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A 'Perfect Storm' Confronts Asbestos Defendants in Newport News

by Mark A. Behrens

Asbestos plaintiffs in Newport News, Virginia enjoy the nation's highest win rate at trial—85%.[1] Courts in Newport News try numerous asbestos cases in part because it is a major shipbuilding center with thousands of shipyard workers and retired Navy sailors who live there. Large payouts are a big draw too. Newport News had 513 asbestos filings from January 2013 through April 2015—seven of every ten asbestos cases filed in the entire Commonwealth. Multi-million-dollar verdicts are common against the few companies willing to roll the dice in a jurisdiction where defendants rarely win.

Newport News plaintiffs' extraordinary rate of success at trial cannot be chalked up simply to good lawyering or damning evidence against the so-called asbestos industry. There are good trial lawyers in other asbestos epicenters, and they win less often. Furthermore, virtually all of the primary historical asbestos defendants have been forced into bankruptcy. They are not the target defendants of today. The evidence in Newport News trials is not egregious or uncommon, as asbestos litigation is now in its fourth decade.

So what's the difference then? Asbestos plaintiffs in Newport News benefit from a favorable confluence of legal precedent and consistently pro-plaintiff judicial rulings that lower the bar for plaintiffs while tying defendants' hands. Below this Legal Opinion Letter highlights a few areas where the administration of justice should be improved in Newport News.

Give Mainstream Causation Instruction. Ship repair cases such as those in Newport News are generally governed by maritime law[2] and require a plaintiff to show that exposure to the defendant's product was a "substantial factor" in causing the plaintiff's harm.[3] But Newport News juries are instructed that a plaintiff only needs to show that exposure to the defendant's product "was not an imaginary or possible factor or having only an insignificant connection with the harm."[4] In contrast, the U.S. Court of Appeals for the Sixth Circuit and a federal asbestos MDL court, among others, require maritime plaintiffs to prove "a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury

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[1] Am. Tort Reform Found., *Judicial Hellholes® 2014/2015*, at 41, *available at* http://www.judicialhellholes.org/wp-content/uploads/2014/12/JudicialHellholes-2014.pdf.

[2] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*., 513 U.S. 527 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Garlock Sealing Techs., LLC v. Little*, 620 S.E.2d 773 (Va. 2005); *John Crane, Inc. v. Jones*, 650 S.E.2d 851 (Va. 2007).

[3] *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005) (citing *Stark v. Armstrong World Indus., Inc*., 21 F. App'x 371, 375 (6th Cir. 2001)); *Connor v. Alfa Laval, Inc*., 842 F. Supp. 2d 791, 797 (E.D. Pa. 2012). The Virginia Supreme Court has rejected substantial factor causation. *See Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013).

[4] *Exxon Mobil Corp. v. Minton*, 737 S.E.2d 16, 26 (Va. 2013).

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is more than conjectural."[5] "In other words, proof of substantial exposure is required…."[6] These holdings are consistent with decisions from the Fourth Circuit[7] and many state courts. The more lax Newport News jury instruction is outside the mainstream.

Eliminate the Categorical Exclusion of Navy/Employer Knowledge. Newport News is also an outlier in its categorical ban against the admissibility of Navy/employer knowledge of asbestos hazards. The circuit court prohibits such evidence for purposes of a "sophisticated purchaser" defense, although the issue is debatable as a matter of Virginia law.[8] Other courts have allowed defendants to argue that the Navy was the sole cause of a harm (*e.g.*, enlisted men had to use the products regardless).[9] The information is also relevant to issues for which it should be admissible, such as the "state of the art."[10]

Pare Back the Categorical Exclusion of Dose Reconstruction Evidence. Today's asbestos cases often involve low-dose exposures to chrysotile asbestos-containing products (*e.g.*, friction products and gaskets) rather than the far more toxic amphibole asbestos found in thermal insulation. Newport News defendants may offer testimony about the general differences in potency between gaskets and pipe covering, but are not permitted to quantify it to bring it home to the jury. Defendants are also categorically prohibited from presenting "dose reconstruction" evidence to show that a low-dose defendant's product was not dangerous, and thus no warning was required. Newport News judges rely on Virginia case law excluding the opinions of car accident reconstruction experts, a very different situation.[11] There do not appear to be jurisdictions outside of Newport News that consistently exclude all dose reconstruction evidence; instead, the admissibility of such evidence turns on its reliability.[12] Furthermore, the ban on defendants' presenting "dose reconstruction" evidence seems to be one way, since Newport News judges allow a frequent plaintiffs' expert to testify regarding similar "work practice studies."

Conclusion. Because of these and other one-sided rulings, a "perfect storm" confronts maritime asbestos defendants in Newport News, Virginia. Trial courts there may not have flexibility where binding precedent is tilted, but they can and should do more to address unfair application of the law and provide a fair shake to asbestos defendants who proceed to trial.

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[5] *E.g.*, *Lindstrom*, 424 F.3d at 492; *Mortimer v. A.O. Smith Corp.*, 2015 WL 1606173, at *1 (E.D. Pa. Jan. 8, 2015).

[6] *Lindstrom,* 424 F.3d at 492; *Hasenberg v. Asbestos Corp. Ltd.*, 2015 WL 1280216, at *1 (S.D. Ill. Mar. 18, 2015) (quoting *Lindstrom*, 424 F.3d at 492).

[7] *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).

[8] A "sophisticated purchaser" defense was rejected by the federal asbestos MDL, *Mack v. Gen. Elec. Co.*, 896 F. Supp. 2d 333 (E.D. Pa. 2012) (maritime), and implicitly in two early Virginia federal cases, *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985); *Willis v. Raymark Indus., Inc.*, 905 F.2d 793 (4th Cir. 1990), but has been consistently recognized in other Virginia federal cases (including those involving alleged carcinogens). *See Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985); *Marshall v. H.K. Ferguson Co.*, 623 F.2d 882 (4th Cir. 1980); *Fisher v. Monsanto Co.*, 863 F. Supp. 285 (W.D. Va. 1994); *Amos v. BASF Corp.*, 1996 U.S. Dist. LEXIS 20604 (W.D. Va. July 15, 1996), *aff'd*, 125 F.3d 847 (4th Cir. 1997).

[9] *McCrossin v. IMO Indus., Inc.*, 2015 WL 575155, at *5 (W.D. Wash. Feb. 11, 2015); *In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dist. Litig.)*, 971 F.2d 831, 838 (2d Cir. 1992); *Owens-Corning Fiberglas Corp. v. Stone*, 1996 WL 397435, at *7 (Tex. Ct. App.-Austin July 17, 1996).

[10] *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991); *Bernier v. Raymark*, 516 A.2d 534 (Me. 1986).

[11] *E.g.*, *Keesee v. Donigan*, 524 S.E.2d 645 (Va. 2002); *Tittsworth v. Robinson*, 475 S.E.2d 261 (Va. 1996); *Brown v. Corbin*, 423 S.E.2d 176 (Va. 1992); *Thorpe v. Commonwealth*, 292 S.E.2d 323 (Va. 1982).

[12] *E.g.*, *Smith v. Union Carbide Corp.*, 2015 WL 575315 (E.D. La. Feb. 11, 2015); *In re Asbestos Prods. Liab. Litig. (No. VI) (Staton v. Am. Standard)*, 2012 WL 1392553 (E.D. Pa. Mar. 28, 2012), *report and recommendation adopted*, 2012 WL 1409282 (E.D. Pa. Apr. 23, 2012); *In re Asbestos Prods. Liab. Litig. (No. VI) (Larson v Bondex Int'l)*, 714 F. Supp. 2d 535 (E.D. Pa. 2010); *see also Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071 (D. Colo. 2006).

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