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A Response to *Sherk*: Chagrin Without Despair and Hope Without Presumption

*William A. Donaher*

I

The development of the judicial concept of strict product liability as a general principle of law, from its early but elaborate suggestion in Justice Traynor’s concurring opinion in *Escola v. Coca Cola Bottling*,¹ (a manufacturing defect case) to its fulfillment in Justice Traynor’s opinion for the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,² (a design defect case) gave every promise of this Garden of Eden having come fully equipped with lurking serpent. The linking, within a single legal concept, of two such disparate subject matters as the production defect and the design defect overlooked the critical differences between these two classifications of cases and the necessity of recognizing that the tests to be applied for the purpose of determining whether a manufacturing defect existed, giving rise to imposition of strict liability, cannot be transposed for application in a design defect case.

Although evidentiary problems may prove difficult in a production defect case, the elements of the cause of action are simplicity itself. The crucial question of defect is addressed by the expedient of determining whether the injury-causing product did or did not conform to a definite norm (such as the manufacturer’s in-house specifications, industry wide standards, or a universal performance expectation), followed by resolution of the question of whether the identified defect was causitive of the injury. Determination of the question of the presence of defect in a design defect case admits of no such easy testing procedure. In the design arena, the design is tested against a societal norm which the jury constructs out of a multiplicity of conflicting considerations which themselves shift in

¹ 24 Cal. 2d 453, 150 P.2d 436 (1944).
the importance accorded them, on a case by case basis. Employment of the familiar Wade criteria indicates the variations, and the variables therein, which come into play whenever any product, even the least complicated, is under examination in the context of design defect litigation. In short, the only thing common to the production defect area and the design defect area is the ultimate step, i.e., imposition of liability without proof of defendant-manufacturer's fault.

However, the spill-over of language and concepts from production defect cases into design defect cases has, by virtue of this odd juxtaposition, resulted in some misleading and confusing results. The premier example of this spill-over effect is found in Cronin v. J.B.E. Olson Corp., a production defect case of simple character in which the California Supreme Court states that the concept of "defect" need not be illumined by considerations of "unreasonable danger," and goes on to note, gratuitously and disastrously, that "we can see no difficulty in applying the Greenman formulation to the full range of products liability situations, including those involving "design defects." A defect may emerge from the mind of the designer as well as from the hand of the workman."5

The short term consequences are discernable in the confusion of the New Jersey courts. The medium term effects are to be observed in the perplexity of the California trial courts' and the in-

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(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. (footnote omitted).

4. Id. at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.


termediate appellate courts’ bewilderment. But the long-term invalid would seem to be Pennsylvania. ⁸

The absurd insistence that a word of art such as “defect” is adequate to enlighten the fact-finding jury of the scope of their function was happily abandoned, if somewhat disingenuously, as early as 1978, in Barker v. Lull Engineering Co., ⁹ by the culprit California Supreme Court. If their ludicrous assertion that it is difficult to understand why Cronin caused confusion¹⁰ may contribute to the merriment of the age, their inapposite suggestion that a test of “excessive preventable danger”¹¹ is a less obnoxious guide than the term “unreasonable danger”¹² compels our conclusion that novelty is the pearl without price in the jurisprudence of California. Certainly the suspicion must have been entertained by others than myself that although the word “unreasonable” does not compel the mind to an orientation of negligence, the term “excessive preventable” inescapably evokes a consideration of manufacturer’s attitude. “Preventable” by whom? In short, the misguided attempt by the California Supreme Court to avoid a wholly imagined confusion of the principles of negligence and strict liability has degenerated into a cosmetic exercise as mystifying as it is pretentious.

For the vast majority of courts, the dilemma was avoided. For the New Jersey courts, it has been overcome.¹³ For Pennsylvania, alas, the error not only persists,¹⁴ but has spawned a frightening progeny.¹⁵ Ironically, it was some months after the California Supreme Court had, in Barker v. Lull Engineering Co.,¹⁶ “interpreted” the guts out of the Cronin decision that the Pennsylvania Supreme Court resoundingly reaffirmed the position it had earlier taken in Berkebile v. Brantly Helicopter Corp.,¹⁷ in its decision in Azzarello v. Black Brothers.¹⁸ The Azzarello opinion relied heavily

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⁹ 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
¹⁰ Id. at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235.
¹¹ Id. at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.
¹² Id at 423, 573 P.2d at 450, 143 Cal. Rptr. at 232.
¹⁶ 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
upon the already repudiated *Cronin* position, in enunciating a Pennsylvania rule that extraordinarily combines within itself the wholly disparate elements of negligence law and absolute liability law. The operative language of *Azzarello* reads:

For the term guarantor to have any meaning in this context the supplier must at least provide a product which is designed to make it safe for the intended use. Under this standard, in this type case, the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.19

The juxtaposition of the negligence language of "intended use," inescapably reflecting manufacturer's establishment of a parameter of liability for itself as well as introducing as a relevant issue manufacturer's conduct, or attitude assumed during the design process, with the absolute liability language of "guarantor," "lacking any element necessary to make it safe," and "possessing any feature that renders it unsafe,"20 creates a dilemma of unimaginable magnitude for those charged with interpreting the Pennsylvania rule. For trial courts, intermediate appellate courts, and lawyers engaged in counseling clients as well as litigating products liability cases, did the absence of any qualifying language addressed to the balancing of risk and utility considerations suggest, or even compel, the conclusion that the Court was opting for an absolute liability rule? And, concurrently, was the court, in employing language of "intended use," suggesting a vast enlargement of the misuse defense, which would mark a further division between the Pennsylvania approach in products liability law and the direction taken by nearly every other jurisdiction? For nearly four years there was no response to either question from the court. In August, 1982, there was delivered an answer,21 arguably somewhat tentative,22 to the second question, but it was an answer that made the previous pe-

language. That unwillingness found its justification in the fact that only two of the seven participating justices of the Pennsylvania Supreme Court joined in the court's opinion, although all seven concurred in the result. Since the Pennsylvania Supreme Court had previously held, in Commonwealth v. Silverman, 422 Pa. 211, 218 n.8, 275 A.2d 308, 312 n.8 (1971) and Commonwealth v. Little, 432 Pa. 256, 260, 248 A.2d 32, 35 (1968), that opinions of their court which had been joined by less than a majority of participating justices lacked precedential effect, the view of the federal courts can be appreciated.

19. 480 Pa. at 559, 391 A.2d at 1027 (footnote omitted).
20. *Id.* (emphasis added).
22. Of the six participating justices, only three joined in the plurality opinion. *See* *supra* note 18.
period of suspense look attractive by comparison.

In *Sherk v. Daisy-Heddon*[^23] the Pennsylvania Supreme Court considered questions of whether actions in negligence, warranty, strict liability in tort (under section 402A of the Restatement (Second) of Torts) or misrepresentation (under section 402B of the Restatement (Second) of Torts) would lie. For three of the participating six members of the court, an alleged misuse of the allegedly defective product by an additional party defendant, sufficed to shield the defendant-manufacturer from liability, with a fourth member of the court joining in the conclusion, if not the opinion, of the other three. Justice Larsen filed a dissenting opinion, in which the then Chief Justice joined.

The events leading to infliction of a mortal injury through use of the allegedly defective product are as follows. A fourteen year old boy persuaded his parents to permit him to purchase, through mail-order, a “Power King” pump-up air rifle manufactured by the Daisy-Heddon Company. The Power King was delivered in a box bearing the Daisy logo, a “bull’s eye” target, and accompanied by certain warnings and instructions. The reader was instructed that the Power-King was much more powerful than the traditional Daisy BB gun and was warned not to point the gun at anyone. There was, however, a complete absence of any warning, in the material accompanying the gun or in the mail-order catalogue materials or advertisements for the gun, that this particular model of the Daisy air rifle was the first Daisy gun which could, and would, kill human beings if it were pumped up to a high level. A few days after receiving the gun, the boy-purchaser, at play with a fourteen year old friend, unintentionally shot his friend in the head with a BB from the Power King. The BB passed through the friend’s skull and penetrated five inches into the boy’s brain, killing him.[^26]

The administratrix of the estate of the deceased child instituted the instant law suit against Daisy, the manufacturer of Power King, predicing her claim upon strict liability grounds of defectiveness of the gun due to absence of adequate warnings and the negligence of the defendant-manufacturer in its manufacture, promotion and marketing of this lethal weapon under the “Daisy” logo, a logo long recognized as associated with a toy.

Inasmuch as the plurality opinion rests entirely upon the pro-

[^23]: 450 A.2d 615 (Pa. 1982).
[^24]: Restatement (Second) of Torts § 402 A (1965).
[^25]: Restatement (Second) of Torts § 402 B (1965).
[^26]: 450 A.2d at 622 (Larsen, J., dissenting).
position that the child firing the Power King "is exclusively re-
sponsible for the consequences of his misuse"27 this commentary
shall be addressed to the narrow grounds for the decision enunci-
ated in the plurality opinion and to certain points raised in the
dissent.28

The scholarly and comprehensive treatment of the issues of neg-
ligence law and causation which constitute a major portion of Ju-
stice Larsen's dissent lie outside the purview of this commentary.
However important, indeed vital, the dissent's observations are
in these areas, the focus of my consideration is upon the long range
implications arising from the plurality opinion and the delightfully
enlightening perceptions about product liability set forth by the
dissenting justice.

II

Not surprisingly, the author of the plurality opinion labors to
assign to the purchaser-actor a degree of perception regarding the
dangerous propensities of the Power King which argues for as-
signing to that child the sole legal responsibility for the tragic end
result.29 It is noted that the boy knew that BBs fired from the
Power King could shatter glass bottles and pierce tin cans, that it
was "some[what more] powerful than the spring BB guns he had
previously used,"30 that a BB fired from a Power King could blind
a person and that the gun should never be aimed at anyone. The
boy's testimony that he hoped to use the gun to kill rabbits and
rats is also recited.31 The only unambiguous conclusion to be
drawn from this summary of testimony is that the Power King was
perceived to be a bigger and better model of the familiar BB gun;
the suggestion that the Power King was perceived, or would be
likely to be perceived as a potential killer of human beings is com-
pletely unsupported by any evidence presented at trial. Indeed, it
is virtually certain from an observation of the warning-instruc-
tional material32 that Daisy was trying to enjoy the best of two
worlds in appealing to its established clientele that the Power King
was a new improved model of the familiar Daisy BB gun, without
committing itself to the statement that it was a death-dealing

27. Id. at 618 (emphasis added).
28. Id. at 622 (Larsen, J., dissenting).
29. Id. at 617-18.
30. Id. at 618 (emphasis added).
31. Id. at 618 (emphasis added).
32. Id. at 619 n.5.
weapon. The evidence of its own Director of Product Evaluation and Director of Research and Development establishes that Daisy was branching out into previously untouched territory, while its warning-instruction material belies any claim that Daisy's new venture was being carried out in a candid fashion. On the record, as referred to in the plurality opinion, it is not only implausible to assert that the child firing the BB gun had any inkling of the potential for serious injury which might result from the act; it is absurd to so argue. Misuse of the product there certainly was, but such a determination does not, can not, conclude the exercise of resolving a complex legal question. Two questions remain: (1) Can Daisy be viewed as responsible for the misuse; and (2) Did Daisy have an obligation to design (in this instance by using a different logo for the Power King, and explicitly warning of the life-taking potential of this weapon) for possible misuse? If either question is responded to affirmatively, then Daisy is not simply equally culpable with the boy who pulled the trigger; Daisy is exclusively responsible for the tragic event.

As to whether Daisy lulled the boy who pulled the trigger into a state of complacency by marketing the gun as simply a "much more powerful type gun than the traditional Daisy spring-air BB gun," certainly a jury question is presented. It is difficult, if not impossible, to conclude that the above complacent kind of wording, especially when coupled with the marketing of the gun under the Daisy logo, would as a matter of law alert the user of the gun to its lethal potential. Rather, particularly in light of the very explicit concern voiced by Daisy's Director of Product Evaluation, but ignored by Daisy in marketing the gun, a stronger case is made for concluding, as a matter of law, that Daisy had encouraged, in the minds of the users of the Power King, an attitude bordering on the cavalier. If so, the plurality opinion exalts to conclusive importance a "misuse" which, at the very least, was to be anticipated, and in fact insulates the manufacturer from the consequences of its own intentional activity.

Under the nearly universally applied standard for determining

33. *Id.* at 623 (Larsen, J., dissenting).
34. *Id.*
35. *Id.* at 619 n.5.
36. *Id.*
37. *Id.* at 623 (Larsen, J., dissenting).
defectiveness in the warning area of product design, Daisy labored under a burden little, if at all, more onerous than it would be required to meet when the complaint sounds in negligence. Daisy was required to warn against, in an adequate fashion, dangers which it did perceive or should have perceived. Daisy's perception cannot be at issue. The only question remaining is addressed to the adequacy of the warning.

It is here that the dissent furnishes new insight regarding both the instant case and the whole approach to product liability. More than one forest has been sacrificed in the payment of tribute to the proposition that it is the product which is the pivotal point in strict product liability litigation, but almost inevitably that observation is closely followed by a discussion of what the manufacturer should have done, or would have been obliged to do if knowledge had been possessed by it. If in fact the manufacturer's state of knowledge or culpable ignorance is irrelevant, it little advances our perception of critical questions concerning product liability to discuss a question in terms of the manufacturer's state of mind. Justice Larsen considers the matter of adequacy of warning in the context of the interplay between product and consumer, putting aside the perceptions of the manufacturer. His language expresses the approach better than any attempted rephrasing:

[C]onfusion can perhaps be avoided if one conceptualizes the product itself as the "defendant" in the case. Within this framework, the trial court should direct the jury's attention to the "invitational aspect" of the product, that is, those characteristics, both apparent physical properties as well as externalities such as marketing, promotional activities, labels, logo, prior use of similar items, etc., that combine to evoke a particular image of the product in the mind of the consumer as to the product's function, its capabilities, the risks inherent in its use, and its limitations. The popular perceptions in the marketplace cannot be divorced from the product . . . . A product thus "speaks" to society through its "invitational aspect", as ascertained both by its apparent physical properties and by various (and varying) external factors. Such an approach relegates the role of the manufacturer's conduct and other negligence concepts to the insignificance consistent with strict product liability, and elevates to requisite prominence the pivotal interplay between product and users (society).

The instant case amply illustrates the necessity of knowing a product's extrinsic characteristics in order to assess the adequacy of warnings, and to determine whether a defect exists for lack of adequate warnings. The strict

39. 450 A.2d at 623 (Larsen, J., dissenting).
41. 450 A.2d at 633-34 (Larsen, J., dissenting).
liability theory advanced at trial was that the Power King was defectively designed for the market in which it was placed because, in that market Daisy BB-guns, through the labels and logos attached to and associated with them, conveyed a certain image as play guns that were relatively safe for use by children, and by introducing the Power King on that market without warnings adequate to inform the user that this gun was unlike those other BB-guns with their image of safety, (i.e., in effect, the Power King was mislabeled) it was in a defective condition which condition caused James Sherk's death. In attempting to introduce evidence of external factors, the plaintiff-appellee was merely endeavoring to prove one of the characteristics of the Power King, its "invitational aspect".

If the jury was to have properly evaluated the adequacy of the warnings given, they had to have been fully apprised of the seriousness of the danger—the hidden danger of death inherent in a gun such as the Power King placed on the traditional gun market. That danger could only be comprehended by a knowledge of the image projected by other Daisy BB-guns in order to appreciate "how much warning is adequate?".

There emerges in the instant case, the reality that the use of the logo "Daisy" with the Power King is of paramount significance in the public mind in that it creates popular expectations as to how the gun will operate (as a play gun), by whom it will be used (children), and with what probable results (bruises, stings, or at worst, a lost eye). The Power King accompanied by the Daisy logo "invites" use by a young boy in a manner substantially the same as the use "invited" by traditional Daisy BB-guns, despite the expectations or the use "intended" by the manufacturer. In effect, it "speaks" to prospective purchasers saying "Use me as a BB-gun—I can hurt but not kill", regardless of warnings that it may be more powerful.

This approach represents the ideal in strict product liability law. It excludes from the assessment of relevant factors the intention of the manufacture and includes the conduct of the manufacturer only to the extent that it is manifested in the finished product. The product is recognized as having anthropomorphic characteristics by virtue of its physical attributes, and identification with other products which have performed in a certain way (logos, product name, mode of advertisement). If the fact-finder is directed to make its determination in the context of consumer perception of product communication, non-verbal more often than verbal, we shall happily have eliminated from the picture manufacturer's conduct. Moreover, we shall have substituted as the determinative factor in products cases the very relationship which Justice Traynor first referred to in Escola:

The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of man-

42. Id. (citation and footnote omitted) (emphasis in original).
ufacturers to build up confidence by advertising and marketing devices such as trademarks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark. 43

In using the "invitational aspect" 44 as the thematic premise we recognize the actual relationship which is meaningful, and we do so in a manner which excludes the extraneous elements of manufacturer's intentions, conduct, or observance of a standard of care. We employ no legal fiction, and we respond to the call of the public policy considerations enunciated 40 years ago.

In conclusion, if the plurality opinion in Sherk confirms fears that under Pennsylvania strict product liability law the defense of misuse is expanded to the point where the manufacturer is given virtual carte blanche to define the parameters of its liability, we have an accompanying dissent which serves as a beacon to illumine the appropriate focus of a products liability case. That dissent invites our serious consideration.

44. 450 A.2d at 633 (Larsen, J., dissenting).