University of Baltimore Law Forum

Volume 33
Number 1 *Summer/Fall 2002*

Article 9

2002

Recent Developments: Crane v. Scribner: Statutory Cap on Non-Damages Does Not Apply When Plaintiff's Last Asbestos Exposure Was before Statute's Effective Date

Farrah L. Arnold

Crane v. Scribner:

Statutory Cap on Non-Damages Does Not Apply When Plaintiff's Last Asbestos Exposure was Before Statute's Effective Date

By: Farrah L. Arnold

The Court of Appeals of Maryland held a statutory cap for non-economic damages does not apply when a plaintiff's last asbestos exposure was before the statute's effective date. *Crane v. Scribner,* 369 Md. 369, 800 A.2d 727 (2001). The court further held such a plaintiff has the burden of proving the cause of action date occurred before the statute went into effect, which is ultimately a question of fact to be determined by a jury. *Id.* at 369, 396-97, 800 A.2d at 727, 742-44.

While in the Navy, John Scribner ("Scribner") worked closely with Crane and Garlock gasket materials that contained asbestos. Upon discharge, Scribner worked for PEPCO until 1995 when he was diagnosed with mesothelioma. Scribner underwent major surgeries but died from the disease a few months later.

After Scribner's death, his wife and children brought a wrongful death action against the asbestos manufacturers who were found negligent and strictly liable in a jury trial. Defendants Crane and Garlock appealed to the court of special appeals, arguing the trial court erred in refusing to apply the cap to the survival action as a matter of law. The court of appeals granted certiorari.

The court of appeals began its analysis by examining three possible approaches for determining when a cause of action arises under section 11-108(b)(1). *Crane,* 369 Md. at 390, 800 A.2d at 739. The court first considered the "manifestation approach" set forth in *Armstrong.* In *Armstrong,* the court rejected the defendant's argument that a plaintiff's cause of action did not arise until the disease manifested itself. *Id.* at 384, 800 A.2d at 735-36. The court noted while such an approach could be applied with simplicity and certainty, this approach was statutorily inconsistent because it disregarded the distinction between when a cause of action arises from when a cause of action accrues. *Id.* at 390, 800 A.2d at 740. However, the court did not expressly adopt an alternative method of determination, but merely ruled out the "manifestation approach." *Id.* at 385, 800 A.2d at 736.

The court next considered the "exposure approach" which suggested the cause of action occurred when a plaintiff first inhales asbestos fibers that cause cellular changes leading to disease. *Id.* at 390, 800 A.2d at 740. The court acknowledged while it is difficult to pinpoint this exact moment, determination of the latency period of the disease can help detect when the disease was contracted. *Crane,* at 382, 800 A.2d at 734. For instance, it can be determined that the first cancer cell developed in Scribner's body prior to July 1, 1986 by examining information such as his first and last exposures to asbestos, the total latency period of the disease, and the rate of his tumor growth. *Id.* The court noted that with hindsight, one may reasonably determine if a plaintiff had the disease before the cap was in effect. *Id.* at 384-85, 800 A.2d at 736.

The third approach, or the "*Grimshaw* approach," looked to when the disease itself arose in the body. *Id.* at 390-91, 800 A.2d at 739-40. *Grimshaw* specifically recognized the cause of action occurred before the diagnosis or symptoms of mesothelioma arose, but refused to conclude the action arose at the time of exposure to asbestos. *Id.* at 385, 800 A.2d at 736. The court stated this approach is difficult to apply because it evokes competing medical expert testimony to define the exact time of the action. *Crane,* 369 Md. at 391, 800 A.2d at 736. Moreover, this approach focused intently on when the first cell turned cancerous, which cannot be accurately as-certained. *Id.*

Of these three approaches for

determining a cause of action, the court explained the "exposure approach" had the fewest significant problems and appeared most consistent with the statutory language. *Id.* at 390, 800 A.2d at 739. The court held if the plaintiff's last exposure to asbestos was undisputedly before the statute's effective date, then 11-108(b)(1) does not apply as a matter of law. *Id.* at 394, 800 A.2d at 742. The court further elucidated that cases where exposure occurred both before and after the statutory effective date will be left to the trier of fact. *Id.* at 394, 800 A.2d at 742. However, the court stated the burden is on the plaintiff to establish by sufficient evidence that his or her cause of action occurred prior to the cap's effective date. *Crane, 369 Md.* at 395, 800 A.2d at 742 (citing *Owens-Corning v. Walatka,* 125 Md. App. 313, 322-31, 725 A.2d 579, 583-88 (1999)).

The court explained the "exposure approach" hinges on the notion that there was an injury, and thus a time of cause of action. *Id.* at 392, 800 A.2d at 740. The court found the plaintiff's non-injurious exposures to the defendant's products were inconsequential to a determination of cause of action. *Id.* The court stated exactly when the injury came into existence cannot be reasonably ascertained through any reasonably reliable methodology, however it is certain that the greater the exposure, the greater the cellular damage. *Id.* at 392-93, 800 A.2d at 741. The court noted it is not yet possible to know which asbestos fiber ultimately caused the cell division impenetrable to the body's defenses. *Id.*

The Baltimore City trial believed a jury should not consider the issue of whether the cap should be applied, nor should it resolve when the plaintiff's cause of action arose. *Crane,* 369 Md. at 396, 800 A.2d 742-43. In *Bauman,* the court, after the jury returned its verdict, held a jury must resolve disputes over when the cause of action occurred. *Id.* at 396, 800 A.2d at 743 (*citing Owens-Corning v. Bauman,* 125 Md. App. 454, 726 A.2d 745 (1999)). Based upon this holding, the second jury was impaneled. *Id.*

Disagreement over impaneling the second jury resulted because statute 11-108(d) suggested a jury may not be informed of the statutory limitation. *Id.* The *Bauman* court explained "not to reveal the cap to the jury did not remove from it the obligation to determine the factual question of when the plaintiff's cause of action arose . . . ." *Id.* Moreover, a jury has as its very function an obligation to be the trier of fact when there is a genuine dispute between parties. *Crane,* 369 Md. at 396-97, 800 A.2d at 743. The jury must, however, be supplied with ap-propriate instructions regarding what test or method must be used to arrive at a determination. *Id.* The court must then decide whether the statutory cap should be applied based upon the jury's determination. *Id.*

The Defendants made case-specific complaints because they believed Scribner failed to produce sufficient evidence that the cause of action arose prior to July 1, 1986. *Id.* at 397, 800 A.2d at 743. They also argued impaneling the second jury on this issue was inappropriate because Scribner produced evidence to the first jury that was inconsistent to the second time around. *Id.* Because the jury found the plaintiff had mesothelioma substantially caused by exposure to Defendants' products, the court stated these case-specific complaints were without merit. *Crane,* 369 Md. at 397, 800 A.2d at 743.

Crane v. Scribner elucidates section 11-108(b) regarding a personal injury cause of action sustained due to asbestos exposure. While no succinct method can steadfastly be applied to a determination of the cause of action date, the "exposure approach" appears most statutorily consistent, and has relatively minor problems. While plaintiffs' last exposure to asbestos is frequently well before the statutory effective year of 1996, this may not always be the case as older buildings and facilities require asbestos abatement to meet upcoming renovation and rehabilitation needs.