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ULTRAHAZARDOUS PRODUCTS LIABILITY: PROVIDING VICTIMS OF WELL-MADE FIREARMS AMMUNITION TO FIRE BACK AT GUN MANUFACTURERS

John P. McNicholas and Matthew McNicholas***

I. INTRODUCTION

A. The Petit & Martin Massacre of 1993 Illustrates That the Sole Purpose of Assault Weapons is to Kill as Many People as Possible in the Shortest Amount of Time

On July 1, 1993, seven innocent people were brutally murdered and six others injured when Gian Ferri walked into the conference room of Petit & Martin, a now-defunct San Francisco law firm, and opened fire with two TEC-DC9 semiautomatic military assault pistols (TEC-DC9).¹ Both of Ferri's guns were equipped

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This Article is dedicated to DeDe McNicholas, wife of John and mother of Matthew, whose love and support made possible our legal careers, which have given birth to this work. We would also like to thank Professor Daniel P. Selmi of Loyola of Los Angeles Law School for reviewing drafts of this Article and for his invaluable insight and comments.

1. See First Amended Complaint for Damages for Wrongful Death, Negligence, Strict Liability, Punitive Damages (Survival) and Unfair Business Practices at 1, *Sposato v. Navegar, Inc.*, No. 960937 (Super. Ct. S.F. County, June 22, 1994) [hereinafter "Complaint"]. This is Stephen and Meghan Sposato's first amended complaint against the manufacturers of the TEC-DC9, the high-capacity bullet magazines, and the Hell-Fire trigger system enhancement as well as the pawn shop that sold one of the guns to Ferri. This is the only complaint referred to throughout this Article. As there were seven bystanders killed and six others injured, several different complaints have been filed. However, this Article refers only to the Sposato's complaint.

with Hell-Fire trigger systems and high-capacity ammunition magazines, allowing each weapon to discharge thirty-two rounds of ammunition at a fully automatic rate.² After cutting down his victims with a hail of bullets, Ferri turned his weapons on himself and took his own life, bringing the death toll to eight.³

After that moment, the lives of the victims, their families, and their loved ones were changed forever, while the lives of the manufacturers of the TEC-DC9,⁴ the Hell-Fire trigger system,⁵ and the high-capacity ammunition magazines⁶ used in the massacre continue as if nothing happened. Undaunted and immune from civil tort liability, these entities continue to sell their products to the general consumer public without pause.

To understand the gravity of the situation requires a brief description of the awesome TEC-DC9s and their product enhancements as used in the Petit & Martin shooting. The TEC-DC9 before modification is a semiautomatic assault weapon based on the TEC-9, a product by the same manufacturer made for the South African military⁷ and now banned in California.⁸ Since the TEC-9 was designed specifically for military use, the TEC-DC9 incorporates characteristics commonly found on military-style weapons which enhance its user's ability to engage in extremely rapid and sustained fire.⁹ For example, the barrels of Ferri's weapons were threaded to accept silencers, and barrel shrouds protected his hands from the extreme heat created during the rapid discharge.¹⁰ In addition, the product's swing swivel and shoulder strap enhanced Ferri's ability to spray fire from the hip.¹¹ The TEC-DC9's product manual describes the assault weapon as "a radically new type of semiautomatic pistol, designed to deliver a high volume of

2. *See id.* at 4.

3. *See id.* at 1.

4. The TEC-DC9 is manufactured by Navegar, Inc. *See id.*

5. The Hell-Fire trigger system is manufactured by Orpheus Industries, Inc., doing business as Hell-Fire Systems, Inc. *See id.*

6. The ammunition magazines used in the shooting were manufactured by U.S.A. Magazines, Inc. *See id.*

7. *See id.* at 5.

8. *See id.*; *see also* CAL. PENAL CODE § 12275.5 (West 1992) (stating that the sale, manufacture, or possession of the TEC-9, among other assault weapons, "poses a threat to the health, safety, and security of all citizens" of California). This Article will discuss this Penal Code section in greater detail.

9. *See* Complaint at 4, *Navegar* (No. 960937).

10. *See id.*

11. *See id.*

firepower.”¹²

Beyond these standard features, Ferri's TEC-DC9s were equipped with detachable ammunition magazines, each carrying thirty-two rounds that could be fired without reloading.¹³ Further, each trigger assembly was modified with the Hell-Fire trigger system, allowing Ferri to dramatically accelerate his rate of fire.¹⁴ Hell-Fire's advertisements claim that a Hell-Fire trigger enhancement enables a user to “empty complete magazines at a full automatic rate.”¹⁵

These products, either individually or when assembled as a whole, are designed for the sole purpose of killing as many people as possible in the shortest possible time. There is no other reason to allow the gun to swivel from the hip in a spray-fire fashion, to use detachable bullet magazines that permit the user to fire thirty-two rounds without reloading, or to adjust the trigger so that the product can empty its hail of fire at a fully automatic rate. Despite this lethal design, however, the product manufacturers are exonerated from legal responsibility. The makers of the TEC-DC9 and its product enhancements, as well as the many other firearm manufacturers that sell their products to the general public in California, are currently beyond the reach of tort liability, free to produce their products in a legal vacuum.

B. The Victims of the Petit & Martin Shooting Fire Back with Lawsuits and Survive Demurrer

1. The victims file lawsuits on theories of negligence and strict liability against the multiple product manufacturers and the product retailer¹⁶

On June 22, 1994, the victims of the Petit & Martin massacre fired back with a lawsuit against the manufacturers of the TEC-DC9, the Hell-Fire trigger system, and the high-capacity magazines, as well as AAL-JAYS Super Pawn, the pawn shop that sold one of the two TEC-DC9s to Ferri.¹⁷ The complaint¹⁸ alleges sev-

12. *Id.*

13. *See id.* at 7.

14. *See id.* at 6. The Hell-Fire trigger system accelerates the rate of fire by returning a firearm's trigger to the ready-to-fire position more quickly than would otherwise be the case. *See id.*

15. *Id.*

16. *See id.* at 8-33.

17. *See id.* at 1-8.

enteen different causes of action based on several legal theories,¹⁹ including negligence and strict liability.²⁰ Under the negligence theories plaintiffs allege that the product manufacturers knew their goods were military-style weapons that had no sporting or self-defense purposes and that it was reasonably foreseeable that such products would be used in violent criminal acts if made available to the general public.²¹ Under the strict liability theories plaintiffs allege that the manufacturers engaged in abnormally dangerous activities by manufacturing and selling their products to the general public in California, a state that banned the very similar TEC-9 firearm produced by the same manufacturer.²²

2. Plaintiffs survive demurrer

On April 10, 1995, the trial court issued its Opinion And Order Re Demurrers, sustaining certain defendants' demurrers, in part, and overruling certain defendants' demurrers, in part.²³ In that Order²⁴ the court made the following rulings: (1) Navegar, Inc.'s demurrer, the manufacturer of the TEC-DC9, was denied as to those causes of action based on abnormally dangerous activities and negligent entrustment; (2) U.S.A. Magazine, Inc.'s demurrer,

18. The court and the pleadings now refer to the case as *In re 101 California Street*.

19. See Complaint at 8-33, *Navegar* (No. 960937).

20. See *id.* The plaintiffs also seek punitive damages, alleging that the manufacturers sold their products to the general public knowing, or with conscious disregard of, the fact that they had no legitimate sporting or self-defense purposes and would be used by criminals and others in military-style mass killings. This, plaintiffs allege, amounted to outrageous conduct. See *id.* at 8-36. This Article does not discuss the punitive damages aspect of the case.

21. This is a "negligent entrustment theory." See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 35 (4th ed. 1971).

22. See Complaint at 3-5, 10, *Navegar* (No. 960937).

23. *In re 101 Cal. St.*, No. 959316 (Super. Ct. S.F. County Apr. 10, 1995) (opinion and order sustaining certain defendants' demurrers in part and overruling others in part).

24. Because several plaintiffs filed separate complaints against several defendants, several demurrers also were filed. This discussion is based on the court's Opinion And Order Re Demurrers, filed April 10, 1995, which addressed all of the demurrers filed by U.S.A. Magazines, Inc., and Navegar, Inc. *Id.* at 2. The manufacturer of the Hell-Fire trigger system is not addressed because it filed bankruptcy and is no longer part of the case.

Note also that since this order was directed at the several demurrers filed by the various defendants, it addresses all of the claims that stood as of the filing of the court's order. Specifically, the order states that "[a]t this time, the Court has before it demurrers by Navegar [the manufacturer of the TEC-DC9] and USA [the manufacturer of the ammunition magazine used in the shooting] . . . based on (1) Strict Liability, (2) Negligence Per Se, and (3) Common Law Negligence." *Id.* Consequently, since the court addressed all of the legal theories pending against these defendants and defined the status of the several plaintiffs' cases with this one order, this Article will use the order to define the current "status" of the lawsuit as of the time of this Article's publication.

the manufacturer of the high volume detachable ammunition magazines, was sustained as to the plaintiffs' claims based on ultrahazardous activities; and (3) Navegar, Inc.'s demurrer regarding the claim based on negligent entrustment was sustained with leave to amend. It is the court's decisions regarding Navegar, Inc., the manufacturer of the TEC-DC9, that are discussed more thoroughly throughout this Article.

C. Article Outline

This Article uses *101 California Street* to examine current theories of products liability as applied to manufacturers of "well-made" guns,²⁵ to exemplify the shortcomings of those theories in well-made gun cases, and to set the stage for the creation of a new cause of action. This Article begins by summarizing the current status of tort law with respect to product manufacturers in general, focusing on the three legal theories of negligence, strict products liability, and ultrahazardous activities. This Article analyzes each theory under a well-made gun plaintiff scenario, such as that described above, illustrating current tort law's shortcomings in the area. From these shortcomings, this Article advocates the creation of a new theory of recovery, extrapolated from the current theories of ultrahazardous activities and design defect under strict products liability. The new theory is called Ultrahazardous Products Liability ("UPL") and would hold the manufacturers²⁶ of certain well-made firearms²⁷ liable for all damages caused by their products.²⁸ These manufacturers would be removed from their le-

25. A "well-made" gun, or firearm, refers to a gun or firearm that operates and performs exactly as designed and manufactured. In other words, it discharges its ammunition as any ordinary person would expect. See Gerald M. Mackarevich, Note, *Manufacturers' Strict Liability for Injuries from a Well-Made Handgun*, 24 WM. & MARY L. REV. 467, 468 (1983).

26. The reference to manufacturers is a shorthand reference to all the parties in the chain of distribution normally held liable under strict products liability.

27. The scope of firearms included will be discussed later in this Article.

28. This Article does not address claims involving guns that have malfunctioned in their operation because such claims are covered under existing tort theories. See *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530 (5th Cir. 1986) (holding the manufacturer of a revolver liable under theories of negligence, strict liability, and breach of warranty because the gun's design allowed it to discharge even with the hammer in the safety position); *Sears, Roebuck & Co. v. Davis*, 234 So. 2d 695 (Fla. 1970) (sustaining jury verdict against manufacturer of .22 caliber rifle where plaintiff suffered injuries when the rifle fired with the safety on); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990) (holding manufacturer of Remington Model 1100 12-gauge shotgun liable to injured plaintiff under negligence theory when barrel of shotgun exploded during trap shooting); *Moore v. Remington Arms*

gal vacuum and treated the same as all other product manufacturers who are held liable for the damages caused by their goods.

The basis for UPL is simple. Consumers and bystanders injured by well-made gun products should be able to hold the manufacturers civilly liable for damages inflicted by such products. Since current tort theories fail to provide such remedies, shrouding the gun industry in a blanket of protection woven from legal technicalities, the law must evolve to meet the needs of the average consumer and provide a basis for recovery. The result of this evolution is the theory of UPL.

Underlying the paradigm that victims of well-made firearms should be allowed to recover from firearm manufacturers is that, as between the relevant parties involved in the production, distribution, and sale of well-made firearms, the party most responsible for the loss should have the duty of repair.²⁹ As between the manufacturer and the victim, the manufacturer is certainly more culpable and clearly more blameworthy as the entity that designed, marketed, and delivered the firearm into the general consumer population.

The benefits of this new theory of recovery would be two-fold. First, victims would have a previously untapped source of damage recovery.³⁰ Second, UPL would force the targeted manufacturers to proactively engage in a more responsible course of behavior to protect the general public from the hazards of their products.³¹ This would be spurred by the economic incentive of avoiding large civil damage awards that would result when manufacturers fail to

Co., 427 N.E.2d 608 (Ill. App. Ct. 1981) (holding shotgun manufacturer strictly liable after barrel of gun exploded on the theory that the type of metal used in the manufacture of the gun was defective); *Philippe v. Browning Arms Co.*, 375 So. 2d 151 (La. Ct. App. 1979) (holding manufacturer liable for defective safety mechanism on shotgun when gun exploded and shooter lost his thumb).

29. See Ronald R. Rattou, *Corrective Justice and the D.C. Assault Weapon Liability Act*, 19 J. LEGIS. 287, 305 (1993) (discussing the theory of corrective justice as applied to the D.C. assault weapons strict liability act).

30. See Mackarevich, *supra* note 25, at 469.

Another factor to which courts have given weight in balancing the interests before them is the relative ability of the respective parties to bear the loss which must necessarily fall upon one or the other. . . . [I]t is a matter of their capacity to absorb the loss or avoid it. . . . Rather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it, the courts have tended to find reasons to shift it to the defendants.

Id. (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 4 (4th ed. 1971) (footnotes omitted).

31. See *id.* at 469-70. For example, gun manufactures may have to implement a distribution screening process or more carefully design their mass-marketing programs.

act responsibly. Put simply, weapon manufacturers would invest extra capital in the design, sale, and distribution processes rather than pay large verdicts after the fact. If they fail to do so, they would bear the risk of loss.

With the theory of Ultrahazardous Products Liability, gun manufacturers would no longer be able to flood the general consumer market with products intentionally designed to kill and maim without bearing financial responsibility when their design goal is realized.

II. ANALYSIS OF A NEW THEORY OF RECOVERY IN TORT LAW: ULTRAHAZARDOUS PRODUCTS LIABILITY

A. Existing Tort Law Allows Recovery Against Product Manufacturers Under Theories of Negligence, Strict Products Liability, and Ultrahazardous Activities but Fails to Provide a Remedy for Well-Made Gun Plaintiffs

1. Negligence theories in a products liability case and their availability to well-made gun plaintiffs

A products liability case can be approached under two negligence theories. Under the first theory, the plaintiff alleges that the product was negligently manufactured or designed.³² Under the second theory, the plaintiff alleges that the product was negligently entrusted or marketed.³³ In the context of well-made handguns, however, the former theory fails by definition, and the latter has been generally rejected under current law.³⁴

Under the first negligence approach, a product manufacturer has a duty to exercise reasonable care in the design,³⁵ manufacture,³⁶ and testing and inspection³⁷ of the product and in the testing

32. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96 (5th ed. 1984).

33. See *id.* The theory of negligent entrustment was plead by certain Petit & Martin plaintiffs.

34. See Mackarevich, *supra* note 25, at 471.

35. See *Varas v. Barco Mfg. Co.*, 205 Cal. App. 2d 246, 258, 22 Cal. Rptr. 737, 743-44 (1962); RESTATEMENT (SECOND) OF TORTS § 398 (1965).

36. See *Sheward v. Virtue*, 20 Cal. 2d 410, 412, 126 P.2d 345, 345-46 (1942); *Nebe-lung v. Norman*, 14 Cal. 2d 647, 652, 96 P.2d 327, 329 (1939); *Reynolds v. Natural Gas Equip., Inc.*, 184 Cal. App. 2d 724, 737-38, 7 Cal. Rptr. 879, 886-87 (1960); *Darling v. Caterpillar Tractor Co.*, 171 Cal. App. 2d 713, 720, 341 P.2d 23, 28 (1959); RESTATEMENT (SECOND) OF TORTS § 395 (1965).

and inspection of any component parts made by another³⁸ so that the product may safely be used in the manner and for the purpose for which it was made. In the case of a well-made gun, the manufacturer is not negligent by definition because it has provided a product that can be safely used in the manner and for the purpose for which it was designed. That is what is meant by a "well-made firearm." Thus, with respect to well-made gun plaintiffs, this theory is inherently flawed and therefore unavailable to victims in cases such as *101 California Street*.

The second theory, negligent entrustment or marketing, does not suffer from the same definitional flaw but nonetheless fails as a viable means of recovery for well-made gun plaintiffs. To succeed under such a claim, plaintiffs must allege and prove that they were injured because the manufacturer supplied a product to a third person with actual or constructive knowledge that such person might use the object in a manner involving an unreasonable risk of harm to the plaintiff and others.³⁹ This theory is based on section 390 of the *Restatement (Second) of Torts*, which states:

One who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm to . . . others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.⁴⁰

In the case of a well-made gun, the focus of negligent conduct is on the method of distribution,⁴¹ requiring proof that the gun manufacturer possessed actual or constructive knowledge that the person ultimately acquiring the gun could not be trusted with it.⁴²

37. See *Reynolds*, 184 Cal. App. 2d at 738-39, 7 Cal. Rptr. at 888; RESTATEMENT (SECOND) OF TORTS § 396 (1965).

38. See *Reynolds*, 184 Cal. App. 2d at 738-39, 7 Cal. Rptr. at 888; E.L. Kellett, Annotation, *Product Liability: Manufacturer's Responsibility for Defective Component Supplied by Another and Incorporated in Product*, 3 A.L.R.3d 1016 (1965).

39. See Mackarevich, *supra* note 25, at 472.

40. RESTATEMENT (SECOND) OF TORTS § 390 (1965).

41. See Mackarevich, *supra* note 25, at 471 (citing Stuart M. Speiser, *Disarming the Handgun Problem by Directly Suing Arms Makers*, NAT'L L.J., June 8, 1981, at 29).

42. See *id.* at 472 (citing *Stephan v. Marlin Firearms Co.*, 353 F.2d 819 (2d Cir. 1965) (holding that, despite knowledge of boy's use of gun, an adult who gave a gun to a fifteen-year-old boy and the dealer who sold the gun to the adult were not negligent after the boy shot a companion because neither knew of the boy's carelessness). *But see* RESTATEMENT (SECOND) OF TORTS § 390 (1965) (stating that one who supplies chattel for the use of another, whom the supplier knows or has reason to know will use the chattel in a manner involving unreasonable risk, is subject to liability for physical harm resulting from that use).

Or, as the *Restatement (Second) of Torts* states, the plaintiff must show that the manufacturer knew or had reason to know of the acquiring party's incompetence.⁴³ Under this legal standard, however, well-made gun plaintiffs have been unsuccessful in asserting negligent entrustment claims for one of two reasons. Either they have been unable to sustain their burden of proof,⁴⁴ or courts have simply refused to recognize the cause of action altogether.⁴⁵

In *101 California Street*, the court allowed the plaintiffs to proceed on their claim of negligent entrustment on a very narrow factual ground, evidencing the difficulty that such a claim presents a well-made gun plaintiff. Specifically, the court relied on Navegar, Inc.'s attempted circumvention of a certain assault weapons ban in California⁴⁶ in overruling the defendant's demurrer to the plaintiffs' negligence theory. In its Order of April 10, 1995, the court

43. See RESTATEMENT (SECOND) OF TORTS § 390 (1965).

44. See *id.* Under this section, a plaintiff must prove that the supplier knew or had reason to know of use in a manner involving unreasonable risk of physical harm. See *id.*

45. See *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987) (stating that Ohio does not recognize a defective distribution theory for handgun manufacturers); *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985) ("[t]here is simply no such products liability principle as 'defect in distribution'"); *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 133 Cal. Rptr. 483 (1976) (a minor injured by a slingshot sued the distributor and retailer under a negligent entrustment theory alleging that the distributor owed a duty to refrain from distributing slingshots to a class of persons likely to misuse them; the court disagreed because such a finding would amount to a constructive judicial ban on slingshots); *Trespacios v. Valor Corp.*, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986) (dismissed plaintiffs' negligence theory against manufacturer of a shotgun used to kill eight people because neither the manufacturer nor the distributor had a duty to prevent the sale of handguns to persons who are likely to cause the public harm); *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989) (dismissing cause of action against gun manufacturer alleging negligent distribution because a manufacturer simply has no duty to refrain from placing legal, non-defective products in the general market); see also *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987) (stating that handgun manufacturers are not subject to duty of care "not to sell their products, merely because such products have the potential to be misused for purposes of criminal activity"); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1296 (Ill. App. Ct. 1985) (holding that handgun manufacturers and distributors owed no duty to plaintiffs to control the distribution of handguns); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. Ct. 1984) (holding that manufacturer had no duty to control or regulate distribution of nondefective firearm to general public); *Earsing v. Nelson*, 629 N.Y.S.2d 563 (Sup. Ct. 1995) (holding that where infant plaintiff was injured by shot from air gun purchased by thirteen-year-old boy, the theory of negligent entrustment did not extend to the manufacturer of the air gun).

46. See CAL. PENAL CODE § 12275 (West 1992). This penal code section includes the Roberti-Roos Assault Weapon Control Act ("AWCA"). See *id.* The AWCA is a gun-ban statute which includes the TEC-9, predecessor to the TEC-DC9. *Id.* § 12276. This ban will be discussed in more detail later in this Article. At this time, it is only relevant to know that the court heavily relied on this ban to allow the plaintiffs to continue with the negligent entrustment claim.

stated:

Plaintiffs do not claim [the manufacturer] breached its duty merely because they marketed the TEC-DC9 in a negligent manner. . . . [Rather, in 1989,] the California Legislature “*prospectively* prohibit[ed] the sale” of the TEC-9 [through the enactment of the Roberti-Roos Assault Weapons Control Act (“AWCA”)]. Despite this prohibition, plaintiffs allege, Navegar modified the [TEC-9 into the TEC-DC9] in an attempt to avoid the ban and then put [the TEC-DC9] into a stream of California commerce. Ferri bought the modified weapon and killed or injured sixteen people with it. This alleged conduct fits California’s law of negligence very well.⁴⁷

With this language, the trial court greatly circumscribed the plaintiffs’ negligent entrustment claim, allowing it to survive only on the theory that Navegar, Inc., the gun manufacturer, attempted to circumvent the California gun ban by modifying the TEC-9 into the TEC-DC9.⁴⁸ In legal terms, this “circumvention” allowed the court to find, at the demurrer stage, that Navegar, Inc. knew or should have known that their product was particularly attractive to criminals and that it knew or should have known that the product would be used in criminal activities.⁴⁹ Therefore, the court did not

47. *In re* 101 Cal. St., No. 959316 (Super. Ct. S.F. County Apr. 10, 1995) (opinion and order sustaining certain defendants’ demurrers in part and overruling others in part).

48. The plaintiff alleged, and the court agreed, that the TEC-DC9 was simply a TEC-9 with insignificant modifications and that both weapons were, for all practical purposes, the same. *See id.* at 4 n.4, 7. Consequently, the court included the TEC-DC9 within the scope of the AWCA’s ban even though it was not specifically enumerated within the statute. *See id.* This inclusion by the court, on its own initiative, will be discussed more fully below.

49. In its discussion of the plaintiffs’ negligence theory, the court stated:

Negligence turns on the concepts of “duty” and the “standard of care” that a reasonable person must exercise. The Court’s task in determining duty is to evaluate generally whether the type of conduct in question is reasonably foreseeable and so likely to result in the kind of harm experienced that liability should be imposed on the negligent party.

Id. at 14 (citing *Ballard v. Urbine*, 41 Cal. 3d 564, 572-73 n.6, 715 P.2d 624, 628 n.6, 224 Cal. Rptr. 664, 669 n.6 (1986)). The court then concluded that “[t]he standard of care required depends on the circumstances.” *Id.*

In *Ballard* the court discussed when a duty should and should not be imposed based on the circumstances of a given case. In particular, the *Ballard* court stated that the general rule in California is that “all persons have a duty ‘to use ordinary care to prevent others being injured as the result of their conduct.’” *Ballard*, 41 Cal. 3d at 572-73 n.6, 715 P.2d at 628 n.6, 224 Cal. Rptr. at 669 n.6 (citing *Rowland v. Christian*, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)). The court went on to enumerate those factors that California courts consider when determining whether a manufacturer has a duty to use ordinary care to prevent injury. Those factors are:

rely on a simple negligent entrustment claim but found determinative that the plaintiffs framed their negligence theory with specific regard to the defendant's attempted circumvention of the AWCA.⁵⁰ Without Navegar, Inc.'s alleged circumvention, the plaintiffs' negligence claim would have failed.⁵¹

2. Strict products liability: an examination of design and manufacturing defect theories and their value to well-made gun plaintiffs

Under strict products liability, product manufacturers,⁵² retail-

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. (citing *Rowland*, 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100) (emphasis omitted).

After the *101 California Street* court stated the rule from *Ballard*—that there are circumstances when the general rule of duty is not applied—the court found that no departure from the general rule was appropriate for the TEC-DC9 manufacturer in the shooting at issue. See *In re 101 Cal. St.*, No. 959316 at 15. In making this determination the court stated:

Plaintiffs allege that the harm they suffered was precisely that which was foreseeable by [the manufacturer's] conduct. They also allege that there was a direct connection between [the manufacturer's] activities and plaintiff's injuries, that [the manufacturer's] conduct in attempting to circumvent the AWCA and then intentionally marketing the TEC-DC9 in California to criminals was morally offensive, and that the legislature has specifically set the policy of preventing future harm for the unsupervised use of assault weapons. These allegations, taken as true and viewed in light of the policy mandated by the AWCA, state a claim for negligence against [the manufacturer].

Id. (citation omitted). This statement makes clear, as does the tenor of the Order, that the AWCA is a substantial, if not determinative, factor in finding a duty on behalf of the TEC-DC9 manufacturer. Without the statute, it is highly questionable whether the court would have found a duty at all.

50. Like the court in *101 California Street*, other courts have allowed well-made gun cases based on theories of negligent entrustment when a specific state or federal gun statute has been violated or circumvented. However, unlike *101 California Street*, these cases discuss the liability of the retail seller, not the manufacturer. See *Franco v. Bunyard*, 547 S.W.2d 91, 93 (Ark. 1977) (stating that gun seller's violation of federal gun control law is evidence of negligence); *Rubin v. Johnson*, 550 N.E.2d 324 (Ind. Ct. App. 1990) (stating that retailer's violation of gun control law is negligence per se).

51. "Accordingly, this opinion does not consider whether, in the absence of the AWCA, plaintiffs' theories of strict liability (indeed, plaintiffs' theories of negligence and negligence per se as well) would survive demurrer." *In re 101 Cal. St.*, No. 959316 at 8 n.12.

52. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

ers,⁵³ wholesalers, and distributors⁵⁴ can be held liable by any purchaser, nonpurchasing user or consumer,⁵⁵ or bystander.⁵⁶ Allowable recovery includes damages for all physical injuries to person⁵⁷ and property⁵⁸ caused by any product such entities manufacture, sell, or distribute. Such liability arises from three theories: design defect, manufacturing defect, and failure to warn.⁵⁹ These theories are powerful tools for recovery when the product at issue does not perform as designed, fails to meet manufacturing or design specifications, fails to meet certain levels of safety expectations, or simply malfunctions.⁶⁰ However, these theories provide no method of recovery in the case of well-made guns.⁶¹ The following is a brief summary of strict products liability under the theories of design and manufacturing defects with accompanying discussions of how suits by well-made gun plaintiffs fail under both.

In *Greenman v. Yuba Power Products*,⁶² the California Supreme Court adopted the rule of strict products liability 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

53. See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

54. See *Kaminski v. Western MacArthur Co.*, 175 Cal. App. 3d 445, 220 Cal. Rptr. 895 (1985); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

55. See *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700 (holding a "manufacturer 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").

56. See *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969) ("If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. . . . In short, the bystander is in greater need of protection from defective products which are dangerous . . .").

57. See *Vandermark*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896; 6 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW* § 1295 (9th ed. 1988).

58. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); WITKIN, *supra* note 57, § 1296.

59. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. Recovery based on failure to warn is outside the scope of this Article.

60. Plaintiffs can pursue concurrent claims under negligence and strict products liability for defective products. See *Jiminez v. Sears, Roebuck & Co.*, 4 Cal. 3d 379, 387, 482 P.2d 681, 686, 93 Cal. Rptr. 769, 774 (1971).

61. This is the situation at bar in *101 California Street* and the topic of this Article; the plaintiffs did not plead any theories of strict products liability under design or manufacturing defects.

62. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

defects, proves to have a defect that causes injury to a human being.”⁶³ This pronouncement focuses a plaintiff’s case on proving the existence of a product “defect” within the meaning of *Greenman*.⁶⁴ In California a plaintiff can make such proof by showing either a design or manufacturing defect, or both.⁶⁵

A manufacturing defect exists when the product at issue differs from the manufacturer’s intended result or differs from apparently identical products from the same manufacturer.⁶⁶ A design defect exists where a product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or where there is a risk of danger inherent in the design of the product that outweighs the benefits of that design.⁶⁷ In other words, a manufacturing defect occurs when the product leaves the production line but fails to comport with the manufacturing and design blueprints, and a design defect exists when the product leaves the production line meeting all design and manufacturing specifications but is nevertheless found defective.⁶⁸

63. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

64. *See Cronin*, 8 Cal. 3d at 135, 501 P.2d at 1163, 104 Cal. Rptr. at 443.

65. *See Barker v. Lull Eng’g Co.*, 20 Cal. 3d 413, 427, 573 P.2d 443, 952, 143 Cal. Rptr. 225, 234 (1978) (“We held in *Cronin* that a plaintiff satisfies his burden of proof under *Greenman*, in both a ‘manufacturing defect’ and ‘design defect’ context, when he proves the existence of a ‘defect’ and that such defect was a proximate cause of injuries.”).

66. *See id.* at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.

In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer’s intended result or from other ostensibly identical units of the same product line. For example, when a product comes off the assembly line in a substandard condition it has incurred a manufacturing defect.

Id.

67. *See id.* at 429-31, 573 P.2d at 454-55, 143 Cal. Rptr. at 236-37. The court stated:

First, our cases establish that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. . . .

. . . [Second,] a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight . . . the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. . . .

. . . [In determining whether the benefits of the design outweigh such risks] a jury may consider, among other relevant factors, the 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 alternate design.

Id. (footnote omitted). The first test is called the consumer expectation test, and the second test is called the risk-utility test. *See Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985).

68. In addition, a plaintiff must also establish the following four elements: (1) the de-

However, a manufacturer is not required to deliver a product that is accident-proof.⁶⁹

A well-made gun cannot be defective under a theory of manufacturing defect. By definition, a well-made gun has met all manufacturing specifications and design requirements—hence the designation well-made. It does not differ from the manufacturer's intended result or from apparently identical products from the same manufacturer. Therefore, a manufacturing defect theory is not a viable theory of recovery for a plaintiff when a well-made gun is the cause of injury.

The unavailability of the manufacturing defect theory of recovery leaves only the possibility of proving design defect under either the consumer expectation or risk-utility test.⁷⁰ In California, however, a well-made gun plaintiff will most certainly fail under both.

First, under the consumer expectation approach, the plaintiff cannot show that a well-made firearm fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. A well-made gun does not contain dangers un contemplated by the ordinary consumer. Rather, its inherent dangers are common knowledge, and it performs as the average consumer expects every time.⁷¹ Therefore, plaintiffs

defendant manufactured the product; (2) the defect existed when the product left the defendant's possession; (3) the defect was a cause of the plaintiff's injury; and (4) the injury resulted from a reasonably foreseeable use of the product. See *RESTATEMENT (SECOND) OF TORTS* § 402(A) (1965).

69. See *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974).

70. See *Barker*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225.

71. See *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986) (applying Florida law, the court declined to impose strict liability on the manufacturer of a .22 caliber pistol used by a husband to kill his wife where there were no design defects and the gun performed exactly as it was supposed to perform); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986) (applying California law, the court held the manufacturer of a .25 caliber automatic handgun was not strictly liable for injuries sustained by a woman intentionally shot by her husband because the handgun was not defective in design, it performed as intended, and the benefits of the design outweighed the risks inherent in the design); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) (applying Louisiana law, the court held a manufacturer of a .25 caliber handgun used to injure and kill people during criminal activity was not liable because there was no design defect, the gun functioned as intended, and the dangers were obvious and well known); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985) (holding manufacturer of handguns used by criminals to kill plaintiffs' decedent was not strictly liable because there was no design defect based on size and concealability where such alleged defect did not cause the guns to fail to operate in a reasonably intended manner); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986) (holding plaintiffs could not recover, as a matter of law, under consumer expectation test as

intentionally injured by such a gun, flawlessly made with no hidden design defects, cannot successfully base their theory of recovery on the consumer expectation test.⁷²

Turning to the risk-utility approach, the applicable balancing test appears, at first examination, to provide well-made gun plaintiffs with a chance for recovery. This "chance" is based primarily on the novel burden-shifting approach pioneered in *Barker v. Lull Engineering Co.*⁷³ In affirming the use of the risk-utility test to determine whether a product defect exists, the *Barker* court announced an unprecedented burden-shifting approach: Once the plaintiff establishes that the design of the product is the proximate cause of the damages at issue, the burden of proof shifts to the defendant to show that the design's utility outweighs its risk.⁷⁴

With respect to a well-made firearm, this would mean the plaintiff would only have to show that the manufacturer's act or omission in producing the firearm was the proximate cause of injury before the burden shifts.⁷⁵ Initially the plaintiff's burden of proof presents two obstacles. First, there must be a causative link between the alleged design defect and the injury, and second, the plaintiff must overcome allegations that the shooter's intentional acts are superseding causes terminating the gun manufacturer's liability.⁷⁶ Only if the plaintiff overcomes these obstacles will the burden shift to the manufacturer allowing the jury to balance risk

the guns at issue functioned precisely as designed, and dangers were obvious and well known to all members of the consuming public); *King v. R.G. Indus.*, 451 N.W.2d 874 (Mich. Ct. App. 1990) (holding that where criminal shot mother and son, resulting in mother's death and rendering son a paraplegic, manufacturer of Saturday Night Special entitled to summary judgment since there was no allegation that the particular gun did not function properly at the time it was discharged).

72. Similarly, tobacco manufacturers have also avoided liability for cancers resulting from cigarette smoking under the consumer expectation test because smokers are generally aware of the dangers of tobacco. See *Mackarevich*, *supra* note 25, at 481-82.

73. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

74. See *id.* at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237. The court stated:

[W]e conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective. Moreover, inasmuch as this conclusion flows from our determination that the fundamental public policies embraced in *Greenman* dictate that a manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence.

Id. (citations omitted).

75. See *Mackarevich*, *supra* note 25, at 488-89.

76. See *id.* at 491.

against utility.⁷⁷ In other words, only if the plaintiff can show causation will the innovation of *Barker's* burden-shifting be realized.

However, further examination reveals that well-made gun plaintiffs cannot harness the consumer-oriented approach adopted in *Barker* under any circumstances. California Civil Code § 1714.4⁷⁸ specifically limits the risk-utility test with respect to products liability actions involving firearms and ammunition. Section 1714.4(a) provides that "no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged."⁷⁹ Furthermore, § 1714(b) provides that:

(1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.

(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.⁸⁰

Thus, in one fell swoop, the legislature ruled out a well-made gun plaintiff's possible recovery under the theory of design defect. With § 1714.4(b)(2), the Legislature determined that when a person is shot with a firearm of any kind, the proximate cause of the injury is not the design of the firearm. This means that the burden-shifting approach approved by *Barker* is useless to the well-made gun plaintiff. Further, with § 1714.4(a), the legislature determined that no firearm can be found defective in design under a risk utility examination, eliminating the risk-utility test altogether in the well-made gun case. Finally, in a more far-reaching statement, § 1714.4(b)(1) commands that a well-made gun is not, as a matter of law, defective in design.

Consequently, suits by well-made gun plaintiffs fail under California's innovative risk-utility approach as well as the consumer expectation test.

3. The theory of ultrahazardous activities, its application in cases

77. *See id.*

78. CAL. CIV. CODE § 1714.4 (West 1985).

79. *Id.* § 1714.4(a).

80. *Id.* § 1714.4(b).

of well-made firearms, and its use in *101 California Street*

The final legal theory discussed in this Article is strict liability through ultrahazardous activities.⁸¹ Under this theory individuals or entities are held strictly liable when their actions create a sufficiently serious risk of danger that cannot be eliminated even with the exercise of due care.⁸² This absolute liability is based on the "recognition of the risk inherent in the undertaking despite the exercise of due care"⁸³ and that "liability for the loss is placed upon the party best able to shoulder it."⁸⁴

Under the ultrahazardous activities theory, the court, rather than the jury, determines whether an activity is ultrahazardous.⁸⁵ In making its determination the court considers the following six factors:

- (a) existence of a high degree of risk of some harm to the person, land, or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.⁸⁶

A classic example of an activity which falls within the doctrine is blasting with explosives in a city or other densely populated area.⁸⁷

In *101 California Street*, the plaintiffs argued that the combination of the following activities constituted an ultrahazardous activity: (1) manufacturing the TEC-DC9, "a weapon of mass de-

81. Ultrahazardous activities are now referred to as "abnormally dangerous activities" in the *Restatement (Second) of Torts*. RESTATEMENT (SECOND) OF TORTS § 520 (1977). This Article uses the term ultrahazardous activities because the new legal theory it espouses, ultrahazardous products liability, borrows its title directly from the ultrahazardous phraseology rather than the "abnormally dangerous" phraseology.

82. See *Smith v. Lockheed Propulsion Co.*, 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128, 137 (1967) (finding that defendant could be held strictly liable for firing a fuel rocket which caused seismic vibrations resulting in damage to plaintiff's property).

83. *Id.*

84. *Id.* (citing WILLIAM L. PROSSER, LAW OF TORTS 318 (2d ed. 1955)).

85. See *Edwards v. Post Transp. Co.*, 228 Cal. App. 3d 980, 983, 279 Cal. Rptr. 231, 232 (1991); *SKF Farms v. Superior Ct.*, 153 Cal. App. 3d 902, 906, 200 Cal. Rptr. 497, 499 (1984).

86. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

87. See *McGrath v. Basich Bros. Constr. Co.*, 7 Cal. App. 2d 573, 576, 46 P.2d 981, 982-83 (1935); *McKenna v. Pacific Elec. Ry.*, 104 Cal. App. 538, 286 P. 445 (1930).

struction,” and the high capacity ammunition magazine used in the killing; (2) the manufacturer’s decision to modify the TEC-9 into the TEC-DC9 through “insignificant” changes designed to avoid California’s ban on the AWCA; and (3) the conscious decision to market the weapon directly to criminals.⁸⁸ The court supported this theory. It noted, and the plaintiffs agreed, that the act of manufacturing the gun or the magazines by itself did not constitute an ultrahazardous activity, nor did the act of marketing an otherwise potentially dangerous product.⁸⁹ Rather, it was the combination of the above three factors that allowed the ultrahazardous theory to proceed.⁹⁰

As it did in allowing the claim for negligent entrustment to go forward, the court relied heavily on the AWCA and the defendant’s attempted circumvention of it in discussing the six ultrahazardous activity factors.⁹¹ In fact, the court specifically stated that its “opinion does not consider whether, in the absence of the AWCA, plaintiffs’ [theories] of strict liability . . . would survive demurrer.”⁹²

The broader and more important question that arises from *101 California Street*’s reliance on the AWCA is whether suits by other well-made gun plaintiffs injured or killed by weapons not properly included within the AWCA’s ban would survive demurrer on claims of ultrahazardous activities and negligent entrustment. If the order of the court in *101 California Street* is any indication, the answer is most certainly no.⁹³

Consequently, because the plaintiffs were forced to phrase their claim of ultrahazardous activities so narrowly to encompass

88. See *In re* 101 Cal. St., No. 959316 at 6-14 (Super. Ct. S.F. County Apr. 10, 1995) (opinion and order sustaining some defendants’ demurrers in part and overruling others in part).

89. See *id.* at 7.

90. See *id.*

91. See *id.* at 8 n.12.

92. *Id.*

93. Most jurisdictions have found that the sale and distribution of firearms is not an ultrahazardous or abnormally dangerous activity. See *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987) (refusing to hold manufacturer of handguns liable under the ultrahazardous activity doctrine); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985) (holding that the manufacture, sale, and marketing of a small, easily concealable handgun does not constitute an abnormally dangerous activity); *Diggles v. Horwitz*, 765 S.W.2d 839, 841 (Tex. Ct. App. 1989) (stating that “the manufacture or sale of a handgun had not been recognized as an ultrahazardous activity”); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988) (holding that the manufacture, distribution, or sale of a handgun is not a high-risk, ultrahazardous activity).

aspects of the AWCA and the manufacturer's alleged attempt to circumvent that statute, and because the court relied so heavily on its own interpretation of the AWCA, the ultrahazardous activities claim in *101 California Street* does not create a generally available theory of recovery for other well-made gun plaintiffs. As with negligent entrustment, these plaintiffs are surviving on a very thin, factually intensive line that depends on the critical interpretation and use of the AWCA.

B. The Potential Effect of the AWCA on Civil Code § 1714's Elimination of the Risk-Utility Test for Well-Made Gun Plaintiffs

In 1974 California Civil Code § 1714 eliminated the use of the risk-utility test to prove the design defect of a well-made firearm. In 1989, however, the enactment of the Roberti-Roos Assault Weapons Control Act⁹⁴ (AWCA) may have reversed § 1714's impact. In other words, victims of well-made firearms may be able to overcome the far reaching ban of § 1714 and use the risk-utility test to sustain their burden in a products liability suit.

The AWCA is a section of the California Penal Code banning specifically enumerated assault weapons and firearms from the State of California and criminalizing certain contraventions of that ban.⁹⁵ Specifically, any party who

within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for four, six, or eight years.⁹⁶

The AWCA then defines the term "assault weapon" with certain listed firearms,⁹⁷ including the Intratec TEC-9, the predecessor to

94. CAL. PENAL CODE §§ 12275-12277 (West 1992).

95. *See id.*

96. *Id.* § 12280(a)(1) (West 1992 & Supp. 1997).

97. *Id.* § 12276.

All of the following specified rifles: (1) All AK series including, but not limited to, the models identified as follows: (A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S. (B) Norinco 56, 56S, 84S, and 86S. (C) Poly Technologies AKS and AK47. (D) MAADI AK47 and ARM. (2) UZI and Galil. (3) Baretta AR-70. (4) CETME Sporter. (5) Colt AR-15 series. (6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR110C. (7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter. (8) MAS 223. (9) HK-91, HK-93, HK-94, HK-PSG-1. (10) The following MAC types: (A) RPB Industries Inc. sM10 and sM11. (B) SWD Incorporated M11. (11) SKS with detachable magazine. (12) SIG AMT, PE-57, SG 550, SG 551. (13) Springfield Armory BM59 and SAR-48. (14) Ster-

the TEC-DC9. The legislature based this assault weapon ban on the following legislative findings, enumerated in the AWCA itself:

The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities.⁹⁸

The AWCA's assault weapon ban and the legislature's new finding of related health and safety risks⁹⁹ have an uncertain effect on the legislature's old determination, enumerated in California Civil Code § 1714, that firearms are not defective in design as a matter of law. Does the AWCA implicitly repeal Civil Code § 1714? The fact that the Legislature restricted the assault weapons specified in the AWCA on the "finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings"¹⁰⁰ rings of a risk-utility balancing that is specifically con-

ling MK-6. (15) Steyer AUG. (16) Valmet M62S, M71S, and M78S. (17) Armalite AR-180. (18) Bushmaster Assault Rifle. (19) Calico M-900. (20) J&R ENG M-68. (21) Weaver Arms Nighthawk. (b) All of the following specified pistols: (1) UZI. (2) Encom MP-9 and MP-45. (3) The following MAC types: (A) RPB Industries Inc. sM10 and sM11. (B) SWD Incorporated M-11. (C) Advance Armament Inc. M-11. (D) Military Armament Corp. Ingram M-11. (4) *Intratec* TEC-9. (5) Sites Spectre. (6) Sterling MK-7. (7) Calico M-950. (8) Bushmaster Pistol. (c) All of the following specified shotguns: (1) Franchi SPAS 12 and LAW 12. (2) Striker 12. (3) The Streetsweeper type S/S Inc. SS/12. (d) Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5.

Id. (emphasis added).

98. *Id.* § 12275.5 (West 1992).

99. *See id.*

100. *Id.*

trary to Civil Code § 1714. While the implicit legislative effects of the AWCA are not central to this Article, they are nonetheless important and must be noted in passing. If the AWCA effectively overrules the legislature's previous determination that firearms are not defective as a matter of law, the theory of design defect may again be open to well-made gun plaintiffs.

1. *101 California Street's* reliance on the AWCA to maintain plaintiffs' strict liability theories

As discussed above, the *101 California Street* court relied heavily on the AWCA in allowing the plaintiffs to survive demurrer.¹⁰¹ Under the theory of negligent entrustment, the court used the statute to find a duty, the most basic element of that theory. With regard to ultrahazardous activities, the court used the statute to establish the very combination of activities it found were ultrahazardous, as well as the several other legal elements required under that theory.

However, in utilizing the AWCA, the court could not rely on the statute's specifically enumerated assault weapons because the TEC-DC9 is not on the list.¹⁰² Rather, the court used the caveat found in section 12276(d) of the AWCA to determine that the TEC-DC9 was an assault weapon within the statute's meaning.¹⁰³

101. *See In re 101 Cal. St., No. 959316* at 6-14 (Super. Ct. S.F. County Apr. 10, 1995) (opinion and order sustaining some defendants' demurrers in part and overruling others in part).

102. *See id.* at 4 n.4 (noting CAL. PENAL CODE § 12276 (West 1992 & Supp. 1997) does not specifically list the TEC-DC9).

103. There is a caveat in the AWCA stating that an "assault weapon" as defined in § 12276 of the AWCA can include, in addition to the firearms already listed in the statute, "[a]ny firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5." CAL. PENAL CODE § 12276(d).

Turning to § 12276.5, it provides, in relevant part:

(a) Upon request by the Attorney General . . . the superior court shall issue a declaration of temporary suspension of the manufacture, sale, distribution, transportation, or importation into the state, or the giving or lending of a firearm alleged to be an assault weapon within the meaning of Section 12276 because the firearm is either of the following:

(1) Another model by the same manufacturer or a copy by another manufacturer of an assault weapon listed in subdivision (a), (b), or (c) of Section 12276 which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements including, but not limited to: a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic or metal stock; larger magazine size; different caliber provided that the caliber exceeds .22 rimfire; or bayonet mount . . .

(2) A firearm first manufactured or sold to the general public in California

Specifically, the court stated:

Plaintiffs allege that in response to the AWCA, [the manufacturer] modified the TEC-9 in ways immaterial to its assault function and re-named the new weapon the TEC-DC9. *This effort does not take the TEC-DC9 out of the AWCA, however, as the Act specifically provides that it covers the listed weapons "and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer."*¹⁰⁴

Without this caveat, the court loses its basis to find the TEC-DC9 within the prohibition of the AWCA and has no grounds upon which to deny the defendants' demurrers. More specifically, the plaintiffs would have had no legal theories to support their claims.¹⁰⁵

2. The California Court of Appeal is split on whether the *101 California Street* court appropriately used the AWCA

The California Court of Appeal is now split on whether a trial court, on its own initiative, can properly add the TEC-DC9 to the list of assault weapons banned under the AWCA. In *Harrott v. County of Kings*¹⁰⁶ the trial court, on its own initiative, found a Clayco brand rifle the functional equivalent of an AK46. As the Clayco was not enumerated in the AWCA and the AK47 was, the trial court included the Clayco within the AWCA's ban. On appeal, the trial court was reversed because the appellate court found that only the attorney general can add a firearm to the list of banned assault weapons, not the trial court by its own action.¹⁰⁷

after June 1, 1989, which has been redesigned, renamed, or renumbered from one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, or which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms listed in subdivision (a), (b), or (c) of Section 12276

Id. § 12276.5 (West 1992).

104. *In re* 101 Cal. St., No. 959316 at 4 n.4 (quoting CAL. PENAL CODE § 12276(3)(f)) (emphasis added).

105. *See id.* ("Accordingly, this opinion does not consider whether, in the absence of the AWCA, plaintiffs' theories of strict liability (indeed, plaintiffs' [theory] of negligence . . . as well) would survive demurrer.").

106. 46 Cal. App. 4th 592, 54 Cal. Rptr. 2d 145 (5th Dist. 1996).

107. *Id.* at 599, 54 Cal. Rptr. 2d at 149.

In sum, after review of the Act as a whole and of its legislative history, we conclude the Legislature did not intend for local law enforcement agencies to make the initial determination whether a specific firearm is an assault weapon. Such a determination is made by the Legislature, through inclusion in section 12276, or by the trial court, but only after the filing of a petition by the Attorney General.

The court of appeal in *People v. Dingman*,¹⁰⁸ however, impliedly held that a trial court can include a weapon within the AWCA if it merely interprets the enumerated list in the AWCA to include the weapon at issue, even though it contains slight alterations, rather than using the caveat found in 12276.5.¹⁰⁹ As *Dingman* was decided after *Harrott*,¹¹⁰ it appears that the court of appeal was trying to avoid the reach of *Harrott* and provide trial courts with the ability to do the same. Therefore, the propriety of the 101 California Street court's action in including the TEC-DC9 within the AWCA remains a legal issue that will certainly be challenged.

The California Supreme Court has granted review in *Harrott*.¹¹¹ In so doing, it will resolve the conflict between the two appellate opinions with respect to a trial court's ability to define additional firearms as assault weapons within the meaning of the AWCA. Further, it will also determine whether the court in 101 California Street exceeded its authority in adding the TEC-DC9 to the list of banned weapons under the AWCA, and therefore, indirectly determine whether the plaintiffs' claims will actually survive to trial and thereafter.

3. Under the different theories of negligence and strict products

By requiring the Attorney General to file the petition, two layers of review are ensured before a firearm is declared to be an assault weapon: review by the Attorney General's office and review in the trial court. This double review helps ensure that the Legislature's prosecution of assault weapons is appropriately enforced. Were we to find otherwise, one county, given a receptive judge, could have a plethora of weapons declared to be assault weapons, a declaration binding on the citizenry of the entire state, even against the express wish of the Attorney General, who represents the State of California as a whole.

Id.

108. 47 Cal. App. 4th 1068, 55 Cal. Rptr. 2d 211 (1996).

109. *See id.* In *Dingman* the defendant purchased his gun with a fixed magazine, and argued that such a weapon was not within the scope of the AWCA because the AWCA only contemplated the defendant's type of weapon if it was originally manufactured with a detachable magazine. *See id.* at 1071, 55 Cal. Rptr. 2d at 212. The Court of Appeal interpreted the AWCA on its own to include the defendant's modified gun. *Id.* at 1073-79, 55 Cal. Rptr. 2d at 213-17. In doing so the court held that the ban on defendant's type of weapon "with [a] detachable magazine" included a weapon altered to have a detachable magazine, even if manufactured with a fixed magazine. *Id.* This action is contrary to that in *Harrott*, which required the Attorney General to include different weapons within the ban.

110. *Harrott* was decided on June 18, 1996. *See Harrott v. County of Kings*, 46 Cal. App. 4th 592, 54 Cal. Rptr. 2d 145 (1996). *Dingman* was decided July 29, 1996. *See Dingman* 47 Cal. App. 4th at 1068, 55 Cal. Rptr. 2d at 211.

111. *Harrott v. County of Kings*, 923 P.2d 766, 57 Cal. Rptr. 2d 277 (1996) (granting petition for review).

liability, causation remains a critical issue

Under all of the theories discussed above, causation is a critically important element.¹¹² Whether the claim is based in negligence or strict liability, the rules of actual and proximate cause must be satisfied.¹¹³ With respect to a well-made gun case, "[t]his requires that the plaintiff show that some aspect of the [firearm's] . . . design caused his injury, even though the weapon was manufactured flawlessly and contained no hidden dangers."¹¹⁴ The true obstacle in establishing this element is overcoming the doctrine of superseding causes.¹¹⁵ When a "plaintiff's injuries resulted from the intentional criminal acts of another, the plaintiff probably will be unable to demonstrate the proximate cause connection. . . . [T]he handgun manufacturer's claim of superseding cause [will] prevail in most jurisdictions."¹¹⁶

At first glance, this proximate cause requirement appears surmountable in California because of certain developments in the area of superseding causes. Specifically, California has rejected the blanket rule that an intervening criminal act is by its very nature a superseding cause.¹¹⁷ Instead, it has adopted the *Restate-*

112. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962) (holding manufacturers strictly liable for injuries caused by their products); *Paverud v. Niagara Mach. & Tool Works*, 189 Cal. App. 3d 858, 863, 234 Cal. Rptr. 585, 588 (1987) (finding that trial court committed reversible error by failing to instruct the jury on superseding causation when employer's negligence may have been a superseding cause); *Endicott v. Nissan Motor Corp.*, 73 Cal. App. 3d 917, 926-27, 141 Cal. Rptr. 95, 100-01 (1977) (finding no causal connection between allegedly defective seat belt and plaintiff's injuries arising out of car crash); *Thompson v. Package Mach. Co.*, 22 Cal. App. 3d 188, 193-95, 99 Cal. Rptr. 281, 285-87 (1971) (holding it was error to refuse instruction on concurrent causes). Remember also that the burden-shifting rule defined in *Barker*, which states that if the plaintiff proves that his injury was proximately caused by the product's design the burden shifts to the defendant to prove the product was not defective, relies on the application of the rules of causation. See *supra* note 74 and accompanying text.

113. See *supra* note 74 and accompanying text.

114. *Mackarevich*, *supra* note 25, at 491.

115. See *id.* at 493.

116. *Id.* (footnote omitted).

117. See *Richardson v. Ham*, 44 Cal. 2d 772, 777, 285 P.2d 269, 272 (1955) (holding that defendant's duty to plaintiff included protection from the intentional misconduct by unauthorized third persons and thus, such misconduct was not a superseding cause of injured party's harm); *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 218, 157 P.2d 372, 374 (1945) (finding that action of intervening agency was not a superseding cause exonerating defendant from negligence when what occurred was reasonably foreseeable); *Rosh v. Cave Imaging Sys.*, 26 Cal. App. 4th 1225, 1236, 32 Cal. Rptr. 2d 136, 142 (1994) (finding security company's repeated failure to remove terminated employee from the premises was substantial cause of employee's subsequent assault on manager who had fired him); *Cam-*

ment's formulation that "[i]f 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 harm caused thereby."¹¹⁸

However, any potential application of this evolved rule does not extend to well-made firearm cases. California Civil Code § 1714.4 states that, with respect to all products liability actions, "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product."¹¹⁹

Consequently, the legislature returned the applicable causation rule to its former state¹²⁰ with respect to gun plaintiffs, taking away what the courts had developed. As a result, causation remains a thorn in the side of well-made gun plaintiffs and will likely defeat most, if not all, claims against manufacturers.

In *101 California Street* the plaintiffs survived demurrer with respect to causation because of the AWCA and their carefully crafted theory aimed at the defendant's act of marketing the TEC-DC9 in contravention of the AWCA.¹²¹ When the defendant gun manufacturer challenged the plaintiffs' claims under California Civil Code §1714.4, the court stated that normally a manufacturer will not be liable when a user of the product intervenes to create a hazardous situation but "that scenario changes when the Legislature enacts a law such as the AWCA."¹²² More specifically, be-

podonico v. State Auto Parks, Inc., 10 Cal. App. 3d 803, 807, 89 Cal. Rptr. 270, 273 (1970) (holding jury instruction stating that if third party's act was extraordinary or abnormal the original actor's negligence was not proximate cause is reversible error); Terrell v. Key Sys., 69 Cal. App. 2d 682, 688, 159 P.2d 704, 707 (1945) (holding that it was a jury question whether defendant's failure to control actions of drunken passengers was proximate cause of plaintiff's injuries).

118. Richardson, 44 Cal. 2d at 777, 285 P.2d at 272 (quoting RESTATEMENT (SECOND) OF TORTS § 449 (1965)).

119. CAL. CIV. CODE § 1714.4(b)(2) (West 1985).

120. The approach of the older cases was that an intervening criminal act or intentional tort is less foreseeable than an intervening negligent act and ordinarily is a superseding cause. See *Blunk v. Atchison, Topeka & Santa Fe Ry.*, 97 Cal. App. 2d 229, 233, 217 P.2d 494, 497 (1950) (finding railway not liable for injury caused by horseplay of fellow employees because of lack of duty and proximate cause); *Angelis v. Foster*, 24 Cal. App. 2d 541, 543, 75 P.2d 650, 651 (1938) (sustaining defendant's general demurrer despite negligent failure to provide safe transportation for school child because intervening act of intoxicated automobile driver was sole proximate cause of plaintiff's injuries).

121. See *In re 101 Cal. St.*, No. 959316 at 12.

122. *Id.*

cause the plaintiffs framed their complaint with respect to the manufacturer's activities—its alleged circumvention of the AWCA and not the act of designing and manufacturing a dangerous weapon—the court was able to examine the claims under non-product liability theories and find its way around California Civil Code § 1714.4.¹²³ As the court clearly stated in its Opinion And Order, “[p]laintiffs do not challenge [the] design; they challenge [the manufacturer’s] decision to market the TEC-DC9 in a way that made violation of [the AWCA] inevitable. It is this conduct, not problems with the design of the TEC-DC9, that forms the basis for plaintiffs’ claims.”¹²⁴ Obviously, this finding and the corresponding use of the AWCA will be reviewed by the California Supreme Court when it reconciles the current split in *Dingman* and *Harrott*.¹²⁵

C. The Creation of a New Cause of Action for Well-Made Firearm Plaintiffs: Ultrahazardous Products Liability

1. Existing tort law fails to protect well-made gun plaintiffs, requiring the creation of a new theory of recovery: ultrahazardous products liability

As this Article has discussed, the current avenues of recovery under negligence, products liability, and ultrahazardous activities for victims of well-made firearms are simply too narrow or are closed altogether. First, plaintiffs must jump through linguistic hoops in their allegations and pleadings and must articulate complex theories based on a multitude of interrelated actions, any one of which standing alone would not impose liability. Second, if the AWCA or similar statute is unavailable, it is doubtful that even artful pleading could survive demurrer under existing law.

123. *See id.* at 12 n.18.

124. *Id.*

125. See Harriet Chang, *Judge Drops Suit Against Gun Maker*, S.F. CHRON., May 7, 1997, at A17, available in 1997 WL 6696968. As this Article was going to press, the court in *101 California Street* granted defendant Navégar, Inc.’s motion for summary judgment on the issue of causation. In stopping the plaintiffs’ case from proceeding, the court found that there was insufficient evidence to support the legal conclusion that the manufacturer’s alleged circumvention of the AWCA, the alleged ultra-hazardous activity, was the cause of the plaintiffs’ injuries. This ruling underscores the very premise behind this Article’s advancement of a new cause of action for victims of well-made firearms: current law presents so many problems for such victims that the only path to recovery, and manufacturer accountability, will be wrought through an evolution of current law.

Even if the plaintiff is able to achieve these pleading acrobatics, causation promises almost certain failure. As a direct result of the Legislature's pronouncement, a firearm manufacturer's action or inaction is not the cause of a well-made gun plaintiff's injuries in a products liability action.¹²⁶ Even more devastating is the legislature's determination that well-made firearms are altogether excluded from the purview of strict products liability under a design defect theory by defining such products as not defective as a matter of law. Therefore, unless a plaintiff seeks to focus, as did the plaintiffs in *101 California Street*, on a defendant's evasion of the gun-ban statute, the well-made gun plaintiff has no avenue of recovery.¹²⁷

This situation is unacceptable. The law cannot allow the manufacturers, distributors, wholesalers, and retailers of firearms, or any other party involved in the chain of distribution, to continue to market their products of mass destruction and death to the general public with impunity. These entities freely dump their military-style assault products into a nonmilitary civilian market, targeting any average citizen or criminal that will purchase their goods. For example, licensed firearm dealers sell an estimated 7.5 million guns per year¹²⁸ and there are an estimated 1 million semi-automatic assault weapons in private hands in the United States.¹²⁹ In 1994 alone 38,505 Americans were killed with firearms, averaging 105 people every day.¹³⁰

Because gun-producing entities are immune from almost all civil liability—save for a gun that fires sideways or explodes in the user's hand¹³¹—their massive sales and revenues remain unencumbered by any type of safety procedures or requirements. Rather, they can bottom-out their wholesale and retail prices in order to sell as many of their products as possible because they are not

126. See CAL. CIV. CODE § 1714.4(b)(2) (West 1985). Of course, this does not bear on a negligence cause of action.

127. Even if a well-made gun plaintiff does have recourse to a gun-ban statute, the propriety of using such statute, as the plaintiffs have in *101 California Street*, is untested on appeal.

128. See Ray Moseley, *Handgun Ban Garnering Support in Britain*, CHI. TRIB., Sept. 3, 1996, at 11.

129. See Jim Stewart & Andrew Alexander, *Assault Weapons Muscling in on the Front Lines of Crime*, ATLANTA J. & CONST., May 21, 1989 at A1.

130. National Center for Health Statistics, U.S. Dept. of Health & Human Serv., *Advance Report of Final Mortality Statistics, 1994*, 45 MONTHLY VITAL STAT. REP., no. 3, Supp., Sept. 30, 1996, at 9.

131. See *supra* note 28.

faced with the same constraints as other consumer goods manufacturers in this state.

For example, in 1993 the cost of firearm injuries in medical expenses and lost productivity was estimated at more than \$5 billion,¹³² with an additional \$13 billion attributable to lost quality of life.¹³³ In 1993 4,888 people suffered gunshot wounds, eighty percent of whom could not pay for their medical care, shifting the cost to the public.¹³⁴ This is a very significant figure when the average cost of treating a bullet wound victim is \$23,750.¹³⁵

Entities which produce and market firearms must be held accountable when their products achieve their desired goal of death and mutilation. Like all other product manufacturers, they must be held to answer in the courts of law of this state for the damages their products cause.

Since existing tort law fails to articulate a cause of action that can reach the untouchable manufacturers of well-made firearms, a new theory of recovery must be developed in California. At present these manufacturers skate the thin line of immunity that separates the independent theories of negligence, ultrahazardous activities, and design defects under strict products liability. When aimed at the firearm itself, none of these theories work, although aspects of each are applicable.

However, a new cause of action formulated from the theories of ultrahazardous activities and strict products liability could exact the accountability and responsibility consumers need and expect in California. That new cause of action is Ultrahazardous Products Liability (UPL).

In borrowing from the law of ultrahazardous activities, UPL utilizes the concept that some products are so inherently dangerous that strict liability must be imposed when those products cause injury, even though they are legal and serve some social good.¹³⁶ Thus, UPL focuses on a product's unavoidable risk of serious and deadly injury through proper use or consumption.

Of course, the theory of ultrahazardous activities deals with

132. See Robert B. Gunnison, *Gun Violence Costing Billions, Report Says: California Covers Many Victims' Medical Bills*, S.F. CHRON., Oct. 19, 1994, at A11.

133. See *id.*

134. See *id.*

135. See *id.*

136. See *Smith v. Lockheed Propulsion Co.*, 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128, 137 (1967); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 1228 (9th ed. 1988).

actions, not products.¹³⁷ As such, it is not directly applicable to the case of a well-made firearm. To augment this shortfall, UPL must also borrow from the law of strict products liability. Specifically, it must focus on the tangible product as do the theories of manufacturing and design defect. This would allow UPL to consider the firearm product itself and not the actions of its manufacturer in manufacturing, designing, marketing, and selling its firearm products.

The net result is a theory of recovery that looks at the design of the product for an inherently ultrahazardous risk of danger that cannot be eliminated by due care because of the product's nature and intended purpose and holds its manufacturer strictly liable for all damages caused by such product. In the most basic sense, the general theory of UPL may be stated as follows: All parties that manufacture, market, distribute, sell, or otherwise aid in the delivery of a product to the public are held strictly liable if that product is specifically designed to be ultrahazardous¹³⁸ when properly used and is ultrahazardous when so used, even though it comports with all design and manufacturing specifications, is legally produced, and may serve some social good.

By holding the manufacturers¹³⁹ of firearms accountable in this fashion for the dire consequences caused by their products, a new era of consumer protection would unfold. A manufacturer would no longer purposefully design a product meant to be ultrahazardous to both person and property, actively market it to general consumers for profit, and avoid responsibility for the damage it causes. Rather, as with other product manufacturers, firearm manufacturers would have to build into the product, or its distribution system, mechanisms to make the product safe for consumers, passive users, and especially innocent bystanders. If the product cannot be manufactured or marketed safely, the manufacturer would have to build such risk into the cost of the product. This would place the cost of injury, clearly anticipated by the manufacturers of ultrahazardous products, on the least cost avoiders—the manufacturers, distributors, and sellers of such products.¹⁴⁰

137. See *supra* notes 81-87 and accompanying text.

138. This term of art will be discussed in great detail below. See discussion *infra* Part II.C.4.a.

139. The term "manufacturer" refers to all parties in the chain of manufacturing and distribution.

140. The "least cost avoider" is the entity that avoids paying the lowest cost that would have prevented the harm at issue, forcing others to pay a higher cost to avoid or repair the

2. The historical development of California's consumer protection law supports ultrahazardous product liability

Support for the creation of UPL is found in the evolution of California's consumer protection jurisprudence, which has continuously sought to protect the innocent consumer and bystander from dangerous products. Beginning with the seminal case *Greenman v. Yuba Power Products, Inc.*,¹⁴¹ the California Supreme Court adopted the then revolutionary theory of strict products liability.¹⁴² In adopting this theory the court stated that it intended 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."¹⁴³

In *Cronin v. J.B.E. Olson Corp.*,¹⁴⁴ the California Supreme Court announced that a plaintiff in a strict products liability suit is not required to prove that the product was unreasonably dangerous, as the *Restatement* requires, but simply that the product contained a defect.¹⁴⁵ The court held that requiring a plaintiff to prove that a product was both unreasonably dangerous and defective was too great a burden.¹⁴⁶ Consequently, eliminating the "unreasonably dangerous" requirement removed a major hurdle which prevents plaintiffs from recovering altogether in other ju-

same harm. In the situation of a well-made firearm, the manufacturers are the least cost avoiders when it comes to preventing or repairing the massive damage that their products cause. They sell their products to the general consumer population at the cheapest possible prices with no marketing or distribution safeguards while the Legislature and the taxpayers are forced to expend tremendous amounts of capital in passing gun legislation and supporting hospitals that treat gunshot victims.

141. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

142. The California Supreme Court adopted this theory two years prior to its adoption by the *RESTATEMENT (SECOND) OF TORTS* (1965). See Mackarevich, *supra* note 25, at 479.

143. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

144. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

145. See *id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443. *Cronin* stated:

In summary, we have concluded that to require an injured plaintiff to prove not only that the product contained a defect but also that such defect made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated in *Greenman*. We believe the *Greenman* formulation is consonant with the rationale and development of products liability law in California because it provides a clear and simple test for determining whether the injured plaintiff is entitled to recovery. We are not persuaded to the contrary by the formulation of section 402A which inserts the factor of an "unreasonably dangerous" condition into the equation of products liability.

Id.

146. See *id.*

risdictions.¹⁴⁷

In *Barker v. Lull Engineering Co.*¹⁴⁸ the California Supreme Court continued its tradition of consumer protection by announcing that plaintiffs can use two different theories to prove design defect: consumer expectation and risk-utility.¹⁴⁹ Under the first theory, a plaintiff must only that the product at issue did not perform as an ordinary consumer would have expected.¹⁵⁰ Under the second theory, the plaintiff is only required to prove that the product design proximately caused the claimed injuries. Once this is established the burden shifts to the defendant to prove that the product's design was not defective.¹⁵¹ The defendant must then bear both the burden of proof and persuasion to show for any and all relevant balancing factors that the benefits of the product as a whole outweigh the danger inherent in its design.¹⁵² California pioneered this burden shifting risk-utility approach in *Barker* and remains one of the only jurisdictions that has adopted a two-test approach in design defect cases.¹⁵³

Other important consumer-oriented developments include the

147. See Allan E. Korpela, Annotation, *Products Liability: Product as Unreasonably Dangerous or Unsafe Under Doctrine of Strict Liability in Tort*, 54 A.L.R.3d 352, 356 (1973); see, e.g., *Kutzler v. AMF Harley Davidson*, 550 N.E.2d 1236, 1239 (Ill. App. Ct. 1990) (denying liability because motorcycle designed with extra wide gas tank and not equipped with crash bars was not "unreasonably dangerous"); *Brown v. Western Farmers Ass'n*, 521 P.2d 537, 541 (Or. 1974) (holding that purchasers who failed to allege fact showing that chicken feed was unreasonably dangerous could not recover under strict liability for lost profits); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 799 (Wis. 1975) (holding that complaint failed to state a cause of action since pool described in complaint did not contain an unreasonably dangerous defect).

148. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

149. *Id.* at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40. The court further held that a trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

Id. Addressing the burden of proof issue, the court held that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to defendant to prove, in light of the relevant factors[,] . . . that the product is not defective[,] . . . [and] defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence.

Id. at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.

150. See *id.*

151. See *id.*

152. See *supra* note 149 and accompanying text.

153. See *Mackarevich*, *supra* note 25, at 482.

following: (1) an auto manufacturer's engineering design must take into account that vehicles will collide, that vehicles must protect consumers from foreseeable crashes¹⁵⁴ and that high-speed collisions and some degree of consumer misuse are foreseeable,¹⁵⁵ (2) experts are not needed to prove a defect exists, especially where the defect is obvious to the general public,¹⁵⁶ and (3) the use of an expert witness does not invalidate the use of the consumer expectation test.¹⁵⁷

With regard to ultrahazardous activities, California courts have imposed liability without fault when a party's activities create such a serious risk of danger that it is justifiable to place liability of loss on the party engaging in those activities, regardless of the lack of culpability.¹⁵⁸ In applying this rule California courts hold that no matter how carefully a party acts, or how socially important the activity is, if the activity cannot be accomplished without serious risk of danger, the actor will be absolutely liable for any and all damages that occur.¹⁵⁹

While this brief history is by no means a complete reconstruction of California's development of consumer protection through strict products liability and ultrahazardous activity theories, it illustrates the essential point that California tort law has been a major proponent of consumer protection. California was the first jurisdiction to adopt strict products liability as a theory of recovery, and it is one of the few jurisdictions that rejects the more stringent requirement that a plaintiff prove that a product is unreasonably dangerous as well as defective. It is also one of the few jurisdictions to adopt a two-test approach to design defect cases and to use a burden-shifting approach under the risk-utility test.

Viewed as a whole, California's cutting-edge development of strict products liability and its adoption of liability for ultrahazardous activities has paved the way for the next evolutionary step in California law—the genesis of a new theory of recovery that would

154. See *Cronin*, 8 Cal. 3d at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

155. See *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 7, 116 Cal. Rptr. 575, 579 (1974).

156. See *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 124, 649 P.2d 224, 231, 184 Cal. Rptr. 891, 898 (1982) (noting that an expert is not needed, especially where the defect is obvious to the general public).

157. See *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 567 n.4, 882 P.2d 298, 308-09 n.4, 34 Cal. Rptr. 2d 607, 617-18 n.4 (1994).

158. See 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 1230 (9th ed. 1988).

159. See *Smith*, 247 Cal. App. 2d at 785, 56 Cal. Rptr. at 137.

protect consumers now suffering great loss and injury from ultrahazardous products. More specifically, the history of consumer protection in California naturally leads to the adoption of a theory of recovery aimed at protecting the many consumers and innocent bystanders that suffer tens of millions of dollars of damages each year from well-made firearms. Consequently, the creation of the theory of UPL, which will impose absolute liability on manufacturers for products that are extremely dangerous when properly consumed, is merited by the history and tradition of California's consumer protection law.

3. The elements of an ultrahazardous products liability case

To maintain a cause of action under the proposed theory of UPL, the plaintiff must establish each of the following four elements. The plaintiff bears the burden of proof on the first three elements, and once proven, the burden of proving the remaining element shifts to the defendant.¹⁶⁰ Only when the plaintiff satisfies the burden under the first three elements will the burden shift.

a. element one: the product is ultrahazardous

First, the plaintiff must show that the product in question was designed to be ultrahazardous when properly used and was ultrahazardous when properly used. This element delineates those products that fall within the purview of UPL and those that do not, targeting products that rise to the level of ultrahazardous under the theory of ultrahazardous activities. Included are products that create such a serious risk of danger through their intentionally designed use that it is justifiable to place liability for any loss caused by the product on the manufacturer.¹⁶¹ This does not include products that simply are dangerous when improperly used, or even dangerous when properly used. Rather, UPL targets products intentionally designed to be so dangerous that liability must be imposed upon the manufacturers when their intent is realized. In essence, this element seeks to separate products that are merely

160. *Cf. Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234 (1978) (holding that the burden shifts to the defendant to show that the product is not defective once plaintiff shows design of product was the cause of injury).

161. Realize that this focus on intentional design incorporates an element of culpability not required under the theory of ultrahazardous activities. Under the ultrahazardous activity cause of action, nonintentional conduct, like flying debris from blasting, can give rise to liability. See *McGrath v. Basich Bros. Constr. Co.*, 7 Cal. App. 573, 46 P.2d 981 (1935); *McKenna v. Pacific Elec. Ry.*, 104 Cal. App. 538, 286 P. 445 (1930).

dangerous from those that are designed to be ultrahazardous.

When determining whether a given product design is ultrahazardous the object of the inquiry will necessarily fall within one of four separate product categories. The first category is comprised of finished products used by the consumer in the same condition as when they left the manufacturer. The second category encompasses modified products which are a combination of one or more products. This category includes products that were ultrahazardous prior to their modification and those that were not ultrahazardous when produced but were designed to be modified into ultrahazardous products by a third party. The third category includes products with modifications designed solely to be used in conjunction with another product or products and that were designed to make such other products ultrahazardous. The final category includes products that were not designed as ultrahazardous but became ultrahazardous through the unforeseeable alteration of a third party.

Category one would result in liability. When dealing with categories two and three, the plaintiff must prove that the resulting modified product was designed to be ultrahazardous or that the product modification was designed to make another product ultrahazardous and that such modified product or product modification was ultrahazardous when used as intended. It is irrelevant that the modified product or the product modification was not ultrahazardous prior to modification. The final category, on the other hand, would create no liability for the manufacturer.¹⁶²

In recognizing that product modifications and modified products can be ultrahazardous, UPL can reach products that are not designed to be ultrahazardous in their own right but are designed to enhance the danger of another product or are designed to be made ultrahazardous through the addition of another product. Including these modified product categories in UPL prevents manufacturers from avoiding liability by breaking down their manufacturing process into distinct steps or from ending the manufacturing process "early" so that the consumer receives a product that is not originally ultrahazardous but that is intentionally designed to become ultrahazardous through a simple assembly or modification procedure. For example, one manufacturer only produces a gun housing while another manufacturer only produces

162. This category will be addressed below under the doctrine of abnormal alteration.

the automatic trigger system for that housing. Both independent parts were purchased separately by the consumer and were not ultrahazardous on their own, but were intended by the manufacturers to be assembled together by the consumer. In this example neither manufacturer produced an ultrahazardous product, but each produced a product that, when added to the other, created an ultrahazardous product.

Determining whether a product is ultrahazardous is the most fundamental element of the plaintiff's case and requires proof of two distinct characteristics: (1) it was ultrahazardous in its actual use; and (2) it was designed with the intent to be ultrahazardous in such use. To test for these two characteristics, the trier of fact must examine whether a reasonable bystander would perceive the product as ultrahazardous when used in an intended manner. When dealing with a product modification or product that was intended to be modified the trier of fact must examine whether a reasonable bystander would perceive the modified product as ultrahazardous under conditions of intended use.

When examining the sensibilities of the reasonable bystander, the trier of fact should not consider the sensibilities of an average user of the product at issue but the sensibilities of the average person who may encounter the intended use of the product.¹⁶³ The following factors should be considered in determining whether a product is ultrahazardous: (1) whether there is a high degree of risk of harm to person, land, or chattel in the product's designed use; (2) whether it is likely that the harm from the designed use of the product or modified product will be great; and (3) the inappropriateness of marketing the product or modified product to the general consumer public.¹⁶⁴ These factors focus on the product's actual ability to inflict serious or deadly injury, the intent of the product manufacturer that its product achieve such a result, and the marketing and sale of such product to an inappropriate consumer class. If the trier of fact cannot affirmatively answer all three of these questions, the product at issue does not fall within

163. In the assault weapon situation, this average bystander standard prevents the trier of fact from relying on the sensibilities of the average assault weapon owner, forcing it instead to rely on the sensibilities of the average person who may encounter the product as a victim nonuser. Most assault weapon owners would most likely find such a product useful and not extremely dangerous by virtue of their ownership and accompanying support of assault weapons.

164. These factors parallel those outlined under the *RESTATEMENT (SECOND) OF TORTS* § 520 (1965) for abnormally dangerous activities.

the purview of UPL, and the plaintiff's claim must fail.

However, if the trier of fact does answer these questions affirmatively, the product has risen to the level of ultrahazardous. The trier has effectively found that it creates such a serious risk of danger through its intentionally designed use that liability for any loss caused by the product may be justifiably imposed on the manufacturer.

i. element one applied to 101 California Street: the TEC-DC9 is ultrahazardous

The product in *101 California Street* certainly satisfies the first prong. The resulting harm from the designed use was great, and there was a high degree of risk of harm to person. The TEC-DC9, as modified and properly used, inflicted deadly injury when the consumer walked into the conference room and killed seven people and injured six others. It was also produced and modified with the intent to inflict such deadly injury. The pistol had an ammunition magazine capable of delivering thirty-two bullets without reloading, a Hell-Fire trigger system that allowed all thirty-two bullets to be emptied at a fully automatic rate, a shield to protect the gunman's hands from the extreme heat generated by rapidly discharging thirty-two bullets without pausing to reload, and a shoulder strap that allowed the weapon to swivel from the hip in order to spray fire at a series of targets. Finally, manufacturers of the TEC-DC9 and its product enhancements marketed their goods to the general consumer public. As it is only a slight modification of the TEC-9, an assault weapon designed for the South African military, the TEC-DC9 was and is inappropriate for civilian use. There is really no other purpose for a military assault weapon with the firepower and capabilities of the TEC-DC9 than to seriously injure or kill people. Consequently, the TEC-DC9 is ultrahazardous within the meaning of UPL.

b. element two: abnormal alteration

The second element of UPL requires that the ultrahazardous product or modification was not abnormally altered beyond what the product or modification manufacturer could have reasonably foreseen. If the product was modified such that it was not used in a contemplated fashion, element two is not met. This inquiry is designed to protect manufacturers who did not design products or product modifications that were ultrahazardous but that nonethe-

less have had their products or modifications brought within the purview of UPL because of the unforeseeable actions of another party. The doctrine of abnormal alteration protects manufacturers from liability and serves as an affirmative defense to a claim under UPL. If manufacturers do not intend their products to be ultrahazardous or to be modified into an ultrahazardous product by a third party, they should be shielded from liability under UPL. Consequently, UPL treats abnormal alteration much like the defense of unforeseeable misuse under existing theories of product liability.¹⁶⁵

While abnormal alteration is framed as its own element that must be proven in the plaintiff's case, it is actually a facet of the analysis under element one where the plaintiff must show that the defendant's product or modified product is ultrahazardous. Abnormal alteration is naturally the inverse of showing that a modified product was designed to be ultrahazardous. If a defendant can show that it originally created a "benign" product which was not ultrahazardous until it was unforeseeably altered by a third party, it has shown that it did not intend to design an ultrahazardous good. Accordingly, under this element the plaintiff must establish that there is either lack of abnormal alteration or that the alteration at issue is not abnormal because it was foreseeable to the manufacturer or possibly even intended. In contrast, defendants' arguments will employ varying forms of the same logic: Some third party unforeseeably altered the product such that the manufacturer's original design was transformed into an ultrahazardous product, defeating the manufacturer's intended design and creating an ultrahazardous alteration.

The purpose of utilizing a distinct element for the doctrine of abnormal alteration is twofold. First, separation facilitates an understanding of abnormal alteration's independent meaning as well as its relationship to the first element. Second, its separate treatment helps define the proper analytical framework which should be employed by the parties and the respective burdens each party

165. Under strict products liability the seller may assume that the product will be put to its intended use and is free from liability—either on negligence or strict liability theories—for unintended, unexpected, and abnormal use. Expressed in terms of causation, the alleged defect—in this case the ultrahazardous product—is not the proximate cause of the injury when the plaintiff has abnormally altered or otherwise misused the product. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965) (stating that liability may exist where the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold").

bears in establishing an ultrahazardous product and abnormal alteration, or lack thereof.

To determine abnormal alteration within the meaning of UPL, the trier of fact must examine whether the original product, the product modification, or the modified product was altered in a way that the product manufacturer or modification manufacturer could not have reasonably anticipated. In making this determination the trier of fact may consider the knowledge of the defendant manufacturer or the knowledge of defendant manufacturer's industry at large. As the average trier of fact may not be aware of the present state of the product industry's knowledge, such as what alterations and uses are foreseeable, this evidence will aid the trier of fact's decision.

The trier of fact could encounter three distinct types of abnormal alteration: (1) the underlying product itself was abnormally altered; (2) a modified product—a product that was modified with an aftermarket add-on—was abnormally altered; or (3) an after market add-on itself was abnormally altered and used with another product, making the modified product, as a whole, abnormally altered. In examining the first situation, the trier of fact looks to whether the alteration was reasonably foreseeable by the product manufacturer. If so, that manufacturer cannot use abnormal alteration as a defense. In the second and third situations, the trier of fact looks to the reasonable knowledge of both the product manufacturer and the add-on manufacturer. If either could have reasonably foreseen the alteration, such alteration was not abnormal, and the party that should have foreseen the change may not use the defense.¹⁶⁶

The purpose of a reasonable foreseeability standard is to avoid collusion between manufacturers and their consumers or the entities in the chain of sale and distribution. If the reasonable foreseeability standard were not used, manufacturers could evade UPL by designing a product that was not ultrahazardous when delivered but that was designed to be modified by a third party into an ultrahazardous product. This scenario resembles the example above where several manufacturers produce and market the different component parts of an assault weapon with the intent that

166. Note that even if abnormal alteration is established, it does not stand as a complete defense. Rather, as discussed below, the jury will use abnormal alteration in its causation analysis to determine if such alteration caused the harm or the product itself, despite the alteration, caused the harm.

the consumer will assemble them into a single product. As produced, the component parts are not ultrahazardous, but when assembled or altered they become an ultrahazardous product. It is this situation that the reasonable foreseeability test seeks to prevent.

i. element two applied to 101 California Street: there was no abnormal alteration

In *101 California Street*, there was no abnormal alteration of the original product, the product add-ons, or the modified product as a whole. The Hell-Fire trigger system was a simple spring mechanism designed to allow the TEC-DC9 to fire in a fully automatic fashion, and the USA magazine added a larger bullet reserve designed to fit the TEC-DC9. These modifications, designed for the TEC-DC9, were not unreasonably foreseeable; rather, they were specifically foreseen and intended by the add-on manufacturers.

c. element three: causation

The third element of UPL that the plaintiff must establish is the requisite causation—as with any claim in tort. For this element, the plaintiff must show that the ultrahazardous product was a substantial factor in causing the claimed damages. Similarly, the plaintiff must demonstrate the requisite proximate cause.

The test for causation is framed in terms of the ultrahazardous product. This means that the plaintiff will not reach this element if the product has not been found ultrahazardous. However, if the product has been found ultrahazardous, causation must still be established. Causation can be examined under two factual scenarios: (1) an ultrahazardous product that is not abnormally altered and (2) an ultrahazardous product that is abnormally altered. If the product is found ultrahazardous but not abnormally altered, it must be determined whether that product caused the harm at issue. If the product is found ultrahazardous and abnormally altered, it must be determined whether the product caused the harm despite the abnormal alteration or as a result of the abnormal alteration. If the harm was caused as a result of an abnormal alteration, there is no causation on the part of the manufacturer¹⁶⁷ and no liability under UPL. If, on the other hand, the harm would

167. This assumes the manufacturer did not make the abnormal alteration.

have occurred despite the abnormal alteration, the causal link exists. Of course, the jury may apportion causation between the abnormal alteration and the underlying product according to the evidence just as it would under existing tort law.

In the situation of well-made gun cases, proximate cause will no longer present the same thorny issue it did under traditional tort theories. In those traditional cases there was no proximate cause when a third party's intentional use of a firearm to shoot another was not foreseeable. However, a gun manufacturer within the purview of UPL cannot make such an argument. Because its well-made firearm is an ultrahazardous product, the trier of fact will have determined that the product was designed to inflict serious or deadly injury when properly used. This certainly precludes a finding that it was not foreseeable that the gun would be used to shoot another person. Consequently, proximate cause must, by definition, be decided in favor of a well-made gun plaintiff.

i. element three applied to 101 California Street: there is requisite causation

In *101 California Street* it is clear that the two TEC-DC9's used in the shooting were substantial factors in bringing about the deaths of the seven innocent victims. Ferri's semiautomatic TEC-DC9s allowed him to unload sixty-four rounds of ammunition in the Petit & Martin conference room without reloading. He did not have to be accurate in his targeting because the swing swivel and shoulder strap allowed him to spray fire from both weapons from his hip, covering every area of the room. In addition, the barrel shroud protected Ferri's hands from the extreme heat the weapons created so that he could continue to hold the products and fire their ammunition. Furthermore, the manufacturers of this weapon and its aftermarket enhancements certainly contemplated its use on other human beings. The TEC-DC9 was derived from a weapon produced specifically for the South African military where its intended use was in the battlefield. Consequently, the TEC-DC9s satisfy the requirements of cause in fact and proximate cause under UPL.

d. element four: general consumer marketing

Once the plaintiff establishes each of the first three elements, the burden shifts to the defendant to show that the ultrahazardous product was not marketed, sold, distributed, or otherwise ulti-

mately delivered to the general consumer public through ordinary consumer channels or that it was not reasonably foreseeable that the product would be ultimately delivered to the general consumer public.¹⁶⁸

If a member of the general consumer public has access to the product, a rebuttable presumption arises that the product was made available to the general consumer public at large. The defendant then bears the burden to rebut this presumption. If the defendant successfully rebuts this presumption, the plaintiff has failed to make a case under UPL. Such presumption is founded on the following premise: If a single member of the consumer public has access to the product at issue, so must the entire consumer public; if the entire consumer public has access to the product, it must have been marketed to general consumers.

The purpose of this fourth element is to remove parties from the purview of UPL who manufacture and sell ultrahazardous products to very specialized markets not intended for general consumer use. For example, a product that meets the requirements of prongs one through three but fails under prong four would be any type of ultrahazardous product sold exclusively to the United States military. In this situation the manufacturer did not seek to market an ultrahazardous product to general consumers. Instead, it placed the product into the hands of an entity trained to use it for military purposes. Removing the product from the general public's consumption eliminates the risk of harm targeted by UPL, and the doctrine should impose no liability.

Finally, even if the defendant cannot rebut the presumption of general consumer marketing, a defendant manufacturer will not be held liable under UPL if it can show that the product was used under legal privilege.¹⁶⁹ For example, UPL would not hold

168. *Cf. Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 435, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234 (1978) (holding that the burden shifts to the defendant to show that the product is not defective once plaintiff shows design of product was the cause of injury).

169. *See KEETON, supra* note 32, § 16.

"Privilege" is the modern term applied to those considerations which avoid liability where it might otherwise follow. As used in this text, it is applied to any circumstance justifying or excusing a prima facie tort, such as a battery, assault, or trespass; it signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff.

Id. (footnote omitted).

defendants liable for the use of an ultrahazardous product in self-defense¹⁷⁰ or in the rendition of law enforcement services. So long as the force used was appropriate based on the victim's reasonable apprehension of fear in the given situation, such force is permitted by law. As there would be no civil liability for battery or assault there should be no liability under UPL either. Since privileges are based on the idea that a person must be allowed a certain freedom in action "because his own interests, or those of the public, require it, and because social policy will be best served by permitting it,"¹⁷¹ they should extend to an attempted recovery under UPL. Otherwise, UPL would circumvent the law of privileges and thwart its underlying policy.

4. Scope of liability under UPL

If the plaintiff establishes the case in chief as defined above, the manufacturer, distributor, wholesaler, and retailer of any ultrahazardous product, as well as any other party in the chain of production, distribution, and sale, can be held liable under UPL.¹⁷²

When dealing with modified products, the scope of liability becomes slightly more complicated. If a modified product is found ultrahazardous, the manufacturers of both the modification and the unmodified product are jointly and severally liable. If the original product is not found ultrahazardous but the modified product is, the modification manufacturer is liable while the original manufacturer is not, unless the modification was reasonably foreseeable by the original manufacturer. If the modification was reasonably foreseeable, all parties in the chain of distribution and sale are jointly and severally liable to the extent that each party knew or should have known the modification was reasonably foreseeable.

When dealing with an abnormally altered product, the rules are the same as with modified products. If the product is altered in

170. *See id.* § 19. The privilege of self defense is now undisputed [] in the law of torts as well as in the criminal law. The privilege extends to the use of all reasonable force to prevent any threatened harmful or offensive bodily contact, or any confinement, whether intended or negligent. Since it originated as a defense, the burden is upon the defendant to establish the facts creating the privilege.

Id. (footnotes omitted).

171. *Id.* § 16.

172. These entities will be collectively referred to as "manufacturer."

a nonabnormal fashion, it is treated as a modified product and examined accordingly. If the product is abnormally altered, but the trier of fact determines that some or all of the harm complained of would have occurred despite the alteration, it is treated as a modified product and examined accordingly. However, if the product is abnormally altered and such alteration is the sole cause of the harm complained of, the manufacturer of the original product is not liable under UPL.

III. CONCLUSION

The end result of UPL is that those injured by certain well-made guns, either in their person or property, can recover from the various entities in the manufacturing and marketing enterprise. These entities can no longer sell and distribute their ultrahazardous products to the general public with impunity. They will be forced to bear responsibility for the harms caused by their products, just as all other manufacturers are.

Of course, as the new theory of recovery is set forth above, the trier of fact will ultimately determine which firearms are ultrahazardous. While it is clear that the assault weapons used in the *Petit & Martin* shooting certainly qualify, the issue is less clear when dealing with other guns, such as low volume handguns and low powered hunting rifles. It is not possible to define every situation that can arise under firearm violence. However, it is possible to carve out a general cause of action that, in theory, applies to those firearms and products that pose such a threat to the health and safety of our society that their social value, if any, is greatly outweighed. That theory is Ultrahazardous Products Liability, and its application is awaited.

