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The Implications of Kelley from the Defense's Perspective

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The Implications of *Kelley* from the Defense's Perspective

by Edward S. Digges, Jr.

In a landmark decision, the Court of Appeals of Maryland has ruled in *Kelley v. R.G. Industries, Inc.*, that manufacturers and marketers of "small, cheap handguns sometimes referred to as *Saturday Night Specials*, regularly used in criminal activity" may be held "absolutely" liable for an innocent person's gunshot injuries caused by a third party's criminal use of the product. This will be true not because "such" handguns are "unreasonably dangerous" within the meaning of Section 402A of the Restatement (Second) of Torts or because the manufacturing of handguns is "abnormally dangerous or ultrahazardous activity" within the meaning of Sections 519-520 of the Restatement (Second) of Torts, but because in the court's view the society of Maryland bespeaks a policy that justifies the creation of a cause of action that will impose such absolute liability upon the manufacturers and marketers of "such" handguns. The decision is prospective in the sense that such a handgun must have had a retail sale to a member of the public after the date of the mandate on the *Kelley* decision.

With regard to the apparent object of the judicially sculpted cause of action, the court, interestingly, acknowledges that "there is no clear-cut established definition of a *Saturday Night Special,* although there are various characteristics which are considered in placing a handgun into that category." The court does recite "relevant factors" to be considered by the trier of fact (virtually always going to be a jury) in determining whether the conceptual prerequisites for this cause of action have been met: "barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics." As might be expected, this recitation closely resembles a dictionary definition of a *Saturday Night Special*—i.e., "any small, cheap, short-barreled handgun that is readily available, and that is also lightweight and easily hidden".

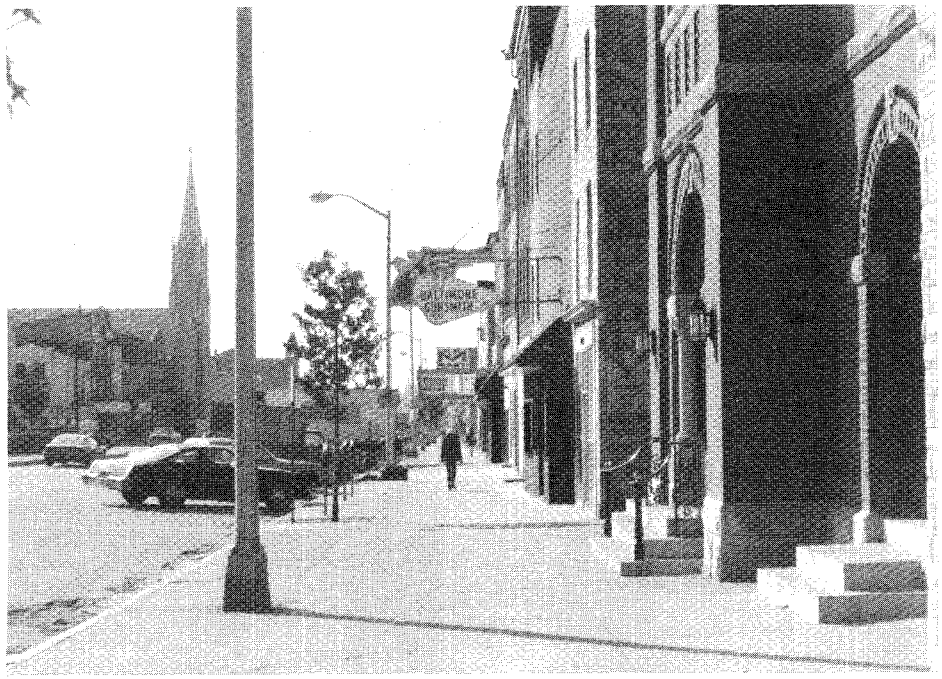
Critically, it is precisely this definitional situation which poses the dilemma for manufacturers and marketers of handguns in view of the impreciseness with which a product liability case proceeds to decision before a jury. In short, product liability cases, such as what will evolve here, often involve severe injuries tied to the use of a particular product and, therefore, proceed within a courtroom environment where there is strong sympathy for the party sustaining the injuries (here, it will by definition always be an innocent victim of criminal activity). This environment is then enhanced by a recitation of law by the trial judge for purposes of the deliberative process that renders a finding of liability relatively easy. Accordingly, when also injecting the human element reflected in studies that most jurors are pre-conditioned to think that on balance it will hurt a corporate defendant/insurer far less to award something to the injured person than to turn that person away with nothing, the *Kelley* decision's message is almost certain to have the effect of not only precluding the manufacture and distribution of the type of handgun known as a *Saturday Night Special* but also precluding in due time most types of handguns. Of course, that result might have been the unwritten intent of the opinion's author.

Legally speaking, the court in *Kelley* has created a cause of action which will be articulated to jurors for decision-making purposes along the following lines:

> You are charged under Maryland law that a (manufacturer) (seller) of a *Saturday Night Special* type of handgun which he knows or reasonably should know is principally to be used for [criminal activity] [or] [activity which has little or no legitimate (use) (value) in today's society] is responsible for injuries caused by persons who use that product for [criminal] [or] [an activity which has little or no legitimate (use) (value) in today's society]. In deciding whether a handgun is a *Saturday Night Special* type, you should consider the following factors: (recitation of aforementioned factors).

As a result, the *Kelley* decision has the "legitimate" handgun industry reeling because of the practical implication of being held liable for injuries resulting from the criminal misuse of "legitimate" handguns. The "legitimate" handgun industry has no difficulty with being subjected to the traditional product liability theories even within the context of their rapid evolution—that is, being held responsible for any

defect in the handgun itself, such as having a safety mechanism that fails under certain circumstances, or having a tendency to misfire, or having a trigger structure that easily catches on foreign objects and thereby causes an accidental discharge. It simply quarrels with the judicial policy-making that will hold it responsible for a third party's deliberate misuse of its product. As an aside, statistics of the Bureau of Alcohol, Tobacco and Firearms seem to suggest that criminals prefer to use high quality .38 and .357 caliber revolvers (the same type of handgun as used by police organizations) over the so-called *Saturday Night Special* in any event. To add another dimension, the underpinning rationale for the *Kelley* decision suggests that there may be room in the cause of action for other types of analogous instrumentalities—e.g., a sawed-off shotgun or the switchblade knife. Only time will tell, however!



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ual is taken into *custody* or *otherwise deprived of his freedom* by the authorities in any significant way and is subjected to *questioning.*'" *Hamilton*, 62 Md. App. at 609, 490 A.2d at 766 (emphasis in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 478 (1966)). Thus, the court reasoned that in order to find a violation of *Miranda*, it must be found "(a) that appellant was interrogated; (b) that the interrogation occurred while he was in custody or otherwise deprived of his freedom; and (c) that appellant was not properly advised of his *Miranda* rights." *Hamilton*, 62 Md. App. at 609, 490 A.2d at 766.

The court quickly found that the acquaintance's conversations with the defendant amounted to an interrogation because he was an agent of the state sent expressly to question the defendant about the murder. Additionally, it is clear that the defendant was not properly advised of his *Miranda* rights. However, the second element, that of custody, was missing.

"Only if the accused is in a situation where there are inherently compelling pressures to respond to interrogation are *Miranda* warnings required." *Hamilton*, 62 Md. App. at 611, 490 A.2d at 767. The court discussed the Supreme Court's decision in *Hoffa v. United States*, 385 U.S. 293 (1966) in reaching its decision. In that case the Court held that the use of testimony of a government informer concerning conversations between the informer and the defendant did not violate the defendant's fifth amendment rights. "[S]ince at least as long as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion. . . ." *Id.* at 304 (footnote omitted), quoted in *Hamilton*, 62 Md. App. at 612, 490 A.2d at 767. The conversations in *Hoffa*, however, took place in the defendant's hotel suite and not in a jail cell.

Judge Alpert then turned to the Court's decision in *United States v. Henry*, 447 U.S. 264 (1980).

> [T]he Supreme Court, while holding that statements made to a police informant after indictment of the accused *and while the accused was incarcerated* were inadmissible on Sixth Amendment grounds, addressed Fifth Amendment concerns in *dicta.* Citing *Hoffa* for authority, the Court noted that "the Fifth Amendment has not been held to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential of compulsion."

Hamilton, 62 Md. App. at 613, 490 A.2d at 768 (emphasis in original) (quoting *Henry*, 447 U.S. at 272).

Although the environment involved in *Hamilton*, namely the confines of a prison cell, leads to thoughts of custody, the court concluded that there was nothing coercive in the casual questioning of Hamilton by Fowler. The court noted that Hamilton "spoke with Fowler of his own volition, was not required to stay and continue the conversation and could have left Fowler at any time." *Hamilton*, 62 Md. App. at 615, 490 A.2d at 769. The court cautioned that "[w]e must not forget that '*Miranda* . . . was aimed not at self-crimination generally . . . but at *compelled* self-incrimination—the inherent coercion of the custodial, incommunicado, third-degree questioning process.'" *Hamilton*, 62 Md. App. at 616, 490 A.2d at 769 (quoting *Cummings v. State*, 27 Md. App. 361, 364, 341 A.2d 294, 297, *cert. denied*, 276 Md. 740 (1975)). Thus, the court concluded "that despite appellant's incarceration the interrogation was not custodial." *Hamilton*, at 615, 490 A.2d at 769.

Before *Hamilton*, the "jail plant" situa-