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EXPLORING THE CHANGING FACE OF PRODUCT LIABILITY

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A Child's Awareness of the Danger of Pointing and Shooting a BB Gun at Another Was a Question for the Jury

By Mark Masters

In *Swix v. Daisy Manufacturing Co.*, 373 F3d 678 (6th Cir 2004), the Federal Court of Appeals analyzed Michigan's "simple tool" doctrine and "open and obvious" defense in a case of one child shooting another with a BB gun.

Nicholas Porrit, age eleven, had received a Daisy BB gun from his grandfather. The gun was locked in a gun cabinet, but Nicholas removed the gun without permission. Nicholas took the safety lock off the gun and checked to see if the rifle was empty. He then shook the rifle with the barrel facing down toward the floor. He pulled the bolt back and tilted the gun towards himself to see if there was a BB inside the rifle. He believed at this point that the rifle was empty. Nicholas then pumped the rifle about five times and shot it at the floor. Only air came out. He took the air rifle to the basement, pumping the rifle as he walked. When he got to the basement, he started to watch a movie with the rifle in his lap. Halfway through the movie, he picked up the air rifle, pointed it at ten-year old Aaron Swix and "the air rifle went off," shooting Aaron in the right eye. Aaron suffered a permanent and near complete loss of vision in his right eye.

Instead of suing Nicholas, his parents, his grandfather, or whoever was supposed to be watching these children, Aaron Swix and his parents sued Daisy Manufacturing Company for one million dollars alleging claims of defective design and failure to warn of a known danger. Plaintiffs argued that "the BB storage magazine ... allowed a BB to become lodged in the forward portion, between the barrel and interior of the outer barrel assembly ... thus misleading the operator to believe ... the air rifle, to be completely empty of BBs [even after pumping and firing], when, in fact, a BB would still be present in the magazine."

Daisy moved for summary disposition arguing the gun was a "simple tool" and that the dangers of pointing it at another person were "open and obvious." While the motion was pending, the magistrate allowed Plaintiffs to amend the complaint to allege that Daisy marketed its BB guns to children, and that the gun

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A Defendant's actions can negatively influence a Court's reasoning beyond the bounds of the law. Here, the Court of Appeals was obviously displeased with the perceived efforts of Daisy to market BB guns to children, and that children, not adults, were the typical users of BB guns.

It is clear that young Nicholas appreciated the risk that a BB could still be inside the gun despite his efforts to make sure that it was unloaded. He visually checked the chamber of the gun, shook the rifle with the barrel pointing the floor, and fired five shots to make sure a BB was still not in the gun. While not discussed in this opinion, one would expect that Nicholas had been ordered by his parents and grandfather never to point the gun (much less shoot the gun) at anyone under any circumstances, even if he believed that it was unloaded.

It is, therefore, hard to explain the Court's finding that reasonable minds could differ regarding whether Nicholas knew or should have known of the danger of pointing and shooting a BB gun at another even when he believed it was unloaded (that is, whether the danger was "open and obvious"), unless the Court's disapproval of Daisy's actions was a factor in its decision.

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was particularly defective and dangerous in the hands of children. A week later, the district court granted Daisy's motion to dismiss based on lack of duty of care.

On appeal, the Sixth Circuit agreed with Plaintiffs that the "simple tool" rule was not a complete defense to a defective design claim. The obviousness of a danger is merely one factor in the analysis of whether the risks are unreasonable in light of the foreseeable injuries. The simple tool issue was the first of two questions addressing liability. The second question was whether the dangers associated with the simple tool were "open and obvious."

A simple tool is one which is not highly mechanized (thus allowing the user to maintain control over the product), and the intended use of the product does not place the user in obviously dangerous positions. Michigan law already recognized that firearms were "simple tools." Since the air rifle was no more mechanized and did not put the user in any more danger than would a firearm, the Sixth Circuit determined that the air rifle was a simple tool.

The Court analyzed whether the dangers associated with the BB gun were open and obvious, and whether the issue should be examined from the point of view of an average, ordinary person, or an eleven year old child. The Court concluded that the examination must be from the perspective of the "reasonable child."

The Court reversed the dismissal and remanded the case for trial, finding that reasonable minds could differ on whether or not the dangers of the BB gun would be "open and obvious" to a reasonable child. The Court focused on what was foreseeable to Daisy rather than what a reasonable child knew or should have known:

"While there is no question that an air rifle *should* be used with adult supervision, the complaint alleges that the typical user of a BB gun a child, so that is the standard the district court must apply. Moreover, a manufacturer has a duty to protect against foreseeable misuses.... It is certainly foreseeable that a twelve [sic] year old child will on occasion use a BB gun which was purchased for his use, without direct supervision, or that any supervision will be inadequate to protect against a split-second decision by the minor to aim at another."

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