Torts: The Nature of Nuisance

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TORTS—THE NATURE OF NUISANCE

The common law definition of a nuisance has been severely criticized in various legal periodicals. The proposed changes run the range of possibility, from minor modifications to a complete elimination of the concept. This criticism is not confined to the textwriters, an increasing number of courts are reflecting this criticism in their decisions. Since the law of nuisance is in a state of flux it may be worthwhile to trace the background, development and present trend of this segment of the law.

Blackstone defines a nuisance as "a species of real injuries to a man's lands and tenements which may be defined as anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another for the rule is, 'sic utere tuo, ut alienum non laedas.' The definition indicates the wide range of wrongs encompassed by a nuisance, and for this reason it does not admit of more definite definition.

The scope and nature of a nuisance can best be understood in the light of historical perspective. Since English law began its development in a landed society it was natural that its primary purpose was the protection of real property. Out of this need grew the basic common law action of assize of novel disseisin, the ancestor of the modern action of trespass. The assize of novel disseisin proved inadequate because, like trespass today, it was limited to direct interferences with possession, but it provided no protection where there was no act done but only a culpable omission, or where the act was not immediately injurious but only by consequence or collaterally. As early as the twelfth century the action originated to secure such protection crystallized into the assize of nuisance. The assize of nuisance was complementary to the assize of novel disseisin. The assize of nuisance provided redress where there was a continuing, indirect injury to the land or interference with its use and enjoyment arising from things done or not done on the land of the defendant. In short, the assize of novel disseisin was directed to secure an undisturbed possession, the assize of nuisance to secure its free enjoyment. Early in the fifteenth century the assize of nuisance was replaced by an action on the case for a nuisance, which became the sole common law remedy. This was a substitution of remedies, and did not change the scope of liability.

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1 Black. Com. 216-217
2 Black. Com. 123.
3 Black. Com. 166; Restatement of Torts, Scope and Introductory Note to Chpt. 40; McRae, "The Development of Nuisance in the Early Common Law," 1 U. of Fla. L. Rev. 27 (1948).
4 Ibid., 1 U. of Fla. L. Rev. 27
Before leaving the historical it may be well to consider the fundamental nature of civil liability under the common law. English law imposed liability on the basis of causal responsibility, and not moral responsibility. Fault was not of the essence of a legal wrong. The rule of strict or absolute liability prevailed. Fault was an element of damages but not of liability; liability existed without fault but the extent of liability was determined by the fault involved. This was based on the principle that damages were compensatory and not punitive.5

The preoccupation of the early common law with the law relating to real property so impressed this principle on this segment of the law that it remains intact today. It is to be noted that a nuisance is a wrong to realty.

It was only in the sixteenth century and with the development of the law of personal torts that the idea that there should be no liability without fault took hold.7 This idea was treated for what it was, an innovation. The rule of limited liability has been largely limited to the field of personal torts, and it remains an exception to the general rule of strict liability. In fact the trend of the law as a whole is to further restrict the law of limited liability and to "revert to ancient conceptions."8

Historically, therefore, the law of nuisance developed to complement the action of trespass. While trespass provided security against direct invasions of possession, nuisance provided protection against indirect injuries to land or its use and enjoyment. Further, the protection afforded was absolute.

Until recently the common law concept of a nuisance was virtually unchallenged. Within the last 25 years an increasing number of courts have broken from the common law definition. Since the breach between the traditional and modern views is fundamental a more detailed consideration of the nature of a nuisance is necessary.

The traditional view, and the one followed in Wisconsin, received its classic expression in *Bowman vs. Humphery.*9 Justice Weaver writing the opinion. The matter is succinctly stated as follows:

"A nuisance is a condition, and not an act or failure to act on the part of the person responsible for the condition. If the

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6 Dexter v. Cole, 6 Wis. 319 (1858).
wrongful condition exists, and the person charged therewith is responsible for its existence, he is liable for the resulting damages."

The presence or absence of a nuisance therefore is not measured by its cause but by its effect. It is a condition and not a type of conduct. A nuisance is an interference with the use and enjoyment of another's land, if there is substantial interference an actionable nuisance results without regard to the type of conduct causing the annoyance. The act or omission is relevant only insofar as it tends to fix responsibility for the condition complained of.10

The elements of this condition may be catalogued as follows

First, the interference must be substantial. A nuisance to be actionable must materially impair the comfort and enjoyment of individuals or the use and value of the property. The standard used is substantial annoyance to persons of normal and average sensibilities, and the standard does not vary because the individual is unusually sensitive or insensitive.11 Further, a material annoyance is an unreasonable one, and what is unreasonable varies with each set of circumstances. For example, smoke and noise that would be an unquestionable nuisance in a residential area might not be a nuisance in an industrial area. Substantial annoyance must be defined in terms of location.12

Second, the interference must be physical or threaten physical injury. A violation of aesthetic values alone, e.g., by building an unsightly fence, does not result in a nuisance. The injury must be tangible or the discomfort perceptible,13 and the nuisance must be the proximate cause of the injury.14

Third, a nuisance is an injury to land, therefore the action must be brought ordinarily by the person in possession.15

Fourth, since the wrong is indirect, the injury must be caused by things done on the land of the defendant and not on the land of the plaintiff.16

Fifth, while a nuisance need not be continuous or even periodical yet it involves the idea of continuity or recurrence. A temporary and

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9 53 Iowa 281, 5 N.W 123, 6 L. R. A. (N. S.) 1111 (1906).
10 Penny v. Allen, 56 Wis. 502, 14 N.W 609 (1883).
11 Stadler v. Grieben, 61 Wis. 500, 21 N.W 629 (1884).
12 Cunningham v. Miller, 178 Wis. 22, 189 N.W 531 (1922).
13 Hasslinger v. Village of Hartland, 234 Wis. 201, 290 N.W 647 (1940).
14 Metzger v. Hochren, 107 Wis. 267, 83 N.W 308 (1900).
16 Greene v. Nunnemacher, 36 Wis. 50 (1874).
17 This is fundamental to a nuisance. See note 7.
not to be repeated annoyance is generally not considered a nuisance, although there is some authority to the contrary. 18

Sixth, the defendant must be causally responsible for the condition. For this reason natural conditions 19 and conditions that are the result of "misfortune or inevitable accident" are not nuisances regardless of the annoyance they cause. 20 The condition must be directly attributable to the acts of the defendant, and such human agency can be established by acts of omission or commission, 21 either in creating a nuisance or maintaining a nuisance created by another. 22 Once it is shown however that the condition was occasioned or contributed to by the defendant, liability follows and the nature of the defendant's act is immaterial. 23

This returns us to the distinction that a nuisance is a condition and not an act. The results of this distinction are far reaching. A current question, on which courts are irreconcilably divided, is whether contributory negligence is a defense where the nuisance is the result of the negligent conduct of the defendant. Courts that follow the common law hold that the doctrine of contributory negligence has no proper application in an action on a nuisance. A nuisance is an annoyance caused by the act of the defendant. It is true that the act can be intentional or unintentional, deliberate or negligent. But liability is not based on the type of the defendant's act, but whether the defendant is responsible for the annoyance. It is the annoyance that furnishes the ground of the action and not the manner by which such annoyance is accomplished. The court need only determine if the act causing the nuisance is the defendant's, it does not look beyond into the nature of the act. The question of negligence therefore is not involved in a nuisance since a negligent act is more than just an act, it designates a particular type of act. 24 The leading Wisconsin case on the subject 25 goes so far as to make it prejudicial error to admit evidence as to the degree of care used by the defendant, since this misleads the jury into believing that negligence is an element of the wrong. "Since liability does not turn upon the question of the defendant's negligence, there can be no such thing as contributory negligence." 26 Under the traditional view therefore contributory negligence serves as no defense.

19 Mohr v. Gault, 10 Wis. 531 (1860).
20 Cobb v. Smith, 38 Wis. 21, (1875).
21 Supra, note 15.
22 Slight v. Gutzlaff, 35 Wis. 675 (1874).
23 Supra, note 10.
24 Supra, note 15.
25 Supra, note 10.
26 Supra, note 9.
The completeness with which this conclusion was accepted at the turn of the century is indicated by Bohan vs. Port Jervis Gas Light Co.,\(^\text{27}\) where it is stated that, "It may be confidently asserted that no authority can be produced holding that negligence is essential to establish a cause of action for nuisance."

Such sweeping statements could not long be made. In 1928 the common law concept of nuisance was repudiated in the leading case of McFarlane v. City of Niagara Falls,\(^\text{28}\) Chief Justice Cardozo writing the opinion. The plaintiff tripped and fell on a fan like projection in the surface of a road, and sued the defendant for maintaining a nuisance. The evidence established that the plaintiff lived in the neighborhood and was aware of the projection. The trial court charged that any contributory negligence on the part of the plaintiff was immaterial. Judgment for the plaintiff was reversed on appeal.

The opinion does not treat a nuisance as a distinct wrong, but rather as a generic term descriptive of a type of damage which encompasses a whole field of tort liability, with the specific torts being alike only in that they constitute invasions of the same right or interest.\(^\text{29}\) The specific torts included in a nuisance are classified according to the type of conduct to which they owe their origin, with liability resting on the rules of law applicable to each type of conduct.

Under the early common law concepts of tort liability a person acted at his peril.\(^\text{30}\) It followed that if it could merely be proved that the defendant's act had created the annoyance he was liable. Under the rule of strict liability a classification of nuisance according to the type of conduct causing the annoyance would be but a mental nicety without practical effect. Therefore none was made. But the development of the law has been away from the concept of strict liability. The law now looks at how the injury was accomplished, and not just at the harm done. While the older theory has survived longer in possessory actions such as trespass and nuisance,\(^\text{31}\) reason demands that they also come under the general rule that liability rests on the type of conduct causing the injury. Nuisances are therefore classified according to the nature of the act causing the annoyance, and liability is determined by the law generally applicable to each type of conduct. Therefore, when

\(^{27}\) 122 N.Y. 18, 25 N.E. 246, 9 L.R.A. 711 (1890).

\(^{28}\) 247 N.Y. 340, 160 N.E. 391 (1928).

\(^{29}\) See also RESTATEMENT, TORTS, Scope and Introductory Note to Chpt. 40, esp. 220-222.

\(^{30}\) Supra, page 2.

\(^{31}\) PROSSER, TORTS, 76-78 (1941).
a nuisance has its origin in the negligent act of the defendant the law of negligence applies, thus making contributory negligence a defense.

In the language of Cardozo

"There has been forgetfulness at times that the forms of action have been abolished, and that liability is dependent upon the facts and not upon the name. We hold that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance. Very often the sufferer is at liberty to give to his complaint either one label or the other. It would be intolerable if the choice of a name were to condition liability. There is one wrong, and one only, whatever the plaintiff may call it."

Cardozo adopted the reasoning of the Restatement,32a that tort liability is fundamentally based on three types of conduct: intentional, negligent and ultrahazardous, and that the rule of strict liability attaches only to intentional and ultrahazardous conduct. Where the nuisance arises from intentional or ultrahazardous conduct negligence is not one of its essential elements. In such circumstances the duty to desist from injurious conduct is absolute, the only fault that bars recovery being fault so extreme as to be equivalent to an invitation of injury. This is dicta for the case was expressly restricted to the specific question involved.

In other situations, as the one considered by the court, which are lawful in their origin but are turned into nuisance by negligence in maintenance, negligence must be pleaded and proved by the plaintiff, and all the incidents of the law of negligence attach including contributory negligence.

In Hoffman v. Bristol32 the Connecticut court decided the question left open by Cardozo, holding that contributory negligence is not a defense to an action for damages resulting from an "absolute nuisance," i.e., one arising from ultrahazardous or intentional conduct. This is the logical conclusion of the McFarlane case, and is in accord with the Restatement.

In short, under the New York rule a nuisance is a type of damages with liability dependent on the nature of the act causing the injury. A common law nuisance was a condition grounded on recurrent injury to realty without regard to care or fault, under the McFarlane case a nuisance is a type of injury with liability predicated on the degree of care exercised. The term is retained but an essential change is worked

32a RESTATEMENT, TORTS, sec. 6.
32 113 Conn. 386, 155 Atl. 499 (1931).
in its definition. A wrong to realty is reduced to the level of a personal tort, and a nuisance, in effect, is eliminated as an independent concept in the law.

The Wisconsin court has refused to eradicate a concept as old as English law itself. The recent case of Dolata v. Berthlet Fuel and Supply Co.\(^\text{33}\) reaffirmed \(\text{Pennoyer v. Allen},^{\text{34}}\) the leading Wisconsin case giving expression to the common law definition of a nuisance.

The refusal of the Wisconsin court to reduce a nuisance to an act is perhaps more graphically indicated in a series of recent cases where the fact situations are much like that in the \(\text{McFarlane}\) case. Under Wisconsin law,

"A municipal corporation has no more right than a natural person to create and maintain a nuisance, and is liable for injuries occasioned thereby in any case where a private person would be liable under like circumstances."\(^{\text{35}}\)

But the common law rule that a city is not liable for negligence in performing governmental functions is also Wisconsin law.\(^{\text{36}}\) The question then arises as to the liability of a city for maintaining a nuisance which has its origin in negligence.

The court has held that while the city sustains no liability for the negligence, it is not thereby exempted from liability for the maintenance of the nuisance.\(^{\text{37}}\) Therefore, where the complaint is drafted on the theory of negligence as distinguished from nuisance, it will be dismissed.\(^{\text{38}}\) But when the cause of action is based on nuisance, the plaintiff is entitled to a recovery.\(^{\text{39}}\) Under Wisconsin law, therefore, the nature of the act causing the nuisance is immaterial. Wisconsin continues to treat a nuisance as a condition rather than an act.

By way of conclusion it may be stated that at common law, and in Wisconsin today, a nuisance was a condition and not an act, and the person causally responsible for the annoyance was absolutely liable. Under the New York rule a nuisance is an act, with liability determined by the law of personal torts relative to such act. At common law the act was de-emphasized to the point of complete immateriality under the New York rule it is made controlling.

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\(^{\text{33}}\) 254 Wis. 194, 36 N.W (2d) 97 (1949).

\(^{\text{34}}\) Supra, note 10.

\(^{\text{35}}\) Harper v. City of Milwaukee, 30 Wis. 365 (1872).

\(^{\text{36}}\) Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W (2d) 736 (1946).

\(^{\text{37}}\) Hasslinger v. Village of Hartland, 234 Wis. 201 (208), 290 N.W 647 (1940).

\(^{\text{38}}\) Skris v. City of Port Washington, 233 Wis. 551, 236 N.W 579 (1936).

\(^{\text{39}}\) Holl v. City of Merrill, and Lincoln County, 251 Wis. 20, 28 N.W (2d) 363 (1936).