2009

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RAISING ENVIRONMENTAL JUSTICE CLAIMS THROUGH
THE LAW OF PUBLIC NUISANCE

Mandy Garrells

I. Introduction

The environmental justice movement is rooted upon the premise that an unfair share of society’s environmental problems disproportionately burden poor minority communities. The burden borne by minority communities as a result of environmentally unjust socio-economic policies has led to disparate and adverse impacts to the health, safety and quality of life of these communities. In raising environmental justice claims, successful application of traditional legal theories, such as constitutional and public nuisance laws, have historically been limited. Plaintiffs have had limited success in raising claims under a constitutional theory because it is difficult to establish the constitutional element of “disparate treatment,” such as proof of discriminatory intent or motive in dealing with persons because of their race, sex, national origin or disability.\(^2\) Constitutional law, at best, would allow a limited scope of claims to be raised due to subject matter limitations under the Fourteenth Amendment, such as racial and religious issues.\(^3\)

Conversely, public nuisance law provides the broadest potential for raising environmental justice claims. Due to the current interpretation of public nuisance’s special injury rule, however, the

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3. See Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (2006) (forbidding racial or ethnic discrimination). The Civil Rights act states that, “[N]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id. § 2000d.

(163)
prima facie standard for raising a claim under public nuisance law has lost much of its original effect with respect to private claims. An historic change in the interpretation of the special injury rule, from the "difference-in-degree" standard to the "different-in-kind" standard, has caused conflict in public nuisance theory in the modern era. Yet, courts continue to dogmatically hold onto the modern special injury standard for fear of multiplicity of suits rather than untying the legal knot that frustrates the principles of public nuisance law. This Article will explore the evolution of public nuisance theory and determine how the law may revitalize its principles to provide the broadest grounds for raising environmental justice causes of action under common law.

II. CURRENT INEFFICACIES OF THE ENVIRONMENTAL JUSTICE MOVEMENT

The initial study spurring nationwide recognition of environmental justice was conducted by the Commission for Racial Justice (CRJ) of the United Church of Christ in 1987. This study provided valuable data correlating the location of hazardous waste facilities to the location of poor, minority communities, evidencing disproportionate environmental impact on a demographic basis.

In 2002, the National Environmental Justice Advisory Council Law Journal (NEJAC) published a report focusing on the issue of environmental justice and integration of such issues into federal programs. This report cited empirical studies that provided data on the negative impact of environmental injustice on ethnic, gen-

5. See id. (explaining traditional doctrine of public nuisance and current conflict in public nuisance law).
8. See generally id. (describing analytical and descriptive studies which reveal commercial, uncontrolled toxic waste sites and facilities in minority communities).
der and economic minority communities.10 According to a report by Marianne Lavelle and Marcia Coyle, titled *A Special Investigation—The Unequal Protection: The Racial Divide in Environmental Law*, penalties for environmental polluters were forty-six percent more likely for violations occurring in white communities than in minority communities.11 The NEJAC report cited another study by Winona LaDuke, titled *All Our Relations, Native Struggles For Land and Life*, that referenced a New York State Department of Health study regarding the disproportionate exposure of lactating Native American women and their infants to environmental hazardous substances.12 The article discussed comparative polychlorinated biphenyls (PCB) levels in the breast milk of Mohawk women who gave birth between 1986 and 1992 against a control group.13 The study revealed that while PCB levels in the mothers decreased with time, infant urine PCB levels were ten times higher than their mothers.14 A separate report further noted that "abandoned hazard waste sites" located in minority neighborhoods took twenty percent longer to be placed on the National Priority List than for those located in white neighborhoods, resulting in significant delays for clean-up in minority neighborhoods.15

From the start, the environmental justice movement has sought legal recognition and adequate remedy through the legal system, yet has achieved minimal judicial and administrative success. The following sub-section discusses current difficulties encountered in administrative and judicial efforts to recognize and resolve problems of environmental injustice.

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10. See id. (noting that study cited negative impact based on ethnic, gender and economic minorities).

11. See Marianne Lavelle & Marcia Coyle, *A Special Investigation—The Unequal Protection: The Racial Divide in Environmental Law*, Nat’l L.J., Sept. 21, 1992, at S2 (noting “[t]he racial imbalance, the investigation found, often occurs whether the community is wealthy or poor.”).


13. See LA DUKE, *supra* note 12, at 11-23 (describing increased PCB levels in Mohawk women).

14. See id. (mentioning continued effect of hazardous waste on infants even after mother’s symptoms decrease).

15. See LAVELLE, *supra* note 11, at S1 (observing lack of priority given to minority communities).
A. Administrative Recognition and Resolution

The Office of the Inspector General (OIG) published a report in March 200416 criticizing the Environmental Protection Agency (EPA)'s Office of Environmental Justice for its ineffective fulfillment of the leadership role set out for it under President Clinton's 1994 Executive Order 12898 (Executive Order).17 Under this Executive Order, the EPA and seventeen other organizations were formed into a Working Group responsible for providing "guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations."18 Yet, as noted by the OIG report, during the ten years following the implementation of the Executive Order, the EPA had not "developed a clear vision; developed a comprehensive strategic plan; established values, goals, expectations and performance measures."19

EPA's failure to define the central concerns of environmental justice illustrates failed leadership on its part in providing guidance and consistency in the execution of the Executive Order. Consequently, the terms of the Executive Order have been subject to interpretation by the respective federal offices responsible for compliance with the Executive Order.20 The divergence between the EPA's approach to environmental justice and the principles laid out under the Executive Order became even more apparent in 1998 when EPA decided to redirect its philosophy away from its Title VI obligations towards a "non-affirmative action" approach:

[s]enior management should recognize that the environmental justice program is not an affirmative action program or a set-aside program designed specifically to address the concerns of minority communities and/or low-income communities. To the contrary, environmental justice belongs to all Americans and it is the responsibility

17. See id. at 16 (concluding EPA has not performed actions intended under Executive Order 12,898).
20. See id. (finding terms of Executive Order 12,898 open to interpretation).
of Agency officials, as public servants, to serve all members of the public.21

This approach deemphasized consideration for ethnicity and economic status, ultimately detracting from the protective scope of the Executive Order.22

B. Judicial Recognition and Resolution

Although courts recognize environmental injustice as a legitimate concern, current statutes and case law do not provide special consideration for such claims. For example, environmental justice claims brought by way of administrative action have failed under Title VI.23 According to the United States Supreme Court, articulated in Alexander v. Sandoval,24 "[n]either as originally enacted nor as later amended does Title VI display an intent to create a free-standing private right of action to enforce regulations promulgated under [S]ection 602 [of Title VI]."25

Later, in South Camden Citizens v. New Jersey Department of Environmental Protection,26 the Supreme Court clarified its position on the matter of environmental justice from a constitutional perspective. "In order to state a claim upon which relief can be granted under either Section 601 of Title VI or the Equal Protection Clause of the Fourteenth Amendment and Section 1983, a party must allege that he or she was the target of purposeful, invidious discrimination."27 No special legal claim for environmental justice was allowed under constitutional theory and the evidentiary burden under constitutional law proved to be another difficult hurdle to

21. Id. at 10 (stating EPA's policy of going towards non-affirmative action approach).
22. See id. at 2 (commenting on effects of non-affirmative action approach). To the greatest extent practicable and permitted by law and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States . . . . Id.
27. South Camden, 254 F. Supp. 2d at 495 (stating holding of case).
overcome. Since purposeful and invidious discrimination is often not obvious and usually difficult to establish in environmental justice cases, especially when dealing with latent environmental effects from facially neutral regulations, redress by way of constitutional law has proven strategically no more successful than tort or administrative law.

In an effort to find an appropriate action for this modern-age concern, it would be helpful to explore the evolution of public nuisance theory to determine whether it can be revitalized to address issues of environmental justice.

III. A Brief Introduction to Public Nuisance

The Restatement (Second) of Torts defines public nuisance as an “unreasonable interference with a right common to the general public.”28 A public nuisance tort occurs when,

an event significantly interferes with public health, safety, peace, comfort, or convenience; proscribed by a statute, ordinance or administrative regulation; or is of a continuing nature or has produced permanent or long-lasting effects, and the actor knows or has reason to know that the conduct has had a significant effect on the public right.29

The principle behind public nuisance law is the recognition of an inherent public right in common property. Derivative to this public right is a personal interest arising from substantial use of common property for private interests.30 An individual may invoke a private claim through public nuisance law if she has suffered personal harm that meets the standard set forth by the special injury rule arising from a public nuisance.31 The test for determining prima facie special injury is based on a showing that the private plaintiff suffered a harm that is different-in-kind from that suffered by the general public.32 The different-in-kind test distinguishes between personal and public injury on the basis of a category, rather than degree, threshold.

The standard for determining the right of a private claim under public nuisance law prior to adoption of the different-in-kind

28. Restatement (Second) of Torts § 821B cmt. e (1979) (defining public nuisance).
29. Id. (noting legal elements of public nuisance).
30. See id. § 821C cmt. b (1979)(noting inherent public right).
31. See id. (discussing when private claim may be invoked).
32. See id. (providing test for finding of special injury).
test was the different-in-degree test. Prior to adoption of the different-in-kind test, the different-in-degree test had been applied for nearly three centuries. The different-in-degree test can be traced back as far as an "anonymous" Kings Bench case in 1535, where the concept of private claims under public nuisance law was said to have first been introduced. It has been hypothesized that the later standard for the special injury rule occurred as a response to a rise in nuisance suits in the early nineteenth century due to railroad construction that occurred across the country at that time. The courts initiated this shift to restrict the scope of private claims allowed through public nuisance law in order to limit the possibility for multiplicity of suits.

IV. ORIGINS OF THE MODERN PUBLIC NUISANCE THEORY

Common law public nuisance theory can be traced back to English common law during the Renaissance period. The first case that addressed private claims arising from public nuisance torts was an "anonymous" case that arose in 1535. An unnamed plaintiff sought a *writ son cas* ("on his case") against the defendant for obstructing the King's highway, which prevented the plaintiff from traveling from his house to his fields. In its decision, the court held that the plaintiff had no right to a private claim through public nuisance law. The court feared that allowing a private right of

35. See Antolini, *supra* note 4, at 762-63 (observing evolution of standard).
36. See Restatement (Second) of Torts § 821C cmt. b (1979) (noting reason for change).
37. See Fifoot, *supra* note 34, at 98. (detailing history of common law nuisance concept).
38. See id. (explaining background of case).
39. See id. (translating anonymous King's Bench case).

It seems to me that this action does not lie to the plaintiff for the stopping of the highway; for the King has the punishment of that, and he has his plaint in the Leet and there he has his redress, because it is a common nuisance to all the King's lieges, and so there is no reason for a particular person to have an *accion sur son cas*; for if one person shall have an action by this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case. *Id.*
action through public nuisance would open a floodgate of litigation and multiplicity of lawsuits.\textsuperscript{40}

Although the 1535 case ruled against the plaintiff, the dissenting opinion was the more significant portion of the case, which led to subsequent victories for private claims.\textsuperscript{41}

I agree well that each nuisance done in the King's highway is punishable in the Leet and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of his special hurt.\textsuperscript{42}

According to the dissenting opinion, where a plaintiff has no private right of action through private nuisance law but has made special use of public property and suffered a substantial degree of personal harm because of the nuisance, fairness would require proportional restitution for the special circumstances.

In his seminal discourse, Justice Fitzherbert's dissenting opinion clearly explains the concept of special injury:

If one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made his ditch across the highway, because I have suffered more damage than any other person. So here the plaintiff had more convenience by his highway than any other person had, and so when he is stopped he suffers more damage because he has to go to his close. Wherefore it seems to me that he shall have this action \textit{pour ce special matiere}, but if he had not suffered greater damage than all other suffered, then he would not have the action.\textsuperscript{43}

Justice Fitzherbert's use of descriptive words such as "greater" and "more" suggests that special injury was identified relative to a plaintiff's degree of reliance on common resources.\textsuperscript{44} In the years following this case, the courts applied the special injury rule based

\textsuperscript{40} See id. (noting fear of multiplicity of suit).
\textsuperscript{41} See id. (discussing belief that fairness should govern).
\textsuperscript{42} FIFOOT, supra note 34, at 98 (noting equity argument).
\textsuperscript{43} Id. (illustrating belief that fairness should apply).
\textsuperscript{44} Id. (noting status of injury determined relative to use of common resources).
on a difference-in-degree test, closely following Justice Fitzherbert's dissent.

In Hart v. Basset, the court held in favor of the plaintiff. The court determined that the plaintiff's level of inconvenience sufficed as a measure of harm to sustain a public nuisance claim, and rejected the defendant's multiplicity argument. Similar application of Justice Fitzherbert's dissent also occurred in Iveson v. Moore, although the court was split on the issue of multiplicity of suits. The Hart decision maintained its influence through 1824, in the cases of Chichester v. Lethbridge, Rose v. Miles, and Greasley v. Codling.

Courts did not adopt the "different-in-kind" test, however, until the mid-nineteenth century, upon the advent of nationwide railroad construction. Even then, courts nevertheless continued to interpret the special injury rule to refer to injury that was different-in-degree rather than different-in-kind. The impetus for courts finally rejecting the different-in-degree test was strong pressures exerted by government to pave the way for the development of a commercial interstate railroad system. The "different-in-kind test... [was] intended as a response to distinct policy issues, such as the specter of widespread litigation, legislative authorization for the expansion and the social need for the new transportation systems."

V. DEALING WITH THE SPECIAL INJURY PARADOX

Two problems arise for private actions brought under public nuisance law in the environmental justice context. First, the different-in-kind test is difficult to apply because there is no clear guideline for determining what types of harm are "different in kind."

46. See id. at 1195 (finding in favor of plaintiff). See also Antolini, supra note 4, at 798 (noting level of inconvenience may suffice to sustain public nuisance claim).
52. See Antolini, supra note 4, at 800-06 (discussing adoption of different-in-kind test).
53. See id. (noting courts' reliance on difference-in-degree test, even after advent of different-in-kind test).
54. See id. at 801 (suggesting court was pressured by government during development of railroad system).
55. Id. (noting policy concerns).
Second, courts have narrowly interpreted the different-in-kind test in order to avoid opening the door for potential multiplicity of suits. Despite the potential justice a court could mete out by interpreting the special injury rule more leniently in favor of injured plaintiffs, courts are reluctant due to the concern for multiplicity of suits.

A. Lack of Standard and Inconsistent Results

The current qualification for bringing suit pursuant to common law public nuisance has been subject to very amorphous standards and interpretations. According to the Restatement (Second) of Torts (Restatement), a plaintiff seeking to bring a private claim through public nuisance law may do so as long as he proves, at a prima facie level, that he has “suffered a harm different-in-kind from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.” 56 Thus, the Restatement provides no clear guidance as to how a particular public nuisance claim would qualify as an injury “different-in-kind,” separable from injuries of the general public, all of which resulted from a common tort.

One way courts have attempted to distinguish an injury “different-in-kind” from the effects of a tort on the general population has been through a finding of actual private harm suffered by the plaintiff. 57 According to the Restatement, an injury different-in-kind exists “[w]hen the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is normally different-in-kind from that suffered by other members of the public and the tort action may be maintained.” 58 This method of defining “different-in-kind” by way of private harm (as collaborative evidence) works well when the evidence clearly establishes that the plaintiff has suffered an injury in fact. This method tends to be useless, however, when tangible proof of actual private harm is lacking. Ironically, the only effect of applying the special injury rule has been the creation of a loophole for private nuisance claims, which allows plaintiffs to bypass private nuisance law’s statute of limitations. 59 “One important advantage of the action grounded on public nuisance is that prescriptive rights, the statute of limita-

56. Restatement (Second) of Torts § 821C (1979) (outlining different-in-kind standard as applied in Restatement).
57. Id. (observing that courts find different-in-kind injury by finding actual private harm to plaintiff).
58. Id. (defining different-in-kind standard).
59. Id. (noting loophole created by applying special injury rule).
tions and laches do not run against the public right, even when the action is brought by a private person for particular harm."60

Unfortunately, the Restatement provides limited guidance on the application of the different-in-kind test. A problem thus arises in circumstances where the distinguishing qualities between private and general injuries are unclear and involve some element of degree of comparison.

Difference-in-degree of interference cannot, however, be entirely disregarded in determining whether there has been difference-in-kind. Normally there may be no difference in the kind of interference with one who travels a road once a week and one who travels it every day. But if the plaintiff traverses the road a dozen times a day he nearly always has some special reason to do so and that reason will almost invariably be based upon some special interest of his own, not common to the community. Significant interference with that interest may be particular damage, sufficient to support the action in tort. Deprivation of immediate access to land... which is clearly a special kind of harm, shades off by imperceptible degrees into the remote obstruction of a highway, which is just as clearly not. Thus in determining whether there is a difference in the kind of harm, the degree of interference may be a factor of importance that must be considered.61

Thus, while the Restatement acknowledges that degree of comparison cannot be entirely disregarded in some cases and allows for its consideration, it fails to provide further guidance on threshold distinctions between private and public injuries.62 Given minimal guidance from the Restatement on how to identify special injuries in murky circumstances, the determination falls upon judicial interpretation, which leads to potential inconsistencies. Lack of clarity in the Restatement with regards to how broadly Section 821C should be interpreted, and how delineating criteria should be identified, has lead to inconsistent and narrow application of the rule.

How, then, do courts distinguish between private and public injury in instances where distinguishing characteristics between the two are not clear? Due to insufficient guidance and the lack of a

60. Id. (defining private nuisance and advantages for plaintiffs).


62. See id. at illus. 1(c) (mentioning significance of degree of comparison).
standard from the Restatement, guidance is drawn from prior case law such as Burgess v. M/V Tamano (Burgess) and Pruitt v. Allied Chemical Corp. Yet, given the fact-specific nature involved in applying the different-in-kind test, analysis borrowed from prior case law may not provide plaintiffs with adequate consideration of their claims under public nuisance theory. In order to expand the protection intended for private claimants under public nuisance law, a clearer legal standard involving minimal risk of multiplicity of suit must be established.

The case of Burgess, involved a class action suit where multiple plaintiffs, including fishermen, clam diggers and coastal on-shore businesses, filed claims in response to an oil spill off the coast of Maine. The defendant sought to dismiss the claims of all three commercial plaintiffs. In deciding the case, the United States District Court for the District of Maine drew its analysis of the different-in-kind test from prior case law involving similar fact patterns. In prior cases involving on-shore and off-shore commercial businesses affected by a public nuisance in the marine system, the critical element used to identify a special injury was a finding of direct pecuniary harm. As such, the claims of all but commercial fishermen and clam diggers were dismissed because the evidence did not show any direct pecuniary injury. Nevertheless, the court acknowledged the lack of guidance from both statutes and the Restatement regarding application of the special injury rule.

In Burgess, the court drew its interpretation of the special injury rule from the Restatement, referring to the "general principle that pecuniary loss to the plaintiff will be regarded as different-in-kind where the plaintiff has an established business making a commer-

65. See Burgess, 370 F. Supp. at 247 (providing background of case).
66. See id. (noting defendant's argument for dismissal).
68. See Burgess, 370 F. Supp. at 250 (emphasizing when injury is not different-in-kind).
69. See id. (comparing direct and indirect injuries). "The commercial fishermen and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally ... [t]he injury of which they complain has resulted from defendants' alleged interference with their direct exercise of the public right to fish and to dig clams." Id.
70. See id. (acknowledging lack of guidance in Restatement and statute).
cial use of the public right with which the defendant inter-
feres. . . . ’”71 Although, in Burgess, the on-shore plaintiffs also
suffered pecuniary injury to their commercial livelihood, only those
entities “directly” harmed were allowed to maintain their nuisance
claims.72 The term “directly” referred to owners whose real or per-
sonal properties were actually damaged by the oil spill. Interest-
ingly, according to the Restatement, identification of a different-in-
kind pecuniary harm is not expressly limited to those suffering di-
rect injury.73 In fact, nowhere in comment (h) of the Restatement
does it require property ownership or direct of harm as elements of
the special injury rule.74 Examples provided under comment (h)
suggest the potential for recovery of indirect pecuniary loss (i.e.
customer loss by non-real property business owners) within the spe-
cial injury rule,

[a] contractor who loses the benefits of a particular con-
tract or is put to an additional expense in performing it
because of the obstruction of a public highway preventing
him from transporting materials to the place of perform-
ance, can recover for the public nuisance. The same is
true when it can be shown with reasonable certainty that
an established business has lost profits, as when the ob-
struction of the highway prevents a common carrier from
operating buses over it or access to the plaintiff’s place of
business is made so inconvenient that customers do not
come to it.75

Consequently, the narrow interpretation of the special injury
rule under Burgess, for purposes of minimizing multiplicity of suits,
diminishes the broader intent of public nuisance theory.

Furthermore, application of alternative tort theories can result
in divergent and inconsistent holdings among cases with similar
fact patterns.76 Savannah, et. al. v. Gill (Gill)77 was a non-maritime
case that involved a business owner who successfully claimed special

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71. Id. at 251 (explaining when injury is not different-in-kind).
72. See id. (noting only those with direct harm, not general public harm could
maintain nuisance claim).
73. See generally Restatement (Second) of Torts § 821C (1979) (observing
no distinction for direct injury).
74. See id. comment h (noting lack of property ownership to be factor in suf-
ferring direct injury).
75. Id. (citing example in comment h).
76. See infra notes 77-85 and accompanying text (referencing existence of in-
consistent holdings in similar cases).
77. 45 S.E. 623 (Ga. 1909).
injury for an obstruction of an adjacent road that also obstructed his customers’ ability to enter his store.\textsuperscript{78}

[T]he store was situated immediately upon the public road leading from Hinesville to Johnston’s station, across the railroad at that point; that the road was not obstructed when he began business in his store; that subsequently the railroad company closed such public road at the point where it crossed its track, and has kept it closed; that the obstruction to such road was an immediate annoyance to the citizens in general, and worked inconvenience and special damage to him, for the reason that his customers could not reach his store without inconvenience, which had decreased his trade. . . a verdict was rendered finding that the road obstructed was a public road, and that the obstruction was a public nuisance which worked special damage and injury to Gill in particular, and that it should be abated. . . .\textsuperscript{79}

Significantly, the facts of this case are similar to those in \textit{Burgess}.\textsuperscript{80} In both cases, a public right of way was blocked and both plaintiffs claimed indirect injury due to the loss of economic gain resulting from their customer’s inability to utilize a public right of way.\textsuperscript{81} In \textit{Burgess}, the court dismissed the plaintiff’s public nuisance claim because the plaintiff did not suffer a direct injury from the oil spill.\textsuperscript{82} The court in \textit{Gill}, however, allowed the businesses to recover despite only suffering an indirect impact from the nuisance.\textsuperscript{83} Yet, the difference in treatment between these two cases is attributable to the fact that the plaintiffs in \textit{Burgess} were subject to stricter standing rules under admiralty law.\textsuperscript{84}

In \textit{Pruitt v. Allied Chemical Corp.} (\textit{Pruitt}), the United States District Court for the Eastern District of Virginia avoided the special

\textsuperscript{78} Savannah, F. & W. Ry Co. v. Gill, 45 S.E. 623, 623 (Ga. 1903) (discussing relevant background facts of case).

\textsuperscript{79} See id. at 624-26 (explaining court’s rationale).


\textsuperscript{81} See id. (stating facts of oil spill in Hussey Sound as blockage of right of way); \textit{see also} Gill, 45 S.E. at 623 (discussing background facts as blockage of right of way).

\textsuperscript{82} See \textit{Burgess}, 370 F. Supp. at 250-51 (applying direct injury test to claim).

\textsuperscript{83} See \textit{Gill}, 45 S.E. at 625 (explaining difference in holding because businesses could recover without direct injury).

\textsuperscript{84} See \textit{Burgess}, 370 F. Supp. at 250 (explaining plaintiffs’ recovery in admiralty court depends on whether damages are based on tortious invasion of public rights held in trust for common benefit of all).
injury rule altogether by drawing conclusions from its analysis of negligence claims.\textsuperscript{85} The issue of whether damages may be sought through public nuisance law for indirect injuries had not yet been decided by the Virginia Supreme Court; the court chose to avoid the burdensome discussion altogether for purposes of expediency. The problem, however, is that the negligence theory's remoteness test and the different-in-kind test of public nuisance law address two different legal questions. The remoteness test under negligence law is meant to determine a defendant's causal link and liability to foreseeable plaintiffs, whereas the different-in-kind test under public nuisance law determines a plaintiff's right to obtain a private remedy. Under the remoteness test, more than one plaintiff may seek a private remedy for the same harm if they fall within the scope of foreseeable plaintiffs. The difference-in-kind test, in contrast, seeks to preclude standing for private tort claimants who share common injuries, even if their injuries are foreseeable. Although the spectrum of parties rendered by either test may overlap, this is not a given, and one test does not properly address the legal element at issue for the other. Thus, the answer to one test cannot effectively replace the other as a basis for dismissing claims. Consequently, due to the problem of insufficient guidance on the matter of indirect pecuniary damages under the special injury rule, both Burgess and Pruitt resulted in arguably unfair results to the plaintiffs.

B. Unreasonable Fear

Adoption of the different-in-kind test as a replacement for the different-in-degree test was done primarily to avoid the issue of multiplicity of suit. Yet, the assurance of minimized multiplicity of action comes at the cost of adequate justice when the special injury rule is subject to such narrow application. "Rather than allowing plaintiffs to risk a failure of proof as damages become increasingly remote and diffuse, courts have, in many cases, raised an absolute bar to recovery."\textsuperscript{86} Although the District Court for the Eastern District of Virginia made this observation in reference to an issue relating to negligence, this point remains relevant to the discussion of the special injury rule. In both Burgess and Pruitt, the plaintiff should have the right to bear the risk of proof when bringing a tort action. "The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore

\textsuperscript{85} See Pruitt, 523 F. Supp. 975, at 979-80 (relying on negligence analysis).
\textsuperscript{86} Id. (examining how court applied different-in-kind test).
naturally should be expected to bear the risk of failure of proof or persuasion."\textsuperscript{87} Although it is obvious that limiting the scope of allowable claims would be an effective way of preventing multiplicity of suits, fairness becomes an issue where there is a lack of guidance as to how the scope will be limited.

In \textit{Pruitt}, the Virginia court itself acknowledged the fact that its blanket dismissal of many valid claims was unarticulated, but was perceived to be necessary in order to avoid additional recovery for the same injury.\textsuperscript{88} The court stated it "thus [found] itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs. Other courts have had to make similar decisions."\textsuperscript{89} The \textit{Pruitt} court thus essentially admitted to some level of arbitrariness in its determination of a special injury, which could unfairly affect other parties' rights to assert valid claims under public nuisance law.

\textbf{VI. A New Approach Around the Special Injury Rule}

Hawaii has been the first and only state to replace the special injury rule with the federal injury-in-fact criteria.\textsuperscript{90} Under Article III of the United States Constitution, a plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."\textsuperscript{91}

In \textit{Akau v. Olohana (Akau)},\textsuperscript{92} the Supreme Court of Hawaii cited various federal and state court decisions that have adopted the injury-in-fact test to support Hawaii's decision to eliminate the special injury rule.\textsuperscript{93} The court began by examining a trend in tax law that has more recently moved away from the inquiry of "whether the injury is shared by the public, to whether the plaintiff

\textsuperscript{87} John Strong \textit{et al.}, \textit{McCormick on Evidence} 411-12 (5th ed. 1999) (assigning burden of proof).
\textsuperscript{88} See \textit{Pruitt}, 523 F. Supp. at 980 (explaining necessity of court's decision).
\textsuperscript{89} Id. (holding liability limited without articulable reason).
\textsuperscript{90} See \textit{Akau v. Olohana Corp.}, 652 P.2d 1130, 1135 (Haw. 1982) (articulating federal injury-in-fact criteria).
\textsuperscript{92} 652 P.2d 1130 (1982).
\textsuperscript{93} \textit{Akau}, 652 P.2d at 1131 (mentioning court's objective to eliminate special injury rule).
was in fact injured."94 According to the Akau court, "[m]any states
have since greatly liberalized taxpayer standing beyond the federal
rule and allow taxpayer suits against any improper expenditure of
public funds without need to show special injury to the plaintiff."95

The Supreme Court of Hawaii provided a two-step method for
avoiding the problem of multiplicity of suit when applying the in-
jury-in-fact test. The first step, when applicable, would be to com-
bine parties with real damages into a class and obtain injunctive
relief specific to the injury of that class.96 "A judgment in a class
action consisting of the people actually injured will bind the mem-
bers who are all those allowed to sue."97 Second, recovery is limited
to either declaratory judgments or injunctions in order to avoid
multiplicity in damage awards.98 The court approved the two-step
method as a potential way for eliminating concerns regarding mul-
tiplicity of suit.99 It is important to note that class action suits which
seek injunctive relief may not be the only method for avoiding mul-
tiplicity of suit and the opportunity is open for remedies to be ob-
tained where an actual injury has been suffered. Thus, the court
held,

that a member of the public has standing to sue to enforce
the rights of the public even though his injury is not differ-
ent in kind from the public's generally, if he can show that
he has suffered an injury in fact, and that the concerns of
a multiplicity of suits are satisfied by any means, including
a class action.100

According to the court in Akau, "it is unjust to deny members
of the public the ability to enforce the public's rights when they are
injured" and where the threat of multiplicity of suit can be allevi-
ated, protection of an injured party's civil liberties should not be
denied.101

Hawaii's elimination of the special injury rule and adoption of
the federal injury-in-fact rule has been a positive change in favor of
both plaintiff and defendants' respective rights and interests pro-

94. Id. (observing trend moving from inquiry into public or private injury).
95. Id. at 1133 (attempting to use taxpayer scenario to show movement away
from special injury rule).
96. Id. at 1133-34 (noting acknowledgment of parties as injured as class).
97. Id. at 1136 (explaining effect of judgment in class action).
98. Akau, 652 P.2d at 1137 (finding recovery should be limited).
99. Id. at 1134 (approving of two-step method).
100. Id. at 1134 (addressing concerns of multiplicity).
101. Id. (expressing fear of multiplicity of suit which can be alleviated is not
just reason to deny public's rights).
ected under public nuisance theory. As illustrated in Akau, which involved an ethnic minority class seeking to preserve cultural interests, minority groups may be able to obtain adequate and specific remedies for their unique circumstances under this new approach to public nuisance law. For these reasons, public nuisance theory is the ideal mechanism through which environmental injustice can find remedy if courts continue to move away from the different-in-kind rule.

VII. Conclusion

Public nuisance law is a potentially powerful tool for remedying problems of environmental and social injustice in the common law system. The modern concept of public nuisance law is very restrictive and does not allow for the incorporation of environmental justice issues. Those restrictions, which have been doctrinally adhered to for the entire twentieth century, have now become somewhat antiquated, especially in light of revolutionary developments in the fields of social justice and environmental protection.

Unfortunately, there have been but a few significant attempts in recent years to improve upon the existing special injury rule under public nuisance law. Significantly, however, application of these new rules has not yet resulted in the opening of floodgates for litigation as feared by conservative theorists of public nuisance law. Alternatively, the newer applications have proven simpler than their prior counterpart. Hawaii’s total elimination of the special injury rule and adoption of the federal injury-in-fact rule, for example, demonstrates the potential for renewed effectiveness of the public nuisance theory without the risk of compromising judicial efficiency. In order for this trend to gain momentum at a national level, this new approach would need to be adopted on a state-by-state level. Such widespread adoption would create the necessary foundation for environmental injustice victims to obtain justice on a national scale.