The Toxic Toy Story

By Melissa Fallah

Millions of Americans are familiar with the dangers of exposure to lead paint, especially if they have young children. Most people associate lead poisoning primarily with paint in older homes. However, the toys children play with, and possibly chew on, also could have dangerously high levels of lead. In the summer of 2007, millions of consumers discovered that some of their children’s favorite toys, in fact, contained toxic levels of lead. These toxic toys were imported to the United States mainly from China and became the focus of several class actions.

China is the United States’ number one trading partner. Toys made in China make up 70% to 80% of the toys sold in this country. One of the problems is the U.S. toy industry is largely self-policed and recalls are made on a voluntary basis. The Consumer Product Safety Commission is the agency that creates safety standards and regulates product recalls. However, it is significantly understaffed. For instance, in 2009, the CPSC had only 100 field investigators and compliance personnel to conduct inspections at ports, warehouses and stores handling the $22 billion worth of toys that came into the country.

Lead poisoning is the greatest environmental health threat to children under the age of six. The poisoning is attributable to swallowing lead paint chips or from breathing lead dust.

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ing in lead paint dust. Although there is a dose-response relationship, even small amounts of lead can be dangerous to children because their bodies absorb lead more easily. Studies have concluded that lead poses special risks to children including brain and nervous system damage, behavioral and learning problems, slowed growth, hearing problems, and mental and physical retardation. Due to the exposure risks, in 1978 a federal ban was put in place prohibiting toys or other children’s articles from having more than 0.06% lead by weight in paint or surface coatings.\(^4\)

In the summer of 2007, several toy manufactures recalled some children’s toys made in China that exceeded the permissible levels of lead in paint. In June 2007, Chicago-based RC 2 Corp., which sells Thomas the Tank Engine toys, recalled its Thomas & Friends wooden railway vehi-

icles because the surface paint contained dangerous levels of lead. Two weeks later, Mattel announced the recall of nine million more toys, including Barbie, Polly Pocket and “Cars” movie toys, and warned that more could be ordered off the shelves because of high lead paint levels. Next, Fisher-Price recalled various Sesame Street and Dora the Explorer toys from retail stores nationwide. Ultimately, Mattel and its Fisher-Price division issued six separate recalls of lead-tainted toys in 2007. In total, around 9.5 million toys were recalled in 2007 in the United States.\(^5\)

Within days of the recall, plaintiffs’ firms filed class actions against the toy manufacturers and their distributors. Historically, lead paint litigation targeted the manufactures of lead paint or the landlords/developers who used it. Plaintiffs’ attorneys then tried to develop a public nuisance claim against lead pigment manufacturers, but may of those claims were rejected. These new lawsuits were different and targeted manufacturers of products that used lead paint. The lawsuits emerged from violations or state consumer protection laws, breach of implied warranties, negligence and product liability.

One class action was filed against Mattel, Fisher Price and Target in the U.S. District Court of Central District of California based on the recalls. RC2 Corp. faced similar class actions in Florida, California, New Jersey and Tennessee. Attorneys General from California to Massachusetts also conducted investigations into the tainted toys and filed suits based on state consumer protection laws.

These class actions have since settled. Mattel and Fisher-Price agreed to pay $12 million to 39 states to settle lead claims regarding its toys. Additionally, Mattel paid on behalf of its subsidiary Fisher-Price, a civil penalty of $2.3 million for violation of the Lead Paint Ban. RC2 Corp. agreed to pay over $30 million to settle their class action lawsuits stemming from the Thomas and Friends toys recall. They paid $1.25 million dollars in civil penalty.

These highly publicized recalls were the catalyst for Congressional action aimed at making children’s toys safer. As a result of the Consumer Product Safety Improvement Act of 2008 (the “Act”), the regulatory limit of lead was reduced to 0.009% on August 14, 2009. This Act creates what has been acknowledged to be the largest expansion of the Consumer Product Safety Commission’s (CPSC) powers since the agency was created by Congress in 1972. The law covers numerous topics, including an entire portion dedicated to children’s products. This Congressional action was aimed at strengthening CPSC and making lead paint limitations under federal law even stricter. The Act expands the current duties of children’s product manufacturers, especially regarding lead paint levels. The new law imposes strict duties and large fines on manufacturers who violate the Act. It also goes as far as authorizing criminal penalties on directors, officers or agents of the manufacturer, even if those individuals had no prior knowledge of noncompliance.\(^6\)

While most of the pending class action claims have resolved, this new legislation expands a manufacturer’s duties and imposes stricter penalties. We can expect more suits against manufacturers of all children’s products containing toxic substances. Recently, cadmium, a known carcinogen, was discovered in imported children’s jewelry and in McDonald’s “Shrek”-themed drinking glasses. Another voluntary recall was issued on these products for fear of long-term exposure low-levels of cadmium. The toy litigation and legislation has increased the scrutiny of import ed toys, tightened related legal standards, and significantly enhanced penalties for companies failing to comply.

**Endnotes**


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Melissa M. Fallah  
Associate • Chicago  
312.645.4595  
mfallah@smsm.com  

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On December 8, 2010 the Illinois Supreme Court entered an order amending Illinois Supreme Court Rule 212(a)(5) which relates to the admissibility of discovery depositions at trial. The amendment appears to be in response to the holding in *Berry v. American Standard, Inc.*, 382 Ill. App.3d 895, 897, 888 N.E.2d 740, 744 (5th Dist. 2008) – a case which denied plaintiff from using her decedent’s discovery deposition as evidence at trial. While the scope of the amendment remains untested, the new rule has the potential to significantly affect the ways in which discovery depositions will now be conducted.

Like many states, Illinois recognizes two different types of depositions, labeled “discovery” and “evidence” depositions. Historically discovery depositions have been just what the name suggests – depositions at which the parties (typically the party or parties adverse to the witness) attempt to glean as much information as possible from the witness to determine his or her role in the case and the testimony expected at trial. Evidence depositions, commonly referred to as de bene esse depositions in other jurisdictions, have been historically intended to preserve a witness’s testimony prior to trial in the event the witness should become unavailable due to death, illness or some other reason.

Outside of the asbestos context, evidence depositions in Illinois civil cases are most commonly employed to preserve the testimony of treating physicians with patient and practice priorities, and non-party witnesses who are located outside of the venue and would be inconvenience by having to travel to the courthouse for trial. In the asbestos context, the most common reason for taking an evidence deposition is to preserve the testimony of a severely ill plaintiff who might not survive until his or her trial date.

Prior to the amendment, Illinois Supreme Court Rule 212(a) provided that discovery depositions of a party witness were inadmissible at trial. Most notably, the rule unequivocally provided that the discovery deposition of a party witness could not be used against an adverse party at trial, even if the adverse party was present at the discovery deposition and had an opportunity to examine the party witness. This limitation implicitly recognized that a mechanism – the evidence deposition – was in place to preserve a party witness’s trial testimony. With the recent amendment, the distinction between discovery and evidence depositions may now become less pronounced, as a practical matter, since the rule appears to contemplate situations in which a discovery deposition might be admissible at trial.

The amended rule is particularly relevant in asbestos cases because an asbestos plaintiff may give a discovery deposition, but may then be unable to give an evidence deposition due to his or her failing health and eventual death. Prior to the amendment, Rule 212(a)(5) absolutely barred a substitute plaintiff from seeking to admit the discovery deposition of his or her decedent at trial, even under these circumstances. However, as this article discusses, the Illinois Supreme Court has now found that there may be “rare, but compelling, circumstances” in which a party’s discovery deposition should be admissible as evidence at trial.
Berry v. American Standard, Inc. et al. – The Historical
Bar on Discovery Deposition Admissibility

In Berry v. American Standard, Inc., 382 Ill.App.3d 895, 897, 888 N.E.2d 740, 744 (5th Dist. 2008), plaintiffs Howard and Linnie Kathryn Berry filed suit against forty-seven defendants alleging that Mr. Berry developed mesothelioma as a result of his alleged asbestos exposure. Mr. Berry’s physician had given him a prognosis of between eight and eighteen months following a September 23, 2008 diagnosis. See id. Approximately three weeks after they filed their complaint, plaintiffs served defendants with notice that Mr. Berry’s evidence deposition would be taken the following month. See id. Defendants objected to the notice on the grounds that they had not had the opportunity to take Mr. Berry’s discovery deposition, and the court ordered Mr. Berry to appear for a discovery deposition before an evidence deposition could proceed. See id. As a result of Mr. Berry’s long employment history and the number of defendants that had been sued, the parties were unable to complete his discovery deposition in one session on the originally scheduled date. See id. Therefore, through a series of agreements and motions, Mr. Berry’s discovery deposition was completed in several phases over the next four months. See id. at 897-898. During this four-month period, plaintiffs asked the court for permission to use Berry’s discovery deposition at trial in the event that he did not survive long enough to complete an evidence deposition. See id. at 898. The circuit court denied this request. See id.

Mr. Berry died approximately one month after the completion of his discovery deposition, without having given an evidence deposition. See id. In light of plaintiffs’ earlier request, defendants filed motions to bar the plaintiffs from using Mr. Berry’s discovery deposition as an evidence deposition pursuant to Illinois Supreme Court Rule 212(a)(5). See id. Defendants argued that Rule 212(a)(5) expressly prohibited a party from using the discovery deposition of a party to the lawsuit as evidence at trial. See id.; ILCS S. Ct. Rule 212(a)(5). Defendants further argued that, although Mr. Berry had died and his wife had been appointed the representative of his estate, Mr. Berry still remained a party to the lawsuit for purposes of the rule. See id. The court agreed with defendants’ arguments and granted their motions. The court also subsequently granted defendants’ motions for summary judgment since plaintiffs could not prove their case without Mr. Berry’s testimony. See id. at 898-899. Plaintiffs appealed the trial court’s ruling that they could not use Mr. Berry’s discovery deposition as evidence at trial.

In reviewing plaintiffs’ appeal, the Fifth District Appellate Court explained that there is a well-settled distinction between discovery depositions and evidence depositions: “Illinois has long recognized a sharp distinction between depositions taken for the purpose of discovery and those taken for use as evidence at trial. . . . Discovery depositions are used to obtain information, to commit witnesses to particular stories, and to obtain admissions from opposing parties. . . . In contrast, an evidence deposition is generally used for the purpose of preserving testimony for trial, and questioning is therefore limited by the rules of evidence.” Id. at 899 (internal citations omitted). The Court found that the exception described in section (a)(5) of Rule 212 did not apply to plaintiffs even though Mr. Berry had died. See id. at 901-902.

Relying on Illinois Supreme Court Rule 212(d), which states that the substitution of parties does not affect the right to use depositions that have been previously taken, the court held that Mr. Berry’s discovery deposition was inadmissible even though he had died and his wife had assumed the role of plaintiff. See id. at 901. The court also cited to the Illinois Supreme Court case of In re Estate of Rennick, 181 Ill.2d 395, 692 N.E.2d 1150 (1998), which held that a deceased party/deponent remains a party to an action through his or her personal representative. Berry, 382 Ill.App.3d at 901. The court specifically noted that allowing a party to use a discovery deposition at trial would not only abrogate the clearly defined rule, but would also essentially turn every discovery deposition into an evidence deposition because the party could potentially use the discovery deposition at trial in the event of the deponent’s death. See id. The court also rejected plaintiffs’ argument that Mr. Berry’s discovery deposition could be admitted under the “dying declaration” exception to the hearsay rule because Mr. Berry’s suit was brought in the context of civil litigation and he did not believe that his death was imminent. See id. at 904.

Attempts to Abrogate Berry – Evolution of the Amended Rule

Following the Fifth District’s decision, Linnie Kathryn Berry filed a petition for leave to appeal the decision to the Illinois Supreme Court, which was subsequently denied. Berry v. American Standard, Inc., 229 Ill.2d 618, 897 N.E.2d 249 (Table) (2008). However, during the 2009 Annual Meeting of the Illinois Judicial Conference (“IJC”), the IJC Committee on Discovery Procedures (the “Committee”), in apparent response to the Berry decision, proposed a modification to Supreme Court Rule 212(a)(5), which would grant judges the discretion to admit discovery depositions as evidence at trial.
The IJC was created in 1953 by the Illinois Supreme Court with the self-stated mission of “maintaining a well-informed judiciary” and “improving the administration of the justice.” Illinois Judicial Conference 2009 Annual Report, at 7. The IJC currently consists of 82 Illinois Supreme Court, appellate court and trial court judges. The self-stated mission of the Committee is to “review and assess discovery devices used in Illinois” and “to propose recommendations that expedite discovery and eliminate any abuses of the discovery process.” Id. at 84. The Committee’s recommendations are not binding unless officially accepted by the Illinois Supreme Court.

In its report, the Committee noted that it had undertaken a review of Supreme Court Rule 212(a)(5) after the Fifth District had issued its opinion in Berry. See id. The Committee described the decision as a “harsh result” and theorized that there could be rare but compelling circumstances in which a party’s discovery deposition should be admitted at trial. Id. at 85. As a result, the Committee drafted a proposed amendment to Rule 212(a)(5), which would allow for the introduction of a deceased party’s discovery deposition at trial. At the time the Committee proposed its amendment, the rule read as follows:

“Discovery depositions taken under the provisions of this rule may be used only: . . . (5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is neither a controlled expert witness nor a party, the deponent’s evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.”

ILCS S. Ct. Rule 212(a)(5) (emphasis added). Under the Committee’s changes, which the court ultimately adopted, the rule reads exactly as above, with the exception that the words “nor a party” are omitted.

The Illinois Supreme Court Rules Committee held a public hearing on this proposed amendment on July 28, 2010 at which time it heard comments and objections to the change. On December 8, 2010, the court accepted the amendment and issued an order holding that the new rule would go into effect on January 1, 2011 and would apply to all cases filed thereafter.

How Will We Take Discovery Depositions in Light of the Amendment?
As the amendment to Rule 212 (a)(5) has recently gone into effect, it has yet to be tested. However, we expect that the amendment will greatly impact how discovery depositions are taken in Illinois, particularly in asbestos cases. In any asbestos case involving a plaintiff suffering from a terminal illness, defendants may now be forced to proceed with an abundance of caution when taking plaintiff’s discovery deposition, particularly if plaintiff is in very poor health at the time of the deposition. The key to taking good discovery depositions will be predicated on balancing two potentially competing interests – exploring the facts and finding out the strengths and weaknesses of a plaintiff’s case versus avoiding opening one’s client up to adverse testimony that could jeopardize the case at trial.

In addition to thoroughly examining plaintiff’s condition at the deposition, defendants will need to have a comprehensive understanding of the status of plaintiff’s treatment and prognosis prior to the deposition. It will now become significantly more important to obtain and review medical records prior to taking a plaintiff’s deposition.

Furthermore, the investigation leading up to plaintiff depositions in asbestos cases will now need to be more thorough. Defendants will need to examine any information within their control in an effort to anticipate what plaintiff’s testimony and product identification will be. For example, defendants may need to conduct site investigations or subpoena documents from employers and jobsites prior to taking depositions. Defendants may also need to interview co-workers and take their discovery depositions prior to taking plaintiff depositions, so that they can learn as much about a plaintiff’s case as possible before taking his or her deposition.

Prior to taking plaintiff discovery depositions, defendants will need to be thoroughly prepared in their examinations so that their questions are carefully and properly phrased. Open-ended, exploratory questions that have been historically effective tools in discovery depositions may now become risky under the amended rule. In fact, plaintiffs’ attorneys may now become much more involved in discovery depositions and may try to conduct the lead examination so that the deposition will proceed as trial testimony would.

see “Berry” continued on page 14
Reduced to its essence, the United State Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), insisted that the “knowledge” brought to court by an expert must be passed through the crucible of reliability in all respects. That is not to suggest that the Court demanded “absolute certainty.” Rather, in dispatching the Frye standard of “general acceptance” in favor of Federal Rule of Evidence 702’s more liberal test, the Supreme Court noted that this “knowledge” which an expert seeks to impart upon a fact finder be “more than a subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.” *Daubert*, 509 U.S. at 590. In the recent decision of *Tamraz v. Lincoln Electric Company*, et al., 620 F.3d 665 (6th Cir. 2010), a panel of the United States Court of Appeals for the 6th Circuit explored the standards by which an expert’s “knowledge” must be assessed. The *Tamraz* Court was careful to note as it undertook this analysis that, “where one see speculation . . . another may see knowledge.” *Id.* at 672.

The facts of *Tamraz* are reasonably straightforward. Plaintiff was a welder from 1979 to 2004. *See id.* at 667. In 2001 he began to experience symptoms of “Parkinsonism.” *See id.* In 2004, plaintiff brought suit against, among others, Lincoln Electric Company, Hobart Brothers Company, ESAB Group Inc., BOC Group Inc. and TDY Industries, Inc. on theories of strict liability, failure to warn, negligent failure to warn and fraud by concealment, claiming that the exposure to manganese fumes from the welding products of the defendants caused his disorder. *See id.* The case was advanced as a bellwether trial from the Northern District of Ohio *In re: Welding Fume Products Liability Litigation*, No. 03-cv-17000, MDL No. 1535, in June 2007. *See Tamraz*, 620 F.3d at 667. The trial resulted in a $20.5 million verdict for Plaintiff and his wife. *See id.*

In general, the term “Parkinsonism” encompasses a wide swath of disorders dominated by those characterized as “idiopathic” or whose cause is essentially unidentifiable. *See id.* at 668. The *Tamraz* court narrowed, as best they could, the relevant considerations of this complex of Parkinson-related disorders. *See id.* As mentioned, most are considered idiopathic, a fact that carried some weight when the Tamraz court assessed plaintiff’s expert’s opinions. In most cases alleging damages as a result of exposure to welding fumes, the disorder claimed is “Manganese” or Parkinsonism related to manganese exposure. *See id.* The symptoms exhibited by plaintiff were consistent with classic Parkinson’s disease. *See id.* at 674. In *Tamraz* the claim was that of “Manganese-induced Parkinson’s.” *See id.* at 669. Though the distinction may seem rhetorical at first blush, as the court explained, they were presented as quite different by plaintiff. The defense did not dispute that the symptoms suggested Parkinson’s disease. *See id.* at 668.

The *Tamraz* court was quick to note that it was not opining on the nexus between welding fumes and Parkinsonism. *See id.* at 677. Rather, the context for the analysis in Tamraz lies in plaintiff’s expert’s effort to create a new diagnosis in the space between Parkinson’s disease and Manganism. *See id.* at 668. The issue presented is whether the strictures of Rule 702 and *Daubert* permit Plaintiff’s expert to suggest that such a space exists.

The symptoms of Parkinson’s differ from those found in Manganism. *See id.* at 668. One suffering from Parkinson’s experiences “a gradual loss of motor function, a tremor when at rest, both usually developing on one side of the body . . . .” *Id.* Manganese’s symptoms do coincide with those of Parkinson’s, but differ in that the tremor is an “action tremor” and they are symmetrical as opposed to one-sided. *Id.* One suffering from Manganism also is known to have a distinct gait. *See id.* Additionally, the area of the brain affected and effectiveness of therapies is also quite different. *See id.*

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*see “Tamraz” continued on page 15*
Since the 1960’s, Bisphenol A (BPA) has been used to strengthen plastic products such as infant formula bottles, food and drink packaging, digital media, sports safety equipment and electrical service components. The Center for Disease Control estimates that approximately 5 – 6 billion pounds of BPA have been produced each year.1 Due to the widespread use of consumer goods that utilize BPA and its publicized potential harmful effect on human health, it has become a lightning rod for clinical research, legislation, and litigation. Each of these areas: science/medicine, government and the legal community are actively seeking answers, proper responses and, not surprisingly, opportunities from the fairly recent advent of possible harm from prolonged BPA exposure.

According to the National Institute of Environmental Health Sciences (NIEHS), exposure to BPA can occur by leaching into food from the epoxy resin lining of cans, from consumer products such as polycarbonate tableware, food storage containers, water bottles, and baby bottles.2 The 2003 – 2004 National Health and Nutrition Examination Survey, conducted by the Centers for Disease Control and Prevention, found detectable levels of BPA in 93% of Americans six years and older.3 The Canadian Health Measures Survey released the results of a multi-year study in August 2010 indicating that BPA was detected in the urine of 91% of the Canadian population aged 6 to 79 years.4 The significance of these findings is somewhat unsettled.

The NIEHS has categorized BPA as one of many identified chemical “Endocrine Disruptors.”5 NIEHS defines an “Endocrine Disruptor” as a naturally occurring compound or man-made chemical that may interfere with the production or activity of hormones of the endocrine system.6 In 2008, the NIEHS released a qualitative assessment of the “possible effects” of exposure to BPA based on a “levels of concern” scale.7 The scale consists of five categories ranging from “serious concern” to “negligible concern” as reflected in the chart at right from the NIEHS publication. 9,10

The NIEHS concluded that there was “some concern” that BPA exposure in fetuses and infants could possibly affect brain and prostate health.11 This finding at the “some concern” level, was released with the caveat that there is insufficient data from studies in humans to reach a conclusion but, there is limited evidence of developmental changes in animal studies. Thus, the NIEHS concluded, that the possibility of adverse health effects on humans cannot be dismissed.12 Continuing to overlay this concern continuum on their research, the NIEHS noted that it has “minimal concern” for effects on the mammary gland and premature puberty for females in fetuses, infants, and children. The same level of concern was expressed for “reproductive toxicity” in those occupationally exposed to BPA.13

At the “negligible concern” level is the potential of fetal or neonatal mortality, birth defects, or reduced birth weight where the exposure occurs during pregnancy.14 The NIEHS further noted a “negligible concern” that exposure to BPA will cause reproductive effects in non-occupationally exposed adults.15

A number of studies have been produced that indicate BPA can be associated with obesity, diabetes, breast and prostate cancer, disorders of the immune, cardiovascular, and nervous systems. The publication of these studies espousing a causal relationship between BPA and serious health conditions have triggered a great deal of controversy.16 The result has been additional studies, many of which demonstrate no connection between BPA and disease.17 There is significant disagreement and criticism between the studies regarding critical issues such as study methods, processes, dose, duration, and other standards employed.18 These criticisms call into question the ability to evaluate the scientific evidence regarding the health effects of BPA exposure.
of some of the studies to be able to produce consistent results.  

As noted above, the actual health effects of BPA exposure are still very much up for debate. As recent as November 1, 2010 The World Health Organization (WHO) organized a panel of approximately 30 experts to review the toxicological and health aspects of BPA. The panel's charge was to undertake a meta-analysis of the studies currently contributing to the scientific body of knowledge concerning BPA and its effects. The WHO panel found that models of human BPA metabolism demonstrate that it was quickly eliminated through urination and does not accumulate in the body. The panel's consensus was that taking any public health measures to ban or control BPA is premature since evidence of its alleged health risks is not robust enough. The findings do not suggest that all further studies regarding the health effects of BPA should be halted. Rather, the panel concluded that the findings of the meeting will direct future research towards the goal of clarifying the human health impact BPA. 

Legislative and Regulatory Impact in the United States

It is too early to tell if the November 2010 findings of the WHO panel will modify or temper interest in regulating the production, sale, and distribution of BPA. What is clear is that there has been a significant thrust to regulate BPA on a local, national, and international level. Several States have already enacted legislation to regulate the production, distribution, and sale of consumer goods containing BPA. The chart on the opposite page reflects state-specific efforts to ban the use of BPA in the listed categories of products.

In addition to those states who have already enacted legislation, Michigan, Pennsylvania, Illinois, Delaware, Missouri, New Jersey, New Mexico, Hawaii, Texas, and Oregon have all had BPA or will have bills considered by state legislators.

The Federal government is also considering a number of bills that address the labeling and regulation of consumer products that contain BPA. In particular, Senator Dianne Feinstein included an amendment in the Food Safety Modernization Act (FSMA) to place federal limits on BPA use in food and beverage containers. Similar to current state legislation, the amendment focused on products for small children and infants. After significant opposition to the BPA amendments inclusion in the FSMA, the amendment was dropped hours before the final vote.

International Perspective

Canada has served as a trailblazer in the regulation of BPA and declared the chemical a toxic substance on October 13, 2010. Two years prior to this declaration, Canada banned the use of BPA in bottles used by infants and children. Both France and Denmark have issued temporary bans of BPA use in the production of bottles used by infants and children.

The European Food and Safety Authority (EFSA) completed a detailed and comprehensive review of recent scientific literature and studies on the toxicity of BPA at low doses in September of 2010. EFSA's Scientist's Panel concluded they could not identify any new evidence which would lead them to revise the current TDI (tolerable daily intake) for BPA of 0.05 mg/kg body weight set by EFSA in its 2006 opinion and re-confirmed in its 2008 opinion. The Panel also stated that the data currently available does not provide convincing evidence of neurobehavioral toxicity of BPA. Despite this announcement from the EFSA, there are no indications that France or Denmark will revoke their temporary bans of BPA.

Current State of Litigation

Predictably, the expressions of concern regarding BPA from the scientific community have spawned litigation over its use. In 2008, BPA products liability class actions pending in eight federal district courts were consolidated in the U.S. District Court for the Western District of Missouri (MDL No. 1967) presided over by Judge Ortrie D. Smith. MDL No. 1967 consolidates all BPA related actions including claims for violation of state consumer protection statutes, fraud, breach of warranty, unjust enrichment, strict product liability, breach of contract, and negligence. This consolidated suit, In re: Bisphenol A (BPA) Polycarbonate, 571 F. Supp. 2d 1374 (J.P.M.L. 2008), was filed against baby bottle and infant formula manufacturers due to their use of BPA in food, beverage, and infant formula containers. The plaintiff class argues that the use of BPA in children's products constitutes a material fact that the defendants failed to disclose to consumers in violation of state consumer protection laws. Significantly, Plaintiffs are not seeking damages as a result of bodily injuries due to BPA exposure, but for economic injury on the basis that they would have purchased BPA-Free products had they known the products they purchased contained BPA. The case has still not been resolved to date and is currently in the discovery phase.

Key to this particular litigation is the narrow scope of the plaintiffs claim – economic rather than bodily injury. The issue of whether insurance carriers had a Duty to Defend BPA cases where only economic injury is alleged was addressed in Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 609 (7th Cir. Ill. 2010). One of the defendants in the underlying BPA class action suit, Avent America Inc., sought a defense from insurers Medmarc Casualty Insur-
<table>
<thead>
<tr>
<th>State</th>
<th>Target BPA Containing Products</th>
<th>Effective Date(s)</th>
<th>Title(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>Receptacle for storing food or beverages, including, but not limited to, baby bottles, spill-proof cups, sports bottles and thermoses, and excluding food or beverage containers intended for disposal after initial use.</td>
<td>October 1, 2011</td>
<td>Conn. Gen. Stat. § 21a-12b</td>
</tr>
<tr>
<td></td>
<td>Infant formula or baby food that is stored in a plastic container, jar or can that contains bisphenol-A.</td>
<td>Manufacture October 1, 2010</td>
<td>Conn. Gen. Stat. § 21a-12c</td>
</tr>
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<td></td>
<td></td>
<td>Retail October 1, 2012</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Empty bottle or cup to be filled with food or liquid that is designed or intended by a manufacturer to be used by a child under the age of 4 years.</td>
<td>January 1, 2012</td>
<td>Md. HEALTH-GENERAL Code Ann. § 24-304</td>
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<tr>
<td></td>
<td></td>
<td>Retail January 1, 2011</td>
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<tr>
<td>New York</td>
<td>Pacifiers and unfilled beverage containers to be used by children under three years old for the consumption of liquids including pacifiers, baby bottles, baby bottle liners and cups, cup lids, straws and sippy cups.</td>
<td>July 30, 2010</td>
<td>NY CLS ECL § 37-0503 NY CLS ECL § 37-0505</td>
</tr>
<tr>
<td>Vermont</td>
<td>Labeling of products that do not contain bisphenol A. The label on such products may prominently state &quot;Bisphenol A Free&quot; or &quot;BPA-Free&quot; to inform consumers that the product does not contain the chemical bisphenol A.</td>
<td>July 30, 2010</td>
<td>NY CLS ECL § 37-0507</td>
</tr>
<tr>
<td></td>
<td>Receptacle for storing food or beverages, including baby bottles, spill-proof cups, sports bottles, and thermoses. The term does not include food or beverage containers intended for disposal after initial usage. Commercial water cooler jugs are not included in this title.</td>
<td>Reusable Food or Beverage Container July 1, 2012</td>
<td>18 V.S.A. § 1512</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Infant Formula or Baby Food Stored in a Plastic Container July 1, 2012</td>
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<td></td>
<td></td>
<td>Infant Formula or Baby Food Stored in a Can July 1, 2014</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>Any bottle, cup, or other container, except a metal can, that contains bisphenol A if that container is designed or intended to be filled with any liquid, food, or beverage primarily for consumption from that container by children three years of age or younger and is sold or distributed at retail without containing any liquid, food, or beverage.</td>
<td>Children’s Containers July 1, 2011</td>
<td>Rev. Code Wash. (ARCW) § 70.280.020</td>
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<td></td>
<td></td>
<td>Sports Bottles July 1, 2012</td>
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</tr>
<tr>
<td>Wisconsin</td>
<td>Baby bottle or spill-proof cup primarily intended by the manufacturer for use by a child 3 years of age or younger.</td>
<td>June 1, 2010</td>
<td>Wis. Stat. § 100.335</td>
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ance Co., Pennsylvania General Insurance Co., and State Farm Fire & Casualty Co. The insurers refused to defend on the basis that the underlying suit was not covered by existing policies because the complaints did not allege bodily injury. Avent argued that the class action plaintiffs’ position was that they would not use BPA containing Avent products out of fear of bodily injury. As such, Avent argued that bodily injury was central to underlying suit. The 7th Circuit Court of Appeals disagreed and found that the insurers only had a Duty to Defend had the plaintiffs sought recovery for bodily injury. The court noted that insurers’ attorney admitted that if plaintiffs in the underlying cases amended the complaints to allege bodily injury, the insurers would be obligated to provide a defense.

Looking forward it is expected that bodily injury claims will be filed with some volume. However, there some noteworthy hurdles these cases may face. The first is the challenges that relate to a Plaintiff’s ability to meet the burden of proof. Considering the manner in which an individual is exposed to BPA and the latency between exposure and manifestation of any of the suggested potential problems, associating a particular manufacturer’s product as the proximate cause, the likelihood of meeting this burden seems slim. BPA containing products are or have been ubiquitous. As noted above, canned goods will often be lined with a BPA coating. Sports bottles and other such items are also extremely common and exist almost without notice in daily life. Absent the availability of market share liability or other extraordinary factual circumstances, the evidentiary gap between Plaintiff’s condition and a manufacturer’s BPA-containing product will likely be too vast.

The second issue that looms for any plaintiff attempting to move forward with a bodily injury suit based upon BPA exposure is the sufficiency of the existing science to withstand Daubert or Frye challenges. As noted above, the scientific foundation for these claims is deeply questioned at this point. As a result of this lack of consensus and more importantly, apparent questioning of the methods and reliability of some studies, challenges under either standard should present a major obstacle to such a case moving forward.

**Risk Management**

The door has been opened by the court and legislation for litigation on the basis of consumer protection but even this law has yet to be settled. Litigation in tort will be difficult to pursue until a plaintiff can demonstrate a cognizable bodily injury attributable to BPA exposure. Further, the prevalence of BPA in consumer products will also make it difficult to demonstrate that a specific product was the source of the prospective plaintiff’s BPA exposure. The final difficult hurdle to overcome is the evolving nature of the body of science associated with BPA. Although the scientific community and other interested parties have, and will continue to invest significant funding in research associated with BPA exposure, it is clear that there is a long haul to travel before a consensus can be established. In the meantime, it is expected that there will continue to be significant pressure on science/medicine, government and the court system to test the viability of the theory that Bisphenol A can produce harm in humans.

**Endnotes**

3. See 2.
5. See 1.
6. See 1.
8. Serious Concern – Exposure to the substance causes reproductive/developmental effects in humans or in laboratory animals under typical human exposure conditions.
9. Negligible Concern – Substance is not considered a reproductive or developmental toxicant.
10. See 7.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
17. Id.
18. Id.
19. Id.
20. See 16.
22. See 7.
23. Michigan HB4522, Pennsylvania HB2478, Illinois SB3750, Delaware SCR32, Missouri HB1925, New Jersey A1532, New Mexico HB22, Hawaii HB1633, Texas 2775, Oregon SB1032 (defeated), and California SB797 (defeated).
24. BPA-Free Kids Act of 2009 (Banning bisphenol a containing children’s food and beverage containers ex-
State Updates

Illinois

By: Cameron D. Turner

Ready II: The Final Word on the Nolan/Ready Debate

In our Fall 2009 issue of the Toxic Tort Newsletter ("Nolan and Ready: How Do The Opinions Relate?") we examined a then-ongoing debate between plaintiffs’ and defendants’ attorneys on how, if at all, two recent Illinois Supreme Court decisions, Nolan v. Weil-McLain and Ready v. United/Goedecke Services Inc., could be read together. In Nolan, an asbestos case, the Illinois Supreme Court held that a defendant has a right to admit evidence of “other asbestos exposures” to present a competent sole proximate cause defense.1 In Ready I, the Court examined whether a defendant in a construction wrongful death case was entitled to include settled defendants on the verdict form to allow the jury to allocate a percentage of fault to those defendants.2 Citing Section 2-1117 of the Illinois Code of Civil Procedure and its underlying legislative intent, the Court held that the settled defendants should not appear on the verdict form.3 The court remanded the case to the intermediate appellate court to determine whether United/Goedecke was entitled to a sole proximate cause instruction.4

Ready I was issued a few months following Nolan, and some plaintiffs’ attorneys argued that it somehow limited the sole proximate cause ruling in Nolan. Essentially, these attorneys cited Ready I for the general proposition that defendants in negligence cases are not always entitled to admit evidence of other parties’ conduct, since that evidence was not allowed by the trial court in the Ready case and the Illinois Supreme Court did nothing to disturb that. In our Fall 2009 article, we asserted that this argument was misplaced and that Ready I did nothing but confirm what asbestos defendants have long known – that settled defendants and non-parties do not appear on the verdict form.

The Ready case made its way back to the Illinois Supreme Court, this time on the sole proximate issue on which it was remanded to the appellate court the first time around. On October 21, 2010, the Illinois Supreme Court issued Ready II and, in the process, confirmed that nothing about Ready I undermines Nolan.2 In fact, in Ready II, the Court specifically cited to Nolan in concluding that the Ready trial court erred in not giving United/Goedecke a sole proximate cause jury instruction: “Last year, we reiterated that a defendant has a right to introduce evidence that some other person or entity was the sole proximate cause of the plaintiff’s injury.”6 In Ready II, the Court in no way limits Nolan nor carves out any exceptions to it. To the contrary, it even clarifies that defendants in negligence cases can point to the negligence of multiple parties as the “sole” proximate cause of a plaintiff’s injury: “This evidence would have tended to show that the settling defendants’ conduct was the sole proximate cause of the accident, and Michael’s death, and the trial court erred in excluding it and refusing to give [the sole proximate cause instruction].”7

The Ready II opinion relies on, cites to and clarifies any doubt or debate regarding the sole proximate cause holding in Nolan v. Weil-McLain. Defendants have a right to put on a competent sole proximate cause defense and can even point to multiple parties as the “sole” proximate cause of a plaintiff’s injury.

Endnotes
3 Id. at 385.  
4 Id.  
5 2010 WL 4126244 (2010).  
6 Id. At 5.  
7 Id. At 6 (emphasis added).

Maryland

By Benjamin D. Whetzel

John Crane, Inc. v. Linkus (Md. Ct. Special App., February 1, 2010)

Defendant John Crane, Inc. filed an appeal from a judgment entered against it in the Circuit Court for Baltimore City. Plaintiff was diagnosed with pleural mesothelioma and alleged exposure to asbestos containing products during his employment as a shipyard machinist from 1952...
through the 1970’s. The jury returned a verdict in favor of plaintiff.

The central basis for John Crane’s appeal was based on its contention that in order to support a finding of causation, expert testimony was required to establish that the amount of asbestos fibers released from its products exceeded ambient air levels. Plaintiff’s experts had testified only generally that there was no safe level of exposure to asbestos below which mesothelioma would not develop. The only testimony on the issue of fiber release came from defense expert Dr. Crapo. He described that a test performed on similar rope showed a release of asbestos fibers below levels in the ambient air.

Plaintiff argued that expert testimony is not required to prove fiber release. Plaintiff contended that unlike prior cases against John Crane in which the products at issue were encapsulated gaskets and packing, this was the first case tried in Maryland against them regarding dry, untreated rope and wicking. Plaintiff argued that sufficient fiber release could be inferred circumstantially through lay testimony supported by their expert witnesses.

The appellate court affirmed the judgment. It concluded that the combination of expert medical testimony describing dose response relationship and the lack of a safe threshold of exposure, along with lay testimony describing dust created by handling the products at issue, was sufficient to create a jury question on the issue of causation. The court opined that Maryland case law does “not support the proposition that a plaintiff is required to produce expert testimony that an unencapsulated asbestos containing product emits asbestos fibers when handled, and that it can not be proved by other evidence, assuming adequate exposure to the product is otherwise shown.”

**Pennsylvania**

**By Douglas J. Gush**


The Pennsylvania Supreme Court recently overturned a trial court decision granting summary judgment in favor of product defendants where plaintiffs’ smoking-related diseases prevented them from proving that exposure to asbestos was the cause of their debilitating conditions. Justice Max Baer, writing for a majority opinion, concluded:

1. the Superior Court erred in using the abuse of discretion standard, as opposed to a *de novo* review, in affirming the decision of the trial court; and
2. summary judgment was improperly granted because reasonably certain expert opinions were proffered attributing plaintiffs’ conditions to both asbestos and non-asbestos related diseases.

The Court stated that appellate review as to whether there are any genuine issues as to any material fact is a question of law and as such, the standard of review is *de novo*. This review includes all expert testimony and reports submitted by the non-moving party. If the expert reports are sufficiently supported, the trial court cannot draw conclusions regarding the veracity of those reports because that decision is reserved for the jury.

In *Summers*, plaintiffs’ expert provided reports stating that each of the plaintiffs suffered from debilitating conditions related to both occupational asbestos exposure and their cigarette smoking. The Court determined the expert report was supported by the record because plaintiffs had demonstrated prolonged exposure to asbestos and the exposure was not disputed. Further, medical histories for both plaintiffs evidenced asbestos related diseases. Based on these facts alone, the decision regarding the factual cause of these injuries was reserved for the jury because plaintiffs had set forth a *prima facie* case of a compensable injury.

The Court held that even though the factual record supported the contention that non-asbestos related health
issues were the cause of the plaintiffs’ debilitating conditions, the record also supported the expert opinion attributing the conditions to occupational asbestos exposure. For these reasons, the questions of fact should have been resolved by a jury rather than the trial judge. Although the opinion treads lightly on unsettled issues of asbestos law in Pennsylvania, the holding is precise and narrowly scoped.

Of note, the Court reserved judgment on the validity of the opinions espoused by the plaintiffs’ expert reports and noted that a decision regarding such advances should be explored in a Frye hearing. Without openly casting doubt on the opinions presented by the expert report, the Court highlighted their opinion in Gregg v. V.J. Auto Parts, Inc., 943 A.2d 216 (Pa. 2007) rejecting the viability of the each and every exposure theory.

Texas

By John LaBoon and Christina Denmark

Georgia-Pacific Corp. v. Bostic (Dallas Ct. App., August 2010).

In this case, the court found that there was legally insufficient evidence of causation and reversed a compensatory and punitive damages verdict totaling $11.5 million. Susan Bostic alleged that Timothy Bostic (“Bostic”) was exposed to asbestos from a variety of products, including joint compound manufactured by Georgia Pacific (“GP”), which caused his death at forty-one years of age. Bostic testified that he worked directly with or was around drywall work his entire life beginning at the age of five when he helped out his father. Other evidence was admitted at trial that substantiated that Bostic was exposed to other asbestos-containing products in addition to his GP exposure.

The crux of the decision surrounded whether there was legally sufficient evidence of causation. GP argued that Bostic failed to satisfy the substantial factor standard of causation. Conversely, Plaintiff argued that she was only required to show that Bostic’s exposure to GP asbestos-containing joint compound was a substantial factor in contributing to Bostic’s risk of mesothelioma and that she was not required to show “but for” causation to prove specific causation. Dr. Hammar, Plaintiff’s causation expert, testified that he could not opine that Bostic would not have developed mesothelioma absent exposure to GP asbestos-containing joint compound. The Court emphasized that the Texas Supreme Court “has recognized that common to both proximate and producing cause is causation in fact, including the requirement that the defendant’s conduct or product be a substantial factor in bringing about the plaintiff’s injury.” See, e.g., Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 46 (Tex. 2007).

Although there was testimony that Bostic was exposed to GP asbestos containing joint compound “many times” over ten years, the Appellate Court did not find that this was sufficient evidence to show that GP’s conduct was a “cause in fact” of Bostic’s mesothelioma. Many of Bostic’s experts relied upon the “each and every exposure” theory of liability and simulation studies. The Appellate Court, however, indicated that this theory is not sufficient to support a finding of causation. The Court found that there was insufficient evidence to provide quantitative evidence of Bostic’s exposure to GP asbestos-containing joint compound or to establish Bostic’s exposure was in amounts sufficient to increase his risk of developing mesothelioma.


Pink was a former employee of Goodyear and sued Goodyear and a number of product suppliers alleging that exposure to benzene caused the Decedent’s renal cell carcinoma. Goodyear filed a no-evidence motion for summary judgment (“NEMSJ”) on gross negligence and negligence (duty, breach, and causation), which was granted by the trial court. Pink appealed the trial court’s granting of Goodyear’s NEMSJ.

Of interest in this case, the Appellate Court examined a short affidavit of Pink’s treating oncologist who opined as follows:
Based upon reasonable medical probability it is my opinion that the cause of Mr. Pink’s renal cell carcinoma was exposure to chemicals, more than likely benzene. In rendering this opinion I have reviewed Mr. Pink’s medical records, the deposition testimony of Mr. Pink and three of his co-workers, the deposition of Dr. Radelat, and scientific literature.

In the proximate cause section of the opinion which addresses the oncologist’s affidavit, the Appellate Court does not even mention the standard for causation and glosses over the issue that the affidavit is conclusory. Instead, it finds that a question of fact over proximate cause existed. Subsequent to this finding, the Court then goes on to ignore the Borg Warner quantitative dose requirement for causation and chastise Goodyear for failing to obtain a ruling for its objections to the oncologist’s affidavit before the NEMSJ ruling. Therefore, as a result of Goodyear failing to timely object, the Court reversed the NEMSJ rendered for Goodyear based on this procedural technicality.


Ms. Robinson appealed the affirmation of the trial court’s granting of Crown Cork’s summary judgment motion. Her husband was exposed to a variety of asbestos containing products while serving in the U.S. Navy from 1956 to 1976. In this decision, the Texas Supreme Court found that the “innocent successor” provision contained in Chapter 149 (part of House Bill 4, which was the legislation resulting in drastic tort reform in Texas) was an unconstitutionally retroactive law as applied to Ms. Robinson’s common-law claims of negligence and strict liability. This provision limits the liability of certain corporations to the fair market value of total gross assets of the transferor determined at the time of the merger or consolidation plus interest. This legislation was enacted for Crown Cork, which acquired the asbestos liabilities of the Mundet Corporation, a manufacturer of asbestos insulation. The Supreme Court noted that Crown Cork’s asbestos liabilities already far exceeded the value of the company with which it merged.

In the decision, the Court noted that retroactive laws are generally unjust and there is a presumption against retroactive laws. Although there is no bright line test for unconstitutional retroactivity, the Court examined three factors: (1) nature and strength of the public interest served by the statute as evidenced by the Legislature’s factual finding, (2) the nature of the prior right impaired by the statute, and (3) the extent of the impairment. Although Chapter 149 in theory would alleviate asbestos related litigation that is known for bankrupting major companies, it was enacted in Texas solely to help Crown Cork and no one else. As such, the public interest served by Chapter 149 is slight. Therefore, after examining these three factors, the Court found that Chapter 149 was unconstitutionally retroactive and therefore reversed the appellate court’s holding and remanded the case to the trial court.

“Toy” continued from page two

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“Toy” continued from page two

2 Id.

“Berry” continued from page five

Finally, in light of the amendment to Rule 212(a)(5), it may now become crucial for discovery and evidence depositions to be scheduled as quickly in succession as possible. In scheduling the evidence deposition, defendants will be wise to wait no longer than the time required to generate the discovery deposition transcript and prepare a cross-examination. Essentially, defendants may need to document a record for the court that they did everything to attempt to preserve the plaintiff’s trial testimony in order to avoid a situation like that which arose in the the Berry case.

Conclusion

It remains to be seen if and how the amendment to Rule 212(a)(5) will affect the method and manner in which discovery depositions are now taken. Undoubtedly, both plaintiffs and defendants will test the boundaries of the amendment, and we may see additional litigation related to the admissibility of discovery depositions. Fortunately, all hope is not lost for defendants in asbestos litigation. There are still mechanisms in place for defendants to arm themselves at discovery depositions to conduct fairly risk-free, yet still effective, examinations. Additionally, with careful preparation and timing, defendants can hopefully make the Berry situation the infrequent exception, rather than the norm.
At trial, the defense challenged the admissibility of the opinions of Dr. Walter Carlini, a treating neurologist, suggesting that they did not meet the Daubert standards. See id. at 669. Dr. Carlini was offered by plaintiff as an expert on the diagnosis and causation of plaintiff’s condition. See id. Notably, there was no disagreement by either side that plaintiff did not suffer from symptoms commonly associated with Manganism. Rather, his symptoms were more classically those found in Parkinson’s. See id. at 674. Dr. Carlini attempted to straddle these diagnoses by opining that plaintiff had “Manganese-Induced Parkinsonism” which was neither Parkinson’s disease nor Manganism. See id. at 669. This was based upon the following reasoning:

1. Mr. Tamraz was exposed to welding fumes presumably containing manganese;
2. he developed the symptoms of Parkinson’s disease (though not those of Manganism);
3. scientists have identified genetic factors that cause some forms of otherwise idiopathic Parkinson’s disease;
4. some literature has hypothesized that toxins combined with genetics may cause other cases of Parkinson’s disease;
5. manganese is known to cause Manganism so it would be a possible candidate for triggering Parkinson’s disease as well;
6. Mr. Tamraz may have the genes for Parkinson’s disease; and
7. manganese may have triggered these genes and given Mr. Tamraz parkinsonism.

Id. at 670 (emphasis added). On cross-examination, Dr. Carlini conceded that the literature he cites to suggesting the triggering of a latent genetic predisposition was “theoretical,” that he performed no tests to establish such a predisposition, and that item 5 in his syllogism was speculation. Id. Reviewing this evidence, the Appellate Court found that Dr. Carlini’s “knowledge” rises no farther than speculation and was therefore admitted improperly. See id. at 678.

Under Daubert, the conclusions of an expert may seem unassailable – “The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” Daubert, 509 U.S. at 595. However, what Tamraz reinforces is how inextricably intertwined foundation and conclusion can be and, therefore, subject both to attack as obviously interdependent. Tamraz perhaps provides a guidepost for countering the opposition argument in the context of a Daubert challenge, that such a challenge is no more than an attack on their expert’s conclusion. In the end, Tamraz does not truly break new ground but rather reminds us that conclusions are often fragilely perched atop marginally constructed hypotheses.
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