

## **Defending Toxic Tort Cases in Maryland -- A Primer**

**By Steven E. Leder and Scott Patrick Burns<sup>1</sup>**

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,” 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.<sup>2</sup>

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

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<sup>2</sup> 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 (4<sup>th</sup> Cir. 1991); *Herlihy v Ply-Gem Indus.*, 752 F. Supp. 1282 (D. Md. 1990).

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 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 is winnable 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 the case is not winnable 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 the product meets the reasonable consumer's expectations as to

safety (“consumer expectation test”)<sup>3</sup> and (2) whether the risks of the product outweigh its utility (“risk utility test.”)<sup>4</sup>

### *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.<sup>5</sup>

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.<sup>6</sup> The plaintiff’s

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

<sup>4</sup> *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.*

<sup>5</sup> Md. Cts. & Jud. Proc. Code Ann. § 5-405.

<sup>6</sup> *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 (4<sup>th</sup> Cir. 1991); *Aldridge v. Goodyear Tire & Rubber Co.*, 34 F. Supp. 2d 1010 (1999)

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.<sup>7</sup> These novel theories have gained minimal acceptance nationwide and have not taken hold in Maryland.<sup>8</sup>

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."<sup>9</sup>

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?<sup>10</sup>

Holding manufacturers liable for hazards that were unknown, and unknowable, at the time of manufacture would stifle innovation and is fundamentally unfair.

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(Plaintiffs failed to prove which, if any, of the chemicals that formed a "toxic soup" caused their specific injuries).

<sup>7</sup> *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).

<sup>8</sup> *See* n. 2, *supra*.

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

<sup>10</sup> *Asner*, 344 Md. at 165 (1996) (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1164 (4<sup>th</sup> Cir. 1986)).

### *Premises Liability*

With property owners, plaintiffs focus on negligence, nuisance, trespass, strict liability for abnormally dangerous or “ultrahazardous activities,” and the Maryland 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,”<sup>11</sup> nuisance and trespass.<sup>12</sup> 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.<sup>13</sup> Likewise, in a carbon monoxide case, the plaintiff must prove some unreasonable conduct by the defendant. Moreover, contributory negligence<sup>14</sup> and assumption of risk<sup>15</sup> are available as defenses in premises cases.

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<sup>11</sup> *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).

<sup>12</sup> *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58 (1994).

<sup>13</sup> 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.

<sup>14</sup> *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));

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

### *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 the client’s case. “As the litigation explosion expands ... junk science is producing junk law.”<sup>16</sup> 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 for 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 1993, the U.S. Supreme Court, in *Daubert*, changed the standard governing the admissibility of expert testimony in presenting

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<sup>16</sup> Thornburgh, *Junk Science –The Lawyer’s Ethical Responsibilities*, 25 Fordham URB. L. J. 449 (1998).

scientific evidence. The opinion begins by construing Federal Rule of Evidence 702.<sup>17</sup>

The Court stated that the words “scientific” and “knowledge” “connote more than subjective belief or unsupported speculation pursuant to Rule 702.” *Id.* 509 U.S. at 590.

Reading those terms together, the Court found that the Rule 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 592-593. 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 593-594

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<sup>17</sup> 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 *Kuhmo Tire*.

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*, at 509 U.S. 595 (citing *Fed. R. Evid.* 703). *Daubert's* general qualification and reliability apply to "nonscientific" expert testimony, not just scientific testimony. *Kumho 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*

Plaintiff's 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<sup>18</sup> to "novel" scientific tests. 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

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<sup>18</sup> 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, 380-381 (1978).



probability in the particular field.<sup>19</sup> 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.<sup>20</sup> 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 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, 456-460, 594 A. 1248, 155-57 (1991).

Following the lead of the federal courts and utilizing 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:

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<sup>19</sup> *Myers v Celotex*, 88 Md. App. 442, 458 (1991) (citing *State v. Allewalt*, 308 Md. 89, 98 (1986)).

<sup>20</sup> *Keirsev v. State*, 106 Md. App. 551, 558 (1995), *rev’d on other grounds*, 342 Md. 120 (1996) and *generally*, Strong, *McCormick On Evidence*, at §203 (5<sup>th</sup> Ed. 1999).

[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.<sup>21</sup>

### **Damage Control**

The means of limitation damages are many fold. First, make 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 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 can not establish medical causation, file a motion for summary judgment. If summary judgment is denied, make this point at trial and, if necessary, on appeal.

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<sup>21</sup> 128 Md. App. at 391 (citation omitted)

Fourth, offer other potential causes for the plaintiff's injuries. While 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 (5<sup>th</sup> ed. 1996). Everything is toxic if you take 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 only exposed to 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.

Often the plaintiff was not hurt by the exposure, or there is an alternative cause for the harm. Frequently the plaintiffs are a little nutty. You may have a plaintiff that is a hypochondriac. If so, the jury may infer that the plaintiff is not hurt due to your alternate explanation for his symptoms. Most importantly, do not be satisfied with attacking plaintiff's case. Have your own coherent story that explains how the occurrence took place.

### **Conclusion**

Toxic tort cases, like all cases, 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 his case? Has the plaintiff proven product identification and medical causation or is she relying upon junk science? Is the product is dangerous, and if so, was that danger

known at the time of the exposure? Is the product dangerous in the levels to which the plaintiff was exposed? Cut the case down to size with motions on the cap and punitive damages. If you can establish an alternate explanation for the plaintiff's complaints, such as they existed before the exposure, they have an alternative cause, or (too often) the plaintiff is a hypochondriac, you can successfully defend the case to a jury.