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Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers

JOHN C. P. GOLDBERG* & BENJAMIN C. ZIPURSKY**

I. INTRODUCTION

In their timely and thoughtful article, Professors Twerski and Sebok make four claims. First, they rightly point out that the most workaday element of negligence—cause-in-fact—figures as centrally to the resolution of negligent marketing claims against gun manufacturers as policy-laden issues such as duty and market share liability.¹ On their analysis of the evidence produced by plaintiffs in the few cases that have gone forward, it appears that any negligence on the part of gun manufacturers has increased only slightly the risk to the general population of injury by wrongful shooting.² As a result, even if plaintiffs can establish that manufacturers owed them a duty of care and breached that duty, few, if any, will be able to prove by a preponderance of the evidence that the breach of duty caused the shootings and injuries of which they complain.

Twerski and Sebok next consider the potential relevance of Wex Malone's famous Realist-inspired thesis that, as a matter of practice rather than mere 'paper' rules, judges permit certain classes of plaintiffs to recover without satisfying the causation element. On their reconstruction,

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** Associate Professor of Law, Fordham University. The authors thank Professors Twerski and Sebok for inviting this response, particularly given that they knew we would use the occasion to register our disagreement with their analysis.

1. See Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379 (2000). Twerski and Sebok provide a great service not only by drawing attention to the importance to these cases of cause-in-fact, but also by emphasizing that there is an issue of causation that poses a problem distinct from the issue of market share liability.

2. In particular, they focus on *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802 (E.D.N.Y. 1999) (appeal pending). *Hamilton* is the only case yet to reach a jury verdict favorable to a plaintiff. Twerski and Sebok also discuss *Merrill v. Navegar, Inc.*, 89 Cal. Rptr.2d 146 (Cal. Ct. App. 1999), *review granted*, 991 P.2d 755 (Cal. 2000). Because *Navegar* may raise distinct issues, we will focus our discussion on *Hamilton*.

the Malone thesis is that judges will wink at questionable jury findings of causation, but only in cases featuring: (1) a meaningful possibility (as opposed to a probability, on the one hand, and a near-zero chance on the other) that the defendant's negligence caused the plaintiff's injury; (2) a particularly culpable defendant; (3) the realization of a risk that falls squarely within the class of risks that the defendant was supposed to guard against; and (4) a fact pattern that is not likely to recur on a large scale. In short, according to Malone, courts will, in the name of deterrence and compensation, tolerate *ad hoc* departures from the causation requirement when confronted with some evidence of possible causation and a defendant 'deserving' of sanction anyway, albeit only in cases confined to a self-contained corner of negligence law, such that the nullification of causation is neither particularly noticeable, nor likely to produce ruinous levels of liability.

Third, Twerski and Sebok argue that, even assuming Malone was right to identify this pattern of *ad hoc* exemption, it offers little precedential or predictive basis for concluding that plaintiffs should or will recover from gun manufacturers on a theory of negligent marketing. This is because the possibility that the manufacturers' negligence injured any given shooting victim is extremely small, and because negligent marketing claims against gun manufacturers already constitute a mass tort, or soon will. Thus, even if courts find that gun manufacturers who market negligently are particularly deserving of sanction, they will not be able to justify permitting recovery on the ground that they are merely massaging negligence doctrine in a few isolated and close cases. Nor can courts presume that individual tort awards will, when aggregated, stay within manageable bounds.

Fourth and finally, the authors suggest the existence of an alternative legal and policy basis for permitting recovery in these cases, namely a version of the "loss-of-chance" doctrine articulated in decisions including *Falcon v. Memorial Hospital*,³ and a concurrence in *Herskovits v. Group Health Coop.*⁴ Under this variant, a patient alleging negligent failure to diagnose or treat disease may recover from her physician even if the chance of recovery that is lost due to the malpractice is less than fifty percent, but she may only recover a partial damage award for the "lost chance," i.e., a percentage of the full compensatory award she would have received that corresponds to the percentage decrease in her chance of recovery that flowed from the physician's negligence.⁵ Thus, Twerski and Sebok maintain that plaintiffs alleging negligent marketing of guns ought to be able to recover under a loss-of-chance theory, yet are barred as a matter of doctrinal logic from recovering more than a *pro rata* share of the

3. 462 N.W.2d 44 (Mich. 1990).

4. 664 P.2d 474 (Wash. 1983).

5. See *Herskovits*, 664 P.2d at 486-87 (Pearson, J., concurring).

aggregate harm that the gun manufacturers have negligently facilitated.⁶ For this reason, they conclude by sharply criticizing Judge Weinstein's opinion in *Hamilton v. Accu-Tek*,⁷ which, at least in principle, permits an award of full compensation.⁸

II.

The analysis provided by Twerski and Sebok is appealing in two ways. First, it presents an argument apparently grounded in negligence law that would seem to permit recovery in a novel litigation context. In part, it does this by presenting the gun litigation as an incremental doctrinal step forward from the loss-of-chance cases. It also purports to demonstrate this by explaining how limited recovery serves both deterrence and compensation, two goals commonly ascribed to tort law. Second, the Twerski-Sebok analysis is attractive as a policy prescription, because it displays a progressive willingness to entertain the prospect of gun liability, yet does so in a manner sensitive to practical concerns about ruinous liability.

Unfortunately, we think that neither of the two grounds that support this surface appeal withstands scrutiny. The proposed scheme of *pro rata* recovery is not supported by an incremental move within tort doctrine. Rather, it would use an already controversial doctrine developed in the specific context of medical malpractice to foment a revolution in the law of negligence. The *pro rata* recovery scheme also does not qualify as negligence law simply because it serves what Twerski and Sebok posit to be the aims of tort law. To begin with, their account of tort law's primary goals is itself contested. Moreover, their implicit further claim—that the law in any given negligence case is nothing other than the result that best serves those functions—is extreme and implausible. Even as pure policy prescription, the proposal for wholesale judicial adoption of a *pro rata* compensation scheme suffers from a failure to acknowledge basic considerations that might weigh against its adoption altogether, or at least counsel against its implementation through a court decision.

6. For example, if one imagines all handguns are produced by a single manufacturer, and that its negligence can be shown to have increased the amount of damage associated with all wrongful shootings by \$1 million, and if we assume a total pool of 1,000 wrongful shooting victims, then each victim/plaintiff should recover \$1,000.

7. 62 F. Supp.2d 802 (E.D.N.Y. 1999).

8. In *Hamilton*, Judge Weinstein entertained the adoption of a *pro rata* approach, but concluded that he did not need to invoke it because the successful plaintiffs, Steven and Gail Fox, had presented evidence sufficient for a jury to find that the negligence of three gun manufacturers was a substantial factor in bringing about their injuries. See *Hamilton*, 62 F. Supp.2d at 802. Because *Hamilton* was tried on a market share theory of liability, and because the jury assigned liability to only three manufacturers with relatively small shares of the market for .25 caliber handguns, the plaintiffs received only about 13% of the \$4 million damage award. See *id.* at 811. This may help explain why Judge Weinstein was unconcerned about permitting the jury to award full compensatory damages.

We do not offer these criticisms out of a conviction that negligence claims by shooting victims against gun manufacturers lack merit. It is surely a great virtue of the common law of torts that it evolves, and some of these cases may provide instances in which evolution is called for. Rather, we only wish to make clear that, at this point, the judicial adoption of a scheme of *pro rata* recovery would constitute the abandonment of the causation element of negligence law. Thus, such a course of action must be understood and evaluated for what it is: not a context-sensitive extension of negligence law, but a radical, policy-driven replacement of it.

III.

According to their reading of the evidence presented in the *Hamilton* litigation, Twerski and Sebok conclude that plaintiffs thus far have at most established that any negligence on the part of gun manufacturers has only slightly increased the aggregate risk of wrongful shootings.⁹ If so, the plaintiffs fell well short of proving by a preponderance of the evidence a but-for causal link between given instances of negligent marketing and the injuries that any of them sustained.

Moreover, Twerski and Sebok seem right to conclude that the plaintiffs' claims will fail even granted Malone's point that courts do at times undertake relaxed "sufficiency of the evidence" review of juries' causation findings.¹⁰ Employing standard New York jury instructions, Judge Weinstein told the *Hamilton* jury that they could find that the defendants' negligence caused the plaintiffs' injuries so long as they concluded that it was a "substantial factor" in bringing about those injuries.¹¹ This instruction is apparently intended to capture the idea that, in some cases at least, juries have substantial leeway to draw conclusions about causation from the evidence and from common sense.¹² Yet if Twerski and Sebok are right about

9. See Twerski & Sebok, *supra* note 1, at 1402-04.

10. For an influential early example of a relaxed approach to sufficiency of the evidence, see *Zimmel v. United States Shipping Board*, 10 F.2d 47 (2d Cir. 1925) (L. Hand, J.). In *Zimmel*, the alleged negligence was the failure of the boat owner to provide guard ropes to prevent the plaintiff's decedent from being washed off of a deck-load of timber on which he was standing. Judge Hand reasoned that, in light of evidence showing that the area where the seaman was standing was struck only by shallow white water (as opposed to being swamped by "green water"), the jury was permitted to conclude that the seaman probably would have been able to save himself had there been a rope. See *id.* at 48-49.

11. See *Hamilton*, 62 F. Supp.2d at 848.

12. Somewhat confusingly, it is perhaps also meant to capture the 'proximate cause' doctrine that there can be more than one negligent but-for cause of a given injury, as well as unusual cases involving the merger of two distinct necessary and sufficient causes (e.g., 'joining fires' cases). See *Kadyszewski v. Ellis Hosp. Ass'n*, 595 N.Y.S.2d 841, 843 (App. Div. 1993) (defendant's negligence "need not be the sole cause of plaintiff's injury; it need only have been a substantial factor in bringing about the injury, i.e., a proximate cause as distinguished from the proximate cause.") (citation omitted); see also DAN B. DOBBS, *THE LAW OF TORTS* §§ 168, 171, at 409, 415 (2000) (suggesting that these are functions served by the substantial factor test).

the evidence, then the *Hamilton* plaintiffs failed even to clear the substantial factor hurdle.

Twerski and Sebok thus seem correct to conclude that an alternative doctrinal basis is needed to support recovery in cases like *Hamilton*. However, they are wrong to assert that one is readily at hand in the "loss-of-chance" doctrine developed in medical malpractice cases. In the first place, as they concede, there are many jurisdictions that have not recognized the *Falcon* model of loss-of-chance, including perhaps New York.¹³ While New York courts have permitted recovery in some cases in which the plaintiff's expert, contending that the defendant injured the plaintiff, did not testify to probabilities of greater than 50%, these courts have not treated chance of recovery as a good in itself, and have not endorsed proportional recovery.¹⁴ Rather, they seem to have treated these cases more or less as Judge Weinstein handled *Hamilton*—not by invoking a separate loss-of-chance doctrine, but by employing the "substantial factor" test to support deferential sufficiency-of-the-evidence review on the question of causation.¹⁵ And, as we have just seen, Twerski and Sebok conclude that

13. See DOBBS, *supra* note 12, § 178, 434-35 (surveying case law). Twerski and Sebok suggest that Judge Weinstein's "adopt[ion]" of *pro rata* recovery in his opinion approving the *Agent Orange* settlement provides a "paradigm for proportional recovery." Twerski & Sebok, *supra* note 1, at 1394. To the extent their use of "adopt[ion]" and "paradigm" is meant to suggest that Judge Weinstein's decision to apportion the Agent Orange settlement fund on a *pro rata* basis provides a precedent for characterizing the law of tort causation, their assertion is misleading. Judge Weinstein adopted a partial *pro rata* distribution because it was a sensible and equitable administrative scheme for distributing a settlement fund, not because it tracked tort rules. Indeed, as he made clear, the plaintiffs' inability to prove even a general causal linkage between Agent Orange and most of their injuries entailed that their cases would fail as a matter of tort doctrine. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 787 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). Hence, he went on to dismiss the actions of those who opted-out of the settlement largely because the opt-out plaintiffs could not prove causation. The dismissal of these claims as legally insufficient was in turn central to the Second Circuit's affirmation of the settlement. See *In re "Agent Orange"*, 818 F.2d at 149-51.

14. See, e.g., *Kallenberg v. Beth Israel Hosp.*, 357 N.Y. S.2d 508, 510 (App. Div.), *aff'd*, 374 N.Y.S.2d 615 (1975) (holding that a malpractice claim can properly be sent to the jury where plaintiff's expert testified that plaintiff would have had a "20, say 30, maybe 40% chance of survival"); *Stewart v. New York City Health and Hospitals Corp.*, 616 N.Y.S.2d 499, 500 (App. Div. 1994), *lv. to app. den.* (1995) (approving jury instruction that pain and suffering for lost chance to conceive naturally may be awarded if it is proved by a "preponderance of the credible evidence" that the chance lost was "substantial" or "more than slight").

15. See *Kallenberg*, 357 N.Y.S.2d at 511 (articulating the principle of broad deference to jury findings as the basis for the court's decision); *Mortenson v. Memorial Hosp.*, 483 N.Y.S.2d 264, 270 (App. Div. 1984) (explaining *Kallenberg* by reaffirming the need for proof of causation, by endorsing the substantial factor test, and by equating "substantial factor in bringing about injury" with "substantial possibility of avoiding the injury"); *Kimball v. Scors*, 399 N.Y.S.2d 350, 351 (App. Div.), *lv. to app. den.* (1978) (interpreting *Kallenberg* as a decision about what creates an issue of fact for the jury); see also *Koster v. Greenberg*, 502 N.Y.S.2d 395, 397 (App. Div. 1986) (the jury could find actual causation where there was a "rational basis" for concluding that the defendant's negligence was a but-for cause of plaintiff's uncured condition, and that the condition "contributed to plaintiff's death."). *Stewart*, 616 N.Y.S.2d 499 is perhaps a different type of loss of chance case altogether, in that the plaintiff faced no difficulty proving causation of a physical injury. Arguably, the issue there was whether a small de-

this sort of deference will provide no help to plaintiffs such as those in *Hamilton*.¹⁶

Even if we were to assume the availability of a genuine "loss-of-chance" doctrine, it would not support proportionate recovery in the gun-liability scenario. To the extent that rulings in *Falcon* and cases like it are plausible, it is because, in the context of medical malpractice, "loss-of-chance" designates a particular kind of injury that the plaintiff suffers, typically "loss of the chance of surviving some serious illness." This injury is distinct from the adverse outcome itself (i.e., death from the illness), while obviously related to it. It is a certain kind of opportunity to avoid it.¹⁷ The injury of which the plaintiff complains against the physician is that of not giving her the chance to survive to which she was entitled. Hence, these are not cases of negligence in the air—cases where the defendant has acted negligently but the tortious nature of the action remains inchoate and unconnected to the plaintiff's well-being (as might be the case with a failed attempt). On the contrary, there is a sense in which the malpractice *has actually injured* the plaintiff by depriving her of a chance to survive.

The point made here is not normative: we take no position on whether the loss-of-chance doctrine ought to be adopted because a loss-of-a-chance-of-survival really is the sort of injury that can support a claim of malpractice. Our point is an interpretive one: courts that adopt this cause-of-action are adopting an at-least plausible theory of what constitutes a particular sort of injury in the malpractice context. Chance-of-survival is probably understood as a distinct good by physicians and patients. Indeed, for certain specialties (e.g., oncology) and doctor-patient relationships, it is precisely the good that the doctor is under a duty to protect. Moreover, physicians know this: it is part of their deliberation, and what they try to protect in treating patients. As courts said long ago, and continue to say

crease in the chance of natural childbirth could figure as part of plaintiff's pain and suffering damages. See *LaVista v. Huntington Hosp.*, 673 N.Y.S.2d 162, 163 (App. Div. 1998) (so interpreting *Stewart*).

16. As Twerski and Sebok point out, the most notable departure in New York law from the causation requirement is found in *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989), which permits the imposition of market share liability on even those DES manufacturers that prove they did not cause harm to the plaintiff. See Twerski & Sebok, *supra* note 1, at 1401-02 n.102. *Hymowitz* itself explicitly denied that its ruling on causation augured a broad shift in the New York common law of tort. See *id.* at 1075 (describing DES litigation as a "singular case"). Indeed, it is quite likely that the Court of Appeals would never have introduced this innovation without prompting from the state legislature. See *id.* (noting the importance of the enactment of New York's DES revival statute to the court's decision to impose market share liability). As a result, we see no basis whatsoever for Twerski's and Sebok's assertion that *Hymowitz* reveals a general receptivity on the part of the New York Court of Appeals to the judicial replacement of tort law with administrative compensation schemes. See *id.*

17. See, e.g., Stephen R. Perry, *Risk, Harm and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321, 339 (David Owen ed., 1995) (suggesting that loss-of-chance cases may plausibly turn on the fact that lost opportunity to receive proper medical treatment is a distinctive form of harm).

today, the provision of medical care constitutes an assumpsit or undertaking, and one may plausibly conclude that this undertaking includes a duty to take care to provide patients with the opportunities for health that good medical care entails.¹⁸ As the *Falcon* court explained:

A woman who engages the services of a physician and enters a hospital to have a child does so to reduce pain and suffering and to increase the likelihood of her surviving and the child surviving childbirth in a good state of health even though the likelihood of the woman and child not surviving in good health without such services is far less than fifty percent. That is why women go to physicians. That is what physicians undertake to do.¹⁹

The problem for Twerski and Sebok is that one cannot generalize from “loss-of-chance-of-survival”—an injury that can reasonably be described as a wrong within the “thick” context of a certain sort of relationship, such as that of doctor and patient—to a generic loss-of-chance cause of action.²⁰ As one abstracts away from the malpractice context, the salient features supporting recognition of loss-of-chance as a cognizable harm—an undertaking to monitor and cure, an understanding of chance-of-survival as a good by doctor and patient, an imbalance of information and expertise, justified reliance—simply vanish. Once rendered generic, loss-of-chance no longer plausibly describes a wrongful injury supporting a claim in tort against a product-supplier such as a gun manufacturer. The slight increase in risk of being shot as one moves from the world of non-negligent distribution to the world of negligent distribution is not a deprivation of a good that forms a meaningful feature of a person’s life. Nor does anyone—victim, manufacturer, or court—regard it as such. To label the plaintiffs’ claims in a case like *Hamilton* as complaining of a “loss-of-chance” is to play word games. In this context, advocating recovery for a lost chance is just a different way of asking the courts to water down the standards of proof of causation so as to achieve a policy goal such as deterrence or compensation. It is therefore not a natural extension of the negligence law of New York or any other jurisdiction.

18. See A.D. KIRALFY, *THE ACTION ON THE CASE* 138-41 (1951) (describing the idea of undertaking to cure as the basis for malpractice actions brought under the medieval writ of Trespass on the Case).

19. *Falcon*, 462 N.W.2d at 52. Thus understood, the loss-of-chance cases do not naturally or logically entail proportionate recovery, as Twerski and Sebok suggest. See Twerski & Sebok, *supra* note 1, at 1388. Indeed, in light of the nature of the injury, particularly in cases of egregious malpractice, a higher level of award might well be appropriate. See DOBBS, *supra* note 12, § 178, at 435 (noting courts that permit full compensation in loss-of-chance malpractice cases).

20. On the relationship-sensitivity of tort duties and wrongs, see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1825-39 (1998).

IV.

Another aspect of the surface appeal of Twerski's and Sebok's proposal is that it seems agreeable to one standard account of tort law's functions. Specifically, the imposition of *pro rata* liability on negligent gun manufacturers, at least when considered in the aggregate, seems to serve neatly the goals of deterrence and compensation by making the manufacturers internalize the 'cost' of their negligence, while providing at least some compensation to the injured. However, even if Twerski and Sebok were justified in reaching this conclusion, they would not be justified in claiming to derive their *pro rata* scheme from the law of torts. Rather, they derive it by conflating the substance of tort doctrine with a particular theoretical account of the goals it is meant to serve.

The collapse of tort law into its supposed aims is a hallmark of a particular set of Realist-inspired theories of tort, which can be grouped under the broad heading of instrumentalism. Instrumentalist theories conceive of tort law as nothing other than a regulatory device for simultaneously deterring undesirable conduct and providing compensation to victims of such conduct. On the instrumentalist account, causation—like every other tort element—is important only to the extent that it allows tort law to serve its goals. Thus, it tends to treat the loss-of-chance cases as ones in which the normally useful causation requirement suddenly threatens to become dysfunctional in that it promises to bar the imposition of liability and the distribution of compensation in cases that involve negligent actors and injured plaintiffs. Loss-of-chance cases, on the instrumentalist view, seem to call for judicial innovation to ensure that mere considerations of 'form' do not prevent tort law from achieving its policy goals.

Still, the loss-of-chance cases pose the instrumentalist with a dilemma at the level of policy. For, if insistence on proof of causation entails underdeterrence and undercompensation, outright abolition of that requirement promises overdeterrence and overcompensation. Once relieved of the burden of proving causation, each loss-of-chance plaintiff stands in principle to recover full compensation, even though the defendant's conduct, considered in the aggregate, only caused harm to a small percentage of the plaintiff class. Hence, instrumentalist analyses of loss-of-chance cases have tended to center on a search for ways to sidestep the 'formal' requirement of causation while avoiding, or at least dampening, this policy dilemma. Malone apparently concluded that the courts were pursuing an *ad hoc* dampening strategy when they abandoned causation only in certain cases that were not likely to repeat themselves, and that featured particularly awful defendants whose conduct already warranted greater sanction anyway. Twerski and Sebok, by contrast, aim to eliminate the dilemma by calling for courts to implement *pro rata* compensation in the gun litigation context.

Have Twerski and Sebok offered a sound policy prescription? We do not know. Certainly, they have not even attempted to address the myriad policy concerns that gun control advocates and opponents debate. Even in the context of tort policy, they have said little about issues that instrumentalists would regard as important, including whether the scheme of *pro rata* compensation would lead to over- or under-litigation; whether courts can handle the administrative burden presented by the scheme; whether juries would operate within a sufficient set of process constraints such that they could be relied upon to make accurate assessments of probabilities and damages; whether the proposal is one that ought to be adopted not just as a patch for a particular sort of negligence claim, but as a substitute for all of tort law. For our purposes, it is enough to take notice of the type of issue now under consideration: is the replacement of the requirement of proof of causation with a *pro rata* compensation scheme sound policy? Plainly, this is *not* a question about what tort law has to say with regard to the negligent marketing litigation.

Twerski's and Sebok's seemingly effortless yet altogether awkward jump from embedded legal analysis to bare policy prescription is an especially dramatic example of instrumentalist scholars' conflation of the law of torts with the ends it is supposed to serve. By contrast, even instrumentalist-inspired courts tend to recognize that there may be other concerns—for example, rule-of-law concerns for accuracy and predictability—that warrant developing doctrines that prevent the achievement of a perfect alignment between tort doctrine and the achievement of certain goals.²¹ Neither is the Second Restatement of Torts—a document heavily influenced by instrumentalism—prepared to treat the causation element as cavalierly as do Twerski and Sebok.²²

Of course, it should go without saying that there are many viable competitors to the instrumentalist theory of torts that insist upon the centrality of causation to tort law. The most obvious candidates are corrective justice theories.²³ Alternatively, we have argued that tort law is best understood as a distinctive branch of private law that empowers certain wronged indi-

21. See, e.g., *Dillon v. Legg*, 441 P.2d 912, 917-18 (Cal. 1968) (en banc) (citing concerns over false claims and uncertain damage awards as grounds for limiting recovery to a limited class of plaintiffs claiming negligent infliction of emotional distress).

22. See RESTATEMENT (SECOND) OF TORTS § 430, at 426 (1965) (setting out the requirement of proof of causation as a black letter principle of negligence law).

23. See, e.g., ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 82-83 (1999) (arguing against liability for the mere imposition of risk without causation of injury); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1-2 (1995) (arguing for centrality of causation to private law); Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-89 (1973) (arguing that a rich understanding of causation lies at the heart of tort doctrine); Perry, *supra* note 16, at 330-39 (arguing against liability for the mere imposition of risk without causation of injury).

viduals to seek redress against those who have wronged them.²⁴ On either of these approaches, causation is not understood as a mere formality; a tool to be placed back in the tool box when it no longer helps attain the ends of deterrence and compensation. Rather, it is regarded as forming part of the bedrock on which stands the basic distinction between the private law of tort and the public law of regulation or redistribution.²⁵

In sum, there is a variety of instrumentalist and non-instrumentalist accounts of tort that, contrary to the view espoused by Twerski and Sebok, grant causation a central place in the law. Our point in making this observation is not to defend one of these alternatives. Rather, it is to take notice of the terrain on which the argument is taking place. In arguing that their *pro rata* scheme should replace traditional causation analysis *because* it serves the goals of deterrence and compensation, Twerski and Sebok are arguing on grounds of policy and theory, not law.

V.

Once it is understood that the *pro rata* scheme favored by Twerski and Sebok cannot be construed as a natural application of tort law, we gain a clearer view of decisions such as *Hamilton*. To be sure, there are some close questions raised by suits alleging negligent marketing of guns: for example, whether it is appropriate to recognize a duty of careful marketing owed by gun manufacturers to shooting victims. But the cause-in-fact issue does not appear to be one of them. Of course, this still leaves the question of whether the courts may or ought to undertake radical law revision in these cases. But now, at least, we understand the question for which we seek an answer.

In part because they purport to make their case on the law, Twerski and Sebok seem content to assume that the policy question is easily answered in favor of permitting judicial law revision. We earlier noted some potential objections to the substance of their proposed scheme. We conclude by noting two reasons that counsel against its being presently implemented by the courts.

Our first concern applies only to decisions rendered in federal courts and is a familiar one. As long as the doctrine of *Erie Railroad v. Tompkins*²⁶ remains good law, it provides a substantial argument against

24. For articulations of this view, see generally Goldberg & Zipursky, *supra* note 19, and Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

25. This is not to say that either a corrective justice or a 'redress' model is incapable of accommodating burden-shifting and other devices by which courts can reduce the height of the hurdle set by the causation requirement. See Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in An Age of Mass Torts*, in PHILOSOPHY AND U.S. TORT LAW (Gerald Postema ed., forthcoming 2000) (arguing that certain instances of burden-shifting are consistent with corrective justice and civil recourse theory).

26. 304 U.S. 64, 78-80 (1938).

federal courts undertaking innovations of the sort apparently undertaken by Judge Weinstein in *Hamilton*. As the Fifth Circuit has noted in striking down attempts at innovative mass proceedings in asbestos cases, federal courts have good reason to be cautious even about subtle, much less radical, revisions of the causation requirement recognized in state tort law.²⁷ Judge Weinstein's suggestion that the issues in *Hamilton* be certified by the Second Circuit to the New York Court of Appeals reflects an appreciation of these concerns.²⁸ Were the Second Circuit not simply to reverse on duty, causation, or market share liability, it surely ought to accede to his suggestion.²⁹

Our second note of caution is not rooted in federalism, but rather a legal process concern about the appropriate occasion for radical judicial law revision. To flesh out this point, it may be helpful to contrast the current status of the New York gun litigation with the posture of an earlier decision that succeeded in effecting a significant change in New York's (and the nation's) tort law: *MacPherson v. Buick Motor Co.*³⁰

When *MacPherson* came to the Court of Appeals, it did so against the backdrop of a line of cases that had seriously qualified the privity rule,³¹ and with a strong factual record. Indeed, one may speculate that the majority was comfortable upholding the plaintiff's verdict in part because the evidence supported a finding that the prospect of injury to product-users such as Mr. MacPherson was "not merely possible, but probable."³² This not only had the effect of legitimating the holding in the case, it also permitted the court to craft quite carefully its initial statement of the duty that manufacturers would henceforth owe to consumers. Indeed, it went to great lengths to specify that they owed an obligation to inspect for defects

27. See *In re Fiberboard*, 893 F.2d 706, 711 (5th Cir. 1990) (rejecting trial procedure of extrapolating class-wide damages from sample trials on the ground that it changes the substance of Texas tort law by permitting recovery without proof of causation).

28. See *Hamilton v. Accu-Tek*, 62 F. Supp.2d 802, 847 (E.D.N.Y. 1999).

29. See also *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-75 (2d Cir. 1997) (Calabresi, J., dissenting) (arguing for greater use of certification in the context of a products liability action). The issue of the propriety of applying market share liability on the facts of *Hamilton* is beyond the scope of this Comment. We note, however, that if the Second Circuit were to extend market share liability to this case, it would be taking a more aggressive position than the one recently adopted by the Appellate Division. Cf. *Brenner v. American Cyanamid Co.*, 699 N.Y.S.2d 848, 853 (App. Div. 1999), *lv. to app. den.* (2000) (refusing to apply market share liability in suit against lead paint manufacturers on various grounds, including lack of identity between different defendants' products).

30. 111 N.E. 1051 (N.Y. 1916). We note that Judge Weinstein suggests in *Hamilton* that his ruling is very much in the spirit of *MacPherson*. See *Hamilton*, 62 F. Supp.2d at 821-22. As we suggest below, this may be a fair application of *MacPherson* on the issue of the duty element, although we have serious doubts that *Hamilton* itself is an appropriate vehicle through which to articulate that duty.

31. See *Goldberg & Zipursky*, *supra* note 19, at 1814-16 (discussing *MacPherson's* use of precedent).

32. *MacPherson*, 111 N.E. at 1053.

only when they had reason to know that the product would be used by a person other than the purchaser, without new tests, and under circumstances where such use entailed a probability of injury.³³

Now contrast the gun litigation. Thus far, there have been two reported jury verdicts, *Halberstam v. S.W. Daniel, Inc.*,³⁴ in which the jury found insufficient evidence of causation, and *Hamilton*, in which the jury made a dubious finding of causation. In the language of mass torts scholarship, the tort of negligent marketing has not yet matured, either in terms of supporting data or in terms of its underlying legal theory.³⁵ As a result, the Second Circuit (or the New York Court of Appeals, if the issues in *Hamilton* are certified), is now facing the first of what might be a steady stream of cases, and one with an extremely weak record. Given this, it will be difficult even for a court inclined to permit liability to craft an opinion that offers a convincing rationale for imposing liability, and that adequately describes and limits the duty being imposed on gun manufacturers.

In drawing this contrast, we do not mean to advocate wholesale rejection of negligent marketing claims against gun manufacturers. Indeed, we are concerned that too strong an adverse ruling at this stage might prematurely shut off a fruitful line of development within the common law of tort. Thus, if a court grants the validity of our contrast between *Hamilton* and *MacPherson*, yet suspects that there is some merit to one or another version of the plaintiffs' underlying theories and claims, it must identify a resolution that is sensitive to these competing concerns.

One solution that holds itself out would be to uphold (if only in *dicta*) *Hamilton's* ruling on the duty issue, but to reverse on causation.³⁶ This would signal a willingness to entertain subsequent litigation that will in turn permit more investigation and development of facts and legal theories by litigants, public interest groups, and government agencies. In addition, to the extent that visible private litigation provides a salutary pressure on legislatures and agencies to address rather than ignore the socially destructive aspects of gun sales, it allows such pressure to continue to build. At the same time, such a ruling will also indicate to future plaintiffs that they will have to offer more by way of proof, or an alternatively crafted theory of liability, before they can prevail. And obviously it avoids the extreme of implementing a full blown, judicially administered compensation scheme

33. See *id.*

34. No. 95 Civ. 3323 (E.D.N.Y. 1998); see generally Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 BROOK. L. REV. 681 (1998) (recounting carefully the trial and outcome of the case).

35. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995) (granting a writ of mandamus decertifying a mass tort class action in part on the ground that consolidated resolution was premature because the litigants and courts had not had sufficient opportunity to develop and test the evidence and novel negligence theories).

36. That is, assuming the reviewing court agrees with Twerski's and Sebok's assessment of the evidence on causation.

that threatens to rip apart the fabric of the common law of tort. Given the current state of play in the litigation of negligent marketing cases, this pragmatic-yet-cautious approach seems to us more in keeping with the spirit of the common law than a simple dismissal of plaintiffs' claims on the one hand, or the outright embrace of a public law model of *pro rata* compensation on the other.

VI. CONCLUSION

Twerski and Sebok begin their analysis by insisting on the axiomatic nature of the causation requirement for tort law. Echoing Cardozo,³⁷ they draw a bright line distinction between private and public law: "[c]ulpability in the air," they insist, "is not the business of tort law, but of public law."³⁸ Causation, they further stress, is "not just a mere technicality, but an element that is equal to duty and breach."³⁹ Likewise, they conclude their article by criticizing the awards of full compensatory damages in cases like *Hamilton*, maintaining that their scheme of *pro rata* recovery defends the integrity of negligence law against the "creati[on] of a degraded standard of causation."⁴⁰

However well-intentioned, and even if tenable at the level of policy, the proposal put forth by Twerski and Sebok necessarily participates in the very degradation they decry. If they are right about the evidence presented in cases like *Hamilton*, the problem with permitting recovery is emphatically *not*, as they suggest, that the evidence of causation is "far too speculative to allow for *full* recovery;"⁴¹ it is far too speculative to permit *any* recovery. In making this point, we do not advocate that courts slam the door on negligent marketing claims against gun manufacturers. Rather, our point is that permitting recovery in these cases would require a massive exercise in *ad hoc* judicial policymaking; an exercise that, in their present posture, the negligent marketing cases cannot sustain.

37. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) ("Proof of negligence in the air, so to speak, will not do.") (quoting SIR FREDERICK POLLOCK, *THE LAW OF TORTS* 455 (11th ed. 1920)).

38. Twerski & Sebok, *supra* note 1, at 1379.

39. *Id.*

40. *Id.* at 1409.

41. *Id.*

