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INTRODUCTION

The national incidence of crime has been steadily rising during the last several decades,¹ and societal reaction to this increasing criminal activity is spurring a new wave of tort claims unique to the established principles of civil liability.² Historically, individuals who suffered harm from criminal activity were relegated to seeking recovery from either state sponsored compensation programs³ or the actual malefactor,⁴ both of which often proved insufficient to compensate the injury.⁵ Increasingly, however, criminally injured plaintiffs have been launching innovative judicial attacks upon yet another front in the form of civil suits against third parties who have in some way contributed to the


⁴. Criminals are generally precluded from making victim restitution either because they are indigent or their earning capacity is reduced by incarceration. See Comment, California Approach, supra note 2, at 544; McAdam, Emerging Issue: An Analysis of Victim Compensation in America, 8 URB. LAW. 346, 347-48 (1976); Schultz, The Violated: A Proposal to Compensate Victims of Violent Crimes, 10 ST. LOUIS U.L.J. 238, 243 (1975). Generally speaking, most violent crimes are not committed by the wealthy. See Comment, Criminal Acts, supra note 2, at 459, n.4. Trial attorney F. Lee Bailey has noted: “Violent criminal defendants are generally penniless. You seldom collect.” Beach, Getting Status and Getting Even, Time, Feb. 7, 1983, at 40.

⁵. See Comment, California Approach, supra note 2, 540-44.
injury for which compensation is being sought. These third party suits have led to a demonstrable and dynamic increase in civil litigation whereby injured plaintiffs have sought to ascertain the scope of liability, and hence recovery, for the consequences of criminal activity in society. These actions are meeting with considerable and significant success in the courts.

Recent societal attention has been focused upon the potential civil tort liability of manufacturers of products for the harm caused to consumers by the criminal tampering of those products. Several lawsuits filed in the wake of this modern day tragedy have raised the spectre of an issue of tort law hitherto unaddressed by the courts: The scope of a manufacturer's product liability for products that operate to cause consumer injury due to criminal tampering. The twofold purpose of this comment is (1) to explore the outer parameters of a manufacturer's liability for criminally tampered products by an analysis of the law of products liability, and (2) to adopt the position that civil liability for criminally tampered products may be established by resort to the prevailing concepts of products liability. Since there is no decisional law and scant scholarly commentary with which to support the position that tort liability exists for criminally tampered products, this comment purports to do no more than present an initial approach and general starting point for a theory enabling the imposition of liability. As Dean Prosser has noted, the law of torts is a battleground of social theory. Thus, whether the imposition of tort liability in a given situation is appropriate traditionally has hinged upon, and been justified by, the seriousness of the dilemma that the liability was called upon to resolve. The problem of criminally tampered products that make their

6. See infra note 8.
7. See supra note 2; Beach, supra note 4, at 40.
10. A products liability decision for criminally tampered products would be a case of first impression in every state and federal court in the nation.
12. See Bazyler, supra note 1, at 728; Prosser, supra note 11, at 15. Dean Keeton notes that this allows the judicial process to continue the "creative continuity" necessary to respond to the ineluctable changes in society and living conditions. See Keeton, Manufacturers' Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L. Rev. 559, 559-60.
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way into the marketplace presents an issue of grave and portentous
significance to a society so necessarily dependent on the availability
and safety of a myriad of consumer goods. One of the primary policies
of tort law is the deterrence of socially undesirable behavior, and
criminal product tampering, socially undesirable by definition, should
fall within the general ambit of tort liability. Although courts have
been reluctant, historically, to impose liability for the intervening crim-
ninal acts of others, this comment will demonstrate that the trend of
the law is to the contrary. Moreover, California courts have tradition-
ally been sensitive to the problems faced by consumers injured by
defective products in their attempts to establish the evidentiary re-
quirements of a prima facie case of liability. Several recent instances
of product tampering aptly illustrate the situation in which a cause of ac-
tion for injury from criminally tampered products would arise.

In October 1982, several bottles of Extra-Strength Tylenol, an over-
the-counter pain reliever, were criminally adulterated with doses of cy-
anide. As a result, several persons died after using the product, and
numerous others became ill. Shortly thereafter, the manufacturer of
the product withdrew all remaining Tylenol from the marketplace and
subsequently reintroduced the product in a specially designed tamper-
resistant package. Whether the manufacturer of Tylenol will ulti-
mately be held liable cannot be foretold with any degree of accuracy,
however, the elements of a cause of action for injury resulting from a
criminally tampered product have probably been established. As
Judge Hand once observed, an entire industry may be in error for un-
duly lagging in the adoption of new and available technology. The
issue of the defendant’s liability is one of A’s responsibility to C for the
criminally intervening act of B. Specifically, the question becomes

(1969) [hereinafter referred to as Keeton, Meaning of Defect]. See generally Bohlen, Fifty Years of
Torts, 50 HARV. L. REV. 725 (1937); Keeton, Creative Continuity in the Law of Torts, 75 HARV. L.
REV. 463 (1962). But compare Dean Pound’s admonition that the tendency to call upon the law in
periods of transition and expansion to do more than it was adapted to do often leads to failure. R.
POUND, CRIMINAL JUSTICE IN AMERICA, 62, 69 (1930).

13. See Bazyler, supra note 1, at 734; PROSSER, supra note 11, at 7. But cf. Klemme, The

14. See Bazyler, supra note 1, at 734. The author suggests that inasmuch as an individual
will almost always conform his behavior in order to avoid potential tort liability, the imposition of
liability for criminal activity will almost certainly result in less consumer injury and a reduction in
the crime rate. Id. at 734, 747-50. See PROSSER, supra note 11, at 23.

15. See infra notes 192-03 and accompanying text.

16. See infra notes 70-302 and accompanying text.

17. See infra notes 32-38 and accompanying text.

18. See supra note 9.

19. See supra note 9.

20. See infra notes 39-302 and accompanying text.

21. See The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).
whether the traditional tools of tort law provide an effective and justifiable remedy for persons injured by products rendered defective through criminal tampering. This comment will address and explore the outer limits of a manufacturer's liability for criminally tampered products in light of general products liability law and California's os
tensive judicial predilection and policy for supporting injured consumers in their quest for recovery.\textsuperscript{22} Pursuant to this objective, a brief discussion of products liability law, entailing a delineation of the strict liability and negligence bases for recovery, will be set forth as a precur-
sor to the primary analysis of whether criminally tampered products may be properly designated defective as to design under these two the-
tories of liability. The conceptual and analytical framework of liability can be viewed as comprising three broad areas of discussion: First, that a product which incorporates a design inordinately susceptible to crimi-
ral tampering may be properly adjudged defective; second, that a criminally tampered product may constitute the cause of a plaintiff's injury; and third, that consideration of the judicial and public policy rationales underlying the imposition of product liability for defective products may support the imposition of liability for criminally tam-
pered products. Specifically, this comment will demonstrate that a cause of action for strict liability and for negligence exists and may be justifiably imposed upon manufacturers of criminally tampered prod-
ucts.\textsuperscript{23} Finally, this comment will demonstrate that the judicial and public policy rationales underlying the doctrine of products liability in California forcibly mandate consumer recovery for injuries caused by criminally tampered products.

\section{A. The Law of Products Liability}

The collective body of law commonly referred to as products liability has existed historically as a means of compensating consumers for inju-
ries sustained through the use of defective products.\textsuperscript{24} Since the first
\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} See infra notes 70-100 and accompanying text.
\item \textsuperscript{23} See infra notes 39-302 and accompanying text.
\end{itemize}
\end{footnotesize}
modern decision over a century ago, this adventitious assemblage of competing doctrines has undergone a significant and dynamic evolution from which three theories have emerged as the most prevalent and frequently alleged bases for recovery—strict liability, negligence, and warranty. However, numerous authorities have expressly rejected the notion of warranty in products actions involving physical injury as beyond the intended scope and efficacy of a justifiable basis for recovery. Moreover, the California Supreme Court has specifically eschewed the utilization of warranty in light of strict liability theory.


26. Much of the development of products liability has centered around the massive accident problems occasioned by the industrial revolution. See Traynor, supra note 24, at 364-65, 376. Dean Prosser has extensively traced the historical development of products liability doctrine in Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960) [hereinafter referred to as Prosser, Assault Upon the Citadel], continued in Prosser, The Fall of the Citadel (Strict Liability to the Consumer) [hereinafter referred to as Prosser, Fall of the Citadel], 50 MINN. L. REV. 791 (1966). There may be anywhere from 12 to 29 different theories of products liability extant in the United States. See Note, Products Liability: Three Theories of Recovery or Twelve? 56 CAL. ST. B.J. 194 (1981); 72 C.J.S. Products Liability §3, at 5 (Supp. 1975). Products liability actions are increasing almost exponentially: there were 50,000 products actions filed in 1960, and over 1,000,000 filed in 1976. See Dworkin, supra note 24, at 34, n.5.


28. See, e.g., Vandall, supra note 24, at 71; Wade, The Nature of Strict Tort Liability, supra note 27, at 829; Wade, Liability of Manufacturers, supra note 25, at 6-8; Traynor, supra note 24, at 365-66; Prosser, supra note 11, at 653; Prosser, Assault Upon the Citadel, supra note 26, at 1124-34; Prosser, Fall of the Citadel, supra note 26, at 800-05; Restatement (Second) of Torts §402A, comment c (1965). Although the action for warranty was originally tortious in nature, similar to deceit, it nonetheless developed along contract lines in commercial settings; the original action was brought on the contract for the economic loss sustained by the buyer because the product purchased was substandard, and hence not what the buyer had contracted to purchase. Wade, Liability of Manufacturers, supra note 25, at 5-8; Prosser, supra note 11, at 634-54. Consequently, the doctrine of warranty in products actions became impregnated with many of the complexities of contract law, such as privity and notice, and the courts were forced to resort to "an infinite variety of highly ingenious and equally fictitious theories," in order to impose liability. Prosser, Fall of the Citadel, supra note 26, at 800-01. See Prosser, Assault Upon the Citadel, supra note 26, at 1124-26 for an interesting compilation of these theories. As Dean Prosser noted, "[t]here is no need to borrow a concept from the contract law of sales; and it is 'only by some violent pounding and twisting' that warranty can be made to serve the purpose at all. Why talk of it?" Id. at 1134.

29. Seeking to establish that a manufacturer's liability for products is not to be governed by the law of warranty, but rather by the doctrine of strict liability, the California Supreme Court has stated that:

Rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability for its defective products unless those rules also serve the purpose for which such liability is imposed. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). This statement makes clear that the only acceptable kind of warranty doctrine in California is that which operates exactly as strict liability, and does not allow the manufacturer to define the scope of his own liability for defective products through the abstruse concept of warranty. Id. See Traynor, supra note 24, at 365-66. Several authorities have noted that the concept of warranty has always existed as a convenient form with which to invoke strict liability ahead of
The prevailing view apparently supports the proposition that the invocation of the law of warranty in products actions is inappropriate and confusing to the jury. The approach utilized herein, therefore, employs a dual analysis of liability under the theories of strict liability and negligence. Finally, the scope of this comment is restricted to a discussion of liability for products rendered defective as to design.

The constituent elements of proof in the causes of action of strict liability and negligence are largely analogous, consisting of a physical injury caused by a defective product. California courts traditionally have been sensitive to the problems faced by consumers of defective products in proving defect and causation, and it is well-settled that a plaintiff may establish both the elements of defect and causation by its time. See Prosser, supra note 11, at 656-58; 4 B. Witkin, Summary of California Law, Torts §809, at 3105 (1965) [hereinafter referred to as Witkin]; Restatement (Second) of Torts 402A, comment m (1965). See generally 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697.

30. See supra notes 28-29 and accompanying text. As Justice Traynor observed, "Insofar as well warranty served in the field of commercial transactions, its invocation in torts to rationalize compensation for injury also served to frustrate it." Traynor, supra note 24, at 365. Professor Wade has noted that "[n]ow that strict liability has become the dominant theory ... it is time to abandon the warranty way of thinking and its terminology just as we have abandoned other 'impediments' of the warranty approach. . . ." Wade, The Nature of Strict Tort Liability, supra note 27, at 834. In their adoption of strict liability, the authors of the Restatement expressly rejected warranty language as superfluous and likely to prove misleading. Restatement (Second) of Torts §402A, comment m; (1965). Wade, Liability of Manufacturers, supra note 25, at 10-11. Thus, since warranty has been relegated to a position not inconsistent with that of strict liability, supra note 29, it appears that the doctrine of warranty is anachronistic and hence cannot be utilized to accomplish anything in the area of products liability that strict liability cannot effectuate. As one court noted at 1913: "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." Mazetti v. Armour, 75 Wash. 622, 627, 135 P. 633, 636 (1913). But cf. Hau ter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975) (wherein the court held that the plaintiff could recover, concurrently, as a matter of law, under the theories of strict liability, breach of warranty, and misrepresentation).


32. See Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 387, 482 P.2d 681, 686, 93 Cal. Rptr. 769, 774 (1971); Witkin, supra note 29, §812, at 3108-09; Prosser, supra note 11, at 671. The similarity of proof is particularly important in design defect actions; thus, the quantum of proof necessary to establish strict liability for defective design is often sufficient to show negligence on the part of the manufacturer. See Wade, The Nature of Strict Tort Liability, supra note 27, at 836-41. See generally Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974). Consequently, California courts have held that when the plaintiff's cause of action is based on two or more theories of products liability, the claims may merge into a single cause of action inasmuch as each allegation seeks damages for physical injury caused by defectively designed products. See Balido v. Improved Machinery, Inc., 79 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1972); Witkin, supra note 29, §812, at 3108-09. Moreover, California law does not require the plaintiff to elect one theory of liability in order to recover. See 4 Cal. 3d 379, 387, 482 P.2d 681, 686, 93 Cal. Rptr. 769, 774.

resort to the use of circumstantial evidence, as direct evidence is frequently impossible in many products actions.\textsuperscript{34} As a result, the use of expert testimony is often employed by plaintiffs in order to establish the circumstantial foundation for their cause of action,\textsuperscript{35} and the technical expert may play a pivotal role in the eventual outcome of a products action.\textsuperscript{36} Coterminous with this consideration is California's judicial predilection to favor consumers injured by defective products in the establishment of a evidentiary basis for products liability.\textsuperscript{37} Consequently, a plaintiff injured by a criminally tampered product should be afforded considerable latitude in the presentation of evidence tending to support a bona fide claim of injury.\textsuperscript{38} Next, this comment will demonstrate that a manufacturer may be strictly liable for injuries resulting from criminally tampered products.

**The Doctrine of Strict Liability in Tort**

The classical definition of the doctrine of strict liability for products has been enunciated by the California Supreme Court in the landmark opinion of *Greenman v. Yuba Power Products, Incorporated*\textsuperscript{39} as follows: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . ."\textsuperscript{40} Under California law, a plaintiff satisfies the burden of proof required by this formulation once he presents evidence of a defect in the product, and that the defect was a proximate cause of the resulting injury.\textsuperscript{41} The indispensable precondition of the strict liability

\begin{itemize}
  \item \textsuperscript{37} See *supra* notes 32-34 and accompanying text.
  \item \textsuperscript{38} See *supra* notes 32-37 and accompanying text.
  \item \textsuperscript{39} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). This was the first judicial decision to expressly adopt the principles of strict liability in tort.
  \item \textsuperscript{41} See 20 Cal. 3d 413, 427, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234; 8 Cal. 3d 121, 133-34, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442; McGee v. Cessna Aircraft Co., 82 Cal. App. 3d 1005,
cause of action is the existence of a defect inherent in the product.\textsuperscript{42} The primary focus in a strict liability action, therefore, is on the product itself, and not on the manufacturer's fault or negligence in the production or marketing of the product.\textsuperscript{43} In short, the plaintiff is not required to impugn the manufacturer, but rather, to impugn the product.\textsuperscript{44} Consequently, the judicial trend since the Greenman decision has been away from fault or negligence as the governing principle for liability in products actions.\textsuperscript{45} Rather, the California courts have increasingly relied upon the relative flexibility of strict liability theory in order to eliminate any existing barriers to an injured consumer's recovery for defective products.\textsuperscript{46}

A. Strict Liability is a Doctrine of Judicial Policy

Traditionally, strict liability was adopted because the demands of public policy required that responsibility for defective products be fixed wherever it would most effectively reduce the dangers to consumers.
that result when such products reach the marketplace.\textsuperscript{47} Thus, the primary purpose of strict liability is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."\textsuperscript{48} Concurrent with this primary consideration, California courts generally consider three additional policy rationales when determining whether the imposition of strict liability is justified: 1) Recognizing the problems of proof inherent in negligence and warranty actions,\textsuperscript{49} strict liability should operate to relieve an injured plaintiff of any onerous evidentiary burdens in order to allow the plaintiff a greater chance to recover;\textsuperscript{50} 2) Fixing liability without fault upon manufacturers should result in an economic incentive to improve product design and create safer products in gen-

\textsuperscript{47} Justice Traynor eloquently defined this policy in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring) as follows:

\[\text{[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they make strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best suited to afford such protection.} \]

\textit{Id.} at 461-62, 150 P.2d at 440-41. See Traynor, supra note 24, at 366.


\textsuperscript{49} See infra note 50. As Professor Wade has noted,

\[\text{[i]t is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.} \]

\textit{WADE, The Nature of Strict Tort Liability, supra} note 27, at 826.

\textsuperscript{50} See 32 Cal. 3d 112, 119, 649 P.2d 224, 228, 184 Cal. Rptr. 891, 895; Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978); 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41; Wade, \textit{The Nature of Strict Tort Liability, supra} note 27, at 826. As the California Supreme Court in \textit{Cronin} noted,

\[\text{the very purpose of our pioneering effects in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty . . . remedies, and thereby "to insure that the costs of injuries resulting from defective products are borne by the manufacturer. . ."} \]

\textsuperscript{8} Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442.
eral, thereby reducing the risk of serious consumer injury; \textsuperscript{51} and 3) Recognizing that the manufacturer may be best able to absorb and spread the cost of injuries from defective products by obtaining insurance and distributing this expense to the public as a cost of doing business, the risk of loss should be shifted onto the manufacturer as the party in the best economic position to bear the financial burden. \textsuperscript{52} Generally, shifting the onus of liability for defective products onto the manufacturer who produced those products is the most efficacious means of compensating injured consumers. \textsuperscript{53} Products that are defective as to design present the most conceptually difficult area of the strict liability cause of action.

B. Defective Design Under Strict Liability

Recognizing the problems inherent in giving meaning and substance to the concept of defect, \textsuperscript{54} particularly in design cases, \textsuperscript{55} the California

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  \item \textsuperscript{51} See 32 Cal. 3d 112, 122, 649 P.2d 224, 230, 184 Cal. Rptr. 891, 897; Spradley, \textit{Defensive Use of State of the Art Evidence in Strict Products Liability}, 67 MINN. L. REV. 343, 348-49 (1982); Keeton, supra note 27, at 34; Traynor, supra note 24, at 366; Prosser, \textit{Assault Upon the Citadel}, supra note 26, at 1119; Franklin, \textit{Replacing the Negligence Lottery: Compensation and Selective Reimbursement}, 53 VA. L. REV. 774, 781 (1964). From a practical standpoint, strict liability should deter the manufacturer from foolhardy business ventures that pose a risk to consumer safety. \textit{See Wade, The Nature of Strict Tort Liability, supra note 27, at 826. This incentive policy may be used to rationalize strict liability even when the design change is a technological impossibility. See Spradley, supra note 51, at 409; Epstein, \textit{Products Liability: the Search for the Middle Ground}, 56 N.C.L. REV. 643, 658-59 (1978).
  \item \textsuperscript{55} The concept of defect is considerably more problematic in the design defect context: manufacturing defects create an aberrant product that becomes readily identifiable to the consumer, whereas design deficiencies reflect the entire product line and hence cannot be so easily

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Supreme Court set forth an innovative, bifurcated approach for the ascertainment of a defectively designed product in *Barker v. Lull Engineering Company*. Pursuant to this analysis, a product may be found defective as to design under either of two alternative tests. First, the plaintiff may demonstrate that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. However, the court was critical of this approach as indicative of only the bare minimal standard with which a product must comport. Moreover, utilization of ordinary consumer expectations as the exclusive measure for recovery posed an additional problem: In many cases the consumer would not know what to expect as he would have no idea how safe the product could be made. Therefore, the court formulated a second, alternative test: Even if the product does, in fact, satisfy ordinary consumer expectations, it may still be found defective if the jury finds that the design of the product embodies an “excessive preventable danger.” A product embodies an excessive preventable danger if the jury determines, retrospectively, that the risk of danger inherent in the challenged design of the product outweighs the benefits of that design. This risk-benefit test employs, in essence, a traditional tort balancing of utility against...

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57. See infra notes 58-61 and accompanying text. See generally *Wade, The Nature of Strict Tort Liability*, supra note 27, at 825; *Keeton, Meaning of Defect*, supra note 12, at 559, for two alternative formulations of design deficiencies. See also *Spradley, supra* note 51, at 424.

58. 20 Cal. 3d 413, 429-30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236. This approach, which is similar to the U.C.C. warranties of fitness and merchantability, reflects in part the warranty heritage whence California products liability doctrine historically derived. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236. Compare *id.* with U.C.C. §§2-314, 2-315 (1978).

59. The *Barker* court was critical of this approach insofar as it treated consumer expectations as a “ceiling” for a manufacturer’s liability, rather than as a “floor”: consumer expectations are the lowest standard a product must meet. 20 Cal. 3d 413, 425-26 n.7, 573 P.2d 443, 451 n.7, 143 Cal. Rptr. 224, 233 n.7.

60. See *id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. 236; *Wade, The Nature of Strict Tort Liability*, supra note 27, at 829. From an evidentiary standpoint, the California Supreme Court has queried as to the potential qualifications a witness must possess before he could be certified as an expert on the issue of ordinary consumer expectations. *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 127, 649 P.2d 224, 233, 184 Cal. Rptr. 891, 900 (1982); *Schwarz, Forward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 480 (1979).

61. 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236-37. See *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 6, 116 Cal. Rptr. 575, 578 (1974), wherein the court noted that “while defective design is an amorphous and elusive concept . . . its contours certainly include the notion of excessive preventable danger.” *Id.*


63. The California Supreme Court was not the first to employ a risk-benefit test to ascertain the existence of a defective product. See, e.g., *Keeton, Products Liability: Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293, 313 (1979); *Wade, The Nature of Strict Tort Liability*, supra note 27, at 837-38. Apparently, the *Barker* court found these formulations too inextricably linked with concepts of negligence to be of any value in California. *Compare id.* with *Restate-
risk,64 and appears, therefore, appropriately suited as the superior analysis with which to ascertain defective design with respect to criminally tampered products.65 Moreover, this second test pragmatically represents the virtual impossibility of eliminating the weighing of competing considerations from the deliberations of the jury.66

In order to clarify application of the risk-benefit test, and to guide and instruct the jury as to the standard to be applied in a given case,67 the Barker court enunciated a series of policy factors to be considered: viz., the gravity of the danger posed by the challenged design; the likelihood that danger would occur; the mechanical feasibility of a safer, alternative design; the financial cost of an improved design; and the adverse consequences to the product and the consumer that would result from an alternative design.68 Thus, by resorting to these relevant policy factors, a plaintiff injured by a criminally tampered product must attempt to establish a prima facie case of liability for defective design under the second prong of the Barker analysis. Finally, the court held that once the plaintiff has made a prima facie showing that the injury was proximately caused by the product's design by use of the enumerated factors, the burden of proof then shifts to the defendant-manufacturer to attempt to prove, in light of the same considerations, that the product was not defective.69 This comment next will demonstrate that under the second prong of the Barker formulation of defect, a manufacturer who produces a product that is, by virtue of its design, inordinately susceptible to criminal tampering may be strictly liable if that product could have been produced with a safer, alternative design.

64. See generally Calabresi & Hirschoff, supra note 24, at 1055. One of the reasons for employing a balancing test is that since strict liability is not designed to constitute insurance, infra note 95, any evaluation of a product's design must necessarily involve the weighing of danger against utility. See Daly v. G.M. Corp., 20 Cal. 3d 725, 746-47, 575 P.2d 1162, 1174-75, 144 Cal. Rptr. 380, 393 (1978); Vandall, supra note 24, at 74.
65. See supra notes 101-63 and accompanying text.
66. See 20 Cal. 3d 413, 433, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238.
67. See id.
68. See id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
69. See id. at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237. The court found justification for this action flowing from and implicit in the fundamental policies of strict liability that require a manufacturer who seeks to escape liability for an injury caused by a defective product to bear the burden of persuading the jury that the product should not be adjudged defective. Id. The California Supreme Court has long adhered to the principle of shifting burdens whenever it would effectively accommodate a plaintiff's cause of action. See generally Sindell v. Abbott Labs. Inc., 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) cert. denied, 449 U.S. 912 (1980); Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).
UNDER CALIFORNIA LAW A MANUFACTURER MAY BE HELD
STRICTLY LIABLE FOR CRIMINALLY TAMPERED PRODUCTS

Although no court has expressly decided the issue of a manufacturer’s strict liability for products rendered defective through criminal tampering,70 California courts have traditionally and consistently demonstrated support for consumers injured by defective products. The continuum of products liability decisions since Greenman forcibly illustrates California’s adherence to the principle that manufacturers must bear primary responsibility for the consequences of defective products in society.71 The judiciary has stood pertinaciously at the vanguard of consumer recovery by expanding existing theories of law and by formulating new ones whenever necessary to protect the interests of injured plaintiffs.72 In order to effectuate these policies, the California courts frequently have utilized the relatively extensible nature of strict liability theory to broaden and expand existing concepts of liability.73 Whether strict liability may be imposed for criminally tampered products must be viewed in light of this clear predilection for consumer recovery at the expense of legal finesse.74 For example, strict liability has been interpreted to include not only manufacturing defects, but also design defects,75 failure to warn defects,76 and patent defects.77 California strict liability theory comprehends market share liability,78 the application of comparative fault,79 and a cause of action

70. See supra note 10.
71. See infra notes 75-100 and accompanying text. Justice Traynor has noted:
The cases on products liability are emerging as early chapters of a modern history on
strict liability that will take long in the writing. There is a wealth of analogy yet to be
developed from the exploding bottles of yesteryear, from lathes on the loose, and capri-
cious safety values, and drugs with offside effects. There are meanings for tomorrow to
be drawn from their exceptional behavior.
Traynor, supra note 24, at 376.
72. See infra notes 75-100 and accompanying text. See generally Note, Continuing Corporate
Existence for Post-Dissolution Claims: The Defective Products Dilemma, 13 PAC. L.J. 1227 (1982);
Peck, Negligence and Liability Without Fault in Tort Law, 46 WASH. L. REV. 225 (1971); Wade,
73. See infra notes 75-100 and accompanying text.
74. Id. For example, the California Supreme Court justified extending the principles of com-
parative fault to strict liability because it was “fair to do so. The law consistently seeks to elevate
justice and equity above the exact contours of a mathematical equation.” Daly v. G.M. Corp., 20
Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).
433 (1972). The court noted that a defect could emerge from the mind of a designer as well as
from the hands of a workman. Id. at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
79. See generally Daly v. G.M. Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380
(1978).
for the infliction of emotional distress.\textsuperscript{80} Additionally, the California Supreme Court has assiduously attempted to expurgate all vestiges of negligence theory from strict liability principles,\textsuperscript{81} and has extended the rule of liability not only to actual consumers, but also to any person to whom an injury is reasonably foreseeable.\textsuperscript{82} Concurrently, the courts have extended the application of strict liability to successor corporations,\textsuperscript{83} retailers,\textsuperscript{84} bailors and lessors,\textsuperscript{85} wholesalers and distributors,\textsuperscript{86} licensors,\textsuperscript{87} and sellers of mass produced homes.\textsuperscript{88} In sum, these inexorable extensions of strict liability theory may be taken as illustrative of California's ability to assimilate new and unique challenges to existing legal theory by incorporating novel situations within existing principles of liability. Specifically, these decisions indicate that a strict liability cause of action for injuries resulting from criminally tampered products is well within the continuum of products liability decisions.\textsuperscript{89} Moreover, the most compelling aspect of California's judicial inclination to broaden the scope of strict liability whenever necessary to protect the interests of injured plaintiffs is the direction of the courts' emphasis: The decisions have consistently advanced the theories and favored the policies that would best operate to secure consumer recovery in virtually all instances, irrespective of the novelty of the cause of action.\textsuperscript{90} As a result, the court's inquiry becomes weighted from the beginning in favor of the injured consumer.\textsuperscript{91} Although this hardly constitutes a neutral balancing of interests,\textsuperscript{92} the practical result is that the onus of liability initially is placed upon the manufacturer, and remains there in the absence of some egregious consumer fault.\textsuperscript{93} Therefore, it appears

\begin{itemize}
\item \textsuperscript{80} See generally Shepard v. Superior Court, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).
\item \textsuperscript{81} See Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972); Wade, the Nature of Strict Tort Liability, supra note 27, at 831-32.
\item \textsuperscript{83} See generally Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).
\item \textsuperscript{84} See generally Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
\item \textsuperscript{86} See generally Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).
\item \textsuperscript{87} See generally Garcia v. Hasslett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).
\item \textsuperscript{88} See generally Kriegler v. Eichlor Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).
\item \textsuperscript{89} See supra notes 70-88 and accompanying text.
\item \textsuperscript{91} See Vandall, supra note 24, at 63-64; Calabresi, supra note 24, at 319; Klemme, supra note 13, at 153.
\item \textsuperscript{92} See Vandall, supra note 24, at 63-64. See generally Calabresi, supra note 24, at 319.
\item \textsuperscript{93} See Vandall, supra note 24, at 64; Calabresi, supra note 24, at 319. One authority has suggested that shifting the onus of loss to the manufacturer may compel the consumer, in effect, to purchase accident insurance for himself through increased prices. See Kalven, Torts: The Quest for Appropriate Standards, 53 Calif. L. Rev. 189, 205-06 (1965).
\end{itemize}
that a consumer injured by a criminally tampered product may be accorded a considerable degree of latitude not only in the evidentiary elements of the cause of action, but also in the fundamental premises of liability that may operate to hasten the consumer's recovery.

An argument may be made, however, that despite the extensible nature of strict liability theory, the cause of action should not be burdened further with an additional basis of recovery grounded upon harm caused by criminally tampered products. Additionally, there is the argument that to allow recovery would open floodgates of litigation, and would operate to render the manufacturer a veritable insurer for his products. In apparent contradiction to these arguments, the California courts have never eschewed the opportunity to overturn existing precedent in favor of compelling policy rationales that support consumer recovery. Moreover, shifting the loss onto the manufacturer is the most efficacious means of actually securing consumer recovery. In addition, the imposition of liability for criminally tampered products should promote product safety by encouraging tamper-resistant products. Finally, the manufacturer should not be regarded as an insurer of his products, because liability for any defective product may not be imposed merely because an injury has occurred; the plaintiff must always demonstrate that the product was defectively designed and that the design deficiency was a proximate cause of the resultant injury.

This comment next will specifically address the determination of defective design under the second prong of the Barker analysis.

94. For example, recovery under strict liability theory for solely economic loss and the rendition of services has been denied. See generally Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Shepard v. Alexian Brothers Hosp., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

95. Notwithstanding the inexorable pace of strict liability doctrine, strict liability does not constitute absolute liability so as to render the manufacturer a veritable insurer of his product. Authorities for this are legion. See, e.g., Wade, Liability of Manufacturers, supra note 25, at 13-16; Wade, The Nature of Strict Tort Liability, supra note 27, at 828; Traynor, supra note 24, at 366-67; Freedman, supra note 24, at 323. See generally Daly v. General Motors Corp., 70 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

96. See supra notes 70-93 and accompanying text.

97. See supra note 53.

98. See supra note 51.

99. See supra note 53, at 1041-42; Wade, Liability of Manufacturers, supra note 25, at 13. See generally Henderson v. Harnishchfeger Corp., 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974); Buccery v. G.M. Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976). Although an accident-free world may be desirable, the attainment is singularly beyond the scope of the judiciary. But compare Cushing v. Rodman, 82 F.2d 864 (D.C. Cir. 1936), wherein the court remarked that nothing but wholesome products could effectively protect consumers from harm. Id. at 869.

100. See supra notes 54-69 and accompanying text.
A. Products That Embody an Excessive Preventable Danger of Criminal Tampering Are Defectively Designed Under the Second Prong of the Barker Analysis.

The determination of defect for a product rendered defective as to design through criminal tampering is predicated upon the analysis set forth in the Barker decision. In applying the second prong of that formulation, the analysis should focus on the adequacy of the product's design to determine if, on balance and through hindsight, that design was not as safe as it should have been. The issue may be framed in the form of a query: Would the plaintiff have been injured if the design of the product had been otherwise? The specific analysis should hinge, therefore, upon the social utility of the product qua product in light of alternative means of designing that product; if the danger of criminal tampering inherent in the design of the product outweighs the social benefits, the product becomes a thing of excessive danger for which strict liability may be imposed. As a general proposition, any product designed in a way that causes injury when used in a foreseeable manner becomes defective if that design created an excessive danger that was readily preventable through the employment of existing technology at a cost consonant with the economic use of the product. California courts have held that part of the plaintiff's burden of proof includes evidence of feasible, alternative designs that might have made the product safer. The crucial issue, therefore, in demonstrating that a product was inordinately susceptible to criminal tampering is the plaintiff's ability to establish through the existence of feasible, alternative designs that the manufacturer could have designed a tamper-resistant product. The plaintiff may attempt to establish this by utilization of the policy factors enunciated by the Barker court. The plaintiff may satisfy the first set of factors, the gravity and likelihood of the danger posed by the challenged design, by demonstrating that the environment into which the product was marketed requires the neces-

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101. See supra notes 54-69 and accompanying text.
103. See Donaher, supra note 24, at 1307.
106. See infra notes 120-36 and accompanying text.
107. See supra note 68.
sity of a safer design commensurate with the gravity of the danger inherent in that environment.

B. The Dangerous Social Environment and the “Crashworthiness” Analogue

California courts have on numerous occasions embraced the concept of “crashworthiness,” or the idea that a manufacturer of certain products must take accidents into consideration when designing those products and employ the design precautions necessary to forestall the risk of injury. Additionally, since the potential of a second accident is also within reason, the law now requires that the manufacturer be aware of some degree of abuse of his product, either by the user or by third parties. Although the problem of criminal tampering does not comprise the issue of use per se, as this relates to the conduct of the plaintiff rather than to the criminal agency, the concept of “crashworthiness” presents an illustrative and useful analogy as to the applicability of the legal reasoning which gave rise to the concept in the first instance. This comment adopts the position that the application of the conceptualization of crashworthiness with respect to criminally tampered products may be the most efficient and legally supportable basis for establishing the necessity for tamper-proof designs. The doctrine of crashworthiness requires that an automobile be designed so as to withstand the impact not only of an initial collision, but also of a subsequent crash thereafter. The reasoning is that automobile accidents, while certainly not normal occurrences, are nonetheless an inescapable component of the environment in which cars are sold. By analogous reasoning, a logical extension of this principle appears to require all manufacturers to be aware of the environment in which their product is to be used, and if a constituent element of that environment involves the risk of crime in the form of product tampering, to design a product that is safe against that possibility. The California Court of Appeal has already extended the concept to include aircraft manufacturers.


112. *See supra* note 108-12 and accompanying text.

113. *See supra* notes 108-12 and accompanying text.

Thus, the proposition logically follows that just as automobile and aircraft manufacturers must design their products to be safe within the chosen marketing environment, so too must other manufacturers design their products to be equally safe within alternate environments. Further support for this proposition may be found in the judicial recognition of the general danger to be encountered in society.

The California Supreme Court has recognized that the design of products is not carried out in an industrial vacuum, but rather with the appropriate and proper realization of the realities of the product's everyday use. One of these realities is the ever increasing risk of danger from multi-varied sources within society. The Barker court took notice of this fact when it stated that

'[t]he technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. This radical change from a comparatively safe, largely agricultural, society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of the tortfeasor but now are more concerned with the safety of the individual who suffers the loss.'

This "radical change" includes, among other things, a steadily rising crime rate, and now, the very considerable danger of product tampering. To paraphrase Justice Traynor of the California Supreme Court, however intermittently or haphazardly these incidents of product tampering may occur, the risk of their occurrence is a constant and a general one, and against such a risk the manufacturer is best suited to provide general and constant protection.

In summary, there may no longer be any valid reason why all manufacturers should not be required to be aware of the dangers inherent to the chosen marketplace for their products, and to provide a general and constant protection to consumers in the form of tamper-resistant products that are safe for use within that environment. Next, the plaintiff may attempt to establish the second set of factors given by the Barker court, the feasibility and

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(1978). The appellate court dispatched with the defendant's argument that the concept of crashworthiness should not be extended to include aircraft manufacturers by stating that "[t]hese are not legal arguments. They are best left for the Legislature." *Id.*


117. *See supra* note 1.

118. *See supra* notes 18-19 and accompanying text.

119. *See supra* note 47.
financial cost of a safer design and the lack of adverse consequences to the product and the consumer, by presenting evidence of subsequent remedial design modifications.

C. Subsequent Remedial Design Modifications May Be Used To Establish the Existence and Feasibility of Safer, Alternative Designs

The evidentiary provisions of the California Evidence Code that preclude the introduction of a manufacturer's subsequent remedial design modifications or precautions in a negligence case do not apply to an action based on strict liability. Therefore, it is admissible that the manufacturer changed the method of making the product, altered the product's design in order to make it safer, or employed existing safety measures after the injury in question took place. The practical significance of such a rule of evidence in a products action is that the rule operates to place the defendant-manufacturer in a no-win position: The manufacturer must redesign the product in order to prevent future injuries and continue the product line, but the reintroduction of the improved design creates demonstrable evidence not only of the excessive danger inherent in the prior design, but also the feasibility of designing a superior product through the employment of existing technology. Moreover, it is of no consequence that the manufacturer complied with the state of the art or the general industry standards utilized by other manufacturers. The manufacturer's reasonableness

121. Evidence of subsequent repairs is generally inadmissable in products actions predicated upon negligence. See id.
122. See id; Ault v. Int'l Harvester Co., 13 Cal. 3d 113, 119, 528 P.2d 1148, 1151, 117 Cal. Rptr. 812, 815 (1974); Spradley, supra note 51, at 431-33; B. Witkin, California Evidence 2d, Circumstantial Evidence §385A, at 146-47 (Supp. 1982). The provisions of the Evidence Code were designed for cases involving the defendant's negligence or culpable conduct; thus, the exclusion of subsequent remedial repairs is not appropriate in strict liability actions where negligence or culpability is irrelevant.
124. As a general proposition, a manufacturer who has taken all reasonable precautions to correct his error may succeed in absolving himself from potential future liability. See generally Balido v. Improved Machinery Co., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).
125. See infra notes 129-36 and accompanying text.
in choosing a particular design is not relevant to the determination of whether that design could have been made safer.\textsuperscript{128} Ostensibly, the very existence of an improved design may be utilized by the plaintiff to show, comparatively, that the prior design was deficient.\textsuperscript{129} Presented with this kind of evidence, the manufacturer may neither assert that the plaintiff should have been aware of the improved design,\textsuperscript{130} nor claim that the defect was obvious\textsuperscript{131}—neither consideration is germane to the determination of defective design under the second prong of the Barker test.\textsuperscript{132} Clearly, the most topical application of this argument is in relation to the subsequent redesign of Extra-Strength Tylenol.

Subsequent to the criminal tampering of the original product, Tylenol was quickly reintroduced\textsuperscript{133} with a vastly improved design that incorporated several safety features specifically designed to prevent future criminal tampering.\textsuperscript{134} Apparently, the plaintiffs who have filed suit against the manufacturer of Tylenol may argue that the existence of the improved product design virtually establishes the second set of relevant policy factors required by Barker.\textsuperscript{135} The plaintiff’s expert could testify, by comparative resort to the reparatory design, that safer alternative designs were, in fact, not only technologically feasible but also capable of adoption with a minimum of cost and aberration to the product.\textsuperscript{136} Next, the plaintiff may attempt to establish causation by pointing to the lack of the improved design as a proximate cause of the injury.

\textsuperscript{128} See supra notes 43-45 and accompanying text. As a result, the manufacturer may be strictly liable notwithstanding the fact that he utilized the best design or materials available when the product was first designed or manufactured. See Vandall, supra note 24, at 74-75; Spradley, supra note 51, at 417-33; 4 U.S. DEP’T OF COMMERCE, INTER-AGENCY TASK FORCE ON PRODUCT LIABILITY, 91 (1977). This has resulted in legislative modifications of products liability law in several states. See Vandall, supra note 24, at 74-75.

\textsuperscript{129} See infra notes 133-36 and accompanying text.

\textsuperscript{130} See supra notes 54-69 and accompanying text.

\textsuperscript{131} The California Supreme Court dispensed with the “latent-patent” distinction in strict liability actions altogether when it held that “[r]quiring the defect to be latent would severely limit the cases in which the financial burden would be shifted to the manufacturer.” Luque v. McLean, 8 Cal. 3d 136, 144-45, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972). See Traynor, supra note 24, at 371.

\textsuperscript{132} See supra notes 54-69 and accompanying text.

\textsuperscript{133} The manufacturers of Extra-Strength Tylenol replaced the tampered product with an improved design within three months. See supra note 9. The California Supreme Court noted in Ault v. Int’t Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974), that evidence of subsequent remedial repairs may illustrate the feasibility of the improvement “if the changes occur closely in time. . . .” Id. at 119, 528 P.2d at 1151, 117 Cal. Rptr. at 815.

\textsuperscript{134} See supra note 9.

\textsuperscript{135} See supra notes 61-69 and accompanying text. California courts have held that the product includes the container or packaging thereof, such that it too must be safe. Wade, The Nature of Strict Tort Liability, supra note 27, at 849. See generally Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961).

\textsuperscript{136} See supra notes 61-69 and accompanying text.
D. The Lack of A Safer, Alternative Design May Be Sufficient to Establish Proximate Causation

Utilization of the Barker analysis requires that the plaintiff present a prima facie case of causation. The plaintiff must present a sufficient quantum of evidence to allow a jury to find that the defectively designed product was a proximate cause of the plaintiff's harm. Once the existence of a defect has been established, it is generally sufficient that the plaintiff show the defective design to have been a substantial factor in causing the injury in order to shift the burden of proof to the defendant. Frequently, the plaintiff seeks to accomplish this on the basis of the manufacturer's failure to include a particular safety precaution in the design of the product. The plaintiff argues that had the design of the product been otherwise, he would more probably than not have escaped injury. Several recent decisions may be indicative as to the quantum of evidence necessary to establish the plaintiff's prima facie case of causation under Barker with respect to criminally tampered products.

In Campbell v. General Motors Corporation, the plaintiff was injured when the city bus in which she was traveling made a sharp turn and hurled her to the ground. The plaintiff alleged that the bus was defectively designed in that it lacked handrails within reasonable proximity, and that this defect was a proximate cause of the injury. The California Supreme Court, after establishing that the plaintiff need not disprove every possible alternative explanation of the injury in order to have the case submitted to the jury, held that it was sufficient that the plaintiff present just enough factual evidence to allow a jury to reasonably infer that had the design of the bus been otherwise, the plaintiff would probably not have been injured. The court noted that taking the case from the jury merely because the plaintiff could not conclu-


138. See supra notes 54-69 and accompanying text.


141. See supra note 102.

142. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

143. Id. at 116, 649 P.2d at 226, 184 Cal. Rptr. at 893.

144. Id. at 121, 649 P.2d at 229, 184 Cal. Rptr. at 896.

145. Id. at 122, 649 P.2d at 230, 184 Cal. Rptr. at 897. See generally Dimond v. Caterpillar.
sively prove that the existence of a safety precaution would have prevented the injury would allow the manufacturer to prevail upon the basis of his failure to provide the required safeguard. Moreover, the court noted that such a holding would be in contravention of the underlying policy rationales of strict liability that favor protection of otherwise defenseless consumers, spreading the risk, and providing an incentive to manufacturers to develop safer products. Similarly, in Dimond v. Caterpillar Tractor, Company, wherein the plaintiff was unable to establish any direct evidence of a causal link between the defect and his injury, the appellate court allowed an inference of proximate cause by circumstantial evidence in light of the strict liability policy favoring injured plaintiffs in the area of proof. If these cases can be viewed as demonstrative of the general trend of products law with respect to causation, the courts appear to be relying more on the underlying policies of strict liability and inferences of proximate causation rather than on complicated evidentiary or causative analyses. Apparently, the judiciary would have to greatly controvert its holdings to date in order to deny liability for criminally tampered products on the basis of causation. Moreover, the jury should in every case be given the opportunity to decide the social utility of the product as well as the cause of the injury.

Finally, the whole of the strict liability policies, which forcibly advocates protecting and securing consumer interests, strongly favors jury resolution whenever the evidence can be interpreted to support the plaintiff’s position. Thus, once the plaintiff introduces evidence that he was injured while using a criminally tampered product in a reasonably foreseeable manner, and that the avoidance of harm was frus-

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146. 32 Cal. 3d 112, 121, 649 P.2d 224, 229, 184 Cal. Rptr. 891, 896. See generally Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).
147. 32 Cal. 3d 112, 121-22, 649 P.2d 224, 229-30, 184 Cal. Rptr. 891, 896-97. See supra notes 47-53 and accompanying text.
149. Id. at 183, 134 Cal. Rptr. at 902.
150. See supra notes 137-49 and accompanying text. Professor Vandall posits that any proximate cause analysis in strict liability design defect actions is redundant and misleading: Vandall notes that since the findings of both proximate cause and defective design invoke identical policy considerations, the social policy issue is asked and answered once the trier of fact ascertains the existence of a defectively designed product. Vandall, supra note 24, at 75. See Wade, The Nature of Strict Tort Liability, supra note 27, at 837-41; Green, supra note 24, at 758-59.
151. See supra notes 47-53 and accompanying text.
trated by the absence of a feasible alternative design, the jury should, in every case, be given the opportunity to render a decision as to the adequacy of the design of the particular product.\textsuperscript{153} This follows \textit{a fortiori} when the injury that occurs is precisely the kind of harm that the safety precaution was designed to prevent.\textsuperscript{154} In addition, automatic jury resolution ameliorates one of the frequent criticisms in design defect cases that such actions almost invariably emphasize a single aspect of the product's design, such as lack of a safety precaution, to the exclusion of all other considerations.\textsuperscript{155} While it may be true that the litigation of a lawsuit is a very poor way to design a product,\textsuperscript{156} the weighing and balancing of policy considerations that the jury employs in its determination of defective design necessarily include the societal value of the product as a whole.\textsuperscript{157}

In summary, it may be established that the strict liability cause of action for products rendered defective through criminal tampering may succeed. The general policy of the judiciary is to strongly support injured plaintiffs in their quest for relief from the dangers of defective products,\textsuperscript{158} and the underlying policy rationales of strict liability forcibly mandate consumer recovery in virtually every instance in which a prima facie case may be established.\textsuperscript{159} The plaintiff may seek to establish a prima facie case under the second prong of the \textit{Barker} analysis by demonstrating the dangerousness of the environment and the crashworthiness analogue,\textsuperscript{160} and by comparative resort to subsequent design modifications.\textsuperscript{161} The plaintiff may demonstrate the causal relation between the defective design and the injury by a circumstantial showing that existence of an improved design would, more probably than not, have saved the plaintiff from injury.\textsuperscript{162} Since the elements of proof necessary to establish a strict liability cause of action for defective design may also establish the manufacturer's negligence as well,\textsuperscript{163} an injured plaintiff may proceed on an alternative theory of recovery.
that considers the manufacturer's failure to design a reasonably safe product as the basis for liability.

NEGLIGENCE LIABILITY FOR PRODUCTS

Although the strict liability cause of action has apparently eclipsed the field of products liability in recent years, the doctrine of negligence continues to be a viable basis for recovery in products actions: many attorneys are more familiar with the negligence cause of action, and evidence of unreasonable behavior frequently results in higher jury awards. Since the landmark case of MacPherson v. Buick Motor Company, negligence principles in products actions have remained relatively constant insofar as the plaintiff is required to present the same basic case for a product recovery as for a traditional negligence recovery. Generally, a plaintiff must allege five constituent elements in order to establish a prima facie case:

1) a duty requiring the defendant to conform to a certain standard of conduct designed to protect the plaintiff from an unreasonable risk of harm; 2) a breach of that duty; 3) the breach as the actual cause of the harm; 4) the breach as the proximate cause of the harm; and 5) actual damages to the plaintiff. Of these five elements, duty and proximate cause comprise the bulwark of the negligence analysis; consequently, these two concepts receive the most attention from the courts, and California decisions frequently treat both duty and proximate cause as synonomous in many instances. Both elements are linked by the integral concept of foreseeability.


166. 217 N.Y. 382, 111 N.E. 1050 (1916). Judge Cardozo successfully overturned the prevailing view of nonliability and set forth the rule that "if the nature of a thing is such that it is reasonably certain to place life and limb in peril if negligently made, it is then a thing of danger." Id. at 389, 111 N.E. at 1053.

167. See infra notes 168-69 and accompanying text.

168. See Vandall, supra note 24, at 65-66; PROSSER, supra note 11, at 143-44, 236-50; WITKIN, supra note 29, §488, at 2749-50. Dean Prosser adds the additional requirement of an act, or failure to act when such is required. PROSSER, supra note 11, at 143-44, 236-50.


A. Duty, Proximate Cause, and the Concept of Foreseeability

In order to recover for an injury caused by a criminally tampered product, the plaintiff must demonstrate that the defendant-manufacturer acted unreasonably in designing a product that was inordinately susceptible to criminal tampering. Basically, the plaintiff must show that the defendant was under a duty not to subject the plaintiff to the risk of criminally tampered products, that the failure to do so constituted the proximate cause of the resulting injury, and that the risk of criminal tampering was reasonably foreseeable under the circumstances. Although no rigid or definitive rule may be set forth conclusively establishing the existence of a specific duty, California courts have enunciated a series of policy factors which, taken in the aggregate, may lead a court to conclude that the plaintiff was entitled to protection. These policy considerations are: the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff would suffer injury; the closeness of connection between the defendant’s act and the plaintiff’s injury; the moral blame attached to the defendant’s conduct; the policy of preventing future harm; the extent of the defendant’s burden and the consequences to the community of imposing a duty; and the availability of insurance. Taken in sum, these factors demonstrate that the ultimate imposition of a specific duty is inherently a question of policy and judicial fairness with respect to a given factual situation. Although an in-depth discussion of the tangled maze of conflicting themes and theories that constitutes proximate cause is beyond the scope of this comment, the traditional imposition of liabil-

172. See infra notes 268-80 and accompanying text.
173. See infra notes 235-302 and accompanying text; Note, 24 MINN. L. REV. 666, 670-80 (1941) [hereinafter referred to as Note].
175. See infra note 176. Duty is not sacrosanct in itself, but is only an expression of the sum total of judicial policy factors that may eventually give rise to liability. See Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968); 131 Cal. App. 3d 999, 1011, 183 Cal. Rptr. 535, 542-43.
177. See Totton v. More Oakland Residential Housing, Inc., 63 Cal. App. 3d 538, 545, 134 Cal. Rptr. 29, 34 (1976); Comment, Criminal Acts, supra note 2, at 427-76; Prosser, supra note 11, at 244.
178. Reflective commentary upon the whys and wherefores of proximate causation are legion; for a good cross-section of the multitudinous array of materials, see generally Prosser, supra note 11, at 236-90; Prosser, Proximate Cause, supra note 102, at 369; Green, Proximate Cause in Texas Negligence Law, 28 TEX. L. REV. (pts. 1, 2, and 3) 471, 621, 755 (1950); Gregory, Proximate Cause
ity for cases of action involving criminally intervening acts almost invariably includes a discussion of proximate causation.179 Practically, proximate cause has little to do with causation;180 rather, it is, like the determination of duty,181 a question of judicial policy whereby the courts attempt to limit the extent of a defendant's liability and to control the scope of the deliberations of the jury.182 Intrinsic to a determination of both duty and proximate cause is the inchoate threat of foreseeability, which runs through both analyses, albeit in different ways.183

Of the enumerated policy considerations that will give rise to a specific duty,184 the foreseeability of harm to the plaintiff is of primary importance.185 The concept of foreseeability operates within the framework of a duty analysis to both establish a particular duty,186 and, thereafter, to limit the character of that duty by restricting the scope of the defendant's responsibility with respect to certain kinds of extraordinary injuries.187 Since this second facet of the duty analysis functions in much the same manner as the proximate cause formulation,188 it has

179. See Prosser, Proximate Cause, supra note 102, at 398. See generally Case Note, 33 Tenn. L. Rev. 407 (1966); Freezer & Favour, Intervening Crime and Liability for Negligence, 24 Minn. L. Rev. 635 (1940); Note, supra note 173, at 666; Eldridge, Culpable Intervention as Superseding Cause, 86 U. Pa. L. Rev. 121 (1937).

180. See Vandall, supra note 24, at 67-69; Prosser, supra note 11, at 244-45; Prosser, Proximate Cause, supra note 102, at 391-98; Witkin, supra note 29, §622, at 2904. As Dean Prosser has noted, California decisional law indicates that 'proximate cause' covers a multitude of sins, that it is a complex term of highly uncertain meaning under which other rules, doctrines, and reasons lie buried, and that at least in many cases there is no real question of causation at all.

181. See supra notes 173-77 and accompanying text.

182. See Vandall, supra note 24, at 67; Prosser, supra note 11, at 236-45; Prosser, Proximate Cause, supra note 102, at 398; Prosser, The Minnesota Court on Proximate Cause, 21 Minn. L. Rev. 19, 22 (1936); Witkin, supra note 29, §622, at 2904.

183. See infra notes 184-203 and accompanying text. Generally, the prediction of liability predicated upon negligence requires evidence from which a finding can reasonably be made that the injury was foreseeable, and that the probable occurrence and seriousness of the harmful consequence were sufficient to require the taking of precautions that the manufacturer did not take in order to satisfy the standard of reasonableness. See Keeton, Products Liability, supra note 27, at 28. Unfortunately, the principle of foreseeability is an elusive and overworked concept, the nebulousness of its definition being exceeded only by the disparity of its application. See Vandall, supra note 24, at 67-68.

184. See supra notes 175-76 and accompanying text.


186. See supra notes 175-76 and accompanying text. Compare supra notes 173-177 and accompanying text (duty) with supra notes 178-182 and accompanying text (proximate cause).
been suggested that liability should be predicated upon the sole measure of duty.\textsuperscript{189} California decisional law in the area of criminally intervening acts tends to support this proposition,\textsuperscript{190} and California courts have frequently emphasized the existence of a duty as determinative in cases involving criminal activity.\textsuperscript{191}

\textbf{B. The Law of Intervening Acts}

One of the greatest hurdles the plaintiff must overcome in seeking recovery for an injury caused by a criminally tampered product is the classification of the criminal intervention as a superseding cause of the harm.\textsuperscript{192} Generally, an intervening act is one that actively operates in causing the plaintiff’s injury after the original act of the defendant has already occurred.\textsuperscript{193} A superseding cause will operate to break the chain of causation between the original act of the defendant and the plaintiff’s injury by becoming the proximate cause of the resulting harm and thereby relieving the defendant from liability for the original

\begin{itemize}
  \item \textsuperscript{189} See Vandall, \textit{supra} note 24, at 67-68; Green, \textit{supra} note 24, at 774; Prosser, \textit{supra} note 11, at 244-45; Prosser, \textit{Proximate Cause, supra} note 102, at 412-13; L. GREEN, \textit{THE DUTY PROBLEM IN NEGLIGENCE CASES} 755-56, 772-76 (1928).
  \item \textsuperscript{191} See \textit{supra} note 190. The ill-fated attempt by the California Supreme Court to impose “dram shop liability” on tavern owners for the consequences of their inebriated patrons presents an illustrative example of this policy. See generally Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, \textit{cert. denied}, 429 U.S. 859 (1976); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). Rejecting traditional notions of proximate cause as inapplicable, the court imposed liability predicated upon an extensive concept of duty. As the California Supreme Court noted in \textit{Vesely}, “[t]o the extent that the common law rule of nonliability is based on concepts of proximate cause, we are persuaded by the reasoning of the cases that have abandoned the rule.” 5 Cal. 3d 153, 163, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 630. Moreover, “[t]he central question in this case, therefore, is not one of proximate cause, but rather one of duty . . . .” \textit{Id.} at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631; see Comment, \textit{California Approach, supra} note 2, at 538-40. Although the Legislature subsequently overturned these decisions, CAL. CIV. CODE §1714(b),(c), the judicial attempt is nonetheless indicative of the court’s ability to stress notions of duty whenever a compelling social policy issue is at stake.
  \item \textsuperscript{192} Initially, the issue appears to be whether the defendant shall be liable for an injury to which he has substantially contributed, but for which he may not be liable due to a subsequent cause of independent origin which actually causes the harm. However, the issue of superseding causes is essentially a question of whether the defendant shall be relieved of responsibility; in fact, the ultimate determination is generally one of judicial policy. Prosser, \textit{Proximate Cause, supra} note 102, at 398. \textit{See id.} at 401; Prosser, \textit{supra} note 11, at 270-72, 283; Note, \textit{supra} note 173, at 407; Freezer & Favour, \textit{supra} note 179, at 642-49. \textit{See generally} Eldridge, \textit{supra} note 179, at 121; Harper & Kime, \textit{The Duty to Control the Conduct of Another}, 43 \textit{Yale L.J.} 886 (1934).
  \item \textsuperscript{193} See \textit{RESTATEMENT (SECOND) OF TORTS} §441; Prosser, \textit{supra} note 11, at 271; Prosser, \textit{Proximate Cause, supra} note 102, at 399; Witkin, \textit{supra} note 29, §§627-48 at 2909-28. Intervening acts may be either dependent or independent: the former operates in response or in reaction to the original actor’s conduct, whereas the latter functions from an independent origin not stimulated by the original actor’s conduct. \textit{RESTATEMENT (SECOND) OF TORTS} §441, \textit{comment c} (1965).
\end{itemize}
conduct.\textsuperscript{194} The general test as to whether a particular act supersedes is the reasonable foreseeability of harm to the defendant.\textsuperscript{195} Historically, California courts have been reluctant to impose liability for the results of criminally intervening acts,\textsuperscript{196} citing the relative unforeseeability of crime in general.\textsuperscript{197} However, the modern trend of the law appears to be to the contrary,\textsuperscript{198} and numerous decisions have uniformly rejected the notion that criminally intervening conduct must automatically cut off liability for the original conduct.\textsuperscript{199} Rather, the current approach is that an intervening act will not operate to relieve an otherwise culpable defendant from liability if the act or risk thereof was reasonably foreseeable,\textsuperscript{200} irrespective of whether the intervening agency was criminal, negligent, or innocent.\textsuperscript{201} Thus, California courts have recognized that

\textsuperscript{194} See Bigbee v. Pac. Tel. & Tel. Co., 131 Cal. App. 3d 999, 1014, 183 Cal. Rptr. 535, 544 (1982); Restatement (Second) of Torts §§440-442 (1965); Note, supra note 173, at 668.


\textsuperscript{196} The foreseeability required is that of risk of harm, not of the particular intervening act; thus, if the defendant's conduct was a substantial factor in bringing about the injury, he may be liable despite the fact that he neither foresaw nor should have foreseen either the extent of the harm or the precise manner in which it occurred. See Restatement (Second) of Torts §435 (1965); Witkin, supra note 29, §629, at 2911-12 (citing cases). See generally Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 110 P.2d 1044 (1941); Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950).

\textsuperscript{197} The approach of older cases was that intervening criminal acts were simply less foreseeable than intervening negligent acts, and therefore to be regarded as superseding causes. See Comment, Criminal Acts, supra note 2, at 464; Prosser, Proximate Cause, supra note 102, at 369; Witkin, supra note 29, §642, at 2921-22. The courts often took refuge in antiquated theories of law such as the "last human wrongdoer" rule, and other vestiges of anachronistic jurisprudence. See Comment, Criminal Acts, supra note 2, at 464; Prosser, supra note 11, at 247; Eldridge, supra note 179, at 124. See, e.g., Stasulat v. Pac. Gas & Elec. Co., 8 Cal. 2d 631, 67 P.2d 678 (1937); Hale v. Pac. Tel. & Tel Co., 42 Cal. App. 2d 1044 (1944); Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950).

\textsuperscript{198} The view that a criminally intervening act is ipso facto a superseding cause has been rejected by California courts as an illogical and undesirable formula. Authorities point out that in many instances the very reason why the defendant is negligent is that his conduct creates the risk of criminal intervention, and it is, therefore, absurd to invoke the very fact that established culpability in order to absolve the defendant from negligence. See infra notes 283-297 and accompanying text; Prosser, Proximate Cause, supra note 102, at 398-408; Harper & Kime, supra note 192, at 898; Restatement (Second) of Torts §§440-444 (1965); Witkin, supra note 29, §643 at 2922-23.


\textsuperscript{200} See supra note 195.

\textsuperscript{201} Freezer & Favour, supra note 179, at 639-42; Eldridge, supra note 179, at 125-33; Harper
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Criminal activity is to be expected in many instances, and decisional law is replete with cases imposing liability for the criminally intervening conduct of others. Next, this comment will address the two broad areas of law with which to establish a manufacturer's duty to protect consumers from criminally tampered products: The establishment of special relationships and the general policy considerations underlying the concept of duty.

C. Negligence Liability for Criminal Activity

Generally, negligence liability for criminally intervening activity has been premised upon the breach of a duty arising from either various "special relationships" formed between the plaintiff and the defendant, or from the general policy considerations underlying the concept of duty. The determination as a matter of law that no duty existed is particularly common in cases involving a defendant's responsibility for criminal acts. Therefore, the establishment of a duty to protect consumers from the risk of product tampering at the outset is of critical importance in attempting to present the case to the jury. First, the plaintiff may allege that there exists a special relationship between himself and the defendant.

1. Special Relationships That Give Rise to a Duty

There is no duty at common law to anticipate the criminal acts of others. Generally, the reasonable person may assume that most people will obey the criminal law and is, therefore, under no corre-

& Kime, supra note 192, at 898; Bohlen, supra note 12, at 1229; Restatement (Second) of Torts §§302B, 442A, 447-449 (1965); Witkin, supra note 29, §643, at 2922-23 (citing cases).

202. See supra note 199.

203. See supra note 199.

204. Dean Freezer has posed the issue of a defendant's liability for intervening criminal acts as follows: "Shall one who by his negligence has set a stage upon which a third person commits a crime be responsible to the person suffering loss or injury from the crime?" Freezer & Favour, supra note 199.

205. See infra notes 208-230 and accompanying text.

206. See infra notes 231-33 and accompanying text.


208. See supra note 199.

209. See infra notes 208-230 and accompanying text.

210. See supra note 199.

211. See supra note 199.

212. See supra note 199.

213. See supra note 199.

214. See supra note 199.

215. See supra note 199.

216. See supra note 199.

217. See supra note 199.

218. See supra note 199.

219. See supra note 199.

220. See supra note 199.

221. See supra note 199.

222. See supra note 199.

223. See supra note 199.

224. See supra note 199.

225. See supra note 199.

226. See supra note 199.

227. See supra note 199.

228. See supra note 199.

229. See supra note 199.

230. See supra note 199.

231. See supra note 199.

232. See supra note 199.

233. See supra note 199.
sponding duty to protect others against the risk of criminal conduct.\textsuperscript{210} As a result, the law has traditionally carved out a series of exceptions, or special relationships, the breach of which may give rise to liability for negligence.\textsuperscript{211} These relationships are generally predicated upon the element of control or influence inherent in the relationship which the defendant occupies with respect to the plaintiff.\textsuperscript{212} The Restatement (Second) of Torts (hereinafter referred to as the Restatement) has classified several relationships as special in this regard,\textsuperscript{213} and this comment submits that the entire issue of a manufacturer's liability for criminally intervening acts may be particularly suited to the special relationship analysis.\textsuperscript{214} Utilizing the rules set forth in Sections 315,\textsuperscript{215} 302B,\textsuperscript{216} 449,\textsuperscript{217} and 448,\textsuperscript{218} California courts have established both duty and

\textsuperscript{210} See \textit{supra} notes 208-209 and accompanying text.


\textsuperscript{212} See Comment, \textit{Criminal Acts, supra} note 2, at 468; Bazyler, \textit{supra} note 1, at 736; Comment, \textit{California Approach, supra} note 2, at 549-50; \textit{Restatement (Second) of Torts} §320 (1965).

\textsuperscript{213} See generally \textit{Restatement (Second) of Torts} §§302B (1965), comment c; 314(a), 315, 320. The \textit{Restatement} specifically recognizes that there may be additional relationships not enumerated therein. \textit{Id.} §314(a).


\textsuperscript{215} \textit{Restatement (Second) of Torts} §315 (1965) is as follows:

There is no duty to so control the conduct of a third person as to prevent him from causing physical harm to another unless,

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other the right of protection.

\textsuperscript{216} \textit{Restatement (Second) of Torts} §302B (1965) is as follows:

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

\textsuperscript{217} \textit{Restatement (Second) of Torts} §449 (1965) is as follows:

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for the harm caused thereby.

The authors of the \textit{Restatement} suggest that sections 302B and 449 be read in conjunction so as to give rise to the following rule:

[T]he mere possibility or even likelihood that there may exist intentional or criminal misconduct is not in all cases sufficient to characterize the actor's conduct as negligence. It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent.

\textit{Id.} §449 comment a.

\textsuperscript{218} \textit{Restatement} Section 448 provides that an individual's criminal act does not constitute a superseding cause under sections 302B and 449:
proximate cause for injuries occasioned by criminal conduct. The sum of these rules, which generally presuppose some kind of special relationship between the parties, create duties and establish breaches for failure to protect plaintiffs from reasonably foreseeable risks of crime brought about by the defendant's original conduct. Basically, the Restatement approach posits that if the likelihood that a third party will act in a criminal manner is one of the hazards that renders the defendant's conduct negligent in the first instance, any resulting injury caused by the intervening criminal act will not relieve the defendant from liability.  

California courts have expanded the litany of special relationships, and have found liability for criminal acts to exist with respect to common carriers, innkeepers, landlords, psychotherapists, hospitals, schools, and parole boards. Moreover, the California Supreme Court recently suggested that the appropriate analysis with which to establish a duty to protect another from criminal activity is not by rejecting the common law rule of nonliability, but rather "by expanding the list of special relationships which will justify departure from liability."
from that rule." Thus, the court has explicitly left open the possibility of finding additional special relationships when necessary. The underlying policy considerations of duty may also give rise to a specific duty to protect against criminal activity.

2. General Considerations of Policy as Establishing The Existence of a Specific Duty

Although the California courts have suggested that expanding the special relationship rubric may be an appropriate means of establishing liability in the area of intervening criminal conduct, decisional law indicates that liability for criminal acts has traditionally been predicated upon the general duty of reasonable care and foreseeability of harm under the circumstances. This approach utilizes the enumerated policy considerations that may give rise to a general duty in order to create a specific duty of care with respect to the protection of innocent plaintiffs from the risk of criminal conduct.

In summary, the crucial element of the existence of a duty may be established through either the special relationship doctrine or the policy considerations underlying the general concept of duty. Next, this comment will demonstrate that both these indicia of duty may give rise to a specific duty to protect consumers from harm caused by criminally tampered products.

A Manufacturer May Be Liable Under Negligence Theory for Injuries Caused By Criminally Tampered Products

Specifically, in order to hold a manufacturer liable for injuries resulting from a criminally tampered product, the plaintiff should establish that 1) the manufacturer was under a specific duty to protect the plaintiff from injury caused by criminal tampering, 2) the manufacturer breached this duty by his failure to produce and design a product that

230. See Tarasoff v. The Regent of the Univ. of Cal., 17 Cal. 3d 425, 435 n.5, 551 P.2d 334, 343 n.5, 131 Cal. Rptr. 14, 23 n.5 (1978); Comment, California Approach, supra note 2, at 551.

231. See supra note 230.

232. See 17 Cal. 3d 425, 434-39, 551 P.2d 334, 343-45, 131 Cal. Rptr. 14, 23-28; 88 Cal. 3d 342, 348-49, 151 Cal. Rptr. 796, 798-99; Comment, California Approach, supra note 2, at 547-49; Bazyler, supra note 1, at 737-40. The California Supreme Court noted in Tarasoff that in each case the sufficiency of the defendant's conduct was to be "measured against the traditional negligence standard of the rendition of reasonable care under the circumstances." 17 Cal. 3d 425, 439, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25. See generally Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).


234. See supra notes 203-33 and accompanying text.
included reasonably necessary safety precautions, and 3) the intervention of criminal tampering did not constitute a superseding cause that could foreclose the defendant's liability. Although California courts have traditionally relied upon the rule set forth in the Restatement as indicative of a manufacturer's general duty with respect to potentially dangerous products, this rule does no more than supply a loose definitional framework of liability. Moreover, it adds little to an appropriate analysis by which it may be said that the manufacturer's duty includes protecting consumers against criminally tampered products. Rather, the plaintiff should seek to establish and premise this specific duty upon either the special relationship doctrine or the general policy considerations underlying the concept of duty. First, this comment will demonstrate the special relationship that may exist between manufacturers and consumers.

A. The Manufacturer Occupies a Special Relationship With the Consumer

The authors of the Restatement have stated that a manufacturer of products undertakes a "special responsibility" toward all members of the consuming public that could be injured by those products. Justice Traynor of the California Supreme Court observed in 1944 that the relationship between manufacturers and consumers was not as it once was, noting that the consumer's erstwhile vigilance was being lulled by the incessant efforts of the manufacturer to build up trust and confidence in the manufacturer's product. Thus, the consumer was no longer able to investigate for himself the safety of a product, but was forced to rely upon the reputation of the manufacturer. This led Justice Traynor to state that "[t]he manufacturer's obligation to the

235. See supra notes 164-203 and accompanying text.
236. Restatement (Second) of Torts §395 (1965) states:
A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.
238. See Restatement (Second) of Torts §402A comment c (1965). Dean Prosser notes that purveyors of products for human consumption have been under a "special responsibility" to the consuming public since the year 1266 when the English common law imposed civil liability by virtue of the "'common custom of the realm.'" Prosser, Assault Upon the Citadel, supra note 26, at 1103.
240. See id.; Restatement (Second) of Torts §402A comment c (1965).
consumer must keep pace with the changing relationship between them. . . .⁴⁴ An argument may be made that by the incessant efforts of the manufacturer to influence and control the consumer's purchasing power with respect to the manufacturer's product, a special relationship has been established between the manufacturer and the consumer whom he attempts to control.⁴² Concurrent with this relationship would exist the duty not to subject the consumer to an unreasonable risk of danger from criminal product tampering.⁴³ This would be especially true inasmuch as it is the defendant-manufacturer's affirmative conduct that has created a situation of danger to the consumer by encouraging the consumer to purchase a criminally tampered product.⁴⁴ Logically, once the manufacturer has influenced the consumer to purchase a particular product, the manufacturer should not be allowed to assert that his responsibility ended at that point if the proffered product embodied a risk of unreasonable danger from criminal tampering.⁴⁵

Although there is no specific decisional law expressly adopting the relationship between a manufacturer and a consumer as special in this context, the California Supreme Court has stated that expanding the list of special relationships would be an effective way of protecting the plaintiff's interests,⁴⁶ especially when failure to do so would result in a morally insupportable result.⁴⁷ Apparently, there is little justifiable reason why the special relationship doctrine should not be expanded so as to include manufacturers and consumers.⁴⁸ Finally, to deny an injured consumer recovery merely because he was unable to establish a legally recognized special relationship would work exactly the kind of manifest injustice that the court sought to avoid.⁴⁹ Next, this comment will demonstrate that the general policy considerations underlying the concept of duty may give rise to a specific duty to protect consumers from criminally tampered products.

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⁴¹ 24 Cal. 2d 453, 467, 150 P.2d 436, 443.
⁴² See supra notes 238-241 and accompanying text. It has been suggested that a "depend-ence-control" approach, based upon the defendant's voluntary assumption of responsibility toward the plaintiff, may present the superior analysis. See Comment, California Approach, supra note 2, at 552-57. The author posits that a voluntary and gratuitous assumption of responsibility for the plaintiff may give rise to a concordant duty to protect that person from the risk of harm to be reasonably expected from the relationship. Id. at 553-54.
⁴³ See supra notes 206-234 and accompanying text.
⁴⁵ As Dean Green notes, manufacturers should simply be taken at their word. Green, supra note 24, at 1191. See Vandall, supra note 24, at 76-77.
⁴⁶ See supra note 230.
⁴⁸ See supra notes 238-47 and accompanying text.
⁴⁹ See supra notes 238-47 and accompanying text.
B. General Policy Considerations May Be Utilized To Establish a Specific Duty to Protect Consumers From Criminally Tampered Products

Irrespective of the relationship between the parties,250 the plaintiff may argue that the reasonably foreseeable risk of crime in general, and of product tampering in specific, should give rise to a duty based on policy considerations not to unreasonably subject consumers to this risk of harm.251 The foreseeability of harm to the plaintiff is the most important element of the several policy considerations that will, in the aggregate, give rise to a specific duty;252 thus, the reasonableness of the defendant-manufacturer should be measured by the relative foreseeability of harm to consumers through product tampering.253

The existence of crime in a populous, industrialized society is by no means uncommon.254 Decisional law indicates that California courts have never been reticent to impose liability for the consequences of criminal activity if the occurrence of that activity was reasonably foreseeable to the defendant.255 The ubiquitous cases of automobiles in which the keys are left in the ignition present both a frequent cause of litigation and an illustrative analogy with respect to criminally tampered products. Generally, the courts have held that the foreseeable risk of crime inherent in leaving the keys in an unattended and unlocked automobile was sufficient to give rise to a duty of care to any person subsequently injured by the thief-driver.256 In Richardson v. Ham,257 for example, the California Supreme Court held that there was a reasonably foreseeable risk that the defendant's bulldozers might be tampered with if left unattended, and imposed liability for the con-

250. See supra notes 238-49 and accompanying text. Notwithstanding the viability of finding an additional special relationship between manufacturers and consumers, California courts have rejected the notion of relationships between the parties as dispositive of liability in other contexts. See Rowland v. Christian, 69 Cal. 3d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).
251. Dean Freezer has stated that the question of responsibility for intervening criminal acts can be distilled into one question: "Is it the policy of this court that a negligent person shall bear the risk that a third person will take advantage of the opportunity afforded by such negligence to commit a crime?" Freezer & Favour, supra note 179, at 642.
252. See supra notes 184-85 and accompanying text.
253. See Comment, California Approach, supra note 2, at 545; Freezer & Favour, supra note 179, at 643.
255. See supra notes 184-203 and accompanying text.
sequent injuries that occurred.\textsuperscript{258} Similarly, in \textit{Murray v. Wright},\textsuperscript{259} it was held that the risk of a theft from a used car lot was a matter of common knowledge in the community, and, therefore, the defendant came under a specific duty to protect innocent plaintiffs from the results of the stolen automobile.\textsuperscript{260} Although these decisions frequently place emphasis upon the existence of unique or special circumstances, such as the neighborhood in which the car was left,\textsuperscript{261} these circumstances are not always required. In \textit{Enders v. Apcoa, Incorporated},\textsuperscript{262} the court held that the intervening chase of a police car was sufficiently foreseeable to create a duty to protect the plaintiff from injury resulting from the thief's attempt to elude the police officer.\textsuperscript{263}

Unfortunately, it is difficult to state with precision or acuity what a particular court will find to be reasonably foreseeable under the circumstances.\textsuperscript{264} Until recently, instances of product tampering were scattered and few.\textsuperscript{265} With the advent of the Tylenol tamperings,\textsuperscript{266} and the flurry of federal legislative action that followed,\textsuperscript{267} it seems clear that manufacturers may no longer be able to claim that product tampering is too unforeseeable to warrant the imposition of liability. In effect, all manufacturers may be on notice that instances of product tampering are, henceforth, reasonably foreseeable under all circumstances. Apparently, a manufacturer of products could ignore this very real and present danger only at the peril of the imposition of liability. Next, this comment will demonstrate how the manufacturer may

\textsuperscript{258} \textit{Id.} at 776, 285 P.2d at 271.
\textsuperscript{259} 166 Cal. App. 2d 589, 333 P.2d 111 (1958).
\textsuperscript{260} \textit{Id.} at 592, 333 P.2d at 113.
\textsuperscript{261} \textit{See, e.g.}, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).
\textsuperscript{262} 55 Cal. App. 3d 897, 127 Cal. Rptr. 751 (1976).
\textsuperscript{263} \textit{Id.} at 905-06, 127 Cal. Rptr. at 755-56.
\textsuperscript{264} It thus becomes apparent that to attempt to lay down any general rule as to what is or what is not a foreseeable intervening crime is wholly impracticable if not impossible. Each case must be decided upon its particular facts, the rule being that if, under the circumstances, a reasonable man in the position of the defendant would have foreseen the intervening crime, the defendant may be liable.
\textsuperscript{266} \textit{See supra} notes 18-19 and accompanying text. \textit{See Dworkin, supra} note 24, at 34 n.9.
\textsuperscript{267} The federal government has already enacted the Product Liability Risk Detention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (1981), which provides for nationwide manufacturers' self-insurance groups. \textit{See Dworkin, supra} note 24, at 34 n.9. Several commentators have urged a nationwide reform of products liability law due to perceived disparate laws and inconsistent results from state to state, \textit{id.}, and further federal legislation is currently being considered that would drastically alter the law in California by requiring, among other things, that: 1) the plaintiff prove that the defendant manufactured the allegedly defective product; 2) a presumption of products safety be established once the product meets federal standards; and 3) the burden of proof be shifted from manufacturers to consumers. \textit{See id.}; Calabresi, \textit{supra} note 24, at 314. This legislation would, if passed, effectively overrule the decisions in \textit{Sindell, supra} note 78, and \textit{Barker, supra} note 56. \textit{See Dworkin, supra} note 24, at 34 n.9. \textit{See generally Calio, supra} note 123, at 112.
breach his duty by designing a product that is not reasonably safe from product tampering.

THE MANUFACTURER BREACHES HIS DUTY TO DESIGN A SAFE PRODUCT IF HE FAILS TO INCLUDE REASONABLY NECESSARY SAFETY PRECAUTIONS IN THE DESIGN OF THE PRODUCT

Generally, the extent of a manufacturer's duty is commensurate with the danger inherent in the foreseeable risk of harm that gives rise to the duty in the first instance. Whether the manufacturer can satisfy that duty may ultimately depend upon his ability "to so design his product as to make it not accident-proof, but safe for the use for which it was intended." It is well settled that a manufacturer may breach this duty by designing a product that fails to include reasonably necessary safety precautions. The Restatement specifically states that a manufacturer should be subject to liability for his failure to exercise reasonable care in the adoption of a safe plan or design for the product. Although what constitutes reasonable care varies with the facts and circumstances of each case, the traditional inquiry employs a balancing of the likelihood of harm to be expected from a product with a given design, and the gravity of that harm should it occur, against the burden of employing the safety precautions that would be effective to avoid the injury. In determining whether the manufacturer has exercised reasonable care in designing a product against criminal tampering, two general propositions weigh heavily in favor of the consumer. First, the manufacturer is under the duty of an expert to be aware of the latest developments in the field, inclusive of all available safety precautions

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270. See generally 2 Cal. 3d 465, 470 P.2d 229, 85 Cal. Rptr. 629; 205 Cal. App. 2d 246, 22 Cal. Rptr. 737; Darling v. Caterpillar Tractor Co., 17 Cal. App. 2d 713, 341 P.2d 23 (1959); Noel, Liability for Negligence supra note 269, at 454. See also Boeing Airplane Co. v. Brown, 29 F.2d 310 (9th Cir. 1926).

271. RESTATEMENT (SECOND) OF TORTS §398 (1965) states:

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

272. See supra notes 268-69 and accompanying text.

which could feasibly be employed. Second, the gravity of harm from criminal tampering is so egregious that presentation of the case to the jury may have a profound impact upon the eventual imposition of liability.

A. The Manufacturer's Duty as an Expert Requires That the Manufacturer Be Aware of Situations Involving the Possibility of Criminal Product Tampering

What is not obvious to an ordinary consumer with respect to the design safety of a given product may be glaringly so to an expert in the field who is cognizant of all the latest scientific and technological developments. Consequently, the manufacturer is charged with the knowledge and skill of an expert in the field. Thus, the manufacturer's duty as to design includes all reasonably necessary design precautions that are consistent with that knowledge, and requires that the design of the product be consonant with the technological and scientific advances in the field. This includes designing against even obvious dangers, as the patency of danger is germane only to the manufacturer's defenses, and not to whether he has satisfied his duty of reasonable care as to design. Therefore, it is proper to introduce evidence as to the necessity and feasibility of alternative design choices that would have enhanced the factor of safety, for the purpose of demonstrating the manufacturer's failure to exercise reasonable care in the design of the product. Whether the manufacturer should have employed alternative designs may ultimately depend upon how great the jury determines the gravity of danger to be from criminal product tampering.

B. The Gravity of Injury From Criminal Product Tampering, is so Egregious That the Manufacturer May Always Be Unreasonable in Not Adopting Safer Designs

Once evidence of any alternative design has been introduced, the jury must balance the burden to the defendant in employing an alter-

274. See infra notes 276-80 and accompanying text.
275. See infra notes 281-82 and accompanying text.
277. See supra note 276.
279. See id.
native design against the likelihood of gravity of danger.\textsuperscript{281} Balancing the risk of injury from criminally tampered products against a manufacturer's financial burden in employing a reasonably necessary design modification may present a rhetorical question: Given the tragic consequences and egregious manner in which criminally tampered products affect society, is there any economic burden on the manufacturer that is sufficiently great so as to force the injured consumer to bear the physical burden of product-caused injury? The argument may be made that if a manufacturer is unable to produce an economically feasible product due to the necessity of including tamper-resistant designs, then that manufacturer should produce no product at all. Moreover, production of the product without safety designs may be tantamount to extremely unreasonable behavior in the face of the presently foreseeable risk of product tampering.\textsuperscript{282} Next, this comment will demonstrate that general notions of proximate causation will not relieve the manufacturer of criminally tampered products from liability.

\textbf{PROXIMATE CAUSATION WILL NOT OPERATE TO RELIEVE A MANUFACTURER FROM LIABILITY ONCE DUTY HAS BEEN ESTABLISHED}

Unfortunately, proximate cause analyses tend more to the ingenious than to the ingenuous\textsuperscript{283} and whenever a plaintiff attempts to establish liability for criminally intervening activity, the issue of proximate cause is generally the most formidable hurdle to be overcome.\textsuperscript{284} If the intervening act is designated a superseding cause, the plaintiff fails in his case for lack of proximate causation.\textsuperscript{285} However, California courts have abandoned the once restrictive rules of proximate cause for the relatively flexible concept of duty in determining liability for intervening criminal acts.\textsuperscript{286} Moreover, California decisional law frequently treats duty and proximate cause as synonymous in cases of criminal conduct\textsuperscript{287} and cases imposing liability for intervening crimes generally emphasize the existence of a duty as determinative of liability.\textsuperscript{288} The argument may be made that once the defendant's duty to protect the plaintiff is established, it should be of no consequence what occurs

\textsuperscript{281} See supra notes 268-73 and accompanying text.
\textsuperscript{282} See supra notes 264-67 and accompanying text. See generally, Annot., 95 A.L.R.3d 1066 (1981) (duty of manufacturer to equip product with safety device to protect against a patent or obvious danger).
\textsuperscript{283} See supra notes 178-82 and accompanying text.
\textsuperscript{284} See supra notes 178-82 and accompanying text.
\textsuperscript{285} See supra notes 192-203 and accompanying text.
\textsuperscript{286} See supra notes 184-91 and accompanying text.
\textsuperscript{287} See supra notes 171-91 and accompanying text.
\textsuperscript{288} See supra notes 184-91 and accompanying text.
in the interim.\footnote{289}{See supra notes 184-91 and accompanying text; PROSSER, supra note 11, at 271. See generally Freezer & Favour, supra note 179, at 635; Eldridge, supra note 179, at 121; Harper & Kime, supra note 192, at 886.} Moreover, there is a compelling logic to this proposition: If the reason the defendant may be negligent is that he has failed to protect the plaintiff from a reasonably foreseeable risk of criminal product tampering, then it becomes inherently illogical and legally suspect to invoke the very occurrence of criminal tampering in order to absolve the defendant from liability.\footnote{290}{See supra notes 192-203 and accompanying text.} This comment takes the position that when criminal product tampering occurs, it should not be utilized to insulate the manufacturer from liability under an attenuated proximate cause analysis. Furthermore, it appears unsound in terms of policy to limit a manufacturer’s liability merely because an intervening criminal act, the very probability of which may have rendered his conduct unreasonable in the first instance, has brought about the expected harm.\footnote{291}

The preferable approach, therefore, in determining which party shall ultimately bear the loss for criminally tampered products\footnote{292}{See Klemme, supra note 13, at 161; Calabresi, supra note 24, at 500-06; Prosser, Proximate Cause, supra note 102, at 397. See generally Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 365, 91 Cal. Rptr. 745 (1970).}—the negligent defendant or the innocent plaintiff—is to make the dispositive issue that of duty.\footnote{293}{See Prosser, Proximate Cause, supra note 102, at 401-03. See generally supra notes 171-191 and accompanying text.} As Dean Prosser has noted, “[a] criminal intervening act will not relieve the defendant if he was under a duty to protect the plaintiff against it,”\footnote{294}{Prosser, Proximate Cause, supra note 102, at 382-83, 403.} and “[o]nce that question is answered in the affirmative, nothing more remains to be said.”\footnote{295}{Id. at 401.} Inasmuch as California decisional law has consistently emphasized the existence of duty in imposing liability for criminally intervening acts,\footnote{296}{See supra notes 184-91 and accompanying text.} it appears both legally sound and internally consistent to make a manufacturer’s liability for criminally tampered products dependent upon this same approach. Dean Prosser has observed that there is a definite tendency of the courts to avoid entirely any discussion of proximate cause and to abdicate this troublesome issue to the jury;\footnote{297}{See supra notes 184-91 and accompanying text.} with that premise, this comment is in complete accord.

In summary, a plaintiff injured by a criminally tampered product may attempt to establish a manufacturer’s duty by demonstrating either the existence of a special relationship between the plaintiff and the

\footnote{289}{See supra notes 184-91 and accompanying text; PROSSER, supra note 11, at 271. See generally Freezer & Favour, supra note 179, at 635; Eldridge, supra note 179, at 121; Harper & Kime, supra note 192, at 886.}
\footnote{290}{See supra notes 192-203 and accompanying text.}
\footnote{291}{See supra notes 184-91 and accompanying text.}
\footnote{292}{See Klemme, supra note 13, at 161; Calabresi, supra note 24, at 500-06; Prosser, Proximate Cause, supra note 102, at 397. See generally Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 365, 91 Cal. Rptr. 745 (1970).}
\footnote{293}{See Prosser, Proximate Cause, supra note 102, at 401-03. See generally supra notes 171-191 and accompanying text.}
\footnote{294}{Prosser, Proximate Cause, supra note 102, at 382-83, 403.}
\footnote{295}{Id. at 401.}
\footnote{296}{See supra notes 184-91 and accompanying text.}
\footnote{297}{See Prosser, Proximate Cause, supra note 102, at 420.}
manufacturer, or that the general considerations of policy underly-
ing the concept of duty support the imposition of liability. The man-
ufacturer may be shown to have breached this duty by his failure to
include reasonably necessary safety precautions as indicated by his sta-
tus as an expert and the gravity of harm to be expected from this fail-
ure. Finally, it may be demonstrated that the primary concept of
duty should be determinative of the manufacturer’s liability for crim-
nally tampered products irrespective of any attenuated proximate cau-
sation, and that it is inherently logical to support liability for the
results of criminally tampered products.

CONCLUSION

The cumulative history of California products liability law forcibly
demonstrates that the judiciary will seek to secure and protect the inter-
ests of consumers injured by defective products. Plaintiffs are al-
lowed broad latitude in the evidentiary elements of a prima facie case
for products liability. Moreover, California decisional law indicates
that existing theories of liability are sufficiently broad to include new
causes of action for injuries wrought by a changing society. This
comment has demonstrated that causes of action for strict liability
and for negligence may exist for harm caused by criminally tam-
pered products. Further, it has been shown that the continuum of
products liability decisions strongly recognizes California’s prevailing
judicial policy for supporting plaintiff’s injured by defective products,
irrespective of the means by which the harm occurred. It has been
submitted that criminally tampered products may now constitute a
constant and general danger to consumers of those products. Fin-
ally, this comment has demonstrated that the manufacturer must bear
the primary responsibility for the results of criminally tampered prod-
ucts in society, and that the manufacturer is in the best position to

298. See supra notes 238-49 and accompanying text.
299. See supra notes 250-63 and accompanying text.
300. See supra notes 268-82 and accompanying text.
301. See supra notes 283-97 and accompanying text.
302. See supra notes 283-97 and accompanying text.
303. See supra notes 70-100 and accompanying text.
304. See supra notes 70-100 and accompanying text.
305. See supra notes 39-163 and accompanying text.
306. See supra notes 164-302 and accompanying text.
307. See supra notes 39-100 and accompanying text.
308. See supra notes 39-100 and accompanying text.
309. See supra notes 39-100 and accompanying text.
310. See supra notes 39-100 and accompanying text. Although some 86% of firms subject to
products liability actions carry some form of insurance, U.S. DEPARTMENT OF COMMERCE, FINAL
REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, III-2 (1978), the judicial
increase in manufacturers’ liability for defective products has led to alarm on several fronts: in-
provide compensation for the harm resulting from criminally tampered products.\textsuperscript{311} In sum, it appears that the California courts that have so long occupied the vanguard of consumer recovery for defective products would have to undergo a 180-degree about face in order to deny recovery for criminally tampered products once the basic elements of a prima facie case have been established.

\textit{Kenneth A. Roberts}

\begin{itemize}
  \item Surfers are raising their premiums for product liability insurance by hundreds, sometimes thousands of percent. See Dworkin, supra note 24, at 34; Note, \textit{When the Product Ticks: Products Liability and Statutes of Limitations}, 11 IND. L. REV. 693, 698-99 (1978). Consequently, many product manufacturers have difficulty in obtaining liability insurance. See Calabresi, supra note 24, at 313.
  \item See supra notes 47-53 and accompanying text. Professor Calabresi has criticized manufacturers for suggesting a crisis in products liability law. Although manufacturers may wish to shift the loss to consumers, supra note 267, Calabresi posits that this contravenes a basic economic premise: taking risks is what corporations do best. Calabresi, supra note 24, at 321. See Vandall, supra note 24, at 77 n.130. See generally Calabresi & Hirschoff, supra note 24, at 1055.
\end{itemize}