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How High Court May Rule On The Bare-Metal Defense

By **S. Christopher Collier and Michael Arndt** (October 16, 2018, 2:58 PM EDT)

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Hypotheticals involving ashtrays and flashlights, references to the least cost avoider and discussion of whether foreseeability should be considered for the existence of a duty, or proximate cause, or both — you'd be forgiven for guessing a law school seminar, but it was actually oral argument at the U.S. Supreme Court. The court addressed foundational tort principles last Wednesday at oral argument in Air and Liquid Systems Corp. v. Devries. The high court took the case to decide whether a defendant can be held liable, under maritime law, for products it did not make, sell or distribute.

Unbounded by statute or constitutional text, the justices were considering previous "judge-made" law, and determining the proper application of tort principles. To do so, the justices turned the courtroom into a classroom, with frequent references to the Restatement and an occasional naked policy question, doubtless reminding all listeners of their first year torts class in law school.

The case involves a lawsuit brought by U.S. Navy sailors' estates against various manufacturers for diseases caused by exposure to asbestos. Certain manufacturers frequently rely on variations of the so-called "bare-metal defense." As the name suggests, the defense is generally looked to by manufacturers who made and sold metal products, to which asbestos-containing materials were later added by some other party. In this simple form, the defense is straight-forward: The manufacturer is not liable because it did not make, sell or distribute the asbestos-containing component that the claimant is alleging caused injuries.

The defendant in this case applied the same argument to internal, asbestos-containing components in the product that had been replaced many times before the claimants' alleged exposures. At argument, the court seemed less interested in the replacement part portion of the case, and spent most of the time analyzing the issue of a defendant who sold a bare-metal product which was designed to have asbestos insulation added to it. And the justices considered the issue by analogy.

Justice Sonia Sotomayor asked whether the petitioner was any different than the "bare-metal car seller" who is sued for an explosion in a gas tank that resulted from the car sparking. That analogy soon fell apart because the car manufacturer, in that example, appears to have created a faulty product — a gas tank that sparks — so it is not an extension of traditional negligence principles to hale the car manufacturer into court.

Counsel for the bare-metal defendant responded with a series of hypotheticals, some of which were based in favorable precedent: A tire manufacturer designing a tire for a multi-piece dangerous wheel is not liable when the wheel explodes; a jet manufacturer is not liable when seats installed in the plane cause blood clots for passengers; drywall products need not warn of the dangers of paint that will inevitably be added to the drywall; and toy manufacturers are not responsible for leaking batteries, even if the batteries are required for the toy to operate.

These examples, and the resulting discussion, reveal that the justices were — to borrow a phrase from the late Justice Antonin Scalia — at sea, with precious few buoys to guide the way. The examples test the manufacturer's argument that duty (and potential liability) end with the chain of distribution: The plaintiffs were owed a duty from their employer (the Navy who provided the

specifications for the insulation) and the manufacturer of the insulation, but not the manufacturer of the bare-metal product.

Counsel for the plaintiffs countered the argument on the facts, noting the "special feature of this case." The bare-metal defendant was not a stranger to the asbestos exposure, because the machine itself contributes to the liability. The operating temperature of the machine degrades the asbestos insulation, requiring routine maintenance that the bare-metal defendant knew about and addressed in its manual provided with the product.

In this way, counsel for the plaintiffs argued, the hypotheticals are easily answered under nonobjectionable principles of tort law. The bare-metal product is different from an ashtray — even if you assume that the ashtray was designed specifically for smoking, and used only in that manner — because the ashtray does not contribute to the inhalation of cigarette smoke. Similarly, a flashlight manufacturer need not warn of dangers associated with the batteries necessary for the flashlight to operate. If the flashlight manufacturer knew that operating the flashlight as intended would degrade the battery and cause it to leak, however, then the flashlight manufacturer would indeed need to warn of dangers from batteries leaking.

In addition to the hypotheticals, the justices asked counsel to articulate the underlying principles of tort law. Counsel for the manufacturer stated that tort law generally places the burden of warning on the least cost avoider, which is a favorite hobby horse of the law and economics crowd. The general idea is that the law need not be inefficient, and duties should be imposed on those who can avoid the relevant harm at the least cost. In this case, either the employer, who specifically called for asbestos-containing products, or the manufacturer of the asbestos-containing product could warn of the hazards of asbestos more cheaply and more effectively than the bare-metal defendant.

While true — and while we suspect all the justices accept the theory of the least cost avoider to some degree — it seems unlikely that this principle will resolve the question before the court. Justice Stephen Breyer, in fact, provided a simple negligent entrustment example where both the person entrusting the vehicle to the driver and the driver could be liable for a car accident. This uncontroversial example belies the argument that tort duties stop with the least cost avoider. For his part, counsel for the plaintiffs, again, pointed to the facts: Since the manufacturer was already providing manuals on how maintain the machine, the inefficiency of adding a warning about handling asbestos seems negligible.

In the brief, counsel for the bare-metal defendant pointed out how peculiar it would be to warn in this case. After all, the Navy provided the specifications for the asbestos-containing products, and purchased asbestos-containing products from third parties pursuant to those specifications. As the Navy was well aware it was getting asbestos-containing products, there is no benefit to warning unless there is reason to believe the manufacturer knew the hazards of asbestos and the Navy did not. In that situation, as acknowledged by counsel and Justice John Roberts at the argument, the warning might make sense — but that was not the case here.

This relates to the manufacturer's normative argument: Finding a duty to warn here will inevitably lead to overwarning, which will have the perverse effect of overwhelming the consumer and diluting the strength of any warning. Counsel painted a picture of everyday goods papered with warnings like NASCAR cars' logos.

The justices, to put it lightly, seemed unconcerned with this potential negative consequence. Justice Brett Kavanaugh asked why too many warnings were bad, and Justice Neil Gorsuch — seemingly acknowledging that the cost of additional warnings was not enough to win the argument — asked counsel to identify additional negative consequences. Justice Elena Kagan downplayed the concern, stating it would be two warnings "at most," and later jokingly asked Justice Sotomayor if she felt "overwarned" when Justice Sotomayor referenced that she had a flashlight with a warning that it should not be stored with the batteries. While it's always a good idea to point to negative consequences of an adverse ruling, overwarning did not appear to concern the justices.

Likewise (and as is the generally the case at the Supreme Court), the justices did not seem as interested in discussing the case's peculiarities as in addressing the broader common law issue of the duty to warn. Justice Sotomayor asked counsel for the manufacturer to ignore, for the sake of the conversation, that the Navy was the plaintiffs' employer and the manufacturer's customer. In a way,

this makes sense because the Navy's knowledge of asbestos and immunity for common law claims relating to asbestos exposure make this particular case more difficult to decide.

Justice Breyer, likewise, noted that the voluminous record from the trial was not easily (or best) reviewed by the Supreme Court. For this reason, we expect the justices to make a clear statement about the duties owed under federal maritime law, and they may very well return the case for consideration of the record under those articulated principles. We do not expect the court to adopt the categorical rule that duty ends with the chain of distribution, but also do not think the court will impose a duty to warn on mere foreseeability or knowledge of later-added products. Although the court's ruling would be limited to the maritime cases, the reasoning will doubtless prove persuasive to lower courts considering bare-metal challenges.

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