

Special Tort Actions

SUMMARY

This chapter discusses the torts of nuisance, negligence per se, wrongful death, and wrongful life.

CHAPTER OUTLINE

I. NUISANCES

A. Nuisance defined:

1. Unreasonable or unlawful use of one's real property.
2. Such use injures someone or interferes with owner's use of his or her land.

B. Types of nuisance: Public, private, and mixed. Some nuisance situations can involve both public and private types and are sometimes called mixed nuisances.

II. PRIVATE NUISANCES

A. Occurs when tortfeasor uses his or her land in such a way as to unreasonably and substantially interfere with another person's use and enjoyment of his or her land.

B. Elements:

1. Using one's land so as to
2. Unreasonably and substantially interfere with
3. Another person's use and enjoyment of his or her land.

C. Parties involved:

1. Tortfeasor (defendant) is land user whose activities offend his or her neighbor(s).
2. Neighboring land user(s) (plaintiff(s) sue tortfeasor for private nuisance.

D. Unreasonable and substantial interference:

1. Defined in terms of offensiveness to the reasonable person.
2. Would reasonable person, with ordinary sensibilities, find tortfeasor's land use unreasonably offensive?
3. Community standard:
 - a. In private nuisance cases, reasonable person standard is normally defined by community standards.
 - b. How would people living in community in which alleged nuisance is taking place react to activity?

E. Use and enjoyment:

1. Term of art in nuisance law.
2. Includes injury to nuisance neighbors' pleasure in using their land.

III. EXAMPLES OF PRIVATE NUISANCES

A. Physical effects on land:

1. Ground vibrations, e.g., constant vibrations from manufacturing facility affecting neighbors (especially residential neighbors).
2. Pollution of water or soil, e.g., chemical plant discarding pollutants into ground or ponds, streams, underground well water supplies, etc.
3. Crop destruction, e.g., coal-burning electricity plant emitting coal dust in its smoke, which falls upon neighboring crops and hinders their growth.
4. Flooding, e.g., downstream landowner erects dam, causing flooding on upstream landowners' properties.
5. Excessive clutter, e.g., junk yard next door.
6. Unwanted excavations, e.g., strip-mining operation that leaves land barren and hole-ridden, next to landowner's woods.

B. Health hazards or offending sensibilities:

1. Sensibilities = physical senses (sight, hearing, smell, taste, touch).
2. Nuisances can offend people's sensibilities and create health hazards.
3. Noxious odors, e.g., trash dumps, livestock farms, chemical processing plants.
4. Smoke and dust, e.g., smoke emissions from factory into air, which neighbors are forced to breathe. Consider example of smokers/nonsmokers in public places.
5. Excessive noise and temperatures, e.g., factory noise that prevents neighbors from sleeping, or causes nervousness; factory excess heat that is carried by the air across neighbor's land.
6. Incessant telephone calling, e.g., creditors calling debtors late at night to intimidate them into paying bills.

C. Unwanted associations with neighboring uses: Neighbors may file nuisance lawsuits against adjacent prostitution house, X-rated movie theaters, adult video or bookstores, and liquor or gambling establishments.

COMING TO THE NUISANCE

- A. Defense that defendant uses to counter plaintiff's private nuisance claims.
- B. Definition: Plaintiff owned or used land in location in which alleged nuisance activity was already occurring. Thus, plaintiff "came to the nuisance" and cannot recover against defendant.
- C. Defense is similar to assumption of risk.

PUBLIC NUISANCES

- A. Land use which injures public at large rather than just a single individual.
- B. Public nuisance unreasonably interferes with public's enjoyment of legal rights common to public.
- C. Elements:
 - 1. Tortfeasor's use of land that
 - 2. Unreasonably and substantially interferes with public's use and enjoyment of legal rights common to public.
- D. Public at large = general public. Includes general population living in area affected by public nuisance, such as neighborhood, end of town, entire city, etc.
- E. Unreasonable and substantial interference. Same definition as used in private nuisance.
- F. Use and enjoyment of common legal rights:
 - 1. Tortfeasor's land use must interfere with public's common legal rights.
 - 2. Common legal rights = public's right to peaceably assemble in public places, right to use public streets and sidewalks without being subjected to offensive activities, or right to safe and health conditions in one's neighborhood.
- G. Government as plaintiff:
 - 1. Governmental entities file public nuisance lawsuits on behalf of citizens affected.
 - 2. Actions are filed usually through city or county prosecutors' offices, or state attorney general's offices, etc.
 - 3. Governments have constitutional, statutory, and/or common law authority to protect citizens against public nuisances under police power. Police power = governments' authority to protect public health, safety, welfare, or morals.
- H. Most public nuisances are defined by statutes or ordinances.

EXAMPLES OF PUBLIC NUISANCES

- A. Gambling.
- B. Prostitution.
- C. Distribution of sexually explicit material.
- D. Sale of alcohol.
- E. Allowing weeds or poisonous plants to grow on one's land.

- F. Failing to comply with health code provisions requiring one's land to be kept clean or vermin-free.
- G. Keeping unrestrained wild or vicious animals on one's property.

VII. MIXED NUISANCES

- A. Activities that constitute both public and private nuisances simultaneously.
- B. Rule of thumb: The greater the number of persons adversely affected by allegedly offensive land use, the more likely it will be considered a public, as well as private, nuisance.
- C. Adversely affected neighboring landowner brings private nuisance lawsuit, while government files public nuisance action.

VIII. NUISANCES PER SE

- A. Latin *per se* = "by itself."
- B. Activities are nuisances per se if they violate public nuisance statutes or ordinances.
- C. Violation of statute is prima facie evidence that public nuisance exists, and defendant is liable as a matter of law.

IX. COMING TO THE NUISANCE NO DEFENSE IN PUBLIC NUISANCE

Defense ineffective in public nuisance cases, because that defense focuses upon individual plaintiff coming to preexisting use; public nuisances affect general public who are entitled to live in areas without public nuisances.

X. REMEDIES FOR NUISANCES

- A. Equitable remedies:
 - 1. Not money damages.
 - 2. Court orders defendant to do (or not to do) something (mandamus orders; injunctions).
- B. Equitable nuisance remedies:
 - 1. Abatement
 - a. Court orders defendant to cease, or *abate*, nuisance activity.
 - b. Abatement is often permanent order, in the form of permanent injunction.
 - 2. Injunctions
 - a. Court orders defendant to cease doing nuisance activity.
 - b. Types of injunctions: Temporary and permanent:
 - (1) Temporary restraining orders (T.R.O.s): Court forbids defendant to engage in alleged nuisance activity from early point in lawsuit, usually until court can hold hearing to determine if nuisance has occurred and what relief would be appropriate. Often issued for 10-day periods, by statute or procedural rule.
 - (2) Permanent injunctions:
 - (a) Court orders defendant to permanently abate nuisance activity.

(b) Usually issued after trial on merits.

(c) If defendant violates order, court could hold defendant in contempt, further ordering monetary fines or imprisonment.

C. Money damages:

1. Alternative to equitable remedies, when nuisance activity cannot reasonably be abated.
2. E.g., extremely offensive odors created by privately owned water treatment plant. Public need for clean water precludes abatement as reasonable remedy, so neighbors are paid money damages as compensation for private nuisance.

XI. NEGLIGENCE PER SE

- A. Conduct which is automatically negligent as matter of law.
- B. Behavior is negligent "by itself" because it violates statute or ordinance.
- C. To meet burden of proof, plaintiff need only prove that defendant violated statute or ordinance. Defendant is then presumed negligent.
- D. Plaintiff must prove that he or she falls within class of persons protected by statute. E.g., customer becomes ill from eating spoiled food at restaurant, when spoilage occurred because of restaurant's violation of public health statutes. Plaintiff, as restaurant patron, was within class of persons protected by public health statutes, and so restaurant was negligent per se by violating the statutes.
- E. Defendant may disprove negligence presumption, perhaps through proof that defendant did not proximately cause plaintiff's injuries, or the like.
- F. Applicability of negligence defenses:
 1. Sometimes is defined by statutes or ordinances, but more commonly is defined by common law interpretations of statutes or ordinances.
 2. Often, defenses of contributory negligence, comparative negligence, or assumption of risk apply in negligence per se cases.
- G. Mislabelling of negligence per se as absolute liability:
 1. Courts sometimes confuse these concepts, but they are distinguishable.
 2. Under negligence per se, defendant is presumed to be negligent, but can disprove negligence to avoid liability. Under strict liability, defendant cannot escape liability in this way.

II. WRONGFUL DEATH STATUTES

- A. Statutes giving cause of action to surviving family members of deceased tort victim against tortfeasor whose negligence or intentional torts resulted

in victim's death.

B. Typical fact pattern:

1. Tortfeasor commits tort against victim.
2. Victim dies as result of tortfeasor's actions.
3. Victim's spouse and/or children sue tortfeasor for wrongfully causing victim's death.

C. Plaintiffs in wrongful death actions:

1. Surviving spouse or children of decedent. Could also be parents of deceased children or decedent's estate.
2. Some statutes also allow decedent's siblings or other relatives to file wrongful death actions.

D. Wrongful death damages:

1. Victim's lost lifetime earnings potential.
2. Loss of consortium = recovery for victim's family (usually spouse) for lost love and companionship of decedent.

E. Defenses: Defendant may use any defenses applicable to specific tort that produced victim's fatal injury.

XIII. WRONGFUL LIFE (PREGNANCY) ACTIONS

A. Lawsuits for wrongful birth of child.

B. Typical fact patterns:

1. Couple visits physician for vasectomy or tubal ligation to prevent future conceptions. Medical procedures fail and couple inadvertently conceive child. Parents sue physician in wrongful life.
2. Couple have child born with birth defects as result of mother's illness during pregnancy, when physician negligently advised couple that child would not be harmed by mother's illness.

C. Relatively new tort in American law, having arisen within past 25 years.

D. Plaintiff's damages.

1. Medical expenses incurred during pregnancy and delivery.
2. Sometimes, defendant is ordered to pay plaintiffs for cost of raising plaintiffs' child until age of majority.