

Strict Products Liability: Application to Gun Dealers Who Sell to Incompetent Purchasers¹

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Strict products liability is a judicial doctrine designed to protect the public from the sale of dangerously defective products² by shifting liability to the seller, who has a superior ability to administer the risk of loss.³ The justification for this shift of liability is that the seller undertakes the special responsibility for standing behind the product marketed, and the consuming public relies on this undertaking.⁴ Risk thus shifts from the vulnerable consumer to those who can offer "maximum protection" to the consumer after marketing and profiting from the particular product.⁵

The elements of a strict products liability claim are: 1) a product is sold by a person regularly engaged in the sale of such products; 2) a defect exists in the product at the time it is sold; 3) this defect makes the product unreasonably dangerous; and 4) this defect causes physical harm to the user or consumer or to his property.⁶ Whether a product is defective is determined

1. The term "incompetent purchaser," as used throughout this Note, refers to minors, insane persons, and individuals considered mentally deficient.

2. See *Carruth v. Mariani*, 11 Ariz. App. 188, 191, 463 P.2d 83, 86 (1970). See generally R. EPSTEIN, *MODERN PRODUCTS LIABILITY* (1980); W. KIMBLE & R. LESHER, *PRODUCTS LIABILITY* (1979).

3. See *Carruth*, 11 Ariz. App. at 191, 463 P.2d at 86. See generally RESTATEMENT (SECOND) OF TORTS § 402A comment c (1977); Noel, *Defective Products: Extension of Strict Liability to By-standers*, 38 TENN. L. REV. 1 (Fall 1970).

4. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1977).

5. *Tucson Industries Inc. v. Schwartz*, 108 Ariz. 464, 467-68, 501 P.2d 936, 939-40 (1972).

6. RESTATEMENT (SECOND) OF TORTS § 402A (1977) provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies though
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In discussing strict products liability, one must be cognizant of the various facets and competing tests used to determine liability. Arizona is one of only thirteen states which strictly interprets § 402A. These states use the ordinary consumer's expectation for measuring defectiveness and require proof that the product is defective and unreasonably dangerous. See *infra* notes 34-38 and accompanying text. Twelve states have abolished the distinction between a defective product and an unreasonably dangerous product; the words are considered synonymous. Ten states use standards

by the ordinary user's or consumer's expectation as to that product's safety.⁷

Strict products liability differs significantly from liability founded upon negligence. It is predicated solely upon the product's defective condition without regard to the defendant's conduct,⁸ whereas negligence focuses on the defendant's conduct as the basis for recovery.⁹ Unreasonableness of the product's condition, not the defendant's conduct, establishes liability under the doctrine.¹⁰

A growing number of legal commentators are calling for application of the strict products liability doctrine to gun sales.¹¹ These commentators propose application of the doctrine based on two different theories to protect the public from gun-related injuries.¹² The first and more far-reaching proposal would hold handgun sellers strictly liable for gun-related injuries because a handgun's inherent danger outweighs its social utility to such an extent that it is per se defective.¹³ The second proposal would hold members of the distribution chain strictly liable because they failed to exercise proper care to prevent distribution of handguns to incompetent purchasers.¹⁴

This Note urges the application of Arizona's strict products liability doctrine to handgun sales to incompetent purchasers. The primary focus is on the bystander's right to recover from the gun dealer under strict products liability. Exploring this right, this Note first gives a brief overview of two proposed applications of strict products liability to gun sales. This Note then discusses Arizona's strict products liability doctrine and suggests that Arizona's doctrine permits application of one of these proposals to impose strict liability for the sale of handguns to incompetents. Finally, the criticisms of applying strict liability in this context are discussed along with the policy considerations that justify imposing strict products liability on gun dealers.

other than, or in addition to, the ordinary consumer's expectation for determining liability. For example, under the prudent manufacturer's test, knowledge of the product's defectiveness is imputed to the manufacturer, and liability is found if an ordinary prudent manufacturer would not have placed the product on the market with this knowledge. This negligence standard significantly expands the basis of liability. The remaining states either have no strict products liability doctrine or have not yet developed their law to a degree that places them in one of the above categories. See generally J. BEASELY, *PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT* (1981); W. KIMBLE & R. LESH, *supra* note 2, § 52 at 67-68.

7. See, e.g., *Hohlenkamp v. Rheem Mfg. Co.*, 134 Ariz. 208, 211, 655 P.2d 32, 35 (Ct. App. 1982); *Brady v. Melody Homes Mfg.*, 121 Ariz. 253, 257, 589 P.2d 896, 900 (Ct. App. 1979); *Maas v. Dreher*, 10 Ariz. App. 520, 523, 460 P.2d 191, 194 (Ct. App. 1969). See also RESTATEMENT (SECOND) OF TORTS § 402A; J. BEASELY, *supra* note 6, at 167-70 and 187-93.

8. See *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974); *Brady*, 121 Ariz. at 258-59, 589 P.2d at 901-02 (consideration of the defendant's conduct is the basis of a negligence claim, whereas strict liability is concerned solely with the product's condition).

9. See *supra* note 8.

10. *Jackson*, 499 F.2d at 812.

11. See generally Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16 (1981); Podgers, *Handguns New Target of Tort Lawyers*, 67 A.B.A.J. 1443 (Nov. 1981); Note, *Manufacturer's Strict Liability For Injuries From a Well-Made Handgun*, 24 WM. & MARY L. REV. 467 (Spring 1983). This trend has been encouraged by increasing concern over the role handguns play in causing violent death and injury in the United States. It is estimated that 10,000 deaths annually result from the misuse of handguns. See Fields, *Does Blame for Handgun Crime Lie at the Factory Gate?*, 45 BUS. & SOCIETY R. 51-55 (Spring 1983); Fisher, *supra* at 16.

12. See Fisher, *supra* note 11; Podgers, *supra* note 11.

13. See *supra* note 11 and *infra* notes 15-24 and accompanying text.

14. See *supra* note 11 and *infra* notes 26-31 and accompanying text.

TWO THEORIES BEHIND STRICT LIABILITY FOR HANDGUN DEALERS

One theory that supports finding handgun dealers strictly liable for handgun-related injuries is based on the *Barker v. Lull Engineering* decision.¹⁵ In *Barker*, the California Supreme Court established an alternative method to the consumer expectation test for determining if a product is defective. The court held that a product is defective not only if it fails to perform as safely as the ordinary consumer would expect, but also if the dangers posed by the product's design outweigh its social utility.¹⁶ Under this theory, gun dealers are strictly liable on the ground that the danger posed by a handgun's design outweighs its social utility. Such a finding proves the gun defective and subjects the dealer to strict liability for any handgun-related injury.¹⁷ Use of this risk/benefit approach to strict liability, however, is not promising in Arizona. The Arizona Supreme Court appears to have adopted the *Barker* test in *Byrns v. Riddell*¹⁸ when it spoke of the "usefulness and desirability" of a product in determining if it is defective.¹⁹ The lower courts, however, have not utilized the *Barker* approach. In *Brady v. Melody Homes Manufacturers*,²⁰ Division One of the Arizona Court of Appeals rejected the risk/benefit portion of the *Barker* decision. The court held that such an analysis is essentially a negligence test focusing on the defendant's conduct²¹ and implied that the Arizona Supreme Court did not intend to adopt this approach to strict products liability.²² Division Two of the Court of Appeals noted this conflict in *Moorer v. Clayton Manufacturing Corp.*, but failed to address the issue.²³ Thus, it remains unclear whether the *Barker* risk/benefit test applies in Arizona.

It is clear however that many courts refrain from applying the *Barker* test to gun dealers and sellers of similarly dangerous articles for fear of judicial usurpation.²⁴ Using the *Barker* test to establish strict liability for gun dealers permits the courts to invade an area generally reserved to the legisla-

15. 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

16. *Barker*, 143 Cal. Rptr. at 237-38, 573 P.2d at 455-56. Note that the consumer expectation test is the traditional strict products liability test laid out in RESTATEMENT (SECOND) OF TORTS § 402A (1977). The risk/benefit test varies from the strict products liability test in that it clearly encompasses negligence elements.

17. See Fisher, *supra* note 11 and Podgers, *supra* note 11. The theory of strict liability based on the *Barker* risk/benefit test is similar to the test set out in RESTATEMENT (SECOND) OF TORTS § 520 for abnormally dangerous activities. Section 520 balances the activity's utility against the risk of injury.

18. 113 Ariz. 264, 550 P.2d 1065 (1976).

19. *Id.* at 267, 550 P.2d at 1068.

20. 121 Ariz. 253, 589 P.2d 896 (Ct. App. 1979).

21. *Id.* at 258, 589 P.2d at 901.

22. *Id.* at 258, 589 P.2d at 901. The *Brady* court stated, "while *Byrns v. Riddell* . . . defined 'unreasonably dangerous' by a risk/benefit analysis, we are not convinced that the Arizona Supreme Court has adopted the ramifications inherent in that definition."

23. 128 Ariz. 565, 567-68, 627 P.2d 716, 718-19 (Ct. App. 1981). The *Moorer* court avoided this issue by deciding the case under that portion of *Barker* in accord with § 402A: that a product is defective if it does not meet consumer expectation as to its safety.

24. See Podgers, *supra* note 11; Santarelli, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471 (Spring 1983). See also *Richman v. Charter Arms Corp.*, 571 F.Supp. 192, 198 (E.D. La. 1983) (courts must defer to legislature in such matters); *Bojorquez v. House of Toys*, 133 Cal. Rptr. 484, 486, 62 Cal. App. 3d 930, 933 (Ct. App. 1976) (plaintiff's argument that defendant was liable for selling slingshots to children infers a total ban on the product and "such a limitation is in the purview of the Legislature, not the judiciary.").

ture. Thus courts have expressly stated that it is the function of the legislature, not the courts, to determine if handguns should be permitted in society.²⁵

The more promising theory for imposing strict liability on gun dealers in Arizona holds that the seller's failure to prevent distribution of handguns to incompetent purchasers places the gun in a condition unreasonably dangerous to the public.²⁶ This approach requires an expanded meaning of the term "condition." The product's condition must refer not only to its physical composition, but also to its relationship with the particular environment in which it is placed.²⁷

The rationale supporting this theory is that handguns are inherently dangerous products.²⁸ Placing a gun in the hands of an incompetent increases the risk of its misuse.²⁹ This increased risk makes the weapon dangerous to an extent beyond that contemplated by the ordinary consumer or user³⁰ and therefore defective to the extent that it fails to meet the consumer's expectation of the handgun's safety.³¹ Such an approach to imposing strict liability on handgun dealers who sell to incompetent purchasers is compatible with Arizona's strict products liability doctrine.

ARIZONA'S STRICT PRODUCTS LIABILITY DOCTRINE

Arizona's courts apply a bifurcated test for establishing strict products liability.³² To recover, a plaintiff must show that 1) the product was in a defective condition when sold, and 2) this condition was unreasonably dan-

25. See *supra* note 24.

26. See Fisher, *supra* note 11 and Podgers, *supra* note 11.

27. See *infra* notes 83-84 and accompanying text.

28. State v. Gordon, 120 Ariz. 172, 176, 584 P.2d 1163, 1167 (1978) (quoting State v. Luckey, 322 N.E.2d 354, 358 (Ohio Ct. App. 1974)) (court notes that guns are inherently dangerous weapons, defining "inherently dangerous" as "any instrument which, when used in [the] ordinary manner contemplated by its design and construction, . . . is likely to cause death or great bodily harm"); State v. Church, 109 Ariz. 39, 43, 504 P.2d 940, 944 (1973) (a gun is a deadly weapon which is inherently dangerous).

29. This theory underlies the *Federal Gun Control Act of 1968*, 18 U.S.C. § 922 (1968). See *infra* note 53 and accompanying text.

30. See *infra* notes 47-61 and accompanying text. See also Podgers, *supra* note 11.

31. RESTATEMENT (SECOND) OF TORTS § 402A (1977). The risk of misuse (measured by the potentiality of misuse) must be distinguished from the danger created by misuse. In the sale of handguns to incompetents, it is the risk or potentiality of misuse that surpasses consumer expectations of danger. This issue is distinct from the consumer's expectation of danger from actual misuse of the product. The consumer does not expect to be faced with the increased probability that the gun will be misused, although he might expect the consequences of such misuse. In the latter case, the product would be defective only if the consequences of such misuse—rather than the probability of such misuse—surpassed consumer expectations. Since such consequences are generally known and expected by the consumer (which is what makes the increased risk of misuse so dangerous), the gun would not be defective for this reason alone. See *infra* note 34 and accompanying text.

32. Arizona adopted RESTATEMENT (SECOND) OF TORTS § 402A as the basis of its strict products liability doctrine in *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968). Arizona courts strictly interpret § 402A, rejecting the view adopted by some states that the terms "defective" and "unreasonably dangerous" are synonymous and holding that both requirements of § 402A must be met—the product must be shown to be both defective and unreasonably dangerous. *E.g.*, *Rogers v. Unimac Co., Inc.*, 115 Ariz. 304, 307, 565 P.2d 181, 184 (1977); *Byrns v. Riddel*, 113 Ariz. 264, 266, 550 P.2d 1065, 1067 (1976); *Vineyard v. Empire Machinery Co., Inc.*, 119 Ariz. 502, 505, 581 P.2d 1152, 1155 (Ct. App. 1978); *Sullivan v. Green Mfg. Co.*, 118 Ariz. 181, 186, 575 P.2d 811, 816 (Ct. App. 1978). See also *supra* note 6 and accompanying text.

gerous.³³ Both prongs of this test must be satisfied; the product must be both defective and unreasonably dangerous.

Arizona courts define a defective condition by reference to the user's or consumer's expectation.³⁴ The first prong of Arizona's strict products liability test is satisfied if the product is dangerous to an extent beyond that contemplated by the ordinary user or consumer.³⁵ If the product clearly meets the consumer's expectation of danger, the product is not defective and any claim against the seller must sound in negligence.³⁶

The second prong of Arizona's strict products liability test is satisfied if the proven defect is unreasonably dangerous.³⁷ If no unreasonable danger is found, again, liability must be predicated on negligence.³⁸

Arizona extends strict products liability protection to third-party bystanders, adopting the view that strict products liability is designed to protect not only users and consumers, but also injured persons generally.³⁹ Bystanders are entitled to such protection because they are unable to inspect the product in question for defects;⁴⁰ they are strangers to the distribution chain and therefore vulnerable to flaws within it.⁴¹ Thus, bystanders in Arizona can recover for injuries even where the defective product is used by another with full knowledge of the dangers associated with such use.⁴² Such extended protection opens the door to handgun dealers' liability to injured bystanders for gun sales to incompetent purchasers.

33. See case listed *supra* note 32.

34. *E.g.*, *Hohlenkamp v. Rheem Mfg. Co.*, 134 Ariz. 208, 211, 655 P.2d 32, 35 (Ct. App. 1982) (product is in a defective condition if it is in a condition not contemplated by the user or consumer and which is unreasonably dangerous to him); *Moorer v. Clayton Mfg. Corp.*, 128 Ariz. 565, 568, 627 P.2d 716, 719 (Ct. App. 1981) (product is defective if it failed to perform as safely as an ordinary consumer would expect); *Maas*, 10 Ariz. App. at 523, 460 P.2d at 194 (to prove strict products liability, "[t]he article . . . must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with ordinary knowledge common to the community"). See also RESTATEMENT (SECOND) OF TORTS § 402A comment g (1977).

35. *Hohlenkamp*, 134 Ariz. at 211, 655 P.2d at 35.

36. *Id.*

37. *Id.* This test is virtually the same as the test for whether a defect exists. Comment i to § 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it. . . ." Thus, both prongs of Arizona's strict liability test employ the same standard. Indeed, this is the very reason that many states consider the terms "defective" and "unreasonably dangerous" synonymous. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). The only possible distinction between the two tests is that the test for a defect might be viewed as being bifurcated. In this case, one must show that the product was in an unexpected condition and unreasonably dangerous to meet the first prong of the strict liability test and show the product "defective." This does little, however, to remove the redundancy of the second prong of Arizona's test. One is still proving unreasonable danger even though it has already been established by showing that a defect exists.

38. *Hohlenkamp*, 134 Ariz. at 211, 655 P.2d at 35.

39. *Sullivan*, 118 Ariz. at 186, 575 P.2d at 816; *Carruth*, 11 Ariz. App. at 189-92, 463 P.2d at 84-87 (quoting *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1963)).

40. *Sullivan*, 118 Ariz. at 186, 575 P.2d at 816; *Carruth*, 11 Ariz. App. at 190, 463 P.2d at 85 (so long as the injury to the bystander is reasonably foreseeable, the bystander should be entitled to greater protection than users or consumers because the latter are in a better position to protect themselves from the defective product).

41. R. EPSTEIN, *supra* note 2, at 59.

42. *Sullivan*, 118 Ariz. at 187, 575 P.2d at 817.

APPLYING ARIZONA'S STRICT PRODUCTS LIABILITY DOCTRINE TO GUN DEALERS

Consumer Expectation and Defectiveness

Under Arizona's strict products liability doctrine, a product is defective if dangerous to an extent beyond that contemplated by the ordinary consumer.⁴³ "Consumer" is a generic term,⁴⁴ referring to the class of all foreseeable users and consumers of the particular product.⁴⁵ The particular user's or consumer's subjective knowledge is irrelevant; liability is based upon the objective standard of "ordinary knowledge common to the community."⁴⁶ Community expectations thus determine defectiveness.⁴⁷

The community in general, and consumers in particular, reasonably expect gun dealers to keep their product out of an incompetent's hands. Most consumers do not expect the increased risk posed by guns placed in such a dangerous condition.

State and federal laws evidence and foster the community's expectation that sales to incompetents will not occur. Arizona statutorily prohibits the sale or gift of a firearm or similar device to a minor.⁴⁸ Furthermore, selling a deadly weapon to an unauthorized purchaser is a felony in Arizona.⁴⁹ Federal law prohibits the sale or delivery of a firearm by any licensed firearms merchant (or other individual or company) to anyone under eighteen years of age.⁵⁰ The law also prohibits selling firearms to those who have been

43. See *supra* notes 34-36 and accompanying text.

44. *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 892 (9th Cir. 1977). See also RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977); W. KIMBLE & R. LESHER, *supra* note 2, §§ 31-33.

45. *d'Hedouville*, 552 F.2d at 892; see also RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977).

46. *d'Hedouville*, 552 F.2d at 892; *Maas*, 10 Ariz. App. at 523, 460 P.2d at 194; see also RESTATEMENT (SECOND) OF TORTS, § 402A comment i (1977).

47. *d'Hedouville*, 552 F.2d at 892. The composition of the "community" is debatable. Is it comprised solely of those who actually purchase or are likely to purchase the product, or does it encompass the community at large? In any event, given the prodigious number of gun owners and purchasers in the United States, even the narrower community of purchasers comprises a very large segment of the public.

48. ARIZ. REV. STAT. ANN. § 13-3109 (1978) provides:

Sale or gift of firearm to minor; . . .

A. A person who sells or gives to a minor, without consent of the minor's parent or legal guardian, a firearm, ammunition or toy pistol by which dangerous and explosive substances may be discharged, is guilty of a class 2 misdemeanor.

49. ARIZ. REV. STAT. ANN. § 13-3102 (1978) provides:

Misconduct involving weapons; . . .

A. A person commits misconduct involving [a] weapon [] by knowingly:

5. Selling or transferring a deadly weapon to a prohibited possessor. . . .

I. Misconduct involving weapons under [paragraph 5] of subsection A of this section is a class 6 felony.

50. 18 U.S.C. § 922 (1968) provides:

. . . .

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age. . . .

. . . .

"adjudicated as a mental defective" or who have been committed to any mental institution.⁵¹ Arizona laws incorporate federal law, allowing a person to purchase or obtain a firearm only if the seller and purchaser comply with relevant federal law.⁵²

The clear purpose of these laws is to keep guns from those who, commonly, are unable to use them safely.⁵³ They seek to protect individuals from the type of injury which could accompany misuse of an inherently dangerous article. That state and federal statutes prohibit gun sales to incompetents reinforces the view that such sales violate the community's expectation of safety and evidences a community desire and expectation that sales to incompetents will not occur.⁵⁴ Because the legislature gives effect to the public's will, such legislative enactments aimed solely at the public's protection presumably originate from public demand.⁵⁵ Such laws are thus strong evidence that the public wants such restrictions and is aware that they exist.⁵⁶

(d) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

...
 (4) has been adjudicated as a mental defective or has been committed to any mental institution.

The statute refers to "possessors" and not only to "purchasers"; unlike strict products liability, this statutory liability is not predicated upon a sale.

51. 18 U.S.C. § 922(d)(4) (1968).

52. ARIZ. REV. STAT. ANN. § 13-3106 (1978) provides:

A person residing in this state, or a corporation or other business entity maintaining a place of business in this state, may purchase or otherwise obtain firearms anywhere in the United States if such purchase or acquisition fully complies with the laws of this state and the state in which the purchase or acquisition is made and purchaser and seller, prior to the sale or delivery for sale, have complied with all requirements of the Federal Gun Control Act of 1968. . . .

53. In *Barrett v. United States*, 423 U.S. 212, 218 (1976) the court stated: "The very structure of the Gun Control Act demonstrates that Congress did not intend merely to restrict interstate sales but sought broadly to keep firearms away from persons classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means." See also *United States v. Hammons*, 566 F.2d 1301, 1303 (5th Cir. 1978) (citing *Barrett*), *vacated on other grounds*, 439 U.S. 810 (1979); *United States v. Ocequeda*, 564 F.2d 1363, 1365 (9th Cir. 1977) (Gun Control Act is "intended to keep firearms out of the hands of those not entitled to have them because of age, criminal background, or incompetency").

54. Note, *Strict Products Liability: Admissibility of Post-Manufacture Safety Standards on the Issue of Design Defect*, 2 REV. OF LIT. 331, 336-37 (Summer 1982) (safety codes indirectly engender consumer trust in an industry and its products and thereby create consumer expectation by "prescribing [the] minimum levels of performance that will secure public acceptance").

55. In *re Englewood Mfg. Co.*, 28 F.Supp. 653, 655 (E.D. Tenn. 1939) ("an act of a legislative body is a mandate from the people"); In *re Anderson*, 30 B.R. 995, 1004 (M.D. Tenn. 1983) (citing *In re Englewood*); *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 423, 229 A.2d 388, 394 (Ct. App. 1967) ("a law is a rule of conduct prescribed by the legislative agents of the people"); *State v. Brantley*, 112 Miss. 812, 816, 74 So. 662, 666 (1917) ("A statute and a Constitution, though of unequal dignity, are both 'laws,' and each rests upon the will of the people."), *overruled on other grounds*, *Power v. Robertson*, 130 Miss. 188, 93 So. 769 (1922); *State v. Silver Bow Refining Co.*, 78 Mont. 1, 4, 252 P. 301, 304 (1926) ("A statute is the expression of the public will by the lawmaking power of the state."); *Watts v. Mann*, 187 S.W.2d 917, 924 (Tex. Ct. App. 1945) ("legislative enactments are the enactments of the people themselves acting through their representatives").

56. If public desire affects public expectation—people's expectations fall in line with their wants—then it is important to note that only small minorities of U.S. citizens feel that stiffer gun control laws would have no effect on the number of handgun deaths. See *Handguns: Americans Want Tougher Laws*, 215 GALLUP REPORT 3-12 (August 1983). Fifty-nine percent of the public

Moreover, Arizona recognizes that certain independent safety standards offer important guides to determining defectiveness.⁵⁷ These standards may indicate a consumer's reasonable expectation as to a particular product's safety.⁵⁸ Statutory laws and regulations, which are the ultimate industry standards, should be afforded similar weight for determining defectiveness.⁵⁹ Such laws and regulations set the parameters within which the industry must operate and, therefore, influence the public's expectation of safety.⁶⁰ Violating a statutory standard is thus evidence that a product is defective because it does not meet the consumer's expectation of safety.⁶¹

Sales to incompetents are not within the community's expectation of potential danger resulting from gun sales and therefore create an unexpected risk. Thus, under Arizona's test for strict products liability, a gun sold to an incompetent purchaser is in a defective condition.⁶²

A product's defective condition alone, however, is insufficient to establish strict products liability. In Arizona, such liability exists only when the defective condition is unreasonably dangerous.⁶³ Thus, a gun dealer is strictly liable for selling to an incompetent under Arizona's strict liability doctrine only if the sale places the gun in an unreasonably dangerous condition.

The Unreasonably Dangerous Requirement

A product is unreasonably dangerous if it is dangerous to an extent not

wants stricter laws governing gun sales; thirty-one percent are satisfied with current laws; and only four percent believe that present laws should be weakened. *Id.* at 3-4. However, a majority of 48% to 44% oppose a total ban on handgun sales. *Id.* at 9.

57. *Deyoe v. Clark Equipments Co., Inc.*, 134 Ariz. 281, 285, 655 P.2d 1333, 1337 (Ct. App. 1982); *Hohlenkamp*, 134 Ariz. at 212, 655 P.2d at 36. See also Hoffman, *Use of Standards in Products Liability Litigation*, 30 DRAKE L. REV. 283 (1980) (Appendix A, pp. 298-305, listing *Brady*, 121 Ariz. 253, 589 P.2d 896, and *Roger*, 115 Ariz. 304, 565 P.2d 181, both of which allowed outside evidence to be admitted on the issue of whether the product in question was defective).

Introducing industry standards does not switch the focus from the product's condition to the issue of the defendant's conduct. It is the product, not the manufacturer, which is held to these standards. *Deyoe*, 134 Ariz. at 285, 655 P.2d at 1337; *Hohlenkamp*, 134 Ariz. at 212, n.3, 655 P.2d at 36, n.3.

58. J. BEASELY, *supra* note 6, at 386.

59. *Anderson v. Hyster*, 74 Ill.2d 364, 366, 385 N.E.2d 690, 692 (1979) (product can be shown to be unreasonably dangerous due to a design defect by evidence that the design did not conform to standards set by legislation or governmental regulation); J. BEASELY, *supra* note 6, at 402 points out that federal standards that subject the defendant to criminal penalties are "so minimal that the failure to meet them is presumptively negligence *per se*," which often imposes a lesser duty on the manufacturer or seller than does strict tort liability. Failure to meet such standards is thus relevant to a determination of whether a product is defective or unreasonably dangerous or both. W. KIMBLE & R. LESHER, *supra* note 2, § 233 at 237 suggests that if courts adopt a legislative standard and hold manufacturers and sellers negligent as a matter of law when the product fails to comply with it, then failure of the product to comply should also be viewed as establishing the product's defectiveness as a matter of law under strict tort liability principles; Note, *supra* note 54, at 345.

60. J. BEASELY, *supra* note 6, at 394 (standards establish a floor as to what the consuming public will tolerate in regard to concern for their safety); Note, *supra* note 54, at 337 (safety codes help establish consumer faith and expectations in a product by "prescribing minimum levels of performance that will secure public acceptance"); Note, *supra* note 11, at 477.

61. See *infra* note 63.

62. See *supra* note 35 and accompanying text.

63. W. KIMBLE & R. LESHER, *supra* note 2, § 55 at 80-81. See also RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977); *supra* note 31 and accompanying text.

contemplated by the ordinary consumer.⁶⁴ This test is identical to the first prong of Arizona's test establishing a defect.⁶⁵ Both tests are based on the consumer's expectation of danger. This similarity between the tests for defectiveness and unreasonable danger results in a distinction without a difference. For this reason, many courts hold that the terms "defective" and "unreasonably dangerous" are synonymous.⁶⁶ Arizona rejects this approach, but the similarity between the two prongs means that a plaintiff who establishes defectiveness under the first prong, for all practical purposes, establishes unreasonable danger under the second.

Given a handgun's inherent danger and the serious potential for injury, there is little doubt that ordinary consumers would find a gun placed in an incompetent's hands unreasonably dangerous. State and federal laws prohibiting such sales support this conclusion.⁶⁷ These laws are predicated on the belief that it is unsafe to give handguns to those who are not competent to use them.⁶⁸ Placing a gun in an incompetent's hands makes an inherently dangerous product dangerous to an extent beyond most consumer expectations.⁶⁹ The gun is therefore in an unreasonably dangerous condition, thereby satisfying the second prong of Arizona's test. The injured plaintiff can thus recover from the gun dealer under Arizona's strict products liability doctrine for sale to an incompetent, which renders the gun defective and unreasonably dangerous.

CRITICISM OF STRICT PRODUCTS LIABILITY FOR GUN DEALERS

There are several major criticisms of applying Arizona's strict products liability doctrine to gun sales to incompetent purchasers. All criticisms focus on the actor's conduct in causing the plaintiff's injury and the distinction between strict liability, which looks solely to the product's condition, and negligence, which looks to the defendant's conduct. These criticisms can be dispelled upon closer analysis.

Market-Use Environment: Defective Though Well Made

The first major criticism is that, despite unexpected risks to the consumer and others, the gun itself is not defective; it functions as intended.⁷⁰ If anything, it is the incompetent purchaser's conduct that is "defective." However, a broader and more appropriate reading of the term "condition" defeats this criticism.⁷¹

That a product functions properly and safely when used as intended

64. *d'Hedouville*, 552 F.2d at 891; W. KIMBLE & R. LESHER, *supra* note 2, § 55 at 80-81; RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977).

65. *See supra* note 37.

66. *Id.*

67. *See supra* notes 48-52 and accompanying text.

68. *See supra* note 53 and accompanying text.

69. The same argument could be applied to knife or automobile sales to minors or other incompetents. However, these articles are not considered inherently dangerous, and their practical utility outweighs their danger.

70. Santerelli, *supra* note 24, at 492.

71. *See infra* notes 83-85 and accompanying text.

does not render it nondefective.⁷² When a dealer allows incompetent persons to obtain handguns, a defect exists just as if the handgun was improperly made.⁷³ Defectiveness is always measured by the consumer's expectation of a product's safety,⁷⁴ even where the product is used in a foreseeable manner not intended by the manufacturer or seller.⁷⁵ Consumer expectations may differ from the manufacturer's or seller's expectation of proper use. Thus, even though a product is used in a manner not intended by the manufacturer or seller, it is defective if the danger associated with such foreseeable misuse exceeds consumer expectations. Manufacturers and sellers must, therefore, consider the potential injuries that may result from foreseeable misuse of the product before placing it on the market.⁷⁶ Such considerations give rise to a duty to warn of or eliminate the potential danger.⁷⁷

A manufacturer or dealer has a duty to warn consumers and users of any potential danger that it knows or should know might result in injury.⁷⁸ This duty can arise even if the product's owner or user is aware of the danger, but the danger is neither known nor appreciated by the injured bystander.⁷⁹ Courts hold manufacturers and sellers liable in such cases under the general rule that products must be reasonably safe for the user and others who might foreseeably be injured by their operation.⁸⁰ Failure to eliminate or warn of such dangers can make a product defective.⁸¹ Thus, a product faultlessly made and properly functioning can nevertheless be legally defective due to such a failure to warn.⁸²

Foreseeable misuse of a well-made product that is potentially dangerous may thus give rise to an exception to the general rule that a product is not defective if it is safe for normal use.⁸³ This exception recognizes that a product can be defective though properly made and is evidence that a product's

72. *d'Hedouville*, 552 F.2d at 890 (rejecting the defendant's jury instructions which based the issue of unreasonable danger, and therefore defectiveness, upon whether the product was being used for its "intended use"); *Amburgey v. Holan Division of Ohio Brass*, 124 Ariz. 534, 535, 606 P.2d 24, 25 (Ct. App. 1979) (rejecting a jury instruction that "[i]n order to prove a defective design it is necessary to prove that the injury occurred while the product was being used in a way it was intended to be used," and holding that the issue was not whether the use was intended by the manufacturer, but "whether the use was reasonably foreseeable"), *vacated*, 129 Ariz. 531, 606 P.2d 21 (1980) (but the court also rejected the jury instruction).

73. *Podgers*, *supra* note 11, at 7; *W. KIMBLE & R. LESHAR*, *supra* note 2, § 53 at 69 states that the defect may arise during the distribution stage.

74. *See supra* note 34 and accompanying text.

75. *d'Hedouville*, 552 F.2d at 890; *Amburgey*, 124 Ariz. at 535, 606 P.2d at 25.

76. *See, e.g., Kavanagh v. Kavanagh*, 131 Ariz. 344, 348, 641 P.2d 258, 262 (Ct. App. 1982); *Rodriguez v. Besser Co.*, 115 Ariz. 454, 460, 565 P.2d 1315, 1321 (Ct. App. 1977); *Tucson Industries, Inc. v. Schwartz*, 15 Ariz. App. 166, 172, 487 P.2d 13, 18 (1971), *vacated on other grounds*, 108 Ariz. 464, 501 P.2d 936 (1972).

77. *W. KIMBLE & R. LESHAR*, *supra* note 2, § 135 at 167.

78. *Ghera v. Ford Motor Co.*, 55 Cal. Rptr. 94, 102, 246 Cal. App. 2d 639, 647 (Ct. App. 1966) (cited and adopted in *Embry*, 115 Ariz. at 436, 565 P.2d at 1297). *See also* RESTATEMENT (SECOND) OF TORTS § 402A comment h (1977).

79. *See supra* note 77.

80. *See supra* note 77. *See also Sullivan*, 118 Ariz. at 186, 575 P.2d at 816; *Carruth*, 11 Ariz. App. at 190-91, 463 P.2d at 85-86; *Johnson v. Standard Brands Paint Co.*, 79 Cal. Rptr. 194, 197, 274 Cal. App. 2d 331, 334 (Ct. App. 1969).

81. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1977).

82. *Id.*

83. *Id.*

mere physical condition is not the sole focus of strict products liability. It implies a broader concept of the term "condition": a product's defective condition must include not only its physical construction, but also its relationship to the environment into which the seller introduces it. A product's true safety can only be measured by reference to the environment in which its use is expected.⁸⁴ Thus, the environment in which a product is used is an element of its dangerous "condition" for purposes of strict liability. When the danger resulting from this condition surpasses the ordinary consumer's expectation, the product is defective.⁸⁵

Placing a handgun in an incompetent purchaser's hands introduces it into an environment where it poses foreseeable risks to the public. Such risks are clearly foreseeable by the dealer.⁸⁶ Given the existence of state and federal laws and the foreseeability factor, the ordinary consumer does not expect incompetents to possess handguns.⁸⁷ If a handgun is in an incompetent's hands, it is in an environment where the risk of unexpected injury is great.⁸⁸ A warning cannot adequately reduce the danger created by incompetents' foreseeable misuse since it will not prevent the misuse or protect innocent bystanders. Thus, under the broader meaning of "condition," a gun sold to an incompetent is defective even though it is well made, because it is in an environment where its foreseeable misuse creates an unexpected danger to the public at large—a danger that cannot be removed by product warnings.

Incompetent's Misconduct: No Bar To Defectiveness

A second criticism of imposing strict products liability on gun dealers argues that it is the incompetent's misconduct, rather than the gun itself, that causes the plaintiff's injuries. This argument is not a bar to finding a handgun defective, especially since it is the increased likelihood of such misconduct that initially makes the gun defective.⁸⁹ That negligent use is necessary for a product to be dangerous is not evidence of non-defectiveness. If it were otherwise, an injured consumer could recover under strict products liability only upon a showing that he did not negligently use the product.⁹⁰

84. Articles such as explosives, insecticides, and various power tools are examples of products that can be perfectly safe in trained hands or when used for a given purpose, but which can become deadly when misused. This fact plays a role in products liability case law. See *d'Hedouville*, 552 F.2d 893 (liability was predicated "upon the sale of a product unreasonably dangerous to the ultimate user or consumer because of its inherent unsuitability for the reasonably foreseeable use"); *Tucson Industries*, 15 Ariz. App. at 172, 487 P.2d at 18 ("To determine both the adequacy of the warning and those who might reasonably be expected to be in the vicinity, the manufacturer must also anticipate the environment in which his product is normally used.").

85. See *supra* note 34 and accompanying text.

86. In *Richman v. Charter Arms Corp.*, 571 F.Supp. 192, 197-200 (E.D. La. 1983), the court found a gun dealer strictly liable under § 520 of the RESTATEMENT for selling a gun to a minor. The court noted that given the large number of deaths caused by handguns, manufacturers must reasonably expect purchasers of their products to kill periodically. Further, the court ruled that, as a matter of law, criminal use of handguns is a "normal use" of the product.

87. See *supra* notes 57-62 and accompanying text.

88. *Id.*

89. See *supra* notes 29-30 and accompanying text.

90. Cf. *Sullivan*, 118 Ariz. at 187, 575 P.2d at 817. Such a result would also conflict with the rule that "the owner's knowledge of a defect [and therefore his negligence in using the product] is

This view conflicts with the rule that proof of a defect does not depend on a showing that the product was used as intended by the manufacturer or seller.⁹¹ Moreover, such a result would contravene the rule that contributory negligence does not bar strict liability.⁹²

In *Moorer v. Clayton Manufacturing Corp.*,⁹³ Arizona adopted the view that consumer negligence in permitting a defective product to cause harm does not bar strict products liability. In *Moorer*, the plaintiff was injured by an emissions testing machine purchased by Moorer's employer from Clayton Manufacturing.⁹⁴ Clayton claimed that Moorer's employer had failed to properly train Moorer to use the machine safely and argued that since the employer's negligence caused the injury, Clayton could not be held strictly liable.⁹⁵ The court rejected this argument, stating that the defendant could not avoid strict liability by claiming that the employer helped cause the injury.⁹⁶ The court noted that the plaintiff could recover under strict products liability even though product defectiveness was only one of several proximate causes of the injury.⁹⁷ Similarly, a gun dealer who sells to an incompetent purchaser, thereby placing a gun in a condition that is unexpectedly dangerous to the public, cannot avoid strict liability by claiming that the purchaser's conduct helped cause the injury. Though the incompetent purchaser's conduct is one proximate cause of the plaintiff's injury, the fact that the gun was introduced into an environment where it was unsuitable for safe use is an equally important proximate cause. The injured bystander may thus recover from the gun dealer under strict products liability. This result accords with the expanded protection given to bystanders in Arizona, permitting recovery for injury caused by the user's intentional misuse of the product.⁹⁸

irrelevant to the question of liability by bystanders." *Id.* See also RESTATEMENT (SECOND) OF TORTS § 402A comment n (1977).

91. See *supra* note 72 and accompanying text.

92. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1977).

93. 128 Ariz. 565, 627 P.2d 716 (Ct. App. 1981).

94. *Id.* at 567, 627 P.2d at 718. Moorer was employed at Hamilton Test Systems Emissions Control Center, which conducted vehicle emissions testing for the State of Arizona. During a routine test, in which the car's rear wheels were placed on a rolling drum and spun, Moorer's arm was caught, dragged under the car's rear wheel, and crushed between the tire and the rolling drum. The only way to extract Moorer's arm was to reverse the process and crush the arm again between the car's tire and the rolling drum. Moorer sued Clayton Mfg. Corp. alleging that the company was strictly liable for its failure to have a safety guard and device on the machine for extracting his arm. *Id.*

95. 128 Ariz. at 568, 627 P.2d at 719.

96. *Id.* at 569, 627 P.2d at 720.

97. *Id.*

98. See *supra* notes 39-42 and accompanying text. This result is similar to that reached under RESTATEMENT (SECOND) OF TORTS § 390 (1977), which provides:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Comment b to this section holds that liability exists "even though the chattel is in perfect condition"

The major distinction between liability under § 390 and § 402A is that the former is based on negligence while the latter is based on strict liability. Section 390 focuses on the supplier's conduct in light of the injuries that can reasonably be expected to result from the product's use. If the injury

Dealer's Negligence: No Bar To Strict Liability

A third criticism of holding gun dealers strictly liable for sales to incompetent purchasers is that it awards the plaintiff damages for the defendant's *conduct*, which violates the principle that strict products liability is concerned solely with the product's condition.⁹⁹ This criticism argues that applying strict liability to gun sales blurs the distinction between negligence and strict products liability and, therefore, that the standard of care issues raised by a dealer's nondiscriminatory distribution of his product should be viewed as raising a negligence claim, rather than a strict liability claim.¹⁰⁰

The criticism misconstrues the distinction between negligence liability, which is premised on the defendant's conduct, and strict liability which is premised on a harmful defect created by the defendant's conduct. All product defects can in some way be attributed to negligence or oversight somewhere in the manufacturing or distribution chain.¹⁰¹ A defect that arises from an inadequate warning is the clearest example of a negligently created defect.¹⁰² The defect arises directly from the defendant's conduct in failing to warn the user of the potential danger.¹⁰³ Significantly, courts realize that the determination of whether a defect exists for a failure to warn is based on negligence principles.¹⁰⁴

The role of negligent conduct in strict products liability law is illustrated by judicial reliance upon negligence principles in strict liability

is within the supplier's reasonable expectation, the supplier is liable. This is a negligence claim. *See supra* notes 8-9 and accompanying text. In contrast, the standard for imposing strict liability upon sellers for gun sales to incompetents is the consumer's expectation, rather than the supplier's. The focus shifts from what the supplier or seller can reasonably expect to what the consumer reasonably expects. If risk of injury exceeds consumer expectation, the product is defective and the seller is potentially strictly liable. It is this shift in focus that causes the same elements of liability to be considered under both sections 390 and 402A.

In *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (Ct. App. 1977), the court used § 390 to impose strict liability upon one who sold a slingshot to a 12-year-old. The 12-year-old subsequently blinded another child with the slingshot. The court noted that "a manufacturer, wholesaler and retailer of a manufactured product owe a legal obligation of due care to a bystander affected by use of the product . . ." *Id.* at 428, 254 N.W.2d at 762. The court held that liability was proper because the defendant "created an unreasonable risk to others by placing the chattel in the hands of a person whose use thereof is likely to create a recognizable risk to a third person." *Id.* This same result is presumably possible under § 402A in regard to selling guns to incompetent purchasers so long as the focus remains on the unreasonably dangerous condition of the product and not on the defendant's conduct. *See infra* notes 99-113 and accompanying text.

99. *See supra* notes 8-10 and accompanying text.

100. Podgers, *supra* note 11, at 1444; Note, *supra* note 11, at 478.

101. Some scholars believe that evidence proving a design defect is sufficient to prove negligence on the part of the manufacturer. The same holds true for defects arising from a failure to warn. *See generally* J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) reprinted in J. BEASELY, *supra* note 6, at 725-46.

102. Arizona has adopted the view that, under § 402A, a failure to warn may make a product "defective." *See, e.g., Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, 563, 667 P.2d 750, 757 (Ct. App. 1983); *Kavanaugh v. Kavanaugh*, 131 Ariz. 344, 348, 641 P.2d 258, 262 (Ct. App. 1982); *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 434, 581 P.2d 271, 279 (Ct. App. 1978); *Embry v. General Motors Corp.*, 115 Ariz. 433, 436, 565 P.2d 1294, 1297 (Ct. App. 1977).

103. *See Tucson Industries, Inc. v. Schwartz*, 108 Ariz. 464, 468, 501 P.2d 936, 940 (1972).

104. It is important to note that whether a product is defective or unreasonably dangerous due to a failure to warn depends on the same elements inherent in a negligence claim: foreseeability, seriousness of the danger, and cost of prevention. *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 434, 581 P.2d 271, 279 (Ct. App. 1978).

cases.¹⁰⁵ It is the existence of culpability that distinguishes strict liability from absolute liability.¹⁰⁶ Manufacturers and sellers are never absolutely liable for injuries resulting from their product's use.¹⁰⁷ It is therefore implicit in strict products liability cases that there be fault on the defendant's part for the plaintiff to recover: for if "defect" is defined without reference to a "correctable wrong" on the defendant's part, then the law has moved from strict liability in tort into a "compensatory system based on injury."¹⁰⁸

Because elements of negligence law are so influential in strict products liability cases, commentators claim that it is impossible to consider defects arising from a failure to warn in other than negligence terms.¹⁰⁹ Because the test for defectiveness depends on a reasonableness standard created by consumer expectation, it has been equated with a negligence standard.¹¹⁰ One commentator concludes that while strict tort liability principles suitably define a defendant's liability in the manufacturing stages, these principles might not suitably define liability in the design and marketing stages.¹¹¹

The imposition of strict liability is not barred merely because the defendant's conduct is necessary to create a harmful defect. Rather, it is whether attention is focused upon the defendant's conduct or on the product's condition that determines the proper theory of liability. If attention is focused solely upon the product's dangerous condition, without regard to the conduct that brought it about, strict liability is the proper theory. If attention is focused upon the defendant's conduct, negligence is the proper theory.

This distinction is crucial to imposing strict liability on gun dealers for sales to incompetent purchasers. The gun dealer's liability is based on the fact that a handgun in an incompetent's hands is in a condition below the public's expectation of safety and is therefore defective.¹¹² The claim against the gun dealer focuses on this defective condition without regard to the conduct that brought it about. This reasoning does no harm to the distinction between the negligence and strict products liability theories, and the injured bystander may assert his claim in strict products liability based on the argument that the gun was in a defective condition.¹¹³

POLICY CONSIDERATIONS SUPPORT IMPOSING STRICT PRODUCTS LIABILITY

Strict products liability offers an important alternative to other forms of recovery against gun dealers for injuries caused by incompetents who obtain handguns from established dealers. While negligence and negligence per se are applicable in such cases, they suffer serious shortcomings. An injured

105. *Brady*, 121 Ariz. at 258-59, 589 P.2d at 901-02.

106. *Id.*

107. *Maas*, 10 Ariz. App. at 521, 460 P.2d at 192.

108. *Brady*, 121 Ariz. at 258-59, 589 P.2d at 901-02.

109. *W. KIMBLE & R. LESHER*, *supra* note 2, § 54(e) at 76.

110. *Id.* See also *J. BEASELY*, *supra* note 6, at 61.

111. *W. KIMBLE & R. LESHER*, *supra* note 2, § 55 at 83.

112. See *supra* notes 47-61 and accompanying text.

113. *Id.*

bystander is disadvantaged in proving pure negligence because of the lack of first-hand knowledge of circumstances surrounding the sale. Further, the bystander faces the burden of showing two instances of negligent conduct to recover.¹¹⁴ First, one must show that the incompetent purchaser negligently caused the injury. If the bystander is not injured through some form of misconduct, there is no remedy.¹¹⁵ Additionally, one must show that the seller negligently sold the gun to the purchaser. Strict products liability eliminates this burden, allowing a direct attack on the seller based solely on the fact of sale to the incompetent. Fault is not an issue.

Negligence per se is also an inadequate basis for a bystander's recovery. Courts are reluctant to apply negligence per se to gun dealers who allegedly violate state and federal law: courts and commentators have stated that compliance with statutes defining a seller's minimum duty to investigate the purchaser relieves the seller of liability.¹¹⁶ Thus, if the seller does not know or does not have reasonable cause to believe that the purchaser is incompetent, no statute is violated and the seller is not liable.¹¹⁷ Injured bystanders are generally unable to prove that the seller actually or constructively knew that the purchaser was incompetent and that the seller knowingly violated the law.¹¹⁸

Since negligence per se focuses on the reasonableness of the seller's conduct, the seller can escape liability by justifying any legal violation. Innocent ignorance that the particular sale is governed by the law is one justification.¹¹⁹ Thus, proof of negligence per se is difficult where the purchaser's incompetence is not readily apparent.¹²⁰ In these cases, the seller is not held

114. There is some question as to whether an additional showing of negligence on the incompetent's part is required (i.e., a showing that the incompetent breached a duty owed to the plaintiff), or whether it is only necessary to show that the anticipated misconduct by the incompetent caused the injury. The latter is the case in states adopting the common law negligent entrustment theory. Under this theory, the seller is liable for knowingly entrusting a dangerous article to an incompetent user if the user's incompetence proximately caused the plaintiff's injury. *See, e.g., Syah v. Johnson*, 55 Cal. Rptr. 741, 745, 247 Cal. App.2d 534, 538 (Ct. App. 1966); *Rosenburg v. Packerland Packing Co., Inc.*, 13 Ill. Dec. 208, 212, 55 Ill. App. 3d 959, 963, 370 N.E.2d 402, 406 (Ct. App. 1980). Where the negligent entrustment theory is applied, the presence or absence of negligence on the incompetent user's part is irrelevant; liability rests solely upon the seller's "own independent negligence" in entrusting the article to someone known by the seller to be incompetent. *Syah*, 55 Cal. Rptr. at 745, 247 Cal.App.2d at 538. This requires a thinly veiled showing of negligence. Though the plaintiff need not show that the incompetent user owed and breached a duty to the plaintiff, it must be shown that the misconduct engendered by the user's incompetence proximately caused the injury. Thus, though no actual negligence on the part of the incompetent is required, the plaintiff is still left with showing two specific acts of misconduct and their causal relation to the injuries. Arizona is silent on whether it follows the negligent entrustment theory.

115. *See supra* note 114.

116. *Note, supra* note 11, at 477.

117. *Id.* *See also* Federal Gun Control Act of 1968, 18 U.S.C. §§ 922(b)(1), 922(d).

118. *Note, supra* note 11, at 473.

119. *Brannigan v. Raybuck*, 136 Ariz. 513, 517, 667 P.2d 213, 217 (1983); RESTATEMENT (SECOND) OF TORTS § 288 (1977).

120. *See Note, supra* note 11, at 477-78. It is questionable whether dealers should be liable if they are unaware that they are selling to an incompetent. However, this view ignores the "special duty" that the sellers undertake to the public in selling the product and places the entire burden of loss on the injured bystander. The policy goals that underlie strict products liability are inconsistent with such a result. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment c (1977). In view of the policies set out by the RESTATEMENT supporting strict products liability, the gun dealer should assume liability for sales to incompetents because: 1) the seller has undertaken a special duty to the public by selling an inherently dangerous product on the market; 2) the seller has the wherewithal to

accountable for the resulting injuries and the injured bystander has no viable remedy. Since incompetents, such as minors, generally lack sufficient financial resources to compensate the plaintiff, the bystander may be entirely without remedy.

Strict products liability bypasses the problems associated with pure negligence and negligence per se by focusing on the product's defective condition rather than the seller's conduct. The reasonableness of this condition's danger determines liability.

Moreover, in addition to the legal considerations, there are strong public policy considerations that favor imposing strict products liability on handgun dealers who sell to incompetent purchasers. The purpose behind this doctrine is to shift the risk of loss from innocent individuals to those who are responsible for placing the product on the market and who are in a position to reduce the risk and bear the loss.¹²¹ The justifications for this shift in risk are: 1) the seller undertakes a special responsibility toward all members of the consuming public who may be injured by the product; 2) the public rightfully expects the seller to stand behind the product once it causes injury; 3) public policy demands that the seller bear the burden of accidental injuries and that the seller treat such a burden as a cost of doing business; and 4) the consumer is entitled to "maximum protection" from those who market products.¹²² These justifications are particularly applicable to injured bystanders, who have little protection against defective products.¹²³ Bystanders are the most innocent plaintiffs; often, their only contact with the product is at the time of injury. The special responsibility of a dealer who sells products that may endanger the public extends to bystanders.¹²⁴

Handguns are inherently dangerous products, and dealers therefore have the special duty to consider the public's safety when selling them.¹²⁵ Moreover, the public has a right to expect a handgun dealer to stand behind the product's safety and to obey the law. By selling handguns to incompetents in violation of the law, the dealer flouts the public's expectation of at least a minimal respect for safety. Refraining from selling to incompetent purchasers, as legally required, is a necessary cost of doing business. This cost is small when compared to the personal and public damage caused by

remove the danger and the financial resources to make the plaintiff whole; and 3) the injured bystander, for all practical purposes, has no other source for recovery (an incompetent wrongdoer may not have the resources to compensate the plaintiff for injuries).

121. *Tucson Industries, Inc.*, 108 Ariz. at 457-68, 501 P.2d at 939-40.

122. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1977).

123. See *supra* notes 40-42 and accompanying text.

124. RESTATEMENT (SECOND) OF TORTS § 402A comment f (1977).

125. In this instance, the duty to consider public safety owed by the gun dealer is strikingly similar to that established for tavern owners in *Brannigan v. Raybuck*, 136 Ariz. 513, 667 P.2d 213 (1983). In *Brannigan*, the defendant tavern argued against its liability for selling liquor to a minor who subsequently was injured, by claiming that imposing liability in this situation would put a higher duty of care on the tavern than that owed by other merchants. The court agreed with this assertion, but held that the higher duty of care was justified because "alcohol is more dangerous than most other products. We do no more than place upon those who furnish alcohol the burden of responding in damages for failure to use due care in furnishing such a product." *Id.* at 519, 667 P.2d at 219. A handgun is at least as dangerous a product as alcohol. Thus, placing a similar duty on gun dealers is not unreasonable.

the indiscriminate distribution of handguns to unsuitable persons.¹²⁶ More importantly, the handgun dealer is the only person who can provide "maximum protection" to the public; only the dealer is in a position to eliminate the danger. The public, therefore, must rely on the gun dealer to further public safety. Warnings to consumers are inadequate protection because the incompetent purchaser is likely to disregard them and the bystander will generally never receive such warnings. "Maximum protection" therefore mandates that handgun sales to incompetents never occur, and, that once a bystander is injured by such a sale, the dealer be a viable source for recovery.

Imposing strict products liability on handgun dealers might place a greater burden on them than other merchants are forced to bear. The consumer-protection policies underlying this doctrine justify this burden. The gun dealer profits from selling an unusually dangerous article on the open market and is thus responsible to the public for that product's safety.¹²⁷

CONCLUSION

Handgun dealers in Arizona should be held strictly liable for failing to exercise proper care to prevent distribution of handguns to incompetent purchasers. Such a result accords with Arizona's strict products liability doctrine, which holds a product defective and unreasonably dangerous if the danger presented by the product exceeds consumer expectation, thus subjecting a seller to liability. Sellers who place a handgun in the hands of an incompetent purchaser render it dangerous to an extent beyond that contemplated by consumers. The gun is therefore defective and unreasonably dangerous, subjecting the handgun dealer to strict liability for any resulting injury.

126. It is estimated that 10,000 people were killed by handguns in 1979. *See supra* note 11.

127. *See supra* note 125.

