# PUBLIC NUISANCE CLAIMS OF VICTIMS OF HANDGUN VIOLENCE

by David Kairys*

In the last three years, more than thirty cities and counties (including almost all of the nation's largest cities) and one state attorney general have brought lawsuits against the manufacturers, distributors, or dealers of handguns. While there is some variation in the factual allegations and legal claims, the primary basis has been marketing and distribution practices that knowingly facilitate easy access to handguns by prohibited purchasers and persons intent on crime, and the primary claim has been public nuisance.[1] State and local governments have the traditional power and duty to bring public nuisance lawsuits to protect the public from dangers to public health, safety, comfort, or convenience. In addition, private plaintiffs who have been harmed by a public nuisance may assert a public nuisance claim in some circumstances. In two pending lawsuits, individual victims of firearms violence have asserted such claims against the manufacturers, distributors, or dealers based on the same or similar facts and legal theory as the governmental handgun cases.[2] This brief

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1. The complaints, other major pleadings, and briefs on motions to dismiss in all the cases are available on a web site maintained by the Education Fund to End Handgun Violence, *Firearms Litigation Clearinghouse* (visited Apr. 5, 2001), *available at* <http://www.firearmslitigation.org>. On the factual basis and the public nuisance theory, see, e.g., David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175 (2000) [hereinafter Kairys, *Public Nuisance Law*]; David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMPLE L. REV. 1 (1998); David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163 (2000).

2. *See* Complaint at 3, Ileto v. Glock, No. BC 234 882 (Cal. D. Ct. L.A. Aug. 9, 2000) (bringing suit on behalf of postman killed and children shot or present at the Jewish

Article sets out and assesses the traditional requirements for a private-party public nuisance claim and considers whether individual victims of firearms violence satisfy those requirements.[3]

The essence of a public nuisance claim is an "unreasonable interference with a right common to the general public,"[4] and the usual plaintiff is a state or local government or official.[5] Private nuisance claims are regularly brought by individual plaintiffs, but they are limited to invasion of interests in land and they do not involve public rights or suits by private individuals based on interference with public rights.[6] The generally accepted requirement for a private plaintiff to maintain a public nuisance action is "harm of a kind different from that suffered by other members of the public."[7] This is regularly distinguished from harm of a "greater extent," which is insufficient.[8]

For example, a public nuisance that partially obstructs a highway inconveniences and creates some danger and fear for everyone who travels the highway. One who uses the highway once a month cannot bring an individual public nuisance action, nor can one who uses it twice a day. The former plaintiff suffers the same harm as the general public; the latter's harm is different but only in degree, not different in kind.[9] On the other hand, a public nuisance claim could be brought by one who runs into such an obstruction at night and is personally injured or suffers damage to his car.[10] Personal injury is different in kind from inconvenience, danger, and fear.

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Community Center in Los Angeles in August, 1999); Complaint at 2, Ceriale v. Smith & Wesson Corp., No. 99 L 5628 (Ill. Cir. Ct. Cook Cty. 1999) (bringing suit on behalf of three young people killed by handguns in Chicago). Pleadings in both cases are available at *Firearms Litigation Clearinghouse* (visited Apr. 5, 2001) <http://www.firearmslitigation.org>.

3. This Article addresses only the issue of the whether victims of handgun violence may assert a public nuisance claim.

4. RESTATEMENT (SECOND) OF THE LAW OF TORTS § 821B(1) (1964); *see* W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 88, at 626 (5th ed. 1984) [hereinafter PROSSER & KEETON]; Kairys, *Public Nuisance Law*, *supra* note 1, at 1176-78. Citations herein are generally limited to the *Restatement*, which is generally accepted in this area, and *Prosser & Keeton*, which is widely viewed as authoritative.

5. *See* RESTATEMENT, *supra* note 4 § 821C.

6. *See* RESTATEMENT, *supra* note 4 §§ 821A, B, D; *see also* PROSSER & KEETON, *supra* note 4, § 86 (noting public and private nuisance "have almost nothing in common...and it would have been fortunate if they had been called from the beginning by different names").

7. RESTATEMENT, *supra* note 4 §821C(1). In some states, the rule is statutory. *See* CAL. CIV. CODE § 3493 (1997) (providing that a "private person may maintain an action for public nuisance, if it is specially injurious to himself"); Brown v. Petrolane, Inc., 102 Cal. App. 3d 720, 725 (1980) ("The genesis of this rule is found in the common law."); Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 123-24 (1971) (interpreting the statute to require damage that is different in kind, rather than degree).

8. *See* RESTATEMENT, *supra* note 4 § 821C, cmt. b.

9. *See id.*

10. *See id.*, cmt. d.

The underlying policy reflects a balance between two important concerns: private parties should not be deprived of an action against a wrongdoer merely because many others were also harmed or because public authorities may also seek relief for the public; yet there should be some limit on the scope of liability to potentially numerous private parties in multiple suits for often minor individual claims. In many, if not most applications, the rule seems appropriate. Thus, the rule forecloses a multiplicity of claims by everyone who uses the partially obstructed highway, each of which would be for a relatively minor inconvenience.[11] Governmental officials can stop and abate the public nuisance with an action on behalf of the public, and the individual actions foreclosed are minor and could result in a multiplicity of minor claims.

However, the "different in kind" standard forecloses some meritorious individual claims and is questionable as a matter of principle. In all of the circumstances covered by the rule, both the harm to the public and the harm to a private party stem from and are necessarily related to the same public nuisance. Requiring a harm different in kind can exclude those most harmed by the very features of the public nuisance that make it actionable. For example, the rule makes little sense as applied to a loud noise that mildly irritates the whole population of a town, seriously irritates some, and temporarily or permanently incapacitates others, depending on distance and direction from the source of the noise and a range of individual factors. The mild irritation is perhaps too minor for multiple individual claims, but individuals incapacitated or seriously irritated should not be foreclosed because their harm is of the same kind the general population suffers. This undercuts, rather than furthers, the policy underlying the rule.

Courts have attempted to deal with the rule's shortcomings in two ways. First, as the *Restatement* puts it, "Difference in degree of interference cannot, however, be entirely disregarded in determining whether there has been a difference in kind."[12] For example, an interference with passage on a road may be sufficiently different for someone who "traverses the road a dozen times a day" compared to someone who uses it only once a week.[13] Second, courts have recognized a number of particular circumstances as establishing "special injury" that is actionable, including personal injury, which encompasses physical injury and serious emotional distress; particular pecuniary loss; and harm to an interest in land.[14]

The *Restatement* sets out the physical injury rule in a comment and provides an illustration:

> Physical harm. When the public nuisance causes personal injury to the plaintiff or physical harm to his land or chattels, the harm is

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11. *See id.*
12. *Id.*, cmt. d.
13. *Id.*
14. *See id.*, cmts. d, e, f, h; PROSSER & KEETON, *supra* note 4 §90 ("Where the plaintiff suffers personal injury, or harm to his health, or even mental distress, there is no difficulty in finding a different kind of damage.").

> normally different in kind from that suffered by other members of the public and the tort action may be maintained.[15]

If "A digs a trench across the public highway and leaves it unguarded at night without any warning light [and] B, driving along the highway, drives into the trench and breaks his leg[,] B can recover for the public nuisance."[16] The general public suffers inconvenience, danger, and fear; the individual plaintiff may assert a public nuisance claim for damages because he suffers a broken leg.

A theoretically more satisfying rule would formulate the limits on individual actions based on the type of public nuisance and the type of harm suffered, and specifically in terms of the underlying policy. Thus, an individual plaintiff who suffers inconvenience, danger, and fear (not amounting to substantial emotional distress) usually has a lower level claim. But where the public nuisance creates substantial inconvenience, danger, or fear, or where it harms individuals directly and seriously, the individual claims should not be foreclosed, particularly not on the ground that they suffer a greater extent or degree, rather than a different kind, of injury. In any event, the courts' application of the "different in kind" rule, with the caveat and recognized categories of special injury just discussed, more-or-less achieves the same results.

In the two pending public nuisance suits brought by individuals harmed by firearms, the complaints allege that the injuries to the plaintiffs resulted from a public nuisance created or contributed to by the defendant manufacturers, distributors, and dealers of firearms.[17] In *Ileto v. Glock*, children were shot at the Jewish Community Center in Los Angeles in August, 1999, and later the same day, postman Joseph Ileto was shot and killed.[18] Plaintiffs were shot or shot at, and they suffered death, severe physical injury or traumatic emotional distress.[19] This is surely different in kind, not just degree, from the harm to the general public, which suffers danger, fear, inconvenience, interference with the use and enjoyment of public places and a sense of insecurity in public places, and which, as emphasized in the governmental cases, indirectly bears the burden on the public purse.[20] Moreover, the particular injuries suffered by these plaintiffs–personal

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15. RESTATEMENT, *supra* note 4 § 821C, cmt. d.

16. *Id.*, illus. 2.

17. *See* Complaint, Ileto v. Glock, No. BC 234 882 (Cal. Dis. Ct. L.A. Aug. 9, 2000); Complaint, Ceriale v. Smith & Wesson Corp., No. 99 L 5628 (Ill. Cir. Ct. Cook Cty. 1999).

18. *See* Complaint, Ileto v. Glock, No. BC 234 882.

19. *See id.*

20. The *Ileto* Complaint spells out the interference with public rights and the harm to the public generally in some detail:

> Defendants...substantially interfere with public rights common to the general public. The resulting inordinately high levels of firearms use in crime affect the rights of the considerable number of members of the public. The general public is rendered vulnerable to crime and assault, and defendants' conduct obstructs the free passage or use, in the customary manner, of the public parks, squares, streets, and highways....

physical harm and severe emotional distress–are specifically recognized as quintessential "special injuries."

Similarly, the plaintiffs in *Ceriale v. Smith & Wesson*[21] were shot and killed.[22] In three rulings, the trial court denied motions to dismiss because the plaintiffs suffered "a special and particular injury distinct from that suffered by him in common with the public at large."[23] Plaintiffs were "killed as a result of the defendants' alleged conduct."[24]

In the handgun cases generally, the public experiences danger, fear, inconvenience, and interference with the use and enjoyment of public places that affect the tenor and quality of everyday life; the individual victims were shot or shot at, suffering death or serious physical or emotional injuries. This is a difference in kind, not just degree, and it also falls within the personal injury rule. It is hard to imagine any circumstance in which the injury to an individual plaintiff resulting from a public nuisance is more clearly actionable.

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> Defendants' interference with rights common to the public...interferes with the public safety, health or peace. This interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community, and a substantial number of persons....

*Id.* at ¶¶108–109; *see also id.* at ¶¶ 26, 80, 90.

21. Complaint, Ceriale v. Smith & Wesson Corp., No. 99 L 5628.

22. Opinion and Order Denying Motion to Dismiss at 3, Ceriale v. Smith & Wesson, No. 99 L 5628 (Ill. Cir. Ct., Nov. 30, 1999).

23. *Id.*

24. *Id.*

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