Santa Clara Law Review

Volume 24 | Number 3 Article 6

1-1-1984

Hitting the Mark: Strict Liability for Defective Handgun Design

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HITTING THE MARK: STRICT LIABILITY FOR DEFECTIVE HANDGUN DESIGN

I. INTRODUCTION

Fifty percent of all homicides committed in the United States each year involve handguns.[1] These deadly weapons also play an important role in other crimes such as robbery and assault. Further deaths may occur if handguns are improperly handled and stored.[2] Incidents of this nature are especially distressing because they often may involve children. The handguns involved in a majority of deaths and injuries have five common characteristics: (1) low cost, (2) short barrel (easy concealment), (3) small caliber, (4) easy availability, and (5) deadly force. The combination of these characteristics makes handguns extremely dangerous products.

Under present strict liability principles, manufacturers are liable for the injuries their products cause when placed on the market in a defective condition.[3] A defective condition may occur either in the manufacturing of the product or in its design.[4] If a defect in manufacturing causes an injury, for example when the barrel of a handgun explodes harming the user, the handgun manufacturer will be liable. Handgun manufacturers have not yet been held liable however, for those deaths and injuries involving handguns which were marketed to the general public without warnings or safety devices, even though handguns are designed to embody deadly force.

Handguns have failed to meet two tests that have traditionally

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1. Between 1976 and 1980, this amounted to 95,803 deaths. U.S. DEPT. OF JUSTICE, Attorney General's Task Force on Violent Crime, Final Report, 11-13 (1981).

2. As there is no statistical differentiation given between handguns and firearms in most analyses, the exact number of accidental handgun deaths is not known. But, for the period 1976 to 1979, there were 7,641 accidental firearm deaths in the U.S. It is safe to assume that, as with murders, the greatest percentage of those deaths were attributable to handguns. P. SHIELDS, GUNS DON'T DIE—PEOPLE DO, 175 (1980).

3. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

4. Barker v. Lull Engineering Co., 20 Cal. 3d 413, 417-18, 573 P.2d 443, 446, 143 Cal. Rptr. 225, 228 (1978) (although a defect in warning is often categorized as a separate type of defect, in this comment it is analyzed as a defect due to the inadequate *design* of a product's warning).

defined strict liability in this area. The first test is that no liability attaches to products that are inherently dangerous and cannot be made safer.[5] The second test is that liability can attach only to products that are dangerous beyond the contemplation of the ordinary consumer.[6] Because people expect and assume that handguns must be designed to embody deadly force, handgun manufacturers have not been held liable for the death and injury inherent in current handgun design.

This comment will initially examine the judicial evolution of strict liability in California. The barriers to this liability will be explored as well as possible methods to overcome them. Utilizing the standards announced in *Barker v. Lull Engineering Co.*,[7] this comment will then demonstrate four types of design defects for which handgun manufacturers may be liable. Finally, the defenses available under strict liability will be analyzed to determine the feasibility of their use by handgun manufacturers in design defect actions.

II. STRICT LIABILITY IN CALIFORNIA

In 1957, Mr. Greenman, while using a combination power tool as a lathe, was injured when the wood he was turning suddenly flew out of the machine and struck him in the head. With that blow fell not only Mr. Greenman, but also "the citadel" of implied warranty.[8] Following the requirements for recovery set forth in previous cases, Mr. Greenman asserted both warranty and negligence causes of action as the bases for his recovery. This, however, presented the California Supreme Court with a dilemma because Mr. Greenman had given late notice to the manufacturer, thus defeating his warranty claim. The court resolved this problem by removing all remaining vestiges of contract law and finally recognizing the need "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."[9] Therefore, the court held that "[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."[10] Under this standard, Mr.

5. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).
6. *Id.* at 402A comment g.
7. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
8. *See* Prosser, *The Assault Upon the Citadel*, 9 YALE L. J. 1099 (1960).
9. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
10. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

Greenman was only required to show that he used the product in a reasonably foreseeable or intended manner and that the product embodied a defect that proximately caused his injury.[11] Lack of notice and contract disclaimers would no longer allow the manufacturers of defective products to escape liability.[12] In addition, *Greenman* eased the statute of limitations so that it would run from the time of injury, rather than from the time of the product's sale.[13] The most important effect of this decision, though, was the elimination of the privity requirement. After *Greenman*, it was no longer necessary to have a specific contract relation with the manufacturer in order to recover against him.[14]

In a series of cases following *Greenman*, the strict liability action was reformulated and expanded to hold retailers, wholesalers, and distributors liable.[15] The boundaries of liability were further extended in *Elmore v. American Motors Corp.*[16] to allow recovery on behalf of injured third parties. In that decision the court emphasized that bystanders do not have the same opportunity to inspect products for defects or to purchase them from reputable manufacturers as consumers do. Thus, the bystander "should be entitled to greater protection than the consumer or user [when] injury to bystanders from the defect is reasonably foreseeable."[17]

The decisions following *Greenman* assumed that the test used in *Greenman* to determine a defective condition was similar to the test found in the Restatement. The latter test requires that the product be "in a defective condition unreasonably dangerous to the user or consumer."[18] In *Cronin v. J.B.E. Olson Corp.*,[19] however, the court rejected that contention. The court based its decision on its fear that a bifurcated standard requiring the plaintiff to prove both the presence of a defect and its unreasonable danger would burden "the injured plaintiff with proof of an element which rings of negligence."[20] This test, the court concluded, would place a greater bur-

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11. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
12. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
13. A. WEINSTEIN, A. TWERSKI, H. PIEHLER, W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT 16 (1978).
14. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
15. Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 252-53, 71 Cal. Rptr. 306, 321 (1968) (wholesalers and distributers); Vandermark v. Ford Motor Co., 61 Cal. App. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964) (retailers).
16. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).
17. *Id.* at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.
18. RESTATEMENT, *supra* note 5, at 347.
19. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
20. 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

den on the plaintiff than that prescribed in *Greenman*. Therefore, the court dismissed the requirement that in order to be liable for a defective condition a product must be in an unreasonably dangerous condition outside the expectations of the ordinary consumer.[21]

Nevertheless, the court left unaddressed the question of what constitutes a defect. Guidance was provided only in a footnote in which the justices stated that a "cluster of useful precedents" could supply a standard.[22] The variety of tests applied by the lower courts, as well as the widespread dissatisfaction with *Cronin*, led the court in *Barker v. Lull Engineering Co.*[23] to provide a more substantial definition of the term "defect."

In *Barker*, the plaintiff was operating a forklift to raise a load of lumber. As it was raising the lumber, the forklift began to tip. At that time, the plaintiff attempted to jump from the lift and was struck by a piece of falling lumber. The plaintiff asserted that the lack of seatbelts, rollbar, and outriggers to compensate for instability constituted a cause of action for a defect in design. At trial, a verdict for the defendant was returned after the trial court instructed the jury that liability for a defect in design must be based on a finding that the product was "unreasonably dangerous" for its intended use.

The California Supreme Court, reversing the decision, refused "to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries caused by the product" and emphasized that *Cronin* had rejected any "unreasonably dangerous" requirement.[24] The court also recognized that a defect in manufacturing is much more apparent than a defect in design. This is because a manufacturing defect becomes evident when the product in question is compared with other similar products. In a design context, however, the application of a deviation-from-the-norm test will not identify the defect "since by definition the plans and all such units will reflect the same design."[25]

In providing a paradigm for the identification of a design defect, the court employed two alternative tests for use in subjecting a manufacturer to strict liability for resulting injuries. The first test provides recovery for the plaintiff if he or she can demonstrate that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable man-

21. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
22. *Id.* at 134 n.16, 501 P.2d at 1162 n.16, 104 Cal. Rptr. at 442 n.16.
23. 20 Cal. 3d at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235 (1978).
24. *Id.* at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.
25. *Id.* at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.

ner."[26] Under the second alternative test, "a product may be found defective in design "if through hindsight the jury determines that the product's design embodies excessive preventable danger, or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design."[27] To further aid the jury in evaluating the utility of the challenged design, the court listed as relevant factors to be considered:

> [T]he gravity of the danger posed by the challenged design, the likelihood that such 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 to the consumer that would result from an alternative design.[28]

Because of the *Barker* decision, once a plaintiff establishes that he was proximately injured by the design of the defendant's product, the burden of proof shifts to the defendant to prove "in light of the relevant factors, that the product is not defective."[29] The court's rationale for this shift is that the manufacturer has better control and knowledge of the technical aspects of the product.[30] By placing the burden of proof on the manufacturer, the plaintiff is thus relieved of many of the evidentiary burdens which are presented in a negligence cause of action.

The standards enunciated in *Barker* may provide the basis for a cause of action against handgun manufacturers for designing their products to embody deadly force. A cause of action against handgun manufacturers will fulfill the policies on which strict liability was founded. If a handgun manufacturer is held liable, it will: (1) provide a strong economic incentive to improve handgun safety, (2) serve to spread the risk of loss among all handgun purchasers through increased handgun prices, (3) relieve the plaintiff of many of the burdens involved in a negligence cause of action, and (4) compensate the injured handgun victim.[31]

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26. *Id.* (Despite the *Barker* court's rejection of the Restatement's "unreasonably dangerous" formulation it appears that the consumer expectations standard announced by the court originated from comment i, § 402A of the RESTATEMENT (SECOND) OF TORTS).

27. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

28. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

29. *Id.*

30. *Id.*

31. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 686-92 (1980).

III. The Unavoidably Dangerous Product as a Barrier to Handgun Liability

It has generally been assumed that some products are "inherently dangerous" or "unavoidably unsafe." The manufacturers of such products have not been held liable for the harm their products create. Thus, liquor manufacturers have not been held liable for injuries stemming from the inherently dangerous nature of their products, such as death and injury caused by drunken driving and alcoholism. Knives, automobiles, and cigarettes[32] are also included in this category of products. To insure that the manufacturers of these products do not "become automatically responsible for all the harm that such things do in the world,"[33] the Second Restatement of Torts requires the product to be "in a defective condition unreasonably dangerous to the user or consumer before the manufacturer can be held liable."[34]

Handguns are often included among the aforementioned products because it is assumed that a product whose norm is the infliction of injury or death cannot be made safer. It does not follow, though, that the hazards inherent in handguns should preclude liability. "If a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger?"[35] The crux of the analysis, moreover, should not be on how dangerous the article is but, rather, on how safe it can be designed. Former Chief Justice Traynor made clear that some generic dangerous qualities may be unnecessary:

> The cancer producing qualities of cigarettes are generic only in the sense that all cigarettes have those qualities but they are neither produced nor consumed for that reason. They may be likened to the matches of the 19th century whose phosphorous

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32. *See* Hudson v. R. J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970); Ross V. Phillip Morris Co., 328 F.2d 3 (8th Cir. 1964) (no liability in any of these decisions because the defendant could not have known of the danger at the time of sale); Lartique v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963). *But see* Pritchard v. Liggett and Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (a 2-1 decision which found an implied warranty to the consumer that cigarettes are safe to smoke).

33. Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J., 23 (1966).

34. Restatement, *supra* note 5, at 347.

35. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 368 (1965).

> fumes entered the body through cavities in teeth and caused necrosis of the liver, or poisoned the air that people inhaled. With the development of the safety match these dangers were eliminated. The harm-producing qualities of cigarettes may be no more generic than the harm-producing qualities of pre-safety matches.[36]

With the advent of low-tar and low-nicotine cigarettes, it appears that Justice Traynor's prediction may soon become true.

A comparison between the evolution of handguns and automobiles further demonstrates the concept that some generic dangerous qualities are unnecessary. Automobiles have often been considered unavoidably unsafe products due to their mass, speed, obvious utility, and the skill needed to operate them. Yet, since *MacPherson v. Buick Motor Co.*,[37] the burden has been placed on the manufacturer, through both legislation and judicial action, to improve the safety of automobiles. Automobile manufacturers have responded to this challenge by providing shatterproof glass, four-wheel brakes, non-vulnerable fuel tanks, and collapsible steering columns. Indeed, a sobriety-based ignition test may be commonplace on all automobiles in the near future. By comparison, during this same period, the only protective device developed for handguns has been the "safety." This is a switch that prevents the trigger from being pulled. Its effect as a safety device is severely limited, however, because it can be easily released by a small child or through careless handling.

Additional reasons for holding handgun manufacturers strictly liable are present when handguns are distinguished from other acknowledged unavoidably unsafe products. With products such as cigarettes and whiskey, for example, the exposure to the dangers involved are by choice and largely confined to the user. In contrast, the danger in handguns is usually to third parties who have no choice in accepting the dangerous risks of the product.

Handguns can also be distinguished from other potentially harmful products based on their respective social utilities. For example, knives have a utility because they are a necessary tool. Similarly, automobiles are a great benefit to society for purposes of transportation and recreation. Most handguns, however, are of little value to society. They are too small for effective use in hunting and target

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36. *Id.* at 320-21.

37. 217 N.Y. 382, 111 N.E. 1050 (1916) (action for injuries caused by a defective wheel—the first decision to allow a cause of action for negligence against a remote manufacturer).

shooting, and their benefit as a method of self-defense is minimal. Conversely, the burden handguns place on society, in terms of death and injury, is enormous.[38]

Handguns do not have to be considered unavoidably dangerous products; it is possible that they can be made safer. Furthermore, even if handguns are considered unavoidably unsafe, their low social value should not allow handgun manufacturers to escape liability.

IV. APPLICATION

A. *Lethal Force as a Defective Handgun Design*

The application of the *Barker* "ordinary consumer" test provides the first basis for demonstrating a defect in the design of handguns.[39] Under this standard, the plaintiff must demonstrate that the handgun failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. For example, a plaintiff injured by a handgun may argue that he did not expect his handgun to be used against him by a criminal. The plaintiff may also claim that he would not have purchased the handgun had he expected to be injured. If the trier of fact believes that an ordinary consumer should have expected the gun to be used in this manner, these arguments will fail. Under this analysis, the manufacturer's burden will be easily met because most people realize that handguns are lethal and that extra care must be taken when storing and handling them.

The *Barker* decision, however, established that "the expectations of the ordinary consumer cannot be used as the exclusive yardstick for evaluating design defectiveness because [i]n many situations . . . the consumer [will] not know what to expect because he [will] have no idea how safe the product [can] be made."[40] Therefore, even though the minimum standard of the consumer expectations test is met, a handgun manufacturer may still be liable under the alternate *Barker* standard if it is found that "the risk of danger inherent in the challenged design outweighs the benefits of such a design."[41] Once the plaintiff demonstrates that the design of the handgun proximately caused his injury, the burden of proof shifts to the handgun

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38. *See infra* text accompanying notes 40-49.

39. 20 Cal. 3d at 429-30, 573 P.2d at 454-55, 143 Cal. Rptr. at 236-37.

40. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (quoting Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 829 (1973)).

41. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

manufacturer. The manufacturer must prove that the challenged design has higher social utility than risk of danger. However, the plaintiff must still demonstrate that the handgun embodies "excessive preventable danger"[42] in order to rebut the defendant's evidence.

To establish this danger, the plaintiff may address the factors provided in *Barker*.[43] First, the plaintiff would demonstrate that the gravity of the danger posed by the challenged handgun design is extremely high. This is apparent from the fact that handguns are designed to be lethal.

A second factor that can be considered in light of *Barker* is the high degree of likelihood that the danger involved will occur. Statistics could be used to show that specific handguns are involved in a disproportionately high number of crimes and deaths.[44]

The third factor referred to in *Barker* involves the mechanical feasibility of a safer alternative design. After the manufacturer has attempted to show the nonfeasibility or lack of alternative designs, the plaintiff could rebut that showing by providing evidence, for example, of the feasibility of creating non-lethal handguns. One such handgun is the "Taser," which shoots a barbed contact into a victim and temporarily incapacitates him with an electrical current. Though this design is only effective in close proximities, it must be remembered that a large portion of handgun deaths and injuries occur within close distances. Thus, the Taser is an example of a possible alternative to the current lethal design of handguns.[45] Other viable options include the use of darts with anesthetic tips or possibly even rubber bullets.[46] Although injuries might occur with any alternative, it can be easily demonstrated that they would not approach the numbers of those injuries caused by conventional handguns.

The next *Barker* factor the plaintiff may address is the overall adverse consequences to the product and the consumer which would result from the use of an alternative design. The manufacturer may attempt to assert the high utility of current handgun designs through

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42. *Id.*

43. *See supra* text accompanying notes 23-29.

44. For example, the type of handgun used in the attempted assassination of President Reagan has been shown to have been used in 14% of all handgun crimes even though its share of the handgun market is only 9%. Lauter, *Suits Target Handgun Makers*, 5 NAT. L.J. 1, 12 (1982).

45. *See* People v. Heffner, 70 Cal. App. 3d 643, 139 Cal. Rptr. 45 (1977) (in which the Taser was held to be a firearm for purposes of CAL. PEN. CODE § 12031(a), which makes it a misdemeanor to carry a loaded firearm in public).

46. *See Task Force Report: Science and Technology*, INSTITUTE FOR DEFENSE ANALYSES, 15 (1967).

their use in hunting and target shooting, as collectors items, and for purposes of self-defense. These uses, however, are rebuttable by the plaintiff. The plaintiff may successfully demonstrate that most hunters rely on high-powered rifles and shotguns, rather than handguns. The reason hunters use rifles and shotguns is because they have greater range, power, and accuracy than handguns.[47] The problem of accuracy also makes handguns less desirable for target shooting because an increase in the length of the barrel provides a proportionate increase in accuracy.[48] The handguns involved in most design defect suits will most likely have short barrels, because this feature makes them easily concealable and therefore attractive to criminals. This short barrel, however, is unsuitable for target shooting except at very close ranges. Finally, the fact that these handguns are inexpensive, in great supply, and usually of poor quality makes them undesirable as collector's items.[49]

The manufacturer's alternate claim that handguns are valuable for purposes of self-defense may be controverted by a demonstration of the inadequacy of handguns as a method of protection. For example, the majority of burglaries occur while no one is at home; consequently, handguns are ineffective in stopping the majority of home burglaries. In addition, it is of little value to have a handgun if it is likely to be stolen while the owner is absent.[50] Finally, for a handgun to be effective in protecting one's person, it must be kept loaded and in close proximity to its owner. Even with this preparedness, the criminal still has the advantage of surprise. Indeed, the presence of a handgun in the hands of a victim may provoke the aggressor to immediate violence.

Perhaps the most effective argument a plaintiff can make in a strict liability action against a handgun manufacturer is to illustrate that alternative designs would be just as effective for protection. For example, a handgun that fires rubber bullets may be shown to repel assailants as successfully as conventional handguns.

The last factor in *Barker* which the plaintiff may have to address is the cost involved in the alternative design. Manufacturers may claim that the expense in changing the design would be too

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47. P. SHIELDS, *supra* note 2, at 45-46.

48. *Id.*

49. *Id.* at 42, 46.

50. It has been estimated that between 65,000 and 225,000 handguns are stolen each year. TASK FORCE ON VIOLENT CRIME, *supra* note 1, at 32 (citing Mark H. Moore, "Keeping Handguns from Criminal Offenders," *The Annals of the American Academy of Political and Social Science*, at 100 (1981)).

high. However, the manufacturers' arguments may be successfully refuted in one of two ways. First, they can be refuted by showing that the expense of the alternative is less than the costs attributable to the design of the handgun at issue. Secondly, even if the cost of the safety remedies is so great that the product becomes too expensive to produce, it does not preclude the possibility that liability may be imposed. This was alluded to in *Barker* when the court noted:

> In the instant case we have no occasion to determine whether a product which entails a substantial risk of harm may be found defective even if no safer alternative design is feasible. As we noted in *Jiminez v. Sears, Roebuck and Co.* [citations omitted] Justice Traynor has suggested that liability might be imposed as 'to products whose norm is danger.'[51]

Several appellate decisions have also cited Justice Traynor's comments.[52] Thus, there is potential merit in the argument that some products, such as handguns, are of such minimal value to society that the manufacturers of those products should be held liable regardless of whether their product can be made safer.

B. *Defects in Design Due to Inadequate Safety Devices*

Handgun manufacturers may also be held liable for the defective design of specific features of a handgun, such as the lack of adequate safety devices. If the handgun as a whole is not considered to be defectively designed, surely it is rendered so by the absence of an effective safety device.[53] This cause of action was first established when the court in *Pike v. Frank G. Hough Co.*[54] held that a "product without necessary safety devices may be found defective."[55] In reversing a summary judgment, the *Pike* court stated that it was for the trier of fact to consider whether a bulldozer was defective be-

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51. 20 Cal. 3d at 430 n.10, 573 P.2d at 455 n.10, 143 Cal. Rptr. at 237 n.10 (quoting Traynor, *supra* note 34, at 367 et seq.).

52. *See* Jiminez v. Sears, Roebuck and Co., 4 Cal. 3d 379, 383, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971); Culpepper v. Volkswagen of America Inc., 33 Cal. App. 3d 510, 517, 109 Cal. Rptr. 110, 115 (1973); Titus v. Bethlehem Steel Corp., 91 Cal. App. 3d 372, 381, 154 Cal. Rptr. 122, 128 (1979).

53. A manufacturer has suggested that a handgun is safe provided the owner takes the basic "safety precaution" of removing a bullet and keeping the hammer over that empty chamber to prevent accidental discharge. Lauter, *supra* note 43, at 12.

54. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

55. *Id.* at 476-77, 467 P.2d at 237, 85 Cal. Rptr. at 637. *See also* Garcia v. Halsett, 3 Cal. App. 3d 319, 323, 82 Cal. Rptr. 420, 422 (1970) (washing machine found to be defective as it lacked an inexpensive safety device that would have prevented the machine from spinning while the door was open).

cause it was manufactured without rear view mirrors. The addition of these mirrors would have eliminated a forty-eight foot blind spot behind the machine and would have enabled its operator to see the plaintiff before he backed into him.

In a later case, *Buccery v. General Motors*,[56] a manufacturer of a small truck was held responsible for injuries sustained by the plaintiff which could have been prevented if the truck had been designed with headrests. The court emphasized that "any product so designed that it causes injury when used or misused in a foreseeable fashion is defective if the design feature which caused the injury created a danger which was readily preventable through the employment of existing technology at a cost consonant with the economical use of the product."[57]

The fact that a handgun is by its very nature unsafe, should not diminish the need for safety devices, but rather increase it. This is especially true when someone is involved who, because of inexperience or young age, does not understand the dangerous nature of products like handguns. Thus, in *Titus v. Bethlehem Steel Corp.*, the manufacturer of an oil derrick was held liable when it was demonstrated that the addition of a metal safety guard would have prevented the injuries to a child crushed while "riding" the derrick.[58]

The aforementioned decisions, while decided before *Barker*, utilize similar considerations. As a result, in the case of a child injured while playing with a handgun, the plaintiff may demonstrate that a handgun designed without adequate safety devices creates a high degree of danger. This is true not only because of the handgun's highly lethal nature, but also because of its ease of operation. The plaintiff may also use statistics showing the number of child deaths attributable to handgun mishandling. In using the statistics, it would not be necessary to show a large number of prior child deaths to hold a manufacturer liable because low-cost alternative designs and devices are available which could have prevented the deaths. For example, trigger locks, which prevent a handgun from being fired unless it is first unlocked, are currently available for a nominal price. Such locks are sold separately from handguns, but the plaintiff may demonstrate how easily they could be incorporated into existing

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56. 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976).

57. *Id.* at 547, 132 Cal. Rptr. at 614.

58. 91 Cal. App. 3d 372, 154 Cal. Rptr. 122 (1979) (noteworthy in this respect is the testimony of the child's mother who, when asked why she did not warn the child of the dangers involved in playing on the derrick, responded that she recognized such an activity as dangerous and thought her child did also. *Id.* at 374, 154 Cal. Rptr. at 123).

designs.[59]

Additionally, the plaintiff may argue that as the number of handguns increases, more of them will be placed in the hands of inexperienced owners who do not properly store the weapons out of the reach of children.[60] These handguns are very attractive to children particularly because of their prevalence in the media. Therefore, the manufacturer should arguably foresee that the number of accidental child deaths attributable to handguns will continue to increase.

It is clear that these deaths could be prevented at a low cost to the handgun manufacturer by incorporating safety devices into current handgun designs. Indeed, it seems anomalous that we keep curious children out of aspirin bottles by the use of child-proof caps but do not require similar precautions with handguns.

C. *Design Defects in the Promotion and Distribution of Handguns*

When a dangerous product is placed into the hands of the general public, it is inevitable that some ill-trained, incompetent, or irresponsible persons will misuse the product. As a result, the manufacturer who allows this dangerous product to be openly distributed and promoted should be held strictly liable for any injuries the product creates. To determine those to whom the dangerous product must be denied, it is first necessary to determine the foreseeable misuses of the product. The court of appeals addressed this issue in *Dosier v. Wilcox-Crittendon Co.*[61]

In *Dosier*, an airline mechanic was injured when a "snaphook" broke while being used to lift a counterweight. Because the hook was designed and marketed for use with livestock, the court held that the manufacturer could not be expected to foresee the plaintiff's misuse of the product. Therefore, the manufacturer was not liable for failing to warn the plaintiff of the "snaphook's" lifting capacity. In its holding, the court emphasized that "the market for which [the product] is produced is a most important consideration" in determining whether

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59. This analysis may also be used to demonstrate the feasibility of transparent chambers or other devices to alert the person cleaning a handgun to the presence of a bullet. These devices might simultaneously eliminate the element of chance in "Russian Roulette" and prevent the deaths which that game creates.

60. The U.S. Dept. of the Treasury has reported that 2.4 million handguns were produced in the U.S. in 1980, excluding those for military use. P. SHIELDS, *supra* note 2, at 177.

61. 45 Cal. App. 3d 74, 119 Cal. Rptr. 135 (1975).

the product is being used in an intended or foreseeable manner.[62] The court based its rationale on the cost-spreading policy of strict liability announced in *Greenman*. The court reasoned that if the manufacturer is to know where to distribute those costs they must be able to identify and anticipate their market.

Additional support for the theory of a defect in the design and promotion of a product may be gained from *Hyman v. Gordon*.[63] In that decision, the plaintiff kicked over a gasoline-filled can of paint brushes which was located on the floor of his garage. The gasoline flowed into the pilot light of a water heater creating a fire which burned the plaintiff. The court held that it was for the trier of fact to determine "whether the presence of the water heater in the garage location constituted a defective design; and the foreseeability of harm resulting therefrom."[64] Thus, even though the water heater functioned as intended, the builder could be held strictly liable for placing it in an unfavorable location.

As can be readily seen, "strict liability focuses on the reasonableness of the product in the environment of its use."[65] Therefore, an injured handgun victim may effectively argue that "[i]t is possible that a [handgun] may function safely in one location in the design but not another."[66] For example, if handguns were marketed and distributed solely to police officers, they would probably not be found defective.[67] This is because police officers are trained to properly handle and store their weapons. Required target practice, for most officers, serves to further familiarize the police officer with the dangers of handguns and the ways to avoid their hazards.

The majority of handguns, however, are distributed to the general public. They are sold not only in firearm shops, but also in sporting goods stores and flea markets. In addition, parts and accessories for these handguns are readily available by mail. These handguns are promoted in mass circulation magazines such as *Shooting Times*, and *Guns and Ammo*, by firearm organizations and lobbies, and more subtly on television. In this context, it is apparent that handgun manufacturers should foresee that many persons to whom their product is distributed will use it for criminal purposes. Fur-

62. *Id.* at 78, 119 Cal. Rptr. at 137.

63. 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973).

64. *Id.* at 773, 111 Cal. Rptr. at 265.

65. A. Weinstein, *supra* note 12, at 9.

66. 35 Cal. App. 3d at 773, 111 Cal. Rptr. at 264.

67. Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16, 17 (Jan.-Aug. 1981).

thermore, with the present increase in handgun sales, manufacturers should also expect that a substantial number of their customers are first time handgun owners who have had no instruction in proper handgun use. This lack of training creates an increased danger of accidental death or injury through mishandling.

This foreseeable defect in distribution should be used to restrict the distribution and promotion of handguns to the public in a manner similar to the way we restrict other dangerous products such as explosives and certain chemicals. At the very minimum, it should be utilized to hold handgun manufacturers liable unless they provide proper instruction and training in the use of their product. We should require at least the same instruction and training for a product that is lethal as we do for a mere disabling weapon, such as mace.

D. *Inadequate Warning as a Defective Handgun Design*

Similar to the defect in promotion is the defect due to the inadequacy or lack of warning regarding a product's dangerous propensities. Such a defect was first established in *Canifax v. Hercules Powder Co.*,[68] in which the court recognized that a product, although free from manufacturing or design defects, may nonetheless become defective "if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied and no warning is given."[69] Thus, there was a triable issue of fact present as to whether a retailer was liable for selling dynamite fuses without providing warnings as to their rate of burn. The faster burn rate of the fuses sold to the plaintiff caused his injuries when they detonated the dynamite sooner than the plaintiff expected.

In the subsequent case of *Dosier v. Wilcox-Crittendon Co.*,[70] the *Canifax* standard was held not to be affected by the *Cronin* court's decision rejecting the unreasonably dangerous formulation. In a footnote, the court states that the warning defect actually extends liability beyond the perimeters of *Greenman*.[71] Therefore, the unreasonably dangerous standard was necessary to make certain that the manufacturer did not become the insurer of his product.

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68. 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

69. *Id.* at 53, 46 Cal. Rptr. at 558. (Liability has also been applied to products with inadequate assembly instructions which cause injury. Midgley v. S. S. Cresege Co., 55 Cal. App. 3d 67, 127 Cal. Rptr. 217 (1976)).

70. 45 Cal. App. 3d 74, 119 Cal. Rptr. 135.

71. *Id.* at 80-81 n.3, 119 Cal. Rptr. at 138-39 n.3.

In *Cavers v. Cushman Motor Sales, Inc.*,[72] the court resolved this issue when it rejected the use of the unreasonably dangerous formulation. The court, however, affirmed the lower court's instruction that a warning defect could not be found unless the absence of any adequate warning rendered the product "substantially dangerous" to the user. This elevated standard was, the court felt, justified for otherwise the plaintiff would merely have to prove the absence of warning made the product "dangerous." Such a formulation would place too much of a burden on the defendant because "[w]hy else was the plaintiff injured, a jury would reasonably ask itself, unless the product was 'dangerous?' "[73] Therefore, the court held that the "substantially dangerous" standard "adequately focused the jury's attention upon the relevant factors in . . . determining whether the magnitude of the danger inherent in the use of a product was sufficiently great as to require a warning."[74]

Cavers also provided guidance for the determination of a warning defect. Emphasizing that the conceptual difficulties of this defect make it even more elusive to define than defects in design, the court adopted the analysis used in *Barker*. Thus, in warning defect cases the focus should be on such considerations as "the normal expectations of the consumer as to how the product will perform, degrees of simplicity or complication in the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning."[75]

As *Barker* left open the development of other standards for determining the presence of a defect, the higher standard of *Cavers* serves as the present guide in actions for defective product warnings. This standard must still be viewed in light of the *Barker* criteria. As a result, a plaintiff asserting a claim against a handgun manufacturer must rely on arguments similar to those made earlier regarding defects in design. In addition, the plaintiff must demonstrate the feasibility and beneficial effect of the warning. This creates a major problem for the plaintiff. Generally, when the dangerous propensities of a product are within the reasonable contemplation and knowledge of the consumer, a lack of warning will not constitute a defect.

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72. 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979).

73. *Id.* at 348, 157 Cal. Rptr. at 149.

74. *Id.* at 350, 157 Cal. Rptr. at 149-50.

75. *Id.* at 348, 157 Cal. Rptr. at 148. *See also* Barth v. B. B. Goodrich Tire Co., 265 Cal. App. 2d at 244-45, 71 Cal. Rptr. at 321; Bojorquez v. House of Toys Inc., 62 Cal. App. 3d 930, 933-34, 133 Cal. Rptr. 483, 484-85 (1976).

For example, in *Bojorquez v. House of Toys, Inc.*,[76] a slingshot was not considered to be defective because it lacked a warning.[77]

This patent-latent distinction has been rejected in both manufacturing and design defect actions.[78] Arguably it should also be eliminated from the concept of a defect in warning. Former Chief Justice Traynor enunciated this point nineteen years ago when he said:

> Moreover, there are no warnings on cigarette packages of a sort to bring home the gravity of the risk. Important though it may be to scrutinize one man's meat for signs of non-conforming poison, it may more often prove necessary to scrutinize his conforming poison for signs of warning as to its use and even reminders as to its patent risks.[79]

As most currently marketed handguns only provide a minimal warning of their dangerous propensities, a more effective warning might serve a very beneficial purpose. Such a warning could be used to "bring home" to the handgun owner the need to keep handguns safely out of the reach of children, or the extra caution needed to avoid injuries caused by mishandling. Although people realize handguns are dangerous, they nonetheless treat them in careless ways.[80] Perhaps this is due to our frontier history or the great exposure handguns are given in the media. In either case, an effective warning might serve as a constant reminder, such as those legislatively mandated for cigarettes, of the consequences of careless use of a handgun. Since this could be accomplished at a very low cost, handgun manufacturers who do not provide an adequate warning should be held liable for the damages their products cause.

V. The Inadequacy of Defenses for the Handgun Manufacturer

Under strict liability, the defenses a handgun manufacturer may assert are limited. Because the focus is on the product and not the

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76. 62 Cal. App. 3d 930, 133 Cal. Rptr. 483 (1976).

77. *Id.* at 933-34, 133 Cal. Rptr. at 484-85. *See also* Holmes v. J. C. Penney Co., 133 Cal. App. 3d 216, 220, 183 Cal. Rptr. 777, 779 (1982) (carbon dioxide cartridges used to power pellet guns not defective when sold to minors without a warning).

78. *See* Luque v. McLean, 8 Cal. 3d 136, 144, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972).

79. Traynor, *supra* note 34, at 371.

80. *See* Cunningham v. Chandler, (unpublished) (1983) (in which a handgun fell out of the defendant's pants while he was "mooning" the camera during a family photograph session, accidentally fired, and injured two persons).

manufacturer's actions, the reasonable conduct of the manufacturer will not preclude liability.

The fact that handguns present a patent danger will also not constitute a defense. This patent-latent distinction was rejected in *Luque v. McLean.*[81] In that case, a lawnmower manufacturer was held liable for injuries caused when, during a fall, the plaintiff's hand went into the unguarded opening of an operating lawnmower. The court disavowed the notion that the plaintiff was required to prove he was unaware of the defect, stating:

> It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects.[82]

The contributory negligence defense would also not be available to the handgun manufacturer in most jurisdictions. This defense was highly criticized because it barred recovery for any plaintiff who contributed to his injuries. Therefore, California adopted the comparative approach to negligence in *Li. v. Yellow Cab Co.*,[83] and subsequently, to strict liability in *Daly v. General Motors Corp.*[84] The court's rationale in *Daly* was based upon the recognition that, under the contributory approach, assumption of the risk served as a complete defense to products liability. This defense created "the curious and cynical message . . . that it profits the manufacturer to make his product so defective that in the event of injury he can argue that the user had to be aware of its patent defects."[85] Thus, in most jurisdictions, handgun manufacturers will be held liable under comparative liability for the proportionate share of damages for which the trier of fact finds them responsible. This is regardless of whether or not the plaintiff contributed to his injuries.

Handgun manufacturers will also have difficulty arguing that

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81. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

82. *Id.* at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449. *See also* Pike v. Frank Gittough Co., 2 Cal. 3d at 473-74, 467 P.2d at 234, 85 Cal. Rptr. at 634 (the danger of being struck by a bulldozer was obvious, yet the defendant was still liable for not installing mirrors to protect against the danger of being run over by the machine).

83. 13 Cal. 3d 804, 828-29, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).

84. 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

85. *Id.* at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

intervening factors, such as mishandling or criminal use of their products, should sever their liability. Currently, a manufacturer is required "to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse."[86] This misuse may even include those which are "unusual" or "abnormal."[87] How foreseeable that misuse is becomes an issue for the trier of fact.[88] Therefore, although intervening actions by criminal third parties are not normally considered foreseeable, when the product itself is an instrument of a disproportionately high amount of crimes, the manufacturer should be required to foresee the misuse.

In the area of automobile liability, the "motor vehicle manufacturer is required to foresee that as an incident of normal operation in the environment in which his product will be used accidents will occur."[89] As these manufacturers are liable for injuries caused by unintentional but foreseeable car crashes, should not handgun manufacturers be likewise held responsible for similar foreseeable misuses? This is heightened by the fact that it is quite foreseeable that handguns will be used for criminal purposes due to their low cost and easy concealability. Indeed, they are already involved in one-half of the annual homicides committed in the United States. Similarly, should not the handgun manufacturer be required to foresee deaths that result from the mishandling of their product when it is sold, without adequate safety devices, to a largely untrained public? Better care in the handling and storage of handguns would prevent many of these injuries, but it is not a solution. Carelessness is commonplace in society, and when it is combined with a dangerous product, the potential for harm is increased. Therefore, just as we require the manufacturer of a dangerous product, such as the automobile, to foresee and take this carelessness into account in his product's design, we should also place at least the same duty on the part of the handgun manufacturer.

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86. Self. v. General Motors Corp., 42 Cal. App. 3d 1, 7, 116 Cal. Rptr. 575, 579 (1974). *See also* Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (1970).

87. Johnson v. Standard Brands Paint Co., 274 Cal. App. 2d 331, 340, 79 Cal. Rptr. 194, 199 (1969) (citing Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. at 36-38).

88. 45 Cal. App. 3d at 78, 119 Cal. Rptr. at 137.

89. 42 Cal. App. 3d at 7, 116 Cal. Rptr. at 579.

VI. CONCLUSION

The damage to life and property that handguns create is rising yearly. Unfortunately, legislative attempts to place controls on handguns have either failed or been circumvented by the general public as well as by private firearm lobbies.[90] Treating the handgun as a "defective product" would effectuate the public policy behind strict liability which "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."[91]

Handguns are of minimal value to society. Their design makes them inadequate for hunting, target shooting, or collecting. In addition, their effectiveness as a method of self-defense is limited. They are, however, extremely lethal products. Their low cost, easy availability, and concealability make them a primary instrument of most crimes as well as one-half of our yearly murders.[92] Their ease of operation and minimal safety devices, when combined with a careless and untrained public, are the cause of many deaths and injuries. These deaths and injuries clearly outweigh the few benefits handguns provide.

Holding handgun manufacturers strictly liable for the damages their products create will force the manufacturer to internalize those damages into their product's design. For "[t]he design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use."[93] This liability will effectively place the burden on handgun manufacturers to increase the safety of their product, or in the alternative, to halt the production of handguns altogether.

Michael Dillon

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90. For example, the 1968 Gun Control Act banned, with few exceptions, the importation of handguns into the United States. However, a loophole in the bill allows handgun parts to be imported into the United States and then assembled and sold as handguns. 18 U.S.C. 925(d) (1968).

91. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J. concurring).

92. P. SHIELDS, *supra* note 2, at 30.

93. 8 Cal. 3d at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.