

## Nuisance

PLF claims that, by creating a nuisance on DLCN [address of defendant's property], DFT unreasonably interfered with his/her/its use of PLCN [address of plaintiff's property]. To recover on this nuisance claim, PLF must prove that, more likely than not, four things are true:

1. PLF owns [controls] PLCN.
2. DFT owns [controls] DLCN.
3. DFT created [permitted] [maintained] a condition [activity] on DLCN, which substantially and unreasonably interfered with PLF's use and enjoyment of PLCN.
4. The interference [was intentional] [resulted from {negligent} {reckless} {ultrahazardous} conduct].<sup>1</sup>

### (a) Ownership And Control

*< if elements 1 and 2 are uncontested >* The parties agree that the first two parts of this claim are met. So I will explain the third and fourth parts of this claim in more detail.

*< if elements 1 or 2 are contested >*

*< control >*<sup>2</sup> PLF does not have to own PLCN, but must have control over the property. A person controls land if s/he has the right to use and enjoy the land under a lease [deed, easement, etc.].<sup>3</sup> For instance, a tenant living in an

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<sup>1</sup> *Morrissey v. New Eng. Deaconess Ass'n*, 458 Mass. 580, 588 (2010); *Taygeta Corporation v. Varian Associates, Inc.*, 436 Mass. 217, 231 (2002).

<sup>2</sup> Rarely, the parties may contest ownership. The judge should incorporate the applicable instruction on contract, adverse possession, or prescriptive easement or may have to draft a case-specific instruction about ownership of real estate.

<sup>3</sup> Often, the judge should decide the "control" issue as a matter of law. "To bring a private nuisance action, a plaintiff must have some interest in the property affected. Thus, tenants, holders of easements and profits, as well as owners of fee interests have been permitted to recover in nuisance actions. The prevailing rule is, however, that licensees, mere occupants, or

apartment does not own the apartment, but does have the right to control the apartment by, for instance, excluding other people from entering the apartment. The tenant controls the apartment as long as s/he lives in the apartment. The law of nuisance protects only the owner and people who have the legal right to use and enjoy PLCN.

< ***need for two parcels*** > There must be two parcels of land: the parcel that DFT owned [controlled] and the parcel of land that PLF owned [controlled].<sup>4</sup>

### **(b) Condition or Activity**

[Third,] PLF must prove that DFT [created] [permitted<sup>5</sup>] [maintained] a condition [activity] on DLCN and that this condition [activity] caused substantial and unreasonable interference with PLF's use of PLCN.

The word "substantial" means significant. DFT's conduct must significantly contribute to PLF's harm. In other words, it must be an important ingredient in causing that harm. The harm itself also must be significant. PLF must show s/he/it suffered important harm and not just an annoyance or a slight inconvenience.

The word "unreasonable" means that the harm must go beyond what you, as the jury, would expect a reasonable person to tolerate. To decide what is unreasonable, you should ask, for instance:

- How much harm did DFT cause?
- How foreseeable was that harm?
- What was DFT's purpose or motive?

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lodgers have no interest in the property affected and cannot maintain an action in private nuisance." *Connerty v. Metropolitan District Commission*, 398 Mass. 140, 147 (1998).

<sup>4</sup> See *Doe v. New Bedford Hous. Auth.*, 417 Mass. 273, 288 (1994) ("A tenant cannot sue his landlord for a nuisance on the property that the tenant rents from the landlord.").

<sup>5</sup> See *Whalen v. Shivek*, 326 Mass. 142 (1950) (If a nuisance condition already exists when a landlord leases an entire property, "the landlord is deemed by the act of letting to have contemplated or authorized the continuance or maintenance of the nuisance. If however, the premises are a nuisance, not in themselves, but in consequence of the use made of them by the tenant, then the question is whether this use is authorized by the landlord.").

You should also consider all other relevant circumstances.<sup>6</sup>

DFT's interference is unreasonable if the seriousness of the harm outweighs the usefulness of DFT's conduct. You must ask whether reasonable people, looking at the whole situation fairly, would consider DFT's conduct unreasonably interferes with PLF's use and enjoyment of PLCN. PLF's personal opinions about what is reasonable do not matter. Nor do DFT's.

< *if surface water flow is at issue* > The law gives each landowner the right to make a **reasonable** use of his/her/its land, even if that use changes the flow of surface waters and causes harm to other landowners. However, a landowner does not have that right if his/her/its harmful interference with the flow of surface waters is unreasonable.<sup>7</sup>

### (c) State of Mind/Ultrahazardous

Finally, PLF must prove DFT's state of mind. PLF must prove that the interference [was intentional] [resulted from negligent or reckless conduct] [was ultrahazardous].

< *Insert, as applicable, the Definition of "Intent", "Reckless" or the general negligence instruction* >

< *for "ultrahazardous" nuisance* > "Ultrahazardous" means beyond the normal risk. DFT engaged in ultrahazardous conduct if his/her/its [type of conduct] created an unusual and abnormal risk; that is: a risk beyond what you expect from normal behavior.<sup>8</sup>

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<sup>6</sup> *DeSanctis v. Lynn Water & Sewer Commission*, 423 Mass. 112, 116 (1996) (reasonable use doctrine, applicable to flow of surface water), citing *Tucker v. Badoian*, 376 Mass. 907, 916–917 (1978) (*Kaplan, J., concurring*).

<sup>7</sup> *DeSanctis*, 423 Mass. at 116, citing *Armstrong v. Francis Corp.*, 20 N.J. 320, 327 (1956).

<sup>8</sup> Restatement (Second) of Torts § 520 (1977); see *Jupin v. Kask*, 447 Mass. 141, 157 (2006).

**(d) Defenses/Mitigation**

Insert applicable Defenses/Mitigation from Trespass instruction.<sup>9</sup>

**(e) Damages**

Insert applicable Damages Instruction from Trespass instruction.

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<sup>9</sup> As to continuing nuisance, see *Taygeta Corporation v. Varian Associates, Inc.*, 436 Mass. 217, 230-232 (2002) (claim for ongoing nuisance was timely where, although dumping of hazardous materials occurred in the early 1970's, the presence of contaminants on defendant's property caused ongoing seepage of contaminated groundwater onto plaintiff's property during the limitations period in the mid-1990s). The case also discusses the discovery rule for purposes of applying the statute of limitations to a negligence claim.