A Shot at Stricter Controls: Strict Liability for Gun Manufacturers

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A Shot At Stricter Controls: Strict Liability For Gun Manufacturers*

Every 13 seconds a new handgun is manufactured or sold in this country. Every two minutes the police take a handgun from someone. And every 20 minutes, someone is killed with a handgun. That's an unacceptable product history for any product.¹

Gun control proponents believe that the old-fashioned capitalist theory of supply and demand may actually work against the concept of an orderly society.² Statistics illustrate this point. Researchers estimate

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* During the final stages of publication, Assembly Bill 75 was signed by Governor Deukmejian and became Chapter 1299 of the 1983 Statutes of California. Chapter 1299 added section 1714.4 to the Civil Code, which provides that in a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged. Subdivision (c) of section 1714.4, however, does not preclude a products liability action alleging that a safer alternative design was available to the manufacturer. Although this change in statutory law impacts upon various theories advocated by this comment, an analysis of a strict products liability action against gun manufacturers remains worthy of examination. The central theme of this comment is the building of a strict products liability case using the theories of Barker v. Lull Engineering Co. The illustration presented in this comment easily can be applied to products other than firearms and ammunition. Furthermore, although a strict products liability cause of action against gun manufacturers may be foreclosed in California, many states have developed case law that is similar to the Barker line of cases. See, e.g., Henderson v. Ford Motor Co., 519 S.W.2d 87, 92 (1974). Consequently, the theories advocated by this author concerning the possible design defects of a small handgun with a barrel length of 2½ inches or shorter (a snubby) may be used in jurisdictions that have not foreclosed the cause of action. Finally, at this point, the interpretation of subdivision (c) of section 1714.4 is uncertain; just how broadly this subdivision will be applied to exempt alternative design cases remains to be decided. This comment asserts that alternative designs of handguns are available to take the place of a snubby. See supra notes 118-23 and accompanying text. Therefore, a manufacturer's decision to produce a snubby arguably could constitute an improper selection of design alternatives. Since this design theory was not affected by Chapter 1299, a strict products liability cause of action against gun manufacturers still might be brought successfully.

Civil Code Section 17144.4:
(a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
(b) For purposes of this section:
(1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.
(c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.
(d) This section is declaratory of existing law.

1. Transcript from 60 Minutes, Warning: Dangerous to Your Health, October 24, 1982, at 7 (quoting Windle Turley, a products liability attorney from Dallas, Texas) (Copy of transcript on file at Pacific Law Journal) [hereinafter cited as Transcript]).
that as of April, 1981, 50 million handguns existed in the United States, and the numbers were expected to increase to 54 million by the end of that year. Although these numbers are staggering, handguns comprise only 20% of all firearms in the United States. Nevertheless, the harmful impact of handguns on society far exceeds their proportional representation within the class of firearms. In particular, handguns account for 90% of all gun related deaths and injuries, resulting in approximately 22,000 deaths per year.

Confronted with these frightening numbers, the majority of Americans have continually expressed a desire for more restrictions on handguns. Recent attempts to limit the availability of handguns through statutory means, however, have failed. An example of the failure to impose statutory restrictions occurred in California recently when Proposition 15, a gun control initiative, was defeated by a two to one margin. Many gun control proponents blame the powerful “gun lobbies” for the failure of proposed gun control laws. The lobby thought to be primarily responsible for defeating gun control legislation is the National Rifle Association, which has been called the most effective lobbying organization in Washington, D.C. Through the efforts of the National Rifle Association, a uniform regulatory scheme aimed at gun control remains an elusive goal. As a result, a “patchwork” of inconsistent and barely enforceable regulations has resulted.

The gun control regulatory scheme in California exemplifies this problem. Under existing California statutes, all concealable weapons must be registered. The failure to register a handgun results in a mere misdemeanor charge with a maximum fine of $50. In a profita-

6. Id.
8. It's Time to Ban Handguns, TIME, Apr. 13, 1981, at 51 [hereinafter cited as Time]. A 1981 Gallup Poll found that 62% of Americans favor some type of restriction on handguns. Id.
12. See TIME, supra note 8, at 51.
13. Id.
14. See id.
15. See id.
16. CAL. PENAL CODE §12073. Those engaged in the business of selling handguns at retail are required to keep a register identifying the person purchasing the gun as well as a description of the gun, which could be used to identify it at a future point in time. The register is open for inspection by the police at all times. Id. §12350.
17. Id. §12351.
ble retail handgun business, a small fine does not effectively deter retailers from keeping inaccurate records. Furthermore, registration requirements do not address the problem of handguns reaching the "wrong people" — those who will use them to perpetrate a crime rather than those who want them for self-defense or sport. One final inadequacy of this regulatory scheme is that fines do not benefit the person who ultimately falls victim to a crime involving an unregistered handgun.

In reaction to the lack of an effective legislative remedy to this problem, gun control proponents now seek a solution from the courts. A growing number of people believe that private civil litigation can more effectively achieve the goal of fewer handgun related injuries and deaths than can the enforcement of criminal laws or the implementation of gun control legislation. A potent reason for resorting to civil litigation is that the courts can deal with the gun control issue more efficiently than the legislature due to the reduced amount of political pressure placed on judges and juries. The specific judicial remedy looked to is in the field of strict products liability. Gun control proponents want to hold gun manufacturers strictly liable for injuries caused by their "defective" guns. Under strict products liability principles, a product is defectively designed if the product is placed on the market with the knowledge that it will be used without an inspection for defects, and the product then causes personal injury because of the defect.

Supplied with this theory, many plaintiffs are asserting that a small handgun, with a barrel length of 2 1/2 inches or shorter (hereinafter referred to as a "snubby"), is defectively designed because the short barrel allows easy concealment, making snubbies the "criminal's weapon of choice." Most plaintiffs tend to use some variation of the test first advocated by Deans Wade and Keeton for strict products liability, the

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18. See Moore, *Keeping Handguns From Criminal Offenders*, AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, May, 1981, at 92. Only 10% of all federally licensed dealers are investigated within a given year. Fewer than 1% have any action taken against them. Id.
19. See id. Even though there are statutes that make certain individuals ineligible to purchase guns, this does not prevent a retailer from being deceived, or merely overlooking disqualifying characteristics in order to make a sale. Id.
21. See *Taking Aim*, supra note 5, at 42.
22. See id.
23. See New Target, supra note 20, at 1443.
24. See generally id.
25. See generally id.
26. See generally id.
27. See *Guns*, supra note 7, at 12.
“hazards v. utility” test.\textsuperscript{28} By applying this test, these plaintiffs intend to show that the inherent hazards posed by a handgun outweigh any possible social utility of the weapon, thus creating a “defect.”\textsuperscript{29} These plaintiffs believe that an expansion of the theory of strict liability will encourage the firearm industry to take steps to keep handguns from reaching inappropriate persons.\textsuperscript{30}

This comment will explore the possibility of bringing a strict products liability case against gun manufacturers in California. Initially, the discussion will focus on policy factors that would permit this cause of action. Once a foundation is laid the next step will be to illustrate what plaintiffs must show in their prima facie case when claiming that a handgun is defectively designed. The discussion of the prima facie case will involve the following issues: (1) the expectations of a handgun consumer; (2) the foreseeability of misuse and harm caused by a handgun; and (3) the question of whether the design of a handgun can be the proximate cause of injury. Within the topic of proximate cause will be an analysis of intervening criminal conduct and a discussion of whether this conduct supersedes the liability of gun manufacturers.

After establishing the prima facie case, this comment will apply the risk/benefit test defined by the California Supreme Court in \textit{Barker v. Lull Engineering Co.},\textsuperscript{31} a landmark case illustrating the use of strict products liability in California. As applied to handguns, the risk/benefit test balances the social utility of a handgun small enough to be hidden and used in crime against the inherent hazards posed by the same design. The test will be analyzed in terms of five factors that juries in California must consider in all strict products liability cases. In addition, the potential scope of liability will be explored to demonstrate that the retailer as well as the manufacturer may face liability under this theory. Finally, this comment will conclude that defective design claims against gun manufacturers can succeed in California using the theories found in \textit{Barker} and other cases dealing with strict products liability. As a preliminary matter, however, a consideration of the various policies permitting these claims is necessary.

\textbf{California Products Liability: Public Policy}

In California, when a manufacturer places a product on the market with the knowledge that the product will be used without an inspection for defects, and the product then proves to have a defect that causes

\textsuperscript{28} See \textit{New Target}, supra note 20, at 1443.

\textsuperscript{29} See \textit{id.}

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
personal injury, the manufacturer will be strictly liable in tort.\textsuperscript{32} The policy underlying strict liability is to insure that the manufacturers, rather than injured persons who are theoretically powerless to protect themselves, bear the costs of injury resulting from the use of a defective product.\textsuperscript{33} Discouraging manufacturers from marketing products with defects that "menace" the public presumably serves the public interest.\textsuperscript{34}

The specific type of defect that is the focus of these claims against gun manufacturers is a design defect.\textsuperscript{35} A product has a design defect if the design of the product causes injury to a human being when used in a normal or foreseeable manner.\textsuperscript{36} Attorneys currently litigating actions against gun manufacturers claim that the design of a snubby, with a barrel length of 2 ½ inches or less, is defective because the size of a snubby permits easy concealment for use in crime.\textsuperscript{37}

Traditionally, this argument could not have been made because handguns posed an obvious danger\textsuperscript{38} that precluded the existence of a design defect. Recent California cases, however, suggest that the obviousness of the danger will not bar manufacturer liability.\textsuperscript{39} For example, California courts have stated that inequity would result if a plaintiff could recover when a manufacturer negligently marketed a defective product, but could not recover under strict liability theories when the manufacturer knowingly marketed an obviously dangerous product.\textsuperscript{40} If the foregoing were allowed, manufacturers who knowingly ignore the dangerous characteristics of their products would be protected from strict liability claims, while manufacturers who negligently market defective products would be subject to liability.\textsuperscript{41} Since manufacturers of obviously dangerous products are more likely to satisfy negligence standards of reasonability, strict products liability may be the only option open to plaintiffs injured by those obviously dangerous products.\textsuperscript{42} As the Barker court suggested, a manufacturer's liabil-

\begin{itemize}
\item \textsuperscript{32} \textit{Greenman}, 59 Cal. 2d at 62, 377 P. 2d at 900, 27 Cal. Rptr. at 700 (1963).
\item \textsuperscript{33} \textit{Comment, Strict Products Liability: Giving Content to the Term "Defect" in Design Cases}, 40 OHIO ST. L. J. 209, 219 (1979).
\item \textsuperscript{34} \textit{Escola v. Coca Cola Bottling Co.}, 24 Cal. 2d 453, 462, 150 P. 2d. 436, 441 (1944).
\item \textsuperscript{35} \textit{See New Target, supra note 20, at 1444.}
\item \textsuperscript{36} \textit{See Comment, supra note 33, at 212.}
\item \textsuperscript{37} \textit{See Guns, supra note 7, at 10.}
\item \textsuperscript{38} \textit{See Thompson v. Package Machinery Co.}, 22 Cal. App. 3d 188, 192, 99 Cal. Rptr. 281, 283 (1971). The modern approach to products liability does not preclude liability solely because a danger is obvious, even if the obviousness of the peril is conceded. \textit{See id.}
\item \textsuperscript{39} \textit{See id.}
\item \textsuperscript{40} \textit{Luque v. McLean}, 8 Cal. 3d 136, 145, 501 P. 2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972).
\item \textsuperscript{41} \textit{See Id.}
\item \textsuperscript{42} \textit{See generally id. at 145, 501 P.2d at 1169, 104 Cal.Rptr. at 449 (discussing the applicability of strict products liability to products with latent defects).}
\end{itemize}
ity does not disappear merely because the product is dangerous. Consequently, a manufacturer could be liable for the design of a dangerous product even though a safer alternative design does not exist. Following the above rationale, gun manufacturers will not be immune from strict liability claims in California merely because the handgun is an obviously dangerous product. An important question to ask, therefore, is whether the obvious danger posed by the handgun results from its defective design, and as a preliminary matter, who carries the burden of answering this question.

**Establishing the Existence of a Defect: Plaintiff's Prima Facie Case**

To prove the existence of a design defect, California courts have held that the injured plaintiff must initially establish a prima facie case. To build the prima facie case, the plaintiff must prove that (1) the snubby did not meet the safety expectations of the ordinary consumer, (2) the snubby was used in an intended or reasonably foreseeable manner, and (3) the defective design of a snubby proximately caused the injury.

1. **Consumer Expectations**

The first step in deciding whether a defect exists in the design of a handgun is to explore consumer expectations. Some writers suggest that this consumer expectation element reflects a warranty analysis: "When a manufacturer places a product on the market, a representation is impliedly made that the product is safe for the tasks it was designed to accomplish."

Since most people recognize the possibility of harm or death resulting from the use of a handgun, the dangers posed by a snubby do not necessarily go beyond the dangers contemplated by the ordinary consumer. California courts have held, however, that many situations exist where the consumer cannot form a reasonable expectation because information as to safer alternatives is not common knowledge in the community. Statistics help prove that consumer expectations are not

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43. See 20 Cal. 3d 413, 430, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 236 (1978).
44. See id. at 432, 573 P.2d at 456, 143 Cal. Rptr. at 237.
46. See id.
47. See 20 Cal. 3d at 429, 573 P.2d at 455, 143 Cal. Rptr. at 235 (1978).
49. Id.
met in relation to handguns.\textsuperscript{51} For example, most consumers would not expect that a gun kept in the house is six times more likely to kill a member of the family as opposed to an intruder,\textsuperscript{52} or that approximately one-half of the guns used in crime are stolen from the households they were supposed to protect.\textsuperscript{53} In regard to the consumer expectation that a handgun will provide some form of protection, statistics from the city of San Francisco show that this belief is illusory.\textsuperscript{54} In 1981, statistics for San Francisco showed that handguns were used in self-defense only four times.\textsuperscript{55} Conversely, handguns caused over 50\% of the homicides in the city,\textsuperscript{56} resulting in 126 deaths.\textsuperscript{57} Furthermore, a handgun kept in the home for protection is normally not readily accessible and often will be used by intruders against the owners whom the handguns were to protect.\textsuperscript{58}

Since the burden of proof necessary to establish a prima facie case does not require a showing beyond a reasonable doubt,\textsuperscript{59} these statistics may help meet this burden by showing that consumer expectations of handgun safety might not be met. The consumer expectation element of a prima facie case of design defect, thus, can be proved by admitting the statistical evidence. The next step in the prima facie case is to determine whether the handgun was used in an intended or reasonably foreseeable manner.

2. Foreseeability of Misuse and Harm

The second element of the plaintiff's prima facie case, that the product was used in an intended or reasonably foreseeable manner, could be difficult to prove when the product in question is a handgun. Specifically, a major area of debate concerning the application of the \textit{Barker} test to handguns concerns the issues of foreseeability of misuse and intervening criminal conduct.\textsuperscript{60} To reiterate the point, California public policy strives to place the responsibility for defective products where that burden will most likely result in the lessening of the hazards to life

\textsuperscript{51} See infra notes 53-57 and accompanying text.
\textsuperscript{52} See Reno, \textit{Why I Don't Want a Gun}, \textsc{McCall's}, Mar., 1982, at 146 (quoting a 15 year study by the School of Medicine of Case Western Reserve University).
\textsuperscript{53} See Smith, supra note 3, at 24.
\textsuperscript{54} \textit{Shot Down}, \textsc{Time}, July 12, 1983, at 17 [hereinafter cited as \textit{Shot Down}].
\textsuperscript{55} See id.
\textsuperscript{56} Id.
\textsuperscript{57} Department of Justice, Division of Law Enforcement, Crime and Delinquency in California, at 14-15 (1981)(copy on file at the \textit{Pacific Law Journal}) [hereinafter cited as \textit{Crime}].
\textsuperscript{58} See \textit{Guns}, supra note 7, at 12.
\textsuperscript{59} See Campbell v. General Motors Corp., 32 Cal. 3d 112, 121, 649 P.2d 224, 229, 184 Cal. Rptr. 891, 896 (1982).
\textsuperscript{60} See generally Fischer, \textit{Are Handgun Manufacturers Strictly Liable in Tort}, \textsc{56 Cal. St. B.J.} 17 (1981).
and health.\textsuperscript{61} The test is whether the seller, at the time of the sale, should have reasonably anticipated that the buyer would use the gun in a criminal manner.\textsuperscript{62} Early cases developing the theory of strict products liability required manufacturers to foresee some degree of misuse and abuse of the product, either by the user or third parties, and to take precautions to minimize these dangers.\textsuperscript{63} These cases held that manufacturers should be required to recognize the realities of everyday life instead of functioning within an "industrial vacuum" when designing or manufacturing products.\textsuperscript{64}

Just as these manufacturers were required to recognize the realities of everyday life, gun manufacturers should be required to consider the realities of handgun usage when designing handguns. As previously noted, one stark reality is that 90\% of all gun related deaths in the United States can be attributed to handguns.\textsuperscript{65} This figure includes both accidental and criminal deaths.\textsuperscript{66} In California, 68\% of all homicides committed with firearms involved the use of handguns.\textsuperscript{67} Handguns also are often used in robberies and assaults.\textsuperscript{68} These statistics suggest that handgun manufacturers should reasonably foresee that their products will be used to harm or kill people, and furthermore, that this harm is a foreseeable result.

The issue of foreseeability of harm caused by handguns can be clarified by drawing an analogy to the application of strict liability principles to auto manufacturers.\textsuperscript{69} For example, motor vehicles are not intended to collide in normal usage.\textsuperscript{70} Case law, however, has held that collisions must be considered a reasonably foreseeable occurrence.\textsuperscript{71} Consequently, because of the reasonably foreseeable occurrence of a collision, a manufacturer must design the car to minimize unreasonable risks of injury and death.\textsuperscript{72} The design does not have to cause the accident for recovery to follow as long as the design substantially contrib-

\begin{itemize}
\item \textsuperscript{61} Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 439 (1944).
\item \textsuperscript{63} See Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 127, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972).
\item \textsuperscript{64} See McGee v. Cessna Aircraft Co., 82 Cal. App. 3d 1005, 1012, 147 Cal. Rptr. 694, 698 (1978).
\item \textsuperscript{65} See Taking Aim, supra note 5, at 42.
\item \textsuperscript{66} See generally id.
\item \textsuperscript{67} See Department of Justice, Homicide in California, 61 (1981) (a report issued by the Attorney General of California) (copy on file at the Pacific Law Journal) [hereinafter cited as Department of Justice].
\item \textsuperscript{68} See Crime, supra note 57, at 14-15.
\item \textsuperscript{69} See infra notes 77-80 and accompanying text.
\item \textsuperscript{70} Self v. General Motors Corp., 42 Cal. App. 3d 1, 7, 116 Cal. Rptr. 575, 578 (1974).
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id.
\end{itemize}
uted to the plaintiff's injury.\textsuperscript{73}

In a similar vein, the design of a snubby does not have to be the actual cause of the injury to the plaintiff. Liability will ensue if the plaintiff establishes that the design of a snubby substantially contributed to the plaintiff’s injury because the design enabled the criminal to hide the weapon, thus facilitating the commission of a crime leading to the plaintiff’s injuries. This could be accomplished by showing that snubbies are the criminals’ weapons of choice.\textsuperscript{74} Specifically, studies in 18 cities reveal that of the handguns used in murders, rapes, robberies, and muggings, two out of three were snubbies.\textsuperscript{75}

Although the plaintiff may prove that consumer expectations of handgun safety are not met by the snubby, and that foreseeability of injury can be demonstrated, a major obstacle remains to be overcome. Handgun plaintiffs must also prove the defect was the proximate cause of the harm suffered.

3. Proximate Cause

California courts have avoided formulating rigid rules pertaining to the issue of proximate cause.\textsuperscript{76} Rather, the courts have expressed a belief that factual matters surrounding proximate causation must be left for juries to handle on a case-by-case basis.\textsuperscript{77} Normally, in a strict products liability action as in a negligence action, the legal cause of injury can be a concurrent cause of the injury.\textsuperscript{78} The plaintiff merely must show that the legal cause was operative at the moment the injury occurred.\textsuperscript{79}

With this in mind, a handgun designed so that it can be hidden and used in a crime should be viewed as a concurrent cause with the criminal act because the defect exists at the time of the injury.\textsuperscript{80} Specifically, a snubby, which is small enough to be hidden in a pocket, should be considered a cause of injury because the design of the gun allows the criminal to enter a store with the snubby unnoticed. When the gun is

\textsuperscript{73} See Endicott v. Nissan Motor Corp., 73 Cal. App. 3d 917, 926, 141 Cal. Rptr. 95, 100 (1977).
\textsuperscript{74} The Snub Nosed Killers: Handguns in America, A Cox Newspaper Series, at 3 (1981) (copy on file at the Pacific Law Journal) [hereinafter cited as Killers]; see also Transcript, supra note 1, at 8.
\textsuperscript{75} See Killers, supra note 74, at 3.
\textsuperscript{76} Fierro v. International Harvester Co., 127 Cal. App. 3d 862, 868, 179 Cal. Rptr. 923, 926 (1982).
\textsuperscript{77} See id.
\textsuperscript{79} Id.
\textsuperscript{80} See generally id. This illustration is based upon the legal theories found within Thompson. See id.
later used to rob the owner, the criminal act of employing the gun should be seen as just another concurrent cause of the store owner's injuries. Therefore, submission to a jury of a strict products liability question involving a snubby should not be precluded simply because other causes for the harm exist, such as the intervening act of a criminal. Nevertheless, a discussion of criminal intervention and its possible effect on a manufacturer's liability would be helpful in making the proximate cause aspect of this analysis more complete.

a. Intervening Criminal Conduct

Under basic negligence principles, a third person's intentionally tortious or criminal behavior will supersede the initial cause of the harm, even though the initial cause gave the third person the opportunity to act in this tortious or criminal manner. If, however, the criminal act is a foreseeable consequence of the negligent conduct, the criminal act will not supersede responsibility for the negligence, and the chain of causation will remain unbroken. Since most theories of causation within the area of negligence, including proximate cause, cross over and apply to strict products liability, this argument should be available with regard to handguns.

To illustrate the way this theory is applied in negligence actions, a discussion of one of the leading cases in the area of criminal intervention would be of assistance. In O'Hara v. Western Seven Trees Corporation, the California appellate court found that a landlord of an apartment building in an urban residential area had a duty to protect the tenants of the building from criminal activity. In O'Hara the landlord concealed information about a man who had raped several female tenants. The landlord also represented to the plaintiff that the building had adequate security. The landlord's failure to take reasonable precautions to safeguard the common areas of the apartment building, in light of the fact that criminal activity was prevalent in that community, was determined to have contributed heavily to the tenant's injury. Thus, according to O'Hara, if a person's conduct places another in a position of unknown or unexpected peril, that conduct could...
result in liability even though the injuries resulted from the criminal conduct of another.\textsuperscript{90}

Few difficulties are involved in applying these principles to snubbies and the injuries caused by them as a result of the criminal conduct of a third person. An advocate must persuade the court to consider the environment into which the snubby is being placed. The reality of criminal abuse of handguns in California is that 39.7\% of all homicides in 1981 were committed with handguns.\textsuperscript{91} Of all homicides committed with firearms, handguns were responsible for approximately 68\% of those deaths.\textsuperscript{92} Handguns not only play a large role in murder, but also in robbery and assault.\textsuperscript{93} Snubbies, in particular, are highly represented within the category of "crime guns."\textsuperscript{94} Of the fifteen handguns most often used in crime, ten are snubbies.\textsuperscript{95} Manufacturers cannot realistically claim that they lack knowledge that their products are used in a criminal manner. Since manufacturers realize or should realize this manner of use, their failure to take some type of precaution, such as designing the handgun with a longer barrel, should be seen as contributing to the plaintiff's injury according to the rationale of \textit{O'Hara}. This failure of gun manufacturers to act potentially places others in positions of unknown or unexpected peril. The intervening criminal act, therefore, does not become a superseding cause terminating the manufacturer's liability for defectively designing and manufacturing the snubby.\textsuperscript{96}

Once the plaintiff establishes that the criminal act is not a superseding cause and that the snubby was used in an intended or reasonably foreseeable manner, the plaintiff's prima facie case is complete. Under the holding of \textit{Barker}, the burden of proof now shifts to the defendant gun manufacturer who must prove that in light of the evidence provided by the plaintiff, the social utility of the design of the snubby outweighs the inherent risks of that design.

\textbf{SHIFTING THE BURDEN—RISK V. BENEFIT}

After the burden has shifted, the manufacturer must establish that

\textsuperscript{90} 75 Cal. App. 3d 798, 803-04, 142 Cal. Rptr. 487, 490 (1977); see also Restatement (Second) of Torts §449 (1976).
\textsuperscript{91} See Department of Justice, supra note 67, at 62.
\textsuperscript{92} See id.
\textsuperscript{93} See Crime, supra note 57, at 14-15.
\textsuperscript{94} See Killers, supra note 74, at 5.
\textsuperscript{95} See id.
\textsuperscript{96} See generally Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 147, 18 Cal. Rptr. 892, 896 (1962). A camp operator was held liable for injuries sustained by an 11 year old camper when she was sexually abused. The court held that an intervening act that was criminal in nature could be found to be reasonably foreseeable. \textit{Id}.
the product is not defective despite the evidence in the plaintiff's prima facie case.\textsuperscript{97} This task is accomplished by weighing the benefits of the handgun design against the dangers inherent in that same design.\textsuperscript{98} California courts have incorporated this burden shifting step because the manufacturer is usually in the best position to justify the particular design chosen.\textsuperscript{99}

A jury must consider five factors when evaluating the possible existence of a defect. These factors include: (1) the gravity of the danger posed by the challenged design;\textsuperscript{100} (2) the likelihood that the danger would occur;\textsuperscript{101} (3) the mechanical feasibility of a safer alternative design;\textsuperscript{102} (4) the financial cost of an improved design;\textsuperscript{103} and (5) the adverse consequences to the product and to the consumer that would result from an alternative design.\textsuperscript{104} In order to rebut the plaintiff's prima facie case, a defendant must establish that the benefits of a particular handgun design outweigh the dangers created by the design.\textsuperscript{105} This analysis relies completely upon a balancing process using the five Barker factors.\textsuperscript{106}

Keeping these factors in mind, a strong argument can be made that the risks posed by the design of a snubby outweigh the potential benefits of that same design. In particular, because of the size of the snubbies, these guns seem to be the best weapons for self-defense and protection.\textsuperscript{107} The small size permits easy concealment in purses and pockets.\textsuperscript{108} Regarding concealability, however, the law generally prohibits the carrying of a concealed weapon.\textsuperscript{109} In addition, the benefits of carrying a concealed weapon for self-defense are slight.\textsuperscript{110} Studies have shown that victims had an opportunity to use a weapon in only 3.7\% of reported crimes.\textsuperscript{111} Moreover, the belief that a concealed weapon will offer the victim some form of protection is misguided. Victims who offer armed resistance when attacked are more likely to be

\textsuperscript{97} Barker, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. 225, 237 (1978).
\textsuperscript{98} See id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.
\textsuperscript{107} See generally Mann, Our Endangered Tradition, FIELD & STREAM, Oct. 1975, at 22-23.
\textsuperscript{108} See Killers, supra note 74, at 3.
\textsuperscript{109} See CAL. PENAL CODE §12020.
\textsuperscript{110} See Reno, supra note 52, at 146.
\textsuperscript{111} See id.
The specific design feature of the shorter barrel that makes the snubby so small is precisely what creates the potential for abuse. An inference can be drawn that the smaller the gun, the larger the proportion of crimes committed with that particular type of gun. For example, statistics in California for 1981 show that 39.7% of willful homicides were committed with handguns as opposed to 5.7% with rifles and 7% with shotguns. The persuasiveness of this inference is underscored by the fact that two-thirds of all handguns confiscated in crimes are snubbies.

Elimination of the snubby would not have a severe impact on the market since longer barrel alternatives are already in existence. As a result, manufacturers would not incur additional costs in developing a new design. The longer barrel guns would simply absorb the remaining market left by the absence of the snubby. Furthermore, consumers would not have to spend more money for these guns. Many snubbies fall within the same price range as the longer barrel alternatives.

In summary, the dangers posed by snubbies are great because of the likelihood that snubbies will be used to perpetrate a crime. The mechanical feasibility of an alternative design is already in existence and will not cause the manufacturer or consumer to incur additional costs. Finally, although the consumer will no longer have the option of purchasing one particular design of handgun, the adverse consequences do not appear to be great; a major factor in many crimes will be taken off the market and consumers will be able to meet their needs with comparable longer barrel alternatives.

Once the design of a handgun is found defective and liability for injury caused by that defect is a possibility, the next step is to decide how far the scope of liability should extend. When a handgun reaches an individual who will foreseeably misuse it, should liability

112. See Guns, supra note 7, at 12.
113. See Transcript, supra note 1, at 8.
114. See generally Department of Justice, supra note 67, at 62.
115. See id.
116. See Killers, supra note 74, at 3.
117. See Transcript, supra note 1, at 8.
118. See id. at 11.
119. See id.
120. See Killers, supra note 74, at 4.
121. See supra notes 108-15 and accompanying text.
122. See supra notes 116-19 and accompanying text.
123. See supra notes 106-19 and accompanying text.
extend only to the gun manufacturer, or should liability reach the entire distribution chain down to the retailer?

**Scope of Liability**

Addressing the issue of the scope of liability, the California Supreme Court in *Kasel v. Remington Arms Company*,\(^{125}\) formulated the rule that strict products liability for defective products should fall upon the entire production and marketing chain.\(^{126}\) The court reasoned that the entire chain of distribution was responsible for placing the defective product into the stream of commerce.\(^{127}\) Retailers are a part of the production and marketing chain. Moreover, the retailer is often the only member of the marketing chain who is accessible to the injured plaintiff.\(^{128}\) Those who advocate applying strict products liability to snubby manufacturers believe that once these manufacturers are threatened with indemnity claims from retailers facing million dollar judgments and soaring interest rates, the snubby will be taken off the market or better methods of distribution will result.\(^{129}\) The manufacturer will ultimately have to compensate the retailer or lose a vital link in the distribution chain.\(^{130}\) The retailer's liability, therefore, furthers the goal of safety, thus fulfilling a basic policy of strict products liability.\(^{131}\)

The rationale for holding retailers liable is clearly explained in *Vandermark v. Ford Motor Company*.\(^{132}\) In *Vandermark*, the California Supreme Court stated that in many cases the injured party will only have access to the retailer.\(^{133}\) The retailer, who faces potential liability, would then exert pressure on the manufacturer to produce a safer product.\(^{134}\) Through this method, the costs of protection can be adjusted between the manufacturer and retailer as a part of their continuing business relationship, thus placing no undue hardship on either of the parties.\(^{135}\)

A related issue pertaining to the scope of liability concerns the proper party to bring a strict products liability action. In California, the precise legal relationship between the parties has not played a ma-

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\(^{126}\) See id. at 724, 101 Cal. Rptr. at 322.

\(^{127}\) See id.

\(^{128}\) See id. at 724, 101 Cal. Rptr. at 322.

\(^{129}\) See id. at 262, 391 P.2d at 899.


\(^{131}\) See id.

\(^{132}\) See 61 Cal. 2d at 262, 391 P.2d at 171-72, 37 Cal. Rptr. 899-901 (1964).

\(^{133}\) See *Id.*

\(^{134}\) See Id.

\(^{135}\) See *Vandermark*, 61 Cal. 2d at 262-63, 391 P.2d at 172, 37 Cal. Rptr. at 900.
jor role in strict products liability.\textsuperscript{136} The plaintiff can be a "mere by-

stander" who is totally unconnected with the distribution chain except as an ultimate victim.\textsuperscript{137} One theory suggests that a bystander requires even greater protection since he or she generally has no say in the sale or purchase of the product.\textsuperscript{138} Victims of crime perpetrated through the use of a snubby certainly can be classified as bystanders since they have no say in whether the user or consumer should have been allowed to purchase the gun. This bystander classification promotes the broad philosophy that the costs and injuries resulting from a defective prod-

uct should be borne by those responsible for placing the product on the market rather than by those injured and powerless to protect them-

selves.\textsuperscript{139} Victims of crime, therefore, should be allowed to bring these claims against gun manufacturers.

CONCLUSION

Handguns, in general, pose a great risk of danger to the public. Moreover, specific designs of handguns, such as the snubby, pose an even greater risk.\textsuperscript{140} Although handguns represent only 20\% of the firearm market, 90\% of all gun related deaths involve a handgun.\textsuperscript{141} To date, gun control legislation has played a very minor role in reducing these risks of danger.\textsuperscript{142}

A solution to the handgun problem may exist in the courts. In par-
ticular, strict products liability law has now developed to the point in California that it can, and often does, act as an effective tool in encour-

aging manufacturers to design safer products.\textsuperscript{143} By discouraging man-

ufacturers from marketing products with defects that endanger the public, the potential for risk is decreased, and the public interest in safety is served.\textsuperscript{144}

This comment has explored the feasibility of applying strict products liability theories in California to cases involving handguns. The specific issue addressed is whether manufacturers and retailers of snub-

bies, a particular type of handgun, can be held strictly liable in tort for the resulting harm caused by the defective design of the snubby. The success of these strict products liability actions in California depends

\textsuperscript{137} See 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657.
\textsuperscript{138} See id.
\textsuperscript{140} See supra notes 108-16, and accompanying text.
\textsuperscript{141} See Taking Aim, supra note 5, at 42.
\textsuperscript{142} See supra notes 9-20 and accompanying text.
upon the application of the analysis for strict products liability actions provided in *Barker*. Using the *Barker* analysis, the existence of a defect can be established through the construction of plaintiff's prima facie case. Initially, plaintiffs must prove that consumer expectations of handgun safety are not necessarily met just because a handgun is an obviously dangerous product. In addition, manufacturers can be compelled to redesign snubbies because the potential for misuse in crime is a foreseeable occurrence. To complete the prima facie case, the issue of proximate cause must be addressed by the plaintiff. A conclusion can be drawn that the defective design of a snubby is the proximate cause of injury because the defect is a concurrent cause with the criminal act that produces the injury. Moreover, an intervening criminal act will not automatically be a superseding cause of harm because the criminal act is a foreseeable event.

Once the burden of proof shifts to the defendant gun manufacturer, the risk/benefit test of *Barker* should be applied. Unless the defendant can prove that the benefits of a snubby outweigh the risks created by the small size, a defective design can be found and liability for injuries caused by this defective design will be imposed upon the gun manufacturer. Theories defining the potential scope of liability will permit victims of crimes to bring these strict products liability actions as bystanders. Furthermore, retailers as well as manufacturers may be held liable for injuries caused by the defective design of a snubby because of the retailer's position in the distribution chain.

This comment finds no significant barriers to the application of strict products liability to actions involving manufacturers of snubbies. Through the strict products liability cause of action, gun manufacturers may be encouraged to prevent criminals from obtaining snubbies by designing and manufacturing guns that are less dangerous.

Those who believe that the right to possess a gun for self-defense or protection of the home is inalienable undoubtedly will charge that this form of litigation will only prevent law abiding citizens, not criminals, from obtaining handguns. Studies have shown, however, that most

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145. See *supra* notes 45-124 and accompanying text.
146. See *supra* notes 45-95 and accompanying text.
147. See *supra* notes 47-59 and accompanying text.
148. See *supra* notes 60-75 and accompanying text.
149. See *supra* notes 76-95 and accompanying text.
150. See *supra* notes 81-95 and accompanying text.
151. See *supra* notes 96-123 and accompanying text.
152. See *supra* notes 96-123 and accompanying text.
153. See *supra* notes 131-38 and accompanying text.
154. See *supra* notes 124-30 and accompanying text.
guns used in crime are new. Therefore, a reduction in the supply of handguns currently being produced will greatly diminish the supply of guns available for use in crimes.

Snubbies most often are just a "tool of destruction," and marketing them to the general public poses an unacceptable risk of injury and harm to society. Strict products liability may be the only effective way to reduce this risk of injury by forcing manufacturers to accept responsibility for injuries inflicted by their product.

Rose Safarian

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155. See Moore, supra note 18, at 95.