

Asbestos

Raising the Bar in Asbestos Litigation

PAGE 3

The Application Of The Strict Products Liability Test Should Be Limited To Common, Commercially Distributed, Products

A Commentary by Edward R. Hugo and Bina Ghanaat of Hugo Parker LLP

PAGE 8

The Dust Settles on Causation: Tippin Decision is a Big Win for Talc Defendants

A Commentary by Elizabeth Sorenson Brotten and Michael E. Tuttle of Foley Mansfield

PAGE 11

Fla. Jury Awards \$18 Million, Finds Lone Remaining Defendant 15 Percent Liable

PAGE 12

Bankruptcy Court Rejects Red River Talc's Prepackaged Reorganization Plan

11

Wash. Court Awards More than \$16 Million at Conclusion of Trial Against ACL

13

J&J Says it Will Return to Tort System, Will Not Appeal Dismissal Order

15

Plaintiffs Back Ask for Prejudgment in Case That Ended in \$22.5 Million Verdict

17

N.J. Court In Part Denies Summary Judgment in U.S. Naval Mesothelioma Case

20

Court Awards Judgment to Insurance Companies in Coverage Dispute

22

Court Grants L'Oreal's Motion To Dismiss Mesothelioma Talcum Powder Case

COLUMNS

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PERSPECTIVES

The Application Of The Strict Products Liability Test Should Be Limited To Common, Commercially Distributed, Products 3
by Edward R. Hugo and Bina Ghanaat of Hugo Parker LLP

The Dust Settles on Causation: Tippin Decision is a Big Win for Talc Defendants 8
by Elizabeth Sorenson Brodden and Michael E. Tuttle of Foley Mansfield

TABLE OF CASES

A Regional Listing of All the Cases Covered in This Issue 10

COURTROOM NEWS

Fla. Jury Awards \$18 Million, Finds Lone Remaining Defendant 15 Percent Liable 11
Wash. Court Awards More than \$16 Million at Conclusion of Trial Against ACL 11
Bankruptcy Court Rejects Red River Talc's Prepackaged Reorganization Plan 12
J&J Says it Will Return to Tort System, Will Not Appeal Dismissal Order 13
Court Denies Motions to Reconsider Order, Says There Are 'No Errors of Law' 14
MDL Court Schedules Status Conference, Outlines Motions it Will Address 14
Plaintiffs Back Ask for Prejudgment in Case That Ended in \$22.5 Million Verdict 15
15 Attorney Generals Urge Trusts Not To Proceed with Document Destruction 16
Veteran Claim Court Remands Asbestos-Related Service Connection Claim 16
N.J. Court In Part Denies Summary Judgment in U.S. Naval Mesothelioma Case 17
Court Sustains Objections Made by Insurance Company in Coverage Dispute 18
Court Dismisses Action Filed by Art Supplier, Says Exclusion Bar Claims 19
Court Awards Summary Judgment to Insurance Companies in Coverage Dispute 20
Ill. Court Grants Motion to Dismiss RICO Case Filed by J-M Manufacturing 20
Del. Court Appoints Receiver for Bankrupt Seller of Valves 22
Court Grants L'Oreal's Motion to Dismiss Mesothelioma Talcum Powder Case 22

VERDICT REPORT

A Listing of the Last Year of Asbestos Verdicts 24



The Application Of The Strict Products Liability Test Should Be Limited To Common, Commercially Distributed, Products

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Author bios on page 7

Pursuant to the Third Restatement of Torts, “a ‘product’ subject to strict liability” is “‘tangible personal properly distributed commercially for use or consumption.’” *McIndoe v Huntington Ingalls, Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016)¹ quoting Restatement (Third) of Torts: Prods. Liab. § 19(a) (Am. Law Inst. 1998)) (emphasis added by *McIndoe*). The Restatement continues: “[O]nly when the complained-of injury was allegedly caused by a defect in something within this . . . definition of ‘product’ should the defendant manufacturer or seller be strictly liable for the harm caused.” *Id.* at 1173 (quoting Restatement (Third), § 19 reporter’s note, cmt. a). Conversely, “[i]njuries caused by other items are actionable only ‘under negligence, misrepresentation, or some other liability theory.’” *McIndoe*, 817 F.3d at 1173 (quoting Restatement (Third), § 19 reporter’s note, cmt. a). Pursuant to this definition, the *McIndoe* Court held that warships are not products and are excluded “from the realm of strict products liability” because they “were never ‘distributed commercially.’” *McIndoe*, 817 F.3d at 1173.

The rationale of *McIndoe* applies equally to various pieces of equipment aboard the ship. For example, Navy warship boilers are not distributed commercially, and public policy militates against imposing strict liability against the builder of a custom-ordered Navy warship equipment assembled to precise military specifications. Navy warship boilers do not enter

the general stream of commerce and are not mass-produced. Instead, they are built one at a time in accordance with precise, mandatory, Navy specifications. Stated differently, the role of the builder of a Navy warship boiler is more like a provider of a service (the assembly of an assortment of component parts chosen by the purchaser) than the manufacturer of a product. See 63 Am.Jur.2d Prod. Liab. § 617 (“The concept of strict tort liability does not apply to defective services, as opposed to defective products”); *cf.* *McKee v. Miles Lab., Inc.*, 866 F.2d 219, 221 (6th Cir. 1989) (Kentucky law); *Dudley v. Business Exp., Inc.*, 882 F. Supp. 199, 210 (D.H.H. 1994) (New Hampshire law); *Coleman v. Charlesworth*, 157 Ill.2d 257, 262, 191 Ill.Dec. 480, 623 N.E.2d 1366 (Ill. 1993) (Illinois law); *Watts v. Rubber Tree, Inc.*, 121 Or. App. 21, 23, 853 P.2d 1365 (Or.App.1993) (Oregon law). Accordingly, a Navy warship boiler is not a “product” within the meaning of strict product liability law.

Given the custom-built nature of Navy warship boilers, imposing strict liability against the manufacturer of such equipment would run afoul of public policy considerations. Imposing strict liability on a Government Contactor would not advance the goal of shifting liability to the “party most able to prevent harm” because the purchaser, *i.e.*, the Navy, was the one who (1) controlled the design of its equipment pursuant to precise military specifications, including by requiring use of asbestos-containing component

parts; and (2) controlled the working environment of the sailors that worked with or around the equipment. See *McIndoe*, 817 F.3d at 1174. The Government Contractor does not control the working environment of the sailors that work with or around the equipment. Rather, the United States Navy exercises complete control over the sailor’s working environment and is the entity most able to prevent harm caused by the products that it specifies.

Under California State Law, the Consumer Expectation Test is Inapplicable Highly Complicated Equipment Such as a Navy Warship Boiler

CACI No. 1203 defines Strict Liability under the Consumer Expectation Test as follows:

[Name of plaintiff] claims the [product]’s design was defective because the [product] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/distributed/sold] the [product];
2. That the [product] did not perform as safely as an ordinary consumer would have expected

it to perform when used or misused in an intended or reasonably foreseeable way;

3. That [name of plaintiff] was harmed; and

4. That the [product]'s failure to perform safely was a substantial factor in causing [name of plaintiff]'s harm.

First, the California state law consumer expectation test does not apply to a Navy warship boiler because such equipment is highly complicated and not within the understanding of ordinary lay consumers. For instance, in *Jones v. John Crane, Inc.*, 132 Cal.App.4th 990 (2005), the Court considered the applicability of California's consumer expectation test to a common gasket. The Appellate Court appropriately started its analysis by reviewing the test outlined by the Supreme Court:

In *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [34 Cal.Rptr.2d 607, 882 P.2d 298], the Supreme Court held that the consumer expectations test is properly applied in "cases in which the everyday experience of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." In contrast, the test should not be used "when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit," since "in many instances it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not." (*Id.* at pp. 562-563.) "**The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the prod-**

uct's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Id.* at pp. 568-569.)

Jones, 132 Cal.App.4th at 1002-03.

In applying the *Soule* test, the *Jones* Court found that "[a]ccording to defendant's own explanation, there is nothing complicated or obscure about the design and operation of the products, nor are there any esoteric circumstances surrounding the manner in which Jones was exposed to the asbestos fibers." *Jones*, 132 Cal.App.4th at 1003-04. Accordingly, the consumer expectation test was found applicable to a common gasket.

Similarly, in *Saller v. Crown Cork & Seal Company*, 187 Cal.App.4th 1220 (2010), the Appellate Court considered the applicability of California's consumer expectation test to common insulation, "an apparently innocuous product" and concluded:

Here, we agree that the consumer expectations test applied to the use of asbestos at Standard Oil and that **Saller's** testimony concerning his expectations about its safety in its ordinary use at Standard Oil were sufficient to require a jury instruction on the issue. The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers.

Id. at 1236.

Because a Navy warship boiler is a complicated piece of machinery designed to the Navy's own specifications, the California consumer expectation test is inapplicable. Even Plaintiff's Naval expert will concede that "[t]he [whole steam] system itself is highly complicated, and as a result of years and years of engineering by the Navy."² Furthermore, unlike the "apparently innocuous product" in *Saller*, 187 Cal.App.4th at 1236, a

Navy warship boiler is obviously dangerous.³ (*See* 3 ER-509-511, Doc. 624, p.713:22-715:6.) For instance, the temperature inside a Navy boiler would be about 2,500 or 2,700 degrees Fahrenheit, and if there were a steam leak on the boiler it would not be visible and if an unsuspecting sailor stuck their hand out to test a leak, their fingers would be cut off.⁴

Not only is a Navy warship boiler a highly complicated and dangerous piece of equipment, but it is also not subject to use or any expectations by an "ordinary consumer." For over 40 years, the California Supreme Court has explicitly limited the applicability of the consumer expectation test to cases where *ordinary knowledge* as to the product's characteristics "permit an inference that the product did not perform as safely as it should." *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 566 (1994); *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978). The *Soule* case focused on an ordinary consumer's expectations regarding a common commercially produced automobile, which is significantly less complex than a warship boiler built to precise Navy specifications.

An ordinary consumer of automobiles cannot reasonably expect that a car's frame, suspension, or interior will be designed to remain intact in any and all accidents. Nor would ordinary experience and understanding inform such a consumer how safely an automobile's design should perform under the esoteric circumstances of the collision at issue here. Indeed, both parties assumed that quite complicated design considerations were at issue, and that expert testimony was necessary to illuminate these matters. Therefore, injection of ordinary consumer expectations into the design defect equation was improper.

Id. at 570.

PERSPECTIVES

Subsequent cases have found the consumer expectation test inapplicable to machinery such as cotton pickers (*Bates v. John Deere Co.*, 148 Cal.App.3d 40 (1983)) and front-end loaders (*Lunghi v. Clark Equipment Co.*, 153 Cal.App.3d 485 (1984)), which actually have commercial consumers and are far less complicated than a Navy warship boiler and do not call “for a careful assessment of feasibility, practicality, risk and benefit.” *Soule*, 8 Cal.4th at 562-63.

Not only is a Navy warship boiler a complicated and dangerous piece of machinery that is not commercially distributed, but there is also no “ordinary lay consumer” of such equipment. These boilers are custom-built to precise Navy specifications and are not available for purchase by ordinary consumers. Ordinary consumers do not use, and therefore have no expectations regarding, Navy warship boilers.

Navy sailor’s expectations are ultimately irrelevant because they are required to follow the Navy’s orders even at their own peril. They understand that they could die during their Navy service⁵ and that they had to follow orders, without question.⁶ Accordingly, they would have gone aboard a ship that said “asbestos,” “warning may cause cancer,” if they were ordered to do so, rendering any warning moot.⁷

The 9th Circuit recently agreed with this logic. In an unpublished Memorandum Decision dated March 11, 2025 the 9th Circuit upheld the trial court’s decision to exclude plaintiff’s proposed Strict Liability instruction regarding navy warship boilers reasoning as follows:

“In *McIndoe*, we considered whether the builders of a United States naval warship could “be held strictly liable for defects in materials originally installed on the ships they built.” *Id.* at 1173. We held that, under the Restatement (Third) of Torts: Products Liability § 19

(1998), a warship is not a “product” that is “distributed commercially for use or consumption.” *See McIndoe*, 817 F.3d at 1173. Naval warships are custom built to specifications provided by the United States and sold exclusively to the United States. *See id.* at 1174. They are not “distributed commercially.” *Id.* at 1173.

Here, the evidence shows the Navy underwent its customary request for proposal process when procuring Foster Wheeler’s boilers for use in naval warships. That process involved the Navy providing detailed specifications for each boiler, “including requirements such as chemical composition, dimensions, required testing and performance demonstrations, required labeling, packaging, and shipping requirements, and similar content.” Foster Wheeler followed the Navy’s specifications when building the boilers. Naval specifications “required the use of asbestos for the gaskets, the packing, and the insulating block[s].”

Because Appellant offered no evidence to the contrary, there was no triable factual issue over whether the boilers “enter[ed] the general stream of commerce” like “commercially distributed or mass-produced” property. *See id.* at 1173, 1174 n.3. Instead, the only evidence was that the boilers were custom-built property, which, like the naval warship in *McIndoe*, are excluded from the realm of strict products liability. *See id.* at 1173. Therefore, the district court did not err in rejecting Appellant’s strict liability jury instruction.”

Rosa Dennis, individually and as successor-in-interest to Patrick W. Dennis (Deceased) v. Foster Wheeler Energy Corporation; Foster Wheeler LLC, et al., No. 23-4283 (9th Cir. Mar. 11, 2025).

Public policy and common sense dictates that the application of Strict Products Liability should be limited to common, commercially distributed, products.

Endnotes

¹ Edward Hugo argued the *McIndoe* case before the United States Court of Appeals, 9th Circuit, on August 31, 2015.

² Q (Plaintiff’s counsel) put up a diagram that showed the whole steam system. Do you remember that earlier?

A Yes.

Q Would you describe that as a simple system?

A No, I would not. I mean, you mean the diagram or the system itself?

Q The whole system itself.

A The system itself is highly complicated, and as a result of years and years of engineering by the Navy.

Q How hot is the inside temperature for 600-pound Foster Wheeler boiler?

A In the furnace, it would range about 2,500, 2,700 degrees Fahrenheit.

Q That is pretty hot, right?

A Yes.

Q So if there is a steam leak on a boiler, it’s not something you can see, right?

A That’s correct. If it’s super-heated steam, in particular, and super-heated steam is steam once it’s turned to steam they keep heating it so it gets more energy into it. That is what I mean by super-heated steam. But in the case of super-heated steam, you are not going to see it, you may hear it, but you not going to see it.

Q If you are walking with your hand out to test a leak, it’s going to cut your fingers right off the hand?

A They teach sailors to use brooms to -- if they hear a steam leak to use a broom to test it and not their hands. You are correct, it would cut off the hand if they were foolish enough to put their hand into it.

Q They teach them that at school, right?

A They teach them that at school and petty officers also teach the firemen and fire apprentices that report to them the very same thing.

Q The boilers does not have a warning sign, that says, watch out for steam leaks, does it?

A Not to my knowledge.

Q The boiler is really loud.

A I can be, yes.

Q It's basically, although it is a big thing, it's in a relatively confined compartment, correct?

A I think that is a good characterization.

Q The boiler does not have a warning about ear protection, does it?

A It does not.

⁴ *Id.*

⁵ Deposition Testimony of (Plaintiff) from March 27, 2020 (volume 3)

283:24 Q. And you also understood that you could die in

283:25 that process, that the hatch could close behind you if

284:01 that fire was uncontrollable and that you could die?

284:02 A. Yes.

⁶ Deposition Testimony of (Plaintiff) from March 26, 2020 (volume 2)

137:07 Q. Is it correct that one of the things you learned

137:08 in recruit training is that orders are not optional, and

137:09 that you were obligated to follow orders from a senior

137:10 enlisted personnel or officer?

137:11 A. Yes.

137:12 Q. Were you allowed to question or refuse orders?

137:13 A. No.

206:11 Is it fair to say, sir, while you were in the

206:12 Navy, you had to follow Navy rules and regulations

206:13 24 hours a day, seven days a week?

206:14 A. Pretty much, yeah.

206:15 Q. I mean, even on leave, you had to follow some of

206:16 the regulations or you'd get in trouble.

206:17 Right?

206:18 A. That's correct.

⁷ Deposition Testimony of (Plaintiff) from March 27, 2020 (volume 3)

287:23 Q. And if the ship had "asbestos" on the side of it,

287:24 "warning may cause cancer," if your chief petty officer

287:25 ordered you to go aboard and go down and do repair and

288:01 maintenance, that was something you were obligated to do.

288:02 Fair enough?

288:03 A. Yes.

Deposition Testimony of (Plaintiff) from March 26, 2020 (volume 2)

163:14 Q. Well, when you did work in the Navy, did you

163:15 follow any of the procedures?

163:16 A. Yes.

163:17 Q. Okay.

163:18 And the Navy was responsible for teaching you the

163:19 procedures they wanted followed?

163:20 A. Yes.

206:11 Is it fair to say, sir, while you were in the

206:12 Navy, you had to follow Navy rules and regulations

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288:03 A. Yes.



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