

ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 1999 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the October 1999 California First Year Law Students' Examination and two selected answers for each question.

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

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page ii.

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ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

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

Question 1

A fuel meter in Paul's car automatically adjusts the fuel mixture when the car goes above a set altitude. When Paul took the car to Dealer for routine service, Dealer's mechanic replaced the fuel meter in accord with the regular maintenance schedule for Paul's car, but she inadvertently failed to connect the fuel meter. Paul paid Dealer for the new meter and the cost of the service.

The car operated normally until Paul took the car on a business trip in the mountains. The engine stalled as soon as the car reached the set altitude. This was the first time Paul had driven at that altitude, and Dealer's mechanic had never been to that altitude. In a light rain Paul walked to a nearby telephone where he called a repair service which towed the car to its garage. Paul rented a car to use while his was being repaired, and bought a new suit to wear because the one he had been wearing was thoroughly soaked by the rain. The delays caused him to miss a meeting with an important client. As a result he lost a major sale.

Diagnostic tests at the repair service's garage showed that the fuel meter was not faulty. It was connected properly by the repair service, after which the car operated without difficulty. Paul paid the repair service for the towing, diagnostic tests, and labor.

On what legal theory or theories might Paul recover damages from Dealer, and what items of damage are recoverable on each theory? Discuss.

ANSWER A TO QUESTION 1

Paul v. Dealer

Paul will attempt to recover damages from Dealer based on a negligence theory in tort.

Negligence

Negligence is shown through a duty owed to plaintiff, and breach of that duty, causation-both actual and proximate, and damages

Foreseeable Plaintiff

A duty under negligence is owed only to a foreseeable plaintiff. Under the Palegraf case, Cardozo's view says that anyone in the 'zone of danger' is a foreseeable plaintiff, whereas the Andrews view holds that anyone injured will be viewed as a foreseeable plaintiff. Here, the damages incurred by Paul resulted from work performed on his car-he could be presumed to drive it. Therefore, he is a foreseeable plaintiff under either view.

Duty

The duty owed is to act as a reasonably prudent person. "Professionals" owe a duty to act at the minimal level of competence of the profession. It is arguable whether a mechanic will be judged a professional. Here, the mechanic will be held to act at least under the general standard of the reasonably prudent person or to the higher standard of the minimal level of competence of mechanics in general.

Breach

Breach occurs when the duty to act as a reasonably prudent person is violated. Here, mechanic's failure to connect the new fuel meter-as a reasonably prudent person would do in performing the service on Paul's car-constitutes a breach of the duty.

Causation-Actual

Actual causation is shown through the 'but for' test where it can be stated that but for defendant's acts the damage would not result. Here, but for the mechanic's failure to connect the meter, Paul's car would not have stalled and his resulting damages would not have occurred. Therefore, Dealer's mechanic will be the actual cause of Paul's damages.

Causation-Proximate

Proximate causation is shown where the damages are not so remote from the cause as to cut off liability. Intervening acts that are not foreseeable will cut off the claim of proximate causation. Here, Paul's damages were directly caused by the stalling of his car. There are no intervening act which

would break the chain of causation. Therefore, the Dealer's mechanic will be the proximate cause of Paul's damages.

Vicarious Liability Respondent Superior

Under the theory of respondent superior, an employer will be held vicariously liable for the torts of its employees as long as the employee is acting within the scope of the employment. Here the mechanic performed the service on Paul's car at the Dealer's location presumably during regular business hours. Paul paid Dealer for the service. Therefore, the service was performed in the scope of mechanic's employment and Dealer will be held liable for the damages caused by mechanic's negligent service.

Defenses

Defenses to negligence include contributory negligence or comparative negligence and assumption of risk.

Contributory Negligence

Under contributory negligence, if Dealer can show that Paul was negligent and his negligence contributed to his damages, his case will be barred. Contributory negligence is shown through duty, breach, causation and damages. Here no facts show that Paul was negligent in any way. This was the first time he had driven to the altitude where stalling occurred and he would not have been under a duty to anticipate the stalling. Therefore, Paul will not be found contributorily negligent and this will not provide a defense.

Comparative Negligence

Most jurisdictions have adopted a theory of comparative negligence rather than contributory. Under comparative negligence, the relative negligence of the parties determines the amount of damages each will be assessed. Here, again, there are no facts to support Paul was negligent at all. Therefore, no defense.

Assumption of Risk

A plaintiff can be shown to have assumed a risk if he was aware of the risk, appreciated the risk and voluntarily assumed it. Dealer may argue that Paul assumed the risk merely by driving the car into the mountains. However, no facts show that Paul was aware of the risk of stalling-he reasonably relied on Dealer's service to put his car into good working order. Therefore, Dealer's assumption of risk defense will fail.

Damages

Paul can claim any damages that were a direct result of Dealer's/mechanic's negligence. The rental car expense, towing, diagnostic test and labor costs of the repair service were all direct results of Paul's car stalling. Therefore, Dealer will be liable for each of these items of damages. The lost revenue from Paul's losing the major sale would be too speculative for Paul to recover. First, the exact dollar figure would be difficult to determine. Second, it would be difficult for Paul to prove that he lost the sale only because of his missing the meeting with the client-this time would not then have been 'cause' by the negligence. As to the new suit, the rain which damaged Paul's suit was not caused-proximately by Dealer/Mechanic An Act of God-such as weather conditions would break the causal chain. Paul therefore could not recover the cost of his new suit. He may also be shown to be contributorily negligent by not having a raincoat.

Contracts Theory

Paul may also assert a claim against Dealer on a contracts theory. We can infer that a valid contract was formed between Paul and Dealer for the service to his car. Contracts are formed through offer, acceptance, consideration and lack of defenses. Contracts are sometimes formed through the parties' conduct, with specific words. By taking his car to Dealer for service and paying for the service when it was done, Paul's conduct infers a valid offer and acceptance of a contract for the service. Consideration is shown by Paul's payment and Dealer's performance of the service. No defenses to formation would make the contract unenforceable because it is completely executed.

Contract Damages

Paul would be entitled to his expectation damages-A Car that was in proper working order. He would be arguable entitled to cover by having the service to properly install the new meter where he broke down. However, his other damages would not be recoverable under contract law. He is therefore more likely and would be wiser to pursue his tort claim.

ANSWER B TO QUESTION 1

Paul v. Dealer

Negligence

Negligence occurs when a defendant's act breaches a duty of care causing damages to the plaintiff. Here, Paul may bring an action against Dealer for negligence, as the act of Dealer's employee (the mechanic) may be held to have breached a duty to Paul by negligently failing to connect the fuel meter on Paul's car. Dealer would owe a duty to Paul, as it had entered into what may be considered to be a contractual relationship when it agreed to service Paul's automobile in return for Paul's monetary payment. As an employer, Dealer is liable for the acts of its employees when they are acting within the scope of the employment, which the mechanic clearly was when she replaced the fuel meter. Paul also suffered damages, such as costs of repair and other losses, to be discussed below.

Dealer may raise the defense, however, that Paul was contributorily negligent, however, in taking the automobile to the mountains, something which he had not done before. This would likely fail however, as one is not simply negligent if one drives at a higher altitude on public roads, which appears to have been the case here. Although Dealer's mechanic had never driven herself at the altitude in question, it was reasonable that some of Dealer's customers would. Indeed, it is arguable that the automatic fuel meter was designed for just this purpose, in that it was designed to compensate for differences caused by the varying altitudes that one might encounter while traveling.

If Dealer is found liable to Paul for negligence, it will owe to him the damages he suffered as a natural probable consequence of its act. This would include the cost of towing his automobile and the cost of the repair service in testing and repairing it so that it was functional. The amount of damages would also likely include the cost of Paul's renting a car, if it is held that it was reasonably foreseeable that he would require substitute transportation in the event of a breakdown. Paul perhaps may not, however, be able to recover for the cost of a new suit, unless the court determines that replacement was reasonable given the damages to Paul's other suit due to its being soaked by the rain, especially given the fact that he was evidently not prepared for the weather conditions by having an umbrella or other protection. Finally, the loss of a major sale and the resulting lost profits are probably also not recoverable. While it may be argued that Dealer's (alleged) negligence was the cause in fact of Paul losing the sale, the event may be too far removed in the chain of causation for it to be held to be the proximate cause. Paul perhaps also may be held to be at fault on this point, as it was perhaps foreseeable that he should have accounted for some possible delays in traveling to an important meeting.

Implied Warranty

Paul may also be able to bring an action against Dealer in quasi-contract, alleging that Dealer breached an implied warranty by failing to correctly install the fuel meter. The contract would involve the agreement

of Paul to pay Dealer in exchange for Dealer's performance of everything that was required in the routine maintenance. As Paul paid for the meter and the cost of its installation, Dealer may be said to have made an implied warranty that the meter was installed correctly. If Paul brings an action in contract, however, his damages would be limited to his expectation damages and any incidental damages flowing from the breach. The expectation damages would include the cost of what it would take to give Paul the 'benefit of the bargain', i.e. the cost of placing film in the position he would have been in had the contract been fulfilled as he expected. The expectation damages would thus be the amount Paul paid to the repair service for testing and service. Paul would also be able to recover "incidental" damages, or the cost of obtaining the substitute performance, which would include the towing fee. He would not, however, likely be able to recover for any damages to his clothing or for any economic losses from lost business as these were not reasonably contemplated by both parties at the time the contract was formed.

Question 2

Joker knew that Dan was very jealous about Dan's wife, Victoria, and that on one occasion Dan attacked a man who spoke to Victoria in a bar. On April Fool's Day, anticipating that Dan would "explode," but nothing more, Joker told Dan that Victoria was having an affair with Boss, her employer. Joker's detailed description of the imaginary office romance so upset Dan that he went home from work early, mixed himself a drink, and brooded over the affair as he waited for Victoria to come home from work. When she did not arrive at 5:30 p.m., her usual hour, Dan, still drinking, became increasingly jealous and angry. At 7:00 p.m. he decided to see if Victoria was with Boss at their office. As he left the house, he picked up a gun that he kept for family protection, loaded it, and put it in his pocket.

After stopping at a bar for another drink to "fortify" himself, Dan drove to Victoria's office where he saw a light in her window. Enraged, Dan ran up the stairs and burst into Victoria's office, waving the gun in the air. There he saw Victoria and Boss, heads together, examining something on her desk. Before either could react to his entry, Dan began shooting wildly. One shot ricocheted, killing Victoria instantly. Boss was unhurt. Dan was arrested as he knelt over Victoria's body sobbing inconsolably. After Dan told the police about Joker's accusation, the police also arrested Joker.

Would evidence of the above events be sufficient to support conviction of:

- A. Dan for the first degree murder of Victoria or any included offense, and, if so, on what theory or theories? Discuss.
- B. Dan for attempted murder of Boss? Discuss.
- C. Joker for any offense? Discuss.

ANSWER A TO QUESTION 2

Call 1. State v. Dan (D) First Degree Murder of Victoria?

The state will prosecute D for the murder of his wife, V, and the attempted murder of Boss.

Homicide

Homicide is the killing of a human being by another human being. D, a human being, fired a gun and V was killed. Thus, a homicide has occurred.

Causation

:Actual

But for D firing the gun, the bullet would not have killed V. Thus, D is the actual cause of V's death.

:Proximate

It was foreseeable that if D fired the gun in V's direction, she would be killed. The ricochet was a foreseeable event which does not break the chain of causation. D is the legal cause of V's death.

Murder

Murder is the unlawful homicide committed with malice aforethought. Malice can be proven in any of four different ways:

- A. Specific intent to kill
- B. Specific intent to cause great bodily harm
- C. Homicide committed by a depraved and wanton act
- D. Felony murder rule

D's act of taking the gun, and his act of drinking additional alcohol to "fortify" himself, indicate that he had the intent to kill. He at least had the intent to cause great bodily harm. When D began shooting wildly, he would have known of a substantial and unjustifiable risk that either V or Boss or both would be killed. Thus, D acted with wanton recklessness. D acted with malice aforethought, and is guilty of murder.

Murder in the First Degree

First degree murder is committed when the defendant acts with premeditation and deliberation.

D acted with some amount of premeditation and deliberation when he took the time to load the gun and put it in his pocket. Further, he went to a bar to drink more and "fortify" himself. This desire to fortify himself indicates that he was planning something drastic, something he wanted to do but knew he would not have the heart to do if his mind was clear. His fortifying is evidence that he was deliberating a

killing.

Because D deliberated, "fortifying" himself for a shooting, he is guilty of first degree murder.

Murder in the Second degree

Second degree murder is all murders not raised to the first degree. If D is found not to have deliberated sufficiently to be guilty of first degree murder, he is guilty of second degree murder.

Voluntary Manslaughter

Voluntary manslaughter is a killing done because of adequate provocation or in the presence of an imperfect defense.

For a killing to be mitigated to voluntary manslaughter, four elements must be met:

1. An event must occur which would be sufficient to make a reasonable person act from passion rather than reason. Normally, word alone are not sufficient to constitute adequate provocation. However, some courts hold that informational words, such as those implicating a spouse in an affair, are sufficient. Thus, Jokers words about Victoria and Boss were sufficient to make a reasonable person act from passion.
2. The defendant himself must have acted from passion. Here, D did not become passionate immediately, but went home and brooded. Then, he did not act from passion when he went out. He intentionally reasoned to drink and "fortify himself". This element is not met.
3. There must not have been a period in which the reasonable person would have cooled off. Here, there was a considerable length of time between the words of J and the killing. A reasonable person would have cooled off. D may argue that his passion was rekindled when he saw the light in the office window. However, he was at that time under intentional intoxication. This argument will fail.
4. The defendant must himself have cooled off. The facts show that D went home and brooded. He cooled off. His crime will not be mitigated to voluntary manslaughter.

Defenses

Voluntary Intoxication

In some cases, **voluntary intoxication** can be found to take away the mens rea, and mitigate a crime to Involuntary manslaughter. However, D purposely drank to gear himself up for the killing. Therefore, his intoxication will not be a defense.

Call 2. Attempted murder of Boss

For an attempt, the defendant must intent to perform the act constituting the attempt, and he must intend to commit the target crime. As noted supra, D's "fortifying" himself indicates that he had the mens rea to go commit the shooting and to commit murder. Thus D had the mens rea for attempt.

Preparation v. Perpetration

D entered Boss's office and shot "wildly" at Boss. Clearly D had entered the zone of perpetration.

Homicide, defined supra.

D shot at B, a human being. There was an attempted homicide.

Causation

But for D's shooting, the danger to B would not have been, and it was foreseeable that D's shooting could result in B's death.

Murder, defined supra.

D's intentional drinking, and loading and taking the gun, shows that he intended either to kill B or to cause him great bodily harm. D is thus guilty of the attempted murder of Boss.

Call 3. Joker guilty of crime?

The state will charge J with solicitation and Involuntary manslaughter.

Solicitation

Solicitation is an act of counseling, inciting, or enticing committed with the intent to induce another to commit a crime. J intended only that D would "explode", not that D would commit a crime. J is not guilty of solicitation.

Involuntary manslaughter

Involuntary manslaughter is an unintended killing which is caused during the perpetration of an unlawful act not amounting to a felony, or as a result of criminal negligence. The state will argue that J should have known that his conduct created a high and unreasonable risk of harm to V. J will argue that he was not the **proximate cause** of V.'s death because D's criminal act was a superceding act. J will prevail. He is not guilty.

ANSWER B TO QUESTION 2

People vs. Dan

Can Dan be properly convicted of first degree murder and if not first degree murder then voluntary manslaughter.

Murder is the unlawful killing of another human being with malice aforethought. Malice may be implied by:

- A. Intent to kill
- B. Intent to inflict serious bodily injury
- C. Reckless disregard to an unjustifiable high risk to human life
- D. Intent to commit a felony.

Malice

Here Dan showed an intent to inflict serious bodily injury on Victoria because he began to shoot wildly, he also had a reckless disregard to an unjustifiable high risk to human life because he used a gun, drank liquor and of course Dan began to shoot wildly in the room

Therefore he has the requisite malice for murder.

Because of Dan's actions, Victoria died.

Therefore Dan committed murder

However to be convicted of First degree murder Dan's killing must have either been deliberate and premeditated or in the commission of inherently serious felony.

Here, the issue that will most likely apply is deliberate and premeditated.

Deliberate and Premeditated is when makes a decision to kill in a cool and dispassionate manner and actually reflected on the idea of killing, even if for a brief period. Here the prosecutor will argue Dan made a decision to kill in a cool and dispassionate manner because he as he left the job, he picked up a gun and loaded it, and put it in his pocket to go look for his wife. And also that before he went to the house he stopped at the bar for another drink to "fortify" himself. However, Dan will argue that he didn't kill her in a cool and dispassionate manner and actually reflected on the idea of killing her because he didn't pick up the gun to go to kill her, he probably picked up the gun for his protection, after all he did go looking for Victoria during night time. Maybe he did not want anyone to mug him, also that he began to shoot wildly, which one could infer he was only trying to scare her. First degree murder is a tough call and would depend on whether the jury believed Dan or the prosecutor. It will be hard to prove what was in Dan's mind.

Actual and proximate Cause

However, if can't convict him of first degree murder, then he may be convicted of Voluntary manslaughter.

Voluntary manslaughter is a killing that would otherwise be murder but for the existence of adequate provocation. Provocation is adequate if the

1. Provocation would arouse sudden and intense passion in the mind of an ordinary person causing him to lose self control
2. Defendant was in fact provoked
3. There was no sufficient time between passion and killing for a reasonable person to cool
4. In fact defendant did not cool off.

Here, Dan was already jealous about his wife and one occasion Dan attacked a man who spoke to Victoria. Also Joker told Dan that Victoria was having an affair with her Boss. The provocation of the fact that he saw Victoria and Boss heads together would arouse sudden and intense passion in an ordinary person, causing him to lose self control because Dan already had in mind that Victoria was having an affair and also because the Boss was in Victoria's office late at night. This issue would depend on whether the jury would believe that this action would arouse sudden and intense passion. I think that it would and after all I'm an ordinary person. Dan was in fact provoked because he saw Victoria and boss in a very peculiar situation with both their heads together and also he was already jealous. Here there was no sufficient time between the provocation and killing to cool off because he saw them with their heads together, he reacted immediately. Before either Victoria or Boss could react he began shooting wildly. However, the prosecution will argue that his provocation came when Joker told him about the affair and when she didn't come home at 5:30. If this is the case, then he did have sufficient time to cool because he picked up the gun, loaded it, and put it in his pocket, he also stopped at a bar to get a drink to fortify himself. This clearly shows that a reasonable person would have sufficient time to cool off. Also he came home early and waited for her and mixed some drinks. But once again it depends on when the provocation began. If at the beginning then no manslaughter. Here Dan clearly did not cool off because he ended up killing Victoria. Therefore we have voluntary manslaughter. Dan could also be convicted of aggravated battery but it would merge with either manslaughter or first degree murder.

Battery is the unlawful application of force upon the body of another resulting in either harmful or offensive contact. Here Dan shot Victoria injuring her of course by killing her. Aggravated battery because Dan used a deadly weapon and also because it was battery on a woman.

Can Dan. be properly convicted of attempted murder of Boss?

Murder is the unlawful killing of another human being with malice aforethought-Malice may be implied by the following. Same as above.

Attempt is an act, done with intent to commit a crime, that falls short of completeness.

Specific Intent

Unlike for murder which only requires malice to prove for murder, for an attempted murder, the prosecution must prove specific intent on the part of Dan. Dan must have specifically performed an act to obtain a result, that if achieved would be murder.

Here the Prosecution will argue that as soon as Joker told Dan his wife was having an affair with Boss, that Dan intended to kill his boss because he picked up gun, and loaded it, and went looking for his wife and the Boss. Again, why else would he be carrying a gun that is loaded with him. Also that he went beyond mere perpetration because he loaded a gun and shot. He was in the zone of danger, proximately close. However, Dan will argue that he did not intend to kill Boss, and the only reason why he was carrying the gun was for his own protection. After all he was walking at night. This issue would depend on what Dan was thinking in his mind. It is subjective, therefore if the jury believes Dan, then no attempted murder. He may be convicted of aggravated assault.

Assault is an attempt to commit battery or intentional creation of reasonable apprehension in the mind of victim of imminent bodily harm or offensive touching

Here Dan intended to create a reasonable apprehension in Boss's mind because he ran in the office waving a gun in the air. There would be a reasonable apprehension in the mind of a person. Therefore assault. Aggravated Assault because he used a deadly weapon.

Can Joker be convicted of Dan's crime based on Accomplice Theory.

One is an accomplice if he aids and abets or encourages anyone to commit a crime with the intent that the person commit a crime. Here Joker doesn't aid or abet or encourage Dan. to commit murder because **Joker** didn't give him a gun or tell him go and kill your wife. He also didn't have the intent because Joker was playing a practical joke on Dan. It was April Fools day. Therefore Joker not guilty of any crimes.

Question 3

Dolly makes and sells unique dolls dressed in colonial clothing she has designed and hand sewn. On December 15, Dolly mailed the following signed letter to Pat who owns a local gift store:

"I will supply you with as many of my colonial dolls as you order during the next calendar year, not to exceed 10 dolls a month, at a price of \$50 each, payment due 30 days after delivery. I guarantee that the price will not be increased during the year."

Pat was familiar with Dolly's colonial dolls and had sold some of them in her store. She replied on December 20 by mailing a signed letter which said only "I accept your offer of December 15." Pat immediately planned and paid for advertising announcing that ten of Dolly's dolls would be available each month beginning in January for sale to the first ten customers.

On January 5, Pat ordered ten dolls. Dolly filled the order on that same day, delivering the dolls to Pat with an invoice, billing the dolls at \$60 each. Dolly enclosed a letter that said: "Since I wrote to you, there has been an increase in the cost of the materials I use, and I must increase my prices for this order and all future orders to \$60 per doll." Pat accepted the dolls, but objected to the price increase in a letter sent to Dolly the day the dolls were received.

On February 5, Pat ordered another ten dolls. Dolly delivered only five, billing them at \$60 each. Pat also accepted these dolls and, again, sent a letter to Dolly objecting to the price increase. To date Pat has not paid anything for the fifteen dolls delivered by Dolly.

What are the rights and remedies of Pat and Dolly as to each of the two shipments of dolls? Discuss.

ANSWER A TO QUESTION 3

Pat v. Dolly:

UCC: This is a contract that deals with the sale of dolls, a good that is identified and moveable at the time of the contract. Thus, this contract is governed by the UCC.

Offer:

A valid offer is the outward manifestation of present contractual intent defined in terms and communicated in such a way as to create in the offer a reasonable expectation that the offer or is willing to enter into a contract. Here the outward manifestation that was made, was made in writing by Dolly to Pat. The offer contained the terms: Quantity: up to 10 dolls per month; Time of Performance: every month for the next year; IDENTITY OF THE PARTIES: Pat and Dolly; PRICE: \$50 per doll; and SUBJECT MATTER: the colonial dolls. Thus there are sufficiently defined terms and there is a valid offer.

Quantity : The UCC only requires that there be a sufficient definition of the quantity requirement. However, here Pat is not bound to make any purchases, and thus Dolly will argue that the contract is illusory. However, the UCC is very liberally construed, and thus if the parties intended to be bound, a contract will be found.

Merchant firm offer rule:

When a merchant makes an offer in writing, that is signed which purports a time that the offer will be held open, it will be held open for that period of time, not to exceed three months. If no time is stated, then for a reasonable time. Here Dolly made a written offer to Pat that contained the terms. The writing did not contain a specified period of time, thus the offer will be held open for a reasonable amount of time not to exceed three months.

Termination by Time:

The offer will not have terminated, as five days, for a contract for dolls is not unreasonable.

Acceptance:

A valid acceptance is the unequivocal assent to the terms of the offer. Here Pat answered the offer within five days simply stating that she accepted the offer. This is an unequivocal assent and thus there is a valid

acceptance.

Consideration:

Consideration is bargained for exchange with legal detriment to both parties. Here the consideration that Dolly has in the contract, is her promise to provide up to ten dolls per month to Pat. Pat has promised to order as many as she is ordering, up to ten dolls. There is valid consideration.

Defenses-Statue of Frauds

The statue of frauds requires that contracts for the sale of \$500 or more be in writing. This is a contract that each month could include a shipment of goods that is \$500 dollars. Thus this contract falls within the statue of frauds.

Sufficient memorandum for the Statue of Frauds:

The Statute of Frauds requires that there be a writing signed by the party to be charged, which contains the necessary terms, in order to remove the contract from the statute of frauds. Here, there is an offer that is signed by dolly (the party being charged) that purports the terms of the contract. Thus there is sufficient writing for the statue of frauds.

Modification:

Under the common law, a modification required new consideration. Here there is no new consideration for the modification of price that Dolly is proposing.

Under the UCC, a modification only requires GOOD FAITH. However, a raise in price of production costs is foreseeable, and simply raising the price on such grounds does not exhibit good faith. Thus, there is no valid modification even under the UCC.

Condition:

A condition is an act or event not certain to occur which gives rise to or extinguishes a duty to tender performance under the terms of the contract. Here, Dolly has a condition to deliver the dolls, up to ten a month, that Pat orders.

Excuse of Condition:

Impossibility: Dolly will argue that it was impossible for her to perform under the terms of the contract, as her prices had increased to the point where she could not perform under the contract. However, impossibility only applies where it is objectively impossible for anyone to perform the contract. As this is not the case, Dolly's condition will not be excused by impossibility.

Discharge of Duties:

Impossibility

As discussed above, impossibility will not apply as it is not objectively impossible to perform the contract.

Commercial Impracticability

Dolly will argue that it is commercially impractical for her to perform under the current terms of the contract. However, the commercial impracticability rule usually only applies to unforeseen events, and a raise in material prices is foreseeable, and usually the ten times rule must apply. As the price is not raised by ten times the contract price, the rule will not apply.

Breach: Delivery of one partial order, would be a minor breach, as it can be cured or recovered and does not impair the rest of the contract. Thus it is a partial, and minor breach.

Damages:

Because the dolls are specially manufactured and unique goods, Pat can seek specific performance, as money damages would not be sufficient.

Reliance damages: Pat will also be able to recover for her costs that she lost in advertising that she would have ten per month, and then not being able to fill orders as ten were not delivered.

Dolly v. Pat:

Mutual assent: Offer, Acceptance, and consideration:

See above for mutual assent discussion.

Modification:

As discussed above, the common law requires new consideration for a valid modification.

However, under the UCC, only good faith is necessary. As discussed supra, there is not good faith evidenced and thus the modification will fail.

Condition:

A condition is an act or event not certain to occur which gives rise to or extinguishes a duty to tender performance under the terms of the contract.

Here, Pat a condition to pay for the dolls. She has not valid excuse for paying.

Breach:

Failure to pay for the contract matter, goes to the essence of the bargain, thus Pat's breach is major.

Remedies:

Dolly will recover the original contract prices of \$50 for each doll that has been delivered and accepted (the fifteen that Pat has).

ANSWER B TO QUESTION 2

Pat (P) vs. Dolly (D)

UNIFORM COMMERCIAL CODE

The UCC governs those transactions which involve the sale of goods which are tangible and moveable at the time of the contract. This includes the sale of unique dolls, and therefore, this transaction is governed under the UCC.

MERCHANTS

Merchants under the UCC are those who deal regularly with a particular kind of good, or who hold themselves to have a particular skill or knowledge in a particular area.

D makes and sells unique dolls. As producing large quantities of goods are not a requirement to being a merchant under the UCC, she will be considered a merchant as she deals regularly in the sale of dolls. P owns a local gift store, and thus deals regularly with goods similar to dolls. P is a merchant under the UCC. Both parties will be held to a high standard of good faith and honesty as merchants under the UCC

FORMATION ISSUES

OFFER

An outward manifestation of present contractual intent which is communicated in clear and definite terms to the offeree. The UCC merely requires quantity and an intent to deal. D's mailing of the letter was her outward manifestation of present contractual intent which is demonstrated by the fact that she mailed it to P signed. The objective theory of contracts would indicate that a reasonable person receiving this communication would view it as an offer. The writing contains clear/definite terms, i.e. 10 dolls per month (Quantity/Subject Matter/time for Performance), for \$50 each (Price) sold from D to P (Identity of Parties). A valid offer exists.

ACCEPTANCE

An unequivocal assent to the terms of the offer-

P's reply "I accept your offer of Dec. 15" was clearly unequivocal assent to the terms of the offer. The parties have demonstrated an intent to bound by a contract. Thus mutual assent exists under both common law and UCC rules.

CONSIDERATION

The bargained for exchange of legal detriment for legal benefit.

The agreement involves the sale of as many dolls as P needs for one year. Under common law principles this would be considered illusory as P was under no obligation to purchase any dolls if she claims to have no need for them. Under the common law the contract would fail for lack of sufficient consideration.

The UCC is less stringent and would find that the agreement was for a requirements contract and would be enforceable as long as both parties acted in good faith. The reasoning is that D gives up the legal detriment of producing dolls in exchange for the legal benefit of payment, while P gives up her rights to purchase special dolls elsewhere and must act in good faith. Thus, valid consideration exists under the UCC.

DEFENSES-The statute of frauds does not apply as the contract is in writing signed by both parties. No other defenses exist.

CONDITIONS

A condition is an act or event, the occurrence of which gives rise to a duty. Here P will argue that there is a condition to her duty of payment.

P may argue that D's maintaining a \$50 price to the dolls was an express condition precedent to her payment. However, in situations such as these, the courts generally prefer to interpret such communication as covenant allowing for recovery under breach instead of condition since it is unclear that the parties intent the above statement to be a condition.

MODIFICATION

D attempted to modify the contract by notifying P of the price increase she was establishing as a result of the increase in material costs. Since no agreement (mutual assent) between the parties occurred, the courts will not enforce this modification.

DIFFERENT TERMS (UCC 2-207)

As the terms contained in D's invoice she shipped to P were different from the terms of the agreement, we have a problem of different terms. As the terms are materially different than the terms of the contract,

they will not become the merchant's new course of dealing.

Regarding the Shipment of 1/5

As the modification of the terms of the contract was not valid, D has no right to demand payment in the form of \$60 per doll. She will be bound under her original agreement of \$50 per doll as the court will find that good faith requires that she be bound to her guarantee to not have a price increase during the year of sale.

Remedies are discussed infra under REMEDIES

Regarding the Shipment of 2/5

NON-CONFORMING GOODS

After P ordered another ten dolls from D, D ignored the request and delivered only 5 dolls. As this is different than the order received, D's delivery constituted an acceptance and breach of the request for delivery of 10 dolls. D has three remedies under the UCC:

1. Reject the shipment
2. Accept and recover damages
3. Accept part reject the rest

Here the only available remedies are to reject the whole, or accept the whole and recover damages. This is the method she used.

After accepting the non-conforming goods, D mailed a notice stating that she objected to the price increase. Thus she fulfilled her requirements under non-conforming goods and her acceptance and suit for breach is valid.

BREACH

As D demanded a price increase, the courts will find her in minor breach of contract until she accepts payment under the terms of the original agreement.

The courts will also find P in major breach of contract and will require her to pay the amount owed under the contract price. She may argue that she only had a duty to pay once D agreed on the contract price and that failure to do so, wrongfully prevented her from her duty to pay. However, this is unlikely to succeed.

REMEDIES

GENERAL DAMAGES-Expectancy under the contract terms

D will be able to recover only the original contract price for the dolls delivered to P. Thus she will be able to recover \$750.

P will allow D reasonable time for D to cure her non-conforming shipment of 5 dolls and will recover for nominal damages after D does so if able
Thus, D will recover \$750 under general damages.

SPECIAL DAMAGES

Under Hadley vs. Baxendale special damages are recoverable if foreseeable at the time the contract was formed. Here P may argue loss of business as the failure to deliver dolls damaged her store reputation. She may also seek recovery for the advertising she spent on announcing the coming of D's dolls. It is unlikely that the courts will find either to be foreseeable, and as such will not be recoverable under Hadley.

Question 4

"Senior Prank Day" is a long standing, unofficial tradition at Westside High School, a private college preparatory school. Over the years, on Senior Prank Day, senior students have done such things as setting off stink bombs, lighting firecrackers, and tossing water-filled balloons in the school building. The school administration has warnings that any student caught perpetrating pranks will be expelled and denied the right to graduate. However, no student has ever been caught and the school administration does not provide any extra supervision of the building on Senior Prank Day. Until this year there had never been any serious injury as a result of Senior Prank Day activities.

This year, Donald, a 17 year-old senior, spread a small quantity of an "itching" powder on the lockers in the Westside High School hallway. Peggy, a student at Westside High, got some of the powder on herself and, for several hours, suffered from eye, nose and lung irritation. She also developed a disfiguring skin condition that her physician believes may be permanent. Her physician also believes it is reasonably likely that all of these problems are a result of Peggy's exposure to the powder even though no prior medical information would suggest such a reaction and no other student has complained of similar symptoms. Peggy is very depressed because she fears that the disfiguring skin condition may continue and, if it does, will prevent her from winning the Miss Westside High beauty competition she had entered.

Donald, remorseful, has admitted being the prankster and has stated he had no desire or plan to cause physical injury to anyone. He admits he knew the powder would cause itching on anyone who touched it but denies knowing that the powder might cause serious or lasting effects.

On what theory or theories might Peggy recover damages, and what kinds of damages might she recover, in an action against:

- A. Donald? Discuss.
- B. Westside High School? Discuss.

ANSWER A TO QUESTION 4

1. Peggy (P) v. Donald (D)

Assault

An assault is the intentional placing of another in reasonable apprehension of an imminent danger, without consent or privilege.

When D placed the powder on the lockers, he knew it would place others in danger. However, P was not aware of this action and when she came in contact with the powder she had no apprehension. Although D had not consent or privilege, there is not assault since P had no knowledge of the contact.

There was no assault.

Battery

A battery is the intentional harmful or offensive touching of another, without consent or privilege. D intended the contact, as he was fully aware that other students would be exposed to the contact and suffer itching because of it. The powder was an entity within D's control, which he placed on the lockers, so there was a touching although it was not physical per se. Causing a person to itch would be considered offensive, as a reasonable person would not care to be seen itching in public and it would also be considered harmful, as it is foreseeable that a person may have reactions to the chemicals contained in the powder. D had no consent to this contact, nor was he privileged to put the powder on the lockers.

Mayhem

Mayhem is the intentional permanent disfigurement of another.

D's conduct caused permanent disfigurement in P, who had intended to participate in a beauty pageant but who could not as a result. However, this disfigurement was not intended, nor could it have been reasonably foreseen.

D is not guilty of mayhem

TRESPASS TO CHATTEL

Trespass to chattel is the intentional interference with the chattel of another, preventing them from the use and enjoyment thereof.

When D sprinkled the powder on the lockers of the other students, he prevented them from a reasonably expected use of their lockers, and interfered with their enjoyment thereof. This conduct was intended, as D physically sprinkled the powder on the lockers by his own volition. Although the students did not technically "own" their lockers, they were given the use of them for the school year, making it their own property.

D is liable for trespass to chattels.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional infliction of emotional distress is the outrageous conduct which causes severe emotional or

physical distress. D intended to cause discomfort and distress to his classmates, and although he did not intend to cause physical injury, he was fully aware that itching would cause a person to be distressed. The conduct was outrageous, as it is something a reasonable person would not anticipate or expect, and everyone has a right not to be put in such a danger. This action caused P to suffer physical irritation and also a severe skin condition which would be a physical manifestation of distress as to show that she was indeed distressed. D is liable for intentional infliction of emotional distress

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Negligent infliction of emotional distress is conduct which is negligently committed but which is unreasonably dangerous and exposes others to an unreasonable risk of harm. D's placement of the powder was not intended to cause severe injury to others, but he was negligent in overlooking the fact that others may have a reaction or suffer injury as a result. Itching powder may not be considered unreasonably dangerous, however, since there was no prior medical information to show that this was a common malady caused by the powder. Therefore, D's placing of the powder would not constitute an unreasonably dangerous activity. D is not liable for negligent infliction of emotional distress.

NEGLIGENCE

Negligence occurs where the defendant owes a duty to plaintiff and breaches that duty, which actually and proximately causes danger to plaintiff.

DUTY

D is owed a duty to act reasonably at his school, and not to commit pranks which would possibly have severe or distressing effects. He had a duty to act as a reasonable person, and to not act irresponsibly.

BREACH

D breached his duty of reasonable care when he sprinkled powder all over the lockers.

CAUSATION

Actual-But for the conduct of D in unreasonably sprinkling the powder, P would not have suffered the injury or been disfigured

Proximate-It was foreseeable that a P's coming in contact with the powder that D sprinkled would cause her to sustain injury.

DEFENSES

CONTRIBUTORY NEGLIGENCE

D will argue that P was negligent in not being aware of what was going on around her, since the Prank

Day was a tradition and students were are that pranks were being played. However, this defense will fail as P did not see the powder, and did not voluntarily encounter the danger.

DAMAGE

P suffered injury in the form of sever physical irritation and possibly permanent disfigurement. She will be able to recover from D for these injuries.

2. Peggy v. Westside

VICARIOUS LIABILITY

The master is liable for the torts committed by his servant within the course and scope of his employment. Although modernly the master theory does not hold, it is held that one in control or authority of another will be liable for his actions. P will assert that D was under the authority of the school, and that the school knew of the pranks but did nothing to prevent them; however, D's actions were not condoned or done with the school's consent. W will argue that as a public had not duty to control D's actions, and W will likely succeed in this argument.

W will not be held liable for the torts committed by D; however, P will hold W liable under a negligence theory.

NEGLIGENCE

Defined supra

DUTY

P will argue that W had a duty to maintain a reasonably safe premises, and to enforce the rule against pranks.

BREACH

W breached this duty by not supervising the students although it was aware that Prank Day was a traditional activity and that many potentially harmful pranks would be committed. W does not do anything to enforce the rule against perpetrating pranks.

CAUSATION

Actual-But for the school not supervising the students, D would not have sprinkled the powder which causes injury to P.

Proximate-It is foreseeable that students left unsupervised will do things which would be dangerous to other students and it is foreseeable that unenforcement of a school rule would cause students to not follow those rules.

DAMAGE

Discussed and defined supra

P will be able to recover damages from W

STRICT LIABILITY

Where there is an unreasonably dangerous activity occurring on premises, the owner will be liable for the damage that results from that dangerous activity. P will argue that, as a school, W should be held strictly liable for the harm that occurs as a result of activities on its premises. W was not engaged in an abnormally dangerous activity however and the sprinkling of itching powder would not constitute an abnormally dangerous activity. If the courts find that a school would be liable for the activities of students P would be able to recover from W under a strict liability theory; however, that is not likely.

W is not liable under a strict liability theory.

ANSWER B TO QUESTION 4

1. Peggy v. Donald

Battery-the harmful or offensive touching of the person of another without consent or legal justification.

Donald may have committed a battery against Peggy when he placed the itching powder on the lockers. Peggy would need to prove Donald intended the volitional act or knew with substantial certainty that the result was likely to occur. The facts tell us that Donald knew that the powder would cause itching on anyone who touched it. The fact that he did not intend physical injury is irrelevant because he only needed to intent to do the act of putting the powder on the lockers. Itching may not usually be harmful but most would agree that coming in contact with itching powder would be offensive. Was this the "touching of the person of another"? The "person of another", courts have held, can be something that the person is wearing (like a hat) or holding (like a plate of food). Peggy would need to show that the student lockers were an instrumentality used to cause the touching of another. Peggy got some of the powder on her hands (not likely) by touching the effected lockers and then touched her face causally connecting the two. Since this is how Donald expected the itching powder to come into contact with people, this would be a reasonable presumption. Donald may argue consent by Peggy because of the long standing tradition of "Senior Prank Day". Because of the past customs of pranks, Peggy may have implicitly consented to the battery. Being hit with a water balloon could also be considered a battery as is what occurred on previous "Prank Days". Donald would have to show that Peggy had knowledge of the tradition in order for this defense to be successful. Donald may try to argue minority as a defense. This too will fail because minority is not a defense in

most jurisdictions. Furthermore Donald was 17 years old and can understand the nature and consequences of his actions. Donald may claim that her seer injuries were not foreseeable injuries from itching powder and thus should not a liable. This will most likely fail as well. "You take your victims as you find them" refers to the eggshell thin skull case. A defendant is liable for the injuries caused by him. The Physician's report may mitigate the amount of damages unless his idea of "reasonably likely" is more along the lines of "highly probable" as a result of the itching powder. Maybe Peggy developed this skin disfigurement condition separately. Donald's best defensive argument would be the facts that "no prior medical information" would suggest a reaction like this. If Donald could prove that the disfiguring skin condition was not caused by the itching powder, he would not be liable for those damages. Peggy may be able to recover damages from Donald under a negligence theory.

Negligence-doing or failing to do what a reasonable person would or would not do under the same. or similar circumstances. It is a duty and breach of that duty which result in plaintiff's injuries. Donald owed a duty to all students not to place a substance on their lockers that would cause them harm. Donald breached that duty by placing itching powder on their lockers.

Causation-"But for" Donald placing the powder on the lockers, Peggy would not have suffered injuries.

Damages

Under battery, Peggy would be able to recover general and special damages. General damages are pain and suffering, etc. Special damages are medical bills, lost wages, etc. and must be plead and cannot be speculative. Punitive damages are designed to punish the wrongdoer and are usually recoverable in battery cases because the act was intentional. Under negligence, Peggy would be able to recover general and special damages for her injuries. Two other possible areas of recovery would be Negligent Infliction of Emotional Distress and Negligent Interference with Prospective Business. Peggy's depression is probably not sever enough to support a cause of action for negligent infliction of emotional distress.

Negligent Interference w/Future Business is only supported in a few jurisdictions. Peggy would have to prove that her chances of winning the beauty pageant were very likely. She would have to show specific damages that are not too speculative under this theory. She would also have to prove that her skin condition would be the reason she did not win the competition.

2. Peggy v. Westside High School

Negligence-defined supra

Duty-Westside owed a special duty to its students or invitees, to inspect and warn of dangers on the property.

Breach-Westside breached that duty by failing to inspect or even adequately supervise the property on "Senior Prank Day". Westside had prior experience and previous knowledge of these "traditional" customs. Even though no one had been injured in the past, it is reasonably foreseeable that someone would eventually be injured by a prank. A reasonable person would provide extra supervision on "Senior Prank Day."

Causation-"But for" the lack of supervision, Donald would not have been able to put the itching powder on the lockers and Peggy would not have been injured.

Damages

Peggy could recover general and special damages as described previously. However, she may not be able to recover for her disfigurement condition if it can be shown to be an independent, unforeseeable, unrelated to the itching powder.