Stripped Bare: The Supreme Court's Decision in *Air & Liquid Systems v. DeVries* Signals the End for the Bare-Metal Defense

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It is black-letter products liability law that a product manufacturer cannot be liable for injuries arising from a product that it did not manufacture or control. In *Air & Liquid Systems Corp. v. DeVries*,[1] the third majority opinion authored by Justice Brett Kavanaugh[2] in a thinly reasoned decision in derogation of the rights of manufacturer defendants, the U.S. Supreme Court held that "a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger."[3] The Court relied on "maritime law's long-standing solicitude for sailors"—a euphemism, perhaps, for the Court's sympathy for seamen—to justify the Court's expansion of liability to a party for products it neither manufactured nor controlled.

The two newest members of the Supreme Court found themselves on opposite sides of the issue, a circumstance that apparently surprised veteran Court-watchers.[4] As Justice Neil Gorsuch reasoned in his dissent, a manufacturer's duty has traditionally been "restricted to warnings based on the characteristics of the manufacturer's own product."[5] Rather than apply this hornbook rule, which is simple in articulation and straightforward in application, the majority invented a new three-part test by which it will analyze future tort claims. In doing so, the Court embraced a results approach over common sense and favored activism over strict application of precedent. *DeVries* effectively marks the end of the so-called "bare-metal"[6] defense in maritime cases and portends its erosion in state law cases as well.

The "Bare-Metal" Defense

The *DeVries* case arises out of the plaintiffs' allegations of exposure to asbestos-containing products while serving in the U.S. Navy. The pumps, blowers, and turbines manufactured by the defendants, and to which John DeVries was allegedly exposed, were equipped with asbestos-containing components *not* manufactured by defendants. The original manufactured equipment was not shipped with asbestos components (hence the shorthand description of the defense—"bare-metal"), but such equipment allegedly required subsequent application of asbestos insulation in order to function properly. DeVries claimed that manufacturers have a duty to warn when their products required incorporation of a "necessary" part that makes the "fully integrated" product dangerous for its intended uses. The 6-3 majority held that in the maritime tort context,[7] a manufacturer has a duty to warn when it knows or has reason to know that a part, required for its equipment to function properly, is likely to be dangerous and the manufacturer has no reason to believe the end user will realize that danger.[8]

The defendants in *DeVries* sold equipment to the Navy for use on ships that was delivered "bare-metal," that is, without any asbestos-containing insulation. All of the equipment required insulation, however, in order to function safely and properly. The Navy applied asbestos insulation after delivery of the equipment. Because the Navy is generally protected from suit under sovereign immunity principles, and since most manufacturers of asbestos-containing thermal insulation are bankrupt as a result of asbestos liabilities, the only targets available for a plaintiff's recovery were so-called "bare-metal" equipment manufacturers.

The Court considered three approaches for application of a general "duty to warn" principle in cases in which a manufacturer's product requires incorporation of a dangerous part in order to function as intended. The first approach, which the Court describes as the "plaintiff-friendly foreseeability rule," states that a "manufacturer may be liable when it was foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of

that other product or part."[9] The second approach is the "defendant-friendly bare-metal defense," which states that "if a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product, even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses."[10]

The third approach, which the Court ultimately adopted, is an amalgam of the first two. "Foreseeability that the product may be used with another product or part that is likely to be dangerous is not enough to trigger a duty to warn. But a manufacturer does have a duty to warn when its product *requires* incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses."[11] In its analysis, the majority observed that *equipment* manufacturers are in a better position to warn than *parts* manufacturers, as parts manufacturers may be unaware that their part will be used in a dangerous manner. As justification for this relaxed rule, the majority points to maritime law's "long-standing solicitude for sailors."[12]

In dissent, Justice Gorsuch relied on common law principles that hold no duty to warn about another manufacturer's products, even when those products are used together with the original manufacturer's product. This precept ensures that parts manufacturers retain their duty to warn, while at the same time reflecting more realistic consumer expectations. In so arguing, the dissent made comparisons with other products that are frequently used in concert with dangerous component parts. For instance, "Would a company that sells smartphone cases have to warn about the risk of exposure to cell phone radiation? Would a carmaker have to warn about the risks of improperly stored antifreeze? Would a manufacturer of flashlights have to warn about the risks associated with leaking batteries? Would a seller of hot dog buns have to warn about the health risks of consuming processed meat?"[13]

Importantly, the dissent highlights the uncertainty introduced by the majority's test: The majority fails to define what qualifies as an "incorporated" or "integrated" product. Simply put, the dissent argues that "tort law is supposed to be about aligning liability with responsibility, not mandating a social insurance policy in which everyone must pay for everyone else's mistakes."[14] That the defendants acted properly and provided all legally required warnings decades ago when the products were sold has no bearing under a *DeVries* analysis. Rather, manufacturers of products lacking the offending component are retroactively liable for breaching a duty they did not know they had and with which they cannot now comply.

Future of the "Bare-Metal" Defense

With the Navy immune from suit under traditional theories of sovereign immunity, and many parts manufacturers bankrupt, plaintiffs with asbestos exposures primarily resulting from service in the Navy have precious few "targets" for liability. The *DeVries* decision and its ex post facto imposition of liability will, no doubt, resuscitate the so-called "Navy cases"[15] that had experienced a decline in active litigation, courtesy of the bare-metal defense. Manufacturers of shipboard equipment should brace for the inevitable resurgence of litigation, particularly in jurisdictions like California,[16] Washington,[17] Massachusetts,[18] and Maryland,[19] among others, which recognize the bare-metal defense. For now, the bare-metal defense remains technically intact, but only insofar as a defendant can effectively demonstrate the level of knowledge of the end user: The final prong of Justice Kavanaugh's new test, whether "the product's users will realize the danger," can be attacked with evidence of the Navy's knowledge of the dangers of their products, and by showing that the Navy, and not the sailors, were the "users" of the products. A defendant unable to meet both of these requirements will find the bare-metal defense unavailing.

The effects outside of the maritime context will likely be more substantial than the Court seems to intend. In non-Naval exposure cases, bare-metal defendants, who were virtually immune from suit in asbestos cases in many jurisdictions, may be targeted once again by plaintiffs who will no doubt attempt to expand the Supreme Court's reasoning beyond the maritime context. Notwithstanding Justice Kavanaugh's express limitation of the Court's holding to the maritime tort context, plaintiffs will use the *DeVries* decision to try to eradicate the bare-metal defense from state law claims. Manufacturers of land-based turbines, boilers, and other equipment frequently sold without any asbestos insulation are likely to experience an increase in litigation activity. These defendants must be prepared for the erosion of the bare-metal defense through reliance on *DeVries*. Conversely, this may relieve some pressure from premises defendants, who are often the only solvent entity who may be responsible for exposures in their facility, as many component part manufacturers are bankrupt and equipment manufacturers were able to rely on the bare-metal defense.

Justice Gorsuch's dissent asserts that the common law, as properly applied, creates no duty to warn about another manufacturer's products, but instead only to warn about a manufacturer's own product.[20] Justice Gorsuch elaborates that the new test makes particularly little sense when viewed against the risk of widespread adoption in other areas of tort law, such as automotive manufacturers being required to warn about improperly stored antifreeze or a seller of hot dog buns having to warn about the health risks of consuming processed meat.[21] Gorsuch, obviously concerned that the *DeVries* holding will be expanded to other applications, concludes his dissent with the aspiration that state courts exercise their liberty to refrain from implementing the test announced by this decision, if it was, indeed, driven only by "solicitude for sailors."[22]

Misguided Activism

As suggested by the dissent, "in deviating from the traditional common law rule, the court may be motivated by the unfortunate facts of this particular case" where "the bare metal defendants may be among the only solvent potential defendants left."[23] In 1950 in the *Feres v. United States* case, the U.S. Supreme Court held that service members cannot bring tort suits against the government for injuries that arise "out of or are in the course of activity incident to service."[24] This doctrine has been in place since, and Congress has not chosen to alter the law, nor has the Supreme Court reversed its precedent on this issue. The Court should not engage in policy-making.[25] If the doctrine of Naval immunity results in an inequity, Congress, rather than the courts, should act to create an avenue for recovery. In the interim, the Navy's immunity should not be the rationale for an unwarranted extension of liability upon heretofore innocent manufacturers. The majority based its opinion on "long-standing solicitude" for naval veterans, but sympathy for a plaintiff should not be the basis for judicial activism.

A further rationale for the majority's holding—that the parts

manufacturers, who created actual asbestos-containing products, are bankrupt—is equally misplaced.[26] The bankruptcy courts have established an avenue of recovery from these entities in the form of bankruptcy trusts formed specifically to compensate plaintiffs injured by asbestos exposure. Unavailability of a defendant with deep enough pockets should not be the basis for passing liability along to an unrelated party. The majority reasoned that equipment manufacturers are in a better position to warn than parts manufacturers, as parts manufacturers may be unware that its part will be used in a dangerous manner; this rationale is entirely incongruous and inapplicable in a case dealing with asbestos-containing parts, where the hazards of asbestos were likely equally known to both equipment and parts manufacturers.

The Court correctly observes that the two optimal targets for recovery, the Navy and parts manufacturers, are unavailable in many Navy cases. Searching for a more adequate, better-funded defendant, the plaintiffs settled on manufacturers of products that never contained asbestos. Based on the Court's reasoning, an absence of alternatives results in liability passing to these parties who, at the time of manufacturing, acted properly and lawfully, but now will hold liability for actions by the Navy and other companies who have already filed for bankruptcy protection.

Stripped Bare

The *DeVries* decision marks a dangerous expansion of liability for equipment manufacturers. Decisions based upon policy making rationale leads to inconsistent results, as Justice Gorsuch's dissent explains. The "solicitude" for sailors in this case has resulted in liability for equipment manufacturers who never sold a single asbestos-containing product and who have no way to comply with the newly imposed duty. Although the Court's holding is "tightly cabined" in the maritime tort context,[27] there can be no doubt that this decision will be cited in state court cases across the country as justification for expanding liability against manufacturers. The slippery slope of Supreme Court jurisprudence is likely to erode the bare metal defense and potentially expand liability for manufacturers in other contexts. ⊙

Endnotes

[1]*Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).
[2]*Statistics*, SCOTUSblog, https://www.scotusblog.com/statistics (last visited Apr. 8, 2019)
[3]*DeVries*, 139 S. Ct. at 996.
[4]Mark Sherman, *Trump's Two Supreme Court Picks on Opposite Sides in Two of Three Cases*, Wash. Times (Mar. 19, 2019), https://www.washingtontimes.com/news/2019/mar/19/brett-kavanaugh-and-neil-gorsuch-trump-supreme-cou; *see also* Bradford Betz, *Trump Picks Gorsuch, Kavanaugh Take Opposite Sides on 2 of 3 Supreme Court Rulings Tuesday*, Fox News (Mar. 20, 2019), https://www.foxnews.com/politics/2-of-3-supreme-court-cases-see-conservative-justices-at-odds-report.
[5]*DeVries*, 139 S. Ct. at 997.
[6]The bare-metal defense states: "If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses." *Id.* at 993.
[7]U.S. Const. art. III, § 2, cl. 1 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority … to all cases of admiralty and maritime jurisdiction…."; *see also* 28 U.S.C.A. § 1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) Any civil case of admiralty or maritime jurisdiction….").
[8]*DeVries*, 139 S. Ct. at 995.
[9]*Id.* at 993.
[10]*Id.*
[11]*Id.* at 993-94.
[12]*Id.* at 995.
[13]*Id.* at 999.
[14]*Id.*
[15]The "Navy case" is shorthand for cases where the plaintiff alleges exposure to asbestos while serving in the U.S. Navy.
[16]*O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012).
[17]*Simonetta v. Viad Corp.*, 197 P.3d 127, 138 (Wash. 2008).
[18]*Whiting v. CBS Corp.*, 83 Mass. App. Ct. 1113 (2013).
[19]*Ford Motor Co. v. Wood*, 119 Md. App. 1, 36, 703 A.2d 1315, 1332 (1998), *abrogated on other grounds by John Crane Inc. v. Scribner*, 369 Md. 369, 800 A.2d 727 (2002).
[20]*DeVries*, 139 S. Ct. at 997.
[21]*Id.*
[22]*Id.* at 1000.
[23]*Id.*
[24]*United States v. Johnson*, 481 U.S. 681, 681 (1987) (citing *Feres v. United States*, 340 U.S. 135 (1950)).
[25]*See, e.g.*, *Knox* v. *Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 326 (2012) (Sotomayor, J., concurring) ("the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers").
[26]*DeVries*, 139 S. Ct. at 992.
[27]*Id.* at 995.