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The Curious Case of Tort Liability for a Defective Product That the Defendant Did Not Make, Sell, or Distribute

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ABSTRACT

Rarely does the United States Supreme Court consider and decide an issue of tort law, especially one that does not implicate any aspect of federal constitutional law. The problem of bare-metal equipment is just such an issue, taken up and addressed by the U.S. Supreme Court less than three years ago in the case of Air and Liquid Systems Corp. v. DeVries*. Despite the Court's opinion, the question continues to generate different responses from state courts and fails to enjoy much accord or consensus at the state-law level, where it has the greatest practical impact.*

The problem presented to the courts by bare-metal equipment is determining under what circumstances the manufacturer or seller of a product that is reasonably safe at the time of sale, and then made unreasonably unsafe by the post-sale addition of defective parts manufactured and supplied by third parties, may be liable to a person injured by that combined equipment.

Upon examination, this turns out to be a more difficult and subtle problem than it may first appear. Especially for courts not accustomed to analyzing products liability issues, there can be a temptation to analyze the problem somewhat casually—thereby failing to securely situate it within the specific and quite different doctrinal frameworks in which it can arise. Some federal courts, including the U.S. Supreme Court, have yielded to that temptation. As a result, these courts have not sufficiently appreciated that this issue presents very different conceptual challenges and requires dramatically different consideration and analysis, depending on whether it arises in the

[*] Professor of Law, Columbus School of Law, The Catholic University of America. I am grateful to the Columbus School of Law for continuing support of this work. As always, I critically relied upon the expertise and superb judgment of Professor Paula Monopoli. Also making this work possible was the unflagging support of the Quaranteam (Victoria, Christopher, Bogart, and Ellie). My genuine thanks and love to them all.

context of a negligence claim or in the context of a strict products liability claim.

Failure to appreciate the different nature of the problem in the context of these two quite different causes of action has led some courts, including the U.S. Supreme Court, to offer a single, univocal approach to this problem that both oversimplifies and overcomplicates the matter. Specifically in the case of the U.S. Supreme Court, its holding, opposed by a vigorous dissent, produces a set of rules that are at the same time both inconsequential in the negligence context and conceptually incoherent in the context of a strict products liability claim.

This article describes and analyzes this fascinating issue, including the recent U.S. Supreme Court decision which squarely addresses it. It proposes an approach to future consideration of the problem by courts that grounds the analysis in the specific doctrinal frameworks within which the issue may arise and explains the very different qualities and challenges that the issue presents in these different doctrinal contexts.

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I. INTRODUCTION

Imagine the following circumstance: a defendant is a manufacturer of a product that requires the addition of other components. The defendant does not manufacture or sell these additional components. The user of the product must obtain these parts from other manufacturers and sellers. Some of these additional required parts turn out to be defective, and dangerously so. When incorporated into the basic product, and in combination with it, these additional parts cause serious physical injury to certain persons.

The legal rules regarding the liability of the parties in the commercial chain of distribution for the defective add-on parts is reasonably clear, and a well-established part of products liability law.[1] But what rules regulate the tort liability of the manufacturer and seller of the basic, sometimes called "bare-metal" product?

A variety of approaches have been formally adopted by different courts, each of which enjoy strengths and weaknesses, leaving an unresolved, controversial space within modern products liability law.[2]

This question of products liability law is one that has been directly addressed by the United States Supreme Court—a rare occurrence in the products liability area[3]—and the Court has offered its own preferred and

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[1] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, CHAPTER 1 LIABILITY OF COMMERCIAL PRODUCT SELLERS BASED ON PRODUCT DEFECTS AT TIME OF SALE, TOPIC 1. LIABILITY RULES APPLICABLE TO PRODUCTS GENERALLY (AM. L. INST. May 2022 Update); DAVID G. OWEN, PRODUCTS LIABILITY LAW, CHAPTER 5 STRICT LIABILITY IN TORT (2d ed. 2008). The fact that a defective product was integrated into another product does not relieve the component-part manufacturer of liability. Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 517 P.2d 406, 413–14 (Colo. App. 1973); Burbage v. Boiler Eng'g & Supply Co., 249 A.2d 563, 566 (Pa. 1969). When the component is defective, the component manufacturer may be held liable. *See generally* Dougherty v. Edward J. Meloney, Inc., 661 A.2d 375 (Pa. Super. Ct. 1995); Parkins v. Van Doren Sales, Inc., 724 P.2d 389, 392 (Wash. Ct. App. 1986).

[2] Petition for Writ of Certiorari, Air and Liquid Sys. Corp. v. DeVries, 2018 WL 741615, at 14–18, 17, 19 (2018) (noting that "state courts disagree about the bare-metal rule's applicability in cases arising under state law" and that "the confusion is spreading, not subsiding"); David Judd, *Disentangling DeVries: A Manufacturer's Duty to Warn Against the Dangers of Third-Party Products*, 81 LA. L. REV. 217, 220 (2020) ("Courts disagree on the appropriate standard governing a manufacturer's duty to warn about the dangers of third-party products used with the manufacturer's own product. Some courts outright deny any such duty, others equate it to the uncontroversial duty to warn against the dangers of one's own products, and the rest fall somewhere in the middle.").

[3] Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 946 (1996) ("the Supreme Court . . . has dealt with products liability only in a tiny number of cases with federal-law significance. Accordingly, the Supreme Court is currently unfamiliar not only with the larger body of tort law in general but also with the narrower body of products liability law in particular."). In

unique resolution.[4] This is an unusual instance of the highest federal court in this country taking up an issue of substantive tort law that has no constitutional dimensions.[5]

II. BARE-METAL JURISPRUDENCE

A. The DeVries *Case on its Way to the U.S. Supreme Court*

The U.S. Supreme Court case in question is *Air and Liquid Systems Corp. v. DeVries*, decided by the Court in 2019.[6] The case came to the Supreme Court because the plaintiffs were servicemen in the United States Navy who were exposed to asbestos while assigned to Navy ships.[7] The federal court system in the United States is granted exclusive jurisdiction over maritime cases by Article III of the United States Constitution.[8]

The defendants in the case manufactured and sold certain equipment used in the engines of Navy ships.[9] This equipment required additional parts to operate properly.[10] These parts, which included asbestos, were acquired by the Navy from third-party sellers and integrated into the equipment acquired from the defendants.[11] The equipment, once retrofitted with the additional components and in operation, released asbestos fibers into the air, exposing the plaintiffs.[12] The plaintiffs were

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contrast, however, see Anita Bernstein, *Product Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. Rev. 1193 (2001–2002). There is a surprisingly robust academic literature on the question of the U.S. Supreme Court's status as a producer of products liability law. *See also* Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075 (1996); RICHARD NEELY, THE PRODUCT LIABILITY MESS 4–5 (1988).

[4] Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[5] *See* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 759 (2004) ("The Supreme Court has no power to decide questions of state tort law . . . so its role in speech-tort cases is only to apply federal constitutional law."); Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695, 710 (2011) ("the U.S. Supreme Court has a valid role to play in terms of policing state tort law end runs around constitutional principles.").

[6] *DeVries*, 139 S. Ct. 986 (2019).

[7] *Id.* at 991.

[8] U.S. CONST. art. III, §2 ("The judicial Power shall extend to all Cases, in Law and Equity . . . of admiralty and maritime Jurisdiction"). In a maritime case like *DeVries*, the federal courts act as a common-law court. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

[9] *DeVries*, 139 S. Ct. at 991.

[10] *Id.*

[11] *Id.*

[12] *Id.*

subsequently diagnosed with cancer.[13] They claimed that their illness was caused by their exposure to the asbestos fibers emitted by the equipment on the ship—equipment that was an integrated combination of the defendants' non-defective products and the defective products of third-party manufacturers and sellers.[14]

The manufacturers of the defective asbestos parts had gone bankrupt.[15] The plaintiffs believed the Navy was immune from liability under *Feres v. United States*.[16] The plaintiffs therefore focused on the defendants and sued them in Pennsylvania state court, claiming that the defendants breached their legal duty to warn against the dangers posed by the operation of the integrated equipment.[17] Subsequently, the defendants removed the case to federal district court, invoking federal maritime jurisdiction.[18]

The case was first heard in the federal court system by the United States District Court for the Eastern District of Pennsylvania, located in the Third Circuit, where it became part of the consolidated asbestos products liability multidistrict litigation (MDL 875).[19] The district court granted the defendants' motion for summary judgment based upon its adoption and application of the so-called "bare-metal defense."[20] "Bare-metal" in this context means that the product requires additional products to be incorporated before it is operational.[21] Frequently in the case of asbestos injuries, these additional products are insulating materials.[22] The bare-metal defense holds that the manufacturer of such equipment—equipment that is not dangerous in its bare-metal state—is generally not

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[13] *Id.*

[14] *Id.* at 992.

[15] *Id.*

[16] *Id. See generally* Feres v. United States, 71 S. Ct. 153 (1950).

[17] *Id.*

[18] *Id.*

[19] DeVries v. General Electric Company, 188 F. Supp. 3d 454 (E.D. Pa. 2016). *See generally Mesothelioma.com*, www.mesothelioma.com [https://perma.cc/7PGB-WU7M] (last visited Dec. 19, 2022) (MDL 875 is the multidistrict litigation number for asbestos federal mass tort cases. Created in 1991, relevant lawsuits are transferred to the Eastern District of Pennsylvania (EDPA), which handles asbestos MDL cases. With nearly 187,000 cases having been transferred to EDPA between 2006–2015, MDL 875 is the largest and longest-lasting MDL in United States history.).

[20] *DeVries*, 188 F. Supp. 3d at 458–60.

[21] *In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232, 234 (3d Cir. 2017). *See* Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third-Parties: Courts are Properly Rejecting This Form of Guilt by Association*, 37 AM. J. TRIAL ADVOC. 489, 492 (2014).

[22] *See* David Judd, *Disentangling DeVries: A Manufacturer's Duty to Warn Against the Dangers of Third-Party Products*, 81 LA. L. REV. 217, 237 (2020); Taylor v. Elliot Turbomachinery Co., 90 Cal. Rptr. 3d 414 (Cal. Ct. App. 2009).

liable for the harm caused by the dangerous nature of the after-acquired components and the integrated equipment system.[23]

On appeal, the Third Circuit remanded the case to the district court, seeking clarification of various issues in the summary judgment entered for defendants and the application of the bare-metal defense to the case.[24]

In its opinion on remand, the district court expressed concern that the thousands of cases pending in the consolidated asbestos products liability multidistrict litigation (MDL 875) be treated consistently.[25] The bulk of these cases would be adjudicated in the Sixth Circuit.[26] As a result, the Eastern District of Pennsylvania, though located in the Third Circuit, chose to follow Sixth Circuit precedent which recognized the bare-metal defense.[27]

The primary Sixth Circuit precedent relied upon by the district court was *Lindstrom v. A-C Product Liability Trust*.[28] The district court described the *Lindstrom* case as being, at that time, "the only pronunciation of maritime law on the matter from any federal appellate court."[29] The court also concluded that *Lindstrom* was consistent with the decisions of the only two states that had until then considered the issue.[30]

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[23] DeVries, 139 S. Ct. 986, 993 (2019) (U.S. Supreme Court defining the bare-metal defense as follows: "If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product – even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses."). *See also* Lindstrom v. A-C Product Liab. Tr., 424 F.3d 488, 492, 495–97 (6th Cir. 2005); Evans v. CBS Corp., 230 F. Supp. 3d 397, 403–05 (D. Del. 2017); Cabasug v. Crane Co., 989 F. Supp. 2d 1027, 1041 (D. Haw. 2013).

[24] *In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232 (3d Cir. 2017). A significant focus of the Third Circuit's remand of the granting of the summary judgment order was a request for an explanation of the district court's understanding of the applicability and status of the bare-metal defense with respect to a negligence theory of liability (in addition to a strict products liability theory). *Id.* at 241.

[25] DeVries v. Gen. Elec. Co., 188 F. Supp. 3d 454, 455–58 (E.D. Pa. 2016) ("This MDL Court was mindful that applying an interpretation of maritime law on the matter that was inconsistent with that of the Sixth Circuit would give rise to inconsistencies in the handling and outcome of the thousands of cases pending in the MDL").

[26] *Id.* at 456.

[27] According to the district court, at the time of its decision "the matter of the 'bare-metal defense' had never been squarely addressed by the Third Circuit. . . . Therefore, the matter was one of 'first impression' in the Third Circuit, for which there was no binding precedent." 188 F. Supp. 3d 454, 457 (2016).

[28] Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (6th Cir. 2005).

[29] DeVries v. Gen. Elec. Co., 188 F. Supp. 3d 454, 458 (E.D. Pa. 2016).

[30] The Court identified those states as California and Washington. *Id.* at 455–56. The Court recognized that Washington may have subsequently retreated to some degree from its prior unfettered embrace of the bare-metal defense. *Id.* at 456 n.4. *Compare* Simonetta v. Viad Corp., 197 P.3d 127 (Wash. 2008) (adopting bare metal

Lindstrom was a merchant seaman for more than thirty years who died of malignant mesothelioma.[31] He claimed that he contracted the fatal disease as a result of repeated exposure to multiple pieces of equipment that contained asbestos on numerous ships on which he had worked.[32] He brought claims against bare-metal manufacturers and the manufacturers of component parts added to the bare-metal products post-sale.[33] The action was brought in the Northern District of Ohio in April of 1998.[34] The Sixth Circuit affirmed the district court's summary judgment in favor of some defendants,[35] and judgment in favor of the remaining defendants following a bench trial.[36]

The *Lindstrom* district court determined that the plaintiff bore the burden of establishing that he experienced "a substantial exposure to [the asbestos in] a particular defendant's product for a substantial period of time" with respect to the product of any defendant,[37] and that the plaintiff had failed to meet that evidentiary burden regarding some defendants for summary judgment purposes.[38] The court stated clearly its view: "A manufacturer is responsible only for its own products and 'not for products that may be attached or connected' to the manufacturer's product."[39] The

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defense) *and* Braaten v. Saberhagen Holdings, 198 P.3d 493 (Wash. 2008) (reasserting its adoption of bare metal defense) *with* Macias v. Saberhagen Holdings, Inc., 282 P.3d 1069 (Wash. 2012) (distinguishing the facts from *Simonetta* and *Braaten*).

[31] Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488, 491 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[32] Lindstrom worked on various ships, primarily in the engine department, as a Fireman/Watertender, Chief, and First, Second, and Third Engineer. Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 604 (N.D. Ohio 2004), *aff'd sub nom*. Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019). He died from peritoneal mesothelioma on June 15, 2003. *Id.*

[33] Lindstrom v. AC Prod. Liab. Tr., 264 F. Supp. 2d 583, 595 (N.D. Ohio 2003), *aff'd sub nom*. Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[34] Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 604 (N.D. Ohio 2004), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 203 L. Ed. 2d 373, 139 S. Ct. 986 (2019).

[35] Lindstrom v. AC Prod. Liab. Tr., 264 F. Supp. 2d 583 (N.D. Ohio 2003), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[36] Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488, 499 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[37] Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 610 (N.D. Ohio 2004), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019) (citing Stark v. Armstrong World Indus., Inc., 21 Fed.Appx. 371, 380–81 (6th Cir. 2001)).

[38] *Id.*

[39] Lindstrom v. AC Prod. Liab. Tr., 264 F. Supp. 2d 583, 595 (N.D. Ohio 2003), *aff'd sub nom*. Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (6th Cir. 2005),

court held that a defendant "is not liable for exposure to any . . .[asbestos containing product] . . . that was manufactured or provided by another company."[40]

Relying heavily on the earlier decision in the *Lindstrom* case, the district court in *DeVries* resoundingly affirmed the validity and applicability of the bare-metal defense.[41] It made clear that in doing so, it fully considered the negligent failure to warn claims in the case and determined that the bare-metal defense applies equally to bar both negligence and strict products liability claims.[42]

The Third Circuit reviewed the district court decision *de novo*.[43] The Third Circuit reversed the district court and held that, under maritime law, "[A] manufacturer of even a bare-metal product [may] be held liable for asbestos-related injuries when circumstances indicate the injury was a reasonably foreseeable result of the manufacturer's actions – at least in the context of a negligence claim."[44] Based on this holding, the Third Circuit vacated the district court's entry of summary judgment for the defendants on the negligence claims and remanded the case for further proceedings.[45]

When the Third Circuit published *DeVries*, it created a circuit conflict in maritime law regarding the legal rule that determines the potential liability of a party who supplies only bare-metal equipment. The Sixth Circuit held that such a defendant is not liable for harm caused by defective parts subsequently added to the bare-metal product.[46] On the other hand, the Third Circuit held that such a defendant may be held liable if the subsequent addition of defective parts was foreseeable.[47] In February 2017, one federal district court recognized the circuit split on the issue, noting:

> Courts in six separate jurisdictions . . . have held, or at least suggested, that an equipment manufacturer may be held liable on a failure to warn theory for harm caused by asbestos-containing replacement

abrogated by Air & Liquid Sys. Corp. v. DeVries, 203 L. Ed. 2d 373, 139 S. Ct. 986 (2019).

[40] *Id*.

[41] DeVries v. Gen. Elec. Co., 188 F. Supp. 3d 454, 458–64 (E.D. Pa. 2016), *aff'd in part, vacated in part, remanded sub nom. In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232 (3d Cir. 2017), *aff'd but criticized sub nom.* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[42] *Id.* at 464.

[43] *In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232 (3d Cir. 2017), *aff'd but criticized sub nom.* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[44] *Id.* at 234.

[45] *Id.* at 241.

[46] Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488, 495 (6th Cir. 2005), *abrogated by* Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

[47] *Compare* Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488 (N.D. Ohio 2005) *with In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232 (3d Cir. 2017).

> components. . . . Similarly, if one includes the MDL court, then courts in six jurisdictions . . . have adopted, or at least suggested, the opposite conclusion.[48]

Moreover, the difference that existed among the various federal courts on this issue at that time is not adequately captured by a description of a clean split between two distinct approaches: either no possible liability under a bare-metal defense or possible liability if the subsequent addition of defective components to the original equipment could be shown to have been foreseeable. Instead, various federal courts have adopted a number of other possible approaches.[49]

A district court in the Fourth Circuit held that a bare-metal manufacturer could be held liable for failure to warn only when subsequently added third-party defective components were essential to the proper functioning of the defendant's product.[50] A district court in the Seventh Circuit determined that possible liability for the bare-metal equipment manufacturer existed only when the subsequently added defective component was "not just foreseeable, but inevitable."[51] And further, a district court in the Fifth Circuit set forth a strikingly complicated approach to the issue that identifies and specifies different treatment for at least a half dozen separate circumstances possibly applying to a defendant manufacturer of base equipment.[52]

B. The U.S. Supreme Court Decision in DeVries

It was in this jurisprudential environment that the United States Supreme Court granted defendant Air and Liquid Systems Corp.'s petition for certiorari.[53] The majority affirmed the Third Circuit by a six-to-three vote.[54] Justice Kavanaugh authored the majority opinion and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.[55] Justice Gorsuch dissented, joined by Justices Thomas and Alito.[56] The majority held:

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[48] Chesher v. 3M Co., 234 F. Supp. 3d 693, 704 n.10 (D.S.C. 2017).

[49] Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993–94 (2019); Petition for Writ of Certiorari at 14–17, Air and Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993–94 (2019) (No.17-1104), 2018 WL 741615, at *14–17 (2018).

[50] Chesher v. 3M Co., 234 F. Supp. 3d 693, 713–14 (D.S.C. 2017).

[51] Quirin v. Lorillard Tobacco Co., 17 F. Supp. 3d 760, 771 (N.D. Ill. 2014).

[52] Bell v. Foster Wheeler Energy Corp., 2016 WL 5780104, at *6–7 (E.D. La. 2016).

[53] Air & Liquid Sys. Corp. v. DeVries, 138 S. Ct. 1990 (2018).

[54] Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 988 (2019).

[55] *Id.* at 988.

[56] *Id.*

> 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 that danger.[57]

This was a new and unique test for the possible liability of a bare-metal equipment manufacturer.[58]

The dissenting justices preferred an approach by which the bare-metal equipment manufacturer could be held potentially liable only for the qualities of the bare-metal equipment.[59] Under such a standard, bare-metal manufacturers would not be liable for the quality of integrated pieces of equipment that combined both the bare-metal product and the subsequent add-on product or products of third parties.[60] In other words, the dissent agreed with the district court, disagreed with the Third Circuit, and would adopt the bare-metal defense for maritime law.

C. The Early Legacy of the U.S. Supreme Court's Decision in DeVries

Since the March 2019 publication of the Supreme Court's decision in *DeVries* until the end of calendar year 2021, the case has been cited in forty-one federal court opinions and in seven state court opinions.[61] As

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[57] *Id.* at 991.

[58] *In re* Asbestos Prod. Liab. Litig., 547 F. Supp. 3d 491, 492 (E.D. Pa. 2021).

[59] *DeVries*, 139 U.S. at 997.

[60] *Id.*

[61] The federal court opinions are: Spurlin v. Air & Liquid Sys. Corp., 537 F. Supp. 3d 1162, 1168 (S.D. Cal. 2021); Dennis v. Air & Liquid Sys. Corp., No. CV 19-9343-GW-KSX, 2021 WL 3555720, at *6 (C.D. Cal. Mar. 24, 2021), a*ppeal dismissed sub nom.* Dennis v. IMO Indus., Inc., No. 21-55578, 2021 WL 4025834 (9th Cir. June 29, 2021; Dennis v. Air & Liquid Sys. Corp., No. CV 19-9343-GW-KSX, 2020 WL 9072957, at *5–6 (C.D. Cal. Dec. 17, 2020), *superseded*, No. CV 19-9343-GW-KSX, 2021 WL 3555720 (C.D. Cal. Mar. 24, 2021), *appeal dismissed sub nom.* Dennis v. IMO Indus., Inc., No. 21-55578, 2021 WL 4025834 (9th Cir. June 29, 2021); Dennis v. Air & Liquid Sys. Corp., No. CV 19-9343-GW-KSX, 2020 WL 10728629, at *4–5 (C.D. Cal. Oct. 5, 2020), *superseded*, No. CV 19-9343-GW-KSX, 2020 WL 9072957 (C.D. Cal. Dec. 17, 2020), *superseded*, No. CV 19-9343-GW-KSX, 2021 WL 3555720 (C.D. Cal. Mar. 24, 2021), *appeal dismissed sub nom*. Dennis v. IMO Indus., Inc., No. 21-55578, 2021 WL 4025834 (9th Cir. June 29, 2021); *In re* Asbestos Litig., No. CV 19-548-MN-SRF, 2021 WL 3025842, at *6 (D. Del. July 16, 2021), *report and recommendation adopted*, No. CV 19-548 (MN) (SRF), 2021 WL 3662847 (D. Del. Aug. 18, 2021); McAllister v. McDermott, Inc., No. CV 18-361-SDD-RLB, 2020 WL 4745743, at *12 (M.D. La. Aug. 14, 2020); Lopez v. McDermott, Inc., No. CV 17-8977, 2020 WL 3964989, at *2, *8 (E.D. La. July 13, 2020); Sebright v. Gen. Elec. Co., 525 F. Supp. 3d 217, 234 (D. Mass. 2021); Hammell v. Air & Liquid Sys.

Corp., No. CV 14-00013(MAS) (TJB), 2020 WL 5107478, at *5 (D.N.J. Aug. 31, 2020), *reconsideration denied*, No. CV 14-13 (MAS) (TJB), 2021 WL 1401521 (D.N.J. Apr. 14, 2021); Phelps v. CBS Corp., No. 17-CV-8361 (AJN), 2021 WL 4226037, at *5 (S.D.N.Y. Sept. 16, 2021); *In re* Asbestos Prod. Liab. Litig., 547 F. Supp. 3d 491, 493 (E.D. Pa. 2021); Yaw v. Air & Liquid Sys. Corp., No. C18-5405 BHS, 2019 WL 1755299, at *2 (W.D. Wash. Apr. 18, 2019); Deem v. Air & Liquid Sys. Corp., No. C17-5965 BHS, 2019 WL 1755302, at *1 (W.D. Wash. Apr. 18, 2019); Daniel v. United States, 139 S. Ct. 1713 (2019) (Thomas, J., dissenting); Carroll v. Carnival Corp., 955 F.3d 1260, 1267 (11th Cir. 2020); *In re* Toy Asbestos, No. 19-CV-00325-HSG, 2021 WL 1930992, at *4 (N.D. Cal. May 13, 2021); *In re* Asbestos Litig., No. CV 19-548 (MN) (SRF), 2021 WL 3662847, at *5 (D. Del. Aug. 18, 2021); *In re* Asbestos Litig., No. CV 18-1101-MN-SRF, 2020 WL 4370436, at *6 (D. Del. July 30, 2020); *In re* Asbestos Litig. No. CV 19-548 (MN) (SRF), 2021 WL 3662847, at *5 (D. Del. Aug. 18, 2021); Vocciante v. Air & Liquid Sys. Corp., No. 18-540-MN-SRF, 2020 WL 1450542, at *5 (D. Del. Mar. 25, 2020); *In re* Asbestos Litig., No. CV 18-410-LPS-SRF, 2019 WL 6211371, at *3 (D. Del. Nov. 20, 2019); *In re* Asbestos Litig., No. CV 16-308-LPS-SRF, 2019 WL 3082196, at *1 (D. Del. July 15, 2019); Molokai New Energy Partners, LLC v. Maui Elec. Co., No. CV 20-00134 JMS-KJM, 2021 WL 3197031, at *2 (D. Haw. July 28, 2021); Allen v. United States, No. 3:19-CV-01065-GCS, 2020 WL 2616265, at *2 (S.D. Ill. May 22, 2020); Whitehead v. Air & Liquid Sys. Corp., No. 1:18CV91, 2020 WL 2523169, at *4 (M.D. N.C. May 18, 2020); Ortega Garcia v. United States, 427 F. Supp. 3d 882, 889 (S.D. Tex. 2019), *aff'd*, 986 F.3d 513 (5th Cir. 2021); Robinson v. Grove US, LLC, No. 19-CV-0025-F, 2021 WL 5235548, at *7 (D. Wyo. Nov. 10, 2021); Dutra Grp. V. Batterton, 139 S. Ct. 2275, 2293 (2019) (Ginsburg, Breyer, Sotomayor, JJ. Dissenting); Ortega Garcia v. United States, 986 F.3d 513, 534 (5th Cir. 2021); Avila v. Collins, No. 820CV00295DOCADS, 2021 WL 3053312, at *4 (C.D. Cal. July 19, 2021); *In re* Toy Asbestos, No. 19-CV-00325-HSG, 2021 WL 2020561, at *6 (N.D. Cal. May 20, 2021); Landaker v. Eaton Corp., No. 219CV00987KJMJDP, 2021 WL 1773538, at *1 (E.D. Cal. Feb. 11, 2021); Clarke v. Air & Liquid Sys. Corp., No. 2:20-CV-00591-SVW-JC, 2020 WL 6204564, at *3 (C.D. Cal. Sept. 16, 2020); *In re* Sea Legend LLC, No. 218CV05879SVWMRW, 2019 WL 8889971, at *12 (C.D. Cal. June 11, 2019); Carlson v. CBS Corp., No. 3:17-CV-1916 (VLB), 2020 WL 70814, at *2 (D. Conn. Jan. 7, 2020); *In re* Asbestos Litig., No. CV 18-410-LPS-SRF, 2019 WL 6134815, at *5 (D. Del. Nov. 19, 2019); *In re* Asbesto Litig., No. CV 17-1570-MN-SRF, 2019 WL 2124951, at *3 (D. Del. May 15, 2019); *In re* Asbestos Litig., No. CV 17-1472-MN-SRF, 2019 WL 2098359, at *5 (D. Del. May 14, 2019); *In re* Asbestos Litig., No. CV 17-1570-MN-SRF, 2019 WL 2083295, at *3 (D. Del. May 13, 2019); Hindsman v. Carnival Corp., No. 19-23536-CIV, 2020 WL 5893537, at *3–4 (S.D. Fla. Oct. 5, 2020); Allstate Ins. Co. v. Thompson Gas, LLC, No. 1:18-CV-3371-JMC, 2019 WL 5265301, at *2 (D. Md. Oct. 17, 2019); Gay v. A.O. Smith Corp., No. 2:19-CV-1311, 2021 WL 2652926, at *3 (W.D. Pa. June 28, 2021); Gay v. A.O. Smith Corp., 545 F. Supp. 3d 255, 260 (W.D. Pa. 2021); Gary v. A.O. Smith Corp., No. 2:19-CV-1311, 2021 WL 1663877, at *2 (W.D. Pa. Apr. 28, 2021); Gay v. A.O. Smith Corp., No. 2:19-CV-1311, 2021 WL 1664006, at *3 (W.D. Pa. Apr. 28, 2021); Martinez v. Med. Depot, Inc., 434 F. Supp. 3d 537, 547 (S.D. Tex. 2020); Glover v. Hryniewich, 438 F. Supp. 3d 625, 635 (E.D. Va.); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 WL 3423958, at *2 (W.D. Wash. Aug. 5, 2021); Wineland v. Air & Liquid Sys. Corp., 539 F. Supp. 3d 1149, 1153 (W.D. Wash. 2021); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 WL 1964438, at *2 (W.D. Wash. May 17, 2021); Wineland v. Air & Liquid Sys. Corp., 523 F. Supp.

might be expected given its status as binding precedent in the federal court system, *DeVries* is adopted and followed in all of the federal court cases.[62] Some of the courts specifically apply the three prongs of the *DeVries* test to the facts of the case before them and thereby begin the work described by the District Court of Massachusetts: "It is the role of the federal courts to fill the *DeVries* test with life and meaning when administering their maritime function."[63]

Of the seven state court cases in which *DeVries* is cited, four do not involve issues of products liability law and cite *DeVries*, somewhat oddly, for a tort law proposition irrelevant to the bare-metal defense.[64] The remaining three cases provide an apt illustration of the divergence among

3d 1245, 1253 (W.D. Wash. 2021); Yaw v. Air & Liquid Sys. Corp., No. C18-5405 BHS, 2019 WL 3531232, at *1 (W.D. Wash. Aug. 2, 2019); English v. Moynihan, 802 F. App'x 686, 688 (3d Cir. 2020); Clarke v. Air & Liquid Sys. Corp., No. 2:20-CV-00591-SVW-JC, 2021 WL 1534975, at *4 (C.D. Cal. Mar. 18, 2021); Phanthalasy v. Hawaiian Agents, Inc., No. CV 18-00285 JAO-WRP, 2019 WL 2305133, at *3 (D. Haw. May 30, 2019); Papineau v. Brake Supply Co., No. 4:18-CV-168, 2021 WL 4493707, at *4 (W.D. Ky. Sept. 30, 2021); Hailey v. Air & Liquid Sys. Corp., No. CV DKC 18-2590, 2020 WL 4732141, at *4 (D. Md. Aug. 14, 2020); Gay v. A.O. Smith Corp., No. 2:19-CV-1311, 2021 1663823, at *3 (W.D. Pa. Apr. 28, 2021), *reh'g granted*, No. 2:19-CV-1311, 2021 WL 1663877 (W.D. Pa. Apr. 28, 2021); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 WL 4709899, at *2 (W.D. Wash. Oct. 8, 2021); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 2021 WL 3617202, at *2 (W.D. Wash. Aug. 16, 2021); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 WL 3423950, at *2 (W.D. Wash. Aug. 5, 2021); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 WL 3292257, at *2 (W.D. Wash. Aug. 2, 2021); Wineland v. Air & Liquid Sys. Corp., No. C19-0793RSL, 2021 WL 3036855, at *2 (W.D. Wash. July 19, 2021); Yaw v. Air & Liquid Sys. Corp., No. C18-5405 BHS, 2019 WL 3946594, at *2 (W.D. Wash. Aug. 21, 2019); The state court opinions are: Coffman v. Armstrong Int'l., Inc., 615 S.W.3d 888, 898 (Tenn. 2021); Coffman v. Armstrong Int'l., Inc., No. E201700062COAR3CV, 2019 WL 3287067, at *13 (Tenn. App. July 22, 2019); Whelan v. Armstrong Int'l. Inc., 231 A.3d 640, 656–57 (N.J. 2020); Schrader v. Ameron Int'l. Cop., 2609 EDA 2018, 2020 WL 1460697, at *10–11 nn.4–5; Davis v. John Crane, Inc., 836 S.E.2d 577, 583 (Ga. App. 2019); Broadway Nat'l Bank, Tr. Of Mary Frances Evers Tr. V. Yates Energy Corp., 631 S.W.3d 16, 37 (Tex. 2021) (Busby, J., dissenting); Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 191 (Utah 2020); Maples v. Giefer, No. 53738-9-II, 2021 WL 877131, at *3 (Wash. Ct. App. 2021).

[62] *See infra* note 66.

[63] *Sebright*, 525 F. Supp. 3d at 235.

[64] Odd in so much as a federal court not interpreting the law of the state of the citing court is not creating binding precedent for that state court and is instead serving as a decidedly secondary authority for a general proposition of common tort law. *See Schrader*, 2020 WL 1460697, at *11 n.5; *Broadway Nat'l Bank*, 631 S.W.3d at 37; *Ipsen*, 466 P.3d at 191; *Maples*, 2021 WL 877131, at *3.

American jurisdictions regarding the legal treatment of a bare-metal manufacturer under current products liability law.[65]

In October 2019, just seven months after the publication of the *DeVries* decision, the Court of Appeals of Georgia confronted a case that involved, in part, a plaintiff who died from malignant mesothelioma.[66] He alleged the disease was caused by exposure to asbestos while working around asbestos-containing replacement parts produced by third parties and installed on the defendant's bare-metal industrial pumps.[67] The plaintiff argued that the foreseeability of subsequent incorporation of third-party asbestos containing parts alone was sufficient to impose a formal legal duty on the producer of the bare-metal product.[68] The court, however, decline[d] to advance such a theory of liability in Georgia."[69] The court further elaborated: "'A manufacturer has the absolute right to have his . . . liability for injuries adjudged on the basis of the design of his own marketed product and not that of someone else.'"[70]

The plaintiff urged the Court of Appeals of Georgia to adopt the Supreme Court's recent holding in *DeVries*, and the court explicitly declined that invitation, noting that *DeVries* by its terms formally applies only to maritime law.[71] Instead, and in contrast, the court explicitly adopted the bare-metal defense doctrine, which had previously only been implicitly embraced by Georgia courts.[72] The court concluded that the plaintiff "seeks to expand the traditional duty to warn so as to require a manufacturer to warn of the hazards in *another* manufacturer's product. This has never been the law in Georgia, and we decline to expand our case law in this respect."[73]

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[65] *Coffman*, 615 S.W.3d at 898; *Whelan*, 231 A.3d at 656–57; *Davis*, 836 S.E.2d at 583.

[66] *Davis*, 836 S.E.2d at 580.

[67] *Id*.

[68] *Id.* at 582.

[69] *Id*.

[70] *Id.* (quoting Talley v. City Tank Corp., 279 S.E.2d 264 (Ga. Ct. App. 1981)).

[71] *Id.* at 583. The court characterizes the plaintiff as having argued "vociferously" for the court's adherence to DeVries. *Id.*

[72] *Id.* at 584. The case cited by the court that had previously adopted the bare-metal defense by implication in Georgia is Thurmon v. A.W. Chesterton, Inc., 61 F. Supp. 3d 1280 (N.D. Ga. 2014), *aff'd sub nom* Thurmon v. Ga. Pac., LLC, 650 Fed.App'x 752 (11th Cir. 2016), a case decided by a Federal District Court in the Northern District of Georgia and subsequently affirmed by the 11th Circuit Court of Appeals. The court notes that this federal court case interpreting and applying Georgia law based its analysis in part on a prior unpublished opinion of the Court of Appeals of Georgia, Toole v. Ga. Pacific, LLC, No. A10A2179, 2011 WL 7938847 (Ga. App. 2011). *Id.* at 584 n.9.

[73] *Id.* at 584 (emphasis in original).

By contrast, the Supreme Court of New Jersey adopted the holding of *DeVries*.[74] In this case, the court held that a defendant producer of bare-metal equipment can be held liable for harm caused by defective replacement component parts if the plaintiff can prove that:

> (1) the [bare-metal] manufacturer or distributor incorporated asbestos-containing components in its original product; (2) the asbestos-containing components were integral to the product and necessary for it to function; (3) routine maintenance of the product required replacing the original asbestos-containing components with similar asbestos-containing components; and (4) the exposure to the asbestos-containing components or replacement components was a substantial factor in causing or exacerbating . . . [the plaintiff's] . . . disease.[75]

In its opinion, the Supreme Court of New Jersey prominently relied on *DeVries*.[76]

The Court of Appeals of Tennessee has also relied heavily on *DeVries*.[77] The court quoted extensively from *DeVries*, including from the dissent, and devoted discussion at significant length to a consideration of Tennessee's preferred position on the question of the potential liability of bare-metal defendants.[78] Ultimately rejecting both the majority and the minority approaches in *DeVries*, as well as the decision of the lower court in the case, the Court of Appeals of Tennessee adopted a complicated rule that involves an initial foreseeability test followed by, if satisfied, a balancing analysis consisting of at least eight separate factors.[79]

The short record of state court decisions following the publication of the *DeVries* opinion demonstrates little fidelity to its logic and shows the diversity in state-law approaches to bare-metal manufacturers. This circumstance largely mirrors the situation prior to *DeVries*, where there

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[74] Whelan v. Armstrong Int'l. Inc., 231 A.3d 640, 658 (N.J. 2020).

[75] *Id.* at 660.

[76] *Id.* at 657–58.

[77] Coffman v. Armstrong Int'l, Inc., 2019 WL 3287067, at *13 (Tenn. Ct. App. 2019).

[78] *Id.* at *13–20.

[79] *Id.* at *18, 20. The eight factors identified by the Court to be considered as part of a balancing analysis in every such case are: "(1) the foreseeable probability of the harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct." *Id.* at *18 (quoting Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 365 (Tenn. 2008).

was a similar lack of consensus among states concerning the potential liability of a bare-metal defendant.[80]

III. COMMENTARY ON ANY FUTURE BARE-METAL JURISPRUDENCE

While the relatively narrow issue of the potential liability of bare-metal defendants in maritime law is for the moment determined and settled, the status of the issue in larger products liability law remains wide open, and it appears, at least in early days, that the U.S. Supreme Court's resolution of the bare-metal equipment issue in maritime law will not be powerfully influential in the broader sphere.

When considered from the full perspective of the relatively large number of opinions of both federal and state courts that have confronted and analyzed it, this issue reveals itself as subtle and complex, perhaps surprisingly so. What follows is an effort to help prepare the ground for further judicial consideration of this matter.

A. What Difference Should It Make That DeVries *Is a Maritime Law Decision?*

Rooted in Article III, Section 2 of the United States Constitution,[81] maritime law is one of the few and oldest areas of federal common law.[82] One important consequence of *DeVries* being a maritime law decision is that the U.S. Supreme Court's resolution of the case going forward is formally binding as precedent only on federal courts considering maritime law cases, and not on either federal or state courts dealing with the issue outside of this specific context.[83] In terms of analysis and policy, however,

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[80] Petition for Writ of Certiorari at 17, Air and Liquid Systems Corp. v. DeVries, 139 S. Ct. 986 (2008) ("state courts disagree about the bare-metal rule's applicability in cases arising under state law.").

[81] U.S. CONST. art. III, §2 ("The Judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction"). *See also* 28 U.S.C. § 1333 (granting to the federal courts "original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction").

[82] *See* Exxon Shipping Co. v. Baker, 544 U.S. 471 (2008); Miles v. Apex Marine Corp., 498 U.S. 19 (1990); United States v. Reliable Transfer Co., 421 U.S. 396 (1975); Detroit Tr. Co. v. Thomas Barlum, 292 U.S. 619 (1934); Willam Castro, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEG. HIST. 116 (1993).

[83] In its *DeVries* decision, the U.S. Supreme Court is careful to consistently qualify its holding as applying only "[i]n the Maritime Tort context." Air and Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 991, 994–95 (2019). On this point the majority and the dissent are in complete agreement. *Id*. at 1000 (Gorsuch, J. dissenting) (2019) ("In announcing its new standard, the Court expressly states that it does not purport to define the proper tort rule outside of the maritime context. [citation omitted] . . . All

should the analysis of the bare-metal product issue be meaningfully different within maritime law as contrasted with broader negligence and products liability law?

While a number of factors have been identified that arguably characterize maritime law as appropriately distinctive and apart from similar legal doctrine operating outside of the maritime context,[84] the one distinguishing factor consistently cited and emphasized by the federal courts regarding the bare-metal equipment issue is maritime law's special solicitude for sailors.[85] Every federal court that dealt with the *DeVries* case as it moved its way up the hierarchy of the federal court system to the U.S. Supreme Court prominently noted in its opinion this feature of maritime law and its import.[86] The U.S. Supreme Court put it this way:

> Maritime law has always recognized a 'special solicitude for the welfare' of those who undertake to 'venture upon hazards and unpredictable sea voyages.' The plaintiffs in this case are the families of veterans who served in the U.S. Navy. Maritime law's longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances.[87]

As often as the idea of maritime law including some special solicitude for sailors is mentioned by the federal courts, specific policy justifications for such solicitude have rarely been offered, and when they have been they

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of this means, of course, that nothing in today's opinion compels courts operating outside the maritime context to apply the test announced today.").

[84] *See, e.g.*, *In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232, 238–40 (3d Cir. 2017) (the Court identifies four established principles of maritime law: "the protection of sailors;" "'traditions of simplicity and practicality;'" "'the protection of maritime commerce;'" and "'uniform rules to govern conduct and liability.'"). *See also* William Tetley, *Maritime Law as a Mixed Legal System (with Particular Reference to The Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317 (1999).

[85] Julia Mayer, *Air and Liquid Systems Corp. v. DeVries: The "Special Solicitude to Sailors" Tips the Scale in "Bare-metal Manufacturer" Products Liability Cases*, 32 U.S.F.MAR. L.J. 151 (2019–2020).

[86] *DeVries*, 139 S. Ct. at 995 (2019) ("Maritime law's longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances."); *In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232, 239 (3d Cir. 2017) ("Here, maritime law's special solicitude for sailors' safety similarly favors the adoption of the standard-like approach to the bare-metal defense."); DeVries v. General Electric Company, 188 F. Supp. 3d 454, 463 (E.D. Pa. 2016) (favorably citing the recognition that "since time immemorial, it has been one of the primary goals of maritime law to protect maritime workers from the perils of working at sea" in Mack v. Gen. Elec. Co., 896 F. Supp. 2d 333, 338 (E.D. Pa. 2012)).

[87] *DeVries*, 139 S. Ct. at 995 (2019).

are sometimes suspect.[88] For example, Justice Joseph Story, then Associate Justice on the U.S. Supreme Court and serving concurrently as Circuit Justice for the First Circuit, wrote in a decision on behalf of the U.S. District Court for Maine, "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached."[89]

Nevertheless, there is little question or controversy that expanded protection for sailors is a foundational part of American maritime law, even if "courts have subscribed to inconsistent theories of special solitude."[90] Areas of maritime law that have been cited as demonstrating the effect of this special solicitude include "a wrongful-death action that arises out of death in state territorial waters or on the high seas; a survival action; recovery of loss-of-society damages in wrongful-death and personal-injury actions; damages for pain and suffering; punitive damages; emotional distress damages; and recovery of loss of future earnings in a survival action."[91]

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[88] Dutra Group v. Batterton, 139 S. Ct. 2275, 2287 (2019) ("Batterton points to the maritime doctrine that encourages special solicitude for the welfare of seamen. But that doctrine has its roots in the paternalistic approach taken toward mariners by 19th century courts. [citations omitted] The doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law.").

[89] Harden v. Gordon, 11 F.Cas. 480, 485 (D. Me. 1823).

[90] Ugo Colella, *The Proper Role of Special Solitude in the General Maritime Law*, 70 TUL. L. REV. 227, 240 (1995).

[91] *Id.* at 230–31 (1995) (citing Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387–88 (1970)) (wrongful-death action that arose out of death in state territorial waters); Hammill v. Ilympic Airways, S.A., 398 F. Supp. 829, 835–38 (D.D.C. 1975) (wrongful-death action that arises out of death on the high seas); Kuntz v. Windjammer Barefoot Cruises, 573 F. Supp. 1277, 1286 (W.D. Pa. 1983), *aff'd without opinion*, 738 F.2d 423 (3d Cir.), *cert. denied* 469 U.S. 858 (1984) (a survival action); Muirhead v. Pacific Inland Navigation, 378 F. Supp. 361, 363 (W.D. Wash. 1974) (a survival action); Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 583–88 (1974) (recovery of loss of society damages in wrongful death actions); American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284–86 (1980) (recovery of loss of society damages in personal injury actions); Greene v. Vantage S.S. Corp., 466 F.2d 159, 167 (4th Cir. 1972) (damages for pain and suffering); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137, 140 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972) (damages for pain and suffering); *In re* Morehead Marine, 844 F. Supp. 1193, 1197, (S.D. Ohio 1994) (punitive damages); Sincere Navigation Corp., 329 F. Supp. 652, 654–57 (E.D. La. 1971*), rev'd sub nom*., *In re* S/S Helena, 529 F.2d 744 (5th Cir. 1976) (emotional

It is understandable that this list is comprised of either the recognition of standing (or expanded standing) to bring a claim, or the recognition of damages (or expanded damages) in response to a claim successfully brought. These are aspects of legal doctrine that could be said to be "plaintiff-centered" in so much as they focus on the plaintiff's side of the cause of action. Their expansion on behalf of a plaintiff might well extend or increase the amount of a defendant's liability, but only so long as the defendant's liability can be otherwise established, independent of these doctrines.

As such, these doctrines are arguably appropriate subjects for the exercise of a special solicitude for sailors, who are overwhelmingly plaintiffs, and not defendants, in tort claims under maritime law. Their expansion in favor of the plaintiff confers a legal benefit—demonstrates a special solicitude—most directly and primarily on behalf of the sailor/plaintiff. While the defendant suffers from (i.e., pays for) such judicial solicitude for the opposing party in terms of possible liability to certain persons they might not otherwise have exposure to, or for the kind of more expansively defined plaintiff harm for which they must provide compensation, all such affected defendants are nevertheless determined to be worthy of liability by means of doctrines that are not skewed by any special solicitude to any party.

Without such a limitation, exhibited by the list of affected doctrine above, the embrace and implementation of some sort of special solicitude by the law on behalf of only one of the two parties in contested personal injury litigation can be seen as problematic and pernicious rather than as an expression of a facially benign, humanitarian impulse. On what principled rationale should a defendant be held at all liable on a claim that falls under maritime law in circumstances in which the same defendant behavior would not be deemed worthy in law of triggering liability outside of maritime law? Defendant behavior presumably either involves sufficient fault on the part of the defendant or qualifies the defendant for strict liability treatment, whether or not that defendant behavior takes place on open navigable waters.

Moreover, even if somehow justifiably applied to some defendant-centered liability-determining doctrines, where, on principle, should the expression of such special solicitude for plaintiff/sailors in maritime law end? How far should maritime law venture from the balance of factors that results in the substance of liability-determining tort doctrine in other arenas in order to sufficiently express some special solicitude? How much pressure should be exerted by a judicial thumb placed on the scales of the substance of maritime tort law in favor of sailors? How far from long-

distress damages); Evich v. Morris, 819 F.2d 256, 258 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) (recovery of loss of future earnings in a survival action).

standing consensus about the fair and appropriate substance of tort doctrine should maritime tort law be stretched?

While some solicitude toward sailors might be rationalized in terms of the shaping and interpretation of plaintiff-centered doctrines in maritime law, like standing and damages, no similar rationale exists for special, maritime-law-only versions of bedrock, liability-determining tort law doctrines. No policy or rationale exists that begins to suggest how far such plaintiff-friendly distortion should go compared to the version of that same legal doctrine that exists outside of maritime law.

A bare-metal defendant's duty to warn users of dangers posed by later-added components is plainly a matter of liability doctrine rather than of plaintiff-centered doctrine like standing or damages. As such, the existence of some special solicitude for plaintiffs, even when it exists, has no principled and appropriate role to play in the resolution of the bare-metal equipment issue. It is not at all clear just what analytical role such solicitude actually played in the majority's decision in *DeVries*, despite its prominent appearance in the opinion.

In any case, special solicitude is a factor cited by the Supreme Court in *DeVries* that should be ignored by future courts wrestling with this issue outside of maritime law. Further, in the absence of this factor, there is no reason why the resolution of this issue in maritime law should differ in any way from its resolution in tort law generally. The fact that the Supreme Court decided the issue in the context of maritime law results importantly in the formal limit on its authority and effect as precedent, but it plays no appropriate role in the persuasiveness of the court's analysis and argument regarding the resolution of the issue going forward. Apart from a special solicitude for sailors—a factor not appropriate to this particular issue—there is no rationale for a different resolution of this legal issue in maritime law as contrasted with the rest of negligence and products liability law. The persuasiveness of the U.S. Supreme Court's analysis and resolution of this issue in *DeVries* stands or falls without the aid of the crutch that it was encountered and considered in the context of maritime law.

B. A Consistent Failure to Consider the Bare-Metal Equipment Issue Within Its Appropriate Doctrinal Context

One striking aspect of the various court decisions in *DeVries*, and more generally regarding the bare-metal equipment issue, is courts' consistent failure to incorporate well-established tort law doctrine (as contrasted with generalized tort law policy) into their analysis of the issue. Put another way, it is remarkable the degree to which courts in many decisions do not frame the issue they believe they are required to resolve within the relevant and specific doctrinal framework of tort law.

Frequently, in fact, the relevant tort law doctrinal requirements regarding the claim at issue are neither set forth nor even mentioned.[92]

A large number of court decisions in this area, including the U.S. Supreme Court in *DeVries*, frame the issue as determining the degree to which a bare-metal manufacturer should bear a formal legal duty to warn consumers of the unreasonably dangerous quality of their otherwise reasonably safe product when components produced and sold by third parties are subsequently incorporated into that bare-metal product.[93] That

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[92] It is striking in reading the U.S. Supreme Court decision in *DeVries* to see that the word "negligence" (which is, after all, according to the Court, the specific cause of action at issue in the case) is used only twice in the majority opinion, and is used not at all in the dissenting opinion. Nowhere in either opinion is the prima facie case for negligence set forth, nor the prima facie case for strict products liability, even though the Third Circuit states that "Devries and McAfee's Complaints each allege claims of negligence and strict liability" and a significant part of both the Third Circuit's decision to remand, and the district court's response to that remand, focus on the possibly of a formally different status of the bare-metal defense under each separate claim. *In re* Asbestos Prod. Liab. Litig. (No. VI), 873 F.3d 232, 234 (3d Cir. 2017).

Nowhere does either the majority or the dissenting opinion consider the possibility that there might be an important difference within the context of a negligence claim as contrasted with a strict products liability claim to the fact that the defendant's product as sold and provided to the buyer did not contain any asbestos and therefore did not cause the harm to the plaintiff, even though it is this very fact that creates the legal issue before the Court. Instead, both the majority and dissent frame the claims in broad, generalized, largely maritime law terms and then analyze the issue at stake from a soft, casual, unsystematic cheapest-cost-avoider perspective. The judicial approach of the Court in this respect has been noted by academic commentators. Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs* (reviewing JOHN C.P. GOLDBERG & BENJAMIN C. ZAPURSKY, RECOGNIZING WRONGS (2020)), 134 HARV. L. REV. 1423, 1423–24 (2021) ("the U.S. Supreme Court faced a novel tort law issue in 2019 in Air & Liquid Systems Corp. v. DeVries . . . In a 6-3 decision, Justice Brett Kavanaugh, drawing heavily from Judge Guido Calabresi's 'cheaper cost avoider' theory, held for the majority that the bare-metal product manufacturer did have a duty to warn, reasoning that 'the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product.' . . . Justice Neil Gorsuch, for the dissent, likewise built his analysis around Judge Calabresi's cheapest-cost-avoider theory, but reasoned that the subsequent part manufacturer 'is in the best position to understand and warn users about its risks; in the language of law and economics, those who make products are generally the least-cost avoiders of their risks.' Thus, while the majority and dissent disagreed as to which party--the bare-metal product manufacturer or the subsequent parts manufacturer--was in fact the cheapest cost avoider, they were unanimous in using the lens of law-and-economics, incentive-driven tort theory.") (reviewing JOHN C.P. GOLDBERG & BENJAMIN C. ZAPURSKY, RECOGNIZING WRONGS (2020).

[93] Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993 (2019) ("In this negligence case, we must decide whether a manufacturer has a duty to warn when the manufacturer's product requires later incorporation of a dangerous part – here,

issue is then viewed and discussed more or less in isolation from the larger surrounding tort doctrine that gives the issue legal significance. Such an approach, as discussed below, both overcomplicates and oversimplifies the resulting legal analysis.

The typical approach in a large number of these decisions, including *DeVries*, is to say, after identifying the issue, that one possible resolution is that the bare-metal manufacturer bears a formal legal duty to warn so long as the subsequent addition of third-party components to the bare-metal equipment that makes the integrated product unreasonably dangerous is foreseeable to the original manufacturer.[94] The court then sets forth what is characterized as the resolution of the issue that resides at the opposite end of the spectrum, which is that the manufacturer of the bare-metal product bears no formal legal duty to warn consumers of any potentially dangerous attribute of the product that is not a feature of the bare-metal product itself; that the manufacturer or seller of the original equipment has no duty to warn of the product after dangerous third-party parts or components are added to it.[95] This latter approach is typically labeled as the bare-metal defense.[96]

Having constructed the framework within which the issue is to be resolved in this way, the court then frequently announces that it has adopted neither of the polar opposite positions but has instead come to one or another of a middle position between the two whereby the original equipment manufacturer does bear a formal duty to warn, but only under

asbestos – in order for the integrated product to function as intended."). *See also* Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 794 (E.D. Pa. 2012) ("the Court now considers whether, under maritime law, Defendants are liable for injuries caused by asbestos products manufactured by others but used with Defendants' products."); Schwartz v. Abex Corp., 106 F. Supp. 3d 626, 628 (E.D. Pa. 2015) ("Before the Court is the issue whether, under Pennsylvania law, a manufacturer Defendant is liable for harm arising from asbestos-containing component parts that it neither manufactured nor supplied, but which were used with its product.").

[94] *DeVries*, 139 S. Ct. at 993 ("The first approach is . . . : A manufacturer may be liable when it was foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part."). *See also* Kochera v. Foster Wheeler, LLC, 2015 WL 5584749, at *4 (S.D. Ill. 2015); Chicano v. General Electric Co., 2004 WL 2250990, at *9 (E.D. Pa., 2004).

[95] *DeVries*, 139 S. Ct. at 993 ("The second approach is . . . : If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product").

[96] *Id.*; Lindstrom v. A-C Prod. Liab. Tr., 424 F.3d 488, 492, 495–97 (6th Cir. 2005); Evans v. CBS Corp., 230 F. Supp. 3d 397, 403–05 (D. Del. 2017); Cabasug v. Crane Co., 986 F. Supp. 2d 1027, 1041 (D. Haw. 2013).

conditions that include more requirements than mere foreseeability.[97] *DeVries* follows this approach.

The rhetorical advantage of such an analytical approach is obvious, allowing the deciding court to posture as moderate and reasonable in fashioning a resolution between two extremes. It also portrays the court as innovative in so much at it has developed and now announces a resolution of the issue that is both novel and, typically, more complicated and elaborate than either identified existing end of the spectrum.[98] Unfortunately, such a framing and conception of this issue fails to consider that the bare-metal product issue may arise in two very different doctrinal contexts: negligence and strict products liability. Whether the case arises in one or the other of these contexts should matter a great deal to a court's analysis and resolution.

1. Bare-Metal Equipment Manufacturers as Defendants in Negligence Claims

A person injured by a product made unreasonably dangerous only because of parts or components subsequently supplied by a party other than the manufacturer or seller of the original, bare-metal product typically has the option to seek legal redress from the bare-metal manufacturer or seller based on either one, or both, of two legal causes of action: negligence and strict products liability.[99]

The key insights about the bare-metal equipment issue in the doctrinal context of a negligence claim are: (1) requiring the plaintiff to establish reasonable foreseeability is entirely superfluous and without any

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[97] *DeVries*, 139 S. Ct. at 993 ("The third approach falls between those two approaches."). *See also* Quirin v. Lorillard Tobacco Co., 17 F. Supp. 3d 760, 769–70 (N.D. Ill. 2014); *In re* New York City Asbestos Litig., 59 N.E.3d 458, 474 (N.Y. 2016); May v. Air & Liquid Sys. Corp., 129 A.3d 984, 1000 (Md. 2015).

[98] *DeVries*, 139 S. Ct. at 991 ("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 that danger.").

[99] Marjorie A. Shields, *Application of "Bare-metal" Defense in Asbestos Product Liability Cases*, 9 A.L.R.7th art.2 (2015) ("A manufacturer or seller of asbestos or asbestos-containing materials is liable for injuries suffered by persons exposed to asbestos fibers, and a plaintiff may proceed against them on both negligence and strict liability theories."); Ralph Gerstein, *Cause of Action for Failure to Warn of Hazards of Exposure to Asbestos*, 97 CAUSES OF ACTION 2D 461 (2021) ("A prima facie case can be based on state common law of torts, using either a negligence failure-to-warn theory or a strict liability theory; in the strict liability case, the product is deemed unreasonably dangerous because of the manufacturer's or supplier's failure-to-warn.").

practical effect; while, by contrast, (2) adopting the bare-metal defense is highly consequential and violates basic negligence principles and policy.

A negligence claim in these circumstances would be in the form of a standard negligence action.[100] As such, it would require the plaintiff to establish duty, breach, causation, and harm.[101] Under such a claim, in order to establish the breach element of the prima facie case, the plaintiff would need to convince the finder of fact that, all things considered, the defendant bare-metal manufacturer or seller acted with unreasonable carelessness under the circumstances.[102] Satisfaction of this element establishes one level of fault on the part of the bare-metal defendant: the existence of unreasonably careless, and thus antisocial, behavior, appropriately deterred by the imposition of formal legal liability.

Negligence requires more, however. It also requires the plaintiff to establish causation, which requires that the defendant's breach be both an actual and proximate cause of the plaintiff's harm.[103] To do this, the plaintiff must prove that but for the defendant's breaching behavior the plaintiff would not have suffered the harm for which the plaintiff is seeking compensation by means of the negligence claim (actual cause),[104] and also prove that the harm suffered by the plaintiff was reasonably

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[100] Crayton v. Oceania Cruises, Inc., 600 F. Supp. 2d 1271, 1275 (S.D. Fla. 2009) ("The elements of maritime negligence are essentially the same as those for common law negligence.").

[101] Pearce v. United States, 261 F.3d 643, 647 (6th Cir. 2001) ("To be successful in its suit against the United States, the plaintiffs needed to establish all elements of a negligence cause of action in admiralty. Those elements, 'which are essentially the same as land based negligence under the common law,' are: 1) the existence of a duty of care owed by the defendant to the plaintiff; 2) the breach of that duty of care; 3) a causal connection between the offending conduct and the resulting injury, which is called "proximate cause"; and 4) actual loss, injury or damage suffered by the plaintiff." *citing* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5–2, at 170 (3d ed. 2001)); Esanu v. Oceania Cruises, Inc., 49 F. Supp. 3d 1078, 1081 (S.D. Fla. 2014).

[102] David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1676–79 (2007) ("modern negligence law imposes a duty on most persons in most situations to act with reasonable care, often referred to as 'due care,' for the safety of others and themselves. A person who acts carelessly-unreasonably, without due care--breaches the duty of care").

[103] *Id.* at 1679–85; PV Holding Co. v. Poe, 861 S.E.2d 265, 267 (Ga. Ct. App. 2021) ("To prove causation in a negligence case, the plaintiff must show that the wrongdoing is both a cause in fact and a proximate cause of the injuries alleged.").

[104] Drouhard-Nordhus v. Rosenquist, 345 P.3d 281, 286 (Kan. 2015) ("To establish causation in fact, a plaintiff must prove a cause-and-effect relationship between a defendant's conduct and the plaintiff's loss by presenting sufficient evidence from which a jury can conclude that more likely than not, but for defendant's conduct, the plaintiff's injuries would not have occurred."); RESTATEMENT (THIRD) OF TORTS, §26, Reporters' Note cmt. b (AM. L. INST. 2010) ("Courts and scholars routinely acknowledge that the but–for test is central to determining factual cause").

foreseeable as one consequence of the defendant's breaching behavior (proximate cause).[105]

That the production, or sale, of a product is the focus of the defendant's alleged unreasonably careless behavior is not particularly significant within the traditional negligence claim. It may be relevant in determining which legal persons may be sued by the plaintiff for negligence,[106] but it otherwise is not relevant to the substance of the negligence cause of action. Traditional negligence treats the alleged unreasonably careless creation or sale of a product just like the alleged unreasonably careless behavior of the defendant in most every other realm, such as unreasonable driving of a vehicle or unreasonable maintenance of equipment that the defendant did not create or sell.[107]

In order to satisfy the actual cause requirement of the prima facie case, the plaintiff would need to show that the defendant's breaching behavior was a "but for" cause of the plaintiff's harm.[108]

In order to establish the proximate cause requirement, the duty requirement, or sometimes both, the plaintiff would need to establish that the harm suffered by the plaintiff was reasonably foreseeable given the defendant's breaching behavior.[109] Thus, in all negligence cases—and

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[105] Smith v. Herbin, 785 S.E.2d 743, 745 (N.C. Ct. App. 2016) ("Proximate cause is an essential element of a negligence claim."); *In re* Walmart, Inc., 620 S.W.3d 851, 861 (Tex. App. 2021) ("Causation includes two elements: cause in fact and foreseeability."); RESTATEMENT (THIRD) OF TORTS §3 cmt. g (AM. L. INST. 2010) ("To establish the actor's negligence, it is not enough that there be a likelihood of harm; the likelihood must be foreseeable to the actor at the time of conduct."); RESTATEMENT (THIRD) OF TORTS §3, Reporters' Note cmt. g (AM. L. INST. 2010) ("Determinations of negligence are commonly based on findings as to which harms are foreseeable.").

[106] For example, some versions of the negligent entrustment of a vehicle claim require that the defendant be the owner of the vehicle. Silvas v. Harrie, 2018 WL 5733187 (W.D. Tex. 2018) ("To establish a claim of negligent entrustment, a plaintiff must show '(1) entrustment of a vehicle by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, (4) that the driver was negligent on the occasion in question and (5) that the driver's negligence proximately caused the accident.'") (quoting Schneider v. Esperanza Transmission Co., 744 S.W.2d 595, 596 (Tex. 1987)).

[107] *See, e.g.*, Chavez v. 24 Hour Fitness USA, Inc., 238 Cal. App. 4th 632 (Cal. Ct. App. 2015); Zipusch v. LA Workout, Inc., 155 Cal. App. 4th 1281 (Cal. Ct. App. 2007); Mark E. Milsop, *Corporate Negligence: Defining The Duty Owed By Hospitals To Their Patients*, 30 DUQ. L. REV. 639, 648–49 (1992).

[108] Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985) ("The most widely used test of actual causation in tort adjudication is the but-for test, which states that an act (omission, condition, etc.) was a cause of an injury if and only if, but for the act, the injury would not have occurred. That is, the act must have been a necessary condition for the occurrence of the injury.").

[109] Neering v. Illinois Central R.R. Co., 50 N.E.2d 497, 503 (Ill. 1943) ("What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the

completely apart from whether the claim involves a bare-metal product, or any product at all for that matter—reasonable foreseeability must be established.[110] A foreseeability requirement is doctrinally hardwired into every negligence claim, and no negligence claim can succeed without the plaintiff establishing that the harm for which the plaintiff is seeking compensation by means of the claim was reasonably foreseeable given the unreasonably careless behavior of the defendant.[111]

Thus, in a negligence claim involving a bare-metal product, a requirement of reasonable foreseeability by the defendant does not exist on one far end of some spectrum. It is instead a bedrock requirement of the negligence cause of action.[112]

Courts wishing to impose a foreseeability requirement upon bare-metal plaintiffs need make no alteration at all to the applicable negligence doctrine and need not make any special judgment or declaration to achieve that result. If a reasonable person in the position of the defendant would not have foreseen the addition of the dangerous component or would not have foreseen that the bare-metal equipment with the addition of the subsequently added component would be unreasonably dangerous, then the plaintiff's negligence claim cannot succeed. It cannot succeed because

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natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence.").

There exists long-standing ambiguity in negligence law regarding the manner and degree to which a generally agreed upon reasonable foreseeability requirement in the prima facie case for negligence should be understood to be part of the required duty element, the required proximate cause element, or both. *See Torts – Proximate Cause as Obscuring the Duty Problems*, 38 YALE L.J. 1157 (1929); *see also* Patrick J. Kelly, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039 (2001).

[110] Stewart v. Jefferson Plywood Company, 469 P.2d 783, 786 (Or. 1970) ("Foreseeability is an element of fault; the community deems a person to be at fault only when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen."); DiPonzio v. Riordan, 679 N.E.2d 616, 618 (N.Y. 1997) ("Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated.").

[111] Noon v. Knavel, 339 A.2d 545, 549 (Pa. Super. Ct. 1975) ("It is well settled that the appellant 'could be properly liable only with respect to those harms which proceeded from a risk or hazard the foreseeability of which rendered its conduct negligent.'") (quoting Metts v. Griglak, 264 A.2d 684, 687 (Pa. 1970)); Maltman v. Sauer, 530 P.2d 254, 258 (Wash. 1975) ("The hazard that brought about or assisted bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendant's conduct was negligent.").

[112] Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009); Comment Note, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942 (originally published in 1965).

the plaintiff would not be able to establish either the duty or the proximate cause elements of the prima facie case, or perhaps both.

Understood in this way, a court's decision to impose upon a negligence plaintiff a doctrinal requirement any greater or more burdensome than foreseeability is a decision to provide greater protection from legal liability to negligence defendants in bare-metal product situations. The adoption by courts of a "bare-metal defense" in negligence cases is the embrace and adoption of an outright grant of effective immunity to bare-metal equipment manufacturers against possible negligence liability. This immunity would include cases in which the defendant acted with unreasonable carelessness and could, as a result, have reasonably foreseen harm to the plaintiff. These are cases in which the defendant would likely be liable to the plaintiff on a negligence claim in the absence of a bare-metal defense.

2. The Bare-Metal Defense is Not a Conceptually Coherent Response to the Bare-Metal Equipment Issue in the Context of Negligence

Are there any sound justifications for providing negligence defendants in bare-metal equipment situations with any greater protection from legal liability than is afforded to other negligence defendants? After all, these defendants cannot be held liable for negligence unless it has been determined by a trier of fact that they acted with unreasonable carelessness under the circumstances and that the harm suffered by the plaintiff as a result was a reasonably foreseeable consequence of that unreasonably careless behavior.[113] Why should such defendants be further shielded from the obligation of compensating the foreseeable victims of their faulty behavior because their unreasonably careless behavior was carried out through the design, manufacture, or commercial sale of bare-metal equipment?

Imagine, for example, a hypothetical case involving a Keurig coffee maker.[114] In one version of the hypothetical, a particular model of the machine is designed and manufactured so that water and brewed coffee can become trapped and stagnant within the machine. Eventually, these stagnant liquids contaminate freshly brewed coffee and physically harm persons who drink that coffee. Presume that Keurig is found to have been unreasonably careless in the design, manufacture, or inspection of this model of the machine and that the kind of harm suffered by persons who

[113] *See supra* notes 109–16 and accompanying text .

[114] This example is purely hypothetical and is, in full, a product of the author's imagination. Use of the brand name "Keurig" is only by way of making the hypothetical more easily understood to the reader and for purposes of verisimilitude. No suggestion regarding the existence of any dangerous quality of Keurig coffee makers or the coffee pods used with them is made or intended.

drink the resulting contaminated coffee was reasonably foreseeable given Keurig's carelessness. In such circumstances, Keurig would likely be liable to injured consumers in response to a negligence claim brought by them, and appropriately so. Compensation, deterrence, and efficient risk-spreading considerations all support liability for Keurig in such a circumstance.

In a second version of this hypothetical, the Keurig model in question is fully competently designed, manufactured, and sold. By itself, it represents no unreasonable risk of injury to any individual. However, one manufacturer of a brand of coffee that is packaged and sold in Keurig compatible K-cups has engaged in unreasonably careless behavior so that a large percentage of the K-cups they produce and sell contain dangerously contaminated ground coffee. When this coffee is brewed using these K-cups in a Keurig machine, persons consuming that brewed coffee are physically injured.

Presume in this second hypothetical that Keurig is found to have been aware, or reasonably should have been aware, of the danger to consumers posed by the combination of its coffee makers and these K-cups and, further, that Keurig was unreasonably careless in failing to provide a warning to purchasers of their machines regarding the risk of physical injury posed by brewing that brand of coffee in those machines.

In such circumstances, as in the first version of the hypothetical, Keurig is likely to be held liable to injured consumers in response to a negligence claim.[115] And as in the first version of the hypothetical, this result would be entirely consistent with the fundamental policy goals of tort law, including those of negligence.

On what basis should any additional requirements be imposed on plaintiffs in the second version of the hypothetical in contrast to the

[115] *See, e.g.*, Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 862 (8th Cir. 1975) (Plaintiff was injured while replacing a tire whose rims had previously been improperly reassembled by a third party not the manufacturer. The tire as initially sold by the manufacturer (Firestone) was not dangerous. When the plaintiff sued Firestone asserting a negligently insufficient failure to warn of the dangerous post-sale modification, the court found that "A jury could reasonably have found that Firestone failed to meet its duty of reasonable care, that this failure was a proximate cause of plaintiff's injuries, and that there was no independent intervening cause."); Witthauer v. Burkhart Roentgen, Inc., 467 N.W.2d 439, 445 (N.D. 1991) (Court concludes that a state statute that deals with the alteration or modification of a product "does not preclude a seller's liability when it is premised on the negligent failure to provide adequate warnings of the dangerous consequences resulting from a foreseeable alteration or modification of a product."); STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, AMERICAN LAW OF TORTS, Volume 6, Section 18:163, *Alteration, Modification, or Change of the Product – The Foreseeability Factor* (March 2022 update) ("Generally, only alterations or modifications that were not reasonably foreseeable by the manufacturer or seller are sufficient to preclude imposition of liability.").

first?[116] So long as in both cases defendant Keurig acted unreasonably carelessly and that carelessness actually caused reasonably foreseeable harm to reasonably foreseeable plaintiffs, Keurig should be held liable in negligence to compensate those victims for that harm. For these purposes, it is irrelevant to tort law policy that the problematic condition of Keurig's machine was a consequence of its unreasonable carelessness and more directly caused the injury to the plaintiff as compared to Keurig's machine itself being reasonably safe except when combined with a dangerous component supplied by a third party. Once a negligence defendant can be found to have breached a legal duty of reasonable care by failing to warn others of possible dangerous uses of, or possible dangerous modifications to, otherwise reasonably safe products, then there exists no meaningful distinction between cases of defective products and those of bare-metal products that become unreasonably dangerous with the inclusion of the wrong additional part or component. There exists no rationale for treating the two cases differently doctrinally.

Providing defendants in cases like the second version of the hypothetical with an absolute "bare-metal defense," or accreting onto this class of negligence claims additional formal doctrinal requirements, results in an unwarranted distortion of the usual operation of the negligence cause of action and inevitably results in outcomes in these cases that run counter to, and thus compromise, basic tort law principles and policy.

In every instance in which the existence of additional, court-designed requirements for bare-metal cases make any difference in the outcome of a negligence claim, they are operating to force an outcome in those cases that is different from what it would have been otherwise. This means that in every such circumstance these additional requirements are replacing the flexibility that negligence law normally chooses to allocate to finders of fact in determining breach of duty and foreseeability of resulting harm. This in turn compromises the normal use that negligence law makes of, and the value provided by, the intuition and instincts of the trier of fact regarding defendant fault and the defendant's genuine social responsibility for the plaintiff's harm.[117]

The answer to the initial question—what legal justification exists for shielding bare-metal defendants from the usual legal consequence of their negligence—is simple: none. The *DeVries* majority opinion offers no such

[116] Such as the additional requirements set forth in DeVries that: (1) the product requires incorporation of a part; and (2) the manufacturer has no reason to believe that the product's users will realize that danger, Air & Liquid Sys. Corp. v. DeVries, 139 S.Ct. 986, 991 (2019), or the complicated muti-part analytical template set forth by the Court of Appeals of Tennessee in Coffman v. Armstrong Int'l, Inc., 2019 WL 3287067 (Tenn. Ct. App. 2019).

[117] Otherwise those court-designed criteria and requirements would be meaningless and without practical consequence.

justifications. The imposition of such additional formal burdens on negligence actions is the consequence of courts considering and deciding the bare-metal equipment issue within an analytical framework that fails to meaningfully distinguish between negligence claims and strict products liability claims in these cases.[118]

3. Bare-Metal Equipment Manufacturers as Defendants in Strict Products Liability Claims

The history, purpose, underlying policy, and doctrinal features of the strict products liability claim in tort law all differ from those of the negligence cause of action.[119] As much as the bare-metal defense is unwarranted and should be no part of a negligence action brought against a bare-metal equipment defendant, these same considerations and doctrinal features raise difficult and foundational issues in the context of a strict products liability action.

One critical difference between a negligence and a strict products liability claim is that the plaintiff in a negligence claim must establish that the defendant acted with unreasonable carelessness in connection with the plaintiff's injury, while no such doctrinal requirement exists with strict products liability.[120] Negligence is based, at its core, on the faulty behavior of the defendant,[121] while strict products liability, as its name clearly

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[118] As is illustrated by the U.S. Supreme Court's majority opinion. Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 991–96 (2019).

[119] DAVID G. OWEN, PRODUCTS LIABILITY LAW, Ch. 5, Strict Liability in Tort, 254–340 (2d Ed. 2008); DAN B. DOBBS, THE LAW OF TORTS, Ch. 24, Products Liability, 969–77 (2000).

[120] RESTATEMENT (SECOND) OF TORTS §402A (1965) ("(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."); Ellen Werthheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1187–88 (1992) ("Strict products liability is a nonmoral doctrine that applies even when 'the seller has exercised all possible care in the preparation and sale of his product.' Thus, a finding of liability does not mean that the manufacturer is blameworthy or did something wrong . . .") (quoting RESTATEMENT (SECOND) OF TORTS §402A(2)(a)(1965)).

[121] Carson v. State *ex. rel*., Wyoming Workers' Safety and Compensation Div., 322 P.3d 1261, 1266 (Wyo. 2014) ("Our general negligence theory is one based on fault."); Artlip v. Queler, 470 S.E.2d 260, 262 (Ga. Ct. App. 1996) ("liability for negligence must be based on fault"); Note, *Private Actions as a Remedy for Violations of Stock Exchange Rules*, 83 HARV. L. REV. 825, 838 n.93 (1970) ("Traditional

indicates, is designed to impose formal liability on defendants who have not necessarily been shown to have engaged in unreasonably careless behavior.[122]

So with negligence, the initial, first-level answer to the question as to who may possibly be held liable to a plaintiff for certain harm is: only those potential defendants who have engaged in unreasonably careless behavior in connection with that harm.[123] If no fault (in terms of unreasonably careless behavior), then no possible liability for negligence.[124]

While behavioral fault of this sort is necessary for negligence liability, it is not sufficient.[125] Unreasonably careless behavior alone, in the abstract, is not enough to result in liability being imposed on the defendant. Negligence requires that the plaintiff establish that the defendant engaged in unreasonably careless behavior, and also requires the plaintiff to establish that the careless defendant is socially responsible for the harm suffered by the plaintiff.[126] Only defendants who are shown

negligence law is based on fault"); Daniel Klerman, *Settling Multi-Defendant Lawsuits: The Advantage of Conditional Setoff Rules*, 25 J. LEGAL STUD. 445, 447 n.8 (1996) ("Under a negligence regime, both liability and apportionment are ordinarily based on 'fault').

[122] Bylsma v. R.C. Willey, 416 P.3d 595, 611–12 (Utah 2017) ("[W]hen we adopted section 402A of the Restatement (Second) of Torts, which sets forth the doctrine of strict products liability, we adopted its strict liability regime for products liability claims. Because strict liability is, by definition, 'liability without fault,' 'culpable conduct is not at issue in strict liability, only causation.' . . . stripped of its imposition of 'strict' liability—liability without fault, based on a breach of a legal duty not to sell a defective product—it is no longer the doctrine of strict products liability.") (quoting Mulherin v. Ingersoll-Rand Corp., 628 P.2d 1301, 1304 (Utah 1981)).

[123] Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1041 (2001) ("State courts across the United States, with perhaps two exceptions, state the prima facie case for negligence as follows: . . . 2) Breach of that duty by defendant's failure to act as an ordinary reasonable person would act under the circumstances.").

[124] Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695, 698 (2007) ("The affinity between negligence and fault is one of the most basic truths in tort law.").

[125] The prima facie case for negligence also includes required elements of causation and harm. Joyner v. Lifeshare Management Group, LLC, 2018 WL 6092743, at *3 (S.D. Ga. 2018) (In order to sustain a claim for negligence, a plaintiff must be able to establish "(1) a legal duty; (2) a breach of this duty; (3) an injury; and (4) a causal connection between the breach and the injury.") (quoting Persinger v. Step By Step Infant Dev. Ctr., 560 S.E.2d 333, 335 (Ga. Ct. App. 2002)).

[126] Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.'") (quoting FREDERICK POLLOCK, THE LAW OF TORTS 455 (11th ed. 1920)).

to be genuinely responsible for the plaintiff's injuries are held liable to compensate those plaintiffs for those injuries.[127]

Negligence establishes genuine social responsibility primarily by means of the causation element of the prima facie case.[128] No matter how unreasonably careless a defendant has been, that defendant is not deemed to be socially responsible for the plaintiff's harm unless the unreasonably careless behavior actually caused the plaintiff's harm and also proximately caused that harm.[129] Actual cause is typically established by proving that, but for the defendant's unreasonably careless behavior, the plaintiff would not have suffered the injury for which the plaintiff is seeking compensation in the negligence action.[130] Proximate cause is typically established by proving that the injury suffered by the plaintiff was among the reasonably foreseeable consequences of the defendant's unreasonably careless behavior.[131]

Thus, within negligence, foreseeability plays a critical role in establishing that an unreasonably careless defendant is sufficiently at fault for the plaintiff's injuries to be appropriately held formally liable and forced to compensate the plaintiff for those injuries. Foreseeability performs this function by establishing the necessary link between the defendant's faulty behavior and the plaintiff's harm. No matter how wildly unreasonable the defendant's behavior might have been, the defendant is not genuinely socially responsible for the plaintiff's harm unless that behavior actually caused the harm and also that the link

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[127] John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of MacPherson*, 9 J. TORT L. 91, 113 (2016) ("So far as Cardozo was concerned, when a court sets about determining whether a defendant should be held liable to a plaintiff for negligence, it aims to determine whether, under existing doctrine or a fair extension of it, the defendant can be held responsible to the plaintiff for having carelessly injured the plaintiff. And this determination requires judgments as to the *wrongfulness* of the defendant's conduct.").

[128] Marin Roger Scordato, *Three Kinds of Fault: Understanding the Purpose and Function of Causation in Tort Law*, 77 UNIV. MIAMI L. REV. 149 (2022).

[129] *Id.*

[130] John D. Rue, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2681 (2003) ("[I]n order to prove factual causation, the plaintiff must show that the act or omission in question resulted in the harm to the plaintiff. Classically, cause-in-fact was determined using the 'but for' test. Simply stated, 'but for' analysis requires the finder of fact to determine that the asserted harm would not have come to pass 'but for' the defendant's tortious act. An action is not a 'but for' cause of an injury if the injury would have come about regardless of the action.") (citations omitted).

[131] W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 748–49 (2005) ("A common thread among proximate cause cases, however, is that either explicitly or implicitly, most consider some notion of foreseeability.") (citations omitted).

between the behavior and the resulting harm was close enough to be reasonably foreseeable.[132]

Thus reasonable foreseeability is doctrinally required in negligence in order to ensure that all defendants who are held liable for negligence claims are deemed to be at fault for the harm for which they are forced to provide compensation in three ways. First, at fault for having engaged in unreasonably careless behavior. Second, at fault for that undesirable behavior having been an actual cause of that harm. And third, at fault (i.e., genuinely socially responsible) because that harm, under the circumstances, was a reasonably foreseeable consequence of the undesirable behavior.[133] The foreseeability requirement in negligence is all about limiting liability to only those defendants who are deemed socially appropriate subjects of such a formal consequence by imposing liability only on defendants both at fault for engaging in unreasonably careless behavior and also at fault in being a socially responsible cause of the plaintiff's harm.[134]

The strict products liability cause of action does not require behavioral fault on the part of the defendant.[135] That is its special feature

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[132] Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421, 423, 425, 429 (1999) ("'there is no such thing as negligence in the air, so there is no such thing as liability in the air.' [quoting Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd. (the Wagon Mound), [1961] AC 388 (P.C. 1961) (Eng.) (commonly known as "Wagon Mound No. 1")] . . . Whatever conceptual vehicle is utilized--proximate cause or duty--the remoteness limitation on liability has endured as a basic doctrine of tort law . . . Many courts have utilized the concept of 'proximate cause' or 'legal cause' as a conceptual explanation for the remoteness doctrine. These courts appreciate that there is an important and vital distinction between cause-in-fact ("but for" causation) and proximate cause. If one were merely to ask: 'Would the plaintiff have been injured if the defendant had not engaged in negligent or wrongful activity?,' thousands of claims could be produced. Tort law has clearly rejected 'cause-in-fact' as the sole limitation on whether a defendant will be deemed liable for another's harm.").

[133] Marin Roger Scordato, *Three Kinds of Fault: Understanding the Purpose and Function of Causation in Tort Law*, 77 UNIV. MIAMI L. REV. 149 (2022).

[134] *Id.*

[135] Bylsma v. R.C. Willey, 416 P.3d 595, 605 (Utah 2017) ("In the context of strict products liability, we impose on a seller of a defective product the duty to compensate the harms resulting from the use of that product. The liability is 'strict' because a seller of a defective product is liable even if 'the seller has exercised all possible care in the preparation and sale of his product.' (quoting *Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 156 (Utah 1979) (quoting* RESTATEMENT (SECOND) OF TORTS §402A(2)(a) (AM. LAW INST. 1965))). The seller's duty is not to sell a defective product—there is no analysis of due care or preventative measures. There is no room in a strict liability regime for the consideration of culpability—indeed, to do so would not only destroy what makes strict liability "strict," but also, in the context of products liability, undermine the very purposes of the doctrine.").

and the innovation that it introduced to tort law.[136] Thus, within strict products liability, the domain of possibly liable defendants is not identified, either initially or eventually, by the defendants' unreasonably careless behavior, as it is with negligence. Instead, the initial and most crucial factor that identifies potentially liable defendants in a strict products liability action is the defendant's relationship to the harm-producing product.[137] Typically, the defendant must be, in some manner, a commercial manufacturer or seller of the product.[138]

In negligence, the defendant's relationship to a tangible harm producing object is not meaningful so long as the defendant was unreasonably careless with that object and as a result actually and proximately caused the plaintiff harm. For example, imagine that person A, highly intoxicated, collides into his neighbor's, B's, car while driving his own. Both cars suffer significant damage, including damage to the axles of the cars that is not readily apparent. When questioned by B, A denies any involvement or responsibility for the damage to B's car.

Imagine two scenarios in this hypothetical. In the first, when B tries to drive his now damaged car to a body shop, he loses the capacity to steer the car once it reaches a speed of forty miles per hour. The car lurches uncontrollably off the road, striking a support pole for a traffic light and causing B significant physical harm. B's car lost the capacity for steering as a result of the damage caused to it by the collision with A's car.

In scenario two of this hypothetical, B asks to borrow A's car, which does not outwardly appear to be as damaged as B's car, to run a critical errand. Telling B nothing about the recent collision, or its severity, A lends the car to B. When B reaches a speed of forty miles per hour in A's car, B loses the capacity to steer it. The car lurches uncontrollably off the road, striking a support pole for a traffic light and causing B significant physical harm. A's car lost the capacity for steering as a result of the damage caused to it by the collision with B's car.

In both of these scenarios, A is very likely to be liable to B for negligence. This is because A acted with unreasonable carelessness and the resulting harm to B was both actually and proximately caused by that carelessness. It makes no difference that the injurious instrument in scenario one was a car legally owned by B, while in scenario two it was a car legally owned by A. Negligence is generally unconcerned with the

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[136] *Id.*

[137] RESTATEMENT (THIRD) OF TORTS §1 Comment c.1. (AM. LAW INST. 1998) ("American courts universally hold that only sellers who are in the business of selling products are strictly liable.").

[138] DAVID G. OWEN, PRODUCTS LIABILITY LAW 274–75 (2d ed. 2008) ("Strict products liability in tort applies to all parties in the commercial chain of a product's distribution, from manufacturers, through intermediate dealers, to retailers. . . . it does not apply to the occasional private seller, such as a private individual who sells his or her used car.").

defendant's legal or functional relationship with the harm-producing instrumentality. What counts, and counts critically, for negligence is that the defendant in some way acted with unreasonable carelessness in connection with that instrumentality and that carelessness actually and foreseeably resulted in harm to the plaintiff.

In stark contrast, A is highly unlikely to be liable to B in either scenario for strict products liability. This is the case because under either scenario A lacks the necessary relationship to the harm-producing instrumentality. A is not any of manufacturer, wholesaler, distributor, or commercial seller of either B's or his own damaged car, even though A is the cause of both cars being damaged. Strict products liability requires as a threshold and bedrock matter that the defendant facing such a claim is a regular commercial manufacturer or seller of the harm-producing instrumentality—the defective product.[139]

It does not matter for purposes of strict products liability that A caused the damage to both cars.[140] It does not matter that A caused that damage through unreasonably careless conduct.[141] It does not matter that both cars, once damaged, were defective and that the defects caused them to be unreasonably dangerous to B.[142] None of that matters because the initial, the primary, and the foundational requirement for the imposition of strict products liability in tort is that the defendant had a certain formal relationship to the defective product (the cars in these hypotheticals).[143] In the same way that only those persons who acted unreasonably carelessly are eligible for possible liability in negligence, only those persons who had a particular commercial relationship with the harm-producing product (typically, the manufacturer or other commercial seller of the product) are eligible for possible liability in strict products liability cases.[144]

This difference between negligence and strict products liability is critical to properly understanding the bare-metal equipment issue in each separate doctrinal context.

In negligence, it makes no difference whether the harm-producing instrumentality was the original bare-metal product sold by the defendant

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[139] RESTATEMENT (THIRD) OF TORTS §1 Comment c.2. (AM. LAW INST. 1998) ("The commercial seller must be in the business not only of selling products, but selling products of the type that harmed the plaintiff."); Counts v. MK-Ferguson Co., 680 F. Supp. 1343, 1347 (Mo. Ct. App. 1988) ("Section 402A liability does not extend to the occasional seller—one who sells a product other than in the ordinary course of business.").

[140] Because A is not a manufacturer or a seller of either his car or B' car, A is not liable to B under a strict products liability cause of action, regardless of whether A caused the damage to both cars.

[141] For the same reason.

[142] Again, for the same reason.

[143] *See, supra* notes 144–46.

[144] *Id.*

or a piece of equipment that consisted of the original bare-metal product plus the subsequent addition of parts or components sold and supplied by a third party. Either way, the defendant seller of the original equipment is potentially liable if he, all things considered, acted unreasonably, and he is not potentially liable if he did not. The fact that the defendant is the seller of bare-metal equipment, standing alone, is largely irrelevant to a negligence analysis, making the adoption by any court of a complete bare-metal defense, or some less complete limitation on the negligence liability of bare-metal defendants, a serious and unwarranted intrusion upon the normal operation of the negligence tort.

The situation is completely different in the context of strict products liability. In strict products liability, the relationship of the defendant to a defective and harm-producing product is critical, and arguably paramount. It could not be more relevant to the issue of liability pursuant to the strict products liability tort whether the defendant actually manufactured, distributed, or sold the defective product that caused injury to the plaintiff.

Imagine, as an illustration of this point, that A has purchased bare-metal equipment from B. Sometime after the purchase and the physical transfer of the equipment from B to A, A arranges for the installation of certain third-party-supplied parts to be integrated into the bare-metal equipment purchased from B. A hires an engineer, C, to perform this installation work. The combination of the original bare-metal equipment and the subsequently acquired and installed third-party components results in a piece of equipment that is unreasonably dangerous and thereby defective. C should reasonably be aware that the modified equipment is now unreasonably dangerous. Nevertheless, C is either unaware of the dangerous nature of the modified equipment or fails to inform A of the equipment's dangerous nature.

In these circumstances, C is very likely liable to A pursuant to a negligence claim for harm done by the unreasonably dangerous equipment. However, it is very unlikely that C will be liable to A for such harm pursuant to a strict products liability claim. Why? Because C, not being either manufacturer or seller of the equipment, lacks the necessary relationship to the harm-producing instrumentality to create possible exposure to liability pursuant to strict products liability.[145] Strict products liability is a tort that generates possible liability only to a select group of possible defendants—manufacturers and commercial sellers of the defective product.[146] If a party did not manufacture or commercially sell

[145] Harmon v. Nat'l Auto. Parts Ass'n, 720 F. Supp. 79, 80 (N.D. Miss. 1989) ("The statement of the rule [of strict products liability] makes it obvious that strict liability for injury caused by a defective product is not to be imposed on one who neither manufactures nor sells the products.").

[146] Zuzel v. Cardinal Health, Inc., 565 F. Supp. 3d 623, 635 (E.D. Pa. 2021) ("Under [Pennsylvania] products liability law, all suppliers of a defective product in the chain of distribution, whether retailers, partmakers, assemblers, owners, sellers,

the defective product, then they cannot be liable pursuant to a strict products liability claim for harm that the defective product causes.[147]

The fundamental claim of bare-metal defendants in bare-metal equipment cases is that the defective equipment that caused the plaintiff harm was not their product, and thus they cannot be held liable under a tort that requires that the defendant be the manufacturer or commercial seller of that equipment. Further, they argue that whatever part of that harm-producing equipment was once their product, it was, when it was their product, not defective.

In contrast, plaintiffs in bare-metal cases are arguing that the subsequent, post-sale altered product of the defendant should, in some circumstances, as a legal matter, be treated as the defendant's product for purposes of a strict products liability claim.

Understood in this way, bare-metal equipment cases pose to tort law an important question as to the appropriate definition of a defendant's product under strict products liability, a question that (unlike in negligence) goes to the heart of one of the foundational requirements of the tort. To what extent should post-sale and post-transfer alterations or additions to a product be deemed to be part of the original product sold by the defendant, especially when these changes transform a non-defective original product into a subsequently defective one, triggering at least a formal legal duty on the part of the defendant to warn the plaintiff of its defective nature?

It is beyond the ambition and the scope of this Article to directly address this question.[148] Its proper resolution, or perhaps varied

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lessors, or any other relevant category, are potentially liable to the ultimate user injured by the defect." Burch v. Sears, Roebuck & Co., 467 A.2d 615, 621 (Pa. Super. Ct. 1983). "[This] reflects the social policy that a seller or manufacturer is best able to shoulder the costs and to administer the risks involved when a product is released into the stream of commerce." Davis v. Berwind Corp., 690 A.2d 186, 189–90 (Pa. Sup. Ct. 1997).

[147] Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d. 135, 140–42 (4th Cir. 2019) ("Maryland law imposes [strict products] liability *on the seller* . . . And the ordinary meaning of 'seller' is 'one that offers [property] for sale,' with 'sale' defined as 'the transfer of ownership of and the title to property from one person to another for a price.' quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1129, 1097 (11th ed. 2007) . . . While Amazon does in fact sell products that it owns on its website and thus would be considered a seller of *those* products, in this case it facilitated the sale for Dream Light under its fulfillment program. We thus conclude that Dream Light was the seller . . . and there is no evidence to indicate that title passed other than from Dream Light to Cao. Although Amazon's services were extensive in facilitating the sale, they are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered the headlamp to Cao. Neither Amazon nor UPS Ground was a seller incurring liability for the defective product.").

[148] Unlike analyzing the logical and conceptual coherence of a court imposing additional doctrinal burdens on a plaintiff bringing an action against a bare-metal equipment manufacturer for either negligence or strict products liability, the issue of

resolutions by different jurisdictions, should depend upon a close examination of the underlying rationales for imposing liability without fault on commercial sellers of products. Are the reasons why strict products liability is thought to be appropriately applied to commercial sellers of products sufficiently present in bare-metal equipment cases to legally alter the intuitive notion that the product should be understood to be the tangible object transferred from defendant to buyer at the time of the sale?

Consideration should also be given to previous court and academic examinations of possible defendants in strict products liability cases other than defendants who clearly and obviously designed, manufactured, and directly sold the defective product, persons such as: (1) retailers, wholesalers and distributors with respect to product defects they neither caused nor could have known about;[149] (2) suppliers of raw materials and component parts;[150] (3) parent corporations of manufacturing

what should legally constitute the definition of product in a claim of strict products liability against a bare-metal equipment manufacturer possesses at least three distinguishing characteristics: (1) the question may well not reduce to a single doctrinal resolution that is clearly and logically supported by all products liability policy but instead may yield multiple possible resolutions, each of which might lay claim to meaningfully advancing either the same or different underlying policy goals; (2) in such a circumstance, the choice between these competing doctrinal definitions may well depend upon a value-laden preference for the advancement of some product liability policies over others, a choice that is not a productive subject of logical or academic analysis; and (3) it may well be the case that a single doctrinal resolution of the issue does not best respond to the full range of foreseeable factual bare-metal equipment situations and that a range of different doctrinal definitions of product most successfully responds to the anticipated variety of factual circumstances, meaning that there is no one optimal approach or doctrinal definition that an academic article could usefully offer.

[149] DAVID G. OWEN, PRODUCTS LIABILITY LAW 1009–11 (2d ed. 2008).

[150] *See generally*, David A. Fischer, *Product Liability: A Commentary on the Liability of Suppliers of Component Parts and Raw Materials*, 53 S.C. L. REV. 1137 (2002); M. Stuart Madden, *Component Parts and Raw Materials Sellers: From the Titanic to the New Restatement*, 26 N. Ky. L. Rev. 535 (1999).

subsidiaries;[151] (4) successor corporations;[152] (5) trademark licensors;[153] and (6) apparent manufacturers.[154] Each of these types of possible strict products liability defendants pose to the courts often subtle and complicated problems of analysis, and each have generated their own unique jurisprudential histories.[155] There is little reason to think that the issue of the proper treatment of bare-metal equipment manufacturers should be much different or easier to analyze and resolve.

And yet very little of the appropriate analytical work is evident in the current case law. Certainly, neither the majority nor dissent in *DeVries* confront the relationship between the bare-metal defendant and the plaintiff through the lens of strict products liability.

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[151] *See, e.g.*, *In re* Silicone Gel Breast Implants Prod. Liab. Litig., 887 F. Supp. 1447, 1453 (N.D. Ala. 1995) ("Because the evidence available at a trial could support—if not, under some state laws, perhaps mandate—a finding that the corporate veil should be pierced, Bristol [the parent of the manufacturing entity] is not entitled through summary judgment to dismissal of the claims against it."); Barry Meier, *Dow Chemical Held Liable in Implant Case*, N.Y. TIMES at A14 (Oct. 30, 1995), https://www.nytimes.com/1995/10/30/us/dow-chemical-is-held-liable-in-implant-case.html [https://perma.cc/57ET-JRPD]; Jay Mathews, *Jury Targets Dow Chemical For Breast Implant Damages*, WASH. POST at D1 (Oct. 31, 1995), https://www.washingtonpost.com/archive/business/1995/10/31/jury-targets-dow-chemical-for-breast-implant-damages/1d2a5e8a-ecfd-478d-9a54-00a3cab37adc/ [https://perma.cc/XP9H-MT62]; *N.Y. Court Tosses Several Claims Against Tobacco Parent Cos. – Brantley v. Philip Morris, Inc.*, 24 No. 11 ANDREWS ASBESTOS LITIG. REP. 11 (2002).

[152] *See, e.g.*, Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977) (holding that a party who acquires a manufacturing business under certain circumstances assumes exposure for strict products liability in tort based on defects in units of the same product line manufactured by the acquired entity); Tift v. Forage King Indus., Inc., 322 N.W.2d 14, 18 (Wis. 1982) (holding that "The present organization, although it has undergone a structural metamorphosis, remains in substance the identical organization manufacturing the same product. It is liable for the defective product manufactured by the original business organization.").

[153] *See generally* Jennifer Rudis Deschamp, *Has the Law of Products Liability Spoiled the True Purpose of Trademark Licensing? Analyzing the Responsibility of a Trademark Licensor for Defective Products Bearing Its Mark*, 25 ST. LOUIS U. PUB. L. REV. 247 (2006); Arthur Schwartz, *The Foreign Trademark Owner Living with American Products Liability Law*, 12 N.C. J. INT'L L. & COM. REG. 375 (1987).

[154] David G. Owen & Mary J. Davis, *Parent and Apparent Manufacturers; Franchisers; Trademark Licensors*, 2 OWEN & DAVIS ON PROD. LIAB. § 16:13, 15–16 (4th ed. May 2022 Update); Kayla R. Bryant, *Products Liability (Devices) – E.D.N.C.: Hyperbaric Chamber Case Deflates, Apparent Manufacturer Not Liable After All*, WOLTERS KLUWER HEALTH LAW DAILY, 20152015 WL 7289207 (October 6, 2015).

[155] *See, supra* notes 156–61.

4. The Bare-Metal Defense is at Least a Conceptually Coherent Response to the Bare-Metal Equipment Issue in the Context of Strict Products Liability Claims

Unlike in the negligence context, judicial adoption of a bare-metal defense is one coherent approach to the issue of bare-metal equipment in the strict products liability context. It is the doctrinal expression of an underlying judgment that the legal definition of the defendant's product—the necessary status that subjects the defendant to any possible liability for strict products liability—does not include the post-sale addition of third-party parts by persons other than the defendant.

While there may be some questioning of the underlying judgment and the degree to which it optimally advances the foundational policy goals of products liability law, the bare-metal defense response is at least conceptually coherent in the context of strict products liability law. It is also possible that different underlying judgments in this realm, judgments that the definition of a product for strict products liability purposes should include the addition of some post-sale third-party parts and components under some circumstances, would also be similarly conceptually coherent, even if substantively different. But there is also the possibility that they would not be.

Consider again the holding in *DeVries*:

> 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 that danger.[156]

The first of the three requirements set forth by the Supreme Court for an imposition of strict products liability on a bare-metal defendant—that its product requires incorporation of a part—mandates that the product itself possess a certain attribute or condition and as such it is consistent with the doctrinal design of the strict products liability tort. It is conceptually consistent.

The second and third requirements, however, do not impose conditions on the product itself but instead require that there be certain characteristics and attributes true of the defendant. This violates the basic doctrinal structure of the strict products liability cause of action, which requires only that the defendant have a certain relationship with the defective product—that of manufacturer or commercial seller.

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[156] Air and Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 991 (2019).

This difference is not a mere matter of facial doctrinal surface. It is because the strict products liability tort only requires of a possibly liable defendant that it be a manufacturer or a commercial seller of the defective product, and not that it have acted unreasonably carelessly in doing so, that it carries the potential for imposing upon the defendant true strict liability.

This point might be illustrated by noting that the second and the third requirements in *DeVries* for holding a base-metal defendant liable can fairly be restated in this way: bare-metal defendants may be held liable for harm caused by a subsequent version of the initial bare-metal equipment created by the addition by other than the defendant of additional third-party provided parts or components so long as the bare-metal defendant either knew or should have known (1) that the combination of the bare metal equipment and the subsequently added part(s) was likely to be dangerous for its intended uses, and (2) that the integrated product's users will fail to realize that danger.

Restated in this way, the *DeVries* holding is revealed plainly as the embrace and articulation of a required fault standard. Gone with the imposition of these new requirements is the basic notion that the only required action of a defendant in a strict products liability claim is having placed into the stream of commerce a defective product, with the remainder of the strict products liability analysis focusing on the features of, and consequences caused by, the product itself. Gone also is the power of the strict products liability tort to actually impose true strict liability in bare-metal equipment cases. Instead, the defendant in bare-metal equipment cases must be shown to have, in essence, been at fault in failing to provide the plaintiff with a warning when the defendant knew, or should have known, that the subsequently altered bare-metal equipment would be unreasonably dangerous and that the plaintiff would likely not be aware of the danger.

While certainly more favorable to bare-metal plaintiffs than adoption of the bare-metal defense, the approach announced by *DeVries*, and by other courts that have adopted something less protective of the defendant than the full bare-metal defense,[157] requires a plaintiff bringing a strict products liability claim against a bare-metal defendant to essentially and directly establish that the defendant's sale of the equipment without an accompanying warning was unreasonably careless. While it has been more than once observed that some aspects of current strict products liability doctrine possess in actual practice attributes in common with more traditional fault and negligence standards,[158] this represents something

[157] *See, e.g.*, Coffman v. Armstrong Int'l, Inc., No. E201700062COAR3CV, 2019 WL 3287067, at *19 (Tenn. Ct. App. 2019).

[158] *See, e.g.*, William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 Tex. L. Rev. 777, 778–79 (1983); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743,

quite different: it is the direct and wholesale grafting of an unmistakable fault standard onto the basic requirements of a strict products liability claim. Nothing in the published cases provides anything like an appropriate justification for such a compromise of the basic conception and design of the strict products liability tort, nor any rationale for why such a dramatic departure from strict products liability doctrine is justified by the particular circumstances of bare-metal equipment claims.

Moreover, remember that the issue posed to strict products liability law by bare-metal equipment cases is the proper legal definition of a product for purposes of the claim. In what way is it appropriate, or even conceptually coherent, to say that a product for these purposes is legally defined one way if "the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses" and is legally defined another way if the manufacturer does not?[159] Under *DeVries*, the question of whether the proper object of analysis in a strict products liability claim—the question of what is the product at issue in the case—is decided in significant part by what the manufacturer defendant knew, did not know, or should have known about the dangerous qualities of an altered version of the initial product hypothetically to be created by others through the addition of new parts or components supplied by third parties other than the defendant.

The same holds true for *DeVries's* third requirement. There, the legal definition of the product hinges on a bare-metal manufacturer's perceptions of consumer knowledge of the danger of a modified bare-metal product.

In both instances, what the defendant knew, should have known, did not know, or had no reason to believe becomes the determining factor in legally identifying what is and is not a product for the purposes of a strict products liability claim. This is the result—the defective product if you will—of a deep and profound conflation of the nature and essence of a negligence claim, and its fault-based approach to tort liability, with the intended nature and essence of strict products liability.

IV. CONCLUSION

The issue of how to regulate potential tort liability for a manufacturer or commercial seller of an otherwise reasonably safe product that is subsequently made unreasonably unsafe because of the post-sale addition

744, 749 (1996); Richard C. Ausness, *Sailing Under False Colors: The Continuing Presence of Negligence Principles in "Strict" Products Liability Law*, 43 U. DAYTON L. REV. 265 (2018); Abed Awad, *The Concept of Defect in American and English Products Liability Discourse: Despite Strict Liability Linguistics, Negligence is Back with a Vengeance!*, 10 PACE INT'L L. REV. 275, 276, 359 (1998).

[159] Air and Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 991 (2019).

by the purchaser of defective third-party produced components is more difficult and more subtle than it may on the surface appear. Enormous variation currently exists among different state courts and among state courts and the federal courts as to how to handle the issue.[160]

The overwhelming majority of courts that have confronted this issue—state and federal courts alike, including the U.S. Supreme Court—have framed it, analyzed it, and resolved it in isolation from the specific doctrinal context in tort law from which it arises.[161] Specifically, courts have consistently failed to sufficiently appreciate that the issue may arise in the context of either a negligence action brought against the original, bare-metal equipment manufacturer, or in the context of a claim for strict products liability. This doctrinal distinction makes an enormous difference in the proper analysis of the issue.

In the context of a negligence claim, the issue is essentially of no consequence, and therefore moot. In a negligence claim, the critical focus of inquiry is the quality of the defendant's behavior and whether that behavior was an actual and proximate cause of the plaintiff's harm.[162] It makes little or no difference whether a defendant who engaged in unreasonably careless behavior and as a result actually and proximately caused the plaintiff harm did so by means of an instrumentality that was a commercial product produced or sold by the defendant, or by means of some altogether different kind of a harm-producing instrumentality.[163] Similarly, a defendant in a negligence action may be found liable whether or not the harm-producing instrumentality was in any way defective.[164] It is not the nature of the harm-producing instrumentality, or the defendant's formal relationship to it, that matters in a negligence case. It is the quality of the defendant's behavior, all things considered, and whether that behavior, if unreasonably careless, actually and proximately caused the plaintiff harm.[165]

Therefore, decisions by courts to permit liability to be imposed on a bare-metal equipment defendant in a negligence action only if the plaintiff can establish foreseeability by the defendant are doctrinally redundant and without practical consequence. Foreseeability must already be established in a negligence action for satisfaction of the proximate cause, and sometimes also for the duty, elements of the prima facie case.[166] Adopting a rule that a plaintiff can only potentially recover in negligence against a bare-metal equipment manufacturer if the plaintiff establishes that the

[160] *See supra* text accompanying notes 2, 48–54, 63–83.

[161] *See supra* text accompanying notes 97–104.

[162] *See supra* Section III.B.1.

[163] *See supra* text accompanying notes 144–45.

[164] *See supra* notes 150–53.

[165] *See supra* Section III.B.2.

[166] *See supra* text accompanying notes 115–18, 137–40.

subsequent existence of a composite piece of equipment, and its defective nature, was reasonably foreseeable to the defendant is legally meaningless, and without doctrinal consequence in any negligence action.

In contrast, the embrace of a "bare-metal defense" in negligence cases carries great doctrinal and practical significance, but that consequence is without any supporting justification in negligence theory or policy. So long as the plaintiff is able factually to satisfy the duty, breach, causation, and harm elements of the prima facie case for negligence, and there are no traditional affirmative defenses available, the defendant should be held liable. The fact that a defendant who acted with unreasonable carelessness and as a result legally caused harm to the plaintiff was also a bare-metal equipment manufacturer should make no difference in terms of ultimate liability. Allowing a bare-metal defense to negligence makes sense only if under no factual circumstances could a bare-metal equipment defendant reasonably foresee that third-party parts would be added to the bare-metal equipment and cause the combination to be unreasonably dangerous and therefore defective.

The problem of bare-metal equipment manufacturers as defendants in strict products liability cases is an altogether different one. Unlike negligence, the focus of analysis in strict products liability cases is not the defendant but the product itself.[167] The plaintiff need not establish that the defendant acted with unreasonable carelessness but must absolutely establish that the defendant's product was unreasonably dangerous and therefore defective and was the legal cause of harm to the plaintiff.[168]

The problem posed in strict products liability cases by bare-metal equipment is the need, in difficult circumstances, to legally define what is and is not the product that will be the focus of the legal analysis. Is the product for legal purposes the bare-metal equipment in the condition it was sold by the defendant to the buyer or is it the composite version of the equipment as modified by third-party components later added to the original bare-metal equipment by the buyer?

Understood in this way, recognition by a court of a bare-metal defense is conceptually coherent as one way of articulating a judgment that the appropriate legal definition of product in such cases is the unmodified bare-metal equipment. Whether or not viewed as the preferred resolution of the underlying issue, the bare-metal defense is at least a doctrinally coherent resolution.

In contrast, however, courts that reject adoption of a bare-metal defense in favor of instead requiring the plaintiff to establish foreseeability by the defendant, or foreseeability plus additional required factors, as the U.S. Supreme Court has done,[169] are effectively shifting the analytical

[167] *See supra* text accompanying notes 141–44.

[168] *See supra* note 126.

[169] Air and Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 991 (2019).

focus away from the product itself and on to the quality of the defendant's behavior. Such approaches are in effect searches for behavioral fault on the part of the bare-metal equipment defendant.

A large part of the general tort law purpose of shifting the analytical focus away from the defendant, as is the case in negligence, and on to the product, as is the case in strict products liability, is to allow for the possibility of genuine strict liability to be imposed in those circumstances where the defendant's product was unreasonably dangerous and defective, and as a result caused harm to the plaintiff, but the defendant itself cannot be shown to have acted with unreasonable carelessness.[170] The approach adopted by the U.S. Supreme Court in *DeVries*,[171] and by other courts,[172] effectively forecloses the possibility of genuine strict liability in all cases of bare-metal equipment defendants, and does so without offering any supporting justification.

[170] *See supra* text accompanying notes 141–44, 146–50.

[171] *DeVries*, 139 S. Ct. at 991 (2019).

[172] *See, e.g.*, Coffman v. Armstrong Int'l, Inc., No. E201700062COAR3CV, 2019 WL 3287067, at *13–15, *17 (Tenn. Ct. App. 2019).