WRITERS' CORNER

Lucid Legal Writing for Judges, Lawyers, and Litigants

Newest Justices' Dueling Opinions Sparkle

By Lawrence S. Ebner

The Supreme Court's two newest members—Justices Brett Kavanaugh and Neil Gorsuch—are brilliant legal writers. Earlier this year they squared off for the first time by authoring the majority and dissenting opinions in *Air & Liquid Systems Corp. v. Devries*, No. 17-1104 (Mar. 19, 2019). In that case the Court rejected 6 to 3 the "bare metal defense" invoked by manufacturers of Navy ship machinery (e.g., pumps; blowers; turbines) in asbestos-related product liability suits. *See* slip op. at 3, 7–8. Although the Court's holding is confined to the maritime tort context, anyone interested in superlative legal writing should study Justice Kavanaugh's and Justice Gorsuch's majority and dissenting opinions for their organization, style, and clarity.

Justice Kavanaugh's legal analysis is crystal clear. Writing for six Justices, Justice Kavanaugh's majority opinion begins with a two-paragraph introduction that summarizes the case and holding. *See id.* at 1–2. But readers should not stop there. The opinion proceeds to briefly describe the case's factual background, *id.* at 2–4, explain the constitutional basis for federal courts' maritime jurisdiction, *id.* at 4–5, and set forth "basic tort-law principles" regarding a product manufacturer's duty to warn, *id.* at 5. Justice Kavanaugh then frames the specific question presented by lucidly summarizing lower courts' differing approaches regarding "how to apply [the] general tort-law 'duty to warn' principle when the manufacturer's product requires later incorporation of a dangerous part in order for the integrated product to function as intended." *Id.* at 5. *See id.* at 5–7. His holding on this issue is straightforward and concise:

> 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.

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Id. at 2, 9–10 (same), 10 (same). Although Justice Kavanaugh thoroughly critiques the petitioner manufacturers' legal and policy arguments, *see id.* at 7–9, he cautions lower courts and litigants against reading too much into the opinion by repeatedly emphasizing that the Court's holding applies *only* to maritime torts. *See id.* at 1, 2, 5, 7, 9, 10.

Don't forget Justice Gorsuch's dissent! Dissenting opinions too often are overlooked, perhaps because they sometimes are tedious. That said, Justice Gorsuch's dissenting opinion in *Air & Liquid Systems* is a must-read.

Justice Scalia often demonstrated that there is a special art to writing dissenting opinions. Justice Gorsuch's dissent in *Air & Liquid Systems* (in which Justices Thomas and Alito joined) embodies that art. Consider the pithy way that Justice Gorsuch begins his dissenting opinion:

> Decades ago, many of the defendants before us sold "bare metal" products to the Navy. Things like the turbines used to propel its ships. Did these manufacturers have to warn users about the dangers of asbestos that someone else later chose to add to or wrap around their products as insulation?

Dissent at 1.

In these three simple sentences Justice Gorsuch explains what the case is about. (Actually, the second sentence—"Things like the turbines used to propel its ships"— is not even a full sentence, but it nonetheless accomplishes its purpose.) And then, he lobs an imperative to the reader: "Start with a couple of things we all can agree on." *Id.*

In another part of his dissent, Justice Gorsuch invites the reader to "[j]ust consider some of the uncertainties each part of the Court's new three-part test is sure to invite." *Id.* at 5. After positing a series of difficult questions and hypotheticals, Justice Gorsuch offers the following memorable statement: "Headscratchers like these are sure to enrich lawyers and entertain law students, but they also promise to leave everyone else wondering about their legal duties, rights, and liabilities." *Id.* at 7.

Finally, Justice Gorsuch rejoices that "there is a silver lining here… the Court expressly states that it does 'not purport to define the proper tort rule outside of the maritime context.'" *Id.* at 8. Concluding with a judicial zinger, he notes that "[i]n other tort cases, courts remain

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non-working hours was not unreasonable. *Id.* at 46.

Massachusetts is not alone in requiring employers to create accommodations for employees who use medicinal marijuana. In fact, Connecticut and Delaware have included requirements for employers to accommodate medical marijuana patients in their respective medical marijuana acts. Conn. Gen. Stat. §21a-408p; Del. Code tit. 16, §4905A. Last year, in *Noffsinger v. SSC Niantic Operating Company, LLC*, 338 F. Supp. 3d 78 (D. Conn. 2018), the U.S. District Court for the District of Connecticut held that the employer violated the anti-discrimination provision in Connecticut's Palliative Use of Marijuana Act (PUMA), when it rescinded the plaintiff's job offer after she tested positive for marijuana. *Id.* at 86. The *Norffsinger* court rejected the employer's argument that it was exempt from PUMA's anti-discrimination provision. The PUMA anti-discrimination provision allows an employer to choose not to hire or to discharge an employee who uses medical marijuana if it is "required by federal law or required to obtain federal funding." Conn. Gen. Stat. §21a-408p. The employer argued that the Drug Free Workplace Act (DFWA) mandates federal contractors, such as the employer, to maintain a drug-free work environment. *Id.* at 84. The court held that the DFWA does not require an employer to rescind a job offer because the DFWA does not require drug testing or prohibit federal contractors from employing people who use illegal drugs outside the workplace. *Id.*

It is important that employers confirm that their drug policy is in compliance with the laws in the states where their employees are located. As more people are prescribed medicinal marijuana, it is anticipated that states will enact more statutes to govern employers' rights within these states. Because there are no clear tests to determine whether an employee is under the influence during working hours, there are many questions that still need to be answered by the courts and state legislatures.

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free to use the more sensible and historically proven common law rule.… [T]hat is a liberty they may be wise to exercise." *Id.*

Justices Gorsuch and Kavanaugh write for everyone. Some appellate judges write in a way that only other judges and lawyers can fathom. But not Justices Gorsuch and Kavanaugh. If their early Supreme Court opinions are any indication, their opinions not only will guide judges, attorneys, and litigants for many years to come, but also will significantly contribute to the public's understanding of the legal system and the law. And any lawyer who wants to improve or refine his or her legal writing should make a habit of reading Justice Gorsuch's and Justice Kavanaugh's stunning opinions.

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it is in senior lawyers' interest to take our associates to court, even if we cut our own time. If you don't give younger lawyers the experience, how will they be ready when it is "their turn"?

It is in your interest, and mine, to help our colleagues shine. Our clients, the courts before which we appear, and our legal communities need to see that our firms have a deep bench. After all, the first rule of effective succession planning is looking out for number two.