Journal of Air Law and Commerce

Volume 73 | Issue 1 Article 7

2008

Products Liability in Maritime Law: A Court's Refusal to Impost Liability on a Manufacturer for Failure to Warn of Post-Sale Defects Where the Injury Suffered was Purely Economic

Katharine Lavalley

PRODUCTS LIABILITY IN MARITIME LAW: A COURT'S REFUSAL TO IMPOSE LIABILITY ON A MANUFACTURER FOR FAILURE TO WARN OF POST-SALE DEFECTS WHERE THE INJURY SUFFERED WAS PURELY ECONOMIC

KATHARINE LAVALLEY*

AS A GENERAL rule, tort claims for post-sale negligence against manufacturers, such as failure to warn of known defects, are barred when the injury caused is purely economic.[1] The United States Supreme Court extended the purely-economic loss rule into the context of maritime law in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, holding that "a manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself."[2] Despite this apparently broad holding, lower courts across the country are split regarding the existence of an exception to the *East River* doctrine for a manufacturer's failure to warn of post-sale defects.[3] In *Bouttee v. ERA Helicopters, L.L.C.*, the Western District of Louisiana explicitly refused to find an exception for a manufacturer's post-sale failure to warn of known defects in the product, holding that the *East River* doctrine served as a general bar to tort recovery for purely economic loss.[4] The court erred in refusing to acknowledge an exception for post-sale negligence by failing to: 1) recognize the distinction between a defect *during* the product's manufacture and failure to warn of a defect discovered *after* the product's

* J.D. Candidate, Southern Methodist University Dedman School of Law, 2009; B.A., the University of Texas at Austin, 2005. The author would like to thank her fiance, John Kane, for his unconditional love and understanding, and her parents, Liz and Jerry Lavalley, for a lifetime of support and encouragement.

[1] 63B AM. JUR. 2D *Products Liability* § 1914 (2007).

[2] E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986).

[3] *See, e.g.*, Mem'l Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GMBH, No. G-06-438, 2007 WL 2446787, at *3 (S.D. Tex. Aug. 23, 2007).

[4] Bouttee v. ERA Helicopters, L.L.C., 244 F.R.D. 360, 368 (W.D. La. 2007).

manufacture; 2) adhere to Fifth Circuit precedent; and 3) recognize that the policy issues inherent in the failure to warn context are best handled by tort law.

On May 13, 2006, a pilot employed by ERA Helicopters, L.L.C. ("ERA") was transporting a passenger, Boutte,[5] over the Gulf of Mexico in a helicopter manufactured by Eurocopter.[6] During the journey, an engine malfunction forced the ERA pilot to make an emergency landing in the Gulf of Mexico.[7] Though the emergency water landing was successful, the helicopter rolled and inverted during the rescue team's attempts to recover it from the water.[8] The total submersion of the helicopter in salt water completely destroyed the helicopter, rendering it a total loss.[9] The engine that caused the malfunction and subsequent emergency landing was manufactured by Turbomeca USA, Inc. ("Turbomeca").[10]

Boutte brought suit against Turbomeca, Eurocopter, and ERA for alleged damages from injuries resulting from the accident.[11] Subsequently, ERA sent a demand letter to Turbomeca and Eurocopter ("the Manufacturers") stating that "because the incident was caused by a defect in the engine, [the Manufacturers] were liable for the loss of the helicopter."[12] After unsuccessful negotiations between the parties, Turbomeca sought declaratory judgment that ERA's claim against the Manufacturers was barred by the *East River* purely economic loss doctrine, since ERA was only seeking to recover for the loss of the helicopter.[13] In response, ERA requested that the court recognize an exception to the *East River* doctrine for post-sale negligence.[14]

The Western District of Louisiana declined to recognize the suggested exception, holding that ERA's claim for damages against the Manufacturers was barred by *East River*.[15] The court

---

[5] Apparently, the plaintiff's name is misspelled in either the case name or the decision ("Bouttee" versus "Boutte"). *Id.* at 361.

[6] *Id.* at 362.

[7] *Id.* at 361.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 362.

[13] *Id.*

[14] *Id.* at 364–66. ERA alleged that the Manufacturers were negligent in failing to monitor the reliability of the engines and failing to publish data regarding maintenance and repair of the engine. *Id.* at 366.

[15] *Id.* at 368.

based this conclusion on its determination that *East River* operates as a complete bar to recovery against all tort claims for purely economic loss.[16] Thus, because a manufacturer has no duty to prevent a product from injuring itself, no tort claim (including post-sale negligence) is viable where the loss suffered is purely economic.[17]

The court began its legal analysis by noting that neither the United States Supreme Court nor the Fifth Circuit has expressly decided whether the reasoning of *East River* allows for an exception for post-sale negligence.[18] However, the court acknowledged that the Fifth Circuit, in *Nicor Supply Ships Associates v. General Motors Corp.*, "did not preclude the possibility" of the existence of a post-sale negligence exception to the *East River* doctrine.[19] After stating the absence of any controlling precedent, the court noted that the Third Circuit was the only federal circuit court to reach the issue[20] and applied the Third Circuit's reasoning in *Sea-Land Service, Inc. v. General Electric Co.*[21]

In *Sea-Land,* a ship owner brought a tort claim against the manufacturer of the ship's diesel engine for damages arising as a result of the engine's failure.[22] The ship owner's claim for purely economic loss rested on the theory that the manufacturer had failed to warn him of a defect in its engine which the manufacturer became aware of after the engine's sale.[23] Rejecting the ship owner's claim, the Third Circuit noted that *East River* "enunciated an unconditional bar for all tort recovery for economic loss arising out of a defective product."[24] Further, the court noted that the plaintiff in a post-sale negligence action is left with all available contractual remedies, which are better suited to resolve the issue than tort remedies.[25]

---

[16] *Id.*

[17] *Id.*

[18] *Id.* at 367.

[19] *Id.* at 368 (citing Nicor Supply Ships Assocs. v. Gen. Motors Corp., 876 F.2d 501 (5th Cir. 1989)).

[20] *Id.* at 367.

[21] *Id.* (citing Sea-Land Serv., Inc. v. Gen. Elec. Co., 134 F.3d 149 (3d Cir. 1998)).

[22] *Sea-Land Serv., Inc.*, 134 F.3d at 151.

[23] *Id.* at 155.

[24] *Id.*

[25] *Id.* (noting "the reason for [the *East River* rule] is that the parties to such a bargain can set the terms of their expectations through negotiations, contract provisions, price adjustments, and insurance" and "[i]f either party deems it advisable to require warning of a known defect in order to protect the *product,* that

Adopting the Third Circuit's reasoning in *Sea-Land*, the *Bouttee* court ultimately based its holding on two factors. First, like the Third Circuit in *Sea-Land*, the court determined that *East River*'s "unequivocated" holding that a manufacturer in a commercial relationship has no duty to prevent a product from injuring only itself was "directly applicable."[26] Thus, according to the *Bouttee* court, *East River* serves as a "broad, unadulterated bar precluding all negligence claims for economic loss arising out of damages to a defective product."[27] Second, the court adopted the Third Circuit's reasoning in *Sea Land* that "[t]he policy of economic loss is better adjusted by contract rules than by tort principles."[28]

The *Bouttee* court erred in its refusal to acknowledge an exception to the *East River* doctrine for a manufacturer's post-sale negligence. First, the Fifth Circuit, whose precedent is controlling on the *Bouttee* court, recognized the existence of the post-sale negligence exception in *Nicor Supply Ships Association v. General Motors Corp.*[29] Second, the court wrongly concluded that the United States Supreme Court intended *East River* to operate as a bar against all tort claims where the loss suffered was purely economic. Third, the court wrongly concluded that contract remedies are better suited to resolve the issue of a manufacturer's post-sale duty to warn.

First, the court's conclusion that the Fifth Circuit has never recognized an exception to the *East River* doctrine for post-sale negligence is inaccurate.[30] In fact, the Fifth Circuit's plain language explicitly recognized an exception in *Nicor Supply Ships.*[31] In *Nicor*, the Fifth Circuit analyzed two pre-*East River* decisions[32] that distinguished between a manufacturer's negligence *during* the manufacturing process and a manufacturer's failure to warn

---

party can negotiate for such a provision or can protect against a defect through insurance").

[26] *Bouttee*, 244 F.R.D. at 368; *Sea-Land Serv., Inc.*, 134 F.3d at 155.

[27] *Boutee*, 244 F.R.D. at 368.

[28] *Id.* at 367.

[29] Nicor Supply Ships Assocs. v. Gen. Motors Corp., 876 F.2d 501, 504 (5th Cir. 1989).

[30] Before *East River* was decided in 1986, the Fifth Circuit allowed for tort recovery in maritime law for purely economic injury caused by a product to itself. Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171, 175–76 (5th Cir. 1975).

[31] *Nicor Supply Ships*, 876 F.2d at 504.

[32] *Id.* (citing Miller Indus. v. Caterpillar Tractor Co., 646 F. Supp. 1520 (D.N.J. 1986); McConnell v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984)).

of a known defect *after* the product's sale.[33] The Fifth Circuit concluded that both of these courts found that a purchaser may sue in tort for a manufacturer's post-sale negligence as long as two elements are satisfied: "the manufacturer has 'discovered [the defect] after the engine was already on the market,' and 'the warranty does not expressly disclaim negligence.'"[34] After applying these two elements to the *Nicor* facts, the Fifth Circuit concluded that "the contract between General Motors and Nicor expressly disclaimed General Motors' liability for negligence arising out of the purchase of the engine."[35] Thus, because the plaintiff had failed to prove both elements, the Fifth Circuit stated that "Nicor's claim does not fall into the possible exception to *East River* carved out by the *Miller Industries* and *McConnell* courts."[36]

In its analysis of *Nicor*, the *Bouttee* court recognized only that "in *Nicor*, the Fifth Circuit *did not preclude* the possibility of the existence of a post-sale negligence exception."[37] However, the court's interpretation of *Nicor* is inaccurate. In *Nicor*, the Fifth Circuit analyzed cases adopting the post-sale negligence exception, recognized and applied a two-part test to determine whether a particular plaintiff fell within the exception, and determined that the plaintiff in that case failed to prove the elements.[38] The application of the two elements to the facts in the case served as the Fifth Circuit's implicit recognition of the existence of the exception in cases where the two elements are met. Thus, the Fifth Circuit's language referring to a "possible" exception to *East River* referred not to the possibility of the *existence* of the exception, but instead to the potential that a particular plaintiff might *adduce enough evidence* to meet the two elements.[39]

The court's next error was its interpretation that *East River* completely bars all tort recovery where the injury suffered was purely economic. As ERA argued in *Bouttee*, *East River* does not,

---

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Bouttee v. ERA Helicopters, L.L.C., 244 F.R.D. 360, 368 (W.D. La. 2007) (emphasis added).

[38] *Nicor Supply Ships*, 876 F.2d at 504.

[39] In *Bouttee*, it is unclear from the facts as presented whether the plaintiff adduced enough evidence to meet the two elements of the *Nicor* test. First, the facts do not show whether the warranty expressly disclaimed liability for negligence; second, the facts do not show whether the Manufacturers were aware of the defect in the engine. *See Bouttee*, 244 F.R.D. at 361–62.

and was not intended to, bar all types of tort claims for purely economic loss; it was merely intended to bar those tort claims that are *also* recoverable under contract law.[40] The Supreme Court's intention to bar only tort claims that are additionally recoverable under contract law is stated in its explanation of the irrelevance of the nature of the malfunction causing the accident:

> Either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain-traditionally the core concern of contract law.[41]

The Supreme Court's intention is further illustrated by its statement that if products liability actions were taken too far, "contract law would drown in a sea of tort."[42] Thus, the Supreme Court in *East River* did not intend to bar tort claims for purely economic loss that are not recoverable under contract law.

Claims for post-sale negligence, especially failure to warn, are not covered by contract principles. As ERA argued, the *East River* doctrine does not bar claims for post-sale negligence, and particularly post-sale failure to warn of a known defect, "because the parties to the sale of the defective product did not negotiate for and set the terms of their expectations."[43] Thus, since post-sale failure to warn claims, such as those alleged by ERA against the Manufacturers, are not recoverable under contract law, a correct application of *East River* establishes that those claims are not barred by the doctrine.[44]

The court's final error is its contention that post-sale negligence should be handled by contract rather than tort principles. The *Bouttee* court adopted the reasoning that "we, as a society,

---

[40] *Id.* at 368.

[41] E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870 (1986).

[42] *Id.* at 866.

[43] *Bouttee*, 244 F.R.D. at 368.

[44] As stated by the Eleventh Circuit:

> Whatever the merits of adopting a rule that views defects in a product as part of the parties' bargain and thus within the law of sales, it is much less tenable to presume that the buyer has bargained away the manufacturer's obligation to warn of defects that later come to the manufacturer's attention.

Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813, 818 (11th Cir. 1984).

should attempt to provide every incentive for a manufacturer with knowledge that a defective product is on the market to warn its customers."[45] However, in refusing to allow a tort claim for a manufacturer's post-sale negligence where only economic injury is suffered, the court incorrectly required a product to injure a person or other property before the manufacturer has an incentive to warn purchasers of post-sale defects. Had the court acknowledged an exception for post-sale negligence where only economic loss is suffered, it would have provided "every incentive for a manufacturer with knowledge that a defective product is on the market to warn its customers."[46] In sum, the court's holding is directly contradictory to the principles adopted to support it.[47]

Though contract principles sufficiently regulate a buyer's expectations of the product at the time of sale, they are inadequate to ensure that the manufacturer will continue to ensure the safety of its product after the sale. However, ensuring a product's continued safety by imposing tort penalties on the manufacturer is one of the primary goals of tort law. Thus, the court erred in failing to distinguish a manufacturer's negligence during the development of the product from a manufacturer's negligence in failing to inform a purchaser of possible defects *after* the sale. ERA correctly argued that a purchaser should have a tort claim against a manufacturer in cases of post-sale negligence, especially post-sale failure to warn, because a manufacturer's negligence after manufacture has been completed "goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as matter of social and public policy."[48]

In *Bouttee v. ERA Helicopters, L.L.C.*, the Western District of Louisiana held that there was no exception to the *East River* doctrine for a manufacturer's post-sale failure to warn of known defects in the product because *East River* served as a general bar to

---

[45] *Bouttee*, 244 F.R.D. at 367.

[46] *See id.*

[47] Arguably, the Fifth Circuit has previously indicated its belief that tort policies and principles should always govern a manufacturer's post-sale duty to warn. *See* Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171, 175–76 (5th Cir. 1975). In adopting the reasoning of *Jig the Third* and finding a tort duty to warn of post-sale defects even where only economic loss is suffered, the Eleventh Circuit noted that the former Fifth Circuit explicitly "rejected, at least in the maritime context, such a rigid separation of the law of sales and the law of torts." *Miller Indus.*, 733 F.2d at 817.

[48] *Id.*

tort recovery for purely economic loss. The court's conclusion is incorrect because it fails to adhere to Fifth Circuit precedent, misinterprets the breadth of the Supreme Court's holding in *East River*, and fails to distinguish between the applicability of tort principles to pre- and post-sale negligence. For these reasons, the court should have allowed an exception to the *East River* doctrine for a manufacturer's post-sale failure to warn where the only injury suffered was economic.