Public Nuisance: Causation and Liability Theories

author: Catherine Connors

Syllabus

The previous modules have discussed how the concept of public nuisance has been a subject of confusion generally. The proof needed to hold someone liable for ? to say that he ?caused? ? such a nuisance is no exception to this rule. This module attempts to clarify the causation principles that apply to public nuisance claims.

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Text

1. Traditional Tort Principles

Tort law has historically required that, to prevail, a plaintiff must show that the defendant?s acts caused the plaintiff?s injuries.1 Traditionally, the plaintiff?s causation burden contains two elements: (1) cause-in-fact

and (2) legal, also called proximate, cause.[2]

Cause-in-fact is a just that: the defendant must have done (or failed to do) something that resulted in the alleged harm. The traditional measure for cause-in-fact is the ?but-for? test: when the harm would not have occurred absent the defendant?s conduct.[3]

Legal, or proximate, cause is a subset of causes-in-fact. As some commentators have noted, if every cause-in-fact resulted in liability, ?the scope of liability would be vast indeed, for ?the cause of causes [are] infinite?- ?the fatal trespass done by Eve was cause of all our woe.??[4] The law, therefore, cuts off liability, for example, when actions or omissions, while constituting ?but for? causes-in-fact, are too remote or unforeseeable to hold the actor legally responsible.[5]

To illustrate, examining the cause-in-fact requirement, if a plaintiff is hurt in a car accident because the driver of the other car was negligent, in order to prevail, the plaintiff must show that the defendant was in fact the driver and not a stranger to the accident.[6] The typical burden of proof in showing that the defendant was a cause-in-fact is preponderance of the evidence; hence if the fact finder can only speculate whether the defendant was really the culprit, the claim fails.[7]

As for legal, or proximate, cause, perhaps the most famous example of a case with a ?but for? actor nevertheless found not liable is ***Palsgraf v. Long Island Railroad Co***.[8] A passenger was running to catch the defendant?s train; in trying to help the passenger on board, a train worker dislodged a package from the passenger?s arms; the package contained fireworks, falling on the rails and exploding, which, in turn, caused some scales, many feet from the platform, to fall over on the plaintiff. But for the worker?s conduct, the accident would not have occurred. Nevertheless, Justice Cardozo, writing for the majority, held there could be no liability.[9]

As ***Palsgraf*** reflects, often the factor cutting off liability is the lack of foreseeability that the defendant?s act would ultimately result in the plaintiff?s harm.[10] One subset of this type of attenuation in a ?but for? chain of events that cuts off liability are intervening or superseding causes.[11] Whether an intervening cause cuts off the original actor?s liability can be determined by ?asking whether the intervention of the later cause is a significant part of the risk involved in the defendant?s conduct, or is so reasonably connected with it that the responsibility should not be terminated.?[12]

2. Alternate Liability Theories

In some circumstances, a plaintiff does not know who harmed him and can only provide conjecture or speculation. Over time, courts have assessed various efforts to create exceptions to the cause-in-fact requirement of showing that the named defendant was more likely than not the cause that plaintiff?s harm.

Often these alternate liability theories have been asserted in the context of a harm-causing product, and the defendant manufacturer?s membership in an industry. A plaintiff that cannot identify the manufacturer of the specific product that caused his harm may invoke an alternate liability theory, arguing that he should be relieved of his traditional burden of proving cause-in-fact, and asking either that the burden of proof be shifted to the defendant to show that it was not the source of the harm, or that liability be apportioned among multiple defendants, each of whom might be the cause of the particular harm to him.[13]

The majority of courts have rejected most of these theories.[14]

3. Application of Traditional and Alternate Liability Theories in the Public Nuisance Context

The issue explored here is whether these traditional causation requirements, or any alternate liability theories, apply when the cause of action asserted is public nuisance ? is there anything about the public nuisance cause of action that should cause a court to deviate from its usual tort causation rules?

In analyzing this question, it is helpful to divide public nuisance claims into three categories: (1) discharge cases; and (2) product cases; and (3) ?cumulative? claims.

As outlined below, generally courts have ruled that traditional causation rules apply to public nuisance claims.[15] This is particularly true when the claim is based on the manufacture and sale of a product.[16]

Discharge Cases ? Indivisibility and Substantiality

A typical public nuisance case can involve a discharge of a pollutant into a public resource, such as the air, or a river.

In such cases, courts generally still require the plaintiff to meet the traditional cause-in-fact burden of proof, ***i.e.***, that the defendant in fact discharged the offending material into the resource, which then caused the harm.[17]

Two factors, however, can cause special scrutiny in such discharge cases. First, sometimes they can present difficulties of proof, with harm caused by multiple actors.[18] Second, the injuries caused by mingled discharges can be grave and widespread.

One response to these circumstances has been legislative. Through environmental statutes such as the Superfund laws, Congress, balancing various economic and fairness considerations, has diluted some causation requirements and shifted burdens of proof for specified activities and harms.[19]

Under the common law, discharge cases are sometimes analyzed applying principles of indivisibility and substantiality. Looking first at indivisibility, in most circumstances, harms remain distinct. The Second Restatement of Torts, for example, uses the example of two defendants independently shooting a plaintiff at the same time, with one defendant wounding him the arm and the other in the leg. ?The mere coincidence in time does not make the two wounds a single harm, or the conduct of the two defendants one tort.?[20] While in nuisance discharge cases, discharges might commingle, the general rule remains to apportion when possible.[21]

When an injury is truly indivisible, various principles apply to determine for how much, if any, each defendant is responsible. The Second Restatement of Torts provides that ?[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.?[22] Hence, once a defendant?s conduct arises to the level of legal or proximate cause, that defendant can be held responsible for the whole of an indivisible injury.

To rise to the level of legal or proximate harm triggering any liability, however, the concept of substantiality comes into play. The Second Restatement of Torts provides that negligent conduct does not constitute legal cause unless that conduct is ?a substantial factor? in bringing about the harm.[23] In the nuisance

context, this substantiality factor translates so that one can be liable for causing a nuisance if one ?participates to a substantial extent? in carrying it on.[24] Such substantiality is lacking, for example, when someone tosses a match into a forest fire,[25] or is only a patron to a noisy dancehall or a workman employed with others to dig a cesspool.[26]

It is critical to distinguish this substantiality test limiting legal or proximate cause from alternate liability theories. In the substantiality situation, multiple defendants each acted tortiously and each contributed to the plaintiff?s harm; the question presented is whether an individual defendant?s conduct causing the harm contributed to such a degree that that particular defendant should be held liable. In contrast, the alternate liability situation arises in an all-or-nothing context: the plaintiff was harmed by either X or Y defendant, but cannot identify which. As noted, ***supra***, § 2, in such situations, the majority of jurisdictions in most situations conclude that, absent proof that a particular defendant did in fact cause that plaintiff?s harm, liability does not attach.[27]

Product Cases

When a claim is based on harm from use of a product, the threshold inquiry is whether the claim properly sounds in nuisance at all.[28] Moving beyond that fundamental inquiry to focus on causation issues, when a plaintiff asserts a public nuisance claim involving use of a product, a defendant identification issue can arise with traits similar to those presented in other tort causes of action, such as negligence, in which alternate liability theories have been asserted. Whether a claim sounds in nuisance or any other tort, the plaintiff alleges harm from a product, but cannot identify the specific manufacturer of the particular product that caused his harm.

Unsurprisingly and logically, courts that have rejected alternate liability theories to excuse the lack of product identification in other causes of action have generally rejected such theories in the public nuisance context as well.[29]

For example, in Illinois, where the Supreme Court has rejected alternate liability theories in other contexts, the Court of Appeals rejected a public nuisance claim against lead pigment manufacturers:

> Here, however, plaintiff has not identified any specific manufacturer's product at any specific location. Plaintiff is attempting to do what the ***Smith***[30] decision forbids: making each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many. ***City of Chicago v. Am. Cyanamid Co.***, 355 Ill.App.3d 209, 220, 823 N.E.2d 126, 136-37 (2005).

The Missouri Supreme Court ruled similarly in dismissing a public nuisance claim against manufacturers: ?The defendants correctly contend that here, as in [the Missouri Supreme Court decision rejecting the market share alternate liability theory], where a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold that product.? ***City of St. Louis v. Benjamin Moore & Co.***, 226 S.W.3d 110, 114 (Mo. 2007).

?Cumulative? Claims

Where the claim is a public, not private, nuisance, the plaintiff is often a governmental entity ? a city or state ? seeking redress with respect to harm affecting many different residents, or a public resource used by many. Under such circumstances, the plaintiff has occasionally sought to relieve itself of the burden of linking a particular defendant manufacturer to a particular resident?s harm, or harm at a particular site, by analogizing the accumulation of many harms to many people at many sites to multiple discharges into a stream, for which all contributors should be held liable without the need to identify and prove the presence of any of the defendant manufacturer?s product at any location.[31]

To date, when reaching the highest court in jurisdictions where this argument has been made, such public nuisance claims have been rejected. When decisions have focused on the causation element, as the citations to the Illinois and Missouri decisions, ***supra,*** indicate, most courts have found that traditional product identification principles still apply.

In ***City of St. Louis***, for example, the plaintiff City argued that Section 834 of the Second Restatement of Tort?s references to substantiality meant that the plaintiff in a public nuisance claim need only show that an individual defendant contributed a substantial amount of its product (lead paint and pigment) to the total amount of lead paint and pigment throughout all the homes within the city, and that it did not have identify any specific defendant?s paint or pigment as actually present in any individual home.[32]

The Missouri Supreme Court rejected this argument, explaining that Section 834?s reference to substantiality as a requirement for legal or proximate cause did not relieve a public nuisance plaintiff from first showing cause-in-fact, which, in the absence of acceptance of alternate liability theories, requires the plaintiff to identify the defendant?s product as actually present and causing the harm.[33]

Other characteristics of these ?cumulative? public nuisance claims, based on manufacture and sale of a product, tend to undermine analogies to the more typical nuisance discharge cases.

First, as noted ***supra,*** even in nuisance cases involving discharges into streams, injuries and their causes are often deemed divisible. When, as in the Missouri case, the locations at which the nuisance is alleged to exist do not consist of the air, or one river, but rather, thousands of individual dwelling units, divisibility becomes more apparent as a physical reality. Even with respect to Superfund legislation, with relaxed views of causation and often involving contamination of common aquifers, liability is limited to individual facilities or contiguous pieces of property where waste has leached; the statute does not recognize cumulative claims aggregating sites within municipalities or the State as a whole in which the statutory burden of proof would then be altered as to each facility or site.[34]

Second, when probed, the issue in ?cumulative? public nuisance cases is typically not the divisibility of an injury or injuries, but rather, the inability of the plaintiff to identify a particular manufacturer as the source of the harm at any specific location.[35] The inability of a governmental plaintiff to identify the source of a product at any specific location, however, implicates the same considerations as apply in non-nuisance tort cases, explaining why courts rejecting alternate liability theories for non-nuisance claims do the same in the public nuisance context.[36]

Third, whether or not the specific manufacturer of the product present at each location could be identified, perceived inefficiencies of separate suits for each of many aggregated locations may also motivate the governmental plaintiff to allege a cumulative claim.[37] But invocation of efficiency as a basis to dilute traditional causation requirements might more appropriately be addressed to legislatures, not courts, as occurred with discharge cases and the congressional Superfund response.[38] While legislatures are more equipped as a general rule to address widespread public harms through statute, courts, given their traditional adjudicatory function meting out individual justice, have crafted rules for aggregating cases

which are ill suited to adjust causation principles for efficiency reasons. To the contrary, the ordinary judicial response when the need to address individual proof issues would make aggregation cumbersome is not to abandon those proof requirements, but rather to reject aggregation.[39]

Courts may also be reluctant to accept a theory diluting individual proof requirements for aggregated claims for constitutional reasons. For example, the use of a fictional, composite plaintiff to represent many actual plaintiffs has been rejected, based on due process concerns.[40]

In sum, while a public nuisance claim often involves multiple affected persons or properties, the same causation rules and burdens of proof should apply as when only one person is harmed, or one location is at issue. Aggregation does not alter the causal analysis in the judicial setting. Hence, a threshold inquiry in reviewing a public nuisance claim is determining whether the asserted harm is truly indivisible. If so, this may trigger a true substantiality analysis to limit liable defendants to those contributing significantly to the one harm. If not, if instead of an indivisible injury, the claim seeks to aggregate distinct harms, such claims should trigger a procedural determination whether joinder is appropriate, followed by a substantive need for the plaintiff to prove both cause-in-fact and legal or proximate cause as to each joined claim. When the allegations in such aggregated claims focus on use of a product, care should also be taken to determine whether the plaintiff?s invocation of substantiality principles is, as a practical matter, an attempt to avoid the need to identify the particular manufacturer alleged to have caused the harm or harms about which the plaintiff complains. If so, the jurisdiction?s general position on alternate liability theories should logically be the starting point for any determination as to appropriate burdens of proof.

Remoteness and Intervening Causes

The application of principles of remoteness and intervening or superseding causes, used to cut-off some causes-in-fact from legal or proximate cause, is, generally a fact-sensitive inquiry.[41]

When the tort is nuisance, and the tortious conduct entails manufacture or sale of a product, then application of these principles suggest that such product-focused claims should not sound in nuisance as a general matter.[42]

As noted above, concepts of attenuation in the causal chain cutting off liability are often measured by examining foreseeability. On the one hand, if the gravamen of the claim is that a product?s intended use is harmful, then consumers? use of that product is not only foreseeable, but expected and desired. From this perspective, the consumers? expected acts of usage should not be deemed intervening or superseding causes cutting off liability for the manufacturer. On the other hand, if the product was legal and not defective, and the manufacturer otherwise violated no duty to warn as developed in product liability law at the time of manufacture and sale, then the foreseeability element would appear to be lacking. When the harm causing the alleged nuisance arises from misuse of the product, ***e.g.***, illegal use of firearms or failure to maintain lead paint, then such lack of foreseeability is only heightened.[43] The analogy to discharge cases in suits against manufacturers can also fail on this ground when the harm occurs from activities occurring after the manufacturer has discharged its normal obligations of launching a non-defective product into the stream of commerce.[44]

Perhaps for these reasons, courts addressing product-based public nuisance claims have discussed remoteness concepts in terms of the general inappropriateness of nuisance causes of action against manufacturers, and, more broadly, the need to limit the cause of action to clear and predictable parameters.[45] Producing a legal product is deemed an attenuated act cutting off liability as matter of law. When the

product was made and sold many years before any harm becomes known, the disconnect between the manufacturer and the ultimate harm becomes even more acute.46

Hence, the multiple decisions rejecting a public nuisance claim against a product manufacturer based on the fact that the manufacturer no longer controls the product47 can in some respects be viewed as a proximate cause decision: the manufacturer is too remote from the injury directly caused by a discharge or misuse of the product.48 Intrinsic in the fundamental elements of a public nuisance claim, with its focus on abatement remedies, is the concept that those held liable should be the persons or entities which have current possession over the offending property or substance.

Resources

1. See D. Gifford, ?The Challenge to the Individual Causation Requirement in Mass Products Torts,? 62 Wash & Lee L. Rev. 873, 874 & citations in n. 3 (2005).

2. See F. Harper, F. James & O. Gray, The Law of Torts, § 20.1 (2d ed. 1986) (?Harper & James?). See also Restatement (Third) of Torts-Physical Harm, § 26 (Proposed Final Draft #1) (summarizing the meaning of the terms factual, legal and proximate cause as used throughout the First, Second and Third Restatements of Tort.)

3. Id., § 26.

4. Harper & James, § 20.1 at 85-86.

5. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts, § 43 (1984) (?Prosser & Keeton?). The term ?proximate? comes from Lord Chancellor Francis Bacon?s first maxim of the law: ?In jure non remota causa, sed proxima, spectatur? ? in law, not the remote cause, but the proximate cause is looked to. Lord Chancellor Francis Bacon, Maxims of the Law (1630), reprinted in 7 J. Spedding et. al., The Works of Francis Bacon 327 (1870), cited in P. Swisher, ?Causation Requirements in Tort and Insurance Law,? 43 Tort Trial & Ins. Prac. L.J. 1, 8 (2008).

6. See Prosser & Keeton, § 41 at 263: ?An essential element of the plaintiff?s cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.?

7. Id. at 269 (?The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.?) (footnotes with citations omitted).

8. Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928).

9. Id. at 341-44, 162 N.E. at 99-100.

10. See id. (?Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed ??). See generally Harper & James, § 20.5; Prosser & Keeton, § 43.

11. The Second Restatement of Torts, § 440, uses the term ?superseding cause? and defines it as ?an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.?

12. Prosser & Keeton, § 44 at 302.

13. See ?Concert of Activity,? ?Alternate Liability,? ?Enterprise Liability,? or Similar Theory as Basis for Imposing Liability Upon One or More Manufacturers of Defective Uniform Product, in Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury,? 63 A.L.R.

5th 195 (1998).

14. Id., § II. See generally J. Gray & R. Faulk, ??Negligence in the Air? Should ?Alternative Liability? Theories Apply in Lead Paint Litigation?? 25 Pace Envtl. Rev. 247 (2008).

15. See, e.g., Harper & James, §1.28 at 115: ?The doctrine of legal or proximate cause is a limitation on liability for nuisance as it is on tort liability generally?; V. Schwartz & P. Goldberg, The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort,? 45 Washburn L.J. 541, 569 (2006) (?The proximate cause analysis in public nuisance theory is the same as with claims for traditional negligence.?)

16. See infra, § 3.b.

17. See, e.g., Alholm v. Town of Wareham ,371 Mass. 621, 358 N.E.2d 788, 791 (1976) (affirming directed verdict; ?We conclude that, while there was evidence from which the jury could find that the town was maintaining a public nuisance and that the town was negligent in its maintenance of the dump, there was no evidence on which a jury could rationally base a conclusion that the smoke from the dump was causally related to the accident.?);Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53 (R.I. 1980) (holding that defendant was not liable for noxious odors because there was ?virtually no evidence establishing that such odors were caused by any actions on the part of defendant?).

18. See Harper & James, § 1.28 at 115: (On the issue of causation, ?a difficult problem of factual proof is often encountered in [nuisance] cases. Where several defendants, acting independently, contribute to the creation of a nuisance, each is liable only for that part of the total nuisance that represents his contribution and it may be hard or even impossible to prove the measure of this amount.?)

19. See U.S. v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993) (?Hence, it seems plain that in addition to imposing a strict liability scheme, CERCLA does away with a causation requirement.?) These environmental laws typically do not eliminate all causation requirements altogether, e.g., requiring the plaintiff to prove that the defendant (a) arranged for the disposal of waste (b) at the particular site where the disposal of such waste is causing harm. See, e.g., 42 U.S.C. § 9607(a)(1)-(4).

20. Second Restatement of Torts, § 433A, comment b.

21. The Second Restatement provides:

> Divisible harm. There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis and of fair apportionment among the causes responsible. ? Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.
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> Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff?s use or enjoyment of his land. Thus where two or more factories independently pollute a stream, the interference with the plaintiff?s use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream.

§ 433A, comment d.

22. § 875.

23. § 431(a).

24. d., § 834. The Second Restatement of Torts explains:

> When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is because to be a legal cause of harm a person?s conduct must be a substantial factor in bringing it about.

Id., comment e.

25. Prosser and Keeton, § 41 at 267-268.

26. Second Restatement of Torts, § 834, comment d.

27. See, e.g., Payton v. Abbott Labs., 386 Mass. 546, 571, 437 N.E.2d 171, 188 (1982) (identification of the party causing the injury is a ?long standing prerequisite? that ?separates wrongdoers from innocent actors, and also ensures that wrongdoers are held liable only for the harm they have caused.?)

28. This subject is will be discussed in an upcoming module on public nuisance and public liability.

29. Conversely, Wisconsin, which recognizes a ?risk contribution? alternate liability theory, has applied those principles in the public nuisance context. See City of Milwaukee v. NL Indus., Inc., 691 N.W.2d 888, 892 (Wis.App. Ct. 2004). For a detailed examination of this risk contribution theory, see an upcoming model examining market share versus risk contribution concepts.

30. Smith v. Eli Lilly & Co., 137 Ill.2d 222, 560 N.E.2d. 324 (1990) (rejecting market share theory based on sale of diethyl-stilbestrol (DES)).

31. E.g., State v. Lead Industries Ass?n, Docket No. 2004-63 MP (R.I. 7-1-08). See D. Gifford, 62 Wash. & Lee L. Rev. at 926-27 (?The elimination of the individual causation requirement in recoupment litigation asserting public nuisance claims can result either from the substantive definition of the public nuisance tort or from the handling of the causation requirement, and often these issues blur.?)

32. See City of St. Louis, 226 S.W.3d at 114.

33. Id. at 115-16:

> Without product identification, the city can do no more than show that the defendants' lead paint may have been present in the properties where the city claims to have incurred abatement costs. That risks exposing these defendants to liability greater than their responsibility and may allow the actual wrong-doer to escape liability entirely.

Even assuming that the city could prove ? via marketing evidence or something else short of product identification ? that a particular defendant held a certain share of the lead paint market in the city at the relevant time or even if it could prove that because of that defendant's market share there was a statistical probability that its paint was in a certain percentage of the properties at issue ? that would not establish that the particular defendant actually caused the problem. Absent product identification evidence, the city simply cannot prove actual causation.

Governmental public nuisance claims

> The city contends, and the dissent would hold, that this public nuisance claim does not fit within the causation standards for other torts because the damage is not an individual injury, but a widespread health hazard that is "uniquely public ? the monumental task of cleaning up [d]efendants' toxic products falls upon the City and its taxpayers." The trial court noted the attractiveness of the argument, but concluded that to adopt it would require a departure from or require a modification of [Missouri?s case law rejecting the market share theory] and the standards for proving actual causation. This Court declines to approve such a departure in this case.

34. See Sierra Club, Inc. v. Tysons Food, Inc., 299 F. Supp. 2d 693, 708-11 (W.D. Ky. 2003) (summarizing cases); Niagara Mohawk Power Corp. v. Consol. Rail Corp., 291 F. Supp. 2d 105, 125 (N.D.N.Y. 2003) (although contiguous, property owned by a railway naturally divisible from the remainder of the site with no connection with remainder for many years was not a part of the facility); Union Carbide Corp. v. Thoikol Corp., 890 F.Supp. 1035, 1043 (S.D. Ga. 1994) (although located on one parcel, landfill and solid waste management units were separate ?facilities? because they ?are geographically distinct from the landfill, contain a variety of wastes that were not present in the landfill, may require different removal and remedial actions than the landfill, and were not treated as part of a unitary CERCLA facility with the landfill?).

35. In Missouri, for example, the plaintiff City could not identify the manufacturer of any of the lead paint at any location included in each complaint. City of St. Louis, 226 S.W.3d at 113.

36. Also, depending on the product complained about, the prerequisites for application of alternate liability theories in the minority of jurisdictions that have accepted such theories might not be present. See Jefferson v. Lead Indus. Ass?n, 106 F.3d 1245, 1253 (5th Cir. 1997) (even if Louisiana were to accept market share theory, rejecting theory in context of lead pigment claim where there was ?no allegation of when the pigment was applied, or that the defendants? market shares were constant over the whole period that lead pigment was used? and where ?a ?major producer? [was] absent from the case?); Santiago v. Sherwin-Williams Co., 3 F.3d 546, 550-51 (1st Cir. 1993) (even if Massachusetts would adopt a market share theory, lead pigment manufacturers could not be sued under that theory due to paint layering, long span of time, and varied participation in market); Brenner v. Am. Cyanamid, 263 A.D.2d 165, 170-73, 699 N.Y.S.2d 848, judgment aff?d, 288 A.D.2d 869, 732 N.Y.S.2d 799, 852-53 (4th Dep?t 2001) (while New York accepted market share theory in DES context, it was not applicable with respect to lead pigment because some of the lead pigments found in interior paints may have been manufactured by non defendants; the plaintiffs did not identify the market share of defendants for interior residential paint, which is the harmful use; the plaintiffs could not identify a narrow time period in which the paint was applied; lead paint, unlike DES, is not fungible, containing varying amounts of lead pigments; paint manufacturers decide which pigments to use and what quantities; owners and landlords control the hazards of paint when it flakes and peels and becomes ingested and inhaled; and the injuries could have resulted from something other than lead or some source other than lead-based paint.); Matter of New York State Silicone Breast Implant Litigation, 166 Misc. 2d 85, 631 N.Y.S.2d 491 (Sup. Ct. 1995), aff?d, 227 A.D.2d 310, 642 N.Y.S.2d 911, 676 N.E.2d 493 (1996) (refusing to apply market share theory to cases involving silicone breast implant because such products are not fungible); Itrey v. Firestone Tire & Product Co., 33 Ohio Misc. 2d 50, 513 N.E.2d 825 (1986) (rejecting market share liability in tire-rim case due to lack of fungibility).

37. For example, in Rhode Island, the Attorney General alleged that lead pigment was found in approximately 250,000 dwelling units. State v. Lead Industries Ass?n, Docket No. 2004-63 MP at 9 n. 5 (R.I. 7-1-08). Had the Attorney General pursued relief in accordance with Rhode Island?s nuisance abatement statute, he would have needed to identify each location, and, presumably, supplied causal proof regarding the same. See R.I.G.L. 1956 §10-1-1 (?The complaint ? shall ? set forth ? a description of the place complained of?).

38. See In re Lead Paint Litig., 191 N.J. 405, 440, 924 A.2d 484, 505 (2007) (rejecting public nuisance claim against lead paint manufacturers and distributors because, among other reasons, there was no indication that the legislature sought to expand liability beyond traditional nuisance limitations).

39. See Amchen Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997) (upholding, in an asbestos exposure case, the Circuit Court?s denial of settlement class certification under Fed. R. Civ. P. 23(b)(3) in part because the individual class members varied in presence and extent of physical injuries and symptoms, as well as history of tobacco use); Mertens v. Abbott Labs, 99 F.R.D. 38, 41-42 (D.N.H. 1983) (refusing, where class members? use of, exposure to, and harm from DES varied, to certify a class based on the ?mere finding that DES causes injury in utero? because the resultant ?liability issue would require separate and individual proof for each claimant?). See also, e.g., F.R.Civ.P. 20 (limiting joinder in one action to the same transaction or occurrence or series of transactions or occurrences). In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990), the Court stated:

> A contemplated "trial" of the 2,990 class members without discrete focus can be no more than the testimony of experts regarding their claims, as a group, compared to the claims actually tried to the jury. That procedure cannot focus upon such issues as individual causation, but ultimately must accept general causation as sufficient, contrary to Texas law. It is evident that these statistical estimates deal only with general causation, for
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> "population-based probability estimates do not speak to a probability of causation in any one case; the estimate of relative risk is a property of the studied population, not of an
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> individual's case." This type of procedure does not allow proof that a particular defendant's asbestos "really" caused a particular plaintiff's disease; the only "fact" that can be proved is that in most cases the defendant's asbestos would have been the cause. This is the inevitable consequence of treating discrete claims as fungible claims. Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury. Procedures can be devised to implement such generalizations, but not without
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> alteration of substantive principle.
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> We are told that Phase II is the only realistic way of trying these cases; that the difficulties faced by the courts as well as the rights of the class members to have their cases tried cry powerfully for innovation and judicial creativity. The arguments are compelling, but they are better addressed to the representative branches ? Congress and the State Legislature. The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not.

Id. at 711-712 (emphasis in original). See also Sw.Ref. Co. v. Bernal, 22 S.W.2d 3d 425, 427 (Tex. 2000) (rejecting dilution of

intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.?)

40. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344 (4th Cir. 1998) (holding that class certification with trial of fictional representative plaintiff denied defendants a fair trial). See also Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So.2d 3d 425, 437 (Fl. 1996) (striking down as denying the defendant a right to a fair trial a statute providing that when the number of allegedly harmed individuals becomes so large so as to make joinder impracticable, the agency pursuing redress need not identify the individuals).

41. Whether the jury or the court makes this determination may depend on the nature of the dispute. If the facts are undisputed, then, if negligence or foreseeability is not at issue, it is usually the duty of the court to determine whether the public policy principles driving proximate or legal cause limitations should apply. See Second Restatement of Torts, § 453. See generally Prosser & Keeton, § 45.

42. See supra n. 28.

43. See, e.g., District of Columbia v. Beretta, U.S.A. Corp, 872 A.2d 633, 646 (D.C. 2005) (rejecting public nuisance claim against gun manufacturers; ?[t]he question ? is whether the District has sufficiently pleaded that cause of action [public nuisance], and the answer depends critically on how prepared we are to loosen the tort from the traditional moorings of duty, proximate causation, foreseeability, and remoteness that have made us reject the plaintiffs' claim of negligence. For the following reasons, we are not convinced that the public nuisance cause of action the District alleges is sufficiently distinguishable from its negligence claim to justify a different result?); People ex rel. Spitzer v. Sturm, Ruger & Co.,
309 A.D.2d 91, 761 N.Y.S.2d 192, leave to appeal denied, 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421 (2003) (to disregard ?the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm? would invite ?a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.?) In re Lead Paint Litig., 191 N.J. at 434, 924 A.2d at CITE (rejecting public nuisance claim against lead paint manufacturers; ?[a]lthough one might argue that the product, now in its deteriorated state, interferes with the public health, one

cannot also argue persuasively that the conduct of defendants in distributing it, at the time when they did, bears the necessary link to the current health crisis. Absent that link, the claims of plaintiffs cannot sound in public nuisance. Indeed, the suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability to be imposed on manufacturers of ordinary consumer products which, although legal when sold, and although sold no more recently than a quarter of a century ago, have become dangerous through deterioration and poor maintenance by the purchasers.?)

44. In discharge cases, the harm is typically caused by waste discharge, and not the initial manufacture of the product that eventually transforms into waste. Thus even Superfund laws, while holding liable those who arrange for waste disposal, excludes the manufacturer of the product that eventually turns into waste. See Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 775-776 (4th Cir. 1998); AM Int?l, Inc. v. Int?l Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co., 906 F.2d 1059, 1065 (5th Cir. 1990); 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1361 (9th Cir. 1990). See generally A. Topol and R. Snow, Superfund Law and Procedure, § 3:36 (2007) (collecting cases with discussion of the ?useful product? doctrine exempting manufacturers from Superfund liability).

45. So, for example, the Rhode Island Supreme Court, in rejecting a public nuisance claim against lead pigment manufacturers based on a holding that the common law requires the defendant to be in control of the harm-causing agent at the time the harm occurs, noted, among other things that ?liability cannot be predicated upon a prior and remote cause which merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause even though the injury would not have occurred but for such condition or occasion.? State v. Lead Industries Ass?n, Docket No. 2004-63 MP at 32 (citation omitted). See also the module ?Public Nuisance: Defining the Tort,? by Richard Faulk, Section 3.d, ?Intervening Causes.?

46. See City of Chicago, 355 Ill.App.3d at 224, 823 N.E.2d at 139 (noting, in rejecting public nuisance claim against lead pigment manufacturers, all of which stopped making their products by 1978, ?at some point along the causal chain, the passage of time and the span of distance mandate a cut-off point for liability.?) (citation omitted)

47. E.g., Camden Cty Bd. Of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001) (firearms); City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989) (chemicals); State v. Lead Industries Ass?n, Docket No. 2004-63 MP at 4 (lead pigment); Corp. of Mercer Univ. v. Nat. Gypsum Co., No. 85-126-3-MAC, 1986 WL 12447, *6 (M.D. Ga. Mar. 91986) (asbestos). Even in the Love Canal case, a decision cited by plaintiffs seeking to analogize product claims to discharge claims in the nuisance context, while the defendant did not control the contaminated property, it had contracted with the property owner to dispose of the waste ? a connection which permits liability under statutory Superfund provisions. See State v. Schenectady Chems. 459 N.Y.S.2d 971, 974 (Sup. Ct. 1983).

48. See, e.g., City of Chicago v. Beretta U.S.A. Corp., 213 Ill.2d 351, 403, 821 N.E.2d 1099 (2005) (treating control element as one factor in analyzing proximate cause).

Causation

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