

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

Torts

QUESTION

Dan operates a plant where he makes pottery. To provide a special high-capacity power source to his pottery kilns, Dan recently installed on the electric company's power pole outside of his building an electrical transformer that would increase the electrical current entering his plant from the main power line. He did this without the knowledge or consent of the electric company. Dan did not know that the power line on which he installed the transformer also feeds power to the adjacent office buildings.

Peter occupies one of those adjacent office buildings. In the building, he has an extensive computer network that he uses in his business of providing advanced computer services to local commercial enterprises. Peter has been in this business for ten years. He employs several highly paid computer operators and technicians.

Dan's installation of the transformer caused power surges each time his kilns were turned on and off. Soon after Dan had installed the transformer, Peter's computers began to malfunction and eventually were severely damaged by the repeated power surges. As a result, Peter lost a large amount of data stored in his computers. He laid off some employees without pay and shut down his business for two weeks while the computers were repaired and while the remaining employees restored the lost data.

During the shutdown, Peter lost considerable income because he was unable to furnish computer services to his customers.

Peter and the laid-off employees have filed suit against Dan.

1. In an action against Dan, what theories, if any, might Peter assert and what defenses might Dan raise if Peter seeks to recover:
 - a) The cost of repairing his computers? Discuss.
 - b) The cost of restoring the lost data? Discuss.
 - c) His lost income? Discuss.
 - d) Loss of goodwill and other incidental effects of the disruption of his business? Discuss.
2. May Peter recover punitive damages? Discuss.
3. May the laid-off employees recover lost wages and benefits from Dan under any theory? Discuss.

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Torts

ANSWER A

Because of Dan's installation of a high power transformer, Peter claims to have suffered a number of different types of damages. Peter has brought a cause of action against Dan seeking damages under different theories of tort liability.

1. Theories under which Peter may recover.

Negligence

A defendant has a duty to avoid actions that will cause damages to others. Failure to meet this duty, which actually causes damages to others, will result in liability.

Duty

Dan had a duty to conduct his affairs in a manner that would not harm others. This duty extended to his installation of the transformer on the power company's pole. In the installation of the transformer, Dan should have used the amount of care as would have been used by a reasonable person in undertaking such an activity.

Breach of Duty

Here, in installing the transformer, Dan failed to consult or ask permission of the electric company. Furthermore Dan failed to investigate the existence of other connections that may be affected by his installation of the transformer. A reasonably prudent person would normally not modify power lines, or install high power transformers on power lines without consulting the power company, or at the very least taking some precautions to ensure that the power lines do not affect others.

Causation

Peter's damages must have been both actually and proximately caused by Dan's actions. A plaintiff may demonstrate actual causation by demonstrating that but for the defendant's actions, he would not have been injured. Peter's computers were damaged by power surges that occurred when Dan activated his kilns with the transformer in place. The facts clearly indicate that with the transformers in place, the power surges occurred. Since Peter had been connected to the same power lines for ten years and had not been damaged, Peter will be able to demonstrate that but for Dan's installation of the transformer, the power surges would not have occurred. Proximate cause is shown by demonstrating that the defendant could have foreseen the damages experienced by the plaintiff. Here, Dan did not know that the power line connected to Peter's business. Peter will argue that the lines are on poles, and that because they are visible, Dan should have known of their connection. Even if he proves this, Dan will argue that he could not have known that Peter was operating computers, and could not have known that they would be damaged. Many people use computers and other sensitive electronic devices. Because the use

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Torts

of electricity is so prevalent in modern society, Peter's damages will be found to have been foreseeable.

Damages

A plaintiff is entitled to recover the amount of damages necessary to put that plaintiff back in the position he would have been had the tort not occurred. Peter is claiming several different types of damages:

Cost of Repairing Computers - Peter will claim that his computers were damaged by Dan's actions. Because the damages to the physical hardware of the computers was the effect of Dan's actions. Peter will likely receive damages to repair the computers. Dan will argue that computers are abnormally sensitive to electric surges and he should not be held liable because computer damage was not foreseeable. A defendant takes his plaintiff as he finds him, and is liable even for plaintiffs who are more susceptible to damages. Thus this defense will fail. Dan will also claim that Peter failed to mitigate his damages by installing surge suppression devices, or by not using them. It is unclear from the facts whether Peter knew the cause of the malfunctions, and could not be expected to mitigate if he did not.

Cost of Restoring Lost Data - Peter will claim that Dan is liable to restore the lost data. Data loss is a foreseeable result of computer failure which Dan could have predicted would occur if he damaged electronic devices. A plaintiff must be able to prove to a reasonable certainty, however, the amount of damages that have been inflicted. Dan will defend against this claim on grounds that the cost of restoring data is too difficult to determine to a reasonable certainty. If Peter is able to present facts demonstrating the amount of loss data, and its cost to be restored by reliable facts, he will be able to defeat Dan's claims.

Lost Income - Dan will argue that Peter's lost income is a purely economic loss, and that courts do not remedy a plaintiff's purely economic losses in tort. Here, Peter will demonstrate, however, that his losses are due to the destruction of his computers due to Dan's actions. Because the lost income is parasitic to actual damages, a court may allow him to recover. Peter will be required to present evidence as to what the losses in income would have been. He may do this by producing the contracts and other service history which he could not perform due to the damages.

Loss of Goodwill and Other Incidental Effects - Dan will argue that Peter cannot demonstrate to a reasonable certainty the amount to goodwill that Peter has lost. Because goodwill is exceedingly difficult to prove, Peter will likely not collect here. Any other incidental effects will be unactionable unless they were foreseeable results of Dan's actions.

Additional Theories of Recovery

Nuisance

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Torts

A nuisance exists when a defendant's conduct creates a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. The interference must be unreasonable to an average ordinary person. Here, Peter will claim that Dan's actions created power surges that caused an interference with his computers, depriving him of the use of his property for his purposes. Dan will claim that an average person would not have found the surges to be unreasonable, but that only Peter, because of his computers, found them unreasonable. Because businesses and homes rely heavily on reliable electric power, it is likely that an average person would find power surges to be unreasonable. Thus Dan will be found liable for nuisance, and Peter will assert the same damages as noted above.

Strict Liability - Abnormally dangerous activities

A plaintiff may recover from a defendant for damages caused by the defendant's abnormally dangerous activities. Abnormally dangerous activities are actions taken that cannot be made safe no matter how much care is used, and that are not normally conducted in the area. Here, the transmission of electric power can be made safe through proper measures. It is merely Dan's negligence that caused the damages. Thus, Peter will be required to show fault through some other theory, and strict liability will not apply.

2. Recovery of Punitive Damages

Punitive damages may be available in injury causes of action if it is determined that the defendant's actions in inflicting the injury were malicious, willful, or completely reckless. Here Dan's actions were not willful or malicious. Dan did not install his transformer for the purpose of damaging Peter's computers, or disrupting his business. The act of placing a high power transformer on a power line may be considered reckless activity, however. Power lines are probably considered to be hazardous. Making unauthorized modifications to power lines without knowing the full extent of the consequences of those modifications may be considered reckless activity, because it disregards the consequences that may result from the modifications. If a court finds that Dan was reckless, Peter may be awarded punitive damages. The court will not award the damages based on a theory of willful or malicious conduct.

3. Recovery of Laid-off Employees

Courts generally do not award damages for purely economic losses without some actual injury to the plaintiff. Purely economic losses are difficult to determine, and are thus avoided. Peter's laid-off employees will therefore seek some theory to bring against Dan to recover their economic losses as parasitic to injuries.

Interference with Contract

Peter's employees may claim that Dan's actions constituted a tortious interference with their contract rights associated with their employment by Peter. The facts do not indicate, however, the existence of any employment contract. Additionally, if there is a contract, the interference

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

Torts

with contract tort requires that the defendant knew of the existence of the contract and purposefully took actions to interfere with it. The facts indicate that he installed the transformer to operate his kilns more effectively, thus he did not purposefully interfere with any contract that may have existed.

Because the employees have suffered a purely economic loss based on being laid off by Peter, they will probably not be able to recover for their lost wages and benefits.

ANSWER B

1) Theories of P in action against D. D's defenses, and likely remedies P may recover.

Theories:

A) Is D strictly liable for the damage caused to P as a result of his installation of the transformer on the power pole outside of D's building?

One may hold another strictly liable for damages caused by a defendant's abnormally dangerous activity. An activity is abnormally dangerous if it cannot be made safe with reasonable efforts, the risk of injury is great, and the activity is uncommon to that area, and the utility to society of the activity is low.

D will defend that this is not a strict liability.

Here, D's installation of the electrical transformer is not of great utility to society, and it might be uncommon in that area, but the facts do not say if it could be made safe by a reasonable installation of the transformer or whether risk of injury is great.

Therefore, P probably won't be able to assert strict liability.

B) Can P establish nuisance as a theory?

Nuisance is the unreasonable interference with another's use and enjoyment of property in P's possession.

Here D's conduct caused the electrical surges which caused P's damage. P's use and enjoyment of the building office he possesses (occupies) was interfered with by these surges. The question here is whether this interference was unreasonable, i.e., would a reasonable person find this power surge to be an obstacle on his use and enjoyment.

D's defense:

JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Torts

D will assert that power surges would not interfere with a reasonable use and enjoyment, and that P's nature of business made him peculiarly susceptible since his office relied on computers.

However, P will most likely win on this issue because office buildings such as D and P need electricity today to reasonably function because of the high use of computers today.

Therefore P will be able most likely to recover on a nuisance theory.

The remedies that P may recover will be discussed later in the paper under Remedies section.

C) Negligence

P may assert that D was negligent in his installation of the electrical transformer.

1) Did D owe a duty to P?

D had a duty to all foreseeable plaintiffs that are within the zone of danger of his installation of the transformer. D did not know that P or others in P's office building were fed by the electrical pole, but it is foreseeable to a reasonable person that someone would receive electricity from the pole. Therefore D owed a duty to P.

2) Did D breach that duty?

D did not act reasonably prudent when he put a transformer on an electrical pole that did not belong to him because an ordinarily prudent person would not tamper with dangerous electricity and the instrumentality of conveying electricity.

3) Causation?

But for D's installation, P would not have suffered the power surges, therefore D actually caused P's harm.

Proximate: It was reasonably foreseeable to D that persons receiving electricity would be harmed by power surges of the pole. Was the extent of P's harm foreseeable? So long as the injury was foreseeable and there is a direct causation (no intervening-forces) D will be liable for the extent of P's injuries even if the extent was not foreseeable.

4) Damage?

Yes, as discussed below, P was damaged.

D) Intentional Tort Theory?

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

Torts

Did D trespass P's property? Trespass is the entering into someone's property without consent. There is no physical entering, most likely, because electricity is probably like sound waves which have been held to be not physical.

No Trespass Theory.

- Remedies -

Tort remedies make plaintiff whole.

- a) Cost of Computers: P's loss in repairing property damage to computers is compensable in negligence.

In his negligence theory P will recover all damages arising from his breach that were the natural and probable consequence of his breach.

The natural result of tampering with electricity is that it will result in property damage to computers. Thus P will receive such cost of repair.

D will have no defenses.

- b) Cost of restoring lost data
Negligence Theory:

If data is property then the damage to the data and the cost to restore will be compensable by D as a natural flow of D's breach since it is foreseeable as a probable consequence of shortages in electricity.

D will assert that it is not natural because it is too remote from his act of installing the box but he will lose because it is a dependent result/consequence of the breach.

- c) Lost Income
Negligence Theory

Lost income is a damage that must be proved with reasonable certainty to be received.

P was in business for 10 years and might be able to prove what he normally makes in two weeks.

If P is an employee that will be easy. If P is an owner it will be more difficult but could be done by prior bookkeeping records. D will try to defend that P cannot prove lost income certainly.

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

Torts

d) Loss of goodwill and other incidentals

Goodwill probably cannot be proven with sufficient certainty and therefore may not be received by P. It is too speculative. D will win on such a defense.

Incidentals: Nuisance theory will allow relief for lost rent P paid for time he was not able to enjoy his property/office.

2) Punitive damages

Punitive damages are recoverable only when conduct is malicious. Malice is intent to harm or extremely reckless behavior. D will assert he did not know that P was fed by the electrical pole so he did not intend to harm and that his behavior at most is negligent not reckless.

D will win on this point because he was negligent not reckless and had no bad faith. Therefore, no punitive damages.

3) Laid-off employee wages and benefits.

Employees' wages and benefits

D will successfully defend that pure economic loss is not recoverable in tort and therefore the economic loss of the employees is not recoverable.

No tort theory will help the employees recover from D.