



---

Volume 103 | Issue 1

Article 6

---

September 2000

# Hamilton v. Accu-Tek: Collective Liability for Handgun Manufacturers in the Criminal Misuse of Handguns

Colin K. Kelly

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Criminal Law Commons](#), and the [Marketing Law Commons](#)

---

## Recommended Citation

Colin K. Kelly, *Hamilton v. Accu-Tek: Collective Liability for Handgun Manufacturers in the Criminal Misuse of Handguns*, 103 W. Va. L. Rev. (2000).

Available at: <https://researchrepository.wvu.edu/wvlr/vol103/iss1/6>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

# **HAMILTON V. ACCU-TEK: COLLECTIVE LIABILITY FOR HANDGUN MANUFACTURERS IN THE CRIMINAL MISUSE OF HANDGUNS**

---

I.	INTRODUCTION .....	81
II.	THE CONTEXT OF <i>HAMILTON V. ACCU-TEK</i> .....	83
III.	COMMON TORT CLAIMS AGAINST HANDGUN MANUFACTURERS .....	85
	A. <i>The "Ultrahazardous Activity" Doctrine</i> .....	86
	B. <i>The "Defects" in Product Liability Applicability</i> .....	87
IV.	A LANDMARK APPLICATION OF THE NEGLIGENT MARKETING AND DISTRIBUTION DOCTRINE .....	90
	A. <i>A Once Impossible Duty: Guarding Against Criminal Misuse</i> .....	91
	B. <i>The Standard of Care for Marketing and Distributing Handguns</i> .....	93
	C. <i>Transcending Causation: A Public Policy Lesson From The Tobacco Industry</i> .....	95
	D. <i>The Imposition of Market Share Liability</i> .....	97
V.	THE FUTURE OF MARKET SHARE LIABILITY FOR THE HANDGUN INDUSTRY: LIABILITY WITHOUT A SMOKING GUN .....	100
VI.	CONCLUSION .....	101

## I. INTRODUCTION

Since the early 1990s, over a dozen people have filed lawsuits against handgun manufacturers for their role in making handguns widely available for criminal misuse.<sup>1</sup> Prior to February 1999, however, no person had ever been able to successfully recover monetary damages from a handgun manufacturer for the criminal misuse of a handgun.<sup>2</sup> On February 12, 1999, a federal jury in *Hamilton v. Accu-Tek*<sup>3</sup> found three handgun manufacturers collectively liable for the near fatal shooting of Stephen Fox, a sixteen-year-old boy from Queens, New York.<sup>4</sup> Because

---

<sup>1</sup> See generally Timothy Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearm Manufacturers*, 64 BROOK. L. REV. 681 (1998).

<sup>2</sup> See Bob VanVoris, *Weinstein Does it Again: The Maverick Federal Judge Opens the Door in a Novel Handgun Lawsuit*, NAT'L L. J., Feb. 15, 1999, at A1.

<sup>3</sup> 62 F. Supp.2d 802 (E.D.N.Y. 1999).

<sup>4</sup> See *id.* at 808. The jury's verdict was very specific. The jury found fifteen handgun manufacturers negligent and found that nine of those proximately caused injury to one or more of the plaintiffs. No damages were awarded to six of the seven plaintiffs. Interestingly, two plaintiffs were not

Stephen Fox could not link his injuries to any specific .25 caliber handgun manufacturer, Judge Jack Weinstein allowed the jury to apportion liability according to each manufacturers' share of the national .25 caliber handgun market.<sup>5</sup> The federal jury in *Hamilton* found three handgun manufacturers collectively liable for failing to "exercise reasonable care" in their marketing and distribution practices and for failing to take reasonable steps to guard against the criminal misuse of their .25 caliber handgun products.<sup>6</sup> On June 3, 1999, Judge Weinstein issued a one hundred and thirteen page opinion that upheld the jury's findings of fact and firmly supported the application of market share liability against the three negligent handgun manufacturers.<sup>7</sup> *Hamilton* was the first case in American jurisprudence to impose an affirmative duty upon handgun manufacturers to market and distribute handguns in a manner that prevents future criminal misuse.<sup>8</sup>

Part II of this note traces the complex procedural history of the *Hamilton* case from its inception to its final culmination into a \$4 million jury verdict against three handgun manufacturers.<sup>9</sup> Part III outlines the history behind the most commonly asserted claims against handgun manufacturers. Next, Part IV analyzes how the plaintiffs in *Hamilton* were able to hold the handgun industry liable for the criminal acts of third parties under a negligent marketing and distribution theory and examines how the *Hamilton* case has plowed new ground for negligent marketing and distribution claims against handgun manufacturers. Finally, Part V outlines how Judge Weinstein's approval, in *Hamilton*, of the collective liability theory will likely limit its overall applicability outside the state of New York and the United States Court of Appeals for the Second Circuit.<sup>10</sup>

---

awarded any damages even though the jury found both negligence and proximate cause against six defendants. Stephen Fox was the only plaintiff to recover damages. *See id.* at 811-12.

<sup>5</sup> *See id.* at 837. Police, never recovered the .25 caliber handgun that was used to shoot one gunshot victim, Stephen Fox. All police found at the scene was a spent .25 caliber shell casing. *See id.*

<sup>6</sup> *See Hamilton*, 62 F. Supp.2d at 832-33. The following manufacturers were held liable according to their respective share of the .25 caliber handgun market: American Arms, Inc. (.23% liability), Beretta U.S.A. Corp. (6.03% liability), and Taurus International Manufacturing, Inc. (6.8% liability). *See id.* at 808.

<sup>7</sup> *See id.* at 848.

<sup>8</sup> *See Lisa Gelhaus, Brooklyn Jury Adds Momentum to Anti-Gun Litigation*, TRIAL MAG., April 1, 1999, available in 1999 WL 17784097; *see also Mark Hamblett, Verdict Against Handgun Manufacturers Upheld*, N. Y. L. J., May 27, 1999, at 2.

<sup>9</sup> *See Hamilton*, 62 F. Supp.2d at 811. Although the jury awarded \$4 million in total damages to Stephen Fox and his family, Judge Weinstein reduced this amount after trial to reflect each of the three negligent manufacturers market share (.23% for American Arms, 6.03% for Beretta U.S.A., and 6.8% for Taurus International). The total amount recovered was \$522,400. *See id.* at 848.

<sup>10</sup> *See generally David Kairys, Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1 (1998). As of September 30, 2000, twenty-nine cities and municipal governments had filed suit against handgun manufacturers seeking compensation for the costs associated with gun violence. *See Harriet Chang and Kevin Fagan, Gunmakers Can Be Sued By Victims: State Court of Appeal Rules in 101 California Street Massacre Case*, S.F. CHRON., Sept. 30, 2000, at A1.

II. THE CONTEXT OF *HAMILTON V. ACCU-TEK*

Freddie Hamilton and Katina Johnstone were the representatives of children who were shot with illegally obtained handguns in 1993.<sup>11</sup> In January 1995, Ms. Hamilton and Ms. Johnstone filed a civil action against fifty-two handgun manufacturers in the United States District Court for the Eastern District of New York in an attempt to recover civil damages for the crimes committed against their loved ones.<sup>12</sup> In April 1996, six additional plaintiffs were joined in the action and numerous defendants were summarily dismissed from the case.<sup>13</sup> The remaining seven plaintiffs in *Hamilton* levied a total of seven causes of action in their original complaint.<sup>14</sup> The first four causes of action against the handgun manufacturers “[sought] to hold defendants liable for negligence on the theory that [the] defendants . . . market handguns in a manner that fostered the growth of a substantial underground market in handguns.”<sup>15</sup> The plaintiffs claimed that “[t]he existence of this illicit gun market . . . enable[d] youths to buy handguns easily,” thereby proximately causing the acts of handgun-related violence.<sup>16</sup> The plaintiffs’ last set of claims sought to hold the defendants strictly liable under both ultrahazardous liability and products liability laws for failing to use anti-theft devices that could have prevented the criminal misuse of their products.<sup>17</sup>

In August 1996, Judge Weinstein dismissed the plaintiffs’ ultrahazardous activity and products liability claims but denied the defendants’ motion for summary judgment on the remaining negligence claims.<sup>18</sup> With only a limited amount of discovery on the defendants’ marketing and distribution practices, Judge Jack Weinstein felt that the plaintiffs’ negligent marketing and distribution theory

---

<sup>11</sup> See *Hamilton v. Accu-Tek*, 935 F.Supp. 1307, 1313 (E.D.N.Y. 1996). Freddie Hamilton is the mother of Njuzi Ray who was shot and killed in 1993 with an unidentified .25 caliber handgun. Katina Johnstone is the widow of David Johnstone who was also killed in 1993 with an unidentified .25 caliber handgun. *Id.* at 1314. Mrs. Johnstone’s case was later transferred to a federal court in California prior to trial under New York choice of law jurisprudence. Although Mrs. Johnstone’s husband was a New York domiciliary, he was shot while vacationing in San Francisco. See *Hamilton v. Accu-Tek*, 47 F. Supp.2d 330, 335 (E.D.N.Y. 1999).

<sup>12</sup> See *id.* at 1315.

<sup>13</sup> See *Hamilton*, 62 F. Supp.2d at 808-11. Plaintiffs Diane Zaretsky, Koichi Sunada, Andrea Slade-Lewis, Veronica Trott, and Maria Santana were all mothers of teenage sons who were shot and killed in New York City by criminals who used handguns. Gail Fox represented her severely wounded son, Stephen Fox, who was shot with an unidentified .25 caliber handgun. Just prior to trial, Stephen Fox, substituted himself as a plaintiff because he had reached the legal age to sue in New York State. Mrs. Fox remained a party to the suit and was successful in recovering damages for her son’s nursing care. See *id.* at 809.

<sup>14</sup> See *Hamilton*, 935 F. Supp. at 1314. Basically, the plaintiffs’ claims fell into three basic areas of law: negligence, ultrahazardous activity liability, and products liability. See *id.* at 1314-15.

<sup>15</sup> *Id.* at 1314.

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* at 1314-15.

<sup>18</sup> See *Hamilton*, 935 F. Supp. at 1332.

should be submitted to the jury.<sup>19</sup> He commented that it was quite possible that the “plaintiffs [would] be able to show that a substantial cause for the killings that are at the heart of this suit is the operation of a large-scale underground [handgun] market.”<sup>20</sup>

The *Hamilton* case finally went to trial in January 1998. After an arduous four-week trial, the jury found that fifteen of twenty-five defendants marketed and distributed handguns negligently.<sup>21</sup> Although nine defendants were found negligent, the jury assessed damages against only three handgun manufacturers: American Arms, Inc., Beretta U.S.A. Corp., and Taurus International Manufacturing, Inc.<sup>22</sup> Ironically, the jury did not award any damages to the two plaintiffs who had initiated the *Hamilton* civil action and only awarded damages to Stephen Fox and his family.<sup>23</sup> Stephen Fox and his family recovered a total of \$522,400 in damages from the three handgun manufacturing companies.<sup>24</sup>

Unbelievably, the *Hamilton* plaintiffs were able to prove that “industry knowledge of widespread trafficking in new handguns, heavy movement of guns from ‘weak law’ to ‘strong law’ states, and risks associated with criminals’ easy access to these dangerous instruments” warranted the imposition of collective liability on the three defendants.<sup>25</sup> The jury agreed with the plaintiffs’ fundamental claim that handgun manufacturers’ “indiscriminate marketing and distribution practices generated an underground market in handguns, providing youths and violent criminals . . . with easy access to [handguns].”<sup>26</sup> The imposition of collective liability permitted the judge to apportion each negligent handgun manufacturers’ liability according to its approximate national share of the .25

<sup>19</sup> See *id.* at 1316. Judge Weinstein was impressed with the inference that there may have been a prevalent understanding within the firearms industry on the precautions available to reduce the sale of handguns to criminals in urban areas. See *id.*

<sup>20</sup> *Id.* at 1330.

<sup>21</sup> See *Hamilton v. Accu-Tek*, 62 F. Supp.2d 808 (E.D.N.Y. 1999).

<sup>22</sup> See *Hamilton*, 62 F. Supp.2d at 811. Bob VanVorhis criticized the jury’s verdict in *Hamilton* as being suspiciously confusing. See Bob VanVorhis, *Lawyers Debate Who Won Gun Suit: Contested Result Makes it Hard for Others to Figure What Verdict Means for Them*, NAT’L. L. J., Mar. 1, 1999, at A6.

<sup>23</sup> See *Hamilton*, 62 F. Supp.2d at 811.

<sup>24</sup> See *Hamilton*, 62 F. Supp.2d at 848.

<sup>25</sup> *Id.* at 831. The jury was instructed on the issue of collective liability as follows: If you find a defendant is responsible for the injury of any plaintiff, that defendant may be liable in an amount measured by its share of the national market for handguns. By national market share, I mean production in this country less exports, plus imports. There are three possible situations as to market share: First, it is not proven by any party that any particular manufacturer . . . manufactured the handgun in question. Second, that a particular manufacturer is proven by any party to have manufactured the handgun in question. And third, that it is proven by any party that only a limited number of manufacturers could have manufactured the handgun in question.

*Id.* at 849.

<sup>26</sup> *Id.* at 808.

caliber handgun market.<sup>27</sup>

Immediately following the trial, the remaining defendants moved for judgment as a matter of law under Federal Civil Procedure Rule 50(b), stating that: 1) they owed no legally established duty to the plaintiffs for the criminal acts of a third party; 2) the evidence was insufficient to establish that the defendants were negligent or that any negligence was a proximate cause of Stephen Fox's injuries; and 3) that market share liability was inapplicable to the plaintiffs' case.<sup>28</sup> Judge Weinstein examined each of these claims in depth and published a landmark opinion supporting the plaintiffs' negligent marketing and distribution claims and the imposition of market share liability on American Arms, Beretta, and Taurus Manufacturing.<sup>29</sup> Although some observers thought that the Second Circuit Court of Appeals might overturn Weinstein's opinion, on August 16, 2000, the Second Circuit refused to do so.<sup>30</sup> Instead, the Second Circuit certified to the New York Court of Appeals the controversial issue of whether handgun manufacturers owe a duty of care to prevent the criminal misuse of handguns.<sup>31</sup>

### III. COMMON TORT CLAIMS AGAINST HANDGUN MANUFACTURERS

Historically, plaintiffs have had a very solid foundation of case law supporting handgun manufacturer liability for *accidental* handgun injuries.<sup>32</sup> When a handgun manufacturer is found to have produced a "defective" handgun, a well-settled body of product liability law provides that the manufacturer can be held strictly liable for any injuries that result from such a defect.<sup>33</sup> Unfortunately, the law regarding a handgun manufacturer's liability for the criminal and intentional misuse of its products has never been this simple.

Plaintiffs have traditionally sued gun manufacturers for criminally-inflicted injuries under three basic theories of liability: (1) that handgun distribution and marketing is an "abnormally dangerous" activity that triggers strict liability for criminal misuse,<sup>34</sup> (2) that handguns are defective products because they can be

<sup>27</sup> See *id.* at 811-12. See also *supra* note 6 and accompanying text.

<sup>28</sup> See *id.* at 817-18.

<sup>29</sup> See *id.* at 848.

<sup>30</sup> See *Hamilton v. Beretta U.S.A. Corp.*, 2000 WL 1160699, at \*1 (2d Cir. Aug. 16, 2000).

<sup>31</sup> See *id.* at \*2.

<sup>32</sup> See, e.g., *Gootee v. Colt Indus.*, 712 F.2d 1057 (6th Cir. 1981) (holding that handgun manufacturer was liable for violating implied warranty of fitness in an accidental shooting incident); *but see*, e.g., *Milbrand v. Smith & Wesson*, No. 96-CV-0806E (SC), 1998 WL 864885, at \*3 (W.D.N.Y. Dec. 1, 1998) (gun manufacturer found not liable for any "product defect" when a revolver fell off a barroom shelf and discharged).

<sup>33</sup> See Ted Copetas, *Handguns Without Child Safety Devices-Defective in Design*, 16 J.L. & COM. 171, 175 (1996) (citing 79 AM. JUR. 2D, *Weapons and Firearms* § 42 (1975)).

<sup>34</sup> See Matthew Steffy, *Manufacturers' or Marketers' Liability for Criminal Use of Saturday Night Specials: A New Common Law Approach—Kelley v. R.G. Industries*, 497 A.2d 1143, (Md. 1985), 14 FLA. ST.

easily sold and used to commit acts of violence,<sup>35</sup> and (3) that handgun manufacturers' negligent marketing and distribution practices make it easy for criminals to obtain illegal handguns.<sup>36</sup>

#### A. The "Ultrahazardous Activity" Doctrine

The ultrahazardous activity doctrine originated from England in the famous nineteenth century case *Rylands v. Fletcher*.<sup>37</sup> The *Rylands* court held that "a defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained."<sup>38</sup> Most courts, however, including the Western District of New York, have adopted the standard illuminated in the Restatement (Second) of Torts Section 519 that provides:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm . . . (2) This strict liability is limited to the kinds of harm, the possibility of which makes the activity abnormally dangerous.<sup>39</sup>

The idea that the marketing and distribution of handguns is ultrahazardous is premised upon two extremely flawed theories: (1) that the distribution and marketing, rather than the *use*, of handguns is an abnormally dangerous activity, and (2) that the potential risk of criminal handgun misuse outweighs any value that handguns may have in the community.<sup>40</sup> Although many courts would agree that a

U. L. REV. 149, 151 (1986). See also RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1966). For a more in depth exposition on the legal history and elements of strict liability see Paul R. Bonney, *Manufacturer's Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437, 1438 (1985).

<sup>35</sup> See H. Todd Iveson, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771, 780-81 (1983).

<sup>36</sup> See *id.* at 771-72.

<sup>37</sup> 159 Eng. Rep. 737 (1865), rev'd L.R. 1 Ex. 265 (1866), *aff'd as Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

<sup>38</sup> Andrew O. Smith, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 381 (1987)(paraphrasing the holding of *Rylands*).

<sup>39</sup> RESTATEMENT (SECOND) OF TORTS § 519 (1966). The Restatement (Second) of Torts § 520 (1966) outlines specific factors that courts should take into account when determining whether handgun distribution is an "abnormally dangerous activity" such as:

The existence of a high degree of risk of some harm to the person, land or chattels of others; the likelihood that the harm that results from it will be great; the extent to which the activity is not a matter of common usage; the inappropriateness of the activity to the place where it is carried on; and the extent to which its value to the community is outweighed by its dangerous attributes.

See *id.*

<sup>40</sup> Andrew J. McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*. 19 SETON HALL LEGIS. J. 777, 788 (1995).

handgun could present a “tremendously high risk of great harm,” no court has ever held that the distribution or marketing of handguns is in itself an “abnormally risky activity.”<sup>41</sup> The Fifth Circuit Court of Appeals opinion in *Perkins v. F.I.E. Corp.*<sup>42</sup> is a quintessential illustration of the flaws in the ultrahazardous theory. In *Perkins*, the Fifth Circuit flatly refused to apply ultrahazardous liability law in criminal misuse cases because the “marketing of a handgun, as distinguished from its use, is not an abnormally dangerous activity.”<sup>43</sup>

Another important tenet of the historical application of the ultrahazardous activity doctrine is that it has only been applied to abnormal or ultrahazardous uses of real property.<sup>44</sup> The fact that no court, including *Hamilton*, has ever extended the ultrahazardous doctrine to non-land activities compounds the already inherent problems of the ultrahazardous liability doctrine in criminal misuse cases.<sup>45</sup> Although Judge Weinstein recognized that the marketing and distribution of handguns could be considered a very broad form of “conduct,” he opined that neither could be considered an “activity” within the meaning of the ultrahazardous activity doctrine.<sup>46</sup> Despite Judge Weinstein’s strong rebuke of all ultrahazardous activity claims in *Hamilton*, plaintiffs in other cases continue to vigorously pursue ultrahazardous liability claims against handgun manufacturers.<sup>47</sup>

### B. *The “Defects” in Product Liability Applicability*

In a defective products suit, a plaintiff must prove that “the product in question was defective so as to render it unreasonably dangerous . . . beyond that

<sup>41</sup> See *Merrill v. Navegar, Inc.*, 89 Cal. Rptr.2d 146, 191 (1999). The court noted that most “[a]merican courts have taken the position that the distribution or sale of a firearm is as safe as any other mechanical device” and that “[e]very decision in common law jurisdictions . . . has held that the manufacture and sale of handguns to the general public does not constitute an ultrahazardous activity.” (internal citations omitted).

<sup>42</sup> 762 F.2d 1250 (5th Cir. 1985) (*Perkins* sued the handgun manufacturer of a .25 caliber handgun that was used to shoot him during a bar fight in Louisiana).

<sup>43</sup> *Id.* at 1265 n.43 (citing the language of Comment (d) to the RESTATEMENT (SECOND) OF TORTS § 519 (1966) that states “liability arises out of the abnormal danger of the activity itself and the risk that it creates, of harm to those in the vicinity”).

<sup>44</sup> See *Smith*, *supra* note 38, at 382. Examples of strict liability for ultrahazardous uses of land include roadway blasting, the use of atomic energy, the manufacture and storage of explosives, the operation of oil and gas wells, the operation of high voltage power lines, and the use of large storage tanks for flammable materials. *Id.*

<sup>45</sup> See, e.g., *Copier v. Smith & Wesson Corp.*, 138 F.3d 833 (10th Cir. 1998) (citing a litany of federal and state cases that refused to apply the ultrahazardous activity doctrine to the marketing, sale, and distribution of handguns); see also *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (rejecting handgun marketing as an abnormally dangerous activity in John Hinckley’s assassination attempt on President Ronald Reagan).

<sup>46</sup> *Hamilton*, 935 F. Supp., at 1324. (citing *Forni v. Ferguson*, No. 132994-94 slip. op. at 9-10 (N.Y. Sup. Ct. Aug. 2, 1995) (New York Supreme Court decision holding that a handgun manufacturer could not be held liable for manufacturing and distributing guns under a strict liability theory).

<sup>47</sup> See, e.g., *Merrill*, 89 Cal. Rptr.2d 146.



which would be contemplated by an ordinary consumer who purchases it."<sup>48</sup> Most courts use a risk-utility analysis to determine whether a product, such as a handgun, poses an unreasonable risk of harm given its possible utility.<sup>49</sup> Essentially, the risk-utility test requires the court to weigh the following factors:

The likelihood and gravity of potential injury against the utility of the product, the availability of other safer products . . . the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of instructions and warnings for safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive.<sup>50</sup>

Although the general purpose of products liability law is to provide consumers, users, and bystanders with an opportunity to recover for the harms caused by defective products, courts have long recognized that a handgun is not "defective" just because it is used in a crime.<sup>51</sup>

Generally, a design defect claim against a handgun manufacturer requires strict proof that the particular handgun at issue is "unreasonably dangerous, given its intended use."<sup>52</sup> Handgun manufacturers have not been held liable for criminal misuse of handguns because often their intended use is to kill or wound.<sup>53</sup> From a risk-utility standpoint, the "risk of harm" associated with a handgun comes more from its criminal *utilization* and not from some peculiar defect in the product itself.<sup>54</sup> Hence, a properly functioning handgun cannot be considered legally "defective" just because it is *used* in a violent crime.

Plaintiffs have made creative attempts to hold handgun manufacturers responsible for the criminal acts of third parties under existing products liability laws. Recent products liability claims allege that the lack of proper anti-theft

48

See RESTATEMENT (SECOND) OF TORTS § 402A (1964) that provides: (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold. (2) the rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of its product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

49

See McClurg, *supra* note 40, at 778 (note that the one of the factors courts use in determining ultrahazardous activity is substantially similar to the risk-utility test used in products liability cases).

50

RESTATEMENT (SECOND) OF TORTS § 402A (1964); see also Steffey, *supra* note 36 at 162-63.

51

See Kairys *supra* note 10, at 15 (citing a plethora of case law rejecting the application of products liability law on the sale, distribution, or use of handguns).

52

RESTATEMENT (SECOND) OF TORTS § 402A (1964).

53

See *Hamilton*, 935 F. Supp. at 1332.

54

See Ronald Levine, *Liability for the Criminal Misuse of Products: A Primer*. PROD. LIAB. L. & STRATEGY, April 1997.

devices make handguns too easy for criminals to misuse them and therefore constitute a design defect.<sup>55</sup> Although this claim might give a court the authority to weigh the risks and utilities of a specific handgun product, no court has ever done so.<sup>56</sup> In *Kelley v. R.G. Industries*,<sup>57</sup> the Maryland Court of Appeals upheld a very limited cause of action against handgun manufacturers responsible for producing and marketing “Saturday Night Special” handguns.<sup>58</sup> Using a quasi risk-utility analysis, the Maryland Court of Appeals held a manufacturer strictly liable for injuries inflicted by “Saturday Night Special” handguns under a common law theory not a product liability theory.<sup>59</sup> The court found that Saturday Night Specials were “socially useless” handguns that posed too high of a risk for being easily misused.<sup>60</sup> Those who thought that *Kelley* might open the floodgates for similar suits against the handgun industry continue to wait in vain.<sup>61</sup> No other state or federal court has ever followed the decision in *Kelley*.<sup>62</sup> In fact, the Maryland General Assembly passed a law overturning *Kelley* and expressly making Saturday Night Special Handguns completely legal products to sell and manufacture.<sup>63</sup>

Judge Weinstein’s 1996 summary judgment opinion, in *Hamilton*, echoed the overwhelming national trends precluding products liability claims from being waged against handgun manufacturers.<sup>64</sup> In *Hamilton*, the plaintiffs alleged that the handgun manufacturers were liable under products liability law for failing to manufacture handguns with anti-theft devices that could have prevented criminal misuse.<sup>65</sup> Although Judge Weinstein agreed that a handgun is potentially a “dangerous product” that presents some risk of harm, he acknowledged that the

<sup>55</sup> See Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984).

<sup>56</sup> See McClurg, *supra* note 40, at 785 (citations omitted).

<sup>57</sup> 497 A.2d 1143, 1145 (Md. 1985).

<sup>58</sup> “Saturday Night Specials” are generically defined as a cheap, .32 caliber, short-barreled handguns. See *id.* at 1153-1154.

<sup>59</sup> See *id.* at 1149.

<sup>60</sup> See *id.* at 1153-54. The court dismissed the argument that these easily concealable handguns may have some had some social utility in personal protection or sport.

<sup>61</sup> See, e.g., Steffey *supra* note 34.

<sup>62</sup> See Joi Garner Pearson, *Make it, Market it, and You May Have to Pay for It: An Evaluation of Gun Manufacturer Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of in Re 101 California Street*, 1997 B.Y.U. L. REV. 131, 144 (1997).

<sup>63</sup> See MD. ANN. CODE Art. 27, §36(j)(b)(1)(Supp. 1990).

<sup>64</sup> Suits based on the RESTATEMENT (SECOND) OF TORTS § 402(A) (1965), which set forth the principles of strict liability have never been applied to handgun marketing, sale, or distribution practices. See, e.g., Delahanty, 564 A.2d 760-61 (rejecting claims based on §402(A)); Riordan v. Int’l Armament, Corp., 477 N.E.2d 1293, 1298 (Ill. App. Ct. 1985)(rejecting strict liability claim); and Hammond v. Colt Indus. Operating Corp., 565 A.2d. 558, 563 (Del. Super. Ct. 1989)(refusing to apply products liability law to the manufacturing and distribution of handguns).

<sup>65</sup> *Hamilton*, 935 F. Supp. at 1321-22.

“very purpose [of a handgun] is to cause injury - to kill and to wound.”<sup>66</sup> Judge Weinstein recognized that common sense requires that “there must be something wrong with a product” in order to sustain a claim under products liability law.<sup>67</sup> The court rejected plaintiffs’ anti-theft safety device theory as being purely “hypothetical” and a non-viable design alternative.<sup>68</sup>

#### IV. A LANDMARK APPLICATION OF THE NEGLIGENT MARKETING AND DISTRIBUTION DOCTRINE

Common law negligence requires that a plaintiff prove: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant breached this duty by engaging in conduct posing an unreasonable risk of harm; and (3) that the defendant’s breach proximately caused the plaintiff’s injuries.<sup>69</sup> Although negligence has a long and established history in common law jurisprudence, the negligent marketing and distribution doctrine has been narrowly applied in a limited number of civil cases.<sup>70</sup>

The first case where a plaintiff filed a negligent marketing and distribution claim against a handgun manufacturer was *Linton v. Smith & Wesson*.<sup>71</sup> In *Linton*, a woman who had been shot by an intoxicated criminal sued Smith & Wesson, the manufacturer of the handgun used in the crime.<sup>72</sup> The plaintiff’s novel suit alleged that Smith & Wesson 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>73</sup> The Illinois State Supreme Court upheld the trial judge’s dismissal of the case holding that the defendant had met its duty to the public by complying with all state and federal statutory regulations “which serve [d] to filter out high-risk purchasers much as a common-law duty of care would.”<sup>74</sup> For the next ten years, *Linton* remained one of the most commonly cited cases in the dismissal of negligent marketing and distribution claims.<sup>75</sup>

<sup>66</sup> See *id.* at 1322.

<sup>67</sup> *Id.* at 1323 (citing *DeRosa v. Remington Arms Co., Inc.*, 509 F. Supp. 762, 769 (E.D.N.Y. 1981).

<sup>68</sup> See *id.* at 1332-33.

<sup>69</sup> *Hamilton*, 62 F. Supp.2d, at 818 (citing numerous New York common law cases).

<sup>70</sup> See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (hollow point “black talon” bullets); *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 736 (2d Cir. 1979)(prescription drug Quadrigen); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533-34. (11th Cir. 1986) (Saturday Night Special handguns); and *Forni v. Ferguson*, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996) (semiautomatic handguns).

<sup>71</sup> 469 N.E.2d 339 (Ill. App. Ct. 1984).

<sup>72</sup> See *id.* at 340.

<sup>73</sup> *Id.*

<sup>74</sup> See *Lytton*, *supra* note 1, at 700.

<sup>75</sup> See, e.g., *Riordan v. Int’l Armament, Corp.*, 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985); *Trespalacios v. Valor Corp.* 486 So. 2d 649, 650-51 (Fla. 1986); *Knott v. Liberty Jewelry & Loan, Inc.*, 748

The first time a negligent marketing and distribution claim was able to withstand a summary judgment challenge against a handgun manufacturer was in 1998.<sup>76</sup> In a highly publicized case, *Halberstam v. S.W. Daniel, Inc.*,<sup>77</sup> four parents sued a conglomerate of handgun manufacturers for injuries that resulted from a brutal attack on a van carrying a group of Hasidic Jewish children in New York City.<sup>78</sup> The judge who presided over that landmark case was none other than Senior Judge, Jack Weinstein.<sup>79</sup> Although the plaintiffs in *Halberstam* were ultimately unsuccessful in proving that the defendants' negligent conduct was a proximate cause of the criminal shootings at issue,<sup>80</sup> it was the first case in history where a judge allowed the *jury* to determine whether handgun manufacturers owed a duty of care to keep guns out of criminal hands.<sup>81</sup> In many ways, *Halberstam* laid the foundation for *Hamilton's* recognition of a duty for handgun manufacturers to exercise reasonable care in marketing and distributing handguns to the general public.

A. *A Once Impossible Duty: Guarding Against Criminal Misuse*

The basic theory of the negligent marketing claim is that a handgun manufacturer should be held liable for failing to take reasonable steps in the marketing and distribution process that would minimize the risk of criminal misuse and harm.<sup>82</sup> A handgun manufacturer acts negligently if it fails to keep handguns out of the well-supplied "black market."<sup>83</sup> Unlike the cases where plaintiffs sought to impose a legal duty upon individual manufacturers for marketing a defective product,<sup>84</sup> the *Hamilton* plaintiffs sought to hold the entire handgun industry liable for its marketing and distribution techniques, methods, and procedures.<sup>85</sup> The

---

P.2d 661, 664 (Wash. 1988). All of these cases paralleled the opinion in *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. Ct. 1984) that a handgun manufacturer will not be held liable for the criminal acts of a third party as long as it markets and distributes its products in accordance with state and federal laws.

<sup>76</sup> See generally, Lytton, *supra* note 1.

<sup>77</sup> No. 95 Civ. 3323 (E.D.N.Y. 1998) (unpublished opinion cited in Lytton, *supra* note 1.)

<sup>78</sup> See Lytton, *supra* note 1, at 3. (Mr. Rashid Baz was sentenced to life in prison for the death of Aaron Halberstam and the shooting of Nachum Sosenkin. Baz was a Palestinian who apparently was seeking retaliation for a massacre that had killed nearly 29 Palestinians in Hebron, Israel four days earlier).

<sup>79</sup> See *id.* at 687.

<sup>80</sup> See *id.* at 697-698. The jury returned a special verdict for the defendants finding that although the defendants were negligent for marketing parts that substantially contributed to the deaths but the defendant's negligence was not a proximate cause of the harm. See *id.* at 697-698.

<sup>81</sup> See Lytton, *supra* note 1, at 681.

<sup>82</sup> See Iveson, *supra* note 35, at 788.

<sup>83</sup> The underground, illegal trafficking of stolen handguns is considered the "black market" in the industry. See Tyrone Hughes, *Hamilton v. Accu-Tek: Potential Collective Liability of the Handgun Industry for Negligent Marketing*, 13 *TOURO L. REV.* 287, 288 (1996).

<sup>84</sup> See cases and accompanying text *supra* note 64.

<sup>85</sup> See *Hamilton*, 62 F. Supp.2d at 808.

*Hamilton* plaintiffs argued that handgun manufacturers owed them an important legal obligation to “exercise reasonable care in marketing and distributing [handguns] so as to guard against the risk of . . . criminal misuse.”<sup>86</sup> Complicating the analysis was the fact that the *Hamilton* plaintiffs also had to prove that the handgun manufacturers owed them a duty of care for protection against the harms inflicted by the criminal acts of a third party. As the court noted, “courts are reluctant to impose a duty to anticipate the criminal or tortious conduct of third parties”<sup>87</sup> absent some “special relationship” between the defendant and the third party.<sup>88</sup> Yet, Judge Weinstein cited two policy justifications for his conclusion that the defendant handgun manufacturers owed a duty of care to the plaintiffs for the criminal acts of a third party.<sup>89</sup>

First, the court stated that the special ability of manufacturers to detect and guard against the risks associated with criminal misuse placed them in a “protective relationship” with those who may potentially be harmed.<sup>90</sup> Although Judge Weinstein had flatly rejected ultrahazardous liability policy arguments three years earlier, he indicated that manufacturers have a special responsibility to the victims of handgun crimes because of the inherent *dangerousness* of handguns.<sup>91</sup> Without citing any of the specific risks associated with easy access to handguns, the court found it justifiable to impose a very limited duty on manufacturers to take “reasonable steps available at the point of their sale to primary distributors to reduce the possibility that [handguns] will fall into the hands of those likely to misuse them.”<sup>92</sup> Judge Weinstein anchored his opinion around Justice Cardozo’s bedrock idiom, that “the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation.”<sup>93</sup>

Second, the court found that there was a duty owed to the plaintiffs because of the handgun manufacturers’ special relationship with distributors and

<sup>86</sup> *Id.* at 824.

<sup>87</sup> *Id.* at 819 (citing e.g., *Pulka v. Edelman*, 40 N.E.2d 1019, 1022 (N.Y. 1988) (finding it unreasonable to impose responsibility for negligent conduct of another “where regardless of the measures taken, there was little expectation that the one responsible could prevent the negligent conduct”)).

<sup>88</sup> *Id.* at 820 (an example of a special relationship is a carrier and its passenger or a tavern owner and its patron).

<sup>89</sup> *See id.* at 827. Because the issue whether a handgun manufacturer owes a duty of care to victims of criminal shootings had never been addressed specifically by the Eastern District of New York or the Second Circuit, Judge Weinstein had to decide the issue as the state’s highest court would have decided it on first impression. The duty of care issue was subsequently certified by the Second Circuit Court of Appeals to the New York Supreme Court in *Hamilton v. Baretta USA Corp.*, No. 99-7753, 99-7785, 99-7787, 2000 WL 1160699, at \*1 (2d Cir. Aug. 16, 2000). As of this publication date, the Supreme Court of New York had not decided whether handgun manufacturers owe a duty of care to the public to prevent the criminal misuse of handguns.

<sup>90</sup> *Hamilton*, 62 F. Supp.2d at 821-22.

<sup>91</sup> *See id.* at 821 (citing *Iveson*, *supra* note 35 at 787).

<sup>92</sup> *Id.* at 825.

<sup>93</sup> *Hamilton*, 62 F. Supp.2d at 821 (citing Justice Cardozo’s famous axiom from *Palsgraf v. Long Island R.R. Co.*, 248 N.E.2d 4,7 (N.Y. 1928)).

retailers.<sup>94</sup> The court ruled that because handgun manufacturers have sufficient control over their downstream distributors, “it is not unfair for the law to minimize unreasonable risk of harm through the imposition of a duty on manufacturers to market and distribute [their handguns] responsibly.”<sup>95</sup> Surprisingly, Judge Weinstein indicated that handgun manufacturers have a duty under the “negligent entrustment doctrine.”<sup>96</sup> Negligent entrustment liability arises from “selling potentially dangerous products to consumer groups that lack the capacity to exercise ordinary care.”<sup>97</sup> In *Hamilton*, the plaintiffs successfully argued that the negligent entrustment doctrine could be applied to handgun manufacturers who sell their weapons to consumers who are likely to be involved in criminal activity.<sup>98</sup> Although the comparison between “criminals” and those who “lack the capacity to exercise due care” is subtle, it convinced Judge Weinstein that the handgun industry was negligent for marketing in areas where gun laws were too weak to protect consumers from the dangers of possible handgun shootings.<sup>99</sup>

In sum, Judge Weinstein upheld the jury’s decision to hold the defendants liable for criminal misuse because the gun manufacturers could easily have taken reasonable steps “to reduce the risk of their products’ being sold to persons likely to misuse them.”<sup>100</sup> The “reasonable steps” the handgun manufacturers should have taken may constitute the accepted standard of care for marketing and distributing handguns in the future.

#### B. *The Standard of Care for Marketing and Distributing Handguns*

*Hamilton* held that a handgun manufacturer is negligent when it breaches its duty of due care by engaging in conduct that poses an unreasonable risk of harm to others, even if such a breach included a criminal or intentional act of a third-person.<sup>101</sup> Judge Weinstein quickly rejected the defendants’ contention that their compliance with all relevant laws and regulations was absolute proof that they had fulfilled their duty to the plaintiffs.<sup>102</sup> The court stated definitively that the standard of care for the industry in both marketing and manufacturing handguns “must be

<sup>94</sup> *See id.*

<sup>95</sup> *Id.* at 824.

<sup>96</sup> *See id.* at 821. This doctrine imposes liability upon commercial distributors who provide goods to those they know have a propensity to them in an improper or dangerous fashion. *See, e.g., Earsing v. Nelson*, 212 A.D.2d 66, 699 (4th Dept. N.Y. 1995) (plaintiff was hurt by a BB gun and made a negligent entrustment claim against seller of gun to plaintiff’s young friend).

<sup>97</sup> RESTATEMENT (SECOND) OF TORTS § 390 (1986).

<sup>98</sup> *See Hamilton*, 62 F. Supp.2d at 821-22.

<sup>99</sup> *See id.* at 822.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 828 (citing the RESTATEMENT (SECOND) OF TORTS §§302A-B (1965)).

<sup>102</sup> *See id.* at 829. (citations omitted).

assessed according to the standard of a reasonably prudent entity in light of all . . . circumstances.”<sup>103</sup> Judge Weinstein stated that “technical compliance with all relevant laws and regulations is not dispositive . . . the exercise of due care mandates additional preventative measures where a reasonably prudent person would have taken them.”<sup>104</sup> This was the first time any court directly contradicted the long-standing rule of *Linton v. Smith & Wesson* that state and federal statutes for gun distribution defined the applicable standard of care.

The overwhelming evidence that there was industry-wide awareness that .25 caliber handguns were moving illegally through an underground black market swayed Judge Weinstein.<sup>105</sup> Handgun manufacturers claimed that there was nothing they could do to prevent the common “straw purchaser” or “convenience trafficking” problems associated with legal handgun purchases.<sup>106</sup> Straw purchasers are legal handgun buyers who serve as stand-ins for persons not legally allowed to purchase a handgun (such as felons and minors).<sup>107</sup> Convenience trafficking, on the other hand, is the illegal movement of stolen handguns between states for profit.<sup>108</sup> Judge Weinstein agreed that there was very little that the handgun manufacturers could do to stop legal stand-in, or “straw purchasers” from acquiring and selling handguns to felons and criminals.<sup>109</sup>

Conversely, Judge Weinstein indicated there was ample evidence supporting the jury’s conclusion that the defendants could have taken reasonable steps to guard against the convenience trafficking problem.<sup>110</sup> The plaintiffs’ fundamental argument was that handgun manufacturers target their marketing and distribution efforts in “weak law” states knowing that there is a high probability that these guns will eventually make their way into the hands of criminals in states with strict gun laws.<sup>111</sup> Evidence presented by the former head of the United States Bureau of Alcohol Tobacco and Firearms demonstrated that there was industry-wide knowledge that handguns often make their way from “weak law” states to

<sup>103</sup> *Id.*

<sup>104</sup> *Hamilton*, 62 F. Supp.2d at 829 (citing *Jemmot v. Rockwell, Mfg., Co.*, 216 A.D.2d 444,444-45 (2d Dep’t N.Y. 1995) and the RESTATEMENT (SECOND) OF TORTS § 288(c)(1965) respectively).

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* at 829.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 830.

<sup>110</sup> *See Hamilton*, 62 F. Supp.2d at 831.

<sup>111</sup> *See id.* States with relatively “weak” gun control laws are referred to as “weak law” states and vice versa. These are primarily states located in the southeast portion of the United States. Using the Alcohol Tobacco and Firearm’s national tracing database, the plaintiffs’ chief expert concluded that roughly 43% of the illegal guns used in New York City came from southeastern states where gun laws permit an abundance of cheap handguns. *See id.* at 830.

large metropolitan areas and states with strong gun laws.<sup>112</sup>

The plaintiffs' persuaded Judge Weinstein that according to the evidence they present during trial there were three basic steps the defendants could have taken to reduce "convenience trafficking" between weak law and strong law states:

- (1) requiring distributors to sell only to stocking gun dealers, i.e., retailers who stock guns for legitimate retail outlets, (2) prohibiting sales at gun shows where wide-spread unrecorded and unsupervised sales to non-responsible persons are said to take place, and (3) analyzing race requests to locate retailers who serve as crime gun sources, and cutting off distributors who do business with them.<sup>113</sup>

A former executive of Smith & Wesson testified that "manufacturers could feasibly rewrite their distribution contracts to allow them to cut off retailers who make multiple sales and have crime guns repeatedly traced to their stores."<sup>114</sup> There was also evidence presented by Dr. David Stewart, Chairman of the Marketing Department of Southern California, that handgun manufacturers could adapt their marketing agreements, advertisements, and catalogues to reduce the availability of handguns to persons likely to misuse them.<sup>115</sup>

Although Judge Weinstein did not specifically outline a standard of care for marketing and distributing handguns per se, he opined that the jury could have reasonably concluded that the "defendants were negligent for failing to take appropriate steps to reduce the risk of their products being sold to persons with a propensity to misuse them."<sup>116</sup> It remains to be seen whether the "three basic steps" Judge Weinstein outlined in *Hamilton* will ultimately become the standard of care for marketing and distributing handguns.

### C. *Transcending Causation: A Lesson from the Tobacco Industry*

Perhaps the most remarkable aspect of the *Hamilton* decision was its conquest of the proximate causation issue that had been fatal in the *Halberstam* case.<sup>117</sup> By incorporating strong public policy arguments from *Blue Cross & Blue*

<sup>112</sup> See *id.*

<sup>113</sup> *Id.* These were the suggestions compiled from the plaintiffs' expert witnesses. Some of the suggestions that the plaintiffs' marketing specialist, Dr. David Stewart, offered included franchising retail stores, restricting distribution to qualified retail stores, and also terminating distribution agreements with those who sell handguns irresponsibly. See *id.* at 831.

<sup>114</sup> *Id.* at 832.

<sup>115</sup> See *Hamilton*, 62 F. Supp.2d at 832.

<sup>116</sup> *Id.* at 831.

<sup>117</sup> See Lytton, *supra* note 1 at fn. 97 (citing the jury's special verdict form that asked, "[d]id the defendants' negligence cause Arron Halberstam's death?" The jury's answer was "no").



*Shield of New Jersey v. Phillip Morris*,<sup>118</sup> a recent tobacco liability case, Judge Weinstein was able to articulate how the defendants' failure to market and distribute their handguns with reasonable care was a proximate cause of the plaintiffs' injuries.<sup>119</sup> Quoting his own opinion in *Blue Cross Blue Shield of New Jersey*, Judge Weinstein wrote:

It is difficult to imagine a set of circumstances that would militate more strongly in favor of a finding of proximate cause . . . than the present one. If the allegations are to be believed, the defendants in this suit are responsible for many unnecessary deaths through their careless marketing and distribution of handguns. . . the defendants' alleged misconduct entails moral opprobrium of extraordinary proportions. Society has an especially compelling interest in deterring future harms of the type and magnitude alleged [and proved in this case].<sup>120</sup>

Judge Weinstein clearly felt that the "causal connection between the defendant's negligence and plaintiff's injury should be . . . a matter of legal policy" and he subsequently relaxed the standard for proving proximate causation in *Hamilton*.<sup>121</sup>

Not surprisingly, the defendants in *Hamilton* urged Judge Weinstein to overturn the jury's findings on proximate causation in their post-trial motions.<sup>122</sup> The defendants claimed that "the issue of causation should . . . never have been submitted to the jury because any causal connection between the plaintiffs' injuries and negligent conduct on the part of any defendant was broken by the intentional criminal conduct of the shooters."<sup>123</sup> The "superseding cause" doctrine holds that a criminal act of a third party effectively cuts off the imposition of civil liability on the defendant.<sup>124</sup> The Restatement of Torts specifically recognizes that the criminal act of a third party is usually a superseding cause of the harm alleged.<sup>125</sup> Without much discussion on the superseding causation problem, Judge Weinstein dismissed

<sup>118</sup> 36 F. Supp.2d 560 (E.D.N.Y. 1999).

<sup>119</sup> *Hamilton*, 62 F. Supp.2d at 833.

<sup>120</sup> *Id.* (citing Judge Weinstein's paraphrased opinion in *Blue Cross Blue Shield v. Phillip Morris*, 36 F. Supp.2d 560, 584-85 (E.D.N.Y. 1999)).

<sup>121</sup> See *Hamilton*, 62 F. Supp.2d at 833. For a good background on the public policy arguments discussed by Judge Weinstein, see David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

<sup>122</sup> See *id.* at 835.

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., *Richman v. Charter Arms, Corp.*, 571 F. Supp. 192 (E.D. La. 1983). The court wrote, "a defendant can escape liability by proving third-person fault only if the third-person fault 'is the sole cause of the damage;' that is, only if 'the intervening third person's act is in the nature of a superseding cause in Anglo American tort law. *Id.* at 205.

<sup>125</sup> See RESTATEMENT (SECOND) OF TORTS §448 (1965).

the defendants' argument and cited a plethora of rare cases where the superseding cause rule was abandoned by New York courts.<sup>126</sup>

Judge Weinstein wrote that the criminal misuse of handguns by third parties was "not only a reasonably foreseeable consequence of the defendants' negligent marketing and distribution practices, it *was* the precise risk; failure to take reasonable steps to guard against it what made the defendants' conduct negligent."<sup>127</sup> In circling back to the defendants' prescribed duty at issue in the case, Judge Weinstein concluded that "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."<sup>128</sup> In the end, the defendants in *Hamilton* could not overcome New York's incredibly relaxed standard for proving proximate cause in mass tort cases.<sup>129</sup>

#### D. *The Imposition of Market Share Liability*

Generally, regardless of the theory upon which liability in an action is predicated, courts have stated that in order to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must be proof that the defendant being sued is the entity that actually produced, manufactured, sold, or was in some way responsible for the product.<sup>130</sup> In those situations in which the identity of the specific manufacturer of the product is unknown, collective liability theories have come to the rescue.<sup>131</sup> Collective liability theories allow plaintiffs to recover damages from an entire class of defendants without having to identify the *particular* defendant whose tortious act or omission caused their injuries.<sup>132</sup> Hence, plaintiffs are effectively relieved from the onerous burden of proving that a particular defendant was the "sole proximate cause" of the harm alleged.

Collective liability allows a particular defendant's liability to be replaced with the liability of a group of defendants. It allows a plaintiff to establish liability where "proof of causation is impossible and a method of apportioning damages" may be extremely difficult.<sup>133</sup> The policy behind collective liability is "the

---

<sup>126</sup> See *Hamilton*, 62 F. Supp.2d at 833-34. (citing e.g., *Kush v. City of Buffalo*, 449 N.E.2d 725 (N.Y. 1980)(intentional shooting of plaintiff in lobby of an office building with history of criminal activity not a supervening cause); *Rotz v. City of New York*, 143 A.D.2d 301 (1st Dept. N.Y. 1988 (acts of third person initiating stampede in Central Park concert not supervening cause of plaintiff's injuries)).

<sup>127</sup> *Id.* (emphasis added).

<sup>128</sup> *Id.* at 834 (citations omitted).

<sup>129</sup> See *id.* at 835.

<sup>130</sup> See generally, 63 AM. JUR. 2D, *Products Liability* § 5.

<sup>131</sup> See Richard E. Kaye, "Concert of Activity," "Alternate Liability," "Enterprise Liability," or *Similar Theory as Basis for Imposing Liability Upon One or More Manufacturers of Defective Uniform Product, In Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury*, 63 A.L.R. 5TH 195, 215 (1998).

<sup>132</sup> See *id.* at 200.

<sup>133</sup> *Hamilton*, 935 F. Supp. at 1329.

expanding nature of tort law and the need for courts to adapt traditional theories of recovery to keep pace with the evolving requirements of contemporary society.<sup>134</sup> New York recognizes all of the existing theories of collective liability: alternative liability, enterprise liability, concerted action liability, and market share liability.<sup>135</sup> Most observers agree that state and federal courts in New York have been at the forefront of expansionist collective liability decisions especially in the area of market share liability.<sup>136</sup>

Market share liability was first applied in the DES drug manufacturer cases of the 1970s.<sup>137</sup> In the famous case, *Sindell v. Abbott Laboratories*,<sup>138</sup> a large class of plaintiffs were unable to definitively prove which particular DES drug manufacturer allegedly caused their children's injuries.<sup>139</sup> Rather than leaving the plaintiffs remediless, the California Supreme Court eliminated the requirement that the plaintiffs identify a particular DES manufacturer who was responsible for their injuries. The Court held that "that an individual's share of liability should at least be based on its probability (per its market share) of causing the harm alleged."<sup>140</sup> Each DES manufacturer defendant was held liable according to its share of the overall DES market.<sup>141</sup> Since *Sindell*, the market share doctrine has been expanded to a variety of other products such as asbestos, blood products, lead paint, and vaccines.<sup>142</sup>

Like the DES cases, the *Hamilton* court allowed the imposition of market share liability for gun manufacturers because Stephen Fox was unable to identify the exact manufacturer of the handgun that caused his injuries.<sup>143</sup> Not surprisingly, Judge Weinstein grounded his application of market share liability in *Hamilton* on *Hymowitz v. Eli Lilly & Co.*,<sup>144</sup> a DES case where the New York Court of Appeals first adopted market share liability.<sup>145</sup> He stated that the following factors support

<sup>134</sup> *Hamilton*, 62 F. Supp.2d at 842.

<sup>135</sup> *See id.* at 839.

<sup>136</sup> *See id.* at 842-43; *see also*, VanVoris, *supra* note 2.

<sup>137</sup> DES is a pre-natal drug that many women took during pregnancy. DES has been linked to various types of birth defects. *See Hamilton*, 62 F. Supp.2d at 840.

<sup>138</sup> 607 P.2d 924 (Cal. 1980) (this was the first case to eliminate the identification requirement for plaintiffs suing the manufacturers of a specific product).

<sup>139</sup> *See id.* The plaintiffs had trouble linking their injuries to any one particular DES manufacturer because of the generic chemical composition of DES and the large number of manufactures who were producing and marketing the drug.

<sup>140</sup> *See id.* at 937.

<sup>141</sup> *See id.*

<sup>142</sup> *See Hamilton*, 62 F. Supp.2d at 841 (citations omitted).

<sup>143</sup> *See id.* at 843.

<sup>144</sup> 539 N.E.2d 1069 (N.Y. 1989).

<sup>145</sup> *See id.*

the imposition of market share liability for the handgun manufacturers in *Hamilton*:

the superior ability of defendant to bear the costs foreseeable associated with the manufacture and widespread distribution of handguns; (2) the fairness of requiring them to do so since they can reduce their risks by their ability to choose merchandising techniques; (3) the deterrent potential of placing the burden on manufacturers careless of their responsibilities to the public; (4) the fact that injured plaintiffs, unlike the users of products which later turn out to be defective, did not chose their connection with handguns. Under such circumstances the law will not leave the injured unrequited.<sup>146</sup>

Although Judge Weinstein firmly upheld the plaintiffs' right to use market share liability within a particular class of handgun manufacturers, he stopped short of allowing full-blown market share liability claims against the *entire* handgun industry.

Judge Weinstein's summary judgment in 1996 opened the door for the jury's successful imposition of collective liability on the *Hamilton* defendants.<sup>147</sup> In allowing the plaintiffs to pursue alternative theories of liability against the handgun manufacturers, Judge Weinstein indicated that the plaintiffs would not have to show that a *particular* defendant was specifically liable for their injuries. Instead, they could demonstrate that the *collective* efforts of handgun manufacturers negligently flooded the underground handgun market.<sup>148</sup> The *Hamilton* court indicated that the "primary motivating factor [in deciding whether to impose collective liability] has been the injustice of barring innocent plaintiffs' recovery solely because of their inability to identify which of a number of wrongdoing defendants caused their injuries."<sup>149</sup>

At the *Hamilton* trial, it was obvious that Stephen Fox would never be able to prove which particular handgun company manufactured the .25 caliber handgun used in his shooting.<sup>150</sup> The police were only able to recover a spent .25 caliber shell at the crime scene where Stephen Fox was shot.<sup>151</sup> Judge Weinstein's instructions to the jury on collective liability indicated that there were three distinct possibilities in the case:

(1) that no party had proven that the gun at issue was made by any particular manufacturer or group and as such could apportion

146

*Id.*

147

*See Hamilton*, 935 F. Supp. at 1330-31.

148

*See Hughes, supra* note 83, at 297-98. (citing *Hamilton*, 935 F. Supp. at 1329).

149

*Hamilton*, 62 F. Supp.2d at 841.

150

*See id.* at 837.

151

*See id.* at 845.

liability in proportion to each manufacturer's market share of all handguns; (2) that it had been proven that the gun at issue had been made by a particular manufacturer and could assess 100% of plaintiff's damages against it; or (3) the gun was a particular caliber of guns and that only one of a number of manufacturers could have manufactured it such that market share liability could also be imposed in this situation.<sup>152</sup>

Any number of defendants may have manufactured the specific handgun used in the crime, yet under market share liability, the jury held three manufacturers liable for Stephen Fox's injuries according to its respective share of the national handgun market: American Arms, Inc. (.23% liable), Beretta U.S.A. Corporation (6.03% liable), and Taurus International Manufacturing (6.8% liable).<sup>153</sup>

#### V. THE FUTURE OF MARKET SHARE LIABILITY FOR THE HANDGUN INDUSTRY: LIABILITY WITHOUT A SMOKING GUN?<sup>154</sup>

The essential question surrounding the *Hamilton* decision is whether other federal or state courts across the country will adopt Judge Weinstein's expansive approach to handgun manufacturer liability. Judge Weinstein's candid recognition that "New York's approach to market share liability is in many ways more radical than that of other courts which have adopted the theory" may be *the* definitive reason why many other state and federal courts will likely find themselves unable or unwilling to apply the novel liability theories used in *Hamilton*.<sup>155</sup> Indeed, only two federal circuits and a handful of state courts have ever recognized market share liability for any case.<sup>156</sup> Additionally, those few state and federal courts that have recognized market share liability have only applied it to a narrow class of products liability actions. Given that the overwhelming majority of state and federal courts have explicitly rejected the possibility of imposing market share liability beyond products liability cases, it seems highly unlikely that even these courts would be

<sup>152</sup> See *id.* at 849-50.

<sup>153</sup> See *id.* at 808.

<sup>154</sup> Liability without a "smoking gun" refers to the *Hamilton* plaintiffs' imposition of market share liability on the three defendant handgun manufacturers even though police never found a gun at the crime scene.

<sup>155</sup> *Id.* at 842-43. (recognizing that only a handful of states and one federal circuit have recognized market share liability).

<sup>156</sup> State courts that have recognized *some* form of market share liability are Texas, California, Florida, Hawaii, New York, Massachusetts, South Dakota, Washington, and Wisconsin. Most of the cases where market share liability has been applied involved products liability claims against pharmaceutical manufacturers. See *e.g.*, *Sindell*, 607 P.2d at 924; *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991); *McCormack v. Abbott Labs.*, 617 F. Supp. 1521 (D. Mass. 1985); *Hymowitz*, 539 N.E.2d at 1069; *McElhanev v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981); *George v. Parke-Davis*, 733 P.2d 507 (Wash. 1987); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984).

willing to extend collective liability claims against gun manufacturers absent proof of traditional causation.

There has been no indication that those jurisdictions that currently refuse to recognize market share liability in products liability cases would likely adopt it in a case similar to *Hamilton*. Those courts who have continually rebuked plaintiffs' attempts to hold defendants liable under market share liability often cite very similar policy concerns. In *Smith v. Eli Lilly & Co.*,<sup>157</sup> an Illinois DES product liability case, the Illinois State Supreme Court gave the following reasons why it does not recognize market share liability:

(1) the difficulty of establishing . . . defendants' percentages of the market; (2) the theory's potential to treat plaintiffs who cannot identify the specific manufacturer responsible [for the injuries] more favorably than those who can, because . . . the market-share theory permits a plaintiff who cannot identify the responsible manufacturer to spread the liability throughout the members of the industry, reducing the risk that the plaintiff will be without a solvent defendant; (3) the possibility that the defendant actually responsible for the plaintiff's injuries may not be before the court, [and] . . . that a wholly innocent [defendant] . . . will shoulder part or all of the responsibility for the injury caused . . . ; (4) the failure of the market-share theory to serve the purposes expressed in the underlying principles of products liability law; and (5) the theory's disregard for the principle that manufacturers are not insurers of their industry.<sup>158</sup>

Judge Weinstein recognized in *Hamilton* that handguns are rarely recovered and identified in criminal shootings. Unfortunately, without a "smoking gun," future plaintiffs will have trouble linking their injuries to the negligence of an *individual* handgun manufacturer.<sup>159</sup> Because the overwhelming majority of federal and state courts require traditional proof of proximate causation, the future applicability of *Hamilton* will likely hinge upon other courts' unlikely willingness adopt or expand some form of alternative liability.

## VI. CONCLUSION

As of September 2000, twenty-nine suits were pending against various handgun manufacturers for their alleged negligent marketing and distribution practices.<sup>160</sup> City mayors and county representatives from some of America's

---

<sup>157</sup> 560 N.E.2d 324 (Ill. 1990).

<sup>158</sup> See *id.* (internal citations omitted).

<sup>159</sup> See *Hamilton*, 62 F. Supp.2d at 844.

<sup>160</sup> See *Following in Tobacco's Footstep: Three Cities Take Aim at Gun Manufacturers*, PROD. LIAB. L. & STRAT., December 1998; but *c.f.* Kairys, *supra* note 10.

largest urban areas have filed suits against the handgun industry for reimbursement of both law enforcement and health costs that stem from the criminal misuse of handguns.<sup>161</sup> Even the NAACP filed a suit against handgun manufacturers in Judge Weinstein's court for turning urban communities into "war zones" through the negligent sale and distribution of handguns.<sup>162</sup> Since Judge Weinstein issued his post-trial opinion in June 1999, only one judge has ruled definitively, notwithstanding *Hamilton*, whether a city could sue gun manufacturers under the negligent marketing and distribution doctrine.<sup>163</sup> In the Ohio Court of Common Pleas, Judge Robert Ruehlman dismissed the city of Cincinnati's negligence suit without issuing a written opinion.<sup>164</sup> Reporters, who were present in the courtroom when the judge issued his dismissal, stated that the judge felt the suit was an "improper attempt to use the courts to legislate controls over firearms."<sup>165</sup>

Although the court's willingness to apply market share liability in *Hamilton* was a decisive victory for Stephen Fox and his family, it will likely prevent many other plaintiffs outside the Eastern District of New York from recovering under similar negligence claims. Judge Weinstein's opinion recognized that "market share theory is really a rule of last resort" that is not by any means required when a plaintiff cannot prove causation.<sup>166</sup> Although many other courts throughout the country will likely be persuaded by *Hamilton*'s landmark adoption of a new duty for handgun manufacturers to market and distribute their guns with reasonable care, without a smoking gun, many plaintiffs will likely be left empty handed.

Colin K. Kelly\*

---

<sup>161</sup> See Myron Levin, *Judge Rejects Cincinnati's Suit Against Gun Makers*, L.A. TIMES, October 8, 1999, at A1. (Cities include New Orleans, Los Angeles, San Francisco, Chicago, Atlanta, New Haven and Bridgeport, CT; New York City, Miami, Cincinnati, Detroit, Cleveland, St. Louis, Boston, Camden and Camden County N.J., Newark, N.J., and Wayne County Michigan).

<sup>162</sup> See Frank Murray, *NAACP Will Sue Makers of Firearms.*, WASH. TIMES, July 13, 1999, at A 1, 11. (If the group survives the very difficult battle over issues of legal standing to sue gun manufacturers, it will likely sue under both ultrahazardous liability and negligent marketing and distribution theories).

<sup>163</sup> See Myron Levin *Judge Rejects Cincinnati's Suit Against Gun Makers*, LOS ANGELES TIMES, Oct. 8, 1999, at A1.

<sup>164</sup> *Id.* Note that this quote does not come directly from any written opinion of Judge Ruehlman.

<sup>165</sup> *Id.*

<sup>166</sup> *Hamilton*, 62 F. Supp.2d at 844.

\* Associate, ALSTON & BIRD, Atlanta, GA, fall 2001, B.A. Political Science, DAVIDSON COLLEGE, 1998, J.D. Candidate May 2001, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW. I would like to thank both my family and my fiancée, Kelly Bolterstein, for all of their patience, support, and encouragement.