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Joanna L. Grossman

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NOT QUITE HIGH NOON FOR GUNMAKERS, BUT IT'S COMING: WHY *HAMILTON* STILL MEANS NEGLIGENCE LIABILITY IN THEIR FUTURE*

Daniel L. Feldman†

INTRODUCTION

With very few exceptions, American courts have not endorsed mass tort claims against handgun manufacturers. Questions of cause-in-fact and whether third parties have a duty of care to strangers have posed significant obstacles. Likewise, plaintiffs' defeat before the Second Circuit in *Hamilton v. Beretta U.S.A. Corp.*[1] gave credence to the defendant gun manufacturers' protests throughout the lawsuit

† A.B., Columbia College 1970; J.D., Harvard Law School 1973. The author is Director of the Legal Policy and Program Development Unit in the Office of the New York State Attorney General. Views expressed herein are solely those of the author, not of the Office of Attorney General. The author gratefully acknowledges editorial assistance from the staff of the *Brooklyn Law Review* as well as from Page Croyder, a dedicated and talented Maryland prosecutor.

[1] 264 F.3d 21 (2d Cir. 2001) [hereinafter *Beretta III*]. The Second Circuit relied here on answers to the questions it had certified to the New York Court of Appeals, so the New York court produced the legal reasoning at the heart of the matter.

that the law was "settled": victims of handgun violence cannot successfully sue handgun manufacturers for negligence. If, as the gun industry had maintained for many years, the vast bulk of guns used to commit crime were stolen, then negligent distribution and marketing had little affect on the availability of guns to criminals.

But plaintiffs' defeat was not premised upon the old factual understandings and prior theories of liability. In certifying key questions, the Second Circuit gave the New York Court of Appeals ("Court of Appeals") the opportunity to break new ground by questioning supposedly "settled" law, an opportunity the Court of Appeals embraced: "This case challenges us to rethink traditional notions of duty, liability, and causation."[2] And indeed, the Court of Appeals did break new ground, although it could not justify recognition of a gun manufacturer's duty of care to victims of gun violence on the basis of the facts presented.[3]

In *Hamilton,* the Court of Appeals, for the first time in the United States,[4] issued an opinion that in effect took judicial notice of the changed factual context. Instead of rejecting outright the possibility that negligence could apply, as had so many other courts,[5] it noted explicitly that plaintiffs might

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[2] Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 242, 750 N.E.2d 1055, 1068, 727 N.Y.S.2d 7, 20 (2001) [hereinafter *Beretta II*].

[3] *Id.*

[4] The court described its decision as "in accord with most jurisdictions that have considered this issue," with a long string of citations, *id.* at 238 n.6, 750 N.E.2d at 1064-65 n.6, 727 N.Y.S.2d at 16-17 n.6, and properly distinguished "two notable exceptions" both of which involved "different factual contexts and different theories of negligent marketing not relevant here." *Id.* In the more prominent case, the California Supreme Court subsequently reversed, ruling that the gun manufacturer could not be held liable. The California Court held that plaintiffs' negligence claim was a disguised products liability/design defect claim, and as such was precluded by a California statute, CAL. CIV. CODE 1714.4(a) (Deering 1999). Merrill v. Navegar, 28 P.3d 116, 122 (Cal. 2001).

[5] *See, e.g.*, Cincinnati v. Beretta U.S.A. Corp., 1999 OHIO MISC. LEXIS 27, at *8 (Hamilton Cnty. C.P. Ohio, Sept. 27, 1999) *aff'd*, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000). The court held:

> [U]nder Ohio law, in order to hold a defendant liable in negligence for the criminal conduct of a third party, the defendant must owe a duty arising out of a special relationship between the defendant and the third party giving rise to an ability to control the conduct of that third party, or there must be a special relationship which requires the defendant to protect the plaintiff.

Id. See also Penelas v. Arms Technology, 1999 WL 1204353, at *3 (Fla. Cir. Ct., 11th

succeed in a negligence cause of action if they can show that manufacturers knowingly supply wholesalers who regularly distribute guns into the criminal market.[6]

The trial court had permitted the jury to assess damages against several gun manufacturers on the basis of injuries inflicted with the use of only one gun which was never recovered and could not be linked to any manufacturer.[7] The Court of Appeals rejected the trial court's application of the "preponderance of the evidence" standard and of market-share liability to the facts of *Hamilton*. But when other plaintiffs, as in *Camden County Bd. of Chosen Freeholders v. Beretta*,[8] are able to come forward with computer print-outs of thousands of guns traced to crime, each identified by serial number and manufacturer, the outcome may well be different. The Court of Appeals has removed the conceptual barrier, a sufficiently important breakthrough to compel attention here, leaving only an evidentiary obstacle to a negligence-based cause of action.

The Court of Appeals has cast a long shadow over the future of gun manufacturers by raising the specter of an alternative to market-share liability, one based on proportional causation instead, that may also be imposed without linking a particular manufacturer to a particular weapon and to a particular injury.[9]

Now that the Court of Appeals has established the logic for doing so, states should eventually impose liability on handgun manufacturers for damages caused by negligent distribution of their product either through entities they control, or by virtue of non-delegable duties of care to the public through their independent contractors. As the Court of

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Dist. Dec. 13, 1999), *aff'd*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) ("Florida law does not impose a duty on a defendant to protect others from the criminal and reckless behavior of a third person unless there is a special relationship between the defendant and the plaintiff, or the defendant and the third person"); Bubalo v. Navegar, No. 96C3664, 1997 WL 337218 (N.D. Ill. June 13, 1997).

[6] *Beretta II*, 96 N.Y.2d at 237, 750 N.E.2d at 1064, 727 N.Y.S.2d at 16; *see also Beretta III*, 264 F.3d at 28.

[7] *See, e.g.*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 829 (E.D.N.Y. 1999) [hereinafter *Accu-Tek*], *inter alia* (that is why the jury assessed damages against three different gun manufacturers).

[8] 123 F. Supp. 2d 245 (D.N.J. 2000) (dismissing public nuisance, negligent entrustment, and negligence claims), *aff'd*, 273 F.3d 536 (3d Cir. 2001).

[9] *Beretta II*, 96 N.Y.2d at 235, 241 n.11, 750 N.E.2d at 1062-63, 1067 n.11, 727 N.Y.S.2d at 14-15, 19 n.11.

Appeals suggested, a successful liability theory in the handgun manufacturer negligent distribution context must rest on proportional causation, abandoning the traditional "preponderance of the evidence" test.

Part I of this Article suggests that the cultural context of American jurisprudence has been significantly responsible for most courts' reluctance, thus far, to recognize the facts that should drive handgun manufacturer liability. Part II sets forth the district court's handling of the duty question in *Hamilton v. Accu-Tek* and explains how the Court of Appeals found that, although the plaintiffs in *Hamilton* did not satisfy the requirements of the elements of negligence, there is a proper way for future litigants to do so. Part II continues with an alternative theory of handgun manufacturers' liability for negligence: even if they do not control the chain of distribution, they remain liable under one or two exceptions to the rule that exempts principals from the torts of their independent contractors. The first excepts principals who contract out inherently dangerous undertakings. The second excepts principals who negligently select their independent contractors. Part III explains the availability of the theory of proportional causation, and why the courts may allow findings of liability on that theory but preclude liability on older theories.

I. THE CULTURAL CONTEXT OF AMERICAN HANDGUN MANUFACTURERS' LIABILITY JURISPRUDENCE

Our society subjects other comparably dangerous instrumentalities to regulatory schemes that safeguard or compensate the public far more adequately than they can with respect to handguns, in the absence of tort liability. Cigarette manufacturers have incurred tort liability, albeit initially de facto by way of settlements, for a product which also harms substantial numbers of people. Dram shop acts have imposed third-party liability on purveyors of alcohol by the drink, but common-law tort liability was beginning to emerge before legislatures took action.[10] We can regulate automobiles, which

[10] At common law, and apart from statute, no redress existed against persons selling, giving, or furnishing intoxicating liquor for

kill comparable numbers of people as handguns do, through a reasonably effective scheme of licensing, registration, and insurance. However, no comparable scheme can be applied to handguns: criminals will not buy liability insurance to compensate their victims, even if society enacts legislation requiring them to do so.

Why has it taken the United States so long to develop the law and facts in the handgun context? In Great Britain, where such events are relatively rare, sixteen children and their teacher were massacred with a handgun in March 1996.[11] Within seven months, a groundswell of support for gun control moved the government to ban large caliber handguns, and the subsequent Labor Government extended the ban to virtually all such handguns a few months later.[12]

Guns have a special place in American jurisprudence because guns have a special place in American society, and jurisprudence reflects culture. For Americans brought up on cowboy movies, and almost all of us were, the good guy outdraws the bad guy and shoots him dead. From John Wayne to Roy Rogers to Clint Eastwood to Charles Bronson to Bruce Willis, good guys shooting bad guys overwhelmingly dominated

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> resulting injuries or damages due to the acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence. This rule was based on the theory that the proximate cause of the injury was the act of the purchaser in drinking the liquor and not the vendor in selling it. . . . In recent years, many states have retreated from or have abrogated the strict common-law rule. Fourteen states now have dram shop statutes which give, generally, a right of action to persons injured in person, property, or means of support, by an intoxicated person, or in consequence of the intoxication of any person, against the person selling or furnishing the liquor which caused the intoxication in whole or in part. . . . Courts in 29 jurisdictions, including the District of Columbia, have judicially abrogated the common-law doctrine of no liability. . . . Many of the jurisdictions which now recognize a common-law right of action do so on the premise that the serving of liquor to a minor or an inebriated person initiates a foreseeable chain of events for which the tavern owner may be held liable.

Ling v. Jan's Liquor's, 703 P.2d 731, 735-36 (Kan. 1985).

[11] Erlend Clouston & Sarah Boseley, *Dunblane Massacre*, GUARDIAN CENTURY, Mar. 14, 1996, *at* http://www.guardiancentury.co.uk/19901999/story/-0,6051,112749,00-.html. (last visited Nov. 14, 2001).

[12] PETER SQUIRES, GUN CULTURE OR GUN CONTROL? FIREARMS, VIOLENCE AND SOCIETY 5 (2000).

American cinema.[13] This cowboy image has not faded over the decades—merely morphed into a different type of "cowboy." As an historian of America's gun culture wrote, "A generation of Hollywood's maverick cowboys slipped effortlessly from their western landscapes into identical roles as tough city cops in a later film genre."[14]

Before there was such a thing as American cinema, American myth, folklore, history, and literature encouraged the same themes; the Revolution, the Alamo, Daniel Boone, Davy Crockett, James Fenimore Cooper's Natty Bumpo,[15] and Wyatt Earp, all featured heroic Americans shooting guns at bad guys.[16] No matter how sophisticated citizens may be, somewhere in the back of their minds lurks the fantasy that someday, they will do likewise against an armed criminal.

Perhaps even more important, guns have a special place in the American value system as a guarantor of the ability to resist oppression. Notwithstanding our generally positive experience with government, a strong skepticism toward government runs through American history, from Thomas Paine, most radically, and from Thomas Jefferson, whose

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[13] In the 1950s,

> [t]he *Shane* [a 1953 movie starring Alan Ladd] plot-formula of a gunfighter from outside aiding a helpless community was perhaps the most frequently raised. *Representative* [emphasis added] titles include *Man Without a Star* (1955); *Tall T* (1957); *Proud Rebel* (1958); *At Gunpoint* (1955); *Johnny Concho* (1956); *Man From Del Rio* (1956); *Fury from Showdown, Gun for a Coward, Gun Glory* (1957); and *Last of the Fast Guns* (1958).

RICHARD SLOTKIN, GUNFIGHTER NATION 402 (1992).

Then there was the 1952 Stanley Kramer movie *High Noon*, and some of the "recastings of the OK Corral story . . . *Law and Order* (1953), *A Man Alone* (1955), *Top Gun* (1955), *Wichita* (1955), *Gunfight at the OK Corral* (1957), *The Tin Star* (1958), *Rio Bravo* (1959), and *Warlock* (1959)." *Id.* at 403. One might consider the trajectory of progress in the 1960s from *The Magnificent Seven* (1960) to *The Green Berets* (1968), when John Wayne was sixty. *Id.* at 520.

[14] SQUIRES, *supra* note 12, at 57.

[15] "The frontier romances of James Fenimore Cooper, published between 1823 and 1850, codified and systematized the representation of the frontier that had developed haphazardly since 1700 in such diverse narratives as the personal narrative, the history, the sermon, the newspaper item, the street ballad, and the 'penny dreadful.' " SLOTKIN, *supra* note 13, at 15.

[16] The list could be vastly longer: "[f]rom the 1840s through the Reconstruction period, most cheap frontier stories followed the formula of Cooper's historical romances, using Indian warfare and captivities (actual or threatened) and a colonial or Revolutionary War setting to provide a 'historical' context for the action of the plot." SLOTKIN, *supra* note 13, at 127.

vision of agrarian democracy included substantial distrust of big and centralized government. Even George Washington said: "A free people ought not only to be armed, but disciplined . . . ."[17] Forty-three years later, Joseph Story expressed a similar view: "The right of a citizen to keep and bear arms has justly been considered, as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers . . . ."[18]

The same skepticism of government informs Sanford Levinson's view that the framers intended the Second Amendment to guarantee citizens more than the right to participate in state-regulated militias; rather, that they intended to arm citizens as a check against the overbearing use of force by government itself.[19] Whether or not his view prevails as a legal interpretation, certainly the popular understanding of the Second Amendment included the notion that an armed citizenry can resist oppression. A.E. Van Vogt's science fiction story, *The Weapon Shop*, provides a vivid cultural illustration of this attitude.[20] First published in 1942, the story portrays a distant future in which effective resistance to a tyrannical galactic empire can only emerge from a chain of weapon shops. Each weapon shop has a sign out front that reads "The Right to Buy Weapons is the Right to Be Free." Twenty-five years after its original publication, the members of

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[17] 1 ANNALS OF CONG. 969 (1970) (quoted in Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. OF AM. HISTORY 599, 611 (1982)).

[18] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (1833) (quoted in Shalhope, *supra* note 17, at 612).

[19] Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Levinson quotes approvingly the view of an early twentieth-century libertarian defender of both the First and Second Amendments, that "the obvious import [of the constitutional guarantee to carry arms] is to promote a state of preparedness for self-defense even against the invasions of government, because only governments have ever disarmed any considerable class of people as a means toward their enslavement." *Id.* at 650 (quoting THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 104 (reprint ed. 1969) (alteration in the original)). Against the view that has now been conventional for decades, see e.g. Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 107 (1991) ("[T]he Second Amendment . . . has been devoid of importance as a constitutional barrier to gun control laws."), Levinson thinks the Second Amendment might provide the basis for challenging some gun control laws. Levinson, *supra* at 650. The Fifth Circuit has now provided Levinson's views with strong support in dicta in United States v. Emerson, 270 F.3d 203 (2001).

[20] A.E. Van Vogt, *The Weapon Shop*, *in* THE SCIENCE FICTION HALL OF FAME 183 (Robert Silverberg ed., 1970).

Science Fiction Writers of America, hardly a right-wing conservative organization, voted *The Weapon Shop* one of the twenty-five best science fiction short stories of the pre-1965 period.[21] This notion of gun ownership as a bedrock of freedom pervades the story. It could only have commanded such respect among its author's peers because it struck a chord in a culture at large with a strong attachment to that same notion.

Jurisprudence has stymied efforts to hold even the most egregious producers of "Saturday night specials" liable for the harm done by the weapons they manufacture. But that jurisprudence has had more than legal theory behind it. An enormously powerful strain of American cultural tradition underpins the "policy" decisions that the law explicitly allows judges to make in the context of determining duties to third parties in tort liability.

The National Rifle Association ("NRA") has been the most prominent organization giving voice to that cultural tradition, and has exercised the political power to block important aspects of gun control. Although the NRA has long complained that the Federal Bureau of Alcohol, Tobacco & Firearms ("BATF") "harasses honest gun owners and dealers," until the 1990s, at least in terms of their role at the national policy level, the opposite criticism was more accurate: "that the ATF [was] a weak and ineffective agency that has been buffeted by the prevailing political winds, especially those stirred up by the NRA."[22]

For a long time, the gun lobby prevented collection of the data necessary to show the origin of most crime guns. In 1978, the Carter administration attempted to overcome the gun lobby by supporting a $4.2 million appropriation for BATF to computerize their mandated task of crime gun tracing. The NRA furiously and successfully lobbied against the new appropriation. When the NRA learned that BATF thought it could fund the program from elsewhere in its budget, the NRA was able to get Congress to cut the agency's regular appropriation by the same amount.[23]

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[21] *Id.* at ix-x. *See also Van Vogt's obituary*, N.Y. TIMES, Feb. 2, 2000, at A27 (reporting the initial publication date of "The Weapon Shops of Isher" as 1951).

[22] ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 127-28 (1998).

[23] *Id.* at 129.

But, the tide turned. The 1999 Columbine High School massacre may forever symbolize the turning point, but the bloody history of handgun violence in America, as publicized by more pervasive media than the world had ever seen, had already crystallized American public opinion.[24] Public opinion had supported the 1993 enactment of the Brady Law,[25] well before Columbine, and finally emboldened the Clinton White House, in the late 1990s, to have BATF analyze crime gun trace data effectively with computers to determine where crime guns come from.

The conventional view, long promulgated by the NRA, held that most criminals steal the guns they use from the enormous existing stock of guns—more than two hundred million, by most accounts—already in the homes of American citizens.[26] So long as no one knew any better, it seemed to make little difference, therefore, how manufacturers marketed and distributed their new handguns. In 1998, however, a Northeastern University study based on records maintained by BATF[27] demonstrated that the conventional wisdom was wrong: more criminals buy their guns new than steal them.[28] Based on firearms trafficking investigations performed between July 1996 and December 1998 throughout the United States, BATF determined that while over 11,000 of the weapons traced were stolen from Federal Firearms Licensees ("FFLs," or licensed gun dealers), residences, or from common carriers transporting the guns, almost four times as many, or

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[24] *See, e.g.*, Michael Janofsky, *Concerns About Guns Put New Pressure on State Legislatures*, N.Y. TIMES, Jan. 5, 2000, at A12 ("In the wake of the killings at Columbine High School and elsewhere, polls show that a growing number of Americans want their state representatives to do something to relieve gun violence.").

[25] SPITZER, *supra* note 22, at 119.

[26] Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. TIMES, July 1, 1999, at A14.

[27] GLENN L. PIERCE, ET AL., NATIONAL REPORT ON FIREARM TRACE ANALYSIS FOR 1996-1997, (1998). Federal law requires gun manufacturers, distributors, and dealers to respond to requests from BATF for crime gun trace data. *See* 18 U.S.C. § 923(g)(7) (2001) and 27 C.F.R. § 178.25a (2002).

[28] PIERCE ET AL., *supra* note 27, at 11, tbl. 5; *see also* Butterfield, *supra* note 26, at 8 ("[M]ore than a fifth of all guns recovered in crimes in those two years had been purchased from a licensed dealer less than a year earlier, and . . . almost half had been bought from dealers within three years.").

over 40,000, were trafficked by licensed dealers.[29] Of guns trafficked to youth and juveniles, BATF found that only about fourteen percent "involved firearms stolen from a residence," while half "involved firearms trafficked by straw purchasers," and a fifth involved firearms "stolen from a federally licensed firearms dealer."[30] In mid-1999, the public first learned that a small and identifiable percentage of those engaged by manufacturers to sell their products wholesale and retail were responsible for the overwhelming bulk of sales to criminals.[31]

Litigants can now analyze BATF trace data to show that over several years, Manufacturer A received, for example, approximately thirty telephone calls a month from BATF inquiring about the purchaser of particular weapons that had been traced to crimes. Manufacturer A's records show that it sold twelve weapons a month to Distributor B, five weapons a month to Distributor C, and so forth. In turn, the distributors receive similar follow-up calls from BATF with respect to their retailers: the distributors' records show which retailers received the guns that later were used in crime. Since, as it turns out, a small and identifiable group of retailers are responsible for the vast bulk of the sales into the criminal market, distributors know precisely which retailers' sales foreseeably resulted in criminal use, and manufacturers know which distributors sold disproportionately to such retailers.

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[29] BATF, U.S. DEPT OF TREASURY, FOLLOWING THE GUN: ENFORCING FEDERAL LAW AGAINST FIREARMS TRAFFICKERS 13, tbl.3 (2000).

[30] BATF, U.S. DEPT OF TREASURY, YOUTH CRIME GUN INTERDICTION INITIATIVE REPORT 5-6 (1999) [hereinafter YOUTH CRIME REPORT]. "Since firearms may be trafficked along multiple channels, an investigation may be included in more than one category," PIERCE ET AL., *supra* note 27, at 13 tbl. 4.

[31] The results of the Pierce study, *supra* note 27, at 16 tbl. 9, were first reported in the Butterfield article, *supra* note 26, at 8: "[A] mere 389 federally licensed dealers, of 104,855 such dealers around the country, sold half the guns used in 1996 and 1997 that could be traced by law enforcement to their initial sale. . . ." *See also* BATF, U.S. DEPT OF TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 2, tbl. D3, A-25 (2000) ("Just 1.2 percent of dealers—1,020 of the approximately 83,200 licensed retail dealers and pawnbrokers—accounted for over 57 percent of the crime guns traced to current dealers in 1998. And just over 450 licensed dealers in 1998 had 10 or more crime guns with a time-to-crime of three years or less traced to them."). The latter number appears to add up to 491 dealers. A few weeks earlier, Senator Charles Schumer had released the results of his study, also based on BATF data, concluding that one percent of FFLs supplied forty-five percent of guns traced to crime. Shannon McCarthy, *Small Number of Dealers Supply Most Guns Used in Crimes*, ASSOCIATED PRESS STATE & LOCAL WIRE, June 8, 1999, a.m. cycle.

Litigants will have access to this information,[32] and therefore will be able to identify precisely the manufacturers and distributors who knew that sales to particular business customers resulted in criminal use, but nonetheless continued to supply those customers.

If most crime guns are bought, not stolen, sellers of guns can greatly influence the degree to which guns flow to the crime market. Through their records of responses to BATF, manufacturers can, if they wish, stop dealing with distributors who then deal with retailers leaking inventory into the hands of criminals.

But prospective plaintiffs still lack one important element of a successful negligence claim. They may show that a "disproportionately" small number of retailers leak a large number of guns into the crime market. Thus far, however, plaintiffs have been unable to obtain total handgun sales figures by retailer to compare them with crime gun traces. Therefore, they cannot show that particular dealers leak guns to the criminal market in numbers that are a disproportionately large part of their total sales. In theory, "leaks" could be a constant proportion: few guns from dealers with small total sales volume, many guns from dealers with large total sales volume. This pattern would not suggest negligence. With enough volume, the most careful dealer can sell some guns that end up in criminal hands. Based on anecdotal evidence, the *Hamilton* plaintiffs, jury, trial judge, and others believed that negligence, not volume, accounted for the leaks.[33] But without dealer-by-dealer sales figures to match against crime gun traces, plaintiffs had no proof that the negligence of dealers, or of the distributors and manufacturers who continued to supply them, caused their harm or enhanced their risk of harm.

If future plaintiffs can show that leakage is not simply a function of volume, however, courts will find it difficult to continue to reject claims of negligence. The vast majority of retailers have managed for years to avoid selling guns into the

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[32] *See, e.g.*, Second Amended Complaint and Jury Demand at 17-24, Camden County Bd. of Chosen Freeholders v. Beretta, 123 F. Supp. 2d 345 (D.N.J. 2000) (No. 99CV-2518), *aff'd*, 273 F.3d 536 (3d Cir. 2001). The complaint was dismissed for lack of standing, preemption, and lack of duty. 123 F. Supp. 2d 345, 255-64 (D.N.J. 2000).

[33] *Accu-Tek*, 62 F. Supp. 2d at 826-33.

criminal market, arguably by techniques that are not secret. They attempt to avoid selling to "straw purchasers," persons who buy illegally on behalf of felons or underage purchasers. Straw purchasers tend to purchase multiple firearms in a single transaction.[34] Retailers who refuse to avoid sales to straw purchasers may be enhancing the public risk resulting from criminal use. Criminal activity by the ultimate purchaser may not constitute intervening cause under these circumstances.[35]

Retailers are Federal Firearms Licensees ("FFLs"). No one may sell handguns, except at gun shows, without applying for and obtaining a license to do so from the federal government. This requirement helps to assure that most gun dealers adhere to some standards of respectability. However, many do not fit the image normally associated with gun shops. Some do not operate out of retail establishments, but are "kitchen table" or "back of the truck" dealers.[36] Some distributors continue to supply inventory to gun shows, which are not even subject to the legal restrictions governing FFLs. The Court of Appeals found insufficient evidence that manufacturers and distributors know or have reason to know that sales to these kinds of outlets result in disproportionate leakage of guns to the criminal market because plaintiffs presented only anecdotal evidence connecting such outlets to crime gun leakage.[37]

With the best of efforts and intentions by gun dealers, some criminals will buy guns. Even if manufacturers insist that distributors only sell to legitimate storefront retailers, some people will buy guns to commit crimes. Danger to the public inheres, then, in the sale of guns. But future plaintiffs must prove that it makes a great deal of difference how guns

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[34] *See* Douglas S. Weil, & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 J. OF AM. MED. ASS'N 1759 (1996).

[35] Kush v. City of Buffalo, 59 N.Y.2d 26, 33, 449 N.E.2d 725, 729, 462 N.Y.S.2d 831, 835 (1983) ("When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs.").

[36] BATF, DEPT OF TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 16 (Feb. 2000). A random sample inspected in 1998 found that fifty-six percent of FFLs operated out of residential rather than commercial premises.

[37] *See Beretta II*, 96 N.Y.2d at 234, 750 N.E.2d at 1062, 727 N.Y.S.2d at 14.

are sold: without the best of efforts and intentions by sellers, far more criminals will buy guns.

II. DUTY TO THIRD PARTIES IN NEGLIGENCE

A. Hamilton's *Frontal Assault on* McCarthy

The 1996 *Forni v. Ferguson*[38] decision appeared at the time to be the New York courts' last word on the question of handgun manufacturers' liability for negligence when their products were used criminally to kill and injure. The *Ferguson* court held: "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product. The manufacturer in this case certainly had no control over the criminal conduct of a third party."[39]

The Second Circuit the following year, in *McCarthy v. Olin Corp.*, said: "New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition."[40]

McCarthy (now U.S. Representative Carolyn McCarthy, D-N.Y.) had sued the Olin Corporation for negligence and strict liability for their design, manufacture, marketing, and sale of Black Talon ammunition, which has exceptionally ferocious wounding power. In the context of Olin's motion to dismiss McCarthy's claim, the court accepted McCarthy's allegation that criminal use of Black Tallon bullets to injure innocent victims was foreseeable. But, said the trial court, the New York Court of Appeals separates issues of duty and foreseeability in the negligence context, unlike the Michigan court upon whose ruling McCarthy had attempted to rely.[41]

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[38] 232 A.D.2d 176, 648 N.Y.S.2d 73 (1st Dep't 1996).

[39] *Id.* at 176, 648 N.Y.S.2d at 74 (citation omitted).

[40] 119 F.3d 148, 157 (2d Cir. 1997).

[41] McCarthy v. Sturm, Ruger & Co., 916 F. Supp. 366, 369 (S.D.N.Y. 1996) [hereinafter *Sturm, Ruger, & Co.*] (distinguishing New York law from the law applicable in *Moning v. Alfono*, 254 N.W.2d 759 (Mich. 1977)).

In the widely-publicized *Hamilton v. Accu-Tek* decision,[42] relatives of deceased handgun crime victims and one surviving victim sued twenty-five handgun manufacturers, supplying most of the U.S. market, for negligent marketing and distribution. After the trial court awarded damages, defendants appealed to the Second Circuit. Citing *Forni* and *McCarthy* as controlling precedent, defendants protested trial court Judge Jack Weinstein's recommendation that the Second Circuit certify the question of duty to the New York Court of Appeals.[43] Judge Cabranes, in dissent, agreed, concluding that "there are sufficient precedents—from New York courts, from this Court, and from other jurisdictions—for us to make a determination of how New York's highest court would rule."[44]

Nevertheless, on August 16, 2000, the Second Circuit certified the question of the existence of such a duty to the New York Court of Appeals.[45] Had the Second Circuit a less profound understanding of New York law, they would have reversed the decision of trial court Judge Jack Weinstein on the straightforward basis of the *McCarthy* holding.

The holdings in *Forni* and *McCarthy* appear to directly contradict the *Hamilton* trial court's assertion that "the method of sale and distribution [of weapons] by producers may be" tortious.[46] It is significant, therefore that in responding to the certified question of the Second Circuit, the Court of Appeals refrained from citing either *Forni* or *McCarthy* for the holding that New York law does not impose on weapons manufacturers a duty of care to third parties.[47] In applying the Court of Appeals' answers to the certified questions, the Second Circuit, likewise, ignored the *Forni* and *McCarthy* holdings.[48]

The Second Circuit *McCarthy* decision occurred in a context in which the conventional wisdom about crime guns—that most of them were stolen from the public's existing stock of weapons—continued to prevail. Not surprisingly, in that

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[42] 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

[43] Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 42 (2d Cir. 2000) [hereinafter *Beretta I*].

[44] *Id.* at 47 (Cabranes, J., dissenting).

[45] *Id.* at 46-47 (choosing to do so, interestingly, despite opposition to cert-ification by "*all* parties to this appeal [emphasis added]").

[46] *Accu-Tek*, 62 F. Supp. 2d at 825.

[47] *Beretta II*, 96 N.Y.2d at 222, 750 N.E.2d at 1055, 727 N.Y.S.2d at 7.

[48] *Beretta III*, 264 F.3d 21 (2d Cir. 2001).

context, courts concluded that manufacturers of new weapons could do nothing that would sufficiently affect criminal behavior.[49] The *Forni* court thought the manufacturer "certainly had no control over the criminal conduct of a third party."[50] But the *Hamilton* trial court ruled on the basis of testimony strongly suggesting that the *Forni* court was wrong, at least from the point of view of probability and statistics.[51]

The *Hamilton* trial court had the benefit of then-new statistical information, based on a review of gun trafficking investigations in twenty-seven cities, showing that far more crime guns used by persons under the age of twenty-five were purchased from FFLs and by straw purchasers than were stolen.[52] Thus, the trial court noted that handgun manufacturers could "reduc[e] the flow of illegal guns. . .[by] declining to do business with careless or unscrupulous FFLs, limiting sales at unregulated gun shows, and requiring that first sales of handguns to the public take place only in fully stocked, responsibly operated stores."[53]

The trial court also took note of expert testimony by a former executive at Smith & Wesson that the manufacturers could—but do not—force distributors to stop doing business with retailers who generate unusually large numbers of trace requests (inquiries from BATF to gun manufacturers, distributors, and retailers as to the purchasers of their weapons, identified by serial numbers, used in crimes). Since a

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[49] McCarthy v. Olin Corp., 119 F.3d 148, 157 (2d Cir. 1997) [hereinafter *Olin Corp.*] (quoting Pulka v. Edelman, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976)).

[50] Forni v. Ferguson, 232 A.D.2d 176, 176, 648 N.Y.S.2d 73, 74 (1st Dep't 1996).

[51] *Accu-Tek*, 62 F. Supp. 2d at 820.

[52] YOUTH CRIME REPORT, *supra* note 30, at 13 (cited in *Accu-Tek*, 62 F. Supp. 2d at 825-26). The trial court also cited Fox Butterfield, *New Data Point Blame at Gun Makers: Fewer Criminals Stole Their Weapons Than Thought, Analysts Say*, N.Y. TIMES, Nov. 28, 1998, at A8. In addition, the trial court noted the testimony of Joseph Vince, former chief of the Crime Gun Analysis Branch of the Bureau of Alcohol, Tobacco & Firearms, who said that " '[I]n the research that we have done, we have not seen stolen firearms being employed by criminals. The majority of the time we are seeing them getting them from retail sources.' " *Accu-Tek*, 62 F. Supp. 2d at 830 (quoting Tr. at 1044). Also, New York City Police Lieutenant Kenneth McCann, former director of the joint NYPD/BATF task force on illegal gun trafficking, testified that of the guns seized, "a very, very small percentage was reported stolen." *Id.* at 838 (quoting Tr. at 488).

[53] *Accu-Tek*, 62 F. Supp. 2d at 826.

manufacturer must tell BATF which distributor purchased crime guns the manufacturer supplied, the manufacturer can demand that the distributor stop doing business with the retailers responsible for the leakage, on pain of losing the manufacturer as a supplier.[54]

However, although the Smith & Wesson executive had testified at trial that some retailers disproportionately leaked guns to the criminal market, he provided no evidence.[55] It remained theoretically possible for guns to leak to the criminal market fairly evenly across the spectrum of retailers, varying only with sales volume, notwithstanding the apparent differences in their degree of care in marketing. If that were indeed the case, it might not be possible for gun manufacturers to control their liability. If they had no way of establishing a rational policy to control sales at the retail level, they still could not significantly lessen the danger and harm to third parties except by refusing to sell their products altogether.

The *Hamilton* trial court described practical steps manufacturers could have taken to reduce the flow of guns to the criminal market. For instance, manufacturers could have required distributors to sell only to retailers who had actual stores, instead of selling out of the backs of trucks or off kitchen tables. Moreover, manufacturers could have refused to sell to distributors who insist on supplying retailers who sell at gun shows.[56] The trial court also relied to some extent on testimony that the manufacturers "oversupplied" southeastern "weak law" states, from which less expensive handguns flowed illegally to New York, where they could be sold at a profit.[57]

The first question certified by the Second Circuit to the Court of Appeals was whether firearms manufacturers had a duty of care to third parties.[58] In *McCarthy*, the Second Circuit had held that since the Olin Corporation had no special relationship with Ferguson, the shooter, it had no authority over him, no ability to control his behavior, and therefore no

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[54] *Id.* at 831.

[55] *See infra* note 83 and accompanying text.

[56] *Accu-Tek*, 62 F. Supp. 2d at 831.

[57] *Id.* at 830-31.

[58] *Beretta I*, 222 F.3d at 46.

duty to do so under New York law.[59] There, the Second Circuit had based its "special relationship" requirement primarily on *Pulka v. Edelman*.[60] The bane of New York plaintiff lawyers seeking damages for breaches of duty to third parties in tort, *Pulka v. Edelman* stands as shorthand for the proposition that courts will not find such a duty without "authority and ability to exercise control."[61]

In *Pulka*, a pedestrian passing by was injured by a customer driving his car out of the defendant's parking garage. The Court of Appeals said:

> [I]n no sense, can it be said that there was, in fact, a reasonable opportunity to stop drivers from disregarding these precautions in the same way that such drivers disregard their own sense of the danger to pedestrians caused by not stopping or by proceeding recklessly. Accordingly, to say that a duty to use care arose from the relationship of the garage to its patrons when there was no opportunity to fulfill that duty, places an unreasonable burden on the garage, indeed.[62]

Pulka's progeny, emanating from the Court of Appeals as well as the Second Circuit, occasionally included language that suggested a more robust and personal kind of pre-existing relationship requirement between a defendant and an immediate tortfeasor than the Court of Appeals' decisions, at least, actually imply. In one such decision, for example, the court said, "[W]hatever else may be required, however, at the minimum such a duty requires an existing relationship between the defendant and the third person over whom 'charge' is asserted."[63] But there, the defendant had had no authority or ability whatsoever to control the tortfeasor's drunk driving after defendant fired him. A wide range of possible relationships could have fallen within the Court of Appeals' definitional boundaries.

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[59] *Sturm, Ruger and Co.*, 916 F. Supp. at 369; *see also Olin Corp.*, 119 F.3d at 156-57.

[60] *Olin Corp.*, 119 F.3d at 156-57 (citing Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976)).

[61] Although a summary of *Pulka*, the quoted phrase actually appears in Purdy v. Pub. Admin., 72 N.Y.2d 1, 9, 526, N.E.2d 4, 7, 530 N.Y.S.2d 513, 516 (1988).

[62] *Pulka*, 40 N.Y.2d at 784, 358 N.E.2d at 1021, 390 N.Y.S.2d at 395.

[63] D'Amico v. Christie, 71 N.Y.2d 76, 89, 518 N.E.2d 896, 902, 524 N.Y.S.2d 1, 7 (1987).

The Court of Appeals' actual requirements with respect to the relationship have been far more subtle and nuanced. The relationship requirement of *Pulka* itself was based primarily on a very thoughtful law review article,[64] which counseled: "[t]he social policies which determine what relationships require such special assurance [of safety to person and property on the part of the parties thereto] and what ones are sufficiently unimportant not to require them are so incredibly complicated as almost to defy analysis."[65]

In *Pulka*, the New York Court of Appeals noted that Cardozo's rule that "risk imports relation,"[66] has been applied "to determine the scope of duty—only after it has been determined that there is a duty."[67] But various kinds of "special relationships" appear to suffice for a duty to exist. In *Purdy*, the Court of Appeals found for the defendant because neither of the defendants had the "necessary authority" or "ability to exercise control" over the plaintiff's conduct so as to give rise to a duty on the defendants' part to protect plaintiff, a member of the general public."[68] In the *Purdy* context, the relationship the Court of Appeals would appear to have required—"authority" over the plaintiff—seems to be no more than the legal right to have stopped her from driving the car with which she accidentally caused the injury in question. If the Court of Appeals believes that handgun manufacturers can effectively exercise power over sales practices of retailers through distributors, then such manufacturers have the "authority" and "ability" to withhold guns from criminals to a significant degree.

In *Strauss v. Belle Realty Co.*,[69] the Court of Appeals in dicta noted that in appropriate circumstances, it could find a duty where there was neither privity nor foreseeability: "Duty in negligence cases is defined neither by foreseeability of injury (*Pulka v Edelman*, supra, at p. 785) nor by privity of

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[64] Fowler V. Harper & Posey M. Kime, *Duty to Control the Conduct of Another*, 43 YALE L. J. 886 (1934) (cited in *Pulka*, 40 N.Y.2d at 783, 385 N.E.2d at 1021, 390 N.Y.S.2d at 395).

[65] Harper & Kime, *supra* note 64, at 904.

[66] Palsgraf v. Long Island Railroad, 248 N.Y. 339, 344, 162 N.E. 99, 100, 1928 N.Y. LEXIS 1269, *9 (1928).

[67] *Pulka*, 40 N.Y.2d at 785, 358 N.E.2d at 1022, 390 N.Y.S.2d at 396.

[68] *Purdy*, 72 N.Y.2d at 8, 526 N.E.2d at 7, 530 N.Y.S.2d at 516.

[69] 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555 (1985).

contract."[70] This statement strongly suggested that the kind of relationship the defendants argued was needed, a privity-based relationship, was more than the Court of Appeals would require.

The *Hamilton* defendants had argued at trial[71] and on appeal[72] that the *Pulka-Purdy* requirement of "authority and responsibility" required plaintiffs to prove a "special relationship" either between the defendant and the immediate tortfeasor, or between the defendant and the victim. Defendant manufacturers denied any relationship with the shooter or the victim in the instant case, or ability or authority to control criminals generally.[73] Other than with regard to the sufficiency of the evidence, the defendants failed in this line of their argument.

Two Court of Appeals cases illustrate the issue. In the first case, *Nallan v. Helmsley-Spear Inc.*,[74] the Court of Appeals held that the owner of an office building in a high-crime location had a duty to safeguard the lobby for business "invitees." The *Hamilton* defendants sought to distinguish these facts deeming the defendant's ownership and control of the building sufficient to create a "relationship" with the plaintiff, who was nominally an "invitee."[75] But *Nallan* illuminates the artificiality of defendants' "special relationship" construct, a construct that would infuse a kind of personalization into the relationship that the law does not in fact require. The "special relationship" between the owner and the victim in *Nallan* can only have emerged from the fact that

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[70] *Strauss*, 65 N.Y.2d at 402, 482 N.E.2d at 36, 492 N.Y.S.2d at 557.

> [A]n obligation rooted in contract may engender a duty owed to those not in privity. . . [W]hile the absence of privity does not foreclose recognition of a duty, it is still the responsibility of courts, in fixing the orbit of duty, 'to limit the legal consequences of wrongs to a controllable degree' and to protect against crushing exposure to liability. "In fixing the bounds of that duty, not only logic and science, but policy play an important role."

Id. (citations omitted).

[71] *Accu-Tek*, 62 F. Supp. 2d. at 821.

[72] Reply Brief of Defendants-Appellants Beretta U.S.A. Corp. and American Arms, Inc. at 12, *Beretta II*, 96 N.Y.2d 222, 750 N.E.2d 1055, 727 N.Y.S.2d 7 (2001) (No. 03401) [hereinafter *Reply Brief Beretta II*].

[73] *Id.* at 12-13.

[74] 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980).

[75] *Reply Brief Beretta II*, *supra* note 72, at 13.

the shooting victim attended a union meeting in the owner's building, because there was no indication that the owner had ever met the victim, or even heard of him prior to the claim.

The court would not extend a building owner's duty to a stranger who was in no sense an invitee. In the second case, *Waters v. New York City Housing Authority*,[76] the Court of Appeals held that the owner of a housing project owed no duty to a passerby who was dragged off the street and assaulted.[77] Owners could not in fact safeguard such passers-by, so liability could devastate them financially without improving public safety.[78]

The "relationship requirement," then, must enable the defendant to limit and control liability to potential plaintiffs by exercising due care, and need not involve an actual interpersonal encounter. The landlord in *Nallan* could only "control" the actions of an immediate tortfeasor or criminal on his property by creating safety conditions that would affect the statistical likelihood of criminal behavior to a third party. Obviously, he had no relationship with any individual criminal, but he had a duty to third parties nonetheless.

Handgun manufacturers may similarly exercise enough economic power over business entities further down the stream of distribution to distributors and retailers, to dictate at least to some extent the conditions under which they perform their function. That is, the manufacturer can enforce their adoption of certain sales policies, like not selling to straw purchasers, or not selling at gun shows, or otherwise, in the words used in the proceeding paragraph to describe the nature of the landlord's "control" of the criminal in *Nallan*, "creating safety conditions that would affect the statistical likelihood of criminal behavior damaging to a third party,"[79] which is precisely our description of the basis for the *Nallan* landlord's duty to third parties. That the manufacturers' control in this context is abstract and statistical, rather than personal, does not distinguish them from other defendants whose negligence resulted in harm to third parties in violation of their duty of care. Whether the

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[76] 69 N.Y.2d 225, 505 N.E.2d 922, 513 N.Y.S.2d 356 (1987).
[77] *Id.* at 228-31, 505 N.E.2d at 923, 513 N.Y.S.2d at 357.
[78] *Id.* at 230-31, 505 N.E.2d at 923, 513 N.Y.S.2d at 357.
[79] *Id.*

final links in the distribution chain—the retailer who sells to the straw purchaser, the straw purchaser who sells to the actual shooting criminal—are deemed to exercise authority and control does not really matter, since the foreseeability of criminal behavior invalidates any attempt to use criminal action as an "intervening cause" shielding the earlier links in the chain from liability.[80]

The trial court in *Hamilton* heard testimony that some manufacturers can and do require distributors to enforce contractual provisions against retailers that publish off-pricing or even publish certain wholesale prices.[81] If a gun manufacturer stands in that kind of relationship to the downstream entities with which it does business, then, assuming plaintiffs could show that particular practices by retailers disproportionately leaked guns to the criminal market, manufacturers who "control" retailers, in effect "control" the actions of criminals.

The Court of Appeals concluded that the *Hamilton* plaintiffs did not demonstrate that the defendants could have done anything significant to have prevented harm to the plaintiffs.[82] Although witnesses at the *Hamilton* trial suggested steps manufacturers could take to reduce the flow of guns to the criminal market, they had "presented no evidence . . . showing any statistically significant relationship between *particular classes* of dealers [such as those who fail to take the proposed precautions] and crime guns."[83] The Court of Appeals decided, therefore, that plaintiffs in *Hamilton* were analogous to the plaintiff in *Waters*, not to the plaintiff in *Nallan*. But once a plaintiff shows that the actual behavior of gun dealers meaningfully increased his or her risk of harm, the results will be different, for manufacturers who know the results of such negligence are positioned in the chain of commerce to control it.

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[80] "When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs." *Kush*, 59 N.Y.2d at 33, 449 N.E.2d at 729, 462 N.Y.S.2d at 835 (quoted in *Accu-Tek*, 62 F. Supp. 2d at 834).

[81] *Accu-Tek*, 62 F. Supp. 2d at 832 (quoting the testimony of Robert Hass, a former executive at Smith & Wesson: " 'These retailers could be cut off,' he noted, '[j]ust in the same way a retailer would be cut off who broke price and published ads and God knows we did that enough.' Tr[anscript] 2330.").

[82] *Beretta II*, 96 N.Y.2d at 236, 750 N.E.2d at 1063, 727 N.Y.S.2d at 15.

[83] *Id.*

The New York Court of Appeals in *Hamilton* has suggested the strong possibility that any objections to the nature of the relationship between gun manufacturer and criminal or victim would be cured as soon as plaintiffs show that actual negligence increased their risk of harm.

B. *Alternative Theories of Handgun Manufacturer Liability to Third Parties in Negligence*

Defendant gun manufacturers have argued that to find duty to third parties in tort the law requires relationships of a concrete and somewhat personal nature. Although the New York courts have sometimes used language in the past that encouraged that view, the Court of Appeals in *Hamilton* implicitly rejected it. If plaintiffs can rely on that implication, their new course is clear enough. If not, plaintiffs may utilize two alternative theories, especially if gun manufacturers successfully allege that they do not control the manner in which downstream sellers market the product.

Legal theory does not always concede that public policy is a primary consideration. But courts are expected to apply public policy considerations when they decide whether or not to find a duty to third parties in tort.[84] New York jurisprudence, as that of other states, has been less expansive in this regard, generally requiring a pre-existing relationship between the defendant and the tortfeasor or between the defendant and the victim before conceding that the defendant had a duty to the victim.[85] The New York Court of Appeals has often explained

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[84] PROSSER & KEETON ON TORTS ch. 9, § 53, 358 (5th ed., 1984). *See also* Palka v. Servicemaster Mgmt. Serv. Corp., 83 N.Y.2d 579, 587, 634 N.E.2d 189, 193, 611 N.Y.S.2d 817, 820 (1994) (stating that relevant public policy factors should include "reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability"); *Waters*, 69 N.Y.2d at 229, 505 N.E.2d at 923-24, 513 N.Y.S.2d at 358; DeAngelis v. Lutheran Medical Center, 58 N.Y.2d 1053, 1055, 449 N.E.2d 406, 407, 462 N.Y.S.2d 626, 627 (1983).

[85] *See, e.g.*, for New York, Pulka v. Edelman, 40 N.Y.2d 781, 358 N.E.2d 1019, 390 N.Y.S.2d 393 (1976); Purdy v. Pub. Admin., 72 N.Y.2d 1, 526 N.E.2d 4, 530 N.Y.S.2d 513 (1988); McCarthy v. Sturm, Ruger, Co., 916 F. Supp. 366 (S.D.N.Y. 1996), *aff'd sub nom*; McCarthy v. Olin, 119 F.3d 148 (2d Cir. 1997); for Florida, Penelas v. Arms Tech., 738 So. 2d 1042 (Fla. Dist. Ct. App. 2001), Lighthouse Mission of Orlando, Inc. v. Estate of McGovern, 683 So. 2d 1086 (Fla. Dist. Ct. App. 1996),

that if it did not require such relationships, it might be imposing "limitless" and "crushing" liability on defendants who could neither control what tortfeasors do with their products and services, nor protect victims from tortfeasors.[86] In view of this aspect of New York law, an unscrupulous proprietor could hire an independent contractor to undertake such tasks as would involve direct encounters with customers, when such encounters might increase the likelihood that the customers would become tortfeasors or victims.

The notion of an "independent contractor" derives from the likelihood that when an entity engages another under contract to perform a service, the one for whom the service is to be performed does not control the manner of performance. Rather, in contrast with an employee, the independent contractor only warrants to produce the result required, not to produce it in any particular manner.[87]

Potential tortfeasors, thus, could strategically interpose barriers to privity between themselves and victims to preclude liability. The obvious strategic defense was to employ independent contractors to perform those aspects of one's business that included dangerous activities. The manufacturer would have had no relationship with the contractor's own independent subcontractor, and surely none with the random victim of the latter's negligence. Thus, the manufacturer could export those risks and costs of doing the dangerous part of his or her business onto the end subcontractor, or, as is often the

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Austin v. Mylander, 717 So. 2d 1073 (Fla. Dist. Ct. App. 1998); for Ohio, Gelbman v. Second Nat'l Bank, 458 N.E.2d 1262 (Ohio 1984), Simpson v. Big Bear Stores Co., 652 N.E.2d 702 (Ohio 1995). *Compare* Moning v. Alfono, 254 N.W.2d 759 (Mich. 1977) (discussing how Michigan does not treat separately the questions of foreseeability and the existence of a duty).

[86] *See, e.g., Pulka*, 40 N.Y.2d at 786, 358 N.E.2d at 1023, 390 N.Y.S.2d at 397; *Strauss*, 65 N.Y.2d at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556.

[87] If the court finds that the manufacturers did not have a relationship with their distributors that gave them the ability to exercise authority over the manner in which the distributors performed the task for which they were under written or oral contract to perform for the manufacturers, then they were independent contractors. An independent contractor is not subject to the control of the employer as to how he or she performs the work but only for the results of the contracted-for work. *See e.g.* G.D. Searle & Co. v. Medicore Communications, *Inc.*, 843 F. Supp. 895, 904-05 (S.D.N.Y. 1994); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 142-43 (S.D.N.Y. 1991); Beach v. Belzy, 238 N.Y. 100, 143 N.E. 805, 1924 N.Y. LEXIS 653 (1924); Uppington v. City of New York, 165 N.Y. 222, 59 N.E. 91, 1901 N.Y. LEXIS 1409 (1901); Tytell v. Battery Beer Distrib., Inc., 608 N.Y.S.2d 225, 226, 202 A.D.2d 226 (1st Dept. 1994).

case, onto the random victims if the subcontractor had "shallow pockets." Similarly, but under a slightly different theory, the manufacturer may deal through some legitimate and careful independent contractors, and through other illegitimate and careless independent contractors who would do business with a riskier and more profitable end of the market, for example, the gun trafficker who purchases in quantity for resale to criminals.

Therefore, one of the presumptions under which manufacturers traditionally escaped liability even when they produced the guns used to inflict injury, is that they do not exercise control over the manner in which their guns are sold. Rather, they enter into arms-length sales contracts with their distributors, who enter into arms-length contracts with their retailers, who engage in arms-length sales to purchasers, who engage in arms-length sales to criminals. At each stage of the process, everyone is an independent contractor.

Principals ordinarily cannot be held liable for the negligence of their independent contractors for the same reason that principals cannot control the manner in which those contractors meet their contractual obligations.[88] The law, however, has developed exceptions to this rule. Employers have a duty to third parties for the negligence of their independent contractors when the independent contractor negligently performs an assignment the employer knows or should know is inherently or foreseeably dangerous.[89] The employer also has a duty to third parties for negligent work performed by an incompetent independent contractor the employer hired negligently.[90] These legal doctrines could stand ready for use against handgun manufacturers if plaintiffs can link the negligence of "independent contractors," or gun dealers, to an increased risk of harm to plaintiffs.[91]

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[88] *See* authority cited *supra*, note 86.

[89] Rosenberg v. Equitable Life Assur. Soc. of U.S., 79 N.Y.2d 663, 664, 584 N.Y.S.2d 765, 767-78, 595 N.E.2d 840, 842 (1992).

[90] Hesch v. Seavey, 188 A.D.2d 808, 809, 591 N.Y.S.2d 546, 547 (3d Dept. 1992). *See also* Maristany v. Patient Support Servs., Inc., 264 A.D.2d 302, 303, 693 N.Y.S.2d 143, 144 (1st Dep't 1999).

[91] In analogous product liability cases, the delegation of responsibilities to dealers to assemble, adjust, or inspect parts or all of a vehicle did not relieve the manufacturers of their non-delegable duties toward ultimate purchasers. Sabloff v. Yamaha Motor Co., 273 A.2d 606, 612 (N.J. Super. Ct. App. Div.), *aff'd*, 283 A.2d. 321

In addition, the courts have not required extreme danger, only "inherent" danger. Juries have found such "inherent" danger in cleaning mats with soap and water on a New York City sidewalk,[92] painting billboards up on a scaffold over the street,[93] or replacing elevator doors while keeping the elevator running.[94] Likewise, the sale of lethal weapons is an inherently dangerous activity. Even with the exercise of reasonable care, weapons may get into the wrong hands. Without the exercise of such care, far more weapons leak to the criminal market. When most people believed that most criminals stole their guns, one could have argued that a sale was not particularly dangerous. The revelation that more criminals buy their guns, however, has made manifest the danger inherent in the sale of guns. Under these circumstances, if defendant handgun manufacturers cannot control their distributors, then each defendant has a duty that is "non-delegable and, though blameless, it is liable for the independent contractor's negligence."[95] Thus, defendants cannot escape liability by interposing an independent contractor between themselves and victims of negligence in their dangerous endeavors. The defendant can delegate the dangerous task, but not the legal duty. The duty of care, and liability for its breach, remains with the defendant.[96]

Without explicit reference to any such theory, the U.S. Supreme Court found that a manufacturer of a legal but controlled pharmaceutical had a sufficient duty to the public to exercise care that it imposed *criminal* liability for its breach of that duty.[97] The company had filled large orders for the drug from a physician in a small town. The quantities that were

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(1971); Vandermark v. Ford Motor Co., 391 P.2d 168, 171 (Cal. Ct. App. 1964). However, the independent contractor context of "dangerous activity" makes for a different analytical outcome, and therefore should not be confused with the treatment recommended for "ultrahazardous activity" in the product liability context in James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1321 (1991).

[92] Wright v. Tudor City Twelfth Unit, Inc., 276 N.Y. 303, 307, 12 N.E.2d 307, 308, 1938 N.Y. LEXIS 1189, *9 (1938).

[93] Rohlfs v. Weil, 271 N.Y. 444, 3 N.E.2d 588, 1936 N.Y. LEXIS 1221 (1936).

[94] Besner v. Central Trust Co., 230 N.Y. 357, 130 N.E. 577, 1921 N.Y. LEXIS 844 (1921).

[95] *Rosenberg*, 79 N.Y.2d at 666, 595 N.E.2d at 842, 584 N.Y.S.2d at 767,.

[96] *Id.* at 668, 595 N.E.2d at 843, 584 N.Y.S.2d at 768.

[97] Direct Sales Co. v. United States, 319 U.S. 703 (1943).

ordered and sent exceeded the amount likely to be used for legitimate and lawful purposes.[98] The defendants in *Hamilton* attempted to distinguish this case, noting that the Federal Bureau of Narcotics (the precursor of today's Drug Enforcement Agency) had previously warned the company that the morphine had leaked into the criminal market.[99] However, through crime gun trace request telephone calls from BATF, gun manufacturers likewise receive warnings, whether or not they were intended as such, that their products leak into the criminal market.

The knowing or careless selection of distributors who take no precautions against leakage to the criminal market would bring handgun manufacturers under the second exception to the immunizing principals for the torts of their independent contractors. When BATF seeks daily crime gun purchaser information from a gun manufacturer, and the manufacturer finds, ten or thirty or a hundred times a year, that a particular distributor leaked those guns to the criminal market, then that manufacturer has reason to know of the "incompetence," or worse, of that particular independent contractor. (This again assumes that manufacturers or others eventually establish that leakage levels do not just vary with volume, but correlate to negligence or corruption.) The same analysis applies to the distributor whose records show that particular retailers constitute vastly disproportionate leaks of handguns to the criminal market.

Thus, either gun manufacturers exercise economic control over distributors and retailers to the extent that they can enforce their wishes as to the manner in which handguns are sold, or they do not. If the former, manufacturers may exercise authority and responsibility sufficient to make distributors and retailers liable to victims for the negligence of their agents. If the latter, manufacturers cannot delegate to their contractors a duty to those victims but must retain it themselves. The danger in the sale of handguns renders nondelegable the duty to assure public safety; the negligent selection of incompetent independent contractors likewise prevents delegation of the duty to those contractors.

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[98] *Id.*

[99] *Reply Brief Beretta II*, *supra* note 77, at 22.

III. PROPORTIONAL CAUSATION

A. *Why the Preponderance Standard in* Hamilton *Did Not Prevail*

Questions of collective liability as well as proximate cause occupied a great deal of the *Hamilton* trial court's attention. The only plaintiff to win damages for his gunshot injuries was unable to identify the manufacturer of the particular handgun that was used to cause the injury. With no one manufacturer linked to the weapon, plaintiff had no choice but to argue that the range of possible manufacturers bore collective liability, an argument that virtually begged the question of cause-in-fact. With respect to proximate cause, the trial court summarized the testimony of the plaintiff's expert as follows: Gun manufacturers' negligent marketing and distribution resulted in widespread and easy availability of .25 caliber handguns to criminals and to underage purchasers and in consequent injuries to shooting victims. In particular and for example, Alfred Adkins illegally purchased and used such a gun to shoot and cripple his friend and fellow teenager Stephen Fox, a plaintiff in the instant case.[100]

With respect to collective liability, the court agreed with plaintiffs' analogy of "illegal handguns to deadly pathogens[,]" and therefore applied a liability theory used in mass toxic tort cases when "circumstances . . . made it impossible for plaintiffs to determine which one of a number of manufacturers made the particular unit of the product which caused the injury. . . ."[101]

However, most of the argument in *Hamilton* centered on causation.[102] The court permitted the jury to determine

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[100] *Accu-Tek*, 62 F. Supp. 2d at 835.

[101] *Id.* at 834, 836 (citing *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989) for market share liability, which the *Hamilton* trial court applied).

[102] *See generally* Trial Transcript, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (1999) (on file with author).

whether a preponderance of the evidence established defendants' market share liability,[103] and concluded:

> Proof of the sales history of the specific gun used in the Fox shooting is not required. Plaintiff need only produce evidence from which a fair-minded jury could conclude that the Fox defendants failed to market and distribute their product—a .25 caliber handgun—reasonably in light of all the circumstances. They have met that burden.[104]

At oral argument before the Second Circuit,[105] the panel asked the plaintiffs' attorney how she could link a defendant to the gun that was used to shoot the injured plaintiff since the gun was never recovered. She referred to the testimony that the shooter bought the gun from a trafficker who sold it out of the back of his truck, and who had himself purchased it down South, in a pattern that usually includes a straw purchase from an FFL. The defendant's failure to impose requirements through its distributors to its FFL retailers, she suggested, typified the kind of behavior that made possible the rest of the process: sale by FFL to straw purchaser, subsequent sale to criminal, and shooting of victim.

However, the Court of Appeals noted that plaintiffs had not met the "but for" test: had gunmaker defendants taken all the actions plaintiffs alleged constituted the exercise of their duty of care, Stephen Fox, the injured plaintiff, might well still have been shot. The gun in question might have been obtained by the trafficker through a non-negligent retail sale, or from a group of weapons stolen from non-negligent retailers, or even from citizens, although most are not. Had the trafficker not supplied the weapon, the shooter might have borrowed one from a friend, or stolen one himself. It might not have made any difference had the defendant gun manufacturers forced their distributors to cut off retailers who engaged in multiple sales, repeatedly had crime guns traced to them, sold at gun shows, or were not well-stocked storefront establishments.[106]

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[103] *Accu-Tek*, 62 F. Supp. 2d at 835.

[104] *Id.* at 829.

[105] Oral argument for *Hamilton v. Beretta*, No. 99-7753(L), attended March 13, 2000.

[106] *Beretta II*, 96 N.Y. 2d at 232-33, 750 N.E.2d at 1060-61, 727 N.Y.S.2d at 12-14.

Thus, had defendants not engaged in any of the behavior that the plaintiffs claimed constituted negligent marketing, the man who shot Fox might still have obtained the gun he used. In rejecting plaintiffs' effort to show that defendants could have prevented their injuries, the Court of Appeals recognized that this possibility made it difficult for plaintiffs. In adopting a "preponderance of the evidence" standard, plaintiffs undertook to show that defendants did more than merely increase plaintiffs' risk of harm. They had to show, instead, that defendants were more than fifty percent likely to have "caused" the harm, and that defendants' behavior supplied the "specific causal link" to the plaintiffs' injuries.[107]

When a plaintiff cannot identify which manufacturer produced the particular "unit of the product" that caused the injury (the "indeterminate defendant" problem), New York has used market share liability to apportion liability among defendants. But the plaintiff must still establish, by a preponderance of the evidence, that the *product* caused the injury.[108] For the appropriate analogy to hold in *Hamilton*, plaintiffs were required to establish by a preponderance of the evidence that the defendants' *behavior* caused the injury. The Court of Appeals concluded that the plaintiffs had not done so.[109]

Ironically, one of the trial judge's prior opinions offers a causation theory, proportional causation, that fits the facts of *Hamilton*.[110] In *Hamilton*, Judge Weinstein found that plaintiffs need not settle for the substantially smaller awards likely to be available under the proportional causation theory because the evidence they had presented satisfied the requirements of the preponderance standard, under which they

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[107] *Accu-Tek*, 62 F. Supp. 2d at 834; *see generally id.*

[108] *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 1078, n.2.

[109] *Accu-Tek*, 96 N.Y.2d at 236, 750 N.E.2d at 1063, 727 N.Y.S.2d at 15.

[110] *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984), where Judge Weinstein utilized proportional causation to distribute the proceeds of a settlement. In that administrative context, such utilization did not of course constitute precedent as a matter of tort law. *See* John C. P. Goldberg & Benjamin Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411, 1415, n.13 (2000).

could win larger awards.[111] But the Court of Appeals, in rejecting Judge Weinstein's application of the preponderance standard and market share liability,[112] suggested that a successful plaintiff might well pursue damages under the proportional causation theory.[113]

B. *Why "Indeterminate Plaintiff"/"Indeterminate Defendant" Settings Make a Better Fit With Proportional Causation*

Until the advent of proportional causation theory, courts responded to problems analogous to the problem in *Hamilton* in an inconsistent manner. That is, when the defendant's behavior increased the risk to the plaintiff, but there was no way to tell whether the particular plaintiff would have suffered injury in the absence of the defendant's behavior, courts sometimes let the causation question go to the jury and sometimes they did not. The defendant's apparent moral culpability and social status were among the factors that influenced the courts' distinctions.

A seminal 1956 *Stanford Law Review* article by Wes Malone[114] provided several illustrations. When two fires, one caused by a railroad's negligence and one of unknown origin, merged to damage plaintiff's property,[115] or when two motorcycles simultaneously made noise near a horse which, frightened, ran off, injuring the plaintiff,[116] the courts did not simply reject plaintiffs' claims for failure to establish causation. Instead, in "combined force" cases of this kind, they permitted juries to assess damages equally against defendants

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[111] *Accu-Tek*, 62 F. Supp. 2d at 835.

[112] *Beretta II*, 96 N.Y.2d at 234-42, 750 N.E.2d at 1062-68, 727 N.Y.S.2d at 14-20.

[113] *Id.* at 241, 750 N.E.2d at 1067, 727 N.Y.S.2d at 19, n.11.

[114] Wes S. Malone, *Ruminations on Cause-in-Fact*, 9 STANFORD L. REV. 60 (1956).

[115] Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 179 N.W. 45 (Minn. 1920), *cited in* Malone, *supra* note 114, at 89, n.72.

[116] Corey v. Havener, 65 N.E. 69 (Mass. 1902), *cited in* Malone, *supra* note 114, at 89, n.71.

whose identical behavior created equal risk of harm, regardless of the fact that only one and not the other must have "caused" the harm.[117]

At the time in other cases, such as medical malpractice cases, the fact that better treatment would have increased a patient's chance from twenty percent to forty percent was not enough for the court to allow a finding of causation.[118] Courts permitted juries to assess damages against defendants in some cases when no determination of actual cause-in-fact was possible, generally when the juries saw the defendants, one of whom must truly have caused the injury, all as wrongdoers.[119] The social status of the defendant class at the time influenced such perceptions.[120] But after Congress enacted legislation extending provisions of the Federal Employers' Liability Act to sailors, the courts found that employers had a duty to take precautions against danger to sailors. Subsequently, the courts began to find causation against ship owners who didn't provide life preservers.[121]

Professors Twerski and Sebok[122] extend Malone's life preserver discussion with this scenario: Say we know that life preservers would have prevented one out of three sailors from drowning, but we do not know which one. Decedents of a sailor who really drowned because defendants neglected to provide a lifesaver might not recover, because no one would ever know or could ever prove that he would have lived. Decedents of a sailor who would have drowned anyway might recover.[123]

When the evidence supported less than a fifty percent likelihood of causation, courts could not allow findings of causation under a strict preponderance theory. So victims of some defendants whose behavior had indeed caused harm

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[117] Malone, *supra* note 114, at 89.

[118] *See* Kuhn v. Banker, 13 N.E.2d 242 (Ohio 1938); Connellan v. Coffey, 187 A. 901 (Conn. 1936), *cited in* Malone, *supra* note 114, at 87, n.66 ("This would throw the physician open to more claims that it is felt would be proper" at the time).

[119] Malone, *supra* note 114, at 84.

[120] *Id.* at 86.

[121] *Id.* at 76-77.

[122] Aaron Twerski & Anthony Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379, 1380-81 (2000).

[123] *Id.* at 1387.

would never recover damages.[124] When the evidence supported more than a fifty percent likelihood, but of course not certitude, a preponderance of the evidence sufficed to show causation. Therefore, in some such cases, defendants would be held liable for harms they had not inflicted; and the use of such decisions as precedent, for the same class of defendants, would multiply damages against that class for the cost of harms they had not inflicted.[125]

Under proportional causation, defendants are held liable only for the excess risk their behavior contributed to the plaintiff's situation. Thus, in the drowning sailor illustration, decedents of the drowned sailor could recover one-third of the damages his death imposed, because he might or might not have been the one sailor in three whose life would have been saved by the life preserver. Defendants are held liable for destroying his one-third *chance* of surviving.

In the context of multiple defendants, one defendant's behavior may have increased risk more than another's, so the calculation of damages becomes more complicated than apportioning the risk equally over the defendants. In an earlier decision,[126] Judge Weinstein suggested an illustration in which 1,100 people developed cancer after exposure to a toxic carcinogen, one hundred more than without exposure. Damages average one million dollars per cancer victim, but no victim knew which of the ten product manufacturers were responsible for that particular victim's cancer, and obviously no victim out of the 1,100 knew which victims were the one hundred who would not have developed cancer but for the defendant's product. Under these circumstances, Judge Weinstein suggested that with equal toxicity, the ten

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[124] Under the "strong" version of preponderance theory, even with a greater than fifty percent probability of causation, courts do not impose liability without some "particularistic" proof that an individual defendant's behavior caused the particular victim's injury. With strict application of that version of the theory, then, virtually no mass tort plaintiff would ever recover damages. *See* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 857 (1984).

[125] This would be an improper result: "[t]o the extent that a risk is attributable to unknown or nonculpable sources or to the victim's own recklessness, the victim should bear the loss unless society has decided to absorb it collectively.[Citations omitted.]" *Id.* at 880.

[126] *In re* Agent Orange Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984).

manufacturers together would have been liable for the cost of the "extra" cancers (one hundred times one million dollars = one hundred million dollars), so each manufacturer would have had to pay each of the 1,100 victims 1/1100th of one hundred million dollars, or about $90,000 each. While this gives each victim far less than his or her full damages for the illness, it gives each victim the damages proportionate to the manufacturers' behavior in increasing the likelihood that the victim would incur the illness.[127]

In some medical malpractice cases, negligent failure to diagnose cancer at an earlier stage of the cancer could increase a patient's mortality risk from sixty-one percent to seventy-five percent.[128] The patient's subsequent death could not, then, be attributed to the negligence of the physician by a preponderance of the evidence: it "merely" increased the risk fourteen percent. But some courts have awarded damages as follows: the percentage risk times what damages would have been for full liability for the death.[129] As one such court explained, "A patient with cancer . . . would pay to have a choice between three unmarked doors—behind two of which were death, with life the third option. A physician who deprived the patient of this opportunity, even though only a one-third chance, would have caused her real harm."[130]

In a different context, Professors Twerski and Cohen discuss a form of negligence which increases a patient's risk of $100,000 worth of harm from seventeen percent to twenty percent. Out of one hundred patients, twenty will suffer the adverse consequences, but only three will suffer as a result of the physician's negligence. That negligence will have imposed $300,000 of harm, but under the preponderance rule, no patient would recover any damages. Under the proportional causation rule, each of the twenty patients will recover $15,000, the proportion of the harm equal to the degree by

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[127] *Id.* at 837-38.

[128] Herskovits v. Group Health Cooperative of Puget Sound, 664 P.2d 474, 476-79 (Wash. 1983).

[129] *See* Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 N.W. U. L. REV. 1, 20-21, n.48 (citing nine medical malpractice cases). *See also Herskovits*, 664 P.2d at 479, 486-487 (Pearson, J., concurring).

[130] Twerski & Cohen, *supra* note 129, at 16 (quoting Wollen v. DePaul Health Ctr., 828 S.W.2d 681, 684 (Mo. 1992)).

which the doctor increased the patients' risk of suffering that harm. The physician will pay a total of $300,000: precisely the total damage attributable to his negligence.[131] Physician A pays the damage amount he should pay. Since none of his twenty patients knows or can prove which actually suffered because of A's negligence, each gets a pro rata share.

C. *Why Proportional Causation Should Succeed For Handgun Injury Plaintiffs*

Applying proportional causation to the *Hamilton* case poses practical challenges, but not theoretical ones. In *Hamilton*, the jury translated behavioral differences among defendants into findings of liability or non-liability for negligence, and then applied market share to apportion damages. In a new case brought against handgun manufacturers utilizing data made available subsequent to the *Hamilton* trial, a jury would have to translate behavioral differences more finely into percentage degrees of risk enhancement. Testimony could be brought to bear on that task. Plaintiffs may eventually be able to show that permitting sales at gun shows, and permitting multiple sales to the same purchaser by retailers, increases the risk of gun violence to third party victims among the public. BATF found there were five times as many crime guns leaked through FFLs to New York City during one nine-month period as handgun permits were issued by the city in that same period.[132] Plaintiffs would still have to demonstrate that distribution and sales methods alleged to be negligent did in fact disproportionately cause guns to enter the criminal market, but it seems likely that such behavior increases risk. Studies covering 1986 through 1992 quantified "excess murders" during that period for all age groups at about twelve percent,[133] and concluded that "the

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[131] *Id.* at 30.

[132] YOUTH CRIME REPORT, *supra* note 30, at 1; "New Licenses Issued by the License Division, " Police Department, City of New York, under cover letter of 6/22/99 from Inspector John J. Hudson, Commanding Officer, License Division.

[133] Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 19-20 (1995). The twelve percent represents the likely increase over the baseline murder rate of earlier (and most likely, later) periods, but the quantity of homicides potentially attributable to easy access to guns by criminals

lethality of the ubiquitous guns contributed in a major way to the doubling of the homicide rate by (and of) those 18 and under."[134] These studies were not offered into evidence for the *Hamilton* trial.

BATF data suggested to the *Hamilton* trial court that defendants had increased the risk to plaintiffs by thirty-three percent. If so, proof of causation by a preponderance of the evidence would seem arithmetically impossible. Citing Professors Twerski and Sebok's analysis[135] the Court of Appeals noted that even if plaintiffs had persuaded it to recognized a duty of care owed by defendants, the appropriate measure of damages would have reflected the thirty-three percent risk enhancement, not the full damage assessment associated with the preponderance rule.[136] In any case, none of the plaintiffs' evidence persuaded the court that the defendants' alleged negligent marketing and distribution had increased the risk to plaintiffs in any way that could be quantified or separated out from the overall risk posed by guns in the United States generally.[137] But with the proper factual foundation, proportional causation, as the court suggested, makes a far better logical "fit" in an indeterminate plaintiff/indeterminate defendant combination case, like *Hamilton*, where plaintiffs at best will only be able to show risk enhancements by defendants at a level below fifty percent.

CONCLUSION

Future plaintiffs may be expected to seek proof that handgun manufacturers exercise control over the degree to which their product will be used to generate injury and destruction. Courts need no longer believe that they must defer to legislatures to impose liability, and may utilize available

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and youth may include some of the ongoing baseline as well, bringing the total well above twelve percent.

[134] Alfred Blumstein, The Context of Recent Changes in Crime Rates, Panel Paper, National Institute of Justice and Executive Office for Weed and Seed, Washington, D.C., Jan. 5-7, 1998.

[135] *See supra* notes 110-112.

[136] 96 N.Y.2d 222, 241, 750 N.E.2d 1055, 1067, 727 N.Y.S.2d 7, 19 (2001).

[137] *Id.* at 234, 750 N.E.2d at 1062, 727 N.Y.S.2d at 14.

and well-established theories of liability to impose responsibility where it truly belongs.

Although neither the *Hamilton* plaintiffs nor anyone else to date has yet come forward with dispositive evidence of a causal relationship between the negligent marketing and distribution of handguns on the one hand and increased risk to victims on the other, only the capture of that evidence—and not, any longer, an apparent barrier of legal theory—stands between handgun manufacturers and liability on a negligence claim. New York jurisprudence is now open for change with far-reaching potential consequences for both handgun manufacturers, and gunshot victims.

What seemed to be settled law after *McCarthy*, "New York courts do not impose a legal duty on manufacturers to control the distribution of potentially dangerous products such as ammunition,"[138] now is not.

[138] *Olin Corp.*, 119 F.3d at 157.