions of present-day life.[91] Following the spirit of *Jones*, the *McGill* court ruled that because legal malpractice results in an injury to the client's personal property, the action survives under the statute.[92]

In 1979, a Massachusetts Supreme Judicial Court opinion dealt more explicitly with the effect that merging rules of survivability has on traditional distinctions between tort and contract. In *McStowe v. Bornstein*,[93] the plaintiff brought a tort action against the estate of his attorney, who had failed to commence an action on behalf of the plaintiff before the statute of limitations had run.[94] Under Massachusetts law, contract actions survive the death of the defendant, but tort actions, for the most part, do not.[95] Instead of correcting the plaintiff's pleading error by characterizing the suit as one in contract, the court stated that a client's claim against his attorney has aspects of both tort and contract actions.[96] Because a legal malpractice suit brought in tort differs so slightly from one brought in contract, the court found it would be unjust to treat the two suits differently.[97] The court noted, "We have looked with disfavor on rigid procedural distinctions between contract and tort and are more concerned today with substance than with form."[98] The court concluded that the contractual aspects of the parties' relationship permitted the action to survive the defendant's death regardless of whether the suit was brought under a tort or contract heading.[99]

In summary, some courts have shown a tendency to overlook historical distinctions between tort and contract in cases of legal malpractice. The essential similarity between the suits militates in favor of applying similar rules regarding statute of limitations, accrual date and survivability of the action.

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[88] 55 Ill. App. 3d 1037, 371 N.E.2d 892 (1977).

[89] *Id.* at 1041, 371 N.E.2d at 895.

[90] *Id.* (quoting McDaniel v. Bullard, 34 Ill. 2d 487,491, 216 N.E.2d 140, 143 (1966)). The *Jones* court held an action against an attorney for professional negligence survived the death of the plaintiff and could be pursued by her personal representative. 55 Ill. App. 3d at 1042, 371 N.E.2d at 896.

[91] 55 Ill. App. 3d at 1040, 371 N.E.2d at 895 (quoting McDaniel v. Bullard, 34 Ill. 2d 487, 490-91, 216 N.E.2d 140, 143).

[92] 62 Ill. App. 3d 154, 379 N.E.2d 18 (1978).

[93] 79 Mass. Adv. Sh. 1024, 388 N.E.2d 674 (1979).

[94] *Id.*, 388 N.E.2d at 675.

[95] *Id.* at 1027, 388 N.E.2d at 676. *See* Sliski v. Krol, 361 Mass. 313, 315, 279 N.E.2d 924, 927 (1972) (contract actions survive); Gallagher v. First Nat'l Bank, 346 Mass. 587, 589-90, 195 N.E.2d 68, 69 (1964) (tort actions abate).

[96] *Id.* at 1027, 388 N.E.2d at 676.

[97] *Id.* at 1029, 388 N.E.2d at 677.

[98] *Id.*

[99] *Id.*

III. THE CONTORT OF LEGAL MALPRACTICE: AN EVALUATION

As the more recent legal malpractice cases discussed above indicate, courts are showing a reluctance to dispose of similar cases in dissimilar fashions solely because one suit is brought in tort and the other in contract. This judicial attitude is in keeping with a general trend toward a merger of tort and contract.[100] In determining whether the field of legal malpractice is a proper area for further development of what some have called "contorts,"[101] the rationale for rules of tort and contract which existed at the time of their inception must be examined, and their appropriateness in the modern action of legal malpractice must be evaluated. It is submitted that the original justifications for certain distinctions between tort and contract no longer exist, and that justice demands equal rules be applied to all plaintiffs in legal malpractice actions, regardless of the form in which the suit is brought.

A. *Statute of Limitations*

Traditionally, the length of the statute of limitations for tort actions has been shorter than that for contract actions.[102] The forces of the industrial revolution provide one rationale for this distinction. The rise of industrialization and mechanized modes of transportation as well as factory facilities dramatically increased the number of personal injury suits in the nineteenth century.[103] To protect the new industrial forces from crippling compensation payments, the time allotted for such actions was considerably reduced.[104] Another reason for the shorter statute of limitations for tort actions is evidentiary in nature. The shorter the time allowed between injury and litigation, the greater the chance of a clear evaluation of both the source and extent of the injuries.[105]

The tort action of legal malpractice, however, differs greatly from the tort actions with which the drafters of nineteenth century statutes of limitations were concerned. It is doubtful whether the position of the legal profession today warrants application of special rules designed to protect attorneys from tort liability. The economic development of the nation is not implicated in actions of legal malpractice as it was in nineteenth century actions against fledging industries. In addition, the tort action of legal malpractice is not likely to involve proof of bodily injury, which includes evidence susceptible to the wear and tear of time and thus warrants a shorter statutory period. The evidentiary concerns of a tort action of legal malpractice are identical to those of a contract action of legal malpractice. Both suits are primarily concerned with establishing the terms of the agreement and determining whether the defendant's conduct constituted a violation of that agreement. Therefore, under a functional analysis, there is no

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[100] See note 1 *supra*.

[101] GILMORE, *supra* note 1, at 90.

[102] *Statutes of Limitations*, *supra* note 27, at 1193; *Tort in Contract*, *supra* note 39, at 92.

[103] *Statutes of Limitations*, *supra* note 27, at 1193.

[104] *Id.*

[105] *Id.*

reason why one plaintiff should be subject to a shorter statutory period merely because he had the misfortune of bringing the suit in the "wrong" form.

Apart from the evidentiary concerns discussed above, the statute of limitations also is concerned with overall fairness to the defendant. There comes a time, it has been observed, when the defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.' "[106] Presumably, however, legislatures were as well aware of these purposes when they designed the contract statute of limitations as when they designed the tort statute. Thus, if the argument for applying the shorter tort statute of limitations is that the contract statute gives too much time in which to bring the action, the proper course is for the legislature to determine what a fair period is for any legal malpractice action. In 1979, California enacted such a statute which provides that both tort and contract actions of legal malpractice expire one year after the plaintiff discovers or should have discovered the wrongful act, or four years from the date of the wrongful act, whichever occurs first.[107]

In the absence of legislative action, however, courts should apply the statute of limitations most favorable to the plaintiff. If the longer statutory period will result in an onslaught of legal malpractice actions, the crucial problem to be addressed is the standard of care practiced by attorneys, not the period in which clients have to bring the action.[108] To dismiss a tort suit on the basis of the statute of limitations when a contract suit, in which identical issues of proof will be raised, is still viable, indicates that courts are more concerned with adherence to tradition, than with legitimate evidentiary concerns.

For a court to read one interpretation of a plaintiff's suit as controlling in

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[106] *Id.* at 1185 (quoting Order of R. R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

[107] CAL. CIV. PROC. CODE § 340.6 (West 1979) provides:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

Id.

[108] If the standard of care demanded of attorneys is such that they will be subject to overwhelming liability for malpractice, the solution is to determine a truly reasonable standard of care,

order to preserve the claim is not an unprecedented practice. The Federal Rules of Civil Procedure encourage such behavior. Under the Federal Rules, a plaintiff is allowed to present his claim alternatively in tort or contract.[109] He may even choose not to characterize it as either of the two.[110] If the court can sense from the "short and plain statement of the claim"[111] that the pleader has a valid action under any heading, the Federal Rules require the suit to be regarded as brought in the appropriate form.[112] Thus under the Federal Rules, it is well within the court's discretion to characterize a legal malpractice suit as arising in tort or in contract for the purpose of preserving the claim.

In sum, differences in the statutory periods for tort and contract statutes of limitations seem best explained by blind adherence to tradition. There has been no conscious decision by the legislature to narrow the scope of tort liability of attorneys. Moreover, none of the evidentiary concerns that lie at the core of all statutes of limitations warrant a shorter statute of limitations for legal malpractice suits brought in tort than for those brought in contract. For this reason, state legislatures should determine what an appropriate statutory period is for all legal malpractice actions and enact such legislation. Absent such legislative action, should the statute of limitations expire under only one form of the legal malpractice suit, the suit should be preserved under the alternative heading.

Similar policy considerations indicate that the date of accrual for all causes of action based on legal malpractice should be the same. It is submitted that this date of accrual should be the date of discovery. The discovery rule operates to postpone the running of the statute of limitations until that time when the plaintiff discovers, or should have discovered, the injury.[113] Courts have applied the rule to cases of professional negligence against doctors,[114] accountants,[115] stock-

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not to arbitrarily dismiss certain suits because of their failure to conform to traditional rules of form.

[109] Cooley v. Salopian Industries, Ltd., 383 F. Supp. 1114, 1116 (D.S.C. 1974). *See* FED. R. CIV. P. 8 (a), (e)(2). One author notes: "The pleader may allege matters alternatively or hypothetically and. . . the allegations may even be inconsistent. The pleader cannot be required to elect among his allegations, but is entitled to have all his claims and defenses considered by the trier of facts." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 322 (3d ed. 1976) [hereinafter cited as WRIGHT]. *See also* Berry Ref. Co. v. Salemi, 353 F.2d 721, 722 (7th Cir. 1965).

[110] In speaking of the Federal Rules of Civil Procedure, Professor Wright remarks: "There is no requirement of any 'theory of pleadings.' Contrary to the rule in some code states, the complaint is not to be dismissed because the plaintiff's lawyer has misconceived the nature of the claim, if he is entitled to any relief on any theory." WRIGHT, *supra* note 109, at 321. *See also* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1201 n.11 (1969).

[111] "A pleading shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." FED. R. CIV. P. 8(a)(2).

[112] *See* FED. R. CIV. P. 8(e), (f). Professor Wright states:

> Pleadings are to be construed so as to substantial justice. The old rule that a pleading must be construed most strongly against the pleader is no longer followed. Instead the court will not require technical exactness or make refined inferences against the pleader but will construe the pleading in his favor if justice so requires.

WRIGHT, *supra* note 109 at 322. *See also* Hazen v. Western Union Tel. Co., 518 F.2d 766, 770 (6th Cir. 1975).

[113] PROSSER, *supra* note 31, § 30, at 144 (4th ed. 1971).

[114] Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974).

[115] Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967).

brokers,[116] title companies,[117] and insurance agents.[118] Courts adopting the discovery rule in professional negligence cases usually emphasize the special position that the professional holds in relation to his client.[119] Because of the reliance placed on the professional's work, and because most of his work is done outside of his client's view, it is difficult for a potential plaintiff to know if he has a claim of malpractice until the effects of the act impact upon him at a later date. At that point, the plaintiff also may discover his cause of action is barred by the statute of limitations. In recognition of such concerns, several states have now extended the discovery rule to actions of legal malpractice.[120]

In the absence of such legislative action, the justification for judicial extension of the discovery rule to tort actions of legal malpractice is clear. Where there is an "inherently unknowable" harm, justice is best served by postponing accrual of the cause of action until the plaintiff reasonably should learn of the harm. As previously noted,[121] several courts have extended the rule to contract actions of legal malpractice as well. This is a proper response. All of the factors that militate towards the adoption of the discovery rule for tort actions do so with equal force for contract actions. The fiduciary nature of the attorney-client relationship deserves no less protection because the plaintiff brings his suit in contract. For an attorney to escape liability on the basis of his client's unfortunate choice of which form to bring his suit in is unjust. As the California Supreme Court noted upon its adoption of the discovery rule for causes of legal malpractice,

> Today then, is no time to perpetuate an anachronistic interpretation of the statute of limitations that permits the attorney to escape obligations which other professionals must bear. The legal calling can ill afford the preservation of a privileged protection against responsibility, a privilege born of error, subject to almost universal condemnation, and in present day society, anamolous.[122]

Adoption of the discovery rule in legal malpractice cases founded on contract as well as tort would signal a recognition of the principle that all plaintiffs in legal malpractice suits deserve an equal opportunity to present their claims.

B. *Survivability of the Action*

The contrasting rules of tort and contract regarding survivability of a claim stem from the development of the two forms of action. Tort actions traditionally have not survived the death of a party.[123] Since the tort remedy developed as an

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[116] Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968).

[117] Cook v. Redwood Empire Title Co., 275 Cal. App. 2d 452, 79 Cal. Rptr. 888 (1969).

[118] United States Liab. Ins. Co. v. Hardinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970).

[119] Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188-89, 491 P.2d 421, 428-29 98 Cal. Rptr. 851, 844-45, (1971); Hendrickson v. Sears, 365 Mass. at 90, 310 N.E.2d at 135-36.

[120] See note 33 *supra*.

[121] See text and notes at note 66 *supra*.

[122] Neel v. Magana, Olney, Levy, Cathcart, and Gelfand, 6 Cal. 3d at 194, 491 P.2d at 433, 98 Cal. Rptr. at 849.

[123] PROSSER, *supra* note 31, § 126, at 899.

adjunct to criminal punishment, which naturally terminated with the defendant's death, tort liability was considered terminated also.[124] In the case of serious crimes, the Crown would execute the defendant and confiscate all of his property, rendering the question of survival of a personal right of action academic.[125] In the case of less serious crimes, the Crown, not the defendant, was expected to compensate the victim.[126]

Originally, actions in assumpsit as well as tort, sometimes were held to terminate with the death of a party.[127] As time passed, however, courts viewed justice as demanding an expanded liability on the part of an executor for actions brought on a contract.[128] A rule contrary to this view was regarded as enriching the estate of the defendant at the expense of a party to whom a valid obligation was owed.[129] Thus by the beginning of the seventeenth century the question was settled that an action for breach of contract did not abate at the defendant's death.[130]

Today, tort defendants no longer face the drastic remedies imposed by the Crown in sixteenth century England. Should a twentieth century defendant die before suit is brought against him, his estate often is capable of compensating the plaintiff. For this reason, survival statutes have been enacted to preserve certain tort actions beyond the death of a party.[131] Some courts have based their decision that legal malpractice actions survive the death of a party on the proposition that legal malpractice actions fall within the language of its survival statute.[132]

As tort and contract continue to merge in the area of legal malpractice, however, a justification for similar rules regarding survivability apart from that based on the survival statute is becoming clear. As the Massachusetts Supreme Judicial Court noted in *McStowe*, the existence of the contractual relationship between the attorney and his client permits the plaintiff's claim against the attorney to survive the attorney's death.[133] The mere characterization of a legal malpractice suit as tort or contract cannot destroy those aspects of the suit that warrant survival under a contractual analysis. A plaintiff should not be denied compensation solely because the defendant dies before the suit is resolved, regardless of whether the action is brought in tort or in contract.

The *McStowe* decision completed a nationwide merger of tort and contract rules of survivability of legal malpractice actions. Whether by statute or judicial

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[124] *Id.* at 898.

[125] *Id.*

[126] *Id.*

[127] 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 451, 576-78 (3d ed. 1927).

[128] *Id.* at 452.

[129] *Id.*

[130] *Id.* at 451.

[131] PROSSER, *supra* note 31, § 126, at 901. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 228, § 1 (West 1958), which reads in part: "In addition to the actions which survive by the common law, the following shall survive: . . . (2) Actions of tort (a) for assault, battery, imprisonment or other damage to the person . . . or (d) for damage to real or personal property." *Id. See also* DEL. CODE ANN. tit. 10, § 3701 (1974); S.C. CODE § 15-5-90 (1976).

[132] *See, e.g.*, McGill v. Lazzaro, 62 Ill. App. 3d 151, 379 N.E.2d 16 (1978). *See also* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 32 (1977 & Supp. 1980) [hereinafter cited as MALLEN & LEVIT].

[133] 1979 Mass. Adv. Sh. at 1029, 388 N.E.2d at 677.

decision, every state now agrees that an action of legal malpractice survives the death of a party.[134] The statute of limitations and date of accrual cases, discussed above,[135] have shown a similar trend towards merger of rules of tort and contract. It remains to be seen if that trend will continue in another area traditionally affected by the rules of tort and contract, that of damages.

IV. DAMAGES

As has been demonstrated, many courts have shown an inclination to remove obstacles to legal malpractice actions based on distinctions between tort and contract. Nevertheless, at present, the choice of tort or contract still can bring different types of recovery for a legal malpractice plaintiff. Tort damages may include recovery for pain and suffering, mental anguish, and exemplary damages.[136] Contract recovery, however, is limited, for the most part, to expectation damages.[137] The remainder of this note will discuss the traditional distinctions between tort and contract damages in legal malpractice actions and examine ways in which these distinctions are eroding. It will be submitted that this erosion should continue, eventually enabling the legal malpractice plaintiff to recover under both tort and contract theory where justice so requires.

A. *Distinctions Between Tort and Contract Damages in Actions of Legal Malpractice*

Whether the legal malpractice action is brought in tort or in contract, the rules regarding expectation, or direct, damages are the same.[138] An attorney is liable for all damages proximately caused by his wrongful act.[139] The measure of the damages is the difference between what the plaintiff's pecuniary position is and what it would have been had the attorney acted competently.[140]

The recovery of consequential damages, however, depends to a great extent on the tort-contract distinction. Consequential damages have been defined as "those additional injuries which are a proximate result of the attorney's negligence but which do not flow directly from or concern the objective of the retention.[141] The term includes damages for pain and suffering,

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[134] MALLEN & LEVIT, *supra* note 132, § 32.

[135] See text and notes at 54-65 & 66-81 *supra*.

[136] W. Prosser, J. Wade, & V. Schwartz, TORTS, CASES AND MATERIALS 542, 588 (6th ed. 1976).

[137] C. MCCORMICK, HANDBOK ON THE LAW OF DAMAGES, §§ 137, 138 (1935) [hereinafter cited as MCCORMICK].

[138] McClain v. Faroane, 369 A.2d 1090, 1092 (Del. Super. 1977).

[139] MALLEN & LEVIT, *supra* note 132 § 134. *See, e.g.*, Smith v. Lewis, 13 Cal. 3d 349, 361-62, 530 P.2d 589, 597, 118 Cal. Rptr. 621, 629 (1975).

[140] In Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966), *aff'd*, 385 F.2d 869 (6th Cir. 1967), for example, the plaintiff claimed his attorney negligently failed to file suit before the statute of limitations expired. The court stated that the plaintiff would be entitled to recover an amount equal to that which he would have recovered had the suit been properly instituted, if he could prove he would have prevailed in that original suit. *Id.* at 67. *See also* Duncan v. Lord, 409 F. Supp. 687 (E.D. Penn. 1976); Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Ware v. Durham, 268 S.E.2d 668 (Ga. 1980); Flynn v. Judge, 149 App. Div. 278, 280, 133 N.Y.S. 794, 796 (1912).

[141] MALLEN & LEVIT, *supra* note 132, § 131.

mental anguish, and injury to reputation.[142] Recovery of such damages has traditionally been allowed in tort,[143] but not in contract.[144]

In *McEvoy v. Helikson*,[145] for example, the plaintiff sued the defendant for his failure to deliver passports to his clients. The passports would have enabled a transfer of custody of the plaintiff's child.[146] The court held that the infringement of the plaintiff's legal right to the custody of his child entitled him to recover for the anguish and mental suffering caused by the loss of the child.[147] Such damages were perfectly allowable in a *tort* action of legal malpractice.

A legal malpractice action brought in contract, however, is more restrictive as to the nature of consequential damages recoverable. In *McClain v. Faraone*,[148] for instance, the plaintiff sued his attorney for the negligent failure to discover an encumbrance on real estate on which the attorney had performed a title search.[149] The court allowed only direct damages to be recovered.[150] The court recognized that a pecuniary injury caused by a breach of contract is likely to be accompanied by mental suffering.[151] Nevertheless, the court followed traditional contract doctrine and refused to allow recovery for such an injury.[152]

As in the rules regarding consequential damages, tort and contract theory also differ on the availability of punitive damages. Punitive damages are not recoverable for legal malpractice suits brought in contract.[153] Yet the rule in tort actions is to allow such damages if the defendant has been guilty of fraud, malice, or oppression.[154] In *Hall v. Wright*,[155] for example, the plaintiff was allowed to recover punitive damages in tort for her attorney's malpractice. The plaintiff in *Hall* alleged that her attorney fraudulently represented that the vendor with whom she was about to trade homes had a valid title to the land.[156] The plaintiff relied on the defendant's representations and consummated the transaction.[157] When the true owner made his claim to the property known, the defendant deceived the plaintiff into signing a promissory note which obligated her to pay for a house for which she had already traded her own.[158] At trial, the plaintiff was awarded punitive damages because of the defendant's fraud.[159] The Iowa Supreme Court sustained the award.[160]

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[142] *Id.*

[143] See text at note 136 *supra*.

[144] MCCORMICK, *supra* note 137, § 138.

[145] 277 Or. 781, 562 P.2d 540 (1977).

[146] *Id.* at 783-84, 562 P.2d at 541-42.

[147] *Id.* at 789, 562 P.2d at 544.

[148] 369 A.2d 1090 (Del. Super. 1977).

[149] *Id.* at 1092.

[150] *Id.* at 1092, 1094-95.

[151] *Id.* at 1094.

[152] *Id.* at 1094-95.

[153] MALLEN & LEVIT, *supra* note 132, § 146.

[154] *See* PROSSER, *supra* note 31, § 2, at 9-10.

[155] 261 Iowa 758, 156 N.W.2d 661 (1968).

[156] *Id.* at 765, 156 N.W.2d at 665.

[157] *Id.*

[158] *Id.* at 764, 156 N.W.2d at 665. The plaintiff testified: "I said, 'Well, Bob, wait until I get up and get my eyeglasses so I can read it.' He says, 'You don't have to read behind me.' He said, 'I'm your attorney. Just sign this.' So, I signed it." (sic) *Id.*

[159] *Id.* at 760, 156 N.W.2d at 662.

[160] *Id.* at 773, 156 N.W.2d at 670. An award of punitive damages similarly may be sus-

Following the traditional contract rule, however, punitive damages cannot be recovered.[161] In *Hillhouse v. McDowell*,[162] for instance, the client sued his attorney for failure to prosecute his personal injury suit before the statute of limitations had run.[163] The court characterized the suit as a contract action, based on the violation of the defendant's implied promise to exercise reasonable skill and diligence.[164] Turning to the question of damages, the court held that such a breach of contract renders "the attorney liable for the loss resulting, but no more."[165]

The differing rules regarding damages in tort and contract are especially significant in cases where contract damages are the only damages available to the plaintiff. When a client discovers his attorney's negligence before the direct damage is actually incurred, a contract action will offer nominal damages for the breach itself.[166] A tort action, however, cannot accrue until the plaintiff has suffered harm from the negligent act.[167] Therefore, a plaintiff who discovers his attorney's negligence before the resulting damage is incurred does not have a cause of action in tort. The dilemma of a plaintiff who discovers her attorney's negligence too soon to recover in tort is illustrated in *Marchand v. Miazza*.[168] In *Marchand*, the plaintiff sued her attorneys for their failure to protect her rights in certain real and personal property.[169] The plaintiff had dismissed the defendants and retained new counsel.[170] The other counsel pursued the claims that the plaintiff formerly had entrusted to the defendants.[171] At the time of the malpractice action, these claims were still pending.[172] The court noted that the malpractice action could be filed in contract as well as in tort, but treated it as a tort suit.[173] Thus, no recovery could be granted for the defendant's wrongful conduct until the resulting damages had been shown to exist.[174] Had the court treated the suit as arising in contract, the act of negligence alone would have been sufficient to warrant at least nominal damages.[175]

Distinctions between tort and contract play an important role in deciding

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tained if the attorney has shown such lack of care or attention, or such great indifference, that malice may be imputed to his actions. Gay v. McCaughan, 272 F.2d 160, 162 (5th Cir. 1959).

[161] *See, e.g.*, Carroll v. Rountree, 34 N.C. App. 167, 175, 237 S.E.2d 566, 572 (1977); Bland v. Smith, 197 Tenn. 683, 687, 277 S.W.2d 377, 379 (1955).

[162] 410 S.W.2d 162 (Tenn. 1966).

[163] *Id.* at 162.

[164] *Id.* at 166.

[165] *Id.*

[166] *See* MCCORMICK, *supra* note 137, § 20 at 85.

[167] PROSSER, *supra* note 31, § 31 at 143.

[168] 151 So. 2d 372 (La. App. 1963).

[169] *Id.* at 373-74.

[170] *Id.* at 374.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 375.

[174] *Id.* In a related context, the California Supreme Court has noted: "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort . . . . The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action for negligence." Budd v. Nixen, 6 Cal. 3d 195, 200, 491 P.2d 433, 436, 98 Cal. Rptr. 849, 852 (1971).

[175] See text at note 166 *supra*.

the extent of damages recoverable in an action of legal malpractice. The plaintiff may be entitled to a wide scope of damages, or, indeed, none at all, depending on the form in which he brings his suit. Some courts, however, have shown a willingness to base their decisions on damages in legal malpractice actions on the facts of the case, rather than on the form in which it is brought. For example, although traditional rules of contract restrict damages to the amount of actual pecuniary loss, courts have awarded exemplary damages where a breach of contract is accompanied by an intentional wrong or malicious conduct.[176] *Singleton v. Foreman*[177] is an illustration of this judicial approach. In *Singleton*, the plaintiff retained the defendant to represent her in a divorce proceeding.[178] The defendant had the plaintiff sign an employment contract for his services which provided for a contingent fee out of the proceeds from the divorce settlement.[179] Contracts for contingent fees in divorce cases are illegal under Florida law, however.[180] When the plaintiff expressed her desire to settle the case out of court, the defendant "exploded into a torrent of abuse,"[181] and threatened to ruin both Mrs. Singleton and her husband.[182] The plaintiff discharged the attorney, and sued in contract for recovery of the value of certain jewelry given to the defendant as security under the contingent fee agreement.[183] The court found this conduct sufficient to establish a cause of action in tort for infliction of severe emotional distress.[184] Recognizing the general rule that exemplary damages are not allowed for simple breach of contract, the court nevertheless ruled that "where the acts constituting the breach also amount to an independent tort, exemplary damages may be recovered."[185] Because the defendant's breach of contract also constituted the tort of severe infliction of emotional distress, exemplary damages were recoverable although the action was brought in contract.

In summary, a tort action offers the legal malpractice plaintiff a wider scope of damages than does a contract action. Unless the contract plaintiff can establish that an independent intentional wrong accompanied the breach of contract, he is not likely to recover consequential or punitive damages. A plaintiff who brings a legal malpractice action in tort, however, is assured of the availability of both consequential and punitive damages.

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[176] *See, e.g.*, National Homes Corp. v. Lester Indus., Inc., 336 F. Supp. 644 (W.D. Va. 1972); Country Club Corp. v. McDaniel, 310 So. 2d 436 (Fla. Dist. Ct. App. 1975); Hess v. Jarboe, 201 Kan. 705, 443 P.2d 294 (1968); *see also* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 236 (1977); Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975).

[177] 435 F.2d 962 (5th Cir. 1970).

[178] *Id.* at 965.

[179] *Id.* at 965, 969.

[180] *Id.* at 969.

[181] *Id.* at 967.

[182] *Id.* "In the course of said obscenities, the defendant told the plaintiff that she was a "stupid . . .'; that plaintiff did not 'have any more to say in the case than a chair in the courtroom.'" *Id.*

[183] *Id.* at 968.

[184] *Id.* at 971.

[185] *Id.*

B. *Recovery in Legal Malpractice Actions: Damages in "Contort"?*

The preceding examination of choice of statute of limitations, accrual of the action, and survivability in legal malpractice cases has shown the extent to which traditional rules of contract and tort influence the outcome of the suit. It has been suggested that differences in outcome are more the result of the application of anachronistic rules of form than of real differences between the actions. The same is true in the area of damages. The difference in damages recoverable in tort and contract are based on rules most appropriately confined to their nineteenth century origins.

Tort damages began as a method of enforcing obligations by compensating persons to whom obligations were owed but not met.[186] Because the object of tort recovery was primarily to restore the plaintiff to the position he would be in had the wrong not been committed,[187] the plaintiff was allowed compensation for mental anguish, pain and suffering, and severe emotional distress, as well as recovery for any pecuniary loss incurred.[188] If certain acts of the defendant were outrageous enough to raise the indignation of the court, exemplary damages also could be imposed in a tort action, both to punish the defendant and to deter future wrongdoing.[189]

As noted above, contract damages are more limited in nature than tort damages. The reasons for this difference between the two forms of action lies in the development of contract law, and in the economic and philosophical doctrines that characterized the nineteenth century.

Classical contract damage theory was influenced to a great extent by the economic doctrine of laissez-faire.[190] It has been noted that it is more in keeping with the free enterprise system for the law to encourage promisees to rely on the promises of others than to compel performance by threatening a wide scope of damages as punishment for breach.[191] As one commentator observed, "[T]his at least adds to the celebrated freedom to make contracts, a considerable freedom to break them as well."[192] Rather than discouraging businessmen from leaving old enterprises for the purpose of entering into more profitable ventures, contract law instead "has shown a marked solicitude for men who do not keep their promises."[193] Such a result harmonizes well with the free trade economy philosophy of the Victorian era during which the law of contracts was systemized.[194]

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[186] Wigmore, *Responsibility for Tortious Acts: Its History — III*, 7 HARV. L. REV. 441, 453 (1894).

[187] MCCORMICK, *supra* note 137, § 137, at 560-61.

[188] *Id.* at § 88.

[189] *Id.* at § 77.

[190] P. S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 3 (2d ed. 1971) [hereinafter cited as ATIYAH]; GILMORE, *supra* note 1, at 6. *See generally* A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).

[191] Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970).

[192] *Id.*

[193] *Id.* at 1216.

[194] MCCORMICK, *supra* note 137, § 138, at 566-67.

It has been asserted that the most striking characteristic of the laissez-faire philosophy is the narrow scope of social duty which the legal theories implicitly assumed.[195] While tort law is recognized as having its roots in moral obligation to some extent,[196] classical contract law disavows any such connection between what is ethical and what is legal. Holmes, recognized as a "great organizer"[197] of American contract law, wrote: "Every man has the right to 'break' his contract if he so chooses — to pay damages instead of performing his contractual obligation. The wicked contract breaker should pay no more than the innocent and pure in heart."[198]

A plaintiff in a legal malpractice action brought in contract, thus encounters a law of damages founded on nineteenth century economic theory and legal philosophy. Yet neither principles of laissez-faire economics, nor notions of limited social duty are appropriately applied to actions of legal malpractice. The existence of the fiduciary relationship between an attorney and his client means that the attorney does not have considerable freedom to "break" his contract. Indeed, in the Model Code of Professional Responsibility, the American Bar Association specifically prohibits such activity by stating: "A lawyer shall not . . . fail to carry out a contract of employment entered into with a client for professional services. . . ."[199] Contrary to classical contract theory, then, it is the expressed intention of the legal profession today to discourage attorneys from breaching their contracts of employment.[200] The laissez-faire rationale for limiting recovery to expectation damages thus does not exist in contract actions of legal malpractice.

The narrow scope of social duty that characterized the nineteenth century is also inappropriately applied to actions of legal malpractice. An attorney occupies a special position of trust and reliance in today's society. The contractual aspects of the attorney-client relationship in no way diminish the fiduciary nature of the relationship. The American Bar Association has stated that "[A lawyer's] fiduciary duty is of the highest order. . . . He is not permitted to take advantage of his position of superior knowledge to impose upon his client; nor to conceal facts of law, nor in any way to deceive him without being held responsible therefor."[201] Consequently, the need to protect the integrity of the legal profession, and compensate the plaintiff for his losses are as imperative in contract actions as in tort actions. For an attorney to escape full

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[195] GILMORE, *supra* note 1, at 95.

[196] PROSSER, *supra* note 31, § 4, at 16-17.

[197] GILMORE, *supra* note 1, at 6.

[198] O.W. HOLMES, THE COMMON LAW 236 (Howe ed. 1963).

[199] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, D.R. 7-1-1 (1976) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

[200] The merger of the principles of damages in tort and contract actions of legal malpractice is in keeping with the general trend of the law. The restricted role of the law adopted by the nineteenth century courts has been abandoned in modern society. Today the law is viewed more as a positive instrument for the achievement of justice. ATIYAH, *supra* note 190, at 11. As one observer commented: "The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond." GILMORE, *supra* note 1, at 95-96.

[201] CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 199, E.C. 5-1 n.1 at 28 (1976).

liability for his acts solely on the basis of the form in which his client brings suit is an offense to the notions of fair play which guardians of any legal system must protect and foster.

Because the historical reasons for differences in tort and contract recovery do not apply to legal malpractice actions, courts should not be bound by traditional tort and contract distinctions in assessing damages. The suits are essentially identical. If expectation or punitive damages are appropriate based on an evaluation of the attorney's actions, the attorney should not escape such liability because the action is brought in contract. Such a merger of tort and contract will not necessarily result in greater liability for attorneys because the duty owed clients remains the same under both forms. To preserve tort and contract distinctions in the area of legal malpractice is to allow the courts to mask a decision on the merits of the case behind the artifacts of case and assumpsit.[202]

CONCLUSION

An action of legal malpractice may be brought in either tort or contract. Although the suits are almost identical in nature, differences in statutes of limitations, dates of accrual, survivability, and damages may preclude a plaintiff's action or sharply limit his recovery. A legal malpractice action brought in tort, however, is not dissimilar enough from one brought in contract to warrant a different statute of limitations. State legislatures should determine an appropriate statutory period for both tort and contract actions. In the absence of such legislative action, the courts should apply the statute which gives the plaintiff the most time in which to bring the suit. A contrary rule allows an attorney to profit from his client's unfortunate decision to bring the suit in the "wrong" form. In addition, the discovery rule should govern the date of accrual for both forms of a legal malpractice action. To hold otherwise permits the attorney to take advantage of his superior knowledge regarding the legal services he renders. Similarly, just as a contract action of legal malpractice survives the death of a party, so too does a tort action deserve like treatment. Finally, courts should allow aggregation of tort and contract damages in legal malpractice actions, provided duplicative recovery does not result.

Commenting on the impact traditional rules of tort and contract still have on judicial decisions, one judge noted that, "when the ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them, undeterred."[203] So too in legal malpractice actions, courts should step through the remnants of case and assumpsit to focus on the merits of the plaintiff's claim, rather than on artificial distinctions between tort and contract.

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[202] Some courts have already allowed aggregation of tort and contract damages in other areas of the law. *See, e.g.*, E. H. Boerth Co. v. Lad Properties, 82 F.R.D. 635, 646 (D. Minn. 1979) ("Recovery in tort does not preclude further recovery for breach of contract, provided the plaintiff does not recover damages in excess of the actual injury sustained."); Dold v. Outrigger Hotel, 54 Hawaii 18, 22, 501 P.2d 368, 372 (1972) ("[C]ertain situations are so disposed as to present a fusion of the doctrines of tort and contract.") GLENDON, *supra* note 10, at 9-10.

[203] Lord Atkin, in United Australia Ltd. v. Barclay's Bank, A.C. 1, 29 (1941), *quoted in* Note, *Tort and Contract*, 93 LAW Q. REV. 422 (1977).