**13.09 PUBLIC NUISANCE - PRIVATE DAMAGES**

The plaintiff claims that the defendant has created a public nuisance that has caused plaintiff injury.

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

(1) the defendant interfered with a right that is common to the general public;

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

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

(4) the harm to the plaintiff was different in kind than the harm to the general public.

If you decide that all four 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 interference 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. The harm to the plaintiff must 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 the plaintiff alleges private damage from a public nuisance. Instruction 13.08 should be given when private nuisance is claimed.

For a description of what constitutes "unreasonable" in the context of "nuisance," see the discussion on the Use Note for Instruction 13.08.

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

See Comment following Instruction 13.08.

Alaska's nuisance statutes identify certain public nuisances, but do not define the elements of a cause of action for public nuisance. At common law, "the same act or structure may be a public nuisance, also a private nuisance as to a person who is thereby caused a special injury other than that inflicted upon the general public." Snyder v. Kelter, 4 Alaska 447 (Alaska 1912).

The Restatement explains recovery of private damages from public nuisance as follows:

The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same common right. It is not enough that he has suffered the same kind of harm or interference to a greater extent or degree.

Restatement (Second) of Torts § 821C, Comment b (1979).

In addition to the requirement that the plaintiff have suffered an injury different from that suffered by the public, the plaintiff must have suffered the injury in the exercise of a public or common right. Maier v. Ketchikan, 403 P.2d 34, 38 (Alaska 1965). "A public right is one common to all members of the general public." Restatement (Second) of Torts § 821B, Comment g (1979).

The Alaska Statutes identify some specific public nuisances. See, e.g., as follows: AS 03.05.050 (agricultural or fishing products); 03.30.030 (wire fences); 09.50.170-.240 (bawdy houses); 16.05.800 (fishing equipment); 16.05.880 (construction in specified waters); 19.25.150 (advertising signs); and 19.27.060-.080 (junk yards). These statutes may eliminate the necessity of proving one or more of the elements listed in this instruction. See Restatement (Second) of Torts § 821B, Comment e (1979).

A person may suffer a nuisance that is both public and private:

When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one.

Restatement (Second) of Torts § 821C, Comment e (1979).