Question 6

Owner owned and operated a small diner where Cook and Waiter worked. After closing one day, Cook called in sick for the following day. Owner knew that an acquaintance, Caterer, owned and operated a catering business. Owner asked Caterer to fill in for Cook. Owner told Caterer: "I want you to run the kitchen for one day. I will pay you your standard catering fee. I just need somebody who knows what he's doing." Caterer agreed, telling Owner, "I'll bring my own knife set, but I assume the kitchen is fully equipped."

Owner did not check Caterer's references. If he had, he would have learned that Caterer's business had once been shut down by the health department.

Caterer went to Owner's diner and started to cook. Patron, a customer, ordered chicken wings from Waiter. Waiter gave the order to Caterer.

A notice posted on the kitchen wall, entitled "Health and Safety Code Section 300 Notification," stated: "To avoid food poisoning, all poultry products must be cooked at a minimum temperature of 350 degrees." Upon observing that the oven was set at 250 degrees, Waiter informed Caterer that the oven should be set at 350 degrees. Caterer responded: "Just worry about waiting tables, and leave the cooking to me." Caterer did not raise the temperature of the oven, and removed the chicken wings shortly thereafter.

Waiter served Patron the chicken wings. Patron ate the chicken wings and suffered food poisoning as a result.

Under what theory or theories, if any, might Patron bring an action for negligence against Caterer, Waiter, and/or Owner, and what is the likely outcome? Discuss.

QUESTION 6: SELECTED ANSWER A

In a negligence case, the plaintiff must show duty, breach, causation, and harm. When the defendant's conduct creates an unreasonable risk of harm to others, a duty of due care is owed to all foreseeable plaintiffs; the defendant must act as a reasonable person to protect foreseeable plaintiffs. Under the majority Cardozo view this duty is owed to all foreseeable plaintiffs, while under the minority view it is owed to all plaintiffs. When the defendant's conduct falls below the relevant standard of care, the defendant has breached his duty. To show cause, the plaintiff must show actual cause (that the plaintiff's injury would not have happened but for the defendant's conduct) and proximate or legal cause (that the plaintiff's injury was foreseeable in that it was a result of the increased risk created by the defendant's conduct/within the normal incidents of the defendant's conduct). Finally the plaintiff must prove that they suffered damages. Here, Patron will be able to satisfy this final requirement of harm/damages with respect to all possible defendants because Patron suffered food poisoning as a result of eating the chicken wings.

Patron v. Caterer

Patron can bring a negligence claim against Caterer for negligently serving Patron undercooked chicken wings. First, Patron could establish the first element of a negligence claim by arguing because Caterer was cooking food to serve to customers at a diner, he owed a duty to all customers who would be eating at the diner to exercise due care/act as a reasonably prudent person in the preparation of their food. Because Patron was a customer at the diner, Caterer thus owed a duty of care to Patron. Caterer breached this duty in multiple ways. First, Caterer failed to exercise due care by not reading and heeding the notice on the kitchen wall that to avoid food poisoning, all poultry products must be cooked at a minimum of 350 degrees. This notice was easy to understand and seems to have been conspicuously posted, and thus a reasonable cook in the kitchen would have read and followed the warning. Second, Caterer was unreasonable in ignoring Waiter's warning that the oven was only set at 250 degrees.

As a cook by profession, Caterer should have known the necessary temperature to cook food at to avoid food poisoning, and even if he didn't there was a notice in the kitchen stating what temperature poultry must be cooked at. Furthermore, as a cook Caterer should exercise due care in making sure that the oven is set at the proper temperature, and even if he were for some reason excused for not noticing that the oven was at the wrong temperature, the fact that Waiter explicitly warned Caterer that the oven was at 250 degrees would negate any possible excuse. Thus, Caterer breached the duty of due care he owed to Patron by cooking the chicken wings in an oven which he knew was only set at 250 and when he knew that the Health and Safety Code required poultry to be cooked at a minimum of 350 degrees.

Moreover, the fact that a Health and Safety Code mandated a minimum temperature of 350 degrees gives Patron another theory on which to show duty and breach. In this case of a violation of a regulation such as this Health and Safety Code, a plaintiff can take advantage of the statutory presumption of negligence. If a plaintiff can prove a defendant violated a statute, that the plaintiff was within the class meant to be protected by the statute, and that the harm caused to plaintiff was of the harm meant to be prevented by the statute, then the duty and breach elements of a negligence case will be presumed. In this case, Caterer clearly violated the statute by cooking the chicken at 250 degrees. The statute explicitly states that it is meant to avoid food poisoning, so the harm caused to plaintiff was indeed the harm meant to be prevented by the statute. Finally, the statute is a Health and Safety Code that is posted in restaurant kitchens, indicating that restaurant patrons are the class of people meant to be protected by the statute. Thus, all the elements are satisfied and Patron can use Caterer's breach of this statute to show duty and breach.

Actual causation is easily established because if Patron had not eaten the chicken wings, she would not have gotten sick ("but for" consuming the chicken wings, she would not have suffered harm). Proximate cause is also straightforward in this case; it is very foreseeable that serving someone chicken wings that have been undercooked will cause that person food poisoning, especially if the person cooking the chicken wings is

a professional caterer. Finally, as stated in the introductory paragraph, Patron can easily establish damages because she got food poisoning. Thus, Patron is likely to prevail on a negligence claim against Caterer.

Patron v. Waiter

Patron can also bring a negligence claim against Waiter under the theory that he negligently served her undercooked chicken wings or negligently failed to warn her of the possibility that the wings were undercooked.

Patron would argue that as a waiter, Waiter has a duty to his customers to not serve them food that he knows has a substantial likelihood of causing food poisoning, whether or not he himself is responsible for cooking the food. Alternatively, Patron could argue that Waiter had a duty to warn his customers if he was serving them food which he had reason to believe could cause food poisoning. Waiter would counter that because he was not responsible for cooking the food, he did not have a duty to Patron. However, while it is true that Waiter probably didn't have a duty to make sure that the food was cooked property because it was not his job to cook the food, as a professional waiter he did at least have a duty to either not serve food he had reason to believe would cause food poisoning, or to warn Patron that the food might cause food poisoning. This is because a restaurant patron reasonably relies on their waiter to serve them food that the waiter believes to be safe for consumption. If Waiter had no reason to believe that the chicken would cause food poisoning, he would not have breached his duty to act as a reasonable person with respect to his customers. However, here Waiter knew that the oven was only set at 250 and that the cook had ignored his warning to adjust the temperature. Under these circumstances, a reasonable person exercising due care would not have served the chicken wings, at least not without warning their customer. Thus, Waiter breached his duty to Patron by serving her chicken wings when he knew that they were not cooked at the required temperature.

Patron would argue that actual cause is established because if waiter hadn't served her the chicken wings, she would not have eaten them and gotten sick. Waiter would try to argue that if he hadn't served the chicken wings, a different waiter working that day would have brought them to the table, and he is therefore not a "but-for" cause of Patron's injury. However, the most likely interpretation of this situation is that because Waiter knew that the chicken was undercooked, his duty was not simply to refrain from bringing the chicken to the table but rather to make sure that Patron was not served the chicken or was warned about the chicken; because he was employed as a waiter at the restaurant where Patron was eating and knew of the danger, he cannot avoid liability on that argument. Patron would thus be able to establish actual cause: but-for Waiter's failure to prevent Patron from being served or failure to warn her, Patron would not have eaten the wings and gotten sick. Patron would also be able to establish proximate cause: Waiter knew the oven was only set to 250 degrees and that Caterer had ignored Waiter's warning. It was thus foreseeable that the chicken would be undercooked, foreseeable that if Waiter served the chicken to Patron, Patron would eat the chicken, and foreseeable that if Patron ate the chicken she would get sick. Thus, Patron could establish proximate cause. Damages could be established as above.

Therefore, Plaintiff would also likely win in a negligence action against Waiter for negligently serving her chicken wings that he knew were likely to cause food poisoning.

Patron v. Owner

Patron could bring a suit against Owner either for vicarious liability for Caterer's negligence, vicarious liability for Waiter's negligence, or direct negligence for negligently hiring caterer.

An employer is vicariously liable for the negligence of its employees in the course of their duties. An employer will not be liable for negligence of their employees outside of the duties, nor will someone generally be liable for the negligence of an independent contractor (rather than of an employee). However, someone will still be liable for the

negligence of a contractor if the negligence involves a non-delegable duty or an ultrahazardous activity.

Thus, the first question is whether Caterer is an employee or an independent contractor. A court will address this issue by analyzing the degree of care and control Owner exercised over Caterer, taking into account factors such as the length of employment, the nature of the duties, the amount of responsibility retained by and amount of discretion exercised by the employee/contractor, and the nature of payment. In this case, the fact that Caterer was only filling in for Owner for one day while Cook called in sick, was asked only to "run the kitchen for one day," brought his own knives, was paid a one time payment of his standard catering fee, independently owns and operates his own catering business, and does not appear to have been supervised in his duties all support a finding that Caterer was an independent contractor. The fact that aside from the knives Caterer relied on Owner's "fully stocked" kitchen supports an argument that Caterer was an employee; so does the nature of the job, as generally a cook in a restaurant is an employee of the restaurant; however, these facts are not sufficient to support a finding that Caterer was an employee. Thus, Caterer would be found to be an independent contractor.

Therefore, if Patron were to pursue a claim that Owner was vicariously liable for Caterer's negligence, Patron would have to argue that Caterer was performing a non-delegable or inherently dangerous/ultrahazardous function. The latter exception does not apply because while cooking food at a restaurant does have some inherent risks regarding kitchen safety and food poisoning issues, these are not sufficient for a finding that it is ultrahazardous. However, Patron has a chance of prevailing on the argument that the duty of ensuring that food cooked and served to restaurant patrons is cooked to health and safety code specifications is a non-delegable duty. Common carriers and store/restaurant owners are held to have a particularly high duty of care to their customers, and as such some duties are non-delegable. One example of a non-delegable duty is the maintenance of taxicabs: even though taxi drivers and mechanics are independent contractors, the taxi company may not escape liability for negligence in

the maintenance of their fleet of cars by claiming that they are not liable for negligence of independent contractors on public policy grounds. Another example of a non-delegable duty, and one that is more relevant to this case, is the maintenance of a store to keep it safe for customers. In that case, if for example a store owner hires an independent contractor to repair a dangerous condition in the store that creates a hazard to customers, the store owner can still be found vicariously liable for the independent contractor's negligence under the theory that maintaining the safety of the premises is non-delegable for public policy reasons. By analogy, the owner of a restaurant could still be found liable for the negligence of an independent contractor regarding ensuring that food is cooked according to health and safety code requirements, because restaurant owners owe a particularly high duty of care to their customers and therefore such duty is non-delegable on public policy grounds.

Therefore, Patron has a good chance of prevailing on the argument that Owner is vicariously liable for Caterer's negligence on the grounds that the duty of ensuring that food served at Owner's restaurant is cooked according to health code specifications is non-delegable. Of course, for Owner to be vicariously liable, it must also be established that Caterer himself was negligent. As discussed above, Patron has a strong case that Caterer was indeed negligent; therefore, this will not be a bar to arguing that Owner was vicariously liable.

Next Patron could argue Owner is vicariously liable for Waiter's negligence. Here there are no facts indicating that Waiter is an independent contractor. Owner might try to argue that the fact that waiters generally earn most of their wages in tips supports a finding that Waiter is an independent contractor and not an employee. However, this is not very persuasive and court would probably find Waiter to be an employee. Thus, if Patron did prevail on her claim against Waiter for negligence, she could also prevail on a claim against Owner for vicarious liability; however, if Waiter were found not to be negligent, Patron would have no such claim against Owner.

Finally, Patron could argue that Owner was directly negligent in hiring Caterer because he did not check Caterer's references. First Patron would have to establish duty. Patron could successfully argue that Owner had a duty to his customers to exercise due care in selecting his employees and independent contractors. Patron could also successfully argue that Owner breached that duty by not checking Caterer's references. A reasonable restaurant owner would check the references of a Caterer before hiring him. Owner would argue that here he was only hiring Caterer for one day, that Caterer owned and operated his own catering business which was evidence that he was a competent caterer, and that Caterer was an acquaintance of Owner so perhaps he had independent, circumstantial knowledge of his competence. However, these arguments are not persuasive; it would not have taken long to check Caterer's references, and given the nature of the work he was being hired to do, it was still reasonably prudent to check his references even though he was only being hired for one day.

Patron would argue that Owner's breach of duty in failing to check Caterer's references was the actual cause of her harm because the facts state that if Owner had checked Caterer's references, he would have learned that Caterer's business had once been shut down by the health department. To prove actual cause, however, Patron would still have to argue that had Owner found this out he would have then chosen not to hire Caterer or would have chosen to supervise Caterer more carefully. The court will likely permit this inference in Patron's favor, and she will thus be able to establish actual cause.

Patron would argue that Owner's breach was also the proximate cause of her harm because it was foreseeable that by hiring Caterer without checking his references, Owner was taking the risk that Caterer was incompetent and could cause harm as a result of his incompetence. Patron would probably succeed on this element. It is established practice in the service industry to check references before hiring. Thus, it is foreseeable that a failure to check someone's references could lead to the type of situation at issue. Finally, damages would be established as above. Thus, Patron is likely to prevail on a direct negligence claim against Owner.

QUESTION 6: SELECTED ANSWER B

In all negligence actions, the plaintiff must establish a prima facie case for negligence, which generally is composed of four elements:

(i) defendant owes a duty to plaintiff,
(ii) that duty is breached,
(iii) the breach is the actual and proximate cause of the injury, and
(iv) damages to the person or property.

All four elements must be established to succeed on a negligence claim.

The duty owed to the plaintiff is a general duty to all foreseeable plaintiffs. Further, the majority (Cardozo) is that the duty extends only to plaintiffs within the foreseeable zone of the danger. Conversely, the minority (Andrews) is that the duty extends to all plaintiffs. Also important to the first element is what the duty actually is: the standard of care. There are many different standards of care that will be discussed below.

Whether a duty and standard of care is breached is fact specific, but can look to industry custom, regulations or health codes, and any other relevant information.

For causation, plaintiff must establish both actual and proximate cause. Actual cause is causation in fact; but for the defendant's actions, the plaintiff's injury would not have occurred. Proximate cause is a limitation on liability, and says that the injury must be foreseeable; the defendant is generally liable for all harm that is the normal incident of and within the increased risk of his conduct.

Lastly is damages, which must be to the person or property.

The analysis for these elements in part differs depending on who the action is against; thus, they will be discussed accordingly.

(1) Action for Negligence against the Caterer: The action can be based on negligence or arguably negligence per se; both will be analyzed below.

(i) Duty to Patron: Here, Caterer is working in a restaurant and cooking food that is to be served to customers. Thus, he owes a duty to all customers because they are foreseeable plaintiffs and within the zone of danger of his negligent conduct, meaning they will eat his food and get sick. The standard of care here could be a variety of things, but regardless of which the court chooses, the Caterer will have breached it.

The first possible standard of care is the common law one: a person must act as an ordinary, reasonable, and prudent person would act in the same circumstances as the defendant. Such a standard does not take into account the mental capacity of the defendant, but may take into account any physical incapacities. The court may also take into account any expertise or knowledge that he has, such as being a caterer or chef. This is the most likely standard of care.

The second possible standard of care is that of a professional: which requires that a person act with the knowledge and skill of a professional in good standing in his community. It is arguable that a caterer is a professional, but less likely.

The last standard of care is Negligence Per Se which will be discussed with breach.

(ii) Breach of the Duty:

Looking to the first possible standard of care, Caterer clearly breached it by not checking the temperature on the oven despite the warning from both the clearly present Notification which he observed and from the waiter's comment to him. A reasonable and prudent person would have done so in light of these circumstances, and even without such obvious notifications, it would also be required because it is generally common knowledge that undercooked chicken is dangerous.

The second possible standard of care will have a similar outcome. This is an even higher standard of care, which the Caterer cannot meet. If a caterer or chef is considered a professional, then a reasonable and prudent caterer or chef would surely

check the temperature and have the right temperature for cooking meats, especially chicken.

Lastly is negligence per se. Negligence per se is that the generally common law standard of care may be replaced when there is a government regulation, statute, or as is here a health notification, that imposes a criminal penalty, which includes a fine. If negligence per se is established, then it is conclusively presumed that the negligence elements of duty and breach are satisfied. To establish negligence per se, the regulation must be violated without excuse, the plaintiff must have been within the protected class meaning the type of person the regulation sought to protect, and lastly that the plaintiff suffered the type of injury that the regulation sought to avoid. The first issue with negligence per se is whether the Notice constitutes a regulation or statute imposing a criminal penalty. It may not and if it doesn't, then negligence per se does not apply. It is possible it will not because nothing in the facts shows there is a penalty for such a violation. Conversely, usually there are large fines for violating these health code notifications and so it may be ok. Thus, if it does satisfy the first element of negligence per se, it has obviously been violated because caterer cooked the chicken at 250 instead of 350 degrees. Further, there was no evidence of an excuse the 250 degree-cooking. Next plaintiff was clearly in the protected class the notice sought to protect; the notice sought to protect patrons from getting sick. Lastly, plaintiff suffered the type of injury the notification sought to avoid; food poisoning. Thus, it is very possible that the court will determine negligence per se applies. But regardless of the outcome with negligence per se, it will likely be held that Caterer breached his duty under the common law negligence standard of care.

(iii) Causation: actual cause and proximate cause. Looking first to actual cause, defendant's negligent act of undercooking the meat was the cause in fact for plaintiff's injury. But for the undercooking of the meat, plaintiff would not have gotten food poisoning. Secondly, is proximate cause. Defendant's act directly proximately caused plaintiff's injury because it was foreseeable that serving undercooked meat to a patron would make the patron sick. Thus, the causation element is satisfied.

(iv) Damages: damages will be clearly established because plaintiff suffered food poisoning as a result of his negligence.

Thus, it is likely that the Patron would succeed in his action for negligence against the Caterer.

(2) Action for Negligence against the Waiter: The patron may have a claim for negligence against the waiter as well, essentially because the waiter observed the caterer's undercooking and ended up serving the food without confirming with the caterer that his mistake had been remedied. Again, for the waiter to be liable, the patron will have to establish the four elements of negligence.

The first element of duty: The waiter likely owes a duty to the patron because the patron is a foreseeable plaintiff within the zone of danger for his act of possibly negligently serving undercooked meat. Further, the standard of care would likely be the common law standard of care because none of the other standards of care apply to a waiter, which is a non-professional. Thus, the standard of care is that of an ordinary, reasonable, and prudent person in the same circumstances as the waiter.

The second element of breach: It is arguable that the waiter breached his duty to the patron. One the one hand, a reasonable and prudent person, after observing that the oven was set too low and the hearing caterer's defensive response to his inquiry, would likely make sure after the order was completed that the owner had remedied his mistake and changed the temperature of the oven because a reasonable person would be aware of the dangers of serving undercooked chicken to a patron. A reasonable person might also notify the owner of the carelessness to which the caterer is cooking, especially since he will only be working there one day. Conversely, a reasonable and prudent person might assume that after warning the caterer of the oven-temperature error, that he would simply correct his error and that the caterer's snappy response merely derived from his embarrassment at undercooking a chicken. Thus, the court

could really go either way in determining whether the duty was breached, but it seems more likely that the court would determine that it was breached.

The third element is causation: The actual cause will be satisfied because but-for the waiter serving the undercooked chicken, the patron would not have gotten sick. However, the proximate cause is more difficult to establish, but still likely will be. Although the waiter did not undercook the meat, his negligence (if it is found) contributed to the patron's injury. The waiter's act is likely said to be an intervening force or negligent act. The waiter's failure to ensure that the chicken was cooked properly contributed to the patron's injury and was within the normal incidents of and the increased risk of his conduct. Thus, while more difficult because it is a more tenuous cause, it is likely the court will determine this element to be satisfied.

The fourth element is damages: this will be satisfied because the patron suffered food poisoning.

Thus, it is likely the patron will succeed against the waiter for a negligence claim.

(3) Action for Negligence against Owner: The patron may have a view actions for negligence against the owner of the restaurant. The first being an ordinary negligence claim under vicarious liability. The second being direct negligence for the negligent hiring and or supervision of the employee. All will be discussed.

The owner can be liable for the negligence of his employees, and even possibly the acts of independent contractors, under vicarious liability. Vicarious liability says that the master may be liable if the acts of his servant were within the course of employment. Generally, an owner or master will not be liable for the intentional torts of his servants or employees, unless the intentional tort was natural in the nature of the job, performed at the request of the master, or for the master's benefit. Here, there is nothing to suggest an intentional tort, but rather negligence.

Above, it has been established that the caterer was negligent, and thus, his negligence may be attributed to the owner. The first important determination is whether or not the caterer is an employee or an independent contractor. This is important because the vicarious liability of the owner differs depending on this. Generally, to determine whether someone is an employee or independent contractor, the courts look to several factors: degree of skill required in the job, who provided the tools and facilities, duration of the relationship, did principal control the means of performing the task, was there a distinct business, etc. Applying those facts to this case, it would appear that the Caterer was more likely an independent contractor. The reason being that the employment was only for one day, it was because the owner's normal cook was out for the day, the owner did not operate that much control over the caterer, the caterer had his own distinct business, and the caterer brought his own knives. Thus, if the caterer is determined to be an independent contractor of the owner, the owner generally is not liable unless one of the two exceptions apply.

An owner is liable for the acts of his independent contractor in two situations: (i) when the independent contractor is performing an inherently dangerous task and (ii) when because of public policy, the principal's duties are non-delegable. The latter of the two exceptions likely applies here. Public policy requires that an owner of an establishment that invites and charges members of the public for certain services must reasonably maintain their premises and ensure they are safe. Thus, just because the caterer was an independent contractor, does not mean that the owner could delegate the duty to maintain his restaurant and make it safe. Thus, the owner will likely be vicariously liable for the negligence of the caterer.

It should be noted, that if for some reason the court finds that the caterer was actually an employee of the owner because he was using the owner's kitchen and cooking the owner's menu items, then the owner would also be liable because the negligence occurred within the scope of his employment: it occurred while cooking on the job for a patron of the restaurant.

The owner may also be vicariously liable for the negligence of the waiter (if the waiter is found to have been negligent), because the waiter is an employee and the negligence occurred while acting within the scope of his employment.

The patron could also sue the owner for his Direct Negligence. Even if the owner is not vicariously liable, he can be directly liable for his own negligence. All persons are generally personally liable for their own negligence. Here, the direct negligence would arise from the owner's negligent hiring and arguably negligent supervision of the caterer. The owner owes a duty to his patrons to employ persons that are qualified and will perform the job responsibly. The patron will argue that the owner negligently hired the caterer because he gave him the job when the caterer was only an acquaintance. Further, the owner did not check the Caterer's references or ask around, which a reasonable person would have done; and if such acts had been done, he would have learned that the Caterer's business had once been shut down by the health department for violations. It was the owner's negligent hiring that was the actual, and very likely, the proximate cause of the plaintiff's injuries. Thus, the patron will likely succeed in this direct negligence claim against the owner.

The patron could also sue the owner for his Direct Negligence for negligent supervision of his employees. This is less probable because although the facts do not state that the owner inspected the caterer's work and watched him perform, it is not unreasonable for an owner to not check the every move of a caterer or chef. That being especially true when the caterer is performing such a standard task as cooking chicken. Thus, while the owner owed a duty to supervise, it was likely not breached. The duty here takes on the standard of care required for invitees: which is that the owner must make reasonable inspections to discover all non-obvious and dangerous artificial and natural conditions. That standard of care does not cleanly apply here, and even if it does, it is not apparent that it has been breached. Further, his failure to supervise may not be the proximate cause, because of the caterer's intervening act that was likely not the normal incidents of a failure to adequately supervise. Thus, it is likely the patron will lose on this claim.