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Economic and Causation Issues in City Suits Against Gun Manufacturers

Frank J. Vandall*

I recently heard Ted Turner speak and he said that when he used to make presentations at college campuses around the country on nuclear disarmament, he would ask, "How many of you would like to die in a nuclear holocaust?"¹ He reported that no hands were ever raised.²

How many of you would like to have your children shot? The United States is the most violent democratic country in the world.³ One child dies every 92 minutes from gunshots, an average of over 15 children each day.⁴ Approximately 35,000 people perish from gunfire every year.⁵ There were 9,390 gun-related homicides in the United States in 1996, but only 30 in Great Britain and 15 in Japan.⁶ This epidemic of violence has been largely ignored by American society until recently when numerous cities filed suits against gun manufacturers.⁷ The focus of this article is the economic implications of the suits, as well as the cause in fact and proximate cause issues that the city suits will face.

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1. Ted Turner, "Future Makers", Speech at Emory University, Feb. 9, 1999.

2. *See id.*

3. Chelsea Carter, *U.S. Leads Richest Nations in Gun Deaths*, ASSOC. PRESS, Apr. 17, 1998.

4. *See Studies Assess Lethal Toll of Gun Violence*, LAW ENFORCEMENT NEWS, Apr. 15, 1996 at 5 (noting that of 5,751 gunfire deaths of children in 1993, 957 of those killed were under fifteen years of age).

5. *See Bill Rankin, Cities Firing Back at Gun Industry, Tobacco II, Lawyers See Courtroom Assault on Makers of Firearms as a Payback Bonanza for Crime in the Streets*, ATLANTA J. & CONST., Nov. 29, 1998, at A1.

6. *See Carlos Campos, Litigation Won't Fix Problem, Some Say*, ATLANTA J. & CONST., Feb. 5, 1999, at A12 (reporting on Bureau of Alcohol, Tobacco and Firearms study).

7. Suits have been brought by the cities of Atlanta, Bridgeport, Chicago, Miami, and New Orleans to recover the costs of dealing with gun-related violence.

I. ECONOMIC ISSUES

These suits are an attempt to internalize an extremely costly externality.⁸ If you believe in the free market system, the intersection of the supply and demand curves determine the price of a product.⁹ Raw goods, in part, determine the cost to make a product in the United States. Therefore, the steel and labor that goes into making guns must be taken into account to determine the overall cost. The new gun suits seek to place the social costs of guns (death and destruction) on the gun manufacturers so that the purchase price of a gun reflects the real price, not one that has been subsidized.¹⁰ Torts is a very simple subject; it is about damages and there is always a winner and a loser. But, who should bear the loss? In a tort claim, someone always bears the loss.

Presently, the individuals bearing the loss in handgun violence are the taxpayers and businesses in our communities.¹¹ What the cities are finally realizing and saying is “we don’t think that cost should be on our shoulders.”¹² Cities are determining that the cost of handgun violence should not be passed on through increased taxes to citizens and businesses within their community,¹³ but should be borne by gun manufacturers.¹⁴ This concept is worthy of further consideration. Supposing that these suits are successful, what will happen? There is the chance that nothing will happen, but a few cities may follow in their brethren’s footsteps and cause manufacturers to absorb the cost.

Another option is that the price of guns will be increased to reflect the damage they cause.¹⁵ For example, gun manufacturers would determine which guns are costing the company the most in damage awards and would therefore, increase the price of those specific guns to offset the damage awards.¹³ For example, consider the Saturday night special.¹⁴ Following the above theory, one would therefore

8. See Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 201-04 (1996) (arguing that liability should be based on profit of gun manufacturers and not on the amount of harm to the victim).

9. See ROY J. RUFFIN & PAUL R. GREGORY, *PRINCIPLES OF MICROECONOMICS* 50-52 (5th ed. 1993).

10. See Kaplow, *supra* note 8 and accompanying text.

11. See Julie B. Hairston, *Atlanta Officials at Odds Over Next Cuts in Budget, Reduction Revenues Pinches City*, ATLANTA J. & CONST., Oct. 12, 1998, at B4. 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, causing a deterioration of city services and higher taxes. See *id.* One reason for the flight to the suburbs is fear over gun related violence. See *id.*

12. See Kaplow, *supra* note 8 and accompanying text.

13. See *id.*

14. See *id.*

15. See *id.*

13. See *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143, 1153-54 (Md. 1985).

14. The Saturday Night Special is a small handgun that is cheap, easily concealed and extremely unreliable. See *id.* at 1154. Gun salespeople describe Saturday Night Specials as “ghetto guns.” See *id.* at 1158.

expect the price of these guns to increase in light of the amount of damage they cause in the cities. Using similar rationale, cigarette manufacturers recently increased the price of cigarettes by forty-five cents per pack to fund settlement payments.¹⁵

Additionally, these suits could result in the redesigning of guns. The manufacturers may say, "If theft or misuse of the gun is a problem, we can change the design."¹⁶ Since the filing of these suits, many theories are now being espoused on how to make guns safer.¹⁷ The idea of gun personalization is the basis of many of these theories.¹⁸ Consider that many of you drove today and you locked your cars.¹⁹ Because of the key, you believe that there is a good chance that you will find your car where you left it. With guns, however, there are no keys, but they should be the most likely candidates for such personalization.²⁰

One suggestion has been made that would require gun owners to wear bracelets with computer chips in them that match a computer chip in their gun.²¹ If both chips are not present or don't match, the gun is inoperable.²² Additionally, commentators have also proposed the use of a break-off hammer.²³ The hammer is easily removed from the gun, can be stored for safety and security reasons and can be easily reattached to the gun for appropriate use.²⁴ Presently, no concrete efforts have been made to apply any of these safety and preventative advances to

15. Barry Meier, *Cigarette Makers Announce Large Price Rise*, N.Y. TIMES, Nov. 24, 1998, at A20 (reporting that due to settlement, Philip Morris and R.J. Reynolds were raising the prices of cigarettes); *Cigarette Prices Rise Sharply in Wake of States' Tobacco Settlement*, WASH. POST, Nov. 24, 1998, at A5 (quoting tobacco analyst statement as saying that the reason for the cigarette price increase was "to fund the settlement payment").

16. James Bennet, *Gun Makers Agree on Safety Locks*, N.Y. TIMES, Oct. 9, 1997, at A1 (discussing how technology can prevent thieves from stealing guns and using them in crimes and accidental deaths caused by misuse).

17. See *id.*; see also Kit R. Roane, *The Latest in Safety: "Smart" Guns That Know Their Owners*, N.Y. TIMES, Apr. 13, 1997, at N.J. 8 (discussing the use of matching microchips in both the stock of the gun and in a bracelet or ring worn by the owner, so that only the owner can use the gun).

18. See Roane, *supra* note 17.

19. If not, then perhaps one might need to reflect on the wonderful movie *Ferris Bueller* and wonder where your car is. Hopefully, none of you drove your Ferrari today.

20. See Bennet, *supra* note 16 and accompanying text; see also Roane, *supra* note 17 and accompanying text.

21. See Roane *supra* note 17.

22. See *id.*

23. See Joseph Hallinan, *Firm Aims at Gun Safety Market with Removable Hammer*, THE PLAIN DEALER, Feb. 12, 1999, at 1C (noting the invention of a pistol hammer than can be snapped in two to make the gun inoperable).

24. See *id.*

guns.²⁵

Gun manufacturers may find that it is not cost effective to redesign a particular gun and may withdraw it from the market.²⁶ In a related context, the Ford Pinto suffered such a fate. The Pinto had a little design problem; the car tended to explode when hit in the trunk.²⁷ Ford changed the car's name to Bearcat, put a piece of plastic between the differential and the tank, sold it through Lincoln Mercury dealers for a year, and then finally took it off the market.²⁸ Perhaps the gun manufacturers will follow the lesson Ford learned and remove their product from the market.

Small gun manufacturers might file for bankruptcy, but before doing so, they should carefully analyze the plight of the asbestos manufacturers. After several asbestos manufacturers filed for bankruptcy, a board was appointed to run the corporations during the bankruptcy period.²⁹ The board of governors for the asbestos manufacturers consisted of plaintiff's attorneys.³⁰ Can you imagine anything worse for a corporation than having it run by plaintiffs' attorneys? It is likely that gun manufacturer bankruptcy could create the same situation.

Additionally, gun manufacturers may spend enormous amounts of money on advertising and lobbying for more protective laws in ways similar to those undertaken by the cigarette industry.³¹ For example, in response to the gun manufacturer suit filed by the city of Atlanta, the National Rifle Association took great pride in pointing out that the Georgia legislature, within days of the suit, passed a bill forbidding cities to sue gun manufacturers.³² It was indecorous for the NRA to act so quickly. One would think that they would have waited one or two

25. Additionally, what has worked so far is the creation of tighter controls over who can purchase guns. One such control mechanism is the Brady bill, which has been successful at keeping a large number of felons out of the gun purchasing arena. See *White House Press Paper: Keeping Guns Out of the Hands of Criminals*, U.S. NEWswire, June 15, 1999, available in 1999 WL 4636812.

26. Likely candidates for market withdrawal include the Saturday Night Special and automatic firearms.

27. Gary Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1016-17 (1991).

28. See *id.* at 1019. It is interesting to note that the cost of the Ford Pinto increased by only ten dollars after its redesign following litigation. See *id.* at 1060.

29. See ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 470-471 (3d ed. 1996) (noting that businesses faced with large debts will often choose to reorganize under Chapter 11 of the Bankruptcy Code to prevent having to liquidate their assets).

30. See *id.*

31. See *Gunmaker's First Volley in War on Suits: State Lends Its Support*, CHI. TRIB., Feb. 9, 1999, at 6 (discussing the push by gun manufacturers to obtain protective laws against gun manufacturer suits).

32. See Kathy Pruitt, *Blocking of Gun Suit Now Law*, ATLANTA J. & CONST., Feb. 10, 1999, at B1 (reporting that Governor Roy Barnes signed a bill into law blocking the city of Atlanta's lawsuit against gun manufacturers potentially bringing an end to the legislative battle over the right of any local government to bring a product liability suit against gun manufacturers); see also Bruce Alpert, *Morial Targets Guns on Washington Trip*, NEW ORLEANS TIMES-PICAYUNE, Mar. 25, 1999, at A19 (discussing Representative Bob Barr's (R-Ga.) plans to introduce legislation that would ban cities and states from filing lawsuits against gun manufacturers for gun violence).

months before “calling in their chips”, so there was some doubt as to who was running the Georgia legislature. It is now crystal clear that the NRA is at the helm. It is also clear what will happen to gun violence issues entrusted to the Georgia legislature.

II. CAUSATION

Cause in fact poses an interesting problem in gun manufacturer liability. Denise Dunlevy³³ has done a wonderful job touching on that issue regarding the case of *Sindell v. Abbott Laboratories*.³⁴ In *Sindell*, a twenty-year-old developed bladder cancer due to the DES administered to her mother during pregnancy.³⁵ However, there was no way to prove who manufactured the pill that her mother ingested 20 years earlier.³⁶ The court held that the DES manufacturers would be held liable in proportion to their market share.³⁷

The *Sindell* case involved a suit brought by individuals, but the market share theory could work equally well with regard to current gun litigation. The city gun manufacturer suits concern damages brought about by thousands of murders, intentional shootings, robberies, and other similar gun-related crimes. Because it is not possible to show how many of the guns used were Smith and Wesson, Remington, etc., the market share standard of liability is well suited for determining liability in these suits.³⁸

Unlike the DES cases, gun manufacturer suits have an additional variable that requires consideration. Many of the gun manufacturers which have large percentages of the market manufacturer a gun that is not desirable for use in violent crime. For instance, Remington may manufacture a shotgun that is extremely valuable, but only as a collectible.³⁹ Therefore, Remington's defense attorney would move to dismiss.⁴⁰ However, the manufacturers of easily concealed handguns would not be dismissed but would be held liable.⁴¹ Therefore, the

33. Denise Dunlevy is the lead plaintiff's attorney in *Hamilton v. Accu-Tek* and a member of the afternoon panel.

34. 607 P.2d 924 (Cal. 1980).

35. *See id.* at 926.

36. *See id.*

37. *See id.* at 937-38.

38. Because it will be difficult to determine exactly which and how much each gun manufacturer's product contributed to gun related violence, the market share theory is able to make recovery by the cities much easier.

39. *See Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1332 (E.D.N.Y. 1996) (dismissing numerous gun manufacturers from suit).

40. *See id.*

41. *See id.*

holding of *Sindell* is going to be important in the municipal suits.⁴²

When an individual sues a cigarette manufacturer, there is an opportunity to argue that there are environmental and genetic reasons for the development of lung cancer.⁴³ The argument can be made that the plaintiff is genetically predisposed to developing cancer and that bad genes, not cigarettes, were the cause.⁴⁴ A great deal of money is spent in cigarette litigation attempting to prove the existence of other causes for a plaintiff's cancer.⁴⁵ In handgun litigation, as with cigarette litigation, the larger the group, the more powerful the statistics. Several of the gun manufacturer suits, like those brought by Chicago and New Orleans, concern thousands of cases of gun related violence; therefore, their cases are more easily made based on the power of statistics.⁴⁶ The cities will be able to show demographically how many and which guns were involved in acts of gun-violence and can then determine percentage of liability per gun manufacturer.⁴⁷ The statistics work more powerfully in favor of the municipalities than they do in a case like *Hamilton v. Accu-Tek*⁴⁸

Proximate cause is a challenging subject and gun manufacturers will argue that the responsible party is the person who pulled the trigger.⁴⁹ Certainly, this is how the person on the street thinks; that the person who pulls the trigger is the only responsible party.⁵⁰ There are, however, a number of valuable cases that have examined the scope of liability under the proximate cause doctrine, including *Richardson v. Ham*⁵¹ and *Hergenrether v. East*.⁵² The likely gun manufacturer defense is, "We could not foresee that this gun would be used by a criminal to shoot someone; therefore, we should not be held liable."⁵³

42. See *Sindell*, 607 P.2d at 937.

43. See Frank J. Vandall, *Reallocating the Costs of Smoking: the Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 429-30 (1991) (highlighting problems faced by individual plaintiffs who bring suits against tobacco companies).

44. See *id.*

45. See *id.*

46. See generally NOEL A. C. CRESSIE, *STATISTICS FOR SPATIAL DATA* (1993) (discussing various ways to analyze spatial data); see also PAUL NEWBOLD, *STATISTICS FOR BUSINESS AND ECONOMICS* (4th ed. 1995) (analyzing use of statistics and their methods).

47. See generally *id.*

48. 935 F. Supp. 1307 (E.D.N.Y. 1996). For further discussion of this case, see *infra* notes 72-80 and accompanying text.

49. See *No Smoking Gun/Case Against Gun Industry Will be Hard to Prove*, HOUS. CHRON., Jan. 28, 1999, at A22 (arguing that recklessness of gun owners is unforeseen superceding cause of gun violence).

50. In several letters to the editor, people have argued that the "bottom line with guns is responsibility" of the owner. See e.g., Joel Kilthau, Editorial, ATLANTA J. & CONST., Sept. 2, 1998, at A14. Similarly, the oft quoted expression "guns don't kill people, people kill people" echoes the responsible owner theory that most laymen ascribe to. See Jeff DeBord, Letter to the Editor, ATLANTA J. & CONST., June 12, 1998, at A18.

51. 285 P.2d 269 (Cal. 1955).

52. 393 P.2d 164 (Cal. 1964).

53. See *supra* notes 49-50 and accompanying text.

In the *Richardson* case, an owner of a bulldozer left the bulldozer parked on a cliff with the keys in it.⁵⁴ Some boys came along, fired it up, drove it over the cliff, and it went down the hill and ran into the plaintiff's house.⁵⁵ The plaintiff brought suit against the owner of the bulldozer.⁵⁶ There are few things more exciting to a young person than climbing on bulldozers, which naturally leads to the next step of trying to fire it up. Recognizing this, the *Richardson* court held the owner of the bulldozer liable, finding that it is foreseeable that kids would get on the bulldozer and attempt to start it.⁵⁷

Similarly, in *Hergenrether*, a driver of a pick-up truck filled with expensive plumbing supplies left the pick-up parked in a dangerous part of town with the key in the ignition.⁵⁸ After stealing the truck, the thief ran into the plaintiff, and the plaintiff brought suit.⁵⁹ The court held that owner of the pick-up could foresee that a thief would steal his vehicle.⁶⁰

While *Hergenrether* involved liability of an owner and not a manufacturer,⁶¹ there are many situations where a manufacturer is held liable for the damage it causes even though there are others involved later in the chain of causation.⁶² This is particularly true in the area of environmental litigation. That is, a steel manufacturer pollutes the air and pollutes the water. Since 1972, manufacturers have been required to ensure that the air and water are not polluted.⁶³ Large

54. See *Richardson*, 285 P.2d at 270.

55. See *id.*

56. See *id.*

57. See *Richardson*, 285 P.2d at 272 (relying on RESTATEMENT OF TORTS § 449). "If the realizable 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." *Id.*

58. See *Hergenrether*, 393 P.2d at 165.

59. See *id.*

60. See *id.* at 167.

61. One could argue that the owner of the pick-up truck, like the owner of a gun, was a superceding cause, thus breaking the chain of causation. However, this defense did not work in *Richman v. Charter Arms*, 571 F. Supp. 192 (E.D. La. 1983), *rev'd* by *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985), which denied summary judgment to a gun manufacturer by finding that a criminal intervening cause does not automatically relieve manufacturers of liability. See *Richman*, 571 F. Supp. at 205-06. However, the Fifth Circuit Court of Appeals in *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) determined that a criminal act did act as a superceding cause thereby cutting off the gun manufacturer's liability, implicitly overruling *Richman*. See *Perkins*, 762 F.2d at 1268. See also *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (finding that gun manufacturer was not entitled to summary judgment on the same grounds as *Richman*).

62. See *infra* notes 75-80.

63. See John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 227 (1995) (noting that a single toxic waste cleanup costs the steel industry approximately \$25 million).

amounts have been spent by manufacturers to eliminate the pollution and the price of steel reflects that cost.⁶⁴ Similarly, toxic chemical manufacturers contribute to a superfund. When there is a spill of those toxic chemicals, the governmental fund comes into play. The fund provides for the costs of clean up and those costs are then charged back to the manufacturer.⁶⁵ The manufacturer is the logical source if you want a quick response to toxic spills.

There is a legal theory that summarizes this analysis. Judge Guido Calabresi has a theory known as the cheapest cost avoider theory:⁶⁶ the person should bear the loss who is best able to evaluate the loss and do something about it.⁶⁷ In gun litigation, the party who is best able to evaluate the loss and is able to do something about it, in most of the cases, is the gun manufacturer.⁶⁸ Certainly, in the oversupply situation to which Denise Dunlevy refers, and in defective gun cases, the gun owner is not the appropriate person to ask to redesign the gun or to stop over-saturating the market. The logical alternative is therefore the gun manufacturer.

III. TWO TIDE SHIFTING CASES

Two recent cases have affirmed the existence of gun manufacturer liability and may foreshadow the future. Both are suits by individuals, not municipal suits. However, they manifest that the courts are now prepared to deal with gun violence. The first case, *Hamilton v. Accu-Tek*,⁶⁹ dismissed the plaintiffs' claims of fraud and products liability, but not the claim of "collective and individual liability for possible negligence in merchandising handguns in a dangerous manner."⁷⁰ The plaintiffs claimed negligent marketing, on the theory that current handgun marketing "fostered the growth" of a handgun black market.⁷¹ In its discussion of the plaintiff's negligence claim, the *Hamilton* court noted that New York recognized several alternative theories to the causation requirement, including:

64. See Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 606 (1987) (discussing how the increase in environmental regulations forced the United States steel industry to demand higher tariffs on foreign imports to maintain competitiveness).

65. See Comprehensive Environmental Response Compensation and Liability Act (C.E.R.C.L.A.) §9607, 42 U.S.C.A. 103 (1999).

66. 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 the theory that laws should place liability on those best able to analyze and correct the problem).

67. See *id.*

68. Unlike the consumer, gun manufacturers have the economic and political ability to re-engineer their products to make them safer, to track the overall purchases, use, and misuse of their products, are best able to bear the cost and therefore are the cheapest cost avoiders.

69. 935 F. Supp. 1307 (E.D.N.Y. 1996).

70. *Id.* at 1314.

71. See *id.* Plaintiffs alleged that the manufacturer's lax supervision of and control over their products amounted to a tort in negligence. See *id.* at 1316.

alternative, enterprise, concerted action, and market share liability.⁷² These collective theories of liability rely on the existence of unique circumstances that “make it impractical to prove which defendant caused the injury,”⁷³ tortious conduct by all defendants that could have resulted in plaintiff’s injury,⁷⁴ problems of proof relating to the conduct or product,⁷⁵ and no other suitable remedy.⁷⁶ In applying the law of collective liability to the plaintiff’s case, the court determined that the market share theory would be the most viable, provided that plaintiff could produce the necessary evidence.⁷⁷ Thus, municipal suits may be able to avoid difficult causation requirements by relying on *Hymowitz*.⁷⁸

Perhaps the most important recent case dealing with gun manufacturer liability is *Merrill v. Navegar, Inc.*⁷⁹ On July 1, 1993, Gian Ferri entered a high rise office building in San Francisco with two TEC-DC9 semi-automatic assault weapons manufactured and distributed by the defendant, Navegar.⁸⁰ Ferri murdered eight people and wounded six others before taking his own life.⁸¹

Because of its weight and fire power ability,⁸² the TEC-DC9 was best suited and designed for engaging multiple targets during rapid sustained fire.⁸³ A study identified the TEC models as the most favored weapon of the most dangerous criminals and are twenty times more likely to be used for criminal purposes than conventional weapons.⁸⁴ Navegar was aware that their product was “disproportion

72. *See id.* at 1327. Enterprise liability involves holding all manufacturers liable where the individual manufacturer cannot be identified but the entire industry “jointly controlled the risk.” *See id.* For a discussion on market share liability, see *supra* notes 40-51 and accompanying text.

73. *Id.* at 1329 (citing *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073-75, *cert. denied*, 493 U.S. 944 (1989)).

74. *See id.* (citing *Sheffield v. Eli Lilly & Co.*, 192 Cal. Rptr. 870, 880 (Cal. Ct. App. 1983)).

75. *See id.* (citing *Hymowitz*, 539 N.E.2d at 1075).

76. *See id.*

77. *See id.* at 1331.

78. 539 N.E.2d at 1069.

79. 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *cert. granted and opinion superceded by* 991 P.2d 755 (Cal. 2000).

80. *See id.* at 152.

81. *See id.* Ferri held a grudge against a law firm occupying several floors of the high-rise. *See id.* He began his shooting spree on the 34th floor and systematically moved down two of the other floors. *See id.*

82. *See id.* at 153. The TEC models and others like them have been found to have no value as hunting, self-defense, recreational shooting, or target firearms. *See id.*

83. *See id.* at 154.

84. A Cox Newspaper analysis of 1988 BATF data found that “due to its unsurpassed firepower, concealability, and low price” the TEC-9 was a favorite among violent criminals. *See id.* at 155 (quoting James Fox, Dean of the College of Criminal Justice at Northeastern University). Additionally, the Cox report identified that semi-automatic assault weapons, while accounting for only ten percent of the total gun population, represented the weapon of choice in ninety percent of crimes in which guns were used. *See id.* Only ten gun models comprised this staggering figure and the TEC models used in

ately associated with criminal activity,”⁸⁵ and capitalized on this by deliberately marketing their products to military and survivalist types,⁸⁶ advertised in magazines with California distribution, loaned their guns for use in violent films, and, in violation of federal gun laws, aggressively marketed the fact that the TEC models could be easily converted to automatic assault weapons.⁸⁷ Perhaps the most damaging evidence against Navegar was the fact that the National Sales Director acknowledged that when news reports cited the TEC models in connection with violent crimes, sales went up and the media attention was both flattering and profitable.⁸⁸

The trial court granted summary judgment in Navegar’s favor because “the common law has thus far declined to impose liability for injuries caused by a third party using legally manufactured and distributed firearms.”⁸⁹ The California Court of Appeals determined that the issue on appeal was “the existence . . . of Navegar’s duty and . . . the evidence that its allegedly negligent activities were a cause-in-fact of appellants’ injuries.”⁹⁰ The cause of action was for negligent advertising and marketing.⁹¹ The appellate court found that there was evidence that could support a jury’s conclusion that Navegar over-promoted its product to a violent audience.⁹²

The court began its inquiry by examining the duty prong of the negligence formula.⁹³ While the trial court found that no duty existed under the test set forth

one out of every five crimes involving gun violence. *See id.*

85. *Id.* (quoting James Fox, Dean of the College of Criminal Justice at Northeastern University). In a later portion of the opinion, the court distinguishes *Merrill* from *Casillas v. Auto-Ordinance Corp.*, 1996 WL 276830 (N.D. Cal. 1996). *See id.* at 182. *Casillas* also dealt with a Navegar semi-automatic pistol that was disproportionately associated with criminal activity. *See id.* at 181. In *Casillas*, the trial court granted summary judgment in favor of Navegar for the same reason it was granted in *Merrill*; because California “would not allow a [negligence] claim against a third party’s illegal use of a legal and non-defective firearm. . . .” *Id.* (quoting *Casillas*, 1996 WL 276830 at *4). The court distinguished *Merrill* from *Casillas* by stating that no admissible evidence as to whether Navegar was aware that their product was disproportionately associated with criminal activity existed in *Casillas*, but there was ample evidence in existence in the present action. *See id.* at 182. Additionally, there was ample evidence in the present case to create a triable issue of fact regarding whether “Navegar’s conduct in manufacturing, marketing, and distributing the TEC-DC9 was a substantial cause of plaintiff’s injuries.” *Id.* It is believed that this will be a critical distinction to be made in future gun manufacturer suits.

86. *See id.* at 156.

87. *See id.* at 156-57.

88. *See id.* at 157.

89. *Id.* at 160.

90. *Id.* at 161. The court stated that a determination of ordinary negligence required a showing of duty, breach of duty, causation, and damages. *See id.* (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, 164-165 (5th ed. 1984)).

91. *See id.* at 162.

92. *See id.* at 184-85.

93. *Id.* at 161-85.

in *Rowland v. Christian*,⁹⁴ the court of appeals' assessment yielded a different answer.⁹⁵ The court, in noting that plaintiff had chosen not to assert a duty based on special relationship,⁹⁶ extended the holding of *Knight v. Jewett*,⁹⁷ which held that a defendant has a general duty to ensure that the inherent risks associated with a sport are not increased by the type of play.⁹⁸ The *Merrill* court found that the attributes and inherent dangers of sports were analogous to those present in gun use,⁹⁹ that the duty analysis was the same under both assumption of risk and negligence.¹⁰⁰ Additionally, the court was able to skirt the special relationship issue present in *Knight*, usually required in finding duty, by determining that the special relationship standard is only required where the conduct was unintentional and the risk was not clearly foreseeable.¹⁰¹ If with military-style weapons the misfeasance was intentional and the high degree of harm was foreseeable, then special circumstances exist, which preclude the necessity of finding a special relationship.¹⁰² The special circumstances are the military nature of the TEC-9 and the advertising to people who are likely to misuse the gun.¹⁰³

After establishing that Navegar had a duty to ensure that the risk associated with firearms was not increased, the court tackled the difficult issue of foreseeability of harm.¹⁰⁴ With regard to gun manufacturer suits there are several difficult issues, including how to contend with the general rule that no duty to control a third party (the shooter) exists unless a special relationship is present, and whether a

94. 443 P.2d 561 (1968) (superseded by statute as stated in *Perez v. Southern Pacific Transp. Co.*, 267 Cal. Rptr. 100 (Cal. App. 1990)). *Rowland* held that the test for whether one owed a tort duty depended on a variety of factors, including "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, [and] the moral blame attached to the defendant's conduct. . . ." *Merrill*, 89 Cal. Rptr. 2d at 159 (quoting *Rowland*, 443 P.2d at 113).

95. See *Merrill*, 89 Cal. Rptr. 2d at 165.

96. See *id.* at 161-62. The court stated that framing a duty argument on the existence of a special relationship is the standard argument for gun manufacturer liability. See *id.*

97. 834 P.2d 696 (Cal. 1992). *Knight* concerned a plaintiff who was injured during a touch football game and involved the "interplay of the doctrines of assumption of risk and comparative fault." *Merrill*, 89 Cal. Rptr. 2d at 163 (citing *Knight*, 834 P.2d at 703).

98. See *Merrill*, 89 Cal. Rptr. 2d at 164 (citing *Knight*, 834 P.2d at 707-09).

99. See *id.* at 164. "Sporting activities, like handguns, are inherently dangerous in a variety of ways, but they are viewed as socially desirable and useful, and are therefore permitted to be free of the general duty to eliminate all integral risks of harm." *Id.*

100. See *id.* 164-65.

101. See *id.* at 164-65 (citing *Pamela L. v. Farmer*, 169 Cal. Rptr. 282 (1980)).

102. See *id.*

103. See *id.*

104. See *id.* at 165.

criminal act is foreseeable.¹⁰⁵ The court alleviated the first concern by noting that the duty existed because of special circumstances, therefore, the correct determination was to look generally at whether Navegar's negligent conduct (the over-promotion) was "sufficiently likely" to result in someone seeking to injure or kill others with Navegar products.¹⁰⁶ Based on Navegar's media campaign and their knowledge that their product was the "weapon of choice" for violent criminals,¹⁰⁷ the court established foreseeability of harm.¹⁰⁸ The small, easily-concealed nature and rapid-fire character of this killing machine with a sling, spoke volumes.

Because the court determined that the harm suffered by the plaintiffs was foreseeable, the general rule that there is no duty to control the acts of third parties (shooters) was deemed inapplicable.¹⁰⁹ The court analogized the case at bar to *Richardson v. Ham*¹¹⁰ and found Navegar's knowledge of the prevalent criminal misuse of their product and their media campaign, which "invited or enticed" persons likely to misuse the weapon to acquire it, amounted to a finding that Navegar had a duty to exercise reasonable care to protect third parties.¹¹¹ Turning to the issue of foreseeable criminality, the court stated that California rejected the blanket rule that criminal acts are superceding causes,¹¹² by adopting the Restatement view that if there is a "realizable likelihood" of a third party's criminal act, then liability flows from that act and is not cut off.¹¹³ The court recognized that the marketing of the TEC-9 was not compatible with the marketing of handguns or a hunting rifle.¹¹⁴

In discussing Navegar's duty to the plaintiffs, the court determined that Navegar's conduct was morally blameworthy.¹¹⁵ Additionally, the court relied upon the existing social policy of preventing future harm due to gun-related

105. This determination exists where no special relationship is present. Because the court chose to frame Navegar's duty in terms of special circumstances, it was necessary to determine whether Navegar had the duty to control the acts of third parties. *See id.* at 168-69.

106. *See id.* at 165-66 (relying on *Ballard v. Uribe*, 715 P.2d 624, 628, n.6 (1986)). Additionally, the court noted that where duty is based on a special relationship, liability exists only where there is a specific risk of harm. *See Merrill*, 89 Cal. Rptr. 2d at 166 (quoting *Tarasoff v. Regents of University of California*, 551 P.2d 334, 343 (1976)). The *Merrill* court also stated that the "target of the risk is an identifiable and foreseeable victim." *Merrill*, 89 Cal. Rptr. 2d at 166, n.9 (quoting *Hooks v. Southern Cal. Permanente Med. Group*, 165 Cal. Rptr. 741, 746 (1980)).

107. *See Merrill*, 89 Cal. Rptr. 2d at 166.

108. *See id.* at 167.

109. *See id.* at 168.

110. 285 P.2d 269; *see also supra* notes 54, 57-60 and accompanying text (discussing *Richardson*).

111. *See Merrill*, 89 Cal. Rptr. 2d at 169; *see also id.* at 168-69 (discussing the duty analysis).

112. The *Merrill* court cites numerous cases as standing for this proposition. *See id.* at 169.

113. *See id.* at 169 (relying on RESTATEMENT (SECOND) OF TORTS § 449). The court found that "the likelihood that a third person would make use of the TEC-DC9 in the kind of criminal rampage Ferri perpetrated is *precisely* the hazard that would support a determination that Navegar's conduct was negligent." *Id.*

114. *See id.* at 166.

115. The court found that Navegar's indifference to the criminal misuse of their product proved that their conduct was morally blameworthy. *See id.* at 169.

violence;¹¹⁶ specifically, that the imposition of a duty not to over-promote gun sales and the resultant liability from its breach would not unduly interfere with any societal interest in firearms.¹¹⁷ The court also found that statutory compliance didn't shield Navegar from a finding of negligence, especially considering that there was no intent by the legislature to exempt gun manufacturers from the imposition of a duty.¹¹⁸ Finally, the court determined that the "imposition of a duty [did] not constitute an impermissible judicial ban on manufacture and sale,"¹¹⁹ because "[m]aking an activity tortious forces the people who derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs."¹²⁰

After determining that Navegar owed a duty to the plaintiffs to not increase their risk through negligent advertising and marketing, the court examined the issue of causation.¹²¹ Navegar argued that their conduct was causally unrelated to Ferri's rampage.¹²² The appellate court determined however, that Navegar's media campaign established causation¹²³ and that Navegar's sale of the TEC models presented triable issues of causation.¹²⁴ In finding causation as to Navegar's media campaign, the court analogized *Merrill* to the *Stevens v. Parke, Davis & Co.*¹²⁵ over-promotion case, which involved the prescription of a potentially toxic drug to a patient who died after ingesting the drug.¹²⁶ In *Stevens*, the manufacturer was

116. The court pointed to the staggering social and medical costs associated with gun violence. *See id.* at 169-70. Therefore, the court determined that there was a very strong policy of preventing the imposition of these costs. *See id.* at 170. This is a strong argument for municipalities because of the power of the statistics that they will be able to provide.

117. The court considered the burden to Navegar and the consequences to the community by imposing a duty of care and liability, and found that societal interests would not be adversely affected because the manufacture of assault weapons, which have no viable use for recreation or self-defense, does not have great social utility. *See id.* at 171. In support of this proposition, the court likens the imposition of duty on Navegar to asbestos manufacturers. *See id.* at 172. The court noted that the social worth of assault weapons was far less than that of asbestos where manufacturers have been held liable for extremely large damages. *See id.* As a cautionary measure, the court also noted that the risk/benefit analysis required in strict liability and negligence is the same. *See id.* at 175-76.

118. *See id.* at 175-76

119. *See id.* at 178. Additionally, the court relied on the "cheapest cost avoider" theory advanced by Judge Calabresi. *See supra* notes 66-67 and accompanying text.

120. *Merrill*, 89 Cal. Rptr. 2d at 178 (quoting *McCarthy v. Olin Corp.*, 119 F.3d 148, 169-70 (2nd Cir. 1997)).

121. *Id.* at 185.

122. *See id.* at 186. The plaintiffs, in order to prevail, needed to show that Navegar's conduct was a substantial factor in bringing about their injuries. *See id.*

123. *See id.* at 187.

124. *See id.* at 188.

125. 507 P.2d 653 (Cal. 1973).

126. *See id.*

subjected to liability for over-promoting the drug even though the doctor could not “remember specific instances in which he received any information, promotional or otherwise, directly from Parke, Davis. . . .”¹²⁷ The *Merrill* court stated that it had been more difficult in *Stevens* to find a causal link between the manufacturer’s promotions, the acts of the doctor, and the plaintiff’s injury.¹²⁸ Therefore, the *Merrill* court determined that the evidence presented at trial was no less “conjectural than the . . . evidence condoned in *Parke, Davis* to show a causal connection between the marketing of a potentially dangerous product and its use in a particular case.”¹²⁹ As a result, the court refused to dismiss Navegar on the basis that the plaintiff could not prove that the murderer had read Navegar’s ads.¹³⁰

After establishing that the grant of summary judgment on the issue of ordinary negligence was in error,¹³¹ the court turned to the plaintiff’s strict liability claim.¹³² The court determined that the weight of authority in California indicated that neither the manufacture of guns nor their discharge was an ultrahazardous activity.¹³³ Additionally, strict liability relies on an “inability to eliminate the risk by the exercise of reasonable care.”¹³⁴ Therefore, the court reasoned that a finding of strict liability would inherently negate the ordinary negligence claim, and vice-versa.¹³⁵

The California Court of Appeals found triable issues of fact, in connection with the ordinary negligence claim, that a gun manufacturer had a duty to exercise reasonable care not to create risks above those already present in firearm use.¹³⁶

The key to this case, and perhaps municipal gun manufacturer cases, lies in how this court framed the gun manufacturer’s duty. By holding that Navegar had a duty to ensure that the risks associated with firearms were not increased and that this duty was based on special circumstances rather than a relationship, the court avoided the difficulties befalling most individual gun manufacturer suits. Therefore, this case may be of substantial value to municipalities in their suits against gun manufacturers. Not only do the cities have the power of statistics on their side to resolve the causation question,¹³⁷ but, by not having to prove the existence of a special relationship, the cities avoid the necessity of proving thousands of cases of duty to the injured plaintiffs individually. Furthermore,

127. *Id.* at 664, n.16.

128. *See Merrill*, 89 Cal. Rptr. 2d at 188-89.

129. *Id.*

130. *See id.* at 189.

131. *See id.*

132. *See id.* at 190.

133. *See id.* at 191.

134. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 520(c)).

135. *See id.*

136. *See id.* at 152. The dissent argues that, in becoming the first appellate court to find a gun manufacturer liable for injuries caused by a “remote purchaser,” the court undertook “an egregious exercise in judicial legislation.” *Id.* at 193.

137. *See supra* notes 46-51 and accompanying text for a discussion on how statistical analysis is a great benefit to municipality suits.

Merrill v. Navegar, Inc., provides a masterful display of the California Appellate Court's ability to reinforce the importance of the ordinary negligence claim.¹³⁸

This case was unusual because of the overwhelming direct evidence against Navegar. Indeed, several portions of the court's analysis turned on the abundant evidence of Navegar's malfeasance and tortious disregard with respect to their advertising.¹³⁹ *Merrill* seems to hold that there are limits to marketing and advertising of legal products.¹⁴⁰ Without similar levels of damaging evidence, it may be hard for future suits to rely on this case. Furthermore, the extension and innovative use of case law by the *Merrill* court may not withstand a California Supreme Court challenge. The dissent echos the traditional rule:¹⁴¹ there is no precedent for finding gun manufacturers liable in ordinary negligence.¹⁴² The outcome of *Merrill* will ultimately depend on whether the California Supreme Court believes that gun violence is a national epidemic that requires a shared response from communities, legislatures, and courts.

IV. CONCLUSION

The suits brought by municipalities are ordinary tort suits seeking damages. The only thing remarkable about these cases is that municipalities are bringing them. Courts should treat these cases like ordinary suits similar to *Hamilton v. Accu-Tek*¹⁴³ and *Merrill v. Navegar*.¹⁴⁴ The challenging question that Mark Barnes¹⁴⁵ raised and that Denise Dunlevy may have to face is whether municipal suits against gun manufacturers hinge on a political question.¹⁴⁶ That is, are these

138. See *supra* notes 124-28 and accompanying text.

139. For instance, the court noted on the issue of causation that the evidence presented was enough to comply with the standard set forth by *Stevens v. Parke, Davis & Co.*, 507 P.2d 653 (Cal. 1973), and distinguished adverse caselaw for the same reason. See *Merrill*, 89 Cal. Rptr. 2d at 187, n.31.

140. See *id.* at 184-85.

141. The dissent strenuously argues that the majority's opinion is nothing more than judicial activism and legislation and seems to argue for a status quo approach. See *id.* at 193. The dissent targets the majority's duty analysis as legal and analytical error because it

posits a definition of duty which is unsupported by precedent, . . . holds, contrary to well-established precedent, that there may be a duty to protect against the criminal act of a third party, [and] disregards an unbroken line of appellate precedent in both state and federal courts declining to impose a duty on gun manufacturers in ordinary negligence actions. . . ."

Id.

142. See *id.* at 192-93.

143. 935 F. Supp. 1307 (E.D.N.Y. 1996).

144. 89 Cal. Rptr. 2d 146 (Cal. 1999).

145. Mark Barnes is legal counsel for the National Rifle Association.

146. See David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment From Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 749 (1995) (stating that the main reason courts should not hear cases against gun manufacturers when the product does not have a genuine defect

questions better left to the legislature? In response to that question, we should note that courts since *Langridge v. Levy*¹⁴⁷ in 1836 have dealt with a large number of suits involving defective guns. The present municipal suits are just a continuation of the question of how much of the damage caused by guns should be charged back to the manufacturers. The resolution of the question is going to be left to young attorneys. It is for them to decide what kind of society in which they want to live; whether they and their children want to live in fear of needless handgun violence. Let us begin to face the question.

is that such suits “patently seek a remedy which is appropriately dispensed by the legislature, not the judiciary”). *But see* *Abernathy v. Sisters of St. Mary’s*, 446 S.W.2d 599, 605 (Mo. 1969), *superseded by statute as stated in*, *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. 1989). “It is neither realistic nor consistent with the common law tradition to wait upon the legislature to correct an outmoded rule of case law.” *Id.*

147. 2 M. & W. 519 (1837), *aff’d* 4 M. & W. 337 (1838).