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Circumstantial Evidence in Strict Products Liability Actions, Lindsay v. McDonnell Douglas Aircraft Corporation, 460 F.2d 631 (8th Cir. 1972)

CIRCUMSTANTIAL EVIDENCE IN STRICT PRODUCTS LIABILITY ACTIONS

Lindsay v. McDonnell Douglas Aircraft Corporation, 460 F.2d 631 (8th Cir. 1972)

Defendant McDonnell Douglas Aircraft Corporation manufactured an F4B jet aircraft for the Navy, which used the plane for a night training mission two days after receiving it from McDonnell. The plane crashed, apparently while on fire, into the Gulf of Mexico. Neither the plane nor the pilot's body were ever recovered. Although a Naval Accident Board listed the cause of the accident as undetermined, the Board considered material failure the most probable of three possible causes.[1]

Plaintiff brought suit in admiralty under the Death on the High Seas Act[2] for the wrongful death of her husband.[3] The district court held that she had failed to prove that a defective air bleed duct system caused the crash.[4] On appeal, the Eighth Circuit Court of Appeals, in reversing and remanding, *held*: the trial court erred in not applying the

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1. Pertinent parts of the report by the Naval Accident Board, as quoted by the court of appeals, read:

> INVESTIGATION AND ANALYSIS: Both the pilot and NFO [sic] were experienced aviators and in excellent health. They had received adequate rest and nourishment prior to the flight.
>
> The plane was new and had experienced no trouble on the ferry flight. Maintenance procedures were in accordance with stand [sic] operating procedures and are not considered to have had any effect upon the accident. A lack of evidence prohibits a definite statement that a material malfunction occurred, but the possibility warrants strong consideration.
>
> CONCLUSIONS: It is concluded that the cause of the accident is undetermined. Three possible causes exist:
>
> a. Pilot disorientation
> b. Stall/spin
> d. [sic] Material failure.
>
> Board members consider the later [sic] as most possible.

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2. 46 U.S.C. § 761 *et seq.* (1970).

3. Lindsay v. McDonnell Douglas Aircraft Corp., 331 F. Supp. 257 (E.D. Mo. 1971).

4. Specifically the district court found:

> that the credible evidence established no preponderance of evidence by libelant that the F4B aircraft was defectively designed or manufactured; no preponderance of evidence that a defect was the proximate cause of the accident; and lastly, no preponderance of evidence that this unknown defect existed at the time McDonnell Douglas parted with possession of the aircraft.

Id. at 259.

doctrine of strict liability as set forth in Restatement (Second) of Torts section 402A;[5] proof that the plane was defective could be made by circumstantial evidence; and plaintiff was not required to prove a specific defect in the aircraft.[6] Although the case was decided under maritime law, general tort concepts, including strict liability, were applied.[7]

The field of strict liability has advanced significantly in the past decade.[8] Although the burden of strict liability for defective products

5. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(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 without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) 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.

6. Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972).

7. *Lindsay* is decided on the basis of maritime law, which seeks to incorporate the general tort law when the two are harmonious. *See* Sieracki v. Seas Shipping Co., 149 F.2d 98 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946); Warschauer v. Lloyd Sabaudo S.A., 71 F.2d 146 (2d Cir. 1934), *cert. denied*, 293 U.S. 610 (1934); Cain v. Alpha S.S. Corp., 35 F.2d 717 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 642 (1930). Courts have applied strict liability in tort in admiralty cases using section 402A of the Restatement (Second) of Torts. *See, e.g*, McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965); Ohio Barge Line, Inc. v. Dravo Corp., 326 F. Supp. 863 (W.D. Pa. 1971); Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969).

The Death on the High Seas Act is the exclusive remedy for wrongful death occurring on the high seas. *See* Dore v. Link Belt Co., 391 F.2d 671 (5th Cir. 1968); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955). The act applies to air travel over the sea. *See, e.g.*, D'Aleman v. Pan American World Airways, Inc., 259 F.2d 493 (2d Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); King v. Pan American World Airways, Inc., 166 F. Supp. 136 (N.D. Cal. 1958); Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957). *Lindsay* represents the first strict products liability case to be brought under the Death on the High Seas Act in which death resulted from the crash of a military aircraft engaged in training maneuvers. In O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D.N.Y. 1971), a non-admiralty case in which strict liability was asserted, a B-52 crashed while on a training mission over Maine. The plane was recovered, and examination of the wreckage did reveal a defect, but plaintiff failed to prove that the defect was more probably the cause of the accident than weight overload, and hence did not recover.

8. *See, e.g.*, Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); Prosser, *The Assault Upon the Citadel (Strict*

is not totally new to the manufacturer,[9] it was not until the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*[10] in 1960 that the courts began to apply the doctrine to all products. That decision, which allowed plaintiff car buyer to maintain an action for breach of implied warranty even though she lacked contract privity with the defendant, was hailed as a major breakthrough.[11] With the abandonment of the privity requirement, many legal scholars suggested that the misleading and confusing characterization of strict liability as a "warranty" action based on contract be avoided, and that manufacturer liability for defective products be recognized simply as "strict liability in tort."[12] The drafters of the Restatement (Second) of Torts admonished against reference to "warranty"[13] when they enunciated the strict liability doctrine in section 402A. That section was immediately approved and applied by a number of courts,[14] and now is the generally accepted expression of the doctrine of strict liability in tort.

To recover in strict liability for injury caused by a defective product, one must prove by a preponderance of the evidence that (1) the product was defective, (2) the defect existed before it left the manufacturer's

Liability to the Consumer), 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966); Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability,* 64 MICH. L. REV. 1350 (1966).

9. *See, e.g.,* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). *See generally,* Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability,* 64 MICH. L. REV. 1350, 1369 (1966).

10. 32 N.J. 358, 161 A.2d 69 (1960).

11. *See, e.g.,* Keeton, *Products Liability—Current Developments,* 40 TEX. L. REV. 193 (1961). One writer, however, believes that *Henningsen* "shocks the logical judicial mind." *See* Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty,* 33 TENN. L. REV. 323, 326 (1966).

12. *See, e.g.,* Justice Traynor's comments in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963):

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

13. RESTATEMENT (SECOND) OF TORTS § 402A (1965), Comment *m.*

14. *See, e.g.,* Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Stewart v. Budget Rent-A-Car Corp., 57 Hawaii 71, 470 P.2d 240 (1970); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

hands, (3) the defect was the proximate cause of the accident, and (4) the product was being put to the use for which it was intended.[15] In the context of *Lindsay*, the only significant difference between strict liability and negligence is that a negligence action requires one to prove in addition to the above that the manufacturer's negligence caused the defective condition. Dean Prosser insisted that negligence is by far the easiest to prove, especially with the availability to the plaintiff of *res ipsa loquitur*. This gives rise at least to the permissible inference of defendant's negligence, thereby avoiding the necessity of getting direct evidence of what occurred at defendant's plant.[16] Thus the imposition on the manufacturer of strict liability rather than liability based on negligence really does not alter the main problem: proof of the existence of a defective product.[17]

The sufficiency of proof requirements stated by the *Lindsay* court are not new. Previous cases have held that one need not prove a *specific* defect in a product in order to recover under strict liability.[18] Even if a plaintiff does attempt to establish a specific defect as a cause of the accident, failure to do so successfully is not fatal to his case.[19] It is sufficient that the evidence points to a *defective condition* as the most probable cause of the accident. Furthermore, this proof can be made by circumstantial evidence.[20]

15. Dennis v. Ford Motor Co., 332 F. Supp. 901 (W.D. Pa. 1971); Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971); White v. Jeffrey Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See generally*, Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

16. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

17. *See* Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966). *See also* Prosser, *supra* note 16, at 1114: "[A]n honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."

18. *See, e.g.*, Franks v. National Dairy Prod. Corp., 414 F.2d 682 (5th Cir. 1969); Greco v. Bucciconi Eng'r Co., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); Jacobsen v. Broadway Motors, Inc., 430 S.W.2d 602 (Mo. App. 1968); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Brownell v. White Motor Corp., 490 P.2d 184 (Ore. 1971); MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969); Bell Aerospace Corp. v. Anderson, 478 S.W.2d 191 (Tex. 1972).

19. Dennis v. Ford Motor Co., 332 F. Supp. 901 (W.D. Pa. 1971); MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969).

20. *See, e.g.*, Greco v. Bucciconi Eng'r Co., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); Dennis v. Ford Motor Co., 332 F. Supp. 901

Indeed, should plaintiff in *Lindsay* win on remand, the case will represent a striking example of the potency of circumstantial evidence in strict products liability actions. Since the Navy never recovered the plane's wreckage, it was impossible to examine the plane in an attempt to discover what part or parts had failed. Nor was the pilot alive to testify about what actually happened during the mishap. The lack of either of these elements leaves plaintiff with little direct evidence on which to base her case.[21]

In order to meet her burden of proof, Mrs. Lindsay must rely almost exclusively on circumstantial evidence in an attempt to raise three inferences: that the plane was defective; that it was defective when it left McDonnell's plant; and that the defect was the most probable cause of the accident. Plaintiff will have to negate other reasonable causes of the accident in order to fulfill the proximate cause requirement, but this burden also can be met through the use of circumstantial evidence.[22] Proof that the defect existed when it left the manufacturer's hands can be inferred from circumstantial evidence as well.[23] Thus, in *Lindsay* the fact that the plane had just been deliv-

(W.D. Pa. 1971); Stewart v. Budget Rent-A-Car Corp., 57 Hawaii 71, 470 P.2d 240 (1970); Lifritz v. Sears, Roebuck & Co., 472 S.W.2d 28 (Mo. App. 1971); Brownell v. White Motor Corp., 490 P.2d 184 (Ore. 1971).

21. The only direct evidence presented was the testimony of a shrimp boat captain and his wife, who allegedly saw the plane on fire before it hit the water. Presumably the court could accept this testimony as evidence that the plane had malfunctioned. It has been held that evidence of a malfunction of a vehicle is circumstantial evidence of a defect and is sufficient to establish liability without proof of any specific defect. Greco v. Bucciconi Eng'r Co., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969).

22. Dennis v. Ford Motor Co., 332 F. Supp. 901 (W.D. Pa. 1971); Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971); Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426 (Minn. 1971); Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969); Lifritz v. Sears, Roebuck & Co., 472 S.W.2d 28 (Mo. App. 1971); Jakubowski v. Minnesota Mining & Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964).

23. *See, e.g.*, American Motors Corp. v. Mosier, 414 F.2d 34 (5th Cir. 1969); Holkstead v. Coca-Cola Bottling Co., 288 Minn. 249, 180 N.W.2d 860 (1970); Tucker v. Central Hardware Co., 463 S.W.2d 537 (Mo. 1971); Lifritz v. Sears, Roebuck & Co., 472 S.W.2d 28 (Mo. App. 1971).

Pennsylvania courts apply a simple test to determine if the evidence presented supports the inference: "[W]hether the circumstances shown were such as would satisfy a reasonable and well-balanced mind that the defective condition . . . existed when the machine was delivered . . . ." Ebbert v. Philadelphia Elec. Co., 126 Pa. Super. 351, 356, 191 A. 384, 387 (1937), *aff'd*, 330 Pa. 257, 198 A. 323 (1938).

ered to the Navy from McDonnell the day before the accident might be considered strong circumstantial evidence that if a defect did exist, it existed before the plane was delivered.[24]

Regardless of whether plaintiff recovers, one might question whether the law of strict products liability can protect the consumer to any greater degree than that represented by *Lindsay*, for the court is willing to allow recovery in a case depending almost entirely upon circumstantial evidence.[25] It is possible that *Lindsay* represents the ultimate consumer protection for which Prosser argued:

> The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.[26]

Plaintiff's total reliance on circumstantial evidence also suggests that the *res ipsa loquitur* doctrine has been applied implicitly in strict products liability.[27] If indeed it has been, one might question whether the

24. The court may have difficulty, however, reconciling this inference with one arrived at in Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971), where acceptance by the Navy was held to give rise to the inference that the plane was *not* defective at that time. It is to be noted that in *Kropp* the record as to condition at delivery was barren. In *Lindsay*, it is known that the plane's cooling light came on, indicating an overheating condition, during the first three test flights. Nevertheless, the presumption could be made that McDonnell corrected the problem, and the fact remains that the Navy did accept the plane.

25. Circumstantial evidence was relied on successfully under similar circumstances by plaintiff in North American Aviation, Inc. v. Hughes, 247 F.2d 517 (9th Cir. 1957). That case, however, apparently was decided on the theory of negligence. Furthermore, the wreckage in that case was recovered and examined. In this case, the allegedly defective aircraft is lost and therefore can never be examined, the plane's pilot is missing and presumed dead, and since the only eyewitnesses to the mishap saw the plane only moments before impact, no one will ever know exactly what occurred during the crucial moments of the ill-fated flight.

26. Prosser, *supra* note 16, at 1122.

27. For a discussion of the role of *res ipsa loquitur* in strict liability cases, *see* Note, *Proof of a Defect in a Strict Products Liability Case*, 22 ME. L. REV. 189 (1970). *See also* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 842 (1966): "*Res ipsa loquitur*, strictly speaking, is not an applicable principle when there is no question of inferring any negligence; but the inferences from circumstantial evidence which are the core of the doctrine are no less applicable to the strict liability [doctrine]." Another writer states that the landmark *Henningsen* decision was itself an illustration of the use of *res ipsa* to "prove" the defect and get to the jury. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1094 (1965).

safeguards[28] that control the doctrine's application in negligence actions should not also be brought over and adhered to in cases of strict liability.

28. Traditionally, there are three conditions necessary for the application of *res ipsa loquitur*: 1) the event must be of a kind that ordinarily does not occur in the absence of negligence; 2) it must be caused by an agency or instrumentality within the defendant's exclusive control; 3) it must not have been due to any voluntary action or contribution on plaintiff's part. Some courts have suggested a fourth condition, that evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. *See* W. PROSSER, LAW OF TORTS § 39 (4th ed. 1971).