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# PUNITIVE DAMAGES IN TORT CASES IN MARYLAND

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*The author discusses the Maryland law governing the recovery of punitive damages in tort actions. Centering on the recent court of appeals decisions in* H & R Block, Inc. v. Testerman *and* Wedeman v. City Chevrolet Co., *the author analyzes the distinction between actions for torts arising out of contracts and pure actions for torts, and concludes that the standards articulated in* Testerman *and* Wedeman *are those applicable to all punitive damages awards in Maryland cases.*

## I. INTRODUCTION

In recent years the Maryland Court of Appeals has given some structure to the law governing the recovery of punitive damages in tort actions in this state. In *H & R Block v. Testerman,*[1] Judge Levine, writing for a unanimous court, articulated for the first time a distinction between pure actions for torts and actions for torts arising out of contracts,[2] holding that in cases of the latter type, actual malice must be shown before punitive damages will be awarded.[3] Two years later, in *Wedeman v. City Chevrolet Co.,*[4] the court, again speaking unanimously through Judge Levine, declined to apply the *Testerman* rule to an action for fraud inducing the plaintiff to contract, holding that in such an instance, implied malice is sufficient to support an award for punitive damages.[5]

Although the court maintained in both the *Testerman*[6] and *Wedeman*[7] opinions that these decisions do not represent changes in

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1. 275 Md. 36, 338 A.2d 48 (1975).
2. Although prior decisions of the court had implicitly recognized this distinction, *see* text accompanying notes 83–126 *infra,* it had never been articulated in terms of the pure tort-tort out of contract context prior to the *Testerman* opinion.
3. 275 Md. at 47, 338 A.2d at 53.
4. 278 Md. 524, 366 A.2d 7 (1976).
5. *Id.* at 532, 366 A.2d at 12.
6. While it is well settled in this state that punitive damages cannot be awarded in a pure action for breach of contract, such damages are recoverable in tort actions arising out of contractual relationships. In such situations, however, actual malice has been required . . . . This rule has been followed consistently.

   275 Md. at 44, 338 A.2d at 52–53 (citations omitted).
7. Although the court noted in *Wedeman* that "in no prior decision . . . dealing with actionable fraud have we been met squarely with the question whether punitive damages had been properly allowed in the trial court," 278 Md. at 530, 366 A.2d at 11, it applied the standard set out in dicta by the Maryland Court of Appeals in Russell v. Stoops, 106 Md. 138, 66 A. 698 (1907). *See* note 45 *infra.*

the substantive law of punitive damages in tort actions in Maryland,[8] their importance in clarifying prior law should not be overlooked. These decisions and their progeny[9] provide the Maryland practitioner for the first time with guidelines as to what proof of malice is necessary to support an award of punitive damages in a given tort case.

This article will discuss the Maryland law of punitive damages in tort in terms of the structure now provided by *Testerman* and *Wedeman*. It will raise some questions left unanswered by the decisions and suggest possible guidelines for resolution of these remaining issues.

## II. *TESTERMAN*: TORT ARISING OUT OF CONTRACT

### A. *The Case*

In *H & R Block, Inc. v. Testerman*,[10] the plaintiffs, Mr. and Mrs. Testerman, sued H & R Block in an action for negligent preparation of their income tax returns. In their declaration the Testermans asked for damages in both tort and contract, alleging that H & R Block had "negligently, wantonly, maliciously and intentionally" prepared two years' tax returns incorrectly.[11] After finding for the plaintiffs on the liability issue, the trial court ruled as a matter of law that the Testermans were not entitled to punitive damages, since they had proved that H & R Block was guilty of "simple negligence" only.[12] This decision was reversed by the court of special appeals,[13] which held in part that punitive damages were appropriate since implied malice, sufficient to support such an award, had been shown.[14] On certiorari, the court of appeals noted that although the trial court's compensatory damages award was based on negligence, it could have been equally well-founded on the Testermans' alternative contract theory of suit,[15] and consequently the tort

8. Despite the court's contention to this effect in *Testerman*, *see* note 6 *supra*, the difficulty encountered by the court in attempting to reconcile McClung-Logan Equip. Co. v. Thomas, 226 Md. 136, 172 A.2d 494 (1961), with other prior decisions, *see* text accompanying notes 114–19 *infra*, indicates that at least confusion, if not conflict among decisions, existed prior to *Testerman*.
9. Henderson v. Maryland Nat'l Bank, 278 Md. 514, 366 A.2d 1 (1976); General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976); Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705 (1975); Food Fair Stores, Inc. v. Hevey, 275 Md. 50, 338 A.2d 43 (1975); Derby v. Jenkins, 32 Md. App. 386, 363 A.2d 967 (1976); GAI Audio of N.Y., Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. 172, 340 A.2d 736 (1975).
10. 275 Md. 36, 338 A.2d 48 (1975).
11. *Id.* at 37, 338 A.2d at 49.
12. *Id.* at 41, 338 A.2d at 54.
13. Testerman v. H & R Block, Inc., 22 Md. App. 320, 324 A.2d 145 (1974).
14. *Id.* at 350, 324 A.2d at 161.
15. 275 Md. at 47, 338 A.2d at 54.

committed, negligent preparation of the tax returns, arose out of the contractual relationship.[16] The court stated that Maryland has long allowed recovery of punitive damages in such situations, but only when actual malice has been shown.[17] Finding no proof of actual malice, the court reversed the court of special appeals' decision that punitive damages were proper.[18]

*B. The Historical Perspective*

The import of the *Testerman* distinction between torts arising out of, and those independent of, contracts is best understood when placed in the perspective of the historical purpose for damages in general. Compensation has been called the "central theme"[19] of the "harmonious symphony of the law of damages."[20] Thus, damages in contract actions have traditionally been aimed at "compensating" the plaintiff by restoring him to the position he held prior to formation of the contract, and courts have traditionally refused to award punitive damages in cases of pure actions for breach of contract.[21] The Maryland courts have consistently followed this majority rule.[22]

In tort actions, however, the avowed purpose of permitting punitive damages is not to compensate the plaintiff, but rather to punish the defendant in the hopes of deterring future interference with the rights of other individuals.[23] This concept of "exemplary"

16. *Id. See also* text accompanying notes 98–103 *infra.*
17. 275 Md. at 44, 338 A.2d at 53, (citing Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972); Daugherty v. Kessler, 264 Md. 281, 286 A.2d 95 (1972); Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970); St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 278 A.2d 12, *cert. denied* 404 U.S. 857 (1971); Knickerbocker Ice Co. v. Gardiner Dairy Co., 197 Md. 556, 69 A. 405 (1908)). The court then went on to fit McClung-Logan Equip. Co. v. Thomas, 226 Md. 136, 172 A.2d 494 (1961), and Rinaldi v. Tana, 252 Md. 544, 250 A.2d 533 (1968), within this line of cases, noting that although each of the latter decisions appears to uphold an award of punitive damages on implied malice only when the tort arose out of a contract, proof of actual malice was given in each case. 275 Md. at 45–46, 338 A.2d at 53.
18. 275 Md. at 49, 366 A.2d at 55.
19. C. McCORMICK, DAMAGES § 77 at 275 (1935) [hereinafter cited as McCORMICK].
20. *Id.*
21. *Id.* § 81 at 290.
22. Food Fair Stores, Inc. v. Hevey, 275 Md. at 57, 338 A.2d at 47; H & R Block, Inc. v. Testerman, 275 Md. at 44, 338 A.2d at 52; Siegman v. Equitable Trust Co., 267 Md. at 313, 297 A.2d at 760; St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. at 236, 278 A.2d at 33.
23. McCORMICK, *supra* note 19, § 77 at 275. *See also* H & R Block, Inc. v. Testerman, 275 Md. at 43, 338 A.2d at 52, (citing Philadelphia, W. & B. R.R. v. Hoeflich, 62 Md. 300, 307 (1884)); Heinze v. Murphy, 180 Md. 423, 430, 24 A.2d 917, 921 (1942), an action for damages for assault and battery and false imprisonment against a policeman, where punishment and deterrence were both stressed by the court: "exemplary or punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example, or warning, to others."

damages has been widely recognized by courts in England and throughout the United States.[24] Such damages have traditionally been awarded when circumstances showing "aggravation" are present, that is, when intent beyond that necessary to show commission of the tort itself has been proved.[25] Although Maryland joins with the vast majority[26] of American jurisdictions in allowing punitive damages, courts in this state remain reluctant to do so, refusing to uphold such an award absent a finding of actual damages,[27] and requiring proof of aggravated intent as an "absolute prerequisite" to punitive damages.[28] It is the precise definition of this "aggravated intent" or "malice" that has provoked such confusion in the law of punitive damages in Maryland.

In defining the aggravated intent necessary to support a punitive damages award, Maryland courts distinguish between "actual" malice and its legal equivalent,[29] sometimes known as "implied" or "inferred" malice.[30] The definition of "actual" malice most often quoted by the Maryland Court of Appeals is as follows: "[a]ctual or express malice may be characterized as 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."[31] If the "evil or rancorous motive" is omitted from the above definition, "implied malice" or the legal equivalent of actual malice is described: "acts [constituting a tort] practiced

24. McCormick, *supra* note 19, § 78 at 278–79.
25. *Id.* Thus, when the defendant has acted in good faith or upon honest mistake, punitive damages are precluded. Food Fair Stores, Inc. v. Hevey, 275 Md. at 56, 338 A.2d at 47; Siegman v. Equitable Trust Co., 267 Md. at 316, 297 A.2d at 761; Associates Discount Corp. v. Hillary, 262 Md. 570, 582, 278 A.2d 592, 598 (1971).
26. *See* McCormick, *supra* note 19, § 78.
27. *See, e.g.*, Shell Oil Co. v. Parker, 265 Md. 631, 644–46, 291 A.2d 64, 71 (1972); B & B Refrigeration v. Stander, 263 Md. 577, 582, 284 A.2d 244, 247 (1971); Kneas v. Hecht Co., 257 Md. 121, 125, 262 A.2d 518, 521 (1970); Delisi v. Garnett, 257 Md. 4, 9, 261 A.2d 784, 787 (1970).
28. H & R Block, Inc. v. Testerman, 275 Md. at 42, 338 A.2d at 52. Such proof may be supplied by circumstantial evidence. Henderson v. Maryland Nat'l Bank, 278 Md. at 520–21, 366 A.2d at 4–5.
29. Even the court of appeals has recognized that the actual and implied malice distinction has caused confusion:

> The difficulty in the Maryland cases arises in regard to factual situations in which there is no evidence of *actual intent* to injure or of *actual malice* toward the injured person, but in which the defendant's conduct is of such an extraordinary character as possibly to be the legal equivalent of such actual intent or actual malice, sometimes described as "wanton," "reckless disregard of the rights of others," and the like. We rather agree that in this latter type of situation, the language of some of the Maryland cases needs further interpretation and possible reconsideration to reach a more clear-cut rule.

Conklin v. Schillinger, 255 Md. 50, 71, 257 A.2d 187, 198 (1969) (emphasis in original).
30. GAI Audio of N.Y., Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. at 204, 340 A.2d at 755.
31. Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 352, 283 A.2d 392, 398 (1971).

intentionally, wantonly and without legal justification or excuse [show] implied malice or the 'legal equivalent' of actual malice."[32] The distinction between actual and implied malice is, then, that in order to sustain the lesser burden of proof of implied malice, the plaintiff need only show wanton conduct,[33] while proof of actual malice requires a showing of evil motive.[34]

The holding in *Testerman* that actual malice must be shown in order to support a punitive damages award in cases of torts arising out of contracts has been justified by the tort-contract nexus[35] and the historical distinction between the two actions.[36] Although the plaintiff in *Testerman* had a choice of contract or tort action, it is clear that no cause of action would have arisen had it not been for the preexistence of the contract between the plaintiffs and H & R Block.[37] It is on this basis that the court later justified its imposition of the stricter standard of proof of actual malice.[38]

## III. *WEDEMAN*: PURE TORT

### *A. The Case*

In *Wedeman v. City Chevrolet Co.*,[39] the Maryland Court of Appeals reversed the court of special appeals' application of the *Testerman* holding, and set out further guidelines as to when punitive damages will be awarded in tort cases brought in Maryland.

*Wedeman* involved an action for fraud brought by the purchaser of an automobile against the dealer from whom she bought it. The automobile was a "demonstrator." Prior to the plaintiff's purchase, the salesman assured her that the car had never been involved in an accident. This representation was later proved to be untrue. The trial court judge submitted the issue of punitive damages to the jury after instructing them, over defendant's objection, that either actual

32. GAI Audio of N.Y., Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. at 204, 340 A.2d at 755.

33. The Maryland Court of Appeals has given the following definition of "wanton conduct":

> We interpret the language of those cases which speak of wanton conduct or wantonness as being a basis for awarding punitive damages as referring to such conduct as would carry an implication of malice or as conduct from which one would draw a necessary inference of malice, conduct from which one might determine the existence of actual malice.

St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. at 239, 278 A.2d at 34–35.

34. H & R Block v. Testerman, 275 Md. at 43, 338 A.2d at 52; Siegman v. Equitable Trust Co., 267 Md. at 314; 297 A.2d at 760.

35. Wedeman v. City Chevrolet Co., 278 Md. at 529, 366 A.2d at 11; Henderson v. Maryland Nat'l Bank, 278 Md. at 519, 366 A.2d at 4.

36. H & R Block, Inc. v. Testerman, 275 Md. at 44, 338 A.2d at 52–53. *See also* McCormick, *supra* note 19, § 77.

37. Wedeman v. City Chevrolet Co., 278 Md. at 529, 366 A.2d at 11.

38. *Id.*

39. 278 Md. 524, 366 A.2d 7 (1976).

malice or its legal equivalent would support an award of punitive damages.[40] An award of $6,000 punitive damages followed.

The court of special appeals reversed,[41] reasoning that since the fraud was directly related to the purchase of the automobile, *Testerman* applied. Because actual malice had not been established, punitive damages did not lie.[42] On certiorari, the court of appeals held that the court of special appeals had "misconceived *Testerman.*"[43] The misconception, it said, was in the court of special appeals' premise that the fraud shown before the trial court was a tort arising out of a contract. Unlike the torts considered in *Testerman* and the cases before it, however, the tort here preceded the contract; here it was "the tortious conduct which . . . induce[d] the innocent party to enter into the contractual relationship."[44]

Having thus distinguished *Testerman,* the court went on to establish the rule applicable to the recovery of punitive damages in a pure action for fraud. This rule, adopted from dicta in the case of *Russell v. Stoops,*[45] is that in order to recover punitive damages in a pure action of fraud, the plaintiff may show either actual malice or its legal equivalent, implied malice. Finding that on the facts before it this burden had been met, the court remanded the case to the court of special appeals with instructions to affirm the judgment of the trial court.[46]

### *B. Applicability of the* Wedeman *Standard*

The importance of the *Wedeman* decision is twofold: first, it establishes a clear standard for awarding punitive damages in fraud cases. Although the court stated that the rule of *Russell v. Stoops* had "come to be regarded"[47] as the rule applicable to fraud cases in Maryland, and that the court had "[n]ever . . . intimated that actual malice . . . was necessary to recover punitive damages where fraud is established,"[48] it had, nevertheless, not been squarely faced with the issue prior to *Wedeman.*[49] Further, while the adoption of the implied malice standard may appear to present a departure from the

40. *Id.* at 527, 366 A.2d at 9.
41. City Chevrolet Co. v. Wedeman, 30 Md. App. 637, 354 A.2d 185 (1976).
42. *Id.* at 643, 354 A.2d at 189.
43. 278 Md. at 528, 366 A.2d at 10.
44. *Id.* at 529, 366 A.2d at 11.
45. 106 Md. 138, 66 A. 698 (1907).

> In ordinary cases the recovery of exemplary, punitive, or vindictive damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly indicating malice and wilfullness.

*Id.* at 143–44, 66 A. at 700.
46. 278 Md. at 533, 366 A.2d at 13.
47. *Id.* at 530, 366 A.2d at 11.
48. *Id.*
49. *Id.*

conservative attitude toward punitive damages evidenced by *Testerman,* the *Wedeman* opinion is equally significant in that it specifically rejects the notion, suggested by treatise writers,[50] courts of other jurisdictions,[51] and an earlier decision by the Maryland Court of Special Appeals,[52] that proof of fraud per se justifies an award of punitive damages. This notion is based on the premise that proof of the intent required to support an action for fraud necessarily provides proof of the malicious intent required to support punitive damages.[53] The court, however, refused to adopt this reasoning: "[a]lthough we hold here that actual malice is not required to recover punitive damages in cases of actionable fraud, we do not retreat from [our earlier statement] to the effect that such damages will not be awarded as a matter of course in actions for fraud."[54]

Although the decision thus appears to require a plaintiff suing for fraud to meet an additional burden of proving at least implied malice before he can recover punitive damages, it is difficult to imagine a fact pattern that would support an action for fraud without providing proof of the implied malice necessary to support an award of punitive damages.

Secondly, this author believes that the implied malice standard applied in *Wedeman* is the proper standard to be met before punitive damages are awarded in any pure tort action brought in Maryland, regardless of the tort upon which the action is founded.[55] Thus, any tort action brought in Maryland should be analyzed in terms of whether the action is a pure tort action, not arising out of a contract, in which case the implied malice standard espoused in *Wedeman* should apply, or whether it is an action arising out of a contract, in which case the actual malice standard of *Testerman* should apply. An analysis of both the historical development of punitive damages in Maryland and the recent pronouncements of the Maryland courts of appeal supports this thesis.

Before this author's conclusion may be reached, though, two preliminary gaps must be closed. First, it is not evident from the two opinions themselves that together they present the standard applicable to punitive damages awards in all tort actions. Secondly, the decisions themselves do not entirely clarify the issue of when one, rather than the other, applies to a particular fact situation.

50. *See, e.g.,* SEDGWICK ON DAMAGES § 367 (1847).
51. *E.g.,* Harris v. Wagshal, 343 A.2d 283, 288 (D.C. 1975).
52. GAI Audio of N.Y., Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. at 204, 340 A.2d at 755.
53. *Id.*
54. Wedeman v. City Chevrolet Co., 278 Md. at 532, 366 A.2d at 12–13.
55. The one exception to the general applicability of this thesis is defamation, the torts of libel and slander, which, because of their potential infringement on first amendment rights, have been treated differently from other torts in regard to punitive damages. For an analysis of Maryland law on defamation, *see* Murnaghan, Ave *Defamation,* Atque *Libel and Slander,* 6 U. OF BALT. L. REV. 27 (1976).

The court in *Testerman* stated its holding broadly: "where the tort is one arising out of a contractual relationship, actual malice is a prerequisite to the recovery of punitive damages."[56] It is clear from this language that the key to *Testerman* applicability is not that a particular tort is the basis of the action, but rather, that whichever tort is involved, the tort sued on arose out of a contract. The *Wedeman* holding, on the other hand, is stated by the court to apply to cases of "actionable fraud."[57] Nevertheless, the implied malice standard articulated by the court in *Wedeman* has been applied in every case in which the court of appeals has been squarely faced with the issue of whether a trial court properly allowed an award of punitive damages for an action for pure tort when only implied malice was shown.[58]

Analysis of the Maryland decisions regarding punitive damages in pure tort cases is made difficult by the plethora of "red herring" cases in this area. "Red herring" cases are those in which the court was not directly faced with the decision of whether the lower court properly awarded punitive damages, either because there was evidence of actual malice in the case,[59] and thus no necessity to decide if implied malice would have been sufficient, or because, on the contrary, no malice of any kind was shown,[60] or simply because the defendant in the case failed to raise a proper objection to the jury instructions of the lower court.[61] When these "red herring" cases are disregarded, however, it becomes clear that to support an award of

56. 275 Md. at 47, 338 A.2d at 54.
57. 278 Md. at 532, 366 A.2d at 12.
58. *See* text accompanying notes 62–81 *infra*.
59. Summit Loans, Inc. v. Pecola, 265 Md. 43, 288 A.2d 114 (1972). This case involved an action for invasion of privacy. Although the jury instructions had called for proof of actual malice, the court of appeals noted that "[t]here were no exceptions taken by either side to the charge," *id.* at 52, 288 A.2d at 118, and further, "[t]here was . . . evidence of outrageous conduct on the part of Summit Loans with elements of malice, evil and oppression." *Id.* Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971). In an action for assault and battery, false imprisonment and malicious prosecution, the appellant claimed "that . . . the jury instructions did not give the definition of actual or express malice but instead described implied malice." *Id.* at 352, 283 A.2d at 398. The court of appeals stated: "[w]ithout discussing the issue of whether punitive damages can be based on implied malice we, nevertheless, disagree with the appellant's conclusion." *Id.* Galusca v. Dodd, 189 Md. 666, 57 A.2d 313 (1947). The facts showed "there had long been a bitter feeling between defendant and the Alers, by whom the plaintiff was employed . . . . [D]efendant had taken a hostile attitude toward the whole family." *Id.* at 671, 57 A.2d at 315.
60. Associates Discount Corp. v. Hillary, 262 Md. 570, 278 A.2d 592 (1971). This case presented an action for trespass q.c.f. The court of appeals said, "Assuming, arguendo, that wanton conduct would be equivalent to actual malice and sufficient for an award of punitive damages, in our opinion, there is no evidence of wanton conduct on the part of [defendants] and, also, there is no evidence of any evil motive or intent on their part." *Id.* at 582, 278 A.2d at 598.
61. Fowler v. Benton, 245 Md. 540, 226 A.2d 556, *cert. denied* 389 U.S. 851 (1967). Plaintiffs brought an action for fraud. The court of appeals stated:

> Appellants further contend that the lower court erred in not instructing the jury on the matter of punitive damages. As we have seen, the record

punitive damages in any pure action for tort, either actual or implied malice may be shown.

The most obvious torts that require only that implied malice be shown for punitive damages are malicious prosecution and false imprisonment (which includes the tort of false arrest).[62] Malice is an element of a prima facie case for malicious prosecution.[63] The Maryland courts, however, have long held that in suits for malicious prosecution, malice may be implied from another element of a prima facie case, proof of lack of probable cause in making the arrest.[64] Thus it has been held that prima facie proof of malicious prosecution per se supports an award for punitive damages in Maryland.[65] The legal justification for implying malice sufficient to support punitive damages from lack of probable cause in malicious prosecution cases has been extended to cases for false arrest in Maryland.[66] Thus it is clear that in this state, a plaintiff needs to prove no more than a prima facie case of malicious prosecution or false arrest in order to prove the implied malice necessary to support an award for punitive damages.

More elusive of analysis are cases involving torts of which prima facie proof does not lend itself to an inference of malice. Nevertheless, the court of appeals has held that in these cases as well, proof of implied malice is sufficient to support an award of punitive damages.

One example is the combined tort of assault and battery. The leading Maryland case on this point is *Vancherie v. Siperly*.[67] Although technically a "red herring" case in which the court was not forced to consider the issue because the defendant did not object to the jury instruction in question[68] and because evidence of actual

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shows that appellants objected to this omission before the jury retired, but no grounds for the objection were stated as required by Rule 554 d. The objection is therefore not properly before us for review.

*Id.* at 552, 226 A.2d at 564.

The court went on, however, to state that the proper standard for punitive damages in fraud cases is that given in the dicta, quoted *supra* note 45, from *Russell v. Stoops*, later held to be the law in *Wedeman*. *See also* Summit Loans v. Pecola, 265 Md. 43, 288 A.2d 114 (1972), discussed *supra* note 59.

62. *See, e.g.*, Montgomery Ward & Co. v. Cliser, 267 Md. 406, 420–21, 298 A.2d 16, 24–25 (1972).
63. The other elements are: "(a) a criminal proceeding instituted or continued by defendant against plaintiff, (b) termination of the proceeding in favor of the accused, [and] (c) absence of probable cause for the proceeding." Safeway Stores, Inc. v. Barrack, 210 Md. 168, 173, 122 A.2d 457, 460 (1955).
64. Montgomery Ward & Co. v. Keulemans, 275 Md. at 448, 340 A.2d at 709; Safeway Stores, Inc. v. Barrack, 210 Md. at 175, 122 A.2d at 461; Kennedy v. Crouch, 191 Md. 580, 587, 62 A.2d 582, 586 (1948); Derby v. Jenkins, 32 Md. App. at 394, 363 A.2d at 973.
65. Safeway Stores, Inc. v. Barrack, 210 Md. 168, 122 A.2d 457 (1955); Derby v. Jenkins, 32 Md. App. 386, 363 A.2d 967 (1976).
66. Montgomery Ward & Co. v. Cliser, 267 Md. at 421, 298 A.2d at 25.
67. 243 Md. 366, 221 A.2d 356 (1966).
68. *Id.* at 373, 221 A.2d at 360.

malice was given,[69] the court nevertheless considered the standard of proof necessary to support a punitive damages award:

> The argument that there were no grounds for an award of exemplary damages because, as the defendant put it, 'malice is a necessary element in inflicting exemplary damages and no malice was shown in the instant case' overlooks the fact that a finding by the jury that the injury had been wantonly inflicted would also justify the award of exemplary damages.[70]

This dicta of the court in *Vancherie v. Siperly* suggests that proof of implied malice is sufficient to support an award of punitive damages in a case of assault and battery. It has been repeatedly cited in later decisions as stating the law on this point in Maryland.[71]

Negligence is another tort for which no proof of malice is necessary to make out a prima facie case. In *Smith v. Gray Concrete Co.*,[72] the court of appeals applied the implied malice standard to award punitive damages in a pure negligence action. The case is singular in Maryland in its recognition that negligence may prove a basis for punitive damages, and its precedential value must be carefully regarded in view of the court's reluctance to award punitive damages in such cases.[73] With this caveat in mind, it is no surprise that the *Testerman* opinion treated *Smith* as an anomaly in Maryland law,[74] noting that "that particular holding . . . is carefully circumscribed in two important respects. It is confined to a wanton or reckless disregard for *human life,* and to the operation of a *motor vehicle.*"[75]

Even while confining the *Smith* decision to the facts of that case, however, the court of appeals in *Testerman* specifically stated that it was not "attempting to delineate [t]here the circumstances under which the legal equivalent of actual malice may support the recovery of punitive damages [in negligence cases generally]."[76] The question remains open as to how far *Smith* might be applied in future negligence cases. Nevertheless, that opinion makes clear that even in cases of negligence where punitive damages are found to be appropriate, the implied malice standard will apply in Maryland.

More recently, in *GAI Audio of N.Y., Inc. v. Columbia Broadcasting System, Inc.*[77] the court of special appeals recognized

69. *Id.* at 374, 221 A.2d at 360.
70. *Id.* at 373–74, 221 A.2d at 360.
71. *See* General Motors Corp. v. Piskor, 277 Md. at 176, 352 A.2d at 817; Montgomery Ward & Co. v. Cliser, 267 Md. at 420, 298 A.2d at 24.
72. 267 Md. 149, 297 A.2d 721 (1972).
73. *See, e.g.*, Conklin v. Schillinger, 255 Md. at 70–71, 257 A.2d at 197–98.
74. 275 Md. at 47, 338 A.2d at 54.
75. *Id.* (emphasis in original).
76. *Id.* at 46, 338 A.2d at 54.
77. 27 Md. App. 172, 340 A.2d 736 (1975).

for the first time in Maryland the right of a plaintiff to an award of punitive damages for the tort of unfair competition,[78] and applied the implied malice standard in upholding such an award. *GAI Audio* involved a complicated set of facts showing piracy of musical recordings, but there was "no evidence of hate or rancorous motive."[79] Nevertheless, the court allowed the judgment of punitive damages to stand:

> We are, however, confronted with a course of misconduct constituting unfair competition through the device of misappropriation. On the record before us, there can be no doubt that these acts of unfair competition were practiced intentionally, wantonly and without legal justification or excuse. This is implied malice or the "legal equivalent" of actual malice. . . .[80]
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> . . . .
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> [T]he situation is clearly one for the effectuation of the salutory purpose of exemplary damages not merely to enhance compensatory damages but to penalize the tort-feasors and to deter others because of the wanton, wilfull and oppressive character of the acts complained of.[81]

The combined effort of these decisions is to compel the conclusion that *Wedeman,* while presenting a case of first impression in the sense that the court had never before directly considered punitive damages in a fraud context, nevertheless had a predictable outcome in the sense that it merely presented the court with another demand for punitive damages in a pure action for tort. The implied malice standard of *Wedeman* is recognized in Maryland as the standard applicable to all pure actions for tort.[82]

## IV. WHEN DOES A TORT ARISE OUT OF A CONTRACT?

Whether the actual malice standard of *Testerman* or the implied malice standard of *Wedeman* applies to a given case depends on whether the tort sued on is deemed to "arise out of a contract." The court of appeals has given some guidance to the resolution of this issue by identifying certain past decisions that it considered to exemplify torts arising out of contracts[83] and by concluding that

78. *Id.* at 201–03, 340 A.2d at 753–54.
79. *Id.* at 204, 340 A.2d at 755.
80. *Id.*
81. *Id.* at 205, 340 A.2d at 755.
82. *But see* note 55 *supra.*
83. Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972); Daugherty v. Kessler, 264 Md. 281, 286 A.2d 95 (1972); St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 278 A.2d 12, *cert. denied* 404 U.S. 857 (1971); Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970); Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 69 A. 405 (1908).

"[t]hose cases . . . had in common one salient fact: the contractual relationship preexisted the tortious conduct."[84]

The seminal Maryland case on torts arising out of contracts is *Knickerbocker Ice Co. v. Gardiner Dairy Co.*[85] In *Knickerbocker,* the defendant ice manufacturer had been selling its ice to the Sumwalt Company. After Sumwalt contracted to supply ice to the plaintiff, the defendant refused to continue dealing with Sumwalt unless it discontinued deliveries to the plaintiff. Sumwalt complied with the defendant's demands, whereupon the plaintiff instituted suit against the defendant for interference with contractual relations. The trial court found for the plaintiff, and awarded compensatory and punitive damages. On appeal, the defendant contended that the trial court had erred in submitting the issue of punitive damages to the jury. The court held that the tort was "founded on contract"[86] and went on to recognize "the right to exemplary damages in [such] cases."[87] The court then considered the standard of malice necessary to support such an award:

> [T]he difficulty is that there is no evidence of malice in this case, unless it be such as some of the cases speak of that the intention to benefit the defendant, or to injure the plaintiff, is to be treated as evidence of malice. But we have found no case in which exemplary damages were allowed for malice implied from such facts.
>
> . . . .
>
> We do not mean to say there may not be such damages in cases of this character, for if, for example, there was evidence tending to show that the defendant had caused the contract to be broken for the sole purpose and with the deliberate intention of wrongfully injuring the plaintiff, exemplary damages might be recovered, but when the object was merely to benefit itself, although the plaintiff would be thereby injured, there would be no . . . reason for allowing such damages.[88]

The tort sued upon in *Knickerbocker,* interference with contract rights, presents what is perhaps the clearest example of a tort arising out of a contract. In such a case, proof of the tort necessitates proof of the underlying contract. The majority of cases cited in *Testerman* as involving torts arising out of contract involve some

84. Wedeman v. City Chevrolet Co., 278 Md. at 529, 336 A.2d at 11.
85. 107 Md. 556, 69 A. 405 (1908).
86. *Id.* at 569, 69 A. at 410.
87. *Id.*
88. *Id.* at 569–70, 69 A. at 410. *Knickerbocker* has been consistently cited as establishing the rule that actual malice must be proven to support a punitive damages award in a case for interference with contract rights. *E.g.*, St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. at 236–37, 278 A.2d at 33. The court of appeals in *Testerman* expanded the rule to apply to all tort actions arising out of contracts. *See* text accompanying note 56 *supra.*

variation of the situation found in *Knickerbocker.*[89] Cases subsequent to *Knickerbocker,* however, expanded its rule to include other torts arising out of contract. In each case, the contract preceded the tort and was essential to it, in that the tort would not have occurred but for the contract. This two-pronged analysis provides a convenient tool in many cases to ascertain whether the tort involved arose out of a contract.

The two-pronged analysis is easily applied to *Food Fair Stores, Inc. v. Hevey,*[90] the companion case to *Testerman.* There, the tort alleged was conversion. The property allegedly converted by Food Fair was money due the plaintiff employees under an agreement between them and Food Fair entitled "Incentive and Bonus Plan." Thus, the contract between the employees and Food Fair preceded any alleged conversion, and but for the contract, the tort never would have occurred. Since the tort arose out of a contract, the punitive damages awarded the plaintiff employees had to be supported by a finding of actual malice.[91] The record showed that Food Fair "believed itself legally justified"[92] in withholding the money because the plaintiffs had violated the anti-competition clause of the agreement. Citing *Testerman* and *Knickerbocker,* the court applied the actual malice standard[93] and noted that "[a]s the trial judge clearly recognized, the present case is lacking in any evidence that would support a finding of actual malice."[94] Food Fair's good faith in believing itself justified to withhold the money precluded a finding of the actual malice requisite to a punitive damages award:

> It has long been recognized in Maryland that where an act, though wrongful in itself, is committed in the honest assertion of a supposed right or in the discharge of duty, or without any evil or bad intention, there is no ground on which punitive damages can be awarded.[95]

The most recent case decided by the Maryland Court of Appeals involving a tort arising out of a contract is *Henderson v. Maryland Nat'l Bank.*[96] In *Henderson,* as in *Food Fair,* the tort alleged was

89. Of the cases cited in *Testerman* on this point, *see* note 83 *supra,* three involved some form of tortious interference with contract: *Daugherty, St. Paul at Chase Corp.,* and *Damazo.*
90. 275 Md. 50, 338 A.2d 43 (1975).
91. From the record of the trial, it appeared to the court of appeals that the relief granted the plaintiff was based on the contract counts of the declaration. The court noted, however, that "[i]t is clear from [the trial judge's] explanation . . . that he meant to do so under the conversion claims." *Id.* at 52 n.3, 338 A.2d at 44 n.3.
92. *Id.* at 56, 338 A.2d at 47.
93. *Id.* at 54, 338 A.2d at 45.
94. *Id.* at 55, 338 A.2d at 46.
95. *Id.* at 56, 338 A.2d at 47.
96. 278 Md. 514, 336 A.2d 1 (1976).

conversion. The property allegedly converted was the defendant's automobile on which the bank was a lienholder. The lien had been extinguished, but due to a mix-up in the bank's files,[97] the plaintiff continued to receive demands for payment. Finally, the bank repossessed the car, and then found itself subject to the plaintiff's lawsuit.

If the above analysis is applied to these facts,[98] it is readily apparent that the contract preceded the alleged tort, and but for the contract between the parties, the tort would never have occurred. Thus the court properly concluded without any discussion that the tort sued upon had arisen out of a contractual relationship.[99] Applying *Food Fair* and *Testerman,* the court of appeals utilized the actual malice standard.[100] The court of special appeals, in an unreported opinion,[101] had also applied *Testerman,* but had found the evidence of actual malice lacking.[102] The court of appeals reversed, concluding "the evidence presented by appellant [Henderson] permitted a reasonable and probable inference that the bank employee was motivated by actual malice in the form of spite or ill will when he directed the repossession of the automobile."[103]

While the two-pronged test employed above should be utilized to determine whether the tort arose out of a contract, the two prongs alone are insufficient to define the essential prerequisites to applicability of the actual malice standard. A third prong, also present in the cases discussed above, must be added to make the analysis complete: the plaintiff must have alternative causes of action for breach of contract or tort.[104]

*Associates Discount Corp. v. Hillary*[105] reveals the importance of this third element.[106] *Associates* involved an action against a

97. It was adduced at trial that the bank had a similar account with another customer named Henderson who was not so prompt as the plaintiff in making his payments. *Id.* at 518, 366 A.2d at 3.

98. *See* text accompanying note 89 *supra.*

99. 278 Md. at 519, 366 A.2d at 4. There was no need to discuss the issue since the parties to the case and the court of special appeals had agreed that the alleged tort arose out of a contractual relationship. *Id.*

100. *Id.* at 519–20, 366 A.2d at 4.

101. Maryland Nat'l Bank v. Henderson, No. 407, September Term, 1975, decided March 17, 1976.

102. 278 Md. at 515, 366 A.2d at 2.

103. *Id.* at 522, 366 A.2d at 6.

104. In cases in which the tort alleged is interference with contract rights, this third element will not be applicable to the named defendant since the plaintiff's suit will be against a third party and not against the party with whom he contracted. *See, e.g.,* Daughtery v. Kessler, 264 Md. 281, 286 A.2d 95 (1972). Nevertheless, the tort action plaintiff could choose to sue the party with whom he contracted for breach of contract.

105. 262 Md. 570, 278 A.2d 592 (1971).

106. The court of appeals found it unnecessary to answer the question of whether actual or implied malice would have been sufficient because it found that the plaintiff had not met either standard. *Id.* at 582, 278 A.2d at 598. Thus, the case in effect presents a "red herring." *See* text accompanying notes 59–61 *supra.* It may still be employed, however, for purposes of explanation.

repossession contractor for trespass. Friends of the plaintiffs, the Brauns, had purchased an automobile under an installment plan. When the Brauns were late in their payments, the defendant was sent to repossess the car. The defendant found the Brauns' automobile in the plaintiffs' driveway, and in repossessing it, the defendant first moved the plaintiffs' car. Subsequently, the plaintiffs brought suit. Thus, a contract preceded the alleged tort, and but for the contract, the trespass never would have occurred. This author believes, however, that this case represents a pure tort situation rather than one involving a tort arising out of a contract. Unlike cases such as *Testerman* and *Henderson,* the plaintiff in *Associates* could not have brought suit for breach of contract. In the former cases, the plaintiffs could have brought, and in fact did bring, actions for breach of contract.[107] Both *Henderson* and *Associates* involved installment sales contracts, but the plaintiff in *Associates* had no cause of action for a breach of contract. It is this choice of a contract or tort action which is the third key in determining whether actual or implied malice must be shown. As the court in *Testerman* stated:

> [a]lthough the trial court rested the judgment for compensatory damages on a finding of negligence, the Testermans had sued alternatively for breach of contract. Indeed, the trial court left no doubt that had it been denied any other option, it would have bottomed the award on the contract theory. The upshot is that the tort committed here . . . arose out of a contractual relationship.[108]

Thus the ingredients of the three-pronged test are 1) a contract preexists the tort; 2) the contract is essential to the tort; and 3) the plaintiff could sue on alternative theories of tort or contract.

The contract that forms the basis for the tort need not be an express contract but may be implied, as evidenced by cases involving torts committed by common carriers against their passengers.[109] A case in point is *D.C. Transit System, Inc. v. Brooks.*[110] There the plaintiff Brooks sued the D. C. Transit System for assault and battery, false arrest and malicious prosecution, stemming from an altercation between Brooks and a transit driver over whether Brooks had paid the proper fare. The court applied the actual malice standard, quoting from Judge Henderson's language in *Safeway Stores, Inc. v. Barrack*[111] "that 'where damages beyond compensation, to punish the party guilty of a wrongful act, are

107. Henderson v. Maryland Nat'l Bank, 278 Md. at 515, 366 A.2d at 3; H & R Block v. Testerman, 275 Md. at 37, 338 A.2d at 49.
108. 275 Md. at 47, 338 A.2d at 54.
109. *See, e.g.,* D.C. Transit System v. Brooks, 264 Md. 578, 287 A.2d 251 (1972); Philadelphia, W. & B. R.R. v. Hoeflich, 62 Md. 300 (1884).
110. 264 Md. 578, 287 A.2d 251 (1972).
111. 210 Md. 168, 122 A.2d 457 (1955).

asked, the evidence must show wanton or malicious motive, and it must be actual and not constructive or implied.' "[112]

The actual malice standard was applied when the contract involved was that implied in law between a common carrier and its passenger.[113] Thus, *D. C. Transit* stands for the proposition that when the contract is essential to the tort and the plaintiff has alternative remedies, the other element, that a contract precede the tort, may be met by an implied contract.

As noted earlier in this article, the standard of malice applied in pure tort cases appears confused by "red herring" cases.[114] "Red herring" cases have also created confusion with regard to the question of when a tort arises out of a contract. Two such cases, *McClung-Logan Equip. Co. v. Thomas*[115] and *Rinaldi v. Tana*,[116] were reconciled by the court of appeals with the holding in *Testerman*.[117] Both *McClung* and *Rinaldi* appeared to award punitive damages on the basis of implied malice only, and yet both clearly involved torts arising out of contracts.

In *McClung*, the defendant cross-claimed for conversion and trover arising out of the alleged wrongful repossession by plaintiff of a tractor purchased pursuant to an installment sale contract. The court of appeals affirmed an award of punitive damages and clearly applied the implied malice standard.[118] In *Testerman*, the court reconciled the *McClung* case with its later holding by stating:

> [A]ctual malice was found in *McClung-Logan*, where the evil and spiteful motive was thus described:
>
> '[I]t was a reasonable and proper inference that appellant became provoked with appellee's numerous requests that the defective condition of the tractor be corrected and that it determined to put a stop to the complaints by seizing the tractor and forcing the appellee to sign a release of all claims that he might have. The validity of this inference was clear in the light of appellant's insistence that appellee release all claims as a condition for appellant's acceptance of the redemption payment it had demanded of appellee and which it had stated it would accept.'[119]

112. 264 Md. at 584, 287 A.2d at 254.
113. *Id.* at 585, 287 A.2d at 254. The implied contract was not for the purchase and sale of a ticket, but for safe passage. *Id.*
114. *See* text accompanying notes 59–61 *supra*.
115. 226 Md. 136, 172 A.2d 494 (1961).
116. 262 Md. 544, 250 A.2d 533 (1968).
117. 275 Md. at 45, 338 A.2d at 53.
118. 226 Md. at 148–49, 172 A.2d at 501.
119. 275 Md. at 45, 338 A.2d at 53 (quoting McClung-Logan Equip. Co. v. Thomas, 226 Md. at 149, 172 A.2d at 501).

Thus, although the *McClung* court stated it was applying the implied malice standard, *Testerman* noted that the case did contain proof of actual malice.

Similarly, the court reconciled the holding in *Rinaldi*, a per curiam opinion involving an interference with contract action, by quoting from its opinion in *Damazo v. Wahby*:[120]

> '[t]here, although the per curiam opinion does not reveal it, there was testimony in the record that the interferer had expressed animosity towards his sister with whose contract he interfered and had threatened and indicated a determined purpose to harm her. Judge Moore, the trial judge, found this brought the case within the holding of the *Knickerbocker* case on punitive damages.'[121]

Thus, the *Testerman* court concluded that "actual malice was established in both cases."[122]

To the list of "red herring" cases in this area the author adds *Siegman v. Equitable Trust Co.*[123] *Siegman* involved an action brought for conversion of the funds in the plaintiffs' checking account and the wrongful dishonor of checks. Although the *Testerman* court cited *Siegman* in support of its holding,[124] it is clear that the court in the latter case adopted the implied malice standard: "To justify an award of punitive damages . . . the Siegmans were required to show that the conversion and wrongful dishonor of their check were accompanied by actions which manifest actual malice or its legal equivalent."[125] It is equally clear that actual malice should have been required, since the conversion and wrongful dishonor would never have existed had it not been for the contract between the Siegmans and the bank, and such contract gave them alternative tort and contract theories of recovery. Nevertheless, since no malice at all was shown in the case,[126] the court was not forced to consider whether implied malice alone would support punitive damages. Although *Testerman* would overrule *McClung, Rinaldi* and *Siegman* to the extent any of them conflicted with its tenets,

120. 259 Md. 627, 270 A.2d 814 (1970).
121. *Id.* at 639, 270 A.2d at 820.
122. 275 Md. at 45, 338 A.2d at 53.
123. 267 Md. 309, 297 A.2d 758 (1972).
124. 275 Md. at 44, 338 A.2d at 53.
125. 267 Md. at 316, 297 A.2d at 762. The court of appeals recognized the "red herring" nature of the *Siegman* opinion in its later opinion in Food Fair Stores, Inc. v. Hevey, 275 Md. 50, 338 A.2d 43 (1975), where the court stated:
> Although we recognized in Siegman — a tort case involving conversion and wrongful dishonor by a bank — that there can be cases in which the legal equivalent of actual malice might support an award of punitive damages, we held, in effect, that punitive damages were not recoverable there under any theory, since malice was totally lacking in either form — actual or implied.

*Id.* at 54 n.4, 338 A.2d at 46 n.4.
126. 267 Md. at 316, 297 A.2d at 762.

each is reconcilable. Such reconciliation is useful because each of these three cases presents a clear example of a tort arising out of a contract and each still constitutes Maryland precedent.

In summary, then, the case law both prior to and since *Testerman* shows three major elements as prerequisites to a finding that the tort in question "arose out of a contract": a contract must exist prior to the occurrence of the tort; it must be so interrelated to the tort that the tort would not have occurred had the contract not existed; and the plaintiff must have alternative theories of recovery in tort and contract under the facts presented. If all of these elements are shown, the tort "arose out of a contract" and the actual malice standard espoused in *Testerman* applies.

## V. CONCLUSION

Through its opinions in the *Testerman* and *Wedeman* cases, the Maryland Court of Appeals has fashioned a formula that may be used to determine what standard of proof of malice will govern whether punitive damages can be awarded in a given tort case. By applying the suggested three-pronged analysis[127] to the facts of a particular case, a practitioner can determine whether the tort in question arose out of a contract. This initial characterization determines in turn whether *Testerman* or *Wedeman* applies, and thus whether proof of actual malice or merely proof of its legal equivalent will support a punitive damages award.

Some implications of *Testerman* and *Wedeman* have yet to be fully explored and must await further explication by the courts.[128] Nevertheless, it is already apparent that these two decisions have significantly structured the law governing the recovery of punitive damages in tort actions in Maryland. The author questions, however, whether the Maryland law has been soundly structured or rather merely unnecessarily complicated for the practitioner who now must engage in these initial technical characterizations on a case by case basis.

127. *See* text accompanying notes 83–126 *supra*.

128. For example, it is not yet entirely clear what factual proof will be necessary to show either actual malice, *see, e.g.*, Henderson v. Maryland Nat'l Bank, 278 Md. 514, 366 A.2d 1 (1976), or implied malice in a given case. *See, e.g.*, text accompanying note 54 *supra*.

# UNIVERSITY OF BALTIMORE LAW REVIEW

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