

Court of Appeals

STATE OF NEW YORK



IN RE: NEW YORK CITY ASBESTOS LITIGATION

DORIS KAY DUMMITT, Individually and as Executrix
of the Estate of RONALD DUMMITT, deceased,

Plaintiff-Respondent,

—against—

A.W. CHESTERTON, *et al.*,

Defendants,

CRANE Co.,

Defendant-Appellant.

**BRIEF FOR *AMICI CURIAE* THE RETIRED ENLISTED
ASSOCIATION AND THE AMERICAN MERCHANT MARINE
VETERANS IN SUPPORT OF PLAINTIFF-RESPONDENT**

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DISCLOSURE STATEMENT

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ISSUE PRESENTED

Whether a defendant that intentionally manufactures its product to be used post-sale with fungible components – which in some circumstances were supplied directly by the defendant and in other circumstances were supplied by third-parties – owes a duty to warn an end user who is injured by using that product synergistically with those fungible components in the particular circumstances where the components happened to be supplied by third-parties.

AMICI CURIAE'S INTEREST

The Retired Enlisted Association (“TREA”) is a 501(c)(19) national organization comprised of retired enlisted military men and women from all branches of the United States military, including Reserves and the National Guard. TREA has 41 active chapters in the United States and Puerto Rico, including two chapters in New York. TREA supports and advocates for the rights, benefits, and interests of enlisted military veterans. Many of TREA’s members worked on asbestos-containing equipment in various branches of the military, as well as other equipment that utilized fungible or aftermarket components. As a result, TREA has a significant interest in ensuring that New York law remains equitable by permitting military veterans to seek redress for injuries caused by their ordinary

use of manufacturers' equipment in military environments, especially where the injuries are latent in nature.

The *American Merchant Marine Veterans* ("AMMV") is a non-profit organization chartered and headquartered in the state of Florida with members in all 50 states. The organization, with approximately 2,500 members, is a 501(c)(19) veterans organization representing its members, all of whom served during wartime in the merchant marine. The principal purpose of the AMMV is to promote the interests of the former merchant mariners who served during wartime on Merchant Ships. The organization promotes knowledge and awareness of the service of its members and educates aggressively for recognition of that service and fair recognition and compensation for its members. All of the members of the organization served aboard vessels that contained boilers, pumps, valves, gaskets, packing and insulation similar to the equipment and components at issue in this matter. Many of its members were exposed to these asbestos-containing products and many suffer or suffered from the diseases attributable to asbestos, including mesothelioma, the terminal disease suffered by Master Chief Dummitt in this case. The AMMV has a strong interest in the outcome of this matter as part of its efforts to advance the concerns of its members and to obtain just compensation for citizens injured from products used in the course of their service. Those who are

currently ill, or may later become ill, would be denied just compensation for their injuries if the results of this matter are reversed.

Herein, *Amici* present legal and policy arguments related uniquely to the justifications for imposing a duty to warn on equipment manufacturers in military environments.

INTRODUCTORY STATEMENT

Enlisted members of the uniformed services voluntarily serve our Country. Enlisted sailors, including regular sailors and their non-commissioned officers, form the lifeblood of the United States Navy.¹ Master Chief Dummitt enlisted in the Navy at the first opportunity presented to him, rose to the highest rank possible, and served with distinction for 28 years. He personifies everything an enlisted sailor should be.

New York law permits and should continue to permit an equipment user, like Master Chief Dummitt, to seek redress from that equipment's manufacturer when his latent injury resulted from the intended use of the equipment, and the hidden danger was known to the manufacturer. To allow manufacturers like Crane Co. to escape liability by creating an automatic rule that draws a hairsplitting distinction between circumstances where the manufacturer directly supplied the

¹ *United States Navy Enlisted Ranks*, Military-Ranks.org, at <http://www.military-ranks.org/navy-enlisted-ranks>.

aftermarket components and circumstances where it did not, would work a grave disservice to those who served our Country in the military, among other citizens of New York.² A rational boundary cannot be fixed along this imaginary line. After all, Crane Co.'s valves worked exactly the same, as they were intended to work, whether the aftermarket components were supplied by Crane Co. or by a third party, and Master Chief Dummitt was exposed to asbestos from doing nothing more than operating Crane Co. valves.

The public policy considerations for imposing a duty to warn in circumstances involving the synergistic use of a product with fungible or aftermarket components are compelling and have solid jurisdictional support. For the weighty policy reasons discussed herein, the Court should affirm the order of the Appellate Division, First Judicial Department.

² This rule would affect servicepersons in land-based situations as well, such as in boiler rooms at military bases, Atomic Labs, and mechanics working on all types of military equipment such as airplanes.

ARGUMENT

Uniformed services enlisted personnel that are injured from equipment used in military environments deserve the right to seek redress from all culpable product manufacturers, which should include the equipment manufacturers who knew exactly how their products would be used and that a danger existed from the products' synergistic use with aftermarket integral components. This would not impose a duty to warn in every circumstance, but would be circumspect in its application depending on the facts of each case. On the other hand, an automatic rule of no duty in every circumstance where the component is placed into the chain of distribution by a third party would create inequitable consequences and upset the balance between a manufacturer's liability and the rights of product users.

Public policy militates strongly in favor of concluding that Crane Co. was properly held to owe a duty to warn in this case under New York law. These considerations include that: 1) in a military environment, where the product user may not have a choice whether to use the product, a warning is more imperative because work safety practices become the only means to protect the user from the danger; 2) Crane Co. was in a superior position to follow and know the use and adaptation of its valves by the Navy; 3) had Crane Co. complied with its duty to warn at the time of sale for the dangers associated with removing the original asbestos components in its valves, a determination on this issue would be

unnecessary because that original warning would have reached Master Chief Dummitt; 4) it is reasonable and equitable in these circumstances to distribute loss to both the product manufacturer and the component part manufacturer; and 5) a manufacturer that knows its product will be used synergistically with components, and has access to those components to perform testing, should be held to an obligation to warn for dangers associated with that synergistic use.

I. In circumstances where the end user must use a product that poses a hidden and lethal danger, the need for a product warning is amplified because only by implementing safe work practices will the end user be protected from death

A general rationale for imposing a duty to warn is to provide the end user with a choice as to whether or not to use the product in light of the apprised-of danger. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (“The rationale for this rule is that the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm. Thus, a true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.”).

However, in a military environment, product users may be unable to decide whether to cease using the product. An enlisted sailor like Master Chief Dummitt could not choose whether to use Crane Co. valves. He was required to maintain

Crane Co. valves pursuant to orders, because if the valves were not sealed and insulated properly, they would not function; and if the valves did not function, the boiler system could not function; and if the boiler system did not function, the turbines could not function; and if the turbines did not function, the ship would be dead in the water, rendering it useless. Since Master Chief Dummitt had no choice but to use these valves, the need for a warning was amplified because the only possible way for him to have protected himself was to use safety equipment and/or safe work practices.

This is made more critical because the latent danger of asbestos can kill. *Cf. Lancaster Silo & Block Co v Northern Propane Gas Co.*, 75 A.D.2d 55, 65 (4th Dep't. 1980) (the degree of danger dictates the importance of a warning). Where a user *must* use a product that poses a hidden danger of death, like in military environments, public policy renders a duty to warn more crucial, and there should be no basis to excuse a failure to warn when that danger was known to the equipment manufacturer. This policy ground supports the imposition of a duty to warn on Crane Co.

II. An equipment manufacturer has a duty to warn because it is in a superior position to follow and know of the use and adaptation of its product by the military

Crane Co. knew exactly how its valves would be used by the United States Navy, which placed Crane Co. in the best position to warn. Although the Court addressed a similar issue of law in *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289 (1992), albeit on decidedly distinguishable facts from the case at bar, six years thereafter the Court decided a case addressing many policy considerations that apply with equal weight to this case.

In *Liriano v. Hobart Corp.*, 92 N.Y.2d 232 (1998), the plaintiff was injured when using a meat grinder after the safety guard had been removed 32 years after sale. In concluding that a duty to warn could be imposed for this post-sale modification, the Court stated that:

The justification for the post-sale duty to warn arises from a manufacturer's unique (and superior) position to follow the use and adaptation of its product by consumers. (*see, Cover v Cohen*, 61 NY2d 261, *supra*). Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use. A manufacturer's superior position to garner information and its corresponding duty to warn is no less with respect to the ability to learn of modifications made to or misuse of a product.

Id. at 240-241.

As a valve expert, Crane Co. knew better than any other person or entity how its valves would be used, including that the specified asbestos components

were fungible. *See George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990) (manufacturer “is held to the knowledge and skill of an expert and is conclusively presumed to possess all of the knowledge that is available to or could be possessed by an expert.”). This implicates a duty to warn for dangers regarding the anticipated and intended synergistic use of its valves with aftermarket asbestos components in a military environment. This circumstance is, in essence, harmonious with the *Liriano* duty to warn for post-sale product modifications since the application of asbestos lagging pads and the replacement of asbestos sealing devices was a post-sale use of Crane Co.’s valves that was not only known to Crane Co., but intended by design and specification.

Crane Co. clearly followed the use and adaptation of its product by the Navy because it aided the Navy in establishing that use and adaptation.³ This placed Crane Co. in a unique position to warn for the dangers associated with that specific use. As far as policy is concerned, “[n]o material distinction between” post-sale product modifications and aftermarket component use “is evident in this context.” *Liriano, supra* at 240. In fact, the case at bar presents a more compelling basis for a duty than in *Liriano*, as the valves here worked exactly as intended, whereas in *Liriano* the product was substantially modified. *See Penn v. Jaros, Baum & Bolles,*

³ *See Respondent’s Brief: Counter-Statement of the Case*, discussing Crane Co.’s contribution to the publication *Naval Machinery*.

25 A.D.3d 402 (1st Dep't 2006) (a duty imposed where the products were used in synergy and worked exactly as intended).

Manufacturers like Crane Co. cannot just *assume* someone else like the Navy will warn about the operational hazards of Crane Co.'s own products. If that were the law, no product manufacturer would ever have a duty to warn. Because Crane Co. never even attempted to warn in this case, a finding of no duty would unjustly encourage manufacturers not to warn by permitting them to assume someone else will warn. This is contrary to the policy groundwork of products liability which is to promote the safety of products and to provide product users with a sane appreciation of the risks of foreseeable uses or misuses. *See Alfieri v. Cabot Corp.*, 17 A.D.2d 455, 460 (1st Dep't, 1962) ("where the use ... was visualized or contemplated, and the dangerous propensities...known, a duty existed to warn the user of the hazard"), *aff'd* 13 N.Y.2d 1027. Failure to warn for known and intended product use or adaptation should be deterred, not promoted.

Since Crane Co. was in a superior position to warn for the intended use of aftermarket asbestos components with its Naval valves, a duty to warn was properly imposed in this case.

III. A warning from Crane Co. for the dangers associated with the asbestos components it placed into the stream of commerce would have rendered a determination on this issue unnecessary

Equipment placed on Navy ships was intended to have a long service life – typically decades to match the useful life of the ship.⁴ The use of fungible components is what permitted these pieces of equipment, like valves, to function for that period of time.⁵ Whether a sailor was the first person to replace these components or the second or fifth or fifteenth person made no difference to the work they performed or the materials used or the actual need to replace these components to maintain the equipment in working order.

Since Crane Co. placed fungible asbestos components originally into its valves, it cannot seriously be disputed that it had a duty to warn for the dangers of asbestos associated with its valves at the time of sale. Had Crane Co. complied with that obligation to warn, Master Chief Dummitt, who was an ordinary valve user, would have been apprised of the dangers, would have protected himself, and this case would likely not be before the Court now. Stated differently, since these valves were designed to be used with fungible components, a duty to warn is not owed just to the Navy as the valve purchaser, or to the first valve user, but to all sailors that performed ordinary maintenance on the valve during its useful life. *See*

⁴ Richard J. Dunn, III, *The Impact of a Declining Defense Budget on Combat Readiness*, BACKGROUND, No. 2828, AT 6 (July 18, 2013).

⁵ U.S. Department of Energy Federal Energy Management Program, *Operations & Maintenance, Best Practices Guide, Release 3.0*, § 5.3 (Aug. 2010).

McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68 (1962) (“duty to warn of latent dangers extends to the original or ultimate purchasers of the product..., to employees of those purchasers..., and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn...”). Under Crane Co.’s proposed new rule, a duty to warn would terminate the instant the original asbestos components were removed, which could have happened one day after sale, or one week after sale, or one month after sale, etc., notwithstanding that the valves continued to operate with identical asbestos components for another 50 years. That rule ignores the intended function of the product and its useful life.

As a result, this case stems in part from the incontrovertible fact that Crane Co. failed to warn for the original asbestos components it placed in the stream of commerce with its valves. Permitting Crane Co. to avoid its liability merely because its valves were operated as they were intended to be operated by removing and replacing the asbestos components would render hollow the duty to warn in every single scenario where a product incorporates fungible component parts. To split hairs along the lines of who supplied the identical replacement components is no basis to justify excusing the manufacturer’s original failure to warn. This would be especially egregious in circumstances, like here, where the manufacturer had actual knowledge of the lethal hazards but took no action to protect enlisted

personnel who themselves were duty-bound to use this equipment in service to our Country.

Excusing Crane Co.'s original failure to warn merely because it did not supply the necessary aftermarket components is contrary to public policy.

IV. When a product is purposefully combined with an aftermarket component, it is reasonable and equitable to distribute loss to both the product and component manufacturers when an injury occurs from that combined use

Crane Co.'s automatic rule would lead to a disproportionate allocation of loss to the innocent plaintiff who was injured in the course of maintaining the manufacturer's product. In situations where the plaintiff's injury resulted from the synergistic use of a manufacturer's product with a toxin-containing component supplied by another entity, and the manufacturer intended that the component be used and knew that a danger existed, it is reasonable and just to distribute loss to the product manufacturer.

"The common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss." *Waters v New York City Hous. Auth.*, 69 N.Y.2d 225, 229 (1987). In a failure to warn case, a manufacturer's liability "is predicated largely on considerations of sound social policy, including consumer reliance, marketing responsibility, and reasonableness of imposing loss redistribution." *Milau Associates v. North Ave. Development Corp.*, 42 N.Y.2d 482, 489 (1977).

It is certainly reasonable in this context to impose loss distribution on Crane Co. even though the asbestos that Master Chief Dummitt came into contact with when he used Crane Co. valves was distributed by third-party entities. Although the component manufacturers bear responsibility as well, the equipment manufacturers should shoulder some of that loss vis-a-vis the injured plaintiff, and it should be left up to the product and component manufacturers to sort out between themselves what actual burden each should bear as joint tortfeasors. *See Smith v. Sapienza*, 52 N.Y.2d 82, 87 (1981) (“A claim for contribution exists only when two or more tortfeasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person.”). The Legislature has codified this equitable rule under Article 14 of the C.P.L.R. *See Robinson v. June*, 167 Misc.2d 483, 488 (Sup. Ct., Tompkins Cty., 1996) (the rule of joint and several liability reflects “the sense that compensation of the relatively innocent victim serves a more important purpose than striking a nuanced balance between the relatively guilty”). Crane Co. was a joint tortfeasor, even if it did not supply the aftermarket asbestos components in this particular military environment.

In addition, many of the asbestos components used in a military environment were generic, fungible, unbranded components, or had packaging and labeling removed in storage rooms prior to use. The asbestos lagging pads in this case were unbranded components, so Master Chief Dummitt has no ability to seek redress

from that unknown component manufacturer.⁶ Since this component was an integral part of Crane Co.'s valves, Crane Co. should bear that loss as a standard cost of business. Master Chief Dummitt and his family, by contrast, cannot afford to bear that loss.

In addition to the unknown lagging pad manufacturer, many of the gasket and packing manufacturers are defunct, so recovery against them is foreclosed. Other component manufacturers are bankrupt, and although some have set up asbestos bankruptcy trusts under Section 524(g) of Chapter 11 of the Bankruptcy Code, these trusts offer claimants just pennies on the dollar compared to what plaintiffs would have received in the traditional court system. The ARTRA trust, for example, pays *half-a-cent* on the dollar in compensation,⁷ the UNR trust pays 1.38 cents on the dollar,⁸ and the H.K. Porter trust pays 3 cents on the dollar.⁹ They cannot seriously be viewed as a means of making a plaintiff whole, which is the underlying policy justification for tort law. *See Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 42 (1990).

⁶ *See Respondent's Brief: Counter-Statement of the Case.*

⁷ ARTRA 524(g) Asbestos Trust: *Notice of Payment Percentage Adjustment and Amendments to the Trust Distribution Procedures*, located at http://www.artratrust.com/Files/20111017_ARTRA_TDP_Amendment_Notice.pdf

⁸ UNR Asbestos-Disease Claims Trust, Letter from Executive Director David E. Maxam to "Claimant's Counsel," dated October 15, 2014, located at <http://www.cpf-inc.com/upload/temp/NoticeLiftingMoratorium.pdf>

⁹ H.K. Porter Asbestos Trust: *Notice Regarding Payment Percentage Change*, located at http://www.hkporterasbestostrust.org/Files/HKP_Payment_Percentage_Notice_20140617.pdf

The United States is also entitled to sovereign immunity. *See Wake v United States*, 89 F.3d 53, 57 (2d Cir. 1996). To accept the automatic rule proposed by Crane Co. would, in virtually all military environments, leave injured personnel with no recourse against *any* entity. The U.S. Department of Veteran Affairs estimates that several million Navy veterans were exposed to asbestos from equipment.¹⁰ Crane Co.'s rule would pose a grave inequity to members of our military, as well as other citizens, who would be required to shoulder the full weight of a fatal injury on the technicality that, despite the exposure resulting from working on a manufacturer's product, the manufacturer did not supply the specific injury-producing substance. Neither Master Chief Dummitt nor his family should bear that taxing weight when he was just maintaining Crane Co. asbestos-containing valves in exactly the manner that Crane Co. intended, instructed, and designed them to be used.

In sum, Crane Co., as a joint tortfeasor, is in a better position to absorb a loss than Master Chief Dummitt. Crane Co. has every right to seek contribution or indemnification from the component manufacturers. *See* C.P.L.R. 1401.¹¹ It also had an opportunity to prove a share of liability against any component

¹⁰ U.S. Department of Veterans Affairs, *Compensation and Pension Manual Rewrite*, M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, 9(g), at 2-C-8 (2011).

¹¹ Crane Co. has filed at least one action seeking indemnification from a gasket manufacturer. *See Crane Co. v The Goodyear Tire and Rubber Co.*, Case No. 2:14-cv-06509 (S.D. Ca. Aug, 19, 2014).

manufacturer under Article 16 of the C.P.L.R, which would have reduced its own culpability. *See* C.P.L.R. 1601, 1603.

Imposing a strict rule that the product manufacturer has no duty to warn in any synergistic use cases would create inequitable results, first and foremost by leaving the injured plaintiff to shoulder most, if not all, of the burden of his injury. Boiled down to its essence, the issue of loss distribution is merely one of fairness, which favors imposing a duty to warn on Crane Co.

V. A manufacturer that has the ability to test and inspect the components it knows will be used with its product should owe a duty to warn for the dangers associated with that synergistic use

The issue in the case at bar is not one that would impose a duty to warn on a product manufacturer for the use of its product with any component, at any point in time, for any purpose, which would then require it to investigate and test any number of unknown components to comply with its duty to warn. The Court has already correctly rejected that notion in *Rastelli*. The issue here is much narrower and therefore more balanced. A manufacturer that knows certain aftermarket components will be used as integral parts of its product, and has every ability to test and inspect those components in the context of that synergistic use, should owe a duty to warn.

The facts are clear that Crane Co. knew asbestos components would be used in this military environment and that it persistently used asbestos components with its valves in non-military environments. Crane Co. could have tested or inspected these components at any point in time for dangers presented by their synergistic use with its valves.

In circumstances where the components are integral to the proper function of the product, like in particularized military environments such as Navy ship boiler rooms, a manufacturer should not be permitted to stick its head in the sand to avoid liability, especially where it is so simple to warn. *Cf. Liriano v. Hobart Corp.*, *supra* (“it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury”). Crane Co.’s ability to have tested the exact asbestos components at issue for dangers associated with their synergistic use with its valves favors the imposition of a duty to warn.

CONCLUSION

The rule proposed by Crane Co. is contrary to strong public policy and would work a grave injustice to military personnel injured as a result of their use of manufacturers' equipment in service to our Country. The Appellate Division has set forth a more balanced rule that takes into account the rights of both product manufacturers and injured plaintiffs. It is respectfully submitted that the order of the Appellate Division, First Judicial Department should be affirmed.

Dated: New York, New York
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Respectfully submitted,

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