O.K. Corral II: Policy Issues in Municipal Suits against Gun Manufacturers

Frank J. Vandall
Articles

O.K. CORRAL II: POLICY ISSUES IN MUNICIPAL SUITS AGAINST GUN MANUFACTURERS*

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I. INTRODUCTION

There are several epidemics in the United States today that are placing massive losses on states, cities and families. They are tobacco, alcohol and guns. They affect our society in concert. Although govern-

* See Gunfight at the OK Corral (1957). In the movie Gunfight at the O.K. Corral, there was no concern about the damage to the corral. In the new municipal suits, however, the question becomes who should pay for the damages to the cities that flow from the continuing gun violence.

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1. See S. 2047, 100th Cong. § (a)(2) (1988) (noting that approximately one-half of all accidental deaths, suicides and homicides are alcohol related); H.R. 4441, 100th Cong. § 1(2) (1988) (noting that alcohol use costs American economy $1.2 billion per year and alcohol related accidents cause over 23,987 deaths per year); see also Don B. Kates et al., Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?, 62 Tenn. L. Rev. 515, 584 (1995) (noting that men who kill their domestic partners are prone to alcohol abuse); Rachel Gottlieb & Trish Willingham, Mayors See Verdict as Ammunition; Officials in Bridgeport and Other Cities Across the Nation Said a Federal Jury’s Finding Gun Makers Negligent Serves as Motivation to Pursue Similar Lawsuits, Hartford Courant, Feb. 13, 1999, at B1 (reporting that jury awarded $560,000 to one plaintiff). The Chicago suit alleges that manufacturers and distributors saturate suburban gun markets knowing that most guns purchased are brought into the city where handgun ownership is regulated. See Stevenson Swanson, Jurors Find 15 Gunmakers Negligent in N.Y. Shootings, Chi. Trib., Feb. 12, 1999, at A1 (noting suit that alleged gun manufacturers designed and marketed their guns to facilitate illegal sales to criminals). A jury in a suit brought against handgun manufacturers in a New York federal court returned a plaintiff’s verdict under a similar market saturation theory. See id. (noting that many guns were sold in Southern states with lax gun laws and illegally sent to other states with stricter laws); see also Fox Butterfield, Chicago is Suing Over Guns From Suburbs, N.Y. Times, Nov. 13, 1998, at A4 (noting that guns are creating “excess” costs for Chicago’s police, fire departments and public hospitals).

2. For a discussion of tobacco, alcohol and guns, see infra notes 22-23 and accompanying text.

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mental units have not yet sued the alcohol manufacturers, several cities have sued gun manufacturers for the costs of gun-related violence.3

The United States is the most violent country in the world not currently at war. In 1993, for example, one American child died every ninety-two minutes from gunfire, an average of over fifteen children each day.4 Additionally, approximately 35,000 Americans die from gunfire each year.5 By way of comparison, there were 9,390 gun-related homicides in the United States in 1996, but only fifteen in Japan and thirty in Great Britain.6 Until the recent suits by Atlanta, Bridgeport, Chicago, New Orleans and Miami to recover the costs of dealing with gun-related violence, American society had largely ignored this violent loss of life.7

This Article does not discuss the issues involved in the Second Amendment debate.8 Instead, this Article assumes that the Constitution will be interpreted to permit suits by cities against gun manufacturers to


5. See Rankin, supra note 3, at A1 (noting that gun manufacturers contributed to death total by marketing their products to foster growth of underground market sales).


7. See Butterfield, supra note 1, at A4 (noting that cities of Chicago, New Orleans, Miami, Atlanta and Bridgeport have all filed suits against gun manufacturers in recent months); Dahleen Glanton, NRA, Firearms Industry Work to Fight Cities' Suits, CHI. TRIB., Feb. 4, 1999, at 5 (noting that several cities are suing for costs of medical care and intervention resulting from gun violence); Rankin, supra note 3, at A1 (noting that tobacco lawsuits were filed several years before lawsuits against gun manufacturers).

8. Compare Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 EMORY L.J. 1139, 1141 (1996) (quoting Professor Daniel D. Polsby as saying, "almost all the qualified historians and constitutional-law scholars who have studied the subject [concur]. The overwhelming weight of authority affirms the Second Amendment establishes an individual right to bear arms ...."), with Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U. L. Rev. 57, 58 (1995) (arguing that Second Amendment does not extend right to bear arms for self-defense or hunting). Essentially, articles on the constitutional issue and the right to bear arms divide into two camps. Some scholars argue that the Second Amendment of the Constitution establishes a right to possess a gun. Other academics contend that application of the Second Amendment is limited to the militia and, therefore, cases and statutes that restrict ownership and possession of various guns would survive constitutional challenge. In support of the latter contention, Professor Herz notes the following: [T]he courts have consistently found that the Second Amendment guarantees a right to bear arms only for those individuals who are part of a "well regulated Militia"—today's stateside National Guard. Despite widespread belief to the contrary, the courts have clearly held that there is no right to bear arms for self-defense, hunting, or shooting competitions,
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the losses that result from dealing with the damages caused by gun violence.9 This Article will address the economic, cause in fact and proximate cause policy issues in these suits.10

The enormous cost to local government from gun violence provides the foundation for the recent suits brought by several cities. Chicago, for example, is asking for $433 million in its complaint against gun manufacturers.11 These expenses include the hiring of extra police, cleaning up after a shooting in a public area and the medical costs associated with treating gunshot victims. The expenses also include welfare expenditures for surviving families and disabled victims and, in some cases, the added cost of extra police who deal with gun violence.12 What has not been calculated are the enormous secondary costs that grow out of living in walled communities. Homes today are advertised to indicate whether they are gated or have substantial security.13 One of the reasons for the deterioration of our large cities is the fear of being mugged, murdered or raped by someone using a gun to carry out their threats. The city of Bridgeport, Connecticut, for example, is suing for the cost of the deterioration of the city.14

Id.

9. For a discussion of the historic nature of the damage suits against gun manufacturers, see infra note 200 and accompanying text. In October, 1999 the Supreme Court denied cert. to two cases that raised the constitutional right to own a gun. See Richard Carelli, Supreme Court Twice Rejects Gun Ban Appeals, ATLANTA J. & CONST., Oct. 13, 1999, at A6. Apparently help for the gun industry is not on the way.

10. For a discussion of economic, cause in fact and proximate cause policy issues in suits against gun manufacturers, see infra notes 30-159 and accompanying text.

11. See Butterfield, supra note 1, at A4 (noting that on November 12, 1998, Chicago’s mayor, Richard Daley, filed $433 million suit against 22 gun manufacturers, 4 gun distributors and 12 suburban stores). The suit charged gun manufacturers with creating a “public nuisance” by knowingly flooding the city with illegal weapons. See id. (noting that city hopes lawsuits will reduce urban violence and recover costs resulting from illegal gun sales).

12. See Swanson, supra note 1, at A1 (noting allegation in Chicago suit that manufacturers and distributors saturate suburban gun markets knowing that most guns bought are brought into cities where handgun ownership is regulated). A jury in a suit brought against handgun manufacturers in a New York federal court returned a plaintiff’s verdict under a similar market saturation theory. See id. (noting jury’s finding that 15 gun manufacturers were liable for $4 million in damages); see also Butterfield, supra note 1, at A4 (asserting that guns are creating “excess” costs for Chicago’s police, fire departments and public hospitals).


14. See Gottlieb & Willingham, supra note 1, at B1 (noting that gun manufacturers are not using existing technology such as gun locks to limit violence).
Fear, however, may be the largest cost of gun violence.\textsuperscript{15} People are afraid to travel through the core of many of our cities, to walk at night without being escorted by the police and even to drive in our inner cities.\textsuperscript{16} This fear is triggered, in part, by gun-related violence.

The gun manufacturers suggest that the suits by the cities are misdirected—that the key question is one of responsibility.\textsuperscript{17} They argue that everyone should be able to own a gun, that no gun control laws should be passed and that no suits should intrude into the status quo of gun marketing.\textsuperscript{18} Their rallying cry is that people who own guns should be responsi-

\textsuperscript{15} See Cynthia Tucker, Another Son Lost to Gun Violence, ATLANTA J. & CONST., Jan. 26, 1997, at B7 (noting that parents should be more worried about their children dying as result of gun violence than worrying about them being killed in automobile accidents). In 20 states in 1994, more Americans between the ages of 15 and 20 died due to gunfire than car wrecks. See id. (noting that gun violence kills about 100 Americans daily). Overall, cars were only slightly more deadly that year, killing 42,524 people compared to 38,505 people by gun fire. See id. (noting that many lawmakers want stricter regulations on gun sales).

\textsuperscript{16} See Diane R. Stepp, School Watch Students Signing 'No-Guns' Pledge Safety Issue: Parents of Many Middle School Pupils Will Get Copies of the Promise About Gun Safety During Their Next Teacher Conference, ATLANTA J. & CONST., Oct. 15, 1998, at Cobb Extra 4 (discussing articles by middle school student about gun violence). One student from metropolitan Atlanta wrote about the experience of the child’s neighbor who was paralyzed from being shot six times in the back. See id. Another student wrote about how students have to stay inside after school because of the fear of guns. See id. (noting that both wealthy and poor children fear gun violence). Fear of guns can cause people to purchase even more guns. See Lisa Beth Pulitzer, Women Bearing Firearms Increasing, N.Y. TIMES, June 14, 1992, at L13 (noting that most women who own guns cite fear as one reason for initial purchase). Fear of rising crime, due largely to guns, is the most common reason why 15 to 20 million American women own guns today. See id. (noting rising crime rate as major motivation for women who purchase guns).

\textsuperscript{17} See Jeff DeBord, Editorial, ATLANTA J. & CONST., June 12, 1998, at A18 (discussing theory that guns do not kill people, but rather people kill people). In response to an article on gun control, one Georgia resident wrote:

\textquote{The shootings are a sad reminder of the moral decay in our society. They have nothing to do with the availability of guns. Guns have been available for a long time. I take full responsibility for my guns and my kids. The last thing we need is another law to delegate that responsibility.}

Id.

\textsuperscript{18} See id. (noting that gun manufacturers believe that gun owners should be more responsible); see also Editorial, ATLANTA J. & CONST., Jan. 16, 1999, at A12 (arguing that trigger-puller, not firearm, is responsible for crime). The myth of self-defense is shown by the fact that a member of the household with a gun in the home is 43 times more likely to be shot than the intruder. See A.L. Kellerman & D.T. Reay, Protection or Peril? An Analysis of Firearm-related Deaths in the Home, 314 NEW ENG. J. MED. 1557, 1559 (1986). John Lott has argued that the more guns, the less crime. See generally John R. Lott, Jr. & David B. Mustard, Crime, Deterrence, and Right-to-Carry Concealed Handguns, 26 J. LEGAL STUD. 1 (1997). Lott’s theory was shot down by Paul Rubin in Hashem Dezbakhsh & Paul Rubin, Lives Saved or Lives Lost: The Effects of Concealed Handgun Laws on Crime, 468 (Jan. 1998) (unpublished manuscript, presented at American Economic Association meetings in Chicago).
ble citizens and lock their guns away from children. They argue that the wrongful parties are the possessors and owners of guns; the gun manufacturers are merely disinterested third parties. Gun owners ignore the fact that they or a person in their home are forty-three more times likely to be shot than an intruder.

The responsibility that must be examined, however, is legal responsibility. Our society has to ask what are the most serious problems plaguing our communities. In making that inquiry, we soon reach the conclusion that we have three converging and overlapping epidemics. They are, in

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19. See Joel Kilthau, Editorial, ATLANTA J. & CONST., Sept. 2, 1998, at A14 (arguing that increased responsibility will reduce gun violence). A recent letter to the editor of the Atlanta Journal and Constitution is fairly representative of this view: The bottom line with guns is responsibility: responsibility of the owners to keep them out of the reach of children and to teach children (and adults) what guns can do. It is a lack of responsibility that has led to this era of gun-related violence and the proliferation of gun violence by and against children. Gun safety is not about political endorsements, lobbying groups or constitutional rights. It's about responsibility. Id.


21. See Kellerman & Reay, supra note 18, at 1559.

22. See S. 2047, 100th Cong. § (a)(2) (1988) (noting that tobacco, alcohol and guns affect our society in concert). Approximately one-half of all accidental deaths, suicides and homicides are alcohol-related. See id. (noting that alcohol substantially increased risk of suicide); H.R. 4441, 100th Cong. § 1(9) (1988) (noting that alcohol is most commonly used drug by American youth); see also Kates, et al., supra note 1, at 584 (noting that men who kill their domestic partners are prone to alcohol abuse).
order of severity, tobacco, alcohol and guns. This Article will examine the question of legal responsibility for gun-related violence.

The responsibility of the gun manufacturers is the cornerstone of these recent suits brought by American cities. The cities are asking the manufacturers to take responsibility for the marketing of their products. The recent tort suits raise three important issues that are addressed in Sections II, III and IV of this Article: Section II addresses economic analysis; Section III addresses cause in fact; and Section IV addresses proximate cause. Additionally, Section V discusses the potential viability of products liability claims against gun manufacturers. Finally, Sections VI and VII of this Article assess the role of courts in these revolutionary lawsuits and suggests the traditional methods upon which they should be evaluated.

II. Economic Analysis

Because of the insulation of the gun industry, the costs of dealing with gun violence have been shifted from the government to private and corpo-

23. For a discussion on tobacco and alcohol, see Raymond E. Gangerosa et al., Suits by Public Hospitals to Recover Expenditure for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol, 22 FORDHAM URB. L.J. 81, 82 (1994) (noting that smoking inhibits hospitals from preventing disease and promoting efficiency). Each year smoking kills 350,000 people. See Hearings Before the Subcomm. on Health and the Env’t of the Comm. on Energy and Commerce, 99th Cong. 4 (1986) (noting that 90% of smokers start before end of their teenage years); see also ELIZABETH M. WHELAN, A SMOKING GUN: HOW THE TOBACCO INDUSTRY GETS AWAY WITH MURDER 10 (1984) (noting that 17.7 million people over age 18 suffer from negative effects of alcohol). In 1988, the House of Representatives reported that almost 24,000 Americans die each year in traffic accidents as a result of alcohol consumption. See H.R. 4441, 100th Cong. § 1(3) (noting that, in United States, alcohol-related traffic accidents produce more than 23,987 deaths per year); see also Janice Somerville, Gun Control as Immunization, AM. MED. NEWS, Jan. 3, 1994, at 9 (quoting CDC official as stating “Guns are a virus that must be eradicated. We need to immunize ourselves against them ... [g]et rid of the guns, get rid of the bullets, and you get rid of the deaths.”). Between 1979 and 1987, criminal offenders used handguns to kill an average of 9,200 Americans each year and wound 15,000 others. See Nyla R. Branscombe & Susan Owen, INFLUENCE OF GUN OWNERSHIP ON SOCIAL INFERENCE: ABOUT WOMEN AND MEN, 21 J. OF APPLIED SOC. PSYCHOL. 1567, 1584 (1991) (noting that men cause majority of gun related violence). Additionally, during the same time period, 1,200 people died yearly from handgun accidents. See id. Recent studies put the numbers of deaths per year due to guns at over 35,000. See Tucker, supra note 15, at B7 (noting that car accidents and gun violence produce similar amounts of deaths each year).

24. For a discussion of the question of legal responsibility for gun-related violence, see infra notes 30-159 and accompanying text.

25. For a discussion of economic analysis, see infra notes 30-60.

26. For a discussion of cause in fact, see infra notes 61-87.

27. For a discussion of proximate cause, see infra notes 88-159.

28. For a discussion of the design defect theory of suit, see infra notes 160-67 and accompanying text.

29. For a discussion of the role of courts and the basic nature of damages suits against gun manufacturers, see infra notes 168-200 and accompanying text.
rate taxpayers. High taxes have made it more expensive to live in cities and more costly to run a business. These recent suits against gun manufacturers argue that the costs of gun violence should shift from the cities to the manufacturers of the guns and then to the purchasers of guns. In economic terms, the cities are asking the gun manufacturers to internalize the costs of gun violence. This was done with the steel industry when the costs of air and water pollution were placed on steel manufacturers. Consequently, the price of steel increased to reflect those costs.

Once the cost of gun violence is placed on gun manufacturers, several things may happen. It is not inevitable that if the municipalities are successful, gun manufacturers will immediately file for bankruptcy or decrease the number of guns on the street. The potential occurrences follow:

1. Nothing may happen. The loss brought on by the cities' suits may be absorbed by the manufacturers. This is often true in automobile litigation. Ordinarily, there will not be immediate increases in the prices of the automobile even though the car manufacturer was recently sued.

30. See Julie B. Hairston, Atlanta Officials at Odds Over Next Cuts in Budget, Reducing Revenues Pinches City, ATLANTA J. & CONST., Oct. 12, 1998, at 84 (suggesting that less migration to suburbs would improve city services and lower taxes). In a good number of urban centers, many middle class taxpayers, who make up the bulk of the tax base, have left for suburban neighborhoods. See id. This has caused cities to raise tax rates to pay for city services. See id. (noting that cities must also reduce their proposed budgets). During the 1980s, taxes in Atlanta were 40% higher than in other parts of Fulton County, Georgia. See Tom Teepen, City Must Look To Its Tax Future, ATLANTA J. & CONST., Dec. 27, 1986, at A10. Taxes in Fulton County were nearly double those of neighboring Cobb County. See id. (noting that Atlanta's basic services were nearly identical to those of Cobb County).

31. See Louis Kaplow & Steven Shavell, Accuracy in Assessment of Damages, 39 J.L. & ECON. 191, 192 (1996) (noting that gun manufacturers and owners often bear cost of social harm caused by guns); see also A. Mitchell Polinsky & Steven Shavell, Should Liability be Based on the Harm to the Victim or the Gain to the Injuror?, 10 J.L. & ECON. & ORC. 427, 428 (1994) (noting that tort and contract claims are usually based on harm to injured party).

32. See Polinsky & Shavell, supra note 31, at 428 (arguing that liability should be based on profit of gun manufacturers and not harm to victim).


34. Daniel K. Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 HARV. L. REV. 546, 606 (1987) (noting that increase in environmental regulations forced U.S. Steel Industry to demand higher tariffs on foreign imports to maintain competitiveness).

35. See Frank J. Vandall, Criminal Prosecution of Corporations for Defective Products, 12 INT'L LEGAL. PRAC. 66, 68 (Sept. 1987) (noting that punitive damages are rarely awarded against car manufacturers and, when they are, they are often small); see also Gary Schwartz, The Myth of the Ford Pinto Case, 43 RUTGERS L. REV. 1013, 1060 (1991) (noting that cost of Ford Pinto increased by only $10 after its redesign following litigation).
2. The price of the specific gun may increase to reflect the damage it causes. The gun manufacturer may analyze what portion of the judgment is due to a specific gun and increase the price of that gun accordingly. Following the recent tobacco settlement, for example, the price of a pack of cigarettes increased forty-five cents. Tobacco products are, nevertheless, still available. Furthermore, price increases caused by product litigation alert the consumer to potentially unsafe products. As a result, consumers purchase fewer high-priced products. This, in turn, encourages the manufacturer to produce safer products.

3. The particular gun may be redesigned. The gun manufacturer may incorporate a computer chip in the stock of the gun so that it can only be fired by someone with a matching computer chip. There may be combination locks placed on the gun so that no one can use the gun without knowing the combination. The gun may be changed from an automatic to a single shot weapon and, any attempt to change it back, will make the gun unusable. Similar techniques are used on ATM's that destroy un-


37. See Barry Meier, Cigarette Makers Announce Large Price Rise, N.Y. TIMES, Nov. 24, 1998, at A1 (reporting that due to settlement, Philip Morris and R.J. Reynolds Tobacco Company were both raising cigarette prices 45 cents per package); see also Cigarette Prices Rise Sharply in Wake of States’ Tobacco Settlement, WASH. POST, Nov. 24, 1998, at A5 (noting tobacco analyst statement that reason for price increase was “to fund the settlement payment”).

38. See ROBERT COOPER & THOMAS ULEN, LAW AND ECONOMICS 421-62 (1988) (analyzing modern products liability law from economic standpoint). Where a manufacturer is required to compensate parties injured by its defective products, the manufacturer will foresee losses likely to be incurred due to those products. See id. (noting that risk of suit against tobacco companies causes increase in cigarette prices). Therefore, the cost of such foreseeable losses will be included in the price of those products, and act as an implicit insurance policy. See id. (predicting that national average price of cigarettes would increase nearly 26% due to large tobacco settlement).

39. See Roy J. Ruffin & Paul R. Gregory, PRINCIPLES OF MICROECONOMICS 50-52 (5th ed. 1993) (noting basic economic principle that there will be fewer purchasers of goods at higher price than if that good was sold at lower price).


41. See James Bennet, Gun Makers Agree on Safety Locks, N.Y. TIMES, Oct. 9, 1997, at A3 (noting that technology can prevent thieves from stealing guns and using them in crimes). In 1997, the Clinton Administration reached an agreement with a number of gun manufacturers requiring new handguns to be manufactured with child-safety locks. See id. (noting that gun locks would decrease number of accidental deaths cause by guns). The agreement, however, covered about 80% of the new handgun market. See id. This agreement did nothing to increase the safety of those weapons already in circulation. See id. (noting that older guns are responsible for majority of deaths).
funded credit cards. Producing safer guns appears no more technologically challenging than producing voracious ATM machines. 42

4. The specific gun may be withdrawn from the market. Likely candidates for such an approach include the Saturday Night Special and automatic weapons. 43 A manufacturer may discontinue the Saturday Night Special because the guns are responsible for a large amount of violent acts and monetary loss to the cities. By way of example, the Ford Pinto had a tendency to explode when hit in the trunk.44 Consequently, the Pinto was redesigned and later withdrawn from the market. As a further example, automatic rifles are now banned. 45 Although new automatic rifles cannot be purchased in the United States they can still be obtained from individuals. 46 For that reason, the ban is largely meaningless.

5. Small gun manufacturers who cause large amounts of damage may file for bankruptcy. Manufacturers sometimes choose bankruptcy when liabilities exceed assets. 47 Some critics have argued that numerous bankruptcies may decrease the number of guns in the American society. 48 Such an outcome, however, remains unlikely because guns would continue to be manufactured by the government for the police and the military. Defense contractors will continue to produce firearms for the military under government contracts just as they do today. Hunters may be able to request

42. For a further discussion of the role of courts and the basic nature of damage suits against gun manufacturers, see infra notes 168-200 and accompanying text.

43. See Kelley v. R.G. Industries, 497 A.2d 1143, 1153-54 (Md. 1985) (discussing derivation of term Saturday Night Special). The Saturday Night Special is a small handgun that is cheap, easily concealed and extremely unreliable. See id. at 1154 (noting that Saturday Night Special is constructed of poor quality material). Gun salespeople have been quoted as describing their Saturday Night Specials as "ghetto guns." See id. A salesman for R.G. Industries, describing a handgun he was selling, said to a retailer, "If your store is anywhere near a ghetto area, these ought to sell real well. This is most assuredly a ghetto gun." Id. at 1158. In October, 1999, Colt abandoned most of its 144-year-old retail gun business. See Tom Tepen, LaBott Suits Substitute for Decent Gun Policy, ATLANTA J. & CONST., Oct. 19, 1999, at A19.

44. See Schwartz, supra note 35, at 1019 (noting that prior to discontinuing Pinto, Ford redesigned it by adding $11 plastic sheet to protect its gas tank from rupturing on impact).


46. See Violence Policy Center Hails Clinton's Call to Regulate Gun Shows, U.S. NEWSWIRE, Nov. 9, 1998, available in 1998 WL 13607302 (noting that all types of guns can be purchased at gun shows).

47. See Elizabeth Warren & Jay Lawrence Westbrook, The Law of Debtors and Creditors 470-71 (3d ed. 1996) (noting that businesses faced with large debts will often choose to reorganize under Chapter 11 of Bankruptcy Code to prevent having to liquidate their assets).

48. See David G. Epstein et al., Bankruptcy § 10-2 (1993) (noting that small and medium-sized debtors reorganizing under Chapter 11 of the Bankruptcy Code often fail to have plan confirmed and therefore must be liquidated).
special permits for rifles, but this would still keep handguns out of circulation.\textsuperscript{49} In response to those who argue that the gun manufacturers will go bankrupt if sued, no cigarette manufacturer has gone bankrupt in spite of having agreed to pay out $206 billion over twenty-five years.\textsuperscript{50} The Pinto debacle, as mentioned above, did not drive Ford into bankruptcy.\textsuperscript{51} Conceivably though, if there are fewer manufacturers producing guns, there may be fewer guns produced.

6. \textit{The gun manufacturers will likely spend more money on lobbying the state and federal legislatures for special legislative protection.} Gun manufacturers may seek to have Congress adopt protective laws just as tobacco companies have with cigarettes. For example, gun manufacturers may ask the courts for a prohibition against suits brought by the cities because of a failure to warn.\textsuperscript{52} The gun manufacturers may lobby Congress to adopt a bill that would prohibit any liability against them for Saturday Night Specials, zip guns or uzzis. An example of this is the Georgia legislature who just passed legislation forbidding municipal suits against gun manufacturers.\textsuperscript{53} Additionally, Congressman Barr has threatened to introduce similar legislation before Congress.\textsuperscript{54}

7. \textit{There would probably be a flood of media ads by the gun manufacturers, such as the recent ones by the cigarette companies, proclaiming that they are being treated unfairly by the courts, and suggesting that guns are similar in utility to knives or automobiles.}\textsuperscript{55} To be sure, the flood of tobacco ads may have
helped to doom the $868.5 billion settlement.\textsuperscript{56} If the cities win and the gun manufacturers are held liable, the next step is up to the manufacturers. It is important to keep in mind that a civil judgment is not the equivalent to a ban on guns; rather it merely requires the payment of damages.\textsuperscript{57} A manufacturer who has lost a products liability suit may continue to produce the product.

8. \textit{There may be increased federal regulation over guns.} An example of this tighter control over guns is the Brady Bill.\textsuperscript{58} A recent report indicated that it has been very effective in reducing sales to criminals.\textsuperscript{59} Another report states that because of the Brady Bill, thousands of felons each year are unable to purchase a gun.\textsuperscript{60}

\section*{III. \textit{Cause In Fact}}

Cause in fact in a tort suit for damages is a matter of science.\textsuperscript{61} The question is whether, as a matter of science, the defendant's conduct had something to do with the plaintiff's injury. For example, the plaintiff must show that the gun manufacturer had something to do with the loss of life and that the manufacturer precipitated the need to hire additional police. There are two tests for cause in fact: the "but for" test and the "substantial factor" test.\textsuperscript{62} "But for" causation may fail when there are two concurrent

\textsuperscript{56} See id. (noting that National Smokers Alliance supported 60-second radio spots asking why consumers should pay $500 billion in new taxes because of tobacco settlement).

\textsuperscript{57} See Richman \textit{v.} Charter Arms Corp., 571 F. Supp. 192, 203 (E.D. La. 1983) (noting that if manufacturer is found liable, it may still produce handguns and pass costs of unfavorable judgment onto purchasers in form of higher prices), rev'd sub nom. Perkins \textit{v.} F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).


\textsuperscript{59} See id. (reporting that 66.3\% of denials were because of purchaser's criminal record).

\textsuperscript{60} See R. Robin McDonald, \textit{Brady Law Daily Stops 6 Gun Buys; Results Hailed; A U.S. Attorney Says the Curb on Quick Weapon Sales is Preventing Crime in Georgia}, Atlanta J. \& Const., Feb. 28, 1995, at C1 (noting that in its first year, Brady Bill stopped 2,362 felons from purchasing handguns in Georgia according to Georgia Crime Information Center).


\textsuperscript{62} See W. Page Keeton, \textit{et al.}, \textit{Prosser and Keeton on the Law of Torts} § 41 (5th ed. 1984) (explaining two tests of causation); \textit{see also} Gilman \textit{v.} Noyes, 57 N.H. 627, 631 (1876) (using "but for" test to determine cause in fact); Schultz \textit{v.} Brogan, 29 N.W.2d 719, 721 (Wis. 1947) (discussing use of substantial factor test for cause in fact).
causes that bring about an event. 63 This often occurs in product cases, and for this reason, the substantial factor test is more often used. 64 Under the substantial factor test, the court would seek to determine whether the defendant's conduct (selling a defective gun) was a substantial factor in causing the plaintiff's injury.

There are serious issues in reference to a cause in fact analysis in both tobacco suits and suits against gun manufacturers. In tobacco cases, it may be difficult for the parties to identify every type of cigarette a plaintiff smoked. Similarly, in firearms cases, it will be difficult to show which weapons actually caused the harm inflicted. This is because the weapons used to perpetrate crimes are often never recovered. 65

With individual suits brought by smokers suffering from cancer, the issue of fact before the court is often whether the individual smoker consumed only Marlboros or did they also smoke Luckies and Camels? Of course a smoker would have smoked several different brands over the period of their life. This creates a substantial cause in fact problem for individual smokers, and it also raises cause in fact issues in the later suits by the states against the manufacturers of tobacco. For example, how do you prove the amount each smoker consumed of each brand of cigarettes? No records are available to answer that question, and the depositions of the smokers or hospital officials are inconclusive. There is also the cause in fact question of whether the plaintiff's cancer was actually caused by smoking. It is possible that environmental factors or genetic factors were the cause in fact. 66 Fortunately, the law has evolved to respond to the difficulties of proving these challenging cause in fact suggestions.

Perhaps the most important case dealing with complex cause in fact issues is a California Supreme Court case, Sindell v. Abbott Laboratories. 67 In Sindell, a twenty-year-old woman developed vaginal cancer because her mother had taken DES to prevent a miscarriage while the daughter was in utero. 68 The allegation was that the DES caused the daughter's vaginal cancer twenty years later. 69 The cause in fact issue was that the mother could not remember what brand of DES she consumed and the doctor did


64. See id.

65. See, e.g., Bounds v. Delo, 151 F.3d 1116, 1117 (8th Cir. 1998) (stating murder weapon was never recovered); United States v. Lake, 150 F.3d 269, 271 (5th Cir. 1998) (stating gun used in carjacking was never recovered); United States v. Williams, 95 F.3d 723, 728 (8th Cir. 1996) (explaining police never recovered weapon used in murder).

66. For a discussion of causation issues, see supra notes 30-65 and infra notes 67-159 and accompanying text.

67. 607 P.2d 924 (Cal. 1980).

68. See id. at 925.

69. See id. at 925-26.
not keep records of the brand of DES he prescribed for the mother.\textsuperscript{70} Therefore, the plaintiff-daughter could not show which DES manufacturer was the cause in fact of her cancer.\textsuperscript{71}

The court resolved the issue by allowing the plaintiff to sue a majority of the manufacturers of DES, holding each of the defendants liable in proportion to the amount of their sales.\textsuperscript{72} For example, if a manufacturer had sold thirty-three percent of the DES, and over fifty percent of the manufacturers were joined, it would be liable for thirty-three percent of the plaintiff's damages.\textsuperscript{73} In a later New York case, \textit{Hymovitz v. Eli Lilly & Co.},\textsuperscript{74} the court did not restrict the defendants to those who had only manufactured and sold DES in the state of New York, and the court allowed the plaintiff to recover the full amount of her damages, not a percentage as was true in \textit{Sindell}.\textsuperscript{75}

However, in \textit{Collins v. Eli Lilly Co.},\textsuperscript{76} the Wisconsin Supreme Court allowed the defendant, the DES manufacturer, to avoid joinder in the suit, if the defendant could show that there was a distinguishing characteristic in the pill sold by the defendant.\textsuperscript{77} For example, if the defendant sold blue pills and the mother had only taken red pills, then the manufacturer of the blue pills could avoid joinder.\textsuperscript{78} The point of these DES cases was that the plaintiff, although unable to identify the manufacturer of the

\textsuperscript{70} See id. at 926.

\textsuperscript{71} See id. at 925-28.

\textsuperscript{72} See id. at 937 (holding that "[e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff’s injuries").

\textsuperscript{73} See id. (citing Comment, \textit{DES and a Proposed Theory of Enterprise Liability}, 46 Fordham L. Rev. 963, 997 (1978), and explaining connection between percentage of market share and liability).

\textsuperscript{74} 539 N.E.2d 1069, 1078 (N.Y. 1989) (using national market to determine liability).

\textsuperscript{75} See id. (adopting market share theory using national market). The court refused to allow a defendant to escape the suit by showing that it was not selling DES at the time the plaintiff’s mother consumed it. See id. (noting potential for defendant windfall). The New York Court of Appeals held the following: [B]ecause liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff’s injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill . . .

\textit{Id.}

\textsuperscript{76} 342 N.W.2d 37 (Wis. 1984).

\textsuperscript{77} See id. at 50 (holding that at trial, plaintiff must establish, by preponderance of evidence, that defendant produced or marketed type of pill that her mother took by reference to pills' color, shape, markings, size or other identifiable characteristics).

\textsuperscript{78} See id. at 52 (stating that defendant, in order to avoid liability, must prove by preponderance of evidence that it did not produce or market type of DES to which plaintiff was exposed).
specific DES that the plaintiff had taken, was still able to recover from hundreds of defendants.79 These DES cases are likely to become important precedents in the new wave of gun litigation because it is unlikely that the cities will be able to identify the brand of gun that was used in each shooting and thus will have to rely on the market share analysis developed in the DES cases.

The tobacco litigation by the states handled the thorny issue of cause in fact with statistics.80 In suits by individuals, it is possible to argue that there may be other causes of the cancer besides the tobacco smoked by the individual.81 Things such as genetics and environment may play a part in causing cancer in a particular person. But the suits by the states represent hundreds of thousands of victims, and the larger the class of individuals, the more accurate the statistical proof of cause in fact.82 It is possible to argue that, if twenty percent of smokers develop lung cancer, then in a state suit for damages, it is possible to be very accurate in saying that twenty percent of the smokers represented by the suit developed lung cancer from smoking.83 The point is that the larger the group of victims the more reliable the statistics are in showing what in fact caused the damages.

The rule in the Sindell case will also be helpful in gun litigation.84 Applying the Sindell rule, the gun manufacturers will likely be held liable in proportion to their sales. If Glock, for example, sold twenty-five percent of the guns in Chicago from 1994 through 1999, then Glock will likely be liable for twenty-five percent of the Chicago loss, unless they can prove otherwise. Based upon the Sindell rule, Glock will be able to join Remington and Winchester to show that they sold ten percent and five percent of the guns respectively, and therefore Glock will not be liable for the fifteen percent represented by the sales of Remington and

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79. See id. at 44 (noting that as many as 300 drug companies produced or marketed DES throughout nearly 24 years of DES sales).
83. See Massey, supra note 80, at 602-03 (discussing purpose for recent amendments to Fla. Stat. § 409.910 (Supp. 1994)).
84. See Sindell v. Abbott Laboratories, 607 P.2d 924, 936-38 (Cal. 1980) (noting problems experienced by plaintiffs when they tried to identify individual DES suppliers). In the cities’ cases against the gun manufacturers, it will be difficult to determine exactly which and how much, each companies’ guns contributed to the damages the cities have experienced. A market share liability theory would make recovery much easier.
Winchester. Each gun manufacturer will be liable in proportion to their sales. This is a preliminary analysis. At trial, the defense will likely argue the distinctions between collector-model, over-under shotguns that are not likely responsible for much loss to the cities, and Saturday Night Specials that are more likely to be responsible for a great deal of the loss. The manufacturers of the over-unders will be dismissed from suit and the manufacturers of Saturday Night Specials will be held liable.

IV. PROXIMATE CAUSE

Proximate cause is a matter of policy; it is not a question of fact. Proximate cause was created by the judiciary in order to control juries and to limit the scope of liability. It is often said that proximate cause exists because there must be a line drawn somewhere.

There are two fundamental approaches to proximate cause: (1) the rule approach; and (2) the duty approach. Under the rule approach, the court has to struggle to find a rule for proximate cause that will answer policy issues in all cases. Over the years, several rules for proximate cause have developed. One is the directness test, that holds the defendant liable

85. See id. at 937-38 (noting that under Sindell rule, manufacturer is only responsible for its share of market and is not held liable for any amount in excess of its market share).

86. See id. ("Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products.").


88. See Vandall, supra 61, at 343-44 (stating that proximate cause is strictly policy question); see also Leon Green, Proximate Cause in Texas Negligence Law, Pt. III, 28 Tex. L. Rev. 755, 757 (1950) (discussing effects of policy on proximate cause).

89. See Frank J. Vandall, Strict Liability: Legal and Economic Analysis 45 (1989) (citing William Prosser, Handbook of the Law of Torts 244-45 (4th ed. 1971)) (stating term proximate cause is applied by courts to limit liability when cause has been established).

90. See Keeton et al., supra note 62, at 261 (stating that "[s]ome boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy").

91. See In re Polemis and Furness, Wilthay and Co., [1921] 3 K.B. 560, 565-68 (Eng. C.A. 1921) (using rule approach to determine breach of duty). Under the rule approach, liability can be solved with a rule, whereby a party need only use the correct rule. See Vandall, supra note 61, at 343-45 (discussing scope of liability question). Foreseeability is used to answer almost every question in the traditional negligence formula under the rule approach. See id. at 344. The traditional negligence formula requires answering questions of duty, breach of duty, cause in fact, proximate cause and damages. See id. at 343 (stating study of proximate cause begins with five elements). Under the rule approach, the only element in the traditional negligence formula not influenced by foreseeability is cause in fact. See id. at 345 (discussing foreseeability in traditional negligence formula).

92. See Green, supra note 61, at 475-80 (noting Dean Green approach that focuses on whether there is duty of defendant to particular plaintiff for particular injury); see also Vandall, supra note 61, at 349 (applying Dean Green's duty analysis to several well known proximate cause cases).
for all injuries that flow directly from the defendant's negligent conduct. The second test assesses foreseeability and it holds that a defendant should only be liable for results of their negligent conduct when the defendant foresaw the results. The third test is the foreseeable small risk test, which holds that the actor can be held liable when there is a foreseeable small risk of the injury occurring. The fourth test is the foreseeable plaintiff or zone of danger test as articulated in the famous case of Palsgraf v. Long Island R.R. Co. In Palsgraf, Judge Cardozo held that a plaintiff could only recover if the defendant's action created a foreseeable risk to the plaintiff. If the risk of harm caused by the defendant's action was not foreseeable to the plaintiff, then the negligent conduct of the defendant would not extend to the plaintiff. A later formulation of the Palsgraf rule is the zone of danger test, which says that only persons within the zone of danger created by the defendant may recover from the negligent actor. That is, if the plaintiff is outside the zone of danger, then the plaintiff cannot recover under the Palsgraf rule. Municipalities will argue that gun manufacturers were the proximate cause of the cities' losses because they were: (i) direct; (ii) foreseeable; (iii) a foreseeably small risk; (iv) the plaintiffs (the cities) were foreseeable; and (v) the cities were within the zone of danger. The judge and the jury apparently accepted the above arguments in the 1999 New York decision of Hamilton v. Accutek.

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93. See In re Polemis, 3 K.B. at 564 (holding that defendant is liable for damages that are direct result of defendant's conduct).


96. 162 N.E. 99, 101 (N.Y. 1928). This case states that for plaintiff to recover, a plaintiff must show an act that caused harm was a foreseeable risk of harm to the plaintiff. See generally id.

97. See id. at 100-01 (stating that plaintiff must show act may have created readily apparent danger so as to entitle plaintiff to be protected against harm by law).

98. See id. (stating that without foreseeable act to plaintiff, plaintiff cannot recover for negligent act of defendant).

99. See RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1964) (stating that if plaintiff is within given area of danger, plaintiff may recover for injuries caused by defendant's actions).

100. See id. (stating that if plaintiff is outside given zone of danger, plaintiff cannot recover).

Proximate cause is often boiled down to the test of foreseeability and the critical issue of intervening cause.\textsuperscript{102} An intervening cause is one that comes from a source other than the defendant and occurs after the defendant’s negligent conduct.\textsuperscript{103} Further, an intervening cause is merely a later cause from another source, but a superseding cause is one that severs the first defendant’s liability.\textsuperscript{104} For example, if a defendant negligently runs its train into a truck stopped on the railroad track and thieves steal the melons that were thrown out of the truck after the collision, the court would find that the thieves caused the loss of the melons rather than the railroad.\textsuperscript{105} The act of the thieves severed the liability of the railroad. Using such an argument, gun manufacturers will contend that the conduct of the criminal in shooting the gun, supersedes their saturation selling or marketing of a defectively designed gun.

One of the most famous intervening cause cases involved a tank car filled with gasoline that, because of the negligence of the railroad, jumped the track, split open and spewed gasoline onto the city streets.\textsuperscript{106} A person ignited the gasoline causing great damage to the city.\textsuperscript{107} The court held that even if the person was negligent in lighting a cigar, the railroad remained liable because the negligent intervening cause did not sever the liability of the initial negligent actor, the railroad.\textsuperscript{108} The court, however, went on to say that if the intervening actor intentionally lit the gasoline vapors, then the railroad would not be liable because they could not foresee criminality.\textsuperscript{109} In other words, the railroad had no way of anticipating

\textsuperscript{102} See Vandall, supra note 61, at 343 (noting Dean Green’s position that intervening cause is subclass of duty and mere question of policy). Intervening cause should be subsumed under the duty analysis. See id. at 346 (stating insights of Dean Green).

\textsuperscript{103} See Restatement (Second) of Torts § 441 (1964) (defining intervening cause in terms of “intervening force” as “one which actively operates in producing harm to another after the actor’s negligent act or omission has been committed”); see also James Angell McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149, 159-60 (1925) (defining intervening force as “a force which is neither operating in the defendant’s presence, nor at the place where the defendant’s act takes effect at the time of the defendant’s act, but comes into effective operation at or before the time of the damage”).

\textsuperscript{104} See Keeton et al. supra note 62, at 301 (discussing how terminology came about and expounding on interplay between intervening and superseding causes).

\textsuperscript{105} See id. at 301-02 (providing general discussion of intervening causes).

\textsuperscript{106} See Watson v. Kentucky & Indiana Bridge & R.R. Co., 126 S.W. 146, 147 (Ky. 1910) (stating appellee’s tank car was derailed thereby spilling gasoline onto streets).

\textsuperscript{107} See id. (stating that explosion resulted when person threw lighted match used to ignite cigar onto gasoline covered street).

\textsuperscript{108} See id. at 150-51 (quoting Louisville Home Tel. Co. v. Gasper, 93 S.W. 1057, 1059 (Ky. 1906), “[i]t is well settled that the mere fact that there have been intervening causes between the defendant’s negligence and the plaintiff’s injuries is not sufficient in law to relieve the former from liability . . . “).

\textsuperscript{109} See id. at 151 (stating that if act of lighting match and throwing it was malicious, railroad would not be responsible).
that someone would intentionally light the gasoline on fire.\textsuperscript{110} Hence, the
criminal intervening cause of lighting the match would supersede the negli-
gence of the railroad.\textsuperscript{111}

Other cases have held that a criminal intervening cause may be fore-
seeable and, if so, the initial negligent actor should be held liable. For
example, in \textit{Richardson v. Ham},\textsuperscript{112} the owners of a bulldozer left it un-
locked and parked it at the top of a hill.\textsuperscript{113} Some boys came along, started
the bulldozer, drove it down the hill and crashed it into the plaintiff’s
house.\textsuperscript{114} The court held that because it was foreseeable that young
people would climb on the bulldozer, their criminal conduct in starting
the bulldozer and driving it down the hill was not a superseding cause.\textsuperscript{115}

Similarly, in \textit{Hergenrether v. East},\textsuperscript{116} the defendants left a pickup truck,
filled with valuable plumbing supplies, in a densely populated neigh-
borhood overnight.\textsuperscript{117} During the night, thieves stole the truck and crashed
it into the plaintiff’s car.\textsuperscript{118} The court held that the conduct of the thieves
was foreseeable because of the nature of the neighborhood and the valu-
able material left in the pickup truck.\textsuperscript{119} The driver of the pickup truck was
held liable for failing to take the keys out of the ignition, and the criminal
act, in this case the theft, did not supersede his liability.\textsuperscript{120}

In many jurisdictions, there are statutes that require vehicle owners to
remove the keys from the ignition.\textsuperscript{121} Some courts, when interpreting

\begin{footnotes}
\item[110] See id.
\item[111] See id. (holding railroad was not “bound to anticipate the criminal acts of
others by which damage is inflicted and [would not be] liable therefor”).
\item[112] 285 P.2d 269 (Cal. 1955).
\item[113] See id. at 270.
\item[114] See id.
\item[115] See id. at 272 (quoting Restatement of Torts § 449 (1934), “If the real-
zable likelihood that a third person may act in a particular manner is the hazard
. . . which makes the actor negligent, such an act whether innocent, negligent,
intentionally tortious or criminal does not prevent the actor from being liable for
harm caused thereby.”).
\item[116] 393 P.2d 164 (Cal. 1964).
\item[117] See id. at 165 (stating that defendant who was driving left door to truck
unlocked and keys to vehicle in ignition).
\item[118] See id. (providing that thief crossed center dividing line of highway and
collided head on with vehicle in which plaintiffs were riding).
\item[119] See id. at 167 (listing factors contributing to foreseeability).
\item[120] See id.
idling personal automobiles). The statute provides:

No person driving or in charge of any motor vehicle except a licensed
delivery truck or other delivery vehicle while making deliveries, shall per-
mit it to stand unattended without first stopping the engine, locking
the ignition, and removing the key. No vehicle shall be permitted to stand
unattended upon any perceptible grade without stopping the engine and
effectively setting the brake thereon and turning the front wheels to the
curb or side of the street.
\textit{Id.;} see Ala. Code § 32-5A-50 (1989); Ark. Code Ann. § 27-51-1306 (Michie 1994);
\end{footnotes}
these statutes, have held that, because theft is foreseeable, failure to take
the keys out of the vehicle makes the owner of the vehicle liable when a
thief steals the vehicle and crashes it into a third party.\footnote{122} Although there
is initial liability, courts have held that after a certain amount of time has
passed, the responsibility of the owner for their negligence terminates and
the owner can no longer be held liable for injuries to third parties.\footnote{125}

Superseding cause may be an issue in suits against gun manufacturers.
Cities will argue that gun manufacturers know the guns are being sold in
large numbers, which are reaching communities where guns are banned.
Therefore, the manufacturers of guns should be held liable for the effects
of the foreseeable saturation of guns. Additionally, courts may hold the
manufacturers responsible for their gun ads, finding that they facilitate
the sale of guns beyond the intended markets (e.g., guns purchased in the
South and resold in New York City), where they are illegal and being used
in criminal activities.

In cases like those mentioned above, it is possible for courts to hold
that because the distribution and criminal use of the guns was foreseeable,
the manufacturers should be held liable. Furthermore, merely because
the end use was criminal, it should not sever the liability of the gun manu-
facturers. The criminal result was foreseeable and, therefore, the inter-
vening criminal act did not supersede the manufacturers' negligence.

Superseding cause will not be a strong defense for the gun manufactu-
ners in the suits by municipalities. In suits brought by individual plain-
tiffs, superseding cause may carry the day as it did in \textit{Richmond v. Charter
Arms}.\footnote{124} Superseding cause should not be a valid defense in municipal

\footnotesize{Rev. Stat. § 291G-121 (1993); Idaho Code § 49-602 (1994); 625 Ill.
§ 66-7-353 (Michie 1998); Ohio Rev. Code Ann. § 4511.66.1 (Anderson 1997);
Rev. Code Ann. § 46.61.600 (West 1987); Wis. Stat. Ann. § 66.95.0 (West 1990);

122. \textit{See} Vining \textit{v. Avis Rent-A-Car Sys.}, Inc., 354 So. 2d 54, 56 (Fla. 1977)
(holding that if theft is foreseeable, then recovery is possible under statute require-
ing removal of keys from unattended vehicle).

(holding defendant not liable to third persons injured in accident involving stolen
vehicle five and one-half months after theft of vehicle).

there was genuine issue of material fact necessary to determine whether criminal
activity was superseding cause), rev’d, 762 F.2d 1250 (5th Cir. 1985). The argu-
ment of criminal intervening cause acting as a superseding cause was apparently
not persuasive in the trial. \textit{See id.} at 205-06; \textit{see also} Hamilton \textit{v. Accu-tek}, 935 F.
Supp. 1307, 1332 (E.D.N.Y. 1996) (denying summary judgment to gun manufac-
turer on plaintiffs’ theory of collective liability for negligence, thereby holding that
existence of criminal intervening cause does not automatically relieve manufactu-
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cases because the cities suffer the same damage whether the victim was shot by a gun purchaser or an intervening actor. Regardless of who pulls the trigger, the city police must respond to the 911 call and the city hospital must treat any uninsured victims. The fact that one person was shot in a domestic altercation and another victim was shot by a thief does not change the accounting entry for the city. Both types of victims are equally foreseeable by the gun manufacturers and both are expenses to the city. Courts will likely hold the gun manufacturers liable for foreseeing that some guns will be stolen and used in criminal acts and others will be shipped from the South to New York and Chicago.

Saturday Night Specials are cheaply made hand guns that are very inaccurate. People in the industry are aware that these guns are manufactured for and primarily sold to people surrounding and within ghettos. Courts may find manufacturers foresaw that these guns would be used for illegal activities in congested cities. Some courts have not held gun manufacturers to foresee criminal uses, however. For example, in Richmond v. Charter Arms, a mother sued Charter Arms because a person had used a gun manufactured by Charter Arms to rape and murder her daughter. The trial court applied strict liability against the gun manufacturer. On appeal, however, the federal court reversed the verdict against Charter Arms, holding that the rapist was a superseding cause, cutting off the liability of the gun manufacturer. The gun manufacturer did not foresee the criminal use. The court also noted that all of the prior Louisiana cases dealing with strict liability based on the law of ultra-hazardous activities involved land, whereas the marketing of handguns did not. Therefore, strict liability did not apply.

Although the intervening cause theory is one approach, a second approach to proximate cause analysis was developed by Dean Leon Green in the late 1920s. The duty approach, otherwise known as the Green theory, suggests that the judge ask the following question: “Does the defendant’s duty extend from this actor to this plaintiff for this particular injury?”

125. For a discussion of the Saturday Night Special, see supra note 43 and accompanying text.
126. For a discussion of the Saturday Night Special as ghetto guns, see supra note 43 and accompanying text.
127. See Richmond, 571 F. Supp. at 193-94 (noting that convicted rapist and murderer used “snubnose .38,” which was manufactured by Charter Arms, to rape, kidnap and murder plaintiff’s daughter).
128. See id. at 208 (holding that plaintiff could “proceed with her claim under law of ultra-hazardous activities”).
130. See id. at 1267 (discussing Louisiana’s doctrine of ultra-hazardous activities).
131. See id. at 1275 (holding that marketing of handguns falls beyond bounds of doctrine of ultra-hazardous activities).
132. See Green, supra note 88, at 755-59 (discussing role of duty in determining proximate cause); see also Vandall, supra note 61, at 348 (discussing question
To answer the duty question, the court should weigh relevant factors in the particular case.\textsuperscript{135} Although Dean Green was loath to enumerate the relevant factors because he preferred a flexible approach to justice, he nevertheless suggested that in many negligence cases courts consider similar factors.\textsuperscript{134} These factors include: problems of judicial administration, economic impact, justice, defendant’s ability to carry the loss, prevention and precedent.\textsuperscript{135} In regard to judicial administration, courts should ask whether there are any particular administrative problems for the courts in dealing with this case.\textsuperscript{136} In reference to economic impact, courts should consider the economic impact of holding gun manufacturers liable in a case brought by the city.\textsuperscript{137} In regard to justice, courts may inquire, as a matter of fundamental fairness, on whom the loss should be placed, and in regard to ability to carry the loss, courts may determine who should bear the loss—the innocent victim of the shooting, in this case, the city, or the gun manufacturers.\textsuperscript{138} For the prevention factor, courts must consider who is best able to prevent these losses, the gun manufacturer or the city.\textsuperscript{139}

Courts should also consider what previous courts have decided on the issue. These factors will guide courts in a duty analysis. The obvious precedent for these city suits is tobacco. Tobacco companies seem well-suited to carrying cancer-caused losses. Some scholars have suggested, however, that gun manufacturers are small and not nearly as profitable as tobacco manufacturers and not well suited to bear the loss.\textsuperscript{140} The small size of the industry is not the reason for rejecting the suit, however.

The value of Dean Leon Green’s duty theory is that it virtually eliminates the concept of foreseeability from the analysis.\textsuperscript{141} Judges no longer

\textsuperscript{133} See Green, supra note 88, at 757 (listing policies that courts consider when determining limits beyond which liability will not be extended).

\textsuperscript{134} See id. at 747 n.4 (citing reasons why courts have not extended liability); see also Vandal, supra note 61, at 348 (discussing duty factors of precedent, prevention, economic impact of decision, problems in administration, defendant’s ability to carry loss and justice).

\textsuperscript{135} See Green, supra note 88, at 757 n.4 (listing “stock” reasons courts have used for not extending liability).

\textsuperscript{136} See id. at 757 (explaining various policy considerations for limiting liability).

\textsuperscript{137} See id. 757-58 (considering economic consequences of extending liability).

\textsuperscript{138} See id. at 757 (considering whether efforts to do justice in one case may lead to injustice in other cases).

\textsuperscript{139} See id. at 759-60 (discussing that limits are set to enable preventive measures to be effective).

\textsuperscript{140} See Gun Lawsuits: The Fog of Battle, ECONOMIST, Feb. 20, 1999, at 26 (noting that sales of guns in 1997 in United States totaled \$1.4 billion compared to \$48 billion in sales of tobacco products).

\textsuperscript{141} See Green, supra note 88, at 761-65 (limiting concept of foreseeability to breach of duty question). Dean Green felt that intervening cause was merely a
need to ask whether the result was foreseeable. They can now ask operative questions such as: what are the costs of this measure, what is the economic impact of the decision and who can best do something about the problem? These questions are more easily answered than the vague question of whether the defendant could have foreseen the result.

To defend against a duty claim, it is likely that the gun manufacturers will argue that there is no precedent in products liability cases for holding the manufacturer liable for the wrongful acts of the consumer. The gun manufacturers will contend that in superseding cause cases, the owner of the vehicle is sued, not the manufacturer. For example, when a drunk driver crashes an automobile into someone, the driver is sued, not General Motors. This, however, is a superficial analysis.

It is not unique for a corporation to be asked to pay for damages to society for environmental degradation. For example, the purpose of the environmental Superfund is to allow corporations to pre-pay for possible damage to the environment, such as chemical spills.142 If a corporation has toxic by-products, it will have to pay for their disposal.143 It must also pay for filters or baggers that are necessary to comply with the Clean Air Act.144 Similarly, since 1974, only drinkable water can be discharged from point sources such as manufacturing plants.145 All products today, therefore, reflect the cost of complying with the clean air and clean water requirements. There is nothing novel in asking the gun manufacturers to pay for the damages they cause to society (the pollution, if you will) even though they do not pull the trigger.

Another example of loss shifting is the disposal fee for automobile tires.146 When new tires are purchased, the consumer must often pay a disposal fee (directly or indirectly) for each used tire left at the tire deal-

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143. See Martin A. McCrory, The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites, 23 VT. L. REV. 59, 59 (1998) (noting that businesses spend over $30 million, on average, per Superfund site, and have spent over $11.3 billion on CERCLA cleanups).


ers. The same is being asked of gun manufacturers. By holding them liable, gun manufacturers are being asked to pay for the municipal destruction and costs of clean-ups produced by their products. It makes little sense to place the costs of water pollution control on the car driver, but it makes a great deal of sense to place it on the polluting factory owned by General Motors.

To answer the question of who should be liable for gun violence, it is helpful to rely on an approach developed over twenty years ago by Judge Calabresi: the cheapest cost avoider theory. Judge Calabresi suggested that the loss in a products liability suit should be placed on whoever can best analyze the problem and do something about it. In many cases, the individual owner of the gun is the cheapest cost avoider. The owner can secure the gun and keep it away from children. In other cases, the cheapest cost avoider is the gun manufacturer. Gun manufacturers know what types of guns are manufactured; they know who buys their guns; they know how the guns are used; they know what types of injuries occur, and whether those damages are increasing or decreasing; and they can do something about it in terms of increasing the costs of the guns, redesigning the guns, removing the guns from the market, creating locks for the guns or adding computer-chip safety devices to the guns.

Helpful judicial precedent for holding the gun manufacturers liable in the face of a criminal intervening cause is the Alabama Supreme Court case of Kelly v. M. Trigg Enterprises, Inc. In Kelly, Nix, a 16-year-old, purchased an air freshener, known as a “popper,” which was commonly used by teenagers as an inhalant. Nix inhaled the popper until she became dizzy, and she then drove her car into traffic severely injuring Kelly and others. The court reversed a summary judgment in favor of the Ethyl Gaz retailer and distributor and found them liable. Although Nix was a criminal intervening cause, the use of the product as an inhalant was foreseeable and perhaps intended by the manufacturer.

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147. See James Salzman, Sustainable Consumption and the Law, 27 Env't L. 1243, 1266 (1997) (explaining that “advanced disposal fees” are up-front charges in purchase price of product that pay for ultimate disposal of product); see, e.g., Fla. Stat. Ann. § 403.7185 (West 1998) (requiring disposal fee of $1.50 for lead-acid batteries).

148. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1093 (1972) (discussing cheapest cost avoider theory in terms of entitlements, who is given them and when they are protected).

149. See id. at 1096-97 (summarizing principles behind efficient allocation of entitlements).

150. 605 So. 2d 1185 (Ala. 1992).

151. See id. at 1187 (noting that “poppers” have gained popularity as inhalants).

152. See id. ("[Nix] . . . felt dizzy and numb after inhaling the Ethyl Gaz.").

153. See id. at 1190 (stating that reasonable person could conclude that misuse of Ethyl Gaz as inhalant was foreseeable).
Another precedent is the New York case, DeLong v. Erie County,154 where the victim was murdered by a burglar.155 The police were held liable for this criminal intervening cause because they made a negligent mistake in responding to a "911" call from the victim.156 They misrecorded the victim's address and failed to follow department policy.157 In addition, in Stevens v. Parke Davis & Co.,158 the drug manufacturer placed a warning on Chloromycetin, but was nevertheless held liable by the California Supreme Court because the manufacturer actively defeated the warning through over promotion of the product.159

V. What is Wrong with the Product?

The city of Chicago is apparently bringing its suit in design defect.160 One of the issues that will be faced in the design defect case is whether there is something wrong with the gun.161 If the gun misfires or is highly inaccurate, then it can be argued that there is something wrong with the gun. If it is merely highly concealable, as is true with Saturday Night Specials, then the issue becomes more difficult because the gun is exactly as it was designed—small and easily concealable. There is arguably nothing "wrong" with it.

The city of Chicago could make an argument in response to the defect argument that the gun manufacturers have not taken advantage of technology to personalize guns. For example, cars have keys to start the ignition. By merely removing the key, a car is thereby disabled. Gun manufacturers, however, have done little to create similar mechanisms for hand guns.162

155. See id. at 888 (stating that victim "was stabbed to death in her home by an intruder").
156. See id. at 892-93 (finding municipality owed victim duty and that there was proof that negligence was proximate cause of death).
157. See id. at 891 (noting that complaint writer mistakenly recorded victim's address and failed in four respects to follow instructions for taking and recording complaints).
159. See id. at 662-65 (noting that Chloromycetin manufacturer distributed calendars and other items and placed advertisements in magazines that "constantly reminded physicians of the alleged effectiveness of the drug without mentioning its dangers").
Although many gun manufacturers are wary about equipping their guns with safety mechanisms, the technology exists. There has been some suggestion, for example, that there may be a computer chip available to make guns safer.\textsuperscript{163} A chip could be placed in the gun that would interact with a ring or a bracelet so that the gun would not fire without the chip being in close proximity to the ring or bracelet.\textsuperscript{164} This mechanism could decrease accidental gun deaths and hinder criminals who steal guns and then use them to commit crimes.\textsuperscript{165} Another recent suggestion is a snap-off hammer for the gun.\textsuperscript{166} The owner takes the hammer off when the gun is not in use, thereby disabling the gun.\textsuperscript{167}

VI. The Issue of Gun Manufacturers’ Liability is for the Courts

Critics of the gun suits argue that these suits violate the separation of powers that is fundamental to our republican form of government.\textsuperscript{168} They point to cases dating back to \textit{Marbury v. Madison}\textsuperscript{169} as support for the argument that the courts should refuse to hear the suits by the cities against the gun manufacturers.\textsuperscript{170} Guns are for the legislature, they argue.\textsuperscript{171} These critics refuse to accept that these municipal suits are simply questions of who should bear the loss. The argument against passing the issue of gun manufacturer liability to the legislature is that it is a simple question of damages based on negligence, design defect, fraud or public

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{163} See Joe Kilshheimer, Reprogramming the Gun-Control Debate; Technological Advancements Could Improve Gun Safety and Change the Way Americans Think About Imposing Limits on Personal Weapons, Orlando Sentinel, Sept. 27, 1998, at G1 (noting Colt Manufacturing Company’s plans to disclose its “smart gun,” which uses computer chip as safety device).
\item \textsuperscript{164} See Roane, supra note 40, at N.J. 1 (noting that while extensive electronic technology exists, implementation is slow because it is not required by law).
\item \textsuperscript{165} See id. (noting benefits of such technology).
\item \textsuperscript{166} See A Questionable Way to Make Guns Safe, The Plain Dealer, Apr. 4, 1999, at 4D (criticizing idea of removable hammer for guns).
\item \textsuperscript{167} See Joseph Hallinan, Firm Aims at Gun Safety Market with Removable Hammer, The Plain Dealer, Feb. 12, 1999, at 1C (noting invention of pistol hammer that can be snapped in two to make gun inoperable and put back together to make gun operable again).
\item \textsuperscript{168} See generally Linda Sandstrom Simard, Standing Alone: Do We Still Need the Political Question Doctrine?, 100 Dick. L. Rev. 303 (1996) (analyzing how developments in law of standing have affected political question doctrine); Louise Weinberg, Political Questions and the Guarantee Clause, 65 U. Col. L. Rev. 887 (noting recent commentary on political question doctrine).
\item \textsuperscript{169} 5 U.S. (1 Cranch) 137 (1809) (distinguishing between questions concerning rights of individuals and questions that are political in nature).
\item \textsuperscript{170} See id. at 163-65 (stating that legal remedy is available when right is violated).
\item \textsuperscript{171} See David B. Kopel & Richard E. Gardner, The Sullivan Principles: Protecting the Second Amendment from Civil Abuse, 19 Seton Hall Legis. J. 757, 749 (1995) (stating that main reason courts should not hear cases against gun manufacturers when product does not have genuine defect is that such suits “patently seek a remedy which is appropriately dispensed by the legislature, not the judiciary”).
\end{enumerate}
\end{footnotesize}
nuisance and that there is nothing so novel or complex that it should be reserved for the legislature.\(^\text{172}\)

The courts have entertained damage suits against gun manufacturers for over 150 years. The courts have dealt with the liability of gun manufacturers since the 1836 case of \textit{Langridge v. Levy},\(^\text{173}\) where a gun dealer sold a gun for use by the purchaser’s child representing the gun to be safe.\(^\text{174}\) When the child fired the gun, it exploded, injuring the child.\(^\text{175}\) The court allowed the parent to recover as representative for the child, even though there was no privity between the child and the manufacturer.\(^\text{176}\) Recent cases have also considered the liability of the gun manufacturer.\(^\text{177}\) In 1993, for example, a disgruntled client entered a law firm in San Francisco and killed numerous lawyers and secretaries with three semiautomatic assault weapons.\(^\text{178}\) The suit was brought against the manufacturer of the two of the semiautomatic assault weapons.\(^\text{179}\)

In a recent New York trial, \textit{Hamilton v. Accu-tek},\(^\text{180}\) the survivors of several gun shot victims and one permanently disabled victim sued twenty-five gun manufacturers for negligence.\(^\text{181}\) The jury found that the gun manufacturers saturated southern states with guns while knowing that a substantial portion of the weapons would reach the hands of criminals in New York City.\(^\text{182}\) The disabled victim was awarded over $500,000 against

\(^{172}\) See Abernathy v. Sisters of St. Mary’s, 446 S.W.2d 599, 605 (Mo. 1969) (“It is neither realistic nor consistent with the common law tradition to wait upon the legislature to correct an outmoded rule of case law.”).


\(^{174}\) See id. (noting gun manufacturer intentionally sold unsafe gun under pretense that it was safe).

\(^{175}\) See id. at 519-20, 863-64.

\(^{176}\) See id. at 524-25, 865-66 (explaining that duty of reasonable care exists when supplying dangerous object regardless of existence of contract).


\(^{179}\) See Larry D. Hatfield et al., \textit{Highrise Massacre}, S.F. EXAMINER, July 2, 1993, at A1 (noting that assailant killed eight and wounded six with two Luger TEC-9 pistols and .45-caliber handgun and noting that all three weapons were legal in state of California).

\(^{180}\) No. CV-95-0049, 1999 WL 363022 (E.D.N.Y. June 3, 1999).

\(^{181}\) See id. at *1 (noting that relatives of six people killed by guns and one disabled survivor brought negligence suits against 25 gun manufacturers).

a portion of the gun manufacturers. Conceptually, this was a much more challenging case than the cities will face because the plaintiffs had to prove the guns that injured them were part of the over-supply.

Suits in Washington, D.C. and Maryland have involved Saturday Night Specials. In Kelley v. R.G. Indus., Inc. the Supreme court of Maryland held that the Saturday Night Special was unique and therefore it was within the power of the common law to hold the manufacturer of such a unique and dangerous weapon strictly liable. On appeal, the plaintiff did not defend, and therefore the decision was vacated.

Recently, Washington, D.C. passed an ordinance holding manufacturers of automatic weapons strictly liable. This was followed by ordinances in several other cities holding the manufacturers of automatic weapons strictly liable. Congress has decided to deal with the question of who can purchase a gun in the Brady Bill and has dodged the more important question of whether manufacturers should be liable. Congress has since banned the importation and sale of assault weapons.

Congress has had over 150 years to deal with the question of whether the gun manufacturer should be liable for injuries resulting from gun violence. State and federal constitutions guarantee everyone a day in

183. See Gottlieb & Willingham, supra note 1, at B1 (reporting that jury awarded $560,000 to one plaintiff).


185. 497 A.2d 1143 (Md. 1985).

186. See id. (holding that if trier of fact determined gun was Saturday Night Special then liability against manufacturer could be imposed).

187. See id. at 1144-46 (explaining procedural history and background of suit against gun manufacturer).


190. For a further discussion of the Brady Bills' effectiveness in stopping the sale of guns to thousands of felons each year, see supra notes 58-60 and accompanying text.

191. See Michael G. Lenett, Taking a Bite Out of Violent Crime, 20 U. DAYTON L. REV. 573, 580 (1995) (noting that since 1968, semiautomatic assault weapons have been banned from importation into United States). The ATF banned the importation of 43 types of assault rifles in 1989. See id. ("Although ATF banned the importation of forty-three models of assault rifles in 1989, it allowed the importation of assault pistols to continue freely.").

Congressional avoidance of the issue of gun suits requires that the issue be left to the courts. Indeed, if Congress determines that gun manufacturer liability is inappropriate in the courts, it is free to act. They have had the opportunity to remove guns from the courts since 1836 in *Langridge v. Levy*. Although *Langridge* is a British case, it functioned as an invitation to Parliament and Congress to respond to the issue of gun manufacturer liability. Congress remains free to assume jurisdiction, but having failed to do so in a meaningful way, the cities should not be left without a remedy for their losses.

The courts make law through accretion, modifying the preceding case by detail, and in that way develop the common law. The history of torts rests on this concept. It is clear that over the last 150 years the

193. See, e.g., U.S. CONST. amend. V (“No person . . . shall be deprived of life, liberty, or property, without due process of law . . .”); Ala. Const. art. I, § 13 (“[E]very person, for any injury done him, in his lands, goods, person, or reputation shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.”); Ind. Const. art. I, § 12 (“All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”); Pa. Const. art. I, § 11 (“All courts shall be open; and every man for an injury done him . . . shall have remedy by due course of law . . . .”); Wis. Const. art. I, § 9 (“Every person is entitled to a certain remedy in the laws for all injuries . . . .”).

194. See U.S. Const. amend. V (“No person . . . shall be deprived of life, liberty, or property, without due process of law . . .”); see also Ind. Const. art. I, § 12 (“All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”). By failing to pass legislation on the issue, Congress has *de facto* signaled to the Judiciary that it is a matter within their jurisdiction.

195. See Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850) (holding that Congress may limit lower federal court jurisdiction); see also International Science & Tech. Inst., Inc. v. Inacom Communications, Inc. 106 F.3d 1146, 1158 (4th Cir. 1997) (concluding that Congress intended private TCPA actions to be brought exclusively in state courts and did not intend to grant jurisdiction over such claims in federal district courts). If Congress felt that the matter was inappropriate for state courts to decide, it could pass a law governing the gun industry. So far they have failed to take any such action.

196. 4 M. & W. 337 (1838) (affirming that gun maker is liable for injury to buyer’s child).

197. See Pruitt, *supra* note 53, at B1 (noting that Georgia legislature has passed act that forbids suits by cities against gun manufacturers). Atlanta’s mayor, Bill Campbell, believes the law will be struck down for denying the city the right to enforce its police powers. See id.

198. See Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 271 (1992) (“Common law develops by accretion, and the requirement that judges justify what they do by reference to prior decisions, together with a pervasively conservative professional culture, discourage radical change.”); C. Douglas Floyd, *Vertical Antitrust Conspiracies After Monsanto* and Russell Stover, 33 U. Kan. L. Rev. 269, 297 (1985) (“The concept that the common law develops by a process of accretion of numerous decisions, each focused on the narrow issue before the court is well established and has helpful descriptive and normative qualities.”).

common law has dealt with gun manufacturer liability in a large number of cases. This is interstitial common law development: the courts were asked who should be held liable for the damage. The criminal firing the handgun is liable but the criminal is impecunious and in prison. Now the cities are merely asking whether the manufacturer can be held liable for the damages the municipalities have suffered, or should the loss remain with the taxpayers.

VII. THESE ARE BASIC DAMAGE SUITS

The suits brought by cities against gun manufacturers are ordinary tort suits for damages. The only novel aspect of the suits is that the municipalities are the plaintiffs. The foreseeable results of saturation gun sales and defective guns are death, injury and great expenses for the cities. The gun manufacturers are merely being asked to take cognizance of the problem, to change their ways and to pay the cities for their past and future expenses brought on by the excess gun profits. The profits of the gun manufacturers are excessive to the extent that the manufacturers have shifted the costs of violence to the municipalities and other victims.200

200. See Steven Shavell, Strict Liability Versus Negligence, 9 J. LEGAL STUD. 1, 3-4 (1980) (noting strict liability leads to efficient result); Joi Gardner Pearson, Comment, Make It, Market It, and You May Have to Pay for It: An Evaluation of Gun Manufacturer Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of In Re 101 California Street, 1997 BYU L. Rev. 131, 159 (1997) (arguing that gun manufacturers should bear burden of costs of injuries from their products rather than forcing tax payers to bear burden); see also Carpenter v. Double R Cattle Co. 701 P.2d 222, 229 (Idaho 1985) (Bistline, J., dissenting) (noting that compensation to those injured by product or industry is part of external costs to be borne by industry).