**13.08 PRIVATE NUISANCE**

The plaintiff claims that the defendant has created a nuisance with respect to the plaintiff's use or enjoyment of plaintiff's property.

To determine whether the defendant has created a nuisance, you must decide whether it is more likely true than not true that:

(1) the defendant interfered with plaintiff's use or enjoyment of property;

(2) the interference was [intentional and unreasonable] [negligent] [reckless]; and

(3) the interference was a legal cause of significant harm to the plaintiff.

If you decide that all three of these things are more likely true than not true, then you must decide in favor of the plaintiff on this claim.

Otherwise, you must decide in favor of the defendant.

I will define legal cause for you in a moment.

[The inference was intentional if the defendant acted for the purpose of causing it, or knew it was resulting or substantially certain to result from [his] [her] conduct.

The interference was unreasonable if the seriousness of the harm to the plaintiff outweighs the usefulness of the defendant's conduct.]

[The defendant's conduct was [negligent if the interference occurred because the defendant failed to exercise reasonable care. Reasonable care is the care that a reasonably prudent person would have exercised under similar circumstances.] [reckless if the defendant intentionally acted or failed to act under circumstances where the defendant knew or a reasonable person would know that the act or failure to act created an extreme risk that the interference would occur.]]

A significant harm is a harm that a reasonable person would regard as important and involving more than slight inconvenience or petty annoyance. It must also be 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.

Use Note

This instruction is to be used when private nuisance is alleged and denied. Instruction 13.09 should be given when private damage from a public nuisance is claimed.

The Restatement lists factors to be considered in determining the gravity of the harm to the plaintiff and the utility of the defendant's conduct. Counsel should consider listing these factors in the instruction to give additional guidance to the jury.

According to the Restatement, the following factors are important in determining the gravity of the plaintiff's harm:

(a) the extent of the harm involved;

(b) the character of the harm involved;

(c) the social value that the law attached to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment to the character of the locality; and

(e) the burden on the person harmed of avoiding the harm.

Restatement (Second) of Torts § 826 (1979). The following factors are important in determining the utility of the defendant's conduct:

(a) the social value that the law attaches to the primary purpose of the conduct;

(b) the suitability of the conduct to the character of the locality;

(c) The impracticability of preventing or avoiding the invasion.

Restatement (Second) of Torts § 828 (1979).

This instruction should also be given for an allegation that the interference was the result of an abnormally dangerous activity. Whether an activity is abnormally dangerous is to be determined by the court based on the following factors:

(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.

Restatement (Second) of Torts § 520 (1965). In a case in which the court determines that the defendant was engaged in abnormally dangerous activity, the second element of this instruction must be modified or eliminated.

Comment

AS 09.45.230 allows a "person to bring a civil action to enjoin or abate a private nuisance" and to receive damages. Injunction and abatement are traditionally equity matters for the court to decide. It is only when damages are claimed that the case goes to the jury.

The private nuisance statute and Alaska cases are silent as to what interest a plaintiff must have in property in order to sue for loss of its use or enjoyment. At common law, there is liability only to those who have property rights and privileges with respect to the use and enjoyment of the land affected, including:

(a) possessors of the land;

(b) owners of easements and profits in the land, and

(c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment.

Restatement (Second) of Torts § 821E (1979).

AS 09.45.255 defines nuisance as ". . . a substantial and unreasonable interference with the use or enjoyment of real property, including water." The statute does not give any guidance as to what constitutes substantial or unreasonable interference. Therefore, this instruction follows the approach taken by the Restatement.

According to the Restatement, whether an interference was unreasonable is determined by use of a balancing test: if the gravity of the harm outweighs the utility of the conduct, the invasion is unreasonable. Restatement (Second) of Torts § 826 (1979).

The Restatement requires "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) of Torts § 821F (1979).

The Restatement describes "significant" as ". . . harm of importance, involving more than slight inconvenience or petty annoyance." Restatement (Second) of Torts § 821F, Comment c (1979). There must be "a real and appreciable invasion of the plaintiff's interests . . . ." Restatement (Second) of Torts § 821F, Comment c (1979).

Private nuisance is distinguished from public nuisance in that a public nuisance plaintiff must show: 1) that the defendant's act would be injurious to those who came in contact with it in the exercise of a common or public right, Maier v. Ketchikan, 403 P.2d 34, 38 (Alaska 1965); and 2) that the ". . . injury suffered was different in kind and not in degree from that sustained by the general public . . . ." Snyder v. Kelter, 4 Alaska 447 (Alaska 1912).