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Judicial Elimination of Saturday Night Specials: Kelley v. R.G. Industries, Inc.

John D. Warfield

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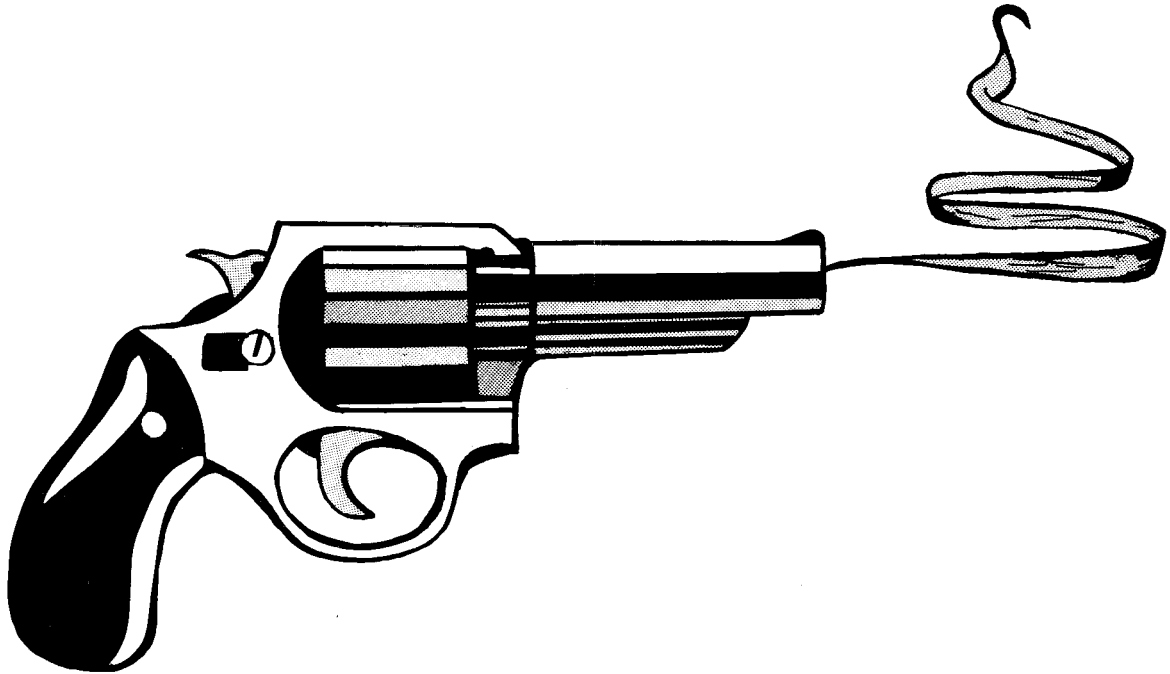
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Judicial Elimination of

Kelley v. R.G.



***Kelley v. R.G. Industries, Inc.:* JUDICIAL ELIMINATION OF SATURDAY NIGHT SPECIALS**

In *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985) the Court of Appeals of Maryland, upon an order of certification from the United States District Court for the District of Maryland, has recently held that a handgun manufacturer or marketer might be liable under some circumstances for gunshot injuries caused by the use of one of its handguns during the commission of a crime. In so holding, the court of appeals has created a new, limited strict liability based upon judicial recognition of society's intent to reduce the availability of inexpensive, poorly constructed handguns useful only to the criminal element.

Olin J. Kelley was injured when an unnamed assailant shot him in the chest during an armed robbery of the grocery store where he was employed. The weapon used in the robbery was a Rohm Revolver Handgun Model RG-38S, designed and marketed by Rohm Gessellschaft, a West German corporation. The revolver was as-

sembled from components and initially marketed by R.G. Industries, a Miami based corporate subsidiary of Rohm Gessellschaft. Kelley and his wife filed a tort action in the Circuit Court for Montgomery County against both corporations, based in part upon strict liability principles. R.G. Industries had the case removed to the United States District Court for the District of Maryland, then filed an answer to the complaint and moved for summary judgment, claiming it had no part in the marketing or distribution of the handgun in question. Thereafter, R.G. Industries was dismissed from the case by stipulation, without prejudice.

The remaining defendant, Rohm Gessellschaft, moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. At a hearing on the motion, the district court found no controlling precedents in that court on the strict liability issues, and certified several questions to the Court of Appeals of Maryland.

The first question addressed by the court of appeals regarded Kelley's contention that the manufacturing or marketing of handguns is an "abnormally dangerous

activity" pursuant to Restatement (Second) of Torts §§ 519-520. These sections recognize that one may be strictly liable when engaging in an "abnormally dangerous" or "ultrahazardous" activity regardless of the degree of care that an individual may have exercised to prevent harm. The court of appeals, however, has never extended the application of the abnormally dangerous activity doctrine beyond instances where the alleged tortfeasor was either the owner or occupier of land. *See, Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 4 A.2d 757 (1939); *Kirby v. Hylton*, 51 Md. App. 365, 443 A.2d 640 (1982). In Maryland, the activity must be abnormally dangerous in relation to the area in which the activity occurs. As an example, the court in *Kelley* cites the service station operator who permitted gasoline to leak from his faulty storage tanks into the underground water supply of a well populated area. *Yommer v. McKenzie*, 250 Md. 220, 257 A.2d 138 (1969). This clearly had a relation to the ownership or occupation of the land in which the abnormally dangerous activity, the storage of gasoline, occurred. The dangers of the use of a handgun in the commission of a crime, however,

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bear no such relation to the ownership or occupation of the land on which the crime was perpetrated. In view of such a distinction, the court of appeals held the abnormally dangerous activity doctrine inapplicable to the manufacture and marketing of handguns.

The second question addressed was Kelley's assertion that a handgun is an unreasonably dangerous product, and that manufacturers or marketers of such weapons should be strictly liable for injuries caused by them under Restatement (Second) of Torts, § 402A. Maryland adopted § 402A in *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976). *Phipps* and its progeny expressly require that the product be defective when sold. In determining whether the product was defective when sold, Maryland courts have frequently applied the "consumer expectation" test, which requires that the product be defective when sold, and unreasonably dangerous in a manner beyond that contemplated by the ordinary consumer. Restatement (Second) of Torts, § 402A Comments g and i. In applying this test in *Kelley*, the court held that a handgun manufacturer or marketer could not be held strictly liable merely because one of its products was used in the commission of a crime, because the ordinary consumer would expect a handgun to be dangerous. For a handgun to be defective, there would have to be a deficiency in the design or assembly of the weapon which could cause an unexpected discharge or malfunction.

The court of appeals in *Kelley* also addressed the "risk/utility" test applied in *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 573 P.2d 443, 143 Cal.Rptr. 225 (1978). This test balances the utility of a product's design and other factors against the magnitude of the risk inherent in that design. While no court in Maryland has expressly applied this test, both the court of appeals and the court of special appeals have indicated that this test merely rationalizes the analysis most courts perform in products liability cases involving unreasonably dangerous products. *Sheehan v. Anthony Pools*, 50 Md. App. 614, 620, n.6, 440 A.2d 1085, 1089 (1982). See also,

Phipps v. General Motors Corp., 278 Md. 337, 348, 363 A.2d 955, 961 (1976). The court found this test inapplicable in a situation where a handgun injures a person in whose direction it was fired, because the weapon performed exactly as intended. Like the "consumer expectation test," the "risk/utility" test requires that a product be defective when sold. Thus the court concluded in *Kelley* that handgun manufacturers and marketers cannot be held liable under either of the traditional applications of strict liability principles under § 402A of the Restatement (Second) of Torts.

The court did not, however, consider this dispositive. Recognizing that the common law is by necessity adaptable and subject to judicial modification in light of changing circumstances and knowledge, the court examined both Federal and Maryland legislation concerning the regulation of handguns. These regulations, according to the *Kelley* court, are consistent in two respects. First, they reflect society's acceptance of handguns, so long as they serve some legitimate and viable purpose, such as law enforcement, or target shooting. Second, there is a type of handgun, the *Saturday Night Special*, which is of such poor quality and so limited in function that it serves no legitimate purpose in today's society. The manufacturers and marketers of these weapons, reasoned the court, are aware of this, and know or ought to know that their products are being used primarily by the criminal community. In view of the foreseeability of this use, the continued marketing of *Saturday Night Specials* could be considered unreasonable. The *Kelley* court found no case law in any jurisdiction which differentiated *Saturday Night Specials* from other handguns, nor any which refused to do so. Nevertheless, the court of appeals has recognized the need in today's society to adopt a new limited form of strict liability, and has been the first to do so.

In determining whether a handgun is a *Saturday Night Special*, there are no established definitions. There are, however, various characteristics which may be considered in placing a handgun in that cate-

gory. Some of these include barrel length, concealability, quality of materials and manufacture, reliability, accuracy, and whether the particular type has been banned from import by the Federal Bureau of Alcohol, Tobacco, and Firearms. Because many of these factors are relative, the court indicates that they are matters to be determined by the trier of fact. This may only be done after the plaintiff has made a showing that the handgun in question possesses sufficient characteristics of a *Saturday Night Special* to create a factual issue appropriate for a trier of fact.

Once the trier of fact determines that a handgun is a *Saturday Night Special*, liability may be imposed on the manufacturer or anyone else in the chain, including the retailer. This liability may only be imposed when a plaintiff or plaintiff's decedent suffers injury or death after being shot by the handgun *during the commission of a crime of which he was not a participant*. The shooting itself may be the crime, or a part of an ongoing criminal transaction. If the foregoing elements are satisfied, the defendant shall be liable for all damages suffered by the gunshot victim consistent with established principles of law concerning tort damages.

Finally, the court addressed the question of whether the Rohm handgun which shot Olin Kelley falls within the *Saturday Night Special* category. Although this question does not present a question of law under the Uniform Questions of Law Act, the court offered a few comments regarding the applicability of its mandate to the instant case.

In the opinion of the court of appeals, the Rohm revolver was within the *Saturday Night Special* category, and liability ought to be imposed pursuant to the mandate set forth in the *Kelley* opinion. The court also noted that strict liability for wounds sustained from *Saturday Night Specials* would only be imposed in Maryland in cases where both the cause of action accrue *and* the handgun was initially marketed to the public after the date of the *Kelley* mandate.

—John D. Warfield