1928 PUBLIC NUISANCE: NEGLIGENT CONDUCT[1]

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

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[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 interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights 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.

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Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property.

[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a public nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the public nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's negligence caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's negligence or by the combined negligence of two or more people.][7]

VERDICT

Question No. 1: Did [Does] a public 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) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[8]

ANSWER: _________
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:
Was (defendant) negligent?

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ANSWER: _________
(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:
Was (defendant's) negligence a cause of the harm suffered by (plaintiff) as a result of the public nuisance?

ANSWER: _________
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][9]

Question No. 5: 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:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence 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: $_____________

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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] "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, 102. 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.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

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The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus*, *supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[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) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) 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." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. S*ee* Comments b and c to Restatement 2d Torts, §821C.

[5] This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 667 (2005). While this quoted language applies in the case of a private nuisance, the rule applies to public nuisances as well. "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.

[6] Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, *see, e.g.,* Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed *supra*, in *Brown* we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. *Brown*, 199 Wis. at 589-90. The Restatement (Second) of Torts § 824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in *Schiro*, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 669-670 (2005).

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The defendant is entitled to a reasonable time within which to remedy the interference after receiving notice of it. Restatement (Second) of Torts §839(c) and Comment *i*.

[7] This paragraph is taken from JI 1500 Cause, as part of the rule that "when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra,* at 668.

[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.

[9] "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. *See, e.g.,* Vogel, 201 Wis. 2d at 425; *Stunkel*, 229 Wis. 2d at 669-70." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 668(2005). In cases involving nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

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