Gun Control Through Tort Law

By Dennis Henigan, Director, Legal Action Project
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The settlement earlier this summer of a suit against a California gun shop focused attention on an important question about the rising tide of American violence: the legal accountability of gun sellers for violent acts committed with their products.

Trader's Sports, the San Leandro, California gun dealer, paid $400,000 to avoid going to trial in a suit filed by the widow of a man killed by an AKS assault rifle purchased at the store.

The suit alleged that in November 1988, 19-year-old Darryl Poole purchased the rifle from Trader's along with three magazine clips and 100 rounds of ammunition, even though he could not produce the identification required by federal law.

The salesclerk allegedly accepted the identification of Poole's friend, acting as a "straw purchaser," even though it was Poole who initiated the transaction, produced the money, and took possession of the rifle. It is a violation of federal law for a gun dealer knowingly to participate in a straw purchase.

Less than a month later, Poole fired the assault rifle on the Nimi'z Freeway because he felt the car in front of him wasn't going fast enough. Larry Ellingsen, returning with his wife, Sharon, from their 29th wedding anniversary celebration, was killed instantly. Sharon Ellingsen's suit against Trader's charged that the gun store should be liable in damages for engaging in an illegal gun sale that led directly to her husband's death.

Dealer Accountability

Holding a person or company liable for the intentionally violent act of someone else is surely the exception, not the rule, in American law. However, we may be witnessing the beginning of a long overdue movement in the courts toward dealer accountability when an irresponsible gun sale leads to violence:

- In 1988, a New York jury handed down a $2.4 million verdict against K-Mart for selling a shotgun to an intoxicated person, who later shot an innocent person. Last year, in a similar case involving the sale of shotgun shells to an intoxicated buyer, a Michigan jury awarded $1.5 million against K-Mart. The Supreme Court of Michigan recently decided to review this verdict.
- In Rubin v. Johnson, 550 N.E.2d 324 (1990), the Indiana Court of Appeals held that a pawn shop could be liable for selling a TEC-9 assault pistol to a buyer who showed signs of mental instability during the purchase and who, six months later, used the gun to commit a murder.
- In West v. Mache of Cochran Inc, 370 S.E.2d 169 (1988), the Georgia Court of Appeals affirmed a directed verdict of liability against a gun dealer who had allowed the buyer of a semi-automatic rifle to use his wife as a straw purchaser. The buyer was legally barred from purchasing the gun because he had been committed to a mental institution and was unable to produce identification. Three weeks later,
- In Crown v. Raymond, 764 P.2d 1146 (1988), the Arizona Court of Appeals held that a gun dealer who had illegally sold a handgun to a teen-age girl could be liable when she later used it to commit suicide.

Why should gun sellers be liable for damages under the circumstances of these cases?

First, tort liability promises to remedy the gross injustice of having all the costs of gun violence fall on the
innocent victims, while the sellers who profit from creating the conditions for violence pay nothing.

Justice certainly demands that the legal system respond to the perpetrator of gun violence by imposing criminal sanctions. The shooter in the California case is serving 20 years to life. Why doesn't justice also demand that the system respond, through civil damages, to the seller responsible for illegally or irresponsibly putting the gun into the perpetrator's hands?

Second, the threat of liability creates a strong incentive for gun dealers to conduct their business in a responsible manner in order to minimize the risk that their products will harm innocent people. (This same consideration underlies an upcoming D.C. referendum on a measure that would impose strict liability on manufacturers and sellers of some assault weapons.)

In cases alleging a statutory violation by the dealer, like the illegal sale of the handgun to a minor in *Crown v. Raymond*, courts have found the violation to establish negligence per se.

In effect, the common law of negligence is being used to aid the enforcement of gun-control laws, even though the laws themselves do not create a private right of action for damages. The application of damages liability in straw-purchaser cases is especially important because the use of straw purchasers is a frequent method of evading federal gun-control laws.

Some courts have even been willing to impose liability on gun dealers in the absence of a statutory violation. In the K-Mart cases, for instance, there was no legal prohibition in either New York or Michigan against the sale of guns or ammunition to intoxicated buyers. The verdicts against K-Mart were based entirely on principles of ordinary negligence.

If gun dealers are to be subject to legal duties beyond those imposed by statute, how far will courts be willing to go? Consider *Phillips v. Roy*, 431 So.2d 849 (1983), in which the Louisiana Court of Appeal held that "in view of the dangerous instrumentality involved" a gun dealer has a duty "to carefully observe the customer for any indication of incompetence and to refrain from selling a weapon to an individual manifesting signs of instability." The case involved the sale of a pistol to a person with a history of mental illness.

This affirmative duty to scrutinize gun purchasers was taken another step by the Supreme Court of Mississippi, in *Howard Bros., of Phoenix City Inc., v. Penley*, 492 So.2d 965 (Miss. 1986), when the court wrote that a gun dealer "should have in effect in his business some safeguard to see that a loaded handgun is not placed in the hands of an unknown person, who may well be a mental case, unless or until his background can be thoroughly investigated." This language was cited approvingly by the Georgia Court of Appeals in *West v. Mache of Cochran*.

Thus, courts in three states – Louisiana, Mississippi, and Georgia – not known for their enthusiasm for gun control have endorsed the idea that gun dealers have a common-law duty to institute business procedures to prevent the sale of firearms to high-risk persons.

It is perhaps too early to speak of a "trend" toward dealer liability; it also is true that some courts have rejected the idea that gun sellers should be held accountable for the criminal acts of their customers. (See *Chapman v. Oshman's Sporting Goods Inc.*, 792 S.W.2d 785 (Tex. Ct. App. 1990.) Nevertheless, the law of gun-seller liability has developed to the point that it should be sending a strong message to the victims of gun violence and their families, and to the gun industry as well.
Victims, their families, and their attorneys should realize that there may be powerful legal remedies against those whose irresponsibility in the sale of dangerous weapons made violence possible.

To the gun industry (and its insurers), these cases may be signaling an end to the era when the industry could pretend that gun violence was someone else's problem. For too long the gun industry has been oblivious to the epidemic use of its products to kill and maim.