ORAL ARGUMENT – 01/19/00
99-0261
TORRINGTON CO. V. STUTZMAN

POWERS: I would like to focus on two issues: first, whether we had a duty to warn about Textron's bearing; and second, the question of whether Textron's bearingswere contaminated when Textron put it in the stream of commerce back in 1984.

First, where does our duty come from? Well the plaintiffs say "we undertook a duty." Now how did we do that? In 1991, there was an investigation of a civilian helicopter crash where the FAA and Bell investigated our Newington plant for civilian -3 nonregreasable bearings. And during that investigation they also found some contamination in -5 military bearings that we had made at our Newington plant.

O'NEILL: I'm trying to get my arms around the scope of this undertaking that is supposedly assumed. And you say it was limited to looking into the three and five bearings manufactured at Newington. What evidence is there that that is the scope, not evidence from which that can be extrapolated, but is there a document or something that says, Here is exactly what we are going to do?

POWERS: Mr. McMurray who was our witness said, What we were asked to do was to provide serial numbers of -5 bearings we had made at Newington so that Bell could tell which ones were made at Newington...

O'NEILL: But there is no definitive document?

POWERS: Well there's testimony that that's what we are asked to do.

O'NEILL: But there is going to be conflicting testimony. So we can't look at some definitive document for that. What standard do we apply if we disagree that predicate issues or the need to present predicate issues were not preserved, and we look at it under the general negligence submission, don't we look to see if there's any evidence to support their definition of the parameters of the undertaking?

POWERS: First of all, we would say that they do have an obligation under _____.

O'NEILL: I understand that. Put that aside for now. If that was waived or doesn't apply and you just look under the general negligence question, don't we review it for any evidence that the scope of the undertaking was as they define it?

POWERS: Right. But the duty rules about undertaking - this is a classic case of we

undertook to do something, and they think we should have done more.

O'NEILL: You say, we agreed to do something, and that's the whole question.

POWERS: What is it we agreed to do?

O'NEILL: And do we examine the jury's finding based on the no evidence point? If there is any evidence to support their characterization of what the undertaking was, don't we then have to uphold the verdict?

POWERS: Under the right(?) duty standard, that's correct. And there's no evidence at all. Because the right(?) duty standard - this is the kind of duty that this court addressed in *Fort Bend County Drainage Dist.*, and *Colonial Savings*. It's §323 of the Restatement. And the correct duty rule under this undertaking theory is that we have a duty to do what they claim we failed to go, to go further. If what our undertaking was, however they define it, the undertaking has to make them worse off than they would have been had we engaged no undertaking at all.

O'NEILL: Unless they say that really what they undertook to do was to look into the broader issue of defective bearing. Even if that's true, then couldn't they say they relied on you to do that and forewent their own investigation?

POWERS: But they go through reliance in a very funny way here. If you look at *Colonial Savings*, for example, the undertaking there was to provide insurance on a house, a promise to provide insurance on a house. And then the defendant failed to go forward and provide that insurance. The reliance on the undertaking meant that this court asked, Did the promise put them in a worse position than they would have been had the promise not been made at all?

O'NEILL: Are you saying they would have had to have shown that because of Torrington's representation, even if the scope was as broad as they define it, they forewent some other investigation, and you're saying there is no evidence of that?

POWERS: None. There is no evidence on this record that if we had not provided the serial numbers we provided, or whatever else they claim we did, they have to prove that if we had not done that, the Navy would have done something else to remove that bearing.

O'NEILL: Is there a reliance on your undertaking to look into the serialized bearings?

POWERS: Reliance means altering of your position to something that would have happened otherwise.

O'NEILL: And is there reliance on the serialized inquiry?

POWERS: Zero evidence that they changed their position with respect to the nonserialized bearing.

O'NEILL: No the serialized.

POWERS: If we had not given any bearings at all - they had come to us and we could have said, We're not talking to you.

O'NEILL: No, based on what happened, is there some evidence in the record that they relied on your investigation of the serialized bearings?

POWERS: There is evidence in the record that they relied on them in the following way. There is testimony that they did not return bearings that were not on the list. But that's to say that we made them worse off because we didn't do more. There is no evidence as to what would have happened if we'd done nothing at all. And that's the right test under *Colonials Savings* and under the restatement. The only evidence they can report to, I think they recognize this problem, is they say if we had done nothing, if we hadn't engaged in the undertaking at all, they claim the FAA would have grounded the fleet. Of course the FAA doesn't have any authority to ground a military plane.

O'NEILL: Is your answer that there is some evidence that they relied under undertaking to report serialized bearings?

POWERS: There's a lot of evidence that - but the Navy didn't even do that. Bell and the Army did return some bearings that we reported. And it is true that they didn't return other bearings because they are not on the list. We agree with that.

O'NEILL: I guess I just want a yes or no. Is there evidence of some reliance on undertaking to look into the serialized bearings?

POWERS: Not on the undertaking. There's no reliance on the undertaking. Reliance means that if we had not engaged in the undertaking, they would have altered their position. There is zero evidence on that. Now it is true that when the Army and Bell returned bearings, they returned bearings that were on our list.

O'NEILL: So isn't that some evidence that they relied on your undertaking?

POWERS: It's evidence of reliance under a standard that we say, Did you not return bearings because they were not on the list? There is no reliance, zero reliance on the undertaking that we engaged in. And the way to test that, take away what we did.

O'NEILL: Isn't what you're saying doesn't that prove just the opposite that if they didn't return them, then they are relying on the fact that you just said the ones they were supposed to

return?

POWERS: I don't think so. Because the test would be, take away what we did, take away us giving them some serial numbers, take that away, what would have happened? Our position is they have to show that if we had not engaged in that undertaking, that if we had not done that, they would have done something about this helicopter and there is no evidence of that.

HANKINSON: But you can also rely on an undertaking by not doing something as a result of the undertaking. Reliance doesn't always require action. Reliance can also mean that I didn't act because you did what you did. But under your definition you're saying they have to have - that action was required for there to be reliance?

POWERS: No. They have to have relied on the part we did. Just like in *Colonial Savings*, the question wasn't, Did you rely on they had promised to get you insurance, and in the abstract sense you thought you were going to get the insurance. The court sent it back to the TC to ask, If no undertaking at all had been engaged in, there had been no promise of insurance, would they have gone and gotten insurance anyway? And we're saying the same standard should apply to our case.

PHILLIPS: Who made the decision to only send a report that involved serialized bearings?

POWERS: That's all we were asked to do.

PHILLIPS: Is there a document that says that? Serialized as opposed to nonserialized, is that going to be uncontroverted testimony that we can look at?

POWERS: The testimony of Mr. McCurry is that we were asked to provide serialized bearings to determine what had been made at Newington verses New Britain. And that's all we were asked to...

PHILLIPS: How about the argument that a nonserialized bearing in and of itself is a defective product because of the difficulty of determining its age?

POWERS: That can't be a claim against us. That could be a claim against Textron because they made the bearing. The source control drawings in 1981 where Textron had proposed a serial number. It couldn't be used unless the military approved it. It was not approved. The source control drawings that were made in 1986 is when they started using serial numbers because they were approved. Putting aside what the government contractor defense does anywhere else, certainly that is a decision by the military that they didn't want serial numbers on these bearings. So the design defect claim against Textron that we arguably pick up through the indemnity is knocked out by the government contractor defense.

O'NEILL: They say in their brief that Torrington made an affirmative representation that everything at New Britain was okay. Is that correct?.

POWERS: There was testimony by Mr. Battle that says that. And we understand we have to live with a no evidence point on that. But that is identical to the representation made in *Colonial Savings*, which says, I _____ the insurance. The court did not ask, Were you made worse off by their _____ or to actually do what they said they would do? The court in *Colonial Savings* said, Were you made worse off by...

O'NEILL: If they said contamination is limited to Newington, and they knew it wasn't, what's the effect to them?

POWERS: Well they might have a misrepresentation claim. They haven't brought that. They don't have an undertaking unless they can show that if we had not made that promise, just like in *Colonial Savings* - a promise to get you the insurance - they have to show that if we had not made that promise, that the Navy would have used some other method of removing this bearing for...

O'NEILL: So in order to _____ your position, we have to presume that if Torrington had not agreed to look into these bearings the Navy would have done nothing to check?

POWERS: Correct. They have the burden to prove that.

O'NEILL: But didn't they by saying that they looked into the investigation and they were looking into it, and Torrington said, Okay we are going to come in and do our part on the bearings. And they said, Okay.

POWERS: There is zero evidence on this record where anybody testified, What would have happened if we just said no to Bell when they said provide these serial numbers? If we just said, no, we are not going to do anything, there is not one shred of evidence as to what the Navy would have done under those circumstances.

O'NEILL: But my understanding of the record was that they had identified that there was a problem possibly with bearings. They have limited their investigation to two or three components. Right? An investigation was going on. And my understanding is that they then backed off when Torrington agreed to do this. Isn't backing off enough evidence to show reliance?

POWERS: There is no evidence - they said they didn't provide bearings that weren't on the list. But there is no evidence that if we had done nothing, the Navy would have removed this bearing. None. All they can say is, they didn't return this bearing because of the representation we made. The test under *Colonial Savings* and under 323 is, you take what their claiming is the undertaking, you take that away and ask is there probative evidence that if we had done nothing, they would have taken some other _____. And they can claim that's true. There isn't any evidence of

that.

OWEN: In *American Tobacco v. Grinell*, we decided that we would not follow the restatement and not impose a duty to take remedial steps after _____. Should we have decided that case differently?

POWERS: I don't think you should have decided that case differently in the context of *Grinnell*. That is the mere fact of selling the product and continuing to get economic benefit from the product. That alone is what the court said in *Grinnell*- there is no post-sale duty. We would agree an undertaking theory is somewhat different than that.

OWEN: But separate and apart from that. They are saying that there should be some liability. If you're a product manufacturer and after the sale you discover your product is defective, you ought to have some duty to _____.

POWERS: No, we think *Grinnell* was decided correctly. And the reason for that is, the afterwards goes on for a long time. It's a very open ended and amorphous duty. If the original cigarette sellers in *Grinnell* were not liable, that is the predecessor who continues to sell the product, going to get economic benefit from the product, if they weren't going to be held liable under *Grinnell*, then it doesn't make any sense for us to be held liable as a successor for that very same thing.

OWEN: But couldn't the original manufacturer here be held liable? They manufactured a product they didn't know at the time that it was defective. Thereafter they learned about the shelf life. Someone is injured from that. What would preclude the person who is injured from suing the original manufacturer and saying, you sold a defective product?

POWERS: Well if it was defective when it was sold, then there would be liability. If it was not defective when sold, under the rules of defect, when put into the stream of commerce, then...

OWEN: Well it was defective because there was a lack of warning about the shelf life. There was a marketing defect.

POWERS: We dispute that. We dispute whether there is any evidence to connect contamination to this bearing back when they put into the stream of commerce. There isn't evidence of that. For there to be liability of Textron they have to prove a 402a claim that is, that the product was defective when it was put into the stream of commerce. And *Grinnell* said under *Turner* that we're not going to then say we are going to later on to find out that the product was defective and hold liability on the basis of post-sale duties by the original seller. And we would think *Grinnell* is perfectly sound on that point for the reason that these post-sale briefs are going to be very open ended. It's different in a case like *Bradshaw* where the seller takes the product back and resells it. There are limited circumstances.

OWEN: I'm still confused. The product was defective. No one knew at the time it was sold that it was defective. But it turns out that several years after it was sold that you learned that the grease doesn't last as long as you thought it would. And it is defective from that standpoint. There's no warning and someone's injured because they used a product beyond its useful life, or beyond the safety time. Then they come back and sue. Why shouldn't there also be a duty to warn on that original manufacturer if they find out that even though they thought the product was okay when they sold it, it wasn't. Shouldn't they have some obligation to go back and warn the public "Don't use these old products?"

POWERS: Whether it was defective when they sold it originally, whether that depends on what they knew or not, depends on whether it's a manufacturing defect or a warning's defect. The rules are different. If, and this is exactly what *Grinnell* said, *Turner* defines how we are going to define whether a product is defective, and we are going to do it at the time the product was sold. If under a warning's claim, the law of Texas is you are only liable under a warning's claim if you knew when the product was sold. That ought to define what the warnings liability is for that product. The danger of then having a post-sale duty to warn except in very limited circumstances like *Bradshaw*, is that going to go on forever. For example, they are claiming we had a post-sale duty to warn about a product that was manufactured in 1984. We should have given a warning in 1991. This bearing, the Navy bearing manual gives it a three-year shelf life. How were we to possibly know this bearing was still going to be on the market and give a warning about it?

ABBOTT: The thing that doesn't make sense about that is if you sell a bearing that you know has a three-year shelf life, and so if you know that after three-years that this is going to be used, the helicopters coming down. Let's just assume that. So if you know after three-years the helicopter is going to crash if that bearing is used, why shouldn't there be an obligation to warn "Do not use this bearing after 3 years?"

POWERS: When the product is sold I think that's true, and the Navy knew that. That's in the Navy bearings manual. We don't dispute that Textron that sold the bearing originally had a duty to warn about shelf life that it knew about. But under *Caterpillar v.* _____ the Navy already knew about that.

O'NEILL: Isn't it a fact issue as to whether the Navy in fact had a shelf life policy for these bearings?

POWERS: The bearings manual lists a three-year shelf life.

O'NEILL: Isn't there a fact issue on that?

POWERS: I don't think so. How could it be that the Navy didn't know this?

O'NEILL: Tab E, what does it mean when it says, The shelf life code assigned by naval

supply systems command to the TRDS hanger bearing is zero?

POWERS: We invite you honors to look very carefully at the way this evidence has been presented in our brief. The hanger assembly is different from the bearing. It doesn't have an independent shelf life. But the bearing itself does have a three-year shelf life and the records for the bearing itself will stay with the hanger bearing assembly.

O'NEILL: Are they going to agree that there's not a factual dispute on that point?

POWERS: They may not agree with that. But when they say that the hanger bearing assembly...

O'NEILL: It doesn't say that. It just said the hanger bearing is zero.

POWERS: But the document that has a zero non_____ that they rely on to say that is a document about the hanger bearing assembly, not the bearing. The bearing has a three-year shelf life. The zero is on a document about the assembly, and the assembly itself doesn't have an independent shelf life other than the components in it.

O'NEILL: Isn't an assembly capable of deterioration?

POWERS: No, that's why they put a zero on their assembly. The assembly itself doesn't have any - the component parts have shelf life, but the assembly itself doesn't have an independent shelf life. And that's all they are saying in that document. That does not mean that the Navy did not have a three-year shelf life for the bearing. And the bearing manual clearly says that.

O'NEILL: Is there testimony that will clarify how you have explained the statement?

POWERS: I think the documents themselves apply to the hanger bearing assembly.

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RESPONDENT

COWAN: Suppose in this case where we had affirmative testimony from witnesses with personal knowledge concerning what Torrington actually did and what undertaking they actually made, someone attempted to introduce evidence to the effect that well if no representation had been made the Navy would have done X, Y, Z. Would not that be the grosses form of speculation and conjecture and would you not as trial judges sustain an objection to that, the speculation and conjecture? The position that Torrington takes is a catch-22 situation. They would require us to prove something which is insusceptible of proof. And that is, what would have occurred had the facts been different? We will explain to you very explicitly why there is plenty of evidence of reliance, plenty of evidence that these men have met their deaths in part because of the failures of Torrington.

HECHT: But I take it by your lead-in that if petitioners are right about the standard, if that's what you had to show was that the Navy would have done something different, you didn't do it?

COWAN: No, we think that the inference could be drawn that the Navy would have done something different. But there is no direct evidence that the Navy would have done something different because it would have been speculative in the light of this record.

Now you are quite right that we have serious differences of opinion on what the evidence shows in this case. And I would draw you attention to the fact that the CA said that both sides misrepresented the record in the CA. I hope we were not guilty of that there. If in the course of your deliberations you conclude that we have been guilty of that in any degree, I hope you will give us an opportunity to submit record references and arguments to repute that. Because this is not the easiest record in the world to read, but we think we've got it right.

We don't think we've got a whole lot of difference from our adversaries as to the applicable law. A few years ago in the _____ case, this court quoted Judge Cardosa who said, It is ancient learning that one who assumes to act may thereby become subject to the duty of acting careful if he acts at all.

O'NEILL: What evidence do you point to to support your scope of the undertaking argument, that they undertook to look into all -5 bearings?

COWAN: The evidence on that occurs in late Sept. or early Oct. 1991 when the FAA and Bell become very suspicious of Torrington. And the FAA and Bell and Petroleum Helicopters launch an investigation of the Torrington manufacturing facility. And during that investigation they find several shocking things. They find that Torrington has been exercising no control over grease lining? And perhaps even more important they find that Torrington has been using contaminated cleaning fluid to clean these bearings, in which cleanliness is essential. And so the party's confer. And the testimony on this comes from Mr. Battles, and it is reflected very, very clearly in the plaintiff's exhibits, which we've cited in our brief.

What then happens is that this investigation is going on and Torrington says, in effect, not to worry. This is a containable problem. All of the problem is at Millington and all of the problem is with these specific serialized bearings.

O'NEILL: And by doing that, did they not thereby limit the scope of their own _____?

COWAN: They went a little bit further than that. They also participated in the investigation. And they also said we said duty not only to give accurate information concerning the bearings that were suspect, but to give an accurate warning concerning the gravity of the situation. So we say, but particularly when you look at the relationship which had been established over the

years between Torrington, and it's only to customers for this bearing, the military and Bell when you look at that relationship, they have a duty not only to give accurate information concerning the bearings that were suspect but to also give a warning which was a minimal to the intensity of the...

O'NEILL: If they in fact said, the problems are at Newington and they relate to serialized bearings, it seems to me that would define the scope of the undertaking. Now there might be a misrepresentation claim but in terms of defining the scope of what they undertook to do, why wouldn't that be sufficient?

COWAN: We don't agree that it is, but assuming hypothetically that you are correct, what happened here is that that was a terrible representation to make. Because we know for four different reasons that that representation was negligently false.

O'NEILL: Well but that's a different legal theory isn't it?

COWAN: No. We pled general negligence. And they were convicted of general negligence. There was never any exception to the general plea of negligence. And we say and the jury found and the evidence supports the fact that after that investigation in Oct. 1991, Torrington was negligent.

O'NEILL: I feel like I'm putting a square pole into a round peg. It seems like that voluntary undertaking is a very limited proposition, and you limit it to only what was undertook. And if that's the case, it seems like what you're saying is, Well because they knew more they should have told us more and they should have undertaken more. But the fact remains that they didn't. They defined the scope of their undertaking.

COWAN: We say they had a duty to tell us the truth. And the reason they didn't tell us the truth is: 1) you can look at the calendar. In October 1991 any bearing that had been out there over 3 years was suspect. They knew they still had unserialized bearings that were on the market. So 1) their representation was false there. We also know it was false because low and behold after we do discovery, these specific numbers that they give us include numbers of bearings which were manufactured at New Britain. Three, we know the representation was false because on the helicopter that caused this fatal accident there were four bearings.

O'NEILL: Let me just get back to the scope of the undertaking. So then your definition of the scope of the undertaking is that they agreed to find out the cause of this 1991 accident, and that was broader than just locating it to a -3 bearing?

COWAN: No. Our argument is that they had the duty to tell us to the truth, to carefully tell us the truth, and to give us an adequate, careful warning which would be given by a person of ordinary prudence.

ENOCH: The navy knew about the shelf life of the bearings?

COWAN: Can I correct a confusing thing about this record that I only realized myself very recently. Part of the confusion in this record is that the witnesses and some lawyers used two terms interchangeably: grease life and shelf life. Those are two entirely different things under the evidence in this case. Shelf life means, according to one of the Navy's manuals, according to the testimony of their witness, the time that the bearing actually sits on the shelf in the wholesale and retail distribution chain. Here, the shelf life of this bearing may not have been more than a week. Then when the bearing is put in the next higher assembly according to the Navy's manual, the bearing may be expected to last longer than the next highest _____, which is what occurred here. So the Navy knew that there was a shelf life, but the Navy did not and was never told by this manufacturer that three years after this bearing is manufactured or three years after the grease is manufactured, you've got to either throw it away or send it back to the factory, which is the warranty which is given by the current manufacturer of this bearing.

ENOCH: So you're saying that although the Navy in its bearing's manual had a three-year shelf life for the bearing, it at no time - the Navy had never been notified that the grease life of this bearing was 5 years?

COWAN: The grease life of the bearing was 2-3 years, and yes, the Navy did not know. And the reason you know the Navy did not know that is because _____ Ex. 23 is the Navy's manual. And you look at that manual and it says, after this three-year shelf life is over you reinspect the bearing. Now this bearing cannot be inspected. A non-regreasable bearing cannot be inspected for bad grease. That's one of the unique things about it. And that's why the current manufacturer says, Two years after we put it out, you need to either throw it away or send it back to us. The Navy very definitely did not know that 2-3 years after this bearing comes off the assembly line, 2-3 years after the grease is put in it, you throw it away. The Navy did not know that. And that is shown by Ex. 23 and it's shown by plaintiff's ex. 31, which is the exhibit that Justice O'Neill was talking about. And what plaintiff ex. 31 shows is what the navy was talking about is that once a bearing is taken off the shelf and put in the next higher assembly and wrapped up and stored under special conditions, then shelf life is not applicable anymore and the bearing can be expected to last longer than the next higher assembly.

OWEN: How can that possibly make sense. It will not last on the shelf but once you install it it's going to be okay. I don't follow that logic.

COWAN: That's what the navy manual said. And it does make some sense because what they do is that they wrap it up, grease up, and they put it in a controlled environment. And so that is what the navy manual says. So capsulizing the evidence, we ask that you look first of all at the nature of the bearing. Second at the relationship that existed between Torrington and the military. Torrington for years has held itself out as the expert on this type of bearing. It had put out oral and written communications giving advice about shelf life and grease life. Confusing and wrong advice,

but advice. It had government inspectors at its factory. It was in constant communication - first name basis with the navy personnel. The navy has admitted that Torrington is in fact the ultimate authority on this bearing. And last of all is the evidence concerning what occurred during the period from Oct. 1991 until the middle of August 1992.

Torrington says, Not to worry. All limited to these specified bearings. And if you do the math there's about 5,000 to 6,000 suspect bearings. The military has 8,000 helicopters; 32,000 bearings out there in use. What Torrington is saying is that the problem is limited to these 5,000 bearings. That information is transmitted to the navy and what the navy maintenance personnel gets is a document called DCD 80(?), which is Bell ex. 35a. And that document says, All you have to do is check on these serial numbers and you don't have to take it out right now, take them out at the next phase inspection. So what we have here is we've got a universe of 30,000 bearings out there and Torrington is saying 1) it's not a real serious problem; and 2) it's limited to these 5,000 bearings. So what we say is what the jury could have concluded, the jury could have concluded that if Torrington had told the truth and if Torrington had said we've got a lot more bearings out there than just 5,000 bad ones, the navy would have taken a more vigorous action. They would have not come out with this sort of _____ warning that you see in DCD 80(?), and if they had regard for their personnel and their property they would have taken more vigorous action as Bell did, because there is evidence that Bell who had more knowledge about this situation than the military sent back all of its -5.

ABBOTT: But is one of the issues that there is no evidence indicating that that is in fact what the navy would have done? What evidence supports your statement that you just made?

COWAN: The statement about what the navy would have done? Common sense; how people normally react. Certainly if the navy had had a good warning it would have gotten these bearings out of there.

ABBOTT: But what evidence supports that?

COWAN: We've got the fact you know what the navy has. We know that the navy had this list of bearings. We know that the warning that was given was not very alarming. And we know that the navy's maintenance people limited their attention to these specified bearings. We also have this situation, which I think is some evidence from which a jury could infer what would have been done had a proper warning been given. From circumstantial evidence it can be established, good circumstantial evidence, that after this fatal accident occurred, the military at that point decided it wanted to get rid of all of these bearings, all of the bearings that had been manufactured under the bad procedures that existed at Torrington. Because one of the things that was discovered in this investigation was that Torrington for years had been using this bad cleaning solution. Bell made them modify their procedures, move it to a different part of their factory, a move which trippled the cost of the bearing.

ENOCH: Now of course that was back when Textron owned the bearings and not Torrington, right?

COWAN: Well that's true.

ENOCH: And these bearings had no serial numbers when Textron was manufacturing them. So what shape of the warning would this subsequent owner of this manufacturing plant have given about the bearings they didn't manufacture?

COWAN: In the first place they took on all of the product liability of their predecessor. They bought the business, they bought the know-how, they bought everything. A proper warning would have said, Look, we've got a bunch of bad bearings out there and some of the worse bearings are the unserialized bearings.

ENOCH: They don't know that do they?

COWAN: They do know that.

ENOCH: Because they are doing the same manufacturing process in Newington that was done in New Britain?

COWAN: Absolutely. Mr. Battles's testimony establishes that.

ENOCH: So Torrington would say that, We understand how Textron was manufacturing these bearings and so we're sending you a warning that all those bearings are bad?

COWAN: Absolutely. It's the same enterprise.

ENOCH: That's the warning they should have had?

COWAN: The same processes. Their warning first of all should have been more intense. Their warning should have been true, and their warning should have told people to get all those bearings out of there that were manufactured under the faulty processes which Bell made Torrington abandon.

ENOCH: And that has to be the fact because without the serial numbers there would have been no way that you could have identified any individual bearing of when it was manufactured. So the only solution would have been to pull all unserialized bearings?

COWAN: Which should have been done in any event because any unserialized bearing was more than three years old.

BAKER: Are you also arguing that because Torrington bought Textron, that it's strictly liable for the defective -5 bearings?

COWAN: Yes.

BAKER: Having said yes there, your opponent says that that was never pled, that you didn't plead a case based on the contractual assumption of liability for defects in Textron bearings?

COWAN: I'm not prepared to address that because I didn't understand that to be their position and I have not studied the pleadings. I cannot accurately answer your question.

BAKER: Assume that that's correct, then would it be a correct statement that the theories of liability would then be limited to the main discussion that you've had this morning of misrepresentations based on the undertaking?

COWAN: Our principal thrust in this case, yes, is directed to plain negligence and plain proximate cause.

BAKER: Justice O'Neill has asked both sides what is the definition of exact undertaking and I'm not sure anybody has answered her question yet. How do you define the undertaking of Torrington vis-a-vis what Bell asked them to do?

COWAN: We think that Torrington having agreed to participate in this process and having said these are the suspect bearings had the absolute obligation to give accurate...

BAKER: That again is your interpretation of what might have happened, but it still doesn't define the precise undertaking. There's an indication from what the court has seen that it was to report serialized bearings in certain classes and it did not include the unserialized bearings that were made in 1984.

COWAN: I would respectfully suggest that if you read Mr. Battle's testimony, if you read the key exhibits, what happened was that these parties had a problem. They had a problem because they knew that bad bearings were going out, and that Torrington for whatever reason said, the problem is limited to these specific serialized bearings manufactured at this plant.

BAKER: Now would it be a fair statement they said that because it was in response to the undertaking that Bell asked them to do, and no more than that?

COWAN: No. There is no precise evidence as to exactly what Bell asked them to do. There's lots of evidence as to what they did. But there is no evidence as to what Bell precisely asked them to do.

O'NEILL: My understanding from reading the briefs, I'm not sure I understand exactly why. The jury came back with a zero liability finding on Textron initially; some reargument was had and they came back with one percent. Can you just tell me what happened there?

COWAN: That is an accurate statement of what occurred. And I would assume you're asking me does that make any sense? And the answer to that is, yes. And the answer to that is, yes, because of the overbearing terrible nature of the negligence that occurred from Oct. 1991 until these men met their death.

O'NEILL: So are you saying that the court said, that finding can't be right, come back and argue it again and take another stab at it?

COWAN: My understanding of that is that that's what Torrington asked them. That's not what the court said. Torrington asked that it be reargued

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LAWYER: Judge O'Neill I was there. I'm the only lawyer addressing this court who was at this trial. To answer your question specifically, issue 1a asked about the negligence of Textron's factory, the old company. There was no evidence of that. We submitted that question. The factory's lawyer objected to the submission of that question. I joined in to that objection because the absence of evidence, the plaintiffs joined in, but the court wanted that question answered. And he got it.

O'NEILL: It was answered with a zero, correct?

LAWYER: Right.

O'NEILL: And then argument was made to the court that that just can't be, so please resubmit it?

LAWYER: Right. The bearings were bad. The global truth of the evidence was the bearings were bad. I argued to the jury, then you must find guilty. But, the overall weight of the fault lies with the Torrington Factory.

O'NEILL: Is 100 percent originally put on there?

LAWYER: Yes. 100 percent was originally put on them, the jury came in, and then at Torrington's factory request asked that the jury be brought back in and argument be made to them to answer the question differently. At that moment _____ argued that 100% be placed on Textron _____. Mr. Waters, my co-counsel, argued apparently very effectively that 1% would be fair. The jury came back with 1% on the _____, and 99% on the other.

What's interesting is, Bell had a negligence question against it. The negligence in this case against it was for the allegation that the bearing failed due to the misaligning of the tail rotor cause the bearing to fail. The plaintiffs submitted evidence on that and brought an expert, and _____ submitted evidence on that and brought an expert, and I had to fight that, and I did that with a preeminent metallurgist that the jury understood and followed and they exonerated Bell completely of any negligence in this case. 100%.

PHILLIPS: I assume we all agree that the allocation of time and strikes has to be on what the trial judge can see from the record, the understanding as of the time those decisions are made. What part if any can the fact that there were no double strikes among this panoply of what turned out to be people, at least by this point, people with a similar interest on both the plaintiffs and the defendant's side. Can the trial judge have looked at that in terms of allocating argument and can we look at it now, the fact that there were no double strikes?

LAWYER: I think the court did. I think that's been the discretion on the trial court to do that and he should do that. I don't think there is any error being addressed to this verdict because of the allocation of argument.

PHILLIPS: It's all on strikes?

LAWYER: Yes. And in that situation, Rule 233 will have to be completely rewritten by this court in order for there to be a reversal of this case. I'm interested in this court affirming the indemnity that is owed, and apparently conceded in argument this morning, owed by Ingersoll-Rand to Textron. Under the contract that was tried to the bench, the judge included that in his judgment, and by inference there was no problem at all with his finding of indemnity.

What the appellates do here is attack that the only way they can. And they are saying that it obtained through collusion. And there was no collusion whatsoever. There is clear evidence and the only evidence in the record is the contrary of collusion. And this court will have to believe that this lawyer standing before you who testified on that issue lied. Because that's what they say I did, and I did not do that.

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REBUTTAL

GONZALES: What did the Navy know? Do you agree with Mr. Cowan's description of what they knew?

TOWNSEND: What we have to keep straight, and I'm not trying to avoid your question, but I've got to put it in context, Are we talking about shelf life? Are we talking about contamination? Are we talking about serial numbers? Are we talking about old grease? Because the Navy knew different things with regard to each of those.

They knew there was a three-year shelf life. Plaintiff's ex. 31 and page 2 of the Tab document you were looking at Justice O'Neill shows that the hanger assembly has a zero shelf life, but that the bearing in it has a three-year shelf life. The Navy always knew that. Contrary to what counsel said, the shelf life of the grease before it goes on the bearing was established by the Navy. The Mobil witnesses came in and said, We guarantee it for 2 years in the can. That came from a Navy specification.

The Navy knew that there were no serial numbers on the bearing in question, because it was made before the government allowed us to put serial numbers on the bearing.

O'NEILL: What did they find as to the 3 bearing in the 1991 crash?

TOWNSEND: They found contamination.

O'NEILL: And so are you saying that they therefore limited their undertaking to contamination and not their shelf life policy?

TOWNSEND: The shelf life, yes. Everybody knew the shelf life. It is a *Caterpillar v. Shears* no duty to warn of something that people already know. It's just that easy on shelf life.

O'NEILL: Did y'all request that it go back to the jury on Textron's liability?

TOWNSEND: What happened was counsel stood up and said, Find my product defective, Textron's product defective, which the jury did but they found no negligence. And then they put zero. And our counsel said there was a conflict because you've got a finding of product defect but a zero answer percentage. And we said it was a conflict. And Judge McHaffey said, well go reargue it. And that's when it was changed.

The thing that everybody seems to be missing, and counsels are talking about, unless the bearing were proved to be defective when Textron put it in the stream of commerce in 1984, then it doesn't matter what happened later. All this stuff about what Torrington did in 1991 and 1992, it just falls by the waste side.

ABBOTT: What if it were defective because of an inadequate warning?

TOWNSEND: Inaccurate warning would have to be the shelf life. And we stand or fall on the fact that the Navy knew what the shelf life was. And we have proof in the record in addition that they disregarded it. So under *General Motors v. Sines* we win on a causation argument as well on shelf life.

OWEN: But didn't Torrington know they were using their bearings much longer than three years?

TOWNSEND: No, there was no evidence of that. Later there is evidence of new bearings being sold with a 5-year shelf life. This bearing was past 5 years old before those contracts were ever signed, and before it was first put in a helicopter. If anything that would have told the Navy, Hey we've got a bearing out here 6 and 8 years olds, we need to get rid of it, and they forgot, which is why they concluded they caused it.

ABBOTT: The shelf life and what I call the use life. The use life was 3 years?

TOWNSEND: Yes.

ABBOTT: Why didn't they have an obligation to warn of the use life?

TOWNSEND: The Navy knew that as well, because the Navy set that specification and we didn't violate that. There is no proof - again going back to Textron - there is no proof that anybody violated that life. All the evidence shows the grease before it was put in the bearing was at most 2 months old.

PHILLIPS: You said the government frequently relies on military contractors to know more about these component parts than the government knows as with the O-ring failure in the Challenger?

TOWNSEND: In some cases, that's correct.

PHILLIPS: And you say that's not true here?

TOWNSEND: That's not true here.

PHILLIPS: Do you also stand or fall on what the navy documents that you refer to say, because apparently there's a difference in view about what's actually _____ and covered by this terminology?

TOWNSEND: The Navy manual does not talk about the grease life in the pan. That is established through the Mobil policies. But it does talk about the shelf life of the bearing after it's been placed into the stream of commerce.

PHILLIPS: What about the fact that opposing counsel said that the manual talked about inspecting after three years?

TOWNSEND: No, the testimony in the record is that you can inspect. You look to see if the seals are discolored, which would show leakage, you look to see if they've been cocked(?) by misalignment, which in fact they found in investigation after this case. And there are ways to inspect it. And the Navy sometimes sends bearings back to its depot and actually regreases them. Even

though they are not supposed to, there is evidence of that in the record.

Their whole attempt to tie liability on Torrington depends on two flimsy pieces of evidence. One is, that we got a Greek(?) bearing back in 1991 that nobody knew where it had come from. It was at least 10 years old and it showed some contamination in it. Well the contamination could be caused simply by the fact that the grease was 10 years old at that point. That gave Torrington no reason to think that this bearing made in 1984 by Textron was contaminated. That's why we didn't undertake any duty to recall bearings that had been made 8 years previously by another company. And their other exhibit is this letter, plaintiff's ex. 74, which talks on its face about -3 bearings. And the undisputed evidence is that the processes for -5 were changed between New Britain and Newington. It's an inference backwards anyway. You have to assume, well there's a bad bearing at Newington, and the letter says Newington is like New Britain, therefore, it must have been a bad bearing at New Britain. But even that letter not talking about -5 is talking about Torrington's processes. It's not talking about Textron.

O'NEILL: If we were to find no liability on Torrington under your theory, we've still got to address indemnity?

TOWNSEND: If you buy my argument that there's no evidence that the bearing was defective when Textron put it in the stream of commerce, then there's nothing to indemnify.

O'NEILL: But if there is evidence, then do we have to address the government contractor defense?

TOWNSEND: Yes, I think you do.

O'NEILL: Did Textron assert that defense?

TOWNSEND: Textron we say as part of its collusion agreed to submit that non-jury to the court. We tendered the defense as the alleged indemnitor on behalf of Textron to preserve that.