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# Comments: Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work

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## MUNICIPALITIES VERSUS GUN MANUFACTURERS: WHY PUBLIC NUISANCE CLAIMS JUST DO NOT WORK

### I. INTRODUCTION

In 1997, 13,677 people were killed and 47,453 more people were injured as a result of the criminal use of firearms in the United States.<sup>1</sup> The direct and indirect costs of gun violence to the United States is estimated to be one-hundred billion dollars a year with cities bearing a substantial amount of that cost.<sup>2</sup> Between law enforcement and emergency health care service, the budgets of major cities are significantly affected by the sheer volume of injuries sustained by these victims.<sup>3</sup>

In an effort to reclaim their money, cities and municipalities have recently commenced litigation against gun manufacturers for the losses incurred.<sup>4</sup> Along with theories of negligence and negligent marketing, cities are attempting to recover based on claims of public nuisance.<sup>5</sup> Because these claims are novel concepts, jurisdictions are in conflict over the extension of the tort of public nuisance to gun manufacturers.<sup>6</sup> For instance, in some jurisdictions, public nuisance claims have survived the burden of pleadings, thus allowing a case to move forward to trial.<sup>7</sup> On the other hand, some gun manufacturers

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1. See *Nonfatal and Fatal Firearm-Related Injuries – United States, 1993-1997*, MORBIDITY AND MORTALITY WEEKLY REPORT (Centers for Disease Control and Prevention) (Nov. 19, 1999), available at <http://www.cdc.gov/mmwr/pre-view/mmwrhtml/mm4845a1.htm>; see also *Injuries from Violent Crime, 1992-98*, (U.S. Department of Justice, Bureau of Justice Statistics) (June 2001), available at <http://www.ojp.usdoj.gov/bjs/abstract/ivc98.htm> (noting that among the average annual 21,232 homicide victims age twelve or older between 1992 and 1998, 72% of the victims were killed with a firearm).
  2. See, e.g., Brady Campaign to Prevent Gun Violence, Facts and Information, Research, Firearm Facts, The Economic Costs of Gun Violence – All Americans Pay a High Price (Jan. 16, 2001), available at <http://www.bradycampaign.org/facts/research/firefacts.asp> [hereinafter Brady Campaign]; *Connecticut Court Denies Gun Appeal*, ASSOCIATED PRESS, Oct. 1, 2002, available at 2001 WL 28014345 (noting that Bridgeport, Connecticut spent \$100 million on overtime for police and medical costs related to gun violence).
  3. See generally Adam Cohen, *Guns in the Courtroom, Making a Case Against the Manufacturers*, TIME, July 6, 1998, available at 1998 WL 11649185 (noting that a reason behind gun manufacturer litigation is to recover the cost of gun crimes, which impact the city budget); Brady Campaign, *supra* note 2 (stating that the costs associated with one gun crime, which include medical treatment and judicial resources to prosecute the criminal user of the firearm, can reach up to \$1.79 million).
  4. See *infra* Part II.B.2.
  5. See *infra* Part II.B.2.
  6. See *infra* Part II.B.2.a-c.
  7. See *infra* Part II.B.2.a.

have been victorious in other jurisdictions when public nuisance claims have been struck down for failing to meet all of the elements.<sup>8</sup>

Maryland courts have not yet faced the issue of gun manufacturer liability based on public nuisance.<sup>9</sup> However, statutes and case law provide valuable insights on the viability of a public nuisance claim against a gun manufacturer in Maryland. Maryland follows the traditional common law of nuisance,<sup>10</sup> which involves an activity on one person's land that affects a right common to the community.<sup>11</sup> Consequently, in order for a gun manufacturer to be held liable under a theory of public nuisance in Maryland, a municipality cannot focus on the unauthorized use of the non-defective gun produced by the manufacturer but, rather, demonstrate that manufacturing guns on the manufacturer's property affects a right common to the surrounding community.<sup>12</sup>

Municipalities bringing gun manufacturer liability suits, however, usually do focus on the unauthorized use of the gun and the resulting injuries.<sup>13</sup> A public nuisance claim could only be successful against an entity with control over the activity being performed on its property, such as manufacturing.<sup>14</sup> This basic characteristic of public nuisance substantially undermines claims brought by municipalities seeking to hold gun manufacturers liable for the injuries resulting from the unauthorized use of their product.<sup>15</sup> Without a common law basis, gun manufacturers could be held liable if the unauthorized use of their product was legislatively designated as a public nuisance.<sup>16</sup>

The Maryland General Assembly has created public nuisances through the enactment of statutes.<sup>17</sup> These statutes prohibit running houses of ill-fame,<sup>18</sup> keeping of gambling equipment,<sup>19</sup> and polluting bodies of water<sup>20</sup> by making each activity a statutory nuisance. One statute even prevents a claim of private nuisance to be brought against

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8. See *infra* Part II.B.2.b-c.

9. See generally Lawrence S. Greenwald & Cynthia A. Shay, *Municipalities Suits Against Gun Manufacturers' Legal Folly*, 4 J. HEALTH CARE L. & POL'Y 13 n.2 (2000).

10. See *infra* Part III.A.

11. See *infra* Part III.A.

12. See *infra* Parts III.A, IV.

13. See *infra* Part II.B.2; see also generally *City of Philadelphia v. Beretta, U.S.A. Corp.*, 277 F.3d 415, 419 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 123 F. Supp. 2d 245, 251 (D.N.J. 2000).

14. See *infra* Parts III.A, IV.

15. See *infra* Part IV; see also *City of Manchester v. Nat'l. Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986); *Tioga Pub. Sch. Dist. v. United States Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993).

16. See *infra* notes 60-66, 215 and accompanying text.

17. See *infra* Part III.B.

18. MD. ANN. CODE art. 27, § 15 (1996).

19. *Id.* § 237.

20. MD. CODE ANN., ENVIR. §§ 4-402, 9-302 (1996).

sport shooting ranges.<sup>21</sup> Notably, there exists no statutory authority classifying any activity by a gun manufacturer or subsequent criminal use of a handgun as a nuisance.<sup>22</sup> Before reaching a conclusion on the success of a public nuisance claim against a gun manufacturer, the fundamental principles of the tort of nuisance and products liability must be considered.

This Comment will analyze whether a public nuisance claim against a gun manufacturer under Maryland law would be successful. First, the tort of nuisance will be shown to have originated as an outgrowth of the tort of trespass in early English common law.<sup>23</sup> The tort of nuisance provided a judicially created remedy to property owners who suffered damages because of the activities performed on a neighbor's land.<sup>24</sup> This tort differed from trespass because there was no need to show a *direct* invasion onto another's property.<sup>25</sup> Thus, a successful nuisance claim proved that a property owner had control over his or her activities and that those activities affected the use and enjoyment of the adjacent properties.<sup>26</sup> The fundamental principle of the tort of nuisance remained unchanged when the United States adopted the English common law.<sup>27</sup>

This Comment will then discuss the law of public nuisance in the United States, paying special attention to products liability actions.<sup>28</sup> With confusion seeping into the tort of public nuisance because of vague statutes, section 821B of the *Restatement (Second) of Torts* and case law sought to clarify the boundaries of nuisance law.<sup>29</sup> This Comment will also examine the failures of public nuisance claims brought by municipalities against manufacturers of toxic chemicals<sup>30</sup> and asbestos products.<sup>31</sup> The current split in jurisdictions regarding the success of a public nuisance claim against a gun manufacturer will be reviewed to demonstrate that, at best, public nuisance claims have survived the burden of pleadings.<sup>32</sup>

Next, this Comment will discuss gun manufacturer liability and the tort of public nuisance under Maryland law.<sup>33</sup> The analysis will focus on the Maryland courts' consistent adherence to the English common law principles of the tort of nuisance.<sup>34</sup> Furthermore, this Comment

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21. MD. CODE ANN., CTS. & JUD. PROC. § 5-403.1 (1998).

22. See *infra* note 215 and accompanying text.

23. See *infra* Part II.A.

24. See *infra* Part II.A.

25. See *infra* notes 43-46 and accompanying text.

26. See *infra* note 46 and accompanying text.

27. See *infra* text accompanying note 67.

28. See *infra* Part II.B.1.

29. See *infra* notes 68-75 and accompanying text.

30. See *infra* Part II.B.1.a.

31. See *infra* Part II.B.1.b.

32. See *infra* text accompanying notes 116, 121, 123.

33. See *infra* Part III.

34. See *infra* Part III.A.

will examine public nuisances in Maryland statutes to highlight the absence of a statute geared towards gun manufacturers.<sup>35</sup> The discussion of Maryland law will conclude with an analysis of both *Kelley v. R.G. Industries, Inc.*,<sup>36</sup> a case in which the Court of Appeals of Maryland held manufacturers of handguns known as Saturday Night Specials strictly liable, and the Maryland General Assembly's subsequent overruling of the *Kelley* decision.<sup>37</sup>

The stage will then be set to consider whether, under Maryland common law, a municipality's public nuisance claim against a gun manufacturer would succeed. The analysis will demonstrate that, in Maryland, a public nuisance claim covers only those injuries that are a direct result of activities occurring on a gun manufacturer's property.<sup>38</sup> Therefore, this Comment will achieve a logical conclusion: a public nuisance claim brought against a gun manufacturer under Maryland common law, in the absence of any statutory authority, should be struck down in order to preserve the tort's legal significance.<sup>39</sup>

## II. THE FOUNDATIONS OF PUBLIC NUISANCE

### A. *The Creation and Development of Nuisance in England*

The tort of nuisance developed as a common law crime in England early in the thirteenth century.<sup>40</sup> "Nuisance," a term capable of almost unascertainable definition,<sup>41</sup> applies to a wide set of circumstances.<sup>42</sup> Originally developed as a private tort tied to the land,<sup>43</sup> a nuisance action was generally brought when a person interfered with another's use and enjoyment of his or her land.<sup>44</sup> However, the "interference" was not the result of a neighbor dispossessing a person of their land or an actual trespass upon another's land.<sup>45</sup> Instead, the "interference" arose from activities taking place on a person's land

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35. See *infra* Part III.B.

36. 304 Md. 124, 497 A.2d 1143 (1985); see *infra* Part III.C.1.

37. See *infra* Part III.C.2.

38. See *infra* Part IV.

39. See *infra* Part V.

40. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997-98 (1966).

41. See *id.* at 997 (stating that the term *nuisance* possesses a "fascinating variety of orthography"); see also F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480 (1949) (stating that a difficulty exists in a definition because the boundaries of nuisance are "blurred"); SIR JAMES FITZJAMES STEPHEN, *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND*, 104-05 (2d. ed. 1890) (declaring that nuisance is a term that has the broadest possible meaning).

42. Prosser, *supra* note 40, at 1000 (listing examples such as "public profanity," "keeping of diseased animals," "shooting fireworks in the streets," and "indecent exposure").

43. Newark, *supra* note 41, at 482.

44. *Id.*

45. Prosser, *supra* note 40, at 997.

that affected the enjoyment of another's land or the right of an easement.<sup>46</sup>

Depending upon the type of interference, nuisance is classified as either "private nuisance" or "public nuisance."<sup>47</sup> A "private nuisance" involves interference with the right to enjoyment of one's land.<sup>48</sup> The individual whose rights have been invaded is solely entitled to a remedy for a private nuisance.<sup>49</sup> The tort of "public nuisance," on the other hand, developed from interference with the right of an easement.<sup>50</sup> However, the tort grew at common law to become a broad-based criminal offense "consisting of an interference with the rights of the community at large."<sup>51</sup> This Comment will focus on the tort of public nuisance.<sup>52</sup>

### 1. Public Nuisance in English Common Law

The list of rights common to the public expands proportionately to the list of public nuisances.<sup>53</sup> In early English common law, the public had the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases.<sup>54</sup> Thus, a person who interfered with those basic rights common to the public had committed a criminal offense against the King and the crown could bring an action for public nuisance.<sup>55</sup>

However, the tort of public nuisance was subject to limitations.<sup>56</sup> The two main limitations focused on the utility of the activity causing the alleged public nuisance, as well as the location of the activity.<sup>57</sup> One commentator highlighted an early case where offensive odors emitted from a candle-making factory located in a town did not constitute a public nuisance because the discomforts endured by the com-

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46. *Id.*; see also Newark, *supra* note 41, at 482 (describing that blocking a public right of way along a highway was considered an "unlawful encroachment against the king").

47. Prosser, *supra* note 40, at 999 (stating that private and public are the "only two kinds" of nuisance whose sole similarity lies in the general way that each one inconveniences someone).

48. Prosser, *supra* note 40, at 999.

49. *Id.*

50. Newark, *supra* note 41, at 482 (asserting that public nuisance found its origins in the obstruction of the public right of way and highways).

51. Prosser, *supra* note 40, at 999; see also STEPHEN, *supra* note 41, at 105 (asserting that a public nuisance must inconvenience "the public in the exercise of rights common to all Her Majesty's subjects").

52. See generally *supra* Part I.

53. See STEPHEN, *supra* note 41, at 104-05 (observing that the tort of nuisance can cover any number of crimes and was attractive for lawyers wanting to get "a wide sweep to the criminal law").

54. *Id.* at 105.

55. *Id.*; Newark, *supra* note 41, at 482.

56. STEPHEN, *supra* note 41, at 106.

57. See *id.*

munity surrounding the factory were outweighed by the utility of the factory's production of candles.<sup>58</sup> Additionally, it is assumed that the common interest in an urban community should allow for reasonably higher levels of noise and pollution than in a rural community.<sup>59</sup>

## 2. Public Nuisance in English Statutory Law

Although the tort of public nuisance was deeply rooted in the early development of the common law,<sup>60</sup> Parliament's power emerged in the fifteenth century to create public nuisances not found in the common law and to authorize certain activities that were previously held to be public nuisances by the courts.<sup>61</sup> Because a public nuisance, by its nature, offended both the King and the community, Parliament was capable of defining the boundaries of public nuisance law through its role as an "instrument of royal government and the voice of the community."<sup>62</sup> Specifically, statutes provided another significant limitation in the determination of public nuisances.<sup>63</sup> It was within Parliament's discretion to determine which lawful acts constituted public nuisances.<sup>64</sup> Parliament also had the authority to authorize activities that would otherwise have been unlawful under the common law of public nuisance.<sup>65</sup> Thus, once Parliament authorized an activity, it ceased to be a public nuisance.<sup>66</sup>

### B. *The Development of Public Nuisance in the United States*

Public nuisance became part of early American law when the English common law was adopted in the United States.<sup>67</sup> Although the tort of public nuisance retained its common law characteristics,<sup>68</sup> confusion arose when state legislatures first began enacting public nui-

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58. *Id.* at 106. *But see* 1 SIR WILLIAM RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 436 (photo. reprint 1979) (1865) (questioning the reasoning utilized in the case because, regardless of the overall utility in making candles, it is unnecessary to produce them in a town).

59. STEPHEN, *supra* note 41, at 106 (stating that a law in a city requiring similar "quietness and purity of air" as would be found in the countryside would be "absurd").

60. Newark, *supra* note 41, at 481.

61. *See* STEPHEN, *supra* note 41, at 107; 2 J.W. CECIL TURNER, RUSSELL ON CRIME 1387 (reprint 1986) (12th ed. 1964); R.J. WALKER, THE ENGLISH LEGAL SYSTEM 58 (6th ed. 1985).

62. A.L. BROWN, *Parliament, c. 1377-1422*, in THE ENGLISH PARLIAMENT IN THE MIDDLE AGES 111 (R.G. Davies & J.H. Denton eds., 1981).

63. STEPHEN, *supra* note 41, at 107.

64. *Id.*

65. *See id.* (citing an English case, *R. v. Train*, 2 B. and S., 640, where the statute that authorized the railway nullified a public nuisance claim that the passing trains frightened nearby horses and hindered traffic on an adjacent road).

66. *Id.*

67. Prosser, *supra* note 40, at 999.

68. *Id.*

sance statutes.<sup>69</sup> One commentator claimed that the statutes defined public nuisances in a “general and rather meaningless fashion.”<sup>70</sup> Because of the ambiguous language in early public nuisance statutes,<sup>71</sup> legal interpretation problems arose when an activity did not fit into any category of public nuisance recognized by common or statutory law.<sup>72</sup> In an effort to clarify this ambiguity, section 821B of the *Restatement (Second) of Torts* is often cited to provide insight on the basic elements of a public nuisance.<sup>73</sup> Section 821B states:

- (1) A public nuisance is an unreasonable interference with a right common to the general public.
- (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
  - (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
  - (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
  - (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>74</sup>

Essentially, a public nuisance must be substantial and “objectionable to the ordinary reasonable man.”<sup>75</sup>

A public nuisance can be described as either an “absolute nuisance” or a qualified nuisance.<sup>76</sup> The main difference between an absolute public nuisance and a qualified public nuisance is the plaintiff’s burden of proof. A person who performs an activity that is found to be an absolute public nuisance is strictly liable.<sup>77</sup> Moreover, a plaintiff in an absolute nuisance action needs to show intentional or reckless con-

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69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 999-1000.

73. *See generally* *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989); *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 315 (3d Cir. 1985); *Tadger v. Montgomery County*, 300 Md. 539, 552, 479 A.2d 1321, 1327-28 (1984); *Robie v. Lillis*, 299 A.2d 155, 158 (N.H. 1972).

74. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

75. Prosser, *supra* note 40, at 1002; *see also Robie*, 299 A.2d at 158 (stating that paramount to a finding of public nuisance is whether the alleged interference is “substantial”).

76. *Jacko v. Bridgeport*, 213 A.2d 452, 453 (Conn. C.P. 1965) (stating that a public nuisance may give rise to an action for both an absolute nuisance and for negligence).

77. *Conn. Bank & Trust Co. v. Mularcik*, 174 A.2d 128, 130 (Conn. Super. Ct. 1961) (asserting that an absolute nuisance involves strict liability).



duct creating a hazard upon which absolute liability attaches.<sup>78</sup> On the other hand, a qualified nuisance is based on negligent conduct that creates an unreasonable risk of harm.<sup>79</sup> Consequently, negligence on the part of the defendant is an essential element of a qualified nuisance claim.<sup>80</sup> The duty of care standard is that of a reasonably prudent person in light of an activity which could potentially be unreasonably dangerous.<sup>81</sup>

These specific modifications to the action of public nuisance are relevant to the recent trend of products liability cases.<sup>82</sup> Courts have refused to extend the tort of public nuisance to products because a public nuisance involves an activity tied to the land.<sup>83</sup> A product, however, is not tied to the land but manufactured with the purpose of leaving the manufacturer's control to be purchased on the open market.<sup>84</sup> The following three cases demonstrate this inherent flaw in bringing a public nuisance action against a manufacturer.

#### 1. The Failure of Public Nuisance Claims in Products Liability Actions

##### a. *City of Bloomington v. Westinghouse Electric Corp.*

In *City of Bloomington v. Westinghouse Electric Corp.*,<sup>85</sup> the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of a public nuisance claim brought by a municipality against a buyer of polychlorinated biphenyls (PCBs).<sup>86</sup> PCBs from Westinghouse's factory were improperly disposed in a Bloomington landfill, and subsequently leaked into the city's sewer system.<sup>87</sup> With the health of the city's inhabitants in jeopardy,<sup>88</sup> the City of Bloomington sought to recapture its cleanup and water treatment expenses from Westinghouse

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78. See generally *Young v. Groenendal*, 159 N.W.2d 158, 159 (Mich. Ct. App. 1968) (stating that an absolute nuisance can be described as a "classic" or "standard" nuisance, such as an intentional unreasonable interference with the land of another).

79. See *Conn. Bank*, 174 A.2d at 130.

80. *Id.*

81. See *Coburn v. Lenox Homes, Inc.*, 441 A.2d 620, 624 (Conn. 1982) (holding the defendant home-builder liable for failing to use reasonable care in the installation of a septic system, which broke down and caused sewage to surface in the plaintiff homeowner's backyard).

82. See generally *Tioga Pub. Sch. Dist. v. United States Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986).

83. *Tioga*, 984 F.2d at 920 (stating that the State's nuisance statute did not apply to products liability cases).

84. *Hooksett Sch. Dist. v. W.R. Grace*, 617 F. Supp. 126, 133 (D.N.H. 1984).

85. 891 F.2d 611 (7th Cir. 1989).

86. *Id.* at 613. Westinghouse used PCBs in its manufacturing of capacitors. *Id.*

87. *Id.*

88. See *id.* Long-term exposure to PCBs can cause skin rashes and liver malfunction. *Id.*

on a claim of public nuisance.<sup>89</sup> The Seventh Circuit held that the City had failed to cite any case that upheld a public nuisance claim in a products liability action.<sup>90</sup> Furthermore, the court held that Westinghouse was not liable under a public nuisance theory because, based on section 821B of the *Restatement (Second) of Torts*, the City had failed to show that the defendant had interfered with a “‘right common to the general public.’”<sup>91</sup>

b. *City of Manchester v. National Gypsum Co.*

The court in *Bloomington* cited another products liability case, *City of Manchester v. National Gypsum Co.*,<sup>92</sup> to re-affirm the concept that public nuisance claims cannot be justified in products liability actions.<sup>93</sup> *Manchester* involved a suit brought by a municipality against manufacturers of asbestos.<sup>94</sup> The City of Manchester purchased plaster-ceiling materials laden with asbestos from the defendant for use in public buildings and schools during a thirty-year period.<sup>95</sup> The City alleged that people regularly using the buildings were faced with a “serious health danger.”<sup>96</sup> It brought an action against National Gypsum for the recovery of damages resulting from the removal and disposal of the asbestos-contaminated plaster.<sup>97</sup>

The court stated that the City’s public nuisance claim was contingent upon whether National Gypsum had control over the instrumentality that caused the nuisance.<sup>98</sup> The court held that the City of Manchester, not National Gypsum, had control over the instrumentality for thirty years, leaving National Gypsum powerless “to abate the nuisance.”<sup>99</sup> With a basic element of public nuisance missing, the court concluded that a dismissal of the public nuisance claim was warranted.<sup>100</sup>

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89. *Id.* The city claimed cleanup costs in excess of \$100 million. *Id.*

90. *Id.* at 614.

91. *Bloomington*, 891 F.2d at 614 (quoting RESTATEMENT (SECOND) OF TORTS § 821B).

92. 637 F. Supp. 646 (D.R.I. 1986).

93. *Id.* at 656.

94. *Id.* at 648.

95. *Id.*

96. *Id.* The people who normally frequented the buildings included teachers, school children, maintenance and administrative personnel. *Id.*

97. *Id.* at 649. The city claimed monetary damages in excess of \$6 million. *Id.* at 649 n.1.

98. *Manchester*, 637 F. Supp. at 656. The instrumentality creating the nuisance in this case was asbestos. *Id.*

99. *Id.*

100. *Id.*

c. *Tioga Public School District v. United States Gypsum Co.*

In a more recent case with almost identical facts,<sup>101</sup> *Tioga Public School District v. United States Gypsum Co.*,<sup>102</sup> the United States Court of Appeals for the Eighth Circuit also held that there was an insufficient basis for a public nuisance claim against a manufacturer of asbestos products.<sup>103</sup> Utilizing the logic of *Manchester*,<sup>104</sup> the court held that United States Gypsum did not have control over the instrumentality and, therefore, was not liable under a claim of public nuisance.<sup>105</sup>

Even though public nuisance claims brought by municipalities were dismissed against manufacturers of toxic chemicals and asbestos products, recently municipalities have attempted to use public nuisance claims again to recover the costs of gun violence.<sup>106</sup> However, unlike the manufacturers in *Bloomington*, *Manchester* and *Tioga*, gun manufacturers have had mixed results in attempting to dismiss public nuisance claims against them.<sup>107</sup>

2. Mixed Results: Public Nuisance Claims in Gun Manufacturer Liability Cases

In the mid-1990s, lawsuits against gun manufacturers surged.<sup>108</sup> Some writers believe that the success of the tobacco litigation and settlement of 1997 inspired municipalities to bring these suits.<sup>109</sup> The first lawsuit, brought by the City of New Orleans on October 30, 1998, was based upon the theories of design defect and unreasonably dangerous activity.<sup>110</sup> An early example of a lawsuit alleging a claim of

101. Compare *id.* at 648 with *Tioga*, 984 F.2d at 916. *Tioga* public school district sought to recover as much as \$1.1 million for the removal and disposal of asbestos products manufactured by United States Gypsum. *Tioga*, 984 F.2d at 917.

102. 984 F.2d 915 (8th Cir. 1993).

103. *Id.* at 921 (holding that the trial court erred in its submission of the nuisance claim to the jury).

104. See *Manchester*, 637 F. Supp. at 656.

105. *Tioga*, 984 F.2d at 920.

106. See *supra* notes 1-5 and accompanying text.

107. See *infra* Part II.B.2.

108. See Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 547-48 (1999).

109. See, e.g., Amanda B. Hill, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH. L. REV. 1387, 1402 (2000) (discussing the merits of gun manufacturer liability cases brought by municipalities in light of the tobacco settlements); Philip C. Patterson & Jennifer M. Philpott, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 579-80 (2000) (stating that the success of the tobacco settlements have "played an important role" in the decisions by municipalities to sue gun manufacturers); Matthew Pontillo, *Suing Gun Manufacturers: A Shot in the Dark*, 74 ST. JOHN'S L. REV. 1167, 1168-69 (2000) (noting that the lawsuits filed against gun manufacturers by municipalities have been inspired by the success of the tobacco litigation).

110. See Complaint at 1, *City of New Orleans v. Smith & Wesson Corp.*, (La. Civ. Dist. Ct. Orleans Parish 1998) (No. 98-18578 Div. M), available at <http://>

public nuisance against a gun manufacturer was *City of Chicago v. Beretta U.S.A. Corp.*<sup>111</sup> Since that lawsuit, claims against gun manufacturers by municipalities have been based primarily on a charge of public nuisance.<sup>112</sup> Trial and appellate courts continue to grapple with the novel and unique issue of applying a public nuisance claim to a gun manufacturer.<sup>113</sup>

*a. Cases Upholding Public Nuisance Claims: Bubalo, White, and Boston*

*Bubalo v. Navegar*<sup>114</sup> was the first case to uphold a claim of public nuisance against a gun manufacturer.<sup>115</sup> In its holding, the court reasoned that the plaintiffs sufficiently pleaded a claim of public nuisance based on Navegar's continued course of negligent conduct.<sup>116</sup> The court also held that the right to be free from the reasonable fear

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[www.firearmslitigation.com/content/docindex/docindex\\_neworleans\\_more.html](http://www.firearmslitigation.com/content/docindex/docindex_neworleans_more.html).

111. See First Amended Complaint at 23, *City of Chicago v. Beretta, U.S.A. Corp.*, (Ill. Cir. Ct., Cook County, 1999) (No. 98 CH 015596), available at <http://www.firearmslitigation.com>.
112. See Complaint at 23, *Bridgeport v. Smith & Wesson, Inc.*, (Conn. Sup. Ct., City of Bridgeport, 1999) (No. CV99-036-1279), available at <http://www.firearmslitigation.com>; Complaint at 33, *Penelas v. Arms Tech., Inc.*, (Fla. Cir. Ct., Miami-Dade, 11th Dist., 1999) (No. 99-01941 CA 06), available at <http://www.firearmslitigation.com>; First Amended Complaint at 2, *Atlanta v. Smith & Wesson, Inc.* (Ga. State Ct., Fulton County, 1999) (No. 99VS0149217J), available at <http://www.firearmslitigation.com>; First Amended Complaint at 34, *City of Boston v. Smith & Wesson, Inc.*, (Mass. Super. Ct., Trial Dept., 1999) (No. SUVC1999-02590-C), <http://www.firearmslitigation.com>; Complaint at 34, *Cincinnati v. Beretta U.S.A. Corp.*, (Ohio Ct. C.P., Hamilton Co., 2000) (No. 990729), <http://www.firearmslitigation.com>.
113. See *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) (upholding plaintiff's public nuisance claim); *Bubalo v. Navegar, Inc.*, 1997 WL 337218 at \*5 (N.D. Ill. 1997) (upholding plaintiff's public nuisance claim); *Boston v. Smith & Wesson Corp.*, 2000 WL 147356B at \*14 (Mass. 2000) (upholding plaintiff's public nuisance claim); see also Doug Morgan, Comment, *What in the Wide, Wide World of Torts is Going on? First Tobacco, Now Guns: An Examination of Hamilton v. Accu-tek and the Cities' Lawsuits Against the Gun Industry*, 69 Miss. L.J. 521, 551-52 (1999) (noting the "unsettled" nature of the theory of public nuisance among courts in gun manufacturer liability cases). But see *Ganim v. Smith*, 1999 WL 1241909 at \*13 (Conn. Super. Ct. 1999) (striking down plaintiff's public nuisance claim); *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353 at \*3 (Fla. Cir. Ct. 1999) (noting that plaintiff's claim of public nuisance failed); *City of Cincinnati v. Beretta, U.S.A. Corp.*, 2000 WL 1133078 at \*7 (Ohio Ct. App. 2000) (noting that the city could not maintain an action for public nuisance).
114. No. 96 C 3664, 1997 WL 337218, at \*1 (N.D. Ill. June 13, 1997).
115. *Id.* at \*5. Michael Bubalo and Daniel Doffyn were Chicago police officers shot by an assailant using a TEC-DC9 handgun manufactured by the defendant. Doffyn was fatally wounded, and Bubalo brought suit on his behalf. *Id.* at \*1-\*2.
116. *Id.* at \*3.

of danger to one's person was a right common to the public.<sup>117</sup> Finally, the court asserted that for Navegar to be held liable, it did not need to have "control" over the handgun.<sup>118</sup> Instead, the court ruled that if the plaintiffs could show that Navegar had responsibility for or notice of the nuisance, it would be found liable.<sup>119</sup>

In *White v. Smith & Wesson*,<sup>120</sup> the District Court for the Northern District of Ohio held that a qualified public nuisance claim could survive a summary judgment motion on the strength of a sufficiently pleaded claim of negligence.<sup>121</sup> Similarly, strong support for public nuisance claims were voiced in *City of Boston v. Smith & Wesson*.<sup>122</sup>

In *City of Boston*, the Superior Court of Massachusetts held that the plaintiffs had pleaded sufficient facts to allow the public nuisance claim to stand.<sup>123</sup> The court stated that the instrumentality that interfered with the public right to safety and health was the "illegal secondary firearms market" created and maintained by Smith and Wesson.<sup>124</sup> The court remarked that the public nuisance charge should stand, despite its novelty in Massachusetts.<sup>125</sup> To support its holding, the court cited section 812B of the *Restatement (Second) of Torts*<sup>126</sup> and Massachusetts case law.<sup>127</sup>

*b. Cases Where the Public Nuisance Claim Failed: Ganim, Penelas and Cincinnati*

In *Ganim v. Smith & Wesson Corp.*,<sup>128</sup> the Superior Court of Connecticut did not strike down the claim of public nuisance; rather, the court noted that the City of Bridgeport's Charter must be consulted for the

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117. *Id.* at \*4. However, the court did not recognize the following rights alleged in the plaintiff's complaint as rights common to the public: the right to be free from fear of being sprayed with bullets from "easily concealable military-style assault weapon[s]" and the right to be free from violence. *Id.* at \*3-\*4.

118. *Id.* at \*5.

119. *Id.*

120. 97 F. Supp. 2d 816 (N.D. Ohio 2000).

121. *Id.* at 829.

122. No. 199902590, 2000 WL 1473568, at \*1 (Mass. Super. Ct. July 13, 2000).

123. *Id.* at \*14.

124. *Id.*

125. *Id.*

126. *See supra* note 71 and accompanying text.

127. *Boston*, 2000 WL 1473568, at \*14 (asserting that the concept of public nuisance encompasses much more than crimes against property) (citing *Leary v. City of Boston*, 481 N.E.2d 1184, 1887 (Mass. App. Ct. 1985)); *Hub Theatres, Inc., v. Massachusetts Port Auth.*, 346 N.E.2d 371, 374 (Mass. 1976) (noting that even legislatively sanctioned business is "subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others" (quoting *Sawyer v. Davis*, 136 Mass. 239, 242 (1884))).

128. No. CV990153198S, 1999 WL 1241909, at \*1 (Conn. Super. Ct. Dec. 10, 1999).

proper remedy.<sup>129</sup> The court stated that in the absence of statutory authority passed by the City Council, it could not provide a judicial remedy.<sup>130</sup> Furthermore, the court noted that the city council of Bridgeport would be properly exercising the authority granted in the city's charter by passing an ordinance against handgun manufacturers.<sup>131</sup> The *Ganim* decision is an example of the deference courts normally give to the elected law-making body in a jurisdiction when the law-making body determines the activities that constitute public nuisances.<sup>132</sup>

The court in *Penelas v. Arms Technology, Inc.*<sup>133</sup> established that in the absence of statutory or judicial authority, a claim of public nuisance against a gun manufacturer must fail.<sup>134</sup> The court relied on the *Tioga* and *Bloomington* cases to further support the position that the weight of judicial opinion weighs against applying common law public nuisance to products liability cases.<sup>135</sup> Also, because the defendant did not control the instrumentality, recovery under public nuisance would not be proper.<sup>136</sup>

Most recently, *City of Cincinnati v. Beretta, U.S.A. Corp.*<sup>137</sup> declined to expand the common law crime of public nuisance to gun manufacturing cases.<sup>138</sup> The court first struck down the claim of absolute nuisance because gun manufacturing and distribution was a lawful activity, "heavily regulated" by federal, state and local authorities.<sup>139</sup> The city's claim of qualified nuisance failed as well. Because a plaintiff must show negligence in order to prevail on a qualified nuisance claim, the court held that as a matter of law the city failed to show that the gun manufacturers had a duty to others.<sup>140</sup>

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129. *Id.* at \*12 (quoting *Keeney v. Town of Old Saybrook*, 676 A.2d 795, 802 (Conn. 1996), which stated that "a city's charter is the fountainhead of its municipal powers . . .").

130. *Id.* at \*13.

131. *Id.* at \*12.

132. See *supra* notes 59-63 and accompanying text.

133. No. 99-1941CA-06, 1999 WL 1204353, at \*1 (Fla. Cir. Ct. Dec. 13, 1999).

134. *Id.* at \*4 (stating that the law of strict liability and negligence, not public nuisance, applies to the manufacture and design of lawful products).

135. *Id.*

136. *Id.*

137. No. A9902369, 2000 WL 1133078, at \*1 (Ohio Ct. App. Aug. 11, 2000).

138. *Id.* at \*6. The court cited, in a footnote, the *Tioga* and *Manchester* cases, as well as other asbestos-related cases, to support its assertion that public nuisance cannot apply to design and product litigation. *Id.* at \*6 n.34.

139. *Id.* at \*7. But see Harold H. Reader, *Are Guns the Next Tobacco?*, 28 A.B.A. THE BRIEF at 2 (1999). One commentator argued that "guns are virtually unregulated." *Id.* Unlike guns, almost all consumer products are under the power of the Consumer Product Safety Commission. *Id.* The commentator asserted that "a child's squirt gun is more closely regulated than a handgun in this country." *Id.*

140. *Cincinnati*, 2000 WL 1133078, at \*7.

c. *The Third Circuit Strikes Down Public Nuisance Claims: Camden and Philadelphia*

While courts in Illinois,<sup>141</sup> Ohio,<sup>142</sup> Massachusetts,<sup>143</sup> Connecticut,<sup>144</sup> and Florida<sup>145</sup> have reached varying conclusions about gun manufacturer liability under public nuisance law, the Third Circuit has struck down the use of public nuisance claims against gun manufacturers.<sup>146</sup> In *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*,<sup>147</sup> the United States Court of Appeals for the Third Circuit affirmed the district court's dismissal of the public nuisance claim against Beretta, a major gun manufacturer.<sup>148</sup> Camden County alleged that Beretta's distribution scheme created an illegal, secondary gun market that allowed criminals greater access to Beretta's handguns.<sup>149</sup> This criminal market, Camden County asserted, "endangered public safety, health, and peace, and imposed inordinate financial burdens on the [County]."<sup>150</sup> Thus, Camden County argued that these facts supported its claim that Beretta intentionally created a public nuisance.<sup>151</sup>

The court of appeals, however, disagreed.<sup>152</sup> Because New Jersey's public nuisance law had never been extended to cover non-defective products in the stream of commerce, the court held that public nuisance law was inapplicable.<sup>153</sup> Furthermore, the court held that even

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141. *Bubalo*, 1997 WL 337218, at \*5 (upholding a public nuisance claim against the defendant gun manufacturer).

142. *White*, 97 F. Supp. 2d at 829 (holding that the State had stated a public nuisance claim against gun manufacturers). *But see Cincinnati*, 2000 WL 1133078, at \*7 (stating that the public nuisance claim failed because the gun manufacturer did not have a duty to others).

143. *Boston*, 2000 WL 1473568, at \*14 (holding that the public nuisance claim against the gun manufacturer could survive the burden of pleadings).

144. *Ganim*, 1999 WL 1241909, at \*12-\*13 (affirming the dismissal of the public nuisance claim against the gun manufacturer because the city's charter failed to provide authorization to bring such a claim).

145. *Penelas*, 1999 WL 1204353, at \*4 (stating that the common law of public nuisance could not be extended to include products liability).

146. *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 426 (3d Cir. 2002) (stating that plaintiff's tort liability claims would be dismissed against gun manufacturers "when their legally sold, non-defective products are criminally used to injure others"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (disallowing a public nuisance claim to be brought against gun manufacturers who were legally selling guns).

147. 273 F.3d 536 (3d Cir. 2001).

148. *Id.* at 538.

149. *Id.* at 539.

150. *Id.* at 538.

151. *Id.* at 539.

152. *Id.*

153. *Camden*, 273 F.3d at 540 ("If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity."). The court stated that other jurisdictions have adhered to the boundaries between

if public nuisance law applied, Beretta lacked the requisite control to abate the alleged nuisance once the handguns left Beretta's property and entered the market.<sup>154</sup> The court found the distribution chain to be too attenuated to find a direct or causal link from the alleged source of the interference to Beretta.<sup>155</sup> The court concluded that "[i]f independent third parties cause the nuisance, parties that have not controlled or created the nuisance are not liable."<sup>156</sup>

Less than two months after the Third Circuit entered its decision in *Camden*, the court, once again, affirmed the dismissal of a public nuisance claim brought against a gun manufacturer in *City of Philadelphia v. Beretta U.S.A. Corp.*<sup>157</sup> Similar to Camden County's allegations,<sup>158</sup> the City of Philadelphia also alleged that Beretta created an illegal handgun market through its distribution chain that allowed unauthorized users to gain access to handguns.<sup>159</sup> The city claimed that it had incurred significant costs preventing and responding to the resulting violence stemming from the misuse of handguns.<sup>160</sup> Nonetheless, the court concluded that Philadelphia failed to state a valid public nuisance claim against the defendants.<sup>161</sup> Employing the same reasoning from *Camden*,<sup>162</sup> the court held that there existed no Pennsylvania precedent that extended the law of public nuisance to non-defective products in the stream of commerce.<sup>163</sup> Relying heavily on the discussion in *Camden*, the court also concluded that Beretta did not have the

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public nuisance law and products liability law because otherwise nuisance law could easily "devour in one gulp the entire law of tort." *Id.* (quoting *Tioga Pub. Sch. Dist. v. United States Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)).

154. *Id.* at 541.

155. *Id.* Initially, Beretta sells its handguns to "federally licensed gun distributors who in turn lawfully sell those handguns to federally licensed dealers." *Id.* Several links down in the chain, the gun reaches an unauthorized user over whom Beretta has no control. *Id.* Therefore, no direct or causal link to Beretta can be established. *Id.*

156. *Id.* The court noted that, as a federal court interpreting state law, it must use state law precedent to predict how a state court would decide the issue. *Id.* The United States Court of Appeals for the Third Circuit stated that there existed a future possibility that the Supreme Court of New Jersey could expand public nuisance law to cover gun manufacturer liability cases, but that they could not predict that it would do so at the time the ruling was made. *Id.*

157. 277 F.3d 415, 426 (3d Cir. 2002).

158. *Camden*, 273 F.3d at 539 (alleging that Beretta's distribution scheme created an illegal secondary market that allowed criminals easier access to handguns).

159. *Philadelphia*, 277 F.3d at 419.

160. *Id.*

161. *Id.* at 422.

162. *See supra* notes 153-56 and accompanying text.

163. *Philadelphia*, 277 F.3d at 421. The United States Court of Appeals for the Third Circuit had to base its decision on Pennsylvania state law and predict how the Supreme Court of Pennsylvania would decide the issue. *Id.*



requisite control over independent third parties in the distribution chain.<sup>164</sup>

Thus, in both *Camden* and *Philadelphia*, the Third Circuit interpreted current New Jersey and Pennsylvania law to arrive at the prediction that neither state would support a public nuisance claim against a gun manufacturer.<sup>165</sup> Like New Jersey and Pennsylvania, Maryland lacks definitive legal authority on the issue of gun manufacturer liability under public nuisance law.<sup>166</sup> Therefore, an accurate prediction of how the Court of Appeals of Maryland would decide the issue requires an examination of the development of public nuisance law in Maryland.

### III. PUBLIC NUISANCE IN MARYLAND

#### A. *Air, Water, Noise and Dangerous Conditions: The Judicial Development of Public Nuisance*

An activity performed on a person's property is considered a public nuisance if the resulting injury from the activity materially diminishes the value of the neighboring properties, and seriously interferes with the enjoyment of those properties and rights common to the public.<sup>167</sup> This rule has been articulated many times in Maryland common law.<sup>168</sup> An activity can be a public nuisance either at common law<sup>169</sup> or by statute.<sup>170</sup> The locality of the activity is a factor to consider when demonstrating how the activity injures the surrounding area.<sup>171</sup> While all people have the right to breathe clean air and enjoy

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164. *Id.* at 422.

165. *See Philadelphia*, 277 F.3d at 421; *Camden*, 273 F.3d at 541-42.

166. *See supra* notes 153, 163 and accompanying text; Part III.

167. *See generally* *Rosenblatt v. Exxon Co.*, 335 Md. 58, 642 A.2d 180 (1994); *Washington Suburban Sanitary Comm'n v. Cae-Link Corp.*, 330 Md. 115, 622 A.2d 745 (1993); *Eanes v. State*, 318 Md. 436, 569 A.2d 604 (1990); *Tadger v. Montgomery County*, 300 Md. 539, 479 A.2d 1321 (1984); *Corbi v. Hendrickson*, 268 Md. 459, 302 A.2d 194 (1973); *Bishop Processing Co. v. Davis*, 213 Md. 465, 132 A.2d 445 (1957); *Meadowbrook Swimming Club, Inc. v. Albert*, 173 Md. 641, 197 A. 146 (1938); *Jackson v. Shawinigan Electro Prods. Co.*, 132 Md. 128, 103 A. 453 (1918); *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 A. 900 (1890); *Woodyear v. Schaefer*, 57 Md. 1 (1881); *Adams v. Michael*, 38 Md. 123 (1873); *Scott v. Bay*, 3 Md. 431 (1853); *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986).

168. *Washington Suburban Sanitary Corp.*, 330 Md. at 124-25, 622 A.2d at 749-50; *Bishop Processing Co.*, 213 Md. at 472-73, 132 A.2d at 448.

169. *See Woodyear*, 57 Md. at 3 (noting that slaughterhouses are *prima facie* nuisances); *Adams*, 38 Md. at 126 (polluting the air by dirt and smoke is a public nuisance.); *Scott*, 3 Md. at 446 ("It is a rule of common law, that a man should so use his own property as not to hurt or injure another. . .").

170. *See Eanes*, 318 Md. at 440, 569 A.2d at 606 (noting that the statute provided that "loud and unseemly noises" were prohibited in any Maryland town or city if they disturbed the surrounding area).

171. *See Corbi*, 268 Md. at 461, 465, 302 A.2d at 196, 197-98 (explaining that the appellees lived in a rural area and had an increased expectation of peace and quiet, and that they would tend to be more affected by rock music

their property as they please, people living in certain locations, like crowded cities, must endure more inconveniences than those living in rural areas.<sup>172</sup>

There are four main types of nuisance: pollution of air,<sup>173</sup> pollution of water,<sup>174</sup> noise disturbances,<sup>175</sup> and dangerous conditions.<sup>176</sup> These types of nuisances reflect the harmful results of certain activities being performed on a neighboring property.

### 1. Pollution of the Air

Air pollution often occurs in the form of smoke or noxious odors. In *Adams v. Michael*,<sup>177</sup> a felt-roofing factory that produced smoke, dirt and odor was held to be a nuisance because the owners of nearby dwellings possessed a natural right to breathe clean air.<sup>178</sup> The court held that the standard for an injury was two-fold: the injury must first materially diminish the value of the property, and, second, must “seriously interfere” with the ordinary use and comfort of the dwelling.<sup>179</sup>

This two-fold standard was applied again several years later in *Susquehanna Fertilizer Co. v. Malone* when fumes from a fertilizer processing plant damaged nearby houses by discoloring laundry, corroding gutters and producing a noxious odor.<sup>180</sup> In other situations, the polluted air does not have to affect the property itself, but, rather, the

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- playing at a nearby nightclub); *Meadowbrook Swimming Club*, 173 Md. at 643-44, 197 A. at 147 (involving residents of the rural hills of the Mount Washington area affected by a jazz orchestra playing four nights a week); *Jackson*, 132 Md. at 136, 103 A. at 457 (describing a city as a “locality where some discomforts must be expected”); *Euler*, 75 Md. at 618-19, 23 A. at 845 (“[A] party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance, that he might rightfully claim if he were dwelling in the country.”).
172. *Euler*, 75 Md. at 618-19, 23 A. at 845-46 (stating that a person living in a city cannot expect the same tranquility as a person living in a rural area). *But see Susquehanna Fertilizer*, 73 Md. at 276-77, 20 A. at 901 (explaining that despite the convenience of the activity in its location and expectation of the local inhabitants, if the activity deprives another property-owner of the right to fully enjoy his or her property then the activity must be deemed a nuisance and judicially abated).
173. *See Bishop Processing Co.*, 213 Md. at 469, 132 A.2d at 446; *Jackson*, 132 Md. at 128, 103 A. at 454; *Euler*, 75 Md. at 617, 23 A. at 845; *Susquehanna Fertilizer Co.*, 73 Md. at 275, 20 A. at 900; *Adams*, 38 Md. at 125.
174. *See Rosenblatt*, 335 Md. at 63, 642 A.2d at 182; *Woodyear*, 57 Md. at 5; *Yarema*, 69 Md. App. at 130, 516 A.2d at 993.
175. *See Corbi*, 268 Md. at 464, 302 A.2d at 197; *Gorman v. Sabo*, 210 Md. 155, 159, 122 A.2d 475, 476 (1956); *Meadowbrook Swimming Club, Inc.*, 173 Md. at 643, 197 A. at 147.
176. *See Tadjer*, 300 Md. at 550, 479 A.2d at 1326; *Gallagher v. Flury*, 99 Md. 181, 183, 57 A. 672, 673 (1904); *Mayor & City Council of Baltimore v. Radecke*, 49 Md. 217, 228 (1878); *Scott*, 3 Md. at 444.
177. 38 Md. 123 (1873).
178. *Id.* at 126.
179. *Id.* at 125-26.
180. 73 Md. at 275-76, 20 A. at 900.

health of the neighboring occupants. In *Bishop Processing Co. v. Davis*,<sup>181</sup> a factory that processed poultry by-products<sup>182</sup> emitted "shocking and nauseating" odors whereby the only relief for the neighboring occupants was a change in the direction of the wind.<sup>183</sup> The court upheld the action for public nuisance despite the company's efforts to alleviate the smell.<sup>184</sup> In essence, the injury resulting from air pollution does not necessarily have to directly injure the property, but, rather, diminish the property's value by affecting the use and enjoyment of the property by its inhabitants.

## 2. Pollution of Water

A recognized common law right exists to enjoy the stream of water in its most natural state.<sup>185</sup> Any activity that negatively changes the condition of the water to render it unusable by property owners downstream constitutes a nuisance.<sup>186</sup> This is also true for underground water reservoirs.

One example of a contaminated reservoir is found in *Exxon Corp. v. Yarema*.<sup>187</sup> The *Yarema* court held that Exxon was accountable under a claim of public nuisance because gasoline that leaked from one of Exxon's underground storage tanks had contaminated the underground water supply.<sup>188</sup> While Exxon argued that there was no direct injury to the plaintiffs, the court held that there was no need to prove direct injury.<sup>189</sup> Because the leak prompted the Baltimore County Department of Health to prohibit development or sale of the Yaremas' property, the court held that the gasoline leak unreasonably interfered with their use and enjoyment of their property.<sup>190</sup> The court concluded that a successful claim of public nuisance does not rest on the physical impact of the activity, but, rather, on whether there was a disturbance of a property right.<sup>191</sup>

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181. 213 Md. 465, 132 A.2d 445 (1957).

182. *Id.* at 469, 132 A.2d at 446. The by-products consisted of, among other things, blood, feathers, bones and feet. *Id.*

183. *Id.* at 470, 132 A.2d at 447.

184. *Id.* The company tried to address the noxious situation through water and chemical treatment and incineration. None of these attempted remedies were successful. *Id.*

185. *See Woodyear*, 57 Md. at 8-9.

186. *Id.* at 11-12. The court stated that a slaughterhouse that disposed of blood and entrails into a river, creating a pungent stench of decomposition had created a nuisance. *Id.* at 11. One mile downstream from the slaughterhouse, a flour mill was unable to use the water and its employees often had to stop working because of the nauseating stench. *Id.* at 5.

187. 69 Md. App. 124, 516 A.2d 990 (1986).

188. *Id.* at 148-53, 516 A.2d at 1003-05 (These reservoirs are often affected by leaking underground fuel storage tanks).

189. *Id.* at 148, 516 A.2d at 1002.

190. *Id.* at 153, 516 A.2d at 1005.

191. *Id.* at 151, 516 A.2d at 1004; *see also Rosenblatt*, 335 Md. 58, 642 A.2d 180. In *Rosenblatt*, although there was proof of contamination as a result of leaking

### 3. Noise Pollution

With noise disturbances, as with water pollution, the injury is an indirect effect on the enjoyment of property. The seminal Maryland case in this regard is *Meadowbrook Swimming Club v. Albert*.<sup>192</sup> Several nights a week, loud jazz music was played in an outdoor dance pavilion in Mount Washington.<sup>193</sup> Residents on the southeastern hills could not “sleep, study, read, converse, or concentrate” until the music stopped playing at midnight.<sup>194</sup> While the court stated that not all annoyances constitute nuisances, it held that the late-night loud music was a nuisance that had to be abated.<sup>195</sup> The essence of a public nuisance claim based on a noise disturbance focuses on the physical discomfort, the vibrations, and the noise that nearby residents are forced to endure.<sup>196</sup>

### 4. Dangerous Conditions

Dangerous conditions, the final major category of public nuisance, can be described as an existing condition that has the potential to injure adjacent property. There exists a basic common law right that all people should be safe and free from the fear of physical danger.<sup>197</sup> The first case in Maryland to deal with that right was *Scott v. Bay*.<sup>198</sup> *Scott* involved defendants who owned a mining operation in a

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underground gasoline tanks, the *Rosenblatt* trial court held that only adjacent owners of property were entitled to use the remedy of public nuisance. *Id.* at 63-65, 642 A.2d at 182-83. The plaintiff, Thomas Rosenblatt, leased the property from Exxon not knowing that the ground water was contaminated. *Id.* at 63, 642 A.2d at 182. The court concluded that subsequent purchasers of property could not make a claim of public nuisance because they have bargaining power that a neighboring property owner does not. *Id.* at 79-80, 642 A.2d at 190-91.

192. 173 Md. 641, 197 A. 146 (1938).

193. *Id.* at 643-44, 197 A. at 147.

194. *Id.* at 647, 197 A. at 149.

195. *Id.* at 648-49, 197 A. at 149. Over thirty-years and a new form of music later, the Court of Appeals of Maryland once again held that loud rock music played at a local nightclub constituted a nuisance when nearby residents were kept awake until late night hours. See *Corbi v. Hendrickson*, 268 Md. 459, 464, 302 A.2d 194, 197 (1973).

196. See, e.g., *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956). Mrs. Gorman, the defendant, embarked on a mission to force her neighbor, Mrs. Sabo, and her family to leave their apartment. *Id.* at 160, 122 A.2d at 477. For several years, Mrs. Gorman deliberately blasted her radio through an open window in the direction of the Sabo apartment. *Id.* The window was kept open year round, including the winter, so that the loud radio noise would not be muffled in any way. *Id.* Mrs. Gorman also encouraged her children to bang sticks and stones on metal furniture to further annoy the Sabo household. *Id.* One neighbor testified that Mrs. Gorman said her intent was “to see that Mrs. Sabo was carried out of the house either in a straight-jacket or in a coffin.” *Id.* The court affirmed Mrs. Gorman’s conviction on nuisance. *Id.* at 161, 122 A.2d at 478.

197. See, e.g., *Scott v. Bay*, 3 Md. 431, 432 (1853).

198. 3 Md. 431 (1853).

quarry,<sup>199</sup> which involved blasting rocks.<sup>200</sup> Eventually, some rocks were blown onto and damaged the plaintiff's property.<sup>201</sup> The court concluded that no matter how lawful the business is, nor how many precautions are taken, if an activity proves to be a nuisance then the business must pay damages.<sup>202</sup>

However, the court later held that machinery used in an activity was not deemed a nuisance even though plaintiffs had shown that the machinery shared a liability common to similar machines.<sup>203</sup> In *Mayor & City Council of Baltimore v. Radecke*,<sup>204</sup> Baltimore City attempted to force the defendant to remove from his premises the steam engine he used in his carpentry business.<sup>205</sup> Baltimore City argued that steam engines had a propensity to explode, thereby starting fires, subjecting neighboring properties to increased risk of fire, raising insurance premiums, and forcing the municipality to spend more on fire-fighting, as well as exciting the fears of the public.<sup>206</sup> The court disagreed, stating that none of the circumstances asserted by the plaintiffs made steam engines a nuisance.<sup>207</sup>

The more recent case of *Tadger v. Montgomery County*<sup>208</sup> also illustrates an attempt to utilize public nuisance to allow recovery for certain dangerous conditions. From 1950 to 1962, Montgomery County used a tract of land as a landfill where trash was buried.<sup>209</sup> After AFA Corporation purchased the tract in 1977, an explosion occurred, allegedly as a result of a methane build up.<sup>210</sup> This explosion caused injury to the plaintiffs.<sup>211</sup> The *Tadger* court held that the plaintiffs failed to set forth an action for public nuisance because they did not demonstrate that the County breached its duty to the plaintiffs.<sup>212</sup> Moreover, the court concluded that the plaintiffs were simply attempting to use their nuisance claims as a disguise in order to "frame an action in negligence using somewhat different terms."<sup>213</sup>

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199. *Id.* at 443.

200. *Id.* at 431.

201. *Id.*

202. *Id.* at 443, 445.

203. *See Mayor & City Council of Baltimore v. Radecke*, 49 Md. 217, 217-18 (1878).

204. *Id.*

205. *Id.* at 217.

206. *Id.* at 218.

207. *Id.* at 219; *see also* *Gallagher v. Flury*, 99 Md. 181, 183, 188-89, 57 A. 672, 673, 675 (1904) (noting that despite the plaintiffs' claims that a stable created an increased risk of fire and increased insurance premiums, the court held that a stable was not a nuisance *per se*).

208. 300 Md. 539, 479 A.2d 1321 (1984).

209. *Id.* at 543-44, 479 A.2d 1323.

210. *Id.* at 544, 479 A.2d at 1323 (noting that the presence of methane was a result of the decomposing garbage).

211. *Id.*

212. *Id.* at 554, 479 A.2d at 1328.

213. *Id.*

*B. Notably Absent: Gun Manufacturer Liability and Nuisance Statutes*

The Maryland General Assembly has the power, within constitutional limits, to declare what shall be labeled a nuisance and provide for its abatement.<sup>214</sup> Maryland's legislature has passed statutes that specify activities that are deemed to be public nuisances.<sup>215</sup> However, manufacture and distribution of handguns is not among those specifically mentioned by statute.<sup>216</sup> Thus, to hold a gun manufacturer liable under a claim of public nuisance, a Maryland court would have to rely on the common law.

In 1985, the Court of Appeals of Maryland was the first court in the United States to fashion a new type of liability for manufacturers of Saturday Night Specials.<sup>217</sup> This decision was quickly overruled by the Maryland General Assembly<sup>218</sup> and has never been followed by a court in any jurisdiction.<sup>219</sup> However, because the *Kelley* holding has been cited in recent gun manufacturer liability cases,<sup>220</sup> its landmark significance cannot be overlooked.

*C. Gun Manufacturer Liability in Maryland: The Landmark Kelley Holding and the Response by the Maryland General Assembly*

1. A New Type of Liability for Gun Manufacturers

In 1985, the Court of Appeals of Maryland, for the first time in American jurisprudence, held that a handgun manufacturer may be

214. See *Becker v. State*, 363 Md. 77, 86, 767 A.2d 816, 820 (2001) (citing *Adams v. Comm'rs of Trappe*, 204 Md. 165, 173-74, 102 A.2d 830, 836 (1954)).

215. See MD. CODE ANN., CTS. & JUD. PROC. § 5-403.1 (1998) (prohibiting the use of private nuisance actions against sport shooting ranges); MD. CODE ANN., ENVIR. § 4-402 (1996) (declaring the public policy for water pollution control and abatement in Maryland); MD. CODE ANN., ENVIR. § 9-302 (1996) (outlining the legislative policy behind water pollution control in Maryland); MD. CODE ANN., HEALTH-GEN I. § 21-254 (2000) (defining the actions against foods that pose an immediate threat); MD. CODE ANN., REAL PROP. § 14-123 (Supp. 2001) (declaring and defining permissible nuisance actions within Baltimore City); MD. CODE ANN., TRANSP. I § 21-205 (1999) (prohibiting unauthorized traffic signs, signals and markings); MD. ANN. CODE art. 27, § 431 (Supp. II 2001) (prohibiting the use of buildings or structures for the purpose of engaging in or soliciting prostitution); MD. ANN. CODE art. 27, § 237 (1996) (prohibiting the keeping of a gaming table or place).

216. See *supra* note 215.

217. See *infra* notes 222-25 and accompanying text.

218. See *infra* Part III.C.2.

219. See *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 534 (S.D. Ohio 1987); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987); *Knott v. Liberty Jewelry and Loan, Inc.*, 748 P.2d 661, 665 (Wash. App. 1988); *Eva A. Shine, The Junk Gun Predicament: Answers Do Exist*, 30 ARIZ. ST. L.J. 1183, 1195-97 (1998).

220. See, e.g., *Moore*, 789 F.2d at 1327; *Caveny*, 665 F. Supp. at 534; *Armijo*, 656 F. Supp. at 775; *Knott*, 748 P.2d at 665.

held liable for injuries caused by the criminal use of its handgun.<sup>221</sup> In *Kelley v. R.G. Industries*, the Court of Appeals of Maryland announced a new type of liability for manufacturers of small, low-cost handguns known as "Saturday Night Specials."<sup>222</sup> This new liability was created because the court believed that the common law principles of strict liability and abnormally dangerous activity could not apply to manufacturers of handguns.<sup>223</sup> Asserting the need for flexibility in the common law to address important social issues,<sup>224</sup> the court of appeals fashioned strict liability for manufacturers of Saturday Night Specials that cause injuries to victims of criminal acts.<sup>225</sup>

The Court of Appeals of Maryland heard the *Kelley* case after receiving certified questions from the United States District Court for the District of Maryland.<sup>226</sup> The questions were rephrased as:

- 1) Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?
- 2) Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as "Saturday Night Specials," and regularly used in criminal activity, strictly liable to a person injured by such handgun during the course of a crime?
- 3) Does the Rohm Revolver Handgun Model RG38S, serial number 0152662, fall within the category referred to in question 2?<sup>227</sup>

Question 1 was answered in the negative,<sup>228</sup> while question 2 was answered in the affirmative.<sup>229</sup> The court of appeals demonstrated that its answer to question 3 would most likely be in the affirmative but left that decision to be made by the district court as a matter of law.<sup>230</sup>

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221. See *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 159, 497 A.2d 1143, 1160 (1985).

222. *Id.* at 158, 497 A.2d at 1160.

223. *Id.* at 132, 497 A.2d at 1146.

224. *Id.* at 140, 497 A.2d at 1150-51.

225. *Id.* at 158-59, 497 A.2d at 1160.

226. *Id.* at 128, 497 A.2d at 1144. Olen J. Kelley, the plaintiff, suffered a gunshot wound to the chest during an armed robbery at the place of his employment. He and his wife brought an action in the Circuit Court for Montgomery County based in strict liability against the manufacturer of the handgun used in the robbery. *Id.* at 129, 497 A.2d at 1145. The manufacturer, R.G. Industries, pursuant to 28 U.S.C. §§ 1441 and 1446, removed the case to the United States District Court for the District of Maryland. *Id.*

227. *Kelley*, 304 Md. at 131, 497 A.2d at 1146.

228. *Id.* at 144, 497 A.2d at 1152-53.

229. *Id.* at 158-59, 497 A.2d at 1160.

230. *Id.* at 159-61, 497 A.2d at 1160-61.

a. *General Strict Liability for Handgun Manufacturers*

Dealing with the strict liability issue raised in the first question, the court addressed the principles of abnormally dangerous activities and abnormally dangerous products.<sup>231</sup> The factors set forth in section 520 of the *Restatement (Second) of Torts*<sup>232</sup> to outline abnormally dangerous activities were quoted, but the court concluded that the factors were inapplicable to handgun manufacturers.<sup>233</sup> Maryland law did not permit the abnormally dangerous activity doctrine to extend to alleged tortfeasors that were not owners of land.<sup>234</sup> Because the activity engaged in by handgun manufacturers and the subsequent use of their handguns in crimes bore no relation to the ownership of land, the court held that the abnormally dangerous activity doctrine did not apply.<sup>235</sup>

To handle the next issue of whether handguns were abnormally dangerous products, the court consulted *Phipps v. General Motors Corp.*<sup>236</sup> The court in *Phipps* adopted section 402A of the *Restatement (Second) of Torts*.<sup>237</sup> The factors stated in *Phipps* and subsequent products liability decisions required that the “product be defective when

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231. *Kelley*, 304 Md. at 132-35, 497 A.2d at 1146-48.

232. These factors are:

- (a) [E]xistence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

233. *Kelley*, 304 Md. at 132-33, 497 A.2d at 1146-47.

234. *Id.* at 133, 497 A.2d at 1147 (citing *Toy v. Atl. Gulf & Pac. Co.*, 176 Md. 197, 4 A.2d 757 (1939)). The court of appeals also cited *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969), to illustrate that the basic thrust of the abnormally dangerous doctrine is that the activity must bear a relation to the ownership of land. *Yommer*, 255 Md. 220, 257 A.2d 138 (1969). The facts of *Yommer* involved an underground gasoline tank that leaked into the ground and contaminated the underground water supply. *Id.* at 221-22, 257 A.2d at 138-39. The *Yommer* court held that the owners of the gasoline tanks were strictly liable because gasoline tanks are inherently dangerous. *Id.* at 227, 257 A.2d at 141.

235. *Kelley*, 304 Md. at 133, 497 A.2d at 1147.

236. 278 Md. 337, 363 A.2d 955 (1976).

237. *Id.* at 344, 363 A.2d at 958. The *Restatement* factors concerning abnormally dangerous products adopted into Maryland law are:

- (1) [T]he product was in a defective condition at the time that it left the possession or control of the seller,
- (2) that it was unreasonably dangerous to the user or consumer,
- (3) that the defect was a cause of the injuries, and
- (4) that the product was expected to and did reach the consumer without substantial change in its condition.

*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965)).



sold.”<sup>238</sup> To make this determination, Maryland courts have employed the “consumer expectation test.”<sup>239</sup> Specifically, to determine if a product is defective under the consumer expectation test, a product must be sold by a manufacturer in a condition that the ordinary consumer would not expect to be dangerous.<sup>240</sup> However, the *Kelley* court surmised that an ordinary consumer expects a handgun to be dangerous.<sup>241</sup> The normal function of a handgun, albeit dangerous, should not be confused with a defective product.<sup>242</sup> Thus, the court concluded that a manufacturer of handguns could not be held liable under the consumer expectation test.<sup>243</sup>

The Court of Appeals of Maryland considered another, less utilized test: the “risk/utility test.”<sup>244</sup> That test determined a design defect on the basis of two alternative tests. If the product fails to perform in a safe manner, as an ordinary consumer would expect when used in a reasonably foreseeable manner, then the product is defective.<sup>245</sup> A product is also considered defective if the plaintiff can demonstrate that the design was the proximate cause of the plaintiff’s injury.<sup>246</sup> However, the defendant can overcome this evidence by showing that the benefits of the design outweigh the risks of using that design.<sup>247</sup> The court, however, stated that the risk/utility test was inapplicable to the instant case because the test only applied to a malfunctioning product.<sup>248</sup> Here, the gun did not malfunction but worked as it was intended: the projectile struck the individual in whose direction the handgun was pointed.<sup>249</sup> Because neither the abnormally dangerous theories nor the risk/utility test applied to the handgun, the Court of

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238. *Kelley*, 304 Md. at 135, 497 A.2d at 1148.

239. *Id.*; see also *Phipps*, 278 Md. at 344, 363 A.2d at 959 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. g to show that a product is defective when “it leaves the seller’s hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him”).

240. *Kelley*, 304 Md. at 135, 497 A.2d at 1148.

241. *Id.* at 136, 497 A.2d at 1148.

242. *Id.*

243. *Id.* at 136, 497 A.2d at 1148.

244. *Id.* at 136-37, 497 A.2d at 1148-49. The court cited *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), which created the risk/utility test. In that case, the plaintiff was trapped in malfunctioning machinery and sustained injuries as a result. *Id.* at 447. The plaintiff alleged that the design was defective because the machinery did not have any safety devices. *Id.* at 448. The Supreme Court of California agreed with the plaintiff and gave a definition of design defect based upon the risk inherent in the design and the utility of the design. *Id.* at 457-58.

245. *Kelley*, 304 Md. at 137, 497 A.2d at 1149.

246. *Id.*

247. *Id.*

248. *Id.* at 138, 497 A.2d at 1149.

249. *Id.*

Appeals of Maryland held that strict liability could not attach to handgun manufacturers.<sup>250</sup>

*b. A Special Strict Liability for Manufacturers of Saturday Night Specials*

To address the second question concerning strict liability for injuries caused by Saturday Night Specials, the court began its discussion by stating the need for flexibility in the common law to accommodate evolving societal issues.<sup>251</sup> While changes in the common law are possible, the changes must be consistent with public policy enacted by the legislature.<sup>252</sup> When the court of appeals decided *Kelley*, the current public policy of both the United States Congress and the Maryland General Assembly reflected an intention to prohibit the use of specific handguns that had no job-related or sporting purpose.<sup>253</sup> The statutes allowed for certain types of guns to be carried or transported for the purposes of job-related duties and competitive sport shooting.<sup>254</sup> Taken as a whole, these federal and state statutes reflected a legislative policy of permitting the use of larger, well-crafted handguns for legal job and sport settings, while restricting the public's access to small,

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250. *Id.*; see also *supra* note 238 (discussing the inapplicability of the abnormally dangerous activities doctrine).

251. *Id.* at 140, 497 A.2d at 1150-51.

252. *Id.* at 141, 497 A.2d at 1151.

253. See *id.* at 141-55, 497 A.2d at 1151-58. The court in *Kelley* discussed the provisions of the Gun Control Act of 1968, 18 U.S.C. §§ 921-28. The Gun Control Act of 1968 stated that the import and receiving of any firearm from overseas is prohibited. 18 U.S.C. § 922 (1968). Further, the Bureau of Alcohol, Tobacco and Firearms ("ATF") has a "partial list," outlining the criterion that a handgun must meet in order to be imported with an approved permit into the United States. First, the handgun must have a safety device that can be manually operated and second, the handgun's combined height and length must be not less than ten inches. *Kelley*, 304 Md. at 149, 497 A.2d at 1155 (citing "Factoring Criteria for Weapons," BATF Form 4590). Maryland has enacted handgun regulation statutes in Maryland Annotated Code article 27, sections 36B-36G (1984). These statutes provide that transporting or carrying a handgun, whether concealed or open, is prohibited. MD. ANN. CODE art. 27, § 36B(b) (1984).

254. *Kelley*, 304 Md. at 142 n.6, 147-49, 497 A.2d at 1151 n.6, 1157-58 (citing section 36B(c) of article 27 of the Maryland Annotated Code and quoting The Gun Control Act of 1968). The United States Congress provided certain exceptions to the prohibition on the importation of handguns with authorization from the Secretary of the Treasury. Specifically, if the firearm is for scientific, sport or training purposes, is not among firearms listed in I.R.C. 5845(a) or the same person who previously took the firearm out of the United States brings it back into the United States, then it will not be prohibited. 18 U.S.C. § 925(a)-(d). Maryland statutes provide for similar exceptions for law enforcement. See MD. ANN. CODE art. 27, § 36E(i) (1982 & Supp. 1984). In addition to these exceptions, the Maryland statutes also provide an exception for an individual who needs protection at home or at his place of business by allowing the carrying and transport of a handgun with a duly authorized permit. MD. ANN. CODE art. 27, § 36E (1982 & Supp. 1984).

low-cost handguns having "little or no legitimate purpose."<sup>255</sup> For these reasons, the Court of Appeals of Maryland judicially created a new type of liability for manufacturers of small, low-cost handguns known as Saturday Night Specials.<sup>256</sup>

Specifically, the court posited that a trial court must first make an initial determination, as a matter of law, that the handgun in question possesses the characteristics of a Saturday Night Special: short-barreled, inexpensive, and having no legally legitimate use.<sup>257</sup> Once the handgun is deemed a Saturday Night Special as a matter of law, the trier of fact must determine whether three elements are present before imposing liability.<sup>258</sup> First, the manufacturer and any other entity in the "marketing chain" must have manufactured the Saturday Night Special.<sup>259</sup> Second, the plaintiff must suffer injury or death as a result of the use of the handgun.<sup>260</sup> Finally, the shooting must have been a criminal act.<sup>261</sup>

*c. Determining Whether the Rohm Revolving Handgun Model RG385 Was a Saturday Night Special*

In response to question three, the court demonstrated that the handgun at issue met the criteria to be deemed a Saturday Night Special, but declined to make that determination as a matter of law because it was a more proper determination for a trial court.<sup>262</sup> Assessing the dynamic principles of common law and already existing consistent policy restricting the use of Saturday Night Specials, the Court of Appeals of Maryland carved a limited area of liability for manufacturers of handguns used in crimes.<sup>263</sup> However, this new liability was criticized as over-extending the boundaries of judicial power, to which the Maryland General Assembly promptly responded.

## 2. Overruling the *Kelley* Decision

The holding of *Kelley v. R.G. Industries* was legislatively reversed by Maryland Annotated Code article 27 section 36-I(h).<sup>264</sup> This section provided that "[a] person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person

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255. *Kelley*, 304 Md. at 155, 497 A.2d at 1158.

256. *Id.* at 157, 497 A.2d at 1159.

257. *Id.* at 158, 497 A.2d at 1160.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 159-61, 497 A.2d at 1160-61.

263. *Id.* at 160-61, 497 A.2d at 1161.

264. MD. ANN. CODE art. 27, § 36-I(h) (Supp. 1988); *see also supra* Part III.C.1.b.

...<sup>265</sup> While the statute prohibits a strict liability action, it leaves open the possibility for other actions brought on principles of negligence or common law. Currently, the common law principle of public nuisance is a potential action to hold handgun manufacturers liable under Maryland law.

#### IV. GUN MANUFACTURER LIABILITY AND PUBLIC NUISANCE CLAIMS JUST DO NOT MIX: THE FINAL ANALYSIS

Given Maryland's understanding of the tort of public nuisance, a gun manufacturer cannot be held liable for injuries resulting from the unauthorized use of its products because the manufacturer no longer controls the activity that causes the injury.<sup>266</sup> The gun manufacturer controls only the activities occurring on its property. If that activity causes injury to adjacent properties, then the manufacturer may be held liable under public nuisance.<sup>267</sup> However, a third party's actions are not subject to the control of the manufacturer, and, thus, public nuisance cannot apply to a gun manufacturer in that situation.

In *Kelley v. R.G. Industries*, the Court of Appeals of Maryland created a new strict liability approach to hold handgun manufacturers liable for injuries resulting from the criminal use of its products.<sup>268</sup> The court also considered other products liability approaches, such as strict liability, consumer expectation and risk/utility tests; however, the court concluded that none of these applied to the manufacturer of a non-defective handgun.<sup>269</sup> The newly formed strict liability approach of the *Kelley* court was legislatively overruled by the Maryland General Assembly with the enactment of Maryland Annotated Code article 27 section 36-I(h).<sup>270</sup> The statute prohibited any type of strict liability approach to gun manufacturers.<sup>271</sup> Between *Kelley* and section 36-I(h), one of the few common law remedies available to hold a gun manufacturer liable is the tort of public nuisance.<sup>272</sup>

It is possible in the near future that a Maryland municipality may attempt to recover tax dollars expended as a result of treating victims of handgun violence under a theory of public nuisance. Like municipalities in other jurisdictions that have brought suits against gun manufacturers,<sup>273</sup> a Maryland municipality could claim that the public

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265. See MD. ANN. CODE art. 27, § 36-I(h) (Supp. 1988). Exceptions to this statute include conspiring or willful aiding and abetting by the person or entity in the commission of a crime while using the firearm. *Id.*

266. See *supra* Part III.A.

267. See *supra* Part III.A.

268. See *supra* Part III.C.1.

269. See *supra* Part III.C.1.a.

270. See *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 836 n.3 (10th Cir. 1998); see also *supra* Part III.B.

271. See *supra* note 265 and accompanying text.

272. See *supra* Part III.

273. See *supra* Part II.B.2.

right to be physically safe and free from the fear of dangerous conditions is seriously interfered with when gun manufacturers allow cheap handguns to be marketed towards the criminal element. In other jurisdictions, a public nuisance claim against a gun manufacturer has survived the burden of pleading at best,<sup>274</sup> but courts usually have struck down public nuisance claims for failing to meet all of the elements.<sup>275</sup> Given Maryland's adherence to the basic common law principles of public nuisance,<sup>276</sup> a gun manufacturer could not be held liable under such a claim without a radical departure from those principles.<sup>277</sup>

At the heart of a public nuisance claim is the activity that causes the injury to the property of others.<sup>278</sup> The essence of public nuisance under Maryland law is that the actor must have control over the activities being performed on his or her property.<sup>279</sup> Thus, the cause of the injury must be directly related to an activity over which the actor has control. For example, in the case of mining in a quarry, the cause of the injury must be directly related to the act of blasting rocks.<sup>280</sup> Additionally, in the case of a ferro-silicon factory, the cause of the injury must be directly related to the smoke and noxious fumes emitted during the act of processing chemicals.<sup>281</sup> Furthermore, in the case of a slaughterhouse, the cause of the injury must be directly related to the act of processing and disposing of meat by-products.<sup>282</sup> Therefore, it follows that in the case of a gun manufacturer, the cause of the injury must be directly related to the act of assembling and building handguns on the manufacturer's property.

However, in suits that claim public nuisance against a gun manufacturer, the cause of the injuries to the victims were not directly related to the act of assembling and building handguns.<sup>283</sup> The injuries are usually caused by the unauthorized use of the final, non-defective product of a gun manufacturer by third parties.<sup>284</sup> A public nuisance claim cannot be successful in such a situation because the actions of

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274. See *supra* text accompanying notes 116, 121, 123.

275. See *supra* Part II.B.2.b-c.

276. See *supra* Part III.A.1-4.

277. See *supra* Part III.A-B.

278. See *supra* notes 43-46 and accompanying text.

279. See *supra* note 167 and accompanying text (discussing the nuisance requirement that an actor have control over the activities being performed); see also *supra* notes 43-46 and accompanying text.

280. See *Scott v. Bay*, 3 Md. 431, 432 (1853).

281. See *Jackson v. Shawinigan Electro Prods. Co.*, 132 Md. 128, 129, 134-35, 103 A. 453, 454, 456 (1918).

282. See *Woodyear v. Schaefer*, 57 Md. 1, 5-6 (1881).

283. See *supra* Part II.B.2.

284. See *Kelley*, 304 Md. at 138, 497 A.2d at 1149 (observing that the gun in question "injured a person in whose direction it was fired," and, consequently, the gun "worked precisely as intended").

third parties are not under the control of the gun manufacturer and are not related to a gun manufacturer's acts on its own property.<sup>285</sup>

When municipalities attempt to recover costs of increased insurance premiums and medical and law enforcement expenditures due to handgun violence, an inexpensive or low-quality handgun, while not defective, is viewed as having certain inherent liabilities.<sup>286</sup> A handgun is designed to propel a projectile at a high rate of speed in the direction of an animal, object or person with the ultimate goal of causing injury or death. The resulting injuries or deaths lead to increased medical expenses.<sup>287</sup> Moreover, additional expenditures by law enforcement agencies and the judiciary are needed to apprehend and prosecute the unauthorized users of handguns.<sup>288</sup>

However, Maryland courts have already ruled that increased expenditures resulting from an activity do not constitute a public nuisance.<sup>289</sup> A steam engine, despite its inherent danger of explosion causing increased risk of fire and higher insurance premiums, was found not to be a nuisance based on those factors.<sup>290</sup> A stable house was also not held to be a nuisance based upon the same reasoning.<sup>291</sup> Finally, Maryland courts are reluctant to uphold a claim of nuisance when it appears that the real claim is based in negligence.<sup>292</sup> In essence, the growing trend attempting to hold gun manufacturers liable under public nuisance is actually an attempt to repackage a set of facts that have already proven unsuccessful as negligence claims.<sup>293</sup>

## V. CONCLUSION

This Comment has explored the common law and statutory aspects of the tort of public nuisance in light of gun manufacturer liability. Looking at its origins in the law of England, public nuisance grew from the tort of trespass.<sup>294</sup> It developed to provide a remedy for property owners who were injured, not by a direct trespass, but by an indirect invasion as a result of an activity being performed on a neighboring property.<sup>295</sup> In the modern era, a public nuisance can be any

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285. See *City of Philadelphia v. Beretta, U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001).

286. See *Kelley*, 304 Md. at 157, 497 A.2d at 1159.

287. See generally Jonathan Bor, *Baltimore's Street Violence Creates an Epidemic of Spinal Cord Injuries*, BALTIMORE SUN, July 30, 2000, at 1A.

288. See *supra* notes 1-5 and accompanying text.

289. See *Mayor and City Council of Baltimore v. Radecke*, 49 Md. 217, 228 (1878).

290. *Id.*

291. *Gallagher v. Flury*, 99 Md. 181, 189, 57 A. 672, 675 (1904).

292. *Tadger v. Montgomery County*, 300 Md. 539, 554, 479 A.2d 1321, 1328 (1984).

293. *Id.*

294. See *supra* Part II.A.

295. See *supra* notes 43-46 and accompanying text.

activity that causes air pollution,<sup>296</sup> water pollution,<sup>297</sup> noise disturbances,<sup>298</sup> or a dangerous condition.<sup>299</sup>

The prominence of the tort of public nuisance in gun manufacturer litigation across the United States<sup>300</sup> has created the possibility that, in the future, a Maryland municipality may follow the recent trend and bring a similar claim in state court. When faced with this novel legal theory, a Maryland court will be confronted with the ambiguous concept of nuisance law,<sup>301</sup> and a split among other jurisdictions regarding the viability of a public nuisance claim against a gun manufacturer.<sup>302</sup>

Despite those hurdles, a gun manufacturer defending such a claim would be the beneficiary of the development of public nuisance law in Maryland over the last one hundred years.<sup>303</sup> A court in Maryland would be remiss in its application of the common law standards of public nuisance if it failed to note that the activity complained of must occur on the property of the defendant.<sup>304</sup> A gun manufacturer has no control of a gun after its production is complete and it leaves the property of the manufacturer in a non-defective condition.<sup>305</sup> In addition to that factor, while public nuisance law focuses on the *activity* that causes the harm, there exists no case or statute in Maryland that has determined a final, non-defective *product* to be a public nuisance.<sup>306</sup>

With the focus of public nuisance law on the activity performed on the defendant's property, a Maryland court would have to abrogate the common law to hold a gun manufacturer liable on a theory of public nuisance. While courts may from time to time change the common law to adapt to changing times,<sup>307</sup> the integrity of the common law and the stability of the entire legal system are preserved through the adherence of time-honored legal standards. There is no doubt that municipalities are grappling with the serious problem of handgun violence and its cost to the community.<sup>308</sup> While redefining the common law tort of public nuisance to hold gun manufacturers liable may be an attractive option for a court wanting to address this societal problem, such judicial activism may be costly in its own right to the stability of the entire legal system. A Maryland court upholding a pub-

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296. See *supra* Part III.A.1.

297. See *supra* Part III.A.2.

298. See *supra* Part III.A.3.

299. See *supra* Part III.A.4.

300. See *supra* Part II.B.2.

301. See *supra* note 41 and accompanying text.

302. See *supra* Part II.B.2.a-c.

303. See *supra* Part III.A.1-4.

304. See *supra* text accompanying notes 278-82.

305. See *supra* text accompanying notes 154-56, 164.

306. See *supra* Part III.A-B.

307. See *Kelley*, 304 Md. at 140-41, 497 A.2d at 1150-51.

308. See *supra* notes 1-5 and accompanying text.

lic nuisance claim against a gun manufacturer in the absence of statutory authority would, in effect, be erasing the time-honored decisions of Maryland courts that have defined the boundaries of public nuisance for over one hundred years. In that case, the tort of public nuisance would have such limitless dimensions that it would cease to have any meaningful legal significance. By striking down public nuisance claims brought by municipalities against gun manufacturers now, courts will be preserving the power of the tort of public nuisance as the voice of the community for the future.

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