

**FEBRUARY 2000 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Remedies*

**QUESTION**

Chemco built a chemical processing plant in a rural area. As part of its operations, Chemco discharges waste into a local river at levels that are low, but constant. Chemco carefully monitors discharge levels on a regular basis.

About six months after Chemco began operations, Pat, a rancher, purchased a tract of grazing land traversed by the same river approximately one-half mile downstream of Chemco's location and stocked the tract with several thousand head of cattle. Within several months, some of Pat's cattle began to get sick and several died. Pat initially attributed the loss of his cattle to a variety of causes, including a recent change he had made in their feed. After another year following the onset of sickness among his cattle, with continuing loss of animals, Pat decided to test the water in the river. He discovered that the level of toxic substances in the local river is sufficient to cause sickness and death to his animals. During the preceding year, Pat's cattle loss totaled about \$100,000, and he projects that his losses will increase every successive year unless Chemco stops discharging waste into the river.

Chemco employs more than 1,000 persons in the rural community, by far the largest employer in the county. As a result of Pat's complaints, Chemco hired an engineering firm to investigate the wastes being emitted at its plant and learned that installation of a new filtration system could substantially reduce, if not eliminate, the emission. The filtration system would cost almost \$1,000,000, a sum that Chemco could pay only if it were financed over a ten-year term. Relocation of the plant would cost many millions of dollars and would cause Chemco to cease operations. Hauling, storing and distributing water for Pat's cattle from alternative sources would cost approximately \$100,000 per year.

Pat sued Chemco requesting an injunction either to enjoin all operations of Chemco or to require that Chemco cease or remedy the discharge or to require Chemco to furnish Pat with clean water from alternative sources. Pat also claimed that he should be awarded substantial damages to compensate him for his past and prospective losses. Chemco opposed the prayer for an injunction on the ground that its operations in the area preceded Pat's activities, and asserted that either an injunction requiring any of the remedies sought by Pat or an award of damages of the magnitude sought by Pat would put Chemco out of business.

1. What arguments might be made for and against an injunction incorporating each of the forms of injunctive relief being sought by Pat, and what would be the likely result on each? Discuss.
2. How should the court rule on Pat's claims for past and prospective damages? Discuss.

Do not discuss state or federal environmental laws.

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**ANSWER A**

Nuisance

Pat is most likely requesting relief on a nuisance theory. A nuisance is an unreasonable and substantial interference with one's use and enjoyment of one's land.

Substantial: An interference is substantial if it is annoying or offensive to the average person. It is not substantial if it is only annoying/offensive because of one's specialized use of his land.

Here, the water pollution may only be a substantial interference if one uses it to feed livestock. If the water is not used for human consumption or offensive for personal use, a court may find it is not offensive. However, as the land is rural, it is likely ranchers such as Pat are common, and not a "specialized use." Thus, it's likely a court will find the interference substantial.

Unreasonable: In determining if the water discharge is unreasonable, a court will balance the benefit of the defendant's conduct with the harm to plaintiff's use and enjoyment.

Here, it is a close issue as Pat's harm is severe. However, Chemco's business is useful to the community and provides employment for many workers.

Assuming, a court finds a nuisance exists, the issue is whether it will issue an injunction.

Trespass: Although less likely, it is worth noting that Pat may also have a case for the trespass to land. Trespass is an intentional physical invasion of one's property.

Intent: Defendant has the intent to do the act of discharging water.

Physical Invasion: The polluted water runs through Pat's property and physically invades it. Thus Pat should also sue based on trespass.

Injunction

In ordering an injunction, the courts will look to the following issues: (1) inadequacy of the legal remedies; (2) whether the claim involves a property right; (3) the feasibility of the injunction; (4) balancing of the hardships; and (5) any defenses defendant may have.

1. Inadequacy of legal remedy

A court may find that a plaintiff's legal remedy is inadequate for a variety of reasons. There may be multiplicity of suits, dollar damages may be too speculative or low, or there may be irreparable injury. In addition, when land is involved, a court is likely to find that legal remedies are per se inadequate because land is considered unique.

Here, defendant could argue that damages could compensate plaintiff if defendant were forced to pay for the injury to the cattle. However, as the harm is continuing, plaintiff would be compensated only for past losses. Without some prospective remedy, plaintiff would be required

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to continue to bring suits in the future. Even if plaintiff was awarded prospective damages, because the land is unique, the courts would likely find the damage remedy inadequate.

Property Right

Historically courts required a property right to be involved before an injunction would be issued. Although a property right is no longer required, and personal rights are a valid base for equitable relief, here Pat has a property right. Thus this element is satisfied.

Feasibility

A court will determine the feasibility of the injunction by looking to factors such as the degree of court supervision and whether it is a mandatory (affirmative) injunction requiring the defendant to do something or a negative injunction forbidding the defendant or prohibiting defendant's activities.

Because the feasibility of each of Pat's injunctions require a separate analysis, we will look at each separately below.

1. Enjoin Defendant's operations

Enjoining operations is a negative injunction and thus the court is more likely to grant it. It is feasible because the court will not have to be excessively involved; it can merely prohibit defendant's operations and defendant will have to move its plant.

2. Requiring Defendant to cease the discharge

Similarly, because this is a negative injunction, and the court only has to require defendant to stop discharging chemicals, the court will find it feasible.

3. Remedy the Discharge

This would require a mandatory or affirmative injunction. Courts are less willing to issue such orders because of the difficulty in supervising the defendant's activities.

Plaintiff will argue that it is feasible and the court can easily assess whether the discharge has been remedied by resorting to an engineering test of the water. Plaintiff will also argue that the court may use a conditional decree by ordering the defendant to cease, and if the defendant does not comply, defendant will be required to remedy the discharge.

However, because the court would be more involved in an affirmative injunction and would have to supervise defendant's remedial activities, it is likely the court will find an order to remedy not feasible.

4. Requiring Defendant to furnish Pat with clean water

As discussed above in (3), the court is less likely to find an affirmative injunction feasible. In a situation where the court must continuously supervise the defendant, the injunction requires too much time and control by the court.

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Here, the court would have to supervise the defendant's activities for as long as Pat required clean water. The involvement would be very high and there would be no easy way for the court to supervise. Thus, it is unlikely the court would grant this order.

Balancing Hardships

In a private nuisance case, the court will balance the hardships of the injury to the plaintiff against the harm to defendant if an injunction is ordered. Again, to analyze each of the hardships, we must look at each injunction requested.

1. Enjoin Defendant

The hardship to defendant if the operations must cease will be extremely burdensome. Defendant employs 1,000 persons and is by far the largest employer in the county. Thus, 1,000 will be laid off and unemployed. Since no other employer as large is in the county, the persons will have to travel far to find work.

Moreover, if defendant relocates his operations, defendant will need to come up with millions of dollars, creating a severe hardship on Chemco's operations. Also, defendant will need to cease operations while moving.

Pat will argue, his harm is severe as well, and it would be an extreme hardship if defendant is allowed to continue operations.

However, as other less drastic forms of relief are available, the hardships seem to weigh in defendant's favor.

2. Requiring Defendant to cease discharge or remedy discharge

Defendant will argue that the installation of a new filtration system is a hardship as it costs \$1,000,000 and defendant would be required to finance it for 10 years.

Although this is a lot of money, plaintiff's hardships will be great if the discharge continues. He will not be able to continue his business unless he pays \$100,000/year for alternative sources of water.

Due to the earning capacity of defendant, as a large company, and due to the fact that courts usually balance in plaintiffs favor for private nuisance, the court will likely come out for the plaintiff here.

3. Requiring Defendant to furnish clean water

Alternatively, in balancing the hardships involved in supplying clean water, Defendant's hardships will be less for the immediate future because it only costs \$100,000 per year. However, defendant would be required to spend time and energy in obtaining the water. Moreover, if additional plaintiffs sue, defendant may be required to provide clean water for all. Thus, it seems better for defendant to remedy the discharge.

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The hardships to plaintiff if clean water is not supplied are the same as discussed above if the discharge is not remedied (i.e. cost to get plaintiff water or moving plaintiff's ranching business). Court is likely to balance for plaintiff in making defendant provide clean water, either by remedying or alternative sources.

Defenses

1. Moving to the Nuisance

Defendant will argue he was there first and plaintiff came to the nuisance. However, court is unlikely to agree with defendant as this is generally not a good defense to nuisances. However, if Pat got the property for a low amount because of the nuisance, the court may consider this in reducing damages.

2. Laches

Defendant may argue Pat waited over a year to assert his rights and thus Pat should be barred. However, Pat didn't know of the problem and most likely has no reasonable way of knowing. Court will likely deny defendant's defense.

No other evidence of equitable defenses such as unclean hands.

Defendant's non-negligence, i.e. that he was careful, will not be a valid defense.

3. Past damages

If Chemco is found liable for a nuisance or trespass to land, plaintiff is entitled to damages to compensate him for his loss. Damages (1) must be certain and not too speculative, (2) they must be a foreseeable result of defendant's tortious conduct, and (3) if punitives are given, they must be proportional to actual damages (and additionally will be higher if defendant is wealthier).

Thus, plaintiff should get \$100,000 for actual damages due to his loss of cattle. Such damages are foreseeable in that ranching activity, and cattle feeding is a foreseeable activity in a rural area. They are also certain as Pat can verify the cost to replace livestock.

Punitives probably aren't awarded as this was not intentional.

Also, the court may give Pat money damages due to the loss of value in his land due to loss of enjoyment. Most courts will give retrospective damages for a nuisance unless they deem it a permanent nuisance (and will give permanent reduction in value of land).

Restitution damages: Probably not awarded as the benefit to defendant probably was not greater than plaintiff's damages. Plaintiff must choose restitution damages or dollar damages.

Prospective losses

Land

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For a nuisance, the court is likely to consider the nuisance a “temporary” nuisance rather than a “permanent” nuisance. Thus, plaintiff will likely obtain the diminution in value from loss of use and enjoyment in the past; that is up to the time of the suit. However, if the court deems this a permanent nuisance, the court will grant the permanent reduction in land value.

Cattle

The increases in damages due to lost cattle every year are foreseeable if the water isn’t remedied. However, they may not be certain as the price of cattle is somewhat speculative. Even if the court deems the damages to be certain, the time period could be indefinite. There is no way to know how long defendant or plaintiff will be in business.

CONCLUSION: Thus future damages are not likely to be awarded. However, an injunction to remedy the discharge and past damages are likely to be awarded.

**ANSWER B**

1. The Injunction

Pat’s prayer for an injunction requires an evaluation of the requirements for granting an injunction in tort (which is what his complaint sounds in); we turn to these in series, beginning with an analysis of the common factors in each of the three forms of injunctive relief for which he has alternatively pled.

A. Inadequacy of the Legal Remedy

A plaintiff seeking injunctive relief in tort must show that legal damages would be inadequate, either because of the prospect of continuing, irreparable injury, the need to initiate multiple suits to obtain relief or the speculative nature of the damages.

Plainly, all facts point to the inadequacy of legal relief. Permitting Chemco to continue discharging waste will, if Pat’s suit is factually grounded correctly, cause continuing damage to his herd by killing more cattle every year. In order to gain relief, Pat would have to initiate multiple future lawsuits to compensate for the loss of his cattle every year. Awarding damages in this suit would not suffice, because it’s speculative and uncertain how many cattle will die in future as a result of Chemco’s discharge. For these reasons, a remedy at law for Pat will not be adequate.

B. Property Right

Old cases evaluating the availability of injunctive relief in tort required that the plaintiffs rights in his property be bound up in the cause of action. This requirement has been argued considerably over time, and although some courts continue to pay heed to it, the notion of a property right has been enlarged to incorporate most anything. Here, Pat’s “right to do business” as a rancher would arguably fulfill the requirement and support injunctive relief.

C. Defenses

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Laches and unclean hands are two defenses to injunctive relief. There is no evidence that Pat engaged in any misconduct here with respect to the activities in question, so unclean hands is not a good defense. Laches, however, deserves discussion. Chemco might argue that Pat's delay in testing the water for toxic waste was unreasonable and should bar his claim for relief. This argument, however, will fail.

Laches is concerned with the effect of unreasonable delay. Here there is no indication that waiting a year to test the water in the river caused Pat to lose any more cattle than he otherwise would have, or that the delay induced Chemco to act any differently. As the facts state, Chemco was already discharging waste when Pat moved on the land, and would have continued regardless of when Pat discovered the toxicity. And Pat would have needed to water his animals regardless where he tested the river, and the facts state that it would have cost an equal amount to procure an alternative source of water or to use the river water (\$100K loss or \$100K additional expenses). So, the effect of the delay was not great.

Moreover, it cannot be concluded that Pat's delay was unreasonable. Cows can get sick for lots of reasons, and Pat's failure to immediately reason that it might be the water is understandable, particularly in light of other factors such as a change in feed. In sum, laches cannot operate as a defense to injunctive relief because Chemco cannot show a detrimental effect attributable to unreasonable delay by Pat in bringing suit.

D. Feasibility and Balancing the Burdens

These two factors receive different analyses for each of the requested alternative forms of relief, and so each will be considered separately. Feasibility refers to ability of the court to frame an enforceable decree and the minimization of court supervision over the defendant. Burdens imposed on the defendant are balanced against the harm the plaintiff will suffer if the decree is not enforced. This is the case here because Pat's claim sounds nuisance, and so a balancing is required prior to granting the injunctive relief. We now turn this analysis to each avenue of relief requested by Pat.

(1) Cessation of Operations

Requiring Chemco to cease operating the plant would be feasible. The court could simply issue a mandatory injunction to close the plant. It would not be difficult to supervise or enforce, as there are no jurisdictional problems related to Chemco or its property - both are within the court's jurisdiction.

However, requiring Chemco to shut down the plant would impose a tremendously heavy burden on Chemco. The company is the largest employer in the county, and requiring the plant closure would financially burden the firm, dislocate workers, and might have a ripple effect on the area's economy. To require this to be borne when there are other avenues of achieving the same result seems inequitable and unwise, and for this reason plant closure would not be likely as a form of injunctive relief.

(2) Cessation of Discharge

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Ordering Chemco to cease polluting the river would be a feasible means of injunctive relief. The decree would be framed as either a mandatory decree or a prohibitory one, judging compliance on either the installation of the filtration system or the reduction in waste levels (judged by measuring the river periodically). Either would be possible and enforceable, although requiring installation of the filter would probably be more desirable as it would require less future supervision and involvement by the court.

The burden on Chemco and the harm to Pat avoided here are essentially equal. The filter would cost about one million dollars, the losses to Pat are likely to be the same (\$100K for ten years). If the plant and the ranch were to co-exist for ten years the burden on Chemco would balance the benefit by Pat, and so this test favors the award of injunctive relief.

(3) Furnishing Alternative Water Source

Here, the burden benefit analysis is essentially the same as the preceding option, although with the added benefit of not requiring Chemco to commit to a large capital purchase.

However, this option is less feasible than the others and requires continuing, indefinite court supervision. The court will be required to referee any disputes between Pat and Chemco over the provision of water, and will need continued involvement in the enforcement of the decree. This argues against this option, and favors the preceding one.

On balance, the option that best satisfies the elements required to issue injunctive relief is to require Chemco to cease discharge of water into the river, and on this Pat has a likely chance of receiving injunctive relief.

II. The Damages

The court should grant Pat compensatory relief for his past damages, but not his future ones. To receive prospective relief, Pat must show that the damages were caused by Chemco's actions, they were foreseeable, they are certain and definitely ascertainable, and they were/are unavoidable. With respect to these factors, Pat has a good claim. Although Chemco might argue that the losses were avoidable because Pat "came to the nuisance," this argument does not relieve it from liability for the damages it caused.

With regard to prospective damages, Pat's claim is less convincing. Although such damages would be foreseeable and causal, Pat could avoid them by bringing in alternative water supplies. This would act to mitigate his losses, particularly if he anticipated that his losses will increase beyond \$100K/year and it would only cost \$100K/year to get alternative water. Moreover, such damages would be speculative - it is impossible to tell for certain how many cattle will perish in the future. For these reasons, Pat's claim for future damages should be denied.