ESSAY QUESTIONS AND SELECTED ANSWERS

JUNE 2001 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the June 2001 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 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.

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

Gameco, Inc. ("Gameco") manufactures several varieties of consumer video games. It traditionally sells these games only to wholesalers. In 1998, Gameco and Wholesale Games ("Wholesale") executed Gameco's standard form agreement for the sale and purchase of Gameco's video games. The agreement provides that Gameco "agrees to sell and Wholesale agrees to buy Gameco video games for distribution to retail businesses in California." Numerous terms in the agreement relate to the methods of shipment, payment and the manner in which Wholesale conducts its business in the sale of Gameco's games.

There is no formula in the agreement for determining the minimum or maximum number of games that Gameco is obligated to sell, or Wholesale is obligated to buy, nor is there a period fixed for the duration of the agreement. One paragraph states, however: "This agreement may be terminated at the will of either party by written notice to the other party given by registered mail. Such termination shall also operate to cancel all orders received but not shipped by Gameco."

Since the execution of the agreement, every order of Wholesale has been shipped by Gameco, and Wholesale has promptly paid every invoice submitted by Gameco. In June of 2001, Wholesale learned that Gameco plans to enter into an arrangement with Tryco. Tryco, a major retailer of video games, was Wholesale's primary video game customer in California during 1999 and 2000.

Gameco acknowledged to Wholesale that Gameco is planning to enter into an arrangement with Tryco. Wholesale's representative stated to Gameco's representative, "How can you do this? You told me before I signed your agreement that you would never sell video games to one of our customers during the life of our agreement." Gameco's representative responded only that competitive factors require it to begin selling directly to retailers. The next day Wholesale received a registered letter from Gameco canceling their agreement.

1. Does Wholesale have an enforceable contract with Gameco? Discuss.

2. Assuming that an enforceable agreement exists, what rights, if any, does Wholesale have against Gameco and what defenses, if any, may Gameco assert? Discuss.

Answer A to Question 1

1. ENFORCEABLE CONTRACT

UCC versus COMMON LAW

We have here a contract for the sale of goods as opposed to services. Since this is the case, the precepts of the UCC (Uniform Commercial Code), as opposed to the common law of contracts, will provide all guidance in helping us to interpret the contract's terms.

CONTRACT FORMATION:

To form a legally enforceable contract, one must have an offer made to a designated offeree and received by same, an acceptance, and consideration to bind the agreement.

Gameco, the manufacturer, and Wholesale, the video game wholesaler, have entered into an agreement of which we are not provided with all the terms in this hypothetical. However, we are told that undisclosed terms govern the manner of payment and how Wholesale conducts its business in the sale of Gameco's games. Therefore, we can logically conclude that there is some form of payment arrangement, most likely based on quantity of games purchased by Wholesale; which would form the consideration to effectively bind this offer.

Thus we can logically assume that we have here a legally binding contract.

OUTPUT OR REQUIREMENTS CONTRACT:

There are contracts, called requirements or output contracts, that are separately considered under the UCC. Special rules apply to them. A requirements contract is one in which the buyer agrees to purchase all of his requirements from a specific supplier. An output contract states that a supplier will produce all of his output for a specific customer. Both of these types of contracts do not require consideration, since the good faith dealings of the parties will be deemed sufficient consideration to bind the deal.

What we have in this hypothetical is not a requirements contract or an output contract. The facts state that Gameco and Wholesale executed Gameco's standard form agreement for the sale and purchase of Gameco's video games. This standard form would indicate that Gameco has many other customers whom it supplies, and the facts also do not indicate anywhere that Wholesale agreed to use Gameco as its exclusive supplier. Thus, it appears that this is not either a requirements or an output contract.

BREACH:

A party can breach a contractual agreement in many ways. He can terminate the contract prior to the termination date, or he can act in a manner contrary to the terms of the contractual agreement. He can also display a lack of good faith in his contractual relations with the other party. Thus, there are as many ways

to breach a contract as there are types of contractual arrangements. What we are concerned with here is: Was there a breach?

The facts of the hypo show that the agreement could be terminated by either party at their will by written notice to the other party given by registered mail. Gameco choose to exercise that option two years into the contract when a dispute arose over a change of Gameco's policy regarding only selling their games to wholesalers. Gameco sent a registered letter to Wholesale terminating their agreement.

Technically, Gameco is within their right to cancel since they did so in accordance with a contract provision. However, Wholesale may have some recourse by trying to plead a defense to the cancellation. The UCC would require. Gameco to give reasonable notice of such cancellation, even though such reasonable notice is not specifically called for in the written contract. UCC would assume reasonable notice to cancel. Gameco does not appear to have given Wholesale reasonable notice and thus may not be able to cancel this contract so abruptly.

PAROL EVIDENCE:

The Parol Evidence Rule disallows the admission of certain prior or contemporaneous agreements that were not included in the written agreement. Just what would be excluded under the Parol Evidence Rule would depend upon whether or not the parties had an agreement that was fully integrated, partially integrated or not integrated at all. In other words, have the parties completely committed their full understanding to written form? Also Parol Evidence would be admissible to clarify a term in the integrated agreement, or to show that a separate agreement not covering any of the terms in the main agreement existed.

The facts of this case show that there was a writing that seemed complete. It contained numerous terms that covered everything from shipping to payment, and everything in between. Nothing in that agreement, however, stated that Gameco was under an obligation to forego selling to retailers in spite of their past practice, and corporate policy of only selling to retailers. Gameco is claiming that there was an oral agreement that Gameco would only sell to wholesalers. Gameco violated that agreement by entering into a contract to supply Tryco, one of Wholesale's major customers.

Since the facts of this case show Good Faith dealings in all matters in the past term of this contract, and that this was the first dispute to arise, I believe that Parol Evidence would be admissible to show that a separate contemporaneous oral agreement existed regarding Gameco's agreeing not to sell to retailers. Also, since past practice will show that Gameco never did sell to retailers, I believe this evidence will merely be considered clarifying the relationship between the parties.

I believe Wholesale will be permitted to introduce this parol evidence to show a contemporaneous oral agreement regarding Gameco agreeing to only sell to wholesalers.

IS THERE AN ENFORCING CONTRACT?

A contract can be written in any way the parties choose to write it, so long as the parties are on equal footing, and there are no illegal or unconscionable clauses written into it.

Both Gameco and Wholesale are merchants according to the UCC, and thus they seemed to enjoy equal footing. There do not appear to be any unconscionable clauses in the agreement. Gameco did have a right to terminate this contract, and took the appropriate actions to do so. While the court may apply the requirement that Gameco give Wholesale some notice of the cancellation . . . perhaps 30 days, etc . . . . I believe Gameco cancelled according to the contract provisions.

The fact that Gameco instituted a new corporate policy regarding selling their products to retailers is not in violation of this contract on its face and only if Wholesale can prove a contemporaneous agreement to the contrary, I believe Gameco will prevail in this action.

Clearly there are other video suppliers in the marketplace and Wholesale can just obtain his product from another one. There is nothing in the facts provided here to indicate that Gameco cannot make changes in a corporate policy, no matter how longstanding, in order to increase their competitive position in a free marketplace.

The UCC favors the formation of contracts and good faith dealings between the parties once those contracts are formed. I believe good faith has been the rule here, and Gameco, in good faith, is simply choosing to exercise a clear-cut business decision designed to improve their profit position in the market.

Wholesale once had an enforceable agreement with Gameco, but now that Gameco has cancelled it in accordance with contract provisions regarding cancellation, they no longer do.

2. RIGHTS AND DEFENSES

If an enforceable agreement existed, Wholesale would have the right to seek damages against Gameco. Wholesale could sue for breach of contract and plead their expectation damages under this contractual agreement.

EXPECTATION DAMAGES:

Expectation damages are awarded to give the non-breaching party the benefit of their bargain. However, such damages must be reasonably certain and able to be calculable with reasonable accuracy.

Wholesale could rely on past sales records and show that because Gameco has begun selling to one of their largest customers, they lost the business from that customer. They could probably show reasonable sales figures and use them to plead the amount of lost profits they actually incurred.

INTERFERENCE WITH CONTRACTUAL RELATIONS

Wholesale could also use tort law and sue for the tort of interference with contractual relations. Tort can be used to show that a party has intentional interference with another's prospective business advantage by taking steps to deliberate interference with such. If Wholesale could prove that Gameco intentionally interfered in their contractual relations with Tryco, they could sue for general damages and maybe even reap some punitive damages as well.

I do not believe that Wholesale will have the evidence to show that Gameco deliberately and intentionally interfered in their contractual relations with Tryco.

I do not believe Wholesale will be able to prove the elements of this tort …and I believe Wholesale will not be successful in such an action.

DEFENSES FOR GAMECO:

I believe Gameco will assert the defense that they merely executed a contractual clause giving them the right of cancellation, and that the Parol Evidence Rule should serve to prevent Wholesale from admitting evidence of an oral agreement not contained in the integrated writing.

I believe Gameco will also assert that business policies change, and this change did not violate the contractual provisions since they were well spelled out in a fully integrated writing. This change of selling to retailers did not violate the contract as it was not something agreed to by the parties at the time of contract formation.

DAMAGES:

If Wholesale prevails, they will receive their expectation damages; i.e., the damages they can show as lost profits in their contract with Tryco. They may also possibly get injunctive relief, though such is highly doubtful, by having the court prohibit Gameco from revising this policy of selling to retailers and cease selling product to Tryco. I doubt Wholesale will receive injunctive relief as such would be against general policy regarding free enterprise and the maintenance of an open market. I strongly doubt the courts would permit this, and at most would give Wholesale their lost profits up to the date the court feels Gameco's cancellation of the contract would be legally valid.

Answer B to Question 1

Does Wholesale have an enforceable contract with Gameco?

Validity of a Contract

UCC

The sale of goods shall be governed by the UCC.

Here they have video games, which are tangible goods. Thus the UCC shall apply.

Merchants

Those that hold themselves out with knowledge or skill peculiar to the items involved in the contract.

Gameco, Inc., is a manufacturer of video games and Wholesale is a distributor of the video game, thus both having held themselves out having skill and knowledge of the good to the transaction.

Validity of a Contract

Require the outward manifestation of intent to be bound by contractual agreement, requiring definite and certain terms, communicated to the offeree, mutual assent and consideration. UCC requires quantity term only.

Gameco and Wholesale executed Gameco's standard form agreement with Wholesale, conduct which shows their intent to be bound by contract with mutual assent to the terms within. The terms consisted of Gameco agrees to sell and Wholesale agrees to buy Gameco video games for distribution to retail business in California, methods of shipment, payment, and a method for termination.

The UCC only requires that quantity exist between the parties for the sale of goods. Wholesale and Gameco did not put a specific amount to sell or any formula to determine quantity. However, the terms themselves suggest a requirements output contract type contract, Wholesale orders and Gameco buys what it orders. There are no terms, however, stating total outputs or requirements, but through their cuts Gameco always provided their requirements, thus a requirement contract. Good faith and fair dealing required.

Since they both agree and executed an argument, Wholesale bargained for Gameco's sale of video games in consideration for payment and Gameco bargained for Wholesale to purchase what was sent, thus valid consideration exists.

Statute of Frauds

The sale of goods over $500 shall be in writing.

Since they have an agreement in written form any sale over $500 in video game shall be consistent with the statute of frauds.

Thus a valid contract exists.

What rights does Wholesale against Gameco?

Parol Evidence

Any oral or written statement, made prior to or any oral statement made contemporaneous to the contract shall not alter or vary the terms of the original contract.

Wholesale will argue that it was agreed that Gameco and Wholesale had a lifetime agreement. Wholesale will assert that Gameco told Wholesale that they would never sell video games to one of our customers during the life of our agreement. Gameco will assert that this was not within the contract, that it is parol evidence. Parol Evidence will only be let in to defend a formation of a contract or for subsequent agreements. Wholesale said this was stated prior to signing the agreement, thus Parol Evidence. This statement if relied on could alter the terms of such agreement.

Parol Evidence will bar statement.

Conditions

Wholesale will argue that Gameco breached its implied in fact conditions of good faith and cooperation that is required in all contracts dealings between merchants and especially in requirements type contracts, that Gameco in conducting business with Wholesale's primary video game customer, that they only sold to wholesalers.

However they only traditionally sold to wholesalers and had liberty to conduct business in a manner only in good faith and honesty in fact.

Gameco will argue that due to competitive factors it was necessary to sell directly to retailers. Since there was no bad faith involved in regards to good faith or cooperations, since they sold to Wholesale what they wanted and effectively terminated contract (infra) there would be no breach.

Validity of Termination

When Wholesale received a registered letter from Gameco canceling their agreement, this method was the agreed method of termination according to the contract. The agreement specifically stated that it may be terminated at will, which Gameco did, by written notice to the other party given by registered mail. Such termination shall also cancel all orders received but not shipped by Gameco. Thus all orders were complied.

Therefore valid termination.

Wholesale had a valid written contract with Gameco and was effectively terminated by the terms of the contract. No existence of Breach of the implied

in fact conditions of good faith and cooperation.

Reliance

Wholesale may assert they relied upon the statement never prior to signing (supra) however this will fail since it would alter terms and since there was good faith involved.

Gameco may assert it will lose sales due to the competition, and will be a detriment. However, competition is a foreseeable type of conduct in the business world.

Question 2

Ann dressed herself in the uniform of a Club Ritz valet parking attendant and walked to Club Ritz. When none of the Club Ritz attendants were in sight, she approached a luxury car pulling up at the curb and cheerfully said, "May I take your car?" Harvey, the car's owner, nodded, left the engine running, and went inside. Ann drove off in Harvey's car to pick up her friends Tom and Beth for a planned crosscountry trip. They expressed admiration and surprise about her "new car," but when Ann told them what happened, Tom warned that the license plates would give them away. He affixed license plates from an abandoned car found around the corner, and the three began their trip. When they arrived at a highway rest stop two hours later, they opened the trunk. Inside was a large basket loaded with fine china and the fixings for a gourmet picnic. The trio congratulated themselves on their good fortune and started to feast. Beth, who was very hungry, consumed the entire contents of a large vacuum bottle of soup. Shortly thereafter, Beth died. The coroner subsequently determined that the vacuum bottle had contained a poison that killed her.

When questioned by police, Harvey stated that he and his wife had been arguing, and that he had prepared the soup with the thought of injuring her. However, he asserted that during a later conversation at the club, he and Dawn had settled their differences and were preparing to leave together when he discovered his car was missing. Dawn and others confirmed the reconciliation.

Based on these facts,

1. Is Harvey guilty of murder of Beth and attempted murder of Dawn or any lesser included offenses? Discuss.

2. Is Ann guilty of theft of Harvey's car? Discuss.

3. Is Tom guilty of any offenses? Discuss.

Answer A to Question 2

Is Harvey guilty of murder of Beth?

Homicide

The killing of a human being by another human being.

Beth died from drinking the poison in Harvey's car. We have a homicide.

Causation

But for the poison being in the soup which Beth drank, she would not have died. There was no intervening factor between her drinking the soup and her death, so her death was actually and proximately caused by the poison.

Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice can be found in one of four ways: intent to kill, intent to inflict serious bodily injury, willful and wanton conduct (depraved heart act), or felony murder.

Harvey intended to kill Dawn, not Beth. The prosecution will apply the doctrine of transferred intent and charge premeditated murder. His act of putting poison in the soup also exhibited willful and wanton conduct with a reckless disregard for the consequences. Harvey will be found guilty of murder.

First Degree Murder

Murder committed with the intent to kill plus premeditation, by poison, bomb, torture, or ambush, or during the commission of an inherently dangerous felony or a felony committed in a dangerous manner.

Harvey intended to kill Dawn. He put poison in the soup to accomplish the deed. His thinking and planning ahead exhibits premeditation with the intent to kill. He will argue that he intended to kill Dawn not Beth. The prosecution will argue that the doctrine of transferred intent will transfer the intent from the original victim to the actual victim. In addition, Harvey was to accomplish the murder by poison which also qualifies for first degree murder charge. Harvey will be prosecuted for first degree murder.

Second Degree Murder

All murder not first degree.

If the prosecution is not successful with a first degree murder charge, they will charge second degree murder based on depraved heart act. The putting of the poison in the soup exhibits a reckless disregard for human life. It could be foreseeable that someone else would eat the soup and become poisoned. Harvey could be convicted of second degree murder.

Voluntary Manslaughter

The intentional killing of another with malice provoked.

Harvey will not be able to mitigate his charge of murder to voluntary manslaughter because he was not provoked by Beth.

Involuntary Manslaughter

The unintended killing of a human being by criminal negligence, intent to inflict non-serous bodily injury, or misdemeanor manslaughter.

Harvey will try to mitigate his murder charge to involuntary manslaughter by arguing that it was negligent for him to have the poisoned soup in his car where someone else might get to it, that he did not intend to kill Beth. The prosecution will argue that his actions should not be reduced to criminal negligence since he prepared the soup with the intent to injure. The prosecution will probably win and Harvey will not get his charge reduced.

Is Harvey guilty of attempted murder of Dawn?

Attempt is a substantial step toward the perpetration of the intended crime. In this instance, Harvey intended to kill Dawn. He prepared the soup with poison in it to "injure" her. The prosecution will argue that the preparation of the soup is a substantial step. The defense will argue that it was not a substantial step but mere preparation for the offense. They will further argue that Dawn was not within the zone of danger. The soup was locked up in the trunk and Harvey had made no effort to have Dawn partake of the substance. The defense will probably win on this point and Harvey will not be successfully prosecuted for the attempted murder of Dawn.

Is Ann guilty of theft of Harvey's car?

Larceny by trick

The taking of property from another by misrepresentation of past or present fact which induces the party to give up possession of his property with the intent to permanently deprive.

Ann dressed herself up in the uniform of a Club Ritz valet parking attendant so that customers would believe she was a valet and that they could entrust their car to her. Harvey was deceived by her dress and gave her possession of his vehicle. Ann intended to deprive Harvey of the vehicle when she took possession and did drive off in the car. Her intent was to take a cross-country trip, indicating that she had no intention of returning the car to Harvey, but to permanently deprive him of its possession. She will be convicted of larceny by trick.

Is Tom guilty of any offenses?

Larceny

The trespassory taking and carrying away of the personal property of another

with the intent to permanently deprive.

Tom took a license tag off of an abandoned car and affixed it to the car Ann had stolen. Tom will argue that the car was abandoned and that it was therefore not a trespassory taking. However, the license was attached to the car and will not be considered Tom's. He had the intent to permanently deprive the owner as he was putting it on the stolen vehicle for a cross-country trip. He will be found guilty of larceny.

Misprision

The concealing of felonious conduct.

When Tom took the tag from the abandoned vehicle, it was to keep the stolen vehicle from being identified by the police. He could be found guilty of misprision.

Accomplice Liability

Under the common law, the parties to a crime were defined as principle in the first degree, the one who actually committed the crime; principle in the second degree, one who was actually or constructively present but did not participate; accessory before the fact, one who aided and abetted the preparation for the crime; and accessory after the fact, one who did not participate but assisted after the crime was completed. Modern law combines the principle in the first degree, second degree, and accessory before the fact into accomplices. The accessory after the fact is left separately and is usually charged with obstructing justice.

Tom would be classified as an accessory after the fact. Neither he nor Beth knew about Ann's plan to steal a vehicle but were informed after the crime had been committed. He assisted Ann in concealing the identity of the car by replacing the license tag. He actively assisted her in hiding her crime. He will be convicted as an accessory after the fact.

Answer B to Question 2

State v. Harvey

As to Beth

1) Is Harvey guilty of murder of Beth?

Common law murder is the unlawful killing of one human being by another with malice aforethought. Malice is expressed through specific intent to kill or implied by intent to inflict great bodily injury, depressed heart or attempt/commission or fleeing inherently dangerous felonies (FMB).

Here, Harvey had no intent towards Beth; they had no relationship nor knowledge of each other. Harvey's intention was to do injury to his wife, not Beth. Beth was not a foreseeable person to Harvey at any point. Harvey would have had to foresee that his car would be stolen, that someone would eat the meal he had planned for his wife to be the proximate cause of Beth's death as it relates to the murder charge. Because the theft of his car was an independent supervening cause that would break the causal chain. Harvey would not be guilty of murder of Beth.

Harvey may be charged with 2nd [sic] degree murder, however, under the theory that he had no specific intent to kill but showed a reckless disregard for the natural and foreseeable consequences of poisoning some food that at some point someone will ingest. Again the proximate causation will be a problem because of the impossibility of knowing that someone, even if not the intended victim, will come in contact with the poisoned soup.

The use of poison also could show the premeditation and deliberation needed for 1st [sic] degree murder as it is a natural and probable and foreseeable consequence of poison that someone will die.

Harvey's specific intent to harm would have to be transferred from Dawn (wife) to Beth in order for the malice and premeditation necessary to convict to carry over. This may be difficult because of the lack of foreseeability of Beth's interception of the soup.

If the causation problems don't allow for convictions of murder or the degrees, Harvey could be convicted of involuntary manslaughter under the criminal culpable negligence theory. His act of poisoning soup, regardless of whom it was for and whether he would have gone through with serving the soup, shows at the least recklessness and negligence to make him criminally culpable for the death that resulted from his actions. At the very least battery for the harmful touching, e.g., death.

As to Dawn

Did Harvey attempt to murder Dawn?

An attempt is a substantial step beyond mere preparation towards the completion of a specific criminal act.

Here Harvey made some soup, poisoned it and packaged it, transported

it under the guise of a picnic lunch and took it with him to meet his wife, who[m] he intended to serve it to, with the "thought of injuring her." All of these steps together went beyond mere preparation, as all that remained was to serve her the soup.

Harvey will argue that they had made up and were leaving together and that he no longer had the evil intention. This argument will not absolve Harvey as his previous acts were substantial in nature and manifested his specific intent to harm his wife with the poison.

Harvey can be convicted of the attempted murder of Dawn based on his overt acts towards the completion. The very least Harvey would be convicted of is an attempted battery towards Dawn as he has stated his intent to cause a harmful or offensive contact that would injure her.

Harvey may be convicted of an attempt at the various degrees of murder also, based on his specific intent to injure, which implies malice under the depraved heart or great bodily injury theory. It is also possible to use the use of poison to imply the malice needed for attempted 1st [sic] degree murder as poison implies premeditation and deliberation towards a specific intent to injure or kill.

State v. Ann

Ann would be guilty of theft under the theory of false pretenses.

False pretenses is gaining voluntary possession and title of the personal property of another with the intent to deprive through a misrepresentation of past or present facts.

Ann dressed in the Ritz uniform and pretended to be a valet gaining possession from Harvey, who believed she was an employee doing her job when she said, "May I take your car?" Ann had the intent to deprive when she represented herself, as she had planned a cross-country trip with her friends, and her malicious intent was shown by her waiting until no one was looking.

Ann will try to assert that Harvey consented because he nodded and left the car running for her when she asked, "May I take your car?" This will fail because Harvey was not consenting to the theft, only to her parking the car.

Ann is guilty of the theft crime of false pretenses and larceny for the trespassory taking of Harvey's car.

State v. Tom

Tom could be charged with a larceny of the license plates from the car. A larceny is a trespassory taking and carrying away [of] personal property of another with intent to deprive.

Tom knew the plates weren't his when he took them, therefore larceny.

Tom could also be charged with being an accessory after the fact because he suggested they switch the plates, knowing the car was stolen, and for the purpose of keeping them from being caught.

Question 3

Henry drove to Bakery and parked in front of the shop. He ordered a vanilla frosted doughnut, indicating that he would eat it at once. The server wrapped the doughnut in a piece of wax paper and handed it to Henry. Each piece of wax paper, manufactured especially for this purpose, bears the printed words "NOT EDIBLE," but Henry did not notice that legend. The wax paper is pale gray and translucent; the words "NOT EDIBLE" are printed in white on the paper.

The purpose of picking up and serving the doughnut in a piece of wax paper is to prevent the server from getting sticky and to protect the doughnut and consumer from germs. The wax paper also protects the consumer from getting sticky because the consumer holds the doughnut in the paper while eating.

Henry left the bakery with his doughnut in hand, planning to eat it as he drove back to work. Unfortunately, the wax paper stuck to the frosting and tore. Henry did not hear or see the paper tear, as he was busy trying to make it through a yellow light. When he put the last bite of doughnut with the fragment of wax paper into his mouth, he choked on the fragment, crashed the car, and caused injury to himself and damage to the car.

On what theory or theories might Henry recover damages from Bakery and what defenses should be anticipated? Discuss.

Answer A to Question 3

I. Henry ('H') v. Bakery ('B')

Henry ('H') may seek recovery for his damages by advancing 3 theories under defective products body of tort law:

1.) Negligence

2.) Strict Liability in Tort

3.) Breach of Implied Warranty

Under the negligence theory, the focus of the court will be on fault, while under the strict liability and warranty theories the focus will be on the defective product.

A. Negligence Theory

To be successful under a theory of negligence, H must prove that 1.) B owed H a duty; 2.) B breached that duty; 3.) which actually and legally caused 4.) H's damages; 5.) and B has no successful defenses.

1.) B's duty to H

Under these facts it is likely that B owed H a duty to act with reasonable care in preparing and serving the doughnuts for its customers, since H was a foreseeable plaintiff under J. Cardozo's view that a duty is owed to all unforeseeable plaintiffs in the 'zone of danger.' B owed H a duty to act as a reasonable baker.

2.) Did B breach that duty?

The bigger question is not whether B owed a duty, but did B breach that duty when it served H a doughnut using the inedible wax paper without warning H not eat the paper? In such a case, the court likely will perform a risk/utility balancing test to determine if a breach occurred. In using the 'learned hand calculus' the gravity and probability of harm will be balanced against the utility of the conduct. Here, the utility in preventing "sticky hands" may not hold much weight, but the "germ prevention" should carry considerable weight in this balancing test. If it is determined that the probability of harm from eating the paper is low, and that even if the paper is eaten that the harm which may occur is low, then no breach will be found.

3.) Did serving the doughnut on the paper cause H's car crash?

If H is able to overcome the breach hurdle, he will still need to prove that B's conduct was the actual and legal cause of his injuries. While 'but-for' the paper on the doughnut, H would not have crashed, the intervention of the car crash and the unforeseeable consequences of a doughnut wrapper causing car

damage may break the causal link between B's conduct and H's injuries. If so, proximate cause will be lacking.

4.) Damages - Personal injuries and car damages

H's personal injuries and damages to his car would also be compensable should H be successful in his claims against B.

5.) Did H's fault create a complete or partial defense for B?

When fault is an issue, the court will determine whether the plaintiff acted reasonably under the circumstances. If the jurisdiction recognizes contributory negligence, H's own fault will completely bar his recovery. However, if the jurisdiction is among the majority view who recognize the doctrine of comparative fault, H's recovery will be reduced in proportion to his percent of fault and may even bar recovery if the jurisdiction bars recovery where a plaintiff's fault may not be greater than defendant's.

H's apparent negligent driving likely will show that H is at least partially at fault for his injuries.

B Strict Liability in Tort

H may also advance his claims against B on a theory of strict liability in tort by alleging that the doughnut wrapper was defective via an inadequate warning. Since H was a foreseeable consumer he is a proper plaintiff, and since B was a in the stream of commerce for doughnut wrappers it is a proper defendant.

1.) Was the warning adequate on the doughnut wrapper?

To establish his claim, H must prove the wrapper was defective, which in this case was due to not having an adequate warning, as opposed to a manufacturing defect, or design defect. While the wrapper had a proper warning "not edible" the adequacy of that warning comes into play since the paper was translucent and the printing was white. If the warning was very difficult to read, the court may decide that it would not have placed much of a burden to use black ink, or different paper. Or that B should have told its customers "Don't eat the wrapper." Again this burden will be balanced against the utility and as long as the wrapper would remain viable with this new more prominent warning, the warning may be deemed inadequate and thus the wrapper is defective.

2.) Causal link broken?

As previously discussed though, the causal link between the wrapper and the injuries may have been broken which would prevent the required finding of proximate cause.

3.) Damages

Previously discussed under negligence

4.) Defenses

Under a theory of strict liability in tort, comparative fault and contributory negligence are not available since fault is not what is being analyzed. Instead, B must show that eating the wrapper was unforeseeable, which it can't prove due to its admission on the wrapper itself indicates the thought of eating a wrapper occurred. B may assert that H assumed the risk when he ate the doughnut while driving.

To be successful with this defense, B must establish that H understood the risks and voluntarily exposed himself to them. Going back to the discussion of "adequacy of the wrapper's warning label," B may not be able to show that H understood the risks and therefore could not voluntarily expose himself to them.

(C) Breach of Implied Warranty

Finally, H may advance his claims under a theory that the doughnut, with wrapper attached, breached the implied warranties of quality for merchantability and fitness for intended purposes. While the wrapper was not fit for consumption, that was not its intent. Moreover, under these facts there is nothing to suggest that the doughnut itself was inedible and it will be difficult for H to sustain his claim under this theory.

Answer B to Question 3

Torts

Product Liability

Respondeat Obscurior

Products Liability

Negligence Duty

Negligence Breach

Actual Causation

Proximate Causation

Damages

Defenses

Contributory Negligence

Comparative Negligence

Assumption of the Risk

Warranty Theory of Recovery

Implied Warranty of Merchantability

Implied Fitness for a Particular Purpose

Actual Causation

Proximate Causation

Damages

Defenses

Strict Liability and Tort

Duty

Breach

Causation

Actual Causation

Proximate Causation

Damages

Defenses

Indemnification

Respondeat Superior. An employer is responsible for the acts of the employees when they are committed within the course and scope of their employment. Here, the server wrapped a donut in a piece of wax paper and handed it to Henry, and as such he. was acting within the course and scope of his employment. The employer was Bakery. So Respondeat Superior would be established and the Bakery would be liable for the acts of the employee which were committed during the course and scope of his employment in the Bakery.

Products Liability. There [are] four theories of recovery under product liability.
Intent
Negligence
Warranty
Strict Liability in Tort

Negligence Duty. Bakery will be under a duty not to use a product that would cause a foreseeable risk of injury to its customers. Bakery is using a product that would be considered defective in design and in warning. The wax paper is printed with the words "Not Edible", but the paper is pale grey and translucent, and the words "Not Edible" are printed white on the paper making the warning on the paper very difficult to see. And further, children are also users of donuts, and they might not even be able to read this, so the warning would not be effective for children, who are also foreseeable users, as was Henry.

In addition, the product is defective in design. A product that is defective in design is one which would cause a foreseeable risk of harm and would defeat the consumer's reasonable expectation . . . would defeat the reasonable commercial expectations of the average consumer. The average consumer would not expect that a mere piece of or fragment of the wax paper could cause a consumer to choke, or for that matter, a child. So in that respect, the paper appears to be defective in design. And Bakery, as the user of this product, is negligent in using this product. The supposed utility of using the product is that it prevents the server from getting sticky hands and it protects the donut and the consumer from germs. Wax paper also protects the consumer from getting sticky because the consumer is expected to hold the paper again while eating. However, the risk of a piece of paper that was a mere fragment that can cause choking . . . fragment of the wax paper can cause choking . . in a consumer, and presumably a child, the risk appears to outweigh the utility. And in addition, the warning [is] ineffective, it is difficult to see, and perhaps Bakery was negligent in wrapping the donut in the paper. So there was a duty, a duty was owed to Henry by the Bakery to use a safe and effective product with an adequate warning.

Negligence Breach. Was the Bakery in fact using a product that would be considered defective? In so doing, did they violate a standard of care they might have owed to Henry? As discussed earlier, the design of the paper was such that even a mere fragment of wax paper could induce choking in an adult,

presumably children also would have the same problem; therefore it was probably defective in design. It was likely to be defective in warning, too, if the words only said "Not Edible". An adequate warning might have said "Not Edible. Could Cause Choking if Swallowed." The paper's pale grey, and translucent, and the "Not Edible" printed in white. [The] cost [of] the utility of printing it in a darker color was minor; they could have cured it that way. So both the warning and the design were probably defective. And the Bakery, in using the product, and seeing it, and using it every day, and handling it every day, probably would be judged to be in breach in their duty of due care to Henry to not use a dangerous product that could cause foreseeable danger to him or other foreseeable users in the use of the product. So they have breached their duty to Henry.

Actual Causation. But for the fragment of papers in Henry's mouth, he would not have choked. And therefore he crashed the car and caused injury to himself, and damaged the car. Bakery may defend saying that it wasn't the wax paper that caused, they weren't the actual cause, it was Henry's negligent driving. But in any case, they could come back with a substantial factor if the but-for didn't work, and under substantial factor, with its major contributing cause to Henry crashing his car, so I think actual causation would be established.

Proximate Causation. Was it foreseeable that a person choking on a piece of wax paper would be injure? Certainly the choking was foreseeable; choking on a piece of wax paper is a foreseeable and dangerous event. Bakery will maintain that Henry's negligent driving or even driving while eating a donut would be an independent and superceding cause and therefore cut off proximate causation. They'll defend it saying that he was planning to eat and drive as he drove, or eat the donut and drive back to work, which in itself is a negligent issue. They'll maintain that even eating a donut with no paper on it, he could have choked while he was driving because he wasn't paying attention to what he was doing, can't do two things at once. Henry on the other hand maintains that people eat donuts all the time when they drive and they don't choke and crash. And that it was the wax paper that caused the crash. He will maintain that even if it is considered an independent cause, it was still foreseeable, and that proximate causation will likely be established leading to damages.

General Damages. Damages will be general damages, which is past pain and suffering, past present, and future. He was injured in the crash, so he would be entitled to pain and suffering.

Property Damages. He would also be entitled to property damage. He has damage to his car, he'd be entitled to that . . . damages for that.

Special Consequential Damages. Hadley v. Basingdale. And he probably also has special consequential damages, Hadley v. Basingdale. These would be any injuries of a monetary damage where he would be out of work, and any lost profits as a result of his crash, that would be under special and consequential.

Defenses. Bakery will defend using three defenses. The first will be Contributory negligence. Contributory Negligence is conduct on the part of Henry that could have contributed to his accident, which fell below the standard of care that Henry should have adhered to for his own safety. And namely this

would be the fact that he was planning to eat the donut while he drove, and he was driving; he was running a yellow light, and when he bit the last bite of the donut, the fragment of paper went in his mouth. He wasn't paying attention. They will maintain that he wasn't using a standard of care; he choked as a result of his own contributory negligence, and crashed the car. And in a contributory negligence jurisdiction, he would not be, they could completely avoid paying any damages to Henry in a jurisdiction of that nature.

Henry will defend using comparative negligence. He may say, yes, in a comparative negligence jurisdiction, comparative negligence is defined as negligence where they compared the negligence of both the plaintiff and the defendant, in terms of blameworthiness, and apportion the damage accordingly. In this case, Henry would plead that if he was negligent at all, it was minor; eating a donut is certainly a normal thing that people do, and that if there was any negligence, it would be minor. And the major negligence was the dangerous product, the defective product that was in the wax paper that caused him to choke and crash.

Bakery will also use Assumption of Risk. Assumption of risk is when the defendant knows and understands the danger yet voluntarily agrees to encounter it, and thereby assumes the risk. Henry knew full well that driving a car with a donut in his mouth and running a yellow light was a dangerous activity, and yet he assumed it. He should have probably stopped and eaten his donut and then gone driving, but instead he was eating his donut and trying to run a yellow light and get to where he was going in a hurry. And as a result he assumed the risk of the car crash by not fully paying attention to what he was doing. Bakery will defend on the assumption of the risk. In my view, most likely, all the defenses will fail because the product is defective. And that is the reason why Henry had his car crash.

Implied Under Warranty. We have implied warrant of merchantability. Implied warrant of merchantability is an assurance from the merchant that the product is safe, and it is fair and average quality, and safe in normal use. Under warranty, strict liability is grounded if there is proven to be a warranty and the warranty is proven to be false. In this case, Henry could have expected the paper and donut together as a unit to be safe for his use, and as a merchant, Bakery does warrant the product to be safe for normal use, i.e., eating. So it is likely that the fitness or warranty of merchantability will be found to be not there, and that Bakery will be strictly liable under that warranty. Also for a particular purpose, warranty for fitness for a particular use when a merchant knows the particular use that the consumer is going to put the product to, and the consumer relies upon that merchant's special abilities in producing and selling a product of that nature for a particular use, there is a warranty for a particular purpose. Bakery knew that the product was meant for eating and that the paper would be used with the product, and conceivably someone could ingest a small fragment of the paper, whether driving or a young child, and no would expect that such a thing would cause anyone to choke, and therefore that warranty is also violated. And they will be strictly liable under that particular warranty.

Actual Causation. Discuss supra.

Proximate Causation. Discuss supra.

Damages. Discuss supra.

Defenses were discussed supra.

Strict liability in tort. When a consumer is injured by defective product that was put in the stream of commerce, the manufacturer will be found strictly liable for the injury. In addition, all others in the stream of commerce, which will include the Bakery, would also be liable under strict liability. The product has to be defective when put into the stream of commerce; it can't be substantially altered, and has to be sold by a commercial seller. So there is a hidden suit here that the manufacturer can be sued under strict liability in tort, the manufacturer of the sheet of paper, because they put the product in the stream of commerce, which is eventually used by Bakery. The product was defective when it was put in as discussed earlier, was defective in warning, and was also defective in that a small piece could make you choke. The proximate use in the food service should not . . . it is conceivable that a person or a child might ingest a small piece, it should not cause you to choke, so it was defective. It was put in the stream of commerce, and it was finally sold by a commercial seller, who was the Bakery. The duty of the manufacturer in this case would be to inspect, detect, and correct any defects in the products. Manufacturer probably should have tested this product; the product should have [had] some testing to see if the product label was easy to see, the average person could see it, they would have to resolve the issue what about children [sic] can't read. And most likely the adequate warning would have been to tell the final end user, the Bakery, not to give this product out to people because they might choke on it, especially children, because they can't read. Further, the manufacturer had a duty to test the product by perhaps having volunteers or animal testing with the small piece of the waxed paper to see if it would induce choking, which they obviously did not do. So they had a duty to test, and to inspect and to look for defects, and they did not, and they breached that duty by not doing so.

Actual Causation, we discussed supra.

Proximate Causation, was discussed supra.

Damages discussed supra.

Defenses discussed supra.

In fact under strict liability in tort, the only defense that would be available would be abuse of product. And I don't think that defense would be likely to be workable in that it is foreseeable that someone might eat a small fragment of the paper. That is not abuse of product.

Indemnification. Bakery, even though Bakery was negligent, may try to go back under strict liability and indemnify themselves, they may have a case for indemnification going back to manufacturer if they were successfully sued by Henry. They may go back to manufacturer to try to seek the compensation for their judgement against manufacturer who manufactured the defective products in the beginning.

Question 4

Alice builds swimming pools. She negotiated with Ben, the owner of a luxury hotel famous for its beauty, to build a pool at the hotel for $100,000. During negotiations they orally agreed that Alice would build a spa next to the pool for an additional $20,000. Ben told Alice that the underlying soil might be swampy because the hotel is located near a river. They agreed that even if construction became difficult because of swampy conditions, Alice would still build the pool for $100,000. Alice and Ben signed a written contract stating:

> "Alice agrees to build a swimming pool for Ben according to the attached plans and Ben agrees to pay $100,000. Alice bears the risk of geologic problems. This is the complete and final agreement between the parties."

Neither the contract nor the plans said anything about a spa.

Alice commenced excavation. She discovered that Ben's underlying property was solid bedrock, a geologic condition heretofore unheard of in the area. She truthfully explained to Ben that completing excavation would cost an additional $100,000. She refused to continue unless Ben agreed to pay this additional amount. He reluctantly agreed.

Alice thereafter completed construction using a grade of concrete slightly lower than that specified in the plans. Alice did this intentionally to save money. The lower grade has no impact on the pool's use or durability. However, it does make the pool less attractive. Alice failed to build a spa. Ben has refused to pay Alice anything.

1. To what relief, if any, is Alice entitled and what defenses may Ben assert? Discuss.

2. To what relief, if any, is Ben entitled and what defenses may Alice assert? Discuss.

Answer A to Question 4

The contract between Alice and Ben, since it deals primarily with a service (the building of the pool and spa), will be governed by the common law of contracts.

Alice v Ben

Alice will sue Ben for the sum of $200,000, which she will claim was the agreed amount for the job as modified. To have a valid contract, in addition to an offer and acceptance, valid consideration is required, which must [be] the bargained-for legal detriment each party gives to the other.

Under the traditional view, a party could not come back for more money when circumstances turned out not as the party had thought, since the party was already under an obligation to perform and there was no new consideration offered in exchange for the change in price. Modern courts now permit changes to contracts when unforeseen circumstances make such a change appropriate.

Here, finding bedrock in an area where it had never been found previously represents such a circumstance. Alice will argue that she requested the additional $100,000 in good faith, and that Ben agreed to it. The fact that he reluctantly agreed is of no import. She will claim that she fully performed and that she should therefore be entitled to full payment.

The problem with this argument is that Alice expressly assumed the risk of geologic problems in her agreement to build the pool. Unless she can introduce evidence that the written agreement does not reflect the true agreement of the parties, she will be required to perform the contract for the original price.

Parol Evidence Rule

The parol evidence rule bars the admission of prior oral and written agreements and contemporaneous oral agreements when a writing represents the parties' complete agreement, known as an integration. Alice and Ben's contract explicitly states that it is "the complete and final agreement between the parties." This merger clause will usually be given effect by the courts, since it is strong evidence that the parties intended to be bound only by the terms expressed in the subject agreement. Ben will argue that finding bedrock is irrelevant. That was Alice's risk.

However, the parol evidence rule does not bar admission of parol evidence to explain the contract. It is clear that when Alice took on the risk of geologic problems, both parties were thinking only of swampy conditions. It is likely, therefore, that this evidence will be admitted to show that finding bedrock was an unforeseen condition; the risk of which Alice had not taken on.

Alice will, therefore, prevail in a suit against Ben.

Quasi-Contract

Even if Alice failed to be able to admit evidence showing that she did not assume the risk, she will nonetheless be entitled to recover the fair market value of her services under a quasi-contract theory, since for Ben to be able to pay nothing would result in his unjust enrichment, which the court would want to avoid.

Ben v. Alice

Ben will claim that he does not owe Alice for the pool since, by using a lower grade of concrete, she did not construct it according to the specification, as required by the contract. He will also insist that she had agreed to build a spa and had not done so.

Express Conditions v. Promises/Constructive Conditions

Express conditions must be perfectly performed before a duty arises. Here, however, a court is extremely likely to interpret the specifications as promises that Alice took on. A promise need only be substantially performed to avoid a total breach. Here, Alice will argue, is such a case. The concrete had no impact on the pool's use or durability.

Ben will counter, however, that the pool was less attractive than it would have been had Alice used the concrete shown in the specifications. A court will likely allow Ben to reduce his payment to Alice by the amount of diminution in value caused by her minor breach.

Failure to Build Spa

Ben may also claim that Alice failed to perform their oral agreement to build a spa for $20,000. If this agreement were to be considered part of the agreement to build the pool, evidence of the oral agreement will be barred by the parol evidence rule, especially in light of the merger clause.

However, there is nothing in the pool agreement that suggests anything about a spa, and the agreement to build the spa had its own consideration. As a result, Ben will argue that this was a separate oral agreement, not subject to the parol evidence rule.

He may well succeed with this argument, but, in the end, the same issues of unforeseen circumstances, the risk of which was not undertaken by one of the parties, may enable Alice to avoid having to build the pool at a price that will not permit her a reasonable profit.

Alice v Ben

11 ISSUE - Did Alice breach the contract when she refused to complete excavation through the bedrock?
Under contract law a breach is a failure to perform a contractual duty when performance is due.
Here Alice had a contractual duty to excavate the ground because she contracted to build a swimming pool which required excavation.
Therefore Alice was in breach of the contract.

2) ISSUE - Was Alice discharged of her duty to excavate the ground because of impracticability?
Under contract law one is excused from performance of a duty if unforeseen and unforeseeable events occur that would make performance impracticable. Impracticable events are found when to carry out the duty would be economically ruinous due to the unforeseen events.
Here an unforeseen and unforeseeable event occurred because Ben's "underlying property was solid bedrock." The performance of the duty in the face of this event would be ruinous to Alice because the difference in the cost would make the contract a losing contract and it is of such scale that it potentially could bankrupt Alice is she were forced to perform.
Ben may try to argue that the "risk of geological problems were born[e] by Alice, as stated in the contract, but evidence suggests that even though the geological risks were discussed, they were thought to be related to swampy [ground] rather than bedrock. Since this evidence would tend to clarify the agreement of the parties, it would not be barred by the Parol Evidence Rule; see defined later.
Therefore Alice can raise the defense of impracticable.

3) ISSUE - Was Alice's and Ben's modification of the contract supported by <u>consideration</u>?

Under contract law modifications to contracts must be supported by consideration, a legal detriment sufficient that the court will enforce the agreement, to be enforceable.

Here Alice and Ben agreed to modify their contract by increasing the price by $100,000.

Ben provided consideration for the modification because he agreed to pay an additional $100,000. Alice provided additional consideration, as noted above, by agreeing to excavate through solid bedrock.

Therefore the modification is supported by consideration.

4) ISSUE - Did Alice breach the contract by using, a lesser grade of concrete?

See Breach defined above.

A breach can either be a major breach or a minor breach. A major breach occurs when the non-breaching party fails to get the benefits of his bargain. The non-breaching party to a major breach may accelerate the contract, cease performance and seek immediate payment of damages. If a party substantially performs and gets the benefit of the bargain then any breach would be a minor breach. The non-breaching party to a minor breach is not excused from performance and can seek monetary damages.

Here Alice committed a minor breach because by using "the lower grade concrete, it had no impact on the pool's use or durability."

Ben will be able to claim damages because the "lower grade concrete does make the pool less attractive, and "Ben's hotel is famous for its beauty."

Therefore Alice is in minor breach and Ben can seek monetary damages for difference in appearance.

5) ISSUE - Can oral evidence be entered into the contract regarding the spa?

Under the Parol Evidence Rule any evidence that is prior to or contemporaneous with the signed integrated contract is barred from entry into the contract, unless to clarify the meaning of ambiguous terms of the contract.

Here the oral agreement to build the spa for $20,000 will be barred from the integrated contract because the signed writing evidencing Ben and Alice's agreement states that it "is a complete and final agreement between the parties."

The agreement to build the spa is prior to the written agreement because "during the negotiations they orally agreed that Alice would build a spa next to the pool for an additional $20,000."

Therefore the oral agreement is barred from the written contract.