

4-2000

Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation

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Recommended Citation

88 Ga. L. Rev. 659 (2000)

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Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability

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I. INTRODUCTION

It is one of the axioms of tort law that a defendant may not be held liable unless he caused the injury about which the plaintiff is complaining. This is true even if the defendant is a wrongdoer. Culpability in the air, so to speak, is not the business of tort law, but of public law. The question of causation is, therefore, a critical one for every tort suit. It is not just a mere technicality, but an element that is equal to duty and breach.

Of course, the question of causation is really two questions: cause-in-fact and proximate cause. As Wex Malone noted over forty years ago in his classic article, *Ruminations on Cause-in-Fact*, proximate cause often gets the lion's share of attention by courts and scholars because it seems so obviously affected by considerations of policy and legal theory.¹ Malone argued that the attention lavished on proximate cause should not distract us from the important policy decisions that are contained in the judicial decision to allow—or disallow—consideration of cause-in-fact by a jury. The decision to let the jury consider the factual question of cause-in-fact is a peculiar judicial decision, since in theory it reflects nothing more than a judicial evaluation of how a reasonable jury would treat the facts as pled. From that point of view, judicial review of motions to dismiss based on cause-in-fact should themselves involve nothing more than an idealized dress-rehearsal of what the jury will have done in the jury room. Malone rejected this characterization of judicial review of the cause-in-fact issue. On many levels, he argued, the decision whether or not to allow a jury to decide whether the defendant's negligence was a cause-in-fact of the plaintiff's injury depends on various policy goals and assumptions hidden

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1. See Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 60 (1956).

within the tort system.

The problem presented itself to Malone most basically at the level of but-for causation. Malone noted that even this test for cause-in-fact, which seems, for all its limitations, so easy to apply, requires certain assumptions about probability. For example, in the cases in which a seaman had fallen overboard, Malone noted that courts originally would not allow these cases to go to the jury on the grounds that it would require the jury to speculate on whether the victim would have been able to reach the life-preserver before drowning.² After 1931, Malone noted, the pattern reversed itself, to the point where no court refused to allow the jury to judge whether the absence of a safety device was the cause-in-fact of the plaintiff's injury.³ In 1956, Malone wrote, a defendant would be able to avoid going to the jury on the cause-in-fact question only in the "extreme" case where the facts pled revealed that "the chance of a successful rescue was virtually nil . . .".⁴ Malone found a similar situation in cases involving the violation of statutory fire safety regulations and the negligent interruption of water used by firefighters.⁵

It is important to see that Malone was not concerned in these cases with the problem of concurrent causation or overdetermination. Rather, the problem was one of underdetermination. The reason we don't know if the defendant's breach of duty caused the injury is because we don't know whether the victim was in a position to benefit from the increase in safety that the duty was supposed to guarantee. For example, it may be the case that thirty-three percent of the time sailors who fall overboard would be helped by a life preserver. What we don't know is whether the plaintiff was, for whatever reason, in the position of the lucky one of three who would have been able to use the safety device or in the position of the unlucky two of three who would not have been able to use the device.

2. See *id.* at 75-76 (citing *New York Cent. R.R. v. Grimstad*, 264 F. 334 (2d Cir. 1920); *Ford v. Trident Fisheries Co.*, 122 N.E. 389 (Mass. 1919)).

3. See Malone, *supra* note 1, at 77 (citing *Di Nicola v. Pennsylvania R.R.*, 158 F.2d 856 (2d Cir. 1946); *Pollard v. Seas Shipping Co.*, 146 F.2d 875 (2d Cir. 1945); *Kirincich v. Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940); *Harris v. Pennsylvania R.R.*, 50 F.2d 866 (4th Cir. 1931); *Zinnel v. United States Shipping Bd. Emergency Fleet Corp.*, 10 F.2d 47 (2d Cir. 1925); *Bochantin v. Inland Waterways Corp.*, 96 F. Supp. 234 (E.D. Mo. 1951); *Tompkins v. Pilots Ass'n for Bay & River Del.*, 32 F. Supp. 439 (E.D. Pa. 1940)).

4. *Id.* at 77. Malone's observation has continued to have force. See, e.g., *Reyes v. Vantage Steamship Co.*, 609 F.2d 140 (5th Cir. 1980); *Walsh v. Zusei Kaiun K.K.*, 606 F.2d 259 (9th Cir. 1979); *Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir. 1962); *Kline v. Marltrans CP, Inc.*, 791 F. Supp. 455 (D. Del. 1992).

5. See Malone, *supra* note 1, at 79-80 (citing *Delaware & H.R. Corp. v. Felter*, 98 F.2d 868 (3d Cir. 1938); *Hurley v. Missouri, K. & T. Ry. Co.*, 156 S.W. 57 (Mo. App. 1913); *Valentine v. Minneapolis St. P. & S. S. M. Ry. Co.*, 118 N.W. 970 (Mich. 1908); *Gulf, C. & S.F. Ry. Co. v. Saunders*, 295 S.W. 283 (Tex. Civ. App. 1927). Other cases are inconsistent with Malone's observations. See, e.g., *Cottonwood Fibre Co. v. Thompson*, 225 S.W.2d 702 (Mo. 1949); *Ocean View Improvement Corp. v. Norfolk & W. Ry. Co.*, 140 S.E.2d 700 (Va. 1965); But see *Collins v. Collins*, 946 P.2d 1345 (Idaho Ct. App. 1997) (allowing case to go to jury).

Whether the victim was lucky or unlucky is a consequence of many actual but unknowable facts which have nothing to do with the defendant's conduct. We know that of every three accidents, the defendant's negligence is the but-for cause-in-fact of one death. We just don't know which one, and cannot know. The same would be true where the ratio was reversed: then, the defendant's negligence would be the cause of two deaths out of every three.

Malone asked why the tort system selects some set of underdetermined causes and not others.⁶ He observed, for example, that what is true about violations of safety norms on ships and in fires is not true about medical malpractice, where underdetermination regularly leads to the dismissal of cases.⁷ He offered two observations. First, he suggested that where the defendant is proved to have been highly culpable in the manner through which they violated the plaintiff's interests, courts have been willing to allow juries to consider cause-in-fact even in cases where it is highly improbable that the defendant's culpable act caused the plaintiff's injury. Malone noted that, just as proximate cause is relaxed by the Restatement for intentional torts, courts "seldom hesitate to allow the jury a free range of speculation" on the question of cause-in-fact in intentional torts.⁸ Malone suggested that the inverse relationship between the defendant's culpability and judicial scrutiny of cause-in-fact maps onto the various levels of negligence. Second, Malone suggested that courts will send the question of cause-in-fact to the jury even in cases of dramatic underdetermination where the defendant breached a duty that was "designed to protect against the very type of risk to which the plaintiff was exposed."⁹ Where the risks that eventuated are high on the proximate cause risk list, Malone suggested that courts will be less demanding regarding cause-in-fact; conversely, for more remote risks that might just pass muster on proximate cause, courts will demand more in the way of proof of cause-in-fact.¹⁰ This variant of the risk rule explains the life preserver cases, since there was no other reason for imposing a duty to provide life-preservers except the chance—no matter how unlikely—that it would make a difference.

Malone noted that in both malpractice and interruption of fire-fighting cases, what the victim loses often is "merely a gambler's chance" that, but for the defendant's breach of duty, the victim would not have suffered an

6. See Malone, *supra* note 1, at 72-73.

7. See *id.* at 85-87 (citing *Connellan v. Coffey*, 187 A. 901 (Conn. 1936); *Kuhn v. Banker*, 13 N.E.2d 242 (Ohio 1938)).

8. *Id.* at 72-73.

9. *Id.* at 73.

10. See *id.* at 74-75. This is clearly the lesson of *Reynolds v. Texas & Pacific Railway Co.*, 37 La. Ann. 694 (1885), a case on which Malone placed great significance in his article. See Malone, *supra* note 1, at 74-75.

injury.¹¹ Malone's use of the term "gambler's chance" is important—since it refers to what in later years would come to be called "loss of a chance." Malone's point was that courts feel torn over the loss of a chance cases and they lurch between crediting them and discounting them for a variety of reasons rooted in both policy and tort theory itself. In the malpractice cases, at least at mid-century, courts did not allow juries to provide full compensation for the loss of a chance because of the special and highly respected role that medicine played in society.¹² Conversely, Malone suggested that defendants who cut off the hoses of fire fighters would be forced to face a jury's wrath because such acts were perceived to be reckless and highly culpable.¹³ Without some extra reason of the sort offered by Malone, allowing a jury to impose liability for the entirety of an injury in every loss of a chance case would make defendants, as a group, pay for more injuries than they caused. Judges understood this, and so they used culpability and the risk relation—which are irrelevant to solving the problem of underdeterminacy—to solve the problem of which subset of loss of a chance cases to allow juries to hear.¹⁴

II. LOST CHANCES AND ENABLING TORTS

The loss of a "gambler's chance"—the loss of a less-than-substantial chance of protection as a result of another's fault—is a tricky problem that has not been fully solved in tort law. It has come up in the context of

11. Malone, *supra* note 1, at 80 (quoting *Valentine v. Minneapolis St. P. & S. S. M. Ry. Co.*, 118 N.W. 970, 974 (Mich. 1908)).

12. *See id.* at 85. The solicitude shown by the courts towards the medical profession has eroded significantly since 1956. *See, e.g.*, David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1784-85 (1997) ("Judicial attitudes on these matters have changed significantly. . . . The current frontier involves cases in which the testimony converges on the view that the medical negligence in suit deprived the patient of a fifty percent or less chance of achieving a better result.") (citing *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978); *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474 (Wash. 1983)).

13. *See* Malone, *supra* note 1, at 80-81.

14. Richard Wright has argued that Malone misread these cases and created a problem where none existed. According to Wright, "a full reading of the cases in which the courts seem to lessen or shift the burden of proof regarding causation usually discloses that the court was explicitly or implicitly concerned that the defendant not escape liability under the governing but-for test when . . . it was more likely than not . . . that the defendant's omission of the safety precaution contributed to the injury." Richard Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1741, 1809 (1985). It is not clear what Wright means by "contribution." Wright himself admits that in a "loss of a chance" case, the increase of risk of injury by 20% does not necessarily "contribute" to the plaintiff's injury. *Id.* at 1815 (referring to cases involving the "failure to provide the proper lifesaving equipment or to properly diagnose and treat [a] patient"). Malone properly understood the life-preserver and interruption of fire-fighting cases as exactly these sorts of cases. As Wright himself admits, one can describe a "loss of a chance" as "contributing" to an injury only if one declares that the chance itself is the interest that was injured. *Id.* at 1815-16.

medical malpractice in misdiagnosis cases,¹⁵ as well as in some toxic torts cases.¹⁶ But as Malone's article suggested, in the general run of things tort law has quietly dealt with underdetermination and loss of a chance through the rough and ready application of policy-driven distinctions.¹⁷ What is important to see is that although some things have not changed since Malone's day, some things have, and we can no longer assume that our rough and ready way of handling causation in loss of chance cases will always serve the purposes of tort law.

One area where the problem of the loss of a chance raises serious questions for tort law is in what Professor Robert Rabin has come to call "enabling torts."¹⁸ An enabling tort, according to Rabin, is not the same as negligent entrustment.¹⁹ It instead encompasses all situations where the defendant "facilitates" the realization of an independently created risk by doing something that they knew or should have known would "pave the way" for a third party to harm the victim.²⁰ With this concept in hand, Rabin links together cases in which a train engineer "enabled" the assault of a female passenger by forcing the passenger to get out at a dangerous location,²¹ where a car owner "enabled" the accidental injury of a driver by leaving his keys in the ignition of his car, allowing it to be stolen and used for a getaway by a thief;²² where a social host "enabled" the accidental injury of a driver by allowing an inebriated patron to drink and then use a car;²³ where a landowner "enabled" the assault of a resident by failing to provide security;²⁴ and finally, where a handgun manufacturer "enabled" the shooting of a citizen by failing to take steps to ensure that the handguns that were sold in one state did not end up being used by criminals in an-

15. See, e.g., *Herskovits*, 664 P.2d at 474 (lung cancer); *Hamill*, 392 A.2d at 1280 (myocardial infarction); see also *infra* notes 63, 65, 68 (citing additional sources).

16. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

17. Some might argue that the general trend in tort law since 1956 has been to turn the exceptions identified by Malone into the rule. See, e.g., Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987).

18. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

19. See *id.* at 438-39 (distinguishing enabling torts from "negligent entrustment" torts described in RESTATEMENT (SECOND) OF TORTS § 390 (1965)).

20. *Id.* at 439.

21. See *id.* (citing *Hines v. Garrett*, 108 S.E. 690 (Va. 1921)).

22. See *id.* at 440 (citing *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252 (Utah 1996)). Rabin notes that some jurisdictions recognize a duty not to enable the wrongdoing of another only if "special circumstances" obtain. *Id.* (citing *Hergenrether v. East*, 393 P.2d 164 (Cal. 1964); *State Farm Mut. Auto Ins. Co. v. Grain Belt Breweries, Inc.*, 245 N.W.2d 186 (Minn. 1976); *Guaspari v. Gorsky*, 36 A.D.2d 225 (N.Y. App. Div. 1971)).

23. See *Clendening v. Shipton*, 196 Cal. Rptr. 654 (Cal. Ct. App. 1983); *Whelchel v. Laing Properties, Inc.*, 378 S.E.2d 478 (Ga. Ct. App. 1989); *McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141 (Mass. 1986).

24. See Rabin, *supra* note 18, at 444 (citing *Kline v. 1500 Mass. Ave Apart. Corp.*, 439 F.2d 477 (D.C. Cir. 1970)).

other state.²⁵

Rabin is right that as a matter of duty and proximate cause, the line of torts beginning with the negligent railroad engineer has progressed logically to handgun manufacturers. But as Malone cautioned, sometimes it is not enough to look at just the tort doctrines of duty or proximate cause to see where and how policy concerns should guide our judgement—sometimes we have to look at cause-in-fact.

Rabin sees a continuous and undisturbed logic between the key-in-the-ignition cases, the landowner cases, and the handgun cases. He fails to see that within the landowner cases there is a breakdown on the issue of cause-in-fact. First, compare the key-in-the-ignition cases with the landowner liability cases. In the former, the duty is premised on the foreseeability that the sort of person who takes a car that does not belong to him or her is likely to drive in a reckless manner, and the failure to act on this duty is seen to increase significantly the risk of collision (which exists at some background level for all drivers and pedestrians). What is more, the question of cause-in-fact in these cases is easy: the likelihood that had the defendant taken the required precaution, the plaintiff would not have been struck by a negligent driver is substantial. There are no serious underdetermination concerns since it is clear that removing the keys from the ignition is a precaution that would have probably succeeded. It is not like the cases with which Malone is concerned. What the defendant has taken from the victim is not a gambler's chance, but a substantial chance of protection.

But the question of underdetermination lurks below the surface of many landowner cases. In the earliest cases, where residents were assaulted in their buildings, it seems clear that the causal relationship between the breach of duty and injury was substantial. In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,²⁶ for example, the failure to have a

25. See *id.* at 435 (citing *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802 (E.D.N.Y. 1999)). In this Article we will discuss two additional cases. See *Halberstam v. S.W. Daniel, Inc.*, No. 95 Civ. 3323 (E.D.N.Y. 1998) (finding by jury of no causation for injuries resulting from negligent marketing); *Merrill v. Navegar*, 89 Cal. Rptr.2d 146 (1999), review granted, 991 P.2d 755 (Cal. 2000) (reversing summary judgment in favor of defendant gun manufacturer on grounds that a duty exists to not increase the risk of an "inherently dangerous" activity through negligent marketing). To the extent that *Hamilton* fits Rabin's "enabling tort" category, so do *Halberstam* and *Merrill*. For an excellent discussion of *Halberstam*, which yielded no written opinion, see Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998). Much of what we say here is also applicable to the claims brought by municipalities against gun manufacturers to the extent that they are based on the theory that manufacturers failed to take reasonable steps to prevent handguns from being sold "directly" to criminals. Some of the suits brought by municipalities sound in negligence and many sound in nuisance. See David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1 (1998). Our comments are most directly relevant to the negligence claim, although to the extent that cause-in-fact is also a necessary element of plaintiff's case in nuisance, our comments may be relevant to this latter group of cases as well.

26. 439 F.2d 477 (D.C. Cir. 1970).

guard at the entrance and, more importantly, the failure to lock another entrance, significantly facilitated access to the building by non-residents. The defendant's causation objection—that perhaps the assault was committed by another resident of the building or a guest, was not substantial enough to warrant taking the cause question away from the jury.²⁷ Rabin moves quickly from *Kline* to shopping center cases, with the goal of moving from the shopping center cases to the handgun cases.²⁸ But in the shopping center cases in which all the plaintiff lost was a gambler's chance, the courts have been taking cases away from the jury for the sort of cause-in-fact reasons that Malone anticipated. In *Lopez v. McDonald's Corp.*,²⁹ for example, the court held that the defendant's breach of duty to provide adequate protection in the form of an unarmed security guard could not be the cause-in-fact of the plaintiff's injuries, which were caused by a determined and armed psychopath. The court acknowledged that the plaintiff's expert argued that the presence of a guard would have increased the chance that the psychopath would have been deterred or less successful, but viewed this argument as speculative.³⁰ Similarly, in *Nola M. v. University of Southern California*,³¹ the court held that even if plaintiff's expert was correct and the defendant had operated its campus security in a careless fashion, no jury could find that the satisfaction of its duty would have protected the victim.³²

In the shopping center cases that Rabin does not discuss it is clear that the enabling torts are meeting with resistance because the courts are unwilling to allow juries to find that the defendant took from the plaintiff a gambler's chance at safety.³³ Of course, the real question is why the courts

27. See *id.* at 487 n.24.

28. See Rabin, *supra* note 18, at 445-46 (discussing *Sharon P. v. Arman, Ltd.*, 65 Cal. Rptr.2d 640 (Cal. 1997); *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (Cal. 1993); *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193 (Cal. 1984); *Abner v. Oakland Mall Ltd.*, 531 N.W.2d 726 (Mich. Ct. App. 1995); *Butler v. Acme Markets, Inc.*, 445 A.2d 1141 (N.J. 1982); *Miller v. New York*, 467 N.E.2d 493 (N.Y. 1984)). This next level of cases involve shopping centers and college campuses, but for convenience we will refer to them as "shopping center" cases.

29. 238 Cal. Rptr. 436 (Cal. Ct. App. 1987).

30. See *id.* at 449 ("Otherwise stated, McDonald's negligent conduct is not a substantial factor in bringing about plaintiffs' injuries if their injuries would have been sustained even if McDonald's had provided the unarmed, uniformed, licensed security guard . . .").

31. 20 Cal. Rptr.2d 97 (Cal. Ct. App. 1993) ("Causation is an established element of the law of negligence in California, perhaps because it imposes rational limits on liability which otherwise attaches under the judiciary's expansive view of duty . . . abstract negligence, which is all that happened here, will not support liability.").

32. See *id.* at 108-09.

33. As Rabin's discussion of *Ann M.*, 863 P.2d at 207, and *Sharon P.*, 65 Cal. Rptr.2d at 640, indicates, California has taken the lead in developing the jurisprudence of the duty of shopping centers, parking lots, and campuses to protect entrants from criminal assaults by third parties. See Rabin, *supra* note 18, at 445-46. Therefore, it is worth noting that other states have indicated that they approve of the approach taken by California in *Lopez* and *Nola M.* See, e.g., *Godfrey v. Boddie-Noell Enter., Inc.*, 843 F. Supp. 114, 122-23 (E.D. Va. 1994) (noting *Nola M.*'s focus on the failure of the plaintiff to

have found that the loss of a gambler's chance in shopping center cases insufficient to establish causation in contrast to the cases Malone analyzed, such as the life preserver and fire-fighting cases. One might want to apply Malone's two rationales and note that in the shopping center cases where cause-in-fact blocks the plaintiffs' case, the defendant's breach of duty is not accompanied by substantial culpability nor by a close relationship between the risk realized and the duty breached by the defendant. The second consideration helps explain, for example, why the courts have been much more willing to allow juries to hear those cases where the defendant had notice of prior criminal activity related to the victim's harm.³⁴

As long as the defendant's breach of duty enables a substantial risk of loss of a chance at protection, then Rabin is correct: our recent history has revealed a steady expansion of duty to prevent the enabling of wrongful acts by third parties. Where the breach of duty enables a non-substantial risk, the courts are willing to allow juries to consider the cause-in-fact question only under certain policy-driven circumstances. What then are we to make of the handgun cases? One might think that they would fit under Malone's model: even if the breach of duty—negligent distribution—only takes away a gambler's chance of safety from the plaintiff, the defendants are highly culpable in a way that the operators of shopping centers are not. The courts, one might argue, have the same reason to allow juries to consider these cases of underdetermination just as in the cases of sailors and fire-fighting.

There is some force in this observation, and it may explain why trial courts in some recent handgun cases allowed those cases to go to the jury even though their cause-in-fact elements are arguably as underdetermined as in the shopping center cases.³⁵ The very act of producing handguns carries with it an air of culpability, and in at least one case, the manufacturers of the product involved—an automatic pistol—surrounded their product with disgusting and anti-social advertising.³⁶ But, as noted above, the decision to allow a jury to award compensation for the loss of a chance involves a trade-off. On the one side are the policy goals that Malone de-

prove cause-in-fact); *Kolodziejczak v. Melvin Simon & Assoc.*, 685 N.E.2d 985, 991 (Ill. App. Ct. 1997) (citing *Nola M.* and finding that whether plaintiff's death by gunshot "could have been prevented by the addition of an additional security guard" at a strip mall was "at best speculation and conjecture" and thus ordering a directed verdict for strip mall defendants); *Allright San Antonio Parking, Inc. v. Kendrick*, 981 S.W.2d 250, 256 (Tex. Ct. App. 1998) (citing *Lopez* for the point that defendant's breach of duty to provide a security guard may not be the cause-in-fact of a "random attack by a homicidal maniac").

34. See, e.g., *Ann M.*, 863 P.2d at 207. Rabin himself has acknowledged this. See Rabin, *supra* note 18, at 445.

35. Compare *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802 (E.D.N.Y. 1999); *Halberstam v. S.W. Daniel, Inc.*, No. 95 Civ. 3323 (E.D.N.Y. 1998); with *Ann M.*, 863 P.2d at 207; *Nola M.*, 20 Cal. Rptr.2d at 97; *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436 (Cal. Ct. App. 1987).

36. See *Halberstam* (No. 95 Civ. 3323); see also *Lytton*, *supra* note 25, at 688.

tailed. On the other side is the knowledge that, for every ten cases in which a jury awards full compensation for the loss of a chance, the majority of defendants will be paying for an injury they didn't cause. This phenomenon is present in all cases where there is some probability that the defendant's breach was not an actual cause. Malone's point was that the lower the probability, the more the court must justify allowing a jury to impose the cost of the accident on the defendant.

Until now, the only policy concerns that have been discussed are those that go in the direction of justifying a jury's treatment of a gambler's chance as if it were a substantial chance. This has seemed fair, where it has occurred, partly because the alternative—denying the victim any compensation—seemed like a harsher alternative where the defendant was culpable or breached a duty closely related to the injury that was inflicted. But as the shopping center cases remind us, once the question of cause-in-fact begins to turn on very low probabilities, courts are reluctant to impose liability in a regime in which full compensation is the only legal response available. Furthermore, where the all-or-nothing causation rule is applied to a very large number of cases, the imposition of full damages begins to chafe even more than it does in the idiosyncratic case. The sailor falling overboard, and the negligent interruption of fire protection are all idiosyncratic cases where even if the odds were only one in three that the defendant's breach of duty caused the harm, one did not expect this type of accident to arise very often. The number of injuries that the defendant did not cause, for which he would have to be the insurer, would be small, and worth paying for, given the other policy considerations at stake.

As we move along the continuum of idiosyncratic cases from those described in Malone's article to shopping center liability to handguns, we see these forces come into play again in a way that does not allow the status quo *ex ante*. Admittedly, the shopping center cases are also idiosyncratic, although less so—as a general matter, crime does occur with sufficient frequency to produce a potentially large plaintiff pool. But, more importantly, the size of the gambler's chance lost in the shopping center cases sometimes looks very small. As the courts have pointed out in the cases which they took from the jury: "It is an easy matter to know whether a stairway is defective and what repairs will put it in order . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?"³⁷ The balance of factors shifts significantly in the handgun cases. These cases are not idiosyncratic. Some, like *Hamilton* and the municipal suits, foresee a plaintiff class that is very large—anyone injured by a handgun that has been negligently marketed. Even those cases that present a single unique plaintiff

37. *Nola M.*, 20 Cal. Rptr. 2d at 103 (quoting *Goldberg v. Hous. Auth. of Newark*, 186 A.2d 291, 297 (N.J. 1962)).

and a single unique weapon present an argument that is both designed and amenable to repeated litigation against the same set of defendants. Even more than in the shopping center cases, these are, as Rabin would have it, "enabling torts" involving very low gambler's chances.³⁸ The probability that the defendant's negligent marketing was the cause of the injuries complained of is very low.

How should the courts respond? Should they treat these cases like the sailor cases or the shopping center cases? If they choose the former path, they will be forcing gun manufacturers to pay for a huge number of accidents that they did not cause, and they will be doing this quite self-consciously, since one cannot hide behind even the facade of idiosyncrasy in these cases. If they choose the latter path, they will allow actors who are more culpable than most shopping center operators to escape liability for even the handful of accidents their negligence enabled.

III. THE PROMISE OF PROPORTIONAL CAUSATION

There is a way out of this dilemma. When Malone wrote, he was forced to use an "all-or-nothing" model of damages. Tort law had refused to recognize any form of proportionality. Comparative fault had only just begun to be adopted, and comparative contribution between tortfeasors was still seen as impossible from a doctrinal, if not a technical, perspective. But since 1956 our understanding of the relationship between causation and damages has become far more nuanced. In a handful of fields—most notably medical malpractice and toxics, commentators have argued for proportional damages based on the proportion of risk a negligent act imposed on the plaintiff. In 1984 in a landmark article, Professor David Rosenberg, applied this approach in the context of toxic torts.³⁹ As Rosenberg noted, in many cases involving a carcinogen, the defendant's negligence does not make it more likely than not that the victim will develop cancer.⁴⁰ Often the breach of duty adds an increased quantum of risk to a preexisting level of risk. Yet we know that if the risk of cancer is increased from ten percent to twenty percent for one-hundred victims, the breach of duty will have caused a physical injury to ten people. Rosenberg noted that under the "strong" version of the "preponderance of the evidence" rule for cause-in-fact, where the plaintiff must show individualized evidence of the connection between the defendant's breach of duty and the plaintiff's cancer,

38. See *infra* notes 97-102 and accompanying text.

39. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984). While the idea of proportional causation was discussed prior to 1984, see, e.g., Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981), it was fully explored in the context of mass torts in Rosenberg's article. See Rosenberg *supra* at 851.

40. See Rosenberg *supra* note 39, at 858-59.

all plaintiff cases will be dismissed.⁴¹ Even if plaintiffs are allowed to argue a "weak" version of the preponderance of the evidence rule, they will still lose, since they will not be able to show that, as statistical matter, the breach of duty made it more likely than not that any one of them would suffer the injury.⁴² And yet, we know that as a factual matter, the breach of duty did cause an injury to ten victims of the defendants' breach of duty. Still, allowing a jury to find that the defendant caused all twenty cancers would be equally unjust, since it would impose the cost of ten naturally occurring cancers on the defendant.⁴³

Rosenberg argued that under circumstances of factual uncertainty—what we earlier called underdetermination—any causation rule will result in erroneous verdicts that either give nothing to the victims or require the defendant to pay for naturally occurring injuries, which might vastly outnumber the injuries they caused.⁴⁴ This dilemma is a consequence of demanding that damages be "all-or-nothing" under circumstances of causal uncertainty. Since we know that we will never know which injuries the defendant's breach caused, it is unclear why we insist on asking juries to pretend that they are determining just that fact. On the other hand, since we do know that we can be reasonably certain of the additional *risk* of injury that the defendant's breach of duty imposed on each victim, it is not clear why we don't take advantage of that information and require the defendant to compensate the victims for *that*. A traditional argument against compensation for risk imposition is that it undercompensates those who were harmed by the defendant and gives windfall to those who were not.⁴⁵

Yet, the problems of undercompensation and windfall are inescapable in situations of underdetermination; where the damages system insists on all-or-nothing compensation, courts rely on a variety of policy reasons to err on the side of one or the other. Compensation for risk imposition cannot solve this problem. What it solves is the problem of excess punishment vis-a-vis the wrongdoer.⁴⁶ When the tort system opts to err on the side of allowing juries to decide cause-in-fact in cases where all the victim has lost

41. *Id.* at 862-63.

42. *See id.* at 863.

43. Imposing the full cost of these cancers on the defendant is also unfair to those members of society who develop cancer naturally but to whom the defendant breached no duties. This latter group will receive nothing (except what social insurance might give them) even though they are no less deserving of aid than those ten victims of the defendant's breach of duty whose injuries were not caused by the breach but by natural forces. P.S. Atiyah sees this injustice between victims of naturally occurring injuries as a serious problem for modern Anglo-American tort law. *See* P.S. ATIYAH, *THE DAMAGES LOTTERY* 143-45 (1997).

44. *See* Rosenberg, *supra* note 39, at 863-66, especially 866 n.65.

45. One response to this argument is to identify the imposition of risk *ex ante*, not the realization of the risk *ex post*, as the harm which the defendant's breach of duty has caused the plaintiff. *See* Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 38 U.C.L.A. L. REV. 439, 466-69, especially n.112 (1990).

46. *See* Rosenberg, *supra* note 39, at 875, especially 875 n.101.

is a gambler's chance in an idiosyncratic case, the social costs of asking the defendant to pay for what he did not cause are not unbearable, given other policy considerations. In the case of mass torts, however, it can be unbearable for two reasons. First, the full imposition of liability can result in astronomical damages. But second, where many cases are decided simultaneously, the knowledge that the court is deliberately requiring the defendant to pay a certain amount of money for harms that it knows the defendant could not have caused disturbs our faith in the tort system in a way that is not so obvious and not so clear when cases are decided idiosyncratically. In the case of sailors who fall overboard, we know that eventually one hundred such cases will occur, and if the jury is allowed to hear them, various defendants will pay for approximately sixty-six injuries that they did not cause. But this will come about diachronically, not synchronically. Where all the injuries are suffered synchronically, it is impossible to ignore the harsh reality that we are imposing liability for far more injuries that the defendant did not cause than for those he did.

In fact, as Rosenberg points out, to the extent that the rest of the world (insurance companies, for example) discounts the value of the life of someone who has been exposed to a toxic risk that has not yet manifested itself, we can similarly calculate the additional risk that the defendant has imposed.⁴⁷ In a sense, by increasing the chance of cancer in each of 100 persons by 10%, the defendant has, through his negligence, reduced each person's "chance" of escaping cancer by 10%. For the person whose chances of escaping cancer were 99%, her chances have been reduced to 89%. For the person whose chances were 59%, her chances have been reduced to 49%.⁴⁸ But the toxic tort victims share the same form of loss with the sailors—for each, the chance they value has been actually, but not substantially, reduced or destroyed by the defendant's negligence. Each has still suffered the loss of a "gambler's chance."

IV. PROPORTIONAL CAUSATION IN THE COURTS

It is clear that what Malone identified as "gambler's chance" cases now fly under the banner of "lost chance"⁴⁹ and the "indeterminate plaintiff."⁵⁰ Faced with traditional causation rules that made liability depend on whether the plaintiff was able to establish that the negligence of a defendant was more probably than not the cause of the plaintiff's injury, many courts have actually opted for some form of proportional recovery.⁵¹ What

47. See *id.* at 885-87.

48. Unlike the sailor who lost a chance at something improbable—safety from drowning—each victim loses a chance at something generally probable—freedom from cancer.

49. See *infra* notes 63-66, 68 (citing sources).

50. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

51. See *infra* notes 65, 66, 68.

forced the move to proportional recovery is a story worth telling. *Herskovitz v. Group Health Cooperative of Puget Sound*⁵² is the lead case. In *Herskovitz*, plaintiff had visited the defendant's hospital with complaints of chest pain and coughing in early 1974.⁵³ In July 1975, the patient consulted a private physician who diagnosed lung cancer. The cancerous lung was surgically removed; however, the cancer metastasized and the patient died in 1977.⁵⁴ Assuming the negligence of the defendant in failing to diagnose the cancer in 1974, the court was faced with a dilemma. Had the cancer been diagnosed in 1974, the patient's chances of surviving a "Stage One" lung cancer were thirty-nine percent.⁵⁵ By the time the cancer was actually diagnosed it had become a "Stage Two" cancer, however, and the statistics for survival had dropped to twenty-five percent.⁵⁶ Thus, the patient suffered a reduction in his chance of survival as a result of the negligent diagnosis.⁵⁷ Under the standard causation formulation, a plaintiff must establish that, more probably than not, plaintiff's injury would have been avoided had the defendant not been negligent.⁵⁸ If this formulation were to govern the plaintiff would lose, because even had the cancer been diagnosed in a timely manner, the probability that plaintiff would have died from cancer anyway was sixty-one percent. Neither the majority nor concurring opinions were prepared to countenance such a result, and they agreed that the plaintiff should prevail.⁵⁹

The opinions differed, however, as to how damages should be ascertained. The majority opinion decided to allow recovery for lost chance in negligent malpractice cases, but it simply allowed the jury to assess damages as it saw fit, taking all the circumstances of the case into account.⁶⁰ A more novel approach was suggested in the concurring opinion. Relying on the work of a provocative law review article by Professor Joseph King,⁶¹

52. 664 P.2d 474 (Wash. 1983).

53. See *id.* at 475.

54. See *id.*

55. See *id.*

56. See *id.*

57. See *Herskovits*, 664 P.2d at 476 (noting that some jurisdictions refuse even to submit the negligence question to the jury unless a plaintiff "is able to show that it was *more likely than not* the harm was caused by the defendant's negligence").

58. See *id.*

59. See *id.* at 477, 479.

60. See *id.* at 479.

61. See King, *supra* note 39. It should be noted that Professor King's actual formula for calculation of the damages was inaccurate to accomplish the goal of preventing both undercompensation and overcompensation. See Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1, 28 n.68 (1999) (citing King, *supra*, note 39, at 1382) (noting that this miscalculation has been repeated with "some frequency" by courts wishing to adopt King's approach, as in *Herskovits*, 664 P.2d at 486, and in *McKellips v. Saint Francis Hospital, Inc.*, 741 P.2d 467, 476 n.25 (Okla. 1990)). As the Twerski and Cohen article explains using the *McKellips* court's calculations as an example, following King's formula to the letter would undervalue the patients true damages due to lost chance and, for example, provide the *McKellips* plaintiffs

the concurring opinion suggested that damages be tailored to reflect the percentage of lost chance inflicted by the defendant's negligence.⁶² The case law since *Herskovits* breaks down into three categories. A significant minority of courts refuses to allow lost chance recovery.⁶³ Faced with the stark statistics of a case like *Herskovits*, they would deny recovery in total. They find it impossible to cheat on causation utilizing the policy factors identified by Malone.⁶⁴ Neither the gross negligence of the defendant in failing to read an X-ray correctly nor the fact that early diagnosis is designed to protect the plaintiff against the very harm suffered by the plaintiff (non-treatment of the patient's cancer) is sufficient to overcome the undeniable reality that plaintiff cannot establish causation utilizing the traditional more probably than not standard. Other courts allow patients lost

with only 15% lost chance damages rather than the 20% calculated as due the plaintiff by Twerski and Cohen. See *id.* Despite the original miscalculation of actual damages, however, the wisdom of Professor King's paradigm of calculating proportional damages by percentage of lost chance remains intact. See *id.*

62. See *Herskovits*, 664 P.2d at 487.

63. See, e.g., *United States v. Cumberbatch*, 647 A.2d 1098 (Del. 1994) (refusing to recognize loss of chance in a wrongful death action); *Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1020 (Fla. 1984) (finding expert testimony did not establish that decedent had a better than even chance to survive in the absence of negligence); *Manning v. Twin Falls Clinic & Hosp., Inc.*, 830 P.2d 1185, 1189-90 (Idaho 1992) (rejecting explicitly the doctrines of last chance and increased risk of harm); *Fennell v. Southern Md. Hosp. Ctr. Inc.*, 580 A.2d 206, 214 (Md. 1990) (declining to recognize either a pure loss of chance doctrine or a loss of chance approach to damages); *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993) (declining to recognize loss of chance in medical malpractice action); *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985) ("Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.'"); *Kilpatrick v. Bryant*, 868 S.W.2d 594 (Tenn. 1993) (holding that patient is not entitled to recovery for increase in risk of harm or loss of chance of receiving better medical treatment); *Volz v. Ledes*, 895 S.W.2d 677, 679 (Tenn. 1995) (reaffirming *Kilpatrick*); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993) (holding recovery totally barred "where preexisting illnesses or injuries have made a patient's chance of avoiding the ultimate harm improbable").

64. See, e.g., *Sherer v. James*, 351 S.E.2d 1130 (N.H. 1986) ("A defendant physician is entitled to put the medical malpractice plaintiff to proof equally as stringent as that required of plaintiffs in other negligence actions."); *Jones v. Owings*, 456 S.E.2d 371, 374 (S.C. 1995) (reaffirming *Sherer* and refusing to allow recovery for loss of chance).

For a review of the various rationales offered by the courts, see Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759, 790-92 (1992). See also Patricia L. Andel, *Medical Malpractice: The Right to Recover for the Loss of a Chance of Survival*, 12 PEPP. L. REV. 973, 976-77 (1985) (calling the "all-or-nothing" approach "harsh" and reporting that it has been widely criticized as "result[ing] in oscillation between overlapishness and niggardliness"); Leon L. Wolfstone & Thomas J. Wolfstone, *Recovery of Damages for the Loss of Chance*, 28 MED. TRIAL. TECH. Q. 121, 139 (1982) ("Most of the cases on loss of a chance . . . have held that compensation should be allowed on an all or nothing basis . . ."); Jeffrey L. Benson, Comment, *The Dilemma of Chance in Medical Malpractice: Should Illinois Recognize a New Cause of Action for "Lost Chance" of Survivability?*, 9 N. ILL. L. REV. 575, 586 (1989) ("Since the majority of jurisdictions award compensation on an 'all or nothing basis, a defendant may be held liable for the full wrongful death damages even in cases where he only caused a portion of the loss."); Stephen F. Brennwald, Comment, *Proving Causation in "Loss of a Chance" Cases: A Proportional Approach*, 34 CATH. U. L. REV. 747, 781 (1985) ("The 'all-or-nothing rule' throws wrongful payments either entirely on defendants or entirely on plaintiffs.").

chance recovery without having to prove that there was a greater than fifty percent chance of a better result.⁶⁵ This is done with the rather clear understanding that juries will discount the damages to take into account the likelihood that early treatment would not have been successful.⁶⁶ A very significant body of case law has embraced the suggestion of the *Herskovits* concurring opinion⁶⁷ and assess damages by multiplying the full damages that would have been awarded in a traditional causation by the portion of the patient's chance of survival that was lost.⁶⁸

65. See, e.g., *Herskovits*, 664 P.2d at 479; *Thompson v. Sun City Community Hosp., Inc.*, 638 P.2d 605, 615 (Ariz. 1984); *Hastings v. Baton Rouge Gen. Hosp.*, 498 So. 2d 713, 720 (La. 1986); *Ansheim v. Humberger*, 695 P.2d 824, 828 (Mont. 1985); *Ehlinger v. Sipes*, 454 N.W.2d 754, 763 (Wis. 1990); see also *Andel*, *supra* note 64, at 982, 993 ("A minority of courts . . . have allowed a relaxed standard of proof of causation where the patient shows that the physician's negligent conduct in any way increased the risk of harm to the patient or deprived him of some chance of recovery," and that such recoveries have "received increasing approval by various courts over the years."); Francis Wayne Thurman, Note, *Loss of Chance in Medical Malpractice Cases: A Contra View With an Examination of Tennessee's Current Position*, 20 MEMPHIS ST. U. L. REV. 81, 91 (1989) ("The loss of chance doctrine, as applied to medical malpractice, allows the plaintiff to recover for the loss of a less than even chance of survival or recovery or for an increased risk of harm.").

It is notable that in an early New York case, *Kallenberg v. Beth Israel Hospital*, 357 N.Y.S.2d 508 (App. Div. 1974), the court sent the question of causation to the jury. How a New York court would rule today is a matter of conjecture.

66. See, e.g., *Sun City Community Hosp.*, 688 P.2d at 616 ("This formulation, of course, merely recognizes that juries often discount damages according to the statistical evidence in order to accurately evaluate the true loss.") (citation omitted); *Ehlinger*, 454 N.W.2d at 763 ("If the defendant's negligence is found to have been a substantial factor in causing the harm, the trier of fact may also consider evidence of the likelihood of success of proper treatment in determining the amount of damages to be awarded."); see also Robert A. Reisig, Jr., *The Loss of a Chance Theory in Medical Malpractice Cases: An Overview*, 13 AM. J. TRIAL. ADVOC. 1163, 1183 (1990) (reporting that one of the disadvantages of allowing the trier of fact to determine damages "without providing any real guidelines" is that "it is incompatible with one of the major goals of recognizing the loss of a chance theory—a more accurate loss allocation"); Brenwald, *supra* note 64, at 782-83 (describing the jury valuation approach as the simplest to apply and adequate where very little statistical medical evidence as to the lost chance exists but that, where medical evidence is available, jury valuation runs counter to the lost chance doctrine's goal of allocating damages more correctly). But see Shelly E. Smith, Comment, *Lost Chance of Survival in Illinois: The Need for Guidance from the Illinois Supreme Court*, 23 LOY. U. CHI. L.J. 155, 177 (1991) (reporting that the jury valuation approach gives "more leeway" than a straight percentage approach and that a possible benefit to this approach, despite considerable variation in expert testimony as to rates of survival, is that "the figure that a jury of twelve arrives at will be the result of a more complex valuation process" that includes an assessment of more factors than would be considered with a straight percentage approach).

67. See *Herskovits*, 664 P.2d at 479 (Pearson, J. concurring).

68. Almost all the cases in this category rely on the landmark article by Joseph H. King, Jr. See King, *supra* note 39. See, e.g., *Mays v. United States*, 608 F. Supp. 1476, 1483 (D. Colo. 1985); *DeBurkate v. Louvar*, 393 N.W.2d 131, 135-37 (Iowa 1986); *Delaney v. Cade*, 873 P.2d 175, 186-87 (Kan. 1994); *Falcon v. Memorial Hosp.*, 462 N.W.2d 44, 50 n.20, 52-53 nn.26-27 (Mich. 1990); *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 683-84 (Mo. 1992); *Perez v. Las Vegas Med. Ctr.* 805 P.2d 589, 591 (Nev. 1991); *Scafidi v. Seiler*, 574 A.2d 393, 407-08 (N.J. 1990); *Roberts v. Ohio Permanente Med. Group, Inc.*, 668 N.E.2d 480, 483-84 (Ohio 1996); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 476 (Okla. 1990); see also Reisig, *supra* note 66, at 1185 (reporting that most courts that have addressed this issue of how loss of chance damages should be valued have "used variations of King's single outcome approach"); Smith, *supra* note 66, at 176-77 (reporting that this method of

What is common to all three approaches, is that courts were unable to escape the harsh reality of the statistical data that made it clear that full, undiminished recovery could not be countenanced. The soft policy factors that Malone suggested allowed judges to send cases to juries under a traditional causation test would no longer work. One cannot say that recovery is based on a more probable than not standard when the real world facts tell us otherwise. Either recovery has to be denied or it must go forward on some theory of proportional recovery.

The other paradigm for proportional recovery for increased risk arises from the toxic tort cases. Judge Jack Weinstein in fashioning the settlement in *In re Agent Orange Product Liability Litigation*,⁶⁹ adopted the Rosenberg proportional recovery theory.⁷⁰ Weinstein recognized that the claims of Agent Orange victims could not be established by a preponderance rule.⁷¹ Claims by veterans, for example, that exposure to Agent Orange increased the incidence of soft-tissue sarcoma, would not support a traditional finding of causation. Plaintiffs could not establish that the incidence of cancer was more than double the background risk for the general population not exposed to Agent Orange.⁷² Nor was particularistic evidence available that would allow a finding that any individual plaintiff's cancer was attributable to Agent Orange.⁷³ Judge Weinstein posited the following hypothetical case:

Let us assume that there are 10 manufacturers and a population of 10 million persons exposed to their product. Assume that among this population 1,000 cancers of a certain type could be expected, but that 1,100 exist, and that this increase is "statistically significant," permitting a reasonable conclusion that 100 cancers are due to the product of the manufacturers. In the absence of other evidence, it might be argued that as to any one of the 1,100 there is only a chance of about 9% (100/1100) that the product caused the cancer.⁷⁴

He then made the following observation:

Suppose all 1,100 of those who were exposed to the harmful substance and who developed the cancer in the example join in a class action against all 10 manufacturers. Let us say that damages aver-

valuing damages by the percentage of lost chance "has been widely accepted, in large part due to the influence of Professor King's article").

69. 597 F. Supp. 740 (E.D.N.Y. 1984).

70. See *supra* notes 39-42, 44, 46-47 and accompanying text (discussing Rosenberg); see also *In re "Agent Orange"*, 597 F. Supp. at 838-39.

71. See *id.* at 833-34.

72. See *id.*; see also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 187-88 (1987).

73. See *In re "Agent Orange"*, 597 F. Supp. at 833-34 (E.D.N.Y. 1984).

74. *Id.* at 837.

age \$1,000,000 per cancer. A recovery of \$100,000,000 ($100 \times \$1,000,000$) in favor of the class would be allowed with the percentage of the award to be paid by each manufacturer depending on the toxicity of its product. For example, if a company produced only 20% of the substance in question but, because of the greater toxicity of its product, likely caused 60% of the harm, it would contribute 60% of the total amount. If accurate records are available on the composition of each defendant's product, that analysis should be possible.

Since no plaintiff can show that his or her cancer was caused by any one of the defendants, they should divide the \$100,000,000 by 1,100, giving each a recovery of about \$90,000. While any plaintiff might feel that his or her recover denigrated the degree of harm, the alternative of receiving nothing is far worse⁷⁵

Judge Weinstein recognized that such an approach was inexact and that he was working rough justice but he concludes:

We are in a different world of proof than that of the archetypical smoking gun. We must make the best estimates of probability that we can using the help of experts such as statisticians and our own common sense and experience with the real universe.⁷⁶

V. THE HARD CAUSATION QUESTION IN HANDGUN CASES

Before turning to a discussion of the trilogy of recent handgun cases, we wish to clear the brush. The discussion that follows deals solely with the issue of but-for causation where the underlying theory of liability is negligent marketing of handguns. For the purposes of the following dis-

75. *Id.* at 838.

76. *Id.* It is important to see that the use of proportionalization to determine damages did not eliminate the risk of plaintiff windfall in *Agent Orange*, whereas proportionalization through use of market share did remove the possibility of windfall in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980) (burden of proof that defendant's negligence did not cause plaintiff's injury shifted and defendant liable for portion of plaintiff's injury equal to proportion of its market share). In *Sindell*, it was virtually certain (because of the uniqueness of the injury) that the plaintiff was injured by some defendant's negligence and that the defendant's negligence caused an injury to someone. In *Agent Orange*, because each plaintiff faced a non-trivial risk of cancer simply from environmental factors unrelated to the defendant's breach of duty, forcing a defendant to pay any amount to each plaintiff would necessarily produce windfalls to some plaintiffs. Thus, Weinstein's decision cannot be justified according to a corrective justice argument that allows the "standards and burdens" of proof of causation to be modified where we know that the plaintiff suffered from a breach of a "relational duty of non-injury" at the hands of an indeterminate defendant. See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND TORT LAW* (Gerald Postema ed., Cambridge Univ Press, 2001) (forthcoming Cambridge University Press) (discussing compatibility of market-share liability with corrective justice).

cussion, we assume that there is a duty to protect against the criminal acts of third persons and that the question of intervening superceding cause is for the jury. We also exclude from our discussion the notion that handguns are so inherently dangerous that they violate risk-utility norms and should not be sold. Although this issue has been raised in litigation over the years,⁷⁷ the current wave of court decisions focus on negligent marketing.⁷⁸ It is to that topic and that topic alone that we address our causation discussion.

*Hamilton v. Accu-Tek*⁷⁹ is the premier opinion in the field. The facts are easily told. Twenty-five gun manufacturers were sued for negligent marketing of handguns by seven plaintiffs who were either injured or killed in criminal acts.⁸⁰ The jury awarded damages for only one plaintiff, Steven Fox, and apportioned damages based on the market share of each of the three liable defendants.⁸¹ The case was tried before Judge Jack Weinstein, the author of the *Agent Orange* opinion discussed earlier.⁸² In a forty page scholarly opinion, Judge Weinstein takes the reader through all the steps of the elements of the cause of action. We shall focus only on the elements of negligent marketing and cause-in-fact.

The heart of plaintiffs' negligent marketing claim was that the defendants had widespread knowledge of trafficking of handguns from states that had "weak" gun control measures to states like New York that had "strong" gun control laws.⁸³ A large number of guns used in crimes were thus emanating from federal firearms licensee (FFLs).⁸⁴ One study of crime gun traces from twenty-seven cities revealed that up to one-third of guns used in crimes by juveniles and one-half of those used by persons

77. See, e.g., *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533-34 (11th Cir. 1986) (collecting cases that similarly hold that the "ultrahazardous activity doctrine" is "inapposite" to circumstances where a gun with "no design defect" performs "exactly as intended" but is used to injure or kill a person, and thus holding that a manufacturer could not be held liable for either manufacture or distribution of a "Saturday Night Special" gun used to kill a woman); *Delahanty v. Hinckley*, 564 A.2d 758, 761 (D.C. 1989) (collecting cases which likewise "reject application of the 'abnormally dangerous activity doctrine' to gun manufacture and sale") (citations omitted).

78. See *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802 (E.D.N.Y. 1999); *Merrill v. Navegar Inc.*, 89 Cal. Rptr.2d 146 (Cal. Ct. App. 1999), review granted, 991 P.2d 755 (Cal. 2000); *Halberstam v. S.W. Daniel, Inc.*, No. 95 Civ. 3323 (E.D.N.Y. 1998). For a discussion of these three cases, see *infra* pp. 17-23, 26-30.

79. 62 F. Supp.2d 802 (E.D.N.Y. 1999).

80. See *id.* at 808.

81. See *id.* The following percentages of liability were assessed for each of the three defendants: American Arms, 23%; Beretta U.S.A. Corp., 6.03%; Taurus International Manufacturing, Inc., 6.8%. See *id.* Although it was determined that for two other plaintiffs, Veronica Trott and Koichi Sunada, some of the 25 defendants had proximately caused their injuries as well, those two plaintiffs could not prove their damages for pain and suffering (which is all they had claimed). See *id.* at 811. Consequently only plaintiff Fox recovered damages. See *id.*

82. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

83. See *Hamilton*, 62 F. Supp. 2d at 831.

84. See *id.* at 829-30.

between the ages of eighteen to twenty-four were purchased from an FFL within three years from the time of sale.⁸⁵ Such a rapid rate of diversion from the legitimate retail market is indicative of substantial firearms trafficking.⁸⁶ The alleged negligence was that the gun manufacturers failed to: (1) require distributors to sell only to stocking gun dealers, i.e. dealers who stock guns for sale at retail stores,⁸⁷ (2) prohibit sales at gun shows, where widespread unrecorded and unsupervised sales to non responsible persons are likely to take place,⁸⁸ and (3) analyze trace requests to locate retailers who disproportionately serve as a crime source and then cut off sales to distributors who do business with them.⁸⁹

As to causation, Judge Weinstein's discussion is brief. Much of it is directed toward the applicability of the market share theory to the instant litigation.⁹⁰ He does, however, note that cause-in-fact is a problem. Citing to Professor Rosenberg's article, Weinstein says that, "arguably, proof of negligence and proof that negligence caused damage to some people, but not necessarily to the particular plaintiffs in the case, would warrant allocating proportional shares of damages among those who are liable defendants."⁹¹ He notes that under this approach one might grant a "relatively small amount of damages" to individual plaintiffs taking into account the increased risk created by the defendant's negligent conduct.⁹² But then Weinstein turns his back on the idea and concludes, "whatever may be the conceptual legal arguments in favor of such an approach in the present case, plaintiffs met their burden of producing evidence sufficient to support the preponderance standard charged in the jury instructions and found by the verdict."⁹³

In the section of the opinion that follows, Judge Weinstein sets out to support his conclusion that causation was established. Much of the discussion is devoted to bolstering what Weinstein calls "general causation."⁹⁴ He rehearses the testimony of an expert witness that gun violence is contagious and that guns begat more guns.⁹⁵ Turning to "specific causation" (cause-in-fact), the entirety of the discussion is found in the following two paragraphs:

The testimony of Joseph Vince that most guns used in crime are

85. See *id.* at 826.

86. See *id.* For a discussion of the integrity of this three-year so-called "time-to-crime" period as a true indicator of illegal behavior by firearms dealers, see *infra* note 99 and accompanying text.

87. See *Hamilton*, 62 F. Supp.2d at 826, 831.

88. See *id.*

89. See *id.* at 831.

90. See *id.* at 835-39.

91. *Id.* at 835 (citing Rosenberg, *supra* note 39).

92. *Id.*

93. *Id.*

94. *Id.* at 836.

95. See *id.* at 836-37.

not stolen but trafficked from retail sources has already been adverted to. Mr. Vince also testified to criminals' preference for new guns, ones that are "new in the box," and therefore relatively "safe" in that they have no prior homicides attached which can be traced and attributed to subsequent purchasers. With regard to New York City crime guns in particular, Lieutenant McCann testified that of guns seized by the joint NYPD/ATF task force on illegal trafficking while he was director, "a very, very small percentage were reported stolen." This evidence was sufficient to permit rational jurors to infer that the gun used to commit the Fox crime, like the majority of crime guns, made its way into the underground market via an initial lawful sale that might have been prevented had the manufacturers insisted on more stringent selling procedures as a condition for supplying guns to their distributors.

Dr. Stewart's testimony that handgun manufacturers could feasibly reduce the risks associated with their product by exercising greater control over retail sales, and that their failure to do so "has been a significant contributing factor in the development of an illegal market," provides further support for the jury's finding of proximate cause. Additional support for this finding was provided by Lieutenant McCann, who testified that since stocking gun dealers were generally more responsible retailers who tended not to permit or engage in illegal trafficking activities, limiting initial gun sales to such dealers would greatly reduce the number of guns entering the illegal market. The evidence of the origin of most New York crime handguns in retail sales outside New York, the general practices surrounding the making of those sales, and the degree of supervision or its lack over first retail sales, was sufficient to permit a reasonable jury to conclude that the negligent marketing and distribution of handguns by manufacturers was a substantial factor in the promotion and development of an underground illegal market supplying New York criminals, and thus increasing the probability of death or serious injury such as that suffered by Mr. Fox.⁹⁶

One wonders how Judge Weinstein was able to conclude that the evidence supported a finding of causation under the preponderance standard. First, it is clear that the mere fact that criminals purchased their guns from legal sources tell us nothing about the volume of guns that came about due to the alleged negligent marketing practices. Guns that would be available to criminals from non-negligent marketing provide the baseline for deciding increased risk. It is only the negligent overage that reckons into causa-

96. *Id.* at 838 (citations omitted).

tion.⁹⁷ Second, Weinstein makes no reference to any data that focuses on whether, even absent negligent marketing, criminals could use *nonretail* methods to obtain non-negligently marketed handguns.⁹⁸ We simply do

97. In the same agency report that published the statistics relied upon in *Hamilton*, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") listed numerous alternative avenues by which crime guns are obtained by criminals other than directly from a retail FFL. See BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, YOUTH CRIME GUN INTERDICTION INITIATIVE, CRIME GUN TRACE ANALYSIS REPORTS: THE ILLEGAL YOUTH FIREARMS MARKETS IN 27 COMMUNITIES 14 (1999) [hereinafter YOUTH FIREARMS MARKETS IN 27 COMMUNITIES]. One of the researchers, Glenn Pierce, along with ATF agents and other experts concede that negligent practices of dealers may not be the primary reason why a dealer "may have many guns traced back to it. . . . It can be a variety of things that have nothing to do with the dealers. . . ." Craig Whitlock, *Crime Guns Flow from Md. Shop, Data Show*, WASH. POST, June 11, 1999, at A-1. Guns obtained by these alternative avenues, therefore, could comprise a significant number of crime guns ultimately traced to a legal sale from an FFL but which do not indicate illegal marketing by retail FFLs. Such alternative non-retail FFL avenues listed include: private used sellers, privately bartered used guns, guns stolen from FFLs, guns stolen from common carriers, guns stolen from manufacturers, and guns stolen from houses. See YOUTH FIREARMS MARKETS IN 27 COMMUNITIES, *supra*.

For example, between 1998 and 1999, firearms dealers voluntarily reported approximately "1,900 interstate thefts, involving over 3,700 firearms." Bureau of Alcohol, Tobacco and Firearms, ATF News: Treasury, ATF Release Firearms Report, Gun Trafficking Actions, at 1 <<http://www.atf.treas.gov/press/fy00press/020400firearmsreport.htm>> (visited Mar. 8, 2000) (citing BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES (Feb. 2000)) [hereinafter COMMERCE IN FIREARMS]. Also, studies by the Department of Justice ("DOJ"), which survey criminal arrestees who have used crime guns rather than simply assessing the pool of recovered crime guns successfully traced by law enforcement, indicate that "many" adult and juvenile offenders "have either stolen a firearm or kept, sold, or traded a stolen firearm." MARIANNE W. ZAWITZ, BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, SELECTED FINDINGS, FIREARMS, CRIME, AND CRIMINAL JUSTICE: GUNS USED IN CRIMES 3 (1995). As many as "9%" of arrestees surveyed had acquired a crime gun through theft, and as many as "28%" had acquired a gun through an illegal market such as a "drug dealer or a fence." *Id.* Moreover, of all inmates surveyed in one 1991 state prison survey, "10% had stolen at least one gun, and 11% had sold or traded stolen guns." *Id.* In another study, DOJ cited a 1986 survey of inmates in which "a major theme" was that "theft was an important means of obtaining firearms for those with criminal intentions" and that "32% of surveyed felons had stolen their most recently acquired handgun." NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE, RESEARCH IN BRIEF, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP OF FIREARMS 7 (1997). Common sense dictates then that some significant portion of guns ultimately traced to an FFL could have been obtained through such alternative means or by theft from a legal purchaser and is, therefore, not the result of negligent marketing by the FFL, such as illegal sales to an unqualified purchaser or even to a "straw man." Consequently these admitted alternative avenues of obtaining crime guns even further reduce the likelihood that a defendant FFL's negligent marketing practices are the actual cause of a criminal obtaining a gun.

98. See discussion, *supra* note 97. The negligent marketing cases also implicate a combined "substantial factor" and intervening cause question. It is certainly the case that even if guns were not negligently marketed many criminals would obtain guns for the commission of crimes. Depending on the nature of the criminal and the incentive to commit a crime a jury might find that the fact that a gun was negligently marketed was not a substantial factor in the injury or death of the plaintiff. According to Professor Lytton, this was the precise reason that the jury found for the defendant in *Halberstam v. S.W. Daniel, Inc.*, No. 95 Civ. 3323 (E.D.N.Y. 1998). See Lytton, *supra* note 25. It should be noted that even if a jury were to find cause-in-fact based on the substantial factor test, a jury would be entitled to find that the determination of the criminal to obtain a gun from whatever source would constitute an intervening superseding cause. It is interesting to note that both the substantial factor and the proximate cause questions may each be subject to statistical determination. That is, it may be possible to

not know how many fewer gunshot wounds would occur if negligent marketing was obliterated from the face of the earth. Indeed, the brute statistics that Weinstein makes reference to early in his opinion indicated that one-third of guns used in crimes by juveniles and one-half used by persons between the ages of eighteen to twenty-four were purchased from an FFL within three years of the commission of the crime.⁹⁹ In order to even come close to a preponderance argument, one would have to assume that every gun used by persons in these age groups came about due to negligent marketing. Surely, it is possible that the vast majority of these crime guns did not arrive at their destination through negligent marketing. We do not know whether a gun ended up in the hands of a criminal through a non-FFL source or an FFL source that had not marketed handguns negligently.¹⁰⁰ To ignore these possibilities is preposterous.

Sans the impressionistic opinion of the experts that negligent marketing increases the pool of guns available to criminals, there is no evidence of any kind quantifying the effect of negligent marketing. The sparse evidence available renders incomprehensible the conclusion that causation was established by a preponderance of evidence.¹⁰¹ Adoption of market

determine what percentage of criminals would obtain guns from non-negligent sources if they were not readily available from negligent marketing. Were such statistics available they might have some impact on the proportional causation figures that would govern a plaintiff's recovery. How this issue is ultimately resolved should have no effect whatsoever under the fundamental but-for causation problem discussed in the text. That issue raises the brute issue of what percentage of guns that exist on the market can be attributed to negligent marketing.

99. See *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802, 826 (E.D.N.Y. 1999). It should be noted that while those who trace crime guns believe that a period of time measured from the initial sale of a gun by an FFL to the gun being used in a crime less than three years later is an indication of "illegal trafficking" of firearms, the report made by the ATF—which published the data relied upon by Judge Weinstein in *Hamilton*, admits that the so-called three-year "time-to-crime" statistic is an "imperfect indicator" of firearms trafficking. YOUTH FIREARMS MARKETS IN 27 COMMUNITIES, *supra* note 97, at 8. The ATF has also established that the three-year time-to-crime figure is only an indicator of "possible illegal activity" by a dealer, but rather a period of less than one-year "time to crime" would be "a very strong indicator" of illegal dealer behavior. Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. TIMES ABSTRACTS 14, July 1, 1999, available in 1999 WL 30528902, at *2 (emphasis added). This suggests that the data relied upon in *Hamilton* is less reliable than portrayed, that the ATF admits other variables can enter into the mix of how a criminal obtained a gun within three years of a legal sale than just a dealer's negligent practices, and that a better one-year indicator is available to the trier of fact in negligent marketing cases such as *Hamilton*.

100. For a discussion of non-FFL sources by which criminals may obtain guns, see *supra* note 97.

101. Judge Weinstein's conclusion that causation was established by a preponderance of the evidence is further undermined by the underlying weakness of the statistics upon which he relied. In the Youth Crime Gun Interdiction Initiative Report that published the data relied upon in *Hamilton* and which the *Hamilton* expert, Joseph Vince, used in his testimony to attribute causation; the ATF admits that the data is not yet comprehensive, consistently collected, or consistent enough between jurisdictions studied so that sophisticated analysis, such as national aggregation, would be inappropriate. See YOUTH FIREARMS MARKETS IN 27 COMMUNITIES, *supra* note 97, at 8, 10, 16, A-1, A-2. Consequently, the ATF explains that as yet, while the comprehensiveness of the tracing program increases and as law enforcement and dealers become more complicit with procedural rigors, the ATF offers this data not because it is statistically conclusive, but rather because it is "helpful" to law enforcement. See *id.* at 7.

share does nothing to resolve the problem of the indeterminate plaintiff. Market share speaks only to the indeterminate defendant.¹⁰²

The following additional factors outlined in the ATF report indicate that the tracing data relied upon in *Hamilton* is not yet sophisticated enough to support any form of finding causation. A crime gun as defined by the ATF is "any firearm that is illegally possessed, used in a crime, or suspected to have been used in a crime." *Id.* at 5 (emphasis added). This broad definition suggests that potentially a far larger number of so-called crime guns that allegedly caused some form of injury are being attributed to an FFL source for liability purposes than have actually been used in a crime that resulted in injury to a person.

Additionally, the ATF has only been tracing firearms since approximately 1996. Only 27 municipal jurisdictions participate in tracing so far, up from only 10 jurisdictions prior to 1997; and those 27 were volunteer cities, not representative areas chosen randomly or by cross section, for example, in order to control for irrelevant variables. *See id.* at A-1. Of those 27 jurisdictions, at least 4, including a notably high-crime city, Los Angeles, did not report crime guns for tracing as comprehensively as did the other 24 jurisdictions. *See id.* at 7. The ATF also admits that not all of those jurisdictions with high volume of recovered crime guns are yet able to use the most accurate method of "electronic batch" tracing for high volumes. *See id.* at 16.

Additionally, not all crime guns appearing in the 27 jurisdictions are traced, only those crime guns recovered by law enforcement. *See id.* at 1. Moreover, of those crime guns even recovered, there is a significant subset, as many as one-third, for which no trace is ever attempted. *See id.* at 19. For example, because of governmental economy and because the enabling legislation which created the record keeping requirements that allowed for tracing was enacted only in 1968, the ATF, for policy reasons, has not traced recovered crime guns manufactured prior to 1968 at all, nor those manufactured prior to 1990 unless law enforcement made a special individual request in order to solve an especially difficult crime. *See id.* at 19 (noting that since the time period covered in this 1999 report, the ATF is now able to trace guns manufactured as far back as 1985 by request). Consequently, the ATF may be tracing a disproportionate amount of new and recently manufactured guns more likely to have come from an FFL source within the last three years and ignoring a potentially significant number of older and used recurrent crime guns for which there are inadequate records.

There are other reasons why the pool of crime gun data may be less comprehensive or reliable than as portrayed in *Hamilton*. The ATF admits that a significant portion of crime guns recovered, as many as 11.4%, have obliterated serial numbers that make the gun untraceable without restoring the number. However, as yet, not all jurisdictions reporting to the ATF are restoring obliterated numbers for tracing, and those that do are not doing so uniformly for all of the guns they recovered with the obliterated numbers. *See id.* at 18. Additionally, the ATF concedes that used guns from both FFLs and private sellers are untraceable due to inadequate record keeping and comprise a "significant source" of crime guns. *See id.* at 15. The ATF also explains that a variety of factors, such as data mismanagement, differences in agency policy from jurisdiction to jurisdiction, and faulty record keeping errors by both law enforcement and dealers result in a significant reduction in successful traces of recovered crime guns even where attempts are made. *See id.* at 19. The ATF also counsels that in order to get a fuller picture of crime gun flow, its gun trace analysis should be augmented by other methodologies, such as use of informants, exploiting cooperation of offenders, undercover work, and interviews of arrestees. *See id.* at 15. Consequently, since the ATF itself recognizes that its data pool is as yet insufficient to form statistically reliable conclusions, without more sophisticated and comprehensive data collection and analysis, it would likely be inappropriate to base a finding of causation by the court in *Hamilton*.

102. *See* Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 377 n.6 (1986) (referring to *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal. 1980)) (recognizing that the "indeterminate plaintiff" problem is different from the "indeterminate defendant" of "Sindell-type" cases which employ the "market share" approach).

In *Hymowitz v. Eli Lilly Co.*, 539 N.E.2d 1069 (N.Y. 1989), the court of appeals adopted market share liability to allow compensation to the offspring of mothers who had taken DES during their pregnancy as an anti-miscarriage drug. Due to the long latency period between the ingestion of the drug by the mother and the onset of the cancers in DES daughters, it was impossible in most instances

VI. HANDGUN CAUSATION: GETTING IT RIGHT

In the context of mass tort litigation, it is crucial that courts clearly set forth a comprehensible theory of causation. The plaintiffs in *Hamilton* are precursors of class members and even if cases proceed on some form of consolidation in the future, the numbers of crime victims of hand guns will run into the thousands. To pretend that each plaintiff is entitled to full recovery is to deny the reality that only a small percentage of those crimes would have been avoided by non-negligent marketing of handguns. What is so mystifying is that Judge Weinstein in *Agent Orange* recognized that absent some form of proportional causation the mass torts could not be fairly decided.¹⁰³ Yet, in *Hamilton*, he is willing to embrace the preponderance standard with little evidence to back it.

The problem with this assumption is obvious. Recall that the plaintiff's causation argument is that the manufacturer's failure to exercise care was more likely than not the cause of Steven Fox's injury.¹⁰⁴ This means that the failure of American Arms, for example, to do *something* made a difference to whether or not Fox would have been shot that day in Brooklyn.¹⁰⁵ But, if as Judge Weinstein notes, two-thirds of all guns used in juvenile crimes do not come directly from FFLs, but from other sources, that means that even if American Arms had acted non-negligently, there still was a sixty-six percent chance that the self-same injury would have occurred.¹⁰⁶

It would appear that Judge Weinstein assumes that the remaining

for the plaintiffs to prove which pharmaceutical company had manufactured the drug that caused any given plaintiff's injury. Several hundred drug companies had manufactured and marketed DES. Defendants in *Hamilton* argued that market share theory was very limited under *Hymowitz* and could not be extended to cover gun manufacturers. See Brief for Defendants-Appellants, Beretta U.S.A. Corp. and American Arms, Inc., at 37-45 (Oct. 22, 1999), *Hamilton v. Accu-Tek*, No. 99-7753(L) (2d Cir. 1999); Brief of Defendants-Appellants Colt's Mfg. Co. and Taurus Internat'l Mfg. Inc., at 19-26 (Oct. 22, 1999), *Hamilton*, (No. 99-7753(L)). Unlike *Hymowitz* where the product involved a generic risk and a signature injury, in *Hamilton* the conduct of the gun manufacturers differed substantially between one and another, and the risk of injury did not involve a signature risk such as DES. The defendant's position appears to be bolstered by a recent decision of the Fourth Department in *Brenner v. American Cyanamid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999), in which the court refused to apply market share to the lead paint litigation based on arguments not far different than those propounded by the defendants in *Hamilton*. A full discussion of market share liability is beyond the scope of this paper. We do note, however, that the willingness of the court of appeals to adopt a proportional theory of causation for the indeterminate defendant rather than imposing an all-or-nothing rule bodes well for the prospect that the court would look favorably at a rule for proportional causation when faced with the problem of the indeterminate plaintiff. See Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 U.C.L.A. L. Rev. 1473 (1986).

103. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 836-37 (E.D.N.Y. 1984).

104. See *Hamilton*, 62 F. Supp. 2d at 835.

105. Fox was shot by a sixteen year-old. See *id.* at 808. This means that the statistics Weinstein cited regarding juvenile crime guns apply; and consequently there existed a two-thirds chance that the gun used to shoot Fox did not come from an FFL source. See *id.* at 826; see also YOUTH FIREARMS MARKETS IN 27 COMMUNITIES, *supra* note 97, at 6 (defining a "juvenile" as "age 17 and under" for crime gun trace analysis purposes).

106. See *Hamilton*, 62 F. Supp. 2d at 826.

thirty-three percent chance represented by the fact that one-third of all juvenile crime guns come from FFLs is tantamount to a finding that every gun used in a crime traced to an FFL was in the market as a result of negligence. However, it is not only logically possible that the gun which caused Fox's death could have been obtained even had American Arms exercised due care, it is a possibility that Judge Weinstein was obliged to consider. Due care does not guarantee absolute safety. A residuum of risk that guns properly marketed would find their way into criminals' hands must be considered.¹⁰⁷

It is clear to us that the negligence of gun manufacturers is the cause of an additional risk which may have resulted in a harm to Fox. However, in order to fairly determine the issue, it is the responsibility of the plaintiff to identify the differential between the baseline risk produced by non-negligent marketing and the ultimate risk produced by the defendants' negligence.

Sophisticated analysis of statistical data can and should produce useable estimates that would enable a factfinder to assess proportional causation.¹⁰⁸ Unlike the question of whether a seaman could be saved by a missing life raft in icy water,¹⁰⁹ a question which is not amenable to statistical analysis, in the handgun case, appropriately focused questions can and should provide useful data.

We would have expected Judge Weinstein to have asked the following questions:

- (1) If American Arms had instructed its distributors to refuse to sell any handguns to an FFL which was a "non-stocking gun dealer," how many fewer guns would have been in the hands of criminals in Brooklyn?¹¹⁰ This could be answered by determining the ratio of total sales by FFLs to "non-stocking gun dealer" FFLs by volume and the relative probability that a "non-stocking gun

107. Adding together the two-thirds of juvenile crime guns that come from non-FFL sources according to ATF data cited in *Hamilton*, see *Hamilton*, 62 F. Supp.2d at 826, along with the admitted alternative non-FFL means by which crime guns are obtained such as theft, see *supra* note 97; and the additional pool of non-FFL crime guns that may not have been successfully traced by law enforcement, see *supra* note 101, this ignored residuum of risk could be quite large. We acknowledge that because the number of traced juvenile non-FFL crime guns is larger (two-thirds) compared to one-half non-FFL crime guns for the 18-24 age group, see *Hamilton*, 62 F. Supp.2d at 826, the residuum of risk for the 18-24 age group would be somewhat smaller than that for juveniles. However, for either group, the residuum remains too significant to ignore in the causation analysis.

108. See discussion of current crime gun data, *supra* note 101.

109. See *New York Cent. R.R. v. Grimstead*, 364 F. 334 (2d Cir. 1920) (noting that question of whether victim would have been able to reach life preserver before drowning too speculative to submit to jury).

110. According to plaintiffs, "non-stocking gun dealer[s]" sell "guns out of the trunk of their cars, their houses, and gun shows." Plaintiff/Appellees Brief, dated Dec. 10, 1999, at 9, *Hamilton v. Accu-Tek*, No. 99-7753(L) (2d Cir. 1999). A non-stocking gun dealer, in other words, is not a retail store. They are sometimes referred to as "kitchen table dealers."

dealer" FFL is more likely to sell a gun that will be used in a crime than a retailer.

(2) If American Arms had instructed its distributors to refuse to sell to any FFLs who sold either at gun shows or had customers who made multiple purchases of more than 'x' handguns per month, how many fewer guns would have been in the hands of criminals in Brooklyn? Again, the answer to this question could be determined through a similar analysis as set out in (1).

(3) If American Arms had instructed its distributors to refuse to sell to any *retail* FFLs whose handguns were directly traceable to criminal use at rates that were significantly higher than other stores of similar sales volume and location, how many fewer guns would have been in the hands of criminals in Brooklyn? Again, the answer to this question could be determined through a similar analysis as set out in (1) and (2).¹¹¹

Without answers to these questions, damages will be assessed on the hypothesis that every gun used in a crime that was directly traceable to an FFL is the product of the failure to exercise reasonable control. As long as courts indulge in that fancy this genre of claims should fail. They are likely to fail in the mass tort setting but are also vulnerable in the idiosyncratic case as we have illustrated above. Proportional causation provides the only way in which plaintiffs, be they individuals, municipalities, or members of a class, can credibly prosecute their claims. The fact that statistical estimates may be somewhat inexact should not be a deterrent as long as the legal principles behind those numbers are consistent with our law and our values.

111. It is not clear that the exercise of due care would require the manufacturers to refuse to deal with all distributors who deal with retailers that are associated with a disproportionate number of "crime" guns. The recent settlement between Smith & Wesson and the Government requires the manufacturer to terminate sales to distributors who have been the source of a disproportionate number of crime guns *if* the distributor fails to provide a "satisfactory" explanation for the statistical discrepancy. See Smith & Wesson Settlement Agreement, Mar. 17, 2000, § E, available in NSSF Online Reports (visited Mar. 24, 2000) <<http://www.nssf.org>>. This caveat in the settlement reflects that, as even the ATF itself has noted, the fact that a dealer is linked with a high number of crime guns does not entail that the dealer acted carelessly. See *COMMERCE IN FIREARMS*, *supra* note 97, at 31 ("Some dealers with a substantial number of crime gun traces and sales volume ranging from 6000 to 15,000 firearms per year had no compliance problems.").

VII. THE CAUSATION PROBLEM IN *MERRILL V. NAVEGAR* AND
HALBERSTAM V. S.W. DANIEL

Merrill v. Navegar Inc.,¹¹² raises the but-for causation issue in a somewhat different setting. In *Navegar*, plaintiffs were the survivors and representatives of victims killed in a bloody massacre.¹¹³ On July 1, 1993, Gian Luigi Ferri armed with two semi-automatic assault weapons manufactured and distributed by Navegar as well as a .45-caliber semiautomatic pistol entered a high-rise office building in San Francisco. Proceeding to the thirty-fourth floor premises of a law firm against which he held a grudge, Ferri opened fire on persons in the offices in the hallways. He then descended to a lower floor to continue his shooting spree. When he was finished, he had killed eight men and women and wounded six others before fatally shooting himself in the stairwell.¹¹⁴

Plaintiffs brought their claims based on three theories of liability: common law negligence, negligence per se, and strict liability for ultrahazardous activities.¹¹⁵ The trial court granted Navegar's motion for summary judgment and plaintiffs appealed.¹¹⁶ An intermediate appellate court reversed finding that plaintiffs had made out a case for negligent marketing of the assault weapons.¹¹⁷ The crux of the negligent marketing claim was that the specific model that Ferri purchased, the TEC-DC9, was marketed to appeal specially to criminals.¹¹⁸ The litany of allegedly negligent marketing claims is set forth by the court:

Navegar's advertising targeted "militarists" and "survivalists" by advertising the TEC-DC9 in magazines they favored, such as *Soldier of Fortune*, *SWAT*, *Combat Handguns*, *Guns*, *Firepower*, and *Heavy Metal Weapons*. Navegar advertised the TEC-9 and TEC-DC9 in a wide variety of publications it knew would be sold in California. Navegar also displayed its weapons at "gun shows" which are attended primarily by people who read these magazines. According to Solodovnick, the substance of Navegar's advertising and its other promotional activities were deliberately calculated to attract "military-type thinking people" likely to use the weapon offensively by referring to the TEC-DC9, for example, as an "assault-type pistol." Navegar's advertisements emphasized the "paramilitary" appearance of the weapon, including references to "military non-glare" finish and "combat-type" sights. Among the

112. 89 Cal. Rptr.2d 146 (Cal. Ct. App. 1999), review granted, 991 P.2d 755 (Cal. 2000).

113. See *id.* at 152.

114. See *id.*

115. See *id.*

116. See *id.*

117. See *Merrill*, 89 Cal. Rptr. 2d. at 152.

118. See *id.* at 156-58.

advertising methods employed for the TEC-DC9 were using the slogan, "tough as your toughest customer," in promotional materials sent to dealers and distributors, but accessible to the general public, and pointing out that the surface of the weapon had "excellent resistance to fingerprints." Solodovnick acknowledged that people who were not knowledgeable about fingerprints could interpret the latter representation as meaning fingerprints would not be left on this weapon. Promotional materials also called attention to other design features of the TEC-DC9 that would be of interest to persons interested in carrying out violent assaults or other illegal activities, such as the "combat sling" and the threaded barrel, which permitted the attachment of a silencer, flash suppressor or barrel extension.¹¹⁹

The plaintiffs introduced a report from a forensic and clinical psychologist who specialized in "affective violence and predatory violence during mass murder" who opined that based on the personality profile of Ferri and the meticulous planning that went into the mass murder that the marketing of the TEC-DC9 "likely emboldened Ferri to undertake mass killings without fear of failure" and was a "substantial factor in his decision to carry out his mass murder...."¹²⁰

In reviewing the summary judgment finding of the lower court the appellate court found that the expert's opinion was sufficient to create a triable issue of fact on causation.¹²¹ There are several difficulties with the court's finding. First, even treating this case as an isolated idiosyncratic event allowing a finding of causation on such a slender thread is troubling. Attempting to work out the complexities of what contributed to the conduct of one who was planing a revenge mass murder is no simple matter. This is not asking whether a locked door would have prevented the entry of a criminal on the premises.¹²² Rather it is an after the fact retrospective that is speculative at best. It may be of interest to a radio or television audience on a talk show where speculation and theorizing is the order of the day. It hardly suffices as proof of causation. Wrapping the expert opinion in the "substantial factor" terminology does not solve the problem. If it is speculative whether the advertising had any impact on Ferri's conduct, then it is not a factor at all, let alone a substantial factor.

However, whether the criminal was a mass murderer or one involved in a single murder the reality is that this claim of negligent marketing of handguns being a factor in the commission of a crime will repeat itself time and again. These cases are mass torts in disguise. Once the template for

119. *Id.* at 157-58.

120. *Id.* at 158, 188.

121. *See id.* at 188-89.

122. *See supra* notes 26-34 and accompanying text.

this type of litigation is set it will be alleged in every complaint and experts will opine that the negligent marketing had some influence on the criminal act in which the handgun was utilized. Guns do embolden criminals. And guns that are advertised will be said to embolden them even more. We will thus see an entire genre of litigation in which the causation issue will go to juries for full value damages without any evaluation as to how much the so-called negligence in marketing increased the risk. Real world realities cannot be ignored by courts without bringing the judicial process into disrepute.¹²³

The lesson from *Hamilton* and *Navegar* is clear. The traditional preponderance rule for causation cannot be utilized to impose liability. The true likelihood that the self-same injuries would have taken place without the negligent marketing are so high that no rational court should impose liability on such a low probability that the marketing caused the criminal act.¹²³ The only way that courts can find causation is to utilize a proportionality approach to causation. To do so will require that courts demand the production of some data to support proportionalization. One need not expect the data to be exact. Good reasonable estimates by experts will have to suffice.¹²⁴ If such data cannot be developed then the negligent marketing cases must fail.¹²⁵

One final word about the third negligent marketing case to go to trial, *Halberstam v. S.W. Daniel, Inc.*¹²⁶ The shooting in that case took place on March 1, 1994, the Jewish holiday of Purim.¹²⁷ Four days earlier Baruch Goldstein massacred twenty-nine Palestinian worshipers at a Mosque in Hebron, Israel.¹²⁸ In apparent retaliation for the Hebron Massacre, a Palestinian, Rashid Baz shot two Hasidic Jews who were driving in a van across the Brooklyn Bridge. One of the pistols was a Cobray M-11/9 which fired eighteen shots in just a few seconds. "The Cobray M-11/9 was assembled from parts manufactured and marketed through mail order assembly kits by a company owned by Wayne and Sylvia Daniel."¹²⁹ The *Halberstam* case contained negligent marketing claims based on advertising that targeted criminals seeking to avoid federal restrictions on firearms possession and

123. See *supra* notes 97, 99, 101, 107.

124. See RESTATEMENT OF TORTS: PRODUCTS LIABILITY § 16 cmt. c (1997) (discussing level of proof required to establish increased risk of harm in context of automobile crashworthiness product defect cases and determining that while proof of increased risk in these instances is "often difficult, [nonetheless when] an expert offers a rational explanation derived from causal analysis, the testimony should [be admitted for] consideration by the trier of fact").

125. We are aware of the inadequacies of the data currently but are hopeful that better data sets can be developed. See *supra* note 101.

126. No. 95 Civ. 3323 (E.D.N.Y. 1998) (pleading and court orders on file in clerk's office at the U.S. District Court for the Eastern District of New York); see also Lytton, *supra* note 25 (discussing the case).

127. See Lytton, *supra* note 25, at 686.

128. See *id.* (citing The Jerusalem Report vol. IX, no. 1, at 160 (1988)).

129. *Id.* at 686.

transfer.¹³⁰ This was done by marketing firearm parts in assembly kits. Since the sale was not of an assembled weapon it was not subject to normal firearms sales and licensing regulations.¹³¹ Plaintiffs further cited ads for the Cobray M-11/9 that touted it as "[t]he Gun that made the 80's Roar."¹³² The ads further proclaimed that the gun was "the controversial 'Drug Lord' choice of Cobray firearms throughout the '80s . . . [and featured] a cartoon of an Al Capone-style gangster in a pin striped suit and a fedora wielding a submachine gun."¹³³

The defendants argued that it owed no duty to protect against the use of its guns by criminals and that its advertising was not negligent.¹³⁴ As to causation the defendants argued that Rashid Baz said that he had never seen any advertisement for the Cobray M-11/9, nor had he purchased the gun from the defendant but instead bought it off the street.¹³⁵ Furthermore, the defendant argued that the plaintiff was not able to produce evidence as to how many parts of the gun used by Baz were marketed by the defendant.¹³⁶ The jury returned a verdict for the defendant. In response to questions posed on the special verdict form the jury found that the Cobray M-11/9 caused the plaintiff's injuries and that "the defendants marketed the parts kit which 'substantially constituted' the weapon."¹³⁷ "In response to the question 'Did the *defendants*' negligence cause Aaron Halberstam's death?' the jury answered 'no.'"¹³⁸

Given the negative jury finding on causation, the pure issue of law as to whether negligent marketing cases should go to juries without causal data was not decided. Once again we note that full recovery in this genre of litigation would be unwarranted. Without some discount for the huge background risk attendant to the widespread presence of non negligently marketed handguns in our society we can not assess the damages for the claims arising from negligent marketing.

Some may believe that drastic discounting of damages to account for background risk will not make these cases worthwhile to litigate. The answer to this dilemma is not to pervert the litigation process by assessing damages that are not fairly attributable to the defendant's conduct. If, how-

130. See *id.* at 687-88.

131. See *id.* (citing Plaintiffs' Second Amended Complaint, *Halberstam* (No. 95 Civ. 3323)).

132. Lytton, *supra* note 25, at 688 (citing Plaintiffs' Second Amended Complaint at Ex. C, Ex. I., *Halberstam* (No. 95 Civ. 3323)).

133. *Id.* at 686.

134. See *id.* at 691-92.

135. See *id.* at 693 (citing Defendants' Second Motion to Dismiss at 10-11, 18, *Halberstam* (No. 95 Civ. 3323)).

136. See *id.* at 693 (citing Defendants' Second Motion to Dismiss at 3 & nn.4-5, 18, *Halberstam* (No. 95 Civ. 3323)).

137. Lytton, *supra* note 25, at 697 (citing Transcript of Trial at 1697, 1731, 1740 (Mar. 26, 1998), *Halberstam* (No. 95 Civ. 3323)).

138. *Id.* at 697 (citing Transcript of Trial at 1740-43 (Mar. 27, 1998), *Halberstam* (No. 95 Civ. 3323) (emphasis added)).

ever, the conduct of the defendant is deemed sufficiently outrageous to support a finding of punitive damages then the specter of such damages may serve as an inducement to bring the actions. Whether the negligent marketing set forth in these cases is sufficiently egregious to support punitive damages is beyond the scope of this paper.

Ultimately the judiciary will not be able to hide from the problem that the causation issue in these cases is far too speculative to allow for full damages recovery. If courts are to allow these actions to proceed data will have to be developed to support proportional recovery. In the absence of data these cases are simply not justiciable on the issue of causation.

VIII. CONCLUSION

One can easily sympathize with the desire of courts to compensate the victims of such terrible crimes as those suffered by the plaintiffs in *Hamilton*, *Navegar*, and *Halberstam*. This is especially true when there is some evidence that a handful of actors, such as firearm manufacturers and distributors, appear to enable in some manner a large number of such crimes. It is clear from *Hamilton* and *Navegar*—as well as the ATF's own data establishing numerous non-negligent alternative avenues of criminals obtaining guns—that causation cannot be established under the preponderance standard. Consequently, plaintiffs' only rational recourse is proportional recovery. Proper application of the proportional causation mechanism, however, requires the use of sophisticated data, preferably subject to regression analysis that controls for background noise and other variables beside negligent marketing that contribute to criminals obtaining guns that cause a victim's injuries. A plaintiff's use of such data, at the very least, must establish a baseline of risk of firearm injuries produced by non-negligent marketing practices contrasted with the ultimate risk produced by defendants' alleged negligent marketing practices.

The courts that have evaluated negligent marketing of firearms claims thus far in *Hamilton* and *Navegar* have ignored these data requirements and thus have allowed for the possibility of such claims being submitted to juries for full damages without any true valuation of the increased risk created by the defendants' negligent practices. While such outcomes may seem satisfying in the short run on the facts of the injuries in these cases, they are determined at the expense of creating a degraded standard of causation to be applied in all circumstances in the future, a standard which hides from juries the fact that the link between defendants' behavior and the victims' injuries is far too speculative to allow for full recovery. Such culpability in the air is not and cannot be the standard of recovery under tort law.

