The Defense Line

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Plaintiff's Fault In Product Cases: Why Are They Getting Away With It (In Maryland)?

by Gardner M. Duvall*

Affirmative defenses in Maryland product liability cases represent a paradox. It has been too easily assumed that the plaintiff's fault is generally irrelevant. Yet that assumption makes it challenging to fashion a place for plaintiff's fault in the strict product liability case. This article considers the possibilities of reconsidering plaintiff's fault and a comparative fault regime for product liability.

Maryland long ago established contributory fault as the rule governing the effect of plaintiff's fault in negligence. Maryland's adoption of §402A from the RESTATEMENT (SECOND) OF TORTS for product liability claims carried along the vague and incomplete statement of defenses in comment n of that section. Comment n provides that the "ordinary" contributory negligence of mere "failure to discover the defect in the product, or to guard against the possibility of its existence," is not a defense to a §402A claim. On the other hand, knowing and unreasonable assumption of the risk of the product defect is a complete defense[1]. While comment n does not purport to be an exhaustive list of the species of a product user's potential fault, it provides no rule or guidance for plaintiff's fault that falls between these two extremes.

The recent RESTATEMENT (THIRD) OF TORTS – PRODUCTS LIABILITY (1998) greatly informs why comment n seems incomplete more than three decades later. The Restatement Third recites that the true focus of §402A was manufacturing defects, eliminating privity of contract, and eliminating any unreasonable requirement of proving *why* a product was sold with a manufacturing defect. REST. (THIRD), Introduction. "Section 402A had little to say about liability for design defects or for products sold with inadequate warnings." *Id.* In that context, the point of denying a defense for the user's failure to notice the manufacturing defect makes perfect sense, because the user has no obligation to look for a fault that can reasonably be expected not to exist[2]. On the other hand, if the user knows of the defect and unreasonably uses the product anyway, there is every reason to absolve the seller from liability for the risk the plaintiff knowingly assumes.

Furthermore, comment n to §402A represented resistance to the general rule of contributory negligence, which was correctly restated as the majority rule of American states in the mid-1960s in the Restatement Second. Since §402A was largely an effort at lawmaking rather than true restatement, the drafters saw no reason to be bound to the historical rule of contributory negligence for this new fault-based theory of product liability. REST. (THIRD), §17, comm. a. Section 402A, comment n, therefore, "altered the general tort defenses by narrowing the applicability of contributory negligence and emphasizing assumption of risk as the primary defense." *Id.* A defense that required the user to be on guard for manufacturing defects would amount to carrying forward an avoidance of liability of the type that §402A was attempting to move beyond.

It is important to remember that when it adopted §402A , and repeatedly thereafter, the

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[1] The only other species of plaintiff fault addressed in §402A is product misuse. *See Ellsworth v. Sherne Lingerie*, 303 Md. 581, 592-597 (1985). Misuse is not considered here.

[2] REST. (THIRD), §17, comm. d.

President's Message

M. King Hill, III — Venable, Baetjer & Howard, LLP

photo pick-up
from last issue

As I prepare my final President's Message, I look back on the last year with a true sense of accomplishment and with a great deal of pride and gratitude for the hard work and dedication of those who served on and assisted the MDC Board.

I would like to take this opportunity to thank certain individuals who, in particular, worked tirelessly to raise the profile of the Association.

First, my thanks go out to Peggy Ward. As Chair of our Program Committee, Peggy put together a number of very interesting, topical, and educational programs. In particular, Peggy organized three brown-bag lunch programs. The brown bag lunches in November in Rockville, with Judges Mary Beth McCormick and Eric Johnson, and in Baltimore, with Judges John M. Glynn and Audrey J. S. Carrion, were well-attended and quite informative. The judges addressed the use of non-medical expert witnesses in the District Court. The informal setting was conducive to a candid exchange of questions, observations, and suggestions. The February brown-bag lunch, at which renowned local attorneys Ed Buxbaum and Matt Zimmerman were given a case at the meeting to evaluate for settlement purposes, also drew a large crowd and generated a certain amount of spirited disagreement from the different perspectives of the two experts involved. The topic was presented in both an educational and entertaining way and was very well-received.

For those of you who have not had the chance to attend an MDC brown-bag lunch, I urge you to make every effort to do so in the coming year. These are free programs which last approximately one hour at lunch time during the work week. They present a great opportunity, particularly for our junior members, to get to see friends in the defense bar and learn a thing or two about the practical side of the practice of law.

Kudos also go out to Peggy for organizing the February 9 dinner meeting featuring John A. Wolf from Ober, Kaler, Grimes & Shriver and the Honorable Paul W. Grimm from the United States District Court for the District of Maryland addressing the topic "Don't Confuse Disappointment with Disaster: Trying the Business Litigation Case." Our speakers regaled us with anecdotes and observations from their unique perspectives. The many members in attendance at this dinner meeting found the topic and the remarks to be timely and extremely informative, both on a legal and practical basis.

My thanks also go out to Hal MacLaughlin, Chair of our Judicial Selections Committee. During the last year, there were a number of judicial openings throughout the State and Hal, with the help of Kevin Murphy in the southern counties, took time from their busy schedules to coordinate the interviews for the numerous judicial candidates. Many of those ultimately selected by Governor Glendenning were endorsed by our Association.

As usual, our most concentrated effort was focused on the Maryland Legislative Session. This year, the Association, through a number of its members, testified against several pro-plaintiff proposals. I am pleased to report that, without exception, the bills the MDC opposed did not pass. Some of the bills defeated were a bill which would have replaced contributory negligence with comparative fault, a bill which would have altered court rulings that have placed restrictions on the availability of punitive damages in Maryland so as to allow exemplary damage awards in motor vehicle accident cases, and a bill which would have made Maryland's non-economic damage caps inapplicable to personal injury and wrongful death claims arising from pre-July 1, 1986 occupational exposure to "a substance." On these and other bills, our Association is indebted to the hard work and long hours of Gerry Tostanoski, Gardner Duvall, Steve Leder, Scott Burns, Jack Harvey, Lee Rutland, Tom Monahan, Bill Tostanoski, and our lobbyist extraordinaire, Maxine Adler.

I would also like to thank Bob Klein for his testimony on behalf of the Association on the proposed amendments to the Federal Civil Rules of Procedure before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and to our Executive Director, Kathleen Shemer, who did her usual excellent job taking care of all the "little things" and for reminding me of all of the things that are so easy to overlook when one tries to manage both a law practice and the responsibilities as President of this Association. Space limitations preclude me from thanking everyone else who made this year a success. Without your commitment to the Association, we would not have accomplished what we did.

For those of you who did not attend the Annual Meeting (otherwise known as the Crab Feast) on June 16, you missed a great time. At the Annual Meeting, I was pleased to accept, on behalf of the MDC, the 1999 Exceptional Performance Citation from the Defense Research Institute. It was also my honor to move the nomination of your officers for 1999-2000, Gerry Tostanoski, President; Jack Harvey, President-Elect; Scott Burns, Secretary; and Hal MacLaughlin, Treasurer. I expect you will be hearing from this administration over the course of the next year about items of concern to the Maryland defense bar, such as the use of outside fee audits by insurance carriers. Also, stay tuned next year for the rollout of the MDC web page.

In closing, I urge each of you to stay active in the Association and encourage your friends, associates, and other defense-minded lawyers to join and actively participate in the Maryland Defense Counsel. Thank you for giving me the opportunity to serve as President of the Maryland Defense Counsel. ■

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Court of Appeals emphasized that this is fault-based liability, not true strict liability. Proof of a sale of a defective and unreasonably dangerous product is proof of fault, without needing to prove *why* the defect was in the product.[3] A fault-based liability system which makes the genuine fault of the product user irrelevant is incoherent.

Unfortunately, the limited experience which informed the drafting of §402A has infected the Maryland decisions on the significance of the fault of the product user. The Fourth Circuit, for instance, has ruled that drunk driving is irrelevant to the recovery in a claim of uncrashworthiness. *Binakonsky v. Ford Motor Co.*, 133 F.3d 281 (4th Cir.1998). In the same case, the negligence of drunk driving defeated the plaintiff's negligence count, as a matter of law. *Binakonsky v. Ford Motor Co.*, 929 F.Supp. 915, 920 (D.Md.1996). But the Fourth Circuit reversed summary judgment for Ford on the §402A claim - even though that count sought the same damages, for the same alleged product defect, caused by the same alleged fault of the manufacturer as the negligence count. The functional difference between the two counts is limited entirely to the labels "negligence" and "strict liability."[4] This is not sound policy.

A review of the cases leading to this muddle is required. In the only case factually considering the plaintiff's fault in a §402A claim, the Court of Special Appeals and Court of Appeals correctly referred to the text of comment n. *Sheehan v. Anthony Pools*, 50 Md.App. 614, 623-627 (1982), *aff'd sub nom Anthony Pools v. Sheehan*, 295 Md. 285, 299 (1983). The claim was that a diving board was faulty because it lacked a non-skid surface out to its side edges, and lacked a warning of this. 50 Md. App. at 622-623. The defense apparently argued to the jury that the plaintiff's inattention caused him to slip off the side of the board. Since plaintiff claimed that a proper board would have prevented the fall, it seems that the only conceivable significance of the plaintiff's conduct is whether the fall would have occurred even if the board was designed as plaintiff claimed was necessary. In other words, this is a poor example of plaintiff's fault, and it seems to fall into the species of failure to detect the defect which comment n speaks directly to. When addressed with this situation, the courts duly noted (without elaboration) that the "ordinary" contributory negligence of failing to notice the defect is not a defense to the §402A claim. *Sheehan* is not a troubling decision.

No subsequent state court decision has considered the significance of facts of a plaintiff's fault in a §402A claim. Unfortunately, several opinions touch on the subject with dicta that treads where it should not.

In *Sherne Lingerie*, the only question about the subject of contributory negligence and strict liability was whether to instruct that the defense did not apply to that claim. 303 Md. at 598-600. Without dispute in the proceeding, the plaintiff had no fault that would be a defense to the 402A claim. Without any factual context to inform a potential change of law (not even the subject of the appeal), the Court of Appeals omits the word "ordinary" in regard to contributory negligence and §402A. The case did not have to decide whether "non-ordinary" contributory negligence affects a strict liability claim, and nothing in the facts or posture of the case indicates a conscious intent to amend the rule stated in *Sheehan* and the Restatement Second. *Sherne Lingerie*, however, provides the bald quote that contributory negligence is never a defense to a §402A claim.

In a subsequent case, the defendant effectively argued that true contributory negligence amounted to the knowing and unreasonable assumption of the risk of a product defect that is a defense to a strict product liability claim. *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 324 (1988), *rev'd on other grounds Montgomery County v. Valk Mfg. Co.*, 317 Md. 185 (1988). At trial, the decedent's driving was judged to be contributorily negligent as a matter of law, denying recovery for the negligence count. The plaintiff had been in an auto accident with a Montgomery County truck, which carried a snow plow hitch made by Valk. The plaintiff "was not remotely aware" that a defectively designed product "was about to aggravate the imminent collision" between plaintiff and the county vehicle. Therefore, plaintiff did not assume the risk of the product defect. *Id.* at 325.

While the *Valk* court was not asked to consider the wisdom of declaring the plaintiff's fault irrelevant for the §402A count, the case presents facts which raise the policy question. If the decedent's fault had not put his car in a position to be "battered" by the high-mount snow plow hitch, the hitch would not have hurt him. His driving lacked due care as a matter of law. His poor driving was not a matter of failing to guard against a product defect he had no reason to expect, the "ordinary" contributory negligence referred to in comment n. Those facts result in no liability for the defendant for the negligence count, yet the plaintiff can recover full damages for the same facts by pleading strict product liability.

The *Valk Manufacturing* courts were not asked to reduce plaintiff's recovery based on his own causal fault. Thus, the question of whether plaintiff's fault affects plaintiff's recovery for strict product liability, when the fault is neither "ordinary" contributory negligence, nor unreasonable assumption of the risk of the defect, is not one previously addressed by Maryland appellate decisions.

ALTERNATIVE APPROACHES

There are two conceptual attacks given the facts and arguments which have resulted in the holdings on the defenses

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[3] *Phipps v. General Motors*, 278 Md. 337, 350-352 (1976); *see also Owens-Illinois v. Zenobia*, 325 Md. 420, 432-438 (1992).

[4] *See e.g. Owens-Illinois v. Zenobia,* 325 Md. at 435.

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for fault-based torts in Maryland. Coherence with the policy decisions embodied in negligence law is preferable to the current incoherence, which has the effect of elevating the pleadings in the complaint above either the facts of a case or the policies behind fault-based recoveries.

One attack is to challenge the dicta that expands the failure to inspect for product defects ("ordinary" contributory negligence) to encompass all acts that might be contributory negligence. The argument is that a drunk driver's causal negligence bars a claim of vehicle uncrashworthiness sounding in strict liability for the same reasons it bars the claim for the same facts and fault alleging negligence. It would remain the law that the "ordinary" contributory negligence of failure to inspect for a product defect is not contributory fault for the purpose of §402A. Whether that neglect would constitute contributory negligence for a product liability negligence claim has no answer in Maryland decisions, but it is doubtful that facts of that nature would permit a contributory negligence defense to go to a jury.

The argument in favor of ignoring the dicta that contributory negligence is never a defense to a Maryland §402A claim is the high level of coherence this outcome would achieve with the effect of contributory negligence in any non-product (and product) negligence case. The likelihood of succeeding with the argument, however, is clouded by the dicta that deems user fault irrelevant to the §402A claim.

The second approach to attacking the fallacious ignoring of plaintiff's fault is the adoption of comparative fault for §402A claims. This attack has the virtue of not arguing against the language of prior decisions. This is the approach adopted in the Restatement Third for product liability cases. It has the shortcoming of inconsistent outcomes between the negligence and §402A counts of a product liability case, an inconsistency which rubs against the grain of more than a century's decisions declining to reduce recoveries based on apportioned fault.

A foolish consistency, however, is the hobgoblin of small minds, and it is indeed foolish of a product defendant to insist on paying a faulty plaintiff 100% of damages. The remainder of this article outlines a method for arguing for comparative fault for a §402A claim, rather than accepting a judgment for full damages in favor of a plaintiff at fault.

A majority of states reduce plaintiff's recovery for a product liability claim caused in part by plaintiff's fault. As a result, the American Law Institute has adopted the rule of comparative fault in the Restatement Third.

The ALI finds that a "strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions." *Id.* The relevance of plaintiff's fault is not limited to unreasonable assumption of the risk of the product's defect. *Id.*

The Restatement Third approach considers "all forms of plaintiff's failure to conform to applicable standards of care" for apportioning responsibility between the plaintiff and defendant. §17, comm. d. This approach declines to separate plaintiff's fault into discrete categories like assumption of the risk, "ordinary" inattention to product design failures, or use of a product while impaired. "Recognition of such special categories tends to result in either a plaintiff being completely absolved from responsibility or being completely barred from recovery." *Id.* That recognition results in litigation attempting to pigeon-hole conduct rather than according the facts their genuine significance. "That effort has proven costly and largely futile." *Id.* Factfinders are competent "to assess the appropriate percentages of responsibility in the circumstances of a case. Such fact-sensitive evaluations are better adapted to apportioning responsibility than is reliance on discrete categories of plaintiff conduct." *Id.*

A small minority of states tightly define the defenses which completely bar or reduce a §402A claim, and reject any other fault as a basis for affecting the damages recoverable for that claim. *See generally* REST. (THIRD) §17, comm. a., Reporters' Note. A reading of those cases, however, shows an approach to strict product liability that diverges from Maryland's fault-based application of §402A.

Maryland courts have the authority to adopt comparative fault for §402A claims. The Court of Appeals in the seminal §402A case rejected the claim that only the General Assembly could determine the law in this field. *Phipps v. General Motors*, 278 Md. 337, 350 (1976). Decisions prior to *Phipps* not adopting strict liability did not constitute a rejection of the concept. *Id.* at 346-350. Likewise, prior decisions not considering comparative fault in relation to a §402A claim cannot constitute a rejection of that concept. Several courts have had no difficulty excluding failure to inspect from plaintiff's fault relevant to §402A liability, while comparing all other fault in determining the defendant's liability.[5]

As a consequence of the considerations of the fault underpinning §402A liability, the American Law Institute has abandoned any non-fault distinction between negligence and strict liability, and settled upon a single statement of law for product liability in the Restatement Third. §2, comm. n. While Maryland has not addressed this development by the ALI, the development is consistent with Maryland's §402A decisions.

The recognition that strict liability is fault-based is inconsistent with a constriction of defenses such that truly faulty behavior which is a substantial contributing cause of harm does not affect plaintiff's recovery at all. The policy of not requiring consumer inspections for defects is a far cry from holding that plaintiff's causal fault has no bearing at all on the liability of the defendant unless it is a knowing, unreasonable assumption of risk of the product defect. ■

[5] *Star Furniture v. Pulaski Furniture*, 297 S.E.2d 854, 862-863 (W.Va.1982); *Busch v. Busch Constr.*, 262 N.W.2d. 377, 394 (Minn.1977).; *see also Murray v. Fairbanks Morse*, 610 F.2d 149, 161 (3d Cir.1979)(applying Virgin Island law).

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U.S. DISTRICT COURT ADOPTS RISK/UTILITY TEST IN MARYLAND DESIGN DEFECT CASES

In *Tannebaum v. Yale Materials Handling Co.,* 38 F.Supp. 2d 425 (1999), the United States District Court for the District of Maryland ruled that in a design defect case, the appropriate legal standard is the "risk/utility test." Although agreeing with the plaintiff on the proper legal standard, the Court granted defendant's motion for summary judgment.

The plaintiff, William Tannebaum, ("Tannebaum"), who was seriously injured while operating a forklift, sued the forklift manufacturer, Yale Materials, ("Yale"), alleging design defect because it lacked a wire mesh cover for the operator's compartment and a rear door. At issue was the proper legal standard to be applied since Maryland accepts and applies both the "consumer expectation" test and the "risk/utility" test in design defect cases. The plaintiff argued that the "risk/utility" theory, which "focuses on whether the benefits of a product outweigh the dangers of its design," should apply. The defendant countered that the "consumer expectation" theory, which "focuses on what a buyer/user of a product would properly expect that the product would be suited for" was the appropriate standard. While not agreeing with Tannebaum's reasoning for utilizing a "risk/utility" test, the Court did hold that this was the appropriate standard.

The Court found that in Maryland, in design defect cases based on the lack of a safety device whose absence does not create an "inherently unreasonable risk" of harm, the "risk/utility" balancing test is applied to determine whether the product, marketed without the device, is "unreasonably dangerous" so that the product is "defective." The ultimate question is "whether a manufacturer, knowing the risk inherent in his product, acted reasonably in putting it on the market."

The factors to be considered in the determination of whether a product is unreasonably dangerous were outlined in *Pease v. American Cyanamid*, 795 F.Supp. 755 (1992), and include, but are not limited to, an analysis of considerations such as usefulness and desirability of the product, safety aspects of the product, and the user's ability to avoid danger by the exercise of care in the use of the product.

FRE 612: DISCOVERY OF DOCUMENTS USED TO PREPARE DEPONENTS

In *Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.*, 183 F.R.D. 458 (1999), the United States District Court for the District of Maryland held that Fed. R. Evid. 612 may require the production of work product materials which were used to prepare a witness for a deposition although the documents were not used during the deposition itself to refresh the witnesses' recollection.

Defense counsel asked the witnesses whether they had reviewed any documents prior to their depositions to assist them in recalling relevant events. Although it was acknowledged that the witnesses had reviewed documents to prepare for the depositions, plaintiff's counsel asserted the work product privilege and instructed the witnesses not to answer all the defendant's questions seeking to discover the identity of the documents, Defendants filed a motion to compel the production of these documents, arguing that the Federal Rules of Evidence entitled them to the production of documents used to refresh the recollection of a witness prior to a deposition.

The judge held that, "if otherwise discoverable documents, which do not contain pure expressions of legal theories, mental impressions, conclusions or opinions of counsel, are assembled by counsel, and are put to a testimonial used in the litigation, than an implied limited waiver of the work product doctrine takes place, and the documents themselves, not their broad subject matter, are discoverable." Three elements must be met before documents used to prepare a witness for deposition must be produced. First, a witness must use a writing to prepare for the deposition. Second, the writing must be used to prepare for the purpose of testifying. Third, the court must determine whether, in the interest of justice, the adverse party is entitled to see the writing.

In order to balance the competing interests of work product versus proper disclosure of documents, Judge Grimm outlined the following nine factors to be considered: (1) the status of the witness; (2) the nature of the issue in dispute; (3) when the events took place; (4) when the documents were reviewed; (5) the number of documents reviewed; (6) whether the witness prepared the document(s) reviewed; (7) whether the documents reviewed contain, in whole or part, "pure" attorney work product, such as discussion of case strategy, theories, or mental impressions, which would require redaction or favor nondisclosure; (8) whether the documents reviewed previously had been disclosed to the party taking the deposition as part of a Fed. R. Civ. P. 34 document production, or otherwise; and (9) whether there are credible concerns regarding manipulation, concealment or destruction of evidence.

SHOWING OF "ACTUAL MALICE" REQUIRED TO OVERCOME CLAIM OF GOVERNMENTAL IMMUNITY

The Court of Appeals, in *Shoemaker v. Smith,* 353 Md. 143 (1999), held that "actual malice" is required to defeat an assertion of immunity under the Maryland Tort Claims Act (the "Act"). Following a series of allegations of abuse carried out by Danny Smith against Donna, Ben, and Travis Smith, Mr. Smith's three children, personnel of the St. Mary's County Department of Social Services and Sheriff's Department attempted to remove Ben and Travis, then minors, from their home. When the two children resisted the removal, they were "forcibly restrained, handcuffed, threatened, driven away and

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detained without benefit of counsel for several hours at a police station" by sheriff's deputies. During the removal operation, the sheriff's deputies also purportedly threatened to kill the family dog, used foul language, and threatened to take Ben and Travis to a mental hospital. It was not until several hours later, when Ben and Travis's lawyer took charge of them, that the children were presented to a court and eventually released to their parents.

Thereafter, at some point in 1994, Judee Smith, on behalf of her children, filed suit in U.S. District Court. Later, in June of 1995, Ms. Smith and her husband, for themselves and their children, also filed suit in the Circuit Court for St. Mary's County. After the four-count federal complaint, alleging violations of the children's civil rights under 42 U.S.C. § 1983, as well as various other state law claims, was disposed of by the District Court, the Smiths revived their state action that had remained dormant during the pendency of the federal lawsuit. After the sheriff's deputies moved for summary judgment in the state suit, the circuit court granted their motion as to all claims except for the assault, battery, and false imprisonment claims asserted against two deputies. Subsequently, the two deputies appealed, claiming immunity under the Act. After that appeal was dismissed by the Court of Special Appeals as interlocutory, the Court of Appeals granted *certiorari*.

In a unanimous decision, the Court of Appeals affirmed the decision of the intermediate appellate court, recognizing that the state personnel were not entitled to immunity if they acted with "malice or gross negligence." The Court held that, in order to defeat a claim of immunity under the Act, a plaintiff must demonstrate that the state personnel acted with "actual malice." According to the Court, whether the two deputies acted with "actual malice" was a question left properly for the trier of fact.

A DISMISSED ALTERNATE JUROR CAN BE SUBSTITUTED FOR A REGULAR JUROR BEFORE THE JURY BEGINS DELIBERATIONS

In *Hayes v. State of Maryland*, 123 Md. App. 558 (1998), the Court of Special Appeals held that an alternate juror can be substituted for a regular juror at any time before the jury starts to deliberate. In *Hayes*, after closing arguments in a non-capital criminal jury trial, a Baltimore County Circuit judge dismissed the alternate juror and directed the rest of the jury to retire to the jury room to start deliberating. Before the jury started deliberations, the judge dismissed one of the regular jurors due to illness. The alternate, still in the courthouse but not in the courtroom, replaced the regular juror. The record does not establish the length of time between the alternate juror's dismissal and reseating, but does confirm that the trial judge failed to inquire as to whether the alternate juror discussed the case with anyone and if exposure to any external influences might affect the alternate juror's impartiality.

Under Md. Rule 4-312(b)(3), a juror shall be replaced by an alternate juror prior to the jury retiring to consider its verdict, and any alternate juror not acting as a replacement shall be discharged when the jury retires to consider its verdict. While the Maryland Court of Special Appeals agreed that the substitution of an alternate juror after the jury retires to consider its verdict is implicitly prohibited under Md. Rule 4-312(b)(3), excusing a jury for deliberations does not equate to a jury "retir[ing] to consider its verdict" under Md. Rule 4-312(b)(3). In *Hayes*, the judge excused the jury but the jury never began deliberations.

Because no Maryland case on point existed, the Court relied on two federal cases interpreting the similarly worded Rule 24(c) of the Federal Rules of Criminal Procedure. The federal cases provided situations under which the substitution of an alternate juror, after the start of jury deliberations, could prejudice a defendant. These situations encompass those that interrupt or taint the deliberation process to the detriment of the defendant such as: (1) when an alternate juror lacks the opportunity to express his views and to persuade jurors whose opinions about guilt or innocence are already formed; (2) when an alternate juror misses the chance to experience the interplay between the jurors that is part of the decision-making process; (3) when the replaced juror's views, possibly already influencing other jurors, is not known to the alternate; and (4) when a juror feigns illness under the great pressure to vote for conviction and places the burden of decision on the alternate. While agreeing with these federal court cases, the Court found that prior to a jury undertaking deliberations, none of these potentially prejudicial effects are implicated. The Court differentiated these cases stating that the phrase "retires to consider its verdict," as used in Md. Rule 4-312(b)(3), contemplates the actual commencement of deliberations.

"REASONABLE CONSUMER" STANDARD ADOPTED FOR DECEPTIVE TRADE PRACTICES

In *Luskins, Inc. v. Consumer Protection Division*, 353 Md. 335 (1999), the Court of Appeals, in determining whether a trade practice is deceptive," rejected the stricter, "unsophisticated consumer" test and instead found that for a trade practice to be "deceptive," the question is whether a "reasonable person" would have been deceived. Luskins, Inc. ("Luskins") ran an advertising campaign that offered customers a certificate for "free" airfare to Florida, the Bahamas, or Hawaii, if the customers made a minimum purchase. The certificates were redeemable from Vacation Ventures, Inc. ("VVI"), a marketer of vacation packages that was not affiliated with Luskins. Receipt of the "free" airfare was subject to additional costs, such as a minimum night hotel stay, taxes, and fees.

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The Consumer Protection Division brought an enforcement action against Luskins and, after an administrative hearing, the state agency concluded that Luskins committed deceptive trade practices as defined in sections 13-301(1), (3), and (9) of the Consumer Protection Act. *See* Md. Code Ann., Com. Law II § 13-101 *et seq*. (Repl. vol. 1990). After Luskins sought judicial review and the circuit court reversed, the Consumer Protection Division appealed to the Court of Special Appeals of Maryland. The appellate court held that the agency did not err in refusing to apply the "reasonable consumer" standard followed by the Federal Trade Commission ("FTC") in deception cases. *See Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984). Instead, the court held that the agency permissibly followed the standard set forth in *Golt v. Phillips*, 308 Md. 1 (1986).

The Court of Appeals granted Luskins's petition for certiorari and reversed. The Court concluded that the Consumer Protection Division should have applied the FTC's "reasonable consumer" standard. To do otherwise, the Court concluded, would disregard both the legislative intent of the Act and the Act's underlying purpose of achieving a "fair comparability" between federal and state law defining deceptive trade practices.

TORT CLAIMS ACT LIMITS DAMAGES BUT NOT POST-JUDGMENT INTEREST

In *Maryland State Highway Administration v. Kim,* 353 Md. 313 (1999), the Court of Appeals held that the sovereign immunity of the state does not bar an award of post-judgment interest, when the money judgment entered against one of the State's agencies, pursuant to Maryland Tort Claims Act (the "Act"), is for the maximum amount prescribed by the Act. According to the Court, the statute limits only the amount of damages and post-judgment interest is not a measure of damages.

In *Kim*, after a reduced verdict awarding Kim $50,000 and $100,000 in damages against the State Highway Administration of the Department of Transportation ("SHA") and the Board of Education of Prince George's County ("BOE"), respectively, both the SHA and the BOE appealed to the Court of Special Appeals, which affirmed the judgments. The SHA tendered to Kim, in payment of the judgment, its check for $50,000 but refused to pay post-judgment interest from the date of the judgment's entry. The circuit court granted Kim's subsequent motion, asking the court to award post-judgment interest on the SHA judgment, prompting SHA's appeal. The Court of Appeals, on its own motion, granted certiorari.

The Court of Appeals recognized that sovereign immunity bars the recovery of damages but stated that the award of post-judgment interest is not an award of damages. The Act exempted pre-judgment interest from the waiver of the State's sovereign immunity from its inception but any mention of post-judgment interest is noticeably absent from the legislation. Furthermore, Maryland law's allowance of interest on a judgment is deeply rooted in its history.

Post-judgment interest is not an element of damages because it compensates the successful suitor for the loss of monies due and owing to him, and the loss of income thereon, from the time the judgment is entered to satisfaction of the judgment by payment. According to the Court, there has never been any attempt to treat the State differently from other litigants insofar as the payment of post-judgment interest is concerned in Maryland.

WORKERS' COMPENSATION—OFFSETS

In *Miller v. Sealy Furniture Co.*, 125 Md. App. 178 (1999), the Court of Special Appeals held that the Workers' Compensation Commission may not offset an award of permanent partial disability benefits by a prior overpayment of temporary total disability benefits, when the later award is based on the same disability. In *Miller*, the plaintiff became disabled as a result of carpal tunnel syndrome. She filed a claim with the Workers' Compensation Commission and was awarded temporary total disability benefits for the period of her vocational rehabilitation. Although rehabilitation services ended in August 1994, the plaintiff continued to receive temporary total disability benefits until February 1995.

In June 1996, the Workers' Compensation Commission awarded permanent partial disability benefits to the plaintiff, but credited the employer for the overpayment of temporary total disability benefits after August 1994. The plaintiff sought judicial review in the Circuit Court for Wicomico County, which granted the employer's motion for partial summary judgment, and affirmed the decision of the Commission to offset the plaintiff's award. After a jury awarded the plaintiff a 25% loss of use of her right hand, she appealed.

On appeal, the plaintiff contended that the circuit court erred in upholding the decision of the Commission to offset her later award. The Court of Special Appeals agreed and reversed. Citing *Montgomery County v. Lake*, 68 Md. App. 269 (1986), the Court recognized that the workmen's compensation act establishes an exclusive procedure for obtaining benefits during every phase of the right to compensation. Because the act does not provide a procedure for an employer to recover funds after overpayment, the Court concluded that the Legislature intended to prohibit such a recovery.

GUN RETAILER LACKS CIVIL OBLIGATION TO PERSON KILLED BY STOLEN HANDGUN

In *Valentine v. On Target, Inc*., 353 Md. 544 (1999), the Court of Appeals affirmed a judgment for a gun store in a claim for civil damages resulting from a murder using a sto-

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len handgun. A handgun, stolen from the defendant's store, was used as a murder weapon in an unsolved crime. The question presented to the Court was what tort duty a gun store owner owed to a third party to exercise reasonable care in the display and sale of handguns. A civil suit filed against the gun store alleged a failure to reasonably protect against the theft of the dangerous instrument.

The trial court and intermediate appellate court both found that the claims stated in the suit were not adequate, if proved, to support a claim for the surviving husband of the murder victim. The Court of Appeals affirmed, finding that the complaint failed to state facts that would support liability. It noted, however, that gun retailers are not immunized from potential tort liability by this decision. The Court nonetheless declined to provide guidance in ascertaining what additional facts, if any, might give rise to civil liability of a gun retailer for stolen weapons. ■

LEGISLATIVE ROUNDUP

By Steven E. Leder[1]

The MDC had a successful 1999 session in the General Assembly. Again this year, a battery of bills was introduced, which would have exposed our clients to new causes of action and larger verdicts. Five House Bills ("HB") and one Senate Bill ("SB") that the MDC leadership targeted were defeated. The MDC, with our legislative representative, Maxine Adler, Esq., Semmes, Bowen & Semmes, organized opposition, position papers, and testimony, which contributed to the defeat of each of these bills.

Perhaps our biggest challenges were two bills that would have eliminated the cap on non-economic damages for plaintiffs who had been exposed to asbestos or tobacco (HB 1060) or "substances" (SB 622) before July 1, 1986. The Bills had strong, well-funded backing from the asbestos and tobacco plaintiff's bar. Chip Hill, Gerry Tostanoski, Scott Burns and Gardner Duvall worked tirelessly to defeat the cap bills. HB 551 to adopt comparative negligence while continuing joint and several liability was again defeated with the help of Tom Monahan and William Ryan. Chip Hill testified against HB 1323, which, if enacted, would have permitted the assessment of punitive damages against drunk drivers in motor torts to the extent of insurance. The MDC helped block two bills, HB 244 and HB 833, designed to permit the assessment of counsel fees, costs and interest in insurance contract disputes. HB 833 would also have permitted the recovery of punitive damages.

Several bills were passed, including two Y2K bills, HB 8 and HB 901, which provide partial immunity for the private and public sector for Y2K problems. Further, several procedural bills were passed. Hal MacLaughlin helped draft an important amendment to HB 216, changing the method by which health care records and writings and paid bills for goods and services are introduced without the provider's testimony. The bill requires a list of the documents, rather than the documents themselves, to be filed with the court. A bill to abrogate parent-child immunity in motor vehicle torts was defeated. A bill to require disclosure of insurance policy limits before suit is filed was likewise defeated.

The legislative function of the MDC is taking on greater importance. The plaintiffs' bar introduces legislation on comparative negligence, insurer liability for counsel fees, and a variety of causes of action for punitive damages each year. The MDC is responding to this challenge by creating ad hoc committees to address recurrent issues. ■

[1] Steve E. Leder, a partner at Niles, Barton & Wilmer, co-chairs the MDC's Legislative Committee.

Spotlights ★ ★ ★

CHRISTOPHER J. HEFFERNAN of Ferguson, Schetelich & Heffernan successfully defended the City of Frederick in a lawsuit brought by highway and bridge contractor, Richard F. Kline, Inc. The contractor sought $1.3 million for treatment of a stockpile of more than 12,000 cubic yards of soil from the Carroll Creek Flood Control and Linear Park project. The contractor claimed that the entire stockpile was contaminated with petroleum products and that it should be paid extra for its treatment services. The City argued that the stockpile was not contaminated to the point that the Maryland Department of the Environment required treatment, that the contractor did not follow contract procedures for notice and measurement of contaminated soils, that it did not properly segregate the contaminated soil, that it never treated the soils as directed, and that it's faulty measurement of the stockpile was unreliable. After nine days of trial, the jury returned a defense verdict in less than an hour.

THOMAS WILSON, III, WILLIAM CARRIER, GERRY H. TOSTANOSKI, and BRIAN E. MESSARIS of Tydings & Rosenberg LLP were retained to represent a client who had been on the losing end of a compensatory damage award of more than $4 million. They convinced the jury to award only $15,000 in punitive damages and then convinced the trial court to grant judgment nov on the underlying counts, thus wiping out the entire compensatory damage award.

In a seminal case in which the MDC filed an amicus brief supporting their position, **GERRY TOSTANOSKI** and **SCOTT PATRICK BURNS** of Tydings & Rosenberg LLP and **GREGORY LOCKWOOD** of Miles & Stockbridge obtained a reversal of the lower court's refusal to apply Maryland's noneconomic damage cap to an asbestos personal injury verdict that exceeded the cap's limits. *Owens Corning v. Walatka*, 125 Md. App. 313 (1999). The appeal involved which party has the burden of proof on the issue of the cap's application, —i.e., whether the plaintiff must prove the cause of action arose before the cap's effective date or whether the defendant must prove it arose afterwards. The lower court imposed that burden on defendants. The Court of Special Appeals reversed. Citing the Legislature's intent that the cap apply broadly, the Court, in order to effectuate that result, held that a plaintiff who seeks to avoid the limits of the cap bears the burden of proving that the cap does not apply.

JOHN McCAULEY with Venable, Baetjer & Howard, LLP, won a de facto defense verdict for Linda Gale in *Carnell v. Gale*, tried before a jury in the Circuit Court for Montgomery County. Ms. Gale rearended the plaintiff, Joyce Carnell, in traffic. There was virtually no property damage and Ms. Carnell suffered minor personal injury. Ms. Carnell's physician reported that she was asymptomatic after several months of treatment. Ms. Carnell, however, asserted that her injuries flared up again and endured. As a result, she claimed damages for past and future pain and suffering and medical expenses.

After the trial court directed a verdict against Ms. Gale on liability, the case went to the jury on damages only. The jury awarded Ms. Carnell past medical expenses for the initial several months of treatment, and one week of lost wages. However, the jury rejected Ms. Carnell's claims for pain and suffering, both past and future, and for future medical expense. The total verdict was 17 times less than the lowest settlement demand communicated to Ms. Gale. ■

NEW MEMBERS

The Association welcomes the following new members:

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