

1983

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Recommended Citation

H. Todd Iveson, *Manufacturer's Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 Fordham L. Rev. 771 (1983).

Available at: <https://ir.lawnet.fordham.edu/flr/vol51/iss4/8>

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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,¹ strict products liability,² and engaging in an abnormally dangerous activity.³ 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.⁴ 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.⁵

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).

4. First Amended Complaint for Damages, *Brady v. Hinckley*, No. 82-0549, at 4-5, 10, 11 (D.D.C. Sept. 8, 1982).

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.⁶ Handguns in circulation⁷ account for only about 20 to 25% of all firearms,⁸ but they are used in the majority of crimes committed with firearms.⁹ They are used in at least 49% of all homicides.¹⁰

1982); *Warning: Dangerous To Your Health*, CBS 60 Minutes, Oct. 24, 1982, at 7 (transcript). This Note focuses on manufacturers' liability for criminal misuse of handguns. For an examination of the larger problem of manufacturer and supplier liability for other kinds of handgun misuse, see Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. Ky. L. Rev. 41 (1982).

6. Cook, *The Effect of Gun Availability on Violent Crime Patterns*, 455 Annals 63, 68, 78 (May 1981); Cox Newspapers, Washington Bureau, *The Snub Nosed Killers: Handguns in America*, at 3, 4, 8 (1981) [hereinafter cited as *Snub Nosed Killers*]; see Progress Report of the Nat'l Comm'n on the Causes and Prevention of Violence, at A-34, Jan. 9, 1969 (weapon most often used in criminal assaults).

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*].

8. Fields, *Handgun Prohibition and Social Necessity*, 23 St. Louis U.L.J. 35, 38 (1979) (extrapolating from FBI Uniform Crime Reports for 1974-1976); see Staff Report to the Nat'l Comm'n on the Causes and Prevention of Violence, *Firearms and Violence in American Life* 6 (1969) (estimating 24 million handguns, 90 million total firearms) [hereinafter cited as Staff Report].

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.¹¹ Therefore, it is particularly appropriate in this context for courts to supplement statutory duties with those imposed by the common law.¹² 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.¹³

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*].

12. See *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1085 (D.C. 1976); *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 440, 396 N.E.2d 534, 537 (1979); *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 561, 390 N.E.2d 1214, 1229 (1979); *Michael v. Warner/Chilcott*, 91 N.M. 651, 654, 579 P.2d 183, 186 (Ct. App. 1978); *Sherman v. M. Lowenstein & Sons*, 28 A.D.2d 922, 922, 282 N.Y.S.2d 142, 143-44 (1967).

13. In analogous cases, some courts have held that there may be a basis for tort liability. *Cf. Decker v. Gibson Prods. Co.*, 679 F.2d 212 (11th Cir. 1982) (handgun dealer's illegal sale may be negligence); *Hetheron v. Sears, Roebuck & Co.*, 593 F.2d 526 (3d Cir. 1979) (handgun dealer's sale in violation of Delaware statute constitutes negligence per se); *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91, *cert. denied*, 434 U.S. 835 (1977) (handgun dealer's sale in violation of federal statute is evidence of negligence); *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977) (slingshot manufacturer liable for improperly marketing product); *McMillen v. Steele*, 275 Pa. 584, 119 A. 721 (1923) (handgun dealer's sale in violation of Pennsylvania statute constitutes negligence); *Olson v. Ratzel*, 89 Wis. 2d 227, 278 N.W.2d 238 (Ct. App. 1979) (dealer's illegal handgun sale may be negligence). *But cf. Bennet v. Cincinnati Checker Cab Co.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (firearms importer not liable for illegal sale because criminal misuse not foreseeable); *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713 (Hawaii 1982) (firearms dealer not liable for illegal sale because criminal misuse not foreseeable).

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. Federal¹⁴ and state governments¹⁵ 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 1968¹⁸ requires that all firearm manufacturers and dealers¹⁹ 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 felons²¹ 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

14. *See, e.g.*, 18 U.S.C. §§ 921-928 (1976 & Supp. V 1981).

15. *See, e.g.*, Ill. Ann. Stat. ch. 38, §§ 83-1 to -16.3 (Smith-Hurd 1977 & Supp. 1982-1983); La. Rev. Stat. Ann. §§ 40:1751-:1804 (West 1977); Pa. Stat. Ann. tit. 18, §§ 6101-6120 (Purdon 1973 & Supp. 1982-1983). Some municipalities also regulate firearm sales. *See, e.g.*, Bureau of Alcohol, Tobacco & Firearms, Department of the Treasury, State Laws and Published Ordinances 24 (1979) (Los Angeles); *id.* at 70-71 (Chicago); *id.* at 179-81 (New York City).

16. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 197, 225-26 (1968) (Findings and Declarations to Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976 & Supp. V 1981)); Ill. Ann. Stat. ch. 38, § 83-1 (Smith-Hurd 1977).

17. *See, e.g.*, Ill. Ann. Stat. ch. 38, § 83-2(a) (Smith-Hurd 1977); N.Y. Penal Law § 400.00 (McKinney 1980 & Supp. 1982-1983); Pa. Stat. Ann. tit. 18, § 6111 (Purdon 1973).

18. 18 U.S.C. §§ 921-928 (1976 & Supp. V 1981).

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,²⁶ and furnish this information to the federal government upon request.²⁷

Section 927 of the Gun Control Act of 1968²⁸ 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.²⁹ Generally, most states that have imposed additional requirements merely increase the prerequisites for purchaser eligibility³⁰ rather than impose affirmative duties on the manufacturer or the dealer.³¹ State regulatory approaches can be divided into three general categories.³² Some states require the purchaser to possess a license issued by the state as a prerequisite to handgun purchases.³³ Some states require the purchaser to obtain a permit for

26. *Id.* § 178.124(c).

27. *Id.* § 178.126(a).

28. 18 U.S.C. § 927 (1976).

29. *Id.*

30. See Cook & Blöse, *State Programs for Screening Handgun Buyers*, 455 Annals 80, 84-85 (May 1981); see, e.g., Conn. Gen. Stat. § 29-33(g) (1981); Ill. Ann. Stat. ch. 38, § 83-2(a) (Smith-Hurd 1977); N.Y. Penal Law § 400.00 (McKinney 1980 & Supp. 1982-1983).

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., Ordinance 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).

31. See, e.g., Conn. Gen. Stat. §§ 29-27 to -38a (1981); Ill. Ann. Stat. ch. 38, §§ 83-1 to -16.3 (Smith-Hurd 1977 & Supp. 1982-1983); N.Y. Penal Law § 400.00 (McKinney 1980 & Supp. 1982-1983). Many states do not prescribe significant prerequisites for handgun purchases. See, e.g., Ark. Stat. Ann. §§ 41-3101 to -3175 (1977 & Supp. 1981) (no prerequisite to purchase); Colo. Rev. Stat. §§ 12-26-101 to -27-104 (1978) (dealer must only keep record of sale); Okla. Stat. Ann. tit. 21, §§ 1271-1289.22 (West 1958 & Supp. 1982-1983) (no prerequisite to purchase). Mississippi and New Hampshire, although prescribing no prerequisites to handgun purchase, require that the sale of a handgun be reported to authorities. Miss. Code Ann. § 45-9-1 (1972); N.H. Rev. Stat. Ann. § 159:9 (1977).

32. Cook & Blöse, *supra* note 30, at 85.

33. See, e.g., Ill. Ann. Stat. ch. 38, § 83-2(a) (Smith-Hurd 1977); Iowa Code Ann. §§ 724.15 -.16 (West 1979); Mass. Ann. Laws ch. 140, § 129B (Michie/Law. Co-op. 1981).

the purchase of each handgun.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.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.³⁶

B. Civil Liability

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

34. See, e.g., Hawaii Rev. Stat. § 134-3 (Supp. 1981); La. Rev. Stat. Ann. § 40:1784 (West 1977); Mass. Ann. Laws ch. 140, § 131A (Michie/Law. Co-op. 1981); Mich. Comp. Laws Ann. § 28.422 (West 1981); N.Y. Penal Law § 400.00 (McKinney 1980 & Supp. 1982-1983); N.C. Gen. Stat. §§ 14-402, -409.1 (1981). A permit differs from a license in that a permit must be obtained prior to each handgun purchase, while possession of a license allows handgun purchases over a period of time. Cook & Blose, *supra* note 30, at 85. Compare Ill. Ann. Stat. ch. 38, § 83-2(a) (Smith-Hurd 1977) (license) with Hawaii Rev. Stat. § 134-3 (Supp. 1981) (permit).

35. See, e.g., Ala. Code § 13A-11-77 (1978) (48 hours); Conn. Gen. Stat. § 29-33 (1981) (2 weeks); Ind. Code Ann. § 35-23-4.1-7(a) (Burns 1979) (7 days); Md. Crim. Law Code Ann. § 442(b) (1982) (same); Pa. Stat. Ann. tit. 18, § 6111 (Purdon 1973) (48 hours); R.I. Gen. Laws § 11-47-35 (1981) (72 hours); S.D. Codified Laws Ann. § 23-7-9 (1979) (48 hours); Tenn. Code Ann. § 39-6-1704(c) (1982) (15 days).

36. See, e.g., Ala. Code § 13A-11-77 (1978); Cal. Penal Code § 12,076(b) (West 1982); Hawaii Rev. Stat. § 134-2 (Supp. 1981); La. Rev. Stat. Ann. § 40:1783 (West 1977); Mass. Ann. Laws ch. 140, § 123 (Michie/Law. Co-op. Supp. 1982); Mich. Comp. Laws Ann. § 28.422(2) (West 1981); Or. Rev. Stat. § 166.420(3) (1981); S.D. Codified Laws Ann. § 23-7-19 (1979). Rhode Island is unique in that it forbids the state to keep a central registry even though its statutes require notification and prescribe a waiting period. R.I. Gen. Laws § 11-47-41 (1981). However, the state does require the dealer to maintain a record of all sales. *Id.* § 11-47-40.

37. S. 511, 98th Cong., 1st Sess., 129 Cong. Rec. S1315-20 (daily ed., Feb. 17, 1983).

38. 18 U.S.C. §§ 921-928 (1976 & Supp. V 1981).

39. S. 511, § 105, 98th Cong., 1st Sess., 129 Cong. Rec. S1318 (daily ed. Feb. 17, 1983). 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 and Firearms, Project Identification, A Study of Handguns Used in Crime (1976), *reprinted in Hearings on Handgun Violence*, *supra* note 7, at 266-67. For a discussion of a manufacturer's common-law liability for selling Saturday Night Specials, see *infra* pt. II(A)(2)(c).

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

The bill also expressly provides for a civil cause of action for injuries resulting from a negligent handgun sale under the statute.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 1968⁴⁴ for injuries resulting from criminal misuse of handguns.⁴⁵ These courts have determined that Congress intended to protect the general public through administrative enforcement⁴⁶ of this statute rather than provide retrospective remedial relief to victims of handgun crime.⁴⁷

One court, however, has held that a dealer's violation of the Gun Control Act of 1968⁴⁸ can be evidence of negligence under state common law.⁴⁹ Moreover, a dealer's violation of state gun control laws has been determined to constitute negligence per se.⁵⁰ While no court has

40. *Id.* § 103(a), 129 Cong. Rec. at S1317.

41. *Id.* § 102(n), 129 Cong. Rec. at S1316.

42. *Id.* § 104(j), 129 Cong. Rec. at S1318 (proposed amendment to 18 U.S.C. § 923(g) (2)-(3) (1976)).

43. *Id.* § 106(d), 129 Cong. Rec. at S1319 (proposed amendment to § 924(e)).

44. 18 U.S.C. §§ 921-928 (1976 & Supp. V 1981).

45. *Decker v. Gibson Prods. Co.*, 505 F. Supp. 34, 36 (M.D. Ga. 1980), *rev'd on other grounds*, 679 F.2d 212 (11th Cir. 1982); *see Olson v. Ratzel*, 89 Wis. 2d 227, 249-50, 278 N.W.2d 238, 248-49 (1979); *cf. Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713, 720 (Hawaii 1982) (firearm). No court to date has determined whether a plaintiff has an implied private right of action against a manufacturer under the Act.

46. *Decker v. Gibson Prods. Co.*, 505 F. Supp. 34, 36 (M.D. Ga. 1980), *rev'd on other grounds*, 679 F.2d 212 (11th Cir. 1982); *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713, 720 (Hawaii 1982); *see Olson v. Ratzel*, 89 Wis. 2d 227, 249-50, 278 N.W.2d 238, 248-49 (1979).

47. *Decker v. Gibson Prods. Co.*, 505 F. Supp. 34, 36 (M.D. Ga. 1980), *rev'd on other grounds*, 679 F.2d 212 (11th Cir. 1982); *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713, 720 (Hawaii 1982).

48. 18 U.S.C. §§ 921-928 (1976 & Supp. V 1981).

49. *Franco v. Bunyard*, 261 Ark. 144, 147, 547 S.W.2d 91, 93, *cert. denied*, 434 U.S. 835 (1977); *see Hetherton v. Sears, Roebuck & Co.*, 593 F.2d 526, 532 (3d Cir. 1979)(dictum).

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). *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, supra* note 1, § 36, 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

Jones Constr. Co., 325 F.2d 605, 612 (8th Cir. 1963); *Whitt v. Dyan*, 20 Md. App. 148, 154-55, 315 A.2d 122, 126-27 (1974); *Horbal v. McNeil*, 66 N.J. 99, 103-04, 328 A.2d 604, 606-07 (1974). However, a defendant may avoid liability by showing that his conduct was unavoidable and therefore reasonable. *See, e.g., Baumann v. Potts*, 82 Mich. App. 225, 229-30, 266 N.W.2d 766, 768-69 (1978); *Gordon v. Hurtado*, 96 Nev. 375, 379-80, 609 P.2d 327, 329 (1980). *See generally* Restatement (Second) of Torts § 288A (1965). It has been held that the intervening criminal misuse of a handgun sold in violation of statute was unforeseeable and therefore the defendant was not liable. *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So. 2d 1074, 1076 (Miss. 1979). For a discussion of proving proximate cause in the context of criminal handgun misuse, see *infra* pt. II(B)(2).

51. *Cf. Orthopedic Equip. Co. v. Enutsler*, 276 F.2d 455, 461 (4th Cir. 1960)(manufacturer's misbranding of surgical instrument in violation of Federal Food & Drug Act constitutes negligence per se); *Lukaszewicz v. Ortho Pharmaceutical Corp.*, 510 F. Supp. 961, 964-65 (E.D. Wis. 1981)(contraceptive manufacturer's failure to comply with FDA regulation constitutes negligence per se).

52. *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1084-85 (D.C. 1976); *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 440, 396 N.E.2d 534, 537 (1979); *Sherman v. M. Lowenstein & Sons*, 28 A.D.2d 922, 922, 282 N.Y.S.2d 142, 143-44 (1967). *But see Corey v. Kaufman & Chernick, Inc.*, 70 R.I. 27, 30, 36 A.2d 103, 105 (1944)(state statute indicates legislative intent to allow sale of guns to all not proscribed).

53. *See Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1085 (D.C. 1976); *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 561, 390 N.E.2d 1214, 1229 (1979); *Michael v. Warner/Chilcott*, 91 N.M. 651, 654, 579 P.2d 183, 186 (Ct. App. 1978).

54. *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 64-65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973).

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,⁵⁶ 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.⁵⁷

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).

57. See *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1085 (D.C. 1976); *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 440, 396 N.E.2d 534, 537 (1979); *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 561, 390 N.E.2d 1214, 1229 (1979); *Michael v. Warner/Chilcott*, 91 N.M. 651, 654, 579 P.2d 183, 186 (Ct. App. 1978); *Sherman v. M. Lowenstein & Sons*, 28 A.D.2d 922, 922, 282 N.Y.S.2d 142, 143-44 (1967).

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.⁵⁸ This duty arises because of the economic benefits the manufacturer derives from the sale of the product⁵⁹ and consumers' justified expectations of safety.⁶⁰ By contrast, in strict products liability a manufacturer is liable when he sells products in a defective condition unreasonably dangerous to the public.⁶¹ The focus is on the condition of the product rather than the conduct of the actor.⁶² Strict products liability

58. *E.g.*, *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1274 (8th Cir. 1972) (duty to design reasonably safe product); *Moning v. Alfonso*, 400 Mich. 425, 432, 254 N.W.2d 759, 762 (1977) (duty not to market to classes likely to misuse product); *see* *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 360 (E.D.N.Y. 1972) (duty to market products with adequate warnings); *Smith v. Hobart Mfg. Co.*, 185 F. Supp. 751, 753 (E.D. Pa. 1960) (duty to design reasonably safe product), *rev'd on other grounds*, 302 F.2d 570 (3d Cir. 1962); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 64, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973) (duty to market products with adequate warnings). *See generally* 1 L. Frumer & M. Friedman, *Products Liability* §§ 7.01, 8 (1982).

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

60. *Id.*

61. *E.g.*, *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 654 (1st Cir. 1981); *Khoder v. AMF, Inc.*, 539 F.2d 1078, 1079 (5th Cir. 1976); *Bair v. American Motors Corp.*, 535 F.2d 249, 250 (3d Cir. 1976); Restatement (Second) of Torts § 402A (1965). Although the Restatement takes no position on whether this duty extends beyond users and consumers, *id.* § 402A caveat, many courts have extended it to bystanders. *E.g.*, *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969); *Herbert v. Brazzel*, 403 So. 2d 1242, 1244 (La. 1981); *Codling v. Paglia*, 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973); *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969); *Howes v. Hansen*, 56 Wis. 2d 247, 260, 201 N.W.2d 825, 831-32 (1972); *see* *Wade, On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 834 (1973).

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.

62. *Bailey v. Boatland of Houston, Inc.*, 585 S.W.2d 805, 810 (Tex. Civ. App. 1979), *rev'd on other grounds*, 609 S.W.2d 743 (Tex. 1980); *Kerns v. Engelke*, 76 Ill. 2d 154, 161, 390 N.E.2d 859, 862 (1979); *Aller v. Rodgers Mach. Mfg. Co.*, 268

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

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.

65. *E.g.*, Lahocki v. Contee Sand & Gravel Co., 41 Md. App. 579, 584, 398 A.2d 490, 495 (1979), *rev'd on other grounds*, 286 Md. 714, 410 A.2d 1039 (1980); Roy Matson Truck Lines v. Michelin Tire Corp., 277 N.W.2d 361, 361 (Minn. 1979); Russell v. Ford Motor Co., 281 Or. 587, 589, 575 P.2d 1383, 1384 (1978). See generally 2 L. Frumer & M. Friedman, *supra* note 58, § 16A[4][f][iii].

66. See, *e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 437, 396 N.E.2d 534, 535-36 (1979); Azzarello v. Black Bros., 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978). See generally 2 L. Frumer & M. Friedman, *supra* note 58, § 16A[4][f][iv][D].

67. *E.g.*, Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 362 (E.D.N.Y. 1972); Cobb v. Insured Lloyds, 387 So. 2d 13, 18 (La. Ct. App.), *cert. denied*, 394 So. 2d 615 (1980); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 163, 386 A.2d 816, 821 (1978).

68. *E.g.*, Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 368 (E.D.N.Y. 1972); Burch v. Amsterdam Corp., 366 A.2d 1079, 1084 (D.C. 1976); Freund v. Cellofilm Props., Inc., 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981). See generally 2 L. Frumer & M. Friedman, *supra* note 58, § 16A[4][f][vi].

69. Freund v. Cellofilm Props., Inc., 87 N.J. 229, 239, 432 A.2d 925, 930-31 (1981); Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805, 810 (Tex. Civ. App.

inquiring whether the product's design and marketing are reasonably safe.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.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.⁷² For design defects, several strict products liability tests have been suggested to determine if a product is unreasonably unsafe.⁷³ The most commonly used inquires whether a product's design meets the reasonable expectations of the ordinary consumer.⁷⁴ Another test, employing more specific criteria,⁷⁵ balances the risks and benefits of a challenged design to determine if the risk of

1979), *rev'd on other grounds*, 609 S.W.2d 743 (Tex. 1980); *Kerns v. Engelke*, 76 Ill. 2d 154, 161, 390 N.E.2d 859, 862 (1979); *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978); *Roach v. Kononen*, 269 Or. 457, 465, 525 P.2d 125, 129 (1974); 2 L. Frumer & M. Friedman, *supra* note 58, § 16A[4][f][iv][A]-[B]; *id.* § 16A[4][f][vi]; *see* Restatement (Second) of Torts § 402A comment g (1965); *Wade, supra* note 61, at 834-35.

70. *See* *Brady v. Melody Homes Mfr.*, 121 Ariz. 253, 259, 589 P.2d 896, 902 (1979); *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1973); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 576, 420 A.2d 1305, 1318 (Law Div. 1980); *W. Prosser, supra* note 1, § 99, at 659 n.72; *Katz, The Function of Tort Liability in Technology Assessment*, 38 U. Cin. L. Rev. 587, 632 (1969); *Wade, supra* note 61, at 850.

71. *See, e.g.*, *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 361 (E.D.N.Y. 1972); *McLeod v. White Motor Corp.*, 399 N.E.2d 890, 891-92 (Mass. App. Ct. 1980); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 385-86, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115, 121 (1976); Restatement (Second) of Torts § 395 & comment b (1965).

72. *E.g. Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 992 (8th Cir. 1969); *Freund v. Cellofilm Props., Inc.*, 87 N.J. 229, 237, 432 A.2d 925, 929 (1981); *Rainbow v. Albert Elia Bldg. Co.*, 49 A.D.2d 250, 253, 373 N.Y.S.2d 928, 931 (1975). In order to be adequate, warnings and instructions must be reasonably calculated to alert a person to the dangers of the product. *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 163 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969); *see* *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 562, 390 N.E.2d 1214, 1229-30 (1979); *Baker v. Saint Agnes Hosp.*, 70 A.D.2d 400, 406-07, 421 N.Y.S.2d 81, 85-86 (1979); *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 198, 423 N.E.2d 831, 837 (1981).

73. *See* *Davison, The Uncertain Search for a Design Defect Standard*, 30 Am. U. L. Rev. 643, 646 (1981).

74. *Id.* at 650. *See generally* *Traynor, The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 370 (1965).

75. *Wade, 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. *Id.*

injury outweighs the design's utility.⁷⁶ Both tests, like the test for improper marketing, require that the product be found unreasonably unsafe.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.⁷⁸ Moreover, because of the

76. *E.g.*, *Jeng v. Witters*, 452 F. Supp. 1349, 1356 (M.D. Pa. 1978), *aff'd*, 591 F.2d 1335 (3d Cir. 1979); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 883 (Alaska 1979); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 177, 406 A.2d 140, 153 (1979); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 495, 525 P.2d 1033, 1038 (1974).

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. *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. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 463 F. Supp. 94, 95 (D. Nev. 1978), *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.), *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).

78. *Cf. Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 361 (E.D.N.Y. 1972) (manufacturers of explosives liable for lack of adequate warnings and instructions); *Moning v. Alfonso*, 400 Mich. 425, 432, 254 N.W.2d 759, 762 (1977) (slingshot manufacturer liable for negligent marketing); *Cepeda v. Cumberland Eng'g Co.*, 76 N.J. 152, 180-81, 386 A.2d 816, 830 (1978) (machine manufacturer may be liable for design that was unsafe for foreseeable misuse), *overruled on other grounds*, *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 177, 406 A.2d 140, 153 (1979).

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, *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,⁷⁹ the manufacturer has a special responsibility to guard against risks that may result from a failure to fulfill this common-law duty.⁸⁰ 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.⁸¹ Although in certain instances a regulatory duty to warn and instruct is imposed,⁸² compliance with these minimal duties does not ordinarily fulfill the manufacturer's common-law duty.⁸³

79. *Folk v. United States*, 102 F. Supp. 736, 740 (W.D.S.C.), *rev'd on other grounds*, 199 F.2d 889 (4th Cir. 1952); *Palmisano v. Ehrig*, 171 N.J. Super. 310, 313, 408 A.2d 1083, 1084 (App. Div. 1979), *cert. denied*, 82 N.J. 827, 412 A.2d 793 (1980); *Yusko v. Remizon*, 199 Misc. 1116, 1118, 106 N.Y.S.2d 285, 286 (Columbia County Ct. 1951), *rev'd on other grounds*, 280 A.D. 637, 116 N.Y.S.2d 922 (1952). The inherent dangerousness of firearms has been recognized since early common law. See Oberer, *The Deadly Weapon Doctrine—Common Law Origin*, 75 Harv. L. Rev. 1565, 1573 n.43 (1962). The penal laws of several states distinguish firearms from other weapons that are considered less dangerous. See, e.g., Conn. Gen. Stat. Ann. § 53a-3(6) (West Supp. 1982); Ky. Rev. Stat. § 500.080(4) (Supp. 1982); N.Y. Penal Law § 10.00(12) (McKinney 1975). The inherent dangerousness of a product is one factor to be considered in determining whether a defendant has acted as a reasonably prudent person when dealing with a product, Restatement (Second) of Torts § 395 comment d (1965), although a product's inherent dangerousness is not necessary to establish a cause of action against a manufacturer. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916); Restatement (Second) of Torts § 395 comment d (1965).

80. See Restatement (Second) of Torts § 298 comment b (1965); *cf.* *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 360 (E.D.N.Y. 1972) (explosives manufacturer); *Palmisano v. Ehrig*, 171 N.J. Super. 310, 313, 408 A.2d 1083, 1084 (App. Div. 1979) (firearms manufacturer), *cert. denied*, 82 N.J. 827, 412 A.2d 793 (1980); *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (dictum) (same); *Wright, Civil Liability For Fire-Arms*, 11 Can. B.J. 247, 248 (1968) (firearms manufacturers' duty borders on strict liability).

81. *E.g.*, *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1084 (D.C. 1976); *Freund v. Cellofilm Props., Inc.*, 87 N.J. 229, 242-43, 432 A.2d 925, 932 (1981); see *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972). See generally 1 L. Frumer & M. Friedman, *supra* note 58, § 8; 2 *id.* § 16A[4][f][vi]; W. Prosser, *supra* note 1, § 99, at 661; *id.* § 96, at 646-49.

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

83. See, e.g., *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 162-63 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973).

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.⁸⁴ 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.⁸⁵ Second, a manufacturer owes a similar duty to warn handgun purchasers of the dangers of improper use and storage,⁸⁶ and to instruct them in procedures to prevent accidents and theft.⁸⁷ 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 defects⁸⁸ as widespread dealer failure to provide adequate warnings and instructions.⁸⁹ In circumstances in which such dealer conduct is foreseeable, the intervening

84. *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 197, 423 N.E.2d 831, 836 (1981); *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 569, 390 N.E.2d 1214, 1235 (1979); see *Dosier v. Wilcox & Crittendon Co.*, 45 Cal. App. 3d 74, 80, 119 Cal. Rptr. 135, 138 (1975). This duty extends to all foreseeable users and includes a duty to warn of harm that can result from foreseeable misuse. *Poland v. Beaird-Poulan*, 483 F. Supp. 1256, 1263 (W.D. La. 1980); *Davis v. Siloo Inc.*, 47 N.C. App. 237, 245, 267 S.E.2d 354, 359, *cert. denied*, 301 N.C. 234, 283 S.E.2d 131 (1980).

85. *Cf. Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 65, 507 P.2d 653, 661, 107 Cal. Rptr. 45, 53 (1973) (drug manufacturers liable for failure to warn doctors about dangers of prescribing product to users susceptible to dangerous side effects); *Incollingo v. Ewing*, 444 Pa. 263, 286-88, 282 A.2d 206, 219-20 (1971) (same). Appropriate warnings and instructions to shippers and dealers regarding theft avoidance may also be necessary. See *infra* notes 112-13 and accompanying text.

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.

88. *Brizendine v. Visador Co.*, 305 F. Supp. 157, 160 (D. Or. 1969), *aff'd*, 437 F.2d 822 (9th Cir. 1970); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 385, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115, 121 (1976); see *First Nat'l Bank v. Nor-Am Agricultural Prods., Inc.*, 88 N.M. 74, 87, 537 P.2d 682, 695 (1975).

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

90. See *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 69, 507 P.2d 653, 664, 107 Cal. Rptr. 45, 56 (1973); *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 566-67, 390 N.E.2d 1214, 1233 (1979).

91. Cf. *Baker v. Saint Agnes Hosp.*, 70 A.D.2d 400, 406, 421 N.Y.S.2d 81, 85 (1979) (drug manufacturer must keep abreast of knowledge pertaining to product and bring that knowledge to the medical profession); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 386, 528 P.2d 522, 528 (1974) (same).

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, 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). 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).

93. Cf. *Hartman v. Miller Hydro Co.*, 499 F.2d 191, 194 (10th Cir. 1974) (expert cannot recover for injuries caused by dangerous plant machinery because danger was obvious); *Poland v. Beard-Poulan*, 483 F. Supp. 1256, 1264 (W.D. La. 1980) (plaintiff denied recovery because danger of chain saw is obvious).

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.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 ignored⁹⁶ or are not effective in reducing the risk of a product's misuse,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 *Moning v. Alfono*.⁹⁸ In that case, the plaintiff was injured when a playmate accidentally hit him with a pellet fired from a slingshot.⁹⁹ In reversing a directed verdict for the manufacturer, the court concluded that the defendant could be found negligent for selling slingshots to children¹⁰⁰ because the child's misuse was foreseeable.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.¹⁰²

120-21 (1976). See generally Darling, *The Patent Danger Rule: An Analysis and a Survey of its Vitality*, 29 Mercer L. Rev. 583, 606-09 (1978).

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 *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. *Id.* at 19.

96. *Doss v. Apache Powder Co.*, 430 F.2d 1317, 1321 (5th Cir. 1970); *Incollingo v. Ewing*, 444 Pa. 263, 292, 282 A.2d 206, 222 (1971).

97. 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).

98. 400 Mich. 425, 443-46, 254 N.W.2d 759, 767-69 (1977).

99. *Id.* at 432, 254 N.W.2d at 762.

100. *Id.* at 458, 254 N.W.2d at 774-75.

101. *Id.* at 441-42, 254 N.W.2d at 766.

102. *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.¹⁰³ 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.¹⁰⁴ Particularly because existing statutes are ineffective in preventing these sales,¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

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

103. See, e.g., 18 U.S.C. § 922(b)(1), (d) (1976).

104. Moore, *supra* note 86, at 97 (1981) (estimates of guns sold by the "federally licensed [retail] sector" to proscribed persons range from 9000-90,000). Evidence suggests that some dealers even aid prospective purchasers to circumvent prohibitory statutes. *Hearings on Saturday Night Specials*, *supra* note 7, at 179-80 (testimony of Albert Seedman, Chief of Detectives, New York City).

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.¹⁰⁸ 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 studies¹⁰⁹ or requests by local law enforcement officials for firearm traces.¹¹⁰ 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.¹¹¹ 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,¹¹² nearly thirty percent are taken from these intermediaries.¹¹³ 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.¹¹⁴ This again will

108. Cf. *Incollingo v. Ewing*, 444 Pa. 263, 292, 282 A.2d 206, 222 (1971) (drug manufacturer that knows product is being prescribed indiscriminately may be liable).

109. See 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 355-419.

110. *Treasury's Proposed Gun Regulations: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 21, 23 (1978) (testimony of Richard Davis, Assistant Secretary of the Treasury).

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

withdrawn in response to adverse congressional and public reaction but remained under study. 44 Fed. Reg. 11,795 (1979).

115. Cf. *Moning v. Alfono*, 400 Mich. 425, 441-42, 254 N.W.2d 759, 765-66 (1977) (slingshot manufacturer liable for misuse because misuse is a foreseeable risk); *Incollingo v. Ewing*, 444 Pa. 263, 292, 282 A.2d 206, 222 (1971) (drug manufacturer who knows product is being used indiscriminately will be liable).

116. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 437, 396 N.E.2d 534, 535-36 (1979); *Azzarello v. Black Bros.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978). See generally 2 L. Frumer & M. Friedman, *supra* note 58, § 16A[4][f][iv][D].

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.

118. Cf. *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957 (3d Cir. 1980) (automobile design unreasonable if risks outweigh benefits), *cert. denied*, 450 U.S. 959 (1981); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 45 (Alaska 1979) (if risks of handgun design far outweigh its benefits, plaintiff would be entitled to directed verdict), *cert. denied*, 454 U.S. 894 (1981).

119. See 127 Cong. Rec. S3807 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy). See generally *Hearings on Saturday Night Specials*, *supra* note 7.

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.¹²¹ 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.¹²²

It has been suggested that Saturday Night Specials pose a great risk of criminal misuse particularly because they are easily concealable and relatively inexpensive.¹²³ Most Saturday Night Specials are, in fact, used in crime.¹²⁴ In addition, any countervailing social usefulness is negligible because the poor quality of their manufacture precludes

121. See *Hearings on Saturday Night Specials*, *supra* note 7, at 132 (testimony of Eugene Rossides, Assistant Secretary of the Treasury); 127 Cong. Rec. S3807 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy).

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.¹²⁵ Other guns are safer¹²⁶ and more accurate¹²⁷ for legitimate uses,¹²⁸ while not posing the same danger of criminal misuse.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.¹³⁰

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.¹³¹ Causation in fact is established by showing that the manu-

125. *Hearings on Saturday Night Specials*, *supra* note 7, at 132 (testimony of Eugene T. Rossides, Assistant Secretary of the Treasury); *id.* at 109 (testimony of Jerry Wilson, Chief of Police, Washington, D.C.); *see* 127 Cong. Rec. S3807 (daily ed. Apr. 9, 1981) (statement of Sen. Kennedy).

126. Because Saturday Night Specials are by definition inexpensive and poorly made, they are more likely to malfunction and cause harm to the user. *See Hearings on Saturday Night Specials*, *supra* note 7, at 155-58 (testimony of D.R. Dunn, Manager, H.P. White Laboratory).

127. 127 Cong. Rec. S3807, 3808 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy).

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, *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, *supra* note 8, at 68; *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 see* National Rifle Association Press Release, *supra* note 55, at 8.

129. Handguns account for only about 25% of all firearms owned in the United States. Fields, *supra* note 8, at 38; Staff Report, *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).

130. *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).

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. *See* W. Luksetich & M. White, Crime and Public Policy: An Economic Approach 83-84 (1982).

131. *See* *Caiazza v. Volkswagenwerk, A.G.*, 647 F.2d 241, 245 (2d Cir. 1981); *Jeng v. Witters*, 452 F. Supp. 1349, 1354-55 (M.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1335 (3d Cir. 1979); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 69, 507 P.2d 653, 664, 107 Cal. Rptr. 45, 56 (1973). *See generally* 1 L. Frumer & M. Friedman, *supra*

facturer's breach was a substantial cause of the injury.¹³² 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.¹³³ 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.¹³⁴

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.¹³⁵ 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.¹³⁶ 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.¹³⁷

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).

133. W. Prosser, *supra* note 1, § 41, at 236-37; *see* Klages v. General Ordinance Equip. Corp., 240 Pa. Super. 356, 373, 367 A.2d 304, 313 (1976); Restatement (Second) of Torts § 431(b) (1965).

134. Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 363 (E.D.N.Y. 1972); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 69, 507 P.2d 653, 664, 107 Cal. Rptr. 45, 56 (1973); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 159, 406 A.2d 140, 144 (1979); Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805, 811 (Tex. Civ. App. 1979), *rev'd on other grounds*, 609 S.W.2d 743 (Tex. 1980); 1 L. Frumer & M. Friedman, *supra* note 58, § 11.02; W. Prosser, *supra* note 1, § 43, at 267.

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-

138. Cf. *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 69, 507 P.2d 653, 664, 107 Cal. Rptr. 45, 56 (1973) (drug manufacturer's failure to warn is legal cause of resulting injury despite doctor's intervening negligence); *Cobb v. Insured Lloyds*, 387 So. 2d 13, 19 (La. Ct. App.) (manufacturer's failure to warn and instruct is a proximate cause of resulting injuries), *cert. denied*, 394 So. 2d 615 (La. 1980).

139. Cf. *Hetherington 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. Alfonso*, 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. *Hetherington 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. Alfonso*, 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).

facturer acted reasonably, a Saturday Night Special would not have been available and thus would not have caused the injury.¹⁴¹

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.¹⁴² If handgun misuse is foreseeable, the manufacturer will be held liable for injuries resulting from that misuse¹⁴³ even though the gun would have been safe if used as the manufacturer intended.¹⁴⁴ Foreseeability refers to the general risk of misuse created by unreasonable marketing or design rather than to specific intervening acts.¹⁴⁵ Therefore, the manufacturer need not foresee the specific chain of events that leads to criminal misuse in order to be liable.¹⁴⁶ 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).

142. *See* Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206, 1210 (E.D. Ky. 1973); Motion to Dismiss, Statement of Points and Authorities, Brady v. Hinckley, No. 82-0549, at 16 (D.D.C. Oct. 18, 1982); *cf.* Gillot v. Washington Metropolitan Area Transit Auth., 507 F. Supp. 454, 457 (D.D.C. 1981) (defendant parking lot operator not liable for rape of customer, even though his negligence afforded the opportunity, because intervening criminal act is a superseding cause); Olson v. Ratzel, 89 Wis. 2d 227, 253-54, 278 N.W.2d 238, 250-51 (Ct. App. 1979) (public policy may relieve handgun dealer of liability even if plaintiff would otherwise be entitled to recovery for common-law negligence).

143. *Cf.* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 363 (E.D.N.Y. 1972) (dynamite manufacturer liable for foreseeable misuse); Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 69, 507 P.2d 653, 664, 107 Cal. Rptr. 45, 56 (1973) (drug manufacturer liable for foreseeable misuse); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 159, 406 A.2d 140, 144 (1979) (machine manufacturer liable for foreseeable misuse); Bailey v. Boatland of Houston, Inc., 585 S.W.2d 805, 811 (Tex. Civ. App. 1979) (boat manufacturer liable for foreseeable misuse), *rev'd on other grounds*, 609 S.W.2d 743 (Tex. 1980).

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.,* Caiazza 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).

145. *See* Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 362 (E.D.N.Y. 1972); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93, *cert. denied*, 434 U.S. 835 (1977); Palmisano v. Ehrig, 171 N.J. Super. 310, 313-14, 408 A.2d 1083, 1084-85 (App. Div. 1979); W. Prosser, *supra* note 1, § 43, at 268-69.

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 act¹⁴⁷ and the dealer's negligence¹⁴⁸ 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 foreseen¹⁴⁹ because "the defendant's duty requires him to anticipate the intervening misconduct, and guard against it."¹⁵⁰ The handgun manufacturers' duties suggested in the previous sections¹⁵¹ 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.¹⁵² Therefore, a breach of these duties may be considered the proximate cause of resulting injuries.

type of [foreseeable] risk"); *Moning v. Alfonso*, 400 Mich. 425, 441-42, 254 N.W.2d 759, 766 (1977) (injury caused by slingshot need only be within "the recognizable risk of harm"). See generally *W. Prosser*, *supra* note 1, § 44, at 268-69; Restatement (Second) of Torts § 449 (1965).

147. *Cf. Gillot v. Washington Metropolitan Area Transit Auth.*, 507 F. Supp. 454, 457 (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. Hetherington 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

153. *E.g.*, *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 173-74, 406 A.2d 140, 151-52 (1979); *Howes v. Hansen*, 56 Wis. 2d 247, 255-56, 201 N.W.2d 825, 829 (1972); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 73 (1975); Davison, *supra* note 73, at 645; Katz, *supra* note 70, at 662; Wade, *supra* note 61, at 826. *But see* Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 33-34 (1972) (efficiency, not compensation, is the goal of tort law).

154. *See, e.g.*, *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); *First Nat'l Bank v. Nor-Am Agricultural Prods., Inc.*, 88 N.M. 74, 87, 537 P.2d 682, 695 (Ct. App. 1975); Calabresi, *supra* note 153, at 77-78, 84; Davison, *supra* note 73, at 645; Katz, *supra* note 70, at 662; Wade, *supra* note 61, at 826.

155. *See* *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); James, *supra* note 89, at 925.

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

157. *See* *Azzarello v. Black Bros.*, 480 Pa. 547, 553, 391 A.2d 1020, 1023 (1978); Wade, *supra* note 61, at 826.

158. *See* *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 368-69 (E.D.N.Y. 1972); *Howes v. Hansen*, 56 Wis. 2d 247, 255, 201 N.W.2d 825, 829 (1972) (quoting Dippel v. Sciano, 37 Wis. 2d 443, 450, 155 N.W.2d 55, 58 (1967)); Davison, *supra* note 73, at 645; Wade, *supra* note 61, at 826.

159. *See* *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972); *First Nat'l Bank v. Nor-Am Agricultural Prods., Inc.*, 88 N.M. 74, 87, 537 P.2d 682, 695 (Ct. App. 1975); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 503, 525 P.2d 1033, 1041 (1974); Cook & Blose, *supra* note 30, at 90. *See generally* *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); Calabresi, *supra* note 153, at 78, 84.

It might be suggested that attempting to reduce the availability of handguns to criminals is a legislative function.¹⁶¹ Certainly, the legislature is an appropriate forum for addressing this problem.¹⁶² Nevertheless, the controversy surrounding this issue intensifies the usual difficulties of legislative action.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 issues¹⁶⁴ or obstruction by special interest groups.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.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.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.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.¹⁶⁹

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.

161. Cf. *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483, 484 (1976) (held that imposing tort liability on slingshot manufacturer for marketing to children usurps a legislative function). *But cf.* *Moning v. Alfano*, 400 Mich. 425, 434, 254 N.W.2d 754, 763 (1977) (held that imposing tort liability on slingshot manufacturer for marketing to children does not usurp a legislative function).

162. See *Hearings on Firearms Legislation* [Part 1], *supra* note 55, at 2 (statement of Chairman Conyers).

163. Cf. J. Freedman, *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.

164. See W. Keefe & M. Ogul, *The American Legislative Process 453-55* (5th ed. 1981).

165. See *Hearings on Firearms Legislation* [Part 1], *supra* note 55, at 4 (opening statement of Chairman Conyers); 127 Cong. Rec. S3806-07 (daily ed. Apr. 9, 1981) (remarks of Sen. Kennedy).

166. See Calabresi, *Product Liability: Curse or Bulwark of Free Enterprise*, 27 Clev. St. L. Rev. 313, 323-25 (1978).

167. *Id.* at 316-17.

168. See Posner, *supra* note 153, at 33.

169. Cf. *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972) (explosives manufacturers); see also Bodine, *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.¹⁷⁰ 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 preempting 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."¹⁷¹ 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.

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170. Wade, *supra* note 61, at 828; *cf.* Traynor, *supra* note 74, at 367 (knife manufacturer).

171. *Moning v. Alfonso*, 400 Mich. 425, 435, 254 N.W.2d 759, 763 (1977).

