ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2000 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the October 2000 California First-Year Law Students' Examination and two selected answers for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

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

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

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

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

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

Question 1

Motor-In, Inc. (Motor-In) entered into a written contract with Decor, Inc., (Decor) in which Decor agreed to redecorate one of Motor-in's motels. The contract between MotorIn and Decor was predominantly for Decor's services and expertise in interior design, but about 15% of the price was attributable to materials that Decor agreed to furnish. Included in the materials to be furnished by Decor was carpeting which was specified in the contract as carpeting manufactured by Plushmaster.

Using its standard order form, Decor mailed an order for Plushmaster carpeting to Wholesale Carpet Supply, Inc. (Wholesale). Wholesale received the order the following day. It no longer sold Plushmaster products, but it did stock carpets by Softstep, a different manufacturer of equal reputation. Wholesale mailed an acknowledgment of the order to Decor. The terms of the acknowledgment were identical to the order, except for substitution of the brand name "Softstep" for "Plushmaster."

Decor received the acknowledgment but did not notice the change. The Softstep carpet was duly delivered to Decor and installed in Motor-in's motel. Decor's staff was unaware of the deviation from specifications.

After the carpet was installed, the president of Motor-In inspected the motel. Discarded wrapping material alerted her to the fact that it was Softstep brand, and not Plushmaster carpet that had been installed. She was greatly distressed because the owner of Plushmaster was a relative and she had particularly wanted his carpets to be used. Decor had no prior knowledge of this relationship.

Motor-In demanded that Decor remove and replace the carpeting with Plushmaster. Decor has refused to do so.

1. What rights, if any, does Motor-In have against Decor? Discuss.

2. What rights, if any, does Decor have against Wholesale? Discuss.

Answer A to Question 1

MOTOR-IN. v. DECOR

UCC or COMMON LAW - Predominant Factor Test

The facts state that the contract between M and D is for D's services of supplying and installing carpet in M's hotel. The facts also say, "The contract between M and D was predominantly for D's services and expertise in interior design, but about 15 percent of the price was attributable to materials that D agreed to furnish." Using the substantial factor test in, this contract was for the D's services rather than the sale of the carpet. Therefore, the common law will govern this contract.

Formation
A meeting of the minds.

D and M entered into a contract that provides the quantity, how ever much work D had to perform to design, the time of performance is not expressly stated in the facts but is implied from the contract, the contract was between D and M, the price was not expressly stated but is implied from the contract, and the subject matter was D's services. The written contract is evidence is a valid offer that was accepted. The consideration to support the contract was D's services in exchange for M's money.
There is a valid contract.

Condition
An act or event not certain to occur, which unless excused or extinguished gives rise to a duty to tender performance under the terms of a contract.

The facts say that, "The contract specified that carpeting manufactured by Plushmaster was to be installed." Since this term was contained in the contract, it is an express condition precedent which unless performed, M's duty to pay D will not arise.

Excuse-Substantial Performance
Where the offeror got substantially what he bargained for, the courts will enforce the contract to the extent necessary to avoid injustice.

D contracted with Wholesaler, a carpet supplier for Plushmaster carpet but W sent "Softstep" carpet instead. D and D's staff did not notice the changed term in W's return letter or notice the difference when the carpet was delivered. D installed the carpet and M noticed the discarded wrapping paper and saw that it was not the carpet that was agreed upon in the

contract. M was "greatly distressed because the owner of Plushmaster was a relative and she had particularly wanted his carpets to be used." D had no knowledge of these facts. D will claim that since Softstep was a manufacturer of "equal reputation", that in installing the carpet, he substantially performed the contract.

P will argue that its duty has not arisen because of the nonfulfillment of the express condition precedent.

Mistake

D will claim that he was honestly mistaken when he laid the carpet down. This is a unilateral mistake and will not be a valid claim.

Breach

An unjustifiable breach of contract.

D did not fulfill the condition in the contract that required Plushmaster carpet be used. Despite this nonfulfillment, the court will probably rule that he substantially performed the contract by installing Softstep carpet that was of equal value and quality. However, D will be liable for a minor breach of the contract in not performing the condition. The reason for M's dissatisfaction is probably unreasonable but if the contract is based upon M's satisfaction, then D must perform.

However, the court might rule that because of the nature of the contract, requiring only D's performance and a specific kind of carpet, that anything but perfect performance is a major breach of contract.

Remedies-Damages

Special

M will recover the difference between the contract price and the installation of Softstep carpets.

Specific Performance

The court could rule for D to give specific performance because of the nature of the contract, which called for D's expert services and a specific kind of carpet. If the contract is based upon M's satisfaction, M will be entitled to this remedy.

2. DECOR v. WHOLESALE

UCC

The contract between D and W is for the sale of carpet. This is a tangible moveable good at the time of sale. Therefore the UCC will govern this contract.

Merchants

The facts state that D regularly deals in the installing of carpets because he is an expert designer. M is a wholesale carpet supplier. Both of the parties have a greater knowledge of the subject matter because they regularly deal in the buying and selling of it. Therefore, they are merchants and will be held to a higher duty of good faith.

Offer

An outward manifestation of present contractual intent communicated to the offeree in such a way as to create a reasonable apprehension that the offeror is willing to enter into a contract.

D, using its standard order form, mailed an order for Plushmaster carpet to W. Under UCC only quantity is required to support a contract. If D's letter contained a specific quantity, it will be considered an offer.

UCC 2-207 Additional Terms

Additional terms will automatically become part of the contract unless 1. the offer expressly limits acceptance to the terms contained in the original offer, 2. the terms are a material alteration of the offer, 3. the offeror does not object within 10 days.

W received the order the following day. It no longer sold P products, but it did stock carpets by Softstep, a different manufacturer of equal reputation. W mailed an acknowledgment of the order to D. The terms were identical to the offer except for the substitution of the name "Softstep" for "Plushmaster". This additional term will probably be ruled to be a material alteration of the original letter. Although P and S are the same kind of carpets, it is a totally different contract when one is substituted.

If the substitution is not ruled to be a material alteration, then it becomes part of the contract unless D rejects it within a reasonable time.

Acceptance
An outward manifestation of unequivocal assent to the terms of the offer.

W mailed an acknowledgment of the offer to D and D did not notice the change. The S carpet was delivered to D shortly after and D installed it in M's motel. D will argue that he did not notice the change. This does not matter because unless he objected to the substitution, it became part of the contract. Whenever D accepted the shipment, he assented to the additional terms added to the fact that he made no objection to it.

Consideration
A bargained for exchange.

D's money is exchanged for W's carpet. There was a bargained for exchange which placed legal detriment on both parties.

Mistake

D will argue that he did not notice that the terms were altered and that he mistakenly thought that the shipment of S carpet was actually P carpet. Since this is a unilateral mistake, it is not a valid claim.

Breach
Supra.

D will argue that W's shipment of non-conforming goods was a breach of contract. The changed term for P carpet to S carpet materially altered the terms of the contract.

W will argue that because D did not object to the additional term, it automatically became part of the contract. Thus, the shipment of S carpet was not a breach but a fulfillment.

If the court rules the changed terms of the kind of carpet was a material alteration of the offer, W will be liable. If the court rules it to be an additional term, D will have no grounds to sue because he accepted the additional term by not rejecting it.

#1 **Motor-In v. Decor**

1. The first issue is if the Uniform Commercial Code (U.C.C.) Governs the contract between Motor-In and Decor.

Under contract law, where the transaction involves goods, moveable products identifiable at the time of transaction, the UCC applies.

Here, carpets are moveable goods but we are informed that only 15% of the contract price is based upon the carpet cost. The predominant percentage is for Decor's services and expertise. Service contracts are not governed by the UCC. Where, as here, the contract involves both goods and services, it is generally the predominant factor which determines.

Thus, when this contract was formed, the UCC does not apply (except perhaps by analogy if the court so chooses) but common law principles apply.

2. The next issue is whether Decor's installation of "Softstep" instead of "Plushmaster" is a breach of contract, and if so if it is a material or minor breach.

Under contract law, any deviation from the terms of the contract as agreed upon, without a valid modification is a breach. A breach can be material, i.e. substantial, or minor.

Here, Motor-In discovered that Decor had installed "Softstep" instead of "Plushmaster," and the contract specified that "Plushmaster" carpeting was to be installed. This being a different carpet than specified was therefore, according to Motor-In, a breach of contract.

Decor, Inc., cannot rebut the fact different carpet was installed.

Therefore, a breach had occurred.

Was the Breach Material?

Decor will assert that even though it breached by installing "Softstep" this breach was only a minor breach, not a material breach.

Under contract law, a material breach excuses performance by the non-breaching party, but a minor breach only gives rise to damages resulting from that breach and does not excuse performance.

Here, Decor will point to the fact that but for the president of Motor-In noticing the

discarded wrapping material nobody would have even been aware of the fact that another brand was used. The quality of both carpets was equal or near equal because "Softstep" had an equal reputation to "Plush master." Decor will point out that even its own installers had not noticed the substitution. The breach was therefore not in bad faith.

Motor-in will attempt to rebut by pointing out that the contract was specific and no modification was agreed to.

However, Decor will prevail because to provide the remedy Motor-In is seeking would require to rip out all the installed carpet which would then become virtually useless and to re-install new "Plushmaster" would greatly add to Decor's expenses and would almost certainly cause this to be a losing contract.

Moreover, Decor's argument will be bolstered by the fact that the only reason for Motor-In's insistence upon "Plushmaster" is become Motor-In's president has a relative who is owner of that company, not for any other aesthetic or quality reason.

This will be regarded as a minor breach only, the court relying on the famous Cardozo opinion where (Reading) pipe was installed in a home contrary to specifications but where, as here, the cost of changing would be greatly disproportionate.

Finally, Decor will point out that this is just one of Motor-in's motels and that the next job can certainly accommodate a "Plushmaster" carpet.

Thus, the breach is minor.

3. The last issue is what damages Motor-In can recover for the breach.

Under contract law, if the breaching party has substantially performed, the non-breaching party can recover damages for the minor breach.

Here, Motor-In will be able to recover for all damages resulting from the unassented-to substitution of the carpets, if any.

Therefore, Motor-In will need to demonstrate all losses connected to the difference, which unless the quality was different (less) may be hard to prove.

Conclusion: At least nominal damages will be awarded, if Motor-In chooses to sue Decor.

#2 Decor v. Wholesale

1. Issue I. Does the UCC Apply?

As analyzed, supra, if a contract concerns goods, the UCC governs. Carpets are moveable goods and therefore the UCC applies.

2. The next issue is if Decor and Wholesale are merchants?

Under the UCC, a merchant is someone who regularly deals in the goods involved or holds herself out to have special knowledge about the subject matter of the contract.

Here, Decor is "in the business" of installing carpets and Wholesale is a supplier of carpets. They both deal in the goods involved here.

Therefore, both Decor and Wholesale are "merchants" under the UCC.

3. The next issue is if Wholesale breached a contract by supplying "Softstep" instead of "Plushmaster."

The rights of the parties depend if a valid contract was formed comprising of an offer, acceptance and consideration.

Decor will assert that by failing to supply the requested brand carpet, Wholesale either did not validly accept Decor's offer or breached their contract.

4. UCC §2-207

At common law, the acceptance had to be identical as the terms of the offer, the so-called "mirror-image-rule". But the UCC has changed that.

Under the UCC (§2-207) an acceptance, that is a reasonable expression of acceptance, with terms at variance or in addition to the terms of the offer, will consider these different or additional terms not to be a functional equivalent of a counteroffer (and thus an implied rejection) but to be proposals for added terms.

Between merchants, these added terms, (here, Wholesale's acknowledgment, substituting, changing Softstep for Plushmaster), these different or additional terms become part of the contract unless objected to or unless they are a material alteration of the contract.

Decor did not specify only "Plushmaster" will do, did not object after delivery of the carpet or after receipt of Wholesale's acknowledgment, therefore the issue is if the substitution was deemed to be a material alteration.

As discussed, supra, the quality of the carpets and reputation of manufacturers was similar therefore there appears not to be any added risk or economic loss to Decor by the "different" terms of Wholesale's acknowledgment.

Therefore, the terms being not a material alteration under §2-207(2)(g) of the UCC they become part of the contract.

The contract being executed already, the court will not order any rescission or restitution.

Note: Decor would only contemplate pursuing its rights if it lost in a suit by Motor-In, which is not likely as previously analyzed.

Conclusion: Decor will not prevail against Wholesale.

Question 2

Urger told Dee: "I want you to kill Vic. If you don't do it within the next two hours, I will burn your house down at a time when you least expect it." Dee, whose ability to exercise good judgment was diminished by a drug she was using pursuant to her doctor's prescription, was terrified by this threat. One hour after Urger's threat, Dee broke into Vic's house, went to Vic's bedroom, and, intending to kill Vic, fired three shots into Vic's chest. Unknown to Dee, Vic was already dead, having died of a heart attack earlier that day.

Of what offense or offenses is Dee guilty, and will Urger's threat and Dee's use of the prescribed drug affect Dee's liability? Discuss.

Answer A to Question 2

State (S) v. Dee (D)

Conspiracy to commit Murder
Is an agreement between two or more persons to commit the illegal act of murder - which is the killing of a human being by another human being with malice aforethought.

The S will argue that Dee and Urger entered into an agreement between each other to commit the illegal act of murder. The S will show how that Urger solicited Dee and that D then acted based upon Urger's threats.

D will argue in defense that she did not want to complete the crime, but that she did so because of fear of her house being burnt down. This defense will be discussed infra, however being that Dee did in fact intend to follow through and kill Vic, it appears that an agreement between the two parties was formed.

Dee will argue that she did not actually agree, and that being that her consent was not voluntary that actual agreement between the parties did not take place. However it does appear that Dee intended to complete the crime - as is evidenced by her actions.

Majority rule requires that an overt act in furtherance of the conspiracy be manifested, in order to prove the existence of the conspiracy. It appears that Dee's breaking into Vic's house would be an overt act in furtherance of the conspiracy and would satisfy this requirement.

Pinkertons Rule: Under this rule, a conspirator may be held liable for the criminal acts of his co-conspirators if they were committed in furtherance of the conspiracy and were a foreseeable result of it.

Under this rule either Dee or Urger could be held guilty for any crimes committed by each other if they were done in furtherance of the conspiracy and were foreseeable.

Absent any valid defenses it appears that Dee would be guilty of conspiracy to commit murder.

Aggravated Common Law Burglary
Is the breaking and entering of the dwelling house of another in the nighttime with the specific intent to commit a felony therein. A burglary will be aggravated when a person is in the house at the time of the breaking.

Breaking: The S will argue that a "breaking" occurred when D "broke" into Vic's house, the law requires only the slightest breaking to suffice.

Entering: The S will show that when D's body actually crossed into the confines of Vic's house that an entering took place that would satisfy this requirement.

Dwelling House: The S will argue that this house was where Vic lived and that he probably used for sleeping at night - thus it would be considered a dwelling house for common law purposes.

Of Another: The facts state that this was Vic's house, this house did not in any way belong to D and therefore it appears that this element would be satisfied.

In the Nighttime: The facts do not state whether or not the breaking and entering took place in the nighttime or not. If it was not in the nighttime then common law burglary would fail.

Specific Intent: The S will show that D had the specific intent to commit the felony of murder inside of the house at the time of the breaking and entering, therefore this element would be satisfied.

As mentioned supra, being that Vic was in the house this burglary may be considered aggravated, however unless the S could prove that the breaking and entering took place in the nighttime then this charge will fail.

It appears that D probably will not be convicted of common law burglary.

Modern Law Burglary
Is the trespassory entering of any structure with the intent to commit a crime.

The S will argue that when D's body entered into Vic's house that such entry was unlawful and treseassory. The S will argue that at the time that D entered he had the intent to commit the crime of murder inside of the house. The S will show that Vic's house is a structure.

Being that D trespassorily entered into a structure with the intent of commit a crime, he would be found guilty of modern law burglary.

Attempted Murder
Is a substantial step towards the perpetration of the intended act of a killing of a human being by another with malice aforethought.

Specific Intent: The S will argue that D had the specific intent to kill Vic, this was manifested by D's obtaining of a gun and pointing it at Vic and firing it several times, it appears that the S would be able to show that D had the specific intent to commit the murder of Vic.

Legal vs. Factual Impossibility: It appears that it is legally impossible to kill a dead person being that they are no longer a "human being" and the law requires that murder be the killing of a "human being". There are two views that deal with this subject:

Traditional View: Was that legal impossibility was a valid defense to an attempt crime, being that what the defendant did was not illegal, he could not be punished simply for his mens rep.

Modern - Model Penal Code Position: Under the modern (minority) view, if the defendant intended to kill the victim, the fact that the victim was not alive will not be a defense to the attempted crime. The logic is that such persons are dangerous to society and they should be punished accordingly.

Under both the modern and traditional views - factual impossibility, is not a defense. Thus under the traditional, majority rule the fact that Vic was already dead when Dee shot him will be a defense - and D would not be able to be convicted of attempted murder. If a court found that Vic's already being dead was mere factual impossibility then under both views Dee would be guilty.

Apparent Ability: The S will show that D had the apparent ability, in that she was holding a loaded gun and in fact shot three times into a Vic. The S will show that D had the ability presently to actually complete the intended crime.

Perpetration vs. Preparation: The S will show that D entered the "zone of perpetration" by her entering into Vic's house and firing into his body three times. This goes beyond the mere process of preparation. Under the Model Penal Code Position this would be considered a substantial step.

Thus it appears that legal impossibility, under majority rule would be a valid defense that would make Dee not guilty of the crime charged. If a court found otherwise then D would be convicted absent any valid defenses.

Defenses - Voluntary Intoxication This defense will only be valid if the voluntary intoxication negates an element of a specific intent crime.

D may argue that his consuming of the drugs by his doctor, made him unable to properly form any intent to both a) commit a felony inside of Vic's house - and b) form the intent to actually kill Vic.

Unless D was able to prove that he could not have formed the intent to commit such

crimes, due to his intoxication, then this defense would not succeed.

Defenses of Insanity

There are four different insanity views, D would argue that the consumption of the drugs rendered her "temporarily" insane.

M'Naghten: Under this majority rule, if D can prove that she was unable to understand the nature or quality of her acts, and that she did not know that what she was doing was wrong then this defense may succeed.

It does not appear that this defense would succeed.

Model Penal Code / Substantial Capacity Test: If D can prove that she lacked the capacity to conform her reasoning to the standards implied by law, then this defense may succeed.

If D can prove that she was unable, due to her temporary insanity, to reason properly then this defense may succeed.

Irresistible Impulse Test: If D can prove that she had an irresistible impulse to kill Vic, in a way that she could not control - then this defense may succeed.

It does not appear that this defense would succeed.

Durham Rule: Under this test, if D could prove that "but for" her temporary insanity, she would not have committed the crimes that she did then this defense would succeed.

This defense may succeed.

Diminished Capacity

Under this minority rule, a defendant may claim that her "capacity" was diminished for some reason - rendering her unable to properly understand what she was doing - or not in a way that a reasonable person would be able to.

D will argue that due to the medication that she was on, she was unable to properly have the capacity to reason correctly. This charge is a lesser included defense of insanity, therefore if D was unable to prove that she was insane, then this defense may succeed.

It appears that because the medication that D was on, caused her to be overly reactive and not to reason correctly - that this defense could possibly succeed.

Defense - Duress

Duress is a valid defense to any crime other than murder, if the threat is of imminent harm to one's person.

D will seek to argue that Urger threatened to "burn her house down" if she did not immediately kill Vic. She will argue that this caused her, under the threat of duress to commit burglary and to attempt to kill Vic.

However the S will show that the harm threatened was not immediate to D's person, but was of future harm. Also the threat was not of imminent personal harm to Dee, thus it does not appear that this defense would succeed.

It does not appear that this defense will succeed.

Answer B to Question 2

State v. Dee (D)

Dee (D) will be charged with conspiracy, Burglary, Murder, and attempted Murder.

Conspiracy

Conspiracy is an agreement between two or more persons to commit a crime with specific intent to commit the crime.

The State will argue that when Urger told D, "I want you to kill Vic," and D later went to actually commit the crime, the latter act would prove that at the time Urger made the demand, D agreed to commit the crime. Her failure to object to the demand, and her later actions consistent with the demand would prove at least a tacit agreement to commit the crime, and D would be guilty of Conspiracy subject to any defenses she might raise.

Defense - Intoxication

D will assert the defense of voluntary intoxication. The facts indicate that D had a prescription that diminished her good judgment. It is likely that if the drug were sufficient to diminish her good judgment, it would also diminish her other faculties as well.

While voluntary intoxication is not a defense to general intent crimes, a crime which requires the actor specifically intend to commit the crime will be excused by the voluntary intoxication.

Since Conspiracy requires that the actor agree to commit the crime with the specific intent that it be carried out, it is a specific intent crime, and D will be excused from culpability under this defense.

Defense - Duress

D will also argue that any actions she took subsequent to the demand by Urger were made under duress. However, in order to claim duress as a defense, the person must have a reasonable fear of an imminent threat to their person. In this case, Urger only threatened to burn down D's house when she least expected it. Even if D argues that "when she least expects it" could include times when she is at home, thus her life would be in danger, the fact is that she would have time to report the crime to the police. She might argue that the drugs made her belief in the duress reasonable, but if that is true, then this defense is unnecessary, as the defense of intoxication would apply.

Burglary

Burglary is the unlawful breaking and entering of the dwelling of another at night with specific intent to commit a felony or larceny therein. Some modern jurisdictions include a lesser degree Burglary that disposes with the "at night" element.

Since the facts indicate that D broke in, it is clear that she used some force to gain entry, so there was a breaking. The facts also indicate that she went inside, so there was an entering. The facts do not state the time of day. If the breaking and entering occurred at night, D would satisfy this element under common law and statutorily for first degree burglary. In jurisdictions with lesser degrees of burglary (i.e. California), the time of day would not preclude a conviction for some form of burglary.

Burglary requires that prior to the breaking and entering, the actor formed the specific intent to commit a felony inside. The facts here indicate that D broke in intending to kill Vic. Subject to any defenses, D would be found guilty of burglary.

Defense - intoxication

However, as discussed above, the voluntary intoxication defense is a legal excuse to all specific intent crimes. Since burglary requires the forming of the specific intent to commit the crime, D will not be found guilty of burglary.

Murder of Vic

Murder is the unlawful killing of a human being by another human being with malice aforethought.

In order to find a killing occurred, it requires that the victim was alive prior to the guilty act of the defendant and that the victim was dead after the guilty act. In this case, the facts indicate that Vic was dead before D ever arrived at his home. He died of a heart attack earlier that day. Thus, there was not a killing.

Parallel analysis applies to causation as well, since there was no causal link between D's actions and Vic's death.

D will not be found guilty of murder.

Attempted Murder of Vic

Attempt is the taking of a substantial step towards the commission of a crime with the specific intent that the crime be carried out.

A substantial step need not be the point of no return for the crime, but it must be some step

that the jury can believe demonstrated the actor's resolve to carry through with the crime. In this case, it is quite easy, since D took the substantial step of shooting Vic three times.

Defense - Factual Impossibility

D may claim that since Vic was already dead when she fired three shots at him, it was factually impossible for her to murder him. However, in evaluating a defense of factual impossibility, the court will ask whether - if all the facts had been as the actor believed -the actions engaged in would have been a crime. Since D was not aware that Vic was dead, as evidenced by her three shots, and she believed him to be alive, then D's actions will be analyzed as if Vic were actually alive.

Defense - Duress

D may assert the defense of Duress, discussed supra. However, duress is not a defense to murder (or attempted murder). Thus, the defense would fail.

Defense - Voluntary Intoxication

Defined supra. Again, Attempted murder is a specific intent crime, and the voluntary intoxication of D would be a legal excuse for her actions.

Mutilation of a Corpse

Although not of a common law crime, many jurisdictions make it a crime to mutilate a corpse. A derivative of mayhem, the crime requires the finding of malice.

When D fired three shots at Vic's corpse, and the shots struck him in the chest, D had committed the actus reus of the crime.

Malice

Malice is defined as the intent to cause great bodily harm, an extreme indifference towards human life, or a wanton and reckless (i.e. depraved) heart. Further, most jurisdictions infer malice under the "deadly weapon" doctrine when a person uses - in its intended manner - any weapon which is designed or intended to cause great bodily injury or death.

In this case, the facts indicate that D used a pistol to fire three shots at Vic. If the facts were as she believed, this act would have likely resulted in Vic's death. Further, even if it didn't kill Vic, it was likely to cause great bodily injury. Lastly, D used a pistol in its intended manner, and the jury could infer malice on that basis.

D acted with malice.

Thus, D will be found guilty of mutilating a corpse (in jurisdictions that prohibit the act), subject to any defenses she might raise. However, neither voluntary intoxication or duress are valid defenses to crimes requiring malice.

Conclusion

Dee will be found not guilty on all charges, except the charge of mutilation of a corpse in jurisdictions where it is a crime.

Question 3

Maker produces outdoor lamps. Competition in the market focuses on durability, energy usage, and adherence to delivery schedules. Maker recently designed a light-bulb socket, with preliminary tests showing greatly improved durability.

After learning about the new socket, Newco (which had been in business six months) wrote to Maker: "We can manufacture and provide monthly delivery of top-quality sockets meeting your specifications. Please advise." Maker responded: "Can you produce 12,000 sockets to be delivered in equal monthly installments, beginning in two months?" Newco replied: "Yes. Price is $5.00 each." Maker immediately replied: "Right. We look forward to doing business with you."

Up to this time all communications including the initial letter had been sent by fax. Maker then filled in the blank spaces on a purchase order and mailed it to Newco. On the first page, in large type, Maker inserted, "TIME IS OF THE ESSENCE." Although it was not customary in the trade to include a "time is of the essence clause" in such transactions, Newco did not object to the term.

One month later, Maker left this voicemail message for Newco: "Because you are new in the business, I'm concerned about your ability to perform. We've got bids out on new contracts, some in areas where we've never sold before. Send me two dozen sample sockets so we can test them for the new customers." Newco did not respond.

When neither the sample sockets nor the first delivery arrived by the end of the second month, Maker faxed Newco stating: "The deal's off. When we didn't receive the samples, we contracted with Oldco to supply all sockets we need at $5.50 each." Newco replied by fax: "We had a minor problem in our machine shop. We are going to hold you to our contract. We'll get the sockets to you as soon as we can, and everything will be back on track by next month."

What are the rights and liabilities of Maker and Newco against each other? Discuss.

Answer A to Question 3

GOODS

Goods are the things which are moveable at the time identified to the contract. Lamp sockets are moveable. Therefore they are goods.

UNIFORM COMMERCIAL CODE (UCC)

The UCC controls contracts dealing with goods. Therefore the provisions of the UCC, Sections 1 and 2 will apply to this contract.

MERCHANTS

A merchant is a person who deals in the goods involved in the transaction or holds himself as having special knowledge about the subject matter by occupation or by virtue of employing someone in that occupation. Certain sections of the UCC apply to merchants only. Those sections will be applicable here.

CONTRACT

An enforceable contract requires an offer, acceptance and consideration in the absence of defenses.

OFFER

An offer is a manifestation of intent to be bound to a contract. For an offer to be valid the offeror must communicate definite quantity, price and time of performance to an identified offeree. Under the UCC the quantity is the only essential term.

Here, the initial fax by Newco to Maker informed the latter of the capability. It lacked the definiteness required of an offer (no quantity). Therefore it will be regarded as a preliminary negotiation for business and not offer.

Maker's response stated quantity and some terms but ended with a query. This will most probably be construed as continuing negotiations. Therefore there is no definite offer yet.

Newco's reply, when coupled with all the previous faxes, will supply all the elements needed for a valid offer. Therefore, there is an offer to supply 12,000 sockets at $5 each to be delivered in equal monthly installments beginning in two months from Newco to Maker.

ACCEPTANCE

An acceptance is a manifest accent to the terms of the offer in the manner invited by the offeror. Here, the response from Maker, looking forward to do business did not manifest any accent. Therefore there was no acceptance at this stage.

Maker's purchase order mailed to Newco manifested an accent. He has introduced additional terms however which fact will be discussed infra.

CONSIDERATION

Consideration is bargain-for legal detriment. Here, Newco wants to sell sockets and Maker is agreeing to buy. There is promise for a promise therefore there is consideration.

BATTLE OF FORMS (UCC Section 207(1) and (2))

Under the UCC as between merchants if additional terms are introduced in the acceptance memo it will become part of the contract unless:

1. the offeror limits acceptance to the terms of the offer
2. the additional terms materially alter the contract or
3. the offeror has already objected to the terms within a reasonable time.

According to UCC Section 207(1) such acceptance is still valid except the offeree limits acceptance to the different or additional terms.

Here, Maker did not limit acceptance to the additional terms. Therefore the acceptance is valid and there is a contract.

The terms of the contract will depend on whether it is determined that the TIME IS OF THE ESSENCE clause materially alters the exchange of bargain.

The trade custom does not include time is of the essence clauses. Therefore if it is found that it materially altered the contract, this additional term will not come in even though Newco did not object.

DEMAND FOR ASSURANCE OF ABILITY TO PERFORM

Under the UCC a merchant may demand an assurance of ability to perform if after the formation of the contract events arise to give rise to doubts about the ability of the other

merchant to perform. The demand must be made in writing and the other merchant must comply in reasonable time, in any case within one month.

Here, Maker did not show that anything happened to cause him to doubt Newco's ability AFTER THE CONTRACT IS FORMED. Furthermore, his request was not in writing as demanded by the UCC. Therefore, it will most probably be decided that Newco was right in ignoring the request.

BREACH OF CONTRACT

A breach occurs when one party whose performance is due does not perform or performs defectively.

ANTICIPATORY REPUDIATION

Anticipatory repudiation occurs when one party to an executory contract declares that he will not perform before his performance is due.

Here, Maker contracted with Oldco. Therefore given all the aforementioned, Maker will most probably be found to have committed anticipatory repudiation.

DAMAGES

Newco will be able to recover on the contract. He can claim his expectation damages for loss of profits on the contract.

In the unlikely event that Maker's time is of the essence clause is sustained, then he will be able to claim the cost of cover 50 cents by 12,000 and any incidental damages.

Answer B to Question 3

MAKER vs. NEWCO

UCC/MERCHANTS

The UCC applies to the sale of goods. Goods are moveable items identified at time of contracting. Since Newco (N) and Maker (M) are contracting for the production and sale of light sockets, a moveable item, the UCC shall apply.

Merchants:

Those who deal regularly in the items of the sale or that hold themselves out as experts in the field.

Here, Maker manufactures light sockets and thus regularly deals in the items of the contract. Maker is a merchant. Newco also manufactures light sockets and thus also regularly deals in the items of the contract. Newco shall also be a merchant under the UCC.

Newco may argue that they are merely subcontractors to Maker, providing a service of producing sockets. However, this may fail since Newco is a manufacturer.

Merchants under the UCC are held to a standard of good faith, fair dealing, honesty in fact and reasonable commercial practices.

OFFER - Preliminarnt Negotiations

When Newco wrote to Maker, "We can manufacture #... Please advise," Newco was making an inquiry as to whether or not Maker wanted to do business.

When Maker responded "can you produce #..." Maker was also making an inquiry to see if Newco would perform.

Neither of these inquiries will be an offer.

OFFER

Present contractual intent, with definite and certain terms communicated to the offeree. Under common law, the terms are quantity, time, identity of parties, price and subject matter. Under the UCC, the required term is quantity.

Here, through preliminary negotiations - supra - when Newco replied "Yes, price is $5.00 each," it displayed a present contractual intent.

The terms were, again know through prelims: Quantity 12,000; Time = per month; Identity = Newco and Maker; Price = $5.00 each; and subject matter = light sockets. Thus, the terms are definite and certain.

The offer was communicated since N and M were communicating by fax machine.

Under the UCC, the offer is also complete: There is evidence of agreement when N said, "Yes" and the quantity term can be implied from the word "each."

Valid offer.

ACCEPTANCE

Unequivocal assent to the terms of the offer. When Maker responded, "Right. Look forward #..." it manifest an unequivocal assent to term of offer, supra.

Modification of Acceptance/Offer

When Maker sent the purchase order in written form and mailed it to Newco, it was also accepting Newco's offer.

Newco will argue that Maker was making an offer at this time and all prior faxes were just preliminary negotiations.

However, Newco and Maker were bound since the faxes did constitute an offer and acceptance - supra.

Newco did not respond to Maker's purchase order. Even if it were an offer, Newco was under a duty to respond since. Silent acceptance would apply since it can be inferred from the faxes that Maker at least expected to be bound contractually, and that without word otherwise, Newco would be also. Thus, Newco's silence would be an acceptance.

2-207 ACCEPTANCE NEW AND ADDITIONAL TERMS

Newco will argue that Maker's purchase order was not an acceptance since it added the term, "Time is of the essence" to the purchase order.

However, under UCC 2-207, new or additional terms in an acceptance will apply between

merchants unless: 1) The original offer conditions acceptance on the terms of the offer only; 2) The offeror (N) objects to the new or additional terms within a reasonable time; or 3) The terms materially change in the original offer.

Here, Newco will argue that the Time is of Essence clause was a material change since it was not customary in the trade.

Maker will argue that competition in the market required adherence to delivery schedules, thus the term was not a material change. Further, in the original negotiations, Maker specifically asked if Newco could make 12,000 per month, thus the time element is introduced. Thus, Maker will argue that it is not a material change.

The court will likely hold it not to be a material change, supra reasons, and that valid acceptance has occurred.

Valid Acceptance

Defense- Statute of Frauds

Sales of goods greater than $500 are to be in writing. Newco will argue that the faxes only resemble preliminary negotiations - supra - and are not offers or acceptances. Thus, Newco will argue that it is not bound by the contract.

Exception-Sufficient Memorandum

Even if Newco did not make this argument, when Maker sent Newco the purchase order Maker will argue that it is a sufficient memorandum.

Newco will argue that for the exception to apply, it must be signed by the person sued. Newco did not sign the purchase order.

However, Maker will argue that under the UCC Written Confirmation Letter rule, the person sued will be presumed to have signed the writing if the recipient does not respond to a written confirmation of the oral contract within 10 days. Furthermore, Maker will argue that the faxes are the original writing of the contract and are sufficiently written. A fax will be considered a writing. Here, Maker will argue that it sent Newco a purchase order in writing and that Newco did not respond. Newco will have been presumed to have signed it.

INVALID DEFENSE

MODIFICATION

Under the UCC a modification is valid if in writing. It does not require new consideration and must be in good faith. Newco will argue that the "Time is of the Essence" clause is a modification to the faxes.

Maker will argue that under 2-207, it's part of the contract, not a mod. supra. Further, it was made in good faith, since in writing and sent to Newco. Invalid Defense.

UCC - REASONABLE GROUNDS FOR INSECURITY

When reasonable grounds for insecurity exist, a merchant may request adequate assurances of performance.

Adequate Assurances

When Maker wrote to Newco asking for a sample one month before law day, it was asking for adequate assurances of the quality of the product from Newco.

Maker had reasonable grounds for insecurity because it had recently designed the socket and because Newco had only been in business for six months. Further, Maker and Newco had not done business.

Newco will argue that Maker did not have reasonable grounds for insecurity since Newco gave no indication it could not perform. It was not required to send the sample since law day was at two months out, not one month.

DIVISIBLE CONTRACT

A contract where performance can be divided succinctly over time.

Here, since the contract calls for 12,000 units per month, the contract can be divided into monthly installments.

A valid contract exists.

CONDITIONS - EXPRESSED

A fact or occurrence which creates or extinguishes an absolute duty to perform.

Here, the express conditions are that there be 12,000 units per month provided by Newco to Maker.

IMPLIED CONDITION

Good faith - UCC - supra.

PRECEDENT:

Condition to occur before duty to perform produced.

Here, Newco's duty to provide is a condition precedent to Maker's duty to pay.

BREACH
UCC - PERFECT TENDER RULE

Under the UCC, any deviation from a perfect tender under the contract is a breach. The aggrieved party must give notice to the breacher and provide opportunity to cure.

Here, Newco failed to deliver the 12,000 units on law day. Thus Newco breached. The breach will be considered major by Maker since it failed the time is of essence clause and minor by Newco since they could cure by next month.

Maker will argue that Newco breached the duty of good faith under UCC by not responding to the request for adequate assurances - supra.

Thus, when Maker gave notice of the breach, it will argue that Newco's failure to respond alleviates the need to wait for cure from Newco.

Newco will argue that Maker must allow it to cure.

REMEDIES

General - Maker will argue that the breach was major and that it lost its expectancy. Thus, its rights were to cancel the contract, seek cover, and sue for damages between price of contract ($5.00) and price of cover ($5.50). Otherwise, Maker could sue for difference in

price of contract and of market at the time it learned of breach. Here, general damages were $6,000.

SPECIALS - CONSEQUENTIALS

Those foreseeable at time of formation (H v. Baxendale).

None apparent in the facts.

TORT
Misrepresentation:

Intentional misstatement of facts made to induce reliance, reliance and damages.

Here, Maker will argue that when Newco said it could make 12,000/month, it did so knowing it could not and intending to deceive. Maker relied on the misstatement when it ordered the sockets.

Newco will argue that it was a new business and didn't intend to deceive.

DAMAGES

Supra.

REMEDIES

Benefit of Bargain

Supra.

Out of pocket loss

Question 4

"Prank Day" is a long standing tradition at Westside High School. Over the years, on Prank Day, seniors have set off stink bombs, lit firecrackers, and tossed water filled balloons in the school building. The school administration opposes Prank Day activities and regularly issues stern warnings that any student caught perpetrating such pranks will be expelled and denied the right to graduate. However, no student has ever been caught. The school administration does not provide any extra supervision of the building on Prank Day. There had never been any serious injuries as a result of Prank Day activities.

On "Prank Day" 2000, Al, a 17 year old senior, spread a small quantity of powder on the lockers of the building hallway. Al has stated that he had no desire or plan to cause any physical injury to anyone. He admits, however, that he knew the powder would cause some irritation to the lungs, noses, eyes and skins of persons who came in contact with it. He says, however, that he believed that the powder would not have any serious or lasting effects.

Mary, a student at Westside High, got some of the powder on herself and, for a few hours, suffered from eye, nose and lung irritation. She also developed skin problems that her physician believes are permanent. Her physician also believes it is reasonably likely that these problems are a result of the exposure to the powder even though there is no prior medical information from which such a reaction could have been predicted.

1. What cause of action may Mary assert against Al and/or Westside High School, and is she likely to prevail on each?

2. For what injuries, if any, can Mary recover damages? Discuss.

Answer A to Question 4

Mary (M) v. Al (A)

BATTERY

The intentional harmful or offensive touching of another without consent or privilege.

M is going to argue that by placing the powder on her locker, A was intending to cause an offensive touching of her person without consent or privilege. A person does not have to actually touch the person for there to be a battery. They only have to have the intent or the desire and knowledge to a certain degree of certainty that a particular act will have a particular result. A knew that when he placed the powder on the locker of M that it would cause some irritation to the lungs, eyes, nose, and skins of the persons it came into contact with. He knew with a substantial degree of certainty that by placing the powder on the lockers that it would result in someone suffering an offensive touching.

A may argue that he did not want anyone to get hurt, but he still knew that someone could be hurt by the powder.

Damages

M could recover damages for the irritation to her eyes, nose, and lungs. It would be nominal/compensatory damages which would repay her for any hospital bills, loss of work, pain she suffered as a result of coming into contact with the powder that A placed on her locker.

Defenses

Consent

A is going to argue that he had M's implied consent to play the pranks on her, because it was known in the school that on prank day, seniors do all sorts of pranks to the other students at the school and there was implied consent on behalf of the student body to play these pranks.

M will argue that she did not impliedly consent to the injuries she suffered. She will argue that if she did give consent it was to the lesser pranks that had happened in the past, the water balloons, stink bombs, and firecrackers, not powder which causes eye irritation, and the other damages.

TRESPASS TO CHATTEL

The intentional interference with the chattel in possession of another.

M will argue that A committed a trespass to chattel because he placed powder on her locker, so that she was not able to open it without coming into contact with the powder with caused her injuries. She will argue that the locker was in her possession and even though it was not hers to own, she still retained possession because she had the key, combination, etc., and her things were stored in it. Therefore, when A placed the powder on her locker, he was intentional or with the desire to do it, trespassing and interfering with the property in possession of another.

A may argue that the locker was not M's locker but was the school's, so he cannot be guilty of the trespass to chattel because it was not M's chattel.

Defenses

Supra

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Conduct of an outrageous nature which causes severe distress to the plaintiff.

M will argue that A's conduct was outrageous and that she has suffered severe distress because she suffered irritation and she also suffered a skin condition as a result of coming into contact with the powder. She will argue that it is outrageous conduct for someone to spread powder around which they know will cause other people to suffer injury.

A may argue that the conduct she suffered was not severe, but a permanent skin condition and the irritations would probably be found to have been severe injury.

NEGLIGENCE

A breach of duty which actually and proximately causes damages to the plaintiff.

Duty

M is going to argue that A as a fellow student owed her a duty to act as a reasonable person and to not place other students in danger of being harmed physically.

A will argue that he should be judged as a reasonable 17 year old would behave, and he will argue that a reasonable 17 year old could have done the same thing that he did.

However, even in comparing him to the other seniors who have participated in the Prank Day, they did not put out powder that caused other students physical harm.

Breach

M will argue that A breached his duty to act as a reasonable person when he placed the powder on her locker because it was not a reasonable thing for a student to do.

Causation

Actual Cause
But for A placing the powder on M's locker, she would not have suffered the eye, nose, lung irritation that she did. She also would not have suffered the skin condition that the doctor says was related to the powder and which is probably permanent.
A will argue that it is not proven yet that the powder he used caused her skin condition, and that there is no prior medical information from which such a reaction could have been predicted.

Proximate Cause
It is foreseeable that when a person does not behave as a reasonable person and puts the powder on someone's locker which he knew would cause irritation to the person, that the person will in fact suffer damages.

Damages

M suffered damages when she came into contact with the powder which was on her locker. Her eyes, nose, and lungs suffered irritation for several hours after she came into contact with the powder that A had placed on her locker. She also developed a skin condition which is thought to be permanent which her doctor reasonably believes came from the powder even though there is no prior medical evidence to prove this.

Nominal Damages

M would receive nominal damages just because A was negligent.

Compensatory Damages

M will receive damages to repay her for her medical bills, pain and suffering from the irritations, and other damages she might have incurred.

Defenses

Assumption of the risk

A will argue that by coming to school on the Prank Day that M assumed the risk that she might have a prank played on her. However, M will argue that she did not knowingly and voluntarily encounter a known risk, which would have been if she saw the powder knew that it could harm her, but touched her locker anyway.

Contributory negligence

A will argue that M was contributorily negligent because she did not look at her locker to see if the powder was on there. However, the facts don't say that the powder was visible or that she could have seen it on her locker.

Mary v Westside Highschool (W)

VICARIOUS LIABILITY

M will argue that W needs to be held vicariously liable for the acts of the students in the school. She will argue the doctrine of respondeat superior even though it applies to employer/employee situations can be used here with the school. However, this is probably not the case, since the students do not work for the school.

NEGLIGENCE

Defined supra.

Special Duty

M will argue that W owes her a special duty because she is a student at the school and as such is under the protection of the school, and because of this relationship the school owes her a duty to make sure that the things the other students do, do not harm any of the other students.

Duty

M will argue that if the school does not have a special duty they have a duty to act as a reasonable person would have under the circumstances.

Breach

M will argue that W breached its special and general duty by allowing the Prank Day to

occur in the first place, and by only threatening that the student would be expelled and not allowed to graduate. She will argue that because they knew that the pranks went on that they should have provided extra security to the students so that they could not be harmed when a prank got out of hand.

W will argue that they did not breach their duty because in all the years that Prank Day had been going on, there had never been an incident when a student had been caught and there had never been any serious injuries to other students. However, this does not mean that the school was not negligent.

Causation

Actual cause

But for the school not monitoring the students activities better and making sure the students are engaging in appropriate behavior, M would not have been harmed by the powder.

Proximate cause

It is foreseeable that if the school did not watch the students better and did not act as a reasonable school would have by not allowing pranks, than M would not have been injured.

Damages

Supra

Defenses
Supra

M could recover from her damages from the irritation and the skin condition as long as the skin condition was caused by the powder. If it was not a cause of injury then she cannot recover for that. She should be able to recover against both of the plaintiffs.

Contribution
W will seek contribution from A since it was his actions which caused the accidents.

Jointly/Severably liable
M can recover the total amount from either party, or can recover part from both.

Answer B to Question 4

MARY (M) v. AL (A)

BATTERY

The intentional harmful or offensive touching of another, without consent or privilege.

The facts indicate that A placed a powder on some lockers at school that he knew would cause irritation to the skin, eyes, and lungs of other persons who came in contact with it. Since intent is found by a desire to bring about a result or knowledge to a substantial degree of certainty that the result will occur, A will probably be found as having the necessary intent. It is obvious from the facts that his whole desire in placing the powder on the lockers was for others to come into contact with it.

Contact with an irritating powder would certainly be harmful, and would probably offend the reasonable person even if it didn't cause harm. That is, no one would volunteer to come into contact with powder known to irritate the eyes, lungs, and skin. Thus, the fact that there was at least an offensive touch is shown.

A might argue that M consented to the touch by coming to school, knowing it to be prank day. However, because M had a right to be at school, and probably did not know she would come into contact with the powder, consent will not be found.

Since this tort will probably lie, M will be able to recover punitive damages from A.

ASSAULT

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

Although M did suffer an offensive touch, it is doubtful that she was apprehensive of such touch. Thus, this tort will not lie.

NEGLIGENCE

A breach of defendant's duty which is the actual and proximate cause of damage to the person or property of another.

DUTY

It could easily be argued that one has a duty not to place powder that is known to

irritate in a place that others will come into contact with it. This duty relates to the duty which everyone has to act as a reasonable person. According to Judge Cardozo, this duty is owed only to foreseeable plaintiffs. Here, although A might not have known M would touch the powder, it is clear that he knew someone would come into contact with it: that was his whole purpose in placing it.

Thus, M was a foreseeable plaintiff and A owed her a duty to act reasonably.

BREACH

As discussed earlier, A placed an irritating powder on some lockers in M's school. Since a reasonable person would probably not engage in such conduct, the standard of due care was violated and A will be found to have breached his duty of due care towards M.

CAUSATION

But for A placing the powder on the lockers, M would not have been injured. Thus, actual causation is shown.

As discussed supra, it was entirely foreseeable that one like M would come into contact with the powder and would suffer damage. Proximate cause is thus established.

A might argue that it was not foreseeable that M would react to the powder in the way that she did and that he did not foresee permanent injury to anyone and should not be liable for M's permanent injury. However, M will argue that she was an "eggshell plaintiff and that A took his plaintiff as he found her. M will win this debate and A will be liable for the damage to M even if such damage resulted from M's abnormal reaction to the powder.

DAMAGES

M will be able to recover for past and future pain and suffering, as well as past and future medical expenses (special and general).

As discussed supra, M will also recover punitive damages resulting from the battery.

DEFENSES

A might argue that M assumed the risk by going to school that day. However, this defense requires the plaintiff to have known of the risk and to have voluntarily encountered it. It does not appear from the facts that M did either. Thus, the defense will not work.

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A might argue that M had the last clear chance to avoid the accident. However, this will not work because this is a plaintiff's defense to a charge of contributory negligence.

PRODUCTS LIABILITY

M might try to recover under this type of theory, but would fail since A was not a manufacturer or distributer of the powder.

MARY v. WESTSIDE HIGH (W)

VICARIOUS LIABILITY

M will try to hold W liable for the actions of A since W was arguably in control of W and had a responsibility to keep the students under control and safe. Since the school knew of the prank day and was in charge of the students, it will probably be liable for A's torts discussed supra.

NEGLIGENCE

Supra

DUTY

A school, like every other entity, has a duty to act reasonably and owes such a duty to all foreseeable plaintiffs. This would be a general duty.

M might argue that the school owed her a special duty under the fact that she was arguably a licensee or an invitee on the property since she was there with permission and was there, arguably, for the economic benefit of the school. This issue might turn on whether or not the school was a private school or a public school.

M might further argue that there was a special duty due to a contract. If the school was private, this argument might work.

Also, she might argue that she had a special relationship with the school as its student.

In any case, a duty will be found that would require W to act reasonably towards M since she is a foreseeable plaintiff (she was a student).

BREACH

When W, knowing of Prank Day, failed to supply extra supervision on Prank Day, it arguably breached its duty. W will contend with the fact that it issued stern warnings that stated that anyone caught on such a day might not be allowed to graduate. The facts state, though, that no person had ever been caught.

The facts indicate that Prank Day was a "longstanding" tradition. Thus, W certainly knew about it. The court will probably not allow W to escape liability or shield itself with the fact that it issued warnings if it never acted on those warnings.

W will probably be found in breach of at least its duty to act reasonably to protect its students from harm.

CAUSATION

It is possible to argue that but for W's negligence, M would not have been injured. But where there are two tortfeasors (W and A), the court is likely to use the substantial factor test. Under this view, M will argue that W's conduct in doing nothing to curb the dangers associated with Prank Day were a substantial factor in her injury. Thus, actual cause will probably be proven.

M will next argue that W should have foreseen her injury; That is, that her injury was foreseeable. W will argue that A's conduct was unforeseeable and thus an intervening cause. However, the facts state that W knew of the danger and had even issued stern warnings to its students about Prank Day.

Although the criminal conduct of another may be deemed unforeseeable, even criminal conduct will not be an intervening cause if it was foreseeable. Thus, since W obviously knew of the danger posed to its students (see supra), M's injury will probably be seen as foreseeable and thus proximately caused.

DAMAGES

Supra

DEFENSES

Supra

IMMUNITY

If W is a public institution, it might seek immunity from M's claim. However,

governmental immunity for torts was abolished by congress. This shield from liability will not work.

INDEMNITY FROM AL

If W is found vicariously liable for A's conduct, W would probably be allowed to recover from A any damages that it is forced to pay M under this theory since A was arguably the primary tortfeasor.

CONTRIBUTION

If both A and W are found to be negligent, W or A might seek contribution from the other because M would probably be allowed to sue either or both under the doctrine of joint and several liability.