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Kelley v. R.G. Industries, 497 A.2d 1143 (Md. 1985)

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Torts—STRICT LIABILITY—MANUFACTURERS' OR MARKETERS' LIABILITY FOR THE CRIMINAL USE OF SATURDAY NIGHT SPECIALS: A NEW COMMON LAW APPROACH—*Kelley v. R.G. Industries*, 497 A.2d 1143 (Md. 1985)

Until October 3, 1985, no jurisdiction recognized a cause of action against a handgun manufacturer or marketer for injuries occasioned by the criminal use of a handgun. On that date, in *Kelley v. R.G. Industries*,¹ the Maryland Court of Appeals unanimously recognized a new, limited area of strict liability for those who manufacture or market "Saturday Night Specials." The decision stands as a victory for anti-handgun advocates who have been frustrated by the inability to achieve their goals through legislative channels.²

Soon Florida courts will be asked to decide if such an action is cognizable. Recently, a suit was filed in the Eleventh Judicial Circuit Court in Dade County seeking damages against the manufacturer and marketer of a Saturday Night Special used to kill the plaintiff's husband.³ *Prescher v. Rohm Gesellschaft*⁴ is predicated on the theory that the manufacturer and marketer knew or should have known at the time the gun was made and sold that it was not suitable for legitimate purposes and was instead more likely to be used for criminal purposes.⁵

The purpose of this Note is to examine the *Kelley* court's treatment of traditional strict liability theories, to discuss the court's creation of a new common law cause of action against a manufacturer or marketer of a cheap handgun used to shoot an innocent victim during a criminal offense, to evaluate the court's decision, and to offer a comparative analysis of strict liability law and handgun policy in Florida.

I. THE BACKGROUND OF *Kelley*

Olen J. Kelley's cause arose during an armed robbery of the grocery store where he worked.⁶ Kelley's assailant shot him in the chest with a Rohm Revolver Handgun Model RG38S designed and

1. 497 A.2d 1143 (Md. 1985).

2. See Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 Mo. L. REV. 830, n.3 (1984) (indicating articles in numerous periodicals discussing litigation brought against handgun manufacturers).

3. Plaintiff's Complaint at 1, 2, *Prescher v. Rohm Gesellschaft*, No. 85-43414CA05 (Fla. 11th Cir. Ct. filed Oct. 17, 1985).

4. *Id.*

5. *Id.* at 2. The principal defendants are Rohm Gesellschaft and R.G. Industries, who were also defendants in *Kelley*.

6. *Kelley*, 497 A.2d at 1144.

marketed by the West German corporation Rohm Gesellschaft.⁷ Kelley and his wife filed suit in the Montgomery County Circuit Court against Rohm Gesellschaft and R.G. Industries, a Miami, Florida, subsidiary which assembled and initially sold the revolver.⁸ The case was subsequently removed to the United States District Court for the District of Maryland.⁹

The Kelleys' declaration offered four theories of recovery, two of which were at issue on appeal:¹⁰ that Rohm should be strictly liable for Kelley's injury because the handgun was abnormally dangerous, and that the handgun was unreasonably dangerous due to a defect in its design, distribution, marketing, and promotion.¹¹ Rohm moved to dismiss the case for failure to state a claim upon which relief could be granted,¹² contending that the handgun performed properly, and that the corporation could not be held responsible for the criminal and tortious conduct of an assailant.¹³ Finding no dispositive precedent on the strict liability issues, the district court certified two questions to the Maryland Court of Appeals. Because of issues raised at oral argument, the district court substituted a series of questions which the court of appeals rephrased as follows:

- 1) Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?
- 2) Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as "Saturday Night Specials," and regularly used in criminal activity, strictly liable to a person injured by such handgun during the course of a crime?
- 3) Does the Rohm Revolver Handgun Model RG38S, serial number 0152662, fall within the category referred to in question 2?¹⁴

7. *Id.* at 1144-45. A Saturday Night Special may be defined as a handgun that costs \$50 or less, which is of .32 caliber or less, and which has a barrel length shorter than three inches. *Id.* at 1153 n.9. However, gun size and barrel length alone are not determinative; small, high-quality, short-barreled handguns designed for legitimate uses are not Saturday Night Specials. *Id.* at 1160. Because of the variety of weapons available, rarely should a handgun be deemed a Saturday Night Special as a matter of law. *Id.*

8. *Id.* at 1145. R.G. Industries was later dismissed from the case by stipulation of the parties after it filed an answer and motion for summary judgment on the ground that it had not marketed the weapon. *Id.*

9. *Id.*

10. The two other theories were negligence and loss of consortium. *Id.*

11. *Id.*

12. FED. R. CIV. P. 12(b)(6).

13. *Kelley*, 497 A.2d at 1145.

14. *Id.* at 1146.

II. TRADITIONAL THEORIES

The first, broad question addressed by the court was whether a handgun manufacturer or marketer is strictly liable under any recognized theory to persons injured as a result of a gun's criminal use. In light of this question the court considered Kelley's two proposed strict liability theories: (1) that manufacturing or marketing a handgun is an abnormally dangerous activity under the Restatement (Second) of Torts sections 519 and 520,¹⁵ and (2) that handguns are abnormally dangerous products under the Restatement (Second) of Torts section 402A.¹⁶ Indeed, most plaintiffs and commentators who have argued for recovery against handgun manufacturers have done so under these two theories.¹⁷

A. *The Abnormally Dangerous Activity Doctrine*

The abnormally dangerous activity doctrine recognizes liability for injuries resulting from such an activity regardless of the degree of care exercised to avoid harm.¹⁸ The Restatement lists six factors which are used to determine whether an activity is abnormally dangerous.¹⁹ The court, however, rejected the imposition of liability against a handgun manufacturer under this doctrine despite the fact that handgun use may indeed satisfy each of these factors.²⁰ This conclusion was based on the fact that Maryland courts have applied the abnormally dangerous activity doctrine only to situations where the tortfeasor is an owner or occupier of land.²¹ If

15. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1976).

16. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

17. See *infra* notes 22 & 33, 34 and accompanying text.

18. RESTATEMENT (SECOND) OF TORTS § 519 comment d (1976).

19. These six factors are:

- (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.

RESTATEMENT (SECOND) OF TORTS § 520 (1976).

20. *Kelley*, 497 A.2d at 1147.

21. *Id.* (citing *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969) (gas station operator may be liable for damage to adjacent landowner's well); *Toy v. Atlantic Gulf & Pac. Co.*, 4 A.2d 757 (Md. 1939) (a defendant must own or control land to be liable for related injury); *Kirby v. Hylton*, 443 A.2d 640 (Md. Ct. Spec. App. 1982) (affirming the doctrine of strict liability espoused in *Toy* and *Yommer*).

manufacturing or marketing Saturday Night Specials were abnormally dangerous relative to the locality where the activity was carried on, liability under section 519 might arise. The court reasoned, however, that Saturday Night Specials pose a threat independent of the use of land and thus liability under this theory was unwarranted. All other courts which have decided this issue have also concluded that this doctrine does not support the imposition of liability against a handgun manufacturer.²²

B. Products Liability Under Restatement 402A

The second theory addressed by the court was that a handgun is an unreasonably dangerous product which should trigger a strict products liability analysis under Restatement section 402A.²³ Maryland had adopted section 402A in *Phipps v. General Motors Corp.*,²⁴ and the *Kelley* court indicated that to recover under this

22. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1266-67 (5th Cir. 1985) (abnormally dangerous activity must be connected with land or other immovables, and the injury must result from the activity itself); *Martin v. Harrington Richardson, Inc.*, 743 F.2d 1200, 1203 (7th Cir. 1984) (use of a handgun, not its manufacture, makes it abnormally dangerous); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1297 (Ill. App. Ct. 1985) (manufacture or sale of handguns not an abnormally dangerous activity, rather use of handgun poses the danger); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 121 (Or. 1985) (manufacture, design, sale, or marketing of handguns not abnormally dangerous activities because the danger must be inherent in the activity, not in the use of the activity's product). For additional argument opposing strict liability against gun manufacturers under the abnormally dangerous activity doctrine, see also Note, *supra* note 2, at 837-40. *But see Disarming the Handgun Problem By Directly Suing Arms Makers*, NAT'L L.J., June 8, 1981, at 30, col. 2. See generally W. PROSSER, *THE LAW OF TORTS* § 78 (4th ed. 1971).

23. *Kelley*, 497 A.2d at 1147. This section provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to 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.

RESTATEMENT (SECOND) OF TORTS § 402A (1964).

24. 363 A.2d 955 (Md. 1976). The *Phipps* court concluded that a plaintiff must establish:

- (1) the product was in a defective condition at the time that it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition.

Id. at 958.

theory a plaintiff must show that the product was defective when sold so as to render it unreasonably dangerous.²⁵ When determining if a manufacturing or design defect exists, Maryland courts follow the consumer expectation test, meaning the product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."²⁶ Using this analysis, the court held that strict products liability could not be imposed against a handgun manufacturer because firing a bullet with deadly force is precisely what a consumer would expect a handgun to be able to do.²⁷ As the court stated:

Kelley confuses a product's *normal function*, which may very well be dangerous, with a defect in a product's design or construction. For example, an automobile is a dangerous product, if used to run down pedestrians. . . . But that same automobile might also be defective in its design or construction, *e.g.*, if the gasoline tank were placed in such position that it could easily explode in a rear-end collision. . . . Similarly, a handgun is dangerous because its normal function is to propel bullets with deadly force. That alone is not sufficient for its manufacturer to incur liability under § 402A. For the handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction.²⁸

The court also addressed the applicability of the risk/utility test for design defect cases as articulated in *Barker v. Lull Engineering*.²⁹ In *Barker* the California Supreme Court announced a two-part definition of design defect which included a balancing of the risks and utilities inherent in a product's particular design.³⁰ However, the Maryland court found the risk/utility test inapplicable in *Kelley* on the ground that the standard applies only when a prod-

25. *Kelley*, 497 A.2d at 1148.

26. *Phipps*, 363 A.2d at 959 (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment i (1964)).

27. *Kelley*, 497 A.2d at 1148.

28. *Id.* (emphasis in original).

29. 573 P.2d 443 (Cal. 1978). Although Maryland has never expressly applied the risk/utility test, authority exists to support use of the standard in that jurisdiction. See *Phipps*, 363 A.2d at 959; *Sheehan v. Anthony Pools*, 440 A.2d 1085, 1089 (Md. Ct. Spec. App. 1982), *aff'd*, 455 A.2d 434 (Md. 1983).

30. *Barker*, 573 P.2d at 455-58. Specifically, the two-part balancing test is whether "in light of the relevant factors . . . the benefits of the challenged design outweigh the risk of danger inherent in such design." *Id.* at 458.

uct malfunctions,³¹ and the handgun in question did not.

The court thus concluded that regardless of the test used, whether consumer expectation or risk/utility, section 402A liability was inappropriate because a product that performs as intended and expected simply cannot be characterized as defective.³² Again, this conclusion is consistent with the decisions of all other courts presented with product liability claims,³³ and with the views of numerous commentators.³⁴

III. A NEW COMMON LAW CAUSE OF ACTION

Although the Maryland court in *Kelley* held that existing strict liability law could not support the cause of action in the case before it, it went further than all other courts that have examined the handgun liability issue. It did not simply consider the conventional theories of recovery. Instead, the court boldly created an entirely new but limited common law cause of action against the

31. *Kelley*, 497 A.2d at 1149.

32. *Id.*

33. See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1269-75 (5th Cir. 1985) (properly functioning handguns lack the requisite defect, thus do not give rise to liability under either the risk/utility or consumer expectation tests); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1201 (7th Cir. 1984) (unreasonably dangerous theory inapplicable without a showing of defect); *Riordan v. International Armament Corp.*, 477 N.E.2d 1293, 1298-99 (Ill. App. Ct. 1985) (a handgun that works as expected fails both the consumer expectation and risk/utility tests absent a showing of defect); *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1211 (N.D. Tex. 1985) (liability under § 402A using the risk/utility balancing test inappropriate without showing something wrong with the product). However, one court, finding that the absence of a legislative ban on handguns indicated they were not unreasonably dangerous, specifically reserved the question of whether Saturday Night Specials might be subject to that products liability doctrine. *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 110-11 (D. Mass. 1983).

34. See Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471 (1983); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984) [hereinafter cited as Note, *Handguns*]; cf. Note, *Manufacturers' Strict Liability for Injuries from a Well-Made Handgun*, 24 WM. & MARY L. REV. 467 (1983) (under *Barker*, anti-handgun plaintiff must surmount a number of obstacles, yet this is not impossible) [hereinafter cited as Note, *Manufacturers' Strict Liability*]. But see Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16 (1981) (arguing for strict liability under the *Barker* test); Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982) (advocating strict liability under a risk/utility analysis); Turley & Harrison, *Strict Tort Liability of Handgun Suppliers*, 6 HAMLINE L. REV. 285 (1983) (same); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach*, 51 FORDHAM L. REV. 771 (1983) (Saturday Night Specials are a defective product line and therefore ought to trigger liability as an unreasonably dangerous product under a risk/benefit analysis.) [hereinafter cited as Note, *Manufacturers' Liability to Victims*]. See also RESTATEMENT (SECOND) OF TORTS § 402A comment g (1964) (discussing the defect requirement).

manufacturer or marketer of a Saturday Night Special for injuries resulting from its criminal use.

The court found a basis for expanding the common law in the principle that:

the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems. The common law is, therefore, subject to judicial modification in light of modern circumstances or increased knowledge.³⁵

The court noted that this idea of judicial activism must be balanced against the principle that the common law should not be at odds with public policy.³⁶ The court thus sought to determine if contemporary circumstances and knowledge would support a common law cause of action against Saturday Night Special manufacturers or marketers without running afoul of the handgun policies articulated by the state legislature.

To ascertain the state's policy, the court looked to Maryland's comprehensive statutory scheme which regulates the wearing, carrying, and transporting of handguns.³⁷ The statute begins with a broad policy statement to the effect that extensive regulation of handguns is necessary to curb an alarming rise in the number of injuries resulting from their criminal use.³⁸ The Maryland General Assembly made it unlawful to carry, wear, or transport handguns, whether openly visible or concealed.³⁹ Exceptions were carved out for federal and state law enforcement personnel, persons engaged in hunting and target practice, use in the protection of a home or business if confined to the property owned or leased by the user,⁴⁰ and persons demonstrating "good and substantial reason" to be issued a permit by the superintendent of the Maryland State Police.⁴¹ The court concluded that the statutory provisions allowing

35. *Kelley*, 497 A.2d at 1150-51 (citations omitted).

36. *Id.* at 1151.

37. MD. ANN. CODE art. 27, §§ 36B-G (1957, 1982 Repl. Vol. & Cum. Supp. 1985).

38. *Id.* § 36B(a)(i)-(iv).

39. *Id.* § 36B(b).

40. *Id.* § 36B(b)-(c).

41. *Id.* § 36E(a)(6). Persons granted permits under § 36E are included in the § 36B(c) exceptions. An applicant for a permit must be 18 years of age or older, *id.* § 36E(a)(1); may not have been convicted of a felony or misdemeanor which carries a sentence of more than one year, *id.* § 36E(a)(2); may not, within the past 10 years, have been committed to a juvenile correction center or similar facility after being adjudged a juvenile delinquent, *id.* § 36E(a)(3); may not have been convicted of an offense involving a controlled substance or

persons to possess and carry handguns in certain circumstances demonstrate that handgun use is not per se inconsistent with Maryland public policy.⁴² On the contrary, the court stated that imposing liability on manufacturers or marketers of handguns generally would be antithetical to legislative policy.⁴³ Yet the court deemed one particular type of handgun unsuited for any of the legitimate purposes recognized by the legislature. It thus created an exception to the general rule against manufacturer or marketer liability for the category of guns called Saturday Night Specials.⁴⁴ These weapons possess distinct characteristics tailor-made for criminal use: they are light-weight, short-barreled, inexpensive, and easily concealed. Moreover, because they are poorly made, of low quality, and are generally inaccurate and unreliable, they are virtually useless for law enforcement, sport, or personal protection.⁴⁵ Further, the guns are difficult to trace and identify because they are so easily altered.⁴⁶ For these reasons, the Maryland court found Saturday Night Specials warrant and are amenable to distinct legal treatment. The court looked to the Gun Control Act of 1968⁴⁷ for a declaration of federal policy on the subject and found there additional support for its novel theory. Federal law prohibits the importation of firearms but provides exceptions for sporting, military, and other purposes.⁴⁸ Because the statute allows the im-

currently be an addict or habitual drug user or alcoholic, *id.* § 36E(a)(4); must not, after an investigation, exhibit a propensity for violence or instability, *id.* § 36E(a)(5); and should have "good and substantial reason" to carry a handgun, such as the weapon is necessary as a reasonable precaution against apprehended danger, *id.* § 36E(a)(6).

42. *Kelley*, 497 A.2d at 1152-53.

43. *Id.* at 1153.

44. *Kelley*, 497 A.2d at 1153. See *supra* note 7.

45. *Id.* at 1153-54 & n.10. See also Cook, *The "Saturday Night Special": An Assessment of Alternative Definitions From a Policy Perspective*, 72 J. CRIM. L. & CRIMINOLOGY 1735 (1981) (data indicating Saturday Night Specials have little value to noncriminals); Note, *Manufacturers' Liability to Victims*, *supra* note 34, at 791 n.124 (statistics showing most crimes involving handguns are committed with Saturday Night Specials). Saturday Night Specials are made of such poor quality materials that prolonged use for target shooting is impractical, the short barrel length precludes use for hunting, and the combination of the short barrel length and small caliber precludes the velocity and bullet size necessary for effective self-defense. *Kelley*, 497 A.2d at 1153 n.9, (noting BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PROJECT IDENTIFICATION: A STUDY OF HANDGUNS USED IN CRIME 6, 7 (Washington, D.C.: Dep't of Treas. 1974)); *Hearings on S.2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 109-10 (1971) (statement of Geoffrey Alprin) [hereinafter cited as *Handgun Control Hearings*].

46. *Kelley*, 497 A.2d at 1153 n.9.

47. Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-28 (1982)).

48. 18 U.S.C. § 925(a)-(d) prohibits the importation of any firearm not suited for, or

portation of handguns for specific purposes, the court reasoned that Congress recognized a species of firearms that serves no legitimate purpose, namely Saturday Night Specials.⁴⁹ As evidence of this congressional belief, the court looked to the legislative history of the Act, noting one senator's comments:

In the course of these hearings, special attention was focused on Saturday night specials because these handguns present a particular problem for law enforcement and public safety by reason of their cheapness, low quality, ease of concealment, and ready availability. Having no legitimate sporting purpose, these weapons, also known as "bellyguns" and "manstoppers," are the predominant firearm used in crime.⁵⁰

Thus, the court was able to conclude that both federal and state policy, as expressed by legislative bodies, support the view that Saturday Night Specials "have little or no legitimate purpose in today's society."⁵¹ This conclusion enabled the court to find that current circumstances warrant the imposition of strict liability against manufacturers or marketers of Saturday Night Specials and that such liability is consistent with public policy.⁵²

The court had no difficulty in imputing knowledge to a manufacturer or marketer making or selling a product used principally in criminal activity.⁵³ By stating that such criminal use is foreseeable, the traditional tort barrier of causation was overcome with one simple judicial finding.⁵⁴

The Maryland Court of Appeals thus gave birth to an unprece-

readily adaptable to, a sport, law enforcement, research, or other legitimate purpose. For the court's analysis of the federal Gun Control Act, see *Kelley*, 497 A.2d at 1154-57.

49. *Kelley*, 497 A.2d at 1156.

50. 118 CONG. REC. 27,030 (1972) (statement of Sen. Bayh, subcommittee chairman). See also *Kelley*, 497 A.2d at 1156-57 for additional legislative history. Further, the court took notice that no leading manufacturer of such guns would testify before the Senate Committee on the Judiciary when subcommittee hearings were held on Saturday Night Specials. *Id.* at 1158 n.18. The inference arising from this fact is that responsible firearm manufacturers agree about the paucity of legitimate uses for Saturday Night Specials.

51. *Kelley*, 497 A.2d at 1158. The court pointed out that during the Senate hearings on the Gun Control Act, Maxwell Rich, then Executive Vice President of the National Rifle Association, testified that advertisements for Saturday Night Specials had never to his knowledge been accepted in the group's publication, *The American Rifleman*, because these weapons are poorly made, have no sporting uses, and "do not represent value received to any purchaser." *Id.* at 1154 n.10 (citing *Handgun Control Hearings*, *supra* note 45, at 315).

52. *Kelley*, 497 A.2d at 1159.

53. *Id.* at 1158-59.

54. For a discussion of the causation problems, see *infra* notes 63-71 and accompanying text.

dented cause of action: manufacturers of Saturday Night Specials as well as all other sellers in the marketing chain are strictly liable in tort for injuries which result from the weapons' criminal use.⁵⁵ To succeed in such an action, the plaintiff must establish that the handgun used was a Saturday Night Special,⁵⁶ the shooting was a criminal act,⁵⁷ and the plaintiff was not a participant in the criminal act.⁵⁸ The trier of fact must determine whether a particular handgun is a Saturday Night Special by considering a number of factors; such as, gun-barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, and reliability; whether the Bureau of Alcohol, Tobacco and Firearms has banned its importation; applicable industry standards; and the views of law enforcement personnel, legislators, and the public.⁵⁹ Neither the doctrine of contributory negligence nor the doctrine of assumption of the risk will operate as a defense.⁶⁰ If found liable, the manufacturer or marketer must pay all resulting damages.⁶¹ This new cause of action was available to Kelley and to all others injured after the date of the decision unless the defendant could prove the gun was marketed before *Kelley* was decided.⁶²

IV. ANALYSIS OF THE MARYLAND DECISION

The most noteworthy aspect of the *Kelley* decision is its frankness. Instead of attempting to force this cause of action within existing strict liability theories, the court recognized the uniqueness of the claim and accordingly created a new common law theory of recovery.

The most troublesome aspect of the decision is its cursory treatment of the causation issues. Difficult questions of policy are involved in holding a party liable for the criminal acts of a third party. Tort liability arises only when an actor's conduct is both a cause in fact and the proximate cause of the plaintiff's injury.⁶³

55. *Kelley*, 497 A.2d at 1159.

56. *Id.* See *supra* note 7.

57. *Id.* at 1160. The shooting can be the criminal act or may occur in the course of another crime.

58. *Id.* at 1160 & n.20. Potential plaintiffs include intended victims, innocent bystanders, law enforcement personnel, or persons who intervene to prevent the crime, assist victims, or apprehend the perpetrator.

59. *Id.* at 1159-60.

60. *Id.*

61. *Id.*

62. *Id.* at 1162.

63. W. PROSSER, *supra* note 22, §§ 41, 42.

Although these two concepts are difficult to distinguish, cause in fact, or "but for" causation, is established when the tortfeasor's act was a substantial factor in bringing about the harm.⁶⁴ One does not escape liability simply because one's conduct is not the sole factual cause of the injury.⁶⁵ Proximate, or legal, causation limits liability to instances when the conduct *foreseeably* causes the plaintiff's injury.⁶⁶ The specific chain of events which brings about the harm need not be anticipated, but the general type or character of harm must be foreseeable.⁶⁷ Although an intervening act is often said to be an unforeseeable occurrence that breaks the causal link between the tortfeasor's conduct and the harm, such an intervening event is foreseeable if it is a significant part of the risk attributable to the tortfeasor's activity.⁶⁸ Thus, one is not insulated from liability if a third party's actions—even if criminal—are a likely hazard.⁶⁹ The *Kelley* court found volumes of evidence indicating that it is common knowledge among persons in the firearms industry that Saturday Night Specials are primarily useful for criminal activity.⁷⁰

From a policy standpoint, if a court were to follow *Kelley* and create a new common law cause of action grounded in large part on the known lack of legitimate uses for Saturday Night Specials, it would be consistent to impute this knowledge to the manufacturer and marketer and to categorize the criminal use as foreseeable, thus overcoming the causation barriers. Once a court decides that public policy favors holding Saturday Night Special manufacturers and marketers liable because they have introduced into the stream of commerce a product fit only for criminal use,⁷¹ the court should

64. *Id.* § 41 at 240-41; RESTATEMENT (SECOND) OF TORTS § 431(a) (1964).

65. W. PROSSER, *supra* note 22, § 41, at 240-41.

66. *Id.* § 43 at 250.

67. *Id.* §§ 42, 43.

68. *Id.* § 44, at 272.

69. *Id.*; RESTATEMENT (SECOND) OF TORTS § 449 (1964). See *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713, 721-22 (Hawaii 1982) (criminal use of a rifle not foreseeable when the purchaser exhibited no unusual conduct); *Robinson v. Howard Bros.*, 372 So. 2d 1074, 1076 (Miss. 1979) (criminal use not foreseeable and instead a superseding cause where there was no notice of a criminal record or propensity for violence). These cases deal with the foreseeability of a particular chain of events. See also *Santarelli & Calio*, *supra* note 34, at 476-78, 487-91 (criminal acts of a third party not foreseeable thus the manufacturers' actions are not the proximate cause of handgun injuries); Note, *Manufacturers' Strict Liability*, *supra* note 34, at 493-97 (criminal misuse of a handgun not foreseeable). But see *Decker v. Gibson Prod. Co.*, 679 F.2d 212, 215-16 (11th Cir. 1982) (in some cases, criminal acts by third persons involving firearms are foreseeable); *Turley & Harrison*, *supra* note 34, at 293-95 (criminal use of handguns foreseeable).

70. See *supra* notes 44-52 and accompanying text.

71. Cf. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1964).

have little trouble deciding that the criminal act of a person pulling the gun's trigger is foreseeable and thus does not break the causal nexus between the manufacturer's or marketer's conduct and the injury.

The larger question which must be addressed in evaluating the wisdom of the *Kelley* decision is who should decide how society will deal with the problem of handgun violence. The tremendous social costs, economic loss, human suffering, and personal tragedy inherent to this issue make the debate heated and emotional. Many courts and commentators have concluded that the debate must be settled by a legislative body.⁷² Only a representative body is conducive to the robust, wide-open debate that this problem requires.⁷³ The legislature is undoubtedly better suited than the courts to gather the necessary information and hear numerous, varied arguments on the topic. The very fact that legislatures around the nation have repeatedly heard proposals, held debate, and often legislated in this general area supports the proposition that the judiciary should not step in and make broad policy when the legislature has failed to do so.

Kelley is not, however, a case of the judiciary invading legislative territory to make broad policy. As the court expressly stated, to hold gun manufacturers or marketers liable for injuries inflicted by their products *as a general rule* would indeed be contrary to public policy as articulated by the legislature and, thus, beyond the proper exercise of judicial power.⁷⁴ Rather than enter the general area of handgun policy which is admittedly reserved for the legislature, the court evaluated society's interest in a particular category of handgun—Saturday Night Specials. The court balanced the value these particular guns have for lawful purposes against the harm caused by users of Saturday Night Specials. The court found that because Saturday Night Specials have only minimal utility but cause substantial injury, the imposition of liability against manufacturers would promote justice without unduly infringing on

72. See *Patterson*, 608 F. Supp. at 1216; *Mavilia*, 574 F. Supp. at 111; see also Santarelli & Calio, *supra* note 34, at 505-06; Note, *Handguns*, *supra* note 34, at 1924-28; Note, *supra* note 2, at 850-52.

73. Santarelli & Calio, *supra* note 34, at 480, point out that there are legitimate uses for Saturday Night Specials. "[T]hose segments of society most often victimized by crime—the poor and the elderly"—often use these same handguns as an affordable means of self-defense. The authors also believe that it is not in the public interest to hold manufacturers responsible for the criminal acts of an individual as this would "send criminals a . . . signal . . . that society will in fact subsidize their criminal misdeeds." *Id.* at 507.

74. *Kelley*, 497 A.2d at 1151.

the rights of persons to own and use handguns for legitimate purposes.

What the court did was to decide whether a manufacturer or an innocent victim ought to bear the loss when the gun is used during the commission of a crime to inflict injury on a blameless individual. Few issues are more suitable for judicial determination than who ought to bear tort losses. Simply because the legislature has regulated a particular activity does not mean the judiciary is precluded from deciding where losses should fall when an injury associated with that activity occurs.

V. FLORIDA LAW AND HANDGUN POLICY

The Eleventh Judicial Circuit Court will soon be faced with a wrongful death action based on the abnormally dangerous and defective product doctrines.⁷⁵ In *Prescher v. Rohm Gesellschaft*,⁷⁶ the wife of a handgun shooting victim complains that the same manufacturer who was found liable in *Kelley* designed, distributed, and sold a Saturday Night Special that was "defective and unreasonably dangerous . . . and intended exclusively for criminal use."⁷⁷ The traditional theories probably will be unavailing.

A. *The Unreasonably Dangerous Activity Doctrine*

Courts faced with strict liability claims have concluded that Florida recognizes a cause of action under the abnormally dangerous activity doctrine articulated in Restatement sections 519 to 520.⁷⁸ A plaintiff arguing for handgun manufacturer liability under this theory would, nevertheless, face many of the same barriers as did Kelley. In Florida, like Maryland, each individual found strictly liable for engaging in an abnormally dangerous activity has been an owner or occupier of land.⁷⁹ Florida's abnormally dangerous activity doctrine developed from the rule in *Rylands v.*

75. Plaintiff's Complaint at 3, *Prescher*, No. 85-43414CA05 (Fla. 11th Cir. Ct. filed Oct. 17, 1985). The two-count complaint also alleged the defendants were negligent in the design, manufacture, and distribution of the .22 caliber Saturday Night Special used to kill the plaintiff's husband. *Id.* at 2.

76. No. 85-43414CA05 (Fla. 11th Cir. Ct. filed Oct. 17, 1985).

77. *Id.* at 3.

78. The leading case is *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. 2d DCA 1975). See also *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510 (Fla. 3d DCA 1984); *Bunyak v. Clyde J. Yancey & Sons Dairy, Inc.*, 438 So. 2d 891 (Fla. 2d DCA 1983), *petition for review denied*, 447 So. 2d 885 (Fla. 1984); *Hutchinson v. Capeletti Bros.*, 397 So. 2d 952 (Fla. 4th DCA 1981).

79. See cases cited *supra* note 78.

Fletcher,⁸⁰ which is limited in England to "those land uses deemed nonnatural."⁸¹ When Florida courts adopted the six-part Restatement test to determine whether an activity is abnormally dangerous, the test was similarly restricted to unnatural uses of land which pose an excessive risk of harm relative to the locality where the activity occurs.⁸²

B. *The Products Liability Doctrine*

Products liability theories in Florida seem equally inhospitable to a claim of handgun manufacturer liability. Florida adopted Restatement section 402A in *West v. Caterpillar Tractor Co.*⁸³ There, the Florida Supreme Court stated that strict products liability should be imposed against manufacturers only when a plaintiff establishes the manufacturer's relationship to the product, the product's defective and unreasonably dangerous condition, and that this condition proximately caused the injury or damage.⁸⁴ Under *West*, Florida courts have usually applied the consumer expectation test to determine the existence of a defect.⁸⁵ One court articulated the following test for determining either manufacturing or design defects: "Were the ordinary consumer's expectations frustrated by the product's failure to perform under the circumstances in which it failed?"⁸⁶

There is also strong support for the position that a risk/utility test is applicable in Florida. The Florida Supreme Court, in *Radiation Technology, Inc. v. Ware Construction Co.*,⁸⁷ stated that section 402A deals with products which are unreasonably dangerous to the user or consumer. What is unreasonably dangerous, the court continued, may be decided by balancing

the likelihood and gravity of potential injury against the utility of

80. [1868] L.T.R. 22 (n.s.).

81. *Bunyak*, 438 So. 2d at 893.

82. *Id.*; see also *Cities Serv.*, 312 So. 2d at 800-03 (both the *Rylands* doctrine and the abnormally dangerous activity doctrine deal with non-natural uses of land).

83. 336 So. 2d 80 (Fla. 1976).

84. *Id.* at 86-87.

85. See *Zyferman v. Taylor*, 444 So. 2d 1088, 1091 (Fla. 4th DCA), *petition for review denied*, 453 So. 2d 44 (Fla. 1984); *Perez v. National Presto Ind.*, 431 So. 2d 667, 669 (Fla. 3d DCA), *petition for review denied*, 440 So. 2d 352 (Fla. 1983); *Builders Shoring and Scaffolding Equip. Co., v. Schmidt*, 411 So. 2d 1004, 1006-07 (Fla. 5th DCA), *petition for review denied*, 419 So. 2d 1200 (Fla. 1982); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1144 (Fla. 1st DCA 1981).

86. *Cassisi*, 396 So. 2d at 1144-45.

87. 445 So. 2d 329 (Fla. 1983).

the product, the availability of other, safer products to meet the same need, the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of instructions and warnings on safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive.⁸⁸

Regardless of whether the consumer expectation test or the risk/utility analysis is used in determining whether a product is unreasonably dangerous, a plaintiff in Florida is unlikely to prevail against a gun manufacturer under the strict products liability theory of 402A. First, each Florida court that has discussed the 402A theory of liability has emphasized the need for a showing of a defect to avoid making the manufacturer an insurer.⁸⁹ Second, the imposition of liability against a gun manufacturer is not compatible with either the consumer expectation or the risk/utility test as applied in Florida: the ability of a gun to kill or inflict grave bodily harm is precisely consistent with consumer expectations. Similarly, in applying the *Radiation Technology* test, handgun manufacturer liability is unwarranted when judged in light of most of the factors used in the analysis under the 402A theory.⁹⁰

C. Statutory Policy Basis for a New Cause of Action

Florida has a statutory scheme for handgun regulation similar to that of Maryland, so a common law cause of action like the one recognized in *Kelley* could be supported in Florida. Section 790.25, Florida Statutes⁹¹ contains a declaration of legislative intent to promote firearm safety and prevent the use of firearms in crimes, and it makes possession lawful without a permit for, among other things, law enforcement,⁹² target shooting,⁹³ and hunting.⁹⁴ Other than for those purposes specifically set out in the statute, Florida

88. *Id.* at 331. See also *Cassisi*, 396 So. 2d at 1145 (risk/utility analysis preferable in design defect cases).

89. See cases cited *supra* note 85.

90. See *supra* text accompanying note 88. Although the likelihood and gravity of potential injury from the criminal misuse of a Saturday Night Special outweighs its utility, when the *Radiation Technology* test is applied, there are no safer alternative products that would be able to perform the same functions; the danger is known and obvious; instructions are unnecessary; and if the dangers inherent in a cheap, poorly made handgun were corrected its cost would surely rise.

91. FLA. STAT. § 790.25(1) (1985).

92. *Id.* § 790.25(3)(d).

93. *Id.* § 790.25(3)(j), (k).

94. *Id.* § 790.25(3)(h).

law requires one to obtain a permit in order lawfully to possess a firearm.⁹⁵ In this fundamental respect, Florida and Maryland law are comparable.⁹⁶

Two differences between the Florida and Maryland statutory gun regulations—each of which could be the basis for arguing that Florida's policy is significantly weaker and therefore more tolerant of Saturday Night Specials—are noteworthy. The Florida statute vests the firearm permitting authority in the county commissions so long as they apply certain minimum criteria.⁹⁷ Maryland law vests the permitting authority in the superintendent of the state police.⁹⁸ Furthermore, the Florida statute includes a statement of legislative intent that it be liberally construed to favor the constitutional right to keep and bear arms;⁹⁹ the Maryland statute does not. Neither point should alter the analysis. Where the authority to issue a gun permit is vested is more relevant to concerns about home rule than about the legitimacy of gun use. In any event, the two states have remarkably similar minimum criteria for obtaining a permit.¹⁰⁰ The legislative intent to construe the statute to favor gun ownership should not affect the analysis either because the Florida Legislature explicitly limited its intent favoring gun ownership to those gun uses which are lawful.¹⁰¹ As the Maryland court found, Saturday Night Specials—given their unique characteristics—are not consistent with lawful purposes.¹⁰²

Thus, Florida's gun control legislation is similar to that of Maryland's in evincing a policy that only certain legitimate uses of handguns are consistent with the public interest. Hence, proponents of Saturday Night Special manufacturer and marketer liability could argue that in Florida as in Maryland any category of firearm not suited for the legitimate uses outlined by the statute is not sanctioned by the public policy of the state.

95. *Id.* § 790.05.

96. Compare FLA. STAT. § 790.05 (1985) with MD. ANN. CODE art. 27, § 36B(b) (1957, 1982 Repl. Vol.).

97. FLA. STAT. § 790.06.

98. MD. ANN. CODE art. 27, § 36E(a) (1957, 1982 Repl. Vol.).

99. FLA. STAT. § 790.25(4).

100. Compare FLA. STAT. § 790.06 (1985) with MD. ANN. CODE art. 27, § 36E(a) (1957, 1982 Repl. Vol. & Cum. Supp. 1985).

101. FLA. STAT. § 790.25(4). The statute directs that it be construed "in favor of the constitutional right to keep and bear arms for lawful purposes." *Id.* (emphasis added).

102. *Kelley*, 497 A.2d at 1153-54.

V. CONCLUSION

The *Kelley* court did not overstep its judicial authority and make law inconsistent with legislative policy or prerogative. Instead, the court decided an issue traditionally within the purview of its role as the arbiter of the common law. It saw an injustice and found that its goal in providing a remedy was within the established policy of the state. If a Florida court were to make a similar decision, it too could reconcile Saturday Night Special manufacturer liability with the state's policy on firearms. No matter how it resolves this issue, however, a Florida court should do so with a candor akin to that exhibited by the Maryland Court of Appeals. It is only by facing the handgun problem head-on that this difficult issue can be fully addressed and the policy choices intelligently made.

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