

Nuisance Under Law of Tort

Htet Htet Zaw *

Abstract

In general, every man owes a duty not to annoy another. A nuisance derived from the common law of tort is defined as a “condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property. Under this definition itself, a nuisance is one of the incidents that the individual may undergo in their daily life. Since the purpose of this research is to examine a nuisance under common law of tort, arising out of the duties by neighbouring occupiers, the first part of this research sets out some of the general principles of the law of tort. Because of the basic principles of a nuisance are notoriously difficult for people to understand a detailed knowledge of the nuisance, this research then goes to what is a “nuisance” in regard to Tort. Moreover, this research seeks to explain kinds of nuisance and elements in establishing nuisance liability as well as general exceptions. It is obvious that the plaintiff can be available the remedies for nuisance, this research will examine what are the remedies for nuisance and learn each remedy in detail.

Introduction

The concept of Nuisance has its origin under the common law of tort. By common law here it means the law based on precedents or case laws. In layman’s language, nuisance means causing trouble or injury to someone. Nuisance is one of the oldest causes of action known to common law. In the beginning, the law of nuisance was made to handle the cases of trespass. Later it provided protection against indirect injuries to land or its use or employment. 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.

Nuisance Under Law of Tort

The word "Tort" is derived from the Latin word “Tortum” meaning conduct which is crooked or twisted as opposed to that of rectum which is right or straight. Tort is not an enacted law; it can therefore be said that it is a customary law which is the outcome of the English common law. And the Law of Tort as administered in Myanmar courts is the English Law of Tort, so far as it is applicable to our own circumstances.

There are many attempts to define the term “tort” by eminent writers.

According to Dr. Ba Han, a learned person and a former Professor Emeritus of Law, Rangoon University (Yangon University), defined “Tort” as:

“Tort is the name of civil wrongs (not being merely breaches of contract) for which there is a remedy by action in courts of common law jurisdiction.”¹

According to Lord Denning, “Tort” means:

“The Province of tort is to allocate responsibility for injurious conduct.”

According to the definition of the University Oxford Dictionary, “tort” is:

“A civil or private wrong”

* Dr, Assistant Lecturer, Department of Law, Dagon University

¹ Dr. Ba Han, "The University English Myanmar Dictionary", part IX, 1963.

Under the above definitions, it may be concluded that a tort, in common law jurisdictions, is a civil wrong that unfairly causes someone else to suffer loss or harm resulting in legal liability for the person who commits the tortious act, called a tortfeasor.

A tort is a civil wrong in the sense that it is committed against an individual (which includes legal entities such as companies) rather than the state. The gist of tort law is that a person has certain interests which are protected by law. These interests can be protected by a court awarding a sum of money, known as damages, for infringement of a protected interest and alternatively, by the issuing of an injunction, which is a court order, to the defendant to refrain from doing something.

Although crimes may be torts, the cause of legal action is not necessarily a crime, as the harm may be due to negligence which does not amount to criminal negligence. The victim of the harm can recover their loss as damages in a lawsuit. In order to prevail, the plaintiff in the lawsuit, commonly referred to as the injured party, must show that the actions or lack of action was the legally recognizable cause of the harm. The equivalent of tort in civil law jurisdictions is delict.

Moreover, legal injuries are not limited to physical injuries and may include emotional, economic, or reputational injuries as well as violations of privacy, property, or constitutional rights. Torts comprise such varied topics as auto accidents, false imprisonment, defamation, product liability, copyright infringement, and environmental pollution (toxic torts). While many torts are the result of negligence, tort law also recognizes intentional torts, where a person has intentionally acted in a way that harms another, and in a few cases “strict liability” which allows recovery without the need to demonstrate negligence.

So, a tort is a class of civil wrong or civil injury. A civil wrong gives rise to a civil proceeding. The purpose of a civil proceeding is to enforce some rights claimed by the plaintiff as against the defendant such as:

- (1) Recovery of debt;
- (2) Restitution of property;
- (3) Specific performance of contract;
- (4) Recovery of damages for an injury committed of wrongdoer;
- (5) To issue injunction for stopping the wrongful conduct.

In contract, criminal proceedings are those which have for their object the punishment of the accused, because a crime is an offence against the public. Thus it can be said that while a civil action is essentially demand for the enforcement of some right vested in the plaintiff, a criminal action merely demands the punishment of the accused for the offence committed by him. Sometimes a plaintiff may prevail in a tort case even if the person who allegedly caused harm was acquitted in an earlier criminal trial. For example, someone was acquitted for murder in court but later found liable for the tort of [wrongful death](#).

Very often one will find that same wrong is both civil and criminal capable of being made the subject of proceedings of both kinds, for instance, an “assault” or “libel”. Assault is any act of the defendant which directly and either intentionally or negligently causes the plaintiff immediately to apprehend a contact with his person.¹

On principle, the plaintiff must establish the absence of consent. It has been held in a case² that “an assault must be an act against the will of the party assaulted; and therefore it

¹ The Law of Tort, by Harry Street, LL.M. Ph.D., L.L.D Solicitor, Professor of English Law in the University of Manchester, Sixth Ed. 1976.

² Christopherson V. Bare (1848), 11.Q.B 473, at p. 477. (perPatteson, J.)

cannot be said that a party has been assaulted by his own permission". To point a loaded gun at half-cock at the plaintiff is an assault, because there is a present ability of doing the act threatened. "Assault" is therefore nothing but it is the type of trespass to the person which is likely to result in breach of the peace so that criminal action should also be taken.

The law of tort therefore is concerned with those situations where the conduct of one party causes or threatens harm to the interests of other parties.¹ Thus the essential aim of the law of tort is to compensate those who have suffered harm through the invasion of certain of their interest occasioned by the conduct of others.² In fact tort really protects the interests of the people at large.

Examples of torts include: -

- Defamation
- Negligence
- Nuisance
- Trespass to goods
- Trespass to land
- Trespass to the person such as assault, battery and false imprisonment.

Among these kinds, this research studies on the "Nuisance".

Concepts of Nuisance

Nuisance is of common-law origin and is grounded in the maxim "Sic utere tuout alienum non laedas" that "a man shall not use his property so as to harm another". The concept of nuisance is a broad one, difficult to define precisely. Its meaning has been the subject of numerous and varied definitions, some of which extend its scope beyond the invasion of property interests. In its narrower, more accurate sense, nuisance denotes a condition, which because of some noxious or harmful characteristic, causes an unwarranted interference with the ownership and enjoyment of another's property.³

Nuisance derived from Fr. *noissance*, means to do hurt or to annoy. It means that which causes offence, annoyance, trouble or injury.

According to the Pollock, "Nuisance" is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of a common right. The wrong is in some respects analogous to trespass, and the two may coincide, some kinds of nuisance being also continuing trespasses.⁴

A nuisance is defined by Amir Tikriti as any human activity or physical condition on someone's property that is harmful, indecent or offensive, or that interferes with someone else's use and enjoyment of his or her property.⁵

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 here

¹ Harry Street, "The Law of Torts", 6th Ed. 1976. London Butter Worths.

² Glanville Williams, "The Aims of the Law of Tort", Current Legal Problems. 1951. P.137.

³ Zoning and the Law of Nuisance, Fordham Law Review, Vol 29, Issue 4, Article 10, [http:// ir.lawnet.fordham. Edu /flr/ vol29/iss4/10](http://ir.lawnet.fordham.edu/flr/vol29/iss4/10)

⁴ Sir Frederick Pollock, "The Law of Tort: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law", Fourth Edition, London: Steven and Sons Limited, 1895, P-359.

⁵ Amir Tikriti, Legal Remedies in a Private Nuisance Case, <http://AllLaw.com.htm>

determents of another.¹ The definition itself covers the variety of wrongs occurring under nuisance.

Therefore “Nuisance” is a tort, arising out of the duties by neighboring occupiers and it is traditionally used to describe an activity which is harmful or annoying to others such as indecent conduct or a rubbish heap.

It has civil as well as criminal aspects. As a criminal wrong, common or public nuisance was punishable from early times. As civil redress the assize of nuisance and an action on the case for nuisance were available to people as a general remedy for different kinds of injuries when no other suitable remedy was available.²

Under the common law, persons in possession of real property (land owners, lease holders etc.) are entitled to the quiet enjoyment of their lands. However, this doesn't include visitors or those who aren't considered to have an interest in the land. If a neighbour interferes with that quiet enjoyment, either by creating smells, sounds, pollution or any other hazard that extends past the boundaries of the property (e.g. a stream of fowl water, or the constant noise or smell of a factory), he will be liable for nuisance and the affected party may make a claim in nuisance. A nuisance may be created not only on the land of the defendant, but also on the places elsewhere (e.g. on a highway adjoining the plaintiff's house or business premises). The Common Law of nuisance is a limitation on activities on one own land. A man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.

The concept of nuisance should be distinguished from trespass and negligence. Trespass and negligence are sometimes confused with nuisance, but these two are distinct with nuisance.

In trespass, there is interference with the person possession of land. In nuisance, there is interference with the persons use or enjoyment of land. Trespass is actionable per se. But in nuisance, a special damage has to be proved. A trespass action protects against an invasion of one's right to exclusive possession of land. If a landowner drops a tree across her neighbor's boundary line she has committed a trespass; if her dog barks all night keeping the neighbor awake, she may be liable for nuisance.

Moreover, 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 plaintiffs' property by giving rise to a cause of action under negligence or nuisance.³ Although, negligence is not a prerequisite in an action for nuisance but we can choose any one among them.⁴

Therefore, 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. Generally, nuisance refers to the interference with the enjoyment of the land by another.

Classification of Nuisance

Nuisance is one of the oldest causes of action known to the common law, with cases framed in nuisance going back almost to the beginning of recorded case law. Nuisance signifies that the “right of quiet enjoyment” is being disrupted to such a degree that a tort is being committed. When something is annoying, it is often thought of it as a nuisance. However, there is a difference between something that it is annoying and what is a legally

¹ <http://scholarship.law.marquette.edu/cgi/viewcontent>

² S. C. Thanvi, Revised by Vishnu Konoorayar, “The Law of Tort”, by Joseph Minattur, Indian Legal System 2nd Revise Edition, The India Law Institute, 2006, P-666.

³ SeongFatt Sawmills SdnBhd V Dunlop Malaysia Industries SdnBhd[1984] 1 MLJ 286 FC.

⁴ <http://letstalkabouttort.blogspot.in/2009/03/nuisance.html>

classed as a “nuisance”. The law and the courts will only be able to provide a remedy to the injured party if the subject matter fits within that legal definition of nuisance.

Although the scope of nuisances is wider, it may affect either private individuals or the general public. Therefore, Nuisance can be divided into two categories:

- (1) Public Nuisance, and
- (2) Private Nuisance.

There tends to be confusion between public and private nuisance.

Generally, any nuisance that is not a public nuisance is a private nuisance. So, a landlord's violation of a state's housing codes would be both a public nuisance as well as a private nuisance to the tenants.¹

Public nuisance is often both a civil wrong (something for which a person could take the person responsible to court) and a crime covering a number of interferences with rights of the public at large, such as brothel keeping, selling impure food and obstructing public highways and there may be [penalties such as fines](#) or imprisonment ordered against those responsible for creating the nuisance. It is not tortious unless an individual proves that he has suffered particular damage beyond that suffered by the rest of the community. Private nuisance is not a crime; it is essentially a dispute between two individuals and it is an unlawful interference with the use or enjoyment of land or some right over, or in connection with it.²

The distinction between public and private nuisance is important for a number of reasons. Most importantly, it determines whether or not the plaintiff has standing (i.e., the right to sue).

An individual does not have standing to sue for a public nuisance, unless an exception applies. The principal exception is if the plaintiff is harmed in a manner that is different in kind from the harm suffered by the public at large (i.e., you have a special injury).

A significant difference between private and public nuisance is that under public, one can claim for personal injuries as well as damage to property. Another difference is that public nuisance is primarily a crime; it only becomes a tort if the claimant can prove that they suffered "special damage" over and above the effects on the other affected people in the "class". The test for the required size of a "class" was also discussed in *Attorney-General v PYA Quarries Ltd*, with the court concluding that the test was whether the nuisance was "so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large".³

Furthermore, a private nuisance is a civil wrong, meaning that [damages are the appropriate remedy](#) for those who have been harmed. On the other hand, a public nuisance is sometimes classified as a criminal offense, and it may be remedied by civil or criminal penalties, but it usually takes a city attorney or another public official (as opposed to a private citizen) to initiate an action over a public nuisance.

Some nuisances can be both public and private in certain circumstances where the public nuisances substantially interfere with the use of an individual's adjoining land. For example; [Pollution](#) of a river might constitute both a public and a private nuisance. This is known as a mixed nuisance.

¹ Amir Tikriti, Legal Remedies in a Private Nuisance Case, <http://AllLaw.com.htm>

² Richard Owen, "Essential Tort Law", 3rd Edition, Cavendish Publishing Limited, 2000, P- 98.

³ *Elliott, Catherine; Francis Quinn (2007). Tort Law (6th ed.). Pearson Longman, P-280.*

In the case of nuisance, the claimant can sue for most acts that interfere with their use and enjoyment of their land. Both types of nuisance involve interference with an individual's enjoyment of land.

Public Nuisance

A public nuisance is an unreasonable, unwarranted, or unlawful interference with a right common to the general public. It covers a wide variety of minor crimes that threaten the health, morals, safety, comfort, convenience, or welfare of a community.

Again, the interference has to be both substantial and unreasonable. It includes conduct that interferes with public health, safety, peace or convenience. The unreasonableness may be evidenced by statute, or by the nature of the act, including how long, and how bad, the effects of the activity may be.

A public nuisance was defined by English scholar Sir J. F. Stephen as,

“An act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of common rights.”¹

In Myanmar, relating to public nuisance, Section 268 of the Penal Code² defines as follows:

“A person is guilty of a public nuisance who does any act or is guilty of illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.”

An obstruction which creates a foreseeable danger will amount to a nuisance. In *Ware v Garston Haulage Co* (1944), an unlit vehicle parked at night so as to obstruct the highway, may cause a nuisance, although it will depend on the facts. In *Dymond v Pearce* (1972), the defendant parked a lorry overnight under a lit street lamp without lights. This was regarded as a nuisance although the plaintiff did not succeed as the nuisance was not the cause of the plaintiff's injury. While, in *Dollman v Hillman* (1941), a piece of fat on which someone slipped was a nuisance.³

As common nuisance, it was an offence to endanger the lives, safety or health of the public. So, a public nuisance is a crime as well as a tort.

If a man digs a trench across a highway, it cannot be sued him simply because the trench prevents the public from passing along the highway as the private person entitled to do; for that is an inconvenience inflicted equally on all men who use the road. But if, while a person is lawfully passing along after dark, and falls into this trench so that he breaks a limb, or goods which he is carrying are spoiled, he shall have the right of action; for this is a particular damage to himself resulting from the common nuisance, and distinct from the mere obstruction of the common right of passage which constitutes that nuisance.

Examples of Public Nuisance

Public nuisances may interfere with public health, such as in the keeping of diseased animals or a malarial pond.

So, public safety nuisances shall include shooting fireworks in the streets, storing explosives, practicing medicine without a license, or harboring a vicious dog. Houses of prostitution, illegal liquor establishments, [Gaming](#) houses, and unlicensed prize fights are examples of nuisances that interfere with public morals. Obstructing a highway or creating a condition to make travel unsafe or highly disagreeable are examples of nuisances threatening the public convenience.

¹ Sir J. F. Stephen, *Digest of the Criminal Law*, P-120.

² *Burma Code Vol. VIII*.

³ Richard Owen, “*Essential Tort Law*”, 3rd Edition, Cavendish Publishing Limited, 2000, P- 109.

Another examples of public nuisance are:

- obstructing the highway;
- blasting and quarrying near built-up areas;
- allowing land to be used as a dump, creating a dangerous or noxious environment;
- noisy parties and “raves”;
- bomb hoaxes and false calls to the emergency services;
- hanging from motorways and bridges, for example in political demonstrations;
- keeping pumas in a domestic garden;
- gang activity involving drug dealing in an urban area.¹

Under Section 269 to 294 (A) of Myanmar Penal Code², kinds of public nuisance in Myanmar are:

- Negligent act likely to spread infection of disease dangerous to life
- Malignant act likely to spread infection of disease dangerous to life
- Disobedience to quarantine rule
- Adulteration of food or drink intended for sale
- Sale of noxious food or drink
- Adulteration of drugs
- Sale of adulterated drugs Sale of drug as a different drug of preparation
- Fouling water of public spring or reservoir
- Making atmosphere noxious to health
- Rash driving or riding on a public way
- Throwing dangerous article on moving vehicle
- Rash navigation of vessel
- Exhibition of false light, mark of buoy
- Conveying person by water for hire in unsafe or overloaded vessel
- Danger or obstruction in public way or line of navigation
- Negligent conduct with respect to poisonous substance, fire or combustible matter, explosive substance, machinery, pulling down or repairing buildings
- Sale, etc., of obscene books, objects to young person
- Obscene acts and songs
- Keeping lottery office

These actions would have an effect on a wide range of people, each of whom would be affected or disadvantaged to differing degrees. In such cases, an action can be taken by the Attorney-General on behalf of the whole community or also by a person who has suffered damage, which has resulted in causing damage to the public in general. For an individual to have an action for compensation for the inconvenience or interference suffered, they would have to show that the impact was such as to cause them **special damage**.

Who can sue for Public Nuisance

A public nuisance interferes with the public as a class, not merely one person or a group of citizens. No civil remedy exists for a private citizen harmed by a public nuisance, even if his or her harm was greater than the harm suffered by others; a criminal prosecution is the exclusive remedy.

In Section 91(1) of the Civil Procedure Code of Myanmar,³ it provides for the suits relating to public matters, especially with regard to public nuisance as follows:

¹ The Law Commission, “Simplification of Criminal Law: Public Nuisance and Outraging Public Decency”, Consultation Paper No. 193, <http://www.lawcom.gov.uk/docs/cp193.pdf>

² Burma Code Vol. VIII.

³ The Civil Procedure Code, Burma Code. Vol. XII.

“In the case of a public nuisance the Attorney-General, or two or more persons having obtained the consent in writing of the Attorney-General: may institute a suit though no special damage has been caused: for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.”

Section 133 to 144 of the Criminal Procedure Code of Myanmar,¹ therefore provide for the power of the judicial authorities, procedures and any other actions, such as issuing injunction or attachment and sale of the offender's properties, to be taken by the judicial authorities to remove such public nuisances.

So, in Myanmar, the remedy for a public nuisance is a prosecution by the Attorney General on behalf of the public and is not actionable by private person. In Myanmar, the actions relating to public nuisance are only criminal, and not tort. It may be because of the strict provisions of the statute laws and lack of knowledge relating to the common law of tort.

However, under common law of tort, if one person suffers harm that is different from that suffered by the general public, he may maintain a tortaction for damages. For example, if dynamiting has thrown a large boulder onto a public highway, those who use the high way cannot maintain a nuisance action for the inconvenience. However, a motorist who is injured from colliding with the boulder may bring a tort action for personal injuries.

So a private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common withall other persons affected by the nuisance. Interference with a common right is not of itself a cause of action for the individual citizen. Particular damage consequent on the interference is.²

There is a dispute as to whether or not it is necessary to have an interest in the land in order to maintain an action for nuisance.

While there are comments in such cases as *Read v Lyons and Weller* vFMDRI which seem to suggest that the plaintiff must be an occupier or have some interest in the land, there are other cases which adopt a broader view. *Lawton J* said obiter in *British Celanese v Hunt* (1969) that the plaintiff need not be the occupier of adjoining land, or any land. Furthermore, it was held that to use the premises for manufacturing was an ordinary use of the land. The issue can only be settled by the House of Lords. An authoritative decision on this point is required.³

Therefore, public nuisance dealt by criminal law is not actionable in tort unless the damage suffered by the plaintiff is a particular damage other than and beyond the general inconvenience and injury suffered by the public and only a plaintiff who suffers particular damage than the damage suffered by the rest of the public, may maintain an action in public nuisance. It is rare for public nuisance actions brought by the public to be successful, as it is difficult to prove that one person has suffered special loss.

Remedies for Public Nuisance

It is also uncommon for public nuisance actions to be brought by the Attorney-General, as public nuisance actions brought by the Attorney-General are limited to the remedy of an injunction to stop or prevent the nuisance.

Violators may be punished by a criminal sentence, a fine, or both for committing public nuisance. A defendant may also be required to remove a nuisance or to pay the costs of removal. For example, a manufacturer who has polluted a stream might be fined and might also be ordered to pay the cost of cleanup.

¹ The Criminal Procedure Code, Burma Code Vol. VIII.

² Sir Frederick Pollock, “The Law of Tort: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law”, Fourth Edition, London: Steven and Sons Limited, 1895, P-361.

³ Richard Owen, “Essential Tort Law”, 3rd Edition, Cavendish Publishing Limited, 2000, P- 113.

A private citizen who suffered an injury by reason of a public nuisance can sustain an action for nuisance, if she/he establishes that an injury special and peculiar to himself/herself and different from the one suffered in common by the general public was caused to him/her.¹

In matters of public nuisance, a fine or imprisonment can be imposed in addition to the abatement or relief of injunction. The remedy of injunction is granted in cases where damage is of such a nature which is irreparable and compensation cannot be regarded as an adequate remedy. The court while granting injunction examines the interest of the parties affected as well as of the public in general.²

A remedy of Self-Help is available in rare circumstances. It should be exercised after some reasonable time by learning to know the nature of the nuisance which also requires a notice to be given to the defendant and failure on his part to act. Although, reasonable force can be used by the plaintiff for abatement but he can also be liable for causing damage unnecessarily.

For example – where some dead limbs of tree extending dangerously in the land of the neighbor can be removed by him after giving a reasonable notice to the person who caused such nuisance. But in cases of emergency like danger to health or life, no notification is required.

In the leading case of *Soltau vs. De Held*,³ the nuisance was that of the noise. The plaintiff resided in a house next to a Roman Catholic Chapel of which the defendant was the priest and the Chapel bell was rung at all hours of day and night. It was held that the ringing was a public nuisance, and the plaintiff was held entitled to an injunction.

In another leading case of the *Mortgage Bank of India vs. Ahmedbhoj Habibbhoj*,⁴ the plaintiffs were the owners of a building containing a large number of rooms which are supposed to be rented. But, because the defendants who were the owners of an adjacent cotton mill have created such a mill, certain rooms in the building remained unlit, because of the noise and smoke of the mill.

In the plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week end, no steps to remedy the risk to passersby had been taken until the Monday. The owner had no actual knowledge of the state of the premises. It was held that the defendant must be presumed to have knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.

Private Nuisance

A private nuisance is an interference with a person's enjoyment and use of his land. The law recognizes that landowners, or those in rightful possession of land, have the right to the unimpaired condition of the property and to reasonable comfort and convenience in its occupation.

Private nuisance was first defined in a case of *Bamford v Turnley*⁵ 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". A private nuisance is a civil wrong that affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public.⁶ In other words, a private nuisance is a substantial and unreasonable interference with the private use and enjoyment of one's land. Examples include interference with the physical condition of the land,

¹ *Brown v. Petrolane, Inc.*, 102 Cal. App. 3d 720 (Cal. App. 2d Dist. 1980).

² <http://law.jrank.org/pages/8871/Nuisance-Remedies.html>

³ *Soltau vs. De Held*. (1851) 2. Sim, N.S. 133 Simons Reports. New Series (1850-1852).

⁴ 1883 8. Bom. 35.

⁵ 1860 3 B&S 62.

⁶ *Armory Park Neighborhood Ass'nv. Episcopal Community Servs.*, 148 Ariz. 1 (Ariz. 1985).

disturbing the comfort of its occupants, or threatening future injury or disturbance. The origin of private nuisance liability is purely tortious in character and not criminal.¹

Therefore, the tort of nuisance provides a remedy for the infringement of servitude, i.e. easements, such as the obstruction of a right of way or the blocking of a right to light. The law always recognizes that a man may use his own land so as to injure another without committing a nuisance. Thus it will be actionable only if such use is unreasonable and becomes unlawful. It is not only limited to servitude, but also to the wrongful acts causing or allowing the escape of deleterious things into another's land, for example, water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity, disease-gems, animals and vegetation.

At one time, the law of private nuisance seemed to be moving away from solely restraining activities which affected enjoyment of land.

In *Khorasandjian v Bush* (1993), the plaintiff was granted an injunction not only in respect of harassing telephone calls at home but also harassment at work and in the street. The House of Lords in *Hunter v Canary Wharf* (1997) rejected this approach and confined nuisance to its traditional boundaries. Lord Hoffman emphasized, in that case, that it is a tort relating to land. However, private nuisance has been held to extend to damage to a floating barge moored in a river in *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* (1996). Since the barge was in use as a mooring, it was so attached for the purpose of the better use and enjoyment of the plaintiffs' mooring right and therefore sufficient to sustain an action for private nuisance.²

Private nuisance is a wrong against a private person exclusively. The action of nuisance being a wrong to property as well as to person is available only to the occupier of the property. Further, nuisance must not be momentary but must continue for some time and there must be some give and take in the affairs of life; hence an accidental injury is not nuisance.³

So the court tries to use common sense in assessing these factors. It will also weigh the inconvenience or impact of the interference on you against the cost and effect of having the person responsible for the interference modify or stop their activities. It is a reality of living in close quarters to the neighbours that there will be competing interests and activities, which on occasion may affect the enjoyment of living in the neighbourhood.

A court, in deciding on a complaint of nuisance, will weigh up these competing interests in a pragmatic sense, recognising that some noise, annoyance, inconvenience and discomfort are likely to occur wherever people live. For example, U Sein's barking dog who is U Mya's neighbor, might wake U Mya up every once in a while, but courts know that dogs bark and that the law allows people to keep dogs. Unless a dog is particularly noisy, a court will not usually help U Mya to keep it quiet.

However, the "interference" was not the result of a neighbor stealing land or trespassing on the land. Instead, it arose from activities taking place on another person's land that affected the enjoyment of that land. The law of nuisance was created to stop such bothersome activities or conduct when they unreasonably interfered either with the rights of other private landowners (i.e., private nuisance) or with the rights of the general public (i.e., public nuisance).

Atkinson. J. said in that case, that "private nuisance arises out of a state of things on one man's property whereby his neighbour's property is exposed to danger."

¹ <http://nuisances.uslegal.com/civil-liability/elements-in-establishing-liability/>

² Richard Owen, "Essential Tort Law", 3rd Edition, Cavendish Publishing Limited, 2000, P-98.

³ S. C. Thanvi, Revised by Vishnu Konoorayar, "The Law of Tort", by Joseph Minattur, Indian Legal System 2nd Revise Edition, The India Law Institute, 2006, P-667.

It was observed in *Rose v. Chaikin*,¹ that noise is an actionable private nuisance if two elements are present: (i) injury to the health and comfort of ordinary people in the vicinity, and (ii) unreasonableness of that injury under all the circumstances. The circumstances may be multiple and must be proven by clear and convincing evidence.²

Therefore, in a private nuisance, a defendant engages in some activity that interferes with the plaintiff's right to enjoy his property. A land owner is entitled to a certain level of comfort that is free from interference while on his private property. Private nuisance can come in the form of physical damage to the property or the disturbance of comfort.

Examples of Private Nuisance

Nuisances that interfere with the physical condition of the land, i.e. private nuisances, include vibration or blasting that damages a house; destruction of crops; raising of a water table; or the pollution of soil, a stream, or an underground water supply.

There are three types of private nuisance in general that can arise in practice:³

- Physical damage to land (for example, by flooding or noxious fumes)
- Amenity damage or Substantial interference with the enjoyment of the land (for example smells, dust and noise)
- Encroachment on a neighbour's land, for example, by spreading roots or overhanging branches, which is of minor significance

If the conduct complained of causes physical damage to the plaintiff's property, this will amount to nuisance (subject to any defence available). In *St Helens Smelting Co v Tipping* (1865), Lord Westbury said an 'occupier is entitled to expect protection from physical damage no matter where he lives'.⁴

In the same way, a defendant will not be liable for physical damage to property caused because of its exceptionally delicate nature. A man cannot increase the liabilities of his neighbour by applying his own property to special uses.

In *Robinson v Kilvert* (1889), the plaintiff occupied a basement in the ground floor of the defendant's building and stored brown paper there. The defendant's boiler had an adverse effect on the plaintiff's goods, although it would not have effected any other type of paper. The plaintiff failed to get an injunction because of the exceptionally delicate trade that he was carrying on.⁵

In *Bridlington Relay Ltd v Yorks Electricity Board* (1965), the plaintiffs were in the business of relaying sound and television broadcasts and the defendant's power line interfered with their transmissions. It was held that the plaintiffs were crying on an exceptionally delicate trade.⁶

Amenity damage is interference such as noise, smells, dust and vibrations which will interfere with use and enjoyment of land without physically damaging the property. Examples of nuisances interfering with the comfort, convenience, or health of an occupant are foul odors, noxious gases, smoke, dust, loud noises, excessive light, or high temperatures. In the case of amenity damage, the degree of interference has to be measured against the surrounding circumstances.

Interesting questions of locality were raised in *Halsey v Esso PetroleumCo* (1961). The plaintiff's house was in a zone that was classified as residential for planning purposes. The defendant's

¹ 187 N.J. Super.210 (Ch.Div. 1982).

² <http://nuisances.uslegal.com/civil-liability/elements-in-establishing-liability/>

³ The law of nuisance and the rule in *Rylands v Fletcher* Flashcards, <http://Quizlet.com.htm>

⁴ Richard Owen, "Essential Tort Law", 3rd Edition, Cavendish Publishing Limited, 2000, P-99.

⁵ *Ibid*, P-101.

⁶ *Ibid*, P-101.

oil depot was across the road in an industrial zone. There was a combination of physical and amenity damage:

- acid smuts from the defendant's depot damaged paintwork on the plaintiff's car, clothing and washing on the line and there was a nauseating smell;
- noise from the boilers caused the plaintiff's windows and doors to vibrate and prevented him from sleeping and there was also noise from the delivery tankers at night.

In *Laws v Florin place Ltd* (1981), the defendants opened a sex centre and cinema club which showed explicit sex acts. Local residents sought an injunction. It was held that the use constituted a private nuisance.

Moreover, a nuisance may also disturb an occupant's mental tranquility, such as a neighbor who keeps a vicious dog, even though an injury is only threatened and has not actually occurred. An attractive nuisance is a danger likely to lure children onto a person's land. For example, an individual who has a pool on his property has a legal obligation to take reasonable precautions, such as erecting a fence, to prevent foreseeable injury to children.¹

The following are examples from the case law of where damage has been found to have been caused:

- Smells and fumes from candle making preventing enjoyment of neighbouring land
- Preventing neighbours' from sleeping due to noise and vibrations
- Damage to neighbours' clothes from use of acid smuts
- Smell emanating from the neighbours pig farm
- Tree roots sucking moisture from adjoining soil which eventually caused subsidence.

However, interruption of television reception due to a tall building has been held not to amount to a private nuisance.²

Examples of interference that have been found to be private nuisances include: noisy animals, loud air-conditioners, smoke, overhanging tree branches, tree roots growing into neighbours' land and interfering with drainage, vibrations and dust. Activities that have caused people to fear for their safety, such as aerial spraying of crops and firing of guns on a rifle range have also been assessed as "private nuisance".

Who can sue for Private Nuisance

Only a person who has a proprietary interest in the land affected by the nuisance will succeed in a claim, e.g. as owner or reversioner, or be in exclusive possession or occupation of it as tenant or under a licence to occupy (but there may be anomalous exceptions). Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance can bring an action for private nuisance. Therefore, an action for private nuisance can be maintained by those:

- whose rights have been disturbed; or
- who have been injured by the alleged private nuisance.³

However, such a disturbance or injury must be in relation to a right such person possesses by reason of ownership interests in land or by those who have some interests in the property affected. Likewise, any person who has no interest in the property affected, such as a licensee, employer, employee, mere occupant, or lodger of premises, or members of the possessor's family cannot maintain an action for private nuisance. Even a state has no right to maintain an action for private nuisance.

To be able to sue someone for a private nuisance, it must be had standing, or the legal right to sue. Only an individual whose personal use or enjoyment of property is harmed may bring an action. This means that you have to have a property interest in the land. A property interest can include

¹ The law of nuisance and the rule in *Rylands v Fletcher* Flashcards, <http://Quizlet.com.htm>

² <http://InBrief.co.uk.htm/Private+Nuisance/>

³ Persons Entitled to Sue for Nuisances – <http://nuisances.uslegal.com>

outright ownership of the land, as well as an interest for a term, such as a tenant of an apartment building.¹

Therefore, a private person can only make a claim for private nuisance if the land which he has a proprietary interest in has been affected. This occurs in the following circumstances:

- If you are the owner of the land;
- If you have exclusive possession over the land;
- If you occupy the land as either a tenant or under a licence to occupy.

Remedies for Private Nuisance

A man may become responsible for a nuisance by erecting and working a noisy smith's forge, or noisy workshops. And no one must make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.

Private nuisance is the using or authorising the use of one's property or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort and convenience. The specific remedy for private nuisance is damages. In the alternative, or in addition, injunction can be asked for. The defendant has also the extra-judicial remedy of abatement of nuisance by himself.²

Any person whose property or personal enjoyment thereof is affected by a private nuisance, may maintain an action for damages therefor. If judgment is given for the plaintiff in the action, the plaintiff may, on motion, in addition to the execution to enforce the judgment, obtain an order allowing a warrant to issue to the sheriff to abate the nuisance. The motion must be made at the term at which judgment is given, and shall be allowed of course, unless it appears on the hearing that the nuisance has ceased or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may proceed to have the defendant enjoined.³

The courts have found different remedies for private nuisances, based on the circumstances. One remedy is an injunction (the correction of the condition) which is an appropriate remedy when the condition is one that can be changed. This is also called "abatement." If the condition cannot be abated, the plaintiff will seek monetary damages for the loss of his property value due to the permanent nature of the nuisance. The court has the flexibility to impose both remedies if it finds that to be appropriate for the particular circumstances.

The following remedies are available for a successful claim of private nuisance:

- Damages – quantified by the damage done
- Injunction – in order to stop the nuisance
- Abatement or Self-help – the victim takes steps himself to stop the nuisance

Damages

The principle lies on the fact that, whether the defendant injures his neighbour. The plaintiff must prove some special damage. The plaintiff will be entitled to full restitution of his loss. In fact, the measure of damages is similar to that in that other tort which protects interests in land, trespass.

Damages are a monetary sum paid by the defendant for the claimant's loss of enjoyment or any physical damage suffered; they may be paid for things as varied as loss of sleep or any loss of comfort caused by noise or smells.⁴

Under the case of *Shelfer vs. City of London Electric Lighting Co.*,¹ Courts usually award damages in combination of the following grounds that the plaintiff's injury is-

¹ Amir Tikriti, Legal Remedies in a Private Nuisance Case, <http://AllLaw.com.htm>

² S. C. Thanvi, Revised by Vishnu Konoorayar, "The Law of Tort", by Joseph Minattur, Indian Legal System 2nd Revised Edition, The India Law Institute, 2006, P-667.

³ Actions And Suits For Nuisances, https://www.oregonlegislature.gov/bills_laws/ors/ors105.html

⁴ *Elliott, Catherine; Francis Quinn (2007). Tort Law (6th ed.). Pearson Longman, P-276.*

- (1) small,
- (2) capable of being estimated in money,
- (3) capable of being adequately compensated by a small money payment and
- (4) where it would be oppressive to the defendant to grant an injunction.

This principle is always taken to be a good working rule.

But for the continuance of a nuisance, the Court cannot lawfully award damages for the subsequent injuries. In fact, for the continuance of a nuisance a fresh cause of action will arise.

So, under *Galstaun vs. Doonia Lal Seal* case,² if substantial damages are once given, and there be a fresh action, then the Court will award exemplary damages to compel abatement. And in *Bracewell vs. Appleby's* case³, where an injunction being refused and an award of damages being made in lien over the plaintiff has proved that substantial interference has already occurred, and is likely to recur in the future, the burden of proof is on the defendant to adduce special circumstances why an injunction should not be granted.

Tort-litigation relating to nuisance in Myanmar has very rare. But in *Nga Myat Hmwe vs. Nga Yi & Mi Kywe* case,⁴ the storage of water for the agricultural land of the appellant was led out by the respondents and in consequence the appellant's agricultural land has been totally destroyed. There was no evidence as to the total destroy of that land was due to the lack of water. But the Court held that the respondents have act.

Abatement of Nuisance or Self-Help

It is a defence to trespass to land that the act was done to end a nuisance to the defendant, for which the plaintiff was responsible.

Abatement is a remedy that allows the claimant to directly end the nuisance, such as trimming back a protruding hedge. If the abatement requires the claimant stepping onto the defendant's land, he must give notice or risk becoming a [trespasser](#).⁵

In *Lemmon vs. Webb's* case,⁶ the House of Lords held that the occupier could, lawfully remove those branches of his neighbour's tree which projected above his own land and interfered with the growth of his own trees.

In an abatement of nuisance, unnecessary damage must not be done. Where there are two ways of abating a nuisance, the less evil or mischievous is to be followed. In doing so no wrong should be done to an innocent third party or the public and previous notice is given when necessary.

A person who has been harmed by a nuisance can also engage in self-help. Self-help means that you are permitted to remove or destroy the nuisance, if you can do so without unnecessarily harming anyone or anything, or without breaching the peace. However, if you have to go onto someone else's property to stop the nuisance, you may have to give reasonable notice. Engaging in self-help will not foreclose you from seeking judicial remedies.⁷

Injunction

In addition to money damages, it may also abate a private nuisance by removing or destroying it completely. The traditional method for abating a nuisance is an injunction. An injunction is a court order that requires the other party to do or refrain from doing a specific act

¹ (1895 1.Ch. 287, 322) A.L. Smith LJ.

² 1905, 32, Cat. 697.

³ 1975. 1. All E.R. 993.

⁴ 2. U.B.R. (1904-06) P.9.

⁵ *Elliott, Catherine; Francis Quinn (2007). Tort Law (6th ed.), Pearson Longman, P-276.*

⁶ 1895 A.C. 1 (the defendant did not actually set foot on the plaintiff's land in abating the nuisance).

⁷ Amir Tikriti, Legal Remedies in a Private Nuisance Case, <http://AllLaw.com.htm>

or acts. To receive an injunction, it must be able to show that it will be suffered irreparable harm if the nuisance continues

Injunctions are the main remedy, and consist of an order to stop the activity causing the nuisance. They may be "perpetual", completely forbidding the activity, or "partial", for example limiting when the activity can take place.¹ Whoever wants to obtain an injunction must prove that nuisance of a permanent character cannot be adequately compensated in damages. If there is the damager of the alleged further nuisance the plaintiff must show a strong case of probability, that such mischief will actually arise. Injunction is a discretionary remedy.

Normally, injunctions are granted when a certain tort has been committed. However, under *Redland Bricks Ltd. vs. Morris* case², if the conduct of the defendant is such that, if it allowed to continue, substantial damages should occur, the plaintiff may bring a 'qui timent' action (action which is to take care), to prevent an apprehended legal wrong.

Essential Elements for Nuisance

The existence of a nuisance in each case depends upon its own facts and special circumstances. Hence there is no exact rule or formula for determining the existence of a 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. When determining whether the defendant has committed a nuisance and whether the plaintiff is entitled to a remedy the courts consider several factors. The defendant's actions must considerably interfere with the plaintiff's enjoyment of property and violate their right to comfort. The courts will weigh the interests of both parties and consider whether the defendant has made an attempts to minimize the alleged nuisance, or if the defendant has the means to do so.

Under the Common Law, the elements required for establishing civil liability are:

- that a defendant performed or carried on an activity; and
- that an injury or significant threat of injury was caused to the interest of a plaintiff.³

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, question that whether a nuisance exists, and whether it has resulted in any damages are question of facts which are to be determined by 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 burden to prove the guilt on the part of the defendant depends upon the plaintiff.⁴

Some minor discomforts which are parts of the social life in crowded cities, have to be endured, and looking to circumstances of time, place and persons they may not be regarded as nuisance by courts. When personal discomfort is caused by the conduct of the defendant, court can afford to take a lenient view of the matter, but if loss to property is caused by the conduct of the defendant, the court is

¹ *Elliott, Catherine; Francis Quinn (2007). Tort Law (6th ed.). Pearson Longman, P-275.*

² 1970.A.C. 652.664, Per Lord Upjohn.

³ <http://nuisances.uslegal.com/civil-liability/elements-in-establishing-liability/>

⁴ *Koll-Irvine Center Property Owners Assn. V. County of Orange*, 24 Cal. App. 4th 1036 (Cal. App. 4th Dist. 1994).

not likely to take a lenient view. Further, the standard of comfort varies from place to place and one is not expected to be hyper-sensitive to smells, noise and other inconveniences.¹

But it must be noted that escape of something on a single occasion would not ordinarily be taken as a nuisance. In *Stone vs. Botton* case,² the plaintiff, while standing on the highway, was injured by a cricket ball struck from the defendant's field. It was held that an isolated act of hitting a cricket ball into a road did not amount to a nuisance. Thus in considering an act to be a nuisance, it must be taken all circumstances regarding the time and place, and state of affairs, the nature and extent of the plaintiff's enjoyment.

In *Spicer vs. Smee* case,³ where the defendant let a defective electrical wiring installed in his premises and which caused a fire resulting in the destruction of the plaintiff's adjoining bungalow, it will amount to a private nuisance.

The maintenance of a nuisance action also depends upon the continuity of an action over a substantial period of time.⁴ However, continuity does not mean that such an act must be habitual or periodical.⁵ Even a single act that produces a continuing result or an injury resulting from an act that is occasional would also constitute a nuisance.⁶

Likewise, under *Sears v. Hull* case,⁷ in order to render a defendant liable for nuisance, it must be established that the defendant's acts were the proximate cause for the creation of the nuisance.

Moreover, it is also important to note that "malice" is an important factor to be considered in judging what constitutes a nuisance. Malice, as an improper motive, cannot turn a lawful act into an unlawful one. But the doing of something which may, on the very face of it, be treated as nuisance for it endangers or disturbs normal conditions of social living. Hence, if the defendant made deliberately and maliciously for the purpose of annoying the plaintiff, the plaintiff will be entitled to get both remedies as mentioned above.

There was a case between *Palmer vs. Loder*,⁸ in which perpetual injunction was granted to restrain defendant from interfering with plaintiff's enjoyment of her flat by shouting, banging, laughing, ringing doorbells or otherwise behaving so as to cause a nuisance by noise to her.

Generally, in *Echard v. Kraft* case,⁹ it was decided that unless injury or damage from the act done is proven, a nuisance cannot be established. However, courts have divergent views with regard to the essentiality of the element of existence of harm or injury. According to one view, in order to obtain recovery for damages there must be a substantial injury or interference.¹⁰ According to another view, damage is not an essential element in the establishment of nuisance. Further a thing can be a nuisance at any time even without causing an actual damage and hence it is not an essential element of tort. Hence the tort of nuisance

¹ S. C. Thanvi, Revised by Vishnu Konoorayar, "The Law of Tort", by Joseph Minattur, Indian Legal System 2nd Revised Edition, The India Law Institute, 2006, P-667.

² 1949 1.ALL E.R. 237. 238. Oliver. J.

³ 1946. 1. All E.R. 489.

⁴ *Hempstead v. S. Zara & Sons Contracting Co.*, 173 A.D.2d 536 (N.Y. App. Div. 2d Dep't 1991).

⁵ *Metropolitan Life Ins. Co. v. Moldoff*, 187 Misc. 458 (N.Y. App. Term 1946).

⁶ <http://nuisances.uslegal.com/civil-liability/elements-in-establishing-liability/>

⁷ 192 Ariz. 65, 70-71 (Ariz. 1998).

⁸ 1962, C.L.Y. 2233.

⁹ 159 Md. App. 110 (Md. Ct. Spec. App. 2004).

¹⁰ *Rose v. Chaikin*, 187 N.J. Super.210 (Ch.Div. 1982).

must be viewed as a disturbance of some right or interest in land which may or may not involve physical invasion of a plaintiff's property.¹

Therefore, to be a nuisance, the level of interference must rise above the merely aesthetic. For example: if your neighbour paints their house purple, it may offend you; however, it doesn't rise to the level of nuisance. In most cases, normal uses of a property that can constitute quiet enjoyment cannot be restrained in nuisance either. For example, the sound of a crying baby may be annoying, but it is an expected part of quiet enjoyment of property and does not constitute a nuisance.

General Defenses for Nuisance

So far, it has been primarily concerned with what a plaintiff has to prove in order to establish the existence of a tort. This would be a convenient point to consider certain defences which may be raised by the defendant, who while admitting the behavior complained of (which would otherwise constitute a tort), then seeks to adduce in evidence additional facts which will excuse what he has done. So, the burden of proving the facts to establish the defence rests on the defendant.

There are several defences to nuisance claims as follows.

Act of God

The first defence is "Act of God". If an escape is caused, through natural causes and without human intervention, in 'circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility'² then there is said to be the defence of Act of God.

In *Nichols v Marsland* (1876), the defence succeeded where a violent thunder storm caused flooding. The case was put into proper perspective by the House of Lords in *Greenock Corporation v Caledonian Railway Co* (1917) where an extraordinary and unprecedented rainfall was held in similar circumstances not to be an Act of God.³

Under these cases, there is no reasonable person who could have anticipated the storm and the court would not disturb a finding of fact. Earthquakes and tornadoes may sometimes be Acts of God.

20 Years Prescription

A second defence is that of "20 Year Prescription", which is valid for private nuisance but not public. If a private nuisance continues for 20 years, it becomes legal by prescription, assuming the defendant can show that it has been continuous and the claimant has been aware of it. A limitation is that the 20 years is from when the activity became a nuisance, not from when the activity started.

A title acquired by use and time, and allowed by Law; as when a man claims anything, because he and his predecessors have had possession for the period prescribed by law. In Myanmar, this prescription is defined in Section 26 of Limitation Act, also 20 years for right of private person and 60 years for right of Government.

In *Sturges v Bridgman case*,⁴ the claimant, a doctor, lived next to a "confectionery business". Vibrations and noises coming from this business continued for over 20 years without causing the doctor nuisance, and the doctor only complained after building a consulting room in his garden. It was held that the actual nuisance only started when the consulting room was built and the activity began to affect the doctor, not when the activity started.

¹ *Koll-Irvine Center Property Owners Assn. V. County of Orange*, 24 Cal. App. 4th 1036 (Cal. App. 4th Dist. 1994).

² *Tennent v Earl of Glasgow* (1864).

³ Richard Owen, "Essential Tort Law", 3rd Edition, Cavendish Publishing Limited, 2000, P- 109.

⁴ 1879 LR 11 Ch D 852.

Statutory Authority

Another defence is statutory authority. It comes into defence when an activity is authorised by the legislation itself. This applies even when the activity is carried out not directly in line with the statute, but *intra vires*. Where a statute has authorised the doing of a particular act or the use of land in a particular way, all remedies whether by way of indictment or action, are taken away; provided that every reasonable precaution consistent with the exercise of the statutory powers has been taken.

Statutory authority may be either absolute or conditional. In case of absolute authority, the statute allows the act notwithstanding the fact that it must necessarily cause a nuisance or any other form of injury. In case of conditional authority, the State allows the act to be done only if it can be without causing nuisance or any other form of injury, and thus it calls for the exercise of due care and caution and due regard for private rights.

In *Allen v Gulf Oil Refining Ltd*,⁷² the defendant in this case was given the authority through act of parliament to build an oil refinery. Although the act did not give any permission to operate it but despite that it came into operation which caused nuisance to claimant through smell and noise. It was observed by the House of Lords that the defendant had the statutory authority to operate the refinery, therefore the claimant cannot succeed in his claim.

Default of the plaintiff

The defendant is not liable where damage is caused by the plaintiff's act or default. If the plaintiff is partially responsible, the defendant will apply this defence.

In *Ponting v Noakes* (1894), the defendant's colt reached over the defendant's land and ate some branches of a yew tree and died. The action did not succeed as the animal's death was due to its wrongful intrusion. Where the damage is attributable to the extra sensitivity of the plaintiff's property then there is no liability subject to *Eastern and South African Telegraph Co Ltd v Cape Town Tramways Co Ltd* (1902) case.⁷³

If a man knowingly purchases an estate in close proximity to a smelting works, his remedy, for a nuisance created by fumes issuing therefrom is not affected. It is not valid defence to say that the plaintiff came to the nuisance.

Zoning

In *Gardner et al. v. International Shoe Company* case,⁷⁴ the plaintiffs sought damages for odors which necessarily interfered with the use, occupation, and wholesome enjoyment of their homes. The odors were emitted by the defendant's tannery. The court held for defendant. Since the evidence showed that the defendant's tannery was located in an industrial area, that it was an essential industry, and that it operated in the most modern manner with the approval of the state board of health, the plaintiffs could not recover in the absence of a showing of material injury to their health or property, for it is against public policy to interfere with normal industrial activity.⁷⁵

Additionally, remoteness, common benefit, act of a stranger, judicial acts, quasi-judicial acts, inevitable accident and exercise of common rights are also applied for the defences in accordance with the circumstances and situations.

Conclusion

The law of nuisance is wrapped up in a pool of uncertainty. The boundaries of this tort are in no way fixed or easy to identify. Recent cases have constantly been changing the ambit of nuisance and to a considerable extent, the tort of negligence has eclipsed important elements of the law of nuisance.

The law related to nuisance is generally un-codified. But it has increased its scope through judgments and interpretations. The concept of nuisance generally occurs in a person's day to day life and the decision is made on the basis of facts and circumstances. It also becomes the duty of the court to compensate the aggrieved plaintiff and make sure that the defendant does not get punished unfairly.

It should be noted that the courts have extreme discretionary power to grant injunction to the plaintiff on the basis of facts and circumstances of the case. It may also reject it. The cases regarding private nuisance generally raise questions of fact rather than the question of law. So it becomes difficult to make adequate form of remedy for such grievances.

The law of private nuisance focuses on protecting the interest of the people. It also takes into consideration the settlement of the disputes between the adjacent landowners. It helps and maintains balance between the right of one person in respect of use of his land in whatever way he wish to use it and not to be interfere with the right of the neighbor.

The law of private nuisance consists of private nuisance which if proven then the plaintiff can sue the defendant for causing nuisance or even interfering with the land of the plaintiff. To succeed in a claim of private nuisance, the plaintiff must prove that the interference caused is significant and is unreasonable irrespective of the harm alleged. To prove an unreasonable interference, the plaintiff must take into account all the factors which will be necessary to prove the level of unreasonableness in the eyes of the court. The plaintiff should also render evidence in support of his arguments.

Public nuisance on the other hand was never considered as a tort in the beginning. It was first regarded as the public action which was totally under the control of the legislature. Mostly in matters of public nuisance, the defendants are neither identifiable nor they can abate it in matters of small contributors. It should be considered that the concept of public nuisance has some advantage over the private nuisance in some group actions but there are conflicting views from the judiciary. While dealing with the matter of public nuisance, the properties which are affected should be clearly delineated before the offence of public nuisance is declared judicially and such conduct should be explained by the standards of legislation, not alone by the creativity of common law.

In order to avoid the public nuisance, the punishment for public nuisance should be severe i.e. minimum 2 years. Proper implementation of punishment within specific time period 20 years period of private nuisance should not exist. And public nuisance should be considered a criminal offense as it affects a large number of people at once. Approval of Advocate General in matters of public nuisance should not be required as it can slow down the procedure.

And the Law of Tort as administered in Myanmar courts is the English law of Torts, so far as it is applicable to our own circumstances. So the courts of Myanmar have borrowed from the principles of English and also from the decisions of the common law system in the matters regarding the law of nuisance. This has resulted to the lack of knowledge of law of tort to the Myanmar people. And because of this result and also the delay, costs and procedures of the courts, there is no tortious action relating to nuisance in Myanmar court.

In conclusion, in order to effectively protect the rights and enjoyments of Myanmar people and not to lose their quiet enjoyment of property, it is necessary to aware the law of tort relating to nuisance, and to share general knowledge relating to their rights and duties and remedies of nuisance, too.

Acknowledgements

I would like to express my sincere gratitude to Sayar Gyi Dr. Hla Htay, Rector, Dagon University for his encouragement and permission relating to research presentation in the 23rd Anniversary of Dagon University Paper Reading Session. My sincere thanks also go to Professor Dr. Mi Khin Saw Aung, Head of the Department of Law, Dagon University, for all of her help and encouragement in all the time of this research. My special thanks extend to all my teachers and all my seniors, colleagues and friends for their invaluable support, advice and kindly co-operation.

References

Laws

- The Criminal Procedure Code. India Act. V. of 1898 1st July 1898. Burma Code Vol. VIII.
- The Civil Procedure Code. India Act. V. 1908. 1st Jan. 1909. Burma Code. Vol. XII.
- The Limitation Act. V. 1908. 1st Jan. 1909. Burma Code. Vol. XII.

Books and Articles

- Dr. Ba Han, "The University English Myanmar Dictionary", part IX, 1963.
Elliott, Catherine; Francis Quinn, "Tort Law", 6th Ed., Pearson Longman, 2007.
- Glanville Williams, "The Aims of the Law of Tort", Current Legal Problems. 1951.
- Harry Street, "The Law of Torts", 6th Ed., London Butter Worths, 1976.
- Indiana Law Journal (Vol. 19), 1944.
- Richard Owen, "Essential Tort Law", 3rd Edition, Cavendish Publishing Limited, 2000.
- S. C. Thanvi, Revised by Vishnu Konoorayar, "The Law of Tort", by Joseph Minattur, Indian Legal System 2nd Revise Edition, The India Law Institute, 2006.
- Simon Deakin, Angus Johnston, and Basil Markesinis, "Markesinis and Deakin's Tort Law", 7th ed, Oxford University Press, Oxford, 2013.
- Sir Frederick Pollock, "The Law of Tort: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law", Fourth Edition, London: Steven and Sons Limited, 1895.
- Sir J. F. Stephen, Digest of the Criminal Law.

Internet Sources

- <http://nuisances.uslegal.com/civil-liability/elements-in-establishing-liability/>
 Actions and Suit for Private Nuisance,
https://www.oregonlegislature.gov/bills_laws/ors/ors105.html
 Amir Tikriti, Legal Remedies in a Private Nuisance Case,
<http://AllLaw.com.htm>
 Persons Entitled to Sue for Nuisances, The Law Commission, "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency", Consultation Paper No. 193,
<http://www.lawcom.gov.uk/docs/cp193.pdf>
- The law of nuisance and the rule in Rylands v Fletcher Flashcards ,
<http://Quizlet.com.htm> Zoning and the Law of Nuisance, Fordham Law Review, Vol 29, Issue 4, Article 10,
<http://ir.lawnet.fordham.edu/flr/vol29/iss4/10>
[http://InBrief.co.uk.htm/Private Nuisance /](http://InBrief.co.uk.htm/Private+Nuisance/)
<http://law.jrank.org/pages/8871/Nuisance-Remedies.html>
<http://letstalk/abouttort.blogspot.in/2009/03/nuisance.html>
<http://nuisances.uslegal.com>
<http://nuisances.uslegal.com/civil-liability/elements-in-establishing-liability/>
<http://nuisances.uslegal.com/remedies-and-procedure/>
<http://www.lawhandbook.org.au/handbook/ch10s02s02.php>
 "Nuisance", [http://The Law New Handbook.com](http://TheLawNewHandbook.com)

Cases

[Allen v Gulf Oil Refining Ltd](#), (1981) AC 1001.

Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 148 Ariz. 1 (Ariz. 1985).

Bamford v Turnley, 1860 3 B&S 62.

Bracewell vs. Appleby, 1975. 1. All E.R. 993.

Brown v. Petrolane, Inc., 102 Cal. App. 3d 720 (Cal. App. 2d Dist. 1980).

Christopherson v. Bare (1848), 11.Q.B 473

Echard v. Kraft, 159 Md. App. 110 (Md. Ct. Spec. App. 2004).

Galstaun vs. Doonia Lal Seal, 1905, 32, Cat. 697.

Hempstead v. S. Zara & Sons Contracting Co., 173 A.D.2d 536 (N.Y. App. Div. 2d Dep't 1991).

Koll-Irvine Center Property Owners Assn. v. County of Orange, 24 Cal. App. 4th 1036 (Cal. App. 4th Dist. 1994).

Leanse v. Egerton, (1943) 1 KB 323.

Lemmon v. Webb's, 1895 A.C. 1.

Metropolitan Life Ins. Co. v. Moldoff, 187 Misc. 458 (N.Y. App. Term 1946).

Mortgage Bank of India v. AhmedbhoyHabibbhoy, 1883 8.Bom. 35.

NgaMyatHmwe v. Nga Yi & MiKywe, 2. U.B.R. (1904-06) P.9.

Palmer vs. Loder, 1962, C.L.Y. 2233.

Redland Bricks Ltd. v. Morris, 1970.A.C. 652.664, Per Lord Upjohn.

Rose v. Chaikin, 187 N.J. Super.210 (Ch.Div. 1982).

Rose v. Chaikin, 187 N.J. Super.210 (Ch.Div. 1982).

Sears v. Hull, 192 Ariz. 65, 70-71 (Ariz. 1998).

SeongFatt Sawmills SdnBhd v Dunlop Malaysia Industries SdnBhd (1984)1 MLJ 286 FC.

Shelfer vs. City of London Electric Lighting Co., (1895 1.Ch. 287, 322) A.L.

Soltau vs. De Held, 2.Sim, N.S. 133 Simons Reports. New Series (1850-1852), 1883 8.Bom. 35.

Spicer vs. Smee, 1946. 1. All E.R. 489.

Stone vs. Botton, 1949 1.ALL E.R. 237. 238.

[Sturges v Bridgman case](#), (1879) LR 11 Ch D 852.

Tennent v Earl of Glasgow (1864).