1924 PRIVATE NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the private nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's conduct caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) engage in an abnormally dangerous activity?

ANSWER: _____
(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) abnormally dangerous activity a cause of the private nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: If you answered "Yes" to Question 4, then answer this question:

Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question:

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant's) abnormally dangerous activity and (plaintiff's) negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. *See*, JI 1920, note 16.

[2] Insert appropriate tense depending on the facts of the case.

[3] "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. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d (1979). "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . 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." *Id.*

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 caselaw 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 (1979). "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). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

[4] "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 (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

[5] The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. *Fortier v. Flambeau Plastics Co.,* 164 Wis.2d 639, 667 (Ct. App 1991).

Comment *l* to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

> *l. Function of court*. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous >is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." *Fortier v. Flambeau Plastics Co., supra,* at 668. While *Fortier* quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported Wisconsin decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

[6] This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because

where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[8] In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Dippel v. Sciano*, 37 Wis.2d 443, 461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in *Dippel* applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.