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The Voice

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An Unbalanced Approach to the "Duty to Warn"

By Peter S. French and Tristan C. Fretwell

In March of this year, the U.S. Supreme Court settled a split among federal and state courts regarding how to apply the general tort law "duty to warn" when a manufacturer's product requires later incorporation of a dangerous part. Limiting the decision to the maritime tort context, the Supreme Court adopted a rule that attempted to find a middle ground between the plaintiff-friendly foreseeability rule and the defendant-friendly bare-metal defense. This middle-way approach, however, may result in some heavy burdens for product manufacturers that is anything but balanced.

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The *Air & Liquid Systems Corp., et al. v. Devries* Decision

In *Air & Liquid Systems Corp., et al. v. Devries*, 139 S. Ct. 986 (2019), the plaintiffs represented two Navy veterans who alleged that they developed cancer after being exposed to asbestos on Navy ships. The defendants were several manufacturers that produced pumps, blowers, and turbines used on those ships. *Id.* at 991. These pieces of equipment required asbestos insulation or asbestos parts to function; however, the defendants often delivered their equipment to the Navy without asbestos. *Id.* It was the Navy that later added the asbestos. *Id.* The plaintiffs sued the defendants, claiming that the manufacturers "negligently failed to warn them of the dangers of asbestos in the integrated products." *Id.* at 992.

In a split decision, the Supreme Court held that a manufacturer does have a duty to warn when the manufacturer's product requires later incorporation of a dangerous part. *Id.* at 993. Specifically, the Court created the following rule:

> in the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize the danger.

Id. at 995.

New Burdens for Product Manufacturers

Contrary to the majority's conclusion that this new rule "should not meaningfully add" to a manufacturer's burden, given the current duty to warn of the dangers of the manufacturer's own product, the Supreme Court's decision will likely result in new burdens and unforeseen consequences for product manufacturers.

First, as the dissent correctly points out, this new rule will hold product manufacturers accountable for the failure of third-party parts manufacturers to provide adequate warnings, causing product manufacturers to "internalize the full cost of any injuries caused by inadequate warnings." *Id.* at 997. By forcing parts and product manufacturers now to share a duty to warn, both parties also will share the corresponding costs and risks. Such a result creates a potential risk that some parts manufacturers will be disincentivized from adequately fulfilling their duty to warn, knowing that any consequences will be shared with a potentially wealthier product manufacturer.

Second, the new rule creates confusion about which products it applies to. In acknowledging these newly created uncertainties, the dissent lists several of the ambiguities, including (1) when is incorporation of a dangerous third-party product "required," as opposed to optimal or preferred; (2) what will qualify as an "integrated product"; and (3) if a defendant reasonably expects that a third-party parts manufacturer will comply with its own duty to warn, is that sufficient "reason to believe" that users will "realize" the danger, absolving the defendant of responsibility? *Id.* at 998–99. There is little doubt that these questions, and others similar to them, will be the subject of future litigation.

Finally, this new rule imposes a duty to warn and the concomitant risk associated with a failure to warn on manufacturers that previously was not recognized in product liability law. Product manufacturers now run the risk of being held retroactively responsible for failing to warn about the dangers of parts manufacturers' products that are incorporated into their own after the fact. As the dissent states, "It is a duty they could not have anticipated then and one they cannot discharge now. They can only pay." *Id.* at 999. Product manufacturers not only must

bear the costs in time and money of adding additional warnings—something that the majority acknowledges—but also, the costs and consequences of not providing warnings on products that they manufactured years ago.

The Uncertain Future

Despite the Supreme Court limiting the holding to the maritime tort context, how federal and state courts may use the reasoning in *Air & Liquid Systems Corp., et al. v. Devries* has yet to be determined. While the Supreme Court conditioned its decision on the special protection afforded to U.S. Navy service members for the hazardous nature of their work, there is little doubt that other courts may find additional classes of plaintiffs that are equally deserving of this protection. Although this decision may only currently affect manufacturers of maritime products, no product manufacturer can afford to ignore that its "duty to warn," and the resulting consequences of a failure to do so, may significantly increase in the near future.

Peter S. French is a partner with **Taft Stettinius & Hollister LLP** in Indianapolis, Indiana, who represents clients in litigation matters in many jurisdictions across the United States. He has represented clients in a wide variety of contexts, including class actions, False Claims Act lawsuits, strict product liability claims, intellectual property infringement matters, securities matters, shareholder disputes, real estate development and construction disputes, false advertising and unfair competition cases, breach of contract cases, commercial mortgage foreclosures, and insurance coverage matters. Mr. French is the DRI Product Liability Committee publications chair.

Tristan C. Fretwell is an associate with **Taft Stettinius & Hollister LLP** in Indianapolis, Indiana. He focuses his practice on a wide variety of commercial and general litigation matters. He earned his J.D., cum laude, from Indiana University Maurer School of Law in 2018.

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Robert W. Maxwell and David W. Case


On July 3, 2019, a state court jury in New London, Connecticut, returned a verdict for Hyundai Motor America, finding no manufacturing defect in the front driver's wheel of a 2013 Hyundai Elantra. *Ryan Brown v. Hyundai Motor America, et al.*, No. KNL2CV1560251305 (Conn. Super. Ct. July 3, 2019). The jury deliberated for 18 minutes after a three-week trial. Hyundai was represented by DRI members Robert W. Maxwell of **Bernard Cassisa Elliott & Davis** in Covington, Louisiana, and David W. Case of **McElroy Deutsch Mulvaney & Carpenter LLP** in Hartford, Connecticut.

The plaintiff, Ryan Brown, a lieutenant in the United States Navy, was driving on an interstate highway in eastern Connecticut on September 29, 2013, after leaving a fraternity party. Brown contended that the front driver's wheel of his vehicle suddenly fractured, causing the car to spin out of control and cross multiple lanes of the highway before eventually coming to a stop in the median. Brown claimed that he sustained numerous orthopedic injuries during the mishap, requiring multiple surgeries and resulting in permanent disabilities.

Brown contended that the cast aluminum wheel fractured, due to manufacturing defects. The vehicle had only 1,100 miles on the odometer at the time of the accident, and it was alleged that the wheel did not undergo proper heat treatment and had excessive levels of porosity and silicon and other defects in the microstructure.

Hyundai countered that the wheel fractured because it hit a rigid object on the highway, producing a force exceeding 10,000 pounds. An extensive series of laboratory tests were performed that proved that the wheel was composed of the proper elements and met hardness specifications indicative of appropriate heat treatment. Additional X-ray studies were conducted that proved that the wheel did not have excessive porosity and fully complied with Hyundai's specifications. Finally, evidence was presented detailing the significant testing that the Elantra and its wheels undergo before being released for sale.

DRI Members Collect Books for Chicago-Area Children at TTEL Fly-In Meeting

Attendees of the recent **Toxic Torts and Environmental Law Committee** fly-in meeting in Chicago collected nearly 100 of their favorite children's books to donate to Bernie's Book Bank. Two out of three low-income children have no books of their own, and Bernie's Book Bank works to increase book ownership among at-risk infants, toddlers, and school-age children in the Chicagoland area. Bernie's commits to providing children with 12 books per year, for 12 years, and relies on donations to do so. In the last 10 years, Bernie's has distributed more than 15 million books to Chicago-area children. Thanks to all who donated to this worthy cause!


IF YOU GIVE A CAT A CUPCAKE
Chicka Chicka Boom Boom
THE MOST MAGNIFICENT THING
ASHLEY SPIRES
Cloudy With a Chance of Meatballs
STUART LITTLE
E. B. White

Bags4Kids Thank You! Bullivant Houser Bailey

Bullivant Houser Bailey donated 1,000 bottles of lotion to add to our Bags4Kids public service project! #DRICares will be assembling 1,000 backpacks filled with 15 items at the 2019 Annual Meeting in New Orleans, which will help support foster children in the New Orleans area. Thank you, BHB!

Bullivant | Houser | Bailey PC
Attorneys at Law

Strictly Automotive, September 12–13, 2019

Come join your colleagues and peers for two days of interactive learning at the DRI Strictly Automotive Seminar. Hear directly from manufacturers on what is important right now in automotive litigation and what is on the horizon with the advancement of new technology. For the first time ever, participants will travel off-site to attend a live crash test and learn alongside experts as they show the latest ways to help defend your automotive cases. Click here to view the brochure and to register for the program.

Talc Litigation: Medical and Scientific Issues, September 19–20, 2019

Over the past 24 months, there has been an avalanche of new cases involving allegations that there were measurable concentrations of asbestos in talc and that those fibers were allegedly responsible for causing mesothelioma. As has been claimed for 20 years, plaintiff experts often stated that any exposure to asbestos above background could be causal (e.g., "every fiber counts") or that "every fiber contributes to the disease." Defendants claim that this is inaccurate and irrelevant since there is ample information that no measurable concentrations of genuine asbestos fibers over 5 μm were detected in bulk samples of talc of the era. Interestingly, defendants have been losing a significant number of cases, and juries have, at times, concluded that huge awards were appropriate. How can this seemingly "implausible" legal conflict over a product that was historically considered harmless have happened, and where is it headed? Click here to view the brochure and to register for the program.

Bootcamp for New Life, Health, and Disability Lawyers, November 8, 2019

The DRI Life, Health, and Disability Committee is once again sponsoring a program for lawyers who are new to the practice. This program, taught by highly experienced attorneys, aims to provide a basic understanding of the concepts applicable to life, health, and disability litigation. This program receives rave reviews each year that it is held and sells out quickly. Young lawyers and older lawyers who are new to the practice or who wish to brush up on their skills are encouraged to attend! To encourage the classroom atmosphere, registration is limited to 50 people. Click here to view the brochure and to register for the program.

Upcoming Seminars

Asbestos Medicine, November 14–15, 2019

Head down the pike to join new friends and old in the cradle of liberty this November! The 2019 DRI Asbestos Medicine Seminar will bring together a superb lineup of experts in the science and medicine of asbestos and top-flight litigators to the city on a hill—Boston, Massachusetts. With updates on recent U.S. Supreme Court and state court rulings that affect our ever-changing litigation, the latest on genetics in causation, and insights into cross-examination and deposition taking, this seminar has more touchdowns than Brady to Gronk. And do not miss out on the opportunities for business development during the breaks, mixers, and receptions, or even those over a cup of Dunk's coffee before the day starts. Attendees at the 2019 DRI Asbestos Medicine Seminar will depart this city, which played a crucial role in American history, with the latest and greatest information to ride home and be revered by their peers! Click here to view the brochure and to register for the program.

Upcoming Webinars

Lateral Employee Hiring and Separation, August 27, 2019, 12:00 pm–1:00 pm CST

dri™ WEBINAR

The presenters will discuss ethical considerations when hiring a lateral attorney as well as considerations when a lateral attorney leaves the firm. Participants will learn limitations on what laterals can do and not do before leaving a firm regarding the firm clients; firm communications when a key lateral is leaving the firm; conflict checks, ethical screens, and other considerations when hiring laterals; and the ABA rules pertaining to lateral hires. Click here to register.

How to Break Out

Recently, a DRI member told us that her firm encouraged her to raise her profile in the legal community because she had significant experience and insight to offer, and it would help her professional progress within the firm. She didn't need to hear that twice.

A quick call to DRI and she learned that the she should join one or more of DRI's substantive law committees (*for free*) and participate in and work with her committee leadership to write an article or speak at an upcoming seminar.

DRI's national magazines, *For The Defense* and *In-House Defense Quarterly*, and *The Voice*, an online newsletter, are read by 20,000 members of the legal defense community.

Another DRI member getting it done, making connections, sharing her expertise, and raising her profile with an upcoming article in DRI's national publication *For The Defense*.

As the saying goes, "Those at the top of the mountain didn't fall there." Unknown attribution.

New Jersey

State Membership Chair

Michael J. Leegan, Partner, Goldberg Segalla

Areas of Practice: Premises liability, product liability, trucking, general defense, and construction defect.

DRI member since 2000.

Michael's experience with DRI: "I was the DRI New Jersey State Representative 2009–2012 and the DRI Atlantic Regional Director 2012–2015. I have been the New Jersey State Membership Chair since January 2018. Throughout my legal career, DRI has played a pivotal role in my development of new business contacts, continuing legal education, and the building of professional friendships that will last a lifetime."

Fun Fact: "Die-hard Mets fan."

State Representative

Natalie H. Mantell, Partner, McCarter English LLP

Areas of Practice: Product liability/mass tort litigation and appellate practice.

DRI member since 2007.

Natalie's experience with DRI: "I am currently the DRI State Representative for New Jersey, as well as a past president and chairperson of the Board of Directors of the New Jersey Defense Association, DRI's SLDO. I am also a member of the DRI Drug and Medical Device, Appellate Advocacy, and Women in the Law Committees. DRI adds tremendous value to my practice through its high-quality seminars and opportunities to network with attorneys throughout the country."

Fun Fact: "I am an avid tennis player and have a healthy obsession with home renovations."

New Member Spotlight

Harjinder Sokhi

Harjinder (Harry) Sokhi is the legal director for State Auto Insurance in Columbus, Ohio. His practice focus is insurance, corporate law, litigation, bad-faith, and coverage issues. He is admitted to the Pennsylvania and Ohio bars.

Quote of the Week

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