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MANUFACTURERS' LIABILITY TO VICTIMS OF HANDGUN CRIME: A COMMON-LAW APPROACH

INTRODUCTION

On March 30, 1981, during an attempt to assassinate President Reagan, James Brady, the President's press secretary, was shot and seriously injured. Mr. Brady has filed suit in the United States District Court for the District of Columbia charging the handgun manufacturer with common-law liability based on theories of negligence, strict products liability, and engaging in an abnormally dangerous activity. The gravamen of the complaint is that the manufacturer placed an inexpensive, easily concealable handgun into the stream of commerce with actual or constructive knowledge that such guns are the preferred weapon of criminals and are ill-suited for legitimate use. This suit is one of a growing number of personal injury suits that seek to impose common-law liability on manufacturers of handguns used in crime.

1. First Amended Complaint for Damages, Brady v. Hinckley, No. 82-0549, at 4-10 (D.D.C. Sept. 8, 1982). For a plaintiff to establish a cause of action in negligence, he must prove that: 1) the defendant owed a duty of care to the plaintiff; 2) the defendant breached that duty; 3) the breach was the cause in fact and proximate cause of the injury; and 4) the plaintiff suffered actual loss or damage as a result of the injury. See Ono v. Applegate, 612 P.2d 533, 538-39 (Hawaii 1980); Christians v. Homestake Enters., 101 Wis. 2d 25, 32, 303 N.W.2d 608, 611 (1981); W. Prosser, Handbook of the Law of Torts § 30, at 143-44 (4th ed. 1971); Restatement (Second) of Torts § 281 (1965).

2. First Amended Complaint for Damages, Brady v. Hinckley, No. 82-0549, at 10-11 (D.D.C. Sept. 8, 1982). A seller is strictly liable in tort if it "sells any product in a defective condition unreasonably dangerous" to another and "physical harm was thereby caused" to the plaintiff. Restatement (Second) of Torts § 402A (1965); accord Jeng v. Witters, 452 F. Supp. 1349, 1354 (M.D.Pa. 1978), aff'd, 591 F.2d 1335 (3d Cir. 1979); Dippel v. Sciano, 37 Wis. 2d 443, 459, 155 N.W.2d 55, 63 (1967).

3. First Amended Complaint for Damages, Brady v. Hinckley, No. 82-0549, at 11-12 (D.D.C. Sept. 8, 1982). If an activity is found to be abnormally dangerous, the defendant is held liable "although he has exercised the utmost care to prevent the harm." Restatement (Second) of Torts § 519 & comment d (1965); accord Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1208-09 (Alaska 1978). This Note does not apply this theory to handgun design and marketing because unlike those activities that have been characterized as abnormally dangerous, the dangers arising in this context can be avoided if the manufacturer exercises reasonable care. See Restatement (Second) of Torts § 520(c) (1965)(danger of abnormally dangerous activity cannot be eliminated by the exercise of reasonable care).


5. E.g., Kelly v. R.G. Indus., No. 60-323 (Montgomery County Cir. Ct., Md.), discussed in Lauter, Personal Injury Bar Takes New Aim at Guns, 4 Nat'l L.J. 4, 4 (Apr. 5, 1982); Riordan v. Interarms Ltd., No. 81-L-27,923 (Cook County Cir. Ct., Ill.), discussed in Tybor, Victim's Widow Sues Over Gun Sale, 4 Nat'l L.J. 30, 30 (Dec. 21, 1981); see also Suits Target Handgun Makers, 5 Nat'l L.J. 1, 1 (Nov. 29,
The suggestion that handguns are ideally suited to criminal use predates the Brady complaint. Handguns in circulation account for only about 20 to 25% of all firearms, but they are used in the majority of crimes committed with firearms. They are used in at least 49% of all homicides.

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7. See Wright, Public Opinion and Gun Control: A Comparison of Results From Two Recent National Surveys, 455 Annals 24, 27 (May 1981) (conservative estimate of 31 million in 1978); Oversight of 1968 Gun Control Act—The Escalating Rate of Handgun Violence: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 664 (1975) (Department of Justice estimate, 1974: 40,142,777) [hereinafter cited as Hearings on Handgun Violence]. This figure is increasing at an approximate rate of 10% a year. To Amend the Gun Control Act of 1968 to Prohibit Sale of “Saturday Night Special” Handguns: Hearings on S. 2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 60 (1971) (statement of Lloyd Cutler, Former Executive Director, National Commission on Causes & Prevention of Violence)[hereinafter cited as Hearings on Saturday Night Specials].


9. Staff Report, supra note 8, at 49 (76%: homicide; 86%: assault; 96%: robbery); see Fields, supra note 8, at 38.

10. FBI, Uniform Crime Reports 12 (1982) (1981-50%); FBI, Uniform Crime Reports 12 (1979) (1978-49%); Hearings on Saturday Night Specials, supra note 7, at 69 (statement of Lloyd Cutler) (1967-63%). Seventy-six percent of all firearms used in homicides are handguns. Id. at 46 (statement of Edmund G. Brown, Chairman, National Commission on Reform of Federal Criminal Laws). In Cleveland in 1970, 72% of all homicides were committed with handguns. Id. at 292 (testimony of Lt. Ralph Joyce, Commanding Officer, Cleveland Homicide Bureau). Significantly, more than 70% of policemen murdered in the line of duty are killed with handguns. See Hearings on Handgun Violence, supra note 7, at 533 (testimony of Edward H. Levi, United States Attorney General); Hearings on Saturday Night Specials, supra note 7, at 169 (testimony of John Lindsay, Mayor, New York City). While the number of victims of handgun crime is relatively easy to determine, the true cost, to victims and society, is elusive. It has been estimated that $500 million is spent annually on treatment of gunshot wounds. Fields, supra note 8, at 35. The effect of the fear caused by the pervasive threat of criminal handgun violence cannot be measured. See Wright, supra note 7, at 29.
Current gun control legislation has not been effective in reducing handgun violence. Therefore, it is particularly appropriate in this context for courts to supplement statutory duties with those imposed by the common law. Nonetheless, no court to date has determined that the likelihood of criminal handgun misuse resulting from a manufacturer's unreasonable product design and marketing may, in some circumstances, provide a basis in negligence and strict products liability for finding a breach of its common-law duty to provide reasonably safe products.

Part I of this Note discusses the interrelationship of handgun manufacturers' and dealers' statutory and common-law duties and suggests that tort law may be an effective means of reducing criminal misuse of handguns. Part II proposes three ways in which a breach of a handgun manufacturer's common-law duties may be established. In addition, it argues that criminal misuse in these situations is foreseeable and that the manufacturer should not be relieved of liability for resulting injuries. Part III analyzes the policies supporting liability in suitable cases. This Note concludes that in proper circumstances, a finding of liability is not only appropriate but that a failure to so find may run counter to the policies underlying products liability law and afford handgun manufacturers an unwarranted immunity from its application.

11. See Hearings on Saturday Night Specials, supra note 7, at 174 (statement of Patrick Murphy, Police Commissioner, New York City); Institute for Legislative Action, National Rifle Ass'n, The District's Handgun Ban, Report from Wash., Aug. 5, 1982, at 7, col. 1 [hereinafter cited as The District's Handgun Ban].


I. INTERRELATIONSHIP OF STATUTE AND COMMON LAW IN REDUCING CRIMINAL MISUSE OF HANDGUNS

A. Statutory Duties

The role that manufacturers should play in reducing criminal handgun misuse is defined in part by the duties imposed by statute. Federal\(^{14}\) and state governments\(^ {15}\) regulate the manufacture, shipment and sale of firearms in an attempt to reduce the availability of handguns to criminals.\(^{16}\) These efforts to reduce criminal misuse rely primarily on purchaser eligibility requirements.\(^ {17}\)

Title I of the Gun Control Act of 1968\(^ {18}\) requires that all firearm manufacturers and dealers\(^ {19}\) be licensed by the federal government.\(^ {20}\) Further, a manufacturer or dealer may be criminally liable for the sale of a firearm to certain classes of purchasers, such as convicted felons\(^ {21}\) or adjudicated mental defectives,\(^ {22}\) but only if it knows or has reasonable cause to believe that the purchaser is a member of a proscribed class.\(^ {23}\) Absent suspicious circumstances, a dealer fulfills this statutory duty if he receives a certification of eligibility signed by the purchaser and some customary form of identification, such as a driver's license.\(^ {24}\) He also must record the transaction,\(^ {25}\) including the


\(^{19}\) Id. § 921(a)(11)(A) (defining a dealer as one “engaged in the business of selling firearms”).

\(^{20}\) Id. § 922(a)(1) (requiring license); id. § 923(a) (license must be obtained from federal government).

\(^{21}\) Id. § 922(h)(1).

\(^{22}\) Id. § 922(h)(4). There are several other proscribed classes in this statute. See, e.g., id. § 922(h)(2) (fugitive from justice); id. § 922(h)(3) (drug addict); id. § 922(b)(1) (persons below the age of 18 for rifles and shotguns, below the age of 21 for all other firearms).

\(^{23}\) Id. § 922(b)(1), (d).

\(^{24}\) 27 C.F.R. § 178.124(c) (1982).

\(^{25}\) Id. § 178.124(a).
name of the purchaser and serial number of the gun, and furnish this information to the federal government upon request.

Section 927 of the Gun Control Act of 1968 embodies clear congressional intent to allow state regulation of the subject matter regulated by the Act as long as it is not in "direct and positive" conflict with the federal statute. Generally, most states that have imposed additional requirements merely increase the prerequisites for purchaser eligibility rather than impose affirmative duties on the manufacturer or the dealer. State regulatory approaches can be divided into three general categories. Some states require the purchaser to possess a license issued by the state as a prerequisite to handgun purchases. Some states require the purchaser to obtain a permit for

26. Id. § 178.124(c).
27. Id. § 178.126(a).
29. Id.

Some municipal ordinances impose stricter controls than either the state or federal governments. New York City, for example, grants its licensing officer broad discretion to deny handgun permits. See New York City Charter & Admin. Code Ann. ch. 18, tit. A, § 436-5.0(1) (Williams 1976) (Commissioner has discretionary authority granted by N.Y. Penal Law § 400.00(1) (McKinney 1980)); N.Y. Penal Law § 400.00(6) (McKinney Supp. 1982-1983) (New York City is the only municipality in the state that has, under most circumstances, the right to refuse to honor permits issued by other state licensing authorities). Recently, the city of Morton Grove, Illinois went even further and imposed a ban on the possession and sale of handguns. Morton Grove, Ill., Ordonance No. 81-11 (June 8, 1981) (handgun possession was still allowed for peace officers, prison officials, armed forces, the national guard, licensed gun clubs and licensed gun collectors), upheld in Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1171 (N.D. Ill. 1981), aff'd, Nos. 82-1045, 82-1076, 82-1132 (7th Cir. Dec. 6, 1982); see Tybor, U.S. Judge Upholds City Ordinance Banning Sale, Possession of Handguns, 4 Nat'l L.J. 3 (Jan. 11, 1982); Note, Banning Handguns: Quilici v. Village of Morton Grove and the Second Amendment, 60 Wash. U.L.Q. 1087 (1982).

32. Cook & Blose, supra note 30, at 85.
the purchase of each handgun.\textsuperscript{34} Other states require the dealer to provide written notification to law enforcement authorities of the prospective purchaser's identity and prescribe a waiting period before purchase.\textsuperscript{35} Many of the states that have adopted one of these three regulatory approaches also require that a sale be registered with authorities upon completion.\textsuperscript{36}

\section*{B. Civil Liability}

The Kennedy-Rodino Handgun Crime Control Act of 1983,\textsuperscript{37} proposed to amend the Gun Control Act of 1968,\textsuperscript{38} would increase federal government regulation of handgun manufacturers and dealers. For example, the bill would ban the sale of Saturday Night Specials;\textsuperscript{39} impose a twenty-one day waiting period, during which the eligibility of a prospective purchaser could be ascertained by law enforcement


authorities;\textsuperscript{40} require all thefts to be reported to authorities;\textsuperscript{41} and require importers and manufacturers to maintain a record of each handgun sale.\textsuperscript{42}

The bill also expressly provides for a civil cause of action for injuries resulting from a negligent handgun sale under the statute.\textsuperscript{43} Such a provision is necessary to afford a plaintiff recovery from a manufacturer or dealer under federal law because courts have refused to imply a cause of action against a dealer under the Gun Control Act of 1968\textsuperscript{44} for injuries resulting from criminal misuse of handguns.\textsuperscript{45} These courts have determined that Congress intended to protect the general public through administrative enforcement\textsuperscript{46} of this statute rather than provide retrospective remedial relief to victims of handgun crime.\textsuperscript{47}

One court, however, has held that a dealer's violation of the Gun Control Act of 1968\textsuperscript{48} can be evidence of negligence under state common law.\textsuperscript{49} Moreover, a dealer's violation of state gun control laws has been determined to constitute negligence per se.\textsuperscript{50} While no court has

\begin{itemize}
\item \textsuperscript{40} Id. § 103(a), 129 Cong. Rec. at S1317.
\item \textsuperscript{41} Id. § 102(n), 129 Cong. Rec. at S1316.
\item \textsuperscript{42} Id. § 104(j), 129 Cong. Rec. at S1318 (proposed amendment to 18 U.S.C. § 923(g) (2)-(3) (1976)).
\item \textsuperscript{43} Id. § 106(d), 129 Cong. Rec. at S1319 (proposed amendment to § 924(c)).
\item \textsuperscript{49} Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93, \textit{cert. denied}, 434 U.S. 835 (1977); see Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 532 (3d Cir. 1979)(dictum).
\item \textsuperscript{50} Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530 (3d Cir. 1979); see McMillen v. Steele, 275 Pa. 584, 587, 119 A. 721, 722 (1923). \textit{But see} Hulsman v. Hemmeter Dev. Corp., 647 P.2d 713, 719-20 (Hawaii 1982). The violation of certain statutes designed to protect a class of which plaintiff is a member from the type of harm in question is, in the majority of jurisdictions, negligence per se, if a causal relationship can be shown between the violation and the injury. Enis v. Ba-Call Bldg. Corp., 639 F.2d 359, 362 (7th Cir. 1980); Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 529-30 (3d Cir. 1979); Macey v. United States, 454 F. Supp. 684, 690 (D. Alaska 1978); Restatement (Second) of Torts § 286 (1965). In a minority of jurisdictions, violation of statute is admissible on the question of negligence but is not dispositive. W. Prosser, \textit{supra} note 1, § 38, at 201; see, e.g., Fidelity & Cas. Co. v.
addressed the issue, handgun manufacturers' failure to fulfill their statutory duties may provide a similar basis of common-law civil liability.51

Full compliance with these statutory duties, although evidence of the reasonableness of a manufacturer's design and marketing, does not fulfill a manufacturer's common-law duty or preclude its civil liability52 if it is determined that the applicable statutory duties are not sufficient to prevent injury.53 For example, a drug manufacturer in full compliance with Food and Drug Administration warning requirements has been held civilly liable for failure to fulfill the stricter duty to warn imposed by the common law.54

The Gun Control Act of 1968 and existing state gun control laws do not adequately protect the public from criminal misuse of handguns.55


55. In 1968, firearms were used in over 8900 murders, 65,000 assaults and 99,000 robberies. See FBI, Uniform Crime Reports 1 (1969). Ten years later, firearms were used in over 11,800 murders, 125,000 assaults and 170,200 robberies. See FBI, Uniform Crime Reports 13, 19, 21 (1979).

Gun control advocates and their opponents disagree as to the effectiveness of gun control legislation, see Hearings on Saturday Night Specials, supra note 7, at 188-89 (conversation between John Lindsay, Mayor of New York City, and Senator Hruska), but both groups agree that existing regulation has failed to reduce significantly
In light of the inadequacies of these existing statutes and the difficulty in enacting more effective legislation, it is particularly appropriate that courts, in addressing the problem of criminal handgun misuse, exercise their long-recognized power to supplement statutory duties with those imposed by the common law.

Handgun violence nationwide. *See Hearings on Saturday Night Specials, supra* note 7, at 174 (statement of Patrick Murphy, Police Commissioner, New York City); *The District's Handgun Ban, supra* note 11, at 7. Consequently, proponents of gun control favor comprehensive federal legislation that would provide uniform control. *See Hearings on Saturday Night Specials, supra* note 7, at 177 (statement of Patrick Murphy, Police Commissioner, New York City); National Coalition to Ban Handguns, 20 *Questions and Answers*, question 17 (information pamphlet) [hereinafter cited as National Coalition to Ban Handguns]. Opponents seek not only to prevent passage of new legislation but also to repeal many existing statutes. *Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 94th Cong., 1st Sess. [Part 8]* 2854-55, 2859-60 (1975) (testimony of Harlon Carter, Executive Director, Institute for Legislative Action, National Rifle Association, and Richard Corrigan, Director, Federal Affairs Division, Institute for Legislative Action, National Rifle Association) [hereinafter cited as *Hearings on Firearms Legislation*]. They argue that these laws divert "scarce police, court and penal resources" without reducing crime. Institute for Legislative Action, National Rifle Ass'n, Press Release 10 (Mar. 4, 1982) (statement of Neal Knox, Executive Director, to Subcommittee on Criminal Law of the Senate Committee on the Judiciary) [hereinafter cited as National Rifle Association Press Release].

Opponents also assert that most gun control legislation is violative of the second amendment provision against infringing the right to keep and bear arms. *See* Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urb. L.J. 31, 52 (1976); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381, 405-06 (1960); Note, *The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 Alb. L. Rev. 74, 85 (1967). However, the Supreme Court recently reaffirmed its position that the Constitution does not protect the right to bear firearms that do not bear "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980)(quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

*56. Cook & Blose, supra* note 30, at 91; *see* Congressional Research Serv., Library of Cong., 97th Cong., 2d Sess., Report to the Senate Comm. on the Judiciary, Federal Regulation of Firearms 15-17 (Comm. Print 1982) (no significant federal gun control legislation has been passed since 1968). Even assuming the existence of a consensus in favor of such legislation, opponents have proven to be effective in blocking passage by lobbying. *See Hearings on Firearms Legislation* [Part 1], *supra* note 55, at 4 (statement of Chairman Conyers).

II. ESTABLISHING MANUFACTURERS' COMMON-LAW LIABILITY FOR CRIMINAL MISUSE OF HANDGUNS

A. The Manufacturer's Common-Law Duty: Reasonably Safe Design and Marketing

1. The Appropriate Standard

Under general negligence principles, a manufacturer has a duty to design and market products reasonably safe for foreseeable uses. This duty arises because of the economic benefits the manufacturer derives from the sale of the product and consumers' justified expectations of safety. By contrast, in strict products liability a manufacturer is liable when he sells products in a defective condition unreasonably dangerous to the public. The focus is on the condition of the product rather than the conduct of the actor. Strict products liability


59. Restatement (Second) of Torts § 395 comment b (1965).

60. Id.


A victim of criminal handgun misuse could also bring a cause of action against a handgun manufacturer based on an implied warranty theory in many jurisdictions. See 2 L. Frumer & M. Friedman, supra note 58, § 16.04[2][c] (discussing case law extending manufacturers' implied warranty liability to bystanders); id. § 16.04[3][a] (discussing U.C.C. § 2-318(b)–(c) alternatives extending manufacturers' liability to bystanders). In most instances, however, application of the theories of implied warranty and strict products liability to bystanders will be the same. See 2 L. Frumer & M. Friedman, supra note 58, § 16A[4][a]; W. Prosser, supra note 1, § 98, at 656.

was developed in part to place liability on the manufacturer because, by marketing a product, it has assumed a special responsibility to the public and should bear the costs of accidents as a cost of doing business.63

In strict products liability, three broad classes of defects are recognized: manufacturing, design, and marketing with inadequate warnings and instructions.64 Manufacturing defects may be demonstrated when a particular product does not perform as it was designed to perform or fails to perform as other products of the same kind.65 Design defects may be established by showing that the entire product line is unreasonably unsafe.66 For example, a product will be found defective and thus unreasonably dangerous if its design fails to discourage foreseeable misuse.67 Finally, an otherwise safe product may be held defective if the manufacturer fails to provide warnings and instructions that are necessary for its safe use.68

Although many courts purport to maintain the distinction between negligence and strict products liability theories in actions based on design or marketing defects,69 both tests can best be understood as

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N.W.2d 830, 835 (Iowa 1978); 2 L. Frumer & M. Friedman, supra note 58, § 16A[4][f][iv][A]; see Restatement (Second) of Torts § 402A comment g (1965).

63. E.g., Roy v. Star Chopper Co., 584 F.2d 1124, 1130 (1st Cir. 1978) (citing Restatement (Second) of Torts § 402A comment c (1965)), cert. denied, 440 U.S. 916 (1979); Huff v. White Motor Corp., 565 F.2d 104, 107 n.4 (7th Cir. 1977) (quoting Restatement (Second) of Torts § 402A comment c (1965)), vacated on other grounds, 609 F.2d 286 (7th Cir. 1979); Brown v. Link Belt Corp., 565 F.2d 1107, 1113 (9th Cir. 1977) (citing Restatement (Second) of Torts § 402A comment c (1965)).

64. See 2 L. Frumer & M. Friedman, supra note 58, § 16A[4][f][i]. The term “marketing” is used throughout this Note to include the concept of warnings and instructions.


inquiring whether the product’s design and marketing are reasonably safe.\textsuperscript{70} In negligence, this entails application of the general standard requiring a manufacturer to exercise reasonable care in the design and marketing of its product.\textsuperscript{71} In a strict products liability claim based on a marketing defect, a similar reasonableness standard is ordinarily used to determine if a product is unreasonably unsafe due to inadequate warnings and instructions.\textsuperscript{72} For design defects, several strict products liability tests have been suggested to determine if a product is unreasonably unsafe.\textsuperscript{73} The most commonly used inquires whether a product’s design meets the reasonable expectations of the ordinary consumer.\textsuperscript{74} Another test, employing more specific criteria,\textsuperscript{75} balances the risks and benefits of a challenged design to determine if the risk of

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75. Wade, \textit{supra} note 61, at 837-38. Professor Wade suggests seven factors: 1) utility of the product; 2) likelihood and seriousness of potential injury; 3) availability of a substitute; 4) ability to eliminate the unsafe character of the product without undue expense or destroying the product’s usefulness; 5) user’s ability to avoid danger; 6) user’s anticipated awareness of danger; and 7) feasibility of the manufacturer spreading the risk of loss. \textit{Id.}
injury outweighs the design's utility.\textsuperscript{76} Both tests, like the test for improper marketing, require that the product be found unreasonably unsafe.\textsuperscript{77} Accordingly, this Note, in discussing possible theories for establishing a handgun manufacturer's liability for criminal misuse of handguns, generally focuses on whether the handgun design and marketing are unreasonably unsafe.

2. Breach of the Manufacturer's Duty

Under either a negligence or strict products liability theory, a manufacturer may have breached its duty to a person injured by criminal handgun misuse if it sold guns that were unreasonably unsafe in design or that were improperly marketed.\textsuperscript{78} Moreover, because of the


\textsuperscript{77} See 2 L. Frumer & M. Friedman, supra note 58, § 16A[4][f][iv]; W. Prosser, supra note 1, § 99, at 659 n.72. Thus, marketing and design defect claims establishing that a product is unreasonably unsafe under either negligence or strict liability will usually require the same proof. W. Prosser, supra note 1, § 103, at 671; Wade, supra note 61, at 836. \textit{But see} Howes v. Hansen, 56 Wis. 2d 247, 253, 201 N.W.2d 825, 827 (1972) (strict liability removes the need to prove specific acts of negligence). Under either theory, the plaintiff is required to establish that 1) he has been injured by the product; 2) the injury occurred because the product was defective; and 3) the defect existed when the product left the defendant's possession. See W. Prosser, supra note 1, § 103, at 671-72. A few courts have significantly changed the plaintiff's burden of proof. In these jurisdictions, if the plaintiff shows that the product design was the proximate cause of his injury, the burden shifts to the defendant to prove that the benefits of the design outweigh the risks. \textit{See}, e.g., Aetna Cas. & Sur. Co. v. Jeppesen & Co., 463 F. Supp. 94, 95 (D. Nev. 1978), \textit{vacated on other grounds}, 642 F.2d 339 (9th Cir. 1981); Moorer v. Clayton Mfg. Corp., 128 Ariz. 565, 568, 627 P.2d 716, 719 (Ct. App.), \textit{cert. denied}, 454 U.S. 866 (1981); Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978).


Of course, if the criminal misuse of a handgun results in the victim's death, the procedural mechanism for recovering from the manufacturer is an action brought by the personal representative of the decedent under a state wrongful death statute. S. Speiser, \textit{Recovery for Wrongful Death} §§ 1:9, 2:1, :9 (2d ed. 1975) (wrongful death action will lie if decedent, had he lived, would have had a valid cause of action; action includes strict products liability claims).
inherent dangerousness of handguns, the manufacturer has a special responsibility to guard against risks that may result from a failure to fulfill this common-law duty. This Note suggests that handgun manufacturers may breach their duty in one of three ways: 1) failing to warn and instruct a handgun dealer or purchaser adequately; 2) negligently entrusting handguns to dealers or shippers; or 3) designing a type of handgun known as Saturday Night Specials.

a. Warnings and Instructions

A manufacturer has a duty to provide adequate warnings and instructions that are necessary to the safe use of its product. Although in certain instances a regulatory duty to warn and instruct is imposed, compliance with these minimal duties does not ordinarily fulfill the manufacturer's common-law duty.


82. E.g., 21 C.F.R. § 203.20(b) (1982) (package inserts for prescription drugs); id. § 369 (warnings for over-the-counter drugs).

A handgun manufacturer may breach its common-law duty to market a product properly by failing to provide either adequate warnings as to foreseeable dangers arising from misuse or adequate instructions for safe use. First, a manufacturer may be found to have a duty to warn dealers of the severe consequences resulting from a failure to screen prospective purchasers adequately. Second, a manufacturer owes a similar duty to warn handgun purchasers of the dangers of improper use and storage, and to instruct them in procedures to prevent accidents and theft. This latter duty to warn the consumer falls most heavily on the manufacturer because it is in the best position to recognize and cure such marketing defects as widespread dealer failure to provide adequate warnings and instructions. In circumstances in which such dealer conduct is foreseeable, the intervening


86. Cf. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 361 (E.D.N.Y. 1972) (manufacturers, and those who use or store explosives, must use degree of care commensurate with great danger); Cobb v. Insured Lloyds, 387 So. 2d 13, 19 (La. Ct. App.) (handgun manufacturer liable for failure to warn adequately of dangers of not following manufacturer's instructions), cert. denied, 394 So. 2d 615 (La. 1980). At least 20-25% of all guns seized in crime had been stolen within the previous 6 months. The Snub Nosed Killers, supra note 6, at 29. Up to 225,000 guns are stolen annually. Id. At least 60,000 are taken from consumers. Moore, Keeping Handguns from Criminal Offenders, 455 Annals 92, 100 (May 1981).

87. Cf. Burch v. Amsterdam Corp., 366 A.2d 1079, 1086 (D.C. 1976) (manufacturer of flammable adhesive liable for failure to provide specific instructions to prevent foreseeable dangers); Davis v. Siloo Inc., 47 N.C. App. 237, 245-46, 267 S.E.2d 354, 359 (manufacturer of chemical solvent liable for failure to provide adequate instructions for foreseeable uses), cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980). Approximately 2400 deaths resulted from firearms accidents annually between 1957 and 1967. Staff Report, supra note 8, at 26. Handgun accidents are more likely to occur while the handgun is being misused, while "long gun" accidents are more likely to occur during hunting or target shooting. Id. at 30-31.


89. James, General Products—Should Manufacturers Be Liable Without Negligence?, 24 Tenn. L. Rev. 923, 925 (1957).
failure of these middlemen may not relieve the manufacturer's liability. 90

In order to warn and instruct adequately, a handgun manufacturer should make reasonable efforts to learn of the principal sources of guns used in crime and the logistical methods of preventing these guns from reaching criminals. 91 It should also make reasonable efforts to bring this knowledge to the attention of the dealer. 92

It might be argued that because the risk that handguns may be criminally misused is patent, the manufacturer has no duty to warn or instruct dealers or consumers. 93 However, the patent/latent distinction as a limitation on liability has been rejected by many courts. 94 It


92. The adequacy of efforts to warn and instruct is a question of fact. Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 66, 507 P.2d 653, 662, 107 Cal. Rptr. 45, 54 (1973); Mahr v. G.D. Searle & Co., 72 Ill. App. 3d 540, 562, 390 N.E.2d 1214, 1230 (1979), and depends not only on the method but on the "intensity" with which the manufacturer disseminates the information. Seley v. G.D. Searle & Co., 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981); accord Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1137 (9th Cir. 1977); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 163 (D.S.D. 1967), aff'd, 408 F.2d 978 (8th Cir. 1969). Advertising and promotional techniques intended to increase the number of buyers may erode a previously adequate warning. See Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 66, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973); Incollingo v. Ewing, 444 Pa. 263, 288-89, 282 A.2d 206, 220 (1971). In analogous cases, drug manufacturers have been held liable on a theory of inadequate warnings when subsequent promotion failed to reinforce a printed warning packaged with the product. Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973); Incollingo v. Ewing, 444 Pa. 263, 288-89, 282 A.2d 206, 220 (1971). Hence, handgun manufacturers' efforts to warn should increase as the scope and intensity of their promotional efforts increase. If the manufacturer has reason to know the dealer will not provide necessary warnings and instructions, it should also make reasonable efforts to bring its knowledge of the dangers to the attention of the consumer. See Restatement (Second) of Torts § 388 comment n (1965); cf. Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812-13 (9th Cir. 1974) (warning to plaintiff's employer not sufficient because duty is owed to ultimate user); Doss v. Apache Powder Co., 430 F.2d 1317, 1321 (5th Cir. 1970) (warning to supplier by dynamite manufacturer may not be sufficient if article is inherently dangerous); Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 433, 581 P.2d 271, 278 (1978) (warning to dealer by manufacturer of explosive liquid not sufficient to fulfill duty).


94. E.g., Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1172 (Fla. 1979); Micallef v. Miehle Co., 39 N.Y.2d 376, 385, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115,
would be incongruous to hold a manufacturer liable for a latent defect while exonerating one that failed to provide warnings, even though fully aware of the danger, simply because the defect was patent.\textsuperscript{95}

b. Negligent Entrustment

Even when warnings and instructions are objectively viewed as adequate, if a manufacturer has reason to know that they are being ignored\textsuperscript{96} or are not effective in reducing the risk of a product's misuse,\textsuperscript{97} the warnings and instructions should not be considered sufficient to relieve liability. Therefore, a handgun manufacturer may be considered to have acted unreasonably if it markets its product to dealers it has reason to know fail to take adequate precautions to reduce the risk of criminal misuse.

This doctrine of negligent entrustment is well illustrated in \textit{Moning v. Alfonso}.\textsuperscript{98} In that case, the plaintiff was injured when a playmate accidentally hit him with a pellet fired from a slingshot.\textsuperscript{99} In reversing a directed verdict for the manufacturer, the court concluded that the defendant could be found negligent for selling slingshots to children\textsuperscript{100} because the child's misuse was foreseeable.\textsuperscript{101} Consequently, marketing a dangerous product without attempting to reduce the product's availability to classes of purchasers likely to misuse the product could be considered unreasonable.\textsuperscript{102}

\textsuperscript{95} Luque v. McLean, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972); see Cobb v. Insured Lloyds, 387 So. 2d 13 (La. Ct. App.), cert. denied, 394 So. 2d 615 (La. 1980). The court in \textit{Cobb} held the manufacturer liable for injuries when a revolver misfired because the safety device was not in the proper position. Plaintiff was familiar with similar weapons but did not realize, even though defendant's instructions were quite specific, that this gun's safety mechanism was unusual. The manufacturer was held to have failed in his duty because he had not explicitly warned of the dangers of not following the instructions. \textit{Id.} at 19.


\textsuperscript{97} \textit{Cf.} Doss v. Apache Powder Co., 430 F.2d 1317, 1321 (5th Cir. 1970) (dynamite manufacturer may be liable if it does not know whether dealer will pass warning on to potential user); Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 433-34, 581 P.2d 271, 278-79 (Ct. App. 1978) (manufacturer of explosive liquid may be liable if he does not know whether dealer will pass warning on to potential user); Incollingo v. Ewing, 444 Pa. 263, 292, 282 A.2d 206, 222 (1971) (drug manufacturer who knew product was prescribed indiscriminately liable despite warning).


\textsuperscript{99} \textit{Id.} at 432, 254 N.W.2d at 762.

\textsuperscript{100} \textit{Id.} at 458, 254 N.W.2d at 774-75.

\textsuperscript{101} \textit{Id.} at 441-42, 254 N.W.2d at 766.

\textsuperscript{102} \textit{Id.} at 446-49, 254 N.W.2d at 769-70.
Similarly, handgun manufacturers should foresee that mere dealer compliance with statutory duties may not eliminate all risks of criminal misuse resulting from the manufacturers’ current marketing procedures because such compliance does not suggest that the dealer has taken all reasonable precautions. For example, in the absence of suspicious circumstances, handgun dealers are not required by statute to determine the authenticity of documents presented or to verify a purchaser’s true identity. As a result, dealers may be unaware that a purchaser is a member of a proscribed class, and many guns are sold directly to persons proscribed by gun control laws. Particularly because existing statutes are ineffective in preventing these sales, a dealer should be liable in negligence for injuries resulting from guns placed in the hands of ineligible purchasers. For example, it might be considered unreasonable for a dealer to sell a handgun without requiring corroboration of the purchaser’s identity and eligibility. Further, a breach of the manufacturer’s duty to market its product safely may be established if it sells handguns to a dealer without requiring that the dealer seek such corroboration.

If a manufacturer has reason to know that a specific dealer has a history of sales to ineligible persons, or that an undue percentage of

105. See Hearings on Saturday Night Specials, supra note 7, at 174 (statement of Patrick Murphy, Police Commissioner, New York City); The District’s Handgun Ban, supra note 11, at 7.
106. See Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530 (3d Cir. 1979) (failure to comply with statute requiring handgun purchasers to be identified prior to purchase was negligence per se); cf. Hartford Accident & Indem. Co. v. Abdullah, 94 Cal. App. 3d 81, 94, 156 Cal. Rptr. 254, 262 (1979) (automobile dealer is liable if he fails to ascertain prospective purchaser’s ability to drive before allowing test drive).

There are a great number of private handgun sales among individuals. Moore, supra note 86, at 98 (300,000 to 700,000 per year). However, most states do not impose a statutory duty to report private transfers. But see Miss. Code Ann. § 45-9-17 (1972) (requiring anyone receiving a firearm to register the gun). The Kennedy-Rodino Amendment to the Gun Control Act of 1968, by requiring that all private handgun sales take place through a licensed dealer, S. 511, § 103(a), 98th Cong., 1st Sess., 129 Cong. Rec. S1317 (daily ed. Feb. 17, 1983), would make it possible to trace the weapon to the individual seller.
107. Cf. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530 (3d Cir. 1979) (dealer liable for failure to obtain required corroborating proof); Hartford Accident & Indem. Co. v. Abdullah, 94 Cal. App. 3d 81, 94, 156 Cal. Rptr. 254, 262 (1979) (automobile dealer liable if he fails to ascertain prospective purchaser’s ability to drive before allowing test drive).
handguns sold by that dealer have been used in crime, it should be liable for continuing to entrust handguns to that dealer. At present, manufacturers concededly cannot determine with certainty whether dealers have made reasonable efforts to screen prospective purchasers. Records of handguns used in crime include only those reported to the Bureau of Alcohol, Tobacco and Firearms (ATF) as a result of statistical studies or requests by local law enforcement officials for firearm traces. Consequently, the use of this standard would depend upon the enactment of legislation requiring that the serial numbers of all guns used in crimes be reported to ATF to be compiled in a permanent public record. This will aid ATF to channel more effectively its limited resources, and allow a manufacturer to identify those dealers that pose an unreasonable risk due to a pattern of sales of guns used in crime.

Another possible theory of negligent entrustment would be based on a handgun manufacturer's duty to make reasonable efforts to prevent handgun thefts from shippers and dealers. Of all firearm thefts, a significant source of guns used in crime, nearly thirty percent are taken from these intermediaries. A manufacturer should require that anyone to whom he entrusts his handguns take adequate precautions to prevent theft. Regulations should be promulgated that would require that firearm thefts also be reported to ATF. This again will


111. The need for more extensive records concerning the sources of handguns and how criminals gain access to these weapons has been recognized. See id. at 18-25 (statement of Richard Davis, Assistant Secretary of the Treasury). The system for compiling such records is available. See generally Speech by Rex Davis, Director, Bureau of Alcohol, Tobacco & Firearms, before the New York State Association of Chiefs of Police Conference, July 29, 1975, in Buffalo, N.Y., reprinted in Hearings on Handgun Violence, supra note 7, at 262-68 (describing the operations of the current firearms tracing center).

112. See supra note 86.

113. Hearings on Handgun Violence, supra note 7, at 241 (testimony of David McDonald, Assistant Secretary of the Treasury) (4% are taken from interstate shipments, 25% are taken from dealers, and 70% are taken from individuals and miscellaneous sources). For a discussion of the possibility of firearm owners' liability for injuries caused by stolen guns, see Fields, Guns, Crime, and the Negligent Gun Owner, 10 N. Ky. L. Rev. 141 (1982).

114. A regulation requiring all federal firearm licensees to report thefts within seven days was proposed in 1978. 43 Fed. Reg. 11,800 (1978). The regulation was
provide ATF with information necessary to direct its enforcement efforts as well as provide the manufacturer with a public record of those shippers and dealers who represent an unreasonable risk. A manufacturer would then have reason to know of previous thefts from a particular shipper or dealer and should be liable if it continues to entrust its handguns to a shipper or dealer from which an undue percentage of guns have been stolen.\(^{115}\)

c. Saturday Night Specials

A design defect may be established by showing that an entire product line is unreasonably dangerous.\(^{116}\) A plaintiff may be able to demonstrate that one particular line of handguns, frequently referred to as Saturday Night Specials,\(^{117}\) is unreasonably dangerous by showing that the risks of criminal use resulting from the design outweigh the benefits of continued availability of these guns.\(^{118}\)

Congress has recognized the grave risks posed by Saturday Night Specials.\(^{119}\) At present, the Gun Control Act of 1968 prohibits the importation of Saturday Night Specials from foreign countries.\(^{120}\) A


117. These weapons are generally described as easily concealable, inexpensive and poorly made. Hearings on Saturday Night Specials, supra note 7, at 132 (testimony of Eugene T. Rossides, Assistant Secretary of the Treasury); id. at 281 (testimony of John Nichols, Commissioner of Police, Detroit); id. at 330-31 (testimony of Harold A. Serr, Retired Director of the Bureau of Alcohol, Tobacco & Firearms); Bureau of Alcohol, Tobacco & Firearms, Project Identification, A Study of Handguns Used in Crime (1976), reprinted in Hearings on Handgun Violence, supra note 7, at 366-67.


120. 18 U.S.C. § 925(d)(3) (1976) (prohibiting importation of any firearm that is not “particularly suitable for or readily adaptable to sporting purposes” or limited other purposes). Although the statute does not specifically refer to “Saturday Night Specials,” the statutory language has been interpreted as referring to these guns. See, e.g., 127 Cong. Rec. S3807 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy).
loophole in the statute, however, allows the importation of parts for these handguns from overseas for assembly and sale in the United States. Subsequent congressional proposals have sought both to close this loophole and to eliminate the risks inherent in continued availability of Saturday Night Specials by banning their sale in the United States.

It has been suggested that Saturday Night Specials pose a great risk of criminal misuse particularly because they are easily concealable and relatively inexpensive. Most Saturday Night Specials are, in fact, used in crime. In addition, any countervailing social usefulness is negligible because the poor quality of their manufacture precludes


122. See, e.g., S. 511, § 105, 98th Cong., 1st Sess., 129 Cong. Rec. S1318 (daily ed. Feb. 17, 1983) (empowering Attorney General to prevent sale of weapons not “readily adaptable to sporting purposes”). A legislative ban of Saturday Night Specials was passed by the Senate in 1972, S. 2507, 92d Cong., 2d Sess., 118 Cong. Rec. 27,502 (1972), but was not approved by the House of Representatives. (The bill was reported to the House of Representatives Committee on the Judiciary, 118 Cong. Rec. 27,713 (1972), but was not passed during the 92d Congress.) The primary objection raised in the Senate hearings was the broad discretionary power the bill granted the Secretary of the Treasury to prevent the sale of handguns unsuitable for sporting uses. See Hearings on Saturday Night Specials, supra note 7, at 316 (statement of Maxwell Rich, Executive Vice President, National Rifle Association); National Rifle Association Press Release, supra note 55, at 7. By contrast, a court does not have similar discretion in determining if a particular handgun may be classified as a Saturday Night Special. Its determination is limited by the specific facts of a particular case.

123. Hearings on Saturday Night Specials, supra note 7, at 330-31 (testimony of Harold A. Serr, Retired Director of the Bureau of Alcohol, Tobacco & Firearms); Bureau of Alcohol, Tobacco & Firearms, Project Identification, A Study of Handguns Used in Crime (1976), reprinted in Hearings on Handgun Violence, supra note 7, at 366-67. This theory is central to the Brady case. First Amended Complaint for Damages, Brady v. Hinckley, No. 82-0549, at 4-10 (D.D.C. Sept. 8, 1982).

124. 127 Cong. Rec. S3807, 3808 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy). These guns account for a large percentage of handguns used in crime. Hearings on Saturday Night Specials, supra note 7, at 181 (remarks of Chairman Birch Bayh) (interpreting FBI statistics to suggest that 43% of all handgun murders are committed with Saturday Night Specials); id. at 263 (testimony of Donald E. Santarelli, Associate Deputy Attorney General) (District of Columbia, 1/1/71-8/14/71: of all handguns recovered in crime, 54% were Saturday Night Specials); id. at 281 (testimony of John Nichols, Commissioner of Police, Detroit, Michigan) (Detroit, 1968-1971: of all handguns recovered in crime, 29.7% to 36.1% were Saturday Night Specials); id. at 344 (testimony of Joseph P. Busch, District Attorney of Los Angeles County) (Los Angeles: of all guns seized in crime and destroyed in July 1971, 37% were Saturday Night Specials).
their use for most legitimate purposes.\textsuperscript{125} Other guns are safer\textsuperscript{126} and more accurate\textsuperscript{127} for legitimate uses,\textsuperscript{128} while not posing the same danger of criminal misuse.\textsuperscript{129} Accordingly, courts should impose liability on manufacturers of Saturday Night Specials for injuries that result from use of these guns because such guns are defectively designed and thus pose an unreasonable risk of harm to the public.\textsuperscript{130}

\section*{B. Cause}

To establish liability, the breach of the manufacturer's duty must be shown to be both the cause in fact and proximate cause of the injury.\textsuperscript{131} Causation in fact is established by showing that the manu-

\begin{itemize}
\item \textsuperscript{125} \textit{Hearings on Saturday Night Specials, supra} note 7, at 132 (testimony of Eugene T. Rossides, Assistant Secretary of the Treasury); \textit{id.} at 109 (testimony of Jerry Wilson, Chief of Police, Washington, D.C.); \textit{see} 127 Cong. Rec. S3807 (daily ed. Apr. 9, 1981) (statement of Sen. Kennedy).
\item \textsuperscript{126} Because Saturday Night Specials are by definition inexpensive and poorly made, they are more likely to malfunction and cause harm to the user. \textit{See Hearings on Saturday Night Specials, supra} note 7, at 155-58 (testimony of D.R. Dunn, Manager, H.P. White Laboratory).
\item \textsuperscript{128} Although many handgun owners cite self-defense as the primary purpose for possessing handguns, few American adults have actually fired a weapon in self-defense. Wright, \textit{ supra} note 80, at 30-31. Available evidence also suggests that the protection afforded by handguns is largely illusory and is offset by increased accidents and illegal use. Staff Report, \textit{ supra} note 8, at 68; \textit{see Hearings on Handgun Violence, supra} note 7, at 809 (testimony of Milton Eisenhower, Former Chairman of the President's Commission on the Causes and Prevention of Violence). But \textit{see National Rifle Association Press Release, supra} note 55, at 8.
\item \textsuperscript{129} Handguns account for only about 25\% of all firearms owned in the United States. Fields, \textit{ supra} note 8, at 38; Staff Report, \textit{ supra} note 8, at 7. Saturday Night Specials, while constituting only about 12\% of handguns owned by law-abiding citizens, account for 68\% of the handguns used by criminals. 127 Cong. Rec. S3808 (daily ed. Apr. 9, 1981) (citing study made by Florida Bureau of Criminal Justice Planning and Assistance).
\item \textsuperscript{130} \textit{See Hearings on Saturday Night Specials, supra} note 7, at 109 (statement of Jerry Wilson, Chief of Police, Washington, D.C.); 127 Cong. Rec. S3807 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy); First Amended Complaint for Damages, Brady v. Hinckley, No. 82-0549, at 4-6 (D.D.C. Sept. 8, 1982).
\item It has been suggested that if these guns become more difficult to obtain criminals will merely shift to other, more expensive guns. Institute for Legislative Action, National Rifle Ass'n, The Myth of the "Saturday Night Special" (1979) (information pamphlet). However, this ignores the fact that as the cost of committing a crime rises, the relative return becomes less, offering a disincentive to criminal activity. \textit{See} W. Luksetich & M. White, Crime and Public Policy: An Economic Approach 83-84 (1982).
facturer's breach was a substantial cause of the injury. Proximate cause, rather than a question of actual causation, is a legal doctrine intended to limit liability to those causes that bear sufficient relation to the injury to warrant legal responsibility. Generally, a manufacturer's breach of a duty will be held to be the proximate cause of the injury only if the injury is foreseeable.

1. Causation in Fact

Actual causation may be established by showing that a handgun manufacturer's design or marketing was a substantial factor in bringing about the criminal misuse that resulted in a plaintiff's injuries. An inference of a causal relation is permissible if the act or omission could reasonably be expected to produce a particular result and that result, in fact, occurred. Even if the injury has been caused by a combination of acts or omissions by the dealer and the manufacturer, neither party should be absolved merely because the other contributed to the result.

note 58, §§ 11.01–.02; W. Prosser, supra note 1, §§ 41–42; Restatement (Second) of Torts § 431 (1965).

132. E.g., Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 617, 292 N.W.2d 630, 635 (1980); Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967); see 1 L. Frumer & M. Friedman, supra note 58, § 11.01; W. Prosser, supra note 1, § 41, at 240–41; Restatement (Second) of Torts § 431 (1965).


135. Cf. Klages v. General Ordinance Equip. Corp., 240 Pa. Super. 356, 373, 367 A.2d 304, 313 (1976) (failure of mace weapon to defend against a criminal attack is a substantial cause of resulting injuries); Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 617, 292 N.W.2d 630, 635 (1980) (defective snowmobile design is a cause of resulting injury if it is a "substantial factor"); Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1130 (Wyo. 1978) (if two parties are negligent for injuries resulting from automobile collision, each will be liable if his conduct "was a substantial factor in bringing about the harm"). Today, most courts apply the substantial cause test instead of the more familiar "but for" test. W. Prosser, supra note 1, § 41, at 240-41; see Restatement (Second) of Torts § 431(a) (1965).

136. W. Prosser, supra note 1, § 41, at 242.

137. W. Prosser, supra note 1, § 41, at 239, 240-41; cf. Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1130 (Wyo. 1978) (if two parties combine to bring about harm, each will be liable if his conduct was a substantial cause of the injury); Cobb v. Insured Lloyds, 387 So. 2d 13, 19 (La. Ct. App.) (manufacturer will be liable for failure to warn despite the user's negligence), cert. denied, 394 So. 2d 615 (La. 1980).
A plaintiff may show a causal relation between the injury resulting from the criminal misuse of a handgun and the manufacturer's failure to warn and instruct the dealer adequately by establishing that: 1) the manufacturer failed to warn and instruct the dealer as to reasonable precautions to prevent thefts or sales to unfit persons; 2) the dealer failed to take adequate precautions to prevent these sales or thefts; and 3) the gun used in the crime was, in fact, obtained as a result of the dealer's failure.138

Similarly, a plaintiff may show a causal relation between an injury resulting from criminal handgun misuse and the handgun manufacturer's negligent entrustment of his product to another, if he establishes that: 1) the manufacturer entrusted its handguns to a dealer but failed to require that dealer to take reasonable precautions to prevent theft or sales to unfit persons; 2) the dealer failed to guard against handgun theft or sales to unfit persons; and 3) the gun used in the crime was, in fact, obtained as a result of that dealer's failure.139

Alternatively, a plaintiff may show a causal relation by establishing that the manufacturer had reason to know that entrusting its handguns to a particular dealer posed an unreasonable risk of criminal misuse either because: 1) of a history of thefts from, or sales to unfit persons by the dealer; or 2) an undue percentage of handguns entrusted to that dealer had, in fact, been used in crime,140 and the plaintiff's injuries were caused by a handgun obtained from that dealer.

Finally, a plaintiff may show a causal relation between the manufacturer's sales of Saturday Night Specials and injury resulting from the criminal misuse of these guns by establishing that had the manu-

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139. Cf. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530-31 (3d Cir. 1979) (compliance with Delaware statute requiring identification of handgun purchaser would have prevented consummation of this particular sale; causation found); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (if federal law had been obeyed, criminal would not have obtained possession of the gun; causation found), cert. denied, 434 U.S. 835 (1977); Moning v. Alfono, 400 Mich. 425, 441-42, 254 N.W.2d 759, 766 (1977) (children's misuse of slingshot was a normal consequence of manufacturer's marketing; causation found).

140. Cf. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530-31 (3d Cir. 1979) (failure to take reasonable precautions and failure to comply with statute may make dealer liable for entrusting handgun to one likely to misuse it); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (same), cert. denied, 434 U.S. 835 (1977); Moning v. Alfono, 400 Mich. 425, 447-49, 254 N.W.2d 759, 769-70 (1977) (manufacturer may be liable for entrusting slingshots to children, a class likely to misuse them).
2. Proximate Cause

Perhaps the most problematic issue in finding the manufacturer liable for criminal misuse of handguns is establishing that the manufacturer's design or marketing was the proximate cause of the injury. If handgun misuse is foreseeable, the manufacturer will be held liable for injuries resulting from that misuse even though the gun would have been safe if used as the manufacturer intended. Foreseeability refers to the general risk of misuse created by unreasonable marketing or design rather than to specific intervening acts. Therefore, the manufacturer need not foresee the specific chain of events that leads to criminal misuse in order to be liable. Neverthe-

141. Cf. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 530-31 (3d Cir. 1979) (compliance with statute would have kept dealer's gun from criminal and dealer's gun would not have otherwise caused injury); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (same), cert. denied, 434 U.S. 835 (1977).


144. For example, an automobile manufacturer is required to design his cars to be reasonably safe in accidents because accidents are foreseeable even though not intended. See, e.g., Caiazzo v. Volkswagenwerk, A.G., 647 F.2d 241, 245 (2d Cir. 1981); Dawson v. Chrysler Corp., 630 F.2d 950, 956 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981); Passwaters v. General Motors Corp., 454 F.2d 1270, 1276 (8th Cir. 1972); Jeng v. Witters, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978), aff'd mem., 591 F.2d 1335 (3d Cir. 1979); Cronin v. J.B.E. Olson Corp., 8 Cal. 2d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972).


146. Cf. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 362 (E.D.N.Y. 1972) (blasting cap manufacturer's failure to warn was proximate cause of injuries to children because accidents that resulted were within the "general kind or
less, a plaintiff must convince a court that both the criminal act\(^\text{147}\) and the dealer's negligence\(^\text{148}\) are not superseding acts that relieve the manufacturer of responsibility and liability.

The intervention of the dealer's negligent act and the criminal misuse should be foreseen\(^\text{149}\) because "the defendant's duty requires him to anticipate the intervening misconduct, and guard against it."\(^\text{150}\) The handgun manufacturers' duties suggested in the previous sections\(^\text{151}\) are predicated on the expectation that the manufacturer should foresee both the likelihood that dealers will fail to guard adequately against unfit persons obtaining handguns and the possibility that unfit persons will purchase guns or that guns will be stolen.\(^\text{152}\) Therefore, a breach of these duties may be considered the proximate cause of resulting injuries.

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\(^{147}\) Cf. Gillot v. Washington Metropolitan Area Transit Auth., 507 F. Supp. 454, 487 (D.D.C. 1981) (defendant parking lot operator not liable for rape of customer because intervening criminal act is superseding); Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206, 1210 (E.D. Ky. 1973) (importer not liable because criminal handgun misuse is superseding); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (handgun dealer liable for injuries because criminal misuse was foreseeable), cert. denied, 434 U.S. 835 (1977); Olson v. Ratzel, 89 Wis. 2d 227, 254, 278 N.W.2d 238, 250-51 (Ct. App. 1979) (suggesting that trial court may find criminal misuse of a handgun to be a superseding cause).

\(^{148}\) Cf. Di Gironimo v. American Seed Co., 96 F. Supp. 795, 796-97 (E.D. Pa. 1951) (when minor was sold a gun in contravention of statute and loaned it to a third party who negligently caused injury to the plaintiff, the dealer is liable if the loan was foreseeable); Spires v. Goldberg, 26 Ga. App. 530, 537-38, 106 S.E. 585, 587-88 (1921) (same); Wassel v. Ludwig, 92 Pa. Super. 341, 347 (1928) (same). This is merely an extension of the general principle that even unusual risks that can be foreseen are the responsibility of the actor. Restatement (Second) of Torts § 302B (1965).

\(^{149}\) W. Prosser, supra note 1, § 44, at 272 (the intervening act is foreseeable if it "is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated").

\(^{150}\) W. Prosser, supra note 1, § 44, at 275.

\(^{151}\) See supra pt. II(A)(2).

\(^{152}\) The dealer's negligence is not a necessary link in the chain of causation if the handgun that was criminally misused was a Saturday Night Special. These guns are more likely to be used by criminals than by law-abiding citizens. 127 Cong Rec. S3808 (daily ed. Apr. 9, 1981) (citing study conducted by Florida Bureau of Criminal Justice Planning and Assistance). Therefore, the mere act of making this weapon available makes the criminal act foreseeable. Cf. Hetherton v. Sears, Roebuck & Co., 593 F.2d 526, 531 (3d Cir. 1979) (violation of a statute that is designed to prevent criminal misuse makes criminal misuse foreseeable); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93, cert. denied, 434 U.S. 835 (1977).
III. Policy Considerations

Strict products liability law developed for two principal reasons: 1) to spread the risk of loss while compensating the victim;153 and 2) to provide incentives for increasing product safety.154 The law focuses on the manufacturer because it is in the best position both to discover and to remedy defects.155 The manufacturer's view of the industry is necessarily broader than that of the individual retailer; only it can address an industry-wide problem.156

Generally, the handgun manufacturer can best afford to compensate the victims of criminal misuse of handguns because it is in the best position to spread the costs of injuries.157 Of course, if the burden of payment is transferred from the victim to the manufacturer, the cost of handguns will rise, and handgun purchasers, those who derive the benefit of handgun availability, will ultimately bear the cost.158

The second policy thrust of products liability law demands that the handgun manufacturers bear the costs of criminal misuse of handguns that could have been avoided by taking reasonable precautions, thereby offering them an incentive to take the reasonable steps required.159 By contrast, the victim is not voluntarily involved in the enterprise and could not be expected to guard against its risks.160


156. See James, supra note 89, at 925.


It might be suggested that attempting to reduce the availability of handguns to criminals is a legislative function.\textsuperscript{161} Certainly, the legislature is an appropriate forum for addressing this problem.\textsuperscript{162} Nevertheless, the controversy surrounding this issue intensifies the usual difficulties of legislative action.\textsuperscript{163} Furthermore, the investment of time and money necessary to enact legislation is often wasted because the legislation is ultimately rejected as a result of objections to peripheral issues\textsuperscript{164} or obstruction by special interest groups.\textsuperscript{165}

The principal advantage of risk and resource allocation through tort law is that the costs are borne not by the taxpayers but rather by those who derive benefits from the handgun industry.\textsuperscript{166} Courts merely determine who is to bear the risk and industry then follows the dictates of the marketplace in determining how best to spread that risk.\textsuperscript{167} Of course, the handgun manufacturer may choose not to change its unreasonable design and marketing and simply spread the cost of litigation or insurance by raising the price of its product.\textsuperscript{168} More likely, however, a handgun manufacturer will choose to fulfill its common-law duty to provide products that are reasonably safe so as to avoid the possibility of large personal injury judgments.\textsuperscript{169}

\textsuperscript{160} See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); James, supra note 89, at 923; Wade, supra note 61, at 826.


\textsuperscript{162} See \textit{Hearings on Firearms Legislation} [Part 1], supra note 55, at 2 (statement of Chairman Conyers).

\textsuperscript{163} Cf. J. Freedman, \textit{Crisis and Legitimacy: The Administrative Process and American Government} 93-94 (1978) ("hotly controverted issues" may result in no legislation because "[s]ometimes a nation has no will sufficiently focused or widely shared to permit present expression through a majority"). See supra note 55.


\textsuperscript{167} \textit{Id.} at 316-17.

\textsuperscript{168} See Posner, supra note 153, at 33.

\textsuperscript{169} Cf. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 368 (E.D.N.Y. 1973) (explosives manufacturers); \textit{see also} Bodine, \textit{7-Figure Verdicts Hit New High}, 3 Nat'l L.J. 1, 1 (May 4, 1981) (pointing out the trend of large personal injury judgments, particularly in product liability suits).
CONCLUSION

The ultimate question in determining a breach of the handgun manufacturer’s duty is whether the design or marketing of its product was unreasonably unsafe. The prevalence of handgun use in violent crime and the ease with which criminals obtain those guns indicate that some manufacturers have failed to make reasonable efforts to reduce criminal misuse of handguns.

Conventional wisdom suggests that if “a gun maker would be liable to anyone shot by the gun,” he would be an insurer. However, this Note suggests that liability should be imposed only if the gun which caused the injury would not have been available had the manufacturer fulfilled its duty to reasonably design and properly market its product. The law should not immunize a handgun manufacturer from liability if a breach of that duty results in injury. Nor should criminal intervention supersede the manufacturer’s liability. A manufacturer should foresee the increased likelihood of criminal misuse resulting from current unreasonable handgun marketing and design.

The fear of overstepping the bounds of judicial restraint and pre-empting a legislative function is a legitimate judicial concern. Nonetheless, it must be realized that “however [a] Court decides [a] case it in effect makes a value judgment.” Imposition of tort liability merely forces the manufacturer to allocate the risks of handgun misuse so that those who derive the benefit from handgun availability also bear the cost.

H. Todd Iveson

170. Wade, supra note 61, at 838; cf. Traynor, supra note 74, at 367 (knife manufacturer).