1930 PUBLIC 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 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.

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 public nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's conduct 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 conduct or by the combined conduct of two or more people.][6]

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?[7]

ANSWER: _____

(Yes/No)

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

Did (defendant) engaged 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 public 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] "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.

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] 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 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.