

**FEBRUARY 2001 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Remedies*

**QUESTION**

In 1998, Diane built an office building on her land adjacent to land owned by Peter. Neither she nor Peter realized that the building encroached about ten inches on Peter's adjacent property. Because of the narrowness of Diane's lot, Diane did not have much latitude in the design of her office building. In December 2000, a town survey made for other purposes revealed the mistake. In constructing her office building, Diane inadvertently destroyed two dozen ornamental trees that had been on Peter's land for years.

Peter, who was a restaurateur, maintained a garden where he grew specialty vegetables for his restaurant. The vegetables have been unable to flourish without the filtered sunlight provided by the trees that Diane destroyed. As a result, Peter's costs have risen as he has been forced to buy more produce from suppliers. In addition, his reputation as a restaurateur has suffered because his customers had come to look forward to his fresh garden vegetables. Many of his customers have begun to frequent other restaurants, and the long-term effect on his business is incalculable.

Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction.

Diane's tenants have been parking on a lot in back of Diane's building. Diane paid for the paving of the lot under the mistaken belief that the lot was on her land. In reality, the lot is almost entirely on Peter's land. Diane has been charging her tenants \$50 a month to lease parking space in the lot. Peter has never voiced any objection to this practice because, until the town survey, he did not realize that the lot was on his land.

What remedies are available to Peter against Diane, and on what theories of liability are they based? Discuss.

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**ANSWER A**

The issue is what remedies Peter has against Diane for the damages to his restaurant business and the trespass on his property, and on what theories of liability he may base his claims. Peter has three causes of action for Diane's (1) encroachment on his property, (2) destruction of his trees and interference with his vegetable garden and the consequential damage to his restaurant business, and (3) use of Peter's land as a parking lot.

1. Peter v. Diane for encroachment of Diane's building on Peter's property

Theories of liability

Peter may bring a claim against Diane for trespass of land, which is the defendant's intentional entering of plaintiff's real property. Whether the defendant knew that he or she was trespassing on another's property is irrelevant for purposes of determining intent. As long as the defendant intended to enter the land, an action for trespass of land lies. Here, Diane built an office building on her land, but which encroached about ten inches on Peter's adjacent property. While Diane did not know at the time she had encroached onto Peter's property, and did so only because her lot was so narrow and did not have much latitude in the design of her building, she had, in fact, intentionally built her structure so that, in effect, it did encroach on Peter's property.

Therefore, Diane has trespassed onto Peter's property and she is liable for trespass of land.

Legal remedies: Damages

Usually, for non-possessory trespass, the only remedy available is nominal damages, which are damages merely to vindicate the plaintiff's legal right. These are damages awarded in the absence of a showing of actual damages. While Peter's legal rights as to his property were violated, here, however, there is a continuing or permanent trespass, for which Peter may pursue a number of remedies.

Peter may pursue compensatory damages for Diane's encroachment on his land. Compensatory damages are a measure of the harm done to the plaintiff. There must be actual causation, proximate causation, certainty of the value of damages, and unavailability. Here, Diane's ten inch encroachment on Peter's land is the actual and proximate cause of her trespass on his land. The certainty of the damages can be measured by the value of the land. Finally, there is little Peter could have done to avoid or mitigate Diane's damages because he did not know that Diane was encroaching on his land at the time.

Punitive damages are not likely to apply since Diane's conduct was not malicious or willful.

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Therefore, Peter may pursue compensatory damages in the form of rental value for the land, or a measure of diminution of value of his land.

Legal restitutionary remedies: Ejectment

Ejectment is a legal action that the plaintiff may take to reclaim real property to which he or she has a legal right of possession, and which the defendant is wrongfully and actually possessing. Here, Peter has a legal right of ownership of the ten inches of land on which Diane has encroached and is wrongfully and actually possessing the presence of her building.

Therefore, Peter may seek an ejectment action to force Diane to remove the ten inch encroachment on his land.

Equitable remedy: Injunction

Peter may also seek to enjoin Diane from using his land. Peter must show that there is an inadequate legal remedy alternative, that he has a property right or protectable interest, that enforcement is feasible, that the balancing of hardships weighs in his favor, and that there are no defenses that can be asserted against him.

First, Peter will have to show that money damages do not adequately address his injury. Here, Diane has encroached about ten inches onto his property. Because the facts do not indicate that the ten inch encroachment caused any other damages besides the trespass on his land (the fact that the building itself caused other consequential damages will be discussed below), money damages will probably be adequate.

Second, Peter clearly has a property right on the ten inch encroachment. Therefore, Peter will win on this point.

Third, enforcement is not likely to be feasible because the sheriff, in an ejectment or injunctive action, is not likely to order Diane to tear down her building in order to stop encroaching on Peter's land. Therefore, Peter will most likely lose on this point.

Fourth, the balancing of hardships is likely to weigh in Diane's favor. Here, Diane has encroached only about ten inches on Peter's land. On the other hand, Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction. Therefore, Diane would not only suffer damages to her building, but would suffer long-term fallout from tenants leaving and justifiably breaking their leases. Because the harm to Diane is great and the harm to Peter is relatively small, Peter is likely to lose on this point.

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Finally, Diane may assert laches in that Peter should have surveyed the land during construction of her building. She will likely lose on this point because neither she nor Peter realized the building had encroached about ten inches.

In conclusion, the balancing of hardships will most likely prevent Peter from seeking an injunction. Therefore, money damages, as discussed above, will most likely suffice for Peter.

2. Peter v. Diane for destruction of Peter's ornamental trees and blocking of filtered sunlight and harm to restaurant business

Cause of action

Peter may assert an action for conversion for the destruction of the ornamental trees that had been on his land for years. Conversion is where the defendant interferes with and damages plaintiff's chattel to such a point that it warrants forcing defendant to pay the fair market value of the chattel at the time of conversion. Here, Diane, although inadvertently, destroyed two dozen ornamental trees that had been on Peter's land for years. Because she destroyed the trees, she is liable for conversion.

Legal remedies: compensatory damages

Peter may seek compensatory damages for the loss of his trees. Diane's actions were the actual and proximate cause, and are certain and unavoidable. Therefore, Peter may seek the fair market value of the trees at the time at which Diane destroyed them.

In addition, Peter may seek damages to his garden. Because the trees were destroyed, the vegetables have been unable to flourish without the filtered sunlight provided by the trees. The damages are readily calculable and certain based on the past production from the garden. However, Diane may successfully argue that Peter had a duty to mitigate the damages by obtaining new trees or trying to find some other means of providing filtered sunlight to his vegetables. Therefore, Peter's recovery for the garden may be reduced.

As for the harm to the restaurant, Diane will argue that those damages cannot be ascertained with certainty. Peter may be able to calculate the rise in costs as he has been forced to buy more produce from suppliers. Determining the certainty of damages requires looking at past historical performance data or calculating future damages with an all-or-nothing "more likely than not" rule. Calculating the damage to Peter's reputation and other long-term effects to his business is "incalculable." Therefore, lacking any degree of certainty, Peter is not likely to recover for the damage to his reputation and long-term reputation to his business.

Punitive damages are not likely to apply since Diane's conduct was not necessarily willful or malicious.

4. Peter v. Diane for Diane's use of Peter's land as a parking lot

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Cause of action

Peter may assert an action for trespass of land for the use by Diane's tenants of a lot behind Diane's building for a parking lot, which was in fact Peter's land. Here, even though Diane paved the lot under the mistaken belief that the lot was on her land, she is still liable for intentionally entering the land and paving the lot on it, because she intentionally entered Peter's land.

Legal remedies: damages

Peter may seek compensatory damages. These damages must arise from Diane's proximate and actual actions that caused the damage, and must be certain and unavoidable. Here, Diane paved over part of Peter's land, causing damage. She has also used Peter's land, incurring rental value of the land. Therefore, Peter may seek compensatory damages for both the damage done to his land and for the rental value of her using his land.

Punitive damages are not likely to apply since Diane's conduct was not malicious or willful.

Restitutionary remedies: restitution

Peter may recover more, however, if he files for restitutionary damages. Restitutionary damages are a measure of the benefit that the defendant has gained from the injury committed on the plaintiff, while compensatory damages are a measure of the damage to the plaintiff. Here, Diane has been charging her tenants \$50 a month to lease parking space on the lot. Therefore, Peter may be able to recover that proportion of the parking lot leasing fees as was on his land, so as to avoid unjustly enriching Diane.

**ANSWER B**

I. Encroachment of Diane's office Building

Liability

The first issue is whether Diane (D) is liable to Peter (P) for her encroachment. Neighboring landowners can be liable for encroachment whenever the improvements on their land physically intrude onto the property of another. Here D's building clearly counts as such an intrusion and the slightness of the intrusion (10 inches) does not prevent the encroachment from being actionable. Neither is D's liability affected by her inadvertence. Nor the fact that she had little latitude in the construction of her building (although her inadvertence ensures she may not be sued for a trespass to land).

Therefore, P may sue D for encroachment.

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### P's remedies for the building Compensatory Damages

The next question is how much damage P is entitled to collect. The damages typically awarded for an encroachment depend on the duration of the encroachment. Where an encroachment is permanent, P will be awarded the market value of the encroached-upon land. Where the encroachment is only temporary, P will be given the fair rental value of the encroached land for the duration of the encroachment. Further, to collect damages, one must show that D's acts were the factual and legal cause of the damage, that the damage can be calculated with reasonable certainty, and that they have taken all appropriate steps in mitigation.

On these facts, D's encroachment is likely permanent (but see injunction below) and D can seek the market value of the taken land. Cause will be established by D's conduct, and P has no realistic means to mitigate. As to certainty, D would likely take the fair market value of his entire tract, as determined by some reasonable means, perhaps by consulting a professional estimator, and divide it by the percentage of land D encroaches.

### Punitive Damages

Punitive damages are intended to punish D for the wrongful conduct. Punitive damages can only be awarded, however, when D has acted willfully in the damaging of P's property. Here, D's acts appear to be inadvertent in every regard, so punitive damages will not be awarded.

### Restitutionary Damages

P may also be entitled to collect the benefit D has enjoyed from the wrongful intrusion upon his land. Restitutionary damages are awarded to P where D has been unjustly enriched by some wrongful conduct, in the amount of that enrichment. Again, P could take the rental value of the tenements on the encroaching portion of the building and try to calculate the amount their rent would have to be reduced were it not for the extra space of the encroachment. This calculation presents serious certainty problems for P.

It should also be noted that P must elect whether to collect actual or restitutionary damages, and cannot collect both. P should select whichever method offers the greatest result, or, if either method cannot be proved to sufficient certainty, should select the one that can be.

### Equitable lien

If P does get a restitutionary award and D refuses to pay, or is somehow unable to, P may also seek to place an equitable lien on D's bank accounts, in the amount of the award. An equitable lien entitles a plaintiff to collect money from the other party without their consent, by giving the plaintiff a secured interest in the other's money.

### Injunction

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The next important issue is whether P will be able to compel D to remove the encroaching portion of her building. A court in equity can order an injunction of this kind where the plaintiff's remedies at law are inadequate, plaintiff has a legitimate property interest, the court has jurisdiction of the subject matter, making the award "feasible," the balance of the hardships tips in the plaintiff's favor, and the defendant has no equitable defenses.

Inadequate remedies

D will argue that an award of money damages or restitutionary damages to P is adequate to compensate him for his loss. P will argue that because his loss is in real property, and all real property is unique, damages are rarely if ever adequate in such cases. The court will likely rule with P that damages cannot adequately compensate one for a loss of real property.

Feasibility

From these facts, it appears that the two properties and both parties all reside in the same state. In such a case, there are no barriers to a court enforcing its orders. If, however, either party were from a different state or the properties were somehow straddling state lines, there could be a problem with [the] court ordering an injunction.

Balancing of the hardships

Balancing allows the court to weigh the respective damage that each party will incur if the injunction is granted or if it is denied. Balancing is considered especially appropriate in cases of encroachment and nuisance.

Here, the encroachment is rather small and P is suffering little harm from his inability to use this 10 inches of his land. If P had some plans for his land that the encroachment were somehow preventing, that would weigh in his favor, but on these facts, his hardship is not great.

D by contrast will likely incur great costs to abate the encroachment. It is certainly possible that her building will have to be torn down entirely. At a minimum, her tenants on that side of the building will have to leave their tenancies for a substantial period and tenants in the rest of the building will have to tolerate the noise and commotion of ongoing construction. D will likely suffer great economic harm if such an order is given.

Equitable defenses

There are no obvious equitable defenses (e.g., unclean hands, laches) presented by these facts. It seems that both parties acted in good faith and were simply unaware of the boundary lines.

II. Conversion of the trees

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P can also sue D for the destruction of the trees on his property. A case of conversion will be made out where one intentionally destroys or otherwise substantially damages the property of another. Here, D's conduct was "inadvertent" so an action for conversion will not lie.

Negligence as to the trees

P may also sue if D was negligent in the destruction of the trees. Negligence requires a duty between the parties that is breached, causing damage. Here, neighboring landowners owe each other a duty to perform construction competently, but the facts do not indicate whether D was negligent in the destruction of P's trees. However, under the doctrine known as *res ipsa loquitur* P can still collect on a negligence theory where 1) the instrumentality of harm was under D's exclusive control, 2) the type of harm is one that would not normally occur without negligence and 3) P was not at fault. Since D was responsible for the construction, negligence will likely be presumed under *res ipsa loquitur*.

P's remedies

Compensatory damages

P may collect for the value of the trees under the same rules announced above.

Damage to garden

Whether P may also collect for the rising costs of tending his garden turns on issue of causation, certainty and mitigation. Again, P will have to show that the absence of the trees caused his gardening problems, he will have to establish a reasonable means of calculating his costs, and will have to prove that there were no steps he might have taken to lessen his damage (e.g., erecting an alternate source of light filtration). In the end, the court would likely permit P to collect for his gardening costs.

Damage to P's business

P's right to collect for his lost business also presents serious certainty and causation problems. P's position will be substantially enhanced if his business has been in existence for a long time. The damages to the reputation of a newer business are frequently regarded as too speculative to be awarded by the courts. P must also show clear causation. D will likely look to the surrounding community and any general decline in restaurant revenues to explain P's losses. In the end, the court should rule that the damages are too speculative.

Restitutionary damages

P may not collect restitution as D was not enriched by the destruction of the trees.



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Encroachment by the parking lot

Damages

P may collect for damages on the same theories explained above for encroachment. That is, P will get the fair market value of the land encroached, unless there is an injunction to remove the parking lot, in which case he will get the fair rental value of the land while it was covered.

Restitutionary damages

P may also elect to collect from D the amount by which the parking lot has enriched her. This would be a relatively simple calculation, given that D has been charging her tenants for use of the parking space. That is, P's case that these amounts are certain is a strong one.

Ejectment

P could also seek to simply have D and her tenants forbidden from returning onto the land, which is almost entirely his. If he were successful, he could theoretically use the lot for his own purposes. However, D would likely be able to recover in quantum meruit for the amount she has enriched D's land with her construction of the parking lot. P will argue that because she's a trespasser, she is entitled to no recovery. On these facts, the court would likely allow D to recover for the amount she benefitted P.

Equitable lien

Under the principles explained above, P might get an equitable lien on D's accounts to ensure prompt payment of the restitutionary damages he may be entitled to.

Injunction to remove the lot

On the same factors explained above, P could seek to have the lot completely removed.

Inadequate remedy

Again, an interest in land is considered "unique" and any payment of a large swath of the land like this would be considered inadequate.

Balancing of the hardships

This calculation weighs far more strongly in P's favor than did the building. Here, D has taken a large portion of P's land, impairing his rights substantially. By contrast, D's only hardship will be the removal of the offending improvement and the loss of income it provides. D may also note that she may lose tenants if she has to give up the lot, but these hardships are all ones D brought on herself, and she cannot avoid them at P's expense.

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Conclusion

Therefore, the court would give P an injunction, ordering D to remove the lot from his land.