Proximate Cause in Infotorts

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1. Introduction

In 1998, I began an essay, now posted at http://www.rbs2.com/infotort.pdf , that lists and classifies court cases in the USA involving tort liability for erroneous information in nonfiction works, entertainment that inspires violent crimes, and other examples of harmful information. In the present essay, I discuss the law in the USA for the causal chain from the source of the information to how the plaintiff was harmed, to see if current tort law would permit information torts *if* freedom of speech did *not* protect the source of the information.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook.*

2. Overview

In most of the infotort cases, judges assert that freedom of speech in the First Amendment to the U.S. Constitution prohibits such torts, and then judges grant summary judgment for the defendant. However, as I point out in my first essay on infotorts, the existing hierarchy of speech recognized by the U.S. Supreme Court includes neither (1) error in nonfiction works nor (2) entertainment that inspires violence, so judges in lower courts apply law developed for other elements in the hierarchy of speech. That is not surprising, because — with the exception of *Greenmoss* — the Supreme Court has *never* considered one of these information tort cases, so we have no definitive case law about information torts in constitutional law.

There is another legal issue that could dispose of an information tort case. Was the erroneous information, or the entertainment that inspired a violent crime, the proximate cause of plaintiff's injury? There are four elements to a classical tort:

1. legal duty owed by D to P,[1]
2. breach of that duty by D,
3. breach is the proximate cause of P's injury, and
4. damages experienced by P.

If a court finds that D's conduct was not the proximate cause, then D wins.

In typical cases involving erroneous information in a book or magazine, P relies on the information, and P is harmed as a result of that reliance. Should P have verified the information before relying on it? One of the fundamental goals of education is to teach people not to blindly

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[1] I use the legal shorthand of P for plaintiff, D for defendant, and V for victim of a crime.

trust everything they read, but to think critically and be skeptical. Just because a book is well written by a competent author does *not* mean that the book is free from errors,[2] and does not mean that the book contains *all* of the relevant information that a reader needs. For those reasons, P may have behaved *un*reasonably by relying on information in a book or magazine, without P verifying the information in another source. Following this argument, P's decision to rely on the erroneous information may break the causal chain between the erroneous information and P's eventual injury, thus relieving the author and publisher of the erroneous information from liability. In my opinion, this analysis should be the law.

In cases involving crimes inspired by entertainment, under current law in the USA, the criminal act(s) by perpetrators of the crimes breaks the causal chain, thus relieving the producers of the entertainment of any tort liability for inspiring the crimes.

Because judges in these information tort cases grant summary judgment primarily on First Amendment grounds, there is no need for the judge to consider the causal chain and proximate causation. For that reason, judicial opinions in information tort cases generally contain no remarks on proximate cause. However, as quoted later in this essay, in a few cases involving either (1) an advertisement for hit men or (2) entertainment that inspired violent crimes, judges have made some remarks on proximate cause. For the same reason, articles in law reviews on information torts have also focused almost exclusively on First Amendment issues. My search of law review articles on this topic in Westlaw on 12 Dec 2006 found only two articles that mentioned proximate causation,[3] and both mentions were a few terse paragraphs in a long article. First Amendment law has a reputation as an intellectual paradise, compared with most of law, which is ordinary and routine. However, as I show below, beginning at page 4, issues in proximate cause and superseding cause are also intellectually complex and involve questions of public policy regarding holding some possible tortfeasors to be legally responsible.

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[2] Even if the author did a first-rate job, errors can be introduced by a copy editor or typesetter and escape correction during proofreading.

[3] Lillian R. BeVier, "Controlling Communications That Teach or Demonstrate Violence: 'The Movie Made Them Do It'," THE JOURNAL OF LAW, MEDICINE & ETHICS, Vol. 32, pp. 47-55, at page 49 (Spring 2004); Amanda Harmon Cooley, "They Fought the Law and the Law (Rightfully) Won ...," TEXAS REVIEW OF ENTERTAINMENT & SPORTS LAW, Vol. 5, pp. 203-236, at pages 227-228 (Spring 2004).

Judges are supposed to resolve cases on issues of common law or statutory law whenever possible, and avoid considering constitutional issues.[4] This is a strange situation when judges disposed of information tort cases on First Amendment grounds, instead of considering duty or proximate cause from the common law of torts.[5] I suggest that judges leaped to the First Amendment grounds to quickly dispose of the case, instead of getting mired in what may have appeared to be more difficult questions regarding superseding cause, and which might have involved making new law. On the other hand, judges who believed the First Amendment barred such torts were also making new law, because those judges often applied rules for political speech or defamation to other kinds of speech.

This essay explores the causal chain in more detail than judges and authors of law review articles have given.

3. Classical Law on Proximate Cause

Did D's negligent act *cause* P's injury? In many tort cases, there is only one plausible cause of P's injury, which makes the question of causation simple to answer. However, in information tort cases, it is easy to see multiple causes of P's injury. For example, in the case of relying on erroneous information in a nonfictional publication, P may have an obligation to independently verify the information. In the case of entertainment that inspires a violent crime, the criminal's act may be the sole legal cause of the injury.

In cases where there are two or more possible causes for an injury, classical tort law speaks of a *causal chain,* a sequence of events set in motion by the first alleged tortfeasor, D_1. According to some complicated rules of law, a subsequent independent act — called a *superseding cause* — can break the causal chain and relieve D_1 of liability for injuries that occurred after the superseding cause.[6] The reader is cautioned that judicial analysis here often involves circular reasoning: the

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[4] See, e.g., *Siler v. Louisville & Nashville Railroad Co.,* 213 U.S. 175, 193 (1909); *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 105 (1944); *Hagans v. Lavine,* 415 U.S. 528, 546-547, n. 12 (1974); *Lorillard v. Pons,* 434 U.S. 575, 577 (1978); *Regents of University of California v. Bakke,* 438 U.S. 265, 411-412 (1978) (Stevens, J., concurring in part); *Wolston v. Reader's Digest Ass'n, Inc.,* 443 U.S. 157, 160, n. 2 (1979); *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 159-163 (1984) (Stevens, J., dissenting).

[5] One early exception is *Watters v. TSR, Inc.,* 904 F.2d 378, 379 (6th Cir. 1990) ("Without addressing the common law questions, the district court held that the United States Constitution bars the imposition of liability in a case such as this. [citation omitted] We see no need to reach the constitutional issue, because we believe that the law of Kentucky, on which the plaintiff's claim is based, would not permit recovery on the facts shown here. We shall affirm the district court's judgment on that basis."). Followed by *James v. Meow Media, Inc.,* 90 F.Supp.2d 798, 818 (W.D.Ky. 2000).

[6] Restatement Second of Torts, §§ 440-453 (1965).

judge decides that it would be "unfair" to hold D_1 responsible, so the judge finds that some other person was a superseding cause of P's injuries.[7]

Before considering general rules of law, it is helpful to consider some specific fact patterns to see how the law has been applied.

In some classical tort cases the reader of the judicial opinion may be inclined to see *two* torts, committed by different people, where the court only found *one* tort. For example, consider P who is injured by D_1 and goes to the hospital for treatment of his/her injuries. In the hospital, P is the victim of medical malpractice by D_2, which makes P's injuries worse. The rule in American law,[8] like it or not, is that D_1 is liable in tort for the injuries caused by both D_1 and D_2. The rule is explained by saying that the negligence of D_1 set in motion a sequence of subsequent events including medical treatment. And it is foreseeable that medical treatment may involve negligence. Because of this rule of law, lawyers refer to causation in tort as *proximate cause,* the word *proximate* meaning the legal cause. While the actual causes of P's injuries were negligence by both D_1 and D_2, the proximate cause is only the negligence by D_1.

An early case stating this rule involved a plaintiff whose leg was broken in an automobile accident that was caused by the negligence of D. After the plaster cast was removed, while P was still walking with the assistance of crutches, P slipped — without any negligence by P — and refractured his leg. The court held that D was also legally liable for the refracture of P's leg. *Wagner v. Mittendorf,* 134 N.E. 539 (N.Y. 1922).[9]

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[7] *Olson v. Ratzel,* 278 N.W.2d 238, 251 (Wis.App. 1979) ("In some cases, the causal connections between transfer [of pistol] and injury are so remote that the court should invoke public policy or the law of superseding cause to prevent unfair imposition of liability." [two footnotes omitted]); *Soule v. General Motors Corp.,* 882 P.2d 298, 312, n. 9 (Cal. 1994). Proser & Keeton, THE LAW OF TORTS, § 44, p. 312 of Hornbook edition (5th ed. 1984) ("The courts have exhibited a more or less instinctive feeling that it would be unfair to hold the defendant liable."). There is a similar rule in criminal cases. *Sims v. State,* 466 N.E.2d 24, 26 (Ind. 1984); *Carrigg v. State,* 696 N.E.2d 392, 396 (Ind.App. 1998).

[8] Restatement Second of Torts, § 457 (1965). There is a similar rule in criminal cases. *Michigan v. Townsend,* 183 N.W. 177, 180-181 (Mich. 1921); *Michigan v. Schaefer,* 703 N.W.2d 774, 785-786 (Mich. 2005); *Colorado v. Saavedra-Rodriguez,* 971 P.2d 223, 226 (Colo. 1998).

[9] See also *Ash v. Mortensen,* 150 P.2d 876, 877 (Cal. 1944) ("It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor." [citations omitted]).

On the other hand, courts are loath to find defendants responsible for harms that are not readily foreseeable.

> It would be irrational to suggest, for instance, that an innkeeper is liable merely because one of his overnight lodgers commits a robbery in the area, even though the lodger might not have been in the area if not for the fact there was room at the inn; or that the owner of a newspaper rack should be liable if a customer takes a paper out of the rack and uses it to start a fire on nearby property, even though the arson could not have occurred in precisely the same way if the newspaper rack had not been present — and even though the arsonist may have been attracted to the area of the newspaper rack because he wanted to read a spicy libel or an alarming advertisement. (Cf. *Gonzalez v. Derrington, supra,* 56 Cal.2d 130, 14 Cal.Rptr. 1, 363 P.2d 1.)

Martinez v. Pacific Bell, 275 Cal.Rptr. 878, 886, n. 3 (Cal.App. 1990).

Another way to break the causal chain is for P to make a conscious choice. For example, if P unreasonably refuses conventional medical care, then D is *not* liable for injuries that would have been cured by such conventional medical care.[10]

The Restatement Second of Torts § 442 has a list of considerations for determining whether a subsequent act is a superseding cause of harm:

(a) the superseding cause introduces a different kind of harm that what otherwise would have resulted from the negligent act of D_1.
(b) the superseding cause appears extraordinary, "in view of the circumstances existing at the time of its operation".[11]
(c) the superseding cause is independent of D_1's negligence.
(d) the superseding cause is a result of a "third person's act or failure to act".
(e) the third person's act in (d) is wrongful.

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[10] *Miller v. Hartman,* 36 P.2d 965 (Kan. Nov 03, 1934); *Munn v. Algee,* 730 F.Supp. 21 (N.D.Miss. 1990), *aff'd,* 924 F.2d 568 (5th Cir. 1991), *cert. den.,* 502 U.S. 900 (1991).

[11] Note that if D_1 "neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred", D_1 is still legally liable for the harm, provided that D_1's "conduct is a substantial factor in bringing about harm to another". Restatement Second of Torts § 435(1).

In doing legal research for this essay, I came across two cases that neatly summarized the law in Missouri on superseding causes.[12] Because those two cases cited only cases in Missouri, I decided not to quote them in this essay.

The Restatement Second of Torts § 442B says that an intentional tort (or a criminal act[13]) by a third person will relieve D_1 of liability, when the intentional tort "is not within the scope of the risk created by" D_1. Similarly, the Restatement Second of Torts § 448 says that intentional torts or crimes are superseding causes, "unless [D_1] at the time of his negligent conduct realized or should have realized the likelihood that ... [D_1's] negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime". These rules of law are applied in cases where entertainment inspired a crime, and these rules generally bar liability for the producer/distributor of the entertainment. However, these rules were *not* developed for crimes inspired by entertainment, and changing social conditions may make a new rule appropriate in the future.

For example, victims in the bombing of the Oklahoma City federal building sued the manufacturer of the ammonium nitrate explosive used by Tim McVeigh. The litigation was dismissed, as the criminal acts of McVeigh were superseding acts, which were the proximate causes of the bombing. *Gaines-Tabb v. ICI Explosives USA, Inc.,* 995 F.Supp. 1304 (W.D.Okla. 1996), *aff'd,* 160 F.3d 613, 620-621 (10th Cir. 1998). See also the cases involving suing manufacturers of firearms for injuries caused by misuse of the firearms by criminals, below, beginning at page 28.

When D_1 has a legal duty to protect V from harm, then D_1 may be liable for harm caused by any act by a third person, even if the third person commits an intentional tort or crime.[14] For example, the operator of a movie theater has a legal duty to protect its customers *inside* the

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[12] *Schaffer v. Bess,* 822 S.W.2d 871, 877 (Mo.App. E.D. 1991) ("An intervening cause is a new and independent force which so interrupts the chain of events as to become the responsible, direct, proximate and immediate cause of the injury, rendering any prior negligence too remote to operate as the proximate cause. It may not consist of an act of concurring or contributory negligence. Moreover, it may not be one which is itself a foreseeable and natural result of the original negligence. Finally, the determination of substantiality and proximity of the causal relationship between negligence and injury is dependent upon the particular facts of the case." [citations omitted]); *Buchholz v. Mosby-Year Book, Inc.,* 969 S.W.2d 860, 861-862 (Mo.App. E.D. 1998) ("The intervening act must be a superseding cause that is independent of the original actor's negligence and severs the connection between the original actor's conduct and the plaintiff's injury as a matter of law. For an intervening act to relieve the original tortfeasor from liability, the act cannot be a foreseeable consequence of the original act of negligence." [citations omitted]).

[13] See Restatement Second Torts § 442B, comment *b*, final sentence. (1965).

[14] Restatements Second of Torts §§ 302B, 449 (1965).

theater from foreseeable harms, but the operator of the theater has no duty to protect customers *outside* the theater premises.[15]

I want to emphasize that determination of proximate causation and superseding causes can be complicated, and is sometimes controversial, as shown by decisions of appellate courts with dissenting opinions.

4. Proximate Cause in Use of Nonfiction Information

My search of all state and federal cases in Westlaw in December 2006 failed to find any mentions of intervening/superseding causes in torts for alleged erroneous information in nonfiction books and magazines. Because there is no legal duty for a publisher to verify facts,[16] the publisher can not be the proximate cause of plaintiff's injuries.

A few law review articles have tersely mentioned that, in the context of injuries from erroneous information in a book, American law continues the *caveat emptor* doctrine,[17] which doctrine has been abandoned in other areas of law, through consumer protection statutes and products liability litigation. In my view, there are good public policy reasons to continue caveat emptor for readers of books, magazines, websites, etc.:

1. readers constitute an indeterminate class, thus preventing liability of authors, as explained in my first essay on infotorts in the section on professional malpractice.
2. society should encourage readers to think critically and verify information, instead of blindly relying on what they read. This means that the reader's negligence in not verifying information is the proximate cause of the reader's injuries from erroneous information.
3. holding authors or publishers liable for errors would likely decrease the amount of published information on dangerous topics, such as school laboratory instructions, chemistry books, etc.

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[15] *Rawson v. Massachusetts Operating Co.,* 105 N.E.2d 220 (Mass. 1952); *Moran v. Valley Forge Drive-In Theater, Inc.,* 246 A.2d 875 (Pa. 1968); *Bill v. Superior Court,* 187 Cal.Rptr. 625, 633 (Cal.App. 1982) (infotort case, no liability for harm outside theater); *Yakubowicz v. Paramount Pictures Corp.,* 536 N.E.2d 1067, 1072 (Mass. 1989) (infotort case, "A fatal assault occurring miles from the theatre as a matter of law could not be attributed to a failure to 'protect [people] at or near the theatre' ...."); *MacDonald v. PKT, Inc.,* 628 N.W.2d 33 (Mich. 2001); *Graves v. Warner Bros.,* 656 N.W.2d 195 (Mich.App. 2002), *appeal denied,* 666 N.W.2d 665 (Mich. 2003), *cert. den.,* 542 U.S. 920 (2004); *Hopkins v. Connecticut Sports Plex, LLC,* 2006 WL 1738369 (Conn.Super. 9 June 2006).

[16] See numerous cases quoted in Standler, *Information Torts,* http://www.rbs2.com/infotort.pdf .

[17] See, e.g., Roy W. Arnold, Note: "The Persistence of Caveat Emptor: Publisher Immunity from Liability for Inaccurate Factual Information," Univ. Pittsburgh Law Review, Vol. 53, pp. 777-811, at p. 803 (Spring 1992); Brett Lee Myers, Note: "Read at Your Own Risk: Publisher Liability of Defective How-To Books," Arkansas Law Review, Vol. 45, pp. 699-728, at p. 728 (1992); Terri R. Day, "Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?," Santa Clara Law Review, Vol. 36, pp. 73-106, at p. 105 (1995).

5. Due Diligence in Investment

My first essay on infotorts cites more than a dozen cases involving either a factual error or alleged negligent advice in a newspaper or newsletter that allegedly caused an investor to lose money. Those cases were all decided on First Amendment grounds and say nothing about a plaintiff's obligation to either: (1) verify facts or (2) think independently before relying on advice. In my opinion, a reader should do his own research before acting on any information or advice contained in a newspaper, newsletter, website, or other publicly available source. An exception might be when the author claims that the information is "exclusive" or available only in this one article, which makes it pointless to check other sources.

I have found only one information tort case in which a judge remarks about plaintiff's duty to verify information before relying on it:

> Further, we question whether appellee's reliance on the news account, without verifying the trading status of the bonds with a broker or otherwise, could ever be considered "justifiable." A contrary result would in effect extend liability to all the world and not a *limited* class,[18] such as the identifiable and foreseeable group of limited partners ....

Gutter v. Dow Jones, Inc., 490 N.E.2d 898, 900 (Ohio 1986).

The following are a few cases in other contexts that require investors to do their own research:

- *Shappirio v. Goldberg,* 192 U.S. 232, 241-242 (1904) ("When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury to the misrepresentations of the vendor.").

- *City Nat. Bank of Fort Smith, Ark. v. Vanderboom,* 422 F.2d 221, 230 (8th Cir. 1970) ("With regard to misrepresentations, the question is whether a reasonable investor, in light of the facts existing at the time of the misrepresentation and in the exercise of due care, would have been entitled to rely upon the misrepresentation."), *cert. den.,* 399 U.S. 905 (1970).

- *Clement A. Evans & Co. v. McAlpine,* 434 F.2d 100, 104 (5th Cir. 1970) (In action by one stock brokerage against another stock brokerage, "... there was substantial evidence to support a jury finding of lack of reasonable diligence on the part of the plaintiff ...."), *cert. den.,* 402 U.S. 988 (1971).

- *Hirsch v. du Pont,* 553 F.2d 750, 763 (2nd Cir. 1977) ("The securities laws were not enacted to protect sophisticated businessmen from their own errors of judgment. Such investors must, if they wish to recover under federal law, investigate the information available to them with the care and prudence expected from people blessed with full access to information. We believe that the diligence of the appellants in this case fell far short of the mark.").

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[18] For discussion of public policy reasons for limiting liability for negligent speech to a limited class of people, see the section on professional malpractice in my first essay on information torts.

- *NBI Mortg. Inv. Corp. v. Chemical Bank,* 1977 WL 1021 (S.D.N.Y. 24 May 1977) ("Furthermore, this court must grant this motion even in the absence of the disclaimer in the agreement. Plaintiff cannot claim reliance if it failed to exercise the due diligence required of it by law.").

- *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.,* 858 F.2d 499, 504 (9th Cir. 1988) ("Where a plaintiff's suspicions have been or should have been excited, there can be no fraudulent concealment where he 'could have then confirmed his earlier suspicion by a diligent pursuit' of further information. *Rutledge,* 576 F.2d at 250.").

If an investor wishes to follow advice without doing independent research, then that investor should hire a securities broker or investment advisor to give advice specifically for that one individual client. In that situation, the investor can sue his/her broker/advisor in tort.

6. Proximate Cause in Hit-Man Adverts

Eimann

In 1988, a U.S. District Court denied *Soldier of Fortune* magazine's motion for summary judgment:

> Finally, Defendants contend that Plaintiffs cannot maintain a negligence cause of action because the injuries resulting from the intervening intentional criminal acts of John Wayne Hearn and Robert Black severed the causal link between Defendants' alleged negligence and Plaintiffs' decedent's death. A defendant's negligence will not, however, be excused by an intervening criminal act when that criminal conduct is a foreseeable result of the defendant's negligence. *El Chico Corp. v. Poole,* 732 S.W.2d 306, 313-14 (Tex. 1987); *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 550 (Tex. 1985). The determination of the foreseeability of intervening criminal conduct rests with the jury. *El Chico, supra* at 314. Plaintiffs have produced some evidence that Soldier of Fortune has, in the past, published advertisements expressly offering criminal services. Hearn has testified in deposition that he estimated that 90 percent of the calls he received in response to his ad inquired about illegal activities. He further testified that he received three to five calls per day from persons wanting him to murder for hire. In light of that evidence, an issue of material fact has been raised as to whether Defendants knew or should have known of the nature of the advertisement and, thus, should have foreseen the likelihood that criminal conduct would ensue.

Eimann v. Soldier of Fortune Magazine, Inc., 680 F.Supp. 863, 866-867 (S.D.Tex. 1988).

At trial, the jury awarded plaintiff $9.4 million. The jury verdict was reversed by an appellate court, on grounds that the magazine had no legal duty to screen advertisements. The appellate court did not discuss proximate causation. 880 F.2d 830.

Braun

In 1991, a federal court awarded damages to plaintiff from *Soldier of Fortune* (SOF) magazine publication of a "gun for hire" advertisement. Plaintiffs successfully sued SOF for the wrongful death of their father, who was killed by a criminal who advertised in SOF. Note that the criminal act of the murderer did *not* break the causal chain began by SOF's publication of the advertisement. The trial judge denied SOF's summary judgment motion:

> The defendants SOF and Omega Group seek summary judgment, asserting that both the First Amendment and principles of tort law forbid imposing liability on a publisher for advertisements printed in its publications which do not overtly promote illegal transactions. They argue that the words "gun for hire," and "all jobs considered" are at best ambiguous, and that imposing liability on a publisher for publishing ambiguous ads is overburdensome. Thus, they argue, the Court should determine that the defendants had no duty to screen its personal ads and pull this particular advertisement from its want ad section.
>
> The defendants' argument that the ad's ambiguity released the publisher from any duty is not well taken. Where the ambiguity lies in whether an ad, on its face, suggests murder for hire, the Court is unwilling to rule that lack of precision in drafting absolves the defendants. Applying the familiar balancing test applied in *Eimann v. Soldier of Fortune Magazine, Inc.,* 880 F.2d 830 (5th Cir. 1989) and accepted under Georgia law, *Ely v. Barbizon Towers, Inc.,* 101 Ga.App. 872, 115 S.E.2d 616 (1960), this Court believes that the likelihood and gravity of the possible harm from an advertisement which, on its face, implies that the advertiser is available to kill others is so great, and that the social utility of advertising criminal activity is so small, that imposing a duty on the publisher not to publish the ad is justified. [FN1] *See* Prosser & Keeton, *The Law of Torts,* § 31 at 170-71 (5th ed. 1984); *Restatement (Second) of Torts,* §§ 291, 292 (1965).
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> FN1. The defendants argue that Georgia law does not impose a duty on a defendant to control the acts of third person except where a special relationship exists between the defendant and that third person or the person injured. Georgia law, however, does impose a duty on defendants where the defendant's affirmative acts create a foreseeable risk of danger. *United States v. Aretz,* 248 Ga. 19, 280 S.E.2d 345 (1981). Thus, the Court is not contravening Georgia law in deciding that SOF has a duty not to publish advertisements that are reasonably construed as soliciting jobs which involve murdering others.
>
> This is not a case where the product advertised is basically a safe product but which may have dangerous uses or propensities in the hands of certain users. *See Walters v. Seventeen Magazine,* 195 Cal.App.3d 1119, 241 Cal.Rptr. 101 (Ct.App. 1987); *Yuhas v. Mudge,* 129 N.J.Super. 207, 322 A.2d 824 (Sup.Ct.App.Div. 1974). Nor is the wording of the ad so facially innocuous that, absent knowledge that the advertiser was soliciting murder contracts, the risk of murder was unforeseeable as a matter of law. [FN2] *Eimann v. Soldier of Fortune Magazine,* 880 F.2d 830 (5th Cir. 1989). Rather, the Court believes that the language of this advertisement is such that, even though couched in terms not explicitly offering criminal services, the publisher could recognize the offer of criminal activity as readily as its readers obviously did. *See United States v. Hunter,* 459 F.2d 205, 213 (2d Cir.), *cert. denied,* 409 U.S. 934, 93 S.Ct. 235, 34 L.Ed.2d 189 (1972). Of course, in this Court's opinion the

foreseeability of the criminal activity is ultimately a question for the jury, and that is where this case should be decided. [FN3]

FN2. The defendants attempt to compare the words "gun for hire" the more commonly used phrase "hired gun," arguing that these two phrases are essentially the same. Although placing those words in Soldier of Fortune Magazine may not give them any hidden or code meaning, the placement of the words "gun for hire" in the same ad as "all jobs considered," "discreet and very private," "professional mercenary," and "other special skills" certainly gives additional meaning to the phrase. Defendants comparison of that phrase, as used in the ad in question, with the phrase "hired gun," as used in describing politicians, lawyers, and professional expert witnesses, borders on the absurd.

FN3. The defendants also argue that summary judgment must be granted for want of proximate cause. As a general matter, an intervening criminal act of a third party will supersede any negligence on the part of a defendant under Georgia law, the applicable law in this case. *Rosinek v. Cox Enterprises, Inc.,* 166 Ga.App. 699, 305 S.E.2d 393, 394 (1983). "[H]owever, if the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the causal connection between that conduct and the injury is not broken." *Id.* at 395.[19] Except in indisputable cases, questions of foreseeability and proximate cause are best reserved for the jury. *Id.* The Court, therefore, will not resolve the issue of causation on summary judgment.

The defendants' argument that the First Amendment protects their ad publications is similarly rejected. While commercial speech [footnote omitted] is protected under the First Amendment, that protection does not extend to advertising commercial activity which is itself illegal. [citations omitted]

Braun v. Soldier of Fortune Magazine, 749 F.Supp. 1083, 1085-86 (M.D.Ala. 1990).

After the jury verdict, the trial judge wrote only the following about proximate causation.

The evidence in this case fully supports the jury's determination that defendants did not conform to the applicable standard of conduct, and that such negligent conduct was the proximate cause of Richard Braun's death and Michael Braun's injuries. It is apparent that an ad containing the terms "Gun for Hire," "Discreet and very private," and "All jobs considered" will be reasonably construed as an offer to perform illegal acts. This is no strained construction. A risk becomes unreasonable when its magnitude outweighs the social utility of the act or omission that creates the risk. *See Restatement (Second) of Torts* § 291 (1965). The risk in the Savage ad was the risk of murder or serious, violent crime. [FN4] Accordingly, defendants' motion for judgment notwithstanding the verdict is DENIED.

FN4. Defendants contend that, as a matter of law, any negligence they may have committed cannot be the proximate cause of the damages suffered by plaintiffs because of the intervening criminal acts of third parties. Where the criminal act, however, is the very thing that is foreseeable from a negligent act, it will not serve to insulate the original negligent actor from liability. *See Cain v. Vontz,* 703 F.2d 1279 (11th Cir. 1983) (applying Georgia law).

Braun v. Soldier of Fortune Magazine, Inc., 757 F.Supp. 1325, 1328-29 (M.D.Ala. 1991).

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[19] The judge's opinion here also contains a citation to "93 S.Ct. at 2563", which is a dissenting opinion by Justice Burger that is irrelevant. This irrelevant citation must be a typographical error. The citation to the "93 S.Ct." case is relevant to the following paragraph of the opinion.

The U.S. Court of Appeals affirmed, also tersely writing about proximate causation:

> SOF's sole remaining claim [footnote omitted] is that the jury erred in finding that SOF's publication of Savage's ad was the proximate cause of appellees' injuries. SOF argues that the events that intervened between its publication of Savage's ad and the carrying out of the murder plot were entirely unforeseeable and, therefore, that SOF's publication of Savage's ad was too remote in the chain of events leading to appellees' injuries for the jury to hold SOF liable. Since the proximate cause issue does not implicate any constitutional values, we review the jury's factual finding under the traditional standard of deference to the fact finder. *See Bose Corp.,* 466 U.S. at 514 n. 31, 104 S.Ct. at 1967 n. 31.
>
> We find that the jury had ample grounds for finding that SOF's publication of Savage's ad was the proximate cause of appellees' injuries. Georgia law recognizes that, "[g]enerally, the intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury, superseding any negligence of the defendant...." *Rosinek v. Cox Enterprises, Inc.,* 166 Ga.App. 699, 305 S.E.2d 393, 394 (1983). If, however, "the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the casual connection between that conduct and the injury is not broken." 305 S.E.2d at 394-95; *see also Craine v. United States,* 722 F.2d 1523, 1525 (11th Cir. 1984). We have already held that the language of Savage's ad should have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk that Savage was soliciting violent and illegal jobs. It follows that a reasonable jury could conclude that the criminal act that harmed appellees was reasonably foreseeable and, accordingly, that the chain of causation was not broken.
>
> For the foregoing reasons, we AFFIRM the district court's judgment.

Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1121-1122 (11th Cir. 1992), *cert. den.,* 506 U.S. 1071 (1993).

A federal district court judge characterized *Braun* as standing for the proposition:

> The likelihood that either party would be responsible for approaching 100% of any negligence involves is far from overwhelming. Where negligence of one party creates conditions leading another's behavior to lead to injury, the predisposing party may share responsibility. See *Braun v. Soldier of Fortune Magazine,* 968 F.2d 1110 (11th Cir. 1992), *cert. denied* 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993).

Wright v. U.S., 866 F.Supp. 804 (S.D.N.Y. 1994).

7. Proximate Cause in Entertainment Torts

We now consider a perpetrator who [repeatedly] watches a movie or plays a videogame, and then commits a crime that is inspired by the movie or videogame. Later, a plaintiff (perhaps the spouse or parent of a victim killed by the perpetrator) sues the producer of the movie or videogame in tort. Are the acts of the defendant-producer the proximate cause of the plaintiff's injuries?

When the case discusses proximate causation, I have also included quotations about duty, because both duty and causation involve foreseeability of harm.

Watters v. TSR

A mother sued the manufacturer of the parlor game "Dungeons & Dragons" for allegedly causing her son's suicide. The trial court briefly summarized the facts alleged by plaintiff and the positions of both parties:

> Plaintiff casts her son as a "devoted" player of Dungeons & Dragons, who became totally absorbed by and consumed with the game to the point that he was incapable of separating the fantasies played out in the game from reality. She states that as a result of his participation in a D & D game "he lost control of his own independent will and was driven to self-destruction." Complaint at 2.
>
> Plaintiff claims that TSR breached its duty to her son by negligently publishing and distributing D & D game materials, or in the alternative, by failing to warn "mentally fragile" persons such as decedent of the possible dangerous consequences of playing D & D.
>
> TSR has moved to dismiss the complaint, on the grounds that its publication of D & D manuals and games are privileged under the first amendment's guarantee of freedom of speech. In the alternative TSR argues that it owed no duty to Plaintiff's son and that decedent's suicide was an intervening superseding cause of death, breaking the chain of causation.

Watters v. TSR, Inc., 715 F.Supp. 819, 820 (W.D.Ky. 1989).

The trial court dismissed the case on First Amendment grounds, and the U.S. Court of Appeals affirmed, but on state law grounds, namely that the manufacturer had no legal duty.

The Court of Appeals wrote the following paragraphs to hold that the son's suicide was an intervening cause of death that relieved the game of tort liability for wrongful death.

> By itself, moreover, a breach of duty is not enough to warrant recovery; there can be no liability for negligence if the negligence is not shown to have "caused" the injury complained of. And the courts of Kentucky have long recognized that the chain of causation may be broken by "facts [that] are legally sufficient to constitute an intervening cause." *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780 (Ky. 1984).
>
> Facts sufficient to constitute an intervening cause "are facts of such 'extraordinary rather than normal,' or 'highly extraordinary,' nature, unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim." *Id.,* quoting *House v. Kellerman,* 519 S.W.2d 380, 382 (Ky. 1974), and Restatement (Second) of Torts §§ 442(b), 447.
>
> Although Kentucky courts may once have treated the issue of intervening or superseding cause as one that could be resolved by the jury, even in the absence of a factual dispute, the highest court of Kentucky has now held to the contrary:
>
> > The question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury.
>
> *House v. Kellerman,* 519 S.W.2d at 382 (footnote omitted).
>
> The fact of Johnny Burnett's suicide is undisputed. The third paragraph of Mrs. Watters' complaint affirmatively avers "[t]hat on the 29th day of September, 1987 the deceased departed this world as a direct and proximate result of a gun shot wound self inflicted by said deceased." Whether that extraordinary and tragic occurrence was or was not a "superseding cause" is thus a legal issue that must be resolved by the court.

Courts have long been rather reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act. See, *e.g., Scheffer v. Washington City V.M. & G.S.R.R.,* 105 U.S. 249, 26 L.Ed. 1070 (1882). Generally speaking, it has been said, the act of suicide is viewed as "an independent intervening act which the original tortfeasor could not have reasonably [been] expected to foresee." *Stasiof v. Chicago Hoist & Body Co.,* 50 Ill.App.2d 115, 122, 200 N.E.2d 88, 92 (1st Dist. 1964), *aff'd sub nom. Little v. Chicago Hoist & Body Co.,* 32 Ill.2d 156, 203 N.E.2d 902 (1965), as quoted in *Jarvis v. Stone,* 517 F.Supp. 1173, 1175 (N.D.Ill. 1981).

There are several exceptions to the general rule. Where a person known to be suicidal is placed in the direct care of a jailer or other custodian, for example, and the custodian negligently fails to take appropriate measures to guard against the person's killing himself, the act of self destruction may be found to have been a direct and proximate consequence of the custodian's breach of duty. *Sudderth v. White,* 621 S.W.2d 33 (Ky.App. 1981). And because Kentucky's Workers' Compensation Act is liberally construed so as to effectuate the beneficent intent of the legislature in enacting it, the suicide of an employee covered by workers' compensation may be compensable if an injury sustained in the course of the worker's employment causes a mental disorder sufficient to impair the worker's normal and rational judgment, where the worker would not have committed suicide without the mental disorder. *Wells v. Harrell,* 714 S.W.2d 498 (Ky.App. 1986).

Outside the workers' compensation area, and beyond the situation where someone with known suicidal tendencies is placed in the care of a custodian who is supposed to guard against suicide, exceptions to the general rule have been recognized where a decedent was delirious or insane and either incapable of realizing the nature of his act or unable to resist an impulse to commit it. Restatement (Second) of Torts § 455; *cf. Jamison v. Storer Broadcasting Co.,* 511 F.Supp. 1286, 1291 (E.D.Mich. 1981), *aff'd in relevant part and reversed in part on other grounds,* 830 F.2d 194 (6th Cir. 1987), and the authorities there cited. But the plaintiff in the case at bar points to no facts suggesting that the suicide of Johnny Burnett came within any such recognized exception.

Johnny was not known to be suicidal, as far as the plaintiff has told us, and he was not placed in the care or custody of defendant TSR. Accordingly, the plaintiff can derive no benefit from cases such as *Sudderth v. White.* This is not a workers' compensation case, so *Wells v. Harrell* is not in point. Even under principles of workers' compensation law, moreover, it would have to be shown affirmatively that Johnny would not have taken his own life absent a mental disorder induced by exposure to Dungeons & Dragons. That would be hard to do, and there has been no attempt to do it. The fact is, unfortunately, that youth is not always proof against the strange waves of despair and hopelessness that sometimes sweep seemingly normal people to suicide, and we have no way of knowing that Johnny would not have committed suicide if he had not played Dungeons & Dragons. Finally, of course, it does not appear that Mrs. Watters can show that Johnny was delirious or psychotic, or that he acted under an irresistible impulse or while incapable of realizing what he was doing.

On the contrary, Mrs. Watters' affidavit shows affirmatively that Johnny Burnett, who lived in her household throughout his life, never caused Mrs. Watters any problems. He went to school regularly, and he took care of a paper route. The record contains no affidavit from a psychiatrist or similar expert suggesting that he suffered from any psychosis. As far as the record discloses, no one had any reason to know that Johnny Burnett was going to take his own life. We cannot tell why he did so or what his mental state was at the time. His death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise.

Watters v. TSR, Inc., 904 F.2d 378, 383-384 (6th Cir. 1990).

On 31 Dec 2006, while I was writing and revising this essay, the Iraqi government executed Saddam Hussein by hanging him. Television news reports showed images of Hussein with a rope around his neck. Later that same day, Sergio Pelico, a 10-year old boy living in Texas, watched these images and asked his uncle why Hussein was hanged. The uncle said it was because "Saddam was real bad." The boy then went to his bedroom and hung himself.[20] Apparently the boy was mimicking or re-enacting Hussein's execution, without fully understanding that it was a lethal experience. As the judge in *Watters* held about the manufacturer of a game that allegedly inspired a suicide, news media have no legal duty to avoid broadcasting material that *might* inspire a few people in the audience to harm themselves, and, further, suicide, is a superseding cause that breaks the causal chain and relieves the news media of liability.

James v. Meow Media

On 1 Dec 1997, Michael Carneal, a 14 y old high school pupil, killed three pupils and wounded five other pupils at his school. The parents of the three dead pupils sued the producers of eight videogames, three websites, and one movie that were the inspiration for Carneal's crimes. The trial court judge wrote a number of paragraphs about proximate causation:

> So that Plaintiffs will fully understand the problems in bringing their negligence claims, the Court will proceed to address a second barrier — the superseding cause doctrine.
>
> The Sixth Circuit has stated that "there can be no liability for negligence if the negligence is not shown to have 'caused' the injury complained of." *Watters,* 904 F.2d at 383. In Kentucky, the chain of causation may be broken by "facts [that] are legally sufficient to constitute an intervening [superseding] cause." *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780 (Ky. 1984). If an intervening act is not a "normal response" to the original tortious act, it is an "extraordinary" act which breaks the chain of causation. *See* RESTATEMENT SECOND OF TORTS § 444. Ultimately, if the act consists of facts "of such 'extraordinary rather than normal' or 'highly extraordinary' nature, unforeseeable in character, [it will] relieve the original wrongdoer of liability to the ultimate victim.' " *Montgomery Elevator,* 676 S.W.2d at 780 (*quoting House v. Kellerman,* 519 S.W.2d 380, 382 (Ky. 1974)).
>
> Plaintiffs argue that whether Michael Carneal's actions were a superseding cause is a question of fact that must be decided by a jury. Contrary to Plaintiffs' argument, the Kentucky Supreme Court has held that "[t]he question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury." *House v. Kellerman,* 519 S.W.2d 380, 382 (Ky. 1974). Whether an intervening act is a superseding cause becomes a factual question for the jury only when the actual occurrence of the intervening act is in dispute. *See id.* at 383. Here, Plaintiffs admit in their complaint that Michael Carneal's conduct was an intervening act and it is undisputed that Plaintiffs' daughters died at the hands of Michael Carneal. Therefore, whether Michael Carneal's intervening acts were a "superseding cause" is a legal issue for this Court to resolve.

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[20] Ruth Rendon, "Saddam's Execution Blamed in Boy's Death," *Houston Chronicle,* (17:05 CST 4 Jan 2007); Ruth Rendon, "Family Struggles to Cope With Loss," *Houston Chronicle,* (09:37 CST 6 Jan 2007).

The Sixth Circuit's opinion in *Watters* demonstrates the operation of the superseding cause doctrine in Kentucky. *See* 904 F.2d at 383-84. When holding that Johnny Burnett's suicide was an intervening, superseding cause which relieved the manufacturers of the game Dungeons & Dragons of liability, the Sixth Circuit stated that

> [c]ourts have long been rather reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act ... We cannot tell why [Johnny committed suicide]. His death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise.

Id.

Plaintiffs argue that "[u]nlike *Watters,* the issue before this Court is whether the criminal act of homicide by a child supersedes an original actor's liability. *Watters* is a fact specific decision limited to suicides." [dkt. # 68, p. 19-20]. Instead, Plaintiffs "direct the court's attention to *Waldon v. Housing Authority of Paducah,* 854 S.W.2d 777 (Ky.App. 1991), a Kentucky decision that considers whether an intervening criminal homicide supersedes the original negligent actor's liability." [dkt.# 68, p. 20]. In *Waldon,* a tenant in a public housing project was shot and killed outside her apartment. *See id.* at 778. The Housing Authority was sued on the grounds that its negligence caused the victim's death because it knew that threats had been made against the victim but did nothing to prevent the shooting. *See id.* The Housing Authority moved for summary judgment and argued that the intervening criminal act superseded its liability. *See id.* The trial court granted summary judgment, but on appeal, the appellate court rejected the argument and held that "[e]ven an intervening criminal act does not relieve one for liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act." *Id.* at 779. Thus, according to Plaintiffs, "[i]f Carneal's criminal acts were a reasonably foreseeable consequence of Defendants' negligent production and distribution of violent, pornographic products, the proximate cause of the Plaintiffs' daughters' murders is '[c]learly a jury question.' " [dkt.# 68, p. 22].

Plaintiffs argue that the holding of *Waldon* is "dispositive in this action." The Court does not agree. Actually, the appellate court reversed summary judgment in *Waldon* because there were issues of fact as to whether the Housing Authority should have realized that its acts or omissions involved an unreasonable risk of harm to the tenant: 1) the Housing Authority knew that the shooter, a man named Williams, had repeatedly threatened to kill the victim; 2) the Housing Authority knew that Williams was staying in the apartment complex with his relatives without permission; 3) the Housing Authority took no action to evict Williams or discourage his presence in the area; and 4) there were no security guards to patrol the complex even though crimes frequently occurred there. *See id.* Because of the existence of these factors, the appellate court concluded that there was a jury question on the issue of proximate cause due to the foreseeability of criminal conduct. *See id.* The appellate court reasoned that since the intervening criminal act was foreseeable to the Housing Authority, the shooting could not be deemed a superseding cause which would relieve the Housing Authority of liability. Contrary to Plaintiffs' argument, the *Waldon* analysis is inapposite to this case because here, Michael Carneal's intervening criminal acts were not foreseeable to the Defendants.

To help courts make the superseding cause determination, the Kentucky Court of Appeals reviewed existing case law on the subject and articulated that a superseding cause possesses the following attributes:

(1) an act or event that intervenes between the original act and the injury;

(2) the intervening act or event must be of independent origin, unassociated with the original act;
(3) the intervening act or event must, itself, be capable of bringing about the injury;
(4) the intervening act or event must not have been reasonably foreseeable by the original actor;
(5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party actor or the second party plaintiff] or the intervention of a natural force;
(6) the original act must, in itself, be a substantial factor in causing the injury, not a remote cause. The original act must not merely create a negligent condition or occasion; the distinction between a legal cause and a mere condition being foreseeability of injury.

NKC Hospitals, Inc. v. Anthony, 849 S.W.2d 564 (Ky.Ct.App. 1993). Assuming Plaintiffs established that the original act of negligently designing, manufacturing, and distributing was a substantial factor in causing Plaintiffs' injuries, the superseding cause doctrine would arise and break the chain of causation: 1) Michael Carneal's shooting spree intervened between the original act of negligently disseminating the materials and the decedents' deaths; 2) the shooting spree was of independent origin; 3) the shooting spree was capable of bringing about the deaths; 4) Michael Carneal's shooting spree was not reasonably foreseeable to Defendants; and 5) the shooting spree involved the unforeseen conduct of a third party, Michael Carneal.

The acts of Michael Carneal in murdering his classmates were so "highly extraordinary in nature" and "unforeseeable in character," that they operate to "relieve [Defendants] of liability to [Plaintiffs]." *See Montgomery Elevator,* 676 S.W.2d at 780. Just as Johnny Burnett's suicide was not a "normal response" to TSR disseminating the game Dungeons and Dragons in the *Watters* case, neither was Michael Carneal's shooting spree a "normal response" to Defendants disseminating their movie, games and website materials in this case. **Pursuant to the superseding cause doctrine, the Defendants in this matter can be no more liable for the decedents' unforeseeable deaths than was the Dungeons & Dragons manufacturer liable for Johnny Burnett's unforeseeable suicide in *Watters.***[21]

Plaintiffs argue that "[i]f this Court elects to entertain Defendants' assertion of the superseding cause defense, ... the argument must still be denied because it has been abrogated by the pure comparative fault doctrine adopted by the Kentucky Supreme Court." [dkt.# 68, p. 23]. Plaintiffs state that, "[w]hen an original actor's negligence and an intervening actor's negligence both play a role in causing the Plaintiffs' injuries, 'the comparative fault doctrine demands that fault and thus damages be apportioned among the tortfeasors.' "[dkt.# 68, p. 25]. Thus, according to Plaintiffs, "a common law doctrine like superseding cause that forgives the liability of a negligent actor is 'manifestly contradictory' to the purposes of the comparative negligence system." [*see id.*]. Contrary to Plaintiffs' argument, the United States Supreme Court has held that the superseding cause doctrine is not inconsistent with the comparative fault doctrine. *See Exxon Co., U.S.A. v. Sofec, Inc.,* 517 U.S. 830, 837-38, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1986). Under the superseding cause doctrine, the intervening actor becomes solely responsible for injuries whereas under the comparative fault doctrine, fault is apportioned among all tortfeasors. In essence, the superseding cause eliminates the original actor's negligence as a cause of the injuries and absolves him of liability. The district court in *Carlotta v. Warner* aptly explained, "[t]he doctrine of comparative negligence does not mean that plaintiff is entitled to a recovery in some amount in every situation in which he can show some negligence of the defendant, however slight. If the plaintiff fails to establish

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[21] Boldface added by Standler.

that defendant's negligent act or omission was a substantial factor in causing harm to the plaintiff, or if there was a superseding cause, defendant will not be liable in any amount." 601 F.Supp. 749, 751 (E.D.Ky. 1985).

Despite Plaintiffs' arguments to the contrary, the superseding cause doctrine is applicable in this matter. Michael Carneal's actions constitute an unforeseeable intervening act which possess all the attributes of a superseding cause as set forth by the Kentucky Court of Appeals in *NKC Hospitals.* In addition, his actions comply with the Restatement Second of Torts' approach to the superseding cause doctrine, which has been adopted in Kentucky: the actions were "highly extraordinary" in nature; "unforeseeable in character;" and were not a "normal response" to the original tortious act. Therefore, as a matter of law, Michael Carneal's actions were a superseding cause which broke the chain of causation and absolved the Defendants of liability. Alternatively, Plaintiffs' negligence claims would be dismissed for this reason.

James v. Meow Media, Inc., 90 F.Supp.2d 798, 806-809 (W.D.Ky. 6 April 2000).

Later in his opinion, the trial judge considered plaintiff's products liability claims and concluded:

Assuming *arguendo* that the doctrine of strict liability could be extended to include the thoughts, ideas, and messages contained in video games, movies, and website materials, Plaintiffs nevertheless would have to establish causation in order to state a claim based on strict liability theories. *See Morales v. American Honda Motor Co., Inc.,* 71 F.3d 531, 537 (6th Cir. 1995). As was previously discussed, causation may be defeated by an intervening act that constitutes a superseding cause. The Court has already determined as a matter of law that Michael Carneal's actions constituted a superseding cause which broke the chain of causation. Therefore, in the alternative, Plaintiffs' strict liability claims would fail for lack of causation.

James v. Meow Media, Inc., 90 F.Supp.2d 798, 811 (W.D.Ky. 2000).

The U.S. Court of Appeals affirmed the trial court. The U.S. Court of Appeals summarized the trial court's opinion:

The defendants moved to dismiss all of James's actions for failing to state any claim on which relief could be granted. *See* Fed.R.Civ.P. 12(b)(6). The district court granted the defendants' motion. The district court held that Carneal's actions were not sufficiently foreseeable to impose a duty of reasonable care on the defendants with regard to Carneal's victims. Alternatively, the district court held that even if such a duty existed, Carneal's actions constituted a superseding cause of the victims' injuries, defeating the element of proximate causation notwithstanding the defendants' negligence. With regard to James's second cause of action, the district court determined that the "thoughts, ideas and images" purveyed by the defendants' movie, video games, and internet sites were not "products" for purposes of Kentucky law and therefore the defendants could not be held strictly liable for any alleged defects.

James v. Meow Media, Inc., 300 F.3d 683, 688 (6th Cir. 2002), *cert. den.,* 537 US. 1159 (2003).

The U.S. Court of Appeals commented on the issue of foreseeable harm from the entertainment, as part of deciding whether defendants had a legal duty to protect anyone from intentional criminal actions:

First, courts have held that, except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts. *See* Restatement (Second) of Torts § 302B, cmt. d ("Normally the actor has much less reason to

anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."). *See also Gaines-Tabb v. ICI Explosives USA, Inc.,* 995 F.Supp. 1304 (D.Okla. 1996) (holding that fertilizer and blasting cap manufacturers were not liable for Murrah Federal Building bombing, as they were entitled to believe that third parties would not engage in intentional criminal conduct); *Henry v. Merck & Co.,* 877 F.2d 1489, 1493 (10th Cir. 1989). The reasons behind this general rule are simple enough. The first reason is a probabilistic judgment that foreseeability analysis requires. Individuals generally are significantly deterred from undertaking intentional criminal conduct given the sanctions that can follow. The threatened sanctions make the third-party intentional criminal conduct sufficiently less likely that, under normal circumstances, we do not require the putative tort defendant to anticipate it. Indeed, this statistical observation explains the distinction drawn by Kentucky courts in the dram shop liability cases.

The second reason is structural. The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. The normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act.

Does this case involve the extraordinary circumstances under which we would require the defendants to anticipate a third party's intentional criminal act? Kentucky courts have found such circumstances when the tort defendant had previously developed "a special relationship" with the victim of a third-party intentional criminal act. *See, e.g., Fryman v. Harrison,* 896 S.W.2d 908, 910 (Ky. 1995) (requiring that the victim be in state custody in order to trigger governmental duty to protect her from third-party violence as a matter of Kentucky tort law). *Cf. DeShaney v. Winnebago County Dep't of Soc. Serv.,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (articulating the special relationship test to trigger a governmental duty to protect persons from private violence under the Fourteenth Amendment). This duty to protect can be triggered by placing the putative plaintiff in custody or by taking other affirmative steps that disable the plaintiff from protecting himself against third-party intentional criminal acts. Of course, a special relationship can be created by a contract between the plaintiff and the defendant. Finally, some states have imposed a duty to protect others from third-party intentional criminal acts on members of discrete professions who become aware of the third-party's intention to engage in criminal conduct against a specific person. *See Tarasoff v. Board of Regents of the Univ. of Cal.,* 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976); *Evans v. Morehead Clinic,* 749 S.W.2d 696 (Ky.Ct.App. 1988).

We can find nothing close to a "special relationship" in this case. The defendants did not even know James, Steger, and Hadley prior to Carneal's actions, much less take any affirmative steps that disabled them from protecting themselves.

Courts have held, under extremely limited circumstances, that individuals, notwithstanding their relationship with the victims of third-party violence, can be liable when their affirmative actions "create a high degree of risk of [the third party's] intentional misconduct." Restatement of Torts (Second) § 302B, cmt. e.H. Generally, such circumstances are limited to cases in which the defendant has given a young child access to ultra-hazardous materials such as blasting caps, *Vills v. City of Cloquet,* 119 Minn. 277, 138 N.W. 33 (1912), or firearms. *Spivey v. Sheeler,* 514 S.W.2d 667 (Ky. 1974). Even in those cases, courts have relied on the third party's severely diminished capacity to handle the ultra-hazardous materials. With older third parties, courts have found liability only where

> defendants have vested a particular person, under circumstances that made his nefarious plans clear, with the tools that he then quickly used to commit the criminal act. *See Meers v. McDowell,* 110 Ky. 926, 62 S.W. 1013 (1901). Arguably, the defendants' games, movie, and internet sites gave Carneal the ideas and emotions, the "psychological tools," to commit three murders. However, this case lacks such crucial features of our jurisprudence in this area. First, the defendants in this case had no idea Carneal even existed, much less the particular idiosyncracies of Carneal that made their products particularly dangerous in his hands. In every case that this court has discovered in which defendants have been held liable for negligently creating an unreasonably high risk of third-party criminal conduct, the defendants have been specifically aware of the peculiar tendency of a particular person to commit a criminal act with the defendants' materials.
>
> Second, no court has ever held that ideas and images can constitute the tools for a criminal act under this narrow exception. Beyond their intangibility, such ideas and images are at least one step removed from the implements that can be used in the criminal act itself. In the cases supporting this exception, the item that the defendant has given to the third-party criminal actor has been the direct instrument of harm.

James v. Meow Media, Inc., 300 F.3d 683, 693-695 (6th Cir. 2002).

Finally, the U.S. Court of Appeals briefly considered the issue of proximate causation:

> Even if this court were to find that the defendants owed a duty to protect James, Steger, and Hadley from Carneal's violent actions, the plaintiffs likely have not alleged sufficient facts to establish the third element of a *prima facie* tort case: proximate causation. The defendants argue that even if they were negligent, Carneal's intentional, violent actions constitute a superseding cause of the plaintiffs' damages and sever the defendants liability for the deaths of Carneal's victims. Generally, a third party's criminal action that directly causes all of the damages will break the chain of causation.
>
> Yet, Kentucky courts have held that an intervening third-party criminal act will not be a superseding cause breaking the chain of causation if the act was reasonably foreseeable. *See, e.g., Britton v. Wooten,* 817 S.W.2d 443, 449-50 (Ky. 1991). In *Britton,* the plaintiff had been injured by a fire in his leased store. The fire started when trash piled next to the building by the landlord was ignited by an arsonist. The court held that the arsonist's intervening act was not a superseding cause of the fire because the act was a reasonably foreseeable result of the landlord's piling of flammable material next to the building. *Ibid.*
>
> The court reached the question of causation in *Britton* because of the landlord's well established duty of care to protect its tenants from injury. *See, e.g., Waldon v. Housing Auth. of Paducah,* 854 S.W.2d 777, 779 (Ky.Ct.App. 1991) (holding landlord liable for failing to protect tenant from being shot by a third-party intruder). As we have noted above, the duty of the media defendants in this case is far from as firmly established. Outside of the landlord-tenant context, Kentucky courts are far more likely to determine that an intervening criminal act is a superseding cause. *See Briscoe v. Amazing Prod., Inc.,* 23 S.W.3d 228, 229-30 (Ky.Ct.App. 2000). *Compare House v. Kellerman,* 519 S.W.2d 380 (Ky. 1974) (confronting the question of superseding cause in the context of the well established duty of driver to protect his passenger). In *Briscoe,* the plaintiff was injured by a third party who battered her by spraying corrosive drain cleaner in her face. The plaintiff contended that the manufacturer of the drain cleaner was negligent and should have anticipated that it could be used as a weapon. The court held that batteror's reaction to and use of drain cleaner as a weapon was sufficiently unforeseeable to constitute a superseding cause. *Briscoe,* 23 S.W.3d at 230.

> A similar analysis is applicable here. Our determination regarding the idiosyncratic nature of Carneal's reaction to the defendants' media would likely compel us to hold that his action constitutes a superseding cause. We, however, need not reach this question because we have determined that the defendants did not owe a duty to protect the decedants.

James v. Meow Media, Inc., 300 F.3d 683, 699-700 (6th Cir. 2002).

Sanders v. Acclaim Entertainment

On 20 April 1999, Dylan Klebold and Eric Harris murdered 13 people at Columbine High School in Colorado. The widow and stepchildren of a murdered teacher sued the producers and distributors of one movie and approximately a dozen videogames that inspired the murders. The defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The trial court granted the motion and plaintiffs did *not* appeal that decision.

The judge decided that the defendants had no legal duty to plaintiffs.

> In resolving the threshold legal question whether the Video Game and Movie Defendants have a cognizable duty to the Plaintiffs, I consider: 1) foreseeability of the injury or harm that occurred; 2) the social utility of Defendants' conduct; 3) the magnitude of the burden of guarding against the injury or harm; and 4) the consequences of placing the burden on the Defendants. *See Bailey v. Huggins Diagnostic & Rehabilitation Center,* 952 P.2d 768 (Colo.App. 1997), *cert. denied,* (Colo. 1998); *Smith v. City & County of Denver,* 726 P.2d 1125, 1127 (Colo. 1986). No single factor is controlling. *Whitlock,* 744 P.2d at 57.
>
> The question whether a duty should be imposed in a particular case is "essentially one of fairness under contemporary standards — whether reasonable persons would recognize a duty and agree that it exists." *Taco Bell, Inc. v. Lannon,* 744 P.2d 43, 46 (Colo. 1987). Generally, a person does not have a duty to prevent a third person from harming another absent special circumstances warranting imposition of such a duty. *See Davenport v. Community Corrections,* 962 P.2d 963, 967 (Colo. 1998), *cert. denied,* 526 U.S. 1068, 119 S.Ct. 1462, 143 L.Ed.2d 547 (1999).
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> a. *Foreseeability*
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> The Colorado Supreme Court teaches that foreseeability is "based on common sense perceptions of the risks created by various conditions and circumstances and includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." *Perreira,* 768 P.2d at 1209.
>
> Generally, under Colorado law a person has no responsibility to foresee intentional violent acts by others. *See Walcott v. Total Petroleum, Inc.,* 964 P.2d 609, 612 (Colo.App. 1998), *cert. denied,* (Colo. 1999) (Gas station owner could not reasonably foresee that a purchaser would intentionally throw gasoline on a victim and set the victim on fire); *see also Solano v. Goff,* 985 P.2d 53, 54-55 (Colo.App.), *cert. denied,* (Colo. 1999) (a murder committed by an escaped inmate who had not committed any prior violent crimes was not foreseeable by the sheriff).
>
> In the circumstances alleged here, the Video Game and Movie Defendants likewise had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers. Plaintiffs do not allege that these Defendants had any knowledge of Harris' and Klebold's identities, let alone their violent proclivities. Nor, for that matter, did the Video Game and Movie Defendants have any reason to believe that a shooting spree was a likely or probable consequence of exposure to their movie or video games. At most, based on Plaintiffs' allegations that children who witness acts of violence and/or who interactively

involved with creating violence or violent images often act more violently themselves and sometimes recreate the violence, *see* Amended C/O 24, these Defendants might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals. A speculative possibility, however, is not enough to create a legal duty. *See Davenport,* 962 P.2d at 968 ("While it is foreseeable that reintroducing convicted criminals into the community will result in some aberrant behavior, the dangers associated with community corrections in general are insufficient to establish the requisite foreseeability needed to impose a duty of care [on community corrections facility]").

Although other courts have addressed this question, the Colorado courts have not had the occasion to consider foreseeability in the similar circumstances alleged here. Applying analogous foreseeability principles, two federal courts have rejected imposition of any such duty on video game makers and movie producers or their distributors. In *Watters v. TSR, Inc.,* 904 F.2d 378 (6th Cir. 1990), the Sixth Circuit held that a game manufacturer did not have any duty under Kentucky tort law to anticipate and prevent the suicide of a disturbed player because such idiosyncratic reactions are not legally foreseeable. The Court held that to impose liability in such circumstances "would be to stretch the concept of foreseeability ... to lengths that would deprive them of all normal meaning." *Id.* at 381.

More recently, in *James v. Meow Media, Inc.,* 90 F.Supp.2d 798, the Court dismissed Plaintiffs' complaint asserting virtually identical claims filed by Plaintiffs in this case. *James v. Meow Media, Inc.* involved a student shooting at a Kentucky high school during which three students were killed and several others seriously injured. The Court accepted as true, as do I, the identical allegations in this case that: 1) the shooter[s] viewed "The Basketball Diaries" film; 2) were "avid consumer[s]" of video games; and 3) were influenced by the film and video games. Stating that "[n]othing Defendants did or failed to do could have been reasonably foreseen as a cause of injury," the Court held that reasonable people could not conclude that the shooter's exposure to video games and the movie made the shooter's actions foreseeable to the video game makers and the movie producers and distributers. *See id.* at 804, 806.

Courts around the country have rejected similar claims brought against media or entertainment defendants. In *Zamora v. Columbia Broadcasting System,* 480 F.Supp. 199 (S.D.Fla. 1979), the Court held that it was not foreseeable to three television networks that a teenager would shoot and kill his neighbor after viewing comparable violence on television over a ten year period. Plaintiff alleged also that watching television had desensitized the teenager to violence and caused him to develop a sociopathic personality. In granting the defendants' motion to dismiss, the *Zamora* Court noted that the three major networks are charged with anticipating: 1) the minor's alleged voracious intake of television violence; 2) his parents' apparent acquiescence in his television viewing, presumably without recognition of any problem; and 3) that Zamora would respond with a violent criminal act. *See id.* at 202. Based in part on the lack of foreseeability, the Court declined to "create such a wide expansion in the law of torts." *Id.* at 203. *See also Brandt v. Weather Channel, Inc.,* 42 F.Supp.2d 1344, 1345-46 (S.D.Fla. 1999), *aff'd,* 204 F.3d 1123 (11th Cir. 1999)[22] (rejecting "novel and unprecedented expansion of ... tort law [ ] to impose on a television broadcaster of weather forecasts" a duty to viewer of forecast who drowned when unpredicted adverse weather conditions caused him to be thrown from a fishing boat); *Davidson v. Time Warner. Inc.,* 1997 WL 405907 *13 (S.D.Tex. 1997) (rejecting claim that "rap" song caused listener to commit murder because murder "was an irrational and illegal act," the defendants

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[22] See my discussion of *Brandt v. Weather Channel* at http://www.rbs2.com/forecast.pdf .

had no duty "to foresee and plan against such conduct"); *McCollum v. CBS, Inc.* 202 Cal.App.3d 989, 996, 1005, 249 Cal.Rptr. 187 (1988) (dismissing claim against defendants who created and disseminated a song called "Suicide Solution" and who allegedly knew or should have known the song might influence susceptible individuals because decedent's suicide was unforeseeable); *Way v. Boy Scouts of America,* 856 S.W.2d 230, 236, 239 (Tex.App.Dallas 1993) (holding decedent's fatal experimentation with gun was not reasonably foreseeable consequence of publishing a shooting sports supplement); *Sakon v. Pepsico, Inc.,* 553 So.2d 163, 166 (Fla. 1989) (concluding, at pleadings stage, that young viewer's injury, which allegedly was inspired by defendant's television advertisement depicting dangerous activity, was not foreseeable consequence of advertisement, even though advertisement targeted audience of young viewers).

I find persuasive the reasoning set out in these cases. Consequently, I conclude under similar Colorado tort law, there is no basis for determining that violence would be considered the likely consequence of exposure to video games or movies. This factor weighs heavily against imposing a duty on the Movie and Video Game Defendants.

Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264, 1271-73 (D.Colo. 4 Mar 2002).

After reviewing the social utility of defendants' conduct (i.e., First Amendment issues), the judge concluded:

Given the First Amendment values at stake, the magnitude of the burden that Plaintiffs seek to impose on the Video Game and Movie Defendants is daunting. Furthermore, the practical consequences of such liability are unworkable. Plaintiffs would essentially obligate these Defendants, indeed all speakers, to anticipate and prevent the idiosyncratic, violent reactions of unidentified, vulnerable individuals to their creative works. As the Sixth Circuit recognized in *Watters:*

> The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all.

[*Watters v. TSR, Inc.,* 904 F.2d 378, 381 (6th Cir. 1990)]; *McCollum,* 202 Cal.App.3d 989, 249 Cal.Rptr. 187. ("[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals.") *Id.* at 1005-06, 249 Cal.Rptr. 187; *Zamora,* 480 F.Supp. at 202 (recognizing the "impositions pregnant" in charging television networks with the duty of anticipating minors' criminal response to television programs). Because Plaintiffs' legal theory would effectively compel Defendants not to market their works and, thus, refrain from expressing the ideas contained in those works, the burden imposed would be immense and the consequences dire for a free and open society.

In this case, Plaintiffs do not allege that the Video Game and Movie Defendants *illegally* produced or distributed the movie and video games Harris and Klebold allegedly viewed or played. Finding that these Defendants owed Plaintiffs a duty of care would burden these Defendants' First Amendment rights to freedom of expression. These considerations compel the conclusion that makers of works of imagination including video games and movies may not be held liable in tort based merely on the content or ideas expressed in their creative works. Placing a duty of care on Defendants in the circumstances alleged would chill their rights of free expression. Therefore, these factors also weigh heavily against imposing a duty on Defendants.

> All four factors weigh heavily against imposing a duty of care on Defendants. Consequently, I hold that the Video Game and Movie Defendants owed no duty to Plaintiffs as a matter of law. Thus, the Video Game and Movie Defendants are entitled to Rule 12(b)(6) dismissal of Plaintiffs' negligence claims.

Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264, 1275 (D.Colo. 2002).

The judge then considered proximate causation.

> Even assuming a duty, the Video Game and Movie Defendants argue that they were not the legal cause of Plaintiffs' injuries. I agree.
>
> To prevail on their negligence claim, Plaintiffs must show that Defendants' tortious conduct proximately caused Mr. Sanders' death. *See Leake,* 720 P.2d at 155. "[Proximate cause] is the cause without which the claimed injury would not have been sustained." *City of Aurora v. Loveless,* 639 P.2d 1061, 1063 (Colo. 1981). In Colorado, causation is generally a question of fact for a jury. But a court may decide the issue as a matter of law where the alleged chain of causation is too attenuated to impose liability. *See Largo Corp. v. Crespin,* 727 P.2d 1098, 1103 (Colo. 1986); *Smith v. State Compensation Ins. Fund,* 749 P.2d 462, 464 (Colo.App. 1987). Here, proximate cause requires that Defendants' conduct produced Mr. Sanders' death "in the natural and probable sequence of things." *See Loveless,* 639 P.2d at 1063; *Schneider v. Midtown Motor Co.,* 854 P.2d 1322 (Colo.App. 1992).
>
> Where the circumstances make it likely that a defendant's negligence will result in injuries to others and where this negligence is a substantial factor in causing the injuries sustained, proximate causation is satisfied. The intervening or superseding act of a third party, in this case Harris and Klebold, including a third-party's intentionally tortious or criminal conduct does not absolve a defendant from responsibility if the third-party's conduct is reasonably and generally foreseeable. *See Ekberg v. Greene,* 196 Colo. 494, 496-97, 588 P.2d 375, 376-77(1978).
>
> It is undisputed that Harris and Klebold murdered or injured the Columbine victims including Mr. Sanders. The issue is whether Harris' and Klebold's intentional criminal acts constitute a superseding cause of the harm inflicted by them, thus relieving the Movie and Video Game Defendants' of liability.
>
> A superseding cause exists when: 1) an extraordinary and unforeseeable act intervenes between a defendant's original tortious act and the injury or harm sustained by plaintiffs and inflicted by a third party; and 2) the original tortious act is itself capable of bringing about the injury. Just as foreseeability is central to finding that a duty is owed, it is also "the touchstone of proximate cause" and of the superseding cause doctrine. *Walcott,* 964 P.2d 609; *see also Smith,* 749 P.2d at 462-63; *Ekberg,* 588 P.2d at 376. Moreover, a superseding cause relieves the original actor of liability when "the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." *Webb v. Dessert Seed Co.,* 718 P.2d 1057, 1062-63 (Colo. 1986) (quoting Restatement (Second) of Torts § 442B).
>
> I hold in this case that Harris' and Klebold's intentional violent acts were the superseding cause of Mr. Sanders' death. Moreover, as I have determined, their acts were not foreseeable. Their criminal acts, therefore, were not within the scope of any risk purportedly created by Defendants. In this case as in *James v. Meow Media, Inc.,* 90 F.Supp.2d at 806-08, the school shooting was not a normal response to dissemination of movies and videos.
>
> I conclude as a matter of law that no reasonable jury could find that the Video Game and Movie Defendants' conduct resulted in Mr. Sanders' death in "the natural and probable sequence of events." *See Loveless,* 639 P.2d at 1063. Therefore, Defendants were not a proximate cause of Mr. Sanders' injuries. Defendants are entitled to Rule 12(b)(6) dismissal as to the negligence claims in Claims One and Two.

Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264, 1275-76 (D.Colo. 2002).

The judge then considered the plaintiff's claims for products liability, and concluded that the movie and videogames were not products. Then the judge remarked:

> Assuming *arguendo* that the strict liability doctrine could be extended to include the thoughts, ideas, images and messages contained in video games and movies, Plaintiffs nevertheless would be required to allege adequately causation in order to state a claim based on strict liability. As I have stated, causation is trumped by an intervening act that constitutes a superseding cause. I determined as a matter of law that Harris' and Klebold's actions constituted a superseding cause which broke any chain of causation. *See* [paragraphs on "forseeability" at 188 F.Supp.2d at 1271-73, quoted above]. Therefore, in the alternative, Plaintiffs' strict liability claims fail for lack of causation.

Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264, 1279 (D.Colo. 2002).

allowing misfits to decide content

A few courts have held that making producers of movies or videogames liable for inspiring crimes would chill development of similar content in the future. The courts have specifically said that this chilling would let misfits decide the content of what everyone can see in the future.

In 1988, a judge in a California appellate court, in a case involving a suicide allegedly caused by listening to Ozzy Osbourne songs, wrote:

> Finally, and perhaps most significantly, it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. [FN11] No case has ever gone so far. We find no basis in law or public policy for doing so here.
>
> FN11 As another court observed in a different but clearly relevant context,
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> > [Instructive also, in this context, is the general First Amendment principle that when speech is of such a nature as to arouse violent reaction on the part of the lawless, the first obligation of government is to maintain the peace and enforce the law, or punish and not to silence the speaker. [footnote omitted] Were this not the rule, all speech would be subject to the "heckler's veto." (Kalven, *The Negro and the First Amendment* (1965) 140-144.) While this is not a situation in which the power of government is invoked directly to stifle speech, similar considerations apply.][23] It is an unfortunate fact that in our society there are people who will react violently to movies, or other forms of expression, which offend them, whether the subject be gangs, race relations, or the Vietnam War. It may, in fact, be difficult to predict what particular expression will cause such a reaction, and under what circumstances. To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land.

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[23] Sentences in brackets not quoted in *McCollum.*

Bill v. Superior Court, ... [187 Cal.Rptr. 625, 629 (Cal.App. 1982)].
McCollum v. CBS, Inc., 249 Cal.Rptr. 187, 197 (Cal.App. 1988).

In 1989 a judge in a U.S. District Court, in a case involving suicide allegedly caused by playing the "Dungeons & Dragons" game, wrote:

> The theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan, "one man's vulgarity is another man's lyric." *Cohen v. California,* 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the first amendment does not hold those whose ideas inspired the crimes to answer for such acts. **To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch, and hear.**[24] [footnote omitted, judge says TSR has no duty to warn "mentally fragile" people] The court's statements in *Zamora v. Columbia Broadcasting System,* 480 F.Supp. 199, 205 (S.D.Fla. 1979) in the context of television programming is even more apt when first amendment protection for publications is concerned. "[The] right of the public to have broad access to programming and the right of the broadcaster to disseminate should not be inhibited by those members of the public who are particularly sensitive or insensitive." *Id.* (Citations omitted).

Watters v. TSR, Inc., 715 F.Supp. 819, 822 (W.D.Ky. 1989).

Quoted with approval by the same judge in *James v. Meow Media, Inc.,* 90 F.Supp.2d 798, 818-819 (W.D.Ky. 2000).

On appeal, a judge in the U.S. Court of Appeals wrote:

> The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all — and we are confident that the courts of Kentucky would never permit a jury to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care.

Watters v. TSR, Inc., 904 F.2d 378, 381 (6th Cir. 1990).

Quoted with approval in both *James v. Meow Media, Inc.,* 90 F.Supp.2d 798, 804 (W.D.Ky. 2000) and *Sanders v. Acclaim Entertainment, Inc.,* 188 F.Supp.2d 1264, 1275 (D.Colo. 2002).

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[24] Boldface added by Standler.

8. Firearms Cases

There is an analogous set of cases in which plaintiffs attempt to hold a firearm manufacturer, distributor, or retail seller responsible for misuse of firearm(s) during the commission of a crime. There are a number of analogies:

1. The expression in movies and videogames are protected by the First Amendment, the right to own firearms is protected by the Second Amendment.
2. It is equally foreseeable that (1) some consumers of movies and videogames will be inspired to commit crimes and (2) some people will use firearms to commit homicides. It is foreseeable because it has happened at least dozens of times in the USA with regard to movies, and at least thousands of times each year in the USA with regard to firearms.
3. In both types of cases, courts have held the criminal act is a superseding cause that prevents the manufacturer from being liable. As the National Rifle Association and others repeatedly say: "Guns don't kill people. People kill people."[25]

However, firearms are products, but information or entertainment is *not* a product. Similarly a criminal *used* a firearm to inflict injuries, while entertainment only *inspired* the injury. This product/idea distinction may not be important here, because plaintiffs in litigation against firearms manufacturers are not alleging that the firearm was a defective product. Indeed, the firearm functioned as intended when it injured a victim.

The following is a partial list of cases, all of which were lost by plaintiffs. Courts generally decided these cases on grounds that the firearm manufacturer had no duty to the person who was shot by a criminal. I have made an effort to include those cases that discuss proximate causation.

- *Mavilia v. Stoeger Industries,* 574 F.Supp. 107 (D.Mass. 3 Nov 1983).
- *Linton v. Smith & Wesson, a Div. of Bangor Punta Corp.,* 469 N.E.2d 339 (Ill.App. 18 Sep 1984).
- *Riordan v. International Armament Corp.,* 477 N.E.2d 1293 (Ill.App. 4 Apr 1985), *appeal denied* (Ill. 1985).
- *Trespalacios v. Valor Corp. of Florida,* 486 So.2d 649, 650-51 (Fla.App. 8 Apr 1986) (" For the reasons that the firearm was not defective, that manufacture or distribution of the weapon is not unlawful pursuant to either state law or the federal Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1982), and that neither the manufacturer nor distributor had a duty to prevent the sale of handguns to persons who are likely to cause harm to the public, there was no duty

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[25] But see *People v. Rodriguez,* 2006 WL 3425035 (Cal.App. 29 Nov 2006) ("Guns *qua* guns don't kill people, but it's a lot easier for people to kill with guns than with most other weapons. Or, as the court in *People v. Perez* (2001) 86 Cal.App.4th 675, 678, 103 Cal.Rptr.2d 533[, 535] put it: '[F]irearms pose a potentially greater risk to safety than other weapons because of their inherent ability to harm a greater number of victims more rapidly.' ").

which had been breached by the manufacturer and distributor so as to support a cause of action based on negligence. [citations to four cases omitted]").

- *Everett v. Carter,* 490 So.2d 193, 195 (Fla.App. 20 June 1986) ("Carter's criminal act of killing Mr. Everett was an independent intervening cause that was not within the realm of reasonable foreseeability on the part of [owner of gun shop]."), *review denied,* 501 So.2d 1281 (Fla. 1986).

- *Shipman v. Jennings Firearms, Inc.,* 791 F.2d 1532 (11th Cir. 25 June 1986) (No liability for manufacturer of "Saturday Night Special"[26] pistol.).

- *King v. R.G. Industries, Inc.,* 451 N.W.2d 874 (Mich.App. 20 Feb 1990) (No liability for manufacturer of "Saturday Night Special" pistol.).

- *Copier By and Through Lindsey v. Smith & Wesson Corp.,* 138 F.3d 833 (10th Cir. 10 Mar 1998) (Footnote 3 lists cases which rejected *Kelley,* a Maryland case holding manufacturers of Saturday Night Specials strictly liable for injuries caused by criminals.)

- *City of Philadelphia v. Beretta U.S.A., Corp.,* 126 F.Supp.2d 882, 906 (E.D.Pa. 20 Dec 2000) ("... the plaintiffs could not demonstrate that they were owed a duty or that they could prove proximate cause at trial. Therefore, the plaintiffs' negligence claims must fail."), *aff'd,* 277 F.3d 415 (3rd Cir. 2002).

- *Hamilton v. Beretta U.S.A. Corp.,* 750 N.E.2d 1055, 1061-62 (N.Y. 26 Apr 2001) ("The pool of possible plaintiffs is very large — potentially, any of the thousands of victims of gun violence. Further, the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs. [two footnotes omitted] ").

- *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.,* 761 N.Y.S.2d 192, 201 (N.Y.A.D. 24 June 2003) ("... defendants' lawful commercial activity, having been followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm."), *leave to appeal denied,* 801 N.E.2d 421, 769 N.Y.S.2d 200 (N.Y. 2003).

- *City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099, 1137 (Ill. 18 Nov 2004).

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[26] *Kelley v. R.G. Industries, Inc.,* 497 A.2d 1143, 1153-54 (Md. 1985) ("Saturday Night Specials are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability. These characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses. [footnote omitted]").

- *Young v. Bryco Arms,* 821 N.E.2d 1078, 1090-91 (Ill. 18 Nov 2004) ("... the defendants, like the car rental company in *Watson,* are in the business of providing a lawful product that may be used unlawfully, causing injury or death. In addition, both the possession and use of firearms and the driving of motor vehicles are highly regulated by law. [citation omitted] Further, the person whose criminal conduct directly caused the injury in *Watson* was several steps removed from the defendant. Similarly, the Smith & Wesson .357 Magnum used to kill Michael Ceriale passed through at least eight sets of hands before it reached Tolliver. The Bryco 59 used to kill Stephen Young passed through at least six sets of hands before reaching Ramos. Finally, the appellate court in *Watson* found it unreasonable to expect a car rental company to foresee a single accident caused by an intoxicated teenage driver who took car keys without permission. We conclude that it is equally unreasonable to expect defendants to foresee that the aggregate effect of the lawful manufacture and sale of firearms will be the creation of a public nuisance in a distant city. Therefore, defendants' business practices merely create a condition that makes the eventual harm possible. As such, defendants' conduct cannot constitute a legal cause of the alleged nuisance. **....** Finally, the defendants' conduct is not a legal cause of the alleged nuisance because the claimed harm is the aggregate result of numerous unforeseeable intervening criminal acts by third parties not under defendants' control.").

- *In re Firearm Cases,* 24 Cal.Rptr.3d 659, 680 (Cal.App. 10 Feb 2005) ("In this case, there is no causal connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm. Defendants manufacture guns according to federal law and guidelines.").

- *Grunow v. Valor Corp. of Florida,* 904 So.2d 551 (Fla.App. 1 June 2005), *review denied,* 918 So.2d 292 (Fla. 2005).

The large number of civil cases against firearms manufacturers were causing burdensomely large legal expenses from manufacturers to defend against these cases. To stop this kind of litigation, on 26 Oct 2005, President Bush signed the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901-03, which prohibits civil litigation in any federal or state court against any manufacturer or seller of firearms, "resulting from the criminal or unlawful misuse of a qualified product". § 7903(5)(A). In the Congressional findings, the Act says:

> Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

15 U.S.C. § 7901(a)(3).

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. § 7901(a)(5).

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions

> by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

15 U.S.C. § 7901(a)(5).

Lost in all of the rhetoric about legal rights is one quirky Maryland case, *Kelley v. R.G. Industries, Inc.,* that declared that, while most firearm manufacturers were *not* responsible for misuse of their products by criminals,[27] the manufacturers of "Saturday Night Specials" — cheap, inaccurate pistols that are easily concealed beneath clothing — were strictly liable in tort for injuries produced when criminals used these cheap pistols.[28] The Maryland legislature promptly enacted a statute that overruled the decision in *Kelley.* Maryland Code, art. 3A, § 36-I(h) (1988 Supp), now Maryland Code, Public Safety, § 5-402(b)(1) (enacted 2003). *Kelley* seems analogous to efforts to impose liability on the small fraction of movies, videogames, and other entertainment that inspires violent crimes.

Because firearms are more dangerous than movies or videogames, it seems that if firearm manufacturers — particularly manufacturers of Saturday Night Specials — can not be held liable for injuries inflicted by misuse of their products by criminals, then there is little hope of holding producers of movies or videogames liable for crimes inspired by their entertainment.

9. Conclusion

In 1985, an attorney writing an article in a law review article said:

> The basic assumption of our form of government is that each citizen in a free society is deemed to have the judgment and responsibility to decide which theories and ideas to accept, not because we assume that everyone will exercise that judgement wisely or responsibly, bet that we are, on the whole, far better off leaving these matters to the marketplace of ideas than to legislature, judge, or jury.

Jonathan M. Hoffman, "From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting," TORT AND INSURANCE LAW JOURNAL, Vol. 21, at p. 81 (1985).

This essay considers two related questions: (1) Whether to hold authors and publishers responsible for harms caused by errors in nonfiction published material. (2) Whether to hold producers of movies, videogames, and other entertainment responsible for crimes inspired by their

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[27] *Kelley v. R.G. Industries, Inc.,* 497 A.2d 1143, 1148, 1153 (Md. 1985)

[28] *Kelley v. R.G. Industries, Inc.,* 497 A.2d 1143, 1159 (Md. 1985) ("... we conclude that it is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products. Furthermore, in light of the ever growing number of deaths and injuries due to such handguns being used in criminal activity, the imposition of such liability is warranted by today's circumstances.").

entertainment. These are political questions. Some idealists want to design a more just society, by compensating those harmed by erroneous information, and compensating victims of crimes inspired by entertainment. Religious zealots want to restrict the availability of entertainment that offends them. On the other hand, some liberals assert nearly absolute First Amendment protections for freedom of speech and press. And self-reliant, freedom-loving libertarians blame readers who rely on erroneous information and blame criminals for their crimes.

There is no unique answer to these questions that will satisfy everyone.

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