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CASENOTES

Merrill v. Navegar: A Soon to Be Reversed Aberration, or a Trend Towards Gun Manufacturer Liability?

I. INTRODUCTION

In *Merrill v. Navegar*,[1] the First District Court of Appeals of California reversed summary judgment granted by the lower court in favor of a gun manufacturer whose alleged negligent production, promotion, and distribution of firearms increased the likelihood that criminals would misuse weapons in the furtherance of a crime.[2] After considering the facts surrounding the tragedy that occurred at 101 California Street, the court became the first appellate court in the United States to recognize a duty on the part of a gun manufacturer.[3] Specifically, the court held that a weapons manufacturer owes a duty to exercise reasonable care to ensure that its actions in manufacturing, marketing, and distributing firearms do not create risks above those already inherent in the presence of guns in society.[4] In so holding, the court reasoned that the criminal misuse of weapons and the resulting injuries were foreseeable. The court cited other factors, such as the manufacturer's morally blameworthy conduct and the public policy of preventing future harm, to justify the imposition of such a duty.[5] Furthermore, the court asserted that the imposition of this duty would not unreasonably deprive responsible citizens of the right to purchase and use firearms.[6]

The tragedy at 101 California Street occurred on July 1, 1993 when Gian Luigi Ferri entered an office building in San Francisco.[7] Armed with two TEC-DC9 semi-automatic weapons manufactured by Navegar and a semi-automatic pistol, Ferri entered a law firm located on the thirty-fourth floor and opened fire.[8] When the carnage ceased, eight

1. Merrill v. Navegar, 89 Cal. Rptr. 2d 146 (Ct. App. 1999).
2. *Id.*
3. *Id.* at 193.
4. *Id.* at 172.
5. *Id.* at 169.
6. *Id.* at 171-72.
7. *Id.* at 152.
8. *Id.*

were dead, six were wounded, and Ferri had fatally shot himself.[9]

Ferri had begun shopping for semi-automatic weapons in early 1993.[10] After making inquiries regarding a wide variety of guns including a TEC-9 and a Glock, he purchased a new TEC-DC9 at a pawn shop in Nevada.[11] He acquired his second TEC-DC9 at a gun show in Nevada several months later.[12] He obtained both guns using counterfeit identification.[13] Navegar had sold the first weapon to a gun distributor in Arizona.[14] A distributor in Ohio purchased the second weapon, and then sold it to a dealer in Utah, from whom Ferri purchased it at the gun show.[15] All of the distributors were licensed and all of the transactions that culminated with Ferri acquiring the weapons were legal under applicable federal and state gun control laws.[16] Since both weapons were acquired outside of California, the Roberti-Roos Assault Weapons Control Act of 1989, which restricts the sale of assault weapons within the state, was not applicable.[17]

On June 18, 1993, just six days before the shooting at 101 California Street, Ferri returned to the pawn shop where he had purchased his first weapon and made a second acquisition.[18] He bought a Norinco Model 1911A1 semi-automatic pistol and ammunition.[19] All three weapons were used during the shooting, and Ferri's strategy regarding each weapon was deliberate.[20] Once on the thirty-fourth floor of the office building, he used the two TEC-DC9s to lay down a field of fire that wounded his victims.[21] The TEC-DC9s allowed him to create a blanket of fire rather than shooting individual bullets one at a time.[22] This blanket of fire covered a large area, decreasing the chances that any

9. *Id.*

10. *Id.*

11. *Id.* at 152-53.

12. *Id.* at 153.

13. *Id.*

14. *Id.*

15. *Id.*

16. Under federal law, both the TEC-9 and TEC-DC9 are specifically identified as "semi-automatic weapons." *See* 18 U.S.C. § 921(a)(30)(A)(viii) (1995). While both federal and state laws restrict the sale of weapons that the legislature deems to be too dangerous, the outright ban of such weapons has not been held to be constitutional. *See generally*, U.S. CONST. amend. II.

17. *See* CAL. PENAL CODE, §§ 12275. The Roberti-Roos Assault Weapons Control Act of 1989 specifically bans the TEC-9. The TEC-DC9 is the successor model to the TEC-9 differs only by very minor modifications. Because of these minor differences, the TEC-DC9 is, by implication, banned by the California legislation.

18. *Merrill*, 89 Cal. Rptr. 2d at 154.

19. *Id.*

20. *Id.* at 156.

21. *Id.*

22. *Id.*

of his intended targets could escape.[23] After immobilizing his victims, he then used the Norinco .45-caliber pistol, a much more accurate weapon at close range, to terminate his victims in a more "direct and personal manner."[24]

The survivors of the victims of the office shooting brought suit against the manufacturer of the weapons used in the shooting, asserting claims under theories of negligence, negligence per se and strict liability for ultrahazardous activities, based on the manufacturing, marketing, and distribution of the weapons.[25] The Superior Court in San Francisco County granted Navegar's motion for summary judgment as to all three causes of action: common law negligence, negligence per se, and strict liability for ultrahazardous activities.[26] The survivors appealed the ruling as to their claims of ordinary negligence and strict liability, but not negligence per se. Despite affirming the grant of summary judgment for the cause of action alleging strict liability, the appellate court reversed the grant of summary judgment for negligence.[27] The court found that Navegar owed a duty to exercise reasonable care to not create risks above those inherent in the presence of firearms, and that there were triable issues of fact as to whether that duty was breached.[28]

This Note will argue that the court erred in holding that Navegar owed any form of duty to the general public. Until now, courts have, without exception, resisted holding gun manufacturers liable under any tort theory including negligence or strict liability for their legally made, non-defective weapons. The only successful claims against gun manufacturers occurred either when there was a cause of action for negligence *per se* where a statute limited the activities of manufacturers, or where there was a cause of action for product liability and the weapon did not perform as intended.[29] Any judgment against a gun manufacturer could

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23. *Id.*

24. *Id.*

25. *Id.* at 152. Lawsuits were also brought against USA Magazines, which manufactured the 32-round magazine used by Ferri in the TEC-DC9s, the Nevada pawn shop where Ferri purchased one of the TEC-DC9s, and Hell-Fire Trigger Systems, Inc., manufacturer of a trigger activator designed to allow more rapid operation of the firearm. Hell-Fire was removed from the case due to its subsequent bankruptcy. The demurrers of USA Magazines were sustained. The pawn shop settled its claims with the plaintiffs. *See* Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: *A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons,"* 8 STAN. L. & POL'Y REV. 41, 53 n.10 (1997); *see also* Harriet Chiang, *Judge Drops Part of Gun Suit: Ammunition Clip Maker Not Tied to Law Firm Massacre*, S.F. CHRON., Mar. 12, 1996, at A11.

26. *Merrill*, 89 Cal. Rptr. 2d at 152.

27. *Id.*

28. *Id.*

29. *See* Gerald M. Mackarevick, *Manufacturers' Strict Liability For Injuries From a Well-Made Handgun*, 24 WM. & MARY L. REV. 467, 481-82 (1983).

set a precedent for other states and effectively shift the battle over guns in the United States from the legislature to the courts.[30] Accepting gun manufacturer liability would open the floodgates to a multitude of similar suits.[31] Every victim of a gun shot wound would attempt to recover from the "deep pockets" of the manufacturer instead of from the actual criminal.[32]

Part Two of this Note will discuss the treatment of claims against manufacturers. Part Three will analyze the *Merrill* court's decision. Part Four will conclude that the *Merrill* court failed to exercise appropriate judicial restraint in the rendering of its opinion, and that the California Supreme Court is likely to reverse the case when confronted with it.

PART II: PERSPECTIVE

Justice Hearle, the dissenting justice on the First District Court of Appeals, noted that this was the first appellate court in the nation to declare, in a negligence action, that a gun manufacturer owes a duty of care to third parties injured by the criminal misuse of one of its weapons by a remote purchaser.[33] Despite the unbroken line of appellate precedent in both state and federal courts that declines to impose a duty on gun manufacturers, the *Merrill* court essentially created a new tort of negligent marketing.[34]

In the absence of a special relationship, the manufacture, marketing, and distribution of a non-defective product that may legally be sold is rarely found to constitute negligence.[35] In fact, the court's ruling is completely without any supporting appellate precedent.[36] Most U.S. courts have held that traditional tort theories provide no basis for holding gun manufacturers liable.[37] To date, courts have declined opportunities to impose a duty on gun manufacturers and have deferred to the appropriate legislative body. This sentiment was even embodied by the trial court here, when it stated that in order "the way (to change the law as it related to the manufacture and sale of firearms) is through the Capi-

30. *See* David B. Kopel & Richard E. Gardner, *Triggering Liability: Should Manufacturers, Distributors, and Dealers Be Held Accountable for the Harm Caused by Guns?*, 19 SETON HALL LEGIS. J. 737, 749-50 (1995).

31. *See* Joi Gardner Pearson, *Make It, Market It, and You May Have to Pay for It: An Evaluation of Gun Manufacturer Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of* In Re 101 California Street, 119 B.Y.U. L. REV. 131, 161 (1997).

32. *See id.*

33. *Merrill*, 89 Cal. Rptr. 2d at 193.

34. *Id.* at 199-200, 203.

35. *See* Kopel & Gardner, *supra* note 30, at 753.

36. *Merrill*, 89 Cal. Rptr. 2d at 203.

37. *See id.*

tol, not the Court."[38]

Advocates of gun manufacturer liability claim that social policy demands that ultimate responsibility for the injuries caused by guns should lie with the manufacturers themselves.[39] They argue that to hold a gun manufacturer strictly liable is economically efficient because it imposes the external costs of guns on the manufacturer.[40] Gunshot victims who are not compensated by the people who caused their injuries often become recipients of government-supported medical assistance.[41] In 1993, the year Ferri committed the office shootings, damages for medical expenses and lost productivity were estimated at more than five billion dollars.[42] An additional thirteen billion dollars were attributable to lost quality of life.[43] That year, eighty percent of the 4,888 people who suffered gunshot wounds could not pay for their medical care.[44] The average cost of treating a bullet wound victim was a staggering $23,750.[45] The argument for holding gun manufacturers strictly liable is that without it, taxpayers effectively subsidize the gun industry.[46] Rather than forcing taxpayers to bear the ultimate burden, advocates claim that society should shift these costs to the manufacturers.[47]

Advocates also claim that liability offers the benefit of deterrence.[48] Without manufacturer liability, they contend, the cost of third-party injuries is not accounted for in the price of guns.[49] As a result, the price of guns remains artificially low, allowing more potential consumers to purchase guns.[50] If these costs are placed on the manufacturers, advocates assert, manufacturers will charge higher prices to offset this additional cost.[51] Not only would this result in fewer gun purchases,[52] but

38. *Id.* at 207.

39. *See* Pearson, *supra* note 31, at 158.

40. *Id.* at 158-59.

41. *Id.* at 159.

42. John P. McNicholas & Matthew McNicholas, *Ultrahazardous Products Liability: Providing Victims of Well-Made Firearms Ammunition to Fire Back at Gun Manufacturers*, 30 LOY. L.A. L. REV. 1599, 1626 (1997).

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Pearson, *supra* note 31, at 159.

47. *See* Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 553 (1999). Critics contend that a solution from the courts is preferable to legislative action. Because the members of the judiciary face less political pressure they may force their collective view for the good of society upon the public with fewer repercussions. *See* Kobayashi & Olson, *supra* note 25, at 41.

48. *See* Pearson, *supra* note 31, at 159.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

manufacturers would be reluctant to continue to produce the more devastating weapons that cause the most injuries.[53]

Liability advocates claim that since gun manufacturers are immune from civil tort liability, they continue to sell their products to the general public without cause.[54] The manufacturer is more culpable and blameworthy than the victim because the manufacturer designed, marketed, and delivered the firearm to the general consumer population.[55] Civil liability, advocates argue, would force weapon manufacturers to "invest extra capital in the design, sale, and distribution processes rather than pay large verdicts after the fact."[56] Gun manufacturers that failed to take steps to make their weapons less dangerous would bear the risk of enormous monetary losses.[57]

Since the early 1980s, when gun murders surpassed car accidents as the leading cause of unnatural death in New York, California, and Texas, gun shot victims and their families have turned to the tort system for compensation.[58] During that time, dozens of lawsuits have been filed against firearm manufacturers for their role in making weapons available for criminal misuse.[59] Prior to *Merrill v. Navegar*, none of these lawsuits had been successful, and only one ever reached a jury.[60] That case, *Halberstam v. S.W. Daniel, Inc.*,[61] successfully overcame several doctrinal obstacles that had doomed previous lawsuits.[62] However, the *Halberstam* plaintiffs failed to present sufficient evidence to demonstrate the alleged link between the gun industry and violent crime.[63] The judge in *Halberstam* issued no written opinion, which gives the case little legal precedent.[64]

Throughout the years, many arguments have been made for placing liability on gun manufacturers. Prior to attempts to impose liability on a

53. *Id.* at 160.

54. *See id.* at 159-60.

55. *See* McNicholas & McNicholas, *supra* note 42, at 1604.

56. *Id.* at 1604-05. Some advocates of gun manufacturer liability argue that the gun industry has deliberately enhanced its profits by increasing the lethality of its products. Guns, when given minimal care, do not wear out. Many have accused the gun industry of increasing the killing power of weapons to stimulate its markets over the last two decades. *See* Tom Diaz, *Gun Industry Marketing of Lethality*, 29 FALL BRIEF 20, 22 (1999).

57. McNicholas & McNicholas, *supra* note 42, at 1605.

58. Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998).

59. *Id.*

60. *See id.*

61. Alberstam v. S.W. Daniel, Inc., No. 95 Civ. 3323 (E.D.N.Y. 1998) (pleadings and court orders on file in clerk's office at the U.S. District Court for the Eastern District of New York; no written opinion).

62. Lytton, *supra* note 58, at 681-82 (citing No. 95 Civ. 3323).

63. *Id.* at 682.

64. *Id.* at 698.

theory of negligence, the argument centered around strict liability.[65] Proponents of placing liability on manufacturers alleged that guns were inherently dangerous instrumentalities, whose criminal misuse was foreseeable.[66] They argued that guns are "defective and unreasonably dangerous" products by their nature and that the manufacture and distribution of guns is an "abnormally dangerous" activity.[67] The manufacturer knew, and could foresee, that the weapons it produced, by their design and because the manner in which they were manufactured, sold, and distributed, could be used to kill human beings.[68] By placing weapons into the stream of commerce, manufacturers created the hazard that their weapons could aid gun buyers in committing murder.[69] The argument follows that, because of this, manufacturers, distributors, and retailers of guns should be held strictly liable even if the product does not malfunction or have a "defect" in the traditional tort sense.[70]

Nevertheless, courts have not embraced the theory of strict liability when used against gun manufacturers. In *Addison v. Williams*,[71] for instance, a Louisiana appellate court ruled that the manufacture and marketing of semi-automatic assault rifles and ammunition to the general public was not an ultrahazardous activity.[72] Therefore, gun manufacturers could not be strictly liable for injuries sustained by victims due to the criminal conduct of an unrelated third party.[73] The court asserted that assault weapons were not "unreasonably dangerous" because they were used in the manner in which they were intended.[74] Since neither Congress nor the Louisiana legislature had enacted any legislation regulating the manufacture, sale, or possession of assault rifles, the court refused to impose a duty on the manufacturer to refrain from selling guns to those who are lawfully entitled to possess them.[75]

Similarly, product liability theory has provided no basis for gun manufacturer liability. Claims brought under this theory have alleged that the lethal nature of firearms constituted a design defect for which manufacturers could be held liable.[76] Courts have repeatedly held that,

65. *See* Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 779 (1996).

66. *See* Nicholas E. Calio & Donald E. Santarelli, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 475 (1983).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Addison v. Williams, 546 So. 2d 220 (La. Ct. App. 2nd 1989).

72. *Id.* at 224.

73. *Id.*

74. *Id.* at 223.

75. *Id.*

76. *See* McNicholas & McNicholas, *supra* note 42, at 1627.

in order to find liability under this theory, the gun had to have some defect that caused it to malfunction and act in a defective manner.[77] In *Forni v. Ferguson*,[78] a New York appellate court held that, absent a statute, the only way to impose liability on gun manufacturers was if the products were defective. Since courts have consistently refused to consider guns to be inherently defective in design, the theory of product liability provides compensation in very few instances.

While the theory of negligence per se has had some success in placing liability on gun manufacturers, it has only done so when there was a federal or state statute that restricted the sale of firearms to a certain class of people.[79] For instance, in *Hetherton v. Sears*,[80] the Third Circuit Court of Appeals reversed summary judgment in favor of a gun retailer in a case where an off-duty policeman was shot and injured by a convicted felon.[81] The gun retailer sold a rifle and ammunition cartridges to the assailant without complying with a Delaware statute requiring the seller to check the purchaser's identification and to keep records of the sale along with a description of the purchaser.[82]

The court held that violation of this statute, intended for the safety of the public, constituted negligence per se.[83] The court noted, however, that its holding was only possible because of the existence of the statute.[84] The court was unable to find any precedent that a gun manufacturer or retailer is liable for the injuries caused by one of its firearms in the hands of a purchaser merely because it sold the weapon to the criminal.[85] In addition, the Third Circuit was unable to find justification for imposing a duty on a gun manufacturer to protect the general public against purchasers of weapons absent a federal or state statute that regulates their sale.[86] The court came to this conclusion because, up until now, every jurisdiction has declined the opportunity to impose such a duty.[87]

It is precisely this refusal to impose a duty upon gun manufacturers by the courts that has prevented the theory of ordinary negligence from imposing liability on gun manufacturers.[88] Many state appellate courts

77. *See* Calio & Santarelli, *supra* note 66, at 493.
78. Forni v. Ferguson, 232 A.D.2d 176 (N.Y. App. Div. 1996).
79. *See* Kopel & Gardner, *supra* note 30, at 763.
80. Hetherton v. Sears, 593 F.2d 526 (3rd Cir. 1979).
81. *Id.* at 527.
82. *Id.* at 528.
83. *Id.* at 529-30.
84. *Id.*
85. *See id.* at 531.
86. *Id.*
87. *Id.*
88. *See* Lytton, *supra* note 58, at 685.

have revisited these issues recently and have unambiguously held that they would not impose such a duty without legislative action. For example, in *Armijo v. Ex Cam, Inc.*,[89] a federal district court applying New Mexico law dismissed an action brought by a widow of a man killed by a person using a gun manufactured and distributed by the defendants.[90] The court noted that, absent any legislative action, it would not impose a duty upon manufacturers of firearms merely because firearms have the potential to be misused for the purposes of crime.[91]

In *Riordan v. International Armament Corp.*,[92] an Illinois appellate court held that handgun manufacturers and distributors owed no duty to take precautions to prevent the sale of their handguns to persons reasonably likely to cause harm to the general public.[93] The court also held that gun manufacturers owed no duty to provide adequate warnings to consumers that possession of a handgun is dangerous and that possession of a concealed weapon was illegal under state and federal law.[94] Gun liability advocates had hoped to use the lack of sufficient warning to their advantage under negligence theory.[95] The court reasoned that these dangers were obvious and a manufacturer or distributor would have no reason to expect that a reasonable consumer would not recognize these dangers.[96]

A Washington state appellate court, in *Knott v. Liberty Jewelry and Loan*,[97] similarly declined to hold a gun manufacturer liable for failing to warn its customers and distributors about the "dangerous propensities" of its weapons.[98] The court reasoned that even though the criminal misuse of firearms can impose a heavy cost on society,[99] the general public can presumably recognize the dangerous consequences of firearms and can assume responsibility for their actions.[100] The court was not willing to invade what it believed to be the province of the legislature.[101]

In *Buczkowski v. McKay*,[102] the Michigan Supreme Court likewise

89. Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D.N.M. 1987).
90. *Id.* at 772.
91. *See id.* at 775.
92. Riordan v. Int'l Armament Corp., 477 N.E.2d 1293 (Ill. App. Ct. 1985).
93. *Id.* at 1295.
94. *Id.* at 1297.
95. *Id.*
96. *Id.*
97. Knott v. Liberty Jewelry and Loan, Inc., 748 P.2d 661, 663 (Wash. Ct. App. 1988).
98. *Id.* at 663.
99. *Id.*
100. *See id.* at 664.
101. *Id.*
102. Buczkowski v. McKay, 490 N.W.2d 330 (Mich. 1992).

declined to impose such a duty.[103] The court held that a retailer of guns had no duty to protect the general public from the unlawful use of ammunition from a purchaser.[104] In that case, an intoxicated customer purchased shotgun ammunition and injured the victim.[105] The court noted that the ammunition was neither defective nor inherently dangerous and that the legislature had not defined a class of purchasers which could be deemed legally incompetent to buy ammunition.[106] The court determined that the retailer should not be burdened by a duty to foresee a customer's criminal purpose, even where the purchaser obtaining the ammunition is intoxicated.[107]

The Arkansas Supreme Court also refused to impose such a duty in *First Commercial v. Lorcin*.[108] There, the administrator of the estate of a victim of a fatal shooting brought a wrongful death action against the seller and manufacturer of a handgun.[109] The court ruled that the gun manufacturer did not have a special relationship with the victim that would give rise to a duty.[110] The court held that no liability existed in tort for harm resulting from the criminal acts of third parties because the manufacturer had no control over its retailers and to whom they sold, and there was no law that controlled weapon distribution.[111] In this situation, the court was persuaded by the lack of precedent for placing liability with a gun manufacturer.[112]

In *Valentine v. On Target*,[113] a Maryland appellate court was unwilling to find a gun retailer negligent when weapons were stolen and later caused injuries.[114] The court held that a gun retailer owed no duty to a murder victim to prevent the theft of his weapons.[115] The court noted that the seller could not have known of the existence of circumstances that increased the probability that a thief would steal guns and that an unknown third party would use one of them in a criminal manner.[116] The court found that the foreseeability that guns are increasingly used in the commission of crimes was an insufficient basis upon which

103. *See id.* at 331.
104. *Id.*
105. *Id.* at 332.
106. *Id.*
107. *Id.* at 336.
108. First Commercial Trust Co. v. Lorcin Engineering, Inc., 900 S.W.2d 202 (Ark. 1995).
109. *Id.*
110. *Id.* at 205.
111. *Id.*
112. *Id.*
113. Valentine v. On Target, Inc., 727 A.2d 947 (Md. 1999).
114. *Id.* at 948.
115. *Id.* at 953.
116. *Id.* at 950.

to impose liability.[117]

Until recently, under negligence theory, negligent marketing remained unexplored as a claim against a gun manufacturer.[118] Traditionally, there have been three insurmountable obstacles to judicial recognition of a duty of care in negligent marketing claims against firearms manufacturers.[119] The first obstacle was a refusal by courts to apply the negligent entrustment doctrine to gun manufacturers who marketed their weapons to the general public.[120] Liability based on a negligent entrustment theory generally arises from selling potentially harmful products to consumer groups that lack the capacity to exercise ordinary care.[121] Courts have held that negligent entrustment applied when a product is marketed to children or some other recognizably high-risk group, but not to the general public.[122] A negligent marketing claim, relying in part on the negligent entrustment theory, is essential if plaintiffs hope to avoid precedents rejecting duty in ordinary negligence claims.[123] Negligent marketing theory allows plaintiffs to argue that manufacturers owe a duty to the general public to adopt reasonable restraints on marketing.[124] Causation is more easily established if the plaintiff can argue that the manufacturer breached its duty by actively marketing to criminals.[125] If courts recognized this duty, a jury would be permitted to infer that particular features of gun promotion and distribution breached that duty.[126]

The second obstacle facing plaintiffs was that courts tended to view negligent marketing claims as design defect claims in disguise. Judges viewed these claims as identical to defect claims, which focused on the dangerous characteristics of guns and sought to stop production of them.[127] Courts, therefore, insisted that plaintiffs allege a defective condition in the weapon in order to recover.[128] The third obstacle was that courts refused to hold defendants liable for injuries inflicted by the inter-

117. *Id.*

118. *See* Lytton, *supra* note 58, at 683.

119. *Id.*

120. *Id.* The author mentions that in the *Restatement (Second) of Torts*, section 390, negligent entrustment is defined as one who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use. *Id.* at 688.

121. *Id.* at 683.

122. *Id.* at 683-84.

123. *Id.* at 683.

124. *Id.*

125. *Id.* at 706.

126. *Id.* at 683.

127. *Id.* at 684.

128. *Id.*

vening, intentional, criminal misconduct of third parties, in the absence of a special custodial relationship between the defendant and the third parties, in the absence of a special custodial relationship between the defendant and the third party.[129]

PART III: ANALYSIS

From the moment this tragedy occurred, advocates of gun manufacturer liability realized that this case had the potential to establish new precedent. First, the media coverage of the senseless brutality raised awareness of the utter devastation that weapons could cause.[130] Second, the weapons involved in this tragedy were not ordinary guns. The TEC-DC9 is a semi-automatic assault weapon based on the TEC-9, a product made by the same manufacturer for the South African military, and now banned in California.[131] Since the TEC-9 was designed for military use, its successor, the "TEC-DC9[,] incorporates characteristics commonly found in military-style weapons which enhance its user's ability to engage in extremely rapid and sustained fire."[132]

The fact that this case withstood summary judgment differentiates it from its predecessors. The California Superior Court's decision to allow the plaintiff's strict liability, negligence, and negligence per se counts to survive a motion to dismiss "was a surprise to many in the legal community."[133] Judge Warren, speaking for the majority, explained that this case differed from the typical gun case because the California Assembly "carefully considered the legislative decision" to distinguish so-called assault weapons from other firearms, in the Roberti-Roos Assault Weapons Control Act of 1989 ("AWCA").[134]

The First District Court of Appeals correctly affirmed the lower court's grant of summary judgment regarding the strict liability claim. Strict liability would not have been appropriate because it is impossible to identify a class of firearms that are used exclusively for illegal purposes. Typically, assault weapons legislation, such as the AWCA, does not target a class of firearms based on whether they are used exclusively for illegal purposes.[135] The firearms designated as assault weapons in the AWCA are not distinguished by their use in crime and are not different from other functionally identical firearms.[136] The poorly conceived

129. *Id.*
130. *Merrill*, 89 Cal. Rptr. 2d at 157.
131. McNicholas & McNicholas, *supra* note 42, at 1600.
132. *Id.*
133. Kobayashi & Olson, *supra* note 25, at 42.
134. In re California Street, No. 959316 (Cal. Super. Ct. filed Apr. 10, 1995).
135. Kobayashi & Olson, *supra* note 25, at 42, 43.
136. *Id.*

legislation, which passed by a single vote, prohibits weapons individually by name.[137] The list of illegal guns has continued to change, resulting in an odd collection of firearms.[138] The weapons classified by the AWCA as "assault weapons" are not more dangerous than those not listed. For example, the TEC-DC9 used by Ferri is functionally identical to, and fires the same ammunition as, hundreds of 9mm semi-automatic pistol models not classified as "assault weapons" by the Act.[139] The firepower of Navegar's TEC-DC9 can be exceeded by any non-assault weapon pistol with an extended ammunition clip that accepts detachable magazines.[140] The list of guns in the legislation is irrational and has been described as having "been selected by persons thumbing through a picture book of firearms, looking for ugly guns."[141]

Although the First District Court of Appeals rejected the theory of strict liability, it incorrectly embraced negligence as a means of imposing liability on Navegar. Unlike previous attempts to place liability on gun manufacturers using a negligence theory, the plaintiffs in this case focused on a claim of negligent marketing.[142] While the elements for the cause of action remain the same, it is easier to establish and define a duty in a negligent marketing claim.[143] There are four elements in an action for negligence: (1) the existence of a duty to conform to a standard of care to protect others against unreasonable risks of harm; (2) conduct below the standard of care which amounts to a breach of that duty; (3) the defendant's act or omission was the cause of the plaintiff's injuries; and (4) damages resulting from the injury.[144] Only two of these four elements were before the court in this case: the existence and scope of Navegar's duty and whether Navegar's activities caused the victim's

137. *Id.* at 44; *see also* George Lucas, *Legislature OKs Ban on Assault Guns*, S.F. CHRON., May 19, 1989, at A1.

138. In upholding California's AWCA, the Ninth Circuit held that an assault weapons ban that specifically identifies guns by model and manufacturer was not an unconstitutional bill of attainder. The court held that the statute caused only economic harm which "in no way amounts to punitive confiscation." Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 956 F.2d 723 (9th Cir. 1992).

139. Kobayashi & Olson, *supra* note 25, at 45.

140. *Id.* The most powerful pistol on the market, the Enforcer 3000, is legal under the AWCA. The most concealable pistol, the Smith & Wesson 5906, is also legal under the AWCA. There is nothing about the TEC-9 which makes it more dangerous than those two legal weapons. The three guns differ only in cosmetic features and nonfunctional accessories. *Id.*

141. *Id.* at 46. The TEC-DC9 used by Ferri in the course of his crime is yet another example of the confusion fostered by the AWCA. Although Ferri purchased his firearm in Nevada, he could have legally purchased it in California. The AWCA only bans the TEC-9. Navegar's new TEC-DC9, which only differs slightly from its predecessor, has not been added to the list of prohibited firearms.

142. *Merrill*, 89 Cal. Rptr. 2d at 152.

143. *See* Lytton, *supra* note 58, at 693.

144. *Merrill*, 89 Cal. Rptr. 2d at 161.

injuries.[145]

Duty is the first essential element of any negligence claim.[146] Duty is a question of whether the defendant is under any obligation to protect the particular plaintiff.[147] The existence of duty depends on whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.[148] Perhaps the largest problem in determining whether a duty exists is that no universal test has been formulated.[149] A determination that the outcome was somehow foreseeable is a prerequisite to finding a legal duty under all analyses.[150]

The word "duty" is used throughout the *Restatement (Second) of Torts* to denote the fact that the actor is required to conduct himself in a particular manner.[151] If the actor does not conduct himself in the prescribed manner, he risks becoming liable for any injury sustained by another to whom the duty is owed, of which that actor's conduct is a legal cause.[152] Although the legal standard of duty is still evolving, an overwhelming majority of American jurisdictions now treat duty as a policy-based, multi-factor balancing test.[153] When dealing with abstract questions of duty, most American courts have had little use for the relevant sections of the *Restatement (Second) of Torts*.[154] Courts disregard the *Restatement* and adhere to an analysis of duty that centers around public policy, social considerations, and other similar factors.[155] Several critical California Supreme Court decisions made this approach popular, particularly *Weirum v. RKO General Inc.*,[156] *Tarasoff v. Regents of the University of California*,[157] and *Rowland v. Christian*.[158]

The *Weirum* court held that a radio station was liable for creating an unreasonable risk to the public because of a contest in which listeners

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145. *Id.*
146. McClurg, *supra* note 65, at 796.
147. *Id.*
148. *Id.*
149. *See id.*
150. *Id.*
151. Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1520 n.112 (1997). *See generally* DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (2d ed. 1993); JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS (1967); W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).
152. Lake, *supra* note 151, at 1520-1522.
153. *Id.* at 1523.
154. *Id.*
155. *Id.*
156. Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975).
157. Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976).
158. Rowland v. Christian, 443 P.2d 561 (Cal. 1968); *see also* Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

were encouraged to speed through a metropolitan area in order to locate a disc jockey who was giving away money prizes.[159] In deciding that the radio station had a duty to the general public because the resulting injuries were foreseeable, the court expanded the concept of "duty."

One year later, in *Tarasoff*, the court further expanded the concept of duty. *Tarasoff* is one of the most celebrated tort case involving "special relationships." The court held that a psychotherapist had a duty to warn his patient's victim, a former girlfriend, of lethal threats against her.[160] The *Tarasoff* court quoted Dean Keeton, who wrote that "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[161] *Tarasoff* and *Weirum*, as well as *Rowland*, have altered the landscape of U.S. tort law by becoming the majority rule.[162] Although the *Merrill* court did not cite *Tarasoff*, it relied heavily on *Rowland* to arrive at its conclusion that Navegar owed a duty to the general public.[163]

In determining whether a duty existed, the *Merrill* court adopted the rule from *Rowland*, which states that "each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care under the circumstances."[164] Whether a duty of care exists in a given circumstance is a question of law to be determined by the court.[165] The court's analysis began with identifying the circumstances under which Navegar manufactured, marketed, and made its product available to the general public.[166] Since the risk of harm resulting from the criminal misuse of firearms is always present within society, the manufacturer and distributor of a legal, non-defective firearm may not be found negligent merely because they make and sell the weapon.[167] However, the three distinct activities of manufacturing, marketing, and distributing the weapons are interrelated. When a gun manufacturer implements a marketing strategy that deliberately targets a criminal customer with a weapon that presents an unusually high risk of harm and has no utility for legitimate purposes, fails to take reasonable steps in the marketing process to minimize the risk that its product will

159. *Weirum*, 539 P.2d 36 at 46-48.

160. *See Tarasoff*, 551 P.2d at 243; *see also* Todd Waller, M.D., Estates of Morgan v. Fairfield Family Counseling Center: *Application of Traditional Tort Law Post-*Tarasoff, 31 AKRON L. REV. 321 (1997).

161. Waller, *supra* note 160, at 325.

162. Lake, *supra* note 151, at 1516.

163. *See Merrill*, 89 Cal. Rptr. 2d at 161-62.

164. *Id.* at 161.

165. *Id.* at 162.

166. *Id.* at 161-63.

167. *See* Calio & Santarelli, *supra* note 66, at 476-77.

be purchased by persons likely to misuse them, the likelihood of injuries resulting from criminal misuse of the weapons increases.[168] As a result, the *Merrill* court held that gun manufacturers have a duty to use due care in order to minimize risks which exceed those already present in the sale of firearms.[169]

Upon reviewing the record, the court identified several aspects of the manufacturing, marketing, and distribution of the TEC-DC9 that increased the risks already associated with weapons.[170] The TEC-DC9 is equipped with "Hell-Fire" triggers that allow it to function like an automatic weapon.[171] This aspect makes it a militaristic weapon that has the capacity to empty its thirty-two round magazine in a matter of seconds.[172] In addition, it is designed to deliver the maximum amount of firepower by storing the largest number of cartridges in a small space.[173] It also comes with a "barrel shroud" that disperses the heat generated by the rapid firing of ammunition, allowing the user to grasp the barrel of the gun with both hands.[174] This facilitates spray-firing not designed to hit any single target. The barrel of the TEC-DC9 is also threaded, making it compatible with a silencer, a device which muffles the sound produced by the firing of the weapon.[175] The use of such devices is restricted by federal law.[176] The court noted that not only is the TEC-DC9 not designed for civilian use, but it is also "completely useless for hunting, is never used by competitive or recreational shooters and has no legitimate sporting use."[177] Due to these characteristics, the TEC-DC9 is also not suited for self-defense and could be dangerous when used for that purpose.[178]

The TEC-9, which looks like a small machine gun, first gained notoriety from its prominent use in the popular television series Miami

168. *Merrill*, 89 Cal. Rptr. 2d at 163-64 (citing Knight v. Jewett, 834 P.2d 696 (Cal. 1992) (holding that defendants do not have a legal duty to eliminate risks inherent in sports such as touch football, but do have a duty to exercise due care not to increase the risks over and above those inherent in the sport)).

169. *Id.* at 164.

170. *See id.* at 154-55.

171. *Id.* The "Hell-Fire" trigger is an accessory made by another company that can also be used in conjunction with many other weapons not manufactured by Navegar. Hell-Fire Trigger Systems, Inc. was also initially part of the law suit but was removed due to subsequent bankruptcy. *See supra* note 25.

172. *Id.* During the office shooting, Ferri fired one round every five seconds. *See* Kobayshi & Olson, *supra* note 25, at 42 n.14.

173. *Merrill*, 89 Cal. Rptr. 2d at 154.

174. *Id.*

175. *Id.*

176. *See* 18 U.S.C. § 921(a)(24) (2000).

177. *Merrill*, 89 Cal. Rptr. 2d at 154.

178. *Id.*

Vice.[179] For two years, it was the leading assault weapon seized by law enforcement agencies.[180] In 1991, it accounted for twenty-four percent of all assault weapons seized.[181] Although assault weapons account for only one-half of one percent of the privately owned firearms in the United States, they represent over ten percent of the guns traced to crimes.[182] Several of the weapon's characteristics make it appealing to criminals. The TEC-DC9 is small enough to be concealed on the body or inside a briefcase, its firepower is virtually unsurpassed, and it is sold at a low price.[183]

The plaintiffs alleged that Navegar understood the unique capabilities that its gun possessed, and deliberately targeted the marketing of the TEC-DC9 to certain types of people.[184] Michael Solodovnick, the sales and marketing director for Navegar from 1989 to 1993, testified during a deposition that he was aware of reports connecting guns to violent crime and admitted that the target market for the TEC-DC9 was "militaristic people."[185] Navegar targeted these people by advertising in gun magazines and displaying weapons at gun shows.[186] Navegar used slogans that labeled the weapon "tough as your toughest customer" and printed promotional materials that referred to the weapon as having an "excellent resistance to fingerprints."[187] Despite having no legitimate civilian use, the weapon was made available to the public. According to an expert during the trial, the availability of the military style assault weapon "was a substantial factor in causing Ferri to undertake his assault at 101 California."[188]

The mere fact that Navegar built a gun with specialized capabilities does not make it liable under negligence. Liability does not arise simply because the weapon was not as safe as it could have been.[189] The

179. Mark Pazniokas, *Gun Maker in Court Makes No Apologies*, HARTFORD COURANT, Jan. 28, 1994, at B1.

180. *Merrill*, 89 Cal. Rptr. 2d at 155.

181. *Id.*

182. *Id.*

183. *Id.* at 156.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 157.

188. *Id.* at 158.

189. *See* Ted Copetas, *Handguns Without Child Safety Devices—Defective in Design*, 16 J.L. & COM. 171 (1996). This Note does not argue for or against gun safety. *See generally* Mark D. Polston & Douglas S. Weil, *Unsafe by Design: Using Tort Actions To Reduce Firearm-Related Injuries*, 8 STAN. LAW & POL'Y REV. 13 (1997). Another way to reduce unintentional shootings is to hold the gun manufacturers liable under products liability for defective design. *See* Hurst v. Glock, Inc., 684 A.2d 970 (N.J. Super. Ct. App. Div. 1996) (holding that even though a gun presents "obvious dangers," a gun used in an unintentional shooting could be a defective product because it did not have a device that prevented discharge when the magazine was removed). On

weapon was also not defective simply because it was capable of being used in conjunction with accessories made by other companies. The functional capabilities of the TEC-DC9 that Ferri used did not provide him with a unique opportunity to commit this particular crime. Ferri fired one round every five seconds.[190] At that rate of fire, he could have used any firearm to carry out his crime. The self-loading characteristic of the TEC-DC9 and its compatibility with accessories were irrelevant to the resulting damage.

Due to the way Navegar manufactured, marketed, and distributed the weapon, the court found that Navegar increased the risk of harm already present in the activity of selling guns.[191] In *Knight v. Jewett*,[192] the California Supreme Court recognized a duty not to increase the risk of harm already inherent in an activity.[193] Although *Knight* concerned the dangers present in sporting activities, the *Merrill* court extended this reasoning to firearms as well.[194] Sports, like handguns, are inherently dangerous in many ways, but are permitted to be free of the general duty to eliminate all risks of harm because they are viewed as socially desirable and useful. The court noted, however, that gun manufacturers can be expected to refrain from actively increasing the inherent risk of danger of their product.[195] *Knight*, like *Tarasoff*, holds that defendants generally owe no duty to minimize the risks inherent in any activity unless they are in a "special relationship" with the plaintiff.[196] Although Navegar was not in a "special relationship" with the general public, the court explained that this general principle has no application where the defendant actively undermined the plaintiff's position and created a foreseeable risk of harm to third persons.[197] Navegar produced its weapons for fantasy and not criminal use, but the court reasoned that the way the gun

March 17, 2000, Smith & Wesson reached a settlement that removes it from suits alleging that defects in design caused unintentional shootings. Faced with suits from more than twenty-five cities and counties, the gun manufacturer announced a twenty-one page agreement that includes several initiatives designed to make guns less subject to misuse. Some provisions include: a promise to devote two percent of revenue to smart technology that would allow only owners to fire their guns; locking devices to keep children from firing the weapons; and guns that only fire from clips of ten or fewer rounds. *See* Richmond Eustis, *Gunmakers Study Smith & Wesson's Settlement*, FULTON COUNTY DAILY REP., Mar. 21, 2000, at 1. Whether the legislature or the judiciary decides to force gun manufacturers to make their weapons safer is irrelevant to whether a gun manufacturer owes a duty to the general public to protect against misuse by a third party criminal.

190. Kobayashi & Olson, *supra* note 25, at 54 n.14.

191. *Merrill*, 89 Cal. Rptr. 2d at 163.

192. Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

193. *Merrill*, 89 Cal. Rptr. 2d at 163-64 (citing *Knight*, 834 P.2d at 696).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 164-65.

was manufactured and marketed enticed criminals, thereby making it an attractive nuisance.[198]

In both *Tarasoff* and *Rowland*, the California Supreme Court enunciated several factors to consider in determining the existence of a duty.[199] The factors are: (1) the foreseeability of harm to the plaintiff; (2) the closeness of the connection between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's conduct; and (4) the policy of preventing future harm.[200] The *Merrill* court found these factors to be the foundation of their determination that Navegar owed a duty.[201]

The court rejected Navegar's contention that Ferri's rampage could not have been foreseen because it did not involve the ordinary use of its product.[202] Although Ferri's act was not specifically foreseeable, the court noted that its task in determining duty was to evaluate whether the category of negligent conduct was "sufficiently likely" to result in harm so liability could be appropriately imposed on the negligent party.[203] The evidence showed that Navegar was aware of reports showing how the TEC-DC9's combined characteristics of high firepower, low price, and concealability made it very desirable to criminals.[204] The evidence also suggested that the favored status and frequent criminal use of the weapon was, in part, enhanced by Navegar's advertising campaign,

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198. *Id.* at 165. Under the attractive nuisance doctrine, an owner or occupier of land is liable to trespassing children for injury caused by conditions or objects on the premises, if the occupier knew, or should have known, that the condition or object was in a place where children are likely to trespass, and the occupier failed to exercise reasonable care to protect against the injury. *See generally* David A. Gurwin, *The Restatement's Attractive Nuisance Doctrine: An Attractive Alternative for Ohio*, 46 OHIO ST. L.J. 135, 138 (1985); Michael A. Ross. *The Duty Owed to Children: Application of Attractive Nuisance Concepts in Products Liability Actions for Failure to Childproof*, 68 U. DET. L. REV. 537 (1991). The attractive nuisance doctrine hinges on the concept of enticement. *See* United Zinc & Chemical Co. v. Britt, 258 U.S. 268 (1922) (holding that the company was liable for exposing something dangerous that is certain to attract children because they are of an age when "they follow bait as mechanically as fish"); Baltimore Gas & Electric v. Lane, 653 A.2d 307 (Md. 1995) (considering whether a utility company could be held liable for a child's injuries, caused by an empty cable spool left by the utility company near a residential area and moved onto a playground by neighborhood children). It could be argued that gun manufacturers similarly lure criminals to misuse their weapons in the way that they market their guns. This, in essence, is what the First District Court of Appeals is reasoning in *Merrill* when it refers to the claim of "negligent marketing."

199. Rowland v. Christian, 443 P.2d 561, at 564 (Cal. 1968).

200. *Id.*

201. *Merrill*, 89 Cal. Rptr. 2d at 165.

202. *Id.*

203. *Id.*

204. *Id.* at 166. Once again, the court's reasoning is flawed. The court cites the combination of firepower and concealability as the characteristic that makes it more desirable to criminals. The lower court rested this assumption on California legislation, the AWCA of 1989. As previously noted, however, the most powerful and conceals pistol are legal under the AWCA. *Lytton, supra* note 58, at 69.

which called attention to its militaristic features.[205] The court concluded that although not specifically foreseeable, Ferri's criminal acts were sufficiently likely to happen.[206]

Although the majority gave great weight to the foreseeability of the events, foreseeability alone is not sufficient to create an independent tort duty.[207] The court, however, found that the imposition of a duty was also justified by the other factors, described in *Rowland*.[208] The court stated that marketing the weapon to get the attention of violent people likely to use it for a criminal purpose, in order to increase sales of the product, was morally blameworthy conduct.[209] Imposing a duty was also necessary, according to the court, in an effort to prevent future harm.[210] Death and injuries result from the misuse of firearms. The court reasoned that if gun manufacturers were held liable in this case, the industry would be forced to manufacture, market, and distribute weapons in ways that did not increase the risks posed by the weapons.[211]

The court emphasized that the imposition of a duty was not a statement condemning the manufacture of assault weapons.[212] The court clarified that the interest of the consumer in unrestricted access to a particular weapon, and the freedom of the manufacturer of that weapon to target the marketing of its product to persons likely to criminally misuse it, does not transcend society's interest in protecting persons exposed to this increased risk of harm.[213] The court also viewed the 1989 assault weapon ban as a sign that the California legislature had already made the policy decision that the risks of assault weapons like the TEC-DC9 outweighed their utility.[214]

Additionally, the appellate court reversed the trial court's grant of summary judgment on the issue of whether Navegar's breach of duty was the actual cause, or cause in fact, of the victims' injuries.[215] Navegar argued that even if there had been a duty to exercise care, Navegar could not be found liable because there was no evidence that its conduct was the actual cause of the injuries suffered by the victims.[216] Since there was no way to be certain whether Ferri was ever exposed to any

205. *Merrill*, 89 Cal. Rptr. 2d at 166.
206. *Id.* at 165.
207. *Id.* at 199-20.
208. *Id.* at 170.
209. *Id.* at 169.
210. *Id.*
211. *Id.* at 172.
212. *Id.*
213. *Id.* at 179.
214. *Id.* at 167. *See also* Pearson, *supra* note 31, at 135-36.
215. *Merrill*, 89 Cal. Rptr. 2d at 189.
216. *Id.* at 185.

kinds of advertisements, Navegar's conduct and Ferri's criminal acts may have been entirely unrelated.[217] The court rejected this argument, holding that Navegar's conduct was a substantial factor in bringing about the injuries.[218] Frequently, events may have multiple causes and the defendant's negligent act need not be the sole cause of injury. Even where the injuries are inflicted by the criminal or negligent acts of a third person, the defendant's conduct may still constitute a contributing cause. Because several periodicals in which Navegar advertised were found in Ferri's room, and many other forms of advertisement, such as promotions at gun shows and the TEC-9s Navegar loaned for use in numerous movies and television programs, were likely to have been noticed by Ferri, the court believed that there was at least triable a issue as to whether the slaughter at 101 California Street would have occurred had Navegar not been negligent.[219]

Previously, California courts have been reluctant to find a duty in cases where there have been intervening acts out of the control of the defendants. In *Avis v. Superior Court*,[220] the court found no duty on the part of a car rental agency to control the conduct of a thief who stole a car and subsequently injured another motorist.[221] Even though the practice of leaving cars with the keys in the ignition increased the chances of theft, the court concluded that the actual theft was an intervening act.[222] The *Merrill* court declined to adopt the *Avis* holding as a blanket rule that an intervening criminal act is, by its very nature, a superseding cause that imposes no duty on the defendant.[223] Instead, the court adopted the *Restatement* view that "if the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious or criminal, does not prevent the actor from being liable for harm caused."[224]

Similarly, in *Casillas v. Auto-Ordinance Corp.*, a California federal court affirmed a motion for summary judgment in favor of a gun manufacturer where one of its semi-automatic pistols was used to shoot and

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217. *Id.* at 186.

218. *Id.* at 186-87. There are many ways to approach the determination of causation. While alternate approaches have not been adopted by the courts, they still receive some support in the academic field. *See generally* Richard A. Epstein, *Causation in Context: An Afterward*, 63 CHI.-KENT L. REV. 653 (1987).

219. *Merrill*, 89 Cal. Rptr. 2d at 189.

220. Avis Rent A Car System, Inc. v. Superior Court, 15 Cal. Rptr. 2d 711 (Ct. App. 1st 1993).

221. *Id.* at 719.

222. *Id.*

223. *Merrill*, 89 Cal. Rptr. 2d at 168-69.

224. *Id.* at 169 (citing RESTATEMENT (SECOND) OF TORTS § 449 (1977)).

seriously injure four members of a family.[225] The court there noted that California law does not impose a duty on gun manufacturers to insure against third party misuse of their non-defective products.[226] The court reiterated that California statutes and caselaw make it likely that "the California Supreme Court would not allow a claim against a firearm manufacturer for damages caused by a third party's illegal use of a legal and non-defective firearm" under a negligence theory.[227]

While the California Supreme Court has done much to expand the definition of "duty" in landmark decisions such as *Weirum, Tarasoff,* and *Rowland,* it is still unlikely to affirm the *Merrill* decision. In *Richards v. Stanley,*[228] the California Supreme Court has previously refused to create a duty when the injuries of a victim are the result of a third party criminal.[229] The court held that in the absence of a special relationship between the parties, there is no duty to control conduct of a third person so as to prevent him from causing harm to another.[230] There, the defendant had left her car unlocked, unattended, and with the keys in the ignition.[231] The car was subsequently stolen by a thief who recklessly caused an accident with a motorcycle, injuring the plaintiff.[232] The court ruled that while the defendant did have a duty to exercise reasonable care in the management of her automobile, this did not encompass a duty to protect the plaintiff from the negligent driving of a thief.[233] Therefore, it is unlikely that the California Supreme Court would affirm the *Merrill* decision, which essentially imposes a duty on gun manufacturers to protect the general public against potential criminals who purchase the weapons from unrelated gun retailers.

The California Supreme Court is likely to have several problems with the appellate court's holding. The duty imposed by the *Merrill* court is too broad. The court will face the problem of where to draw the line when considering which weapons are covered by this newly-created duty. As Justice Hearle posited in his dissent, does the duty apply just to TEC-DC9s? The majority mentioned that part of its reasoning was based on the TEC-DC9's unique capabilities regarding firepower, ammunition, and compatibility with other enhancing devices. If the characteristics of the TEC-DC9 are unique, does the duty extend to other

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225. Casillas v. Auto-Ordnance Corp., No. C 95-3601 FMS, 1996 U.S. Dist. WL 276830, at *6 (N.D. Cal. May 17, 1996).
226. *Id.* at *27.
227. *Id.* at *4.
228. Richards v. Stanley, 271 P.2d 23 (Cal. 1954).
229. *Id.*
230. *Id.* at 27.
231. *Id.* at 24.
232. *Id.* at 25.
233. *Id.* at 29.

guns? Does the duty extend only to assault weapons? Given the previous difficulties that legislatures have had in defining the term "assault weapon," how would courts attempt to do this? Would it include the Norinco .45 with which Ferri killed and wounded six of the fourteen victims? What about the Glock 9mm which Ferri carefully considered before he purchased the TEC-DC9? Regardless of the First District Court of Appeals' assertion, the TEC-DC9 is not unique in its capabilities. Given similar circumstances, a plethora of other weapons could have been used in the same crime.

Since Ferri shopped for weapons for over six months, it is clear that he was going to purchase a gun to commit his planned carnage.[234] One can infer that he did not act because he had two TEC-DC9s as opposed to some other model of weapon. Additionally, it appears that neither the identity of the gun nor the gun manufacturer was critical to him. As noted by the dissenting justice, "the responsibility for tortious acts should lie with the individual who commits those acts."[235] We should be reluctant to allow understandable bitterness regarding the losses inflicted on innocent people to divert attention from where responsibility actually lies. Sympathy for the victim of an intentional shooting is understandable. This sympathy, however, cannot be the foundation for the imposition of civil liability where none is provided by the existing law. Civil liability must be based upon legal principle, not emotions. No principle of existing tort law warrants the transfer of liability from a criminal actor to the manufacturer or seller of the device used to inflict harm on the victim.[236] By creating a duty in these situations and allowing this and other similar cases in the future to go before a jury, the court ensures that the emotion regarding loss of life will force the wrong party to suffer the consequences.

PART IV: CONCLUSION

In other analogous situations, similar liability issues have been resolved against manufacturers and merchants. For example, the sale of alcohol to visibly intoxicated persons will create liability on the part of the server.[237] These situations, however, were resolved by legislatures, not the courts. Claims against retailers and manufacturers for a customer's criminal misuse of a firearm have been recognized where the seller violated a state or federal statute.[238] In those cases, the particular

234. *Merrill*, 89 Cal. Rptr. 2d at 152-53.
235. *Id.* at 214.
236. Cailo & Santarelli, *supra* note 66, at 507-08.
237. *See* Hetherton, 593 F.2d 526, 531 (3rd Cir. 1979).
238. *See id.*

statute identified a class of people incompetent either to purchase or to possess weapons.[239] Beyond the class defined by the particular statute, courts have overwhelmingly held that there is no duty owed to the public to foresee the criminal acts of others.[240]

In *Merrill v. Navegar*, the court has clearly invaded the province of the legislature. This is not a situation where the court is merely shifting other tort concepts over to guns. The sale of firearms is a legal activity. To hold that gun manufacturers owe an indefinite duty to the general public is to, in effect, regulate the manufacturers. Regulation, in any form, is within the province of the legislature, not the courts. "Legislators are better equipped because they are not driven by the facts of one case, but overall policy implications."[241] Whether the manufacture, sale, or possession of assault rifles or any other type of gun should be banned or otherwise restricted is an issue best be decided by the legislative branch of government—either Congress or the state legislature. The First District Court of Appeals of California improperly failed to adhere to the principles of judicial restraint that have led so many previous courts to hold that when a gun manufacturer legally produces weapons that are free from defects, it owes no duty to protect the general public from the perverse misuse of its weapons by a criminal.

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239. *See id.*
240. *Id.*
241. Interview by Stephan Landsman with Senator John McCain of Arizona, *in* Stephan Landsman, *Legislator's Thoughts on Judges as Tort Lawmakers*, 49 DEPAUL L. REV. 519, 521 (1999).