

ESSAY QUESTIONS AND SELECTED ANSWERS

JUNE 1999 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the June 1999 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.

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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

Grainco sells seed grain. Because parasites attack and eat grain that is stored, Grainco, like all seed grain dealers, treats the grain with an invisible mercury based chemical to poison these parasites. The seed grain is sold in bulk by the truckload to farmers who will plant the seed. The trucks are labeled "Seed Grain. Not for Use in Food Products. "

Farmer bought a truckload of grain from Grainco. She supervised the Grainco employees who unloaded the grain from the truck into her silo. She planted some of the grain, but mixed the remainder in feed for her dairy cattle. Farmer then sold milk produced by cows who ate that feed to BigFood, a grocery chain. Several persons who drank milk purchased at BigFood stores became seriously ill, suffering from mercury poisoning. The mercury has been traced to milk sold to BigFood by Farmer.

On what theory or theories might the injured milk consumers recover damages from:

1. Grainco? Discuss.
2. Farmer? Discuss.
3. BigFood? Discuss.

Answer A to Question 1

Consumer v. Grainco

1. Products Liability - Negligence

Negligence requires the presence of a duty on the part of the defendant to exercise reasonable care to avoid exposing foreseeable plaintiff from risk of harm or injury. Breach of that duty of care by defendant the breach is the actual and proximate cause of plaintiff's injuries and damages.

Here plaintiffs will assert products liability in negligence due to the inadequate warning that Grainco provided to farmer.

As a commercial supplier of seed grain Grainco has the duty to warn farmer that its seed grain are treated with mercury. Here the warning given by Grainco to farmer is inadequate because only the truck is labeled "Seed grain, not for use in food products".

Here, but for Grainco's breach of its duty to adequately warn farmer, farmer would not have used the extra seed grain to feed her dairy cattle. Consumer would not have been injured.

Grainco's breach of its duty to adequately warn farmer is therefore the actual and proximate cause of consumers injuries or damage since it is foreseeable that farmer will use the seed grain for other purposes.

Grainco is liable under products liability due to its negligence in not providing adequate warning to farmer.

Consumer v. Farmer

1. Restatement Torts 402A - Strict Products Liability

A commercial supplier of a product (milk) is strictly liable for defective products he puts in the chain of commerce that injures all foreseeable plaintiffs.

Here farmer qualifies as a commercial supplier of milk to BigFood. Farmer sold tainted milk to BigFood. Farmer sold tainted milk to BigFood who then sold the milk to consumers leading to their foreseeable injuries.

2. Products Liability - Negligence

Negligence requires the presence of a duty on the part of the defendant to exercise reasonable care to prevent risk of harm or injuries to plaintiff. Breach of that duty by defendant, the breach is the actual and proximate cause of plaintiff's injuries and damages.

Here, farmer has a duty to deliver safe and wholesome milk. Farmer breached that duty by feeding his dairy cattle with mercury treated seed grain. At the time the seed grain was delivered to farmer, farmer supervised the transfer of the grain to his silo and should have noticed the sign on the truck "Seed grain, not for use in food products".

But for farmer's breach of his duty of care, farmer would not have fed his dairy cattle with tainted grain, leading to production of tainted milk and consumer's injuries and damages.

Since it is foreseeable that feeding dairy cattle with tainted seed grain would lead to production of tainted milk, and farmer sells the milk to retailers, it is also foreseeable and a consumer will be injured by consuming the tainted milk.

Therefore farmer will be liable based on products liability through negligence for the foreseeable consumer's injuries.

3. Products Liability - Warranty of Merchantability Fitness of Purpose

A commercial supplier or a product like farmer here sells his products to retailer with the implied/express warranty of merchantability.

Here farmer sold his milk to BigFood for human consumption with the warranty that it is safe and wholesome.

When farmer supplied tainted milk to BigFood it breached its duty of warranty of merchantability by delivering unsafe products that farmer knows will be resold to consumers leading to foreseeable injuries.

Farmer is liable based on products liability under warranty of merchantability.

Consumer v. BigFood

1. Strict Products Liability - Restatement of Torts 402A

A commercial supplier is strictly liable for defective products that reaches all foreseeable plaintiffs in a defective state. Everybody in the chain from manufacturer to suppliers will be liable.

Here BigFood obtained tainted milk from farmer. The tainted nature of the milk is not discoverable by BigFood's reasonable inspection of the product.

As the retailer of the tainted milk BigFood is liable to all foreseeable consumers injured by the tainted milk.

BigFood is liable under strict products liability to consumer's injuries.

2. Products Liability Warranty of Merchantability Fitness or Purpose

A commercial supplier warrants his products to be fit for the purpose it is intended.

Here BigFood as a commercial supplier of food products warrants that he sells safe and wholesome food products.

BigFood selling tainted milk is not within the scope of the warranty of merchantability. They would be liable for the injury to consumer.

Answer B to Question 1

Injured Milk Consumers v. Grainco

Negligence (Products Liability)

Duty

If an average reasonable person were able to find a risk of harm in a product, and said product is actually defective, the manufacturer thereof has a duty to all foreseeable users to inspect, discover and remedy any defect which a reasonable inspection would discover. In these facts, Grainco has designed the grain product with the purpose of reducing the possibility of damage to the grain by parasites, and treated the grain with mercury. The product was manufactured as it was designed, i.e. with mercury based poison. The product was specifically intended by Grainco to be used for purposes of planting. With respect to the adequacy of the warning placed on the trucks which carry the grain, it stated that such grain was clearly not for use in food products. The potential deficiency in the warning is that if the person to whom to grain is delivered fails to read the warning on the truck, they will not necessarily be informed as to the inability to use the grain product for food products.

Breach

If a product is, in fact, defective, and fails to meet the ordinary consumer expectations of the average reasonable man, a breach of the duty may be manifest. Here, although the grain was designed as it was intended, it could result and did, in fact, result in damage to persons. For the purposes of human consumption, the grain is defective. In addition, it appears that although the grain product was sold by the truckload, that a mere label on the trucks carrying the grain product may be insufficient and inadequate as a warning that the seed grain is "not for use in food products". Although Grainco had intended the grain product to be solely used to plant seed, it may be foreseeable that the product may be misused by its purchaser, such as feeding livestock,

livestock being dedicated to the service of mankind, it thereafter being foreseeable that any such livestock may be consumed or its products (such as milk) being consumed. The grain product, although it was designed as intended, was dangerous to humans in that it contained mercury and misuse was foreseeable. In addition, should a court hold that the warning on the truck was insufficient to clearly identify the intended use of the grain product and the possible dangers in that the grain contained poison, the warning would be inadequate and defective. Based on the foregoing, Gainco breached its duty (supra).

Causation

Cause-in-Fact (Actual Cause) - But for Grainco having produced and provided a defective product, the eventual consumers in the stream of commerce would not have consumed such a defective product and would not become seriously ill from mercury poisoning. Grainco's production and provision of such defective product was the cause-in-fact of the injured milk consumers' injuries. Being as multiple defendants caused these indivisible injuries, they may be held jointly and severally liable as joint tortfeasors.

Proximate Causation - Grainco's provision of the defective product was not the direct cause of the damages which are the subject of plaintiffs' contemplated suit. It was the indirect cause. In such an event, because there are acts of third persons involved in the stream of commerce prior to the mercury reaching the injured milk consumers, it must be reasonably foreseeable that the defective product may injure the milk consumers. As stated supra, it appears that because the potential misuse of grain by the purchasers of the grain product (e.g. Farmer), it may be foreseeable that the mercury contained in the grain product would cause injury to humans. Because of this foreseeability, it should be noted that with respect to food products, a higher standard of care is owed. Even if Farmer's acts in using the product for the purpose which it was not intended were to be considered an intervening factor in the chain of causation, such use of the product was foreseeable and thus proximate causation will lie as to hold Grainco negligently liable for the damages incurred to the milk consumers.

Damages

In order to recover for negligence in the products liability, the injured milk consumers must have actually been damaged. The fact that the milk consumers suffered from mercury poisoning and became seriously ill should be sufficient to indicate that the consumers had medical special damages to treat the poisoning and to recover from it. The milk consumers, while being entitled to general and special damages will not be entitled to purely economic losses for the negligence theory of recovery.

Defenses

Grainco will attempt to aver that Farmer misused the product in that it was not intended to be used as feed, but instead was intended to be used as planting seed. As discussed above, it

was foreseeable given the inadequate warning and lack of conveyance that the seed contained mercury that Farmer would have misused the product, and foreseeable misuse of product is not defense.

Implied Warranty of Merchantability

All products have a warranty implied in sale that such product will be of average and fair quality and fit for its normal purposes. This warranty, in some jurisdictions, may be expressly be disclaimed inasmuch as the manufacturer disclaiming the warranty specifically used the word "merchantability". In this instance, Grainco made no such disclaimer. Accordingly, the grain product carried with it an implied warranty of merchantability. The requirement that the parties be in privity has been laxed by case law in that the foreseeable plaintiffs include all foreseeable consumers of Grainco's product, the family of the consumers and any guests in the consumer's household. Some jurisdictions lessen the former strictness of privity so as to allow all natural persons coming into contact with the defective product to be potential plaintiffs. Because of the foreseeability discussed supra with respect to misuse of product and inadequacy of warning, the implied warranty is sufficient to reach the injured milk consumers which are the subject of this fact pattern. With respect to causation, see discussion supra. With respect to damages, if a manufacturer breaches an implied warranty, which Grainco did, the consumers (in this case our injured milk consumers) will be entitled to their economic losses such as loss of earnings during their treatment and recovery from the mercury poisoning.

Strict Liability in Tort

A manufacturer, distributor, supplier, endorser and all parties in the stream of commerce are strictly liable in tort for any and all damages arising from a defective product which they have placed in the stream of commerce. As a matter of public policy, food products are to be held to a high standard because they are to be consumed by humans. In this case, Grainco did, in fact, place a product which was defective in design in that it contained the toxin mercury and that the warnings accompanying the delivery of the product were inadequate (supra).

Conclusion

Grainco is liable to the injured milk consumers under the tort theories of products liability/negligence, breach of implied warranty of merchantability and strict liability. The risk of potential human poisoning outweighs the utility of the product in preventing damage of the grain product by parasites.

Injured Milk Consumers v. Farmer

Negligence - Products Liability

Duty

Farmer owed the same duty in products liability as did Grainco (supra).

Breach

Because Farmer, in using the defective grain product, used this grain product as a COMPONENT of his milk, he has breached his duty to inspect, discover and remedy any defect which a reasonable inspection may reveal.

Causation

Cause-in-Fact - But for Farmer's feeding of the defective grain product to the livestock which produced the milk which poisoned the injured milk consumers, the injured milk consumers would not be injured.

Proximate Causation

Because the milk which Farmer produced contained the sufficient traces of mercury from the defective grain product to BigFood who thereafter sold it to the injured milk consumers, Farmer is the proximate cause of the damages. Farmer is not the direct cause of the damages in that it may be considered that BigFood failed to reasonably inspect the milk prior to sale and that Farmer or Grainco may attempt to argue that this was an intervening cause. However, any potential negligence of BigFood in failing to inspect the milk or otherwise discover the mercury toxin could be foreseeable and thus this argument is mitigated.

Damages

The injured milk consumers were damages (see supra), they are entitled to recovery for general and special damages. (See supra.)

Implied Warranty of Merchantability

The same warranty which applies to Grainco also applies to Farmer. Farmer has impliedly warranted that the milk which he provides to BigFood is of at least average and fair quality and fit for its normal purposes. Milk containing a mercury toxin is not fit for its normal purposes, i.e. human consumption. Farmer breached its implied warranty, the same rules respecting privity (discussed supra) apply, and Farmer is thus liable to the injured milk consumers for all general and special damages and purely economic damages (as discussed

supra).

Strict Liability in Tort

Farmer was in the stream of commerce (as discussed supra), and because supplied a defective product (milk) is strictly liable in tort for all personal injuries suffered as a result of that defective product. Should Farmer believe that his culpability is mitigated by Grainco's wrongdoing, he is still liable in court, but may seek indemnity from Grainco if Grainco is the party who is ultimately responsible for the injured milk consumers' damages (i.e. Grainco would pay any portion of any judgment which may have been obtained by the injured milk consumers against the joint tortfeasors which Farmer has paid).

Conclusion

Farmer is liable to the injured milk consumers for negligence/products liability, breach of implied warranty of merchantability and strict liability in tort. Farmer may attempt to seek indemnity from Grainco.

Injured Milk Consumers v. BigFood

Negligence/Products Liability

Duty

The same duty respecting products liability/negligence which was applicable to Grainco and Farmer is applicable to BigFood (see discussion supra).

Breach

Because the milk which BigFood supplied to the injured milk consumers contained mercury toxin, it could not fit the ordinary consumer expectation test (discussed supra) and thus BigFood breached its duty.

Causation

Cause-in-Fact - But for BigFood's sale of the toxic milk to the injured milk consumers, they would not have been damaged.

Proximate Causation - Because there was no intervening, supervening or superceding acts between the placing of the milk in the stream of commerce by BigFood, the sale of said milk and the consumption of said milk, such sale was the direct result of the injured milk consumers' damages.

Damages

As discussed supra, the injured milk consumers would be entitled to the same damages in negligence as they would be against Grainco and Farmer. They were actually damaged.

Breach of Implied Warranty of Merchantability and Strict Liability in Tort

The theories of recovery for implied warranty and strict liability as they pertain to Farmer are also applicable and sufficient enough to constitute liability for BigFood. However, BigFood was, as a matter of common sense, the least culpable for the injured milk consumers' damages. However, BigFood is a joint tortfeasor and will most likely be held jointly and severally liable for the damages, but may wish to seek indemnity (supra) from Grainco or Farmer should the injured milk consumers prevail with their claim.

Question 2

Andrea recently started making Rosso, a new red wine, at her winery. Rosso received very high ratings at preview tastings. Bob, who owns a wine shop, telephoned Andrea on May 15 and asked about price and delivery date for 20 cases of Rosso. Andrea told Bob that she expected to have Rosso available for sale by June 28 and would deliver 20 cases to Bob on that date for \$250 per case. Bob replied that he had to think about it because the price was high. Andrea said: "Fine. You can have until June 15 to decide. "

On June 11, Bob agreed orally to sell 5 cases of Rosso to Paul, an accountant, for \$400 per case, delivery promised on July 1. Paul paid Bob in full and made plans to serve the Rosso at a Fourth of July party he was giving for existing and prospective clients. Invitations to the party, which announced that Rosso would be served, were highly prized and many guests planned to attend in order to have a chance to try Rosso.

On June 12, Andrea sent Bob a fax stating: "The market is so hot for Rosso that the price is now \$330 per case. Let me know by June 15 if you are still interested." On the same day, Bob replied by fax stating: "I accept your May 15 offer to sell me 20 cases of Rosso for \$250 per case, delivery on June 28. " Andrea immediately telephoned Bob and said she would not sell for \$250. Bob would have to pay \$330. Bob replied: "No way. We have a deal at \$250." Andrea then said "forget it," and hung up. Bob attempted to get Rosso elsewhere for Paul, but none was available.

Because no Rosso was available, Paul purchased 5 cases of Canti, a premium red wine, at \$500 per case. The total cost of his Fourth of July party was \$75,000. The party was a disaster because Rosso was not served. Few guests drank Canti. Many left early. Paul gained no new clients.

1. What rights, if any, does Paul have against Bob? Discuss.
2. What rights, if any, does Bob have against Andrea? Discuss.

Answer A to Question 2

PAUL v. BOB

OFFER/ACCEPTANCE/AGREEMENT:

On June 11, Bob offered to sell 5 cases of wine and Paul promised to pay \$400, with delivery on July 11. There appears to have been offer and acceptance by the parties. The terms of the agreement are unambiguous.

Bob may claim that since the place for delivery was not stated, that the contract should fail for lack of a material term. However, for the sale of goods, unless otherwise specified, delivery is assumed to be the seller's place of business. Since Bob was a wine merchant, it's reasonable to preclude that the parties intended that Paul pick up the wine at the shop.

CONSIDERATION:

Bob promised to supply the wine; Paul promised to pay for it. This agreement constitutes bargained for exchange and is adequate consideration.

STATUTE OF FRAUDS:

Bob will contend that the agreement is unenforceable in that it violates the Statute of Frauds, which require contracts for the sale of goods over \$500.00 to be in writing.

Paul will contend that their agreement comes within the exception to the S of F in that since he has already fully performed, by paying, and Bob has accepted that performance, Bob is estopped from this claim. Since Bob's action in accepting payment would indicate the existence of the contract, his defense of Statute of Frauds should fail.

IMPRACTICABILITY/BREACH BY THIRD-PARTY/CONDITION PRECEDENT:

Bob may claim that Andrea's refusal to sell the wine for less than \$330 per case made his contract with Paul impracticable. He may also claim that, since Andrea hung up the phone on him and he was unable to locate the wine elsewhere, his performance should be excused.

Paul will state that Bob could have paid the \$330.00, and still made money in selling to Paul, and

that when a party to a contract is relying upon a third-party to supply some necessary element of the contract, the party to the contract has assumed the risk of default by the third-party. When Bob agreed to sell the wine to Paul, he took the chance that Andrea might not deliver the wine to him in time. Since there are not facts to indicate that the receipt of wine from Andrea was a condition precedent to Bob's obligation to Paul, Bob will not prevail on this claim.

MATERIAL BREACH/DAMAGES:

Since the parties had a valid and enforceable contract and Bob failed to perform, his failure constitutes a material breach of the agreement and Paul is entitled to his damages. Under the UCC, when a seller fails to deliver goods, the buyer may "cover" and claim as damages the difference between the contract price and market price, plus incidental and consequential damages.

Paul was unable to locate Rosso and thus had to purchase the more expensive Canti wine. Bob may claim that Paul was obligated to cover with Rossi, but the buyer needs only to make reasonable efforts in obtaining substitute goods at a fair price; they need not obtain the "best price". Therefore, Bob is liable for the additional \$100 per case, for a total of \$500.00.

In addition, Paul will be entitled to recover his incidental damages; any additional shipping costs, etc. in obtaining the replacement wine.

Paul may claim that he is entitled to consequential damages as well; compensation for the disastrous party. Bob will assert that he is only liable for those damages reasonably foreseeable by the parties at the time they entered into the contract. Since it is unlikely that Bob and Paul intended to insure that Paul's party be a success, Bob should prevail on this point, and Paul's damages should be limited to the \$500.00, plus his incidental damages.

BOB v. ANDREA

OFFER/ACCEPTANCE/IRREVOCABLE OFFER/PROMISSORY ESTOPPEL:

Andrea offered to Bob during their May 15th telephone call 20 cases of Rosso for \$250, with delivery not later than June 28th. She manifested an intent to be bound by the terms of her offer, which were reasonably clear as to the quantity, price and time for performance.

However, Bob did not accept Andrea's offer; he asked for more time. Therefore, at the end of the conversation, the offer was still open.

Bob will claim that Andrea created an irrevocable option to keep the offer open until June 15th. However, since Bob did not provide any consideration, an offer may be revoked at any time.

Bob will claim that, as a merchant, Andrea created a "Merchant's Firm Offer". However, under

the UCC, and offer from a merchant to keep an offer open for a specified time (not to exceed 90 days) is enforceable, if it is in writing.

Bob will then claim that the offer should be irrevocable based upon a theory of promissory estoppel; Andrea knew that Bob was a wine merchant, and it was foreseeable that he would rely upon her offer in promising to sell the wine to his customers. Since the wine was highly regarded and much anticipated, it is foreseeable that there may have been- advance demand for it. Although Bob made no indication during the telephone conversation that he might detrimentally rely upon Andrea's promise to keep the offer open, he may prevail on this theory, although Andrea will claim that the offer would have been held open for a reasonable time, that that Bob's delay in accepting until after he had an order from Paul was unreasonable.

REVOCACTION/ACCEPTANCE:

Andrea will claim that the fax of June 12th operated as a revocation of the prior offer and a new offer to sell the wine for \$330 per case. Bob will claim that since the prior offer was irrevocable under a theory of promissory estoppel, he accepted that offer on June 12th. Revocation is effective upon receipt; acceptance is effective upon dispatch. Andrea revoked before Bob accepted.

STATUTE OF FRAUDS:

Even if Bob is able to claim that the contract was formed upon his acceptance on June 22nd because Andrea was estopped from revoking it for a reasonable period of time, Andrea will claim that the contract is unenforceable because, since it is for the sale of goods over \$500.00, it is within the Statute of Frauds. Since this agreement does not seem to fall into any of the exceptions of the S of F, Andrea should prevail on this theory.

ANTICIPATORY BREACH/DAMAGES:

A party to a contract, who, prior to the time of performance, unequivocally repudiates the agreement and expresses a firm indication that they will not perform, is in material breach of the agreement. An anticipatory breach allows the other party to forgo their performance and immediately sue upon the breach. Although Andrea refused to deliver the wine to Bob, there was no contractual obligation to do so; since it does not appear that there was offer and acceptance; or alternatively, that the contract would be unenforceable under the Statute of Frauds, Andrea's refusal to deliver the wine would not constitute an anticipatory breach and therefore she would not be liable for Bob's damages.

Answer B to Question 2

Paul v. Bob

UCC

The Uniform Commercial Code (UCC) governs all contracts involving the sale of goods, such as wine, which are moveable and identified at the time of contracting.

MERCHANTS

A person who holds himself out as having knowledge or skill, or by his occupation holds himself out as having such, peculiar to the services or goods involved in the transaction.

Since Bob owns a wine shop, in the business of buying and selling wine, Bob will be a merchant and therefore held to a higher standard of honesty and good faith in his dealings.

Because Paul is an accountant, he is not in the business of buying and selling wine and as such is not a merchant.

OFFER

An outward manifestation of a present contractual intent with definite and certain terms, quantity, time of performance, identity of parties, price, and subject matter as communicated to the offeree. UCC only requires quantity.

When Bob and Paul orally agreed on June 11 for Bob to sell Paul five cases of Rosso, it can be inferred there was an offer by Paul since the facts state Bob orally agreed.

Paul's oral offer was his outward manifestation showing his present contractual intent to buy five cases of wine (quantity) by July 1 (time of performance) between Bob and Paul (identity of parties) for \$400 per case (price) for Rosso Wine (subject matter).

These definite and certain terms were communicated to Bob on June 11.

There was a valid offer under Common Law and UCC.

ACCEPTANCE

An unequivocal assent acceptance of the terms of the offer. At common law the terms must be a mirror image of the offer. Not so at UCC.

Because the facts state Bob accepted, it can be inferred there was an unequivocal assent

to Paul's offer.

Therefore, there was a valid acceptance.

CONSIDERATION

That which is bargained for and given in exchange for a return promise requiring legal benefit and detriment.

When Bob bargained to sell five cases of wine in exchange for Paul's promise to pay \$400 per case, there was a bargained for exchange.

Bob's benefit is \$20,000 but his detriment is 5 cases less to sell.

Paul's benefit is good wine to serve his guest but at a detriment of \$20,000.

Therefore there was valid consideration and a valid contract.

DEFENSES TO FORMATION

STATUTE OF FRAUDS

Contracts for the sale of goods over \$500 must be in writing in order to be enforceable.

Bob will argue his contract with Paul was unenforceable since it was oral and wine cost over \$500.

However, Paul will show he paid in full for the wine on June 11 and Bob's receipt of payment will be evidence of a contract and remove it from Statute of Frauds.

Therefore there was a valid enforceable contract.

CONDITION - EXPRESS

An event or happening the occurrence or now- occurrence of which creates or extinguishes an absolute duty to perform.

When Bob and Paul orally agreed that the wine would be delivered by July 1, Paul will say this was an absolute duty which must be performed.

Further, since Paul already paid, the condition has been satisfied on behalf of Paul.

DISCHARGE - IMPOSSIBILITY

A change in the circumstances causing one party not to be able to perform due to unforeseen difficulties.

Bob will argue when Andrea, the supplier refused to supply Bob with Rosso due to their breached contract that this was an unforeseen event causing it to be impossible for Bob to perform.

Paul will argue the wine was available but at a higher price therefore it was not impossible.

COMMERCIAL IMPRACTICABILITY

Where the cost of contracting far exceeds (10x's cost) the expectations of parties.

Bob will argue the cost of wine had increased from \$250 per case to \$330 per case and the cost was in excess of what had been anticipated.

Paul will argue the cost did not exceed what would or could have been expected and were not 10x's the cost of what originally contracted for.

Therefore, Bob's argument will fail.

BREACH

An unjustified failure to perform which goes to the essence of the contract.

When Bob did not supply Paul with the wine he had already purchased, Bob unjustifiably failed to perform that which was the very essence of the contract.

Therefore Bob is in major breach.

DAMAGES

General - Expectancy damages which the non-breaching party is entitled.

Since Paul already paid for the wine, Paul will be able to recover the amount paid \$20,000 and any expenses related thereto.

SPECIAL - CONSEQUENTIAL

Per Hadley & Baxendale, since it was foreseeable and known at time of contracting Paul

needed wine to wine and dine and impress his business guest, Paul will be able to recover his loss of any benefit of bargain due to loss contracts or any future prospective advantages and recover cost of party.

However, Paul would have to show these were not too speculative and cost of party may not work.

COVER - AVOIDABLE CONSEQUENCES

Since Paul covered and mitigated his damages, Paul bought a replacement wine for \$500 a case, Paul will also recover the difference in the wines or \$5,000.

Paul will also have a Tort action as discussed.

Bob v. Andrea

UCC - defined and discussed supra. Wine is the good involved.

MERCHANTS

Defined supra.

Both Bob and Andrea are merchants. Bob as discussed supra and Andrea due to she is a producer and seller of wine.

Both are held to higher standard of honesty and good faith in dealing.

INQUIRY

Conduct or language inviting one to deal.

When Bob called Andrea on May 15 and asked about her prices for Rosso wine, Bob was using language inviting Andrea to deal.

Therefore, there was an inquiry or preliminary offer.

Andrea will argue this was an offer since Bob stated exactly what he wanted but since Bob was merely "asking" and therefore not making an offer.

OFFER

Defined supra

When Andrea told Bob over the telephone she would deliver 20 cases of Rosso wine, Andrea was making an outward manifestation of her present contractual intent to sell Bob the wine at \$250 per case.

Since the only term necessary under UCC is quantity, 20 cases, there was a valid offer.

Under common law, you also have the price at \$250 a case, Rosso Wine, subject matter, for delivery June 28, time of performance and between Bob and Andrea, identity of parties.

Therefore, under the common law and UCC there was a valid offer by Andrea.

REJECTION

A rejection of the terms of the offer and a new offer requiring acceptance.

When Bob told Andrea on May 15 he had to think about it, this was a rejection of Andrea's offer. The fact that the price was too high would not be a counter offer since no alternative price given.

OFFER

Defined supra.

When Andrea faxed Bob on June 12 with the price of \$330 per case, she will say this was a new offer since Bob rejected the May 15 offer.

Bob will argue Andrea offered to hold the offer open until June 15.

However, since there was no written agreement under FIRM OFFER, in order to hold an offer open without consideration there must be a writing.

OPTION CONTRACT

An offer will be irrevocable for the time stated with consideration given.

Bob will argue Andrea as merchant in good faith agreed to hold open however since not in writing would need consideration.

Under UCC, because they look for contracts under good faith, because Andrea reaffirmed the offer to remain open until June 15, her original offer might remain in effect without consideration.

ACCEPTANCE

Defined supra.

Bob will argue the original offer valid and his acceptance was valid.

Andrea will argue she made a new offer which was not accepted, by Bob and which she revoked on June 12.

REVOCATION

The termination of offer is power of acceptance.

Andrea will argue she revoked her June 12 offer with her call to Bob however, since she refers to price of \$250, and because the court could find the original offer to hold open done in good faith, her original May 15 offer was valid and Bob's acceptance valid.

CONSIDERATION

Defined supra

Andrea bargained for sell of wine and Bob promised to pay \$250.

STATUTE OF FRAUDS

Goods over \$500 requiring writing.

Bob will agree no writing therefore unenforceable contract.

Andrea will again argue when he faxed Andrea on June 12 accepting the May 15 order his writing would be sufficient as a writing to remove from Statute of Frauds.

UCC-207

Bob will argue the fax of June 12 did not change any terms which materially altered since original price was \$250 and Andrea's refusal was not in good faith.

If court determines Andrea in Breach, Bob's damages would be the cost paid by him to Paul. Except no special since not known at time of contracting about need for Paul's guest.

Paul's Tort Action against Bob

Interference with Contract/Future Prospective Advantages

The intentional interference with a future prospective economic advantage.

Since Paul won't prove the acts of Bob intentionally probably won't recover.

If so, recover by proof of clients, benefitting bargain.

Question 3

Dan and Vicki had lived together for five years when Vicki ended the relationship. Vicki moved into an apartment with Ann and Ann's boyfriend, Charles. Dan called Vicki repeatedly begging her to come back. She refused. Depressed because of Vicki's refusals, Dan ingested marijuana, cocaine and alcohol. After doing so, he drove to the home of his friend, Frank. He entered the open door and; seeing no one, picked up a knife from the kitchen counter, and walked out. Just as Dan was about to enter his car, Frank returned from the garden and called out to him. Dan turned and brandished the knife. Frank saw that the knife was his but believed Dan's gesture was a wave and a request to borrow the knife. He waved back and Dan drove away.

Dan drove to the apartment where Vicki was staying. As he was about to knock he noticed Charles's name on the mailbox next to Vicki's name. Seething in a jealous rage, he broke the door lock, entered, and assaulted Vicki, stabbing her multiple times with the knife he had taken from Frank's house. Ann and Charles tried to subdue Dan, but he stabbed them too. Eventually, by agreeing to go with him, Ann, who was not seriously injured, persuaded Dan to leave. Vicki died before help arrived. Charles was hospitalized for several days but survived.

Dan drove back to Frank's house and told him what had happened. Frank was horrified but agreed to say nothing and buried the knife in his garden. Frank then called a cab and gave Dan money to pay the fare. Dan directed the cab to take him and Ann to the hospital, where Dan was arrested. Later, at the police station, Dan claimed to remember nothing of what had occurred.

Based on evidence of the above facts what crimes can be charged against Dan and Frank, separately, on what theories might each of the crimes be charged and what defenses might Dan and Frank each reasonably raise? Discuss.

Answer A to Question 3

PEOPLE v. DAN

Burglary

At common law, burglary is the trespassory breaking and entering of the dwelling house of another at nighttime with the intent to commit a felony or any theft therein. Modernly, the requirements of night and the dwelling house requirement have been eliminated and criminal liability may attach without these elements. When Dan went to his friend Frank's house, he entered through an open door. There was no breaking. Further, the common law requirement of nighttime (the time the sun goes down to the time it comes up) may not be satisfied for reason that from the facts, adduced, no time is given. Because Frank eventually saw the knife which Dan had taken, it might be reasonably concluded that there was sufficient light outside to see a knife. There are insufficient facts to indicate that he entered with intent to commit any felony or theft. The facts given are insufficient to provide a basis for criminal liability for burglary as against Dan.

Larceny

Larceny is the unlawful taking and carrying away of the property of another with the intent to permanently deprive the owner of possession thereof. Dan took the knife. He had no permission to take it, so he unlawfully took it. The asportation element of the offense was satisfied in that he carried the knife from its found location outside Frank's house. Any carrying, however slight, will be sufficient to satisfy the asportation element. The knife was Frank's, not Dan's. It was the property of another and thus this element was satisfied. Because Dan had taken the knife outside of Frank's residence and because he did, in fact, brandish the knife to Frank, it can be reasonably inferred that he did intend to permanently deprive Frank of the knife. The animus furandi element was accordingly satisfied. Dan may attempt to raise the defense of voluntary intoxication. This is usually not a valid defense, but may however be introduced to show that he lacked the necessary mens rea (criminal intent) to commit the crime. Here, the mens rea of the larceny was the intent to permanently deprive Frank of the knife. He did, in fact, intend to do so, and the mens rea requirement is satisfied. This is corroborated by Dan's brandishing of the knife, which is not a normal response when somebody is drunk or under the influence. The mens rea requirement was satisfied in that Dan did actually take and carry away the property of Frank. The fact that Frank later acquiesced to the mistaken belief that Dan was borrowing the knife was insufficient, because consent after the fact of larceny is not a defense.

Assault

Assault is an attempted battery (unlawful harmful/offensive touching of another without consent or privilege) or an attempt to create an unreasonable fear of harm. Here, Frank, having seen Dan as he was just about to enter his car, Dan turned and brandished the knife. Frank, albeit by mistake, believed that Dan was simply waving at him, was sufficient not to cause him to be fearful of an eminent harmful or offensive touching. A requirement for liability for assault is that the victim be aware of the assault. Here, Dan was not so aware and accordingly criminal liability for assault should not attach. The mens rea requirement that Dan intend to attempt to commit a battery on Frank is absent from the fact that Dan did wave back to Frank. This is not an act of hostility. The brandishing of

the knife may very well have been a mistake on Dan's part caused by his marijuana/cocaine/cocktail cocktail.

Homicide (with Burglary and Battery)

Murder is the unlawful killing of another with malice aforethought. The mens rea of murder is the malice aforethought, an intent to kill will suffice as the requisite mens rea. The actus reus of murder is the actual commission of the death producing act. Commonly today, murder is classed in degrees. First degree murder commonly requires a premeditation, felony murder or murder by poison, torture, etcetera. All other murder is second degree murder. Here, Dan burglarized Ann's house by breaking and entering (see definition supra) of the dwelling house of another with the intent to commit a felony (homicide) therein. However, at common law, liability may not attach because there is no indication that the breaking and entering was during the nighttime.

Murder may be reduced to voluntary manslaughter upon a showing that the killing was the result of an adequate provocation. Evidence will be allowed to show the adequate provocation on an objectively reasonable person test, however, many courts will permit evidence to be evinced showing the defendant's particular state of mind. For the adequate provocation rule to be effective, Dan must prove that he was actually provoked, that any reasonable person would be provoked in the same or similar circumstances, that there was no period of time for him to "cool off" and that he did not actually cool off. It appears that Dan was in a jealous rage when he effected a battery (unlawful harmful touching of another without consent or privilege) upon Vicki and stabbed her multiple times with the knife. Whether a reasonable person would be in such a jealous rage as a result of finding out your girlfriend of five years was now living with another man (although reasonable investigation would have shown that Charles was not in a relationship with Vicki) would be sufficient to adequately provoke one to homicide is a question of fact for the jury to decide. However, it seems that a reasonable person would not commit murder over the loss of a five year relationship. Between the time Dan saw the name on the mailbox next to Vicki's and the time he burglarized, battered and then killed Vicki, there was an insufficient time to cool off Dan's emotions. It appears that Dan's emotions were not cooled off. Because the test for adequate provocation voluntary manslaughter (voluntary manslaughter being murder with facts negating the malice aforethought requirement) is objective based upon a reasonable person test, Dan should not be able to successfully defend to the point of a verdict of voluntary manslaughter.

Further, the fact that Dan went to pick up a knife prior to his going to Vicki's house is corroborative of a premeditation and planning of this homicide. Dan did, in fact, intend on inflicting serious bodily injury to Vicki (malice aforethought). This is sufficient to justify the mens rea requirement. This serious bodily injury resulted in Vicki's death within one year and a day of the incident and accordingly, Dan is guilty of murder. Dan or his counsel may attempt to argue that his capacity was diminished or that he was not able to form the necessary criminal state of mind to support a finding of first degree murder. Although voluntary intoxication is no defense, evidence thereof may be introduced to mitigate an element of the crime. Accordingly, it will be a question for the jury to determine whether or not Dan is guilty of first or second degree murder because voluntary intoxication cannot generally reduce a murder to manslaughter, it can only reduce first degree murder to

second degree.

In addition, there were no facts adduced that Dan was suffering or laboring under any defect of the mind (including insanity arising from persistent drug/alcohol abuse) so that he was not capable of appreciating the nature and quality of his act, or that his criminal act was the product of a mental defect, etcetera. A defense based upon insanity is unsupported by the facts.

Kidnapping

At common law, kidnapping was the unlawful taking of another person with the intent to remove them from their country. Modernly, kidnapping will include simply taking a person to another place against their will. Even though Ann went with him, he neither removed her from the country nor necessarily took her against her will (she agreed to go with him). Although the fact that Ann was not removed from the country will preclude Dan's conviction for common law kidnapping, Ann's agreement may be vitiated by the fact that Dan had recently accosted and battered her and she was doing so under duress. The actus reus is Dan's removal of Ann against her will to another place, the mens rea is the intent to effect such a removal. Dan will again attempt to raise intoxication, but it was voluntary and should not be sufficient to mitigate his criminal liability for kidnapping.

Battery

Battery is the unlawful application of force to another without consent or privilege. Dan did, undisputedly, stab Vicki, Ann and Charles. The fact that he may not have touched them with his body is immaterial. The knife was an extension of his body and an instrumentality of his crime. The mens rea is the intent to apply force and the actus reus is the actual application of the force to the victims. Battery is a general intent crime and intoxication should prove an insufficient defense.

Attempted Murder

An attempt is the intent to commit a crime with a substantial overt act committed in furtherance thereof. Here, Dan attempted to murder Charles in that he did, in fact, stab him, inflicting serious bodily injury, which is sufficient for murder. Dan acted with malice aforethought because of the fact that in stabbing Charles, he intended to inflict serious bodily injury. The same attempt applies to Ann. For defenses, see homicide supra.

Conclusion

Dan is criminally liable for burglary, potential larceny, multiple counts of battery, criminal homicide, attempted murder, and kidnapping. His defense of intoxication will only serve him to the extent it may mitigate first degree murder to second degree murder.

PEOPLE v. FRANK

Accessory After the Fact

Those who give aid or comfort to a felon or assist in concealing a felon or evidence may be convicted as an accessory after the fact to underlying felony. Modernly, the accessorial liability of being liable for the underlying crimes does not apply to accessories

after the fact.

Misprision of Felony

One who conceals the perpetration of a felony of another, with knowledge thereof, without apprising the proper authorities, is guilty of misprision of felony. Here, although Frank told Dan to take a cab to the hospital, where he was eventually apprehended, Frank was under an affirmative duty to immediately inform the authorities. Here, not only did he aid an abet Dan after the commission of his multiple felonies; he assisted in concealing evidence of the crime and in failing to report the felony to the appropriate authorities. A possible defense to misprision is that one simply had knowledge but no participation in the subject felony. Again, Frank was an accessory after the fact to such felonies, and this defense should not lie.

Conclusion

Frank is responsible for being an accessory after the fact and for misprision of felony. He was not an accessory before the fact in lending his knife to Dan because he had absolutely no idea that Dan was going to use it to commit murder (lack of mens rea will prevent conviction).

Answer B to Question 3

STATE v. DAN

The State will bring action against Dan for two counts of burglary, larceny, four counts of aggravated assault, three counts of aggravated battery, and first degree murder.

Burglary

COMMON LAW

Trespassory breaking and entering of the dwelling of an other in the nighttime with the specific intent to commit a felony therein.

With the facts as stated, there is not sufficient evidence to prove breaking, since Dan walked into Frank's house through the open door. There is also no facts to prove that the entrance was at night. It is also not clear that Dan had the specific intent to commit a larceny when he entered the dwelling of Frank.

Under the common law there was no burglary.

MODERN LAW

Trespassory entering of any structure with the intent to commit a crime therein.

Once again, there is insufficient evidence to prove that there was a trespassory entering since Dan walked through an open door. There is also not sufficient evidence to prove specific intent to commit a crime within.

Thus, there was no modern law burglary committed.

LARCENY

The trespassory taking and carrying away of the personal property of another with intent to permanently deprive.

Dan did commit a trespassory taking and carrying away of Frank's knife, his personal property. However, the State will have to prove that Dan had the intent to permanently deprive Frank of it when he took it. The fact that Dan returned to Frank later could help Dan in proving that he did not have the intent necessary to prove larceny. However, if intent is proven, then Dan will be guilty of larceny.

AGGRAVATED ASSAULT 1

Assault is either a substantial step towards the perpetration of a battery, or the intentional placing of another in reasonable apprehension of an imminent battery. A crime is made aggravated when it is committed with the use of an instrument such as a gun or knife, capable of causing more serious physical damage.

The facts indicate that though Dan may have intended to assault Frank, Frank was not placed in reasonable apprehension of an imminent battery, and thus there was no completion of this crime. There was no aggravated assault.

BURGLARY 2 COMMON LAW Defined supra.

When Dan broke the lock on Charles' apartment, he committed a trespassory breaking and entering. And while he did have the requisite intent to commit a felony inside, and while the apartment was the dwelling of another, the crime was not committed in the nighttime, and thus there can be no conviction under common law.

MODERN LAW Defined supra.

The actions of Dan will be sufficient to support a modern law conviction since he did trespassorily enter a structure with the intent to commit the felony of either murder or aggravated battery, either of which would suffice.

There was a modern law burglary.

AGGRAVATED ASSAULT 2 -- OF ANN 3 -- OF CHARLES 4 -- OF VICKI Defined supra.

When Dan brandished a knife and began stabbing Vicki, and Ann, and Charles, there were aggravated assaults committed against each one of them. There was a placing of each in a reasonable apprehension of an imminent battery. However, for Ann and Charles, there was a battery which followed, and the assault will probably merge into those aggravated batteries. For Vicki, there was a homicide which followed, and the aggravated assault would merge into that greater crime.

AGGRAVATED BATTERY 1 -- OF ANN 2 -- OF CHARLES 3 -- OF VICKI

A battery is the unauthorized use of force against the person of another. Aggravated is defined supra.

There were aggravated batteries committed against all three of the named victims above. Ann and Charles both received knife wounds, and Ann received mortal knife wounds. Dan will be convicted of aggravated battery against Ann, and Charles. As with the aggravated assault above, the aggravated battery will probably merge into the completed homicide crime committed against Vicki.

HOMICIDE

The killing of a human being by another human being.

CAUSATION

ACTUAL: But for Dan stabbing Vicki, she would not have died in the way and at the time that she did.

PROXIMATE: It was reasonably foreseeable that stabbing someone with a knife would lead to death.

MURDER

An unlawful homicide committed with malice aforethought.

MALICE AFORETHOUGHT

Malice aforethought is proven in four different ways. Either specific intent to kill, specific intent to cause serious harm, depraved heart act, or the felony murder rule (FMR).

The State will probably make use of the intent to kill, or intent to cause serious harm in seeking a conviction.

The State will argue that Dan had intent to kill Vicki as evidenced by the fact that he went to get a knife, and then went directly to where he knew that she would be. There was premeditation. Whether the intent was to specifically kill, or just to harm will not matter at this point, but the State will probably be successful in proving one of the other.

FMR

Under the felony murder rule, a death which occurs during the commission of an inherently dangerous felony will be imputed to the one who committed the felony.

The State will not be able to prosecute under the FMR because of the theory of merger. The felony which they would predicate the FMR on would be either burglary, or aggravated assault, or aggravated battery. Neither the assault or battery can be used, since they were the means of death. The burglary cannot be used, because the felony on which it was predicated was the aggravated assault and battery. Thus the FMR cannot be employed.

DEGREES OF MURDER

1st Degree: Any killing which occurs during the commission of an enumerated

felony, or by poison, bomb, torture, or lying in wait, or any premeditated killing.

If the State is successful in proving that the killing was premeditated, a first degree murder conviction will be obtained.

2nd Degree: Any murder not raised to the level of 1st degree.

If 1st degree murder is not gained, then Dan will be convicted of second degree murder.

MITIGATING FACTORS

Dan may claim that the fact that he had broken up with Vicki and was in a jealous rage would be sufficient for voluntary manslaughter. The court will probably not follow this however, since voluntary manslaughter, which is a killing which would otherwise be murder, but is committed in response to adequate provocation, requires adequate provocation. There was none, and thus will not be mitigation.

DEFENSES

Dan will claim the defense of intoxication to all of the above crimes. However, voluntary intoxication is not a defense unless it can be proven that the mens rea required for the crime was not present.

It will be up to the court or a jury to decide, but Dan will argue that he could not commit a murder with malice aforethought because specific intent is needed. He would argue the same in relation to the burglary, and the larceny. He could not argue this in relation to the burglary, and the larceny. He could not argue this in relation to the aggravated assault and battery however, since those crimes only require a general intent to support the mens rea requirement.

STATE v. FRANK

The State will bring action against Frank for the crime of misprision, and for aiding and abetting a felon as an accessory after the fact.

MISPRISION

The concealment or nondisclosure of the known felonious conduct of another.

The State will be able to argue successfully that when Frank buried the knife in his garden, he completed the crime of misprision. Frank will be convicted of the crime of misprision.

The State will try to prove that Frank would be liable for the other crimes committed by Dan, but as an accessory after the fact, he could not be held liable for the crimes committed by the person he aided and abetted.

The State may also bring an action against Dan for the kidnapping of Ann.

KIDNAPPING

The unlawful confinement and asportation of another.

While the facts indicate that Ann went with Dan willingly, it would also appear that this was under duress, with the possibility of being stabbed. This, coupled with the asportation of Ann would constitute kidnapping. Depending on other circumstances, and the court's decision, a conviction may be gained.

Question 4

Duff is a professor of law at Marbury College of Law (Marbury). His contract provides that he will teach, conduct research, and be of service to the school and community. Hector, one of his students, asked Duff for a letter of recommendation for a job with the office of the Public Guardian. This office represents the interest of minors in child custody disputes.

Duff knew that Hector had been the subject of a confidential disciplinary proceedings in the law school as a result of an accusation by Hector's former girlfriend that Hector had molested the girlfriend's young daughter. Hector admitted his guilt and underwent counseling as ordered by the school's honor court. The police were never contacted.

Hector gave Duff a document waiving any rights he might have to see Duff's letter of recommendation. The document also waived all rights Hector had to prevent revelation of anything in his record including the internal adjudication of the molestation charge.

Duff wrote a recommendation for Hector to the Public Guardian's Office that stated: "I am pleased to be able to recommend Hector to you. He obtained honors grades in my Civil Procedure courses and was an active participant in class. You would do yourself a favor by hiring this young man. " Duff was aware of the molestation charge but chose not to mention it because he wanted to help Hector get a job. Duff was also aware that lawyers in the Public Guardian's office frequently interview young children alone.

On the strength of the letter from Duff the Public Guardian hired Hector. As part of his duties Hector interviewed six year old Valerie and attempted to molest her. She screamed, attracting the attention of Pauline who was walking by in the corridor. Pauline rushed into the interview room preventing any further attempt at molestation by Hector, but the stress caused Pauline to suffer a debilitating heart attack. Hector was arrested, tried, and convicted. He is serving a prison term and has no assets.

On what theory or theories, if any, might Pauline recover damages from:

1. Duff? Discuss.
2. Marbury? Discuss.
3. The Public Guardian? Discuss.

Answer A to Question 4

Under this fact pattern Pauline will bring a fact pattern of negligence against Duff.

Negligence defined: A Negligent cause of action is possible when the plaintiff can prove that the defendant owed a duty to the plaintiff. That the breach of that duty would be actual legal cause of the plaintiff damages minus any defenses.

Duty: Did Duff owe a duty to Pauline? Any party that performs an affirmative act owes a duty of reasonable care to all foreseeable persons that may be affected by that affirmative act.

Duff's affirmative act of writing a letter of recommendation for Hector which he knew of Hector's problem and did not mention them in the letter, owed a duty to all foreseeable people that could be affected by that affirmative act.

Standard of Care: Under the Standard of Care Duff may be viewed under a couple of different hats. One, his standard of care may be that of a reasonable person, a professional as he is a professor of law and someone with a special relationship, but in this case Duff has no special connection with Pauline under the latter two. Therefore Duff is held to the reasonable person standard of care.

Here Standard of Care on a reasonable person would be Duff's burden not to tell of Hector's act, the cost not to tell of Hector's act versus the gravity of harm should Hector continue with these actions and the probability of Hector hurting somebody else. The question is did Duff breach this duty. Since there was really no burden not to tell. Hector had already signed a piece of paper both waiving all rights to Duff's letter and the cost was the same, a stamp and an envelope but the gravity of harm and the probability of harm was greater. Here Hector had already admitted that he had molested a little girl therefore Duff breached his standard of care or reasonable person.

Actual Cause: But for Duff writing a letter of recommendation Hector would not have been hired by Public Guardian which dealt with interviewing young children alone. It was on the strength of this letter by Duff that Hector was hired therefore but for Duff's letter Hector would not have been hired.

Legal Cause: The question here is whether there was any intervening unforeseeable independent causes that would remove legal liability. Here Duff wrote a letter of recommendation. Letter of recommendation is foreseeable to be used that someone will hire that person based on what you wrote in that letter. Duff was aware of where Hector was going to apply. And Duff was aware of Hector's previous accusation and Hector's possible admitted guilt. Therefore there is no legal intervening independent supervening act that would exclude Pauline's cause of action of negligence against Duff.

Damages: Although Hector did not attempt to molest Pauline, Pauline acted as a rescuer. When one acts as a rescuer the party that causes the emergency is held liable to all foreseeable rescuers that might come to aide. Thus the stress caused a deliberating heart

attack by attempting to rescue Valerie who was being attacked by Hector would be considered damages transferred to Pauline.

Defenses: Duff is going to argue various defenses. Assumption of the risk, contributory and comparative. Pauline assumed the risk when she went to the aide. She has a choice not to. Although this would fail under the rescuer transfer doctrine, Duff would still be able to bring it. Duff would argue also contributory and comparative defenses under negligent hiring by public guardian. Public guardian also had the opportunity to contact the school for further information about Hector in this fact pattern there is nothing to say that they did or did not. But those defenses would be raised by Duff. Duff in turn would ask for indemnification from Marbury the law school and Public Guardian. The Law school based that it did not supply its own documents to the Guardian although there is noting in the fact pattern to show they were on notice here and to the Public Guardian for not following through with Marbury which they knew is where Hector came from.

Pauline v. Marbury Law School: Employer of Duff. Pauline cause of action here would be a vicarious liability.

Vicarious liability is an employer-employee relationship where the employer can be liable for the employee if the employees actions were negligent or intentional but within the scope of the employer's business.

Here it can be argued that Duff is an employee of Marbury College and he was acting within the scope of that employment. Professors are readily asked for letters of recommendation and there's nothing here to show that there is any policy not to send a letter of recommendation. This letter of recommendation is in the furtherance of the business Marbury College of Law in that it is in the interest of the college to have its students hired. A hiring rate will bring more students or better qualified students. Therefore it is argued that professor Duff's letter of recommendation was well within the scope of his employment and as such should professor Duff be found liable under Pauline's cause of action Marbury College of Law would be found vicariously liable.

Marbury would have some causes of action against Duff: But would not affect Pauline's law suit against Marbury.

Pauline v. The Public Guardian: Pauline would bring a cause of action against Public Guardian under negligent hiring, negligence and vicarious liability.

Negligence defined supra: Standard of care, defined supra, breach defined supra. The fact pattern defined would be the same as the reasonable person discussed above. What would be imputed here would be the negligent hiring of Hector.

Actual Cause: But for the negligent hiring of Hector, Pauline would not have been injured.

Legal Cause: Defined above. Under the doctrine of negligent hiring it is foreseeable that if one does not investigate its hiring employees then one could create a dangerous situation by hiring an employee who has not been fully investigated. Therefore it is not

unforeseeable that Hector who was not investigated would not molest a client at Public Guardian therefore there is no cutoff of liability under legal cause.

Damages: See above. Defenses, assumptions of risk, see above.

Pauline will also bring a cause of action under vicarious liability as Hector is an employee of Guardian. See above for previous discussion. Facts are difference here in that Public Guardian hired Hector in as such for his actions if within the scope of his business.

Here Hector was working within the scope of his business, he was interviewing a client, which is what he was hired to do and attempted to attack his client. An employer may be exempt by an intentional criminal act by its employee but this would run into the faith of negligent hiring and as such it would be difficult for Public Guardian to avoid damages as it never fulfilled its obligation to investigate Hector. And being that Hector was interviewing children this should have been a priority with Public Guardian considering the seriousness of his position. In the eve of which it could have received information from Marbury College as Hector had signed all releases.

Side Note: Public Guardian will probably bring a cause of action against Marbury and Duff. Duff in that he misrepresented the facts and Marbury because they did not contact the police department even though Hector admitted a criminal act. And with various statutes such as Megan's law Public Guardian was never on notice and would have been if the police would have been contacted under similar statutes such as Megan's Law.

Answer B to Question 4

PAULINE v. DUFF

Pauline will bring an action against Duff for negligence, seeking to recover general and special damages.

NEGLIGENCE

A breach of defendant's duty which actually and proximately causes damage to the person or property of another.

DUTY

Under the landmark case of Palsgraf v. Long Island Railroad, the extent of liability was decided. The majority rule is that liability extends to foreseeable plaintiffs. As will be shown below under proximate cause, Pauline was a foreseeable plaintiff, and thus Duff owed a duty of due care in conducting himself, and in giving the recommendation which was requested.

BREACH

Pauline will claim that Duff breached this duty when he failed to disclose the known criminal conduct of Hector.

CAUSATION

ACTUAL: But for Duff's failure to disclose the information he knew about Hector, Pauline would not have been injured as she was.

PROXIMATE CAUSE: The actions of Duff created a risk of harm to Valerie. Danger invites rescue, and the rescue attempted by Pauline was foreseeable. This was a dependent intervening, rescue force, and it did not break the chain of causation. Duff will claim that the criminal act of Hector would break the chain of causation, and usually the criminal acts of another will act to break the chain of causation, however, the criminal act of Hector was reasonably foreseeable to Duff, since he knew of his previous behavior, and tendencies. The conduct of Hector would not break the chain of causation. Duff would also contend that the negligent act of Public Guardian in not doing a more thorough background check would break the chain of causation. But simply negligence is not sufficient to break the chain of causation.

There was actual and proximate cause.

DAMAGES

Pauline will seek general and special damages.

GENERAL: Those damages which run directly from the injury, past, present and future pain and suffering, disability, and disfigurement. Pauline will recover general damages.

SPECIAL: Those damages which occur as a result of the injury, medical bills, lost wages, etc. Pauline will recover special damages.

PAULINE v. MARBURY

Pauline will bring action against Marbury under the doctrine of Respondeat Superior, seeking general and special damages.

RESPONDEAT SUPERIOR

An employer will be held liable for the torts of their employees which are committed during the course and scope of their employment. The question is whether Duff was acting in an official capacity at the time that he made the recommendation, or whether he was acting outside the scope of his employment. This would probably be a question for the court. However, the likely outcome should they find that he was acting in his job capacity when he made the referral would be that Marbury would be held liable for Duff's negligence. If they did not find that he was acting in a job capacity, they would not be held liable.

If Marbury were found liable under respondeat superior, they could recover indemnity from Duff to cover whatever expenses they were made to pay out.

PAULINE v. PUBLIC GUARDIAN

Pauline will bring an action against public guardian for negligence and for the torts committed by Hector, under the theory of Respondeat Superior.

NEGLIGENCE

Defined supra.

DUTY

Public Guardian owed a duty to check the background of their employees who would be working with children.

BREACH

Pauline will claim that they breached this duty when they failed to find the molestation charges and conviction in Hector's past.

CAUSATION

ACTUAL: But for Public Guardian's breach of their duty, Hector would not have been hired, and there would have been no need for Pauline to rescue Valerie.

PROXIMATE: It was reasonably foreseeable that failure to do a good background check would result in a situation where a worker would be required to rescue someone. As stated above, danger invites rescue. It was a dependant intervening cause, a rescue force, that Pauline came to the aid of Valerie. This would not break the chain of causation. As shown above, Public Guardian would try to use the same defenses as Duff, by saying that the criminal act of Hector would break the chain of causation. But, in fact the duty owed was to find out if there was criminal conduct which would be foreseeable, thus, the failure to find the conduct would not relieve them of liability.

DAMAGES

Pauline would seek and would recover general and special damages, as stated above under Duff.

RESPONDEAT SUPERIOR

Defined supra.

Pauline will seek to recover for negligent infliction of emotional distress which resulted from the tortuous conduct of Hector during the course and scope of his employment.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Conduct of an extreme and outrageous nature which exposes plaintiff to an impact or threat of impact, causing severe emotional distress.

It would be difficult for Pauline to prove this tort, since either a direct impact, or threat of impact is required. In this case, Pauline entering the room and seeing what was happening did not directly expose her to impact or threat of impact, and unless she had a special relationship to Valerie, she would be unable to recover against Hector for this tort, and thus unable to recover against Public Guardian.

Marbury may argue that the fact that the criminal acts committed by Hector were never revealed to the police would relieve them of the liability for not finding out about the criminal conduct. Thus, the criminal conduct would be an independent intervening force, and would serve to break the chain of causation. This would be up to the court to decide.

Pauline may also be able to recover against Duff for Intentional Misrepresentation.

Misrepresentation

A misrepresentation of past or present material fact intentionally or negligently made, with intent to induce plaintiff's reliance, justifiable reliance thereon, and damages.

If Pauline can show that Duff either intentionally or negligently misrepresented the fact that Hector was a wholesome, upstanding citizen, with the intent that he be able to get a job, then she may be able to recover for the damages which occurred to her as a result of Public Guardian's reliance on Duff's misrepresentation.