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Private Actions for Public Nuisance: Common Law Citizen Suits for Relief From Environmental Harm

David R. Hodas*

INTRODUCTION

In an article written in 1966, Prosser reviewed the long history of the public nuisance doctrine and described the numerous cases involving this cause of action.¹ Because his focus was a comprehensive review of the historic application of the doctrine, Prosser overlooked the possibility that the doctrine could evolve from its 16th century roots to become a common law tool capable of remedying injuries caused by modern environmental torts. Prosser's oversight undoubtedly reflected both the scarcity of environmental tort litigation as of 1966 and his view that public nuisance law was an "impenetrable jungle" in which litigants and courts could become hopelessly lost.²

Historically, a public nuisance, defined as "the doing or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public,"³ has encompassed such actions as the blocking of a public highway.⁴ As Prosser noted, at common law a public nuisance "was al-

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1. Prosser defined a "public" nuisance as one affecting an interference with a right common to the general public. The entire community need not be affected, but the nuisance must interfere with a party in the exercise of a public right. Prosser, *Private Actions For Public Nuisance*, 52 VA. L. REV. 997, 1001-02 (1966). By contrast, private nuisance, whose origin is entirely separate from public nuisance, deals with protecting the enjoyment of private property from unreasonable interference by adjacent property owners. See Bryson & Macbeth, *The Restatement (Second) of Torts and Environmental Law*, 2 ECOLOGY L.Q. 241, 242 n.2 (1972). A single activity can be both a public and a private nuisance. *Miller v. Cudahy Co.*, 592 F. Supp. 976 (D. Kan. 1984), *aff'd in part, rev'd in part*, 858 F.2d 1449 (10th Cir. 1988).

2. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 86, 88 (4th ed. 1971), and PROSSER AND KEETON *ON THE LAW OF TORTS* § 86 (W. Keeton 5th ed. 1984).

3. *Commonwealth v. South Covington Ry.*, 181 Ky. 459, 205 S.W. 581 (1918).

4. Prosser, *supra* note 1, at 997-99.

ways a crime, and punishable as such," even where tort liability arose.⁵ Indeed, until 1536, private actions for public nuisance were disallowed on the grounds that "only the king, and certainly no common person" could have a remedy because of a crime.⁶ That year, however, a divided court allowed a private tort action for a public nuisance in a case where the defendant blocked the King's highway and impeded the plaintiff's access "to his close."⁷ In the court's language, "where one man has greater hurt or inconvenience than any other man had, . . . then he who had more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of this special hurt."⁸ Under this rule, a private plaintiff could bring an action for public nuisance only if the plaintiff could show particular, personal damage not shared in common with the rest of the public.⁹

Prosser concluded that the courts adopted this "special injury" rule for several reasons. First, even after the rights of the English crown passed to the general public, the notion remained that private persons should not be allowed to vindicate rights historically in the province of the sovereign.¹⁰ Second, courts sought to protect defendants from harassment and at the same time to limit the number of complaints about public matters from a multitude of persons claiming injury.¹¹ Finally, the courts refused to be burdened with claims for what they perceived to be trivial or theoretical damages.¹²

These justifications for the special injury rule may have made sense in an era when misuse of existing technology affected only people in the immediate vicinity of the activity and caused only limited harm.¹³ However, the concerns of 1536—e.g., a horse falling into a ditch in the road—pale in comparison to modern worries about an accident at a chemical plant that can kill thousands of persons, an oil spill that can spoil thousands of miles of beaches, riverbanks, or underwater areas, or the release of toxic substances that can contaminate the air, water, and land. Although these types of concerns prompted a revolution in statutory en-

5. *Id.* at 997.

6. *Id.* at 1005.

7. *Id.* (citing an anonymous case reported at Y.B. 27 Hen. 8, fo. 26, pl. 10 (1536)).

8. *Id.* As befit the times, the court provided this example. "If a man make a trench across the highway, and I came riding that way by night, and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man." *Id.*

9. *Id.*

10. *Id.* at 1007.

11. *Id.*

12. *Id.*

13. Under this common law rule, courts have historically awarded damages, issued injunctions, and even approved abatement of nuisances by self-help in cases involving gaming and prostitution houses, gasoline filling stations, baseball parks, quarries, obstruction of public highways and waters, and pollution of public waters. *Id.*

vironmental law by the early 1970's,¹⁴ the common law public nuisance doctrine remained relatively unchanged.

After reviewing draft versions of the *Restatement (Second) of Torts*,¹⁵ Bryson and Macbeth argued that its proposed changes to the public nuisance doctrine had the potential to transform the doctrine into an important weapon for protecting the environment.¹⁶ They were particularly encouraged by the position adopted by some drafters that the tort of public nuisance should be "clearly distinguished from criminal law concepts,"¹⁷ and by the drafters' attempt to conform standing in equitable public nuisance actions with the general law of standing.¹⁸ Indeed, Bryson and Macbeth saw no reason why the standing doctrine should evolve elsewhere in the law while courts "adopted without analysis the old formula"—the special injury rule—to bar public nuisance claims.¹⁹ They hoped that the authority of the *Restatement (Second)* would propel the public nuisance doctrine into the modern era and transform it into "a unique doctrine for the representation of the public interest in freedom from, or compensation for, injury done to the natural resources which the public holds in common."²⁰

The published version of the *Restatement (Second) of Torts* did breathe new life into private actions for public nuisance by providing a broad definition of what constitutes an unreasonable interference with a right common to the public²¹ and by replacing the special injury rule

14. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370a (1982 & Supp. V 1987), in which Congress established the federal policy "to create and maintain conditions under which man and nature can exist in productive harmony," *id.* § 4331(a), and recognized "that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment," *id.* § 4331(c); see also Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1987), which was enacted by Congress "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," *id.* § 7401; Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* § 1251(a); and Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1982 & Supp. V 1987), enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," *id.* § 1531(b).

15. The RESTATEMENT (FIRST) OF TORTS did not address the tort of public nuisance. See Bryson & Macbeth, *supra* note 1, at 242 n.1.

16. *Id.* at 275-76.

17. *Id.* at 250.

18. *Id.* at 251.

19. *Id.* at 256.

20. *Id.* at 281.

21. RESTATEMENT (SECOND) OF TORTS § 821B (1977). The question of how utility of and harm from an activity should be balanced to determine whether an activity is unreasonable is important. However, the question has not been a major concern of the courts in the last decade in environmental matters. Nineteen years ago, courts refused to impose environmental controls on polluting companies without statutory direction, i.e., they said that the public nuisance doctrine did not reach that far. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). Now, some courts will enjoin potentially polluting

with a liberal standing doctrine in equitable actions.²² The *Restatement (Second)* defined a public nuisance as "an unreasonable interference with a right common to the general public."²³ An "unreasonable interference" included conduct involving "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience;"²⁴ conduct "proscribed by a statute, ordinance or administrative regulation;"²⁵ or conduct "of a continuing nature" or which had "produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."²⁶

The *Restatement (Second)* limited the class of private plaintiffs who could recover damages to those who had "suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference."²⁷ However, the drafters also advocated that persons who did not suffer special injury should be able to bring injunctive and abatement actions if they acted as a "representative of the general public, as a citizen in a citizen's action, or as a member of a class in a class action."²⁸ By recommending that parties without special injuries be allowed to seek *equitable* relief, and by broadening the type of conduct that constituted a public nuisance, the *Restatement (Second)* invited a fundamental change in the law of public nuisance. In the past decade courts have begun to accept this invitation.²⁹

The current status of the public nuisance doctrine is of practical interest because a pendent state law public nuisance count might save a cause of action if a federal statutory-based claim fails.³⁰ In addition, if a

conduct even if the company has a permit with which it is complying. *See, e.g., Village of Wilsonville v. SCA Servs., Inc.*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981). For this reason and because it would greatly extend the scope of this article, the question of "unreasonableness" will not be addressed here.

22. Bryson & Macbeth, *supra* note 1, at 249.

23. RESTATEMENT (SECOND) OF TORTS § 821B (1977).

24. *Id.* § 821B(2)(a).

25. *Id.* § 821B(2)(b).

26. *Id.* § 821B(2)(c).

27. *Id.* § 821C(1).

28. *Id.* § 821C(2) states:

- In order to maintain a proceeding to enjoin or to abate a public nuisance, one must
- (a) have the right to recover damages, as indicated in Subsection (1), or
 - (b) have authority as a public official or public agency to represent the state or political subdivision in the matter, or
 - (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

29. *See, e.g., Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982), discussed *infra* at notes 142-47.

30. *See, e.g., Concerned Citizens of Bridesburg v. City of Philadelphia*, 643 F. Supp. 713, 729 (E.D. Pa. 1986), *contempt order aff'd*, 843 F.2d 679 (3d Cir. 1988), in which the plaintiffs, a nonprofit association and 130 persons living near a sewage treatment plant, sued under federal law to enjoin malodorous emissions from the plant. Although the court found no action-

public nuisance cause of action is strong, it may provide citizens acting as private attorneys general with the leverage to force polluters to pay damages as a condition to settling enforcement actions brought under federal environmental laws.³¹ Thus, courts and private citizens have an opportunity to transform the public nuisance doctrine into a powerful and influential common law tool that could fill regulatory gaps left by environmental statutes. Used in this fashion, the doctrine can help develop reasonable standards of environmental conduct much as product liability and negligence law have helped define the duties of manufacturers.³² Society and courts now recognize that human health, safety, and welfare require not only product safety, but the preservation of ecological relationships as well.³³

This Article reviews the evolution of public nuisance law since the 1972 article by Bryson and Macbeth and focuses on two issues: 1) the evolution of the traditional special injury rule into a two-pronged doctrine of standing (injury-in-fact) and proximate cause, and 2) the viability of public nuisance actions in light of existing environmental statutes. The first section of Part I analyzes the reasons why the traditional policies supporting the special injury rule are no longer valid. The second section reviews a number of cases involving actions for damages where the courts, at least implicitly, have not applied the special injury rule to

able claim under federal or state environmental statutes, it retained the case on the basis of pendent federal subject matter jurisdiction and found that the emissions were an enjoined public nuisance; *see also* *Safe Alternatives for Fruit Fly Eradication v. Berryhill*, 22 Env't Rep. Cas. (BNA) 1036 (1984), in which the district court held that citizen groups have standing to sue to protect their members against alleged injury to health and welfare. *Id.* at 1037. The court, however, dismissed the complaint, which sought injunctive relief from aerial broadcast spraying of the pesticide Malathion over 60 square miles of residential Los Angeles after discovery of a Mexican fruit fly. The court based its dismissal on the grounds that federal pesticide laws and regulations did not provide a cause of action. *Id.* at 1039. No public nuisance cause had been alleged. Theoretically, a pendent state public nuisance claim could have provided the court with pendent subject matter jurisdiction with which to consider the merits of plaintiffs' challenge to the pesticide spraying.

31. For example, in *Sierra Club v. Electronic Control Designs, Inc.*, 703 F. Supp. 875 (D. Or. 1989), the court rejected a consent judgment entered into by Sierra Club and the defendants because the judgment's provision for payments to the Sierra Club Legal Defense Fund, Inc., as trustee (with the funds to be used for environmental protection) was deemed to be a civil penalty under the Clean Water Act's civil penalty provision, 33 U.S.C. § 1319(d), (1982 & Supp. V 1987) and therefore could not be retained by the citizen group. Theoretically, if a state law public nuisance count had been alleged in the complaint, the court might have approved the settlement since the money would have been paid to the citizen group in lieu of compensatory or punitive damages for the public nuisance.

32. J. ALLEE, *PRODUCT LIABILITY* § 1.01 (1989).

33. *See, e.g.*, *Endangered Species Act of 1973*, 16 U.S.C. §§ 1531-1544 (1982 & Supp. V 1987), enacted by Congress "to provide a means whereby the ecosystems upon which endangered species and threatened species may be conserved," *id.* § 1531(b); *see also* *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); and *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

limit standing, then it analyzes how courts have dealt with the rule in equitable and class actions. Part II discusses the relationship between the public nuisance doctrine and state and federal environmental statutes.

The Article concludes that, in litigation concerning serious environmental or toxic issues, some courts have accepted public nuisance claims, even though they have not explicitly rejected the special injury rule. It advocates that courts take the final step and reject the special injury rule outright, because private plaintiffs must not be barred at the courthouse door by an outdated special injury rule if public nuisance claims are to fill statutory gaps and help establish standards of reasonable conduct.

I

THE COURTS AND THE SPECIAL INJURY RULE

A. *The Policy Issues*

The special injury rule continues to be the greatest hurdle facing a private plaintiff who brings a public nuisance action for damages because plaintiffs who are permitted to sue generally prevail if their injury is connected to the defendant's actions.³⁴ Although the *Restatement (Second)* recommended that courts not apply the rule in class actions or in citizen suits where equitable relief is sought,³⁵ that approach does not help a plaintiff seeking damages. The question remains, however, why this inconsistency should exist. Why should standing in equitable class actions be more liberal than standing in private suits for damages (even though class status is not needed for equitable relief, and even though the plaintiff in equity may also seek damages)? Moreover, retention of the special injury rule seems particularly anachronistic in light of the Supreme Court's rejection of the concept in federal environmental litigation. If a person who is not specially harmed would have standing under *Sierra Club v. Morton*³⁶ and its progeny,³⁷ why retain the special injury rule in

34. See Kodilinye, *Public Nuisance and Particular Damage in the Modern Law*, 6 LEGAL STUD. 182, 189 (1986).

35. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (1977).

36. 405 U.S. 727 (1972).

Whether a party has a sufficient stake in an otherwise justiciable controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'

Id. at 732 (citing *Baker v. Carr*, 369 U.S. 186, 204 and *Flast v. Cohen*, 392 U.S. 83, 101, respectively).

In *Sierra Club v. Morton*, the Court held that the Sierra Club did not have standing under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1982 & Supp. V 1987), to challenge a Forest Service decision to develop a ski resort near Sequoia National Park because it "failed to allege that it or its members would be affected in any of their activities or pastimes" by the

section 821C(2)(a) of the *Restatement (Second)*? As discussed below, there is no valid reason why the courts should not simply eliminate the special injury rule.

As Prosser noted, the rationale for applying the special injury rule was to protect defendants from harassment and the courts from frivolous claims, to avoid a multiplicity of suits, and to honor the sovereign's prerogative in regulating public rights.³⁸ Although these are all valid concerns, the courts have a variety of ways to address these issues today. Consequently, the special injury rule functions as an anachronistic and overinclusive bar to public nuisance actions.

To the extent the special injury rule exists to limit frivolous claims and to protect defendants from harassment, the rule is superfluous because a claimant already must show a "substantial injury" to maintain an individual or class action public nuisance suit seeking either damages or equitable relief.³⁹ In addition, courts can refuse to certify a class action,⁴⁰ and they have the power to dismiss frivolous suits and sanction attorneys who bring such suits.⁴¹ This burden on the plaintiff and the power of the court both serve to limit frivolous claims. At the same time, removing the special injury rule allows a party who perceives a significant interference with a public right to prosecute an action, even though someone else might view the interference as a minor inconvenience. The court, not the special injury rule, determines whose perception is valid. Finally, modern concepts of justice and social utility require that enterprises fully internalize their costs to maximize resource allocation among competing uses,⁴² thus tortfeasors who impose their externalities on society should not be shielded from liability by the special injury rule.

The concern that liberal standing will result in a multiplicity of actions is accommodated when public nuisance suits are brought as a class action.⁴³ But even when a public nuisance spawns a number of individual actions, the result is similar to the litigation that routinely follows a catastrophic event such as an airplane crash,⁴⁴ a hotel fire,⁴⁵ the discov-

proposed development. *Id.* at 735. The Court, however, noted that "injury of a noneconomic nature to interests that are widely shared" is sufficient injury-in-fact if pleaded. *Id.* at 734.

37. See, e.g., *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59 (1978); and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

38. Prosser, *supra* note 1, at 1006-07.

39. Bryson & Macbeth, *supra* note 1, at 253.

40. See *Palmer v. B.R.G. of Georgia Inc.*, 874 F.2d 1417 (11th Cir. 1989); *Shores v. Sklar*, 885 F.2d 760 (11th Cir. 1989); *Gilpin v. American Fed'n of State, County, and Mun. Employees*, 875 F.2d 1310 (7th Cir. 1989).

41. Bryson & Macbeth, *supra* note 1, at 254; see also FED. R. CIV. P. 11 (sanctions for frivolous suits).

42. Bryson & Macbeth, *supra* note 1, at 274.

43. Bryson & Macbeth, *supra* note 1, at 255.

44. See generally L. KREINDLER, *AVIATION ACCIDENT LAW* (1988).

45. *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983) (consolidated

ery of disease in persons exposed to dangerous drugs,⁴⁶ toxic substances in drinking water,⁴⁷ or asbestos.⁴⁸ Instead of barring these tort claims because of the multiplicity of the claimants, courts have established procedures to handle the claims fairly and expeditiously.⁴⁹ These procedures could be applied to public nuisance claims. Indeed, there is no reason to assume that public nuisance actions are not generally less burdensome on the courts than are complex toxic torts. Moreover, by deterring pollution problems, public nuisance claims could actually reduce the number of toxic tort actions the courts must handle.

Finally, developing more liberal standing requirements does not invade the traditional prerogative of the sovereign to regulate public rights because public nuisances today are not always crimes. Moreover, Congress has explicitly encouraged citizen enforcement of many environmental laws by including statutory provisions that allow individual or class action citizen suits.⁵⁰ As Bryson and Macbeth noted, “[c]ourts in recent

action related to a hotel fire in which 26 people died and over 1,000 were injured).

46. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (class action suit by women against drug companies seeking damages for injuries they sustained as a result of their mothers' use of the drug DES during pregnancy).

47. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (class action suit against a corporation for personal injuries and property damage incurred by residents who lived near the company's chemical waste burial site); *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987) (nuisance action by residents following the contamination of water through the leaching of toxic pollutants from a landfill).

48. *Nicolet, Inc. v. Nutt*, 525 A.2d 146 (Del. 1987) (action by former asbestos workers seeking damages from manufacturer for injuries caused by exposure).

49. *MANUAL FOR COMPLEX LITIGATION SECOND* § 33.21 (1986) (supplement to *FEDERAL PROCEDURE, LAWYERS ED.*) states that “[f]or several decades courts have been using techniques described in the Manual to resolve multiple claims resulting from a mass disaster such as a fire or aircraft crash.” The manual now also applies to mass disasters and other complex tort cases, “particularly those involving numerous claims for . . . damages, and to complex environmental cases that may be brought for injunctive relief, penalties, or damages under federal or state law.” See also *In re MGM Grand Hotel*, 570 F. Supp. 913.

50. See, e.g., *Clean Water Act*, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), in which Congress provided that citizens can seek injunctive relief, abatement, and civil penalties against polluters who violate the Act, *id.* § 1365(a); see also *Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1982), in which Congress provided that responsible parties are “liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan,” *id.*; see generally Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 *ECOLOGY L.Q.* 181 (1986) (discussing the private right of action under CERCLA).

The use of private enforcement actions as a supplement to government enforcement is not unique to environmental law. In securities law, the courts have taken a positive view of private antifraud enforcement, supplementing statutory remedies with an implied right of action based on common law principles. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (implied right of action exists under Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated pursuant to the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78(i)(b) (1982)). Allowing private plaintiffs to bring suit under the rule reinforces administrative enforcement of the rule. The securities analogy may be particularly apt to show that allowing private causes of action under the general rules of standing does not result in an unmanageable multiplicity of lawsuits.

years have taken the practical viewpoint that the public interest will be best guarded if private citizens are given access to courts on matters of public concern which specially affect them."⁵¹

In addition to the foregoing criticism of the special injury rule, a very strong policy argument directly supports the demise of the rule. Traditionally, the special injury rule barred public nuisance suits when injuries were so "general and widespread as to affect a whole community" because wider damage made it less likely that any one person was specially harmed.⁵² Given that an oil spill can spoil an entire coastline⁵³ and that a release of toxic substances can contaminate a city's entire water supply,⁵⁴ it is an illogical and dangerous policy to retain a rule that produces less liability as the interference becomes greater.

Troubled by this situation and generally unwilling to dismiss communitywide public nuisance cases, courts have permitted at least some plaintiffs to proceed in almost every environmental public nuisance case, even when the court supposedly was applying the special injury rule.⁵⁵ As the United States Supreme Court stated in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody."⁵⁶

The courts have not explicitly discussed the policy reasons for maintaining the special injury rule. However, the effect of their decisions has been to focus attention on: 1) whether the plaintiff's interests are sufficiently adverse to result in effective litigation of the issue and thus permit standing; 2) whether the defendant's conduct created a significant interference with a right common to the public; and 3) whether the plaintiff's injury was connected closely enough to the defendant's action to permit the plaintiff to recover damages. The result is that some courts have moved toward requiring a plaintiff to show only injury-in-fact to maintain standing, particularly in instances of toxic pollution. When an important natural resource is contaminated by a toxic chemical, courts

51. Bryson & Macbeth, *supra* note 1, at 258.

52. Prosser, *supra* note 1, at 1015. For example, a law firm that suffered economic loss as a result of an illegal strike by transit workers in New York City could not recover for its injuries because its harm was not a harm different in kind than that suffered by the public generally. *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983).

53. See 1 Alaska Oil Spill Rep. (Waterfront Press Co.) at 1-14 (July 15, 1989) for a general discussion of the impact of the Exxon Valdez oil spill of March 24, 1989, on the Alaskan coastline.

54. See *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986) (pollution of public wells and of groundwater under plaintiffs' homes); *Village of Wilsonville v. SCA Servs., Inc.*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981) (hazardous waste landfill).

55. See *infra* notes 83-98 and accompanying text.

56. 412 U.S. at 687-88.

limit relief not by barring access to the court through the special injury rule, but by requiring that the defendant's actions be the proximate cause of the plaintiff's injuries.

B. Actions for Damages

An early example of a court applying the two-step injury-in-fact/proximate cause test is *Burgess v. M/V Tamano*.⁵⁷ In *Burgess*, a public nuisance class action suit decided in 1973 under federal maritime common law, the court permitted fishermen and clam diggers to sue for damages resulting from the release of approximately 100,000 gallons of oil when a tanker ran aground in Cosco Bay, Maine.⁵⁸ The court held that these plaintiffs had alleged "particular" damage because the interference had affected their "direct exercise of the public right to fish and to dig clams," a special interest separate from the general public's interest.⁵⁹ Applying the same rationale, the court dismissed the claims of businessmen in town, finding that their damages, although significant, derived from the damages to the public at large and thus were common to all businesses and residents in the area.⁶⁰

Under the traditional public nuisance doctrine, however, none of the plaintiffs could have maintained a suit for damages. Thus, *Burgess* provides an example of a court that couched its holding in special injury terms,⁶¹ but, in reality, based its decision on proximate cause analysis.

Where the *Burgess* court's use of a proximate cause analysis was implicit, the court in *Pruitt v. Allied Chemical Corp.*⁶² applied it explicitly. In *Pruitt*, commercial fishermen, seafood wholesalers, retailers, distributors and processors, restaurateurs, marina, boat, tackle and bait shop owners, and their employees sued a chemical company for damages

57. 370 F. Supp. 247 (D. Me. 1973), *aff'd*, 559 F.2d 1200 (1st Cir. 1977). Under the classic formulation of proximate cause, a tortfeasor is not liable to a plaintiff whose injury is only remotely related to the defendant's actions, or is so small or difficult to detect that liability would be unjustified. *See, e.g., Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 339-40, 162 N.E. 99, 104 (1928).

58. 370 F. Supp. at 248. Commercial fishermen, clam diggers, and owners of motels, trailer parks, campgrounds, restaurants, grocery stores, and other affected businesses brought claims for damages caused by the pollution of the coastal waters and the seabed. *Id.* at 249. The court held that none of the plaintiffs had property rights in the coastal waters or the marine life, which were held by the state "in trust for the common benefit of the people," thus their right to sue hinged on whether they could "maintain private actions for damages based upon the alleged tortious invasion of public rights which are held by the state of Maine in trust for the common benefit of all the people." *Id.* at 249-50.

59. *Id.* The court conceded that the "line between damages different in kind and those different only in degree from those suffered by the public at large has been difficult to draw." *Id.* It found that the commercial fishermen and clam diggers had "sufficiently alleged 'particular' damage to support their private actions." *Id.*

60. *Id.* at 251.

61. *Id.* "The Old Orchard Beach businessmen can show no . . . distinct harm from the oil spill."

62. 523 F. Supp. 975 (E.D. Va. 1981).

resulting from the defendant's release of the toxic chemical Kepone into the James River and the Chesapeake Bay.⁶³ Their multicount complaint included a public nuisance cause of action.⁶⁴ Although each plaintiff suffered an indirect loss as a result of the damage to the ecology of the river and bay, none of the plaintiffs claimed property rights in the bay's wildlife, which was directly affected by the pollution.⁶⁵ As such, under the historic common law public nuisance doctrine none of the plaintiffs could recover damages.⁶⁶

The court, however, rejected this result as unjust and argued that because many citizens derive benefit from the bay and its wildlife, a polluter who destroys wildlife and contaminates the bay should not escape liability.⁶⁷ The *Pruitt* court noted the need to establish an outer zone of liability, but found itself "without any articulable reason for excluding any particular set of plaintiffs."⁶⁸ Specifically, the court noted that the pecuniary loss to a wholesaler who has fewer fish to sell is as real as the loss to a fisherman who cannot fish in contaminated waters.⁶⁹ Adopting the proximate cause test outlined in *Palsgraf*,⁷⁰ the *Pruitt* court excluded all marketers and distributors of fish and seafood from recovery on the grounds that their harm, while real and foreseeable, was too remote from the harm the defendant caused to the bay.⁷¹ At the same time, the court refused to apply the *Burgess* court's direct/indirect test strictly; instead, it allowed commercial fishermen to sue for their losses, and marina, boat, tackle and bait shop owners to sue both for their harm and as surrogates for sport fishermen, who were unlikely to sue for their real, but small and difficult-to-prove harm.⁷²

The *Pruitt* court's use of proximate cause language was an important development. The decision provides an example of how courts can use general tort principles to deal with a multiplicity of claimants. Although other courts generally have not followed *Pruitt* and used proximate cause language, a number of them have implicitly abandoned the special injury rule.

Even the Fifth Circuit Court of Appeals, one of the nation's more conservative courts, has modified the special injury rule to accommodate the proximate cause realities of toxic contamination. In another federal

63. *Id.* at 976.

64. *Id.* at 982.

65. *Id.* at 976, 978.

66. *Id.* at 977 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130 (4th ed. 1971)).

67. *Id.* at 978.

68. *Id.* at 980.

69. *Id.* at 979.

70. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

71. *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 980 (E.D. Va. 1981).

72. *Id.*

maritime common law case, *Louisiana ex rel. Guste v. M/V Testbank*,⁷³ various classes of plaintiffs sued for damages after two ships collided in an outlet of the Mississippi River, causing the discharge of toxic chemicals into the water and closing the outlet for two weeks.⁷⁴ A divided court, over a vigorous and scholarly dissenting opinion by Judge Wisdom,⁷⁵ applied the traditional special injury rule and held that plaintiffs who had not sustained physical damage to their property as a result of the chemical spill would not be allowed to recover damages under public nuisance or any other theory.⁷⁶ Even under this strict test, the majority arbitrarily allowed commercial fishermen, who have no property rights in navigable waters or uncaught fish, to recover damages.⁷⁷

In his dissent, Judge Wisdom criticized the majority's restrictive view as "out of step with contemporary tort doctrine," and one that "works substantial injustice on innocent victims."⁷⁸ In its place, Wisdom proposed that the court adopt a test similar to the one used in *Pruitt* under which claims would be barred only if a plaintiff's injury derived solely from contact with another injured party.⁷⁹ Such a rule, he argued, "compensates innocent plaintiffs, and imposes the costs of harm on those who caused it."⁸⁰ Under Judge Wisdom's test, commercial fishermen, shippers, and those who provide a "vital commodity or service" to the community, here marina operators and boat and tackle shop owners, could recover,⁸¹ while restaurateurs, suppliers of goods, and other groups not "sufficiently involved" in the community could not.⁸²

73. 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

74. 752 F.2d at 1020-21.

75. *Id.* at 1035-52. Judges Rubin, Politz, Tate, and Johnson joined the dissent.

76. *Id.* at 1023-32. Plaintiffs argued that when a defendant unreasonably interferes with public rights by negligently polluting a waterway he creates a public nuisance for which all parties who have suffered "particular damage" may recover. *Id.* at 1030. Although the court agreed that "particular damages" are "those which are substantially greater than the presumed at-large damages suffered by the general public," it declined to examine the scope of recovery beyond the fishermen. *Id.* The court saw no jurisprudential value in measuring "who among an entire community that has been commercially affected by an accident has sustained a pecuniary loss so great as to justify distinguishing his losses from similar losses suffered by others." *Id.*

77. *Id.* at 1021 (commercial fishing interests deserve "special protection"). *Id.* at 1026 (citing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), "While conceding that ordinarily there is no recovery for economic losses unaccompanied by physical damage, . . . commercial fishermen were foreseeable plaintiffs whose interests the oil company had a duty to protect when . . . drilling.").

78. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1035 (5th Cir. 1985) (Wisdom, J., dissenting).

79. *Id.* at 1046. The majority, concurring, and dissenting opinions are commended to anyone interested in how serious, informed, and philosophical judges are wrestling with the issue of how far to extend liability for environmental torts.

80. *Id.*

81. *Id.* at 1049-50.

82. *Id.* at 1050-51.

Except for *Pruitt*⁸³ and Judge Wisdom's dissent in *Guste*,⁸⁴ courts generally have retained the language of the special injury rule in actions for damages. Nonetheless, at least in environmental cases, the actions of courts belie the language they use. The implication is that an eroding special injury rule is being replaced by an injury-in-fact/proximate cause analysis.⁸⁵

In recent years, courts in Massachusetts have adopted this analysis, although they have retained the language of the special injury rule. In *Stop and Shop Companies v. Fisher*,⁸⁶ a nonenvironmental case involving the obstruction of public access due to the defendant's collision with a drawbridge, the court allowed an established business to maintain a public nuisance claim for loss of business arising from its customers' inability to reach plaintiff's store while the drawbridge was being repaired.⁸⁷ By allowing the plaintiff store owner to sue for damages for this indirect harm, the court rejected a previous Massachusetts decision holding that a public nuisance claim required that the obstruction directly inhibit the plaintiff's access to his or her property, or cause physical damage to the plaintiff's property.⁸⁸

In defending its decision, the *Stop and Shop* court recognized that the special injury rule established a clear line between special (actionable) and general (nonactionable) damages in order to limit the number of claimants.⁸⁹ But, the court held that as a matter of public policy tortfeasors should be liable to plaintiffs who suffer special pecuniary harm from the loss of access.⁹⁰ Severe economic loss caused by the obstruction of access would satisfy this special harm requirement unless the entire community suffered severe economic loss, in which case plaintiff would have no special harm and could not recover.⁹¹ *Stop and Shop* is important because the court conceded that special harm could arise indi-

83. *Pruitt v. Allied Chem. Corp.* 523 F. Supp. 975 (E.D. Va. 1981).

84. 752 F.2d at 1035-52.

85. While most courts have been reticent to do so, Congress has allowed recovery by parties beyond the scope of the common law rule. See, e.g., Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1653 (1982 & Supp. V 1987), and its supporting regulations, 43 C.F.R. §§ 29.1-.14 (1988), which permit individuals to be compensated for damages to natural resources from an oil spill. Damages can arise from injury to, destruction of, loss of use of, and loss of profits or impairment of earning capacity due to injury to natural resources. This includes loss of subsistence hunting, fishing, and gathering opportunities. *Id.* § 29.1(e). The reticence of the courts to jettison the special injury rule may, in part, be deference to Congress.

86. 387 Mass. 889, 444 N.E.2d 368 (1983).

87. *Id.* at 894-99, 444 N.E.2d at 371-74.

88. *Id.* at 894-96, 444 N.E.2d at 372-73 (rejecting the holding of *Robinson v. Brown*, 182 Mass. 266, 65 N.E. 377 (1902)).

89. *Id.* at 895, 444 N.E.2d at 372.

90. *Id.*

91. *Id.* at 897, 444 N.E.2d at 373. The court stated that "if a whole community suffers . . . loss, then it becomes a public wrong and the plaintiff cannot recover." Thus, when a public way is obstructed "the question becomes whether so many businesses have suffered the same economic harm that plaintiff's damages are no longer special." *Id.*

rectly. Although the court retained the language of the special injury rule, the decision stretched the rule by allowing plaintiffs to maintain a public nuisance action even if their property has not been damaged or directly obstructed.

Three years later, in *Connerty v. Metropolitan District Commission*,⁹² a licensed master clam digger sued on behalf of himself and other master clam diggers to recover damages to their businesses caused by the discharge of raw sewage into Quincy Bay, Massachusetts.⁹³ Although the clam diggers could not bring private nuisance actions because their rights to clam were revocable and therefore not property interests,⁹⁴ the court did consider the viability of a public nuisance action, which it defined as an interference “with the exercise of a public right by directly encroaching on public property or by causing a common injury.”⁹⁵ The *Connerty* court agreed with the *Stop and Shop* court and held that the plaintiff need “only show that the public nuisance has caused some special injury of a direct and substantial character other than that which the general public shares.”⁹⁶ Although the plaintiffs did allege particular harm greater than that suffered by “the ordinary citizen who was merely deprived of a cleaner harbor” for two weeks, the court held that the doctrine of sovereign immunity barred suit against the Commonwealth for an intentional public nuisance.⁹⁷

Although *Connerty* and *Stop and Shop* reaffirmed that the special injury rule could limit liability for public harm, both courts expressed the rule in more flexible terms. Under their definition, a private plaintiff need only articulate a serious injury-in-fact to state a public nuisance cause of action. The harm claimed need not be different in kind from the rest of the public, and although minor inconveniences are not actionable, deprivation of significant educational, recreational, or aesthetic uses caused by injury to a natural resource, or inconvenience, annoyance, or discomfort to the plaintiff might be actionable. This is further evidence that, at least in environmental claims, standing for public nuisance actions is moving toward the injury-in-fact standing test applied in environmental citizen suits.⁹⁸

92. 398 Mass. 140, 495 N.E.2d 840 (1986).

93. *Id.* at 141-43, 495 N.E.2d at 841-42.

94. *Id.* at 145, 147-48, 495 N.E.2d at 843-45. The court noted that “[a] master digger’s license is a nontransferable license to fish or to clam in a limited area and can be revoked at will by the licensing authority. While we have found several cases where fishing licenses have been determined to create property rights, the licenses at issue in those cases possess some attribute normally associated with interests in property such as transferability, irrevocability or a definite and fixed term. The clam digging licenses . . . bear no such attributes.” *Id.* at 145 n.5, 495 N.E.2d at 843 n.5.

95. *Id.* at 148, 495 N.E.2d at 845.

96. *Id.*

97. *Id.* at 148-49, 495 N.E.2d at 845-46.

98. *See supra* note 50.

1. *Physical Injury as a Per Se Special Injury*

When a public nuisance causes physical injury to a plaintiff, the special injury rule generally is satisfied automatically.⁹⁹ At common law, this rule applied to traumatic injuries. It now has been expanded to apply in toxic torts where injuries may be less apparent. For example, in *Anderson v. W.R. Grace & Co.*,¹⁰⁰ the plaintiffs sought damages for physical injuries caused by the pollution of public wells, from which their water was drawn, and the groundwater under their homes.¹⁰¹ The United States District Court for Massachusetts agreed that “the right to be free of contamination to the municipal water supply is clearly a ‘right common to the general public’ ” and that an interference with that right constituted a public nuisance.¹⁰² The court held that the plaintiffs had standing to maintain an independent action because injuries to a person’s health are by their nature special and not common to the public.¹⁰³ The court found, however, that significant questions remained concerning whether, and to what extent, the groundwater contamination had actually caused physical injury to the individual plaintiffs.¹⁰⁴ As such, it limited the plaintiffs’ suit to relief for their personal injuries, including mental distress, and for damages caused by the decline in the value of their property.¹⁰⁵ The court denied a request for injunctive relief to end the continuing groundwater contamination or to clean up the contamination for two reasons.¹⁰⁶ First, none of the plaintiffs had a well on their property and thus could not allege actual detriment to the “use or enjoyment of their land.”¹⁰⁷ Second, the municipal well from which the water had been drawn had been closed.¹⁰⁸ The court reasoned that the continuing groundwater contamination was a general public nuisance for the government to handle.¹⁰⁹

When the impact of the toxic contamination of groundwater is clear, however, the courts may provide extensive relief to individual plaintiffs. For instance, in *Wood v. Picillo*¹¹⁰ the Rhode Island Supreme Court held

99. Injuries to a person are by their nature “of a kind different from that suffered by other members of the public.” RESTATEMENT (SECOND) OF TORTS § 821C comment d (1977).

100. 628 F. Supp. 1219 (D. Mass. 1986).

101. *Id.* at 1232.

102. *Id.* at 1233.

103. “As plaintiffs allege that they have suffered a variety of illnesses as a result of exposure to the contaminated water, they have standing to maintain this nuisance action.” *Id.*

104. *Id.* at 1226-28, 1233.

105. *Id.* at 1233.

106. *Id.* at 1228-34. The continued contamination of unused groundwater under plaintiffs’ homes created an “abstract claim of a threat of invasion” that did not allege sufficient harm to plaintiffs’ use and enjoyment of their property or their health to support injunctive relief on private or public nuisance grounds.

107. *Id.* at 1233.

108. *Id.* at 1234.

109. *Id.* at 1233.

110. 443 A.2d 1244 (R.I. 1982).

the defendant strictly liable for the public nuisance of polluting underground water.¹¹¹ In *Wood*, the special attorney general prosecuting the case presented proof that persons living next to a chemical dump site, which was described as a "chemical nightmare,"¹¹² had already suffered physical effects from exposure to the chemicals and faced potential disease and death. There also was evidence that, if left unchecked, the chemicals would enter and contaminate the groundwater.¹¹³ Declaring that "decades of unrestricted emptying of industrial effluent into the earth's atmosphere and waterways has rendered oceans, lakes and rivers unfit for swimming and fishing, rain acidic and air unhealthy,"¹¹⁴ the court held that negligence was not a necessary element of a public nuisance cause of action where contamination of public or private waters was caused by pollutants percolating into and through the soil.¹¹⁵ The court upheld the injunction issued by the trial court and required the operators of the site to finance the cleanup and removal of the chemicals and contaminated earth.¹¹⁶

Again, in *Burns v. Jaquays Mining Corp.*, where evidence clearly showed that an asbestos mill had caused asbestos-related injuries to the adjacent residents, the court liberally crafted remedies to protect plaintiffs.¹¹⁷ After upholding the lower court's dismissal of claims for subclinical injuries, including mental distress and fear of contracting asbestos-related diseases in the future,¹¹⁸ the Court of Appeals of Arizona reversed the lower court and held that the plaintiffs had a valid public nuisance cause of action for inconvenience, discomfort, and annoyance resulting from their exposure to asbestos.¹¹⁹ Although none of the plaintiffs had been diagnosed as having asbestos-related diseases, the court ordered the defendant to pay for monitoring the plaintiffs' health. The court felt that monitoring was necessary to track the potential development of cancer and other asbestos-related diseases.¹²⁰ The decision seems to indicate that when a plaintiff can pinpoint the nature of an injury and link the injury to the defendant's conduct, the court will be inclined to grant more expansive relief.

111. *Id.* at 1247, 1249.

112. *Id.* at 1246.

113. *Id.* at 1245-47.

114. *Id.* at 1249.

115. *Id.*

116. *Id.* at 1247.

117. 156 Ariz 375, 379, 752 P.2d 28, 32 (Ariz. Ct. App. 1988).

118. The court said that the statute of limitations would not begin to run on these claims until there was a manifestation of physical injury or disease. *Id.* at 378, 752 P.2d at 31. Since there would be no justice to plaintiff or defendant to allow a suit prior to manifestation of injury, the suit was dismissed with leave to refile after manifestation. *Id.*

119. *Id.* at 379, 752 P.2d at 32.

120. *Id.*

2. *The State as a Plaintiff Seeking Damages*

Even if the special injury rule is applied to bar private actions for damages, the state can sue for damages when a serious environmental public nuisance does not cause special damage to any one person. In *State ex rel. Dresser Industries, Inc. v. Ruddy*, the state filed a common law public nuisance action as "trustee for its citizens," seeking actual and punitive damages as "rejuvenating compensation" for injuries to streams and rivers in the state caused by the rupture of a settling dam that retained wastes from a barite mining operation.¹²¹ Citing the *Restatement (Second)*, the Missouri Supreme Court noted the growing tendency "to treat significant interferences with recognized aesthetic values or established principles of conservation of natural resources" as public nuisances.¹²² But, it reiterated that to recover damages, a private plaintiff must show an injury "special or distinctively different from that suffered by the general public."¹²³ The state had argued that if it was limited to seeking injunctive relief and the special injury rule barred private suits, then polluters who damaged the public interest would escape liability if the problem was not ongoing.¹²⁴ Apparently the court accepted this argument, and it remanded the case to the trial court to determine whether damages were "appropriate or allowable."¹²⁵

Prior to *Ruddy*, there were no instances in which courts had allowed public authorities to seek only damages for public nuisance absent specific statutory authority.¹²⁶ The *Ruddy* court's approach, however, is necessary if the special injury rule limits private damage claims, because the state becomes the only party able to collect damages for harm to the public interest. But there is little difference between a state attorney general suing for damages as trustee for the public interest and a class action

121. 592 S.W.2d 789, 791 (Mo. 1980).

122. *Id.* at 793.

123. *Id.* at 792: This case raises the question: What would constitute a special injury for aesthetic harm where a stream is polluted? Would someone who was deprived of the refreshment from the beauty, solitude, and pleasure of fishing in the stream be specially harmed because of the pollution? What if that person could show that these aesthetic and recreational activities were important to his or her sense of well-being and ability to relieve him or herself of working-world stress? Could an environmental citizens group sue on behalf of its members? What about a class action on behalf of all fishermen, hikers, and naturalists? The court has left these questions open.

124. *Id.*

125. 592 S.W.2d at 793 (Mo. 1980). The court also held that the Missouri Clean Water Law, MO. ANN. STAT. §§ 644.006-.561 (Vernon 1988), which was enacted in accordance with the federal Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), did not preempt state public nuisance law. To the contrary, the court found that the preservation of common law remedies "strengthens and makes cumulative" the enforcement powers available to remedy water pollution problems. *Id.*

126. *Id.* Whereas "injunctions or abatement have been the traditional remedies where the state brings suit for public nuisance," in *Ruddy*, the second count of the state's complaint only sought actual and punitive damages based on the common law of public nuisance. *Id.* at 791.

or citizen suit. Thus, the concern expressed in *Ruddy* and *Pruitt*,¹²⁷ that polluters should not be permitted to avoid liability for contaminating natural resources on the basis of rigid adherence to a rule developed in 1536, should guide courts when damages are sought by private groups as trustees for the public. Indeed, by permitting private citizens to help police public nuisances, the courts would ease the burden on overworked attorneys general. To ensure that this policy does not result in a multiplicity of suits, the court could require class actions, suits by common law or statutory attorneys general, suits by citizen groups with standing to sue on behalf of their members, or other case management techniques.¹²⁸ Courts could also require that parties bringing citizen suits notify the state attorney general in order to provide the state with the opportunity to intervene.

Once these parties are allowed to sue, the courts can define the outer limits of liability by applying proximate cause principles. The fact that valuation of damages to, or loss of use of, natural resources due to pollution can be problematic should not bar the claim. Methods of proof can be developed on a case by case basis.¹²⁹ Alternatively, the jury, which is permitted to assess general damages in other personal injury cases, should be permitted to award specific and general damages to the public for interference with rights common to the public. Where general damages are awarded, the money could be placed in a trust fund and used to restore the natural resource or public interest harmed.

C. Equitable Actions

Traditionally, the special injury rule applied to all private actions for public nuisance whether the suit sought damages or equitable relief.¹³⁰ The *Restatement (Second) of Torts* suggested that the special injury rule should not apply in equitable actions, a position not based on any public nuisance case authority.¹³¹ Several jurisdictions have now embraced the notion that liberal standing requirements should apply to equitable actions, even if the special injury rule limits claims for damages. As discussed below, courts have allowed equitable actions by individuals acting

127. *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975 (E.D. Va. 1981).

128. *See supra* notes 43-49 and accompanying text.

129. *See, e.g.*, the natural resource damage provisions in the Comprehensive Environmental Response, Compensation and Liability Act, §§ 101(16), 107(f), 113(g), 42 U.S.C. §§ 9601(16), 9607(f), 9613(g) (1982 & Supp. V 1987) and the Department of Interior regulations promulgated thereunder, 43 C.F.R. pt. 11 (1988); *see also*, *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989). In fact, the field of natural resource damage calculation is rapidly developing. *See, e.g.*, THE BAY INSTITUTE, SAN FRANCISCO, ECONOMIC NON-MARKET EVALUATION OF LOSSES TO FISH, WILDLIFE AND OTHER ENVIRONMENTAL RESOURCES (P. Meyer ed. 1987); Dower & Scodari, *Compensation For Natural Resource Injury: An Emerging Federal Framework*, 4 MARINE RESOURCE ECON. 155 (1987).

130. *See Ruddy*, 592 S.W.2d at 789.

131. *See* RESTATEMENT (SECOND) OF TORTS § 821C comment j (1977).

on their own behalf or as private attorneys general, associations and class representatives.

1. *Common Law Private Attorneys General*

In *Miotke v. City of Spokane*,¹³² owners of waterfront property and the Lake Spokane Environmental Association sued the City of Spokane and the Washington State Department of Ecology for declaratory, equitable, and monetary relief after the city discharged raw sewage into the Spokane River.¹³³ The discharge fouled the waters of the river and adjoining Long Lake with fecal matter, solids, toilet paper, prophylactics, and slime; discolored the water; and filled the air with rancid, noxious, and repulsive odors.¹³⁴ The trial court enjoined further discharge of raw sewage and awarded the plaintiffs damages, attorneys fees, and costs.¹³⁵ On appeal, the Washington Supreme Court upheld the plaintiffs' right to bring a public nuisance action because they had suffered nausea, headaches, nervousness, and insomnia.¹³⁶ Finding that the plaintiffs had incurred considerable expense to effectuate an important public policy that benefitted a large class of people, the court characterized the plaintiffs as common law private attorneys general and upheld the award of attorneys fees incurred in seeking the injunction.¹³⁷

Under the test applied in *Miotke*, plaintiffs have standing to sue if they merely allege exposure to an ugly and unpleasant condition and resulting physical symptoms, which may be relatively minor and temporary.¹³⁸ Although physical injuries are generally special injuries, allowing plaintiffs to maintain a suit based on such relatively minor injuries is new. Moreover, the court did not require that the plaintiffs seek a remedy in the public interest, such as an injunction to stop the discharge of sewage.¹³⁹

132. 101 Wash. 2d 307, 678 P.2d 803 (1986).

133. *Id.* at 309-16, 678 P.2d at 805-09.

134. *Id.* at 317, 678 P.2d at 809-10.

135. *Id.* at 310, 678 P.2d at 805-06. The injunction prevented 1.3 billion gallons of raw sewage from being discharged while the plant was improved. *Id.* at 317, 341, 678 P.2d at 809, 822.

136. *Id.* at 319, 332, 678 P.2d at 810, 817. There was no mention of the association plaintiff, which remained a party on appeal.

137. *Id.* at 340-41, 678 P.2d at 821-22. Although the Washington Supreme Court had addressed the theory of a common law private attorney general in an earlier case, *see Public Util. Dist. No. 1 v. Kottsick*, 86 Wash. 2d 388, 392, 545 P.2d 1, 4 (1976), the *Miotke* court was the first to apply the theory in an actual case. 101 Wash. 2d at 340-41, 678 P.2d at 821.

138. 101 Wash. 2d at 332, 678 P.2d at 817.

139. *Id.*

2. *Class Actions*

The Hawaii Supreme Court has adopted the position advocated by the *Restatement (Second)*¹⁴⁰ and explicitly rejected the special injury rule in a class action suit brought to enforce public rights-of-way along once public trails to a beach.¹⁴¹ In *Akau v. Olohana Corp.*, the court noted that although obstructing a public right-of-way constituted a public nuisance, it did not always cause special injury.¹⁴² Citing the *Restatement (Second)*, the court found that the trend in the law had turned "away from focusing on whether the injury is shared by the public to whether the plaintiff was in fact injured."¹⁴³ This trend, the court continued, was visible in the liberal standing requirements for certain citizen tax and environmental suits and for private actions to protect public trust property.¹⁴⁴ Stating that this injury-in-fact test promoted justice, the court held that a member of the public without special injury has standing to sue to enforce the rights of the public if he can show injury-in-fact and satisfy the court that the concerns of a multiplicity of suits will be satisfied "by any means."¹⁴⁵ The court defined an injury-in-fact as a personal injury to a recognized interest, whether economic, recreational, or aesthetic, but not the mere airing of a political or intellectual grievance.¹⁴⁶

By eliminating the special injury rule in nuisance actions seeking injunctive relief, and by not limiting its holding to class actions, the *Akau* court took an important step in establishing public nuisance doctrine as a powerful legal tool to help combat environmental pollution. Although plaintiffs may still find it difficult to bring public nuisance claims for damages, courts seem increasingly prepared to impose only minimal standing requirements on plaintiffs seeking equitable relief.

3. *Associational Standing*

The right of a citizen group to seek equitable relief for a public nuisance was specifically recognized in *Armory Park Neighborhood Association v. Episcopal Community Services*.¹⁴⁷ In *Armory Park*, a community association sought to enjoin the activities of a center that provided free meals to indigent persons.¹⁴⁸ The association's complaint alleged that before and after mealtime the center's clients trespassed, urinated, defe-

140. RESTATEMENT (SECOND) OF TORTS § 821C(2) (1977).

141. *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982).

142. *Id.* at 384-85, 652 P.2d at 1132.

143. *Id.* at 386, 386 n.3, 652 P.2d at 1133-34, 1133 n.3. But according to RESTATEMENT (SECOND) OF TORTS § 821C(2) comment j, § 821C(2)(c) was created out of whole cloth.

144. 65 Haw. at 386, 652 P.2d at 1133-34.

145. *Id.* at 388-89, 393, 652 P.2d at 1134, 1137.

146. *Id.* at 390, 652 P.2d at 1135.

147. 148 Ariz. 1, 712 P.2d 914 (1985).

148. *Id.* at 2, 712 P.2d at 915. Although this is not an environmental case, it establishes an important doctrine that is equally applicable in environmental public nuisance actions.

cated, drank, and littered on the property of members of the association.¹⁴⁹ After reviewing public nuisance law at length, the court held that the members could bring individual public nuisance actions because the alleged acts affected the use and enjoyment of their houses—a damage special in nature and different in kind from that experienced by residents of the city in general.¹⁵⁰ The association could sue on behalf of its members if it could show a legitimate interest in the controversy and that the suit promoted judicial economy in the administration of justice.¹⁵¹ *Armory Park* provides judicial authority for the representative action exception to the special injury rule proposed in the *Restatement (Second)*,¹⁵² and supplies another example of how courts have adopted the law of public nuisance to meet the exigencies of the modern era.

II

THE RELATIONSHIP BETWEEN STATE PUBLIC NUISANCE LAW AND FEDERAL AND STATE ENVIRONMENTAL LAWS

A. Preemption Issues

As the cases discussed above show, the courts have been creative in adapting the public nuisance doctrine to address environmental problems. In certain instances, however, state or federal environmental statutes may preempt or limit the relief available under a state common law public nuisance cause of action. When a plaintiff's public nuisance suit relates to airports or to nuclear facilities, the courts have held that federal law preempts state court injunctive relief, although plaintiffs may seek damages.¹⁵³ The courts have also held that where interstate issues arise, federal statutes can preempt federal common law public nuisance claims.¹⁵⁴ Although state law public nuisance suits generally are not pre-

149. *Id.* at 3, 712 P.2d at 916.

150. *Id.* at 4-5, 712 P.2d at 917-18.

151. *Id.* at 5-6, 712 P.2d at 918-19. This is similar to the federal test in the "case or controversy" context, which allows an association to sue if: 1) its members would have standing to sue in their own right; 2) the interests that the association seeks to protect are relevant to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of the individual members. *See* *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 345 (1977); *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

152. Although the court did not refer to § 821C(2)(c) as authority for its approval of the representative action, its reasoning ("principles of judicial economy are advanced by allowing the issues to be settled in a single action") and reliance on the federal law of representational standing parallel the Restatement's position. *See* RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) comment j (1977).

153. *See* *Kreuger v. Mitchell*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983) (injunctive relief against airports is preempted by federal aviation law); *Pennsylvania v. General Pub. Utils. Corp.*, 710 F.2d 117 (3d Cir. 1983) (no injunctive relief because federal government has sole and exclusive jurisdiction over nuclear power plants).

154. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (in area of ocean pollution, Federal Water Pollution Control Act and the Marine Pro-

empted in interstate pollution cases, the suit must be brought under the law of the state where the discharging source is located.¹⁵⁵

Stating a cause of action under a federal or state environmental statute does not bar a state law public nuisance claim. In *Environmental Defense Fund v. Lamphier*,¹⁵⁶ two private environmental groups brought suit under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA).¹⁵⁷ The state of Virginia joined the suit seeking relief under its environmental statutes and state public nuisance law.¹⁵⁸ The federal appeals court agreed that the defendant had created a public nuisance and violated both RCRA and Virginia law, and it upheld the lower court's grant of injunctive relief.¹⁵⁹ Because the defendant cited no Virginia authority, the court of appeals rejected his contention that, by analogy to *Middlesex County Sewerage Authority v. National Sea Clammers Association*,¹⁶⁰ the Virginia statute preempted the state common law public nuisance claim.¹⁶¹ When *Lamphier* is read with *International Paper Co. v. Ouellette*,¹⁶² state law nuisance claims generally are not barred by either state or federal environmental statutes.

tection, Research, and Sanctuaries Act of 1972 preempt federal common law of nuisance); see also *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987).

155. *Ouellette*, 479 U.S. at 490. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I"), the Court held that federal common law, not state law, applied to interstate water pollution. *Id.* at 108. After Congress passed the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), the Court held in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("Milwaukee II") that the comprehensive nature of the Clean Water Act preempted the application of federal common law. *Id.* at 320. The decision left open the question of whether state law might still apply. *Id.* at 310 n.4. On remand, the court of appeals presaged the *Ouellette* holding and found that the savings clause of the Clean Water Act, 33 U.S.C. §§ 1365, 1370 (1982 & Supp. V 1987), protected the right of plaintiffs to bring common law suits under the law of the state where the discharge occurred. *Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984).

156. 714 F.2d 331 (4th Cir. 1983).

157. 42 U.S.C. § 6972 (Supp. V 1987).

158. *Lamphier*, 714 F.2d at 335.

159. *Id.*

160. 453 U.S. 1 (no implied right of action under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987), or the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1401, 1402, 1411-1421, 1431-1434, 1441-1444 (1982 & Supp. V 1987), and preemption of federal common law by these acts).

161. The defendant in *Lamphier* cited *Sea Clammers*, 453 U.S. at 14-15, for the proposition that "where a statute expressly provides a particular remedy or remedies a court must be chary [sic] of reading others into it." 714 F.2d at 336. The court, however, distinguished *Sea Clammers* on the grounds that the plaintiff in *Lamphier* did not seek an award of damages, but rather acted as a private attorney general. *Id.* at 337. See also *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (Missouri Clean Water Law does not preempt state public nuisance law).

162. 479 U.S. 481, 490 (1987).

B. *The Effect of Compliance With Applicable Law*

Although failure to comply with applicable statutes and regulations generally supports a public nuisance claim,¹⁶³ compliance does not ensure that an activity cannot be enjoined as a public nuisance. In *Neal v. Darby*,¹⁶⁴ the defendant, operator of a solvent reclamation company, conceded, and the court agreed, that neither RCRA¹⁶⁵ nor the South Carolina Hazardous Waste Management Act¹⁶⁶ preempted a state common law public nuisance action.¹⁶⁷ But, relying on *Milwaukee v. Illinois* (“Milwaukee II”)¹⁶⁸ and *New England Legal Foundation v. Costle*,¹⁶⁹ the defendant argued that the trial court should have deferred to the state and federal agencies that had issued his operating permits.¹⁷⁰ The South Carolina Court of Appeals, however, rejected this argument holding the state can apply stricter standards under state public nuisance law to intrastate discharges than might be required by federal statute.¹⁷¹ After finding that the trial court judge had given “sufficient weight” to the permits in balancing the interests involved, the court of appeals upheld the trial court’s reasoning that “a public nuisance is not excused by the fact it arises from a lawful business.”¹⁷²

Similarly, when the court in *Village of Wilsonville v. SCA Services, Inc.*,¹⁷³ determined that a “dangerous probability” existed that a release of toxic substances could occur and result in substantial injury and disease, it enjoined the operation of a hazardous waste landfill, even though the operator had a state permit to operate the site.¹⁷⁴ The court rejected

163. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2d Cir. 1985) (violation of New York environmental law constitutes nuisance *per se*); *Comet Delta, Inc. v. Pate Stevedoring Co. of Pascagoula*, 521 So. 2d 857 (Miss. 1988) (violation of the Clean Air Act would support a public nuisance action); see also *Miotke v. City of Spokane*, 101 Wash. 2d 307, 332, 678 P.2d 803, 817; *Guy v. State*, 438 A.2d 1250, 1255 (Del. Super. Ct. 1981) (a criminal statute that declares a particular conduct to be a public nuisance sets the standard of conduct for a tort action); *O'Brien v. City of O'Fallon*, 80 Ill. App. 2d 841, 400 N.E.2d 456 (1980) (defendant who deliberately violated EPA regulations regarding disposal of raw sewage had no right to present evidence as to the reasonableness of the conduct).

164. 282 S.C. 277, 318 S.E.2d 18 (S.C. Ct. App. 1984).

165. 42 U.S.C. §§ 6901-6992k (1982 & Supp. V 1987).

166. S.C. CODE ANN. §§ 44-56-10 to 210 (Law. Co-op 1983).

167. See also *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616 (W. Va. 1985); *State v. Schenectady Chems., Inc.*, 103 A.D.2d 33, 459 N.Y.S.2d 971 (N.Y. App. Div. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (1984).

168. 451 U.S. at 304 (holding that the comprehensive nature of the Clean Water Act preempted the application of federal common law). See *supra* note 156.

169. 666 F.2d 30 (2d Cir. 1981) (refusing to enjoin emissions from a coal-fired plant operating under a variance from EPA as a public nuisance under federal common law and holding that, at least in the case at bar, the comprehensive nature of the Clean Air Act, under which the variance had been issued, precluded the court from fashioning a common law remedy).

170. *Neal v. Darby*, 282 S.C. 277, 284, 318 S.E.2d 18, 23.

171. *Id.*

172. *Id.*

173. 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

174. *Id.* at 27, 426 N.E.2d at 837.

the argument that the opportunity for a plaintiff to participate in the administrative review of the permit created an adequate remedy at law which should bar equitable relief.¹⁷⁵ The Georgia Supreme Court reached the same conclusion in *Galaxy Carpet Mills v. Massengill*, finding that air pollution, noise, and vibration from the defendant's coal-fired boiler constituted a public nuisance, even though the boilers were operated pursuant to a state permit.¹⁷⁶ Again, the court ruled that access to the administrative permit process did not create a remedy at law that barred injunctive relief.¹⁷⁷

The courts, however, are more deferential to actions taken by federal agencies where a federal common law public nuisance is alleged. In *New England Legal Foundation*,¹⁷⁸ a federal court refused to enjoin emissions from a coal-fired plant as a public nuisance under federal common law because the plant was operating under a variance from EPA.¹⁷⁹ The court, relying on *Milwaukee II*,¹⁸⁰ held that the comprehensive nature of the Clean Air Act, under which the variance had been issued, precluded the court from fashioning a common law remedy, at least in the case at bar.¹⁸¹ Noting that activities at the plant were technically complex, the court deferred to Congress' decision to rely on the significant technical expertise of EPA.¹⁸² Unlike the state courts in *SCA Services* and *Massengill*, the *New England Legal Foundation* court also found that the plaintiffs had an adequate remedy at law because they could challenge the variance either by direct appeal to the United States Court of Appeals, or by petition to EPA seeking review of the agency's determination of the interstate effects of sulfate emissions.¹⁸³

Similarly, in *Twitty v. North Carolina*,¹⁸⁴ a federal court refused to enjoin the state's disposal of PCB-contaminated soil on state property pursuant to the Toxic Substances Control Act,¹⁸⁵ holding instead that "an action authorized by valid legislative authority" did not create a public nuisance.¹⁸⁶ Because the alleged public nuisance occurred in the state, state rather than federal common law was preempted by the defendant's

175. *Id.*

176. 255 Ga. 360, 361-62, 338 S.E.2d 428, 429-30 (1986).

177. *Id.* at 361, 338 S.E.2d at 430; *see also* *Armory Park v. Episcopal Community Servs.*, 148 Ariz. 1, 712 P.2d 914 (1982); *Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511 (Iowa 1988); *Neal v. Darby*, 282 S.C. 277, 318 S.E.2d 18 (S.C. Ct. App. 1984); and *Bradley v. Township of Southlondonderry*, 64 Pa. Commw. 395, 440 A.2d. 665 (1982).

178. 666 F.2d 30 (2d Cir. 1981).

179. *Id.* at 32-33.

180. *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

181. 666 F.2d at 32.

182. *Id.* at 33.

183. *Id.*

184. 527 F. Supp. 778 (E.D.N.C. 1981), *aff'd*, 696 F.2d 992 (4th Cir. 1982).

185. 15 U.S.C. §§ 2601-2671 (1982 & Supp. V 1987).

186. 527 F. Supp. at 781.

compliance with federal law. *New England Legal Foundation* and *Twitty* may be explained by the fact that the defendants in both cases made good faith efforts to comply with technically complex regulations, and the courts found no evidence that an imminent threat to public health or welfare existed. The decisions might be distinguished on the theory that *Twitty* involved a public entity's compliance with federal regulations, while *New England Legal Foundation* involved a federal common law nuisance cause of action that was preempted by the Clean Air Act.

In general, however, federal and state environmental laws enhance public nuisance claims by establishing minimum standards of reasonable conduct.¹⁸⁷ Environmental statutes do not limit a court's ability to award damages, to issue an injunction or an order to abate, or to devise other legal remedies if a public nuisance exists. Indeed, the courts seem to be particularly willing to allow private plaintiffs into court when they are faced with serious pollution problems such as the discharge of raw sewage or toxic substances.

CONCLUSION

Public nuisance doctrine is in the midst of an important transformation. Historically, a public nuisance action could be maintained by a private plaintiff only if the plaintiff could prove a special injury, one different in kind from that suffered by the general public. The publication of the *Restatement (Second) of Torts* in the early 1970's invited a modernization of public nuisance doctrine by classifying a greater variety of unreasonable acts as public nuisances and by dispensing with the special injury rule in class actions or suits seeking equitable relief. The *Restatement's* approach, although an important step forward, still forced plaintiffs seeking damages to confront the special injury rule.

The second phase of the transformation is now in progress as a number of courts have rejected the special injury rule, if not explicitly, then at least in practice. Although reticent to jettison the language of the special injury rule in damage cases, many courts are willing to do so explicitly where equitable relief is sought. With respect to actions for damages, a growing minority of courts now require that a plaintiff show only an injury-in-fact to gain standing. Because this injury-in-fact requirement is often easy to meet, the crucial issue for the courts is defining the outer limits of liability with proximate cause analysis. The courts adopting this approach have liberally defined the boundaries of liability, especially in class actions.

The implicit rejection of the outdated policies on which the special injury rule was originally based is valid. The courts have ample power to

187. See Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L. REV. 1144, 1148-57 (1985).

limit frivolous or duplicative suits. Courts also have developed procedures to handle complex multiparty suits. Most significantly, the rejection of the old policy rationales has allowed the courts to accommodate modern policy values such as the public's evident concern about environmental contamination.

The third and final component in the modernization of public nuisance doctrine is the enactment over the past two decades of numerous federal and state environmental statutes. These statutes have enhanced, not diminished, the utility of the public nuisance doctrine. These statutory declarations have underscored the nation's concern with environmental issues and given the courts freedom to use public nuisance law to fill the interstices left by the statutes. Indeed, in almost every case, the courts have held that state public nuisance law is unimpaired by either federal or state environmental statutes. As a result of this transformation, public nuisance law has evolved from a doctrine weakened by the outdated special injury rule into a powerful weapon in environmental litigation.