Garlock Sealing Technologies, LLC v. Little

No. 05-002 (Sup. Ct. of Va.), on appeal from the Circuit Court of Newport News; arguments on the petition for appeal were heard on April 6, 2005

This is an action in negligence continued by the executor of the estate of a pipe fitter who died of mesothelioma after working for a shipyard installing equipment on submarines during their construction and making repairs aboard them before and after launching. Claims against all other defendants were settled or non-suited before trial. Petitioner-Defendant Garlock sold gaskets used to join pipe flanges and packing for valves, both products containing asbestos. Other defendants sold pipe insulation made from asbestos, and it was Garlock's defense that the asbestos in the insulation was substantially more lethal because it was friable. The trial judge (Conway) instructed the jury that Garlock could be held liable for failure to warn users of its gaskets about the danger from the insulation surrounding the joints in which its gaskets were fixed. After a jury trial, Garlock was found to be ten per cent liable.

Before trial and to a different judge (Tench), Little's lawyers had moved successfully for the application of maritime law to all of their cases of this sort. In the view of that judge, the decision of the Fourth Circuit in *Oman v. Johns Manville Corp.,* 764 F.2d 224, 1983 AMC 2317 (4th Cir. 1985), was no longer good law. In *Oman,* that court, acting en banc, had reversed its own earlier decision in *White v. Johns Manville Corp.*,662 F.2d 234, 1981 AMC 1770 (1981), and had held that actions by shipyard workers arising from exposure to asbestos products were outside admiralty's jurisdiction in tort for want of a sufficient nexus with traditional maritime activities. In *Oman,* the Fourth Circuit used a four-factor test that examined the functions and roles of both parties, the causation and type of the injury, the vehicles and instrumentalities involved, and "most importantly", traditional concepts of the role of admiralty law. 764 F.2d at 230-231. Now, in the Circuit Court of Newport News, Judge Tench has declared that *Oman* has been superseded by *Sisson v. Ruby,* 497 U.S. 358, 366 n.4, 1990 AMC 1801, 1807 n.4 (1990), and *Grubart v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 1995 AMC 913 (1995). In his view, the proper test calls for a general assessment of the features of the incident to determine its potential for disrupting maritime commerce, and whether the activity giving rise to the incident substantially relates to maritime activity. He treated this case as one of onboard injury to a worker repairing a vessel on navigable waters and found unsafe working conditions aboard ship leading to worker injuries to be potentially disruptive.

What matters here and in the other shipyard asbestosis cases is the law to be applied. In the view of the trial judge in *Little,* maritime law makes a manufacturer liable for failure to warn if he "knew or should have known", while Virginia law would make the manufacturer liable only if he "knew or had reason to know", said to be a more tolerant standard. Moreover, the trial judge, purporting to apply admiralty's version of joint and several liability, declined to credit the sole surviving and solvent defendant with payments made to the plaintiff by the other defendants held liable, including those now bankrupt and those who settled. Virginia law is said to allow such offsets.

On appeal Garlock has attacked the decision that its case is within admiralty's jurisdiction because otherwise Garlock's failure to object earlier to the application of maritime law would now foreclose consideration on appeal.

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