

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

AIR AND LIQUID SYSTEMS CORP.,)
ET AL.,)
 Petitioners,)
 v.) No. 17-1104
ROBERTA G. DeVRIES, INDIVIDUALLY)
AND AS ADMINISTRATRIX OF THE ESTATE)
OF JOHN B. DeVRIES, DECEASED,)
ET AL.,)
 Respondents.)

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Washington, D.C.

Wednesday, October 10, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of the Petitioners.

THOMAS C. GOLDSTEIN, ESQ., Bethesda, Maryland; on 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: Their product would not be salable absent the addition of the asbestos insulation or 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 Navy -- the Respondent --
2 the Petitioners, of course, knew that the Navy
3 was 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 their 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 this 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
13 is creating a spark that a properly operating
14 car 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 -- sorry, Justice
10 Breyer.

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

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

24 If that were the law, drywall
25 manufacturers would be responsible for warning

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

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

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

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

11 MR. DVORETZKY: Well --

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

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

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

23 Nobody would buy drywall without the
24 availability of paint or -- or wallpaper in
25 order to cover it. And so I don't think that

1 our situation is any different from the
2 ordinary tort rule.

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

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

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

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

1 was there before. What's wrong with that one?

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

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

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

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

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

24 JUSTICE BREYER: No, it doesn't.
25 Required means you tell the person that he

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

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

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

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

1 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: Ah -- 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: 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 Breyer --

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

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

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

1 around and you lead to over --

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

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

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

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

24 Is -- when you put your product into
25 the market and say it requires asbestos, that

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

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

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

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

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

24 MR. DVORETZKY: Well, I -- it
25 increases costs if you're looking after the

1 fact at a party that didn't think that the law
2 required it to provide a warning and imposing
3 liability.

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

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

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

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

24 MR. DVORETZKY: Well, no. We're
25 saying a -- a warning at that point -- the

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

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

17 JUSTICE KAGAN: No, but the warning --

18 CHIEF JUSTICE ROBERTS: No, but I mean

19 --

20 MR. DVORETZKY: And it would be
21 counter-productive.

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

1 everybody knows to ignore the warning. But the
2 warning is good for all the time in which the
3 product is used with asbestos.

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

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

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

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

1 got to use asbestos, knowing all the relevant
2 things, that's a negligent act. Okay.

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

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

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

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

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

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

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

1 said to contribute to the harm. With --

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

4 MR. DVORETZKY: Why are too many --

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

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

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

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

1 knows that, in order for that propeller to
2 operate, it needs to be connected to a
3 steam-generating propulsion system that uses
4 asbestos down the line.

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Goldstein.

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

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

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

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

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

1 product's proper operation."

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

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

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

1 the manual created by the Defendants here, you
2 have an injury to which you are subjected.

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

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

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

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

1 warning by the manufacturers here. And if the
2 Navy believed there was over-warning, the Navy
3 would prohibit giving this warning.

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

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

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

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

1 different applications.

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

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

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

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

1 to.

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

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

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

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

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

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

1 talking about put the warning on the gasket, I
2 actually thought about it and wrote it down and
3 it says warning.

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

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

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

14 (Laughter.)

15 MR. GOLDSTEIN: My friend says --

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

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

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

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

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

25 MR. GOLDSTEIN: Okay. Could I just

1 disagree with that premise or --

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

4 (Laughter.)

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

10 (Laughter.)

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

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

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

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

1 MR. GOLDSTEIN: It is the --

2 JUSTICE GORSUCH: And why?

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

7 JUSTICE GORSUCH: Right.

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

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

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

1 for replacement parts that are reasonably
2 foreseeable to be used with your machine.

3 And so --

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

7 MR. GOLDSTEIN: Yes.

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

10 MR. GOLDSTEIN: Yes.

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

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

23 And my friend, I think, is just
24 confused. He says we haven't cited any cases.
25 We've cited the Huynh case, for example, and

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

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

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

15 So you make a respirator and it
16 exposes people to the thing that -- benzene or
17 asbestos or whatever it is that you're trying
18 to protect against. You have a duty to warn
19 that you know that that machine -- that device
20 is only going to operate when it is that it's
21 exposed to the hazardous chemical. That duty
22 exists just as in the gasoline in the car.

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

1 the court of appeals' opinion, and it says the
2 -- the product may be held liable -- you know,
3 the manufacturer, if the facts show the
4 plaintiff's injuries were a reasonably
5 foreseeable result of the failure to provide a
6 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 -- but
19 the -- perhaps one of the other things that the
20 other side is worried about is, if you read
21 that 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 horribles
5 that Mr. Dvoretzky threw out at the end of his
6 argument was like a flashlight with batteries.

7 What -- what -- how should that come
8 out?

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

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

18 MR. GOLDSTEIN: No, I think that, in
19 that situation, the mere fact that batteries
20 are intrinsically dangerous doesn't create the
21 duty to warn. It is, I think, a special
22 feature of this case that the machine itself
23 contributes to the liability. It ships with,
24 very frequently, asbestos gaskets and other
25 material, and it cannot operate without it.

1 It's the 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 have -- has raised
14 about over-warnings, contradictory warnings,
15 and the costs associated with that, that might
16 deter innovation and raise consumer cost
17 needlessly, 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.

20 MR. GOLDSTEIN: So --

21 JUSTICE KAVANAUGH: Just making sure.

22 (Laughter.)

23 MR. GOLDSTEIN: Absolutely. Now I --

24 JUSTICE KAVANAUGH: I just wanted to
25 make sure.

1 MR. GOLDSTEIN: I will say that
2 another part of my answer is that this is the
3 easier case because the product can -- actually
4 contributes to the injury. You may have lots
5 of defenses there, including that there were
6 other warnings that were already given, you
7 have a sophisticated user that already knows
8 about it, that sort of thing. But I actually
9 think that, in that precise hypothetical, it
10 ought to come out that way.

11 JUSTICE SOTOMAYOR: Mr. Goldstein --

12 MR. GOLDSTEIN: I would want to know
13 --

14 JUSTICE ALITO: But --

15 JUSTICE SOTOMAYOR: -- I -- I --
16 having just recently bought a battery --

17 MR. GOLDSTEIN: Yes.

18 JUSTICE SOTOMAYOR: -- the flashlight
19 told me to not store it with the battery.

20 MR. GOLDSTEIN: Okay.

21 JUSTICE SOTOMAYOR: So now --

22 JUSTICE KAGAN: Did you feel
23 overwarned?

24 JUSTICE SOTOMAYOR: -- can you show me
25 why they --

1 (Laughter.)

2 JUSTICE SOTOMAYOR: Can you show me a
3 case that would have suggested --

4 MR. GOLDSTEIN: Sure. Two I -- the
5 two that --

6 JUSTICE SOTOMAYOR: -- that would have
7 come out to the -- to that conclusion? I
8 always assume that when manufacturers do
9 things, it's because somebody sued them.

10 (Laughter.)

11 MR. GOLDSTEIN: Somebody told them to.
12 And sometimes they are over-protective. It's
13 true.

14 JUSTICE SOTOMAYOR: Occasionally.

15 MR. GOLDSTEIN: So I -- the two I
16 think that are -- are quite on point are the
17 Huynh case and the Macias case that I gave, so
18 the California Court of Appeals and the
19 Washington Supreme Court.

20 And I -- I do think I should, you
21 know, to be fair to my friend, address the
22 other examples. And so he gives the airplane,
23 okay?

24 So you -- you manufacture an airplane.
25 It is -- a few things about that. First,

1 airplanes actually do work without seats. You
2 know, some -- if not, somebody better tell
3 FedEx, which is shipping things all over the
4 country. But at the very least, they work with
5 lots of different kinds of seats. That's why
6 some people fly Emirates and not Spirit,
7 because the -- some of the seats will be much,
8 much closer in and have a much greater risk of
9 injury for them.

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

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

22 I hope that they -- we want the
23 airplane manufacturer to warn about that
24 because that -- that plane will not operate
25 without those engines and you are going to be

1 exposed to that risk in the course of
2 maintaining that machine.

3 That's the much more analogous
4 hypothetical of ours.

5 JUSTICE ALITO: What about the
6 ashtray? You didn't answer the question.
7 Yeah.

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

11 JUSTICE ALITO: That's -- I mean,
12 that's -- your answer is, well, you know, the
13 manufacturer of the ashtray is off the hook
14 because it's possible somebody might use it for
15 some purpose other than -- than smoking?

16 MR. GOLDSTEIN: No, I -- I just tried
17 to give -- among the distinctions is certainly
18 that. And so it wouldn't fit within the Third
19 Circuit's --

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

22 MR. GOLDSTEIN: Okay. Then there are
23 -- there are others, and that is the ashtray
24 does not give you cancer. Okay? The ashtray
25 does not actually contribute to your injury.

1 What you have is you have a toxic
2 product that you're making a choice to use that
3 you are putting down. It would be like saying
4 this -- and I think it's a great example for us
5 because it highlights why we are not saying
6 they're responsible for every harm from
7 asbestos, including this asbestos. It would be
8 like us saying: Your machine only works with
9 asbestos; you're liable because I got sick
10 because the storage room had the asbestos in
11 it.

12 We're not just saying kind of but-for
13 causation that there was a relationship between
14 them. You can put your cancer-causing
15 cigarette down in the ashtray and not be liable
16 for it, but if it is the case -- I'll give you
17 an example.

18 What if the ashtray is made of paper?
19 Okay? If the ashtray is made of paper, so that
20 if you put something lit in it, they will cause
21 -- it will cause combustion and it will burn --

22 JUSTICE ALITO: No, but that's
23 different because then your product, the actual
24 product that you're manufacturing, is
25 dangerous.

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

3 JUSTICE ALITO: In and of itself. In
4 and of itself.

5 MR. GOLDSTEIN: I don't -- I don't --
6 I mean, kids make paper ashtrays, and we all --
7 the world goes on. I don't think they are
8 intrinsically dangerous -- I'm -- probably,
9 kids shouldn't be making ashtrays. But --

10 (Laughter.)

11 JUSTICE ALITO: Well --

12 MR. GOLDSTEIN: -- I'm just saying I
13 could.

14 JUSTICE KAVANAUGH: The difference --
15 the difference --

16 MR. GOLDSTEIN: It may not be as good
17 as my gasket.

18 JUSTICE KAVANAUGH: Just so I can
19 follow, the difference between the flashlight
20 and ashtray example?

21 MR. GOLDSTEIN: The -- the difference
22 between the flashlight and the ashtray example
23 is that in the course -- in the necessary
24 course of using it, if you are going to be
25 exposed to harm. And so I suppose on that

1 axis, it is the case that the ashtray can be
2 used for other things.

3 But we are -- I did think that it was
4 quite important that we aren't saying that they
5 are -- they have a duty to warn that kind of
6 encompasses everything that the asbestos
7 manufacturer would, because the asbestos
8 manufacturer may have other warnings and other
9 harm that it causes.

10 Our harm is one that comes distinctly
11 from the fact that this machine is just -- it's
12 not bare-metal; it's dead metal. It is just
13 sitting there as dead weight. And if -- and it
14 may help --

15 JUSTICE GORSUCH: What if -- what if
16 -- let's just take a hypothetical.

17 MR. GOLDSTEIN: Sure.

18 JUSTICE GORSUCH: Okay. The -- the
19 ashtray, a jury will find in my hypothetical
20 case that the particular nature of its design
21 meant that the manufacturer knew it would be
22 used with tobacco products inevitably, okay?
23 Then what?

24 MR. GOLDSTEIN: So there are a lot of
25 different defenses as well, including the

1 sophistication --

2 JUSTICE GORSUCH: Well, just stick
3 with the -- the hypothetical.

4 MR. GOLDSTEIN: I am sticking with the
5 hypothetical.

6 JUSTICE GORSUCH: All right. All
7 right.

8 MR. GOLDSTEIN: I mean, I took the
9 hypothetical to be, you know, will the ashtray
10 maker be liable --

11 JUSTICE GORSUCH: I know there are
12 defenses, and there are going to be defenses --

13 MR. GOLDSTEIN: Yeah.

14 JUSTICE GORSUCH: -- for General
15 Electric or whomever in this case too. I --
16 I'm not asking about that.

17 Is there a duty, is what I'm asking,
18 okay? That -- that you could get to a jury on
19 duty?

20 MR. GOLDSTEIN: Yeah.

21 JUSTICE GORSUCH: That's my question.

22 MR. GOLDSTEIN: The ashtray -- I think
23 that there is not a duty. I think that the
24 important distinctions are that, here, the
25 actual machine creates the special and distinct

1 risk, and, in addition, there is in the common
2 law this understanding about whether you would
3 be an efficient party or there's a much better
4 party to warn.

5 And there we have obviously the
6 situation -- I think the -- the hypothetical
7 resonates because there's so much knowledge in
8 the community about the harms from cigarettes
9 that come from warning about cigarettes.

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

23 JUSTICE ALITO: But, if the question
24 is who is the -- the best party to warn, in
25 this case, why isn't that the Navy? Now I know

1 the Navy isn't liable because of the separate
2 doctrine, but why isn't the Navy -- why wasn't
3 the Navy the best party to -- to warn?

4 The Navy was aware of the hazards long
5 before the ships were built. It wanted to use
6 asbestos. It ordered these products knowing
7 that they would have to have asbestos on it.
8 It had control of the sailors.

9 MR. GOLDSTEIN: Yeah. So what the
10 Navy did -- and so I -- it is a very specific
11 question about the Navy -- what the Navy did is
12 it required the manufacturers to provide
13 manuals on how the machines are maintained. It
14 said to the manufacturer: You know how to
15 maintain your machine.

16 The Navy isn't the party that's most
17 expert about that. It's not the one that
18 tested the machine and the like. Yes, there
19 were specifications that it had to meet, but
20 the party that would produce the manual, the
21 party that would know that this was going to
22 degrade, the party that -- that -- and if I
23 could just give you another precise example
24 because I'm not sure the briefs, you know,
25 elucidate this enough.

1 What happens here is you have two
2 pieces of metal -- that's why it's called the
3 bare-metal defense -- and in between them is a
4 gasket, just like a washer in something in your
5 house, okay?

6 This thing cannot operate unless it's
7 sealed with something that has a little bit
8 more flexibility to it, and that's why you have
9 a gasket and that's why -- the reason it's
10 asbestos is it's the only thing in the relevant
11 period of time that would work.

12 And so, in that situation when you,
13 the manufacturer, are designing your machine
14 and knowing what kind of gasket will I be able
15 to use, it's going to have to be an asbestos
16 one, but not just that, I know that when you
17 break the machine open, right, to do
18 maintenance on the machine, we have to get
19 inside it, I know you're going to have to
20 scrape that off and make it perfectly clean in
21 order to reseal it, given the tolerances of my
22 machine.

23 CHIEF JUSTICE ROBERTS: Counsel, I --
24 I've been thinking about your plane and the
25 Rolls Royce engine.

1 MR. GOLDSTEIN: Yes.

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

5 MR. GOLDSTEIN: Yes.

6 CHIEF JUSTICE ROBERTS: And your
7 theory was that the plane manufacturer is
8 liable to the -- when those dangers injure
9 someone?

10 MR. GOLDSTEIN: Your Honor, what I was
11 -- the example I was giving is if you are doing
12 maintenance on the engine, okay, on -- under
13 the integrated product doctrine, the
14 responsibility there is of the airline
15 manufacturer.

16 It may provide another manual from the
17 Rolls Royce company, but if the airline is
18 providing a manual on how to maintain the
19 machine and it includes the engines, we want it
20 to warn about the dangers of --

21 CHIEF JUSTICE ROBERTS: I would have
22 thought in that case -- it's a point your
23 friend on the other side made -- it does seem
24 to me that it would make a lot more sense for
25 the engine manufacturer to be the one giving

1 warnings about how its product works.

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

5 MR. GOLDSTEIN: Well, I do think that
6 the -- the way the integrated product doctrine
7 has worked, and I think we can also cut through
8 the ambiguities and what the marginal cases
9 are, because they concede liability as to the
10 gaskets that shipped with it originally.

11 So we know we're dealing with an
12 integrated product there. The integrated
13 product doctrine works as saying if you build
14 something into your machine and it is going to
15 operate as intended, it is the manufacturer of
16 the integrated product, the turbine, the pump,
17 in our examples, that has the -- the common law
18 duty to warn.

19 JUSTICE KAVANAUGH: Is the -- is a
20 flashlight an integrated product then with the
21 batteries? Is it --

22 MR. GOLDSTEIN: I -- I think it's
23 probably --

24 JUSTICE KAVANAUGH: Or what's the
25 theory?

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

3 JUSTICE KAVANAUGH: And the ashtray is
4 not an integrated product with the --

5 MR. GOLDSTEIN: With the --

6 JUSTICE KAVANAUGH: -- tobacco?

7 MR. GOLDSTEIN: Exactly.

8 JUSTICE KAVANAUGH: Is that the -- I
9 just want to make sure -- is that the
10 distinction, so I understand?

11 MR. GOLDSTEIN: That is among the
12 distinctions, that's right. And part of it
13 would be probably whether it is the case that
14 these things ordinarily ship with batteries.
15 Okay?

16 If it's the case that these products
17 come with batteries, so, you know, they're
18 perceived as being one integrated thing. If
19 they are instead understood to be two separate
20 things, it would be a different matter.

21 The easy case, I would say -- we --
22 we're having the struggle that the common law
23 has had.

24 JUSTICE KAVANAUGH: So shipped with,
25 not inevitably used with?

1 MR. GOLDSTEIN: No. I think that it
2 is shipped with because it is inevitably used
3 with. It's no accident. It just -- it wasn't
4 like we love asbestos. I mean, there is
5 nothing else --

6 CHIEF JUSTICE ROBERTS: Well, but here
7 -- here, they -- they didn't ship the asbestos
8 with it.

9 MR. GOLDSTEIN: That is --

10 CHIEF JUSTICE ROBERTS: Other than
11 your gasket part. I mean, the insulation was
12 added later.

13 MR. GOLDSTEIN: That is -- so just to
14 be clear, our -- our case rests quite heavily
15 on the internal gasket that turns to dust and
16 the internal packing that turns to dust. That
17 was overwhelmingly provided with the machine
18 because, especially as to the gaskets, you
19 know, the metal will just rub up against it.

20 There is the question of the
21 non-replacement external insulation. And so
22 this could be looked at differently. We do
23 think the result is the same, because the
24 machine will not operate as intended without
25 the external insulation for two reasons.

1 The most important one is the machine
2 is built to keep heat in the system. If you
3 don't have asbestos insulation, all the heat
4 goes out of it. Everybody knows the machine
5 will be covered in insulation.

6 The reason it doesn't ship with it is
7 because it is just very, very difficult to
8 pre-install blanket insulation rather than
9 hanging it on once it gets to the ship itself.

10 I -- I will say there is also a
11 marginal case that my friend sometimes points
12 to, and that is you ship the parts of the
13 machine and there's where you put in the gasket
14 and the packing.

15 That's because some -- these machines
16 can be so big that the Navy can require that
17 they be assembled shipboard, but that doesn't
18 make them any less part of the original
19 machine.

20 JUSTICE BREYER: The part there that I
21 started off, whatever my track was, is -- is in
22 the restatement where it says on -- you're
23 talking about this case that you're talking
24 about, I think, right now.

25 "The law itself must take care to

1 avoid requiring excessive precautions of actors
2 relating to harms that are immediately due to
3 the improper conduct of third-parties, even
4 when that improper conduct can be regarded as
5 somewhat foreseeable."

6 So that says, oh, well, we have to
7 figure it out. And that's why I sort of see,
8 but I thought, well, maybe that should be
9 interpreted as to require, in your third
10 situation, not the first two, that -- that the
11 manufacturer functionally requires that a
12 dangerous item be put to work.

13 MR. GOLDSTEIN: All right. The only
14 change I would give --

15 JUSTICE BREYER: And you all can argue
16 about whether that's true. What?

17 MR. GOLDSTEIN: Sorry. I might not
18 say the manufacturer functionally requires,
19 that is, it is functionally required.

20 JUSTICE BREYER: What would you say?

21 MR. GOLDSTEIN: It is -- in the
22 passive voice, because I just -- if -- if they
23 are making a machine to a Navy specification
24 and the machine will only operate with
25 asbestos, I don't think that gets rid of the

1 duty to warn unless the Navy tells them not to
2 warn. That's the Boyle defense.

3 So I do want to be clear that I think
4 that there are a couple defenses, government
5 contractor and superseding cause, that
6 essentially the other side's argument is, you
7 know, we got halfway there, you know, we didn't
8 actually have the Navy forbidding us from
9 giving warnings and we didn't actually have an
10 unforeseeable superseding cause, but kind of
11 the mix of those as a policy matter is enough
12 to put the liability off on someone else.

13 There should be a real consequence to
14 the fact that they can't meet the standards of
15 the Court's decision in Exxon versus Sofec on
16 superseding cause or the government contractor
17 defense.

18 When the -- those requirements aren't
19 met, that's because we want the liability on
20 the original party here. And that's this
21 party. It is creating the danger.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Four minutes, Mr. Dvoretzky.

1 REBUTTAL ARGUMENT OF SHAY DVORETZKY
2 ON BEHALF OF THE PETITIONERS

3 MR. DVORETZKY: Thank you, Mr. Chief
4 Justice.

5 I think that one of the challenges --
6 one of the challenges of this argument is
7 creating an administrable rule based on these
8 terms like required, directed, inevitable.

9 And I think the back and forth shows
10 that those terms, when you actually try to
11 apply them, are very difficult to apply and
12 will not lead to predictable rules that will
13 tell manufacturers what they need to do and
14 that will promote the interests of maritime
15 commerce.

16 When you talk about the machine not
17 operating without it, in our case, the machines
18 would operate without asbestos. They just
19 would not operate as efficiently.

20 And Joint Appendix 104 and 128 discuss
21 a couple of alternatives that maybe did not
22 meet the Navy's specs but that would have
23 allowed the machines to operate, and, again,
24 they operate without asbestos today.

25 If we're talking about directed, I

1 think it's helpful to look at the -- what an
2 example of a manual in this case actually is,
3 and it's in the Third Circuit Joint Appendix at
4 372 to 404.

5 All it is is a series of sketches that
6 show where the asbestos would go. In other
7 words, this shows the foreseeable use of
8 asbestos by the Navy, but it's not providing
9 specific step-by-step directions saying you
10 must use asbestos and here's how to use it.

11 So, when we talk about directed, what
12 does that mean? And it's important in maritime
13 law in particular to have predictable rules in
14 order to promote maritime commerce.

15 Second point: My friend talks about
16 how our machines created the risk. This is not
17 a combined use sort of case where a flashlight
18 might puncture a battery. And in that
19 situation, of course, the flashlight
20 manufacturer would be liable for contributing
21 to the harm.

22 It was not argued below. There's no
23 evidence in the record that our -- that our
24 machines contribute to the harm in this way.
25 And it's also not true, first, because of the

1 point I made earlier that this is just the
2 natural degradation of asbestos when it's used,
3 not any unique harm caused by our machine.

4 JUSTICE GINSBURG: And what you just
5 said, it sounds to me like -- that those would
6 be an issue -- issues for trial, but you say
7 you should have summary judgment and no trial
8 based on the, what is it, the bare something
9 doctrine?

10 MR. DVORETZKY: Well, if -- if the
11 theory -- if it were argued in this case that
12 there was a genuine issue of fact about whether
13 our equipment contributed to the harm in the
14 way that a flashlight punctures a battery, that
15 might well be a fact question, but that's not
16 been pled or argued, and there's no genuine
17 issue of fact on this record because that's
18 simply not what's been argued below.

19 Moreover, if you look at our system,
20 while the system as a whole generates heat, not
21 all equipment in the system even does that.
22 The -- the turbine, for example, spins around
23 but isn't generating any appreciable amount of
24 heat.

25 And so the idea that every

1 manufacturer in this integrated system is
2 liable for warning would just -- would, again,
3 lead to over-warning and excessive liability.

4 With respect to the cases that Mr.
5 Goldstein cited, the Huynh case is one in which
6 the grinder caused the wheel to explode because
7 the particular wheel was incompatible with the
8 grinder.

9 And so, in that situation, there, of
10 course, might well be a duty on the part of the
11 grinder manufacturer to say: Don't use this
12 wheel.

13 The Macias case did not involve later
14 added components. And the same state supreme
15 court there reaffirmed its earlier decisions in
16 the Braaten and Simonetta cases, which did
17 involve later added components.

18 And it's also worth emphasizing that
19 both of those cases -- both of those cases are
20 asbestos-related cases. And Mr. Goldstein
21 hasn't cited a single case from outside the
22 asbestos made context involving, say, a
23 flashlight manufacturer that needs to warn
24 about the batteries.

25 The fact that flashlight manufacturers

1 might do that as a matter of being overly
2 cautious doesn't mean that the law requires it
3 and doesn't mean that tort law policy is well
4 served by it.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 12:06 p.m., the case
8 was submitted.)

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