



**California  
First-Year  
Law  
Students'  
Examination**

**Essay Questions  
and  
Selected Answers**

**October 2009**



The State Bar Of California  
Committee of Bar Examiners/ Office of Admissions

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## **ESSAY QUESTIONS AND SELECTED ANSWERS**

### **OCTOBER 2009 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the October 2009 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.

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

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## **ESSAY EXAMINATION INSTRUCTIONS**

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

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

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

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

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

## Question 1

Darby organized a political rally attended by approximately 1,000 people in support of a candidate challenging the incumbent in the upcoming mayoral election. Sheila, the wife of the challenging candidate, was the main speaker. When Darby introduced Sheila, he described her as a “. . .kind woman of the people.” In his introduction he also referred to Patty, the wife of the current mayor, as “. . . a snob, who is so cutthroat that she said very nasty things about her closest friend when that friend applied for membership to an exclusive private women’s club of which Patty is a member.” Darby’s statements were reported in the print and television media.

Darby had heard this information about Patty from a notorious local gossip and the information was largely false. In fact, when Patty’s friend was rejected for club membership, Patty was one of her staunchest supporters in the application process. Darby’s statement put a strain on Patty’s relationship with her friend who, upon hearing of Darby’s comments, cancelled an upcoming lunch she and Patty had scheduled several weeks before the rally.

At the time Darby spoke at the rally, Patty had not been involved publicly in her husband’s campaign or political activities. Two days before the rally, Patty appeared with her husband in public for the first time when she learned that Sheila was going to speak at the rally.

1. Under what theory, or theories, if any, might Patty bring an action against Darby? Discuss.
2. What defense or defenses, if any, might Darby assert, and what is the likely result? Discuss.

## Answer A to Question 1

### PATTY V. DARBY

#### DEFAMATION

Defamation is a false and defamatory statement published to third persons, understood by those third persons as relating to Plaintiff, which actually and proximately causes damage to Plaintiff's reputation.

FALSITY: Darby stated that Patty was a "snob," that she said "nasty things" about her friend when her friend applied for membership in a club.

OPINION: Darby's statement that Patty was a snob was his own opinion. It does not relate to a factual matter.

FACT: Darby's statement about Patty's interfering with her friend's application for the club is false because it relates to an event that did not actually occur.

Darby may state that he heard the information from someone else and was merely republishing it. However, because the person he heard this information from was a "notorious gossip," Darby will be found to have known that it was at least highly possible that the information was not accurate.

DEFAMATORY: Darby stated that Patty had actively interfered with a friend's club membership by saying "nasty things" and was snobby. These statements would be understood by anyone to be tending to lower the reputation of the one to whom they referred. Therefore the statements are defamatory.

PUBLISHED TO THIRD PERSONS: Darby's statements were made in front of an audience of 1,000 people. Therefore they were published.

UNDERSTOOD TO BE ABOUT PLAINTIFF: The people at the rally understood that Darby was speaking of Patty the Mayor's wife. Therefore his comments could not be understood to be about another woman named Patty, but only about this particular woman.

CAUSATION: But for Darby's statements to the people at the rally, Patty would not have suffered the loss in reputation that she suffered. Furthermore, it was foreseeable that making these defamatory statements in the public arena would cause a substantial number of people to believe the statements and therefore that the Plaintiff's reputation would be lowered in the estimation of a sizable portion of the attendees.

DAMAGE TO REPUTATION: Patty's reputation was at least lowered in the estimation of the friend whose club membership she had actually supported. Because this friend had been rejected for membership and because she now believed that Patty was the result of that rejection, Friend cancelled her lunch with Patty.

The courts will see even the loss of a gratuity, such as a lunch, as damages in relation to defamation. Therefore Patty has suffered sufficient loss of reputation for defamation to lie.

### **LIABILITY FOR REPUBLICATION**

The original tortfeasor will be liable for all the damage caused by republishers.

Here, Darby's statements were republished by the print and television media. Because these media have substantial viewers and readers, Patty's damages will be seen to have been aggravated by the republication. Patty's damages can be assessed by means of polls or other measures.

Darby will be liable for all damages subsequently proven by Patty to have been sustained by her as a result of the republications.

## **DEFENSES TO DEFAMATION**

### Constitutional Defenses

#### Public Figure:

Darby will argue that Patty was a public figure because she was the mayor's wife and this was an election year. Darby will state that because Patty was a public figure, he should only be held liable if his statements were made with actual malice, that is, intentionally or in reckless disregard of the truth.

The court may determine that Patty's status as the mayor's wife is one of public figure. However, because Darby's information came from a "notorious gossip," the court will likely find that Darby should have known that the information was probably false. It is likely that he will be found to have acted at least recklessly in relation to the truth of the statements he made. Therefore, this defense will not be applicable.

#### Private Figure in Public Matter

Patty will argue that she was not a public figure, that her husband handled the mayoral duties without her, and that she led a quiet life unrelated to her husband's job. However, because she had joined her husband at a political rally two days before the rally at which Darby spoke, the court may find that she had assumed the status of a private figure in a public matter in relation to the current election.

If the court finds that Patty is a private figure in a public matter, Darby will state that his statements relating to Patty's alleged treatment of her friend are within the scope of public interest in the election of a mayor. Patty will argue that Darby exceeded the limits of Gertz in that his false, defamatory statements were made at least negligently, most likely recklessly, and perhaps even intentionally.

This defense will not work.

Darby will be liable for defamation.

**Damages:**

Special Damages: Patty lost the lunch she was going to have with her friend.

General Damages: Because Patty can prove special damages, she can recover for mental suffering and loss of reputation in the community. She will recover from Darby for all losses sustained through the subsequent republication by the print and television media as well.

Punitive Damages: Patty will probably be able to prove that Darby's statements were made maliciously. Therefore punitive damages will be available.

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

Conduct of an extreme and outrageous nature that intentionally or recklessly causes severe emotional distress to Plaintiff.

Darby accused Patty of saying nasty things about her friend. His statements were made in front of 1,000 people. Having such a statement made about one in front of such a large group could be found to be extreme and outrageous. Furthermore, Darby made his statements intentionally. Darby will argue that words alone are insufficient to support IIED, but Patty will counter that the statements were so outrageous that they were certain to cause emotional distress, especially when made in front of such a large group of people.

Patty will have to prove that she suffered severe emotional distress because of the loss of her friend or other embarrassment. If she does prove severe emotional distress, the court may find Darby liable for IIED.



**Defenses:**

Darby will argue that his conduct was not extreme, or that it was uttered as an opinion. However, if the court finds it extreme and outrageous and that Patty suffered severe emotional distress, this will not be a good defense.

**INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE**

Defendant intentionally interferes with Plaintiff's prospective business advantage.

Here, Darby made the statements about Patty in an intentional effort to induce the local voters to vote against Patty's husband for mayor. Thus, because the business advantage in view is that of Patty's husband, rather than Patty, it is unlikely that Darby would be liable for intentional interference with prospective business advantage.

## Answer B to Question 1

### *I. Patty v. Darby*

**Defamation.** Patty may assert a claim against Darby for defamation.

Defamation is a defamatory statement concerning the plaintiff, published to a third party, causing reputational harm.

**Defamatory Statement.** A defamatory statement is a false statement adversely affecting the reputation of the plaintiff in the eyes of a respectable minority of the community. Here, Darby referred to Patty as “a snob, who is so cutthroat that she said very nasty things about her closest friend when that friend applied for membership to an exclusive private women’s club of which Patty is a member.” This statement was “largely false,” as Patty had been one of her friend’s staunchest supporters in the application process. It adversely affected Patty’s reputation because it put a strain on her relationship with her friend, who believed the false statement upon hearing Darby’s statements. Therefore the statement was defamatory.

**Of and concerning plaintiff.** The Plaintiff must be understood to be the subject of the defamatory statement, either by intrinsic or extrinsic evidence. Here, Darby referred to Patty, the wife of the current mayor, in his introduction of Sheila. It clearly identified Patty by name, and it is therefore of and concerning the plaintiff.

**Published to a third party.** The defamatory statement must have been communicated to a third party, either intentionally or negligently, and it must have been understood by the third party. Here, Darby made the statement at a political rally attended by approximately 1,000 people, and it was also reported in the print and television media. Darby knew that people would hear his statements, and desired that they hear them, as he was trying to challenge the incumbent during the mayoral election by speaking negatively about the current mayor’s wife. He must have also known that the media

would be present, and would report what he said. There was clearly an intentional publication.

**Constitutional Limitations.** The level of fault needed to establish defamation depends on the status of the plaintiff and the defendant. Here, Darby is a non-media defendant. If Patty is a public figure, then it must be shown that Darby acted with malice. If Patty is a private figure, and the matter is a public concern, then it must be shown that Darby acted with malice. If Patty is a private figure, and the matter is a private concern, then it must only be shown that Darby was negligent. Here, Patty had not been publicly involved in her husband's campaign or public activities. This would make her a private figure. However, she had appeared in public for the first time two days before the rally. As she made her appearance when she learned that the wife of the challenging candidate would appear, then Patty's appearance was made in connection with her husband's campaign, making it a matter of public concern. Therefore, Darby would need to have acted with malice.

**Malice.** Malice is knowledge of the falsity of the statement or reckless disregard to the truth. Here, Darby heard the information about Patty's nasty statements about her friend from a notorious local gossip. This was not a reliable source of information, and the probability that the information was false was very high. Darby would have needed to verify the truth of the information. The facts don't indicate that he did, and therefore he acted with reckless disregard for the truth. Therefore, Darby acted with the requisite malice.

### **Damages.**

**Slander.** Slander is a defamatory statement which is spoken. Here, as stated above, Darby's statements were spoken. Where there is slander, then the plaintiff needs to prove special damages, or pecuniary losses. Pecuniary losses are monetary, such as loss of income or loss of an expected gift. Here, Patty's relationship with her friend was strained as a result of the defamation, and her friend cancelled an upcoming lunch

which had been scheduled weeks before the rally. This is not sufficient to establish that Patty suffered any monetary losses. Patty would not be able to recover absent a showing of such losses. However, where a defendant has acted with malice, then special damages are presumed. Here, as established above, Darby acted with malice, and therefore Patty could recover for the harm suffered.

**Defenses.** Darby may not be held liable if he can establish a defense.

**Absolute privilege.** One who makes a defamatory statement during the course of a political campaign is privileged as long as they did not act with intent. Here, Darby acted with intent, and therefore would not avail of the privilege.

**Invasion of Privacy.** Patty may also assert a claim against Darby for one of the invasion of privacy torts. Here, she may assert a claim for false light.

**False light.** False light is the intentional falsifying of a plaintiff's beliefs or actions, which would be highly offensive to a reasonable person, and which is widely published. Here, as discussed under defamation, Darby intentionally made a false statement about Patty. The statement falsely reported on an action which Patty did not do – said nasty things about her friend. It was widely published, as it was reported in the print and television media. Such a statement would be highly offensive to a reasonable person because it was damaging to a personal relationship. Therefore Darby would be liable for false light.

**Defenses.** There are no applicable defenses.

## Question 2

Vladimir owed Donald a gambling debt. Knowing that Vladimir had a new laptop computer, Donald sent an e-mail to Brenda, who lived close to Vladimir. The e-mail informed Brenda that Donald had left his laptop at the home of Vladimir, who was away for the weekend, but that Vladimir had given Donald permission to retrieve his laptop while Vladimir was gone. In the e-mail Donald asked Brenda to go to Vladimir's house, locate the door key under the mat on the porch, and bring the laptop to Donald.

Corky, who was at Brenda's house when Donald sent the e-mail to her, read the e-mail and rushed over to Vladimir's house to steal the laptop. When Brenda later arrived at Vladimir's house to retrieve the laptop for Donald, she found the back door open and Corky ransacking the house. Corky was so startled that he fell backwards, hit his head on a table and lost consciousness as he fell to the floor. Brenda went upstairs where she searched for and found the laptop. Always wanting a laptop, she put Vladimir's laptop in her purse to keep for herself. Brenda then called 911. Before the police arrived, Corky regained consciousness and fled out the back door.

When the police arrived at Vladimir's house, Brenda told them that she believed Corky had taken a laptop from the house. When the police went to Corky's house, they found him dead from his head injury.

What crimes, if any, might Donald, Brenda and Corky reasonably be charged with, and what defenses, if any, might each assert? Discuss.

## Answer A to Question 2

### STATE V. DONALD

#### SOLICITATION OF BRENDA

An act of inciting, enticing, or counseling of another, with specific intent to induce them to commit a crime.

Donald e-mailed Brenda and asked her to retrieve his laptop from Vladimir's house.

This is an act of inciting and counseling of another, Brenda, to commit a crime.

However, Donald will argue that Brenda's act would not be a crime because she would not be intending to permanently deprive Vladimir of Vladimir's laptop.

However, State will show that this would be a crime as to Donald, because Donald would be committing a burglary by an innocent agent.

Thus, Donald incited Brenda to commit an illegal act, burglary.

Thus, Donald is guilty of solicitation of Brenda, absent an applicable defense.

#### SOLICITATION OF CORKY

Defined *supra*.

Donald e-mailed Brenda and, as discussed *supra*, solicited her to commit burglary.

However, Donald did not intend to solicit Corky, and further, he did not know that she was even present at Brenda's house.

Thus, Donald did not solicit Corky with intent to induce her to commit a crime.

Thus, Donald is not guilty of solicitation of Corky.

### **CONSPIRACY TO COMMIT LARCENY/BURGLARY**

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

State will argue that Donald agreed with Brenda and Corky to commit burglary.

However, Donald only solicited Brenda, and did not have any agreement with either Brenda or Corky.

Thus, Donald is not guilty of conspiracy.

### **ATTEMPTED COMMON LAW BURGLARY**

**Attempt:** The substantial step towards perpetration of an intended crime

**Common Law Burglary:** The breaking and entering of the dwelling of another, in the nighttime, with specific intent to commit a felony therein.

Donald attempted to have Brenda commit a burglary of Vladimir's house. However, as discussed *infra*, Brenda did not commit a common law burglary because there was no breaking.

Donald succeeded in having Brenda commit an entering of the dwelling of Vladimir, with specific intent to commit a felony therein – larceny.

This is a substantial step toward perpetration of an intended crime, burglary.

Thus, Donald is guilty of attempted common law burglary, absent an applicable defense.

### **MODERN LAW BURGLARY**

**Modern Law Burglary:** The trespassory entering of any structure with specific intent to commit a crime therein.

Donald succeeded in having Brenda commit a trespassory entering of the structure of Vladimir when she entered without his permission, and with specific intent to commit the crime of larceny therein.

Donald will argue that Brenda did not herself intend to commit larceny, and there is no concurrence.

However, State will show that Brenda was an innocent agent, and thus, Donald can still be convicted.

Thus, Donald is guilty of modern law burglary, absent an applicable defense.

### **LARCENY**

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

Here, Donald used Brenda as an innocent agent to take Vladimir's laptop.

Donald knew that this was a trespassory taking and carrying away because Brenda was going to take it and carry it to him, without Vladimir's consent.



Further, this was the personal property of Vladimir, another, and Donald intended to permanently deprive Vladimir of the laptop.

Thus, Donald is guilty of larceny, absent an applicable defense.

### **ACCOMPLICE LIABILITY**

State will argue that Donald should be guilty of homicide of Corky under accomplice liability for the acts of Brenda.

However, Donald will show that, as discussed *infra*, Brenda was not guilty of the death of Corky.

Thus, Donald is not guilty of homicide.

Finally, as discussed *infra*, if the court were to determine that Brenda is guilty of involuntary manslaughter, Donald would still not be guilty because he did not specifically aid and abet the crime of homicide.

### **Defenses Donald can raise to the above crimes**

There are no defenses which Donald can raise to the above crimes.

## **STATE V. BRENDA**

### **CONSPIRACY TO COMMIT LARCENY**

As discussed *supra*, there was no agreement.

Thus, Brenda is not guilty.

### **COMMON LAW BURGLARY**

Defined supra.

Brenda entered Vladimir's house through the open door.

This is not a breaking.

Thus, although Brenda committed an entering of the dwelling of another, there is no breaking, no nighttime, and no specific intent to commit a felony therein.

Brenda is not guilty of common law burglary.

### **MODERN LAW BURGLARY**

Defined supra.

Brenda entered Vladimir's house without his permission. This is a trespassory entering.

Vladimir's house is the structure of another.

However, Brenda did not intend to commit a crime therein at the time she entered, because she thought that the laptop was actually Donald's, and it wouldn't be stealing to take it.

Thus, Brenda is not guilty.

## **LARCENY**

Defined supra.

Brenda took the laptop, intending to keep it for herself.

This is a taking and Brenda carried it away by picking it up.

It was personal property of Vladimir, another.

Further, Brenda intended to permanently deprive the owner of the laptop of it.

Thus, Brenda is guilty absent an applicable defense.

## **HOMICIDE**

The killing of a human being by another human being.

Brenda walked into Vladimir's house, causing Corky to fall over and die.

### ACTUAL CAUSE

But for Brenda entering Vladimir's house, Corky would not have been startled and died.

### PROXIMATE CAUSE

State will argue that it is reasonably foreseeable that entering the house of another without permission will cause another to die.

However, Brenda will show that she was not committing any crime by entering, as discussed *supra*, and it is not foreseeable that merely entering another's house without permission will cause someone to die.

Thus, there is no proximate cause.

However, even if the court were to find proximate cause, Brenda would still not be guilty because she did not have any intent to kill, intent to cause serious bodily injury, a depraved heart act, and the killing did not occur during commission of a felony.

Further, she did not act with criminal negligence, intent to inflict non-serious bodily injury, or through commission of a misdemeanor because there is no crime for simply trespassing.

Finally, if the court were to find that it is a misdemeanor to commit a trespass on another's land, Brenda would be guilty of involuntary manslaughter because the killing occurred during commission of an unlawful act.

### **Defenses Brenda can assert against the above crimes**

#### ***Mistake of fact***

Brenda will argue that she was mistaken as to the fact of whose laptop she was taking.

Although this is generally not a valid defense, it will be if it negates the specific intent for any crime.

Here, this is a valid defense to all of the above crimes except the larceny, because it does not make a difference whose laptop Brenda thought she was stealing when she actually stole it.

Thus, this is a defense to most of the crimes, but not the larceny.

**STATE V. CORKY**

**CONSPIRACY TO COMMIT LARCENY**

As discussed *supra*, there was no agreement.

Thus, Corky is not guilty.

**COMMON LAW BURGLARY**

Defined *supra*.

The facts do not state exactly how Corky entered the house; however, it is likely that Corky broke into it through the back door, because Vladimir was gone, and he likely locked the door.

Thus, there is likely a breaking, and Corky then entered.

This was the dwelling house of Vladimir, another.

Further, Corky intended to steal the laptop, a larceny, which is a felony, at the time he entered.

Thus, Corky is guilty of common law burglary.

**MODERN LAW BURGLARY**

Defined *supra*.

Corky trespassorily entered the structure of another, Vladimir, because he did not have Vladimir's permission to enter.

At the time Corky entered, he intended to commit the crime of larceny therein.

Thus, Corky is guilty of modern law burglary.

### **MALICIOUS MISCHIEF**

The malicious infliction of injury to the property of another.

Here, Corky ransacked Vladimir's house. Ransacking a house generally involves causing injury to the house or the property therein, which was the property of Vladimir, another.

This was malicious, because Corky intended to do it and acted recklessly in acting thus.

Thus, Corky is guilty of malicious mischief.

### **ATTEMPTED LARCENY**

Defined supra.

Corky wished to steal Vladimir's laptop. He acted in perpetration of this intent when he burglarized his home and ransacked the house looking for the laptop,

This is a substantial step towards actually taking the laptop because he had specific intent to take it, there was no legal or factual impossibility, he had the apparent ability to succeed, and he acted towards perpetration of an intended larceny.

Thus, Corky is guilty of attempted larceny.

**Defenses Corky can raise to the above crimes**

There are no defenses which Corky can raise to the above crimes.

## Answer B to Question 2

### I. State vs. Donald:

The state could reasonably charge Donald with the crimes of solicitation, conspiracy, and as an accomplice.

### Solicitation?

Solicitation is the crime of asking or encouraging another to commit a crime and having the specific intent that the crime be committed. Here, the facts show that Donald was attempting to recover on a gambling debt owed to him by Vladimir, (hereinafter "V"), and in turn submitted an e-mail to Brenda who lived close to "V" asking that she go to his home and secure a laptop while "V" was not at home. Knowing that he did not have lawful possession of this laptop he requested that Brenda assist him in committing larceny. His asking of Brenda to participate in this act would merge into the completed offense and, therefore, he would be guilty of solicitation.

**Conspiracy?** Where two or more parties agree to commit a crime. Under the common law approach there had to be two guilty minds in order for the defendant to be guilty of conspiracy. The more MPC approach is that a defendant can be guilty of this crime with a unilateral decision to commit a crime even if the other party did not agree. Here, the facts show that Donald sent an e-mail to Brenda asking her to secure the laptop from "V"'s home using a key that was under the doormat on the porch and to bring it to him. Prior to Brenda reading the e-mail Corky read the e-mail and rushed over to "V"'s home to steal the laptop. There is no indication here that Donald had any agreement with Corky to steal the laptop, committing a larceny or burglary of "V"'s home. There are facts, however, to support that after reading the e-mail from Donald, Brenda rushed over to "V"'s home to secure the laptop for Donald; however, once she arrived and located the laptop she placed the laptop in her purse, intending to keep it for herself. This was not the agreement she held with Donald, as she wanted to keep this laptop for herself. There is no indication that Brenda ever responded to Donald's request and she simply reacted to the e-mail presented. Under the common law approach there would



be no conspiracy between Donald and Brenda or Donald and Corky as they did not agree to commit either the crime of larceny or burglary prior to commencing upon each act.

### **Accomplice to Larceny or Burglary?**

An accomplice is one who aids, abets or encourages the committing of a crime and has the intent that the crime be committed. One who is considered as an accomplice could be charged with the same crimes and the principal offender. Here, Donald would likely be considered an accomplice to the crimes of larceny and burglary.

**Burglary:** Under common law, burglary was the breaking and entering of the dwelling place of another, at night, with the intent to commit a felony therein. The more modern majority has removed the at night and dwelling house requirements for this crime.

Breaking and entering?

Here, the facts show that Donald advised in his e-mail that the key to “V”'s home would be under the mat on the porch. While this would grant entry into the home, this entry would still be considered unlawful as none of the parties involved had prior authority to enter “V”'s home. The facts also show that Corky used this key to open the back door of the home and was later found ransacking the house in an attempt to locate this laptop. This would satisfy the breaking and entering components under either the common or modern view of burglary.

Felony therein?

The second component to the burglary crime is that of committing a felony therein. Here, the facts show that Corky, using information provided by Donald, rushed over to “V”'s home to steal the laptop. This would amount to a larceny, which would be considered a felony, thus satisfying the second component of burglary.

**Larceny:** This is the trespassory taking and carrying away [of] the property of another with the intent to permanently deprive. Here, the facts show that as Donald advised in

his e-mail that his intent was to have Brenda remove (trespassory taking) the laptop owned by "V" (property of another) while he was out. Donald's intent was to use this laptop as compensation for an outstanding gambling debt owed to him (permanently deprive).

Therefore, if Donald is found to be guilty as an accomplice he can be reasonably charged with the crimes of burglary and larceny.

### **Defenses:**

Consent would be a valid defense that Donald could present to these charged crimes as the facts show that he was owed an outstanding gambling debt. This defense would only be valid if it were true that "V" had made a prior agreement with Donald that the laptop would be a valid exchange for his outstanding debt. There are no facts here to support this; therefore, consent would not likely be a valid defense for Donald.

### **II. State vs. Brenda:**

**Conspiracy?** Please see definition supra. Here, as the facts show Brenda did receive Donald's e-mail and immediately went over to "V"'s home, where she searched for and found the laptop. As Brenda intended to keep the laptop for herself and there is no indication that she and Donald ever came to an actual agreement that she would commit the crimes of burglary or larceny and turn over the laptop to Donald. Therefore, under majority rules where two guilty minds are required Brenda would not be guilty of conspiracy.

**Burglary?** Please see the definition supra. Here, the facts show that Brenda later arrived at "V"'s house to find the back door open. She did enter the home which would satisfy the entering element of burglary; however, since the home was open there would be no breaking of an entry. In addition the facts show that Brenda was going to secure the laptop for Donald and later decided to keep the laptop for herself. Since it was not conclusive from the facts that she intended to commit a felony prior to entering the

home, and there was no breaking of an entry, Brenda would likely not be found guilty if charged with the crime of burglary.

**Larceny?** Please see definition supra. Here, the facts show that after arriving Brenda went upstairs and searched for the laptop owned by “V” (property of others). She placed the laptop in her purse, intending to keep it for herself, as she always wanted one (intent to deprive) and left “V”'s home (trespassory taking and carrying away). If Brenda is charged with the crime of larceny she would likely be found guilty of the same as the elements required have been satisfied.

**Accomplice?** Please see definition supra. Here, the facts show that Brenda, after taking the laptop, called the police and informed the police that she believed Corky had taken the laptop from “V”'s home. These actions would constitute Brenda as being an accessory after the fact, as she continued to aid and abet the potential crimes of burglary and larceny after notifying the police.

**Murder?** Murder is defined as a homicide or killing of a human being with malice aforethought. Malice can be determined by the intent to kill, the intent to seriously injure, depraved heart or reckless indifference for human life, or a murder that takes place during the commission of an inherently dangerous felony. Here, the facts show that Corky died after the events of the night took place. Burglary of a home would be considered an inherently dangerous activity and therefore the malice element could be inferred upon Brenda for a death that occurred during this act. In order for the felony murder malice element to be satisfied it must be shown that the death of Corky was foreseeable, the death occurred during the commission of the felony, and the defendants had not reached a point of safety. Here, the facts show that upon her arrival to the home Corky was in the process of ransacking the place. He was startled by Brenda's arrival, fell and suffered a head injury as a result. Prior to Brenda leaving, Corky regained consciousness and fled the scene. He was later found dead at his home upon the police arrival. There is no indication from the facts that if charged with murder that Brenda did anything to participate in this homicide of Corky as when she

saw him he was alive and either ransacking or fleeing the area. Therefore, a charge of the murder of Corky would not likely be a valid charge against Brenda.

### **Defenses?**

**Mistake:** A good faith and reasonable mistake may absolve the defendant of all liability. Here, the facts show that Brenda was informed via e-mail that “V” had given permission to Donald to secure his laptop while he was out. She was also informed where to locate the laptop in the home as well as where to locate the key. This may appear as a reasonable mistake, however not in good faith as upon her arrival to the home she saw that Corky, who was at her home, was ransacking the place. This would have given her reasonable inference that it was possible that permission was not granted and therefore she would not have continued forward with the taking of the laptop. Therefore, this would not be a valid defense for Brenda.

### **III. State vs. Corky**

**Conspiracy?** Please see definition supra. Here, there are no facts to support that Donald had any agreement with Corky. Therefore a charge of conspiracy against Corky would not likely prevail for the state.

**Burglary?** Please see definition supra. Here the facts show that Corky took the information provided in the e-mail, he rushed over to V’s home to steal the laptop, he used the key to open the door of V’s home and enter with the intent to deprive him of the laptop. This would satisfy all of the elements required for burglary and a charge of the same would likely prevail for the state.

**Larceny?** Please see definition supra. Here, the facts show that Corky did intend to trespassorily take the laptop from V’s home; however, upon Brenda’s arrival he was startled and knocked unconscious. Once able to regain his consciousness he fled the scene without any property. Therefore a charge of larceny would not be valid against Corky as he had the requisite intent but did not actually take away any property from V.

### Question 3

Betsy contacted Sam, a salesman who works for Luxe, a company that sells luxury boats, and told him that she was interested in purchasing a luxury boat. Luxe provided Betsy with free airfare and lodging at a hotel resort near the Luxe boat showroom. After shopping at the showroom, Betsy became interested in the Wind Catcher model priced at \$200,000. Sam explained to Betsy the features of the Wind Catcher and told her that it was "state of the art." Sam gave Betsy a one-page purchase order form on which the words "Wind Catcher" were written in the blank space marked "Boat Model," and "\$200,000" was written in the blank space marked "Price." Just above the signature line in red italics were the words "This offer by Purchaser is irrevocable for thirty (30) days. All sales are final when approved by Luxe."

Before Betsy left the hotel the next day, Sam came by to tell her that he had just learned that Luxe was about to raise its prices, but that she could order the Wind Catcher at the current price if she quickly returned the purchase order form she had received the night before. When Betsy returned home, she checked prices on the internet for comparable boats and decided the price quoted by Luxe for the Wind Catcher was a good deal. She signed and faxed the purchase order form to Luxe.

After receiving the purchase order form from Betsy, Sam prepared the documents that Betsy would need to register the boat and went to the boat harbor where Betsy planned to keep the boat to make sure that the docking facilities were adequate for the Wind Catcher.

A few days later, Betsy learned that, despite what Sam had said, Luxe had no plans to raise its prices and that the Wind Catcher was an older model without the navigation and safety features available on newer models. She immediately faxed a letter to Luxe stating that she did not want to make the purchase. That same afternoon Betsy received in the mail from Luxe a photocopy of the purchase order form that was stamped "Accepted" and signed by Luxe.

Under what theory or theories may Luxe be successful in a breach of contract action against Betsy? Discuss.

## **Answer A to Question 3**

### **LUXE V, BETSY**

#### **UCC or COMMON LAW?**

The UCC governs transactions for the sale of goods; a good is an item that is movable at the time of identification to a contract for sale. Most other transactions are governed by the common law.

The transaction is for the sale of boat, which is movable at the time of identification to a contract for sale, and so is a good.

Thus, this transaction is governed by the UCC.

#### **Merchants**

A merchant is one who deals in goods of the kind, or who otherwise by his occupation holds himself out as having knowledge or skill peculiar to the goods or practices involved in the transaction.

Luxe sells luxury boats, and so deals in goods of the kind. Betsy does not deal in goods of the kind, and does [not] by her occupation hold herself out as having any particular knowledge or skill in relation to boats.

Thus, Luxe is a merchant and will be held to a higher standard of good faith and fair dealing under the UCC; Betsy is not a merchant.

#### **FORMATION**

An enforceable contract is formed by mutual assent, often reached by an offer and an acceptance, plus consideration, absent any applicable defenses.

### **Offer**

An offer is an outward manifestation of present contractual intent, clear and definite in its terms, and communicated in such a way as to create in the offeree a reasonable expectation that the offeror is willing to enter into a contract.

### **Preliminary Negotiations**

Sam showed Betsy Luxe's boats, and gave her a purchase order form for the one she was interested in. However, this form was not an offer by Luxe, since [it] required Luxe's final approval and so did not manifest present contractual intent, because Betsy could not form a contract by assenting to its terms.

### **Offer by Betsy**

After some research, Betsy faxed Luxe the purchase order, after signing it. This was a manifestation of present contractual intent, since it gave Luxe the opportunity to form a contract by assent to the offered terms. The offer contained the following terms:

Quantity: 1

Time for Performance: not stated, but a reasonable time would be implied

Identity of Parties: Luxe and Betsy

Price: \$200,000

Subject Matter: "Wind Catcher" luxury boat

These terms were sufficiently definite on which to base a contract, since a court could easily discern the rights and obligations of the parties, and craft an appropriate remedy for breach.

The offer stated that the sale would be final when approved by Luxe, and so could be construed as requiring only Luxe's approval/promise, but not a communication of that promise to Betsy; however, it would probably be implied that Luxe had a duty to notify Betsy within a reasonable time of its acceptance, since Betsy had no other reasonable way of knowing of the acceptance.

### **Irrevocable Offer?**

The offer stated that it was irrevocable for 30 days; however, since this promise was not supported by separate consideration, or even purported consideration, and since Betsy was not a merchant, the offer was still freely revocable.

### **Revocation of Offer**

Betsy will argue that she validly revoked her offer when she faxed to Luxe a letter stating that she did not want to make the purchase. However, since Luxe had likely already accepted the offer, she could no longer revoke it and her revocation was ineffective.

### **Detrimental Reliance on Offer (Rest. 2d sec. 87(2))**

Where an offeror makes an offer which he should reasonably foresee to induce the offeree's detrimental reliance, resulting in action or forbearance to act, the offer will be held open for a reasonable length of time to avoid injustice.

Luxe may argue that even if its acceptance was not effective before the rejection, the offer should be held open since Luxe relied on the offer. Sam relied on the offer by spending the time to prepare the registration documents and by going to inspect the harbor. This type of reliance was probably reasonably foreseeable, and if so Betsy might not be allowed to revoke her offer for a reasonable time.

There was a valid offer.

### **Acceptance**

An acceptance is an outward manifestation of unequivocal assent to the terms of an offer.

Luxe, according to the terms of the offer, accepted Betsy's offer when it approved the sale, thus unequivocally assenting to the offer's terms; however, Betsy may argue that this approval was not an adequate outward manifestation; if it was adequate, Luxe's



letter was probably a timely notification. If mere approval was not adequate, Luxe's letter mailing the photocopy of the purchase order, signed by Luxe, was a valid acceptance.

There is no indication that sending a letter was not a reasonable method of acceptance, so the manner of Luxe's acceptance was probably adequate.

Under the general "mailbox rule," an acceptance is effective upon dispatch. Although some authorities hold that acceptance of an irrevocable offer is effective upon receipt, Betsy's offer was not truly irrevocable. Thus, Luxe's letter of acceptance was effective upon dispatch.

There was a valid acceptance, and thus mutual assent.

### **Consideration**

Consideration is the bargained-for exchange of legal benefit and detriment.

Luxe was to give up a boat, a detriment, and to receive \$200,000, a benefit; Betsy was to give up \$200,000, a detriment, and to receive a boat, a benefit. Each party's detriment was what induced the other party to contract, since each party viewed its detriment as the price of its benefit; thus, the exchange was bargained for.

There is sufficient consideration.

### **Defenses**

#### **Statute of Frauds--UCC 2-201**

A contract for the sale of goods for the price of \$500 or more is not enforceable unless evidenced by a writing sufficient to indicate a contract for sale between the parties, which is signed by the party against whom enforcement is sought and which states the quantity.

This transaction was for the sale of a boat, a good, for \$200,000.

Since this purchase order was signed by both parties, and gave the quantity as one boat, and was sufficient to indicate a contract for sale between Luxe and Betsy, there was a sufficient memorandum and the Statute of Frauds is satisfied.

### **Misrepresentation**

Betsy will argue that she should be allowed to avoid the contract, since Sam (Luxe's representative) misrepresented to her that (1) an immediate purchase was her last chance to purchase at the \$200,000 price, and (2) the Wind Catcher was "state of the art."

Since Luxe actually had no plans to raise its prices, the first representation was false. Also, since a reasonable person would probably understand "state of the art" to mean that the boat included modern features, the second representation was also false.

Betsy will claim that these representations, if Sam knew that they were not true, were therefore fraudulent, and that she justifiably relied on those representations in making her decision to promptly purchase the boat.

If Sam did not know his representations were false, Betsy will argue that they were still material, since Sam made them with the intent of inducing her to enter the contract, and they might be expected to induce a reasonable person to agree.

Luxe will argue that Betsy was not induced to enter into the contract because of Sam's misrepresentations. Luxe will say that Betsy did not buy the boat because the price would increase later, but because the current price was better than other prices; she only made her decision more quickly because of the misrepresentation.

Luxe will also argue that Sam's "state of the art" misrepresentation did not induce Betsy to enter into the contract, since Betsy had been told all the features that were on the

Wind Catcher and bought the boat on that basis. She was only misled as to the relative modernity of those features, not as to the functions of the actual features themselves. Luxe will say that Betsy bought the boat because of its features, not because of its relative modernity.

Betsy may or may not be able to avoid the contract on grounds of fraudulent and/or material misrepresentation.

### **DUTIES**

Unless Betsy can avoid the contract for misrepresentation, she has a duty to pay for the boat and Luxe has a duty to deliver it.

### **Conditions**

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

### **Constructive Condition**

Under the UCC, Luxe's tender of delivery of the boat is a constructive condition to Betsy's duty to pay.

### **Excuse of Condition--Anticipatory Repudiation**

However, if Betsy positively refuses to pay for the boat before Luxe tenders delivery, this is an anticipatory repudiation and Luxe can bring suit for breach without first tendering delivery.

### **BREACH**

If there is an enforceable contract, Betsy will be in major breach if she commits an anticipatory repudiation by refusing to pay for the boat.

## **REMEDIES**

### **Damages**

If Betsy commits an anticipatory breach, Luxe can make a reasonable and good faith sale of the boat to another party under UCC 2-706, and recover from Betsy the difference between the contract price and the resale price. Alternatively, Luxe can recover the difference between the contract price and the market price at the time and place for tender of delivery, under UCC 2-708.

If either of these options is inadequate to place Luxe in as good a position as the sale would have done, such as a “lost volume” sale where Luxe can sell a practically unlimited number of the boats, Luxe can recover its expected profits. Luxe can also recover any incidental damages resulting from a breach by Betsy.

## **Answer B to Question 3**

### **LUXE V. BETSY**

#### **UCC V. COMMON LAW**

The UCC governs contracts for the sale of goods. Goods are items which are identifiable and movable at the time of sale.

This contract is for the sale of a luxury boat, an item which is identifiable and movable at the time of sale.

Thus, this will be governed by the UCC.

#### **Merchants**

Under the UCC, a merchant is one who regularly deals with the goods in question, or who holds themselves out as having knowledge or skill peculiar to the goods.

In this contract, Sam regularly sells boats, and will be a merchant under the UCC.

Betsy does not regularly buy or sell boats, and does not hold herself out as having knowledge or skill peculiar to boats. Thus, Betsy will not be a merchant under the UCC.

Thus, only Sam is a merchant under the UCC, and will be held to a higher standard of good faith.

#### **FORMATION**

A valid contract consists of an offer and acceptance, collectively known as mutual assent, plus consideration, minus applicable defenses.

### **Offer**

The outward manifestation of present contractual intent, which is sufficiently definite in terms, and is manifested in such a way as to create in the offeree the reasonable expectation that the offeror is willing to enter into a contract.

#### **Invitation to deal**

Betsy made an invitation to deal when she told Sam that she was interested in buying a luxury boat. This is not an offer, because it is not sufficiently definite in terms, and Betsy did not objectively manifest an intention to be bound by Sam's acceptance.

Thus this is an invitation to deal.

#### **Preliminary negotiations**

Betsy and Sam talked about the Wind Catcher, and Sam told Betsy the features of that boat. This is not an offer, because neither party made a statement that was sufficiently definite to constitute an offer.

#### **Offer**

Betsy faxed a purchase order form to Sam, which stated the following definite terms:

1. Quantity: one boat
2. Time for performance: a reasonable time
3. Identity of parties: Sam and Betsy
4. Price: \$200,000
5. Subject matter: a Wind Catcher boat

This is an offer, because it is sufficiently definite in terms, and objectively manifests Betsy's intent to be bound upon an acceptance by Sam. Under the objective theory of contracts, an offer which reasonably appears to be a valid offer will be found to be valid by the courts.

Thus, there is a valid offer.

### **Merchant's firm offer rule**

This is not a firm offer, because it is not given by a merchant.

Thus, Betsy can still revoke the offer at any time prior to Sam's acceptance of the offer, even though the offer states that it will be held open for thirty days.

### **Revocation**

Betsy will argue that she effectively revoked her offer by faxing the letter to Sam, stating that she did not want to go through with the purchase. However, under the Mailbox rule of *Adams V. Lindsell*, an acceptance sent by mail is valid upon dispatch, and a revocation is only effective upon receipt.

Thus, because Sam's acceptance was sent by a reasonable means, and was dispatched prior to Sam's receipt of Betsy's revocation, the acceptance will be valid, and the revocation is ineffective.

Thus, the revocation is not valid.

### **Acceptance**

The outward manifestation of unequivocal assent to the terms of an offer.

Sam manifested an unequivocal assent to the terms of Betsy's offer when he mailed back a signed copy of the purchase order form, with the word "accepted" stamped on it.

This is an expression of unequivocal assent, because Sam offered no new terms in his acceptance, and manifested his intent to be bound by the acceptance.

Betsy will argue that the mail was not a reasonable means by which to accept, and thus, the acceptance is not valid. However, under the UCC, any reasonable means may be

used for an acceptance, unless the offer explicitly limits acceptance to a particular method of acceptance.

Thus, the use of the mail was reasonable, as the offer did not limit the means of acceptance, and time is not of the essence in this agreement.

### **Consideration**

The bargained for exchange element of a contract.

Both parties gave up something of value under the contract, either money or a boat. Further, both parties received something of value under the contract, either money or a boat.

Because both parties viewed what they gave up as the price for what they received, there was a bargained for exchange of legal value, and valid consideration.

### **Defenses to formation**

#### **Statute of frauds**

Betsy will argue that because the contract is for the sale of a good for over \$500, it must be in writing to be valid. (This requirement has been modernly raised to \$5,000 although the new rule has not been adopted in most states.)

However, both the offer and acceptance were in writing, and Betsy, the party to be charged, had signed her offer.

Thus, this defense is not valid.



### **Intentional misrepresentation**

Betsy will argue that Sam misrepresented the fact that the price of the Wind Catcher was going to go up, and she only had a small amount of time in which to purchase it at the lower price.

Betsy will show that this representation was not true, and that she relied on the misrepresentation to her detriment.

Betsy will further argue that Sam's representation was made with the intent to cause her reliance, which it did.

Sam will argue that Betsy would have bought the boat anyway. However, she can show that she likely would have found out that the boat was not such a good deal had she looked for a while longer at other boats.

There was a false representation of present fact, likely made with the intent to induce reliance. However, unless Betsy can show that she relied on the misrepresentation, this will not be a valid defense.

Thus, this is not a valid defense.

### **Incapacity**

Betsy will argue that Sam, as a salesman, is not capable of accepting her offer. However, if true, this would only make the contract voidable by Sam, not by Betsy.

Thus, this defense will fail.

### **Undue influence**

Betsy will argue that Sam used undue influence in order to obtain her offer. However, Sam will argue that he was only doing as usual salesmen will do--trying to get a sale.

Because Betsy likely cannot show detrimental reliance on Sam's misrepresentation, she will not be able to show that the misrepresentation unduly influenced her.

Thus, this defense will fail.

### **Duress**

This defense will not work, because only economic influence was used on Betsy--there was no threat of other harm.

### **Warranties**

Sam told Betsy that the boat was "state of the art." Betsy will argue that this is an express warranty, as it is not an expression of opinion, but of fact as to the nature of the boat and its accessories.

Sam will argue that he was only "puffing", and did not mean for Betsy to rely on his statements.

Because the statement objectively appeared to be of fact, the court will likely construe this to be an express warranty.

### **Breach of warranty**

Betsy will show that the boat is not actually state of the art, because it does not have the navigation and safety features that newer models have. This is not consistent with the express warranty that the boat is state of the art.

Thus, there has been a breach of an express warranty.

### **Parol evidence rule**

Betsy will argue that Sam's statement that the boat was state of the art is a condition precedent to her duty to pay. However, Sam will raise the parol evidence rule, arguing that evidence of a prior agreement may not be raised to change the integrated contract.

Under UCC, section 2-202, evidence of a prior agreement may not be admitted if the court finds that the writing is integrated.

Thus, this defense will be valid, and will not allow Betsy to raise the prior agreement.

### **CONDITIONS**

An act or event not certain to occur, the non-occurrence of which gives rise to or extinguishes a legal duty to tender performance under the contract.

### **Express condition precedent**

Betsy will argue that the boat's being "state of the art" is an express condition precedent to her duty to pay the purchase price of the boat.

The court will likely find that this is a covenant, rather than a condition, because the language of the contract does not state anything about the state of the boat.

Thus, this is not likely a condition.

### **Constructive condition precedent**

Where it is not stated by the parties, the courts will imply a condition that the shorter performance is conditioned upon the longer performance.

Thus, Betsy's duty to pay is conditioned upon Sam's duty to tender the boat to Betsy.

### **Excuse to condition**

Sam will show that his duty to tender the boat is excused, because of Betsy's anticipatory repudiation by stating that she does not want to make the purchase.

This is a valid excuse to Sam's duty.

## **DISCHARGE OF DUTIES**

### **Commercial impracticability**

This defense will not work, because it is not subjectively impossible for Betsy to perform.

### **Impossibility**

This defense will not work, as it is not objectively impossible for Betsy to perform.

### **Duress**

This defense will not work, as there was no threat of any harm to Betsy.

## **BREACH**

An unjustifiable failure to perform under a contract.

Because there is a breach of an express warranty, and the warranty goes to the heart of the contract, Betsy is not in breach for telling Sam that she will not go through with the deal.

However, Sam is likely in breach for his breach of warranty.

If the court found that there was no breach of warranty, they would proceed as follows, *infra*.

### **Anticipatory repudiation**

Betsy has anticipatorily repudiated by telling Sam that she does not want to go through with the purchase of the boat.

Because of her repudiation, Sam is entitled to sue immediately for breach, encourage Betsy to perform, or wait until Betsy's duty to perform arises, and then sue if she does not perform.

Sam does have a duty to mitigate damages; however, and this might mean that he must sue immediately, if the price of the boat is about to go up.

### **REMEDIES**

General expectancy damages: Sam may recover the profit he expected to make on the boat, plus incidental damages.

Punitive damages will not be available, unless the court finds that Sam acted in bad faith.

### **Lost profits seller**

Because Sam could likely have sold the boat to another buyer, he will be entitled to the profits he would have made on the sale to Betsy, plus incidental damages resulting from the breach.

## Question 4

Billy, a minor, was suspended from school for throwing an eraser at his teacher. The school principal told Billy's parents that, in the opinion of the school psychologist, Billy should be admitted to a facility where he could be treated for his anger problem. The principal gave the parents a copy of the psychologist's report, which stated that there was a 90% certainty that Billy would hurt someone if he did not receive proper treatment. Billy's parents admitted they had known about his anger problem for about a year, but had done nothing about it.

Billy's parents ignored the principal's advice and instead sent him to stay with his uncle Dan during the suspension from school. On the first day at his uncle's house Billy began playing an electric guitar so loudly it could be heard a block away. Paul, a neighbor, worked as a therapist out of a home he rented near Dan. Paul called Dan and complained that the loud music was interfering with the therapy session of one of Paul's patients. Dan apologized and immediately had Billy lower the sound on his guitar amplifier.

Later that day, before Dan went out, he told Billy to continue to keep the volume of the music down because of Paul's complaint. After Dan left, however, Billy once again began to play the guitar very loudly. Paul immediately went to Dan's house to complain about the music. Paul told Billy that if he did not turn down the music volume, Paul would call the police. Billy told Paul to mind his own business.

As Paul began to walk back home, Billy yelled to Paul: "If you ever complain about my music again I will make you pay!" When Paul did not respond, Billy threw a large rock at Paul. The rock missed Paul but hit Penny, who was walking by. Penny suffered severe injuries as a result of being hit in the head by the rock Billy threw.

Billy did not play his guitar loudly again.

1. Under what theory or theories, if any, might Paul bring an action against Dan? Discuss.
2. Under what theory or theories, if any, might Paul bring an action against Billy? Discuss.
3. Under what theory or theories, if any, might Penny bring an action against Billy? Discuss.
4. Under what theory or theories, if any, might Penny bring an action against Billy's parents? Discuss.

## **Answer A to Question 4**

PAUL V DAN

PRIVATE NUISANCE

Substantial, unreasonable interference with the use and enjoyment of plaintiff's property.

SUBSTANTIAL

Must be inconvenient, annoying to a reasonable person.

Extreme sensitivity would not account.

Here, facts tell us that Paul, who was Dan's neighbor, "worked as a therapist out of a home he rented near Dan." Facts also tell us that loud music was "interfering with the therapy session of one of Paul's patients." And facts also tell us Billy "began playing an electric guitar so loudly it could be heard a block away." This certainly would be inconvenient and annoying to a reasonable person who is trying to work or enjoy the use of his property.

UNREASONABLE

There will be a balancing act when court will take into account the neighborhood, area, and some factors that it would constitute unreasonable.

Here, the fact that the loud music would have been heard a block away would constitute an unreasonable and substantial interference with not only the ones who are trying to work such as Paul but also for people who are just trying to enjoy their property.

Therefore, Paul has a valid claim of Private nuisance.

## REMEDIES

Facts tell us that after Paul called Dan he asked Billy to turn the volume down. However, it continued again. Paul goes to Dan's house to complain about the music. When it continues he uses abatement. If it continues in future Paul can bring action for injunction, can show actual damages if he suffers one.

### Public nuisance

Unreasonable interference with the health and safety and property rights of the public.

Plaintiff must show that he suffered special damages not suffered by the public at large to be able to recover under this theory.

Here, there are no facts indicating that Paul suffered special damages; therefore, this claim will fail.

## NEGLIGENCE

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

Only foreseeable plaintiffs are owed duty of care.

Here, Paul was clearly a foreseeable plaintiff because he was Dan's neighbor and the loud music was interfering with his work and enjoyment of his property.

## STANDARD OF CONDUCT

### CONTROL OF A THIRD PERSON

When one has the right, duty and the authority to control a conduct of a third person when it is known that person is in need for such control or supervision.



Here, based on the facts that Billy's parents "ignored the principal's advice to take him to a psychologist to manage his anger problems" and sent him to Uncle Dan indicates that they did not tell Dan about Billy's anger and aggression issues; therefore he won't be liable for breaching his duty of control of a 3<sup>rd</sup> person.

However, he had a duty to act as a reasonable prudent person. When neighbor complained and Billy turned it down Dan should have inferred that when Billy is home alone he would most probably turn the volume up again. And he should have not left him alone at home.

Breach.

When person's conduct falls below standard of care.

Here one would argue that Dan should have not left Billy alone at home, and would have been reasonable to suspect that if he was playing guitar loudly once in his presence he would continue doing it when he is alone.

#### ACTUAL AND PROXIMATE CAUSE

When there [are] no interfering factors between defendant's acts and plaintiff's damages then defendant is the actual cause.

It can be said but for Dan leaving Billy home alone Paul would not have [and] Penny would not have suffered damages.

However, there was an interfering factor when Paul came to Dan's house to complain about loud music and that is when Billy threw a rock at him. However, this was foreseeable that someone would come to complain [a] second time when the issue was not resolved.

Therefore, Paul may be indirect proximate cause of Penny's damages.

However, there are no facts indicating that Dan knew in any way that Billy needs special attention and that if court finds that leaving Billy home alone was not unreasonable then Dan won't be liable for negligence.

PAUL V BILLY.

PRIVATE NUISANCE DEFINED SUPRA

ASSAULT

Act by defendant that causes apprehension in immediately receiving a battery.

Here, when Paul went to Dan's house to complain Billy opened the door and when Paul told him to "turn the music down" he told Paul mind your own business. These words are not sufficient to cause apprehension in someone because they, as facts show, were not coupled with actions or in any way threatening to [a] reasonable person; however, afterwards Billy yelled "If you ever complain about my music again I will make you pay." This again is insufficient to cause apprehension because it is not an immediate threat but future. Facts further indicate that when Paul did not respond Billy threw a large rock at him, [and] "the rock missed Paul." There are no indications whatsoever that Paul even saw the rock coming or was put in apprehension of receiving immediate battery in any way.

Therefore, the claim for assault will fail.

BATTERY

Act by the defendant that intentionally causes harmful and offensive contact with plaintiff's person.

Act must be a volitional act. Here Billy voluntarily took the rock and threw it to Paul with the intent to hit him – which constitutes an offensive contact. However, here Paul did not suffer a harmful or offensive contact. Rock missed him and hit Penny.

Therefore, the claim of battery for Paul would fail.

## PENNY V BILLY

### TRANSFERRED INTENT

When Defendant intends to commit one tort on a same person but instead commits another tort to the same person or a different person, transferred intent doctrine will apply.

The only time that transferred intent doctrine will not apply is for intentional infliction of emotional distress (IIED) and Conversion.

Here, facts tell us that Billy threw the rock intending to hit Paul (commit an intentional tort of battery on Paul) but it missed him and hit Penny “who was walking by” and Penny “suffered injuries as a result of being hit in the head by the rock that Billy threw.” Doctrine of transferred intent applies here. And Penny can recover under Battery.

### BATTERY

Act by the defendant that intentionally causes harmful and offensive contact with plaintiff’s person.

Here, Billy committed a battery on Penny and facts tell us that [she] “suffered injuries as a result of being hit in the head by the rock that Billy threw.” This was a harmful and offensive contact with Penny’s person – her head was injured as a result.

### REMEDIES

Penny may recover from Billy reasonable value of her medical expenses, lost earnings [and] she may also recover punitive damages if she shows that Billy’s act was willful and wanton.

## PENNY V BILLY's PARENTS

### VICARIOUS LIABILITY

Parents are not liable for the intentional torts of their children unless>>>>

They have a duty and authority to control a child and know that child needs controlling.

In some states parents are liable for the torts of their children up to certain dollar amounts.

### NEGLIGENCE

#### DEFINED SUPRA

#### FORESEEABLE PLAINTIFF

Patty here was a foreseeable plaintiff.

Under Cordoza, anyone who is within a zone of danger is a foreseeable plaintiff.

Here Patty was clearly in the zone of danger "walking by" Paul when rock hit her.

#### STANDARD OF CONDUCT

#### CONTROL OF A THIRD PERSON

When one has the right, duty and the authority to control a conduct of a third person when it is known that person is in need for such control or supervision.

Here, based on the facts that Billy's parents knew about his aggressive, violent behavior. Facts tell us that he was suspended from school for throwing [an] eraser at

teachers, school principal “told Billy’s parents the option of school psychologist that Billy should be admitted to a facility” and the psych. report showed that there is 90% certainly that he would hurt someone if he did not receive proper treatment. However, Billy parents ignored that fact.

Therefore, they have breached their duty to control Billy knowing he is in great need for control and treatment, that he has dangerous propensities of behavior.

#### BREACH

When conduct falls below a standard of care. Knowing he is in great need for control and treatment that he has dangerous propensities of behavior. Billy’s parents ignored that fact. Thus breached their duty.

#### BREACH

#### ACTUAL PROXIMATE CAUSE DEFINED SUPRA

But for Billy’s parents’ negligence Patty would not have suffered damages as when and how she did.

Damages.

Facts show that rock injured Patty’s head; thus, she suffered damages.

## **Answer B to Question 4**

### **Paul v. Dan**

Paul may be able to bring a private nuisance action against Dan.

A private nuisance occurs where an action undertaken or continuing activity by a defendant causes a plaintiff to suffer damages which result from the use and enjoyment of land which he owns, leases, or otherwise possesses and occupies.

Here, Paul “worked as a therapist out of his home” and the loud guitar music which emanated from Dan’s home “was interfering with the therapy session of one of Paul’s patients.”

Not only is the music probably annoying, but it is affecting Paul’s work and impairing his professional capacity as a therapist.

So there is a noise for which Paul is responsible because it is coming from his house, caused by his nephew whom he is supervising, which is resulting in Paul’s use and enjoyment of his land. The noise occurred once, and Paul sought to remedy the situation on his own; it happened again, and he again attempted to stop it on his own. Paul could now seek injunctive relief and other remedies if he lost business as a result of the incidents.

A nuisance action brought by Paul against Dan would likely stand.

### **Paul v. Billy**

Paul could bring an action against Billy for nuisance (see above), if liability was not attributable to Paul, who is acting as his guardian during the incident.

If Paul, after having heard Billy's threat that he would "make [Paul] pay!" was aware and apprehensive of immediate and offensive contact, he could bring a tort action for assault.

Assault is an intentional act which causes another to be reasonably apprehensive of immediate battery (harmful or offensive contact).

Billy's threat would not amount to assault.

Billy threw a stone which missed Paul. If Paul had been aware of the airborne rock as it approached him and was apprehensive, he would be able to bring an action for assault. However the facts do not state that Paul was aware of the rock or that it had even been hurled in his direction; further the facts are totally silent as to whether he was apprehensive of the thrown stone or feared that it might strike him.

Paul would have a nuisance cause of action but not other causes of action against Billy.

### **Penny v. Billy**

Billy threw a stone which "missed Paul (his intended target) but hit Penny."

Under the new theory of transferred intent where one intends an act to cause an injury to one person and actually causes an injury to another, they are liable to the injured party whether or not they contemplated the risk of harming that person.

"Billy threw a large rock at Paul."

Such an act would be a battery if it were successfully carried through.

A battery is an intentional act which results in harmful or offensive contact on another.

An act is intentional if it is undertaken with the desire or belief with substantial certainty that harmful or offensive contact would occur.

Here, Billy threw a large rock “at Paul.” Clearly by sending a rock in the direction of another would demonstrate intent. Billy desired or believed with substantial certainty that Paul would experience harmful or offensive contact as a result of throwing the rock.

Because Penny suffered damages as a result of Billy’s action, which was undertaken with tortious intent, she would have a cause of action under the theory of transferred intent. Here the formation of the theory would be different (plaintiff, same tort, because Billy intended to commit a battery against Paul and committed a battery against Paul and committed a battery against Penny.)

Penny would have a cause of action against Billy for battery under the theory of transferred intent.

### **Penny v. Billy’s parents.**

Penny would have a negligence cause of action against Billy’s parents if she could show that through the exercise of reasonable care, they could have prevented her injuries.

Negligence requires that the defendant have a duty, that the duty is breached and the breach is the actual and proximate cause of the damages which are the basis for the claim.

Here, Billy’s parents were informed that “there was a 90% certainty that Billy would hurt someone if he did not receive proper treatment.” They had knowledge of the risk which Billy posed to others. Further, “Billy’s parents admitted they had known about his anger problem for about a year, but had done nothing about it.”



Because Billy's parents had knowledge of their son's dangerous proclivities, they had a duty to exercise reasonable care to prevent others from being harmed by him.

Under Cardozo's ruling in *Palsgraff*, a duty is owed to all those that are in the zone of danger. Here the zone of danger would extend to encompass anyone within a reasonable proximity to Billy. Wherever Billy goes the zone of danger goes and all those that are near him when his anger is unleashed are foreseeable plaintiffs.

Under *Andrews* where there is a duty to one there is a duty to all. Meaning that where a duty breached to one to whom it is owed and damage somehow results to others, there is liability. So if one claimed that the parents had a duty to Billy alone, and that duty was to help him with his anger problem and breach of that duty resulted in injuries to others, then there would be liability.

According to Learned Hand's algebra, which is found in the *Wagon Mound* cases, where the gravity of harm multiplied by the possibility that it might occur outweighs the expense and effort of preventing that harm, then there is a duty, and where that harm is not prevented there has been negligence.

Here the parents were told that there was a 90% certainty that someone would be harmed. So while the degree of harm is unknown, the likelihood of it occurring is so extreme that there can be no question but that there was a duty owed to Billy and to the general public to mitigate the hazards which were posed by Billy's anger problem.

THERE WAS A DUTY

Was that duty breached?

Billy's parents knew about the problem and "had done nothing about it." They also ignored the advice of the principal to admit Billy to "a facility where he could be treated."

Billy's parents failed to mitigate a hazard of which they were aware and "ignored the principal's advice and instead sent him to stay with his uncle."

The facts do not give any evidence that the parents warned Dan of Billy's dangerous characteristics.

There was a breach of duty because they did not take action to limit the risks of which they were aware.

Was the breach the actual cause of Penny's injuries?

But for Billy parents failing to remedy or make any effort to remedy the dangerous condition of which they were aware, Penny would not have been injured.

Billy, rather than being in a "facility" was at his uncle's house. Billy was a known danger because a psychologist informed the parents that there was "a 90% certainty that Billy would hurt someone" and no action was taken. Their failure to act where they had a duty to act to prevent harm to others was breached and Penny was injured as a direct result of the harm.

WAS THEIR BREACH OF DUTY THE PROXIMATE CAUSE OF PENNY'S INJURIES?

Billy's parents had notice of the danger, and had known about it long before they received notice and did not act. From that failure to act flows a chain of events which is uninterrupted by any supervening cause to Penny's injuries.

It may be argued that Dan was negligent in leaving Billy unattended, but the facts do not state that he was ever informed of the danger that Billy posed. If Dan did know of the harm Billy posed he probably never would have agreed to take care of him during the suspension.

Billy's parents could have prevented the harm and did not. Any and all harm would have been foreseeable and action was not taken and damage resulted.

Billy's parent's negligence was the proximate cause of the damages which resulted.