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MAIL-ORDER GUN KITS AND FINGERPRINT-RESISTANT PISTOLS: WHY WASHINGTON COURTS SHOULD IMPOSE A DUTY ON GUN MANUFACTURERS TO MARKET FIREARMS RESPONSIBLY

Amy Edwards

Abstract: Plaintiffs have historically been unsuccessful in suing gun manufacturers for injuries inflicted by the criminal acts of third parties. Until recently, with one exception, courts uniformly found no basis for liability under either strict liability or general negligence claims. In three recent cases, however, courts have imposed a duty under negligent-marketing theories. These theories have yet to be tested in Washington. This Comment examines the potential viability of a lawsuit by victims of gun violence against gun manufacturers for negligent marketing in Washington. It ultimately concludes that Washington courts can and should impose a duty on gun manufacturers to refrain from marketing their products in a manner that increases the risk that the guns will be used for criminal activity.

Gun violence filled the headlines in 1999. In Colorado, two students armed with two shotguns, an assault rifle, and a TEC-9 assault pistol shot twenty-six people at Columbine High School, killing thirteen.[1] In Los Angeles, California, a Washington resident opened fire on people in a Jewish Community Center using a semi-automatic gun resembling an Uzi.[2] He peppered the building with approximately seventy shots, injuring five people, including three children.[3] While fleeing the community center, he shot and killed a postal worker with a 9-mm Glock 26 handgun.[4] The shooter obtained both weapons in Washington.[5] In Seattle, Washington, a man walked into a shipyard building at the north end of Lake Union and shot four people with a handgun, killing two.[6]

Gun-related violence affects many people in Washington every year. In 1998 alone, firearms caused 542 deaths[7] and 304 injuries.[8] In 1997,

1. *See* Handgun Control, *Private Sales at Gun Shows: Your Friendly Neighborhood Unregulated Arms Bazaar* (visited Jan. 1, 2000) <http://www.handguncontrol.org/gunshws.htm>.

2. *See Suspect in L.A. Shootings Surrenders in Las Vegas*, Seattle Times, Aug. 11, 1999, at A1.

3. *See id.*

4. *See* Mike Carter & Keiko Morris, *Furrow's Gun Originally a Police Weapon*, Seattle Times, Aug. 13, 1999, at A13.

5. *See id.*

6. *See* Steve Miletich et al., *Gunman Kills 2, Wounds 2 in Seattle*, Seattle Times, Nov. 3, 1999, at A1.

7. *See* Washington State Department of Health (WSDH), Center for Health Statistics, Death Certificates (Oct. 1999) (CD-ROM).

firearms were used in fifty-nine percent of all murders in Washington and were the most commonly used weapon in aggravated assaults.[9] Between 1989 and 1995, Washington hospital charges for gunshot trauma exceeded $61 million.[10]

Until recently, almost all cases brought against gun manufacturers in the United States by victims of gun-related violence failed.[11] Courts rejected strict- and product-liability claims where guns were not defective.[12] Under negligence claims, courts refused to impose a duty—a required element in finding liability—on manufacturers to prevent or decrease the likelihood that their products would be misused.[13]

Since 1996, plaintiffs in three cases—two in New York and one in California—have succeeded in establishing that gun manufacturers owed them such a duty.[14] In each case, the respective courts applied negligent-marketing theories and found that gun manufacturers had a duty to refrain from marketing guns in a manner that increased the risk that the guns would be used for criminal activity.[15] By imposing such a duty, courts force manufacturers to address the risks created by their marketing practices and, ultimately, to be more accountable for the harm their products caused.[16] For example, the threat of prolonged lawsuits against gun manufacturers by the federal government and various cities has caused one manufacturer, Smith & Wesson, to adopt measures designed to decrease gun fatalities, including those caused by criminals.[17] If more

8. *See id.*, Office of Hospital and Patient Data, Comprehensive Hospital Abstract Reporting System.

9. *See* Federal Bureau of Investigation, *Uniform Crime Reports for the United States*, at 207, 209 (1997).

10. *See* Washington Ceasefire, *Financial Costs of Firearms* (visited Oct. 24, 1999) <http://www.waceasefire.org/waresfinfacts.htm>.

11. *See infra* Parts II.A and II.B.1.

12. *See infra* Part II.A.

13. *See infra* note 98 and accompanying text. Before a gun manufacturer is held liable, plaintiffs would also need to show breach of duty, causation, and injury. *See* Dan B. Dobbs, *The Law of Torts*, § 115 at 270–71 (2000).

14. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 827 (E.D.N.Y. 1999); Halberstam v. S.W. Daniel, Inc., No. CV 95-3323 (E.D.N.Y. filed Aug. 14, 1995); Merrill v. Navegar, 89 Cal. Rptr. 2d 146, 185 (Cal. Ct. App. 1999), *review granted* 991 P.2d 755 (Cal. 2000).

15. *See infra* Part II.B.2.

16. Because courts typically determine whether a defendant owes a duty to a plaintiff and the jury determines breach and causation, imposing a duty significantly increases the likelihood that a case will go to trial. *See Dobbs, supra* note 13, § 115 at 270–71.

17. *See* Edward Walsh & David A. Vise, *U.S., Gunmaker Strike a Deal*, Washington Post, Mar. 18, 2000, at A1.

courts were to impose a duty on gun manufacturers, similar suits by private plaintiffs would be more likely to create similar pressures.

This Comment argues that Washington courts should impose a duty on gun manufacturers to refrain from marketing their guns in a manner that increases the risk that criminals will use them. Part I discusses the circumstances in which a defendant can be held liable for the criminal acts of a third party in Washington and describes the one Washington case that addressed whether a gun manufacturer is liable for the harm caused by the criminal acts of a third party. Part II examines cases brought in other states by victims of gun violence against gun manufacturers. Part III concludes that Washington law supports imposing a duty on gun manufacturers to refrain from marketing guns in a manner that increases the risk that they will be criminally misused.

I. LIABILITY FOR THE CRIMINAL ACTS OF A THIRD PARTY IN WASHINGTON AND *KNOTT v. LIBERTY JEWELRY & LOAN, INC.*

Although a person generally has no duty to protect others from the criminal acts of third parties,[18] Washington courts have recognized a duty in some circumstances. However, the one Washington case to address whether a gun manufacturer could be found liable for injuries caused by the criminal use of its handgun held that the gun manufacturer had no duty to prevent these injuries.

A. *Liability for the Criminal Acts of a Third Party*

To prevail in negligence actions, plaintiffs must show that defendants owed them a duty of reasonable care.[19] Duty is defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."[20] In general, a person has a duty to act with reasonable care under certain circumstances.[21] In some cases, however, a defendant may have no duty

18. *See infra* note 23 and accompanying text.

19. *See Dobbs, supra* note 13, § 114, at 269; Hutchins v. 1001 Fourth Ave. Assoc., 116 Wash. 2d 217, 220, 802 P.2d 1360, 1362 (1991).

20. Transamerica Title Ins. Co. v. Johnson, 103 Wash. 2d 409, 413, 693 P.2d 697, 700 (1985) (quoting William Prosser, *Torts* § 53 at 331 (3d ed. 1964)) (internal quotations omitted).

21. *See Dobbs, supra* note 13, § 115, at 270.

to act in a particular manner, even when a plaintiff suffers injuries.[22] For example, a defendant generally has no duty to protect others from the criminal acts of third parties.[23] Whether a defendant owes a duty of care is a question of law to be determined by the court[24] and "depends on mixed considerations of logic, common sense, justice, policy, and precedent."[25] Changing social conditions may also lead to the recognition of new duties.[26]

There are four exceptions to the general rule that a person has no duty to protect others from third parties' criminal acts. First, a duty to protect others from the criminal acts of a third party may arise if a special relationship exists between a defendant and either a third party or a victim of the third party's conduct.[27] This special relationship is typically classified by its protective nature and generally involves an affirmative duty to provide aid.[28] For example, it may exist between school and pupil, innkeeper and guest, or common carrier and passengers.[29] Similarly, courts have found a special relationship between a defendant and a third party where the relationship is custodial in nature.[30] A defendant, therefore, has a duty to control the third party and protect others from the third party's "dangerous propensities."[31] Courts have recognized this relationship between employers and employees, psychiatrists and patients, tavern keepers and intoxicated guests, and parents and children.[32]

Second, a special relationship creating a duty to protect others from the acts of a third party may arise if a defendant "creates or increases the risk of injury to the plaintiff, or creates a dependent relationship, that

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22. *See id.*

23. *See Hutchins*, 116 Wash. 2d at 223, 802 P.2d at 1364.

24. *See* Hansen v. Friend, 118 Wash. 2d 476, 479, 824 P.2d 483, 485 (1992).

25. Webstad v. Stortini, 83 Wash. App. 857, 873, 924 P.2d 940, 949 (1996) (quoting Keates v. City of Vancouver, 73 Wash. App. 257, 265, 869 P.2d 88, 93 (1994)) (internal quotation omitted).

26. *See id.* at 872, 924 P.2d at 948 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 53, at 359 (5th ed. 1984)).

27. *See Hutchins*, 116 Wash. 2d at 227, 802 P.2d at 1365–66.

28. *See id.* at 228, 802 P.2d at 1366.

29. *See id.* at 227–28, 802 P.2d at 1366.

30. *See id.* at 228–29, 802 P.2d at 1366 (citing Peterson v. State, 100 Wash. 2d 421, 428, 671 P.2d 230, 237 (1983)).

31. *Id.* at 229, 802 P.2d at 1366.

32. *See id.*

induces reliance or prevents assistance from others."[33] The Washington Court of Appeals addressed this relationship in *Webstad v. Stortini*[34] when it examined whether the defendant Stortini owed a duty to prevent, either through words or action, his female companion Webstad from committing suicide.[35] Although Stortini and Webstad had been in a relationship for more than two years,[36] the court held that Stortini's acts did not create or increase the risk that she would commit suicide, or prevent her from seeking assistance.[37] Thus, it found no special relationship that would give rise to a duty.[38]

Third, in some exceptional circumstances, a duty may arise absent a special relationship. In adopting the Restatement (Second) of Torts section 302B, the Supreme Court of Washington in *Hutchins v. 1001 Fourth Avenue Associates*[39] stated that an act or omission may be negligent if the defendant realized or should have realized that the act created an unreasonable risk that a third party would harm the plaintiff, even if such conduct was criminal.[40] Restatement section 302B, comment (d) explains that generally a defendant may act on the assumption that others will obey the law.[41] However, as comment (e) explains, in certain situations the defendant may be "required to anticipate and guard against the intentional misconduct of third parties."[42] One such situation is where the defendant knows of unusual conditions creating a high risk of intentional misconduct.[43] For example, a railroad company may be liable for running a train with knowledge that striking employees had wrecked the trains or tracks, and the company failed to take proper precautions to guard against the employees' destructive activities.[44]

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33. Webstad v. Stortini, 83 Wash. App. 857, 874, 924 P.2d 940, 949–50 (1996).

34. 83 Wash. App. 857, 924 P.2d 940 (1996).

35. *See id.* at 864, 924 P.2d at 944–45. The court treated the suicide as an act committed by a third party. *See id.* at 866, 924 P.2d at 945.

36. *See id.* at 860, 924 P.2d at 942.

37. *See id.* at 876, 924 P.2d at 950.

38. *See id.*

39. 116 Wash. 2d 217, 802 P.2d 1360 (1991).

40. *See id.* at 230, 802 P.2d at 1367.

41. *See id.* (citing *Restatement (Second) of Torts* § 302B)(1965).

42. *Id.*

43. *See Restatement (Second) of Torts* § 302B cmt. e, subsec. H (1965).

44. *See id.*, at illus. 15.

Finally, Washington courts have recognized a duty when defendants negligently entrust chattels[45] to third parties they know or have reason to know are likely to misuse them.[46] Such a duty has been imposed on defendants in the context of entrusting motor vehicles and firearms to intoxicated persons.[47] For example, in *Bernethy v. Walt Failor's, Inc.*,[48] a representative of the victim's estate sued a retail gun dealer for wrongful death.[49] The plaintiff claimed that the defendant negligently furnished a gun to an intoxicated person, who then shot and killed the victim.[50] Relying on the Restatement (Second) of Torts section 390, the Supreme Court of Washington held that the defendant had a duty not to furnish a "dangerous instrumentality such as a gun to an incompetent."[51] Additionally, the court cited the Revised Code of Washington (RCW) section 9.41.080, a criminal statute that prohibits people from delivering a pistol to someone they have "reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind," as persuasive public policy in support of its decision.[52]

Policy interests also play a role in a court's determination of whether to recognize a duty to prevent injuries caused by third parties.[53] These include the "societal interests involved, the severity of the risk, the burden on defendants, the likelihood of occurrence, and the relationship between the parties."[54] The Washington Court of Appeals in *Lauritzen v. Lauritzen*[55] also considered whether the criminal act was foreseeable, whether defendant would be overly burdened by the duty, whether

45. "Chattel" is defined as "an article of personal property." *Black's Law Dictionary* 236 (6th ed. 1990)

46. *See generally*, Bernethy v. Walt Failor's, Inc., 97 Wash. 2d 929, 653 P.2d 280 (1982); Jones v. Harris, 122 Wash. 69, 210 P. 22 (1922); Mitchell v. Churches, 119 Wash. 547, 206 P. 6 (1922).

47. *See Bernethy*, 97 Wash. 2d at 934, 653 P.2d at 283; Mitchell, 119 Wash. at 555, 206 P. at 8.

48. 97 Wash. 2d 929, 653 P.2d 280 (1982).

49. *See id.* at 930, 653 P.2d at 281.

50. *See id.* at 931, 653 P.2d at 281.

51. *Bernethy*, 97 Wash. 2d at 933, 653 P.2d at 283 (quoting *Restatement (Second) of Torts* § 390 (1965)) (internal quotations omitted).

52. *Id.* at 932–33, 653 P.2d at 282 (quoting statute codified at Wash. Rev. Code § 9.41.080 (1981)) (internal quotations omitted).

53. *See, e.g.*, Webstad v. Stortini, 83 Wash. App. 857, 873, 924 P.2d 940, 949 (1996); Lauritzen v. Lauritzen, 74 Wash. App. 432, 442, 874 P.2d 861, 867 (1994).

54. *Lauritzen*, 74 Wash. App. at 442, 874 P.2d at 867.

55. 74 Wash. App. 432, 874 P.2d 861 (1994).

victims were able to protect themselves from the criminal acts, and whether defendants received financial benefits from plaintiffs.[56]

B. Knott v. Liberty Jewelry & Loan, Inc.: *Rejecting Liability for a Gun Manufacturer for the Criminal Acts of a Third Party*

In the only Washington case to address a gun manufacturer's liability for a third party's criminal act, the court of appeals held that the trial court properly dismissed the case because the gun was not defective and the distributor and retailer had no duty to exceed the statutory marketing guidelines for distributing firearms.[57] In *Knott v. Liberty Jewelry & Loan, Inc.*,[58] Joseph Bates legally purchased a handgun popularly known as a "Saturday night special," which he used to shoot and severely injure Douglas Knott.[59] Knott's mother brought claims against the manufacturer, retailer, and distributor of the handgun under several tort theories.[60] She sought to impose liability against the manufacturer under a product-liability theory alleging that the gun was unreasonably unsafe by design, and also under a strict-liability theory arguing that the court should adopt a new common law cause of action for injuries sustained from the criminal use of handguns that serve no self-defense or sporting purpose.[61] She also sued the retailer and distributor, claiming they were negligent in distributing and marketing a gun that had no legitimate use and was often used for criminal activity.[62]

The court of appeals found that Washington's product-liability statute, RCW section 7.72.030(1)(a), governed and rejected the plaintiff's product-liability claim against the gun manufacturer.[63] Section

56. *See id.* at 442–43, 874 P.2d at 867.

57. *See* Knott v. Liberty Jewelry & Loan, Inc., 50 Wash. App. 267, 269, 748 P.2d 661, 662 (1988).

58. 50 Wash. App. 267, 748 P.2d 661 (1988).

59. *See id.* at 269, 748 P.2d at 662. The term "Saturday night special" refers to handguns that are small, easily concealable, cheaply made, and inexpensive. *See* Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153–54 (Md. 1985).

60. *See Knott* at 269, 748 P.2d at 662.

61. *See id.* at 272, 275, 748 P.2d at 663, 665.

62. *See id.* at 273, 748 P.2d at 664.

63. *See id.* at 272, 748 P.2d at 663. Subsequent to *Knott*, section 7.72.030 was amended to exclude firearms from the general provision holding manufacturers liable where they manufacture products that are not reasonably safe as designed. Product Liability Act, Ch. 94, § 1, 1988 Wash. Laws 316–17. The statute now states that firearms "shall not be deemed defective in design on the

7.72.030(1)(a) states that a "product is not reasonably safe as designed, if . . . the likelihood that the product would cause the claimant's harm . . . outweighed the burden on the manufacturer to design a product that would have prevented those harms."[64] Because the court found it difficult to see how any operable handgun would have prevented Knott's injuries, the statute's requirements could not be satisfied.[65]

The court also rejected the plaintiff's request to adopt a new strict-liability common law action as accepted by the Maryland Court of Appeals.[66] In *Kelley v. R.G. Industries, Inc.*,[67] the Maryland court held the manufacturer of a Saturday night special strictly liable for injuries caused by its criminal use.[68] The court in *Kelley* based its decision on the fact that the Saturday night special was "too inaccurate, unreliable and poorly made" to be used by law enforcement, sportsmen, or homeowners, and the manufacturer knew or should have known that the gun was principally used for criminal activities.[69] However, the court in *Knott* refused to adopt a new rule of law similar to that in *Kelley* because in *Baughn v. Honda Motor Co.*[70] the Supreme Court of Washington rejected a product liability analysis that weighed the risk of harm caused by a product against its utility.[71] In addition, the court stated that the Washington Legislature was the proper body to establish new causes of action regarding handguns.[72]

The *Knott* court also affirmed the trial court's dismissal of the plaintiff's negligence action against the distributor and retailer of the gun.[73] Knott argued that because Saturday night specials have no legitimate purpose and are often used in crimes, the distributor had a duty to warn retailers of the "dangerous propensities" of the gun and the

basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury or death when discharged." Wash. Rev. Code § 7.72.030(1)(a) (1998).

64. *Knott*, 50 Wash. App. at 273, 748 P.2d at 663–64 (quoting Wash. Rev. Code § 7.72.030(1)(a) as codified in 1987) (internal quotations omitted).

65. *See id.* at 273, 748 P.2d at 664.

66. *See id.* at 275, 748 P.2d at 665.

67. 497 A.2d 1143 (Md. 1985).

68. *Id.* at 1159.

69. *Id.* at 1158.

70. 107 Wash. 2d 127, 727 P.2d 655 (1986).

71. *See Knott*, 50 Wash. App. at 275–76, 748 P.2d at 665 (citing *Baughn*, 107 Wash. 2d at 147, 727 P.2d at 667).

72. *See id.* at 276, 748 P.2d at 665.

73. *See id.* at 273–74, 748 P.2d at 664.

retailer had a duty to take more precautions than statutorily required to prevent handgun sales to criminals.[74] The court refused to accept that argument, finding instead that the Washington Legislature had "specifically preempted all further regulation of firearms."[75] In addition, the court cited several non-Washington cases that had rejected similar claims, including an Illinois decision holding that manufacturers had no common law duty to control the distribution of their firearms to the general public.[76] Although when *Knott* was decided other jurisdictions had rejected similar claims,[77] in recent years at least three courts have accepted them.[78]

II. NON-WASHINGTON CASES AGAINST GUN MANUFACTURERS FOR HARM CAUSED BY CRIMINAL ACTS OF THIRD PARTIES

Almost all cases brought against gun manufacturers by victims of gun-related violence have failed.[79] Courts have generally rejected strict- and product-liability claims where the gun was not defective.[80] In negligence actions, most courts have rejected claims that gun manufacturers have a duty to abstain from *selling* their products to the general public even when the manufacturers knew they would be used by criminals.[81] Courts in three recent cases, however, have held that gun manufacturers owed a

74. *See id.* at 273, 748 P.2d at 664.

75. *Id.* (construing statute codified at Wash. Rev. Code § 9.41.290 (1987)). As amended in 1994, section 9.41.290 states:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms .... Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law ... and are consistent with this chapter.

Ch. 7, § 428, 1994 Wash. Laws 2242. In the three other cases that have applied section 9.41.290, the courts addressed whether it preempted a rule or local ordinance. *See* Cherry v. Municipality of Metro. Seattle, 116 Wash. 2d 794, 801, 803, 808 P.2d 746, 749–50 (1991); Seattle v. Ballsmider, 71 Wash. App. 159, 164, 856 P.2d 1113, 1116 (1993); State v. Rabon, 45 Wash. App. 832, 835, 727 P.2d 995, 997 (1986).

76. *See Knott*, 50 Wash. App. at 274, 748 P.2d at 664 (citing Riordan v. International Armament Corp., 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985)).

77. *See infra* Parts II.A and II.B.1.

78. *See infra* Part II.B.2.

79. *See infra* Parts II.A and II.B.1.

80. *See infra* Part II.A.

81. *See infra* Part II.B.1.

duty to refrain from *marketing* their products in a manner that increased the risk of criminal misuse.[82]

A. *Strict- or Product-Liability Theories for Gun Manufacturer Liability*

With the exception of *Kelley*,[83] all attempts to hold gun manufacturers liable for the criminal acts of third parties under strict- or product-liability theories have failed.[84] The plaintiffs in these cases typically asserted claims using theories of design defect, ultra hazardous or abnormally dangerous activity, or failure to warn.

Under the design-defect theory, plaintiffs have asserted that particular guns were defective as designed because they were unreasonably dangerous, served no useful purpose, or posed risks that outweighed their utility.[85] Courts, however, have held that gun manufacturers could not be strictly liable if the plaintiff alleged no actual defect and the gun functioned as designed.[86] Courts have also stated that a risk-utility analysis, which weighs the risk of harm caused by a product against its utility, was inapplicable because the function of firearms—rather than a defect—created the risk of harm.[87]

Under the ultra-hazardous or abnormally-dangerous-activity theory, plaintiffs have argued that gun manufacturers should be liable because the sale of particular guns was an ultra-hazardous activity.[88] However, courts have held that this doctrine applied only to activities that are in

82. *See infra* Part II.B.2.

83. *See supra* notes 67–69 and accompanying text.

84. *See* Copier v. Smith & Wesson Corp., 138 F.3d 833, 836 (10th Cir. 1998); Perkins v. F.I.E. Corp. 762 F.2d 1250, 1275 (5th Cir. 1985); Casillas v. Auto-Ordinance Corp., No. C 95-3601 FMS, 1996 WL 276830, at *4 (N.D. Cal. May 17, 1996); Delahanty v. Hinckley, 564 A.2d 758, 761 (D.C. 1989); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1297 (Ill. App. Ct. 1985); Addison v. Williams, 546 So.2d 220 (La. Ct. App. 1989).

85. *See* Caveny v. Raven Arms Co., 665 F. Supp. 530, 532 (S.D. Ohio 1987); *Riordan*, 477 N.E.2d at 1297–98; King v. R.G. Indus., Inc., 451 N.W.2d 874, 875 (Mich. Ct. App. 1990); Forni v. Ferguson, 648 N.Y.S.2d 73, 74 (N.Y. App. Div. 1996).

86. *See Riordan*, 477 N.E.2d at 1298; *King*, 451 N.W.2d at 875; *Forni*, 648 N.Y.S.2d at 74.

87. *See Perkins*, 762 F.2d at 1268–69; *Caveny*, 665 F. Supp. at 532–33.

88. *See* Casillas v. Auto-Ordinance Corp., No. C 95-3601 FMS, 1999 WL 276830, at *4 (N.D. Cal. May 17, 1996); *Delahanty*, 564 A.2d at 760; *Riordan*, 477 N.E.2d at 1297; Resteiner v. Sturm, Ruger & Co., 566 N.W.2d 53, 56 (Mich. Ct. App. 1997).

themselves inherently dangerous.[89] The use of a gun—not the selling of it—was the ultra-hazardous activity.[90]

Finally, courts rejected claims that gun manufacturers had a duty to warn consumers about the hazards of firearms. Plaintiffs argued that manufacturers should be strictly liable for failure to warn consumers about the criminal misuse of guns.[91] Courts have held that because the general public understood the inherent dangers of firearms, manufacturers had no duty to warn.[92]

B. Negligence Theories for Gun Manufacturer Liability

With three exceptions,[93] plaintiffs have been unsuccessful in arguing that gun manufacturers should be held liable under various negligence theories.[94] In most cases, courts have found that manufacturers had no duty to refrain from selling or distributing their firearms even when manufacturers knew that criminals used them.[95] In three recent cases, however, courts imposed a duty on manufacturers to refrain from marketing their products in a manner that increased the risk that they would be used for criminal activities.[96] In these cases, the duty arose not from merely selling firearms to the general public, as had been argued in earlier cases, but from the manner in which manufacturers chose to market their firearms.[97]

89. *See Delahanty*, 564 A.2d at 761; *see also* Copier v. Smith & Wesson Corp., 138 F.3d 833, 836 (10th Cir. 1998); *Casillas*, 1996 WL 276830, at *4; *Riordan*, 477 N.E.2d at 1297.

90. *See Copier*, 138 F.3d at 836; *Casillas*, 1999 WL 276830, at *4; *Riordan*, 477 N.E.2d at 1297.

91. *See Delahanty*, 564 A.2d at 760; *Resteiner*, 566 N.W.2d at 56.

92. *See Delahanty*, 564 A.2d at 760; *Resteiner*, 566 N.W.2d at 56.

93. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); Halberstam v. S.W. Daniel, Inc., No. CV 95-3323 (E.D.N.Y. filed Aug. 14, 1995); Merrill v. Navegar, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *review granted*, 991 P.2d 755 (Cal. 2000).

94. *See infra* note 98 and accompanying text.

95. *See infra* notes 106–07 and accompanying text.

96. *See infra* notes 110–15 and accompanying text.

97. *See Hamilton*, 62 F. Supp. 2d at 824; *Merrill*, 89 Cal. Rptr. 2d at 163; *Halberstam*, No. CV 95-3323, Mem. of Law in Opp'n to Def.'s Mot. to Dismiss Second Am. Compl., at 15–16 [hereinafter Pls.' Second Mem.].

1. *Cases Where Courts Refused to Impose a Duty on Gun Manufacturers*

In cases where courts did not impose a duty on gun manufacturers, plaintiffs typically alleged that gun manufacturers were negligent in selling specific types of guns to the public when the manufacturers knew or should have known of the high risk that the guns would be used for criminal activities.[98] Plaintiffs argued that manufacturers were negligent in either selling guns to the general public[99] or in the manner in which guns were distributed.[100] For example, in *First Commercial Trust Co. v. Lorcin Engineering, Inc.*,[101] the plaintiff claimed that the defendant was negligent in promoting its handgun in a market it knew or should have known included persons likely to "misuse the handgun by injuring or killing others."[102] In *Riordan v. International Armament Corp.*,[103] the plaintiffs argued that the manufacturer had a duty to take reasonable precautions in selling its products to prevent sale to criminals.[104] Specifically, the plaintiffs claimed that the manufacturer failed to oversee retailers to ensure that they were taking proper measures to screen prospective buyers and that manufacturers had a duty to terminate business with retailers who had a history of selling firearms to criminals.[105]

Courts evaluating such claims generally refused to recognize that gun manufacturers had any duty to protect plaintiffs from intervening criminal acts of third parties absent a special relationship, like that

98. *See* Casillas v. Auto-Ordinance Corp., No. C 95-3601 FMS, 1996 WL 276830, at *2 (N.D. Cal. May 16, 1996); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987); First Commercial Trust Co. v. Lorcin Eng'g, Inc., 900 S.W.2d 202, 203 (Ark. 1995); Delahanty v. Hinckley, 564 A.2d 758, 759 (D.C. 1989); Riordan v. International Armament Corp., 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985); Resteiner v. Sturm, Ruger & Co., 566 N.W.2d 53, 55 (Mich. Ct. App. 1997); Forni v. Ferguson, 648 N.Y.S.2d 73, 74 (N.Y. App. Div. 1996).

99. *See Casillas*, 1996 WL 276830, at *2 (asserting that defendant should be liable for manufacturing and selling weapons associated with criminal activity); *First Commercial Trust*, 900 S.W.2d at 203; *Resteiner*, 566 N.W.2d at 55.

100. *See Riordan*, 477 N.E.2d at 1295; Linton v. Smith & Wesson, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984); *Forni*, 648 N.Y.S.2d at 74.

101. 900 S.W.2d 202 (Ark. 1995).

102. *Id.* at 203.

103. 477 N.E.2d 1293 (Ill. App. Ct. 1985).

104. *See id.* at 1295.

105. *See id.*

between an innkeeper and guest.[106] In other cases, courts held that gun manufacturers had no duty to control distribution of firearms because distribution was intended for members of the general public, who can recognize the dangerous consequences of using handguns.[107]

2. *Cases in Which Courts Imposed a Duty on Gun Manufacturers under Negligent-Marketing Theories*

Courts in three cases have held that gun manufacturers owed plaintiffs a duty of care in the manner in which they marketed their guns.[108] The courts found that the duty arose not from merely selling specific types of firearms to the general public but from the manner in which manufacturers chose to market, advertise, and distribute their products.[109] Although all three cases advanced negligent-marketing claims, the cases relied on slightly different theories. In *Hamilton v. Accu-Tek*,[110] the U.S. District Court for the Eastern District of New York held that manufacturers of inherently dangerous products like handguns had a duty to oversee the distribution of their guns to decrease the likelihood that the guns would end up in the hands of criminals.[111] In *Halberstam v. S.W. Daniel, Inc.*,[112] the plaintiffs asserted that the defendant had a duty based on the negligent-entrustment doctrine: through its marketing techniques, the defendant had acted negligently in entrusting its product to a person likely to use it for criminal activity.[113] In *Merrill v. Navegar*,[114] the California Court of Appeal held that the defendant had a duty not to

106. *See* Casillas v. Auto-Ordinance Corp., No. C 95-3601 FMS, 1996 WL 276830, at *3 (N.D. Cal. May 17, 1996); *First Commercial Trust*, 900 S.W.2d at 205; Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. 1989).

107. *See Riordan*, 477 N.E.2d at 1295; *see also* Linton v. Smith & Wesson, 469 N.E.2d 339, 340 (Ill. App. Ct. 1984); Forni v. Ferguson, 648 N.Y.S.2d 73, 74 (N.Y. App. Div. 1996).

108. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); Halberstam v. S.W. Daniel, Inc., No. CV 95-3323 (E.D.N.Y. filed Aug. 14, 1995); Merrill v. Navegar, 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *review granted* 991 P.2d 755 (Cal. 2000).

109. *See Hamilton*, 62 F. Supp. 2d at 824–25; *Halberstam*, No. CV 95-3323, Mem. of Devorah and David Halberstam and Nachum Sosonkin in Opp'n to the Mots. to Dismiss by S.W. Daniel et al., at 5 [hereinafter Pls.' First Mem.]; *Merrill*, 89 Cal. Rptr. 2d at 152, 185.

110. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

111. *See id.* at 825.

112. No. CV 95-3323 (E.D.N.Y. 1998).

113. *See infra* note 154 and accompanying text.

114. 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *review granted*, 991 P.2d 755 (Cal. 2000).

market its product in a way that substantially increased the risk of criminal misuse.[115]

a. Hamilton v. Accu-Tek*: Negligent Distribution of Firearms*

In *Hamilton*, the district court held that the manufacturers had a duty to take reasonable steps at the point of distribution to reduce the possibility that their firearms would fall into the hands of criminals.[116] The plaintiffs, relatives of seven people killed or injured by handguns in and around New York City, sued twenty-five handgun manufacturers for negligence.[117] The guns used had been obtained illegally and with one exception, the manufacturers were unknown.[118] The plaintiffs claimed that the manufacturers should be liable because their indiscriminate marketing and distribution practices generated an underground market in handguns, which provided criminals access to these weapons.[119] Specifically, the plaintiffs asserted that the defendants had a duty to exercise reasonable care in marketing and distributing handguns to guard against criminal misuse.[120]

The duty imposed by the court came from two intersecting theories: (1) liability for acts of a third party; and (2) duties of manufacturers to design, produce, and market non-defective products.[121] The court held that a duty to minimize the risks of a criminal act by a third party might be imposed where a special relationship existed between defendants and plaintiffs.[122] This special relationship obligated defendants to take reasonable steps to protect plaintiffs from foreseeable risks including the criminal acts of third parties.[123] The court articulated three justifications for finding a special relationship.[124] First, the manufacturers' special ability to detect and guard against the risks associated with their firearms and the foreseeability that these guns would injure plaintiffs created a

115. *See id.* at 185.

116. *See Hamilton*, 62 F. Supp. 2d at 825, 827 (E.D.N.Y. 1999).

117. *See id.* at 808.

118. *See id.* at 808–10.

119. *See id.* at 808.

120. *See id.* at 824.

121. *See id.* at 819.

122. *See id.* at 820.

123. *See id.*

124. *See id.* at 821–22.

protective relationship between the manufacturers and the plaintiffs.[125] Second, the manufacturers' relationship with distributors and retailers provided them with the authority and ability to control the conduct of the distributors and retailers.[126] Thus, manufacturers could be regarded as negligently entrusting their products when they did business with distributors who sold firearms in a manner that posed a great risk to the public.[127] Finally, the court found that a special relationship may be created when manufacturers affirmatively enhance the risk of injury.[128]

The court stated that manufacturers owed a broad duty to consumers to design, produce, and market products that were reasonably safe for their intended use.[129] Liability could attach anywhere along the line of production including manufacturing, advertising, and distribution of the product.[130] The court held that the duty imposed was consistent with the expansive view of duty established in previous New York cases dealing with other types of products.[131]

The court rejected gun manufacturers' concerns that they could have done little to reduce the risk that their firearms would be sold to criminals and thus prevent the ensuing harm.[132] The court cited statistics from the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) that confirmed the rapid movement of guns from legal markets to illegal ones.[133] The court noted that the two most common methods of moving legal guns into the illegal market involve: (1) the use of "straw purchasers" who legally purchase firearms and then sell them to ineligible persons, and (2) falsification of ATF firearm transaction records at the time of purchase.[134] The court found that the relationship between manufacturers, distributors, and retailers gave the manufacturers considerable control over the ultimate use of their products.[135] It reasoned that the defendants could reduce the risk of criminals obtaining

125. *See id.* at 821.
126. *See id.*
127. *See id.*
128. *See id.* at 822.
129. *See id.*
130. *See id.* at 823.
131. *See id.* at 824.
132. *See id.* at 820.
133. *See id.* at 825–26.
134. *See id.* at 826.
135. *See id.*

and misusing firearms by declining to do business with "careless or unscrupulous" federal firearm licensees, limiting sales at unregulated gun shows, and requiring public sales of handguns to occur in responsibly operated stores.[136] The court held that "manufacturers of a uniquely hazardous product, designed to kill and wound human beings," had a duty to take reasonable steps at the point of primary distribution to reduce the possibility that firearms would fall into the hands of those likely to misuse them.[137]

The court distinguished this theory of liability from previous negligence cases that sought to impose liability for marketing a dangerous product.[138] In those cases, the plaintiffs' negligence claims were just an alternative pleading of their strict product liability claims.[139] Therefore, the plaintiffs essentially sought to impose liability merely for selling these weapons to the general public.[140] The theory in *Hamilton* instead imposed liability based on the nature of the marketing techniques employed by the manufacturers.[141] The court found that the manufacturers' method of sale and distribution could be tortious even if the actual sale of the weapon was not.[142]

The court also articulated several public-policy reasons supporting its decision. It found that manufacturers were well-positioned to reduce the rapid rate of diversion from legal retail markets to underground criminal markets, and that imposing a duty would be an appropriate cost-spreading mechanism.[143] The court found that "between a negligent handgun manufacturer and an injured bystander, the former must be regarded as the cheapest cost avoider,—[sic] the party on whom the imposition of liability will lead to the greatest degree of safety and efficiency."[144] Furthermore, the court stated that recognizing a duty would not necessarily impose crushing liability on the industry.[145] The court concluded that legal and policy arguments adequately supported

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136. *Id.* at 826.

137. *Id.* at 825.

138. *See id.* at 824.

139. *See id.* at 825.

140. *See id.*

141. *See id.* at 824.

142. *See id.* at 825.

143. *See id.* at 826.

144. *Id.* at 827 (internal citations omitted).

145. *See id.*

the imposition of a duty on the defendants to use reasonable care in marketing and distributing their firearms.[146]

b. Halberstam v. S.W. Daniel, Inc.*: Negligent Entrustment of Firearms Through the Manufacturer's Marketing Techniques*

In *Halberstam v. S.W. Daniel, Inc.*,[147] the plaintiffs based their case on the doctrine of negligent entrustment: the defendant had acted negligently by entrusting its product to a person likely to use it for criminal activity.[148] The plaintiffs asserted that the manufacturer owed a duty to the general public to adopt reasonable restraints on the marketing of its product.[149] The court denied defendant's motions to dismiss.[150]

The plaintiffs sued the manufacturer of a Cobray M-11/9 after Rashid Baz used it to shoot at a van of children, killing Aaron Halberstam and injuring Nachum Sosonkin.[151] The Cobray was assembled from parts the defendant manufactured and marketed through mail-order assembly kits.[152] The defendant asserted that Baz had purchased the Cobray "on the streets."[153]

The plaintiffs based their negligent-entrustment claim on the Restatement (Second) of Torts section 390, which states that a person who provides a dangerous instrumentality to someone likely to misuse it may be liable for any harm caused by that party.[154] In an effort to include the defendant's activities under this doctrine, the plaintiffs relied on Restatement section 302B, which states that "[a]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of . . . a third

146. *See id.*

147. No. CV 95-3323 (E.D.N.Y. filed Aug. 14, 1995). Because the court did not issue any written opinions, the information in this section comes from court documents and briefs, and Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 Brook. L. Rev. 681 (1998).

148. *See* Lytton, *supra* note 147, at 688.

149. *See id.* at 682, 687.

150. *See Halberstam*, No. CV 95-3323 Civil Docket at 6, 12, and 23.

151. *See* Lytton, *supra* note 147, at 686.

152. *See* No. CV 95-3323, Pls.' Second Am. Compl. at 11–13.

153. *See* Pls.' Second Mem., *supra* note 97, at 37 n.24.

154. *See* Lytton, *supra* note 147, at 688 (citing *Restatement (Second) of Torts* § 390)(1965).

person which is intended to cause harm, even though such conduct is criminal."[155]

Furthermore, the plaintiffs argued that the defendant's advertising campaign and distribution techniques specifically targeted a group of people likely to engage in criminal activity. Advertisements of the Cobray promoted it as "'The Gun that Made the 80's[sic] Roar'" and boasted of "the controversial Drug Lord choice of Cobray firearms."[156] Because the defendant sold the Cobray as an assembly kit not subject to normal firearm sales and licensing regulations that require a serial number, the plaintiffs argued that the defendant's sales procedures were designed to allow criminal purchasers to avoid federal and state restrictions on firearms possession.[157] Therefore, the intended purchaser of the product fell into a group that a reasonable person would consider lacking in ordinary prudence.[158]

The plaintiffs successfully countered the defendant's argument that a duty could not be imposed on a manufacturer to protect against the criminal acts of a third party absent a special custodial relationship.[159] The plaintiffs asserted that the duty arose from specific acts by the defendant that created or increased the risk of criminal misuse of its firearms.[160] The plaintiffs argued that a special relationship 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 creates or increases the risk that a third party will harm a victim.[161] The court denied the defendant's second motion to dismiss based on these arguments.[162] Although the case went to trial, the jury found the defendant not liable.[163]

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155. Lytton, *supra* note 147, at 688–89 (quoting *Restatement (Second) of Torts* § 302B (1965)) (internal quotations omitted).

156. No. CV 95-3323, Pls.' Second Am. Compl. at exh. C, exh. I.

157. *See id.* at 11–13, exh. C.

158. *See* No. CV 95-3323, Def.'s Mot. to Dismiss Pursuant to Fed. R. Civ. Pro. 12(b)(6) [hereinafter Def.'s First Mot. to Dismiss] at 21; Pls.' First Mem. at 8.

159. *See* Pls.' First Mem., *supra* note 109, at 37.

160. *See id.* at 5.

161. *Id.* at 36–37 (citing Carrini v. Supermarkets Gen. Corp., 550 N.Y.S.2d 710 (N.Y. App. Div. 1990)).

162. *See Halberstam*, No. CV 95-3323, Civil Docket at 6, 12, and 23.

163. *See* Lytton, *supra* note 147, at 697–98.

c. Merrill v. Navegar: *Marketing Techniques that Increase the Risk of Criminal Misuse*

In *Merrill*, the California Court of Appeal held that the defendant had a duty to refrain from marketing its firearms in a manner that substantially increased the risk of harm caused by those firearms.[164] The plaintiffs sued Navegar, the manufacturer of the semiautomatic assault weapons (TEC-9 and TEC-DC9[165]) used by Luigi Ferri to kill eight people and injure six others at a San Francisco law firm.[166] Ferri had purchased one TEC-DC9 from a gun show and another from a store in Las Vegas, Nevada.[167]

The plaintiffs alleged that Navegar was negligent or strictly liable or both for these injuries and deaths because of the manner in which it marketed the TEC-DC9.[168] To support their claim, the plaintiffs presented evidence that the TEC-DC9 was an extraordinarily dangerous weapon that was completely useless for hunting, recreational or competitive shooting, and self-defense.[169] The TEC-DC9 was also one of the most commonly used guns in criminal activity.[170] In 1990 and 1991, it was the leading assault weapon seized by law enforcement in large cities.[171] Furthermore, plaintiffs asserted that the manufacturer had exploited the TEC-DC9's popularity with criminals by advertising specific features that served no lawful purpose.[172] For example, promotional materials emphasized the TEC-DC9's resistance to fingerprints.[173] Other design features of interest to criminals included its combat sling; its threaded barrel that permitted the attachment of a silencer, flash suppresser, or barrel extension; its size, which allowed it

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164. *See* Merrill v. Navegar, 89 Cal. Rptr. 2d 146, 185 (Cal. Ct. App. 1999), *review granted* 991 P.2d 755 (Cal. 2000).

165. The TEC-DC9 is a modification of the TEC-9 which may have been intended to "evade a ban on the TEC-9" in Washington, D.C. *Id.* at 152 n.3. Hereinafter, both the TEC-9 and the TEC-DC9 will be referred to as TEC-DC9.

166. *See id.* at 152.

167. *See id.* at 152–53.

168. *See id.* at 152.

169. *See id.* at 154.

170. *See id.* at 155.

171. *See id.* Assault weapons like the TEC-DC9 accounted for 10% of the guns traced to crimes in 1988–89, but represented merely 0.5% of the privately owned firearms in the United States during the same time. *See id.*

172. *See id.* at 156–57.

173. *See id.*

to be transported with relative ease and concealability compared to other guns with similar firepower; and its compatibility with the "Hell Fire" trigger system, which permitted it to be "fired at full automatic rate—300 to 500 rounds per minute."[174]

The court of appeal reversed the trial court's grant of summary judgment for the defendant on the negligence claim.[175] The court stated that the plaintiffs' assertions that Navegar breached its duty to refrain from advertising the TEC-DC9 to the general public must be read together with the allegations regarding Navegar's knowledge of the TEC-DC9's extraordinary risk of misuse.[176] The court held that the defendant owed "a duty to exercise reasonable care not to create risks above and beyond those inherent in the presence of firearms in our society."[177] The court analogized this duty to the one owed under assumption-of-risk and comparative-fault doctrines associated with inherently dangerous activities such as sports.[178] In this context, defendants typically have no duty to eliminate or protect plaintiffs against risks inherent in the activity, but defendants do have a duty to exercise reasonable care not to increase the risks to plaintiffs over and above those inherent in the activity.[179] Similarly, the court stated that gun manufacturers should refrain from increasing the inherent dangers of firearms by marketing them in a manner appealing to criminals.[180]

Although the court recognized that liability for increasing the risk of harm to a third party generally requires a special relationship, lack of a special relationship was not necessarily a bar to imposing a duty in this case where the risk was increased by Navegar's affirmative act of marketing the TEC-DC9 in a manner appealing to criminals, not by its failure to act.[181] Furthermore, a defendant's intentional misfeasance, coupled with a high degree of foreseeable harm, may eliminate the need for a special relationship.[182] For example, the defendant's promotion of

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174. *See id.* at 154, 156–57.
175. *See id.* at 152.
176. *See id.* at 163.
177. *Id.* at 152.
178. *See id.* at 163.
179. *See id.* at 163–64.
180. *See id.* at 164.
181. *See id.* at 164–65.
182. *See id.* at 164.

certain features of the TEC-DC9 may be seen as increasing the inherent risk posed by the gun.[183]

Several factors justified the court's departure from the general rule against imposing liability for the criminal acts of a third party.[184] The court found that the criminal use of the TEC-DC9 was foreseeable.[185] According to the court, the record provided sufficient evidence to prove that Navegar was aware of the significant criminal use of the TEC-DC9 and the lack of any legitimate use.[186] The fact that Ferri's actions were criminal was irrelevant to whether the act was foreseeable.[187] Because the deaths and injuries resulting from gun violence place enormous social and economic costs on society, the court found that preventing these consequences was an important public-policy objective.[188] The court determined that imposing liability on gun manufacturers who make particularly lethal weapons with little legitimate civilian use[189] and who market these weapons to persons likely to misuse them[190] would not unreasonably burden the defendant or adversely affect the community.[191] The court also stated that gun manufacturers should not receive more protection from negligence liability than manufacturers of other more socially useful products.[192]

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183. *See id.* at 165; *supra* notes 173–74 and accompanying text.

184. *See Merrill*, 89 Cal. Rptr. 2d at 165 (referencing factors articulated in Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)).

185. *See id.* at 165–66.

186. *See id.* at 166.

187. *See id.*

188. *See id.* at 169–170.

189. *See id.* at 171. To support its conclusion that the TEC-DC9 had little legitimate civilian use, the court referred to the fact that both the California Legislature and U.S. Congress banned the TEC-DC9. The California Assault Weapons Control Act states that the TEC-DC9 has "such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." Cal. Penal Code § 12275.5 (West 1989). Similarly, in passing the Violent Crime Control and Law Enforcement Act of 1994, Congress considered evidence that assault rifles such as the TEC-DC9 were "the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder." H.R. No. 103-489, 2d. Sess., at 13 (1994).

190. *See Merrill*, 89 Cal. Rptr. 2d at 171.

191. *See id.* at 172. In comparison, the court cited *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 81–82 (Cal. 1997), where the court refused to impose a duty on a garbage truck operator to guard against frightening horses because it would unreasonably burden those who operate garbage trucks, which are a socially useful machine. *See Merrill*, 89 Cal. Rptr. 2d at 170.

192. *See id.* at 172.

The court also found that the defendant's marketing strategy for TEC-DC9s was morally blameworthy.[193] For example, Michael Solodovnick, Navegar's national sales and marketing director from 1989 to 1993, admitted knowing that people were attracted to TEC-DC9s because the guns could be used with the "Hell Fire" trigger system.[194] In 1991, he pled guilty to violating federal gun laws by acting in furtherance of a conspiracy that included transferring manuals and videotapes relating to the conversion of TEC-DC9s into fully automatic firearms.[195] He also stated that the condemnation of the TEC-DC9 generated sales and that "'whenever anything negative has happened, sales have gone tremendously high.'"[196] Furthermore, Carlos Garcia, president of Navegar until 1995, admitted that certain accessories of the TEC-DC9, such as flash suppressors, would be of no interest to law-abiding citizens because those accessories would suggest "'a criminal purpose.'"[197]

The court also rejected the defendant's contention that the California Assault Weapons Control Act (AWCA)[198] and section 1714.4(a) of the California Civil Code prevented imposing a duty on manufacturers.[199] The court stated that the AWCA and other laws applicable to the manufacture and sale of firearms do not necessarily define the scope of the duty or standard of care applicable to gun manufacturers or retailers.[200] It found that the AWCA does not exempt manufacturers from a duty to refrain from marketing their products negligently, even if that duty would impose responsibilities exceeding those required by the AWCA or other gun control laws.[201]

The court also stated that California Civil Code section 1714.4(a) only applies in cases involving a defective product claim.[202] Section 1714.4(a) states: "In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its

193. *See id.* at 169.
194. *See id.* at 157.
195. *See id.*
196. *Id.*
197. *Id.* at 158.
198. Cal. Penal Code § 12275 (West 1989).
199. *See Merrill*, 89 Cal. Rptr. 2d at 173.
200. *See id.*
201. *See id.*
202. *See id.* at 175–76.

potential to cause serious injury, damage, or death when discharged."[203] The purpose of section 1714.4(a) was to deal with product-liability actions involving an allegedly defective product.[204] The court cited the legislative history of the bill as support for this determination[205] and concluded that section 1714.4(a) was not applicable to the manufacturing, marketing, and sale of non-defective firearms.[206]

Finally, the court rejected the defendant's argument that imposing a duty would create an impermissible judicial ban on the manufacture and sale of firearms like the TEC-DC9.[207] The court explained that the purpose of making an act tortious was to force manufacturers to absorb the cost of injuries caused by their products.[208] By imposing a duty, the court, therefore, did not intend to ban the sales of the TEC-DC9.[209]

III. WASHINGTON COURTS SHOULD IMPOSE A DUTY OF CARE ON GUN MANUFACTURERS UNDER A NEGLIGENT-MARKETING THEORY

Washington courts should impose a duty on gun manufacturers to refrain from marketing their products in a manner that increases the risk that criminals will use their guns. Washington case law supports the imposition of such a duty under a general negligent-marketing theory or one related to the negligent-entrustment doctrine. Public-policy factors also support imposing a duty on manufacturers because they are well-positioned to decrease the criminal use of firearms and imposing a duty would not be unreasonably burdensome.

A. *Current Washington Law Supports the Imposition of a Duty on Gun Manufacturers*

Washington courts should impose a duty on gun manufacturers to take reasonable steps to alleviate the use of their firearms by criminals. A

203. *Id.* at 175 (quoting Cal. Civ. Code § 1714.4(a)) (internal quotations omitted).

204. *See id.* at 176.

205. *See id.* The original bill would have precluded negligence actions as well as product-liability actions; however, it was amended to remove the negligence language. *See id.* (discussing Sen. Judiciary Comm. Rep. on Assem. Bill. 75 (1983–1984 Reg. Sess.)).

206. *See id.*

207. *See id.* at 178.

208. *See id.* at 179.

209. *See id.* at 178.

duty should arise when gun manufacturers market guns, either through advertising or distribution methods, in a manner that increases the risk that the guns will be used for criminal activity. Courts should also impose a duty when the manufacturer, through its advertising and distribution methods, negligently entrusts its products to people likely to misuse them. Because the theories rejected in *Knott v. Liberty Jewelry and Loan, Inc.* are distinguishable from these negligent-marketing theories, *Knott* would not preclude imposing such a duty. Finally, imposing a duty would not create an impermissible judicial ban on firearm sales.

Washington law supports the imposition of a duty on gun manufacturers to refrain from marketing their products in a manner that increases the risk that the guns will be used for criminal activities. A Washington court recognized a similar duty in *Webstad v. Stortini*, where the court evaluated whether the defendant had a duty to prevent the plaintiff from committing suicide.[210] Although any firearm has the potential to cause harm, courts should find that gun manufacturers who advertise or distribute their firearms in ways that increase the risk that criminals will misuse them have increased the likelihood that plaintiffs will be harmed by criminal activity. Thus, manufacturers' marketing techniques could create special relationships that give rise to a duty.

The three out-of-state cases addressing negligent-marketing claims also lend support to imposing a duty upon gun manufacturers in Washington. This type of duty was articulated in *Merrill v. Navegar*,[211] relied on in *Halberstam v. S.W. Daniel, Inc.*,[212] and recognized in *Hamilton v. Accu-Tek*.[213]

The Restatement (Second) of Torts section 302B, which the Supreme Court of Washington accepted in *Hutchins v. 1001 Fourth Avenue Associates*, provides additional support for imposing a duty when gun manufacturers market their firearms in a manner increasing the risk of criminal misuse.[214] Section 302B imposes liability when parties act in ways they realize or should realize create an unreasonable risk of harm to

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210. 83 Wash. App. 857, 859–60, 924 P.2d 940, 942 (1996); *see supra* notes 33–38 and accompanying text.

211. *See* 89 Cal. Rptr. 2d 146, 163–165 (Cal. Ct. App. 1999), *review granted*, 991 P.2d 755 (Cal. 2000).

212. *See* Pls.' First Mem., *supra* note 109, at 5, 36–37.

213. *See* 62 F. Supp. 2d 802, 822 (E.D.N.Y. 1999).

214. *See* 116 Wash. 2d 217, 230, 802 P.2d 1360, 1367 (1991).

another through the conduct of a third party.[215] For example, manufacturers who know their firearms are being distributed in a way that increases the likelihood of criminal use are just as culpable as the railroad company in the Restatement's illustration, which ran a train knowing that striking employees had wrecked the tracks.[216]

The theory articulated in *Halberstam*, the mail-order gun case, may provide another avenue for victims of gun violence in Washington. Under this theory, a person who provides a chattel to a party likely to use it to harm another person may be held liable.[217] Furthermore, RCW section 9.41.080 prohibits a person from delivering a firearm to anyone believed ineligible to possess one, including people convicted of felonies or other serious offenses.[218] Washington courts have accepted the negligent-entrustment doctrine where the defendant was the retailer,[219] and the courts should expand it to include manufacturers as well. When gun manufacturers target their advertising in a manner appealing to criminals, they necessarily increase the likelihood that their products will, in fact, be sold to criminals. For example, in *Halberstam*, the defendant designed the Cobray assembly kits so that they were not subject to normal firearm regulations, including restrictions on distribution.[220] Thus, the kits were attractive to people who could not otherwise obtain firearms legally.[221] By selling firearms in such a manner, the intended purchasers fall within a group of people likely to engage in criminal activity.[222]

The greater problem that plaintiffs may face in bringing negligent-marketing actions against gun manufacturers will be determining which acts by manufacturers increase the risk of criminal activity. The courts have not articulated clear rules for making this determination, but recent decisions suggest some general guidelines. The mere act of manufacturing and selling dangerous firearms would be insufficient to

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215. *See Restatement (Second) of Torts* § 302B (1965).

216. *See supra* note 39–44 and accompanying text.

217. *See supra* notes 45–52 and accompanying text.

218. *See* Wash. Rev. Code § 9.41.080 (1998) (referencing Wash. Rev. Code § 9.41.040 (1998)).

219. *See* Bernathy v. Walt Failor's, Inc., 97 Wash. 2d 929, 930, 653 P.2d 280, 281 (1982).

220. *See* Halberstam v. S.W. Daniel, Inc., No. CV 95-3323 (E.D.N.Y. filed Aug. 14, 1995), Pls.' Second Am. Compl., at 11–13 exh. C.

221. *See id.* at 3.

222. *See* Lytton, *supra* note 147, at 692.

establish a duty.[223] In cases where plaintiffs relied on arguments regarding the inherent dangers of firearms and did not address specific acts by manufacturers in marketing them, courts have refused to recognize a duty.[224] In contrast, in cases where courts did find a duty, they referenced specific acts taken by manufacturers, which were found to actually increase the risk that firearms would be misused.[225] For example, the court in *Merrill* pointed to specific design aspects of the TEC-DC9 highlighted by the manufacturer's marketing techniques.[226] Similarly, the *Hamilton* court relied on information regarding the rapid rate at which the manufacturers' handguns moved from legal markets to illegal ones (the "time to crime" rate).[227]

In determining whether to impose a duty, courts should also consider the type of gun used by the criminal third party in conjunction with the marketing technique employed by the manufacturer; where the gun is more likely to be used by criminals and has little or no social value, a court should be more likely to impose a duty on the manufacturer.[228] For example, the court in *Merrill* implied that Navegar's marketing techniques[229] made the TEC-DC9[230] more appealing to criminals. In contrast, a manufacturer would be less likely to advertise a gun having a legitimate social purpose, like a hunting rifle, in a manner appealing to criminals because a hunting rifle would not necessarily have features that criminals desire.

Although the Washington Court of Appeals in *Knott v. Liberty Jewelry & Loan, Inc.* refused to impose liability against a gun manufacturer, distributor, and retailer for injuries caused by the criminal acts of a third party,[231] the case does not preclude a negligent-marketing claim. Because the negligent-marketing theory focuses on marketing techniques employed by the manufacturer and not on the design of the

223. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 163 (Cal. Ct. App. 1999), *review granted*, 991 P.2d 755 (Cal. 2000); Lytton, *supra* note 147, at 684, 690.

224. *See supra* Part II.B.1.

225. *See supra* notes 137, 189–91 and accompanying text.

226. *See Merrill*, 89 Cal. Rptr. 2d at 171–72.

227. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 826 (E.D.N.Y. 1999).

228. *See supra* notes 176 & 189 and accompanying text.

229. *See id.* at 171.

230. *See Merrill*, 89 Cal. Rptr. 2d at 155.

231. *See* Knott v. Liberty Jewelry & Loan, Inc., 50 Wash. App. 267, 277, 748 P.2d 661, 666 (1988).

gun itself,[232] the holding in *Knott*, that a non-defective handgun cannot give rise to a design defect claim, is inapplicable. Similarly, the pertinent Washington statute governing product liability[233] would not preempt a negligent-marketing claim that is not based on an alleged design defect. Moreover, in dealing with a California statute similar to Washington's, the court in *Merrill* found that the statute was not applicable to negligent-marketing claims.[234]

The *Knott* court's rejection of the plaintiff's request to establish a new common law tort does not forbid imposing a duty on gun manufacturers under negligent-marketing theories. Because Washington courts have already recognized a defendant's duty to refrain from increasing the risk of harm to a plaintiff caused by the criminal or tortious acts of a third party,[235] a court would not have to recognize a new tort to impose a duty in these situations. Therefore, the *Knott* court's concerns about recognizing a new common law cause of action[236] would not be implicated by imposing a duty on gun manufacturers who market their products in a manner that increases the risk the guns will be misused.

Furthermore, neither of the rationales used by the *Knott* court to reject the negligent-marketing claims against the retailer and distributor of the handgun should prevent Washington courts from imposing a duty on manufacturers to refrain from distributing their firearms so as to increase the risk they will be used by criminals. The first rationale used by the court to reject the negligent-marketing claim—that the state of Washington had preempted the entire field of firearm regulation under RCW section 9.41.290[237]— is not supported by case law or legislative history. With the exception of *Knott*, courts have applied RCW section 9.41.290 only when addressing whether it preempted a local ordinance or rule, not common law negligence.[238] For example, in *Seattle v. Ballsmider*,[239] the appellate court examined whether section 9.41.290 preempted a local ordinance that imposed a greater sentence for

232. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 824 (E.D.N.Y. 1999).

233. *See* Wash. Rev. Code § 7.72.030(1)(a) (1998).

234. *See Merrill*, 89 Cal. Rptr. 2d at 175–76.

235. *See supra* notes 33–34 and accompanying text.

236. *See supra* note 72 and accompanying text.

237. *See* Knott v. Liberty Jewelry & Loan, Inc., 50 Wash. App. 267, 273–74, 748 P.2d 661, 664 (1988).

238. *See supra* note 75.

239. 71 Wash. App. 159, 856 P.2d 1113 (1993).

discharging a firearm than the state statute allowed.[240] In *Cherry v. Municipality of Metropolitan Seattle*,[241] the Supreme Court of Washington specifically rejected a claim that the preemption statute could apply to something other than a local law or ordinance.[242] Furthermore, nothing indicates that the legislature intended to preempt common law negligence claims against manufacturers, distributors, or retailers through section 9.41.290. As originally enacted,[243] the statute's purpose was to provide uniform firearm laws to remedy the problems associated with varying local laws and ordinances making gun possession and use more restrictive in certain parts of the state.[244] Because section 9.41.290 was intended to preempt only local laws or ordinances, it should not be interpreted as preempting common law negligence claims.

The *Knott* court's reliance on non-Washington cases as its second rationale for rejecting the plaintiff's negligent-marketing claim[245] is not persuasive in light of a more recent growing acceptance of such claims in other jurisdictions. Unlike the cases referenced in *Knott*,[246] more recent cases, relying on new statistical information regarding the movement of firearms into illegal markets, have recognized the ability of gun manufacturers to alleviate gun violence.[247]

Finally, imposing a duty on gun manufacturers under negligent-marketing theories would not create an impermissible judicial ban on the sale of particular firearms. The duty sought to be imposed does not seek to prevent firearm sales to the general public but only to require that manufacturers market their products responsibly. Because the purpose of

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240. *See id.* at 161–62, 856 P.2d at 1116.

241. 116 Wash. 2d 794, 808 P.2d 746 (1991).

242. *See id.* at 803, 808 P.2d at 749.

243. *See* Washington Uniform Firearms Act, Ch. 232, § 12, 1983 Wash. Laws 1200.

244. *See* Senate Judiciary Comm., Section Analysis of Substitute Senate Bill No. 3782, 1983 Legis. Sess. (Wash.); Final Legislative Bill Report on Substitute Senate Bill 3782 (1983) (noting local jurisdictions may only have laws consistent with state laws); *see also* 1985 Wash. Laws ch. 428 § 85 (amending Wash. Rev. Code § 9.41.290) Final Legislative Report on Substitute Senate Bill No. 3450.

245. *See supra* note 76 and accompanying text.

246. *See* Knott v. Liberty Jewelry and Loan, Inc., 50 Wash. App. 267, 274–75, 748 P.2d 661, 664–65 (1988).

247. *See infra* notes 268–73 and accompanying text.

tort liability is to require defendants to absorb the cost of harm caused by their products, this new duty would not create a regulatory prohibition.[248]

B. *Gun Manufacturers' Ability to Alleviate Gun Violence Without Undue Burden Supports the Imposition of a Duty*

Public-policy factors—including the burden on a defendant to prevent harm, financial benefits received by a defendant, and the foreseeability of the criminal activity[249]—support imposing a duty on gun manufacturers for the criminal acts of third parties because they are well-positioned to decrease the use of their products by criminals. Furthermore, Washington courts have acknowledged that changing social conditions often lead to the recognition of new duties.[250]

Imposing a duty on gun manufacturers when they increase the risk of their products being used for criminal activities would not create an unreasonable burden. Imposition of a duty would only require that manufacturers refrain from marketing their products in a manner that increases their risk of being misused. In *Hamilton*, the plaintiffs presented evidence that gun manufacturers could adopt non-negligent but economically feasible distribution practices.[251] In addition, recent studies have shown that a small number of federal firearm licensees are responsible for selling most of the guns used in crime.[252] The ATF reported that 1.2% of current federal firearm licensees accounted for 57% of the guns used in crimes that were traced back to active dealers.[253] Because so few retailers are responsible for selling a majority of guns used in crimes, if manufacturers refrain from selling their firearms to these retailers their overall sales would likely not be greatly impacted.

To the extent that gun manufacturers choose to market their products in a manner that increases the risk that the guns will be used for criminal activity, it is not unreasonable to shift the cost of gun violence back to

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248. *See* Merrill v. Navegar, 89 Cal. Rptr. 2d 146, 178–79 (Cal. Ct. App. 1999), *review granted*, 991 P.2d 755 (Cal. 2000).

249. *See supra* notes 54–56 and accompanying text.

250. *See* Webstad v. Stortini, 83 Wash. App. 857, 872, 924 P.2d 940, 948 (1996) (citing Strode v. Gleason, 9 Wash. App. 13, 17, 510 P.2d 250, 252 (1973)).

251. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 827 (E.D.N.Y. 1999).

252. *See* Department of Treasury, Bureau of Alcohol, Tobacco, & Firearms, *Commerce in Firearms in the United States*, at 23 (Feb. 2000) [hereinafter *Commerce in Firearms*].

253. *See id.*

the industry.[254] Although victims of gun violence do not necessarily provide gun manufacturers with a direct financial benefit, gun manufacturers do profit from the criminal use of firearms. In 1997, the Census of Manufacturers estimated the total product shipments of firearms in the United States at $1.2 billion and ammunitions sales at an additional $859 million.[255] Retail sales of firearms for 1995 were estimated at $9 billion.[256] One gun manufacturer alone, Sturm, Ruger & Company, earned $209.4 million in 1997.[257] In contrast to the profits made by gun manufacturers, the cost of gun violence is borne by victims and, through tax dollars, by the population in general. Between 1989 and 1995, the total hospital costs for gunshot trauma in Washington were more than $61 million.[258] Nationally, the costs of treating gunshot injuries is estimated at $4.5 billion per year.[259] The costs of gun violence are continuing to escalate and one authority estimates that by 2003 gun violence will surpass automobile accidents as the leading cause of death and injury in the United States.[260] However, unlike automobile drivers who are almost always insured, four out of five gunshot victims are on public assistance or uninsured.[261] By not imposing a duty on gun manufacturers, courts allow them to profit from injuries causèd by gun violence.

The use of firearms by criminals is not only foreseeable but actually known by most gun manufacturers. Robert Hass, a former senior vice-president of marketing and sales for Smith & Wesson, has acknowledged the gun industry's awareness of the criminal misuse of firearms and the black market created by the movement of firearms from unsupervised federal firearms licensees.[262] The court in *Hamilton* found that a 1994 promotional pamphlet issued by the Sporting Arms and Ammunition

254. *See Hamilton*, 62 F. Supp. 2d at 827.

255. *See Commerce in Firearms, supra* note 252, at 8.

256. *See* Tom Diaz, *Making a Killing: The Business of Guns in America* 7 (1999).

257. *See id.* at 85.

258. *See supra* note 10.

259. *See* Susan Headden, *Guns, Money and Medicine*, U.S. News and World Report, July 1, 1996, at 30.

260. *See id.*

261. *See id.*

262. *See* City of Chicago v. Beretta, No. 98 CH 015596 (Ill. Cir. Ct., Apr. 6, 1999), First Am. Compl., at 61 (quoting Robert Hass, former senior vice-president for Smith & Wesson).

Manufacturers Institute[263] supports the inference that the industry is aware of the illegal market and that retailers, unsupervised and uncontrolled by manufacturers, are a significant source of these handguns.[264] Furthermore, when ATF traces guns used in crimes back to their origin, they effectively notify manufacturers of the criminal use of their products. [265] For example, ATF traced the AR-15 semi-automatic assault rifle taken from Buford Furrow, the man who opened fire at a Jewish community center in Los Angeles, back to its manufacturer within days of the shooting.[266] In some instances, gun manufacturers have even acknowledged that the criminal use of their products boosted sales.[267]

Finally, there is a growing recognition of gun manufacturers' ability to reduce illegal gun trafficking. The *Hamilton* court found that manufacturers were well-positioned to reduce the flow of illegal guns by declining to do business with "careless or unscrupulous" federal firearms licensees, limiting sales at unregulated gun shows, and requiring the initial public sale of any handgun to take place only in responsibly operated stores.[268] The Department of Housing and Urban Development (HUD) has threatened to sue gun manufacturers on behalf of public housing residents across the United States for the costs of firearm violence to those communities.[269] One of the concessions sought by HUD in the threatened suit is to require manufacturers to supply guns only to licensed dealers who agree to take additional precautions to decrease sales to "straw purchasers."[270] Finally, the gun industry has

263. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 830 (E.D.N.Y. 1999). The Sporting Arms and Ammunition Manufacturers Institute is a trade association to which most of the U.S. handgun manufacturers belong. *See id.*

264. *See id.* The pamphlet discusses membership support for adopting measures designed to prevent criminals from obtaining guns including imposing penalties against dealers who sell to unqualified persons or straw purchasers. *See id.*

265. *See* Fox Butterfield, *Gun Flow to Criminals Laid to Tiny Fraction of Dealers*, N.Y. Times, July 1, 1999, at A14.

266. *See* Steve Berry, *Assault Rifle Used in Shooting Traced to Gun Maker in Maine*, Seattle Times, Aug.12, 1999, at A22.

267. *See supra* note 196 and accompanying text.

268. *See Hamilton*, 62 F. Supp. 2d at 826 (E.D.N.Y. 1999).

269. *See* Chitra Ragavan, *The U.S. Targets Gun Makers*, U.S. News and World Rep., Dec. 20, 1999, at 26.

270. *See Walsh & Vice*, *supra* note 17, at A1. Smith & Wesson recently decided to adopt a number of measures designed to decrease gun fatalities including only supplying its handguns to licensed dealers who agree to a more stringent screening process of prospective buyers. *See id.* Smith & Wesson also agreed to refrain from advertising guns as "fingerprint proof." *See* Susan

expressed an awareness of the movement of firearms into criminal markets through thousands of unsupervised federal firearms licensees; however, none of the principal U.S. manufacturers have made any additional efforts to investigate, screen, or supervise distributors or retailers to ensure that firearms are distributed responsibly.[271]

Recent studies finding that a significant number of crime guns were originally purchased from federal firearms licensees and then rapidly moved into illegal markets support the conclusion that gun manufacturers are well-positioned to control retailers who sell to straw purchasers or criminals. One such study found that 140 gun stores throughout the United States were responsible for a disproportionate number of guns sold to purchasers without criminal records but that were later used in crimes.[272] Of the 35,000 guns traced back to these 140 stores over the past three years, eighty-seven percent were found in possession of someone other than the original buyer.[273]

IV. CONCLUSION

The tragedy of gun violence is well-known. Every year it directly impacts hundreds of people in Washington and indirectly affects thousands more. Common law duties have proven to be an effective way of recognizing the need for various segments of society to take responsibility for the harm they cause. Washington courts should impose a duty on gun manufacturers to refrain from marketing their products in a manner that increases the risk that they will be used by criminals. Public-policy concerns support the conclusion that gun manufacturers are well-positioned to reduce the appeal of certain types of firearms to criminals and to lessen the flow of firearms into illegal markets. Gun manufacturers must become part of the community in which they sell their products and take responsibility for their actions. Imposing such a duty would force them to address these issues and ultimately change their behavior.

Milligan, *New Safety Precautions Taken by Top Gun Maker*, Seattle Post-Intelligencer, Mar. 18, 2000, at A1.

271. *See* City of Chicago v. Beretta, No. 98 CH 015596 (Ill. Cir. Ct., Apr. 6, 1999), First Am. Compl., at 61 (quoting Robert Hass, former senior vice-president for Smith & Wesson).

272. *See* Office of U.S. Senator Charles Schumer, *Schumer Study Reveals First Ever Evidence of Massive Gun Trafficking* (Dec. 20, 1999) (press release).

273. *See id.*