Rhode Island's Childhood Lead Poisoning Crisis Remains Painted Thickly on the Wall after State v. Lead Industries Association

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RHODE ISLAND'S CHILDHOOD LEAD POISONING CRISIS REMAINS PAINTED THICKLY ON THE WALL AFTER STATE V. LEAD INDUSTRIES ASSOCIATION

I. INTRODUCTION

After a few days of vomiting, decreased appetite, limited energy and a fever, a four-year-old boy arrived at the hospital.1 Doctors examined the child and discharged him, but he returned two days later with the same symptoms.2 That night, the child awoke with an escalating fever, and the next morning when his mother tried to comfort him, the child became combative and bit her.3 Tragically, the boy died within three days.4 A subsequent autopsy showed that acute lead poisoning caused his death.5

Childhood lead poisoning has been, and continues to be, a major health crisis in this country.6 For example, five percent of Rhode Island's children suffer from lead poisoning.7 In fact, experts opine that childhood lead poisoning "is the most severe environmental health problem" in the state.8 Ingestion and inhalation of lead paint dust are the leading causes of lead poisoning in children.9 Even low levels of exposure to lead can cause learning disa-

2. See id. (noting child's return to hospital after previous discharge).
3. See id. at 2549 (detailing child's behavior and symptoms).
4. See id. (discussing events leading to child's death).
5. See id. (noting cause of child's death). The autopsy also showed that the child had ingested a charm bracelet made from 99% lead which caused his death. Id. at 2549-50 (discussing cause of death). After treating this patient, the authors acknowledged that "[p]roviders should...consider lead toxicity in patients with unexplained symptoms such as vomiting, developmental delay, hearing loss, behavioral problems, seizures, or anemia." Id. at 2550.
7. See id. at 438 (noting 2005 study showing 5% of Rhode Island's children suffer from lead poisoning, compared with 2.2% national average).
8. Id. (discussing gravity of childhood lead poisoning problem in Rhode Island).
9. See id. at 437 (discussing leading causes of childhood lead poisoning). One doctor said that from January 1993 to December 2004, at least 37,363 of Rhode Island's children suffered from lead poisoning. Id. at 437-38. In 2004 alone, lead paint newly poisoned 1,167 of Rhode Island's children. Id. at 438. This number was "more than double the national average of 2.2 percent" at that time. Id.

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bilities, loss of concentration and behavioral issues. Exposure to high lead levels can cause children to convulse and lapse into comas. In some severe cases, as exemplified in the tragic situation above, elevated lead levels in children may even cause death.

This Note will evaluate the Rhode Island Supreme Court’s decision not to hold former lead pigment manufacturers liable for public nuisance in State v. Lead Industries Association (Lead Industries). Additionally, this Note argues that due to a legal loophole, several of Rhode Island’s lead-poisoned children and their families are left without a remedy. Part II outlines the history of childhood lead poisoning, as well as its causes and effects. Part III delineates the legal background of public nuisance theory and its application in the United States. Part IV discusses the court’s reasoning in reaching its conclusion. Part V critically analyzes the court’s decision and contends that, although the court reached the proper conclusion based on precedent, there is a significant flaw in the law that allows defendants, such as lead pigment manufacturers, to slip through the cracks, leaving extremely sick children without any meaningful recovery. Finally, Part VI assesses the impact this decision will have on Rhode Island’s children, environmental legislation and future use of public nuisance theory against lead manufacturers.

10. See id. at 437 (pointing out possible effects of low lead levels in children’s blood).
11. See Lead Industries, 951 A.2d at 437 (discussing effects of high lead levels in children’s blood).
12. See id. (noting some effects of severe lead poisoning on children). This paint contains lead pigment chips and becomes dust when walls and other surfaces in the home or other buildings begin to deteriorate. Id. Many of these paint chips and dust fall to the ground. Id. Because children under the age of six are more likely to play on the ground and their bodies and nervous systems are very sensitive to lead, young children are more susceptible to lead poisoning. Id.
13. See id. at 458 (noting court’s holding that declined to impose public nuisance liability).
14. For a further discussion on why public nuisance theory is not applicable in this situation, see infra notes 179-81 and accompanying text.
15. For a further discussion of the facts of Lead Industries, see infra notes 20-62 and accompanying text.
16. For a discussion of relevant background, see infra notes 63-150 and accompanying text.
17. For a narrative analysis of the court’s decision, see infra notes 151-78 and accompanying text.
18. For a critical analysis of the court’s decision, see infra notes 179-205 and accompanying text.
19. For a discussion on the potential impact of Lead Industries, see infra notes 206-19 and accompanying text.
II. FACTS

A. Causes of Childhood Lead Poisoning in Rhode Island

Inhaling or ingesting paint and paint dust in homes is the main source of environmental lead exposure in the United States.\textsuperscript{20} Due to the fact that "children spend as much as 80-90\% of their time indoors," their chances of exposure to lead in indoor environments, such as homes and schools, are very high.\textsuperscript{21} Additionally, children have been known to eat lead paint chips because the lead makes the paint taste sweet.\textsuperscript{22} Ironically, while lead poisoning is the most preventable childhood health problem,\textsuperscript{23} it is arguably "the most serious environmental health problem" in Rhode Island.\textsuperscript{24}

Rhode Island's Providence County is one of the oldest industrialized counties in the nation, which correlates directly with Rhode Island's high rates of childhood lead poisoning, as the industrialization and urbanization led to a greater amount of older homes that contained lead-based paint.\textsuperscript{25} In the early 1900s, the United States Gutta Percha Paint Company, which produced several lead-based paints, built a block-long factory in Providence, Rhode Island's largest city.\textsuperscript{26} By the 1970s, ten companies produced lead-based paint in Providence County alone.\textsuperscript{27} It is therefore not surprising that the United States Department of Housing and Urban Development

\textsuperscript{20} See John D. Bogden et al., Lead Poisoning: One Approach to a Problem That Won't Go Away, 105 ENVTL. HEALTH PERSP. 1284, 1286 (1997) (discussing sources of lead poisoning).

\textsuperscript{21} Patrick Brysse et al., The Relationship Between Housing and Health: Children at Risk, 112 ENVTL. HEALTH PERSP. 1583, 1583 (2004) (emphasizing that children spend majority of time indoors).


\textsuperscript{24} For a discussion on the seriousness of the childhood lead poisoning crisis in Rhode Island, see supra note 6 and accompanying text.

\textsuperscript{25} See Bailey et al., supra note 23, at 97 (noting Providence County's industrialization history and pointing to industrialization as one reason for large amount of older homes in Rhode Island).

\textsuperscript{26} See id. at 99 (noting history of industrialization in Providence County). Providence County also contained seven big companies that stored oil and gasoline products in the 1920s. Id. Rhode Island also has a large number of shipbuilding factories in addition to a large jewelry industry. Id.

\textsuperscript{27} See id. (detailing presence of lead paint manufacturers in Providence County).
has estimated that three-fourths of the houses built in the United States prior to 1978 contain lead paint.28

B. Effects of Lead Poisoning on Children

Depending on the level of toxicity and the age of the child, the effects of lead poisoning may vary.29 Exposure to lead may cause behavioral issues, cognitive disorders, impaired hearing and slowed growth.30 Other common symptoms in children exposed to lead include headache, stomach pain, inactivity and irritability.31 Even miniscule amounts of lead dust “equal to two grains of sugar a day on a child’s fingertips then transferred to the mouth, for perhaps a month” could cause a child’s “nerve velocity to decrease, making the child slower, both physically and mentally - perhaps for life.”32 The most prevalent health effect from low-to-moderate lead exposure is impaired neurodevelopment, which is analyzed through performance on IQ tests.33

Furthermore, a low IQ “is deeply implicated in the nexus of bad social outcomes.”34 Several studies link childhood lead poisoning at pre-school age with juvenile crime rates.35 A child who is lead-poisoned at pre-school age is more likely to commit a juvenile

28. See Bogden et al., supra note 20, at 1286 (noting prevalence of homes containing lead paint in the United States).
29. See Berkowitz & Tarrago, supra note 1, at 2548 (noting differences in childhood lead poisoning effects depending on child’s age and lead exposure level).
31. See Berkowitz & Tarrago, supra note 1, at 2548 (pointing out significant effects acute lead exposure can have on children).
32. U.S. Environmental Protection Agency, supra note 22 (stressing dangerous nature of lead paint dust in small amounts).
34. Rick Nevin, Understanding International Crime Trends: The Legacy of Preschool Lead Exposure, 104 ENVTL. RES. 315, 317 (2007) (discussing correlation between lead exposure and low IQ). Lead exposure can cause destruction of myelin sheaths in children’s brains. Id. Studies have linked this myelin destruction to developmental disorders. Id. Additionally, research shows that impulsive teen behavior can be attributed to a destruction of myelin sheaths. Id. A child who has no disruption in myelination is therefore likely to have a higher IQ and be less prone to impulse than a child who has destruction of their myelin sheath. Id. Specifically, a study has shown that children with “IQ of 75-90 are seven times more likely to be incarcerated than those with IQ of 110-125.” Id.
35. For a discussion on the link between exposure to lead at pre-school age and juvenile crime rates, see infra note 36 and accompanying text.
crime than a child who is not lead-poisoned. Moreover, studies associate low IQs with decreased lifetime earning power. Numerous studies also indicate that childhood lead-poisoning disproportionately affects inner-city children with low socio-economic status (SES).

In rare cases, acute lead intoxication can cause symptoms that resemble a breakdown of the central nervous system. High levels of lead exposure can even cause a child’s death. Despite the elimination of the source of lead exposure, the effects of childhood lead poisoning are often irreversible.

C. State and Federal Attempts to Minimize and Remedy the Effects of Childhood Lead Poisoning

Beginning in the 1950s, a number of manufacturers stopped using lead-based paint because they learned of its potential dangers. In 1971, Congress enacted the Lead-Based Paint Poisoning Prevention Act (LPPPA) to study the effects of lead exposure on

36. See Nevin, supra note 34, at 326 (noting tendency toward juvenile crime is related to childhood lead poisoning). Moreover, the lack of impulse control lead exposure causes can result in teens committing more crimes. Id. at 317. For example, from 1976-1980, the average lead level in the blood for black children ages 6-36 months was 50% higher than that of the average blood level of white children.


38. See Bradman et al., supra note 30, at 1079 (noting correlation between low socio-economic status and lead poisoning). Additionally, “[m]inority children are more likely to be living in poverty than nonminority children, and their poverty contributes to elevated lead levels.” Bailey et al., supra note 23, at 97. Children that live in inner-city areas have higher blood levels than children who live in suburban areas because of “diet, reduced access to information and health care, and the increased likelihood that they live in old housing and in areas of general environmental degradation.” Id. Further, minority neighborhoods are more prone to lead exposure because these neighborhoods tend to be more impoverished and “public health interventions may be less rigorously enforced in minority areas with little political clout.” Id. at 98. Nevertheless, “access to lead-free public housing may also explain why some minority groups have lower lead levels than others.” Id.

39. See Berkowitz & Tarrago, supra note 1, at 2548 (noting one rare, but severe, effect of lead poisoning on children).

40. For a discussion on lead’s effects on children, see supra notes 10-11 and accompanying text.

41. See Breyssse et al., supra note 21, at 1584 (pointing out irreversibility of lead poisoning’s effects).

42. See Bailey et al., supra note 21, at 97 (discussing lead paint manufacturer’s decision to remove lead from paint formula). See also Victor E. Schwartz & Phil Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational
children, and to eliminate lead from federally-funded housing.\textsuperscript{43} Nevertheless, it was not until 1978 that the federal government banned the sale of lead-based paint for indoor use.\textsuperscript{44}

Until 1992, Rhode Island failed to enact legislation to regulate lead paint in homes, fourteen years after the LPPPA.\textsuperscript{45} Rhode Island’s first piece of legislation, the Lead Poisoning Prevention Act (R.I. Act), required blood screening of Rhode Island’s children, implementation of programs aimed to prevent childhood lead poisoning and educational programs designed to educate the public about the dangers associated with lead exposure and lead poisoning.\textsuperscript{46} Later, in 2002, the Rhode Island legislature enacted the Lead Hazard Mitigation Act (LHMA), which, \textit{inter alia}, required landlords to correct all lead hazards on their properties.\textsuperscript{47} Since Rhode Island enacted and began enforcing this legislation, the number of lead-poisoned children has significantly declined.\textsuperscript{48}

D. Lead Industries

In an attempt to combat its childhood lead poisoning crisis, Rhode Island’s Attorney General filed a complaint on behalf of the state against eight former lead paint manufacturers.\textsuperscript{49} The State claimed that these manufacturers, or their predecessors-in-interest, “manufactured, promoted, distributed, and sold lead paint pigment for use in residential paint,” even though they knew, or should have

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\textsuperscript{44} See Bailey et al., supra note 23, at 97 (noting that federal government did not make lead paint illegal for residential use until 1978).
\textsuperscript{45} See id. at 100 (emphasizing Rhode Island did not enact legislation to deal with lead paint in homes until 1992).
\textsuperscript{47} See R.I. GEN. LAWS § 42-128.1-7 (2008) (requiring landlords who owned properties built prior to 1978 to remove lead from those properties).
\textsuperscript{48} See Lead Industries, 951 A.2d at 439 (discussing decrease in numbers of lead-poisoned children in Rhode Island since state and federal government enacted legislation).
\textsuperscript{49} See id. at 439-40 (acknowledging manufacturers as parties to action). The manufacturers named as parties include NL, Sherwin-Williams, ARCO, The Gidden Company, The O’Brien Corporation, SCM Chemicals, American Cyanamid Company and E.I. Du Pont de Nemours Company. \textit{Id.} The Attorney General filed this lawsuit in 1999. \textit{Id.} Additionally, the attorney general filed the state’s initial complaint against the Lead Industries Association (“LIA”). \textit{Id.} LIA filed for bankruptcy, however, before the case went to trial. \textit{Id.} at 439 n.7. After a few amendments to the State’s complaint, SCM was no longer a party and Cytec Industries, Inc. as well as Millennium Inorganic Chemicals, Inc. became parties. \textit{Id.} at 440.
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known, about lead’s hazardous effects on human health. The State alleged that the manufacturers not only failed to warn the public of lead’s harmful effects, but also misrepresented the safety of lead pigment to the public. The State asserted that the manufacturers’ actions caused Rhode Island to incur extensive damages and claimed that the manufacturers were liable for public nuisance.

After seven weeks of trial, a deadlocked jury could not return a verdict and the court declared a mistrial. Subsequently, a four-

50. Id. at 440 (stating State’s claim). Moreover, the State alleged LIA aided and abetted at least one of the manufacturers from 1928 to the time of the complaint. Id.

51. See id. (detailing State’s allegations). The claim also asserted that the manufacturers failed to adequately test the lead pigment. Id.

52. See id. (alleging public nuisance). Further, the State alleged the manufactures were liable for “violations of Rhode Island’s Unfair Trade Practices and Consumer Protection Act, strict liability, negligence, negligent misrepresentation, fraudulent misrepresentation, civil conspiracy, unjust enrichment and indemnity. The state also requested equitable relief to protect children in Rhode Island.” Id. Nevertheless, the public nuisance claim was the only claim that ended up going to trial. Id. at 440-41. The State also requested compensatory and punitive damages and an order mandating the manufacturers to abate lead pigment in all Rhode Island buildings accessible to children and to fund lead-poisoning prevention programs. Id. When the state amended its complaint, it eliminated the equitable relief claim. Id. at 440 n.15. The manufacturers motioned to dismiss all the State’s claims. Id. at 440. They denied they had control over the lead pigment when it harmed Rhode Island’s children and that there was a lack of interference with a public right. Id. Due to lacking control and lacking interference, the manufacturers claimed “they cannot be held liable for public nuisance.” Id. The State, however, argued it was irrelevant whether the manufacturers currently had control over the “lead-poisoned properties.” Id. at 441. Despite the manufacturers’ motion to dismiss the state’s claims, the trial court denied this motion. Id.

53. See Lead Industries, 951 A.2d at 442 (declaring mistrial). Thereafter, the state and manufacturers filed a series of pre-trial motions. Id. When the second trial finally commenced, only four former lead pigment manufacturers remained parties. Id. During trial, the State’s witnesses testified as to the use of lead pigment in paint and the effects this usage had on lead poisoning of Rhode Island children. Id. The court granted the manufacturers’ motion as to the indemnification, unjust enrichment and compensatory damages. Id. Nevertheless, the “court reversed judgment . . . on whether the state had proven a sufficient nexus between [the manufacturers’] activities and the presence of lead paint in Rhode Island.” Id. at 441-42. Afterwards, the manufacturers claimed “the state had failed to prove a sufficient nexus between [the manufacturers’] activities and the presence of lead pigment in Rhode Island” and moved for a judgment as a matter of law. Id. at 442.

The trial justice concluded the jury should decide whether the state had sufficiently proved the manufacturers were liable of public nuisance. Id. The trial justice explained to the jury that “public nuisance [is] something that unreasonably interferes with a right common to the general public. It is something that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.” Id. (quotation marks omitted). Further, the justice added “an interference is unreasonable when persons have suffered harm or are threatened with injuries that they ought not have to bear.” Id. As for proximate cause, the trial justice defined it as “a cause that in a natural, continuous, and
month retrial culminated with a jury finding three of the manufacturers liable for public nuisance. The court then ordered the three manufacturers to abate the public nuisance. This trial was the longest civil trial in Rhode Island's history, and the first time a court held lead paint manufacturers liable for public nuisance.

The Rhode Island Supreme Court granted the manufacturers' writ of certiorari after several motions for appeal. On appeal, the manufacturers contended that the trial court erred in denying their motion to dismiss the State's public nuisance claim. Furthermore, the manufacturers asserted that the court should have granted them judgment as a matter of law upon the completion of the State's argument. The court reaffirmed that to successfully assert a public nuisance action in Rhode Island, a plaintiff must prove each of the following: (1) the defendant unreasonably interfered with a public right; (2) the defendant had control over the alleged nuisance; and (3) the defendant actually and proximately

unbroken sequence produces an event or injury and without which the event or injury would not have occurred." Id. The court instructed the jury on the elements of public nuisance and emphasized that for the manufacturers to be liable, the State had to sufficiently prove all the elements of public nuisance and that the manufacturers were the proximate cause of the nuisance. Id. The justice also informed the jury that if it found the manufacturers liable, the jury would need to decide which, if any of the manufacturers needed to abate the public nuisance. Id.

54. See id. at 442 (finding defendants liable for public nuisance). The jury found that Millennium, Sherwin-Williams and NL were the proximate cause for the public nuisance, so they were responsible for abating it. Id. The jury found the fourth manufacturer, ARCO, not liable. Id. Soon thereafter, the three manufacturers filed several motions, including one for a judgment as a matter of law, all of which the trial justice denied. Id. The State also filed some appeals at this juncture. Id. at 434.

55. See id. at 442 (ordering defendants to abate nuisance). Abatement occurs when a party takes any measure to try and permanently eliminate lead paint hazards in residential buildings. 66 Am. Jur. Trials § 47 (2008). Specifically, these measures "include the removal of lead-based paint and lead contaminated dust; the permanent enclosure or encapsulation of lead-based paint; the replacement of lead-painted surfaces or fixtures; and the removal or covering of lead contaminated soil. Abatement includes all preparation, clean up, disposal, and post-abatement clearance testing activities associated with such measures." Lead Industries, 951 A.2d at 442.

56. See Lead Industries, 951 A.2d at 434 (stressing trial's extensive length and importance).

57. See id. (describing Rhode Island Supreme Court's acceptance of appeal). Additionally, the State cross-appealed the court's denial of compensatory damages. Id. at 435. The manufacturers had petitioned the Rhode Island Supreme Court for writ of certiorari in 2004, but the court decided this issue was not justiciable at that time. Id.

58. See id. at 443 (stating defendants' appeal).

59. See id. (describing manufacturer's want for dismissal). The manufacturers also claimed the trial justice improperly instructed the jury. Id.
caused the alleged nuisance. Additionally, the traditional use of public nuisance requires the alleged nuisance to be related to real property. The court ultimately dismissed the State’s public nuisance claim because the State failed to prove all of the required elements.

III. BACKGROUND

A. History of Public Nuisance at Common Law

Primarily originating in state common law, nuisance law is a tort that “is as elusive as it is ubiquitous in the environmental context.” Nuisance law is traditionally based on the notion that while private property is sacred, it should not be used to harm one’s neighbor or the public. According to twelfth century English common law, public nuisance was a tort-based crime for infringing on the rights of the King. In the fourteenth century, public nuisance grew to incorporate the rights of the people, rather than solely the interests of the King. At that time, public nuisance, a criminal offense, protected certain rights of the English people, such as the right to breathe unpolluted air. The lack of regulation required the government to develop a way to address problems with land use and social welfare. To meet this need, public nuisance theory developed flexibly and proved useful in a variety of situations.

60. See id. at 446-47 (explaining public nuisance elements).
61. See Lead Industries, 951 A.2d at 452 (noting traditional public nuisance usually must relate to land).
62. See id. at 458 (noting court’s holding).
65. See Schwartz & Goldberg, supra note 42, at 543 (discussing origins of public nuisance theory). See also Richard O. Faulk & John S. Gray, Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation, 2007 Mich. St. L. Rev. 941, 951 (pointing out “early authority to commence public nuisance actions was derived from the sovereign’s ‘police power’”).
66. See Schwartz & Goldberg, supra note 42, at 549 (describing extension of public nuisance theory to include members of public).
67. See id. at 543-44 (providing examples of public nuisance theory’s application). See also Faulk & Gray, supra note 65, at 951 (describing public nuisance’s early protections for public). In addition to protecting the right to be free from unpolluted air and water, public nuisance theory protected the public from disorderly conduct and unsafe roadways. Id.
68. See Faulk & Gray, supra note 65, at 951-52 (explaining policy behind public nuisance theory).
69. See id. (noting flexibility of public nuisance at time).
into a private tort, thereby allowing individuals "to sue and recover damages under the doctrine."  

In the eighteenth century the United States adopted the familiar English common law system, including the theory of public nuisance.  

When the United States shifted from an agricultural to an industrial society in the mid 1800s, there were few regulations to control the noise, smells and pollution that new machinery emitted. Accordingly, governments used public nuisance when they "could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public."  

B. Modern Public Nuisance Theory  

Even though governments used public nuisance to regulate sweeping social problems, the theory was expanded to include ordinances and statutes that specifically defined what conduct constituted a public nuisance at the federal, state and local level.  Both "comprehensive statutory and regulatory schemes" set forth appropriate societal behavior during the New Deal in the 1930s. As these statutes and regulations became more prevalent, common law public nuisance theory was no longer needed to define which behaviors were punishable by law.  

In the 1960s, public nuisance theory resurfaced when the drafters of the Restatement (Second) of Torts (Second Restatement) attempted to limit public nuisance theory to only violations of criminal stat-

70. Id. at 952 (noting expansion of public nuisance theory into private tort). Nonetheless, for a private citizen to use public nuisance, that person needed to prove that he suffered a special injury different in kind, not just degree, from the injury the general public suffered. Id. at 953-54.  
71. See id. at 953 (discussing United States' adoption of English common law public nuisance theory).  
72. See Schwartz & Goldberg, supra note 42, at 546 (demonstrating new problems that arose during industrialization of United States).  
74. See Schwartz & Goldberg, supra note 42, at 546 (noting use of statutes to regulate industrialization). Moreover, the majority of these statutes authorized governments to abate conduct specifically defined as public nuisance in the ordinances and statutes. Id.  
75. See id. at 546 (discussing lack of need for public nuisance theory). To that end, the 1939 Torts Restatement did not even include public nuisance. Faulk & Gray, supra note 65, at 954 (describing near disappearance of public nuisance theory in United States).  
76. See Schwartz & Goldberg, supra note 42, at 546 (discussing effect of specification of public nuisances).
UTES.77 Environmentalists, however, thought it was essential that public nuisance theory created civil liability for those responsible for causing pollution, even though pollution was sanctioned through non-criminal statutes and regulations.78 To address environmentalists’ concerns, the drafters of the Second Restatement defined public nuisance as “an unreasonable interference with a public right.”79 Yet, the Second Restatement emphasized that if a defendant’s conduct “does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.”80

C. Wave of Public Nuisance Claims in Environmental Cases

In the 1970s, a California appellate court rejected environmental advocates’ use of public nuisance theory in a class action suit against the defendant automobile manufacturers, petroleum refiners and individual polluters in Diamond v. General Motors Corp.81 The plaintiffs alleged that the defendants emitted harmful pollutants and odors into the atmosphere.82 Although the appellate court affirmed the trial court’s decision to dismiss the plaintiffs’ claim, the court emphasized that “[t]he dismissal was not on the merits... [nor] a bar either to individual actions, or to other class actions appropriately framed.”83 Nevertheless, the court concluded that to recover under public nuisance in this situation, each and every person in the class would have to prove specific injury.84 Due to such an incredibly high burden, the plaintiffs failed to provide enough evidence that would make one defendant vicariously liable.

77. See id. at 547-48 (noting revival of public nuisance theory).
78. See Faulk & Gray, supra note 65, at 955 (pointing out environmentalists’ concerns with public nuisance theory’s description in Restatement (Second) of Torts).
79. Restatement (Second) of Torts § 821B cmt. e (1979) (defining public nuisance).
80. Id. (stressing if common law or legislative act does not prohibit conduct, courts are acting without authority in holding party liable for public nuisance). Environmentalists also sought to establish standing for individual members of the public to sue under public nuisance theory, and sought to change the standard so that anyone who suffered from the nuisance could sue using the theory, regardless if they suffered a special injury. Schwartz & Goldberg, supra note 42, at 547-48.
82. See id. at 377 (discussing plaintiff’s claims).
83. Id. at 378 (emphasizing that court dismissed claim for procedural reasons only).
84. See id. at 378 (discussing necessity of special injury for individuals to recover under public nuisance theory).
for the conduct of the other defendants. The court noted that
the plaintiffs merely asked the court to do the job of the legislature:
to create stricter standards for the emission of pollutants into the
atmosphere. As such, the California Court of Appeals affirmed
the trial court's dismissal of the plaintiffs' public nuisance claim.

In 1974, the Florida Supreme Court, in *U.S. Steel Corp. v. Save
Sand Key, Inc.* (*Save Sand Key, Inc.*), held that a non-profit organi-
zation comprised of private citizens did not have standing to sue a
corporation under public nuisance theory. The plaintiff com-
plained that the defendant, a large corporation that was building a
resort on a public beach, was liable for public nuisance for blocking
the plaintiff's use of part of the beach. To that end, the plaintiff
sought to prohibit the corporation from blocking plaintiff's use of
the beach in the future. Despite the appellate court's decision,
concluding that the plaintiff had a legitimate claim, the Florida Su-
preme Court dismissed it and held that the plaintiff failed to prove
any non-special damages different from those suffered by the gen-
eral public. The plaintiff, therefore, had no standing to sue under public nuisance theory.

Yet, two cases in the 1980s allowed plaintiffs to use public nuis-
ance theory in claims against manufacturers. In the first case, *Akau
v. Olohana Corp.*, the Supreme Court of Hawaii permitted indi-
vidual members of the public to sue a corporation under public nuis-
ance theory, even though these individuals did not suffer injuries
"different in kind" from the general public. The plaintiffs
claimed that the defendant, a large corporation, created a public
nuisance by blocking the plaintiffs' access to trails leading to public
beaches. Relying on a new trend in tax law, the court broadened
the test for standing to bring a public nuisance suit. The Su-

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85. See *id.* at 379 (noting that plaintiff failed to provide ample evidence).
86. See *Diamond*, 20 Cal.App.3d at 379 (outlining separation of powers argument).
87. See *id.* at 382-83 (dismissing class action public nuisance claim due).
88. 303 So. 2d 9 (Fla. 1974).
89. See id. at 11,13 (dismissing plaintiffs' claim).
90. See *id.* at 9-10 (stating plaintiffs' claim).
91. See *id.* at 10 (laying out damages plaintiffs sought).
92. See *id.* at 11, 13 (noting plaintiff's failure to prove special damages).
93. See *Save Sand Key, Inc.*, 303 So.2d at 11, 13 (dismissing plaintiffs' claim).
94. 652 P.2d 1130 (Haw. 1982).
95. See *id.* at 1134 (allowing plaintiffs to sue under public nuisance theory).
96. See *id.* at 1132 (outlining plaintiffs' claims).
97. See *id.* at 1133 (noting court's reliance on tax law to illustrate trend in
expanding standing requirement).
preme Court of Hawaii concluded that, if an individual member of
the public can prove injury in fact, the person "has standing to sue
to enforce the rights of the public even though his injury is not
different in kind from the public's generally."98 Nevertheless, no
other court has followed this reasoning in allowing individuals to
sue for public nuisance without proving special injury.99

In the second case, State v. Schenectady Chemicals, Inc.,100 a New
York appellate court allowed the State to use public nuisance theory
against a chemical company, holding that "someone must pay to
correct the [pollution] problem."101 The defendant chemical com-
pany had manufactured paints and other chemicals since the early
1900s.102 The defendant knew that waste improperly disposed of
would be harmful to plants, animals and humans.103 As a result,
the defendant hired a contractor to dispose of the waste produced
by these chemicals.104 The State asserted that in addition to know-
ing that the contractor was improperly disposing of the chemical
waste, the defendant failed to advise the contractor of proper dispo-
sal means, thereby causing the contractor to continue the improper
disposal.105 Due to the defendant's conduct, the State claimed the
chemical waste contaminated and polluted both the ground water
and the air, which constituted a public nuisance.106 To "meet a
desired end" in having someone pay for the contamination, the
court concluded that the State's complaint alleged a legitimate
cause of action for nuisance.107

98. Id. at 1134 (noting that so long as nuisance affected individuals and
caused injury, plaintiffs could recover under public nuisance theory).
99. See Schwartz & Goldberg, supra note 42, at 550 (highlighting that no other
court has followed Akau decision). Most courts do not allow these types of public
nuisance claims when the elements are not met, just because the ends justify the
means. Id. at 551.
100. 459 N.Y.S.2d 971 (N.Y. 1983).
101. Id. at 977 (explaining court's reasoning for allowing plaintiff's claim).
102. See id. at 974 (listing and describing chemicals defendant created).
103. See id. (indicating defendant's knowledge of products' possible harmful
effects).
104. See id. (acknowledging that defendant hired contractor to remove waste
by dumping directly into lagoons and burying at chemical waste site).
105. See Schenectady Chem., Inc., 459 N.Y.S.2d at 974 (pointing out defendant's
failure to take appropriate action in advising contractor of waste material's danger-
ousness and to recommend proper disposal methods).
106. See id. (explaining that plaintiff brought suit because defendant polluted
at least one of area's drinking wells and refused to pay clean up costs).
107. See id. at 977 (concluding public nuisance claim existed). See also
Schwartz & Goldberg, supra note 42, at 550 (noting that court found plaintiff had
legitimate claim as means to desired end).
Approximately a decade later, the Ninth Circuit Court of Appeals upheld a lower court’s summary judgment ruling in favor of an oil company in *Alaska Native Class v. Exxon Corp.*108 Due to the defendant’s oil spill, the plaintiffs contended that they could no longer maintain their “subsistence way of life” because they were unable to fish in the nearby waters.109 The court maintained that to recover economic damages under public nuisance, a plaintiff must prove special injury, which is defined as an injury that is different in kind, not just different in degree.110 Here, because plaintiffs failed to prove that defendant’s oil spill caused them to suffer a different injury than the public as a whole, the Ninth Circuit affirmed the lower court’s summary judgment in favor of the defendant.111

D. Public Nuisance Claims against Product Manufacturers that Did Not Involve Land

In an attempt to side-step products liability rules, attorneys over the last few decades have tried to use public nuisance theory in cases against manufacturers not involving land.112 The 1980s and 1990s marked the birth of a wide use of public nuisance theory where a product itself was the alleged nuisance.113 Although the products were “lawfully manufactured, distributed, and sold[,]” the plaintiffs complained that the products interfered with the “public’s right to health or safety.”114

To fund asbestos abatement initiatives, many cities and school districts claimed that asbestos manufacturers were liable for public

108. 104 F.3d 1196, 1198 (9th Cir. 1997) (upholding summary judgment in favor of defendants finding that class failed to prove special injury supporting public nuisance action).

109. Id. at 1197 (detailing plaintiffs’ claim).

110. See id. at 1198 (laying out elements private plaintiffs must prove for public nuisance).

111. See id. (holding that plaintiffs failed to prove all elements and granting defendants’ motion for summary judgment).

112. See Schwartz & Goldberg, supra note 42, at 552 (explaining personal injury lawyers’ attempts to use public nuisance theory in non-land cases). Unlike products liability, public nuisance theory does not have well-defined boundaries. Id. For example, strict liability requires that a plaintiff prove that the injury the product caused was due to a particular defect. Id. Additionally, products liability has stringent statutes of limitations and does not allow recovery for purely economic loss. Id.

113. See id. at 553 (acknowledging trend in public nuisance claims alleging product rather than use of product is public nuisance).

114. Id. at 552 (discussing public nuisance claims against manufacturers of asbestos, tobacco and lead paint). Most commonly, plaintiffs assert public nuisance claims against manufacturers whose products can potentially be used incorrectly or illegally. Id.
nuisance.\textsuperscript{115} In \textit{Detroit Board of Education v. Celotex Corp. (Celotex)},\textsuperscript{116} a Michigan appellate court dismissed the school districts’ claim that asbestos manufacturers, installers and distributors were liable for public nuisance.\textsuperscript{117} The school districts claimed that the manufacturers should be responsible for paying the costs of removing a harmful type of asbestos from the schools’ buildings.\textsuperscript{118} In response, the manufacturers asserted that their only role was to create the product.\textsuperscript{119} They contended that to be liable for nuisance, a party needed to actually have control over the nuisance, and that imposing liability on a party who merely created the product was an “overly broad” use of nuisance theory.\textsuperscript{120} According to the manufacturers, they abdicated control of asbestos when they sold the product to the plaintiffs; thus, they “lack[ed] the legal right to abate whatever hazards their products may [have] pose[d]; ownership and possession [were] exclusively with [the] plaintiffs.”\textsuperscript{121} The Michigan Court of Appeals agreed with the manufacturers, and concluded that the lower court erred in not granting the manufacturers’ motion for summary judgment regarding the plaintiffs’ nuisance claim.\textsuperscript{122}

The first time plaintiffs used public nuisance in class actions against product manufacturers occurred in the 1990s with class ac-

\textsuperscript{115} See Gifford, supra note 73, at 745-46 (stating that traditionally public nuisance not regarded as tort but was way for public officials to abate harmful conduct). Additionally, it was rare for an individual member of the public to have the ability to assert a public nuisance claim. \textit{Id.}


\textsuperscript{117} See \textit{id.} at 522 (holding plaintiffs failed to prove nuisance claim).

\textsuperscript{118} See \textit{id.} at 517 (discussing plaintiffs’ claim that they already had and would continue to spend money to remove asbestos from buildings).

\textsuperscript{119} See \textit{id.} at 521 (identifying manufacturers’ argument that manufacturers had limited role).

\textsuperscript{120} See \textit{id.} at 521 (defining manufacturers’ control over nuisance).

\textsuperscript{121} \textit{Celotex}, 493 N.W.2d at 522 (recognizing that plaintiffs controlled nuisance and manufacturers could not be liable for nuisance).

\textsuperscript{122} See \textit{id.} (dismissing plaintiffs’ nuisance claim against asbestos manufacturer); \textit{see also} Tioga Pub. Sch. Dist. v. United States Gypsum Co., 984 F.2d 915, 922 (8th Cir. 1993) (holding that North Dakota school district unable to successfully assert nuisance claim against asbestos-based plaster manufacturer). Although the school district asserted that North Dakota’s nuisance statute was applicable to this case, the court emphasized that North Dakota courts had not extended nuisance theory to situations where a plaintiff bought a product from a manufacturer and the product later becomes a nuisance. \textit{Id.} at 920-21. Furthermore, the court pointed out that nearly all of the cases that fell under the North Dakota nuisance statute involved a nuisance that arose on land over which a particular landowner had control. \textit{Id.} at 920. As such, the Eighth Circuit concluded that the court improperly submitted the school district’s nuisance claim to the jury; therefore, the judgment in favor of the school district was set aside. \textit{Id.} at 921.
tion suits against tobacco companies. Plaintiffs in the tobacco lawsuits sought to recover costs to pay for medical programs designed to treat tobacco-related problems. Nevertheless, it remains a mystery whether the public nuisance theory would have been successful because only one suit actually made it to court.

In Texas v. American Tobacco Co. (American Tobacco), a Texas district court dismissed the State’s public nuisance claim against tobacco manufacturers. The State complained that the manufacturers’ tobacco products interfered with the public’s right to be free from unwarranted disease and injury. The manufacturers contended that the State failed to adequately claim the elements of public nuisance; the State neither claimed that the manufacturers misused their property, nor that the State was injured while using the manufacturers’ property. The United States District Court for the Eastern District of Texas agreed with the manufacturers and dismissed the State’s public nuisance claim.

Following the lead of the plaintiffs in the tobacco cases, several plaintiffs filed public nuisance claims against firearms manufacturers. Despite a creative twist aimed to attack the manufacturers’ marketing plays rather than the product itself, the majority of these claims failed. In City of Chicago v. Beretta U.S.A. Corp. (Beretta), the Illinois Supreme Court dismissed the city’s public nuisance claim against several gun manufacturers and retailers. The city claimed that the defendants designed and marketed the firearms to

123. See Schwartz & Goldberg, supra note 42, at 554 (discussing first time that plaintiffs filed mass claims against manufacturers).
124. See id. (detailing unusual types of remedies plaintiffs sought).
125. See id. (explaining that tobacco products manufacturers’ $246 billion Master Settlement agreement with states and plaintiffs denied courts chance to decide public nuisance claims).
126. 14 F.Supp.2d 956 (E.D. Tex. 1997). See Schwartz & Goldberg, supra note 42, at 554 (noting that American Tobacco was only case going to trial where plaintiffs pursued public nuisance claim against tobacco manufacturers).
127. See American Tobacco, 14 F. Supp. 2d at 973 (dismissing State’s claim).
128. See id. (describing State’s public nuisance claim).
129. See id. (explaining manufacturers’ contention that State failed to prove elements of public nuisance).
130. See id. (dismissing State’s claim).
131. See Faulk & Gray, supra note 65, at 958-59 (noting claims against firearm manufacturers stemmed from claims against tobacco manufacturers).
132. See Schwartz & Goldberg, supra note 42, at 554 (pointing out public nuisance claims failed despite plaintiffs’ new tactics).
133. 821 N.E.2d 1099 (Ill. 2004).
134. See id. at 1148 (dismissing City’s claim).
attract buyers who intended to use them in a criminal manner.\textsuperscript{135} For example, some of the firearms resisted fingerprints, were easy to conceal and were capable of firing many rounds from just one ammunition clip.\textsuperscript{136} The city averred, therefore, that because the defendants knew or should have known that these marketing and design techniques would lead to more illegal firearms in Chicago, the defendants were liable for public nuisance.\textsuperscript{137} The court, however, concluded that it was a personal, rather than a public right to be free from people who commit crimes.\textsuperscript{138} Additionally, the court emphasized its unwillingness to extend public nuisance theory to cover this claim, because if it did, it would create a slippery slope with endless claims against manufacturers.\textsuperscript{139} Accordingly, the Supreme Court of Illinois dismissed the city's public nuisance claim against the defendants.\textsuperscript{140}

In the 1980s, a team of contingency lawyers filed several unsuccessful lawsuits against lead pigment manufacturers, though none were public nuisance claims.\textsuperscript{141} The Rhode Island trial court's decision in \textit{Lead Industries} marked the first time lead pigment manufacturers were held responsible for allegedly causing childhood lead

\textsuperscript{135} See id. at 1107-08 (describing City's claim). The City also contended that these design and marketing features served no legitimate hunting purpose. \textit{Id.} The only purpose they served was to "appeal to criminals who wish[ed] to be better armed than other criminals or law enforcement officers." \textit{Id.}

\textsuperscript{136} See id. at 1109 (discussing defendants' marketing and designs).

\textsuperscript{137} See id. at 1109 (describing City's claim).

\textsuperscript{138} See Beretta, 821 N.E.2d at 1116 (analyzing whether rights violated were public rights or combination of individuals' rights). The court was "reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another." \textit{Id.}

\textsuperscript{139} See id. (describing slippery slope for claims against manufacturers of various products).

\textsuperscript{140} See id. at 1148 (reversing appellate court's judgment and dismissing public nuisance claim). Although the Illinois Supreme court represents the majority view, the Supreme Court of Indiana has held in \textit{City of Gary ex rel. King v. Smith & Wesson Corp.} that a city could proceed with a public nuisance claim against firearm manufacturers. \textit{City of Gary ex rel. King v. Smith & Wesson Corp.}, 801 N.E.2d 1222, 1233 (Ind. 2003). Nonetheless, the court recognized that it was acting contrary to precedent because all other public nuisance claims in Indiana involved real property. \textit{Id.} at 1231. The court concluded that so long as "an activity meets the requirements of an unreasonable interference with a public right, it may constitute a public nuisance." \textit{Id.} at 1239.

\textsuperscript{141} See Schwartz & Goldberg, supra note 42, at 557 (discussing Ralph Nader's efforts to hold lead pigment manufacturers liable). The state of Massachusetts filed the first lawsuit on behalf of a few children for damages against lead pigment manufacturers. Martha R. Mahoney, \textit{Four Million Children at Risk: Lead Paint Poisoning Victims and the Law}, 9 STAN. ENVT. L.J. 46, 60 (1990).
poisoning.\textsuperscript{142} Significantly, in the suit, the plaintiffs relied on public nuisance theory.\textsuperscript{143} Nonetheless, since the Rhode Island Supreme Court overturned the decision, lead pigment manufacturers have been virtually free from liability in public nuisance and products liability suits brought against them.\textsuperscript{144}

Recently, in \textit{In re Paint Litigation},\textsuperscript{145} the New Jersey Supreme Court refused to expand public nuisance theory to hold former lead pigment producers and distributors liable for the costs of finding and removing lead paint from buildings.\textsuperscript{146} The court reasoned that the necessary link between health problems and the defendant manufacturers' actions in producing and distributing lead products was missing.\textsuperscript{147} Additionally, the court emphasized that the private plaintiffs failed to prove the required special injury to recover damages.\textsuperscript{148} Finally, the court noted that this claim should have been based in products liability, rather than public nuisance.\textsuperscript{149} Accordingly, the court granted the defendants' motion for summary judgment as to public nuisance.\textsuperscript{150}

\section*{IV. Narrative Analysis}

In \textit{Lead Industries}, the Rhode Island Supreme Court reversed the lower court's decision and dismissed the State's public nuisance

\begin{itemize}
\item \textsuperscript{142} For a discussion on the length and importance of trial in \textit{Lead Industries}, see \textit{supra} notes 53-56 and accompanying text.
\item \textsuperscript{143} For a discussion on the use of public nuisance theory in \textit{Lead Industries} at the trial level, see \textit{supra} note 52 and accompanying text.
\item \textsuperscript{144} See Schwartz & Goldberg, \textit{supra} note 42, at 560 (noting success of plaintiffs using public nuisance theory against pigment manufacturers and distributors. On appeal, however, appellate courts overturned virtually all of these pro-plaintiff decisions and held in favor of defendant manufacturers and distributors. \textit{See, e.g., City of Chicago v. American Cyanamid Co.}, 823 N.E.2d 126, 139 (Ill. 2005) (holding public nuisance theory could not legitimately be used against lead pigment manufacturers). \textit{See In re Lead Paint Litig.}, 924 A.2d 484, 501 (N.J. 2007) (recognizing no grounds for State's public nuisance complaint against former lead paint manufacturers); \textit{see also City of St. Louis v. Benjamin Moore & Co.}, 226 S.W.3d 110, 116 (Mo. 2007) (holding City's failure to prove control element of public nuisance necessitated granting summary judgment for defendant lead pigment manufacturers).
\item \textsuperscript{145} 924 A.2d 484 (N.J. 2007).
\item \textsuperscript{146} \textit{See id.} at 506 (reversing lower court's judgment and entering judgment in favor of defendants).
\item \textsuperscript{147} \textit{See id.} at 502 (stating plaintiff's failure to prove causation element of public nuisance).
\item \textsuperscript{148} \textit{See id.} at 503 (recognizing plaintiff did not seek appropriate remedy under public nuisance).
\item \textsuperscript{149} \textit{See id.} (emphasizing claim was actually products liability claim).
\item \textsuperscript{150} \textit{See In re Lead Paint Litig.}, 924 A.2d at 506 (granting defendant's motion for summary judgment). For examples of other courts that did not allow public nuisance claims against pigment manufacturers, producers or distributors, see \textit{supra} note 144.
\end{itemize}
The Rhode Island Supreme Court has traditionally defined public nuisance as "behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community." The State failed to prove all the elements of public nuisance, leaving the court no choice but to dismiss the State's claim.

A. Public Right

The justices of the Rhode Island Supreme Court emphasized that a public right usually refers to interference with resources that the public shares, such as water, air and public right of ways. Consequently, because children are usually exposed to lead paint in

152. See id. at 443 (outlining defendants' arguments that public nuisance claim should be rejected).
153. Id. (quoting Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 188 (R.I. 2008)) (explaining court system does not fix all injuries and problems). The court also recognized that judges are not completely free in making their decisions. Id. at 436. Rather, a judge "is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the 'primordial necessity of order in social life.'" Id. (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 141 (Yale Univ. Press 1921) (1921)).
154. See id. at 446 (explaining incremental and gradual nature of changes in common law prevents courts from making drastic changes).
155. Id. (quoting Citizens for Pres. of Watermelon Lake v. Davis, 420 A.2d 58, 59 (R.I. 1980) (laying out Rhode Island's definition of public nuisance). For the elements of public nuisance, see infra note 156.
156. For a discussion of the State's failure to prove the elements of public nuisance, see supra notes 60-61 and accompanying text. Rhode Island's elements of public nuisance are as follows: "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred." Lead industries, 951 A.2d at 452. If a plaintiff proves all elements, the plaintiff must then prove the defendant actually and proximately caused the nuisance. Id. Furthermore, to date, Rhode Island courts have recognized that public nuisance occurs when someone used land improperly. Id. at 453.
157. See Lead Industries, 951 A.2d at 453 (describing typical public nuisance).
their own homes and other private settings, the right not to be poisoned by lead is a private right, not a public one. In recognizing the grave threat of the slippery slope laid out in \textit{Beretta}, the Supreme Court refused to expand the definition of a public right to cover the situation at issue.

B. Control

A party "must have control over the instrumentality causing the alleged nuisance at the time the damage occurs." It is imperative that the defendant have control of the nuisance at the time of the claim, because the primary remedy for public nuisance is abatement. For the State’s public nuisance claim in \textit{Lead Industries} to have proceeded, the State would have needed to prove that the defendants manufactured and controlled the lead pigment at the time it poisoned the children. The court found that the State failed to prove the required element of control.

C. Unreasonable Interference

Interference with a public right usually involves violating a statute or ordinance; if a particular activity substantially interferes with a public right, however, courts have generally found such an activity to be unreasonable, even if it does not violate a written law. Plaintiffs have the burden of proving that a defendant’s legal act is unreasonable. Yet, a court will not determine whether an act is unreasonable based on a pre-determined formula; rather, the court looks at all the facts in a particular situation to determine if an act is unreasonable. In \textit{Lead Industries}, the State failed to prove that a child’s right not to be poisoned by lead constitutes a public right.

158. See id. at 454 (explaining right not to be lead-poisoned is private right).
159. See id. at 454-55 (declining to characterize right of children not to be poisoned by lead as public right). See also \textit{City of Chicago v. Beretta U.S.A. Corp.}, 821 N.E.2d 1099, 1116 (Ill. 2004) (discussing Illinois’ Supreme Court’s refusal to extend public nuisance theory against firearm manufacturers and retailers).
161. See id. (discussing importance of control so abatement remedy is logical).
162. See id. at 455 (demonstrating how element of control could have been met in case).
163. See id. (detailing state’s failure to prove control element).
164. See id. at 447 (expanding definition of unreasonable interference).
165. See \textit{Lead Industries}, 951 A.2d at 447 (describing burden of proof in public nuisance claim).
166. See id. (defining court’s method of determining reasonableness of particular activity).
167. See id. at 455 (emphasizing lack of public right requirement).
As such, the court did not need to determine the reasonableness of the defendants’ conduct.168

D. Related to Land

The court recognized that actions for public nuisance in Rhode Island had only related to land.169 Specifically, “a public nuisance typically arises on a defendant’s land and interferes with a public right.”170 To that end, the court ruled that the Rhode Island Superior Court erred because it strayed too far from the established requirements of common law public nuisance, which involved land use.171 According to the court, no matter how harmful a product may be, public nuisance theory does not apply to the manufacture of products.172 The court instead concluded that the proper claim would be one set in products liability.173

E. Causation

Plaintiffs that assert a public nuisance must also show that the nuisance complained of caused the injury.174 A party will therefore only be held liable if the “conduct complained of actually caused an interference with a public right.”175 Additionally, plaintiffs must prove proximate causation, which is a cause that is so closely related to the injury that a reasonable person would foresee the injury “as a likely result of [the] conduct.”176 In Lead Industries, the court held that the State did not prove the prior elements of public nuisance, and therefore did not need to address the element of causation.177 Ultimately, because the State failed to prove more than one of the

168. See id. (explaining if public right not proved, court need not address reasonableness of defendants’ behavior).
169. See id. at 452 (pointing out necessity of land in public nuisance claims).
170. Lead Industries, 951 A.2d at 452 (noting that public nuisance traditionally involves land).
171. See id. at 455 (stating lower court’s departure from common law).
172. See id. at 456 (denying use of public nuisance in case).
173. See id. (suggesting state should have filed products liability claim). The state also appealed the Rhode Island Superior Court’s denial of compensatory damages as well as the court’s grant of a judgment as a matter of law to one particular lead pigment manufacturer. Id. at 458-59. Additionally, both parties appealed contempt of court issues. Id. at 459-68.
174. See id. at 450-51 (explaining causation).
175. Lead Industries, 951 A.2d at 451 (discussing when element of cause is met in public nuisance claim).
176. Id. (describing element of proximate causation).
177. See id. at 455 (explaining court need not address all elements if first elements not met).
necessary elements of public nuisance, the Rhode Island Supreme Court dismissed the State's public nuisance claim.\(^{178}\)

V. CRITICAL ANALYSIS

Although the court in *Lead Industries* properly dismissed the State’s public nuisance claim under applicable law, this decision left a hole in the hearts of the justices, and exposed a major flaw in the law.\(^{179}\)

A. State's Failure to Prove Public Nuisance Elements

To be liable for public nuisance in Rhode Island, a plaintiff must prove: (1) the defendant unreasonably interfered with a public right; (2) the defendant had control over the alleged nuisance; and (3) the defendant actually and proximately caused the alleged nuisance.\(^{180}\) In this case, the State failed to prove all three elements.\(^{181}\)

In *American Tobacco*, a Texas district court concluded that the tobacco manufacturers did not unreasonably interfere with a public right, because the State failed to prove the manufacturers misused their property.\(^ {182}\) Analogous to the tobacco manufacturers, the lead paint manufacturers did not misuse their property; they simply manufactured a legal product.\(^ {183}\) Moreover, similar to the defendants in *Celotex*, who legally produced and distributed asbestos, the defendants in *Lead Industries* legally produced and distributed lead

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\(^{178}\) For the Rhode Island Supreme Court’s holding, see *supra* note 151 and accompanying text.

\(^{179}\) For the court’s holding, see *supra* note 151. *See also Lead Industries*, 951 A.2d at 435 (stressing justices’ reactions about holding in case). The court noted, “[i]n reaching this conclusion, we do not mean to minimize the severity of the harm that thousands of children in Rhode Island have suffered as a result of lead poisoning. Our hearts go out to those children whose lives forever have been changed by the poisonous presence of lead.” *Id.* The court then stressed that although the childhood lead poisoning crisis is quite serious, “public nuisance law simply does not provide a remedy for this harm.” *Id.*

\(^{180}\) For a discussion on the public nuisance elements, see *supra* notes 60-61 and accompanying text.

\(^{181}\) For the court’s holding, see *supra* note 151.

\(^{182}\) For a discussion on the lack of misuse of property in the tobacco manufacturer case and the court’s holding, see *supra* notes 131-40 and accompanying text.

\(^{183}\) For an example of when merely manufacturing asbestos- a legal product at the time- did not constitute a public nuisance, see *supra* notes 115-122 and accompanying text. *See also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (warning against extending public nuisance to hold manufacturers liable for producing legal products).
pigment. After the manufacturers sold the product, they no longer maintained control over it.

The right to be free from health problems is a private right, not a public one, because one's health is specific to each and every individual. On the contrary, historically recognized public rights have included rights which we share publicly, such as the right to clean water and unpolluted air. Although people unlawfully used firearms in Beretta, the court emphasized that the right to be free from people who commit crimes is not a public right. Municipalities, landlords and homeowners responsible for the upkeep of schools and other public buildings have failed, and continue to fail, to remove dilapidated lead paint from their properties. Although children have the indisputable right to be free from the damage that chipped paint and paint dust cause, this is not a public right, but a private right of each and every individual child.

Nevertheless, even if the court concluded there was a public right, the alleged nuisance did not occur until the lead paint chipped, turned into dust and became unavoidable for children to inhale and ingest. Unless the pigment manufacturers owned or controlled these properties when the paint chipped and the children ingested the residue, it is questionable at best whether the manufacturers actually caused the nuisance. Moreover, it is an

184. For a discussion on the legality of selling lead paint for residential use prior to 1978, see supra note 44.
186. See id. at 447-48 (comparing and citing examples of private and public rights). The court emphasized the difference between a public right and an aggregation of private rights. Id. at 448.
187. For a discussion on the traditional meaning of a public right, see supra note 67 and accompanying text. See also Lead Industries, 941 A.2d at 447-48 (discussing definitions of public right as currently applied).
188. For a discussion about an Illinois court's decision that being free from those who commit crimes is a private right, see supra notes 138-40 and accompanying text.
189. See, e.g. Misti Crane & Mark Ferenchik, Banned Three Decades Ago, Lead Paint Continues to Poison Ohio's Children, COLUMBUS DISPATCH, May 11, 2008, available at http://www.dispatch.com/live/content/local_news/stories/2008/05/11/LEADED_ART_ART_05-11-08_A1_STA5K8A.html (providing example of city that has failed to adequately remove lead paint from homes and reasons for failure).
190. See Lead Industries, 951 A.2d at 454 (discussing similarity between child's right to be free from health hazards lead paint causes with other nonpublic rights).
192. For the elements of public nuisance, see supra notes 60-61. Moreover, "legal responsibility must be limited to those causes which are so closely connected
illogical and inappropriate leap to conclude that the manufacturers controlled the chipped paint when it harmed the children.\textsuperscript{193}

Rhode Island had a legitimate, idealistic goal to remove all remaining lead pigment in buildings, and tried to find a way to make someone pay for the undue harm lead paint already caused Rhode Island’s children.\textsuperscript{194} This, however, did not grant the court the power to embellish traditional public nuisance law to hold the manufacturers responsible for a nuisance they did not create.\textsuperscript{195} Accordingly, the Rhode Island Supreme Court properly dismissed the State’s public nuisance claim.\textsuperscript{196}

B. The Ineffectiveness of Products Liability Theory in Suits against Product Manufacturers

Most often, plaintiffs will request that courts impose strict liability when attempting to recover from manufacturers under products liability theory.\textsuperscript{197} According to the Second Restatement, the first element a plaintiff must prove under strict liability is that the defendant sold a “product in a defective condition unreasonably danger-

\textsuperscript{193} For a discussion on a New Jersey case that refused to overextend public nuisance theory, see supra notes 145-50. For a discussion on The Supreme Court of Rhode Island’s refusal to extend public nuisance theory in Lead Industries, see supra notes 153-56.

\textsuperscript{194} For a discussion of the Rhode Island trial court’s strategy in Lead Industries, see supra notes 53-56 and accompanying text.

\textsuperscript{195} For a discussion on a New York court that held in favor of the plaintiffs because it was a means to a desired end, see supra notes 100-07 and accompanying text. Nevertheless, the court in Lead Industries stressed that the “enormous leap that the state urge[d] [it] to take is wholly inconsistent with the widely recognized principle that the evolution of the common law should occur gradually, predictably, and incrementally.” State v. Lead Indus. Ass’n, 451 A.2d 428, 454 (R.I. 2008). Because all of the traditional elements of public nuisance were not met, the court was unwilling to take a huge step to hold the lead pigment manufacturers liable. Id. See also supra note 153 (pointing out that judges do not have power to solve all social problems).

\textsuperscript{196} For the court’s holding in Lead Industries, see supra note 151 and accompanying text.

\textsuperscript{197} See Brady L. Montalbano, Comment, It’s Not Easy Being Green- Holding Manufacturers of Genetically Modified Bentgrass Liable Under Strict Products Liability, 14 Penn St. Envtl. L. Rev. 111, 119 (2005) (noting that strict liability is most often used in products liability cases).
ous to the user or consumer or to his property.”198 If a sufficient causal link exists between the defendant’s actions and the harm, the defendant could then be liable for physical harm that the product might cause to the consumer or the consumer’s property.199

When applying strict liability to lead pigment manufacturers, the analysis abruptly ends, because the lead pigment was likely not defective when the manufacturers produced it.200 Even if it was defective, the causal link between the lead-poisoned children and the defendants’ actions in producing the lead pigment is too remote.201 Although several courts have suggested that claims against manufacturers were better set in products liability, such an approach would not have been successful in Lead Industries.202

C. Public Nuisance and Products Liability Theories Fail – Now What?

History shows that, save for a few exceptions, public nuisance claims against manufacturers have proved futile.203 Additionally,

198. Restatement (Second) of Torts § 402A (1965) (noting requirement that product must be defective to use strict liability theory).
199. See id. (stating if the product is defective manufacturer can be liable if other requirements are met).
200. For a discussion on types of defects, see infra note 201.
201. See Montalbano, supra note 197, at 122 (discussing defect element and causation requirements). There are three types of defects: manufacturing defect, design defect and failure to warn defect. Id. The defect must be one that is “unreasonably dangerous” to assert a claim under strict products liability. Id. The unreasonableness of the defect is measured by what a reasonable consumer with a reasonable amount of knowledge would think about the defectiveness of the product. Restatement (Second) of Torts § 402A cmt. i (1965). For a discussion on the federal ban on retail of lead paint for indoor use, see supra note 44. Moreover, a plaintiff must prove the element of causation to effectively assert a products liability claim. Restatement (Second) of Torts § 402A (1965). For a further discussion on the element of causation, see also supra note 192.
the rigid elements necessary to prove products liability render the theory inapplicable to a state's claim against lead pigment manufacturers.\textsuperscript{204} The follow-up question therefore becomes: now what? What adequate remedy does the court system presently provide to innocent children, who were in the wrong place at the wrong time and became the unfortunate victims of lead poisoning? Gertrude Stein's blunt words are extremely apropos in this situation, "There ain't no answer. There ain't gonna be any answer. There never has been an answer. That's the answer."\textsuperscript{205}

\section*{VI. IMPACT}

Before the \textit{Lead Industries} decision, Rhode Island's court system remained the only glimmer of hope to those fighting for a successful use of public nuisance theory against product manufacturers.\textsuperscript{206} The reversal of the lower court's decision, however, significantly lessened the chance for public nuisance theory to be used effectively against product manufacturers in the future.\textsuperscript{207} The decision also eliminated the possibility that former lead paint manufacturers would pay both healthcare costs for lead-poisoned children and costs to remove lead paint from Rhode Island homes and buildings.\textsuperscript{208}

Yet, the decision, albeit disconcerting, did not eradicate future strategies to address childhood lead poisoning. Since Rhode Island enacted legislation to regulate lead paint in residential areas, the number of newly lead-poisoned children has decreased signifi-

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\item bacco manufacturers were not liable for public nuisance); \textit{City of Chicago v. Beretta U.S.A. Corp.}, 821 N.E. 2d 1099 (Ill. 2004) (dismissing public nuisance claim against firearm manufacturers).
\item 204. For a discussion on products liability theory, see \textit{supra} note 202 and accompanying text.
\item 205. T.J. MacGregor, \textit{Kill Time} 307 (Kate Duffy ed., 2007) (quoting Gertrude Stein).
\item 206. For examples of cases where public nuisance claims against manufacturers proved to be inefficient, see \textit{supra} note 203.
\item 207. \textit{See} Peter B. Lord, \textit{R.I. High Court Overturns Lead-paint Verdict}, \textit{PROVIDENCE J.}, July 2, 2008, available at http://www.projo.com/business/content/Paint_suit_07-02-08_SEANHTM_v41.403bac8.html (noting that "[l]awyers said the decision will likely dampen the zeal other states and municipalities have expressed for filing similar suits.").
\item 208. For the Rhode Island Supreme Court's holding, see \textit{supra} note 151 and accompanying text. After spending an inordinate amount of money and time litigating this case and winning, it would be almost unheard of for the defendants to then voluntarily pay the plaintiffs. Lord, \textit{supra} note 207. One lawyer said, "[t]he state cut spending on lead abatement in half this year [2008], to about $650,000, because it anticipated getting some help from the companies. Now . . . it will have to look to other sources." \textit{Id.}
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cantly. Given that legislation has made a dent in the childhood lead poisoning crisis, and manufacturers will not pay to correct lead poisoning, it is possible that Rhode Island's legislature will enact new and improved environmental laws to further address the childhood lead poisoning crisis. Regardless, one lead-poisoned child is one too many; but the unfortunate truth is that most individuals or states do not have the power, skills or resources to completely eliminate childhood lead poisoning.

In an ideal world, money would not be an issue in rectifying childhood lead poisoning. Everyone would have the knowledge and means to be able to identify and safely remove lead paint from their own homes. Additionally, the attempted removal of lead paint would not come with the risks of causing further health hazards. In reality, however, neither individuals nor Rhode Island's government has the means to effectively remove the lead paint. Furthermore, attempts to remove it can also result in the...

209. For a discussion on the positive effects of lead paint legislation, see supra note 48 and accompanying text.

210. For a discussion on the success of lead paint legislation, see supra note 48.

211. See generally Giegengack et al., An Educational Strategy to Reduce Exposure of Urban Children to Environmental Lead: ENVS 404 at the University of Pennsylvania, in ACTING LOCALLY: CONCEPTS AND MODELS FOR SERVICE LEARNING IN ENVIRONMENTAL STUDIES 120 (Harold Ward ed., 1999) (providing example of significant monetary costs in removing lead paint from homes). Specifically, "[t]he cost of mechanical abatement of interior lead-based paint is currently about $15,000/house, or $6 billion to remove lead paint from only the interior surfaces of all affected houses in Philadelphia." Id. at 124. Additionally, research shows that "careless abatement may actually increase exposure to environmental lead by converting much of the removed paint to interior dust that then adheres to freshly cleaned surfaces, to be picked up by sticky little hands." Id. During Lead Industries, the State estimated that it would cost 2.4 billion dollars to "cleanup" Rhode Island's lead paint problem. Debra Cassens Weiss, Rhode Island Supreme Court Overturns Verdict Against Lead Paint Makers, A.B.A. J., July 1, 2008, http://www.abajournal.com/news/rhode_island_supreme_court_overturns_verdict_against_lead_paint_makers/. Nevertheless, there are some less expensive ways to reduce some of the hazards associated with lead paint. See Pierre Erville, Weatherization Rehab Asset Pres. P'SHIP, ISSUE BRIEF: STRATEGIES FOR ADDRESSING PAINT ABATEMENT IN LOW-INCOME WEATHERIZATION AND REHAB 3 (2004) (discussing costs associated with lead abatement). Only in extreme situations would it cost "tens of thousands of dollars to remove all lead paint from a large, free-standing single-family home." Id. Today, it is more common to use a technique that involves paint stabilization and lead dust cleanup. Id. "Paint stabilization entails wet scraping the old paint off (to avoid dust generation), and then repainting with non-lead paint." Id. This method is much less expensive and still is able to reduce some of the health hazards lead paint poses. Id.

212. For a discussion on hazards and costs of lead paint removal, see supra note 211 and accompanying text.

213. For a discussion on the costs of removing lead paint from buildings, see supra note 211.
creation of a more hazardous environment for children.\footnote{214} Nevertheless, there are realistic steps to take in order to reduce the effects of this intense environmental problem.\footnote{215} While schools can continue to educate children and their families about the harm of lead poisoning, the government can provide assistance so the public can protect itself against such harm.\footnote{216} Moreover, the Rhode Island legislature can enact additional legislation to protect low-income individuals if they inquire or complain to their landlords about the presence of lead in their homes.\footnote{217} In such a scenario, courts would be required to enforce the laws which the legislature creates.\footnote{218}

As the Rhode Island Supreme Court aptly concluded in \textit{Lead Industries},

\begin{quote}
[This] was a hard case—hard not in the sense that it [was] legally difficult or tough to crack, but in the sense that it [required the justices] to deny relief to a plaintiff for whom [they had] considerable sympathy. [They had to] for it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.\footnote{219}
\end{quote}

\footnotetext{214}{For a discussion on hazards of lead removal, see \textit{supra} note 211.}
\footnotetext{215}{For a discussion on steps to take to minimize childhood lead poisoning, see \textit{infra} notes 216-18 and accompanying text.}
\footnotetext{216}{For an example of a resource that teachers can use to help educate young children about the dangers of lead poisoning, see Sesawmorkshop, http://www.sesawmorkshop.org/initiatives/health/lead (last visited Feb. 20, 2009) (providing video and written information about lead's dangers). \textit{See} Erville, \textit{supra} note 211, at 2 (noting several federal programs that exist to provide grants so that low-income homeowners can afford to make home rehabilitations). Some of these programs also provide grants "to support lead abatement work." \textit{Id}. Additionally, the Rhode Island Department of Health has information available on the internet so that the public can learn the requirements and ways to make their homes safe. Rhode Island Department of Health, Lead Poisoning Prevention Program, http://www.health.ri.gov/lead/renovating.php (last visited Feb. 16, 2008).}
\footnotetext{218}{For a discussion on effective legislation reducing childhood lead poisoning, see \textit{supra} note 48 and accompanying text.}
And so, for the time being, Rhode Island’s lead poisoning crisis remains painted thickly on the wall.

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