1920 NUISANCE: LAW NOTE

The Wisconsin Supreme Court has addressed nuisance law in a number of decisions issued since the Committee last revised the nuisance jury instructions.[1] As a result, the Committee has developed a series of six new instructions which follow this Note. (These instructions all pertain to nuisance actions for damages; actions seeking injunctive relief to abate a nuisance are equitable actions which the courts have jurisdiction to decide without a jury trial.[2])

"NUISANCE" DEFINED

The term "nuisance" refers to a condition or activity which unduly interferes with the use of land or a public place.[3] In the legal sense, it is important to keep in mind that "nuisance" does not refer to the conduct that causes the harm, but to the type of harm caused by the conduct.[4] Also, "nuisance" does not describe a cause of action for the interference, but rather a type of harm that may or may not be actionable. "(I)t is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm."[5]

CLASSIFICATION OF NUISANCES

Nuisances can be classified based on the type of interference involved and the nature of the conduct which is alleged to give rise to liability for the nuisance.

Nuisances are divided into two types, depending on the nature of the interference: private or public. A private nuisance is a nontrespassory invasion of or interference with an interest in the private use and enjoyment of land.[6] A public nuisance is a condition or activity which unreasonably interferes with the use of a public place or with the activities of an entire community.[7] "In order to recover damages in an individual action for a public nuisance, one must have 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 interference."[8]

Although the type of harm suffered in the case of a private nuisance is different than that suffered where there is a public nuisance, the prerequisites to liability in either case are virtually identical.[9] In either case, the plaintiff must demonstrate that the interference resulted in significant harm.[10] There can be situations in which a plaintiff has a cause of action for both a private nuisance and a public nuisance arising out of the same conduct.[11]

The conduct giving rise to liability for creating or maintaining a nuisance can be either intentional or unintentional. A nuisance is the result of intentional conduct if the defendant either (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct. It is not necessary that the defendant act with a malicious intent to harm the plaintiff; the defendant need only realize that the nuisance is substantially certain to result from his conduct, even if the conduct itself has a laudable purpose.[12]

Liability can also arise from unintentional conduct. Where the plaintiff alleges the defendant unintentionally maintained or failed to abate a nuisance, the traditional rules

for liability based on negligent conduct apply.[13] The usual defenses in a negligence action are also available to the defendant.[14]

There are situations where unintentional conduct can subject the defendant to strict liability regardless of the defendant's negligence. The Restatement describes these cases as arising out of conduct which is "abnormally dangerous."[15] Wisconsin court decisions suggest these types of nuisances are those unintentionally "created" as opposed to "maintained" by the defendant[16] Examples of what the Restatement and Wisconsin reported decisions refer to by these types of nuisances include a tannery or slaughter-house in a residential area, ownership of a vicious dog and blasting activities in an inappropriate place. In these cases, liability "does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care."[17] In such situations, the defendant is subject to strict liability[18] and "no question of negligence or want of liability is involved."[19]

The Committee determined there should be a total of six separate instructions covering the various claims for liability based on nuisance. The appropriate classification of nuisances is shown in the following table:

CLASSIFICATION OF NUISANCES					
PRIVATE			PUBLIC		
INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT		INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT	
	Created by/ abnormally dangerous activity	Negligence		Created by/ abnormally dangerous activity	Negligence

The instructions differentiate between claims for private and public nuisance. Within each of those classifications, there are separate instructions depending on whether the conduct involved is alleged to be intentional or unintentional. Finally, the instructions involving unintentional conduct differentiate between claims alleging negligence and claims alleging the conduct of an abnormally dangerous activity for which the defendant is strictly liable.

COMMENT

This law note was approved by the committee in 2009. The comment was updated in 2019.

[1] *See, e.g., Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77 (2002); *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635 (2005); *City of Milwaukee v. NL Industries*, 315 Wis.2d 443 (2008).

[2] *United States v. Richards*, 201 Wis. 130 (1930).

[3] *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002).

[4] Restatement (Second) of Torts § 821A, Comment b (1979).

[5] *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 (2005).

[6] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D. While the definition of a private nuisance in Restatement (Second) of Torts § 821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin case law consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts § 821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002).

[7] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, ¶ 21. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See also Prosser and Keeton on Torts* § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co*., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id*. at 658-659.

[8] Restatement (Second) of Torts § 821C(1) (1979).

[9] "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." *Milwaukee Metropolitan Sewerage District, supra,* at 668.

"But as the tort action came into the picture, the use of the single word 'nuisance' to describe both the public and the private nuisance, led to the application in public nuisance cases, both criminal and civil, of an analysis substantially similar to that employed for the tort action for private nuisance." Restatement (Second) of Torts § 821B, comment e (1979).

[10] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F.

[11] Restatement (Second) of Torts § 821B, Comment h (1979).

[12] *Milwaukee Metropolitan Sewerage District, supra* at 663; Restatement (Second) of Torts § 825 (1979).

[13] *Milwaukee Metropolitan Sewerage District, supra* at 667-668; Restatement (Second) of Torts § 822 (1979).

[14] *Milwaukee Metropolitan Sewerage District, supra* at 668.

[15] Restatement (Second) of Torts § 822 (1979). *See, also,* Restatement (Second) of Torts § 519, 520 and

Comments.

[16] "[I]n those cases where the nuisance is created by the defendant, no question of negligence or want of ordinary care is involved. As we explained in *Brown*, this rule applies in cases such as 'a tannery or a slaughter-house in the midst of a residential area, where the mere act of using the plant creates the nuisance.' *Id.*" *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 661 (2005), quoting from *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929). This quoted language from *Brown* appears to square with language in the comments to Restatement (Second) of Torts § 822, though the Restatement uses different terminology. Comment c to Restatement of Torts § 822 describes the bases for nuisance liability as follows:

> "An invasion of a person's interest in the private use and enjoyment of land by any type of liability-forming conduct is private nuisance. The invasion that subjects a person to liability may be either intentional or unintentional. A person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case, and he is subject to liability for an unintentional invasion when his conduct is negligent, reckless *or abnormally dangerous*. These are the types of conduct that are stated in this Chapter as subjecting a person to liability for invasions of interests in the private use and enjoyment of land." (emphasis added). Restatement (Second) of Torts § 822, Comment c (1979).

The Comment makes clear that an unintentional invasion is actionable not only if the defendant's conduct is negligent or reckless, but also if it is "abnormally dangerous." The language in *Milwaukee Metropolitan Sewerage District* referencing the holding in *Brown, supra,* that no question of negligence is involved where the defendant created the nuisance, appears to contemplate the same type of conduct which the Comment in the Restatement characterizes as "abnormally dangerous." *Brown* gives as an example a "tannery or slaughter-house in a residential area." Comment j to § 822 gives the following examples:

> "The last basis for liability for a private nuisance is the defendant's abnormally dangerous activity, enterprise or maintained condition, under the rules stated in Chapters 20 and 21. Thus a dog known by the owner to be vicious may create a private nuisance when it interferes with the use or enjoyment of the land next door, and the owner may be subject to strict liability because of his knowledge of the dog's propensities. So likewise, blasting activities or the storage of a large quantity of explosives in an inappropriate place may create a private nuisance because of the resulting interference with the use and enjoyment of land in the vicinity."

Thus, although there has been no reported Wisconsin decision explicitly involving nuisance liability predicated on abnormally dangerous behavior, the Committee believes the court's discussion of nuisances "created by" the defendant in *Milwaukee Metropolitan Sewerage District* is intended to describe what the Restatement regards as abnormally dangerous behavior. (For specific recognition that Wisconsin recognizes intentional conduct, negligence and abnormally dangerous activity as the three grounds for maintaining a nuisance claim, *see, Physicians Plus, supra* at 145-146, J. Bradley concurring.) The Committee also believes "abnormally dangerous activity" is a better description of the conduct which triggers strict liability than the reference to a nuisance "created" by the defendant for a number of reasons. First, "abnormally dangerous activity" is a more precise description the type of conduct necessary to trigger strict liability. Second, use of the term "created" to describe situations where strict liability applies appears to have its origins from a time when a nuisance itself was considered actionable without any underlying tortious conduct. The *Brown* decision includes the following language: "'Negligence of the

defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in *creating or maintaining* it, and the negligence of the defendant, unless in

exceptional cases, is not material.' *Lamming v. Galusha,* 135 N.Y. 239, 242, 31 N.E. 1024. *See, also,* Joyce,
Nuisances, 80." (emphasis added) *Brown, supra,* at 589. While *Milwaukee Metropolitan Sewerage District* quotes *Brown* for the proposition that negligence need not be proved where the defendant *created* a nuisance, *Brown* itself concludes that negligence need not be demonstrated where the defendant *maintained* a nuisance either. *Lamming*, the New York case cited for this proposition in *Brown*, was decided in 1892. *Lamming* itself quoted the language from *Congreve v. Smith,* 18 N. Y. 79, an 1858 New York appeals court decision. As noted in Restatement (Second) of Torts §822, Comment b:

> "In early tort law the rule of strict liability prevailed. An actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally. In course of time the law came to take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability. This change came later in the law of private nuisance than in other fields."

Whether the quoted language from *Brown* represents the current state of the law or is a remnant from the days when there was liability for a nuisance without tortious conduct is open to question. However, the relatively recent evolution of nuisance liability rules is another reason the Committee concludes that "abnormally dangerous activity" is a better description than a nuisance "created" by the defendant when referring to a situation that gives rise to strict liability.

[17] *Milwaukee Metropolitan Sewerage District, supra* at 661, quoting from *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929).

[18] Restatement (Second) of Torts § 822, Comment a (1979).

[19] *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929).

Anticipated Nuisance Claim. Under Wisconsin case law, "anticipated private nuisance" claims are recognized claims. Krueger v. AllEnergy Hixton, LLC., 384 Wis.2d 127, 132, 918 N.W. 2d 458 (2018). Such an action may be brought when the alleged anticipated nuisance "will necessarily result from the contemplated act or thing which it is [s]ought to enjoin." See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51 (1923). A claim for anticipated nuisance must include factual allegations that, if true, would support each of the following conclusions:

> the defendant's proposed conduct will 'necessarily' or 'certainly' create a nuisance; and
>
> the resulting nuisance will cause the claimant harm that is 'inevitable and undoubted.'" See Wergin, 179 Wis. At 606-07.

Although Kruger focuses on an anticipated private nuisance claim, the most pertinent Wisconsin case also contemplates anticipated public nuisance claims. See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51

(1923). While the court in Kruger used the term "anticipated" nuisance, synonymous terms include "threatened" nuisance, "prospective" nuisance, and "anticipatory" nuisance. See Wergin, 179 Wis at 606.

Filing a Written Notice of Injury. Each alleged nuisance causing action constitutes a separate "event" for the purposes of filing a written notice of injury. See The Yacht Club at Sister Bay Condominium Ass'n, Inc. v. Village of Sister Bay, 2019 WI 4, 922 N.W.2d 95, 101 (2019), reversing in part and remanding 378 Wis.2d 742, 905 N.W.2d 844 (Ct. App. 2017). Future nuisance actions are not barred if the written notice of injury pertaining to the new "event" giving rise to the claim is filed within 120 days after the happening of the event. Wis. Stat. § 893.80 (1d)(a).