

# VIRGINIA LAWYERS WEEKLY

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## THE WEEK'S OPINIONS

### **NEGLIGENCE**

#### **Maritime Law – Asbestos Exposure**

A \$3.4 million award is affirmed for the estate of a Newport News shipyard worker who suffered from malignant mesothelioma after exposure to asbestos, against defendant John Crane Inc., the manufacturer and/or distributor of asbestos containing products used in building and repairing various marine vessels.

We first address defendant Crane's assertion that the trial court erred in applying general maritime law to the estate's action. We conclude decedent's inhalation of asbestos fibers while engaged in the repair and construction of vessels on navigable waters had the potential to disrupt maritime commerce. Injury to decedent that occurred during these activities could potentially slow or frustrate the work being done on the vessel. Such a result could, in turn, have a disruptive impact on maritime commerce.

The second prong of the connection test – whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity – requires a definition of the relevant activity not by the particular circumstances of the incident, but by the general conduct from which the incident arose.

The record reflects that during the time decedent was exposed to asbestos-containing products manufactured by Crane, Crane marketed gaskets and packing material directly for the marine industry and advertised its products for marine engine and general ship use. Crane also advertised its products in publications about maritime activity. This activity bore a substantial relationship to traditional maritime activities. The fact that Crane did not directly undertake any activity aboard a maritime vessel does not obviate this connection.

In sum, we find the circumstances of this case satisfied both the location and connec-

tion tests required under *Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), and therefore, the trial court did not err in applying general maritime law.

Crane also asserts the trial court erred in allowing the estate to call as a witness Crane's custodian of records "solely for the purpose of impeachment, when the substance of his testimony was unchallenged." A number of Crane's responses to interrogatories, submitted under the custodian's verification, were untruthful. While we agree that the estate could not call the custodian for the sole purpose of impeaching him, this is not what occurred at trial. Because the custodian's testimony concerned an improper discovery verification procedure, it tended to undermine the credibility of Crane's assertion that he employed proper procedures with respect to researching the dangers posed by asbestos or to disseminating that information and that Crane was forthcoming with regard to other statements it made. Thus, the custodian's testimony did have a logical tendency to prove an issue in the case, and we cannot say it was irrelevant.

We conclude the trial court did not abuse its discretion in allowing the custodian to testify.

Crane further argues the trial court erroneously interpreted the S.Ct. Rule 4:1(b)(40)(A)(i) to unfairly limit the expert testimony of Dr. Victor Roggli and Henry Buccigross.

The trial court sustained the estate's objection regarding Roggli's testimony on the amount of asbestos in the ambient air and its relationship to the cause of mesothelioma because this opinion was not disclosed pursuant to Rule 4:1. We have not previously examined the degree of specificity required by Rule 4:1(b)(4)(A)(i). Nothing in Crane's disclosure reveals that Roggli might testify about asbestos in the ambient air. Further, a party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or

the opportunity to depose the expert. Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the nondisclosing party to ascertain the substance of the expert's opinion. We reject this reading of Rule 4:1(b)(4)(A)(i). The trial court did not abuse its discretion in ruling that Dr. Roggli's opinion testimony regarding asbestos in the ambient air was inadmissible because Crane failed to comply with the Rule's disclosure requirement. Although Crane's pre-trial disclosure indicated Buccigross would testify about his research and testing of various asbestos insulation products, including Unibestus and Kaylo, Crane admitted a report on the latter two products was not attached to the disclosure. The trial court refused to allow Buccigross's testimony on the tests because the estate had not received the report. We conclude the trial court did not abuse its discretion in refusing to allow the testimony at issue.

Crane asserts the trial court erred in failing to set aside the verdict as excessive compared to verdicts in similar cases. The jury returned a verdict of \$10.4 million in damages, apportioning 34 percent to Crane. The trial court reduced the award to \$10 million and Crane's liability amounted to \$3.4 million.

The "average verdict rule" is not probative of whether a verdict is excessive; rather, that determination must be made based on the facts and circumstances of each case.

We find nothing in the record to support Crane's contention that the verdict was not the product of an impartial decision.

Judgment and \$3.4 million jury award affirmed.

*John Crane Inc. v. Jones, Adm'x (Lacy, J.) No. 062164, Sept. 14, 2007; Newport News Cir. Ct. (Tench) Michael A. Pollard, Archibald Wallace III, Thomas J. Moran, Michael C. McCutcheon for appellant; Robert R. Hatten, Donald N. Patten, Hugh B. McCormick III, William W.C. Harty for appellee. VLW 007-6-113, 20 pp.*