

## **ESSAY QUESTIONS AND SELECTED ANSWERS**

### **JUNE 2006 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the June 2006 California First-Year Law Students' Examination and two selected answers for each question.

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

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

<u>Question Number</u>	<u>Subject</u>	<u>Page</u>
1.	Torts	1
2.	Contracts	13
3.	Criminal Law	24
4.	Torts	36

## **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 state statute requires motorcyclists to wear a safety helmet while riding, and is enforced by means of citations and fines. Having mislaid his helmet, Adam jumped on his motorcycle without one and went riding down the street. Barb, who was driving her car in the opposite direction on the same street, briefly looked down to get her sunglasses, which had dropped to the floor. At that moment a bee landed on Adam's head. In attempting to brush it away, he lost control of the motorcycle. The motorcycle fell and went sliding over the double line into Barb's lane with Adam pinned beneath it. When Barb retrieved her sunglasses and looked ahead, she saw that the motorcycle was sliding towards her, going the wrong way in her lane. She abruptly turned her wheel to avoid hitting it, crossed over the double line, and collided head-on with a truck that was approaching her at twice the posted speed limit. The truck, owned and driven by Dave, was badly damaged in the collision, as was Barb's car. Barb was seriously injured when the force of the collision threw her against her own seat belt, breaking her sternum.

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

1. Barb against Adam? Discuss.
2. Barb against Dave? Discuss.

## ANSWER A TO QUESTION 1

Q-1

Torts

Barb v. Adam

Negligence Per Se - See under Breach. (defined intra)  
Crossing the double line - excusable

### NEGLIGENCE

Negligence where a duty is owed and that duty is breached and that breach is the actual and proximate cause of plaintiff's damages.

Here Barb will argue that Adam owed her a general duty of due care to act as a reasonable person and prevent foreseeable harm or injury by driving in a safe and appropriate manner. Moreover[,] Barb will assert that Adam owed a duty to follow the rules of the road.

Breach

Because Adam failed to wear his helmet[,] Barb will argue Negligence Per Se[;] a violation of statute in California creates a rebuttable presumption of negligence.

A state statute required a motorcyclist to wear a safety helmet while riding. The intent of the legislature was to protect the motorcyclist from head injuries from accidents. Adam is a motorcyclist. Here the legislat[ion] intended to protect him[,] not Barb. The classification is motorcyclist which Adam not Barb is. The type of injury is a head injury of a motorcyclist and passenger.

There is no negligence per se as it is not the type of injury ("a bee sting") the legislature is trying to prevent.

Barb will argue that Adam failed to control his motorcycle and he owed her a foreseeable general duty of due care as a motorcyclist to stay on the appropriate side of the road. Adam[,] after being landed on by a bee[,] brushed it away and lost control of his vehicle, breaching his duty of due care to drive safely and to maintain control of his bike and drive on his side of the road. Adam lost control of the bike[,] fell and skidded over the double line[,] a violation of statute[,] causing Barb to swerve and strike Dave's truck. It is the intent of the legislator to protect other motorist[s] from injury[.] Both are motorists and suffer the type of injury injuring herself and Dave's property.

There is a breach.

## Causation

### Actual Causation

But for Adam losing [sic] control of his bike and crossing the double line[,] Barb would not have been injured. Adam is a substantial factor of her injuries.

There is actual causation.

### Proximate Causation

It is foreseeable that when one loses control of a motorcycle and fails to (not cross) the double lines[,] which is a violation of statute negligence per se[,] that it would cause Barb to swerve in avoidance of striking Adam and his bike causing an accident with Dave. Adam was the proximate cause of her accident[.]

There is proximate causation.

## Damages

Barb suffered personal injury of a broken sternum and was seriously injured. Her car was badly damaged[.]

## Defenses

### Contributory Negligence

When a plaintiff has a responsibility to act with conduct of a certain standard and fails to hold at or above that level of conduct and contributes to his or her own injury.

Here, Adam will argue that Barb's own negligence caused her injuries. Barb by looking down at the floor to get her sunglasses placed herself in jeopardy of accident[.] Here Barb failed to hold to the conduct required of drivers to drive safely and keep the[ir] eyes on the road.

Barb will argue it is normal to avert eyes [on] dropping.

There is contribut[or]y negligence. In some states it is a Complete Bar to Recovery.

### Comparative Negligence

Comparative negligence is an apportionment of fault and will affect the recovery of the parties depend[ing] on the type of comparative negligence the[re] must be under 50% in order to recover.

Adam will assert: By swerving and crossing into Dave[']s path here Barb looked at the floor and averted her eyes from the road. Barb has a percentage of fault in the accident. Barb will argue it was brief and would not have mattered. The courts will decide if there is comparative negligence.

This is comparative negligence.

### Assumption of the Risk

Knowing the dangers and being fully aware and accept[in]g the risk is a defense under Assumption of the Risk[.]

Here Adam will argue that Barb drove know[in]g there are dangers out on the road and the[re] are accidents that happens[sic][.] She had full and complete knowledge.

Barb will counter that she was unaware of Adam[']s bee incident and who knows when an accident will occur? She could not have complete knowledge.

There is no assumption of the risk based on Barb's lack of knowledge and accepta[n]ce of Adam's driv[in]g skills.

### Damages/Remedies

#### General Damages

Barb will seek to recover her past[, ] present[, ] and future pay and suffering[.] In some states she may recover economic loss of her car. (May reduce future to recover).

#### Special Damages

Barb will seek to recover any certain and foreseeable losses related to her lost wages [and] medical bills. (provable expenses)

#### Nominals

To assert plaintiff[']s rights

There will be no nominals because of the type of accident. If there is it will be small.

#### Punitive Damages

To punish for malicious or wantonly reckless or intentional behavior.

There will be no punitives unless there is wanton recklessness.

As there appears to be joint tortfeasance[,] Dave speed[ing] and Adam recklessness[,] she may seek dam[ages] from both. However[,] her total damages may not exceed the amount by collecting each successive tortfeasor[;] may seek injury from each other or contributions.

Barb v. Dave

Negligence per se

Defined supra.

Here, Dave violated the posted speed limit. Under negligence per se the legislature intended the speed limit to protect from car accidents. The type of injury intended to prevent to motorists Dave & Barb, both parties with the characteristics of parties injured. Here Dave may be found to have created a rebuttable presumption of neglig[en]ce under CA law.

There is neglig[en]ce per se.

Dave will assert that Barb crossed the line and struck him. His speed would not matter and for severity of injury, not causing the accident.

Duty

Defined supra.

Here Barb will assert that Dave owed a general duty of due care to drive within the speed limit. A reasonable driver would foresee that speeding may cause serious injuries and inability to avoid accidents.

Breach

Defined supra.

Here Dave drove at twice the speed limit. A reasonable person would foresee that speed[ing] would breach a general duty of due care to other drivers like Barb. Dave breached his duty and the neglig[en]ce per se created a rebuttable presumption of negligence, violating the speed limit.

Dave will assert that speeding limit [sic] was designed to control avoidable accidents and that Barb swervy[sic] over the double line, here she created the accident and breached her duty to Dave.

## Actual Causation

But for Dave violat[ing] the speed limit Barb would not have been severely injured in the head[on collision]. Dave is a substantial factor in Barb's injuries.

There is Actual Causation[.]

## Proximate Causation

It is reasonably foreseeable that Dave's speeding was the legal and proximate cause of Barb's severe injuries.

There is proximate causation.

## Damages

Defined supra.

## Defenses

### Contribut[or]y Neglige[nc]e

#### Defined Supra

Dave will argue that Barb crossed th[e] double lines and that she contributed to her own injuries by fail[ing] to keep her eyes on the road and swer[ving] to avoid [w]recking by en[ter]ing into an oncoming lane & crossing double lines. A driver owes a conduct of due care to stay in her lane and drive defensively with their eyes on the road. Barb failed to do this and contributed to her accident.

There is contributory negligence.

### Comparative Negligence

#### Defined Supra.

Here Barb contributed to her injuries defined infra in contribut[or]y negligence.

There is comparative negligence.

### Last Clear Chance.

Barb will argue in her defense that Dave had [the] last clear chance to avoid the accident but failed to do so because he was speeding.



There is no Last Clear Chance.

Ass[um]pti[on] of the risk

Defined Infra

There is not assumption of the risk. Dave did not know Barb would have an accident and not give up her offer.

Generals

Defined supra.

Barb may recover general damages for her suff[er]i[n]g past present and future reduced for Adam.

Specials

Defined supra.

Several

Defined supra.

Punitives

Defined supra.

## ANSWER B TO QUESTION 1

**Q-1**

1. BARB v. ADAM

NEGLIGENCE

Duty to conform to a standard of care and breach of duty is the actual and proximate cause of plaintiff[']s damages.

DUTY

FORESEEABLE PLAINTIFF

Here, Barb was driving on a road shared by fellow motorists including Adam, which puts her in the zone of danger should Adam not drive safely. Therefore Barb is a foreseeable plaintiff.

STANDARD OF CARE

Under these circumstances, Adam had a duty to act as a reasonably prudent driver while sharing the road with other drivers.

BREACH

Where the defendant's conduct falls short of the required standard of care applicable and owed to plaintiff.

Here, Adam's conduct of brushing away a bee from his head jeopardized the safety of Barb, which fell short of a reasonably prudent driver.

VIOLATION OF STATUTE

Where the[re] is a statute [of] specific duty, it replaces the more general standard of care and a violation of such statute establishes a brea[c]h.

Here, Adam violated the state statute by not wearing a safety helmet while driving a motorcycle.

The statute[,] enforced by means of citations and fines, clearly establishes a criminal penal[t]y. Further, the statute clearly defined the conduct required as wearing a safety helmet while driving a motorcycle. However, the statute-specific duty was not established to protect fellow motorists such as Joan. Rather, the statute was designed to protect the driver of the motorcyclist [sic].

Therefore, Adam's violation of statute does not establish a brea[c]h. Adam did, however, breach the more general duty owed to Barb (defined/discussed supra.)

## CAUSATION

### ACTUAL CAUSE

But for Adam attempting to brush away a bee and losing control of his motorcycle, Barb would not have been injured how and when she was.

### PROXIMATE CAUSE

When a bee landed on Adam's head and he attempted to brush it away, it was foreseeable that he could lose control of his motorcycle. Between Adam's act of brushing away the bee and losing control of his motorcycle there were no intervening events to break the chain of causation leading to Barb's collision with Dave.

## DAMAGES

### GENERAL DAMAGES

Barb will be entitled to general damages for any pain and suffering caused by Adam's act of sliding into her lane[,] resulting in her attempt to avoid a collision with him.

### SPECIAL DAMAGES

Barb will be entitled to special damages for any medical bills as a result of her broken sternum and any other injuries caused by this collision. Also, Barb is entitled to special damages for any lost wages.

### PROPERTY DAMAGES

Barb is entitled to the cost to repair her car of [sic] the reasonable value of her car if it was totally destroyed.

## DEFENSES

### CONTRIBUTORY NEGLIGENCE

Here, if the court determines that Barb's conduct fell short of a reasonably prudent driver by briefing [sic] looking down to get her sunglasses that had dropped to the floor, this would be a total bar to recovery in contributory negligence jurisdictions.

## LAST CLEAR CHANCE DOCTRINE

However, an exception would be made if Adam was found to have had the last clear chance to avoid the accident.

## COMPARATIVE NEGLIGENCE

In comparative negligence jurisdiction's [sic] Barb and Adam's percentage of degree of fault would be determined and damages would be paid accordingly.

## ASSUMPTION OF THE RISK

Barb did not willingly, knowingly or unreasonably assume any risk by sharing the road with Adam as she had no way to know a bee would land on Adam's head[,] causing him to swerve into her lane.

## JOINT & SEVERAL LIABILITY

On these facts, Adam and Dave will be joint and severally liable for Barb's injuries[;] therefore, both are responsible for her total damages.

## CONTRIBUTION

Adam may also seek contribution from Dave if he pays more damages than he was required.

## 2. BARB v. DAVE

### NEGLIGENCE

Defined supra.

### DUTY

### FORESEEABLE PLAINTIFF

Because Barb shared the road with Dave, she was in the zone of danger should Dave's driving put her at risk. Therefore, Barb is a foreseeable plaintiff.

### STANDARD OF CARE

Here, Dave had a duty to drive as a reasonably prudent driver under the circumstances of sharing the road with fellow drivers.

## BREACH

Defined supra.

Here, when Dave drove twice the posted speed limit[,] putting his fellow drivers[,] including Barb[,] at risk, he breached his duty.

## VIOLATION OF STATUTE

Defined supra.

Here, a statute established a criminal penalty for speeding. Further, a statute clearly defined conduct expected as half the speed Dave was driving. And finally, the statute was designed to protect both Dave and fellow drivers such as Barb. Therefore, Barb was part of the class sought to protect.

Dave has violated a statute and breached his standard of care owed to Barb.

## CAUSATION

### ACTUAL CAUSE

But for Dave driving at twice the speed limited [sic], Barb would not have been injured how and when she was.

### PROXIMATE CAUSE

Barb's injuries were a foreseeable result of Dave speeding and colliding with Barb. Adam's act of sliding into Barb's lane is not an intervening act to break the chain of causation.

Therefore, Dave is the actual and proximate cause of Barb's injuries.

## DAMAGES

### GENERAL DAMAGES

Barb is entitled to general damages for pain & suffering caused by this accident.

### SPECIAL DAMAGES

Barb is entitled to special damages for her medical bills for her injuries including a broken sternum. Sue is also entitled to special damages for lost wages.

## PROPERTY DAMAGES

Defined & discussed supra.

## DEFENSES

### CONTRIBUTORY NEGLIGENCE

Defined & discussed supra.

### LAST CLEAR CHANCE DOCTRINE

If the court finds that Dave had the last clear chance to avoid his collision with Barb, Barb will not be barred from recovery if she is found to have contributed to her injuries.

### COMPARATIVE NEGLIGENCE

Barb & Dave's degree of fault will be determined by percentages and damages paid accordingly.

### ASSUMPTION OF THE RISK

Here, Barb did not knowingly[,] willingly or unreasonably assume any risk by sharing a road with Dave.

Assumption of the risk does not apply.

### JOINT & SEVERAL LIABILITY

Defined/discussed supra.

### CONTRIBUTION

Dave may seek contribution from Adam[,] reimbursement for any damages Dave pays above what he is liable [for].

## Question 2

CapCo sells baseball caps to youth leagues and recently approached two new teams, the Bears and the Lions. Uncertain how many caps the team would require, the Bears' team manager signed a written contract that included the following:

“The Bears will purchase all baseball caps needed for the 2006 season (approximately 75-100 caps) from CapCo @ \$7.50 per cap. All modifications to this contract must be in writing to be enforceable.”

When the Bears team manager subsequently placed the baseball cap order with CapCo, he informed CapCo that fewer kids had signed up than had been expected, and, consequently, the Bears needed only 50 caps. CapCo responded that such small orders generated less profit and would accordingly trigger a higher price of \$8.50 per cap. The Bears team manager orally agreed to that higher price.

CapCo also contacted the Lions, whose team manager was considering several baseball cap suppliers. CapCo sent the Lions manager a letter that stated: “I can offer you a special deal for a limited time. CapCo will provide 100 caps @ \$2.50 per cap, delivery within one week.”

Upon seeing CapCo's letter, the Lions manager was excited about the proposed contract price and immediately mailed her acceptance to CapCo. Before receiving the Lions manager's response, CapCo realized that its offer contained a clerical error—the price was supposed to be \$6.50, not \$2.50, per cap. CapCo immediately telephoned the Lions manager and informed her of the clerical error.

The Bears refuse to pay \$8.50 instead of \$7.50 for each of the 50 caps. CapCo contends that the Bears must order at least 75 caps to obtain the \$7.50 per cap price. The Lions want to enforce the \$2.50 per cap price.

1. If CapCo files a lawsuit against the Bears seeking damages for breach of contract, who is likely to prevail? Discuss.
2. If the Lions file a lawsuit seeking to enforce the contract price of \$2.50 per baseball cap, who is likely to prevail? Discuss.

## ANSWER A TO QUESTION 2

2)

### **CapCo v. Bears**

#### Governing law

As this contract involves the sale of baseball caps, which are items identified as movable at contract formation, the UCC will govern.

A valid contract requires mutual assent (offer and acceptance), consideration, and the absence of defenses.

#### Offer

An offer is a manifestation of present intent to contract, communicated to an offeree with sufficient certainty that the other party would reasonably believe that his or her assent would form a bargain. Here, we have a written contract between the Bears and CapCo for a requirements/output contract. The only formation issue is whether there was sufficient certainty in this contract that a court could provide a remedy. Under the UCC, the essential terms are parties and quantity. Under this contract, only a statement estimate is provided (75-100 caps). However, the facts indicate that this is an output/requirements contract by use of the phrase "purchase all baseball caps needed for the 2006 season." Under the UCC, as long as the parties act in good faith, and do not increase in disproportionate amounts, nor decrease in bad faith, a quantity term will be implied by the course of performance.

#### Acceptance

Acceptance is a manifestation of assent to the terms of the offer, made in a manner required by the offer. Here, since we have a written contract, a valid acceptance is made.

#### Consideration

Consideration is a bargained[-]for exchange in which each party suffers some legal detriment. Here, we have a contract for the purchase and sale of goods, so the exchange and legal detriment elements appear to be met.

Illusory promise? - An illusory promise only has the appearance of binding a party. However, under the UCC, the duty of good faith will satisfy the consideration element. In addition, under the UCC the parties have an implied promise of good faith and fair dealing.

Promissory estoppel? Where consideration is lacking, to the extent necessary to prevent an injustice, the court may hold that plaintiff's reliance on a promise will substitute for



consideration. However, this is not required in this case.

## **Defenses?**

### **Statute of Frauds (“SOF”)**

Under contract law, certain contracts must be in writing in order to be enforced. Under the UCC, a sale of goods contract valued at \$500 or more must be in writing, and signed by the party against whom enforcement is sought. In this case, CapCo is seeking enforcement against the Bears. The facts indicate that the Bears’ team manager signed a written contract. The SOF has been satisfied.

### **Parol Evidence Rule**

The parol evidence rule prohibits introduction of evidence of a prior or contemporaneous agreement that varies or contradicts a fully integrated writing. A merger clause is usually a strong indication that the writing is fully integrated. To determine if a writing is fully integrated, the court may follow either the Corbin or Williston view. Here, we have a written contract with sufficient certainty for a court to enforce it. The attempted change to the contract to 50 caps occurred after contract formation and will be admissible and treated as a modification.

### **Mistake**

When a party to a contract makes a mistake, it is a unilateral mistake, which will not prevent enforcement of the contract unless the other party knew or had reason to know of the mistake. Mistake occurs at contract formation, which may apply here, as an estimate was provided for 75-100 caps. Since we are dealing with an output/requirements contract, this “mistaken estimate” will be treated differently, as the quantity in an output/requirements contract is not explicitly stated in the contract at formation. Mistakes after formation may be addressed as a discharge of duty issue.

### **Modification**

Under the UCC, a modification requires mutual assent; no new consideration is required, but the parties must act in good faith. Here, the elements appear to be established as the parties orally agreed. There are 3 issues with respect to the attempted change to the contract. First, there is a no-oral modification (“NOM”) clause in the written contract. Secondly, because it is an output/requirements contract, a change to output/requirements may be made as long as the decrease in requirements is made in good faith, or the increase is not disproportionate to a statement estimate. Thirdly, a modification is still subject to the Statute of Frauds and must be in writing if it is a sales of goods contract of \$500 under the UCC, which is what we have here.

NOM clause. Generally, under such a clause, it is construed as a private statute of frauds, and the modification must be in writing, as it was a term/promise of the agreement. However, some courts may construe the oral agreement as a waiver of the NOM clause itself. The enforcement of the modification will depend on the jurisdiction, but it will likely be held enforceable provided the parties acted in good faith.

Output/Requirements contract. As stated above, a decrease in requirements is acceptable if made in good faith. Here, the Bears team manager had fewer kids sign up than he expected. There are no facts to indicate that he acted in bad faith. The court will likely enforce the reduction.

State of Frauds. Defined supra. If the modification is \$500 or more, the SOF applies. Here, the modification was for 50 caps at \$8.50 or \$425. The contract will not fall under the SOF.

### **Was the modification made under duress or bad faith?**

Modification is defined supra. Here, CapCo had a duty to act in good faith. When the Bears reduced their amount, CapCo increased the price due to less profits. While not necessarily in bad faith, CapCo assumed this risk when he entered into an output/requirements contract. However, because of the stated estimate of 75-100, CapCo may be successful in arguing he did not believe that nearly a 50 percent reduction in caps was a reasonable risk to assume. Unless an injustice would occur, the original price will likely be enforced.

### **Performance/Breach/Remedies**

A party's duties arise and their performance is due when all conditions are satisfied, excused or waived. Here, Bears owed a duty to pay CapCo upon receipt of the goods. However, Bears is now claiming they do not owe the increased price.

### **Will CapCo or Bears prevail?**

A non-breaching party may recover their expectation damages, plus consequential and incidental damages, less cost avoided and loss avoided. Here, if CapCo shipped 50 hats, he will be entitled to the contract price for that installment. However, the issue is the price. Because the oral modification will likely [be] held to be valid as discussed above, and the loss in profit was assumed by CapCo because of the nature of an output/requirements contract, CapCo may recover for 50 caps at the price of \$7.50 unless an injustice would result.

### **Lions v. CapCo**

**Governing law.** The UCC will also govern this case as in CapCo v. Bears. The elements of a contract are defined supra.

**Offer?** Defined supra. Here, we have a written letter fro[m] CapCo to Lions. There are sufficient terms because parties and quantity is [sic] identified. There is a valid offer.

### **Merchant[']s firm offer?**

Under the UCC, a merchant's signed memo ("merchant's firm offer") will be construed as an option and must be held open for the time stated, not to exceed 3 months. Here, we have a letter from CapCo to Lions identifying the essential terms (quantity and parties). While not signed, it was presumably a letter from CapCo. If on letterhead, the courts will find this to satisfy the signature requirement. While a particular time is not stated, it will be held open for a reasonable time.

### **Acceptance?**

Defined supra. Under the mailbox rule, acceptance is effective upon dispatch. Here, Lions mailed a letter immediately after reading CapCo's letter. Absent other circumstances, this is valid acceptance upon dispatch.

### **Revoked offer/Counteroffer?**

Generally, unless an offer is irrevocable, a party may revoke at any time prior to acceptance. Here, Lions mailed his acceptance. Prior to receiving the acceptance, CapCo found its error and phoned Lions. However, the acceptance was effective upon dispatch as stated above. Unless CapCo can prove a valid mistake, the acceptance formed the contract and his attempt to revoke is invalid. In addition, because of the merchant's firm offer rule, CapCo could not revoke his offer until after a reasonable time, not to exceed 3 months. The facts indicate a short period of time had passed, so the irrevocable period was still in effect.

### **Defenses?**

#### **Statute of Frauds.**

Defined supra. Here, we have a writing from CapCo, with the essential terms. This will satisfy the SOF.

### **Mistake**

When a party to a contract makes a mistake, it is a unilateral mistake, which will not prevent enforcement of the contract unless the other party knew or had reason to know of the mistake. Here, CapCo made a typographical error on their letter and got the price wrong, making this a unilateral mistake. While the facts indicate that the Lions manager was "excited" when he read the letter, there is no indication that he knew or should have known about the error. \$2.50 per cap does not sound so unreasonable that he should have known. The letter also stated that it was a special deal for a limited time. If the court finds

that Lions did now [sic] know, then Lions will be able to enforce the contract as he received it.

### **Performance/Breach/Remedies**

Remedies are defined supra. Lions is owed performance by CapCo to sell/ship the caps at the stated price. Lions will prevail in this case and may sue for enforcement of the contract, or he may cover and sue for the difference between the market price and the contract price.

## ANSWER B TO QUESTION 2

2)

### CapCo v. Bears

#### Contract Formation

A contract is a promise or a set of promises that the law will enforce. A valid contract consists of an offer, acceptance, consideration, and legal purpose and parties. We have legal parties and purpose in the CapCo - Bear contract.

#### Does the UCC apply?

This is an order for the sale of goods (things that are movable at the time of identification for contract) so the UCC applies.

#### Are the parties merchants?

A merchant is someone who sells goods of the type involved in the transaction or holds himself out as having knowledge peculiar to the goods in question. CapCo is in the business of selling baseball caps. CapCo is a merchant.

The Bears is [sic] [in] a youth league and probably an incidental purchaser of goods related to youth baseball. The Bears organization is not a merchant.

#### Does the Statute of Frauds (SOF) apply?

The Statute of Frauds requires that certain agreements must be in writing to be enforceable. These would include promises in consideration of marriage, contracts that could not be performed in one year, the transfer of land, payments by an executor (out of his pocket) for the debts of an estate, guarantors, and in this case, by way of the UCC which codified the requirement, the sale of goods for \$500 or more.

#### Was there an Offer?

An offer is a manifestation of present contractual intent communicated to the intended offeree with the understanding of the offeree that his or her assent would conclude the bargain.

Here, we have the Bears receiving a written offer from CapCo for the sale of "all baseball caps needed" for the 2006 season. Since it is written, it satisfies the SOF (supra) and is needed since the estimated contract price could be as much as \$7,500 if up to 100 (upper range of estimate) baseball caps were ordered by Bears.

Therefore, we have an offer.

### UCC Firm Offer?

In addition to the fact that this appears to be a requirements contract, CapCo is bound as a merchant under the firm offer rule[,] which stipulates that if a merchant in a signed writing to buy or sell goods gives assurances that the offer will remain open, it will remain open for the term stated, but not longer than 3 months if there is no consideration.

### Was there an Acceptance?

An acceptance is the unequivocal assent to the terms of the offer. Here, we have the Bears team manager ordering hats in reliance on the written offer from CapCo when he ordered 50 caps.

### Was there Consideration?

Consideration is that which is bargained for, i.e., the baseball caps. We have consideration.

### Requirements Contract

A requirements contract is one whereby a merchant will provide whatever number of goods that the buyer requires. Here, we have a requirements contract provided by CapCo to Bears to provide all of their baseball caps "needed" for the 2006 season, which have been estimated at 75-100 caps, at \$7.50 each.

Once the Bears manager ordered 50 caps, he was acting within the guidelines of a requirements contract. He was not obligated to place a minimum order, but use only "good faith" in negotiating and performing the contract. CapCo would be obligated to provide these caps at \$7.50 each under the terms outlined.

### Illusory Promise

An illusory contract is one in which the promisor makes a promise that is really not binding because it does not commit him to any action. CapCo may argue that since the Bears only ordered 50 caps and didn't have to order any at all, that they were making an illusory promise. However, this argument will fail in the case of requirements contracts as long as the parties use "good faith" and fair dealings.

### No Oral Modification Clauses

The CapCo - Bear contract contained a no oral modification clause, i.e., "all modifications to this contract must be in writing." Under the UCC, this provision will be enforced.

However, when the Bears manager informed CapCo that they only needed 50 caps and CapCo responded that the price would now “trigger” a higher price per cap of \$8.50, these negotiations were done orally so there was no modification to the agreement because it was not in writing.

Therefore, the original requirements contract was still in force at \$7.50 each.

### Breach of Contract

A breach of contract occurs when one party to the contract indicates that they will not perform according to the terms of the contract, i.e., their agreed performance. A breach can be minor or major (material). Upon breach, the non-breaching party can suspend (minor) or cancel their own performance (major) and sue for damages.

In CapCo’s suit against the Bears, it is most likely that CapCo will lose because Bears had an enforceable requirements contract with CapCo for only the caps that they required (“all caps needed”) for the 2006 season. There was not a minimum order size that was specified in the written agreement. And, because the contract provided for no oral modifications, the later agreement by the Bears manager would not be binding.

In summary, The Bears will prevail and if necessary, they will be entitled to damages based on cover (purchase caps from another supplier) and collect damages from CapCo for the additional amounts they might have to pay the new supplier for the caps (the cover price - contract price). Or if they decide not to cover, the market price - contract price at the time of the breach.

### Lions v. CapCo Contract Formation

A contract is a promise or a set of promises that the law will enforce. A valid contract consists of an offer, acceptance, consideration, and legal purpose and parties. We have legal parties and purpose in the Lions - CapCo contract.

### Does the UCC apply?

This is an order for the sale of goods (things that are movable at the time of identification for contract) so the UCC applies.

### Are the parties merchants?

A merchant is someone who sells goods of the type involved in the transaction or holds himself out as having knowledge peculiar to the goods in question. CapCo is in the business of selling baseball caps. CapCo is a merchant.

The Lions is [sic][in] a youth league and probably an incidental purchaser of goods related to youth baseball. The Lions organization is not a merchant.

#### Does the Statute of Frauds (SOF) apply?

The Statute of Frauds requires that certain agreements must be in writing to be enforceable. These would include promises in consideration of marriage, contracts that could not be performed in one year, the transfer of land, payments by an executor (out of his pocket) for the debts of an estate, guarantors, and in this case, by way of the UCC which codified the requirement, the sale of goods for \$500 or more.

#### Was there an Offer?

An offer is a manifestation of present contractual intent communicated to the intended offeree with the understanding of the offeree that his or her assent would conclude the bargain.

When CapCo sent the Lions a letter, it contained words that indicated to a reasonable offeree that it was an offer, i.e., "I can offer..." It also contained definite terms such as quantity (100 caps), price (\$2.50) and time for performance (one week).

Therefore, we have an offer.

#### UCC Firm Offer?

In addition to the fact that this appears to be a requirements contract, CapCo is bound as a merchant under the firm offer rule[,] which stipulates that if a merchant in a signed writing to buy or sell goods gives assurances that the offer will remain open, it will remain open for the term stated, but not longer than 3 months if there is no consideration.

The letter to the Lions said that the offer would be good "for a limited time" (determined as a reasonable time probably not to exceed one week - the time for delivery). Therefore, this is not a firm offer, but is subject to revocation by the offeror.

#### Was there an Acceptance?

An acceptance is the unequivocal assent to the terms of the offer. Here, we have the Lions team manager ordering hats in reliance on the written offer from CapCo when he "immediately mailed an acceptance to CapCo.["]

Under the mailbox rule, an acceptance is effective when posted if posted in compliance with the offer. Here, because the offer was in a form of a letter, a reasonable acceptance would be by return letter ("mailed her acceptance").

Therefore, we have an acceptance.



### Was there Consideration?

Consideration is that which is bargained for, i.e., the 100 baseball caps for \$2.50 per cap. We have consideration.

### Revocation Attempt/Unilateral Mistake

Once CapCo learned of the mistake they had [made] when they quoted the caps at \$2.50 per cap as opposed to \$6.50, CapCo telephoned Lions about the mistake. However, acceptance had already occurred when Lions mailed the acceptance so this attempt at revoking the offer at \$2.50 will fail.

However, if the Lions knew of [sic] should have known that \$2.50 was an obvious error, then they will not be allowed to “snap up” the hats at the \$2.50 price. However, there are no facts to suggest they were aware of the miscalculation.

Therefore, the revocation will fail because the Lions did not receive the revocation before accepting the offer under the mailbox rules (acceptance when mailed) and CapCo will not be allowed a defense of unilateral mistake.

### Enforcement of Contract

The Lions accepted a bona fide offer from CapCo for 100 caps at \$2.50 each that was in writing and accepted within a reasonable time. They will be able to enforce the agreement against CapCo.

### Question 3

Dan separated from his wife, Bess, and moved out of the house they own together. About one week later, on his way to work the night shift, Dan passed by the house and saw a light on. He stopped and rang the bell. Bess answered the door. She was polite, but told him she was getting ready to go out with her girlfriends. As Dan left, he saw a pair of men's shoes in the entryway.

Later that night, Dan told his friend, Fred, about the shoes. Fred said: "Let's go over there and check it out. We'll use my car so Bess won't recognize it." Dan and Fred drove over to the house, and parked a block away, so the car would not be seen by Bess. Fred waited in the car while Dan went around the side of the house, turned over a garbage can and climbed on top to look through the open bedroom window. Dan saw a man, Chris, on the bed with Bess. Dan jumped through the open window and started yelling at Bess, "How could you do this?"

Dan then went to the closet and grabbed his shotgun, which was locked in a plastic case. He turned to Chris, and chased him down the stairs and out of the house, yelling deadly threats. Chris tripped, fell, and hit his head on the front steps. The fall knocked him unconscious.

Bess called the police. When the police arrived, Dan was sitting outside on the front porch holding the shotgun, still in the locked case. Dan told the police that he had chased Chris out because he feared his wife had been in danger.

Fred got out of the car and came over to the scene. The police placed Dan in custody and asked Fred to meet them at the station for further questioning.

1. With what crime or crimes, if any, can Dan reasonably be charged and what defenses, if any, can he reasonably assert? Discuss.
2. With what crime or crimes, if any, can Fred reasonably be charged and what defenses, if any, can he reasonably assert? Discuss.

### ANSWER A TO QUESTION 3

3)

#### State v. Dan

Conspiracy - an agreement between two or more people with the specific intent to commit an unlawful act or a lawful act by unlawful means.

The facts show that Dan had stopped by to see his wife, Bess, from whom he was separated[,] and while there he saw a pair of men[']s shoes. Dan told his friend Fred about it at work[,] who suggested they go over and check it out. Fred suggested they use his car so Bess wouldn't recognize it. They went to the house but parked a block away. Dan climbed on top of a trash can to look in the bedroom window of the house while Fred waited in the car. Dan would not be charged with conspiracy.

#### Burglary

Common Law - the breaking and entering [of] the dwelling of another at nighttime with the specific intent to commit a felony therein.

Modern Law - the entering [of] a building to commit a[n] unlawful act.

The facts show that Dan worked the night shift and came by later that night after work to Bess's house. Dan and Bess were separated and she was the only one living in the house and therefore it is the dwelling of another[,] not Dan's. Dan jumped through an open window when he saw a man in bed with Bess. This jumping through a window shows an entering into the house. However, Dan did not break into the house so under common law this would fail. The facts do not show that Dan had any intent to commit a felony when he jumped through the window. He was yelling at Bess but did not show that their [sic] was any intent to do a[n] unlawful act at that point. He did commit unlawful acts later but did not have the specific intent when he jumped through the window.

Therefore under both Common Law and Modern Law there is no burglary. Dan cannot be charged with burglary.

Assault is a specific intent crime which may be a[n]:

- (1) Attempted battery
- (2) Intentional placing one in reasonable apprehension or fear of immediate danger for one's life.

### Assault of Chris:

The facts show that Dan went to the closet and grabbed his shotgun and began chasing Chris down the stairs and out of the house. Since Chris was fleeing from Dan he would be in reasonable apprehension and fear for his life. It was an immediate threat as Dan was carrying a shotgun.

Dan will argue that it was not a reasonable apprehension as there was no immediate danger since the shotgun was still in its locked plastic case and therefore Dan was unable to fire it. However, this argument will fail as Dan could have used the gun as a weapon against Chris without firing it as he could have hit him with the gun. Therefore there was an assault.

Dan will argue that he did not have the specific intent to harm Chris and therefore was not guilty of assault. He was only yelling at her [sic] and did not take any steps towards her to place her [sic] in danger. The State will argue that the yelling combined with the getting of the gun was enough to place him in reasonable apprehension or fear as he could have unlocked the gun at any time and used it on Chris.

Defense of Others - One is privileged to use reasonable force to protect others. Dan will argue that he thought Bess was in danger and that he was trying to protect her. He will argue that he used reasonable force as he did not take the gun out of its locked case. This argument will fail as the facts show that Dan had seen men[']s shoes in the house when he had been there earlier and further that he had seen her in bed with Chris. He also had yelled at Bess and asked her how she could do this. This shows that he knew she was not in danger but instead he was angry and shocked at what he had seen. There are no facts to show that Bess was in any danger.

Dan will be charged with the assault of Chris.

### Assault of Bess

The facts show that Dan jumped through the window and began yelling at Bess. While mere words may not be sufficient to cause apprehension[,] when it is coupled with Dan getting a gun out of the closet[,] that is enough to make Bess apprehensive or fearful of immediate harm.

Dan will argue that he did not have the specific intent to harm Bess and therefore was not guilty of assault. He was only yelling at her and did not take any steps towards her to place her in danger. The State will argue that the yelling combined with the getting of the gun was enough to place her in reasonable apprehension or fear[,] as he could have unlocked the gun at any time and used it on Bess.

Dan will be found guilty of assault of Bess.

Battery of Chris - An unlawful application of force on the person of another. Battery is a general intent crime.

The State will argue that Dan's chasing Chris with a gun and threatening Chris that [sic] caused him to trip, fall and hit his head on the steps since he was trying to escape the assault. The facts do not show that any physical force was used by Dan against Chris. However, since Dan's chasing of Chris was the actual cause of his fall[,] Dan will be charged with the Battery against Chris.

Defense of Others - One is privileged to use reasonable force to protect others. Dan will argue that he thought Bess was in danger and that he was trying to protect her. He will argue that he used reasonable force[,] as he did not take the gun out of its locked case. This argument will fail as the facts show that Dan had seen men[']s shoes in the house when he had been there earlier and further that he had seen her in bed with Chris. He also had yelled at Bess and asked her how she could do this. This shows that he knew she was not in danger but instead he was angry and shocked at what he had seen. There are not facts to show that Bess was in any danger so this defense fails.

Attempted Murder of Chris - An attempt is a substantial step taken towards the commission of a crime[,] which in this case would be murder.

Dan grabbed his gun and began chasing Chris[,] yelling deadly threats[,] These are substantial steps towards the commission of murder. Chris was running down the stairs and out of the house trying to escape Dan. The facts show that Chris was in fear for his life. If in fact Dan had killed Chris or Chris had died from his injuries the attempted murder would merge into the crime of murder. However, since Chris was only unconscious there are not facts to show he died.

Dan will argue that he had no specific intent to kill Chris but was just acting in the heat of the moment due to seeing his wife in bed with Chris. He will argue that he had no time to cool off and that he was provoked by seeing his wife in bed with Chris. He will further argue that he never took the gun out of its locked case and was in fact sitting waiting for the police on the porch with the gun still in the locked plastic case. This too shows that he lacked the specific intent.

The State will argue that a gun can be used as a weapon without firing it and that Dan was using it as a weapon to kill Chris[,] but there are no facts to support this contention.

However, the court will find that Dan lacked the specific intent to kill Chris as he did not use the weapon against Chris in any manner[,] so Dan will not be charged with attempted murder.

Defense of Others - One is privileged to use reasonable force to protect others. Dan will argue that he thought Bess was in danger and that he was trying to protect her. He will argue that he used reasonable force as he did not take the gun out of its locked case. This

argument will fail as the facts show that Dan had seen men[']s shoes in the house when he had been there earlier and further that he had seen her in bed with Chris. He also had yelled at Bess and asked her how she could do this. This shows that he knew she was not in danger but instead he was angry and shocked at what he had seen. There are no facts to show that Bess was in any danger.

### **State v. Fred**

Conspiracy - defined and discussed supra. Fred cannot be charged with conspiracy.

Accomplice Liability - One who aids, abets or encourages another in the commission of a crime is liable for the same crimes.

The facts show that Fred suggested they got [sic] to Bess's house to find out why a man[']s shoes were at the house. He also suggested they take his car and park a block away so that Bess wo[uld]n't recognize the car or see it. This shows that Fred was encouraging Dan to go to Bess's house. Fred also waited in the car while Dan went to the house to check things out. The State will argue that Fred's acts shows the [sic] was an accomplice to the crime as he aided Dan by driving him to the scene of the crimes. He encouraged him by saying [']Let's go check it out". Further, by waiting in the car while Dan was at the house he could be considered a getaway driver and was further providing aid to Dan.

As an accomplice[,] Fred can be charged with all of the crimes that Dan is charged with[,] which in this case is battery of Chris, assault of Chris and assault of Bess.

Fred will argue that he did not have the intent to commit any crimes and thought Dan was going to check things out. He will further argue that he did not want Dan to commit any crimes. However, this argument will fail due to the secrecy with which they approached the house. Fred may also argue that he remained in the car and was unaware of what Dan was doing and he did not know Dan was committing any crime.

Fred will not be charged with the crimes listed supra if his defense of lack of intent succeed[s].

### ANSWER B TO QUESTION 3

3)

STATE v. DAN

1. With what crime or crimes can Dan be charged?

#### CONSPIRACY TO COMMIT A CRIME

An agreement by two or more parties to commit a crime with the specific intent that the crime be committed.

Here, “Dan told his friend Fred” about the suspicious shoes in his wife Bess’s house and [sic] which point Fred suggested that they “check it out.” There is no clear agreement between the parties except to go to the house. Whatever they meant by “check it out” could be deemed an implied conspiracy but there is no evidence from the facts that the two men planned to commit any crime or do any harm.

Thus, although they were acting in concert, there is no agreement to commit a specific crime.

#### SOLICITATION TO COMMIT A CRIME

Requesting, urging, tempting another to commit a crime with the specific intent that the solicitee commit the crime.

Here, Fred said “Let’s go over there and check it out” and offered to use his car so Bess wouldn’t recognize them. Again, while this is suspicious and may be childish it does not rise to the level of a specific crime. Nor did Fred urge Dan to do something illegal.

Thus, while Fred instigated this childish behavior there is no specific desire to commit a crime as evidenced by the duo[']s communication.

#### PRINCIPAL

At common law, a principal is the person who actually carries out or commits the criminal elements of the crime at the scene of the crime. Modernly a principal is the same as common law.

Here, Dan went toward the house and Fred stayed in the car. Thus, Fred was not close to Dan while Dan acted[,] and each element of each crime below was committed by Dan.

Thus, [Dan] acted as a common law principal and modernly as a principal in the commission of the crimes listed below.

## BURGLARY - COMMON LAW

The trespassory breaking and entering [of] the dwelling house of another in the nighttime with an intent to commit a felony therein.

Here, Dan entered his own house in the nighttime on his way to work. Although he “owned” the house with Bess, he no longer had habitation privileges and so any entry would be deemed trespassory without Bess’s consent. There are no facts to indicate Dan’s intent upon entering and so entry alone will not prove that he had a felonious intent – perhaps he originally just wanted to talk to them, even though he was yelling. Further Dan entered an “open” window and so the breaking element is not satisfied.

Thus, Dan did not commit common law burglary.

## BURGLARY - MODERNLY

Breaking into any structure to commit any crime, even a misdemeanor.

Here, Dan entered without Bess’s consent and started “yelling” immediately. If he planned to commit a battery[,] which may be inferred by his immediate “yelling” and rush to get his shotgun, he would have committed a modern burglary.

Thus, Dan may be charged with a modern burglary.

## ASSAULT - ATTEMPTED BATTERY

A substantial step toward the completion of a battery with the specific intent that a battery be committed.

Here, Dan “chased” Chris down the stairs and caused Chris to fall. He was chasing him with a shotgun[,] which he could use as a weapon independent of shooting it[,] and his chasing, coupled with his “yelling deadly threats”[,] supports a substantial step toward a battery[,] given that they were in close quarters.

Thus, Dan will be charged with assault type of attempted battery.

## ASSAULT - CREATION OF FEAR

Defendant intentionally created a reasonable apprehension of receipt of an imminent battery in the person of the victim.

Here, as outlined immediately above, Chris was “chased” and obviously in fear as he “fell”[,] and likely did so out of rushing to vacate the house. Chris was aware of and saw Dan so he would have been aware of the gun.



Thus, if Chris had a reasonable fear of being harmed, Dan will be charged with this type of assault.

#### ASSAULT - AGGRAVATED ASSAULT

Assault with a deadly weapon and/or felonious intent.

Here, even though the shotgun was “still in the locked case” Dan had the apparent ability to use the gun in a deadly manner.

Thus, Dan will be charged with aggravated assault.

#### BATTERY

The unlawful application of force to the person of the victim resulting in harm or offensive contact without consent or privilege.

Here, although Dan did not actually touch Chris[,] from the facts, Dan put the forces in motion[,] causing the harmful contact wherein Chris was knocked unconscious from the fall after being “chased” by Dan. Force may be an application of force to something so closely related to the victim as to be a part of[sic]. Since Dan was “chasing” Chris and yelling at him, Chris’s escape was probably not careful and[,] again, Dan put the risky forces into motion that caused Chris’s fall.

Thus, because Dan put the forces into motion causing Chris to fall, he may be charged with battery.

#### MERGE -

An assault of attempted battery will merge into the completed crime of batter[y].

Here, the battery type assault will merge but the creation of fear assault will remain a separate charge.

#### ATTEMPTED MURDER

A substantial step toward the completion of a murder with the intent to kill.

MURDER is homicide with malice aforethought.

Here, Dan must have evidenced an intent and desire to kill coupled with his actions. A crime that requires malice like murder requires a specific intent in the attempt. Because Dan did not take the gun out of the locked case he did not take a “substantial step” toward the murder, unless he planned to knock Chris around with the gun in the locked case. But, since he did no further harm to Chris from the facts[,] [sic] After Chris fell, it is not possible

to infer that Dan wanted Chris dead.

Thus, a charge for attempted murder will likely fail.

## **DEFENSES**

### **ADEQUATE PROVOCATION**

Defendant was provoked to kill; a reasonable person would have been provoked to kill; the defendant did not cool down from the time of provocation to the time of the killing; and a reasonable person would not have cooled down from the time of provocation to the time of the killing.

Here, at common law catching one's spouse in the act of suffering from a staggering blow may have supported a mitigation of a crime due to adequate provocation. Here, however, Dan saw Chris "on the bed" with Bess[,] not having sex with her[,] from the facts. Further, no reasonable person would remain provoked from the original provocation of seeing shoes in the entryway long enough to return and burglarize the house. This issue depends on whether the court looks at the provocation as commencing with the spotting of the shoe in the entryway long enough to return and burglarize the house. This issue depends on whether the court looks at the provocation as commencing with the spotting of the shoe in the entryway – in which case any reasonable person would have calmed down – or at the time he looked into the window and still[,] since the couple did not appear to be making love, Dan's acts will not be mitigated because of this theory. Further he did not complete the crime of murder.

Thus, Dan's offenses will not be mitigated.

### **IMPERFECT SELF[-]DEFENSE**

An honest but unreasonable and mistaken belief in the necessity of deadly force.

Here, Dan claims "he feared his wife had been in danger"[,] which seems unreasonable because Chris ran away and there are no facts to support this. Dan came to the house in a childish manner[,] without a legitimate reason given that he "climbed on top" of a garbage can to spy on his wife Bess. However, even an imperfect self[-]defense may be supported by an unreasonable mistake.

Thus, unless the court finds any reason for Dan to fear for Bess, this theory will fail to mitigate Dan's behavior.

### **DEFENSE OF OTHERS**

At common law a close relationship was required[;] modernly anyone may defend anyone with whatever reasonable force is necessary to repel the attack[,] and one may defend

another with whatever amount of force it reasonably appears that the victim would have been privileged to use.

Here, Dan was “close” to Bess as a separated husband, but Chris was “on the bed with Bess”[,] nothing more[,] from the facts. There is nothing to say that Bess was privileged to use any force against Chris[,] which would support Dan’s claim.

Thus, this theory will likely fail.

## STATE v. FRED

1. With what crime or crimes can Fred be charged?

### CONSPIRACY

Defined supra.

Here, as outline[d] above, the duo did not specify any specific crime; they just went to “check it out”[,] and we don’t know what that means.

Thus, Fred will not be charged with conspiracy.

### SOLICITATION

Defined supra.

Here, Fred may have impliedly solicited Dan to act by encouraging him to do something that Fred knew would aggravate Dan. However, because there is no crime mentioned, this may fail.

Thus, Fred may be charged with solicitation[,] but unless the court infers an implied solicitation[,] this may fail.

### PRINCIPAL IN THE SECOND DEGREE

At common law someone at the scene aiding, encouraging, abetting another in the commission of a crime. All liability for completed crimes committed by the principal in the first degree attaches to the principal in the second degree.

Here, Fred aided and abetted Dan by driving and purposefully hiding the car to encourage Dan’s bad behavior.

Thus, any liability for completed crimes by Dan will attach to Fred.

## ACCESSORY BEFORE THE FACT

At common law [a] person who aids and encourages before the commission of a crime. All liability for completed crimes committed by the principal in the first degree attaches to the accessory.

Here, as outlined above, Fred impliedly encouraged Dan to go to Bess's [house] but nothing more. However, the resulting activity was encouraged by and instigated by Fred.

Thus, Dan's liability will attach to Fred because of Fred's encouragement.

## ACCOMPLICE

Modernly an accomplice is the equivalent of a common law accessory. One who aids and encourages and assists another in committing a crime. All liability for completed crimes committed by the principal in the first degree attaches to the accomplice.

Here, as noted above, Fred helped Dan commit the crimes.

Thus, liability will attach to Fred for Dan's crimes.

## MISPRIS[ION,] A FELONY

Failure to disclose the commission of a felony or to stop a felony.

Here, Fred should have called the police if and when Dan was away too long. If he heard yelling, etc., he should have done something to stop the potential altercation.

Thus, Fred will be charged with mispris[i]on[,] a felony.

## **DEFENSES**

### MISTAKE OF FACT – UNREASONABLE

may be a defense to criminal culpability – even unreasonable mistake of fact if Fred truly did not know of Dan's criminal intent.

Here, Fred may have thought the couple would get back together or talk or something. So even if his mistake is absurd, given his encouragement and childish behavior[,] it could negate the mens rea of specific intent to aid and abet, and the other crimes[,] and relieve Fred of liability as an accomplice or otherwise.

### AGENCY

Vicarious liability theory where a principal uses an agent to commit a crime. The principal authorizes the agent to act[,] who acts at the principal's direction and control.

Here, a court may infer that Fred used Dan as an innocent agent to harm Bess. By saying "Let's check it out" and by offering to drive, Fred may have been putting Dan in a position purposefully to harm Bess[,] unbeknownst to Dan[,] and[,] if so[,] the liability for Dan's completed crimes would attach to Fred under this theory. Dan would have been acting as Fred's instrumentality in this situation. However, there is no dialogue between the two evidencing an intent or agreement (as outlined above) to commit a specific crime.

Thus, Fred may be charged under this theory with sufficient facts.

## Question 4

Grain Co. purchases grain from farmers each fall to resell as seed grain to other farmers for spring planting. Because of problems presented by parasites which attack and eat seed grain that is stored for more than a few months, Grain Co., like all seed grain dealers, always treats the seed grain it purchases with an invisible mercury-based chemical to poison these parasites. Grain Co. sells the seed grain loose by the truckload to the farmers who will plant the seed. The Grain Co. trucks display signs that state: "Seed Grain. Not for Use in Food Products."

Farmer Jones bought a truckload of seed grain from Grain Co. She was present when the seed grain was delivered, and supervised the Grain Co. employees who unloaded the seed grain into her silos. She then used some of the seed grain to sow her field. When she found that she had some seed grain left over, she fed it to her dairy cattle.

Farmer Jones sold the milk produced by her dairy cattle to Big Food Stores, Inc. ("Big Food"). Several of the people who bought their milk at Big Food became seriously ill, and the Centers for Disease Control (CDC), a government agency that investigates outbreaks of illness, determined that mercury poisoning was the cause of their illness. CDC traced the mercury to the milk that Farmer Jones sold to Big Food.

On what theory or theories might the injured milk consumers recover damages from, and what defenses should they anticipate, in actions against:

1. Grain Co.? Discuss.
2. Farmer Jones? Discuss.
3. Big Food? Discuss.

## ANSWER A TO QUESTION 4

4)

1. MILK CONSUMERS (MC) v. GRAINCO

PRODUCTS LIABILITY

NEGLIGENCE

Duty

A commercial supplier has a duty to act as a reasonable person like them would.

Breach

Since GrainCo used an invisible mercury[-]based chemical to poison parasites, it would prevent people such as farmers to [sic] visually recognize that the grain is poisonous. If GrainCo would use some type of dye or other method to easily identify grain that has been treated with mercury poison, it would help prevent the misuse of poisonous grain in food products. Further, GrainCo used an invisible mercury[-]based chemical to poison parasites[;] it would prevent people such as farmers to [sic] visually recognize that the grain is poisonous. Even though the GrainCo trucks display signs that state: "Seed Grain. Not for Use in Food Products", it is unclear from the facts how big these signs are or if Farmer Jones saw the signs while she supervised the delivery. However, given the passage of time, Farmer Jones could have forgotten not to use the Seed Grain in food products. Finally, even though GrainCo warned to not use the Seed Grain in food products, it did not warn that invisible mercury poison was used to treat the seed grain.

Therefore, GrainCo breached its duty.

Actual cause

"But for" GrainCo treating its grain seed with invisible mercury[-]based chemicals, CM [sic] would not have become sick after drinking milk that came from Farmer Jones["] cows, who ate the grain seed.

Therefore, GrainCo is the actual cause of MC's damages.

Proximate cause

MC's damages are a direct result of GrainCo using poison to treat their grain. It is foreseeable that farmers may use the grain for food products which may result in injuries, as those suffered by MC.

Therefore, GrainCo is the proximate cause.

### DAMAGES

MC can recover general damages from their pain and suffering caused by their serious illness. Further[,] they may recover special damages for out[-]of[-]pocket expenses[,] such as medical bill[s][,] to treat their serious illness.

### DEFENSES

#### COMPARATIVE NEGLIGENCE

A plaintiff's recovery is reduced by the amount of harm attributable to her own negligence. In a contributory negligence jurisdiction, any negligence on the party [sic] of the plaintiff is a complete bar to recovery.

There are no fact[s] to indicate the MC were negligent.

Therefore, this defense will fail.

#### ASSUMPTION OF THE RISK

Acts as a complete bar to recovery if it is found that plaintiff was aware of the risk they were taking and acted unreasonably to place themselves at risk.

The facts do not indicate that MC were aware of any risk they were taking.

Therefore, this defense will fail.

Therefore, MC can recover under this theory.

### STRICT LIABILITY

#### DUTY

A commercial supplier has an absolute duty to not introduce into the stream of commerce a defective product.

#### Foreseeable plaintiff

Under McPhersen v. Buick, a plaintiff does not have to be in privity to recover for damages.



## Breach

### Design Defect

Since, GrainCo used an invisible mercury[-]based chemical to poison parasites, it would prevent people such as farmers to[sic] visually recognize that the grain is poisonous. If GrainCo would use some type of dye or other method to easily identify grain that has been treated with mercury poison, it would help prevent the misuse of poisonous grain in food products.

Therefore, there is a design error.

### Warning Defect

Since, GrainCo used an invisible mercury[-]based chemical to poison parasites, it would prevent people such as farmers to [sic] visually recognize that the grain is poisonous. Even though the GrainCo trucks display signs that state: "Seed Grain. Not for Use in Food Products", it is unclear from the facts how big these signs are or if Farmer Jones saw the signs while she supervised the delivery. However, given the passage of time, Farmer Jones could have forgotten not to use the Seed Grain in food products. Finally, even though GrainCo warned to not use the Seed Grain in food products, it did not warn that invisible mercury poison was used to treat the seed grain.

Therefore there is a warning defect.

### Manufacturing Defect

There are no facts to indicate that the seed grain was not manufactured as intended. The facts indicate that all seed grain dealers treat their seed in this fashion.

Therefore there is no manufacturing defect.

### Actual cause

"But for" GrainCo treating its grain seed with invisible mercury[-]based chemicals, CM would not have become sick after drinking milk that came from Farmer Jones['] cows, who ate the grain seed.

Therefore, GrainCo is the actual cause of MC's damages.

### Proximate cause

MC's damages are a direct result of GrainCo using poison to treat their grain. It is foreseeable that farmers may use the grain for food products[,] which may result in injuries, as those suffered by MC.

## 2. MILK CONSUMERS (MC) v. FARMER JONES

### PRODUCTS LIABILITY

#### NEGLIGENCE

##### Duty

Defined Supra[.]

##### Breach

Since Farmer Jones fed the Grain Seed to her dairy cows and sold the milk they produced, causing several people who bought her milk to become seriously ill because of the mercury poison, she breached the duty she owed consumers.

Therefore, there was a breach.

##### Actual cause

“But for” Farmer Jones feeding her cows the poisonous grain seed, MC would not have become seriously ill.

##### Proximate cause

MC injuries are a direct cause of Farmer Jones feeding her cows the poisonous grain seed. It is foreseeable that MC could become ill by drinking this milk.

##### Damages

Defined and discussed supra.

### DEFENSES TO NEGLIGENCE

Discussed and defined supra.

Therefore, MC can recover under this theory.

### STRICT LIABILITY IN TORT

##### Duty

Defined Supra[.]

### Foreseeable plaintiff

Defined in Supra[.]

### Breach

#### Manufacturing Defect

Since Farmer Jones fed her cows the poisonous grain seed, which caused them to produce milk that made several people seriously ill, her milk was not as intended to be produced.

Therefore, there is a manufacturing defect.

#### Warning Defect

Since Farmer Jones failed to warn Big Food or MC that her milk her cows were feds[sic] the poisonous grain seed containing poison[sic], a warning defect exists.

Therefore there is a warning defect.

### Actual cause

Defined and discussed supra[.]

### Proximate cause

Defined and discussed supra[.]

### Damages

Defined and discussed supra[.]

## DEFENSES

### ASSUMPTION OF THE RISK

Defined and discussed supra.

### WARRANTY

Defined Supra[.]

Since Farmer Jones introduced a defective product into the stream of commerce, the bad milk, and MC purchased and consumed it, the milk was not safe for normal consumption of [sic] was not of average quality.

Therefore, MC can recover under this theory.

### 3. MILK CONSUMERS v. BIG FOOD

#### PRODUCTS LIABILITY

##### NEGLIGENCE

Since Big Foods is unable to identify by reasonable inspection that the milk was poisonous, it will not be liable under this theory of law.

##### STRICT LIABILITY

Defined and discussed above.

Since Big Foods has an absolute duty to not introduce a defective product into the stream of commerce, it is strictly liable for the injuries suffered by MC. Further[,] it may seek indemnification from the [sic] Farmer Jones and GrainCo.

##### DEFENSES FOR STRICT LIABILITY

Defined and discussed supra.

Therefore, MC can recover under this theory.

##### WARRANTY

Defined[.]

Since Big Food sold the defective milk to MC, it breached its duty that the milk was safe for normal use and of average quality.

Therefore, MC can recover under this theory.

## ANSWER B TO QUESTION 4

4)

Injured milk consumers (plaintiffs) v. Grain Co.

I. Can plaintiffs sue Grain Co. for damages based on theories of strict liability in tort, negligence, and implied warranty for damages from consuming bad milk?

A. To sue for strict liability in tort, the plaintiff must show that there is a proper defendant, a defect in the product that was the actual and proximate cause of the cognizable injury to plaintiff. There must be no viable defenses.

1. Is Grain Co. a proper defendant? A proper defendant is someone involved in the market chain of the milk. This would start with the mild [sic] producers[,] which include the manufacturer, marketers, wholesalers, distributors, and retailers. Here, Grain Co. was a manufacturer of grain, not milk. These grains were meant to be sown and not fed to dairy cattle. However, there may be a foreseeable misuse of the grain as feed for the cattle, and in fact that is what Farmer Jones did. This led to the bad mild [sic] that caused plaintiffs to suffer injuries. Therefore, Grain Co. is a proper defendant.

2. Are there proper plaintiffs? A proper plaintiff is the consumer and user of the product. Foreseeable bystanders who are injured by the product may also make a claim. Here, plaintiffs are consumers of the bad milk and so will have a claim.

3. Was there a defect in the grain? A defect can be by [sic] in the design, manufacturing[,] or failure to warn.

a. Plaintiffs may argue that there is a defect in the design by applying the parasite poison to grain that may be used as feed. To do this, plaintiff must show that the risk of injuries to plaintiffs outweighs the benefit of using the poison. It is a question of fact whether there is a high probability that farmers will use the grain as feed for their dairy cattle. Farmers tend to avoid waste of anything on their farm, so there is a high probability that the grain will be used as feed. The benefit of using this poison instead of something that will be safer for people down the line must be proven. Since other grain companies also use this poison and it is state[-]of[-]the[-]art, plaintiff will not be able to win the claim of a design defect.

b. Plaintiffs may argue that there is a defect in the warning on the side of the truck. To do this, plaintiff must argue that the warning was inadequate. There must be something more noticeable[,] such as a form for the farmers to sign[,] showing that they know not to use the grain as feed for their dairy cattle. This would be better than simply a sign on the truck saying not to use for feed but did not explain the possible repercussion[s]. The fact finders will find that there is a failure to warn.

4. Was the defect the actual and proximate cause of the injuries to plaintiffs? The facts show that the CDC investigation proved that the use of the poison was the cause of the injuries.

5. Did plaintiff suffer [sic] damages? Here, the facts show that plaintiffs became seriously ill[,] so there are probably damages in medical bills and emotional distress. Also, there may be pecuniary loss from inability to go to work.

6. Can Grain Co. raise the defense of assumption of the risk? The Assumption of the Risk defense is proven by showing that plaintiffs 1) was [sic] actually aware of the risk and 2) voluntarily chose to encounter it. Here, plaintiffs had no knowledge that there was poison in the milk. The defense will fail.

In summary, Grain Co. is strictly liable for the injuries to plaintiffs.

B. To sue for negligence, the plaintiff must show that 1) the defendant owes a duty to act under a certain standard of care, 2) that defendant breached that duty, 3) the breach was the actual and proximate cause of the 4) cognizable injuries to plaintiff.

1. What duty[,] if any[,] does Grain Co. owe to plaintiffs? There is a general duty for defendant to act like a reasonable and prudent man under similar circumstances. Here, Grain Co. must act like a reasonable and prudent grain producer.

2. Did Grain Co. breach its duty? To ascertain, plaintiff may apply the Hand formula,  $B < PL$ . B is the burden of having to act reasonably. P is the probability of an injury occurring. L is the severity of the injuries that occurred. If the burden to act reasonably is less than the product of the probability of injury and the severity of the injury, there has been a breach. Sometimes, courts will add the utility element on the left side of the equation making it  $UB < PL$ . Here, the burden of using a different[,] safer poison or not using one at all[,] may be great as far as cost. However, the burden of getting a better warning system may be quite reasonable as compared to the high probability that farmer[s] may use the grain as feed for their dairy cattle and causing severe injuries to those who consume the milk. Therefore, Grain Co. has breached by not using a better warning.

3. Causation is as above.

4. Damages is as above.

5. Can Grain Co. raise the defense of contributory negligence or comparative fault? The defense of contributory negligence will bar the plaintiff from recovery if the plaintiff's conduct was also breached[;] that of a reasonable prudent man and the breaching conduct was the proximate cause of the injury. Here, the plaintiff did not act unreasonably in any way. All they did were buying[sic] milk at the grocery store. Contributory negligence will not apply. Comparative fault will reduce the plaintiff's recovery in proportion to the degree of negligence of plaintiff's conduct. Again, it also does not apply.

C. To sue for implied warranty, there must be a proper defendant who is a merchant and a proper plaintiff who is the consumer or someone in her household or a foreseeable guest who may consume the product.

1. The defendant in this action must be a merchant. A merchant is someone who deals in the goods of the kind or holds himself out as having special knowledge or skills dealing with the goods in question. Here, the product from Grain Co. is grain and not milk. Grain Co. is not the proper defendant.

2. Since the plaintiffs did not consume grain and is not in the household of Farmer Jones, the plaintiffs may not sue based on implied warranty.

The injured milk consumers will win their claims against Grain Co. for strict liability in tort and negligence, but not under implied warranty.

Injured milk consumers (plaintiffs) v. Farmer Jones

I. Can plaintiffs sue Farmer Jones for damages based on theories of strict liability in tort, negligence, and implied warranty for damages from consuming bad milk?

A. Strict liability in tort

1. Farmer Jones is the proper defendant in this action because Farmer Jones manufacture[d] the milk which is defective.

2. Milk consumers are the proper plaintiffs since they purchased the milk.

3. The defect in the milk existed at the time they left Farmer Jones' farm. It is a defect in manufacturing the milk, as Farmer Jones chose to use grain with the poison substance to feed the dairy cattle. The defect in the milk is beyond the consumer expectations. When people buy milk, they assume that they are reasonably safe for consumption and that they will not get sick after drinking it. Here, the milk was defective when they left the farmer's cattle.

4. Causation is as above.

5. Damages is as above.

6. The only available defense against strict products liability is assumption of the risk[,] and it does not apply as discussed above.

In conclusion, Farmer Jones is liable to the injured milk consumers for their damages under the theory of strict liability in tort because of an unreasonably dangerous and defective milk product.

## B. Negligence

1. Farmer Jones has a duty to act like a reasonable and prudent dairy farmer.
2. Did Farmer Jones breach his [sic] duty by feeding the grain that was meant for sowing only to his [sic] dairy cattle? Here, the Hand formula may be applied again. The burden of having to check the grain or make certain that it was not meant for dairy cattle is less than the high probability of producing poisonous milk that will cause severe illness in people who consume the milk. All he [sic] had to do is [sic] to be more aware of what he [sic] does. A reasonable farmer should know about the grains that he use[s]. He [sic] has breached.
3. Causation is as above.
4. Damages as above.
5. The defenses of contributory negligence and comparative fault will not apply as above. Assumption of the risk also does not apply.

## C. Implied Warranty

1. Farmer Jones is a merchant of milk because he [sic] deals in selling milk to the groceries [sic]; therefore, he [sic] is an appropriate defendant.
2. The injured milk consumers are the natural and foreseeable buyers and consumers of the milk from the grocers. As this was foreseeable, we have proper plaintiffs as well.
3. The milk is not merchantable since it is not fit for the purpose for which it was made when used in a reasonable manner. Here, the milk was not fit for consumption because it made the consumers seriously ill. The milk was not merchantable.
4. Causation is as above.
5. Damages are as above.
6. Merchants can provide disclaimers or limitations on implied warranties if it was communicated to the consumers clearly and in words such as "milk as [sic] sold as is". However, the facts show no such disclaimers or limitations.

In conclusion, the injured milk consumers will win their claims against Farmer Jones for strict liability in tort, negligence, and implied warranty.

Injured milk consumers (plaintiffs) v. Big Food



I. Can plaintiffs sue Big Food for damages based on theories of strict liability in tort, negligence, and implied warranty for damages from consuming bad milk?

A. Strict liability in tort

1. Big Food is a proper defendant because it is a retailer who sells the milk. Big Food is in the market chain of getting of milk to the public.
2. The injured milk consumers are proper plaintiffs as discussed above.
3. Defect is as discussed above.
4. Causation is as above.
5. Damages are as above.

Similar to Farmer Jones, Big Food is liable to plaintiffs under the theory of strict liability in tort.

B. Negligence

1. Big Food has a duty to act like a reasonable and prudent store.
2. Did Big Food breach its duty by not inspecting the milk for the defect? Here, the dangerous [sic] of the poison in the milk was not easily discoverable by inspection. The poison is invisible and would not have caused any obvious discoloration of the milk. It would also be unreasonable for the grocer to taste every product on its shelves to ensure safety. The burden of having to thoroughly inspection [sic] the goods before sale would outweighs [sic] the risk of injury to consumers. Therefore, Big Food did not breach its duty.
3. Causation is as above.
4. Damages are as above.

Big Food did not breach its duty as it would be unreasonable to set up an inspection of all its goods prior to sale.

C. Implied warranty

1. Big Food is a merchant who deals in the sale of produce such as milk so it is a proper defendant.
2. The injured milk consumers were customers of Big Food or people in their household who would reasonably consume the milk. Therefore, we have appropriate plaintiffs.

3. The milk is not merchantable since it is not fit for the purpose for which it was made when used in a reasonable manner. Here, the milk was not fit for consumption because it made the consumers seriously ill. The milk was not merchantable.

4. Causation is as above.

5. Damages are as above.

6. Merchants can provide disclaimers or limitations on implied warranties if it was communicated to the consumers clearly and in words such as "milk as [sic] sold as is". However, the facts show no such disclaimers or limitations.

The injured milk consumers will win their claim against Big Food under the theory of strict liability in tort and implied warranty but not under negligence.