

## Question 6

Paul owns a 50-acre lot in the country. Doug owns a smaller unimproved lot to the north. A stream runs through Paul's lot near the boundary line with Doug's lot. Paul has a house at the south end of his lot and uses it for summer vacations. He plans to build a larger house in the future.

Doug began to clear his land to build a house. To do so, he had to fell trees and haul them to a nearby lumber mill. He asked Paul if he could take a short cut across Paul's lot to the mill, and Paul agreed.

On his first trip, Doug dumped the trees on Paul's lot near the stream, in a wooded area Paul was unlikely to see, much less use. Several of the trees rolled in the stream, blocking its natural flow.

Paul left for the winter. As a result of the winter's normal rainfall, the stream overflowed, causing water to rush down to Paul's house at the other end of the lot, flooding his garage and damaging a 3-year-old motorcycle.

Paul returned in the summer and learned what had happened. It will cost \$30,000 to remove the trees. The trees' presence on the lot has depressed its market value from \$50,000 to \$40,000. It will cost \$5,000 to repair the motorcycle, and \$4,000 to buy a new one.

What intentional tort claims can Paul reasonably bring against Doug and what remedies can he reasonably seek? Discuss.

## SELECTED ANSWER A

### License

Doug may first claim that there have been no intentional torts committed against Paul. He may argue that he had permission to do what he did. Paul will admit that he did give Doug a license. A license is a permission to use another's land in a particular way. A license need not be in writing or evidence any of the formalities of an easement. However, a license is freely revocable.

#### *Scope of the license.*

Importantly, a licensee may only act within the scope of the license. Here, Paul gave Doug permission to cut across his land with his lumber. Doug had represented to Paul that he intended to bring the trees to a lumber mill. As such, the license only involved temporarily passing through the land with the lumber. It did not include Doug dumping the trees. Where a licensee exceeds the scope of his license, he trespasses on the land.

### Trespass to Land

Trespass to land occurs when an individual intentionally invades the real property of another. The trespasser need not know the land is not his own – he need only intend to go where he goes or do what he does. Another important aspect of the rule is that trespass can occur with more than just the trespasser's body. When a trespasser causes a physical object to go onto the land of another, he has trespassed, even if his body does not actually break the relevant plane.

Trespass to land also occurs when a licensee (or any other guest) goes to a part of the land where he does not have permission to go. Here, Paul can reasonably claim that Doug did exactly that – he caused a physical object (the trees) to go exceed the scope of the license (being dumped into the forest). Doug may claim that he had permission to have the trees in this area – however, this permission was for transitory passing through – by allowing the trees to stay, Doug trespassed. Moreover, Doug likely further

trespassed by allowing the trees to go into the stream. It is not clear what caused the trees to roll away – however, it seems quite foreseeable that dumping a bunch of trees close to a stream might end up in a few of the trees going into the stream. Assuming this is a reasonably foreseeable consequence of Doug’s actions, the trees in the stream would be a further trespass.

## **Remedies for the Trespass to Land**

### Legal Remedies

Law prefers money damages. As such, the first question will be whether Paul can recover any legal damages for the trespass to land that Doug has committed. Damages will be accorded to a plaintiff if four conditions are met: the tort was the actual cause of the damages, it was the proximate cause of the damage, the damages are certain and ascertainable, and there was no failure to mitigate.

#### *Actual cause.*

A tort is an actual cause of damages when the damage would not have caused but for the tort. This element is fairly easily satisfied here. We are told that the rainfall was normal, suggesting that the flooding would not have normally occurred. Since the rainfall was normal, the best explanation for the actual cause of the flooding was the blocked river, which would not have happened but for the trespassory dumping of the trees. As such, this element is met.

#### *Proximate cause.*

A tortfeasor is only liable for those damages that are proximately caused by his tort. Proximate cause is a question of foreseeability – where the result is a foreseeable result of the actions of the tortfeasor. At the point where the damages become unforeseeable, law is willing to cut off liability and let the damages fall on the victim.

Here, Paul will plausibly be able to argue that all of the damages were reasonably foreseeable. The first step is that the blocking of the river was a reasonably foreseeable

consequence of dumping the trees. This is discussed above – the trees going in the river is certainly foreseeable.

The next step is whether the flooding was reasonably foreseeable. Doug may argue that the rain was an “Act of God” that should cut off his tort liability. He will lose this argument though – critically, there was only normal rainfall during the winter season. Normal rainfall is practically by definition not an Act of God, and as such should be reasonably foreseeable.

The next step is whether the flooding of the house was reasonably foreseeable. We are not given many facts here. Doug may argue that it was odd that the water would flow across a large, 50-acre plot of land and flood the house. However, this is likely foreseeable. Doug knew about Paul’s house, and he knew where the stream was. A reasonable person should have been alert to the possibility that flooding over the course of an entire season should cause flood damage.

The final step is whether the damage to the garage and motorcycle are foreseeable. This comes closer to the eggshell skull doctrine that you take your victim as you find him – once you flood someone’s garage, you are arguably liable for all the damage to the valuables therein. However, even sticking with merely proximate cause, the damage to the motorcycle is foreseeable. The motorcycle is not especially valuable or special. It is a normal vehicle and it suffered a normal amount of damage given flooding. As such, Paul would likely be able to recover damage to his motorcycle via the trespass to land theory (the precise amount is discussed below).

Additionally, it is fairly easy to see that the decrease in the market value of the property is reasonably foreseeable. Having your river backed up and your property flooded will tend to make the land worth less. As such, Paul would likely be able to recover, at least, for the decrease in property value (whether he will get this amount or the amount to remove the trees is discussed below).

### *Certainty.*

Certainty does not seem to be an issue here. We know precisely how much it will cost to repair the bike or buy a new one, and how much the property value has been decreased. The only issue is if there is other damage to the garage that has not been accounted for. Any damages would need to be certain and ascertainable.

### *Mitigation.*

A plaintiff has a duty to mitigate the damages wherever possible. There are several reasons to think this won't bar damage. First, he was gone for the winter, so he would not have been able to mitigate. Second and more importantly, the trees were dumped in an area where Paul was unlikely to see them. As such, mitigation would not have been reasonable. Paul is not under any duty to mitigate damages he should not ordinarily be aware of.

Mitigation may also play a role in deciding on the damage given for the motorcycle. Doug will reasonably argue that Paul could mitigate the damages by simply buying a new motorcycle instead of repairing his old one, since the price is \$1000 less. This is a good argument. Unless there is some special value that should give Paul a right to repair his own motorcycle, Paul is likely only entitled to the \$4000 cost to replace the bike as a form of mitigation. Indeed even this might be too much. Doug need only put Paul in the place where he found him, with a three-year old motorcycle. The value of this may well be less than \$4000. This is discussed more in the conversation section below.

### *Trees or property value.*

One of the most difficult questions the court will face will be whether to award Paul the \$30,000 to actually remove the trees or only the \$10,000 for the decrease in the property value. Giving both amounts is likely inappropriate, since it seems that the decrease in property value is attributable to the presence of the trees.

On the one hand, Doug will argue that it would be wasteful to spend \$30,000 to remove the trees when the decrease in property value is only \$10,000. He will argue that if Paul didn't like the trees, he would be better off to simply sell the land and buy new land.

However, Paul has a strong counter: law recognizes that land is unique. Paul has a right to have trespassory items taken off the land, since, to Paul, the land is implied to have special value. Since the land is unique, and since Paul is entitled to be put into the condition he would have been on had the trespass not occurred, Paul is entitled to have the trees actually removed, despite the higher cost. As such, Paul should be able to recover the \$30,000 and not the \$10,000.

### Restitutionary remedies

Paul might alternatively be able to recover restitutionary remedies. Restitution is appropriate where the tortfeasor has been unjustly enriched by his activities. Here, Paul might be able to argue that Doug effectively used his land as a tree storage space instead of taking the trees to the lumber mill. Paul might even argue that the value of this storage is \$30,000, since that is how much it costs a person to move the trees away, or \$10,000, since that may be equivalent to the amount of property value diminution Doug avoided by moving the trees. However, these values are not particularly certain, and we'd probably need more evidence to know the proper value that was conferred on Doug by simply leaving the trees on Paul's land.

### Injunction

Paul might also ask for an injunction. Specifically, he may request that Doug actually remove the trees. For an injunction to be appropriate, there the legal remedy must be inadequate, the injunction must be enforceable, and we must balance the hardships. There must also not be any defenses.

#### *Inadequate Legal Remedy.*

Doug's best argument here is that there is an adequate legal remedy. To wit: since we know that it would cost \$30,000, the court could simply give that amount of damages if it concluded that the trees needed to be moved. Moreover, it seems that Doug could also make Paul whole by giving him \$10,000 to correct the decrease in property value of his land. As such, since it is not clear why a legal remedy would be inadequate, an injunction is probably inappropriate.

### *Enforceable.*

Even if an injunction would be appropriate, here it would be questionable whether it would be enforceable. Affirmative injunctions are disfavored since they require supervision. Perhaps it would not require much time to move the logs. Nevertheless, making sure that Doug has actually performed would be troublesome, although not impossible.

### *Balancing hardships.*

Since the conduct was willful, most courts would not balance the hardships. Nevertheless, it is doubtful whether forcing Doug to remove the trees would cause any significant hardships.

### *Defenses.*

There are no valid defenses. Doug might point to laches (the failure to bring an action in a reasonable amount of time), but this argument fails because Paul was not on his land for the winter and could not have known about it sooner.

### Ejectment

Another possible remedy is ejectment. Ejectment allows a person in rightful possession of land to eject a trespasser who is present on his land. This action is only appropriate where the trespasser is still on the land. Here, the ejectment action would be equivalent to an action to have Doug remove the trees, since the trees are the only item or person which remains as an invasion of Paul's property. For this, see the earlier section on the injunction.

### **Trespass to Chattel and Conversion**

Trespass to chattel occurs when someone intentionally interferes with the possessory right to another's chattel. This can occur in two ways: the trespasser can actually deprive the owner of the chattel temporarily or permanently, or the trespasser can cause damage to the chattel. Here, the latter has occurred. The motorcycle is chattel

of Paul. Because of Doug's trespass, the chattel has been harmed, thus interfered with Paul's possessory rights.

Doug may argue that he did not intentionally interfere with the chattel. However, intentionality here only refers to the intention to do the actions that eventually gave rise to the trespass, a general intent. The question would be whether the actions that Doug engaged in reasonably foreseeably caused the damage to Paul's motorcycle. Please see the discussion above related to foreseeability. Paul has a strong claim that the dumping of the trees foreseeably caused the flooding, which foreseeably caused the damage to Paul's garage and bike. Since all these steps are foreseeable, Paul would likely be able to recover from Doug via a trespass to chattel theory.

The remedies to this theory of tort liability turn on the distinction between trespass to chattel and conversion. These torts are largely overlapping – the main difference is one of degree. Conversion consists of the trespass to another's chattel that so interferes with his right to possession that the owner is entitled to a replacement of the chattel. Essentially this is a "forced sale," where the tortfeasor has to pay the reasonable market price of the chattel.

A court would most likely find that the trespass consisted of conversion. The key fact is that the repair cost of the motorcycle is more than the cost to purchase a new one. This suggests that the damage is quite extensive, and that Paul should have the right to force a sale of the motorcycle on Doug for its reasonable fair market value.

### *Damages.*

As stated above, the damages for conversion is the fair market value of the chattel. Here, we are only told that it would cost \$4000 to buy a new motorcycle. But Doug will argue that this is actually an overcompensation: Paul should be entitled to the fair market value of his motorcycle. The motorcycle is three years old, while it costs \$4000 to buy a brand new motorcycle. As such, Paul can reasonably argue that the appropriate damages are actually somewhat less than \$4000 and should be whatever it costs to buy a 3-year-old bike.



## **Punitive Damages**

Paul may well try to seek punitives. Punitive damages have three requirements: there must be actual damages awarded, the punitives must be proportional to the actual damages, and the conduct must be more than negligent. Here, Doug's conduct seems intentional, at least at the outset. He may argue that he did not actually intend any harm, which would diminish any argument for punitives. However, since he did indeed intentionally trespass, and since the damages were reasonably foreseeable, he may well be able to get punitive damages.

## **Nominal Damages**

Even if none of the above damages hold up, Paul would likely be able to get nominal damages, which are awarded when there is a violation of someone's rights but there are no actual damages.

## **Intentional Infliction of Emotional Distress**

This tort requires outrageous conduct that causes severe emotional distress in the plaintiff. The conduct here is probably not so transgressive of all bounds of human decency. And, most importantly, we are not told anything about the emotional consequences that Paul suffered.

## **Battery**

Battery requires an intentional conduct with another's person that would be considered harmful or objectionable to the ordinary person. Here, Doug's actions did not so contact Paul.

## SELECTED ANSWER B

Paul (P) v. Doug (D)

Trespass to land.

Trespass to land is an intentional interference with one's possession of his land. The only interference necessary to constitute a trespass is the entry onto one's land because a person has a right to possess their land, free from others. The entry need not be by a person, but can be by a chattel caused to enter by the defendant.

Here, there are several instances in which D might have trespassed on P's land.

Doug's first trip.

Doug entered Paul's land initially with intent to cross it in order to bring the trees to the lumber mill. This was an intentional entry. Further, this interfered with P's possession because P was no longer in exclusive possession of his land. Therefore, D's entry was potentially a trespass to land.

Defenses: consent.

Where one has consent to commit an intentional tort, this will generally function as a complete defense.

Here D "asked Paul if he could cut across Paul's lot to the mill, and Paul agreed," thereby affecting his consent. Therefore, D has a defense of Paul's consent to part of the trespass, to the extent that it was to "cut across Paul's lot to the mill" this trespass will be excused. To the extent that D's actions exceeded the scope of this consent, D will be liable to P for trespass.

### Leaving the trees on Paul's land

A trespass can also be a “continuing trespass,” by leaving of chattels that the defendant caused to be present on the plaintiff's land, on the plaintiff's land.

Here, D likely is responsible for his continuing trespass by “dumping trees on Paul's lot near the stream in a wooded area [where] Paul was unlikely to see [them].” Note that D's dump[ing]” was likely done intentionally, and not negligently, satisfying the intent requirement for trespass to land. It makes no difference whether or not P was aware (except in his actual awareness to bring this action in tort) in order to constitute trespass. The interference with possession need not affect Paul's use and enjoyment—it is an interference with possession. Placing these trees on P's lot is sufficient trespass to constitute a continuing trespass, and Doug will be liable for this, as well.

### Defenses: consent.

D will argue consent, for the same reasons above. It will fail, as the scope of the consent granted was very narrow - to cross P's land, not to dump trees on P's land.

### Defenses: necessity.

D may argue that he had a necessity to dump the trees on P's land, thereby alleviating him from responsibility for all but the actual damage caused by his trespass. This will not work, as there is nothing in the record to suggest that D had any private necessity.

### Trees rolling down and blocking the stream.

#### Transferred intent.

When a defendant acts with the requisite intent to commit a tort, the fact that another intentional tort is committed in a different manner will still have the original intent, even if the exact ends are not what the defendant foresaw.

Here, D will argue that he did not intend for the trees to roll down the hill and block the stream. P will counter that as D had the intent to “dump the trees,” that this intent should be transferred to the unintentional consequence of blocking the river. A court is likely to accept P’s argument as courts are more willing to hold tortfeasors liable than innocent plaintiffs.

### Proximate cause.

Proximate cause is not generally at issue in intentional torts, but it merits addressing here. In order to determine if D is liable for the following, it must be clear that he was the proximate cause of the damages. This requires determining whether it would be foreseeable at the time D committed his tort that this harm might occur.

Here, it is very foreseeable that intentionally blocking the stream would be foreseeable. The amount of rain that caused the flood was the “winter’s normal rainfall.” D may argue that he did not foresee it because his only experience with the area was as the owner of a “small unimproved lot.” Apparently, D was not a resident of the area. However, blocking a stream with trees and leaving for winter, it would be foreseeable that it might flood and cause damage to the nearby property. Accordingly, on this theory alone, D will be liable to P for the damage issues that follow. However, in an attempt to hold D liable for as many torts as possible, potential intentional tort theories are also discussed.

### Paul’s motorcycle

#### Trespass to chattels.

There is a possible argument that D’s original trespass’s intent transfers sufficiently to constitute a trespass to the chattel that was P’s three-year-old motorcycle. A trespass to chattel is an intentional interference with the use and enjoyment of the chattel.

Here, D intentionally set into motion the events that caused P’s motorcycle to be damaged. Provided that this causal chain is sufficiently clear for the court, the court will

find that this constituted a trespass to chattel, relying on the doctrine of transferred intent.

### Conversion.

A severe interference with P's chattel so significant as to justify the Defendant being forced to pay the market value of the good at the time of the interference is known as conversion. Importantly, transferred intent does not apply to conversion.

Here, as the intent to harm P's motorcycle likely came from the transfer of intent from D's dumping of trees, there is likely not basis to find that D intentionally interfered with P's motorcycle in a sufficient manner to constitute conversion.

### P's garage.

#### Trespass to land: garage.

For all of the reasons noted above, D will be liable to P's land for damage done to the garage, under a trespass to land theory.

### Remedies.

#### Damages.

The underlying theory of damages in Tort is to place the plaintiff in the position as if the tort had never been committed. Further, under the doctrine of "thin shell plaintiffs," the D is liable for all harm proximately caused (as discussed above) whether economic, noneconomic, or property.

### Trespass to land.

#### Nominal damages.

Nominal damages are recoverable where there is no harm to the land.

Accordingly, P will be able to recover the essentially declaratory relief of D's fault, in a nominal damage claim for the exceeding of P's consent in trespass to land.

### Actual damages.

Actual damages are also recoverable in a trespass to land tort, where they occur. The calculation is either diminution in value of the property or cost to repair the property. As courts abhor waste, they tend to award the lowest dollar amount, but on a factual consideration may award one or the other.

### Diminution in value.

The diminution in value is the decrease in value of the property. Here, D will argue that this is the appropriate amount that should be awarded.

The trees' presence on the land (as caused by D), has decreased the value of the land \$10,000, from \$50,000 to \$40,000. D will argue, and some courts will agree, that as this is the lower cost (cost of repair is \$30,000), this should be awarded to avoid waste and forfeiture. However, many courts will award against D as he is the more wrongful party.

### Cost of repair: removal of the trees.

The cost of repair is the cost to bring the land back to how it was before the tort was committed.

In this case, the tort caused trees to be present on the land and to remove them would cost \$30,000. The fact that Paul has owned this 50-acre lot for a significant amount of time (potentially) and uses it for summer vacations will go in favor of the court awarding cost of repair. That P was "unlikely to see, much less use" the area where the trees were is not as important as the fact that P "plans to build a larger house [on the lot] in

the future.” Courts will be likely to award the diminution in value as P intended to continue using the land and to build a bigger house on the land.

#### Punitive damages.

Punitive damages are available in cases where the tort was committed willfully. Here, there is nothing to suggest that D dumped the trees willfully and with intent to harm P, so punitive damages are unlikely to be awarded.

#### Special damages.

If the court views the garage and the motorcycle not as separate torts, but as special damages caused by D’s trespass to land, damage to repair those costs (or potentially to replace the motorcycle—discussed below) will be awarded.

#### Defenses: avoidable consequences.

P will not be able to recover for damages that he could have reasonably avoided.

Here, there is nothing in the record to show that P could have avoided any of the damages caused by D’s tort. D may attempt to argue that P’s recovery should be reduced because P “left for the winter,” thereby increasing the amount of damages. D may, unpersuasively, argue that had P been present, he could have stopped the flood and prevented the damage to his garage and his motorcycle. This is, as indicated, unpersuasive because P’s duty to avoid consequences is a reasonable one, and it is unreasonable to assume that someone will stay at their house, avoiding floods.

#### Trespass to land: garage.

The same damage discussion as above would apply if the court determines that the garage was a separate trespass to land.

#### Trespass to chattel or conversion.

### Conversion.

Despite the doctrinal limitations of transferred intent, as noted above, there is an interesting remedy issue with conversion. If the court were willing to consider the motorcycle as being damaged so significantly as to constitute a conversion, the remedy is the fair market value at the time of conversion, and the tortfeasor gets title to the converted chattel. It is a forced sale.

Here, oddly, D may argue that this should be considered a conversion so that he need not pay the \$4,000 for a “new one” (assuming that “new one” means the fair market value of a three-year old motorcycle). P may well be happy with this, depending on the extent of the damage to his motorcycle.

### Trespass to chattel.

The proper remedy for trespass to chattels is cost of repair. Here, there is a \$5,000 dollar cost to repair, so it is possible that P will argue that this is the appropriate measure of damages. D will argue, as noted above, that the damages should be limited at the replacement value of 4,000 and this may well be persuasive.

### Restitution.

#### Restitutionary damages.

Restitutionary damages seek to disgorge any unjust enrichment from the defendant by making the defendant pay the plaintiff any ill-gotten gain.

Here, P will argue that D received an unjust benefit because he did not have to pay (do you have to pay?) to have the lumber taken to the lumber mill, and rather was able to avoid that cost by dumping the trees on P’s land. There is nothing in the record to indicate the value of this, so no further discussion will be had as to valuation.

### Ejectment.



Ejectment is a legal restitutionary remedy that removes trespassers from land.

Here, P may argue that an ejectment action may be a proper means for placing the entire burden on D to remove the trespassing logs. This is not a typical use of an action in ejectment, but perhaps. . .

### Injunction.

P may seek an injunction.

A permanent injunction is an equitable remedy. It requires that there be no adequate remedy at law, that there be a feasible enforcement of the injunction, that the hardships balance in favor of granting of the injunction, and that there are no defenses.

Here, P will argue that the remedies discussed above are not adequate because he wanted to maintain the property as it had been before the trespass. P will rely on the fact that courts are particularly sensitive to the nature of real property as unique and may well consider the legal remedy inadequate.

Feasibility may well work too. While the courts are generally reluctant to order a mandatory injunction requiring the D to do some affirmative act (here—removing the trees) they may well do that here. It would be a one-time enforcement and would not require supervision over a long period of time.

### Hardships.

Hardships balance in favor of the plaintiff. He was entirely innocent in this case, according to the record. D wanted to not have to take the trees to the lumber mill but wanted the benefit of having his lot clear so that he could build a house. D was almost lazy and avoiding costs whereas P was innocent. There is nothing to place on P's scale and, therefore, the injunction should grant.