



# **California First-Year Law Students' Examination**

**Essay  
Questions and  
Selected Answers**

**October 2023**



The State Bar  
*of California*

OFFICE OF ADMISSIONS  
COMMITTEE OF BAR EXAMINERS

## **ESSAY QUESTIONS AND SELECTED ANSWERS**

**OCTOBER 2023**

### **CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the four essay questions from the October 2023 California First-Year Law Students' Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Torts
3.	Contracts
4.	Criminal Law

# **OCTOBER 2023**

## **ESSAY QUESTION 1 OF 4**

### **Answer All 4 Questions**



# **California First-Year Law Students' Examination**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

You should answer according to legal theories and principles of general application.

## **QUESTION 1**

Helga decided to open a German-themed restaurant and beer garden in a building she owned. She entered into a valid written contract with Otto, a highly-skilled and famous German muralist, who agreed to paint the building's walls with scenes from the German countryside, in exchange for \$20,000, to be completed within the next 3 weeks. The contract did not have any provisions concerning assignment or delegation.

Helga also entered into a valid written contract with Jack, a general contractor, to install her own brewery equipment, in exchange for \$100,000, to be completed within the next 4 weeks. The contract included the following clause: "Because Jack might need to turn down other jobs while he is under contract with Helga, Helga agrees to pay \$50,000 in liquidated damages if she terminates this contract before construction begins."

Shortly after signing the contract, Otto left the country and assigned Helga's contract to one of his art students, Max, who was training to be a muralist. Helga refused to let Max paint the walls.

When Jack showed up to install the brewery equipment, he discovered, much to his and to Helga's surprise, that the building's floor would not support the heavy brewery equipment. The cost to build additional support for the floor was prohibitive. Helga told Jack that the contract obviously was over. Jack responded the next week by suing Helga for breach of contract, demanding \$50,000 in liquidated damages. That same week, Jack entered into a much more profitable year-long contract to renovate an old home.

1. Is the \$50,000 liquidated damages clause valid? Discuss.
2. Is Otto's assignment of the painting contract to Max allowable under contract law? Discuss.
3. Does Helga have any defenses to Jack's breach of contract lawsuit? Discuss.

## QUESTION 1: SELECTED ANSWER B

Jack v. Helga What law applies?

The UCC will apply when the subject matter of the contract is goods. Goods are moveable tangible items at the time of identification to the contract. Common law will govern all other contracts.

Here, the contract between Jack and Helga is for installation of brewery equipment. We also know that the equipment is "her own" therefore, which shows Helga is not purchasing any equipment as part of this exchange. The common law will apply to contracts for installation services and therefore, it applies here.

Valid contract

In order to see what rights the parties have under a contract we must first look to see if there was a valid contract. A valid contract consists of an offer, acceptance, consideration and lack of formation defenses.

Here, we are told that Jack and Helga entered into a "valid written contract." This would show that mutual assent was formed between the parties which satisfies the requirement for an offer and acceptance. Consideration is legally detrimental bargained for exchange and would not be a problem here because Helga is going to

pay Jack \$100,000 for the installation and Jack will install the equipment. Both detriments incurred and neither of which they were legally obligated to do.

#### Lack of formation defenses

Here, Helga may raise a formation defense of mistake due to the party's unawareness of the conditions of the floor support. This issue will be discussed below.

If Helga, is unsuccessful in the argument raised under mistake, she will have no defenses to formation.

Therefore, if no defenses are found, Jack and Helga will be found to have entered into a valid written contract.

#### 1. Is the liquidated damages clause valid?

A liquidated damages clause is generally held to be valid when the actual amount of damages from breach would be difficult to calculate and the amount of the liquidated damages are a fair estimate of the actual cost of the breach. A liquidated damages clause will not be enforced if it is meant to be punitive in nature. In addition, a liquidated damages clause that calls for the same amount of money to be paid regardless of the severity of the breach, called a blunderbuss clause, will not be enforced if the harm caused was not severe enough to warrant the penalty incurred.

Here, the contract between Jack and Helga contained a clause where Helga agrees to pay "\$50,000 in liquidated damages if she terminates this contract before construction begins." The contract in question here is one for contract services. Jack's logic for including the liquidated damages clause was stated as his need to turn down other jobs while he is under contract with Helga. Helga will argue that in this circumstance the liquidated damages clause is invalid because it is not difficult to calculate what the damages from contracts Jack turns down might be. Jack will argue that it would be difficult because if he is engaged in working for Helga, he won't be advertising his services to others and he wouldn't know what opportunities would be out there. While that may be true, the clause in this contract contains a statement that applies the same amount of penalty \$50,000 whether there was any additional work for Jack to perform or none. This would be a classic blunderbuss clause and the court would need to examine whether it was reasonable in light of the actual damages incurred by the parties. Here, Jack was able to enter into another contract the same week of the breach that was " more profitable" which shows that \$50,000 would be merely punitive and not an accurate measure of Jack's damages.

Therefore, the liquidated damages clause will be invalid.

Max v. Olga

In order to see if Max has any rights under the contract, we must look to see if a valid contract was formed.

What law applies? defined above

Here, the original contract was for painting of a mural. Since painting is a service, the common law will govern this contract.

Valid contract defined above

Here, we are told the parties entered into a valid written contract. We can assume that the parties had mutual assent offer and agreement before they entered into this contract. Consideration (defined above) will not be an issue here because Helga is going to pay Otto for the mural and Otto will paint the mural, neither of which they are legally obligated to do. There are no defenses that seem to exist in this fact pattern for the contract between Otto and Helga.

Therefore, there was a valid contract.

Assignment and delegation

The general rule is that all contracts' rights are assignable and all obligations are delegable. However, an exception to the general rule for delegation is that duties are



not delegable when the contract is for personal services and involve items of taste or specific skills of a party to the contract.

Here, Otto is a "highly skilled and famous" German muralist. This shows that Otto had a particular skill which Helga desired when she made the contract. Max is one of Otto's art students and a trained muralist. Although Max may have been able to produce a mural that would be visually equivalent to that of Otto, Helga had a specific interest in having Otto perform under the contract because he is famous and also, he probably has more skill than his students. Therefore, Otto's rights were not assignable as they fall into the exception of the rule.

Therefore, there was no valid assignment of the contract to Max.

Jack v. Helga (continued)

3. Does Helga have any defenses to Jack's breach of contract lawsuit?

As mentioned above, Helga will be able to raise a defense to the formation of her contract with Jack.

Mutual Mistake

The defense of mutual mistake can be raised when the parties were mistaken as to a fact that is material to the contract.

Here, when Helga and Jack made the contract, a basic assumption of the contract was that the floor would support the heavy brewery equipment. Jack and Helga were both surprised to discover that the floor was not in fact strong enough to support this equipment. This shows that neither Jack nor Helga had knowledge that the floor may be weak when they entered into the contract. Jack may try to argue that Helga should bear the risk of the floor's weakness since she was in a position to know more about the condition of the floor as a tenant of the premises. Helga will argue that she is not an expert in construction and had no idea to check on the condition of the floor.

If Jack is successful in his argument, there will be no formation defenses, but Helga may be able to excuse her performance.

## Excuse

The court can excuse a party from its duty under the contract where there is impossibility, impracticability or frustration of purpose.

## Impossibility

When unexpected circumstances that were unanticipated at the time of the contract formation occurs to make performance impossible, the court may excuse the party from their duties under the contract.

Here, Helga will argue that the weakness of the buildings floor was an unanticipated circumstance. However, we are not told that the weakness made it impossible to install the brewing equipment, only that it made it cost more. Since the circumstances did not make performance impossible, this defense will not work.

Therefore, Helga will not succeed in an argument for impossibility.

### Impracticability

When unexpected circumstances that were unanticipated at the time of breach make performance of the contract impracticable for the parties, the court may excuse their performance. However, the fact that performance is only economically impracticable will usually fail to excuse the party from performance.

Here, Helga will argue that the cost of building the additional floor support makes her performance impracticable since it is prohibitive. Since Helga's main argument is simply that the cost is too high, the court will probably not allow her to use this as an excuse for performance.

## Frustration of Purpose

The frustration of purpose doctrine can be used when circumstances have changed so that the main purpose of the contract no longer exists.

Here, Helga will argue she should be excused from performance because her main purpose was to run a profitable business and paying for the floor support may force her to close her business. This probably would fail for the same economic reason the other excuses failed.

## **QUESTION 1: SELECTED ANSWER C**

**HELGA (H) v. JACK (J)**

### **GOVERNING LAW**

The UCC governs all contracts for the sale of goods (tangible movable things at the time of contract formation). The common law governs all other contracts (services).

Brewery equipment is a good and installing brewery equipment is a service. The predominant purpose appears to be installation of the equipment, so the common law applies.

### **CONTRACT FORMATION**

A valid contract requires an offer, acceptance, and adequate consideration. A valid contract imposes upon each party a duty of good faith and fair dealing in performance and enforcement of the contract.

As per the facts, a valid written contract was entered into by H and J.

### **STATUTE OF FRAUDS (SOF)**

Requires certain contracts be in writing and signed by the party against whom enforcement is sought. Contract for services that cannot be completed in less than one year need to be in writing. Contracts for the sale of goods > \$500 need to be in writing. The contract between H and J is to be completed in 4 weeks. If the equipment is more

than \$500 than a contract in writing is required.

There is a valid contract between H and J so the SOF should not be an issue.

## **TERMS**

### **IS THE LIQUIDATED DAMAGES CLAUSE VALID?**

Requires a breaching party to pay a pre-determined agreed upon amount for non-performance by the breaching party. A penalty clause is a 'liquidated damages' clause that is excessive and does not take into account the gravity and the timing of the breach and is unenforceable.

The entire contract with Jack is for \$100,000 to install brewery equipment. H agreed to pay \$50,000 if she terminates the contract before construction begins. As the liquidated damages amount is half of the entire contract, the amount most likely exceeds the reasonable estimate of damages J would incur. Thus, this is more likely a penalty clause and would be unenforceable. H would argue that it would be impracticable as the floor would not support the equipment and the building of additional support would be excessively difficult and prohibitively expensive. A reasonable person would agree that the \$50,000 is excessive and thus unenforceable.

## **BREACH**

A failure to substantially perform under the terms of a contract without excuse of legal justification excusing the non-breaching party from performance.

H told J that the contract was obviously over for which J is holding her in breach. H will

argue that J should have come to the restaurant before-hand to take measurements and assess the building floor as J is in the business of installation.

## **DEFENSES OF H?**

### Mutual mistake

A mistake by both parties of a basic assumption of the contract having a material effect on the agreement where the adversely affected party can void the contract is he does not bear the risk of mistake. One bears the risk of mistake if it is agreed upon in the contract. If it is determined by the court if appropriate to do so, or if one party is aware of the risk but has limited knowledge of the facts and considers that knowledge sufficient ('conscious ignorance').

Here, both H and J were mistaken with the building floor's ability to support heavy brewery equipment. However, H will argue that J should bear the risk of the mistake as he is in the business of installing brewery equipment and should have known to check the floor for support. J will contend that coming to the site before installation is not usually required as most buildings can support the equipment.

The court would most likely agree with H that he did not bear the risk of the mistake and that J should bear the risk of the mistake so this defense would be successful.

### Frustration of purpose

Excuses a party's performance when a party's principal purpose is substantially frustrated by an unforeseen event or contingency, the non-occurrence of which was a

basic assumption on which the contract was made.

Here, H will argue that the lack of building support has frustrated her purpose of installing the heavy brewery equipment and thus should relieve her of her obligation. J will contend that H should have known the floor would not support the equipment.

This defense will likely succeed.

### Impracticability

Excuses a party's performance if it has been rendered excessively difficult or prohibitively expensive by an unforeseen event, the non-occurrence of which was a basic assumption on which the contract was made.

Here, H will argue that the additional support was prohibitive in addition to the already cost of \$100,000. J will contend that H should have taken that into account before contracting for heavy brewery equipment. If the cost of additional support is indeed significant, then this would be a valid defense as well.

### **H v. Otto (O) regarding assignment of painting**

### **GOVERNING LAW**

Defined supra.

Painting is a service, so the common law would apply.



## **CONTRACT FORMATION**

Defined supra.

As per the facts, a valid written contract was made between O and H thus the SOF will not be an issue.

An assignment occurs when a party (O) assigns his rights and duties to a third party (M). In general, assigning contractual rights is valid if it does not materially alter the contract, if the contract does not prohibit or voids assignments, or if the assignment does not violate the law or public policy. In addition, an assignment can be made if it does not increase the risk or significantly alters performance by the obligor (H). A delegation of duties involving a high level of skill and knowledge cannot be delegated. The contract between O and H does not have any provisions regarding the assignment or delegation.

In this case, O left the country shortly after signing the contract with H. O is a highly-skilled and famous German muralist. H is paying O \$20,000 to paint her German-themed restaurant. Assigning this duty to an art student would not be reasonable as a student would not have the level of skill as O would have. O may argue that his student is quite able and even under his tutelage. However, H would be receiving the benefit of the bargain by accepting O assignment to an art student.

This assignment would not be allowable under contract law.

# **OCTOBER 2023**

## **ESSAY QUESTION 2 OF 4**

### **Answer All 4 Questions**



# **California First-Year Law Students' Examination**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

You should answer according to legal theories and principles of general application.

## **QUESTION 2**

One night Paul and Owen, who were home from college for spring break and looking to have some fun, decided to sneak onto Don Denardi's farm. They split up to explore.

Paul walked along the chain link fence surrounding the side of Denardi's property until he saw a hole in the fence. He pried the fence back to make the hole large enough so that he could crawl through. While exploring, Paul fell into an old swimming pool and broke his leg. The pool was surrounded by thick brush and had been empty for years. In the past, Denardi had kicked a few local kids out of the empty pool after he caught them skateboarding in it.

Owen entered Denardi's property by walking up the driveway towards the house. Owen noticed a wallet lying on the ground and put it in his coat pocket. Denardi saw Owen take the wallet and came outside to confront him. When Denardi asked Owen to return the wallet, he refused. Denardi reached out and stepped towards Owen to retrieve the wallet and Owen stepped back, tripping and spraining his wrist as he fell to the ground. Denardi then retrieved the wallet from Owen's coat pocket and Owen fled.

1. What tort claim(s) can Paul reasonably bring against Denardi and what defense(s), if any, may apply? Discuss.
2. What tort claim(s) can Owen reasonably bring against Denardi and what defense(s), if any, may apply? Discuss.
3. What tort claim(s) can Denardi reasonably bring against Paul and what defense(s), if any, may apply? Discuss.
4. What tort claim(s) can Denardi reasonably bring against Owen and what defense(s), if any, may apply? Discuss.

## **QUESTION 2: SELECTED ANSWER A**

### **Paul v. Denardi**

### **Negligence**

### **Duty: Landowner/Occupier**

Generally, defendants are only liable for negligence for volitional acts which creates a duty to act in a way that does not expose others to an unreasonable risk of harm.

However, special duties include omissions to act such as when the defendant is a landowner or occupier of land.

Denardi (D) is a landowner or occupier of his farm, therefore, he will be held to the standard of a landowner.

### **Trespassers**

Landowners owe known trespassers a duty to warn of known artificial dangers on their land, and no duty to unknown trespassers.

D will claim that he was not aware of the risk of trespassers on his land. He will point the fact that he had a fence to keep people out, reducing the likelihood of trespassers.

However, D had kicked other kids out of the pool previously for skateboarding on his land.

Therefore, D was aware that there may be trespassers on his land and will be liable to warn of known dangers.

### **Attractive Nuisance**

Children attracted onto land and injured when they engaged with a dangerous condition on the land. They did not understand the danger because of their youth.

While Paul (P) was a youth, he was not too young to understand the danger of the pool.

Therefore, this will not apply.

### **Breach**

D did not warn of any dangers of the artificial condition of the swimming pool.

While exploring, Paul fell into an old swimming pool and broke his leg. The pool was surrounded by thick brush and had been empty for years.

D should have posted warning of the swimming pool because he knew trespassers might be on his land.

D will be liable for breach of duty as a landowner to known trespassers.

### **Causation: Actual**

But for D not posting warnings on his land of the dangers of the pool, P would not have been injured on his land.

### **Causation: Proximate**

When P fell into the pool, he was a type of plaintiff that it was foreseeable he could be injured by not posting warnings of the dangers of the pool. His type of injury was the type that is foreseeable to occur for D's breach of duty.

P was in the zone of danger created by the dangerous condition on D's land. Nothing and no one intervened between D's negligence and P's injury.

### **Damages: General**

D will be liable for pain and suffering that P endured.

### **Damages: Special**

D will be liable for any medical bills or loss of money from missed work that P endured, if any.

### **Defenses**

#### **Contributory Negligence**

Common law jurisdictions bar recovery if the plaintiff contributed to his injury.

Under common law, D will argue that P will not be able to recover since he contributed to his injury when he went onto the land in the thick bush and explored where he could not see the ground before falling in.

However, this will probably fail since no facts indicate that P did anything that contributed to his own injury. He was trespassing, but this alone would not satisfy the requirements for contributory negligence.

#### **Comparative Negligence**

Most modern law jurisdictions allow recovery for the percentage of fault attributable to the defendant, even if the plaintiff contributed to their own injury.

D will argue that P contributed to his injury when he was exploring in the tall brush and fell in the pool, saying that his conduct did not conform to that required to protect himself.

However, no facts indicate that P was negligent when he explored the farm.

### **Assumption of the risk**

Plaintiff knew the risk and voluntarily chose to undergo it. Bars recovery.

D will argue that P assumed the risk of falling into the pool when he trespassed.

However, he did not assume the risk of falling into the pool as he did not appreciate the risk involved at the time he fell in.

Therefore, this defense will fail.

D will be liable to P.

### **Owen v. Denardi**

### **Battery**



Intentional harmful or offensive touching of another without consent or privilege. A touching may be caused by a series of events set in motion by the defendant that causes the touching.

Denardi reached out and stepped towards Owen to retrieve the wallet and Owen stepped back, tripping and spraining his wrist as he fell to the ground. Denardi then retrieved the wallet from Owens coat pocket and Owen fled.

Therefore, D intended to cause a touching. O was touched by the events put into place when D reached out for him.

Therefore, D has committed battery.

### **Assault**

Intentional placing of another in immediate apprehension of a harmful or offensive contact.

Denardi reached out and stepped towards Owen to retrieve the wallet and Owen stepped back, tripping and spraining his wrist as he fell to the ground. Denardi then retrieved the wallet from Owen's coat pocket and Owen fled.

Therefore, D has committed assault.

## **Defenses**

### **Defense of property**

Reasonable force may be used to retrieve one's property if it is done immediately while the property has just been taken.

Denardi then retrieved the wallet from Owen's coat pocket and Owen fled.

**yes.**

### **Recapture of chattel wrongfully withheld**

Reasonable force may be used to retrieve chattel wrongfully detained.

Denardi then retrieved the wallet from Owen's coat pocket and Owen fled.

yes

### **Denardi v. Paul**

### **Trespass to Chattel**

Intentionally interfering with the property rights of another's chattel. When P cut D's fence, he did so intentionally.

When P cut D's fence, he interfered with the fence which was the chattel of D.

When P cut D's fence, he interfered with the property rights of D to have an intact fence. Therefore, P is liable for trespass to chattel if not conversion.

### **Conversion**

Intentionally interfering with the property rights of another's chattel to the point of converting that chattel to one's own. Such as, the saying, if you break it, you pay for it.

When P cut D's fence he did so intentionally.

When P cut D's fence, he destroyed that section of the fence which was the chattel of D. When P cut D's fence, he destroyed the property rights of D to have an intact fence.

Therefore, P is liable for conversion for the section of the fence destroyed and will be liable to pay for the full value of fixing the fence.

## **Trespass to Land**

Intentional entry upon land in possession of another without consent or privilege.

When P and O entered D's land they did so intentionally. The land was in the possession of D, and P and O had no consent or privilege to enter the land.

P and O will be liable to D for trespass to land.

## **4. Denardi v. Owen**

## **Trespass to Land**

Defined and discussed supra.

## **Trespass to Chattel**

Defined supra.

When O took the wallet from the ground on Denardi's land, he did so intentionally.

O will argue that in that moment, he did not actually cause any interference with the chattel.

However, when D asked O to return the wallet but O refused, he interfered with the property interest of D and had no consent or privilege.

Therefore, O will be liable for trespass to chattel. However, D did retrieve his wallet before the end of the exchange.

### **Conversion**

Defined supra.

When O took the wallet from the ground on Denardi's land he did so intentionally.

O will argue that in that moment, he did not actually cause any interference or harm to the chattel.

However, when D asked O to return the wallet but O refused, he effectively converted the property interest of D and had no consent or privilege.

Therefore, O will be liable for conversion. However, D did retrieve his wallet before the end of the exchange.

## **QUESTION 2: SELECTED ANSWER B**

**Paul (P) v Denardi (D)**

### **Negligence**

This requires duty, breach, causation, and damages.

### **Duty**

This is a standard of care to all foreseeable (Cardozo-majority) and zone of danger (Andrews- minority) plaintiffs.

Discussed below.

### **Standard of Care**

This is generally a reasonably prudent person under the circumstances.

Here, D has property and has the duty of a reasonable prudent property owner. If a person is a trespasser, there is no duty. If they are a discovered trespasser, they are owed to be reasonably warned of any known dangers. P will argue they are a

discovered trespasser because they were common form the skateboarders in the past.

Therefore, we will treat P as a discovered trespasser.

## **Breach**

This is if a person acts below a standard of care. This can be measured by the learned hand method where there is a breach if the burden is less than the probability of harm multiplied by the magnitude of harm.

Here, D will argue that P was trespassing because he had to sneak on the property, and he owed no duty. P will argue that D has had trespassers in and near his pool in the past and should've taken proper measures to warn of the pool. Also, the burden of a few signs is meager compared to the probability and severity of risk involved with a swimming pool per Learned Hand. In the events, P had to make a hole from a fence that was not a proper entrance way and there wouldn't have been a likely preventative sign he would have been able to see anyway as he made his way to the bushes to the pool and not a normal entrance to the pool.

Therefore, P is treated as someone that is owed a duty, but it is not breached.

## **Causation**

This requires actual and proximate cause.

### **Actual Cause**

This is the "but for" cause.

Here, but for D not warning P of a pool, he fell in and broke his leg.

### **Proximate Cause**

This is the philosophical connection between the breach of duty and the harmful result.

Here, there is no breach of duty. However, if there had been a sign or any indication of a swimming pool or that he could've fell in, P would've stayed away.

### **Damages**

This is if there is harm. Here, P broke his leg. Therefore, there are damages.

In conclusion, P does not have a negligence claim against D.

### **Defenses**



## **Contributory / Comparative Negligence**

This is if the plaintiff contributes to his harm. Under contributory negligence (minority) a plaintiff cannot collect if they are even 1% at fault. Under comparative negligence, a plaintiff cannot be over 49/50% at fault. Under Pure comparative negligence, there fault is apportioned as devised by the courts.

Here, P broke into the property of D and was at fault by recklessly breaking into property where he was not sure of the terrain. It was also during an illegal trespass which would show the contribution of negligence.

Therefore, a court could definitely find comparative negligence and comparative negligence would be calculated appropriately.

## **Assumption of Risk**

This is if there is a known risk and a plaintiff voluntarily entered into that risk.

Here, there is a known risk that any trespass that there are unknowns. P knew of that risk and entered into the property anyway.

Therefore, there can be assumption of risk.

## **Owen (O) v Denardi (D)**

### **Assault**

This is the intentional creation of imminent apprehension of harmful or offensive contact. Harmful causes injury and offensive is to the ordinary person.

Here, D moved toward O in a manner that was imminent because it happened in his presence and caused offensive contact because of the manner O was confronted. It was also harmful because P tripped and sprained his wrist.

**Therefore, there can be assault by D.**

### **Battery**

This is the intentional infliction of harmful or offensive contact to a plaintiff's person.

Transferred intent is when one person attempts one intentional tort but creates another.

Here, there was no contact between D and O, but O was harmfully contacted by the ground because of the situation created by D. D assaulted O but committed a harmful contact with the ground which would constitute transferred intent.

**Therefore, there can be battery by D.**

## **Defenses**

### **Defense of Property**

A person may use a reasonable amount of non-deadly force to retain property as long as it is in hot pursuit.

Here, D wanted his wallet returned. It was clearly his wallet because it was on his property. D moved towards O to regain that property when O fell. It is not indicated that he used any force other than what a reasonable person would do to get their wallet back.

**Therefore, there is a defense to property defense and D will not be liable for assault or battery.**

### **Denardi (D) v Paul (P)**

### **Trespass to Land**

This is the invasion to the land of another without their consent.

Here, P peeled back a fence to enter D's property and was not given consent which is clear by the cryptic entry.

**Therefore, there is trespass to land by P**

### **Trespass to Chattels**

This is the minor intermeddling with the property of another.

Here, P peeled by a fence, which by laws of metal, cannot be returned to its normal form. This would count as intermeddling because of the damages of bending the fence.

**Therefore, there is trespass to chattels by P.**

### **Conversion**

This is the severe intermeddling or dispossession of the property of another.

Here, as discussed, P peeled back the fence, which is the property of D and it will never go back to its former state. By that, the fence is completely destroyed and will have to be replaced which is severe intermeddling.

**Therefore, there is conversion by P.**

## **Defenses**

There are no proper intentional tort defenses.

## **Denardi (D) v Owen (O)**

### **Trespass to Land**

This is the invasion to the land of another without their consent.

Here, O entered D's property through the driveway and was not given consent which is clear by the cryptic entry.

**Therefore, there is trespass to land by O.**

### **Trespass to Chattels**

This is the minor intermeddling with the property of another.

Here, O took a wallet that didn't belong to him. It belongs to D, as it was on his property.

**Therefore, there is trespass to chattels by O.**

### **Conversion**

This is the severe intermeddling or dispossession of the property of another.

Here, O picked up the wallet and there was no severe dispossession because O recovered his wallet. The wallet was seemingly unharmed from the fact pattern.

**Therefore, there is no conversion by O.**

### **Intentional Infliction of Emotional Distress (IIED)**

This is the creation of severe emotional distress by extreme and outrageous behavior.

Here, while the behavior of trespassing and stealing is outside of all bounds of decency, D was unphased and therefore didn't suffer severe emotional distress.

**Therefore, there is no IIED.**

## **Defenses**

There are no proper intentional tort defenses.

**OCTOBER 2023**

**ESSAY QUESTION 3 OF 4**

**Answer All 4 Questions**



# **California First-Year Law Students' Examination**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

You should answer according to legal theories and principles of general application.



### **QUESTION 3**

Delta Burger Corporation ("Delta") wanted to put on a fireworks show to celebrate the grand opening of its 100<sup>th</sup> restaurant. On April 15, Dan, Delta's president and CEO, called Pow Corporation ("Pow"), a company that sells fireworks. During the call, Pow agreed to sell Delta 2,000 fireworks, to be delivered within two weeks, and Delta agreed to "pay the market price" for such fireworks. Dan stated that he would have his accounts manager send over a written contract memorializing the terms.

After the call, Dan became busy with other matters regarding the grand opening and forgot to have his accounts manager send a written contract to Pow. On April 20, Pow delivered the fireworks to Delta, along with a bill for \$38,000. Delta accepted delivery of the fireworks and used them at the grand opening, but then refused to pay the Pow bill. Delta contends that it does not have to pay that amount because: (1) Delta never sent a written contract; (2) the parties did not agree to a specific price for the 2,000 fireworks; and (3) there was insufficient consideration for a contract to be formed because Delta could have purchased the same fireworks from Cosmo Inc., Pow's competitor, for \$35,000.

1. Is there an enforceable contract between Delta and Pow despite the lack of a written agreement? Discuss.
2. If there is a contract, must Delta pay \$38,000 for the fireworks? Discuss.
3. How should a court rule on Delta's inadequate consideration argument? Discuss.

### **QUESTION 3: SELECTED ANSWER A**

#### UCC Applicability

The UCC provisions apply when the transaction pertains to the sale of goods. Goods are all things movable at the time of identification to the contract.

Here, fireworks are goods because they were movable at the time of contracting.

Therefore, the UCC provisions apply.

#### The UCC Open Door

The restatement and common law rules are allowed to supplement but never to contradict the UCC provisions or the purposes and policies which are embodied in those provisions.

#### Offer

An offer is a manifestation of intention to enter into a binding contract such as the other person is justified in understanding that his assent is invited and will conclude the bargain.

Here, there was a valid offer made by Delta who contacted Pow and offered to enter into a binding agreement. The offer was sufficiently detailed, contained language of commitment ("agreed to sell"), and suggested a complete bargain. Namely, the offeror detailed the purpose of the transaction which was to celebrate the opening of the 100th restaurant, the subject matter which were the fireworks, the delivery terms (within two weeks), and the quantity.

Thus, there was a valid offer capable of acceptance.

### Indefiniteness

Here, Delta will argue that the offer and the subsequent contract would fail for indefiniteness because it failed to include such an essential term as the price of the transaction. Pow will argue that the UCC approach is liberal with respect to finding contracts even in the absence of essential terms. The UCC provides that so long as the intent of the parties to be bound is ascertainable through their words and conduct and so long as there is a reasonably certain basis for giving an appropriate remedy, the court will not fail the contract because it contains "agreements to agree," misses essential terms, or contemplates a future writing.

Here, Pow will argue that the detailed nature of their negotiations and the completeness of the bargain were indicative that the parties intended to be bound at the time of their telephone conversation and to proceed to their respective

performances rather than to further negotiate and not to be bound unless some further assent to the additionally negotiated terms were given. Here, all essential terms required for timely performance were detailed. Delta will argue that the price term was essential to the transaction and was missing from the contract, but Pow will argue that the UCC gap fillers provide for the similar situations where the parties fail to agree on the price. Here, the contract specifically provided that the price would be the market price. The UCC provides that the market price must be calculated as of the time of delivery.

Thus, the contract would not fail because the price term was missing.

#### Written Memorial Contemplated

Similarly, as long as the intent and agreement in principal is ascertainable, the UCC does not fail the contract.

Here, the agreement in principal was reached during the conversation between the parties and the forthcoming memorandum was not to vary the terms of the agreement but was intended to memorialize what was already agreed to and could have been performed. The parties did not exhibit an intent not to be bound until after a written memorial was prepared and signed by both.

Thus, the offer/contract will not fail because Delta forgot to send the written contract.

### Reasonably Certain Basis

Here, Delta will argue that because the price term was missing there was no reasonably certain basis for giving an appropriate remedy in case of a breach, hence the offer was invalid and the contract void.

Under the UCC, the reasonably certain basis is supplied through commercial standards, usages of trade, course of performance and course of dealing. The UCC provisions as discussed supra have gap fillers which provide for the missing terms except the quantity term which the courts will not decide on instead of the parties.

Here, the price term was sufficiently certain. The quantity term was provided (2000 fireworks).

Thus, there was reasonably certain basis for giving an appropriate remedy.

### Acceptance

An acceptance is the offeree's manifestation of assent to the terms included in the original offer.

Here, the facts do not detail how exactly and when exactly acceptance to the deal was given, however the contract does not fail merely because the time of contract formation is not ascertained. The general idea is given that the contract was formed during the negotiations after the parties expressed their mutual assent.

Thus, there was a valid acceptance.

### Adequacy of Consideration

Apart from mutual assent there must be a bargained for consideration. A return promise or performance is bargained for when it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. In other words, there must be a reciprocal inducement of action on both sides to constitute a sufficient consideration.

Here, Delta argues that the consideration was insufficient because a better price was available in the market. The courts however do not consider the adequacy of consideration in making their determinations whether there is a valid consideration to enforce the contract. The courts may review the adequacy only if there is an extreme disparity which is indicative of fraud or duress. Here, Pow's bill was for 38K, whereas the substitute performance offered by Cosmo costed 35K. The disparity between the two prices was not so extreme as to alert the court that there was fraud or duress. A dispute might arise concerning whether 38K was representative of the fair market

value at the time of delivery. Pow will argue that Cosmo's price of 35K was not descriptive of the market value. Pow will also argue that the services were not comparable. The facts here are sparse on the issue, but Pow will be successful in arguing that the consideration was valid because it was not unconscionable and was not indicative of some sort of undue influence, pressure, duress, or fraud. The mechanism for determining the price was freely bargained and agreed too, and the invoice price was determined in accordance with the mechanism set in the contract from price-fixing. Finally, the consideration was not a nominal or sham consideration to be indicative that it was a mere formality and that an actual bargaining never occurred.

Thus, Delta's argument that the consideration was invalid will fail except if an honest dispute arises as to what constitutes a fair market value at the time of delivery of the fireworks.

### Statute of Frauds

If the transaction is for \$500 or more, then the Statute of Frauds provisions of the UCC require that there be some writing sufficient to indicate the existence of a contract between the parties signed by the party against whom the enforcement is sought. The writing is sufficient even though it has agreements to agree or misses or incorrectly states certain terms of the contract except that the bargain is not enforceable beyond the quantity listed on the contract.

Here, the transaction price exceeded \$500 and therefore the transaction of sale falls within the SOF provisions. Delta will argue that the written contract was never sent to Pow and therefore the transaction was unenforceable. There are, however, exceptions to the SOF rules. The SOF is inapplicable where the goods are specially manufactured, or where the written confirmation sent by one of the parties to another is sufficient to indicate existence of the contract even in the absence of a signature by the recipient, or where the goods are delivered and accepted or the payment is made and accepted. Here, Pow will argue that the bargain was enforceable despite the absence of a writing because the goods were delivered and accepted by Delta who used the fireworks in the grand opening event and exhibited conduct which was not consistent with Pow's ownership.

Thus, the statute of frauds could be no defense to formation.

### Breach

Breach occurs when one of the parties fails to render or tender the promised performance or tenders a defective performance.

Here, Delta was in breach by not paying Pow's invoice. This is because Delta chose to accept the goods and exercised ownership over the goods and incurred an obligation to make the payment and compensate Pow. The invoice with the price was



included together with the delivery so Delta was aware of the price at the time of delivery. If Delta thought that the price was not in conformity with their agreement, then Delta should have properly rejected the goods which he did not.

Thus, there was a breach committed by Delta.

### Perfect Tender Rule

The buyer has a right to reject the goods if the tender or delivery is nonconforming in any respect. Here, Delta could rightfully reject the goods if he thought that the price of 38K was not in conformity with the fair market value at the time of delivery. In order to rightfully reject the delivery, the buyer must seasonably notify the seller of the nonconformity and provide the seller a reasonable opportunity to cure the delivery. Furthermore, the buyer must refrain from exercising any ownership over the products and must keep them with reasonable care available for a sufficient period of time for the seller to remove them. Here, Pow will argue that he was not notified of the nonconformity or that Delta did not agree with the pricing. Pow was not provided with reasonable opportunity to explain the basis for the current pricing or make any adjustment to the invoice if there was any overbilling. Delta will argue that he had to accept the goods out of necessity because there was no time left for him to look for reasonable substitutes to be ready for the opening event. Pow will argue that if such was the case Delta was still under an obligation to notify the seller that the acceptance was being done under protest, that the delivery was nonconforming and

that the buyer was reserving its rights to pursue the seller for damages. Here, Delta never notified Pow that the price was not acceptable.

Thus, Delta was in breach of contract by failing to perform its obligation which was to pay the invoiced amount as was agreed in exchange for a perfect tender.

### Good faith Obligation

If the court finds that the basis for rejecting the goods is trivial then the court may decide that the rejection is being made in bad faith and is a mere pretext to avoid a bad bargain.

Here, Delta is doing exactly that. At the time of delivery, it had no basis to reject the tender because it was perfect in all respects. The nonconformity in the pricing was a pretext to avoid a bad bargain because Delta could have received the fireworks for a better price from Cosmo.

Thus, Delta was in breach of contract.

### The Seller's Remedies

The seller is entitled to recover the price of the contract after the risk of loss of the goods has transferred from the seller to the buyer. Here, the fireworks were delivered

and were used by Delta for the opening event. Delta bore the risk of loss of the goods and was obligated to compensate Pow for the price which was fixed in accordance with the agreed mechanism of "market price."

Thus, it is likely that the court will order Delta to make the payment on the invoice.

## **QUESTION 3: SELECTED ANSWER B**

**POW v. DELTA**

### **Choice of Law**

UCC Article 2 governs contracts of the sale of goods and moveable property between merchants. Common law governs all other contracts. This is the for the sale of fireworks, which is a good, so UCC applies.

### **Merchant**

Is one who regularly trades in the goods or is recognized as knowledgeable regarding the goods and has a requirement to act in good faith and fair dealing. Here, Pow is a merchant of fireworks and Delta is not because they are a merchant in food.

### **Contract Formation**

A contract is a bargained for promise or set of promises for which the law provides a remedy upon breach or the law recognizes performance as a duty. All contracts require mutual assent (valid offer and acceptance / a meeting of the minds) and valid

consideration and there are no defenses to formation and the Statute of Frauds is satisfied.

### **Offer**

Is the objective manifestation of willingness to enter into a bargain so made as to justify another in understanding that his assent is invited and will conclude it. We are told that Pow orally offered to sell 2,000 fireworks to Delta.

UCC requires that an offer identify the parties, subject matter, and quantity (price is not a requirement). Here we are told the parties are Pow and Delta, the subject matter is fireworks, and the quantity is 2,000. Price and other missing terms can be determined later through such means as gap fillers provided by the code.

Conclusion - there was a valid offer for the sale of fireworks by Pow.

### **Acceptance**

Is the objective manifestation of assent by the offeree to the terms thereof in a manner invited or required by the offer. The offer was made by Pow over the phone

and Delta accepted the offer over the phone by agreeing to "pay the market price" for 2,000 fireworks.

Conclusion - there was a valid acceptance by Delta for the purchase of the fireworks.

### **Consideration**

Is a bargained for exchange between parties in which each party incurs a new legal detriment and benefit (or forbearance of such), and it cannot be a pre-existing duty, past consideration, or a mere gratuity. Pow agreed to sell to Delta 2,000 fireworks at "market price" and Delta agreed to pay Pow the "market price" for 2,000 fireworks.

Conclusion - there was valid consideration.

### **Defenses to Formation**

Statute of Frauds

Is a statute that requires certain contracts to be in writing signed by the parties charged. There are 6 historical provisions of the statute of frauds including the 'sale of goods.' For the sale of goods over \$500 the statute requires that the agreement be in writing identifying the parties, subject matter and quantity and signed by the party or parties charged.

We are told that Dan, Delta's CEO, had intended to have his manager send over a written contract but he became busy and forgot. The writing requirement of the statute of frauds was not satisfied, however, there is another way to satisfy the statute and that's through performance.

Despite having a written contract, Pow delivered the entire order of fireworks to Delta on April 20 and Delta accepted them and, in fact, used them later at the grand opening.

Conclusion - the statute of frauds has been satisfied in this case by performance. Pow delivered the fireworks to Delta who accepted them and later used them.

Ambiguous

A contract or a term therein is ambiguous if it is open to 2 or more reasonable interpretations. Delta might try to argue that "market price" is ambiguous and not determinative enough for a valid, enforceable contract.

Conclusion - this defense will fail because Delta agreed to pay "market price" for the fireworks and market price can be determined with reasonable certainty by reliance on the good faith merchant or UCC gap fillers.

### **#1 Is There an Enforceable Contract Between Delta and Pow Despite the Lack of a Written Agreement?**

Based on the analysis above, yes, there is an enforceable contract between Pow and Delta. We know that there was a valid offer, valid acceptance, and valid consideration. While Delta might try to argue that there was not an enforceable contract because the Statute of Frauds for the sale of goods was not satisfied, this argument will fail because the statute was satisfied by performance. Pow delivered the 2,000 fireworks on April 20 and Delta accepted them. In fact, Delta later used them at their grand opening.

Conclusion - there was a valid enforceable contract between Pow and Delta.



## **#2 Must Delta Pay \$38,000 for the Fireworks?**

While Delta and Pow did not agree to a specific price for the 2,000 fireworks, they did agree that Delta would "pay market price" for them. As a merchant, Pow has an obligation to act with good faith and fair dealing. As such, the \$38,000 price should be the "market price" for the fireworks. Because apparently similar fireworks could be purchased from a competitor for \$3,000 there might be an argument by Delta that "market price" should be lower, but Pow might have used slightly better product.

### UCC Gap Fillers

If there is an item that is not clear such as "market price" the UCC has what are called gap fillers that can assist parties to a contract when a term is not clear or there may be differing terms. In this case, if there is a valid argument made by Delta that the price is not fair and too high, then a UCC gap filler will be able to assist to determine an adequate price.

Conclusion - It is more than likely that Delta will have to pay \$38,000 bill from Pow to remedy their breach of the contract. While Delta might be able to argue that the bill

was \$3,000 too high, it's hard to make such an argument when you received the fireworks and then used them.

### **#3 How Should a Court Rule on Delta's Inadequate Consideration Argument?**

Delta's inadequate consideration argument will fail because UCC governed this contract for the sale of goods. UCC does not require price in the offer. It requires that the offer identify the parties, subject matter, and quantity. Each of these items were clearly identified in the offer by Pow.

UCC requires that Pow, as a merchant, act in good faith and fair dealing and there is nothing in the fact pattern to indicate that Pow failed to do as such.

Delta agreed to pay "market price" for the fireworks, which is an amount that can be determined by the parties to the agreement or by a UCC gap filler. If Delta can successfully argue the bill was inflated by \$3,000 and applicable UCC gap fillers demonstrate as such then it's possible Pow's remedy could be reduced to the lower price.

Conclusion - Delta's inadequate consideration argument will fail, and they will be obligated to pay Pow for the fireworks. If Delta can successfully argue the bill was inflated by \$3,000, and applicable UCC gap fillers demonstrate as such, then it's possible Pow's remedy could be reduced to the lower price.

# **OCTOBER 2023**

## **ESSAY QUESTION 4 OF 4**

### **Answer All 4 Questions**



# **California First-Year Law Students' Examination**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

You should answer according to legal theories and principles of general application.

## **QUESTION 4**

Ted and Vicky lived together for several years after college. Ted broke off the relationship and moved out.

Two years later, Vicky began dating Dan. Dan knew about Vicky's past relationship with Ted and was very jealous.

At a house party last week, Ted was surprised to see Vicky for the first time since their breakup. Ted and Vicky quietly stepped into the otherwise empty backyard, embraced, and Ted kissed her on the cheek. Seeing the kiss through a window, Dan entered the backyard and in a jealous rage punched Ted, knocking him down. While Ted was on the ground, Dan saw a gold chain around Ted's neck. Dan pulled it off and put it in his own pocket.

Vicky started screaming at Dan. To keep her quiet, Dan put his hand over her mouth and nose and she passed out. He then put her over his shoulder and carried her to the front yard where he found his good friend, Rick, who was also a guest at the party. Even though Vicky did not drink alcohol, Dan told Rick that Vicky was drunk and they needed a ride. Rick did not believe Dan's story, but he drove them to Dan's apartment anyway and then left.

Vicky woke up and started screaming again and tried to leave. So the neighbors would not hear her, Dan mixed a strong sedative in Vicky's water. Dan was unaware that Vicky was also taking other medications that, when combined with the sedative, stopped her heart. Vicky died as a result.

1. With what crime(s) can Dan reasonably be charged and what defense(s) can he reasonably raise? Discuss.
2. With what crime(s) can Rick reasonably be charged and what defense(s) can he reasonably raise? Discuss.

## **QUESTION 4: SELECTED ANSWER A**

**With what crime(s) can Dan reasonably be charged and what defense(s) can he reasonably raise? Discuss.**

### **Battery - Punching Ted**

Battery is the unlawful contact with another that results in harmful or offensive touching. Harmful touching is defined by one that would cause injury, pain, discomfort, or physical ailment.

Dan enters the backyard and through his own volitional act, punches Ted. In doing so his fist makes contact with Ted's face and would reasonably result in injury for Ted. Therefore, Dan will be charged with criminal battery.

### **Larceny**

Larceny is the trespassory taking and carrying away of another person's property with the intent to permanently deprive the owner.

Dan sees a gold chain tied to Ted's neck and pulls it off to put in his own pocket. The act of taking possession of and putting in his pocket is enough to satisfy the taking and carrying away, as only the slightest movement is required. Furthermore, by Dan putting

the chain in his pocket, it can be inferred that he in fact had the intent to keep the chain for himself with the intent to permanently deprive Ted.

Dan will be charged with Larceny.

## **Robbery**

Robbery is larceny (defined supra) by use of force or threat of harm. The use of the force or threat must be for the purpose of taking or carrying away the property.

Here, the facts show that Dan entered the backyard in rage of Ted and Vicky's relationship and attacked Ted as a result of that rage. Because the force used was in correlation to the rage of their relationship and was not done so concurrently with the intent to steal the necklace, this would likely not be enough to satisfy the elements of robbery, as Dan was already knocked out and was not forced or threatened to give up the chain.

Dan would likely not be charged with robbery.

## **Assault of Ted**

Assault is the creation of a reasonable apprehension of imminent bodily harm, or attempted battery of another.

Dan approaches Ted in a jealous rage and punches Ted. If the jury finds that facts indicate that Ted was aware of Dan approaching him or was threatened by his actions and feared imminent bodily harm, there may be a showing of assault.

Dan may be charged with assault of Ted.

### **Battery of Vicky**

Batter defined supra.

Here, Dan puts his hand over Vicky's mouth and nose in order to keep her quiet. This act would satisfy the volitional act required for a showing of battery. Further, this caused Vicky to pass out, suggesting that his act would have caused her harm or discomfort, which would satisfy the element of harmful or offensive contact.

Dan will be liable for battery to Vicky.

### **False Imprisonment**

False Imprisonment is the unlawful confinement of a person to fixed boundaries by use of force or threat, in which the plaintiff has knowledge of or is harmed by the confinement.



The facts show that Dan carries Vickey to Rick's car while she is unconscious. Although false imprisonment requires harm or consciousness, Vickey eventually regains consciousness when she is taken to his apartment. She is aware and tries to escape and does not let her leave.

Because she is confined there against her will by use of force, elements of false imprisonment are met. Dan will be charged with false imprisonment.

### **Kidnapping**

Kidnapping is false imprisonment (defined supra) with movement or concealment of the victim.

When Vickey is passed out, he instructs Rick to take them both to his apartment. Rick then takes them to Dan's apartment. Because there was no active concealment, and the location of Dan's apartment was known to others like Rick, this may likely not constitute kidnapping.

### **Homicide**

Homicide is the unlawful killing of another person by a person. There must be actual and proximate cause of the killing.

## **Actual Cause**

The defendant must have been the actual cause of the plaintiff's death. This can be determined by use of the "but for" test.

But for Dan giving Vicky a strong sedative, she would not have suffered a reaction that resulted in her death.

Dan's act was the actual cause of Vicky's death.

## **Proximate Cause**

The killing must be a foreseeable result of the defendant's conduct.

Here, it is foreseeable that mixing strong drugs into a person's water would result in a harmful bodily injury, or potentially even death.

Dan's act was the proximate cause of Vicky's death.

## **First Degree Murder**

First Degree Murder is the intentional killing of a person with premeditation and deliberation. There must be a showing of a specific intent to kill or in some jurisdiction, an intent to commit a felony.

The facts indicate Vicky was screaming and that Dan did not want the neighbors to hear her. He mixed strong sedatives in her water with the intent to quiet her. Therefore, there is no showing that Dan specifically intended to kill Vicky.

Dan would not be charged with first degree murder.

### **Common Law Murder**

Common Law or murder in the second degree is all murder that is not first degree that is done with malice aforethought. Malice aforethought exists when a party has a 1) intent to kill, 2) intent to cause great bodily harm, 3) reckless disregard for human life (depraved heart murder) 4) or a killing that occurs in the commission of an inherently dangerous felony.

Here, a jury may find that because Dan intentionally gave her strong sedatives, he was acting in a reckless disregard for the risk of harm that may result. However, if the jury finds that this was not acting with a depraved heart in doing so, he will likely not be charged with common law murder.

Dan may be charged with common law murder.

### **Attempted Murder**

Attempt requires a specific intent to commit the crime with a substantial step towards completion. Attempted murder will require a specific intent to kill.

As discussed supra, because Dan intended for the sedative to quiet her, and did not have the intent to kill her during the act of giving her the sedatives, this will not be a sufficient showing to satisfy the intent required for attempted murder.

Dan will not be charged with attempted murder.

### **Involuntary Manslaughter**

Involuntary Manslaughter is a killing that occurs due to criminal negligence, recklessness, during the commission of a malum in se misdemeanor, or during the commission of a non-dangerous felony.

Here it is established that Dan was reckless in mixed sedatives in her water. The reckless element for manslaughter is a lesser severity than the depraved heart recklessness needed for a showing of murder. Therefore, the jury may find that because

Dan did not act with the intent to kill, that he may be convicted of involuntary manslaughter.

Dan may be convicted of involuntary manslaughter.

## **Defenses**

### **Adequate Provocation**

Adequate Provocation exists where a defendant was provoked, by means of which a reasonable person would be provoked, did not have time to cool off, and did in fact not cool off.

The facts show that Dan was in fact provoked when he saw Ted kissing Vicky outside. Acting in a heat of passion, he heads outside and punches Ted.

However, adequate provocation is a mitigating defense in reducing a murder charge to voluntary manslaughter and would not serve as a defense to battery.

In regard to the killing of Vicky, this defense would also fail as there was sufficient time to cool off in between the time in which he was provoked at the house party, to the time it took to arrive at his apartment.

## **Intoxication**

Dan may assert the defense of voluntary intoxication. Although the facts stipulate that the crimes occurred during a party in which alcohol was present, there is no indication that Dan participated in drinking or was intoxicated during these events. Furthermore, voluntary intoxication would not serve as a defense to crimes in which the necessary criminal intent is not that of a specific intent to do so.

Therefore, the defense of intoxication may fail.

**With what crime(s) can Rick reasonably be charged and what defense(s) can he reasonably raise? Discuss.**

## **Accomplice to Dan**

An accomplice is one who aids and abets a crime with the specific intent that the crime be committed. An accomplice is liable for all foreseeable crimes committed by the principal. Mere presence in the crime is not enough to convict someone as an accomplice.

Here, Dan tells Rick that he needs a ride to his apartment while he is carrying Vicky unconscious. Dan tells Rick that she was drunk and that he was helping her. The facts indicate that Rick in fact did not believe Dan's statement but proceeded to give Vicky

and Dan a ride regardless. In order to be liable as an accomplice, Rick would have had to have an intent to commit the crimes commissioned by Dan. It is likely that Dan was not acting with the specific intent to carry the crimes and was simply agreeing to giving them a ride home. This does not satisfy the aiding and abetting needed for accomplice liability, unless the jury finds that he acted in a way to help further Dan's crimes.

Rick may be charged as an accomplice to Dan.

### **Kidnapping**

Defined supra.

If the jury does in fact find Rick an accomplice to Dan, he will be held liable for all crimes that Dan has committed from the time of Rick's involvement.

Therefore, Rick may be held liable for kidnapping as an accessory to Dan, if the jury finds that he had the intent to aid him in this crime.

### **Accessory After the Fact**

A person who helps a felon escape conviction, punishment, or arrest may be liable as an accessory after the fact. There must be a showing that the defendant knowingly

aided the felon's escape with the intent to aid them in escaping the punishment of the crimes.

Here, although Rick agreed to give Dan a ride home, nothing in the facts indicate that Rick was aware of the crimes that Dan had committed at the party prior. However, Rick seems to be suspicious of Dan's assertion that Vicky was drunk and needed a ride home yet did not further question Dan's plans and proceeded to help take her to his apartment. This could likely be a showing that Rick acted with the intent to aid Dan's escape, and Rick may be convicted of being an accessory after the fact to Dan.

## **Defenses**

Rick may assert the defense of mistake. He may argue that he was mistaken as to the intentions of Dan and was acting as a friend in agreeing to a ride home. However, this defense may fail if the jury finds that his suspicion of Dan's motives constituted the intent required to aid Dan in his crimes.



## QUESTION 4: SELECTED ANSWER B

**State v. Dan**

As to Ted

Battery

Battery is the intentional causing of harm or offensive contact with the person of another.

Here, Dan committed battery against Ted because Dan, with intent to make contact, punched Ted in a jealous rage which had enough force to knock Ted down and would have been harmful because a punch of such force would have caused Ted pain and presumably bodily injury.

Therefore, Dan could be charged with battery.

Defenses

Defense of Others

Defense of others is a defense to a crime if the defendant used reasonable force in defending another person from the unlawful conduct of another. However, a majority of jurisdictions hold that the defendant must reasonably believe that the person who was protected was justified in using the amount of force that the defendant used.

Here, Dan will argue that he was defending Vicky from Ted's advances because Ted embraced Vicky and kissed Vicky on the cheek. However, Dan used unreasonable force by punching Ted and, in any case, Ted's conduct towards Vicky was lawful.

Therefore, Dan could not reasonably raise defense of others as a defense.

## Assault

Assault is the intentional causing of a reasonable apprehension of imminent harmful or offensive contact with the person of another, or an attempted battery.

Here, Dan committed assault against Ted because Dan, with intent to make contact, moved his fist to punch Ted in a jealous rage and Ted likely apprehended the contact by seeing Dan as Dan was imminently about to make harmful or offensive contact with him by punching him, which was harmful because it would have caused pain and presumably bodily injury.

Therefore, Dan could be charged with assault. Defenses

Defense of Others

Rules, *supra*.

Here, Dan will argue that he was defending Vicky from Ted's advances because Ted embraced Vicky and kissed Vicky on the cheek. However, Dan used unreasonable force by moving to punch Ted and, in any case, Ted's conduct towards Vicky was lawful.

Therefore, Dan could not reasonably raise defense of others as a defense.

Larceny

Larceny is the trespassory taking and carrying away of personal property of another with the intent to permanently deprive the owner of possession.

Here, Dan committed larceny because Dan pulled off the gold chain that was on Ted's neck and put it in his own pocket, which a trier of fact would reasonably find that Dan did this to keep the gold chain for himself and permanently deprive Ted, the owner, of possession. Dan's taking of the gold chain from Ted's neck was trespassory because Dan did not have authorization to take the gold chain and Dan carried away the gold chain at the moment he removed the gold chain from Ted's neck.

Therefore, Dan could be charged with larceny.

## Robbery

Robbery is larceny which involves the use or threat of force in the taking of personal property of another from their person or presence.

Here, Dan committed larceny and used force in taking Ted's gold chain from his person and presence by punching Ted, which knocked Ted down, and in Ted's injured state on the ground, Dan was able to commit the larceny of the gold chain which was on Ted's neck.

Therefore, Dan could be charged with robbery.

## Common Law Burglary

At common law, burglary is the breaking and entering into the dwelling house of another, at night, with the intent to commit a felony therein.

Here, Dan saw Ted kiss Vicky through a window and entered the backyard. If Dan was not initially at the house where the house party was being held and had seen Ted kiss Vicky through a window of a different house, Dan could have broken into and entered the backyard of the house hosting the house party with the intent to commit assault and battery of Ted, which may be a felony. However, the facts were silent as to what time of day Dan's assault and battery of Ted occurred and Dan did not break into the dwelling house itself because he only entered the house's backyard.

Therefore, Dan could not be charged with common law burglary.

## Modern Law Burglary

Modernly, burglary is the breaking and entering into real property of another with the intent to commit a felony therein.

Here, Dan saw Ted kiss Vicky through a window and entered the backyard. If Dan was not initially at the house where the house party was being held and had seen Ted kiss Vicky through a window of a different house, Dan could have broken into and entered the backyard of the house hosting the house party with the intent to commit battery and assault of Ted, which may be a felony.

Therefore, Dan could be charged with modern burglary.

As to Vicky

Battery Rules, *supra*.

Here, Dan committed battery against Vicky because Dan, with intent to make contact, put his hand over Vicky's mouth which caused her to pass out. Dan's contact was offensive because having a person put their hands on another's mouth in such a way that they pass out is offensive to a reasonable person's sense of dignity.

Therefore, Dan could be charged with battery.

## Assault

Rules, *supra*.

Here, Dan committed assault against Vicky because Dan, with intent to make contact, moved his hand to put over Vicky's mouth and Vicky likely apprehended the contact because Dan's hand was approaching her face which she could see, which was offensive because having a person put their hands on another's mouth in such a way that they pass out is offensive to a reasonable person's sense of dignity.

Therefore, Dan could be charged with assault.

Here, Dan committed assault against Ted because Dan, with intent to make contact, moved his fist to punch Ted in a jealous rage and Ted likely apprehended the contact by seeing Dan as Dan was imminently about to make harmful or offensive contact with him by punching him, which was harmful because it would have caused pain and presumably bodily injury.

## False Imprisonment

False imprisonment is the unlawful confinement of another, against that person's will, to a bounded area with no reasonable means of escape.

Here, Dan put his hand over Vicky's mouth which caused her to pass out. As a result, Vicky was unconscious and her body was unlawfully confined to a bounded area defined as wherever Dan placed her and, due to her being unconscious, she had no reasonable means to escape.

Therefore, Dan could be charged with false imprisonment.

## Kidnapping

Kidnapping is the unlawful confinement of another, against that person's will, coupled with the movement or concealment of such person.

Here, Dan had unlawfully confined Vicky, analysis supra, and moved her unconscious body by putting Vicky on his shoulder and carrying her to the front yard and having Rick drive both Dan and Vicky to Dan's apartment.

Therefore, Dan could be charged with kidnapping.



## Murder

Murder is conduct which causes the unlawful killing of another with malice aforethought.

## Malice

Malice is constituted by the intent to kill, the intent to inflict serious bodily injury, reckless indifference to the value of human life under depraved heart murder, or the intent to commit an inherently dangerous felony (burglary, arson, rape, robbery, kidnapping, and, at common law, mayhem, and sodomy) under the felony murder rule.

## Depraved Heart Murder

A defendant is guilty of murder if the defendant's conduct was recklessly indifferent to the value of human life and the defendant's conduct caused the unlawful killing of another.

Here, Dan mixed a strong sedative in Vicky's water to disable Vicky so the neighbors would not hear her screaming when she woke up. Dan's administration of the strong

sedative was recklessly indifferent to the value of human life because a trier of fact could reasonably find that administration of strong sedatives has a risk of causing death to those who consume them because other sedatives, such as sleeping pills, are known to cause death if excessively consumed.

Therefore, Dan could be charged with murder under depraved heart murder.

## Defenses

### Mistake of Fact

Mistake of fact is a defense to a specific intent crime if the defendant was mistaken as a fact which was material and constituted an element of the crime to have been committed and the mistake negated the specific intent required to commit the crime.

Here, Dan could raise this defense because he was mistaken as to the fact that administering the strong sedative to Vicky would only render her unconscious and not kill her. Dan was mistaken as to the fact that Vicky was taking other medications which, in combination with the strong sedative, stopped her heart and killed her.

Therefore, Dan could raise mistake of fact as a defense to murder.

### Felony Murder

A defendant is guilty of felony murder if there was an unlawful killing of another while the defendant was engaged in an inherently dangerous felony, *supra*, and the unlawful killing was committed before the defendant had reached a place of temporary safety.

Here, Dan committed two inherently dangerous felonies: burglary, robbery, and kidnapping. However, all three felonies occurred while at a house party, which Dan left the scene of because Rick drove Dan, and Vicky, away from and Dan and Vicky arrived at Dan's apartment, which was a place of temporary safety.

Therefore, Dan could not be charged with felony murder.

### First Degree Murder

First degree murder is statutory murder which involves premeditation and deliberation, egregious means, or is committed in connection with an inherently dangerous felony, *supra*.

Here, Dan committed murder as to Vicky under depraved heart murder, but no facts indicated that he planned to kill Vicky or used any intentional or egregious means to kill Vicky. Dan did commit three felonies, *supra*, but Dan's murder of Vicky was not in connection with the commission of those three felonies because Vicky's murder was committed after Dan had reached his apartment with Vicky, which was a place of temporary safety.

Therefore, Dan could not be charged with first degree murder.

## Second Degree Murder

Second degree murder is statutory murder which does not rise to the level of first-degree murder, *supra*, and is not reduced to manslaughter.

Here, Dan committed murder as to Vicky under depraved heart murder which did not rise to the level of first-degree murder, *supra*.

Therefore, Dan could be charged with second degree murder.

## Defenses

Mistake of Fact Rules, *supra*.

Here, Dan could raise this defense because he was mistaken as to the fact that administering the strong sedative to Vicky would only render her unconscious and not kill her. Dan was mistaken as to the fact that Vicky was taking other medications which, in combination with the strong sedative, stopped her heart and killed her.

Therefore, Dan could raise mistake of fact as a defense to second degree murder.

## Involuntary Manslaughter

Involuntary manslaughter is the unlawful killing of another due to gross negligence or the unlawful killing of another while the defendant was engaged in a misdemeanor and the unlawful killing was committed before the defendant had reached a place of temporary safety.

Here, Dan mixed a strong sedative in Vicky's water to disable Vicky so the neighbors would not hear her screaming when she woke up. Dan's administration of the strong

sedative was negligent because Dan's conduct created a foreseeable zone of danger which caused harm to Vicky, Dan owed a standard of care to act as a reasonable person under the circumstances, Dan breach the duty he owed to Vicky by administering the strong sedative to her by mixing it in her water, but for Dan's administration of the strong sedative, Vicky would not have ingested it and died due to her taking other medications which, in combination, stopped her heart and killed her. Dan will argue that his conduct was not the proximate cause of Vicky's death because administering the strong sedative to her was not reasonably foreseeable to him to result in her death, but a trier of fact could reasonably find that administration of strong sedatives have a reasonably foreseeable risk of causing death to those who consume them because other sedatives, such as sleeping pills, are known to cause death if excessively consumed.

Therefore, Dan could be charged with involuntary manslaughter.

## Defenses

### Mistake of Fact

Mistake of fact is a defense to a specific intent crime if the defendant was mistaken as a fact which was material and constituted an element of the crime to have been

committed and the mistake negated the specific intent required to commit the crime. However, to be a defense to a general intent crime, the defendant's mistake must be reasonable.

Here, Dan could raise this defense because he was mistaken as to the fact that administering the strong sedative to Vicky would only render her unconscious and not kill her. Dan was mistaken as to the fact that Vicky was taking other medications which, in combination with the strong sedative, stopped her heart and killed her. However, Dan's mistake was not reasonable because a trier of fact could reasonably find that administration of strong sedatives has a risk of causing death to those who consume them because other sedatives, such as sleeping pills, are known to cause death if excessively consumed.

Therefore, Dan could not raise mistake of fact as a defense to involuntary manslaughter.

### **State v. Rick**

Accomplice Liability

An accomplice is one who encourages or assists the principal with the commission of a crime with the intent that the crime be committed. An accomplice is liable to the intended crime committed by the principal and all other crimes committed by the principal in furtherance of the intended crime which were reasonably foreseeable.

Here, Rick did not believe Dan's story when Dan told him that Vicky was drunk and Dan and Vicky needed a ride. A trier of fact could reasonably conclude that Rick believed that Dan was committing false imprisonment and kidnapping as to Vicky because Rick did not believe Dan's story. Rick then assisted Dan, the principal as to false imprisonment and kidnapping, drove Dan and Vicky to Dan's apartment and left.

Therefore, Rick could be charged with false imprisonment, kidnapping, and all other crimes committed by the principal, Dan, in furtherance of those crimes which were reasonably foreseeable to Rick under a theory of accomplice liability.

False Imprisonment Rules, *supra*.

Here, Rick did not believe Dan's story when Dan told him that Vicky was drunk and that he and Vicky needed a ride. It was apparent to Rick that Dan was committing false imprisonment as to Vicky because Dan had Vicky, who was unconscious, over his



shoulder, and Rick assisted Dan by driving Dan and Vicky to Dan's apartment and then left.

Therefore, Rick could be charged with false imprisonment under a theory of accomplice liability.

Kidnapping Rules, *supra*.

Here, Rick did not believe Dan's story when Dan told him that Vicky was drunk and Dan and Vicky needed a ride and it was apparent to Rick that Dan was committing kidnapping as to Vicky because Dan had Vicky, who was unconscious, over his shoulder, and Rick assisted Dan by driving Dan and Vicky to Dan's apartment and then left.

Therefore, Rick could be charged with kidnapping under a theory of accomplice liability.

Murder

Rules, *supra*.

Here, Rick did not believe Dan's story when Dan told him that Vicky was drunk and Dan and Vicky needed a ride. It was apparent to Rick that Dan was committing kidnapping as to Vicky because Dan had Vicky, who was unconscious, over his shoulder. Rick assisted Dan by driving Dan and Vicky to Dan's apartment and then left. A trier of fact could reasonably conclude that it was foreseeable to Rick that Dan would murder Vicky because Vicky was unconscious and Dan had taken Vicky to Dan's apartment and was being falsely imprisoned and kidnapped at the time Rick assisted Dan with Dan's false imprisonment and kidnapping. A trier of fact could reasonably conclude that it was foreseeable to Rick that Dan would murder Vicky because Vicky would be a witness to Dan's criminal conduct and Dan had an interest in murdering her so he could escape prosecution. However, Rick will argue that he could not foresee the manner in which Vicky was killed, which was through Dan's administration of the strong sedative which stopped her heart because Vicky was taking other medications.

Therefore, Rick could be charged with murder under a theory of accomplice liability.

### Accessory After the Fact

An accessory after the fact is an individual who assists the principal evade apprehension by law enforcement with the belief that the principal had committed a crime. At common law, an accessory after the fact may be prosecuted under a theory of accomplice liability, *supra*.

Modernly, an accessory after the fact is guilty of the lesser charge of obstruction of justice.

Here, Rick did not believe Dan's story when Dan told him that Vicky was drunk and Dan and Vicky needed a ride and it was apparent to Rick that Dan was committing kidnapping as to Vicky because Dan had Vicky, who was unconscious, over his shoulder, and Rick assisted Dan by driving Dan and Vicky to Dan's apartment and then left. A trier of fact could reasonably conclude that Rick believed that Dan was committing false imprisonment and kidnapping and assisted Dan evade apprehension by law enforcement by driving Dan and Vicky to Dan's apartment.

Therefore, Rick could be charged with obstruction of justice.