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Mark C. Treanor
Miles & Stockbridge

MISCHIEF WITH MALICE: A REVIEW OF LIABILITY FOR PUNITIVE DAMAGES AND THE INSURED'S RIGHT TO INDEMNITY AGAINST AN EXEMPLARY AWARD

Mark C. Treanor†

This Article begins with an examination of the law of punitive damages, both in Maryland and in other jurisdictions. The author then discusses the question of whether an insured has a right to indemnity against a punitive award, focusing on the issues of insurance policy construction and public policy. A detailed analysis of a recent Maryland opinion on the subject is undertaken, and the author concludes with several recommendations for the Maryland judiciary and the legislature.

I. INTRODUCTION

In *First National Bank of St. Mary's v. Fidelity & Deposit Company*[1] the Court of Appeals of Maryland specifically held[2] that public policy did not protect the Fidelity & Deposit Company of Maryland from liability under the policy of insurance it had issued to the First National Bank of St. Mary's for that portion of a judgment entered against the Bank assessing exemplary damages.[3] Addressing the issue of insurance coverage for exemplary damages for the first time,[4] the court appears implicitly to have sanctioned the greatest departure to date from the previously espoused rationale for awarding punitive damages in Maryland, while explicitly altering the relationship between an insured and its insurer in terms of coverage provided and the premium rates charged for that coverage.[5]

This Article examines the new law concerning insurance coverage for punitive damages in Maryland in light of prior

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† B.S., 1968, United States Naval Academy; J.D., 1976, University of Maryland School of Law; Associate, Miles & Stockbridge, Baltimore, Maryland.

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1. 283 Md. 228, 389 A.2d 359 (1978) [hereinafter sometimes referred to as the *F & D* case].
2. The majority opinion was written by Judge Smith. Joining him were Chief Judge Murphy and Judges Eldridge, Orth, Cole, and Liss (specially assigned). Judge Levine filed a dissenting opinion, 283 Md. at 243, 389 A.2d at 367. It is interesting to note that Judge Levine previously had written almost all of the court's majority opinions in cases dealing with punitive damages since 1972.
3. 283 Md. at 243, 389 A.2d at 367.
4. The issue has been addressed previously by a number of other jurisdictions, and there is a definite split of opinion on the subject. *See* text accompanying note 55 *infra*.
5. *See* text accompanying notes 139–74 *infra*.

Maryland decisions dealing with punitive damages issues and with regard to the case law in other jurisdictions that have addressed the subject. In doing so an attempt is made to draw attention to questions left unresolved by the court's decision in the *F & D* case and to suggest areas in which further judicial or legislative guidance is needed.

II. PUNITIVE DAMAGES IN MARYLAND

A. The Rationale Behind Punitive Awards

A variety of rationales have been expressed as justification for the award of punitive damages. The courts allowing "punitive" or "exemplary" damages are generally in agreement — though individual courts' expressions of the rationale may differ slightly — that such damages are levied against a wrongdoer as a means of punishment because of his particularly aggravated misconduct and as a deterrent to others, warning them that similar conduct on their part will be dealt with harshly.[6]

A few courts stray from this punishment/deterrent rationale, asserting that punitive damages may be viewed in a limited sense as compensatory. In that sense they are allowed as compensation for a plaintiff's wounded feelings as a roundabout means of compensation for the infliction of mental distress.[7] A third theory asserted by a few courts — and probably an underlying unspoken feeling of most — is what might be termed the "private attorney general" rationale. Courts ascribing to this theory assert that punitive damages should be allowed on the supposition that civil prosecution of persons guilty of aggravated misconduct is desirable, and the award of punitive damages is a necessary encouragement to potential litigants who, perhaps because of the likelihood of receiving only a small compensatory damages award, would not otherwise sue.[8]

In Maryland it is well settled that a plaintiff may in the proper case[9] be awarded punitive damages. Though an undercurrent

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6. *See* W. PROSSER, THE LAW OF TORTS 9 (4th ed. 1971)[hereinafter cited as PROSSER]; D. DOBBS, LAW OF REMEDIES § 3.9 (1973) [hereinafter cited as DOBBS]; 22 AM. JUR.2d *Damages* §§ 236, 237 (1965); 25 C.J.S. *Damages* § 117(1) (1966); RESTATEMENT (SECOND) OF TORTS § 908 (Tent. Draft, 1973).
7. PROSSER, *supra* note 6, at 9; DOBBS, *supra* note 6, at 204-05.
8. PROSSER, *supra* note 6, at 10; DOBBS, *supra* note 6, at 205.
9. In Maryland, punitive damages are allowable in most actions sounding in tort. *See, e.g.*, Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976) (fraud); Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972) (negligent entrustment); Summit Loans, Inc. v. Pecola, 265 Md. 43, 288 A.2d 114 (1972) (invasion of privacy); D.C. Transit Sys., Inc. v. Brooks, 264 Md. 578, 287 A.2d 251 (1972) (false imprisonment); Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971) (assault, battery, false imprisonment); Associate Discount Corp. v. Hillary, 262 Md. 570, 278 A.2d 592 (1971) (trespass); American Stores v. Byrd, 229 Md. 5, 181 A.2d 333 (1962) (defamation). Punitive damages may not be

encompassing all of the above-discussed theories may be found in the Maryland cases, the continuously expressed rationale behind the award had been the need to punish the offender for his grievous wrong, and in doing so, to set an example for others.[10]

B. The Malice Requirement

Evaluation of the feasibility of bringing or defending a punitive damages case necessarily begins with an assessment of the most

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awarded, however, in a pure contract action, *i.e.* an action for breach brought by one party against the other. *See, e.g.*, Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972). On the other hand, they may be awarded for a cause of action that has arisen out of a contractual relationship, such as the tort of interference with contract. *See* Henderson v. Maryland Nat'l Bank, 278 Md. 514, 366 A.2d 1 (1976); H & R Block, Inc. v. Testerman, 275 Md. 36, 338 A.2d 48 (1975); Daugherty v. Kessler, 264 Md. 281, 286 A.2d 95 (1972); Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970); Rinaldi v. Tana, 252 Md. 544, 250 A.2d 533 (1969); McClung-Logan Equip. Co. v. Thomas, 226 Md. 136, 172 A.2d 494 (1961).

Plaintiffs seeking punitive damages must bring their actions in a court of law; a court of equity lacks the power to grant punitive awards, even if the facts of a given case would justify their imposition at law. *See, e.g.*, Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581, 48 A.L.R.2d 932 (1954) (an extensive review of Maryland's and other jurisdictions' rulings on the issue). Although by bringing an action in equity a plaintiff waives his claim to punitive damages, there appears to be a gray area in equity — perhaps analogous to the ephemeral basis of recovery for pain and suffering — in which, when determining the amount of compensatory damages to be awarded, the chancellor may take into consideration the motive of the wrongdoer. The tort-feasor's bad motive then may be reflected in the increased assessment of compensatory damages without actually acknowledging that such an increase is the equivalent of a punitive award. *Id.*

As a practical matter, when seeking both compensatory and punitive damages combined with a plea for equitable relief, as in a cause of action for libel, one may avoid forfeiting a claim to an exemplary award by bringing an action at law for damages and seeking an injunction at law as ancillary relief under MD. RULES BF 40-43. *See* Prucha v. Weiss, 233 Md. 479, 197 A.2d 253, *cert. denied*, 377 U.S. 992 (1964).

Actions based wholly or in part upon statutory rights present different problems. Survival actions and actions for wrongful death are examples and must be clearly distinguished. Punitive damages are not recoverable in a wrongful death action brought under MD. CTS. & JUD. PRO. CODE ANN. § 3-904 (Supp. 1978) because the rights of the plaintiff are created by statute, and the recoverable damages are specifically limited thereby. Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972). Survival actions, however, brought by the administrator of the decedent's estate under MD. EST. & TRUSTS CODE ANN. § 7-401 (1974), are not predicated upon a new cause of action created by statute, as are wrongful death actions. The plaintiff's claim in a survival action is one the decedent could have maintained himself had he lived to do so. Hence, even though not expressly authorized by statute, a personal representative may recover punitive damages in any case where they might have been awarded to the decedent had the latter survived the defendant's wrongful act. Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972).

10. *See, e.g.*, General Motors Corp. v. Piskor, 281 Md. 627, 381 A.2d 16 (1977); Gaither v. Blowers, 11 Md. 536 (1857); *cf.* Pratt v. Ayler, 4 H. & J. 349 (Md. 1817) (criminal intentions in civil assault and battery case may be considered by jury in awarding damages). In light of the *F & D* decision, however, the validity of the warning rationale may now be open to some question. *See* text accompanying notes 139-74 *infra*.

critical point of such a case — the likelihood of establishing that the defendant acted with "malice" as that term is construed by the courts of Maryland. The determination of whether the defendant acted with malice is the crucial issue in an action for punitive damages, for without such a finding no case can be established for an exemplary award.

The question "What is malice?" cannot be answered directly for in reality it appears to be whatever conduct by the defendant is so offensive that the court or jury believes him to be worthy of punishment. At one extreme might be the case where a defendant has clearly acted in a spirit of outright hatred toward the plaintiff, leaving little doubt that his wicked acts are deserving of the jury's, or perhaps ultimately the Court of Appeals', wrath. The threshold at the other end of the spectrum over which a defendant must have stepped to be found deserving of punishment is not as easily recognized.

The basic criteria by which to judge a defendant on the punitive damages issue was stated in the oft-cited 1884 case of *Philadelphia, Wilmington & Baltimore Railroad Co. v. Hoeflich.*[11] In reversing the lower court's assessment of punitive damages against a conductor who had wrongfully and forcibly ejected a passenger from a train, the Court of Appeals enunciated guidelines that have purportedly controlled the court decisions in Maryland punitive damages cases for the better part of a century:

> The force and deliberation with which the wrongful act is done, are not necessarily the tests by which the question of punitive damages is to be determined. On the contrary, to entitle one to such damages there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act.
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> . . . [T]o entitle the plaintiff to recover punitive damages . . . the jury must find that the wrongful act was done wantonly, or wilfully, or in the spirit of oppression. It is the evil motive or intention with which the wrongful act is done . . . on which rests the rule of punitive damages.[12]

The *Hoeflich* holding was translated by the court into a two-part rule for evaluating defendant's conduct. One part demanded a finding of an actual, real, evil motive. The alternative second part tempered the first by equating malice with a recklessness, closely bordering on the intentional disregard of plaintiff's rights.

Hence in *Heinze v. Murphy,*[13] the court stated that,

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11. 62 Md. 300 (1884).
12. *Id.* at 307, 309.
13. 180 Md. 423, 24 A.2d 917 (1942).

> A wrong motive must accompany the wrongful act, and without proof of malice or some other aggravation, exemplary damages cannot be recovered.[14]

The terms "malice" and "wanton" were defined in stark, sharp terms in *Dennis v. Baltimore Transit Co.*:[15]

> The word 'malice', as used in the rule for imposition of punitive damages, signifies that the defendant was influenced by hatred and spite and that he indulged in deliberate and wilful mischief to injure that plaintiff.
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> . . . .
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> The word 'wanton' means characterized by extreme recklessness and utter disregard for the rights of others.[16]

Following those definitions the court pronounced the test to be used in evaluating defendant's conduct:

> We specifically hold that, in a suit for [punitive damages] . . . it must be shown by the plaintiff in order to recover punitive damages that the [defendant] not only acted wrongfully but without just cause or excuse, and with the evil motive to injure or oppress, or at least with a reckless disregard of the rights of the person injured.[17]

Entangled in the court's pronouncements about the meaning of malicious or wanton conduct has been the semantic battle over distinctions between "actual" malice and "implied" malice. At first glance one might conclude that the court was demanding proof of a visceral, gut-felt hatred underlying defendant's conduct. Indeed in 1971 the Court of Appeals stated in *Drug Fair of Maryland v. Smith,*[18]

> Actual 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 willfully injure the plaintiff.[19]

Strong language that! But that language is subject to tempering by the notion that besides an actual loathesome hating, which is clearly "actual" malice, there is a "legal equivalent" of that hatred

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14. *Id.* at 429, 24 A.2d at 921.
15. 189 Md. 610, 56 A.2d 813 (1948).
16. *Id.* at 616-17, 56 A.2d at 817.
17. *Id.* at 617, 56 A.2d at 817.
18. 263 Md. 341, 283 A.2d 392 (1971).
19. *Id.* at 352, 283 A.2d at 398.

which, if established by plaintiff, may entitle him to recover punitive damages in certain cases.[20] That legal equivalent of malice has been characterized as an action by defendant "accompanied by fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury."[21] Until recent years, however, it was not clear whether a plaintiff, in any given case, was required to prove actual malice or only to meet the somewhat less onerous burden of establishing its legal equivalent of implied malice.[22]

In a series of cases beginning in 1975, the Court of Appeals set forth guidelines to be followed in making that determination. In *H & R Block, Inc. v. Testerman,*[23] the plaintiffs had sued in both tort and contract alleging that H & R Block had "negligently, wantonly, maliciously and intentionally" prepared their income tax returns incorrectly.[24] Labeling the plaintiffs' claim as one for "a negligent breach of contract,"[25] the court held that where the tort for which a punitive damages recovery is sought is one that arises out of a contractual relationship, actual malice as described above is a prerequisite to the recovery of punitive damages.[26] Though in later

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20. *See, e.g.,* Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972); St. Paul at Chase Corp. v. Manufacturer's Life Ins. Co., 262 Md. 192, 278 A.2d 12, *cert. denied,* 404 U.S. 857 (1971); Vancherie v. Siperly, 243 Md. 366, 221 A.2d 356 (1966); Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942).
21. McClung-Logan Equip. Co. v. Thomas, 226 Md. 136, 148, 172 A.2d 494, 500 (1961).
22. *See generally* McCadden, *Punitive Damages in Tort Cases in Maryland,* 6 U. BALT. L. REV. 203 (1977).
23. 275 Md. 36, 338 A.2d 48 (1975).
24. *Id.* at 37-38, 338 A.2d at 49.
25. *Id.* at 48, 338 A.2d at 55.
26. *Id.* at 47, 338 A.2d at 54. In so holding, the court cited a number of prior cases, which it said foreshadowed the rule stated in *Testerman. See* 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. Manufacturer's 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 Co. v. Gardiner Co., 107 Md. 556, 69 A. 405 (1908).

The court also distinguished Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972), the only case in which the Court of Appeals has held that punitive damages could be recovered for an automobile tort. In *Gray,* the majority, over Judge Smith's strong dissenting view that the court was usurping legislative prerogatives, departed from the stark strictness of *Hoeflich* by formulating a test based largely upon the theories found in cases dealing with the crime of manslaughter by motor vehicle:

> We regard a "wanton or reckless disregard for human life" in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct, as the legal equivalent of malice. It is a standard which, although stopping just short of willful or intentional injury, contemplates conduct which is of an extraordinary or outrageous character.

267 Md. at 168, 297 A.2d at 731. The court in H & R Block, Inc. v. Testerman, 275 Md. 36, 338 A.2d 48 (1975), later indicated that the *Gray* holding "is confined to a wanton or reckless disregard for *human life* and the operation of a *motor vehicle.*" *Id.* at 47, 338 A.2d at 54 (emphasis in original).

opinions[27] the court drew the distinction between pure tort cases and cases in which the tort arose from a contractual relationship, the first detailed explanation of the distinction drawn by the court between pure tort and tort arising out of contract causes of action came in *General Motors Corp. v. Piskor*.[28] Describing the latter type of case, the court observed that

> [a] common thread runs through all these cases. In each instance, the tortious conduct and the contract were so intertwined that one could not be viewed in isolation from the other. Indeed, a conspicuous number of the cases in which the actual malice rule has been applied concern tortious inducement to breach a contract. In still others, the tort consisted of nothing more than an allegedly negligent performance of contract obligations, to the extent that the tort action was accompanied by a separate cause of action sounding in contract. In one form or another, then, the tort arose directly from performance or breach of contract.[29]

The court distinguished cases that had involved only tangential contractual relationships. It noted that the torts for which punitive damages had been sought in those cases could not have been found to have arisen out of the contractual relationship because there was no direct connection between the contract and the tort in question.[30] The court's holding relied upon this distinction:

> In order, then, for an alleged wrong to constitute a "tort arising out of a contractual relationship," thereby necessitating proof of common law actual malice to permit recovery of punitive damages, we require that there be a direct nexus between the tortious act and performance or breach of the terms and conditions of the parties' underlying contract.[31]

It is now clear, therefore, that when considering the possibility of the jury's awarding punitive damages and evaluating the malice requirement in the case, the parties must not only draw a distinction

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27. *See, e.g.*, Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976); Henderson v. Maryland Nat'l Bank, 278 Md. 514, 366 A.2d 1 (1976); Food Fair Stores v. Hevey, 275 Md. 50, 338 A.2d 43 (1975).
28. 281 Md. 627, 381 A.2d 16 (1977).
29. *Id.* at 637, 381 A.2d at 21.
30. *Id.* at 637-38, 381 A.2d at 22 (*citing* Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705 (1975); Montgomery Ward & Co. v. Cliser, 267 Md. 406, 298 A.2d 16 (1972); D.C. Transit Sys., Inc. v. Brooks, 264 Md. 578, 287 A.2d 251 (1972); Vancherie v. Siperly, 243 Md. 366, 221 A.2d 356 (1966); Dennis v. Baltimore Transit Co., 189 Md. 610, 56 A.2d 813 (1948)).
31. General Motors Corp. v. Piskor, 281 Md. 627, 640, 381 A.2d 16, 23 (1977).

between tort and contract causes of action,[32] but must also closely examine the type of tort and the relationship between the parties from which the cause of action arises.

C. *Proof of Malice*

It has long been recognized that malice, fraud, deceit, and wrongful motive are seldom admitted and most often must be inferred from acts and circumstantial evidence, and need not be proved by direct evidence.[33] Hence the trier of fact may draw an inference of malice or its legal equivalent from both direct and circumstantial evidence. To entitle a plaintiff to a punitive recovery, malice usually must be proved as a distinct matter different from the basic elements of the tort at issue. In the case of malicious prosecution, however, punitive damages may always be awarded whenever the defendant is held liable for the tort itself.[34] The malice that constitutes one element of the tort is sufficient to support a punitive award.[35]

D. *Imputing Malice*

As well as being inferred from the facts of a case, malice may also be imputed from the circumstances surrounding defendant's acts. If punitive damages are not recoverable against one's agent, they may not be assessed on the basis of the agency relationship against the principal himself.[36] If, however, the agent is found to have acted with malice, that malice may be attributable to the principal if the agent's conduct was within the scope of his employment.[37] In order to impute the agent's malice to the principal, there is no need for affirmative proof that the employer authorized, participated in, or ratified the tortious act of his employee, as long as the latter was acting in furtherance of his master's business.[38] Furthermore, the defendant employer generally has the burden of

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32. The *Piskor* court reiterated the rationale behind the rule that punitive damages could not be awarded in actions for breach of contract. *See* 281 Md. at 638-39, 381 A.2d at 22.
33. McClung-Logan Equip. Co. v. Thomas, 226 Md. 136, 172 A.2d 494 (1961); Geisey v. Holberg, 185 Md. 642, 653, 45 A.2d 735, 740 (1946).
34. *See, e.g.*, American Stores v. Byrd, 229 Md. 5, 181 A.2d 333 (1962); Newton v. Spence, 20 Md. App. 126, 316 A.2d 837 (1974).
35. *See, e.g.*, First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 389 A.2d 359 (1978); Montgomery Ward & Co. v. Cliser, 267 Md. 406, 298 A.2d 16 (1972); American Stores v. Byrd, 229 Md. 5, 181 A.2d 333 (1962).
36. Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972).
37. Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 306 A.2d 548, *cert. denied*, 269 Md. 756 (1973).
38. Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 306 A.2d 548, *cert. denied*, 269 Md. 756 (1973).

proving to the jury that the defendant employee was not engaged in the course of his employment when the act was performed.[39] That burden of proof is not one that is readily met.

Significantly, the question of the master's liability does not turn on the quality of the act performed or the method by which that act is accomplished. Punitive liability instead turns simply upon a determination of whether the servant performed the act in the line of duty and within the scope of authority conferred upon him by the master.[40] Only if the jury finds that the employee's acts were motivated solely and exclusively by some personal motive unrelated to his position as an employee, will the employer escape liability.[41] Hence, although the servant's mode of action may exceed all reasonable bounds that a rational employer would expect him to use in his duties, if the tortious act occurred in the performance of those duties, punitive damages may be assessed against the master.[42]

E. Other Jury Considerations

The existence or nonexistence of malice is a question of fact to be determined by the jury, although the trial judge may not allow the jury to speculate that there were sufficient grounds for an award of punitive damages when in reality there were none.[43] Many other factors besides the definition of malicious conduct must, of course, also be considered. Given the right set of facts, a defendant has the right to have the judge instruct the jury that it should take into consideration the provocative acts and words of the plaintiff in mitigation of the punitive damages it might assess against the defendant.[44] Similarly, in those cases where probable cause has been a factor in defendant's actions, such as false arrest, the existence of probable cause, while not necessarily a defense to the act, may be shown in mitigation of punitive damages.[45]

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39. Newton v. Spence, 20 Md. App. 126, 316 A.2d 837, *cert. denied,* 271 Md. 741 (1974).
40. *See, e.g.,* Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 306 A.2d 548, *cert. denied,* 269 Md. 756 (1973); *cf.* Dennis v. Baltimore Transit Co., 189 Md. 610, 56 A.2d 813 (1948) (street car conductor maliciously ordered arrest of passenger while transacting the carrier's business).
41. Newton v. Spence, 20 Md. App. 126, 316 A.2d 837, *cert. denied,* 271 Md. 741 (1974).
42. Boyer & Co. v. Coxen, 92 Md. 366, 48 A. 161 (1901) (a vivid example of the proposition — the employee had viciously beaten a salesman with a monkey wrench). *See also* cases cited at notes 74-80 *infra.*
43. Baltimore Transit Co. v. Faulkner, 179 Md. 598, 20 A.2d 485 (1941).
44. Vancherie v. Siperly, 243 Md. 366, 221 A.2d 356 (1966); Feinberg v. George Washington Cemetery, 226 Md. 393, 174 A.2d 72 (1961); Dennis v. Baltimore Transit Co., 189 Md. 610, 56 A.2d 813 (1948); Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942).
45. Great Atl. & Pac. Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970); Clark's Park v. Hranicka, 246 Md. 178, 227 A.2d 726 (1967); Fleisher v. Ensminger, 140 Md. 604, 118 A. 153 (1922).

The award of a punitive damages recovery is not a matter of right. Although punitive damages are purportedly awarded on public policy grounds as a punishment for, and as a deterrent against, malicious conduct, they are not meant to compensate plaintiff for his loss, and generally there can be no award of exemplary damages in favor of one who has proved no actual compensable loss.[46]

If the jury does determine that the defendant acted with malice and that compensatory damages should be awarded, it may also award such an amount of exemplary damages as the jurors in their discretion see fit upon consideration of all of the attendant circumstances of the case.[47]

In Maryland, unlike several other jurisdictions, there is no requirement that there be some ratio established between the compensatory award and the amount of the punitive damages.[48] The jury's discretion should not be unlimited, utterly arbitrary, or be exercised with passion, prejudice, or bias,[49] and may be subject to the trial court's order of remittitur.[50] Upon appeal, however, the court generally will not disturb the trial judge's discretion in denying a

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46. Shell Oil Co. v. Parker, 265 Md. 631, 291 A.2d 64 (1972); B. & B. Refrigeration & Air Conditioning Serv. Co., Inc. v. Stander, 263 Md. 577, 284 A.2d 244 (1971). *See also* Wolf v. Levitt & Sons, 267 Md. 623, 298 A.2d 374 (1972); Delisi v. Garnett, 257 Md. 4, 261 A.2d 784 (1970). In the realm of punitive damages the requirement that a plaintiff establish the existence of such harm translates into the necessity for proof, and recovery, of compensatory damages. While every technical invasion of one's legal rights may give rise to a cause of action for the recovery of nominal damages (generally a trivial sum such as one cent or one dollar), it is clear that in Maryland recovery of merely technical nominal damages will not, in all but a few special cases, afford a basis for recovery of punitive damages. The exceptions to this requirement of a substratum award of actual compensatory damages appear to be actions involving the torts of malicious prosecution and cases of slander or defamation. *See, e.g.,* Nance v. Gall, 187 Md. 656, 50 A.2d 120 (1946), *modified,* 187 Md. 656, 51 A.2d 535 (1947); Newton v. Spence, 20 Md. App. 126, 316 A.2d 837, *cert. denied,* 271 Md. 741 (1974).

    The relationship between compensatory and punitive awards presents another potential problem in those actions involving a remittitur. Following a jury award of both compensatory and punitive damages, the trial judge may grant a judgment *n.o.v.* on the punitive damages issue and also grant defendant's motion for a new trial on the compensatory damages issue unless plaintiff agrees to a remittitur of part of the compensatory damages. If plaintiff accepts the remittitur, he will be deemed to have waived his right to appeal on the punitive damages issue. Kneas v. Hecht Co., 257 Md. 121, 262 A.2d 518 (1970); Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 158 A.2d 125 (1960).

47. Galusca v. Dodd, 189 Md. 666, 57 A.2d 313 (1948); Dennis v. Baltimore Transit Co., 189 Md. 610, 56 A.2d 813 (1948); Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942).
48. D.C. Transit Sys., Inc. v. Brooks, 264 Md. 578, 287 A.2d 251 (1972).
49. *See* 8 M.L.E. *Damages* § 113 (1960); 25 C.J.S. *Damages* § 126(1) (1966).
50. *See* Kneas v. Hecht Co., 257 Md. 121, 262 A.2d 518 (1970); Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 158 A.2d 125 (1960).

new trial because of the inadequacy or insufficiency of the award or overturn the verdict because of its size.[51]

Because punitive damages should be assessed in an amount that will punish the malicious defendant, there is no set formula by which the jury may calculate the proper amount of the exemplary award. As closely as possible the punishment should be made to fit not only the enormity of the act but also the particular circumstances of the actor.

> Damages which may constitute proper punishment or provide a sufficient deterrent in the case of a defendant of modest means may not serve those purposes so far as a more affluent defendant is concerned. Conversely a verdict that would scarcely be regarded by a wealthy man, might be ruinous to a poor man.[52]

In order to assist the jury in arriving at a determination of the amount of punitive damages to be assessed, the plaintiff has been permitted to introduce evidence of defendant's financial worth.[53] In the same light it seems that an impecunious defendant should be able to introduce evidence of his financial status in an attempt to lessen the amount of exemplary damages that the jury may assess against him.[54]

III. INSURANCE COVERAGE

Traditionally, the Maryland courts have sanctioned the imposition of a punitive assessment only against those defendants who had acted with "malice" toward the persons whom they had

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51. D.C. Transit Sys., Inc. v. Brooks, 264 Md. 578, 287 A.2d 251 (1972); Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 427-28, 306 A.2d 548, 554, *cert. denied,* 269 Md. 756 (1973) (*citing* Bell v. Morrison, 27 Miss. 68, 86 (1854)).

    Cases involving multiple torts, however, present a particular problem for the calculation of a punitive award. In such actions it is incumbent upon the trial judge to instruct the jury that even though plaintiff's claim may be stated in separate counts, it must determine whether the alleged facts occurred in actuality in one continuous transaction. If so, the plaintiff will not be allowed to pyramid his punitive damages into several different awards, but may receive only one award based upon defendant's malicious actions considering the transactions as a whole. Montgomery Ward & Co. v. Cliser, 267 Md. 406, 298 A.2d 16 (1972); Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Newton v. Spence, 20 Md. App. 126, 316 A.2d 837, *cert. denied,* 271 Md. 741 (1974).

52. Freeman Assocs., Inc. v. Murray, 18 Md. App. 419, 306 A.2d 548, *cert. denied,* 269 Md. 756 (1973).

53. *Id.*; Fennell v. G.A.C. Fin. Corp., 242 Md. 209, 218 A.2d 492 (1966). The decision in First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 389 A.2d 359 (1978), however, has placed the use of this procedure in considerable doubt. *See* text accompanying notes 139-74 *infra.*

54. *Cf.* Nance v. Gall, 187 Md. 656, 50 A.2d 120 (1946), *modified,* 51 A.2d 535 (1947) (evidence as to defendant's financial responsibility could have been offered to the jury, although none was introduced).

damaged. Further, the courts have determined that that award should be granted in such an amount as would provide for deterrence and punishment in light of each individual case's circumstances of wrongdoing and the defendant's financial condition. Prior to the *F & D* case, however, no appellate level decision in Maryland had addressed the question of whether a wrongdoer who had been found to have acted with malice and had therefore had an exemplary award assessed against him could be indemnified by his insurer for such punitive damages.

A. Other Jurisdictions

The question of whether an insurance company must indemnify its insured against a punitive damages award assessed against it has been addressed by less than one-half of the jurisdictions in this county. Most of those cases deal with motor vehicle torts and therefore interpret automobile liability insurance policies. The reported decisions show a definite split among the authorities.[55]

Determination of the issue of whether an insurance company must indemnify its insured against punitive damages assessed against him requires a two-fold analysis. The first question to be decided is whether the language of the applicable insurance policy

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55. Cases holding against insurance coverage for punitive damages include Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935) (applying Missouri law); Gleason v. Fryer, 30 Colo. 106, 491 P.2d 85 (1971); Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971); Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934); Sterling Ins. Co. v. Hughes, 187 So. 2d 898 (Fla. Dist. Ct. App.), *cert. denied*, 194 So. 2d 622 (1964); Nicholson v. American Fire & Cas. Ins. Co., 177 So. 2d 52 (Fla. Dist. Ct. App. 1965); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964); Padavan v. Clemente, 43 A.D.2d 729, 350 N.Y.S.2d 694 (1973); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375 (1969).

Cases that have permitted insurance coverage for punitive damages include Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Thorton, 244 F.2d 823 (4th Cir. 1957) (applying South Carolina law); General Cas. Co. of America v. Woodby, 238 F.2d 452 (6th Cir. 1956) (applying Tennessee law); Fagot v. Ciravola, 445 F. Supp. 342 (E.D. La. 1978) (applying Louisiana law); Norfolk v. Western Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92 (N.D. Ind. 1976) (applying Indiana law); Concord General Mut. Ins. Co. v. Hills, 345 F. Supp. 1090 (D. Me. 1972) (applying Maine law); United States Fidelity & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943) (applying California law); Capital Motor Lines v. Loring, 238 Ala. 260, 189 So. 897 (1939); Employers Ins. Co. of Ala. v. Brock, 233 Ala. 551, 172 So. 671 (1937); American Fidelity & Cas. Co. v. Werfel, 230 Ala. 552, 162 So. 103, *aff'd*, 231 Ala. 285, 164 So. 383 (1935); Maryland Cas. Co. v. Baker, 304 Ky. 296, 200 S.W.2d 757 (Ct. App. 1947); Cavin's, Inc. v. Atlantic Mut. Ins. Co., 27 N.C. App. 698, 220 S.E.2d 403 (1975); Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341 (Tex. App. 1972). See cases cited at note 144 *infra*. *See generally* Anderson, *Indemnity Against Punitive Damages*, 27 Sw. L.J. 593 (1973) [hereinafter ANDERSON]; STEIN, DAMAGES AND RECOVERY IN PERSONAL INJURY AND DEATH ACTIONS § 201 (1972) [hereinafter STEIN]; Annot., 20 A.L.R.3d 343 (1968).

should be construed to provide for indemnity against such damages. An affirmative answer to that question requires consideration of a second: Would such indemnity against exemplary damages violate the public policy of the jurisdiction? Courts addressing the problem have differed in their approaches, some discussing only one or the other of these questions, others discussing both.

B. Insurance Policy Construction

The courts that have addressed the construction issue have often differed on their interpretations of essentially the same policy language. Further, although some cases have held against indemnity on the basis of construction of the language of the insurance policy involved, most indicate, explicity or implicitly, that the court's decision was based in part on public policy considerations also.[56] Courts construing policies in such a way as to deny coverage for punitive damages have found that language providing for indemnity against damages assessed "because of bodily injury" or "because of property damage" precluded exemplary damages because exemplary damages are assessed as punishment for a defendant's wrongful acts and as a deterrent to others, not "because of" bodily injury. Hence, in *Universal Indemnity Insurance Co. v. Tenery*,[57] an auto negligence case, the court stated that,

> . . . the policy indemnifies against damages for bodily injuries, and nothing in addition is contracted for, and there is no further liability. The injured will not be allowed to collect from a non-participating party, for a wrong against the public.[58]

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56. Cases that have held against indemnity on the basis of construction of the insurance policy language include Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964); LoRocco v. New Jersey Manufacturer's Indem. Co., 82 N.J. Super. 323, 197 A.2d 591, *cert. denied*, 42 N.J. 144, 199 A.2d 653 (1964).

    Cases that have refused indemnity on the basis of public policy considerations include Surety Co. of New York v. Gold, 375 F.2d 523 (10th Cir. 1966); Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); Ohio Cas. Ins. Co. v. Welfare Fin. Co. 75 F.2d 58 (5th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); Price v. Hartford Accident & Indem. Co., 16 Ariz. App. 514, 494 P.2d 711 (1972); Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934); Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971); Nicholson v. American Fire & Cas. Ins. Co., 177 So. 2d 52 (Fla. Dist. Ct. App. 1965); Padavan v. Merchants Mut. Ins. Co., 43 A.D.2d 729, 350 N.Y.S.2d 694 (App. Div. 1973); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375 (Dist. Ct. 1969); Cavin's, Inc. v. Atlantic Mut. Ins. Co., 27 N.C. App. 698, 220 S.E.2d 403 (1975); Edmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966).

57. 96 Colo. 10, 39 P.2d 776 (1934).

58. *Id.* at 17, 39 P.2d at 779. *See also* Gleason v. Fryer, 30 Colo. 106, 491 P.2d 85 (1971); Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971); Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941) (statutory multiple damages for injuries resulting from willful violation of traffic

Other courts faced with similar language have not found it a barrier to indemnity. Construing such standard language as "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injuries," courts holding in favor of punitive coverage have often focused on the term "all sums" and found the provisions broad enough to warrant recovery.[59] Courts construing such language in favor of coverage for punitive assessments have stressed that the voluntary contracts in question did not specifically exclude punitive damages, were free of ambiguity, and hence could be construed against the insurer.[60]

C. *Public Policy Considerations*

The courts that have approached the issue of whether punitive damages may be covered by insurance from the point of view of public policy considerations have split in their opinions of the validity of indemnification for damages that are allegedly imposed for punishment and deterrence. The oft-cited opinion of the Fifth

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regulations; held that policy language should be construed narrowly in light of public policy against indemnity for penalties imposed because of a public wrong); Crull v. Gleb, 382 S.W.2d 17 (Mo. Ct. App. 1964).

59. *See, e.g.*, General Cas. Co. of America v. Woodby, 238 F.2d 452 (6th Cir. 1956) (reliance solely upon construction of policy language obligating the insurer "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability . . . imposed upon him by law . . . for damages . . . sustained . . . by any person . . ."); Concord Gen. Mut. Ins. Co. v. Hills, 345 F. Supp. 1090 (D. Me. 1972); Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1973); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964). *See also* Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965), where the court relied upon construction of the policy provision "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: A. bodily injury . . . sustained by any person . . . arising out of the . . . use of the owned automobile, or any non-owned automobile . . . ." The court then determined that the obligation to pay "all sums" that the insured was legally obligated to pay as damages included punitive damages. It further resolved that punitive damages are also "damages because of bodily injury," stating that the average insured would expect that the policy afforded coverage of all claims for any kind of damages arising out of his use of his automobile. *Id.* at 204, 139 S.E.2d at 909 (*citing* T.J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4312 at 132–33 (1962)). *Accord,* Fagot v. Ciravola, 445 F. Supp. 342 (E.D. La. 1978) (policy held to provide indemnity against punitive liability of policemen for violation of plaintiff's civil rights); Norfolk & W. Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92 (N.D. Ind. 1976); United States Fidelity & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943); Southern Farm Bureau Cas. Ins. Co. v. Danill, 246 Ark. 849, 440 S.W.2d 582 (1969).

60. *See, e.g.*, Greenwood Cemetery, Inc. v. Travelers Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977) (finding no specific exclusion of punitive damages but noting the exclusion for criminal acts in a unique cemetery liability policy); Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1973); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965).

Circuit Court of Appeals in *Northwestern National Casualty Co. v. McNulty*[61] is the leading decision holding against insurance coverage for punitive damages. The policy in question in *McNulty* was a family combination automobile policy issued to one Smith, a resident of Virginia. Smith, while intoxicated, was involved in a high speed, hit-and-run accident in Florida, which caused McNulty extreme injury, including permanent brain damage. A Florida court awarded both compensatory and punitive damages, and McNulty then brought an ancillary garnishment proceeding against the insurer in federal district court. The insurer appealed from the portion of the ensuing judgment allowing recovery of punitive damages under the insurance policy. The insurance company argued both that the language of the policy did not cover exemplary damages, and that, even if the policy construction would permit coverage, such coverage would violate public policy. The Fifth Circuit did not even consider the language construction issue; instead, it based its holding against coverage entirely upon public policy grounds. The court stated that the fundamental purposes of exemplary damages are punishment and deterrence, and, therefore, the burden of paying such damages should rest upon the wrongdoer. The court noted that an attempt to shift the burden to insurance companies would result in increased insurance premiums and that society would, therefore, actually be punishing itself. Analogizing to criminal misconduct and the public policy against insurance against criminal fines, the court stated that the same public policy should invalidate contracts of insurance against "the civil punishment that punitive damages represents" so that a person does not gain "a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."[62]

The *McNulty* court found that three substantial practical difficulties weighed against allowing coverage for punitive damages. First, such coverage would produce a serious conflict of interest between the insurer and the insured in settlement negotiations and trial tactics.[63] Second, there would be a conflict between the rule that the defendant's financial standing may be considered in assessing punitive damages and the rule against referring to the defendant's insurance in the presence of the jury.[64] Third, jury verdicts for small compensatory damages and gigantic punitive assessments could cause results having no relation to making the injured party whole and would therefore be justifiable only if the wrongdoer himself paid the amount assessed by the jury as punishment.[65]

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61. 307 F.2d 432 (5th Cir. 1962).
62. *Id.* at 440.
63. *Id.* at 441.
64. *Id.*
65. *Id.*

In reaching its holding, however, the majority laid greatest stress upon the fact that many people are maimed or killed in highway accidents and vehemently argued that depriving socially irresponsible drivers of insurance coverage for punitive damages would act as a deterrent to reckless driving.[66]

The leading case contrary to the *McNulty* rationale is *Lazenby v. Universal Underwriters Insurance Co.*[67] In *Lazenby,* the Supreme Court of Tennessee first held that the policy language in question provided for indemnity against a punitive award.[68] The *Lazenby* court then acknowledged that the primary purposes of punitive damages in Tennessee are punishment and deterrence and cited extensively from the *McNulty* decision. The court, however, declined to follow *McNulty* for several reasons. First, the court observed that even though highway accident deaths and injuries are a very serious problem, forbidding the payment of punitive damages through insurance would not necessarily accomplish the result of deterring drivers from their wrongful conduct.[69] Second, the court found that the policy language had been construed by most courts at the time to cover punitive damages,[70] and opined that the average policy holder reading the policy would believe he was protected against all claims not intentionally inflicted.[71] Third, it was noted that there is often a fine line between simple negligence and the type of negligence upon which a punitive award can be made.[72] The court concluded that to deny coverage of exemplary damages would result in a partial voiding of the contract between the insurance company and its insured, and, declaring that partial voiding of private contracts should not be done except in the clearest of cases, found no persuasive public policy reasons for denying insurance coverage for the punitive award.[73]

D. Vicarious Liability

In cases in which an insured has been found only vicariously liable for its agent's wrongdoing, the courts have had little difficulty in allowing indemnity against a punitive award assessed against the insured. The proposition that public policy does not preclude indemnity against punitive damages that have been awarded on the

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66. *Id.* at 441–42. The concurring opinion was skeptical of the argument that depriving irresponsible drivers of insurance coverage would deter reckless driving. *Id.* at 444.
67. 214 Tenn. 639, 383 S.W.2d 1 (1964).
68. *Id.* at 647, 383 S.W.2d at 5.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

basis of respondeat superior is generally designated by the commentators in terms such as "the strong majority view."[74] Even those courts that would hold that indemnity for punitive damages generally is against public policy have often carefully distinguished situations dealing with such damages assessed against one whose only liability is vicarious.[75]

Ohio Casualty Insurance Co. v. Welfare Finance Co.,[76] the leading case concerning a vicarious liability situation, is illustrative of the approach taken by the courts. In that case, arising in Missouri, the insured corporation had been found vicariously liable for its employee-truck driver's reckless and wanton act. The policy in question insured the corporation

> [a]gainst loss by reason of liability imposed by law upon the assured for damages on account of bodily injuries . . . accidentally sustained . . . by any person or persons, other than employees of the assured.[77]

The court construed that language as follows:

> Since this policy clearly covers bodily damage through negligence and since these punitive damages are imposed because of the aggravated circumstances or form of this negligence, such punitive damages must be regarded as coming within the meaning of the policy.[78]

Addressing the public policy issue, the court noted that insurance against the consequences of intentional wrongdoing would probably be against public policy and implied that public

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74. *See, e.g.*, STEIN, *supra* note 55, at § 201; ANDERSON, *supra* note 55, at 605.
75. *See, e.g.*, Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 439-40 (5th Cir. 1962) ("[A] factor not always focused upon, yet of crucial importance, is the point that if the employer did not participate in the wrong the policy of preventing the wrongdoer from escaping the penalties for his wrong is inapplicable."). In Sterling Ins. Co. v. Hughes, 187 So. 2d 898 (Fla. Dist. Ct. App.), *cert. denied*, 194 So. 2d 622 (1964), the court stated,
> > [T]here is a distinction between the actual tort feasor and one only vicariously liable and that therefore public policy is not violated by construing a liability policy to include punitive damages recovered by an injured person where the insured did not participate in or authorize the act.
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> *Id.* at 900 (footnote omitted). In so holding, the *Sterling* court determined that the insurance policy term "accident" included the assault and battery since it was committed by the servant without the insured's consent. Although the policy insured against all damages "because of bodily injury," the court did not discuss that terminology. The court was not confronted with the question of whether the servant had been negligently hired.
76. 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935) (applying Missouri law).
77. *Id.* at 58.
78. *Id.* at 59.

policy might also be contravened by indemnifying an actual — as opposed to a vicariously liable — wrongdoer against a punitive assessment.[79] Holding that the insurer must indemnify the vicariously liable corporation against the punitive award, the court reasoned that where there was no direct or indirect participation on the part of the master in the commission of the act, no public policy would be violated by protecting the master from the unauthorized action of his servant:

> A different situation is present where the sole liability of the insured arises out of the relation of master and servant. If the master participates in, authorizes, or knows in advance that his servant will probably commit the unlawful injurious act, then the situation may be analogous to where the insured himself commits an intentional act with an intended injury and the same reasons for holding a protecting policy invalid as to such acts would exist. However, the court has here found that there was no evidence that the servant causing the injury here "had been instructed by plaintiff to act in a negligent, wanton, wrongful or unlawful manner towards [the injured], nor that the alleged negligence or wrongful acts of [the servant] were necessary to the performance by [the servant] of his duties as the employee of plaintiff, nor that he had ever previously been guilty of such or similar actions."[80]

IV. THE MARYLAND CASE

The *F&D* litigation was instituted in 1976. The issue, which previously had been addressed by only a few jurisdictions, would now be presented in Maryland: Should the insurance policy in question be construed in a manner allowing for indemnity against a punitive award? If so, would the public policy of the state allow for such indemnity?

A. The Case In The Lower Court

1. Background

In July, 1976 the First National Bank of St. Mary's[81] and Thomas Combs, assistant manager of the Bank, brought a declaratory action in the Circuit Court for Prince George's County against the Fidelity & Deposit Company of Maryland[82] in which the Bank sought a declaration of its rights as insured and the rights of

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79. *Id.*
80. *Id.* at 60.
81. Sometimes referred to herein as "the Bank."
82. Sometimes referred to herein as "F & D."

the Fidelity & Deposit Company as insurer under a "Special Multi-Peril Policy for Financial Institutions" issued by F & D to the Bank.[83] The declaratory judgment action sought answers to questions arising from a prior action filed in April, 1976 by Mrs. Alma Todd, a customer of the Bank, in the Circuit Court for St. Mary's County[84] against the Bank and Mr. Combs, alleging that the Bank, through its officers, agents, and employees, including Combs, had maliciously prosecuted Mrs. Todd.[85] Subsequently, the Bank requested that the insurer provide a defense to the suit. F & D, through its counsel, notified the Bank that it would provide insurance coverage for, and undertake the defense of, the compensatory damages claim, but it would not provide insurance coverage for, or a defense of, the punitive damages claim. Thereafter, as a result of that communication, the Bank retained its own counsel to represent it in the tort action.[86] Following the trial of that action, the jury returned a verdict of $4,000 compensatory damages against Mr. Combs and $4,000 compensatory and $8,000 punitive damages against the Bank alone.[87]

Before the Circuit Court for Prince George's County, the Bank sought a judgment declaring that the insurer was obligated both to undertake the complete defense on behalf of the Bank and Mr. Combs in the Todd action irrespective of the types of damages claimed, and to pay all counsel fees and costs, including costs of the instant declaratory judgment action.[88] The Bank also sought a finding that the insurer was obligated to pay on behalf of the Bank, all sums, including punitive damages, that the Bank was obligated to pay as a result of the Todd action.[89]

Following a hearing,[90] the trial judge, Howard S. Chasanow, rendered what the appellate court described as a "scholarly and well-reasoned opinion"[91] in which he held that the insurer was obligated

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83. *See* Joint Record Extract at 32–38, First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 389 A.2d 359 (1978) [hereinafter "Record"].
84. That action was later removed to the Circuit Court for Calvert County where it was tried before a jury. An appeal was taken from the judgment in that case and was heard by the Court of Appeals on certiorari granted prior to hearing in the Court of Special Appeals. The Court of Appeals' decision in First Nat'l Bank of St. Mary's v. Todd, 283 Md. 251, 389 A.2d 371 (1978), was also filed on July 18, 1978 as a companion decision to the *F & D* case.
85. Record at 7.
86. *Id.*
87. *Id.* at 7–8.
88. *Id.* at 8–9.
89. *Id.* at 9.
90. *Id.* at 72–102.
91. First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 230, 389 A.2d 359, 360 (1978). The trial court opinion in First Nat'l Bank of St. Mary's at Leonardtown v. Fidelity & Deposit Co., Law No. 64, 391 (Cir. Ct. for Prince George's County, Maryland, filed June 28, 1977) is also contained in the Joint Record Extract.

to provide a defense in the Todd action on behalf of the Bank and therefore was liable for the cost incurred by the Bank in that defense.[92] Because the insurer had unjustifiably refused to defend the Todd action from which the instant action arose,[93] Judge Chasanow held that the insured Bank could also recover the counsel fees and costs incurred in bringing the declaratory judgment proceeding as well as the counsel fees expended to defend the initial action.[94]

After deciding those two issues, the circuit court went on to rule that the insurance policy in question did provide coverage for the award of punitive damages assessed against the Bank,[95] but that public policy precluded insuring against direct, rather than vicarious, liability for punitive damages imposed against the Bank.[96]

2. Policy Construction

Since the Court of Appeals found the question was not properly before it,[97] it quickly disposed of the issue of whether the insurance policy in question by its terms afforded coverage for the punitive damages assessed against the Bank. With neither quotations from the policy nor citation of authority, the court simply stated,

> In this instance, we have examined the policy provision in question and conclude that if the matter were properly before us we would hold that the trial judge did not err in

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92. Record at 10-12. The trial judge found the decision of the Court of Appeals of Maryland in Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975), apposite to the case at bar. In *Brohawn,* the Court of Appeals held that an insured is not deprived of his contractual right to have a defense provided by the insurer when a conflict of interest between the two arises because the insured has been sued under a declaration stating both a cause of action covered by the policy and an alternative cause of action not covered by the policy:
> When such conflict arises, the insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the insurer or to select an attorney himself to conduct his defense. If the insured elects to choose his own attorney, the insurer must assume the reasonable costs of the defense provided.
Id. at 414-15, 347 A.2d at 854.
93. Record at 12.
94. *Id.* at 12-13. Neither of these rulings was appealed. The circuit court noted that one exception to the general rule that counsel fees are not a proper element of damages was established in Cohen v. American Home Ins. Co., 255 Md. 334, 258 A.2d 225 (1969). In *Cohen,* the Court of Appeals held that when an insurer unjustifiably refuses to defend a suit for damages and the insured brings a declaratory judgment action, the insured may recover the counsel fees and costs incurred in bringing the declaratory judgment proceeding as well as the counsel fees expended to defend the initial action.
95. Record at 13-17.
96. *Id.* at 24.
97. First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 231, 389 A.2d 359, 361 (1978).

determining that its provisions embraced an award for exemplary damages.[98]

In light of this statement, the following review of the rationale applied by the lower court may provide some guidance to counsel attempting to determine the scope of coverage of policy provisions as they relate to coverage for awards of exemplary damages in Maryland.[99]

The "Special Multi-Peril Policy for Financial Institutions" issued by F & D to the Bank explicitly provided coverage for the tort of malicious prosecution and contained the following "personal injury" liability endorsement:

> I. COVERAGE — PERSONAL INJURY LIABILITY
>
> The Company will pay on behalf of the insured *all sums which the insured shall become legally obligated to pay as damages because of injury (herein called "personal injury")* sustained by any person or organization and arising out of one or more of the following offenses:
>
> Group A — false arrest, detention or imprisonment, or malicious prosecution;
>
> . . . .
>
> . . . [T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury even if any of the allegations of the suit are groundless, false or fraudulent.
>
> . . . .
>
> IV. AMENDED DEFINITION
>
> When used in reference to this insured: '*damages*' means only those damages which are *payable because of personal injury arising out of an offense* to which this insurance applies.[100]

The circuit court began its analysis by noting that although the court was not aware of any cases involving the exact language in the policy at bar, several courts had already decided that "very similar" language in a liability policy provides coverage for punitive damages.[101] Choosing two cases as illustrative of that proposition,

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98. *Id.*
99. The Maryland appellate courts have not previously addressed the issue.
100. Record at 6 (trial opinion; emphasis in original).
101. Record at 14. *See also* Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734 (1935); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964); Concord Gen. Mut. Ins. Co. v. Hills, 345 F. Supp. 1090 (S.D. Me. 1972); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341 (Tex. Civ. App. 1972); Scott v. Instant Parking, Inc., 105 Ill. App. 2d 133, 245 N.E.2d 124 (1969).

the court noted that in *Carroway v. Johnson*[102] the Supreme Court of South Carolina had both pointed out that an insurer could include a clause in its insurance contract restricting liability or excluding coverage under certain conditions, and explained that punitive damages could only be sustained if there was an award for actual damages. Thereafter the South Carolina court construed the following policy provision:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: bodily injury . . . sustained by any person . . . arising out of the . . . use of the owned automobile or any non-owned automobile.

and held that the language was

> sufficiently broad enough to cover liability for punitive damages as such damages are included in the "sums" which the insured is legally obligated to pay as damages because of bodily injury within the meaning of the policy.[103]

The circuit court also quoted as follows from *Southern Farm Bureau Casualty Insurance Co. v. Daniel*[104] in which the Arkansas Supreme Court found coverage of punitive damages:

> As we read the policy herein it agrees to pay on behalf of the insurer all sums which the insured shall become LEGALLY OBLIGATED TO PAY AS DAMAGES, because of bodily injuries sustained. When we consider that under our law, one cannot become legally obligated to pay punitive damages unless actual damages have been sustained and assessed, we find that punitive damages constitute a sum which the insured becomes legally obligated to pay as damages because of bodily injuries sustained.[105]

In support of its contention that punitive damages were not within the terms of its policy, F & D cited a 1973 Minnesota decision, *Caspersen v. Webber*,[106] which decided that punitive damages were not included in "sums the insured shall be legally obligated to pay as damages because of bodily injury." Judge Chasanow, however, distinguished that case on the basis that the Minnesota court had

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102. 245 S.C. 200, 139 S.E.2d 908 (1965).
103. *Id.* at 205, 139 S.E.2d at 910.
104. 246 Ark. 849, 440 S.W.2d 582 (1969).
105. *Id.* at 852, 440 S.W.2d at 584 (*citing* Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965)).
106. 298 Minn. 93, 213 N.W.2d 327 (1973).

based its holding in part on the fact that in that state punitive damages are recoverable without proof of actual damages and therefore even in cases where there was no bodily injury, a plaintiff nonetheless might be entitled to exemplary damages.[107] The trial judge noted that in Maryland, however, an award of punitive damages is dependent upon actual damages or actual injury since no punitive damages award can be made unless there is compensable injury and compensatory damages are awarded.[108]

Of further significance to the circuit court was that the policy under consideration expressly covered the offense of malicious prosecution "for which the award of punitive damages is common in Maryland," and yet the insurer had failed to explicitly exclude punitive damages from coverage under the policy.[109] The court stated that, given that failure to specifically exclude punitive damages, it would follow the rules that when the facts pertinent to a question of insurance coverage are undisputed, the issue is one of construction in light of the language employed in the contract, the subject matter, and the surrounding circumstances.[110] In case of ambiguities the policy is construed strictly against the company that prepared the policy and in favor of the insured.[111] Accordingly, the court held that the F & D policy language at most could be regarded as ambiguous and therefore construed that language against F & D. Accordingly, the court held that punitive damages are included in the language "all sums which the insured shall become legally obligated to pay as damages because of injuries sustained by any person or organization."[112]

3. Public Policy Considerations

The approaches to the public policy questions taken by the Court of Appeals and by the circuit court differed considerably. Judge Chasanow began his analysis of the issue of whether insurance coverage for the punitive damages assessed against the Bank would

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107. Record at 15.
108. Record at 16 (*citing* Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 446, 340 A.2d 705, 708 (1975) and Shell Oil Co. v. Parker, 265 Md. 631, 644, 291 A.2d 64, 71 (1972)). *See* note 46 *supra*.
109. Record at 16 (*citing* Price v. Hartford Accident and Indem. Co., 108 Ariz. 485, ___, 502 P.2d 522, 525 (1972) ("In any event a court should not aid an insurer which fails to exclude liability for punitive damages. Surely there is nothing in the insuring clause that would forewarn an insured that such was to be the intent of the parties."). *But see* text accompanying notes 56-58 *supra*.
110. Record at 15-16 (*citing* Wirterwerp v. Allstate Ins. Co., 277 Md. 714, 717, 357 A.2d 350, 352-53 (1976) and Allstate Ins. Co. v. Humphrey, 246 Md. 492, 496, 229 A.2d 70, 72 (1967)).
111. Record at 16 (*citing* Allstate Ins. Co. v. Humphrey, 246 Md. 492, 496, 229 A.2d 70, 72 (1967)).
112. Record at 16-17.

be against public policy by stating that in states, like Maryland,[113] that impose punitive damages for punishment and deterrence and not for compensation, "the weight of authority seems to be that it is against public policy for an insurance company to indemnify an individual tort-feasor for punitive damages as a result of his personal misconduct."[114] The court also pointed out that most commentators favor the position that public policy should prevent an insurance company from issuing a policy that covers a client's liability for punitive damages for his own misconduct.[115]

In support of the proposition that one cannot insure against an award of exemplary damages, the circuit court quoted at length from the leading case holding against insurance coverage for such damages, *Northwestern National Casualty Co. v. McNulty:*[116]

> Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.
>
> The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment

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113. The court cited Wolf v. Levitt and Sons, Inc., 267 Md. 623, 626, 298 A.2d 374, 376 (1972) and Heinze v. Murphy, 180 Md. 423, 430, 24 A.2d 917, 921 (1942). Record at 17.

114. Record at 17 (*citing* American Sur. Co. of New York v. Gold, 375 F.2d 523 (10th Cir. 1966) (applying Kansas law)); Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) (applying either Florida or Virginia law); American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965) (dicta, applying Connecticut law); Nicholson v. American Fire and Cas. Ins. Co., 177 So. 2d 52 (Fla. Dist. Ct. App. 1965); Guardianship of Estate of Smith v. Merchants Mut. Bonding Co., 211 Kan. 397, 507 P.2d 189 (1973); Padovan v. Clemente, 43 A.D.2d 729, 350 N.Y.S.2d 694 (1973); LoRocco v. New Jersey Mfrs. Indem. Ins. Co., 82 N.J. Super. 323, 197 A.2d 591 (App. Div. 1964); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966).

115. Record at 18-19. *See, e.g.*, STEIN, DAMAGES AND RECOVERY PERSONAL INJURY AND DEATH ACTIONS § 201 (1972); Hall, *The Validity of Insurance Coverage for Punitive Damages — An Unresolved Question?*, 4 N.M.L. REV. 65 (1973); Obler, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431 (1976); Comment, *Public Policy Prohibits Insurance Indemnification Against Awards of Punitive Damages*, 63 COLUM. L. REV. 944 (1963); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957); Comment, *Insurer's Liability for Punitive Damages*, 14 MO. L. REV. 175 (1949); Comment, *Insurance Coverage and the Punitive Damage Award in the Automobile Accident Case*, 19 U. PITT. L. REV. 144 (1957); Comment, *Punitive Damages and Their Possible Application in Automobile Accident Litigation*, 46 VA. L. REV. 1036 (1960). *But see* Lentz, *Payment of Punitive Damages by Insurance Companies*, 15 CLEV.-MAR. L. REV. 313 (1966); Note, *Automobile Insurance Coverage for Punitive Damages*, 20 S.C.L. REV. 71 (1968).

116. 307 F.2d 432 (5th Cir. 1962).

> and deterrence, would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.[117]

Judge Chasanow's analysis of the cases holding that public policy does not exclude insuring against punitive damages indicated to the circuit court that "almost all" of the cases could be distinguished from the one at bar, either because they involved "gross negligence" or something less than intentional acts, or because the punitive damages were imposed as a result of vicarious rather than direct liability.[118]

Discussing the distinction between vicarious and direct liability coverage,[119] the trial judge, citing *Ohio Casualty Insurance Co. v. Welfare Finance Co.*[120] and *Sterling Insurance Co. v. Hughes,*[121] noted that where punitive damages have been imposed on the insured solely as the result of vicarious liability, the great weight of authority is that insurance coverage of such damages does not violate public policy.[122] This is true even though many of those same authorities also imply that their results might have been different had the insured participated in, authorized, or ratified the tortious conduct of its agents, employees, or other persons for whom it was

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117. *Id.* at 440.
118. Record at 19.
119. Because it held that the trial judge had not erred in holding that liability was direct rather than vicarious, the Court of Appeals did not need to draw a distinction between the public policy considerations concerning a punitive award assessed against one found vicariously liable and one found directly liable and therefore did not even mention the distinction. In light of the court's holding concerning insurance coverage in a direct liability situation, however, it is quite likely that the Maryland court would find coverage afforded in a vicarious liability situation.
120. 75 F.2d 58 (8th Cir. 1934), *cert. denied,* 295 U.S. 734 (1935).
121. 187 So. 2d 898 (Fla. Dist. Ct. App. 1966).
122. *See, e.g.,*Commercial Union Ins. Co. v. Reichard, 404 F.2d 868 (5th Cir. 1968); Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), *cert. denied,* 295 U.S. 734 (1935); Travelers Ins. Co. v. Wilson, 261 So. 2d 545 (Fla. Dist. Ct. App. 1972). Sterling Ins. Co. v. Hughes, 187 So. 2d 898 (Fla. Dist. Ct. App. 1966); Continental Ins. Co. v. Hancock, 307 S.W.2d (Ky. App. 1974).

vicariously responsible.[123] Finding that authority persuasive, the trial judge stated that "the weight of authority and logic" compelled the court to hold that where punitive damages are based on vicarious liability no public policy is violated by allowing insurance coverage.[124]

Further distinguishing cases that uphold insurance coverage of punitive awards, the court noted that three of the leading cases[125] allowing insurance coverage for punitive damages deal with punitive damages imposed for gross negligence in auto accidents, "which may involve different considerations than in the instant case, where punitive damages were imposed for an intentional tort."[126] The trial court stated that the only case of which it was aware that had considered the public policy question of insurance coverage for a punitive damages award against a corporation had not indicated whether the corporation's liability was imposed because of corporate acts or under the theory of respondeat superior.[127] The court noted that persuasive arguments could be made that because a corporation can act only through its agents, it can only act vicariously and, therefore, should always be able to

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123. *See, e.g.,* Commercial Union Ins. Co. v. Reichard, 404 F.2d 868 (5th Cir. 1968); Ohio Cas. Ins. Co. v. Welfare Finance Co., 75 F.2d 58 (8th Cir. 1934), *cert. denied,* 295 U.S. 734 (1935); Sterling Ins. Co. v. Hughes, 187 So. 2d 898 (Fla. Dist. Ct. App. 1972).

124. Record at 22.

125. Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 502 P.2d 522 (1972); Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).

126. Record at 20, quoting from Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849, 852, 440 S.W.2d 582, 584 (1969) ("Neither can we find anything in the State's public policy that prevents an insurer from indemnifying its insured against punitive damages arising out of an accident, as distinguished from intentional torts."). Another case, Colson v. Lloyds of London, 435 S.W.2d 42 (Mo. App. 1968), was distinguished because the court in that case held that it was not against public policy for police officers to insure themselves against the assessment of punitive damages for willful and intentional acts such as false arrest, but in doing so the court emphasized the negative effect that a contrary public policy would have on the recruitment of qualified police officers. Record at 20.

127. Record at 22. In Scott v. Instant Parking, Inc., 105 Ill. App. 2d 133, 245 N.E.2d 124 (1969), the corporation had been found liable for punitive damages "for willful and wanton misconduct," and the appellate court, without indicating whether liability had been imposed because of corporate acts or under the theory of respondeat superior, simply stated,

> the appellant filed a supplemental list of authorities, which pertain to the right of an individual tortfeasor to insure himself against liability for his own acts. We have already noted that several jurisdictions arrive at various rules of law in that situation. This case is different, it involves only the right of a corporation to insure against liability caused by its agents or servants. There is no reasonable basis to declare the latter type of insurance is against public policy.

105 Ill. App. 2d at 137, 245 N.E.2d at 126.

insure itself as an entity against punitive damages because of acts committed by its agents.[128] Similarly, it could be argued, since the ultimate burden of a punitive award falls on a corporation's shareholders, corporations should be freely allowed to protect their shareholders by insurance.[129]

The court believed, however, that those arguments failed to consider that where an employer authorizes, ratifies, or participates in an act of an employee, the employer is directly liable for punitive damages assessed as a result of the employee's act.[130] It would therefore seem that an employer should not escape the full economic impact of that basic principle merely by incorporating.[131] Further, punitive damages are often assessed as a result of a deliberately established corporate policy, not simply because of vicarious liability.[132]

Judge Chasanow believed that a number of abhorrent situations could easily be imagined in which a corporation, in an attempt to reap economic benefits, might adopt a policy of deliberate misrepresentation or of deliberate violation of the rights of others. In such situations he expected that the threat of punitive damages would be an effective deterrent, but only if the corporate policy makers know that insurance would not cover such damages.[133] Accordingly, the court observed that "[t]o always allow a corporation to escape, through insurance, a punitive damage award for deliberate corporate acts would seem violative of public policy."[134] The circuit court found the issue in the instant case comparable to a situation in which a corporation is found guilty of a crime and sentenced to a fine,[135] and it noted that an insurance policy permitting the insured to recover the amount of fines imposed for a violation of a criminal law would clearly be against public policy.[136] Based upon the foregoing analysis, the circuit court held,

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128. Record at 22.
129. *Id.*
130. *See* text accompanying notes 74-80 *supra.*
131. Record at 22-23.
132. *Id.* at 23. *See, e.g.*, Summit Loans, Inc. v. Pecola, 265 Md. 43, 288 A.2d 114 (1972) (award of punitive damages against a loan corporation for invasion of privacy allowed where court found sufficient evidence to show that corporation had deliberate and persistent policy to harass debtor and intimidate her into repaying loan); GAI Audio of New York, Inc. v. Columbia Broadcasting Sys., Inc., 27 Md. App. 172, 340 A.2d 736 (1975).
133. For an analysis of such a rationale, *see* Obler, *Insurance for Punitive Damages: A Reevaluation,* 28 HASTINGS L.J. 431, 466-74 (1976).
134. Record at 23.
135. *Id.* (noting that according to 10 W. FLETCHER, CYCLOPEDIA OF CORPORATIONS § 4942 at 67 (1963, Supp. 1976) the general rule appears to be that a corporation may be held criminally responsible for the illegal acts of its employees if such acts are "(1) related to and committed within the course of employment; (2) committed in furtherance of the business of the corporation; and (3) authorized or acquiesced in by the corporation.").
136. Record at 23-24 (*citing* 43 AM. JUR. 2d *Insurance* § 241 (1969) and 44 C.J.S. *Insurance* § 242 (1945)).

> that where a corporation is held liable for punitive damages, and an insurance policy is in effect which covers punitive damages, the insurer is liable for the amount of the punitive damages unless the insurer can show it would be against public policy for the corporation to shift the penalty to the insurer. This could be done by showing that the corporation through its officers, directors, etc., authorized, or ratified the act that gave rise to the punitive damages.[137]

In the instant case, it was clear to the court that the insurer had met its burden and established that the corporation, its insured, was directly, rather than vicariously, liable for the punitive damages imposed against it for the malicious prosecution of Mrs. Todd. Accordingly, public policy precluded insuring against the punitive damages awarded against the Bank.

B. The Court of Appeals Opinion

The circuit court's decision was appealed by the plaintiff Bank.[138] The central issue on appeal was whether the circuit court had been correct in holding that the public policy of Maryland would not allow for insurance coverage of the punitive damages assessed against the Bank.[139]

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137. Record at 24.
138. *Id.* The Bank had appealed to the Court of Special Appeals, and the Court of Appeals granted the Bank's petition for a writ of certiorari prior to argument in the Court of Special Appeals.
139. The Bank had also asserted that the trial court was in error in holding that the Bank's liability in the *Todd* case was direct rather than vicarious. See text accompanying notes 125–37 *supra*. Pointing out that the Bank had overlooked the written stipulation of facts the parties entered into in the case, the Court of Appeals quickly disposed of the Bank's argument by holding that the circuit court had not erred in determining that liability was direct rather than vicarious. 283 Md. at 231, 389 A.2d at 361.

> The parties had stipulated as follows:
>
> 6. Counsel for Alma Todd wrote a letter to the First National Bank of St. Mary's County outlining the defenses of Alma Todd and requesting that the matter be handled civilly rather than through criminal prosecution. After advice of counsel, *it was the corporate decision* of the First National Bank of St. Mary's County to continue with the criminal prosecution.
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> 7. After consultation with counsel, the First National Bank of St. Mary's County, *as a matter of corporate policy,* rejected the offers of Alma Todd and *made the corporate decision in the furtherance of the business purposes of the corporation* to prosecute Alma Todd.

Id. (footnote omitted) (emphasis added by court).

F & D also argued that the terms of the policy itself did not provide coverage for exemplary damages but the Court of Appeals held that that issue was not properly before it. The court, however, also concluded that had the issue been properly preserved for review, it would have held that the circuit court had not erred in determining that the policy terms covered punitive damages assessments. *Id. See* text accompanying note 98 *supra*.

Noting that Mrs. Todd's action against the Bank and its employee was for malicious prosecution, the majority acknowledged that the Court of Appeals had previously stated that punitive damages were properly recoverable in such an action if a jury found "a want of probable cause."[140] Writing for the majority, Judge Smith then pointed out that in one of its latest pronouncements concerning punitive damages[141] the court had stated that exemplary damages "are awarded, over and above all compensation, to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct."[142] According to the majority, it is from such statements that the public policy argument is constructed, that if the wrongdoer may have someone else bear the expense of paying such an assessment, the deterrent effect is lost.[143] Pointing out that a large number of cases involve claims arising from auto accidents, the court acknowledged that there is a split of authority as to whether it is against public policy to provide insurance coverage for punitive damages.[144]

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140. 283 Md. at 232, 389 A.2d at 361 (*quoting* Safeway Stores, Inc. v. Barrack, 210 Md. 168, 177, 122 A.2d 457, 462 (1956)). For other cases discussing punitive damages awards in malicious prosecution actions, see Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705 (1975); D.C. Transit Sys., Inc. v. Brooks, 264 Md. 578, 278 A.2d 251 (1972).
141. Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976).
142. 283 Md. at 232, 389 A.2d at 361 (*quoting* Wedeman v. City Chevrolet Co., 278 Md. 524, 531, 336 A.2d 7, 12 (1976)).
143. 283 Md. at 232, 389 A.2d at 361. The dissent emphasized that prior case law mandated such a conclusion:

> If we assume, as our prior case law says we must, that the goals of punishing and deterring extreme and outrageous behavior are subserved by allowing punitive damages in appropriate cases, it follows inexorably that the burden of the penalty so assessed must be borne exclusively by the culpable party. The risk of such a loss thus cannot, consistent with the theory behind exemplary damage awards, be shifted to a third party, be it a surety, an insurance company or the public at large.

283 Md. at 246, 389 A.2d at 368 (*citing* Butler v. United Pacific Ins. Co., 265 Or. 473, 509 P.2d 1184 (1973)).
144. The court noted that cases holding against such coverage include American Sur. Co. of New York v. Gold, 375 F.2d 523 (10th Cir. 1966) (applying Kansas law); Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) (applying Virginia and Florida law); Ging v. American Liberty Ins. Co., 293 F. Supp. 756 (N.D. Fla. 1968) (applying Florida law); Commercial Union Ins. Co. of New York v. Reichard, 262 F. Supp. 275 (S.D. Fla. 1966) (applying Florida law); American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965) (applying Connecticut law); Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941); Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964); Newark v. Hartford Accident & Indem. Co., 134 N.J. Super. 537, 342 A.2d 513 (App. Div. 1975); LoRocco v. New Jersey Mfrs. Indem. Ins. Co., 82 N.J. Super. 323, 197 A.2d 591 (App. Div. 1964); and Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966).

Cases holding that public policy does not bar insurance coverage of punitive awards include Hartford Life Ins. Co. v. Title Guarantee Co., 520 F.2d 1170 (D.C. Cir. 1975); Price v. Hartford Accident and Indem. Co., 108 Ariz. 485, 502 P.2d 522 (1972); Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969); Greenwood Cemetery v. Traveler's Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977); Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.,

Recognizing *Northwestern National Casualty Co. v. McNulty*[145] as the leading case denying coverage on public policy grounds,[146] the court, as had the trial judge, quoted what has come to be the legal touchstone for denying coverage on public policy grounds.[147] Stating that *Lazenby v. Universal Underwriters Insurance Co.*[148] is the "premier case" holding insurance coverage for exemplary damages not barred by public policy,[149] Judge Smith quoted as well from the *Lazenby* opinion:

> We accept, as common knowledge, the fact death and injuries on our highways and streets is a very serious problem and such is a matter of great public concern. We further accept, as common knowledge, socially irresponsible drivers, who by their actions in operation of motor vehicles, could be liable for punitive damages are a great part of this problem. We, however, are not able to agree the closing of the insurance market, on the payment of punitive damages, to such drivers would necessarily accomplish the result of deterring them in their wrongful conduct. This State, in regard to the proper operation of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation.[150]

Judge Smith then noted that the following observations from the majority opinion in *Harrell v. Travelers Indemnity Co.*[151] also applied to the instant case:

> [T]his case does not involve the application of any settled and established rule of contract 'public policy,' but the adoption in Oregon of a proposed new rule of 'public policy' under which both existing and future insurance contracts which undertake to provide protection from liability for punitive damages would be held to be invalid.
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> It has been said of 'public policy' as a ground for invalidation by the courts of private contracts that "those

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95 Idaho 501, 511 P.2d 783 (1973); Continental Ins. Co. v. Hancock, 507 S.W.2d 146 (Ky. 1974); Colson v. Lloyd's of London, 435 S.W.2d 42 (Mo. App. 1968); Harrell v. Traveler's Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); and Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).

145. 307 F.2d 432 (5th Cir. 1962). *See* text accompany notes 116-18 *supra.*
146. 283 Md. at 233, 389 A.2d at 362.
147. *See* text accompanying note 117 *supra.*
148. 214 Tenn. 639, 383 S.W.2d 1 (1964). *See* text accompanying notes 67-73 *supra.*
149. 283 Md. at 234, 389 A.2d at 363.
150. 214 Tenn. at 647, 383 S.W.2d at 5.
151. 279 Or. 199, 567 P.2d 1013 (1977).

> two alliterative words are often used as if they had a magic quality and were self explanatory . . ." and that for a court to undertake to invalidate private contracts upon the ground of 'public policy' is to mount "a very unruly horse, and when you once get astride it you never know where it will carry you."[152]

Other statements in *Harrell* were also found by the *F & D* majority to be apropos. As one example of what it considered could be the unfortunate result if insurance coverage against punitive damages were held against public policy, the *Harrell* court had said,

> The owner of a retail store who causes the arrest and prosecution of a suspected shoplifter under circumstances not sufficient to constitute "probable cause" may also have an uninsurable liability for punitive damages because the jury may make a finding of malice based upon lack of probable cause.
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> . . . .
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> Under the rule proposed by the defendant, and as held by the trial court, even though the risks involved in each of these examples were of such a nature as to be encountered in the operation of such business or professions, and the conduct involved did not involve "intentionally inflicted injury," any contract with an insurance company to provide protection against the risk of punitive damages as the result of such conduct would become invalid as a matter of "public policy," regardless of whether the insurance contract was negotiated upon payment of an additional premium for protection against such liability.[153]

The *Harrell* court observed that it is naive to hold an insurance contract covering punitive damages invalid as contrary to public policy on the grounds that such coverage would result in punishment to the insurer or society as a whole. The *Harrell* majority emphasized the right of an insurance company to contract as it saw fit:

> [A]n insurance company which deliberately enters into a contract to provide coverage against liability for punitive damages is free to charge either a separate or additional premium for that risk. Conversely, if an insurance contract excludes coverage for liability against punitive damages no such additional premium need be charged and the insurance company may charge a lower premium for such a policy.[154]

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152. 279 Or. at 209–10, 567 P.2d at 1016 (*quoting* 6A A. CORBIN CONTRACTS § 1375 at 10 (1962) and 14 S. WILLISTON, LAW OF CONTRACTS § 1629, at 7–8 (3d ed. 1972)). (footnotes omitted).
153. 279 Or. at 210–11, 567 P.2d at 1018–19 (citation omitted) (footnote omitted).
154. *Id.*

The Oregon court had pointed out that alternatives such as elimination of punitive damages, limitations on amounts of punitive awards, or limiting liability to such flagrant misconduct as intentionally inflicted injury, might be preferable to the then-existing law in Oregon but noted that such "possible alternatives might more appropriately be considered by the legislature, rather than by the courts."[155] Judge Smith believed that the same comments could be made relative to Maryland.[156]

The *F & D* court summarized the *Harrell* dissent by quoting the following statement:

> The purpose of compensatory damages is to compensate, and this purpose is carried out no matter who is held ultimately responsible for payment. The purpose of punitive damages, on the other hand, is to deter, and this purpose is not carried out if the one who ultimately pays is an insurer rather than the wrongdoer.[157]

Though finding that the *McNulty* opinion and *Harrell* dissent have a "theoretical, intellectual"[158] appeal, the majority stated that that appeal fades materially when the problem is surveyed "in practical terms looking at certain bench marks for guidance."[159] Conducting that survey, the majority found guidance for its decision in a century-old statement made in *Estate of Woods, Weeks & Co.*:[160]

> [T]he right of parties to contract as they please is restricted only by a few well defined and well settled rules, and it must be a very plain case to justify a court in holding a contract to be against public policy. It must be a case in which the common sense of the entire community would so pronounce it.[161]

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155. *Id.* at 216, 567 P.2d at 1021.
156. 283 Md. at 237, 389 A.2d at 364.
157. 279 Or. at 229-30, 567 P.2d at 1028.
158. 283 Md. at 238, 389 A.2d at 364.
159. *Id.*
160. 52 Md. 520 (1879). Judge Levine in dissent said the majority's reliance upon that case controvenes the principle of *stare decisis* and "abandon[s] controlling authority barely two months old in favor of . . . outmoded and patently inadequate precedent." 283 Md. at 244-45 n.2, 389 A.2d at 368 n.2.
161. 52 Md. at 536. In Maryland-Nat'l Capital Park and Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 386 A.2d 1216 (1978), Judge Levine observed that "[e]nforcement [of contract provisions] will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh 'the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement' of the contested term." *Id.* at 607, 386 A.2d at 1229 (citation omitted).

Having thus set the tone for his further discussion of public policy considerations, Judge Smith pointed out the cautious approach to be taken by a court when making public policy determinations, by quoting from *Patton v. United States:*[162]

> The truth is that the theory of public policy embodies a doctrine of vague and variable quality and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.[163]

Noting again that the legislature is the normal policy-declaring department of the government,[164] the court stated that "when the General Assembly has desired to forbid protection by insurance from the equivalent of exemplary damages, it has done so explicitly."[165] The court found that the only instance in which the General Assembly had seen fit to make a pronouncement on the subject was with regard to claims in workmen's compensation cases where a statute provides that when doubled payments are awarded against the employer to an illegally employed minor, his employer cannot be indemnified by insurance for the extra punitive part of the award.[166]

The court reached the heart of the decision after listing contracts which it had "no doubt that the common sense of the entire community . . . would in each instance pronounce . . . void as

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162. 281 U.S. 276 (1930).

163. 281 U.S. at 306. The Court of Appeals also quoted from W. BRANTLEY, LAW OF CONTRACT (2d ed. 1922) where that text discusses agreements contrary to public policy: "Another element of uncertainity in the application of this principle is that the popular, and consequently the judicial view of what is right and wrong, fair and unfair, changes and varies in a silent and unconscious growth. What one generation deems fair and right is in the *mores* of age, and another generation may deem it wrong, and that makes it wrong." *Id.* at 220–21 (footnote omitted).

164. 283 Md. at 239, 389 A.2d at 365 (*citing* 4 S. WILLISTON, LAW OF CONTRACTS § 1629A at 4558 n.4 (rev. ed. S. Williston & G. Thompson 1937)). *See also* text accompanying note 156 *supra*.

165. 283 Md. at 239, 389 A.2d at 365.

166. *Id.* at 243, 389 A.2d at 367. Section 47 of the Maryland Workmen's Compensation Act, MD. ANN. CODE art. 101 (Supp. 1978) states in part: "All compensation and death benefits provided by this article, however, may be doubled in the discretion of the Commission in the case of any minor employed illegally under the laws of this State, and no insurance policy shall be available to protect the employer of such minor from the payment of the extra or additional compensation or benefits to be awarded by reason of such illegal employment, but the employer alone shall be liable for the said increased amounts of compensation or death benefits."

against public policy."[167] Then determining that the common sense of the community would in fact demand that punitive damages assessed against a small businessman be satisfied through the insurance for which he paid, the court observed,

> If we were to hold that F & D was barred by public policy from paying the exemplary damages assessed against the Bank and thus that it had to be paid by the stockholders of the Bank, such a holding would have implications far beyond this case, as was pointed out forcefully in *Harrell*. It would be equally applicable to the small businessman who has attempted to protect his business by purchasing various types of liability insurance. If we were to determine that it is against public policy for one to protect himself by insurance against exemplary damages, such a small businessman could be crippled or virtually wiped out by an assessment of exemplary damages in a malicious prosecution action where he proceeded with what he regarded as good reason to prosecute a shoplifter but the courts found that he lacked probable cause for such pursuit. The same would be true of the small businessman who is angered at being given a bad check for a past due account and then proceeds to swear out a warrant for the arrest of that individual, not being cognizant of the fact that to constitute a violation of our statute there must be a present consideration. It is not an adequate answer to such concerns to say that the trier of fact assessing such damages had before it the net worth of the offending party, because insofar as many small business people are concerned that new worth will to a large degree be composed of their home and the stock in trade or other assets of their business. We suspect that in such situations the common sense of the entire community would not construe such insurance contracts to be against public policy. In fact, we strongly suspect that the common sense of the community as a whole would expect a judgment

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167. 283 Md. at 240, 389 A.2d at 365 (referring to Estate of Woods, Weeks & Co., 52 Md. 520 (1879)). As examples of such contracts, the court listed

> . . . agreements having a tendency to obstruct or interfere with the administration of justice, or to injure public service; contracts clearly repugnant to sound morality, such as contracts based on illicit association or intercourse; agreements to commit a crime or to reward one for the commission of a crime or for the suppression or compounding of a crime; agreements to wrong or defraud third persons; and contract provisions for immunity from bad faith or fraud, . . . contracts which aid the enemy or operate to the disadvantage of the country in time of war; . . . those for rewards for the arrest of persons where the arrest would be illegal; a sham agreement intended to enable one party to reduce his tax liability; contracts involving the unlawful practice of law; and contracts not within the powers conferred on banks and which jeopardize the safety of bank deposits.

283 Md. at 240, 389 A.2d at 365 (citations omitted).

> including exemplary damages to be satisfied through the insurance policies for which such small business people have paid. It would be outraged and have substantial difficulty in comprehending the reasons for a holding to the contrary.[168]

Countering the contention that permitting payment of punitive damages by an insurance company eliminates deterrence, the court noted that deterrence of wrondgoing would be prompted by the potential wrongdoer's knowledge that persons who are shown by experience to be poor risks encounter difficulty in obtaining insurance[169] or may become subject to policies written with retrospective premiums where the premium is computed after losses are determined.[170]

Finally, the court stated that in the past insurance companies have not shown reluctance to write restrictions in their own best interests into insurance policies; yet no such restriction was included in the F & D policy. The majority stated that in the fourteen years since *Lazenby*[171] insurers surely were cognizant of the fact that they might be called upon to pay punitive awards and "probably have considered such a possibility in establishing rates."[172]

Therefore, having found "not the slightest suggestion of a 'constitutional or statutory provision' from which a public policy against payment is deducible,"[173] the court held that the common sense of the entire community would not pronounce it against public policy for F & D to pay the judgment for exemplary damages assessed against the Bank.[174]

C. *The Dissent*

Judge Levine began his analytical dissent by stating that,

> Swayed by what it terms "practical" considerations, the majority . . . has *sub silentio* dealt a death blow to the theory of exemplary damages applied in Maryland for well over a century.[175]

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168. 283 Md. at 241, 389 A.2d at 366 (citation omitted).
169. *Id.* at 242, 389 A.2d at 366.
170. *Id.*
171. Lazenby v. Universal Underwriter Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964).
172. 283 Md. at 243, 389 A.2d at 362. *But see* text accompanying notes 217-33 *infra.*
173. *Id.* (*citing* Patton v. United States, 281 U.S. 276, 306 (1930)).
174. *Id.*
175. 283 Md. at 243-44, 389 A.2d at 367 (footnote omitted). Judge Levine noted that "although punitive damages have been recognized by the common law since the mid-eighteenth century, Huckle v. Money, 2 Wils. 205, 207 (K.B. 1763), the first Maryland decision expressly recognizing the doctrine was handed down in 1857. Gaither v. Blowers, 11 Md. 536, 552-53 (1857)." 283 Md. at 244 n.1, 389 A.2d at 367 n.1.

Referring to the court's responsibility to balance carefully the public and private interests in determining whether to enforce a contractual provision asserted to be void as against public policy,[176] the dissent found that among those factors that militate against enforcement of such a contract provision are the strength of the public policy as manifested by either legislation or judicial decisions and the likelihood that a refusal to enforce the disputed term will further the policy.[177] Since punitive damages, as distinguished from compensatory or nominal damages, are awarded "to punish reprehensible and outrageous conduct and to set an example which will serve to deter the wrongdoer and others from engaging in such conduct in the future,"[178] it was Judge Levine's opinion that these policies weighed against enforcement of the insurance contract provision at hand, and could be promoted only by denying enforcement of insurance agreements that indemnify adjudicated intentional tort-feasors against punitive awards. "A contrary result . . . would in practical effect, be tantamount to abolishing punitive damages altogether."[179] Assuming, as Judge Levine found prior case law required, that the goals of punishing and deterring extreme and outrageous behavior are subserved by allowing punitive damages in appropriate cases, the dissent determined that,

> Logic therefore demands that individuals or enterprises directly responsible for the commission of outrageous injurious acts be prohibited from escaping the impact of an award of exemplary damages through the simple expedient of purchasing liability insurance.[180]

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176. 283 Md. at 244, 389 A.2d at 367 (*quoting* Maryland-National Capital Park and Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 607, 386 A.2d 1216, 1229 (1978)):
> Enforcement will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the contested term.

177. 283 Md. at 244, 389 A.2d at 367 (*citing* Maryland-National Capital Park and Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 386 A.2d 1216 (1978)).

178. 283 Md. at 245, 389 A.2d at 368 (*quoting* General Motors Corp. v. Piskor, 281 Md. 627, 638, 381 A.2d 16, 22 (1977) and *citing* Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 at 205 (1973)). The dissent also noted that aside from punishment and deterrence, punitive damages may serve to channel a plaintiff's anger from retaliating against a defendant or may simply reflect social outrage apart from any remedial purpose. 283 Md. at 245-46 n.3, 389 A.2d at 368 n.3 (*citing* Harrell v. Traveler's Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977) (Linde, J., dissenting) and Morris, *Punitive Damages in Tort Law*, 44 HARV. L. REV. 1173, 1198 (1931)).

179. 283 Md. at 245, 389 A.2d at 368.

180. *Id.* at 246, 389 A.2d at 368.

Judge Levine found that the majority's argument in favor of permitting insurance for punitive damages liability, when reduced to its essentials, "is founded on a noble but rather misplaced solicitude for the economic well-being of small businessmen."[181] Arguing against the majority's position in that regard, the dissent pointed out that punitive damages may be awarded only when "the tortious conduct can be described as extreme or outrageous, similar to that usually found in crime."[182] Accordingly, when even a small businessman's conduct is so reprehensible that he exposes himself to the risk of liability for damages in excess of those necessary to compensate his victim, he is entitled to no more or less protection than others who commit acts of a similar kind deserving the imposition of punitive damages:

> Even though financial disaster may be the immediate consequence of a punitive damage award, there is no injustice in the eyes of the law, provided the punishment exacted reasonably corresponds to the gravity of the tortious conduct involved.[183]

The dissent next addressed the troublesome fact that only in malicious prosecution actions is it possible for a plaintiff to recover punitive damages, even though viewed objectively, the defendant's conduct is not truly extreme or outrageous. Judge Levine noted that whenever a defendant is found guilty of malicious prosecution, punitive damages may be awarded[184] on the theory that the malice necessary to support the punitive award is an element of the tort itself.[185] Further, though malice must be shown in order to support a malicious prosecution action,[186] that malice need not be proved separately but may be inferred from want of probable cause on the part of the defendant.[187] And, based on that inferrence, punitive damages may be recovered.[188] In Judge Levine's opinion, however, "a finding that a defendant instituted criminal proceedings against the plaintiff based on something less than probable cause does not necessarily mean that the defendant's conduct in this regard was either extreme or outrageous."[189] In his view, such an aberration in

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181. *Id.* at 247, 389 A.2d at 369.
182. *Id.*
183. *Id.*
184. *Id.* at 248, 389 A.2d at 369 (*citing* Safeway Stores, Inc. v. Barrack, 210 Md. 168, 122 A.2d 457 (1956)).
185. *Id.* (*citing* Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972)).
186. *Id.* (*citing* Cecil v. Clarke, 17 Md. 508 (1861)).
187. *Id.* (*citing* Exxon Corp. v. Kelly, 281 Md. 689, 381 A.2d 1146 (1978)).
188. *Id.* (*citing* Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705 (1975)).
189. *Id.* at 248, 389 A.2d at 369-70.

the law of damages did not allow the majority to "justify a broad-sweeping rule allowing persons to insure themselves against punitive damage awards in all tort cases where such damages are otherwise available."[190] The better approach to such a situation would be to modify the present law by requiring a higher degree of offensiveness as a prerequisite to punitive damages recovery in malicious prosecution actions, thereby assuring that punitive damages would be assessed in all tort actions according to a uniform standard of culpability and would comport with the punitive and deterrent function of such awards.[191] An alternative, though less desirable, course of action would be to permit parties to insure against punitive damages only in those malicious prosecution actions in which liability is predicated upon implied malice.[192]

Judge Levine noted that the deterrent function of punitive damages should not be overestimated. For example, one acting out of anger or hate in commiting an assault is unlikely to be deterred by fear of punitive damages. He believed, on the other hand, that a tort-feasor engaging in intentional misconduct pursuant to a well defined corporate policy would be more likely to pause and consider the consequences if aware that his wrongdoing may expose him to punitive liability.[193] He disagreed, however, with the majority's suggestion that the deterrent effect of punitive damages will be preserved because tort-feasors found to be poor risks will have difficulty in obtaining insurance. Judge Levine felt that though poor risks may be required to pay higher premiums, an increase in premium rates spread over a number of months, probably tax deductible, would be far less effective as a deterrent than the threat of sudden and severe economic loss caused by a lump sum judgment for which the defendant is solely responsible.[194]

Finally, the dissent addressed the majority's reliance upon the fact that the General Assembly had not acted to prohibit insurers from providing liability coverage against punitive damages awards. Stating that public policy is not derived exclusively from constitutional provisions and legislative enactments as the majority indicated, it was Judge Levine's opinion that where the controversy centers around the application of a common law doctrine such as punitive damages, the fact that the legislature has not intervened indicated that it was willing to allow the courts to continue to control the evolution of the law. Accordingly, the proper application of judicially defined policies dealing with punitive damages was

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190. *Id.* at 248, 389 A.2d at 370.
191. *Id.* at 248-49, 389 A.2d at 370.
192. *Id.* at 248, 389 A.2d at 370.
193. *Id.* at 249 n.5, 389 A.2d at 370 n.5.
194. *Id.* at 249, 389 A.2d at 370.

squarely within the competence of the court to resolve and, therefore, in the dissent's opinion, the court should have held that insurance against liability for punitive damages offended the public policy of this state.[195]

V. A REVIEW

The opinion rendered by the majority of the *F & D* court leaves unanswered some questions concerning the scope and the applicability of the court's holding to future cases involving the issue of insurance coverage for punitive damages and, possibly, even to cases dealing with the initial question of whether a punitive award may be assessed against a defendant himself.

Judge Levine may have been correct in his assessment of the majority's treatment of the theoretical basis for imposition of punitive damages in Maryland when he stated that the court had "*sub silentio* dealt a death blow to the theory of exemplary damages applied in Maryland [in a] radical transformation of the law of punitive damages."[196] The Court of Appeals, for well over a century, has stated and reiterated the basic premise that punitive damages are awarded to punish and to deter reprehensible conduct.[197] The *F & D* majority acknowledged that rationale at the outset of its opinion.[198] The court, however, went on to conclude that the "theoretical, intellectual" appeal of opinions from other courts, which had determined that the deterrent effect of punitive damages would be lost if an insurer instead of the tort-feasor pays the exemplary award, faded when examined from a practical viewpoint.[199] That "practical" view, however, focused on the theoretical potential for financial harm, which the majority opined could befall a small businessman[200] if he were to be the subject of a large punitive award. The majority, moreover, did not directly address the dissent's argument that a small businessman who is guilty of extreme and outrageous conduct should be entitled to no more or less solicitude than any other defendant who has committed reprehensible acts if the punishment imposed reasonably corresponds to the enormity of

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195. *Id.* at 250, 389 A.2d at 371.
196. *Id.* at 243-44, 389 A.2d at 367.
197. *See, e.g.*, note 10 *supra.*
198. 283 Md. at 232, 389 A.2d at 361 (*citing* Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 712 (1976)).
199. 283 Md. at 238, 389 A.2d at 364.
200. *Id.* at 241, 389 A.2d at 366; *see* text accompanying note 168 *supra.* In dissent Judge Levine observed,

> The majority's preoccupation with the plight of the small business community is somewhat surprising considering the fact that the tortfeasor in this case is one of southern Maryland's leading banking institutions and thus hardly qualifies as a small business.

Id. at 247 n.4, 389 A.2d at 369 n.4.

the tortious conduct. Instead, inferentially acknowledging that a jury evaluating a punitive claim may be presented with evidence of a defendant's financial standing,[201] the court expressed its concern that a small businessman may be "crippled or virtually wiped out by an assessment of exemplary damages,"[202] stating:

> It is not an adequate answer to such concerns to say that the trier of fact assessing such damages has before it the net worth of the offending party, because insofar as many small business people are concerned that net worth will, to a large degree, be composed of their home and the stock in trade or other assets of their business.[203]

Not addressed, however, were past pronouncements that punitive awards should be tailored to both the enormity of the act and the particular circumstances of the actor.[204] In light of such statements, the majority could have acknowledged even more readily, and more consistently with past pronouncements, that once the small businessman's net worth has been introduced into evidence, he should be allowed to offer countervailing evidence to explain his financial status in an attempt to mitigate against an enormous award. The ability to present such evidence would allow the defendant the opportunity to convince a jury that any exemplary award should be only punitive, not ruinous. Failing in that endeavor, such a presentation by the defendant nonetheless gives him the opportunity to lay the groundwork to request an order of remittitur should the jury return an excessive punitive verdict.[205]

Perhaps the majority was correct when it posited the negative statement that,

> It can not properly be said that permitting payment of exemplary damages by an insurance company eliminates deterrence, notwithstanding the fact that the loss is thus spread across a number of policy holders through the payment of premiums . . . because those who are demonstrated by experience to be poor risks encounter substantial difficulty in obtaining insurance, a fact such persons know.[206]

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201. *See* text accompanying notes 53-54 *supra.*
202. 283 Md. at 241, 389 A.2d at 366.
203. *Id.*
204. *See* Heinze v. Murphy, 180 Md. 423, 429-31, 24 A.2d 917, 921 (1942); Sloan v. Edwards, 61 Md. 89, 100 (1883); Gaither v. Blowers, 11 Md. 536, 542 (1857).
205. *Cf.* Kneas v. Hecht Co., 257 Md. 121, 262 A.2d 518 (1970) (after defendant's motion for judgment *n.o.v.* on punitive damages was granted, new trial was ordered unless plaintiff agreed to remittitur on compensatory damages); Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 158 A.2d 125 (1960) (defendant's motion for judgment *n.o.v.* was granted and trial court ordered new trial unless remittitur was accepted by plaintiff).
206. 283 Md. at 242, 389 A.2d at 366.

Yet, it is difficult to fault the logic of Judge Levine's statement that such minimal deterrence is hardly comparable to the deterrent effect which might be gained by the knowledge that the defendant may be solely responsible for a large lump sum punitive judgment.[207]

It seems clear that as Judge Levine said in his dissent, "[w]hat troubles the majority is the fact that in malicious prosecution actions (and in those cases alone), it is possible under existing Maryland law for a plaintiff to recover punitive damages even though the defendant's conduct, objectively viewed, is not truly extreme or outrageous."[208] Writing for the majority, Judge Smith placed significant emphasis on the fact that the underlying cause of action for which punitive damages had been awarded in the instant case had been the tort of malicious prosecution.[209] That fact made the case an unfortunate vehicle by which to deal with the question of insurance coverage for punitive damages because of the nature of the proof of malice that may be established to support a punitive award for that tort.[210]

Judge Levine's statement that the court had dealt a death blow to the theory of punitive damages may be of only academic, not practical, import. The majority did acknowledge the punitive/deterrent rationale of punitive damages and did not overtly stray from that rationale, instead taking pains to opine that the deterrent effect would be subserved through the inability of a wrongdoer to obtain insurance.[211] Further, even if one assumes that the rationale underlying punitive awards has been altered by *F & D,* the fact that the case dealt with the tort of malicious prosecution may readily provide the basis for limiting the impact of the decision to actions dealing only with that tort. Accordingly, it is appropriate to assume at this juncture that the court's opinion will have significant practical effect only upon the narrower issues involving insurance coverage for punitive damages.

Whether Judge Levine was correct when he made the sweeping statement that the majority had built upon the anomaly of malicious prosecution law a broad-sweeping rule allowing persons to insure themselves against punitive damages awards in all tort cases where such damages are otherwise available[212] cannot yet be determined. Given the court's public policy holding and its apparent approval of the trial court's policy construction analysis, however, it appears that those standard liability policies presently in force that afford

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207. *Id.* at 249, 389 A.2d at 370; *see* text accompanying notes 193-94 *supra.*
208. *Id.* at 247-48, 389 A.2d at 369.
209. *Id.* at 241, 389 A.2d at 365-66.
210. *See* text accompanying notes 184-89 *supra.*
211. *See* text accompanying note 169 *supra.*
212. 283 Md. at 248, 389 A.2d at 370.

coverage to a Maryland insured would be held to afford coverage for a punitive assessment for any wrong for which the policy provided indemnity for a compensatory damages award. Though it would be necessary to analyze the provisions of the individual policy in question to determine the scope of its coverage, as a general proposition it may be said that commercial policies carrying endorsements affording coverage for malicious prosecution, defamation, and false imprisonment would be held to afford indemnity for both compensatory and punitive awards.[213] While it may not be possible to indemnify oneself against any damages assessed for direct liability for such torts as assault or battery,[214] it does appear that the *F & D* public policy analysis combined with the trial court's vicarious liability analysis would allow a business entity to insure itself against liability for a punitive award based on an assault or battery committed by one of its employees.[215] In fact, given the Court of Appeals' public policy analysis, it is clear that in the case of a punitive award against a business entity based solely upon a theory of vicarious liability, the general rule followed in most, if not all, jurisdictions that have considered the question[216] would pertain, and the insured would be allowed to recover both the compensatory and punitive damages assessment from his insurer unless specifically precluded from doing so by the policy terms.

Although both the Court of Appeals and the lower court stressed that F & D had not specifically excluded punitive damages from the terms of its policy coverage,[217] it is not clear that the insurer would have been allowed by the Maryland state agency regulating insurance matters to do so had it made the attempt. No Maryland court, at least at the appellate level, had considered the question of insurance coverage for punitive damages prior to the instant case, and it does not appear that the Attorney General had rendered an opinion on the matter. The issue, however, had been addressed at least twice by the Maryland Insurance Commission, and both times the Commission refused to give approval for the use of a punitive damages exclusion endorsement to insurance policies.

In February, 1975, Northland Insurance Company requested permission from the Insurance Commission to issue an endorsement to its commercial automobile liability policies that would have stated in part,

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213. *See* First Nat'l Bank of St. Mary's v. Fidelity and Deposit Co., 283 Md. 228, 389 A.2d 359 (1978).
214. *See generally* R. LONG, THE LAW OF LIABILITY INSURANCE § 1.16 (rev. perm. ed. 1978).
215. *See* First Nat'l Bank of St. Mary's v. Fidelity and Deposit Co., 283 Md. 228, 241, 389 A.2d 359, 366 (1978).
216. *See* text accompanying notes 74-80 & 122 *supra*.
217. *See* text accompanying notes 109 & 172 *supra*.

> It is hereby agreed and understood, in consideration of the premium charged, that damages, costs and expenses covered under Insuring Agreements . . . exclude punitive and/or exemplary damages.
>
> These Insuring Agreements and/or coverage parts are limited to compensatory damages resulting strictly from liability for the coverage as defined.[218]

In support of its proposed endorsement, the insurance company reasoned that most liability policies do not define damages within the insuring agreement and generally do not exclude punitive damages within the policy terms; consequently most courts construe the policy language in such a fashion to hold the insurer responsible for payment of all damages, including punitive damages.[219] Secondly, there was a large disparity among the states' laws and regulations concerning insurance coverage for punitive damages, and the carrier wished to clarify the distinction between compensatory and punitive awards.[220] The carrier stated that its liability rates did not contemplate any coverage exposure for punitive awards, that allowing indemnity for punitive awards would result in increased rates being passed on to the insuring public, and shifting the burden of punitive damages from the party responsible for the wrongful act to an insurance company did not serve the purposes of such damages, which were designed to punish.[221]

Disapproving that request, the Insurance Commissioner stated,

> 1. No statistical evidence was included in your filing to support your request for the amendment of coverage.
>
> 2. Under Florida and Virginia law, "punitive damages" are punitory and deterrent. Maryland law, however, is not quite as explicit and there is little case law on the subject.
>
> Compensatory damages are generally defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and bodily pain and suffering. Exemplary, vindictive or punitory damages are such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but also a punishment to the offender and an example to the community.
>
> It would appear that it would be more appropriate to consider the nature of the conduct of the wrongdoer rather

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218. Letter from Edwin M. Mitchell, Vice President & Assistant Secretary, Northland Insurance Company to State of Maryland Department of Insurance (Feb. 19, 1975).
219. *Id.*
220. *Id.*
221. *Id.*

> than the nature of the damages awarded. These, however, are legal issues which are more appropriately the province of our judicial system.[222]

In 1977, the Insurance Commission again received a request for permission to explicitly exclude punitive damages from insurance policies. The Insurance Services Office of Maryland requested permission to add the following endorsement to a number of types of liability policies:

> Regardless of any other provision of this policy, this policy does not apply to punitive or exemplary damages.[223]

Again denying permission to add an excluding endorsement, the Insurance Commission reiterated much of the rationale of its denial of the Northland request, and added that,

> 4. In a very broad sense, all awards under a tort liability system could be interpreted as containing elements of punitive damages.
>
> 5. It is necessary to consider the reasonable expectations of the insured. While claims may be made, there need not be any real basis in fact for the claim and the insured has the reasonable expectation of defense.[224]

The *F & D* decision would appear to give the Insurance Commission the authority that it had indicated previously it believed it lacked to approve either endorsements excluding punitive damages coverage or increased premium rates for coverage for such damages.[225] It appears, however, that the Commission is going to be very reluctant to allow the explicit exclusion of exemplary damages coverage in policies issued in this state.[226]

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222. Letter from Thomas J. Hatem, Insurance Commissioner, to E. M. Mitchell (May 12, 1975).
223. Letter from John A. Beilein, Manager, Insurance Services Office of Maryland, to Insurance Commissioner (Sept. 20, 1977).
224. Letter from Edward J. Birrane, Jr., Insurance Commissioner, to John A. Beilein (Oct. 4, 1977).
225. Judge Smith stated for the majority,
> Insurance companies have not shown a reluctance in the past to write into their policies such restrictions as they deem to be in their best interest, yet no restriction relative to the issue at bar appears in the policy issued by F & D. Surely since the decision in *Lazenby* 14 years ago, if not before, these companies have been congnizant of the fact that they might be called upon to pay an award such as that at issue in this case. As a consequence, they probably have considered such a possibility in establishing rates.

283 Md. at 242-43, 389 A.2d at 367.
226. It is not clear at this time, how many of the insurers that issue policies in this state will seek either to amend those policies and exclude punitive damages

In December, 1978, the Prudential Property and Casualty Insurance Company asked the Insurance Division to reconsider its previous rejection of a punitive damages exclusion that Prudential proposed to add to its umbrella personal liability insurance policy.[227] Pointing out that no court decision or statute precluded the contractual right of an insurer to exclude punitive coverage in an excess specialty insurance contract by express policy language, Prudential's position was that the proposed express exclusion

> is merely to clarify any perceived ambiguity in the policy. We do not provide this coverage, and seek only to clarify this for our policyholders in order to avoid needless confusion and litigation over this issue. The formal exclusion does not reduce or change present coverage, and we would continue to defend (at the insured's request) punitive damages claims made in conjunction with covered (negligence) claims.[228]

In support of its request for permission to add the exclusion, Prudential set forth the usual arguments that because punitive damages are designed for punishment and deterrence rather than compensation, no useful purpose is served by allowing a wrongdoer to shift his liability to an insurance company, thereby, at the expense of other purchasers of insurance, passing along his responsibilities for, and the cost of, punitive damages to the citizens of the state, the very people to whom he or she is a menace.[229] The insurer also pointed out that in cases where punitive damages are warranted, the financial worth of the wrongdoer generally is admissible to determine an amount sufficient to punish the wrongdoer and to deter similar misconduct in the future. Therefore, if a jury took into account a wrongdoer's financial condition in order to award an exemplary verdict sufficient to punish him, the result

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coverage or to raise their premium rates. At least one commentator has suggested that competition in the insurance market does not encourage insurance companies expressly to exclude punitive damages. *See* Haskell, *The Aircraft Manufacturer's Liability For Design and Punitive Damages — The Insurance Policy and The Public Policy,* 40 JOURNAL OF AIR LAW AND COMMERCE 595, 633 (1974). It does not appear that many insurers in Maryland had previously sought permission to add exclusionary endorsements to their standard policies. At this writing, however, the Insurance Commissioner has received several requests for such permission but the author is aware of none that have been granted. Several insurers, however, recently have issued policy renewals in Maryland that contain endorsements explicitly excluding coverage for punitive damages, apparently without previously having obtained the Insurance Commissioner's permission to do so.

227. Letter from Cynthia H. Levy, Law Department, Prudential Property and Casualty Insurance Company, to John F. Crouse, Actuary III, Insurance Division (Dec. 27, 1978).

228. *Id.*

229. *Id.*

would be that an insurance company would pay a higher award for a rich wrongdoer than for a poor one.[230]

Emphasizing the financial impact upon policy holders of not allowing such an exclusion, Prudential stated,

> [I]f the burden of payment is shifted from the wrongdoer to the insurer, other purchasers of insurance are ultimately punished through higher rates, not the wrongdoer. This result would completely abrogate the fundamental purpose and public policy of punitive damages.
>
> [O]ur present Personal Catastrophe policy rates are based upon our past experience and normal trend factors. Unlike many other carriers, since our policy language was never intended to cover punitive damages there is no premium loading included in our rates to cover this exposure. Nor have we charged a premium or offered a buy-back for expected punitive damage losses.
>
> It can be said, however, that if we ultimately are required to carry the burden of paying punitive damages rather than the wrongdoer, our policyholders will face higher rates.
>
> . . . .
>
> [T]he exclusion would favorably affect the majority of the citizens of your state by upholding the purpose of punitive damages, while avoiding the possible need to raise rates in the future because of these claims if they are ever deemed to be covered. Only relatively few people may be adversely affected by this justifiable approach, those committing such acts as to warrant punitive damages.[231]

Disapproving Prudential's request for permission to explicitly exclude punitive damages coverage from the policy in question, the Insurance Division broadly stated its understanding of the *F & D* court's holding to be that punitive damages are covered by a liability insurance policy unless specifically excluded by the language of the policy, and that it is not contrary to public policy in Maryland to provide insurance for such damages.[232] The crux of the Insurance Division's rejection was contained in the following statement:

> The Court goes on to state that it might well be in the public interest to include such coverages and that the deterrent effect would be spread over a large group. They also point

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230. *Id.*
231. *Id.*
232. Letter from John F. Crouse, Actuary III, Insurance Division, Department of Licensing and Regulation, to Cynthia H. Levy, Law Department, Prudential Property and Casualty Insurance Company (Jan. 16, 1979).

> out that insurance companies can and do control the exposure either through rating or underwriting. Large corporations and specialist [*sic*] such as lawyers or agents and brokers would realize the consequence of an exclusionary endorsement but the average driver of an automobile or a homeowner or a small businessman would not. The Court did point out the problems that would face the small businessman.[233]

VI. RECOMMENDATIONS

Based upon the aforegoing review of the Maryland law of liability for punitive damages and the insured's right to indemnity against an exemplary award, it is suggested that two modifications to the law as it presently exists in Maryland are desirable. The first recommendation is that the common law as enunciated by the Court of Appeals be modified. The second recommendation is that the Maryland General Assembly provide statutory guidance to the Insurance Division and the insurance companies it regulates.

A. Punitive Damages in Malicious Prosecution Actions

When presented with the appropriate case, the Court of Appeals should assert its perogative to guide the evolution of the common law of the state and follow Judge Levine's recommendation by modifying the present law to require a higher degree of offensiveness than is presently required as a precondition to punitive recovery in malicious prosecution cases. The rules under which sufficient malice to support a punitive award may be inferred from a finding that a defendant instituted the initial proceeding against a plaintiff based on something less than probable cause should be overruled.

The Court of Appeals has been asked to address that issue once already. In the companion case to *F & D, First National Bank of St. Mary's v. Todd*,[234] the issue presented upon appeal was whether it was against public policy to permit punitive damages awards to be predicated solely upon the type of malice that is inferred from a want of probable cause for bringing the suit that was the basis for the malicious prosecution claim.[235] Judge Smith, again writing for the court, stated that the court had previously held "that punitive damages could be recovered in a malicious prosecution action if a jury found 'a want of probable cause, plus malice, but that malice might be inferred from a want of probable cause.'"[236]

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233. *Id.*
234. 283 Md. 251, 389 A.2d 371 (1978).
235. *Id.* at 252, 389 A.2d at 372.
236. *Id.* at 255-56, 389 A.2d at 374.

He noted, though, that "our prior holdings may not be the majority rule"[237] because the authorities generally hold that exemplary damages may be awarded in malicious prosecution actions when there is proof of actual malice, and that such damages may be properly assessed where the defendant's act was willfully done, in a wanton and oppressive manner and in conscious disregard of his civil obligations.[238] The court, however, never reached the issue, finding instead that it had not been preserved for appellate review.[239]

Further, the *F & D* majority was vitally attuned to the inherit difficulties presented by the common law regarding malicious prosecution in Maryland. Considerable effort was spent by the majority pointing out the likelihood of a basically well-meaning businessman finding himself liable for both compensatory and punitive damages in a malicious prosecution action after he had instituted the initial action for what he believed to be good reason, to protect his business interests.

In light of the relative ease with which punitive damages may be recovered against a defendant in a malicious prosecution action even if his conduct, objectively viewed, is not extreme or outrageous, it is suggested that Judge Levine's theory of ensuring that punitive damages be assessed in all tort actions according to a uniform standard of culpability, thereby furthering the punishment and deterrence rationale behind exemplary awards, should become the law of this state.

B. Insurance Coverage for Punitive Damages

The *F & D* majority placed major emphasis upon the fact that the General Assembly has made no pronouncements on the subject of insurance coverage for punitive damages and therefore the court had received no guidance from the normal policy-declaring department of the government to assist in its resolution of the issue presented.[240] Finding "not the slightest suggestion of a 'constitutional or statutory provision' from which a public policy against payment [by an insurer of a punitive award against its insured] is deducible," the court made its own determination that "'the common sense of the entire community would [not] pronounce it' against public policy for the Bank's insurance company to pay the judgment for exemplary damages assessed against the Bank."[241]

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237. *Id.* at 256, 389 A.2d at 374.
238. *Id.* The court quoted from 52 AM. JUR.2d *Malicious Prosecution* § 94 (1970) and cited RESTATEMENT (SECOND) OF TORTS § 908 (Tent. Draft No. 19, 1973).
239. 283 Md. at 257, 389 A.2d at 374.
240. *Id.* at 239, 243, 389 A.2d at 365, 367.
241. *Id.* at 243, 389 A.2d at 367.

In light of those pronouncements by the Court of Appeals and the Insurance Division's apparent hesitation to assert its authority to permit exclusionary endorsements without more explicit directions from the judiciary, the need for legislative guidance is clear. It is therefore recommended that at its earliest opportunity, the General Assembly forbid protection by insurance indemnity against exemplary awards.[242] It is suggested that despite the *F & D* court's concern for the potential plight of the small businessman facing a malicious prosecution award, the "common sense of the entire community" as reflected in its microcosm, the jury, would be surprised and offended if the jurors were instructed that they could award damages for the purpose of punishing the defendant and deterring other potential wrongdoers, yet were also aware that the sum which they assessed as a punishment and a deterrent would come not from the pockets of the defendant but from the coffers of an insurance carrier.[243] If the purpose of punitive damages is to punish and deter, that purpose is adequately fulfilled only if the wrongdoer suffers the immediate and personal consequence of his wrongdoing without the ability to dissipate the immediate financial impact of his punishment by shifting that impact away from himself or by deferring it to a later point in time when his rates are increased or his insurance is not renewed. Further, it is suggested that if insurance carriers are required to provide coverage for punitive awards, it is likely that many policy holders will be faced with increased premium rates as the risk of punitive awards is spread beyond those guilty of extreme and outrageous conduct to the insurance purchasing population as a whole. Even if insurance carriers are allowed the option of providing or refusing punitive assessment coverage, it seems probable that inequities will result. Business entities and wealthy individuals could more readily afford to pay increased premiums to obtain optional coverage for potential punitive liabilities than could less well-to-do persons. Such a situation therefore results in the anomaly of the wealthy tort-feasor virtually escaping financial punishment for his wrongs while the poorer one bears the full impact of punitive liability for his wrongdoing. The "common sense of the entire community" should be offended by such a result.

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242. On February 23, 1979, S. 1089 was introduced in the Senate of Maryland. The declared purpose of the bill was to render "the payment of punitive damages by insurance companies . . . against public policy." The Legislature, however, rejected the bill.

243. In light of current law regarding the mention of insurance before a jury, jurors could not actually be told that the defendant had insurance coverage for any of the wrongs alleged. *See, e.g.*, Snowwhite v. State, Use of Tennant, 243 Md. 291, 221 A.2d 342 (1966).