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## Kelly v. R.G. Industries: A Cause of Action for Assault Weapons

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# KELLEY v. R.G. INDUSTRIES: A CAUSE OF ACTION FOR ASSAULT WEAPONS

Joshua M. Horwitz\*

## I. INTRODUCTION

In *Kelley v. R.G. Industries, Inc.*,<sup>1</sup> the Maryland Court of Appeals found, *inter alia*, that manufacturers and marketers of "Saturday Night Specials" should be held strictly liable "to innocent persons who suffer gunshot injuries from the criminal use of their products."<sup>2</sup> The Maryland Court of Appeals was the first court in the country to recognize this cause of action.<sup>3</sup> Refusing to extend the traditional theories of strict liability, the court fashioned a new cause of action. This note discusses the cause of action recognized in the *Kelley* case, and argues that it should be applied to marketers and manufacturers of semi-automatic assault weapons when their products injure an innocent person during the course of a crime.

## II. FACTS AND HOLDING

In *Kelley v. R.G. Industries, Inc.*,<sup>4</sup> the plaintiff, Olen J. Kelley was shot during the armed robbery of a grocery store where he was employed.<sup>5</sup> The unidentified robber, used a Rohm Revolver Handgun assembled and sold by R.G. Industries, Inc.<sup>6</sup> Kelley, joined by his wife, filed a lawsuit against defendants Rohm and R.G. Industries, Inc. in

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1. 304 Md. 124, 497 A.2d 1143 (1985). *Kelley* was legislatively overridden by MD. ANN. CODE art. 3A, § 36-1(h) (1988 Supp).

2. *Kelley*, 304 Md. at 157, 497 A.2d at 1159. Factors that define a "Saturday Night Special" include: "the gun's barrel length, concealability, cost, quality of materials, quality of manufacturer, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics." *Id.* at 145-46, 497 A.2d at 1153-54.

3. *Id.* at 156, 497 A.2d at 1159.

4. *Id.* at 124, 497 A.2d at 1143.

5. *Id.* at 128, 497 A.2d at 1144.

6. *Id.* at 128, 497 A.2d at 1145. The Gun Control Act of 1968, 18 U.S.C. § 925 (1983) provides that handguns that do not meet criteria for importation as promulgated by the Bureau of Alcohol, Tobacco and firearms (BATF) be denied importation. *Id.* at § 925(d)(3) However, the law provides that the parts to handguns that are denied importation can be imported and assembled in the United States. *Id.* Rohm Gesellschaft is a German firearms manufacturer that imports parts to handguns denied importation as a whole. Riordan, *Gun was made here, but sale is outlawed*, The Miami Herald, Apr. 1, 1981, at 7, col. 1. The parts are then assembled by R.G. Industries in the United States.

the Circuit Court for Montgomery County, Maryland.<sup>7</sup> The Plaintiffs alleged four causes of action: (1) strict liability for an abnormally dangerous product; (2) strict liability for defective marketing, promotion, distribution, and design making the handgun unreasonably dangerous; (3) negligence; and (4) loss of consortium.<sup>8</sup> R.G. Industries, Inc. removed the action to the United States District Court for the District of Maryland.<sup>9</sup> By stipulation, the parties dismissed R.G. Industries, Inc. from the case without prejudice.<sup>10</sup>

Rohm then moved to dismiss the case for failure to state a cause of action.<sup>11</sup> In support of its motion Rohm stated: "the [p]laintiffs' contentions [must] fail because the handgun performed as it was supposed to perform and because Rohm Gesellschaft is not responsible for the criminal and tortious acts of Mr. Kelley's assailant."<sup>12</sup> Finding no controlling precedent in Maryland law, the United State District Court for the District of Maryland certified three questions to the Maryland Court of Appeals.<sup>13</sup> Although there were some problems framing the questions properly,<sup>14</sup> the court of appeals finally settled on these three

7. *Kelley*, 304 Md. at 129, 497 A.2d at 1145.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Rohm made this motion pursuant to FED. R. CIV. P. 12(b)(6).

12. *Kelley*, 304 Md. at 129, 497 A.2d at 1145.

13. *Id.*

14. The United States District Court originally certified the following questions to the Maryland Court of Appeals:

*Question 1*

Is a handgun, which inflicts injury as the norm, rather than the exception, a defective or unreasonably dangerous product?

*Question 2*

Is the marketing of handguns an abnormally dangerous activity?

(a) Does the abnormally dangerous activity doctrine extend to instances in which the alleged tortfeasor is not an occupier of land?

(b) Does the abnormally dangerous activity doctrine apply where harm is brought about by some third person or persons over whom the tortfeasor has no control?

*Id.* at 129-30, 497 A.2d at 1145. After oral argument, the plaintiffs asked that a new order of certification be issued that better addressed matters raised at that hearing. *Id.* The United States District Court withdrew the original order and substituted the following four questions through a Further Order of Certification:

*Question 1*

Is a handgun, which inflicts injury as the norm, rather than the exception, a defective or unreasonably dangerous product? If the answer to question to one is "No," then

*Question 2*

Is a Rohm Handgun Revolver Model RG38S, which inflicts injury as the norm, rather than the exception, a defective or unreasonably dangerous product?

*Question 3*

Is the marketing of Handguns an abnormally dangerous activity? In answering this question, it may be that the Court of Appeals may desire to address itself to the following sub-questions:

issues:

- (1) Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?
- (2) Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as "Saturday Night Specials," and regularly used in criminal activity, strictly liable to a person injured by such a handgun during the course of a crime?
- (3) Does the Rohm Revolver Handgun Model RG38S, serial number 0152662, fall within the category referred to in question 2?<sup>15</sup>

Kelley argued that under either the abnormally dangerous activity doctrine stated in Restatement (Second) of Torts sections 519–20,<sup>16</sup> or under the abnormally dangerous products doctrine stated in Restatement (Second) of Torts section 402A,<sup>17</sup> the answers to questions one and two were in the affirmative. The court disagreed and held that "neither of these doctrines, nor any other previously recognized strict liability principles, could properly be applied to hold, in general, the manufacturer or marketer of a handgun liable to a person injured by the handgun during the course of a crime."<sup>18</sup>

### III. CONVENTIONAL THEORIES OF LIABILITY DO NOT APPLY

#### A. *Abnormally Dangerous Activity Doctrine*

Restatement (Second) of Torts sections 519–20<sup>19</sup> delineate a num-

(a) Does the abnormally dangerous activity doctrine extend to instances in which the alleged tortfeasor is not an occupier of land?

(b) Does the abnormally dangerous activity doctrine apply where harm is brought about by some third person or persons over whom the tortfeasor had no control?

If the answer to question 3 is "No," then

#### *Question 4*

Is the marketing of the Rohm Revolver Handgun Model RG38S an abnormally dangerous activity? In answering this question the Court of Appeals of Maryland may desire to address the following sub-questions:

(a) Does the abnormally dangerous activity doctrine extend to instances in which the alleged tortfeasor is not an occupier of land?

(b) Does the abnormally dangerous activity doctrine apply where harm is brought about by some third person or persons over whom the tortfeasor had no control?

*Id.* at 130–31, 497 A.2d at 1145–46. The further order of certification clarified that the Maryland Court of Appeals was not to be limited by the phrasing of the certified questions. *Id.*

15. *Id.* at 131, 497 A.2d at 1146.

16. RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977).

17. *Id.* § 402A.

18. *Kelley*, 304 Md. at 132, 497 A.2d at 1146.

19. RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977). Section 519 states:

(1) 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 harm.

ber of factors under which a person may be held strictly liable in tort for abnormally dangerous or ultra-hazardous activities. Liability may be imposed even where the person is not negligent and has taken every precaution to prevent damage to the victim.<sup>20</sup> Maryland law, however, has never permitted liability to attach, under this doctrine, to activities not connected to the use of land by the owner or occupier.<sup>21</sup> "The thrust of the doctrine is that the activity be abnormally dangerous in relation to the area where it occurs. . . . The dangers inherent in the use of a handgun in the commission of a crime, on the other hand, bear no relation to any occupation or ownership of land."<sup>22</sup> The court was not willing to extend the abnormally dangerous activity doctrine to an activity such as the manufacturing or marketing of a handgun that was not intimately connected to land. Thus, the defendant was not liable under the abnormally dangerous activity doctrine.

### B. *Abnormally Dangerous Product Doctrine*

The second argument in *Kelley v. R.G. Industries, Inc.*,<sup>23</sup> was that the defendant was liable under the abnormally dangerous product doctrine set forth in Restatement (Second) of Torts section 402A.<sup>24</sup> Under

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

RESTATEMENT (SECOND) OF TORTS § 519 (1977). RESTATEMENT (SECOND) OF TORTS § 520 states:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

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

20. See RESTATEMENT (SECOND) OF TORTS § 519. Examples of ultra hazardous activity include: Blasting with explosives; fumigating with deadly poison; crop dusting; testing rocket motors; and use of blow torch on waste oil tankers. Activities not ultra hazardous include: impounding water; aviation; and excavation and earth moving. See 6 WITKIN, SUMMARY OF CALIFORNIA LAW §§ 1232-39 (1988).

21. *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 133, 497 A.2d at 1143 (citing *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969)); *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 4 A.2d 757 (1939); *Kirby v. Hylton*, 51 Md. App. 365, 443 A.2d 640 (1982).

22. 304 Md. at 133, 497 A.2d at 1147; *accord Addison v. Williams*, 546 So. 2d 220, 223 (La. Ct. App. 1989); *Richardson v. Holland*, 741 S.W.2d 751, 755 (Mo. Ct. App. 1987).

23. 304 Md. at 124, 497 A.2d at 1143.

24. RESTATEMENT (SECOND) OF TORTS § 402A (1977) states:

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

this cause of action, adopted by Maryland in *Phipps v. General Motors Corp.*,<sup>25</sup> a plaintiff can prevail if the product, *inter alia*, was defective and unreasonably dangerous to consumers.<sup>26</sup> Maryland law provides two ways to prove that a product is defective.<sup>27</sup> According to the *Kelley* court, however, neither method was available to the plaintiffs.<sup>28</sup>

One method of proving the existence of a defect in a product design or a manufacturing defect is the "consumer expectation test." Under this test, a product is unreasonably dangerous if it is more dangerous than would be expected by the ordinary consumer.<sup>29</sup> The court in *Kelley* held that the defendant could not be held liable under this theory because a consumer would expect a handgun to expel a projectile with deadly force. Thus, simply because a handgun is dangerous does not make it defective under the Restatement (Second) of Torts section 402A.<sup>30</sup>

Another less accepted method of proving a product defect is the "risk/utility" test recognized in *Barker v. Lull Engineering Co., Inc.*<sup>31</sup> Under the risk/utility test:

[a] product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that on balance, the benefits of the challenged design outweigh the risk of danger inherent in such a design.<sup>32</sup>

Although there is some authority in Maryland that would have allowed the *Kelley* court to apply the risk/utility test,<sup>33</sup> it refused to do

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

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

(2) the rule stated in subsection (1) applies although

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

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

25. 278 Md. 337, 363 A.2d 955 (1976).

26. *Kelley*, 304 Md. at 135, 497 A.2d at 1148.

27. The *Kelley* Court explained that in *Phipps* they explicitly recognized the consumer expectation test as a method of proving a product defect. *Id.* The court also acknowledged that it had never expressly accepted the risk/utility test, but that, "we did state in *Phipps* that 'in some circumstances the question of whether a particular design is defective may depend upon a balancing of the utility of the design and other factors against the magnitude of the risk.'" *Id.* at 137-38, 497 A.2d at 1149 (quoting *Phipps*, 278 Md. at 348, 363 A.2d at 966).

28. *Id.* at 136-38, 497 A.2d at 1148-49.

29. *Id.* at 135, 497 A.2d at 1148; see also *supra* note 24 and accompanying text.

30. *Kelley*, 304 Md. at 136, 497 A.2d at 1148.

31. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

32. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.

33. See *supra* note 24 and accompanying text.

so. The court held that the risk/utility test only applies when something goes wrong with a product. The discharge of a handgun is supposed to inflict bodily injury. "Therefore, the risk/utility test cannot be extended to impose liability on the maker or marketer of a handgun which has not malfunctioned."<sup>34</sup>

#### IV. A NEW CAUSE OF ACTION

While holding that the two traditional theories of strict liability were inapplicable, the court in *Kelley v. R.G. Industries, Inc.*,<sup>35</sup> invoked its common law powers to create a new cause of action.<sup>36</sup> The court held that "manufacturers and marketers of Saturday Night Special handguns [are] strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products."<sup>37</sup> The court generally characterized Saturday Night Specials as those handguns that have short barrels, are light weight, easily concealable, low in cost, made of cheap materials, poorly manufactured, and inaccurate and unreliable.<sup>38</sup>

The *Kelley* court based the new cause of action on three criteria: (1) the risk of the product to society outweighs its utility to society; (2) the foreseeability or knowledge by the maker or seller that the product is principally to be used in criminal activity; and (3) the relative degree of fault between the maker or seller and the innocent victim.<sup>39</sup>

The first element of the test was decided in *Kelley's* favor. The court looked to the laws of both the United States and Maryland and concluded that weapons known as Saturday Night Specials were distinguishable from other handguns because as a class they are more of a risk to society than a benefit.<sup>40</sup>

The second element of the test, foreseeability, also was determined by the court to militate for liability. The court held that a "manufacturer or marketer of a Saturday Night Special knows or ought to know that he is making or selling a product principally used in criminal activity."<sup>41</sup> It was the defendant's knowledge of the harm produced by

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34. *Kelley*, 304 Md. at 138, 497 A.2d at 1149.

35. 304 Md. 124, 497 A.2d 1143 (1985).

36. *Id.* at 157, 497 A.2d at 1159.

37. *Id.*

38. *Id.* at 145-46, 497 A.2d at 1153-54.

39. *Id.* at 155-57, 497 A.2d at 1158-59.

40. *Id.* at 147-54, 497 A.2d at 1154-58. The court relied on a number of statutes and legislative reports to determine that public policy indicated that Saturday Night Specials were more detrimental to society than beneficial. They included: The Gun Control Act of 1968, 18 U.S.C. § 921 (1968); S. Rep. No. 1097, 90th Cong., 2d Sess., 76-80, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2164-67; 118 CONG. REC. 27030 (1972) (statement of Sen. Bayh, Subcommittee Chairman); and H.R. No. 1577, 90th Cong., 2d Sess., 9, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 4415.

41. *Kelley*, 304 Md. at 155, 497 A.2d at 1158. The court based this finding on statements  
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these weapons that was considered to be unreasonable.<sup>42</sup> Thus, the defendant was culpable because it had knowledge of the predictable and probable criminal use of its product.

Additionally, the *Kelley* court found that as between a totally innocent victim and the marketer or manufacturer that makes a product available to the public that will be used most commonly in criminal activity, the latter is more at fault.<sup>43</sup> Because all three factors weighed towards liability, the court held that if the Rohm handgun in question was a Saturday Night Special,<sup>44</sup> liability should be imposed on the manufacturer and the marketer.<sup>45</sup>

## V. ANALYSIS

The decision in *Kelley v. R.G. Industries, Inc.*,<sup>46</sup> created a framework for establishing liability against the makers and sellers of cheap, easily concealable handguns that injure innocent victims during the course of a crime. There has been discussion of *Kelley* in other cases.<sup>47</sup> Many of these cases have been critical of the *Kelley* court. Whether or not there is merit to the criticism as it applies to handguns, the cause of action is particularly well suited to holding manufacturers and marketers of semi-automatic assault weapons liable to innocent persons injured by these weapons during the course of a crime.

### A. What Is An Assault Weapon?

Assault weapons became a national issue following the January 17, 1989, massacre at a Stockton, California schoolyard in which 29 children were injured and five killed by a gunman with an AK-47.<sup>48</sup>

made by an R.G. Industries salesman, as chronicled in Brill, *The Traffic (Legal and Illegal) in Guns*, HARPERS, Sept. 1977, at 40.

42. *Kelley*, 304 Md. at 156, 497 A.2d at 1159. For a discussion of the basis of foreseeability as a criterion for liability, see Iveson, *Manufacturers Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771 (1983).

43. *Kelley*, 304 Md. at 157, 497 A.2d at 1159. For a discussion of the equities between the innocent injured party and the manufacturer or marketer, see Bonney, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437, 1463 n.167 (1985).

44. The *Kelley* court determined that as a matter of law the plaintiff in this type of action must first show that the handgun in question possesses sufficient attributes of a Saturday Night Special before allowing the trier of a fact to make the final determination. *Kelley*, 304 Md. at 158, 497 A.2d at 1160.

45. *Id.*

46. 304 Md. 124, 497 A.2d 1143 (1985).

47. See, e.g., *Caveny v. Raven Arms, Co.*, 665 F. Supp. 530, 533 (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Armijo v. Ex Cam Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987); *Delahanty v. Hinckley*, 564 A.2d 758, 761-62 (D.C. 1989); *Richardson v. Holland*, 741 S.W.2d 751, 756-57 (Mo. Ct. App. 1987); *Knott v. Liberty Jewelry and Loan, Inc.*, 50 Wash. App. 267, 748 P.2d 661, 665 (1988).

48. Statement by Janet Gengs, Coalition to Stop Gun Violence Press Conference (Jan. 17,

During the past year there has been much debate about the definition of assault weapons.<sup>49</sup> Much of this debate appears to have been calculated by firearms industry forces to obscure the important issue of how to keep these most deadly and dangerous weapons off the street. After the public outcry following the massacre, industry and "pro-gun" forces attempted to halt legislation banning assault weapons by asserting that "assault weapons" cannot be specifically defined.<sup>50</sup> Considering that the AK-47 used in the Stockton massacre fired 106 rounds of ammunition in under two minutes,<sup>51</sup> it is clear that the weapon is in a different class than the average sporting rifle. Assault weapons are "designed for one purpose only—to efficiently kill people."<sup>52</sup>

For years the firearms press had clearly defined these weapons.<sup>53</sup> Moreover, the Bureau of Alcohol, Tobacco and Firearms (BATF) defined assault rifles<sup>54</sup> for the purpose of prohibiting foreign importation of these weapons in compliance with Title 18 United States Code section 925(d)(3).<sup>55</sup> The BATF Report set forth criteria identifying assault rifles by the following attributes: (1) military appearance;<sup>56</sup> (2) large magazine capacity;<sup>57</sup> (3) semiautomatic version of a

1990) [hereinafter Gengs statement] (Gengs is a teacher who was wounded in the Stockton, California attack).

49. See Testimony of Darrel W. Stephens, Executive Director of the Police Executive Research Forum, Remarks before the United States House Of Representatives' Select Committee On Narcotics Abuse And Control: Assault Weapons and Drug Enforcement (Nov. 1, 1989) [hereinafter Stephens Testimony].

50. Interview with Jeff Muchnick, Legislative Director of the Coalition to Stop Gun Violence (Jan. 25, 1990).

51. Gengs Statement, *supra* note 48.

52. Stephens Testimony, *supra* note 49.

53. There is a publication called *The Shooter's Bible*, which had a separate section on paramilitary weapons that included a picture of almost all of the assault weapons under current debate. 78 SHOOTER'S BIBLE 342-56 (1987). Interestingly, the 1990 edition of *The Shooter's Bible* has deleted the paramilitary chapter and dispersed the weapons through other chapters of the book. 81 SHOOTERS BIBLE 1 (1990); see also THE GUN DIGEST BOOK OF ASSAULT WEAPONS (1986).

54. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES (1989) [hereinafter BATF REPORT]. BATF only has the power to ban importation of weapons. 18 U.S.C. § 925(d) (1988). BATF does not, generally, have the statutory authority to remove domestically produced weapons from sale in the United States. *Id.*

55. 18 U.S.C. § 925(d)(3) (1988). Weapons can only be imported under 18 U.S.C. § 925(d)(3) if they are of a type "generally recognized as particularly suitable for or readily adaptable to sporting purposes." *Id.*

56. BATF REPORT, *supra* note 54, at 6-8. Features determined to give a weapon a military configuration include: (1) ability to accept a detachable magazine; (2) folding/telescoping stocks; (3) pistol grips; (4) ability to accept a bayonet (as to this category the working group stated "we know of no traditional sporting application for a bayonet."); (5) flash suppressor; (6) bipods; (7) grenade launcher; and (8) night sights. *Id.*

57. *Id.* The weapon that was used in the Stockton, California incident fired 106 rounds in under two minutes. Gengs Statement, *supra* note 48 and accompanying text.

machinegun.<sup>58</sup> Once identified, each weapon was examined for its overall “sporting purpose”<sup>59</sup> as required under the statute.<sup>60</sup> The BATF Report found that 43 weapons failed the “sporting purpose” test and were denied importation to the United States.<sup>61</sup> These foreign rifles, similarly configured domestic rifles and similarly configured pistols are what this article refers to as “assault weapons.”

## B. Application of the Kelley Factors To Assault Weapons

### 1. Risk/Utility

The court in *Kelley* held the manufacturers and marketers of Saturday Night Specials liable, in part, because the societal risk of these weapons outweighed their utility.<sup>62</sup> Similarly, strong evidence of the lack of utility of assault weapons is their failure to pass the sporting purpose test of Title 18 of the United States Code section 925 (d)(3).<sup>63</sup> Sales of these weapons reflect intended use outside the traditional sporting application. Since assault weapons are anti-personnel and designed to be used as offensive weapons, one of their most obvious non-sporting applications is in the criminal arena.<sup>64</sup>

The *Atlanta-Journal Constitution* undertook to quantify the criminal use of assault weapons through data compiled by the BATF.<sup>65</sup> The

58. BATF REPORT, *supra* note 54, at 8. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS NEWS 3 (1989) (“The semiautomatic assault rifles in question represent a distinct type of rifle characterized by certain military features which distinguish them from the traditional sporting rifle.”).

59. “Sporting purpose” refers to the traditional shooting sports of target shooting, skeet and trap shooting, and hunting. The report also addressed the activity known as plinking or “shooting at randomly selected targets such as bottles and cans” and determined that the activity was a pastime and not a sport. BATF REPORT, *supra* note 54, at 10–11.

60. 18 U.S.C. § 925(d). The BATF Report omitted discussion of foreign assault weapons in a pistol configuration. Bills pending in the United States House of Representatives and the Senate, at the time this article was written, apply the BATF Report criteria to pistol and rifle configuration regardless of country of origin. See *infra* note 71 and accompanying text.

61. BATF REPORT, *supra* note 54, at 15–17.

62. *Kelley*, 304 Md. at 155–57, 497 A.2d at 1158–59.

63. BATF REPORT, *supra* note 54, at 15–17. The domestic equivalent of the weapons prohibited from importation have not been removed from the United States market as of the date of this article. Failure to ban assault weapons made in the United States is not a reflection on their utility but rather on the political will of the Bush administration.

64. See *Maryland Panel Approves More Gun Sales*, The Wash. Post, Jan. 9, 1990, at 1, col. 1 (statement of Matt Fenton concerning the Intrate Tec-9 assault weapon); *Inexpensive Tec-9 Top Assault Weapon*, Daytona Beach Sunday News-Journal, May 21, 1989, at A-10, col. 1.; see also BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, BATF PRESS RELEASE NO. 1 (1989) (“The study was undertaken because of the dramatic increase in the number of these [assault rifles] weapons being imported and police reports of their use in violent crime.”); *Anti-Gun Michigan Cops Stage Semi-Auto Demo*, GUN WEEK, Jan. 19, 1990, at 10 (“Elizabeth Welton, supervisor of the Michigan State Police’s firearms record division, claimed that the number of assault weapons confiscated in drug raids and other arrests doubled from 900 in 1987 to 1,800 in 1988.”).

65. Stewart & Alexander, *Assault Guns Muscling In On The Front Lines Of Crime*, At-

study reviewed 42,758 trace requests<sup>66</sup> submitted to the BATF from the period January 1, 1988 through March 27, 1988.<sup>67</sup> The study found that:

While assault guns account for just 1 million—or 0.5 percent—of the 200 million privately owned firearms in the United States, they were used in one of every 10 crimes that resulted in a firearms trace. . . . The findings appear to document for the first time what police across the nation have asserted for months—that a minute number of semi-automatic guns patterned after military firearms are the favored weapon of a growing number of criminals, especially violence-prone drug gangs which infest larger U.S. cities.<sup>68</sup>

In light of this study and the other reports,<sup>69</sup> it seems that assault weapons, due to their high propensity for use in crime, balanced against their lack of sporting purpose, are more of a danger to society than a benefit.

## 2. Foreseeability

In *Kelley*, the court determined that the manufacturer or marketer that has knowledge of the potential harm of its product can be held liable.<sup>70</sup> In applying the *Kelley* analysis to assault weapons, the maker or seller should be able to foresee that its product's main use is for criminal activity. There is a core group of weapons that have been unequivocally identified as assault weapons. This group includes the AK-47, Uzi, Baretta Ar-70, Colt AR-15 and CAR-15, FN/FAL, FN/LAR and FNC, MAC-10 and MAC-11, Steyr AUG, INTRATEC TEC-9, and the Street Sweeper and Striker 12.<sup>71</sup> Manufacturers that

lanta J. Const., May 21, 1989, at A-1, col. 1.

66. *Id.* The BATF is the federal agency responsible for identifying the origin of weapons confiscated by local law enforcement. A trace request is the method local law enforcement uses to ask the BATF to investigate a particular weapon.

67. *Id.*

68. Stewart & Alexander, *supra* note 65, at A-2; see also Statement of William Pattison, Executive Vice President of the National Association of Police Organizations, Remarks before the United States Senate Subcommittee on the Constitution (Feb. 10, 1989) ("The availability of, and access to, assault weapons by criminals has become so substantial that police forces are being forced to upgrade the weapons supplied to police officers merely as a matter of self-defense and self-preservation."); Stephens Testimony, *supra* note 49, at 1 ("Their [Police Executive Research Forum members] regular encounters with the corrosive effects of drug abuse have become more dangerous, because drug traffickers and abusers have turned to semiautomatic assault guns as their weapons of choice.").

69. See *supra* note 64 and accompanying text.

70. *Kelley*, 304 Md. at 155-56, 497 A.2d at 1158-59.

71. This list of assault weapons is identified in S. 747, 101st Cong., 1st Sess. (1989). The bill is being sponsored by Senator DeConcini before congress at the time this article was written. The list of weapons is considered the least inclusive of all bills currently proposed. The list only includes weapons unequivocally defined as assault weapons. Additionally, the foreign manufac-

now make or market these weapons or other substantially similar weapons have constructive notice through their inclusion in proposed legislation, that their weapons have been identified as having a high risk of criminal use. A manufacturer consistently identified as a maker of assault weapons cannot claim ignorance of its product's classification as an assault weapon and its foreseeable use. Thus, manufacturers and marketers of identified assault weapons should be deemed to have, at the very least, constructive knowledge of the weapon's lack of social utility.

### 3. Fault

As discussed above, manufacturers and sellers of assault weapons can no longer profess ignorance or dismay that these weapons have a strong probability of criminal use. These weapons have been identified by state and federal legislatures and the BATF to be in a special class. One who now willfully makes or sells an assault weapon must know that there exists a strong chance of criminal use. Therefore, as between the merchant making a profit on the weapon and an innocent person, not even a party to the sale of the weapon, the merchant is clearly more at fault.<sup>72</sup>

### C. Potential Criticisms

During the remainder of this note, the author will examine the criticisms of the *Kelley* decision as it applies to assault weapons. The subsections below illustrate why the *Kelley* cause of action, as applied to assault weapons, should be particularly insulated from these criticisms.

#### 1. Legislative Function

A number of sources accused the *Kelley* court of usurping the legislative function.<sup>73</sup> It is likely that this criticism would be leveled at a

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tured weapons on the list are also included in the BATF Report. BATF REPORT, *supra* note 54, at 1-2. Finally, H.R. 1190, 101st Cong., 1st Sess. (1989) and S. 386, 101st Cong., 1st Sess. (1989) include the list of weapons of S. 747 in their definition of assault weapons.

72. See *Richardson v. Holland*, 741 S.W.2d 751, 757 (Mo. Ct. App. 1987) (Prewitt, J., dissenting) ("A manufacturer who placed such a product among the public 'is certainly more at fault' than the innocent victim. . . . [Imposing liability] would allow the victims to recover from those that profit knowing that those profits are earned at the risk and expense of the innocent.") (quoting *Kelley*, 304 Md. at 157, 497 A.2d at 1159).

73. See *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 535 (S.D. Ohio 1987) ("Legislatures, in contrast to courts, can consider all the competing policy interests as well as the public will."); *Knott v. Liberty Jewelry and Loan, Inc.*, 50 Wash. App. 267, 271, 748 P.2d 661, 665 (1988) ("[E]stablishing a new cause of action regarding handguns is properly the domain of the legislature."). *But see* Note, *Kelley v. R.G. Industries: When Hard Cases Make Good Law*, 46 Md. L. Rev. 486, 493 (1987).

court that recognized a cause of action for assault weapons as well. However, the *Kelley* court did address this issue by indicating that the common law has the flexibility to adopt a cause of action to fit the needs of society.<sup>74</sup> Indeed, the court pointed out many instances where common law courts have recognized a new cause of action.<sup>75</sup> Adopting new causes of action is not an anomaly to Maryland, since other state common law courts have done so routinely.<sup>76</sup> In fact, common law courts have time and time again extended the scope of products liability by adopting new causes of action and accepting new doctrines.<sup>77</sup> If a cause of action does not abrogate a legislative scheme, courts, relying on their common law traditions, should be able to adopt it. Thus, the judiciary will be able to better reflect society's realities and demands.<sup>78</sup>

## 2. Cost Will Not Be A Determinative Factor For Liability

Courts have criticized the *Kelley* opinion because a factor in finding manufacturers and marketers of Saturday Night Specials liable was the low cost of this class of guns. Basing liability on cost, it is argued, would discriminate against low income purchasers.<sup>79</sup>

This writer proposes that all assault weapons, not just inexpensive and poorly made ones, should be subject to the *Kelley* cause of action. Hence, a duty would be imposed not by the price and quality of the weapons, but rather through the design. Manufacturers and marketers

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74. *Kelley*, 304 Md. at 157, 497 A.2d. at 1159.

75. *Id.* at 140-41, 497 A.2d at 1150-51 (citing *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983)); *Moxley v. Acker*, 294 Md. 47, 447 A.2d 857 (1982); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978); *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977).

76. *E.g.*, *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974) (where the Virginia Supreme Court held that a cause of action existed for infliction of emotional distress even in the absence of physical injury). The holding in *Womack* represents a court fashioning a cause of action to meet society's needs. The *Kelley* court met a similar demand and should not be criticized for doing so.

77. *See Barker v. Lull Engineering, Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (first court in country to recognize cause of action under Restatement (Second) of Torts § 402A.); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976).

78. *Kelley*, 304 Md. at 141, 497 A.2d at 1151.

79. *See Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 534 (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987) ("[C]laims against gun manufacturers will have the anomalous result that only persons shot with cheap guns will be able to recover, while those shot with expensive guns, admitted by the *Kelley* court to be more accurate and therefore deadlier, would take nothing."); *Delahanty v. Hinckley*, 564 A.2d 758, 762 (D.C. 1989); *Richardson v. Holland*, 741 S.W.2d 751, 756 (Mo. Ct. App. 1987). Although the *Delahanty* court relied on the logic proposed in *Armijo*, the argument does not seem suited for the District of Columbia because under District of Columbia law no one, regardless of economic status, can legally purchase a gun. Hence, the cause of action in *Kelley* would not discriminate against low income purchasers because no legal purchasers exist in the District of Columbia.

that make and sell weapons that fall into the design category of assault weapons, well made or poorly made, cheap or expensive, will all have the same burden. Thus, unequal treatment based on economic status, as an argument against liability, is removed.

### 3. Assault Weapons Are Readily Definable

In criticizing the *Kelley* decision, the court in *Delahanty v. Hinckley*<sup>80</sup> indicated that justifying liability for manufacturers and marketers of such a vaguely defined class of weapon as the Saturday Night Special is problematic.<sup>81</sup> Manufacturers, the *Delahanty* court opined, would not know if their weapons fell into the category of Saturday Night Specials. However, assault weapons can be defined with more precision. As discussed earlier, assault rifles have been defined by the consensus of laws and reports.<sup>82</sup>

The criteria for assault weapons has been framed. Although the manufacturer or the marketer may disagree with the breadth of the criteria there is no denying that these criteria are now accepted. Merchants may choose to continue the sale and manufacture of these weapons. However, in defense of a liability suit, manufacturers and marketers can not convincingly argue that due to the vagueness of the definition they did not know they were dealing in assault weapons. Fair notice of the definition has been given.<sup>83</sup>

### 4. Social Utility Is Not The Only Factor Determinative Of Liability

In, *Richardson v. Holland*,<sup>84</sup> the court criticized the *Kelley* decision because the result of such a theory,

is to fasten strict liability upon the manufacturer and vendor of a lawful product because it is determined by an appellate court that the misuse of such a product outweighed its social value. If accepted, that doctrine can be applied to many products such as whiskey, fuzz busters, all-terrain vehicles and overpowered automobiles.<sup>85</sup>

Clearly, however, the *Kelley* court indicated that there are other factors besides social utility to consider. The second and third prongs of the *Kelley* test include knowledge and relative degree of fault.<sup>86</sup> As the dissent in *Richardson* illuminated:

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80. 564 A.2d 758 (D.C. 1989).

81. *Id.* at 762.

82. *See supra* note 71 and accompanying text.

83. *See generally* BATF REPORT, *supra* note 54.

84. 741 S.W.2d 751 (Mo. Ct. App. 1987).

85. *Id.* at 756.

86. *Kelley*, 304 Md. at 155-57, 497 A.2d at 1158-59.

The basis of *Kelley* is almost the sure knowledge of those who sell Saturday Night Specials "that the chief use of the product is for criminal activity". . . . Many products such as alcohol, firearms and automobiles are often misused, but they are not designed and sold knowing that the majority of instances of use will be improper . . . . [T]he handgun used to shoot plaintiff had little, if any legitimate use, and a probable illegal use. Seeking to profit by helping create such an activity should also create responsibility for the damages caused. A holding of potential liability here creates no danger to manufacturers or distributors of products which are legitimate but subject to improper use.<sup>87</sup>

The *Richardson* dissent highlights that knowledge of a product's illegitimate purpose is a crucial factor in assessing liability through the *Kelley* cause of action.

Adopting the logic in the *Richardson* dissent, an even stronger argument can be made for assault weapon liability than for Saturday Night Special liability. The lack of legitimate purpose for assault weapons has been explained above.<sup>88</sup> Moreover, their use in criminal activity is 20 times in excess of their numbers in the general firearms population.<sup>89</sup> The knowledge of this lack of societal value, not the lack of value by itself, coupled with the total non-culpability of the innocent victim, is the essence of the *Kelley* cause of action.

## VI. CONCLUSION

This article argues that manufacturers and marketers of assault weapons should be held to a strict liability standard by those innocent persons who are injured by the criminal use of their weapons. Liability should be fashioned on the three criteria of *Kelley v. R.G. Industries, Inc.*<sup>90</sup> These criteria are that: (1) assault weapons are more of a risk to society than a benefit; (2) the manufacturers and marketers have knowledge of this risk; and (3) between the innocent victim and the merchant profiting from the sale of such a product the merchant is more at fault.<sup>91</sup>

The *Kelley* case found manufacturers and marketers of weapons known as Saturday Night Specials strictly liable to innocent persons injured through the criminal use of these weapons. Although the *Kelley*

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87. *Richardson*, 741 S.W.2d at 757 (Prewitt, J., dissenting) (quoting *Kelley*, 304 Md. at 156, 497 A.2d at 1159).

88. See generally BATF REPORT, *supra* note 54.

89. Stewart & Alexander, *supra* note 65, at A-1, col. 2.

90. 304 Md. 124, 497 A.2d 1143 (1985).

91. *Id.* at 155-57, 497 A.2d at 1158-59.

case has been often criticized, the theory recognized by the court is well suited to impose strict liability on manufacturers and marketers of assault weapons.

*Editor's Note:*

The published version of this article did not incorporate specific revisions submitted by the author. Because some of these revisions are vital to an accurate understanding of his thesis, we are publishing here-with the major substantive revisions to his article, with our apologies to Mr. Horwitz. These revisions are as follows:

Page 125, footnote 6:

6. *Id.* at 128, 497 A.2d at 1145. The Gun Control Act of 1968, 18 U.S.C. § 925 (1983) provides that firearms that are not generally recognized as particularly suitable for or readily adaptable to sporting purposes be denied importation. *Id.* § 925(d)(3). However, until 1986 the law provided that the parts to handguns that were denied importation could be assembled in the United States. *Id.* Rohm Gesellschaft is a German firearms manufacturer that imports parts to handguns denied importation as a whole. Riordan, *Gun Was Made Here, but Sale Is Outlawed*, The Miami Herald, Apr. 1, 1981, at 7, col. 1. The parts were then assembled by R.G. Industries in the United States.

Page 133, footnote 63:

63. BATF REPORT, *supra* note 54, at 15-17. Since the BATF has no jurisdiction over weapons made in the United States, the domestic equivalent of the weapons prohibited from importation have not been removed from the United States market as of the date of this article.

Page 134, footnote 71:

71. This list of assault weapons is identified in S. 747, 101st Cong., 1st Sess., 135 CONG. REC. S3634 (1989). The bill is being sponsored by Senator Dennis DeConcini and was before Congress at the time this article was written. The list of weapons is considered the least inclusive of all bills currently proposed. The list includes only weapons unequivocally defined as assault weapons. A bill to be considered by the full House, H.R. 4225, sponsored by Representative Bill Hughes, would extend the sporting purposes test to the domestic assault weapons included in S. 747, among others, and ban their production. See H.R. 4225, 101st Cong., 2d Sess. (1990). Additionally, the foreign manufactured weapons in S. 747 are also included in the BATF Report. BATF REPORT, *supra* note 54, at 1-2. Finally, H.R. 1190, 101st Cong., 1st Sess. (1989) and S. 386, 101st Cong., 1st Sess., 135 CONG. REC. S1361 (1989) included the list of weapons of S. 747 in their definition of assault weapons. On the state level both California and New Jersey have passed bans on assault weapons that include all the weapons in S. 747. See CAL. PENAL CODE §§ 12275-12276.5 (West Supp. 1990); 1990 N.J. Laws 32.

[This page should replace page 139 in the University of Dayton Law Review, Vol 15, No. 1 (1989).]

