

Solicitude for Sailors: The United States' Supreme Court Balances in Favor of Sailors Over Marine Manufacturers

Article

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The Supreme Court recently decided a very narrow issue related to maritime tort law, though widely affecting marine manufacturers, guided in part by a maritime principle of "Solicitude for Sailors." The Supreme Court charted new waters (sorry) by finding that a manufacturer has a duty to warn when it sells a product that, by its very nature, requires the incorporation of hazardous materials, even if it does not incorporate those hazardous materials itself. In doing so, the Court noted that "[m]aritime law has always recognized a 'special solicitude for the welfare' of those who undertake to 'venture upon hazardous and unpredictable sea voyages.'" *Air and Liquid Systems Corp. v. Devries*, 586 U.S. at ___, 139 S. Ct. at 995 (citing *American Export Lines, Inc. v. Alvez*, 446 U. S. 274, 285 (1980)).

The plaintiff-respondents in the case were retired United States Navy sailors, who worked for long periods of time on Navy ships that contained asbestos-containing equipment. The manufactured equipment required asbestos insulation or asbestos parts to function, though the manufacturer did not always incorporate the asbestos into those products itself. When the manufacturer did not, the Navy later added the required asbestos to the equipment.

The plaintiff-respondents sued the manufacturer of the equipment for negligence in failing to warn of the asbestos danger in the integrated products. Plaintiff-respondents argued a warning would have led sailors to wear asbestos-protective masks to prevent their eventual cancer and other maladies resulting from that asbestos exposure.

The manufacturer defended against the claim, arguing the "bare-metal defense," which holds that manufacturers should not be held liable for harms caused by the later incorporation of harmful products by other entities. For those parts that were created by them, in which asbestos was later incorporated by other entities, the manufacturer claimed it could not be found liable. The District Court agreed, granting summary judgment to the manufacturers. However, the Third Circuit vacated and remanded the case, adopting a foreseeability approach, finding that

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a manufacturer would be found 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.

The Supreme Court articulated a novel middle-ground foreseeability approach, finding that a manufacturer may be found liable for failing to warn when the manufacturer knows that its bare metal equipment *requires* the incorporation of a hazardous element for its intended uses. In the instance of selling parts that required asbestos, a duty to warn would arise because the manufacturer knew a dangerous element would need to be added to make the part functional.

The dissent disagreed, finding this middle-ground an unfounded deviation from common law: "[i]n deviating from the traditional common law rule, the Court may be motivated by the unfortunate facts of this particular case, where the sailors' widows appear to have a limited prospect of recovery from the companies that supplied the asbestos (they've gone bankrupt) and from the Navy that allegedly directed the use of asbestos (it's likely immune under our precedents)." *Id.* at ___, 139 S. Ct. at 1000 (Gorsuch dissent).

The dissent, unlike the majority, chose not to credit maritime law's "special solicitude for the welfare" of those who undertake to 'venture upon hazardous and unpredictable sea voyages.'" *Id.* at ___, 139 S. Ct. at 995. In fact, the dissent acknowledges that the majority's standard derives from this special solicitude, but nevertheless criticizes this departure from common law, even within this maritime context.

And what is that context? Sailors and marines work, live, and serve on ships for the defense of the United States, unable to sue the United States for hazards visited upon them by the United States. When the dissent acknowledges those sailors are "likely immune under our precedents," it alludes to the *Feres* doctrine, a doctrine that prevents servicemembers or their families from suing the United States government for torts committed upon them by the United States while serving with the United States armed forces. *Feres v. United States*, 340 U.S. 135 (1950). So, in this context, when a manufacturer sent "bare metal" equipment to the United States Navy, equipment which would *require* hazardous material be incorporated by the United States Navy for its intended use, the manufacturer could legally shift responsibility of a duty to warn to an entity against which the sailors cannot bring a lawsuit. This case puts an end to that shift, and changes the entire liability landscape for marine manufacturers and their suppliers.

The Court now requires manufacturers to warn sailors, when the manufacturer knows a danger exists or will exist by virtue of its product: "[a]nd the rule that we adopt here is tightly cabined. The rule does not require that manufacturers warn in cases of mere foreseeability. The rule requires that manufacturers warn only when their product *requires* a part in order for the integrated product to function as intended." *Air & Liquid Sys.*, 586 U.S. at ___, 139 S. Ct. at 995. One might expect

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Justice Kavanaugh, the author of the opinion, would dispute the dissent's claim that this is a deviation of common law, and argue this is an evolution of the common law based upon the context and this special solicitude extended to our sea servicemembers.

Regardless, manufacturers within the maritime sphere need to become aware that a new standard applies to their duty to warn. Wisconsin in particular has several well-respected manufacturers that specialize in marine equipment, not to mention their suppliers, which will all now have to reevaluate their processes and warnings. Further, though currently "cabined" within the maritime sphere, one might expect analogous arguments being made to all military manufacturers, with a special solicitude being extended to all of our other military services. Fighting in Iraq or Afghanistan certainly is no less hazardous or unpredictable than the sea. Manufacturers in this realm would be wise to review their policies as well.

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