Welcome to the Jungle:
The Dangers of the Expansion of the Public Nuisance Cause of Action

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Introduction

What is the tort of public nuisance? Well, in the traditional lawyer response—*it depends.* William Prosser, best known for authoring *Prosser on Torts* and for being the original reporter for the *Restatement (Second) of Torts*, once noted that "there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance."[1] Today, if you asked a defense attorney, they would likely say that public nuisance is an out-of-control, catch-all tort that is an ever-expanding cause of action. If you asked a plaintiffs' attorney, they would probably say that the public nuisance cause of action is an equitable pathway to remedy individuals who have been harmed by "unreasonable" interferences with their public rights. Going one step further, if you asked a group of attorneys twenty years ago, their answers would be vastly different than the responses you would receive today.

In short, the tort of public nuisance is rapidly evolving cause of action that is being used in new ways every day. As one article stated, "[p]ublic nuisance has lived many lives."[2] Throughout history, many actions and behaviors have been categorized as public nuisances: making harassing telephone calls; embezzling public funds; keeping a tiger in a pen along the highway; lead contamination; selling tobacco; and more recently, making and distributing opioids.[3]
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This article will explore the history of the public nuisance cause of action and its original purpose within the law. It will then explore public nuisance's evolution over time to its eventual, modern-day status as a catch-all cause of action, devoid of duty, breach, causation and individual injury. Lastly, the article will address the dangers of allowing the public nuisance cause of action to continue to expand and erode the elements of tort law.

The Impenetrable Jungle: A History of its Origins

The origins of the tort of public nuisance can be traced back to 12th century England where the tort was created as an avenue for the King of England to address incidents where

[1] William Prosser, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971).
[2] Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 705 (2023).
[3] *Id.* at 705-06.

royal property was infringed upon or blocked.[4] By the 16th century, the tort was broadened to allow individuals to bring public nuisance claims to recover damages for "injuries" to a public right.[5] In the early days of the tort, the conduct was usually limited to conduct affecting the right to property, waterway, and land. However, "[o]ver time, other public right interferences, such as noxious and offensive trades that interfered with the public's health, comfort and, in some cases, morals were considered public nuisances."[6] In the 1500s, in a case called *Anonymous*, a judge's dissent gave rise to the "special injury rule"—which ultimately led to private individuals obtaining the right to sue for damages resulting from a public nuisance.[7] The dissent described the "special injury" as follows:

> I agree well that each nuisance done in the King's highway is punish-able in the Leet and not by action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt. So if one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the high-way, because I have suffered more damage than any other person.[8]

By the 18th century, the United States was well-on its way to developing its legal system. Building off the English model, the United States adopted public nuisance primarily as a cause of action for conflicts affecting the use of public highways and navigable waterways.[9] "Less common were a loose amalgamation of minor offenses involving public morals or the public welfare that were classified as either public nuisances or common nuisances, including lotteries, other forms of gambling and wagering, keeping a disorderly house or tavern, enabling prostitution, and using profane language."[10]

For over 700 years, the concepts of public nuisance litigation have been narrowly tailored to the following:

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[4] *See Waking the Litigation Monster: The Misuse of Public Nuisance Actions*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Mar. 2019), at 3.
[5] *Id.*
[6] *Id.* at 4.
[7] *Id.* (citing Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV.741 (2003)).
[8] Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV.741, 800 (2003).
[9] *Id.*
[10] *Id.* at 800-01.

> (1) A public nuisance lawsuit must defend a public right. Blocking private driveways or even doing something against the public interest is not interfering with a public right.
>
> (2) The public nuisance is the condition blocking the public's right to use the land or water. It has nothing to do with actions elsewhere, like marketing or promoting products.
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> (3) To be liable for the public nuisance, one must be engaged in an unlawful activity that is causing the public nuisance condition. These are generally quasi-criminal acts.
>
> (4) Only the person unlawfully causing or in control of the public nuisance is responsible, not the companies that made products used to create the nuisance.[11]

However, as the young country began to develop, so did the claims underlying public nuisance causes of actions. By the mid-1840s, industrialization spurned new injuries stemming from water pollution and air pollution.[12] Then, individuals sought to use public nuisance as a vehicle for recovering damages from the increased use of railroads and manufacturing facilities. As the country continued to modernize, it became increasingly more difficult to foresee what activities would be deemed a public nuisance next. "State legislatures, particularly during times of economic and industrial transformation, could not anticipate and explicitly prohibit or regulate through legislation all the particular activities that might injure or annoy the general public."[13]

During the early 20th century, there was a substantial reduction in public nuisance suits of all types.[14] This is likely due to the increase in Progressive Era/New Deal statutory and regulatory schemes that were implemented to replace other regulations for former public nuisance prosecutions.[15] In fact, the first Restatement of Torts did not even mention public nuisance.

In 1966, William Prosser included public nuisance in the Restatement (Second) of Torts and provided that "[a] public or 'common' nuisance is always a crime."[16] In his original draft, Prosser limited public nuisance to "a criminal interference with a right

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[11] *The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort,"* AMERICAN TORT REFORM ASSOCIATION, (2020), at 1, *available at* https://www.atra.org/wp-content/uploads/2020/03/Public-Nuisance-Super-Tort.pdf.
[12] Gifford, *supra* note 8, at 802.
[13] *Id.* at 804.
[14] *Id.* at 805.
[15] *Id.* at 805-06.
[16] *Id.* at 806 (citing William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966)).

common to all members of the public[,]" and he limited damages only to individuals who satisfied the special injury rule."[17] Then, at the urging of environmentalists, the Restatement (Second) of Torts expanded public nuisance to include "an 'unreasonable interference' with a public right. It also suggested that individual plaintiffs could seek to enjoin or abate a public nuisance if they sued "as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."[18] Essentially, this was the beginning of a whole new era for public nuisance claims and a clear departure from the narrow constraints of the public nuisance of the past.

The Beastly Expansion of the Public Nuisance Claim

In the 1960s, plaintiff lawyers sought to find new ways of expanding public nuisance causes of actions to a broader array of actions. They wanted "public nuisance liability to include any conduct, even when lawful and regulated, and for manufacturers to face broad-based liability for any costs associated with their products, regardless of fault."[19] In 1971, the plaintiffs' lawyers tried their first major expansion case when California residents sued multiple companies whose businesses caused smog.[20] However, the California court did not agree with the litigants, dismissed the case, and "explained that there is a 'system of statutes and administrative rules' that govern emissions in this country and that engaging in lawful commerce cannot be re-categorized as tortious conduct, even when contributing to a public nuisance."[21]

In an article published by the American Tort Reform Association aptly titled, "The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance 'Super Tort,'" the authors delve into the late 20th century public nuisance surge:

> The dynamics for these lawsuits fundamentally changed in the 1990s. Private lawyers realized that they can get life-changing wealth through contingency fees if these types of cases succeed. They signed up local governments to sue for a variety of environmental and social issues associated with the use, misuse, or disposal of products, from lead poisoning to gun violence. They also leveraged their ability to bring the same cases in multiple jurisdictions in hopes of finding at least one judge to let a case go forward. All they would need is one crack in the dam to create huge contingency fees. These cases did not argue that products were defective, but that manufacturers

[17] *Waking the Litigation Monster: The Misuse of Public Nuisance Actions*, *supra* note 4, at 7.
[18] *Id.* at 7.
[19] *The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort," supra* note 11, at 2.
[20] *Id.* at 2-3.
[21] *Id.* at 3.

> should have to pay to remediate harms. Full stop. **No wrongdoing, no fault, and no causation needed.**[22]

(Emphasis added). With the rise in creative and strategic litigation, there were serious concerns, with parts of the legal community, that public nuisance causes of actions would eventually have no limiting principles. In 2003, in *People ex rel. Spitzer v. Sturm, Ruger, & Co.*, a New York appellate court stated that "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born."[23] And indeed, the creative minds got to work—leading to public nuisance causes of action for lead paint, tobacco, asbestos, and eventually, opioids.

The breakthrough in "creative" public nuisance cases came in the late 1990s. There were only a few lead paint companies still in business, and plaintiff attorneys across the country filed suit in various jurisdictions to see where they could obtain favorable rulings. Certain states such as Rhode Island and New Jersey, foresaw the dangers of expanding liability.[24] However, success was found in California when

> the lower courts endorsed the legal work-arounds widely rejected everywhere else, awarding $1.15 billion in abatement costs against three companies without any proof that these companies' paint was in any home. The trial court made clear that it was trying to solve a problem, not enforce the law, saying it did not want to "turn a blind eye" to lead poisoning and that it was trying to "protect thousands of lives." In what can be described only as an act of judicial malpractice, the California Supreme Court refused to consider an appeal of that ruling. [In 2019], the case settled for $305 million, with $65 million going to the plaintiffs' lawyers.
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> The California lead paint case has been the clarion call plaintiffs' lawyers have been seeking for more than 50 years, as they try to make money off of environmental or social harms. The traditional tenets of product liability, including the lack of a manufacturer's wrongdoing, a product's utility, the overall public interest, and the lapse of time since the product was lawfully sold, take a back seat to this desire for a new revenue source. [25]

[22] *Id.*
[23] *Id.*
[24] *Id.* at 4.
[25] *Id.*

(Internal citations omitted).

This expansion and lack of deference for the historical origins of public nuisance is best exemplified by the mixed rulings that have been handed down over the past two decades. Some courts, such as those in Missouri, New Jersey, Rhode Island, Illinois, Michigan, and even the U.S. Supreme Court, have rejected the expansion of the tort and have held that many of the new claims exceed the traditional limits of public nuisance.

- Missouri: Upheld the dismissal of a public nuisance case against manufacturers of lead paint and pigment because neither the Missouri Supreme Court nor Missouri case law "abandon[ed] the requirement of proving actual causation in a public nuisance claim."[26]

- New Jersey: Supreme Court held that 26 municipalities could not bring a public nuisance claim against lead paint manufacturers and distributors to recover costs of finding and removing said paid, among other costs. The Court found that the claims had no basis in tort and if they were to let the claims proceed, it would "stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[27]

- Rhode Island: Supreme Court overturned a verdict that would have awarded litigants a large sum from three lead paint manufacturers. The Court reasoned that the "hazards of unabated lead" did not rise to the level "of alleging an interference with a public right as that term has traditionally been understood in the law of public nuisance."[28]

- Illinois: Rejected a public nuisance claim against a gun manufacturer and reasoned that a public right does not equate to widespread interference with private rights. Further, there is "no reason to depart from the long-standing principle that a public right is a right of the public to shared resources such as air, water, or public rights of way."[29]

[26] *Waking the Litigation Monster: The Misuse of Public Nuisance Actions*, *supra* note 4, at 14-15 (discussing *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (en banc)).
[27] *Id.* at 16 (discussing *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007)).
[28] *Id.* at 17 (discussing *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008)).
[29] *Id.* at 18 (discussing *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004)).

- Michigan: Appellate Court refused to hold asbestos manufacturers, sellers, and installers liable on a nuisance theory because "[t]o hold otherwise would significantly expand, with unpredictable consequences, the remedies already available to persons injured by products, and not merely asbestos products."[30]

However, while these jurisdictions have tried their best to limit nuisance liability to its traditional constraints, many other jurisdictions are leading the warpath toward expansion.

- Wisconsin: Appellate Court reversed a trial court's dismissal of a city's public nuisance claim against lead paint manufacturers. The Court agreed with the city's argument that specific identification of the manufacturer in a particular house was unnecessary because the lead paint constituted a "community-wide heath threat which is the alleged public nuisance."[31]

- California: Upheld a verdict against three lead paint manufacturers for $1.15 billion and stated that the allegations that "lead causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property" were enough to support a public nuisance claim.[32]

- Oklahoma: Public nuisance law is provided in statute, not in the common law. It is intentionally broad and has been used as a catch-all to stop a wide variety of local disturbances. Most notably, and most recently, the broad language has been used to uphold an arbitrary award of nearly $500 million against Johnson & Johnson—placing the blame of Oklahoma's opioid epidemic on one company.[33]

- Kansas: Although the litigation is not mature, Kansas-based law firms have approached school boards across the state in an attempt to file a public nuisance lawsuit against vaping

[30] *Id.* at 12-13 (discussing *Detroit Board of Education v. Celotex Corp.*, 493 N.W.2d 513 (Mich. App. 1992)).
[31] *Id.* at 19 (discussing *City of Milwaukee v. NL Industries*, 691 N.W.2d 888 (Wis. Ct. App. 2005)).
[32] *Id.* at 19-20 (discussing *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018), *cert. denied sub nom. ConAgra Grocery Prods. V. California*, 139 S. Ct. 377 (2018), *cert. denied sub nom. Sherwin-Williams Co. v. California*, 139 S. Ct. 378 (2018)).
[33] *The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort," supra* note 11, at 5-6 (discussing *State of Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816 (Dist. Ct., Cleveland Cnty., Nov. 15, 2019)).

> manufacturers—essentially modeling it after the opioid and tobacco cases.[34]

Beyond the Bare Necessities: The Dangers of Expansion

As discussed above, plaintiffs' attorneys have tried—both successfully and unsuccessfully—to find the next claim that will lead to large monetary settlements. Recently, the opioid litigation (and possibly the vaping litigation) have taken the public nuisance world by storm; however, as many of these cases are still in progress, we have yet to see how many of the courts across the country will decide. Yet, it is concerning that these cases have passed the initial threshold and been allowed to proceed at all.

Public nuisance causes of action have evolved from the traditional constraints of the early centuries—that has been exemplified by the history of public nuisance and the cases referenced throughout this article. However, has public nuisance also evolved past the traditional elements of tort law in general? What about meeting the threshold for duty, breach, causation, and damages? As succinctly stated in a *Columbia Law Review* article, "[i]n its modern incarnation, as reflected in the *Restatement (Second) of Torts*, public nuisance is assumed to be a tort, which in turn means courts have inherent authority to hear these actions as part of their powers as common law tribunals"[35]—but is it a tort? Arguably, it is not. At the least, it cannot be disputed that public nuisance law has been expanded far beyond its intended parameters and now allows for cases to proceed with little to no legal grounding, a lack of causation, and overstated factual premises. "[I]nstead of offering proof of specific injury to each involved individual, plaintiffs have attempted to focus on how widespread the product or problem is or its potential to cause harm."[36] Moreover, litigants are being presented with oversized damages awarded against companies that may not be (alone or shared) at-fault. Stated another way,

> [p]ublic nuisance law has gone off the rails, and that the ultimate reason for this is that public nuisance is not, and never was, a tort. Public nuisance is properly regarded as a public action - an action by public authorities to charge criminally or abate (that is, to order an end to) a condition that is deemed to be inimical to interests shared by the public as a whole. As a public action, the closest analogy to public nuisance, both historically and conceptually, is not tort but criminal law.

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[34] *Id.* at 6.

[35] Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4(2) J. TORT L. ii, 4 (2011), *available at* https://scholarship.law.columbia.edu/faculty_scholarship/823.

[36] Ronald L. Oren, "The US Plaintiffs' Class Action Bar Increasingly Looks to and Relies Upon the Public Nuisance Cause of Action to Address Social Ills," BAKER MCKENZIE (Oct. 1, 2020), https://globallitigationnews.bakermckenzie.com/2020/10/01/the-us-plaintiffs-class-action-bar-increasingly-looks-to-and-relies-upon-the-public-nuisance-cause-of-action-to-address-social-ills/.

> Indeed, before the publication of the *Restatement (Second) of Torts*, public nuisance, even when brought as a civil action, was universally understood to be based on the defendant's maintenance of a condition that was also a crime.[37]

Under the common law, "a paradigmatic public nuisance suit involves clearly unlawful conduct, such as running a brothel or drug house in a residential neighborhood, blocking a public right of way, or operating a factory that emits noxious smells. Defendants in such lawsuits are the agents directly responsible for causing the alleged harm."[38] We have witnessed this evolution throughout history from actual trespassers on land and specifically identifiable polluters of waterways to lawsuits filed against gun manufactures and lead paint distributors at-large, to current trend of blankly suing vaping companies, social media platforms, and car companies whose care are "too easy to steal."[39]

If we allow these causes of action to proceed, we risk usurping the law and its intended purpose—to protect discrete interferences with public rights. And, while many of these expanded cases have failed, there have been some successful cases with massive settlements which have encouraged plaintiffs' attorney and shaped the development of nuisance law.[40]

Conclusion

Sadly nearly 60 years after Professor Prosser quipped that "there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance," the sentiment has arguably never been more-true. The cases being filed against "Big Oil" and "Big Pharma" increase every year, with claims against "Big Social Media" and "Big Vaping" coming in the near future. Without major tort reform and a committed effort to restrain the plaintiffs' attorneys' attempt to use nuisance cases as a mechanism for addressing public policy, this will be just the beginning of a new, uncharted legal era—welcome to the jungle.

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[37] Merrill, *supra* note 35, at 5.
[38] David V. Rivkin, Jr. and O.H. Skinner, "The 'Public Nuisance' Menace," WALL STREET JOURNAL, (Aug. 16, 2023), https://www.wsj.com/articles/public-nuisance-gun-pharma-car-theft-pollution-fossil-fuels-trial-lawyer-settlement-abuse-power-f45a858.
[39] *Id.*
[40] Oren, *supra* note 36.