

1932 PUBLIC NUISANCE: INTENTIONAL CONDUCT¹

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) intentionally caused the public nuisance. A person's conduct caused the public 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 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:

Did (defendant) intentionally cause the public 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 "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

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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).a" *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. See Comments b and c to Restatement 2d Torts, §821C.

⁵ Restatement (Second) of Torts §825.

⁶ The concept of unreasonableness described in the first element involves the unreasonableness of the interference with the use of a public place or the activities of an entire community and is an inherent part of the definition of a public nuisance itself. This fourth element requires the jury to find, in addition, that the

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particular actions of the defendant in creating the unreasonable interference were unreasonable themselves.

The standard in the instruction for evaluating the reasonableness of the defendant's conduct is taken from Restatement (Second) of Torts §826. Additional guidance in applying the standard can be found in Restatement (Second) of Torts §§827-831.

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.