

Nuisance is a Legal Injury, Not a Cause of Action - A Waltz Across Texas Nuisance Law

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In [*Crosstex North Texas Pipeline v. Gardiner*](#), issued June 24, 2016, the Texas Supreme Court considered a noise nuisance claim involving a natural gas compressor station, and seized on the opportunity to waltz across the state of nuisance law in Texas to provide some needed clarification. Their analysis, harkening back to first year torts, is music to the ears of those hoping to understand how the concept of nuisance will now be applied in Texas.

The Facts

Plaintiffs (Gardiniers), owners of an undeveloped ranch, claimed that defendant (Crosstex), in the operation of its natural gas compressor station on adjacent property, intentionally and negligently created a nuisance on the plaintiffs' property by the noise generated at the station. The trial court directed a verdict for Crosstex on the ordinary negligence claim, but agreed to submit intentional nuisance and negligent nuisance claims to the jury. The court declined to submit a claim based on abnormal and out of place conduct because the plaintiffs had failed to plead it. The jury found Crosstex had negligently created a nuisance that was permanent and valued the plaintiffs' diminution in property value at \$2 million. Crosstex appealed.

The court of appeals held that evidence was legally but not factually sufficient to support the jury's finding of a negligently created nuisance, but also that the trial court had erred in denying plaintiffs' request for a trial amendment to plead "abnormal and out of place" nuisance. The court of appeals reversed and remanded to allow the plaintiffs to add an "abnormal and out of place" claim. Both parties filed petitions for review, which the Supreme Court granted.

Nuisance is Not a Cause of Action; it's a condition of substantial interference that causes unreasonable discomfort

The Supreme Court initially distinguished between private and public nuisance—a public nuisance addressing conduct that interferes with common public rather than private rights, but declined to address it, focusing instead, based on the facts before it, on private nuisance.

The Court declared that nuisance is now to be defined as the particular type of legal injury, based on an invasion of plaintiff's legal rights, that can support a cause of action, but is not a cause of action. Nuisance is a "kind of damage done."

The Court described that injury as an interference with the use and enjoyment of property and clarified that the interference must be "substantial" and must cause discomfort or annoyance that is "unreasonable."

The Court explained whether an interference is substantial depends on the facts, including as to the nature and extent of the interference and how long it lasts or recurs. The type of interference that may constitute a nuisance includes physical damage to property, economic harm to property's

market value, harm to the plaintiff's health, or psychological harm to the plaintiff's peace of mind in the use and enjoyment of their property. If it rises to the level of "substantial," "virtually any disturbance of the enjoyment of the property may amount to a nuisance."

The Court explained that a substantial interference, to be a nuisance must also be unreasonable in its effect, that is:

- (1) The focus is on the unreasonableness of the interference's effect on plaintiff's comfort or contentment and not on defendant's conduct;
- (2) It must be based on an objective standard of persons of ordinary sensibilities and not on the subjective response of any particular plaintiff; and
- (3) It must include a balancing of a wide variety of facts, including, among other things, the character of the neighborhood, the extent to which others are engaged in similar conduct, the social utility of each property's usage, the magnitude, extent, degree, frequency, or duration of the harm, the relative capacity of each party to mitigate the harm, defendant's motive, and interests of the community and public at large.

In sum, "nuisance" refers to a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities attempting to use and enjoy it.

To establish nuisance, plaintiffs must show there has been a legal wrong—conduct that is intentional or negligent or that is abnormally dangerous and creates a high risk of serious injury

The Court further explained that an injury without a wrong does not create a cause of action; to establish a cause of action, there must be a legal wrong—a violation of a legal right and a breach of a legal duty, *e.g.*, based on the defendant's conduct—whether that conduct constitutes an intentional or negligent invasion of another's interests or is abnormal or out of place (strict liability). To prove intentional nuisance, the plaintiff must establish that the defendant intentionally caused the interference, not just that the defendant intentionally engaged in the conduct that caused the interference.

Intention includes not only a desire to create an interference, but also knowledge that the interference is substantially certain to result. Intentionality does not entail an inquiry into whether the defendant's conduct be unreasonable. It is the condition created by the interference, *i.e.*, the effects of the conduct, rather than the defendant's conduct that must be unreasonable.

The Court explains that negligent conduct may also give rise to a nuisance claim. To establish negligence, a plaintiff must show the existence of a legal duty, a breach of that duty, and damages proximately caused by it. To establish breach, a plaintiff must show that the defendant did or failed to do what a person of ordinary prudence in the same circumstances would have done or not done, that is, a failure to take precautions against a risk apparent to a reasonable man, *e.g.*, to repair or abate a condition under his control.

As to culpability based on abnormal or out of place conduct, *i.e.*, *Rylands v. Fletcher* strict liability, the Court explained its underpinnings to be based on the idea that the defendant was engaged in some kind of activity exposing others to a risk of harm from an accidental invasion under circumstances that justify allocating certain losses from such risk to the defendant even though the

defendant acted with reasonable care. In other words, the focus is on the nature of the risk rather than on the nature of the interference. The Court explains that: “the mere fact that the defendant’s use of its land is ‘abnormal and out of place in its surroundings’ will not support a claim alleging a nuisance; instead, in the absence of evidence that the defendant intentionally or negligently caused the nuisance, the abnormal and out-of-place conduct must be abnormally ‘dangerous’ conduct that creates a high degree of risk of serious injury.”

Jury Questions

The Court explained that the questions of whether an interference with the use and enjoyment of property is substantial, whether the effects of such an interference on the plaintiffs are unreasonable, whether the defendant intentionally or negligently created the interference, and whether the interference results from abnormally dangerous activities generally all present questions of fact for the jury to decide. A court may decide these issues as a matter of law only if the underlying facts are undisputed or reasonable minds cannot differ.

Nuisance remedies include damages, injunctive relief, and self-help

As to the remedies for a nuisance—damages, injunctive relief, and self-help, the Court explains the decision whether to enjoin is discretionary for the judge after the case has been tried and the jury dismissed. When injunction is inappropriate, the plaintiff may recover damages. Generally, for temporary nuisance, the land owner may recover only lost use and enjoyment, e.g., loss of rental value or possibly the cost of restoration; if permanent, the plaintiff may recover lost market value, including lost future rents. The presumed highest and best use of land, against which damages are to be measured, is its existing use—another fact issue. Although generally the test is the market value before and after the injury, where there is no isolated event that caused the injury, the proper comparison may be of market value with and without nuisance.

The Court’s Decision

Turning to the sufficiency of the evidence and applying its definition of nuisance, the Court concluded that the plaintiffs had presented legally sufficient evidence that the defendant had substantially and unreasonably interfered with their property. The Court also agreed with plaintiffs that to establish a failure to exercise reasonable care, *i.e.*, in building and operating the compressor station in such a way that its noise was beyond reasonable levels, the plaintiffs did not need expert testimony on a specialized standard of care.

As to factual sufficiency, the Court agreed with the test the court of appeals applied, that is, if it determines that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of evidence, that the answer should be set aside and a new trial ordered, in which case the court must detail the relevant evidence and clearly state why it was factually insufficient. In this case, the Court found the court of appeals had met this burden. The Court, therefore, had no jurisdiction to evaluate the “factual insufficiency” point. The Court affirmed the court of appeals’ remand for a new trial.

The Court, however, did take issue with the court of appeals’ holding that the plaintiffs should have been allowed to plead an “abnormal and out of place” nuisance claim. The Court noted that strict liability must be predicated on conduct that constitutes an abnormally dangerous activity and not on conduct that is merely abnormal and out of place in its surroundings. On the record, the Court found that there was no evidence that the compressor station was abnormally dangerous or that defendant had engaged in the type of abnormally dangerous or ultra-hazardous conduct that would

support such a cause of action. The Court, therefore, held that the trial court properly denied the plaintiffs' request for a trial amendment.

The Court concluded that “the term ‘nuisance’ describes a particular legal injury involving interference with the use and enjoyment of property but does not describe a cause of action; that a defendant can be liable for intentionally or negligently causing a condition that constitutes a nuisance; and that neither claim requires a separate finding that the defendant unreasonably used its property when creating a nuisance.”

For more information contact one of the lawyers listed below.