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ADDITIONAL COUNSEL AND PARTIES JOINING IN THIS PLEADING ARE LISTED IN EXHIBIT 1 TO THE REPLY BRIEF

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550 (b))	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4095
FIREARMS CASE Including actions: People, et. al. v. Arcadia Machine & Tool, Inc., et. al. People, et. al. v. Arcadia Machine & Tool, Inc., et. al. People, et. al. v. Arcadia Machine & Tool, Inc., et. al.	San Francisco Superior Court No. 303753 Los Angeles Superior Court No. BC210894 Los Angeles Superior Court No. BC214794 **SUPPLEMENTAL NOTICE OF LODGMENT IN SUPPORT OF DEFENDANTS' REPLY BRIEF RE DEMURRERS AND MOTION TO STRIKE PLAINTIFFS' COMPLAINTS** Hon. Vincent P. DiFiglia Date: September 15, 2000 Time: 1:30 p.m. Dept.: 65 Trial Date: None Set

Pursuant to California Rule of Court 319 and Local Rule of Court 6.15, the moving defendants hereby lodge the following foreign authorities and other documents in support of Defendants' Reply Brief re Demurrers and Motion to Strike Plaintiffs' Complaints:

Exhibit 1 City of Cincinnati v. Beretta U.S.A. Corp. (Aug. 11, 2000) 2000 WL 1133078

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Exhibit 2 Glittenburg v. Doughboy Recreational Industries, 491 N.W.2d 208 (Mich. 1992)

Exhibit 3 Moning v. Alfono, 254 N.W.2d 759 (Mich. 1977)

Exhibit 4 Department of Treasury/BATF, Commerce in Firearms in the United States pp. 22-23 (February 2000)

Exhibit 5 Proposed San Francisco City Ordinance (Section 2, Article 35 of the San Francisco Police Code) proposed August 21, 2000

DATED: September 8, 2000

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: Lawrence J. Kouns

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Sturm, Ruger & Company, Inc.

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Only the Westlaw citation is currently available.

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Court of Appeals of Ohio, First District, Hamilton County.

CITY OF CINCINNATI, Plaintiff-Appellant,
v.
BERETTA U.S.A. CORP., Bryco Arms, Inc., Colt's Manufacturing Co., Inc., Fabrica D'Armi Pietro Beretta, S.P.A., H & R 1871, Inc., Hi-Point Firearms, B.L. Jennings, Inc., Lorcin Engineering Co., Inc., North American Arms, Inc., Phoenix Arms, Smith & Wesson Corp., Sturm & Ruger Co., Inc., Taurus International Manufacturing, Inc., American Shooting Sports Coalition, Inc., National Shooting Sports Foundation, Inc., And Sporting Arms And Ammunition Manufacturers' Institute, Inc., Defendants-Appellees.

Nos. C-990729, C-990814, C-990815.

Aug. 11, 2000.

Civil Appeal From Hamilton County Court of Common Pleas.

Waite, Schneider, Bayless & Chesley, Co., LPA, Stanley M. Chesley, Paul M. DeMarco, and Jean M. Geoppinger; Fay D. Dupuis, City Solicitor, W. Peter Heile, Donald B. Lewis, and John J. Williams; Legal Action to Project Center to Prevent Handgun Violence, Dennis A. Henigan, Jonathan E. Lowy, Brian J. Siebel, and Rachana Bhowmik; and Barrett & Weber and Michael R. Barrett, for Plaintiff-Appellant,

Calfee, Halter & Griswold, LLP, Thomas I. Michals, and Mark L. Belleville, and Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, Lawrence S. Greenwald, and Robert C. Gebhardt, for Defendants-Appellees Beretta U.S.A. Corp. and Fabrica D'Armi Pietro Beretta, S.p.A.,

Brown, Cummins & Brown, Co., LPA, and James R. Cummins, and Jones, Day, Reavis & Pogue and Thomas E. Fennell, for Defendant-Appellee Colt's Manufacturing Co., Inc.,

Rendigs, Fry, Kiely & Dennis, LLP, and W. Roger Fry, and Renzulli & Rutherford, LLP, and John Renzulli, for Defendants-Appellees H & R 1871, Inc., and Hi-Point Firearms,

Buckley, King & Bluso and Raymond J. Pelstring, and Beckman & Associates and Bradley T. Beckman, for Defendant-Appellee North American Arms, Inc.,

Taft, Stettinius & Hollister, Thomas R. Schuck, and Ross A. Wright, for Defendant-Appellee Smith & Wesson Corp.,

Thompson, Hine & Flory, Bruce M. Allman, and Robert A. McMahon, and Wildman, Harrold, Allen & Dixon, James P. Dorr, and Sarah L. Olson, for Defendant-Appellee Sturm & Ruger Co., Inc.,

Porter, Wright, Morris & Arthur, LLP, Mark E. Elsener, and Michael E. McCarty, for Defendants-Appellees Bryco Arms, Inc., B.L. Jennings, Inc., and Taurus International Manufacturing, Inc.,

James C. Sabalos, for Defendants-Appellees Bryco Arms, Inc., and B.L. Jennings, Inc.,

Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Timothy A. Bumann, and Dana S. Mancuso, for Defendant-Appellee Taurus International Manufacturing, Inc.

Harold Mayberry, Jr., for Defendant-Appellee American Shooting Sports Council, Inc.,

Douglas E. Kliever, for Defendants-Appellees National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

OPINION

WINKLER.

***1** The city of Cincinnati appeals from the trial court's dismissal of its complaint against fifteen

firearms manufacturers, a firearms distributor, and three firearms trade associations. For the reasons that follow, we affirm the court's judgment that the complaint failed to state a claim upon which relief could be granted.

Procedural History

The city's broad-ranging assertions included the following claims: (1) strict product liability for the defective condition of firearms; (2) strict product liability for failure to warn of the risks of firearms; (3) negligence; (4) negligent failure to warn; (5) unfair and deceptive advertising practices; (6) public nuisance; (7) fraud; (8) negligent misrepresentation; and (9) unjust enrichment. The city alleged that, as a result of the defendants' conduct in manufacturing or distributing handguns, the city had suffered a host of problems, ranging from the costs of responding to shootings to decreased property values and tax revenues, and to Cincinnatians' general fears resulting from criminal activity and injuries caused by firearms. The city sought injunctive relief, compensatory and punitive damages, restitution, and disgorgement of profits.

In its single assignment of error, the city claims that the trial court erred in granting the defendants' motions to dismiss. But the city contests only the dismissal of its claims for product liability, negligence, public nuisance, and unjust enrichment. The city has abandoned its claims for unfair and deceptive advertising practices, fraud, and negligent misrepresentation.

Civ.R. 12(B)(6)

***2** To determine whether a complaint states a claim upon which relief may be granted, all factual allegations of the complaint must be presumed true. [FN1] A trial court may dismiss a complaint under Civ.R. 12(B)(6) only where it appears beyond doubt that the plaintiff can prove no set of facts warranting recovery. [FN2] Under the rules of notice pleading, the plaintiff must provide a short and plain statement of its claims and the grounds upon which they are based, so that the defendant has fair notice of what is at issue. [FN3]

FN1. See Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756.

FN2. See Taylor v. London (2000), 88 Ohio St.3d 137, 139, 723 N.E.2d 1089, 1091, citing O'Brien v. University Community Tenants Union (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

FN3. Civ.R. 8(A)(1); see Chatfield and Woods Sack Co., Inc. v. Nusekabel (Oct. 22, 1999), Hamilton App. No. C-980315, unreported, citing Fancher v. Fancher (1982), 8 Ohio App.3d 79, 83, 455 N.E.2d 1344, 1348.

Nowhere in its forty-three-page complaint does the city set forth facts that, if proved, would provide a basis for recovery. [FN4] The city claims that it has sustained significant expenses for medical, police, court, corrections, and emergency services as a result of shootings and the unauthorized possession of firearms. The city also claims that the manufacture and distribution of firearms has caused its citizens to be injured and fearful, and that it has suffered from decreased property values and tax revenues.

FN4. See Illinois Controls, Inc. v. Langham (1994), 70 Ohio St.3d 512, 526, 639 N.E.2d 771, 782.

Using a shotgun approach in its complaint, the city has made its broad assertions without alleging a direct injury caused by a particular firearm model or its manufacturer. We hold that the city's attempts to stand in the shoes of its citizens and to recover its municipal costs must fail.

Strict Product Liability

All common-law claims for product liability survive the 1988 enactment of the Ohio Products Liability Act, R.C. 2307.71 et seq., unless they are specifically covered by the act. [FN5] The act "collects all product liability claims into a standard set of theories of recovery * * *." [FN6] In this case, the city's product-liability claims against the manufacturers include allegations of (1) defective condition and (2) failure to warn. Both of these claims are specifically covered by the act, so we look to the act to determine whether the city has stated claims upon which relief may be granted. [FN7]

FN5. See Carrel v. Allied Products Corp. (1997), 78 Ohio St.3d 284, 289, 677 N.E.2d 795, 800.

FN6. Perkins v. Wilkinson Sword, Inc. (1998), 83 Ohio St.3d 507, 509, 700 N.E.2d 1247, 1249.

FN7. See R.C. 2307.75 (defective design) and R.C. 2307.76 (failure to warn); see, also, Carrel, supra.

1. The City is Not a Proper Plaintiff

Under R.C. 2307.71(M), the definition of a "product liability claim" includes one that seeks to recover compensatory damages arising from the following:

(1) the design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of a product; [or]

(2) any warning or instruction, or lack of warning or instruction associated with a product[.] * * *

One essential element of such a claim is the occurrence of "harm," which means "death, physical injury to person, serious emotional distress, or physical damage to property * * *." Economic loss is not itself compensable unless the injured party has also suffered one of the statutory forms of harm. In this case, it is clear from the complaint that the city, as a corporate entity, can prove no harm to itself in the form of death, physical injury, or emotional distress. Moreover, there is no allegation of any physical damage to the city's property. Under these circumstances, its product-liability claims under the act fail as a matter of law.

2. The City Cannot Recover for Economic Loss Alone

***3** In each of its product-liability claims, the city has alleged merely that it has suffered "actual injury and damages including, but not limited to, significant expenses for police, emergency, health, corrections, prosecution and other services." These municipal costs are unrecoverable in this case because they are no more than economic loss, which is defined as "direct, incidental, or consequential pecuniary loss * * *." Economic loss is not "harm" under the act and is not compensable where, as here, the injured party has not separately suffered from death, physical injury to person, serious emotional distress, or physical damage to property. [FN8]

FN8. See R.C. 2307.71(B) and (G); R.C. 2307.79; see, also, LaPuma v. Collinwood Concrete (1996), 75 Ohio St.3d 64, 661 N.E.2d 714, syllabus.

3. The City Has Failed to Identify a Particular Product, Defect, or Defendant

In order to state a product-liability claim for defective design, the plaintiff must allege (1) a defect in the product manufactured and sold by the defendant; (2) that the defect existed at the time the product left the manufacturer's hands; and (3) that the defect was the direct and proximate cause of the plaintiff's injuries or loss. [FN9] As long as there is a set of facts, consistent with the plaintiff's complaint, that would allow the plaintiff to recover, a trial court should not grant a motion to dismiss a claim predicated upon these elements. [FN10]

FN9. See State Auto Mut. Ins. Co. v. Chrysler Corp. (1973), 36 Ohio St.2d 151, 304 N.E.2d 891, syllabus; Lonzrick v. Republic Steel Corp. (1966), 6 Ohio St.2d 227, 218 N.E.2d 185; Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 364 N.E.2d 267; Friedman v. General Motors Corp. (1975), 43 Ohio St.2d 209, 331 N.E.2d 702; Bowling v. Heil Co. (1987), 31 Ohio St.3d 277, 286, 511 N.E.2d 373, 380.

FN10. See York v. Ohio State Highway Patrol (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063, 1065.

Nowhere in its forty-three-page complaint does the city identify a single defective condition in a particular model of gun at the time it left its particular manufacturer. In fact, out of the complaint's 162 counts, the city's sole assertion naming a single manufacturer and its gun does not even implicate any of the defendants, because the harm was caused by the intentional act of a criminal, not by the manufacturer:

In February, 1998, Cincinnati Police Officer Kathleen Conway was ambushed and shot four times in her lower abdomen and thigh with a Smith & Wesson .357 magnum.

Allowing the city to proceed on these indistinct allegations would fly in the face of fairness and the purposes of notice pleading. The complaint must contain some notice to show the defendant that the plaintiff is entitled to relief. [FN11] This concept of notice pleading, embodied in Civ.R. 8(A), serves "to simplify pleadings to a 'short and plain statement of the claim' and to simplify statements of the relief demanded * * * to the end that the adverse

party will receive fair notice of the claim and an opportunity to prepare his response thereto." [FN12] The city has not even alleged that the shootings for which it seeks recovery were committed with a firearm lacking the design features that the city believes should be implemented. Without identifying a particular manufacturer, a particular gun, or a particular defective condition that caused direct injury, the city's product-liability claims must fail.

FN11. See Civ.R. 8(A).

FN12. See Chatfield, supra.

Rather than targeting a specific manufacturer, product, and defect, the city makes generic claims against all the manufacturers in an effort to gloss over the fatal omissions in its complaint. The city cannot pursue a market-share theory of liability, under which there is no requirement to identify a particular tortfeasor, because this theory has not survived the enactment of the Ohio Products Liability Act. [FN13] Nor may the city proceed on a theory of alternative liability, because not all of the possible tortfeasors are named in its complaint. The city itself admits that it has relied on instances where no gun was recovered and no manufacturer can be identified. Not only does the city ignore the fact that it has not named all gun manufacturers, but it has also overlooked the other obvious "possible tortfeasors," the shooters themselves. [FN14]

FN13. Sutowski v. Eli Lilly & Co. (1998), 82 Ohio St.3d 347, 355, 696 N.E.2d 187, 193, reconsideration denied (1998), 83 Ohio St.3d 1419, 698 N.E.2d 1008.

FN14. See Minnich v. Ashland Oil Co. (1984), 15 Ohio St.3d 396, 473 N.E.2d 1199; Goldman v. Johns-Manville Sales Corp. (1987), 33 Ohio St.3d 40, 45-46, 514 N.E.2d 691, 696-697.

4. The City Has Failed to State a Failure-to-Warn Claim

***4** The city's failure-to-warn claims under the act miss the mark, too, not only due to the city's failure to identify injuries caused by specific manufacturers or products, but also because the manufacturers have no duty to give warnings about the obvious dangers of handguns. In this respect, R.C. 2307.76(B) provides the following:

A product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.

The city has alleged that the manufacturers have failed to adequately warn gun owners about (1) the risks that minors and other unauthorized users may gain access to handguns; (2) the proper storage of handguns; (3) the possibility that a round may remain in a gun's firing chamber; and (4) the potential for guns to fire with the ammunition magazine removed.

The trial court stated, "The [c]ourt finds as a matter of law that the risks associated with the use of a firearm are open and obvious and matters of common knowledge." We agree.

A manufacturer has no duty to warn of an obvious danger. Knives are sharp, bowling balls are heavy, bullets cause puncture wounds in flesh. The law has long recognized that obvious dangers are an excluded class. [Footnote deleted.] As the colorful Seventh Circuit Judge Richard Posner once wrote in an Indiana federal case, if you "go to the zoo and put your hand through the lion's cage, and the lion bites your hand off, * * * you do not have an action against the zoo." [FN15]

FN15. O'Reilly and Cody, Ohio Products Liability Manual (1992), Section 10.13, 147.

The dangers of a gun are obvious and a matter of common knowledge, so no warning is required. [FN16] The city's failure-to-warn claims accordingly fail as a matter of law.

FN16. See, also, Nadel v. Burger King Corp. (1997), 119 Ohio App.3d 578, 695 N.E.2d 1185 (Hildebrandt, J., dissenting), appeal not allowed (1997), 80 Ohio St.3d 1415, 684 N.E.2d 706, citing Gawloski v. Miller Brewing Co. (1994), 96 Ohio App.3d 160, 644 N.E.2d 731; Hanlon v. Lane (1994), 98 Ohio App.3d 148, 648 N.E.2d 26, appeal not allowed (1995), 71 Ohio St.3d 1491, 646 N.E.2d 467 (no warning required for the danger of carbon monoxide where its lethality is a matter of common knowledge).

Negligence Claims

In order to establish actionable negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. Typically, a duty may be established by common law, by legislative enactment, or by the particular facts and circumstances of the case. [FN17] The existence of a duty is a question of law for the court. [FN18] There is no set formula for determining whether a duty exists. [FN19]

FN17. Chambers v. St. Mary's School (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198, 200, reconsideration denied (1998), 83 Ohio St.3d 1453, 700 N.E.2d 334.

FN18. Mussivand v. David (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 270.

FN19. Id.

Whether a duty exists depends largely on the foreseeability of the injury to a person in the plaintiff's position. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. [FN20]

FN20. Menifee v. Ohio Welding Products (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707, 710.

The city claims that the gun manufacturers and trade associations may be held liable for foreseeable injury inflicted as a result of the criminal or careless acts of third persons. However, foreseeability alone is not enough to create liability. [FN21] Generally, under Ohio law, there is no duty to prevent a third person from causing harm to another in the absence of a special relationship between the parties. [FN22]

FN21. Simpson v. Big Bear Stores Co. (1995), 73 Ohio St.3d 130, 134, 652 N.E.2d 702, 705.

FN22. Id.

In Gelbman v. Second Natl. Bank of Warren, [FN23] the Ohio Supreme Court cited with approval Section 315 of the Restatement of the Law 2d, Torts (1965), which provides:

FN23. (1984), 9 Ohio St.3d 77, 78, 458 N.E.2d 1262, 1263.

*5 There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless
(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Relationships that give rise to a duty to control a third person's conduct include the following: (1) parent and child; (2) master and servant; and (3) custodian and person with dangerous propensities. [FN24] Relationships that result in a duty to protect others include the following: (1) common carrier and passengers; (2) innkeeper and guests; (3) possessor of land and invitee; (4) custodian and person taken into custody; and (5) employer and employee. [FN25] These relationships reflect some type of control over the third person or the premises involved.

FN24. See Restatement of the Law 2d, Torts, Sections 316 through 319.

FN25. See Restatement of the Law 2d, Torts, Sections 314(A), 314(B) and 320.

The alleged harm in this case resulted from intentional and unintentional shootings, and the illegal possession of firearms. In each situation, a third party, either a shooter or a possessor, was involved. We hold that, because no special relationship existed, the manufacturers and trade associations had no duty to the city to prevent third persons from causing harm, whether that harm resulted from a shooting or simply from unauthorized possession.

The cases relied on by the city do not persuade us otherwise. In Taylor v. Webster, [FN26] the Ohio Supreme Court concluded that the defendant's duty arose pursuant to statute. In that case, the defendant owned an air gun and permitted its use by her ten-year-old son. One of the son's playmates took the gun and fired it at another playmate, injuring his eye. The Ohio Supreme Court held that, since R.C. 2903.06 [FN27] imposed upon the defendant a specific duty for the protection of others, her failure to observe that duty constituted negligence per se.

There is no similar statutory provision that would give rise to a duty in this case.

FN26. (1967), 12 Ohio St.2d 53, 231 N.E.2d 870.

FN27. R.C. 2903.06 provides, "No person shall sell, barter, furnish, or give to a minor under the age of seventeen years, an air gun * * *, or, being the owner or having charge or control thereof, knowingly permit it to be used by a minor under such age. * * * "

Nor are we persuaded by the reasoning of Pavlides v. Niles Gun Show, Inc. [FN28] In that case, juveniles stole some handguns from a gun show and then stole a car. One of the juveniles then shot the plaintiffs, who were trying to stop the juveniles. Although the trial court granted summary judgment in favor of the gun-show promoter on the basis that there was no duty owed to the plaintiffs, the Fifth Appellate District reversed. The appellate court held that reasonable minds could conclude that it was foreseeable to the gun-show promoter that a child might steal a firearm from the show and then use it criminally.

FN28. (1994), 93 Ohio App.3d 46, 637 N.E.2d 404.

First, we point out that Pavlides involved a gun-show promoter. The case did not involve the manufacturer of the gun used to injure the victims or any type of trade association. A manufacturer or trade association is even further removed from the victims, as far as any potential foreseeability is concerned. Also, the Ohio Supreme Court made clear in Simpson v. Big Bear Stores Co., [FN29] decided after Pavlides, that foreseeability alone is not enough to establish a duty.

FN29. Supra, at fn. 21.

In Simpson, the plaintiff was injured during a robbery that occurred on property adjacent to the defendant grocery store. The court held that, absent a special relationship, the store had no duty to prevent the third person from harming the plaintiff. As the dissent in a later appeal in Pavlides pointed out, Simpson requires that a special relationship exist between the plaintiff and the defendant before a duty will be recognized in cases where the plaintiff is injured by a third person:

***6** It is clear that no special relationship existed between the plaintiff and the defendant [gun-show promoter] in this case. Therefore, to find some duty on the part of defendant is to extend the concept of imposing financial liability for the criminal conduct of a third person to new heights. [FN30]

FN30. Pavlides v. Niles Gun Show, Inc. (1996), 112 Ohio App.3d 609, 620, 679 N.E.2d 728, 735 (Reece, J., concurring in part and dissenting in part), appeal not allowed (1996), 77 Ohio St.3d 1473, 673 N.E.2d 138.

In this case, even if we assume that the acts of third persons are in some way foreseeable to the manufacturers and trade associations, there is still no duty imposed by law in the absence of a special relationship between the parties. Because no special relationship exists, the manufacturers and trade associations have no duty to the city to prevent a third party from causing harm. On this basis, courts have uniformly rejected attempts by plaintiffs to hold gun manufacturers and distributors liable for the criminal misuse of their products. [FN31]

FN31. See, e.g., First Commercial Trust Co. v. Colt's Mfrg. Co., Inc. (C.A.8, 1996), 77 F.3d 1081; Addison v. Cody Wayne Williams (La.Ct.App.1989), 546 So.2d 220; Knott v. Liberty Jewelry and Loan, Inc. (1988), 50 Wash.App. 267, 748 P.2d 661; Armijo v. Ex Cam, Inc. (D.N.M.1987), 656 F.Supp. 771, affirmed (1988), 843 F.2d 406; Patterson v. Rohm Gesellschaft (N.D.Texas 1985), 608 F.Supp. 1206; Linton v. Smith & Wesson (1984), 127 Ill.App.3d 676, 82 Ill.Dec. 805, 469 N.E.2d 339; King v. R G Industries, Inc. (1990), 182 Mich.App. 343, 451 N.W.2d 874; but, see, Kelly v. R G Industries, Inc. (1985), 304 Md. 124, 497 A.2d 1143.

Public Nuisance

The city claims that it has been injured by a public nuisance arising from the defendants' conduct in designing, marketing, and distributing guns in ways that unreasonably interfere with public health and safety. But there is no such claim upon which relief may be granted in this case.

1. Nuisance Law Does Not Apply to the Design of Products

The Supreme Court of Ohio has refused to extend the law of public nuisance to the design and construction of products. In Franks v. Lopez, [FN32] the court considered whether a highway sign could be considered a public nuisance because of its design flaws:

FN32. (1994), 69 Ohio St.3d 345, 632 N.E.2d 502.

Appellants * * * have asked us to expand our nuisance definition to include design and construction defects and the failure to erect signage. This we decline to do. This court has never held that defective design or construction or lack of signage constitutes a nuisance. These categories simply do not constitute a nuisance as this term has been defined by this court. [FN33]

FN33. Id. at 349, 632 N.E.2d at 506; see, also, Gray v. SK Construction Co. (June 3, 1999), Franklin App. No. 98AP-947, unreported, reversed on other grounds (1999), 87 Ohio St.3d 262, 719 N.E.2d 548.

This reasoning is consistent with that of other courts. For example, the Eighth Circuit Court of Appeals has noted the refusal of courts to extend nuisance law to product-design-and-distribution claims. [FN34] To do otherwise, the court reasoned, would make nuisance law "a monster that would devour in one gulp the entire law of tort."

FN34. See Tioga Public School Dist. v. United States Gypsum Co. (C.A.8, 1993), 984 F.2d 915, 920, citing City of Manchester v. National Gypsum Co. (D.R.I.1986), 637 F.Supp. 646, 656; Town of Hooksett Sch. Dist. v. W.R. Grace & Co. (D.N.H.1984), 617 F.Supp. 126, 133; Detroit Bd. of Educ. v. Celotex Corp. (1992), 196 Mich.App. 694, 493 N.W.2d 513.

2. The City Cannot State a Claim for Absolute Nuisance

A public nuisance may be either absolute or qualified. [FN35] The essence of an absolute nuisance is that, no matter how careful a person is, the activity is inherently injurious and cannot be conducted without causing damage. [FN36] An absolute nuisance is based upon either intentional conduct or abnormally dangerous conditions, so strict liability is imposed. [FN37] In this case, the city has alleged that the defendants intentionally and recklessly marketed, distributed, and sold guns that they knew would be possessed and used illegally.

FN35. See id.

FN36. See Metzger v. Pennsylvania, Ohio & Detroit RR Co. (1946), 146 Ohio St. 406, 66 N.E.2d 203, paragraph one of the syllabus.

FN37. See Jennings Buick, Inc. v. Cincinnati (1978), 56 Ohio St.2d 459, 466, 384 N.E.2d 303, 307.

An activity that is authorized by law cannot be a public nuisance or an absolute nuisance. [FN38] "This is especially true where a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct exist." [FN39]

FN38. See Crawford v. National Lead Co. (S.D.Ohio 1989), 784 F.Supp. 439; see, also, Allen Freight Lines, Inc. v. Consolidated Rail Corp. (1992), 64 Ohio St.3d 274, 595 N.E.2d 855; Mingo Junction v. Sheline (1935), 130 Ohio St. 34, 196 N.E. 897.

FN39. See Brown v. County Commissioners of Scioto County (1993), 87 Ohio App.3d 704, 715, 622 N.E.2d 1153, 1159.

***7** The Second Amendment to the United States Constitution and Article I, Section 4 of the Ohio Constitution guarantee the right of the people to keep and bear arms. But the regulation of gun manufacturing, distribution and sales is apparent at federal, state and local levels. All firearm manufacturers, importers, and dealers must be licensed by the federal government. [FN40] Federal law regulates the shipment of firearms to and from licensed manufacturers, licensed importers, licensed firearms dealers, and licensed collectors. [FN41] Every manufacturer and importer must legibly identify each firearm with an individual serial number, the firearm model, the caliber or gauge, the name of the manufacturer, and either the city or the state of its place of business. [FN42] These markings must not be susceptible to alteration or removal. [FN43]

FN40. See Section 178.41, Title 27, C.F.R.; Section 923, Title 18, U.S.Code.

FN41. See Section 923, Title 18, U.S.Code.

FN42. See Section 178.92, Title 27, C.F.R.

FN43. See id.

No firearm may be shipped if the importer's or manufacturer's serial number has been removed or altered. [FN44] Firearms manufacturers and importers must keep detailed records of each firearm they make or sell, including, for example, records of importation, production, shipment, receipt, sale, or other disposition, [FN45] and of the type, model, caliber or gauge, manufacturer, country of manufacturer, and serial number. [FN46]

FN44. See Section 178.34, Title 27, C.F.R.

FN45. See Section 178.121, Title 27, C.F.R.

FN46. See Sections 178.122 and 178.123, Title 27, C.F.R.

Even the city has passed municipal ordinances to control firearms distribution. The ordinances place restrictions on the transfer of firearms, [FN47] establish a waiting period for the transfer of firearms, [FN48] and ban the ownership, possession and sale of certain semi-automatic firearms. [FN49] In sum, the city has no claim for public or absolute nuisance arising from the defendants' heavily regulated distribution of firearms, because "what the law sanctions cannot be said to be a public nuisance." [FN50]

FN47. See Cincinnati Municipal Code 708-18.

FN48. See Cincinnati Municipal Code 708-33.

FN49. See Cincinnati Municipal Code 708-37.

FN50. See Mingo, supra, at 41, 196 N.E. at 900.

3. No Qualified Nuisance

In order for a duly licensed and regulated gun manufacturer or trade association to be found liable for maintaining a nuisance, negligence must be established under the theory of a qualified nuisance. A qualified nuisance consists of a lawful act that is so negligently or carelessly done that it creates an unreasonable risk of harm resulting in injury to another. [FN51] "The allegations of nuisance and negligence therefore merge, as the nuisance claims rely upon a finding of negligence." [FN52] In an action for nuisance based on negligence, there must be some duty and a breach of that duty. [FN53] As we have stated earlier, however, there is no duty as a matter of law in this case, so the city cannot maintain an action for qualified nuisance.

FN51. See Brown, supra, at 713, 622 N.E.2d at 1159.

FN52. Allen, supra, at 276, 595 N.E.2d at 856.

FN53. See Metzger, supra, at 410, 66 N.E.2d at 205.

Unjust Enrichment

The city maintains that the sale of handguns has resulted in an increase in the city's expenditures for medical care and law enforcement. But, to maintain a cause of action for unjust enrichment under Ohio law, the plaintiff must allege the following: (1) a benefit conferred by the plaintiff; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. [FN54] The city has not, and cannot, allege that its expenditures have conferred a benefit upon any of the manufacturers. The city has not, and cannot, allege that the manufacturers have been aware of any so-called benefit. The beneficiaries of the city's expenditures are its own residents, not the manufacturers. Under these circumstances, the city has no claim of unjust enrichment as a matter of law.

FN54. See Telephone Management Corp. v. The Goodyear Tire & Rubber Co. (N.D.Ohio 1998), 32 F.Supp. 960, 972, citing R.J. Wildner Constructing Co., Inc. v. Ohio Turnpike Commn. (N.D.Ohio 1996), 913 F.Supp. 1031, 1042; Hambleton v. R.G. Barry Corp. (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, 1302.

The City Cannot Pursue Remote and Derivative Claims

***8** Even if the city's complaint did not suffer from the infirmities we have already discussed, the city's claims would still be barred by the doctrine of

remoteness. The doctrine of remoteness bars recovery in tort for indirect harm suffered as a result of injuries directly sustained by another person. [FN55] As the United State Supreme Court has stated, "[A] plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." [FN56] There must be a direct relation between the alleged injury and the defendant's conduct. [FN57] So a plaintiff must allege not only that the defendant's acts have caused the plaintiff's injury, and that the injury was reasonably foreseeable, but also that the injury was direct. [FN58]

FN55. See, e.g., Cincinnati Bell Telephone Co. v. Straley (1988), 40 Ohio St.3d 372, 533 N.E.2d 764, citing Midvale Coal Co. v. Stroud (1949), 152 Ohio St. 437, 89 N.E.2d 673 (damages incidentally suffered by an employer because of a third party's act toward the employer's employee are too remote to be recovered from the third party); Tanzi v. The New York Central Rd. Co. (1951), 155 Ohio St. 149, 98 N.E.2d 39, paragraph four of syllabus; Grover v. Eli Lilly & Co. (1992), 63 Ohio St.3d 756, 762, 591 N.E.2d 696, 700.

FN56. Holmes v. Securities Investor Protection Corp. (1992), 503 U.S. 258, 268-269, 112 S.Ct. 1311, 1319, 117 L.Ed.2d 532, citing 1 J. Sutherland, Law of Damages (1882), 55-56.

FN57. Id. at 268, 112 S.Ct. at 1319; see, also, Tanzi, supra, at syllabus (no liability if cause is remote); Grover, supra (because of remoteness of time and causation, pharmaceutical company's liability for a defective drug does not extend to persons never exposed to the drug, either directly or in utero).

FN58. See Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc. (C.A.2, 1999), 191 F.3d 229, 235-236, certiorari denied (2000), — U.S. ----, 120 S.Ct. 799, 145 L.Ed.2d 673.

The Holmes court identified three policy reasons justifying the general principle that indirect injuries are too remote to support recovery. First, the more indirect an injury is, the more difficult it becomes to determine the amount of the plaintiff's damages attributable to the defendant's wrongdoing. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the wrongdoing, in order to avoid the risk of multiple recoveries. Finally, struggling with the first two policy concerns is not necessary where there are directly injured parties who can remedy the harm without these attendant problems. [FN59]

FN59. Holmes, supra, at 269-270, 112 S.Ct. at 1319; see, also, Laborers, supra, at 236-237.

The city claims that the Holmes factors weigh in favor of a conclusion that "the [c]ity should be permitted to recover costs of providing services to injured victims of [the defendants'] wrongdoing." We disagree. First, if a citizen is injured by gunfire, other independent factors obviously come into play, such as criminal conduct, drug or alcohol abuse, or other misconduct by the gun owner. These are just some of the factors that would make it very difficult to determine what portion of a given injury should be attributed to a gun manufacturer or a trade association. Second, recognizing the city's claims for recovery on the basis of injuries to its citizens would require complicated rules apportioning damages to avoid multiple recoveries by shooting victims or property owners and the city, or unfairly holding one defendant liable for another defendant's misconduct. Finally, a directly injured citizen is in a better position to sue the defendants for his or her injury.

The city claims that its expenses and lost revenues constitute direct injury in that they are not recoverable by another party. However, similar arguments made by union benefit funds against tobacco companies have been rejected by numerous courts. [FN60] In such cases, the funds had sought to recover medical payments made on behalf of their members, as well as damages for "harm to [their] infrastructure, financial stability, [and] ability to project costs." [FN61] The pivotal question was viewed to be "whether the damages a plaintiff sustains are derivative of injury to a third party." [FN62] As one court noted,

FN60. See, e.g., Laborers, supra; Texas Carpenters Health Benefit Fund v. Philip Morris, Inc. (C.A.5, 2000), 199 F.3d 788; Intl. Brotherhood of Teamsters v. Philip Morris, Inc. (C.A.7, 1999), 196 F.3d 818; Oregon Laborers-Employers Health & Welfare Trust

Fund v. Philip Morris, Inc. (C.A.9, 1999), 185 F.3d 957, certiorari denied (2000), --- U.S. ----, 120 S.Ct. 789, 145 L.Ed.2d 666; Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc. (C.A.3, 1999), 171 F.3d 912.

FN61. See Laborers, supra, at 239.

FN62. Id. at 238-239.

Ultimately, [ ] whether plaintiffs' injuries are labeled as "infrastructure harm" or "harm to financial stability," their damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products. Without injury to the individual smokers, the Funds would not have incurred any increased costs in the form of the payment of benefits, nor would they have experienced the difficulties of cost prediction and control that constituted the crux of their infrastructure harm. Being purely contingent on harm to third parties, these injuries are indirect. [FN63]

FN63. Id. at 239.

***9** In this case, the city has alleged costs that would not exist without a direct injury to a shooting victim. Therefore, the city's alleged injuries derive solely from harm to its citizens and are too remote to support a cognizable claim.

The city argues that it incurs expenses even when no other person suffers an injury. The city cites as examples (1) its costs for detection, school security, and law enforcement, incurred because juveniles have access to guns; (2) its costs for law enforcement where a shooting occurs, but no person or property is injured; and (3) its revenue losses caused by instances of illegal gun possession and criminal misuse of guns. Obviously, the Holmes justifications apply with equal force to these instances. Costs for detection and law enforcement exist not only for guns, but for all other types of weapons. Other factors, such as the conduct of the weapon owner or possessor, would immediately become involved to make it impossible to parse out the degree of harm caused by the manufacturer of the gun used. Attempting to allocate these costs to a gun manufacturer, as opposed to, for example, a knife manufacturer, would be ludicrous.

The City Cannot Recover its Municipal Costs

The city has alleged in its complaint that, as a result of the defendants' conduct, it has sustained significant financial losses for medical, police, court, corrections and emergency services. However, we agree with the trial court's conclusion that "the [c]ity may not recover for expenditures for ordinary public services which it has the duty to provide." [FN64]

FN64. See, also, Kodiak Island Borough v. Exxon Corp. (Alaska 1999), 991 P.2d 757.

"The general rule is that public expenditures made in the performance of governmental functions are not recoverable." [FN65] This rule, which is grounded in public-policy considerations, applies even if a party's negligence has created an emergency that requires the use of these services. [FN66] As Justice (then Judge) Kennedy has explained,

FN65. Koch v. Consolidated Edison Co. of New York, Inc. (1984), 62 N.Y.2d 548, 560, 479 N.Y.S.2d 163, 468 N.E.2d 1, 8, certiorari denied (1985), 469 U.S. 1210, 105 S.Ct. 1177, 84 L.Ed.2d 326 (city could not recover costs for wages, salaries, overtime, and other benefits of police, fire, sanitation and hospital personnel arising from a blackout).

FN66. Township of Cherry Hill v. Conti Construction Co. (1987), 218 N.J.Super. 348, 349, 527 A.2d 921, 922, review denied (1987), 108 N.J. 681, 532 A.2d 253.

[W]e conclude that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. See City of Bridgeton v. B.P. Oil, Inc., 146 N.J.Super. 169, 369 A.2d 49 (1976). Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement.
* * *
***10** Here governmental entities themselves currently bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates

fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns. [FN67]

FN67. City of Flagstaff v. Atchison, Topeka & Sante Fe Ry. Co. (C.A.9, 1983), 719 F.2d 322.

In a case where the District of Columbia sued Air Florida, Inc., for recovery of the costs of emergency services and cleanup after a plane crash, the Court of Appeals for the District of Columbia Circuit upheld the dismissal of the district's claim for reimbursement, noting the following:

We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions. Furthermore, it is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties. [FN68]

FN68. District of Columbia v. Air Florida, Inc. (C.A.D.C.1984), 750 F.2d 1077.

Conclusion

The city has failed to state any claims against the defendants that would allow it to recover for its municipal expenses. Were we to decide otherwise, we would open a Pandora's box. For example, the city could sue the manufacturers of matches for arson, or automobile manufacturers for traffic accidents, or breweries for drunken driving.

Guns are dangerous. When someone pulls the trigger, whether intentionally or by accident, a properly functioning gun is going to discharge, and someone may be killed. The risks of guns are open and obvious.

We hold that the trial court properly dismissed the city's complaint. The city's claims are too remote and seek derivatively what should be claimed only by citizens directly injured by firearms. The city cannot recover its municipal costs. We overrule its assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., concurs separately and PAINTER, J., concurs in judgment only.

Hildebrandt, P.J., concurring separately.

I concur with the lead opinion that, under the present state of the law in Ohio, the trial court was correct in dismissing each of the city's claims. However, because I believe that the Ohio Supreme Court should revisit the applicability of public-nuisance law to product-liability cases, I write separately.

In my view, the city should be permitted to bring suit against the manufacturer of a product under a public-nuisance theory, when, as here, the product has allegedly resulted in widespread harm and widespread costs to the city as a whole and to its citizens individually. This is especially true in a case involving the manufacture of guns, where the allegations indicate that the potential harm caused by the product could be greatly reduced by the implementation of safety mechanisms that would not appreciably affect the utility of the product. Although the effect of individual suits against the gun manufacturers would perhaps result in only the payment of money damages, the potential exposure resulting from suits by governmental entities would have a greater bearing on the implementation of effective safety measures. As the lead opinion notes, however, the maintenance of such a suit would require a change in the law that we are not empowered to effectuate. But because I believe such a change to be warranted, I concur separately to note my concerns.

PAINTER, J., concurring in judgment only.

***11** I agree that the motion to dismiss was properly granted, but not for all the reasons cited by the majority opinion. The alleged harm to the city is too remote to be recovered from the gun manufacturers. That is enough to dismiss the case. We should not make bad law that can be applied in other situations--perhaps an individual plaintiff with a products-liability claim-- just to pound another nail in the coffin of this case.

I. The Majority Opinion Goes Too Far--And Will Hurt Legitimate Plaintiffs in

the Future.

The majority opinion goes too far, and misstates the law in ways that I believe will haunt us in the future. Other cases not controlled by the remoteness doctrine will be affected by the majority's rulings on products liability, failure to warn, notice pleading, and other needlessly addressed issues. This case may bar the courthouse door to a plaintiff with legitimate claims in the future. That is why I must protest.

I write separately to state where I believe the majority is in error. But first I will state the issues on which I agree with the majority.

II. The Harm is Too Remote--We Must Draw the Line Somewhere.

The harm suffered by the city is too remote to sustain this lawsuit. For citizens who are injured by gunfire, the costs to the city are entirely derivative of the injuries to the citizens--the city's claims flow from harm to the citizens, not to itself. As in the cases where courts rejected claims by union-benefit funds against tobacco companies, the city's claims are too remote. [FN69] For the expenses incurred by the city even when no other person suffers an injury, the city's claims do not meet the factors set out in Holmes v. Securities Investor Protection Corp.: [FN70] (1) the city's injuries are indirect and based on intervening factors, such as the conduct of gun owners, (2) recognizing claims would require the court to adopt complicated rules apportioning damages, and (3) directly injured citizens are in a better position to sue the manufacturers. At some point, a line must be drawn. The remoteness doctrine is a proper bar to recovery in this case.

FN69. See Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc. (C.A.2, 1999), 191 F.3d 229, certiorari denied (2000), --- U.S. ----, 120 S.Ct. 799, 145 L.Ed.2d 673; Texas Carpenters Health Benefit Fund v. Philip Morris, Inc. (C.A.5, 2000), 199 F.3d 788; Internatl. Brotherhood of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc. (C.A.7, 1999), 196 F.3d 818; Oregon Laborers-Employers Health & Welfare Fund v. Philip Morris, Inc. (C.A.9, 1999), 185 F.3d 957, certiorari denied (2000) --- U.S. ----, 120 S.Ct. 789, 145 L.Ed.2d 666; Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc. (C.A.3, 1999), 171 F.3d 912, certiorari denied (2000), --- U.S. ----, 120 S.Ct. 844, 145 L.Ed.2d 713.

FN70. (1992), 503 U.S. 258, 269, 112 S.Ct. 1311, 1318, 117 L.Ed.2d 532.

III. The City Cannot Recover Public Expenditures in this Case--It is Different from the Tobacco Cases.

Also, the city cannot recover public expenditures that it has a duty to provide. While it is true that a governmental entity may recover the cost of its services in certain instances, such as where recovery is permitted by statute or where the government incurs expenses to protect its own property, [FN71] this case is not one of them. This case involves expenditures-- police and emergency services, health-care costs, court costs, social-services costs, and prison costs, for instance--that should be borne by the public as a whole. If we try to apportion each police run, or emergency run, or other costs implicated by this lawsuit, the expense would greatly exceed the recovery.

FN71. See Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co. (C.A.9, 1983), 719 F.2d 322, 324.

We note that this case can be distinguished from the litigation with which it is sometimes compared: the lawsuits brought by the states against tobacco companies, which resulted in a recent multi-billion-dollar settlement. The tobacco litigation involved claims to recover Medicaid payments made on behalf of victims of smoking. Under federal law, states must include procedures in their administration plans for recovering funds from third parties liable for injuries to Medicaid recipients. [FN72] In some states, such as Florida and Massachusetts, statutes authorized direct action against tobacco companies. [FN73] Other states had statutes that permitted recovery through subrogation. In an effort to avoid defenses available to the tobacco companies in subrogation suits, such as assumption of the risk, these states generally pursued equitable actions against the companies. [FN74] Thus, in the tobacco litigation, the issue was not whether the states could recover public expenditures for Medicaid per se. Rather, the issue was whether the causes of action were viable means of recovery.

FN72. See Section 1396a(25), Title 42, U.S.Code.

FN73. See Fla.Stat.Ann. 409.910; Mass.Gen.Laws Ann., Chapter 118E, Section 22.

FN74. See Sherrill, Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution (1997), 19 U.Ark. Little Rock L.J. 497.

IV. Some Other Claims Would Not Survive Anyway.

***12** Even if the lawsuit were not barred by the remoteness and public- expenditure doctrines, most claims would not survive. First, the city's negligence claims would fail. As a matter of law, no duty exists between the gun manufacturers and the city. There are too many intervening factors. Also, the city's nuisance claims could be dismissed. Nuisance law should not be expanded to include the design, marketing, or lawful sale of products. In addition, the city's unjust-enrichment claim would fail. It cannot be said that the city's provision of police, medical, and other services was a benefit conferred on the gun manufacturers that the city should have expected to get back, especially in light of the fact that the city provided those services in the performance of its governmental duties.

V. But Some Claims Are Proper--for Other Parties.
A. The Products-Liability Defective-Design Claim Might Be Proper.

But I do take issue with various aspects of the majority's opinion, particularly with regard to the city's products-liability claims. Certainly, the prospect of a city suing gun manufacturers is a very controversial and politically charged issue, with potential staggering consequences for the manufacturers. But, with all the hoopla put aside, this case really boils down to nothing more than a lawsuit governed by the rules of civil procedure. Applying these rules, I disagree with the majority's conclusion that the city's products-liability claims fail because the city's complaint did not allege particular guns or defective conditions that caused direct injuries.

Notice pleading is still the law, [FN75] and the city clearly alleged that each defendant has manufactured defective products by failing to implement alternative safety designs. That was enough to give the manufacturers fair notice of the claims against them. Any further details could come out in discovery. Whether the city should or would succeed at trial, or even if the city would survive summary judgment, is not the issue. Rather, the issue is simply whether the city's allegations were sufficient to survive a motion to dismiss. Even if the pleadings were not adequately stated, the trial court should have given the city the opportunity to amend its complaint. [FN76] If the city's claims did not fail for remoteness, they would have survived. By stating otherwise, the majority bars the courthouse door to future parties with perhaps legitimate claims.

FN75. See Civ.R. 8.

FN76. See State ex. rel. Huntington Ins. Agency v. Duryee (1995), 73 Ohio St.3d 530, 533, 653 N.E.2d 349, 353 (liberal amendment of pleadings).

B. The Products-Liability Failure-to-Warn Claim Might Succeed.

***13** The majority believes that the city's failure-to-warn claims were properly dismissed based on the obvious dangers of handguns. It is true that certain risks associated with the use of guns are open and obvious. People know that guns fire bullets that can kill. But some of the city's allegations, such as the fact that a semi-automatic gun can hold a bullet in its chamber, even when the ammunition magazine is empty or removed from the gun, involve risks that are not necessarily open and obvious. That issue involves questions of fact, and, at least, more discovery is needed before it should be decided. Accepting the allegations in the complaint as true, as is required at this point, dismissal--for this reason--is premature. [FN77]

FN77. See White v. Smith & Wesson (Mar. 14, 2000), N.D.Ohio No. 1:99 CV 1134, unreported ("This Court cannot say as a matter of law that it is an 'open and obvious risk' or a matter of common knowledge that handguns would be used by some individuals, e.g., children, to harm themselves or others, and that a proper warning or instruction would not be used by a manufacturer exercising reasonable care. Whether the manufacturer Defendants prevail on their 'open and obvious risk' defense is a matter of fact for the jury to decide.").

C. Economic Loss Is Sufficient Harm.

Finally, I disagree with the majority's decision regarding economic losses for strict-products-liability claims. The Ohio Supreme Court has specified that a failure to allege other than economic damages does not destroy a products- liability claim, but rather removes it from the purview of the Products Liability Act. [FN78] Courts have also stated that common-law strict- liability claims for purely economic loss may be maintained as long as there is no privity of contract between the plaintiffs and defendants. [FN79] Thus, I believe that the majority incorrectly concludes that recovery under a products- liability claim is no longer permitted for economic loss alone. Although the Products Liability Act bars claims solely based on economic harm, certain claims may still be brought under the common law. [FN80]

FN78. See LaPuma v. Collinwood Concrete (1996), 75 Ohio St.3d 64, 661 N.E.2d 714, syllabus.

FN79. See Nadel v. Burger King Corp. (1997), 119 Ohio App.3d 578, 585, 695 N.E.2d 1185, fn. 3; Chemtrol Adhesives, Inc. v. American Manuf. Mut. Ins. Co. (1989), 42 Ohio St.3d 40, 49, 537 N.E.2d 624, 634 (citing Iacono v. Anderson Concrete Corp. [1975], 42 Ohio St.2d 88, 326 N.E.2d 267; Inglis v. American Motors Corp. [1965], 3 Ohio St.2d 132, 209 N.E.2d 583).

FN80. See Carrel v. Allied Prods. Corp. (1997), 78 Ohio St.3d 284, 289, 677 N.E.2d 795, 800 (common-law products-liability actions survive the enactment of the Products Liability Act, unless specifically covered by the act); White v. DePuy, Inc. (1998), 129 Ohio App.3d 472, 480, 718 N.E.2d 450, 455 (common-law theory of implied warranty, or strict liability, survives the enactment of the Products Liability Act).

VI. The Majority Makes the Right Decision--But for Some of the Wrong Reasons.

Nevertheless, because the city's claims do not survive the remoteness and public-expenditure doctrines, the motion to dismiss was properly granted. But I believe the majority's misstatements on other issues will bring travail in the future.

Therefore, I concur in the court's judgment, but not in the opinion.

END OF DOCUMENT

Supreme Court of Michigan.

David and Connie GLITTENBERG, Plaintiffs-Appellees,
v.
DOUGHBOY RECREATIONAL INDUSTRIES, a foreign corporation, Defendant-Appellant,
and
Robert and Dianne Wilcenski and Victor Hill & Charles Wilson d/b/a/ Hilson's Pool Company, Defendants.
Allan SPAULDING and Jane Spaulding, Plaintiffs-Appellants,
v.
LESCO INTERNATIONAL CORPORATION, and Coleco Industries, Incorporated, Defendants-Appellees,
and
Ernest J. Pietila and Thomas R. Pietila, d/b/a/ Pietila Brothers Pool Service & Specialty Company, Defendants-Cross Plaintiffs-Appellees,
and
S.K. Plastics Corporation, Defendant-Cross-Defendant-Appellee,
and
Oceanic Leisure Corporation, John G. McCracken, d/b/a Pool Site, Doughboy Recreational Incorporated, Hoffinger Industries, Incorporated, and Sears Roebuck & Company, Defendants.
William HOREN and Pamela Horen, Plaintiffs-Appellees,
v.
COLECO INDUSTRIES, a foreign corporation; Bridgeport Pools, Inc., a Michigan corporation; and Lomart Industries, a Division of Doughboy, successor corporation to Coleco Industries, Defendant-Appellants.

Docket Nos. 85391, 88429 and 88580.
Calendar Nos. 1-3, Oct. Term, 1991.

Argued Oct. 8, 1991.
Decided Sept. 29, 1992.

Plaintiffs brought separate actions against manufacturers and sellers of above-ground swimming pools, seeking damages for head injuries and paralysis suffered when plaintiffs, in separate incidents, attempted to dive headfirst into shallow water. The Circuit Courts of Jackson County, Gordon Britten, J., Saginaw County, Joseph R. McDonald, J., and Wayne County, John H. Hausner, J., each granted summary disposition in favor of manufacturers and sellers, and plaintiffs appealed. The Court of Appeals, 169 Mich.App. 725, 426 N.W.2d 794, reversed, 182 Mich.App. 285, 451 N.W.2d 603, reversed, and 174 Mich.App. 321, 435 N.W.2d 480, affirmed in part, reversed in part, and remanded. Appeal was granted as to last case only, and the Supreme Court, 436 Mich. 673, 462 N.W.2d 348, affirmed and remanded. The Supreme Court, Boyle, J., granted rehearing, granted application for leave to appeal, consolidated all cases, and held that manufacturers and sellers had no duty to warn of danger of headfirst dive into shallow water of above-ground pool.

Two cases reversed, and one case affirmed.

Levin, J., dissented and filed an opinion in which Michael F. Cavanagh, J., joined.

Mallett, J., dissented with regard to conclusion, and filed an opinion.

West Headnotes

[1] Negligence ⇐ 1692
272k1692
(Formerly 272k136(14))

Question of duty is to be decided by trial court as matter of law.

[2] Products Liability ⇐ 14
313Ak14

Manufacturers have duty to warn purchasers or users of dangers associated with intended use or reasonably foreseeable misuse of their products; however, scope of duty is not unlimited, and law qualifies manufacturer's duty to warn by declaring some risks to be outside that duty.

[3] Products Liability ⇐ 14
313Ak14

Manufacturer or seller has no duty to warn of open and obvious dangers connected with otherwise nondefective product.

[4] Products Liability ⇐ 14
313Ak14

In determining whether product-connected danger is "obvious," focus is typical user's perception and knowledge and whether relevant condition or feature that creates danger associated with use is fully apparent, widely known, commonly recognized, and anticipated by ordinary user or consumer.

[5] Products Liability ⇐ 15
313Ak15

Although plaintiff's subjective knowledge is immaterial to antecedent determination of whether product presents open and obvious danger, it is relevant to determination of whether, given existence of duty, manufacturer's failure to warn was legal or proximate cause of plaintiff's injuries.

[6] Products Liability ⇐ 11
313Ak11

In design defect context, obvious risks may unreasonably breach duty to adopt design that safely and feasibly guards against foreseeable misuse; obviousness of danger does not preclude possibility that alternative design could reduce risk of harm at cost and in manner that maintains product's utility.

[7] Products Liability ⇐ 14
313Ak14

In failure to warn context, obvious nature of simple product's potential danger functions as inherent warning that risk is present; if risk is obvious from characteristics of product, product itself telegraphs precise warning that plaintiffs complain is lacking.

[8] Products Liability ⇐ 14
313Ak14

There is no duty to warn as to obvious danger of simple product because obvious danger is no danger to reasonably careful person.

[9] Products Liability ⇐ 87.1
313Ak87.1

(Formerly 313Ak87)

Where manufacturer claims that it owes no duty to warn because of obvious nature of danger, court must determine whether reasonable minds could differ with respect to whether danger is open and obvious; if reasonable minds cannot differ on "obvious" character of product-connected danger, court determines question as matter of law, while, where court determines that reasonable minds could differ, obviousness of risk must be determined by jury.

[10] Products Liability ⇐ 60
313Ak60

For purposes of products liability action, above-ground swimming pool is "simple product"; all characteristics and features of above-ground pool are readily apparent or easily discernible upon casual inspection.

[11] Products Liability ⇐ 60
313Ak60

Manufacturers and sellers of above-ground swimming pools had no duty to warn potential users of danger of headfirst dive into shallow water of such pool; pool's potentially dangerous condition, shallow water, was readily apparent or discoverable upon casual inspection, and thus warning explicitly detailing obvious risk of hitting pool's bottom was not required.

****209 *383** Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick by Richard E. Shaw, Detroit, for plaintiffs-appellees in No. 85391.

Kerr, Russell and Weber by Robert G. Russell, Joanne Geha Swanson, Janice A. Furioso, Detroit, for defendant-appellant in No. 85391.

***384** Plunkett & Cooney, P.C. by Ernest R. Bazzana, Detroit, for amici curiae Ass'n of Defense Trial Counsel, Michigan Defense Trial Counsel, and Defense Research Institute.

Chad C. Schmucker, Jackson, for Robert and Diane Wilcenski.

Aaron D. Twerski, Professor of Law, Brooklyn Law School, Brooklyn, N.Y., and Terrence E. Haggerty, Bowman and Brooke, Detroit, for amicus

curiae Product Liability Advisory Council.

Barry P. Waldman, Detroit, Monica Farris Linkner, Berkley, Charles P. Burbach, Southfield, for amicus curiae of the Michigan Trial Lawyers Ass'n.

**210 Mark Granzotto, Detroit, for amicus curiae.

Jeannette A. Paskin, Daniel J. Seymour, Paskin, Nagi & Baxter, P.C., Detroit, amicus curiae for Hartford Ins. Co. & Claims Management, Inc.

Ronald R. Gilbert, Chairman, Detroit, amicus curiae for Foundation for Spinal Cord Injury Prevention and Aquatic Injury Safety Foundation on Glittenberg.

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OPINION *384 ON REHEARING

BOYLE, Justice.

In these cases, we confront again the scope of the duty to warn. The issue is whether summary disposition was properly granted in favor of the defendant manufacturers and sellers on the basis that they had no duty to warn of the danger of a headfirst dive into the shallow water of an aboveground pool, which the parties do not dispute *385 is a simple tool, [FN1] that is, a product all of whose essential characteristics are fully apparent.

FN1. A different issue would be presented if it were contended that the pools involved in these cases could not be so characterized.

The lengthy factual and procedural background for this inquiry is set forth in the appendix. In brief, each plaintiff sustained tragic injuries when he dove into the shallow water of an aboveground pool. Each previously had been in the pool in question and each acknowledged that he knew the depth of the water in the pool and that a deep dive into shallow water was dangerous. The Court of Appeals reversed the trial court's grant of summary disposition in Glittenberg v. Wilcenski, 174 Mich.App. 321, 435 N.W.2d 480 (1989), and Horen v. Coleco Industries, Inc., 169 Mich.App. 725, 426 N.W.2d 794 (1988), and affirmed summary disposition in Spaulding v. Lesco Int'l. Corp., 182 Mich.App. 285, 451 N.W.2d 603 (1990). This Court's plurality result in Glittenberg v. Doughboy Recreational Industries, Inc., 436 Mich. 673, 462 N.W.2d 348 (1990) (Glittenberg I), led to rehearing and consolidation of these cases. 437 Mich. 1224, 464 N.W.2d 710 (1991).

After meticulous consideration of the records below and the significant issues implicated, [FN2] we now hold that summary disposition was properly granted in favor of the defendants. The manufacturer of a simple product has no duty to warn of the product's potentially dangerous conditions or characteristics that are readily apparent or visible upon casual inspection and reasonably expected to be recognized by the average user of ordinary intelligence. On this record we conclude that the product is not defective or unreasonably dangerous for want of a warning. Because the duty question involves the issue of fault for which there is no material issue of fact, we reverse the decisions of the Court of Appeals in Glittenberg and Horen *386 and affirm

**211 the decision of the Court of Appeals in Spaulding.

FN2. The prior record was inadequate to allow us to evaluate whether a material issue of fact regarding the open and obviousness of the danger could be created.

I

[1] In the products context, duty to warn has been described as an exception to the general rule of nonrescue, imposing an obligation on sellers to transmit safety-related information when they know or should know that the buyer or user is unaware of that information. As agreed in Glittenberg, the question of duty is to be decided by the trial court as a matter of law. Antcliff v. State Employees Credit Union, 414 Mich. 624, 640, 327 N.W.2d 814 (1982); Smith v. Allendale Mut. Ins. Co., 410 Mich. 685, 713-715, 303 N.W.2d 702 (1981). [FN3]

FN3. See Prosser & Keeton, Torts (5th ed.), § 96, p. 686; 2 Restatement Torts, 2d,] 388, pp. 300-301; 3 American Law of Products Liability, 3d, § 33:25, pp. 52-54; and Twerski, Weinstein, Donaher & Piehler, The use and abuse of warnings in products liability--design defect litigation comes of age, 61 Cornell L.R. 495, 523-524 (1976).

Most jurisdictions that have addressed similar cases have been unwilling to impose liability on the pool manufacturer or seller. [FN4] Summary judgment in favor of the defendant has been based on lack of a causal connection between the alleged negligent failure to warn and the plaintiff's injury. [FN5] Courts typically focus on the plaintiff's deposition testimony, establishing familiarity with the ***387** pool and awareness of the depth of the water in relation to the body, and hence recognition of the need to execute a shallow, flat dive in order to avoid contact with the bottom of the pool and injury. From this, it is concluded that, because the plaintiff was aware of the shallow condition of the pool's water and the dangers inherent in a headfirst dive into observably shallow water, the absence of a warning conveying those very facts could not be a proximate cause of the plaintiff's injuries. [FN6]

FN4. See cases cited in n. 5 and also Smith v. Stark, 103 A.D.2d 844, 478 N.Y.S.2d 353 (1984); Neff v. Coleco Industries, Inc., 760 F.Supp. 864 (D.Kan., 1991); Mucowski v. Clark, 404 Pa.Super. 197, 590 A.2d 348 (1991); Greibler v. Doughboy Recreational, Inc., 160 Wis.2d 547, 466 N.W.2d 897 (1991); Winant v. Carefree Pools, 709 F.Supp. 57 (E.D.N.Y., 1989). Contrary to the assertions in the dissent, similar results have been reached despite similar record evidence. See, for example, Neff, supra.

FN5. Kelsey v. Muskin, Inc., 848 F.2d 39 (C.A. 2, 1988); Colosimo v. May Dep't. Store Co., 466 F.2d 1234 (C.A. 3, 1972); McCormick v. Custom Pools, Inc., 376 N.W.2d 471 (Minn.App., 1985); Vallillo v. Muskin Corp., 212 N.J.Super. 155, 514 A.2d 528 (1986); Howard v. Poseidon Pools, 72 N.Y.2d 972, 534 N.Y.S.2d 360, 530 NE2d 1280 (1988); Belling v. Haugh's Pools, Ltd., 126 A.D.2d 958, 511 N.Y.S.2d 732 (1987).
Of the cases cited by the dissent, n. 31 and 32, only two are apposite to the issue presented.

FN6. The dissent attempts to distinguish the swimming pool cases on the basis that some plaintiffs allege that they were injured while attempting a flat or shallow dive as opposed to a steep, vertical dive. Nonetheless, shallow or flat dives are, in fact, headfirst dives.

Although these cases could be decided on the fact specific basis of causation, the temptation to do so or to rely on the observation that a jury should be permitted to determine whether the asserted danger is latent, Levin, J., Op., p. 225, simply postpones to another day the need to grapple with the more difficult duty analysis. On the record here presented, we find that the plaintiffs' evidence fails to demonstrate the existence of a necessary antecedent to resolution of the causation issue, i.e., that the defendants owe the plaintiffs a duty to warn.

II
A

[2] Manufacturers have a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products, [FN7] but the **212 scope of the duty is not ***388** unlimited. [FN8] As one commentator observed:

FN7. Antcliff, supra 414 Mich. at 638, 327 N.W.2d 814. The Court concluded that this Court's "prior

decisions support a policy that a manufacturer's standard of care includes the dissemination of such information, whether styled as warnings or instructions, as is appropriate for the safe use of its product. If warnings or instructions are required, the information provided must be adequate, accurate and effective." Id.

FN8. Id at 639, 327 N.W.2d 814. The Court was careful to note that the manufacturer's interests are also entitled to protection. Furthermore, in Owens v. Allis-Chalmers Corp., 414 Mich. 413, 432, 326 N.W.2d 372 (1982), and Prentis v. Yale Mfg. Co., 421 Mich. 670, 683, 365 N.W.2d 176 (1984), this Court recognized that product manufacturers and sellers are not insurers and, thus, they are not "absolutely liable for any and all injuries sustained from the use of [their] products."
The dissent cites Moning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977), to support the argument that placing a product on the market creates the requisite relationship between a manufacturer and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected, Op., p. 11, n. 17. However, we note that the Court in Moning relied on Prosser, Torts (4th ed.), § 37, p. 206, which provided: "It is no part of the province of a jury to decide whether a manufacturer of goods is under any obligation for the safety of the ultimate consumer," to conclude:
"It is now established that the manufacturer and wholesaler of a product, by marketing it, owe a legal duty to those affected by its use. The duty of a retailer to a customer with whom he directly deals was well established long before the manufacturer and wholesaler were held so obligated. The scope of their duty now also extends to a bystander." 400 Mich. at 433, 254 N.W.2d 759.
The case law cited to support this proposition was Piercefield v. Remington Arms Co., Inc., 375 Mich. 85, 133 N.W.2d 129 (1965), and MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Both of those cases involved manufacturer liability when defectively made products foreseeably injured innocent bystanders. Imposing a duty of safety upon retailers and manufacturers to persons injured by the use or misuse of a product sold, without regard to the type of product, the method of marketing, or whether it was defective, is in effect, absolute liability; a concept rejected by this Court in Prentis v. Yale Mfg. Co., supra.

"If there were an obligation to warn against all injuries that conceivably might result from the use or misuse of a product, manufacturers would find it practically impossible to market their goods." Noel, Products defective because of inadequate directions or warnings, 23 S.W.L.J. 256, 264 (1969).

A manufacturer's or seller's duty to warn of its product's potentially dangerous condition "is not a duty which necessarily attaches to the status of manufacturer or seller, nor is it one which exists regardless of the nature of the product." Anno: ***389** Manufacturer's or seller's duty to give warnings regarding product as affecting his liability for product-caused injury, 76 ALR2d 9, 16. For policy reasons, the law qualifies a manufacturer's duty to warn by declaring some risks to be outside that duty. See Antcliff, supra 414 Mich. at 630-631, 327 N.W.2d 814, [FN9] Elbert v. Saginaw, 363 Mich. 463, 475-476, 109 N.W.2d 879 (1961), [FN10] and Friedman v. Dozorc, 412 Mich. 1, 22, 312 N.W.2d 585 (1981). [FN11]

FN9. This Court stated in Antcliff, 414 Mich. at 631, 327 N.W.2d 814:
"The terse legal conclusion that a duty is owed by one to another represents a judgment, as a matter of policy, that the latter's interests are entitled to legal protection against the former's conduct."

FN10. As the Elbert Court elucidated at 476, 109 N.W.2d 879:
"[T]he problem of duty is simply the problem of the degree to which one's uncontrolled and undisciplined activities will be curtailed by the courts in recognition of the needs of organized society.... It involves, as we have seen, much of legal history, of precedent, of allocations of risk and loss."

FN11. The Friedman Court at 22, 312 N.W.2d 585, observed:
"In a negligence action the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty."
See also Prosser & Keeton, supra, § 53, p. 358: "[I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."

A duty is imposed on a manufacturer or seller to warn under negligence principles summarized in § 388 of 2 Restatement Torts, 2d, pp. 300-301. [FN12] Basically, the manufacturer or seller must (a) have ***390** actual or constructive knowledge of the claimed danger, (b) have "no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition," and (c) "fail to exercise reasonable care to inform ****213** [users] of its dangerous condition or of the facts which make it likely to be dangerous." Id. at 301.

> FN12. The basic duty to warn section was initially set out in 2 Restatement Torts, § 388, p. 1039, and has been reaffirmed with minor changes in the revision, 2 Restatement Torts, 2d, § 388.

[3] Comment k to subsection 388(b) explains the conditions necessary for recognition of the duty to warn, stating the generally accepted rule that a manufacturer or seller has no duty to warn of open and obvious dangers connected with an otherwise nondefective product. [FN13] See anno: 76 ALR2d 38. See also 3 American Law Products Liability, 3d, § 33:25, p. 52. A manufacturer has no duty to warn if it reasonably perceives that the potentially dangerous condition of the product is readily apparent or may be disclosed by a mere casual inspection, and it cannot be said that only persons of special experience will realize that the product's ***391** condition or characteristic carries with it a potential danger.

> FN13. The full text of comment k reads:
> "One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved. It is not necessary for the supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made. However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize." 2 Restatement Torts, 2d, § 388, pp. 306- 307. (Emphasis added.)

In the context of warnings of the obvious danger of simple products, the duty inquiry asks whether people must be told what they already know. Warnings protect consumers where the manufacturer or seller has superior knowledge of the products' dangerous characteristics and those to whom the warning would be directed would be ignorant of the facts that a warning would communicate. Thus, it has been observed that no duty exists where "the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product...." 3 Products Liability, supra, § 33:25, p. 55. Anno: 76 ALR2d 29-30. See also Madden, The duty to warn in products liability: Contours and criticism, 89 W.Va.L.R. 221, 231 (1986).

The seminal case regarding "simple tools" is Jamieson v. Woodward & Lothrup, 101 U.S.App.D.C. 32, 35, 37, 247 F.2d 23 (1957), cert. den. 355 U.S. 855, 78 S.Ct. 84, 2 L.Ed.2d 63 (1957). The court explained:
"A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require [a manufacturer] to warn of such common dangers.

* * * * * *

"[W]here a manufactured article is a simple thing of universally known characteristics, not a device with parts or mechanism, the only danger being not latent but obvious to any possible user, if the article does not break or go awry, but injury occurs through a mishap in normal use, the article reacting in its normal and foreseeable manner, the manufacturer is not liable for negligence."

[4] Determination of the "obvious" character of a product-connected danger is objective. The focus is ***392** the typical user's perception and knowledge and whether the relevant condition or feature that creates the danger associated with use is fully apparent, widely known, commonly recognized, and

anticipated by the ordinary user or consumer. 3 Products Liability, supra, § 33:22, p. 47. [FN14]

FN14. Prosser & Keeton, supra, § 96, pp. 686-687 observed:
"[C]ourts have usually meant by 'obvious danger' a condition that would ordinarily be seen and the danger of which would ordinarily be appreciated by those who would be expected to use the product."

**214 Open and obvious dangers are conditions that create a risk of harm
"is visible, ... is a well known danger, or ... is discernible by casual inspection. Thus, one cannot be heard to say that he did not know of a dangerous condition that was so obvious that it was apparent to those of ordinary intelligence." 3 Products Liability, supra, § 33:26, p. 56. [FN15]

FN15. This analysis and definition of "obvious dangers" is consistent with the approach used by a vast majority of the jurisdictions in their negligent failure to warn cases. See Ford Motor Co. v. Rodgers, 337 So.2d 736, 740 (Ala., 1976) ("commonly known"); Prince v. Parachutes, Inc, 685 P.2d 83, 88 (Alas., 1984) ("dangers that would be readily recognized by the ordinary user of the product"); Brown v. Sears, Roebuck & Co., 136 Ariz. 556, 562, 667 P.2d 750 (1983) ("simple thing of universally known characteristics," "every adult knows that if an electrical extension cord is cut or frayed a danger of electrical shock is created"); Delahanty v. Hinckley, 564 A.2d 758, 760 (D.C.App., 1989) (" 'danger, or potentiality of danger, is generally known and recognized' "); Orkin Exterminating Co. v. Dawn Food Products, 186 Ga.App. 201, 203, 366 S.E.2d 792 (1988) ("common dangers connected with the use of a product"); Kokoyachuk v. Aeroquip Corp., 172 Ill.App.3d 432, 439, 122 Ill.Dec. 348, 526 N.E.2d 607 (1988) ("generally appreciated"); Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 571 (Iowa, 1986) (risks sufficiently known to consumers at large); Duncan v. Louisiana Power & Light Co., 532 So.2d 968, 971 (La.App., 1988) ("the danger and the manner of avoiding it are common knowledge"); Lorfano v. Dura Stone Steps, Inc., 569 A.2d 195, 197 (Me., 1990) ("patently obvious and equally apparent to all"); Nicholson v. Yamaha Motor Co., 80 Md.App. 695, 720, 566 A.2d 135 (1989) (generally known and recognized); Laaperi v. Sears, Roebuck & Co., Inc., 787 F.2d 726, 730 (C.A. 1, 1986) (applying Massachusetts law) (risks discernible by casual inspection); Mix v. MTD Products, Inc., 393 N.W.2d 18, 19 (Minn.App., 1986) ("obvious to anyone using the product"); Grady v. American Optical Corp., 702 S.W.2d 911, 915 (Mo.App., 1985) ("commonly known"); Smith v. Hub Mfg., Inc., 634 F.Supp. 1505, 1508 (N.D.N.Y., 1986) (danger that is well known); Simpson v. Hurst Performance, Inc., 437 F.Supp. 445, 447 (M.D.N.C., 1977), aff'd 588 F.2d 1351 (C.A. 4, 1978) ("a condition which is plainly observable"); Snyder v. Philadelphia, 129 Pa.Commw. 89, 94, 564 A.2d 1036 (1989) ("generally recognizable" danger); Brune v. Brown Forman Corp., 758 S.W.2d 827 (Tex.App., 1988) (well known to the community generally); Shuput v. Heublein Inc., 511 F.2d 1104, 1106 (C.A. 10, 1975) (applying Utah law) (well known; common knowledge); Menard v. Newhall, 135 Vt. 53, 55, 373 A.2d 505 (1977) ("generally known and recognized").

*393 [5] Thus, a plaintiff's subjective knowledge is immaterial to the antecedent determination of an open and obvious danger. It is relevant, rather, to the determination whether, given the existence of a duty, the defendant's failure to warn was the legal or proximate cause of a plaintiff's injuries. 3 Products Liability, supra, § 33:23, pp. 48-50. [FN16]

FN16. See also Nabkey v. Jack Loeks Enterprises, 376 Mich. 397, 137 N.W.2d 132 (1965); Spencer v. Ford Motor Co., 141 Mich.App. 356, 367 N.W.2d 393 (1985); Van Dike v. AMF Inc., 146 Mich.App. 176, 379 N.W.2d 412 (1985); Bishop v. Interlake, Inc., 121 Mich.App. 397, 328 N.W.2d 643 (1982); Durkee v. Cooper of Canada, Ltd., 99 Mich.App. 693, 298 N.W.2d 620 (1980). See also Henderson & Twerski, Doctrinal collapse in products liability: The empty shell of failure to warn, 65 N.Y.U.L.R. 265, 306 (1990).

Our jurisprudence recognizes the well-established rule that there is no duty to warn of dangers that are open and obvious. [FN17] We have also narrowed application of the no-duty rule to those cases involving "simple tools or products." Owens v. Allis-Chalmers Corp., 414 Mich. 413, 425, 326 N.W.2d 372 (1982). We have rejected the proposition that the "open and obvious danger" rule is an incantation that obviates the threshold inquiry

of duty in design defect cases. We have not held that the duty inquiry should be similarly limited as to the obligation to communicate safety-related information ***394** upon which the warnings leg of products liability claims rest. [FN18] Thus, the narrow issue presented here is whether there is a duty to warn of the dangerous characteristics of a simple product ****215** that are readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence.

FN17. Fisher v. Johnson Milk Co., 383 Mich. 158, 174 N.W.2d 752 (1970); Hensley v. Muskin Corp., 65 Mich.App. 662, 238 N.W.2d 362 (1975); Durkee v. Cooper of Canada, Ltd., supra, Mach v. General Motors Corp., 112 Mich.App. 158, 315 N.W.2d 561 (1982); Raines v. Colt Industries, Inc., 757 F.Supp. 819 (E.D.Mich., 1991). See also anno: 76 ALR2d 28-29.

FN18. Justice Levin's approach would preclude the inquiry by concluding that because a relationship exists between a manufacturer and a consumer, the manufacturer's status subjects it to a jury determination concerning the reasonableness of its conduct.

B

[6] In the design defect context, obvious risks may unreasonably breach the duty to adopt a design that safely and feasibly guards against foreseeable misuse. Because the manufacturer's liability for choice of design is not determined solely by looking at the obvious nature of the alleged defect, obviousness of the danger does not preclude the possibility that an alternative design could reduce the risk of harm at a cost and in a manner that maintains the products utility. Owens, supra.

[7] In the failure to warn context, the obvious nature of the simple product's potential danger serves the core purpose of the claim, i.e., it functions as an inherent warning that the risk is present. Stated otherwise, if the risk is obvious from the characteristics of the product, the product itself telegraphs the precise warning that plaintiffs complain is lacking. [FN19] See Henderson & Twerski, Doctrinal collapse in products liability: ***395** The empty shell of failure to warn, 65 N.Y.U.L.R. 265, 282 (1990). Thus, this is not a situation in which duty is based on the negligence principle of omission to protect against foreseeable injury. Nor is it a situation where the manufacturer is held to a higher standard to protect against unknown or unappreciated properties of the product or in its use, Jennings v. Tamaker Corp., 42 Mich.App. 310, 201 N.W.2d 654 (1972). The dissent's observation notwithstanding, [FN20] all properties of the pools in these cases were knowable, and known. The fact that most individuals do not understand how the laws of physics operate during a dive no more alters the perceived danger in the use of this product than failure to understand the medical reasons why a cut with a knife that severed a major artery could lead to death or catastrophic injury.

FN19. By contrast, the ordinary consumer or product user will find it difficult to discover the risk posed by some medicines or to uncover other injury producing facts. See, e.g., Larson v. Johns-Manville Sales Corp, 427 Mich. 301, 399 N.W.2d 1 (1986); In re Certified Questions, 419 Mich. 686, 358 N.W.2d 873 (1984). Risk utility balancing, consumer expectation, and the efficient allocation of resources supports the imposition of a duty to warn in such cases. See Landes & Posner, The Economic Structure of Tort Law, (Cambridge, Mass.: Harvard University Press, 1987), pp. 295-297.

FN20. The position advocated by the dissent confuses the concept of specific risk with the types of injuries that might be incurred. For example, while there is a general risk of hazard to health from smoking, the risk to fetal life is a distinct specific risk as perhaps is the risk to third parties of secondary smoke.

In a simple product situation, the warning leg of products liability for products in normal use presents no real risk/utility issue, nor does it serve to protect a knowledgeable user who is distracted or inattentive. Thus, the obvious nature of the danger serves the exact function as a warning that the risk is present. Reduced to its simplest terms, the obvious danger rule in the context of a warning with regard to a simple product is both fair and logical. Where a warning is not needed because the product's potentially dangerous condition (and not the consequences of ignoring that condition) is fully evident, providing a warning does not serve to make the product safer. [FN21]

FN21. See 5 Harper, James & Gray, Torts (2d ed.), § 28.5, p. 356:
"The sharpness of knives and axes, or the tendency of unpacked fresh meat to spoil are so notorious that a warning could be expected to add nothing useful to the perception gained from one's senses and the knowledge common to all. Nor does any alternative feasible precaution suggest itself."

[8] There is no duty to warn as to the obvious ***396** danger of a simple product because an obvious danger is no danger to a "reasonably" careful person. See Pomer v. Schoolman, 875 F.2d 1262 (C.A. 7, 1989).

The dissent's resort to rhetoric requires us to emphasize that today's holding signals no retreat from Owens. [FN22] Obviousness ****216** of danger is merely one factor in the analysis of whether a design is reasonable.

FN22. As recognized by Prosser & Keeton, § 96, p. 687:
"This objective approach to the issue of warning about obvious dangers may be regarded as reasonable, if the court is willing to find obvious dangers defective when there is a feasible way to make the design safer."
See also Henderson & Twerski, supra, p. 282.
In their article, which critically examines failure to warn claims, Henderson and Twerski, underscore:
"[T]he argument for abandoning the patent danger rule in warning cases, simply because the rule has been abandoned in design cases, makes no sense. In a design case, the obviousness of the danger does not necessarily preclude the possibility that an alternative design would reduce the risk cost-effectively. By contrast, assuming that some risks are patently obvious, the obviousness of a product-related risk invariably serves the same function as a warning that the risk is present. Thus, nothing is to be gained by adding a warning of the danger already telegraphed by the product itself."

We hold today only, that where the very condition that is alleged to cause the injury is wholly revealed by casual observation of a simple product in normal use, a duty to warn serves no fault-based purpose, Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176 (1984), and that this approach is consistent with Owens, supra. It is one thing to say in a design defect case, even if a danger is open and obvious, that a manufacturer has a duty, ***397** if feasible, to adopt a design to minimize harm and that the manufacturer is at fault if it does not do so. It is quite another thing to say that a manufacturer has an obligation to warn of a simple product's potentially dangerous condition when the condition is readily apparent and its danger widely recognized.

Warning analysis is not preferable to design defect analysis as an approach to products liability. That there may be limited situations when a product implicitly states its warning through the openness of the danger in normal use must not obscure the fact that the ultimate inquiry in products liability is the safety of the overall design. [FN23] A warning is not a Band-Aid to cover a gaping wound, and a product is not safe simply because it carries a warning. See, generally, Twerski, Weinstein, Donaher & Piehler, The use and abuse of warnings in products liability--design defect litigation comes of age, 61 Cornell L.R. 495 (1976). The converse is also true; design defect analysis must not be used to evaluate failure to warn claims. When a design defect claim is examined, the obvious nature of the product-connected danger will not preclude a court from entertaining a plaintiff's claim that an alternative design could feasibly reduce the risk of injury. However, when a negligent failure to warn claim is examined, the open and obvious danger of a simple product may preclude a plaintiff from establishing the requirement of duty of the prima facie case. [FN24]

FN23. In Owens, supra 414 Mich. at 426-428, 326 N.W.2d 372, we rejected Professor Henderson's claim that the polycentricity of design defect analysis is inherently unmanageable for courts and the assertion that it was better to have the warning leg of products liability substitute for design defect analysis. We also reject the claim that warning jurisprudence is inherently unmanageable. See Henderson, Judicial review of manufacturers' conscious design choices: The limits of adjudication, 73 Colum L.R. 1531 (1973), Henderson, Design defect litigation revisited, 61 Cornell L.R. 541 (1976), Twerski, Weinstein, Donaher & Piehler, The use and abuse of warnings in product liability: Design defect comes of age, 61 Cornell L.R. 495 (1976), and Henderson & Twerski, supra.

FN24. The open and obvious danger rule remains embedded in the common law of the vast majority of

states. See, generally, cases cited in anno: 76 ALR2d 28-36, § 9. The doctrine has also been statutorily adopted in six states. See Kan.Stat.Ann. 60-3305; La.Rev.Stat.Ann. 9.2800.57; Mont.Code Ann. 27-1-719(5)(a); N.J.Stat.Ann. 2A: 58C-3a; Ohio Rev.Code 2307.76(B); Tenn.Code Ann. 29-28-105(d). See also Henderson & Twerski, A proposed revision of section 402A of the Restatement (second) of torts, 77 Cornell L.R. 1513, 1522-1523 (1992).

Of those states that have rejected the rule in design defect cases, a majority uphold application of the rule in failure to warn cases. Compare cases cited in anno: 35 ALR 4th 872-880, § 4 (jurisdictions adopting the view that the patent danger rule does not preclude liability in design cases) with cases cited in anno: 76 ALR2d 28-36, § 9 (jurisdictions adhering to the view that there is no duty to warn of open and obvious dangers). See, e.g., Holm v. Sponco Mfg. Inc., 324 N.W.2d 207 (Minn., 1982) (rejecting the patent danger rule in design defect cases) and Mix v. MTD Products, Inc., n. 15 supra at 19 ("[A] manufacturer of a product has no duty to warn of dangers that are obvious to anyone using the product"); Micallef v. Miehle Co., 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976) (rejecting the patent danger rule in design defect cases), and Kerr v. Koemm, 557 F.Supp. 283, 287, n. 1 (S.D.N.Y., 1983) ("Obviousness should not relieve manufacturers of the duty to eliminate dangers from their design if that can reasonably be done, but obviousness relieves the manufacturer of a duty to inform users of a danger"); Auburn Machine Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla., 1979) (rejecting the patent danger rule in design cases), and Knox v. Delta Int'l. Machinery Corp., 554 So.2d 6, 7 (Fla.App., 1989) ("[A] manufacturer has no duty to warn consumers of ... an obvious danger").

****217 *398** Our holding does not "effectively immunize manufacturers and sellers of aboveground pools from liability...." Op., p. 224. We do not holdthat there is no duty to warn regarding all conditions alleged to be open and obvious. Whether the condition is open and obvious, and whether the very danger asserted is the cause of an injury that a warning would allegedly have prevented, must be addressed on a product-by-product basis.

[9] In summary, when a defendant claims that it owes no duty to warn because of the obvious nature of a danger, a court is required, as a threshold matter, to decide that issue. The court must determine whether reasonable minds could differ with respect to whether the danger is open and obvious. [FN25] If reasonable minds cannot differ on ***399** the "obvious" character of the product-connected danger, the court determines the question as a matter of law. If, on the other hand, the court determines that reasonable minds could differ, the obviousness of risk must be determined by the jury. 3 Products Liability, supra, § 33:42, pp 69-70. [FN26]

FN25. This conclusion is supported by the bulk of the cases cited by the dissent at op., pp. 227-229, where the courts found that, although there is no duty to warn of a patent danger, under the record facts presented, the courts could not hold as a matter of law that the risk of danger was open and obvious. Compare Brune v. Brown Forman Corp., 758 S.W.2d 827 (Tex.App., 1988), with Joseph E. Seagram & Sons v. McGuire, 814 S.W.2d 385 (Tex., 1991). In addition, many of the cases cited by the dissent rely on a strict liability theory of recovery and do not involve simple products. Finally, the claim in Corbin v. Coleco Industries, Inc., 748 F.2d 411 (C.A. 7, 1984), described by the dissent as particularly persuasive, has been characterized along with Glittenberg v. Wilcenski, supra, as "absurd." See Henderson & Twerski, supra, p. 317, and n. 208.

FN26. "The duty issue, like any other, can be broken into (a) rules and (b) the application of those rules to the concrete facts of a given case. Here as elsewhere the court lays down the rules. But the application of those rules to particular facts should be, and in fact usually is, committed to the jury on the duty issue as upon any other." 3 Harper, James & Gray, Torts (2d ed.), § 18.8, p. 743.

III

[10] Viewing the materials presented by plaintiffs in the most favorable light, there is no dispute that the aboveground pools are simple products. No one can mistake them for other than what they are, i.e., large containers of water that sit on the ground, all characteristics and features of which are readily apparent or easily discernible upon casual inspection. As Justice Griffin highlighted in Glittenberg I, supra 436 Mich. at 695-696, 462

N.W.2d 348:

"[T]here is nothing deceiving about [their] appearance, nothing enigmatic about [their] properties. [They have] no mechanical devices, but rather [are] uncomplicated ... product[s] with universally known characteristics."

***400** [11] The condition creating the asserted danger, i.e., shallow water, is a fact that is readily apparent or discoverable upon casual inspection. The record evidence does not counter that fact. The records and reasonable inferences do not support the contention that the potential for injury from a dive into the observably shallow water of these pools is not a common and generally recognized danger. The record does not support the inference that users of aboveground pools are not aware of the general risk of injury, [FN27] and special experience is not required to perceive the danger or risk of injury presented by the shallow water.

FN27. The record does not reflect and the plaintiffs do not argue, as does the dissent, "that the likely consuming public does not appreciate either the general risk of diving in shallow water in an aboveground swimming pool or the specific risk of quadriplegic injury...." Op., p. 224. (Emphasis added.)

The obvious risk of this simple product is the danger of hitting the bottom. When ****218** such a risk is objectively determinable, warnings that parse the risk are not required. The general danger encompasses the risk of the specific injury sustained. In other words, the risk of hitting the bottom encompasses the risk of catastrophic injury.

The gravamen of each of the plaintiff's argument is that the danger presented is not open and obvious because the specific harm of paralysis or death is not generally recognized. [FN28] Plaintiffs ***401** Horen and Spaulding add the argument that the danger is not open and obvious because the average user does not generally recognize that the laws of physics, biomechanics, and hydrodynamics can transform a miscalculated shallow dive into a deep dive that is recognized as dangerous. [FN29] However, the threshold issue is not whether a shallow dive can be successfully executed but, rather, whether people in general are unaware of the fact that there is a risk of serious harm when diving in shallow water. The fact that all plaintiffs acknowledged the necessity to perform a shallow dive simply underscores the conclusion that the risk of diving in shallow water is open and obvious. In effect, plaintiffs seek to convert the duty to warn argument by conceding a readily apparent and generally recognized dangerous condition for which no duty exists, while claiming that because a specific consequence or degree of harm from that dangerous condition, i.e., paralysis or death, is not ***402** generally recognized, a specific warning is required.

FN28. For example, in support of the argument that summary disposition was improperly granted, plaintiff Glittenberg relies upon his deposition testimony and an affidavit provided by his expert, Dr. M. Alexander Gabrielson. Viewing this material and the record in a light most favorable to the plaintiff, we are now persuaded that it does not permit inferences contrary to the facts asserted by Doughboy.

Plaintiff's deposition revealed only that he was unaware of the fact that diving in shallow water posed a risk of paralysis. That testimony is clearly insufficient to raise a material issue of duty or proximate cause. We cannot reasonably conclude from the bare fact that plaintiff has testified that he was subjectively unaware of the specific gravity of the danger, that the danger was not well-recognized, generally known, and appreciated by those expected to use aboveground pools, or that there is a material issue of fact that lack of a warning was the proximate cause of plaintiff's injury.

Furthermore, Dr. Gabrielson's affidavit does not address the critical issue of the "obvious" nature of the product-connected danger.

We agree that it is undisputed that pool manufacturers were aware of injuries in aboveground pools; however, Dr. Gabrielson's affidavit does not identify from the number of total pool accidents the number of diving injuries that occur yearly in aboveground pools of the type involved in this case.

FN29. Plaintiff Horen's expert, Dr. Lawniczak, testified that the general public is not aware of and does not appreciate the grave risk of serious spinal cord injury when diving. Similarly, defendant Coleco's expert, Dr. Richard Stone, testified that there is a general lack of awareness of the risk of catastrophic injury. Plaintiff Spaulding's expert, University of Michigan diving coach James Richardson, also opines that the average person does not appreciate the fact that diving in shallow water

carries the potential for life-threatening injuries.
To suggest, as the dissent does when it highlights the testimony of Dr. Lawniczak, Op., p. 224, that a reasonable inference can be drawn that a duty to warn of the danger of diving into a two-foot pool exists, even when viewed most favorably to plaintiffs, is again simply to argue that the trial courts have an obligation to submit every product liability question to the jury. A standing dive into a pool with two feet of water cannot be reasonably perceived by any reasonable juror as anything other than an activity that ignores the essential properties of that simple product.

There is no question that under either negligence or strict liability principles, a fault-based theory of liability will be recognized where the product is defective, either because its design presents an unreasonable danger given the conditions of use, or because there is an unknown risk in use of the product. [FN30] However, where the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, and no disputed question exists regarding the danger of the product, the law does not impose a duty upon a manufacturer to warn of all ****219** conceivable ramifications of injuries that might occur from the use or foreseeable misuse of the product. [FN31] As the court observed in Jamieson, supra 101 U.S.App.D.C. at 39, 247 F.2d 23:

FN30. Even where strict liability is imposed if a product fails to meet consumer expectations, it has been recognized that an aboveground swimming pool meets the expectation of the ordinary consumer, Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis.2d 326, 230 N.W.2d 794 (1975).

FN31. A defendant whose breach of duty causes foreseeable personal harm to the plaintiff, however, is liable for the direct consequences to that individual, even if he could not have foreseen the particular result that did follow. Prosser & Keeton, supra, § 43, p. 290.

"[S]urely a manufacturer, to be protected from liability for negligence, need not enumerate the possible injuries which might befall one.... We have in the case at bar a detached retina, but we might have had any of an infinite number of injuries to eye, mouth, ear, nose, etc. We do not agree with, and find no authority to support, a holding either that a manufacturer must utter a general warning of danger from mishap with an article such as this rope or that he must catalog injuries possible upon such a mishap."

See also Noel, supra, p. 264.

These are difficult cases. Plaintiffs and their families have sustained tragic injuries, the human ***403** and economic cost of which might as a matter of legislative policy, be otherwise allocated. However, neither negligence nor product liability jurisprudence establishes the legal principle that every injury warrants a legal remedy.

IV

We affirm the validity of the obvious danger doctrine in negligent failure to warn cases as to simple products. The doctrine implicates the duty element of the plaintiffs' prima facie case and is a question of law for the court to decide. Because the existence of a duty to warn in the first instance is the issue, adoption of the doctrine of comparative negligence has no effect on the duty determination. [FN32]

FN32. Ward v. K Mart Corp., 136 Ill.2d 132, 146, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990), see also Robertson, Ruminations on comparative fault, duty-risk analysis, affirmative defenses, and defensive doctrines in negligence and strict liability litigation in Louisiana, 44 La.L.R. 1341, 1374-1382 (1984).

Summary disposition was properly granted in Glittenberg, Horen, and Spaulding. We reverse the decisions of the Court of Appeals in Glittenberg and Horen and affirm the decision of the Court of Appeals in Spaulding. [FN33]

FN33. Plaintiff Spaulding also argues that the trial court and the Court of Appeals improperly dismissed his design defect claims along with his failure to warn claims. Plaintiff points to his expert's testimony that the ladder's platform provided an invitation to dive and thus argues that the ladder was defectively designed. Plaintiff's expert, Dr. Gabrielson, however, is not qualified, nor does he purport to be, as an expert in the design of aboveground pools and pool apparatus.
At the hearing on the motion for summary

disposition, Coleco, the ladder manufacturer, contended that it was entitled to dismissal because the essence of plaintiff's defect claim was that the ladder should have contained warnings against diving. The plaintiff did not dispute Coleco's argument, and the trial court dismissed the case, finding no duty to warn because the asserted danger was obvious. Finding no error, the Court of Appeals affirmed the trial court's decision regarding the design defect issue.

Although we clarify here that the analysis for failure to warn claims is distinct from that in design defect claims, on the basis of the record in Spaulding, the Court of Appeals reached the correct conclusion. Thus, we affirm the Court of Appeals in Spaulding on this issue.

ROBERT P. GRIFFIN, ***404** RILEY and BRICKLEY, JJ., concur.

APPENDIX
Factual and Procedural Background

The plaintiffs [FN34] were paralyzed after diving headfirst into aboveground pools. Each sued, alleging that his injuries were proximately caused by the pool manufacturer's or seller's negligence in failing to provide a warning against diving.

FN34. Connie Glittenberg, Pamela Horen, and Jane Spaulding are named plaintiffs. However, because their loss of consortium claims are derivative in nature, and for convenience sake, we use the term "plaintiffs," to refer to David Glittenberg, William Horen, and Allan Spaulding.

A. Glittenberg v. Doughboy

David Glittenberg was permanently paralyzed when he struck his head on the ****220** bottom on an aboveground swimming pool. Mr. Glittenberg testified that he intended to make a shallow or surface dive from the shallow end of the pool toward his wife who was on a floating chair in the deep end of the pool.

The pool, located in the backyard of the plaintiff's neighborhood friends, the Wilcenskis, was built into the side of a hill at the rear end of the house so that the top edge of the pool itself was approximately two feet above the ground level on the west end, and approximately four feet above the ground level on the east end. Doughboy Recreational Industries manufactured the pool, ***405** which was surrounded by an attached redwood deck and fence. The water level was approximately three and one-half feet in the shallow end and seven and one-half feet at the deepest point. There was a ledge three and one-half feet below the water line to allow easy access to the water. There was no ladder, no diving board, no depth markings, and no warnings against diving posted on or near the pool. [FN35]

FN35. "Warning labels and instructions for posting the labels were provided by [Doughboy] to the original purchaser of the pool, Fred Bancroft. However, the warning labels were not placed on the pool by Mr. Bancroft or the Wilcenskis, who purchased the pool from Bancroft." Glittenberg I, supra 436 Mich. at 677, 462 N.W.2d 348.

It is undisputed that the plaintiff was an experienced swimmer and diver, and that he was familiar with the pool, including its depth, having been in the pool at least twice before the accident. He was aware that a deep dive into shallow water was dangerous because he could hit the pool bottom and possibly break an arm or suffer a concussion. However, he considered it safe to make a shallow dive in shallow water, if you "were versed in diving and knew what type of dive you were doing...."

Mr. Glittenberg brought an action against the defendant, Doughboy, and others, alleging in pertinent part that he was seriously and permanently injured as a result of the defendants' negligent conduct in failing to warn of the grave risk of paralysis or death that is inherent when diving into an aboveground pool. The trial court granted Doughboy's motion for summary disposition on the basis that, because the swimming pool was a simple product and the hazards of diving into its shallow water were open and obvious, the defendant had no duty to warn the plaintiff under these ***406** facts. [FN36] Plaintiff's subsequent motion for rehearing was denied. [FN37]

FN36. In Glittenberg I, supra at 679-681, 462 N.W.2d 348, this Court agreed that, although the defendant's motion for summary disposition was brought pursuant to GCR 1963, 117.2(1), failure to state a claim upon which relief could be granted, the motion would be treated as one brought pursuant to GCR 1963, 117.2(3), which mandated that the

moving party be granted judgment as a matter of law if no genuine issue of material fact existed.

FN37. In his motion for rehearing, the plaintiff argued that he had secured the opinion of an expert to support his claim that the relevant danger was not open and obvious and that this expert opinion constituted new evidence. The trial court found no basis for reversal because the expert's opinion was merely supportive of the plaintiff's original position, which the court had rejected, and that the plaintiff had had over four years in which to establish the factual basis of his claims.
The trial court also rejected the plaintiff's argument that he should be allowed to amend his complaint to incorporate design defect claims because the plaintiff failed to present the court with a motion incorporating the proposed amended complaint. Moreover, the court emphasized the fact that the alleged design defects were related to the failure to warn claim, which had been pleaded.

The Court of Appeals reversed the decision of the trial court, 174 Mich.App. at 326, 435 N.W.2d 480, holding that the open and obvious danger rule is no longer viable in Michigan and that, under the facts of this case, the swimming pool was not a simple tool, and the danger of paraplegia was not open and obvious:
"Nothing in the appearance of the pool itself gives a warning of the very serious consequences to which a mundane dive can lead. Nor are we convinced that the danger of serious injury from a dive is a risk of which the public is generally aware." [FN38]

FN38. The Court of Appeals also explained:
"The fact that warning labels accompanied the pool does not conclusively establish defendant Doughboy's compliance with its legal duty; that involves an inquiry into the applicable standard of care--a question of fact for the jury to decide. Likewise, Glittenberg's admissions regarding his swimming experience and knowledge do not pertain to the duty question but rather concern the questions of proximate causation and comparative negligence--also questions for the jury." 174 Mich.App. at 328, 435 N.W.2d 480.

**221 *407 Doughboy appealed, and we granted leave to appeal, 433 Mich. 880, 446 N.W.2d 168 (1989). [FN39] However, because the majority was unable to agree on the viability of the open and obvious danger doctrine in cases raising a negligent failure to warn claim, the Court ordered the case remanded to the trial court for a determination of the threshold question whether the duty of reasonable care required a warning.

FN39. Leave to appeal was limited to the issues whether the defendant manufacturer had a duty to warn the plaintiff that serious or permanent injuries could result from a dive into the shallow end of the defendant's aboveground pool and whether it was error for the trial court to grant summary disposition in the defendant's favor.

B. Horen v. Coleco Industries

On July 3, 1981, Bill Horen was permanently paralyzed from the chest down when he attempted a shallow or surface-type dive from the deck partially surrounding his in-laws' pool and struck his head on the bottom. At the time of the accident, plaintiff was thirty-three years of age, five feet ten inches tall, and weighed 150 pounds.

The pool measured four feet in height and twenty-four feet in diameter and included a partial, manufacturer-supplied [FN40] decking and fencing which totally enclosed the pool and deck area. There was a ladder leading up to the enclosed pool area and another leading into the water. The center of the pool was dug out to a depth of approximately five feet. The water level ranged from approximately three and one-half feet to four and one-half feet. At the time of the accident

FN40. The pool was manufactured in 1978 by defendant Coleco, and was sold to the Coxes by defendant Bridgeport. Defendant Lomart is the successor corporation to Coleco.

"[t]he pool contained only one small, faded and peeling warning label affixed at the base of a ***408** corner of the chain-link fence adjoining the deck which read: 'No diving. Shallow Water.' However, Mr. Horen testified that he saw no warning labels or signs in or around the pool to indicate that there should be no diving. He also testified that he was a recreational swimmer of limited swimming and diving experience and that he had never received any diving instruction." 169 Mich.App. at 727, 426 N.W.2d 794.

On the date of the accident, Mr. Horen had not been drinking and was not taking medication. He testified that he had swum in the Coxes' pool once before the accident, had successfully dived from the deck area at that time and on the day of the accident, and, on both occasions, he had seen other adults successfully dive into the pool.

Plaintiff acknowledged that he could see the bottom of the pool from the deck, could tell the depth of the water by where it was in relation to his body, that he was aware of some danger of hitting the bottom of the pool, and that he could scrape or bruise himself if he performed a deep dive. However, he believed the Coxes' pool was a safe depth for a surface or shallow-type dive.

As in Glittenberg, the thrust of plaintiff's claims is that the defendants breached a duty to warn of the dangers of diving into the pool. The trial court granted the defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(8), [FN41] **222 concluding that, because the danger involved in *409 diving headfirst into an aboveground swimming pool is open and obvious, the pool manufacturer had no duty to warn.

FN41. The Court of Appeals recognized that, although the defendant moved for summary disposition pursuant to MCR 2.116(C)(8), summary disposition was to be reviewed as if it were brought pursuant to MCR 2.116(C)(10), because defendant Coleco argued that no genuine issue of material fact existed, that diving headfirst into an aboveground pool is an open and obvious danger for which a manufacturer has no duty to warn, and, hence, as a matter of law, that defendants were entitled to summary disposition. Furthermore, a review of the record revealed that the trial court also considered the motion as if it had been brought pursuant to MCR 2.116(C)(10). 169 Mich.App. at 728, 426 N.W.2d 794.

The Court of Appeals reversed the decision of the trial court, concluding, as did the panel in Glittenberg, that this Court's holding in Fisher v. Johnson Milk Co., 383 Mich. 158, 174 N.W.2d 752 (1970), that there is no duty to warn of an obvious danger associated with a simple product or tool, had been modified by Owens v. Allis-Chalmers Corp., supra. Thus, the panel held, where the injury was reasonably foreseeable, a jury question remained concerning whether the manufacturer used reasonable care in guarding against unreasonable, foreseeable injuries, even where the danger was obvious. [FN42]

FN42. Reviewing the evidence in a light most favorable to plaintiff, the Court of Appeals decided that it could not conclude that a genuine issue of material fact did not exist and pointed out that the plaintiff had presented evidence from which a jury might find the manufacturer's product posed an unreasonable and foreseeable danger.
"[A]n ordinary recreational swimmer of limited swimming and diving experience, with no diving training, might believe that a flat, shallow dive could be performed without threat of death or paraplegia, especially when the swimmer was not presented with a hazard sign sufficient to warn of such danger and when other swimmers were observed executing similar dives without harm. Even should the evidence establish [plaintiff's] consciousness of a vague danger, this would not preclude a jury from finding that a warning was nonetheless required to give full appreciation of the life-threatening risks involved. See Michigan Mut Ins Co v. Heatilator, 422 Mich 148, 154, 366 NW2d 202 (1985)." 169 Mich.App. at 731, 426 N.W.2d 794.

C. Spaulding v. Lesco Int'l Corp

Allan Spaulding was rendered quadriplegic as a result of diving into and striking his head on the bottom of an aboveground swimming pool at the home of his friend, Richard Henwood. The pool measured twenty-four feet in diameter by four feet *410 in height and the depth of water varied from approximately three and one-half feet at the sides to approximately four feet at the center. [FN43] Mr. Henwood estimated the water depth in the center to be about forty-six or forty-seven inches. On the day in question, plaintiff dived from a small eighteen-inch by eighteen-inch wooden platform that sat a few inches above the lip of the Henwood pool at the top of an "A" frame metal ladder that provided access to the pool. No warnings against diving were displayed on any part of the pool or the ladder. [FN44] At the time of the accident, plaintiffwas thirty-six years old, six feet tall, weighed 215 pounds, and considered himself to be a good swimmer. He had received some instructions in diving, could not recall any specifics, but had been in the Henwood pool on at least one prior occasion, and was in the pool at least fifteen to

twenty minutes on the day of the accident. Mr. Spaulding testified that he stood upright in the pool and was aware that the depth of the water was somewhere around his chest level, and that during the time that he was in the pool on August 5, he got in and ***411** out of the pool about ten to fifteen times, jumped from the platform into the pool, and dived headfirst from the platform into the pool two to four times.

FN43. The Henwood pool was purchased "used" by Richard Henwood in the spring of 1980, and was allegedly manufactured or distributed by defendants Oceanic Leisure Corporation and Lesco International Corporation. Its replacement liner was manufactured by defendant S.K. Plastics, and sold to Mr. Henwood by defendant Pietila Brothers, and its ladder was manufactured by defendant Coleco. Mr. Henwood installed the pool himself, using, to a certain extent, a manual he received free of charge from defendant Sears entitled, "Above-Ground Swimming Pools Do-It-Yourself Guidebook."

FN44. In Spaulding v. Lesco Int'l. Corp., supra 182 Mich.App. at 288, 451 N.W.2d 603, the Court of Appeals noted, however, that the S.K. Plastics warranty for its pool liner did include a warning stating:
"This swimming pool does not have sufficient depth for diving. Do not dive, do not allow others to dive into this swimming pool. Diving is dangerous."
The Court of Appeals also noted that, when manufactured, the Coleco ladder allegedly had warnings against diving, but they were absent at the time plaintiff's accident occurred. Id.

****223** Plaintiff sued the defendants, claiming they breached duties owed him under a number of theories including negligent design, manufacture, and warning, and breach of express and implied warranties of fitness and safety. The trial court granted summary disposition in favor of the defendants, essentially finding in pertinent part regarding all defendants no duty to warn of the open and obvious danger of diving into shallow water. Spaulding v. Lesco Int'l. Corp., supra 182 Mich.App. at 289-290, 451 N.W.2d 603.

Plaintiff appealed, and the Court of Appeals affirmed. Disagreeing with the Horen and Glittenberg panels, the Spaulding Court concluded:
"[A] manufacturer still has no duty to warn of obvious and patent dangers when a simple product is involved. We believe that the above-ground pool in this case was a simple product and that the dangers of making a deep dive into the pool were obvious. Moreover, we agree with the circuit court's conclusion that the failure to warn in this case was not the proximate cause of plaintiff's injuries. Plaintiff knew how deep the water was, how tall he was, and the dangers of making a deep dive into shallow water, including breaking his neck." Id. at 293, 451 N.W.2d 603.

The trial court in each case granted the defendants' motion for summary disposition on the basis that the danger of diving into shallow water was open and obvious and that the defendants therefore owed the plaintiffs no duty to warn of the danger. The Court of Appeals reversed the ruling of the trial court in Glittenberg v. Wilcenski and in Horen v. Coleco Industries, Inc., and affirmed the ***412** trial court ruling in Spaulding v. Lesco Int'l. Corp. This Court's plurality result in Glittenberg v. Doughboy Recreational Industries, Inc., led to rehearing and consolidation with Horen and Spaulding. 437 Mich. 1224, 464 N.W.2d 710 (1991).

LEVIN, Justice.

The question presented is whether summary disposition was properly granted defendant manufacturers and sellers of aboveground swimming pools on the basis that the danger of diving in a shallow aboveground swimming pool is open and obvious.

We would hold that the plaintiffs presented sufficient evidence to raise a genuine issue of material fact whether the danger is open and obvious, and would remand these cases for trial.

The plaintiff in each of these cases became quadriplegic as the result of diving in an aboveground swimming pool, and commenced an action claiming that the manufacturer and seller was negligent in failing to provide a warning concerning the dangers of diving in such a pool.

The majority holds, as a matter of law, that the dangers of diving in shallow pools are open and obvious, and there is no duty to warn. We would adhere to the approach outlined in Glittenberg v. Doughboy Recreational Industries, Inc., 436 Mich.

673, 699, 462 N.W.2d 348 (1990) (Glittenberg I), where, in remanding to the circuit court for further factual development, I joined in saying that "a manufacturer's duty to warn is not automatically excused when the risk of harm is obvious."

This Court remanded Glittenberg I for further factual development so that the question whether there was an obligation to warn of the dangers of diving in an aboveground pool would not be answered ***413** in a "vacuum." [FN1] The plaintiffs in the instant ****224** cases, consolidated on appeal, proceeded to develop a factual record that contains substantial evidence tending to show that users of aboveground pools do not perceive the risk of quadriplegic injury from diving, that they do not know how to dive in shallow water safely, and that it is possible to effectively warn of the risks of diving in shallow pools.

FN1. The rationale for the remand was stated:
"The judgment whether a warning was required in the circumstances of this case should not be made in a vacuum. The fundamental problem in cases such as this is that we lack the information necessary to make an intelligent decision, even with regard to the obviousness of the dangers of diving. We remain largely uninformed regarding such crucial questions as the efficacy of warnings against diving when they are provided, whether there is, in fact, any safe way to dive into shallow water, and what dangers are actually perceived by the users of above-ground pools. On remand, we urge the parties to provide evidence which will allow the court to evaluate the risk inherent in defendant's product, and its obvious or nonobvious qualities." 436 Mich. at 702, 462 N.W.2d 348. (Opinion of Boyle, J.) I signed this opinion. (Emphasis added.)

The majority adopts an analysis that ignores that evidence. In that vacuum, the majority concludes that because the shallowness of an aboveground pool is obvious, and the general risk of diving in such a pool is also obvious, there is no obligation to warn of the specific risk of "shallow" diving and catastrophic diving injury. [FN2]

FN2. The majority states:
"[W]here the facts of record require the conclusion that the risk of serious harm from the asserted condition is open and obvious, and no disputed question exists regarding the danger of the product, the law does not impose a duty upon a manufacturer to warn of all conceivable ramifications of injuries that might occur from the use or foreseeable misuse of the product." Op., pp. 218-219.

The majority effectively immunizes manufacturers ***414** and sellers of aboveground swimming pools from liability, and is regressive because it invites the swimming pool industry to take a step back on safety issues.

I

Our principal disagreement with the majority is with its failure to consider the evidence in the light most favorable to the plaintiffs.

As set forth in the majority opinion, "[t]he gravamen of each of the plaintiff's argument is that the danger presented is not open and obvious because the specific harm of paralysis or death is not generally recognized. Plaintiffs Horen and Spaulding add the argument that the danger is not open and obvious because the average user does not generally recognize that the laws of physics, biomechanics, and hydrodynamics can transform a miscalculated shallow dive into a deep dive that is recognized as dangerous." [FN3]

FN3. Op., p. 218.

Dr. Gabrielson offered the following data:
"The National Spinal Cord Injury Data Research Center, through its publications estimates that 800 diving injuries occur each year resulting in paralysis; further that as many as 25% of these injuries occur in pools."

The majority dismisses this evidence with the observation that the fact of injuries does not establish the latency of the danger alleged. [FN4] Putting aside that the majority concludes that the danger of diving in shallow water is open and obvious as a matter of law without considering the evidence, the frequency of such injuries suggests both the ***415** latency of danger and that it is not open and obvious.

FN4. Op., n. 28.

A reasonable person, viewing the plaintiffs' evidence as a whole, could conclude that a

significant number of catastrophic injuries occur, that the swimming pool industry has been aware of the potential for such injuries for a number of years [FN5] and in many instances provided warnings with the product, and that the likely consuming public does not appreciate either the general risk of diving in shallow water in an aboveground swimming pool or the specific risk of quadriplegic injury occurring during a shallow dive assumed by the uninformed diver to be safe.

FN5. Dr. Lawniczak testified on deposition:
The pool industry has had statistical evidence of a "significant problem associated with the foreseeable activity of headfirst entries into swimming pools by recreational users" as far back as the '5O's.

The majority acknowledges that Dr. Lawniczak testified that "the general public is not aware of and does not appreciate the grave risk of serious spinal cord injury when diving," [FN6] and that James Richardson testified that "the average person does not appreciate the fact that diving in shallow **225 water carries the potential for life-threatening injuries." [FN7]

FN6. Op., p. 218, n. 29.

FN7. Id.

Lawniczak testified that diving in shallow water is not necessarily an open and obvious danger to a recreational swimmer. Richardson, diving coach at the University of Michigan, testified that divers do not really understand the potential for serious injury when diving in a shallow pool: "the general public just does not understand about entering the water and what can happen, even at depths that appear to be, to everybody concerned, safe depths.... It's just a lot more going on there than ***416** people understand and can imagine is going on." (Emphasis added.)

The majority argues that "[t]he fact that all plaintiffs acknowledged the necessity to perform a shallow dive simply underscores the conclusion that the risk of diving in shallow water is open and obvious." [FN8]

FN8. Op., p. 218.

Performance of a shallow dive, while it is evidence that the diver recognizes a need to modify his actions in response to a perceived danger, is also evidence that divers incorrectly perceive that execution of a shallow dive is sufficient protection from the danger presented by diving in a shallow aboveground swimming pool.

Viewing the evidence most favorably to the plaintiffs, we would conclude that they offered sufficient evidence both of the latency of the specific risk of catastrophic injury, and that divers are unaware of the risks posed by diving in shallow water, to pose a genuine issue of material fact whether the specific risk is open and obvious.

II

The majority frames the analysis by distinguishing design defect cases from failure to warn cases for the purpose of applying the open and obvious, or "patent" danger rule. The majority, while acknowledging that the decision of this Court in Owens v. Allis-Chalmers Corp., 414 Mich. 413, 326 N.W.2d 372 (1982), abrogated the patent danger rule in design defect cases, holds that the open and obvious/patent danger rule still governs in failure to warn cases. [FN9]

FN9. Op., pp. 215-216.

***417** A

The patent danger rule was abrogated in Owens, supra, because, in part, the rule removed the incentive for adopting safer product designs. [FN10] The correlative rationale applies to a failure to warn; a manufacturer should provide warnings that make a product safer to use. [FN11]

FN10. Op., p. 215.
According to Owens, the obviousness of a risk is one factor to be considered in determining what a reasonably prudent manufacturer would do in the circumstances. See Owens, supra, 414 Mich. p. 425, 326 N.W.2d 372; see also Glittenberg I, supra, 436 Mich. pp. 699-700, 462 N.W.2d 348.

FN11. If these cases were to be tried by a jury, the jury would be instructed to apply SJI2d 25.31, which does not mention the obviousness of the risk to the plaintiff. The standard instruction speaks of the duty of a defendant manufacturer in these terms:

"The defendant had a duty to use reasonable care at the time it [manufactured] the [product] so as to eliminate unreasonable risks of harm or injury which were reasonably foreseeable.

"However, the defendant had no duty to [manufacture] a [product] to eliminate reasonable risks of harm or injury or risks that were not reasonably foreseeable.

"Reasonable care means that degree of care which a reasonably prudent manufacturer would exercise under the circumstances.... It is for you to decide ... what a reasonably prudent manufacturer would do or not do under those circumstances.

"A failure to fulfill the duty to use reasonable care is negligence." SJI2d 25.31. (Emphasis added.)

To be sure, there is no legal obligation to supply "superfluous" warnings, warnings that are by definition unneeded. A superfluous warning is not required because a warning is required only when it would make the product safer to use. We all agree that a product warning that does not apprise a consumer of anything of which he is not already aware does not make a product safer to use.

**226 The plaintiffs in the instant cases do not claim that the defendants should have warned of obvious dangers associated with aboveground swimming pools. The plaintiffs claim rather that there is a *418 risk of catastrophic injury, quadriplegia, that may result from diving in shallow aboveground pools, that this risk is not obvious, and that such pools would be safer to use if manufacturers provided a warning concerning the risk of catastrophic injury. A jury might properly conclude from the plaintiffs' evidence that the asserted danger is latent, and that a warning would make the product safer to use. Such a warning would not, on such a finding, be superfluous.

III

The majority attaches considerable significance to what it describes as the "simple" character of aboveground pools. The majority argues that because an aboveground pool is a "simple product" its inherent "characteristics and features ... are readily apparent or easily discernible upon casual inspection." [FN12]

FN12. Op., p. 217.

This description of "simple product" begs the question, since it assumes that all characteristics of a "simple" product are universally known, and therefore such products cannot present a latent danger. Under the majority's approach, a latent danger could never be found, and a warning never would be needed with a "simple product" because the characteristics of such products are, by definition, "universally known."

At some point "simplicity" and "complexity" come full circle. If simple products require no warnings because their characteristics are universally known, so too complex products because their characteristics are universally un known, and consumers should reasonably treat them with caution. If a car battery is not a simple product, then it can be argued that it is mysterious enough to warrant *419 extreme caution in its use. But surely the majority would not suggest that this "universally known latency" of risk obviates any obligation to warn.

The simplicity or complexity of a product is not controlling on a warning issue. The pertinent inquiry is whether a danger is latent. If a simple product can never in principle present an obvious risk to users, then the definition of "simple product" merely expresses the prejudgment that no latent risk inheres. But at that point the inquiry should focus on the basis for making that prejudgment.

The claim that there is nothing "enigmatic" about such pools is not accurate. [FN13] The plaintiffs presented evidence of properties inherent in a shallow aboveground pool that are indeed enigmatic and not observable upon casual inspection. The testimony of the expert witnesses negatives defendants' claims that the pools are comprised only of "universally known characteristics." [FN14]

FN13. " '[T]here is ... nothing enigmatic about [their] properties. [They have] no mechanical devices, but rather [are] uncomplicated ... product[s] with universally known characteristics.' " Op., p. 217 (quoting Griffin, J., in Glittenberg I).

FN14. See part I.

Undeniably the shallowness of aboveground pools is readily apparent. [FN15] It does not follow that because the "condition creating that danger" is readily apparent, all dangers created by the obvious

condition are readily apparent or "discoverable upon casual inspection."

FN15. The majority argues:
"[T]here is no dispute that the aboveground pools are simple products. No one can mistake them for other than what they are, i.e., large containers of water that sit on the ground, all characteristics and features of which are readily apparent or easily discernible upon casual inspection." Op., p. 217.

***420** The majority assumes that the bare observation of shallow water fully reveals all dangers inherent in shallow water. It is precisely plaintiffs' contention that at least some danger, the risk of quadriplegic injury, is not discoverable upon casual inspection of a shallow pool, and there is substantial ****227** evidence in the record supporting that contention. [FN16]

FN16. See part I.

IV

At the heart of the majority's analysis is the assertion that there is no need to warn of a specific risk if the general risk is open and obvious. Since the general risk of diving in shallow waters is, according to the majority, open and obvious, it is of no importance that the specific risks of quadriplegia, paralysis and the consequences are not generally recognized. [FN17]

FN17. "The gravamen of each of the plaintiff's argument is that the danger presented is not open and obvious because the specific harm of paralysis or death is not generally recognized.... However, the threshold issue is ... whether people in general are unaware of the fact that there is a risk of serious harm when diving in shallow water. The fact that all plaintiffs acknowledged the necessity to perform a shallow dive simply underscores the conclusion that the risk of diving in shallow water is open and obvious." Op., pp. 217-218. (Emphasis added.)
The majority also states that the plaintiffs
"seek to convert the duty to warn argument by conceding a readily apparent and generally recognized dangerous condition for which no duty exists, while claiming that because a specific consequence or degree of harm from that dangerous condition, i.e., paralysis or death, is not generally recognized...." Id., p. 218. (Emphasis added.)
The plaintiffs do not seek to evade the "duty analysis." Duty is not the issue. Inherent in the manufacturer--consumer relationship is the duty of reasonable care to avoid negligent conduct. Plaintiffs argue only that this duty includes the obligation to warn of a latent danger. The issue in the instant cases is whether the standard of care applicable to a manufacturer of aboveground swimming pools requires a warning about the risks of shallow diving and quadriplegia. As this Court stated in Moning v. Alfono, 400 Mich. 425, 438-439, 254 N.W.2d 759 (1977):
"Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation.... It is well established that placing a product on the market creates the requisite relationship between a manufacturer ... and persons affected by use of the product giving rise to a legal obligation or duty to the persons so affected."
As manufacturers of aboveground pools, defendants have a duty to make their products reasonably safe. Given the evidentiary record developed by the instant plaintiffs, we would not decide that standard of care issue as a matter of law. See part I.
See also Riddle v. McLouth Steel, 440 Mich. 85, 119-121, 485 N.W.2d 676 (1992) (Levin, J., dissenting) (distinction between "duty" and "standard of care").

***421** Although the plaintiffs acknowledged that they knew diving in shallow pools was dangerous, they offered evidence to support their claim that they did not appreciate the risk of quadriplegic injury.

A

Under the analytical framework adopted by the majority, if there is an obvious general danger associated with using a product, the manufacturer does not have an obligation to warn of any latent specific risk in using the product. The obligation to warn of a risk in using a product does not, however, depend on whether the risk is "general" or "specific." The essential question respecting an obligation to warn is whether the risk complained of is obvious.

Failure to warn cases that consider the interplay of "patent," "latent," "general," and "specific" characteristics of product-related dangers present

these issues in a variety of contexts. [FN18] But they ***422** share a common thread: whether there is an obligation to warn depends on the latency of the specific risk, not the general risk. If there is a specific latent risk, there is an obligation to warn, even if there is a more general obvious risk. In numerous cases, courts have rejected claims that mirror the arguments adopted by the majority.

FN18. These cases treat the issues in the contexts of theories of negligence, strict liability, assumption of risk, incurred risk, defective design, and adequacy of warning. The cases frequently combine two or more of these theories.

In Hopkins v. E.I. DuPont de Nemours & Co., 199 F.2d 930 (C.A. 3, 1952), a workman was killed by a dynamite explosion during an excavation project, and his widow brought a negligent failure to warn claim against the maker of the explosives. The United States Court of Appeals for the Third Circuit observed:

"Defendant tells us that everybody knows that dynamite is dangerous and ***228** that there is no need to warn against the obvious. But plaintiff's theory does not go to the generally dangerous character of dynamite.... Everybody knows that dynamite should not be thrown in a fire, but apparently most construction workers do not know that it should not be placed in a hole under the conditions existent in this case." Id. at 933. (Initial emphasis added.)

In East Penn Mfg. Co. v. Pineda, 578 A.2d 1113, 1122 (D.C.App., 1990), a mechanic was injured by a car battery that exploded. The manufacturer of the battery argued that the mechanic's experience had acquainted him with the particular risks associated with batteries, and thus there was no duty to warn of the dangers. The District of Columbia Appeals Court of Appeals held that the manufacturer had a duty to warn of the specific risk that the battery might explode during charging, even though the mechanic "clearly knew that a person should exercise ***423** care around batteries because they produce explosive gases."

In Whitehead v. St. Joe Lead Co., 729 F.2d 238 (C.A. 3, 1984), the plaintiff claimed that lead poisoning was caused by long-term exposure to lead in the plant owned by the defendant. The defendant argued that lead contamination was a generally known danger, and thus there was no duty to warn. The United States Court of Appeals for the Third Circuit responded:

"We cannot conclude that lead exposure in the workplace is a 'generally known' risk requiring no warning as a matter of law. Our concern is not with whether it is generally known that lead can be harmful if deliberately consumed. Rather, we consider whether safe exposure limits to airborne lead are generally known, and whether it is generally known that these levels were exceeded in plants like Alpha's." Id. at 254. (Emphasis added.)

In Haberly v. Reardon Co., 319 S.W.2d 859 (Mo., 1958), a boy helping his father paint, was blinded in one eye when cement-based paint accidentally lodged in his eye. The defendant paint manufacturer argued that there was no duty to warn of the specific danger of paint entering the eye because everyone knows that paint of any kind will cause problems if lodged in the eye. In rejecting this claim the Missouri Supreme Court said:

"It is certainly common knowledge ... that foreign substances ... should not be lodged in an eye.... [E]veryone knows that, generally speaking, a foreign substance in an eye ... sometimes will result in pain and ... possibly serious consequences. It does not follow ... from the fact that such is common knowledge that a specific warning [of the tragic consequences of paint in the eye] would not alert one to act far differently than ***424** otherwise he would have acted...." Id. at 867. (Emphasis added.)

In Leonard v. Uniroyal, Inc., 765 F.2d 560, 566 (C.A. 6, 1985), where one truckdriver was injured and another killed when an underinflated truck tire blew out, the plaintiff secured a favorable jury verdict on a claim that Uniroyal was negligent in failing to warn of the dangers of tire underinflation. Uniroyal argued that the jury should have been instructed that there was no duty to warn since truckdrivers generally knew of the dangers from underinflated tires. The United States Court of Appeals for the Sixth Circuit held that Uniroyal was not entitled to a "no duty" instruction since it produced no evidence to establish that danger from underinflated tires is common knowledge among professional truckdrivers.

In Long v. Deere & Co., 238 Kan. 766, 715 P.2d

1023 (1986), a worker, injured when a "crawler loader" rolled over, claimed that the defendant should have warned of the necessity of wearing a seat belt while operating the loader. Deere argued that since the risks of not using seat belts are generally known, a warning would have been futile. The Kansas Supreme Court held that it could not say as matter of law that because of the common use of seat belts in passenger vehicles that the risks associated with the loader were commonly known, and that a warning would have been futile.

****229** In Brune v. Brown Forman Corp., 758 S.W.2d 827, 831 (Tex.App., 1988), the Texas Court of Appeals reversed a summary judgment in favor of a liquor manufacturer in an action brought by a survivor after her daughter died from acute alcohol poisoning. In holding that the failure to warn claim was improperly dismissed, the court said:

***425** "[T]he fatal propensities of acute alcohol poisoning cannot be readily categorized as ordinary common knowledge. Although there is no question that drinking alcoholic beverages will cause intoxication and possibly even cause illness is a matter of common knowledge, we are not prepared to hold, as a matter of law, that the general public is aware that the consumption of an excessive amount of alcohol can result in death. We realize that there is no clear line between what is and is not common knowledge, but where facts, as shown by appellant's summary judgment proof, show how easily disputed the knowledge of the fatal propensities of alcohol may be, we will not recognize it as common knowledge as a matter of law." (Emphasis added.) [FN19]

FN19. Other cases that tie a failure to warn claim to the awareness of a specific danger include Rinehart v. Int'l Playtex, Inc, 688 F.Supp. 475 (S.D.Ind., 1988) (the risk of toxic shock syndrome is latent, not open and obvious, thus Playtex had a duty to warn of the particular risk; the incurred risk defense requires more than general awareness of a potential for mishap; it must show acceptance of a specific risk); Shuput v. Heublein, Inc., 511 F.2d 1104, 1106 (C.A. 10, 1975) (the plaintiff was partially blinded after being hit in the eye by a plastic stopper that popped out from a champagne bottle; the court said "[t]he propensities of bubbly wine may be well known to many but are not a matter of such common knowledge as to be established as a matter of law and imposed as a matter of judicial knowledge"). Accord Burke v. Almaden Vineyards, Inc., 86 Cal.App.3d 768, 150 Cal.Rptr. 419 (1979).
The same thread runs through cases that present the issue in terms of whether the plaintiff "assumed the risk" of injury. Cota v. Harley Davidson, 141 Ariz. 7, 684 P.2d 888 (1984) (the plaintiff, injured in motorcycle crash when a gas tank ruptured, claimed defective design; Harley raised an assumption of risk defense; the court held that Harley was not entitled to an instruction on assumption of risk because, although the plaintiff had general knowledge of the danger, there was no evidence that he had actual knowledge of the specific risk that a mirror bracket could puncture a tank at 20 to 30 mph).
The confluence between the warning and assumption of risk cases lies in the centrality of the issue of the obviousness of the danger that produced an injury.

B

The majority further characterizes the plaintiff's claims regarding the specific risk of ***426** quadriplegic injury as claims not about the danger presented by the pools, but, rather, only about the "specific consequences or degree of harm" from the danger. [FN20]

FN20. Op., p. 218.

It would, indeed, be unreasonable, probably impossible, to require a manufacturer to warn consumers about every conceivable injury that might result from the use of a product, and the law assuredly does not impose such an obligation. [FN21] While we agree that there is no obligation to warn of a particular danger simply because it is "conceivable," the plaintiffs do not argue that there is an obligation to warn of all conceivable dangers associated with aboveground pools. The plaintiffs argue that there is a specific significant danger for which a warning should be supplied because that danger is latent, and a warning would reduce the number of occurrences of significant injury.

FN21. "[S]urely a manufacturer, to be protected from liability for negligence, need not enumerate the possible injuries which might befall one...." Jamieson v. Woodward & Lothrop, 101 U.S.App.D.C. 32, 39, 247 F.2d 23 (1957).

V

The majority states:
"Most jurisdictions that have addressed similar cases have been unwilling to impose liability on the pool manufacturer or seller." [FN22]

FN22. Op., p. 211.

The results in the swimming pool cases, while consistent with the holding by the majority, are problematic. Closer examination **230 reveals merely coincidental support for the result in the instant cases, and highlights the inadequacy of the approach taken by the majority.

*427 A

Several of the cases cited differ significantly from the instant cases in that they did not concern injuries resulting from shallow or "flat" dives into aboveground pools, but, rather, involved injuries sustained from vertical or "deep" dives. [FN23]

FN23. In Kelsey v. Muskin Inc., 848 F.2d 39 (C.A. 2, 1988), the plaintiff became quadriplegic after diving in an aboveground pool, headfirst with his arms at his side, from a height of eight feet. In Howard v. Poseidon Pools, 72 N.Y.2d 972, 534 N.Y.S.2d 360, 530 N.E.2d 1280 (1988), the plaintiff was severely injured after attempting to dive headfirst through an inner tube that was floating in a shallow aboveground pool. In Belling v. Haugh's Pools, Ltd, 126 A.D.2d 958, 959, 511 N.Y.S.2d 732 (1987), the plaintiff suffered serious injury after attempting what the court described as a "vertical dive" through an inner tube floating in a shallow pool.

Because these cases did not involve the flat or shallow dives attempted by the instant plaintiffs, there was no expert testimony regarding the industry's awareness of the risk or danger of shallow diving, and that the public was unaware of that risk. [FN24]

FN24. Smith v. Stark, 103 A.D.2d 844, 478 N.Y.S.2d 353 (1984), involved a claim of negligent design, and the memorandum opinion does not indicate whether the alleged design defect resulted from the lack of a warning. Cf. Colosimo v. May Dep't. Store Co., 466 F.2d 1234 (C.A. 3, 1972), involving a claim that the absence of a warning rendered the design of the pool defective.

B

The majority states that it eschews the proximate cause approach [FN25] in favor of "the more difficult duty analysis." [FN26]

FN25. "Summary judgment in favor of the defendant has been based on lack of a causal connection between the alleged negligent failure to warn and the plaintiff's injury. Courts typically focus on the plaintiff's deposition testimony.... From this, it is concluded that, because the plaintiff was aware of the shallow condition of the pool's water and the dangers inherent in a headfirst dive into observably shallow water, the absence of a warning conveying those very facts could not be a proximate cause of the plaintiff's injuries." Op., p. 211.

FN26. Op., p. 211.

*428 As the majority notes, [FN27] courts that concluded that a failure to warn could not have been a proximate cause of a diving injury typically focused on the testimony presented by the plaintiffs themselves. [FN28] The courts thus drew their conclusions about the obviousness of the dangers presented by the pools without evidentiary records comparable to those in the instant cases. [FN29]

FN27. Op., p. 211.

FN28. See cases cited in Op., pp. 213-214, n. 15. The courts in two of the cases held that the plaintiff's conduct, not the lack of a warning, was the sole proximate cause of his injuries. See Howard v. Poseidon Pools, Inc., n. 23 supra at 974, 534 N.Y.S.2d 360, 530 N.E.2d 1280; Winant v. Carefree Pools, 709 F.Supp. 57, 62 (E.D.N.Y., 1989). This further reduces the persuasiveness of the cases, since Michigan law recognizes that there may be more than one proximate cause of an injury.

FN29. See part I.

Other courts, in deciding swimming pool cases, implicitly concluded that a warning would not have altered the conduct of the plaintiff. In contradistinction to the instant cases, those courts were not presented evidence supporting claims that pool users generally are unaware of the risks of shallow diving and catastrophic injury. To the extent that the cited cases involved claims that

manufacturers should have given general warnings about the dangers of diving, the claims are inapposite to those now before this Court.

C

The assertion that swimming pool manufacturers and sellers have not been held subject to liability in similar cases by "[m]ost jurisdictions" [FN30] is overstated. [FN31] ****231** Other jurisdictions have not uniformly ***429** responded to such claims. [FN32]

FN30. Op., p. 211.

FN31. The majority cites eleven cases from other jurisdictions that involve diving accidents in aboveground pools. However, four of the cases, Winant, n. 28 supra, Howard, n. 23 supra, Belling, n. 23 supra, and Smith, n. 24 supra, were decided under the law of a single jurisdiction, New York.

A variation on the swimming pool cases is found in Griebler v. Doughboy Recreational, Inc., 160 Wis.2d 547, 560, 466 N.W.2d 897 (1991), where the Wisconsin Supreme Court held that diving in water of unknown depth presented a danger open and obvious as a matter of law. The plaintiff presented testimony from experts to the effect that the average consumer does not appreciate the risks of diving into water of unknown depth. The nature of the analysis is unclear, but the court appears to have looked at proximate cause instead of duty issues. The plaintiff apparently introduced expert testimony to support his argument that his conduct was not unreasonable.

The Griebler court grounded the result on two Wisconsin cases that represented "nearly twenty years of precedent," id. at 561, 466 N.W.2d 897, and seemed to imply that the plaintiff was guilty of contributory negligence: "We refuse to overrule Scheeler [v. Bahr, 41 Wis.2d 473, 164 N.W.2d 310 (1969),] and Davenport [v. Gillmore, 146 Wis.2d 498, 431 N.W.2d 701 (1988),] and adopt the rule advanced by the court of appeals. Doing so would open the door to plaintiffs recovering for injuries they suffered as the result of their own unreasonable behavior.

"Although expert opinion may be relevant in determining what is an open and obvious danger, the test is ultimately one of reasonableness." Id. 160 Wis.2d at 559-560, 466 N.W.2d 897. (Emphasis added.)

The court briefly discussed Corbin v. Coleco Industries, Inc., 748 F.2d 411, 417-418 (C.A. 7, 1984) but merely dismissed it:

"We have already rejected this position as a reason to overrule nearly twenty years of precedent." 160 Wis.2d at 561, 466 N.W.2d 897.

FN32. Stanton v. Miller, 66 Ohio.App.3d 201, 204, 583 N.E.2d 1080 (1990), concerned a diver seriously injured after diving in an aboveground pool. The court reversed a grant of summary judgment in favor of the manufacturer and retailer, holding that diving in the pool did not constitute "primary assumption of the risk," and that the record did not demonstrate that the dive constituted even an "implied assumption of risk."

Although using the taxonomy of "assumption of risk," the holding of the court implicates duty to warn issues. The court distinguished "primary" and "implied" assumption of risk:

"[Primary assumption of risk] is predicated upon a determination, as a matter law, that the defendant owes no duty to the plaintiff ... because certain risks are so inherent in some activities that they cannot be eliminated.

"Implied assumption of risk is, on the other hand, defined as the plaintiff's consent to or acquiescence in an appreciated, known or obvious risk to the plaintiff's safety." Id. at 203-204, 583 N.E.2d 1080. (Emphasis added.)

The court added:

" 'Clearly, there is a risk of injury while diving into a shallow pool. The risk, however, is not so inherent as to relieve pool operators from any duty whatsoever to all divers.' " Id. at 204, 583 N.E.2d 1080 (quoting Collier v. Northland Swim Club, 35 Ohio.App.3d 35, 518 N.E.2d 1226 [1987]). (Emphasis added.)

By declining to find that the plaintiff's conduct constituted "primary assumption of risk," the court refused to find that the dangers of diving in an aboveground pool were so obvious as to preclude a duty to warn on the part of the manufacturer or retailer. Had the court found evidence sufficient to raise the issue of "implied" assumption of risk, the issue would ordinarily have gone to the jury. Id. 66 Ohio App.3d at 203, 583 N.E.2d 1080.

In Erickson v. Muskin Corp., 180 Ill.App.3d 117, 121-125, 535 N.E.2d 475 (1989), the court applied an "assumption of risk" analysis to a case concerning a diver who broke his neck after diving through an inner tube in an aboveground pool. The court

affirmed a jury verdict finding both that defendant owed a duty to warn of the danger of diving into the pool, but that the plaintiff assumed ninety-six percent of the risk. The court said:

"A subjective test [for whether the plaintiff assumed the risk] is used, i.e., what plaintiff actually knew. Plaintiff's age, experience, knowledge, and understanding, in addition to the obviousness of the defect and the danger it poses will all be relevant factors for the jury's consideration.

* * * * * *

"Moreover, plaintiff's use of expert testimony to show that the public may not be aware of the hazards of diving into an above-ground pool is not relevant to what Lance [Erickson] himself knew. Lance's knowledge, or lack thereof, and whether he had assumed all or part of the risk was a question of fact to be resolved by the jury." (Emphasis added.)

The duty to warn in this case was determined by an "objective standard." Id. at 122, 535 N.E.2d 475. The obviousness of the danger neither prevented the case from reaching a jury, nor did the jury's involvement produce a windfall for the plaintiff, whose recovery was reduced by ninety- six percent.

See also King v. S.R. Smith, Inc., 578 So.2d 1285, 1287 (Ala., 1991) (reversing summary judgment in favor of a manufacturer who argued no duty to warn of the danger of diving from a diving board into an in-ground pool; "Whether a danger [is] 'open' and 'obvious' does not go to the issue of duty of the defendant.... Instead, 'open' and 'obvious' danger relates to the affirmative defense of assumption of risk, ... and the issue of causation."

In Shaw v. Petersen, 169 Ariz. 559, 821 P.2d 220, 222 (1991), parents of 19 month old child injured after falling in a pool claimed the owner should have warned of danger of the pool. The Court said: "Whether a reasonable person would believe a pool was an open and obvious hazard to a 19 month old child is a question that relates to breach of duty, not its existence. Whether a hazard is 'open and obvious' is not relevant to determine the existence of duty, rather it is relevant to determining if the duty was breached."

***431** In Corbin v. Coleco Industries, Inc., 748 F.2d 411 (C.A. 7, 1984), the United ****232** States Court of Appeals for the Seventh Circuit reversed a summary judgment on a negligent failure to warn claim granted defendant manufacturer. After reviewing the record of expert testimony, the court said:

"[E]ven though people are generally aware of the danger of diving into shallow water, they believe that there is a safe way to do it, namely, by executing a flat, shallow dive. If people do in fact generally hold such a belief, then it cannot be said, as a matter of law, that the risk of spinal injury from diving into shallow water is open and obvious. Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious." [FN33]

FN33. Id. at 417-418.

The result in Corbin is particularly persuasive. The Corbin court, like the majority in the instant cases, employed a "duty analysis," [FN34] and focused on the testimony of experts as well as the plaintiff himself, [FN35] but reached a result contrary to that of ***432** the instant majority. The court did not find that the danger of diving in a shallow aboveground pool was open and obvious, but only that the plaintiff presented evidence "sufficient to preclude summary judgment ... on the basis of the open and obvious defense." [FN36]

FN34. Id. at 417.

FN35. Id. at 418. The court also reversed the grant of summary judgment on the proximate cause issue based on plaintiff's knowledge of the danger.

FN36. Id. at 417.

We would similarly so conclude that there is a genuine issue of material fact, and would remand these cases for trial.

MICHAEL F. CAVANAGH, J., concurs.

MALLETT, Justice (dissenting).

Although I concur in the majority's analysis, I dissent with regard to its conclusion. Because I do not consider the presented threat open and obvious,

an aboveground pool manufacturer has a duty to warn.

Therefore, I respectfully dissent from my colleagues.

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Supreme Court of Michigan.

Royal MONING, by his next friend, Ronald Moning, and Ronald Moning, Individually, Plaintiffs-Appellants,
v.
Joseph ALFONO, a minor, Yvonne Alfono, and Vincent Alfono, and Georgette Campbell, d/b/a Campbell Discount Jewelry, King Tobacco and Grocery Co., a Michigan Corporation, and Chemtoy Corporation (formerly Chemical Sundries, Inc.), a Foreign Corporation, jointly and severally, Defendants-Appellees.

No. 55669.

June 15, 1977.

Twelve-year-old boy brought negligence action against manufacturer, wholesaler and retailer of 10 cents slingshot seeking recovery for loss of sight of an eye which was struck by a pellet fired from a slingshot being used by his 11- year-old playmate. The Circuit Court, Wayne County, directed verdict for defendants, and plaintiffs appealed. The Court of Appeals, Division I, affirmed, and plaintiff appealed. The Supreme Court, Levin, J., held that whether manufacturer, wholesaler and retailer, in violation of obligation of due care to bystander affected by use of product, created unreasonable risk of harm in marketing slingshots directly to children was a jury question.

Reversed and remanded.

Fitzgerald, J., dissented with opinion in which Coleman, J., joined.

West Headnotes

[1] Products Liability ⇦ 22
313Ak22

Manufacturers, wholesalers and retailers of manufactured products owe a legal obligation of due care to bystanders affected by use of the products.

[2] Products Liability ⇦ 88
313Ak88

Whether manufacturer, wholesaler and retailer of 10 cents slingshot were in violation of obligation of due care to bystander by creation of an unreasonable risk of harm in marketing slingshot directly to children was question for jury.

[3] Negligence ⇦ 1537
272k1537
(Formerly 272k119(1))

It obscures the separate issues in negligence case to combine and state them together in terms of whether there is a duty to refrain from particular conduct.

[4] Negligence ⇦ 233
272k233
(Formerly 272k1)

"Negligence" is conduct involving an unreasonable risk of harm.

[5] Negligence ⇦ 233
272k233
(Formerly 272k4)

Reasonableness of risk of harm, whether analyzed or expressed in terms of duty, proximate cause or the specific standard of care, and whether regarded as issue of law or fact or for the court or the jury to decide, turns on how the utility of the defendants' conduct is viewed in relation to the magnitude of the risk.

[6] Negligence ⇦ 1693
272k1693
(Formerly 272k136(14))

Preference for jury resolution of issue of negligence is not simply an expedient reflecting the difficulty of stating a rule that will readily resolve all cases; rather, it is rooted in the belief that the jury's judgment of what is reasonable under the circumstances of a particular case is more likely than the judicial judgment to represent the community's judgment of how reasonable persons would conduct themselves.

[7] Negligence ⇦ 1693
272k1693
(Formerly 272k136(14))

If experience should be that juries invariably reach one result in determining standard of care, that may suggest specific standard of care upon which all reasonable persons would agree; however, until community judgment is made to appear, the principle that doubtful questions regarding application of standard of care should be decided by reference to community judgment requires jury submission of question so in doubt.

[8] Negligence ⇦ 200
272k200
(Formerly 272k1)

Law of negligence was created by common-law judges and, therefore, it is the court's responsibility to continue to develop or limit the development of that body of law absent legislative directive.

[9] Negligence ⇦ 202
272k202
(Formerly 272k1)

Elements of an action for negligence are duty, general standard of care, specific standard of care, cause in fact, legal or proximate cause, and damage.

[10] Negligence ⇦ 210
272k210
(Formerly 272k2)

"Duty" comprehends whether defendant is under any obligation to the plaintiff to avoid negligent conduct; it does not include where there is an obligation, the nature of the obligation, the general standard of care and the specific standard of care.

[11] Negligence ⇦ 1694
272k1694
(Formerly 272k136(14))

[11] Negligence ⇦ 1713
272k1713
(Formerly 272k136(25))

While court in negligence action decides questions of duty, general standard of care and proximate cause, jury decides whether there is cause in fact in the specific standard of care and whether defendants' conduct in particular case is below general standard of care, including, unless court is of opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy, whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.

[12] Negligence ⇦ 210
272k210
(Formerly 272k2)

[12] Negligence ⇦ 387
272k387
(Formerly 272k56(1.4))

"Duty" is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person; while proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences.

[13] Products Liability ⇦ 6
313Ak6

A manufacturer owes consumer an obligation to avoid negligent conduct and the obligation extends to persons within the foreseeable scope of the risk.

[14] Products Liability ⇦ 88
313Ak88

Eleven-year-old's shooting pellets toward tree with a slingshot and ricochet into 12-year-old playmate's eye was within the "recognizable risk of harm" created by marketing slingshot directly to children and the ricochet was "a normal consequence of the situation" created by manufacturers, retailers and wholesalers' conduct, thus, creating jury question on liability of manufacturer, retailer, and wholesaler.

[15] Negligence ⇦ 231
272k231
(Formerly 272k4)

[15] Negligence ⇦ 233
272k233
(Formerly 272k4)

In a negligence case, standard of conduct is reasonable or due care.

[16] Products Liability ⇐ 23.1
313Ak23.1
(Formerly 313Ak23)

A person who supplies an article to a child which may pose a reasonable risk of harm in the hands of an adult but which poses an unreasonable risk of harm in the hands of the child is subject to liability for resulting harm under doctrine of negligent entrustment.

[17] Products Liability ⇐ 23.1
313Ak23.1
(Formerly 313Ak23)

Doctrine of negligent entrustment is not limited to plaintiffs whose "individual" propensities are known to the supplier; doctrine also applies to classes of persons.

[18] Negligence ⇐ 351
272k351
(Formerly 272k26)

[18] Parent and Child ⇐ 13(1)
285k13(1)

A parent or other responsible adult who entrusts a potentially dangerous instrumentality to a child may be subject to liability.

[19] Products Liability ⇐ 23.1
313Ak23.1
(Formerly 313Ak23)

Liability under doctrine of negligent entrustment arises from the defendant's act of misconduct; he has actually created an unreasonable risk to others by placing a chattel in the hands of a person whose use thereof is likely to create a recognizable risk to third persons.

[20] Negligence ⇐ 216
272k216
(Formerly 272k7)

The obligation to guard or secure objects which are dangerous to children arises because of the likelihood of their own intermeddling; persons dealing with children must take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that comes in their way.

[21] Negligence ⇐ 1174
272k1174
(Formerly 272k39)

The attractive nuisance doctrine, an exception to the general rule limiting liability of landowners for injuries to trespassers, is based on child's inability to appreciate danger and his inclination to explore without regard to the risk.

[22] Negligence ⇐ 1174
272k1174
(Formerly 272k39)

Doctrine of attractive nuisance does not depend on the landowner's knowledge that the individual child is incompetent.

[23] Negligence ⇐ 351
272k351
(Formerly 50k21, 272k14)

Doctrine of negligent entrustment is not peculiar to automobiles but, rather, an ordinary application of general principles for determining whether a person's conduct was reasonable in light of the apparent risk.

[24] Negligence ⇐ 351
272k351
(Formerly 50k21, 272k14)

Doctrine of negligent entrustment is grounded in general principle that a reasonable person will have in mind the immaturity, inexperience and carelessness of children.

[25] Products Liability ⇐ 88
313Ak88

Issue of whether manufacturer, retailer and wholesaler of slingshot were subject to liability for 12-year-old's loss of sight of an eye which was struck by a pellet fired from a slingshot being used by his 11-year-old playmate could not be taken from jury on supposition that an 11-year-old boy knows how slingshot operates and, therefore, appreciates the risk.

[26] Products Liability ⇐ 12

313Ak12

Just as the driver of an automobile is expected to take precautions for the safety of children playing near a highway even though children can be expected to appreciate the risk and the driver does not know that the individual children are incompetent to look after themselves, so too a supplier can be expected in marketing a product to take precautions for the safety of children and others even if the child may be expected to appreciate the risk and individual children may thus appreciate it and be skilled in using the product.

[27] Negligence ⚿ 233
272k233
(Formerly 272k4)

Even if a person recognizes that his conduct involves a risk of invading another person's interest, he may nevertheless engage in such conduct unless the risk created by his conduct is unreasonable.

[28] Negligence ⚿ 1693
272k1693
(Formerly 272k136(14))

Balancing of magnitude of the risk and utility of the actor's conduct in determining whether risk created by conduct is unreasonable requires a consideration by the court and the jury of the societal interests involved; the issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases.

[29] Common Law ⚿ 2.1
85k2.1
(Formerly 85k2)

Statutes and other legislative judgments may themselves be a source of common law.

[30] Products Liability ⚿ 88
313Ak88

Balancing the magnitude of risk and utility of conduct consisting of manufacture and sale of slingshots to children, there is not sufficient basis for concluding as matter of law that utility of conduct outweighs risk of harm thereby created, and sharp difference of opinion regarding balancing of utility and risk of harm would require submission of questions for jury assessment as part of its consideration of reasonableness of risk of harm and of manufacturers', retailers' and wholesalers' conduct in sale of slingshots.

[31] Common Law ⚿ 1
85k1

The common law is not immutable, unable to respond to change in society and technology.

Negligence ⚿ 1172
272k1172
(Formerly 272k39)

Trespass is basic requirement of attractive nuisance.

****761 *431** Milan & Miller, Zeff & Zeff, Detroit, for plaintiffs and appellants; Edward Grebs, Detroit, of counsel.

****762 *432** Robert E. Fox, Detroit, for defendant-appellee, cross- appellant and cross-appellee Chemtoy Corp., formerly Chemical Sundries Co., appearing specially.

Richard B. Kramer, Southfield, for defendant-appellee, cross-appellant and cross-appellee King Tobacco.

Garan, Lucow, Miller, Lehman, Seward & Copper, by Albert A. Miller, Detroit, for cross-appellees Joseph Alfono, a minor, Yvonne Alfono and Vincent Alfono.

LEVIN, Justice.

Royal Moning, when he was 12 years old, lost the sight of an eye which was struck by a pellet fired from a slingshot being used by his 11 year old playmate, Joseph Alfono.

There was evidence that Alfono purchased two 10 cents slingshots from defendant Campbell Discount Jewelry and had given one to Moning, and that the slingshots had been manufactured by defendant Chemtoy Corporation and distributed by defendant King Tobacco and Grocery Company.

Moning claims that it is negligence to market slingshots directly to children, and that the

manufacturer, wholesaler and retailer are subject to liability.

The claim against the Alfonos was settled. Upon completion of Moning's proofs, the trial judge directed a verdict for the remaining defendants. The Court of Appeals affirmed.

[1][2] We remand for a new trial because 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, and whether defendants in violation of that obligation created an unreasonable risk of harm in marketing slingshots directly to children is for a jury to decide, reasonable persons being of different minds.

My colleague declares that there is no legal duty to refrain from manufacturing slingshots for and marketing them directly to children.

[3] It obscures the separate issues in a negligence ***433** case (duty, proximate cause and general and specific standard of care) to combine and state them together in terms of whether there is a duty to refrain from particular conduct.

It is now established that the manufacturer and wholesaler of a product, by marketing it, owe a legal duty to those affected by its use. The duty of a retailer to a customer with whom he directly deals was well established long before the manufacturer and wholesaler were held to be so obligated. The scope of their duty now also extends to a bystander. All the defendants were, therefore, under an "obligation for the safety" [FN1] of Moning; they owed him a duty to avoid conduct that was negligent.

> FN1. See Prosser, Torts (4th ed.), s 37, p. 206, quoted in my colleague's opinion.

Whether it would be a violation of that obligation to market slingshots directly to children is not a question of duty, but of the specific standard of care: the reasonableness of the risk of harm thereby created.

[4] Negligence is conduct involving an unreasonable risk of harm.

Slingshots pose a risk of harm. In manufacturing and marketing slingshots the defendants necessarily created such a risk.

The meritorious issues are whether the risk so created was unreasonable because the slingshots were marketed directly to children, and whether this should be decided by the court or by the jury.

[5] The reasonableness of the risk of harm, whether analyzed or expressed in terms of duty, proximate cause or the specific standard of care, and whether regarded as one of law or fact or for the court or the jury to decide, turns on how the utility of the ***434** defendants' conduct is viewed in relation to the magnitude of the risk.

If a court is of the opinion that marketing slingshots directly to children is of such utility that it should be fully protected, the court in effect determines as a matter of law that the risk of harm so created is not unreasonable and, therefore, such conduct is not negligent.

****763** The resolution of the balance between the utility of children having ready-market access to slingshots and the risk of harm thereby created is an aspect of the determination of the reasonableness of that risk and of the defendants' conduct, and should be decided by a jury:

Reasonable persons can differ on the balance of utility and risk, and whether marketing slingshots directly to children creates an unreasonable risk of harm;

The interest of children in ready-market access to slingshots is not so clearly entitled to absolute protection in comparison with the interest of persons who face the risk thereby created as to warrant the Court in declaring, as a rule of common law, that the risk will be deemed to be reasonable.

The statement that "we are being asked to perform a legislative task" because a holding for Moning "would in effect be making a value judgment and saying * * * (that slingshots) should not be manufactured or marketed " (emphasis supplied) to children assumes that allowing juries to decide the reasonableness of the risk of harm created by marketing slingshots directly to children will so burden the manufacture and marketing of slingshots that all manufacturing and marketing would cease,

rather than merely affect the manner and cost of marketing slingshots, and does not take *435 into account that however the Court decides the case it in effect makes a value judgment:

> Affirming a directed verdict for the defendants in effect expresses a value judgment that the interest of the child in ready-market access to slingshots is of such societal importance that as a matter of law it takes precedence over the interest in protecting persons exposed to the risk of harm so created, or that all reasonable persons would agree that the risk so created is not unreasonable.
>
> Reversing the directed verdict and holding that the issue should be decided by a jury is not an expression of a value judgment that slingshots should not be manufactured and marketed, but rather expresses a value judgment that all reasonable persons do not agree concerning the reasonableness of the risk so created and that the interest of the child in ready-market access is not of such overriding importance as to be entitled to absolute protection as a matter of law, and therefore a jury, applying the community's judgment of how reasonable persons would conduct themselves, should make the ultimate value judgment of the risks and the societal importance of the interests involved in marketing slingshots directly to children.

However the Court decides this case, it necessarily makes a choice, even if the Legislature may later make a different choice.

[6] If the issue is left to juries to decide, different juries will, indeed, reach different results, sometimes in cases appearing to be factually indistinguishable. The variant results may be more perceptible in this kind of case than in one where it may appear there are more variables. The preference for jury resolution of the issue of negligence is not, however, simply an expedient reflecting the difficulty of stating a rule that will readily resolve *436 all cases; rather, it is rooted in the belief that the jury's judgment of what is reasonable under the circumstances of a particular case is more likely than the judicial judgment to represent the community's judgment of how reasonable persons would conduct themselves.[FN2]

> FN2. "The reasonable man represents the general level of community intelligence and perception and the jury, being a cross-section of the community, should best be able to tell what that general level is." 2 Harper & James, The Law of Torts, s 16.10, p. 936.
>
> Similarly see, Prosser, supra, s 37, p. 207; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99, 120 (1868).

[7] If the experience should be that juries invariably reach one result, that may suggest the specific standard of care upon which "all" reasonable persons would **764 agree.[FN3] Until the community judgment is made so to appear, the principle that doubtful questions regarding the application of the standard of care should be decided by reference to the community judgment requires jury submission of the question so in doubt.

> FN3. See Prosser, supra, s 35, p. 188; 2 Harper & James, supra, s 17.2, p. 971.

[8] The law of negligence was created by common law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law absent legislative directive. The Legislature has not approved or disapproved the manufacture of slingshots and their marketing directly to children; the Court perforce must decide what the common law rule shall be.

I
Duty and Proximate Cause

While we all agree that the duty question is *437 solely for the court to decide, [FN4] the specific standard of care is not part of that question.

> FN4. See Prosser, supra, s 37, p. 206. See, also, Elbert v. Saginaw, 363 Mich. 463, 476, 109 N.W.2d 879 (1961).

[9] The elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage.

"[10] Duty" comprehends whether the defendant is under any obligation to the plaintiff to avoid negligent conduct; it does not include where there is an obligation the nature of the obligation: the general standard of care and the specific standard of care.

Dean Prosser observed:
"It is quite possible, and not at all uncommon, to deal with most of the questions which arise in a negligence case in terms of 'duty.' Thus the standard of conduct required of the individual may be expressed by saying that the driver of an automobile approaching an intersection is under a duty to moderate his speed, to keep a proper lookout, or to blow his horn, but that he is not under a duty to take precautions against the unexpected explosion of a manhole cover in the street. But the problems of 'duty' are sufficiently complex without subdividing it in this manner to cover an endless series of details of conduct. It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy ***438** the duty." Prosser, Torts (4th ed.), s 53, p. 324 (emphasis supplied).

The statement in my colleague's opinion that the "defendants did not owe plaintiff minor the asserted duty not to manufacture, distribute and sell slingshots" combines the separate questions of duty, general and specific standard of care and proximate cause: whether in marketing a product a manufacturer, wholesaler and retailer are under any legal obligation to a bystander (duty); the nature of that obligation (general standard of care: reasonable conduct "in the light of the apparent risk"); whether marketing slingshots directly to children is reasonable conduct (specific standard of care); whether marketing slingshots directly to children is "so significant and important a cause (of loss resulting from such marketing) that the defendant should be legally responsible" [FN5] (proximate cause, a policy question often indistinguishable from the duty question).

FN5. Prosser, supra, s 42, p. 244.

**765 [11] Combining in one statement these different questions obscures the functions of the court and jury. While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: [FN6] whether defendants' conduct in the particular case is below the general standard of care, including unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable.

FN6. Id., s 45, pp. 289-290; s 37, pp. 205-208.

[12] Duty is essentially a question of whether the ***439** relationship [FN7] between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences.[FN8] In the Palsgraf [FN9] case, the New York Court of Appeals, combining the questions of duty and proximate cause, [FN10] concluded that no duty is owed to an unforeseeable plaintiff.

FN7. Id., s 42, p. 244; Clark v. Dalman, 379 Mich. 251, 260, 150 N.W.2d 755 (1967).

FN8. See generally, H. L. A. Hart and A. M. Honore, Causation in the Law (Oxford, Clarendon Press, 1973), ch. IX.

FN9. Palsgraf v. Long I. R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

FN10. Prosser, supra, s 43, p. 254.

The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.

[13] It is well established that placing a product on the market creates the requisite relationship between a manufacturer, wholesaler and retailer and persons

affected by use of the product giving rise to a legal obligation or duty to the persons so affected. A manufacturer owes the consumer an obligation to avoid negligent conduct.[FN11] The obligation extends to persons within the foreseeable scope of the risk. In Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965), a bystander, injured when his brother's shotgun barrel ***440** exploded, was permitted to maintain an action against the manufacturer, wholesaler and retailer of allegedly defective shotgun shells.[FN12]

FN11. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

FN12. "Agreeing as all of our recent decisions do with the developing weight of authority, the essence of which is that the manufacturer is best able to control dangers arising from defects of manufacture, I would say definitely that Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873; Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918; Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786, and Hill v. Harbor Steel & Supply Corp., 374 Mich. 194, 132 N.W.2d 54, have put an end in Michigan to the defense of no privity, certainly so far as concerns an innocent bystander injured as this plaintiff pleads, and that a person thus injured should have a right of action against the manufacturer on the theory of breach of warranty as well as upon the theory of negligence." Piercefield v. Remington Arms Co., 375 Mich. 85, 97-98, 133 N.W.2d 129, 135 (1965) (emphasis supplied).

A manufacturer, wholesaler and retailer of slingshots can be expected to foresee that they will be used to propel pellets and that a person within range may be struck. Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children. Moning was a foreseeable plaintiff. The defendant manufacturer, wholesaler and retailer were under an obligation for the safety of Moning.

****766** The question of proximate cause, like the question of duty, is "essentially a problem of law." [FN13] ***441** Most proximate cause problems are not involved in this case.[FN14]

FN13. Prosser, supra, s 42, p. 244.
"(I)t is possible to approach 'proximate cause' as a series of distinct problems, more or less unrelated, to be determined upon different considerations. The list, which is not necessarily exclusive, would include at least the following problems:
"1. The problem of causation in fact * * * .
"2. The problem of apportionment of damages among causes. * * *
"3. The problem of liability for unforeseeable consequences * * * .
"4. The problem of intervening causes * * * .
"5. The problem of shifting responsibility * * * ." Id., pp. 249-250.

FN14. See fn. 13, supra ; there is no issue of apportionment of damages, or of shifting responsibility to another person except insofar as defendants similarly situated might be free to leave the duty of protecting a person affected by a child's use of a slingshot to adults were they to market slingshots in a manner designed to reach adults and not children; the issue of causation in fact is for a jury to resolve.

Alfono's conduct in using the slingshot to propel pellets was to be anticipated. "If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent, among other reasons, because he has failed to guard against it; or he may be negligent only for that reason." Prosser, supra, s 44, p. 272.

[14] By marketing slingshots directly to children, the defendants effectively created the risk that Alfono would use the slingshot. "Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which he has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility." Id., p. 273.[FN15]

FN15. The Restatement illustrates the scope of the responsibility for delivering a potentially dangerous chattel to a child:
"A gives a loaded pistol to B, a boy of eight, to

carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D." Restatement 2d, Torts, s 281, Illustration to Comment f on Clause (b).

"If a gun is entrusted to a child, it suggests at once to anyone with imagination at all that someone, the child or another, is likely to be shot." Prosser, supra, s 44, p. 273.

Alfono's shooting pellets toward a tree and a *442 ricochet into Moning's eye was within the "recognizable risk of harm" created by marketing slingshots directly to children.[FN16]

FN16. Restatement, supra, s 281, Comment f on Clause (b).

"So far as scope of duty (or, as some courts put it, the relation of proximate cause) is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal. Even criminal conduct by others is often reasonably to be anticipated. After all, if I leave a borrowed car on the streets of New York or Chicago with doors unlocked and key in ignition, I am negligent (at least towards the owner) because of the very likelihood of theft. And if I lend a car to one known by me to be habitually careless I am negligent precisely because of the likelihood of his negligent operation of the car. Again the importance of the factor of foreseeability is not altered if the intervening act is that of plaintiff himself, nor is it if that act is a negligent one. When I lent my car to the careless driver, one of the risks that made me negligent was surely the chance that he might hurt himself. If he is barred from recovery for such hurt it is because of his contributory fault, not for want of a causal connection or because he is beyond the scope of my duty." 2 Harper & James, supra, s 20.5, pp. 1144-1146.

Similarly see Comstock v. General Motors Corp., 358 Mich. 163, 179, 99 N.W.2d 627, 78 A.L.R.2d 449 (1959); Berry v. Visser, 354 Mich. 38, 47, 92 N.W.2d 1 (1958).

The ricochet was "a normal consequence of the situation" created by the defendants' conduct.[FN17]

FN17. "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." Restatement, supra, s 443. "The word 'normal' is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events." Id., comment b.

**767 II

General Standard of Care Specific Standard of Care

Turning to a consideration of the nature of the obligation owed by a manufacturer, wholesaler or retailer, we note that this is not an ordinary *443 products liability case where the plaintiff seeks to recover by proving a defect in the product without carrying the burden of proving fault or negligence. Moning's claim is grounded in negligence. He asserts that his damage was caused by the fault of the defendants.

[15] In a negligence case, the standard of conduct is reasonable or due care. The Restatement 2d, Torts, s 283, provides: "The standard of conduct to which (the actor) must conform to avoid being negligent is that of a reasonable man under like circumstances." "(I)n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk." Prosser, Torts, supra, s 53, p. 324.

It is the application of that general standard of conduct to the marketing of slingshots to children, the specific standard of care not whether there is a duty of due care in such marketing that is the primary area of disagreement in this case.

Manufacturing and marketing slingshots necessarily creates a risk of harm. Moning does not, however, contend that manufacturing and marketing slingshots is negligence per se. His contention, rather, is that marketing them directly to children creates an unreasonable risk of harm.

[16][17] Moning relies on the doctrine of negligent entrustment, one of the many specific rules concerning particular conduct that have evolved in

the application of the general standard of care. A person who supplies an article to a child which may pose a reasonable risk of harm in the hands of an adult but which poses an unreasonable risk of harm in the hands of a child is subject to liability for resulting harm:

"One who supplies directly or through a third person *444 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." Restatement 2d, Torts, s 390. [FN18]

FN18. The doctrine is not limited to plaintiffs whose "individual" propensities are known to the supplier. The comments following Restatement, supra, s 390, show that the doctrine of negligent entrustment also applies to classes of persons. Restatement, supra, s 390, Comment (b).

[18][19] The common law has long recognized that a parent or other responsible adult who entrusts a potentially dangerous instrumentality to a child may be subject to liability.[FN19] Liability "arises from (the defendant's) active misconduct; he has actually created an unreasonable risk to others by placing a chattel in the hands of a person whose use thereof is likely to create a recognizable risk to third persons." [FN20]

FN19. See, Harper & Kime, The Duty To Control the Conduct of Another, 43 Yale L.J. 886, 894 (1934).

FN20. Id.

[20] The obligation "to guard or secure objects which are dangerous to children" arises "because of the likelihood of their own intermeddling." [FN21] Persons dealing **768 with children must "take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way." [FN22]

FN21. James, Scope of Duty in Negligence Cases, 47 N.W.U.L.Rev. 778, 782 (1953). See Terranella v. Union Building & Construction Co., 3 N.J. 443, 70 A.2d 753 (1950).

"A product designed to be used by adults who may be expected to exercise care may not be dangerous, but when intended to be placed in the hands of inexperienced children who may seek to enlarge their knowledge by experimentation of various and sometimes unsuspected character, it may be a source of peril * * * ." Crist v. Art Metal Works, 230 App.Div. 114, 117, 243 N.Y.S. 496, 499 (1930), aff'd 255 N.Y. 624, 175 N.E. 341 (1931).

FN22. Note, Dangerous Toys, 64 Irish L.Times 223, 224 (1930); 38 Am.Jur., Negligence, s 40, pp. 685-686.

*445 [21][22] Special rules for children are not unusual. The attractive nuisance doctrine, an exception to the general rule limiting the liability of landowners for injuries to trespassers,[FN23] is based on the child's inability to appreciate danger and his inclination to explore without regard to the risk. The doctrine does not depend on the landowner's knowledge that the "individual" child is "incompetent."

FN23. See generally, Prosser, supra, s 59, p. 364.

[23][24] The doctrine of negligent entrustment is not peculiar to automobiles but rather an ordinary application of general principles for determining whether a person's conduct was reasonable in light of the apparent risk.[FN24] It is grounded in the general *446 principle that a reasonable person will **769 have in mind the immaturity, inexperience and carelessness of children. If, taking those traits into account, a reasonable person would recognize that his conduct involves a risk of creating an invasion of the child's or some other person's interest, he is required to recognize that his conduct does involve such a risk. "He should realize that the inexperience and immaturity of young children may lead them to act innocently in a way which an adult would recognize as culpably careless, and that older children are peculiarly prone to conduct which they themselves recognize as careless or even reckless." Restatement, supra, s 290, comment k.[FN25]

FN24. While the Restatement's illustrations and the case law applying the doctrine of negligent entrustment largely concern suppliers of automobiles (see, e. g., Johnson v. Cassetta, 197 Cal.App.2d 272, 17 Cal.Rptr. 81 (1961)), it does not depend on

the nature of the chattel. Fredericks v. General Motors Corp., 48 Mich.App. 580, 585, 211 N.W.2d 44 (1973) (supply of dies to plaintiff's employer). See also Dee v. Parrish, 160 Tex. 171, 327 S.W.2d 449, 452 (1959); 65 C.J.S. Negligence s 69, pp. 949-950; cf. Woods, Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability, 20 Ark.L.Rev. 101, 107-108 (1966); Littlejohn, Torts, 21 Wayne L.Rev. 665, 681 (1975). Nor is the doctrine restricted to chattels classified as latently defective or inherently dangerous. Fredericks, supra, 48 Mich.App. p. 584, 211 N.W.2d 44.

The Restatement sets forth a rule crystalized by the development of the common law concerning the liability of one who sells or entrusts devices to children who, because of their youth and inexperience, cannot be relied on to use them prudently, or because of their immaturity may not appreciate the risk of injury or have the skill to use such devices safely:

"At common law the legal principle is established that if one sells a dangerous article or instrumentality such as firearms or explosives to a child whom he knows or ought to know to be, by reason of youth and inexperience, unfit to be trusted with it, and who might innocently and ignorantly play with or use it to his injury, and injury does in fact result, he may be found guilty of negligence and consequently liable in damages." Anno., Liability of Seller of Firearm, Explosive, or Highly Inflammable Substance to Child, 20 A.L.R.2d 119, 124.

See also 79 Am.Jur.2d, Weapons and Firearms, s 43, p. 48. "The common law imposes upon every one the duty of so using and disposing of his property as not to injure the person or property of another, and if one sells a dangerous article to a child whom he knows to be, by reason of his youth and inexperience, unfit to be trusted with it, and who probably might innocently and ignorantly play with it to his own injury, and injury does in fact result, he is liable in damages therefor." McEldon v. Drew, 138 Iowa 390, 392, 116 N.W. 147, 148 (1908).

In McEldon, the court held that the seller of ten cents worth of gun powder to a 12 year old boy was liable for the injury to one of the boy's eyes caused by an inadvertent explosion. See also Carter v. Towne, 98 Mass. 567, 96 Am.Dec. 682 (1868).

Entrusting other devices used by children as playthings may also give rise to liability. See Schmidt v. Capital Candy Co., 139 Minn. 378, 166 N.W. 502 (1918) (sparkler) (dictum); Bosserman v. Smith, 205 Mo.App. 657, 226 S.W. 608 (1920) (fireworks); Gerbino v. Greenhut-Siegel-Cooper Co., 165 App.Div. 763, 152 N.Y.S. 502 (1915) (airgun used on retailer's premises); Semeniuk v. Chentis, 1 Ill.App.2d 508, 117 N.E.2d 883 (1954) (airgun; sale to parents, retailer knew that 7 year old would use); Krueger v. Knutson, 261 Minn. 144, 111 N.W.2d 526 (1961) (potassium chlorate); La Faso v. La Faso, 126 Vt. 90, 223 A.2d 814 (1966) (cigarette lighter without fluid); Note, supra, 64 Irish L.Times 223 (citing cases). The only basis for distinguishing these cases from the instant case would be to conclude that there is a qualitative difference between the risk of entrusting such instrumentalities to children and the risk posed by marketing slingshots directly to children. In light of the frequency and severity of injuries to children attributable to slingshots, and the widely held view, expressed in statutes and ordinances, that children should not be entrusted with slingshots, there is no sound basis for creating, as a matter of law, such a distinction.

FN25. An actor "is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; * * * " Restatement, supra, s 289.

"For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know

"(a) the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community." Id., s 290.

[25] ***447** The issue whether the defendants are subject to liability cannot properly be taken from the jury on the supposition that an 11 year old boy knows how a slingshot operates and, therefore, appreciates the risk. [FN26] Even if it is thought, without supporting evidence and as a matter of law, that children should be deemed to appreciate the risk, there still may be an unreasonable risk of physical harm to the child and others in marketing slingshots directly to them.

FN26. There is some evidence that one of the

reasons slingshot injuries are experienced by children between the ages of 5 and 14 in disproportion to the populace generally is that the risk is not appreciated. See, Johnston, Perforating Eye Injuries: A Five Year Survey, 91 Transactions of the Ophthalmological Soc'y U.K. 895, 897 (1971); Kerby, Eye Accidents to School Children, 20 Sight-Saving Rev. 2 (1950).

Entrusting potentially dangerous articles to a child may pose an unreasonable risk of harm not only because the child may not appreciate the risk or may not have the skill to use the article safely but even if he does appreciate the risk and does have the requisite skill because he may recklessly ignore the risk and use the article frivolously due to immaturity of judgment, exuberance of spirit, or sheer bravado.

"One has no right to demand of a child, or of any other person known to be wanting in ordinary judgment or discretion, a prudence beyond his years or capacity, and therefore in his own conduct, where it ***448** may possibly result in injury, a degree of care is required commensurate to the apparent immaturity or imbecility that exposes the other to peril. Thus, a person driving rapidly along a highway where he sees boys engaged in sports, is not at liberty to assume that they will exercise the same discretion in keeping out of his way that would be exercised by others; and ordinary care demands of him that he shall take notice of their immaturity and govern his action accordingly." 3 Cooley, Law of Torts (4th ed.), s 490, pp. 433-434.

[26] Just as the driver of an automobile is expected to take precautions for the safety of children playing near a highway even though children can be expected to appreciate the risk and the driver does not know that the individual children are incompetent to look after themselves,[FN27] so too a supplier ****770** ***449** can be expected in marketing a product to take precautions for the safety of children and others even if the child may be expected to appreciate the risk and individual children may both appreciate it and be skilled in using the product. It is for a jury to decide whether any negligence in marketing slingshots directly to children is a cause in fact of plaintiff's loss.[FN28]

FN27. Reasonable precautions must be taken even though the actor does not know that an individual child is not competent and the child may appreciate the risk:

"And when children are in the vicinity, much is necessarily to be expected of them which would not be looked for on the part of an adult. It may be anticipated that a child will dash into the street in the path of a car, or meddle with a turntable. It may be clear negligence to entrust him with a gun, or to allow him to drive an automobile, or to throw candy where a crowd of boys will scramble for it. There have been a number of 'pied piper' cases, in which street vendors of ice cream, and the like, which attract children into the street, have been held liable for failure to protect them against traffic. It may be quite as negligent to leave the gun, or to leave dynamite caps, where children are likely to come, and can easily find them. In all such cases, the question comes down essentially to one of whether the risk outweighs the utility of the actor's conduct. He may be required to guard a power line pole located in a public park, but not one in the open country; and whether he must take steps to prevent children from interfering with such an object as a stationary vehicle is entirely a matter of the circumstances of the particular case." Prosser, supra, s 33, pp. 172-173.

"In addition, people who have an ordinary amount of exposure to the facts of modern life in America will be treated as though they know many other things. The normal adult is held to have knowledge of the characteristics of animals common to his community, such as the proneness of mules to kick, the viciousness of bulls, and the propensity of mad dogs to bite. He is also required to be acquainted with the natural propensities of children,35 the dangers incident to common sports, and the elements of the weather to which he is accustomed.

" 35 Such as their heedlessness Femling v. Star Publication Co., 195 Wash. 395, 81 P.2d 293 (1938); the attractiveness of ponds of water Davoren v. Kansas City, 308 Mo. 513, 273 S.W. 401, 40 A.L.R. 473 (1925); the attractiveness of dangerous objects such as explosives Wellman v. Fordson Coal Co., 105 W.Va. 463, 143 S.E. 160 (1928); childish impulses Louisville & N. R. Co. v. Vaughn, 292 Ky. 120, 166 S.W.2d 43 (1943); climbing propensity Deaton's Administrator v. Kentucky & West Virginia Power Co., 291 Ky. 304, 164 S.W.2d 468 (1942); propensity of small children to wander into streets Agdeppa v. Glougie, 71 Cal.App.2d 463, 162 P.2d 944 (1945). Compare s 27.5 infra." 2 Harper & James, supra, s 16.5, pp. 912-913.

The trier of fact decides whether reasonable

precautions have been taken and thereby establishes the specific standard of care:
"The common formula for the negligence standard is the conduct of a reasonable man under like circumstances. In applying this standard under the instructions of the court, the jury normally is expected to determine what the general standard of conduct would require in the particular case, and so to set a particular standard of its own within the general one. This function is commonly said to be one of the determination of a question of fact, and not of law. It differs from the function of the court, however, only in that it is not reduced to any definite rules, so that the same conclusion will not necessarily be reached in two identical cases, and that it is a secondary function, performed only after the court has reached its initial conclusion that the issue is for the jury." Restatement, supra, s 328 C, Comment on Clause (b).

FN28. A jury might conclude that because the child was skilled in the use of a slingshot and did not use it frivolously, the manner of marketing the slingshot was not the cause in fact of plaintiff's injury.

III
Reasonableness of the Risk of Harm

[27] Even if a person recognizes that his conduct ***450** involves a risk of invading another person's interest, he may nevertheless engage in such conduct unless the risk created by his conduct is unreasonable.

The reasonableness of the risk depends on whether its magnitude is outweighed by its utility. The Restatement provides: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." Restatement, supra, s 291.

[28] The balancing of the magnitude of the risk and the utility of the actor's conduct requires a consideration by the court and jury of the societal interests involved.[FN29] The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases.

FN29. "Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable. Therefore, one relying upon negligence as a cause of action or defense must convince the court and jury that this is the case." Restatement, supra, s 291, Comment b, p. 55 (emphasis supplied).

****771** A court would thus refuse to allow a jury to consider whether an automobile manufacturer should be liable for all injuries resulting from manufacturing automobiles on the theory that it is foreseeable that some 50,000 persons may be killed and hundreds of thousands injured every year as a result of manufacturing automobiles. The utility of providing automobile transportation is deemed by society to override the magnitude of the risk created by their manufacture. Similarly, a court might conclude that it would be violative of public policy to hold a manufacturer of slingshots liable ***451** for all injuries resulting from their use. The interest of mature persons who wish to purchase and use slingshots might be deemed to supersede the interest of those who may be harmed by their careless or improper use.

The issue in the instant case is not whether slingshots should be manufactured, but the narrower question of whether marketing slingshots directly to children creates an unreasonable risk of harm. In determining that question, the Court must first ask whether the utility of marketing slingshots directly to children so overrides the risk thereby created as to justify the Court in refusing to permit juries to subject persons who engage in such conduct to liability for the resulting harm. If it concludes that the utility does not, as a matter of law, override the risk, then the question of balancing utility and risk is for the jury to decide, again, as part of its consideration of the reasonableness of defendants' conduct, unless the Court concludes that all reasonable persons would be of one mind on that question.

The Restatement suggests a number of factors that should be considered in balancing the utility of the actor's conduct and the magnitude of the risk. First, the magnitude of the risk:
"In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:
"(a) the social value which the law attaches to the

interests which are imperiled;
"(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
"(c) the extent of the harm likely to be caused to the interests imperiled;
"(d) the number of persons whose interests are likely *452 to be invaded if the risk takes effect in harm." Restatement, supra, s 293.

a) The law attaches a high social value to the interest of persons in unimpaired eyesight.

b) Slingshots are potentially dangerous. An expert witness, called by Moning, testified that the slingshots Alfono purchased were capable of launching projectiles at speeds exceeding 350 miles per hour. Slingshots cause hundreds of serious injuries each year to school age children. Almost all these injuries are head or eye injuries and occur to children 5 to 14.[FN30] Experience **772 therefore shows that marketing slingshots to children may with substantial frequency cause an invasion of the interest in unimpaired eyesight of a substantial number of persons.

FN30. Projections from one study indicate that nearly 66,000 school children in the United States during any 9-month school year suffer injuries to the eye. Over 4% of the reported injuries in a study carried out in Louisville were caused by slingshots and other weapons. Such instrumentalities were responsible for 17% of the more serious injuries. Kerby, supra, 20 Sight Saving Rev., pp. 3-4, 11.
Another study shows that "(t)here were an estimated 471 injuries related to slingshots and sling propelled toys during the period July 1, 1974-July 30, 1975, treated in United States hospital emergency rooms, all but 2 of which were head or eye injuries to victims under 15 years of age." U. S. Consumer Product Safety Commission, Bureau of Epidemiology, Special Report: Injuries Associated with Products Which Have Projectiles (Draft, October 23, 1975), p. 15. During the same time period, 2,120 injuries reported to hospital emergency rooms involved projectile products. Id., p. 17.
The U. S. Consumer Product Safety Commission states that since "(s)lingshots range from toys to hunting models capable of killing small game * * * it is recommended that high powered slingshots be sold only to persons over 20 years of age." Id., p. 23. The Commission concluded that "(o)verall, projectile products include a diverse array of products which while they share a common hazard are very different in age of users, intended use, and likelihood and consequences of misuse," and that therefore "Commission action would be most effective" "in the area of toy guns and other toy weapons with projectiles and slingshots." Id.

c) The extent of the harm likely to be caused to the interest so imperiled may be of a most serious nature.

*453 d) The number of persons whose interests are likely to be invaded is difficult to estimate, but it appears that hundreds of injuries, many resulting in serious impairment of vision, occur every year as a result of the use of slingshots by children.[FN31]

FN31. See fn. 30, supra, and accompanying text.

Turning to utility:
"In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:
"(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
"(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
"(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct." Restatement 2d, Torts, s 292.

a) There is a sharp difference of opinion concerning the social value of the child's interest in having direct-market access to slingshots. The view that slingshots should not be sold or used by children is widely held and is reflected in statutes and ordinances prohibiting the sale of slingshots to or their use by minors.

[29] Statutes and other legislative judgments may themselves be a source of common law. "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory

construction but also in those of decisionallaw." ***454** Moragne v. States Marine Lines, 398 U.S. 375, 390- 391, 90 S.Ct. 1772, 1782, 26 L.Ed.2d 339 (1970).[FN32] Similarly, see Williams v. Polgar, 391 Mich. 6,- 14, 26-28, 215 N.W.2d 149 (1974).[FN33]

FN32. The United States Supreme Court, relying on state statutes providing for wrongful death actions and overruling cases to the contrary, held that under general maritime law there was a cause of action for wrongful death. State courts created an action for wrongful death in admiralty cases, based on statutes not, by their terms, applicable to maritime cases. In that context, judges were "awake to the purport of this legislative movement, eagerly seized upon principles derivable from 'natural equity' and 'consonant * * * with the benign spirit of English and American legislation on the subject' to mould admiralty law to conform with the trend of civilized thought." Landis, Statutes and the Sources of Law, Harv.Legal Essays 213, 226 (1934). Several state courts have relied on statutes in other jurisdictions as "the wiser and safer rule," notwithstanding local common law to the contrary, in holding that a general devise operates to execute a power of appointment vested in the testator. Id., p. 231.
Legislative judgments or trends and statutory changes may be relevant in assessing the "national conscience" in common law and constitutional adjudication. See Furman v. Georgia, 408 U.S. 238, 298-299, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring).

FN33. In extending the obligation of an abstractor to persons not in privity of contract, this Court relied in part on statutes of other jurisdictions so providing.

North Carolina and Mississippi prohibit sale of a slingshot to a minor. [FN34] Idaho prohibits sale to a minor under 16 without parental consent. [FN35] Mississippi holds a father liable for allowing a son under 16 to have, own or carry concealed a slingshot.[FN36] Pennsylvania prohibits sale to and carrying by persons under 18 of an implement "which impels a pellet of any kind with a force that can reasonably be expected to ****773** cause bodily harm".[FN37] Nine states prohibit any person from carrying a concealed slingshot.[FN38] A number of states consider slingshots ***455** to be deadly weapons and treat them under statutes prohibiting carrying concealed weapons. [FN39] Many cities regulate the sale and possession of slingshots.[FN40]

FN34. N.C.Gen.Stat. s 14-315; Miss.Code Ann. s 97-37-13.

FN35. Idaho Code s 18-3302.

FN36. Miss.Code Ann. s 97-37-15.

FN37. Pa.Stat.Ann., title 18, s 6304 (Purdon).

FN38. Alas.Stat.Ann. s 11.55.010; Idaho Code s 18-3302; Miss.Code Ann. s 97-37-1; Mont.Rev.Codes Ann. s 94-3525; Tenn.Code Ann. s 39-4901; Utah Code Ann. s 76-23-4; N.C.Gen.Stat. s 14-269; S.C.Code s 16-23-460; R.I.Gen.Laws s 11-47-42.

FN39. Alas.Stat.Ann. s 11.55.010 (treated, along with pistols, firearms and daggers, under carrying concealed weapons statute); Del.Code Ann., title 11, s 222(5) (defined to be a "deadly weapon"); D.C.Code Ann. s 22-3217 ("dangerous article"); Idaho Code s 18-3302 (treated with "concealed and dangerous weapons"); Ind.Code Ann. s 35-1- 79-1 (Burns) ("dangerous weapon"); Mass Laws Ann., ch. 269, s 12 (sale prohibited, along with switch knife, sword cane, bludgeon and blackjack); Miss.Code Ann. s 97-37-1 ("deadly weapon"); Mont.Rev.Codes Ann. s 94- 3525 ("deadly weapon"); N.J.Stat.Ann. ss 2A:151-2, 2A:151-5 (West) ("weapon," "dangerous instrument"); N.C.Gen.Stat. s 14-269 ("deadly weapon"); S.C.Code s 16-23-460 ("deadly weapon"); Tenn.Code Ann. s 39-4901 ("dangerous weapon"); Utah Code Ann. s 76-23-4 ("deadly weapon"). See Ga.Code Ann. s 26-2901, committee notes, p. 201.

FN40. 39 Fed.Reg. 16707-16710 (1974).

Michigan empowers fourth class cities to "prohibit and punish the use of toy pistols, sling shots and other dangerous toys or implements within the city" (emphasis supplied).[FN41] Nine cities in this state prohibit persons from possessing slingshots,[FN42] five others prohibit possession by or sale to minors.[FN43] Those ordinances generally classify slingshots as "dangerous weapons." [FN44]

FN41. M.C.L.A. s 91.1; M.S.A. s 5.1740.
Home-rule cities possess the police power and thus there is no need for specific enabling legislation. M.C.L.A. s 117.3; M.S.A. s 5.2073.

FN42. Belding ordinances, s 12.11; Buchanan ordinances, s 11.4; Center Line ordinances, s 8-108; Escanaba ordinances, s (D); Grand Haven ordinances, s 8-209; Hazel Park ordinances, s 15; Sterling Heights ordinances, s 7.(1); Trenton ordinances, s 9.171, and Warren ordinances, s 8-210. See 39 Fed.Reg. 16708-16710 (1974).

FN43. Gladstone ordinances, s 504.06 (prohibits possession, sale, or gift to persons younger than 18); Lake Orion ordinances, s 9 (prohibits sale, offer to sale, give away or distribute to persons under the age of 21); Port Huron ordinances, s 9.117 (prohibits parents to knowingly permit child under 18 to use or possess except under adult supervision); Waterford ordinances, s 61-IX (prohibits possession, sale or gift to persons younger than 21); Royal Oak ordinances, s 276.1(c) (prohibits selling or giving to persons under 16). See 39 Fed.Reg. 16707-16710 (1974).

FN44. See 39 Fed.Reg., supra.

***456** It is apparent from the legislation in other states and innumerable municipalities that all reasonable persons do not agree that marketing slingshots directly to children does not involve an unreasonable risk of harm. The failure of other states and cities to enact like statutes and ordinances, and of the Legislature either to authorize or prohibit the marketing of slingshots directly to children, indicates a variety of opinion, but not a consensus regarding the reasonableness of marketing slingshots directly to children.

b) Children are more likely to obtain slingshots if they are marketed directly to them.

c) Slingshots could be marketed in a manner designed to confine sale to adults and to exclude purchases by children. Instead of manufacturers, wholesalers and retailers effectively determining whether children shall have slingshots, an adult who generally would know the child would decide whether he is of sufficient maturity to have one; the adult would, under the common law, assume responsibility for any negligence on his part in entrusting a slingshot to the child.

Having in mind the parent's interest in protecting the child from potentially dangerous instrumentalities [FN45] and in avoiding exposure to litigation such as befell the Alfonos, the child's interest in an opportunity ****774** to use slingshots cannot be said as a matter of law to be inadequately advanced or protected by allowing a jury to decide that a manufacturer, wholesaler or retailer is negligent in marketing them directly to children.

FN45. See generally 59 Am.Jur.2d, Parent and Child, s 106, p. 205 et seq.; Prosser, supra, s 125, p. 888 et seq.

[30] Balancing the magnitude of the risk and the utility of the conduct in the application of the factors suggested by the Restatement, there is not ***457** a sufficient basis for concluding as a matter of law that the utility of the defendants' conduct outweighs the risk of harm thereby created. The sharp difference of opinion regarding the balancing of utility and risk of harm requires submission of these questions for jury assessment as part of its consideration of the reasonableness of the risk of harm and of defendants' conduct.

[31] While "slingshots have a long history of association with the human race" and have been used for hundreds of years by both adults and children, the common law is not immutable, unable to respond to changes in society and technology.
"The customary usage and practice of the industry is relevant evidence to be used in determining whether or not this standard (of reasonably prudent conduct) has been met. Such usage cannot, however, be determinative of the standard. As stated by Justice Holmes:
" 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' Texas and Pacific R. Co. v. Behymer (1903), 189 U.S. 468, 470, 23 S.Ct. 622, 47 L.Ed. 905." Marietta v. Cliffs Ridge, Inc., 385 Mich. 364, 369-370, 189 N.W.2d 208, 209 (1971).

As society becomes increasingly urbanized and access to open space decreases, the law responds and develops.

Modern technology may have magnified the risk of ricochet and of injury to persons not in the immediate range or direction in which the slingshot is aimed. Slingshots capable of firing projectiles at 350 miles per hour may be a far cry from those

historically made by children from rubber bands and household paraphernalia.

Nor does calling a slingshot a "toy" make it any less dangerous nor immunize its marketing directly *458 to children from the general rules of negligence liability.[FN46]

FN46. A slingshot is no more a toy than a sparkler, fireworks, an air gun or an empty cigarette lighter, yet courts have sustained liability for the entrustment of such articles to children. See fn. 24, supra. Books prepared for parents speak of the dangers of such "toys." See, e. g., Swartz, Toys That Don't Care (Gambit, Inc., 1971), p. 251. The toy industry has acknowledged its awareness of the risks; the industry's proposed draft of Voluntary Product Standards for Toy Safety (May, 1972), while excluding slingshots from coverage, states that there are "(c)ertain well-recognized hazards inherent in such traditional toys as bows and arrows, slingshots and darts," quoted in Swartz, Blindness in the Toy Box, 43 Sight Saving Rev. 95, 97 (1973).

There is a qualitative difference between slingshots and other projectile "toys" on the one hand, and baseball equipment and bicycles on the other. The latter are viewed by society essentially as are automobiles in that although children are injured and killed riding bicycles and playing baseball, the utility of such activity is regarded by society and all reasonable persons as outweighing the risk of harm created by their manufacture for and marketing to children. Statutes and ordinances do not prohibit the purchase or use of bicycles or baseball equipment by children. There is no ongoing debate, as there is about slingshots, whether children should have direct market access to bicycles or baseball equipment.

In sum, it cannot be said that there was no "obligation of reasonable conduct for the benefit of the plaintiff",[FN47] or that all reasonable men would agree that defendants' conduct was not "a substantial factor in producing the result" [FN48] or regarding "the foreseeability of (the) particular risk" [FN49] or regarding "the reasonableness of the defendants' **775 conduct with respect to it, or the normal character of (Alfono's conduct)" [FN50] as an intervening cause.

FN47. Prosser, supra, s 45, pp. 289-290.

FN48. Id.

FN49. Id.

FN50. Id.

*459 Since reasonable persons can differ regarding the balance of risk and utility (the reasonableness of the risk of harm) and since there is no overriding policy based on social utility of maintaining absolute access to slingshots by children, we reverse and remand for a new trial.

KAVANAGH, C. J., and WILLIAMS, J., concur.

RYAN and MOODY, JJ., not participating.

FITZGERALD, Justice.

This appeal concerns the propriety of a trial court's grant of directed verdict in favor of defendants, the manufacturer, wholesaler, and retailers of a slingshot, in an action brought by plaintiff to recover for injuries sustained as a result of use of the slingshot.

Evidence introduced at trial indicated that on August 17, 1967, Joseph Alfono, age 11, purchased two ten-cent slingshots from defendant Campbell Discount Jewelry. He gave one of the slingshots to plaintiff, age 12, and the boys rode their bicycles to a nearby park. At the park plaintiff and Joseph Alfono employed their slingshots to shoot projectiles at frogs which they found in the vicinity of a pond. The incident of injury occurred when plaintiff was standing near the small pond and Joseph was on the side of a nearby hill. Joseph called to plaintiff to look up and watch as Joseph shot at a bird. When plaintiff looked up, he was struck in the left eye by a projectile from Joseph's slingshot. Evidence introduced at trial indicated that the injuring slingshot was manufactured by Chemical Sundries, Inc.,[FN1] and distributed by King Tobacco and Grocery Co.

FN1. After commencement of this litigation the name of defendant was changed to Chemtoy Corporation.

*460 Settlement was agreed upon between plaintiff and defendant Alfonos with the result that the Alfonos were only nominal parties to the litigation. [FN2] The trial court, upon motion of the remaining

defendants after presentation of plaintiff's proofs, granted directed verdict in favor of defendants, opining that defendants owed plaintiff no legal duty upon which recovery could be premised and that defendants' conduct was not the proximate cause of plaintiff's injury.[FN3] The Court of Appeals affirmed in an unpublished per curiam opinion. We granted leave to appeal.

FN2. The Alfonos are party to a cross-appeal concerning their respective rights against the other defendants in the event this Court were to set aside the directed verdict entered by the trial court.

FN3. The trial court's extensive opinion was issued from the bench and evidences thorough consideration of the case before that court.

We would affirm the trial court and the Court of Appeals, concluding defendants did not owe plaintiff minor the asserted duty not to manufacture, distribute and sell slingshots.

I

Prosser, in his treatise on the law of torts, offers the following analysis of the role of the court and jury respecting the question of whether a legal duty is owed by one party to another:

"3. The existence of a duty. In other words, whether, upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. This is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which ***461** make up the law; and it must be determined only by the court. It is no part of the province of a jury to decide whether a manufacturer of goods is under any obligation for the safety of the ****776** ultimate consumer, * * * . A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant." (Emphasis supplied.) Prosser, Torts (4th Ed.), s 37, p. 206.

Decisions of this Court have in similar fashion recognized that the question of duty is to be resolved by the court rather than the jury. See Fisher v. Johnson Milk Co., Inc., 383 Mich. 158, 162, 174 N.W.2d 752, 754 (1970), in which the Court viewed summary judgment for defendant manufacturer of a wire milk bottle carrier proper after determination that there was "no legal duty to supply a carrier so designed as to prevent bottles placed therein from breaking when dropped to a hard surface". Also, see Bonin v. Gralewicz, 378 Mich. 521, 527, 146 N.W.2d 647 (1966).

The trial court in this case found no legal duty owed plaintiff by defendants. We now review as a question of law that determination.

II

During the course of proceedings below plaintiff has alleged that the defendants violated numerous duties [FN4] which attached liability. Through the sifting and winnowing action of the trial and appellate ***462** process these allegations have been refined so that we have presently before us only the following contention as stated at page 11 of plaintiff's brief:

FN4. Among these duties was the duty to warn plaintiff purchaser of the dangerous propensities of a slingshot either by personal notification as in the case of a retailer or by printed notice as in the case of the wholesaler and manufacturer. Other courts have uniformly rejected a duty to warn when confronted with products, like the slingshot, the dangerous propensities of which are well known. See, e. g., Pitts v. Basile, 35 Ill.2d 49, 219 N.E.2d 472 (1966), and Morris v. Toy Box, 204 Cal.App.2d 468, 22 Cal.Rptr. 572 (1962). See, also, Prosser, Torts (4th Ed.), s 96, p. 649.

"Plaintiff's position (is) that the defendants had a duty as reasonably prudent manufacturers, distributors and retail merchants not to manufacture, market and sell these slingshots to young children."

It is asserted that two factors give rise to this duty: "(1) the inherently dangerous nature of the slingshot, and (2) the youthfulness and lack of discretion of the purchasers."

The question before us is not settled by Michigan case law precedent. A related question was considered by this Court, however, in Chaddock v. Plummer, 88 Mich. 225, 50 N.W. 135 (1891). In

Chaddock, an air gun case, this Court affirmed a directed verdict in favor of the father-purchaser of an air gun used by a neighbor boy in injurious fashion. Evidence indicated the mother, rather than the father, was in "control" of the premises at the time the gun was loaned to and used by the visiting child. Negligence of the mother was not asserted. The court concluded:

"It was not negligence per se for the defendant to buy this toy gun, and place it in the hands of the boy nine years of age; and there were too many intervening causes without the act or knowledge of the defendant, between the buying of the gun and the injury to hold the defendant liable for its use in this case. If his own son had in any manner contributed to the accident, a different question would arise, upon which I express no opinion." supra, 230, 50 N.W. 136.

***463** Whalen v. Bennett, 4 Mich.App. 81, 143 N.W.2d 797 (1966), involved the circumstance of injury which occurred when defendant's son shot an air gun while playing with friends and injured one of his companions. The Court of Appeals [FN5], concluded that the trial court's grant of summary judgment was improper, there being evidence indicating that a duty on the part of the parent, to supervise the use of an instrumentality as dangerous as an air gun, had been breached.[FN6] Neither Chaddock nor ****777** Whalen dealt with the liability of retailers, wholesalers, or manufacturers.[FN7]

FN5. Justice Fitzgerald authored the opinion when sitting as a judge of the Court of Appeals.

FN6. See for an analogous holding, which additionally discusses application of Restatement of Torts Second, s 390, discussed infra herein, Fredericks v. General Motors Corp., 48 Mich.App. 580, 211 N.W.2d 44 (1973).

FN7. Plaintiff also asserts that Crowther v. Ross Chemical & Manufacturing Co., 42 Mich.App. 426, 202 N.W.2d 577 (1972), is a case in point. This action was brought to recover for the wrongful death of two young girls who were killed by a man who had allegedly been sniffing glue manufactured by defendant. The Court of Appeals concluded that the trial court's grant of summary judgment was inappropriate because

"It is an issue of fact whether, as plaintiff alleges in his complaint, the practice of glue sniffing was, at this time, sufficiently notorious that defendant knew or should have known this was an alternative use for its product."

In Crowther, however, summary judgment on the pleadings alone was involved. Here we have a directed verdict granted after plaintiff has presented all his proofs. The thrust of decision in Crowther was that plaintiff be given an opportunity to present proofs. In the present case plaintiff enjoyed such opportunity. Crowther is therefore not of decisional significance to the case before us.

Cases from other jurisdictions offer instruction not afforded by Michigan precedent. In Pitts v. Basile, 35 Ill.2d 49, 219 N.E.2d 472 (1966), a child struck by a dart thrown by another child brought suit against the wholesaler of the dart and the retailer from whom the darts had been purchased. The appeal considered only the question of the wholesaler's liability. The Illinois Supreme Court concluded that there was insufficient causal connection***464** between alleged negligence on the part of the wholesaler and resulting injury, finding that there was no relation between the marketing of the darts and subsequent injury. In addition, the Court commented:

"We are not concerned in this case with the liability of the proprietors of the grocery store who sold the darts to the eight-year-old boy, but with the liability of the defendant (wholesaler), who sold the darts to the proprietors of the grocery store. There was no contention or proof that the darts were in any way defective, and the appellate court emphasized that it was not characterizing them as 'inherently dangerous.' In this court, however, the plaintiff urges that the defendant's ' "non-defective" dart manifestly was not safe when used by small children for the purpose for which it was intended. The dart in question was intended to be thrown at various objects * * * . Its propensity to cause serious injury, particularly to the eyes, was demonstrated by the very injury suffered by the infant plaintiff in the instant case.'

"There are many things used by children that may be said to be unsafe when used for the purpose for which they are intended. A baseball, a baseball bat, a penknife, a Boy Scout hatchet, a bicycle, all have the capacity to injure the user or others in the course of their normal use. They are not, however, to be categorized as 'dangerous instrumentalities.' As was said by the Tennessee court in Highsaw v. Creech, 17 Tenn.App. 573, 69 S.W.2d 249, 252

(1934), 'an air gun is not a dangerous instrumentality of itself, but is in fact a toy. * * * The fact alone that an injury may be inflicted by such a toy does not make of it a dangerous instrumentality in the sense that the term is generally used.' In Morris v. Toy Box (1962), 204 Cal.App.2d 468, 22 Cal.Rptr. 572, 574-575, a complaint brought by a minor against a retailer alleging that the retailer knew that the intended user of a bow and arrow was the purchaser's ten-year-old boy was dismissed, the court saying, 'the bow and arrow has been in use by young and old alike for *465 thousands of years. * * * To us it is simply inconceivable that a 10-year-old boy, much less his mother, would be unacquainted with the use of so common an article as the one here in question.' See also, White v. Page (Ohio App.1950), 105 N.E.2d 652." supra, 35 Ill.2d 49, 51-52; 219 N.E.2d 472, 473, 474.

The Supreme Court of Oklahoma in Atkins v. Arlan's Department Store of Norman, 522 P.2d 1020 (Okl.1974), quoted the above from Pitts v. Basile in concluding that there was no cause of action for plaintiff against the manufacturer and retailer of a lawn dart game for injury caused when a lawn dart struck the eye of a child. That court concluded:

**778 "There are many toys and playthings, perfectly harmless and inoffensive in themselves, but whose common use can be perverted into a dangerous use and design, and there are very few of the most harmless toys which cannot be used to injure another. The dart's propensities to cause injury is demonstrated by the injury sustained but the fact that an injury was sustained does not necessarily mean that the manufacturer or retailer are liable for those injuries.

The dart in question was not designed or manufactured to be thrown at an individual but at a plastic ring or another target." supra, 1022.

In Morris v. Toy Box, 204 Cal.App.2d 468, 22 Cal.Rptr. 572 (1962), the Second District Court of Appeals of California faced the allegation of plaintiff that the retailer of a bow and arrow was liable for injuries sustained by a child who had been struck by an arrow shot by the son of the buyer of the bow and arrow. The California court rejected the *466 notion that a bow and arrow were "inherently dangerous",[FN8] and commented:

FN8. The talismanic label "inherently dangerous" attained significance because a finding of "inherent dangerousness" avoided the privity requirement of contract law subjecting the wholesaler, manufacturer or retailer to liability in tort. Plaintiff's complaint is framed in terms of negligence. The doctrine of "inherent dangerousness" is not of decisional significance to the case at hand.

"As in the case of a slingshot,[FN9] the bow and arrow has been in use by young and old alike for thousands of years; its method of operation, therefore, is a matter so notorious to all that production of evidence relative thereto would be unnecessary * * * ." (Emphasis supplied.) supra, 472, 22 Cal.Rptr. 574.

FN9. The California court at this point footnotes the following:

" 'And David prevailed over the Philistine, with a sling and a stone, and he struck, and slew the Philistine.' (1 Kings 17.50)"

The court concluded there was no duty on the part of the retailer to warn of the dangers incident to the bow and arrows' use and found no cause of action. [FN10]

FN10. The New Jersey Superior Court similarly commented that a plastic slingshot was not a dangerous instrumentality in Levis v. Zapolitz, 72 N.J.Super. 168, 178 A.2d 44 (1962), a case involving injury sustained as a result of a defective slingshot.

Plaintiff refers us to s 390 of the Restatement of Torts, 2d, indicating that this section affords a basis for liability. This section states:

"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."

A similar contention was rejected by the California Court of Appeals in Bojorquez v. House of Toys, *467 Inc., 62 Cal.App.3d 930, 933, 133 Cal.Rptr. 483, 484 (1976), with the following remarks.

"A ten cent slingshot is a toy although its use, like

the use of other toys, such as baseball bats and bows and arrows, may cause injury to others. The cases we have found under section 390 and the illustrations provided in the Restatement all involve the sale or entrustment of a chattel to a particular individual who allegedly was known to the seller to be too young, inexperienced or incompetent to use the item properly.

"Here (plaintiff) wants us to hold the retailer and distributor negligent for selling toy slingshots to the class of persons for whom they were intended the young; in effect, she asks us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary."

The illustrations to the Restatement indicate that that section was intended to apply when knowledge of an individual's circumstances **779 indicates to the supplier reasonable likelihood that the individual supplied is incompetent to use the chattel supplied and may therefore cause harm to himself and others. Plaintiff in this case seeks an extension of the Restatement doctrine to recognize the status of children, rather than circumstances concerning an individual child, and in relation thereto to circumscribe with duty the distribution of toys, the misuse of which involves a likelihood of injury i. e., here, slingshots.

III

In our view we are being asked to perform a legislative task. If we were to find a duty on the part of defendants not to supply slingshots to children, we would in effect be making a value judgment and saying to defendants and their counterparts *468 that such in this instance toys should not be manufactured or marketed.

As has been noted, slingshots have a long history of association with the human race. Indeed, anyone can make one from a tree branch and a piece of inner tube. We acknowledge that there are dangers incident to their use and that such dangers are magnified when slingshots are used by minors. In the case of use by a minor, the law recognizes that parents have some responsibility of supervision. See, e. g., Whalen v. Bennett, supra. Cf. Chaddock v. Plummer, supra.

In the absence of legislative prescription circumscribing the manufacture, distribution, or sale of slingshots or providing that defendants insure against the misuse of their products, we are unable to find a duty upon which the liability of defendants may be premised.

We would affirm.

COLEMAN, J., concurs.

END OF DOCUMENT

Commerce in Firearms in the United States

February 2000

Department of the Treasury
Bureau of Alcohol, Tobacco & Firearms

"Working for a Sound and Safer America through Innovation and Partnership"

EXHIBIT 4

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

DIRECTOR

Washington, D.C., February 2, 2000

Dear Secretary Summers:

The Bureau of Alcohol, Tobacco and Firearms (ATF) submits this report on its activities relating to the regulation of firearms during the calendar year 1999. This report is submitted in accordance with ATF's mission of informing the public.

Sincerely,

Bradley A. Buckles,
Director

Table 12.

Sources of firearms trafficking identified in ATF illegal trafficking investigations involving youth and juveniles

Note: Since firearms may be trafficked along multiple channels, an investigation may be included in more than one category.

Source	Number	%
Firearms trafficked by straw purchaser or straw purchasing ring	330	50.9%
Trafficking in firearms stolen from FFL	134	20.7%
Trafficking in firearms by unregulated private sellers*	92	14.2%
Trafficking in firearms stolen from residence	88	13.6%
Trafficking in firearms at gun shows, flea markets, auctions, or in want ads and gun magazines	64	9.9%
Firearms trafficked by licensed dealer, including pawnbroker	41	6.3%
Street criminals buying and selling guns from unknown sources	26	4.0%
Trafficking in firearms stolen from common carrier	16	2.5%
Other sources (e.g. selling guns over internet, illegal pawning)	9	1.4%

*as distinct from straw purchasers and other traffickers

Source: *Youth Crime Gun Interdiction Initiative Performance Report*, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, February 1999.

analysis of crime gun traces, multiple sale and stolen gun reports and other information. In conjunction with Northeastern University, the CGAB began developing a series of trafficking indicators, including:

- multiple crime guns traced to an FFL or first retail purchaser;
- short time-to-crime for crime guns traced to an FFL or first retail purchaser;
- incomplete trace results, due to an unresponsive FFL or other causes;[36]
- significant or frequently reported firearms losses or thefts by an FFL;
- frequent multiple sales of handguns by an FFL or multiple purchases of firearms by a non-licensee, combined with crime gun traces;[37] and
- recovery of firearms with obliterated serial numbers.

New indicators continue to be developed by the CGAB and Northeastern University. For instance, the concentration of an FFL's crime gun traces in a particular geographic area in another State may be a useful indicator. While a trafficking problem can be suggested by these indicators, further information, which can be gathered through regulatory inspections and criminal investigations, is required to determine whether trafficking has actually occurred, what form it is taking and who is responsible.

Crime Gun Traces as Indicators of Illegal Trafficking

As stated above, crime gun traces do not necessarily indicate illegal activity by licensed dealers or their employees. Guns purchased from FFLs may have been unknowingly sold by the

[36] Trace results are incomplete when the firearm cannot be tracked from the manufacturer or importer to an individual retail purchaser. Multiple incomplete trace results are considered a trafficking indicator because they may indicate that (a) the firearm was stolen from interstate shipment (and thus never reached the retailer); (b) the receiving FFL is not telling the truth about not receiving the firearm; or (c) the shipping FFL is not telling the truth about who the FFL shipped the firearm to.

[37] ATF experience has shown that multiple sales or purchases are a significant trafficking indicator; crime guns recovered with obliterated serial numbers are frequently purchased in multiple sales.

Table 13

Distribution of traces among current dealers, 1998

	Number of traces to a dealer	Dealers		Traces	
		Percent	Number	Percent	Number
All Retail Dealers (Retail Gun Dealers and Pawnbrokers)	0 or more	100.0%	83,272	...	...
	1 or more	14.3%	11,947	100.0%	55,990
	2 or more	7.2%	6,056	89.5%	50,099
	5 or more	2.7%	2.253	71.7%	40,139
	10 or more	1.2%	1,020	57.4%	32,147
	25 or more	0.4%	332	39.6%	22,168
	50 or more	0.2%	132	27.2%	15,220
Retail Gun Dealers	0 or more	100.0%	73,016	...	...
	1 or more	11.8%	8,651	100.0%	40,809
	2 or more	5.6%	4,114	88.2%	36,272
	5 or more	2.8%	1,517	72.5%	29,599
	10 or more	1.0%	713	59.7%	24,360
	25 or more	0.3%	252	43.2%	17,630
	50 or more	0.1%	99	30.4%	12,399
Pawnbrokers	0 or more	100.0%	10,256	...	...
	1 or more	32.1%	3,296	100.0%	15,181
	2 or more	18.9%	1,942	91.1%	13,827
	5 or more	7.2%	736	69.4%	10,540
	10 or more	3.0%	307	51.3%	7,787
	25 or more	0.8%	85	29.9%	4,638
	50 or more	0.3%	33	18.6%	2,821

Sources: Data, Bureau of Alcohol, Tobacco and Firearms; Tables prepared by Glenn L. Pierce, Northeastern University, College of Criminal Justice, Center for Criminal Justice Policy Research.

FFL to straw purchasers, resold by an innocent purchaser or by an illegal unlicensed dealer, otherwise distributed by traffickers in firearms, bought or stolen from FFLs or residences, or simply stolen from its legal owner. Nevertheless, when trafficking indicators are present, it is important to find out if the FFL or someone else is violating the law. This requires either a regulatory inspection or a criminal investigation. Table 12 shows a breakdown by trafficking channel of ATF illegal trafficking investigations involving youth and juveniles conducted between July 1996 and December 1998.[38]

Over a quarter of these investigations were initiated based on crime gun trace information, and many more of the investigations used tracing in the investigation.

Distribution of Crime Gun Traces Among Licensed Retail Dealers

A small number of licensed dealers account for a large proportion of the firearms traced. As Table 13 shows, in 1998, among all current dealers, 14 percent had one or more firearms traced to them in that year; about 32 percent of the pawnbrokers and about 12 percent of other retail dealers had a trace that year. Only 1.2 percent of dealers in 1998 were associated with 10 or more traces. These approximately 1,000 dealers accounted for well over 50 percent of

[38] *Youth Crime Gun Interdiction Initiative Performance Report*, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, February 1999.

FILE NO. _____

LEGISLATIVE DIGEST

[Firearm Strict Liability Act]
Amending Article 35 of the Police Code by repealing existing Sections 3500 through 351 d adding new Sections 3500 through 3503 to impose strict liability on gun manufacturers, importers and dealers for injuries and deaths caused by firearms and which occur within ity and County of San Francisco.

Existing Law

Existing Article 35 of the Police Code regulates the possession of handguns. This ordina however, was found to be preempted by state law in 1982. *Doe v. City and County of Sa Francisco* (1982) 136 Cal. App. 3d 509. Accordingly, this law is being repealed. Curren does not address strict liability for firearms manufacturers, importers or dealers for injuri d deaths caused by firearms.

Amendments to Current Law

This ordinance would make firearms manufacturers, importers and dealers strictly liable injuries and deaths caused by firearms and which occur within the City after the effective of the act. Persons injured or killed as a result of the discharge of a firearm within the City s would have a cause of action against the manufacturer, importer and dealer of the firearm causing the injury or death. The ordinance would not apply to injuries or deaths from the discharge of firearms that occur before the effective date of the ordinance.

Persons engaged in the commission of a crime, or who are injured or killed by a law enfo ent official would not be entitled to bring an action under the ordinance. In addition, there w be no cause of action under the ordinance where the firearm involved is a shotgun or rifle w t a magazine, or which has a fixed magazine of four rounds or less.

Where a manufacturer, distributor or dealer has insurance that covers damages resulting the discharge of the firearm, the liability imposed under the ordinance would not exceed the nt of the insurance, provided that the amount of the insurance is at least $100,000 per incide

No liability would be imposed with respect to any firearm that was equipped with an inte personalized safety feature at the time of its first retail sale. As defined by the ordinance, personalized safety feature is any internal locking device or other mechanical or electrica ice integral to the frame of the firearm that prevents any unauthorized use of the firearm. A er lock or other external device does not constitute an internal personalized safety feature u he ordinance.

Background Information

The unauthorized use of firearms in San Francisco is responsible for approximately 200 i es and 60 deaths each year, resulting in costs to the citizens of San Francisco of approximat ree

EXHIBIT 5

million dollars in hospital costs alone. In many of the recent publicized incidents of gun violence, victims of gun violence have no recourse against the shooter, particularly in cas where the shooter is indigent or deceased. The proposed legislation seeks to more equita allocate the costs of gun violence by imposing limited liability upon firearms manufactur importers and dealers, the entities profiting from the sale of firearms and in a position to p on the social costs of firearms amongst their customers.

Section 2. Article 35 of the San Francisco Police Code is hereby amended by adding new sections 3500 through 3503 to read as follows:

ARTICLE 35: FIREARM STRICT LIABILITY ACT

SEC. 3500. Findings The Board of Supervisors finds as follows: (a) The unauthorized use of firearms in the City and County of San Francisco is responsible for approximately two hundred injuries and approximately sixty deaths each year.

(b) The cost of these needless deaths and injuries is generally borne by the injured parties and their families or by the public through the provision of police, emergency and medical services, even in those instances where the person using the firearm is convicted of a crime. The average cost of hospitalization for each person injured as a result of a shooting in San Francisco was approximately $12,128 as of 1996. The total monetary costs to the citizens of San Francisco each year due to these injuries and deaths as a result of hospital expenditures alone exceeds approximately three million dollars.

(c) The manufacturers, importers and dealers of these firearms profit handsomely from the sales of firearms, but bear virtually no responsibility for the costs incurred as a result of the deaths and injuries caused by the use of their products in San Francisco.

(d) In order to promote and to protect the health, safety and welfare of the citizens of San Francisco, it is necessary and appropriate to reallocate the cost of injuries and deaths arising from the discharge of firearms by imposing strict liability upon the manufacturers, importers and dealers of those firearms, who are most able financially to accept these costs due to their ability to pass the costs on to consumers of firearms.

(e) Imposing strict liability upon manufacturers, importers and dealers of these firearms for injuries and deaths caused by the firearms is appropriate because these firearms are designed to inflict serious injuries and death.

///

SEC. 3501. DEFINITIONS. (a) "Firearm" shall have the same meaning as in San Francisco Police Code section 613.1(a).

(b) "Dealer" means any person engaged in the business of selling firearms at wholesale or retail and specifically includes pawnbrokers who take or receive firearms as security for the payment or repayment of money.

(c) "Importer" means any person engaged in the business of importing or bringing firearms into the United States for sale or distribution.

(d) "Manufacturer" means any person in business to manufacture or assemble a firearm or ammunition for sale or distribution.

(e) "Law enforcement agency" means a federal, state or local law enforcement agency, state militia or an agency of the United States government.

(f) "Law enforcement official" means any officer or agent of an agency defined in paragraph (e) of this section who is authorized to use a firearm in the course of his or her work.

(g) "Internal personalized safety feature" means any internal locking device or other mechanical or electrical device integral to the frame of the firearm that prevents any unauthorized use of the firearm. Such mechanical or electrical devices can include but are not limited to devices that use computer microchips, radio signals or user fingerprints as a means to "recognize" an authorized user. A trigger lock or other external device shall not be considered an internal personalized safety feature.

SEC. 3502. IMPOSITION OF STRICT LIABILITY (a) Each manufacturer, importer and/or dealer of a firearm shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages arising from bodily injury or death where the bodily injury or death results from the discharge within the jurisdiction of the City and County

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of San Francisco of any firearm manufactured, imported, distributed, sold, leased or otherwise transferred by the manufacturer, importer and/or dealer, except that no liability shall be imposed pursuant to this subsection for a discharge that occurs prior to the effective date of this section.

(b) Exemptions and Limitations. (1) No action may be commenced pursuant to this section by any person who is injured or killed by the discharge of a firearm while such person is committing or attempting to commit a crime (whether or not such crime is actually charged), or while such person is attempting to evade arrest by a law enforcement official. This exemption shall be in the nature of an affirmative defense, and shall be proven by a preponderance of the evidence.

(2) No action may be commenced pursuant to this section by any person injured or killed by the discharge of a firearm by a law enforcement official.

(3) This section shall not limit in scope any cause of action, other than that provided by this section, available to a person injured by or killed by a firearm.

(4) Nothing in this section shall prevent a manufacturer, importer or dealer from seeking whole or partial indemnity or contribution for any liability incurred under this section from any third party wholly or partially responsible for the injury or death.

(5) No action may be commenced pursuant to this section by any person for a self-inflicted injury.

(6) No action may be commenced pursuant to this section where the firearm was equipped with an internal personalized safety feature at that time of its first retail sale.

(7) If any manufacturer, importer or dealer has purchased and has in effect at the time of the injury an insurance policy that covers any and all damages, including but not limited to bodily injury or death, resulting from the discharge of the specific firearm involved in the incident, the liability imposed under this section as to that manufacturer, importer or dealer

shall not exceed the total amount of coverage available under said policy provided that the total coverage available under the policy shall not be less than $100,000 per incident.

(8) No action may be commenced pursuant to this section where the firearm involved is either (a) a shotgun without a magazine or having a fixed magazine of four or less rounds or (b) a rifle without a magazine or having a fixed magazine of four or less rounds.

SEC. 3503. SAVING CLAUSE: INVALIDITY OF PART OF ARTICLE NOT TO AFFECT REMAINDER.

If any section, subsection, sentence, clause or phrase of this Article is for any reason held to be unconstitutional, or invalid, such decision shall not affect the validity of the remaining portions of this Article. The Board of Supervisors hereby declares that it would have passed this Article and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

APPROVED AS TO FORM:

LOUISE H. RENNE, City Attorney

By: 

D. CAMERON BAKER
Deputy City Attorney