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# HALBERSTAM V. DANIEL AND THE UNCERTAIN FUTURE OF NEGLIGENT MARKETING CLAIMS AGAINST FIREARMS MANUFACTURERS\*

Timothy D. Lytton<sup>†</sup>

## INTRODUCTION

Criminal misuse of firearms is a widespread social problem in America. Each year, more than 600,000 violent crimes involving firearms are reported in the United States.<sup>1</sup> Gun murders have surpassed car accidents as the leading cause of unnatural death in New York, California, and Texas.<sup>2</sup> As a result, many crime victims and their families have turned to the tort system seeking compensation for their losses.

Since the early 1980s, victims and their families have filed dozens of lawsuits against firearms manufacturers for their role in making weapons widely available for criminal misuse. To date, none of these lawsuits has been successful, and only one case has ever reached a jury. That case, *Halberstam v. S.W. Daniel, Inc.*,<sup>3</sup> signals the uncertain future of tort claims against firearms manufacturers by crime victims. On the one hand, the *Halberstam* plain-

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\* ©1998 Timothy D. Lytton. All Rights Reserved. This brief note on the *Halberstam* case raises a variety of policy issues beyond the scope of the narrow doctrinal analysis presented here. I shall address these larger issues in a more comprehensive examination of tort claims against firearms manufacturers that is currently in progress.

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<sup>1</sup> *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1313 (E.D.N.Y. 1996) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FIREARMS AND CRIMES OF VIOLENCE: SELECTED FINDINGS FROM NATIONAL STATISTICAL SERIES 3 (1994)).

<sup>2</sup> Donna Morel, *Bang! Bang! You're Liable! The Imposition of Strict Liability on the Makers of Semi-Automatic Assault Weapons*, 3 SAN DIEGO JUST. J. 263 (1995).

<sup>3</sup> No. 95 Civ. 3323 (E.D.N.Y. 1998) (pleadings and court orders on file in clerk's office at the U.S. District Court for the Eastern District of New York).

tiffs managed to obtain unprecedented jury consideration of their claim, successfully overcoming several doctrinal obstacles that had frustrated previous lawsuits and resulted in their dismissal. On the other hand, having reached the jury, the *Halberstam* plaintiffs failed to present sufficient evidence to substantiate the alleged link between the arms industry and violent crime. Thus, while the *Halberstam* case offers new hope to future plaintiffs of avoiding dismissal of their claims, it also provides a sober warning that plaintiffs will ultimately fail if they continue to rely on highly speculative arguments linking firearms manufacturers to gun violence.

In lawsuits prior to *Halberstam*, plaintiffs made multiple claims against defendant-manufacturers under a variety of theories. Most plaintiffs made products liability claims, alleging that the lethal nature of firearms constituted a design defect for which defendant-manufacturers could be held strictly liable. Courts dismissed these claims on the ground that plaintiffs could not recover under design defect theory unless they alleged a particular defective condition in the firearm that caused it to malfunction.<sup>4</sup> While well-made firearms that function precisely as designed might be dangerous, they are not defective.<sup>5</sup> To avoid the need to identify a defect, some plaintiffs prior to *Halberstam* also made negligence claims, alleging that the manufacture and sale of firearms to the general public created an unreasonable risk of harm. Courts dismissed these claims too, holding that a manufacturer owes no duty to refrain from legally marketing a non-defective product to the general public.<sup>6</sup>

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<sup>4</sup> See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148, 154-55 (2d Cir. 1997) (ammunition not defectively designed); *Moore v. R.G. Industries, Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533-34 (11th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1272, 1275 (5th Cir. 1985); *Hamilton*, 935 F. Supp. at 1323; *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1207, 1216 (N.D. Tex. 1985); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 108, 110 (D. Mass 1983); *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762, 769 (E.D.N.Y. 1981); *Trespacios v. Valor Corp.*, 486 So. 2d 649, 650 (Fla. 1986); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1298-99 (Ill. 1985); *Kelly v. R.G. Indus., Inc.*, 497 A.2d 1143, 1148-50 (Md. 1985) (rejecting plaintiff's design defect claim, allowing novel "Saturday Night Special" strict liability theory); *Richardson v. Holland*, 741 S.W.2d 751, 754 (Mo. 1987); *Forni v. Ferguson*, 232 A.D.2d 176, 176, 648 N.Y.S.2d 73, 73-74 (1st Dep't 1996).

<sup>5</sup> See James Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability without Defect*, 66 N.Y.U. L. REV. 1263, 1297-1316 (1991) (arguing against "product-category liability"). But see *Symposium on Generic Products Liability*, 72 CHI-KENT L. REV. (1996) (offering a variety of arguments against Henderson & Twerski in favor of "generic products liability").

<sup>6</sup> See, e.g., *Olin Corp.*, 119 F.3d at 157; *Shipman*, 791 F.2d at 1533-34; *Armijo*,

The *Halberstam* plaintiffs, seeking to avoid the products liability requirement of alleging a defect in the firearm, sued under a negligence theory, relying in part on negligent entrustment doctrine.<sup>7</sup> To avoid precedents rejecting a duty to refrain altogether from marketing firearms,<sup>8</sup> they argued in favor of a more modest duty owed by manufacturers to the general public to adopt reasonable restraints on marketing. If the plaintiffs could get the court to recognize a duty to adopt reasonable restraints on marketing, then they might convince a jury that particular features of the defendant's promotion and distribution of its weapons constituted a breach of this duty, one that proximately caused the plaintiffs' injuries.

In their successful effort to obtain jury consideration of their claim, the *Halberstam* plaintiffs overcame three previously insurmountable doctrinal obstacles to judicial recognition of a duty of care in negligent marketing claims against firearms manufacturers. The first obstacle was a long-standing refusal by courts to apply negligent entrustment doctrine to firearms manufacturers who marketed their weapons to the general public.<sup>9</sup> In commercial settings, liability based on negligent entrustment arises from selling potentially harmful products to consumer groups that lack the capacity to exercise ordinary care. For example, a merchant may be subject to liability for selling air rifles to small children.<sup>10</sup> Marketing a product to the general public, however, cannot be negligent under this

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656 F. Supp. at 775; *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1239 (Alaska 1983); *First Commercial Trust Co. v. Lorcin Eng'g Inc.*, 900 S.W.2d 202, 205 (Ark. 1995); *Delahanty v. Hinckley*, 564 A.2d 758, 762 (D.C. 1989); *Trespacios*, 486 So. 2d at 651; *Riordan*, 477 N.E.2d at 1296; *Linton v. Smith & Wesson*, 469 N.E.2d 339, 340 (Ill. 1984); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53, 56 (Mich. 1997); *Forni*, 232 A.D.2d at 176, 648 N.Y.S.2d at 74; *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664 (Wash. 1988).

<sup>7</sup> The doctrine of negligent entrustment states that a person may be subject to liability for harm that results from entrusting a potentially dangerous object to another whom the giver has reason to know is likely to use it in a manner that poses an unreasonable risk of harm to the recipient or to others. For example, a person may be subject to liability for entrusting a loaded gun to a small child who, while playing with it, injures herself or another. See RESTATEMENT (SECOND) OF TORTS § 390 (1986) and discussion of negligent entrustment doctrine *infra* notes 31-37 and accompanying text.

<sup>8</sup> See, e.g., *McCarthy*, 119 F.3d at 156-57; *Forni*, 232 A.D.2d at 176, 648 N.Y.S.2d at 74.

<sup>9</sup> See *Riordan*, 477 N.E.2d at 1295-96; *Linton*, 469 N.E.2d at 340.

<sup>10</sup> See, e.g., *Semenuik v. Chentis*, 117 N.E.2d 883 (Ill. 1954); *Earsing v. Nelson*, 212 A.D.2d 66, 629 N.Y.S.2d 563 (4th Dep't 1995); *Sickles v. Montgomery Ward & Co.*, 6 Misc. 2d 1000, 167 N.Y.S.2d 977 (Sup. Ct. Ulster County 1957); *Henningsen v. Markowitz*, 132 Misc. 547, 230 N.Y.S. 313 (Sup. Ct. N.Y. County 1928).

doctrine, since the general public, itself, sets the standard of ordinary care. The *Halberstam* plaintiffs successfully argued that negligent entrustment doctrine could be applied to firearms manufacturers who marketed their weapons to consumers "likely to be involved in criminal activity."<sup>11</sup>

The second obstacle was a tendency among courts to view negligent marketing claims against firearms manufacturers as being essentially design defect claims in disguise and to insist that plaintiffs allege a defective condition in the weapon in order to recover.<sup>12</sup> Since plaintiffs who asserted negligent marketing claims often emphasized the dangerous nature of firearms and alleged a duty to refrain from marketing them, judges viewed these claims as practically identical to design defect claims that focused on the dangerous characteristics of guns and sought to stop production of them. The *Halberstam* plaintiffs, by alleging a duty of care that demanded reasonable restrictions on marketing without completely prohibiting the promotion and sale of weapons, clearly distinguished their negligent marketing claim from design defect theory and avoided the need to allege a defect in the firearm.

The third obstacle was the refusal of courts to hold defendants liable for injuries inflicted by the intervening intentional, criminal misconduct of third parties in the absence of a special custodial relationship between the defendant and the third party or a special protective relationship between the defendant and the plaintiff.<sup>13</sup>

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<sup>11</sup> Plaintiff's Second Amended Complaint at 3, *Halberstam v. S. W. Daniel, Inc.*, No. 95 Civ. 3323 (E.D.N.Y. 1998).

<sup>12</sup> See, e.g., *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996) (Weinstein, J.); *Derosa v. Remington Arms Co.*, 509 F. Supp. 762, 766 (E.D.N.Y. 1981) (Weinstein, J.); cf. *McCarthy v. Olin Corp.*, 119 F.3d 148, 163 n.13 (2d Cir. 1997) (Calabresi, J., dissenting).

<sup>13</sup> See, e.g., *Olin Corp.*, 119 F.3d at 156-57; *First Commercial Trust Co. v. Lorcin Eng'g Inc.*, 900 S.W.2d 202, 205 (Ark. 1995); *Delahanty v. Hinckley*, 564 A.2d 758, 762 (D.C. 1989); see also, *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (duty of therapist to warn third parties of threats by patient); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 518, 407 N.E.2d 451, 457, 429 N.Y.S.2d 606, 613 (1980) (duty of landowner to protect visitors from criminal acts of third parties); *Einhorn v. Seely*, 136 A.D.2d 122, 126, 525 N.Y.S.2d 212, 215 (1st Dep't 1988) (There will ordinarily be no duty thrust on a defendant to prevent a third party from causing harm to another. The exception may occur in the case where a special relationship exists between the defendant and the third person so as to give rise to a duty to control, or alternatively, when a special relationship exists between the defendant and the victim which gives the latter the right to protection.); *Stevens v. Kirby*, 86 A.D.2d 391, 393, 450 N.Y.S.2d 607, 610 (4th Dep't 1982) (duty of tavern owner to protect patrons from criminal acts of third parties). See generally W. PAGE KEETON ET AL., PROSSER AND

Thus, courts have held that defendant-firearms manufacturers have no duty to take reasonable precautions against the possibility of crimes committed by third parties using a gun that the defendant-manufacturer marketed. No court has yet recognized a special relationship that would support such a duty, and the *Halberstam* plaintiffs alleged none. Instead, they argued that firearms manufacturers owe a duty to the public to take precautions against the intentional, criminal misuse of their products where their own promotion and distribution of weapons contribute to the risk of such misuse.

The *Halberstam* case represents a significant advance in attempts to impose a duty on firearms manufacturers to exercise reasonable restraint in marketing their weapons. The value of the case, however, should not be overstated. While the plaintiffs did avoid dismissal of their negligent marketing claim, the judge issued no written opinion which might provide support to similar claims in the future. Thus, the case should be viewed principally as a guide to litigation strategy rather than any sort of legal precedent. Furthermore, the jury verdict in *Halberstam* highlights the lack of evidence available to establish the alleged causal connection between manufacturers' aggressive marketing of guns and criminal misuse of them.

Although the *Halberstam* case ought not occasion excessive optimism among the plaintiffs' bar nor overconfidence on the part of defense counsel, it does provide a useful opportunity to reflect upon many issues surrounding negligent marketing claims in general. One such issue is the role that marketing plays in the creation and maintenance of markets. Another issue is determining who is responsible when legal markets facilitate criminal activity. Further study of both of these issues will be essential in resolving the uncertain future of negligent marketing claims against firearms manufacturers.

Part I of this Article describes the facts, procedural history and trial of the *Halberstam* case. Part II analyzes the case, focusing on the three doctrinal obstacles to establishing a duty of care in negligent marketing cases that the *Halberstam* plaintiffs managed to overcome in order to reach the jury. Part III briefly discusses remaining difficulties for future plaintiffs seeking to bring negligent marketing claims and identifies unresolved public policy issues raised by the *Halberstam* case.

I. *HALBERSTAM V. DANIEL*

On February 25, 1994, the Jewish holiday of Purim, Baruch Goldstein massacred 29 Palestinian worshippers at a mosque in the city of Hebron, Israel.<sup>14</sup> Four days later, on March 1, in apparent retaliation for the Hebron Massacre, Palestinian Rashid Baz opened fire using two automatic pistols on a van carrying Hasidic Jewish children across the Brooklyn Bridge. One of the pistols was a Cobray M-11/9 which fired eighteen shots in just a few seconds. A bullet from this pistol struck and killed sixteen year-old Aaron Halberstam. Another bullet from either the Cobray M-11/9 or the other pistol struck and injured his companion Nachum Sosonkin. 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.

Baz was subsequently convicted of the crime and sentenced to life in prison.<sup>15</sup> After his trial, Baz denied that he had purchased the Cobray M-11/9, or parts for it, directly from any of the Daniels' companies. Presumably, he acquired it from an acquaintance or bought it on the black market.

Aaron Halberstam's parents and Nachum Sosonkin filed suit eighteen months later on August 14, 1995, seeking \$5 million in compensatory damages and \$20 million in punitive damages.<sup>16</sup> Their initial complaint named Baz and the Daniels as defendants and set forth a variety of counts including assault, battery and negligent marketing.<sup>17</sup> The plaintiffs' negligent marketing counts were based on two distinct theories. First, the plaintiffs argued that marketing semi-automatic pistols by means of mail-order assembly kits violated federal and state firearms regulations and, therefore, consti-

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<sup>14</sup> *THE JERUSALEM REPORT* vol. IX, no. 1, p. 160 (1998).

<sup>15</sup> Daniel Wise, *Victors Enjoy Win in Gun Liability Case*, N.Y.L.J., Mar. 30, 1998, at 1.

<sup>16</sup> Index to Pleadings at 1, *Halberstam*, No. 95 Civ. 3323 (on file with author); Plaintiffs' Second Amended Complaint at pp. 35-36. The plaintiffs, Brooklyn residents, filed suit in the United States District Court for the Eastern District of New York. The court, exercising diversity jurisdiction over the case, applied New York law. Plaintiffs' Second Amended Complaint at ¶ 4.

<sup>17</sup> Memorandum of Deborah and David Halberstam and Nachum Sosonkin in Opposition to the Motions to Dismiss by S.W. Daniel, Inc.; Mountain Accessories Corporation; Cobray Firearms, Inc.; F.M.J., Inc.; The Ultra Force, Inc.; Sylvia Daniel and Wayne Daniel at 12-13 [hereinafter Plaintiffs' First Memorandum].

tuted negligence per se.<sup>18</sup> Second, they argued that, aside from any violation of statutory regulations, the Daniels were negligent in their failure to exercise reasonable care in marketing their weapons.<sup>19</sup> Rashid Baz, who was in prison following a criminal conviction for the shooting, did not defend against the suit, and the court entered a default judgment against him.<sup>20</sup> The Daniels filed a motion to dismiss.

At the hearing on the Daniels' motion to dismiss held on March 18, 1997, Judge Jack B. Weinstein dismissed all counts of the plaintiffs' complaint except the negligent marketing count.<sup>21</sup> Judge Weinstein ruled against the negligence per se theory, preferring to treat the statutory regulations as part of the overall context within which to determine the reasonableness of the defendants' conduct in marketing their weapons.<sup>22</sup> The judge issued no written memorandum on this ruling despite a request for one by the defendants, and he rejected their motion for an interlocutory appeal.<sup>23</sup> Following this ruling, the plaintiffs submitted an amended complaint setting forth a claim based solely on the theory of negligent marketing.<sup>24</sup> In support of their negligent marketing claim, the plaintiffs alleged that the defendants owed a duty to the public to exercise reasonable care in marketing their product.<sup>25</sup> They further alleged that the defendants breached this duty by marketing the Cobray M-11/9 pistol to customers especially likely to engage in criminal misuse of the weapon.<sup>26</sup> In support of this allegation, the plaintiffs

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<sup>18</sup> Plaintiffs' First Memorandum at i, ii.

<sup>19</sup> Plaintiffs' First Memorandum at i, ii.

<sup>20</sup> As Baz had no assets, the plaintiffs never sought execution of the judgment against him.

<sup>21</sup> Transcript of Motion before the Hon. Jack B. Weinstein, U.S.D.J., Mar. 18, 1997, 9:30 a.m. at 41-43 (on file with the author).

<sup>22</sup> Transcript of Motion, Mar. 18, 1997 at 41-47. Judge Weinstein's ruling on the plaintiffs' negligence per se claim is somewhat ambiguous. He did not rule that the doctrine of negligence per se did not apply to the *Halberstam* case. Nor did he rule, as argued by the defendants, that the extensive regulatory regime governing the distribution and sale of "firearms" cited by the plaintiffs did not apply to "firearms parts." Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), ¶ 15 [hereinafter Defendants' First Motion to Dismiss]. Judge Weinstein did, however, express an aversion to the "esoteric and complex" nature of the negligence per se doctrine and a desire to engage the jury in a contextualized evaluation of the defendants' conduct rather than an exercise in statutory interpretation. Transcript of Motion at 41-43.

<sup>23</sup> Transcript of Motion, Mar. 18, 1997 at 45-46.

<sup>24</sup> See generally Plaintiffs' Second Amended Complaint.

<sup>25</sup> Plaintiffs' Second Amended Complaint at 28.

<sup>26</sup> Plaintiffs' Second Amended Complaint at 3, 13, 24, 28, 29, 33.



cited ads for the Cobray M-11/9 promoting it as "The Gun that Made the '80s Roar" and boasting of "the controversial 'Drug Lord' choice of COBRAY firearms throughout the '80s." The ads regularly featured a cartoon of an Al Capone-style gangster in a pin-striped suit and fedora wielding a submachine gun.<sup>27</sup> In addition, the plaintiffs claimed that the defendants' sales procedures were designed to allow criminal purchasers to avoid federal and state restrictions on firearms possession and transfer.<sup>28</sup> The defendants sold the Cobray M-11/9 in the form of mail- and phone-order assembly kits. Since these sales involved firearm parts and not assembled weapons, they were not subject to normal firearm sales and licensing regulations. Moreover, gun parts sold in this fashion were not required to, and did not, bear a serial number by which they could be traced back to the manufacturer or to registered owners.<sup>29</sup> Finally, the plaintiffs alleged that the defendants' breach of duty was a factual and proximate cause of the shooting and resulting injuries.<sup>30</sup>

The plaintiffs' claim relied upon the widely accepted doctrine of negligent entrustment.<sup>31</sup> The *Restatement (Second) of Torts* section 390 defines negligent entrustment as follows:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

In seeking to interpret negligent entrustment to include the entrustment of a chattel to a person likely to engage in criminal conduct, the plaintiffs cited section 302B of the *Restatement (Second) of Torts* which states that:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through

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<sup>27</sup> Plaintiffs' Second Amended Complaint at Exh. C, Exh. I.

<sup>28</sup> Plaintiffs' Second Amended Complaint at 11.

<sup>29</sup> Plaintiffs' Second Amended Complaint at 11-13, Exh. C.

<sup>30</sup> Plaintiffs' Second Amended Complaint at 31.

<sup>31</sup> Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint at 14 [hereinafter Plaintiffs' Second Memorandum] (citing Plaintiffs' First Memorandum at 47-49).

the conduct of . . . a third person which is intended to cause harm, even though such conduct is criminal.<sup>32</sup>

Previously, courts in several jurisdictions had applied negligent entrustment doctrine to merchants for retail sale of firearms to unsuitable purchasers such as children, intoxicated individuals, ex-convicts, and persons acting suspiciously.<sup>33</sup> No court prior to *Halberstam*, however, had applied negligent entrustment doctrine to a firearms manufacturer. In support of their attempt to convince Judge Weinstein to do just that, the plaintiffs argued that the Daniels, while manufacturers of the Cobray M-11/9 parts kit, also conducted their own retail sales.<sup>34</sup> The plaintiffs further cited supposedly favorable precedent—two New York Appellate Division cases and two New York trial court opinions—although none of the cases cited involved firearm sales.<sup>35</sup> One case concerned liability for negligent entrustment of a firearm but not in the context of a sale.<sup>36</sup> The other three dealt with negligent sales of BB guns to children.<sup>37</sup>

In response to the plaintiffs' amended complaint, the defendants filed a second motion to dismiss.<sup>38</sup> They asserted several arguments countering the plaintiffs' contention that they owed a duty to the public to take precautions against criminal misuse of the Cobray M-11/9 parts kits that they manufactured and sold. First, the

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<sup>32</sup> Plaintiffs' Second Memorandum at 21 n.14.

<sup>33</sup> See *supra* note 10; see also WINDLE TURLEY & JAMES ROOKS, JR., FIREARMS LITIGATION: LAW, SCIENCE AND PRACTICE 94-95 (1988). See generally Francis M. Dougherty, Annotation, *Handgun Manufacturer's or Seller's Liability for Injuries Caused to Another by Use of Gun in Committing Crime*, 44 A.L.R. 4th 595 (1987); James L. Isham, Annotation, *Liability of One Who Provides, by Sale or Otherwise, Firearm or Ammunition to Adult Who Shoots Another*, 39 A.L.R. 4th 517 (1986); Larry D. Schafer, Annotation, *Liability of One Who Sells Gun to Child for Injury to Third Party*, 4 A.L.R. 4th 331 (1981).

<sup>34</sup> Plaintiffs' Second Memorandum at 39 n.27, 37 n.24.

<sup>35</sup> Plaintiffs' Second Memorandum at 24, 37-39.

<sup>36</sup> *Splawnik v. DiCaprio*, 146 A.D.2d 333, 540 N.Y.S.2d 615 (3d Dep't 1989) (defendant helped plaintiff's wife, who suffered from depression, load a gun which she subsequently used to commit suicide).

<sup>37</sup> *Earsing v. Nelson*, 212 A.D.2d 66, 629 N.Y.S.2d 563 (4th Dep't 1995) (defendant sold BB gun to a 13 year-old); *Sickles v. Montgomery Ward*, 6 Misc. 2d 1000, 167 N.Y.S.2d 977 (Sup. Ct. Ulster County 1957) (the father of a 9 year old boy and salesperson knew that the father would subsequently entrust the air gun or BB gun to the child); *Henningsen v. Markowitz*, 132 Misc. 547, 230 N.Y.S. 313 (Sup. Ct. N.Y. County 1928) (defendant sold BB gun to 13 year-old boy).

<sup>38</sup> Motion to Dismiss Plaintiffs' Second Amended Complaint (Third Complaint) [hereinafter Defendants' Second Motion to Dismiss].

defendants asserted that a manufacturer has no duty to refrain from the lawful distribution of a non-defective product.<sup>39</sup> They pointed to the "prolific commerce" in firearm parts and the exclusion of these transactions from the extensive regulation of firearms in order to show that no legal duty exists to refrain from such activity.<sup>40</sup> In response, the plaintiffs argued that the legality of an activity does not preclude a negligence claim based on how it is conducted, and common law may impose a duty of care beyond that mandated by statute.<sup>41</sup> The duty in *Halberstam*, plaintiffs emphasized, did not demand that manufacturers refrain from selling firearms but required merely reasonable care in promotion and distribution.<sup>42</sup> For example, this duty might require a firearms manufacturer to refrain from touting the potential criminal uses of its products or to require background information from purchasers at the time of sale.

Second, the defendants asserted that the plaintiffs' emphasis on the dangerous characteristics of the Cobray M-11/9 and their ultimate aim to stop the manufacture of it amounted to a products liability claim for which they could not recover without alleging a defective condition in the product that caused it to malfunction.<sup>43</sup> The plaintiffs responded that their claim was a negligence claim based on the defendants' conduct, and hence, no showing of product defect was necessary to support recovery.<sup>44</sup> Defectiveness of the product, they argued, was irrelevant to establishing the defendants' negligence in marketing it.<sup>45</sup> Furthermore, the plaintiffs

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<sup>39</sup> Defendants' Second Motion to Dismiss at 3.

<sup>40</sup> Defendants' Second Motion to Dismiss at 5. Defendants based their contention that firearm parts are not covered by regulations governing firearms on an alleged lack of federal and state efforts to restrict widespread and growing commerce in firearm parts and on the definition of firearms in the U.S. Code as a frame or receiver and any combination of parts from which a firearm can be assembled. See Defendants' First Motion to Dismiss at 5-6 (citing 18 U.S.C. 921(3) (1995); 26 U.S.C. 5845(b) (1995); 27 C.F.R. 178.11 (1998); 27 C.F.R. 179.11 (1998)).

<sup>41</sup> Plaintiffs' Second Memorandum at 4, 28 (citing *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1320 (E.D.N.Y. 1996) (Weinstein, J.); *Feiner v. Calvin Klein, Ltd.*, 157 A.D.2d 501, 501, 549 N.Y.S.2d 692, 693 (1st Dep't 1990); *Sherman v. M. Lowenstein & Sons, Inc.*, 28 A.D.2d 922, 923, 282 N.Y.S.2d 142, 143-44 (2d Dep't 1967).

<sup>42</sup> Plaintiffs' Second Memorandum at 18.

<sup>43</sup> Defendants' Second Motion to Dismiss at 13-15. In arguing that the plaintiffs' negligent marketing claim really amounted to an alternate pleading of design defect, the defendants cited Judge Weinstein's opinion in the *Hamilton* case in which he discussed the negligent marketing claims in *Forni v. Ferguson* and *McCarthy v. Sturm, Ruger & Co.*

<sup>44</sup> Plaintiffs' Second Memorandum at 29.

<sup>45</sup> Plaintiffs' Second Memorandum at 29-31; see also Plaintiffs' First Memorandum

reiterated that the practical effect of liability under their claim would be reasonable restrictions on promotion and distribution, not an end to production and sale.<sup>46</sup>

Third, the defendants asserted that a manufacturer has no duty to protect others from the criminal misuse of its products absent a special custodial relationship between the manufacturer and the injurer or a special protective relationship between the manufacturer and the victim, and that no such special relationship was alleged by the plaintiffs or supported by the facts.<sup>47</sup> In response, the plaintiffs argued that New York courts have imposed a similar duty upon BB gun sellers to protect others from criminal misuse of the weapons they sell, even absent a special relationship.<sup>48</sup> This duty, they argued, arises not out of any special relationship but from the high risk of injury from foreseeable misuse created by the retailer's conduct in selling weapons.<sup>49</sup> A special relationship, the plaintiffs explained, is necessary only in cases of nonfeasance, where the defendant fails to intervene to prevent a third party from harming a victim, not in cases of misfeasance, where the defendant's conduct, itself, creates or increases the risk of a third party harming a victim.<sup>50</sup>

In their first motion to dismiss, the defendants had argued that a duty on manufacturers to restrict the sale of gun parts to the gen-

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at 4.

<sup>46</sup> Plaintiffs' Second Memorandum at 15-16. Like the defendants, the plaintiffs also cited Judge Weinstein's opinion in *Hamilton*, noting that he distinguished the *Hamilton* plaintiffs' negligent marketing claim from those in *Forni* and *Sturm, Ruger & Co.* and refused to dismiss it. Plaintiffs' Second Memorandum at 31.

<sup>47</sup> Defendants' Second Motion to Dismiss at 12, 19; see also Defendants' First Motion to Dismiss at 11. The defendants noted that the foreseeability of criminal misuse, which might give rise to a duty in other jurisdictions, is, under New York law, relevant only in determining the scope of a duty not whether it exists. Defendants' First Motion to Dismiss at 10-11, 18; Defendants' First Motion to Dismiss at 6 (citing *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996); *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 482 N.E.2d 34, 36, 492 N.Y.S.2d 555, 557 (1985); *Pulka v. Edelman*, 40 N.Y.2d 781, 784, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976)).

<sup>48</sup> Plaintiffs' Second Memorandum at 23-24. Plaintiffs relied on cases cited *supra* note 10.

<sup>49</sup> Plaintiffs' First Memorandum at 5.

<sup>50</sup> Plaintiffs' First Memorandum at 36-37 (citing *Carrini v. Supermarkets Gen. Corp.*, 158 A.D.2d 303, 550 N.Y.S.2d 710 (1st Dep't 1990) (security firm not liable for injuries caused by thief to bystander for failure to prevent flight of thief absent special relationship between the security firm and the bystander); *Connell v. Berland*, 223 A.D. 234, 228 N.Y.S. 20 (1st Dep't 1928) (defendant, who left car unattended with key in the ignition, liable for injuries to young child who started the car)).

eral public could not be based on any analogy to negligent entrustment doctrine. The defendants asserted that while this doctrine might support liability in selling products to children, alcoholics or those suffering from depression, it would not do so in selling to the general public.<sup>51</sup> Negligent entrustment doctrine, explained the defendants, applies only where the intended purchasers fall within a group that "a reasonable person would consider lacking in ordinary prudence."<sup>52</sup> The general public, whose behavior defines the standard of ordinary prudence, cannot as a group lack it. The plaintiffs replied that the defendants' advertising campaign and distribution mechanisms for the Cobray M-11/9 specifically targeted a pool of purchasers likely to engage in criminal activity.<sup>53</sup>

The defendants further argued that even if the court imposed upon them a duty to exercise reasonable care, their marketing practices did not constitute a breach of that duty. In response to the plaintiffs' allegations about advertisements for the Cobray M-11/9, the defendants maintained that none of the ads was false or misleading and none encouraged illegal use.<sup>54</sup> The plaintiffs replied that the defendants' advertising and sales methods encouraged criminal purchasers seeking to avoid licensing restrictions and background checks.<sup>55</sup> These restrictions, argued the plaintiffs, provide evidence of the standard of reasonable care applicable in weapons sales, and the jury could find that in avoiding such restrictions, the defendants failed to exercise reasonable care.

In addition to their arguments addressing duty and breach, the defendants also contended that regardless of the nature of their conduct in marketing the Cobray M-11/9, this conduct did not cause Baz's attack on the plaintiffs. First, Baz stated that he had never seen an advertisement for the Cobray M-11/9, that he had neither purchased it nor any parts for it directly from the defendants, and that he had never heard of the defendants or their company.<sup>56</sup> Second, the defendants asserted that the plaintiffs could not produce evidence concerning how many parts of the gun used

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<sup>51</sup> See discussion of negligent entrustment doctrine *supra* note 7.

<sup>52</sup> Defendants' First Motion to Dismiss at 21 (citing *Sturm, Ruger & Co.*, 916 F.Supp. at 370).

<sup>53</sup> Plaintiffs' First Memorandum at 8.

<sup>54</sup> Defendants' First Motion to Dismiss at 19; Defendants' Second Motion to Dismiss at 12.

<sup>55</sup> Plaintiffs' Second Memorandum at 8-9.

<sup>56</sup> Defendants' Second Motion to Dismiss at 10-11, 18.

by Baz were marketed by the defendants or even that any single part originated with the defendants.<sup>57</sup> The plaintiffs countered by claiming that the defendants bore responsibility for these evidentiary difficulties in establishing causation, and, therefore, the court should shift the burden of proving causation onto the defendants under a theory of market share liability.<sup>58</sup> Lack of serial numbers on the firearm parts, which were essentially fungible with those of other manufacturers, made tracing them back to the defendants nearly impossible.<sup>59</sup> Furthermore, during discovery the plaintiffs learned that all of the defendants' sales records which might have been relevant to the case had been destroyed in a flood and a sewage backup.<sup>60</sup> Thus, argued the plaintiffs, insofar as the defendants were responsible for the lack of evidence relevant to causation and controlled the market in Cobray firearms and parts, the burden of proving causation should shift onto the defendants.<sup>61</sup>

Finally, the defendants argued that their marketing was not a proximate cause of the plaintiffs' injuries, asserting that Baz's attack was an intervening cause that broke the chain of causation.<sup>62</sup> In the defendants' first motion to dismiss, they cited case law in support of the principle that an intervening criminal act is, as a matter of law in New York, a superseding cause.<sup>63</sup> The plaintiffs replied by disputing this principle and arguing that according to New York case law, the foreseeability of the intervening criminal act is a matter of fact for the jury, which determines whether the act is a superseding cause.<sup>64</sup>

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<sup>57</sup> Defendants' Second Motion to Dismiss at 3 & nn.4-5, 18.

<sup>58</sup> Plaintiffs' Second Memorandum at 32-34.

<sup>59</sup> Plaintiffs' Second Memorandum at 38-39.

<sup>60</sup> Telephone conversation with Steven J. Harfenist, counsel for the defendants (June 15, 1998).

<sup>61</sup> Plaintiffs' First Motion at 5, 23-29 (citing *Kush v. City of Buffalo*, 59 N.Y.2d 26,

<sup>62</sup> Defendants' Second Motion to Dismiss at 20; Defendants' First Motion to Dismiss at 12.

<sup>63</sup> Defendants' First Motion to Dismiss at 19-20 (citing *Jantzen v. Leslie Edelman*, 206 A.D.2d 406, 614 N.Y.S.2d 744 (2d Dep't 1994) (sale of a shotgun was not, as a matter of law, proximate cause of subsequent shooting)).

<sup>64</sup> Plaintiffs' First Motion at 5, 23-29 (citing *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 449 N.E.2d 725, 729, 462 N.Y.S.2d 831, 835 (1983)) ("When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs."); *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980) ("Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the inter-

At a hearing on February 19, 1998, Judge Weinstein denied the defendants' second motion to dismiss.<sup>65</sup> Again, despite a request by the defendants, Judge Weinstein refused to issue a written opinion.<sup>66</sup> The defendants, thereupon, petitioned the Second Circuit Court of Appeals for a writ of mandamus seeking to transfer the case to another judge based in part on Judge Weinstein's repeated refusals to specify prior to trial the legal duty that the defendants owed to the plaintiffs.<sup>67</sup> The Second Circuit refused to stay the trial in order to consider the petition.<sup>68</sup>

The trial of *Halberstam v. Daniel* began on March 13, 1998.<sup>69</sup> At trial both parties focused on the issues of causation and breach of duty. First, the plaintiffs produced eye witnesses to the shooting and ballistics experts to support their claim that the bullets that killed Aaron Halberstam and injured Nachum Sosonkin came from the Cobray M-11/9 and not from the other automatic pistol used by Baz in the attack.<sup>70</sup> Second, the plaintiffs presented testimony and documentary evidence to show that the defendants dominated the market in the manufacture and sale of M-11/9 pistols and parts to sustain their allegation that the M-11/9 used by Baz was made up of parts manufactured and sold by the defendants.<sup>71</sup> In addition, they pointed to the defendants' Cobray trademark engraved on several principle parts that, assembled, made up the gun.<sup>72</sup>

Third, the plaintiffs offered a variety of evidence to bolster their contention that the defendants were negligent in the manner in which they marketed Cobray M-11/9 parts kits insofar as it was foreseeable that the weapons would be purchased by individuals likely to engage in criminal activity. They presented the expert

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vening act is a normal or foreseeable consequence of the situation created by the defendant's negligence.").

<sup>65</sup> Transcript of Proceedings before the Hon. Jack B. Weinstein, U.S.D.J., Feb. 19, 1998, 12:00 p.m. at 62 [hereinafter Transcript of Proceedings, Feb. 19, 1998] (on file with the author). The court considered this motion following discovery and treated it procedurally as a motion for summary judgement. Transcript of Proceedings, Feb. 19, 1998 at 5.

<sup>66</sup> Transcript of Proceedings, February 19, 1998 at 64.

<sup>67</sup> Petition for Writ of Mandamus at 2 (on file with the author).

<sup>68</sup> Telephone conversation with Steven Harfenist, counsel for the defendants (June 15, 1998).

<sup>69</sup> Transcript of Trial before the Hon. Jack B. Weinstein, U.S.D.J., and Jury, Mar. 13, 1998, 9:00 a.m. [hereinafter Transcript of Trial] (on file with the author).

<sup>70</sup> Transcript of Trial, Mar. 13, 1998 at 1532-36.

<sup>71</sup> Transcript of Trial, Mar. 13, 1998 at 1562-63, 1573.

<sup>72</sup> Transcript of Trial, Mar. 13, 1998 at 1566-67.

testimony of an academic and several law enforcement professionals to establish that the Cobray M-11/9 was an unusually common weapon in the commission of violent crimes and that all 3,074 of the M-11/9 pistols recovered and traced in crime investigations from 1993 through 1998 had been manufactured by the defendants.<sup>73</sup> The law enforcement professionals also testified that the design of the Cobray M-11/9 made it unsuitable for sporting, hunting, or self-defense.<sup>74</sup> Its primary use, according to an article about the weapon in *Machine Gun News*, was "cleaning out a phone booth or an elevator."<sup>75</sup> The plaintiffs also offered into evidence the ads describing the Cobray M-11/9 as "The Gun that Made the '80s Roar" and touting "the controversial 'Drug Lord' choice of Cobray arms throughout the '80s" with a cartoon of a gangster figure in the corner.<sup>76</sup> The plaintiffs further introduced evidence describing the defendants' sales methods which involved ordering by phone, postal delivery, bargain rates for bulk purchases, no requests for any information other than that pertinent to payment and shipment, and the failure to keep sales records.<sup>77</sup> While federal law requires serial numbers on gun frames, the defendants sold unmarked sheet metal flats that, when folded, would serve as gun frames for their Cobray M-11/9 parts.<sup>78</sup> Moreover, defendants Wayne and Sylvia Daniels both testified that they did not care who purchased their weapons.<sup>79</sup> Finally, the plaintiffs produced testimony from a man formerly involved in the illegal sale of Cobray M-11/9 pistols to individuals and organizations involved in the drug trade. The man described the ease and convenience with which he and a partner had purchased and sold the guns over the course of several years.<sup>80</sup>

In turn, the defendants first presented evidence that the bullets that killed Aaron Halberstam and injured Nachum Sosonkin did not come from a Cobray M-11/9. They introduced a videotaped confession of Baz taken during the police investigation in which he,

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<sup>73</sup> Transcript of Trial, Mar. 13, 1998 at 1543-46. The M-11/9 was banned in late 1994 by the federal government. Transcript of Trial at 1545.

<sup>74</sup> Transcript of Trial, Mar. 13, 1998 at 1542.

<sup>75</sup> Transcript of Trial, Mar. 13, 1998 at 1542-43.

<sup>76</sup> Transcript of Trial, Mar. 13, 1998 at 1584.

<sup>77</sup> Transcript of Trial, Mar. 13, 1998 at 1549-57.

<sup>78</sup> Transcript of Trial, Mar. 13, 1998 at 1560, 1588. These flats did not have, nor were they required under federal regulations to have, serial numbers.

<sup>79</sup> Transcript of Trial, Mar. 13, 1998 at 1557-58, 1584.

<sup>80</sup> Transcript of Trial, Mar. 13, 1998 at 1565.



when asked about the weapons involved in the attack, named two guns, neither of them a Cobray M-11/9.<sup>81</sup> Second, the defendants produced a firearms expert who testified that several principle parts of the M-11/9 which the plaintiffs alleged Baz used in the attack were, in fact, not from a Cobray parts kit similar to the one entered into evidence by the plaintiffs.<sup>82</sup> Furthermore, the defendants offered testimony from Sylvia Daniels that the Cobray trademark was widely counterfeited by other manufacturers.<sup>83</sup>

Third, the defendants offered evidence to refute the plaintiffs' claim that there was anything negligent about their marketing of the Cobray M-11/9. They produced their own statistics showing that an M-11/9 was used in only one-seventh of 1 percent of crimes reported by the Federal Bureau of Investigation ("FBI").<sup>84</sup> A federal law enforcement officer testified that guns recovered in criminal investigations were rarely made from parts kits.<sup>85</sup> The defendants also presented a police officer who testified that he purchased a Cobray M-11/9 for home protection.<sup>86</sup> Moreover, a former assistant director of the Federal Bureau of Alcohol, Tobacco and Firearms ("BATF") testified that none of the Cobray ads constituted criminal solicitation.<sup>87</sup> The defendants insisted that the so-called "gangster" in the ads was really a G-man.<sup>88</sup>

Finally, the defendants introduced evidence to show that Baz's attack on the plaintiffs was not caused by any conduct of the defendants. They submitted an affidavit and a deposition transcript from Baz in which he stated that he had purchased an M-11/9 from someone off the street, that he had never seen an ad for any Cobray product, and that he had never had any business dealings with the defendants personally or by proxy. He further testified that the defendants did not influence him in any way to purchase firearm parts.<sup>89</sup> In their summation, the defendants emphasized that Rashid Baz would have carried out his attack on the plaintiffs even if he

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<sup>81</sup> Transcript of Trial, Mar. 13, 1998 at 1640.

<sup>82</sup> Transcript of Trial, Mar. 13, 1998 at 1623-24.

<sup>83</sup> Transcript of Trial, Mar. 13, 1998 at 1627, 1635.

<sup>84</sup> Transcript of Trial, Mar. 13, 1998 at 1620.

<sup>85</sup> Transcript of Trial, Mar. 13, 1998 at 1632-33.

<sup>86</sup> Transcript of Trial, Mar. 13, 1998 at 1607-09.

<sup>87</sup> Transcript of Trial, Mar. 13, 1998 at 1630.

<sup>88</sup> Transcript of Trial, Mar. 13, 1998 at 1584. The term "G-man" means a government law enforcement official and was a term used in the 1930s to refer to agents of the FBI.

<sup>89</sup> Transcript of Trial, Mar. 13, 1998 at 1641-43.

had never obtained an M-11/9.<sup>90</sup> Holding the defendants liable for the criminal attack of Baz, they argued, would be as unfair as holding liable the manufacturer of the automobile which he was driving at the time.<sup>91</sup>

Prior to closing arguments at trial, the defendants moved for a directed verdict based on their argument that a manufacturer has no duty to protect others from the criminal misuse of its products absent a special custodial relationship between the manufacturer and the injurer or a special protective relationship between the manufacturer and the victim. As the plaintiffs alleged no such relationship, the defendants requested that the judge rule in their favor prior to jury determination of any factual issues.<sup>92</sup> In response, Judge Weinstein acknowledged the lack of any special relationship between the defendants and either Baz or the plaintiffs. Then, in a highly unusual ruling, he insisted on withholding judgment on the necessity of establishing such a relationship until after the jury returned a verdict.<sup>93</sup> The defendants objected to allowing jury consideration prior to a judicial ruling on the threshold issue of duty. Despite this objection, the judge proceeded to charge the jury on the issues of breach, causation and damages.<sup>94</sup> Had Judge Weinstein ruled in favor of the defendants on the issue of duty at any time prior to sending the *Halberstam* case to the jury, he would have been in accord with every state and federal court, including the Second Circuit Court of Appeals, that had ever considered a negligent marketing claim against a firearms manufacturer.<sup>95</sup> His refusal to grant the defendants' motion for a directed verdict marks the first time such a claim has ever been submitted to a jury.

Following six hours of deliberations, the jury returned special verdicts supporting judgment in favor of the defendants.<sup>96</sup> The jury found that the Cobray M-11/9 caused the plaintiffs' injuries, and that the defendants marketed the parts kit which "substantially constituted" the weapon. In response, however, to the question, "Did the defendants' negligence cause Aaron Halberstam's death?" the

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<sup>90</sup> Transcript of Trial, Mar. 13, 1998 at 1649-50.

<sup>91</sup> Transcript of Trial, Mar. 13, 1998 at 1636.

<sup>92</sup> Transcript of Trial, Mar. 25, 1998 at 1462-64.

<sup>93</sup> Transcript of Trial, Mar. 25, 1998 at 1464, 1469, 1474.

<sup>94</sup> Transcript of Trial, Mar. 26, 1998 at 1674-97.

<sup>95</sup> See, e.g., *supra* note 6.

<sup>96</sup> Transcript of Trial, Mar. 26, 1998 at 1697, 1731, 1740.

jury answered "no."<sup>97</sup> The jury responded similarly to the same question regarding Nachum Sosonkin's injuries. Based on conversations with the jurors after the trial, the attorneys for each side agreed that the jury's verdict was driven primarily by a sense that the defendants' marketing did not cause Aaron Halberstam's death or Nachum Sosonkin's injuries.<sup>98</sup> Several jurors expressed a belief that had Baz not obtained a weapon made from the defendants' parts, he would easily have obtained another and carried out the attack. A number of jurors stated their belief that Baz's attack, not the Daniels' marketing, really caused the death of Aaron Halberstam. That is, the defendants' marketing was neither a but-for cause nor a substantial factor in bringing about the plaintiffs' harm.

## II. THREE OBSTACLES TO ESTABLISHING A DUTY IN NEGLIGENT MARKETING CASES AGAINST FIREARMS MANUFACTURERS

In the end, the *Halberstam* plaintiffs lost. By reaching the jury, however, they provided a road map for avoiding dismissal of negligent marketing claims and perhaps even charted a path toward establishing a duty to exercise care in marketing firearms to the general public. Like the *Halberstam* plaintiffs, future travellers on this path will have to overcome three doctrinal obstacles erected by prior case law. The absence of any written judicial opinion in the case makes it especially important to examine these obstacles here.

The first obstacle was presented by the defendants' argument against establishing a duty on the basis of negligent entrustment doctrine. They asserted that negligent entrustment applies only when a product is marketed to children or some other recognizably high-risk group but not when the product is marketed to the general public. Prior to *Halberstam*, courts often employed this argument to justify the dismissal of negligent marketing claims against firearms manufacturers.

This first obstacle was initially erected in the often cited case of *Linton v. Smith & Wesson*.<sup>99</sup> In *Linton*, the plaintiff, having been

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<sup>97</sup> Transcript of Trial, Mar. 27, 1998 at 1740-43.

<sup>98</sup> Telephone conversations with Steven Harfenist, counsel for the defendants (June 15, 1998); Richard Davis, counsel for the plaintiffs (June 16, 1998); Thomas Bar, counsel for the plaintiffs (June 16, 1998).

<sup>99</sup> 469 N.E.2d 339 (Ill. App. Ct. 1984). Many courts have followed *Linton*. See, e.g., *Riordan* at 1295; *Trespalacios v. Valor Corp.*, 486 So. 2d 649, 650-51 (Fla. 1986); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661, 664 (Wash. 1988).

shot by an intoxicated woman, sued the manufacturer of the gun, arguing that the defendant had a "duty to use 'reasonable means to prevent the sale of its handguns to persons who are likely to cause harm to the public.'"<sup>100</sup> In affirming the trial court's dismissal of the plaintiff's claim, an Illinois appellate court held that there existed no Illinois precedent imposing a "duty upon the manufacturer of a non-defective firearm to control the distribution of that product to the general public" beyond the requirements of federal and state statutory regulations, none of which the defendant violated.<sup>101</sup>

The *Linton* court distinguished an earlier Illinois case, *Semenuik v. Chentis*,<sup>102</sup> which, relying on negligent entrustment theory, "found that a retailer had a duty to the plaintiff to use care in selling air rifles to persons whom the retailer knew would allow their use by young children."<sup>103</sup> In distinguishing *Semenuik*, the *Linton* court pointed out that "*Semenuik* dealt only with the liability of the retailer, and did not impose liability upon the manufacturer of the air rifle or upon a remote vendor."<sup>104</sup> Retailers, unlike manufacturers, deal directly with purchasers. Thus, retailers can more effectively identify purchasers who are likely to misuse the weapons they sell. Retailers can also more easily prevent sales to such purchasers or offer additional warnings. By contrast, manufacturers are often too removed from the point of sale to identify high-risk purchasers or to take effective precautions that could prevent sales to them.

The *Linton* court also argued that *Semenuik* imposed "liability based upon the sale of toy weapons to children, a class of persons known to be irresponsible in the use of such products[.]" whereas, the *Linton* plaintiffs sought "liability based upon the manufacture of products intended for distribution to the general public[.]"<sup>105</sup> Children, as opposed to the general public, are a readily identifiable

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<sup>100</sup> *Linton*, 469 N.E.2d at 340.

<sup>101</sup> *Id.*

<sup>102</sup> 117 N.E.2d 883 (Ill. 1954).

<sup>103</sup> *Linton*, 469 N.E.2d at 340. The issue on appeal in *Semenuik* was really proximate cause and not duty. The court, however, in addressing the defendant's claim "that the sale of the air rifle . . . was not the proximate cause of the subsequent injury sustained by the plaintiff," cited authorities on duty and its conclusion that the plaintiff's claim, which stated a cause of action in negligence, implied that the defendant owed a duty. *Semenuik*, 117 N.E.2d at 884.

<sup>104</sup> *Linton*, 469 N.E.2d at 340.

<sup>105</sup> *Id.* The *Linton* court considered the BB gun in question—which was an air rifle as opposed to a firearm—to be a toy weapon primarily intended for the use of children.

group that consists of a greater than average number of individuals likely to misuse weapons. Sales to children are negligent insofar as they give rise to a higher than normal risk of injury. Distribution of weapons to the general public cannot by definition involve such an abnormal risk since it is the general public, itself, which serves as the standard of normal risk.

Furthermore, the *Linton* court pointed out that the level of risk in selling firearms to the general public is reduced significantly through federal and state statutory regulation of firearm possession and transfers.<sup>106</sup> Such regulations prohibit selling firearms to children, drug addicts, mentally incompetent individuals, felons and other groups consisting of a high concentration of persons likely to misuse weapons. The *Linton* court implied that these statutory regulations, which serve to filter out high-risk purchasers much as a common-law duty of care would, make redundant any judicial imposition of a duty.

The *Linton* court thus established three reasons for the inapplicability of negligent marketing doctrine to firearms manufacturers. First, manufacturers have available no effective precautions that might lower the risk of sales to potential criminals. Second, marketing weapons to the general public, who as a group define the standard of reasonable care, cannot entail an unreasonable risk of harm. Third, statutory firearms regulations filter out high-risk purchasers, thereby making gun consumers a low-risk group.

None of these three reasons applies to situations like that presented by the *Halberstam* case. First, the *Halberstam* defendants were both manufacturers and retail sellers of the Cobray M-11/9, and they could have taken precautions against purchases by criminals by using questionnaires, conducting interviews and background checks, maintaining sales records and monitoring registration of the firearm parts by serial number. Second, evidence at trial indicated that the defendants may have had reason to know that purchasers of the Cobray M-11/9 included a higher than average concentration of individuals likely to be engaged in criminal activity. Third, by selling weapons in the form of parts kits, the defendants evaded statutory firearms regulations that restrict distribution and sale.

The second obstacle to establishing a duty of care was reflected in the defendants' argument that the plaintiffs' negligent marketing claim amounted to no more than a design defect claim, which

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<sup>106</sup> *Id.*

required them to allege a defect in the weapon used by Baz. This objection was most clearly articulated by Judge Weinstein, himself, as dictum in *Hamilton v. Accu-Tek*.<sup>107</sup> *Hamilton* was filed shortly before *Halberstam* and, as of the time of this writing, has still not reached trial.<sup>108</sup>

In *Hamilton*, the plaintiffs, representatives of people who were shot and killed by individuals who illegally obtained handguns, filed suit against handgun manufacturers under a mass tort theory. Analogizing handguns and ammunition to pathogens such as asbestos, Agent Orange, the Dalkon Shield and silicone gel breast implants, the plaintiffs sued the defendants for negligently marketing their weapons "in a manner that fostered the growth of a substantial underground market in handguns."<sup>109</sup> This market, the plaintiffs claimed, made guns readily available to individuals who used the guns to inflict widespread harm on innocent victims, creating a major public health problem.<sup>110</sup> In addition, the plaintiffs set forth claims based on design defect, ultrahazardous activity and fraud theories.<sup>111</sup> The defendants, in moving for dismissal of the plaintiffs' claims, argued that they were engaged in the lawful manufacture and sale of non-defective products. Judge Weinstein dismissed the claims based on design defect, ultrahazardous activity and fraud but allowed the plaintiffs to proceed with discovery on the negligent marketing claim.<sup>112</sup> The judge indicated that the court might recognize a duty upon manufacturers to take precautions in the distribution of their weapons to retail firearms dealers, and that the plaintiffs might be able, upon further discovery, to provide evidence of a breach of this duty.<sup>113</sup>

In allowing the *Hamilton* plaintiffs to proceed with their negligent marketing claim, Judge Weinstein distinguished it from claims in two recent cases in which New York state and federal courts had dismissed negligent marketing claims against firearms manufacturers. Both cases, *Forni v. Ferguson*<sup>114</sup> and *McCarthy v. Sturm, Ruger &*

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<sup>107</sup> 935 F. Supp. 1307 (E.D.N.Y. 1996).

<sup>108</sup> The trial has been scheduled for January, 1999.

<sup>109</sup> *Hamilton*, 935 F. Supp. at 1313-4.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1314-5.

<sup>112</sup> *Id.* at 1314.

<sup>113</sup> *Id.* at 1316.

<sup>114</sup> 232 A.D.2d 176, 648 N.Y.S.2d 73 (1st Dep't 1996).

Co.<sup>115</sup> arose out of an assault on a Long Island Railroad commuter train in which plaintiffs were shot by a fellow passenger using a semi-automatic handgun loaded with "Black Talon" bullets which are designed to expand upon impact in order to create a bigger wound. In both cases, the plaintiffs sued under design defect and negligence theories. In *Forni*, where the plaintiffs sued the manufacturer of the handgun, the court rejected both theories, refusing to "impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product."<sup>116</sup> In *McCarthy*, where the plaintiffs sued the manufacturer of the ammunition, the court refused to recognize a duty "not to produce ammunition with the destructive capabilities of the Black Talon bullets."<sup>117</sup>

In accepting the plaintiffs' negligent marketing claim in *Hamilton*, despite rejections of similar negligence claims in *Forni* and *McCarthy*, Judge Weinstein explained that "under the facts of [*Forni* and *McCarthy*, the plaintiffs' negligence claims] really amounted to an alternate pleading of the product liability theory."<sup>118</sup> "The mere act of manufacturing and selling a handgun," he continued, "does not give rise to liability absent a defect in the manufacture or design of the product itself."<sup>119</sup> Thus, the negligence claims in *Forni* and *McCarthy* were rejected for failure to allege a defect in the product.

Judge Weinstein's analysis in *Hamilton* establishes that the negligence claims in *Forni* and *McCarthy* were really product liability claims insofar as they sought to hold the defendants liable for the manufacture and sale of the products in question, just like a claim based on defective design. In *Hamilton*, by contrast, the plaintiffs could argue for a duty to take precautions short of refraining altogether from marketing the defendants' products. In that way they could set forth a negligent marketing claim distinct from a design defect claim. Thus, the *Hamilton* plaintiffs did not need to allege a product defect in order to recover.

While Judge Weinstein's opinion in *Hamilton* clarified the second obstacle to establishing a duty under negligent marketing

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<sup>115</sup> 916 F. Supp. 366 (S.D.N.Y. 1996).

<sup>116</sup> *Forni*, 232 A.D.2d at 176-77, 648 N.Y.S.2d at 74. The *Forni* court affirmed the trial court's dismissal of the plaintiffs' design defect claim and affirmed the trial court's denial of the plaintiffs' request to amend their complaint to add a negligence claim.

<sup>117</sup> *Sturm, Ruger & Co.*, 916 F. Supp. at 369 (S.D.N.Y. 1996).

<sup>118</sup> *Hamilton*, 935 F. Supp. at 1323; cf. *McCarthy v. Olin Corp.*, 119 F.3d 148, 163 n.13 (2d Cir. 1997) (Calabresi, J., dissenting & rejecting this idea).

<sup>119</sup> *Hamilton*, 935 F. Supp. at 1323.

theory (i.e. the need to prove a defect), it also indicated a way to avoid this obstacle by alleging a duty of care short of ceasing production. The *Halberstam* plaintiffs alleged a duty to adopt reasonable restrictions on marketing which did not imply a judicial ban on firearms. Thus, they avoided the need to prove a defect in the properly functioning Cobray M-11/9. Future plaintiffs in cases where discrete features of a defendant-manufacturer's marketing strategy are unreasonable could formulate a similarly limited duty.

The third obstacle to establishing a duty in negligent marketing claims against firearms manufacturers was set forth in the defendants' argument that a manufacturer has no duty to protect others from the criminal misuse of its products absent a special custodial relationship between the manufacturer and the injurer or a special protective relationship between the manufacturer and the victim.<sup>120</sup> Custodial relationships include those between parents and their children and have been expanded to include those between psychiatrists and their patients.<sup>121</sup> Protective relationships include those between landlords and their tenants or school teachers and their pupils.<sup>122</sup>

There are two ways to address this obstacle. First, as was the case in *Halberstam*, plaintiffs may deny the need to establish a special relationship where the defendant-manufacturer's own conduct created or increased the risk of criminal misconduct. Under this approach, plaintiffs could argue that they do not seek to hold defendant-manufacturers liable for the conduct of third party criminals but only for harms proximately caused by supplying easy access to weapons tailored to criminal activity and encouragement to use them accordingly.

Second, plaintiffs may allege that a manufacturer has a special relationship with the public that would support a duty to take reasonable precautions against criminal misuse of its products. In his scholarly dissent in *McCarthy*, Judge Guido Calabresi pointed out

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<sup>120</sup> See W. PAGE KEETON ET AL., *supra* note 13, § 33, at 201-03.

<sup>121</sup> See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (therapist has duty to warn third parties of threats against them by patient); *Estate of Mathes v. Ireland*, 419 N.E.2d 782 (Ind. Ct. App. 1981) (duty of parents and grandparents to protect third parties from insanely violent person).

<sup>122</sup> See, e.g., *Bell v. Board of Ed. of the City of N.Y.*, 90 N.Y.2d 944, 687 N.E.2d 1325, 665 N.Y.S.2d 42 (1997) (duty of school to protect students from assault); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980) (duty of landowner to protect visitors from criminal acts of third parties).



that products liability doctrine imposes liability on manufacturers for injuries to innocent bystanders that result from product misuse by a negligent purchaser, and that such liability rests on a duty that runs from the manufacturer to the bystander.<sup>123</sup> If the relationship between a manufacturer and a bystander supports a duty under products liability doctrine, it might support a duty of care in negligence. Future plaintiffs might argue that the introduction of firearms into the stream of commerce should carry with it some special responsibility to the public.

### III. REMAINING DIFFICULTIES AND PUBLIC POLICY ISSUES

The *Halberstam* case helps define the challenges faced by future plaintiffs bringing negligent marketing claims against firearms manufacturers, and it raises several important public policy questions about the regulation of legal markets that provide products frequently used in criminal activity. Future plaintiffs will have to substantiate the alleged causal connection between the marketing of firearms and injuries resulting from violent crime. They will also have to articulate and justify a duty to exercise care in marketing that extends beyond the specific and somewhat idiosyncratic facts of the *Halberstam* case. From a public policy perspective, the desirability of future litigation rests upon clarification of who ought to be responsible for the role that legal firearms markets play in facilitating criminal activity and whether the tort system is an appropriate institution for addressing this question.

The alleged causal connection between marketing firearms and violent crime remains largely unsubstantiated. Common arguments based on concurrent increases in firearm sales and violent crime in the United States rely on a great deal of speculation.<sup>124</sup> In individual cases, the promotion, distribution or sale of any particular weapon is almost never a but-for cause of a crime committed with it, given the ready availability of other weapons in stores and on the

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<sup>123</sup> *Olin Corp.*, 119 F.3d at 167.

<sup>124</sup> See Randy Barnett & Don Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1247-1251 (1996) (criticizing the widespread claim that more guns produce more crime); cf. Markus Boser, *Go Ahead, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 319 (1992); Stephen Teret & Garen Wintemute, *Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility*, 6 HAMLIN L. REV. 341, 347 (1983).

street. Juries are likely to find, as did the jury in the *Halberstam* case, that had the criminal not purchased the particular gun in question, he would have easily obtained another weapon with which to commit the crime.

In exceptional cases, *selling* firearms may be considered a substantial factor in bringing about injuries resulting from criminal misuse of a gun, such as when a shooting occurs shortly following a purchase.<sup>125</sup> *Marketing* firearms, however, is less likely to be viewed as a substantial factor in bringing about injuries resulting from criminal misuse. The effect of a manufacturer's promotion and distribution on a criminal purchaser is never as closely linked to a gunshot injury as is the retailer's sale when it is followed shortly by a shooting. Furthermore, empirical evidence concerning the effects of advertising on criminal behavior is notoriously controversial.<sup>126</sup> For these reasons, the *Halberstam* plaintiffs stressed that the defendants, themselves, sold the Cobray M-11/9, and the plaintiffs emphasized those features of distribution that essentially constituted sales practices. In this regard, the *Halberstam* case relied more on allegations of negligent sale than negligent marketing. Even so, the *Halberstam* plaintiffs failed to convince the jury on the issue of causation.

Putting aside for a moment the difficulties of establishing causation, the issue of duty requires further clarification if *Halberstam* is to provide guidance to future plaintiffs. The *Halberstam* plaintiffs claimed that firearms manufacturers owe a duty to the public to exercise care in marketing their weapons in order to prevent purchase by individuals whom they have reason to believe are likely to be engaged in criminal activity. Sometimes, the plaintiffs argued that the defendants breached this duty by actively marketing to criminals through their advertising and promotional schemes.<sup>127</sup> At other times, the plaintiffs asserted that the defendants breached this duty by failing to prevent purchase by criminals, supporting this assertion with the Daniels' testimony that they didn't care who bought the

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<sup>125</sup> See, e.g., *Cullum & Boren-McCain Mall, Inc. v. Peacock*, 592 S.W.2d 442 (Ark. 1980); *Angell v. F. Avazini Lumber Co.*, 363 So. 2d 571 (Fla. 1978).

<sup>126</sup> See Clay Calvert, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 Sw. U. L. Rev. 401 (1998).

<sup>127</sup> See *supra* notes 26-30, 76-78, and accompanying text; see also Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 806 (1995).

Cobray M-11/9.<sup>128</sup> If future plaintiffs allege that a defendant-manufacturer's breach of duty consists of actively marketing to criminals, then this will ease some of the difficulty of establishing causation. If plaintiffs can somehow prove that a defendant's marketing efforts create a new market among individuals known to be likely to engage in criminal activity who, but for the defendant's efforts, would be less likely to purchase a weapon, or at least a weapon with the firepower of the defendant's, then plaintiffs may be able to convince a jury on the issues of breach and causation. Perhaps it would even be enough to allege that the defendants merely play an essential role in sustaining such a market. Following *Halberstam*, plaintiffs will have to allege that defendants could avoid being negligent by taking precautions short of refraining altogether from selling the weapon.

Clearly, the problem with such an approach is its inapplicability to the facts of most, if not all, marketing efforts by firearms manufacturers. It will be very difficult to prove—widespread accusations notwithstanding—that firearms manufacturers actively seek to create or sustain markets for their products among criminals.<sup>129</sup> Even more difficult to prove will be that such marketing efforts are a substantial factor in criminals' ability and desire to purchase comparable weapons. Indeed, the more manufacturers there are participating in criminal markets, the less likely are plaintiffs' chances of proving that any one manufacturer played a substantial role in a particular purchase. This difficulty has led the *Hamilton* plaintiffs, as well as some cities, to file lawsuits against a large number of firearms manufacturers, alleging that collectively they created and sustained the market for firearms among criminals.<sup>130</sup>

Future plaintiffs might instead allege that a defendant-manufacturer's breach of duty consists of a failure to prevent purchase of its weapons by individuals whom it has reason to know

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<sup>128</sup> See *supra* note 79; see also Joshua M. Horowitz, *Kelley v. R.G. Indus.: A Clause of Action for Assault Weapons*, 15 U. DAYTON L. REV. 125, 134-35 (1989).

<sup>129</sup> See, e.g., Timothy Bunman, *A Products Liability Response to Gun Control Litigation*, 19 SETON HALL LEGIS. J. 715, 721-22 (1995); David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMPLE L. REV. 1, 5-12 (1998); Morel, *supra* note 2, at 283-84; Siegel, *Liability of Manufacturers for the Negligent Design and Distribution of Handguns*, 6 HAMLINE L. REV. 322-23 (1983). For a response to these accusations see Donald Santarelli & Nicholas Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 476-478 (1983).

<sup>130</sup> See Pam Belluck, *Wearry of Gun Violence, Chicago Considers Suit*, N.Y. TIMES, June 12, 1998, at A12; Kairys, *supra* note 129, at 5-12.

are likely to engage in criminal activity. Plaintiffs are likely to find substantial evidence to prove that many firearms manufacturers have reason to know that their weapons are especially popular among individuals likely to engage in criminal activity, and that they have taken no measures to reduce purchase by such individuals.<sup>131</sup> Rather than arguing that the defendant's marketing creates or sustains a criminal market for its products, plaintiffs, under this approach, merely allege that the defendant exploits an existing criminal market for weapons similar to those it sells. The defendant engages in legal profiteering off of the widespread criminal activity of others. This approach to breach of duty, however, presupposes a preexisting consumer demand among criminals for firearms, making causation difficult to prove for the reasons mentioned above. Given the widespread availability of firearms, if a particular criminal in search of a gun did not purchase the defendant's particular weapon, he could easily have purchased another.

Whether future plaintiffs allege that defendant-manufacturers creates and sustains criminal markets for legal weapons or merely take advantage of them, negligent marketing claims raise a more general question of public policy: who is responsible for the role, if any, that legal firearms markets play in facilitating criminal activity? Even if one believes that legal firearms markets, by making weapons widely and easily obtainable for both legitimate and criminal use, play some role in facilitating criminal activity, there is still much room for disagreement about who is responsible for these markets. The actions of countless agents constitute and maintain firearms markets: manufacturers, wholesale distributors, retail sellers, advertisers, consumers, and regulators, as well as others who support the activities of these agents, such as designers, lawyers, advertising firms, and local government functionaries. The web of transactions and supporting activities that constitute a market is very broad and highly complex.

There are two general approaches in seeking an answer to such question. One might begin with a macro perspective on how firearms markets are created and sustained, and how they are related to crime.<sup>132</sup> One could examine statistics concerning manufacturing output, resources dedicated to promotion, distribution practices,

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<sup>131</sup> See, Kairys, *supra* note 129, at 6-8.

<sup>132</sup> For an excellent example of this approach, see Teret & Wintemute, *supra* note 124.

sales levels, consumption patterns and crime rates. One might then seek to identify statistical correlations between a particular group's activity, such as advertising, and particular social phenomena, such as the level of consumer demand or the rate of violent crime. One might then suggest reasons for the correlations, for example, that advertising by manufacturers creates consumer demand for firearms, always controlling for other factors which might otherwise account for the correlation. Approaching questions of public policy from this macro approach has traditionally been the province of legislatures due to the resources required to gather the information and the expertise necessary to analyze and debate it.

Alternatively, one might begin with a micro perspective by examining individual cases in great detail in order to understand the interactions of particular participants within the contexts of firearm production, sale and criminal misuse. One could investigate the promotional activities of a firearms manufacturer with regard to a particular weapon and the effect of those activities on the decisions of individual consumers to purchase and use that weapon. After studying several cases, one might begin to generalize in an effort to provide a more comprehensive account of how the activities of firearms manufacturers affect criminal markets for the products they make. This micro approach has traditionally been the province of courts, which are especially well suited to undertake the detailed examination of individual cases and filter out some of the bias that often accompanies such a process through the rules of procedure and evidence.

The process of addressing the question of who is responsible for the role of legal firearms markets in facilitating criminal activity will benefit by employing both a macro and a micro approach. Both legislatures and courts have a place in determining an answer to this question. Further statistical evidence and impartial analysis is needed and so is a larger collection of individual case studies. The impact of gun violence on life in our society will ensure that legislatures continue to study the relation between firearms markets and crime and will continue to provide statutory regulations in order to place responsibility for preventing the problem where it belongs. Tort litigation like the *Halberstam* case will continue to provide detailed examinations of these relations as the courts seek to determine liability for the tragic results of the criminal misuse of firearms.

## CONCLUSION

Courts have consistently dismissed tort claims against firearms manufacturers for injuries resulting from crimes committed with the weapons that they sell. Yet, despite bleak prospects for success, crime victims continue to bring such claims. The negligent marketing claim in *Halberstam v. S.W. Daniel, Inc.*, which survived dismissal by the judge only to be subsequently rejected by the jury, signals the uncertain future of this kind of litigation. On the one hand, the *Halberstam* case offers guidance to future plaintiffs about how best to articulate a duty of care owed by firearms manufacturers to the general public in marketing weapons. On the other hand, the case provides a warning to future plaintiffs not to rely on highly speculative causal arguments linking firearms manufacturers to violent crime. Only further litigation will determine whether future claims against firearms manufacturers hit their target or end up being merely another shot in the dark.

