Santa Clara Law Review

Volume 34 | Number 4 Article 6

1-1-1994

An Amendment for the Environment: Alternative Liability and the Resource Conservation and Recovery Act

Melinda H. Van der Reis

AN AMENDMENT FOR THE ENVIRONMENT: ALTERNATIVE LIABILITY AND THE RESOURCE CONSERVATION AND RECOVERY ACT

I. INTRODUCTION

The last three decades brought about a new awareness of the environment throughout the world, especially in the United States. Humans faced the reality that the environment is not indestructible. It is, in fact, quite perishable if handled improperly. People took steps to protect healthy parts of the environment and to ameliorate past deterioration. Lifestyles were reevaluated to include a new respect for the environment. By the 1960's, people were looking for the most effective way to prevent environmental harm. In 1969, a writer for the *Los Angeles Times* wrote:

> What to do about our environment? Our system of government is one of checks and balances among its executive, legislative and judicial branches. Rightly or wrongly, the public feels that in environmental matters both the executive and legislative branches have let them down. And so, they have turned to the judiciary in their grievance for a cleaner environment—there will be more and more petitions, initiatives . . . and lawsuits.[1]

In response to such sentiments, the legislative branch endeavored to address environmental concerns and enacted several environmental statutes in the 1970's and 1980's.[2] A truly comprehensive scheme, however, remains elusive. The legislature has tried to amend these statutes to implement changes that might fill some of the gaps.[3] It is necessary,

---

1. James E. Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105, 106 (Malcolm Baldwin & James E. Page, Jr. eds., 1970) (quoting Irving Bengelsdorf, *That Breathing by the People Shall Not Perish From the Smog*, L.A. TIMES, Aug. 14, 1969, § 2, at 7).

2. *See, e.g.*, National Environmental Policy Act of 1967, 42 U.S.C. §§ 4321-70 (1967); Clean Air Act, 42 U.S.C. §§ 7401-71 (1977); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1987).

3. For a discussion of several legislative proposals, *see* Palma J. Strand, *The Inapplicability of Traditional Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983).

however, that the judiciary also take an active role in solving environmental problems. Through continuous analysis and decision-making, courts may bring about changes required by the environment and its inhabitants.

This comment addresses the effect of the alternative liability theory in *Zands v. Nelson*[4] on plaintiffs' actions under the citizen suit provision of section 6972(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA).[5] The purpose of RCRA and other environmental statutes is to protect human health and the environment.[6] Application of the alternative liability theory to negligence and strict liability cases under RCRA furthers this purpose. Future application will lead to greater compliance with the statute and to more careful action by those handling, storing, and transporting hazardous substances. Application of the theory also significantly widens the scope of environmental litigation. Plaintiffs will be encouraged to redress their injuries in court and will be compensated for their injuries; defendants will no longer avoid liability for their actions.

In *Zands*, the court applied the alternative liability theory in a case involving leaking gasoline storage tanks.[7] The theory establishes that after meeting a threshold level of proof, the burden of proving causation shifts from the plaintiffs to the defendants.[8] Since the early 1940's, the alternative liability theory has gone through some changes, but its basic premise has remained the same.[9] The alternative liability theory is accepted by the legal community as a viable theory and was also adopted into the *Restatement (Second) of*

---

4. 779 F. Supp. 1254 (S.D. Cal. 1991).

5. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-87 (1988)) [hereinafter RCRA]. This particular section of the statute was enacted with the 1984 amendments and is discussed in greater detail later in this comment. *See infra* text accompanying notes 104-115.

6. *See* H.R. REP. No. 198, 98th Cong., 2d Sess., pt.1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

7. *Zands*, 779 F. Supp. at 1264.

8. *Id.* at 4. The alternative liability theory was first pronounced in Summers v. Tice, 199 P.2d 1 (Cal. 1948).

9. The development of the alternative liability theory is discussed further in this comment. *See infra* text accompanying notes 42-60. Briefly, it is a theory developed to help plaintiffs recover for injuries incurred through no fault of their own, where causation is difficult, if not impossible, to prove because of multiple tortfeasors. Summers v. Tice, 199 P.2d 1, 3-4 (Cal. 1948). The burden of proof of causation shifts to defendants once a plaintiff meets a threshold level of proof. *Id.*

Torts.[10] If courts follow the *Zands* decision, plaintiffs will fare better in environmental litigation. The burden of proving causation for plaintiffs will be substantially lighter, and defendants will bear a heavier burden to show that they are not liable.

The alternative liability theory evolved beyond its original scope.[11] Upon examination of judicial and legislative interpretation of the theory in this comment, however, it appears that the theory's evolution is consistent with its purpose.[12]

Several other significant issues are discussed in this comment: (1) the extent to which the theory may be diluted and extended;[13] (2) the criteria necessary for a plaintiff to "qualify" under the theory in litigation;[14] and (3) whether future application of the alternative liability theory will become so extensive that the exception will swallow the rule.[15]

Section II paints the backdrop for the alternative liability theory and the reasons for its development.[16] It presents problems associated with multiple-tortfeasor lawsuits and solutions that courts developed in response to these problems.[17] Codification of the alternative liability theory is examined in the *Restatement of Torts*.[18] RCRA's legislative history and purpose are introduced and harmonized with the common law scheme of alternative liability as well.

Section III analyzes possible repercussions of the *Zands* decision and addresses issues that courts will face if they adopt the alternative liability theory in environmental cases where there are multiple defendants and proof of causation is problematic for the plaintiff.[19] Problems inherent in enforce-

---

10. *See* RESTATEMENT (SECOND) OF TORTS § 433(B) (1977).

11. The theory's use in environmental litigation will further strengthen the theory's growth to a workable and useful doctrine. In its original context, the alternative liability theory was applied in very limited situations. *Id.* § 433(B) cmt. h. Today, however, plaintiffs may implement the burden-shifting theory in circumstances that are not as extreme, where proving causation only *seems* impossible or arduous.

12. *See infra* text accompanying notes 62-76, 130-140.

13. *See infra* text accompanying notes 37-50.

14. *See infra* text accompanying notes 23-41, 62-82.

15. *See infra* text accompanying notes 169-179.

16. *See infra* text accompanying notes 23-41.

17. *See infra* text accompanying notes 28-75.

18. *See infra* text accompanying notes 77-87.

19. *See infra* text accompanying notes 155-179.

ment of the environmental statutes are examined.[20] Changes in the alternative liability theory are discussed, as is the possibility that the exception will become the rule.[21]

Section IV proposes new guidelines for the courts to follow in other environmental protection cases.[22] A statutory amendment that addresses the problems inherent in environmental cases is also set forth.

II. BACKGROUND

A. *Historical Burden-of-Proof Rules in Multiple-Tortfeasor Suits*

Traditionally, plaintiffs were required to prove actual causation in negligence suits.[23] A successful suit required proof of: (1) duty of care, (2) breach of the duty, (3) causation, and (4) damages.[24] Failure to fulfill all of the requirements precluded recovery.[25] Causation was traditionally the most problematic of the elements for plaintiffs to prove.[26] Frequently, cases failed because actual causation was impossible to demonstrate due to circumstances beyond the plaintiff's control.[27] It is for this reason that the burden of proving causation sometimes shifts to defendants.

1. *Shifting the Burden of Proof*

The alternative liability theory is used in many types of cases. Frequently, California courts applied it to accidents involving multiple-vehicle collisions. In 1940, a version of the

---

20. *See infra* text accompanying notes 143-169.

21. It is unusual for an exception to a rule to become accepted as the favored method of deciding a case. It seems possible that alternative liability may be implemented so that it is the more accepted rule in environmental litigation. It usually proves to be an uphill battle to try to implement such a change in settled methods of rule- and decision-making. Alternative liability, however, has the flexibility needed to be appealing and accepted in varying situations. For a more detailed discussion of this concept, *see infra* text accompanying notes 170-179.

22. *See infra* text accompanying notes 180-192.

23. *See* CLARANCE MORRIS ET AL., MORRIS ON TORTS § 1, at 44 (2d ed. 1980).

24. *Id.*

25. *Id.*

26. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 42, at 273 (5th ed. 1984).

27. Defendants may have injured the plaintiff in a manner that makes it impossible for the plaintiff to demonstrate the identify of the defendant responsible for the injury. Plaintiffs should not be denied recovery simply because defendants were fortunate enough to cause the injury in such a way.

theory was applied in *Cummings v. Kendall*.[28] In this case, plaintiff brought an action for injuries sustained in an automobile accident where two vehicles struck the car in which the plaintiff was riding.[29] The defendants were speeding, and because they were the wrongdoers, the court ruled they were to "carry the burden of showing that no injuries resulted from their wrong and their task is to unravel the causistries. In arguing the impossibility of doing this they concede their failure."[30]

The *Cummings* court recognized the importance of holding the wrongdoer, not the innocent victim, responsible for explaining the injuries.[31] The court stated that "since it is impossible to prove what share the act of either of the tortfeasors contributed, or whether it contributed any at all, if this prevailed, each would escape—an absurd result."[32] Throughout this century, courts became more accustomed to shifting the burden of actual causation to the defendant.[33] This attitude continued to evolve as new problems came before the courts.

2. Ybarra v. Spangard

The California Supreme Court addressed the problem of proving causation in multiple-tortfeasor cases in *Ybarra v. Spangard*.[34] In this case, the court recognized problems plaintiffs face when forced to bring suit under traditional burden-of-proof standards.[35] Because of circumstances beyond the plaintiff's control, he sustained injuries in ways that made causation almost impossible to demonstrate.[36] The court recognized this problem and held that because "of the

28. 107 P.2d 282 (Cal. 1940).

29. *Id.* at 283.

30. *Id.* (citing Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co., 98 F.2d 694, 697 (2d Cir. 1938)).

31. *Id.*

32. Cummings v. Kendall, 107 P.2d 283, 287 (Cal. 1940).

33. *See, e.g.*, Copley v. Putter, 207 P.2d 876 (Cal. 1949); Apodaca v. Haworth, 23 Cal. Rptr. 461 (1962); Fireboard Paper Prods. Corp. v. East Bay Union of Machinists, 39 Cal. Rptr. 64 (1964).

34. 154 P.2d 687 (Cal. 1944).

35. *Id.* at 689. Throughout this comment, the term "burden of proof" includes allocations of burdens of persuasion and evidence, shifting burdens through presumptions, and various theories such as res ipsa loquitur and alternative liability.

36. *Ybarra*, 154 P.2d at 688.

magnitude and unfairness of this burden . . . plaintiff could maintain his claim against all persons who had any connection with the operation, even though he could not select which particular person . . . led to his injury . . . ."[37] Thus, as early as the 1940's, the courts were searching for ways to provide injured plaintiffs with fair opportunities for recovery when evidentiary rules were stacked in the defendants' favor.[38]

In *Ybarra*, the plaintiff raised an inference of negligence by showing that the accident was one that ordinarily does not occur in the absence of negligence; the defendants were then called upon to explain the result and to demonstrate their non-involvement.[39] Thus, the plaintiff made the clearest showing of negligence that he was able to make under the circumstances. The court demonstrated how res ipsa loquitur could be liberalized and modified according to the facts of a case.[40] *Ybarra* laid the foundation for the later development of the alternative liability theory by changing the traditional burden of proof requirement. The decision, using the doctrine of res ipsa loquitur, effectively shifted the burden of proof to defendants to explain the cause of the injury after the plaintiff met a lower standard of proof.

---

37. Haft v. Lone Palm Hotel, 478 P.2d 465, 475 (Cal. 1970) (discussing *Ybarra*).

38. *Ybarra* is a special case, because the court allowed the plaintiff to recover under res ipsa loquitur after injury during surgery. *Ybarra*, 154 P.2d at 691. Literally translated, res ipsa loquitur means "the thing speaks for itself." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). Its use creates a rebuttable presumption that defendant was negligent. *Id.* The defendant's negligence is inferred from the fact that the accident happened under particular circumstances. *Id.*

39. Ybarra v. Spangard, 154 P.2d 687, 691 (Cal. 1944).

40. *Id.* at 689. The patient brought a personal injury suit for damages after injury during the course of an operation. *Id.* at 688. Plaintiff sustained injuries to his shoulder after he underwent an appendectomy. *Id.* The court held for the plaintiff even though he could not pinpoint exactly who caused the injury. *Id.* The plaintiff showed that the injury was not due to his own voluntary action, that the injury was caused by an instrumentality within the defendant's exclusive control, and that the accident was one that does not ordinarily occur in the absence of negligence. *Id.* at 689. Defendants were then called upon to explain the result. *Id.* at 688. In *Ybarra*, the plaintiff was unconscious. *Id.* The burden-shifting doctrine, however, was extended to cases where plaintiff is not unconscious during an operation in which he sustained injuries. *See, e.g.*, Mahoney v. Hercules Powder Co., 221 Cal. App. 2d 353 (1963); Emerick v. Raleigh Hills Hosp.-Newport Beach, 133 Cal. App. 3d 575 (1982).

Ybarra is also important because it demonstrated how the courts can equalize a situation where defendants' negligence was very technical. Not only was this plaintiff unconscious, but he was untrained in the medical profession and consulted several physicians in order to understand the complexities of the circumstances under which the accident occurred.[41]

3. *The Alternative Liability Theory:* Summers v. Tice

In 1948, the California Supreme Court set out a definitive theory of burden-shifting in *Summers v. Tice*.[42] From the time of the *Ybarra* decision until 1948, a comprehensive and workable formula had evaded the court. When the opportunity presented itself in *Summers*, the court handed down a unanimous decision on the alternative liability issue.[43]

In *Summers v. Tice*, two hunters shot a third member of their hunting party with identical birdshot from their shotguns.[44] The court held that the plaintiff was injured as a direct result of the two defendants' negligence and that the plaintiff was not contributorily negligent.[45] The court held "that the defendants were jointly liable and that thus the negligence of both was the [legal] cause of the injury."[46] The court was unable to ascertain which defendant fired the injurious shots under the circumstances.[47] Despite this inability, however, both were held responsible.[48]

The court justified its conclusion in part by borrowing the language of a Mississippi case where a traveler was hurt when hunters shot at some birds across a highway.[49] " 'We think that . . . each is liable for the resulting injury to the boy,

41. *Ybarra,* 154 P.2d at 688.
42. 199 P.2d 1 (Cal. 1948).
43. *Id.*
44. *Id.* at 2.
45. *Id.*
46. *Id.* at 2.
47. Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948). Plaintiff and the defendants were quail-hunting at the time of the accident. *Id.* Prior to the hunting expedition, plaintiff discussed hunting procedure with the defendants and indicated that they were to "keep in line." *Id.* The three hunters proceeded up a hill in the form of a triangle, and each hunter knew of the others' locations. *Id.* While in this formation, defendant Tice flushed a quail, and both defendants shot at the bird. *Id.* Although plaintiff had a plain view of both defendants, he could not determine which hunter's shot caused his injury. *Id.*
48. *Id.* at 2.
49. *See* Oliver v. Miles, 110 So. 666, 667 (1926).

although no one can say definitely who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent and the injury resulted from such negligence.' "[50] Because of the "practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did," the court developed a theory that has since been incorporated into the *Restatement (Second) of Torts*.[51]

In *Summers*, the court balanced the interests of the plaintiff and defendants.[52] The court considered several factors in making its final decision: the relative positions of the two parties, the parties' access to evidence, the possible results if the burden of proof remained on the plaintiff, and the negligence of plaintiff and defendants.[53] The court also relied on its decision in *Ybarra*.[54] The court stated that although the plaintiff in *Ybarra* was trying to avail himself of res ipsa loquitur, rather than where the burden of proof lay, "the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury."[55] By analogizing the plaintiff's situation in *Ybarra* to the case before it, the *Summers* court concluded that the facts of each were similar in that if one defendant escaped liability under traditional burden of proof rules, the others could as well, and the plaintiff would be left without a remedy.[56] The possibility of liable parties escaping liability permeates the case law in which alternative liability is applied.[57] Indeed, the judicial concern of holding parties accountable for their actions greatly influenced the changing burden of proof rules.[58]

---

50. *Summers*, 199 P.2d at 3 (quoting *Oliver*, 110 So. at 668).

51. *See* RESTATEMENT (SECOND) OF TORTS § 433(B) (1977).

52. Summers v. Tice, 199 P.2d 1, 4-5 (Cal. 1948).

53. *Id.* at 4.

54. *Id.* For a more detailed discussion of *Ybarra*, *see supra* text accompanying notes 34-41.

55. *Summers*, 199 P.2d at 4.

56. *Id.*

57. *See, e.g.*, Copley v. Putter, 207 P.2d 876, 878 (1949) ("It would be a frustration of justice for the wronged person [to] be required to demonstrate which [defendant] caused the damage.").

58. *See, e.g.*, Finnegan v. Royal Realty Co., 218 P.2d 17, 32 (1950) ("[T]he law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.").

The defendants in *Summers* argued that for the court's theory to apply, the defendants must act in concert, and that the plaintiff still had the duty of apportioning the injury to each defendant.[59] The court's response to the argument demonstrates a conviction that plaintiffs need more protection in these kinds of cases. The court shifted the burden of proof to provide plaintiffs with redress:

> If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment.[60]

Thus, the unanimous *Summers* court advocated a burden shifting theory, subsequently labeled the alternative liability theory, which has since been accepted as valid law by California courts.[61]

4. *Extension of the Alternative Liability Theory*

The *Summers* theory set the precedent for shifting the burden of proof in subsequent cases. The theory is flexible and applies to almost any fact pattern in which the defendants placed the plaintiff in an impossible evidentiary situation.

For example, in *Sindell v. Abbott Laboratories*,[62] the court recognized the general rule that the imposition of liability requires that the plaintiff show that the defendant's acts, or an instrumentality under the defendant's exclusive control, caused the plaintiff's injuries.[63] The California Supreme Court extended the alternative liability theory to a multiple-defendant suit where the plaintiff sued for injuries allegedly sustained from her mother's ingestion of the drug DES[64] dur-

---

59. Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948).

60. *Id.* at 5.

61. *See* discussion *infra* text accompanying notes 62-75.

62. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

63. *Id.* at 928.

64. Diethylstilbesterol (DES) is a drug composed of a synthetic compound of the female hormone estrogen. *Id.* at 925. It was administered to prevent miscarriages. *Id.* Studies in the 1960's and 1970's revealed that many of the daughters exposed to the drug in utero developed cancer of the uterus. *See generally* Naomi Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

ing pregnancy.[65] The court offered an exception to the general rule "grounded upon an extension of the *Summers* doctrine."[66] The majority wrote: "Where, as here, all defendants produced a drug . . . and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted."[67] The court ultimately applied a diluted version of the theory under which the burden of proof of causation shifted to the defendants once the plaintiff joined a significant percentage of the DES producers.[68] Under this version, the defendants must prove that they are not liable.[69] The court reasoned that once a significant number, but not necessarily all possible, defendants were joined, the potential for injustice from the shift was minimal.[70]

Use of the alternative liability theory in *Sindell* is significant. The facts of this case are very different than those in *Summers*.[71] The theory is capable of being extended and used, however, in many different factual situations. This is an essential characteristic of the theory, and without it, alternative liability would not be viable today.

Alternative liability was also imposed in collision cases after the *Summers* decision.[72] Reasoning similar to that in *Cummings*[73] influenced a later decision where a court held

65. DES was produced from a common and mutually agreed-upon formula interchangeable with other brands of the same product. *Sindell*, 607 P.2d at 936. The court held that the defendants knew or should have known that it was customary for doctors to prescribe the drug in its generic form and that pharmacists fill the prescription from whatever brand is in stock. *Id.* Therefore, it was impossible to determine which company produced the drug that had been ingested. *Id.*

66. *Id.* at 928.

67. Sindell v. Abbott Lab., 607 P.2d 924, 936 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

68. *Id.* at 937.

69. *Id.* For example, one defendant demonstrated innocence and was dismissed from the case by proving it had not manufactured DES until after the plaintiff was born. *Id.*

70. *Id.*

71. In *Sindell*, the plaintiff had to join enough of the DES manufacturers to represent a substantial share of the market. *Id.* In *Summers*, the plaintiff joined all of the possible defendants. Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948). Alternative liability was not yet extended to cases involving injuries from products when *Ybarra* was decided by the California Supreme Court.

72. *See, e.g.*, Copley v. Putter, 207 P.2d 876 (1949); Apodaco v. Haworth, 23 Cal. Rptr. 461 (Cal. App. 1962).

73. 107 P.2d 282 (Cal. 1940). *See also supra* text accompanying notes 28-31.

that "[i]t is sufficient that plaintiff establish that his injuries did happen as a result of any one or all of the several independent negligent acts."[74] After the *Summers* decision, courts were more comfortable applying the alternative liability theory.[75]

The California Supreme Court's pronouncement in *Summers* had widespread repercussions. Legal scholars solidified the theory so that courts could implement it more easily. This was accomplished by including the theory in a section of the *Restatement (Second) of Torts*.[76]

B. *The Restatement (Second) of Torts and Codification of the Theory*

The *Summers* alternative liability theory is codified in section 433(B) of the Second Restatement of Torts.[77] Subsection (3) is the codified exception to the general rule that the plaintiff bears the burden of proving that defendant's conduct caused the harm.[78] Subsection (3) states:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.[79]

The comments to the Restatement serve to interpret the meanings of the various sections. Under section 433(B), the

---

74. *Apodaco*, 23 Cal. Rptr. at 464. In *Apodaco*, a chain reaction of collisions and near-misses occurred on a foggy highway. *Id.* at 463. The plaintiffs were in a car stopped in traffic when defendants crashed into them. *Id.*

75. *See, e.g.*, Duprey v. Shane, 249 P.2d 8 (1952) (shifting burden of proof in medical malpractice case).

76. RESTATEMENT (SECOND) OF TORTS § 433(B) (1977).

77. *Id.* Section 433(B) states in full:

> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is on the plaintiff.
>
> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

78. *Id.* § 433(B)(3).

79. *Id.*

comments reveal how and why courts have manipulated traditional burden-of-proof rules.[80] Plaintiffs still must show: [1] "that each of the two or more actors has acted tortiously, and [2] that harm has resulted from the conduct" of one or more of the defendants.[81] These requirements are the same as those articulated by the *Summers* court.[82]

Comment h of section 433(B), however, reveals how the theory has been modified over time.[83] "The rule stated in section [433(B)] subsection (3) is not intended to preclude possible modification if such situations call for it."[84] Like most legal theories, the alternative liability theory is dynamic and adapts to meet society's new concerns. The Restatement continues to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous.[85] Cases might arise where some modification of the rule would be necessary because of the effect of lapse of time, the risks the defendants created, or other circumstances.[86]

The drafters of the Restatement internalized the purpose of the alternative liability theory and embodied the intent of the *Summers* decision. Courts may now use the Restatement as a flexible guide in providing redress for injured parties. As noted in *Sindell*, the courts may either "adhere rigidly to prior doctrine denying recovery to those injured by such products or fashion remedies to meet changing needs."[87]

Because of the intent underlying the alternative liability theory, it has been extended to apply in many kinds of cases.[88] For the purposes of this comment, the focus will be the theory's applicability to environmental cases. Most environmental cases currently arise from violations of environmental statutes such as the Resource Conservation and Recovery Act.

---

80. *Id.* at cmts. d, e, f, g, h.

81. *Id.* at cmt. g.

82. *See supra* text accompanying notes 42-60.

83. RESTATEMENT (SECOND) OF TORTS § 433(B)(3) cmt. h (1977).

84. *Id.*

85. *See* Sindell v. Abbott Lab., 607 P.2d 924, 931 n.16 (Cal. 1980) (quoting RESTATEMENT (SECOND) OF TORTS § 433(B) cmt. h (1977)).

86. *See id.*

87. *Id.* at 936.

88. *See supra* text accompanying notes 28-75.

C. *Application of the Theory to Environmental Cases*

1. *The Resource Conservation and Recovery Act*

a. *Background of RCRA*

The Resource Conservation and Recovery Act (RCRA)[89] was signed and enacted by President Ford on October 21, 1976.[90] The Act established the first comprehensive federal policy for waste management.[91] It was enacted in response to growing public awareness of serious problems related to disposal of hazardous waste.[92] RCRA's purpose is threefold: (1) to provide technical assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials, (2) to provide for the safe disposal of discarded materials, and (3) to regulate the management of hazardous waste.[93] The Act is a multifaceted approach to solid-waste management, mandating federal regulations and encouraging solid-waste planning and funding for resource recovery projects.[94] When Congress enacted RCRA, the volume of hazardous waste was increasing and was posing a threat to human health and to the environment.[95]

Congress intended that the statute apply to people who do no more than merely create solid waste.[96] Labeled as a "cradle-to-grave regulatory regime," RCRA applies to individuals who generate, transport, and store solid waste at any point during the waste's lifetime.[97] RCRA provides for identification of hazardous wastes, written manifests tracking

89. RCRA, *supra* note 5. The Resource Conservation and Recovery Act is an amendment to the Solid Waste Disposal Act. *See* William L. Kovacs & John F. Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENVTL. L. 205, 217 (1977). Throughout this comment, reference to the statute will be to both the RCRA and U.S.C. citations as follows: RCRA § —, 42 U.S.C. § —.

90. 12 WEEKLY COMP. PRES. DOC. 1560 (Oct. 25, 1976).

91. *See* Kovacs & Klucsik, *supra* note 89, at 205.

92. RCRA, *supra* note 5, § 1002, 42 U.S.C. § 6901.

93. RCRA, *supra* note 5, § 1003, 42 U.S.C. § 6902.

94. Roger W. Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 635 (1978). Resource recovery includes use, reuse, recycling, and reclamation of hazardous wastes in order to protect human health and the environment. H.R. REP. No. 198, 98th Cong., 2d Sess., pt.1, at 46 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5605.

95. Andersen, *supra* note 94, at 636.

96. *See* Zands v. Nelson, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991).

97. H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

waste shipments, and permits for facilities that store hazardous waste.[98] The breadth of the statute reveals that Congress intended it to regulate every aspect of the creation and disposal of solid waste.

Congress regarded the solid-waste disposal problem as a serious one that affected the lives of all citizens.[99] Therefore, a section of the Act recites national policy on solid-waste disposal.[100] Congress declared that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible.[101] Congress also stated that where waste is generated, it "should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."[102] In order to aid this objective, Congress included a citizen suit provision in the Act.[103]

b. *The Citizen Suit Provision*

In order to ensure enforcement of the various provisions of RCRA, Congress established several modes of enforcement. One of these is the citizen suit provision.[104] Citizens are directly affected by improper handling of hazardous waste; they become ill and bear the costs of the handlers' mistakes and negligence. Therefore, they have the right to bring suit against parties responsible for their injuries. Citizen involvement as watchdogs over the Environmental Protection Agency (EPA)[105] and the states is crucial to the success of RCRA.[106]

---

98. RCRA, *supra* note 5, §§ 3002-04, 42 U.S.C. §§ 6921-24.

99. RCRA, *supra* note 5, § 1002(b)(2), 42 U.S.C. § 6901(b)(2).

100. RCRA, *supra* note 5, § 1003, 42 U.S.C. § 6902.

101. RCRA, *supra* note 5, § 1003, 42 U.S.C. § 6902(b).

102. *Id.*

103. H.R. REP. No. 198, 98th Cong., 2d Sess., pt.1, at 53 (1984), *reprinted in* U.S.C.C.A.N. (1984) 5576, 5612.

104. *See* RCRA, *supra* note 5, § 7002(a), 42 U.S.C. § 6972.

105. "The federal Environmental Protection Agency (EPA) was created in 1970 to permit coordinated and effective governmental action on behalf of the environment. The EPA endeavors to abate and control pollution systematically, by proper integration of research, monitoring, standard setting, and enforcement activities." BLACK'S LAW DICTIONARY 534 (6th ed. 1990). The Agency makes public its written comments on proposals from the standpoint of public health, welfare, and the environment. *Id.* Citizens may put pressure on the EPA when they feel certain environmental issues are not being properly addressed, and they may also work with EPA to expedite certain projects and goals.

106. *See* Andersen, *supra* note 94, at 675.

RCRA section 7002(a) authorizes citizens to commence a civil action to enforce "any permit, standard, regulation, condition, requirement, or order which has become effective under the Act."[107] Citizens may commence a civil action against the United States or any other governmental agency for a permit violation.[108] There are, however, various restrictions to these suits. Plaintiffs must give sixty days' notice to the EPA Administrator, to the state in which the alleged violation occurred, and to the alleged violator.[109] The action must be in the proper jurisdiction,[110] and the EPA Administrator has the right to intervene in the suit.[111] Despite these minor procedural restrictions, citizens were empowered to play a role in enforcing RCRA's requirements. Congress felt, however, that citizens needed an even broader window of opportunity to bring suit against violators.

In 1984, Congress significantly amended RCRA. Environmental issues and concerns became more central to national politics. Thus, the citizen suit provision was modified when Congress added RCRA section 7002(a)(1)(B) to the statute.[112] This subsection included a new cause of action for plaintiffs by inserting an additional provision for citizen civil actions:

> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.[113]

---

107. RCRA, *supra* note 5, § 7002(a)(1), 42 U.S.C. § 6972(a).

108. RCRA, *supra* note 5, § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A).

109. RCRA, *supra* note 5, § 7002(b)(1)(A)(i-iii), 42 U.S.C. § 6972(b)(1)(A)(i-iii).

110. RCRA, *supra* note 5, § 7002(a), 42 U.S.C. § 6972(a). An action under § 7002(a)(1) shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. *Id.*

111. RCRA, *supra* note 5, § 7002(d), 42 U.S.C. § 6972(d) (1988).

112. RCRA, *supra* note 5, § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

113. *Id.*.

This provision expanded citizens' ability to sue violators by allowing them to sue for permit or regulation violations, and for "imminent and substantial endangerment to health or the environment."[114] Congress deliberately added this broad definition of harm to the statute.[115] The Legislature believed "this expansion of the citizens suit provision will complement . . . the [EPA] Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action . . . ."[116]

2. *Application and Interpretation of the Alternative Liability Theory in Environmental Cases:* Zands v. Nelson

In *Zands v. Nelson*,[117] the United States District Court for the Southern District of California decided a case involving a citizens' suit under RCRA. Landowners brought an action against former landowners, former lessees, and the installer of pipes and gasoline tanks for relief regarding contamination of the land.[118] Plaintiff Zands initially filed a complaint under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[119] The first amended complaint was filed several months later under RCRA sections 3004, 3005, and 3006; the second amended complaint added a claim under RCRA section 7002(a)(1)(A).[120] The plaintiffs then amended their complaint a third time, ultimately placing their claim under the newest provision of the citizen suit provision, RCRA section 7002(a)(1)(B).[121]

---

114. *Id.*

115. H.R. REP. No. 198, 98th Cong., 2d Sess., pt.1, at 53 (1984), *reprinted* in U.S.C.C.A.N. (1984) 5576, 5612.

116. *Id.*

117. 779 F. Supp. 1254 (S.D. Cal. 1991).

118. *Id.*

119. *Id.* at 1257. The Comprehensive Environmental Response, Compensation and Liability Act is discussed later in a section addressing the problem of vague environmental legislation and the effects of legislation in which rules are more precisely laid out. *See infra* text accompanying notes 144-150. The courts' words in U.S. v. Monsanto, Co., 858 F.2d 160 (4th Cir. 1988) and Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d. 1568 (5th Cir. 1988) are introduced in conjunction with the discussion to illustrate the courts' role in statutory interpretation, the importance of clear statutory language, and the effect that courts' rulings have on environmental issues.

120. *Zands*, 779 F. Supp. at 1257.

121. *Id.*

Each of the defendants in the suit had contact with the land that Zands owned at the time of the suit.[122] The land was used as a gasoline station for many years, and eventually became contaminated with gasoline.[123] The lower court held that the plaintiffs were entitled to bring their suit under RCRA because gasoline was a solid waste and all the defendants were potentially liable as contributors.[124] The court denied the defendants' motion for summary judgment.[125]

The district court reviewed the defendants' motion for summary judgment.[126] First, the court determined that the plaintiffs had a cause of action under RCRA section 7002(a)(1)(B).[127] The primary issue was "whether the leakage of gasoline from an underground storage tank can create a cause of action . . . ."[128] The court considered the legislative intent of the statute and determined that Congress designed RCRA to protect the environment from the dangers associated with solid waste and that the citizen suit provision was one of the mechanisms for the control of solid waste.[129] Therefore, the citizen suit was an effective means to the statutory ends. In its statutory interpretation, the court analyzed the language of the statute itself.[130] The court determined that leaking gasoline is an abandoned material that has been disposed of.[131] "Disposed of" was then determined to be synonymous with "discarded."[132] The court found that "discarded" is statutorily defined as the " 'leaking . . . of any

122. Plaintiffs Zands joined the following defendants: (1) former landowners from the time during which gasoline leaked from the pipes, tanks, and pumps; (2) individuals who leased the property during the period and operated the gasoline station; (3) individuals who operated the pumps during the time that the gasoline leaked; and (4) individuals responsible for installation of the piping and pumps for the gasoline tanks that leaked. Zands v. Nelson, 779 F. Supp. 1254, 1257 (S.D. Cal. 1991). Each defendant was in control of the property at some point from 1961 until 1980, when Zands purchased it. *Id.* at 1264.

123. *Id.*

124. *Id.*

125. *Id.* at 1255.

126. *Id.* at 1257, 1261.

127. Zands v. Nelson, 779 F. Supp. 1254, 1261 (S.D. Cal. 1991).

128. *Id.*

129. *Id.*

130. *Id.* at 1262.

131. *Id.*

132. Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991).

solid waste or hazardous waste into or on any land or water . . . .' "[133]

Next, the court accepted the very broad definition of solid waste as any discarded material that is no longer a useful product.[134] Finally, it held that "gasoline is no longer a useful product after it leaks into, and contaminates, the soil . . . [and] has been abandoned via the leakage (even if unintentional) into the soil."[135] Reading this conclusion in conjunction with the purpose of the citizen suit provision and the statute as a whole, the court held that "the mere creation of solid waste, and the subsequent abandonment of it in the ground, will support a cause of action under section 6972(a)(1)(B)."[136]

In this case, there were significant hurdles in proving causation. Defendants challenged whether they could be considered "contributors" under the statute and thus liable for the damage.[137] The court adopted a dictionary definition of "contribute to" as "to be an important factor in."[138] The court also recognized, however, that under section 7002(a)(1)(B), there must be some sort of limitations placed on the definition of "contributor."[139]

The court studied the specific facts of the case to determine appropriate contributor limitations and "whether the actions of each of the defendants satisfy the statutory requirement that the person be one who 'contributed.' "[140] In this case, the defendants owned land during the time that the gasoline allegedly leaked, operated the pumps during the time of the alleged leaks, or installed the allegedly leaky pipes and pumps.[141] Therefore, the court held that "[n]one of th[e] individuals are so far removed that it can be said that, as a matter of law, they did not contribute to the leakage," and thus each of the defendants may be a contributor under the statute.[142]

---

133. *Id.* (quoting 42 U.S.C. § 6903(3) (1983 & Supp. 1991)).
134. *Id.*
135. *Id.*
136. *Id.* at 1264.
137. Zands v. Nelson, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991).
138. *Id.* (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabridged 1987)).
139. *Id.*
140. *Id.*
141. *Id.*
142. Zands v. Nelson, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991).

Zands is an important extension of the *Summers* alternative liability theory to an environmental issue. The plaintiffs faced an impossible causation situation, and the court shifted the burden to the defendants as a group, after plaintiffs met a threshold level of causation. Application of modified burden-of-proof requirements permits and encourages enforcement of environmental protection statutes. The court recognized the need for modernization of the traditional burden rules and permitted change to the extent necessary for justice to prevail and for statutory ends to be fulfilled.

III. ANALYSIS

A. *Inherent Problems with Enforcement Under RCRA*

Many problems plague environmental statutes. Vague legislation, problems with the burden of proof, and the great lapses of time between the violation and the time of injury all contribute to the problems legislators face in creating workable statutes. Because of the various obstacles blocking RCRA's use, one of the most troubling questions facing legislators after enactment of the RCRA was whether it would be effective.[143]

1. *Vague Legislation*

While the legislators who created RCRA had a clear idea of what they wanted RCRA to accomplish, in practice, the goals have been difficult to reach. The potential liability of the actors involved in a hazardous waste generation, transportation, and treatment regime requires clear and unambiguous legislation. Involved parties must be aware of their potential liability at the outset of an undertaking. Courts must be able to look at the legislation, understand the intent of its creators, and rule accordingly.

Many of the other environmental statutes are unclear on the issue of liability. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides potentially responsible parties with little guidance.[144] This is a common characteristic of legislation

143. *See* Andersen, *supra* note 94, at 713.

144. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988). CERCLA established a "Superfund" to compensate parties who undertook hazardous waste cleanup projects. *Id.* at § 9611. CERCLA was enacted in the last few days of Congress'

written in great haste. Courts are placed in the "undesirable and onerous position of construing inadequately drawn legislation."[145] They must interpret legislative intent from ambiguous, piecemeal legislation.

However ambiguous portions of CERCLA may be, the statute was interpreted to impose joint and several liability on potentially responsible parties.[146] In *United States v. Monsanto*,[147] the court held that joint and several liability should be used under CERCLA in circumstances of indivisible injury.[148] Though parties may not know exactly what they may be liable for, the statute was interpreted to prescribe joint and several liability in very distinct instances.[149] RCRA might be similarly amended to implement alternative liability.

RCRA enumerates the duties of generators, transporters, and owners or operators of treatment, storage, and disposal facilities (TSDFs).[150] RCRA, however, was not subjected to as much judicial review as CERCLA. The method of impos-

---

last session under President Carter. *See* Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) (observing that the statute was enacted in the "waning hours of the 96th Congress, and as the product of apparent legislative compromise, is not a model of clarity.") The legislators knew that the statute might not pass once President Reagan took office. *Id.* Thus, it was essentially thrown together and passed to meet the legislative deadline. *Id.*

145. *Tanglewood*, 849 F.2d at 1572 (5th Cir. 1988).

146. Joint and several liability is liability in which a defendant might be liable for the entire loss sustained by the plaintiff, even though the defendant's act concurred or combined with that of another wrongdoer to produce the result. *See* KEETON ET AL., supra note 26, § 47; *see also* William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937).

147. 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

148. *Id.* at 172. The case involved an enforcement suit by the federal government to recover costs of removing hazardous wastes from disposal sites. After defendants were all found to be potentially responsible parties, the court held that plaintiff was not required to trace the hazardous substances to each of the defendants. Requiring such specific proof of causation would be at odds with the intent of the statute. The court then went on to extend joint and several liability to all the defendants. *Id.* at 174, 176.

149. *Id.* at 171 n.23.

150. RCRA, *supra* note 5, §§ 3002, 3003, 3004, 42 U.S.C. §§ 6922, 6923, 6924. These sections list the requirements for generators, transporters, and owners and operators of treatment, storage, and disposal facilities, respectively. *Id.* For example, all three types of parties must use a manifest system that tracks the waste from its point of creation to its point of storage. *Id.* The legislators have made the best effort possible to show the parties what is required of them in these three sections. If any of the listed requirements is unfulfilled, the party will be liable. *Id.*

ing liability in cases of indivisible injury, such as the *Zands* case, is unsettled. It is in this respect that RCRA should be amended. Since hazardous waste disposal is a significant issue in contemporary America, statutes must directly address the issue. Plaintiffs must be informed of what burden they will be called upon to shoulder. Vague legislation, however, is not the only complication in the scheme.

2. *Lapse of Time*

It may take years, sometimes decades, for the effects of improper handling of hazardous waste to manifest. Plaintiffs bear injuries from acts that occurred years before, and the lapse of time between cause and effect erects a barrier for plaintiffs' recovery. When the defendants' acts occurred years before the plaintiffs' injuries, recovery under traditional burden rules is almost impossible. "Because toxic waste pollution injuries do not fit into th[e] common law tort mold, victims are not compensated."[151]

Courts and legislators endeavored to tailor the rules under hazardous waste cases to address the hazardous waste problem. They recognized that defendants should not be able to hide behind traditional common law statutes of limitations to avoid liability.[152] Rules were updated to address modern procedural needs.[153] Thus, there is no strict statute of limitations for RCRA cases. It would not fulfill the legislative purpose if RCRA regulations prevented parties from bringing cases because the plaintiff's damages surfaced long after the defendants committed the harmful act. Courts attempted to achieve the legislative ends through this flexible approach to time limits. It is only through a similarly tailored approach that responsible parties will actually compensate others for the damage they caused.

---

151. Strand, *supra* note 3, at 618. Strand also identifies the indeterminacy of causation and the long time lag between action and harm as special characteristics of the problem of non-compensation of victims. *Id.*

152. *Id.* at 581. Some states altered the date from which the statute of limitations runs. *Id.* at 581 n.23.

153. It is for this reason that a new section was added to the citizen suit provision of RCRA. The legislature recognized the need for more enforcement opportunities and gave citizens more power to protect the environment. *See supra* text accompanying notes 89-115.

B. *The Plaintiff's Burden of Proof in Environmental Cases*

1. *Historical Support*

Perhaps the most troublesome aspect of environmental statutes is that they protect polluters. Courts applied traditional burden of proof theories to new environmental problems.[154] burden of proof rules were formulated to foster economic expansion in the United States.[155] Although expansion is no longer a priority, the rules remain the same. Discussing stagnation in the development of new burden of proof rules, Professor James E. Krier stated: "Yet the burden rule, the justifications for its existence largely dead and gone, lives on to govern the allocation of the obligation of persuasion in a large number of suits. The rule is a serious obstacle to environmental litigation . . . ."[156] Even though courts accept the alternative liability theory as a workable way of helping plaintiffs recover for their injuries,[157] it is scarcely applied in the environmental sector.

If traditional burden of proof rules are updated to address the current problems facing society, plaintiffs will be given a fair chance to recover. Twenty years ago, society was unaware of the environmental problems caused by waste dumps.

The decisions in *Summers*[158] and *Ybarra*[159] were based upon the same judicial policy: If the collective result of independent acts of individual defendants caused injury to plaintiff and thereby rendered impossible a determination of each party's liability, total liability should be imposed upon each defendant unless each can absolve itself.[160] The problems with causation that the plaintiff faced in *Zands*[161] were similar to the situations the plaintiffs faced in *Summers* and *Ybarra*. The same rationale is as applicable to today's environmental cases as when it was first applied to the unconscious patient on the operating table in *Ybarra*.

---

154. Strand, *supra* note 3, at 579-80.

155. *See* Krier, *supra* note 1, at 107-08.

156. *Id.* at 108.

157. *See supra* text accompanying notes 140-142.

158. 199 P.2d 1 (Cal. 1948).

159. 154 P.2d 687 (Cal. 1944).

160. *See* Donald F. Morey, *A New Burden of Proof in Negligence Actions Involving Statutory Violations?*, 23 HASTINGS L. J. 650, 665 (1972).

161. 779 F. Supp. 1254 (S.D. Cal. 1991).

The plaintiff in *Zands* could not identify which defendant was the owner or occupier of the land during the period of leakage from the underground tanks.[162] There was leakage, however, that the plaintiffs did not cause.[163] There was damage to the environment that put the population's health at risk.[164] The court weighed this fact heavily in the plaintiff's favor.[165] The burden of proving causation eventually shifted to the defendants.[166] There are hundreds of environmental cases with facts similar to those in *Zands*.[167] Plaintiffs in those suits should be given the same opportunity to bring suit and help fulfill RCRA's statutory purpose. Further, plaintiffs in suits with different circumstances should also be given the same chance.

Alternative liability should be applied in multiple-defendant suits brought under RCRA.[168] In order to be truly effective, the burden should be shifted to the defendants when the plaintiff cannot demonstrate liability on the part of any defendant. If not, the theory's use in the field of environmental protection will be limited. Occasional application of the theory merely would lead to more confusion over the issues involved in the cases and to more statutory deadlock. Plaintiffs must know what challenges they face under RCRA's citizen suit provision. Defendants must be aware of their potential burden of proof.

---

162. *Id.* at 1257.
163. *Id.*
164. *Id.*
165. *Id.* at 1264.
166. 779 F. Supp. 1254, 1264-65 (S.D. Cal. 1991).
167. *See, e.g.*, Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951).
168. Alternative liability should apply to citizens' suits as well as to suits brought by the government when intervening in a suit under RCRA § 7002(d). It might also be applied when a citizen sues the government for failure to perform a non-discretionary duty. This would be the case only if there were other defendants involved in the action in addition to the government. The alternative liability theory, however, was implemented in cases where there is only one defendant. Haft v. Lone Palm Hotel, 478 P.2d 465, 468 (1970). This places yet another twist on the extent to which the alternative liability theory might be applied in future environmental cases. *See id.*

2. *Taking the Alternative Liability Theory to the Extreme*

The alternative liability theory has been regarded as the exception to the rule of causation.[169] The plaintiff faces "the difficulty and expense of proving legal causation between a[n] . . . act or omission and the harmful consequence alleged."[170] Past application of the alternative liability theory changed tort law. Plaintiffs did not always bear the traditional burdens in a lawsuit. Part of their burden transferred to the defendants after the plaintiffs demonstrated a relation between the harm suffered and the defendants' act or omission.[171]

This is an important issue when considering whether to extend the theory to environmental cases. It is rare for the exception to become the rule. Much of the tradition and respect that the law has gained over the years stems from the notion of stare decisis.[172] In a lecture on stare decisis, Roscoe Pound stated:

> Law must be stable and yet it cannot stand still. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the social life which it is to govern.[173]

These words are of special relevance in the relatively new and dynamic field of environmental law.

Judges do not have free reign to rule as they please. They may not disregard case law that speaks on a particular

---

169. Courts limit use of the alternative liability theory and refuse to apply it where there may be some doubt about proximate cause. *See, e.g.*, Thornton v. Luce, 26 Cal. Rptr. 393, 400 (1962).

170. Joseph K. Brenner, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1059 (1981).

171. *Id.* at 1059 & n.70.

172. *See* Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis, in* PRECEDENT IN LAW (Laurence Goldstein ed., 1987). The author defines stare decisis as courts being bound by decisions of higher courts. *Id.* at 81.

173. ROSCOE POUND, LAW FINDING THROUGH EXPERIENCE AND REASON: THREE LECTURES 23 (1960).

issue; they must consider it before making a decision.[174] If a higher court later disagrees with a lower court's decision, that court then has the ability to overrule the decision on appeal, and the lower court must follow the higher court's ruling.[175] Stare decisis, however, cannot be law, and precedent cannot be absolutely authoritative.[176] "Judges owe their fidelity, not to the pronouncements of predecessors, but to the law . . . . [T]hey are ultimately free to reject a precedent if they do not believe it represents the law."[177] Thus, scholars agree that judges may adapt old theories to new cases.

There is a system of checks and balances inherent in the federal system, as well as within the judicial system itself. If there is a fear that implementation of a new rule of law will shake the foundation upon which our legal system is based, it will probably be struck down. Laws that threaten the legal system as a whole, however, are rarely passed. Those people who work to create a better system of laws are not going to try to destroy that which they are striving to perfect. If a law is passed or handed down by a court, it might not actually be as threatening when examined more closely or when its legislative history is studied. The status of the law changes over time through continuous amendment and as lawsuits are brought before the courts.

Such is the case with the alternative liability theory. It has evolved greatly since *Ybarra*. Now is the time for it to go through another phase in its development. Society needs more protection from hazards created by modern technology. Old rules of law do not address these issues. In fact, they cannot, for many of the problems did not exist when the laws were made. Statutes alone proved insufficient to protect citizens. Courts must get involved and supplement legislation with case law. They must continue to interpret the legislation, read legislative history, and guide citizens. *Zands* can set the precedent for continued application of the theory in the environmental sector. If the decision is followed, people will realize that their fears of the change were unfounded. Once courts accept the decision, others will accept its use as well. "The courts can and should make some effort to respond

174. *See id.* at 34-35.
175. *See id.* at 35.
176. *See* Wesley-Smith, *supra* note 172, at 87.
177. *Id.*

. . . to the needs of emerging environmental concern."[178] A sufficient effort may prove to be the implementation of alternative liability in environmental protection cases.

Defendants may argue that eroding the traditional burden-of-proof rules unfairly prejudices them in these suits. Plaintiffs, however, must still make some kind of showing before the burden is shifted. "The rule stated has no application to cases of alternative liability, where there is not proof that the conduct of more than one actor has been tortious at all. In such a case the plaintiff has the burden of proof both as to the tortious conduct and as to the causal relation."[179] If modified burden rules are implemented in environmental suits, however, plaintiffs and defendants will litigate on a level playing field.

The environmental statutes that exist today are very workable models. They address most of the problems that society is facing regarding environmental protection and cleanup. They need to accomplish more, however, if they are to remain a force in environmental protection. They must be modified so that they address problems more thoroughly. If statutes were meant to remain exactly as they were written when Congress passed them, most legislation passed to date would be useless. Everything, including environmental protection laws, must continue to change with the times. Through amendment of RCRA, the statute can address solid-waste disposal problems more fully.

IV. Proposed Statutory Amendment and Guidelines for the Courts

The present surge of environmental litigation calls for restructuring of our substantive and procedural law.[180] In order to fulfill the goal that RCRA sets out in its statement of Congressional purpose,[181] the statute should be amended. "To solve th[e] problem, society must find a means of placing sufficient economic pressure on waste generators . . . . It is

178. Krier, *supra* note 1, at 110.

179. Restatement (Second) of Torts § 433(B)(3) cmt. g (1977).

180. *See* Krier, *supra* note 1, at 106.

181. RCRA was designed to eliminate the last loophole in environmental law, that of unregulated disposal of discarded materials and hazardous wastes. *See* Brenner, *supra* note 170, at 1051 & n.28; *see also generally*, H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.

for Congress, not the judiciary, to provide such a means."[182] This reasoning is as applicable to handlers and storers of waste as it is to generators.

Current legislation is workable. There must be some additions, however, that directly address and solve problems that have arisen with enforcement since RCRA's enactment. The loopholes in the statute make enforcement in the area of environmental protection extremely difficult. The Act seems to be missing several elements essential to enforcement despite its most recent amendments.[183]

A. *Proposed Statutory Amendment*

The basic framework of the statute should be maintained. It sets out what is required of generators, transporters, and storers of hazardous waste.[184] There should be a section added to the Act, however, that defines the liability of RCRA violators.

The new section should be placed immediately before or after the citizen suit provision.[185] Thus, potential plaintiffs can anticipate their burden of proof in an RCRA suit.

First, the section should have a statement of purpose. It must explain the rationale behind the additional section of the statute. Potential litigants would then have notice of why they must prove certain things and not others. The section should not explain the legislative history, because this information can be derived from other, more appropriate sources.[186]

Second, the section should state that alternative liability is imposed in situations where multiple tortfeasors caused

---

182. Brenner, *supra* note 170, at 1080-81.

183. Before the Act was passed, it went through many substantive changes in both the House and the Senate. Kovacs & Klucsik, *supra* note 89, at 216-220. The final draft of the Act was completed just prior to passage and was ratified without having been read by any of those voting. 122 CONG. REC. H11182 (daily ed. Sept. 27, 1976). For a thorough account of the "beat the clock" character of the final days prior to the Act's passage, see Kovacs & Klucsik, *supra* note 89, at 205.

184. RCRA §§ 3002, 3003, and 3004 set out these requirements in a clear and concise manner. RCRA, *supra* note 5, §§ 3002, 3003, 3004, U.S.C. §§ 6922, 6923, 6924. The parties involved should not have an excuse that they did not know what was required of them if suit is brought against them.

185. *See* RCRA, *supra* note 5, § 7002, U.S.C. § 6972.

186. Transporters, handlers, and storers of waste may be put on notice of the statute's liability provisions when applying for a permit, for example.

harm. There should also be a provision stating that the alternative liability theory is used in situations where causation is difficult for a plaintiff to prove and where there is only one defendant or tortfeasor involved in the suit. This leaves room for continued change and development of the theory.

Third, the section should delineate the defendants' burden if alternative liability is implicated. There should be a provision requiring plaintiffs to meet a slightly higher initial threshold of proof before the burden is shifted. This would make the change more equitable for defendants. Essentially, the statute should set out exactly what defendants may be called upon to show. If done in this clear manner, enforcement actions would probably increase, and eventually, compliance will increase.

Suits like that brought in *Zands* would move through the courts more quickly. This is desirable, since one of the purposes of RCRA is to protect citizens from hazardous waste.[187] Once someone is held liable for damage to the environment, the process of repairing the environment may commence. The sooner the process begins, the sooner the environment would be returned to a healthful state. Additional long-term damage to the environment and to citizens would be minimized.

With the proposed amendments to RCRA, there will be less confusion and argument about what sort of liability is imposed. The whole enforcement system will thus run more smoothly, and there will be greater consistency in enforcement suits once the alternative liability theory is regarded as the accepted way of proving causation. It is only through this explicit statement of the rule that enforcement would occur in the manner necessary to address the problems identified by Congress in its original findings.[188]

---

187. *See* RCRA, *supra* note 5, § 1002(b), 42 U.S.C. § 6901(b).

188. These findings are all listed in the act. *See* RCRA, *supra* note 5, § 1002, 42 U.S.C. § 6901. A sampling of the findings reveal that there has been an increase in solid waste resulting from technological progress and improvements in manufacturing methods, *id.* § 1002(a)(1); that the environment and the population is continuously expanding and thus contributing to the increased amount of waste in the nation's landfills, *id.* § 1002(a)(2); and that the placement of inadequate controls on hazardous waste management will result in substantial risks to human health. *Id.* § 1002(b)(5).

B. *Guidelines for the Courts*

Once the Act is amended, courts will have a clearer sense of what the statute aims to achieve. The statute will be easier to follow and comprehend in its new form than in its present form. The amount of confusion and the number of appeals on the issue of causation in these types of cases will decrease. Judges will be able to develop complementary doctrines to try to cushion the impact of the change in the common law doctrine once the statute is enacted.

It is inevitable that there will be some opposition to the amendment by the courts. "Courts are generally loath to adopt this exception to specific causation in cases involving no clear indication that all the defendants are at fault; moreover, courts are naturally disinclined to embrace the alternative liability theory when all possible defendants are not before the court."[189] This reluctance, however, derives from the courts' fear of deviating from the norm.[190] Once the norm has been changed, the fear will subside, and courts will adhere to the Act's requirements.

Burden of proof rules may be an effective tool for reform in law. James Krier stated:

> A reason why environmentalists and their lawyers might wisely focus attention on burden of proof rules grows from the argument that judges traditionally have felt least restrained about law-making activity when they could operate through the medium of burden of proof. [T]he burden rules seldom touch "the major prejudices of the age." They are quiet, bland, unspectacular. As a result, juggling them in favor of one interest or another tends to go unheeded—and uncriticized. Hence burden of proof rules can be effective levers for law reform, operating with both little friction and little greasing.[191]

Thus, judges may manipulate burden rules in applying the alternative liability theory. The environment would be protected, and the change might even be met with minimal criticism. Burden of proof rules can "perform a valuable service by stimulating thoughtful decision making about the environ-

189. Ora Fred Harris, Jr., *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 S.W. L.J. 909, 931-32 (1986).

190. *See id.* at 932.

191. Krier, *supra* note 1, at 108.

ment, even if they cannot reach the more ideal goal of ensuring perfect decisions."[192]

V. CONCLUSION

The policy of the California courts seems to favor the innocent plaintiff over the negligent defendant since, by definition, the negligent defendant will be the more culpable party.[193] This attitude naturally leads to drastic change in tort law and reflects a concern about making victims whole and holding the responsible parties liable.[194] "National indifference and ambivalence are slowly being replaced by a broadening consensus that environmental values are important and must be taken into account, insofar as practicable, in public and private decision making about all activities which touch on environmental quality . . . ."[195]

As time goes by, the workings of RCRA will be better understood, and environmental polluters, environmental protectionists, courts, and legislators will be able to function within a workable statutory system rather than in an amalgamation of disjointed laws. A change in the present status of the law is necessary. Changing the plaintiff's burden of proof in a suit under RCRA is a method to effect such change. It will not create an upheaval in environmental law; rather, it will alter the statute and create a more complete document that addresses the concerns it was initially created to address.

Stare decisis is a consideration when a change in law is apparent. This doctrine, however, was not established in order to prevent the law from changing. It was created to ensure stability in the legal system and to allow people to tailor their behavior and expectations to the status of the law. If law becomes stagnant and no longer addresses the needs of the citizens it governs, it is of little use. It will not provide guidance for any sort of behavior. Laws must conform to people's needs just as people conform to what the law requires. "To some extent, law is an expression of a society's values and policy preferences. Beyond this, however, the power and influence of law make it an important arena for the clarification

192. *Id.* at 122.

193. *See* Morey, *supra* note 160, at 668.

194. *Id.*

195. *See* Krier, *supra* note 1, at 110.

and development of new trends in human values."[196] Today, people want a clean and healthy environment. Shifting the burden of proof in environmental cases will make a difference in citizens' lives.

Once clear statutory requirements are set forth, people and courts will be able to address very real and pressing problems. When the law becomes more settled and alternative liability is woven into the fabric of litigation under RCRA's citizen suits, the theory might be extended to other environmental cases. Utilizing burden of proof rules in this manner is an effective addition to a complex solution for a very large problem.

Environmental problems are defined and addressed in limited terms. Though superficially effective, this method does not address long-term environmental concerns. Piecemeal legislation and short-term solutions are insufficient. Shifting the burden of proof in environmental litigation is a broad approach directed at the issues at hand. It is a concept that has existed for many years. It is a concept capable of expansion and one that might create a new trend in environmental law.

Melinda H. Van der Reis

196. Kenneth A. Manaster, *Law and the Dignity of Nature: Foundations of Environmental Law*, 26 DEPAUL L. REV. 743, 744 (1977).