Manufacturers' Strict Liability for Injuries From a Well-Made Handgun

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Litigation ostensibly resolves conflicts regarding the individual rights and duties of the parties before the court. Judicial decisions, however, often affect more than an individual legal contest. The final decision in a case may establish precedent for future litigants in analogous situations. In some cases, the outcome contributes to a public policy dialogue on a particular issue or triggers major changes related to that policy issue. For example, displayed prominently near the mouth of many champagne bottles is a bold-print warning that advises the consumer to point the plastic cork stopper away from people when opening the bottle. Government regulators have not mandated the warning. Apparently, some vintners decided to stamp the warnings on their products soon after a


A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court. Id. at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.


3. Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose is to make a fair adjustment of the parties' conflicting claims. The twentieth century, however, has brought an increasing realization of the involvement of general societal interests in privately litigated disputes. Id. at 14-15.

4. See, e.g., Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). There, the United States Court of Appeals for the Eighth Circuit held that defendant automaker had a duty to design its car to protect occupants against unreasonable injury during a foreseeable accident. The decision in Larsen affected substantially the "intended use" doctrine, which provided that an automaker had no duty to plan for the consequences of an accident, because an automobile was not intended by the manufacturer to be in an accident. The Larsen "crashworthiness" doctrine became the majority rule, giving automakers an economic incentive to produce safer cars.


5. Telephone interview with Betsy Bradford, Acting Chief, Commodity Classification
consumer, blinded by a flying cork, sued a champagne producer.\(^6\) The appearance of champagne cork warnings,\(^7\) although not a major change in itself, illustrates how plaintiffs using the courts for personal redress can stimulate widespread changes in the marketplace.

Similar to the appearance of champagne cork warnings, gun control advocates, dismayed at the failure of legislatures to enact laws to stem handgun violence,\(^8\) hope to use the judicial forum to effect policy changes.\(^9\) These advocates are studying closely litigation in which plaintiffs seek to hold firearms manufacturers strictly liable for injuries resulting from handgun incidents. Handgun plaintiffs allege strict liability even when the weapons involved are "well-made" handguns that function perfectly and exhibit no hidden defects.\(^11\)

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6. Shuput v. Heublein, Inc., 511 F.2d 1104 (10th Cir. 1975) (applying Utah law). The plaintiff asserted, under a strict liability theory, that a champagne bottle without a warning was defective and unreasonably dangerous. The champagne producer contended, as a matter of law, that everybody knows confined carbonation can transform a bottle stopper into a harmful projectile. The trial court directed a verdict for the producer, but the United States Court of Appeals for the Tenth Circuit reversed, holding that a jury should decide whether the lack of a warning rendered the bottle unreasonably dangerous. Id.

7. See supra note 6 and accompanying text.


Plaintiffs pleading novel handgun claims in tort may encounter courts convinced that legislatures, not courts, should make policy determinations concerning firearms. See, e.g., Abernathy v. Schenley Industries, Inc., 420 F. Supp. 1, 5, aff'd, 556 F.2d 242 (4th Cir. 1976) (dismissing claim that whiskey distiller's failure to warn of inherent dangers of alcohol rendered whiskey defective) (legislature, not the court, is proper body to require warning labels); Knecht v. St. Mary's Hospital, 392 Pa. 75, 78, 140 A.2d 30, 32 (1958) (in refusing to abrogate tort immunity of charitable organization, court said issue "poses a question of public policy which falls peculiarly within the competence of the legislature"). But see Casrell v. Altec Industries, Inc., 335 So.2d 128, 133 (Ala. 1976) ("By extending the doctrine of manufacturer's liability, we are not invading the province of the Legislature. Developing case law is the proper role of this court, and that is what we are doing in this case.").


11. This Note will not address claims involving malfunctioning weapons. Many plaintiffs have won recoveries against manufacturers for injuries caused by firearms that failed to function as the manufacturer intended. See, e.g., Philippe v. Browning Arms Co., 375 So. 2d 151 (La. App. 1979), aff'd on rehearing, 395 So. 2d 310 (La. App. 1981) (plaintiff's thumb injured by weapon with malfunctioning safety). In product liability law, such flaws are la-
Most courts, applying traditional product liability law, would dismiss a strict liability claim against manufacturers of well-made firearms. Recent developments in a minority of jurisdictions, however, may assist handgun plaintiffs. Most notably, the 1978 California Supreme Court case of Barker v. Lull Engineering Co. rejected traditional product liability doctrines that limit strict liability recovery to situations in which products fail to meet the safety expectations of the ordinary consumer. In addition to a novel legal theory of risk-utility balancing, these developments give plaintiffs the tactical advantage of shifting the burden of proof to the defendant manufacturers. Under this approach, handgun plaintiffs may force firearms manufacturers to prove to a jury that a handgun’s benefits outweigh its risks of danger.

Extension of strict liability to manufacturers of well-made handguns would accomplish several goals. Most important from the perspective of the plaintiffs, the new theory would provide a previously untapped source of damage recovery. From the perspective


12. See infra notes 58-77 and accompanying text. Most jurisdictions would dismiss the handgun claim at the pleading stage.


14. The “deep pocket” of a firearms corporation supplies the only practical recovery source when a person shoots a member of his family. For example, a wounded sister who successfully sues her brother wins nothing if the parties share a common source of financial support. In incidents other than intra-family shootings, other sources of recovery may exist. Full redress, however, would depend on the personal wealth of the defendant or the existence and extent of applicable liability insurance.

Dean Prosser commented on the tendency of courts to shift the burden of loss to defendants with greater economic resources:

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. This is not so much a matter of their respective wealth, although certainly juries, and sometimes judges, are not indisposed to favor the poor against the rich. Rather, it is a matter of their capacity to absorb the loss or avoid it. The defendants in tort cases are to a large extent public utilities, industrial corporations, commercial enterprises, automobile owners, and others who by means of rates, prices, taxes, or insurance are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization. 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. Probably no small part of the general extension of tort law to permit more frequent recovery in recent years has been due to this attitude.
of public policy, forcing the gun manufacturer to pay\textsuperscript{16} for the damages caused by its product will provide an economic incentive to make the product safer.\textsuperscript{18} Whether the plaintiffs win or lose, gun control advocates have an ulterior goal. They hope that the cost of litigation and any resulting increased insurance costs will force firearms manufacturers to increase handgun prices. Ideally, increased prices will deter sales and help stem the proliferation of handguns, thus reducing handgun injuries and deaths.\textsuperscript{17}

The success of handgun plaintiffs in pleading this new theory could trigger changes that some might consider undesirable. For example, if additional safety features were required, the firing efficiency of weapons would be reduced,\textsuperscript{18} thus compromising the safety of a person using the weapon for personal protection. Less serious would be the inconvenience these safety features would im-

\textbf{W. Prosser, supra note 2, § 4, at 22 (footnotes omitted).}

\textbf{15.} Handgun plaintiffs currently are focusing their attack on manufacturers rather than gun dealers. One treatise lists public policies supporting such tactics:

(1) The manufacturer was in a peculiarly strategic position to promote safety in his products; (2) The manufacturer was often in the dominant economic position in the chain of production and distribution; (3) Imposing liability on the manufacturer corresponded to the growing practice for makers to indemnify or insure dealers who handled their products; (4) The manufacturer could anticipate some hazards and guard against the recurrence of others, as the public could not; (5) The cost of an injury and the loss of time or health could be insured by the manufacturer and distributed among the public as a cost of doing business.

\textbf{W. KIMBLE & R. LESHER, supra note 11, § 2, at 11.}

\textit{But see} Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91, cert. denied, 434 U.S. 835 (1977) (limiting liability to the immediate supplier for negligence \textit{per se} in violating a gun control statute).

\textbf{16.} \textit{W. Prosser, supra note 2, § 4, at 23.}

\textbf{17.} Applebome, \textit{supra} note 10, at 80. A handgun plaintiff's best chance for victory exists when the litigation involves a weapon with minimal utility. An inexpensive, inaccurate, small-caliber weapon that is virtually useless for hunting or target shooting possesses little utility for purposes other than use against human beings at close range. \textit{Id. See also Darts and Laurels, Colum. Journalism Rev., Jan.-Feb. 1982, at 22 (citing investigative series in Cox Newspapers, Sept. 6-11, 1981) (giving statistical evidence of disproportionate criminal use of short-range, inaccurate handguns labeled as “snubbies” because of their short barrels).} If strict liability recovery is limited initially to such inexpensive handguns, the resulting price escalation will affect only those weapons. The price differential, therefore, will narrow between the inexpensive snubbies and larger handguns. Eventually, the cheap handgun will cease to exist, and consumers who wish to purchase snubbies will have to pay almost as much as they would for a more substantial firearm.

\textbf{18.} \textit{See infra} note 194.
pose on hunters or target shooters. Additionally, handgun price escalation, whether caused by litigation, increased insurance costs, or radical design modification, would make future handgun ownership a function of personal wealth.

The pending litigation over firearms manufacturers’ strict liability has attracted national attention. This Note will examine the novel risk-utility balancing approach developed by some courts in design defect strict product liability actions. In examining this theory, the Note explains the unavailability of negligent entrustment theories and the obstacles attending traditional strict liability doctrines for handgun plaintiffs. Finally, the Note evaluates the risk-utility balancing approach in the firearms context and concludes that despite some obstacles, handgun plaintiffs may prevail against handgun manufacturers in limited circumstances.

**TRADITIONAL APPROACHES**

*Inadequacy of the Negligent Entrustment Theory*

Recent commentary suggests that a negligence theory can assist plaintiffs in handgun litigation. Alluding to section 390 of the Restatement (Second) of Torts, one commentator asserts that plaintiffs can establish negligence by showing that a firearms manufacturer failed to prevent distribution of the weapons to “obviously irresponsible” persons, such as those with criminal intent. Although current law rejects this theory, an analysis of the unavailability of the negligent entrustment theory will aid in understanding the handgun plaintiff’s situation.

Section 390 and related sections of the Restatement describe a

20. Podgers, supra note 9, at 5; Speiser, Disarming the Handgun Problem by Directly Suing Arms Makers, 11 Nat’l L.J. 29, 30 (1981).

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and 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.

Id.

22. Speiser, supra note 20, at 29.
23. E.g., RESTATEMENT (SECOND) OF TORTS § 308 (1965):
cause of action known as negligent entrustment.\textsuperscript{24} Under this theory, a plaintiff alleges that he was injured because the defendant supplied an object to a third person with actual or constructive knowledge that the person might use the object in a manner involving an unreasonable risk of physical harm to the plaintiff or others. For example, plaintiffs injured by individuals who have misused alcoholic beverages have prevailed on the negligent entrustment theory.\textsuperscript{25} Additionally, plaintiffs have used the negligent entrustment theory to allege that defendants negligently sold\textsuperscript{26} or loaned\textsuperscript{27} firearms or weapon-like toys to incompetent persons.

As in all negligence actions, the defendant's conduct is the vital element of the cause of action.\textsuperscript{28} In firearms entrustment actions plaintiffs allege improper conduct, not in the design or manufacture of the device, but in its distribution. In determining a defendant's culpability, courts invariably demand a showing that the defendant possessed actual or constructive knowledge that the person acquiring the device could not be trusted with it.\textsuperscript{29} Under

\textsuperscript{24} W. PROSSER, supra note 2, § 104, at 678-79.
\textsuperscript{27} See, e.g., Stephan v. Marlin Firearms Co., 353 F.2d 819 (2d Cir. 1965); Pepper v. Hoffecker, 56 Del. 162, 192 A.2d 213 (1963).
\textsuperscript{28} W. PROSSER, supra note 2, § 30, at 143.
\textsuperscript{29} Stephan v. Marlin Firearms Co., 353 F.2d 819 (2d Cir. 1965) (15-year-old boy shot hunting companion; adult who gave gun to boy and dealer who sold gun to adult with knowledge of boy's subsequent use were not negligent because neither knew of boy's carelessness); Hetherton v. Sears, Roebuck & Co., 445 F. Supp. 294 (D. Del. 1978), rev'd on other grounds, 593 F.2d 526 (3d Cir. 1979) (defendant lacked actual knowledge of gun pur- chaser's criminal record; no recovery on entrustment theory); Semeniuk v. Chentis, 1 Ill. App. 2d 508, 117 N.E.2d 883 (1954) (complaint stated cause of action where seller had actual knowledge that adult was buying air rifle for 7-year-old who lacked appreciation of danger); Sabatinelli v. Butler, 363 Mass. 565, 296 N.E.2d 190 (1973) (father who permitted 20-year-old son to have gun not negligent when no evidence that father knew or should have known of son's propensity to misuse weapon; knowledge of son's psychiatric and drinking
section 390 of the Restatement, the plaintiff must show that the defendant knew or had reason to know of the acquiring party's incompetence.\textsuperscript{30} Firearms plaintiffs have been unsuccessful in asserting negligent entrustment because they are unable to bear this burden.

\textit{Hetherton v. Sears, Roebuck & Co.}\textsuperscript{31} demonstrates the typical judicial response to a negligent entrustment claim against a firearms supplier. In \textit{Hetherton}, a gun customer lied to a salesman by asserting that he was not a felon.\textsuperscript{32} Under Delaware law, felony status precludes a person from purchasing or owning a deadly weapon.\textsuperscript{33} Additionally, Delaware, like many states,\textsuperscript{34} requires firearms vendors to subject prospective purchasers to a rigid identification procedure.\textsuperscript{35} The salesman in \textit{Hetherton} failed to follow the required procedure.\textsuperscript{36} The felon bought a rifle and subsequently

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\textsuperscript{30} See \textit{RESTATEMENT (SECOND) OF TORTS} \S 390 (1965).

\textsuperscript{31} 445 F. Supp. at 296 n.1. The buyer declared on a required federal firearms form that he was not a felon. He later was convicted on a charge of knowingly making a false statement on the required form.

\textsuperscript{32} DEL. \textit{CODE ANN.} tit. 11, \S 1448 (1974).

\textsuperscript{33} See, \textit{e.g.}, \textit{MD. ANN. CODE} art. 27, \S 442 (1982); \textit{N.C. GEN. STAT.} \S 14-402 to -406 (1981).

\textsuperscript{34} DEL. \textit{CODE ANN.} tit. 24, \S 904 (1974). The statute requires a seller to record the names of two freeholders who reside in the state in which the purchase is attempted and who can verify the identity of the prospective purchaser.

\textsuperscript{35} 445 F. Supp. at 296. The seller merely asked the customer to display a driver's license
used it to wound the plaintiff.

In his first count, the plaintiff pleaded that the salesman negligently entrusted the rifle to the purchaser by failing to use reasonable caution in determining whether the purchaser was permitted statutorily to own a firearm. In two other counts, the plaintiff alleged that the salesman's failure to comply with the state identification procedure and a corresponding federal statute constituted negligence per se.

The trial court granted the defendant summary judgment on all three counts. As to the negligent entrustment count, the trial court concluded that the common law should not be extended to impose a duty on the firearms dealer to investigate the truthfulness of a purchaser's statement absent some knowledge or reason to believe that the purchaser was likely to misuse the firearm. Regarding

37. Id.
38. See supra note 35.
39. Gun Control Act of 1968, 18 U.S.C. § 922(b)(2) (1976). The statute forbids a firearms supplier from selling a weapon unless he knows or has reasonable cause to believe that the sale will not violate state law. Id. In Hetherton, the applicable state law prohibited the sale of deadly weapons to felons. 445 F. Supp. at 296 n.4 (applying Del. Code Ann. tit. 11, § 1448 (1974)).
40. Dean Prosser discussed negligence per se as follows:

   Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature. . . . The effect of such a rule is to stamp the defendant's conduct as negligence, with all the effects of common law negligence, but with no greater effect. There will still remain open such questions as the causal relation between the violation and the harm to the plaintiff, and, in the ordinary case, the defenses of contributory negligence, and assumption of the risk.

W. Prosser, supra note 2, § 36, at 200.
41. 445 F. Supp. at 305. Testimony revealed that one telephone call to local police would have exposed the customer's felony record. Id. at 304 n.26. The court reasoned, however, that the possible sources of information a seller theoretically could check are numerous.

Federal and state laws specify other disabilities that legally preclude firearm ownership in addition to felon status. These disabilities include drug addiction, illegal alienage, felony indictment, and a history of mental institution commitments. See Gun Control Act of 1968, 18 U.S.C. § 922(b)(3), (d) (1976); Del. Code Ann. tit. 11, § 1448 (1974). The court noted that the plaintiff had not suggested how many verification checks would constitute reasonable caution. 445 F. Supp. at 305 n.27.
the other two counts, the trial court conceded that violation of the two statutes was negligence per se, but held as a matter of law that the plaintiff had not established sufficient causation between the statutory violations and the injury.42

On appeal, the United States Court of Appeals for the Third Circuit affirmed the trial court's holding on the negligent entrustment count,43 but reversed the grant of summary judgment on the other two counts.44 Emphasizing that the purpose of the Delaware and federal statutes was to prevent criminals from obtaining weapons,45 the court held that whether the statutory violations proximately caused plaintiff's injuries was a jury question46 and remanded the case for such a determination.47

The court in Hetherton relied on both state and federal gun regulation statutes to reach its final decision. The Gun Control Act of 196848 established a nationwide standard for suppliers to follow to prevent gun procurement by felons, fugitives, felony indictees, drug users, dishonorably discharged veterans, the mentally ill, and the mentally incompetent. State statutes supplement the federal effort.49 Violations of these statutes by gun sellers can establish a

42. 445 F. Supp. at 298.
43. 593 F.2d at 531.
44. Id. at 532.
45. The trial court accepted the defendant's argument on the purpose of Delaware's "two freeholder" identification procedure. See supra note 35. The purpose was to verify the identity of the prospective buyer, not to reveal any felony record. 445 F. Supp. at 298. The Third Circuit disagreed, holding that the Delaware Legislature imposed the additional identification procedure to make the purchase of weapons more difficult for felons. "Compliance with the statute would have prevented consummation of the sale at least at that time because [the purchaser] was not accompanied by two freeholders." 593 F.2d at 531.
46. 593 F.2d at 531.
47. Id. at 532.
plaintiff’s cause of action, as in Hetherton, under a negligence per se theory. Commentators conclude, however, that the significant number of handgun injuries demands that courts require a higher standard of care than that set by the statutes. Using a negligent entrustment theory, the commentators propose an expansion of the “reason to know” prong of section 390 of the Restatement, thereby creating an extensive duty to investigate the background of prospective gun purchasers.

Commentators urge such an expansion of the standard because the pre-transaction procedures mandated by gun control statutes do not detect all “obviously irresponsible” persons. The procedures formulated to keep felons from purchasing firearms will not prevent nonfelons from buying guns on behalf of felons. Nor will the procedures affect gun purchasers with clean records who intend to use the weapons to commit their first crimes. Similarly, emotionally disturbed individuals without a history of judicial

delay between customer application and completion of transaction). But see Va. Code § 15.1-524 (1981). Virginia has a minimal gun control scheme, giving Virginia counties power to require handgun sellers to record purchaser information after the sale and transmit information to the circuit court clerk. Id.


51. See, e.g., Speiser, supra note 20, at 29. The same courts that refuse to apply a higher standard of care also acknowledge the probable need for such a higher standard in many situations. See 593 F.2d at 532.

52. See supra note 21.

53. One commentator uses this phrase to describe the type of person that gun sellers should detect under an expanded duty to investigate. See Speiser, supra note 20, at 29. Additionally, Speiser has suggested that handgun manufacturers could devise computerized systems to supplement statutory identity verifications of prospective gun buyers. Such a computerized system could be similar to the system used by many supermarket chains that have collaborated with food producers to devise a system of label codes that facilitates shopper transactions and inventory. See id.

Another commentator cited Moning v. Alfonso, 400 Mich. 425, 254 N.W.2d 759 (1977), in proposing that gun manufacturers be liable for failure to implement distribution controls. See Podgers, supra note 9, at 7. In Moning, the court held that a jury should decide whether a slingshot manufacturer had created an unreasonable risk of harm in marketing its products directly to children. 400 Mich. at 434, 254 N.W.2d at 763. The decision in Moning, however, is not precedent for an expansion of a supplier’s duty to investigate. Because the slingshot purchasers were children, the supplier had actual knowledge of the buyers’ incompetence. When a 10-year-old boy attempts to buy a dangerous toy, the supplier need not investigate to determine whether the customer is youthful. The situation is not analogous to the sale of firearms to adults, because adults generally display no outward signs that they are unfit to own weapons.
commitment can purchase firearms despite statutes precluding the mentally ill from gun ownership. Thus, the statutory schemes fail to achieve their purpose of preventing those whom the law has termed incompetent from obtaining firearms.

Congress and the state legislatures, by enacting gun control statutes, have provided courts with a convenient standard of care. Rather than articulate a proper and more realistic standard, the courts use the statutory standards to circumscribe a gun supplier's duty to investigate. If a gun supplier complies with the applicable regulations prior to selling a weapon, and such compliance does not result in a discovery that the gun customer is precluded statutorily from purchasing a gun, courts usually conclude that the supplier's investigation was sufficient and precludes liability. Upon compliance with the statute, the supplier has done enough; he has no "reason to know" that the customer is unfit to own a firearm.

Despite recognition by both courts and commentators that the statutory standard of care is inadequate, courts are unwilling to alter this approach. Whether out of deference to the legislature or because of convenience and simplicity in application, courts continue to emphasize compliance only with state and federal gun control laws. Thus, gun control advocates should abandon efforts

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54. Although states maintain records of judicial commitments, privacy statutes could limit disclosure of those records. Additionally, the records do not include names of persons who commit themselves voluntarily. Finally, many persons without histories of commitments nevertheless suffer severe emotional illness.

55. See Restatement (Second) of Torts § 390 (1965).


A Florida jury recently awarded an injured police officer $1 million on a statutory violation claim. A gun supplier sold a rifle to a person under felony indictment, which is a disa-
to use a negligent entrustment theory against handgun manufacturers because establishing liability under such a theory requires the plaintiff to prove that a supplier had actual or constructive knowledge of the buyer's incompetence. Because a gun customer's appearance may not betray his motives, background, or competence with weaponry, a gun supplier usually has no actual knowledge of the customer's irresponsibility. Under the constructive knowledge prong of negligent entrustment, statutory and practical considerations limit a supplier's duty to investigate. Considering the unlikelihood of holding a seller or supplier liable for negligent entrustment, the chances of reaching a manufacturer, who is further removed from the transaction, are even more remote. Therefore, alleging manufacturer negligence in the distribution of handguns provides no realistic possibility of recovery for injuries from well-made guns. The handgun plaintiffs should concentrate instead on the deficiencies of the product design.

*Traditional Strict Liability and the Consumer Expectation Test*

Plaintiffs in recent products liability actions increasingly bypass negligence theories and plead strict liability. Unlike negligence, which concentrates on the reasonableness of a supplier's conduct, strict liability stresses the condition of the product itself. Strict liability theories give plaintiffs tremendous tactical advantages and allow them greater chances for victory.

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57. **Restatement (Second) of Torts** § 390 (1965).
   The cause of action covered by the term "strict liability in tort" is designed to relieve the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability.

59. *See W. Kimele & R. Lesher, supra* note 11, § 77.
   In product liability, proof is the Achilles' Heel of the negligence action. With its range of possible plaintiffs unlimited by doctrines of privity, the negligence action would provide all the remedy that considerations of public policy require, were it not for the need for and difficulty of proving the manufacturer's or seller's negligence. To prove a product defective is one thing; to prove that
Strict liability gained credence in 1963 with the California Supreme Court's decision in *Greenman v. Yuba Power Products, Inc.* The plaintiff in *Greenman* was injured by a piece of wood ejected from a lathe. At issue were whether the manufacturer negligently constructed the lathe and whether the manufacturer violated an express warranty in marketing a product that did not perform as advertised. Writing for the court, Justice Traynor held that the plaintiff need not conform his claim to traditional theories of negligence or warranty: a manufacturer is strictly liable in tort if its product causes injury.\(^\text{61}\)

Contemporaneous with the *Greenman* decision, the American Law Institute (ALI) debated a proposed section to the Restatement of Torts addressing the strict liability concept.\(^\text{62}\) The ALI issued the final draft of Restatement (Second) of Torts section 402A\(^\text{63}\) two years after *Greenman*. Section 402A and *Greenman* revolutionized product liability law by conditioning liability, not on the supplier's degree of reasonable care, but on the actual con-

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the defect flowed from a failure to exercise reasonable care is quite another. The one does not "prove" the other; even the most careful manufacturer may produce a defective product. The injured plaintiff, therefore, is faced with the requirement that he prove both a standard of care in an industry or business of which he may know nothing, and the departure from that standard which may be equally mysterious.

*Id.*


61. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.


63. See *RESTATEMENT (SECOND) OF TORTS* § 402A (1965).

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*
A plaintiff no longer had to prove that a supplier negligently produced a product. Under strict liability theory, the mere deficiency of a product proved the plaintiff's case.

Although similar, *Greenman* and section 402A do not describe an identical cause of action. *Greenman* suggests unconditional manufacturer's liability upon proof of a product-related injury. Section 402A, however, requires proof that the product when purchased was "in a defective condition unreasonably dangerous." Courts have used the Restatement's definitions of "defective condition" and "unreasonably dangerous" to temper the revolutionary aspects of the strict liability concept. Commentators and courts have agonized over the two definitions because of their internal inconsistencies. Most authorities agree that the definitions outline a liability-limiting device known as the consumer expectation test. The consumer expectation test may be summarized as follows: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."
Seventeen years after the adoption of section 402A, plaintiffs seeking compensation for injuries inflicted by well-made handguns are attempting to establish causes of action in strict liability for defective design. These plaintiffs will be unsuccessful in most courts because a majority of jurisdictions follow some variation of section 402A and the consumer expectation test. Thus, in most jurisdictions, a well-made handgun cannot form the basis for a strict liability claim because the weapon does not contain dangers unanticipated by the ordinary consumer. The inherent dangers of a handgun are common knowledge; therefore, a handgun that is flawlessly manufactured and contains no hidden design defects passes the consumer expectation test and cannot be considered "unreasonably dangerous." In an analogous context, tobacco manufacturers have used the consumer expectation test to escape

Id.

Some courts have interpreted the references to whiskey, tobacco, and butter in comment i of § 402A to mean that the entire comment deals solely with household substances that usually present a risk only from excessive consumption. See, e.g., Knitz v. Minster Machine Co., 69 Ohio St. 2d 460, 464 n.2, 432 N.E.2d 814, 817 n.2 (1982). This argument supports the view that the "unreasonably dangerous" component of § 402A has no independent significance in determining whether strict liability should apply in a product case. See infra notes 86-94 and accompanying text. According to the prevailing view, however, comment i embraces all products. See J. BEASLY, supra note 68, at 72-76.

72. Typical plaintiffs include: the survivors of a child who shot himself while playing unattended with a handgun; an adolescent boy paralyzed by a fellow student's handgun that discharged in a school parking lot; and persons or the survivors of persons shot intentionally by criminals. See Wolf v. Colt Indus., No. 81-11899-6 (Dallas County, Tex., 134th D.) (set for trial June 20, 1983) (survivors of a child); Clancy v. Zale Corp., No. 81-11097-D (Dallas County, Tex., 95th D.) (set for trial Apr. 9, 1983) (a boy paralyzed); Patterson v. Rohn Gesellschaft, No. CA3-81-1006-R (N.D. Tex. filed Sept. 1981) (survivors of criminal shooting victim). See also Applebome, supra note 10, at 79-80; Newsweek Magazine, Aug. 2, 1982, at 42.

73. Strict liability for product defect embraces both manufacturing defects and design defects. See W. KIMBLE & R. LESHER, supra note 11, chs. 8, 9. When a product does not perform to the manufacturer's specifications and results in injury, the plaintiff alleges a manufacturing defect. Id. Handgun plaintiffs currently seek compensation for products that function as designed; therefore, these plaintiffs must prove that the design itself is inadequate.

74. Most jurisdictions follow § 402A's formulation of "defective condition unreasonably dangerous." Id. § 2 n.41.

75. Comment i to the RESTATEMENT (SECOND) OF TORTS § 402A (1965), provides in pertinent part: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Id. at 352.

76. See supra note 71 and accompanying text.
liability for cancers resulting from their products’ use because the community in general is aware of the dangers of cigarette smoking.\textsuperscript{77} Similarly, firearms manufacturers should escape liability because of the common perception that handguns are dangerous.

In the minority of jurisdictions that reject the consumer expectation test, handgun plaintiffs have a viable chance for success. In those jurisdictions, general community perceptions concerning handguns will not necessarily dispose of the liability question as they would under the majority consumer expectation test. Handgun plaintiffs have a better chance for recovery in jurisdictions adopting the risk-utility balancing approach pioneered by the California courts.

**The New Approach: Jury Balancing of Product Design’s Risk and Utility**

*Barker v. Lull Engineering Co.*

Much of the recent effort to affect handgun policy issues in the judicial forum\textsuperscript{78} stems from the California Supreme Court’s holding in *Barker v. Lull Engineering Co.*\textsuperscript{79} The court in *Barker* utilized a risk-utility balancing test for determining product defectiveness.\textsuperscript{80} Using an unprecedented approach, the court held that once the plaintiff established a prima facie case of causation, the burden of proof shifted to the defendant to show that the design’s utility outweighs its risk.\textsuperscript{81}

In *Barker*, the plaintiff, Ray Barker, was operating a loader to move lumber to the second floor of a building under construction. After parking the loader on a steep slope below the building and

\textsuperscript{77} Government regulation has insulated tobacco manufacturers from strict liability even further by requiring them to post health warnings on cigarette packages. Section 402A’s comment j states that, to prevent a product from being unreasonably dangerous, a seller may be required to give consumers an adequate warning. *Restatement (Second) of Torts*, § 402A, comment j (1965). Cigarettes, therefore, are insulated even from the comment j exception. See R. Epstein, *supra* note 64, ch. 8; Darling, *The Patent Danger Rule: An Analysis and A Survey of its Validity*, 29 MERCER L. REV. 583 (1978).


\textsuperscript{79} 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

\textsuperscript{80} *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. For examples of California lower court decisions that previously had used the risk-utility balancing test, see *infra* note 96.

\textsuperscript{81} *Id.* at 432-33, 573 P.2d at 455, 143 Cal. Rptr. at 237.
beginning to lift the lumber, Barker felt the load shift. He leaped from the machine, and a piece of lumber fell from the machine and seriously injured him.82

Barker sued the machine’s manufacturer on a strict liability theory. He contended that one or more design defects caused the accident.83 The manufacturer claimed that the machine was not defective and that Barker’s inexperience in operating the machine was the proximate cause of the accident.84 After the trial court instructed the jury that it would have to find the machine “unreasonably dangerous” for Barker to recover, the jury returned a verdict in favor of the manufacturer.

On appeal, the California Supreme Court held the trial court’s jury instruction erroneous.85 Citing California precedent,86 the court stressed its past “disagreement with the restrictive implications of the Restatement formulation”87 of the consumer expectation test88 on which the trial court based its instruction. The court noted that the Restatement definition of “unreasonably dangerous”89 shields a defendant from liability so long as a product does not fall below the ordinary consumer’s expectations as to the product’s safety.90 Recalling the rationale of Cronin v. J.B.E. Olson Corp.,91 the court concluded that adherence to a consumer expectation test as a ceiling on manufacturer’s liability would prevent

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82. Id. at 419, 573 P.2d at 447, 143 Cal. Rptr. at 229.
83. Id. at 420-21, 573 P.2d at 447-48, 143 Cal. Rptr. at 229-30.
84. Id. at 422, 573 P.2d at 449, 143 Cal. Rptr. at 231.
85. Id. at 426, 573 P.2d at 452, 143 Cal. Rptr. at 234.
87. 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.
88. RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965).
89. See supra note 71 and accompanying text.
90. 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233. The court stated that under California law, ordinary consumer expectations establish a floor on manufacturers’ responsibility, whereas the Restatement treats expectations as a ceiling. Id. at n.7. Consumers under California law can assume that the products they buy will be at least as safe as they expect. Under the Restatement approach, a manufacturer producing a product no safer than what the ordinary consumer expected will not be liable.
91. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In Cronin, the court stated that the Restatement’s imposition of a dual burden of showing defectiveness and unreasonable danger does not apply in actions alleging strict liability for design. Id.
"another Greenman"\textsuperscript{92} from recovering in a strict liability case.\textsuperscript{93} The lower court's rationale would subvert the decision in Greenman by enabling a manufacturer of relatively dangerous products to shield itself from liability by showing that an ordinary consumer would have contemplated the risk of danger from the product at issue.\textsuperscript{94} Thus, under Barker, the consumer expectation test is useful only in determining that a product is so defective that it does not meet even ordinary expectations.\textsuperscript{95}

The more controversial aspect of Barker addresses products that arguably are not defective. Regarding marginally defective products, the California Supreme Court ratified the use of a risk-utility balancing test by lower courts in determining a product's defectiveness.\textsuperscript{96} The risk-utility test embodies Professor John Wade's contention\textsuperscript{97} that the expectations of the ordinary consumer cannot

\begin{itemize}
\item \textsuperscript{92} The court used the plaintiff in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), as a prototypical strict liability plaintiff.
\item \textsuperscript{93} 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.
\item \textsuperscript{94} For example, a lathe, the product at issue in Greenman, generally is considered a dangerous product. Although the decision in Greenman, which antedated § 402A by two years, influenced the drafters of § 402A, the section's final version contained the liability-limiting device of comment i. See Wade, \textit{On Product "Design Defects" and Their Accountability}, 33 VAND. L. REV. 551 (1980). This device requires a plaintiff to show not only that the product at issue was defective, but also that it was unreasonably dangerous. See supra note 71 and accompanying text.
\item \textsuperscript{95} In Cronin, the California Supreme Court declared that Greenman still was good law: [T]o require an injured plaintiff to prove not only that the product contained a defect but also that such a 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 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.
\item \textsuperscript{8} 20 Cal. 3d at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443.
\item \textsuperscript{97} Wade, \textit{supra} note 69, at 829.
\end{itemize}
serve as the exclusive yardstick for measuring design defectiveness.\textsuperscript{98} Although cautioning that no single definition of defective design can encompass every conceivable situation,\textsuperscript{99} the court presented a definition applicable to the facts in \textit{Barker}:

[I]n design defect cases, a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves 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) the plaintiff proves that the product’s design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.\textsuperscript{100}

Reviewing previous California decisions,\textsuperscript{101} the court outlined some “relevant factors”\textsuperscript{102} that the jury could consider in assessing whether the product’s design utility outweighs its risk of danger. These factors included “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 consumer that would result from an alternative design.”\textsuperscript{103}

The court’s use of the risk-utility balancing test in \textit{Barker} was not, in itself, a dramatic development, because lower courts in California already had formulated a risk-utility test in similar litigation.\textsuperscript{104} The innovation in \textit{Barker} was shifting the burden of proof

\textsuperscript{98} 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.
\textsuperscript{99} Id. at 429-30, 573 P.2d at 454-55, 143 Cal. Rptr. at 235-36.
\textsuperscript{100} Id. at 429, 573 P.2d at 453, 143 Cal. Rptr. at 234.
\textsuperscript{102} 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
\textsuperscript{103} Id.
\textsuperscript{104} See supra notes 96 & 101.
to the defendant under the test. The court noted that "a manufacturer who seeks to escape liability for an injury proximately caused by its product's design . . . should bear the burden of persuading the trier of fact that its product should not be judged defective." Once the plaintiff establishes that the product design proximately caused the injury of which he complains, the burden shifts to the defendant manufacturer who must convince the jury that the benefits of his product's design outweigh the design's risk of danger. If the jury decides that the risk outweighs the benefits, the design is defective and the manufacturer is strictly liable for all physical injuries caused by the design.

Barker and its Legacy of Confusion

Courts in other jurisdictions rapidly have recognized the innovative combination in Barker of a risk-utility test and a defendant burden of proof under that test. Alaska, Ohio, and Florida have adopted the Barker approach either expressly or im-

105. The court in Barker explicitly stated that its central holding involved burden of proof. 20 Cal. 2d at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237. See R. Epstein, supra note 64, at 82; Wade, supra note 94, at 573.

106. 20 Cal. 3d at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237. The court noted that one of the principal purposes for the use of strict liability in products liability actions is to relieve plaintiffs of the evidentiary burdens inherent in a negligence cause of action. Id. See supra notes 62-64 and accompanying text.

107. The court in Barker stated that "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger.'" 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (emphasis added). One commentator, incensed at the Barker decision, noted that the hindsight evaluation of a product design "further turns the screw against product manufacturers." R. Epstein, supra note 64, at 82 (footnote omitted). "The Barker decision makes virtually any product-related injury the proper subject for a lawsuit, in a stunning reversal of the historical presumption that tort recovery is the exception rather than the rule." Id. The controversy spawned by Barker underlies the enthusiasm shown recently by plaintiffs claiming that well-made handguns are defective. The risk-utility jury balance outlined in Barker and similar holdings in other jurisdictions promise chances for success on claims previously thought to be unrecoverable.

108. For a criticism of Barker, see R. Epstein, supra note 64, at 82.


strict liability of handgun manufacturers

87. Courts in Colorado, West Virginia, Washington, and Kansas, however, have rejected the approach in Barker.

Some states, without mentioning Barker, follow some aspects of the case. New York and Texas, for example, use variations of the risk-utility test but retain the requirement that a plaintiff prove a product unreasonably dangerous before it can be found defective, a requirement that California rejected. Other states, such as Pennsylvania, imitate Barker's rejection of the unrea-

116. Robinson v. Reed-Prentice Division of Package Machinery Co., 49 N.Y.2d 440, 426 N.Y.S.2d 717 (1980). The court of appeals described a defective product as "one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous; one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce." Id. at 479, 403 N.E.2d at 443, 426 N.Y.S.2d at 720 (emphasis added).
117. Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979). The court in Turner followed an approach between the Restatement formulation and a risk-utility balancing test. The court defined a defective product as one that is "unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." Id. at 847 n.1. In putting the "unreasonably dangerous" determination to the jury, the trial judge should neither define the concept according to the comment i consumer expectation test, nor explicitly outline the various risk-utility factors to the jury. Such factors, the court noted, involve a balancing that is implicit in the determination of unreasonable danger. Id. at 851.

The approach in Turner probably is closer to the Wade-Keeton negligence equivalency test than to the approach in Barker. In the Wade-Keeton test, constructive knowledge of a design defect is imparted to a manufacturer who arguably may not have been aware of the defect when he placed the product on the market. Given this constructive knowledge, a jury then decides whether the manufacturer was prudent in marketing the product. The court uses various risk-utility factors in deciding whether the plaintiff has established a case sufficient to reach the jury. Unlike the approach in Barker, the judge does not instruct the jury explicitly concerning the relevant risk-utility factors. See Keeton, Manufacturers' Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559 (1969); Wade, supra note 69, at 837-38; Wade, Strict Tort Liability of Manufacturers, 19 SW. L. J. 5, 17 (1965).

119. See generally J. BEASLEY, supra note 68 (dividing American jurisdictions into four categories based on their approaches to the "unreasonably dangerous" standard: those following the Restatement, those following Greenman/Cronin, those following the Wade-Keeton approach, and those with no specific approach).
120. "It must be understood that the words 'unreasonably dangerous' have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier." Azzarello v. Black Brothers Co., 460 Pa.
reasonably dangerous requirement but have not yet adopted a risk-utility test. Courts in some states have erroneously interpreted *Barker* as presenting an alternative definition of "unreasonably dangerous" rather than rejecting that concept and its concomitant consumer expectation test.\(^\text{121}\)

**Garcia v. Joseph Vince Co.**

A California intermediate court case, *Garcia v. Joseph Vince Co.*,\(^\text{122}\) illustrates the confusion created by *Barker*; moreover, *Garcia* has special relevance to the handgun plaintiffs because the litigation involved a novel claim analogous to those involving well-made handguns. Analyzing the court's misapplication of the new risk-utility approach in *Garcia* illuminates the difficulties that handgun plaintiffs may face if a court follows the *Barker* approach.

The plaintiff in *Garcia* suffered an eye injury during a fencing match when his fencing opponent, wielding an illegally sharp blade, pierced the plaintiff's wire mesh face mask. The plaintiff sued the mask manufacturer, alleging that the mask design proximately caused the injury. The trial court dismissed the action, and the plaintiff appealed.\(^\text{123}\)

The intermediate court affirmed the dismissal, misreading *Barker* in three ways. First, the court stated that before a jury may be instructed to employ the risk-utility balancing test, the plaintiff must establish the existence of a product defect.\(^\text{124}\) The court in *Barker*, however, actually held that a plaintiff's burden lies in establishing causation between the product's design and the injury; once the plaintiff establishes causation, the jury decides whether

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"[T]he 'reasonable man' standard in any form has no place in a strict liability case . . . . The plaintiff still must prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous." Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 96, 337 A.2d 893, 900 (1975) (plurality).


123. Id. at 871, 148 Cal. Rptr. at 845.

124. Id. at 874, 148 Cal. Rptr. at 848.
the design is defective. The jury, not the judge, decides the issue of defectiveness, guided by the various risk-utility factors outlined by the court in Barker. Second, the court in Garcia erred in requiring the plaintiff to show that he used the product in its intended manner, because the suggested jury instruction in Barker cited "intended use" as only one factor under the consumer expectation prong. Finally, the court in Garcia mistakenly read Barker as requiring the plaintiff to prove the reasonableness of alternative designs. Read properly, the court in Barker held that the jury should consider alternative design as one of several relevant factors in the risk-utility test. Thus, a plaintiff need not demonstrate the existence of alternative designs to get the case to the jury, but the defendant bears the burden of proving the unreasonableness of design alternatives.

The plaintiff in Garcia should have been permitted to present his case to the jury because the risk-utility approach merely requires that the plaintiff establish causation between the product design and the injury. Arguably, the plaintiff in Garcia could have established the necessary causation by alleging that the mask's defective design caused the blade to pierce the mask and cause the injury. Proximate cause having been established, the burden of proof would shift to the manufacturer, to show that the design was not defective. Even if the plaintiff’s case in Garcia had gone to the jury, the defendant probably would have prevailed.

125. 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 237.
126. Id.
127. 84 Cal. App. 3d at 876, 148 Cal. Rptr. at 848.
128. See supra note 100 and accompanying text.
129. 84 Cal. App. 3d at 877, 148 Cal. Rptr. at 848.
130. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
131. Id.
132. The defendant manufacturer in Garcia easily might have overcome the burden of showing that the mask design was not defective. First, the manufacturer could have introduced evidence that no other manufacturer marketed a significantly different mask. See generally J. BEASLEY, supra note 68, ch. 14 (discussion of “state of the art” as a factor in design defect litigation). If the plaintiff had hypothesized a design featuring impenetrability, such as one using unbreakable plastic, the defendant could have produced experts to testify that wire mesh is lighter, cheaper, and more breathable than a hypothetical plastic mask. Finally, statistical evidence of the improbability of the accident that occurred would have supported the argument that the risk of injury was slight. See supra note 103 and accompanying text.
The court’s misapplication of the Barker approach, therefore, did not prejudice the plaintiff. Nevertheless, the trial court’s conceptual errors in applying the Barker test should not have been perpetuated by the appellate court. The appellate court should have affirmed by explaining that, under a proper application of Barker, the defendant still would have prevailed.

Neither the trial court nor the appellate court in Garcia addressed the paramount question that remains after Barker: at what point does a plaintiff establish proximate cause and shift the burden of proof to the manufacturer under the risk-utility test? When a defendant presents an overwhelming case, as in Garcia, the answer is virtually irrelevant to the outcome. In closer cases, however, the answer could be decisive. Forcing a manufacturer to prove that its design’s utility outweighs its risk of danger gives the plaintiff a significant tactical advantage, especially when the jury performs the balancing.133

The California Supreme Court and other courts following Barker have not delineated fully the requirements under the new approach’s causation prerequisite. Presently, the common law of strict liability for design defect gives trial judges wide latitude in using causation considerations to terminate litigation at an early stage. By noting that a plaintiff must meet causation requirements,135 the Barker holding suggests that a judge can use those requirements to dismiss claims or give directed verdicts in cases involving novel liability theories.136 Absent any guidance as to a judge’s proper exercise of such discretion, causation looms as the most formidable obstacle for handgun plaintiffs applying the Barker approach.

**APPLICATION OF THE BARKER APPROACH: THE HANDGUN PLAINTIFF’S CAUSATION OBSTACLE**

For a cause of action to be complete, any tort plaintiff must

133. The combination of an injured plaintiff and a sympathetic jury could result in victory even if the design objectively passed a risk-utility test.
134. See supra notes 109-11 and accompanying text.
135. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
136. The court in Barker acknowledged that its decision would not make manufacturers insurers of their products. Id. at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.
show a substantial connection between the defendant's act or omission and the plaintiff's injury.\textsuperscript{137} Causation is as important to strict liability actions as it is to negligence actions.\textsuperscript{138} Showing that a defendant's act or omission was a cause of the harm is insufficient. To establish liability, the plaintiff must show that the defendant's act or omission was the \textit{proximate} cause of the injury.\textsuperscript{139} This proximate cause requirement also must be satisfied under the \textit{Barker} approach. In handgun litigation, plaintiff's proximate cause obstacles are twofold. First, he must show a causative link between an alleged design defect and the injury. Second, the handgun plaintiff must overcome any allegation of superseding cause. Only if plaintiff overcomes these obstacles will the jury then balance risk and utility.

**Demonstrating a Causative Link Between Design and Injury**

To prevail under the \textit{Barker} theory of strict product liability, the plaintiff must make "a prima facie showing that the injury was proximately caused by the product's design."\textsuperscript{140} This requires that the plaintiff show that some aspect of the handgun design caused his injury, even though the weapon was manufactured flawlessly and contained no hidden dangers. The handgun's physical characteristics could supply the required design-injury nexus. Unlike rifles, handguns are concealable and maneuverable, characteristics that a court could interpret as causative factors in any shooting incident.\textsuperscript{141}

Assuming the handgun's physical characteristics create a heightened injury potential, plaintiffs could strengthen the causative link by arguing that the lack of additional safety features increased that potential. Although alternative design feasibility is one of the

\textsuperscript{137} See W. Prosser, \textit{supra} note 2, \S 41, at 236.

\textsuperscript{138} J. Beasley, \textit{supra} note 68, at 411.

\textsuperscript{139} \textit{Id.} at 413. The Restatement defines proximate cause as a substantial factor in bringing about the harm. \textit{Restatement (Second) of Torts} \S 431(a) (1965).

\textsuperscript{140} 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. For the text of a suggested jury instruction, see \textit{supra} text accompanying note 100.

\textsuperscript{141} Criminals can conceal handguns more easily than rifles. Similarly, legitimate handgun users can store handguns in household locations accessible to curious children. Additionally, the light weight and compact dimensions of handguns enhance their maneuverability and increase the likelihood that users will point the handguns in unsafe directions during handling.
“relevant factors”\textsuperscript{142} that juries must weigh in the risk-utility balance, a plaintiff also can use alternative design to demonstrate proximate cause. First, the plaintiff could use statistics of frequent injuries by handgun discharges\textsuperscript{143} to demonstrate the foreseeability of such an occurrence.\textsuperscript{144} Next the plaintiff could argue that certain hypothetical safety features would have prevented these incidents.\textsuperscript{146} Finally, the plaintiff could assert that because the injuries were foreseeable and preventable by use of additional safety features, the lack of such features proximately caused the injuries.\textsuperscript{148}

The design-injury nexus required under the Barker theory departs from the traditional causation requirements of strict liability. The majority view as defined by section 402A, looks initially to the ordinary consumer's expectations to determine defectiveness.\textsuperscript{147} Under the majority approach, something is "wrong" with the product if it contains hidden dangers not in the contemplation of the ordinary consumer.\textsuperscript{148} Once the existence of a defect is established, whether the defect caused the injury must be determined.

In contrast, under the Barker approach the initial inquiry is whether the alleged design defect caused the injury. Then, this minority approach\textsuperscript{149} determines whether the design was, in fact, de-

\begin{itemize}
    \item \textsuperscript{142} See supra notes 101-03 and accompanying text. Initially, in deciding whether the plaintiff met the causation requirement, the judge determines only whether the lack of the hypothetical design alternative proximately caused the injury. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
    \item \textsuperscript{143} See Firearms and Violence, supra note 45, ch. 5.
    \item \textsuperscript{144} See generally J. Beasley, supra note 68, ch. 15.
    \item \textsuperscript{145} For example, if the claim involves a child who found a loaded pistol and shot a playmate, the plaintiff may argue that a design lacking a "child-proof" safety mechanism, analogous to bottle caps on prescription drugs, proximately caused the shooting. Similarly, a plaintiff who shot himself while handling what he thought was an unloaded revolver could argue that a warning light denoting the presence of a bullet in the firing chamber would have prevented his injury. Therefore, the lack of such a device proximately caused the injury.
    \item \textsuperscript{146} "There is also authority to the effect that a plaintiff is not necessarily barred from recovery because the danger is open and obvious, as where an injury occurs due to momentary forgetfulness or inattentiveness, if a possible safety device could have eliminated the danger. W. Kimble & R. Lesher, supra note 11, at 167. The fact that additional safety features are nonexistent should not preclude the plaintiff from establishing proximate cause under the Barker approach. 20 Cal. 3d at 430 n.10, 573 P.2d at 455 n.10, 143 Cal. Rptr. at 237 n.10.
    \item \textsuperscript{147} Restatement (Second) of Torts, § 402A, comments g, i (1965).
    \item \textsuperscript{148} See W. Prosser, supra note 2, § 97, at 659.
    \item \textsuperscript{149} See supra notes 109-11 and accompanying text.
\end{itemize}
fective. The traditional rule, therefore, searches for a defect-injury causative link while Barker requires a design-injury link. The distinction is subtle, but has far-reaching effects in the handgun context. A plaintiff, using innovative theories such as the lack of hypothetical safety devices, conceivably could establish the design-injury nexus if the allegedly dangerous design causes an injury. The causative link having been established, if the jury finds the risks of danger outweigh the utility of the handgun, the design is defective and the manufacturer is strictly liable for the injuries caused by that design.

**Overcoming the Defense of Superseding Cause**

Even if the plaintiff demonstrates the necessary causative link, establishing proximate cause in a firearms case may be thwarted by the doctrine of superseding cause. Where the plaintiff’s injuries resulted from the intentional criminal acts of another, the plaintiff probably will be unable to demonstrate the proximate cause connection. Although a causative link arguably exists, the handgun manufacturer’s claim of superseding cause would prevail in most jurisdictions.\(^\text{150}\)

For example, a plaintiff shot by a criminal during a robbery might attempt to establish that the weapon’s concealability, a design feature, proximately caused the shooting. Perhaps a court would consider concealability a causative factor; but, given the tendency of courts to find intervening criminality a superseding cause,\(^\text{151}\) the plaintiff probably would fail to establish the necessary design-injury nexus. When a shooting is unintentional, the handgun plaintiff is more likely to convince a court that proximate cause exists because courts are less willing to declare that non-criminal activity supersedes an antecedent act or omission of a defendant.\(^\text{152}\)

Nevertheless, a common assumption in firearms cases is that the negligence of the person pulling the trigger is an intervening

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150. See infra notes 153-60 and accompanying text.
151. See infra notes 152-54 and accompanying text.
152. See, e.g., Watson v. Kentucky & Indiana Bridge & R. Co., 137 Ky. 619, 126 S.W. 146 (1910). See generally W. Prosser, supra note 2, § 44.
force\textsuperscript{153} that supersedes other causative factors.\textsuperscript{164} For example, in \textit{Sturm, Ruger \& Co. v. Bloyd},\textsuperscript{155} the Kentucky Supreme Court framed the issue of superseding cause in words resembling a slogan in the gun control debate: "By their very nature firearms are dangerous, but do not kill people. It is the action of people in the use of firearms that kill or injure people."\textsuperscript{156} In \textit{Bloyd}, a carwash employee discovered a loaded revolver while cleaning a car interior. The gun, a replica of a Victorian-era weapon including the original safety mechanism defect, discharged and wounded the employee. The victim sued the gun manufacturer and the owner of the car and gun. The jury awarded the victim $50,000 from the gun manufacturer and a nominal amount from the owner.\textsuperscript{167}

On appeal, the Kentucky Supreme Court reversed the trial court's finding of manufacturer liability.\textsuperscript{158} The court reasoned that the owner's negligence was a superseding cause of the injury because the manufacturer had warned gun purchasers about the safety defect and the manufacturer could not have foreseen that the owner would show "pure and culpable negligence" in storing a loaded weapon under a car's floor mat.\textsuperscript{159} Thus, the court in \textit{Bloyd} followed the majority rule\textsuperscript{160} and invoked lack of foreseeability to declare the gun owner's intervening negligence a superseding cause of the plaintiff's injury.\textsuperscript{161}

A 1977 Arkansas decision, \textit{Franco v. Bunyard},\textsuperscript{162} however, demonstrates that handgun plaintiffs may be able to satisfy the foreseeability test and avoid having a claim barred by the superseding cause doctrine. In \textit{Franco}, the Arkansas Supreme Court reversed a

\begin{itemize}
\item \textsuperscript{153} "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." \textit{Restatement (Second) of Torts} § 441(a) (1965).
\item \textsuperscript{155} 586 S.W.2d 19 (Ky. 1979).
\item \textsuperscript{156} \textit{Id. at} 21.
\item \textsuperscript{157} \textit{Id. at} 20.
\item \textsuperscript{158} \textit{Id. at} 23.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{See} \textit{J. Beasley}, \textit{supra} note 68, at 414-16.
\item \textsuperscript{161} Foreseeability thus remains a factor in determining superseding cause despite a trend toward abandoning foreseeable consequences as a test for proximate cause generally. \textit{See id.}
\item \textsuperscript{162} 261 Ark. 144, 547 S.W.2d 91, \textit{cert. denied}, 434 U.S. 835 (1977).
\end{itemize}
summary judgment for a defendant gun dealer who sold a pistol to an escaped convict who used the weapon to murder two persons. The trial court held that the convict’s criminal use of the weapon was an unforeseeable intervening force that superseded the seller’s negligence of failing to require adequate identification prior to the sale. The supreme court disagreed, holding that the dealer’s negligence was a proximate cause of the murders because the murders would have been avoided had the federal regulations been obeyed. The court reasoned that the buyer’s use of the pistol to injure others was foreseeable, even though the dealer may not have foreseen the precise sequence of events leading to the shootings.

Franco is a vital precedent for persons seeking to affect national handgun policy through litigation and is indicative of a trend away from the traditional view of superseding causation. Each time courts follow this trend, they weaken the belief that subsequent intervening criminal forces supersede antecedent defendant acts or omissions. Notwithstanding such developments, the traditional view remains strong, and plaintiffs injured intentionally by handguns will face great difficulties in circumventing intervening criminality as a bar to recovery.

Plaintiffs in cases involving accidental discharges of guns may avoid superseding cause as a bar to recovery by relying on precedents in the analogous area of negligent entrustment of alcoholic beverages. Traditionally, courts absolved bartenders of negligence for selling liquor to persons already intoxicated because the buyer’s consumption of the liquor, not the transaction, was the proximate cause of any accident following the purchase of an alcoholic beverage. Courts, however, are increasingly rejecting the traditional

163. Id.
164. Id. at 145, 547 S.W.2d at 92.
165. Id. at 147, 547 S.W.2d at 93. The existence of the gun control statute influenced the court in finding that the convict’s criminal acts were not a superseding cause. Arguably, the dependence in Franco on negligence per se could limit the use of the case as a precedent in an intervening force situation.
166. Id.
167. See generally J. Beasley, supra note 68, ch. 15.
168. See supra notes 150-51 and accompanying text.
169. See, e.g., Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978) (applying Missouri law); Starage v. Bilbo, 382 So. 2d 423 (Fla. Dist. Ct. App. 1980) (sale of liquor was not proximate cause of shooting accident, even though “dram shop” law established negligence
view. Many courts have held bartenders liable for serving alcohol to already-intoxicated persons who subsequently become involved in accidents. In these cases, the customer’s negligence in drinking and driving did not supersede the seller’s negligent entrustment of liquor. In other decisions, the existence of a dram shop statute triggered automatic seller liability, allowing the courts to ignore the traditional views concerning a drinker’s responsibility for his own actions. Similarly, handgun plaintiffs must counter traditional views that the negligence of the shooter supersedes any design deficiencies in the weapon.

"Second collision" cases provide another source of precedent modifying traditional views on superseding causation. In these cases, plaintiffs injured in accidents sue the automakers, alleging that the manufacturing or design defects increased the severity of their injuries. Traditional tort law precluded plaintiffs from pursuing these claims on the rationale that an automobile’s involvement in collisions was not its intended purpose. Under the traditional view, the factors immediately causing the accident superseded the automaker’s negligence in marketing the car, the design of which enhanced occupant injuries in the accident.

The United States Court of Appeals for the Eighth Circuit modified this doctrine in 1968 in Larsen v. General Motors Corp. The plaintiff in Larsen contended that the car’s design proximately caused his impalement on the steering wheel during a frontal collision. The manufacturer countered that the plaintiff’s negligence proximately caused the accident and all injuries, even those enhanced by the automobile’s design. The Eighth Circuit rejected the

per se of bartender); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. 813, 390 N.E.2d 1133 (1979) (auto accident); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970) (refusing to abrogate common law presumption that it is not a tort to sell liquor to "able-bodied men").

170. See supra note 25.
172. The common law presumes that an “able-bodied man” is responsible for his own actions, even if he becomes increasingly intoxicated by drinks provided by a wantonly negligent bartender. See, e.g., Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970).
174. See, e.g., Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).
175. 391 F.2d 495 (8th Cir. 1968).
traditional doctrine espoused by the manufacturer, and held that the automaker should have known that many of its products eventually would be involved in injury-causing mishaps; therefore, the automaker had a duty to design its products accordingly.176 Furthermore, the duty of reasonable design existed regardless of the intervening factors that directly caused the accident.177

The growing adherence to the *Larsen* rule178 indicates a general decline in the significance of the intervening forces doctrine when litigation attempts to assess responsibility for physical injuries. Cases in which plaintiffs recover for enhanced injuries despite the plaintiffs' blatant intervening negligence clearly illustrate this trend.179

Relying on these recent precedents that deemphasize intervening forces in accident cases, plaintiffs injured by accidental handgun discharges can challenge the traditional presumption that the person pulling the trigger takes sole responsibility for the shooting. For example, when a child finds a handgun in his parents' bedroom night table and wounds himself, courts should consider recent precedents demonstrating a more liberal approach to intervening forces instead of routinely ruling that the parents' negligence superseded any design defect.180

**Jury Balancing of Risk-Utility Factors**

Under the approach pioneered in *Barker*, once the plaintiff

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176. *Id.* at 502-03.

177. Expressing typical reluctance to make the manufacturer an insurer of its product, the court noted that the automaker need not design cars to protect occupants in every conceivable accident. Rather, the automaker has a duty to eliminate design components that pose an unreasonable risk of injury in the event of foreseeable mishap. *Id.* at 503.

178. *See* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (containing compilation of jurisdictions following *Larsen*).


180. The parents' negligence in this situation consisted of allowing the child access to a loaded handgun. This negligence, however, occurred subsequent to the manufacturer's act of marketing a weapon that a child easily could fire. Under the *Barker* formulation, plaintiffs representing the injured child could argue that a handgun design lacking a "child-proof" safety mechanism proximately caused the shooting. *See* W. KIMBLE & R. LESHER, *supra* note 11, § 135.
shows causation, the burden of proof shifts to the manufacturer to prove that the benefits of the gun's design outweigh any risks of danger presented by its design. If the manufacturer fails to carry this burden, the jury should find the design defective and hold the manufacturer strictly liable for the injuries caused by that design.\textsuperscript{181}

The court in Barker suggested several factors for consideration by the jury in making its defectiveness determination.\textsuperscript{182} Although this list is not all-inclusive, these factors provide insight into how a judge might instruct the jury in a claim involving a well-made handgun.

The first suggested factor, the "gravity of the danger posed by the challenged design,"\textsuperscript{183} presents an issue that the manufacturer will have no choice but to concede. A concealable and highly maneuverable handgun that discharges a projectile at great speed with the touch of a finger poses the gravest of dangers. The second factor, that such danger is likely to occur,\textsuperscript{184} may be demonstrated by statistical analysis. Thousands of persons die each year due to accidental, negligent, or intentional handgun discharges.\textsuperscript{185} The likelihood that thousands more will die in similar occurrences therefore is great.

A third factor, involving "the mechanical feasibility of an improved design,"\textsuperscript{186} probably would be the most intensely litigated factor. Because the basic components and structure of pistols and revolvers vary little within the industry, the firearms manufacturer will argue that he has met his duty under the industry state of the art.\textsuperscript{187} Courts have split, however, as to the weight accorded to a "state of the art" defense in products liability litigation.\textsuperscript{188} Addi-

\textsuperscript{181} 20 Cal. 3d at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.
\textsuperscript{182} See supra notes 101-03 and accompanying text.
\textsuperscript{183} 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
\textsuperscript{184} Id.
\textsuperscript{185} See Newsweek Magazine, supra note 8, at 42.
\textsuperscript{186} 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
\textsuperscript{187} See J. Beasley, supra note 68, at 393-410.
tionally, courts exhibit a growing tendency to require manufacturers to exceed industry standards if the situation so warrants.\textsuperscript{189} Under a more demanding standard, a jury may accept the testimony of the plaintiff’s expert witnesses that the invention and implementation of added safety devices were feasible. For example, one such device could require an additional procedure in the firing process, such as the engaging of a switch simultaneously with the pulling of the trigger.\textsuperscript{190} Also included within the list of suggested balancing factors in \textit{Barker} is “the financial cost of an improved design.”\textsuperscript{191} Research and development of any new safety device, along with retooling of factory assembly lines and market testing, would increase the manufacturer’s cost; however, the manufacturers probably would pass these costs on to their customers in the form of higher handgun prices.\textsuperscript{192}

The final suggested factor that a judge might instruct the jury to consider is the “adverse consequences to the product . . . from an alternative design.”\textsuperscript{193} The manufacturer undoubtedly would try to show that new safety devices would compromise the handgun’s utility. For example, the hypothetical double safety arguably would disorient users, adversely affecting firing efficiency and accuracy.\textsuperscript{194}

\begin{footnotes}
\item[189] A frequently applied test in determining the defectiveness of a product’s design is whether the manufacturer has complied with the state of the art. Such a focus requires that the design be viewed in light of economically and technologically feasible advancements at the time of manufacture. The test is not merely descriptive of what others in the industry have done, but rather \textit{what could have been done}. See \textit{W. Kimble & R. Lesher}, supra note 11, § 133.

\item[190] Many household power tools are manufactured with such double switches. For other hypothetical safety features, see \textit{supra} note 145, \textit{infra} note 194.

\item[191] \textit{20 Cal. 3d} at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

\item[192] Gun control advocates would welcome handgun price inflation. See \textit{supra} note 17 and accompanying text.

\item[193] \textit{20 Cal. 3d} at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

\item[194] \textit{See Firearms and Violence, supra} note 45, at 165.

\item Most handgun designs allow a user, once any safety mechanism has been disengaged, to fire successive rounds as quickly as he can pull the trigger. A hypothetical mechanism that would force a user to reengage an additional safety switch prior to each successive trigger pull would disrupt this process. One court recognized that modification of the typical firing procedure would diminish efficiency and accuracy. In \textit{DeRosa v. Remington Arms Co., Inc.}, 509 F. Supp. 762 (E.D.N.Y. 1981), the court rejected plaintiff’s claim that a shotgun manufacturer’s failure to increase trigger-pull resistance rendered the weapon unreasonably dangerous. The court included in its balancing test the “deleterious effect on the accuracy and speed of a marksman” resulting from the plaintiff’s hypothetical design alternative. \textit{Id.} at 768.
\end{footnotes}
The plaintiff could counter that no reason exists for handguns to exhibit rapid-fire capability, because legitimate users of guns, such as hunters, rarely use handguns in their activity, and because those who do use handguns for legitimate purposes, such as target shooters, usually shoot slowly and deliberately. If the manufacturer argued that police need rapid-fire handguns, the plaintiff could suggest that the manufacturer should have established a dual distribution system: traditional weapons for police and military, and the new, safer variety for the general public.

The application of risk-utility balancing factors to handgun litigation vividly demonstrates the inherent difficulties facing defendants under the Barker approach. Assuming that the plaintiff surmounts causation obstacles, the manufacturer must defend a product that has contributed to many thousands of deaths. To avoid liability, the manufacturer must convince the jury that the handgun buyer's desire to purchase weapons unencumbered by added safety devices outweighs the social misery caused by the weapons. This formidable burden has led at least one commentator to state that the Barker approach "turns the screw against product manufacturers."

**Conclusion**

Prior to the 1978 holding in Barker, victims of flawlessly manufactured handguns possessed no viable tort remedy. Although Barker represents a significant change, traditional views of strict liability stressing general awareness of inherent product dangers still preclude recovery in the majority of jurisdictions. Similarly, negligent entrustment theories provide little hope for handgun plaintiffs.

Courts would not necessarily consider reduced firing efficiency an adverse consequence in allocating the factors in the jury's risk-utility balance. Marksmen and other hobbyists eventually would become accustomed to the additional safety device, which would be only a minor inconvenience to these regular users. Conversely, a child who discovers a loaded pistol with the safety device would be confused and less likely to fire the weapon. Similarly, a double safety would force an inexperienced adult shooter to proceed more deliberately than with a weapon capable of rapid fire. Reduced firing efficiency, therefore, should reduce the incidences of unintentional discharges.

195. Manufacturers of cheap, inaccurate handguns would face the most difficulty, presumably because their products possess the fewest legitimate benefits. See supra note 17.
196. R. Epstein, supra note 64, at 82.
In jurisdictions following the *Barker* approach, however, plaintiffs should prevail if their cases reach the jury. A handgun design probably will be held defective when a jury weighs the design’s many risks against its marginal benefits. Getting the case to the jury, however, will pose difficult obstacles for handgun plaintiffs. Considerations of superseding causation, particularly in cases of intentional shootings, will defeat many claims. And, even if a trial judge fails to find that intervening criminality or negligence was a superseding cause of the shooting, the plaintiff must convince the judge that the handgun design proximately caused his injury.

Nevertheless, the plaintiff could convince a judge that the handgun design was a substantial factor in a shooting. The plaintiff could overcome this initial causation obstacle by stressing the unique dangers of the handgun’s physical characteristics and the absence of essential safety features. Having established proximate cause, the plaintiff then will advance to the jury determination with an enviable burden of proof advantage over the manufacturer.

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