

**ESSAY QUESTIONS AND SELECTED ANSWERS**  
**OCTOBER 1998 FIRST-YEAR LAW STUDENTS' EXAMINATION**

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

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

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

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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.

**CONTRACTS**  
**OCTOBER 1998 CALIFORNIA BABY BAR EXAMINATION**  
**QUESTION #1**

Joan owns and operates a carpet cleaning business. Two months ago she posted an undated flier on the notice board of a local supermarket. The flier read:

JOAN'S QUALITY CARPET CLEANING  
One week special! Carpets cleaned for \$1.00 a square yard.  
You can beat a carpet, but you can't beat our price!  
Call Joan at CARPETS (227-7387)

Alex saw the flier last week. A checker at the supermarket said she had heard a rumor that Joan had gone out of business but did not recall where she had heard that. The rumor was, in fact incorrect, but Alex did nothing to inquire into the truth or falsity of the rumor. Six days later, Alex mailed a letter to Joan stating that he was hiring Joan to clean his carpets at the rate she stated in the flier. Joan received the letter two days later. She immediately returned to the supermarket and removed the flier. Alex has not heard from Joan.

Barbara, a lawyer, also saw the flier. She telephoned Joan, and during their conversation they agreed that Joan would clean the carpet at Barbara's office every six months for the next five years or for as long as Barbara remained in practice. Barbara then learned that several other carpet cleaners would do the work for less than the price on which Barbara and Joan had agreed. Right after Joan finished the second six-month cleaning, Barbara told Joan she no longer required her services.

Charles called Joan on September 1 and offered to pay her \$500 if she would clean the carpets in his house, which he described. He told her he needed to have her answer immediately. Joan responded: "I think \$500 is too low. I'll definitely do the job for \$1,000, but let me sleep on your offer." Charles replied: "OK. I'll talk to you later." Two days later Joan mailed a letter to Charles, stating Joan would clean Charles' carpets for \$500. In the interim Charles had retained Kwality Kleening to clean his carpets. He immediately called Joan and told her he would not need her services.

1. If Alex sues Joan for breach of contract, what defenses can Joan reasonably assert? Discuss.
2. If Joan sues Barbara for breach of contract, who is likely to prevail? Discuss.
3. Was a contract formed between Joan and Charles? Discuss.

## Answer A to Question 1

### ALEX v. JOAN

Alex will sue Joan on breach of contract but will probably not be able to prevail on formation issues, specifically, lack of a valid offer and acceptance.

### JOAN'S DEFENSES:

#### Was there a valid offer v. invitation to deal?

Alex will claim that he reasonably understood the flier to be an offer. It contained price, and identify of Joan. But Joan will contend that she posted it over two months ago, declared it a "one week special," and listed a phone number where interested persons could call her. She will maintain that it was an invitation to deal and should not be construed as an offer. She will contend that the ad was not specific enough to be construed as an offer. She did not say that ALL carpets would be cleaned, for example.

The courts are reluctant to construe advertisements as offers due to the uncertain response that they may bring. For an ad to be viewed as an offer, it must be specific and be reasonably understood as creating the power of acceptance. It is, therefore, highly unlikely that the court will find an offer ... but if it does ...

#### Was there a valid acceptance?

##### Timeliness

J will argue that the flier was over two months old and since it was limited to a week by its terms, A did not accept in a timely fashion. A will contend that he responded within a week from when he saw the letter and that it is J's fault for leaving the flier up. Since an acceptance is effective when sent, A will probably prevail on this issue.

##### Method

If there was an offer contained in the ad, J will argue that its terms specified the means of acceptance was to call J at the number listed. A will argue that an offer can be accepted by any commercially reasonable means, and that sending a letter was a valid acceptance. However, it is unlikely since the offeror is master of her offer and since it was specified as the means of acceptance.

But if the court determines that there was an offer and that offer was able to be accepted by letter, then A will prevail, and J will have to pay damages.

## **JOAN v. BARBARA**

In an action for breach of contract, Barbara will raise the defenses of the Statute of Frauds, and breach of express warranty, but Joan will prevail.

### Statute of Frauds

J and B contract for five years or "as long as B remained in practice." B will contend that a contract which is not performable within a year must be in writing. But it is possible that Barbara would go out of practice within one year. The fact that she is still in practice is not relevant -- she still could have gone out of practice within one year making the contract performable in that year. It is amazing that Barbara is still in practice. A lawyer should know better than to raise this defense.

### Breach of Express Warranty

B will claim that J breached her express warranty on the flier that her prices "can't be beat." B will argue that it is specific enough to be a warranty and that she found several other carpet cleaners who would do the work for less, but the court will most likely construe it as "puffing" and not a warranty.

### Conclusion

Joan is likely to prevail on both issues and will be able to recover expectancy damages in the amount of the contract price less cost of performance for the five years minus the two cleanings made.

## **CHARLES v. JOAN**

Joan will sue Charles for a breach of contract. Whether a court finds a contract will hinge on the following questions.

### Was there a valid offer?

J will claim that there was a valid offer. Charles made an offer for \$500. The facts say that the carpets were described (subject matter) and that the price was set (\$500). The court should find a valid offer.

### Was there a TIMELY acceptance?

C will admit that he made an offer for *immediate acceptance*. He will further defend that it was clear to J as he "told her that he needed an answer immediately." C will contend that he agreed to let J "sleep" on his offer and that he meant until the next day. J will assert that she had a longer time in mind, but in light of the fact that C needed an answer immediately, the court will probably find for C. However, if it finds that the acceptance was timely, C will assert that the acceptance was not reasonable.

Was the offer accepted in a reasonable manner?

C will contend that since he needed an answer *IMMEDIATELY*, it was unreasonable to accept his telephone offer by mail. It was obvious that the mail would take longer than a telephone call and since time was of the essence; mail was not a reasonable method of acceptance. Also in Charles' favor was his statement that he would "talk to her later" implying his understanding that her acceptance would be oral.

There is most likely NO contract between Charles and Joan.

### Answer B to Question 1

#### ALEX v. JOAN

In this question, since we are dealing with services and not sales of goods, common law will apply and not U.C.C.

#### 1. DEFENSES OF JOAN

Joan will have several defenses in regards to Alex's lawsuit for breach of contract.

##### A. No Contract Exists

In order for Joan to assert that no contract existed between Alex and Joan, Joan should establish that there was no mutual assent and/or consideration.

##### I. Mutual Assent

Mutual assent requires offer and acceptance.

##### a. Offer?

Outward present manifestation of intent enters into the bargain so as to make others reasonably believe that their acceptance is invited and therefore will conclude it. The offer needs to be certain and definite as to its terms and be communicated to the offeree. The offer could be made to the public at large which is called a public offer.

Joan did create a public offer because placing an ad on the local supermarket board is considered reasonable and it is foreseeable that a large number of people will notice it and respond to it.

However, Joan will assert that her public offer was not valid because it was lacking one of the elements of the offer (certain and definite to its term). The term that is missing in Joan's offer is the time of the offer. Even though she indicated a one-week special, she did not state from what date to what date.

Furthermore, Joan will contend that her offer indicates "Call Joan at CARPETS (227-7387)." Since the offeror is the master of the offer, he or she can indicate the manner of the acceptance to be communicated.

b. Acceptance?

Acceptance is an unequivocal assent to all the terms of the offer by the offeree, which has been communicated to the offeror by the way that it has been asked in the offer. Acceptance is valid upon dispatch except in a public offer which is valid upon receipt.

Alex mailed a letter to Joan (rather than call as indicated in the offer) six days later. Any reasonable person would understand that it will take reasonable time (two or three days) for the letter to be received by the other party.

In this case, since Joan's offer was a public offer (established supra), the acceptance would be valid upon receipt. Since eight days had passed since Alex saw the ad (six days later plus two days in the mail is eight days) and the acceptance was received, as well as the fact that the offer indicated that it was good for only one week (one week special), the acceptance was not timely and not valid. Therefore, no contract was established between Joan and Alex.

c. Consideration?

Consideration is a bargaining for in exchange of a promise in the form of an act, forbearance or performance. Also it must have legal value. Here, there is no issue for consideration since Joan and Alex did not exchange money or performance.

B. Revocation of the offer?

Revocation of the offer by the offeror is valid before the acceptance by the offeree. It could be expressed (direct revocation) or indirect revocation.

1. Indirect Revocation

Indirect revocation is when the offeree learns from a reliable source

that the offer has been revoked.

Alex heard from a checker at the supermarket who said she heard a rumor that Joan had gone out of business. A reasonable person would understand that the checker at the supermarket is a reliable source because the ad is posted at the supermarket bulletin board where the checker works. Therefore, Alex should have suspected that Joan's offer could not be accepted since the offeror had gone out of business.

However, Alex will contend that since the supermarket checker used the word "rumor" and did not know by actual fact, Alex should not have relied on the supermarket checker.

Joan will contend that Alex should have at least done some inquiry into the truth or falsity of the matter. Joan's argument, at this point, will not be a strong one because if Alex would have inquired, he would have found out that Joan was still in business. However, at that time, Joan could tell Alex that the public offer (the "one week special") had been terminated because of the lapse in time.

Therefore, Alex will not have a cause of action against Joan for breach of contract due to the defenses of Joan discussed above.

## **JOAN v. BARBARA**

In order for Joan to succeed in a breach of contract against Barbara, Joan must assert that there was a valid contract between herself and Barbara, and that she indeed breached that contract.

### A. Contract?

A contract is a promise or set of promises which for breach of which the law gives remedy.

#### 1. Divisible Contract?

A contract is divisible when the performance of each party could be divided into equal shares. Here, the contract between Joan and Barbara will be considered a divisible contract because Joan would clean the carpet in Barbara's office every six months for the next five years. Therefore, Joan and Barbara's contract will be considered a divisible contract.

In order for a contract to be valid, we need mutual assent and consideration.

Here, there is no issue as to mutual assent and consideration.



B. Statute of Fraud?

A contract that cannot be fulfilled less than a year must be in writing.

The facts indicate that Barbara and Joan agreed through the telephone to their contract (five years of cleaning the carpet). Therefore, Joan and Barbara's contract will not be valid since it is not in writing.

However, Joan will assert that since the contract indicated "as long as Barbara remained in practice," and she could be out of practice in less than a year, their contract could be valid even though it is oral (not in writing).

C. Breach?

Breach is an unequivocal assent not to comply with the terms of the offer.

The facts indicate that Barbara told Joan she no longer required her services. This could be construed as having intent and a desire not to comply with the term of the offer (cleaning for five years) which puts Barbara in breach of her contract with Joan.

Therefore, it will most likely be that Joan will prevail on the cause of action against Barbara regarding breach of contract.

**JOAN v. CHARLES**

In order to establish that a contract is formed between Joan and Charles, mutual assent and consideration must be established.

A. Contract

A contract is a promise or set of promises for breach of which law gives remedy.

B. Mutual Assent?

Mutual assent is established by showing offer and acceptance.

1. Offer

An offer is an outward manifestation of present intent entered into the bargain so as to make another reasonable person believe that his acceptance is invited and will conclude it. The offer must be certain and definite as to its terms and communicated to offeree.

Charles called Joan on September 1st and offered to pay her \$500 if she would clean the carpets in his house which he described to her.

This could be construed as an offer because it shows that Charles has a present desire to enter into a bargain with Joan.

Also, since the time (September 1st), the price (\$500), the identify of the parties (Joan and Charles on the phone), quantity (one house) and the subject matter (cleaning the carpet) are clearly communicated (over the phone from Charles to Joan), all the elements of offer have been met. Therefore, there is a valid offer.

The offeror is the master of the offer and can indicate the way of receiving the acceptance.

The facts indicate that Charles told Joan he needed to have Joan's answer immediately. This could be reasonably construed that Charles needed an acceptance from Joan by telephone.

## 2. Acceptance?

Acceptance is unequivocal assent to all the terms of the offer. Acceptance must be communicated in a way that the offeror indicates in the offer.

Acceptance will be valid if it is communicated to the offeror before the offeror revokes his or her offer.

### a. Grumbling Acceptance (Bargaining)

Grumbling acceptance is when the offeree does not expressly reject the offer. Also, the offeree does not accept the offer right away.

Joan's response to Charles' offer over the phone was "I think \$500 is too low. I'll definitely do the job for \$1,000, but let me sleep on your offer." That could be construed as acceptance since Joan did not unequivocally say to Charles that she will not do the job for \$500. Since Joan also said "let me sleep on your offer," this can show that she has not rejected the offer yet. Joan still has the power to accept the offer.

However, since Charles told Joan he needs to have an answer immediately (via the phone or a faster way of communication) and Joan, instead of calling, mailed the letter to Charles two days later which was probably received by Charles within about five days after their conversation, this will most likely not be the "immediate" answer that Charles was looking for. Therefore, Joan's acceptance was not communicated to Charles by the way the offeror (Charles) had asked for. Thus, the acceptance would not be valid. Therefore, no contract could be formed.

### 3. Revocation?

Revocation is when the offeror revokes the offer before the offeree's valid acceptance.

Revocation could be done directly or indirectly.

#### **a. Direct Revocation?**

Direct revocation is when the offeror communicates directly to offeree that the offer has been revoked. This will constitute as a direct revocation when Charles retained Kwalita Kleening to clean his carpets, and called Joan and told her about it.

Therefore, due to improper communication of acceptance and proper revocation of offer, no contract between Joan and Charles was formed.

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## Question 2

Marineship builds oil tankers. Two years ago it built Oiler, a large tanker equipped with a steel steering mechanism. Unknown to Marineship, the steering mechanism on Oiler did not conform to design specifications because the steel contained a high percentage of impurities.

Marineship sold Oiler to Coastal Oil Shippers (Coastal) which is in the business of shipping oil in tankers. Coastal hired Skipper as Oiler's captain one year ago, but has never required Skipper to undergo any medical examinations or tests of any kind.

At a party on board Oiler while the ship was at sea, Skipper ingested illegal drugs. He had never done so before. Under the influence of the drugs he left the bridge unattended, went to his cabin and fell asleep. Able, a recently hired seaman with no experience on the bridge, found it unattended. Instead of summoning the second in command, he began steering the tanker. While he was doing so, the steering mechanism broke as a result of the impurities in the steel. Because of his inexperience, Able did not know how to control the tanker without the steering mechanism and it ran aground, spilling its cargo of oil which washed ashore and damaged property owned by Paul.

A statute applicable in the jurisdiction provides: "Any company employing any individual as captain of a ship must periodically require the individual to undergo medical tests for drug or alcohol use while on duty. If such use is discovered, the company must relieve the individual of duty."

On what theory or theories may Paul recover damages from:

1. Skipper? Discuss.
2. Able? Discuss.
3. Coastal? Discuss.
4. Marineship? Discuss.

## Answer A to Question 2

### PAUL v. SKIPPER

In order for Paul to prevail in a cause of action of negligence against Skipper, Paul must plead and prove that Skipper had a duty to Paul and, by breaching such duty, Skipper was the actual cause and the proximate cause of the damages to Paul.

#### I. NEGLIGENCE?

##### A. Duty?

Everyone has a duty as an ordinary, prudent person under the same, similar circumstances not to expose others (foreseeable plaintiffs in a zone of danger) to an unreasonable risk of harm.

The facts indicate that Skipper ingested illegal drugs which he had never done before at a party aboard while the ship was at sea. Skipper, as an oiler captain, has the same and similar duties as other captains not to expose others (foreseeable plaintiffs in a zone of danger) to a risk of harm. Skipper has a duty not to ingest illegal drugs and leave the bridge unattended and go to his cabin to fall asleep.

##### B. Breach?

Breach is established by not complying with the duty.

Since Skipper did not act as a reasonable, prudent captain under the same similar circumstances (ingesting illegal drugs while the ship was at sea and leaving the bridge unattended), he breached his duty.

##### C. Actual Cause?

“But for” Skipper ingesting illegal drugs, being under the influence of these drugs, and leaving the bridge unattended, the oil would not have been spilled and Paul's property would not have been damaged. Therefore, Skipper is the actual cause of Paul's damages.

##### D. Proximate Cause?

It is foreseeable that when one leaves the bridge of a ship unattended while the ship, carrying oil (ultrahazardous materials), the accident may happen, the oil will spill, and will more than likely harm others (like Paul's property.)

1. Foreseeable Plaintiff? (Mrs. Palzgraf v. Long Island Railroad)

According to Chief Justice Cordozo, the plaintiff is foreseeable when the plaintiff is in a zone of danger.

a. Zone of Danger

Paul's property, being located by the shore, will be in the zone of danger even though the tanker is in the middle of the ocean and Paul's house is located on the shore (a great distance). However, when a large ship spills oil into the ocean, the oil (a dangerous, poisonous product) will eventually reach the shore. Therefore, Paul is a foreseeable plaintiff in a zone of danger.

b. According to Chief Justice Andrew, the dissent in Mrs. Palzgraf of v. Long Island Railroad, if one finds that he owes a duty to another person, he owes a duty to everyone. Therefore; according to this view, Skipper owes a duty to Paul since he will be a foreseeable plaintiff in a zone of danger.

Skipper will assert that Able was the intervening act which caused the accident by not summoning the second in command and would cut the chain of causation and release Skipper from liability. However, this defense will not be valid since a negligent act of the third party is foreseeable and will not cut the chain of causation.

Skipper also will assert that the negligent act of Marinesship (the defective steering mechanism) was the actual and proximate cause of the damage. Therefore, it will cut the chain of causation and release Skipper from liability. Again, this argument will not be prevailed because if the Skipper was there instead of Able, the Skipper could have controlled the ship and stopped the oil spill.

E. Damages?

The facts indicate that Paul's property was damaged. Therefore, Skipper will be liable for damages to Paul under negligence.

**PAUL v. ABLE**

1. **NEGLIGENCE?**

A. Duty

Defined supra.

Also, a duty could be established by an omission to act. Ordinarily, there

is no duty to help or attempt to rescue unless there are special relationships (employer/employee, parents/children), or a person creates a dangerous situation by his negligent act.

Here, the facts indicate that Able is a recently hired seaman. This could indicate that Able is an employee of Coastal which he has a duty to report to. When Able found the bridge unattended, he began steering the tanker instead of summoning the second in command.

B. Breach

Defined supra.

By not complying with his duty (summoning the second in command), Able breached his duty.

C. Actual Cause

"But for" Able not summoning the second in command, the accident occurred and Paul's property suffered damages.

D. Proximate Cause

It is foreseeable that when one sees the bridge unattended on a large oil tanker and has no experience or knowledge on how to operate it, an accident and harm to others may occur.

However, Able will assert the defense of an intervening, independent, superseding act.

1. Intervening, Independent, Superseding Act

Intervening, independent, superseding acts are the acts that occur after the defendant performs a negligent act and before the plaintiff receives the harm which is not related to the defendant's negligent act. Therefore, this cuts the chain of causation and relieves the defendant from liability.

Able will argue that because the steering mechanism broke as a result of the impurities in the steel which was not related to his negligent act (not summoning the second in command), the harm to Paul occurred. Therefore, because the steering mechanism broke, this will be considered an intervening, independent, superseding act. Able will be released from his liability to Paul.



## PAUL v. COASTAL

### I. VICARIOUS LIABILITY (RESPONDENT SUPERIOR)

Employer is liable for all the tortious acts of his employee while the act occurs during the course and scope of employment.

Since Skipper and Able were both working for Coastal and they were on the ship when the accident happened, due to Skipper's and Able's negligence (established supra), Coastal will be liable as well to Paul for the same causes of action that Paul may have against Skipper and Able.

### II. STRICT LIABILITY (LIABILITY WITH NO FAULT)

#### A. Ultrahazardous Activity

One is liable for damages occurring while he or she is engaged in ultrahazardous activities no matter how much care is taken if the damage caused is the result of the propensity of the product.

Transporting oil with a large tanker is considered an ultra-hazardous activity because if an accident should occur, the oil spill could create an environmental hazard, as well as harm to people.

#### 1. Foreseeable Plaintiff and Zone of Danger

Established supra.

Paul is a foreseeable plaintiff and is in a zone of danger because he lives by the shore, and any oil spill in the ocean will eventually reach Paul's property and will damage it.

The facts indicate that the tanker ran aground, spilling its cargo of oil which washed ashore and damaged property owned by Paul. It can be construed that the damages to Paul's property was caused by the oil spill.

Therefore, Coastal is liable to Paul for the damages under the theory of ultrahazardous activity absent any defenses.

#### a. Defenses

- (1) Coastal may assert the negligent act of Skipper or Able, however, as discussed supra, employer (Coastal) is liable for the negligent act of its employees (Skipper and Able).

- (2) Coastal will assert the defense that the harm to Paul's property occurred because the steering mechanism broke due to the impurities in the steel, and that would be the negligent act of Marinesship, the builder of the tanker. However, as indicated above, Paul's cause of action against Coastal is considered an ultrahazardous activity and the negligent act of the third party may not supersede (cut the chain of causation). Therefore, this defense will not be valid.

### III. NEGLIGENCE

Paul may assert action against Coastal for negligent hiring of Skipper because Coastal hired Skipper as an oiler captain one year ago, but has never required Skipper to undergo any medical exams or tests of any kind.

Coastal will argue that even if Coastal had administered the appropriate tests, they would not find any evidence of drug or alcohol use because the facts indicate that Skipper had never ingested illegal drugs prior to the accident.

#### A. Negligence Per Se

Negligence per se is established when:

1. A statute is violated.
2. The statute is designed to protect this kind of plaintiff from this kind of harm.

By establishing negligence per se, the element of duty and breach of negligence has been established. However, if Coastal would have complied with the statute ("Any company employing any individual as captain of a ship must periodically require the individual to undergo medical tests for drug or alcohol use while on duty. If such use is discovered, the company must relieve the individual of duty."), the accident would still happen because, as discussed supra, Skipper never took drugs before and the results would not show on the test in order to put Coastal on notice.

Therefore, negligence per se cannot be established. However, as discussed supra, Coastal will be liable for negligent acts of Skipper (employee) during the course and scope of his employment.

## PAUL v. MARINESHIP

### I. STRICT LIABILITY (PRODUCT LIABILITY)

One is strictly liable when he or she puts a defective product into the market

which causes an unreasonable risk of harm to others. Defendant must be in the business of buying or selling of that product, and the product must have left the defendant's hand with the defect, and reach the plaintiff without substantial changes.

A. Defect?

Defect will be established when it is a:

1. design defect,
2. manufacturing defect,
3. supervising defect,
4. improper warning.

The facts indicate that Marineship builds oil tankers and two years ago, it built Oiler, a large tanker equipped with a steel steering mechanism. Unbeknownst to Marineship, the steering mechanism on Oiler did not conform to design specifications because the steel contained a high percentage of impurities. This fact could be established as a design defect and also as a manufacturing defect.

Since the ship left the way that Marineship intended it to leave (with the defect) and it did reach Coastal in the same way (with the defect), Marineship will be strictly liable under the design and manufacturing defective product laws.

B. Foreseeable Plaintiff

Under strict liability (product liability), no privity is required and the defendant is liable to the buyer, user, and/or to a bystander.

Because Paul lives by the shore, he would be considered a bystander (foreseeable plaintiff). Therefore, Marineship is liable for Paul's damages under the strict liability code (product liability).

## **Answer B to Question 2**

### **1). PAUL v. SKIPPER**

Paul will sue Skipper for Negligence, Nuisance, and Trespass to land.

#### **Negligence**

Paul can prove negligence if he can show that Skipper owed him a duty of care, that he breached that duty, and that the breach actually and proximately caused damage to his person or property.

### **Duty**

Skipper had a duty to act as a reasonable person to protect others from harm. Furthermore, he will be held to a higher duty of care because he is a professional ship captain. He had a duty to operate the ship in a reasonable manner. However, Skipper will argue that he owed no duty to Paul since Paul only owned property on shore, and was not in the water. However, this will not succeed because under the **Cardozo** test from the case of Palsgraff v. Long Island Railroad any plaintiff within the foreseeable zone of danger has standing to sue. It was foreseeable that negligence would cause the boat to damage those on shore, therefore Paul has standing to sue.

### **Breach**

Paul will argue that it is unreasonable to leave the helm while the ship is underway. A reasonable person would at least have sought a qualified replacement.

**Negligence Per Se**-breach of statute.

Paul will argue that Skipper breached his duty by taking illegal drugs, which is against the law. Paul will be required to prove that he was in the class protected by the law and that the harm that occurred was the type the statute was intended to protect against. However, it is unlikely that the statute was intended to protect against negligent ship driving. Paul may argue that the statute was meant to protect anyone from harm from people high on drugs, but this is too vague to succeed.

Skipper has not breached by violation of statute, but he has breached because it is unreasonable to leave the helm unattended.

### **Causation**

Actual Cause-but for Skipper's negligence the accident would not have occurred. Even though the breaking of the steering mechanism was a partial cause, Skipper is a substantial factor in the accident and is the actual cause.

Proximate Cause-Skipper will argue that it was completely unforeseeable that the rudder would break, but this will not succeed because part of the reason a qualified professional is needed is in case something went wrong. The rudder breaking will be a foreseeable, independent force because the type of harm, even if not the specific fact, was foreseeable.

Skipper is the actual and proximate cause of the injury to Paul's land.

**No defense**-intoxication. Skipper can argue that he was high (intoxicated) with illegal drugs, but this is not a valid defense and Skipper will still be liable.

### **Damage**

Paul's land was damaged by the oil and Paul may recover the special damages of his cleanup costs, and devaluation of the land. **Punitive** damages are generally not allowed for negligence unless recklessness is involved. Skipper may have been

reckless of the risk to others, and if so he will be liable for punitive damages.

**Nuisance**-a private nuisance is a substantial and unreasonable interference with the plaintiff's possessory rights in the use and enjoyment of his land.

This intrusion upon Paul's land was physical, and therefore the better action is trespass. I Trespass to Land Trespass to land is the intentional entry upon land in possession of another, without consent or privilege.

Trespass can be accomplished not only with actual intent to enter land, but by a negligent entry. Skipper will be liable for the damages caused by the entry of the oil.

**Strict Liability**-abnormally dangerous activity.

Hauling oil is not abnormally dangerous, and it is in common use. It will not be considered a subject for strict liability.

## **2). Paul v. Able**

### **Negligence**

See definition above.

### **Duty**

Able had a duty to use reasonable care in steering the ship. He may argue that he had no duty to steer the ship at all, but he assumed the duty by taking the wheel, and he has a duty to use reasonable care in his assumed duty.

### **Breach**

Although Able can argue that he did the best he was able because of his training, he breached his duty by not calling someone who was qualified. A reasonable person would not steer a ship without training.

### **Causation**

Actual Cause-but for Able's negligence, Paul's land would not have been injured.

Proximate Cause-the harm was foreseeable, supra.

### **Damage**

Supra.

### **Double Recovery Rule**

If Able and Skipper are found to be the joint cause of the harm, Paul may not recover the entire judgment from each.

**Private Nuisance**-not applicable, see above.

### **Trespass to Land**

See definition above.

Able negligently caused the oil to come upon Paul's land and he will be liable for special damages, see above.

### **3). Paul v. Coastal**

Paul will sue coastal for negligent hiring, vicarious liability.

### **Negligence #1**

Definition above.

**Duty**-Coastal had a duty to exercise reasonable care to hire careful employees that will not harm the public.

### **Breach**

Coastal had no idea that Skipper took drugs. Since Coastal had no warning, there is no breach.

### **Negligence #2**

See definition above.

### **Duty**

Coastal had a duty to exercise reasonable care in checking the performance of their employees.

### **Breach**

Violation of Statute-Paul will argue that Coastal broke the statute requiring periodic checks for drugs. The statute was meant to prevent accidents such as what happened, and Paul, a foreseeable bystander, is included in the class of people protected by the statute. However, the breach of the statute was not the **Cause** of the harm.

**Causation**-actual cause.

But for Coastal's negligence, Paul would still have been injured.

Skipper had not used drugs before, and Coastal would not have been able to prevent the accident. Coastal is not liable under either of the negligence theories.

### **Vicarious Liability**

#### **Respondeat Superior**

An employer will be held vicariously liable for the torts of its employees which occur within the course and scope of their employment.

Skipper's negligence was in performing his duties, therefore it lies within the course and scope.

Skipper was also an employee, and not an independent contractor because he had

worked for Coastal for a year.

He also used Coastal's tools, and did not have power over his performance.

Able was also an employee, and he was acting within the scope of his employment by steering, even though it wasn't his specific duty.

**Trespass to Land**-Coastal will be vicariously liable for the trespass.

**Negligence**-Coastal will also be liable for Able and Skipper's negligence.

**Indemnity**-Because Able and Skipper are the primary tortfeasors, Coastal can recover the entire judgment from them.

#### **4). Paul v. Marineship (Marine)**

Paul will sue Marine for Products Liability.

#### **Products Liability**

Where a manufacturer or distributor of goods places a defective product into the stream of commerce, it will be held liable for harm caused by use of the defective product.

**Privity**-the requirement of privity has been abolished primarily by the case of Lawrence v. Fox.

#### **Products Liability-Negligence**

Where a manufacturer of goods places a product into the stream of commerce, it has a duty to make a reasonable inspection of the goods and to correct or warn of all defects which a reasonable inspection would reveal.

**Duty**-Marine had a duty to make an inspection of the ship before it sold it. The question is whether a reasonable inspection would have turned up the defect. A reasonable inspection of something like a ship would certainly include the steering mechanism, and a defect like bad metal should have been discovered.

#### **Breach**

There was a defect in manufacture that Marine failed to discover. Marine has breached its duty of care.

**Causation**-but for the defective rudder the ship would not have gone ashore and spilled the oil.

**Proximate Cause**-it is reasonably foreseeable that a defective rudder will cause a crash.

Marine is the actual and proximate cause of the harm to Paul's land.

**Damages**

Same as negligence, see above.

**Products Liability-Warranty of Merchantability.**

Where a manufacturer or distributor of goods places a product into the stream of commerce that is of unacceptably low quality and not fit for its ordinary use, it will be held liable for harm caused by use of the defective product.

Paul can probably show that the average ship did not have a steering system made of defective metal. He will recover under the warranty of merchantability.

**Causation-supra.****Damages**

Paul may not only recover his special damages of damages to his land, but in some jurisdictions he can also recover pure economic damages.

**Products Liability-Strict Liability**

Where a manufacturer or distributor of goods places into the stream of commerce a product which is both defective and unreasonably dangerous, it will be held strictly liable for harm caused by use of the defective product.

The steering mechanism is defective in that it doesn't work properly. A defective mechanism is unreasonably dangerous, because there is no social value to it, and it would be easy to repair while the risk of harm is very serious. In California there is no requirement of unreasonably dangerous, but this product is defective for the purposes of strict liability under either rule.



### Question 3

Dan, a county sheriff, whose responsibilities include operation of the county jail, hired Cook, whose only vocational background and training were in food preparation, to manage the jail kitchen. This included preparation of meals for Dan and other jail personnel. Dan was so pleased with the meals Cook prepared for him that Dan changed Cook's job classification to "deputy sheriff," which gave Cook a substantial pay increase. Cook's responsibilities did not change however, and Cook was not given any additional training.

Dan was unaware that Cook took his new title seriously. Cook began carrying a legally owned revolver and considered himself a real deputy. One evening, at his home during an evening of drinking with his friend Vic, Cook bragged about his new position and displayed his gun. He then played a form of "Russian Roulette" in which he loaded four bullets into the chamber of the revolver (which could hold six), spun the chamber, and pointed the revolver at Vic. Vic ignored him. When Cook pulled the trigger the gun fired. The bullet struck Vic in the leg.

Vic's niece Marge, arriving for a visit, saw the shooting through the front window as she walked toward the house. She now suffers headaches and insomnia as she often relives the trauma of seeing her uncle get shot, the bleeding, and the pain he suffered.

On what theory or theories might damages be recovered, and what defenses might be raised, in actions by:

1. Vic against Cook? Discuss.
2. Vic against Dan? Discuss.
3. Marge against Cook? Discuss.

**[Do not discuss issues of governmental immunity.]**

## Answer A to Question 3

### 1. Vic v. Cook

#### Assault

Assault is the intentional placing of another in reasonable apprehension of an imminent harmful or offensive touching, without consent or privilege.

While at Vic's home one evening, Cook intentionally loaded four bullets into his gun and pointed the gun at Vic. Intent is the desire or knowledge to a substantial degree of certainty that a particular act will have a particular result. Cook would have known that pointing a loaded gun at Vic would have the foreseeable result of placing Vic in apprehension of being shot. It is not necessary that the plaintiff have suffered actual fear, it is sufficient that the plaintiff be aware of a potential harmful touching. Pointing a loaded gun at someone would place them in potential danger of a harmful touching, namely being shot by a bullet. Even though Vic ignored Cook, it does not mean that Vic was not in apprehension of being shot. If he was at least aware of the loaded gun being pointed at him this would be sufficient for liability for assault.

#### **Defenses**

Cook will claim in defense that Vic did not suffer apprehension of being shot since Vic ignored him when he pointed the gun at him. As discussed supra, it is enough that Vic was aware that the gun was being pointed at him.

Cook may also attempt to argue that he had the legal authority based on his title of "Deputy sheriff" to point a loaded gun at Vic without being liable for assault. This is not a valid defense, since Cook was not acting in any sort of official capacity by playing a form of Russian Roulette with his gun.

Cook may also argue that Vic impliedly consented to the gun being pointed at him by ignoring Cook and not requesting that he not point the gun at him. Again, this will not be a valid defense since an assault may be ignored and yet the person may be in apprehension of an imminent harmful touching.

Cook might attempt to claim that since they had been drinking he was intoxicated and did not have the necessary intent to cause an assault. However, voluntary intoxication is not a defense to a tort action.

Cook will most likely be held liable for the assault of Vic.

## **Battery**

Battery is the intentional harmful or offensive touching of another without consent or privilege.

When Cook pointed the loaded gun at Vic and pulled the trigger, he committed an intentional act sufficient for liability for battery. By pulling the trigger and causing the gun to fire and hitting Vic in the leg, Cook caused a battery. A battery may be committed by the defendant actually touching the plaintiff, or by the defendant causing some other instrument, such as a bullet, to touch the plaintiff in a harmful or offensive manner. Causing a bullet to enter someone's leg is definitely a harmful touching.

Cook will be held liable for the battery of Vic.

## **Defenses**

Cook will attempt to claim the same defenses discussed supra, as he claimed for assault. However they will not apply for the same reason as discussed supra.

## **Negligence**

Negligence is a breach of defendant's duty to plaintiff which actually and proximately causes damage to plaintiff's person or property.

## **Duty**

Cook was under a special duty to Vic based on their prior relationship as friends. Cook had a duty to operate his gun in a reasonable manner. A reasonable person would not have played Russian Roulette with a loaded gun and pointed it at a friend's leg.

## **Breach**

Cook breached his duty to Vic as a friend and also breached his duty of due care when he pointed the loaded gun at Vic's leg.

## **Causation**

"But for" Cook's pointing the loaded gun at Vic's leg, Vic would not have been shot in the leg. It was foreseeable that pointing a loaded gun at Vic's leg would result in him being shot and suffering injury. There were no intervening factors or other breaks in the chain of causation.

## **Damages**

Vic suffered personal injury for which he can recover from Cook. He will most likely be able to recover for any costs associated with his injury, including medical costs and lost wages for time off work for recovery. He may also be able to recover for emotional damages.

## **Defenses**

Cook may claim that Vic was contributorily negligent in ignoring Cook when he pointed the gun at him. Cook may argue that if Vic had not ignored him but had moved a safe distance away, he would not have been shot. The court will probably not accept this argument since Vic was in his own home and should not have had to move to avoid the act of Cook. If a court finds Vic contributorily negligent, he will not be able to recover from Cook.

If the court does not find Vic contributorily negligent, Cook will raise the defense of comparative negligence. If Vic was comparatively negligent by inviting Cook into his home and allowing him to display his gun without protest, his recovery from Cook will be diminished in proportion to his fault.

Even if the court holds Vic contributorily or comparatively negligent, Vic may still raise the counter-defense that Cook had the last clear chance to avoid the accident which injured Vic. The gun was under the direct control of Cook and he was the one who had the final control over whether or not he pointed it at Vic's leg and shot it. This will most likely be a valid defense and Cook will be held liable for Vic's injuries.

Cook may also claim that Vic assumed the risk of being shot, however, there is not evidence that Vic knowingly encountered a known risk of harm. He did not know which of the gun's cylinders were loaded and it would be presumed that no reasonable person would knowingly assume the risk of being shot by a guest in their home.

## **2. Vic v. Dan**

### **Vicarious Liability**

An employer is held liable for the torts of his employees which are committed during the course and scope of their employment.

Dan was Cook's employer and was the one who gave him the title of Deputy Sheriff. However, Cook was not on duty at the time he committed the torts upon Vic and his actions of playing a form of Russian Roulette were not part of the

scope of his employment. Employers are generally not held liable for the intentional torts of their employees unless they have knowledge of the employees propensity toward the intentional acts.

Dan will not be held vicariously liable for the torts of Cook against Vic.

### **Negligence**

Defined supra.

Even though Dan may not be held vicariously liable for Cook's actions he may be held liable for negligently giving him the title of Deputy Sheriff and not explaining that it was simply an honorary title.

### **Duty**

Dan owed a special duty to Cook, who was his employee, to act in a reasonable manner. Dan also owed a duty to all foreseeable plaintiffs in his dealings with Cook. Dan was under a duty to explain to Cook that the title of Deputy Sheriff was simply an honorary title and did not entitle Cook to act in any way on behalf of the county jail, except as Cook. If Dan expected Cook to act as a deputy, he was under a duty to provide Cook with adequate and proper training.

### **Breach**

Dan's failure to explain to Cook the honorary nature of his title was a breach of Dan's duty. Dan's failure to provide Cook with additional training was also a breach of his duty.

### **Causation**

It is not likely that Vic's injury was an actual or proximate cause of Dan's breach of his duty to Cook. There is no evidence that "but for" Dan's Breach, Vic would not have been injured. It is possible that Cook would have been carrying a legally owned revolver regardless of the fact that Dan bestowed the title of Deputy Sheriff on him and that Vic would have been injured regardless of Dan's actions. Proximate cause between Dan's actions and Vic's injury cannot be proved because although it was foreseeable that Cook would begin carrying a gun as a result of his title change, it is not foreseeable that Vic would be injured thereby.

Since there is no actual or proximate cause between Dan's actions and Vic's injury, Dan will not be held liable for Vic's injury.

## **Defenses**

If the court does find the requisite causation between Dan's negligence and Vic's injury, Dan will claim that Cook had the last clear chance to avoid the injury which injured Vic.

### **3. Marge v. Cook**

#### **Negligent Infliction of Emotional Distress**

Negligent infliction of emotional distress is conduct which exposes plaintiff to an impact or threat of impact which results in the plaintiff suffering severe emotional distress.

As Marge arrived for a visit at Vic's house, she saw Vic get shot in the leg as she walked past the front window. The shooting of Vic was caused by Cook.

In order for Marge to recover from Cook for negligent infliction of emotional distress she must show three things: that she suffered physical injury as a result of Cook's' conduct, that there was a special relationship between her and Vic and that Cook was aware or should have been aware of her presence. The headaches and insomnia that Marge now suffers is sufficient to show that she suffered physical injury as a result of Cook's conduct. A special relationship exists between Marge and Vic based on the fact that Marge is Vic's niece. However, there is nothing in the fact pattern to indicate that Cook was aware of Marge's presence or that he should have been aware of her visit.

If Marge can prove that Cook was aware that she might arrive at about the time he shot Vic, Marge will probably be able to recover from Cook for negligent infliction of emotional distress.

### **Answer B to Question 3**

#### **Vic v. Cook**

#### **Assault**

An intentional act by the defendant that causes a reasonable apprehension of receiving a battery.

Here, Cook loaded a firearm with four bullets, pointed the gun at Vic. The facts state "Vic ignored him." This tends to indicate that Vic did not feel fear of apprehension of receiving a battery.

Therefore, an action of assault will fail.

## **Battery**

An intentional act by the defendant that causes a harmful or offensive touching of the plaintiff's person.

## **Intent**

Intent can be shown by doing the act or the desire to do the act, or with knowledge of substantial certainty that the act or desire to do the act will occur.

Here, Cook loads a pistol with 4 of 6 rounds. Cook spins the chamber, points the gun at Vic, pulls the trigger, and Vic is struck in the leg by a bullet. It is clear that getting shot is an offensive harmful touching and that Cook had the intent to place the bullets into the gun and pull the trigger.

Therefore, Cook is liable for battery.

## **Intentional Infliction of Emotional Distress**

Extreme and outrageous conduct by the defendant that causes severe emotional distress.

Here, Cook's actions of playing "Russian Roulette" is extreme and outrageous conduct. Cook shoots his friend, Vic, in the leg. Lacking from the facts are any statement as to Vic's suffering "severe emotional distress."

Therefore, Cook will not be liable for intentional infliction of emotional distress.

## **Negligence**

A duty to conform to a standard of conduct that is breached by the defendant and the breach is the actual and proximate cause of the plaintiff's injury.

## **Duty**

All foreseeable plaintiffs are owed a duty of care.

## **Standard of Care**

An objective reasonable person under similar circumstances.

Here, Cook loads a firearm, a pistol, a dangerous weapon with four bullets to play "Russian Roulette." Cook points that gun at Vic, pulls the trigger and shoots Vic.

### **Breach**

When defendant fails to conform his duty to a foreseeable plaintiff he has breached his duty.

Here, Cook owes Vic a duty of reasonable care in the handling of a firearm. Cook shot Vic, playing a game.

Therefore, Cook has breached his duty to Vic.

### **Actual Cause**

An act or omission to act is cause in fact of injury and the injury would not have occurred "but for" the defendant's act.

Here, Vic would not have been injured, "but for" Cook shooting him.

Therefore, Cook is the actual cause of Vic's injury.

### **Proximate Cause**

The defendant is liable for all harmful results that are within the natural increased risk caused by his act.

Here, Vic's injury was clearly foreseeable by a reasonable person standard. Cook was playing "Russian Roulette" with a loaded firearm.

Therefore, Cook is the proximate cause of Vic's injury.

## **Vic v. Dan**

### **Negligence**

As stated.

### **Duty**

As stated.

### **Standard of Care**

As a reasonably professional county sheriff.

Here, Dan hired Cook to run the County Jail kitchen. Dan was the sheriff. Dan was so impressed with Cook's cooking, Dan appointed him as a deputy sheriff. Cook did not receive any training, but received a pay increase.



## **Breach**

As stated

## **Third Party Plaintiff**

An injury occurring to a third party plaintiff by a second party.

## **Foreseeable**

Cardozo (majority) the plaintiff must be within the "zone of danger."

Andrews - All injured parties are foreseeable plaintiffs.

Therefore, under the Cardozo Rule, Vic would not be a foreseeable plaintiff, but under Andrews he would.

## **Actual Cause**

As stated

Here, it can not be stated that "but for" Dan's act of making Cook a deputy sheriff, Vic would not have been injured. There are no facts that indicate that the gun used to shoot Vic with was Sheriff property or the property of Cook. The facts do state that Cook shot Vic in his home and not as a result of carrying the pistol off-duty or on-duty.

Therefore, Dan is not the actual cause.

## **Proximate Cause**

As stated

Here, Dan made Cook a deputy sheriff.

There are no facts that limited Cook's activities within that classification. But, there are no facts indicated showing it was foreseeable on Dan's part to expect Cook to play with a loaded gun.

Therefore, Dan is not the proximate cause and will not be held liable for negligence.

## **Vicarious Liability**

Employer/Employee Relationship. An employer will be held liable for all negligent torts committed by an employee acting under course and scope of employment.

Here, Cook was employed as a deputy sheriff by Dan, the sheriff. Cook was off duty at home drinking with his friend Vic. Cook loaded a gun playing "Russian Roulette" and shot Vic in the leg. The facts show that Cook was acting within the course and scope of his employment. Therefore, Dan is not vicariously liable.

### **Negligent Hiring, Training, and Supervision**

An employer is liable for damages due to negligent hiring, training, supervision or retention of personnel.

Here, Dan hired Cook as a deputy sheriff because of his abilities in the kitchen. Dan never trained Cook or limited Cook's activities (lawful) as a deputy sheriff. Cook, once appointed, began carrying a firearm. Cook had not been trained and shot Vic while playing with his gun.

Therefore, Dan may be held liable for negligent hiring and training of Cook.

### **Marge v. Cook**

#### **Negligent Infliction of Emotional Distress**

Plaintiff must suffer injury or impact, plaintiff must be closely related to the injured party, plaintiff must have been a witness to or perceived the event.

Here, Marge is related to Vic. Vic was shot by Cook. Marge was walking up to the residence that Vic and Cook were within. Marge observed her uncle, Vic, get shot by Cook. Marge suffers from headaches and insomnia as a result of the trauma of seeing Vic shot.

Therefore, Cook is liable to Marge for negligent infliction of emotional distress.

## Question 4

Deft, a pickpocket and drug user, frequently plied his trade near the Medical Arts Building at which many elderly people visited their physicians. Hoping to learn which patients had prescriptions for drugs he enjoyed using, Deft asked his friend Fred, whether Fred knew how to gain computer access to the data base of a health insurer. He told Fred he hoped to locate potential drug sources. Fred said he did not know how to break into a data base and was not interested in helping Deft. However, Fred told Deft that Gina, another mutual friend, really enjoyed "hacking" into data bases.

Deft contacted Gina, told her about his project, and asked her to teach him how to break into an insurer's data base. When Gina demonstrated her ability to do so on her own computer, Deft asked her whether the computer could be used to find out which patients had prescriptions for the drugs in which he was interested. Gina said yes and showed Deft how to make that kind of search. However, when she saw Deft making notes of names of patients she located, Gina stopped and told him she did not mind showing him how to use the computer but she was not comfortable helping Deft pick out victims. Deft asked whether he could continue the search, and Gina permitted him to do so in her absence. Deft located the names of seven persons who had physicians in the Medical Arts Building and had prescriptions for the type of drugs he wanted. He was then able to confirm the dates of their next appointments.

Deft waited outside the medical building at the time one of those patients, Vic, had an appointment, and observed Vic having a prescription filled at the pharmacy in the building. When Vic came out Deft bumped into him forcefully, knocking Vic to the ground. As Deft apologized profusely and helped Vic to his feet, Deft lifted the vial of medication which Vic needed to control a serious heart condition, from Vic's pocket. Vic was unaware of the loss of his medicine until the time for his next dose, long after the pharmacy was closed. Before Vic could obtain a new supply of the medicine, he suffered a severe heart attack and died.

With what offenses, if any, and on what theory or theories should the prosecutor charge:

1. Deft? Discuss.
2. Gina? Discuss.
3. Fred? Discuss.

## Answer A to Question 4

### **1). What offenses may Deft be charged with?**

Deft may be charged with 2 counts of solicitation, conspiracy, battery, robbery, larceny, and murder.

#### **Solicitation #1**

Solicitation is an act of inciting, enticing, or encouraging, with the intent that a crime be committed.

Deft asked Fred to help him hack into the database. He intended that the crime be committed by Fred. He will be guilty of solicitation unless it merges into a completed conspiracy or crime.

#### **Conspiracy**

A conspiracy is an agreement between two or more people to commit an illegal act.

The prosecutor can argue that Fred agreed to commit the crime by helping Deft find Gina. However, Fred never actually agreed, even by actions, and there must be two parties to a conspiracy.

#### **Solicitation #2**

Deft asked Gina to show him how to get into the database. The only question is whether this is a crime or not, but Gina knew of the eventual purpose and knew a crime was being solicited.

As above, Deft will be guilty unless the solicitation merges.

#### **Conspiracy #2**

Deft agreed with Gina to learn how to hack into the database. If the hacking is a crime, then there is an agreement.

#### **Battery**

A battery is the unauthorized application of force to the person of another.

Deft intentionally pushed Vic, which was unauthorized. He has no privilege, and he is therefore guilty of battery. However, the battery will merge (according to the **merger rule**) with the later robbery because a battery is a crime that is completely included in robbery.

#### **Larceny**

Larceny is the trespassory taking of the personal property of another with the intent to permanently deprive.

The medicine was Vic's personal property, and Deft took it with the intent of

depriving Vic of it permanently. Deft then took it away by leaving with it. Deft has committed a larceny, but it may merge into a robbery, as above.

### **Robbery**

Robbery is the taking of the personal property of another from his person by violence or intimidation.

Deft used force to get the property from Vic. Although Vic was not aware of the purpose of the force, he was aware of its use.

Even though he was not intimidated, the fact that violence was used to gain control of the property, combined with the fact that it was taken from his person, will suffice.

### **Homicide**

A homicide is the killing of a human being by another human being.

Vic was killed by the fact that he did not have his medicine, which was Deft's fault. He was killed by another human being and a homicide has been committed.

### **Causation**

Actual Cause-but for Deft's actions, Vic would not have died.

Proximate Cause-Deft knew what type of medicine he was stealing, so it was reasonably foreseeable that Vic would die because of his actions.

Deft is the actual and proximate cause of Vic's death.

### **Murder**

Murder is a homicide committed with malice aforethought.

Malice can be shown in four ways.

1. Intent to Kill
2. Intent to cause serious bodily harm
3. Felony Murder Rule
4. Depraved Heart Act

Because intent is the desire or the knowledge to a substantial degree of certainty that a particular act will have a particular result, Deft had the intent to kill Vic. He knew he was taking heart medication, and he knew Vic might die without it. Deft's only good argument is that he was not sure if the medicine was that important.

Deft also had the intent to cause serious bodily harm, because while he might not have known for sure that Vic would die, he DID know that he would suffer some kind of serious harm.

### **Depraved Heart Act**

A depraved heart killing is where the defendant acts in reckless disregard for the value of human life. Deft knew that Vic needed his medicine, and he ignored the extremely high risk that Vic might die.

### **Felony Murder Rule**

Killings which occur during the commission of an inherently dangerous felony are murder.

Vic died as a result of the robbery by Deft. It was foreseeable that the felony would cause the death, and it was the actual cause. However, the death occurred long after the felony was complete and Deft had reached a point of safety. The question is whether Deft will still be liable under this theory when the felony occurs long before the death.

Deft will probably not be liable under this theory because the purpose of the felony murder rule is to extend liability for accidental deaths resulting from a felony. Deft will be guilty under intent to kill, and the felony murder rule will probably not apply.

Deft will be guilty of murder under intent to kill, intent to cause serious bodily harm, and under the depraved heart act.

### **First Degree Murder**

First degree murder can be proved in three ways.

1. Premeditated killings.
2. Killings by bomb, poison, torture, or lying in wait.
3. Enumerated Felonies.

Deft did not premeditate or want to kill Vic, and he did not kill by bomb, torture, or lying in wait.

The enumerated felonies are Mayhem, Rape, Sodomy, Burglary, Arson, Kidnapping, Escape, and Robbery.

If the court finds Deft guilty of felony murder he will be guilty of First Degree Murder under the felony murder rule because the underlying felony is robbery, which is inherently dangerous.

### **Second Degree Murder**

Second degree murder is any murder not in the first degree. If the court finds that the felony murder rule does not apply, Deft will be guilty of second degree murder under the depraved heart act and the intent to kill or seriously injure.

### **Involuntary Manslaughter**

Involuntary Manslaughter is a killing which occurs during the commission of a crime

not amounting to a felony, or as a result of criminal negligence.

If for some reason the prosecutor is unable to get murder, Deft will be guilty of involuntary manslaughter because it is criminally negligent to take someone's heart medication, and also because it was the result of a larceny, which is a misdemeanor.

## **2). State v. Gina**

**Conspiracy**-see definition above.

Gina agreed to show Deft how to hack the database. If that is a crime, there is a conspiracy. If not, there is no conspiracy because Gina did not agree to help rob people.

### **Pinkerton's Rule**

If the court finds a conspiracy, Gina will be liable for the murder of Vic as well as the robbery. Pinkerton's Rule states that a co-conspirator will be liable for all foreseeable crimes committed in furtherance of the conspiracy. If there was a conspiracy, the robbery was foreseeable, and possibly the homicide too because Gina was aware that Deft was taking medication that was needed by others.

It is unlikely that the court will find a conspiracy, but if it does then Gina will be liable for murder and robbery.

### **Accomplice Liability**

One who aids and abets a crime but is not present at the commission is an accomplice before the fact.

Gina helped Deft learn the database, knowing what he intended to do. This was an aiding, and it does not matter that Gina did not want the crime to be actually committed.

Accomplices before the fact are liable as principals in modern law, and Gina will be liable for all foreseeable crimes.

As stated above, both crimes are foreseeable results of Gina's knowledge, and she will be held guilty of both robbery and murder.

She will not be liable under the felony murder rule because the causation of felony murder is too remote.

## **3). State v. Fred**

**Conspiracy**-see definition above.

Fred is not guilty of conspiracy because he did not agree to commit an illegal act.

Also, some jurisdictions require an overt act to show the existence of a conspiracy, but this is satisfied by Deft's actions.

Fred will probably not be guilty of conspiracy.

### **Accomplice Liability**

An accomplice before the fact is one who aids and abets a crime before the fact, but is not present when the crime was committed.

Fred did not agree to help Deft, but he did help Deft by recommending Gina.

Normally, just recommending someone's services is not sufficient for liability, but in this case Fred KNEW Deft's intentions and he helped him anyway. Fred's intentions do not matter since he rendered aid. Fred could even desire that the crime never be committed, as long as he helped knowing the crime was going to be attempted.

As an accomplice before the fact, Fred is liable for all foreseeable crimes as a principal.

Because the purpose was to steal, the Robbery was foreseeable. Fred can argue that the murder was not foreseeable, and that he really did not realize that heart medication was being stolen. However, Fred knew that medication was being taken, and a death is very likely to occur from that.

Fred will most likely be guilty of both second degree murder of Vic and of the robbery of Vic.

## **Answer B to Question 4**

### **1. State v Deft:**

State will proceed against Deft for murder, battery, robbery, larceny (failing a robbery conviction).

### **Solicitation**

An act of counseling, inciting, or encouraging another to commit a crime.

Here, Deft (D), encouraged Fred (F) to break into the computer database in order to help locate potential drug sources. Breaking into records is not a crime at common law, however, at modern law, this may be an offense.

If breaking into computer records is a crime in this jurisdiction, D will be guilty of solicitation.

D will also be guilty of a second count of solicitation when he asked Gina (G) to break into the database.



### **Conspiracy**

An agreement between two or more persons to commit an unlawful act.

Here, D asked G to teach him how to break into an insurer's database. G agreed and showed him how to do so. When she broke into the database, she committed an overt act in furtherance of the conspiracy to break into the database.

The intent required for conspiracy is specific intent to agree plus commit the unlawful act. This appears to have been met here by both parties (G's later withdrawal will not defeat this).

Again, if breaking into the database is a crime in this jurisdiction, D (and G) will be guilty of conspiracy.

### **Robbery**

The trespassory taking of the personal property of another from his person by means of force or fear.

Here, D bumped V and knocked him to the ground. This constituted force and was the means by which D was able to effectuate his subsequent taking of the prescription. The prescription is personal property which was taken with the intent to permanently deprive.

D may defend that the bumping was incidental to the taking. This argument will not likely prevail as it is one transaction.

D will be guilty of robbery.

### **Battery**

The unauthorized application of force to another's person.

Here, D "bumped" V. This is an unauthorized application of force. It was committed with the intent of effectuating the theft of the prescription and is not accidental.

D will be guilty of battery if a robbery is not found above. If a robbery is found, the battery will likely merge into the robbery.

### **Larceny**

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

Here, D "lifted the vial" from V. D will assert that this was without force as V didn't know that the vial was taken. However, force was used when D bumped V to the ground and was part of the same criminal transaction.

D will be guilty of larceny if the robbery charge above is not proven. Otherwise, the larceny will merge into the robbery.

### **Homicide**

A killing of a human being by another human being.

Here, D stole V's drugs causing a fatal heart attack and resulting in V's death. But for the taking of the drugs, V would not have died. It is foreseeable that taking drugs from an elderly patient might result in a death. Thus, D is the actual and proximate cause of V's death.

D has committed a homicide.

### **Murder**

An unjustified homicide committed with malice aforethought.

State will assert malice here as a result of application of felony murder rule (a killing occurring as a result of an enumerated felony will have malice presumed for murder). Since a robbery has been shown, State will assert that the malice requirement has been met.

D will contend that the *res gestae* has been completed, he has reached a place of temporary safety, and the crime is over. The death did not occur during the crime, but as a result of the crime. D will likely prevail on these arguments.

State will next proceed with wanton conduct (stealing heart drugs from an elderly man creates a knowing disregard for human life) under the depraved heart act. This will be found sufficient for malice.

D will be guilty of murder at common law.

### **First degree murder**

This will be found with intent to kill with premeditation and deliberation, use of poison, bomb, torture, or lying in wait (probably not applicable here).

If the felony murder rule is found to apply by means of the robbery (an inherently dangerous felony), then D will be guilty. However, if D's arguments (*supra*) prevail with regard to the felony having been completed, then D will be acquitted of this charge.

### **Second degree murder**

All murder other than first degree.

D will be guilty of second degree murder as a result of wanton conduct.

## **2. State v Gina:**

As discussed above, State will proceed against G for conspiracy and accomplice liability.

### **Conspiracy**

Defined supra.

Here, G will argue that she did not have a criminal purpose and she attempted to withdraw. Her withdrawal was ineffective, however, as she did not deprive her assistance of its benefit to D and allowed him to continue to use the computer.

G will be guilty of conspiracy and of all crimes reasonably foreseeable as a result of the conspiracy (Pinkerton's rule).

### **Accomplice liability**

As an aider, G will be liable for the crimes committed by D (since she did not deprive her assistance of its usefulness).

### **3. State v Fred:**

Fred will be liable as an accomplice, a precrime aider by assisting when he identified Gina to D.

No conspiracy liability - no agreement. No intent.