

## CHAPTER 14

### The Theory of Nuisance as an Impediment to Mining Operations

Maxwell P. Barret, Jr.

Stoll, Keenon & Park

Lexington, Kentucky

#### Synopsis

§ 14.01. Introduction.

§ 14.02. Public Nuisance.

§ 14.03. Private Nuisance.

§ 14.04. Conclusion.

#### § 14.01. Introduction.

Since the dawn of English common law, there has been a cause of action designed to prohibit or redress unreasonable interference with the use and enjoyment of property rights.<sup>(1)</sup> Property law has traditionally embraced the principle that landowners are entitled to the free use and enjoyment of their property, subject to such restrictions as may be imposed for the common good.<sup>(2)</sup> However, nearly every property use restricts or interferes to some extent with the occupation and quiet enjoyment of adjoining property or the convenience of adjoining landowners. In some instances, the interfering use may also provide benefits to neighbors or to the community.<sup>(3)</sup> This clash of competing property interests, and of reciprocal costs and benefits, is inherent in organized society. Nuisance law emerged as one of the earliest means to resolve these conflicts between competing interests and to allocate the costs and burdens associated with them.<sup>(4)</sup>

Nuisance is properly viewed as a field of tort liability, rather than a particular type of tortious conduct.<sup>(5)</sup> The term "nuisance" derives from the French *nuisant*, which means hurtful, injurious, or prejudicial and has become a legal catchword encompassing a broad range of rights and remedies.<sup>(6)</sup> The essence of private nuisance is unreasonable or substantial injury or interference with the use and enjoyment of plaintiff's land as a result of some act or use conducted on defendant's land. Whereas common law trespass generally requires a physical invasion as an element of the cause of action, nuisance does not; in practice, courts often intertwine principles of trespass, private nuisance, and negligence.<sup>(7)</sup>

As nuisance law developed, it expanded to include actions for interference with public rights, such as obstruction of a public highway, by plaintiffs suffering "special injury." Now referred to as public nuisance, this cause of action is essentially an action for personal injury arising from interference with a public right, as opposed to an action for injury to private lands or property interests.<sup>(8)</sup> The two fundamentally different wrongs -- interference with use and enjoyment of land ("private nuisance") and special injury from interference with a public right ("public nuisance") -- came under the common umbrella of nuisance law.

Use of the term nuisance to refer to both has resulted in the development of rules that, with minor differences, apply equally to both causes of action.

Mining operations can be difficult neighbors, regardless of efforts to ameliorate their effects upon adjoining landowners. As social values or priorities have changed to reflect increased appreciation for the environment and its preservation, concepts of the reasonableness of land use have also changed. Nuisance actions, grounded in a balancing of competing interests, are influenced by social values, economic effects, and changing circumstances, particularly residential development occasioned by an expanding population. As a result, nuisance actions are enjoying a certain resurgence, fueled in part by an environmental plaintiffs' bar that encourages nuisance actions as an adjunct to the citizens' suits and private actions authorized under the myriad regulatory schemes applicable to the modern coal industry.

#### **§ 14.02. Public Nuisance.**

A public nuisance is an unreasonable interference with a right common to the general public.<sup>(9)</sup> Examples include such activities or conditions as obstruction of or damage to highways, maintenance of a house of prostitution, distribution of obscene material, air or water pollution, deteriorated buildings, noise, unlicensed sale of alcoholic beverages, and disorderly conduct. All are typically defined by statute as constituting public nuisances. The defining requirement for public nuisance is that the conduct must affect an interest that is truly public; an interference with a private right, even if common to a very large number of people, does not amount to public nuisance.<sup>(10)</sup>

Under early English common law, a public nuisance was a crime, subject to prosecution and abatement by the Crown, and a private citizen had no standing to bring the action.<sup>(11)</sup> However, the English courts eventually created an exception to permit a private cause of action for personal injury arising from a public nuisance, but only if the defendant's conduct resulted in special damage or inconvenience to the plaintiff different from that endured by the public at large.<sup>(12)</sup> These principles survive under modern theories of public nuisance.

An action to abate or enjoin a public nuisance is primarily the function of government or the governmental agency with jurisdiction over the activity involved or the public right or interest being threatened.<sup>(13)</sup> Private citizens can bring an action to abate or recover damages for a public nuisance in two instances -- (1) where authorized by statute to sue as a representative of the general public or the affected class<sup>(14)</sup> or (2) where they have suffered damages from the activity "different in kind" from that suffered by the general public.<sup>(15)</sup> The requirement that a private plaintiff demonstrate damages different in kind (as opposed to different in degree) to maintain a public nuisance action has been the source of much controversy and criticism by legal commentators.<sup>(16)</sup> The rationale for the special injury rule was to prevent a multiplicity of lawsuits seeking to represent the public to remedy a single wrong against the public interest; however, by requiring the private plaintiff to establish an injury different in kind from the general public, the rule created a private attorney general whose interest was, by definition, different from the interests of the public whose rights the private plaintiff sought to represent.

In an era of environmental activism, the special injury standing rule prohibited or limited public nuisance actions by environmental groups.<sup>(17)</sup> As a result, environmental interests persuaded Congress to include provisions for citizen suits as part of the major environmental legislation of the 1970's and 1980's, including the Surface Mine Control and Reclamation Act<sup>(18)</sup> (SMCRA), the federal Water Pollution Control Act<sup>(19)</sup> (Clean Water Act or CWA), the federal Clean Air Act<sup>(20)</sup> (Clean Air Act or CAA), the Resource Conservation and Recovery Act<sup>(21)</sup> (RCRA), and the Comprehensive Environmental Response,