

1926 PRIVATE NUISANCE: INTENTIONAL CONDUCT¹

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) intentionally caused the private nuisance. A person's conduct caused the private nuisance if it was a substantial factor in producing the nuisance.

A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.⁵

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.⁶ An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if: (a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.⁷

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)?⁸

ANSWER: _____
(Yes/No)

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

Did (defendant) intentionally cause the private nuisance?

ANSWER: _____
(Yes/No)

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

Was (defendant's) conduct in causing the nuisance unreasonable?

ANSWER: _____
(Yes/No)

Question No. 5: 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.

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. "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. "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 Restatement (Second) of Torts §825.

⁶ "In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability." Restatement (Second) of Torts §821D, Comment d.

⁷ Restatement (Second) of Torts §826.

⁸ 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.