The Defense Line

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Defending Toxic Tort Cases in Maryland – A Primer

by Steven E. Leder and Scott Patrick Burns[1]

The twenty-first century is a dangerous time, filled with potentially toxic substances. People are exposed to asbestos from insulation, carbon monoxide from furnaces, lead from paint and gasoline, "sick buildings," and benzene and vinyl chloride from contaminated wells, resulting in cancer, brain damage and other adverse health effects. The increase in toxic exposures has led to an increase in toxic tort lawsuits. When people become ill after exposure to or ingestion of toxic substances, they sue those who have placed them in harm's way. Usually they sue the sellers and manufacturers of toxic products. Sometimes they sue the owners or managers of property where the exposure occurred. Plaintiffs may proceed under a variety of theories, including strict liability, negligence, express and implied warranty, the Maryland Consumer Protection Act ("CPA"), trespass, nuisance, and collective liability theories such as market share liability.[2]

Plaintiffs frequently start the case with great field position. The jurors know from their everyday experience that toxic chemicals kill, or cause cancer or other ailments. The plaintiff may allege that he was exposed to a toxin and that he has an ailment that could be caused by that toxin. Therefore, the reasoning goes, the plaintiff's ailment resulted from exposure to defendant's toxic chemicals. Further, in latent disease cases, the plaintiff may claim that the cap on noneconomic damages does not apply because the cause of action arose prior to July 1, 1986. There may also be claims for punitive damages. In short, the defendant may be presented with a case involving serious injuries in an inflammatory context, where the sky is the limit on damages.

Understanding the basic themes for addressing these issues may help you to construct a framework for defending these cases. First, you must determine if the case can be won on the merits. This requires a determination of whether your client's product or actions in fact caused the plaintiff's injuries, whether there is medical evidence linking the product at issue to the plaintiff's injuries, and whether your client knew or should have known of any defects in the product. If you cannot win on the merits, then you must attempt to limit damages. As described below, in Maryland there are a number of ways to do this.

Plaintiffs' Legal Theories

The plaintiff's choice of legal theories will depend upon the selection of the target defendant.

Products Liability Defendants

When suing manufacturers and sellers of goods, plaintiffs focus on strict liability, breach of warranty and failure to warn theories. Under these theories, the focus is on the safety of the product: was it "unreasonably dangerous" or defective when it left the defendant's hands? There are two tests to determine whether a product is "unreasonably dangerous": (1) whether

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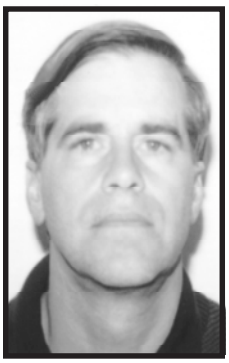
[2] *See Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 936, *cert. denied*, 449 U.S. 912 (1980). Maryland has not adopted the "market share" theory of product liability. *See Lee v. Baxter Healthcare Corp.,* 721 F. Supp. 89, 93 (D. Md. 1989); *McClelland v. Goodyear Tire & Rubber*, 735 F. Supp. 172, 174 (D. Md.1990), *aff'd,* 929 F.2d 693 (4th Cir. 1991); *Herlihy v Ply-Gem Indus.,* 752 F. Supp. 1282 (D. Md. 1990).

President's Message

Jack L. Harvey — Wharton Levin Ehrmantraut Klein & Nash



When I last wrote this column, I had recently been "inducted" as President of the MDC at the annual Crab Feast at Bo Brooks on Belair Road. I now write, as an ex-President, having just witnessed the election by popular acclamation of a new slate of officers. This occurred at the June 7 Crab Feast at Bo Brooks' new location in Canton. Scott Burns is your new President and already both literally (with a steaming heap of crabs at Bo Brooks) and figuratively (with his plans for the upcoming year) has rolled up his sleeves for the job ahead.

It was my distinct pleasure to serve as President during the last year. I think that the MDC made great strides last year, but only with the very capable assistance of many people. I extend my personal thanks to the entire Executive Committee. I am not only appreciative of the help of my fellow officers, Scott Burns, Hal MacLaughlin and Peggy Ward, but also for the hard work of various others on the Committee. This includes in particular Kathleen Shemer, Executive Director, who keeps the organization running on a day-to-day basis while the rest of us bill our hours. Gardner Duvall once again did yeoman's service in advancing the legislative agenda of the MDC in Annapolis. Joe Jagielski and his Committee had a terrific year in Annapolis protecting and promoting the interests of the MDC with respect to workers compensation law. Natalie Stroud Fenner spent innumerable hours arranging for and participating on panels of MDC members who interviewed and evaluated candidates for judicial appointment, primarily those applying for Circuit Court judgeships. Steve Leder put together a very successful series of "brown bag" lunches and an extremely well attended jointly sponsored (with the Federal Bar Association) dinner at which Judge Paul Grimm spoke. Steve also teamed up with John Griffith in arranging a memorable Past Presidents Reception at the offices of Piper Marbury Rudnick & Wolfe in Mount Washington. Finally, Katherine Williams undertook the thankless task of putting together the Defense Line, including the unenviable task of prodding me for the President's Message.

When I wrote for the column in the early fall of 2000, I highlighted as a primary goal the growth of membership in the MDC, both in absolute numbers and in terms of geographical diversity. Due to a membership initiative that was pursued during the fall of 2000, I am very pleased to report that the MDC's membership is now approaching a total of 650 members. This compares to a membership of less than 500 from the prior year. The growth in membership also has produced additional revenue for MDC, although that was not the primary purpose of expanding membership. So the very important goal of reinforcing the ranks of our association has been achieved. However, the expansion of membership in terms of geographical diversity has proved more challenging. The MDC still needs to reach out and attempt to attract additional membership from outside the Baltimore area. I know that Scott Burns and the Executive Committee will be tackling that goal.

Also of particular note is that the MDC is now online. Kathleen Shemer is to be commended for tackling and successfully completing this project. I encourage each and every one of you to come visit the MDC at its new web site. Simply type in Mddefensecounsel.org. You will find historical information about the MDC, announcements concerning upcoming events, the most recent version of the Defense Line and a click entry for Members Only.

Finally, I should not close without noting the continuing success of the MDC, working with other groups, in fending off ill-advised legislative initiatives. During the past legislative session, the Maryland Trial Lawyers Association once again sponsored legislation to adopt comparative negligence in Maryland. As has been the case in past sessions, the proposed bill was poorly drafted and simply unfair. It proposed to abolish contributory negligence in favor of adoption of a "modified" system of comparative negligence. Yet, the bill failed to address the fundamental inequity of adopting comparative negligence while preserving the joint and several liability of defendants. Through Gardner Duvall, the MDC highlighted the shortcomings of the bill and offered, as an alternative, more even-handed comparative negligence legislation in the event that the Legislature decided to abandon Maryland's long-standing contributory negligence defense. Once again the comparative negligence legislation was voted down in committee. However, as sure as there are taxes and death, the Maryland Trial Lawyers will be back during the next legislative session with some form of proposed comparative negligence designed to enhance the chances of recovery of plaintiffs while doing little, if anything, to relieve the exposure of marginally involved defendants.

It has been a very good year for the MDC, but there still is a lot to be done. I look forward to my now "ex-President" role with the Executive Committee. I encourage any readers who want to become involved with the MDC to contact Kathleen Schemer at 410-560-3895. Not only does the MDC seek new membership but it encourages the active involvement of existing members. ■

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the product meets the reasonable consumer's expectations as to safety ("consumer expectation test")[3] and (2) whether the risks of the product outweigh its utility ("risk utility test.").[4]

Defenses In Products Liability Cases

A manufacturer's or seller's principal defenses are product identification, state of the art, and medical causation. The "sealed container" defense is available to sellers in products liability actions.[5]

Product identification can be a strong defense. In asbestos-containing products or chemical exposure cases, for example, the plaintiff must prove not only that he was exposed to asbestos or the chemical, but that the particular defendant's product was a substantial contributing factor in the development of his disease.[6] The plaintiff's difficulty in identifying a particular manufacturer's product in certain contexts such as lead paint and DES cases has led to innovative theories such as market share and enterprise liability.[7] These novel theories have gained minimal acceptance nationwide and have not taken hold in Maryland.[8]

State of the art evidence is a fundamental component of negligence and Restatement (Second) of Torts § 402A strict liability/failure to warn cases. In failure to warn cases, negligence principles have been grafted to strict liability so that liability is no longer "strict."[9]

State of the art includes all of the available knowledge on a subject at a given time, and this includes scientific, medical, engineering, and any other knowledge that may be available. State of the art includes the element of time: What is known and when was this knowledge available?[10]

The state of the art defense is based on the belief that holding manufacturers liable for hazards that were unknown, and unknowable, at the time of manufacture would stifle innovation and is fundamentally unfair.

Premises Liability

In actions against property owners, plaintiffs focus on theories of negligence, nuisance, trespass, strict liability for abnormally dangerous or "ultrahazardous activities," and the Maryland Consumer Protection Act (CPA). For example, owners of leaky oil or gasoline tanks are likely to be sued for strict liability for engaging in "abnormally dangerous" or "ultrahazardous activities,"[11] nuisance and trespass.[12] Landlords in lead-based paint cases and HVAC contractors are sued for negligence and violating the CPA.

Defenses to Premises Liability

Landlords and HVAC contractors have several defenses. First, a plaintiff's lead paint case will fail if he fails to prove notice of the defect and an opportunity to repair.[13] Likewise, in a carbon monoxide case, the plaintiff must prove some unreasonable conduct by the defendant. Moreover, contributory negligence[14] and assumption of risk[15] are available as defenses in premises cases.

Medical Causation

Expert scientific evidence makes or breaks most toxic tort cases. Expert testimony provides the critical link to proximate cause, consisting of cause-in-fact and legal cause. The experts are usually epidemiologists, toxicologists or treating physicians. All too often, however, plaintiffs hire "expert" witnesses not for their scientific expertise, but for their willingness to testify, for a price, to whatever is needed to make

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[3] *Phipps v. General Motors Corp.,* 278 Md. 337, 344 (1976); *Kelley v. R.G. Indus., Inc.,* 304 Md. 124 (1985).

[4] *Simpson v. Standard Container Co.*, 72 Md. App. 199 (1987). Maryland courts have established seven factors to evaluate the risk/utility element. *See U.S. Gypsum Co., v. Mayor and City Council of Baltimore*, 336 Md. 145 (1994); *Phipps*, 278 Md. at 345, n. 4. The seven factors are:

(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. Id.

[5] Md. Cts. & Jud. Proc. Code Ann. § 5-405.

[6] *Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179, 208 (1992); *McClelland v. Goodyear Tire & Rubber Co.,* 735 F. Supp. 172 (D. Md. 1990), *aff'd*, 929 F.2d 693 (4th Cir. 1991); *Aldridge v. Goodyear Tire & Rubber Co.,* 34 F. Supp. 2d 1010 (1999) (Plaintiffs failed to prove which, if any, of the chemicals that formed a "toxic soup" caused their specific injuries).

[7] *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 936, *cert. denied*, 449 U.S. 912 (1980); *Hall v E.I. DuPont de Nemours & Co.,* 345 F. Supp. 353 (E.D. N.Y. 1972).

[8] *See* n. 2, *supra.*

[9] *ACandS, Inc. v. Asner*, 344 Md. 155, 167-68 (1996); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 435 and n.7. (1992).

[10] *Asner,* 344 Md. at 165 (quoting *Lohrmann v. Pittsburgh Corning Corp.,* 782 F. 2d 1156, 1164 (4th Cir. 1986)).

[11] *Exxon Corp. v. Yarema*, 69 Md. App. 154 (1986) ("placement of large underground storage tanks in close proximity to private residences and drinking wells constitutes an abnormally dangerous activity from which strict liability may flow."); *Yommer v. McKenzie*, 255 Md. 220 (1969).

[12] *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58 (1994).

[13] This was once a major hurdle for plaintiffs. Now it is merely a short step. Since the Court of Appeals decided *Brown v. Dermer*, 357 Md. 344 (2000), all that a plaintiff must show in order to satisfy the reason to know element is that there was flaking, loose or peeling paint and that the defendant had notice of that condition. It need not be shown that the landlord knew that the flaking, loose or peeling paint was lead-based.

[14] *Faith v. Keefer*, 127 Md. App. 706, 745 (1999) (citing *Smith v. Warbasse*, 71 Md. App. 625, 627 (1987) (quoting *Menish v. Polinger Co.*, 277 Md. 553, 559 (1976).

[15] *ADM Partnership v. Martin*, 348 Md. 84, 90-91 (1985). *See also Rogers v. Frush*, 257 Md. 233 (1970).

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the client's case. "As the litigation explosion expands … junk science is producing junk law."[16] To what extent will the trial court examine the methodological basis of expert scientific testimony?

It is black letter law that the proponent of the evidence must establish its reliability. This concept is the basis for all rules regarding admissibility of scientific evidence. The proponent must demonstrate both that the theory upon which the scientific evidence is based and the technique applying the theory are valid and that the theory and the technique were properly applied in the particular case. Maryland and Federal courts use different tests to determine the admissibility of scientific evidence.

Federal Law - Daubert

The Federal courts apply the *Daubert* test first enunciated in *Daubert v. Merrell-Dow Pharm., Inc.,* 509 U.S. 579 (1993). In *Daubert*, the U.S. Supreme Court changed the standard governing the admissibility of expert testimony in presenting scientific evidence. The opinion began by construing Federal Rule of Evidence 702.[17] The Court stated that the words "scientific" and "knowledge," read together, "connote more than subjective belief or unsupported speculation pursuant to Rule 702." *Id.*, 509 U.S. at 590. The Court concluded, therefore, that Rule 702 limits scientific expert testimony to opinions that are the product of scientific thinking. The Court reasoned:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation — i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id.

The court must conduct "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The Court provided the following non-exclusive list of factors the trial court should consider in performing this gatekeeper function:

1. Whether the theory or technique used by the expert can be, and has been, tested;
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error of the method used; and
4. The degree of the method's or conclusion's acceptance within the relevant scientific community.

Id. at 593-94.

The trial court must also decide whether the expert's testimony fits the facts of the case; that is, is it relevant? Rule 702's requirement that the testimony "assist the trier of fact" mandates that the testimony is sufficiently tied to the facts of the case. Fed. R. Evid. 702.

The Court noted that Rule 703 requires that the expert's opinion be based upon the type of facts and data that are "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Daubert,* 509 U.S. at 595 *(citing* Fed R. Evid. 703). *Daubert's* general qualification and reliability requirements also apply to "nonscientific" expert testimony, not just scientific testimony. *Kumbo Tire Co. v. Carmichael,* 119 S. Ct. 1167 (1999).

"Abuse of discretion" is the appellate standard of review in assessing a trial judge's screening of scientific evidence. *General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997). Rules 701, 702 and 703 have been amended to reflect the *Daubert* standards.

Maryland Law - Frye/Reed

Plaintiffs' experts who may be tempted to rely on creative scientific testing should understand the standard for opinions relying upon such scientific tests. Maryland courts apply the *Frye/Reed* test[18] to "novel" scientific tests. An expert opinion that relies upon established scientific theories but "is not presented as a scientific test the results of which are controlled by inexorable, physical laws" must be rendered to a reasonable degree of probability in the particular field.[19] The *Frye/Reed* test contemplates a two-stage process for "novel" science. First, the scientific community develops a theory and determines the reliability of a scientific method through research, experimentation and publication. Second, once the novel science becomes generally accepted, it may be used as evidence in the courtroom.[20] The *Frye/Reed* test applies solely to "novel" scientific tests and opinions that necessarily rely on those tests. It *does not* apply to an expert opinion that relies upon established scientific theories but is not offered as a scientific test where the results are "controlled

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[16] Thornburgh, *Junk Science –The Lawyer's Ethical Responsibilities, 25* Fordham Urb. L. J. 449 (1998).

[17] Federal Rules of Evidence 701, 702 and 703 have been revised, effective January 1, 2001, to make them more consistent with the requirements of *Daubert* and *Kumbo Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

[18] The *Frye/Reed test* was first enunciated in *Frye v. U.S.,* 293 F. 1013 (D.C. Cir. 1923) and adopted in Maryland in *Reed v. State*, 283 Md. 374, 380-81 (1978).

[19] *Myers v. Celotex,* 88 Md. App. 442, 458 (1991) (citing *State v. Allewalt*, 308 Md. 89, 98 (1986)).

[20] *Keirsey v. State*, 106 Md. App. 551, 558 (1995), *rev'd on other grounds*, 342 Md. 120 (1996); *see generally* Strong, *McCormick On Evidence,* at §203 (5th ed. 1999).

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by inexorable, physical laws." Those expert opinions must be rendered to a reasonable degree of probability in the particular field. *Myers v. Celotex*, 88 Md. App. 442, 456-60 (1991).

Following the lead of the federal courts and utilizing Maryland Rule 5-702, Maryland courts recently have exhibited a willingness to look more critically at expert testimony outside the *Frye/Reed* novel scientific technique context. In *Porter Hayden v. Wyche*, 128 Md. App. 582 (1999), the court was highly critical of, and ultimately found to be nonprobative, testimony by an expert witness designed to avoid application of Maryland's noneconomic damage cap. The expert testified that the plaintiff's cancer, diagnosed in 1993, had actually been present for between seven to ten years, thus possibly placing the cancer's origin before the cap's effective date of June 1, 1986. In finding the testimony insufficient to render the cap inapplicable, the Court examined the testimony in great detail, stating:

> [The doctor's] testimony was so carefully hedged that it seems to be little more than speculation. [E]xperts cannot simply hazard guesses . . based on their credentials. . . [S]peculative testimony . . . must . . . be excluded as incompetent. Furthermore, Rule 5-702 requires that expert testimony be sufficiently grounded in fact.[21]

Damage Control

The means of limiting damages are many. First, be sure the cap on noneconomic damages is in place. This may be an issue in latent disease cases where exposure to the toxin occurred before the cap's July 1, 1986 effective date. Second, move to dismiss the punitive damage claims. Punitive damage awards are rarely available in toxic tort cases in Maryland. *See, e.g., Owens-Corning Fiberglass Corp. v. Garrett*, 343 Md. 500 (1996); *Owens-Illinois v. Zenobia,* 325 Md. 420 (1992); *Owens-Corning v. Bauman,* 125 Md. App. 454 (1999). If the cap applies and punitive damage claims are dismissed, you have dramatically reduced your client's exposure. What began as a potentially multimillion-dollar noneconomic damage case has been converted into a $350,000 to $600,000 personal injury case, or $850,000 to $1.4 million wrongful death case.

Third, the plaintiff may find it very hard to meet his burden to prove medical causation. Move to exclude plaintiff's experts if they rely upon unfounded science or if they simply do not prove plaintiff's case. Plaintiffs try to prove general causation without specific causation. As someone put it, plaintiffs prove guns can kill people, but do not prove the plaintiff was shot. If the expert cannot establish medical causation, file a motion for summary judgment. If summary judgment is denied, make this argument at trial and, if necessary, on appeal.

Fourth, offer evidence of other potential causes for the plaintiff's injuries. Although the jury may not ultimately agree, you may cast enough doubt in their minds so that they compromise by reducing damages. At trial, it is the defendant's job to educate the jury. Talk about toxins. Every substance has a safe dose. Paracelsus said almost 500 years ago: "All substances are poisonous; there is none which is not a poison. The right dose differentiates a poison from a remedy." Klaassen, *Casarett & Doll's Toxicology* 4 (5th ed. 1996). Every substance is toxic if you ingest too much of it. Too much aspirin, too many vitamins, too much water. Use a chart showing the safe level, no observed effect level, lowest observed adverse effect level, and the frank effect levels. Emphasize that the plaintiff was exposed to only tiny or trace amounts of the chemical. Make sure that the issue is not whether the chemical is bad for people, but whether it caused the harm alleged in the quantities alleged. You must demonstrate your command of the science to the jury and become an unnamed scientific expert.

Frequently, the plaintiff was not hurt by the exposure, or there is an alternative cause for the harm. There are frequently psychological issues; you may have a plaintiff who is a hypochondriac. If so, the jury may infer that the plaintiff is not hurt, based upon your alternate explanation for his symptoms. Most importantly, do not be satisfied with attacking the plaintiff's case. Present your own explanation of how the occurrence took place.

Conclusion

In toxic tort cases, as in all cases, you need a defense theme to present to the jury. Your theme will depend on the legal and factual defenses you can rely upon. Has the plaintiff proven the case? Has the plaintiff proven product identification and medical causation or is the plaintiff relying upon junk science? Is the product dangerous, and if so, was that danger known at the time of the exposure? Is the product dangerous at the levels to which the plaintiff was exposed? Cut the case down to size with motions on the noneconomic damages cap and punitive damages issues. If you can establish an alternative explanation for the plaintiff's complaints, *i.e.*, they preexisted the exposure, they have an alternative cause, or (too often) the plaintiff is a hypochondriac, you can successfully defend the case to a jury. ■

[21] 128 Md. App. at 391 (citation omitted).

Recent Decisions

COURT OF SPECIAL APPEALS REJECTS "WRONGFUL LIFE" CLAIM

In *Kassama v. Magat*, 136 Md. App. 637 (2001), the Court of Special Appeals held that an infant with Down's syndrome could not recover damages from her mother's doctor for his alleged negligence in failing to inform the mother about a genetic defect in the fetus and/or advise her of her option to get both an amniocentesis and an out-of-state abortion – in effect, arguing that the infant would be better off if she had never been born.

Addressing the "wrongful life" issue for the first time in Maryland, the Court of Special Appeals aligned itself with the "vast majority" of courts in other states that have rejected such claims. The court adopted the view taken by appellate courts in twenty-three states that have "refused to recognize a cause of action for wrongful life because it is an impossible task to calculate damages based on a comparison between life in an impaired state and no life at all."

The Court noted that although Maryland and most other states have recognized wrongful-birth claims (brought by the parent, rather than the disabled child), the "vast majority" have rejected wrongful life claims, because the injury that forms the basis of the complaint is "life itself." The court's decision hinged on the "impossibility" of determining damages in such a case.

The Court affirmed the judgment of the circuit court, entered upon the verdict of a Baltimore County jury, which concluded that the mother was contributorily negligent because she waited too long before taking a genetic test that revealed the defect. The Court rejected the mother's argument that the circuit court erred in not instructing the jury on the doctrine of "last clear chance," noting that in medical malpractice cases, a physician's act of primary negligence may not be used again to serve as the last clear chance to avoid the plaintiff's injury.

FRANCHISEE'S ALLEGED DEFAMATORY STATEMENTS PROTECTED BY QUALIFIED PRIVILEGE

In *Gohari v. Darvish*, 363 Md. 42 (2001), the Court of Appeals held that a franchisee has a qualified, or conditional, privilege under the common law with respect to statements made to its franchisor in connection with its former employee's application to own and operate his own franchise. The court held that this privilege is similar to that which protects communications in other business and employment related contexts.

Gohari was employed by Darcars, a group of automobile franchises owned by Darvish. After leaving his position with Darcars, Gohari entered into a contract to purchase a Toyota franchise. As a condition of the purchase, Gohari had to obtain approval from the Central Atlantic Toyota Distributors, Inc. (CATD) to own a franchise. Gohari had authorized CATD to consult with "outside sources" about his qualifications. The CATD representatives contacted Darvish, who gave Gohari an unfavorable assessment. Gohari was unable to get approval from CATD until he met certain conditions which he alleged were imposed as a result of the unfavorable comments of Darvish, and his contract to purchase the dealership expired before he was able to do so. He sued Darvish for defamation and tortious interference with contract. Darvish asserted that his comments were privileged.

At trial, the court did not allow Darvish to assert defenses based on truth and qualified privilege. The jury awarded Gohari $500,000 in compensatory damages for defamation, and Gohari and the dealership he sought to purchase $2,120,000 in compensatory damages for tortious interference with contract.

The Court of Special Appeals vacated the judgment and remanded the case. The Court of Appeals granted Gohari's petition for writ of certiorari, and affirmed the decision of the intermediate appellate court.

The Court of Appeals noted that common law privileges protect important social interests, and that a basic common law qualified privilege is the privilege to publish to someone who shares a common interest. It stated that such common interest may include interests in business or professional dealings, where one party believes that facts exist which the other is entitled to know. The Court noted that an important consideration is whether the allegedly defamatory comments were made in response to a request.

The Court also noted that such privilege could be lost if the publication were made for a purpose other than to further the social interest entitled to protection, or if it was motivated by malice on the part of the speaker. It stated that the question of the existence of the qualified privilege is a question of law for the court; whether the privilege was abused is a question for the jury.

The Court concluded that under the circumstances of the case, this qualified privilege may be applicable and that the trial court erred in precluding Darvish from asserting that defense.

INDEPENDENT INSURANCE AGENT/BROKER OWES FIDUCIARY DUTY TO INSURANCE COMPANY

In *Insurance Co. of North America v. Miller*, 362 Md. 361 (2001), the Court of Appeals held that an insurance agent, who was an officer of an insurance agency and brokerage, owed a fiduciary duty to an insurance company, which he breached when he obtained premium financing for an insured's insurance premiums, but then failed to forward the entire premium to the insurance company, instead making only installment payments to the insurance company and retaining the financed premium amount for the insurance agency's use.

The insurance agency, J. L. Hickman & Co., Inc. ("Hickman") entered into an agreement with Insurance

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Company of North America ("INA") in 1995 to serve as a broker for INA's insurance products. The agreement required, *inter alia*, that Hickman collect premium payments from insureds and forward the payments to INA. INA believed that Hickman was receiving installment payments from insureds and forwarding them immediately to INA. Instead, Hickman was obtaining full payment of premiums from a premium financing company, depositing those funds in agency accounts for agency use, and remitting installment payments to INA. The agent and officer, William R. Miller, admitted that he was aware of the "double financing" plan as early as the latter part of 1996 and that he participated in the scheme. Hickman ceased operations in early 1997, and Miller then set up an agency known as North American Risk Management ("NARM").

INA became aware of the scheme and sued Miller and NARM for conversion, breach of fiduciary duty and negligence arising out of Miller's knowledge of and participation in the scheme. The case proceeded to trial on the breach of fiduciary duty and negligence counts. The trial court found in favor of the Defendants. The court concluded that Miller had an agency relationship with INA but it was that of an insurance agent whose role was only to sell insurance and contractually bind INA, and the relationship did not obligate him to ensure that premiums were sent to INA. INA appealed, and the Court of Appeals granted review prior to argument in the Court of Special Appeals.

The Court of Appeals reversed and remanded the case. The Court of Appeals held that Miller was an "appointed agent" of INA, and that, as such, he had a duty to act solely for its benefit in all matters connected with his agency. It held that, as INA's agent, he owed INA a fiduciary duty, which he breached by participating in the double financing scheme and failing to timely notify INA of the scheme. The Court further held that Miller's actions could constitute negligence, as well.

COURT CAN RESOLVE DISPUTE OVER PROPERTY INTERESTS OF RELIGIOUS ORGANIZATION

In *El Bey v. Moorish Science Temple of America, Inc.*, 362 Md. 339 (2001), the Court of Appeals held that the Circuit Court possesses the authority to consider injunctive relief in a legal dispute involving a religious organization, noting that courts have a legitimate interest in resolving secular disputes, including those involving property interests, or the interpretation of corporate charters, through the application of neutral principles of law. It also noted that, for purposes of obtaining injunctive relief, substantial and irreparable injury need not be beyond all possibility of compensation in damages to warrant such relief, nor need it be very great; such injury is suffered whenever monetary damages are difficult to ascertain or are otherwise inadequate.

In *Moorish Science Temple*, the Petitioner, Frank Lewis El Bey, sent a memorandum to all leaders affiliated with the Respondent, Moorish Science Temple of America, Inc. ("the Temple"), a religious corporation, claiming that he had been appointed the trustee of the Temple by an express trust created by the Temple's founder, who died in 1929, before Petitioner was born. The Temple petitioned the Circuit Court for Prince George's County to issue ex parte interlocutory and permanent injunctive relief to restrain El Bey from referring to himself as an officer, director, agent or trustee for or of the Temple. El Bey failed to attend a show cause hearing and the court granted Respondent an interlocutory injunction. El Bey promptly filed a motion to dissolve the injunction. The circuit court, following a hearing, found no evidence of any document providing for El Bey's alleged express trust and granted the Temple's request for a permanent injunction. The Court of Special Appeals affirmed the circuit court's judgment.

El Bey petitioned the Court of Appeals for a writ of certioriari, maintaining that the trial court did not have subject matter jurisdiction to hear the case because it involved a religious dispute. The Court of Appeals concluded, however, that although El Bey claimed that the dispute concerned the rightful leadership of the church, El Bey had repeatedly asserted the right to all "trust" property, assets and records. The Court concluded that when property rights are involved, the court must adjudicate those rights, not only to resolve the particular dispute, but to preserve definiteness and order in the holding of property by religious organizations. It also concluded that the Temple had failed to produce evidence that El Bey's conduct caused, or was likely to cause, irreparable harm, and therefore reversed the judgment of the Court of Special Appeals and remanded the case with directions that it vacate the judgment of the circuit court.

STATUTE REQUIRING PARENT TO SUPPORT DESTITUTE ADULT CHILD CREATED NO CAUSE OF ACTION AGAINST TORTFEASOR

In *Freeburger v. Bichell,* 135 Md. App. 680 (2000), the Court of Special Appeals held that a statute requiring parents to support their destitute adult children (§13-102(b), Family Law Article, Ann. Code of Md.) did not create an independent cause of action by the parent against the tortfeasor responsible for the injuries which resulted in the child's inability to be self-supporting.

Michael Freeburger was permanently and seriously injured in a car accident while riding in a car driven by Melvin Bichell and owned by James Kerns. Michael settled his claim with Kerns' insurance company for $50,000 and released any further claims against Bichell or Kerns. Michael's father then sued Bichell and Kerns, maintaining that, because his son was physically incapacitated and no longer self-supporting, he was statutorily required to support him, and seeking recovery of the sums that he was under a statutory duty to

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provide his son. The trial court granted Kerns' motion for summary judgment, and the Court of Special Appeals affirmed.

The Court noted that §13-102(b) creates a duty for a parent to support a disabled adult child if the parent is financially able to do so. It also noted that the father had not alleged or offered any proof that he had the means or could earn sufficient means to provide for his son's medical care. Thus, under the facts set forth by the father, no such duty existed. Moreover, it observed that a parent has no common law right of action against one who tortiously injures the parent's adult child. It stated that although §13-102(b) created a duty on the part of financially able parents to support the destitute adult child, it did not expressly create a cause of action which did not exist at common law, as did the wrongful death statute. Its primary purpose was to remove from public support destitute and disabled persons whose families were financially able to support them. It concluded, therefore, that it did not create a cause of action that would entitle the parent to recover those expenses from the tortfeasor who caused the injury resulting in the disability.

PARENT-CHILD IMMUNITY HELD INAPPLICABLE WHERE CLAIM IS INSURED AND DEFENDANT IS DECEASED

In *Bushey v. Northern Assurance Co. of America*, 362 Md. 626 (2001), the Court of Appeals, applying a factual test of Maryland's parent-child immunity doctrine, held that the parents of two sisters who died in an automobile crash could maintain a lawsuit against the estate of the daughter who was driving, for damages arising out of the injury and death of the other daughter.

In so holding, the Court vacated the decision of the Court of Special Appeals, which upheld the Circuit Court for Charles County's dismissal of William and Linda Bushey's declaratory judgment action, seeking uninsured motorist benefits following the death of their daughters Susan, 17, who had been driving the automobile at the time of the accident and died almost immediately, and Miranda, 15, who died five days later from her injuries.

The insurer argued that its coverage did not apply to the parents' wrongful death claim against Susan's estate because of parent-child immunity. The parents asked the Court to abrogate the doctrine of parent-child immunity where the claim is covered by automobile liability insurance, and particularly where the defendant is deceased.

Although the Court declined to totally abrogate the doctrine, it concluded that the doctrine should not be applied under the facts of this case. It noted that the prerequisite of the wrongful death statute was satisfied because the injured person, Miranda, could have sued her sister. It further stated that the interests sought to be preserved by the doctrine, family harmony and parental discipline, were not affected under the circumstances because both children were dead. It stated that the parents' claim for Miranda's wrongful death arose the moment the parent-child relationship with Susan terminated, with her death. It therefore held that the doctrine did not bar the parents' claim against Susan's estate.

ACCOUNTANT LIABLE TO THIRD PARTY FOR NEGLIGENCE WHERE PRIVITY EQUIVALENT EXISTS

In *Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645 (2000), the Court of Appeals held that an accountant may be held liable for negligence to a non-contractual party when there exists some connection between the accountant and that party which is the equivalent of privity.

George and Shirley Katz sued Walpert, Smullian & Blumenthal, P.A. (WS&B), an accounting firm, seeking damages based on theories of negligence, gross negligence, negligent misrepresentation and breach of contract, for losses they suffered as a result of loans they made to Magnetics, Inc., George Katz's former company and WS&B's client. The Katzes claimed that WS&B accountants knew that the Katzes had relied upon information supplied by WS&B in deciding to lend monies to, or to secure loans for, Magnetics. They alleged that a mathematical error made by the accountants resulted in the collapse of the business and prevented them from recovering their loans to the business.

The trial court granted summary judgment in favor of WS&B, finding that the accountants owed no duty to the Katzes because there was no privity between the parties and the Katzes were not the intended beneficiaries of WS&B's contract with Magnetics. The Court of Special Appeals reversed. The Court of Appeals granted WS&B's petition for writ of certioriari and affirmed.

The Court noted that the issue of an accountant's duty to a non-contracting party with respect to negligent misrepresentation was one of first impression in Maryland. It observed that a significant number of jurisdictions, in determining the scope of accountants' liability to third parties who use and rely on their audit reports, apply variations of the formulation set forth in *Ultramares Corporation v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441 (1931), pursuant to which a third party will be denied relief for an auditor's negligence in the absence of a relationship with the auditor that constitutes privity or that is equivalent to privity.

The Court adopted the analysis of a line of cases which has developed since *Ultramares* holding that accountants may be held liable for negligence to non-contractual parties when they are aware that the financial reports they prepare are to be used for a particular purpose or purposes, that a known party or parties are intended to rely on those reports for that purpose or purposes, and there is some conduct on the part of the accountants that indicates that the accountants are aware of that party's reliance.

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DAMAGES LIMITED WHERE MEDICAL RECORDS INTRODUCED UNDER § 10-104

In *Butler v. James*, 135 Md. App. 196 (2000), the Court of Special Appeals reversed a judgment entered upon a verdict awarding more than $300,000 in damages to a man injured in an automobile accident because he introduced medical records under a statute limiting damages to $25,000 – the jurisdictional limit of the district court, where the lawsuit originated.

Clarence James' vehicle was rear-ended by Nathaniel Butler's truck in May 1998. James had initially filed suit in the District Court of Maryland for Prince George's County seeking damages in the amount of $25,000, and provided notice of his intent to introduce medical records under § 10-104 of the Courts and Judicial Proceedings Article, Ann. Code of Md. Butler timely requested a jury trial, and the case was transferred to the circuit court. Butler offered no witnesses at trial. The jury was not instructed that damages were capped at $25,000, and it awarded James $7,540.91 for medical expenses, $2,800 for loss of earnings and $300,000 for non-economic damages.

On appeal, Butler argued that his liability should have been limited to $25,000, because James had provided notice of his intent to introduce medical records pursuant to the statute, and Butler had made pretrial tactical decisions on the assumption that his liability was limited to $25,000. The intermediate appeals court agreed, concluding that "a plain reading of § 10-104(c)(2) and an examination of the history of its enactment evince an intent that medical records not be admitted under the statute unless the amount in controversy, as measured by the damages claimed, does not exceed $25,000," because "when the defendant is exposed to damages greater than $25,000, the plaintiff should be required to authenticate the records through live testimony." Thus, it held, when a plaintiff has introduced medical records pursuant to the statute, the plaintiff's recovery is limited to $25,000.

EXPERT OFFERED TO TESTIFY REGARDING DEFECTIVE AIR BAG MUST HAVE SPECIALIZED KNOWLEDGE

In *Wood v. Toyota Motor Corp.*, 134 Md. App. 512 (2000), the Court of Special Appeals held that a mechanical engineer with 26 years' experience was not qualified to testify as an expert about air bags in a lawsuit brought against Toyota Motor Corp. The court affirmed the trial court's grant of summary judgment for the automaker, noting that "a plaintiff who claims to be injured due to the defective design of an air bag must provide expert testimony to generate a jury issue on whether the air bag was defective."

The Court held that the engineer, who worked on automotive cooling and heating systems, was not qualified to express an expert opinion that the chemical burns the plaintiff sustained in an accident were caused by a design defect in the air bag. The Court noted that the engineer had never been accepted as an expert witness concerning air bag design, his knowledge of air bags was primarily derived from his work as a litigation consultant, he did not have any hands-on experience relating to air bag technology, and he had never designed methodology for analyzing an air bag system.

The Court observed that air bag technology is "highly specialized" and other jurisdictions have required an expert in air bag deployment and defect cases. It concluded that not only did the expert lack specialized knowledge, but his opinion was based on an incomplete investigation and he failed to provide an explanation how the data upon which he relied led to a conclusion that the defective design of the air bag caused the plaintiff's injuries.

The Court concluded that a jury could not resolve the issue of the alleged defective design of an air bag without the assistance of expert testimony, and therefore, summary judgment was appropriate. ■

Spotlights ★ ★ ★

JOEL NEWPORT, of SEMMES, BOWEN AND SEMMES, won a defense verdict before Judge James Smith and a jury in the Circuit Court for Baltimore County in a negligence case. In *Erdman v. Superior Shotcrete*, the Plaintiff was injured when he slipped and fell off a roof, while helping workers from his brother's company. He claimed the company was negligent and that it violated OSHA standards in failing to provide fall protection for workers on the roof. He claimed $13,000 in medical expenses and $100,000 in noneconomic losses.

★ ★ ★

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