

PRINCE GEORGE'S COUNTY BAR ASSOCIATION
LAW 101
April 24, 2008

ADMITTING EVIDENCE IN COURT - REPRISE
PROOF OF FACTS - COMMON MISTAKES &
EXPERT WITNESSES

1. Sources of law.

Maryland Rules of Civil Procedure

- 2-504 Scheduling Order - "Counselor - where is that in the Pretrial Statement?"
- 2-504.etc "Pretrial Conf, Notice of computer generated evidence - digital camera?, drop-deadlines, etc.
- 2-516 Exhibits - "Mark-em"
- 2-517 Method of making objection - "Worth the read"

Maryland Rules of Evidence

- 5-106 Remainder of Writings - "Opened the door"

- ** 5-401 Relevancy, et seq - "What element does this tend to prove"
- ** 5-404 Character evidence not admissible - "defensive objection"

- ** 5-601 Competency
- ** 5-602 Lack of personal knowledge
- 5-608 & 5-609 Impeachment
- 5-611 Mode and order of interrogation
- 5-612 Writing or other item used to refresh recollection
- 5-613 Prior statements of witnesses
- 5-616 Impeachment & rehabilitation
- 5-701 Opinions by lay witnesses "everybody has one"
Experts - see below

- 5-801 Hearsay "ie: rule against hearsay"
- 5-802.1 Hearsay exceptions - prior statements of witness at trial

Prior inconsistent statement - "Bearing witness against self"
NO - prior consistent statement - "buttress credibility - said it
before - say it again.... unless...."

5-901 Authentication - "FOUNDATION in plain language - but stipulate"

5-902 Self Authentication - "Certificates of custodian"
Shpigel v. White, 357 Md. 117 - need medical expert. But hospital
report comes into evidence
Cf Courts 10-104

5-1001 Contents of Writings, photos, etc. "Do believe what you read"

5-1005 Public Records

5-1006 Summaries - "but notice to other side"

5-1008 Testimony or written admission of party "Admissible!!! Query -
cross-exam or read into the record - or both"

Courts & Judicial Proceedings

Title 9 **Witnesses**, 9-101 et seq. "About 23 ways to trip up. Immunities,
privileges, dead or incompetent witnesses - worth the read."

Title 10 **Evidence**, 10-101 et seq. "Lot of stuff here." Some duplicates of
Maryland Rules.

10-104 Admissibility of writings of health care providers

10-105 Admissibility of bills for goods and services - "take that!"

Maryland Pattern Jury Instructions - civil and criminal

Elements of crime, cause of action, etc.

2. Foundations and relevance "inextricably linked"

Personal knowledge - senses - hear, see, feel, mind (if applicable)

Conclusion? Speculation? Opinion? (how would this witness know
that?)

Relevance - Why did you ask that? Tends to prove a fact. Which issue or
jury instruction?

4. Expert witnesses

2-504 B deadline - see pretrial order

Maddox v. Stone 174 Md.App. 489, 921 A.2d 912. (2007)

34 days late - trial court struck expert as witness. CSA. Rule of timing not of substance. Report in advance of expert deposition. No surprise - well advance of trial. No prejudice. Could give continuance. Any other option rather than exclusion.

But see: *Rodriguez v. Clarke*, 400 Md. 39, 926 A.2d 736 (2007).

Med mal. Expert stricken. Reversed by legislation. *Naughton v. Bankier*, 114 Md. App. 641 (1997) - Expert disclosed day before trial. Trial court abused discretion in allowing testimony. *Dorsey v. Nold*, 362 Md. 241 (2001) - Medical examiner was expert but did not develop his opinion in anticipation of experts. Discussion of experts, scheduling orders & discovery.

2-504.2 (b)(11) designation - see pretrial order & statement

What is the expert going to say?

2-402(f) Scope of Discovery

Trial Preparation - Experts.

(1) Expected to be called at trial. (A) Generally. A party by interrogatories may require any other party to identify each person, other than a party, whom the other expects to call as an expert witness at trial: to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings or opinions. A party may also take the deposition of the experts.

See also 2-402 (f)(B) Can get qualifications, publications and \$\$\$\$\$\$.

5-702 Testimony by Experts

Expert testimony may be admitted...if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.

(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,

(2) the appropriateness of the expert testimony on the particular subject, and

(3) whether a sufficient factual basis exists to support the expert testimony.

Do I need an expert?

Shpigel v. White, 357 Md. 117

Need medical expert to establish foundation:

Treatment - medically necessary; *Cost of treatment* - ordinary & reasonable

Causation - treatment was related to subject of suit.

But hospital report & bill comes into evidence.

- Q. Doctor, do you have an opinion, within a reasonable of medical probability, whether or not the treatment provided to Mr. X was ordinary, reasonable, medically necessary, and causally related to the accident which is the subject of the suit?
- A. Yes.
- Q. Doctor, please inform the jury of your opinion.
- A. Yes.

Cf Courts 10-104 - allows designation of medical bills and report in District Court and Circuit Court on jury trial prayer.

Dover Elevator Company v. Swann, 334 Md. 231 (1994)

Where resolution of the issues of negligence and causation necessarily requires knowledge of complicated matters, issues should not be resolved by laypersons without expert assistance.

Limits application of *res ipsa loquitur*.

“Things mechanical.”

If the issue is outside of the ordinary knowledge of the ordinary person, an expert is needed. *Res ipsa loquitur* circle. RJ would create inference of negligence however it does not apply if there is no inference of negligence. Could this happen in life without anyone being at fault? [Answer - not in America.]

Will the court allow my expert?

Montgomery Insurance v. Chesson, 399 Md. 314 (2007). Mold case - sick building. Basis of medical opinion includes scientific evidence. Scientific evidence must meet Frye-Reed standard. Court must hold hearing to determine if the basis for the scientific evidence is “generally accepted as reliable within the expert’s scientific field.”

Rule 5-704 Opinion on Ultimate Issue

Opinion may be on ultimate issue if otherwise admissible.

Wood v. Toyota Motor Corp, 134 Md. App. 512, *cert denied*, 362 Md. 189 (2000)
Expert not qualified. Expert must have basis other than *ipse dixit*. Worth the read - only 10 pages.

USAA v. Riley, 393 Md. 55 (2006).

Lead paint exposure case. Jury question on medical opinion as to exposure and causation.

Carter v. Shoppers Food Warehouse MD Corp., 126 Md.App. 147 (1999)
“Notably absent from [the expert’s] opinion were both statutory guidelines requiring a certain weight or type carpet and scientific testing of the actual carpet at issue. Without such information, there was no foundation upon which to admit his testimony that the carpet at issue was inappropriate or dangerous.”

Accident reconstructionists, Safety Experts & Human factors

NB - These are folks who through their expertise want to tell jury what happened and why. Obtain detailed statements as to proposed testimony. Carefully review proposed testimony. Watch for testimony which transcends the science and expertise and devolves in the Seventh Juror.

5. Miscellaneous

Crawford - USSC - admissibility of 911 calls. Spontaneous v. testimonial declarations.

Mason v. Lynch, 388 Md. 37 (2005). Photos of minimal damage to vehicle may be admitted. Counsel may argue the physics of the accident.

Other..... Place notes here _____

6. Trial preparation and organization

“To go” file on the law. Rules, jury instructions, statutes, cases.

Separate files for each witness - outline of examination, documents/exhibits, Answer to discovery, depositions, questions, impeachment material

No fumbling

Always win every objection - your credibility is on the line
know the rule or rules which support the objection
know why you asked the question

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