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## Deterrence: The Legitimate Function of the Public Tort

Thomas C. Galligan, Jr.

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# Deterrence: The Legitimate Function of the Public Tort

Thomas C. Galligan, Jr.\*

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### I. Introduction

In 1900, workers' compensation in America was a controversial, hotly debated, allegedly unconstitutional scheme.<sup>1</sup> Today, it is commonplace.<sup>2</sup> Likewise, in 1900, imposing liability upon a product manufacturer absent privity of contract with the injured victim was a radical suggestion.<sup>3</sup> Today, it is the rule.<sup>4</sup> In 2001, despite the incredibly large settlements reached in the states' suits against the tobacco industry, the idea of holding a person or entity liable to a governmental entity for costs incurred by the government, arising out of personal injuries its citizens suffered or arising out of attempts to prevent injury, is not yet generally accepted. Will such liability be commonplace in fifty or one hundred years, or will such suits fall by the liability wayside? Is liability theoretically justified, or is it such a deviation from generally accepted notions of tort law that courts should refuse to impose liability? What are the primary theoretical justifications for these governmental tort claims?

This Article will consider the legitimacy of the so-called public tort and will examine some objections as well as justifications. In sum, while there are bona fide philosophical and practical problems with public tort suits, there are also good reasons for allowing such suits to go forward. In particular, the public tort suit has a key role to play in providing efficient deterrence, as the legal economist uses that term.

Public torts provide a mechanism that will encourage persons to take account of all the costs posed by their activities and, therefore, to invest efficiently in safety. Initially, public torts provide a vehicle that forces a defendant to take account of the costs it has imposed on society, even though the defendant's victims will not recover those costs as damages in individual tort suits either because those individuals do not sue, or because recovery is not allowed for reasons other than the defendant's conduct, i.e., administrative convenience. Public tort liability may be particularly appropriate in cases in which traditional tort concepts would not lead to liability in individual tort suits, but in which conglomerating claims in the public suit would overcome these traditional hurdles. Notable hurdles include the requirement of proving cause-in-fact or legal cause in an individual tort suit. Classic conceptions of liability and societal norms may cause a decisionmaker to balk at imposing liability in an individual's case, whereas liability in a conglomerated claim may be more palatable. Moreover, there may well be normative concerns that properly deny an individual recovery, such as the fault of the individual

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1. 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 2.07 (2000).

2. *Id.* § 2.08.

3. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 972-74 (2000) (discussing privity rule and its subsequent decline).

4. *Id.*

victim.<sup>5</sup> However, denying all recovery results in underdeterrence. Put differently, denying recovery in all individual suits may create an externality for the defendant. Because the defendant escapes liability in individual suits, it will not face all of the costs of its activity and, therefore, it will not take those costs into account when making critical decisions about engaging in the relevant activity. Merely because the defendant should not be held liable to the individual does not preclude some other liability-imposing device. Such a device forces the defendant to take account of all the costs that its activity imposes upon society. The public tort suit might be that device.

## II. Defining Public Torts

To oversimplify, a tort is a private wrong other than a breach of contract.<sup>6</sup> The word "private" in that definition initially seems to indicate that torts involve actions (and potentially some inactions<sup>7</sup>) by one person that cause injury to another person. Torts is the body of law in which society decides if the person sued must make redress to the person suing, or if the person suing is entitled to some equitable relief against the person sued in order to prevent or stop some injury. Does a governmental entity acting and suing as a governmental entity have any place in the tort mix? Or, more succinctly, should there be such a thing as a public tort?

Interestingly, since at least the 1920s with Leon Green's work,<sup>8</sup> many commentators and courts have explained tort law in public policy terms. They discuss the effect of imposing or refusing to impose liability on the broader society, not just on the parties to the lawsuit. Now, it is common when discussing the "purposes" of torts law to list, among other things, deterrence, compensation, risk spreading, avoidance of undue administrative burdens, and respect for both judicial precedent and legislative will.<sup>9</sup> These are all public

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5. This justification for the public tort suit is most persuasive in those jurisdictions that retain contributory negligence as a bar to recovery or that have adopted modified, as opposed to pure, comparative fault. Analogously, Professor Bogus has noted that there may well be cases in which societal values see multiple parties at fault, i.e., both the producer and user of a product. In such cases, liability of the producer may be appropriate even though the product's user is also to blame. See Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353 (2000) (observing that paradigm allocating blame either to individual smoker or to tobacco companies is beginning to disintegrate).

6. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS 1 (2000).

7. See generally Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsychological Analysis*, 27 U. MICH. J.L. REFORM 439 (1994) (arguing for modification of tort law to provide for duty to act in situations where reasonable person would act altruistically).

8. See, e.g., LEON GREEN, JUDGE AND JURY (1930); LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

9. See, e.g., William L. Crowe, Sr., *The Anatomy of a Tort: Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone: A Primer*, 22 LOY. L. REV. 903, 906-09 (1976) (discussing considerations for evaluating duty).

policy ends. When one speaks of torts in public policy terms, the speaker is being an instrumentalist;<sup>10</sup> she explains, decides, or justifies results based on some greater public good. To that extent, *all* tort suits might be viewed as public tort suits because they affect the broader public. However, that is too broad a definition of the public tort for current purposes.

Alternatively, when one focuses on the sheer size of many modern tort suits, one may be impressed by their resemblance to "public law" suits. Class actions in product liability suits or toxic tort suits and multi-district litigation (MDL) tort suits look more like public law suits, involving desegregation of school systems and reform of prisons, than they look like the tort cases with which most of us begin our basic torts classes.<sup>11</sup> The big tort suit involves many parties and extensive administrative oversight by relatively active and engaged trial judges. Rather than sit back and rule on evidentiary matters, jury instructions, and relevant motions, the court must be actively engaged in the administration and management of the suit. Indeed, the modern mass tort suit may be the descendant of the public law, institutional reform suits of the 1960s, 1970s, and 1980s.<sup>12</sup>

Even when allegedly tortious conduct does not give rise to a class action or MDL certification, it still has public law aspects when it allegedly causes injury to many people. Imagine multiple lawsuits alleging that a manufacturer defectively designed a product when no class is certified and no MDL case is formed. Nevertheless, concern over consistent treatment of parties in similar cases will arise, and this concern may have a potential impact on society's notions of justice, i.e., there may be a public policy side effect.

Moreover, the reality of tort law in twenty-first century America is that at least one of the parties is a huge entity, such as a major corporation or an insurer (albeit possibly another major corporation). In such cases, the lack of equality between the resources that the respective sides bring to the litigation may make the claim resemble a public lawsuit by a citizen against a governmental (large) entity arguing about entitlements, equality, or treatment in schools, hospitals, or prisons.

Although all of these points may indicate that many tort suits, including garden-variety tort suits, are public tort suits, I use the term "public tort" in a much narrower sense. I include as public tort suits only those suits in which the

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10. See, e.g., ERNEST J. WEINRIE, *THE IDEA OF PRIVATE LAW* 48 (1995) (distinguishing instrumentalist and non-instrumentalist theories of law).

11. See, e.g., SCHWARTZ ET AL., *supra* note 6, at 4-16 (presenting collection of core torts cases). I began my own study of torts with an earlier edition of this frequently adopted torts casebook.

12. I am indebted to Professor Linda Mullenix of the University of Texas School of Law, whose observations during a post-lecture colloquia while visiting at Tennessee helped me to recognize this relationship between modern mass tort suits and institutional reform suits of the recent past.

plaintiff is a governmental entity that has filed suit against a person for damages caused by that person through her allegedly tortious behavior. In most public tort suits, the defendant will have actually caused the government some injury, such as the expenditure of funds on public services necessitated by the tort. However, from a pure deterrence perspective, if other citizens who incurred damages will not recover their damages, the failure of the tort to cause the government any damages should not be fatal to the government's claim because the defendant, and others like the defendant, will not take those costs into account when deciding what to do and how to do it. Those individual citizens might choose not to sue or the law might not recognize their claims for some reason that makes sense in the one-to-one private law framework, but that does not make sense if the goal is overall efficient deterrence.

Of course, the way I define public torts immediately brings to mind the states' claims against tobacco manufacturers,<sup>13</sup> the thirty-plus suits that various American cities and counties have filed against firearm manufacturers,<sup>14</sup> and the claims filed by foreign sovereigns against tobacco manufacturers.<sup>15</sup> These are the public tort suits of which I write. One can guess the public tort suits that lie ahead: toxic tort suits; suits against manufacturers of alcohol, caffeine, fast food, pharmaceuticals, and lead paint; racial discrimination suits; and more. Critically, determining the viability of the public tort suit from a deterrence perspective depends upon the particular suit and the various factors at issue therein. Justifying some public tort suits by their deterrent effect does not necessarily mean that recovery is justified in every public tort suit.

Quite correctly, one might argue that many of the public tort suits filed thus far have not been tort suits *per se*. Many of the state tobacco suits were based on theories of unjust enrichment and violation of state consumer protection statutes.<sup>16</sup> In fact, the tactical brilliance of such cases was that they

13. See generally Frank J. Vandall, *The Legal Theory and the Visionaries that Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473 (1998) (discussing history of tobacco litigation).

14. See generally Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547 (1999) (addressing economic cause-in-fact and proximate cause policy issues in gun litigation); Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521 (2000) (analyzing claims embedded in municipal claims against gun manufacturers); Developments, *The Paths of Civil Litigation, Part II – The Use of the Public Nuisance in Tort Against the Hand Gun Industry*, 113 HARV. L. REV. 1752, 1758-59 (2000) [hereinafter *Paths of Civil Litigation*] (describing municipal suits against tobacco firms and handgun manufacturers as novel forms of collectivization).

15. See, e.g., *Republic of Guatemala v. Tobacco Institute*, No. 98-1185 (D.D.C.); *Republic of Nicaragua v. Liggett Group, Inc.*, No. 99-1535 (D.D.C.); *Ukraine v. Am. Brands*, No. 99-3080 (D.D.C.); *In re Tobacco/Governmental Health Care Costs Litig.*, MDL Docket No. 1279.

16. See generally Vandall, *supra* note 13. See also Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: III Conceived from Any Angle*, 32 CONN. L. REV. 1277, 1280-88 (2000) (analyzing claims made in municipal lawsuits against gun manufacturers).

avoided the difficulties inherent in subrogation claims. By basing their right to recover in restitution, the states were able to claim that they were not subject to defenses available against individual smokers, such as victim fault (i.e., contributory negligence, comparative negligence, and assumption of risk).<sup>17</sup> I will return to this point extensively below; however, it is important to point out that although some governmental suits, including some public tort suits, may not look like tort suits from the pleadings, these suits arise out of personal injury or the threat of personal injury. Specifically, they arise out of personal injury suffered by or threatened to the populace and out of conduct that is allegedly tortious. These suits involve many of the same policies at stake in tort law: deterrence, compensation, risk spreading, and normative notions of fault and blame. As such, these policies are directly relevant to these suits. Consequently, it is critical to analyze these cases as public tort suits. Tactical brilliance and legal ingenuity in coming up with creative theories, such as unjust enrichment, should not shield these suits from analysis under the principles we have come to apply to tort law. In fact, when so analyzed, there are strong reasons grounded in deterrence to recognize and justify public tort suits.

Many of the firearm public tort suits include traditional tort claims. The claims include negligence and strict product liability in tort.<sup>18</sup> These are run-of-the-mill tort claims that do not require the torts teacher to consult her colleagues teaching remedies. Before turning to some objections and then justifications for public tort suits, in the next Part, I provide some tort analogies to the current round of public tort suits.

### III. Public Tort Suit Analogies

#### A. The Public Nuisance Claim

Perhaps the clearest analogy to the public tort suit is the public nuisance claim. A public nuisance is an unreasonable interference with a right common to the public.<sup>19</sup> For example, the earliest public nuisance likely involved someone blocking a road. Public authorities, such as state or local governments, have the right to sue to abate a public nuisance.<sup>20</sup> Governments have used the theory of nuisance to deal with many intrusions on the public good, such as

17. Vandall, *supra* note 13, at 477-80.

18. Kimball & Olson, *supra* note 16, at 1280-81. For a catalogue and analysis of the claims in the firearms suits, mostly rejecting liability, see Scott R. Preston, *Targeting the Gun Industry: Municipalities to Hold Manufacturers Liable for Their Products and Actions*, 24 S. ILL. U. L.J. 595 (2000) (examining successes and failures in municipal litigation against gun manufacturers). See also Amanda B. Hill, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH L. REV. 1387 (2000) (detailing theories of liability in municipal litigation against gun manufacturers and legislative responses to such suits).

19. RESTATEMENT (SECOND) OF TORTS § 821(B); DOBBS, *supra* note 3, at 1334.

20. DOBBS, *supra* note 3, at 1335.

houses of prostitution, sources of pollution, drug houses, and gangs.<sup>21</sup> States have filed public nuisance actions against entities in neighboring states to enjoin pollution.<sup>22</sup> In their firearm suits, many cities alleged public nuisance claims, seeking both damages and injunctive relief.<sup>23</sup>

An excellent article, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*,<sup>24</sup> points out that the public nuisance claims in firearm suits are, in fact, three separate claims seeking three separate types of relief. The claims are for (1) damages the cities have suffered in their private, proprietary capacity, (2) damages the cities have suffered in their public or governmental capacities, and (3) injunctive relief.<sup>25</sup> The first claim is based on the rule that a private person can sue for damages caused by a public nuisance if, but only if, she has suffered some special harm – an injury that is different in kind (not just degree) from the injuries suffered by society at large.<sup>26</sup> Thus, if a city suffers damage in its proprietary (private) capacity that is different in kind from the injury that the public as a whole suffers, recovery would be appropriate. For instance, holes in public buildings from gun fights might satisfy the different in kind requirement.<sup>27</sup> Claims based on bullet holes in public buildings, however, are standard tort claims for property damage. The bullet hole damage is akin to the asbestos abatement costs public entities incurred and sought to recover from asbestos producers. Although property damages ought to be recoverable, they are not particularly interesting for present purposes. They are not recovery of expenditures for public services resulting from personal injury, nor are they recovery of damages suffered by, but not recovered or recoverable by, individual citizens.<sup>28</sup>

The second public nuisance theory or claim in the firearm suits is for recovery of public expenditures. This second claim demands particular attention in the analysis of public tort suits and I turn to it below. Of particular relevance is the Ninth Circuit Court of Appeals decision in *City of Flagstaff v.*

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21. *Paths of Civil Litigation*, *supra* note 14, at 1764.

22. *See, e.g., Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915) (alleging that defendants discharged noxious gasses in Tennessee which traveled over state lines and destroyed vegetation in Georgia).

23. *See* David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1175-81 (2000) (discussing elements of municipal claims in context of traditional public nuisance law).

24. Note, *supra* note 14.

25. *Id.* at 1527-38.

26. *See id.* at 1527 (discussing grounds for public nuisance claims by municipalities against gun manufacturers).

27. *Id.* at 1528.

28. The author of *Recovering the Costs of Public Nuisance Abatement* points out that some courts have been willing to interpret the state's proprietary interest broadly. Note, *supra* note 14, at 1528-29.



*Atchison, Topeka & Santa Fe Railway*,<sup>29</sup> authored by Justice Kennedy while serving on that court.<sup>30</sup> In *City of Flagstaff*, the court held that under Arizona law, a city, as plaintiff, could not recover emergency expenditures arising out of the evacuation of an area after a train derailment.<sup>31</sup> The court in *City of Flagstaff* did, however, recognize a critical exception to its own no recovery rule. Recovery of municipal expenditures might be recoverable in a public nuisance action seeking abatement of the nuisance.<sup>32</sup> This exception threatens to swallow the rule. One wonders if slight doctrinal differences between tort theories should govern a policy-oriented analysis of recovery. Some argue that, in any event, a public entity should not be able to recover damages occasioned by a public nuisance.

From a policy perspective, the ostensible rule in *City of Flagstaff*, which states that public service or response costs are not recoverable in a municipal tort suit, is akin to the economic harm rule. The economic harm rule provides that no one is liable in negligence (or product liability) for purely economic loss.<sup>33</sup> Although I discuss the rule below, it is important to note that the economic harm rule is riddled with exceptions.<sup>34</sup>

The third public nuisance theory or claim in the municipal firearm suits is the claim for injunctive relief. This is not really a claim as much as it is a remedy for a public nuisance. There is authority for allowing a public entity to successfully seek an injunction against a public nuisance.<sup>35</sup> One may justifiably wonder why an injunction should be viewed differently than damages. If an injunction is, in fact, merely a remedy for the public nuisance, then why should there be a rule which states that another remedy – a certain type of damages – is unavailable as a matter of law? Certainly, a court considering an injunction ordering abatement would undertake the familiar balancing process to determine the appropriate remedy. But should the law totally deny

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29. 719 F.2d 322 (9th Cir. 1983).

30. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322 (9th Cir. 1983).

31. *Id.*

32. *Id.* at 322, 324; see also *City of Philadelphia v. Beretta, U.S.A.*, 126 F. Supp. 2d 882, 894-95 (E.D. Pa. 2000); Note, *supra* note 14, at 1524 n.19 (citing additional relevant cases).

33. DOBBS, *supra* note 3, at 488-89.

34. See *infra* text accompanying notes 89-94 (discussing rule, its exceptions, and its relationship to public torts). In *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000), the court refused to dismiss plaintiff's public nuisance claim on the ground that plaintiff sought recovery of municipal expenditures, noting the *City of Flagstaff* abatement exception. *Id.* at 265-66. However, the court still dismissed the plaintiff's public nuisance claim, reasoning that the defendants did not have control over the nuisance. *Id.* at 266. Of particular relevance to the court on the control issue was the fact that the wrong suffered would not have occurred absent the wrongdoing of third persons. *Id.* This is a proximate cause/remoteness type of analysis.

35. Note, *supra* note 14, at 1536-38.

the damages remedy for public nuisance? Ironically, by denying damages but allowing injunction, the law may push courts to impose the more draconian remedy – an injunction that prohibits the alleged conduct. In fact, the unavailability of damages may make the legal remedy inadequate, thereby justifying the injunction.

Making damages unavailable deprives the trial court of the power to govern the state/defendant relationship with what Calabresi and Melamed call a "liability rule."<sup>36</sup> The no-damages-but-injunction rule is a property rule under which the defendant, if it chooses to continue the prohibited behavior, must negotiate with the plaintiff to purchase the right to do so.<sup>37</sup> Transaction costs may make it impossible to successfully conclude such a negotiation, even though it would be the efficient result. Under the no-damage-but-injunction rule, the defendant – if it chooses to try and continue to engage in the prohibited behavior – must purchase that right from the plaintiff.<sup>38</sup> But, from whom may the defendant "purchase" that right? From the executive who instituted the suit? From the legislature by lobbying for the passage of protective legislation? The problems inherent in injunctive relief suggest that damages may actually be simpler for defendants to deal with and for courts to administer. These problems demonstrate why the public tort claim for damages cries out for theoretical analysis.<sup>39</sup>

### B. *Parens Patriae* and Other Analogies

Other analogies to the new public tort suit include governmental suits under environmental statutes to recover cleanup costs and suits seeking damages for violation of antitrust or consumer protection laws. States may prosecute such suits as *parens patriae* or parent of the country.<sup>40</sup> However, that little bit of Latin should not be used to obscure the obvious fact that the state must first have some claim, i.e., that the defendant committed or was alleged to have

36. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105-06 (1972).

37. *See id.* (noting types of societal rules for protecting and enforcing entitlements).

38. *Id.*

39. Arguably, injunction claims for individual clients may not be efficient deterrents, given the reality of civil litigation in America. Tort suits are prosecuted by lawyers whose fee is paid out of the recovery under a contingency fee agreement. Many lawyers representing governmental entities do so on at least a partial contingent fee basis. An injunction does not produce a fund out of which plaintiffs' lawyers may recover a contingent fee (absent some fee shifting statute). Arguably, plaintiffs' lawyers prefer to represent plaintiffs in damages actions, rather than in suits seeking equitable relief. A rule that allows for the issuance of an injunction, but not for damages, could mean that an inefficiently low number of suits seeking injunctions will be prosecuted. Therefore, defendants will engage in the tortious behavior because they know they will probably not have to respond in damages nor face an action in injunction.

40. *See, e.g., Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

committed some legally cognizable wrong. Moreover, although a state may be able to sue as *parens patriae*, a city or other governmental entity may not.<sup>41</sup> Whatever a theory might indicate about the viability of the city's claim, local law must be considered in determining the governmental entity's standing to assert the claim. This paper is not about those municipal law issues; rather, it is about the theoretical *bona fides* of the public tort suit. Thus, in the following Part, I consider some objections to the public tort suit.

#### *IV. Some Preliminary Objections to the Public Tort Suit*

##### *A. The No Change Fear*

One initial objection to the public tort suit is that it is different from other tort suits and, as such, it should be viewed with suspicion. Whether we admit it or not, lawyers are a relatively conservative group. Lawyers distrust wholesale change. The nature of the common law system is that previous cases and rules are treated as precedent. They are not followed when found distinguishable. Only rarely does a court overrule its prior decisions, usually doing so after distinguishable situations arise and begin to form a cohesive body of conflicting authority. In the civil law system, courts must act cautiously because the will of the legislature is supreme. Legislation is the primary source of law.

But, while lawyers are cautious and, indeed, conservative, lawyers also know that the law must respond to the needs of the society it orders. Perhaps it need not be totally flexible, but it certainly cannot be rigid.<sup>42</sup> The development of personal injury law in the twentieth century – workers' compensation, strict product liability in tort, the general reasonableness standard in negligence, the Learned Hand formula and its widespread influence, comparative fault, and the move to and away from joint and several liability – evidence modern and post-modern tort law's adaptation to changing times, economics, and values. Courts, after all, exist to decide cases that arise in particular social contexts. As such, the objection to the public tort suit as different from other tort suits seems unpersuasive.

##### *B. Corrective Justice and the Public Tort Suit*

One might argue that because the public tort suit is so different from other tort suits, it is inconsistent with notions of corrective justice inherent in private law and tort law. Some corrective justice theories of torts depend upon an academic knowledge of philosophy that few lawyers, judges, or (I confess) law professors possess.

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41. Note, *supra* note 14, at 1527.

42. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1266-73 (2000) (analyzing how initial framing of key issues – such as scope of duty – can often be outcome determinative).

In *The Idea of Private Law*, Ernest Weinrib sets forth one of the most comprehensive, complete, and compelling corrective justice theories.<sup>43</sup> Weinrib argues that tort law, and all private law, ought to be logically coherent.<sup>44</sup> It must explain itself.<sup>45</sup> Thus, pointing to distributive justice goals outside the bipolar (plaintiff vs. defendant) tort case that affects one party, such as deterrence (defendant)<sup>46</sup> or risk spreading (plaintiff and society),<sup>47</sup> are not persuasive justifications for legal rules. They are not persuasive because, to paraphrase, they are not fair. They are not fair because they do not adequately explain the result in the case as it affects both parties. Thus, there is no logical coherence in a rule explained in reference to a policy that effects either one party or society as a whole, but not both parties.

To restate a Weinribian corrective justice theory of tort law in even more oversimplified terms, tort cases ought to involve one person against another person. In tort cases, the first person (the plaintiff) seeks redress for some wrong caused or threatened by the second person (the defendant). The litigation focuses on those two people and their actions. That focus allows for an application of the law – i.e., fault, cause, damages, defenses – to the particular facts and equities of a specific case. Thus, the system achieves a result that is fair or just to the parties before the court.

Justifying recovery in terms of some broader societal good, however, may sacrifice justice or fairness between the parties. For instance, suppose a court imposes liability in order to deter the defendant and others similarly situated. The defendant, not the plaintiff, is the focus of the deterrence. Thus, deterrence might point toward liability, even when society views the plaintiff as undeserving. In fact, deterrence might point toward liability when the injury was only threatened, but not incurred.<sup>48</sup> Alternatively, focusing on compensation highlights the plaintiff, but not the defendant. Compensation

43. WEINRIB, *supra* note 10, at 48. Weinrib's theory is, of course, only one theory of corrective justice.

44. *Id.* at 30.

45. *Id.* Professor Weinrib states the following: "For a juridical relationship to be coherent, its component features must come together not through the operation of something beyond them that brings them together but because they are conceptually connected in such a way that, in some sense still to be explained, they intrinsically belong together." *Id.* Later, Professor Weinrib notes, "For a private law relationship to be coherent, the consideration that justifies any feature of that relationship must cohere with the considerations that justify every other feature of it. Coherence is the interlocking into a single integrated justification of all the justificatory considerations that pertain to a juridical relationship." *Id.* at 32.

46. *See id.* at 46-48 (criticizing economic analysis of private law).

47. *See id.* at 36-38 (arguing that question of who is at fault is distinct from question of who can best spread risk).

48. *See generally* Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 20-23 (1990) (discussing fact that from efficiency viewpoint, payment of compensatory damages to injured plaintiffs is not necessary).

might favor liability even when society would not otherwise find fault with the defendant's conduct. A public tort suit, however, moves the focus away from the facts of the particular or individual case. The issues and arguments are too big and are by their nature based on distributive justice concerns such as deterrence and risk spreading.

Several responses are apparent to this particular corrective justice objection. First, corrective justice theories may not be easily accessible to the judges and lawyers who actually deal with tort suits or to the legislators who pass tort-related statutes. This is a somewhat unfair and anti-intellectual response because I rely on my own intellectual shortcomings and assumptions about many judges and lawyers to mitigate the impact of their theoretically brilliant work. However, for a theory to gain widespread adoption, it must usually be broadly accessible.

Second, the corrective justice theory is not reflective of our post-millennium reality. Courts do consider concepts like deterrence, compensation, administrative convenience, and risk spreading when deciding tort cases.<sup>49</sup> Modern tort law and economic analysis of tort law are based on the notion that deterrence works. In Aristotelean terms, courts do consider distributive justice when deciding tort cases and when articulating the "rules" of tort law.

Another related objection to the public tort suit is based on the nature of the adversary system and on the lawyer's role in that system; it points to the importance of the narrative in developing law and persuading legal decision makers. Lawyers tell stories in developing their clients' cases. Stories are better when based on actual human experience. Telling a person's story, and encouraging the decisionmaker to understand or to empathize, is the best way to humanize a client's plight. However, it is difficult to turn the public tort suit into a compelling story about a sympathetic party. Of course, the answer to this argument is that the public tort suit may present a challenge to the litigator. So be it.<sup>50</sup>

Yet another objection rooted in corrective justice is related to what might be viewed as one of the public tort suit's inherent strengths: the public tort suit is a way for the plaintiff/governmental entity to avoid defenses available against individual plaintiffs. For instance, in the tobacco suits, the states sought to recover under unjust enrichment theories. They did not seek to recover through subrogation, in part because subrogation claims would have exposed the states to defenses such as assumption of risk and plaintiff negligence. These defenses were available against the people who used tobacco and suf-

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49. See, e.g., DOBBS, *supra* note 3, ch. 1.

50. Realistically, the public tort suit may trigger values and themes that are not as relevant in individual suits. The lawyer's story will highlight these values and themes rather than those emphasized in the individual suit. See generally Bogus, *supra* note 5, at 1359-72 (discussing role of societal values in tobacco litigation outcomes).

ferred injuries, thus causing the states to expend the funds sought as recovery in their suits. Some commentators claim that bypassing individual victims' defenses is somehow unfair because it excuses the personal injury victim from fault or responsibility. I shall return to this objection below, where I argue that individual recovery should be denied while governmental entity recovery ought to be permitted. Denying individual recovery may be consistent with our corrective justice notions of fault and blame. Allowing public entity recovery provides deterrence without sacrificing corrective justice ideals in individual suits.

### C. *The Economic Harm Rule*

The last objection arises out of the economic harm rule. Governmental entities in public tort suits seek, in part, to recover pure economic loss. To the extent a governmental entity does not seek to recover property damage (i.e., building damage in a gun suit), the government entity seeks to recover money that would not otherwise have been expended (i.e., medical services, welfare expenditures, increased police or ambulance expenditures). It is hornbook law (with some rather large exceptions) that in strict liability or negligence cases the plaintiff is not entitled to recover purely economic loss.<sup>51</sup> Should governmental entities be able to escape this rule? I foreshadow my answer by pointing out that in several other contexts, I have criticized the economic harm rule.<sup>52</sup> It also bears emphasis that the economic harm rule does not bar recovery in wrongful death cases, many professional malpractice cases, non-personal injury misrepresentation cases, or interference with contract cases. Logically, if theory or fairness justify recovery of purely economic loss, the economic loss should be recovered.

## V. *The Legitimacy of the Public Tort Suit – Deterrence*

### A. *An Explanation of Deterrence*

Given these objections to the public tort suit, what can be said for it? Its primary justification lies in the deterrence function of tort law.<sup>53</sup> From an economic perspective, the law ought to encourage people to act efficiently. Forcing people to take account of, or at least to consider, all the costs of their proposed activity (or the method of engaging in that activity) will lead to efficient investments in safety. The public tort suit may help to insure efficient investments in safety if it can force actors to take account of costs they would

51. DOBBS, *supra* note 3, at 488-89.

52. See Thomas C. Galligan, Jr., *Contortions Along the Boundaries Between Contracts and Torts*, 69 TUL. L. REV. 457, 512-20 (1994) (discussing economic harm rule); Galligan, *supra* note 48, at 43-63 (same).

53. Admittedly, deterrence is a function of tort law that Professor Weinrib may reject. See generally Weinrib, *supra* note 10.

otherwise ignore because existing legal rules do not provide liability for those costs. An explanation follows, beginning with a theory of general deterrence.

To the economist, when a person decides what to do and how to do it, the person will consider both the costs and benefits of his proposed action. The person will invest or produce up to the point where the marginal benefit of the last unit produced equals that last unit's marginal cost. If the costs the person faces are not accurate because they are too low, the person will overproduce because he will face a lower than actual marginal cost curve. A cost which the person faces or imposes, but which he does not pay, is called an externality.<sup>54</sup>

In deciding whether to make investments in production, a person must consider all costs of a proposed action. These costs include the accident costs imposed upon society by the proposed activity. This truism is the basis of Learned Hand's negligence formula; one is negligent if the pre-event burden  $B$  of avoiding a loss is less than the pre-event probability  $P$  of the event times the pre-event expected loss  $L$ .<sup>55</sup> That is, one is negligent if  $B < P \times L$ .

The idea that a person should account for all of the costs caused by its proposed activity, including accident costs, is the basis for Judge Guido Calabresi's masterpiece, *The Costs of Accidents*.<sup>56</sup> Internalization of accident costs, or at least the threat of paying those costs, is necessary to encourage efficient investments in safety.

If legal rules do not force a person to take account of all the costs of a particular action, then legal rules will not lead to efficient investments in safety. Instead, they will lead to underinvestments in safety or overinvestments in relevant activity. In order to encourage efficient investments in safety, legal rules should force actors to take account of the costs of their activities. Public tort liability against defendants who otherwise would not be forced by prevailing legal rules to take account of all of the accident costs of their activities might produce an overall efficiency gain.

### *B. Applying a General Deterrence Theory to the Public Tort Suit*

How might the theory of deterrence justify the public tort suit? Initially, there are several reasons to believe that current legal rules do not force actors to consider all the costs that their activities might cause. Some are the same economic reasons that might justify an award of punitive damages (or aug-

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54. See, e.g., Lytton, *supra* note 42, at 1249-50 (arguing that there may be market failures in certain firearms markets). See also Bogus, *supra* note 5, at 1367-72 (examining externalities in context of tobacco litigation); Frank J. Vandall, *Economic and Causation Issues in City Suits Against Gun Manufacturers*, 27 PEPP. L. REV. 719 (2000) (examining economic implications of municipalities' suits against gun manufacturers).

55. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

56. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

mented awards).<sup>57</sup> Others are more closely tied to the nature of the public tort suit and the ways in which it is different from the traditional bipolar tort suit. Some of the reasons relate to damages that individuals suffer but that they do not recover. Others relate to damages that the defendant's conduct causes the governmental entity to suffer.

*1. All Those Injured May Not Sue or May Not Recover*

Borrowing an insight from Dorsey Dan Ellis, Jr.'s analysis of punitive damages, all people who are injured might not sue.<sup>58</sup> To the extent that injured people do not sue – and to the extent that actors anticipate that all those injured will not sue – the relevant actors face potential damage awards that are less than the actual accident costs caused by their activities. Therefore, the rational actor will underinvest in safety and/or will overproduce. If a governmental entity could recover losses suffered by those who did not sue, there would be an efficiency gain as long as the costs of the governmental entity's suit were less than the deterrence gain from prosecuting the suit.

Why might people decide *not* to sue for their losses? The losses may be so small to any one person that the costs of suit, including opportunity costs, would make it too expensive or too much trouble to sue. Although individual claims might be small, pooling small losses may result in a significant total loss. However, one way to pool losses is to allow the state to do the pooling.

The small claim pooling justification for the public tort suit may also apply to class actions and punitive damages claims. But, in the class action arena, administrative costs are arguably higher than in state suits. The costs of notifying class members of their rights and of the progress of the suit, as well as the costs of the distribution of the proceeds of the suit, are present in class actions but not in the public tort suit. In the public tort suit, there is no problem with certification, opt-outs, or complex distribution procedures. In the classic punitive damages suit, all punitive damages go to one private plaintiff. He or she receives a windfall.<sup>59</sup> Although that fact is not terribly critical from a deterrence perspective, it is a windfall nonetheless, with accompanying moral concerns (such as, did the plaintiff *deserve* this windfall?). It is true that in the public tort suit, the government would recover for losses suffered by others under the small claim justification; but the government would, by definition, use the recovered funds for public purposes subject to the pressures and controls of the democratic process.

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57. See generally Galligan, *supra* note 48 (analyzing theoretical basis and practical effects of punitive damages schemes).

58. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

59. Galligan, *supra* note 48, at 58.



Additionally, injured persons may not sue if they have some moral objection to the legal process or if they have been killed by the defendant's actions and have no statutorily designated survivors to prosecute their claims.<sup>60</sup> The existence of this death category depends upon the local law governing wrongful death and survival actions. Once again, if all those injured do not sue, then the potential defendant faces less than full accident costs and will not be effectively deterred when behaving rationally (i.e., seeking to maximize profits). The public tort suit can provide a vehicle to encourage efficient investments in safety.

In the public tort context, an injured person who suffers injury and then relies upon social welfare for medical expenditures and/or costs of living may have little incentive to sue. The state that provides the social benefits suffers the loss. If the state is not allowed to sue, then the defendant has no incentive to consider the benefits' cost in its behavior calculus. Intuitively, those without significant wage losses or without real access to justice might be less likely to sue than those high wage earners who feel comfortable with the American judicial system.

Recall now the decision in *City of Flagstaff*, in which the court held that municipal recovery costs are not cognizable in a tort case (other than perhaps, a public nuisance, abatement case).<sup>61</sup> In *City of Flagstaff*, the city sued for its own losses.<sup>62</sup> However, the decision also seems to apply where the government entity sues as proxy for losses suffered by another.

The court's conclusion was based upon the following reverse risk spreading theory:

Although precedent on the point is limited, we conclude that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. See *City of Bridgeton v. B.P. Oil, Inc.*, 146 N.J. Super. 169, 369 A.2d 49 (1976). Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement. This is so even though the tortfeasor is fully aware that private parties injured by its conduct, who cannot spread their risk to the general public, will have a cause of action against it for damages proximately or legally caused.<sup>63</sup>

The logic seems to be that if the governmental entity has decided to bear some loss and to spread it through taxes, then the government cannot seek to recover the loss from the entity that created the necessity for the expenditure in the first

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60. See DOBBS, *supra* note 3, at 814 (discussing statutory limitations on beneficiaries).

61. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323-24 (9th Cir. 1983).

62. *Id.* at 323.

63. *Id.*

place. However, a governmental entity's decision to pay a cost and to then spread it through the vehicle of taxes or assessments does not deter the entity that imposed the cost in the first place.<sup>64</sup> By paying the cost, the government makes no obvious decision to forego ultimate recovery and/or deterrence. Thus, the court's decision is rather unconvincing on this point. Perhaps recognizing this problem, the court stated that a contrary holding would upset the expectations of business entities.<sup>65</sup> Presumably, the expectation that would be disappointed is the expectation that the defendant would not be liable to the government for its conduct. But should that expectation be protected if it is the result of an externality (i.e., an expectation that the defendant will not have to pay all of the costs that its activity imposes on society)? Arguably not, unless society is willing to forego the deterrence provided by that liability.

The *City of Flagstaff* court recognized:

Settled expectations sometimes must be disregarded where new tort doctrines are required to cure an unjust allocation of risks and costs. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Escobar v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944). The argument for the imposition of the new liability is not so compelling, however, where a fair and sensible system for spreading the costs of an accident is already in place, even if the alternate scheme proposed might be a more precise one. Here the city spreads the expense of emergency services to its taxpayers, an allocation which is neither irrational nor unfair.<sup>66</sup>

But why should the existence of a cost-spreading regime justify not imposing that cost on the wrongdoer for deterrence purposes? The answer is not clear. In fact, parties insure against risks all the time as a means of spreading costs. Frequently thereafter, the first party insurer that paid the loss will seek recovery from a tortfeasor through subrogation. In the worker compensation arena, certain accident costs are spread through worker compensation insurance, but by statute or judicial decision, the employer or the compensation insurer is allowed to recover the amounts it has paid to an injured worker from a non-immune tortfeasor who caused the injuries.<sup>67</sup> These are examples of situations in which there is a risk spreading vehicle or device, but tort recovery is still allowed against a third party tortfeasor.<sup>68</sup>

64. *But see* Kimball & Olson, *supra* note 16, at 1296-1301 (exploring rationales supporting policy of barring cost recovery for public services).

65. *City of Flagstaff*, 719 F.2d at 323.

66. *Id.*

67. LARSON & LARSON, *supra* note 1, chs. 116 & 122.

68. *See* Kimball & Olson, *supra* note 16, at 1299-1300 (analogizing rule that municipality cannot recover public service costs as damages to firefighter's rule). That so-called rule provides that firefighters or police officers (and possibly other public servants) cannot recover for the injuries that they suffer when responding to a negligently caused emergency from the person whose negligence caused the emergency. At face value – even ignoring its many exceptions –

Thus, there are reasons for allowing either an augmented awards claim or a public tort suit based on the fact that someone has suffered a compensable injury but chooses not to sue. In this regard, the augmented awards plaintiff or the governmental plaintiff asserts a type of derivative claim – derivative of the injured individual's rights. Kimball and Olson rely upon what they call the "doctrine of remoteness" to argue that derivative claims should not be allowed.<sup>69</sup> Although I discuss the so-called doctrine of remoteness below, it is important to recognize that an externality arises if the public tort claim is not allowed to go forward and no one else brings, or is allowed to bring, the claim. The defendant will not be forced to take account of all the costs of its activities. Not allowing recovery leads to underinvestments in safety. Thus, the defendant will be underdeterred.

An additional economic reason that may justify the public tort is that even if all those injured sue, certain types of damages may not be recoverable for reasons of judicial efficiency.<sup>70</sup> I have written about such claims elsewhere as a possible justification for augmented awards (or punitive damages).<sup>71</sup> For example, in significant part, administrative convenience justified the classic rule disallowing negligent infliction of emotional distress claims. One reason for the traditional no-recovery rule was the difficulty of quantifying the losses. It was hard for courts to decide whether the plaintiff's losses were real or sufficiently significant to justify recovery in particular cases. Another facet of the original no-recovery rule was that courts feared a flood of claims. From the perspective of the potential defendant, real but uncollectible damages for emotional distress were an externality. Although the defendant caused emotional distress damages, it was not legally required to take them into account

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it is not a persuasive analogy. First, the firefighter's rule is occasionally rooted in the assumption of risk theory. In the public tort suit there is little to suggest that the public entity assumes the risk of liability merely by providing benefits to the citizen victims of the defendant's tort. Secondly, the firefighter's rule is based upon the notion that the public servant receives liberal worker compensation benefits and, therefore, should not recover in tort for negligence. There is an implied bargain between the firefighter and the community for which the public servant toils. There is no similar implied bargain apparent between the public tortfeasor and the governmental plaintiff. In *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 821-22 (N.D. Ohio 2000), the court rejected the firefighter's rule as a basis to bar municipal plaintiffs from recovering the costs of dealing with firearm violence. *See also* *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 260 n.10 (D.N.J. 2000) (noting that New Jersey had abolished fireman's rule).

69. Kimball & Olson, *supra* note 16, at 1288-96.

70. These are not derivative claims per se because there is no one who is allowed to bring them. These types of claims are only derivative in the sense that they seek to recover for an injury suffered by another who is not allowed to sue. Thus, the individual who suffered the injury is not in an economically preferable position to prosecute the claim. *Cf.* Kimball & Olson, *supra* note 16, at 1288-96 (discussing claims barred by remoteness despite fact that claimants suffered some injury related to tortious conduct in question).

71. *See generally* Galligan, *supra* note 48 (discussing evolution of punitive schemes).

in its decisionmaking. Arguably, the result was inefficient behavior. Some device whereby those injuries could be estimated and collected, if tortiously caused, provided an efficiency gain if the device's cost was less than both the efficiency gain and the administrative costs of individual actions. Of course, in the emotional distress arena, the response has not been public tort suits or augmented awards. Rather, it has been a rejection of the original rule and increased efforts to provide rules that separate legitimate and illegitimate claims. The proverbial jury is still out on the effectiveness and efficiency of those rules.

In any event, the point is that in certain types of cases, the costs of litigation may be too high to justify allowing individual claims to be pursued for certain types of injuries, even though we know that these injuries occur. Failing to allow recovery by *anyone* only serves to understate the total costs of the activity to the defendant. A vehicle or device, such as the public tort suit, whereby a defendant would be forced to take account of those costs without an inordinate administrative burden, provides a deterrence gain.

Relatedly, courts and legislatures have limited the classes of plaintiffs that can recover for certain relational injuries. Wrongful death or consortium plaintiffs are a limited group of close and sometimes financially dependent relatives of the decedent or injured person. However, others do suffer loss. In a state where the applicable wrongful death law does not allow a parent to recover for a child's wrongful death if the deceased child has a spouse or children, the parent's real loss will go uncompensated. The defendant who does not have to pay those damages will not consider them in deciding whether and how to act. Thus, the defendant will behave inefficiently. A public tort suit (or augmented awards to those who can recover) might provide efficient deterrence, although one wonders if allowing such recovery when the legislature has not extended recovery is an abrogation of legislative will.

Presently, I turn to another, perhaps more concrete, example. Many states have enacted various damages caps. By their nature, these caps threaten to create externalities and consequent under-deterrence, resulting in too many injuries. For example, many states have enacted caps on liability (at least for certain types of damages) in medical malpractice actions.<sup>72</sup> Assuming a hypothetical \$500,000 cap, anyone who suffered injuries over \$500,000 at the hands of a negligent health care provider would be under-compensated and health care providers in general would be under-deterred. However, one might argue that codes of professional ethics and professional values adequately provide sufficient incentives to health care providers to care for their patients. That is, the normative aspects of professional ethics and culture might have a deterrent effect that offsets at least some of the deterrence lost as a result of the cap.

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72. See DOBBS, *supra* note 3, § 384 (discussing capping statutes and other devices that limit damage recovery).

However, pushing the inquiry one step further, if individuals or entities not bound by the health providers' professional ethics play a key role in deciding how much to invest in treatment, the professional code or culture will be less significant in offsetting the externality caused by the cap. Thus, insurers or health maintenance organizations will, when deciding what treatment to authorize, consider that their potential liability cap is \$500,000. The normative suasion of medical professional ethics will not operate on the business person untrained in, or uninfluenced by, those ethics and values. A public tort suit against the corporate entity would provide a deterrence gain while keeping the cap intact vis-a-vis the individual health care provider. The deterrence gain could also be provided by recognizing individual tort claims against the corporate actor and/or by allowing augmented awards to individual actors. Although the individual suit would more appropriately fulfill the compensatory function of tort law, the benefit of the public tort suit is that it could conglomerate all such claims, thus creating a single large claim rather than many smaller ones.

*2. Appropriate Limitations on Individual Recovery Do Not Necessarily Apply to Public Tort Suits – Preserving Corrective Justice and Deterrence*

I now turn to another set of deterrence justifications for public tort suits. These justifications rely upon the very differences between the public tort suit and the traditional bipolar tort law paradigm. Recall that under the traditional tort/corrective justice model, the case should focus on the particular parties, their relative moral position, and the particular facts as they affect the particular parties before the court.

*a. Cause-in-Fact*

One way in which the law has guarded the traditional tort model is its requirement that there be a sufficiently close factual causal connection between the defendant's action and the plaintiff's injury. That is, the defendant must be a cause-in-fact of the plaintiff's injuries. The "but for" test is the traditional test that courts have used to determine cause-in-fact: can the plaintiff establish that but for the defendant's particular alleged tortious act the plaintiff would have avoided his or her particular alleged injury?<sup>73</sup> Of course, the traditional plaintiff must prove cause-in-fact by a preponderance of the evidence.

Proving cause-in-fact requires the plaintiff to identify the wrongdoer. This may not always be possible. Which cigarette company caused the plaintiff's lung cancer when the plaintiff smoked several brands over many years? A similar problem led some states to adopt market share liability in diethyl-

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73. DOBBS, *supra* note 3, §§ 168-69; *see also* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765-68 (1997) (discussing but-for causation at length).

stibesterol (DES) cases.<sup>74</sup> However, the theory has not been widely adopted beyond that product, although it clearly seems to have had an effect in the settlement of the tobacco cases. For present purposes, the point is that a market share theory may strain the bounds of credulity in an individual's tort case. The equities of the case may be such that a court will be hesitant to adopt such a deviation from the traditional tort model. But, when a governmental entity sues for a broader range of injury caused by the defendants' activity, the market share causation theory may be much more compelling.

Alternatively, exposure to some product or toxin may increase the chance of an individual developing some adverse health consequence. Suppose exposure to the defendant's product increased the risk of developing lung cancer by 15%. Suppose further that the background risk of developing lung cancer was 25%. The background risks would cause 25 out of 100 people to develop lung cancer. Of the 100 smokers exposed to the defendant's product, assume 40 developed lung cancer (unrealistically assuming away synergistic causation). Who (i.e., which 15 of the 40) developed cancer because of the defendant's product and who developed it because of the background risks? In individual tort suits, the equities might be such that a court will deny recovery. The plaintiff simply cannot clear the cause-in-fact hurdle without some rather radical alterations to traditional tort law rules.<sup>75</sup>

However, in the given community, the evidence would be clearer that 3/8 (15/40) of the total lung cancer losses were attributable to the defendant's product. Although one cannot say that but for the defendant's wrong the individual plaintiff would not have developed cancer, one can say that but for the defendant's wrong, 3/8 of the lung cancer costs in the relevant community would not have been incurred. Allowing each cancer victim to recover 3/8 of his or her losses accomplishes the same end, but somewhat less efficiently and consistently. Not forcing the defendant to take account of those costs would inefficiently underdeter. Thus, although there might be reasons in a traditional individual tort suit to deny recovery, those reasons are much less significant in the public tort suit. The public tort suit allows society to see the cause-in-fact forest, whereas traditional tort suits quite properly focus on the trees. The potential problem of always and only focusing on the trees is that the critical deterrence gain provided by stepping back and looking at the forest may be lost.

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74. *Sindell v. Abbott Labs.*, 607 P.2d 924, 936-38 (Cal. 1980); *Hymovitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989).

75. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411 (2000) (expressing reservations about desirability and practicality of proportional causation and recovery); Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379 (2000) (advocating proportional causation and recovery).

To summarize, statistical evidence of cause-in-fact may not be sufficiently persuasive to establish that a particular plaintiff suffered injury from a particular action. But, that same statistical evidence may be sufficiently persuasive to establish that some portion of the total injuries from a particular condition or disease were caused-in-fact by a defendant. What may not be obvious in a particular case is apparent across a broad range of cases.

*b. Proximate or Legal Cause*

This same broad view may also overcome certain legal cause or duty issues that impede recovery in individual tort suits. At the legal cause or scope of duty phase of the trial, the court decides whether the particular defendant owes the particular plaintiff a duty to protect against the particular risk at issue. Put differently, should this defendant be liable to this plaintiff for the injury that occurred in this manner? To Judge Cardozo in the *Palsgraf*<sup>76</sup> case, the duty inquiry was fact specific, i.e., was the specific risk to the specific plaintiff foreseeable? Likewise, in a case or jurisdiction where the decision about proximate or legal cause is left to the jury, the inquiry often gets very specific. Under the corrective justice model, the inquiry absolutely ought to be case specific. Additionally, the policy analysis at the heart of the legal cause or scope of duty stage should be case specific. Once again, the relevant question is whether *this* plaintiff should recover from *this* defendant under *these* circumstances. In many instances, the manner in which the injury arose might be so unforeseeable and bizarre that liability to the particular plaintiff would be unjustifiable.

For instance, in a suit against the manufacturer of a firearm, the intervention of a third party criminal's act may be so egregious or bizarre that liability would not be justified. However, in the public tort suit, when one steps back from the details of particular cases and considers the general foreseeability of third party criminal acts (instead of the foreseeability of a particular criminal act), liability may be justified. In other words, some case specific equities or applications may counsel against liability to a particular plaintiff under particular facts. However, when stepping back and generalizing risk in the public tort suit, liability may be justified for purposes of efficient deterrence.

Because the legal cause or scope of duty issue is where much of tort law's critical policy analysis occurs, this is a particularly appropriate place to consider three arguments for limiting liability in public tort suits. Two such arguments are the doctrine of remoteness and the rule that purely economic loss is not recoverable in tort. The third argument is derived from the holding in *City of Flagstaff*, which states that funds expended on public services are not recoverable in a public nuisance action.<sup>77</sup>

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76. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

77. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983).

First, the doctrine of remoteness is merely a label for "no liability."<sup>78</sup> It is a conclusion with an amorphous, often hard to explain, content. Under one generally accepted test for proximate cause, the negligent defendant is only liable for those injuries or damages which it causes directly.<sup>79</sup> Alternatively, damages that are not sufficiently direct are remote and a defendant's conduct is not a proximate cause of remote damages. Thus "remote" is simply the legal opposite of "direct."

To say that damages are remote is merely a conclusion, but it is often not a wholly logical conclusion. Intuition plays a role when a jury decides where to draw the line between remote and direct damages. Critically, the direct cause test for proximate cause was born at a time when courts focused more on the temporal relationships between the defendant's act and the plaintiff's injury, i.e., how much time passed and what other cause intervened after the defendant's negligent act occurred? This focus on the temporal has long been questioned. But, the so-called "doctrine of remoteness" seeks to revive that focus. The defendant raising the doctrine of remoteness emphasizes some action *after* the defendant's alleged fault occurred, such as the personal injury victim's smoking in a tobacco case or a third-party criminal act in a firearms case. The argument, from a traditional doctrinal perspective focusing on legal cause, is that the smoker's voluntary choice to smoke or the third-party criminal act is a superseding cause that relieves the defendant from liability. In scope-of-duty phraseology, the claim is that the defendant's duty does not include the risk of the smoker's smoking or the third party criminal's shooting. But why not? While the arguments are based on traditional notions of tort law that are perhaps relevant to the individual's suit, they are much less relevant to the public tort suit. The doctrine of remoteness is no response to the arguments made above about the general deterrence advantages of the public tort suit. Applying the benefits of generalizing risks to this doctrinal context, what may appear "remote" at the level of the particular case may become sufficiently direct (or foreseeable) from a policy perspective when viewed more broadly.<sup>80</sup>

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78. As one court has rather eloquently written:

Defendants argue that Plaintiffs' claims are barred by the "remoteness" doctrine. Defendants are confused: no such independent doctrine exists. "Remoteness" as the term is used in legal doctrine and in the cases cited by Defendants, either relates to, and is merely an element of, whether a plaintiff properly has standing to bring a claim or whether a plaintiff has shown the existence of proximate causation as an element of a specific claim.

*White v. Smith & Wesson*, 97 F. Supp. 2d 816, 823 (N.D. Ohio 2000); *see also Sills v. Smith & Wesson*, 2000 WL 33113806 (Del. Super. 2000) (denying motion to dismiss based in part on remoteness).

79. *See DOBBS, supra* note 3, § 184 (discussing direct causation and foreseeability).

80. On the issue of foreseeability of general harm, *see generally* David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN.L. REV. 1163, 1164-69 (2000).



In the context of the firearm litigation, a related aspect of the doctrine of remoteness is stressed. There is a notion, somewhat related to the underpinnings of the economic harm rule, that derivative claims arising from injury to nonparties should not be allowed. Thus, when a defendant causes injury to a third person, the plaintiff who suffers some injury as a result of the third person's injury may not recover; arguably, the plaintiff's injuries are too remote.<sup>81</sup> Pointing to the United States Supreme Court's articulation of the doctrine of remoteness in *Holmes v. Securities Investor Protection Corp.*,<sup>82</sup> Kimball and Olson cite the following three part test for determining if injuries are too remote:

(1) there are more direct victims of the alleged wrongdoing who can be expected to act as "private attorney general"; (2) because it will be difficult to apportion damages, the court will be forced to "adopt complicated apportionment rules" to avoid multiple recoveries; and (3) because the causal connection is attenuated, it will be difficult to define what proportion of the plaintiff's damages are attributable to the defendant's conduct.<sup>83</sup>

Turning first to the expected direct victim suit, under the deterrence theory of the public tort suit the so-called "direct victims" are not more likely to sue for damages than is the governmental entity in its derivative suits. The basis of the deterrence theory in the public tort suit is that all those injured will not sue or recover because either their claims are too small or because there is some legal impediment to recovery. Moreover, even when suit is likely, recovery is unlikely because of the difficulty of proving cause-in-fact or proximate cause. Or, recovery might be unlikely because of some defense applicable in the individual suit, which, across the broad spectrum of claims, creates an externality. Additionally, the direct victim arguments have no relevance at all to the damages suffered by the government in its own capacity, rather than in its derivative capacity. Finally, the law recognizes many derivative claims, such as wrongful death claims and loss of consortium claims.

Second, if damages are extremely difficult to apportion, recovery should not be allowed. However, courts have long distinguished fact of injury from the amount of allowable damages. Once fact of injury is established, plaintiffs are allowed greater leeway in proving amount of damages. Moreover, the difficulty of apportioning damages may not be the same across the spectrum of public torts. In some cases, difficulty of apportionment may prove fatal to the claim. In other cases, it may not be a factor at all.

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81. Kimball & Olson, *supra* note 16, at 1288.

82. 503 U.S. 258 (1992); *see also* *Serv. Employees Int'l Union Health & Welfare Fund v. Phillip Morris Inc.*, 249 F.3d 1068, 1069 (D.C. Cir. 2001) (dismissing tobacco claims as too remote).

83. Kimball & Olson, *supra* note 16, at 1290-91 (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

Third, the attenuation of the causal connection may be precisely the reason why recovery is denied in an individual case. But, when viewed more broadly across a range of claims, the causal connection is not attenuated at all. It may indeed be compelling. Thus, it is predictable that defendants and their lawyers would zealously attempt to shift the focus from the general to the specific.

As noted, the direct/remote test for proximate or legal cause has a respectable intellectual tradition. So does the foreseeable risk test. From the defendant's perspective in the public tort suits, the direct/remote test is preferable to the foreseeable risk test. This is because the direct/remote test encourages the court to focus on intervening actors and to decide if those intervening actors break the causal chain. The foreseeable risk test is less appealing; it allows the plaintiff to argue that the risk was foreseeable because the defendant should have foreseen the intervention that led to the ultimate harm. The fact that several courts have adopted the doctrine of remoteness in rejecting public tort suits is a testament to the ability of defense counsel to shape the issues in their clients' favor. This effort to shape the issues is the essence of proximate cause battles.

While Kimball and Olson distill a three part test from *Holmes*, others articulate a six part test.<sup>84</sup> One of the elements of the six part test is whether the type of the plaintiff's alleged injury is consistent with the purposes of tort law.<sup>85</sup> My claim for the legitimacy of the public tort suit is that it may have a positive deterrent effect upon the conduct of certain defendants. The governmental plaintiff's injury, both derivative and independent, directly relates to the deterrent purpose of tort law.

Professor Victor Schwartz has written a series of articles in which he attempts to develop the contours of the remoteness doctrine.<sup>86</sup> Analyzing some of the older cases that denied recovery based on remoteness, he identifies four factors that support the remoteness doctrine. They are as follows: (1) intervening acts between the defendant's conduct and plaintiff's injury; (2) the possibility of duplicate recovery for the same harm; (3) the prevention

84. See, e.g., *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000). In *Camden County*, the court found that the plaintiff lacked standing to bring its negligence claims because it could not establish proximate cause, i.e., its claims were too remote. *Camden County*, 123 F. Supp. 2d at 256-64. In so holding, it relied upon the six *Holmes* factors. *Id.* But see *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (refusing to dismiss under doctrine of remoteness).

85. *Camden County*, 123 F. Supp. 2d at 259.

86. Victor E. Schwartz, *The Remoteness Doctrine: A Rationale for a Rational Limit on Tort Liability*, 27 PEPP. L. REV. 759 (2000) [hereinafter Schwartz, *The Remoteness Doctrine*]; Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421 (1999) [hereinafter Schwartz, *A Rational Limit*].

of an avalanche of claims; and (4) that indirect economic harm suggests remoteness.<sup>87</sup> These four factors are related to Kimball and Olson's three factors, as well as to the six factor test.

Turning to Schwartz's first factor, the relevance of intervening acts should not be determinative. The more foreseeable an intervening act, the more compelling the claim for the imposition of liability. When the intervening act is the very risk that makes the defendant's action dangerous, liability is a compelling conclusion. Keeping with one of the themes of this piece, it is possible that intervening acts may lead to a finding of no liability in an individual suit against a defendant. However, for deterrence purposes, when the class of intervening acts is viewed across the panorama of all injuries arising from the defendant's conduct, liability becomes appropriate.

Schwartz's second factor is the possibility of duplicate recovery for the same harm. From a deterrence perspective, duplicate recovery is a troubling fact. Double recovery leads to overdeterrence, a result that is obviously inconsistent with the deterrence theory for the public tort suit.

Next, Schwartz argues that the remoteness doctrine prevents an avalanche of claims. From a deterrence perspective, the efficiency of any deterrence system must depend upon its costs. If the cost of the system is greater than its benefits, including deterrence, then the system is not worth the cost. Thus, if a legal rule provides deterrence, but it costs more to administer than the gain it provides, then the rule is not worth the cost. However, whether or not an avalanche of claims is justified from a deterrence perspective depends upon empirical data that may differ from claim to claim and case to case. Although the simplest way to get rid of an avalanche of tort claims would be to eliminate tort liability altogether, no one has seriously proposed that option. When a defendant's conduct causes great and serious injury, an avalanche of claims may be the perfectly appropriate response. More particularly, when analyzing public tort suits in light of the avalanche concern, one should bear in mind that although public tort suits are large, complex cases and the number of governmental plaintiffs is limited, the number of individual claimants is much larger. Thus, although the overall cost of public tort suits must be determined to assess whether each public tort suit will provide a deterrence gain, the fear of an avalanche of claims does not seem realistic.

Schwartz's final factor is that indirect economic harm suggests remoteness. This factor is a slight restatement of the economic harm rule that I will discuss separately. Critically, with all the remoteness factors and analyses, the issue becomes whether the factors counseling against liability outweigh the factors pointing towards liability, such as the deterrence rationale for the public tort suit. Even though some of the remoteness factors point toward no

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87. Schwartz, *The Remoteness Doctrine*, *supra* note 86, at 762-64; Schwartz, *A Rational Limit*, *supra* note 86, at 426-28.

liability in suits filed by individuals (perhaps for corrective justice reasons), are those same reasons any less persuasive in the public tort suit?

Notably, several courts in the firearms context have refused to dismiss governmental suits under the doctrine of remoteness, at least at the pleading stage.<sup>88</sup> Those courts tended to look at the causation issue from a broad perspective, noting that the general foreseeability of the crime alleged by the plaintiffs caused the injury.

### c. *The Economic Harm Rule*

What about the rule that purely economic damages are not recoverable in tort (or at least not in negligence)? This rule has always puzzled me.<sup>89</sup> Perhaps it has a place if a plaintiff, in a case in which contract norms are implicated, seeks to recover in tort some damages not recoverable in contract.<sup>90</sup> Likewise, it has a place when recovery duplicates damages another party has already recovered.<sup>91</sup> Outside these and perhaps other limited contexts, why limit recovery? Indeed, there are many exceptions to the rule. Wrongful death recovery for loss of support is an exception, as is loss of consortium. Recovery for legal or accountant malpractice is another exception. Many misrepresentation cases involve purely economic loss. So does interference with contract. From a deterrence perspective, if a defendant tortiously causes economic loss to another, a rule which shields that defendant from *any* liability for that loss is inefficient.<sup>92</sup>

The holding in *City of Flagstaff*, which states that money expended on public services by a governmental entity is not recoverable in a public nuisance action, is subject to similar criticism.<sup>93</sup> If the defendant causes the public entity to incur costs it otherwise would not have incurred, then the failure to allow recovery of those costs will lead to inefficient deterrence. The argument that public entities exist to provide public services is a confusing

88. See, e.g., *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 823-26 (N.D. Ohio 2000); *Sills v. Smith & Wesson*, 2000 WL 33113806 (Del. Super. 2000) (dismissing negligent marketing and distribution claims and unjust enrichment claims, but not plaintiffs' other claims).

89. Thomas C. Galligan, Jr., *supra* note 52, at 522-25 (comparing recovery of economic loss in tort and contract); see also Galligan, *supra* note 48, at 43-53 (discussing economic harm rule).

90. Galligan, *supra* note 52, at 512-20.

91. *Id.*

92. Indeed, the economic loss rule may not apply in the public nuisance context. See, e.g., *Dundee Cement Co. v. Chem. Law, Inc.*, 712 F.2d 1166 (7th Cir. 1982) (acknowledging precedent allowing recovery of lost profits in nuisance actions).

93. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983).

response. So what? Public services traceable to a defendant's torts ought to be recoverable in order to encourage efficient investments in safety.<sup>94</sup>

*d. Victim Fault and the Public Tort Suit*

Now, it is useful to slightly alter the inquiry from legal cause and scope of duty to defenses. One of the objections to the public tort suit is that it bypasses defenses available against individual plaintiffs, such as victim fault and assumption of risk. Others argue, however, that this very fact is actually one of the public law suit's strengths.<sup>95</sup> I have noted that the more general risk focus of the public tort suit may provide a deterrence gain when individual recovery may not be justified, most often in cases in which the individual plaintiff cannot establish cause-in-fact or legal cause.<sup>96</sup>

Significantly, the public tort suit also may be particularly appropriate when one considers the plaintiff's fault and its effect upon recovery and deterrence. One of the tort revolutions of the twentieth century was the widespread adoption of comparative fault in the United States.<sup>97</sup> Currently, in most states, the plaintiff's fault will *not* automatically bar recovery. Instead, it reduces recovery in most cases. There are several comparative fault regimes in America.<sup>98</sup> Under pure comparative fault, the plaintiff's fault will reduce recovery by the percentage of that plaintiff's fault. Assuming one plaintiff and one defendant who bears all fault not allocated to the plaintiff; the 10% at fault plaintiff will recover 90%; a 50% at fault plaintiff will recover 50%; a 51% at fault plaintiff will recover 49%; and a 90% at fault plaintiff will recover 10%.

Another type of comparative fault is called "modified" comparative fault. Under the modified approach, the plaintiff's fault reduces recovery until it reaches a specified level. Once it reaches that level, the plaintiff recovers nothing. There are two basic types of modified comparative fault in America. Under one, plaintiff's recovery is reduced unless it is "as great as or greater than" defendant's fault. Once plaintiff's fault is "as great as" defendant's fault, plaintiff recovers nothing. Under the other modified comparative fault system, plaintiff's recovery is reduced until its fault is "greater than" defendant's fault. Once plaintiff's fault reaches that level, recovery is barred.

Thus, under the first modified approach, again assuming one defendant bears all fault not allocated to the plaintiff, the 10% at fault plaintiff recovers

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94. *But see* Kimball & Olson, *supra* note 16, at 1296-1301 (arguing against right of recovery of costs of public services).

95. *See, e.g.,* Vandall, *supra* note 13, at 478-81 (noting that switch from claims based on subrogation to claims based on unjust enrichment or statutory games precluded tobacco companies from using certain defenses).

96. *See supra* text accompanying notes 73-87 (analyzing cause-in-fact issues).

97. DOBBS, *supra* note 3, § 201.

98. *Id.* at 505-06.

90%. The 50% at fault plaintiff recovers nothing. Likewise, any plaintiff whose fault is greater than the defendant's fault recovers nothing. Under the second modified approach, the 50% at fault plaintiff recovers 50%. The 51% or greater at fault plaintiff recovers nothing. The critical difference between the modified approaches is in the 50/50 case, where plaintiff is 50% at fault and defendant is 50% at fault. In the "not as great as" state, the plaintiff recovers nothing when his fault is 50%, but in the "not greater than" state, the plaintiff recovers 50%. Given the common sense of the 50/50 split in a difficult case, the difference in the two modified approaches may be significant to the plaintiff.

But, what effect does comparative fault have on deterrence and where do public torts fit in? First, imagine a private law suit in a jurisdiction where plaintiff's fault is still a bar to recovery. Assume that a fact finder would have allocated 5% of the fault to plaintiff and 95% of the fault to defendant, and that the plaintiff suffered \$100,000 in damages. Under comparative fault principles, the defendant would be responsible for \$95,000 of the plaintiff's damages. But, under the applicable contributory negligence regime, the defendant would pay nothing. Consequently, deterrence theory tells us that the defendant would have *no* economic incentive to take account of damages it caused to an at-fault plaintiff because it will *never* have to pay those damages. In such a state, the public tort suit may have a positive deterrent effect. It would allow recovery in the amount of the damage caused by the defendant, but not recoverable by the individual plaintiff. Although recovery of \$95,000 might not be significant, when one considers all the damages caused by defendants that they do not need to pay for, nor take account of, because of the contributory negligence rule, the deterrence gain of the public tort suit is apparent.

Similar claims for the public tort suit can be made in modified comparative fault jurisdictions. Under any of the comparative fault regimes discussed above, the defendant in the 5%/95% hypothetical would be liable to plaintiff for \$95,000. This potential liability would have a positive deterrent effect because it provides an incentive to invest efficiently in safety when the defendant decides what to do, how to do it, and how often to do it.

But, let us assume a modified comparative fault jurisdiction in which plaintiff was 51% at fault, defendant was 49% at fault, and plaintiff suffered \$100,000 in damages. No matter which of the two types of modified comparative fault is applied, the plaintiff would recover nothing – plaintiff's fault was both "as great as" and "greater than" defendant's fault. The adverse impact on efficient deterrence is apparent. Even though the defendant, under comparative fault principles, caused \$49,000 of the plaintiff's damages, the defendant need not pay them. Thus, the defendant will not consider those damages as a cost of its activity and will not take them into account when making decisions about whether to engage in the relevant activity. Under a pure comparative fault regime, the defendant pays \$49,000 in damages. That potential liability provides defendants with an incentive to behave safely when facing situations in

which the negligence of the defendant and plaintiff combine to cause an injury.<sup>99</sup> At the least, the defendant could not ignore that \$49,000 in damages.

Of what relevance is this discussion to the public tort suit? In a modified comparative fault regime or a contributory negligence regime, a defendant is not liable to a plaintiff under some circumstances, even though it might be said that the defendant was causally responsible for some of the plaintiff's injuries. In the relevant jurisdiction, it might be said that normatively when a plaintiff was either at fault (contributory negligent) or over some specified level of fault (modified comparative), it is not fair for the plaintiff to recover from the defendant. The relevant jurisdiction sacrifices some of the deterrent effect of liability in individual suits because of the normative or corrective justice aspects of the particular cases. However, the public lawsuit might provide a vehicle whereby the defendant must take account of damages, but in which an individual plaintiff may not recover because of plaintiff's fault or the level of that fault.

Imagine a defendant who caused \$1,000,000,000 in damages to a group of plaintiffs who were 51%<sup>100</sup> at fault in a contributory negligence or modified comparative fault regime. The hypothetical plaintiffs will recover \$0, yet it can be said that the defendant is responsible for \$490,000,000 in damages; a sum that will no doubt impact society as well as the individual plaintiffs in the group. One may be persuaded that the equities of the individual cases are such that given the values inherent in the applicable contributory negligence or comparative fault regime, no individual recovery is justified. One could also argue rather persuasively that a public tort suit, in which the applicable governmental entity recovers the \$490,000,000 damages (caused by defendants but not recoverable by individual plaintiffs), provides a deterrence gain. The threat of such a suit and its accompanying liability provide an incentive for defendants to invest efficiently in safety.

#### *e. Recap on Deterrence and the Public Tort Suit*

Similar to cause-in-fact and proximate cause issues, these arguments about deterrence, the public tort suit, and victim fault rely on the differences between individual suits (and the inherent equities in those suits), as well as public tort suits focusing on deterrence across a broad class of claims. To reiterate, the public tort suit that deals with a broad spectrum of injuries (to a

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99. See generally Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989) (discussing rules of apportionment and their effects).

100. Assuming that all plaintiffs are 51% at fault is a simplified assumption. Some may be more at fault and some may be less, but I oversimplify to make the general point that there may be significant differences in individual victims' fault. This may require a significant investment in judicial resources that would undermine the efficiency gains in public tort suits, or courts might rely on broad statistical proof about victims' fault.

city, state, or nation) may provide a deterrence gain by forcing defendants to take account of those damages that the defendant "caused," but that are not recoverable in individual (traditional) tort cases because of the narrow focus of the case, corrective justice, and/or the equities of the individual case. Professor Matsuda states the following: "We could establish a legal principle of causation that says that if the party most proximate to the harm is less likely to be deterred by imposition of liability than other causal agents less proximate, then the others less proximate shall be considered a proximate cause of the harm."<sup>101</sup> Echoing Judge Calabresi, Professor Matsuda goes on to note that the law should hold the person in the best position to prevent the harm accountable for it.<sup>102</sup> In my scheme, a public tort suit may be appropriate when a defendant is in a position to prevent some harm and an individual plaintiff's recovery is either unlikely, impossible, or when the defendant's failure to prevent the harm leads to some harm (cost) to the governmental plaintiff. In such cases, taking a broad view of the foreseeability of the harm and finding it to be the proximate cause of the relevant harm arguably provides a net deterrence gain.

As noted, there may be objections to the broad focus of the public tort suit and its reliance on statistical evidence. However, it seems that a general risk assessment focus is exactly the type of analysis that a person might engage in when deciding whether or how to make a certain product. The analysis would be broad, not case specific.

From a power perspective, the public tort suit equalizes the relative strength of the parties. The suit is one powerful entity – a governmental entity – against another, a large entity or group of entities. It is not an individual plaintiff versus a large entity or group of entities; it is large versus large.<sup>103</sup> To the unsophisticated observer, the public tort suit may look more like a fair fight between powerful organizations. The critic might query whether class actions do the same thing. The clear and emphatic answer must be no.

A class action is an aggregation of individual claims. The claims are aggregated, in oversimplified terms, only if common issues of law and fact predominate over particular issues. The public tort suit is the governmental entity's claim for damages. It is *not* an aggregation of individual claims. Thus, even when a class action may be inappropriate, a public tort suit might be a logical alternative.

Imagine a purported class action seeking to impose market share liability on a manufacturer. Further assume that in the relevant jurisdiction, a manufacturer can avoid market share liability by establishing that it did not produce

101. Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2211 (2000).

102. *Id.*

103. *See, e.g.,* Lytton, *supra* note 42, at 1260 (opining that potential costs of defending suits may have brought firearms' manufacturers to settlement table).



the particular product that injured the particular plaintiff.<sup>104</sup> Might the court in such a jurisdiction refuse to certify a class because individual issues about whether defendants can prove that they did not supply the product to a particular plaintiff predominate over common issues? Possibly. In such a case, there would be no class action, but a public tort suit would not be subject to the same objections. The public tort suit could proceed.

#### VI. *A Few Practical Issues with the Public Tort Suit*

Finally, I turn to some practical issues that public tort suits raise; practical issues that may counsel caution in particular cases. The first issue relates to separation of powers. Is the public tort suit inappropriate because it might lead to a liability not imposed by the legislature? Quite simply, the answer is no. Absent proper legislative prohibition, the public tort suit is nothing more than a garden-variety tort suit.<sup>105</sup> In most common law jurisdictions there is no express authorization for tort suits; those suits are allowed, defined, and refined by the judiciary. Moreover, when the executive commences such a suit, the executive is asserting itself in the tort arena. It is asking the judiciary to decide a basic liability issue. The separation of powers doctrine does not seem to require legislative authorization for the public tort suit.<sup>106</sup> Although the issue is a serious one,<sup>107</sup> so is the extent to which a public tort suit might improve the efficient operation of deterrence.

A second practical issue is the concern with avoiding double recovery. A court deciding a public tort suit must be careful to avoid awarding the same

104. See, e.g., *Martin v. Abbott Labs.*, 689 P.2d 368-80 (Wash. 1984); *Sindell v. Abbott Labs.*, 607 P.2d 924, 936-38 (Cal. 1980).

105. After the commencement of municipality suits against firearm manufacturers, some states passed statutes to bar the pending suits. These statutes raise critical constitutional issues about ex post facto laws, among other concerns. See, e.g., *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (holding LA. REV. STAT. ANN. § 40:1799, which precluded local government authorities from suing various firearm manufacturers and related entities, constitutional).

106. See *Kairys*, *supra* note 80, at 1173-74 (arguing that courts merely need to apply well established tort law in order to allow suits against gun manufacturers to proceed); see also *Kairys*, *supra* note 23, at 1181 ("Protecting the public by monitoring dangerous or threatening activities or conduct, determining what conduct constitutes a public nuisance, and seeking immediate relief is among the highest powers and duties of executive officials."). But see *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (rejecting contention that suits against gun manufacturers violates separation of powers); Robert A. Levy, *The New Business of Government Sponsored Litigation*, 9 KAN. J.L. & PUB. POL'Y 592 (2000) (arguing that substituting government-sponsored litigation for failed legislation violates principle of separation of powers). See generally *Lytton*, *supra* note 42 (arguing that tort system complements rather than usurps legislative or executive authority).

107. See, e.g., James H. Warner, *Municipal Anti-Gun Lawsuits: How Questionable Litigation Substitutes for Legislation*, 10 SETON HALL CONST. L.J. 775, 778 (2000).

damages twice. For instance, imagine the plaintiff in a public tort suit seeking recovery for medical expenses incurred by the public entity as a result of a mass tort. After recovery of those damages, assume an individual who received public assistance to pay some of his medical expenses, filed suit against the tortfeasor. Normally, under the collateral source rule, the individual plaintiff could recover the medical expenses paid by the governmental entity.<sup>108</sup> However, if both the governmental entity *and* the individual recover for the medical expenses, the same damages will be awarded twice. There will not only be overcompensation; there will also be overdeterrence. Consequently, courts must be cautious to avoid this double recovery problem. In the hypothetical asserted, denying the individual plaintiff's recovery is a deviation from the traditional collateral source rule, but it is critical to insure optimal, but not overdeterrence.

What if individuals recover in tort before the public tort suit is filed? Then, the judge hearing the public tort suit must reduce the state's recovery by the amount already recovered by individual plaintiffs. Although this marshaling is necessary to avoid overdeterrence, it could take a lot of time. Moreover, somewhat ironically, it requires that the court hear the public tort suit in numerous particular victim recovery analyses. These mandated analyses are somewhat ironic in that one of the supposed strengths of the public tort suit is avoiding such victim specific analysis. Consequently, the most administratively efficient arenas for public tort suits are areas in which individual recovery has not been common. Prior to the state suits against tobacco manufacturers, individual recovery was extremely rare. Likewise, individual recovery from firearm manufacturers was not the rule. Perhaps, public tort suits in these areas were responses to imperfections caused by the prior no-liability decisions.

What effect would the widespread adoption of several liability, as opposed to joint and several liability, have on a public tort suit? Obviously, it depends upon the particular several liability regime. Conceivably, several, but not joint, liability requires the allocation of fault to individual victims and others. This might result in a significant administrative expense and one would have to compare the amount of that expense to the deterrence gains from the public law suit.

Another issue of significance is the compensation depletion effect of the public tort suit. If governmental entities recover, will defendants be unable to pay individual claimants? Should governmental entities recovery prime individual recovery? These are difficult issues. However, like individual tort suits, one underlying premise of the governmental tort suit is that the government has suffered injury. Thus, a central question is: should the government go uncompensated? Additionally, at least some of the damages governmental

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108. See DOBBS, *supra* note 3, at 1058-61 (discussing collateral source rule).

entities seek to recover are for expenditures from the public fisc to deal with individual injuries, such as medical expenses or other public assistance payments. Finally, should defendants avoid liability to a governmental entity *because* liability might mean that a future individual's judgment against the defendant may not be satisfied in full if that individual sued?

Based on the questions raised above, one might cry out – what limit? Why should the deterrence gain from liability be limited to public tort suits? Could anyone sue and would liability potentially have a deterrence gain? I have written something along those very lines as an argument in favor of punitive damages or augmented awards.<sup>109</sup> But, conglomerating those claims in the public tort suit avoids the problems of rent-seeking and assures recovery of public damages.

### VII. Conclusion

The public tort suit is a new breed of claim. It is different from the bipolar tort suit to which we have become accustomed. The public tort suit has the potential to assure efficient deterrence. It might assure efficient deterrence in areas in which individual suits are not brought or in which corrective justice demands no liability to individual plaintiffs.

The public tort suit promises to be particularly appropriate in cases in which all those injured either do not sue or do not recover. Public tort suits might provide an efficiency gain in cases in which individual plaintiffs cannot establish cause-in-fact or legal cause under traditional, corrective justice notions of tort law, but in which cause-in-fact and legal cause are more clearly established across a broad range of claims. The deterrence gains of the public tort suit are also apparent when one considers the fact that victim fault may point towards no recovery in individual suits, but that the applicable victim fault rule, while encouraging individual responsibility, might result in an overall deterrence loss. The public tort suit can account for that loss. Consistently, when an effective vehicle for efficiently improving safety is developed, courts or legislatures tend to adopt it over time.<sup>110</sup> Time will tell if the same is true for the public tort suit.

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109. See Galligan, *supra* note 48, at 72-73 (discussing alternative plaintiffs seeking augmented awards).

110. See, e.g., *Turner v. NOPSI*, 476 So. 2d. 800, 807 (La. 1985) (Dennis, J., concurring) ("As a practical matter, whenever a superior economic alternative has been presented, our society has shown itself ready to abandon the view that justice requires individual injurers to pay their victims solely on the basis of fault.").