

Barker v. Lull Engineering Co.
573 P.2d 443 (Cal. 1978)

TOBRINER, C.J. In August 1970, plaintiff Ray Barker was injured at a construction site at the University of California at Santa Cruz while operating a high-lift loader manufactured by defendant Lull Engineering Co. and leased to plaintiff's employer by defendant George M. Philpott Co., Inc. Claiming that his injuries were proximately caused, inter alia, by the alleged defective design of the loader, Barker instituted the present tort action seeking to recover damages for his injuries. The jury returned a verdict in favor of defendants, and plaintiff appeals from the judgment entered upon that verdict, contending primarily that in view of this court's decision in *Cronin v. J. B. E. Olson Corp.* 501 P.2d 1153 (Cal. 1972), the trial court erred in instructing the jury "that strict liability for a defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use. . . ."

As we explain, we agree with plaintiff's objection to the challenged instruction and conclude that the judgment must be reversed. . . .

[W]e have concluded from this review that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design. In addition, we explain how the burden of proof with respect to the latter "risk-benefit" standard should be allocated.

This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be. At the same time, the standard permits a manufacturer who has marketed a product which satisfies ordinary consumer expectations to demonstrate the relative complexity of design decisions and the tradeoffs that are frequently required in the adoption of alternative designs. Finally, this test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the *product*, not on the *manufacturer's conduct*, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail in such an action. . . .

1. THE FACTS OF THE PRESENT CASE

[Barker, a substitute driver, was injured while using a Lull High-Lift Loader, which was designed to be kept level on a sloping terrain. He had received only limited instruction in the use of the loader. While attempting to lift a load of lumber 18 or so feet on uneven ground, he sought to maneuver the forks on the base of the load to compensate for sloping ground. As he lost control of the loader, he attempted to jump away from it, and was struck and seriously injured by some falling timber.

The plaintiff claimed that the loader was defective in several respects: first, that it was not equipped with seat belts or a roll-bar; second, that it was not equipped with "outriggers" that might have given it greater lateral stability; third, that it was not equipped with an automatic locking device on its leveling mechanism; and, fourth, that it was not equipped with a separate park gear. In response to this assignment of defects, the defendant argued as follows: first, seat belts or roll-bars were in fact dangerous because they prevented any quick escape from the loader; second, that the outriggers were not needed if the loader was operated on level terrain as was intended, that none of the defendant's competitors had such outriggers, and that a regular crane should have been called in if work on uneven terrain was required; third, that the leveling device used was the most convenient and safe for the operator; and, fourth, that none of the transmissions manufactured for loaders incorporated a park position. The defendant also argued that the plaintiff's inexperience and panic were the sole source of his injury.

The jury returned a verdict for the defendant by a vote of ten to two.] . . .

3. A TRIAL COURT MAY PROPERLY FORMULATE INSTRUCTIONS TO ELUCIDATE THE "DEFECT" CONCEPT IN VARYING CIRCUMSTANCES. IN PARTICULAR, IN DESIGN DEFECT CASES, A COURT MAY PROPERLY INSTRUCT A JURY THAT A PRODUCT IS DEFECTIVE IN DESIGN IF (1) THE PLAINTIFF PROVES THAT THE PRODUCT FAILED TO PERFORM AS SAFELY AS AN ORDINARY CONSUMER WOULD EXPECT WHEN USED IN AN INTENDED OR REASONABLY FORESEEABLE MANNER, OR (2) THE PLAINTIFF PROVES THAT THE PRODUCT'S DESIGN PROXIMATELY CAUSED INJURY AND THE DEFENDANT FAILS TO PROVE, IN LIGHT OF THE RELEVANT FACTORS, THAT ON BALANCE THE BENEFITS OF THE CHALLENGED DESIGN OUTWEIGH THE RISK OF DANGER INHERENT IN SUCH DESIGN. . . .

As this court has recognized on numerous occasions, the term defect as utilized in the strict liability context is neither self-defining nor susceptible

to a single definition applicable in all contexts.⁸ . . . [T]he concept of defect raises considerably more difficulties in the design defect context than it does in the manufacturing or production defect context.

In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. For example, when a product comes off the assembly line in a sub-standard condition it has incurred a manufacturing defect. . . . A design defect, by contrast, cannot be identified simply by comparing the injury-producing product with the manufacturer's plans or with other units of the same product line, since by definition the plans and all such units will reflect the same design. Rather than applying any sort of deviation-from-the-norm test in determining whether a product is defective in design for strict liability purposes, our cases have employed two alternative criteria in ascertaining, in Justice Traynor's words, whether there is something "wrong, if not in the manufacturer's manner of production, at least in his product." (Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 366 [1965].)

First, our cases establish that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This initial standard, somewhat analogous to the Uniform Commercial Code's warranty of fitness and merchantability (Cal. U. Com. Code, §2314), reflects the warranty heritage upon which California product liability doctrine in part rests. As we noted in *Greenman*, "implicit in [a product's] presence on the market . . . [is] a representation that it [will] safely do the jobs for which it was built." When a product fails to satisfy such ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation, a manufacturer is strictly liable for resulting injuries. . . .

As Professor Wade has pointed out, however, the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defectiveness because "[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made." . . . Numerous California decisions have implicitly recognized this fact and have made clear, through varying linguistic formulations, that a product may be found defective in design, even if it

8. One commentator has observed that, in addition to the deficiencies in the "unreasonably dangerous" terminology noted in *Cronin*, the Restatement's language is potentially misleading because "[i]t may suggest an idea like ultrahazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous." (Wade, *On the Nature of Strict Tort Liability for Products* 44 Miss. L.J. 825, 832 (1973).) We agree with this criticism and believe it constitutes a further reason for refraining from utilizing the "unreasonably dangerous" terminology in defining a defective product.

satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. . . .

A review of past cases indicates that in evaluating the adequacy of a product's design pursuant to this latter standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design. . . .

Although our cases have thus recognized a variety of considerations that may be relevant to the determination of the adequacy of a product's design, past authorities have generally not devoted much attention to the appropriate allocation of the burden of proof with respect to these matters. . . . The allocation of such burden is particularly significant in this context inasmuch as this court's product liability decisions, from *Greenman* to *Cronin*, have repeatedly emphasized that one of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action. Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the "risk-benefit" standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer, we conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective. Moreover, inasmuch as this conclusion flows from our determination that the fundamental public policies embraced in *Greenman* dictate that a manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence. . . .

Because the jury may have interpreted the erroneous instruction given in the instant case as requiring plaintiff to prove that the highlift loader was ultrahazardous or more dangerous than the average consumer contemplated, and because the instruction additionally misinformed the jury that the defectiveness of the product must be evaluated in light of the product's "intended use" rather than its "reasonably foreseeable use" . . . , we cannot find that the error was harmless on the facts of this case. In light of this conclusion, we need not address plaintiff's additional claims of error, for such issues may not arise on retrial.

The judgment in favor of defendants is reversed.

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