



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

**Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432**

Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

Tort Liability for Gun Violence: Exposures in a Dynamic Social and Political Landscape

I. Liability Case Issues

a. Case history from Shootings

i. Virginia Tech

1. April 16, 2007: The shooter, a senior at Virginia Tech, shot and killed 32 people and wounded 17 others in two separate attacks, approximately two hours apart, before committing suicide.
2. A civil suit was filed by the parents of two students, Erin N. Peterson and Julia K. Pryde. A jury found that VA Tech was negligent for not issuing a timelier warning of an active threat. It awarded both families \$100,000 judgments against the school. VA Tech is now considering an appeal.

ii. Aurora

1. July 20, 2012: A mass shooting occurred inside of a Century movie theater in Aurora, Colorado, during a midnight screening of the film “The Dark Knight Rises.” A gunman entered the theater with multiple firearms, killing 12 people and injuring 58 others. The suspected shooter was arrested outside the cinema minutes later.
2. A Colorado University psychiatrist was treating the shooter while he was a student at Colorado University.



3. A widow of a man killed in the shooting filed a civil lawsuit against the school and the psychiatrist. She alleges that the psychiatrist had the opportunity to use reasonable care when a Colorado University Police Officer offered to apprehend the shooter and place him on psychiatric hold. Essentially, the basis of the suit is that there was a failure to act by the treating psychiatrist. The case is still pending.

iii. Columbine

1. April 20, 1999: Two senior high school students murdered a total of 12 students and one teacher. They injured 21 additional students, with three other people being injured while attempting to escape the school. The pair then committed suicide.
2. Nine civil suits were filed against Sheriff John P. Stone and the Jefferson County Sheriff's Department for various acts of negligence, including failing to act on indications of the coming violence. In November 2001, all but one of the suits were dismissed in federal court. The judge ruled that, while possibly negligent, officials were protected by governmental immunity unless their actions were "willful and wanton." The only case allowed to move forward involved a teacher who bled to death while waiting to be rescued.
3. The shooters' families faced several wrongful death suits, one of which was settled in April 2001 for \$2.53 million, the proceeds to be shared by more than 30 families of the victims. Lawsuits were also filed against school officials and the Tanner Gun Show, where one of the guns was purchased by friend of the shooters when she was eighteen years old.

b. Legal Duties in Shooting Cases

i. Negligence

1. Conduct that creates and unreasonable risk of harm
2. Conduct that falls below the standard established by law for the protection of others from unreasonable risk of harm
3. Risk-benefit analysis

ii. Negligent storage of Firearms

1. Safe Storage
2. Locked and unloaded
3. Risk of Criminal misuse of Stolen Guns
4. Financial burden of safe storage



5. Inconvenience burden of safe storage
 6. Self-defense burden of safe storage
- iii. Negligent Entrustment
- iv. Liability for design defects – particular to each state’s law
1. If a product is marketed with inadequate instructions or warnings as to foreseeable risks, it may be defective.
 2. If a product is manufactured with a flaw but the design and marketing of the product are fine, it may constitute a manufacturing defect.
 3. If a product is designed in such way that it is foreseeable that injury could result and if the risk of injury could have been reduced by an alternative design, then a product may be considered defective in its design.
 4. When looking at alternative designs, some states’ courts will look at the costs associated with the alternative designs, whether the proposed alternative would in fact have reduced the foreseeable risks of harm associated with the product and whether the failure to use the alternative design made the product unreasonably unsafe at the time it was manufactured.
 5. If a product is defective in the way that it is marketed, manufactured or designed and someone is injured as a result of that defect, then the manufacturer, distributor and/or seller of the product will typically be considered liable for damages and the consequences of the defect.
 6. If the weapon appears to have malfunctioned in some way, then recovery may be possible under a product liability theory.
- v. Public Nuisance
- c. Brady Act (criminal) – requires that background checks be conducted on individuals before a firearm may be purchased from a federally licensed dealer, manufacturer or importer—unless an exception applies.

These prohibitions apply to any person who:

1. Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
2. Is a fugitive from justice;
3. Is an unlawful user of or addicted to any controlled substance;



4. Has been adjudicated as a mental defective or committed to a mental institution;
5. Is an alien illegally or unlawfully in the United States;
6. Has been discharged from the Armed Forces under dishonorable conditions;
7. Having been a citizen of the United States, has renounced U.S. citizenship;
8. Is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner;
9. Has been convicted in any court of a misdemeanor crime of domestic violence; or
10. Has a record of being a felon.

d. Immunity Issues of Federal Protection of Lawful Commerce in Arms Act

i. The Protection of Lawful Commerce in Arms Act (2005)

1. Purpose as outlined by the Act:

- a. Prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended;
- b. Preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting;
- c. Guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment;
- d. Prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce;
- e. Protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably and to petition the Government for a redress of their grievances;



- f. Preserve and protect the Separation of Powers doctrine and important principles of federalism, state sovereignty and comity between sister states;
- g. Exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

2. Exceptions to Prohibition of Civil Liability Action against Gun Manufacturers

- a. An action brought against a transferor (i.e. a federal firearms licensee) if the transferor was convicted under 18 USC Sec. 924, which makes it unlawful for anyone to “knowingly transfer a firearm, knowing that such firearm would be used to commit a crime of violence.”
- b. An action brought against a seller for negligent entrustment or negligence per se.
- c. An action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product and the violation was a proximate cause of the harm for which relief is sought.
- d. An action for breach of contract or warranty in connection with the purchase of the product.
- e. An action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.
- f. The Act does not prevent the Attorney General from enforcing the relevant Gun Control Act or National Firearms Act against federal firearms licensees through the administrative or civil proceedings provided for in those statutes.

3. Liability For Use

- a. Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.
- b. A qualified civil liability action may not be brought in any Federal or State court.



- c. Penalties Relating To Secure Gun Storage Or Safety Device:
With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing:
 - i. (i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or
 - ii. (ii) subject the licensee to a civil penalty in an amount equal to not more than \$2,500.
- ii. Daniel Williams et al v. Beemiller, Inc., et al, New York State Supreme Court, Appellate Division, Fourth Department CA11-0292.
 - 1. The plaintiff was shot nearly a decade ago in New York can sue the manufacturer, the distributor and the dealer of the semi-automatic pistol used to shoot him.
 - 2. The shooter was a convicted felon and was barred from purchasing guns, according to the ruling. The shooter traveled to Ohio, which does not require a license to buy a gun, to procure a large numbers of handguns, including the pistol used to shoot plaintiff.
 - 3. The complaint alleges that defendants:
 - a. negligently distributed and sold the gun at issue to individuals they knew or should have known were in the business of illegally distributing handguns;
 - b. negligently entrusted the gun to individuals they knew or should have known would create an unreasonable risk of physical injury to others;
 - c. committed negligence per se by violating various federal and state gun laws;
 - d. created a public nuisance by distributing a large number of guns into the illegal gun market and selling them to that market; and
 - e. intentionally violated federal, state, and local legislative enactments.
 - 4. Defendants claimed they cannot be sued because of the federal Protection of Lawful Commerce in Arms Act, a 2005 law that shields firearm manufacturers and sellers from liability for harm caused by the criminal misuse of their non-defective products.
 - 5. Appellate court reversed a 2011 ruling that threw out the case against the defendants - Beemiller, MKS Supply and gun dealer Charles Brown,



who sold the guns to James Bostic, a Buffalo resident accused of running a trafficking scheme that funneled guns into the black market in New York.

6. Court found that “although the complaint does not specify the statutes allegedly violated (by the defendants), it sufficiently alleges facts supporting a finding that defendants knowingly violated federal gun law.”
7. A lower court had tossed the case, based on the federal Protection of Lawful Commerce in Arms Act, a 2005 law that protects gun manufacturers and sellers. But the appeals court held that the law, which was signed by President George W. Bush, does not provide immunity to gun companies that illegally supply gun traffickers or irresponsible dealers, Reuters noted. The case was remanded to the trial court.

e. Constitutional Issues

- i. District of Columbia v. Heller (2008)
- ii. McDonald v. Chicago (2010)
- iii. President Obama’s recent position regarding gun violence and 2nd Amendment
 1. Calls Into Question the Immunities Provided in the Lawful Commerce in Arms Act
 2. Generally his plan includes:
 - a. Closing background check loopholes;
 - i. Criminal background checks for all sales
 - ii. Licensed dealers and private sellers to perform background checks
 - b. Banning military-style assault weapons and high-capacity magazines;
 - i. Limit magazines to 10 rounds
 - ii. Reinstate ban on assault weapons
 - iii. Ban armor piercing bullets
 - c. Tools to prosecute and prevent gun crime; and
 - i. Prevent “straw-purchasers”



- ii. Increase police presence
 - iii. Improve gun-tracing data
 - iv. Preventing guns from being returned to wrong hands
 - v. Confirm director for ATF (six years since last one)
 - vi. Improve regulations on outdated firearms
 - vii. Prosecution of felons illegal attempts to purchase and evasion of background checks with false info
 - viii. Analyze info on lost and stolen guns and improve database
 - ix. Improve effective training for active shooter situations.
- d. Gun Violence Research
- i. Stop freeze
 - ii. \$10 million fund for CDC to research relationship between video games, media, and violence
- e. Preserve Rights of Health Care Providers –
- No federal law preventing health care providers from warning law officials
- f. Improve Gun Owner Safety Responsibility
- i. Storage and locking
 - ii. Innovative gun safety technology
- g. School safety
- i. Increase school resource officers
 - ii. Implement an emergency management plan
 - iii. Nurture safer school climate
- h. Increasing access to mental health service.
- i. Identifying mental illness early and refer for treatment
 - ii. Provide mental health training for teachers



- iii. Train additional mental health professionals for students and young adults
 - iv. Ensure health insurance plans for mental health services
 - f. Liability of others for gun violence
 - i. School Officials and Government Agencies
 - 1. Potential Liability: Failure to provide adequate protection or to prevent the shooting from occurring.
 - 2. School liability has increased over the last decade, especially in the area of tort liability.
 - 3. “Courts will consider each of the elements of negligence in the context of education law when determining a school’s liability.”
 - 4. Considerations include whether the reasonable standard of care would apply to the circumstances and whether the school applied that reasonable standard of care?
 - ii. Gun Manufacturers
 - 1. Potential Liability: Failure to provide warnings and adequate safety features.
 - 2. The warnings on guns—and knowledge of those warnings—have been called into question. However, children are not usually held to be able to discern the imminent danger presented by their actions when bringing firearms to school. The duty owed by the gun manufacturers to warn of their dangers and provide functioning safety features is most often found to have been satisfied.
 - iii. Gun Distributors and Dealers
 - 1. Potential Liability: Making guns too easily accessible and available for purchase to the general public.
 - 2. The Federal Protection of Lawful Commerce in Arms Act, in a broad sense, prohibits most civil lawsuits against firearm stores. The gun industry is heavily regulated, and dealers and manufacturers strictly adhere to the laws and controls placed upon them. When firearms end up in the wrong hands—in this case, the hands of children—the duty owed by the manufacturers and distributors has been met, and they are not typically a liable party.



3. In Illinois, a lawsuit was filed in Cook County Circuit Court by the Brady Center to Prevent Gun Violence against Armslist LLC, a website gun distributor for sale of a gun involved in a murder. This case brings into question provisions in federal law that allows private sales of firearms over the Internet and at gun shows without background checks. The shooter contacted a gun dealer in Seattle through Armslist.com. He then drove from Surrey, British Columbia, to Seattle to purchase the handgun and ammunition and headed to Chicago and shot a female on April 13, 2011. The case is now pending.

iv. Parents of the Shooters

1. Potential Liability: Failure to control and properly monitor their children.
2. Although in most states parents can be held liable for the intentional acts of their children, there is usually a monetary limit to the amounts that the parents can be responsible to pay. They are not held liable for unintentional but negligent acts.
3. Civil lawsuits continue to be filed in school-shooting cases. In Springfield, Ore., where a high school shooting occurred, the parents of one of the student victims injured in the shooting filed a \$14.5 million lawsuit against the estate of the shooter's parents, alleging that they were "negligent in providing their son with firearms and failing to supervise his access to them." The parents died as a result of the actions of their son, the shooter, who also shot them.

v. Psychiatrists and Counselors

1. Potential Liability: A patient has communicated to the psychiatrist a serious threat of imminent physical violence against a specific person or persons or after a personal patient evaluation determining that the person appears to have a mental illness and, as a result of the mental illness, the psychiatrist determines that the patient appears to be an imminent danger to others and then negligently fails to initiate involuntary seventy-two-hour treatment and evaluation. (C.R.S. § 13-21-117) (Colorado law)
2. Basis of civil lawsuit arising out of shooting in Aurora. A widow of a victim filed a civil suit claiming the psychiatrist treating the patient acted negligently by failing to warn of an imminent threat and placing the shooter on a psychiatric hold when the psychiatrist was aware of imminent threat.

vi. The Media, Videogame Developers and Filmmakers.

1. Potential Liability: Sensationalizing and producing movies, video games, and web sites that induce violence.



2. Several school-shooting victims' families have filed lawsuits against 25 entertainment companies, One lawsuit from the school shooting at Columbine High School in Colorado seeks \$5 billion in punitive damages. The victims' lawsuit states, "Absent the combination of extremely violent video games and these boys' incredibly deep involvement, use of, and addiction to these games and the boys' basic personalities, these murders and this massacre would not have occurred."
3. While most of the lawsuits filed in school shooting cases remain pending, we must learn from these events to better understand the risk exposure and duties owed to prevent future occurrences and to formulate a sound, rational and consistent approach to notions of civil liability and compensation.

