

The Ethics of Firearm Industry Lawsuits

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“The cases against gun manufacturers are a parody of tort law.”

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Introduction

This paper examines the ethics of suing the firearms industry (manufacturers, distributors, and retailers) for costs, whether real or imagined, when their products are used by criminals in the commission of a crime. Are the arguments that form the basis for these suits based on legal established torts? Are the arguments made by the plaintiffs moral and is the behavior of using the courts to answer them ethical?

We'll briefly examine the history for these suits, and look at the ethics of using historians to testify in this or any industry specific litigation. Arguments for both sides will be presented, and the outcomes of the known cases. Finally we will offer our analysis on whether the industry has acted in an ethical manner, and whether the cities and individuals who bring such suits do so as well.

Background and History of Firearms Litigation

Criminal misuse of firearms has had a large drain on city, county and state governments. It is claimed that each year billions of dollars are spent on direct and indirect costs of firearm injuries and damages. Cities and states were looking for ways to get reimbursements for expenses incurred while fighting gun-associated crime. Some would argue that the cities are being more than creative as they strive to rewrite American Tort law.

With the success of the tobacco industries suits, the cities are employing a similar legal strategy to recover health expenses. The anti-gun organizations persuaded trial-lawyers, many of whom were successful against the tobacco

companies, to handle the lawsuits for the various cities (Bonney, “Using the Courts to Target Firearms Manufactures” Idaho Law Review 2002). New Orleans filed the first lawsuit against firearms manufacturers in 1998.

Tort Litigation

Tort litigation is the basis for these suits. Torts are civil matters where a tort is defined as “... the violation of some duty clearly set by law, not by a specific agreement between two parties, as in breach of contract. When such a duty is breached, the injured party has the right to institute suit for compensatory damages” (Brunner, 2003). Torts are distinct from a crime. An act may be a violation of law and a tort (read it as O.J. Simpson who was acquitted of the crime of murder but was found guilty in a civil action of causing the death of Ron Goldman and Nicole Simpson, his former wife).

According to Attorney Brunner, tort litigation has cost over \$154 Billion to the U.S. economy. This is one reason why so many inside and outside of the legal profession advocate reforming the tort system by limiting judgments and awards, and in the case of the firearms and food industries, legislation is being proposed that would eliminate or restrict the types of torts that those industries are directly responsible for.

Needless to say, the American Association of Trial Lawyers adamantly opposes any such legislation while the American Tort Reform Association is the primary trade group lobbying for nationwide reform of tort law. On their web site, the Tort Reform Association proclaims that the current tort system returns less than fifty cents on the dollar to the litigants (American Tort Reform web site home page,

2003). The Association further states on their web site, that between 1980 and 1985 alone, punitive damage awards increased 440 times the rate of job growth.

The advocates for tort reform amply demonstrate that is quite possible to bankrupt an industry through litigation. As the Association for Tort Reform points out, Cessna Aircraft ceased production of their single engine planes after several large awards were litigated against the company. After federal legislation was passed to protect the industry, The Association states: "Cessna has invested \$55 million in facilities and equipment. It currently employs 650 people and plans to double that number in 1998." The industry expects 25,000 new jobs to be created in the industry that are attributable to the General Aviation Revitalization Act (GARA) passed by Congress and signed into law in 1996 (American Tort Reform web site home page, 2003).

The stories of large punitive damage awards are legend. Such as the 79 year old woman who burns herself because she puts a cup of McDonald's hot coffee between her legs as she removes the lid to put creamer and sugar in the coffee, and the coffee spills on her inner legs and thighs. A New Mexico jury awarded Ms. Liebeck \$160,000 in compensatory damages and \$2.7 million in punitive damages.

Then there was the case of the BMW owner who found that there had been minor cosmetic damage to his "new" BMW that the company refinished and then sold the car as new. What was the total amount of the repair? It was \$650. But the owner of the vehicle sued BMW and initially won \$4,000 in compensatory damages and \$4 million in punitive damage. An appeals court cut the award in half, but the

U.S. Supreme Court ruled that the award violated the U.S. Constitution as it was excessive and sent the case back to the appeals court.

Encouraged by the billions won in litigation against the tobacco industry, trial lawyers have now set their sights on other industries. Here, the trial lawyers are attempting to have the courts rewrite tort laws and the legal concepts of liability. They are in essence attempting to make law through the courts.

There is now litigation pending against fast food restaurants where the plaintiffs state they are obese and it was the fast food chain's fault for not telling that eating excessively at their business would make them fat (the basis is simplified, but that is the essence of it). Plaintiffs promoting litigation against firearm manufacturers commonly use the torts of product liability and negligence as the basis for their suits. We will examine these arguments in detail next. They attempt to collect huge punitive damage awards (the City of Chicago is seeking \$477 million in the suit they filed against manufacturers in 1998).

Yet the size of the entire industry (firearms industry) in 2000 was estimated to be approximately \$1.2 billion dollars. The estimated annual profit for the entire industry was \$200 million (Department of the Treasury, Bureau of Alcohol Tobacco and Firearms, 2000). To date, the industry estimates it has cost manufacturers, distributors and dealers over \$100 million to fight the lawsuits. One damage award from a single suit could force the entire industry into bankruptcy. As can be seen the stakes are high and the industry is literally fighting for its life.

Ethics – Can or Should the Firearms Industry Be Sued?

The question the following analysis attempts to answer is whether it is ethical to hold the manufacturer of a product liable if their product in fact is not defective (functions as it should), but is used criminally by another. Here the industry maintains that they do act responsibly. The manufacturers sell to only distributors and dealers who have an FFL (Federal Firearms License) issued by the U.S. Government for the purpose of firearms commerce. The distributors contend that they distribute firearms only to dealers with valid FFLs. And the dealers maintain they cannot be held responsible for a legal sale to an individual who in turn disposes of the firearm to a disqualified person or if the legal sale results in a crime down the road due to a theft from the rightful owner etc.

If the industry acts as it claims then where would liability begin and end for victims of the criminal misuse of firearms? One city has found that the industry does act in an ethical way in designing products, distributing and marketing their products. Boston declared such when they dropped their suit against the industry in 2001. Boston stated that they recognized the industry does have a “long standing commitment” to the “safe, responsible, and lawful distribution of their products” (City of Boston’s Motion to Dismiss, 2001).

Pro-Litigation Arguments

The cities claim that the issue is one of cost to local, and state governments. The cities claim that crimes involving firearms is putting a strain on the budgets as are the medical costs and expenses incurred as the result of firearms incidents.

The cities put a cost of initial response to a crime scene which comprises of a fire department, paramedics, police officers, and if used a helicopter at approximately \$8,000. Medical costs including first treatment runs about \$35,000. Additional costs for continuing investigations and arrests run \$6,000. The trial and appeals run about \$350,000. In general the total cost to the public from one crime involving a firearm could run over one million dollars (Siebel 1999).

The cities further claim that guns are responsible for injury and death of children and teenagers through unsafe gun design. Changing the design making guns more safe can save lives. This is another reason for suing the gun manufactures (Siebel 1999).

More importantly the gun manufactures and dealers need to change the way they do business. The Cities and counties are seeking to force the industry to undertake reforms to prevent injuries and save lives. Some of the reforms are the manufacture of safety devices or the safe manufacture of guns (Brady Center 1999). The legal system responds to the criminal by imposing criminal sanctions in the form of incarceration, fines or even the death penalty. So why not impose sanctions on those responsible for putting the guns into the hands of the criminal? The cities claim that responsibility rests on the firearms industry and their distributors.

The threat of liability may create the desire of the gun dealers to better police themselves to ensure that the weapons they sell do not fall into the wrong hands, whether they are that of a criminal or a child. Some activists believe that the time is coming when victims and their families, and the city and county

governments will be able to hold the gun industry and the dealers responsible for their actions in not keeping the weapons out improper hands (Henigan, 1991).

The cities rely on a variety of strategies including a new twist or legal theory on strict liability and tort law. The cities claim that 1) guns are dangerous; 2) the firearms industry has been negligent in their distribution of their products; and 3) cities should be entitled to recover their costs associated with the criminal misuse of firearms from the manufacturers themselves.

Anti-Litigation Arguments

As we've just discussed, the trial lawyers litigating these cases for the cities are proposing radical new legal theories in regards to torts. Buoyed by the tobacco settlement, they are attempting to rewrite traditional tort and common law with an unprecedented expansion of rights to plaintiffs who want to seek so called justice. The major legal theories they push in the litigation are: negligence, and that of being a public nuisance.

Today there are few remaining suits that are proceeding through the legal system as the courts have overwhelmingly struck down most if not all of the legal theories being used by the city plaintiffs. The novel reversal in tort law that would hold manufacturers libel for the criminal use of their product is a slippery slope. In an article authored by H. Sterling Burnett and published by the Heartland Institute, Burnett asked: "Should automobile makers be held responsible for vehicular homicides committed by people in the grip of road rage? If gun makers are held liable when criminals misuse guns, where will the lawsuit parade end?"

Additionally, Burnett points to a contemporary case:

“In *Wasylow v. Glock, Inc.*, for example, the court ruled that ‘It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either 1) ban some classes of handguns or 2) transform firearm enterprises into insurers against misuse of their products. Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change.’ ”

The plaintiffs are in essence asking the courts to usurp the authority of the legislature with these lawsuits.

The Question of Negligence

The negligence argument is that the firearm manufacturers are negligent in the distribution of their products. That they do not provide safeguards to straw-man purchases¹ made at the retail level, that they sell to “kitchen-top”² dealers who do not have a store front presence, and that they are negligent in making a product that is inherently dangerous without safeguards that are built-in to prevent unauthorized use.

The majority of courts have rejected this argument. Citing the fact that the manufacturers are too far removed (remoteness/proximate cause) from the criminal misuse of their products to be held liable. The court thoroughly thrashed the plaintiff’s arguments citing the underpinning common law as being: “In general, no liability exists in tort for harm resulting from the criminal acts of third parties.”

¹ Straw-man purchases are purchases where the buyer is actually buying the firearm for another person.

² Kitchen-top dealers is a term used for licensed firearm dealers who do not operate from a traditional store front.

There is no “legal duty” on the part of the manufacturers to plaintiffs when the actions of a criminal caused the harm (Superior Court of District of Columbia, 2000, 21).

Judge Cheryl M. Long further wrote: "the various causes of action pleaded in this case are facially insufficient as a matter of law. In each instance, this is not a close question." Here the plaintiffs seek to have the courts to favorably look on their argument that the manufacturers have been negligent in the design, distribution and marketing of their products.

The design negligence rebuttal: The plaintiffs put forth the argument that the firearms are designed to be inherently unsafe and dangerous. However they fail to demonstrate a single defect in the design of the firearms marketed by the manufacturers they are suing and therefore the courts have held that under strict liability laws, the argument used by the plaintiffs fails. A product that functions perfectly and as it is designed to function is not defective the courts have held. Additionally, in terms of accidents and deaths, the U.S. is currently experiencing the lowest rate of civilian firearm injuries and deaths in 35 years (Deaths and Injuries from Guns Decline in U.S., 2001).

Negligence in Marketing: Another novel legal theory of the plaintiffs that has been allowed to proceed to trial only by the 9th Circuit of California, is that the manufacturers recklessly and negligently market their products. In other cases, the courts have found (and the City of Boston recognized when they dropped their lawsuit) that firearm manufacturer's market a legal product legally, and do so to federally licensed dealers and distributors. They do not market to children (as some

plaintiffs have claimed), unlicensed dealers nor do they flood the streets with firearms. Manufacturers do take precautions to sell their products through a responsible and legal distribution channel (City of Boston's Motion to Dismiss, 2001). The legal theory fails as to do otherwise, would create a virtual ban on handguns by the judiciary as the Fifth District Court of Appeals pointed out in a separate ruling.

The Question of a Public Nuisance

In Archer v/ Arms Tech. Inc., the plaintiff (Archer was the Mayor of Detroit) alleges that the manufacturers named in the suit have created a public nuisance by selling an otherwise perfectly legal product through licensed dealers.

In part the suit claims:

“Defendants’ conduct constitutes a public nuisance in that it significantly interferes with the public’s health, safety, welfare, peace, comfort and convenience, and because it is conduct which Defendants knew or should have known to be of a continuous and long-lasting nature that produces permanent and significant adverse effects on the City of Detroit, its employees, and its citizens. Defendants’ conduct constitutes actionable negligence in that it violates Defendants’ duty to the City of Detroit, its employees, and its citizens not to impose an unreasonable risk of foreseeable harm, and has thereby proximately caused harm” (State of Michigan Plaintiff’s Complaint, 1999).

A Michigan court allowed the lawsuit to proceed to a jury based on the nuisance claim, but granted dismissal of a portion of the suit claiming negligence for reasons previously cited.

Yet other courts have unmasked the claim for what it is.

“Public nuisance law does not sweep so broadly as to impose liability on manufacturers of a legal product, who follow relevant regulations, and who do not control or participate in irresponsible secondary and tertiary acts that are more directly responsible for the end harm” (District Judge Jerome B. Simandle, 2000).

And further:

“If public nuisance law were permitted to encompass product liability, nuisance law ‘would become a monster that would devour in one gulp the entire law of tort.’. 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.... To extend public nuisance law to embrace the manufacture of handguns would be unprecedented under New Jersey state law and unprecedented nationwide for an appellate court.” (U.S. Court of Appeals for the 3rd Circuit, 2001)

The Detroit suit however has been rendered moot though it is still on appeal as the State of Michigan has passed legislation barring frivolous lawsuits based on unfounded legal theories against the firearms industry. Michigan did this through the passage of statewide preemption.

It does appear that the anti-gun arguments being put forth in these suits are in themselves defective and have questionable legal basis to state them. As we've seen, some opinions of the courts have also hinted at the morally bankrupt position they start from. Table One contains the firearms litigation scorecard that was up to date at the beginning of 2003.

Conclusion

The moral issue of these lawsuits is multifaceted. However, let us consider only two. The first is whether it is morally objectionable for government to on the one hand sanction an action and then penalize a party for following law. The second moral issue to consider is what would the cost be to society as a whole if the novel legal arguments of the plaintiffs forced manufacturers to stop manufacturing and selling handguns. Would there be a Utilitarian or Kantian justification to do so?

Engage in Legal Commerce, and Lose Big

Having examined the legal deficiencies of the plaintiffs arguments, we conclude as the majority of the courts have, that the plaintiffs "strain the law to absurdity" (U.S. Court of Appeals for the 3rd Circuit, 2001). We now turn to a moral analysis of the issues.

If we accept the plaintiffs argument, we would have to look at the universal application of the rule. If firearm manufacturers can be made responsible through tort law for the actions of a distance third party, then we would assume we could hold automakers libel for deaths and injuries caused by third parties engaged in road rage. We'd have to hold kitchen knife manufacturer's libel for stabbing deaths and kitchen injuries.

Have the municipalities considered that they themselves can be sued under a similar legal theory? The Bureau of Alcohol, Tobacco and Firearms have found that thousands of firearms that have been used in crimes actually came from the police. These weapons come into criminal hands as frequently as other legally owned and transferred firearms. Certainly, if the novel legal theory of negligence that the cities are pushing were allowed to go forth, then the cities themselves could face similarly huge monetary awards from victims as the cities seek from the firearms industry (Cities Suing Gun Firms Have a Weak Spot: They're Suppliers, Too, O'Connell).

For years, police have sold their old guns to dealers by the thousands. As Gun Week Editor Tartaro points out in a December 1999 article, Boston, New Orleans and San Francisco have all sold the city's used firearms to dealers (effectively putting them on the street). These same cities are involved with current litigation against the firearms industry. They are even suing some of the same dealers to whom they have sold their used police guns (Recycled Cop Guns: Another Bogus Issue, Tartaro).

If we believe the end game of these suits is to financially harm those who sell firearms that eventually end up in the commission of crime, then it would stand to reason that any municipality that has resold its used firearms should also be financially harmed for the action. That would be consistent in the moral application of the plaintiffs arguments since the cities are acting as the Fireman/Arsonist (they start the fire then get the credit for putting it out).

Yet the circular argument presents a conflicting moral issue to both sides of the debate. And that is the utilitarian good that is provided by government to citizens (and therefore it would be morally wrong to consciously try to inflict financial harm) and the use of firearms in preventing crime (again, a positive effect and benefit for society). From that perspective, the lawsuits against either manufacturers, or against cities for selling firearms that wind their way to a criminal's hand would fail on moral grounds.

Another negligence argument that is promoted by the plaintiffs is that manufacturers contribute to murders, suicides and death by manufacturing high capacity magazines for semiautomatic pistols. This argument is equally absurd if you take suicides in context. It does not matter whether a firearm has six bullets (as most revolvers do) or 15 bullets (as most semiautomatics do). One bullet is usually sufficient for someone intent on taking their own life. At the risk of sounding cavalier, this author has never heard of an instance of suicide where someone emptied a 15 round clip into their person.

Therefore, universality cannot be applied to the argument of negligence for if it were, it would consume itself. If we consider the costs to society, we have to weigh some common arguments used in litigating these cases.

The cities who bring these suits make claims as to the monetary loss that their cities have endured as justification for punitive damages. However, there is another side to the argument. Economist John Lott states in his book *More Guns*

Less Crime, that lives are actually lost where handguns have been banned (i.e. Chicago).

Lott studied firearms, law and crime data from every county in the country. To date there has not been any creditable rebuttal to his data, analysis or methodology. Lott looked at firearm related deaths and accidents in all 3,054 U.S. Counties for 18 years (1977 through 1994). In an interview, Lott stated: “When states passed these laws (*concealed carry, sic*), the number of multiple-victim shootings declined by 84 percent. Deaths from these shootings plummeted on average by 90 percent, and injuries by 82 percent.”

Further, Lott’s research reveals that: “For the first five years that such a law is in effect, the total benefit from reduced crimes usually ranges between about \$2 billion and \$3 billion per year” (Confirming More Guns Less Crime, 2002, 1). Through the data in his study, Lott et al confirms his study that concluded more guns provide less crime. The social benefits in reduced injuries, murders, and other violent crime provides both a compelling moral rationale (i.e. more guns saves lives) and huge economic benefit.

Our ancient philosophers also weighed in the morality of allowing people to use weapons in their own defense. Cicero commented: “There are, many occasions on which homicide is justifiable. In particular, when violence is needed to repel violence, such an act is not merely justified but unavoidable” (*Selected Political Speeches, 78-81*). But if firearms manufacturers are driven out of business by litigation, then all the benefits demonstrated in John Lott’s studies and contemplated by the ancients like Cicero become a moot issue. If the greater good

is served by having more guns in the hands of citizens, then it would be morally incorrect to disarm them, or in the case of industry suits, make the cost of firearms so prohibitive that only the privileged may own them.

A more in depth analysis of the Utilitarian principles is not required as the negligence argument fails on its face. The lawsuits cannot be applied universally nor can they be justified for the greater-good, when there exists a growing body of data that suggests just the opposite is true.

Kantian analysis also reveals the moral deficiencies as the municipalities have stated that their end game is political (they have said as much to the press). The courts however have quickly pointed out the shortcomings of this cunning approach to get the judiciary engaged in legislation. “In the view of this Court, the City’s complaint is an improper attempt to have this Court substitute its judgment for that of the legislature, which this Court is neither inclined nor empowered to do.” So stated Judge Ruehlman, of the Court of Common Pleas of Ohio, who presided over the *City of Cincinnati v. Beretta U.S.A. Corp.* suit.

There is only one conclusion one can draw based on the volumes of case law from 1998 to present regarding municipal lawsuits against the firearms industry, and our moral analysis. The municipalities are pursuing a morally incorrect course of action. Taxpayer money would be better spent on pursuing those who criminally misuse firearms, and implementing policies that allow for qualified individuals to easily

obtain concealed carry permits. Both public policies would do much to reduce crime, and uphold the established basic tenants of tort law.

Likewise, cities need to address the moral inconsistency of prosecuting the firearms industry on the one hand, while the other hand is putting their own city's firearms back to the street. In turn, policies such as those would provide a cost benefit and quality of life benefit to all citizens. Kant would be pleased as we would be treating people as an end unto themselves, and the Utilitarian would also find the greater good being served.

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Table One
MUNICIPAL FIREARMS LITIGATION “SCORECARD”

<p><u>Complete Dismissals</u></p> <p><u>Fully & Finally Adjudicated Cases</u></p> <p>New Orleans - Affirmed LA S. Ct., cert. denied by U.S. S. Ct. Bridgeport - Affirmed CT Supreme Court Miami - Affirmed FL Appellate Court, petition denied by FL S. Ct. Camden County - Affirmed U.S. Cir. Court of Appeals Philadelphia - Affirmed U.S. Cir. Court of Appeals Atlanta - Case dismissed by GA Court of Appeals Boston - Voluntary dismissal with Prejudice Wilmington - Case dismissed by Super. Ct., New Castle Co. No appeal taken.</p> <p><u>Dismissals On Appeal</u></p> <p>Chicago – Dismissed by trial court; reversed by IL Court of Appeals; defendants filed petition for appellate review by IL S. Ct. pending</p> <p>Gary – Affirmed as to manufacturers/distributor by IN Court of Appeals. City filed petition for appellate review by IN S. Ct.</p> <p>New York State – Pending before NY State Appellate Division, 1st Dept.</p> <p>Washington, D.C. - Dismissed by Super. Ct., plaintiffs filed notice of appeal</p> <p>California - Summary judgment granted 3/7/03. Appeal anticipated.</p> <p><u>Partial Dismissals on Interlocutory Appeal</u></p> <p>Newark - Motion for interlocutory appeal granted. Pending before NJ State Appellate Division Detroit/Wayne Co. - Interlocutory appeal pending</p>	<p>Appeals Re: State Preemption Statutes Detroit/Wayne County</p> <p><u>Cases Terminated Based on State Preemption</u></p> <p>New Orleans (retroactive) Philadelphia Atlanta (retroactive)</p> <p><u>Pending Cases</u></p> <p><u>Appeals – Dismissal Reversed</u> Cincinnati – Dismissed by trial court; affirmed by OH Court of Appeals (4-3) by OH S. Ct. Fact discovery ongoing; Sept. 2003 trial date.</p> <p><u>Dismissal Denied</u></p> <p>Cleveland – Stayed during Cincinnati appeal. Fact discovery to resume.</p> <p><u>Pending Motions to Dismiss</u></p> <p>Camden City – Stayed pending Newark appeal St. Louis – Oral argument Jan. 24, 2003 <u>No Motion to Dismiss Filed</u></p> <p>New York City – Case stayed pending appeal of NY State case Jersey City – Complaint filed March 28, 2002</p> <p><u>Other Cases</u></p> <p>NAACP – Pending in federal court in Brooklyn, NY before Judge Jack B. Weinstein. Motions to dismiss denied; writ of mandamus pending in appellate court. Fact discovery completed. Expert discovery ongoing. March 2003 trial date.</p>
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Caption Table One

Rev 3/7/03

Source: <http://www.hsshf.org/share/legal/scorecard/index.cfm> Hunting and Shooting Sports Heritage Foundation web site, retrieved on 06/20/2003

Author's Note:

1) On May 14th, a 12 person advisory jury dismissed the NAACP claims and lawsuit (see Other Cases in Table One).