

THE CONCEPT OF NUISANCE

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INTRODUCTION

The word nuisance is derived from a French word “nuire” which means “to hurt or annoy”.

According to Blackstone, nuisance is ‘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’. The definition itself covers the variety of wrongs occurring under nuisance.

Under the common law, land owners or lease holders etc who possess the real property have a right to enjoy their property to the fullest. Though this does not include those people who have no interest in the property of the owner or who is a visitor to such property. If an individual or a neighbor interferes with the quiet enjoyment of the land by owner, either by making sound or pollution or any other type of interference, then the owner of such property who has been affected by such interference, have the right to claim a remedy under the law of nuisance.

In legal terms, the concept of nuisance is used in three ways:-

- Any activity that affect others. For example – a smoking chimney or an indecent conduct.
- Activities like making loud noises which effects the peaceful enjoyment of the land by an individual.
- A legal liability arising out of the combination of the above two points.

In *Bowman vs Humphery*, Justice Weaver explained the meaning of nuisance as :-

“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 wrongful condition exists and the person charged therewith is responsible for its existence, he is liable for the resulting damages.”

So, the existence of nuisance in a situation is not measured by its effect but by the condition which exists at that time. Generally, nuisance refers to the interference with the enjoyment of the land by another but where a substantial interference occurs, an action can be taken without considering what caused the annoyance.

According to Winfield, the term nuisance means, “ an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it.”

Further in terms of the acts which can be called as nuisance are – noise, vibrations, heat, smoke, smell, fumes, water, gas, electricity, excavation or disease producing germs.

The concept of nuisance should be distinguished from Trespass, Negligence and Rule of Rylands v Fletcher.

A) Generally, trespass consists of:

- i. a direct physical interference
- ii. with the plaintiff’s possession of land
- iii. through some materials or tangible object

Main points of distinction between nuisance and trespass are:-

- a) If there is direct interference, it amounts to trespass. For example – when a person plants a tree on another’s land, it is trespass.
Where it is consequential, it amounts to nuisance. For example – when a person plants a tree on his own land but the roots of the tree extends to the land of another, it is nuisance.
- b) In trespass, there is interference with the person possession of land.
In nuisance, there is interference with the persons use or enjoyment of land.
- c) In trespass, interference is always caused by a tangible object or by some material.
In nuisance, interference is always committed through intangible objects like vibrations, gas, noise, smell, electricity or smoke.

- d) Trespass is actionable per se
Nuisance, a special damage has to be proved.

B) Nuisance and Negligence

Between nuisance and negligence, overlapping does exist, as an act of negligence also gives rise to the nuisance. In this case, there was escape of water from defendant's property, which resulted in damage to the plaintiff's property by giving rise to a cause of action under negligence or nuisance. Although, negligence is not a prerequisite in an action for nuisance but we can choose any one among them.

In another case, D was doing some construction work nearby P's clinic. The work consisted of excavation and piling job. The wall of P due to this act got cracked and tilted. D argued that he took all precautions required by him to be taken. Court allowed damages to P by accepting his claim. At the end, D in his appeal contented that the main issue in this case was of negligence and as nuisance was not there, the appeal should be allowed.

The Supreme Court observed that negligence is not a prerequisite to the nuisance. The main thing which is necessary here is the proof of special damage caused to P by the act of D through his land. The appeal was dismissed as the cause of action which arose in this case was based on the natural right of support, which was same as making a claim under the law of nuisance.

C) Nuisance and the Rule of Rylands V Fletcher

The Rule of Rylands V Fletcher puts liability when something which can cause damage by escaping from D's land to P's land. This might create a right under the law of nuisance, which is not the case.

The main difference between the two is, in Nuisance there exist continuous interference but in case of Rule of Rylands V Fletcher, a single act of interference is sufficient to make a claim fall into it. The Rule of Rylands V Fletcher comes into picture where there has been some special use of land which created danger to the land of another. Although it does not include causing damage to the property of adjoining owners by ordinary use of the land.

Historically speaking, the concept of nuisance under English law was existing since the time of Henry II. The term nuisance is derived from a Latin term called ‘nocumentum’ meaning infringement of easement. In the beginning, there existed four types of remedies for an offence of nuisance. First was, the assize of nuisance where defendant’s actions interfered with the claimant. Second was, the action where the land in question was alienated, Third was, the writ of trespass and Fourth was the action on the case for nuisance which was the main remedy because it was faster than the other actions.

During 17th century a new perspective was emerged regarding the protection for the enjoyment of the claimant’s land, which imposed a duty on the person who has committed nuisance to prevent it in whatever way possible.

By the 19th century and the effect caused by industrial revolution, the law regarding nuisance was changed drastically with different standards applying to companies and individuals. Due to different judicial philosophers, this decision was varying in many ways. For example - In *St. Helen’s Smelting Co V Tipping* - many judges were clear of the view that they were affected by the sudden change in the laws of nuisance. Though A.V. Dicey and Adam Smith was in favour of the philosophy of *laissez faire*.

During 20th century, it became difficult to administer the law of nuisance, which resulted in land use planning i.e. zoning. This describes what activities are allowed in a given location. For Example – where a factory operates in an industrial area, then the people living in the neighbouring industrial zone cannot make a claim under the law of nuisance.

Environmental nuisance – The term environmental nuisance in the field of environmental science, includes noise and light pollution. Though there are some exceptions to this definition which does not mean environmental nuisance in legal matters. For example – excess of insects’ population can be called as ‘nuisance population’ in an ecological way.

Generally, to constitute a nuisance, the complaint regarding nuisance should be substantial, unreasonable and intentional under the circumstances. The courts itself has created several tests in determining the reasonableness of an interference. While deciding a case, the trial court should keep in mind the conduct of reasonableness and balance these factors in respect of harm caused and the nature of the effected neighbor.

In *Macdonald V. Perry* – A serious nuisance in one area due to density of population can be called in another area and under different circumstances as proper and unobjectionable. The thing which amounts to nuisance by causing inconvenience in the lawful use of a person's property depends upon the circumstances and cannot be clearly defined.

ESSENTIALS TO CONSTITUTE NUISANCE

The presence of nuisance in each case depends upon the facts and circumstances of it. So, there is no specific rule which determines the presence of nuisance in a given situation.

Under the common law, the essentials which constitute nuisance are:-

- That a defendant committed an activity or action
- That in furtherance of that action, an injury is caused to the interest of the plaintiff.

Generally, following are the elements which should be established to constitute nuisance:-

- Unreasonableness caused by the defendant to another;
- The continuance of acts of nuisance for an unreasonable period;
- Proximate relation or connection between the defendant and nuisance complained of; and
- Existence of damage or injury.

Normally, the question regarding the presence of nuisance in a given situation, that whether it has caused damage or not, depends upon the jury. To make the defendant liable for his action under the law of nuisance, the plaintiff must prove that the conduct of the defendant was unreasonable. So, the onus to prove the guilt on the part of the defendant depends upon the plaintiff.

The action of nuisance also depends upon the continuity of the action in a substantial period of time. But the continuity does not mean that such an act should be habitual. A single act which produces continuing result from an act of nuisance, can also fall under nuisance. Generally, a nuisance cannot be established unless there is no harm or injury is caused from the act. Although, the courts have different views regarding the elements which constitute harm or

injury. In one view, to obtain the claim for damages, there should be interference. In other view, damage does not constitute an essential element of nuisance. So, the concept of nuisance should be read or viewed as a disturbance of some right or interest in someone's land which might not involve a physical invasion on the property of the plaintiff.

So, the elements of nuisance can be summed up as follows:-

1 – The interference caused by a person should be substantial. To bring an action under the law of nuisance, there should be interference with the enjoyment or use of the land by the plaintiff. An annoyance is unreasonable where it is caused by a material and to determine what is unreasonable depends upon the circumstances of each case. For example – smoke and noise which are clearly considered as a nuisance in residential area might not be considered as a nuisance in industrial area. Substantial annoyance should be defined in respect of location.

2 – There should be a physical injury or some physical interference. Violation of principle values alone would not amount to nuisance. The injury caused should be tangible or a discomfort caused to the plaintiff which is noticeable. The nuisance should also be proximate result of the injury.

3 – The action under the law of nuisance should always be brought by the person who is in possession of the land where injury is caused.

4 – The injury caused under the law of nuisance should have been caused by the acts of the defendant.

5 – One of the most essential element of the nuisance is that it must involve the idea of continuity or recurrence. A temporary annoyance can never be considered as nuisance.

6 – Lastly, the defendant should owe the responsibility of the act or injury caused. It is because of this reason, natural conditions or inevitable accidents are not considered as nuisance even after the amount of annoyance they cause. The condition or circumstance should directly correspond to the acts of the defendant. After it is proved that such circumstance was caused by the acts of the defendant, liability follows the defendant irrespective of the nature of his acts.

CLASSIFICATION OF NUISANCE

The concept of Nuisance, broadly talks about two types of nuisance:-

A) Public Nuisance

B) Private Nuisance

The detailed explanation regarding the above mentioned types can be understood as follows:

A) Public Nuisance

Definition

The meaning of public nuisance under the traditional view can be defined as, “ an act committed by a person which is not warranted by any law or where he refuses to obey a legal duty imposed upon him, where the effect of such an act will amount to endanger the life, health or property of the public, the person committing such an act will be considered guilty of public nuisance (also called common nuisance).

The examples regarding public nuisance can be mentioned as follows:-

- i) Causing obstruction in highway.
- ii) Causing blast in the close built-up areas.
- iii) By letting a land to be used as a dump, which results in creating a dangerous environment.
- iv) Making fake emergency calls.
- v) To obtain popularity by hanging on bridges.
- vi) Participating in drug or gang activities in urban areas.
- vii) Keeping pumas in domestic areas.

The legal effect of public nuisance can be of three types:

Firstly, any person can sue under the law of tort where he or she has been affected in a level of degree different from the general or local public.

Secondly, where the person who is responsible for such a public nuisance, had knowledge about the effects of such public nuisance, he or she will be punishable for a criminal offence.

Thirdly, an injunction can be issued by the attorney general or the local authority under whose jurisdiction such case falls.

The concept of public nuisance has been extensively criticized by J R Spencer. In his first argument, he contended that this offence of public nuisance is very much wide, which makes it almost impossible to fall under the requirements of a criminal offence. Secondly, he contended that maximum number of public nuisance have now been covered under specialized statutory offences. Lastly, he contended that the offense should be abolished because this offense does not create a physical injury to the public which can be called as an offense.

CURRENT PRACTICE

At present, the concept of public nuisance can be divided into two types:-

- 1) Environmental Nuisance: it includes harmful substances or objects and obstructing the highway.
- 2) Behavioural Nuisance: it includes behaviours which are considered offensive to the public

Though there does exist overlapping between the two types. For example – a party full of noise and dealing in drugs in public, both affect the principles of an area and are illegal per se.

A detailed explanation of the above two types can be discussed as follows:-

- 1) Environmental nuisance – This type of nuisance is dealt by the local authorities through the help of statutory powers. Such powers include licensing schemes or enforcement notices. The strategy which is appointed by the local authorities in dealing with such offence is by discussing the problem with the person responsible for such offense before issuing enforcement notice.

This view is based on the strategy appointed by the local authorities regarding the landlord and consumer product safety cases, which is called compliance strategy. Local authorities with the help of such strategies applies a variety of measures which consists of voluntary or informal approach and prosecution measure as a last resort. All these measures are applied with great discretion by keeping in mind the degree of risk involved and level of fault. Local authorities also have the power in matters of public nuisance to go beyond the field of environmental regulation.

For example – A licensing authority under section 4(2)(c) the Licensing Authority Act 2003 is required to carry out its functions by keeping in mind the prevention of public nuisance.

Other enforcement measures adopted by the local authorities includes an injunction which is brought by the person who got effected or by the Attorney General. The Attorney General executes the proceedings by allowing the effected person or the local authority to use his or her name on their behalf.

The local authorities under Section 222 of the Local Government Act 1972 have the power to execute civil and criminal proceedings in their own name, although the section does not specifically defines whether in matters of public nuisance or else. By this power, the local authorities exercise it against the matters of public nuisance like granting injunctions. Although this measure is very rarely appointed by the local authorities. Such power is exercised by them only in matters where an individual has been continuously prosecuted under noise nuisance but after that also he or she continues committing it. In other words, the offence of public nuisance is used by local authorities in cases where there exists some kind of overlapping between environmental and behavioral types of nuisance.

- 2) Behavioural Nuisance - This kind of nuisance is generally dealt by the police authorities and the crown prosecution service in the name of common law offence. These kind of

prosecutions in today's world are frequent, although the offense of public nuisance is often coupled with statutory offences.

Following are the examples of the public nuisance which are covered by the Crown Prosecution Service:-

- 1) For political protest, climbing on cranes
- 2) Woman harassment, exposure in public
- 3) Illegal behaviours regarding drugs.
- 4) Making fake calls to the police regarding false hoaxes.

ALTERNATIVES OF PUBLIC NUISANCE

By looking at the broader view of the concept of public nuisance, it should be noted that most of instances of public nuisance fall under the law of other offences or statutory provisions. Under the following heads, we discuss the offences and statutory provisions with which the concept of public nuisance overlaps.

- 1) Environmental Nuisance :- under the Environment Protection Act,1990 following are the matters which overlaps with public nuisance
 - By way of authorizations, notices of enforcement or prohibition notices, controlling the pollution.
 - A system of licensing for the disposal of waste.
 - Identifying a contaminated land with the help of a system, through notices or penalties for contravention.
 - Lastly, provisions regarding litter or radioactive substances.
- 2) Statutory Nuisance – matters which include statutory offences are :-
 - Any area in a state which is harmful to the health of an individual.
 - Any kind of Smoke emitted from a place which can affect the health of other.

- Harmful gases emitted from a premises of a state which is prejudicial to the health of another.
- Any kind of smell or dust arising from an industrial area which can be harmful to the health of another.
- Any animal kept in any area of a state which can affect the health of another.
- Any type of insect arising from the premises of any trade, industry or business which can effect or can be harmful to the health of any individual
- Any type of artificial light which arises from an area which can create nuisance or can be harmful to the interest of an individual
- Any type of noise arising from an area causing nuisance or effecting the health of an individual
- Anything which is declared by any law as a kind of nuisance or harmful to the health of an individual.

Generally, while dealing with the cases under statutory nuisance the procedure which is adopted by the local authorities includes giving an abatement notice, which it is required to submit immediately after hearing the offense of nuisance to the person who has committed it. A period of seven days is also given to the person who has committed nuisance, to deal with the problem. An individual can himself approach the court of magistrate for an abatement order. Once abatement order is issued and the party to whom the order is made, fails to comply with it, then he/she will be called as offender. Although, statutory nuisance is not considered as an offence.

Section 235 of the Local Government Act 1972 talks about the other procedure which the local authorities adopt to deal with then statutory nuisance. For example – making byelaws. Under this heading, the type of nuisances which are covered includes offensive behavior, inconvenient behavior and environmental nuisances. Currently, breaking a byelaw is an offense to be prosecuted in the court. To enforce on the spot fines and also to make the mechanism more efficient, the local government and the department of communities is at present focusing on making a new procedure which can allow the local authorities to make byelaws in respect of certain subjects without looking for permission by the Secretary of State.

Section 222 of the Local Government Act 1972 refers to the powers which are granted to local authorities, like issuing injunction orders in respect of offences which effect the local residents and also against the wrongs which may result in nuisance. For example – Trading on Sunday, breaking the planning law, breaking the orders relating to preservation of trees, breaking the orders of notices regarding noise abatement, trading in unlicensed streets, unlicensed sex shops, breaking the standards of trading, breaking the licensing laws and anti-social behavior which may or may not amount to offense.

Although it should be noted that in statutory offences, power of injunction should be used by the court as a last resort i.e. enforcement notices, prosecutions etc should be tried and prove ineffective before resorting for injunction. But in case of unlawful trading and building, this is not a necessary requirement. Injunction can be straightaway granted if not giving it instantly can result in irreparable damages to the plaintiff.

3) Behavioural Nuisance

Offences under this topic includes:-

- Violent disorder under section 2 of The Public Order Act 1986.
- Affray under section 3 of The Public Order Act 1986.
- Illegal behavior under section 4 of The Public Order Act 1986.
- Drunk behavior under section 91 of the Criminal Justice Act, 1967.
- Harassment under section 1 of the Protection from Harassment Act 1997.
- Indecent exposure under section 66 of the Sexual offences Act 2003.
- Holding raves in breach of statutory requirements under section 63 of the Criminal Justice and Public Order Act 1994.
- Bomb Hoaxes under section 51 of the Criminal Law Act 1977
- Sending items purporting to be noxious substances under section 114 of the Anti-terrorism, Crime and Security Act 2001.
- Sending dangerous or noxious things through the post under section 85 of the Postal Services Act 2000.
- Poison pen letters under section 1 of the Malicious Communications Act 1988.

POSITION IN OTHER COUNTRIES

Under the states of Australia, except some states who have a codified criminal law, the concept of nuisance is defined in the same way as in England.

Under section 145 of the Crimes Act 1961 in New Zealand, Criminal Nuisance is defined as :

- (1) Everyone commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.
- (2) Everyone who commits criminal nuisance is liable to imprisonment for a term not exceeding 1 year.

Under Section 180 of the Canadian Criminal Court, the word nuisance is defined as follows:-

- (1) Everyone who commits a common nuisance and thereby
 - (a) Endangers the lives, safety or health of the public, or
 - (b) Causes physical injury to any person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- (2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
 - (a) Endangers the lives, safety, health, property or comfort of the public; or
 - (b) Obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

Generally, the basic definition of nuisance is similar with the English law, which includes acts dangerous for the property or effecting public rights or public comfort like highways. Although it won't be called a criminal act unless it causes an injury to someone or puts in danger the health, life or safety of another.

The definition of nuisance under Canadian law is silent regarding the element of fault of the offence.

The concept of public nuisance under United States is similar with the England law. It includes For example – any offence against public morals or any gang activity in a city etc.

PRIVATE NUISANCE

In private nuisance, it is enough to prove that a person has been affected by the act or omission of another. Such effect should be related to the use or enjoyment of the land. And to claim under private nuisance, a person must prove that he or she lives on the property.

Private nuisance was first defined during 18th century in a case as "any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land". The damages under private nuisance are recoverable by a person who have legal interest in the property affected. Except in a case where the Court Of Appeal observed that a woman have a right to claim injunction for telephone harassment while living in her mother's property without having any legal interest in it.

The Court while hearing a complaint of private nuisance, looks into the following factors:

- The nature of the neighborhood
- The place where the interference actually happened
- What thing caused such interference
- For how long that interference lasted and whether it is still going on or not
- The time at which such interference occurred
- The kind of impact caused by such interference
- Whether such interference was already existing before entering into the property
- What type of people would think of such interference

Examples under private nuisance includes: Noisy animals, loud air-conditioners, smoke, overhanging tree branches, roots of tree growing into neighbor's land, interfering with drainage, vibrations and dust, aerial spraying of crops and firing guns on a rifle range etc.

Following are the ingredients which should be established to have a claim under private nuisance:-

a) Substantial Interference

It is not necessary for the plaintiff to prove under private nuisance that he has suffered a particular damage. It is enough to prove that the plaintiff has suffered some form of damage by the act of the defendant to obtain his claim. Generally, nuisance provides protection to a person from:

- Interference with the use or enjoyment of land
- Any physical damage to a property

This element of substantial interference can be further divided into two parts:

- i) Interference with the use, comfort or enjoyment of land: Interference with the use of land depends on the facts and circumstances of each case.

For example:-

- Due to extreme noise pollution, losing sleep at night
- Using adjoining property for prostitution
- As a sex shop
- Continuous telephone calls
- Where the plaintiff claimed under High Court to issue an injunction against the defendant from operating his factory. The allegations by the plaintiff was that the operation of the factory results in emitting of gases which are harmful for the residents of the area. As the plaintiff was also affected by such harmful gases, the High court granted injunction by declaring that private nuisance has been occurred in this case.

The Courts have also taken into account the cases where the interference leads to emotional distress. Although things which blocks the pleasant view of an individual or a signal from a television, are not considered part of nuisance. An individual can also be liable for an

interference caused naturally. It is here to be assumed that the individual was aware of that interference but failed to take reasonable care on time.

- ii) Material or physical damage to land or property: It should be proved that the damage occurred is substantial in nature and what amounts substantial interference depends upon the facts and circumstances of each case. In this case, the defendant's action resulted in actionable nuisance under law. Here the defendant cannot take the defence that he took all measures to prevent such nuisance.
- b) Unreasonableness: At present, there is no clear cut definition which explains what amount to unreasonable interference. It can be caused by substantial interference also as both are interconnected and forms an essential element of nuisance. The factors which are taken into account as to what constitutes unreasonableness includes:
- Any abnormal sensitivity by the plaintiff
Where the property of the plaintiff is prone to damages by the actions of the defendant.
 - The nature of the place or area where nuisance took place
The place or locality where such nuisance took place also helps in determining the unreasonableness of the impact of nuisance caused. Where it is found that the activity is out of place from the locality, it was held as unreasonable. But where it is found that the action by the defendant resulted in physical damage to the plaintiff, then it is immaterial to look for the place of nuisance as a factor in determining the unreasonableness.
 - Time and duration of such interference
Some activities may be reasonable at one time but can't be at another. For example – In this case, filling of the oil tankers at 10 am was held reasonable but at 10 pm it was held unreasonable.
 - The conduct of the defendant
In this situation, the motive and the reasonableness of the conduct of the defendant are the main factors through which the unreasonableness of the actions of the defendant can be determined.

- Benefit to the public by the defendant's activities

Where any action by the defendant on one side results in benefit to the public but on the other side it causes damage to the property of the plaintiff, then an action for private nuisance can be taken.

- Interference should be continuous

A type of interference which occurs on continuous basis brings out an action for private nuisance. For example – In this case, there was continuous nuisance as the roots of the tree caused damage to the structure of the neighbor's property.

- Malice

The presence of malice can also make the defendant liable for his acts. For example, In this case, the plaintiff used to take music classes at her house. Defendant, who is the neighbor in this case, didn't like the noise of music coming from the classes and in return he shouted or did acts to disturb the music classes. It was observed by the court that the defendant intentionally did such acts and an injunction is granted to the plaintiff.

In another case, the defendant intentionally prevented the flow of water so that the plaintiff gets less water. It was observed by the court that as the plaintiff is not entitled to continuous amount of water at his place, the defendant committed no offense and his acts were lawful.

Issues with private nuisance:

Since 50 years, the criticism of private nuisance has been carried out. For example, no clear-cut definition of private nuisance has been made yet. At some cases, it has been shown that private nuisance can only exist where there are two occupiers. According to Conor Gearty, the concept of private nuisance is confused.