

ESSAY QUESTIONS AND SELECTED ANSWERS

JUNE 1998 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the June 1998 California First Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The handwritten answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Applicants were given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page ii.

<u>Question Number</u>	<u>Subject</u>	<u>Page</u>
1.	Torts	1
2.	Contracts	8
3.	Torts	14
4.	Criminal Law	22

ESSAY EXAMINATION INSTRUCTIONS

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 case 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, lawyer-like 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.

If your answer contains only a statement of your conclusions, you will receive little 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 which are not pertinent to the solution of the problem.

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

QUESTION 1

A 15 mile segment of Highway 12 required complete reconstruction. Highway 12 is a typical four lane, divided highway used for high speed inter-city travel. Builders Inc. contracted to do the reconstruction work and agreed to keep the highway "open and usable by traffic" while the work took place. Builders began the reconstruction in June 1997, putting all traffic on the 15 mile segment of roadway into one lane in each direction. There was no barrier dividing the traffic.

Highway reconstruction projects are known to create a substantial risk of accidents and injury to third parties. Two options are available for reducing such risks: (1) placing concrete lane dividers between the opposing lanes to keep most cars from crossing to the other lane, and (2) careful scheduling of construction work to allow temporary reopening of the full highway during peak traffic periods. The concrete lane dividers are customarily used only at particularly dangerous points for traffic separation, but it is not customary to use them for long stretches of highway because of the large number of dividers required (about 500 per mile) and the high costs of installation and removal. The second option (temporary reopening during peak traffic hours) can delay the work or compel a contractor to work overtime to finish the project on time. The second option also costs more because it is necessary to create temporary lane markings and to change warning signs.

The reconstruction project was ongoing in July 1997. The fourth of July weekend is the period of highest traffic on Highway 12 every year. On July 4, 1997, a west bound car driven by Dan crossed over into the east bound lane and collided with a car driven by Victor. Victor suffered serious injuries.

On what legal theory or theories, if any, may Victor recover damages against Builders Inc., and what is the likely result on each? Discuss.

Answer A to Question 1

Victor v. Builders, Inc.

Negligence

A duty to conform to a standard of conduct that is breached by defendant, which actually and proximately causes plaintiff's damages.

Duty

A specific standard of care is owed to foreseeable plaintiffs.

Foreseeable plaintiff

All drivers using the highway would be foreseeable plaintiffs. Victor is a driver on the highway; therefore, Victor is a foreseeable plaintiff.

Standard of care

The general standard of care is that one must exercise the care used by a reasonable, prudent person under the same or similar circumstances.

Here, Builders, Inc. is a company that has contracted to do the reconstruction work. Its employees would be held to the standard of a reasonable, prudent employee in like circumstances. Builders, Inc. would be responsible for the negligence of its employees under the theory of respondeat superior.

Respondeat superior

An employer is responsible for the negligence of its employees committed while in the scope of their employment, which occurs when they are doing something in furtherance of their duties, or when the employer could be exercising control over them.

Breach

Reasonable employees of Builders, Inc. would have carefully scheduled their construction work to allow temporary re-opening of the highway, the full highway, during the peak traffic period of the Fourth of July weekend, or at least the day of the Fourth of July. Here, employees put all the traffic in one lane in each direction and left it there. Injury to a driver is particularly foreseeable on a busy holiday, more so on the busiest, in terms of traffic, holiday each year. Highway projects are known to create a substantial risk of accidents and injury to third parties anyway. Therefore, to not take extra precautions on this busiest holiday is a definite breach of the duty of due care.

Builders might even be held to a high degree of care since reconstruction projects are known to create a substantial risk of accident. If this were so, they have definitely breached the duty since they breached the duty of due care.

Burden of eliminating risk

Even if it were argued that re-opening the highway would cost more or delay the work, that would have to be weighed with the gravity of the risk and the likeli-

hood of serious harm if the risk materialized. Here, the likelihood of serious harm was great since cars are driven at high speeds and accidents are known to cause serious harm and are often fatal. The risk was also high since highway reconstruction projects create a substantial risk of accident to third parties. These two factors would weigh more heavily than the cost to eliminate or lessen the risk since a company's employees often have to work overtime for less serious reasons than the loss of life. Frequently, construction projects are delayed. These costs are foreseeable and should be calculated into the overall cost of the project beforehand. Therefore, Builders, Inc. cannot argue that it did not breach its duty.

Causation

The defendant's acts must be the actual and proximate cause of plaintiff's injury.

Actual cause

When it can be said that "but for" the negligence or acts of defendant, plaintiff would not have been injured, actual cause exists. Here, actual cause may be hard to establish because, had all four lanes been open, Dan might still have crossed over into the eastbound lane and collided with Victor. If there had been concrete barriers there at that precise point, then he couldn't have injured Victor, of course. But there is nothing to suggest that the dividers would have been there anyway, even if Builders had exercised great care, for the concrete lane dividers are customarily used only at particularly dangerous points, and we are not told if Dan's and Victor's cars collided at such a dangerous point. Even if the concrete dividers had been used for long stretches of highway, there is no indication they were required to be at the place when Dan and Victor crashed. It would appear unreasonable to require Builders to place concrete dividers the entire stretch of the highway, since cost would be prohibitive. It is not even customarily done for long stretches of highway because of the large number needed and the high cost of installation and removal.

Although the entire custom of the industry could be negligent, and therefore evidence of industry custom alone does not disprove negligence, it would probably be too expensive to require a company to place barriers the entire length of a highway. The burden of eliminating the charges would outweigh the risk and gravity of harm because it would make construction projects unaffordable. Therefore, actual causation might be difficult to find. However, if the court does find it, they would look to see if there were.

Proximate cause

When an act by a person or an "act of God" intervenes between a person's negligence and plaintiff's injury, proximate cause is found only if such act was unforeseeable. Here, an intervening act by Dan-his car crossing over into Victor's lane-interceded between Builders' negligence and Victor's injury. We are not told why Dan's car crossed over, if he was drunk or simply careless, but that probably wouldn't matter since only criminal acts by third parties are superceding, and then only if they are unforeseeable. Even if driving drunk were a criminal act in the juris-

diction, it is imminently foreseeable that drunk drivers are on the road, especially on holiday weekends. Since Dan's act would be foreseeable, it would not be superceding and would not break the chain of causation. Therefore, proximate cause exists.

Damages

Damages are not presumed in negligence and must be shown. Here, Victor's serious injuries would be proof of actual damages and therefore, the damage requirement is met.

Victor could recover from Builder on a negligence theory only if actual cause were found.

Breach of contract

Third-party beneficiaries may recover for breach of contract if they are intended beneficiaries. Intended beneficiaries are those whom the promise intends to benefit. They are usually named in the contract, performance is to run directly to them, and have a relationship with the promise. All other beneficiaries are incidental beneficiaries.

Usually in city contract or county contract cases, members of the public are not considered intended beneficiaries. Performance does not run directly to them and they are not named in the contract. Here, Builders has contracted to keep the highway open and useable by traffic. It is unclear if there has been a breach because the highway was open, although not all four lanes. In any event, Victor was not named in the contract, performance did not run directly to him, and his only relationship with the city, the promise, was that maybe he was a resident, but we don't know that. Therefore, he is at most an incidental beneficiary and can probably not recover under a breach of contract action.

Strict liability for abnormally dangerous activity

Strict liability is imputed if an activity (1) cannot be performed with complete safety even while exercising due care, (2) involves a high risk of harm to persons or property, and (3) is not commonly engaged in the community.

Here, highway construction would probably not be considered abnormally dangerous since it is engaged in all the time in all communities as the need arises. Therefore, Victor could not recover on this theory.

There do not appear to be any defenses as there is nothing to indicate Victor was contributorily negligent, or assumed a specific risk.

Answer B to Question 1

There are three theories of liability available in the law of torts: intentional tort, negligence, and strict liability. The facts do not indicate any intentional tortious acts by Builders, Inc.; therefore, those type of actions will not be discussed.

STRICT LIABILITY: A party will be held strictly liable for any damages that result when he is involved in an "ultra-hazardous activity." An ultra-hazardous activity is one that cannot be made safe, no matter how much care is used. For a party to recover on a theory of strict liability, the defendant must be involved in an activity that is highly dangerous and cannot be made safe, he must also suffer the type of harm that makes this activity dangerous, and it must be a "common" activity.

Victor's case will probably fail because: 1) the facts indicate that the activity can, and usually is, made safe; and 2) road construction may be such a common activity that strict liability may not be applicable.

Even if Victor's case fails on a theory of strict liability, he may still be able to recover on a theory of negligence.

NEGLIGENCE: Negligence is the failure to exercise that degree of care that a reasonable and prudent person would have exercised under the same or similar circumstances.

Duty: A person (or company) has a duty to act as a reasonable person and prevent foreseeable risks of harm when their actions create a foreseeable risk to the plaintiff. Here, Builders, Inc. was working on the highway, and thereby created a foreseeable risk to drivers on that highway. A question may arise as to whom Builders, Inc. owes a duty to. Under the Cardozo "zone of danger" test, a defendant only owes a duty to those in the zone of danger, while the Andrews (the minority in Palsgraf, and not the law) view is that a duty owed by one is a duty owed to all. In either case, Victor was a driver on the highway and clearly in the zone of danger and foreseeable; therefore, a duty of reasonable care was owed to him by Builders, Inc.

Builders, Inc. might argue that they only had a contractual duty with the government agency awarding the contract. However, this argument will fail because, although a contract may expressly create a duty, contractual privity is not required for a duty to arise in tort.

Builders, Inc. had a duty to act as a reasonable and prudent construction contractor. The actual requirements of Builders and his specific duty under the circumstances are determined by an objective standard. Builders, as a construction contractor, presumably with experience and education, is required to act as a reasonable and prudent contractor with like qualifications.

The specific requirements of one's duty may also be established by custom and usage. The facts indicate that the custom in that industry is to either put up a barrier between lanes of traffic, or open the traffic periodically during peak hours. This may or may not be the adopted standard. "That which is usually done may

be evidence of what ought to be done, but what ought to be done is determined by reasonable care, whether usually complied with or not," meaning the industry standard will be weighed accordingly in determining the due care owed to the plaintiff.

Breach: When a party's conduct fails to adhere to the standard of care, then that party is in breach. To determine whether a party is in breach (acted reasonably), the court will weigh the foreseeability of harm against the burden to avoid the harm and social utility. In the present case, the foreseeability of a plaintiff's car being crashed into (which is quite foreseeable and with a high level of damage) will be weighed against the burden to avoid the damage (the cost of the barriers and/or labor) and the social utility (the social utility in road repairs is quite high).

This actual determination will ultimately be a question for the trier of fact, but for the purposes of this examination, it will be assumed that the burden to avoid this damage was slight compared to foreseeability of the damage. Builders, Inc. therefore, is in breach of its duty and will be held liable for damages proximately resulting therefrom.

Causation: The damages must be the actual and proximate cause of the breach.

Actual cause is determined by the "but for" test, or the substantial factor test. When only one cause is present, the "but for" test is effective and the damage will be the cause when "but for the defendant's conduct, the harm wouldn't have occurred." This test will not work in the present case because "but for" the defendant's conduct, Victor might still have been crashed into by Dan. Even on a four- or even twelve-lane highway, Dan may still have crossed over and crashed into Victor.

In such a case, the substantial factor test will be appropriate, and defendant will be the actual cause of the damage if he was a "substantial factor" in the resulting damages. A party is a substantial factor when his conduct in probability multiplies the chance of the harm. This is the case here. By Builders not setting up a barrier or opening traffic during peak times, it probably increased the risk of cars colliding. Builders, therefore, is the actual cause of the harm.

Defendant must also be the "proximate cause" of the harm. Proximate cause is a theory whereby a court may cut off defendant's liability for harm he actually caused but where it is too unforeseeable to hold him legally responsible.

In this case, there is, in fact, an intervening force (Dan's negligence). Negligence is almost always foreseeable, and this case is no exception. A negligent driver on an undivided two-lane highway is highly foreseeable, also evidenced by an industry custom calling for barriers. Therefore, liability is not cut off, and Builders is the proximate cause of plaintiff's harm.

Note: Dan's negligent driving may also be the proximate cause as there may be more than one cause of a harm. In such a case, the parties will be said to be "joint and severally liable," where they are both responsible for the entire harm, but the plaintiff may only receive one recovery. In such a case, if Builders satisfied the

claim, they may seek contribution from Dan, who was also partly at fault (contribution is either divided equally between the number of parties, or it is divided according to percentage of fault, depending on the jurisdiction).

Damages: The plaintiff may recover for all damages caused by Builder, including medical bills, loss of wages, etc. The facts state that he suffered "serious injuries" and that will be sufficient damage to sustain a cause of action for negligence.

QUESTION 2

Traveler telephoned Hotel's national reservations number to secure a room for the annual meeting of Traveler's professional association. Hotel's reservation clerk advised him that the only room available was a suite at \$200 per night instead of the convention rate of \$100 per night. Traveler responded, "I don't need a suite. What if I lock the door to the living room and use only the bedroom?" The Hotel reservation clerk replied, "That would be O.K. Since we want to do everything possible to satisfy your association, we'll let you have the bedroom only for \$100 per night, but you must agree not to use the living room." Traveler said, "Thanks. I promise. Send the bill to my office."

Traveler became ill and was unable to attend the convention. He offered the room to Friend who was also a member of the organization. Friend accepted. Traveler told Friend: "It's \$100 a night. When you arrive, just tell them to send you the bill." Traveler neglected to tell Friend about the condition that he would only be able to use the bedroom.

Friend registered in Traveler's name because he did not want to risk losing the room, and occupied the room for ten days, using both the bedroom and the living room. At the end of his stay, Hotel sent a bill for \$2000 to Traveler. Traveler has refused to pay the bill, and Friend claims he is responsible for only the convention rate of \$100 per night.

What rights, if any, does Hotel have against Traveler and/or Friend? Discuss.

Answer A to Question 2

Hotel v. Traveler for Payment.

A contract for the room was made between Hotel and Traveler, who then assigned his rights under the contract to Friend. He also delegated to Friend his (Traveler's) duty to pay for the room. The issue here is, under what circumstances were the rights assigned and the duties delegated?

Assignment and Delegation.

Early common law decisions held that contract rights could not be assigned without the express consent of the other party to the contract. However, modernly, both the Restatement 2d and the U.C.C. make assignment of rights and delegations of duties freely possible. Rights to a contract are freely assignable as long as the contract right being assigned is not materially dependent on the person of the assignor. Here, we are talking about a generic hotel room where it is doubtful that any personal consideration, other than credit, was a material part of any contract term.

The Restatement Rule.

Duties under a contract may be freely delegated as long as such delegation does not (1) materially alter the duty, (2) materially increase the risk under the contract, (3) materially impede the non-delegating party's right to return performance under the contract, or (4) substantially change the essence of the bargain. Rooms and hotel services are not "movable at the time of identification to the contract" and so the U.C.C. does not apply here. For that reason, the Restatement rule on delegation and assignment is quoted rather than the U.C.C. rule found at 2-210. In this contract, assignment and delegation, Traveler substituted Friend to receive the right to occupy the room, but he could not totally assign either the right to the room or the duty to pay unless Hotel consented.

Duty to Pay and the Analysis under the Restatement Rule.

Here, Friend is a member of the same organization as Traveler, and this implies some equality. Therefore, a person of more or less the same quality and credit standing was to occupy the room and stand good for the obligation to pay. Further, Traveler remained as the occupant as Friend rented the room in Traveler's name. Therefore, the duty was not materially changed (in fact, it was not changed at all). The return performance was still guaranteed. No facts are present to show the risk was increased, and the essence of the bargain remained the same. Therefore, the assignment was valid as was the delegation. Friend took the same rights and duties which Traveler originally had under the contract. This was subject to the rule that the delegated obligation or performance may be demanded by either the assignor or the other party to the contract. Similarly, with respect to the duty to pay, Hotel may demand payment from either Traveler as the primary obligee, or from Friend who used the room, as Traveler's delegatee/ assignee.

The Policy Reasons.

Courts long ago pointed out the difference between contracts which are dependent on personal factors, such as taste, fancy, personal fame, or unique goods, and generic contracts which are held to be performable by any reasonably equal entity in the same business or trade. To enhance the economic agility of the market place and to favor the enforcement of bargains, courts (and legislatures) favor a policy of free assignability and delegation of contract rights and duties. To safeguard against decreased performance, such assignments and delegations, unless consented to by the opposite party, or unless specifically limited to rights to sue or be paid, are held to be subservient to the original rights and duties of the assignor/delegator. Thus, even though Traveler assigned his right to the room and delegated to Friend his duty to pay for it, he remained obligated, together with Friend, to the duty to pay. In a like manner, Friend received from Traveler only those rights and obligations which Traveler originally possessed under the contract, that is, Friend only received those rights which existed under the original exchange of promises, i.e., to occupy only the bedroom or to pay the full \$200.00. Thus, Traveler still has to pay if Friend will not or is held to be judicially relieved of some portion of their joint obligation. This is further buttressed by the fact that Friend used Traveler's name and Traveler originally told Hotel to send the bill to Traveler's office. Hotel was unaware of the assignment/delegation and could not have consented to it even if it had been willing to do so. Thus, under the Restatement rules, Traveler does have to pay for the room.

Friend's Obligation to Pay.

Traveler can sue Friend for the payment under the Restatement 2d rule that either the assignor or the non-assigning party may demand performance. However, Friend took the room under the natural assumption that he could use any part of it which was accessible. Friend was going to the convention and the going convention rate was \$100.00 a night. Further, Traveler told Friend it would be \$100.00 a night. Traveler did not tell Friend about the agreement to use only the bedroom and no facts are stated which would tend to show he had any reason to know.

However, Friend did use the room and he took from Traveler the obligation to pay. Therefore, Friend has an obligation to pay and Traveler has the right to demand payment from him. But Friend may oppose defenses to that demand. Hotel may also demand payment from Friend, and Friend may oppose the same defenses to Hotel's demand.

Defenses.

Friend will argue that the legal remedies open to him are inadequate as he will have to pay \$2,000.00 for a room he was told was worth \$1,000.00. Friend will contend that he detrimentally relied on Traveler's statement that the room would only be \$100.00 a night. However, Hotel will not be held to this defense as they made the situation clear to Traveler in the first place. Friend may have an equitable action for reformation against Traveler, just as Traveler may have one for unjust

enrichment against Friend, but both Traveler and Friend owe the rightful room charges to Hotel, and Hotel may sue either one or both, even though Hotel will be allowed only one recovery.

Friend may argue mistake, but there was no mistake as Friend's predecessor in right fully understood the import of the room charges and Friend took pursuant to that understanding. If there was any mistake, it was not on the part of Hotel. Of course, Friend will argue that if Hotel wanted to block off the living room, they should have locked it. But this is a suite, and the arrangement with Traveler was only made on Traveler's request. It was not proposed by Hotel. This will be further buttressed by the fact that Friend was at the convention for ten days. It could not have been that difficult to find out the true rates for rooms during this convention.

Answer B to Question 2

In determining Hotel's right against Traveler and/or Friend, we have to examine the contractual relationship among the parties.

It is important to determine at which stage a contract has been reached between Traveler and Hotel. To constitute a valid contract, there must be an offer, acceptance, and consideration.

An offer exists when it creates a reasonable expectation in the mind of the offeree that the offeror is willing to enter into a contract based on the proposed terms.

To constitute a valid offer, it must be (1) a promise, undertaking to enter into a contract, (2) be definite as to material terms of the contract, and (3) be communicated to the offered.

Here, Hotel's first time conversation with Traveler in advising the latter that the only room available was a suite at \$200 should be regarded as preliminary price quotation. It is not definite and does not create a reasonable expectation in the mind of the offeree that he is willing to enter into a contract with the offerer on that basis.

On the other hand, it could be argued that under the circumstances described, or probably in light of previous dealings between the parties, the price quote of \$200 can be regarded as an offer from Hotel to Traveler for a suite of rooms. For the purpose of discussion, we shall assume that is the case.

This offer, however, has not been accepted by Traveler as Traveler went on to make further inquiries about the offer. Traveler inquired about the price where Traveler will lock the door to the living room and use only the bedroom. Hotel can be regarded as extending a second offer to Traveler by saying that they'll charge \$100 only for using the suite of rooms on the condition that the door to the living room shall be locked.

Assuming that Hotel had extended two offers to Traveler, the next question is, when did Traveler accept the offer and which offer did Traveler accept?

An acceptance is an unequivocal assent to every term of the offer in an authorized or specified manner. To constitute a valid acceptance, it must mirror every term of the offer. Acceptance must be conducted in the method specified by the offeror, or in the absence of which, in a reasonable manner. Also, acceptance must be communicated to the offeror before it is effective.

In deciding whether Traveler has validly accepted Hotel's offer, we shall make a distinction between two kinds of contracts-unilateral and bilateral. An unilateral contract can only be accepted by performance of the contract. An unilateral contract can be accepted by a promise from the offeree only. According to First and Second Restatement, unless the offeror specifies otherwise, a bilateral contract can be accepted either by promise or performance.

In this case, the offers from Hotel are either of an unilateral or bilateral nature and can be accepted by performance.

So, one way of interpreting the contractual relationship between Traveler and Hotel is that Friend (who is a member of Traveler's association and is using Traveler's name, he shall be deemed to be acting for and on behalf of Traveler), has by way of this action, chose to accept the first offer of Hotel, namely, a suite offered at \$200 per night.

Due to the nature of acceptance (by action or performance), the court sometimes requires the offeree to communicate its acceptance to the offeror to ensure that the offeror would have knowledge that the offeree has already accepted the offer. In this case, by virtue of Friend's action, it is already clear to Hotel that a contract based on the first offer (i.e., a suite at \$200 per night has been accepted).

On this basis, it could be argued that Traveler has entered into a valid contract with Hotel based on Hotel's first offer. Since there is a valid offer, valid acceptance, supported by consideration, Hotel will be able to claim the consideration from Traveler.

It is also worthy to examine if there is any contractual relationship between Hotel and Friend so that Hotel can enforce its rights against Friend.

The facts indicated that Traveler was ill and offered the room to Friend, who accepted Traveler's offer.

It could be argued that over the phone, Traveler and Hotel have already concluded a contract on the basis of Hotel's second offer (i.e., a suite without the use of the living room for \$100 per night).

Based on Traveler's and Friend's conversation, it could be argued that Traveler had assigned all his rights and delegated all his duties under the contract with Hotel to Friend.

As a general rule, contract rights can be assigned unless it would change the obligor's risk or duties. Here, Traveler is assigning his rights to use the hotel room to Friend, and it does not appear that Friend's assumption of Traveler's role will create much difference in risk or duties to Hotel.

At the same time, Traveler can be said to have delegated all his duties under the Hotel contract (i.e., to pay for hotel charges) to Friend. Again, as general rule, there is no prohibition to delegation of duties unless it involves a personal service or it changes the personal expectations of the obligee. Here, the duty involved is to pay the hotel charges to Hotel. It does not seem that the duty falls within any of the non-delegable categories.

The effect of delegation is that the delegatee (i.e., Friend) has assumed the duties to perform to Hotel. As far as Traveler is concerned, Traveler is still liable to Hotel unless a novation contract is entered into whereby Traveler is totally discharged from its obligation. As far as Hotel is concerned, since delegatee (Friend) has assumed the duties to perform to Hotel, Hotel is a third-party beneficiary of the contract between Traveler and Friend. Hotel can have the right to sue either Traveler or Friend in the event of non-performance by Friend.

After establishing the privity relationship between Hotel and Friend, one more question is whether Hotel can enforce the \$2000 bill against Friend, since this is not the contract originally entered into between Hotel and Traveler.

It can be argued that subsequent to the assignment and delegation, Friend, by virtue of his conduct, has caused a contract modification to be effected. By way of Friend's act in using the living room as well, an implicit understanding is that the contract terms have been modified to provide a suite at \$200 per night to Friend. This contract modification will be valid as it is supported by consideration from both parties (Hotel and Friend). Hotel has suffered detriment in providing suite room facility to Friend.

On this basis, a valid contract based on suite room service has been entered into between Hotel and Friend. So, Hotel can enforce payment against Friend. Arguably, since Traveler is not yet discharged from the contract, Hotel is entitled to pursue against Traveler in the event Friend does not perform its duties.

QUESTION 3

Thirteen year old Paul attended Bob's Baseball Camp, owned and managed by Bob. During the last week of camp, Paul was invited to play in the camp "All Star Game" in which selected campers would play a nine inning game against the camp counselors. Paul had some concern about playing against the older, stronger counselors, but decided to participate since his selection was an honor.

Bob cautioned the counselors just before the game to remember to "take it easy" because they were playing against younger, less experienced players. The rules of the American Baseball Camp Association, to which Bob's camp belongs, prohibit play between players of disparate ages and abilities. The rules also bar players younger than 14 from nine inning games.

The game was tied when Paul reached third base during the last inning. Excited by the chance to score the winning run, Paul took off his batting helmet even though counselors had repeatedly told all campers to keep their helmets on while running the bases because there is always a risk of being hit by a thrown ball.

When the next batter hit the ball, Paul ran toward home plate. Charles, a nineteen year old camp counselor, caught the ball. Bob, who was standing near Charles, shouted, "Don't throw. Hold the ball." Charles threw toward home plate anyway, using his full strength. The ball struck Paul in the head, injuring him severely.

On what legal theory or theories, if any, might Paul recover damages from, and what defenses, if any, might be raised by:

1. Charles? Discuss.
2. Bob? Discuss.

Answer A to Question 3

Paul v. Bob

Negligence is the failure to exercise that degree of care that a reasonable and prudent person would have under the same or similar circumstances.

Duty: A party has a duty to act reasonably to all foreseeable plaintiffs when his conduct creates a foreseeable risk of harm.

Bob clearly had a duty to Paul in that he was the manager of the camp which Paul was attending. His duty is not only clear under the circumstances, but probably arises out of a contractual relationship as well. He has a duty to all his members of the camp, including Paul.

A defendant has a duty to act reasonably. That reasonableness is often dictated by statutes, or can be determined by an objective measure of a "like" defendant with similar qualifications. It can be inferred that a camp manager has such qualifications to be held to a particularly high degree of care. Furthermore, American Baseball Camp Association prohibits certain conduct by camp managers, and this may be evidence of what the proper standard of care is under these circumstances.

Breach: If a party fails to adhere to the standard of care required of him, he is in breach. A court determines whether a party has acted "reasonably" by weighing the foreseeability of harm versus the burden to avoid that harm and social utility. In this case, the foreseeability of harm to Paul, as well as to the other ball players, may have been slight, and the burden to avoid might be considered even slighter, depending on the importance the campers placed on this game. Maybe Bob could have made the game less than nine innings or had camp members versus other youngsters (not in violation of the ABCA rules). Bob's conduct in staging a game between counselors and thirteen-year-olds for the duration of nine innings was probably in breach of the standard of reasonable care.

Negligence per se is used in some jurisdictions to provide a presumption of negligence when defendant violates a statute, ordinance, or regulation which is designed to prevent this type of harm to this class of plaintiff. The relevant issue here becomes, are the rules established by the ABCA a statute, ordinance, or regulation? Probably not. The ABCA is most likely not a governmental body, and therefore, its rules will not create a presumption of negligence, but they may still be evidence of a standard of care to which camp managers should comply.

Bob's conduct in warning the players to keep helmets on and his warning to Charles to not throw might be considered in determining whether Bob was in breach; however, such warnings probably will not show enough exercise of care to neutralize Bob's breach.

Bob, being in breach, will be held liable for all damages proximately and actually resulting therefrom. A breach is the actual cause when one of two tests is met. The "but for" test is used when there is only one cause and "but for" the

defendant's breach, plaintiff wouldn't have been injured. When there is more than one cause, the breach will be the actual cause if it was a substantial factor, meaning in all probability, it multiplied the chance of the damage occurring. Bob was both the "but for" cause because but for his scheduling a nine-inning game, plaintiff wouldn't have been injured in the ninth inning (or even playing against adults), and thereby wouldn't have been injured. But in any event, even if plaintiff would have been injured but for Bob's breach, he was at least a "substantial factor" in the damage occurring.

Proximate cause is a legal theory whereby a defendant will not be held liable for results he actually caused because the damages were too unforeseeable. If intervening forces are present and are unforeseeable, they will supercede defendant's negligence and his liability will be cut off. Here, defendant Bob's negligent act was staging the game. An intervening force was Charles's throwing the ball notwithstanding the warnings not to. This is negligent behavior, but negligence is usually considered foreseeable, and this case is no exception. It is very foreseeable that a player will throw a ball even though warned not to, especially in the heat of the game. Therefore, this negligent act will not supercede Bob's negligence, and he is the proximate cause.

Damages: The facts indicated that Paul was injured severely by the ball striking him in the head, and he may recover for those damages.

Defenses: Bob may have defenses which will be discussed following the discussion of Charles's liability, as the same defenses apply to both defendants.

Paul v. Charles

Intentional Tort: No facts indicate that Charles intended to cause a harmful contact (nor an apprehension thereto) with Paul, so battery (and assault) will not be discussed. The facts state that they were involved in a baseball game, and Charles's intent was presumably to throw the ball to the catcher so that Paul would be "out."

Negligence: Negligence was defined above.

Duty: As discussed above, a person has a duty to act reasonably when his conduct creates a foreseeable risk of harm to the plaintiff. Charles's conduct (throwing the ball) created a risk to the plaintiff, thereby he has a duty to act reasonably in doing so.

Breach: A party is in breach when his or her actions fall below the standard of care. No facts indicate Charles was negligent in throwing the ball; however, his willful disobedience of the warning by Bob to "not throw" could be considered a breach.

Actual Cause: But for Charles throwing the ball, Paul wouldn't have been hit with it. Obviously, Charles was the actual cause of the damage.

Proximate Cause: Proximate cause was defined above. There are no intervening forces between Charles's breach and the injury, therefore, Charles's breach was

a direct cause (and definitely the proximate cause) of the damage. Liability will not be cut off.

Note: A less logical analysis might point to Paul's taking off his helmet as an intervening negligent act; however, Paul removed his helmet prior to Charles's throwing the ball and therefore, it is not "intervening."

Damages: Paul may recover from Charles the injuries he received as a result of the ball striking his head.

Joint and Several Liability: Since there were two causes of this damage (Bob's negligence and Charles's negligence), the parties will be said to be joint and severally liable, and Paul may recover from one or both, but may only receive one recovery. The paying defendant might be able to recover from the other defendant contribution for his percentage of the fault.)

Vicarious Liability: A party will be vicariously liable for the acts of his or her employee(s) when that employee is acting in the scope of his or her employment. Charles was Bob's employee and presumably, playing in the ball game was part of the counselor's job, or at least it conferred a benefit upon the employer, so those acts are said to be arising out of and in the course of employment for which an employer will be liable for the torts of his agents. Bob might argue that he told Charles not to throw the ball, so he was not acting within the scope of employment. This argument will fail due to the foreseeability of Charles's throwing the ball anyway. In any event, Bob would be liable for his own negligence and could be held vicariously liable for Charles's negligence, if Charles was, in fact, also negligent.

Defenses:

Contributory Negligence: A theory where any fault on behalf of the plaintiff will bar all recovery against the defendant. Almost all jurisdictions have abandoned this rule in favor of comparative negligence. If this was a contributory negligence state, however, Bob and Charles would argue that Paul's negligence in failure to protect himself by taking off his helmet will bar all recovery. Contributory negligence has an exception: if the defendant had the "last clear chance" to prevent the harm, he will still be liable. Such is the case here. Paul, if he was negligent in taking off his helmet, was at peril and Charles had the last clear chance to prevent the harm by not throwing the ball.

Comparative Negligence: Most jurisdictions use comparative negligence in its pure form where the plaintiff's recovery will be reduced by whatever percentage of the fault he is attributed to. Some jurisdictions limit it so that a plaintiff has to be at most 49% at fault to recover anything, if such is the law of the state in the present case, Paul's negligence will be assigned a percentage of the total damages and his recovery reduced by that much.

Note: In determining Paul's fault or negligence (in comparative of contributory negligence), his duty to protect himself will be judged by the same standard of care requirements as in all negligence actions-he has a duty to act as a reasonable

person of like age, education, and experience. Since Paul is thirteen years old, he must act as a reasonable thirteen-year-old, and it is quite possible that a reasonable thirteen-year-old might take off his helmet even though warned not to and his conduct might not be negligent at all.

Assumption at Risk: If plaintiff expressly or impliedly assumed the risk of the injury, he will not be able to recover for his damages. Charles and Bob will argue that Paul assumed the risk of injury by agreeing to participate in a game of baseball. Normally, participation in sporting events will imply this type of assumption. However, in the instant case, Paul exercised reservations about playing in the game, but only decided to play because of the honor associated with such a selection. This may or may not show that Paul assumed the risk of injury in playing ball, but he probably didn't wish to assume the risk of being struck with a ball thrown by a nineteen-year-old.

Note: One might argue that taking off the helmet was an assumption of the risk of being nailed with the ball. However, this is analogous to a pedestrian who runs across a busy road-he doesn't assume the risk of being hit by a car, but he is comparative/contributorily negligent. Such is the case here. Paul was negligent in taking off the helmet, but probably did not assume the risk of being hit with the ball.

Answer B to Question 3

PAUL V. CHARLES

NEGLIGENCE

Negligence

If a plaintiff can show that the defendant owed him a duty of care, that the duty was breached, and that the breach was both the actual and proximate cause of an injury to the plaintiff, then he will have a cause of action in negligence.

DUTY

Under the Cardozo view, a duty is owed only to those persons within the zone of danger. A person is required to bring suit for direct breaches rather than as a vicarious beneficiary to the breach of others. Under the Andrews rule, the duty is owed to everyone with the liability being determined by the analysis of causation.

Charles was playing baseball with a group of people, he therefore owed a duty to everyone in the game to use a reasonable standard of care.

The facts further indicate that Charles was a camp counselor and nineteen years old. As a counselor playing against the younger campers; Charles will be held to a higher standard of care.

Charles therefore owed a duty of care to Paul.

CAUSATION

ACTUAL

But for the act of Charles in throwing the ball so forcefully and striking Paul, Paul would not have been injured.

PROXIMATE

It is foreseeable that throwing with such force creates the possibility of person running for the plate being hit and injured.

Charles is therefore both the actual and proximate cause of the injury to Paul.

DAMAGES

The facts indicate that Paul was struck in the head and severely injured. Paul will be entitled to both general and special damages. Paul may recover for his pain and suffering, medical expenses, and perhaps loss of future ability to earn, if applicable.

DEFENSES

CONTRIBUTORY NEGLIGENCE

A person is said to have contributed to his own injury when his conduct falls below the reasonable level required for his own safety.

Charles will contend that Paul contributed to his injury by removing his helmet; had Paul had the helmet on, the injury would not been severe.

Paul will argue that as an infant his standard of care is not required to be as high as an adult. As a child, he will be judged by his age, maturity, and experience as compared to similar children.

If the court finds that the actions of Paul fell below those standards, he may be found to have contributed to his injury. A finding of contributory negligence is a complete bar to recovery.

COMPARATIVE NEGLIGENCE

In jurisdictions using comparative negligence, the recovery is not barred. The amount recovered is reduced by the negligence of the plaintiff.

If Paul is found to have been negligent, his award will simply be reduced.

ASSUMPTION OF THE RISK

In order to assume the risk, a person must have subjective knowledge of the danger to be assumed and voluntarily assume it.

Some courts have held that a participant to a sporting event have impliedly assumed the risk of injury normal to the activity, such as being hit by a ball.

Paul may argue that he did not assume the risk that the counselors would play to their adult ability and therefore did not assume that risk. The facts indicate, however, that Paul was concerned about playing against the counselors because of the risk and decided to play anyway.

The court will have to determine if the risk was assumed and if so, to what level of risk.

PAUL V. BOB

NEGLIGENCE

Defined supra.

DUTY

Defined supra.

SPECIAL DUTY

HERE, Paul was a paying guest at Bob's Baseball Camp. As owner of the camp, Bob had a special duty for the care of the children attending the camp. Paul, as a paying camper, was such a person and therefore owed a duty to B.

BREACH

Paul will argue that Bob breached his duty in holding the All-Star game whereby the younger campers would be pitted against the older and stronger counselors.

Paul will contend that the acts of Bob in having the game was a direct violation of the association the camp belongs to. While the violation of these rules will not have the same effect as the violation of a statute, showing negligence per se, it may be considered by the court in establishing the customary standard of care required by a member camp.

Bob has therefore breached his duty to Paul.

CAUSATION

ACTUAL

But for the holding of the game, Paul would not have been injured.

PROXIMATE

It is foreseeable that matching the younger campers against the stronger, older counselors, and playing a full nine innings, someone might be injured. The injury foreseeable would be such as that suffered by Paul.

Bob is therefore both the actual and proximate cause of the injury to Paul.

DAMAGES

Supra.

DEFENSES

Supra

Bob should be held liable for the damages to Paul.

VICARIOUS LIABILITY

RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, an employer may be held liable for the torts committed by his employee in the course and scope of his duties.

Here, Charles was playing a baseball game at the instruction of his employer, Bob.

Bob may be held liable for the damage to Paul by Bob as discussed supra.

Bob will argue that Charles violated a direct order by throwing the ball, and he should therefore not be held liable for his acts.

Paul will counter that many things are shouted during a game and not considered to be orders regarding their input. Further, the excitement of the game makes it foreseeable that a person will be excited and not listen to directions.

Bob will be held liable for the acts of Charles.

INDEMNITY

Charles will have a cause of indemnity against Bob for damages paid to Paul due to Bob's negligence.

QUESTION 4

Alice and Brenda approached Carl, who was alone at a bus stop late at night, and loudly demanded money. Carl panicked and started to walk toward them, yelling and swinging his arms. Alice, who had a history of mental illness, pulled out a gun and waived it around, ordering Carl to stop while Brenda stood by her side. The gun discharged. Carl was struck and seriously injured by the bullet.

Alice and Brenda were arrested at the scene by a passing police officer. Brenda told the officer that she had not known that Alice was armed and that the shooting was a complete surprise to her. Alice told the officer that she did not know the gun was loaded, that she did not intend to kill anyone, that she waved the gun around because she was frightened, and that she wanted to scare Carl to get him to stop yelling and swinging at her and Brenda.

Alice and Brenda have been charged with attempted robbery, attempted murder, and assault.

1. Would evidence of the facts leading to the arrest of Alice support conviction of Alice on any or all of the above charges; what defenses might she offer; and if her statement to the arresting officer is believed, of what offenses, if any, should she be convicted? Discuss.
2. On what theory or theories might Brenda be prosecuted, and if her statement to the arresting officer is believed, of what offenses, if any, should she be convicted? Discuss.

Answer A to Question 4

State v. Alice

Attempted Robbery

Robbery is the trespassory taking and carrying away of the personal property of another by force of fear, with the intent to permanently deprive the person of their property.

Specific Intent

For an attempted robbery, Alice must have the specific intent to commit a robbery of Carl. Here, Alice and Brenda approached Carl when he was alone, at night, and loudly demanded money. These actions show the intent to take money from Carl through force or fear. Alice has the necessary specific intent.

Legal Impossibility v. Factual Impossibility

The attempt to rob Carl failed because it became factually impossible to complete the crime. Carl's reaction and the arrival of a police officer stopped the crime.

Factual impossibility does not relieve Alice of her liability in the attempted robbery.

Apparent Ability

Alice and Brenda caused panic in Carl. In addition, Alice was armed and pulled out the gun. Alice had the apparent ability to complete the crime.

Perpetration v. Preparation

An attempt requires a substantial step toward perpetration of the crime beyond mere preparation.

Here, Alice and Brenda actually approach Carl and demand money; and Alice pulls a gun. These actions go far beyond mere preparation.

Alice will be found guilty of attempted robbery.

Attempted Murder

Murder is the killing of one human being by another with malice aforethought.

Specific Intent

Attempted murder requires the specific intent to commit the crime of murder.

Alice claims that she did not know the gun was loaded and that she pulled the gun only to scare Carl to get him to stop yelling and swinging at her and Brenda.

Alice lacks the specific intent to kill Carl. She only wanted to scare him. Her mistake as to the fact that the gun was loaded also negates the intent required.

Although the other elements of attempted murder are present, Alice will not be found guilty of attempted murder because of her lack of the required intent.

Assault

An assault is either an attempted battery or the intent to cause apprehension in another person.

Here, when Alice and Brenda first accosted Carl, they did so with the intent to take his money through force or fear. They were attempting to cause apprehension in Carl.

Later, Alice pulls a gun, with the intent to induce apprehension in Carl.

Alice will be found guilty of assault.

Conspiracy

A conspiracy is an agreement between two or more persons to commit an unlawful act.

Brenda and Alice approached Carl together, with the intent to take money from him by force or fear. Their actions imply that they were working together under an agreement. The unlawful act that was planned was robbery.

Alice and Brenda made an overt act in furtherance of the conspiracy when they approached Carl and tried to get his money.

Alice may be found guilty of conspiracy.

Defenses

Self Defense

Alice will claim that she pulled the gun in self-defense. She reasonably believed that Carl was going to harm her.

The State will counter that the defense of self-defense is not available to the initial aggressor. Since Alice is the aggressor, her self-defense theory will fail.

Insanity

Since the fact pattern states that Alice had a history of mental illness, she may claim insanity.

In the majority of jurisdictions, the test of insanity is the M'Naughton rule. Alice will need to show an underlying mental illness or defect. She will also need to show that she did not understand the nature and quality of her actions, or that they were wrong.

However, Alice's actions show an understanding of what she was doing. The fact that she accosted someone who was alone, at night, shows that she appreciated what she was doing. Her reaction to Carl's swinging his arms also shows that she appreciated and understood what was going on. Alice's secrecy in attempting to rob Carl also shows she knew it was unlawful.

Alice's defense of insanity will fail.

Diminished Capacity

Alice may claim that her history of mental illness left her incapable of forming the specific intent for the crimes. However, the specific intent may be inferred from her methods and actions. This defense will fail.

State v. Brenda

Conspiracy

A conspiracy is an agreement between two or more persons to commit an unlawful act.

Here, there is no mention of an express agreement. However, an implied agreement may be inferred by the actions of Alice and Brenda. They accosted Carl together. There was an apparent agreement between them.

For conspiracy, most jurisdictions require that there be some overt act in furtherance of the conspiracy. Actually approaching Carl and demanding money is more than enough to qualify as an overt act.

Brenda may be found guilty of conspiracy.

Under the Pinkerton rule, conspirators may be liable for all of the foreseeable crimes committed by co-conspirators in furtherance of the conspiracy. Thus, Brenda could be found guilty of Alice's crimes under the theory of conspiracy.

Defense

Withdrawal

Brenda may claim that she withdrew from the conspiracy when Alice drew the gun. However, to be effective, withdrawal must be timely and complete, and communicated to other conspirators. Even then, the crime of conspiracy is complete at the time of the agreement and overt act, and withdrawal only limits liability for subsequent crimes of the co-conspirators.

Brenda's withdrawal was neither timely nor complete, and was not effective, and will fail.

Accomplice Liability

An accomplice is someone who knows of a future crime, aids or encourages the principal in the first degree, and has the intent that the crime be committed.

Here, Brenda is present when the crime of attempted robbery takes place. She assists with the perpetration of the crime. She is therefore a principal in the second degree.

As an accomplice, Brenda may be found guilty of the crime committed, and all other crimes which foreseeably flow from the target crime.

Thus, Brenda may be guilty of Alice's crimes under theory of accomplice liability.

Alice will therefore be found guilty of attempted robbery and assault.

Answer B to Question 4

1. Alice.

Attempted Robbed.

Robbery is larceny from the person by force or threat of force.

Attempt is a substantial step to completion of a crime with specific intent to commit the [word illegible] offense.

Alice approached Carl demanding money, which would be larceny (trespassory taking of property of another with intent to steal). She waved a gun around, which was a threat of force. This was a substantial step towards a robbery, thus, she can be convicted of attempted robbery. It doesn't matter that she didn't know the gun was loaded-the threat of it was enough.

Attempted Murder

Attempt - defined supra.

Murder is the unlawful killing of another with malice aforethought. Malice is supplied by intent to kill, intent to seriously injure, reckless disregard of a high likelihood of death from conduct, or felony murder-death resulting from an inherently dangerous felony.

If Carl had died from Alice's gunshot, she could have been convicted of murder-on a felony murder basis-since robbery (or attempted robbery) is an inherently dangerous crime.

However, as noted above, attempt is a specific intent crime and the facts do not show she meant to kill Carl. Therefore, she's not guilty of attempted murder.¹

Assault

Depending on the definition of criminal assault in this jurisdiction, Alice may be guilty of assault.

If defined as attempted battery, she would only be guilty of attempting to shoot Carl. The facts indicate the gun discharged accidentally while she was waving it, therefore, she is not guilty in this case.

If defined as intentionally causing a fear or apprehension of an imminent battery, she is guilty since she waved the gun to make Carl stop. (It wouldn't matter that she didn't think the gun wasn't loaded-Carl didn't know this.)

¹Alice's statement that she didn't know the gun was loaded shows she didn't have the specific intent to kill Carl.

Defenses²

Insanity

The majority rule is there is no criminal culpability of defendant because of a mental illness, has a defect of the mind that prevents him or her from knowing the nature and consequences of their conduct, or its wrongfulness.

Alice may argue that because of her mental illness, she was legally insane. However, she accounted for her behavior to the officer and appeared to know right from wrong, "did not know the gun was loaded, did not intend to kill anyone."

Diminished Capacity

Though not sufficient for insanity, Alice's mental illness may be sufficient to attempt-that she wasn't smart enough to plan a robbery or murder.

If accepted, this will make her only liable for the crime of assault, and only in a jurisdiction where it's not defined as attempted robbery.

2. Brenda.

Accomplice Liability

Accomplices are liable for crimes foreseeably committed in furtherance of the [words illegible] crime.

Brenda was a principal in the second degree-an accomplice-being physically present with Alice in accosting Carl. She is therefore liable for attempted robbery. Alternatively, since it's not clear who (Alice or Brenda) "loudly demanded" the money, [words illegible] may be charged as a principal in the first degree.

Attempted Murder

Same analysis as for Alice. No specific intent to commit murder of Carl, therefore, not guilty.

Assault

See discussion regarding Alice and assault. Alice has accomplice liability and guilty in jurisdiction allowing "apprehension of battery."

²Self-Defense - A person is privileged to use reasonable force against an imminently perceived battery. Alice may argue that when Carl ran toward her, waving his arms, she feared a battery from him. However, as the aggressor, she didn't have a self-defense right, and further the force (gunshot) was excessive. This is not a good defense.
defense.

Defense of others – To protect Brenda, same analysis as above. Not a good

Conspiracy

An agreement by two or more people, with an intent to agree and an intent to commit another crime. One is liable for foreseeable crime resulting from the conspiracy.

If Alice and Brenda had planned ahead of time to rob Carl, she could be charged with attempted robbery, attempted murder, and assault as these are all foreseeable.

The fact that Brenda did not know Alice was armed is not a good defense, as it is foreseeable that a gun will be used by a co-felon during a crime.

In summary, Brenda should be convicted of attempted robbery, possibly assault (depending on local law), but not attempted murder.