

## Notes/Questions/Problems

### Nuisance

Two types of nuisance actions typically exist.

I. ***Public nuisance*** actions typically involve an action brought by the government in response to some activity or use of property by a landowner [D] that causes an injury to the public generally. Public nuisance actions have historically been criminal actions; however, today they are often civil actions. Generally, a private party can't bring a public nuisance action. [Remainder of the discussion will refer only to private nuisance actions].

II. ***Private nuisance*** actions allow an individual [P] to bring an action against another landowner [D] when the D engages in conduct that interferes with P's use and enjoyment of her land. The interference must be both substantial and unreasonable. The interfering activity can be an illegal activity or it can be a totally legal activity.

***Definition of Private Nuisance:*** A private nuisance is the use of defendant's land which results in an intangible invasion of plaintiff's land that substantially and unreasonably interferes with plaintiff's use and enjoyment of her land.

A physical invasion of property is a trespass.

An intangible invasion of property would include things such as sound, smell, dust, vibrations, pollution or light.

The "***substantial interference***" requirement serves to separate normal everyday noise, smells, etc. which a reasonable person of ordinary sensibilities would find acceptable from those which a reasonable person of ordinary sensibilities would find unacceptable because they are a substantial interference with their right to use and enjoy their

property. This requirement recognizes that in day-to-day society we all must accept a certain amount of noise and other intangible interferences. This requirement acts as a filter to block actions for typical intangible interferences which a reasonable person would find acceptable.

The "*unreasonable interference*" requirement is used by the court to engage in a balancing between the competing land uses of plaintiff and defendant, and the societal effects of allowing or disallowing the conduct at issue. This means that a substantial interference with the use and enjoyment of your property may or may not be a nuisance depending upon all the facts and surrounding circumstances.

(A) An injury must be shown for a private nuisance action to prevail. That injury can be an interference with use of the land itself (e.g. shaking from a subway running under your house); an interference with the landowner's comfort or health when she is using her land (e.g. noxious odors or release of carcinogenic gases that invade landowner's property); or, in some cases, an interference with the landowner's peace of mind (e.g. operating a low-level nuclear waste storage facility on adjacent land).

(B) *Ordinary person standard* – the interference with the use and enjoyment of the land must be sufficient to offend the average normal person with ordinary sensibilities.

(C) Fact dependent analysis – the determination of the existence of a nuisance cannot be determined in a vacuum. The surrounding facts and circumstances are always relevant. Therefore, it is possible for a land-use to be a nuisance in one area but not a nuisance in another area.

(D) Balance of competing land uses – the determination of whether some land use is a nuisance typically involves balancing the competing uses of the P and D. Courts often follow the Restatement (Second) of Torts with regard to determining whether a nuisance exists. The Restatement requires the court to balance the utility of the D's land use against its effect on the P. The Restatement lays out the following to

assist in the balancing – The existence of the following factors often supports finding a nuisance:

(1) The alleged nuisance is an activity that is not customary for or suited to the area.

(2) The activity causes observable effects that most of us would find disagreeable, without regard to whether the activity actually harms the plaintiff.

(3) The activity is carried on via methods that produce more disturbance than other available methods.

(4) The activity is of little value to the defendant.

(5) The activity is unimportant to society.

(6) The defendant's activity was begun after plaintiff began her present use of her land.

(E) *Remedy* – traditionally, once a continuing nuisance is found it will be enjoined by a court. Damages may also be available for past injury; the injunction will prevent future injury. A modern trend - at least in some jurisdictions - is to refrain from automatically issuing an injunction for a continuing nuisance. Pursuant to this trend some courts have awarded money damages to compensate for the ongoing nuisance in lieu of an injunction.

### III. Distinction between trespass and nuisance:

(A) *Trespass* involves a physical invasion of your land by a person or a tangible physical object. No injury or damage is required to establish a trespass. The mere invasion of your property interferes with your right to exclusive possession and use of your land and therefore such interference alone is actionable. Another way to look at this is to say the injury is the interference with the landowner's exclusive right to exclude others from her land.

(B) *Private nuisance* involves an invasion of your land by intangibles

**(e.g. noise, smell, vibrations) which substantially and unreasonably interferes with your ability to use and enjoy your land. Unlike trespass, not all actions that interfere with your use and enjoyment of your land are actionable as a nuisance. The determination of a nuisance involves a balancing among competing land uses. In a sense, nuisance law is an attempt by courts to find a way to accommodate competing land uses in an ever-changing society. Therefore, some interference with the use and enjoyment of your land may be legally permissible. This can be considered the cost of living in society with neighbors.**