

ESSAY QUESTIONS AND SELECTED ANSWERS

JUNE 2000 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the June 2000 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 four hours to answer four 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

Debbie hoped to energize her campaign for State Assembly with advertisements on several billboards during the last month of the campaign. In March she signed an agreement with Signs to rent 20 prime-location billboards for 4 weeks in October and for the first week of November for \$1,000 (\$200 per week) per billboard. The standard form supplied by Signs included a clause that provided:

Any breach of this agreement by customer shall result in the total contract price becoming immediately due, plus a cancellation fee of 50% of said price to compensate Signs for related losses.

At the time Debbie signed the agreement, she was the subject of a State Elections Board investigation. On September 20, the Board removed her from the ballot. On September 27, the court refused to reinstate her on the ballot. She notified Signs the next day that she would not rent the billboards because she was no longer a candidate, and suggested another local candidate from her party who would be interested in renting them. Signs replied by letter demanding immediate payment of \$30,000 (\$20,000 contract price plus \$10,000 cancellation fee) pursuant to the agreement.

Signs made no effort to rent the billboards for October, but rented all 20 of them for a total of \$5,000 for the first week of November.

Signs has filed an action against Debbie alleging breach of contract and seeking damages of \$30,000.

What defense, if any, might Debbie assert; is it likely that she will prevail; if not, to what amount of damages, if any, is Signs entitled? Discuss.

Answer A to Question 1

Signs v. Debbie -- Formation

The Uniform Commercial Code (UCC) applies to contracts involving the offer and acceptance of sale of goods. This contract involves the rental of sign space (a fixture on real property). As such the UCC does not apply.

An offer is a manifestation of an assent to be bound to a contract coupled with reasonably certain terms.

An acceptance is the offeree's manifestation of assent to be bound to the offeror's terms.

Here, the facts are limited. Debbie signed an agreement with Signs. This suggests actual manifestations of assent. Likewise, the number of signs, the time of performance and the price are all clearly set out. There is a valid offer and acceptance.

Consideration

Consideration requires that each contractual promise be supported as part of a bargained for exchange. Here, the sign rental in exchange for the price satisfies the consideration requirement.

Unconscionability

An unconscionable term of contract is one which one party had no meaningful choice but to accept (procedural unconscionability) and contains terms unreasonably favorable to the other party (substantive unconscionability).

Here, Debbie will claim that the term (1) making any breach for her requiring immediate payment and (2) subjecting her to substantial liquidated damages is unconscionable. She will point to the fact that this term was a part of a form contract, supplied by Signs. The term is an unusual feature of any contract and Debbie will claim that she was (a) unlikely to know of its presence and (b) even if she knew of it, she had no ability to refuse to accept the term, as it was part and parcel of doing business with Signs.

Signs will respond that Debbie could have done business elsewhere, rather than accept the term, and thus she did have a meaningful choice. This argument fails. "Prime location" sign space is not a fungible good. Debbie could not procure this space anywhere else. Thus, she had no meaningful choice but to accept the term (not taking the space is not a meaningful choice where no equivalent exists).

Debbie will also claim that the term is unreasonably favorable to Signs. This succeeds. The term makes any breach by Debbie a major item (although it does not appear to discharge Signs' duties -- so it is not an express condition) requiring her to pay the full price immediately and subjecting her to extensive liquidated damages. The term imposes no correspondent risk upon Signs. It appears unreasonably favorable to Signs.

As both of the elements of unconscionability are met, a court will not enforce the term.

Liquidated Damages

Even if the term is enforced, the liquidated damages clause has other problems.

A liquidated damages clause is one which provides for a pre-set amount of damages upon breach. Courts disfavor such clauses, and will consider them to be unenforceable penalties unless (a) the damages are expected to be hard to calculate at the time of contracting (b) The amount is not disproportionate to estimated/expected damages (c) the amount is not disproportionate to actual damages, if such can be determined.

Here, the clause provides that upon any breach, Debbie will have to pay a 50% "Cancellation Fee". (This amounts to \$10,000.) Plus the full contract price (which would seem to cover actual expectation damages). As the \$10,000 amount is pre-set, it is a liquidated damages clause.

The clause does not meet the Requirements set forth above. (1) Damages cannot be expected to be hard to estimate, as the likely damages (lost rental income) seem readily calculable. (2) As the \$10,000 is on top of the full contract price (which should compensate for most if not all actual damages) it can readily be viewed as disproportionate to expected damages. (3) Actual damages here are easily calculable, as rental price and time out of service.

The liquidated damages clause will be viewed as a penalty and will not be enforced, as against public policy.

Performance

September 28 - Anticipatory Repudiation

Signs will claim that Debbie's notification to them that she was no longer a candidate (and this was made prior to the time of performance of those duties and thus had no need for sign space) qualifies as an anticipatory repudiation, discharging their duties to her and allowing for an immediate suit.

An anticipatory repudiation is a statement (or expressive conduct) by one party, communicated to the other, that that party will not perform some or all of their obligations under the contract. As anticipatory repudiation will be a material breach (discharging the

other's duties and allowing for immediate suit) if the stated intention, if carried out, would be a material breach.

Here, Debbie's reasonably apparent intention is to refuse to rent the signs. If actually performed, this would be a material breach. Whether a breach is material is evaluated using five criteria:

1. Gravity of the injury to the innocent party.
 - Here, the injury is grave, Signs will lose their entire expected profit and have unrented sign space.
2. Forfeiture to the breaching party imposed by discharging the innocent party's duties:
 - Here, there is no forfeiture imposed upon Debbie, as she has no need of the signs. (She is no longer a candidate.)
3. Ability of money damages to cure the breach:
 - This weighs in favor of minor breach, as monetary compensation can fully cure Signs's injury.
4. Likelihood that the breaching party will lose:
 - Debbie has stated that she will not perform. This suggests that she will not cure.
5. Good and Bad Faith in the breach:
 - This breach is not the result of an honest misunderstanding or the contract's terms. It is an attempt to avoid a known responsibility. Bad Faith.

The factors overwhelmingly support a finding of material anticipatory repudiation.

Frustration of Purpose

A breach is excused if an unforeseen intervening act contravenes a basic assumption of both parties, rendering the contract valueless to one party.

Debbie will claim that her disqualification was an unforeseen event which contravened a basic assumption (that she would be a candidate), rendering the contracted for sign space useless to her.

Not so, replies Signs. (1) An investigation was pending at the time of contracting, so disqualification can hardly be viewed as unforeseen. (2) The assumption that Debbie would still be a candidate was basic to her, but not to Signs (who couldn't care less what she uses the space for).

Signs prevails. Given the pending investigation, a court is likely to find that the risk of disqualification was foreseeable, and is properly placed upon Debbie. The defense fails.

Damages

As has been noted above, the clauses requiring full payment and \$10,000 upon breach are unenforceable.

Thus, Signs will get the ordinary measure of contract damages: expectation damages - but amount that will put him in the position that he would have been in had the contract been performed, plus any consequential or incidental damages minus any amount gained as a result of the breach.

Here, Signs notes that the sign space was unrented for all of October. Thus, although Signs did not lose any benefit for the week in November, it did lose all of October, and thus, says Signs, Debbie should have to pay for all four weeks.

Mitigation of Damages

But wait, says Debbie. One whose contract has been breached by the other party has an obligation to make reasonable efforts to reduce their loss (e.g., by finding another buyer). Debbie correctly points out that she notified Signs of another interested buyer, but still they made no effort to secure a buyer during October.

This prevails. Signs's damages will be the rental price for October less any amount that Signs could have obtained with reasonable efforts to mitigate its damages.

Answer B to Question 1

Debbie defenses

- 1) Formation -- There appears to be a valid contract demonstrating mutual assent by both parties. Debbie signed an agreement with clear and specific terms with Signs. There is good consideration -- she promised to pay (legal detriment), he promised to provide billboard (legal detriment).
- 2) Performance:
 - a.) Signs will argue that Debbie made a clear and unequivocal statement of repudiation in her communication of September 28, which is an anticipatory repudiation of the contract and therefore Debbie breached
 - b.) Debbie can defend by asserting failure of condition precedent to her duty to perform. Since Signs never performed his obligation to place the billboards, Debbie's obligation to pay never matured into a duty to pay.
 - c.) Signs will counter by asserting that he was ready, willing and able to tender his performance on the date due. When Debbie communicated her unwillingness on September 28, he is entitled to suspend performance and sue for breach immediately.

Signs will prevail in this argument under common law because Debbie's breach was unequivocal and material - it went to the heart of the bargain.

- d.) Debbie can raise a second defense -- Frustration of Purpose. Here she will claim that Signs knew of the purpose of the contract to provide advertising billboards for her campaign for election. Because she was disqualified, the purpose for the contract which was known to both parties at the time the contract was formed is no longer relevant.

However, here the facts do not indicate that Signs knew that Debbie was under investigation by the State Elections Board. Therefore, Signs had no knowledge or ability to foresee at time of formation that there was a possibility that events would occur that would eliminate the purpose of the contract.

Debbie, on the other hand, would certainly have been aware of the investigation as the investigation had begun at the time she signed the contract with Signs. Therefore, when she entered into the agreement she had sufficient knowledge to assume the risk that she would be unable to continue her campaign if the Election Board made an adverse ruling.

Thus, Debbie could have bargained for language in the contract that would have protected her should such a ruling be issued by the Board.

Because Debbie had knowledge of the possibility that the purpose of the contract would be frustrated by an adverse ruling, and Signs did not have that knowledge, Signs will prevail - Debbie is in breach.

Damages due to Signs

Under the liquidated damages clause in the agreement, Signs will ask for damages in the amount stated in the clause (\$30,000).

However a liquidated damages clause may not be placed into a contract as a punitive measure. It must be a reasonable reflection of the actual damages, and is usually accepted by the courts only when the damages would be difficult or impossible to measure at the time of formation.

Here, the damages seem to be unreasonable as outlined in the clause rather than a true measure of the financial harm Debbie's breach actually caused. If Debbie breached early, Signs gets the entire price of the contract plus 50% fee for expenses, and he still gets to rent to someone else. If Debbie breached later, he gets the same amount.

Debbie will argue that the court should not uphold the clause because it is an unreasonable measure of Signs' damages, which can easily be calculated.

In addition, she gave him notice that there was another candidate who was willing to rent the billboards. Debbie will claim that Signs didn't act upon this information, waiting until November to mitigate his damages by renting to someone else.

However, the facts don't tell us whether Signs was unable to rent the billboards to someone else because he had done preliminary work for Debbie which had to be reversed before he could rent them to another. We only know that he "made no effort."

At common law one will have his damages reduced if he was able to mitigate his damages by accepting another, as long as it doesn't increase his risk or substantially change his own performance.

Here the court will not admit the liquidated damages clause but will calculate the damages on a reasonable basis it provided Signs the benefit of his bargain -- his expectancy interest.

Since Signs rented the billboards for the first week in November, the \$5,000 that he got will be considered mitigation of damages and will be deducted from the contract price of \$20,000 leaving \$15,000.

Since Signs ignored an opportunity to rent the billboards for the month of October he will have the fee that he could have obtained deducted from the \$15,000 if it is considered unreasonable for him to avoid minimizing his damages.

However, Sales doesn't have to accept any offers that would be different in character or risk from the contracted agreement. If he has valid reason for not taking Debbie's suggestion, and the first opportunity he had to rent the billboards was when he did so in November, then Debbie will be held liable for the difference because the contract price less the November mitigation equals \$15,000.

This amount, \$15,000 will also be reduced by any expenses Signs saved by not having to perform his part of the contract.

Signs asked for \$10,000 (50% of contract) as liquidated damages. The court will not uphold this clause as it seems too punitive and is a measure of damages that do not reasonably consider the amount necessary to make Signs whole.

Here the court will impose those incidental damages (costs to cover to find new renter) that Signs will reasonably need to put him in the position he would have been in if the contract were completed.

Question 2

Deft, a state employee, was devastated when his mother, Victoria, was diagnosed with a rare disease and told she had no more than six months to live. The only treatment was an experimental drug made by Phantax. The drug was being tested in a university study, but Deft was told by the university that there would be no openings in the testing program for at least a year.

Desperate, Deft contacted Em, a Phantax employee, and pleaded with her to steal a supply of the experimental drug, agreeing to pay her for it. She initially refused, but after Deft called her several times and described Victoria's condition, Em agreed. Em gave Deft a package containing the drug. The package bore a Phantax label that gave the recommended dosage. Deft gave Victoria the recommended dosage, which she consumed with a glass of water given to her by Deft. Tragically, Victoria suffered cardiac arrest in reaction to the drug and died.

State law provides that receipt of stolen property is a felony. It also provides that unauthorized possession or distribution of a controlled substance is a felony. The experimental drug is a controlled substance subject to that law.

Based on the above facts:

1. Is Deft guilty of first degree murder on a felony murder theory? Discuss.
2. Is Deft guilty of any other homicide-related offense? Discuss.
3. Is Em guilty of any homicide-related offense? Discuss.

Answer A to Question 2

1) Is Deft guilty of First Degree Murder on Felony Murder theory?

Felony Murder theory is applied when a homicide occurs during the commission of a felony and there is a casual connection between the felony (underlying felony) and the homicide. When this occurs, the malice that is required for a murder charge is implied by the act of committing the underlying felony.

To reach the level of First Degree Murder under Felony murder, the underlying felony must usually be one that is so inherently dangerous that not only is malice implied, but so is the deliberation/premeditation needed for the First Degree Murder. Most jurisdictions enumerate these felonies, i.e., burglary, arson, rape, robbery, kidnapping. All other felonies will result in a Second Degree Murder charge under felony murder theory.

The state law, as given, does not list possession/distribution of controlled substance as an inherently dangerous felony for purposes of imposing First Degree Murder under Felony Murder theory.

While there is a casual connection between the felony (distribution of controlled substance) and the death of Victoria, it will not reach the level of First Degree Murder under felony murder (will likely be Second Degree).

2) Other homicide related offense(s)

Second Degree Murder -- Felony Murder:

As discussed above, when felony does not reach level for First Degree (enumerated by standard/inherently dangerous) a charge of Second Degree Murder can still be applied (all other felonies.) For felony murder (unlike misdemeanor manslaughter) it doesn't really distinguish between a felony that is malum prohibitum (regulatory) or malum in se (act itself is evil). If there is a casual connection between the felony and the death, the malice can be implied. Deft did possess and distribute a controlled substance (a felony in that state) that directly resulted in the death of Victoria. He can therefore be charged with Second Degree Murder under Felony Murder theory.

Involuntary Manslaughter:

When there is no intent to kill (malice) or no evidence of wanton disregard/depraved heart or intent to commit great bodily harm, the killing may be reduced to involuntary manslaughter. In this case, it would be based on criminal negligence (where the act is not on level of wanton disregard/depraved heart but above mere negligence -- usually determined by person acting with knowledge (knowingly) of risk.)

Deft knew that this was an experimental drug and gave it to Victoria without consulting a doctor, pharmacist, or anyone with knowledge of possible side effects, dangers, etc. This would likely rise to level beyond mere negligence, and Deft could be charged with Involuntary Manslaughter (criminal negligence).

While statute also includes Receiving Stolen Property as felony, and while Deft did commit this offense, the casual connection is not present in same way as with "dispensing" to apply Felony Murder-2nd for violation of that statute.

Defenses of Deft

Deft may argue that his actions (felonies committed, etc.) were not the cause of Victoria's death because she was terminal already. The causation argument will not be successful even though she would likely have died in months, anyway. Since the cause of death was heart attack from medication, this satisfies legal "but for" cause and proximate cause (no intervening act to break connection).

He may also claim necessity, but this will only likely mitigate his actions to show no intent/malice and leave him being charged with Involuntary Manslaughter as discussed above.

3) Em

Em may be charged in a couple of ways. Felony Murder/Second Degree Murder -- There was a casual connection between Em's actions distributing substance to Deft and the death of Victoria, so that Em could be charged individually under this theory.

Em could also be charged for actions with Deft. Em and Deft together could be liable for felony of conspiracy to possess and distribute a controlled substance. This was an agreement between them and they were both aware of the purpose and took steps to advance the purpose of conspiracy.

As a co-conspirator, Em would be liable for the acts of Deft, provided they were foreseeable. Em knew that Deft was getting this for his mother and knew it would be given to her. She therefore could be charged with Second Degree Murder under Felony Murder as a coconspirator of Deft.

Em also acted as an accomplice (if conspiracy not appropriate or not proved) since Em was aware of Deft's goals and agreed to take payment for providing the medication.

Accomplice liability will also leave him liable for Deft's foreseeable actions. Common law thus would be accomplice in First Degree Murder as Em actively participated in taking and stealing the controlled substance.

Answer B to Question 2

1. Felony-murder

In order to satisfy the malice requisite of murder, a homicide committed during the commission of a felony enumerated by common law will qualify as Felony Murder and modernly be classified as First Degree Murder.

However, here neither receipt of stolen property or possession or distribution of a controlled substance is one of the enumerated felonies.

Alternatively, if a felony is inherently dangerous or commissioned in a dangerous manner, this would qualify under felony murder.

Receipt of Stolen Property is not an inherently dangerous felony or when Em stole the experimental drug from the University, would this be considered done in a dangerous way?

The question is whether the possession or distribution of the controlled drug would be considered an inherently dangerous felony or of a dangerous manner. Considering that the drug was experimental and there is no stated dangerous properties of the drug, Deft would not be guilty of first degree felony murder.

The felony could qualify for Second Degree Murder.

2. Deft did not have the intent to kill his mother or do her serious bodily injury since the facts state that he was devastated by news of her diagnosis, and that he wanted to extend her life.

Arguably, there is an issue whether he acted wantonly with reckless disregard for her life when he instigated the action and administration of an experimental drug without regard or knowledge of side effects or possible reactions. This is not really supported by the facts because it is clear that his "desperate" actions were done in an attempt to help his mother, since he was told there were no openings in the testing program for her treatment. Deft did not have the requisite intent for any form of first degree murder. Deft would probably not be charged with second degree murder either under this theory since he did not act with a depraved heart.

Causation

However, since there is a homicide which falls within the year and a day rule, and but for Deft's administering the drug, Victoria would not have died (actual cause) and proximately there is no intervening cause of her death, Deft is responsible for the homicide.

Involuntary Manslaughter

Because Deft did not intend Victoria's death or act with malice, he is guilty by criminal negligence - that he should have been aware of a substantial and unjustifiable risk and therefore can be charged with involuntary manslaughter if he is not found guilty of second degree felony murder.

3. Em

Conspiracy (two or more persons required for agreement)

By entering into an unlawful agreement to commit unlawful acts or crimes with Deft, Em is guilty of conspiracy to commit larceny and possession/distribution of a controlled substance.

By modern law an overt act is required, which she definitely manifested by giving Deft the package containing the drug and being paid for it.

Pinkerton's Rule

As a co-conspirator, Em is guilty of all crimes committed in the furtherance of the conspiracy.

She is guilty of Deft's homicide against his mother as well as her conspiracy charges.

Question 3

Art attended a backyard party at Barb's house where friends from his class were celebrating their college graduation. While Barb was grilling steaks in the corner of her backyard, smoke from the grill drifted into the adjacent yard of her neighbor Carol, irritating Carol's eyes and causing her to suffer a painful cough. Carol called over the fence to Barb, asking that Barb turn off the grill because the smoke was hurting Carol's eyes and throat. Barb ignored Carol, who was forced to go back inside her house to avoid the smoke.

Art decided to leave the party at about 10 p.m. because Dave, who had been drinking too much, was getting argumentative. As he stood up and turned to say goodbye, he saw Dave lift an empty glass bottle and realized that Dave was about to throw it at him. Ed also saw this and tackled Dave from behind, but Dave had already thrown the bottle. Barb did not see any of this, but as Art ducked, the bottle hit Barb in the head.

Dave chased Art into the house, pushed him into a bathroom without windows, and put a chair under the doorknob to hold the door closed. Dave then left the party. Art was unable to get out of the bathroom until another person came by several minutes later and removed the chair.

On what theory or theories, if any, might each of the persons named below seek damages; what forms of damages, if any, are available under these theories; and what defenses, if any, should each anticipate?

1. Carol? Discuss.
2. Art? Discuss.
3. Barb? Discuss.
4. Dave? Discuss.

Answer A to Question 3

Carol v. Barb

Nuisance. Occurs when defendant's actions substantially cause the plaintiff the loss of use and enjoyment of their property. Here, Barb was grilling and smoke drifted into Carol's yard. There have been cases where smoke, made up of particulates have been found to be a trespass. However, in the main, smoke can be classified a nuisance as well will here. The questions for determination are whether Carol was abnormally sensitive to the smoke and reacted vastly differently from the average person, and whether the extent of Carol's loss of use and enjoyment is actionable. It appears that Barb did not have reason to know of Carol's adverse reactions to smoke, and did not have to consider Carol's unique reaction. The bigger question is whether did Carol have a substantial impairment of her use and enjoyment of her property caused by Barb, such that damages are available. Barb's gathering was a onetime graduation ceremony lasting a few hours. Considering the fact that Carol was only inconvenienced for a few hours from her backyard, she cannot recover in damages under the theory of nuisance.

Art v. Dave

Assault occurs when the defendant engages in a violent act with the requisite intent that caused the plaintiff to suffer reasonable apprehension of an imminent harmful or offensive touching. Here, Dave voluntarily lifted the empty glass bottle with a conscious effort and without a reflex threw the bottle at Art.

Intent here can be satisfied by the fact that Dave threw the bottle at Art and that the results were substantially certain that with good aim, Art would be hit by the thrown bottle. Art realized Dave was about to throw the bottle at him, and suffered reasonable apprehension by ducking to avoid the bottle, realizing that if one is hit by a bottle that it could hurt. Art wins against Dave on the assault charges as no defenses are available to Dave. Art proves all the elements of the tort.

Damages. Actual damages cannot be proven here. The facts do not state that Art suffered any damages.

False Imprisonment occurs when the defendant intentionally and unlawfully causes the plaintiff to be confined within a bounded area. Here, Dave placed Art into a bathroom without windows and presumably one way out, and secured the door to the room with a chair, locking Art in. The bathroom was a bounded area. Art was aware that he was locked in, and because there were no windows he did not have a reasonable means of escape. Art was confined in the bathroom for several minutes. All the elements for false imprisonment are met.

Defenses. Art did not consent to the false imprisonment. Dave had no authority to confine Art, nor was there any necessity to do so. Neither was there a self-defense issue for Dave. Dave's confinement of Art was unprincipled.

Damages. Available in the range of nominal, general, or punitive.

Battery. A battery occurs when a defendant with the requisite intent causes the plaintiff to suffer a harmful or offensive touching.

Here, Dave pushed Art into the bathroom. Dave's intent was to force Art into the room. It is likely that Dave used some force, more than a gentle shove because Art did not willingly enter the bathroom. Though the shove might not have caused Art any harm, it would certainly have been offensive.

Defenses. None of the defenses for intentional torts apply here.

Damages. Likely damages only nominal.

Barb v. Dave

Battery. Dave is guilty of a battery against Barb.

Transferred Intent. Though Dave intended to hit Art, he hit Barb. The transferred intent allows the victim of the tort to sue, even if they were not the intended victim of the defendant. The requirement is that the plaintiff suffered from the intentional act done with the requisite intent by the defendant. Here, Art violently threw the bottle intending to hit Art but hitting Barb instead. Intent accomplished.

Defense. None available.

Damages. General damages and special damages pled and proven.

Dave v. Ed

Battery. Conceded that Ed engaged in a battery against Dave.

Defenses. Here, Ed was acting in the defense of others. Defense of others is allowed when one reasonably believes that reasonable force is necessary to prevent harm to others. Certainly tackling a person about to throw a bottle is reasonable force to prevent them from causing harm to others. The belief was reasonable under the circumstances, and the force was reasonable to prevent Dave from throwing the bottle and likely causing the harm which he did cause to Barb.

Damages. None to Ed.

Answer B to Question 3

Carol will sue Barb for Private Nuisance - where a person has substantially interfered with the use and enjoyment of your property, there is a remedy. Carol must prove that Barb's smoke from her grilling caused smoke to waft over to her property, that smoke was causing her a painful cough. She had to go inside and could not use her property. Carol will say Barb's smoke specifically caused her to suffer a cough and she was constructively evicted from her property.

Barb will allege the interference was not unusual or substantial and Carol was unduly sensitive. For private nuisance, a defendant must take the plaintiff, she, Carol, as she finds them. Carol's cough was caused by the smoke and that caused her to go inside. Carol can recover, under special damages, any medical expenses incurred; under general, any pain, plus future pain and the diminished value of her property.

Barb will sue Dave for Battery - the intentional, harmful or offensive touching of another. Barb will show Dave threw the bottle. He intended to throw the bottle and the bottle actually hit her and was the direct cause of her injuries.

Dave will argue that he did not have the specific intent to hit Barb and this was an accident.

Barb will say under the theory of transferred intent that Dave's intent to throw the bottle at Art was sufficient. The intent to harm Art can be transferred to Barb. The court will agree.

Dave will allege that battery is a specific intent tort and that since he was drunk he could not have formed that intent.

The facts show Dave was drinking and became increasingly argumentative. It is arguable that his voluntary intoxication did reduce his ability to form the intent to harm someone.

More facts would be needed, i.e., did Dave drink to re-inforce his pre-existing intent to Art?

If the court finds for Barb on battery, she can recover special damages, medical care plus future medical care, special damages, pain and suffering if she is maimed, possible loss of society, etc.

Art will sue Dave for several torts. Assault - when a person intentionally places a person in imminent fear of harmful or offensive touching. When Art saw Dave pick up the bottle and cock his arm in Art's direction, Art was in fear of an imminent harmful touching. Dave will say Art was mistaken. Dave never intended to throw the bottle at Art. Art will argue Dave's intent was apparent by his previous argumentative nature and acts immediately before and after.

The court will say Dave is guilty of assault to Art.

Art will sue for Battery - the harmful or offensive touching. When Dave placed his hands on Art and shoved him into the house, that was a battery. The court will agree with Art that Dave battered him.

Art will sue Dave for False Imprisonment - when an act of a person intentionally causes a person to be confined, with intent to confine that person, resulting in actual confinement, and that person's awareness of confinement. Art will show that Dave forced him into the bathroom and shoved the chair under the doorknob and that caused him to be imprisoned. He was aware of it and Dave, as evidenced by putting the chair in front of the door, intended it.

Dave will argue Art consented by failing to resist. Art will say he acted reasonably under all the circumstances that Dave's aggravated state made it reasonable not to resist. Dave will also state Art had a duty to escape and did not. The facts show that Art was unable to escape.

The court will say none of Dave's defenses hold water.

Art will sue Dave for Intentional Infliction of Emotional Distress - extreme and outrageous conduct by a person with the intent to inflict emotional distress and, in fact, results in emotional distress. Art will say, that taken as a whole, Dave's assault and battery, and false imprisonment combined to demonstrate extreme and outrageous conduct. The issue is: did Art suffer any emotional distress? The facts are absent but he probably did. A reasonable person subjected to the prolonged attack by Dave probably would have.

If Art did, in fact, suffer severe emotional distress, he will be allowed to recover?

Again, as to all intentional torts, Dave will allege the defense of voluntary intoxication (previously discussed).

If Dave's defense fails, Art can recover general damages, emotional distress, any pain and suffering, and loss of society.

Art can recover special damages of torn clothing, present and future medical expenses and incidental costs.

Dave will sue Ed for battery - intentional, harmful or offensive touching of another person.

Dave will say Ed intended to tackle Dave. When Ed did this, he touched Dave and it was at least harmful. Dave does not need to show any damages with this or any intentional tort.

Ed will allege the defense of justification. Here Ed will say that when he saw Dave with the bottle, about to inflict serious injury to someone (Art intended but Barb actually), he had the privilege to act in defense of Art or Barb. Here there is a problem. When a party uses justification as a defense to battery, mistake is not a defense. So Ed will have to say it was Barb he was defending. Different jurisdictions have different rules but generally the party alleging the defense has the right to use the force. The party being assaulted has the right to

use, i.e., stands in the shoes of the potential victim. Here Barb could have used reasonable force to prevent being struck with a bottle. Tackling the perpetrator would be reasonable, so Ed can use this defense. Dave will not recover.

Question 4

Alice owned a drawing by Picasso which had an appraised value of \$20,000. Alice had long admired a small painting owned by her friend Bob. Both Alice and Bob thought Bob's painting was by Matisse. Had the painting been by Matisse, it would have been worth \$25,000 or more. In reality, and unknown to Bob, Bob's painting was a worthless forgery.

Bob said to Alice: "Since you like my Matisse so much, I'll trade it for your Picasso." Alice immediately agreed. She gave Bob her Picasso and took Bob's painting. Bob then sold the Picasso to Charles for \$20,000. Charles gave the Picasso to his grandmother, Gram, for a birthday present. Shortly thereafter, Alice had the painting she received from Bob appraised and discovered it was a fake.

1. What rights, if any, does Alice have in an action against Bob? Discuss.
2. Does Gram have good title to the Picasso? Discuss.

Answer A to Question 4

Governing Law

Contracts for the sale of goods are covered under the UCC. Since this contract is for sale of paintings which are moveable and tangible, it will be goods and the UCC will govern. The facts do not state that the parties were merchants -thus we will assume they are merely private collectors.

Offer

An offer is the outward manifestation of present contractual intent communicated in clear and definite terms to the offeree.

Here, Bob made a clear communication, which included the terms of subject matter and quantity (two paintings), parties (Bob and Alice), and price (Picasso painting in exchange for Matisse painting); and implied a reasonable time. Thus, there was a valid offer.

Acceptance

An acceptance is the outward manifestation of unequivocal assent to the terms of an offer. Upon hearing B's offer, A immediately agreed. Thus, there was a valid acceptance.

Consideration

Consideration is the bargained for exchange in a contract, whereby each party incurs a legal benefit and a legal detriment.

B incurred the detriment of having to give up his Matisse in exchange for A's detriment of giving up her Picasso. Since the exchange was bargained for, there is valid consideration.

Defenses

Statute of Frauds

The Statute of Frauds requires all contracts for the sale of goods of \$500 or more to be in writing to be enforceable. Since the contract here involves goods valued between \$20,000 and \$25,000, it will fall within the statute of frauds.

Removing Contract from the Statute

UCC contracts may be removed from the Statute by, 1) a sufficient memorandum, 2) part performance, 3) part payment or, 4) manufacturing of unique goods. Since both parties have executed the contract, it is fully performed, thus removing the contract from the Statute of Frauds.

Mutual Mistake

If both parties to a contract make a mutual mistake as to a basic assumption of fact on which the contract is made, it will be voidable by the adversely affected party, as long as he did not bear the risk of mistake.

Here, both parties mistook the value and authenticity of one of the paintings, believing it to be a \$25,000 Matisse when, in fact, it was a worthless forgery. Since the value of the painting is material, A may void the contract under the theory of mutual mistake.

Unconscionability

When the contract is so unfair as to be unconscionable for the courts to enforce, they may render it null and void.

Here, the giving of a \$20,000 Picasso in exchange for a worthless forgery is extremely unfair. The court may throw it out as unconscionable.

Negligent Misrepresentation

A negligent misrepresentation occurs when one party to a contract makes a (1) negligent false representation (2) of past or present material fact (3) with intent to induce plaintiff's reliance, (4) causing justifiable reliance and (5) damages.

Here B made a false representation that his painting was a Matisse and was negligent since he should have made sure of his assertion. His misrepresentation was of past and/or present fact: Past - that Matisse painted the picture; Present - that it was a Matisse painting. He intended A to rely on his statements and A did, in fact, rely on his statements to her damage. B's misrepresentation should be a valid defense to enforcement of the contract.

Executed Contract - All Duties Performed

Each party has performed their duties under the contract.

Discharge of Duties

Frustration of Purpose

A will argue that her duty to give the painting should be discharged and she should recover the painting since the aforementioned facts render the purpose of the contract frustrated by an unforeseeable event which A did not assume the risk of occurring.

Defenses to Formation - Discharge Duty

The defenses to formation, supra, will also discharge A's duty to perform. However, since she has already performed, she may have a problem here.

Material Breach

Assuming the contracts were formed and executed, A will sue for Material Breach - the unequivocal and unjustifiable refusal to perform, which goes to the essence of the contract.

Breach of Express Warranty

A will submit evidence that B expressly stated that the painting was a Matisse, thus creating an express warranty. Since the painting was not, in fact, a Matisse, B will be in breach.

Implied Warranty of Fitness for Intended Use

This will not apply; it is only for merchants.

Rights and Remedies of Alice in an Action Against Bob

UCC Perfect Tender Rule

Under the UCC, when the goods or tender of delivery fail in any respect to conform to the terms of the contract, the buyer may (1) reject the whole, (2) accept the whole, or (3) accept any commercial unit and reject the rest. Here, since there is only one unit, A may accept or reject it.

Buyer's Remedies After Acceptance

A is required under the good faith requirement to notify B within a reasonable time of when he discovers the breach. She must then ask for instructions on returning the non-conforming goods, and if no instruction is given, may, 1) return the goods to the seller, 2) sell them on the open market or, 3) keep them for the seller's account.

Avoidable Consequences - Cover

Normally, A would be required to cover her damages. However, since the painting she received was a worthless fraud, she will not be able to sell it and receive any profit. Therefore, she will not be required to cover.

General Expectation Damages

A will be entitled to expectation damages under the contract. These are calculated by finding the difference between the price of the goods as contracted for and the price of the goods as delivered. Had the painting been a genuine Matisse, it would have been worth \$25,000. The forgery, which was actually delivered, was worthless. Therefore, A could recover \$25,000 in expectation damages.

Consequential Damages - Hadley v. Baxendale

There are probably no foreseeable consequential damages.

Restitution

Under restitution, B will be required to pay damages for the reasonable value of the painting A gave up. The Picasso was valued at \$20,000 so that will be the amount recoverable under restitution.

Equitable Remedies

Specific Performance

When the goods are unique such that legal damages, money, is not sufficient, the courts may grant the equitable remedy of specific performance.

Here, A will argue that the contract was for unique goods, and that B should have to give her a genuine Matisse. However, B will contend that he doesn't own a genuine Matisse and may have no way of obtaining one.

Rescision

The court might possibly rescind the contract, restoring the parties to the position they were in before the contract was made, however, this is unlikely.

Does Gram Have Good Title to the Picasso?

Upon receiving the Picasso from A, B had voidable title. This means that A could recover title to the painting at any time.

However, B did not keep title to the painting, but transferred it to Charles for \$20,000. Charles, in turn, transferred it to Gram as a gift.

The regarding of transfer of title by one who only has voidable title says that one who has voidable title may transfer valid title to a third party who reasonably believes the seller has good title.

Since C had no reason to believe that B did not have good title, C was given good title. This good title was transferred to Gram, who now has good title.

Answer B to Question 4

Contract Theory

Alice vs. Bob

Alice may sue Bob under contract theory in order to rescind the contract.

Offer

An offer is an outward manifestation of present willingness to be bounded if the person to whom the manifestation is addressed assents to the terms of the offer, requiring clear and definitive terms. Here we have quantity (one Matisse and one Picasso), time (present trade), identity of parties (Bob and Alice), price on equal trade and subject matter (paintings). Although the offer is not a very strong, valid one, the intent of the parties are to be bound to trade, and their actions will concur that the offer was valid.

Acceptance

Acceptance is an unequivocal assent to the terms of the offer. "Alice immediately agreed," shows that she unequivocally assented to the terms.

Consideration

Consideration is that which is to be bargained for and given in exchange for a returned promise, requiring detriment or benefit. Alice was gaining a Matisse which she thought was very valuable, and she was giving her Picasso in exchange for the Matisse. Both parties were mutually bound and gained something for their exchange. Therefore adequate consideration existed.

A valid contract had been formed, subject to defenses to formation.

Statute of Frauds

Some contracts must be in writing in order to be valid. These contracts are said to be "within the Statute of Frauds," and aren't valid if oral. One type of contract which must be in writing is when personal property of over \$20,000 is sold between parties. Therefore, in order for this contract to be binding, it must be in writing, however, full performance of the contract (receipt of the property) takes it out of the statute. Therefore, despite an oral contract, this contract is valid because parties have fully performed.

Mutual Mistake

Alice may also claim that the contract is voidable due to Mutual Mistake. Mutual mistake occurs when both parties (Alice and Bob) to a contract share the same mistaken assumption concerning the terms of the contract. Mutual mistake makes a contract voidable by either party. Thus, the contract is voidable.

Specific Performance

Specific Performance is an equitable remedy that the courts will use if there is no legal remedy available to the parties. In this case, no legal remedy is available, because artworks are unique in value and can't be replicated. Furthermore, an award of money damages cannot place Alice back to her original position. The only thing that can restore Alice is if she could retrieve her Picasso painting. However specific performance, as well as any other equitable remedy, will be denied if the good was sold to a bona fide purchaser. In this instance, Charles was a bona fide purchaser, and will retain possession over the Picasso. Therefore, specific performance will be denied.

Restitutionary Damages

If the court feels that Bob was unjustly enriched, they may force him to pay damages to Alice not exceeding \$20,000. However, most likely Alice will be denied recovery because she bore the risk when the mutual mistake occurred.

Does Gram have good title to the Picasso?

When a person buys a good that has been previously sold in a wrongful manner, but is himself a bona fide purchaser, good title exchanges also. Therefore, Charles bought the Picasso for \$20,000 fairly and rightly. The Picasso was bought by Charles who also retained good title to the Picasso. Charles gave the present to his grandmother for her birthday. A present passes title to the receiver, which Gram was. Therefore, Gram has good title to the Picasso.

Tort Theory

Alice vs. Bob

Misrepresentation

Misrepresentation occurs when one induces the reliance of another based upon the falsity of a past or existing fact. One must knowingly use false information to induce the reliance of another. Here both Alice and Bob were under the same mistaken belief that the Matisse was real. Bob did not knowingly conceal or induce Alice to buy the painting, thus he will not be liable for misrepresentation.

Misrepresentation can also be shown through negligence or strict liability. However, the facts do not indicate that this occurred.