

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 AIR AND LIQUID SYSTEMS CORP.,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 17-1104
7 ROBERTA G. DeVRIES, INDIVIDUALLY)
8 AND AS ADMINISTRATRIX OF THE ESTATE)
9 OF JOHN B. DeVRIES, DECEASED,)
10 ET AL.,)
11 Respondents.)
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13
14 Washington, D.C.
15 Wednesday, October 10, 2018
16

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 11:09 a.m.
20 APPEARANCES:
21 SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of
22 the Petitioners.
23 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Maryland; on
24 behalf of the Respondents.
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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1104, Air and Liquid Systems versus DeVries.

Mr. Dvoretzky.

ORAL ARGUMENT OF SHAY DVORETZKY

ON BEHALF OF THE PETITIONERS

MR. DVORETZKY: Mr. Chief Justice, and may it please the Court:

Petitioners had no duty to warn about asbestos added to their equipment years or even decades after its sale. That follows from a well-established tort law principle, manufacturers are not liable for injuries caused by third-party goods.

That tort law principle --

JUSTICE GINSBURG: Counsel, their product would not be salable absent the addition of the asbestos insulation, whatever it is. They're making a product that is useless unless the asbestos is added. And doesn't that make a difference?

MR. DVORETZKY: No, it doesn't, Justice Ginsburg.

1 First, the -- the Respondent -- the
2 Petitioners, of course, knew that the Navy was
3 going to use asbestos because the Navy
4 determined that asbestos met its
5 specifications. That doesn't mean that the
6 Petitioners' products were useless without
7 asbestos. Today, those same products are used
8 without asbestos on Navy ships.

9 CHIEF JUSTICE ROBERTS: Why is that?
10 Did they discover something new that's better
11 than asbestos?

12 MR. DVORETZKY: They did, in fact.
13 Technology advanced and there were different
14 forms of insulation, and the Navy eventually
15 transitioned to those forms. And our equipment
16 today is used with non-asbestos forms of
17 insulation.

18 JUSTICE GINSBURG: But at least at the
19 time of these sales in question, the
20 manufacturers have a product that, to be used,
21 requires the addition of asbestos. So they
22 know that the sale of this equipment is
23 dependent upon asbestos being incorporated into
24 it.

25 MR. DVORETZKY: They -- they do know

1 that asbestos will be incorporated by the Navy.
2 However, when the Navy chooses to use a
3 third-party's asbestos with our product, our
4 products are not the cause of the injury. And
5 -- and you can look at --

6 JUSTICE SOTOMAYOR: I'm sorry --

7 CHIEF JUSTICE ROBERTS: What about
8 this --

9 JUSTICE SOTOMAYOR: -- how is your
10 product not the cause of the injury? The
11 asbestos as sold is perfectly safe. It's
12 integrated. It's whole. It doesn't release
13 molecules. What causes it to degrade is your
14 ship, is your product. Your product heats up
15 to such an extreme degree that it degenerates
16 the asbestos.

17 So it's somewhat incongruous for me to
18 think that you're saying that the harm's caused
19 by the asbestos. The asbestos is in the shape
20 because of what you did to it, meaning your
21 product did to it. It's an integrated product.
22 It's not standing alone.

23 MR. DVORETZKY: Two responses to that,
24 Justice Sotomayor. First, our product does not
25 cause the asbestos to degrade in any unique

1 way. This is just what happens to asbestos
2 when it's used, just as gasoline is used in a
3 car and eventually needs to be replaced. But
4 our product is not contributing to the harm in
5 any way that is different than what otherwise
6 happens to asbestos.

7 Second, even if you think --

8 JUSTICE SOTOMAYOR: In -- in normal
9 tort law, if you create a car that has a spark
10 in the tank, and the gasoline, which is what
11 explodes the car, explodes, the consumer is not
12 going to sue the gasoline company. It's going
13 to sue you because you, the car manufacturer,
14 produced a defective product that caused an
15 injury that the gasoline would otherwise not
16 cause.

17 Why are you any different than the
18 bare-metal car seller?

19 MR. DVORETZKY: Because, in that
20 situation, the consumer might well sue both the
21 car manufacturer and the gasoline manufacturer
22 because both products contributed together to
23 the harm, where -- whereas in --

24 JUSTICE SOTOMAYOR: That's the fault
25 --

1 CHIEF JUSTICE ROBERTS: No, that's not
2 -- he wouldn't see the gasoline manufacturer.
3 I mean, normally -- you normally run a car with
4 gasoline and it's normally perfectly safe.
5 Here, you normally run your product with
6 asbestos and it's not perfectly safe.

7 MR. DVORETZKY: Well, here, you run
8 our product and our product is safe. It's the
9 asbestos that is causing the harm. Now the
10 asbestos naturally degrades with use, and then
11 replacing it can be dangerous. That's true.

12 But unlike the defective car, which is
13 creating a spark that a properly operating car
14 should not create, and thereby causing the
15 injury with the gasoline, our equipment is not
16 making the asbestos any more dangerous than it
17 would be.

18 CHIEF JUSTICE ROBERTS: If -- if --

19 MR. DVORETZKY: The other --

20 CHIEF JUSTICE ROBERTS: I'm sorry.
21 But if -- are you arguing that this is a
22 special rule in admiralty, or are you arguing
23 that this is the normal tort rule?

24 MR. DVORETZKY: We're arguing that
25 it's the normal tort rule that ought to be

1 adopted as a matter of general admiralty law.
2 As a matter of ordinary tort law, product
3 liability defendants, of course, may be liable
4 for injuries that their products cause, so the
5 defective car that causes a spark is causing an
6 injury. But they're not liable for the
7 injuries that are caused by third-party
8 products foreseeably used with their own.

9 Consider, for example, a tire
10 manufacturer that designs a tire to be used
11 specifically with a multi-piece wheel, and the
12 multi-piece wheel may explode when the tire is
13 installed on it. The wheel manufacturer in
14 that situation can be sued, but the tire
15 manufacturer, even knowing that its tire is
16 going to be used with the dangerous wheel, is
17 not liable.

18 Likewise, a jet manufacturer isn't
19 liable when the seats that are later installed
20 in the plane can cause blood clots, even though
21 you might think of the jet with the seats, in
22 common parlance, as an integrated product or --

23 JUSTICE SOTOMAYOR: But in those -- in
24 those situations, it wasn't foreseeable. They
25 didn't know it was going to cause a blood clot.

1 I -- I think you -- what do I make of
2 the fact that this is maritime law, which is
3 different, and that you claim there's a uniform
4 tort principle, but not every state has the
5 absolute rule that you tout?

6 There's a split of authorities among
7 states as to the extent of liability, if any,
8 for bare-metal providers. So what do I do if
9 I'm in a special area with a solicitude for
10 sailors and I don't buy your argument that we
11 should ignore that principle or overturn it
12 after two centuries of case law on it?

13 Assume I accept the principle.

14 MR. DVORETZKY: So, Justice Sotomayor,
15 I think there are a few questions embedded in
16 there. Let -- let me try to tease them out.

17 First, in the tire case and the jet
18 case, you say it's not foreseeable. Quite the
19 contrary, the jet manufacturer makes a
20 passenger jet, of course, knowing that seats
21 are going to be used and it's common knowledge
22 that you can -- that can cause blood clots.

23 The -- the tire manufacturer in the
24 Reynolds case that I'm referring to
25 specifically manufactured the tire to be used

1 with this particular kind of wheel that was
2 dangerous.

3 So there is foreseeability, but the
4 point is that, as a matter of ordinary tort
5 law, foreseeability alone is not enough to
6 create a duty when you're talking about the
7 foreseeable use of your product with somebody
8 else's product.

9 The second question --

10 JUSTICE BREYER: So --

11 MR. DVORETZKY: Sorry, Justice Breyer.

12 Well, the second question, Justice
13 Sotomayor, that I think you asked is about the
14 state of tort law.

15 If you look only at asbestos-specific
16 cases, then there's a split of authority. But
17 there's no reason that you would look only at
18 asbestos-specific cases. You ought to look at
19 the body of tort law as a whole. And when you
20 do, Respondents haven't found a single case,
21 not even one, outside of the asbestos context
22 holding that a defendant is liable for injuries
23 caused by a third-party product used with its
24 own.

25 If that were the law, drywall

1 manufacturers would be responsible for warning
2 about the dangers of paint. The airplane and
3 the seats, the tire and the wheel. Toy
4 manufacturers would be responsible --

5 JUSTICE GINSBURG: No, but there's no
6 -- no one --

7 MR. DVORETZKY: -- for warning about
8 leaking batteries.

9 JUSTICE GINSBURG: This is different
10 from those in that no one would buy your
11 product but for the use of asbestos with it.

12 MR. DVORETZKY: Well --

13 JUSTICE GINSBURG: And that's not true
14 of the other examples that you've given.

15 I mean, what makes the product
16 desirable is when the asbestos is incorporated,
17 it works in a certain way. Without the
18 asbestos, it doesn't work.

19 MR. DVORETZKY: Justice Ginsburg, I
20 think that is true of the other examples.
21 Nobody would buy a commercial passenger jet
22 without the availability of seats to be
23 installed in it later by a third party.

24 Nobody would buy drywall without the
25 availability of paint or -- or wallpaper in

1 order to cover it. And so I don't think that
2 our situation is any different from the
3 ordinary tort rule.

4 JUSTICE BREYER: It is somewhat. I
5 mean, this is an area where I had to go back
6 and read the restatement of torts about 50
7 times -- not 50, but -- because this is a
8 negligence case.

9 So I -- I don't know that there are
10 special rules here, at least I haven't been
11 convinced of that. So, if you look at it as a
12 negligence case, then you look at the
13 restatement, and then you look at what the
14 court ordered below, I do have trouble with one
15 of the things.

16 But do you really have a problem if
17 the manufacturer specifically directed that the
18 product be used with an asbestos-containing
19 material, where he knew that it was dangerous?
20 That's one of the things they want to show.

21 I don't see what your problem is with
22 that, or, that the product was originally
23 equipped with an asbestos-containing part that
24 you could reasonably expect will be replaced,
25 because simply, when people do replace things,

1 they do tend to use the kind of equipment that
2 was there before. What's wrong with that one?

3 Now containing an -- I might -- the
4 third one, I don't know, because there's
5 conflicts sort of within the restatement, so I
6 thought maybe you should phrase it in your
7 favor somewhat and say, well, he could be
8 liable to where the manufacturer functionally
9 requires, you see, he puts out a product that
10 to work, that to work, you have to use the
11 dangerous thing.

12 I'm pretty sure he should be liable
13 there, but I can see that C in -- the Court of
14 Appeals may be read to go beyond that. All
15 right. It's a long question.

16 But really it comes down to what's
17 wrong with A and B, and what's wrong with C if
18 we interpret it as I suggested?

19 MR. DVORETZKY: So let's take A, B,
20 and C. I think A was required, B was directed,
21 and C was replacement parts.

22 The problem with required is that
23 required just really means foreseeable. Just
24 like --

25 JUSTICE BREYER: No, it doesn't.

1 Required means you tell the person that he
2 better use this product, which is very
3 dangerous, by the way, and you know it, or it
4 won't work. It's like telling people if you
5 have one of those hammers, you know, that
6 shoots nails, and you know the nails are -- are
7 absolutely defective, and you say: You've got
8 to use this product, says the manufacturer,
9 with Smith's nails, which he knows work
10 backwards. Okay?

11 I mean, that's what it seems to me
12 this says. The manufacturer specifically
13 directed that the product be used with an
14 asbestos-containing part.

15 MR. DVORETZKY: First, we did not
16 specifically direct the Navy to do anything,
17 nor -- nor -- nor could we have.

18 JUSTICE BREYER: Oh, well, that's what
19 you say. The other side may say the opposite.
20 And there we looked through the record briefly,
21 I'm not an expert there, but I think we only
22 have to -- it did seem to me maybe there's some
23 evidence on their side there, and -- and I
24 don't think that's -- I can't read the whole
25 record and know if there's evidence there or

1 not. This isn't a summary judgment case here.

2 MR. DVORETZKY: You don't need to read
3 the whole record. But if you look, for
4 example, at Joint Appendix 27, it tells you
5 that the Navy was the one that specified the
6 asbestos.

7 JUSTICE BREYER: Okay. Fine. Then
8 you'll win.

9 MR. DVORETZKY: But --

10 JUSTICE BREYER: Then the jury will
11 decide in favor of you. And if they come up
12 with some evidence that says it is specifically
13 directed, they will win if the jury believes
14 them. All right? Fine. End of case for us.
15 Anything wrong with that?

16 MR. DVORETZKY: So -- yes.

17 (Laughter.)

18 MR. DVORETZKY: Even -- even if a
19 manufacturer "directs" somebody else to do
20 something, the manufacturer doesn't control the
21 Navy. It's ultimately the Navy's choice what
22 to do. It's an asbestos manufacturer's choice
23 whether to supply the asbestos that is
24 dangerous or whether --

25 JUSTICE SOTOMAYOR: That's a separate

1 defense. Forget the Navy. Let's assume the
2 Navy was not involved --

3 MR. DVORETZKY: So any --

4 JUSTICE SOTOMAYOR: It was a private
5 -- any private person.

6 MR. DVORETZKY: -- any third -- any
7 third-party, even if you're talking about a
8 private user of ship components, the
9 manufacturers don't have the power to direct
10 them to do anything. They make the choice what
11 equipment to use. And a later asbestos
12 manufacturer or, as the Chief Justice asked
13 earlier on, a later manufacturer of an
14 alternative form of insulation.

15 JUSTICE GINSBURG: And, by the way,
16 and what is the Navy's -- what is the Navy's
17 liability? What is the Navy's exposure to
18 these widows to seamen who died of cancer?

19 MR. DVORETZKY: The Navy is immune
20 under Feres, but there is a worker's
21 compensation system that the Navy administers
22 that can provide some form of compensation.

23 JUSTICE GINSBURG: Very little.

24 MR. DVORETZKY: Going back to Justice
25 --

1 JUSTICE KAGAN: Mr. Dvoretzky -- and
2 this follows on Justice Breyer's -- when you
3 say that even when this manufacturer is -- or
4 the Navy or whoever else it is, is directed to
5 use asbestos, you are not liable, are you
6 making a fairness argument? Are you making an
7 efficiency argument? What kind of argument is
8 that?

9 MR. DVORETZKY: It's -- it's both a
10 doctrinal argument and a policy argument. As a
11 doctrinal argument, tort law draws -- draws the
12 line of liability at the chain of distribution.

13 JUSTICE KAGAN: Okay. I mean, we
14 could read the restatement and contest that.
15 So -- so I guess what I'm asking is, like what
16 -- what -- what sense would that rule make?

17 If -- if you think that that's what
18 the doctrine says, tell me why the doctrine
19 says that, because -- because I can't think of
20 a reason, and that makes me think that the
21 doctrine doesn't say it.

22 So here is -- this is your opportunity
23 to tell me what sense would it make to say,
24 even though you direct the use of asbestos, you
25 can't be liable for its harms?

1 MR. DVORETZKY: Because tort law
2 places the duty to warn and also places
3 liability on the party that is in the best
4 position to control or avoid the harm.

5 And it is the -- well, the subsequent
6 manufacturer of asbestos or of the Chief
7 Justice's alternative to asbestos that is in
8 the best position to control the harm in this
9 situation.

10 That party is also in the best
11 position --

12 JUSTICE KAGAN: But why is that?

13 MR. DVORETZKY: Once we put our
14 product out there, we don't control what some
15 third-party develops or sells as insulation.

16 JUSTICE KAGAN: You've directed it to
17 use asbestos, so they're going to use asbestos.

18 MR. DVORETZKY: The fact that we -- if
19 we had directed something, that still doesn't
20 obligate the insulation manufacturer to sell
21 asbestos. If the insulation manufacturer
22 learns, gee, asbestos is dangerous, I either
23 shouldn't sell this or I ought to warn about it
24 or I ought to put money --

25 CHIEF JUSTICE ROBERTS: What --

1 MR. DVORETZKY: -- into R&D in order
2 to come up with an alternative, that's all
3 within their control, not ours. And the tort
4 --

5 CHIEF JUSTICE ROBERTS: What if --
6 what if you are the only one who knows about
7 it? I mean, the asbestos manufacturer, their
8 -- their scientists haven't discovered yet that
9 it's going to kill you, but you have, and it's
10 the same case, you still don't have a duty to
11 warn?

12 MR. DVORETZKY: I don't think you have
13 a duty to warn in that situation, but that's
14 also far from this case. There's -- there is
15 no --

16 CHIEF JUSTICE ROBERTS: No, no, I know
17 it's not this case. But your position is even
18 if you, the manufacturer, is telling people to
19 use asbestos with your product, they don't know
20 that it's harmful, but you do, you have no duty
21 to warn?

22 MR. DVORETZKY: Perhaps you might in
23 that situation on a different theory have some
24 sort of a fraud claim, but that's not what's
25 alleged here.

1 There's no question here that the Navy
2 knew about the dangers of asbestos and that,
3 over time, asbestos manufacturers knew about
4 the dangers of asbestos and, again, companies
5 came up with alternatives.

6 So the policy rationale here is to
7 place the burden on the party that has the
8 ability to control the harm, and, moreover, the
9 asbestos component manufacturers are the ones
10 that are in the best position to warn.

11 If we had put some sort of a plate on
12 our equipment, first, who knows if it would
13 have been seen down the road as opposed to the
14 package of new insulation that has to be opened
15 and applied.

16 And, second, as technology changes,
17 our warning from 1945 might well have become
18 outdated and inconsistent with a
19 state-of-the-art warning provided later.

20 And so that's why tort law puts the
21 liability on the party that actually has the
22 ability to control the harm. Getting back --

23 JUSTICE GORSUCH: Besides -- besides
24 the costs of having an additional warning, do
25 you see any other downsides to expanding the

1 scope of the duty to warn in this way?

2 MR. DVORETZKY: Well, I think --

3 JUSTICE GORSUCH: I'm really not
4 interested in asbestos and bare metal. I'm
5 talking, as Justice Kagan was, as a matter of
6 doctrine and policy.

7 What costs, what downsides are there
8 associated with expanding the duty to warn, at
9 least insofar as we're talking about things
10 that are directed or necessary or inevitably
11 used? Forget about foreseeability for a
12 moment.

13 We -- we normally do, you're right,
14 put the duty to warn with the lowest cost
15 avoider. But sometimes it's expanded and, in
16 some cases, it has been expanded in this area,
17 it looks like, and I'm just wondering what --
18 what are the negatives associated with that?
19 Why is that bad?

20 MR. DVORETZKY: So, again, outside the
21 asbestos context, I don't think it has been.
22 But, to answer your -- your policy question,
23 it's bad, first, because if you believe that
24 the incentive ought to be placed on the -- the
25 party that can avoid the harm, you dilute that

1 -- that incentive by spreading the liability
2 around and you lead to over --

3 JUSTICE GORSUCH: No, that incentive
4 remains. I mean, that still -- we're expanding
5 the duty to warn. We're not contracting it.
6 Okay? So that doesn't work.

7 MR. DVORETZKY: You lead to
8 over-warning, which will lead people just to be
9 deluged with warnings and to ignore them. You
10 create a situation where there really isn't any
11 clarity from manufacturers about what they do
12 or don't have to warn about, because we're
13 talking about tests like directed and required,
14 but what do those really mean?

15 If we talk about required, really what
16 that means is it's really foreseeable, but at
17 some point, there can be another alternative
18 that maybe is 10 percent less effective and
19 10 percent more expensive.

20 At that point, is asbestos or whatever
21 product we're talking about still required, or
22 can we say, well, the equipment will run with
23 this alternative, it just won't run quite as
24 well?

25 Is -- when you put your product into

1 the market and say it requires asbestos, that
2 doesn't even hold as technology changes. So
3 "required" and "specified" are indeterminant
4 terms, and one of the costs, to answer your
5 question, Justice Gorsuch, is you're leaving
6 manufacturers at sea, whether we're talking
7 about maritime law or on land --

8 JUSTICE SOTOMAYOR: I'm sorry, why --

9 MR. DVORETZKY: -- about what warnings
10 they need to provide.

11 JUSTICE SOTOMAYOR: I'm sorry. I -- I
12 don't understand your point about the future
13 and a change. If you've warned that asbestos
14 products are dangerous and you should exercise
15 care in removing them, then it's the people
16 down the line who choose to continue doing it,
17 you're off the hook because you gave them a
18 warning. This is a failure to warn claim.

19 If you did what you were supposed to
20 do, that doesn't take away their incentive to
21 change to a less dangerous product if it's
22 cheaper or if it's easier to deal with. I'm
23 not sure what that -- why that increases cost
24 in some meaningful way.

25 MR. DVORETZKY: Well, I -- it

1 increases costs if you're looking after the
2 fact at a party that didn't think that the law
3 required it to provide a warning and imposing
4 liability.

5 It dilutes the effectiveness of
6 warnings to have too many of them. If you just
7 have warnings about everything, people ignore
8 them. And, again, moreover, you may end up
9 with inconsistent warnings.

10 If the company -- if a company
11 provides a warning about how to handle
12 insulation based on what's known in 1945, that
13 may be inconsistent, it may be the wrong way to
14 handle insulation in whatever form it takes 20
15 years later. And so --

16 CHIEF JUSTICE ROBERTS: Well, but
17 that's -- I don't understand your -- your
18 technology argument. I mean, we're talking
19 about people who were injured at a time where
20 this was what you use, asbestos, right?

21 And you're saying, well, a warning
22 would be bad because 20 years later maybe
23 there's something better. Is that the
24 argument?

25 MR. DVORETZKY: Well, no. We're

1 saying a warning at that point -- the warning
2 is best provided by the asbestos manufacturer.
3 We're not saying that there shouldn't be a
4 warning by somebody and that there shouldn't be
5 somebody to sue. You can sue the asbestos
6 manufacturer if it didn't provide the warning
7 and setting aside any government contractor
8 defense or anything.

9 But the -- the problem is if you have
10 multiple warnings, it dilutes the value of them
11 and it can also lead to contradictory warnings.
12 Once we put, let's say, a plate on our
13 equipment that provides instructions about what
14 to do in 1945 based on the state of insulation
15 then, a few years later when an alternative
16 comes on the market, that may have to be
17 handled very differently.

18 JUSTICE KAGAN: No, but the warning --

19 MR. DVORETZKY: And it may be
20 counter-productive.

21 JUSTICE KAGAN: -- presumably would
22 say when this product is used with asbestos, it
23 creates the following dangers. So, if 20 years
24 from now the product is not used with asbestos,
25 everybody knows to ignore the warning. But the

1 warning is good for all the time in which the
2 product is used with asbestos.

3 MR. DVORETZKY: That -- not
4 necessarily. What -- what if five years down
5 the road there is different thinking about how
6 best to handle asbestos itself?

7 JUSTICE BREYER: Then they're not
8 negligent. I mean, that's -- see, I've been --
9 tell me if I'm -- where I'm wrong on this. I
10 found it easier to think about this case once I
11 forgot about warnings.

12 And I said the case is not that
13 complicated a case. It's the case in the
14 Restatement. Judy loans her car for the
15 evening to Grant, whom she knows is a very
16 dangerous driver. The least-cost avoider, of
17 course, is Grant. But, nonetheless, Judy is
18 negligent.

19 And the negligence that they're
20 claiming here is taking a thing, a physical
21 thing which the manufacturer knows is dangerous
22 and unreasonably putting it out into interstate
23 commerce, perhaps on a boat, perhaps somewhere
24 else. And that's why if you tell the user he's
25 got to use asbestos, knowing all the relevant

1 things, that's a negligent act. Okay.

2 And, similarly, if you use asbestos in
3 it on a part that will wear out easily, because
4 people do use the past to judge the present,
5 he'll replace it with asbestos material, and
6 that's an unreasonable act.

7 And the third thing is if you
8 functionally -- that's why I thought this third
9 was better for you -- you know, you
10 functionally require the use of asbestos in one
11 way or another, then you have performed an
12 unreasonable act.

13 Whether you could cure the problem
14 with a warning or not cure the problem with a
15 warning is a question of what makes it
16 unreasonable and what should a remedy be. All
17 right. I was thinking of it and now I've
18 listened to you and I'm not sure I'm thinking
19 of it correctly. So I would like to know what
20 you think.

21 MR. DVORETZKY: Well, I think the
22 problem with all of those standards is that
23 they don't give manufacturers clear guidance
24 about what they need to warn about.

25 Does a manufacturer of a device that

1 takes batteries -- and batteries can leak, does
2 the manufacturer in that situation have to
3 include a warning? Just in case the battery
4 manufacturer doesn't tell you that its battery
5 can leak, I'm going to tell you this battery
6 can leak because I'm telling you to use
7 batteries in my product.

8 Does the manufacturer need to do that?
9 Has it directed the use of batteries? The --
10 there's no tort case in which in that situation
11 people have gone beyond suing the battery
12 manufacturer and actually sued the electronic
13 products manufacturer because, again, tort law
14 places the burden on the battery manufacturer.
15 It's their product that's actually causing the
16 harm.

17 The duty doesn't extend beyond your
18 own product and the harm is caused by somebody
19 else's product. So whether it's viewed as a
20 question of duty or causation, tort law puts
21 the liability on the manufacturer, distributor,
22 or seller of the product that actually causes
23 the harm. Not just any product downstream that
24 is used with it and in a but-for way can be
25 said to contribute to the harm.

1 JUSTICE KAVANAUGH: Why are too many
2 warnings bad?

3 MR. DVORETZKY: Why are too many --

4 JUSTICE KAVANAUGH: Why is that bad?
5 You said too many warnings. Why are too many
6 warnings -- explain that to me.

7 MR. DVORETZKY: For a couple of
8 reasons. One is that over-warning just dilutes
9 the value of warnings. When -- when you get a
10 product that is just plastered with warnings,
11 it leads people not to pay any attention to the
12 warnings that they actually should pay
13 attention to.

14 JUSTICE KAGAN: Well, at most, you
15 have two warnings here. You have the equipment
16 warning and the asbestos warning. Does that
17 really -- I would think that that's kind of
18 good. You know, it's two warnings. You take
19 it pretty seriously.

20 MR. DVORETZKY: Well, but if you
21 follow this rule to its logical conclusion, you
22 would have multiple warnings essentially on
23 every part that's connected to every other part
24 within the ship. The propeller manufacturer
25 knows that, in order for that propeller to

1 operate, it needs to be connected to a
2 steam-generating propulsion system that uses
3 asbestos down the line.

4 Does each manufacturer at each step of
5 that process need to slap on a warning not only
6 about asbestos but about every solvent that is
7 used down the line in the ship? About weapons
8 that are on the ship? All of these things are
9 interconnected, and in a sense, the propeller
10 requires them; otherwise, the propeller's not
11 going to operate.

12 But, if you have warnings all the way
13 down the line, it dilutes the value of the
14 warnings. It can also lead to inconsistent
15 warnings because the party that's in the best
16 position to provide an accurate warning is the
17 party that actually provides the
18 injury-producing good, not the propeller
19 manufacturer down the line.

20 If I could, I'd reserve the rest of my
21 time.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Goldstein.

25

1 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
2 ON BEHALF OF THE RESPONDENTS

3 MR. GOLDSTEIN: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 This is a failure to warn case under
6 Section 388 of the Second Restatement. That's
7 where the principle is embodied, and that says
8 something that ought to be uncontroversial, and
9 that is, if you make a product and the ordinary
10 use or maintenance of that product is going to
11 cause a harm that you know about, then you need
12 to warn about that.

13 And the court of appeals here quite
14 explicitly limited its holding to situations in
15 which you have a product that has a part and
16 that part is required for it to operate.

17 And so if I could just point us to the
18 first operative sentence of the court of
19 appeals' opinion. It's at 2a of the Joint
20 Appendix. It's not that long. "The defense's
21 basic idea" -- this is bare-metal -- "is that a
22 manufacturer who delivers a product,
23 bare-metal, that is, without the insulation or
24 other material that must be added for the
25 product's proper operation."

1 And so it is concerned only there with
2 the case in which you just -- these machines
3 will not work if they don't have asbestos in
4 them. But it's worse for that -- for the
5 defendants in terms of their liability, because
6 as been -- as has been suggested, it is the
7 operation and maintenance of the machine that
8 makes the danger worse.

9 So, Justice Breyer or -- and Justice
10 Sotomayor discussed a situation of how it is
11 that asbestos can be on a shelf and it's not at
12 all dangerous, but if you put it in the machine
13 and you subject it to the temperature of 100 --
14 850 degrees and you compress it and you leave
15 it there over time, it will degrade to the
16 point that when you have ordinary maintenance,
17 which is specified in the manual for the
18 machine, and you are digging it out and
19 chopping it up, that creates asbestos dust.

20 Asbestos dust is a distinct danger
21 that causes a distinct harm from asbestos as a
22 part. And that is the concern here. And that
23 is when you are maintaining the machine as
24 you're supposed to, as you are directed to by
25 the manual created by the defendants here, you

1 have an injury to which you are subjected.

2 There's a pretty good illustration of
3 that, and that's their own concession that when
4 they ship the machine with the original gasket
5 in it or when they provide the 992 replacement
6 gaskets that Foster Wheeler did, who's one of
7 the defendants, they're liable. They recognize
8 it's part of their machine. Maintaining their
9 machine is creating the risk.

10 Their responsibility for that, for
11 warning us, telling us wear a mask in the
12 manual, doesn't change when we get to the 993rd
13 gasket.

14 Now I take the kind of law and
15 economics take on this to be, well, who's the
16 most efficient party to warn? And I want to
17 explain why it is that they are.

18 But just to pause for a second, that,
19 I think, is probably the function of maritime
20 law here, and that is even if you disagreed
21 with us and believed that there was a division
22 in how the common law was applied in these
23 circumstances, there is a special solicitude
24 for sailors that you would say requires the
25 warning by the manufacturers here. And if the

1 Navy believed there was over-warning, the Navy
2 would prohibit giving this warning.

3 Now why are they the most efficient
4 party to give the warning? First, it's their
5 machine. They're much more familiar with how
6 the parts work than the part manufacturer
7 because the parts can be used for lots of
8 different machines.

9 What happens with a gasket, for
10 example, is we'll get shipped a set of asbestos
11 board, and it will be cut out to fit inside
12 whatever flange or whatever pipe connection is
13 inside the machine. The people who know how
14 that's going to operate, how much pressure is
15 going to be on it is the maker of the machine.

16 The asbestos packing, it comes off a
17 shelf. It gets put in the machine. Now who
18 knows how the machine will affect the asbestos?
19 The maker of the machine.

20 The real manufacturer that's going to
21 point to the cases that he's citing are the
22 makers of the asbestos replacement parts,
23 because he says examples like, well, you know,
24 this could be used for lots and lots of
25 different applications.

1 So take a maker in their mind of the
2 asbestos gasket material or the asbestos
3 packing. It's not necessarily going to be used
4 on a Navy destroyer in a GE turbine.

5 The people who know the effects of a
6 Navy destroyer GE turbine are GE, who made the
7 turbine. In addition --

8 JUSTICE ALITO: Well, what if they did
9 know? What if -- how far up the supply chain
10 does this go? And suppose that the
11 manufacturers of these component parts knew
12 this was a custom-made part for the -- the
13 equipment that the -- these manufacturers were
14 going to supply? Would they be liable as well?

15 MR. GOLDSTEIN: Likely not because --
16 and this is a question in the common law that
17 is dealt with by the Integrated Product
18 Doctrine, and that is if the component
19 manufacturer advises the manufacturer of the
20 product and it's being used as intended, then
21 the duty to warn is taken on by the
22 manufacturer of the integrated product here,
23 which is what makes this case quite different
24 from a lot of the hypotheticals that we can get
25 to.

1 I did want to just, if we could --

2 JUSTICE ALITO: What is the reason for
3 drawing the line there? What is the policy
4 reason for drawing the line at that point?

5 MR. GOLDSTEIN: Along the lines of
6 what I've just described, and that is the
7 manufacturer of the integrated product knows
8 how its product is operating, knows what effect
9 will happen on the parts, and it centralizes
10 the warnings there.

11 And so I could probably put it in very
12 precise terms for you, and that is if we could
13 stop talking about putting signs on things for
14 just a moment and talk about how this actually
15 operates.

16 They provide a manual on how to
17 maintain their machine, okay? It has pages in
18 it. And it will say disconnect the flange and
19 take out the asbestos and the like.

20 That is where the warning should be
21 because that's what we're going to look at.
22 You know, when we're -- we're talking about the
23 harm that comes from asbestos that you are
24 taking out of it, and so, when my friend was
25 talking about put the warning on the gasket, I

1 actually thought about it and wrote it down and
2 it says warning.

3 Now what will this look like in 10
4 years after it's been, you know, subjected to
5 850 degrees and is being dug out with a
6 screwdriver? You're not going to see it at all
7 on the actual gasket itself when you're digging
8 it out.

9 CHIEF JUSTICE ROBERTS: I'm sorry. I
10 missed the point. What is the piece of paper?

11 MR. GOLDSTEIN: Sorry. I'm sorry.
12 The piece of paper is the gasket.

13 (Laughter.)

14 MR. GOLDSTEIN: My friend says --

15 CHIEF JUSTICE ROBERTS: That's a
16 gasket?

17 MR. GOLDSTEIN: Yes. My friend says
18 to put the warning on the gasket. And my point
19 is this looks great today. But, when I'm going
20 to tear it off the machine and it's going to get
21 ripped up and torn up and turned into dust,
22 which is what our case is about, this turns
23 into dust. It is extremely difficult to read
24 in that circumstance.

25 So the -- the natural party who would

1 provide this warning to us is, at the very
2 least, the manufacturer knows I'm going to
3 operate the machine and I'm going to maintain
4 the machine by digging this out of its machine
5 is going to tell me.

6 Now you can have other cases that are
7 much more marginal cases, but I don't think
8 it's an excuse to say, well, we're 100 percent
9 certain that this machine is going to require
10 asbestos, but if it only was -- if we were
11 10 percent certain, you wouldn't hold us to
12 having a duty to warn, the common law is
13 smarter than that. It's much more practical
14 than that. And the easy case is when you know
15 as a matter of fact and it's the premise of
16 liability that the machine won't operate
17 without this.

18 JUSTICE GORSUCH: Well, Mr. Goldstein,
19 that's where I guess I'm having trouble
20 figuring out where the line is. The Third
21 Circuit, as I read it, adopted a foreseeability
22 analysis, which is quite generous. And it
23 could be that 10 percent possibility.

24 MR. GOLDSTEIN: Okay. Could I just
25 disagree with that premise or --

1 JUSTICE GORSUCH: Well, at the end of
2 the question you may do with it what you wish.

3 (Laughter.)

4 JUSTICE GORSUCH: You can answer it.
5 You can choose not to answer it. We've seen
6 plenty of that on this bench. You can choose
7 to answer another question. Entirely up to
8 you.

9 (Laughter.)

10 JUSTICE GORSUCH: But a foreseeability
11 analysis might be a 10 or a 30 percent, we can
12 quibble, okay, but some chance.

13 Then there is in the case law a
14 suggestion of inevitability, okay, certitude,
15 we know it's going to be used.

16 And then there is the third possible
17 rule, which seems to be the traditional
18 products liability rule, which is you warn for
19 your own thing and not for someone else's,
20 okay? Those are the three choices between us.

21 And I think we've been aligning the
22 first two a little bit here in this discussion.
23 And I'm just curious, which is it that you are
24 asking this Court to adopt?

25 MR. GOLDSTEIN: It is the --

1 JUSTICE GORSUCH: And why?

2 MR. GOLDSTEIN: Okay. It's the
3 second, because that's the actual rule of the
4 Third Circuit. That's actually why I started
5 with the opinion. So the --

6 JUSTICE GORSUCH: Right.

7 MR. GOLDSTEIN: -- what the court of
8 appeals did is it said the common law
9 recognizes reasonable foreseeability. And my
10 friend likes reasonable foreseeability, despite
11 all the complaints about it.

12 So take the original gasket in the
13 machine. He wants to be held liable only, of
14 course, for reasonably foreseeable disease from
15 the original gasket. What the Third Circuit
16 said is we are going to adopt the common law
17 rule that you have a duty to warn about your
18 own machine, and that's going to include parts
19 and replacement parts that must be there, that
20 are required and the machine will not operate
21 without them.

22 Then you are responsible for the
23 reasonably foreseeable harm that comes from
24 that. It did not say that you are responsible
25 for replacement parts that are reasonably

1 foreseeable to be used with your machine.

2 And so --

3 JUSTICE GORSUCH: I'm not talking
4 about the replacement parts portion of the
5 opinion right now.

6 MR. GOLDSTEIN: Yes.

7 JUSTICE GORSUCH: I'm just talking
8 about the bare-metal portion of the opinion.

9 MR. GOLDSTEIN: Yes.

10 JUSTICE GORSUCH: Put aside the
11 replacement parts. I think we're -- we have
12 three possibilities before us. And you're
13 still -- you're saying the second one is the
14 one you'd have us adopt?

15 MR. GOLDSTEIN: And that is it is
16 inevitable. So I do want to say that I do
17 disagree, respectfully, with your understanding
18 that the ordinary rule is that you're
19 responsible only for the thing that you, you
20 know, you make alone without regard to
21 replacement parts.

22 And my friend, I think, is just
23 confused. He says we haven't cited any cases.
24 We've cited the Huynh case, for example, and
25 that's a situation in which you have an

1 asbestos grinder and you have a wheel on it and
2 the wheel runs out, and you replace it with an
3 identical wheel, and there is a risk that the
4 wheel will explode.

5 Of course, your duty to warn that,
6 hey, my machine, you know, it tends to blow up
7 the wheel is -- remains your duty even if you
8 replace the wheel.

9 We also have the Macias case. So the
10 first one was from the California court of
11 appeals. The Macias case is from the
12 Washington supreme court. That's a respirators
13 case.

14 So you make a respirator and it
15 exposes people to the thing that -- benzene or
16 asbestos or whatever it is that you're trying
17 to protect against.

18 You have a duty to warn that you know
19 that that machine -- that device is only going
20 to operate when it is that it's exposed to the
21 hazardous chemical. That duty exists just as
22 in the gasoline in the car.

23 JUSTICE BREYER: Well, let's -- can I
24 go back for a second? Because now I -- I did
25 have this kind of question.

1 I suddenly went back to the court of
2 appeals' opinion, and it says the -- the
3 product may be held liable -- you know, the
4 manufacturer, if the facts show the plaintiff's
5 injuries were a reasonably foreseeable result
6 of the failure to provide a warning.

7 MR. GOLDSTEIN: Yes.

8 JUSTICE BREYER: Then it gives three
9 examples.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE BREYER: Well, I don't have
12 any problem -- or I probably don't have a
13 problem with the three examples.

14 MR. GOLDSTEIN: Yes.

15 JUSTICE BREYER: But it doesn't say
16 they're exclusive.

17 MR. GOLDSTEIN: Oh.

18 JUSTICE BREYER: And so I think
19 perhaps one of the other things that the other
20 side is worried about is, if you read that
21 sentence without limiting it to the three
22 examples, it would create the horrors that
23 they show -- that they agree with.

24 MR. GOLDSTEIN: I understand.

25 JUSTICE BREYER: Yes.

1 MR. GOLDSTEIN: And I think you can
2 take some comfort from my reading from the
3 first operative sentence of the court of
4 appeals' opinion that it's talking about only
5 parts that have to be there for the machine to
6 operate.

7 When the court of appeals -- and this
8 is going to be at 16A of the Petition Appendix
9 -- says we've given you three, we're not saying
10 these are, you know, all of the possible
11 examples. I just think it was being sensible
12 in a very common law way. But it was
13 excluding --

14 JUSTICE ALITO: But where we --

15 MR. GOLDSTEIN: If I could just be
16 precise about one thing it was excluding, and
17 it didn't, and so you would know what the
18 actual consequences of this are.

19 There is a leading district court
20 opinion that gets cited here by the court of
21 appeals, and it had a fourth, and that is
22 knowledge. If you know that the part, the
23 asbestos part will be in it, but you didn't
24 require it, and it wasn't absolutely necessary
25 for the machine to work -- and the court of

1 appeals, I think, was avoiding passing on that
2 question, which isn't in the case, and I think
3 you fairly can too.

4 JUSTICE KAGAN: One of the horrors
5 that Mr. Dvoretzky threw out at the end of his
6 argument was like a flashlight with batteries.

7 How should that come out?

8 MR. GOLDSTEIN: If the flashlight is
9 designed in a way that it punctures the
10 battery, okay, in the same way that maintaining
11 this machine causes the asbestos to turn into
12 --

13 JUSTICE KAGAN: No, you just put the
14 batteries in, a normal flashlight, but it
15 doesn't work. You can turn it on, it doesn't
16 work, unless the batteries are in there.

17 MR. GOLDSTEIN: No, I think that in
18 that situation, the mere fact that batteries
19 are intrinsically dangerous doesn't create the
20 duty to warn. It is, I think, a special
21 feature of this case that the machine itself
22 contributes to the liability.

23 It ships with, very frequently,
24 asbestos gaskets and other material, and it
25 cannot operate without it. It's the

1 combination of those things.

2 JUSTICE GORSUCH: Well, I guess I'm
3 confused then, because I -- I haven't used a
4 flashlight without a battery very often. I
5 mean, you know, it seems inevitable. The other
6 example that we're given is the manufacturer of
7 the ashtray --

8 MR. GOLDSTEIN: Yeah.

9 JUSTICE GORSUCH: -- who inevitably
10 knows that it's going to be used with some sort
11 of tobacco product, hopefully. And extending
12 the duty to warn in those cases, some of the
13 concerns that your colleague has raised about
14 over-warnings, contradictory warnings, and the
15 costs associated with that, that might deter
16 innovation and raise consumer cost needlessly,
17 seem to have some purchase to me.

18 So help me out.

19 MR. GOLDSTEIN: Sure. Okay.

20 JUSTICE GORSUCH: I'm -- I'm stuck
21 where Justice Kagan is.

22 MR. GOLDSTEIN: Okay. I think their
23 better example is flashlights, rather than
24 ashtrays, because you can use ashtrays for
25 other things. So I don't want to avoid the

1 harder hypothetical.

2 And that is, if you have a -- a
3 flashlight and you know as the manufacturer
4 that the batteries in them are going to leak
5 out and put acid on your hands, I actually do
6 think on reflection that that manufacturer
7 needs to warn about that. Right?

8 So it -- it is technically the case
9 that the battery inside is leaking, but you're
10 operating a flashlight and you're going to be
11 exposed to that risk. I would think that you
12 would want the manufacturer of the light to
13 warn people while you're holding this
14 flashlight you could be exposed to acid.

15 Now you may have --

16 JUSTICE KAVANAUGH: So you just
17 changed the answer.

18 MR. GOLDSTEIN: I did.

19 JUSTICE KAVANAUGH: Okay. Just making
20 sure.

21 (Laughter.)

22 MR. GOLDSTEIN: Absolutely. Now, I --
23 I will say that another part of my answer is
24 that this is the easier case because the
25 product can -- actually contributes to the

1 injury. You may have lots of defenses there,
2 including that there were other warnings that
3 were already given, you have a sophisticated
4 user that already knows about it, that sort of
5 thing. But I actually think that in that
6 precise hypothetical, it ought to come out that
7 way.

8 JUSTICE SOTOMAYOR: Mr. Goldstein --

9 MR. GOLDSTEIN: I would want to know
10 --

11 JUSTICE SOTOMAYOR: I -- I -- having
12 just recently bought a battery --

13 MR. GOLDSTEIN: Yes.

14 JUSTICE SOTOMAYOR: -- the flashlight
15 told me to not store it with the battery.

16 MR. GOLDSTEIN: Okay.

17 JUSTICE SOTOMAYOR: So -- now --

18 JUSTICE KAGAN: Did you feel
19 overwarned?

20 (Laughter.)

21 JUSTICE SOTOMAYOR: Can you show me a
22 case that would have suggested --

23 MR. GOLDSTEIN: Sure. There are two.
24 The two that --

25 JUSTICE SOTOMAYOR: -- that would have

1 come out to the -- to that conclusion? I
2 always assume that when manufacturers do
3 things, it's because somebody sued them.

4 (Laughter.)

5 MR. GOLDSTEIN: Somebody told them to.
6 And sometimes they are over-protective. It's
7 true.

8 JUSTICE SOTOMAYOR: Occasionally.

9 MR. GOLDSTEIN: So I -- the two that
10 are -- are quite on point are Huynh case and
11 the Macias case that I gave. So the California
12 Court of Appeals and the Washington Supreme
13 Court.

14 And I -- I do think I should, you
15 know, to be fair to my friend, address the
16 other examples. And so he gives the airplane,
17 okay?

18 So you -- you manufacture an airplane.
19 It is -- a few things about that. First,
20 airplanes actually do work without seats. You
21 know, some -- if not, somebody better tell Fed
22 Ex, which is shipping things all over the
23 country. But at the very least, they work with
24 lots of different kinds of seats. That's why
25 some people fly Emirates and not Spirit,

1 because some of the seats will be much, much
2 closer in and have a much greater risk of
3 injury for them.

4 And that's why we don't say, as the
5 court of appeals did here, that the airplane
6 will only work in a situation in which you are
7 going to be exposed to it.

8 But I'll give you another airplane
9 hypothetical that I would hope come out this
10 way, and that is the airplane manufacturer
11 attaches Rolls Royce engines. You know that
12 working on the engine can expose you to
13 terrible shock and being killed or gasoline
14 will pour out of it or oil will pull -- pour
15 out of it.

16 I hope that they -- we want the
17 airplane manufacturer to warn about that
18 because that -- that plane will not operate
19 without those engines and you are going to be
20 exposed to that risk in the course of
21 maintaining that machine.

22 That's the much more analogous
23 hypothetical of ours.

24 JUSTICE ALITO: What about the
25 ashtray? You didn't answer the question.

1 MR. GOLDSTEIN: Oh, I'm sorry. I had
2 said that the ashtray could be used for a lot
3 of different things.

4 JUSTICE ALITO: That's -- I mean,
5 that's -- your answer is, well, you know, the
6 manufacturer of the ashtray is off the hook
7 because it's possible somebody might use it for
8 some purpose other than -- than smoking?

9 MR. GOLDSTEIN: No, I -- I just tried
10 to give -- among the distinctions is certainly
11 that. And so it wouldn't fit within the Third
12 Circuit's --

13 JUSTICE ALITO: What if I don't think
14 that's much of a distinction?

15 MR. GOLDSTEIN: Okay. Then there are
16 -- there are others, and that is the ashtray
17 does not give you cancer. Okay? The ashtray
18 does not actually contribute to your injury.

19 What you have is you have a toxic
20 product that you're making a choice to use that
21 you are putting down. It would be like saying
22 this -- and I think it's a great example for
23 us, because it highlights why we are not saying
24 they're responsible for every harm from
25 asbestos, including this asbestos. It would be

1 like us saying: Your machine only works with
2 asbestos; you're liable because I got sick
3 because the storage room had the asbestos in
4 it.

5 We're not just saying kind of but-for
6 causation that there was a relationship between
7 them. You can put your cancer-causing
8 cigarette down in the ashtray and not be liable
9 for it, but if it is the case -- I'll give you
10 an example:

11 What if the ashtray is made of paper?
12 Okay? If the ashtray is made of paper, so that
13 if you put something lit in it, they will -- it
14 will cause combustion and it will burn --

15 JUSTICE ALITO: No, but that's
16 different because then your product, the actual
17 product that you're manufacturing, is
18 dangerous.

19 MR. GOLDSTEIN: Well, Your -- Your
20 Honor, none of this is about the product --

21 JUSTICE ALITO: In and of itself.

22 MR. GOLDSTEIN: I don't -- I don't --
23 I mean, kids make paper ashtrays, and we all --
24 the world goes on. I think they are
25 intrinsically dangerous -- I'm -- probably,

1 kids shouldn't be making ashtrays. But --

2 (Laughter.)

3 JUSTICE ALITO: Well --

4 MR. GOLDSTEIN: -- I'm just saying I
5 could.

6 JUSTICE KAVANAUGH: The difference --
7 the difference --

8 MR. GOLDSTEIN: It may not be as good
9 as my gasket.

10 JUSTICE KAVANAUGH: Just so I can
11 follow, the difference between the flashlight
12 and ashtray example?

13 MR. GOLDSTEIN: The -- the difference
14 between the flashlight and ashtray example is
15 that in the course -- in the necessary course
16 of using it, if you are going to be exposed to
17 harm. And so I suppose on that axis, it is the
18 case that the ashtray can be used for other
19 things.

20 But we are -- I did think that it was
21 quite important that we aren't saying that they
22 are -- they have a duty to warn that kind of
23 encompasses everything that the asbestos
24 manufacturer would, because the asbestos
25 manufacturer may have other warnings and other

1 harm that it causes.

2 Our harm is one that comes distinctly
3 from the fact that this machine is just -- it's
4 not bare-metal; it's dead metal. It is just
5 sitting there as dead weight. And if -- and it
6 may help --

7 JUSTICE GORSUCH: What if -- what if
8 -- let's just take a hypothetical.

9 MR. GOLDSTEIN: Sure.

10 JUSTICE GORSUCH: Okay. The -- the
11 ashtray, a jury will find in my hypothetical
12 case that the particular nature of its design
13 meant that the manufacturer knew it would be
14 used with tobacco products inevitably, okay?
15 Then what?

16 MR. GOLDSTEIN: So there are a lot of
17 different defenses as well, including the
18 sophistication --

19 JUSTICE GORSUCH: Well, just stick
20 with the -- the hypothetical.

21 MR. GOLDSTEIN: I am sticking with the
22 hypothetical.

23 JUSTICE GORSUCH: All right. All
24 right.

25 MR. GOLDSTEIN: I mean, I took the

1 hypothetical to be, you know, will the ashtray
2 maker be liable --

3 JUSTICE GORSUCH: I know there are
4 defenses, and there are going to be defenses --

5 MR. GOLDSTEIN: Yeah.

6 JUSTICE GORSUCH: -- for General
7 Electric or whomever in this case too. I --
8 I'm not asking about that.

9 Is there a duty, is what I'm asking,
10 okay? That -- that you could get to a jury on
11 duty?

12 MR. GOLDSTEIN: Yeah.

13 JUSTICE GORSUCH: That's my question.

14 MR. GOLDSTEIN: The ashtray -- I think
15 that there is not a duty. I think that the
16 important distinctions are that, here, the
17 actual machine creates the special and distinct
18 risk, and, in addition, there is in the common
19 law this understanding about whether you would
20 be an efficient party or there's a much better
21 party to warn.

22 And there we have obviously the
23 situation -- I think the -- the hypothetical
24 resonates because there's so much knowledge in
25 the community about the harms from cigarettes

1 that come from warning about cigarettes.

2 But, you know, to take the battery
3 example from the flashlights, there are other
4 sensible instances in which we say: Look, if
5 using the machine is going to expose you to a
6 distinct risk, or at the very least, when using
7 the machine is going to create the risk, what
8 is it that we think the actual -- you know, the
9 asbestos manufacturer, not knowing that it's
10 going to be used in this GE machine, not
11 knowing that it's going to be 850 degrees, that
12 this certain pressure will be at, not knowing
13 that GE will instruct to how to maintain the
14 machine, so to give it, you know, again --

15 JUSTICE ALITO: But, if the question
16 is who is the -- the best party to warn, in
17 this case, why isn't that the Navy? Now I know
18 the Navy isn't liable because of the separate
19 doctrine, but why isn't the Navy -- why wasn't
20 the Navy the best party to -- to warn?

21 The Navy was aware of the hazards long
22 before the ships were built. It wanted to use
23 asbestos. It ordered these products knowing
24 that they would have to have asbestos on it.
25 It had control of the sailors.

1 MR. GOLDSTEIN: Yeah. So what the
2 Navy did -- and so I -- it is a very specific
3 question about the Navy -- what the Navy did is
4 it required the manufacturers to provide
5 manuals on how the machines are maintained. It
6 said to the manufacturer: You know how to
7 maintain your machine.

8 The Navy isn't the party that's most
9 expert about that. It's not the one that
10 tested the machine and the like. Yes, there
11 were specifications that it had to meet, but
12 the party that would produce the manual, the
13 party that would know that this was going to
14 degrade, the party that -- that -- and if I
15 could just give you another precise example
16 because I'm not sure the briefs, you know,
17 elucidate this enough.

18 What happens here is you have two
19 pieces of metal -- that's why it's called the
20 bare-metal defense -- and in between them is a
21 gasket, just like a washer in something in your
22 house, okay?

23 This thing cannot operate unless it's
24 sealed with something that has a little bit
25 more flexibility to it, and that's why you have

1 a gasket and that's why -- the reason it's
2 asbestos is it's the only thing in the relevant
3 period of time that would work.

4 And so, in that situation when you,
5 the manufacturer, are designing your machine
6 and knowing what kind of gasket will I be able
7 to use, it's going to have to be an asbestos
8 one, but not just that, I know that when you
9 break the machine open, right, to do
10 maintenance on the machine, we have to get
11 inside it, I know you're going to have to
12 scrape that off and make it perfectly clean in
13 order to reseal it, given the tolerances of my
14 machine.

15 CHIEF JUSTICE ROBERTS: Counsel, I --
16 I've been thinking about your plane and the
17 Rolls Royce engine.

18 MR. GOLDSTEIN: Yes.

19 CHIEF JUSTICE ROBERTS: I want to make
20 sure I understand it. The engine can cause all
21 sorts of dangers when it's running.

22 MR. GOLDSTEIN: Yes.

23 CHIEF JUSTICE ROBERTS: And your
24 theory was that the plane manufacturer is
25 liable to the -- when those dangers injure

1 someone?

2 MR. GOLDSTEIN: Your Honor, what I was
3 -- the example I was giving is if you are doing
4 maintenance on the engine, okay, under the
5 integrated product doctrine, the responsibility
6 there is of the airline manufacturer.

7 It may provide another manual from the
8 Rolls Royce company, but if the airline is
9 providing a manual on how to maintain the
10 machine and it includes the engines, we want it
11 to warn about the dangers of --

12 CHIEF JUSTICE ROBERTS: I would have
13 thought in that case -- it's a point your
14 friend on the other side made -- it does seem
15 to me that it would make a lot more sense for
16 the engine manufacturer to be the one giving
17 warnings about how its product works.

18 Now, I'm not quite sure why that's
19 different than the case before us, but it does
20 strike me as -- as a different situation.

21 MR. GOLDSTEIN: Well, I do think that
22 the -- the way the integrated product doctrine
23 has worked, and I think we can also cut through
24 the ambiguities and what the marginal cases
25 are, because they concede liability as to the

1 gaskets that shipped with it originally.

2 So we know we're dealing with an
3 integrated product there. The integrated
4 product doctrine works as saying if you build
5 something into your machine and it is going to
6 operate as intended, it is the manufacturer of
7 the integrated product, the turbine, the pump,
8 in our examples, that has the -- the common law
9 duty to warn.

10 JUSTICE KAVANAUGH: Is the -- is a
11 flashlight an integrated product then with the
12 batteries? Is it --

13 MR. GOLDSTEIN: I -- I think it's
14 probably --

15 JUSTICE KAVANAUGH: Or what's the
16 theory?

17 MR. GOLDSTEIN: I -- I think it is
18 because we're talking about wear parts here --

19 JUSTICE KAVANAUGH: And the ashtray is
20 not an integrated product with the --

21 MR. GOLDSTEIN: With the --

22 JUSTICE KAVANAUGH: -- tobacco?

23 MR. GOLDSTEIN: Exactly.

24 JUSTICE KAVANAUGH: Is that the -- I
25 just want to make sure -- is that the

1 distinction, so I understand?

2 MR. GOLDSTEIN: That is among the
3 distinctions, that's right. And part of it
4 would be probably whether it's the case that
5 these things ordinarily ship with batteries.
6 Okay?

7 If it's the case that these products
8 come with batteries, so, you know, they're
9 perceived as being one integrated thing. If
10 they are instead understood to be two separate
11 things, it would be a different matter.

12 The easy case, I would say -- we --
13 we're having the struggle that the common law
14 has had.

15 JUSTICE KAVANAUGH: Is shipped with
16 not inevitably used with?

17 MR. GOLDSTEIN: No. I think that it
18 is shipped with because it is inevitably used
19 with. It's no accident. It just -- it wasn't
20 like, we love asbestos. I mean, there is
21 nothing else --

22 CHIEF JUSTICE ROBERTS: Well, but
23 here, here they -- they didn't ship the
24 asbestos with it.

25 MR. GOLDSTEIN: That is --

1 CHIEF JUSTICE ROBERTS: Other than
2 your gasket part. I mean, the insulation was
3 added later.

4 MR. GOLDSTEIN: That is -- so just to
5 be clear, our -- our case rests quite heavily
6 on the internal gasket that turns to dust and
7 the internal packing that turns to dust. That
8 was overwhelmingly provided with the machine
9 because, especially as to the gaskets, the
10 metal will just rub up against it.

11 There is the question of the
12 non-replacement external insulation. And so
13 this could be looked at differently. We do
14 think the result is the same, because the
15 machine will not operate as intended without
16 the external insulation for two reasons:

17 The most important one is the machine
18 is built to keep heat in the system. If you
19 don't have asbestos insulation, all the heat
20 goes out of it. Everybody knows the machine
21 will be covered in insulation.

22 The reason it doesn't ship with it is
23 because it is just very, very difficult to
24 pre-install blanket insulation rather than
25 hanging it on once it gets to the ship itself.

1 I -- I will say there is also a
2 marginal case that my friend sometimes points
3 to, and that is, you ship the parts of the
4 machine and there is where you put in the
5 gasket and the packing.

6 That's because some -- these machines
7 can be so big that the Navy can require that
8 they be assembled shipboard, but that doesn't
9 make them any less part of the original
10 machine.

11 JUSTICE BREYER: The part there that I
12 started off, whatever my track was, is -- is in
13 the restatement where it says on -- you're
14 talking of this case that you're talking about,
15 I think, right now.

16 "The law itself must take care to
17 avoid requiring excessive precautions of actors
18 relating to harms that are immediately due to
19 the improper conduct of third parties, even
20 when that improper conduct can be regarded as
21 somewhat foreseeable."

22 So that says, oh, well, we have to
23 figure it out. And that's why I sort of see,
24 but I thought, well, maybe that should be
25 interpreted as to require, in your third

1 situation, not the first two, that the
2 manufacturer functionally requires that a
3 dangerous item be put to work.

4 MR. GOLDSTEIN: All right. The only
5 change I would give --

6 JUSTICE BREYER: And you all can argue
7 about whether that's true.

8 MR. GOLDSTEIN: Sorry. I might not
9 say the manufacturer functionally requires,
10 that is, it is functionally required.

11 JUSTICE BREYER: What would you say?

12 MR. GOLDSTEIN: It is -- in the
13 passive voice. Because I just -- if they are
14 making a machine to a Navy specification and
15 the machine will only operate with asbestos, I
16 don't think that gets rid of the duty to warn
17 unless the Navy tells them not to warn. That's
18 the Boyle defense.

19 So I do want to be clear that I think
20 that there are a couple defenses, government
21 contractor and superseding cause, that
22 essentially the other side's argument is, you
23 know, we got halfway there, you know, we didn't
24 actually have the Navy forbidding us from
25 giving warnings and we didn't actually have an

1 unforeseeable superseding cause, but kind of
2 the mix of those as a policy matter is enough
3 to put the liability off on someone else.

4 There should be a real consequence to
5 the fact that they can't meet the standards of
6 the Court's decision in Exxon versus Sofec on
7 superseding cause or the government contractor
8 defense.

9 When those requirements aren't met,
10 that's because we want the liability on the
11 original party here. And that's this party.
12 It is creating the danger.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Four minutes, Mr. Dvoretzky.

17 REBUTTAL ARGUMENT OF SHAY DVORETZKY

18 ON BEHALF OF THE PETITIONERS

19 MR. DVORETZKY: Thank you, Mr. Chief
20 Justice.

21 I think that one of the challenges --
22 one of the challenges of this argument is
23 creating an administrable rule based on these
24 terms like required, directed, inevitable.

25 And I think the back and forth shows

1 that those terms, when you actually try to
2 apply them, are very difficult to apply and
3 will not lead to predictable rules that will
4 tell manufacturers what they need to do and
5 that will promote the interest of maritime
6 commerce.

7 When you talk about the machine not
8 operating without it, in our case the machines
9 would operate without asbestos. They just
10 would not operate as efficiently.

11 And Joint Appendix 104 and 128 discuss
12 a couple of alternatives that maybe did not
13 meet the Navy's specs, but that would have
14 allowed the machines to operate and, again,
15 they operate without asbestos today.

16 If we're talking about directed, I
17 think it's helpful to look at what an example
18 of a manual in this case actually is. And it's
19 in the Third Circuit Joint Appendix at 372 to
20 404.

21 All it is is a series of sketches that
22 show where the asbestos would go. In other
23 words, this shows the foreseeable use of
24 asbestos by the Navy, but it's not providing
25 specific step-by-step directions saying you

1 must use asbestos and here's how to use it.

2 So when we talk about directed, what
3 does that mean? And it's important in maritime
4 law, in particular, to have predictable rules
5 in order to promote maritime commerce.

6 Second point: My friend talks about
7 how our machines created the risk. This is not
8 a combined use sort of case where a flashlight
9 might puncture a battery. And in that
10 situation, of course, the flashlight
11 manufacturer would be liable for contributing
12 to the harm.

13 It was not argued below. There is no
14 evidence in the record that our machines
15 contribute to the harm in this way. And it's
16 also not true, first, because of the point I
17 made earlier that this is just the natural
18 degradation of asbestos when it's used, not any
19 unique harm caused by our machine.

20 JUSTICE GINSBURG: What you just said,
21 it sounds to me like -- that those would be an
22 -- issues for trial, but you say you should
23 have summary judgment and no trial based on
24 the, what is it, the bare something doctrine?

25 MR. DVORETZKY: Well, if -- if the

1 theory -- if it were argued in this case that
2 there was a genuine issue of fact about whether
3 our equipment contributed to the harm in the
4 way that a flashlight punctures a battery, that
5 might well be a fact question, but that's not
6 been pled or argued and there is no genuine
7 issue of fact on this record because that's
8 simply not what's been argued below.

9 Moreover, if you look at our system,
10 while the system as a whole generates heat, not
11 all equipment in the system even does that.
12 The -- the turbine, for example, spins around
13 but isn't generating any appreciable amount of
14 heat.

15 And so the idea that every
16 manufacturer in this integrated system is
17 liable for warning would just -- would, again,
18 lead to over-warning and excessive liability.

19 With respect to the cases that Mr.
20 Goldstein cited, the Huynh case is one in which
21 the grinder caused the wheel to explode because
22 the particular wheel was incompatible with the
23 grinder.

24 And so in that situation there, of
25 course, might well be a duty on the part of the

1 grinder manufacturer to say: Don't use this
2 wheel.

3 The Macias case did not involve later
4 added components. And the same state supreme
5 court there reaffirmed its earlier decisions in
6 the Braaten and Simonetta cases, which did
7 involve later added components.

8 And it's also worth emphasizing that
9 both of those cases -- both of those cases are
10 asbestos-related cases. And Mr. Goldstein
11 hasn't cited a single case from outside the
12 asbestos made context involving, say, a
13 flashlight manufacturer that needs to warn
14 about the batteries.

15 The fact that flashlight manufacturers
16 might do that as a matter of being overly
17 cautious doesn't mean that the law requires it
18 and doesn't mean that tort law policy is well
19 served by it.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 12:06 p.m., the case
23 was submitted.)

24

25

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