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FEATURE ARTICLES

The Limits on the Use of Tort Law To Encourage Consumer Safety

Sarah L. Olson
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Introduction

Consumer safety is one of the fundamental reasons for courts' universal application of strict liability and negligence principles to product design, manufacture, warnings and sale. When litigants part ways with traditional notions of product liability and negligence law in suits involving firearms, however, they also move well past the enunciated goal of promoting consumer safety into a larger discussion of societal goals in relation to violence. There are limits to the lengths that product liability and negligence law can be stretched to accommodate more generalized societal concerns over violently inflicted injury. This attempt at expanding negligence law is clear in the realm of tort-based firearms litigation, when plaintiffs seek to impose liability for the criminal, intentional or accidental injuries caused by use of a non-defective and lawfully sold firearm. Neither the law nor public policy supports the expansion of tort law from a vehicle for promoting individual consumer safety into a means to further societal or legislative ends.

The basic premises that limit the application of tort law in product-related cases are simple and based on common sense. Because manufacturers are not insurers of all harms that can be occasioned by the use of their products, a product must be defective or unreasonably
dangerous in design, manufacture or warnings for liability to attach. Manufacturers cannot be liable to remedy what they do not control. Where injuries stem from product uses or from open and obvious characteristics which are not defective, manufacturers have no means, short of discontinuing production, to respond. Similarly, the extent to which liability for negligence may be alleged and imposed is limited by concepts of duty and proximate cause. Unless the manufacturer stands in a relationship with the injuring or injured party such that it can control the conduct of one and prevent harm to the other, neither a breached duty nor a causal connection between breach and injury can arise.

By examining the history of tort-based claims against firearm manufacturers over the last twenty-five years, one can perceive the outline of principles which protect consumers in individual cases but restrict the application of tort law to promote more general societal goals. This article addresses these principles:

I. A product must actually be defective for tort liability to be imposed against its manufacturer for injuries sustained during its use.
   A. The risk-utility test for product defect does not measure social utility generally.
   B. A product is not defective based solely on the fact that it can be used – criminally, intentionally or accidentally – to inflict injury.

II. Product warnings are intended to protect those to whom dangers are not obvious. Where a danger inherent in a product is open and obvious, no warning is required.

III. Tort liability cannot be imposed where a manufacturer has no relationship with the injured party, the injuring party, or the product that causes injury at the time that an injury
occurs.

IV. For tort liability to be imposed, the manufacturer must control the risk at the time of injury.

I. To Impose Tort Liability, A Product Must Actually Be Defective

The threshold requirement of any tort claim based upon the operation of a product, regardless of the theory on which it is brought, is the identification of a product defect which proximately causes the plaintiff's injury. In the forty years that have elapsed since product liability theory took root, a philosophical and legal battle has raged around the scope of protection it provides. One element of this debate can be framed as follows: Does product liability law apply to products which are in themselves not defective in condition, but which can be used to inflict harm? In the context of firearm litigation, the courts' answer has been a resounding "No."

The central inquiry in these cases is not whether through its normal function a firearm is capable of causing harm, but whether an unreasonably dangerous defect in its condition does so. Almost without exception, the tort law of all fifty states has rejected the proposition that the function of a product, as opposed to its condition, can constitute a defect. In the firearm context, this rule has been uniform. A defective product:

Is 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 for its intended use.

If, in fact, a firearm is sold in a defective condition, a product liability suit (if even required) can amply redress an individual plaintiff's wrongs and simultaneously
protect other consumers by encouraging the manufacturer to correct the specific flaw.

Notwithstanding this explicit threshold requirement of defect, however, many plaintiffs in firearm cases fail to allege a legally cognizable defect in the firearm with which they have been injured. Instead, over the last twenty-five years, plaintiffs have often contended that because a firearm has the inherent capacity to be used to inflict death or serious injury, the product is itself de facto defective. This is contended even though the firearm is perfectly manufactured, operates exactly as designed and intended by the user, is accompanied by copious warnings, and produces no injury to the “consumer.” Under the guise of a traditional product liability claim, these plaintiffs argue that their complaints state valid causes of action by alleging that a particular firearm is too small, too concealable, of “too high a caliber,” “too powerful” or simply because it has the capacity to inflict serious injury. This argument mischaracterizes the meaning of “defect” under the law of any state; all of these characteristics are inherent in or flow from the function of firearms, not a defect in the condition of a specific firearm.

In the face of this protracted debate, courts have held firm to the principle that without a product defect there can be no tort claim against firearm manufacturers under either product liability or negligence theories. For example, in *Patterson v. Rohm Gesellschaft*, a convenience store robber shot and killed plaintiff’s daughter, using a revolver in the crime. Plaintiff filed suit against the manufacturer of the firearm claiming, among other things, that the revolver was unreasonably dangerous and should not have been distributed to the public because of the general prevalence of handgun use in crime. Rejecting this argument the court noted that:

[the unconventional theories advanced in this case . . . are totally without merit, a misuse of
products liability laws. It makes no sense to characterize any product as "defective" – even a handgun – if it performs as intended and causes injury only because it is intentionally misused.\(^6\)

Similarly, New York trial and appellate courts rejected claims by victims of the infamous criminal rampage by Colin Ferguson aboard the Long Island Rail Road in December of 1993, which left six people dead.\(^7\) The plaintiffs contended that the model of Sturm, Ruger pistol used by Ferguson was defectively designed because it purportedly had "no legitimate sporting purpose" and was "completely unnecessary for self-defense."\(^8\) In support of this assertion, plaintiffs pointed to the pistol's size and design, which permitted the easy removal and replacement of ammunition magazines. Plaintiffs made no allegation that the specific pistol used by Ferguson had malfunctioned or was defective in condition; indeed, the facts alleged clearly indicated that the firearm had functioned precisely as designed and as Ferguson intended, with tragic results.

Granting the manufacturer's motion to dismiss, the trial court observed that plaintiffs were, in fact, complaining of the very function of the firearm and the risks which attend that function. As the court noted:

> The risk of a gun lies in its function and not a defect in the product. A gun is designed to fire a bullet which is capable of killing or seriously injuring another. It is difficult to discern an alternative design which would reduce the likelihood of injury without changing its function.\(^9\)

Because plaintiffs could not identify any defect in the condition of the specific firearm in question, they could not pursue a product liability or negligence action against its manufacturer.

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Wayne Williams. In Addison, Mr. Williams fired 55 rounds from a semi-automatic rifle through the steel doors of a bar, killing one person and injuring five others. The Louisiana appellate court rejected plaintiffs’ theory that the firearm was defective because it was “too powerful,” “attractive to criminals,” and had “no purpose except to kill human beings,” stating:

The primary or basic function of a gun is to fire a bullet capable of killing. A gun that has the capacity to shoot and kill, which is its primary function, cannot be said to be unreasonably dangerous per se because it has that capacity. A product cannot be said to be unreasonably dangerous per se where the danger complained of is the purpose and function of the product . . . . [A]ll guns are dangerous and have the capacity to kill. Each type of gun has characteristics that make it more dangerous than another type, depending on the circumstances of its use . . . . Thus, attempting to characterize one type of gun as presenting a greater risk of harm or as being more susceptible to criminal misuse than another type becomes extremely tenuous . . .

The manufacturers of the weapon and the ammunition used in it are not liable for injuries resulting from the intentional criminal misuse of the gun.  

Every jurisdiction that has considered the application of product liability law to firearm manufacturers for injuries inflicted with non-defective firearms has rejected plaintiffs’ efforts to expand this theory to such radical lengths. In each case, courts have held that plaintiffs do not state a product liability cause of action by asserting that a firearm is defective based on its function rather than a flaw in its condition, regardless
of how that assertion is specifically framed.

A. The Risk-Utility Test For Product Defect Does Not Measure Social Utility Generally

Frustrated by courts' unwillingness to expand product liability law to situations where a non-defective firearm has been used to cause injury, plaintiffs have invoked the risk-utility test by which a product's design is assessed in some states. In the seminal case of Barker v. Lull Engineering Co., the California Supreme Court adopted this test, which weighs the risks associated with the use of a specific product as designed, against its specific uses and usefulness. Other courts have adopted the same test to determine whether a product is unreasonably dangerous. This test considers the usefulness and desirability of the specific product; the likelihood that, as configured, it will cause injury; the probable severity of injury; the existence of alternative feasible designs; the ability to eliminate the danger without compromising the usefulness of the product; the user's ability to avoid danger by the exercise of reasonable care; and the ability of the manufacturer to spread the loss.

In applying the risk-utility test to firearms that function as designed (and often as their user intended) however, litigants have attempted to inappropriately expand that concept to situations it was never intended to address, even under Barker v. Lull. Risk-utility is an analysis of alternative formulations of a product, that is, of the specific design incorporated into an individual product. It does not encompass a consideration of the social utility per se of a category of products, for example, the usefulness of all toasters, regardless of manufacturer or model. The test measures the risk of a particular formulation of a product against the given use of the product, not against its usefulness as a social concept.

This interpretation of the risk-utility test is not
only supported by explicit formulations of risk-utility analysis; it is also implicit in the factual circumstances of the cases that discuss that theory. For example, in *McKay v. Sandmold Systems, Inc.*, the issue was not the design of muller machines in any foundry, but rather whether the door on a specific muller should have been equipped with a limit switch so that the machine could not be started with the door open. In *Burch v. Sears, Roebuck & Co.*, the issue was the danger inherent in the use of a particular electric lawn mower designed without a dead man’s switch, not the danger inherent in all lawn mowers because they utilize rotating sharp blades to accomplish their objective. In *Voss v. Black & Decker Mfg. Co.*, plaintiffs stated a cause of action by alleging that a specific circular saw was defectively designed in that it permitted an excessive amount of blade to be exposed, leading to plaintiff’s particular injury. The cause of action was not based on the fact that all circular saws have the capacity to cause laceration even when used as designed and intended. The underlying theme of the risk-utility test is the premise that this concept applies only when “something goes wrong with a product,” not every time an individual is injured during its use.

Product liability cases involving firearms illustrate the limits drawn by the law on the application of the risk-utility test as a measure of product design. For example, in the early case of *DeRosa v. Remington Arms, Inc.*, a police officer died when his partner accidentally discharged a shotgun. The plaintiff alleged that the shotgun fired because the trigger pull was “too light.” Applying the risk-utility test of product defect, the court held that the firearm was not unreasonably dangerous as a matter of law simply by virtue of its function. Pointing out that “… a gun [must] be designed so that it finally can be fired . . .,” the court aptly stated:

Sadly, it must be acknowledged that: [m]any products, however well-built or well-designed
may cause injury or death. Guns may kill; knives may maim; liquor may cause alcoholism; but the mere fact of injury does not entitle the [person injured] to recover . . . . [T]here must be something wrong with the product, and if nothing is wrong there will be no liability.22

In other words, even when the risk-utility test is the measure of product defectiveness, there must be an actual defect alleged in a specific product before the test is applied.

In _Kelley v. R.G. Industries, Inc._,23 the court considered plaintiff’s argument that a handgun, which performed without malfunction in the murder of the decedent, should be evaluated under the risk-utility analysis. The court disagreed:

We believe . . . that the risk-utility test is inapplicable to the present situation. This standard is only applied when something goes wrong with a product . . . . [I]n the case of a handgun which injured a person in whose direction it was fired, the product worked precisely as intended. Therefore, the risk-utility test cannot be extended to impose liability on the maker or marketer of a handgun which has not malfunctioned.24

Despite these consistent rulings, plaintiffs continue to attempt to use the risk-utility test as a way of stating a product liability cause of action in cases involving firearms that function precisely as designed and, often, as intended, and they cite to cases like _O’Brien v. Muskin Corp._25 or _Perkins v. Wilkinson Sword._26 These cases, however, involve the evaluation of the condition of a specific product (such as the slippery nature of the bottom of a particular swimming pool or the absence of devices to prevent small children from using a specific cigarette lighter), not the function of the product (to hold
water or to start a flame). In contrast, plaintiffs in firearm cases often attempt to use the risk-utility test to condemn the function of the product (to discharge a bullet when the trigger is pulled), rather than its condition (for example, a firearm which emits lead or gases which strike the shooter's hand when it is fired). Using the O'Brien swimming pool example, the proper analogy would be whether the manufacturer of a non-defective swimming pool, which properly holds water as its primary function, may be held liable when someone intentionally holds another under water and drowns him or her because the instrumentality of the pool was employed (and employable) for carrying out the criminal act. Courts have overwhelmingly agreed that the risk-utility test cannot be applied to "create" a defect in condition in this way; rather, that test is appropriate only where there is an underlying defect in condition to evaluate.

B. A Product Is Not Defective Because It Can Be Used To Inflict Injury

Rather than squarely addressing the requisite elements of a product liability claim, plaintiffs sometimes allege that the inherent function of a firearm — that it will discharge a bullet if all of the steps necessary to do so are taken — constitutes the required defect. Although not limited to these circumstances, the flaw in these plaintiffs' cases is most obvious where injury or death by gunshot wound was the very result intended by the shooter.

A firearm, which necessarily must be capable of being fired or otherwise it would not be a firearm, is not defective merely because it is capable of being used during a criminal act or suicide to inflict intended harm. If a firearm may be found to be defective because it fires a projectile when the trigger is intentionally pulled, a knife or a pair of scissors is defective because it will cut, and gasoline is defective because it will ignite.
As noted above, state tort law does not support such claims because, in the absence of a defect in the condition of the firearm, no product liability cause of action can be stated. Moreover, in many states, courts have found that plaintiffs cannot state a cause of action where injury has been intentionally inflicted. Here, the acts of the shooter prevent the plaintiff from showing that his or her injuries were proximately caused by any act or omission of the defendant or by any defect in its product. Thus, courts across the country have held that firearm manufacturers are not liable in tort for injuries that result from the intentional functioning of a firearm, whether or not the resulting harm is intended.2

Even though issues of proximate cause are ordinarily factual questions for the jury to decide, courts may determine as a matter of law that a plaintiff cannot allege or satisfy this requirement as a matter of law.28 In these instances, proximate cause acts as a limit on the scope of product-related tort claims that may be pursued. Where a firearm is used to injure oneself or another deliberately, its inherent capacity to do so is a result of its function, not a defect in condition. Therefore, liability cannot attach.

II. Product Warnings Are Not Required When The Danger Is Obvious

A substantial number of cases in which plaintiffs raise product liability or negligence claims against firearm manufacturers include allegations that a particular product’s warnings were inadequate. Whether warnings are attacked on product liability grounds (an inadequate warning causes a product to be defective) or on negligence grounds (the manufacturer’s conduct in supplying inadequate warnings was unreasonable), these claims all require the following basic elements. First, the product must contain a latent or undisclosed defect that
posed a risk to the consumer. Furthermore, the warnings that accompanied the product did not adequately warn the consumer of that defect or did not give instructions on how to safely use the product. Finally, the consumer was injured as a proximate result of that inadequate warning about the risk.

Embedded in this set of criteria is the assumption that the injured consumer did not already know about the risk that ultimately caused his or her injury. "As a general rule, a manufacturer does not have a duty to warn customers of dangers inherent in the manufacturer’s product if those dangers are generally known and recognized by the ordinary consumer." Under the law of many states, manufacturers simply have no duty to warn of an open and obvious danger. As one court noted, it is simply not "necessary to tell a zookeeper to keep his head out of the hippopotamus’ mouth." An open and obvious danger is one which is “plain enough [that it ought to] be seen by anyone.” Courts around the country have frequently supported this principle, in both the firearm and other product contexts. Thus, where the dangers associated with the use of a particular product are open and obvious to the reasonable consumer, or are specifically known by the plaintiff, liability cannot be established and inadequate warnings claims will be dismissed in many jurisdictions.

The risks associated with owning, using and storing firearms, including the risk that they may be criminally, intentionally or accidentally misused, are dangers made open and obvious by the very nature and function of firearms themselves. In many states, the obvious nature of the danger associated with firearm use is reflected in criminal statutes and common law that assume specific intent to commit homicide from the act of pointing a firearm at a person and firing. Based upon the well-known function of firearms, "[t]he act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and
probable consequence." This is a fact with which even school children are familiar. As the court succinctly noted in *Mavilia v. Stoeger Industries*, "that death may result from careless handling of firearms is known by all Americans from an early age." Similarly, the acts of an individual who intends to commit suicide using a firearm cannot form the basis for any claim resting on a failure to warn.

Over the years, plaintiffs have also asserted that the warnings that accompany firearms upon sale by their manufacturers are inadequate because they do not warn that the firearm may be stolen and subsequently used in crime. However, it has been obvious since at least biblical times that a possibility exists that a criminal may steal one's small, valuable, portable possessions. Common sense and common law dictate that a product manufacturer does not have a duty to warn consumers of the obvious danger that arises when its products are stolen from the consumer's home. This specifically applies to the theft of firearms, the risk of which is well known. Further, it is clear that there are persons in our society who will use various products, including but not limited to firearms, gasoline, water, rope, knives, electricity, poison, automobiles, chains and baseball bats to inflict harm upon others. The manufacturers of these products can have no duty to warn consumers of a fact that has long been a tragic social reality.

Where no duty to warn exists, no duty to recall is justified, even in those states that impose such a post-sale duty on manufacturers. A duty to recall arises out of the presence of a latent, unexpected danger about which a warning would or should have been given, had the danger been recognized at the time of sale of the product. Where the dangers associated with the intentional use or misuse of a product are obvious, neither a duty to warn nor a duty to recall can be
imposed under the law.

III. Imposition of A Duty Requires A Relationship Between the Parties

While no duty exists in the examples above, it is not accurate to say that product manufacturers do not owe any duties towards consumers of their products. For example, product manufacturers have a non-delegable duty to manufacture products free from dangerous latent defects in construction or design. Manufacturers have a corresponding duty to test adequately and to inspect products before their sale. Additionally, manufacturers have a duty to warn consumers about latent or hidden dangers associated with its products and to provide instructions for their safe use. Other duties are specified by various states' common law. Over the last twenty-five years, however, a dispute has raged in negligence suits against firearm manufacturers, parallel to the debate in product liability cases over the definition of "defect." In negligence suits, the threshold dispute has been whether plaintiffs are seeking to impose a recognized duty on defendants that the law currently does recognize, or whether plaintiffs are seeking to impose an entirely new duty without foundation in the law.

Because plaintiffs often assert previously unrecognized duties against firearm manufacturers, the first question presented is whether such a duty actually exists. The answer is, in every jurisdiction, a question of law for the court. In fixing a duty, it is the court's obligation "to limit the legal consequences of wrongs to a controllable degree" so as to protect against crushing exposure to liability.

In many negligence-based cases involving firearms, plaintiffs have sought to impose a "duty" to refrain from lawfully selling a non-defective product to those members of the public entitled to purchase them.
under the law. In these cases, plaintiffs have not alleged any illegality on the part of the firearm manufacturers. Rather, plaintiffs assert that simply by placing into the stream of commerce a lawful and non-defective product that has the capacity to be misused for illegal ends, the defendant has breached a duty to the plaintiffs. Alternatively, plaintiffs claim that firearm manufacturers have a duty to police the entire distribution chain of their products.

Courts have generally disagreed with the theories mentioned above. Absent something “wrong” with a firearm, courts have overwhelmingly ruled that a manufacturer does not owe any duty to remotely located individuals to refrain from lawfully distributing its products to people or entities that may legally purchase them. For example, in Patterson v. Rohm Gesellschaft, a U.S. district court found that the firearm manufacturer was under no common law duty to regulate the distribution of or to refrain from marketing its non-defective firearms to members of the public with whom it never had any contact or relationship. Many other courts have agreed by specifically rejecting claims that a firearms manufacturer can be liable for negligence where there is neither an allegation nor evidence that the manufacturer had any relationship with, or any control over, either the injured party or the individual who inflicted injury using a firearm.

In fact, various legislative enactments on both state and federal levels have already predetermined for firearm manufacturers who may lawfully purchase or possess their products. Legislatures have repeatedly considered this subject for more than a hundred years and have determined whether, and under what conditions, citizens may purchase, own or possess firearms as a matter of public policy. For example, pursuant to federal law, a firearm manufacturer may sell firearms only to other federally licensed firearm manufacturers, federally licensed firearm importers,
federally licensed firearm dealers or federally licensed firearm collectors. The Firearms and Explosives Licensing Center of the Bureau of Alcohol, Tobacco and Firearms ("BATF") is charged with investigating the qualifications of every applicant for such a federal firearms license. Firearm manufacturers must keep detailed records of each product they manufacture and/or sell, including type, model, caliber, serial number, purchaser’s identity, address and other required information. Firearm manufacturers cannot ship any firearm that does not bear, among other things, a unique and permanent serial number and the manufacturer’s identity. Every firearm produced and sold by a firearm manufacturer must be regularly accounted for to the BATF either by documenting its legal sale or by showing that it is still in the manufacturer’s possession.

Many more federal regulations govern firearm manufacture and distribution. In addition, each state establishes its own civil, criminal and regulatory structure to control firearm distribution, ownership, possession and use within the state. Municipalities and counties likewise regulate firearm ownership, distribution and use. In all of these statutory and regulatory schemes, the courts have placed the primary burden of monitoring and overseeing the lawful distribution of firearms on the retail seller, which is usually the only entity which has contact with individual consumers.

Why doesn’t a duty arise to avoid selling an otherwise lawful and non-defective product because it might be used to injure another? The short and pragmatic answer is that human beings are endlessly creative in their mischief. Shifting the burden of that mischief to the manufacturer which has lawfully sold a perfectly sound inanimate object moves society further away from addressing the cause and prevention of injury, rather than closer.

The legal answer is also simple. Tort-based duties do not exist in the abstract. Rather, they only arise on the
basis of relationships, which may create in one person a
duty to control another’s actions and a corresponding
obligation to protect third parties from those actions. The existence of a direct relationship between the
defendant and an injury-inflicting actor provides the
defendant with at least theoretical control and an
opportunity to intervene to prevent injury, creating in
some circumstances a duty to do so. Alternatively, a
preexisting relationship between the defendant and an
injured person can hypothetically permit the defendant
to protect, and thus avoid injury to, that person. In the
absence of a direct relationship with either the injurer or
the injured, however, a product manufacturer has no
ability to influence the outcome. The liability imposed on
manufacturers under these circumstances is absolute and
more akin to an insurance scheme than to tort liability.
Thus, in the absence of a direct relationship – whether
parent/child; employer/employee; landlord/tenant;
common carrier/passenger or other – the law has
determined that no duty can arise.

A duty to control the acts of criminals or to protect
another against the criminal acts of a third party is
naturally even more circumscribed, and requires that the
defendant have an actual, not just theoretical, relationship
with and control over the third party’s conduct for
liability to attach.6 The Elsroth case is particularly
illuminating. Plaintiffs brought suit against
pharmaceutical maker Johnson & Johnson after the
decedent was poisoned as a result of criminal tampering
with a bottle of Extra-Strength Tylenol.65 Plaintiffs
complained that defendant’s packaging had “enhanced”
the risk of criminal tampering. In dismissing product
liability and negligence claims against the manufacturer,
the court aptly stated that “[t]he doctrine of strict
products liability . . . was not created as a lever to control
the criminal conduct of persons over whom manufacturers
and retailers have no control.”66 Although the court
recognized that the random death of innocents was an
egregious injustice, it concluded that “... a second [injustice] would be perpetrated were we to permit recovery against these defendants for a wrong they did not truly commit.”

That crime is a foreseeable fact of human society and injury from crime is sure to result, is simply not enough standing alone to create a duty to prevent or restrict the lawful distribution of a non-defective firearm. This lesson is illustrated by *Buczkowski v. McKay*, in which the Michigan Supreme Court refused to impose a duty on the basis of a “fiction of foreseeability.” In that case, plaintiff’s decedent was shot shortly after an individual purchased a firearm from the defendant retailer. Plaintiff claimed that the retailer should have foreseen that a crime would be committed based on the customer’s demeanor. The Michigan high court concluded that even though a buyer/seller relationship existed between the retailer-defendant and the customer-shooter, that particular relationship was not sufficient to create a duty on the part of the retailer to foresee and forestall subsequent injury to a third party.

In reaching this conclusion, the court followed the position enunciated by Oliver Wendell Holmes in rejecting the concept that foreseeability alone creates a duty:

> If notice [foreseeability] so determined is the general ground for liability, why is not a man who sells firearms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol from him for some unlawful end? ... The Principle is pretty well established ... that everyone has a right to rely upon his fellow-man to act lawfully and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be.
Unless a manufacturer has a direct relationship with a criminal actor and the ability to control his or her actions, the imposition of a fictional duty to prevent a specific crime at some undetermined future time and place creates a scheme of absolute liability in which the manufacturer must insure any injury intentionally caused with its products. Tort law simply does not contemplate such sweeping and limitless shifts of responsibility. As the Supreme Court of New York County has pointed out:

While it may be argued that a gun manufacturer has a moral duty to prevent or reduce the likelihood of injury to shooting victims, by not designing and marketing [a specific type of] hand guns, to impose a legal duty here would create limitless liability. This would be inappropriate because . . . the gun/ammunition manufacturer has no control over the actions of a criminal whose goal might be to randomly kill or seriously injure innocent people.

IV. For Tort Liability To Be Imposed, the Manufacturer Must Control the Risk at the Time of Injury

Over the past two decades, plaintiffs have attempted to establish liability on the part of manufacturers for injuries sustained through product use by invoking alternative, more tenuous tort theories. Two theories have gained particular favor among plaintiffs, if not in the courts: absolute liability for ultrahazardous activities and liability for creating a public nuisance. However, efforts to apply these theories to product-related injuries suffer from a major flaw – the absence of control by the product manufacturer over the injury-
causing instrument or person at the time that injury occurs.

The Restatement (Second) of Torts § 519(1) sets the following standard for imposing absolute liability for ultrahazardous activities:

One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

Many states have adopted this principle in certain, limited circumstances. Typically, these cases involve the use of property that is under the defendant’s control at the time the plaintiff sustains an injury. In New York, for example, ultrahazardous activity theory has formed the basis for liability in cases involving blasting, the collection of a quantity of water or other natural resources in a dangerous location, dredging property adjacent to plaintiffs’ land, or contamination of a neighbor’s property by spillage of chemicals, oil or other allegedly harmful substances.

Where absolute liability has been imposed, the courts’ rulings have been premised on the ability of the responsible party to control and/or eliminate the specific risk of which plaintiff complains. In all activities traditionally classified as abnormally dangerous, the party against whom liability is sought controls the risk at the time of the injury-producing activity. Thus, those who store or blast with explosives, store oil or gas, or dredge channels have been found liable under this doctrine. However, absolute liability has not been imposed on the manufacturer of the explosives, the producer of the oil or gas, or the manufacturer of the dredger. The reason for this distinction is clear: A manufacturer typically has neither control nor custody over the risk at the time of injury.

In the firearm context, courts have universally
rejected efforts to apply the ultrahazardous activity theory to the manufacture and sale of lawful, non-defective products. Every court that has specifically considered whether the manufacture and lawful sale of non-defective firearms are ultrahazardous or abnormally dangerous activities has ultimately rejected plaintiffs' theory. For example, in Martin v. Harrington & Richardson, Inc., the Seventh Circuit Court of Appeals affirmed the ruling of an Illinois federal district court dismissing plaintiffs' ultrahazardous activity claim for failure to state a cause of action. The appellate court found that "[p]laintiffs' claim, in essence, is that manufacturing and selling handguns to the public is an ultrahazardous activity that gives rise to strict liability for any damage done by the guns." The court explained the flaw in plaintiffs' argument:

[I]t blurs the distinction between strict liability for selling unreasonably dangerous products and strict liability for engaging in ultrahazardous activities by making the sale of a product an activity. Accepting plaintiffs' argument would run counter to Illinois' long-standing requirement that strict liability for the sale of a product be limited to unreasonably dangerous products. Illinois has never imposed liability upon a non-negligent manufacturer of a product that is not defective.

Some courts have gone further to conclude that the intervention of substandard conduct by a third person precludes the classification of an activity as ultrahazardous as a matter of law. In Kent v. Gulf States Utility Co., the Louisiana Supreme Court refused to classify transmission of electricity over high-tension power lines as an ultrahazardous activity, despite the known risks to neighboring persons and property. In making this determination, the court observed that when
transmission of electricity results in injury, it is almost always because of substandard conduct on the part of someone other than the electric company. From the perspective of public policy, the court determined that absolute liability irrespective of fault was not appropriate under those circumstances. The court stated:

It is noteworthy that, in each of the activities placed in this special [ultrahazardous activity] category by decisions of Louisiana courts, the enterpriser is almost invariably the sole cause of the damage and the victim seldom had the ability to protect himself. No decisions have placed in this category any activities in which the victim or a third person can reasonably be expected to be a contributing factor in the causation of damages with any degree of frequency.

In cases where non-defective firearms are lawfully marketed to those in the “general public” who are entitled to purchase them and are subsequently used to intentionally or accidentally inflict injury, a third person can reasonably be expected to be a contributing factor in the causation of injury in every instance. Put differently, “[t]he marketing of a handgun is not dangerous in and of itself, and when injury occurs, it is not the direct result of the sale itself, but rather the result of actions taken by a third party.” Having no control over the product or the situation, where the manufacturer is incapable of eliminating the risk of injury; courts recognize that absolute liability has no basis in the law.

Courts have also generally rejected a cause of action for public nuisance against the manufacturer of a non-defective, lawful product for injuries arising from the conduct of third parties subsequent to its sale. For example, in City of Bloomington v. Westinghouse, the City sued Monsanto Corporation, claiming that improper disposal of PCBs manufactured by Monsanto and sold to
Westinghouse had polluted the City’s water treatment system. Plaintiff appealed the dismissal of its nuisance claims against Monsanto. The appellate court found that Monsanto could not be liable because “the pleadings [did] not set forth facts from which it could be concluded that Monsanto retained the right to control the PCBs beyond the point of sale to Westinghouse.” Further, the court found that Westinghouse was “in control of the product it purchased and was solely responsible for the nuisance created by not safely disposing of the product.”

Other courts have agreed and have applied the requirement of control in dismissing nuisance claims against manufacturers of lawful, non-defective products. For example, in City of Manchester v. National Gypsum Co., plaintiff sued the manufacturers of asbestos products used in schools and public buildings in Manchester, New Hampshire. Plaintiff based its complaint on multiple theories, including the claim that the asbestos manufacturers had created a public nuisance by using asbestos in public buildings. After acknowledging that the concept of public nuisance is comprehensive, the district court nonetheless found that control over the asbestos at the time of the alleged injury was “a basic element of the tort of nuisance.” Because plaintiff had failed to allege such control and, by virtue of the facts pled would never be able to plead such control, its complaint was dismissed. As the court noted, “[i]f defendants exercised no control over the [offending] instrumentality, then a remedy directed against them is of little use.”

Several recent cases have studied the applicability of public nuisance law to the manufacture and sale of non-defective firearms. In Bubalo v. Navegar, two police officers were shot when they responded to a suspected breaking and entering. The surviving officer and the family of the deceased officer brought a public nuisance action against the manufacturer of the firearm used in this crime, “a compact, lightweight, semi-automatic,
The Bubalo plaintiffs specifically alleged that defendant’s actions in designing, manufacturing, marketing, and selling a firearm that purportedly appealed to criminals constituted a public nuisance. In dismissing those claims as a matter of law, the district court held that it was “reluctant to recognize a new theory of nuisance liability without a more solid foundation in Illinois decisional law.” The court also observed that the Seventh Circuit’s analysis in Martin v. Harrington and Richardson, Inc., that there could be no liability for merely manufacturing dangerous products, provided “ample justification for precluding the application of Illinois nuisance law to reach a similar result.”

Likewise, in Cincinnati v. Beretta U.S.A. Corp., an Ohio trial court held that public nuisance “simply does not apply to the design, manufacture and distribution of a lawful product.” Noting that the integrity of the entire body of product liability law would be destroyed by application of public nuisance principles to the design, manufacture and sale of products, the court concluded that “a party cannot be held liable in nuisance absent control of the activity which creates or maintains the nuisance.” This ruling is consistent with the limitations that many states’ common law places on public nuisance liability.

V. These Limitations On Tort Actions Reflect Sound Public Policy

Complaints which attempt to allege causes of action in the absence of the requisite defect, duty, proximate cause, or control over the offending product distort the scope of tort law in any state beyond all reasonable bounds and directly conflict with established precedent. Under the guise of a tort action, plaintiffs in these cases urge courts to impose an unprecedented duty
on firearm manufacturers to limit the distribution of their legally produced, non-defective handguns to "safe" consumers of those products. Alternatively, plaintiffs urge courts to impose strict or absolute liability on firearm manufacturers for the intentional, criminal or accidental misuse of their non-defective products by individuals over whom the manufacturers have no control and with whom they have no relationship.

In taking this position, plaintiffs immediately come into direct, irreconcilable conflict with state and federal public policy as expressed through their respective legislatures. The lawful distribution of firearms is highly regulated in this country, having been addressed by various legislatures for over one hundred years. Moreover, firearm manufacture, distribution, possession, ownership and use are highly controlled by multiple layers of government. The constitutions and statutory schemes of many states endorse an individual right to own or possess firearms. In creating and buttressing federal firearm regulations, the United States Congress has declared that it did not thereby intend to "discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." This legislative intent was recently reinforced by the United States Supreme Court, which recognized that "there is a long tradition of widespread lawful gun ownership by private individuals in this country," and that "despite their potential for harm, guns generally can be owned in perfect innocence."

Plaintiffs dismiss existing statutory and regulatory controls in an effort to judicially create wholly new and unsupported limitations on and liability for the lawful manufacture and sale of non-defective firearms. In the process, plaintiffs implicitly urge courts to abandon an extensive, long-standing and effective framework of federal, state and local laws and administrative regulations governing the manufacture, distribution, sale, ownership and use of firearms. Specifically, plaintiffs
would have courts abandon existing enactments that have predetermined who may lawfully sell and who may lawfully purchase and own handguns. By urging civil liability for the lawful manufacture and distribution of non-defective firearms within the existing framework of public policy and legislation, some plaintiffs have candidly made plain their primary goal in this litigation: to end or to severely limit the manufacture and distribution of legally produced, non-defective firearms. Such a goal is clearly political in nature. It calls for action which is not judicial, but rather lies well within the realm of the legislature, where decisions can be democratically reached after amassing the facts, hearing competing viewpoints and allowing full and open debate.

Many courts have indicated their clear understanding of this point, declining “to interfere with the Legislature’s exercise of authority in this area.” In King, plaintiff was rendered paraplegic after being intentionally shot with a handgun alleged to be a “Saturday Night Special.” The King court rejected plaintiffs’ proposal to substitute their individual moral judgments for the extensive, long-standing framework of public policy reflected in federal, state and local laws and regulations permitting the design, manufacture, sale and ownership of legally sold, non-defective firearms of that design. That opinion echoed the sentiments of many courts, as summarized by a Pennsylvania trial court:

[only the legislature should have the power to regulate the sale of firearms on the market, and decide whether they are so dangerous that manufacturers, wholesalers and retailers should be absolutely liable for injuries resulting from their use. The jury should not be able to speculate on whether handguns are beneficial to society; that is a policy matter for the legislature to decide.]

These decisions uphold the doctrine of separation
of powers, which balances the various branches of an
effective system of democratic government. “The
doctrine of separation of powers prohibits courts from
exercising a legislative function by engaging in policy
decisions and making or revising rules or regulations.”
As James Madison recognized, judges must refrain from
lawmaking to avoid violating that basic tenet of tripartite
government. “Were the power of judging joined with the
legislative, . . . the judge would then be the legislator.”

Although the United States Constitution does not
impose the doctrine of separation of powers on state
governments, that doctrine is implicitly embedded in
many of the states’ Constitutions and in the manner in
which they organize their governments. Suits that seek
to limit the lawful distribution of firearms of certain
designs or to exert global control over their already
highly regulated distribution violate the principle of
separation of powers by intruding the court into an
inherently legislative process.

The function of the courts is to deal with the
particular facts of specific situations while acting on a
case-by-case basis. The legislature is better equipped to
make policy decisions that will apply to all parties in
similar situations. The problems which may arise when
these functions are confused or commingled are
illustrated by the response of other courts to Kelley v. R.G.
Industries, Inc., in which the Maryland Court of Appeals
adopted a new theory of absolute liability for the
manufacturers of “Saturday Night Specials.” In
rejecting this theory, the District Court for the District of
Columbia in Brady v. Hinckley, pointed to a series of
practical problems and unintended consequences caused
by the Kelley decision, including a practical restriction on
access to firearms for self-defense which affected only
economically disadvantaged consumers. The court also
noted that the Maryland court’s foray into an essentially
legislative arena created problems of a constitutional
proportion:
All of the above suggests to this Court that what is really being suggested by the plaintiffs . . . is for this Court, or Courts, to indirectly engage in legislating some form of gun control. The pitfalls noted above seem to be ample evidence, however, that such legislation should be left to the federal and state legislatures which are in the best position to hold hearings and enact legislation which can address all of the issues and concerns as well as reflect the will of the citizens.\textsuperscript{114}

When legislative efforts to change a substantive body of law are not successful over time, it is tempting to believe that appeal to a judicial forum may be effective. Such reactions do unintended damage, however, by undermining the premises upon which our tripartite system of government rests, challenging the rights of private companies to engage in lawful, regulated trade, and altering the fundamental bases and limitations of tort liability. Expansion of tort liability beyond its inherent limitations would have a profound effect not only on manufacturers of firearms, but on every person or entity who makes, sells, distributes or uses products. Such a startling departure from existing law should be taken only after the most thorough and open debate in the legislature occurs where voices of all concerned can be heard.

Conclusion

Tort claims based on a specific product's design, manufacture or warnings may result in improvements in that product to the indirect benefit of consumers, generally. This does not mean, however, that tort liability can be effectively used to combat violence or to address broader societal concerns. In short, there are limits on the uses to which tort litigation involving products can and
should be established. To the extent that litigants’ actual goals are political or legislative, the only constitutionally permissible forum for those debates is likewise political or legislative.

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Endnotes

1. See, e.g., Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986); Codling v. Paglia, 298 N.E.2d 622 (N.Y. 1973). Throughout this article, cases from many different jurisdictions are cited and quoted. These were chosen as representative of principles widely adopted in many or all states, but reference to the specific case law of any given state may reveal variations on or even, occasionally, rejection of these themes. To ascertain the overall law of a particular state, therefore, detailed review of its tort law is required. Copies of slip opinions are available upon request (and in cases of very large orders, copying and postage) from Sarah L. Olson at olson@whad.com.


1990); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

4. Robinson, 403 N.E.2d at 443.

5. 608 F. Supp. 1206 (N.D. Tex. 1985)

6. Id. at 1216.


8. Id.

9. Id.


11. Id. at 225.


13. 573 P.2d 443 (Cal. 1978)


15. See, e.g., Barker, 573 P.2d at 443.


18. 450 N.E.2d 204 (N.Y. 1983)


21. See id. at 769.

22. Id.

23. 497 A.2d 1143 (Md. 1985).


27. See, e.g. Resteiner, No. 94-30474 (Mich. Cir. Ct. March 9, 1995)
(dismissing plaintiff’s tort claims against firearm manufacturer
where a stolen gun was intentionally and criminally misused, and
awarding sanctions for frivolous appeal); see also Rodriguez v. Glock,
Inc., 28 F. Supp. 2d 1064, 1073 (N.D. Ill. 1998) (holding that
ammunition manufacturer was not liable for the criminal misuse of
its product); Bolduc v. Colt’s Mfg. Co., Inc., 968 F. Supp. 16, 18 (D.
Mass. 1997) (ruling absence of proposed alternative design using
magazine disconnect did not render pistol defective where decedent
“deliberately pointed the gun at his own head and pulled the
1996) (dismissing design defect claims based on pistol’s lack of
manual safety or magazine disconnect where plaintiff sustained
injuries through his own “undeniable” misuse of the product);
1994) (“The moral of this story is simple. One should never point a
gun at another, thinking it is unloaded. And one should never
compound the felony by pulling the trigger. When these cardinal
rules are violated, the victim has an airtight negligence suit against
the shooter. He has no case against the gun maker”); Raines v. Colt
plaintiff’s claim that gun was defective absent magazine disconnect;
individual's act of deliberately firing pistol relieved firearm
manufacturer of liability as a matter of law); Delahanty v. Hinckley,
564 A.2d 758 (D.C. 1989) (concluding that traditional tort theories
provide no basis for holding firearm manufacturers liable for injuries
arising from guns’ intentional uses), aff’d, 900 F.2d 368 (D.C. Cir.
1990); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D.N.M. 1987)
(following the “overwhelming weight of authority which rejects
strict products liability as a theory for holding handgun
manufacturers liable for the criminal misuse of their products” and
acknowledging that “[t]he mere fact that a product is capable of
being misused to criminal ends does not render the product
defective”), aff’d, 843 F.2d 406 (10th Cir. 1988); Patterson, 608 F. Supp.
at 1212 (ruling mother of murder victim could not recover damages
from firearm manufacturer under “unconventional” and “expanded”
theory of products liability where plaintiff did not offer, and could
not offer, alternative design “because a gun, by its very
nature...[m]ust have the capacity to discharge a bullet with deadly
firearm, magazine, and ammunition manufacturers’ motion to
dismiss product liability and negligence claims arising out of the
Long Island Railroad shooting, noting that the manufacturers
“certainly had no control over the criminal conduct of a third
(holding that firearm manufacturer could not be held liable for
intentional functioning of handgun); Addison v. Cody Wayne Williams, 546 So.2d 220, 226 (La. App. 2d Cir. 1989), writ denied, 550 So.2d 634 (La. 1989) ("The manufacturers of the weapon and the ammunition used in it are not liable for injuries resulting from the intentional criminal misuse of the gun."); Taylor v. Gerry's Ridgewood, Inc., 490 N.E.2d 987, 990-92 (Ill. App. 3d 1986) (ruling summary judgment properly granted for manufacturer despite claimed need for an additional safety device where revolver "performed according to its design" when individual "deliberately pointed it at the decedent's head and pulled the trigger"); Riordan, 477 N.E.2d 1293 (affirming grant of firearm manufacturers' and distributors' motion to dismiss "where the plaintiff's injury was caused by that product's operation precisely as it was designed to operate").


29. See, e.g., Riordan, 477 N.E.2d 1293.


34. See, e.g., Raines, 757 F. Supp. at 826.


38. See id.


40. Deuteronomy 5:19 and parallel prohibitions in all major religions.


42. See, e.g., Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1209 n.7 (N.D. Tex. 1985); Resteiner v. Sturm, Ruger & Co., Inc., No. 94-30474 (Mich. Cir. Ct. March 9, 1995) (“Theft [of firearms] and subsequent use by a criminal are a (sic) widely known, commonly recognized and unfortunate realities regarding which Sturm, Ruger had no duty to warn”).


51. Two currently pending decisions, which appear to articulate negligence-based liability for lawful distribution of certain firearms (or certain quantities of firearms) to the population entitled to purchase them, are aberrations in their respective states of origin, and are being appealed. See Hamilton v. Accu-Tek, 62 F. Supp.2d 802 (E.D.N.Y. 1999) (reflecting a trial court’s refusal to apply controlling


54. See id. at 1211.

55. See Knott v. Liberty Jewlery & Loan, Inc., 748 P.2d 661 (Wash. App. 1988), review denied, 110 Wash.2d 1024 (1988) (“The manufacturer of a non-defective firearm has no duty to control the distribution of that handgun as the distribution was intended for the general public who presumably can recognize the dangerous consequences in the use of handguns and can assume responsibility for their actions.”); Richardson v. Holland, 741 S.W.2d 751, 755 (Mo. App. 1987) (“The basis alleged . . . for imposing strict liability upon [the firearm manufacturer] is that it failed to warn of the dangers associated with the distribution of the handgun and failed to regulate or limit the distribution and sale of the handgun so as to prevent its use in criminal activities . . . A conclusory allegation of a failure to regulate or limit the distribution of handguns violates no duty of [the manufacturer] to the plaintiff”); Delahanty, 564 A.2d 758 (D.C. 1989); Armijo, 656 F. Supp. at 773; Caveny, 665 F. Supp. at 531; Riordan, 477 N.E.2d 1293 (Ill. App. 3d 1985); Bennet, 353 F. Supp. 1206
(E.D. Ky. 1972).


60. See 27 C.F.R. § 178.23.


65. See Elsroth, 700 F. Supp. at 165.

66. Id.

67. Id. at 168.

68. Buczkowski, 490 N.W.2d at 335.

69. See id.


72. Restatement (Second) of Torts § 519(1) (1965).

74. See id.


79. 743 F.2d 1200 (7th Cir. 1984).

80. Id. at 1201-02.

81. Id. at 1204.

82. 418 So.2d 493 (La. 1982).

83. Id. at 499 n.8.

84. Perkins, 762 F.2d at 1265-1266.

85. 891 E.2d at 611 (7th Cir. 1989).

86. Id. at 614 (emphasis added).

87. Id.

89. Id. at 656.


92. Id. at *2.

93. Id. at *14-15.

94. 743 F.2d 1200 (7th Cir. 1984).


97. Beretta, 1995 Ohio Misc. LEXIS 27, at *8. The legal basis of a contrary ruling in Ceriale v. Smith & Wesson Corp., No. 99L.5628 (Ill. Cir. Ct. Nov. 30, 1999) is seriously flawed. The trial court there ruled that plaintiff had standing to bring a public nuisance claim against an entire manufacturing industry based on an Illinois appellate decision which had been reversed by the Illinois Supreme Court. See Glisson v. City of Marion, 720 N.E.2d 1034 (Ill. 1999). In giving her ruling, the Ceriale judge acknowledged the unique nature of her opinion by inviting additional dispositive motions and by stating that, if a case remains following those motions, immediate interlocutory appeal will be permitted.


100. See e.g., Louisiana Constitution, Art. I, § 11.

101. 18 U.S.C. § 921 ("Other provisions" (b)(2)).


105. King, 451 N.W.2d at 875.

106. See id.


111. Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985). Despite its sound approach to product liability law, the Kelley court established an entirely new area of absolute liability only for the manufacturers of firearms which the court deemed inexpensive, "poor quality," small, easily concealable handguns of a type not used by sporting or law enforcement consumers. This new area of liability was based solely on the court's mistaken impression that the Maryland legislature had expressed its desire as a matter of public policy to ban distribution of such firearms. To the contrary, after the Kelley decision was issued, the Maryland legislature enacted a statute overruling the cause of action that case purported to create. See Md.
ANN. CODE art. 27, § 36-1(h)(1)(1994).


113. Kelley, 497 A.2d at 1143.

114. Brady, No. 82-549 (D.D.C. July 3, 1986); but see, Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985) (“It would be improper for courts to ignore the fact that legislatures have repeatedly rejected arguments like those made by plaintiffs’ attorneys in this case”).