101 California Street Killings and Gun Control Litigation: *Merrill v. Navegar, Inc.*

Bryan Kirk

The 101 California Street building stands in the heart of San Francisco's Financial District taking up the block made by California Street to the north, Davis Street to the east, Pine Street to the south, and Front Street to the west. Ascending 48 stories to a height of 600 feet, an immense corrugated cylinder of dark glass rises from a massive triangular block of pink-peach, gray-speckled granite, which juts out towards the intersection of California and Front like a defiant foot. In the large plaza facing the intersection of California and Davis, the same granite is stacked to create three five-level, triangular prism-like terraces arranged with their points facing inward, two along California and one along Davis. In between the two terraces along California, water flows over a mushroom-like fountain and spreads into a shallow pool below. Across the way, at the far end of the terrace along Davis, a woman sells flowers out of a traditional white gazebo. Behind the gazebo, at the base of 101 California Street's tower, a marble-lined, glass atrium slants up seven stories to form the building's palm-filled, greenhouse lobby.

This is the starting place for the story of *Merrill v. Navegar, Inc.*[1]—the case which, while it lasted, was the golden child of the gun control movement.

Part 1, July 1, 1993:

On Thursday July 1, 1993 at around 2:45 p.m., on an anomalously hot San Francisco summer afternoon, Gian Luigi Ferri—a short, heavy-set, fifty-five year old man with medium-length, thinning, dark, curly hair and wearing a dark business suit and suspenders—pulled an airplane luggage cart loaded with two black leather attaché cases and a large canvas duffel bag into the lobby at 101 California Street.

Randall Miller, who worked in the building and was on his way out to grab a cup of coffee, noticed Ferri, and thinking he was a salesman, said to himself, "That must be a tough job."

Ferri—who was not a salesman—was actually making his second visit to 101 California Street, that day. Early the same morning, Ferri had driven north to San Francisco five hours from his apartment in the San Fernando Valley community of Woodland Hills and had a brief interview with lawyers on the 34th floor of 101 California Street at the law firm of Petit & Martin.

---

[1] 26 Cal. 4th 465 (2001); 75 Cal. App. 4th 5000 (1999).

Returning now, some three or four hours later, Ferri walked by Miller and past the security station in the center of the lobby, which was manned by three guards. He then entered one of the building's three elevators that traveled to the top floors. Ferri pushed the button marked 34.

On the 34th floor at about the same time, Judy Roberts, a legal secretary with Petit & Martin, left her desk to go buy a soda. The 34th floor, along with the 33rd and 36th, made up the San Francisco offices of Petit & Martin, a full-service law firm, which was then the Bay Area's fifteenth largest. Roberts' desk was on the west-side of the building, near the office of Bob Burke, the attorney for whom she worked. On the 34th floor, the attorney's offices ran along the edge of the building. The desk of the legal secretaries and paralegals, along with the offices of the firm's various internal departments (word processing, accounting, etc.), were clustered about the floor's interior.

Roberts wove through the desks around her own, then walked the short distance past the word processing department to the reception desk. She then turned right into the elevator lobby.

The elevator lobby stood in the middle of the floor and extended out, creating a hallway that ran from the reception area on the west to the main conference room on the far east-side of the building. The soda machines were on the 36th floor. An interior stairwell connected the 33rd and 34th floors. However, as the building's emergency stairwell did not open to any floors except the lobby unless a fire alarm had been activated, to reach the 36th floor one had to take the elevator.

Roberts stood in the elevator lobby and waited.

When the elevator door opened, a stocky, slightly disheveled man in a dark business suit, accompanied by a luggage cart, stood in the back right-hand corner. The man seemed preoccupied with something in one of his bags.

Stepping into the elevator, Roberts asked the man if he needed any help. The man responded, "Wait right there."

Roberts gave him a once over. The man had a handgun.

Thinking the man was a thief, Roberts prepared to offer him her purse.

The man again said: "Wait right there."

The man then stepped forward and pulled the red lever disabling the elevator. He exited the elevator into the elevator lobby and turned to his left towards the conference room on the east.

Sharon O'Grady, a Petit & Martin bankruptcy attorney, stood at the reception desk, as Roberts entered the elevator. O'Grady noticed Ferri as he exited the elevator and watched him for a moment to see if he belonged.

At the entrance of the elevator, Roberts waited momentarily. As she saw Ferri head towards the east-side of the floor -- seeming to still be preoccupied with the one bag he had taken with him, Roberts ran from the elevator towards the reception desk.

With O'Grady following, Roberts darted into the word processing department around the corner, warning them that there was a man on the floor with a gun.

Roberts then sprinted to her boss Bob Burke's office and closed the door behind her, turning the lock.

Bonnie Young, another employee of Petit & Martin, stood near the eastern end of the elevator lobby as Ferri entered onto the floor, walking past her line of vision as he headed toward the east-side conference room. From Young's perspective, he seemed to be carrying what looked like a video camera.

Young followed for a moment. Then, suddenly, she realized that what she thought was a video camera was actually a gun.

She ducked into the door of the accounting department and told the employees there what she had seen.

* * *

The handgun, which Roberts had noticed, was a Norinco 1911A1, a very effective and accurate .45-caliber pistol. It was loaded with Winchester "Black Talon" hollow-point bullets—bullets, whose tips mushroom into six sharp points and rotate at approximately 100,000 revolutions per minute upon entering the human body. What Young had thought to be a video camera was one of the two TEC-DC9 assault weapons, which Ferri had slung one over each of his shoulders. The TEC-DC9s—twelve and a half inches long, barrel-shrouded, 9-millimeter, semi-automatic assualt weapons—were both equipped with "Hell-Fire" trigger systems. By means of a spring placed behind the trigger guard, both TEC-DC9s were capable of firing in rapid bursts much like an automatic weapon.

In Ferri's bags were several hundred rounds of ammunition, including a handful of magazines containing as many as forty or fifty rounds.[2] Each of the two TEC-DC9s was armed

[2] Rounds are bullets. Magazines carry bullets and function more or less like the bottom portion of a Pez candy dispenser—feeding the gun with bullets until the magazine is empty. With the TEC-DC9s, the magazine attaches to the gun by fitting into what most might percieve as a short (potentially quite long, once the magazine is attached) second handle that

and loaded with a thirty-two round magazine—in part, like the Norinco 1911A1, filled with "Black-Talon" bullets.

* * *

In the conference room at the end of the hall, Deanna Eaves, a thirty-three year old court reporter from Richmond, California was transcribing the deposition of Jody Jones Sposato in preparation for an arbitration proceeding in a wrongful termination/sexual discrimination suit, which Sposato had filed against a company represented by a Petit & Martin affiliate.

Sposato sat facing the interior of the floor. A curtain concealed the large glass wall that stared out onto the floor's main hallway. Sposato's lawyer, Jack Berman, a thirty-five year old attorney from the San Francisco firm of Bronson, Bronson & McKinnon, sat next to her. Sharon Jones O'Roke, an attorney from Plano, Texas who was representing the Petit & Martin affiliate, sat on the other side of the table at the end.

Suddenly, the glass shattered.

In a single burst of fire, Sposato and Berman were struck and fell from their chairs. Eaves and O'Roke ducked under the table. Eaves grabbed hold of a chair to protect herself.

Ferri then entered the room, spraying under the table. Eaves was struck on her right side. O'Roke was struck in her head, chest, and arms.

With the Norinco pistol, Ferri reached over and shot both Sposato and Berman at point-blank range. Both were killed.

Ferri then exited the conference room and turned to his right, walking along the perimeter of the floor.

Down the arch of the hall six or seven doors from the conference room, thirty-nine year old litigation attorney Brian Berger was in the office of fifty-two year old partner Allen Berk. Berger's office was next door. He had come over to chat.

Before Berk and Berger could process and decided how to react to the glass shattering and gunfire down the hall, Ferri fired through the glass wall of Berk's office. Both Berk and Berger were struck.

Stepping into the office, Ferri shot and killed Berk with the Norinco pistol.

He then stepped back, and turned and walked back towards the conference room. Berger was wounded in his left arm and chest.

---

descends directly in front of the gun's trigger guard.If a gun's magazine is detachable, as with the TEC-DC9, the magazine can potentially hold a very large number of bullets. In addition, with a detachable magazine, a new set of bullets can be added to the weapon quite easily and rapidly—as often seen in action movies.

Ferri walked past the conference room, then continued along the perimeter towards the interior staircase leading to the 33rd floor.

He continued to fire. The bursts seemed to come six at a time.

As he descended the interior staircase, Ferri fired at two individuals at point-blank range. David Sutcliffe, a thirty year old summer associate at Petit & Martin from the University of Colorado, Boulder, was killed instantly. Charles Ross, a forty-two year old contract attorney, serving as a consultant to Petit & Martin, was struck on his right arm.

* * *

Shortly before Ferri had entered 101 California Street, twenty-seven year old Petit & Martin associate Michelle Scully had dropped by the office of her husband, John Scully, twenty-eight years old and a fellow Petit & Martin attorney. The two had met in law school and been married for around nine months. John's office was on the 34th floor. Michelle's was on the 33rd. Michelle had planned to tell John she was going to go to University of San Francisco's law library to do some research. John, however, had persuaded her to stay and work in his office.

Michelle was on her way back to her office, to gather her things and bring them back up to John's, when John, still in his office, heard the shattering glass and gunfire. Someone told him to get out of the building. He ran downstairs and grabbed Michelle. He told her that he had heard "pops" and that they were evacuating the building. Michelle thought it was a Fourth of July prank, but followed. Then, they saw Ferri.

Ferri approached a young man in the stairwell, then—seemingly in the same moment—the young man collapsed in a pool of blood. John and Michelle turned and ran into an empty office. They tried to conceal themselves behind a cabinet. Ferri, however, followed. John threw his body over Michelle as bullets sprayed the room.

When the gunfire moved on, John asked Michelle if she had been hit. She said no. (In truth, she had been wounded in her right shoulder and chest.) Michelle asked John. He had been hit. He was bleeding badly.

Michelle attempted to call 911. John tried to help. John then turned to Michele. "Michele," he said, "I am dying…I love you."

They said their good-byes.

* * *

Under contract with 101 California Ventures, the owners of the 101 California Street building, American Protective Services ("APS") provided security for the building. When an

alarm lit up on the building's security console showing an elevator had been disabled on the 34th floor, APS employee Lisa Quadri immediately sent one of the guards to check on it.

When the guard arrived on the 34th floor, via another elevator, the guard found a large canvas bag and a large amount of ammunition lying in the elevator that had been abandoned. Quickly, the guard reactivated that elevator and headed back down to the lobby, radioing his supervisor to tell what he had found.

Downstairs, guards had already begun receiving calls reporting gunfire.

As Randall Miller returned from what turned out to be a trip to the ATM at the Wells Fargo a block up on California Street, the normally relaxed security desk was active on the telephones and radio. As he approached the elevators, Miller heard an alarm.

Upstairs, perhaps only a minute or two earlier, John Sanger, an attorney with Petit & Martin, had ran from his office on the 34th floor down the interior staircase to the elevators on 33rd. A summer associate had told Sanger that there was a gunman on the floor.

A group of fifteen to twenty, including Sanger, rushed into the 33rd floor elevator in the same moment as Petit & Martin legal assistant Lorretta MacDonald was on her way out. Someone told MacDonald about the gunman. MacDonald quickly got back on.

When the elevator stopped at the 27th floor, the Petit & Martin employees burst out, yelling "Help us, there's a man with a gun!" The group then as quick as possible headed to the lobby.

A moment after Randall Miller pushed the button for an elevator going up, this large group of people exited. As they exited, someone said, "Don't go up there."

Miller inquired why.

Someone said, "There's a man with a gun."

Sanger walked past Miller and grabbed security guard, Michael Kidd. Kidd, apparently, was yet to be informed. Miller entered the elevator and rode down to the underground parking garage. From there, he called his secretary on a pay phone and told her to lock the doors.

The first call out of 101 California Street to 911 was received by operators at 2:57 p.m. A little over a minute later, operators received a second call, now reporting two people down. Almost immediately, an ambulance was dispatched to the scene.

Then, however, the dispatchers' computers experienced an information overload. Calls continued to come in, but police could not be dispatched. It took a little less than three minutes for the problem to be remedied. At 3:03 p.m., the first police unit was dispatched.

When Miller returned to the building's lobby, a police officer was talking to the group of people who had come down from the 33rd floor. The guards at the security desk had told the callers to call 911. They had also allegedly told callers to pull the fire alarms to try to seal the interior staircase between the 34th and 33rd floors and trap the gunman. Whether they had considered the other consequence of pulling the fire alarms—the opening of access to all the floors of the building from the emergency stairwell—was not clear.

* * *

At some point, the fire alarm had been pulled.

Ferri entered the emergency stairwell on the 33rd floor and descended to the 32nd. The 32nd floor was leased by Trust Company of the West and sub-leased in part to the law firm of Davis, Wright & Tremaine. Large, lockable wooden doors separated the floor's lobby from the offices. No one on the floor, however, had been warned of a gun man.

Ferri exited the emergency stairwell into the lobby for Trust Company of the West. At some point, one of Ferri's TEC-DC9s had jammed and overheated. In the Trust Company's lobby, Ferri paused and reloaded his weapons.

Although his office sat in plain view of the lobby, forty-eight year old Trust Company employee Donald Merrill, better known as Mike, did not notice Ferri. Entering the offices, Ferri spray-fired through the glass wall of Merrill's office. Struck, Merrill fell below his desk.

Ferri moved through the floor.

Sixty-four year old Trust Company secretary Shirley Mooser died after being struck four times. Thirty-three year old Deborah Fogel, a legal secretary for Davis, Wright & Tremaine, was hit by nine bullets, and later died.

Ferri returned to Mike Merrill's office, a handful of minutes after he left, and sprayed beneath the desk. Now struck by four bullets, Merrill died within twenty minutes.

Sitting in her office, forty-one year old Vicky Smith, marketing vice-president of Trust Company of the West, was struck five times, wounded in her left shoulder, lung, and hand.

Ferri exited the 32nd floor into the emergency stairwell.

The fire alarm now had been deactivated. There was no exit but the lobby.

Ferri descended to the 30th floor.

Below, SWAT team members began to ascend the stairwell.

On the platform between the 29th and 30th floors, Ferri placed the Norinco pistol under his chin and fired.

He fell facing up.

* * *

In about fifteen minutes, Ferri had fired off somewhere between seventy-five and a hundred rounds. At some point during the shooting, he had donned ear protectors to quiet the sound of his weapons. Including Ferri, nine had been killed. Those killed included three employees of Petit & Martin (one partner, one associate of little over a year, and one summer associate), two individuals that happened to be in Petit & Martin's offices for a deposition, two employees of Trust Company of the West, and one employee of Davis, Wright & Tremaine. Six additional people had been wounded.

* * *

At approximately 3:06 p.m., an announcement played for the first time over 101 California Street's intercom. It stated: "This is an emergency. Stay in your office. Lock your doors. Do not leave. Do not go on the elevator. Do not go on the stairwell. We'll get back to you." The message repeated every five minutes throughout the remainder of the afternoon.

On the 40th floor, employees of Boyd & McKay had locked their doors and barricaded themselves in with a couch. On the 25th floor, realtor Turner Newton tried to get some work done to distract himself. Below, SWAT and police teams slowly sprawled from floor to floor, searching for the gunman. Or men: at this point, it was not certain.

On the 26th floor, police supervised express, women-first elevator rides to the lobby.

Rides stopped when word came the gunman was in the stairwell.

At around 3:30 p.m., Davis Wright & Tremaine attorney Harry Shulman, concerned about the victims and the continuing lack of paramedics on the 32nd floor, decided to go down the emergency stairwell and look for help.

Within seconds, he encountered Ferri's body.

At about the same time, a group of police arrived. The police asked Shulman to check the pulse on the body. Shulman did as asked, then watched as other police arrived. In moments, they realized they had the gunman.

At 4:07 p.m., police summoned a witness "with a heavy stomach" to the stairwell below the 30th floor.

* * *

Outside the building, emergency crews had set up stretchers over the cable car tracks on California Street. BART and Muni were shut down. Near-by streets were blocked off. Swarms of media crews were at the scene. People around the building and around the Bay Area became

fastened to their TVs and radios, waiting to find out what exactly had happened and what exactly continued to happen.

People trickled out of 101 California Street. The victims from the 34th and 33rd floors, and then the 32nd appeared. A number were rushed off to San Francisco General. Others were already dead.

At 5:00 p.m., not long after Ferri's body was rolled out of 101 California Street, the Ferry Building's clarion played "Beautiful Dreamer" as it always did at that time. The Financial District began to empty. Some headed home without knowledge of the shooting. A large number were still stuck inside the building.

By 9:00 p.m., the 101 California Street building was empty except for police.

* * *

On July 2, 1993 (the next day), the only thing out of the ordinary on California Street was the Red Cross van parked near Davis Street and the media teams hovering across the street.

Trauma workers went door to door offering counseling and stress-briefing sessions, while TV newscasters interviewed comers-and-goers from the building. The offices of Petit & Martin, along with several others in the building, were closed.

At City Hall, San Francisco Mayor Frank Jordan held up a TEC-9, an earlier version of the TEC-DC9s used by Ferri, and told a crowd of citizens and reporters, "There is absolutely no reason why a weapon like this should be legal. This is a weapon of war and only of war."

California Senators Diane Feinstein and Barbara Boxer similarly called for federal regulation limiting the availability of semi-automatic weapons in their own press conferences. The National Rifle Association issued a statement citing the need to keep dangerous individuals off the street and the need for greater criminal justice enforcement.

Part 2, Gian Luigi Ferri:

In the days following the shooting, information regarding Gian Luigi Ferri accumulated. While Ferri's motives for killing in the way he did remained murky, the outlines of a troubled—almost deserving of the cliché—man emerged.

When police searched Ferri's body on the day of the shooting, they found a four-page, single-spaced letter typed in all capital letters taped to his torso. Under the heading, "List of Criminals, Rapist, Racketeers, Lobbyists," Ferri provided a chronicle of names, phone numbers, and grievances. Listed were over thirty lawyers, bankers, and real estate executives, as well as contact names and addresses for a dozen television news and talk shows.

The letter included a vow to shoot up Petit & Martin. However, none of those wounded or killed was mentioned. The letter also included a vow to shoot up the Battery Street realty firm, Marcus & Millichap, as well as a manufacturer of the food additive monosodium glutamate, or MSG.

Towards the end, the letter rails against the Food and Drug Administration for its failure to regulate MSG. It reads: "The last thing that made all this come to a head is that I am one of those people of the 50% of the population (12.5 million people), where the poison [sic] monosodium glutamate (MGS) [sic] has reached such high levels in our cells, that a minimum amount more can kill us."

The letter culminates: "There is this condescending attitude in business that when you get emotionally and mentally raped, well 'you get screwed' and the accepted result is the victim is now supposed to go to work at 7-11 or become homeless and the rapist is admired and envied [sic] as 'a winner.' I have always admired and tried to copy winners, but rape of any kind is deplorable and against the law. Remember the time when the same sneakering [sic], laughing attitude was bestowed upon drunk drivers, and the victim got no sympathy? Remember the time when the person raped physically did not dare to report it because of the humiliation and ridicule that the legal system put the victim thru. It is understandable that business people compete with each other [sic]. When you hire a consultant or an attorney you don't hire for the purpose of getting raped and then having all your efforts toward legal recourse totally thwarted by a corrupt legal system of 'esquires.' Esquires in the dark ages roamed the country-side to steel [sic] from the working people and give to the prince. Do attorney [sic] want us to call them esquires because their allegiance to the monarchy?"

* * *

Gian Luigi Ferri was born in Asmara, Ethiopia in 1937. At twenty, he began work as an engineer. At twenty-seven, he immigrated to the United States.

He arrived in Boston, then moved to San Francisco shortly thereafter. He lived first in San Francisco's Tenderloin district, then down the San Francisco pennisula in Daly City, then north in Sonoma County in Santa Rosa, Cotati, and Petaluma, then back south again in rural Santa Cruz County. He was a draftsman for Stanford Oil Co., then a counselor at Sunny Hill's children's center in San Anselmo, then an instructor at Sonoma State. He enrolled at University of California, Santa Cruz in 1969.

That same year, he married a mental health worker named Donna Jean Bendetti and became a naturalized citizen. Ferri then, himself, became a mental health worker. In the early

seventies, he and Bendetti moved to Marin, California, north across the Golden Gate Bridge from San Francisco.

By the late seventies, however, Ferri and Bendetti were divorced. At the same time, Ferri had become enraptured with a get-rich-quick, self-actualization minister named Terry Cole Whittaker. Ferri went into real estate.

Up through 1993, while living on and off in both Las Vegas, Nevada and the San Francisco Bay Area, before ultimately moving to Southern California six months prior to the shooting, Ferri was involved in several unsuccessful real estate deals. They involved property throughout California and the Las Vegas area. Many of the deals devolved into lawsuits. Ferri's bookkeeper in Las Vegas could not remember Ferri ever completing a deal.

In 1981, Ferri first came in contact with Petit & Martin. He had hired the firm to help him arrange a deal in which he and a group of Italian investors planned to buy three mobile home parks in the mid-West. The seller and realtor of the property was the realty firm Marcus & Millichap. The cost of the property was somewhere near $8 million.

Petit & Martin attorneys advised Ferri and helped him purchase the property, which he did by means of $6 million of debt and a $1.9 million down payment partly funded by the Italian investors. The deal, however, fell apart as financial and engineering problems developed, in part due to the parks' being located on flood plains. The Italian investors sued Ferri. Ferri sued Marcus & Millichap.

In 1982, Petit & Martin attorney Peter Russell flew to Indianapolis to find a local lawyer to handle Ferri's case. That lawyer eventually secured Ferri a $1 million settlement—$223,000 in cash, which Ferri used to cover other investments, and the remainder as part of a restructuring of the $6 million debt. Around this time, Petit & Martin also advised Ferri in a land deal involving a residential development in Leadville, California. Like many of those Ferri had worked with during his time in real estate, the attorneys at Petit & Martin suspected no dissatisfaction on Ferri's part in relation to the services they had provided him.

Ferri, however, apparently viewed things differently. The letter police found taped to his chest cites the 1981 mobile home park deal as a central part of his greivances. Regarding the deal, the letter states, "I spent the last 13 years trying to find legal recourse and to get back on my feet only to find a wall of silence and corruption from the legal community."

It claims Petit & Martin "had not attended to details" of his investment and had given deliberate bad advice in order to "steal the money and take over the corporation." It claims Marcus & Millichap had falsified records, bribing and conspiring in order to achieve a

"ridiculous settlement." At the bottom of the final page of the letter, Ferri scrawled in his own hand, "One possibility of the deciet [sic] of P & M is old racial and ethnic prejudice: two of our investors are African, one Spanish. One Muslim." At another point, Ferri scrawled: "What happened to me at P & M…was rape."

Ferri's failed real estate deals were the source of almost all of the names on his list. When informed that their names were on Ferri's list, however, almost all of those listed were surprised. A handful had no recollection of ever dealing with Ferri. Most had vague recollections of incomplete business deals or brief interactions.

Those who most recently came into acquaintance with Ferri described him as one who often didn't work, spent long hours alone, harbored grudges, paced a lot and was in need of money. Those who knew Ferri earlier in his life were largely astonished to learn of the shooting. He had no criminal record. An autopsy found his body to be drug-free.

* * *

In January 1993, Ferri made his first visit to the Pawn and Gun Shop in Henderson, Nevada. Over the next several weeks, he made a handful more.

According to the sales clerk at the store, during the course of his visits, Ferri inquired about "a wide variety of guns" and spent several hours discussing and examining "maybe 10." He seemed interested in a high-capacity weapon. He told the sales clerk he needed a gun for home protection.

Ultimately, Ferri purchased a used TEC-9, an earlier version of the TEC-DC9s he would eventually use during the shooting at 101 California Street. It was the only TEC-9 or TEC-DC9 in stock. He came back the same day, however, and returned the weapon.

He told the sales clerk, "I don't trust this gun. I need a new gun for a very special task."

On April 25, Ferri visited AALJ's SuperPawn in Las Vegas, Nevada. He told the sales clerk, here, as well as another customer, Ward Messing: "I'm looking for an excellent 'target practice' gun. I want it for plinking."

The sales clerk remembered showing Ferri a TEC-DC9 and another, more expensive, gun made by Glock. The sales clerk could not remember whether she or Ferri suggested the Glock. She did, however, remember she tended to steer customers towards better, higher quality firearms, which the Glock was. She could not remember ever suggesting the TEC-DC9 to a customer. She remembered only moderate discussion of the price of the weapons.

Ferri was only interested in the TEC-DC9.

In reference to the gun, Ward Messing told Ferri: "They'll laugh you off the shooting range if you show up with that gun. It's a waste of time because it's not an accurate weapon at all." Messing suggested that if Ferri wanted a gun for "plinking"—shooting cans or bottles, or possibly even targets, generally in open areas or occasionally at ranges—Ferri should opt for a .22 caliber gun, as ammunition for a 9-millimeter weapon like the TEC-DC9 was quite expensive, costing around eleven dollars for a box of fifty rounds.

In reference to the TEC-DC9, Messing said, "I couldn't afford to shoot it." In response, irritated by Messing's comments, Ferri slapped an invalid Nevada driver's license along with the necessary two hundred eighty-eight dollars of cash onto the counter and purchased the TEC-DC9.

He filled out the necessary single sheet of paperwork, using an invalid license and a fake address, then walked out of the store.

A week later, Ferri returned to purchase an attachable "combat-sling" for the TEC-DC9. The store, however, was out of stock.

On May 8, Ferri purchased a second TEC-DC9 at a gun show in Las Vegas. Again, he used the invalid Nevada license and fake address. The seller of the gun was Danny W. Peterson Guns of Utah. Ferri told the sales clerk that he already owned one TEC-DC9. He paid two hundred ten dollars for the second TEC-DC9—the cheapest price available at the gun show for the gun.

This second gun came via Utah from a firearm distributor in Lebanon, Ohio. The first TEC-DC9 Ferri purchased (the one from AALJ's Superpawn) had come from a distributor in Prescott, Arizona. Navegar, Inc., the manufacturer of both the TEC-9 and the TEC-DC9, was based out of Miami, Florida.

With the exception of Ferri's use of fraudulent identification, all his purchases were completely legal under all relevant law. All of the dealers were licensed.

On June 18, two weeks before the shooting, Ferri accepted an invitation from a Southern California friend to go on an "early morning target shooting trip" in the Mojave Desert. Ferri and two others drove to a shooting range in the desert, where Ferri fired one of the TEC-DC9s.

Ferri then drove back to Henderson, Nevada. On June 25, Ferri purchased the Norinco pistol, along with several hundred rounds of ammunition from the Pawn and Gun Shop in Henderson.

* * *

When San Francisco Police investigators arrived at Ferri's Woodland Hills apartment, they found two final demand notices for Ferri's $800 a month rent nailed to the door. (Both notices had been placed there the day of the shooting.)

Inside, they found piles of dirty dishes and an unmade bed with unclean linens. There were no pictures of family or friends. There was, however, a plethora of gun-related material.

There were no weapons. However, in addition to technical manuals for the two TEC-DC9s and a handful of promotional and sales material from Navegar, there were dozens of copies of *Soldier of Fortune*, *Guns*, *Strike Force*, and other survivalist and gun-related magazines. There was an ad for Hell-Fire trigger systems torn out of an issue of *Guns*. There was also a flyer for a 1993 *Soldier of Fortune* gun show.

The investigators took a sampling of the materials back to the Police's evidence locker in San Francisco. Unclaimed, the remainder of the items were disposed of by the landlord.

Part 3, the Aftermath:

Individual memorial services for the victims were held on the Monday and Tuesday following the shooting. No one claiming his body, Ferri was to be cremated and his ashes spread over the Pacific.

At the funeral for Allan Berk on Monday July 5, Chuck Ehrlich, a partner with Petit & Martin, announced the formation of Legal Community Against Violence. Lawyers at Petit & Martin had formed the organization over the weekend. It was to be dedicated to gun control advocacy and education. Ehrlich urged mourners to contribute and told the press that he had asked all of San Francisco's largest law firms to contribute one hundred dollars a lawyer to start the organization running. Ehrlich also told reporters that he was flying to Washington D.C. the next day to meet with the directors of Handgun Control, Inc., the legal arm of the Brady Center, the country's leading gun control advocates.

At a separate meeting with the press, Steve Sposato, the husband of Judy Jones Sposato, read from a letter that he had sent to President Clinton. Urging the President to ban assault weapons, he wrote, "Hopefully I can tell my daughter Meghan Marie that her mother's death was not entirely in vain."

On Friday July 9, over 2,000 people gathered at 101 California Street in a service for all nine of the victims, including Ferri. Mayor Frank Jordan spoke along with several others. Mementos and letters were left at an altar memorializing the victims that would stay in place for weeks.

* * *

For Senator Diane Feinstein the shooting at 101 California Street became a galvanizing event. Gun control had not been on the freshman Senator's political agenda prior to the shooting. By August of 1993, however, she was campaigning and politicking throughout Washington with the aim of passing a ban on assault weapons.

The bill that Feinstein was proposing stood to ban the manufacture, sale, transfer, possession, and import of nineteen specified semiautomatic assault weapons as well as any ammunition magazine in excess of ten rounds. The TEC-DC9 and the TEC-9 were among the weapons specified. Also included were all commercially available models of the Avtomat Kalachnikov (more commonly known as AKs), as well as the Action Arms Israeli Military Industries' Uzi and Galil—all weapons, like the TEC-9 and TEC-DC9, well-suited to mass violence. Any copy of the named weapons were also banned, as were any semi-automatic rifles, pistols, or handguns, which possessed the ability to accept a detachable magazine and which possessed at least two of a set characteristics designated for each type of weapon.

To placate some gun advocates, Feinstein named six hundred and fifty guns that would not be banned. In addition, the ban on transfer and possession would not apply to weapons already otherwise legally owned.[3]

In September 1993, Steve Sposato appeared before California's State Legislature. With his daughter Meghan harnessed to his back, he told the legislators how he became a single dad. Within months, Sposato told the U.S. Congress the same story, again with Meghan peering over his shoulder. His testimony was in regards to the Brady Handgun Violence Prevention Act.

In November 1993, after more than seven years of being fought by the NRA, the Act[4] was signed into effect by President Clinton. Widely known as the Brady Bill, the Act mandated a 15-day waiting period for all handgun purchases and required criminal background checks be performed by all licensed firearm dealers. It would have had no effect on the ability of someone like Ferri, who had no criminal record[5], to purchase a weapon. Nevertheless, between March of 1994, when the Act came into effect, and December 2002, the Act would prevent the sale of

[3] Due to this last exception, it is not clear whether the ban—even if enacted well-prior to July 1, 1993—would have had any practical effect on what happened at 101 California Street. Ferri would not have been able to walk into a gun shop or show and buy a new TEC-DC9 (or any other similarly designed assualt weapon); however, he likely could have obtained the same weapon, without much additional hassle, through other means. Ferri might have had more difficulty obtaining the large capacity magazines he used; however, it is not clear what effect having to reload his weapons might have had on the damage he inflicted.

[4] 18 U.S.C. 922 (t)(1)

firearms to 976,000 prohibited purchasers, a category which included convicted felons, minors and mental incompetents.[6] Prior to the Act, firearm dealers more or less relied on the representations of the purchaser regarding their eligibility to own a gun.

In January 1994, the San Francisco Board of Supervisors passed a measure outlawing the sale within the city's limits of exploding bullets (such as the Winchester "Black Talon" ammunition Ferri had used) and ammunition magazines in excess of 15 rounds. The measure also required all firearm dealers within the city to obtain a city license[7]—something no other city in the United States had done.

Then, in May 1994, President Clinton signed Feinstein's Assault Weapons Ban[8] into law. With Sposato, again with Meghan on his back, and Feinstein by his side, Clinton dedicated the legislation to Jody Jones Sposato. Within less than a year of the shooting, legislation had been passed that—in regards to the future, at least—more or less outlawed assault weapons.

But what about the past? What about the burden of what had happened on July 1, 1993?

As one might expect, the answer, or rather the search for the answers to these questions turned to the courts.

* * *

In same month that the Assault Weapons Ban was signed into law, the families of four of the victims of the shooting at 101 California Street—Steve and Meghan Sposato; Mike Merrill's wife, Marilyn, and his two adopted children, five-year-old Kristin and three-year-old Michael; John Scully's wife, Michelle Scully; and Jack Berman's wife, Carol Kingsley, and two-year-old son, Zachary Kingsley Berman—each filed an unprecedented law suit in the Superior Court of San Francisco.

The four independent actions (which were later consolidated) named as defendants: AALJ's SuperPawn (the place where Ferri had purchased the first TEC-DC9); Orpheus Industries (the manufacturer of the Hell-Fire trigger systems used by Ferri); USA Magazines (the manufacturer of the large-capacity ammunition magazines used by Ferri); and Navegar, Inc (the manufacturer of the TEC-9 and TEC-DC9). The complaints made claims based on grounds of both strict liability and negligence, as well as unfair business practices in regards to Navegar. Damages were unspecified.

---

[5] Ferri's invalid license and fake address had been used to prove he was a resident of Las Vegas, not that he was someone other than himself.
[6] 18 U.S.C. 922 (d)
[7] San Francisco City & County Muncipal Code, Part II, Chapter VIII, Article 9 §613 to §613.20
[8] 18 U.S.C. 922 (v)(1); (w)(1)

In addition, the Merrills, along with a couple of unrelated plaintiffs such as the Fireman's Fund, also filed suits against 101 California Ventures (the owners of the 101 California Street building) and American Protective Services (the security providers for 101 California Street). Here, the allegations were based on negligence and landlord-tenant duties. Again, damages were unspecified.

Not long after the complaints were filed, David Sutcliffe's parents, as well as two of the wounded victims, Charles Ross, and Deanna Eaves, with her husband, Roy, also joined the case. There were now seven groups of plaintiffs and seventeen plaintiffs, total. Of the eight killed by Ferri, only the families of Allen Berk (survived by his wife, Barbara, and two daughters), Shirley Mosser (a widow of 14 years, whose mother had died four months before the shooting), and Deborah Fogel (survived by her parents and a brother, all of whom lived outside California) did not join the suit.

Representing each of the plaintiffs, and the actual filer of the claims, was Handgun Control, Inc. ("HCI"), and its director, attorney Denis Henigan. Few, if any one, knew the area of gun control better than Henigan.

That the Merrills, and others, had claims beyond the realm of firearms initially provided pause for Henigan, as HCI's charter limited its activities to matters involving gun control. However, by each plaintiff group additionally having their own counsel, HCI and Henigan were persuaded to stay on. Given the size and unprecedented nature of the case, each family would likely need the extra help, regardless. William Kissinger, a former paralegal for Petit & Martin, became the attorney for Marilyn Merrill and her two children.

As the case progressed, Henigan provided the intellectual horsepower. Kissinger became the organizer.

Part 4, Navegar, Inc.:

The TEC-9 was born in the early 1980s out of the partnership of a Swedish weapon designer named George Kellegren and a Cuban immigrant named Carlos Garcia. Garcia had turned National Guns, the mom-and-pop gun store he owned in the Little Havana district of Miami, Florida, into the busiest weapon emporium in the area. Kellegren had designed a semi-automatic military handgun to be used for riot control by the South African and Rhodesian police only to have his market dissolve. Kellegren was in search of an American entrepreneur with knowledge of the gun industry and marketing savvy. Garcia, with dreams of creating his own

weapons empire and plans for doing so, was exactly what Kellegren was looking for. They formed Navegar, Inc.—later, also known as Intratec—in 1980.

Within the same year, Navegar manufactured its first weapon: the KG-9. Based on Kellegren's designs, it cost a little less than ninety dollars to produce. Described by one gun magazine writer as "the world's first assault pistol," or "civilian-legal submachine gun," the handgun, at a little over a foot long, used 9-millimeter parabellum—"for war"—ammunition, and featured a double-column, detachable ammunition magazine, which was designed to hold a thirty-two round clip, as well as a shrouded barrel, which was meant to disperse heat generated by rapid firing allowing the user to grasp the barrel and hold the weapon with two hands. Both these features were usually reserved for military weapons.

According to its manual, the KG-9 "combined the high capacity and controlled firepower of a military submachine gun with the legal status and light weight of a handgun." The Bureau of Alcohol, Tobacco and Firearms ("BATF"), however, found the gun a little too easy to convert into an automatic weapon.

The BATF halted production. Navegar, however, in response, simply made changes to the gun's bolt, making conversion to automatic slightly more difficult, then remarketed the weapon as the KG-99. To encourage new buyers, the "new" gun now featured an "assault weapon grip." According to the manual, "You basically hold gun with two hands like you would a military assault weapon." It was the ideal grip for firing off a thirty-two round clip.

The BATF, however, again was dissatisfied. Forbidding the attachment of the assault grip, they directed Garcia to "make it safe enough to sell." Heeding the BATF's instruction, Garcia simply packaged the grip and the gun separately and required the gun's order form be stamped with a statement that the grip cannot be attached legally to the gun.

In 1985, the gun was re-named the TEC-9.

* * *

In the mid-to-late eighties, Navegar became serious about marketing. In magazines such as *Soldier of Fortune*, *SWAT*, *Heavy Metal Weapons*, *Guns*, *Firepower*, and *Combat Handguns*, Garcia—who was in charge of Navegar's marketing—ran advertisements touting the features of their weapon.

One typical ad, entitled "Higher TEC" and featuring several versions of the TEC-9, reads: "At two-thirds the weight (and price) of an Uzi, the TEC-9 series clearly stands out among high capacity 9 mm assault-type pistols. Ounce for ounce they deliver more gutsy performance and reliability than ANY other gun on the market. TEC-9s are built comfortable with an

ergonomically designed grip and frame—32 rounds of firepower make them ideal for self-defense or recreation. Simple, two-step disassembly for easy cleaning makes them convenient. In standard or mini version, blue, stainless steel, or our new 'TEC-KOTE' finish the TEC-9's offer rugged, reliable, affordable technology." A different ad featured a smoking target in the shape of a human. Another featured a bikini-clad woman on her hands and knees cradling the gun. (Garcia's marketing techniques were often sexual.)

At gun shows, attended in large part by the readers of the magazines mentioned above (*Soldier of Fortune* sponsored many), Navegar displayed its weapons and distributed promotional materials both to dealers and consumers. In one sales brochure—which was distributed to gun retailers and also available to the public—Navegar touted the TEC-9's "military non-glare TEC-KOTE finish," which they claimed provided "a natural lubicity [sic] to increase bullet velocity, excellent resistance to fingerprints, sweat rust, petroleum distillates of all types, gun solvents, gun cleaners, and all powder residues." Another brochure read: "Intratec: Weapons that are as tough as your toughest customer." The TEC-9's product manual—in addition to providing the necessary safety warnings, technical information, and operating instructions—recommended and depicted a handful of shooting positions. One of these position was "hip fire at shortest range"—i.e., spray-firing.

The manual, which remained more or less the same through to Ferri's purchase of the weapon, and came with each weapon, reads at one point: "Thanks to its dimensions and designs, the TEC-9 can be used in modes of fire impossible with most handguns." The manual, at another point, reads, "A radically new type of semiautomatic pistol, designed to deliver a high volume of firepower." Additional advertisements for the TEC-9 describe it as "paramilitary" and boast its "military blowback system," "combat-type" sights, and "firepower above and beyond."

Soon, the gun had cult status.

In addition to the gun shows and magazine ads, Navegar soon was also giving away and loaning TEC-9s to producers to be used on television and in film. The gun featured prominently in the 1987 film, Robocop, as well as in the 1992 film, Freejack. There is hardly an episode of Miami Vice that does not feature the weapon—the producers of the show wanting "that flashing intimidating look."

In the year after Garcia began seriously advertising the TEC-9, Navegar's sales went up 250%. In the late eighties, Navegar sold around ten thousand TEC-9s a year. According to Navegar, the TEC-9 was a "fun gun" for "plinking," and also useful for self-defense. According

to Navegar, their target consumers were "survivalists" and "militarists." They avoided the mention of criminals.

* * *

Criminals, however, did not avoid Navegar.

In May of 1989, Cox Newspapers, one of the nation's largest newspaper publishers, conducted a study on assault weapons.[9] According to their analysis of BATF data from 1988 and 1989, due to its firepower, concealability, and low price, the TEC-9 was the most favored weapon among the United States' most dangerous criminals—that is, namely, violence-prone drug gangs in metropolitan areas.

According to their analysis, assault weapons, which accounted for .5% of the 200 million then privately owned firearms in the U.S., were twenty times more likely to be used for a criminal purpose than conventional firearms. In some cities, such as Los Angeles, they were forty times more likely. In total, assault weapons made up 10% of the guns traced to crime and ten models accounted for 90% of weapons in those crimes. Of the ten models, the TEC-9 was number one. It accounted for one-fifth of the crimes, 2% of all the weapons traced to crime.

At around the same time as the Cox Newspaper report, a man named Patrick Purdy opened fire on a Stockton, California schoolyard. Using a Norinco 56S (one of the AK models that was later specifically outlawed by the 1994 Assault Weapons Ban), loaded with a seventy-five round magazine, Purdy killed five students and wounded twenty-six others.

In direct response to the shooting, California shortly thereafter passed the Roberti-Ross Assault Weapons Control Act ("AWCA").[10] A precursor to Feinstein's 1994 federal Assault Weapons Ban, the AWCA outlawed the manufacture, distribution, transport, import, keeping for sale, offering for sale, giving, or lending, and advertising of a list of specific high-capacity handguns.[11] Like the later 1994 Assault Weapons Ban, prior legal ownership was not affected by the Act. Unlike the 1994 legislation, however, transfer of otherwise legally owned assault weapon was prohibited. As one of the firearms named, the TEC-9 thus generally became illegal to obtain in California.

---

[9] *see Merrill v. Navegar, Inc.*, 75 Cal. App. 4th 500 (Cal. App. 1999).
[10] Cal. Penal Code § 12280(a)(1)
[11] The AWCA made California the first state to attempt a comprehensive ban on assault weapons.

Similarly, in 1991, Washington D.C. passed legislation[12] that provided that makers of a specified list of assault weapons would be held strictly liable if one of their weapons was used to kill someone within the city's jurisdiction.[13] Again, the TEC-9 was one of the weapons listed.

Navegar's response?

In a 1992 New York Times article[14] regarding assault weapons—the legislation, the shootings, the statistics—Navegar's then national director of sales and marketing, Michael Solodovnick, also known as "Mike Solo," was quoted as saying, "I'm kind of flattered. It just has that advertising tingle to it. Hey, it's talked about. It's read about. The media writes about it. That generated more sales for me. It might sound cold and cruel, but I am sales oriented." Later, Solodovnick says, "The wrath of government, the only thing it has done is increase our sales. What the people are starting to realize is 'Geez, I really want that firearm, but I can't get it anymore, I better buy it fast.' I'm sorry to say, whenever anything negative has happened, sales have gone tremendously high."

In response to the California ban, Navegar had begun marketing the TEC-9 as an "Endangered Species," often—despite the AWCA's prohibition—in gun magazines that Navegar knew would be distributed in California. After the DC legislation, Navegar simply, once again, re-named their weapon.

In 1991, Navegar introduced the TEC-DC9. The "new" weapon now featured a "side-sling catch," which enabled the use of a "combat-sling," allowing rapid firing of two of the weapons at the same time. There were no other significant changes. In relation to the new "side sling catch," Navegar officials claimed the "DC" of the TEC-DC9 stood for "defensive carry." By this point, the weapon also now featured a threaded barrel, which allowed the attachment of such things as silencers and flash suppressors (both of which were restricted under federal law), as well as barrel extensions, which would enable the weapon to be fired with higher velocity and at greater distances while still allowing it to be broken down to a concealable size.

The same year, Michael Solodovnick was indicted in the Federal District Court for the Southern District of Florida for conspiracy to violate gun laws. He was charged with transferring manuals and videotapes relating to the conversion of the TEC-9/TEC-DC9 "into fully automatic firearms (machine guns)." He pled guilty.[15]

---

[12] District of Columbia Code § 7-2551.02

[13] To date, no successful case has been litigated.

[14] *see, Merrill v. Navegar, Inc.*, 89 Cal.Rptr.2d 146, 157 (Cal. App. 1999).

[15] In 1993, Solodovnick left Navegar.

In 1991, a Congressional Research study found that 2% of all TEC-9s made up to that point had been traced in connection with a criminal investigation. Depending on who you talked to, the number either demonstrated the rare use of the TEC-9 for criminal purposes or demonstrated the culpability of Navegar.

* * *

At the time of the shooting at 101 California Street, the TEC-DC9 offered the maximum firepower commercially available in a firearm.

Among others, Minuteman Publications published a manual entitled "Full Auto" which provided all the "engineering data, manufacturing procedures, and machinists drawing" necessary to convert the TEC-9/TEC-DC9 into "ultra-compact, fully automatic sub machine gun which fire from an open bolt." In addition, Orpheus Industries advertised the TEC-9/TEC-DC9 as one of the nineteen semi-automatic weapons compatible with its Hell-Fire trigger systems.

According to Carlos Garcia, "I know some of the guns going out of here are going to end up killing people. But I'm not responsible for that."

Part 5, Assembly Bill 75:

At the time when the plaintiffs filed their claims, section 1714.4 of the California Civil Code read as follows: "(a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of the injury, damage, or death when discharged. (b) For purposes of this section: (1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design. (2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product."

For obvious reasons, section 1714.4 was a major concern, as the plaintiffs in the 101 California shootings began to develop their case. The statute clearly blocked certain types of suits having to do with firearms and ammunitions. But which ones?

More specifically, did the statute apply to the plaintiffs' case? Were the plaintiffs bringing a "products liability action"? Were they proposing for the court to find Navegar's TEC-DC9 or USA Magazines' magazines "defective in design"? Were they asking for a risk/benefit analysis? Was the "potential to cause serious injury, damage, or death" really what the plaintiffs saw as wrong with the TEC-DC9 or its large-capacity ammunition magazine?

As the statute, itself, did not provide definitions, or answers to these questions, interpretation of the legislation became a matter of importance.

* * *

Assembly Bill Number 75 of 1982-83—the bill from which section 1714.4 stemmed—had been introduced before the California Legislature on December 8, 1982. Sponsored by the NRA, and introduced by Democrat Assemblyman Alister McAlister,[16] AB 75 originated in response to the filing of a number of suits against the manufacturers and dealers of what were called "Saturday Night Specials"—small, easily concealable, low-quality, largely inaccurate, and relatively inexpensive handguns, which were very popular among criminals, gangs, and drug dealers.

In seventies and early eighties, a group of Southern California gun manufacturers known as "the Ring of Fire" pumped out large quantities of these weapons, and the guns became sadly well-known in inner cities throughout the country. So well-known, in fact, that in the early eighties victims in a number of incidents involving the weapons filed suit. The plaintiffs in California, whose suits led to AB 75, alleged that the "Ring of Fire" manufacturers should be held strictly liable as "Saturday Night Specials" were "inherently defective products" causing "widespread damage and severe harm without conferring any substantial social benefit." In doing so, the California plaintiffs were more or less mirroring allegations in a suit that had recently been decided in Maryland.

In Maryland, a little before AB 75 had been introduced, an appeals court—in a decision, *Kelley v. R.G. Industries,*[17] that was shortly reversed by the Maryland legislature[18]—-upheld a lower court's decision finding a manufacturer of a "Saturday Night Special" strictly liable in a claim based on allegations almost identical to those made by the California plaintiffs against the "Ring of Fire" defendants. The Maryland appeals court, in a self-consciously narrow opinion, created a special niche of strict liability for "Saturday Night Specials." The decision explicitly did not apply to any other weapons. According to the Maryland court's opinion, in a future case plaintiffs had to first establish that the firearm in question met the necessary requirements of a "Saturday Night Special" and then the plaintiffs would have to prove causation and damages (the remaining questions under strict liability). Further narrowing its opinion, the court claimed its decision was based, not on a risk/benefit analysis but "as a matter of public policy."

---

[16] McAlister was a California assemblyman from 1970 through 1986. Currently, he works as a lobbyist for the Association of California Insurance Companies.
[17] 497 A.2d 1143 (Md. 1985)
[18] Md. Ann. Code Art.27 §36-I(h)

Based on model legislation drafted by the NRA, AB 75 was quite clearly conceived of as a means of barring California's courts from following Maryland's example and thereby also suppressing California's own pending "Saturday Night Special" litigation. As initially introduced, AB 75 read: "The furnishing of firearms or ammunition, with or without consideration, is not the proximate cause of injuries resulting from the use of firearms or ammunition, but rather the wrongful misuse of firearms or ammunition is the proximate cause of injuries inflicted upon another by the use of a firearm or ammunition."

AB 75 was amended multiple times prior to being passed. On May 11, 1983, while still in the Assembly, the bill was amended to read: "Except where there is a manufacturing or design defect which causes a firearm or ammunition to malfunction or where the furnishing of a firearm or ammunition is prohibited by statute, no person, organization, or public or business entity of any kind may be held legally accountable for damages of any type, whether to persons, property, or for the death of any person, suffered as the result of the furnishing, with or without consideration, of a firearm or ammunition." On May 25, additional language, "Nothing herein shall be construed to modify the negligent entrustment doctrine as enunciated by California case law and statute," was added.

On June 8, this language passed the Assembly by a 73 to 1 vote.

In the Senate, however, support for AB 75, as it then read, was not so strong. While before the Senate, all previous language in AB 75 was eliminated. It was then replaced with the language that appeared in section 1714.4 as enacted.

The Senate Judiciary Committee report regarding the amendments noted four concerns, all centering around possible litigation the Senate felt might be affected by AB 75 as it previously read. Those concerns were: one, the Senate did not want to preclude liability based upon "marketing circumstances," specifically, lack of warnings; two, it did not want to preclude cases based on "negligent entrustment" and other "forms of negligent furnishing," such as selling a firearm to a minor or a drunk; three, it did not want to restrict restricting liability for products which are "unsafe because the design failed to incorporate some safety measures"; and four, it did not want to foreclose strict liability cases based on a consumer expectation test for product defect.

In regards to this fourth concern, and in fact, as background to the all the concerns, the legislature most certainly was considering the 1978 California Supreme Court case, *Barker v.*

Lull Engineering Co.[19]. In *Barker*, the Court had approved two tests for determining whether a product is defective in design, and thus whether a manufacturer could be held strictly liable as a result. The first was the "consumer expectation" test --"that the product failed to perform safely as an ordinary customer would expect when used in an intended or reasonably foreseeable manner." In relation to firearms, this was the test the Legislature desired to preserve. The second test was a "risk-benefit analysis." It required that "the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger." In relation to firearms, this was the test that Legislators sought to limit. Many of the legislators in support of AB 75 feared that a jury might find that firearms per se did not pass a risk/benefit analysis.

According to the Court in *Barker*, the "factors" that a jury or a court could weigh in a "risk-benefit analysis" include "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." In light of these factors, most cases that apply a "risk-benefit analysis" would involve consideration of a "reasonable alternative design." With regards to firearms, this emphasis would seem to preclude a court from finding a weapon or ammunition device defective "in the absence of a reasonable alternative design" (in other words, when there is nothing the manufacturer can do but stop making their product). In footnote 10 of *Barker*, however, the Court notes: "In the instant case we have no occasion to determine whether a product which entails a substantial risk of harm may be found defective even if no safer alternative design is feasible." The Court cited Justice Traynor as having "suggested that liability might be imposed as to products whose norm is danger."

Despite the Maryland appeal court's claim to the contrary in *Kelley*, this was, in essence, what they had decided. And this was what the California Legislators, at minimum, wanted to keep from happening, with regards to firearms, in their state.

AB 75, as amended by the Senate, was sent back to the Assembly on August 30 by a 30 to 1 vote. On September 15, it passed California's Assembly by a 52 to 22 vote (it had needed a 2/3 majority), then returned to the Senate and passed by a 38 to zero vote.

In the Fall of 1983, section 1714.4 was enacted.

---

[19] 20 Cal.3d 413 (Cal. 1978)

As enunciated in the Senate analysis, the purpose of the bill was: one, "to protect manufacturers and sellers of firearms from being held liable in tort for selling or furnishing a firearm that was used to cause an injury or death"; two, "to preclude courts from using products liability theories to hold firearm manufacturers and dealers civilly liable to victims of firearms usage"; three, "to prevent the courts from extending product liability laws to hold a supplier of a firearm liable in tort to persons injured by use of the weapon"; and four, "to 'stop at birth' the notion that manufacturers and dealers are liable in products liability to victims of handgun usage."

But did the legislators' earlier noted concern align with the changes they had made? And did the stated purposes of the new law align with the language that was now in the Code? Again, these would be questions for the courts.

Part 6, the Pleadings:

The plaintiffs' final amended complaint included claims against six defendants. First, there were the Merrills' claim against the building defendants, 101 California Ventures and A. P. S. Second, there were the claims against USA magazines, Orpheus Industries, and AALJ's SuperPawn. Finally, there were the claims against Navegar.[20]

In relation to the building defendants, the Merrills' claim were fairly straightforward. In brief, the Merrills alleged that the defendants had a special relationship to Mike Merrill as a tenant in the defendants' building and that the defendants had breached their duty by failing to provide proper security—both preventive and in response—on July 1, 1993. The basic issue looked to be causation—the extent to which the defendants' action/inaction (i.e. possible instructions to pull the fire alarm, failure to immediately inform tenants, delay in contacting 911, etc.) facilitated Ferri's rampage, and the extent to which the security procedures in place prior to the shooting were reasonable given the buildings circumstances. The issues were factual. Legally, the claim was simple.

In relation to USA Magazines, Orpheus Industries, and AALJ's SuperPawn, the plaintiffs' claims became a little more complex. The issues looked to be both legal and factual.

---

[20] No claims were ever made against Norinco (the maker of the .45-caliber pistol Ferri used, and that was directly responsible for the death of at least half of his victims), or Winchester (the manufacturer of Ferri's "Black Talon" bullets), or Danny W. Peterson Guns (the source of Ferri's second TEC-DC9). In regards to Norinco and Winchester, the plaintiffs likely could not come up with a theory of liability that would not result in liability for any manufacturer whose weapon or ammunition was used to injure someone. In regards to Danny W. Peterson Guns, the defendant probably lacked resources or could not be found.

The plaintiffs first made claims based on common law negligence. In relation to all three defendants, the plaintiffs alleged that the defendants knew or should have known that their product[21]: one, had "no sporting or self-defense purpose," and, two, was disproportionately associated with criminal activity. In relation to USA Magazines and Orpheus Industries, the plaintiffs additionally alleged that the defendants knew or should have known that their product was particularly "suitable" for use with assault weapons and that assault weapons themselves were disproportionately associated with criminal activity. Based on these allegations, the plaintiffs claimed that the defendants could reasonably foresee that their products (or the product they sold) would be used to kill or wound innocent people, and thus, the defendants should be held liable for "distributing, marketing, and making [their product] available for sale to the general public." The plaintiffs secondly raised claims based on traditional strict liability, e.g, the law governing dynamite blasting. According to the plaintiffs, here, the defendants' "distributing, marketing, and making [their product] available for sale to the general public" was "abnormally dangerous," and thus the defendants should be held strictly liable.

On the surface, the claims were not necessarily complex. However, there were two things that should be noted. First, the thing that the plaintiffs were claiming the defendants should be held negligent/strictly liable for was not actually one thing. Rather, it was three. "Distributing," "marketing," and "making available for sale to the general public"— at least, in the abstract — were three separable acts. The plaintiffs, however, asked the court to view them as one. According to the plaintiffs, each of the components of the claim only mattered insofar as it related to the other two.

The second thing to be noted is that the common law negligence claims and the strict liability claims were not necessarily complimentary. In essence, under both theories, the plaintiffs claimed the same thing: that the defendants had put a dangerous product on the market and thus should be responsible for the harm that product caused. In regards to a common-law negligence, however, the defendant's responsibility stems from a finding that the defendant's action was unreasonable. In contrast, in regards to a traditional strict liability claim, the defendant's responsibility usually stems directly from the danger posed by the defendant's conduct. With traditional strict liability, the theory is usually not that the defendant's action is unreasonable. Rather, the theory usually is that the defendant's action is actually desirable or

[21] For AALJ's Superpawn, the product is the TEC-DC9. Although they did not manufacture the weapon, according to the plaintiffs, Superpawn did nevertheless make it available for sale to the public and market it, as well, as some degree of marketing was inherent in the retail sale of a product.

possibly even a matter of necessity. However, despite the defendant's reasonableness, it is best to make the defendant bare the costs of any injuries incurred, due the danger of the defendant's conduct. This is what is generally meant when something is alleged to be "abnormally dangerous."

In theory, the plaintiffs were giving the court two choices for liability. Along with the plaintiffs' three-into-one basis of liability, this gives rise to legal questions—questions, which a judge, not a jury, would decide.

By the end of the pleadings phase, the plaintiffs' claims in relation to Navegar, took similar form to those raised against USA magazines, Orpheus, and Superpawn.

The plaintiffs based their claims against Navegar on three theories of liability: one, common law negligence—that Navegar "acted negligently by manufacturing, marketing, and making available for sale to the general public the TEC-9 and TEC-DC9"; two, negligence per se—that Navegar had violated the AWCA by advertising the TEC-9/TEC-DC9 in California and that that advertising "was the direct and legal cause in bringing about plaintiffs' injuries"; and three, strict liability—that "making the [TEC-9/TEC-DC9] available for sale to general public" was "an abnormally dangerous activity."

In relation to the plaintiffs' common-law negligance claim, the specific allegations were that Navegar knew or in the exercise of reasonable care should have known: one, that the TEC-DC9 had "no legitimate sporting or self-defense purpose and is particularly well adapted to a military-style assault on large numbers of people"; two, that certain features of the TEC-DC9 "make the weapon more attractive to criminals"; three, that the weapon is "disproportionately associated with criminal activity"; and four, that "the TEC-9 and TEC-DC9 would be used to kill or injure innocent persons in violent criminal acts such as the mass killing committed by Ferri." The plaintiffs also alleged that Navegar's conduct breached its "duty not to advertise the TEC-9 and TEC-DC9 for sale to the general public" and that their advertising of the TEC-9 "target[ed] a criminal clientele." Based on these allegations, the plaintiffs claimed Navegar could reasonably foresee that their products would be used to kill or wound innocent people, and thus, they should be held liable for "negligent manufacturing, marketing, and making available for sale to the general public."

Although the last two allegations raised by the plaintiffs dealt with Navegar's marketing, as with USA magazines, Orpheus, and Superpawn, the plaintiffs again insisted upon a three-into-one theory of common law negligence. According to the plaintiffs, Navegar's marketing (or manufacturing, or distributing) was relevant only in so far as it related to the other two aspects of

claim. Again, this gave rise to a legal question, in regards to how to interpret the plaintiffs' claims.

* * *

Why the complexity of the plaintiffs' claims? Why give the judge these legal questions? Viewed one way, the plaintiffs were being clever and coming up with all the options that were possible. Viewed another way, the plaintiffs were grasping for any options they could find.

In essence, the plaintiffs were trying to cover all their bases in a situation with limited, possibly non-existent options. The precedent on suits against firearm manufacturers based on claims that the manufacturers' weapon had been used to injure the plaintiff almost unanimously favored the gun manufacturers. In addition, the plaintiffs had to deal with section 1714.4 and also causation.

Due to the presence of section 1714.4, the plaintiffs could not simply claim that the defendants should be liable for putting a dangerous product on market. They needed something more. The obvious alternative would be a "negligent marketing" claim. But did the plaintiffs have sufficient evidence to show that Navegar's, or any of the other defendants' marketing techniques, caused Ferri to do what he did? Moreover, would such a claim align with what the plaintiffs' saw as wrong with the defendants?

The plaintiff's "manufacture, marketing, and making available for sale" was likely their attempt at an answer. First, the three-into-one formulation seemed to move the claim out of the ambit of section 1714.4. Second, the theory would not limit causation simply to the defendants' advertising. And third, the all-inclusiveness nature likely better matched the plaintiffs' sense of what the defendants did wrong.

In all likelihood, the plaintiffs made the strict liability claims and the negligence per se claim against Navegar (which in some way was a "negligent marketing" claim, except that the negligence did not need to be proven), because they were options, not because that was what they believed. In all likelihood, the common law negligence claims, and specifically their claim against Navegar, were the plaintiff's main focus.

* * *

By the end of the pleadings, Navegar—now represented by the Los Angeles-based law firm of Latham & Watkins and attorney Ernest Getto (who actually had served as co-counsel with William Kissinger on a previous case)—had filed several demurrers.

In addition to the standard "failure to allege sufficient facts" and "complete lack of precedent," Navegar argued that section 1714.4 barred the plaintiffs claim. According to Getto, the plaintiffs' case was exactly what section 1714.4 was enacted to bar.

Part 7, Discovery:

In the Spring of 1995, California superior court Judge James Warren, the grandson of former U.S. Chief Justice Earl Warren, made his first major mark on *Merrill.*. While acknowledging a "general trend" of dismissal in cases brought against gun manufacturers, Warren announced that *Merrill* was "a case of first impression in the United States," and consequently dismissed all of Navegar's demurrers.

According to Warren, the earlier pre-1989 California rulings in favor of gun manufacturers did not necessarily apply to the case due to the passage of the AWCA. In relation to section 1714.4, Warren held that the case was not a "product liability action" and thus the statute was irrelevant. If the plaintiffs could produce the necessary factual evidence, the defendants could be held liable.

One step closer to trial, an elated Denis Henigan praised Judge Warren for applying "age-old legal principles to this new contemporary horror of assault weapons."

In response, Ernest Getto refuted the claims against his client, stating in a press conference that the guns were made legally in Florida, sold legally in Nevada, and had no connection to California. Shortly thereafter, Getto announced Navegar would not then appeal. Rather than immediately take their legal questions to the Court of Appeals, Navegar would "go through discovery and then request summary judgement in light of a complete and accurate record."

In his own press conference, Kissinger then stated, "Getto thinks we won't be able to prove our facts. I think we'll prove him wrong."

The case against Navegar moved on to discovery. The process would last over a year and a half.

* * *

Through discovery, the plaintiffs had three main stories they needed to tell: first, the events that transpired on July 1, 1993; second, the history and alleged infamy of Navegar and the TEC-9/TEC-DC9; and third, the between link Navegar's conduct and Ferri. The plaintiffs hired a private investigator to make sure no stone was unturned.

As the case progressed, its fate would more or less come to rest on the depositions and declarations of fewer than ten individuals.

First, there were the depositions of San Francisco Police Investigators Napoleon Hendrix and Earl Sanders[22].

According to both Hendrix and Sanders, Ferri employed a specific strategy during the massacre at 101 California Street. Relying on the heavy firepower of the TEC-DC9, Ferri "[laid] down a field of fire," effectively immobilized his victims. He then, in the words of Hendrix, "us[ed] the .45 caliber pistol to finish them off in a more direct and personal manner."

According to the ballistics reports, six of the fourteen dead and wounded were killed or wounded by .45-caliber bullets fired from Ferri's Norinco pistol. Of these, Jody Sposato and Jack Berman were shot with both the .45 caliber bullets from the Norinco and the 9-millimeter bullets from the TEC-DC9s, but were fatally wounded by the bullets from the Norinco pistol. According to Hendrix, "the TEC-DC9s Mr. Ferri used played a significant role in the timing of the murders. Had Mr. Ferri not used the TEC-DC9s, and instead used a conventional semiautomatic pistol, he would not have been able to fire as many shots as fast as he did. As a result, I believe, it would have taken Mr. Ferri longer to carry out his crime had he not been armed with two TEC-DC9. Said otherwise, without the TEC-DC9s, I believe Mr. Ferri would not have arrived on the 33rd and 32nd floors when he did and instead would have arrived at a later point in time." Similarly, Sanders stated that the "extended magazines" of the TEC-DC9 "gave [Ferri] an opportunity to fire a much longer period of time [and] many more shots than he would have been capable of with…what might be determined to be a standard semiautomatic pistol."

The investigators also testified that as many as fifty gun-related magazines (paper, not ammunition) lay on the floor of Ferri's apartment. According to Sanders they "took a couple [magazines], maybe, if at all" back the evidence room at the police headquarters to be booked, as they only "selected materials that might be useful" to their investigation. None of the magazines booked contained ads for Navegar, but Hendrix and Sanders stated they saw many of the same magazines, such as *Soldier of Fortune* and *Guns*, in which Navegar was known to advertise. The investigators additionally stated they found a flyer for a 1993 Soldier of Fortune gun shows on the floor of Ferri's apartment, as well as an advertisement for Hell-Fire trigger systems, which had been torn out of an issue of *Guns*.

Directly related to Navegar, the investigators stated they found two TEC-DC9 manuals, one Intratec (Navegar's "doing business as" name) catalog, and two price lists. The Intratec

[22] Sanders would eventually become San Francisco's Chief of Police.

catalog had a single fold in it, which indicated it had been delivered to Ferri in person (catalogs sent through the mail had two folds). In addition, according to the investigators, the catalog, unlike previous editions, did not contain mention of the TEC-DC9's "excellent resistance to fingerprints."

Second, for information on the TEC-9/TEC-DC9, itself, the plaintiffs relied on the statements of Leonard J. Supenski, a police chief and nationally recognized firearms expert, whose statements the defendants did not dispute.

According to Supenski, the TEC-9/TEC-DC9 differed from conventional handguns in six significant ways. First, there was the large capacity detachable magazine, which according to Supenski, was "designed to deliver maximum firepower by storing the largest number of cartridges in the smallest…space" and provided a level of firepower "associated with military or police, not civilian, shooting requirements." In addition, there was the barrel shroud, allowing a two-hand grip and facilitating "spray-fire from the hip"; the barrel's being threaded; the "combat-sling" swing swivel, again, facilitating hip-fire; the compact size; and, finally, the compatibility with Hell-Fire trigger system, which, according to Supenski, when properly installed would permit firing at a full automatic rate of three hundred to five hundred rounds.

The TEC-9/TEC-DC9 was "completely useless for hunting," according to Supenski. In addition, in his experience, it was never used by competitive or recreational shooters, and "has no legitimate sporting purpose," as "plinking" has never been considered a "sporting activity." Moreover, the weapon was so lacking in accuracy, it was arguably inadequate for "plinking," in his opinion, as well. In fact, according to Supenski, the TEC-9/TEC-DC9 was of no practical value for self-defense, and actually stood to be hazardous if used for defense, due to its light weight, inaccuracy, and firepower of weapon. According to Supenski, "spray fire" from such an inaccurate weapon provided a "severe threat" to innocent bystanders. In addition, in Supenski's opinion, "the full-metal jacketed ammunition recommended [for use with the TEC-9/TEC-DC9]" provided an added threat to bystanders as such bullets "will penetrate a human body and keep on moving." Supenski corroborated a BATF statement, which read, "[Assault weapons such as the TEC-9/TEC-DC9] were designed for rapid fire, close quarter shooting at human beings. That is why they were put together the way they were. You will not find these guns in a duck blind or at the Olympics. They are mass produced mayhem."

Supenski also corroborated the analysis of BATF data for 1988 and 1989 done by Cox Newspapers. In 1991, Supenski, himself, directed research for an association of police chiefs of a number of large U.S. cities, which yielded similar findings. According to the reported headed

by Supenski, in 1990 and 1991, the TEC-9 was "far and away" the leading assault weapon seized by law enforcement in the cities included in the research. According to their numbers—the study did not include certain major cities like New York, Chicago, and Houston, nor did it include seizures by federal agencies—the TEC-9 accounted for "24% of all assault weapons seized, and 42% of all assault pistols seized." Supenski additionally pointed to information from the BATF's Tracing Center finding that the TEC-9/TEC-DC9 accounted for 3,710 of the firearms traced to crime—mainly narcotics, assault and murder—by law enforcement officials nationwide from 1990 through 1993. There were perhaps as many as 150,000 TEC-9/TEC-DC9s in existence at that time.

Providing corroborating testimony, the plaintiffs also took the statement of James Fox, Dean of the College of Criminal Justice at Northeastern University. Based on the Cox Newspaper study and the B.A.T.F. data, Fox concluded that the "TEC-9 is disproportionately associated with criminal activity, i.e., it is much more likely to be used by criminals relative to its numbers produced than are other handguns." He also stated: "Even more indicative of the danger involved with the TEC-9 is the fact that the disproportionate tracing rate for the TEC-9 is particularly great for violent incidents and is the greatest for homicides…This suggests that the TEC-9 is especially a weapon of choice for violent offenders."

Third, the plaintiffs turned to Navegar. Plaintiffs' attorneys deposed both Carlos Garcia and Michael Solodovnick.

Interviewed at his palatial Miami mansion, Garcia reiterated his claim that the TEC-9/TEC-DC9 was a "fun gun" for "plinking." In regards to the most vilified portions of Navegar's advertising, Garcia said that "tough as your toughest customer" was derived from a car ad, and that "excellent resistance to fingerprints" referred to the gun's resistance to oil and corrosion. In regards to the assault weapons studies, he acknowledged that he was aware of the studies and that, at the time of the shooting at 101 California Street, he knew that the TEC-DC9 was the most firepower "that could be concealed in a briefcase." He also acknowledged that some of Navegar's ads for the TEC-9 stated the weapon had a flash suppressor and that he had no idea why a law-abiding citizen would have interest in such a thing. He admitted that the use of a flash suppressor or silencer would necessarily show some type of criminal purpose. Nevertheless, Garcia insisted that Navegar was simply appealing to "survivalists." He described his consumers as "Walter Mitty" types, "such a person who dresses up in a military outfit and to goes there [to a Gun Show] like he's a soldier, but he's not really, but he plays this game, and he likes it," those people looking for "effective protection from a government takeover or corrupt law

enforcement…preparing for civil chaos…as it happened in Cuba, as it happened in the Soviet Union, as it happened in China, as it could happen here."

Michael Solodovnick—who the defense attorneys did not know had pled guilty to violating federal gun laws until plaintiffs' attorneys posed their questions—similarly insisted Navegar simply targeted "militaristic people," the "survivalist community," and "Walter Mittyish" individuals. He described the targeted consumer as one who "play[s] military" and pretends "he's a soldier…eats, sleeps and breathes it as a secret life, and yet,…nobody knows what he really is." Going further, Solodovnick stated Navegar deliberately targeted "military-type thinking people" by referring to the TEC-9/TEC-DC9 as an "assault-type pistol" and touting its "para-military" appearance, "military non-glare" finish, "combat-type sights," "combat sling," and "threaded barrel." Solodovnick acknowledged that "excellent resistance to fingerprints" could be interpreted as meaning no fingerprints would be left on the weapon. He also acknowledged his awareness of the reports connecting assault weapons to criminal activities as well as his statements in the New York Times regarding the benefits Navegar received as a result. Solodovnick acknowledged he had pled guilty to federal charges and said that other officers at Navegar knew of the availability of all the necessary information to convert the TEC-9/TEC-DC9 into an automatic weapons. He admitted he and others knew that the compatibility with the Hell-Fire trigger systems attracted many to the TEC-9/TEC-DC9. Finally, Solodovnick also stated that Garcia had told him the "DC" of TEC-DC9 referenced the Washington, D.C. assault weapon legislation.

Lastly, to bring things back to Ferri, the plaintiffs added the twenty-two page declaration of forensic and clinical psychologist J. Reid Meloy, Ph.D. Meloy was a specialist in "affected violence and predatory violence during mass murder," as well as Chief of the Forensic Mental Health Division of the Office of Court Services in San Diego, a consultant to numerous federal and state law enforcement agencies, adjunct professor of psychiatry at University of California, San Diego School of Medicine, and the author of numerous books, articles, and over three hundred forensics evaluations.

Meloy's basic theory was that the TEC-9/TEC-DC9's features and "military-style physical appearance" "emboldened Ferri to undertake mass killings without fear of failure." According to Meloy, "the availability of the TEC-9 military style assault weapon" was not the only or necessarily the chief reason for Ferri's carrying out his attack, but it was "a substantial factor"—which was what the plaintiffs needed to prove to establish the causation aspect of their claims. Meloy begins his reasoning with the differentiation between "affective aggression,"

which he described as a "defensive mode of violence," and "predatory aggression," which was "an attack mode of violence." According to Meloy, people who meet all or most the forensic criteria for predatory violence—Ferri met all ten—"are reasonably certain to have engaged in a planned, purposeful and emotionless attack form of aggression." In Meloy's opinion, however, the availability of the TEC-DC9 and the nature of Navegar's advertising likely "fueled" Ferri's "fantasy-based violence." According to Meloy, individuals such as Ferri were always concerned about lack of firepower and statements such as "a radically new type of semi-automatic pistol, designed to deliver a high volume of fire power," "tough as your toughest customer," and "excellent resistance to fingerprints," among others, were "exactly what appeals to individuals who engage in such fantasy-based violence." Thus, Navegar "emboldened" Ferri.

When the plaintiffs turned their arguments to the court, this "emboldening" theory would provide their main means of linking Navegar's conduct to Ferri.

In response to the statements presented by the plaintiffs, Navegar added the declaration of Holly Newberry—Navegar's director of marketing after Solodovnick left—and Eugene J. Wolberg, a "forensic firearms criminalist."

Newberry stated she was unaware that Navegar's marketing or advertising intended to attract any "particular group of persons to purchase Navegar's products." She also stated that she was unaware that Navegar ever marketed or advertised it's products in relation to "high-capacity aftermarket magazines," the Hell-Fire trigger systems, silencers, or any kits designed to convert Navegar's products into fully automatic firearms. Wolberg stated he was informed that Navegar uses an electroless nickel finish on its firearms, which simply prevents body oils and perspiration form penetrating and "etching" the surface of the firearm, and "has no effect whatsoever on the police's ability to 'lift' fingerprints from a firearm." Wolberg also stated he was "aware of no facts which suggest that the TEC-DC9, or 'assault weapons' generally, are disproportionally used to commit violent criminal acts." In his experience, "'assault weapons' constitute a negligible portion of all firearms used to commit violent crimes."

* * *

At the end of discovery, Navegar filed for summary judgement.

Part 8, Warren's decision:

When it came time for Judge Warren to decide whether *Merrill.* would go trial, it had been almost four years since the shooting.

In 1994, Marilyn, Kristin, and Michael Merrill moved out of their house in Oakland and into a home in a gated community in Lafayette. Mike Merrill had helped design the house, in part, in an effort to help protect his family from the urban violence of Oakland.

At around the same time, Navegar had doubled production of the TEC-DC9 in anticipation of the Assault Weapon Ban coming into effect. They again marketed the weapon (not without success) as an endangered species. Then, a little over a month after the ban's effective date and a delayed halt of production of TEC-DC9s, they introduced the AB-10. With the exception of a few minor cosmetic changes, it was the same weapon as the TEC-DC9. Although arguably (or perhaps definitely) a violation of the new federal law, as a copycat weapon, Navegar persisted in producing and marketing the weapon.

In May of 1995, Petit & Martin dissolved and emptied out of 101 California Street. The firm at one point had offices in San Francisco, San Jose, Newport Beach, Los Angeles, Washington, D.C., and Hong Kong. However, it had been in a decline since well prior to the shooting. In 1990, they had trimmed their staff by a quarter. The firm cited an inability to recover from the economic recession of the early nineties as the reason for its dissolution. As many as ten partners, however, had left the firm within the year or two of July 1, 1993. None mentioned the shooting as their reason for leaving, but for many of those who left the shooting certainly caused a reassessment of priorities.

Also in 1995, Orpheus Industries, which had been based out of Montrose, Colorado, filed for bankruptcy, and effectively ended the plaintiffs' suit against them. In addition, in March 1996, Judge Warren threw out the plaintiffs' case against USA magazines, ruling in favor of the defendant on summary judgement.

The plaintiffs' claims against USA magazines were substantially similar to those against Navegar. However, in relation to USA magazines, the plaintiffs' had no studies linking USA's particular type of large capacity magazine to crime; nor could they point to advertisements touting the potentially criminal aspects of USA magazines' product; nor was it in any way clear that USA magazines' product lacked a legal purpose. In addition, the plaintiffs' had no Dr. Meloy to link USA magazines to Ferri. According to Kissinger, Warren kept on "re-casting the case" to try and provoke the type the evidence against USA magazines that was being produced against Navegar. Ultimately, the plaintiffs could not produce and decided not to appeal Warren's decision and focus on Navegar.

Also in early 1996, the plaintiffs settled with AALJ's SuperPawn and received $150,000. The money was dedicated to the suit versus Navegar.

In regards to the Merrills' suit against the building defendants, at the time of Warren's opinion, the plaintiffs were dragging the building defendants through discovery. The building defendants were reluctant to disclose any information or materials, such as security handbooks and tapes of security personnel's interactions on the day of the shooting. In the summer of 1997 (a few months after Warren's opinion), the Merrills would settle with the building defendants for several million dollars. 101 California Ventures had been insured up to one million dollars for each occurrence of violence. It is not clear whether American Protective Services was insured. Both the defendants and the plaintiffs remained largely silent in regards to the settlement. It did not make the papers. For Marilyn Merrill, the money provided a means of taking care of her two young children. She did not feel compelled to make it public. (Today, there are no less than a dozen security officers manning the entrances of 101 California Street and all guests must check in at the reception desk in the building's lobby. Almost all other large buildings in San Francisco's Financial District take similar precautions.)

At the time of Warren's decision, the plaintiffs' suit against Navegar looked to be their only chance at a courtroom.

* * *

In May 1997, Judge Warren issued a twenty-seven page opinion. In brief, Warren granted Navegar summary judgment on all claims. In theory, summary judgment depends on whether the plaintiffs have produced sufficient evidence to prove their claims. Warren's opinion, however, in a way that was distressing to the plaintiffs, seemed more to deal with the questions of law that he presumptively had decided at the pleading phase, rather then the evidence the plaintiffs had presented.

In relation to the claim of negligence per se (that Navegar violated the AWCA by advertising the TEC-9/TEC-DC9 in California and that that proximately caused the plaintiffs injuries), Warren focused on the problems of causation. In brief summation, Warren stated, "The links that plaintiffs seek to establish between the advertisements and carnage amount to little more than guesswork…Plaintiffs have advanced no direct evidence that establishes a causal link between Navegar's conduct and plaintiff's damages." Here, Warren dealt with the plaintiffs' evidence. In relation to the claims of common law negligence and strict liability, however, Warren did not seem to pay much attention to the products of the parties' extensive discovery.

In relation to the claim of strict liability, Warren held that—as "a matter of law"—the distribution of a firearm was not "abnormally dangerous." Warren stated that marketing could not be a part of the determination, as marketing related only to negligence, and thus the

plaintiffs' claim, in regards to strict liability for "abnormally dangerous" activity, was limited to the defendant's manufacture and distribution of the TEC-9/TEC-DC9. According to Warren, "the manufacture of assault weapons is not inherently dangerous." He stated it was not inherently dangerous "to put a product into the stream of commerce *even if*…that product has no legitimate or social value."

In relation to the claim of common law negligence, Warren emphasized the lack of common law legislative precedent—the same precedent he had previously stated was irrelevant due to the passage of the AWCA—and emphasized that "Navegar's weapons were *legally* manufactured and *legally* sold." In addition, he did not seem to give much thought to the plaintiffs' three-into-one theory of negligent "manufacturing, marketing, and making available for sale to the general public." Without delving too far, if at all, into the statements presented by the plaintiffs, Warren concluded: "The Court may not, in the absence of judicial or legislative authority, expand a manufacturer's liability for dangerous products beyond established law…if plaintiffs want to change the law as it relates to the manufacture and sale of firearms, the way is through the Capitol, not the Court."

To the plaintiffs, Warren was more or less contradicting his previous decisions.

According to Kissinger, Warren simply "got nervous." Warren did not want to risk all the effort of large trial, which was certain to attract a lot of attention, when there was a chance of the case simply being overturned on appeal. According to Kissinger, Warren needed a higher court to tell him it was okay.

The plaintiffs shortly appealed.

Part 9, the Court of Appeals:

On appeal, the plaintiffs dropped their claim of negligence per se, and sought review solely of Warren's strict liability and common law negligence rulings.

In theory, having had their case dismissed on summary judgement, the plaintiffs had only to prove the sufficiency of the evidence they had presented at discovery in order to persuade the Court of Appeals to overrule. However, due to the retreating nature of Warren's decision, the plaintiffs seemed also to be in the position of having to persuade the court that their allegations were legally viable in the first place.

In contrast, Navegar had simply to persuade the Court of Appeals that Warren did not err in his findings and reasoning.

* * *

On appeal, Navegar argued the lack of precedent and legality of their conduct. The plaintiffs argued the TEC-9/TEC-DC9's complete lack of legitimate purpose. Navegar argued the imposition of a legal duty would be tantamount to a "judicial ban" on legal conduct—an completely unprecedented invasion of the Legislature's territory—and that Ferri's use of the TEC-DC9 was completely unforeseeable as it was a highly "unusual"—in fact, criminal—conduct. The plaintiffs countered that conduct such as Ferri's was not merely foreseeable by the defendant, but that Navegar actually foresaw such occurrences and capitalized upon them, as evidenced by their marketing and the statements of their officers.

Both sides presented their version of the significance of California's legislature's having banned the manufacture, sale, and advertisement of the TEC-9 by means of the AWCA. According to Navegar, the AWCA "did not declare all firearms defective or their manufacture morally blameworthy, and, …specifically allowed out of state sales." In Navegar's opinion, "The Legislature expressly confirmed Navegar's right to do exactly what it did here—market and sell 'assault weapons' outside of the State." According to the plaintiffs, the AWCA did not "allow" or "confirm Navegar's right" to sell assault weapons outside California, rather the AWCA simply had no effect outside California's border. In the plaintiffs' opinion, the AWCA was simply an earlier statement by the California Legislature of their point that the TEC-9/TEC-DC9 lacks any legitimate purpose.

As they had done before, Navegar claimed the plaintiffs' suit was barred by section 1714.4. As they had done before, the plaintiffs reiterated that their claim was not a "products liability action." Navegar argued there was no evidence linking their conduct to Ferri. The plaintiffs pointed to Dr. Meloy's testimony and the magazines found in Ferri's apartment.

The case came before the Court of Appeals late in the summer of 1999.

* * *

In the spring of 1999, two high school seniors, Dylan Klebald and Eric Harris, walked into their high school in Columbine, Colorado and opened fire. In an event that took the breath out of America, they killed thirteen and terrorized an entire school. One of the weapons they used was a TEC-9.[23]

In June 1999, the ashes of Gian Luigi Ferri, along with 5,000 others, were found in the airport hangar of pilot Allan Vieria. Vieria had been hired by dozens of funeral homes to dispose of the remains over the sea. He went missing the day police found the ashes, and the next day his body was found in the hills of Contra Costa County along with an apologetic note.

Also during the summer of 1999, California Governor Gray Davis signed into effect legislation finally placing copycat weapons officially under the ban of the AWCA. Similar legislation had failed to pass the Legislature a year earlier by one vote.

In September—when the Court of Appeals issued its opinion—Meghan Sposato began grade school. Steve Sposato, who had become a prominent figure in the realm of gun control, had remarried a little over a year earlier. Meghan had one new baby sister and a second one, soon on the way.

* * *

In September 1999, the Court of Appeals, in part, did what Judge Warren had refused to do: it indulged the novelty of the plaintiffs' claim.

The court sustained the trial court's ruling in relation to strict liability. Under similar (though, not the exact) reasoning to Warren, the court concluded that the danger firearms pose is from their use and not the mere nature of their existence, and thus firearms are distinguishable from those activities which have been held to be "abnormally dangerous" in the past. Navegar could not be held strictly liable. This was the only part of Warren's decision the court upheld.

In relation to the common law negligence claim, which to gun control advocates was a brave, logical exploration of the issues of the case and which to gun advocates was a poorly-reasoned wandering into unprecedented territory, the court overruled Warren's grant of summary judgement regarding the common law negligence claim.

In a forty page opinion, Justice J. Anthony Kline—writing for himself and Justice James R. Lambden—laid out the court's reasoning.

The first ten pages of the opinion are dedicated to the background of the case. Kline describes all portions of the parties' extensive discovery discussed above. He then turns to a discussion of duty.

He begins by analyzing the plaintiff's claim. According to Kline, unlike a typical suit against a firearm manufacturer, "appellants do not assert a duty…on the basis of a special relationship." Rather, "the duty appellants assert arises instead from the general rule"—stated in California Civil Code section 1714—"that 'every one is responsible…for an injury occasioned to another by his want of ordinary care or skill in management of his property or person….'" Looking to the specific allegations made by the plaintiffs in their complaint, Kline concludes that what the plaintiffs basically allege in their "negligent manufacturing, marketing, and making

---

[23] The weapon had been possessed prior to the 1994 Assault Weapon Ban, and thus was legally obtained.

available for sale to the general public" is "Navegar's breach of a duty to use due care not to increase the risk beyond that inherent in the presence of firearms in our society."

In his dissent, Justice Paul R. Haerle rails against the majority for "improperly substituting its own theory of duty for that consistently asserted by appellants." In his opinion, Haerle briefly recounts the majority's formulation of duty, then states: "I have a different view. I submit (to borrow the lead opinion's exquisitely obfuscatory phraseology) that appellants' 'complaint can best be understood as presenting a theory of negligence based on Navegar's breach of a duty' *precisely as pleaded by them*." Later, Haerle accuses the majority of creating an entirely new tort.

Kline, however, finds support for his formulation of duty in *Knight v. Jewett*, the California Supreme Court's decision in a case dealing with a injury that occurred during a game of touch football. As the case ultimately deals with a concept—assumption of risk—unrelated to the suit against Navegar, this is a move as controversial the previous one. Nevertheless, Kline—to support of his reasoning—draws from *Knight*, the Supreme Court's statement: "It is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and over above those inherent in their sport." According to Haerle, this was "dubious precedent." According to Kline, however, sporting activities were sufficiently analogous to the commercial activity of manufacturing firearms for the concept to transfer. In Kline's opinion, the concept of a duty not to increase the risk had already been found by the California courts to apply in multiple situations outside the recreational sports realm.

Kline cites two cases: one[24], which involved a person voluntarily coming to the aid of another, and another[25], which involved a landlord-third party situation. Normally, these cases involve a "special relationship." However, according to Kline, "'special circumstances'" "where the defendant's misfeasance *was* intentional and a high degree of harm *was* foreseeable…may eliminate the need for a special relationship." And thus Kline surmounted the issue of duty. (According to Haerle, the majority had not only completely re-cast the plaintiff's complaint, but substituted its theories for the plaintiffs' as well.)

Turning to "the major policy considerations that bear upon whether a court should depart from the principle that a person is liable for injuries caused by failure to exercise care," Kline first looks at foreseeability. Going through a number of cases, Kline finds "the fact that Ferri's acts were criminal does not necessarily render them unforeseeable." In fact, according to Kline, "The fact that the intervening acts that injured appellants were criminal rather than negligent is

[24] *Baker v. City of Los Angeles*, 188 Cal.App.3d 902 (Cal.App. 1986)

immaterial in light of their foreseeability." According to Haerle, this is completely against precedent. Kline, however, concludes that the policy in regard to foreseeability cuts in favor of the plaintiffs.

Also cutting in favor of the plaintiffs, according to Kline, are the moral blameworthiness of the defendants—he cites Solodovnick's guilty plea to federal charges—and the policy of preventing future harm. (According to Haerle, these factors are irrelevant as Ferri's acts were completely unforeseeable.)

To finish his opinion, Kline turns to the remainder of Navegar's arguments. First, he dismisses Navegar's claims that an imposition of duty would conflict with the AWCA and constitute an impermissible judicial ban on manufacture and sale of firearms. In the majority's opinion, the decision of the Legislature was legislative, and did not preclude anything in regards to the court. Second, he also dismisses Navegar's claim that the plaintiffs' suit was barred by section 1714.4. In the majority's opinion, the statute was applied to an entirely different type of case.

In conclusion, Kline turns to causation and finds that there are sufficient triable issues to allow the case to go forward. Citing the California Supreme Court decision in *Stevens v. Parke, Davis* (a case involving alleged "overpromotion" of a dangerous drug), Kline dismisses the idea that the link between Navegar and Ferri was too attenuated. According to Kline, in *Parke, Davis*, the physician who prescribed the "overpromoted" drug (the individual between manufacturer/marketer and the individuals injured; that is, the person in the same position as Ferri) actually testified that he "could not remember specific instances in which he received any information, promotional, or otherwise…"; the court, however, allowed the case to go to jury, believing that, in Kline's words, "the jury was entitled to disbelieve all or portion's of the physician's testimony 'and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material.'"

In regards to Navegar, in Kline's opinion, there was more than the necessary amount of circumstantial evidence to link Navegar to Ferri and, moreover, there was no testimony from Ferri that he was not influenced by Navegar's ads. In Kline's opinion, investigators Sanders' and Hendrix's statements that numerous magazines were found in Ferri's apartment (and these were the same magazines in which Navegar advertised), and that Navegar had promoted its weapons in movies and on televisions, and at the type of gun shows Ferri was known to attend were

---

[25] *Peterson v. San Francisco Community College Dist.*, 36 Cal.3d 799 (Cal. 1984)

sufficient under the standard of *Parke, Davis.* And this was not to mention the declaration of Dr. Meloy. Based on these facts, in Kline's opinion, there was more than sufficient evidence for a jury to rule in favor of the plaintiffs on the issue of causation.

* * *

Henigan touted the decision as "historic," and stated in a press conference, "This ruling is a tribute to the innocent victims of this tragedy who will now get their day in court against a gun maker that showed no regard for public safety. No longer will the gun industry escape accountability for conduct that endangers us all."

In contrast, then research scholar at Yale Law School, John R. Lott, commented: "If you sold your car, and had to be liable for every traffic accident that happened afterward, would that be fair?" According to Lott, greater restrictions on gun manufacturers made guns more expensive and thus burdened the poor, not the gun manufacturers.

* * *

Insofar as he did not spend any time recounting the facts, Justice Haerle's dissent ran nearly as long as the majority's opinion. Haerle begins his opinion by listing the nine flaws he found in the majority's opinion. According to Haerle, the majority: "(1) mischaracterizes the trial court's holding concerning the issue of 'duty,' (2) improperly substitutes the lead opinion's own theory of duty in lieu of that specifically pled by appellants and ruled on by the trial court, (3) posits a definition of duty which is unsupported by precedent, (4) creates a new California tort which it denominates 'negligent manufacture, marketing, and distribution' but then effectively converts into one of 'negligent marketing,' (5) holds, contrary to well-established precedent, that there may be a duty to protect against the criminal act of a third party, (6) disregards an unbroken line of appellate precedent in both state and federal courts declining to impose a duty on gun manufacturers in ordinary negligence actions, (7) mischaracterizes the holdings and the factors underlying them in authorities it purports to distinguish, (8) ignores a primary basis for those authorities, the principle that legislatures, not courts, should make gun control policy, and (9) on the issue of causation, ignores appellants' repeated disclaimer of any need to show reliance by Ferri on Navegar's advertisements or marketing tactics." In short, Haerle argued that the majority had distorted the plaintiffs' claim, misread precedent, and used flawed reasoning. To be even more brief: in Haerle's opinion, the majority had done everything wrong.

In its subsequent appeal to the California Supreme Court, Navegar basically reiterated Haerle's arguments.

* * *

And appeal was likely Navegar's only option. Although cordial with the plaintiffs throughout the proceedings and appeals, Navegar never expressed any interest in discussing settlement.

In all likelihood, a likely part of the reason was that Navegar did not have much of anything to settle with. They did not likely have liability insurance. In addition, during the time since the shooting, flouting the government's firearms regulations had become significantly less lucrative than it once had been. Between 1994—when the Assualt Weapons Ban came into to effect—and 2001, Navegar's profits had dropped by 60%. Navegar, along with a few other gun manufacturers, tried to retain profitability via a "rebel" image. However, they instead found themselves marginalized in the gun-media and excluded from gun shows as a result of their failure to heed legislation.

In April 2001, one month before the case was to be heard before California's Supreme Court, Navegar voluntarily dissolved. As Navegar still remained liable to any potential creditors (in liquidation, the first priority is paying off debts; and if liquidation has already occurred, assets may be traced to transferee shareholders), the case continued and Navegar still had interests to protect. However, as Navegar was no longer producing its weapons, one can not help wonder if this factored into the California Supreme Court's thinking.

Part 10, the California Supreme Court:

Factually, Navegar's main contentions before the Supreme Court were: one, that all Navegar's conduct had been legal; two, that price was a main motivator in Ferri's purchase of the TEC-DC9; and three, that there was no evidence showing Ferri was in any way influenced by, or even saw, Navegar's advertising.

Regarding the issue of duty, Navegar attacked Kline's opinion, as Haerle had done, claiming that the court had misapplied and disregarded precedent in an effort to enact "judicial legislation" based on inappropriate "value judgements" and a reformulation of the plaintiffs' complaint. According to Navegar's opening brief: "Perhaps the next court will disapprove of the 'extraordinary horsepower' of a sports car advertised well beyond the speed limit; and after that, perhaps it will be the 'extraordinarily intoxicating effect' of single malt scotch, advertised as having a higher alcohol content than other similar beverages." Adding to the arguments put forth by Haerle, Navegar reiterated their claim that section 1714.4 blocked the plaintiffs' claim, and

also claimed that the Court of Appeals' decision violated the Commerce Clause, as it stood to effect commerce beyond California's borders.

In response, the plaintiffs first—in the course of the first twenty pages of their answer—again recounted the facts they had compiled. Then, over the remaining twenty-seven pages, they attacked Navegar's arguments.

The plaintiffs' arguments now more or less followed the progression of Justice Kline's logic. First, they argued that Navegar had a duty of due care towards the plaintiff. Second, they argued that none of the exceptions to duty—including section 1714.4—applied. Third, that there did not need to be a special relationship. Fourth, that Navegar's conduct had been misfeasance, not nonfeasance. And fifth, that there were sufficient facts on the issue of causation. The plaintiffs argued that the Appeals Court had not re-formulated their complaint and had not over-stepped its bounds. They also argued that the California Supreme Court would not be over-stepping its bounds in upholding the decision—Commerce Clause, or otherwise.

With a few additions, it was, in essence, Kline's opinion versus Haerle's.

To begin their reply brief, Navegar seizes upon one sentence from the plaintiffs' brief—"Designing, marketing, and distributing TEC-9s was the way in which Navegar increased risks"—and claims: "after four years, appellants have finally stated their true position…they maintain that the mere act of producing these products and putting them in commerce (regardless of Navegar's compliance with applicable legal and regulatory mandate) was in itself sufficient to constitute a breach of duty." In the remainder of their brief, however, Navegar more or less reiterates their earlier arguments.

* * *

On May 7, 2001, the day of the hearing before the Supreme Court, 101 California Street and *Merrill v. Navegar* were again on the front page of the newspapers. It had been almost eight years since the shooting, and over seven years since the initial complaints had been filed. Despite the passage of time, assault weapons remained on the forefront of many minds. The Court of Appeals' decision had been historic and many—on both sides of the issue, including plaintiffs and defendants in a handful of cases similar to *Merrill* across the country—were eager to see what the California's Supreme Court would do.

At oral arguments, the six presiding justices, Justice Ming W. Chin, Justice Joyce Kennard, Justice Marvin R. Baxter, Justice Janice R. Brown, Justice Kathryn Michele Werdegar, and Chief Justice Ronald M. George, covered all the points of contentions. What was the basis for finding a duty? Were Ferri's acts foreseeable? Why didn't section 1714.4 and the other

proferred exceptions to a general duty of care apply? Did Navegar's conduct cause Ferri's acts, or merely allow them? What is the difference? What exactly did Navegar do wrong? What role did the advertising play? What specific part of the advertising was negligent?

One month later, the court issued its opinion.

It was somewhat anti-climatic.

In a five to one decision, with only Justice Werdegar dissenting, the Supreme Court ruled in favor of Navegar's appeal. Their reasoning, or somewhat more appropriate, reason was not necessarily what either party expected. In brief, the court, with Justice Chin writing for the majority, held that the plaintiffs' suit, though worded in a manner to attempt to make it seem otherwise, was, in essence, nothing more than a product liability case involving a risk/benefit analysis and, as a result, was barred by section 1714.4.

Navegar had made the claim all along. California's Supreme Court justices, however, were the first ones to listen.

Justice Kline, in the section of his opinion regarding section 1714.4, focuses on *Barker*. According to Kline, while Assembly Bill 75 initially had a "grander purpose," as it was amended, it simply dealt with the "risk/benefit analysis" prong of *Barker*'s two tests. As *Barker* dealt with strict liability product design defect, common law negligence suits such as the plaintiffs' were not affected. This also seemed to be the Warren's opinion on the issue when he dismissed Navegar's demurrer. As Haerle does not mention section 1714.4 in his dissent, it might well have been his interpretation as well

Justice Chin and the rest of the Supreme Court, with the exception of Justice Werdegar, did not abide by Justice Kline's limited reading of the statute.

The main thrust of Chin's opinion is that "products liability action" does not simply mean the two tests articulated in *Barker*. About a page into his discussion, Chin states: "A plaintiff may seek recovery in a 'products liability case' either 'on the theory of strict liability in tort or on the theory negligence.'" According to Chin, the plaintiffs' having argued negligence does not move them out of the ambit of section 1714.4. In relation to the history of section 1714.4, Chin states: "the revisions that occurred during section 1714.4's enactment process do not persuade us the Legislature either intended to exclude or in fact excluded plaintiffs' negligence claim from the statute's reach." And, according to Chin, neither does the wording of the plaintiffs' complaint.

According to Chin, in their repeated pointings to the TEC-9/TEC-DC9's lack of civilian use and extreme potential danger, the plaintiffs were essentially asking the court to do exactly

what section 1714.4 bars: a risk/benefit analysis. Moreover, Chin notes, "even were plaintiffs correct that section 1714.4 applies by its term only to the strict liability theory of products liability, we would find that the policy the statute establishes bars plaintiffs' claim."

The plaintiffs' case was over.

For good measure, Chin dismisses the idea—first introduced by Judge Warren—that the AWCA changes things—"We would read too much into the AWCA if we found in it the expression of a state policy that manufacturers of specified assault weapons may be civilly liable based on an assessment of the risks and benefits of making their product available to the general public, at least when they comply with the AWCA." In Chin's opinion, it simply was not what the plaintiffs' pled and, in fact, the plaintiffs' repeatedly dissuaded the court from regarding Navegar's advertising as separate from its production and distribution.

In conclusion, Chin holds that even if the case were not barred by section 1714.4, no triable issues of fact regarding causation were present to begin with. Chin distinguishes *Parke, Davis,* from the situation at hand, as a case dealing with a professional product distributor, not a mere consumer like Ferri. There, according to Chin, the physician had prescribed the product by name and the only sources of information regarding the drug available to him were the manufacturer's advertising and visits from sales representatives. Thus, in Chin's opinion, despite the physicians' lack of memory regarding ever actually viewing promotional materials, it was entirely possible (and probable) to infer the necessary level of influence from the circumstantial evidence. In regards to Navegar, however, Chin cites the lack of any evidence "direct or circumstantial" that Ferri ever encountered Navegar's advertisements or promotional materials, and thus finds the circumstantial evidence clearly insufficient.

Thus ended *Merrill v. Navegar*.

The NRA's fax alert the next morning was titled "California Supreme Court Rejects Brady Bunch's Reckless Suit." The subheading read: "The suit against Navegar may have been the crown jewel in the gun-ban movement's ongoing attempt to bankrupt the lawful firearm industry."

Epilogue:

Was Justice Chin's reading of section 1714.4, its history, and the plaintiffs' claim correct? Did the plaintiffs' cleverness, with their three-into-one theory, appropriately fail?

Did section 1714.4 really bar the plaintiffs' claim? Could the three aspects of "manufacture, marketing, and making available for sale to the general public" truly be so

intertwined that they could not be separated out from one another? Is it really logically possible not to separate out the three aspects?

Was Justice Kline's opinion—in his formulation of the plaintiffs' claim, of the question of duty, of the issue of causation—truly an unconscionable stretch? Was it a stretch at all? Was it, as Denis Henigan viewed it: an admirable demonstration of "age-old legal principles"?

And what about Justice Werdegar's view—in her dissenting opinion, for the California Supreme Court—that it was Navegar's failure to restrict their sales to military and police that was the negligent act really the proper way of viewing the case? But then would that simply be a de facto way of saying don't distribute? Would American, or any similarly situated country's military and police have use for guns basically designed for firing bullets into crowds of people?

What would the Supreme Court have decided in the absence of section 1714.4?

In regards to this last question, an answer, could be forthcoming. In the Fall of 2002, in the aftermath of *Merrill*, California's Legislature repealed section 1714.4. After the California Supreme Court decision, numerous parties called for California's Legislature to repeal section 1714.4. Editorials ran in the San Francisco Chronicle, the Los Angeles Times, and the San Jose Mercury News calling for reform. On August 21, 2001, two pending bills, one in the Assembly and one in the Senate, were both amended to include a repeal of section 1714.4. Supporters of the twin bills clamored for the Legislature to "fix the problem" and remove the "legal loophole" that allowed gun manufacturers to escape the normal standards for liability. Opponents argued the injustice of holding gun manufacturers liable for the use of their weapons. It took over a year, but in September 2002 both bills passed by ample majorities, and California became the first state to repeal a gun manufacturer immunity statute.

By contrast, as of 2002, gun manufacturer immunity statutes had been proposed in forty-six states and enacted in thirty-one. Some, using similar language to section 1714.4, were limited to products liability cases. Some went further, using language similar to the early versions of AB 75. Many prohibited suits by governmental entities or precluded "public nuisance cases," as a number of such suits had been filed by several cities in the late nineties. A handful of states restricted suits by public entities as well as product liability actions.

Moreover, currently before the U.S. House of Representatives, having already passed the Senate, is legislation that stands to grant immunity to all gun manufacturers in any case in which their weapons were used in a crime. Similarly, the Assault Weapons Ban initially enacted in 1994 also is in peril, as it stands to expire at the end of 2004. Senator Feinstein, along with New York Democrat, Representative Charles Schumer, has drafted legislation to renew the ban.

However, while President Bush has said he supports the ban, House Majority Leader, Tom DeLay—like Bush, a Republican from Texas—has vowed to block any extension.

Putting aside possible federal legislation, how would a California court rule, now that section 1714.4 is repealed? Would the Court embrace a design defect case that did not involve consideration of a reasonable alternative design? The Courts that have done so, have quickly been overruled by their Legislatures.[26]

Was there really enough of an issue in regards to causation to get by summary judgement? Were two high firepower weapons, magazines on the floor of an apartment, a handful of brochures and manuals, and Dr. Meloy's "emboldened" theory really enough? What more, short of declaration from the grave (or lack thereof) by Ferri, would be needed and/or could be produced? After Warren's decision in regard to the plaintiffs' negligence per se claim, plaintiffs' attorney Dean Alper said: "Ferri's suicide prevented us from having the evidence we needed." Perhaps he was right. But maybe not.

What would have happened if the case had gone to trial? Does some of the burden of Ferri's acts appropriately lie upon the manufacturer of his weapons? What responsibility do the manufacturers of firearms have in regard to the presence of their weapons in our society? Would we have the same difficulties if they were manufacturing something other than guns? Can we really think of these issues outside the realm of firearms? And what about the responsibility of the A.P.S., 101 California Ventures, U.S.A. Magazines, Orpheus Industries, AALJ SuperPawn, Danny W. Peterson Guns, Henderson, Nevada's Pawn and Gun Shop, the San Francisco police department, the paramedics, and the 911 system? What about Ferri, himself?

Ultimately, *Merrill v. Navegar* provides many more questions that it did any sort of answers.

Legal Community Against Violence, the organization founded the weekend after the shooting, which its founders thought perhaps would last through the passage of the Assault Weapons Ban in 1994, remains alive and active out of its San Francisco office.

Functioning as a national clearinghouse for research and education regarding gun laws, and as a source of legal assistance for state and, particularly, local governments seeking to draft and enact gun legislation, LCAV has had not a small part in making California—although it boasts the largest number of NRA members of any state in the country—also the state with the strictest gun laws. California law currently includes a ban on large ammunition magazines, a

[26] Remember *Kelley*.

state handgun safety certificate law, one-gun-a-month restrictions, and required child safety locks for all firearms manufactured in the state.

What is the import of these laws and of gun legislation more broadly? The Center for Disease Control and Prevention recently issued a study finding "insufficient evidence" to currently evaluate the effectiveness of firearms legislation. The NRA has claimed the study proves gun laws are ineffective. LCAV has issued a rebuttal analysis. The study and the statements are available at the organizations' respective websites.

Information regarding the gun laws of all fifty states as well as those of the federal government is available on Legal Community Against Violence's website.

Sources of Information

The description of the 101 California Building is from personal observation.

The description of the events of July 1, 1993 and their aftermath was largely gleamed from the newspaper coverage—mainly the San Francisco Chronicle/Examiner, but also the Los Angeles Times and New York Times—in the days that followed. Also of assistance were the statements of a handful of witnesses, most notably, Randall Miller, Judy Roberts, Sharon O'Grady, Lisa Quadri, John Sanger, and Michelle Scully.

The information regarding Ferri's past and the letter found on his body was for the most part taken from two articles that ran in the San Francisco Chronicle/Examiner: "Gunman's goal: Kill, then tell all on Oprah," Eric Brazil, Seth Rosenfeld, Lance Williams (San Francisco Examiner, July 4, 1993, A1); and "Killer's Letter Shows Depth of his Anger," Ken Hoover, Susan Sward, Michael Taylor (San Francisco Chronicle, July 3, 1993, A1). The information regarding Ferri's purchases and trips to Nevada was largely taken from the Court of Appeals' and the Supreme Court's opinions—75 Cal. App. 4th 500 and 26 Cal. 4th 465, respectively.

The information regarding Navegar and their weapons, in part, was also taken from the Courts' opinions. The plaintiffs' and the defendants' pleadings and discovery materials were also referenced. In addition, the book *Outgunned—Up Against the NRA: The First Complete Insider Account of the Battle over Gun Control* by Peter Harry Brown and Daniel G. Abel (The Free Press, NY 2003) served as a helpful resource.

An interview with Bill Kissinger is responsible for the details regarding the progression of the case up through the hearing before the Court of Appeals.

An interview with Julie Leftwich, managing attorney for Legal Community Against Violence, is responsible for most of the information regarding the development of the gun control legislation beyond the case.

The description of the plaintiffs' and defendants' discovery came mainly for the Court of Appeals' opinion. The Supreme Court's opinion as well as the parties' pleadings and briefs were also referenced. And of course, the handful of actual discovery documents I was able to access were also used.

The recounting of the development of section 1714.4 was from these last-mentioned sources and, of course, the Legislature's records themselves. The information regarding the repeal of section 1714.4 was likewise based on the Legislature's records.

The CDC's website is www.cdc.org. LCAV's website is www.lcav.org. The NRA's website is www.nra.org.