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STATE LAWS LIMITING LIABILITY FOR NONECONOMIC DAMAGES: HOW COURTS HAVE DEALT WITH THE RELATED LEGAL AND MEDICAL ISSUES IN ASBESTOS PERSONAL INJURY CASES

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I. INTRODUCTION

In the 1980s, "more than three-fifths of the states enacted some form of tort reform legislation"1 in response to a widely perceived insurance crisis and criticism among legal scholars that the tort system had become ineffective.2 Two of the most widely adopted methods of reform involved placing limits on noneconomic damages and modifying joint and several liability.3

The statutory limits, or caps, on noneconomic damages have varied widely among the states that have enacted them.4 Some states

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2. See id. These reforms included modifying joint and several liability, limiting noneconomic damages, “re-establishing many sovereign immunities, limiting liability for certain activities or actors,” limiting the recovery of attorney’s fees, imposing penalties for frivolous lawsuits, and encouraging alternative dispute resolution. Id. at 633-34.

3. See id. at 633.

4. See Heidi Li Feldman, Harm and Money: Against the Insurance Theory of Tort Com-
impose noneconomic damages caps in tort cases generally;\(^5\) other states limit noneconomic damages, but only in medical malpractice cases;\(^6\) and other states impose noneconomic damages caps for other specific types of tort cases.\(^7\) Several state statutes have been in-

\(^{5}\) \textit{pensation}, 75 Tex. L. Rev. 1567, 1567-68 (1997) ("Twenty-three states currently place statutory limitations on tort damages for pain and suffering: seven states cap damages in general tort cases; an additional sixteen states limit awards solely in medical malpractice cases. Several states also have provisions limiting damages in other, very specific types of tort cases." (footnotes omitted)).


validated on state or federal constitutional grounds. Despite constitutional issues, states continue to introduce legislation in an effort to place limits on noneconomic damage awards.

Maryland’s cap statute, section 11-108 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland, was enacted in 1986 to respond to a perceived crisis in Maryland concerning the cost and availability of liability insurance. Section 11-108 estab-suits), MONT. CODE ANN. § 39-2-905(3) (1995) (no pain and suffering damages in wrongful discharge cases), and N.Y. Ins. LAW § 5104 (McKinney 1985) (no pain and suffering damages for negligent operation of an automobile if there is no serious injury)).

8. See id. at 1568 & n.4 (noting that in Alabama, Florida, New Hampshire, Ohio, Texas, and Washington, statutory damage limitation provisions have been struck down as unconstitutional). A statutory limitation on noneconomic damages was found to violate a plaintiff’s right to due process where the court found that the plaintiff had a vested property right in a particular measure of damages and the statute as enacted denied recovery on an arbitrary basis. See, e.g., Peter A. Davis, The Constitutionality of Michigan’s Medical Malpractice Damages Cap: Can it Survive Judicial Review?, 75 MICH. B.J. 258, 258-62 (1996) (discussing Wright v. Central Du Page Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976) (holding that a medical malpractice noneconomic damage cap statute violated the plaintiff’s due process rights as guaranteed by Illinois’ state constitution) and Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985) (rejecting plaintiff’s due process challenge to California’s medical malpractice damages cap statute)). A damage cap statute was found to violate a plaintiff’s right to equal protection of the laws because it classified the limits imposed on claims in an unfair, arbitrary, and unreasonable manner. See id. at 262 (citing Carson v. Maurer, 424 A.2d 825 (N.H. 1980)). In addition, a statutory limitation on noneconomic damages was found to violate a plaintiff’s Seventh Amendment right to a jury trial to the extent that it required a judge to disregard the amount of jury award which exceeded the limit set forth in the statute. See id. (citing Moore v. Mobile Infirmary Assoc., 592 So. 2d 156 (Ala. 1991)).


10. See Murphy v. Edmonds, 325 Md. 342, 368, 601 A.2d 102, 114 (1992); Report of the Governor’s Task Force to Study Liability Insurance 3-4 (Dec. 1985) [hereinafter Governor’s Task Force Report]; Report of Joint Executive/Legislative Task Force on Medical Malpractice Insurance 5 (Dec. 1985) [hereinafter Joint Task Force Report]; Diana M. Schobel, Recent Development, The Application of the Cap on Noneconomic Damages to Wrongful Death Actions, 54 Md. L. Rev. 914, 914 (1995) (citing United States v. Streidel, 329 Md. 533, 549, 620 A.2d 905, 913 (1993)). State-wide task forces formed to study the issue concluded that a noneconomic damages cap would lead to greater predictability of damage awards, making the insurance market more stable and thus more attractive to insurance underwriters. The Governor’s Task Force Report noted that noneconomic damages are “impossible to ascertain with precision and are subject to emotional ap-
lished a $350,000 limit on “any action for damages for personal injury in which the cause of action arises on or after July 1, 1986.” Notwithstanding the statute’s seemingly straightforward language, difficult issues of interpretation have arisen concerning its applicability in product liability cases involving injuries arising out of latent diseases, specifically asbestos cases.

The primary issue that Maryland courts have addressed, but failed to resolve with any workable test, is how to determine when a cause of action “arose” in determining whether the noneconomic damages cap is applicable to a case involving an asbestos-related, latent disease. This is an issue in cases filed after July 1, 1986, the noneconomic damages cap statute’s effective date, where exposure appeals to a jury.” Governor’s Task Force Report, supra at 11. It concluded that a $250,000 cap would “help contain awards within realistic limits.” Id. at 10.


13. See infra notes 22-24, 35-116 and accompanying text.
to the asbestos product occurred well in advance of that date.14

The determination of when a cause of action arose ultimately depends upon answering the question: When did the injury occur?15 Plaintiffs generally argue that the injury occurred on the date of first exposure to the product.16 Defendants maintain that no injury occurs until the plaintiff actually becomes ill—when the plaintiff experiences symptoms of disease and incurs damages, such as medical expenses, pain and suffering, and lost wages.17

The problem lies not only in determining when the injury occurred, but also in determining what the injury is.18 In asbestos litigation, this question is particularly difficult to answer in mesothelioma cases,19 which involve an extremely long latency period consisting of a complex progression of cellular changes between exposure to asbestos and the ultimate diagnosis of the disease.20 Unfortunately, the decisions to date by Maryland appellate courts have served only to complicate the issue.21

Maryland courts have attempted to resolve the issue of when a cause of action arises in an asbestos case by holding that the cause of action arises when the injury—the disease—"comes into exis-

15. See infra notes 63-69 and accompanying text. This issue arises where a plaintiff does not experience symptoms and is not diagnosed prior to the effective date of the statute. The cap prevents plaintiffs from recovering more than $350,000 in noneconomic damages when the cause of action arose after July 1, 1986. Consequently, plaintiffs seek to avoid the cap by contending that their injury occurred when their cancer developed—at some time before the statute's effective date—notwithstanding that they may not have experienced any symptoms until after the effective date. Defendants maintain that the cap should apply to limit a plaintiff's damages, arguing that a plaintiff cannot incur legally compensable damages prior to the development of any symptoms, which occur in many cases after the cap's effective date, because of the long latency period.
16. See infra note 87 and accompanying text.
17. See infra notes 79, 92 and accompanying text.
18. See infra notes 70-79, 88-94 and accompanying text.
19. See Scott S. Shepardson, Note, Buttram v. Owens-Corning Fiberglas Corp.: A Cruel Accrual Rule?, 32 U.S.F. L. Rev. 459, 463 (1998) ("Mesothelioma is a particularly aggressive form of cancer that is remarkable in that it is caused almost exclusively by exposure to asbestos.").
21. See Owens-Illinois v. Armstrong, 326 Md. 107, 120-21, 604 A.2d 47, 53-54 (1992) (holding that a cause of action arises when the injury comes into existence). In the context of a disease with a long latency period, this determination is difficult at best. See infra notes 109-16 and accompanying text.
tence." In the context of litigating a case involving a latent disease such as mesothelioma, this test requires extensive expert testimony. Even with an expert opinion as to when a cancer began to develop, there remains the question of when the plaintiff’s injury came into existence. Was it when the first cancerous cell formed, when a malignant tumor formed, or when the tumor developed to the extent that the plaintiff experienced symptoms? Could a legally compensable injury occur prior to the plaintiff incurring damages such as medical bills, lost wages, and pain and suffering? Could a legally compensable injury occur before the plaintiff was even aware that he was injured? Who has the burden of proof as to these issues? When does an injury arise in the context of a loss of consortium claim? These questions are awaiting ultimate resolution in Maryland and will likely arise in other states which have enacted or may enact similar noneconomic damages cap statutes.

The California Supreme Court recently adopted a test that avoids the uncertainty inherent in the Maryland test and reduces the need for complex medical testimony. The California test provides that a cause of action for damages from a latent disease accrues, for purposes of the cap statute, when the disease is diagnosed or the plaintiff discovers the illness or injury, whichever occurs first. In adopting this test, the California Supreme Court rejected a qualified “appreciable harm” test, similar to Maryland’s “legally compensable injury” test, declaring that the appreciable harm test bore “little or no relation to the considerations of fairness and policy” which guided the California court in its interpretation of the statute. To date, no other state has addressed the specific issue of

22. Owens-Illinois, 326 Md. at 120-21, 604 A.2d at 53-54.
23. See infra notes 95-116 and accompanying text.
24. This issue may arise in latent disease cases in states enacting cap statutes which limit noneconomic damages awards generally and contain no express applicability provisions or which contain applicability provisions similar to Maryland’s—one providing that the statute is applicable to causes of action “arising” or “accruing” after the statute’s effective date. See, e.g., ALASKA STAT. § 09.17.010 (Michie 1994); COLO. REV. STAT. § 13-21-102.5 (1989); IDAHO CODE § 6-1603 (1987); 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (West 1995); KAN. STAT. ANN. § 60-19a02 (1994); OHIO REV. CODE ANN. § 2323.54 (Banks-Baldwin 1997). At least one state has avoided this issue by providing that the cap statute is applicable to causes of action filed on or after its effective date. See, e.g., MICH. COMP. LAWS § 600.2946a (1996).
26. Id. at 83; cf. Consorti v. Owens-Corning Fiberglas Corp., 657 N.E.2d 1301 (N.Y. 1995). In Consorti, the Court of Appeals of New York considered “whether a
when a cause of action arises for purposes of a noneconomic damages cap.\textsuperscript{27}

Part II of this Article reviews the development of Maryland law on the issue of when a cause of action arises and the closely related issue of what constitutes an injury in the application of Maryland's cause of action lies for loss of consortium where, prior to the marriage, the plaintiff's spouse was exposed to, and ingested, a substance that remained in his body and eventually caused illness, but the illness did not occur until after the marriage.\textsuperscript{27} "Id. at 1301 (quoting Consorti v. Owens-Corning Fiberglas Corp., 45 F.3d 48, 49 (2d Cir. 1995)). In concluding that such a plaintiff would not have a cause of action, the court rejected a "fact-based date of medical injury test" based on "practical and policy reasons . . . [including] the need to provide manufacturers, employers and other economic actors who are potential defendants with a degree of certainty or predictability in assessing the risk of liability and to avoid stale claims which often turn on questions of credibility or disputed medical judgments." Id. at 1302. The court reaffirmed a "bright line, readily verifiable rule . . . in which, as a matter of law, the tortious injury is deemed to have occurred upon the introduction of the toxic substance into the body." Id. The court did not distinguish between the injury to the person and the injury to the marital relationship. In a later case, the Court of Appeals of New York recognized that its bright line "exposure" rule was abrogated by statute, N.Y. C.P.L.R. 214-c (McKinney 1986), which provides for a discovery rule in toxic tort cases. See Blanco v. American Tel. & Tel. Co., 689 N.E.2d 506, 509 (N.Y 1997).

\textsuperscript{27} Several courts have addressed the question of when a claim arises or accrues with regard to the applicability of statutes that established exclusive theories of liability in product liability actions after their effective dates. See, e.g., Brown v. R.J. Reynolds Tobacco Co., 52 F.3d 524, 526-30 (5th Cir. 1995) (holding that under Louisiana law, for purposes of application of the Louisiana Product Liability Act, a smoker's cause of action accrued not upon exposure, but upon injury; affirming summary judgment in favor of the defendant on pre-Act causes of action because the plaintiff, who was diagnosed after the Act's effective date, produced no evidence of injury prior to the effective date; holding doctor's affidavit that there can be a 10 year latency period between exposure and development of cancer was insufficient to show the plaintiff suffered pre-Act damages); Cole v. Celotex Corp., 599 So. 2d 1058, 1063 (La. 1992) (holding that a cause of action accrues when plaintiff may bring a lawsuit; construing "events" as meaning injury producing events—repeated or significant tortious exposures—when the statute provided that it applied only to claims arising from events occurring after the effective date); see also Viereck v. Fibreboard Corp., 915 P.2d 581, 584 (Wash. 1996) (holding that under the Washington Product Liability Act, the plaintiff's cause of action arose when injury producing events—exposure—occurred); cf. Champagne v. Raybestos-Manhattan, Inc., 562 A.2d 1100, 1107 (Conn. 1989) (holding that under Connecticut's general product liability statute, a cause of action accrued when plaintiff suffered actionable harm—when plaintiff (1) discovered or should have discovered he had been injured and (2) that defendant's conduct caused such injury).
II. DEVELOPMENT OF MARYLAND LAW

During the 1980s, the insurance industry reacted to increasing losses by raising premiums and canceling or refusing to issue certain high-risk policies.35 As a result, Maryland experienced an insurance crisis, evidenced by the unavailability of liability insurance for certain businesses, particularly those engaged in hazardous activities, and skyrocketing insurance premiums for doctors, particularly in high-risk specialties.36 In an effort to attract private insurers back to Maryland, provide affordable liability insurance, and ensure an adequate supply of quality medical services in the state, the Maryland General Assembly enacted section 11-108 of the Maryland Code, Courts and Judicial Proceedings Article.37 Section 11-108 provides that, in "any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000."38

28. See infra notes 35-116 and accompanying text.
29. See infra notes 117-41 and accompanying text.
30. See infra notes 124-41 and accompanying text.
31. See infra notes 142-63 and accompanying text.
32. See infra notes 164-76 and accompanying text.
33. See infra notes 177-214 and accompanying text.
34. See infra notes 215-24 and accompanying text.
35. See Manzer, supra note 1, at 629 & n.6.
36. See supra note 10 and accompanying text.
Notwithstanding the statute’s seemingly straightforward language, its application to personal injury actions involving latent diseases has proven to be problematic.\(^{39}\) Specifically, Maryland courts have failed to develop a clear test for determining when a plaintiff’s cause of action arises to determine whether the cap should apply in an asbestos-related latent disease case.\(^{40}\)

A. Armstrong I

In *Owens-Illinois v. Armstrong (Armstrong I)*,\(^{41}\) the Court of Special Appeals of Maryland construed the meaning of the phrase “cause of action arises” in section 11-108. Plaintiff Armstrong, a shipyard worker, and three other workers brought product liability claims in the Circuit Court for Baltimore City against manufacturers, installers, and suppliers of asbestos-containing insulation, under theories of negligence and strict liability.\(^{42}\) The jury awarded Armstrong $730,000 in compensatory damages: $5,000 for future medical expenses and $725,000 for noneconomic damages.\(^{43}\) Defendants appealed, contending that the trial court erred in failing to reduce the noneconomic damages award pursuant to section 11-108.\(^{44}\) Defendant Owens-Illinois\(^{45}\) argued that because Armstrong was first diagnosed with asbestosis in September 1987 (based on a medical examination from the previous May), more than a year after the section 11-108’s effective date, his damage award was subject to the cap.\(^{46}\) The court of special appeals disagreed and affirmed the verdict.\(^{47}\)

The court of special appeals stated that a “ ‘cause of action arises’ in negligence or strict liability when facts exist to support each element” of the claim.\(^{48}\) The court rejected Owens-Illinois’s contention that a cause of action does not arise until it is “discov-

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39. See infra notes 41-116 and accompanying text.
40. See infra notes 41-116 and accompanying text.
42. See id. at 705, 591 A.2d at 547.
43. See id.
44. See id. at 707, 591 A.2d at 547.
45. See Owens-Illinois, Inc. v. Armstrong, 326 Md. 107, 111, 604 A.2d 47, 49 (1992) (noting that the second defendant, Eagle-Fischer Industries’ appeal was stayed because it filed a Title 11 bankruptcy petition, thereby leaving Owens-Illinois as the sole defendant seeking review of the judgments).
46. See Armstrong I, 87 Md. App. at 724, 591 A.2d at 556.
47. See id.
48. Id. at 725, 591 A.2d at 556.
ered” by the plaintiff, holding that the term *arises* in section 11-108(b) does not carry the same meaning as the term “accrues.”50 The court noted that the discovery rule, which delays the running of the statute of limitations until the plaintiff discovers or could reasonably have discovered the nature and cause of the injury, did not alter the moment at which a cause of action was deemed to have arisen.51 Therefore, the court concluded that the cause of action *arose* when the facts existed to support each element, but it did not *accrue* for purposes of the statute of limitations until discovery.52

The *Armstrong I* court then reviewed the evidence and concluded that Armstrong must have contracted asbestosis prior to July 1, 1986.53 The court noted that Armstrong was diagnosed as having asbestosis in September 1987,54 and he was continuously exposed to asbestos between 1942 and 1963.55 Owens-Illinois’s medical expert testified that asbestosis has a latency period—the period from exposure to diagnosis—of fifteen to twenty years, but in circumstances of heavy exposure, it could be shorter.56 Armstrong’s medical expert put the latency period at twenty to thirty years, but stated that asbestosis is present from the time the first fibers enter the lungs.57 The court concluded that even assuming the longest latency period of thirty years (from 1942 until 1972), by July 1, 1986, the disease would have had fourteen more years to develop than was required under *normal exposure*.

The court concluded that “[i]t [was] inconceivable that Armstrong’s asbestosis came into existence between July 1, 1986 and his medical examination in May, 1987,” and held that his damage award was not controlled by the cap.59 Subsequently, the Court of Appeals of Maryland granted defendant Owens-Illinois’s petition for certiorari and reviewed the court of special appeals’s decision in *Owens-Illinois, Inc. v. Armstrong* (*Armstrong*

49. See id.
50. See id. at 726, 591 A.2d at 557.
51. See id. (discussing Harig v. Johns-Manville Prods., 284 Md. 70, 83, 394 A.2d 299, 305 (1978) (extending discovery rule to situations involving latent development of disease)).
52. See id. at 726, 591 A.2d at 557.
53. See id.
54. See id. at 725, 591 A.2d at 556.
55. See id. at 727, 591 A.2d at 557.
56. See id.
57. See id.
58. See id.
59. Id. at 727, 591 A.2d at 557.
B. Armstrong II

In Armstrong II, the Court of Appeals of Maryland affirmed the court of special appeals’s holding that the cap was not applicable to plaintiff Armstrong’s damages award. The Armstrong II court affirmed the court of special appeals’s conclusion that the cause of action arose “when facts exist[ed] to support each element,” and noted that, “[i]n a negligence claim, the fact of injury would seemingly be the last element to come into existence.” The Armstrong II court concluded, therefore, that the cap applied only if Armstrong’s “‘injury’ came into existence on or after July 1, 1986.”

The Armstrong II court acknowledged that, “[u]nfortunately, identifying the time at which an asbestos-related injury came into existence is usually not a simple task.” The court concluded, however, that it need not decide exactly when Armstrong contracted asbestosis because it was “inconceivable that Armstrong’s asbestosis came into existence between July 1, 1986 and his medical examination in May 1987.” The court noted that, based on the expert testimony, “it was reasonable to assume that Armstrong’s asbestosis took approximately 20 years to develop.” Because Armstrong’s exposure began in the early 1940s, the court found the most reasonable conclusion was that his asbestosis developed at least by the mid-1960s. The court observed that even if the initial damage to Armstrong occurred in 1963, the last year he worked in the shipyard, the disease ordinarily would have developed by 1983, and under unusual circumstances even earlier. Thus, the court found the “only reasonable conclusion, even viewed in the light most favorable to Owens-Illinois,” was that Armstrong contracted asbestosis prior to the effective date of the cap statute.
C. Legally Compensable Injury

The Armstrong I opinion included a discussion of what is a legally compensable injury.\(^7\) The court held that mere alteration of the pleura—the thin membrane which lines the chest wall and diaphragm—caused by asbestos inhalation did not constitute a legally compensable injury.\(^1\) The court noted evidence demonstrating that pleural plaques and pleural thickening—the respective terms for localized and widespread scarring resulting from asbestos inhalation—altered the pleura, but did not cause any loss or detriment.\(^2\) Owens-Illinois's experts testified that "pleural plaques and pleural thickening did not affect the human body, did not shorten life expectancy, did not cause complications or problems, did not cause pain, and could not be felt."\(^3\) Likewise, plaintiffs' experts testified that the two conditions had "no health significance and did not cause any pain, dysfunction, symptoms or problems."\(^4\)

In holding that the mere alteration of the pleura was not a legally compensable injury, the court noted that *harm* was one of the necessary elements of a cause of action in both negligence and strict liability.\(^5\) The court cited section 7(2) of the Restatement (Second) of Torts, which defines *harm* as "the existence of loss or detriment in fact of any kind to a person resulting from a cause."\(^6\) The court then quoted comment "b" to section 7: "[h]arm implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing . . . . In so far as [sic] physical changes have a detrimental effect on a person, that person

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70. See Owens-Illinois v. Armstrong, 87 Md. App. 699, 734, 591 A.2d 544, 560-61 (1991) (discussing Wright v. Eagle-Picher Industries, Inc., 80 Md. App. 606, 565 A.2d 377 (1989) (holding a jury instruction that the medical condition of pleural plaques was not a compensable injury did not invade the province of the jury because the plaintiffs had offered no evidence of injuries suffered solely as a result of pleural plaques)). The Armstrong I court noted that the Wright court rejected plaintiffs' argument that pleural scars were "nonconsented alterations" to their bodies and, thus, grounds for compensation. Id. at 735, 591 A.2d at 561. The Armstrong I court similarly rejected plaintiffs' broad definition of "bodily harm," adopting instead the Restatement (Second) of Torts's definition of "harm" as requiring a "loss or detriment," and not a "mere change or alteration" to a person. Id. at 734, 591 A.2d at 561.

71. See id.

72. See id.

73. Id. at 733, 591 A.2d at 560.

74. Id.

75. See id. at 734, 591 A.2d at 561.

76. Id. (citing *RESTATEMENT (SECOND) OF TORTS* § 7(2) (1965)).
suffers harm."77

After *Armstrong I* and *II* were decided, litigants cited both cases as authority for diametrically opposing propositions. Plaintiffs claimed that both cases supported the conclusion that a cause of action for damages resulting from an asbestos-related disease arises upon exposure to the defendant's product, because the injury begins upon first inhalation.78 Defendants asserted that the *Armstrong I* and *II* cases made clear that a cause of action cannot arise until the plaintiff experiences some compensable harm that cannot occur until the disease has resulted in "functional impairment," which can take place many years after exposure.79

D. Grimshaw

In April 1997, the court of special appeals again addressed the applicability of the noneconomic damages cap in *Anchor Packing Co. v. Grimshaw*,80 in which plaintiffs diagnosed with mesothelioma sued manufacturers of asbestos products.81 Defendants appealed from the trial court's ruling that the noneconomic damages cap did not apply to the claims.82 The court's ruling was based on expert testimony that the mesothelioma occurred prior to July 1, 1986, the effective date of the noneconomic damages cap statute.83 All four plaintiffs were diagnosed with mesothelioma; three in 1994 and one in 1993.84

In *Grimshaw*, the court of special appeals concluded that it was clear from the court of appeals's opinion in *Armstrong II* that a cause of action for an asbestos-related disease arises before diagnosis.85 However, the *Grimshaw* court observed that because of the particular facts in *Armstrong II*, the court of appeals did not have to de-

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77. *Id.* (quoting *RESTATEMENT (SECOND) OF TORTS* § 7 cmt. b (1965)).
78. See *infra* note 80 and accompanying text.
81. See *id.* at 144, 692 A.2d at 10; see also *Maryland Appeals Court Applies Statutory Cap to Asbestos Cases*, *Anchor Packing v. Grimshaw*, DES LITIG. REP. (Andrews) 25710 (May 1997) (summarizing *Grimshaw*).
83. See *id.* at 165, 692 A.2d at 20.
84. See *id.* at 147-48, 692 A.2d at 12.
85. See *id.* at 156, 692 A.2d at 16.
termine precisely when the injury came into existence. 86 Thus, the Grimshaw court proceeded to address the more exacting task of determining the precise date of injury.

Plaintiffs contended that an injury "arises in an asbestos-related disease claim when an individual is first exposed to asbestos fibers causing cellular changes to begin." 87 However, the court of special appeals reiterated its holding in Armstrong I, that to have a cause of action based on product liability or negligence, the plaintiff must produce evidence of a legally compensable injury. 88 The court also restated the requirement of harm, citing section 7(2) of the Restatement (Second) of Torts, 89 which provides in comment "b" that "'[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing." 90 The Grimshaw court concluded that "[m]ere exposure to asbestos and cellular changes resulting from asbestos exposure, such as pleural plaques and thickening, alone is not a functional impairment or harm, and therefore, do not constitute a legally compensable injury." 91 But, the Grimshaw court also rejected defendants' assertion that the injury or harm does not arise until the symptoms of the disease become apparent, dismissing the argument that such an approach would be less speculative. 92

The court concluded that an asbestos-related injury occurs "when the inhalation of asbestos fibers causes a legally compensable harm." 93 Specifically, the Grimshaw court stated: "Harm results when the cellular changes develop into an injury or disease, such as asbes-

86. See id. The Armstrong II court determined, based on expert testimony and viewing the facts in a light most favorable to the defendant, that the plaintiffs' disease must have developed at least three years before the enactment of the statute. See id.; see also supra note 68-69 and accompanying text.
88. See id. at 158, 692 A.2d at 17.
89. See id.
90. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 7(2) cmt. b (1965)).
91. Id. at 159, 692 A.2d at 17. In a footnote, the Grimshaw court added: "[T]his is not to say that immediate harm cannot arise shortly after exposure to asbestos fibers. . . . '[T]he inhalation and retention of asbestos fibers may cause immediate harm to the cells and tissues of the lung.' " Id. at 159 n.5, 692 A.2d at 17 n.5 (quoting Armstrong II, 326 Md. 107, 123, 604 A.2d 47, 55 (1992) (quoting Lloyd E. Mitchell, Inc. v. Maryland Cas. Co., 324 Md. 44, 61, 595 A.2d 469, 477 (1991))).
92. See id. at 160, 692 A.2d at 18.
93. Id.
The court then reviewed the expert testimony. At trial, two experts testified that mesothelioma typically exists ten years before diagnosis. One expert testified that cancer began, at the earliest, three years before diagnosis. The court remarked that "[u]nfortunately we are without the benefit of the trial court's reasoning in denying appellants' motion to apply the statutory cap to noneconomic damages." The court concluded, therefore, that it had to assume that the trial court denied the defendants' motion to apply the cap based on the expert testimony that the mesothelioma...
developed before July 1, 1986.99 The court of special appeals noted that, although there was some medical testimony to the contrary, "it was up to the trial court, as the trier of fact on that issue, to weigh the evidence and reach a final determination."100

The Grimshaw court held, based on the expert testimony,101 that the record supported a finding that plaintiffs developed cancer, and that their causes of action arose, at least eight years prior to diagnosis in 1994 (three plaintiffs) and seven years prior to diagnosis in 1993 (one plaintiff), and thus their causes of action arose before July 1, 1986, the statute's effective date.102 Therefore, the court of special appeals affirmed the trial court's ruling.103

In Grimshaw, the court of special appeals, while purporting to set forth a clear test for determining when an asbestos-related injury occurs, merely confused the issue, as is illustrated by its holding.104 The Grimshaw court held "that an injury occurs in an asbestos-related injury case when the inhalation of asbestos fibers causes a legally compensable harm. Harm results when the cellular changes develop into an injury or disease, such as asbestosis or cancer."105

The first sentence appears to be clear: that an injury occurs when the inhalation of asbestos fibers causes legally compensable harm. Legally compensable harm would seemingly be such harm that would form a basis for recovery by a plaintiff, such as medical expenses, pain and suffering, lost wages, and loss of consortium. However, the second sentence arguably means that a person who has developed a cancerous cell has sustained legally compensable harm, notwithstanding the fact that he has sustained no functional impairment or loss—no medical expenses, pain and suffering, or lost wages.106

99. See id.
100. Id.
101. See supra note 95.
105. Id.
106. Apparently, the court of special appeals equates the development of the first cancerous pleural cell with the development of mesothelioma. The court of appeals, however, has stated that mesothelioma is "the occurrence of malignant tumors in the pleura." Owens-Corning Fiberglas Corp. v. Garrett, 343 Md. 500, 506 n.2, 682 A.2d 1143, 1146 n.2 (1996). Because it is an undisputed
Under the *Grimshaw* test, a plaintiff would conceivably be deemed to have suffered legally compensable harm at the time his injury is so undeveloped as to be undiagnosable, and may never actually develop into a legally compensable harm. Thus, under the *Grimshaw* analysis, a plaintiff who developed a cancerous cell in 1980 and remained symptom-free until he died accidentally in 1995 would have had a cause of action for asbestos-related injuries, even though he had experienced no functional impairment or other compensable damages.

The medical fact that not every cancerous cell ultimately becomes part of a tumor, the position taken by the court of special appeals is not scientifically supported.


108. In January 1998, the court of special appeals decided two asbestos cases, *Ford Motor Co. v. Wood, 119 Md. App. 1, 703 A.2d 1315 (1998)* and *ACandS, Inc. v. Abate, 1998 WL 2803 (Md. Ct. Sp. App. Jan. 7, 1998)*. In *Ford*, the plaintiff, who died of mesothelioma, worked from 1948 to 1952 in a garage and was allegedly exposed to asbestos dust created by mechanics working in an adjacent area on automotive parts containing asbestos. *See Ford, 119 Md. App. at 10, 703 A.2d at 1319*. The plaintiff's estate and survivors sued Ford, the manufacturer of the asbestos-containing parts. *See id. at 9, 703 A.2d at 1318*. The plaintiff began experiencing symptoms in 1992 and was diagnosed with mesothelioma in 1993. *See id. at 46, 703 A.2d at 1337*. Ford urged the court to find that the plaintiff's cause of action arose when he began experiencing symptoms. Ford argued that the cap statute required the determination of an exact date the cause of action arose, which could only be determined precisely by looking at when the first symptom or diagnosis occurred. *See id. Ford urged that Armstrong II was distinguishable because the medical evidence in that case indicated that the plaintiff developed asbestosis at least by the mid-60s, and because it was inconceivable that the asbestosis came into existence between the cap's effective date in 1986 and the date of diagnosis in 1987. See id. at 46-47, 703 A.2d at 1337*. Ford argued that as the date of manifestation of the disease approached the statute's effective date, it was more important to determine
It is speculative for a court to determine that a cause of action exists at the time the first cancer cell forms. Tumors develop as a result of a complex progression of cellular changes and unpredictable growth; therefore, a determination at the time of formation of the first cancer cell as to the existence of a cause of action would be impossibly speculative.\(^{109}\) Even with the benefit of hindsight, such a determination is no less speculative. It is impossible to determine when the injury, and, thus, the cause of action, first existed because of the latent nature of the injury, and the fact that medical science has not developed adequate methods of measuring its growth.\(^{110}\)

Based on the court’s analysis in \textit{Grimshaw}, however, all that may be necessary to show that such injury or legally compensable harm existed before the effective date of the cap statute is expert testimony which seemingly does no more than conclude that the injury could

the exact date the injury occurred. See id. The court rejected Ford's argument that the \textit{Grimshaw} test was too speculative. See id. at 48-49, 703 A.2d at 1338. The court noted that the plaintiff’s medical expert had testified that “his cancer likely began to develop at least ten years prior to the date of diagnosis.” \textit{Id}. As the plaintiff was diagnosed in 1993, the court concluded that such evidence was sufficient to support a finding that his injury occurred prior to the effective date of the cap statute. See \textit{id}. at 48, 703 A.2d at 1338. It concluded that, “[u]nder \textit{Grimshaw}, we will uphold a trial court’s determination of when an injury arises as long as that determination is supported by legally sufficient evidence.” \textit{Id}. Ford has petitioned for certiorari to the Court of Appeals of Maryland. In contrast to Ford, in \textit{ACandS, Inc. v. Abate}, the court of special appeals applied the cap statute to a case involving a plaintiff diagnosed in 1992 with pleural plaques and held that the plaintiff’s cause of action could not have arisen until 1990, when he first experienced functional impairment as a result of that condition. See \textit{Abate}, 1998 WL 2803, at *50. The plaintiff’s exposure to asbestos began in 1950, and a medical expert testified that pleural disease normally occurred between ten and fifteen years after first exposure; thus, it could have manifested itself as early as 1960. See \textit{id}. However, because the plaintiff experienced no functional impairment until 1990, the court concluded that his cause of action did not arise until that time. See \textit{id}. Accordingly, the court held that the noneconomic damages cap was applicable. See \textit{id}. These two seemingly inconsistent opinions, decided just one day apart, fail to clarify Maryland law in this area.

\(^{109}\) \textit{See, e.g.}, Official Trial Transcript, \textit{Brannan v. ACandS}, Consolidated Case No. 9535270, Indiv. Case No. 92153501 (Cir. Ct. Baltimore City) (expert testimony). Dr. Brody testified that bodily defense mechanisms can clear away injured cells before they grow into tumors. See \textit{id}. at T.662-63. Dr. Gabrielson further testified that all cancers have “multiple mutation, multiple chromosomal aberrations,” and that such changes occur over many years. “[O]nly after there is the right combination is the cell fully cancerous.” \textit{Id}. at T.2318.

\(^{110}\) \textit{See infra} notes 112-16 and accompanying text.
have occurred prior to that date.¹¹¹

The following expert testimony formed the basis, in part, for the Grimshaw trial court's determination that the plaintiffs' injuries occurred prior to 1986:

Q. Doctor, you testified . . . about 10 years between the manifestation or diagnosis of mesothelioma and when it began to grow, do you remember that?
A. Yes, sir.
Q. And isn't it true that it is your opinion that most likely the period of growth for mesothelioma tumor is on the order of five years?
A. The time that one cell has all of the genetic changes, all of the chromosomal changes until the time that that cell has produced a clinically recognized tumor is on the order of five to ten years, probably more like ten years. . . .

Maybe the tumor didn't develop until seven or eight years before the clinical recognition, maybe five years.
Q. I [have] got your deposition taken in this case. . . . The question was put to you, "Do you have an opinion as to how long Mr. Grimshaw had this tumor before it was diagnosed?"

And your answer was, "It is my opinion that the tumor existed in some form probably on the order of five years prior to diagnosis."
Was that part of your answer? And then you can see the rest of it.
A. Then I rambled on probably on the order of five years perhaps longer, perhaps ten years. Nobody knows for sure.¹¹²

Predictably, in the wake of the Grimshaw case, the application of the noneconomic damages cap statute has become a battle of the experts, with determinations of applicability hinging on opinions like


the above, which at times appear to be based on no more than the purest speculation.\textsuperscript{113} However, evidence based on mere speculation will not support a claim for damages.\textsuperscript{114}

Plaintiffs' experts have testified that the period of growth for a mesothelioma tumor—between inception and diagnosis—is likely to occur within ten years.\textsuperscript{115} It would seem to follow that a diagnosis after 1996 would trigger application of the cap. Proponents of the \textit{Grimshaw} test would assert, therefore, that the problems discussed herein will resolve in time. Recent testimony by a medical expert testifying for a plaintiff, however, illustrates that this may not be the case:

Q. And, Doctor, with respect to the diagnosis in January of '97, do you have an opinion as to when [the plaintiff's] mesothelioma developed? . . .

A. It's my understanding . . . that he actually had chest pain as early as 1993. The type of mesothelioma he had was an epithelial type. I would say that it would be probably somewhere between 1980 and 1985 . . .

Q. Now I think you've testified in the past at least epithelial mesotheliomas will develop within 10 years from the date of diagnosis? . . .

A. I think what I've said is that they have started, at the latest, ten years before they are diagnosed clinically. . . .

Q. . . . [H]ave you ever testified before, with respect to a time period of development, that that goes from the time of symptoms?

A. I've never specifically, I don't think, said that, but if you look at how mesotheliomas are diagnosed and you look at various patients . . . when they're evaluated, is that there are many cases where the mesothelioma is probably diagnosed sometimes as much as one to five years after the patient has developed a tumor.\textsuperscript{116}

Thus, the question becomes: how far will experts go (and be allowed to go) with their testimony in latent disease personal injury

\textsuperscript{113} See supra note 108 and accompanying text.
\textsuperscript{114} See Davidson v. Miller, 276 Md. 54, 61-62, 344 A.2d 422, 427-28 (1975).
\textsuperscript{115} See supra note 112 and accompanying text.
cases to avoid or to trigger the application of noneconomic damages cap statutes?

III. ADMISSIBILITY OF EXPERT EVIDENCE ON THE DEVELOPMENT OF ASBESTOS-RELATED DISEASE: THE FRYE-REED AND DAUBERT STANDARDS

Under the Frye-Reed standard, which governs admissibility of scientific evidence in Maryland, the evidence at issue must be shown to be generally accepted as reliable within the expert's particular scientific field. If a scientific technique's validity is in controversy in the relevant scientific field, or if it is regarded generally as an experimental technique, expert testimony dependent upon its validity cannot be admitted into evidence.

It is undisputed that medical science has not yet advanced so as to enable doctors to determine the growth rate of a mesothelioma tumor. Thus, there is no definitive test to determine when a

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117. See Reed v. State, 283 Md. 374, 381, 391 A.2d 364, 368 (1978). The Frye-Reed standard is a stricter standard than that applied by federal courts, as articulated in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). In Daubert, the Supreme Court concluded that Federal Rule of Evidence 702 superseded the Frye test, reasoning that the "rigid 'general acceptance' requirement [for admission of scientific evidence] would be at odds with the 'liberal thrust' of the Federal Rules" of Evidence. 509 U.S. at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 159 (1988) (citing Rules 701 to 705)). The current inquiry under Rule 702 is whether the evidence in question is scientific knowledge that will assist the trier of fact, i.e., whether the evidence is both "reliable"—qualifies as scientific knowledge—and "relevant"—will assist the trier of fact. See id. at 589-92. Despite the fact that the current Maryland rules are derived from the federal rules, Maryland courts have chosen not to adopt the relaxed Daubert standard. See Keene Corp. v. Hall, 96 Md. App. 644, 626 A.2d 997, cert. granted, 332 Md. 741 (1993); see also K. M. Carroll, Codifying the Rule on Expert Testimony: Why Traditional Analysis Should be Generally Acceptable, 54 MD. L. REV. 1085 (1995); JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1406A (2d ed. 1993 & Supp. 1998). The Court of Appeals of Maryland has not explicitly decided whether the newly adopted Maryland Rules of Evidence modify the Frye-Reed standard. See id. at 89 (Supp. 1998). On several occasions, however, the court of appeals applied the Frye-Reed standard in cases decided after the new rules became effective. See id.


mesothelioma tumor began to form.120 Yet, as illustrated below, such evidence is routinely admitted when courts are determining whether the noneconomic damages cap applies.

In *Sheppard v. ACandS, Inc.*,121 an asbestos case tried in the Circuit Court for Baltimore City in May 1997, the plaintiffs’ expert testified as follows on direct examination:

Q. Doctor, with respect to the cancers caused by asbestos exposure, do you have an opinion within reasonable medical certainty as to when those tumors began?
A. Yes.
Q. What is that opinion?
A. With respect to mesothelioma, I think there is good evidence in the medical literature to suggest that those cancers begin at least ten years before they are diagnosed clinically. . . .
Q. Now, you said there is some good evidence in the literature. Does this have to do with the idea of doubling times?
A. It does.
[Extended explanation of various studies involving doubling times—mathematical formulas for measuring the rate of growth of certain cancers]
Q. Doctor, the concepts about doubling time and how cancers grow that you have discussed with the jury today, are those concepts that are generally accepted in the medical literature? . . .
A. Yes.122

The following testimony was elicited on cross-examination.

Q. Now, you told us that you had . . . a pretty thick file of articles that dealt with doubling, tumor doubling or tumor growth?
A. Yes.
Q. If I did pick up your file, there would only be one article in that file that would deal specifically with the issue

120. See *infra* notes 123-24 and accompanying text.
121. No. 97121701 (Cir. Ct. Baltimore City).
122. Official Trial Transcript at T.1610, T.1660-61, Sheppard v. ACandS, Inc., No. 9712701 (Cir. Ct. Baltimore City) (testimony of Dr. Hammar). See the Appendix to this Article for an extended excerpt.
of doubling or growth, tumor growth for mesotheliomas, am I correct?

A. Only one that I know about. . .

Q. You yourself have expressed that opinion under oath that this very article, the only article dealing with doubling time for mesotheliomas, in fact, in your opinion is not reliable?

A. Well, I — I don’t know exactly how I said it. I would say that when you only have one article that talks about a subject like that, you can’t absolutely be certain that that is what is going to come out to be the absolute way the data is. . . .

Q. For that reason, you do not think there is any absolute experimental data, either clinical or experimental for that matter, that will tell us exactly what the doubling time is for mesothelioma?

A. Correct. I think I answered that, too. . . .

Q. Now, at the close of your direct examination, Doctor, you were asked a question about when a specific — a mesothelioma began in a specific individual. . . .

Q. Let me take you back to your deposition in the Walatka matter. . . .

Quote, “QUESTION: So, Doctor, if I were to put the question to you, do you have an opinion to a reasonable degree of medical certainty concerning how long before June of 1995, Mr. Walatka had a malignant mesothelioma, would you be able to answer that question?

“ANSWER: I wouldn’t be able to answer in a scientific manner, or a manner based on scientific fact. All I could basically do would be to tell you what I just told you.” . . .

“QUESTION: So to a reasonable degree of medical certainty, you could not answer that question?

“ANSWER: That is probably correct. I really couldn’t. I don’t think anybody can answer that question.”123

As the above testimony illustrates, an adequate test has not been developed to measure the growth rate of a mesothelioma tumor.124 Nonetheless, as the above excerpts illustrate, the dearth of

123. See id. at T.1610. See the Appendix to this Article for an extended excerpt.
124. Published studies on doubling time have measured cancers other than mesothelioma. Doubling time differs dramatically depending on the cell type of the tumor. See Strauss, supra note 119, at 169. Even within the same cell
scholarship and the lack of an adequate formula has not stopped plaintiffs' experts from opining as to the inception of the disease in the various plaintiffs, and from basing their conclusions about the date of inception of mesothelioma upon the doubling test. Based upon the above testimony, not only does the doubling method test fail to meet Maryland's standard that the test be generally accepted within the relevant scientific community, but it does not even meet the more relaxed standard adopted by the Supreme Court in Daubert.

Under Daubert, the evidence in question must be reliable and relevant. In order to be reliable, the evidence must qualify as "scientific knowledge." The Court, in Daubert, defined scientific as having a "grounding in the methods and procedures of science," and knowledge as "more than subjective belief or unsupported speculation." Guidelines for determining whether evidence qualifies as scientific knowledge include: whether the theory or technique can or has been tested; whether it has been subject to peer review and publication; the known or potential rate of error; standards for controlling the technique's operation; and general acceptance within the scientific community.

Based on the above testimony, it is clear that the doubling method does not meet the reliability prong of the Daubert test when applied to mesothelioma cases. Plaintiffs' experts acknowledge that the scholarship on the test's application to mesothelioma is extremely limited, and its reliability has been questioned generally in the medical community. Its application to mesothelioma cases is admittedly uncertain and unsupported by any reliable data. Accordingly, it does not meet the requirement of reliability as set forth in Daubert.

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125. See supra notes 122-23 and accompanying text.
126. See supra notes 122-23 and accompanying text.
127. See supra notes 122-23 and accompanying text.
129. Id. at 590.
130. Id.
131. See id. at 593-94; see also WEINSTEIN & BERGER, supra note 127, § 702.05 (discussing the four Daubert guidelines).
132. See supra note 123 and accompanying text.
133. See supra note 123 and accompanying text.
In addition, the doubling method fails to meet the second prong of the *Daubert* test because it is not relevant. A conclusion based on application of the doubling method cannot assist the trier of fact in determining the inception of a mesothelioma tumor because it is not based on scientific knowledge with regard to measuring mesothelioma tumor growth. Moreover, the development of a test which might meet the reliability and relevancy requirements does not appear to be imminent.

Under the *Armstrong* and *Grimshaw* tests, much of the evidence on when the inhalation of asbestos causes a legally compensable harm involves speculative and medically unsupported expert testimony. In both *Armstrong* and *Grimshaw*, the courts were called upon merely to decide whether the medical evidence was sufficient to conclude that the injury occurred prior to the effective date of the noneconomic damages cap statute. It is inevitable, however, that the Maryland appellate courts will ultimately have to address the issue of admissibility of this expert testimony in future cases when the trier of fact is called upon to determine when an asbestos-related disease first occurred. The cap applicability test established by the Maryland courts in *Armstrong* and *Grimshaw*, at least in its application to mesothelioma cases, relies upon the establishment of facts which arguably cannot currently be supported scientifically in a manner which meets the admissibility requirements of Maryland law.

In rejecting plaintiffs' claims that an asbestos-related injury occurs, for purposes of the cap statute, upon exposure to asbestos, and defendants' assertions that the injury occurs when the plaintiff experiences symptoms of the disease, the *Grimshaw* court established a *functional impairment* test for which there seems to be no objective measure. By requiring a finding as to the onset of a disease, 

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134. See supra notes 119-23 and accompanying text.
135. See supra notes 119-23 and accompanying text.
136. See, e.g., Official Trial Transcript at T.1610, T.1660-61, Sheppard v. ACandS, Inc., No. 9712701 (Cir. Ct. Baltimore City) (testimony of Dr. Hammar); see also supra notes 113-23 and accompanying text.
137. See supra notes 117-20 and accompanying text.
138. See Anchor Packing Co. v. Grimshaw, 115 Md. App. 134, 158-60, 692 A.2d 5, 17-18 (1997). The lengthy latency period renders efforts to pinpoint the date on which the disease was contracted virtually impossible, medically and legally. See Porter v. American Optical Corp., 641 F.2d 1128, 1133 (5th Cir. 1981). Plaintiffs, of course, would still argue that the development of the disease and the commencement of a plaintiff's *functional impairment* occurs upon first exposure. Defendants would still maintain that such impairment cannot conceiva-
which experts have testified occurs years before the first symptom, the test requires a factual determination as to the first manifestation of undetectable, asymptomatic, subclinical, cellular change. There appears to be no scientific test, nor does one appear to be imminently available, to make such a determination. Thus, as long as Grimshaw remains the law in Maryland with regard to determining the applicability of the cap statute, evidentiary issues and problems of proof will persist. Moreover, other states using a test similar to the Maryland test will face the same evidentiary issues, whether they apply a Frey-Reed or Daubert standard of admissibility.

IV. THE BURDEN OF PROOF

Predictably, the evidentiary problems associated with the cap applicability issue have wrought a threshold issue: Who bears the burden of proof as to the applicability of the cap statute? Does the defendant bear the burden of showing that the relevant injury occurred after the effective date of the cap statute, or is it the plaintiff's burden to show that the injury occurred prior to that date?

Generally, plaintiffs claim that a defendant bears the burden of proof on the applicability of the cap statute for the following reasons.

1. When a defendant seeks to take advantage of a rule requiring a reduction in the amount of damages claimed by a plaintiff, the defendant has the burden of proving that rule's applicability.

2. Plaintiffs asserting negligence and strict liability theories of recovery need only show that they suffered harm as a result of the defendant's conduct. A defendant's reliance on the cap statute to limit plaintiff's damages constitutes a defense, avoidance or limitation on recovery, that must be affirmatively proven by defendants.

bly occur until the onset of the first symptom.

139. See Grimshaw, 115 Md. App. at 161, 692 A.2d at 18; see also supra notes 122-23 and accompanying text.

140. See supra notes 119-23 and accompanying text.

141. See supra notes 117-20 and accompanying text.

142. See infra notes 143-50 and accompanying text.

143. See, e.g., In re Baltimore City Personal Asbestos Litig., No. 97027701, slip op. at 5 (Cir. Ct. Baltimore City, Sept. 9, 1997).

144. See id.

145. See id.
3. Defendants seek to apply the cap statute in derogation of plaintiffs' common law right to obtain damages deemed appropriate by the trier of fact; thus they must prove its applicability.

Defendants, on the other hand, assert that plaintiffs bear the burden of proof for the following reasons:146

1. Assigning the burden of proof to a defendant would create a presumption that the statute does not apply, and a presumption against applicability is contrary to the remedial purpose of the statute. The mandatory language of the statute establishes a presumption of its applicability.147

2. Where suit is filed and the evidence of first compensable harm occurs after July 1, 1986, the statute presumptively applies, and the person claiming inapplicability bears the burden of proving avoidance of the statute.148

3. The legislature did not make the cap an affirmative defense.

4. Maryland asbestos cases149 that have applied the cap have all implicitly placed the burden on the plaintiff.150

147. See In re Baltimore City Personal Asbestos Litig., No. 97027701, slip op. at 5 (Cir. Ct. Baltimore City, Sept. 9, 1997).
148. See id.
149. See supra note 12.
150. See Brown v. R. J. Reynolds Tobacco Co., 52 F.3d 524 (5th Cir. 1995); Chustz v. R. J. Reynolds Tobacco Co., 961 F. Supp. 143 (M.D. La. 1996) (affirming and granting, respectively, summary judgment motions of defendants based on plaintiffs' failure to produce evidence that their causes of action accrued—that they suffered damages or bodily injury—before the effective date of the Louisiana Product Liability Act).

Baltimore City Circuit Court Judge Richard Rombro recently held, that defendants bear the burden of proof as to applicability of the cap statute. See Mem. Op. and Order, Walatka v. ACandS, Inc., No. 9234501, (Cir. Ct. Baltimore City, Sept. 9, 1997). The court maintained that the burden of proof is on the party who asserts the affirmative of an issue, and that burden never shifts. See id. at 6. The court further maintained that a defendant has the burden of proving matters of reduction and mitigation of plaintiff's damages, and since the defendants sought the cap's benefit in order to reduce the verdict, they bore the burden of proving its applicability. See id. The court found that because the defendants presented no evidence that the plaintiff's functional impairment developed after July 1, 1986, they failed to carry their burden of proof as to the cap's applicability. See id. at 8.
In *Porter Hayden Co. v. Brannan*, the first Maryland appellate opinion to expressly address the burden of proof issue in the context of applying the noneconomic damages cap, the Court of Special Appeals of Maryland held that defendants bear the burden of proof. The court observed that “[t]he matter was simply of no significance until after the jury returned its verdict,” and, thus, it rejected the defendants’ contentions that the plaintiffs had the burden of producing evidence during trial to establish that the cap was inapplicable. The *Brannan* court noted that when the verdicts were rendered, the defendants moved to reduce the amounts of the awards in conformance with the statute. The court observed that “[o]rdinarily, the moving party bears the burden of establishing that his or her motion should be granted,” and concluded that it could “perceive no reason to depart from the general rule in the instant case.” The court held that “none of the evidence . . . established precisely when the plaintiffs developed their mesotheliomas,” and, therefore, the defendants failed to shoulder their burden.

The court’s ruling highlights a practical problem with assigning the burden of proof to a defendant. Assigning the burden to a defendant places the defendant in the position of denying that the plaintiff has developed the disease and then having to offer expert proof that the plaintiff developed the disease between 1986 and the time of trial. Traditionally, defendants have been required to plead in the alternative. For example, with regard to the defense of contributory negligence, a defendant maintains that it was not negligent, but assuming it was, plaintiff was also negligent in such a way as to contribute to the accident. Here, however, the defendant is forced to present scientific evidence that directly contradicts its assertion as to plaintiff’s lack of injury. It is fundamentally distinct from a traditional plea in the alternative because in the traditional scenario, the defendant is not forced to prove an element of the plaintiff’s case in order to prevail on the issue. As a practical matter,

152. See *id*.
153. *Id*.: at 40.
154. See *id*. at 40-41.
155. *Id*.
156. *Id*. at 42.
157. See *id*.
therefore, it may be unfair to assign this burden to a defendant.\textsuperscript{159}

This ruling adds to the uncertainty and highlights the unworl

kability of the current test for determining whether to apply the noneconomic damages cap. While the Maryland appellate courts have acknowledged the difficulty in determining when a cause of action arises,\textsuperscript{160} and doctors have acknowledged that a precise determination is impossible given the current medical science,\textsuperscript{161} the Court of Special Appeals of Maryland seemingly suggests in \textit{Brannan} that defendants must establish "precisely when the plaintiffs developed their mesotheliomas."\textsuperscript{162} As plaintiff's experts have acknowledged, determining the exact date of harm is impossible.\textsuperscript{163} Thus, it is inconceivable that Maryland courts would require defendants to overcome this insurmountable hurdle. The \textit{Brannan} court's ruling compounds the confusion surrounding the application of the noneconomic damages cap in latent disease cases in Maryland.

V. LOSS OF CONSORTIUM

The effect of a cap on noneconomic damages on loss of consortium claims is another issue currently being litigated in Maryland.\textsuperscript{164} Maryland courts have held that a loss of consortium claim is derivative of the injured spouse's personal injury claim, and, therefore, a single cap applies to the entire action.\textsuperscript{165}

In \textit{Grimshaw}, the trial court refused to apply the noneconomic damages cap to reduce the three plaintiffs' one million dollar loss of consortium awards.\textsuperscript{166} The court of special appeals affirmed the trial court's ruling, reasoning that the plaintiffs suffered personal injury when they developed mesothelioma.\textsuperscript{167} Thus, the cause of action in each case arose prior to the effective date of the statute, not-
withstanding the fact that some of the harm suffered—loss of consortium—occurred after that date.\footnote{168}

Apparently, the *Grimshaw* court based its holding on the implicit notion that loss of consortium damages constitute merely a part of the harm arising from the spouse's physical injuries; thus, for purposes of applying the cap statute, the physical injury constituted the only * Injury* that was applicable to determining when the cause of action arose.\footnote{169}

The court did not, however, explicitly address the question of whether, in determining the applicability of the cap statute, the injury to the marital unit and the spouse's personal injury are one * Injury* or two separate injuries. Although a loss of consortium claim derives from the initial injury to the spouse, it clearly represents an injury separate from that suffered by the injured spouse. It is an injury to the marital unit.\footnote{170} To conclude that loss of consortium is the *same Injury*, in the sense that all the elements of a cause of action for loss of consortium are present when the elements of the cause of action based on the personal injury claim are met, does not reflect factual reality. The loss of consortium—the "loss of society, affection, assistance, and conjugal fellowship"—does not occur when the first cancer cell forms in the injured spouse's body, even though that cancer may be the * Injury* that results in the ultimate death. Generally, a plaintiff's loss of consortium would not occur until well after the spouse's first symptom, when the injury prevents the spouse from doing what he or she used to be able to do,

\footnote{168. The *Grimshaw* court stated:
In the case at bar, each plaintiff exposed to asbestos suffered personal injury when he or she developed mesothelioma, which was prior to 1986. It is true, however, that some of the harm plaintiffs suffered as a result of those personal injuries, i.e., loss of consortium, did not occur until after the effective date of the statute. . . . Although plaintiffs continued to suffer damages, as a result of their personal injuries, after the effective date of the statute . . . the cause of action arose prior to the effective date. *Id.*; see also Porter Hayden Co. v. Brannan, No. 190, slip op. at 38 (Md. Ct. Spec. App., Mar. 10, 1998) ("We . . . explained in *Grimshaw* that, because a loss of consortium claim is derivative of a claim for personal injury, the cause of action for loss of consortium is deemed to have arisen when the cause of action for personal injury arose, even if the harm actually occurred later.").


thus, adversely affecting the marital relationship. Analogous to a loss of consortium claim is a cause of action for wrongful death, which arises upon the death of the injured spouse, and not when the first cancerous cell forms in the spouse’s body. It would be logical to conclude, therefore, that a cause of action for loss of consortium can only arise when the marital unit experiences some injury.

172. See id.
173. See generally Oxtoby v. McGowan, 294 Md. 83, 447 A.2d 860 (1982). In Oxtoby, the court interpreted the effective date clause of the Health Care Malpractice Claims Act, which provided that the Act would apply only to medical injuries occurring on or after July 1, 1976. See id. at 85, 447 A.2d at 862. The question presented to the court was whether medical injury occurred when the malpractice occurred or when a resulting harm or damage occurred. The court concluded that medical injuries referred to “legally cognizable wrongs or damage arising or resulting from the rendering or failure to render health care.” Id. at 94, 447 A.2d at 866. The court considered whether all claims arising out of the injury to the patient would be treated as a unit for purposes of the statute’s applicability where the initial physical injury occurred before, but some of the claims arose after, the effective date. See id. at 95, 447 A.2d at 866-67. The court considered situations in which a physical injury occurring before the effective date resulted in continued damage to the patient after the effective date. See id. at 96-97, 447 A.2d at 867-68. The court concluded that a medical injury would have been deemed to have occurred prior to the Act’s effective date, even though all of the resulting damage to the patient had not been suffered prior to that date. See id. at 97, 447 A.2d at 868. Moreover, the court concluded that a wrongful death claim, which asserted a separate cause of action, should not be treated as a claim for a separate medical injury, but should be brought under the umbrella of the medical injury which constituted the physical harm which was the basis of the survival action. See id. at 95, 99, 447 A.2d at 866-67, 869. The court concluded that based on the statute’s purpose to reduce costs of handling claims, and because the statute provided a new procedure governing litigation of medical malpractice actions, whereby claims arising out of injuries after the effective date would be subject to arbitration, and those before would not, the legislature intended that all claims arising out of one injury be litigated together. See id. at 97-98, 447 A.2d at 868. Accordingly, it held that where a medical injury occurred before the effective date, wrongful death actions based on that patient’s death were not subject to the Act, regardless of when the death occurred. See id. at 99, 447 A.2d at 869. By contrast, application of the noneconomic damages cap to a loss of consortium claim in a case in which the cap does not apply to the underlying claim for injury does not create the procedural problems involved in Oxtoby. Moreover, it is clear that, for purposes of cap applicability, the cap will apply to the wrongful death action although the injury occurred prior to the applicable date of the statute. See Grimshaw, 115 Md. App. at 153, 692 A.2d at 14.
The problem inherent in the Grimshaw court's holding becomes clear when one contemplates the following situation. A worker is exposed to asbestos between 1955 and 1978. He marries in 1990. He experiences his first symptoms in 1994, becomes ill, and dies the same year. After his death, his estate and his widow bring survival and wrongful death actions against various asbestos manufacturers. The court finds that his injury developed before 1986, his cause of action therefore arose before 1986, and accordingly, the limitation on noneconomic damages is inapplicable. The court further concludes that, under Grimshaw, the widow's cause of action for loss of consortium arose before 1986, even though the couple did not marry until 1990, and he did not experience any symptoms until 1994.

Applying the Grimshaw test to the hypothetical loss of consortium claim highlights the test's illogical premise and inherent unworkability. As noted above, applying the Grimshaw Court's analysis of the cap statute in the context of a personal injury claim demonstrates that in many cases, a cause of action may arise years before a single item of damages has been incurred. Likewise, in the context of a loss of consortium claim, under the Grimshaw interpretation, a cause of action may be deemed to have arisen years before the first injury to the relationship. In some cases, the cause of action for loss of consortium could be deemed to have occurred even before the marriage took place.

VI. CALIFORNIA - BUTTRAM v. OWENS CORNING

California, the only other state that has addressed some of the above issues in the context of a statute limiting noneconomic damages, has chosen a direction that avoids the problems discussed

174. See supra note 107 and accompanying text.
175. See supra note 108 and accompanying text.
176. But see Consorti v. Owens-Corning Fiberglas Corp., 657 N.E.2d 1301 (N.Y. 1995) (finding that because tortious injury occurred upon plaintiff's inhalation of asbestos fibers, which occurred prior to his marriage, the wife could not recover loss of consortium damages even though husband's mesothelioma developed sixteen years after the marriage). The Consorti court made no distinction between the injury to the husband and the injury to the marital unit. In a later case, the Court of Appeals of New York recognized that its bright line exposure rule was abrogated by statute, specifically N.Y. C.P.L.R. 214-c (McKinney 1986), which provided for a discovery rule in toxic tort cases. See Blanco v. American Tel. & Tel. Co., 689 N.E.2d 506, 509 (N.Y. 1997).
The Court of Appeals of Maryland should adopt a similar interpretation if and when it does accept this issue for review.\textsuperscript{179}

In August, the Supreme Court of California decided \textit{Buttram v. Owens-Corning Fiberglas Corp.},\textsuperscript{180} which addressed the issue of when a cause of action accrues for purposes of applying California’s noneconomic damages cap to damages from a latent disease, such as asbestos-related pleural mesothelioma. The \textit{Buttram} court held that the cause of action accrues when either the disease was diagnosed or when the plaintiff otherwise discovered the illness or injuries, whichever occurs first.\textsuperscript{181} In doing so, the California court rejected as unworkable a test similar to the \textit{Grimshaw} test.\textsuperscript{182}

The Fair Responsibility Act,\textsuperscript{183} popularly known as Proposition 51,\textsuperscript{184} is California’s statutory limitation on damages.\textsuperscript{185} Proposition

\begin{itemize}
\item \textsuperscript{178} See id.
\item \textsuperscript{179} See Shepardson, \textit{supra} note 19, at 474-75 (comparing Maryland’s approach in \textit{Armstrong II} with California’s approach in \textit{Buttram}). As one commentator concluded, the \textit{Buttram} court’s approach “strikes the proper balance between consideration of a party’s settled expectation of the law, accrual of rights, and implementation of new legislation.” \textit{Id.} at 478.
\item \textsuperscript{180} See \textit{Buttram}, 941 P.2d at 71.
\item \textsuperscript{181} See \textit{id.} at 83; see also Champagne v. Raybestos-Manhattan, Inc., 562 A.2d 1100 (Conn. 1989) (holding that the cause of action accrued, for purposes of applicability of product liability statute, when plaintiff suffered actionable harm—when plaintiff discovered or should have discovered that he had been injured and that defendant’s conduct caused such injury); Shepardson, \textit{supra} note 19, at 460 (explaining that the proper accrual date was held to be “the date of the plaintiff’s diagnosis or diagnosibility”).
\item \textsuperscript{182} See \textit{Buttram}, 941 P.2d at 82.
\item \textsuperscript{183} See \textit{CALIF. CIV. CODE}, §§ 1431-1431.5. (West 1982 & Supp. 1998).
\item \textsuperscript{184} See Shepardson, \textit{supra} note 19, at 459.
\item \textsuperscript{185} See \textit{Buttram}, 941 P.2d at 75. The Act begins with the following statement of Findings and Declaration of Purpose:

The legal doctrine of joint and several liability, also known as the ‘deep pocket rule,’ has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) . . . Under joint and several liability, if [deep pocket defendants] are found to share even a fraction of the fault, they are often held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of soaring costs of lawsuits and insurance premiums.
51, which took effect June 4, 1986, modified significantly the common law rule of joint and several liability in situations involving comparative fault. Under Proposition 51, multiple tortfeasors continue to be jointly and severally liable for plaintiffs' economic damages. However, after Proposition 51, multiple tortfeasors are now liable only for the percentage of noneconomic damages that correlates to their own percentage of fault.

Proposition 51, codified in California's Fair Responsibility Act, provides:

In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment

§ 1431.1 (a)-(c). The measure declares that its purpose is to "remedy these inequities" by holding defendants "liable in closer proportion to their degree of fault," id. § 1431.1 (c), thus eliminating the "deep pocket rule" and the resulting injustice to certain defendants. See id. § 1431.1 (a); Buttram, 941 P.2d at 75.

186. See Buttram, 941 P.2d at 75.
187. See id.
188. See id. As stated by the California court:

Proposition 51 was designed to rectify the situation [that existed] under California's comparative fault tort law, whereby a defendant who bears only a small share of fault for an injury can be left with the obligation to pay all or a large share of the plaintiff's damages [when other more culpable tortfeasors are insolvent]. The drafters of Proposition 51 attempted to alleviate the perceived inequity arising from this situation. 'While recognizing the potential inequity in a rule which would require an injured plaintiff . . . to bear the full brunt of the loss if one of a number of tortfeasors should prove insolvent, the drafters of the initiative at the same time concluded that it was unfair . . . to require a tortfeasor who might only be minimally culpable to bear all of the plaintiff's damages. As a result, the drafters crafted a compromise solution: Proposition 51 retains the traditional joint and several liability doctrine with respect to a plaintiff's economic damages, but adopts a rule of several liability for noneconomic damages, providing that each defendant is liable for only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury.

Id. at 75 (quoting Evangelatos v. Superior Court, 753 P.2d 585, 590-91 (Cal. 1988)).
shall be rendered against that defendant for that amount.\(^{189}\)

Like Maryland's cap statute, Proposition 51 is prospective only in its application.\(^{190}\) The California Supreme Court previously held that Proposition 51 does not apply to a cause of action that has "accrued" before its effective date of June 4, 1986.\(^{191}\)

In *Buttram*, the California Supreme Court was called upon to determine when the plaintiff's cause of action for damages arising from mesothelioma *accrued* for the purpose of determining whether Proposition 51 was applicable to his case.\(^{192}\) The court reviewed a court of appeal's decision affirming a trial court ruling that Proposition 51 did not apply to the plaintiff's case because the plaintiff's medical testimony had established that "undetected cancer cells in probability had started forming by 1984, two years prior to the effective date of Proposition 51,"\(^{193}\) and thus the plaintiff's cause of action for injuries arising from pleural mesothelioma had *accrued* before the effective date.\(^{194}\) The court of appeal had reasoned that, for purposes of Proposition 51, plaintiff's cause of action *accrued* when "he suffered some sort of appreciable, meaning compensable, harm or injury."\(^{195}\) Under the court of appeal's test, "subclinical (i.e., undiscovered and unmanifested) cellular changes, such as development of the first cancer cell, constitute[d] the 'appreciable harm' that triggers accrual of a cause of action for Proposition 51 purposes in the latent disease context."\(^{196}\)

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\(^{189}\) Cal. Civ. Code § 1431.2(a). The statute defines noneconomic damages as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." CAL. CIV. CODE § 1431.2(b)(2).

\(^{190}\) See Evangelatos, 753 P.2d at 598.

\(^{191}\) See id. at 611.

\(^{192}\) See Buttram, 941 P.2d at 73.

\(^{193}\) Id.

\(^{194}\) See id.

\(^{195}\) Id.

\(^{196}\) Id. The court of appeal articulated the test as follows: "[F]or purposes of determining the applicability of Proposition 51, a cause of action accrues when the injury reaches the point that it is 'compensable,' i.e., when the plaintiff suffers such 'appreciable harm' that he would be entitled to commence an action for damages," *Buttram v. Owens-Corning Fiberglas Corp.*, 39 Cal. Rptr. 2d 703, 708 (Cal. Ct. App. 1995), rev'd, 941 P.2d 71 (Cal. 1997). In applying the test, the court concluded that the plaintiff had suffered appreciable harm prior to the effective date of Proposition 51 where there was unrebuted testimony that the plaintiff "probably had cancer cells seven years before the 1991
The Supreme Court of California noted that there were a number of possible triggering events that might establish the accrual date of a cause of action for personal injuries arising from a latent disease. The possible triggering events included medically significant events such as exposure to the substance, subclinical changes, the appearance of symptoms, diagnosis, or legally significant events such as actual or constructive knowledge of the development of the disease.

The court observed, however, that a cause of action may be viewed as accruing for different purposes on different dates; in the context of third-party liability insurance coverage, courts have invoked an early accrual date; and in a statute of limitations analysis, courts have applied a later accrual date, consistent with the policy considerations underlying each determination. The court observed that one consideration that it took into account in determining that Proposition 51 was only to be applied prospectively was that applying it retroactively could have unfair consequences on parties who had acted in reasonable reliance on pre-Proposition 51 law.

However, in the context of determining the appropriate accrual

discovery of fluid in his lungs." Id. at 707; see also Peterson v. Owens-Corning Fiberglas Corp., 50 Cal. Rptr. 2d 902, 903 (Cal. Ct. App. 1996) ("We hold that, for purposes of Proposition 51, an action accrues when the plaintiff undergoes a physiological change that, to a reasonable degree of medical certainty, caused the condition giving rise to the claim.")., overruled by Buttram v. Owens-Corning Fiberglas Corp., 941 P.2d 71 (Cal. 1997); Coughlin v. Owens-Illinois, Inc., 27 Cal. Rptr. 2d 214, 229 (Cal. Ct. App. 1993) ("[T]he key inquiry is: When did plaintiff suffer sufficient injury such that, had he been aware of it, he could have established a cause of action?")., overruled by Buttram, 941 P.2d 71.

197. See Buttram, 941 P.2d at 76-77. Specifically, the court stated:

Analytically, one could posit a continuum of triggering events which, from a medical or legal standpoint, might be used to establish the date on which a cause of action for personal injuries arising from a latent disease has "accrued," beginning with initial exposure to the toxic substance and proceeding through the inception of undetected physical changes (i.e., "subclinical" or "cellular" changes), the first appearance of symptoms, medical diagnosis (which may come before or after the onset of symptomatology), and the occurrence of certain legally significant events (i.e., actual or constructive knowledge of the onset of disease).

Id.

198. See id.

199. See id. at 77.

200. See id. at 79-80.
date of a cause of action for latent disease, the reasonable reliance consideration did not exist, because prior to discovery or diagnosis, the plaintiff has no awareness of his injury or of the possibility of a need to file suit in the future.\footnote{201}{See \textit{id.} at 80. The court stated:}

The Supreme Court of California observed that the Court of Appeals of Maryland's opinion in \textit{Armstrong II} "gives no consideration whatsoever to the analogous policy considerations and purposes to be served in adopting an accrual rule that determines the applicability of a tort reform statute such as Proposition 51."\footnote{202}{\textit{Id.} at 82.} The \textit{Buttram} court added: "We cannot agree that subclinical alteration of the cells during the decades-long latency period of asbestos-related disease, determined only in retrospect through medical testimony, without manifestation of any symptoms or awareness of illness on the plaintiff's part, should be the event establishing accrual . . . ."\footnote{203}{\textit{Id.}}

The California court noted that under the appreciable harm test, an asbestos plaintiff who had suffered no impairment or damages as of the effective date of Proposition 51, but whose medical experts later convinced a jury that he had developed cellular changes decades earlier, could have his suit governed by tort law that was abrogated more than a decade earlier.\footnote{204}{The court observed: Under the ["appreciable harm" test] the lawsuits of any presently identified or future asbestos plaintiff, who, as of Proposition 51's effective date of June 4, 1986, had no actual physical impairment or}
fore rejected a test "dependent on medical testimony that seeks to retrospectively determine the point at which asymptomatic undetected cellular changes in probability first altered the plaintiff's physiology years or decades earlier," and instead adopted the "diagnosis or discovery" test to determine applicability of the limitation on noneconomic damages.

In rejecting the Court of Appeals of Maryland's reasoning in Armstrong II, the Supreme Court of California noted that the Maryland court's holding in Armstrong II appeared to have been based, to a large extent, on the express meaning of the word arises. It observed that the California statute had no similar controlling language.

Arguably, the use of the word arises, rather than accrues, in Maryland's noneconomic damages cap statute supports the argument that it would not be appropriate to make discovery or diagnosis the trigger for determining the applicable date when determining whether the claim is governed by the cap. However, that is not necessarily so. The Court of Appeals of Maryland defined arises as "comes into existence" and concluded that a cause of action arises when facts supporting all of its elements have come into exis-

symptoms of any asbestos-related disease and who had yet to suffer any noneconomic damages or harbor any awareness that he would in the future suffer from such a disease and ultimately bring suit against asbestos defendants—but whose medical experts later convince a jury in retrospect that in probability formation of asymptomatic and undetected cellular changes had commenced decades earlier—would be governed by tort laws overwhelmingly abrogated by the electorate over a decade ago. Indeed, given the decades-long latency periods of asbestos-related disease, it is not unrealistic to conclude that under the accrual test adopted by the Court of Appeal, the now disfavored joint and several liability rule would still have to be applied in asbestos-related latent injury litigation well into the 21st century.

Id. at 83.

205. Id. at 80 n.5.

206. See id. at 80. However, the court did not consider the question of when a cause of action for loss of consortium would accrue, nor did it specifically address the issue of which party bears the burden of proof with regard to accrual for purposes of applicability of the statute.

207. See id. at 81.

208. See id.

The court of appeals stated that the fact of injury was generally the last to come into existence, and therefore, a cause of action arose when the injury came into existence. 211

The *Armstrong II* court then assumed that the injury would have to occur before diagnosis or discovery. 212 It would be equally consistent with the language of the statute, however, to conclude that the injury occurred, and thus the cause of action arose, upon diagnosis or discovery, whichever occurred earlier. This is consistent with the requirement that the plaintiff incur some objectively verifiable functional impairment in order to have a legally compensable injury. 213

It is only after the plaintiff has been diagnosed or has experienced symptoms of disease that the plaintiff incurs such legally compensable damages as lost wages and pain and suffering. 214 Thus, a *diagnosis* or *discovery* test would be consistent with the language of Maryland's noneconomic damages cap statute.

A *diagnosis* or *discovery* test would be both simpler to apply and more consistent with the policy considerations underlying the statute. The Maryland courts' mechanical application of the language of the statute gives no consideration either to the policy considerations or to the practical considerations associated with applying the statute.

VII. CONCLUSION

The Court of Appeals of Maryland has not yet expressed a willingness to address the issue of the applicability of the statutory cap on noneconomic damages. 215 The court should grant certiorari on this issue in a future case in order to clarify the law, remedy the problems of proof discussed above, and ensure that the statute is applied in a manner which more fully effectuates its intent.

The court should clarify its holding in *Armstrong II*, that a cause of action arises for purposes of the cap statute "when facts exist to support each element," 216 of the cause of action, with the fact of injury being the last element to come into existence, by defining the *injury* element as requiring legally compensable harm that would
form a basis for recovery by a plaintiff.\textsuperscript{217} The court should reaffirm the 
*Armstrong I* holding that mere alteration of the pleura—the thin membrane which lines the chest wall and diaphragm—does not constitute a legally compensable injury\textsuperscript{218} because it does not cause any loss or detriment.\textsuperscript{219} Further, the court should make clear that legally compensable injury occurs only when physical changes cause an objectively verifiable *functional impairment*, as expressed by the court of special appeals in *Armstrong I*.\textsuperscript{220} Further, the court should make clear that functional impairment does not occur until a plaintiff has experienced symptoms of the disease which actually impair his physical functioning.\textsuperscript{221} Finally, the court should make clear that, for the purpose of applying the cap statute, an *injury* does not occur until the plaintiff suffers damages which are legally compensable, such as medical expenses, lost wages, pain and suffering, or loss of consortium.\textsuperscript{222}

The test adopted by the Court of Special Appeals of Maryland in *Grimshaw* is based upon a “development of disease” analysis, for which there seems to be no objective measure. This test seems inconsistent with settled principles of Maryland law requiring that, in order to state a tort cause of action, a plaintiff must incur legally compensable damages.\textsuperscript{223} California’s “discovery or diagnosis” test, adopted in *Buttram*, avoids the problems associated with the *Grimshaw* test. California’s test provides a clear method for courts to determine when a cause of action arises for purposes of applying the limits provided by noneconomic damages cap statutes.\textsuperscript{224} Maryland and other states faced with these issues in asbestos or other latent disease cases can avoid the problems described above by adopting similar tests.

\textsuperscript{217} See supra notes 107-14 and accompanying text.
\textsuperscript{218} See supra notes 71-77 and accompanying text.
\textsuperscript{219} See supra notes 71-77 and accompanying text.
\textsuperscript{220} See *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 735, 591 A.2d 544, 561 (1991) (“Mere exposure to asbestos and cellular changes resulting from asbestos exposure, such as pleural plaques and thickening, alone is not a functional impairment or harm, and therefore, do not constitute a legally compensable injury.”); see also supra notes 71-77 and accompanying text.
\textsuperscript{221} See supra notes 106-11 and accompanying text.
\textsuperscript{222} See supra notes 71-77, 106-11 and accompanying text.
\textsuperscript{223} See supra notes 70-77 and accompanying text.
\textsuperscript{224} See supra notes 160-63, 192-98, 202-14 and accompanying text.
APPENDIX

Testimony of Medical Expert for Plaintiff in Sheppard v. ACandS, Case No. 97121701, Circuit Court for Baltimore City:

Q. Doctor, with respect to the cancers caused by asbestos exposure, do you have an opinion within reasonable medical certainty as to when those tumors began?
A. Yes.
Q. What is that opinion?
A. With respect to mesothelioma, I think there is good evidence in the medical literature to suggest that those cancers begin at least ten years before they are diagnosed clinically.

Q. Now, you said there is some good evidence in the literature. Does this have to do with the idea of doubling times?
A. It does.

[Extended explanation of various studies involving doubling times—mathematical formulas for measuring the rate of growth of certain cancers]

Q. Doctor, the concepts about doubling time and how cancers grow that you have discussed with the jury today, are those concepts that are generally accepted in the medical literature?
A. Yes.

The following testimony was elicited on cross-examination.

Q. Now you told us that you had . . . a pretty thick file of articles that dealt with doubling, tumor doubling or tumor growth?
A. Yes.

Q. If I did pick up your file, there would only be one article in that file that would deal specifically with the issue of doubling or growth, tumor growth for mesotheliomas, am I correct?
A. Only one that I know about.

Q. Fair enough. And the only one, as you said, that you are aware of is the article by Dr. Greengard and others styled, Enzyme Pathology of Human Mesotheliomas, published in the Journal of the National Cancer Institute in 1986, correct?

Q. Now I don't think I heard this.
Did you tell the jury that there are a lot of folks in the medical and scientific community that have not found this study to be reliable in terms of doubling time or growth rate for mesotheliomas?

A. I think there has always been a question about the thymidine kinase concept.

And the issue has always arisen as how accurate that is with respect to whether or not it is as accurate as the doubling times calculated by mathematical measurements of chance in the tumor over a period of time. . . .

And that's probably going to exist until more data is given. But, you know, I think Greengard, at least in her initial article, indicated why she thought it was accurate. And she indicated in the second article on mesotheliomas what the values she obtained for the 16 cases that she examined.

Q. You yourself have expressed that opinion under oath that this very article, the only article dealing with doubling time for mesotheliomas, in fact, in your opinion is not reliable?

A. Well, I — I don't know exactly how I said it. I would say that when you only have one article that talks about a subject like that, you can't absolutely be certain that that is what is going to come out to be the absolute way the data is.

But I would also say that that is the only thing that has been done. And based on Greengard's initial studies, there is reasons to believe that that data at least would indicate what the doubling times were for lung cancers, based on the data that she calculated.

What she didn't do, and there is no way to do this, there is no way to do a mathematical calculation of doubling times in mesothelioma. It is impossible. And the reason it is impossible is because of the way the tumor grows.

So then you are always going to have to take this data that is attributable to some other type of tumor and see if you can apply it to mesothelioma.

And I think I gave the reasons that I thought you could, in general, apply lung cancer doubling to mesothelioma, based on the fact that the epithelial mesotheliomas have a lower S phase, and have a more normal DNA index than, say, pulmonary adenocarcinomas.

. . .
Q. In the Walatka deposition, you talked about that there was one study that had been done, but that you did not think it was that reliable of a study.

"Is that the study that was done by, I guess, it was the pediatrician, Greengard."

Your answer on March 4, 1997 was, "Yes."

"QUESTION: Are there any other studies other than the Greengard study?"

And your answer was, "No." . . .

Q. Now, . . . would it be fair to state, contrasted with the issue of doubling time with lung cancer, very few people have considered the issue of doubling time with mesothelioma?

A. That's true. That's for the reasons I have already expressed. Namely, that it is a tumor that can't be measured by ordinary radiographic techniques.

Q. For that reason, you do not think there is any absolute experimental data, either clinical or experimental for that matter, that will tell us exactly what the doubling time is for mesothelioma?

A. Correct. I think I answered that, too.

. . .

Q. As of today, you have not done any [experimental work] that you have published in the medical literature; is that right?

A. Not published in the medical literature, no.

Q. And would you agree that, basically, your thought is, we know very little about how fast mesotheliomas grow?

A. In general, that is correct.

Q. Now, at the close of your direct examination, Doctor, you were asked a question about when a specific — a mesothelioma began in a specific individual.

Do you recall that?

A. Yes, I do.

Q. Now, you have been asked that question before, have you not?

A. Yes.

Q. Let me take you back to your deposition in the Walatka matter, which was referenced in the earlier question and answer. . . .

Q. And if I could direct you to page 50, Doctor, you were asked the following question.
Quote, "QUESTION: So, Doctor, if I were to put the question to you, do you have an opinion to a reasonable degree of medical certainty concerning how long before June of 1995, Mr. Walatka had a malignant mesothelioma, would you be able to answer that question?

"ANSWER: I wouldn't be able to answer in a scientific manner, or a manner based on scientific fact. All I could basically do would be to tell you what I just told you." . . .

"QUESTION: So to a reasonable degree of medical certainty, you could not answer that question?

"ANSWER: That is probably correct. I really couldn't. I don't think anybody can answer that question."

Did I read that correctly?
A. You did.

Q. And you subsequently testified at the trial of that matter in Baltimore on February 3, 1997, did you not? . . .

Q. And referring now to page 1179, "QUESTION: You can't say within a reasonable degree of medical certainty how long before June of 1995, Mr. Walatka had a malignant mesothelioma?

"ANSWER: Probably not within medical certainty. There has only actually been one study that had looked at how fast mesotheliomas grow and how — what their doubling time is. And that study might not even be reliable, so I could not."

Q. And then you were asked a follow-up question on page 1180, the next page, and you were asked this follow-up question.

"Is it just not known at this point in time?

"ANSWER: It is the type of tumor that might not be known for a long time until we get some better methods, because it doesn't grow as a spherical mass. It grows as a rind. And it is very hard to see the change in size over time, which is necessary to calculate how fast a tumor grows."

Did I state your answer to that question correctly?
A. You did, yes.

Q. And as you have told us a moment ago, there isn't anything new and startling in the medical literature which has appeared since your deposition in December of 1996, or your trial testimony in 1997 on the issue of doubling time and mesotheliomas; is that correct?
A. That is correct.
