July 1989

Question 2

Paul recently moved into the area to open a new restaurant. After months of searching for a personal residence, Paul offered to purchase Seller's house. With his new restaurant soon to open, Paul hired Chef to head up his kitchen staff under an agreement that allows either party to terminate the employment relationship on thirty days' notice. Paul entered into a written three-year contract with Meatco, a food supplier, for regular weekly deliveries of high quality meat.

Dan, owner of ten restaurants, learned about all of the above and resolved to do what he could to hinder the operation of Paul's new restaurant. Dan offered Chef double his current salary and told Chef that if he did not quit his job with Paul, "I can make it difficult for you to get your next job. I have many restaurant connections all over the country, you know."

Dan wrote to Meatco: "It has come to my attention that you are supplying Paul. In all candor, I must tell you that so long as you continue to do so, I will not deal with you once our contract ends in two weeks."

Dan then offered Seller a much higher price for his house than that offered by Paul, hoping that recommencing a house search would divert Paul's attention from operating his restaurant.
Chef terminated his employment with Paul and went to work for Dan. Meatco stopped deliveries to Paul. Seller accepted Dan's offer for the house.

Paul's restaurant opened but incurred significant losses. Paul's reputation in the restaurant community was adversely affected. Meanwhile, Dan's restaurants flourished.
Paul sues Dan.

What are Paul's rights and remedies, if any, against Dan? Discuss.

ANSWER A TO QUESTION 2

From the facts, it seems clear that Dan has intentionally interfered with Paul's contractual relationships with the other persons. Dan engaged in a series of intentional acts, designed to disrupt Paul's contracts with the others, and ultimately to cause his business to fail. This conduct is tortious and entitles Paul to several remedies. The precise nature of the remedies depends on the particulars of each of the three situations.

(1) Chef's employment contract:

Paul and Chef had entered into an apparently valid contract for Chef to manage the kitchen staff of Paul's new venture. Assuming the contract was supported by consideration, and its terms were properly definite, it would be a valid and binding contract. No facts appear to suggest the contrary. After this contract was formed, Dan intermeddled with Chef in his employment relationship to Paul. Although Dan might properly attempt to "outbid" Paul for Chef's services at the conclusion of his obligations to Paul, here it appears that Dan has gone beyond the normal competitive forces between competing restauranteurs, and has actively threatened Chef, with the intent of depriving Paul of Chef's services. Dan has used his influence with other restaurants to force Chef to breach his contract with Paul.

The major issues, however, is the question of what was Chef's obligation to
Paul. From the terms of the contract, it appears that Chef was bound to Paul only for - a 30 day period, since the contract could be cancelled by either upon 30 days' notice. Unless there appears an enforceable -- i.e., reasonable in geographic scope and time -- non-competition clause in the contract between Paul and Chef, Chef would have been free at the end of the 30 day period to go to work for Dan on whatever terms he could arrange.

This factor should not absolve Dan of liability here, rather it raises an issue to the extent of Paul's damages as a result of Dan's conduct.

The normal damage measure for breach of an employment contract would be the difference in expectancy. Paul would be entitled to recover the increased costs of hiring and paying another chef for the contract term. Here, the term of 30 days would result in a minimal expectancy recovery. Further, since Paul would be put to the expense of rehiring if Chef had exercised his option to leave on 30 days' notice, these expenses are likely not recoverable.

It would be difficult to prove that Dan was unjustly enriched by Chef's leaving Paul. There is no direct benefit to Dan, other than the reduced competition which might result if Paul's restaurant is not successful. However, as a new venture, any such recovery would likely be too speculative. Hence, it appears unlikely that a restitutionary award could be made.

Paul may seek injunctive relief, although it is unlikely to be successful. Paul's remedy at law would be equal to monetary damages to enforce his contract expectancy, and this appears adequate.

However, if he can show that Chef's services were unique and that money damages would not adequately compensate his loss, he might seek a"true injunction" to prohibit Chef from working for Dan. The period of the injunction would be necessarily short -- 30 days -- absent some contrary provision in the contract. Thus, it appears again that his legal remedy of damages would be adequate. Finally, no specific performance of the contract between Chef and Paul is available, given that it would result in an enforced "servitude" in violation of Constitutional strictures.

(2) Meatco Contract:

Paul had a valid contract with Meatco. From the facts, the contract was for a three year term and in writing. There is no statute of frauds difficulty with enforcement. Moreover, the contract was between merchants, involving the sale of goods between a commercial buyer and seller. Thus, although there was no price or quantity term specified in the fact pattern, it is likely that one could be implied from the course of dealings between the parties, or from reference to commercially reasonable terms in a similar business. It is also possible that if Paul had agreed to purchase all his meat requirements from Meatco, that the court would find this to be a valid requirements contract.

It appears that Dan tortiously interfered with this contract also. Although his own contract with Meatco was ending soon, and Dan was not obligated to renew that contract, it appears that he was not bargaining for a better contract for himself -- upon pain of taking his business elsewhere -- but was explicitly seeking to disrupt Paul's contractual relationship with Meatco. There is no information in the question that suggests that Meatco's supplying Paul's restaurant would interfere with its ability to insure a supply to Dan's restaurants. Rather, Dan's explicit statement was that "so long as you deal with Paul" the meat company would not get Dan's business. His only goal appears to interfere with Paul's business, not to properly protect his own supply, etc.

Thus, when Meatco stopped supplies to Paul, it breached its contract. Paul would have a cause of action against Meatco directly. He also has a cause of action against Dan.

Paul is entitled to the loss of his bargain with Meatco and to the costs of finding an alternate supplier of meat. This would be to protect his expectancy in his Meatco contract. However, here, as above, damages must be proven with sufficient certainty and must be foreseeable. Again, given a new restaurant, it is uncertain what Paul's meat needs would have been, thus it is difficult to calculate his loss expectancy. There is no difficulty with the award of "costs" as they were clearly foreseeable both to Meatco and to Dan.

Likewise, there appears to be no direct unjust enrichment of Dan from Paul's loss of the meat supplier. The possible damages resulting from the inability to compete as efficiently are likely too speculative to recover.

However, here a grant of specific performance would be proper. If there are no other meat suppliers, or no comparable suppliers available, Paul may be left with an inadequate legal

remedy. Assuming, too, that the terms of the contract are sufficiently definite and certain to allow the court to enforce, there would be no bar to specific

performance. These are large hurdles, especially with commercial traders in goods, and where the extent of Paul's needs over the three year period will be uncertain, given the risky nature of a new restaurant.

(3) Seller's Acceptance of Dan's Offer:

No contract existed between Paul and seller. Rather, Paul had made an offer on a house after months of unsuccessful searching. Seller had not accepted this offer. Given what appears to be a very tight housing market, Dan's offer of a much higher price, whatever its motive, seems not to be actionable. There is no evidence that Dan used the same coercive tactics on the seller that he had used on the chef and the meat company. Rather, he outbid Paul and made a contract to purchase a house. Both appear to be proper. Dan's motives appear immaterial. Paul may be disappointed, but he does not appear to be damaged.

(4) Tort Remedy:

Since Paul is asserting his action against Dan in tort, he is entitled to recover for all injuries both actually and proximately caused by Dan's tortious conduct. Here, "but for" Dan's activities, it appears that neither Chef nor Meatco would have breached their contracts with Paul. Thus, Dan's actions were the "but for" or actual cause of Paul's injury. Moreover, these actions appear to be the proximate cause of injury to Paul. It was directly foreseeable that Dan's intentional and coercive statements to Chef and Meatco would deprive Paul of the advantage of his contractual arrangements.

However, there is a difficulty with certainty of damages in this situation. Since the tort damage depends on the underlying contractual damages, the speculative nature of a new restaurant business, the limited duration of the contract with Chef, and the perhaps limited nature of the remedy available against Meatco, all combine to limit what Paul's recovery would be for actual damages. However, at least some damage exists.

Moreover, Paul is under a duty to mitigate damages. Since he went ahead and opened his restaurant, it appears that he located another chef and an alternative supply of meat. If done in a commercially reasonable manner, then Paul has met his obligation to minimize damages.

Finally, Paul is entitled to a remedy for the damage to his reputation in the restaurant community as a result of Dan's intentional acts. Although this is not a "defamation" case, if, through his intentional conduct, Dan did injury to Paul's reputation -- and if Paul can sufficiently prove the injury and the associated damages -- Paul should recover.

Moreover, since Dan's actions were willful and intentional, Paul is entitled to recover punitive

damages; since he has suffered some actual loss, Paul can recover punitives. On these facts, he should be so entitled. In fact, the award of punitives may be the major element in Paul's recovery against Dan. The amount of loss to his restaurant business occasioned by Dan's misconduct is likely speculative and may be difficult to recover. However, the nature of Dan's actions merit the award of punitives, which may properly be proportioned to defendant's wealth. The facts suggest that Dan is a rather wealthy man -- owning ten restaurants and having the power to control

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persons throughout the restaurant business. He was able to outbid Paul for the house, even in this tight housing market. Given his wealth, and the goal of punitive damages of deterring such wanton and willful conduct in the future, the court may properly consider Dan's wealth in determining the award of punitives. Since Paul will be entitled to at least a minimal actual damage recovery, he will have a "hook" on which to hang the punitive damage award.

ANSWER B TO QUESTION 2

1. Tortious Interference with Contractual Relationships.

As to each action of Dan, his liability to Paul will probably be based upon whether or not it meets the standard for tortious interference with contractual relationships, and if so, whether the defense of business privilege is available. For a defendant to be guilty of tortious interference, there must be (1) an existing contractual relationship; (2) defendant must interfere with the relationship by some affirmative act; (3) defendant must intend to disrupt the relationship in order to damage the plaintiff; (4) plaintiff must be damaged by defendant's conduct; and (5) defendant must not be able to assert the defense of privilege.

In this case, each potential tort will be examined separately. 2. Paul's Offer to

Seller.

Dan is probably not liable to Paul for making a higher offer to Seller because although Paul had made an offer to Seller, no contract had been formed. A contract is not formed until there is an offer and an acceptance by the offeree. There is no right to remain free from competing offers, whatever the competing offeror's motives. Seller was free to select among competing offers and would naturally accept a higher offer.

Furthermore, in some jurisdictions, liability for tortious interference is limited to business or protected (e.g., spousal) relationships. Here, the house was to be acquired as a personal residence, not for business purposes.

Paul might argue that Dan should be liable for depriving him of the opportunity to acquire the house if his bid was not in good faith, and he does not actually complete his purchase of the house from Seller. Although it is unlikely that a court would find Dan liable on this basis, if it did so, Dan would probably argue the defense of privilege -- that he is entitled to take advantage of an investment opportunity without regard to his motive. Dan would probably prevail on such a defense.

3. Chef's Employment Contract.

Paul did have an existing contractual relationship with Chef, and Dan is therefore subject to liability for interference with that contract. His motive as a competitor to interfere with the operation of Paul's business is stipulated. His action in offering Chef more money might be deemed to fall within the realm of business privilege, but when coupled with his implied threat to make Chef less employable, there is probably sufficient evidence to establish that the defense is not available to Dan.

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The defense of business privilege is a qualified privilege and is limited to conduct which is done for a legitimate business purpose, in good faith, rather than conduct which is intended simply to harm the plaintiff. If the harm to plaintiff is incidental, the privilege may obtain; if harm to plaintiff, rather than benefit to defendant, is the principal purpose and effect, then the privilege is not a defense.

In this case, Dan will argue that as a restauranteur in competition with Paul, he is privileged to hire away Paul's chef, since he has a legitimate business purpose and receives benefit from the act. Paul will respond that the fact that Dan offered Chef double his present salary and threatened him with personal harm is sufficient to establish his lack of good faith, and the fact that the principal purpose was to harm Paul rather than benefit Dan.

It is not clear from the facts whether Chef had access to privileged, confidential business information (secret recipes or formulas) or other information of pecuniary value to Dan. Neither is it clear whether Chef was unique or special, or irreplaceable. These facts are relevant to the relief available to Paul and may also pertain to the defense of privilege.

4. Relief Available for Interference with Chef's Contract.

Damages

The most obvious remedy available to Paul would be the remedy of damages. Paul would be entitled to recover all damages proximately caused by Dan's wrongful conduct, including

general compensatory damages, incidental and consequential damages, and perhaps punitive damages. Paul's principal difficulty here will be to establish that such damages are certain, i.e., measurable and provable. It is extremely difficult to recover damages for lost profits from operation of a new business, where there is no history of operation and the failure to operate profitably could be caused by any one of a number of factors. Also, where there is no history of profits, there is no measure that can be applied with reasonable certainty.

Paul might be entitled to recover punitive damages if Dan's conduct was found to be wanton, willful, extreme and outrageous. Although the duress employed was one such act, it is probably insufficient to warrant an award of punitive damages.

Since Paul's contract with Chef was terminable upon 30 days' notice by either party, Dan could argue that his liability for damages would be limited to the 30 day period (if Chef left without giving notice to Paul). However, the court may presume that the contract would have continued indefinitely if Dan had not interfered, and would probably not limit Paul's recovery on that basis alone. Since Paul's business was new, however, and there was no long term relationship with Chef, and the chances of business failure were high in any event, Dan might be able to argue that Chef would have been likely to accept a competing offer in any event.

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Restitution

Since Paul will probably be unable to prove substantial compensatory damages and is probably not entitled to punitive damages, the remedy of restitution might be a better one for him. If he can prove that Dan received some peculiar benefit from interfering with his business, i.e., if Chef was world-renowned and provided Dan with special services, Paul might be able to prove that Dan received some pecuniary benefit that he should not be permitted to retain. However, such facts are not given. In their absence, and considering the fact that Paul's business was new and Dan, as owner of 10 restaurants, probably received little incidental benefit from hiring Chef, restitution is not a very good remedy for Paul.

In'tunctive Relief/Specific Performance

Specific performance is generally unavailable to enforce the terms of a personal services contract, and such relief could only be afforded against Chef. If Chef had access to trade secrets or special proprietary information, or if his services were sufficiently unique, then a court might grant Paul injunctive relief against Dan, prohibiting Dan's continued employment of Chef. Injunctive relief is afforded only if there is an irreparable injury, not compensable at law (or the legal remedy is inadequate), the injunction is feasible, the harm to defendant does not outweigh the benefit to plaintiff, and there are no equitable defenses available. In this case, the remedy at law (damages/restitution) is inadequate because Paul is incapable of proving his actual damages due to the newness of his business and the speculative component of such an award. Nominal damages are insufficient to make Paul whole. However, injunctive relief might not be available because of the detrimental effect on an innocent party (Chef) and the fact that punishing Dan

will not prevent the injury to Paul.

If trade secrets are involved, injunctive relief would be available to restrain Dan from using them. If Chef's services were unique, they would similarly be available to prevent Dan from reaping the benefit of his wrongdoing and thereby competing unfairly with Paul. There appears to be no basis for asserting any of the equitable defenses (such as laches, unclean hands).

5. Interference with Meatco Contract.

There was a valid, enforceable contract between Paul and Meatco. Because both are merchants, and the contract is for the sale of goods, the UCC applies. Although certain key terms are not stated (price, quantity), the subject matter of the contract is sufficiently specific that the UCC will operate to imply the missing terms. This is a requirements' contract (all of Paul's weekly requirements), and the price will be presumed to be market price. The contract is written and therefore complies with the requirements of the statute of frauds.

However, Dan will argue that he committed no act that unfairly interfered with the Meatco contract. He is privileged to buy meat from whomever he may choose and may inform an important supplier that he does not wish to be competing for supplies with another similar business. Here, no threats of improper conduct were made, and Dan would probably prevail in his argument that he did not tortiously interfere with Paul's contract.

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6. Remedies for Interference with Meatco Contract.

Damages

Again, Paul would be entitled to recover damages. Although he could probably not recover lost profits, for the reasons stated above, he would have an alternative measure of damages available: the difference between the market value of the meat he was to have received and the actual cost of obtaining a replacement source of meat products (cost of "cover"). Although Paul might argue that he is entitled to damages flowing from lesser quality meat, if that is all that can be obtained from an alternate source, that would probably deemed too speculative.

In addition to the "benefit of bargain" damages or "cover" damages, Paul would be entitled to recover the cost of cover and any other incidental or consequential damages provable with reasonable certainty. Paul would probably not be entitled to recover punitive damages because his conduct with regard to Meatco is not particularly outrageous or extreme so as to warrant societal sanction.

Restitution

If Dan has appropriated to himself a particular benefit (i.e., the only good quality meat in town)

and therefore was able to offer a product with which Paul could not compete, Paul might argue that he is entitled to restitution of any benefit which Dan obtained for himself by his wrongful conduct. However, because such damages are speculative in this case, and there does not appear to be sufficient basis in fact for them, restitution would not be allowed.

Iniunctive Relief

This does not appear to be a proper case for injunctive relief. Specific performance of the contract would possibly be obtainable against Meatco but would not involve Dan. An order of the court directing Dan to purchase or not purchase from Meatco would not alleviate the harm (at least not directly) and appears inappropriate.

7. Other Possible Theories of Recoverv.

In the case of Dan's interference with the Meatco, Seller and Chef contracts, he might also be found to be guilty of the tort of interference with prospective economic advantage. This is really just a variation of the tort of interference with contractual relationships, but it might also extend to the prospective purchase of the residence. If Paul could prove that his offer to purchase the residence would probably have been accepted by Seller (if, for example, it equalled or exceeded the offering price or listing price), and if he could show that it was an economic bargain, he might have a case for interference with prospective economic advantage. He might also argue that a contract was formed when he submitted his offer if the offer exceeded the listing or offering price, but given the facts, it seems unlikely that a contract would be found to exist.

February 1991
Question 5

Owner hired Plummer, a plumbing contractor, to repair the plumbing in a store that Owner planned to lease. In performing the repair, Plummer used a connector on a hot water pipe made of a different metal than the pipe itself As a result of the incompatibility of the two metals, the connector corroded and weakened. This condition was not obvious because the weakened connection was located within a wall. After the repair was completed, the store was leased to Amy's, a swimwear retailer.

Two years after Plummer finished the repairs, the connector burst. Hot water broke through the wall and sprayed into the store, scalding Carrie, a customer who was in the store at the time. The water also ruined swimsuits on display in the store. While repairs were being made, Amy's had to close for two months during the summer, causing significant financial loss. Emma, an employee of Amy's, lost her job because of the closure.

1. What rights, if any, does Carrie have against Owner and against Plummer? Discuss.

2. What rights, if any, does Amy's have against Plummer? Discuss.
3. What rights, if any, does Emma have against Owner and against Plummer? Discuss.

ANSWER A TO QUESTION 5

1. Carrie (C) v. Owner (0)

a. 0 as a landlord

• may be liable to C if he breached his duty of care as a landlord of a retail store. A landlord who knows that his property is being held open to the public has a duty to warn of known dangers and inspect and make safe unknown dangers to the licensees - Carrie was a licensee because she was a customer in the store. (Note that in California, a landowner owes a duty of due care to all on his land and the court will employ the Rowland factors.)

Breach - The facts indicate that 0 did not know of the danger because it was in a wall. Also, it is unlikely that a reasonable inspection would have revealed the

defect, considering it had been there for two years. Thus, 0 may not have breached her duty.

Causation - Assuming 0 did breach her duty, her failure of warning about the defect was the actual and legal cause of C's injuries. There were no intervening acts and C was a foreseeable plaintiff because she was a customer. Also, her harm was foreseeable personal injury harm damages. 0 would be liable for all damages proximately caused by her conduct. This includes medical expenses, lost wages and pain and suffering.

Defenses - It does not appear that C was contributory negligent nor are there other defenses 0 could raise.

b. O's liability for negligently hiring Plummer (P)

• may also be liable for negligently hiring P. If 0 had notice that P was not a reliable plumber, or if she failed to investigate his past performance, she would have breached her duty to responsibly hire a plumber.

c. 0 vicariously liable for P

• may also be vicariously liable for P's conduct. P is an independent contractor. An owner is vicariously liable for an independent contractor for non-delegable duties. Since safety is a non-delegable duty, 0 will be vicariously liable for P's negligence. (Note that 0 would be entitled to indemnification from P.)

2. C V. P

Duty - P would be liable to C for engaging in conduct which posed a foreseeable risk of harm to C. C was a foreseeable plaintiff as a customer in the store. P knew it was a store that he was working on.

Breach - The court may hold P to a professional plumber standard of care because he was a professional. The court will determine whether a reasonable plumber would have used a different metal or not. Alternatively, they may look to the custom of the industry to see if different metals are commonly used. Custom is only evidence of a breach. Finally, they may employ the carroll towing formula and balance the severity and risk of harm against the utility and necessity of P's conduct. Since C was severely burned, if the availability of the conforming metal was not a problem, P would have breached his duty.

For causation, damages and defenses issues, see above. 3.

Amy's (A) v. P

Duty - A could also sue P for negligence. A was a foreseeable plaintiff because A eventually leased the store.

Breach - See above.

Causation - P's breach was the actual cause of the injury because "but for" P's conduct, A would not be injured. Also the type of harm was foreseeable - that the store's contents would suffer water damage. Thus, P's breach was also the legal cause of A's damages.

Damages - A is entitled to be in the same position as if the breach had not occurred.

Property Damage - P would be liable for all foreseeable harm, including property damage. (The manner and extent need not be foreseeable.) Thus, A could recover for lost suits and store damage.

Loss Profits - P is liable for all foreseeable and certain harm. The issue is whether loss profits are too speculative to recover. A has been in business for two years. If they can show comparable sales for last summer and no reason why this should change, they may collect their loss profits.

Defenses - See above.

4. Emma (E) v. 0 - E has suffered a purely economic injury. Traditionally, the courts will not allow a plaintiff to recover in negligence a purely economic injury without a showing of an accompanying physical injury or property damage.

5. E v. P - Again, since E suffered only an economic injury, the courts will not grant her relief without an accompanying physical injury.

ANSWER B TO QUESTION 5

1. Carrie (C) v. Owner (0)

At common law, landlords owed no duty to make premises safe or warn of dangers. Modernly, however, landlords are required to warn of or make safe hidden dangers, even in commercial leases such as this. This duty is owed not just to the tenant but also to people using the premises with permission of the tenant, especially where, as here, the landlord knows that a retail store will have customers. Thus, 0 probably owed a duty to C.

However, this duty is not absolute. 0 is only required to warn of dangers 0 did or should have (on reasonable inspection) known of. It does not appear that 0 had any way of knowing that the plumbing posed any kind of danger to tenants or customers. The plumbing was within the walls and the work was not done by 0.

Also, since it appears Plummer (P) was an independent contractor, 0 would not be liable for any negligence on P's part under a respondeat superior theory. There is no indication that 0 exercised any type of supervision or control over how P completed the plumbing work. In addition, plumbing is not generally a dangerous activity which could give rise to any non-delegable duties on landlord. Thus, it does not appear C has any recourse against 0 since 0 breached no duty owed her.

2. C V. P

Negligence

In order to make a prima facie case for negligence, C must establish: 1) duty, 2) breach, 3) actual cause, 4) proximate cause, and 5) damages. Since the bursting of the pipes was a direct cause of her injuries, there do not appear to be any questions as to causation or damages.

The initial question is whether P owed a duty to C, and more particularly whether she was a foreseeable plaintiff. There are two basic approaches to this question: 1) whether she was within the "zone of danger"; and 2) if a duty owed to one is breached, causing injury to another, the other is a foreseeable plaintiff. The majority or zone of danger (Cardozo) approach is probably satisfied since C was in the store, apparently near the pipes where the burst could injure her. The second approach is clearly satisfied as P clearly owed a duty to 0 and others to not be negligent and create a risk of harm, and C was injured. (Note: this approach virtually eliminates the need to concern about a foreseeable plaintiff.)

The second issue in determining the duty owed is the standard of care. Generally, the standard is to act as a reasonable person under the circumstances. However, here P is apparently a professional plumber, or at least he held himself out to 0 as having skill to do the work. Thus, he will be required to act with the degree of skill and knowledge as other reasonably capable plumbers.

The second major issue is whether P breached that duty. The facts are sketchy as to whether he knew or whether plumbers should know not to use the different metal connector. If

plumbers should know that corrosion and weakness are a result, he has breached the duty and is liable for C's damages.

The damages include medical expenses (if any), pain and suffering, and perhaps other damages if C can demonstrate them with some degree of certainty (lost income, for example).

2. Amy's (A) v. P

A had no contract with P. However, A may argue she is a third party beneficiary of P's contract with 0. However, in order to have any enforceable rights as a third party beneficiary, one must be an intended, not incidental beneficiary. In order to be intended, it

is generally required that the person be identified in the contract. Assuming a contract between 0 and P, there is no way A was, since A did not commence the lease until after the work was done. Thus A has no contract remedy versus P.

However, A could assert a claim for negligence. Essentially the same analysis applies for A as for C with respect to duty, breach, and causation. However, as part of her damages, A will want lost profits for the two months she was forced to close her shop. (The damages to her swimsuits are clearly recoverable if P breached his duty.) Generally, lost profits are not awarded to new businesses, but can be awarded to established ones if a history of profitability can be demonstrated. Here, A has been open for two years, but there is no evidence as to earnings. If she can establish a profit track record (which she may also do by showing profitability before trial), then the damages will not be too speculative and may be recovered.

3. Emma (E) v. 0

As with the analysis for C versus 0, E will not be able to recover if 0 has breached no duty. E would stand essentially in the same shoes as C. However, even if a duty were breached, E's damages may be too remote as to not be proximately caused (see below).

4. E v. P

In a negligence action against P, E would have a difficult time establishing the duty and proximate cause elements. (The breach, actual cause, and damages elements should be okay assuming she mitigated her damages by seeking another job.)

Whether E was a foreseeable plaintiff may depend on whether the Cardozo or Andrews test is followed. Under the Cardozo or zone of danger test, there is a good argument that she was not close enough to be in the zone of danger. However, since she was in the store and probably worked at times near the danger, she has a strong argument to the contrary. Under the Andrews test, there is no question that she is a foreseeable plaintiff since the question is pretty much moot.

Assuming she is a foreseeable plaintiff, she will probably not satisfy the proximate cause element. Even though the loss of her job was a virtual direct result of the plumbing burst, policy of courts dictates that damages be cut off where they are too remote. It is likely that a court would conclude the loss of her job was too remote as it assumes the burst caused the store to

close and the store could not afford to retain its employees.

ANSWER B TO QUESTION 5

1. Carrie (C) v. Owner (0)

At common law, landlords owed no duty to make premises safe or warn of dangers. Modernly, however, landlords are required to warn of or make safe hidden dangers, even in commercial leases such as this. This duty is owed not just to the tenant but also to people using the premises with permission of the tenant, especially where, as here, the landlord knows that a retail store will have customers. Thus, 0 probably owed a duty to C.

However, this duty is not absolute. 0 is only required to warn of dangers 0 did or should have (on reasonable inspection) known of. It does not appear that 0 had any way of knowing that the plumbing posed any kind of danger to tenants or customers. The plumbing was within the walls and the work was not done by 0.

Also, since it appears Plummer (P) was an independent contractor, 0 would not be liable for any negligence on P's part under a respondeat superior theory. There is no indication that 0 exercised any type of supervision or control over how P completed the plumbing work. In addition, plumbing is not generally a dangerous activity which could give rise to any non-delegable duties on landlord. Thus, it does not appear C has any recourse against 0 since 0 breached no duty owed her.

2. C V. P

Negligence

In order to make a prima facie case for negligence, C must establish: 1) duty, 2) breach, 3) actual cause, 4) proximate cause, and 5) damages. Since the bursting of the pipes was a direct cause of her injuries, there do not appear to be any questions as to causation or damages.

The initial question is whether P owed a duty to C, and more particularly whether she was a foreseeable plaintiff. There are two basic approaches to this question: 1) whether she was within the "zone of danger"; and 2) if a duty owed to one is breached, causing injury to another, the other is a foreseeable plaintiff. The majority or zone of danger (Cardozo) approach is probably satisfied since C was in the store, apparently near the pipes where the burst could injure her. The second approach is clearly satisfied as P clearly owed a duty to 0 and others to not be negligent and create a risk of harm, and C was injured. (Note: this approach virtually eliminates the need to concern about a foreseeable plaintiff.)

The second issue in determining the duty owed is the standard of care. Generally, the

standard is to act as a reasonable person under the circumstances. However, here P is apparently a professional plumber, or at least he held himself out to 0 as having skill to do the work. Thus, he will be required to act with the degree of skill and knowledge as other reasonably capable plumbers.

The second major issue is whether P breached that duty. The facts are sketchy as to whether he knew or whether plumbers should know not to use the different metal connector. If plumbers should know that corrosion and weakness are a result, he has breached the duty and is liable for C's damages.

The damages include medical expenses (if any), pain and suffering, and perhaps other damages if C can demonstrate them with some degree of certainty (lost income, for example).

2. Amy's (A) v. P

A had no contract with P. However, A may argue she is a third party beneficiary of P's contract with O. However, in order to have any enforceable rights as a third party beneficiary, one must be an intended, not incidental beneficiary. In order to be intended, it is generally required that the person be identified in the contract. Assuming a contract between 0 and P, there is no way A was, since A did not commence the lease until after the work was done. Thus A has no contract remedy versus P.

However, A could assert a claim for negligence. Essentially the same analysis applies for A as for C with respect to duty, breach, and causation. However, as part of her damages, A will want lost profits for the two months she was forced to close her shop. (The damages to her swimsuits are clearly recoverable if P breached his duty.) Generally, lost profits are not awarded to new businesses, but can be awarded to established ones if a history of profitability can be demonstrated. Here, A has been open for two years, but there is no evidence as to earnings. If she can establish a profit track record (which she may also do by showing profitability before trial), then the damages will not be too speculative and may be recovered.

3. Emma (E) v. 0

As with the analysis for C versus 0, E will not be able to recover if 0 has breached no duty. E would stand essentially in the same shoes as C. However, even if a duty were breached, E's damages may be too remote as to not be proximately caused (see below).

4. E v. P

In a negligence action against P, E would have a difficult time establishing the duty and proximate cause elements. (The breach, actual cause, and damages elements should be okay assuming she mitigated her damages by seeking another job.)

Whether E was a foreseeable plaintiff may depend on whether the Cardozo or Andrews test is followed. Under the Cardozo or zone of danger test, there is a good argument that she was not close enough to be in the zone of danger. However, since she was in the store and, probably worked at times near the danger, she has a strong argument to the contrary. Under the Andrews

test, there is no question that she is a foreseeable plaintiff since the question is pretty much moot.

Assuming she is a foreseeable plaintiff, she will probably not satisfy the proximate cause element. Even though the loss of her job was a virtual direct result of the plumbing burst, policy of courts dictates that damages be cut off where they are too remote. It is likely that a court would conclude the loss of her job was too remote as it assumes the burst caused the store to close and the store could not afford to retain its employees.

July 1995
Question 3

Booker is the owner of The Bookstore. Walker, a clerical worker in a nearby office, came into The Bookstore every day at lunchtime to browse. Booker became annoyed because Walker read books and magazines but never bought anything. Finally, Booker told Walker that he would call the police if Walker came into the store again.

Walker returned the next day, and Booker called the police. Booker made a citizen's arrest of Walker for violation of the local vagrancy ordinance that made it a misdemeanor to "loiter in an annoying fashion in any place open to the public." Walker objected loudly to the arrest, yelling, "You can't arrest me, I didn't take anything."

Reporter overheard Walker's remarks. Reporter worked for *The News,* the local newspaper, and recognized Walker because one year earlier Walker had led a movement to remove certain books from the local high school library. Reporter thought that the police were arresting Walker for shoplifting and rushed back to the paper to file a story on the arrest.

The next day, *The News* reported that Walker had been arrested for shoplifting, in a story headlined: "Book Burner Arrested for Book Theft."

Walker was charged with vagrancy. The charge was dismissed on the ground that the vagrancy ordinance had long been construed to require actual disturbance of the peace, and in this case there was no actual disturbance.

1. What claims, if any, does Walker have against Booker? Discuss.
2. What claims, if any, does Walker have against The News? Discuss.

ANSWER A TO QUESTION 3

1. Walker v. Booker

Malicious Prosecution

Malicious prosecution tort claims require the institution of proceedings (in some states, civil proceedings qualify, but criminal do in all states), their favorable termination in plaintiff's favor, the lack of probable cause for the proceeding, improper purpose, and damages.

Here, there was a criminal proceeding instituted (Walker was charged with vagrancy), it terminated in Walker's favor (the charges were dismissed), there was no probable cause (the vagrancy ordinance had long been construed as not applying here -- it's not some new law whose applicability is unclear), and there were damages. Walker probably had to hire a lawyer, lost time from work, was exposed to contempt and ridicule.

Booker was also probably acting for an improper purpose; he wasn't genuinely concerned about his safety or the safety of his property -- it's not even clear he thought Walker was committing a crime. According to the facts, Booker was simply annoyed by Walker's failure to buy. This sort of annoyance hardly seems like a proper purpose for bringing an unfounded criminal prosecution.

False Imprisonment

Booker not only brought charges against Walker; he actually placed him under citizen's arrest. Thus, Walker was detained by Booker's intentional act; he reasonably felt that he wasn't free to leave. He should be able to get damages for this, actual (if, say, he missed work and was docked for it, or if he was injured in the process), plus damages for the indignity of being falsely imprisoned, plus possibly even punitives, given that Walker was acting intentionally and possibly even maliciously (realizing that he had no privilege to arrest Walker).

Booker does have the right to place criminals under citizen's arrest, even for misdemeanors. But here Walker wasn't committing a crime; moreover, Booker should have known that Walker wasn't committing a crime. The law does allow more margin for honest

errors when merchants are detaining suspected shoplifters, but Booker didn't think Walker was shoplifting. (False imprisonment requires lack of consent. There is no evidence here that Walker consented; in fact, he protested).

Battery

If Booker physically restrained Walker when arresting him, he may be liable for battery. Battery is defined as unconsensual, offensive, intentional touching. Even if there aren't damages, Walker can still recover something for the indignity, plus possibly punitives if Booker was acting intentionally and maliciously (of course this assumes there was indeed touching, and that it was offensive).

There's a privilege for reasonable force used in a citizen's arrest, but as discussed above this probably wasn't a valid citizen's arrest.

Intentional Infliction of Emotional Distress

Booker might also be liable for intentional infliction of emotional distress, which requires outrageous conduct, done intentionally or at least recklessly, that caused (both in the actual cause and proximate cause senses) severe emotional distress. Here, Booker's conduct -- causing someone's arrest for a crime that he didn't commit just because he annoyed him by browsing without buying -- may well be outrageous; on the other hand, if Booker didn't know the law didn't cover Walker's conduct, and genuinely believed that Walker was committing a crime, his conduct might not be so outrageous (even if it was tortious in other ways). Booker did do what he did intentionally; if the outrageous requirement is met, and Walker can show some severe emotional distress actually and proximately caused by what Booker did, then he can recover whatever damages he can show flowed from that distress.

2. Walker v. The News

First, a general point: If the article in The **News** is actionable, The News is liable both vicariously, for its reporter's conduct done in the course of his job, and directly, for publishing the story itself.

Libel

The newspaper published a defamatory statement (certainly the allegation that someone was arrested for theft is defamatory, in that it exposes Walker to contempt, derision, and obloquy); the statement was of and concerning the plaintiff; it was published to third parties; and it can be presumed to cause damage, because it essentially accuses someone of a crime.

Under the common law, these elements were enough to make out a prima facie libel case;

truth had to be pled as a defense. But the court's constitutional libel jurisprudence has changed this; if the statement is on a matter of public concern -- and an alleged crime almost certainly is -- falsity has to be proven by the plaintiff. Here, though, plaintiff can do that.

Besides truth, there are other defenses to libel -- consent, absolute privilege (statements made in the course of judicial proceedings, statements on the floor of legislative bodies, statements by high executive officials, interspousal communications) and qualified privilege. Qualified privilege includes accurate reports of judicial proceedings, as well as some other categories not relevant here.

The accurate report of judicial proceeding defense, though, won't save The News here; the report wasn't accurate, and on the facts it's not even clear that it was a report of a judicial proceeding (rather than just Booker's citizens arrest).

Constitutional Defenses

However, even once the prima facie case is made out, and the common-law defenses are rejected, The News can still defend on constitutional grounds, because its story was on a matter of public concern (as discussed above).

The exact level of protection depends on whether Walker is considered a public figure. If he is, he'd have to prove actual malice, a term of art meaning that either The News knew the story was false or acted with reckless disregard of whether it was true or false ("malice" in the lay sense -- ill will -- isn't required). If he isn't a public figure, he'd have to show negligence. In either case, he can't collect punitive damages or presumed damages in the absence of actual malice.

Public figures include public officials, and other people who are generally famous. They also include "limited purpose public figures" -- people who aren't generally famous, but who have injected themselves into a particular public controversy. Walker might be a limited purpose public figure for purposes of discussion of the library book removal movement. The courts are hesitant to consider people who are involuntarily drawn into the limelight to be even limited purpose public figures; Walker's arrest (especially given that it was groundless) wouldn't make him a public figure.

So whether Walker is a public figure will depend on whether the newspaper story was basically about the earlier controversy into which Walker had voluntarily thrust himself. If it was -- if it **was** basically a "look at these awful censors, who demand restrictions on what others read but can't even abide by restrictions on stealing" -- then the actual malice standard would probably apply. But if the story was basically about this incident (quite likely given the time lapse since the prior incident; the headline, though, stresses the two evenly), the negligence standard would apply.

Under the actual malice standard, Walker might still win. If Reporter knew that what he was saying was false, that's actual malice (though, as I mentioned before, the Reporter's ill will, if any, towards Walker isn't at issue -- the question is knowledge or recklessness as to falsity). But there's also actual malice if Reporter acted in reckless disregard of the truth.

Here, even a cursory check, of the sort that's probably extremely standard in the profession, would have revealed that Walker was arrested not for shoplifting but for vagrancy (also an unpleasant sounding offense, but one that doesn't sound as bad as theft). True, Walker did say "I didn't take anything," but still Reporter should have checked. By itself "should have checked" doesn't amount to reckless disregard, but if this is the sort of trivially easy, routine check that all reporters are expected to do, it might well be reckless disregard. (It's not open-and-shut though, as it would be if Reporter knew his statement was false, or if someone had alerted him to the error but he didn't follow that up.)

Under the negligence standard, Walker is even more likely to win. Reporter would have been negligent for not checking further into what Walker was arrested for.

As mentioned above, Walker can only get punitive and presumed damages if he proves actual malice.

Other Torts

Conceivably, Walker might try to sue for false light invasion of privacy -- on the theory that the story placed him in a false light that was grossly offensive to a typical person, but that probably wouldn't get him anything more than he could get under libel. The constitutional standards for false light are no lower than for libel, see Time. Inc. V. Hill; and false light actions also have the problem that the plaintiff must prove damages.

Misappropriation of a person's name, likeness, or persona (right of publicity infringement) doesn't apply, even if the story used Walker's name -- the right of publicity requires commercial use, and not merely use in a news report.

ANSWER B TO QUESTION 3

A. Walker v. Booker

Walker may have several different claims against Booker based on Booker's threatened and actual arrest of Walker.

1. False Imprisonment

To prevail on a claim for false imprisonment, Walker must show that Booker (1) committed the act of confining Walker to a bounded area; (2) had the intent to commit that act; and (3) that Booker's actions caused the injury to Walker.

a. Act of Confinement

By placing Walker under citizen's arrest and calling the police, Booker acted to confine Walker to a bounded area.

b. intent

Booker's act of arresting Walker was volitional, and thus intended. c.

Causation

Booker's arrest of Walker caused him to experience confinement which he was aware of, and from which there was no reasonable means of escape.

Booker's Defenses

Booker will argue that his acts are privileged. Private individuals have a privilege to make a citizen's arrest when a suspect actually commits a misdemeanor in his or her presence. However, the privilege does not apply where the misdemeanor was not actually committed. Booker will argue that the mistake was reasonable, given that the statute only requires a perpetrator to loiter in an "annoying fashion". However, the privilege of arrest does not apply where the actor (Booker) is mistaken as to whether a crime was actually committed, even if reasonably so. Thus, the privilege of arrest is not a defense to Booker's false imprisonment of Walker.

2. Abuse of Legal Process

A tort-feasor abuses legal process when they threaten to initiate or actually initiate legal proceedings for an improper purpose such as harassment.

Here, Walker has a good argument that Booker abused legal process by threatening to call the police if Walker continued to come into his store. The facts suggest that Booker's threat was based on the improper purpose of retaliating against Walker for repeatedly patronizing his store without making a purchase.

3. Malicious Prosecution

To prevail on a claim for malicious prosecution, Walker must show: (1) A legal proceeding against him that terminated in his favor; (2) lack of probable cause to support that proceeding; (3) an improper purpose for the proceeding; and (4) actual damage.

a. Legal Proceeding Terminating in Plaintiff's favor

Walker was charged with vagrancy after being arrested by Booker, but the charges were dismissed upon a finding that Walker had not violated the ordinance.

b. Lack of Probable Cause

Given the language of the vagrancy statutes, and Walker's refusal to desist in his loitering despite repeated warnings, it is unlikely that Booker can show that there was no probable cause for his arrest and prosecution on vagrancy charges.

c. Improper Purpose

As discussed above, the facts indicate that Booker initiated proceedings in retaliation for Walker's failure to make a purchase, rather than for any real disturbance caused by Walker.

d. Damages

Although the facts are silent as to damages suffered by Walker, it is reasonable to assume his arrest and the publicity surrounding it caused him actual damage.

4. Intentional Infliction of Emotional Distress IIIED)

To prevail in an action for IIED, Walker must show that Booker's (1) extreme and outrageous conduct towards Walker caused (2) Walker to suffer severe emotional damage.

Extreme and Outrageous

Walker will argue that it was extreme and outrageous for a store owner like Booker to arrest Walker for merely reading magazines in his store. Subjecting someone to criminal arrest is beyond bounds of common decency.

Severe Damages

To prevail, Walker will need to show that he suffered severe emotional damages. Given the nature of Booker's conduct and the public arrest, this should not be hard.

B. Walker v. The News 1. Defamation

To prevail in a defamation action, a plaintiff must show the following elements: (1) a defamatory statement about the plaintiff; (2) publication to third party; (3) Damage to reputation.

In addition, in cases where the defamatory statements touch on a matter of public concern, the plaintiff must also show: (1) falsity of statement; (2) fault.

pet amatory Statement about Walker

The article clearly identified Walker and made an assertion of fact that he had stolen books.

Publication,

The News widely distributed the story on Walker.

Damages - - Libel

Because The News printed its statements, they are libelous, and damages are presumed.

Public Concern

In general, any arrest on criminal charges is considered a public concern. Moreover, The News would argue that Walker's advocacy of book banning in schools makes his arrest for book theft a public concern. Thus, Walker needs to prove the additional elements of falsity and fault.

Falsity

The statement regarding Walker is false because he was arrested for vagrancy, not book theft, as the statement says.

Fault

The degree of fault that the plaintiff must show depends upon whether that plaintiff is a private or public figure. If plaintiff is a private figure, it is enough that defendant negligently published the false statements.

If plaintiff is a public figure, the plaintiff must show that defendant intentionally or recklessly (i.e. with malice) published the defamatory statements. Even the private plaintiff must show "malice" on the part of the defendant to collect presumed, rather than actual, damages.

The News will argue that Walker's involvement in book banning from public schools makes him a public figure. Although this limited public involvement would not make Walker a public figure for all purposes, it arguably makes him a public figure at least for the limited purpose of book-related incidents. Thus, Walker would need to show that The News was reckless and malicious in falsely stating he was arrested for book theft, even though he was actually arrested for vagrancy.

Because The News reporter heard Walker exclaim and protest that he hadn't stolen anything upon his arrest, it was reasonable for The News to think that Walker had been arrested for book theft. Thus, it was not reckless for The News to make this error.

Defenses

The News does not have recourse to any privilege that would immunize its defamatory statement.

2. Publication Placing Plaintiff in "False Light"

A cause of action based on the right to privacy arises when a defendant publishes a story in connection with the plaintiff that places him in a false light. Plaintiff can prevail on that claim only if they show the publication was (1) objectionable to a reasonable person and (2) widely disseminated. Moreover, with matters of public concern, malice on the part of the defendant must be shown, as with defamation.

Here, The News published a story that cast Walker in a false light, making him sound like a book thief. This false connection would be objectionable to an average person. The News' story was presumably widely disseminated since it was published in a newspaper.

Since Walker's arrest is a matter of public concern, he cannot prevail absent a showing that defendant acted with malice, i.e. with intent or recklessness. As discussed above, News has a good argument that Walker's own conduct and the scene witnessed by The News reporter were a reasonable, non-reckless basis for the story.

3. Intentional Infliction of Emotional Distress

The elements discussed in Walker's action against Booker are incorporated here by reference.

Here Walker can argue that The News' publishing of the story, despite its falsity, was extreme conduct that caused severe emotional damage to Walker.

Falwell - First Amendment Rule

However, even if Walker can make out a claim for IIED on these facts, he cannot prevail if his defamation and privacy claims are otherwise barred on 1st Amendment grounds (i.e. because of inability to show The News acted with malice). The Supreme Court found such an action for IIED barred in Falwell v. Penthouse.

February 1997
Question 1

Peters, a suburban homeowner, decided to resurface with bricks the concrete area surrounding his pool. He purchased from Homeco, a local home improvement store, a concrete cutter manufactured by Conco, which had a blade manufactured by Bladeco. He then took the

concrete cutter home and assembled it following the instructions provided by Conco.

The blade that Peters purchased was clearly labeled "Wet." Although no instructions or warnings came with the blade, Conco included several warnings throughout the instructions to the concrete cutter stating, "If using a wet blade, frequently water the blade and surface being cut to avoid risk of blade degradation." No other warnings relating to the blade were included with the concrete cutter.

Peters began cutting the concrete with the concrete cutter without using water. Less than five minutes into the job he noticed that the cutter was vibrating excessively. He turned the machine off by hitting the "kill switch" located near the blade at the bottom of the cutter, with his right foot. The cutter's handle did not have a "kill switch." After carefully examining the concrete cutter and blade, Peters became convinced that nothing was wrong and continued to operate it. Nevertheless, within seconds, the concrete cutter again began vibrating violently.

As Peters reached with his right foot to hit the "kill switch" again, the blade broke into pieces, forced off the cutter's safety guard, spiraled into Peter's right foot and caused permanent injuries.

On what theory or theories might Peters recover damages from and what defenses may reasonably be raised by:

1. Conco? Discuss.

2. Bladeco? Discuss.

3. Homeco? Discuss.

ANSWER A TO QUESTION 1

PETERS V. CONCO

THEORIES

A. PRODUCT LIABILITY - STRICT LIABILITY

Peters may choose to sue Conco in strict liability for the damages that he received from the use of their product. To prove this, Peters must be the proper plaintiff, Conco must be a proper defendant, there must be some defect in the product and Peters must have suffered some injury because of that defect.

1. PROPER PARTIES. The plaintiff in a strict liability products action may be anyone who is injured by the product. Peters was injured, therefore he is a proper plaintiff. A proper defendant may be any manufacturer or seller of the particular defective product - anyone who touches it during its chain of creation to distribution. Here, Conco is the manufacturer of the concrete cutter, and a proper defendant.

2. DEFECTIVE PRODUCT. The product may be defective in its design, manufacture, or warning. Here, there may be two problems with this cutter:

a. DESIGN. In determining whether the design of a product is defective, the court will look to two tests. The first is the reasonable consumer expectation test, and the second is the feasibility of alternatives test. Using the consumer expectation test, the court will examine whether a reasonable consumer would expect the product to perform as it did. Here, the cutter performed badly - vibrating to such a degree that Peters, had to turn it off. Then, the cutter blade broke apart, seriously injuring Peters foot. Consumers would expect that when using the proper safety precautions, such injury would not occur, unless the product was defective. The problem under this test is whether the reasonable consumer would have used this product as Peters did (without water), and what the proper safety procedures would be (discussed below under DEFENSES). If the court finds that the defect fails the consumer expectation test, this will be a design defect.

If the court chooses to use the feasibility of alternatives test, the court will examine whether there were any other safer designs available at the time that this product was manufactured. Later developments will not satisfy this test. Additionally, these alternatives must have been feasible, that is, they must not have been prohibitively expensive given the risk of injury. In this case, it seems feasible to have placed a kill switch on the handle of the cutter as well as by the blade (or instead). Such a switch would be safer to reach in the event that the cutter began to operate in an unsafe manner. Kill switches exist on other types of machines like lawnmowers and edgers and trimmers (on handles).

The risk involved here is a serious one: permanent injury to the body of the user or bystanders, from a machine that is sturdy and sharp enough to cut cement. The balancing of this with the seemingly low cost and simple burden of a safer kill switch position, weighs in favor of the consumer. The court would probably find that this position test is met as well.

b. WARNING. There may also be a defective or inadequate warning available with the cutter. To establish this, Peters must prove that the warning given did not adequately inform and alert him of the risks involved, and that Peters would have read and heeded such a warning if it had been properly included. In effect, he must establish that the lack of warning was the actual cause of his injuries.

Here, there was no warning at all included with the blade, although there were several warnings as to the proper use of the blade included throughout the other cutter instructions. The blade itself said only "WET," and did not warn of the danger involved in not using water with it. Given the low burden on Conco of including more specific warnings regarding the blade, or putting a warning sticker onto the blade itself, and the seriousness of the danger, the court is very likely to find this warning inadequate. Further, the other included warnings only stated that the blade may "degrade" and not that it would then break into pieces - seriously injuring the user at that time. This warning was inadequate.

Peters must also prove that he would have heeded the warning, however. Peters carefully followed all instructions in putting the cutter together. He stopped the cutter immediately when it began to shake, carefully inspecting it. He did not resume use of the cutter until he was convinced that there was nothing wrong with it. He did not use water on the blade, nor on the surface, although the instructions recommended that he do so. It is very likely that Peters did not because he did not understand the graveness of the risks involved if he did not use water. Given the careful nature of his use, and his adherence to the other instructions, it is very possible that he would have heeded a more explicit warning regarding the blade. When he stopped and checked it, he could have read the sticker (for example) and been reminded of the need for water. If Peters can establish this, he will have proved an inadequate warning.

3. INJURY. Since Peters was severely and permanently injured by the blade when it broke off, he will establish this element to the court's satisfaction.

B. PRODUCTS LIABILITY - NEGLIGENCE

In order to establish a claim against Conco in negligence, Peters must prove duty, standard of care, breach, causation, and damages, plus any defenses.

1. DUTY. Manufacturers have a duty to protect their customers from injury.

2. STANDARD OF CARE. The standard that they owe those customers and others is

to avoid unreasonable risks caused by the product. They must take the care that a reasonable person would take to avoid injuries.

3. BREACH. If Conco has failed to take reasonable care to avoid such injuries, then they have breached this duty. Custom and Industry practice will help to establish this. For example, if other manufacturers of like products consistently provide more thorough and careful warnings, or include kill switches on the handles of their products, there will be a breach. Since other tools like lawnmowers, jackhammers, weed trimmers, edgers, and the like often have such switches on their handles, this is probably a breach of Conco's duty. This is especially true given the feasibility of the alternatives discussed.

4. CAUSATION. Conco's breach must be the actual and legal cause of Peters damages. The actual cause can be established by use of the "But for..." test. But for Conco's breach in not including an adequate warning, or in placing a kill switch on the handle, Peters would not have been injured. This seems to be accurate here (incorporating by reference above discussions). Legal cause requires that this plaintiff be foreseeable, and that the type and extent of the injuries also be foreseeable.

Peters is the purchaser and user of the product, and he is the person who was injured. He is foreseeable to Conco, who is aware that anyone who buys and uses their product could possibly be injured by it. Peters was injured by the blade breaking apart, something that the instructions made slight attempts to avoid. Further, a safety guard had been installed on the cutter, presumably to avoid injury to users in checking the blade, and in using the machine. Peters' injuries were caused by the blade fragments spiraling into his foot. This is very foreseeable as far as both the type of injury and the extent (permanent physical damage) incurred. Conco's breach is also the legal cause of Peters injuries.

5. DAMAGES. As above, Peters will have no trouble establishing that he has been injured and has suffered damages.

6. DEFENSES. These will be discussed below in I.D.

C. INTENTIONAL TORT - BATTERY

A battery is defined as the offensive or harmful touching of another with intent to do so. Here, there doesn't seem to have been any intent to injure Peters by any of the defendants, but if a court found such intent, Peters may also recover in this cause of action.

D. DEFENSES

There are basically two defenses that Conco can raise in defending the suit by Peters:

1. ASSUMPTION OF THE RISK. Conco could argue that Peters purchased a dangerous product for use in a dangerous job, and he cannot now complain of injuries he received while performing this dangerous job. In order to be successful, this defense

requires that the plaintiff have made a knowing and intelligent assumption of the risks involved in the activity. Since, Peters was not even aware of the seriousness of the risks here (inadequate warning assured this), he cannot reasonably be said to have assumed the risk that the blade would break apart and seriously injure his foot.

2. CONTRIBUTORY NEGLIGENCE. Conco may argue that Peters was also negligent in the way that he operated the cutter (without using water as instructed), and that he therefore, contributed to his own injuries. This defense is entirely unavailable in actions of strict liability, however, and Conco may only raise it in connection with the Negligence (and intentional tort) claim. The court will examine whether Peters acted with the care that a reasonable person would have taken under the circumstances. If he did, this defense will fail. If he did not, this defense will be effective. In some jurisdictions this defense will act as a total bar to any recovery by Peters (in this claim only) - these are jurisdictions that have not altered the common law. In others, Peters may still recover if he was negligent depending on the courts finding as to the degree of that negligence. Some of these jurisdictions will allow recovery if the plaintiff is less that 50% at fault, and others will allow him to recover if he is less than 100% at fault (Pure comparative fault).

Depending on the jurisdiction, Peters may still be able to recover even if a court finds him negligent in failing to use water.

PETERS V. BLADECO THEORIES

Bladeco is the manufacturer of the actual blade that caused Peters injuries. They will be liable to Peters in the same manner as Conco, with a few exceptions.

Bladeco will only be liable to Peters if he can prove that the actual blade was defective. If not, they will not be liable under this theory because that means there was no defect when they supplied the blade, and that they did not place a defective product into the stream of commerce. However, they may have been responsible for a defective warning on the blade since that was within their control to supply. If the court finds that they should have supplied the label, they will be liable here. If the court finds that it was reasonable for them to rely on Conco to supply such a label, no liability will attach.

B. NEGLIGENT PRODUCTS LIABILITY

This analysis is the same as for Conco. If Bladeco was negligent in the manner in which they designed, manufactured or labeled the blade with a warning, they will be liable to Peters. They are subject to the same duty, standard of care and breach analysis. The one exception here is that it may have been reasonable for Bladeco to rely on Conco to supply the needed warnings. If so, there will be no liability for them, unless the blade was actually designed or manufactured defectively.

C. DEFENSES

The same exact defenses will apply to Bladeco, and this incorporates by reference the

previous discussion.

PETERS V. HOMECO

THEORIES

Again, much of the analysis for this defendant is the same as the previous two, and this discussion incorporates those by reference. However, the following changes apply to Homeco.

A. PRODUCTS LIABILITY - STRICT LIABILITY

Since any manufacturer or seller is liable to Peters for a defective product, Homeco, who sold him the product, is also liable and to the same extent. Homeco may seek indemnity from the other defendants, but they will be entirely liable to Peters as well.
Peters must establish (in addition to the above elements discussed) only that this cutter was defective when it left the store. If so, recovery here is proper.

B. PRODUCTS LIABILITY - NEGLIGENCE

To hold Homeco liable under this theory, Peters must establish that the store failed to inspect the product where a reasonable person would have done so, or that they inspected it and then failed to discover the defect where a reasonable person would not have failed to do so. The court will consider things like previous complaints from customers regarding the instructions, warnings or kill switch, and the history Homeco has had in dealing with Conco. If there has been nothing in that history to alert Homeco of the need for an inspection, they were not negligent in failing to conduct one. If there has been such information, they will be expected to have done an inspection (and to have discovered the defect if a reasonable person would have done so).

C. DEFENSES

All of the same defenses apply to Homeco as above, and are hereby incorporated by reference. Additionally, Homeco may be able to seek indemnity from the other two defendants if their conduct was more negligent than Homeco's. Indemnity seems appropriate in this case.

CONCLUSION

In sum, Peters seems likely to recover from all defendants on the various causes of action his damages to some degree.

ANSWER B TO QUESTION 1

1. Peters v. Conco

Strict Liability in Tort

A manufacturer of a product who places the product into the stream of commerce may be held strictly liable in tort for injuries to persons or property caused by a defective product. Privity with plaintiff is not required. Any foreseeable consumer or user of the product may recover for injuries caused by the defective product. (McPherson).

A product may be defective in design, manufacture or have proper failure to warn of known or reasonably known defects or dangers. A manufacturer must inspect, discover and correct defects. Strict liability is imposed if a commercial seller of a product (manufacturer, distributor, retailer) places the product in the stream of commerce. This liability may also be imposed on component manufacturers.

Design Defect

A product is defective in design if it fails to perform within the reasonable expectations of the foreseeable user based on its intended use. Here, Peters will claim that there are two manufacturing defects on the concrete cutter. First, the failure to have a "kill switch" in a readily accessible location makes the product unreasonably dangerous. Second, the cutter's safety guard was defectively designed since it is foreseeable that if a blade breaks into pieces the safety guard should sustain the impact.

Failure to Warn

Peters will also claim that the failure to give proper warnings of the precise dangers involved in using a "wet" blade without water made this cutter defective. He will argue that although the instructions contained several warnings about the use of water, the instructions did not provide the risk of harm to allow a user to proceed with necessary caution.

Conco's Defenses to Strict Liability in Tort

Conco will counter that the defense of assumption of the risk precludes Peters' recovery. When Peter noticed the cutter was vibrating excessively he turned the machine off. Conco will argue that at that point Peter should have been aware that there was a problem with his use of the cutter. They will assert that when Peters began to use the cutter after his initial observation and awareness, he assumed the risk of his being injured.

Further, Conco will argue that its instructions clearly and adequately warn of the dangers in using a "wet" blade dry. Conco will be held strictly liable in tort based on the failure to provide an adequate kill switch (design defect).

Negligence - Product Liability

Peters will also assert a negligence theory of recovery. A manufacturer will be liable in negligence if a duty is owed, the duty is breached, and the breach actually and proximately causes plaintiff's damages.

Duty

A manufacturer owes a duty to all foreseeable users to manufacture a product as a reasonable manufacturer under the same or similar circumstances. Conco owed a duty to Peters.

Breach

This duty is breached if the product is defective in design or manufacturer. Conco breached this duty.

Causation - Actual

But for the defect in failure to warn, design and manufacture, Peters would not have been injured.

Causation - Proximate,

It was foreseeable that if a blade breaks and the safety guard fails, a user's foot will be injured. It is foreseeable that insufficient warnings will result in injuries to a user.

Damages

Peters suffered damages. His foot was permanently injured. Absent a defense, Conco is liable to Peter in negligence.

Conco's Defenses to Negligence

Contributory Negligence

Conco will claim that Peters failed to act as a reasonable person when he continued to use the cutter after noticing the vibrations. In a traditional jurisdiction, Peter's contributory negligence will be a complete bar to his recovery. In other jurisdictions (e.g. California) the rules of comparative negligence will allow an apportionment of damages.

Conco's Breach of Implied Warrantv/Express Warranty,

Peters will argue that Conco breached the implied warranty of merchantability and the implied warranty of fitness for intended use. Further, Peters will claim breach of express warranty based on any manufacturer's warranty expressly given by Conco.

Conco's Defense

Conco will claim that Peters used the cutter in an inappropriate fashion, i.e., without water. Conco should prevail on the warranty claim, based on Peters' misuse of the product.

2. Peters v, Bladeco Strict Liability Defined Supra

Peters will argue that Bladeco manufactured a product, albeit a component part, which was placed in the steam of commerce. As such they are liable to him as a foreseeable consumer.

Failure to warn

Although the blade was marked "Wet" Peters will assert that the blade should have been supplied with independent warnings. Since the cutter was sold unassembled, the dangerous component parts should have been provided with warnings. Bladeco will assert the defense of assumption of the risk. Peters will prevail based on duty to warn, thereby imposing strict liability on Bladeco.

Negligence - Product Liability

Defined Supra

Peters will bring a negligence suit against Bladeco based on an alleged breach of duty to manufacture a product that does not present an unreasonable risk of harm to a foreseeable user. Peters will assert that the blade actually and proximately caused his injuries.

Bladeco's Defenses to Negligence

Bladeco will assert the defenses of contributory and comparative negligence since Peter failed to use the wet blade properly per instructions with the cutter. They will also raise the defense of assumption of the risk. Depending on jurisdiction, Peter will either be barred from recovery, or his recovery will be apportioned according to culpability.

Express and Implied Warranty

Defined Supra. Discussed Supra.

Contribution and Indemnity

Bladeco will seek either indemnity or contribution from Conco, if they (Bladeco) are found liable. Bladeco will argue that they should be indemnified by Conco since Conco manufactured the cutter, and Conco is simply a component manufacturer. If Conco cannot get indemnity, then they can sue Bladeco for Contribution.

3. Peters v. Homeco

Strict Liability in Tort

Defined supra.

A retailer will be held strictly liable in tort if they sell commercially an unreasonably dangerous product. As discussed, supra, the cutter was arguably defective in design and for failure to properly warn. Therefore, Homeco will be held liable.

Negligence

If Homeco simply sold a packaged, sealed product to Peter, then they should not be liable in negligence. Homeco did not have duty to inspect or make safe the product, unless they knew or should have known of its defective condition.

Express/Implied Warranty

Based on the facts given, Homeco will not be liable under warranty theories.

Indemnity

Homeco will be entitled to indemnity from Conco. Generally, the manufacturer must act as a surety for its products absent any intervening and superseding events. If the product was in a defective condition when it left Conco, and has not been altered prior to purchase by Peters, then Homeco is entitled to indemnification.

July 1977

QUESTION NO. 2

Mack suffered from severe emotional instability and was under treatment by Doctor, a psychiatrist. During the course of consultations with Doctor, Mack admitted that while driving his car on the highway he would frequently experience aggressive impulses, during which he would drive directly toward another vehicle in order to frighten the driver and at the last moment swerve back into his own lane. Doctor frequently counselled Mack against driving until his emotional condition improved, but Mack admitted to Doctor that he was ignoring the advice.

One day, while driving on a crowded city street, Mack had one of his impulses and he drove directly toward Al, another motorist, who was approaching from the opposite direction. Al, badly frightened, swerved sharply to his right in order to avoid a collision. Al did so despite his awareness that such a swerve would probably cause his car to strike Bud, who was standing on the sidewalk. Al's car struck and injured Bud. Al did not sustain any physical injury.

These events were witnessed from an upstairs window by Carrie, an elderly woman who lived nearby. Carrie sustained a disabling heart attack as a result.

(1) Does Bud have any rights of recovery against Al? Mack? Doctor? Discuss. (2) Does Al have any rights of recovery against Mack? Doctor? Discuss. (3) Does Carrie have any rights of recovery against Mack? Discuss.

Answer A to Question 2

Bud can attempt to state a cause of action against Al for battery, which is the intentional infliction of a harmful touching of one's person. There is the requisite act which is the striking of Bud's body by Al's car. There is no difficulty with causation as but for Al's swerving, Bud would not have been struck. The difficulty lies with Bud proving that Al acted with the intent to strike Bud or with the realization, that commission of his act made substantially certain the striking of Bud. The facts state that Al swerved realizing that doing so would probably cause his car to strike Bud. That satisfies the intent requirement and Al will be liable to Bud for battery absent any defense since Bud need not show damages.

The mere emergency situation does not provide a defense to the battery as long as Al acted with a volitional rather than a mere reflex action. Again, the facts state Al knew the problem and thus he will not have a defense to a battery action.

Bud can also sue Al for negligence in the operation of his motor vehicle. Under the Cardozo approach the bystander is within the zone of danger and is thus a foreseeable plaintiff to whom a duty is owed by the operator of the vehicle. Under the Andrews approach, since Al would foresee injury to some plaintiff (Mack for example), the Al owes a duty to the entire world subject to the restrictive rules of proximate causation. Thus Bud is a foreseeable plaintiff under either theory.

Bud still needs to show breach of duty by Al. Has Al acted as a reasonable man under the emergency situation would act? Bud has engaged in a volitional rather than reflex movement. The issue is whether a reasonable person under the same circumstances would have swerved his car knowing it would strike an unprotected bystander or would have instead chosen an alternative course such as allowing his car to strike Mack's car since at least both parties had protection of the cars' bodies. Furthermore, since the accident was on a crowded city street, it's questionable how fast Mack's car was proceeding. Also, allowing Al's car to swerve into pedestrian traffic on a crowded day raises the likelihood of many more persons being injured. It would seem that Al has not acted as a reasonable person under the circumstances would.

Bud must then show cause in fact (the "but for" argument discussed above with respect to the battery). Since there are no intervening events, Al's negligence is a direct cause of the accident which resulted in a type of injuries and in the manner which were foreseeable. Thus Bud can recover against Al on the negligence theory for his pain and suffering, wage loss and future earning capacity loss, and for his medical bills.

Bud can sue Mack on a cause of action for battery as Mack's activity of intentional driving at the vehicle of another created a substantial certainty that that vehicle would go out of control to strike the person of another, Mack has set the instrumentality in motion and as such, he is liable for battery to Bud even though he himself never made contact with Bud. The fact that there are impulses implies volitional rather than reflex action.

Bud will also sue Mack on a negligence cause of action, arguing that he is a person within the zone of danger created by erratic driving and thus a person owed a duty by said erratic driver. Furthermore, under Andrews approach, since Mack can foresee injury to Al (in case Mack couldn't pull his car away in time to avoid the collision), Mack owes a duty to Bud unless cut off by proximate causation (public policy) grounds.

There is no problem with breach of duty under either theory as Mack's care in driving his car is under the standard of care of a reasonable person under the circumstances. Mack will argue that the standard is to be one judged by a person having the emotional instability such as Mack's; however, even assuming the court applies the reasonable man with emotional instability standard, Mack was aware of his problem (he was consulting a psychiatrist) and thus he was negligent for operating a vehicle at all with knowledge of his affliction. Thus, Bud can prove a breach of duty.

There is no problem with proving cause in fact between Mack's driving and Bud's injuries as but for Mack's driving and Al's subsequent actions, Bud would not have been struck. Thus, Mack was a substantial factor. Further, Mack's liability is not going to be cut off by Al's subsequent negligent actions as Al's actions were a normal response to the risk created by Mack's erratic driving. It is highly foreseeable to Mack that his negligent conduct will endanger the lives of the bystander who risks being struck by either Mack's car or a vehicle which must swerve to avoid Mack's car. No priority between bystander and Mack need be established for recovery.

Bud will have a more difficult time establishing a duty owed to him by Doctor. Clearly, there's no privity of the doctor/client relationship between Bud and doctor. Under the Cardozo approach, one must ask whether Bud is within the foreseeable zone of danger. Arguably he is on the basis that if the doctor fails to act appropriately to keep Mack from driving vehicle he has his condition, that Mack will be involved in an automobile collision which would also invite injury to bystanders. The Andrews approach would argue that the Doctor can foresee injury to someone as a result of Mack's condition and thus Doctor owes a duty to the whole world again subject to the rules of proximate causation.

It is important that Mack has told Doctor of his behavior pattern re: driving a car at another car and then swerving away. This is exactly the type behavior Mack engaged in which has led to Bud's injuries. Certainly, the Doctor wouldn't know the name of the intended victim (as in the Tarasoff v. Regents of the U. of Cal. case), but the bystander is clearly within the zone of danger of an automobile accident which Doctor could foreseeably predict from Mack's statement to him.

The breach of duty question is difficult to show here. First, Doctor will be held to the reasonable standard of care of an expert psychiatrist under the circumstances. The issue is whether doctor's mere counselling rather than more affirmative action such as seeking the commitment of Mack to a hospital breached Doctor's duty of care.

Even if there was the breach by Doctor not taking stronger action, the cause in fact issue is very difficult. To show but for the Doctor's breach of duty for not taking stronger measures with Mack other than mere counseling, Bud's injuries resulted is impossible. However, Bud might present enough evidence to argue to a jury that Doctor's actions were a substantial factor in causing Bud's injuries.

The intervening event of the car accident between Mack's car, Al's car and Bud is clearly a foreseeable event from the Doctor's standpoint. This is exactly the type behavior for which he was treating Mack and the type of injury to the bystander is likewise a foreseeable result of the car accident.

If Bud can hurdle the duty and breach of duty issues against Doctor, he may be able to recover from Doctor for negligence.

Al's rights against Mack begin with a cause of action for assault which is the intentional placing of a human being in reasonable apprehension of an immediate and harmful touching. Again, Mack's intent is the same as with respect to the battery issue with Bud. The impulse appears to be controllable and are thus volitional rather than reflex; thus there is the act. The intent is clear as Mack wishes to run his car towards Al which placed Al

in reasonable apprehension that he would be struck by Mack's car.

Causation is the same as with respect to the battery claim of Bud.

Assault does not require a showing of physical damage by Al; he can recover for the right sustained.

Al can plead a cause of action for intentional infliction of emotional distress arguing that Mack's conduct was outrageous conduct, intended to frighten him which it did. Here, the act, intent and causation are the same as for assault except for the requirement of outrageous conduct.

Al however must show some injury even though it is purely an emotional one. He would need to show nervous breakdown for example.

Al could recover property damage to his car from Mack on the negligence theory which has the same duty, breach of duty actual cause and proximate causation arguments as outlined above with respect to Bud's suit against Mack.

However, since Al sustained no personal injuries, his recovery against Mack for negligence is limited to his property damage, if any to his car.

Al's cause of action against Doctor for negligence fares the same duty, breach of duty, cause in fact and proximate causation, arguments and difficulties as did Bud's action against Doctor as discussed above and incorporated by reference herein. Since Al could only recover property damage, the court might not extend the duty by the Doctor to Al for his patient/doctor relationship with Mack as readily as the court would do for Bud's personal injuries.

Both Al and Bud can seek to recover on the intentional tort theories punitive damages by showing Mack acted with malice (to vex; annoy, spite or intentionally injure).

Carrie can attempt to plead intentional infliction of emotional distress against Mack but since Carrie was not the person threatened by Mack's actions, she would need to show that she was a close relative to either Bud or Al, present at the time of Mack's actions, and that Mack was aware of her presence and relationship. None of these facts are apparent from the facts given and this cause of action would lose.

Carrie would next argue the negligent infliction of emotional distress caused by Mack's negligent activities. The duty problem will probably defeat Carrie's cause of action as for this tort, most court's require the plaintiff to be within the zone of danger of physical contact, which she wasn't as she was upstairs. No impact is required between defendant's vehicle and plaintiff and Carrie has sustained the physical injury (heart attack) as a result of the emotional distress.

However, unless the California view of Dillon v. Legg (foreseeability of the plaintiff; not necessarily that plaintiff be within the zone of danger), Carrie would lose.

Even under Dillon, it's arguable that only a nearby pedestrian, not a person looking out an upstairs window is a foreseeable plaintiff to Mack.

Answer B to

Question 2 I(A)

Bud vs. Al

Bud may have an action against Al for negligence, although due to the circumstances it is questionable that Al will be held liable. He might also have an action for battery.

The negligence action will depend upon a finding that Al had a duty to exercise due care towards him, which duty was breached. There does not

appear to be any problem with proximate cause, his damages may be inferred from his injury, and he does not appear to have been negligent himself.

Al had a duty to act as a reasonable person would have in the emergency in which he found himself. Their would be a jury question, therefore, as to whether a reasonable person, knowing of Bud's presence in the course of escape, would have nonetheless hit him rather than absorb the impact himself.

As to the battery, there is the necessary act and causation, but there is a question as to intent. An intentional tort requires that the act be done with the actual intent of bringing about the result, or that it be done with the knowledge of a substantial certainty that the result ensues. Here, there is a question as to whether his awareness that he would probably strike Bud is of a sufficiently salient degree to constitute the requisite "intentional harmful touching of another." And in any event, he could argue that his act was reflex and ought to be excused as such.

(B) Bud vs. Mack

Bud probably has a good claim against Mack based on any or all of the theories of negligence, intentional infliction of emotional distress, or battery.

Mack has clearly conducted himself in a negligent fashion by allowing HS car to leave his own lane. It is foreseeable that in so doing, another operator would act to escape the danger or in reflex to it, which would create an unreasonable risk to harm to third parties. Thus, under either the Andrews or Cardozo approach set out in Palsgraf, he owed a duty of care to Mack, and has breached it. As Mack was struck by an auto reacting to Mack's operation of his own car, his injury occurred in exactly the manner foreseeable, and was therefore proximately caused by it.'

Mack's conduct was sufficiently outrageous and without social utility to form the basis for a recovery for intentional infliction of emotional distress. He admittedly committed these acts "to frighten other drivers," and this is an intentional tort to which the transferred intent doctrine applies. In essence, he has set in motion a chain of events in which Bud's injuries can be traced to his act, the act was intentional as to Al, the intent can be transferred as to Bud, and his conduct was outrageous, and he has suffered damages as a result.

He has, adopting the same analysis of causation and transferred intent, also engaged in a battery, using, in effect, Al as an innocent agent.

(C) Bud vs. Dr.

Bud probably can make claim against Dr., arguing that either Dr. was negligent in failing to control Mack despite his knowledge of his propensity, or that his conduct constituted malpractice, or perhaps that his conduct, if neither of the above, constituted a violation of an independent duty owed to Bud.

Duty: Generally, people have no duty to control the behavior of others, unless they have some knowledge of a propensity of the other to act in a dangerous manner and have a right to control that person. Dr, certainly knew of Mack's dangerous tendencies, but it is questionable that he had a right
to exercise any greater degree of control than is evidenced by the facts here. Even a parent, who has great inherent control over his children, is not held liable if he has reprimanded the child against the wrongful conduct in question. Dr. can argue that his reprimand was sufficient to form a basis for finding that he acted with due care.

However, Dr. knew that Mack was not heeding his reprimands, and as a skilled person, would perhaps be held to a higher duty of care, one requiring that he act affirmatively to neutralize the risk posed by Mack's behavior, including at the least, informing a

proper authority in order to have Mack's driving privilege revoked. The confidential nature of his relationship with Mack does not extend to maintaining as privileged that, Mack's future illegal conduct.

Using the same analysis as above, Bud is just as foreseeable a plaintiff as a driver scared by Mack, so Dr. duties, if found to exist would extend to him.

As a skilled practitioner, he might also be found to have breached a duty giving rise to a claim of malpractice if it is found that in a similar situation, his colleagues would have taken affirmative steps beyond the reprimand given.

Even if it is found that the common law doctrines of duty to supervise or malpractice don't encompass this affirmative duty to act, the courts have residual authority to find such a duty using the seven-step examination of factors set out and applied in Connor v. Great Western Savings and Loan.

Assuming Dr's behavior was found to be negligent, it is also probable that it will be found to be the proximate cause. His failure to take steps to keep Mack off the road was the "but for" cause of the injuries, and the result, being foreseeable, and caused by a dependent intervening force, would probably be found to be proximate.

II Al vs. Mack

Al has a claim against Mack for assault, as it is apparent that he had a reasonable apprehension of an immediate battery, and Mack's act was clearly intentional. No damages are required, and he can probably obtain punitives, as Mack's act was malicious.

He may not have any claim for negligence unless he can show damage to his auto from the collision. Otherwise, it is clear that Mack's conduct was negligent and was the proximate cause of any damage suffered.

His claim for intentional infliction or negligent infliction of emotional distress also turn on the question of damages.

If he is found to have negligently caused injury to Bud, Al will have a right to contribution from Mack, and probably be able to obtain indemnification for the entire claim as he was only passively negligent, if at all.

(B) Al vs. Dr.

The analysis here is the same as in Bud vs. Dr. Additionally, if Dr. is liable and Al is found to have been negligent in causing injury to Bud, the same rights of contribution would apply and the right to indemnity would turn on the jury's evaluation of the degree of negligence of both.

III Carrie vs. Mack

Carrie's claim is for either intentional or negligent infliction of emotional distress.

In the case of intentional infliction, while the transferred intent doctrine might be applicable, her claim would probably fail as not having been proximately caused by Mack's act in that it was not foreseeable, and thus too remote.

As to negligent infliction, under a traditional analysis no recovery may be had simply for seeing injury caused to a third person unless you yourself were in the "zone of danger" or

your child was in the zone. While this rule was replaced in California by Dillon v. Legg several years ago, the new test still has inherent in it a notion of foreseeability, and Carrie's claim would fail.

Fall 1978
QUESTION NO. 10

Star stored furniture in a warehouse owned by Ware and prepaid one month's storage fees. At the end of the month. Star demanded return of his furniture but Ware. claiming in good faith that storage fees were due, refused to surrender the furniture. Ware informed Star that he would check to determine if the fees had been paid and would call Star if he determined payment had been made. Star heard nothing further from Ware.

The day following Star's demand, Ware contracted with Exco, a licensed exterminator, to free the warehouse of rats. Ware and Exco agreed that a poisonous gas would be used for this purpose, but all decisions about the work were left to Exco.

Two days later, before Exco had completed the job, some of the gas escaped from the warehouse into the adjoining building. Otis, an occupant of that building. was injured by inhalation of the gas. There is no evidence as to how the gas escaped into the adjoining building. All usual precautions had been taken to seal all exits and openings in the warehouse.

Gas fumes exploded when they came into contact with an open flame in the warehouse. The explosion destroyed Star's furniture. This is the first instance in which the gas used by Exco has exploded. The accepted opinion of the experts was that it was not flammable or explosive.

What are the rights of Star against Ware? Against Exco? Discuss. What are the rights of Otis against Ware? Against Exco? Discuss. Answer

Answer A to Question 10

Star v. Ware: Star's first cause of action will be against Ware based upon conversion. Conversion is an intentional interference with the rights of another in personal property, and the interference is of such an extent as to destroy the owner's interest in the property.

Here, Ware believed, in good faith, that he could detain Star's property. However, a good faith belief will not provide a defense to Ware. The only intent required is that Ware intend to interfere, and this is what he has done.

But for Ware's interference, Star's furniture would not have been destroyed. In addition, Ware could have checked his records to determine whether Star had paid, before the fire.

Was Ware negligent?

Duty of care: Due to the relationship of Ware to Star, a bailee/bailor relationship arising out of contract, Ware owed a duty to use due care in his activities which could result in interference with Star's rights to his furniture.

Standard of care: The applicable standard would be that of a reasonable warehouseman under similar circumstances.

Breach of duty: There is nothing in the facts to show that Ware has acted in any way which had breached his duty of due care towards Star's furniture. The activity which caused the explosion was from an open flame. If the flame was negligently caused by Ware, and as a result the room exploded, causing Star's furniture to burn, then Ware may or may not be negligent.

Causation: For the moment, I will assume the explosion was ignited by Star's negligent flame.

Proximate Cause: Under the Polemis view, Star can only be liable for the foreseeable results of his negligence. A small fire cannot foreseeably cause an explosion of gas which is assumed to be non-flammable or explosive. Under the Wagon Mounds view, if Ware was negligent as to one, he will be liable for all directly caused damage, whether it was foreseeable or not. In those jurisdictions applying the directly caused - unforeseeable consequences rule, Ware would be liable for the damage to Star's furniture.

However, if Ware's open flame did not breach his duty to Ware, as it probably didn't, then there is no negligence. Since no facts are given as to why the flame, Star will not prevail on a negligence theory. A res ipsa loquitur theory of breach may be applied, but the other defendant, Exco, was involved. Res ipsa will only be applied when the accident usually doesn't happen in the absence of negligence, the instrumentality is in the control of defendant, and plaintiff is not contributorily negligent. Since there is more than one defendant, the res ipsa instruction would not be used. Star could also rebutt the presumption by showing due care.

If Star was negligent in hiring Exco, and Exco performed negligently, Star will be liable, even if Exco is an independent contractor. Exco is not an employee as Ware has no control over Exco's activity on the job.

Star v. Exco: Exco owes Star a duty of due care, and must act reasonably in his activities which may cause injury to Star or his property.

Exco could not have known of the explosive properties of his products, as he may reasonably rely on the opinion of experts.

Strict liability: An actor will be strictly liable in tort when his activities create an unreasonable risk, which cannot be eliminated through the exercise of due care, and the damaged caused was due to the foreseeable consequences of the risk.

Here, the unreasonable risk is poison, not explosion. The risk was unforeseeable from the type of harm expected from poison gas. Therefore, Exco is not strictly liable in tort to Star.

(2.) Otis v. Exco: Exco is liable to Star on a theory of strict liability. Strict liability is where the actor's activity creates an unreasonable risk of harm, which risk cannot be eliminated through the use of due care, and the damage is of the type to be expected by the type of unreasonable risk.

Otis was poisoned by poison gas. This type of activity is inherently dangerous. Even if Exco was extremely reasonable and careful, as he took "usual precautions", he cannot eliminate the risk. For policy reasons strict liability allows Otis a recovery even though Exco may not have been negligent. The damage was of a foreseeable type-poison.

Exco may also be liable on a negligence theory. Exco owed Otis a duty of due care in the use of his poison, and must act in a reasonable manner. The facts show Exco took the "usual precautions", but this does not have to be conclusive, if a reasonable exterminator would do more, such as evacuate or monitor adjacent buildings.

The trier of fact could find that Exco should have done so. Exco's failure to evacuate or monitor is then a breach of his duty, and is the actual and proximate cause of Otis' injury.

Otis v. Ware: (Strict liability) Ware cannot, by contracting with Exco, eliminate his liability for being strictly liable. This is a policy decision, based on the reasoning that by contracting away your duty to others one might be able to escape liability -- and when dealing with ultra-hazardous activities the one who most stands to benefit from the activity will escape liability.

(Negligence) If Exco was negligent, Ware will be liable only to the extent that Otis could prove that Ware negligently selected Exco as his independent contractor. (See Star v. Ware.)

Under strict liability theory, Exco and Ware are jointly and severally liable. Otis may sue one or both. If a judgment is paid by Ware, he may compel contribution by Exco, and vice-versa.

Answer B to Question 10

Star v. Ware: While Star had given possession of the furniture to Ware (bailor-bailee relationship), when Star came to get his furniture Ware wrongfully exercised continued control over them. Thus, Star would have a cause of action against Ware either for conversion or trespass to chattels. In trespass to chattels there must be damage to the chattels (as here the furniture was destroyed by fire) and in conversion the person must exercise wrongful dominion and control over the property and are liable either to give the property back or for its value. It would be irrelevant that damage or destruction of the property were not foreseen or foreseeable. Thus, Ware should be liable for the value of the furniture to Star either in a cause of action in trespass to chattels or conversion.

Exco is probably liable under a strict liability theory as the extermination process is probably considered an ultra-hazardous activity. As such, Exco would be liable for those damages which were actual proximate damages of the activity.

The damages were a direct result of the gas exploding but this was the kind of damage foreseeable from such an activity. For example, rocks thrown by explosions may be a direct proximate result of explosion from the use of dynamite but minks miscarrying at a nearby mink farm is not such a foreseeable result. Here, the kind of damage foreseeable from the ultra-hazardous activity of extermination would be death or injury from breathing the fumes. Thus, it is arguable that the exploding gas was not the proximate cause of the burning of P's furniture. A negligence theory of recovery would also probably not yield recovery as experts who tested the gas apparently found it not flammable. Thus, Exco could not have foreseen such a result nor should he have been expected to protect against it.

Otis v. Exco: Otis on the other hand was injured by the exact type of event which would make extermination ultra-hazardous - i.e. - he was injured by the escaped gas.

Under a strict liability theory it doesn't matter that the actor used the utmost care - as here the usual precautions were used to seal the building.

0 doesn't need to prove breach of duty of care on the part of E, that is, he need not prove negligent sealing - all he needs to prove is that it was E's gas that escaped and caused his injuries.

If for some reason, extermination is not considered an ultra-hazardous activity, then 0 will need to proceed on a theory of negligence.

Under a negligence theory, 0 will need to establish that E owed a duty of care to act as an ordinary reasonable person engaged in exterminating activities. He will need to show that E breached that duty of care by not engaging in the precautions necessary. The gas was the cause in fact of O's injuries and was the direct result of O's failure to seal. There are no facts to indicate supervening causes of the escaped gas, e.g., criminal activity. It is likely that 0 can succeed by using the theory of res ipsa loquitur - that is - that such damages generally do not occur but for the negligence of the defendant, that plaintiff was not contributorily negligent and that the instrumentality was under the exclusive control of the defendant. All elements for RIL seem to be present in this set of facts. Thus, 0 should be able to recover also under a negligence theory.

Otis against Ware: If E was engaged in an ultra-hazardous activity, then W does not escape liability by delegating the activity to E. W remains liable even though he turned all the decisions over to E. Here, the injuries appear to be

proximately caused (Ware is probably not liable to Star under this theory because the injuries were not proximately caused by the activities of E).

Under a negligence theory, if this extermination activity is not considered ultra-hazardous, then 0 must prove that W negligently delegated the activity to E. 0 would have to prove, for example, that W knew that E company was not reliable, that the quality of their work was poor, that they were a cut-rate company and that many injuries had occurred as a result of their work. Only if O can prove such a negligent delegation will he be able to collect damages against 0.

0 can collect for his medical expenses, pain and suffering, time lost from work, and reduction of future earning capacity. There is nothing in the facts to establish a basis for punitive damages.

Spring 1978

QUESTION NO. 2

Ped suffered a broken leg on November 1, 1977 when he was struck by an automobile negligently driven by Driver. Ped's doctor, Dr. Brown, placed the leg in a cast. Three weeks after the accident. Ped received a payment of $5,000 from Driver's insurance carrier and Ped signed the following release:

"I, Ped, hereby release Driver from any and all liability arising out of the injuries received by me on November 1, 1977."

One month after the accident, Ped returned to the hospital to have the cast removed. At that time Dr. Brown discovered that the leg had become infected under the cast. Dr. Brown used a full dose of a new drug in order to counteract the infection.

Ped had a serious reaction to the drug, was hospitalized for ten days, and is still in a greatly weakened condition. At the time of administering the drug, Dr. Brown did not know that the drug would be likely to cause such a reaction. However, it was generally known in the medical profession that drugs of this type had components that would produce such a reaction in about one patient out of ten thousand and that a simple skin test using a small quantity of the drug would disclose the possibility of that reaction.

(1) What rights, if any, does Ped have against Dr. Brown for harm resulting from the drug? Discuss.

(2) What rights, if any, does Ped have against Driver for harm resulting from the drug? Discuss.

(3) Assuming Ped recovers against Driver for harm resulting from the drug, what rights, if any, does Driver have against Dr. Brown? Discuss.

Answer A to Question 2

P v. Dr. B

P's theory of recovery lies in negligence against Dr. B.
(The fact that a dangerous drug was used does not necessarily bring an action for products liability since the drug was not commercial purchased by (either P or Dr. B, but only used by Dr. B)

In a negligence action, P must establish that (1) a duty was owed him by Dr. B which was (2) breached upon (3) a standard of care, (4) causing in fact the damage and (5) which approximately caused the (6) damage.

Of course, P cannot be contributorily negligent nor have assumed the risk.
Dr, Brown owes a duty to P because P is his patient and any doctor who practices medicine owes an affirmative duty to his patients.

The standard of care for general practitioners is that "minimum common skill of doctors in qood standing in the community "

Although Dr. B did not subjectively know that the drug was likely to cause reaction, it was "generally known in the medical profession" that such drugs would cause such reactions in 1/10,000 of persons.

Dr. B is subject to this objective standard held by practitioners in the community; his actual lack of knowledge will be no defense.
Dr. B may be held to have breached his duty of care when he failed to act as a reasonable doctor in the community.
Since a "simple skin test using a small amount of drug" would have disclosed the possibility of reaction, it would not be unreasonable to require Dr. B to have applied a similar skin test to P even though only 1/10,000 people were :known to suffer from such reactions.

The burden of taking such precautions does not outweigh the risks inherent in not taking such precautions.
Thus Dr. B may have breached his duty to P by failing to test P's skin before administering the drug.

The damage to P (hospitalization for 10 days) in a weakened condition, of course was caused--in fact by Dr. B who is at least a substantial factor in causing the condition.

Since no intervening causes appear, Dr. B is also the proximate cause of P's injuries.

It does not appear that P was negligent himself and thus contrib. neg. has no application.

Also, P had assumed no risk since he did not voluntarily assume any known specific risk, such as

the particular reaction suffered.
Thus Dr. B is not only liable for negligence in administering the drug, he may also be liable in negligently setting the cast which gave rise to the infection initially.

Given the facts however, there does not appear to be any breach of duty of care. All that is known is that P's leg in fact did become infected after the cast was set.

Assuming a breach of a duty could be found, Dr. B's acts could be a substantial factor and prox. cause of P's infection.

P v. D

The issue of D's own negligence is assumed (from the facts) but whether D is now liable for P's subsequent injuries remains.
Since P's infection and drug reaction were caused by a broken leg on the November 1, 1977 accident, it appears that they would not have occurred but for the broken leg caused by D. At the very least, D's neg. driving was a substantial factor bringing about P's injuries.
Although D may have been the cause in fact of P's injuries, public policy requires that D also be the prox. cause of P's injuries and will relieve D of any unforeseeable intervening acts which could independently be legally responsible for the injuries.

D of course will argue that Dr. B's acts in setting the cast and administering the drug were supervening acts relieving D of any liability.

But it is generally held that medical aid, acts in recuperation and rehabilitation, and any aggravation of injuries are foreseeable and will be applied to the original tortfeasor.
Thus P's injuries, although negligently caused by Dr. B, will be attributed to D's original negligent driving, since the subsequent injuries to P in recuperating from his broken leg are clearly foreseeable. It is foreseeable that casts and medication will be given for such injuries.
Again it does not appear that contrib. neg. will bar P from recovery since P does not appear negligent with respect to his recovery.

Nor has P assumed any risk in having his broken leg cast and in taking medication. His acts are simply not voluntary with respect to any specific risk.

Effect of Release

D will argue that P's signature on the release will bar P from bringing action against D for P's subsequent injury.

Generally, a release is effective to shield a party from further liability. It serves as a settlement and will be given effect by a court where such settlement is by mutual agreement.

However P will argue that a release, although applicable to settlement situations involving property where damages are determinable upon the injury, should not as a matter of public policy be applied in the context of personal injuries where aggravations and complications in recovery

are always foreseeable and not readily determinable.

D's best rebuttal is that P signed the release three full weeks after Dr. B set the cast which was ample time for any complications to surface.

However, P may show that it was not for another one week (or one month after the accident) that the infection was discovered.

P may also argue that the release was but an adhesion contract required by all insurance companies as a condition for payment.

D v. Dr. B

Although P is allowed but one recovery, he may sue D and Dr. B jointly and severally.

A release of one party at common law released all defendents; but today that has been abolished in most states by statute.
Thus even though P released D, Dr. B, today, would still be liable. Co-defendants such as Dr. B and D may seek indemnity and contribution from each other upon judgment for P.

Answer B to Question 2

Ped v. Dr. Brown

Negligence

Negilgence arises where one owing a duty to another, by omitting to act or acting, breaches that duty that results in the actual cause and proximate cause of the damages suffered.
An act by Dr. Brown, giving the "full dose of a new drug" is sufficient for the requirement of act.

Did Dr. Brown owe a duty to Ped?

A duty is owed where it is foreseeable that the average reasonable person in the same or similar circumstances would foresee a standard of care owing.
However, Doctors, when acting in that capacity owe a standard of care that is higher than just the reasonable person's standard of care because they are an expert in the field.

The duty owed by Dr. Brown to Ped is the care and skill and prudence that a doctor in the same community would use in using this "new drug".

By "failing to give the simple skin" test to Ped, Dr. Brown breached his duty of care to Ped as it was "generally known" in the medical profession that drugs of this type could be tested simply.

Therefore, the utility of the conduct of Dr. Brown by failing to administer this test would outweigh the likelihood of injury and result in a breach.

Actual cause is present because "but-for" the breach of duty by Dr. Brown Ped would not have had the "serious reaction" to the drug.

Probable cause would be present and make Dr. Brown liable for the reaction of Ped because it was a foreseeable result with no intervening forces.

Dr. Brown might argue that one patient out of ten thousand is not foreseeble, but as the injury to Ped from the drug, resulted directly from the breach of duty owed to him by Dr. Brown.

Damages by Ped are his 10 day hospital stay, additional pain and suffering and his subsequent weakened condition. There do not appear to be any defenses although if a court felt that this was a sufficiently dangerous drug, it might impose strict liability in tort to all doctors who use the drug without the simple test.

Ped v. Driver

Ped had signed a release with driver to release driver from "any and all liability arising out of injuries ... on November 1, 1977".

Ped may argue that the subsequent injuries from the drug is not an injury arising out of the November lst accident. However, if this proves to be a winning argument then it may cut off liability in the proximate cause analysis.

Recission

Recission may be based on fraud, misrepresentation or mutual mistake. Ped will attempt to assert a mutual mistake of a material fact that goes to the basis of the bargain which results in a lack of mutual assent.

However, it is more likely that it was a unilateral mistake by Ped of the extent of his injuries which unless driver knew or should have known would not be grounds for recission.

Assuming a rescission, what is the liability of driver?

The fact pattern indicates that driver was negligent. This means that act, duty and breach is met. The difficult analysis is in causation.

Actual cause is present as either but for or as a substantial factor of driver's negligence Ped would not be in the hospital.

Proximate cause may be present because negligent medical attention has been held to be foreseeable. While Dr. Brown's acts are an intervening force, they are dependent and are put in action as a result of driver's negligence.

Accordingly, the driver is the proximate cause for the injuries to Ped as they are foreseeable dependent intervening acts which usually do not cut off the chain of liability.

The resulting injuries sustained by Ped may be attributed to driver and result in the damages to Ped.

Driver v. Dr. Brown

By either joining Dr. Brown as a co-defendant or by separate suit, driver will seek indemnity or contribution from Dr. Brown for the resulting injuries from the drug to Ped.

Driver would like to get complete indemnity from Dr. Brown on the theory that the injuries from the drug were while he was passively negligent and Dr. Brown was actively negligent.

If he is unable to get indemnity then he would surely seek contribution because driver will again assert that although negligent and possibly the proximate cause of the harm, the direct cause was Dr. Brown's negligence regarding the drug and its subsequent injuries.

Fall 1981

QUESTION NO. 7

Peter carelessly left his wallet containing $100 lying on the cashier's counter in Jim's restaurant and walked away. Jim observed the wallet but neglected to call it to Peter's attention. Immediately thereafter, David, another restaurant patron, paid his bill and picked up Peter's wallet by mistake, thinking it was his own.

As David was leaving the restaurant, Peter saw the wallet in David's hand

and recognized it as his own. Before Peter could call out, David boarded a bus owned by Busco. Peter followed and managed to board the bus just as it started to move. He skinned his knee in so doing. He yelled, "Stop, thief!" and worked his way around other passengers to where David stood.

The loud accusation angered David, who, even after he noted that the wallet was not his own, retorted, "Don't you call me a thief! Take your wallet and get out of here." He hurled the wallet at Peter. It struck Peter's face, glanced off and flew out the bus window. Peter attempted to get off the bus, but the bus was so arranged that passengers were required to pay fares as they left. Peter had no money with him and argued with the operator of the bus while the bus travelled several blocks. When the bus was stopped by traffic, Peter jumped out and ran back. He was unable to locate his wallet.

A. What are Peter's rights against:

I . Jim? Discuss.

2. David?

Discuss. 3.

Busco? Discuss.

B. Does David have any right against Peter? Discuss.

Answer A to Question 7

A) Peter's rights:

1) P V. J

P's rights against J would be based on negligence principles. In order for there to be negligence liability, there must be a duty, breach, causation, and damages.

Here, J had an arguable duty to exercise reasonable care toward his restaurant patrons. It

could be regarded as a common occurrence that customers leave belongings at the restaurant, in which case the owner may have a duty to safeguard such items or to seek to contact the owner.

On the other hand, a restaurant owner is in the business of serving food, not acting as a bailee of customer's possessions. If such analysis is followed, as in a number of jurisdictions, no negligence liability would be available.

Even such a duty did exist, it can be persuasively argued that J breached the duty because he noticed that P left his wallet, yet he failed to bring it to P's attention.

In addition, J may have been able to notify D that he had picked up the wrong wallet, thereby further breaching the duty of care that he arguably owed to P.

Even if duty & breach are shown, J's negligence must be both the cause-in-fact and proximate cause of P's damages.

In order to find cause-in-fact, J's actions must satisfy either the "but for" or "substantial factor" test.

Here, but for J's negligence, P's wallet would not have been left on the counter for D to pick up.

The proximate cause determination is made by analyzing whether had a result which was foreseeable, probable, or not improbable.

Losing the wallet is a foreseeable result, although the subsequent events could be regarded as sufficiently unforeseeable so that they would become superseding causes.

There are several problems, however, with finding negligence liability against J.

First, J's failure to act can best be regarded as an omission, which is generally not regarded as a breach of duty unless a special relationship exists between the parties. As noted earlier, a restaurant owner may be regarded as having a special duty to a patron, but in most cases failure to act is not sufficient to impose tort liability.

Second, J may have a defense against P for contributory negligence, for his careless act of leaving the wallet on the counter. The same basic analysis applies as was outlined above.

Depending upon the jurisdiction, contributory negligence would either be a complete bar to P's recovery. In a comparative negligence jurisdiction, P would receive damages only if his negligence was less than J's. In a "pure" comparative negl. system (California) P would obtain the percentage of recovery equal to the apportioned degree of i's negligence.

2) P v. D

a) conversion and/or trespass to chattels

P may have a successful action against D for either trespass to chattels and/or conversion, both of which are intentional torts against property interests.

Trespass to chattels always exists when there is conversion - the elements are the same except with conversion there is greater interference with the chattel and the remedy is different.

The elements for each include: an intentional act, interfering with P's possessory rights in property (or w/ conversion, the unauthorized assertion of control over another's property) and resulting damage.

Mistake is no defense to an action based on conversion/ trespass to chattels, D must

merely have intentionally asserted control or interference with the property in question.

Here, a wallet and money do constitute personal property, and D's actions deprived P of control & use in an unauthorized manner.

The remedy for such a tort is either damages for loss of use (trespass to chattels), or replacement cost (since the wallet cannot be found).

It is unclear whether P could recover for the damages resulting from his skinned knee when he was trying to recover his property.

Such a recovery would seem to be outside the scope of damages usually awarded for conversion.

b) Battery. P could also battery, and possibly assault, although the facts are not clear as to whether the assault elements existed (intentional act, intending to cause apprehension of an imminent battery, apprehension by P, damage).

Battery is also an intentional tort which requires an intentional act which is intended to and does result in a harmful or offensive touching of the person of P.

D's actions here clearly constitute a battery, and P's accusations against D do not constitute a defense or justification for D's act.

The facts do not indicate that D was acting in self-defense, and tion is not an excuse for a battery.

3) P v. B

a) Negligence.

P could also assert a claim vs. B based on negligence. Depending on the particular facts, P could possibly recover for his skinned knee if he could show that B failed to exercise reasonable care by moving while a passenger was alighting the bus, or by improper construction of the bus steps.

Again, P could be found to be contributorily negligent for getting on a moving bus. Or, B could argue that P knowingly and voluntary assumed the risk of entering a moving bus, which would also be a defense.

b) False Imprisonment. P could also assert a claim based on false imprisonment.

This intentional tort requires an intentional act, causing the actual confinement (overcoming of the will to leave) of P.

Although P could arguably be said to have been confined in the bus by B, such an action was not an intentional act intended to cause the confinement described by this tort.

Rather, B justifiably kept P on the bus in order to pay a fare -- P could remove himself from confinement, theoretically.

The lst amendment limitations on defamation arguably do not apply in such a case, since this action does not involve the media, only private individuals.

Defamation requires a defamatory statement, of and concerning P, publication to third persons, causing injury to P's reputation.

Slander (spoken defamation) is regarded as defamatory, when the statement is such that it

would cause P to be subject to contempt or ridicule. Calling someone a thief is thus defamatory, and is in fact slander per se because it accuses P of a crime involving moral turpitude.

There was also publication, accomplished by yelling in front of the busriders.

Since slander per se is involved, at common law damages to P were presumed without a necessity of showing actual damages.

D's defense to the charge is truth, although it appears from the facts that P was not a thief.

If constitutional limitations are extended, a showing of fault would be required in order for P to recover.

Thus, P would have to show D spoke with malice (knowing or reckless disregard of the truth) or negligently in order to recover.

The trend is to keep defamation from being a strict liability tort. Thus D may not be liable here.

Answer B to Question 7

Peter v. Jim

Negligence: Peter will sue Jim (and the restaurant) for negligence in failing to inform Peter that he had left his wallet on Jim cashier counter. Peter will assert that Jim owed him a duty, that is a legally recognized obligation to avoid unreasonable risk of harm to Peter. Furthermore, Peter will allege that since Jim owns a restaurant, he is very much like an inn keeper, who owes an even higher duty to protect it's patrons from loss and injury. Under the facts, since the injury to

Peter, (ie) the loss of his wallet could have easily been prevented by Jim, who actually knew of Peters action, the injury could have been remedied with very little effort, and was therefore an unreasonable failure to act on Jim's part. By not informing Peter of his mistake, Jim was negligent and "but for" this negligence, Peter would not have suffered any loss. Therefore, Jim was the cause in fact as well as the proximate cause of Peters injuries and will be liable for all the foreseeable losses.

Contributory Negligence: Where contributory negligence is recognized as an absolute defense to a negligence action, Jim would assert such a defense to avoid all liability. The facts indicate that Peter "carelessly" left his wallet on the counter, if such conduct by Peter falls below the standard of care, (reasonable person) which Peter must observe in his daily conduct, he is guilty of contributory negligence & will not be allowed to recover from Jim. It appears that mere "carelessness" is not tantamount to negligence & if a court construes Peters conduct this way he will recover.

PETER v. DAVID:

Trespass to Chattel: Peter will argue that David "intentionally interfered with the chattel, (wallet) of Peter's and should be liable for trespass. Since David did volitionally pick up the wallet from the counter, he will be liable for trespass, despite his ignorance of the fact that the wallet was Peters and not his own as he believe. David will be liable for all damages actually incurred by Peter, if so proved. Conversion: Peter may further allege that such a trespassory interference with his property was so serious an act of dominion & control that it constitutes a conversion which allows the plaintiff to impose a "forced sale" upon the defendant. Since only the owner of a wallet has right to possess it, and because of the very personal nature of the contents of a wallet, Peter may succeed in his conversion action against David.

Battery: When David threw the wallet at Peter on the bus, Peter was struck in the face by the wallet. Peter will allege that Davids volitional acts, caused a touching of Peters person which was both harmful (painful) as well as offensive (embarrassing), and that such conduct by David was without the consent of Peter and therefore David should be liable for battery. Most jurisdictions recognize a battery even for the slightest touching, and in this case Peter may probably recover minimal damages.

Negligence: As observed above in Peter v. Jim, Peter will allege here that David owed a duty to act reasonably in his conduct towards Peter. Since the throwing of a wallet with the apparent force with which David used in "returning" the wallet, may be seen as unreasonable on a moving & crowded bus, David may be liable to Peter for causing the wallet to fly out the open window. Since it is not improbable, looking back on the facts that such an event might occur, David was the proximate cause of Peters loss.

There don't appear to be any defenses to Peters suit against David.

PETER v. BUSCO:

Negligence: As discussed above in Peter v. Jim, Peter will allege a negligence action against Busco & will assert that the same higher duty of care is owed by Busco to Peter since Busco is a common carrier. Since Busco owes the higher duty to Peter it will be liable for any injuries which were cause by its negligence in the operation of the bus, which caused Peters injuries.

Here, Peter skinned his knee while trying to board the bus & Peter will seek to recover his damages.

Contributory Negligence: Busco will assert that Peter himself acted negligently while

trying to board a moving bus, and therefore should be barred from any action against Busco. However, it seems reasonable that Peter, who was attempting to recover his wallet with $100 in it was not acting unreasonably under these circumstances & will be able to recover.

False Imprisonment: Peter will allege that Busco intentionally confined him to a specific area & should therefore be liable for false imprisonment. Although acting intentionally, Busco was privileged to detain Peter until Peter paid his fare to Busco, therefore under these facts, Peters suit for false imprisonment will fail.

DAVID v. PETER

Defamation: David will sue Peter, alleging injury to his reputation, when Peter said to David, "Stop thief." Defamation requires (1) a false statement about the plaintiff, (2) falsity, (3) Publication, and (4) damages. Since the facts state that David mistakenly took Peter wallet, he would not be guilty of criminal larceny and the statement is therefore false. Most courts recongize that where oral defamation is made and imputes a crime of moral turpitude to the plaintiff, it will be labeled "slander per se." Under our facts, Peter's "slander per se" was made in a "loud accusatory" manner on a public bus, David may easily show therefore, that the requisite publication was made, as it is presumed that at least one other person on the bus heard & understood this accusation. Under a slander per se rule, the plaintiffs injury to his reputation is presumed, due to the nature of the words, and therefore the plaintiff David, need only plead and prove his special damages to recover from Peter.

Defense: Peter will claim that he was justified in making his accusation in view of the fact that he was attempting to regain possession of his wallet. The court may consider this fact along with all the circumstances in determining what damages David will recover.

Spring 1982
QUESTION NO. 1

A storage shed on the suburban yard of Construction Co. (Conco) caught fire on a Sunday morning. Dennis, Conco's draftsman at its downtown office, happened to be bicycling by on a personal errand. He broke into the yard office through a closed window and notified the local volunteer fire department. He next located ignition keys and moved eight pieces of heavy equipment onto an adjacent field. The heavy equipment consisted of trucks and bulldozers, which were threatened with imminent destruction, but were not damaged.

Unknown to Dennis, the adjacent field belonged to a wholesale florist, Frank. Although the field appeared to be vacant and unused, Frank had planted it with valuable tulip bulbs. Bulbs valued at $9,000 were destroyed under the weight of the heavy equipment.

After firefighters extinguished the fire, Frank asked Dennis to come to his office to discuss the damage. Dennis agreed. As soon as Dennis entered the office, Frank told Dennis, in the presence of four of Frank's employees, that Dennis would have to remain at the office until he summoned the president of Conco and the president had arrived at the office. When the president arrived an hour later, Frank told Dennis he could leave, and Dennis left.

1. What are Frank's rights against Dennis and against Conco? Discuss.

2. What are Dennis' rights against Frank? Discuss.

Answer A to Question 1

I. Frank vs. Dennis

Frank (F) may bring suit against Dennis (D) for the tort of trespass: ie: an intentional and volitional entry on to another's property depriving the possessor of the land of exclusive possession. D was not required to have a harmful motive in entering F field, in order to satisfy trespass, merely that he intended to enter the property. Here the movement of the trucks and bulldozers is sufficient to satisfy the element. The fact that F was not at the tulip field on Sunday morning is also no defense to D as F has the unconditional right to absolute possession of his land.

Since D entry caused damage to F valuable tulip bulbs F would have the choice of pursuing the tort of trespass causing severance which would more clearly compensate him for the damage to tulip crop, as opposed to the simple Tort of trespass which often entitles the plaintiff only of a recovery of nominal damages, (a vindication of F right to occupancy of the tulip field.)

D's Defenses

D would like contend that the entry was privileged due to the fact that the heavy equipment was threatened by imminent destruction by the spreading of the fire.

Courts have traditionally acknowledged the right of trespassing individuals to make unconsented entries on other's property, but have none-the-less required the "trespasser" to pay

for any damages cause pursuant to the entry. Here the tulips were valued at $9,000. Courts however have imposed limitations on recoveries sought for tortious conduct, i.e. (1) the caused the damages; (2) that the defendant could reasonably foresee the damages (3) they are of a definite and certain measurement and (4) they were not subject to mitigation. Here D clearly caused the crop damage by moving the vehicles onto the field, and the $9,000 measure is certain of which F could not have mitigated. However, the fact that valuable tulip bulbs were planted in the otherwise barren field prompts an inquiry into the forseeability aspect of the damage requirement.

Arguably D has a good argument that since he was employed as a draftsman at the down town office, not at the storage shed on the suburban yard, that he had no knowledge of the wholesale florist business that adjoined the Conoco yard. Therefore he should not be required to pay anything for the entire crop. Although courts will normally try to "make the plaintiff whole" in tort suits, D will arguably be required to pay some damages.

The recovery may be limited to the amount of a average crop of tulips as opposed to a valuable crop price of $9,000.

II. Frank vs. Conoco - Respondent Superior

Frank will attempt to sue Conoco under the theory that a employer is vicariously liable for the torts committed by an employee done while the employee was furthering the employers business, ie D's tort of trespass.

Here Conoco will likely seek to avoid liability by contending that D was not officially working for the company, as D was merely bicycling by the yard on a personal errand, rather than on official business for the firm on that Sunday morning. Therefore the position is that D was not acting to further the business of Conoco but instead was acting as a vigilant and good citizen of the community by breaking into the yard office to (1) notify the local fire department and (2) seek to locate the keys to the equipment in order to move it. Conoco will heavily rely on the fact that D was not assigned to work at the storage shed and the fact he had to break into the shed to gain entry is tantamount in showing D was not an employee. Furthermore, the fact that D had to seek to locate the keys to the equipment would also be indication of the fact that D was not acting to further C's business thereby subjecting Conoco to vicarious liability for D's trespatory entry on F's tulip field.

Based on the above fact it is likely that no vicarious liability would be imputed to Conoco, however, if the court would find vicarious liability, Conoco might seek indemnification from D for those damages.

Waiving of the Tort

F might seek in the alternative to waive the tort of trespass and sue in assumpsit on the theory that great benefit was conferred upon Conoco, as none of the eight pieces of heavy equipment were damaged by the fire. Therefore, F is entitled to the value of this benefit as measured by the prevention of loss or in the alternative the cost of the temporary use of the land. The courts would likely seek to place a fair market value of

parking space for the eight vehicles, but it would likely be less than the value of the recovery of the damage to the tulips. In either event, F would have the ultimate choice.

Lastly, F would only be able to recover actual damages and arguably no punitives as D's entry was not made in bad faith.

II. Dennis vs. Frank

False Imprisonment

Dennis (D) will likely sue F for the tort of false imprisonment of the intentional

confinement of D to the limited area of F's office from which there was no reasonable means of escape.

Here F intended to confine D to the office area as he made the announcement that he would not be released until the president of Conoco arrived.

Although D went to the office on his own volition would not preclude the tort of F. Imp. because once he arrived, he had the unconditional right to leave. Here the presence of 4 of F's employees would arguably be sufficient coercion to create the fear that if he were to attempt to leave, he might be harmed. On the other hand, F could contend no such threat was ever voiced therefore the prima facie tort is not met. D would contend that F could have reached settlement negotiations without this forcible confinement as evidenced by his immediate release, once the president arrived.

Although D was confined for 1 hour he still may recover damages as a confinement for a minute will satisfy the tort requirement.

Damages

D will seek to recover nominal damages and punitives for F bad conduct, however court has traditionally required the punitive damages bear some reasonable proportion to the actuals.

Answer B to Question 1

Frank vs. Dennis

In order to recover from Dennis, Frank must plead and prove the intentional tort of trespass to land.

The elements of this tort are an intentional act, an intent to act, a trespassory invasion of his land causation and that he was the possessor of the land.

Frank had possession of the land Dennis drove the truck on because he had planted bulbs in the field which belonged to him. Dennis acted volitionally and intentionally when he drove the equipment on the property. He intended to drive the trucks where he drove them. It is not important that he did not know who owned the land, just that he drove where he wanted.

There is actual or direct causation by Dennis because he drove the truck and caused the trespass. The moment the trucks went onto Franks field there was a trespassory invasion because any unauthorized trespass is an invasion. Frank had not authorized the trucks to come onto the land.

Because the elements of trespass have been met Dennis is liable for trespass and the damages caused by the trespass. The damages are definite in that $9,000 of bulbs were lost.

Was Dennis privileged to go onto the land? A person may be privileged to go onto the land of another to prevent a harm to life or property. When the harm affects the public the privilege is called a privilege of Public Necessity and is an absolute privilege.

This was not a public necessity because there was only the private interest of Conco that was being threatened. There is no evidence by this burning the public would be endangered.

Dennis would defend on the basis this was a Private Necessity. A private necessity privileges a person to go onto to the land of another to protect the life or property of himself or another.

Here, Dennis sees a fire and calls a volunteer fire department. He may know that because this is not a regular fire department, they may take longer to respond and the building and contents may be destroyed.

He also was aware that the equipment was in imminent peril. There was no time to wait. He acted to save Conco's property and would probably be covered by the private necessity privilege.

What is the effect of the Private Necessity Privilege? It absolute. Dennis would be liable for the damages caused.

The $9,000 destruction of the bulbs. Frank vs. Conco

The shed of Conco started on fire. There is no evidence that Conco intended or was negligent in the fire.

Frank would attempt to hold Conco liable on the grounds of Vicarious Liability of its Employee, Dennis.

An employer is liable for the intentional and negligent actions of its employees done within the scope of their employment.

Dennis act was intentional. Usually when intentional the acts are criminal and therefore out of the scope of employment which relieves the employer of liability.

Dennis was employed by Conco; however, was he within the scope of his duties? Dennis was a draftsman at a different location. He did not drive the equipment and was not responsible for its safety. He was therefore out of his scope of employment and vicarious liability would not apply.

Dennis was under no duty to rescue the equipment and when he did so he became a rescuer. There is no duty owned by a rescued person to a rescuer unless they put themselves in the peril.

Conco may have a moral obligation to Dennis but most likely it does not have a legal

duty to indemnify him.

If Conco has no duty to indemnify Dennis Frank cannot hold them responsible because his rights are derived from the vicarious liability of Dennis. Dennis vs. Frank

Dennis would try to plead and prove the elements of false imprisonment against Frank.

False imprisonment is the wrongful confinement of another. The elements are an act, intent, and confinement by the defendant of which the plaintiff has not consented.

When Frank asked Dennis to go to the office there was no evidence Dennis was not free to leave. By asking him (Dennis) to accompany Frank there was no false imprisonment.

Once inside in front of four of his employees Dennis was told that he had to remain. Dennis must show that he was not free to leave that his engress and egress was blocked. Words alone may constitute false imprisonment. When Frank acted by speaking the words that Dennis not leave, did he intend to confine him?

The facts are not clear but apparently if he felt he couldn't leave because the four employees would stop him Dennis was falsely imprisoned.

If Dennis felt he could leave at any time but stayed to see the president and work things out then he was not falsely imprisoned.

The shopkeepers privilege of restraining someone in a reasonable time and manner doesn't apply because no theft is involved and one hour would be an unreasonable detention for the privilege.

Dennis may also bring an action for Intentional Infliction of Emotional Distress.

The elements of this tort are an act by the defendant that is outrageous to the community. Would the one hour detention be outrageous? If Dennis couldn't leave for an hour because four people were guarding him that would be outrageous. The plaintiff must prove the defendant intended to inflict emotional distress. Dennis would rely on the substantially certain test. He was substantially certain to cause the injury. Frank by his actions of confinement caused Dennis emotional injuries. Dennis would not have to show physical injuries by modern law.

Fall 1982

QUESTION NO. 7

Mag, Inc. publishes a magazine and operates a laboratory for testing merchandise of its advertisers. Mag authorizes the use of a symbol that says "Mag Seal of Approval" when Mag's tests indicate the product is safe and wholesome.

Mag examined samples of Tint hair coloring produced by Tintco, Inc. Mag's tests indicated that Tint was effective and satisfactory. Mag authorized Tintco to use Mag's Seal of Approval in advertising Tint and on Tintco's labels placed on containers of Tint. Neither Tintco nor Mag was aware that when Tint is brought into direct contact with Balm, an infrequently used scalp medicine, Tint causes hair to turn purple.

Gloria, a contestant in a beauty contest, used Tint on her hair while it was still wet with Balm. As a result, Gloria's hair turned purple and she had to withdraw from the contest. She had been regarded as the favorite. To Gloria's embarrassment her hair discoloration persisted until her hair grew out.

What are Gloria's rights against: 1.

Tintco? Discuss. 2. Mag? Discuss.

ANSWER A TO

QUESTION 7 1.

Gloria vs. Tintco

A number of theories of liability are today available in tort and contract for injuries caused by the use of defective products. Among these are negligence, strict products liability, the breach of implied warranties of merchantability and fitness for a particular purpose, and, in a more far-fetched vein, battery. Here, Gloria may have actions vs. Tintco based on all of these theories, though her chance of recovering is not guaranteed under any of them.

1. Strict Products Liability

Under the theories of products liability that prevail today, a manufacturer who releases into the stream of commerce a product that is defective and the use of which creates, under the majority view, an unreasonably dangerous possibility of harm is strictly liable to the user of the product and foreseeable bystanders for injuries caused through the use. A product may be defective in design, in manufacture, or even in the absence of warnings.

Here, Tint Hair Coloring is clearly a"product". The central question is whether it is, or was, defective. The fact that one product may interact chemically with another and cause harm does not render the product per se defective in the view of most courts. Here, Tint's coloring by all accounts is perfectly effective and satisfactory when used by the vast majority of the populace who do not use Balm. Thus, I believe it is unlikely that Tintco is liable for defective manufacture or design of Tint -- in any event, we would need more facts to determine this.

However, Gloria's most promising theory would clearly appear to be based on the failure of Tintco adequately to warn of the dangerous propensities of Tint. A warning would have been easy and not costly, both factors germane to the balancing often done in products liability cases to determine manufacturers' duties.

The critical and dispositive question is whether Tintco produced a defective product in failing to warn of the dangers of direct contact with an infrequently used scalp medium. A manufacturer need not warn of every contingency associated with the use of his product, however far-fetched -- otherwise product labels would run to pages. The central question, shading here over into negligence, is whether a reasonable manufacturer would have warned of this unlikely contingency; liability is still strict, but some consideration must be given to the unlikely nature of the injury.

Still, as reasonable misuse must be anticipated, so should a manufacturer of hair coloring anticipate use of his products with other hair and scalp products.

CONCLUSION: Thus, I believe Tintco is strictly liable. [Damages Below.] 2.

Implied Warranties & Express Ones

The privity concept today has been disregarded and any consumer can sue a manufacturer for warranties running with the product. Here, Tintco has, at least arguably, expressly warranted that Tint is "satisfactory and effective" by adopting Mag's seal. Tintco has, under the UCC, clearly warranted that its product is merchantable, and this warranty, under the majority view, runs to user/consumer Gloria. At least arguably, Tintco has also warranted that its product was fit for the particular purpose of hair coloring, with Gloria "relying" by using it and Tintco being held to the standard of the requisite holder of "special skill."

For all of these warranties, the central and dispositive question is, again, whether the failure to warn of, or anticipate, adverse reactions from the interaction of Balm and Tint rendered the product Tint either:

a] unsafe and ineffective and unsatisfactory;

b] not merchantable; or

c] unfit for hair coloring.

And again, the resolution will turn whether a product is defective because, in a small number of cases, it causes adverse reactions.

CONCLUSION: Inasmuch as the use of Tint in conjunction with a hair balm seems foreseeable, I believe that there is at least a reasonable chance that these warranties have been breached.

3. Negligence

Of course, the possibility of standard negligence liability remains. The product may have been defectively designed through the failure of a reasonably prudent tint manufacturer to anticipate the possibility of adverse interaction with a hair balm. More likely, the failure to warn of the possible adverse reaction may have been negligent. Here, both inquiries will turn squarely on the foresee ability of the harm; or, to use Learned Hand's formulation, the magnitude of the harm discounted by its probability.

Here, given the infrequent use of Balm, the question's resolution isn't clear. But, as the interaction of Tint with a scalp medicine likely should have been foreseen by a reasonable tint maker, I believe Tintco's failure to warn was negligent.

4. Battery

Unlikely -- we'd need to charge Tintco with knowing with substantiated certainty that its product would cause a harmful or offensive contact. That state of mind doesn't appear on the facts.

DAMAGES: On all theories, clearly embarrassment, pain and suffering, and incidental and consequential damages are recoverable. Whether Gloria can receive something for her lost prospects caused by withdrawal from the beauty contest is less clear -- such damages may be speculative, even given her favorite's status -- and non-foreseeable. Even under strict liability, foreseeability poses some outer damage limit.

2. Gloria vs. Mag

Here, as Mag does not manufacture the "product", strict products liability is most unlikely; Mag's seal of approval does not make Mag a "vicarious manufacturer." Two legal theories do, however, appear worthy of pursuit: negligence and breach of warranty.

A. Negligence

By holding itself out as a judge of the quality of products, Mag assumes the duty of performing that judgment process in a reasonable and careful fashion. If it fails to do so, Mag will be liable, on some theory of general negligence or negligent misrepresentation, to any one foreseeably harmed by the misjudgment. The causation requirement would, however, seem to demand some reliance by the consumer on the quality representation, though that may be reasonably implied. Mag's potential liability might, under general negligence or negligent misrepresentation, be staggering, and courts might seek to limit it somehow -- but then, no one asked Mag to get in the business of product rating, and it does receive a pecuniary benefit from the process in the form of more advertising.

Mag's liability will turn on whether a reasonably prudent product tester would have foreseen that a hair tint might not be safe or wholesome when used in conjunction with a scalp balm. For the reasons noted above under Tintco (3), I believe Mag may well have been negligent.

Finally, some courts have imposed equitable limits on the scope of liability for negligent misrepresentation to avoid staggering liability on one who misrepresents to the public. I do not believe that such limits would defeat Gloria's recovery here however, in light of the comparatively small number of people affected by the negligence.

B. Warranty Theories

Mag has clearly warranted that Tint is safe and wholesome. Usually, however, some contractual nexus, however distant, is needed between the warrantor and warrantee to impose warranty liability. Thus, a manufacturer will be held in warranty privity with a consumer through the chain of distribution. Though a patent fiction, this does impose some limit on liability.

Here, Mag is clearly not in that chain, and some courts might deny warranty recovery for want of privity. Two theories, however, may still hold Mag to its warranties:

1. Gloria's detrimental reliance binds Mag to honor its warranties; and

2. The fact that Mag tests only its advertiser's products may establish a sufficient connection between the consumer who finances that advertising and the product warrantor.

A more liberal court might hold Mag in warranty liability to Gloria on either basis.

DAMAGES: Same as above for Tintco by way of foreseeability, speculation matters.

CONCLUSION: Both Tintco and Mag are likely liable to Gloria in damages, although the liability of each is arguable.

ANSWER B TO QUESTION 7

Gloria v. Tintco

Gloria has several potential choices for a products liability case v. Tintco.

Strict liability in tort for defective products is available when the defective product is in an unreasonably dangerous condition, beyond the danger a reasonable consumer would expect. This standard has been weakened in several jurisdictions. First, many states, including California, feel the burden of proving a "defective condition unreasonably dangerous" is too great on plaintiff and so would require only that Gloria (G) prove a defective product caused damages; thus, burden on Tintco (T) to prove reasonableness. Other jurisdictions have focused on the consumer expectation element and will not permit a company to escape liability just because it warns consumers the product may be dangerous; there must be no more feasible alternative for making the product safe. In the facts given, there is no indication as to whether T tried to exculpate itself with warnings, etc., but even if it did, under the defective and causing damage or the feasible alternative approaches, the burden would be on T to justify the defect.

The mere fact that the reaction is only produced by the mixture of a rare scalp medicine will not make the defect reasonable if T could foresee a possibility that the two products would be mixed. This is especially true in light of the fact that it does not appear from facts that it would have been impossible to remedy the defect. Since G was a direct user of the dye, there is no problem with her standing to assert the defective product claim and, at any rate, the "privity" requirements have been abandoned in most states to the point where even bystanders can recover under strict liability for defective products.

Even if G can establish T's liability, she must have damages. The theory of tort damages is to put the plaintiff in as good a position as she was in prior to the tort. The actual damages must be foreseeable however, and G will have a hard time establishing that her beauty contest was foreseeable. Further, the damages must be reasonably certain and since there is no way to predict if G would have won the contest or even if she'd get any benefits from it, it is unlikely that she can get damages representing the consequences of having to drop out of the contest. She can, however, recover general damages for her pain and suffering caused by the dye and special damages for any medical costs or hairstyling expenses incurred in attempting to cure the problem. Punitive damages are unlikely as there is no indication that the manufacturer acted willfully; there is no need to establish a punishment since T was not aware they were doing wrong.

Gloria could also base her action v. Tintco on negligence. The duty owed to G would be to not put out defective products; i.e., to use reasonable care in assuring safety of the product. Gloria would be a foreseeable plaintiff under either the Andrew's or Cardozo ("zone of danger") tests since there was not only a probability someone could be hurt by a defective hair dye (upon which Andrews test would make the whole world proper plaintiffs) but it is the danger to the

user that is particularly apparent (and thus within "zone of danger" to satisfy Cardozo . The issue of damages is discussed supra. As for causation, the dye was clearly the actual cause. The damage was the result of a combination of two substances so there are multiple factors, any single one of which would not have produced the effect. Therefore, the appropriate test of actual cause is the "substantial factor" test whereby dye is held the actual cause if it was a substantial factor in producing the damage. Since it combined with Balm was the only way to produce the unwanted results, this test seems met. As for establishing the proximate or legal cause, it was a direct cause and so generally held to be sufficient. T might argue that G's use of Balm was a superceding cause or intervening in some way so as to "break" the causal chain, but it is foreseeable that users of T's products might also be users of scalp medicine so no break.

The real problem for G in a negligence action is establishing that T breached its duty of care. A breach is generally a failure to act reasonably, obviously. The ostensible breach here involved is that T failed to discover that the dye would, when mixed with Balm, cause such a reaction. The final analysis depends on balancing the potential negative effects against the methods for preventing this harm. In this case, there is evidence of testing of the product, at least by the independent Mag testers. However, this testing could have been negligent or unreasonably inadequate because the product is intended to be used on the scalp and surrounding area so it is foreseeable

that it may contact other materials in the same general vicinity. Thus, it would seem reasonable to test the effects of combining it with various scalp medicines, as well as hair types. Just how much such testing was done will dictate whether there was a breach of the duty. No manufacturer is under an absolute duty to test -- not in a negligence action. The tests must merely have been what a reasonable person in similar situation would make.

G could also have her products liability claim v. Tintco on a breach of implied warranty of fitness for particular purpose, imposed in most jurisdictions by the UCC. Since the dye was supposed to be effective in tinting the hair, not totally discoloring, it would be unfit for the particular purpose for which it was sold. If G was purchaser of Tint then she would be in required privity and could bring action for similar damages as mentioned supra. Even if G was not the purchaser, the Code has broadened the privity requirement so that family, visitors, and customers would certainly be within the required privity. Since that would be a contract based action, G might even be able to recover something for her loss of the chance at the beauty pageant because contracts actions assess foreseeability under the Hadley v. Baxendale standard and if Tintco knew or had reason to know its product would be used by aspiring beauty pageant contestants, those losses would be foreseeable as well. However, even contract damages must have the requisite certainty and G was not guaranteed anything out of the pageant, so such damages are still too speculative to be recovered.

Gloria v. Mag

Since Mag was neither the producer nor manufacturer of the tint, they are not liable for the defective product itself. The only possible action against Mag seems to be one of misrepresentation, specifically the tort of negligent misrepresentation. The prima facie case of negligent misrepresentation is a negligent statement made to another that both actually and justifiably induces that person to act and to their detriment (causes damages).

As to whether there was a negligently made statement, analysis is similar to that used in establishing Tintco's negligence. M was supposed to test the product and so have to assess whether such tests, if conducted non-negligently -- as if performed by reasonable persons intended to test (similar circumstances) -- would have disclosed the defect. If so, then M's action in stating the product was safe and wholesome would be negligent.

As for inducement, G must show she actually and reasonably relied on M's representations. The actual reliance may be inferred from the use of the "seal" of approval in advertising or packaging, etc., and would have to consider prominence of the seal vis-a-vis whether G would even see and recognize that M approved product. As for reasonable reliance, that would be dependent on whether M had a favorable or neutral reputation for testing and recommending products. If M had a reputation for approving only unhealthy, bad products, such that a reasonable person would not rely on their recommendation to use Tint, then no justifiable reliance. If, however, M has good reputation so a reasonable person would rely on it, then probably justifiable reliance. Damages the same as mentioned against Tintco. The recovery against the two would likely be joint and several with M permitted to get indemnity from T if T was found much more negligent than M.

Spring 1983

QUESTION 3.

An automobile, owned by Ace Auto Rentals (Ace) and rented to and driven by Bruce, collided with an automobile owned and driven by Chuck when Chuck entered a main highway without looking to see if it was safe. Bruce would have been able to avoid the collision except that he was driving at a recklessly high speed. Unknown to Ace, Bruce had no driver's license.

Chuck's car caught fire. Dave, a passenger who had met Chuck through a want ad and was sharing expenses and driving responsibilities while on a cross country trip, escaped without injury. Chuck was trapped in the burning car. Peter, a bystander, tried to pull Chuck out of the car. Peter was severely burned. Chuck died of his burns.

What are Peter's rights, if any, against Ace, Dave, and Chuck's estate? Discuss.

ANSWER A TO QUESTION 3

I. Peter v. Chuck's estate

Most jurisdictions have survival statutes which allow plaintiffs to bring against the estate of the would-be defendant any claims that he could have brought against defendant had defendant lived. These statutes also allow the same defenses to be asserted by defendant's estate as could have been asserted by defendant. Therefore, Peter's rights against Chuck's estate will be the same as Peter's rights against Chuck, had he lived.

Peter will have an action for negligence against Chuck.

Because he was a bystander on the highway, Peter was a foreseeable plaintiff to whom Chucked owed a duty of care. Chuck breached this duty by driving negligently, i.e., he did not look to see if it was safe before entering the highway.

Chuck's negligence was an actual cause of Peter's injury. But for Chuck's negligence, the accident would not have occurred. And but for the accident, Peter would not have tried to rescue Chuck and gotten burned.

There is more of an issue of whether Chuck's negligence is a proximate or legal cause of Peter's injuries. Peter's attempted rescue was a dependent intervening cause, i.e., it intervened between Chuck's negligence and Peter's injury, but it would not have happened but for Chuck's negligence. Thus, Peter's action will break the causal chain only if it was unforeseeable. It is not unforeseeable that a bystander would try to rescue someone in a burning car. Thus, although the manner in which the harm came about is not the usual way in which bystanders are injured (they are usually hit by the car), Peter's injury was foreseeable and Chuck's negligence was a proximate cause.

(The fact that Bruce was also negligent and that his negligence was also an actual and proximate cause (see below) will not help Chuck. Where two tortfeasors cause an injury that would not have occurred had either one of them not been negligent, they will both be held responsible as "substantial" causes. "But for" causation is not strictly required in such cases.)

Chuck's negligence caused Peter's injury, and therefore Peter can establish damages.

Chuck could possibly raise defenses. The only plausible defense against Peter would be contributory negligence or assumption of the risk, i.e., that Peter, conscious of the risk, took an unreasonable chance in attempting to rescue Chuck. However, rescue attempts are to be encouraged as a matter of public policy and are not generally deemed to be contributorily negligent, primarily because the risk is reasonable when undertaken to save a human life.

Therefore, Chuck will have no valid defense against Peter. Moreover, even if Peter were contributorily negligent, that would only serve to reduce his damage award in comparative negligence jurisdictions, unless it were found he was more than 50% responsible, in which case it would bar his actions except in a pure comparative negligence jurisdiction.

Chuck might claim that Bruce or even Ace or Dave was contributorily negligent, but that would have no bearing on Peter's claim. Similarly, Chuck's allegation that Bruce had the last clear chance to avoid the accident would be to no avail against Peter.

II. Peter v. Ace

Peter might possibly have a cause of action against Ace under two different theories.

(1) Ace might be vicariously liable for Bruce's conduct in a jurisdiction with a permissive use statute. However, if Bruce's conduct was reckless and not merely negligent (we are told he was driving at a "recklessly high speed"), the permissive use statute might not apply, depending on the jurisdiction.

Bruce's negligence would be established in the same manner as Ace's (see above), with two additional considerations:

(a) Bruce did not try to save Peter. Arguably, Bruce had a duty to help Peter, because Bruce had been responsible in placing Peter in peril. However, it is questionable whether Bruce was obligated to follow Peter into a burning car, and in any event, as to Ace, the causation may be too remote, i.e., was it foreseeable that this entire scenario would happen and then that Bruce would fail to help Peter? I think proximate cause could not be established here.

(b) Bruce did not have a driver's license. Although this is a violation of a statute, in order for it to establish Bruce's duty and breach thereof (i.e., negligence per se), Peter must be in the class of people protected by the statute and the purpose of the statute must be to prevent the type of injury that happened to Peter. These requirements do not appear to be satisfied. A driver's license seems to be more of an administrative requirement. It does not assure that the licensee is a safe driver.

(2) The other theory under which Peter could pursue Ace is that Ace was negligent in renting a truck to Bruce without a driver's license. Peter would have to establish that Ace had a duty to inquire whether Bruce had a license and not to rent to him if he did not. This can probably be established as the standard of care, since it is standard practice for car and truck rental companies to check driver's licenses. However, the same considerations apply here. If the license is purely for administrative purposes, Ace's failure to check it would not be negligence as to Peter.

If, however, Ace should have checked it to make sure Bruce was a safe driver, then Ace could be held to have breached a duty and thereby contributed to Peter's injuries.

The issue again would be proximate cause, and the same considerations would apply, except that with respect to Ace the causation seems even more remote. Is it reasonable to expect Ace to foresee that if it does not check Bruce's license, Bruce will drive at a reckless speed, etc.? I think not. Even if Ace had checked Bruce's license, the same thing could have happened.

III. Peter v. Dave

Peter would have three possible theories against Dave:

(A) Dave was negligent in failing to check if the highway was clear before Chuck entered it. Dave was sharing driving responsibilities with Chuck. Peter would argue that Dave should have been watching the road and should have warned Chuck not to enter. If so, then the same discussion of Chuck's negligence, above, would apply here, and Dave would be liable.

However, it is unreasonable to assume that when two people share driving responsibilities in a cross-country trip, both will watch the road all the time, even when they are not driving. Peter would have a better case if Chuck had been speeding, since Dave would more likely be charged with a duty to warn Chuck not to speed, and Dave could notice more easily that Chuck was speeding than that Dave was about to enter a road without checking that it was clear.

(B) Dave was a joint venturer with Chuck, having agreed to share driving and expenses, and thus he is vicariously liable for Chuck's negligence. This argument is weak because vicarious liability for a joint venture is usually not imposed in civil cases unless there is a true,

economic joint venture, e.g., joint venturers in a hotel project might be held liable for the negligence of a part owner-engineer in constructing a faulty walkway.

(C) Finally, Peter could argue that, having been at least partially responsible for his peril, Dave was under a duty to rescue him. The same considerations apply as discussed above with respect to Bruce.

ANSWER B TO QUESTION 3

Peter v. Ace, Dave, and Chuck's estate

All of these claims should first be analyzed by pointing out that the law recognizes that danger invites rescue. Thus, Peter, as a rescuer, is deemed to be a foreseeable plaintiff, and any injuries to him caused by his rescue attempt will be deemed to have been proximately caused by his rescue attempt.

Therefore, I will discuss the liability of Ace, Dave and Chuck's estate v° a vis the accident itself.

Where I conclude that a defendant has been negligent and that such negligence has proximately caused the accident, Peter will be able to recover against that defendant.

I will dismiss now any claim of contributory negligence or assumption of the risk. Due to the policy of encouraging rescue attempts, the court will not find contributory negligence where a plaintiff is forced to make an emergency decision concerning saving the life of a fellow human being. Furthermore, Peter did not "assume the risk" because he did not voluntarily expose himself to such danger, but only reacted to the emergency before him.

In those jurisdictions applying principles of comparative negligence, the result would be the same--no contributory negligence whatsoever.

Liability of Ace

There is no evidence of any mechanical failure upon which to hold Ace strictly liable. Ace's only liability is possible negligence in renting to Bruce, who has no driver's license.

Ace, as an automobile renter, has a duty of care owed to all those foreseeably endangered by its conduct. As discussed above, Peter is a proper plaintiff.

The standard of care is crucial in deciding Ace's liability. Should a car rental outfit be required to check for driver's licenses before renting a car?

Certainly a reasonable car rental agency would make absolutely sure that its customers are properly licensed to drive before entrusting such a dangerous instrumentality. It is true that most adults have driver's licenses, but Ace should check in all cases.

Furthermore, the facts don't describe Bruce. If Bruce was young -- below the driver's age minimum -- Ace's conduct in not checking for a license could be considered "malicious" or "wantonly reckless," thus justifying punitive damages.

Did Ace's negligence proximately cause the accident?

Ace's negligence was in renting to Bruce without a license. If Ace had checked for a license, the car would not have been rented and the accident would not have happened. Thus Ace's negligence was the cause-in-fact.

However, two intervening acts occurred after Ace's negligence but before the accident.

One such act was Bruce's recklessness. This will not cut off Ace's liability because it was the possibility of such recklessness (or negligence) which made Ace's conduct negligent in the first place.

The second intervening act was Chuck's negligence. This will not cut off Ace's liability either because negligence of Chuck's type is always foreseeable. People often don't look where they are going.

It should be noted that Bruce's not having a license did not, of course, by itself, cause the accident. However, liability will be imposed upon Ace because it has a duty to try to weed-out reckless customers. Perhaps Bruce has a long record of reckless driving and that is the reason he doesn't have a license.

Liability of Dave

The only theory under which Dave could be liable is vicarious liability under the doctrine of joint enterprise. Under such a theory, a "joint enterpriser" is liable for the negligent acts of his "co-joint enterpriser" which occurred during and within the scope of the enterprise.

The main problem with Peter's claim is whether such a trip is an enterprise. Normally a long trip and sharing expenses, while done together for a common purpose, is not a sufficient enough undertaking to be considered a joint enterprise. However, they are not friends, but more like business partners because Dave found him through a want ad, and they are sharing driving responsibilities.

Thus I would consider this to be a joint enterprise and hold Dave liable.

Liability of Chuck's estate

Chuck's estate is liable if Chuck would have been liable if he were still alive, because a tort cause of action survives the death of either the plaintiff or the defendant.

Chuck drove into the highway without looking to see if it were safe. This is obviously negligent.

However, Bruce was not only negligent, but he was reckless. Also, he could have avoided the accident. Thus, although Chuck was negligent, Bruce may have been a superceding cause -- but as discussed above with respect to Ace -- wasn't because he was foreseeable.

July 1984

QUESTION 6

Abel and Baker were working on a scaffold lawfully erected over a public sidewalk. Abel, contrary to an express rule of his employer, was not wearing a hard hat.

While trying to park her automobile near one of the supports of the scaffold, Diana

maneuvered it into such a position that she knew there was a risk of knocking the scaffold down if she backed without someone to guide her. She appealed for help to Sam, a stranger who was passing by. Sam just laughed. Angered, Diana proceeded to back her automobile without assistance and knocked a support out from under the scaffold, causing Abel and Baker to fall.

Abel severely fractured his skull and was taken unconscious to a hospital. If he had been wearing his hard hat, he would have suffered only a slight concussion with minimal disability.

Baker sustained a fracture of a vertebra, but he was able to walk and felt only slight pain. The fracture could have been easily diagnosed by x-ray and a medical doctor of average competence could have successfully treated it by immobilization. Instead of visiting a physician, Baker worked the rest of the day. While driving his car home later that day, Baker stopped at an intersection and his car was struck from the rear by a car driven by Ed. The collision caused only slight damage to Baker's car, but it was sufficiently severe to aggravate the fracture in Baker's back, resulting in paralysis.

Diana and Sam settled Baker's claims against them and received general releases from him. Abel sued Diana and Sam. Baker sued Ed. Assume that Diana, Sam and Ed raise all appropriate defenses.

1. What rights, if any, does Abel have against Diana? Sam? Discuss. 2. What rights, if any, does Baker have against Ed? Discuss.

ANSWER A TO QUESTION 6

I. Abel v. Diana

To establish a prima facie case of battery, Abel must show Diana acted in a manner that actually and proximately caused, and intentionally caused, a harmful or offensive contact with Abel's person.

A. Intent

The intent necessary for battery is established if Diana acted either with the goal of causing a harmful or offensive contact to Abel's person or with the knowledge of the substantial certainty her conduct would cause such a result. Clearly this wasn't Diana's goal; the facts say she did know of the risk of knocking down the scaffolding. It is doubtful this risk was a "substantial certainty," and so there is no intent here and no battery. Even then, it is not clear she knew someone was up on the scaffolding.

B . Causation

Certainly Diana was the actual cause of Abel's injuries; but for her act, he would not have been injured.

There is also little doubt she was the proximate cause. Her action directly caused Abel to be injured without the need for any supervening outside force, and the manner was fully foreseeable. While the extent of injuries may not have been foreseeable and may in part be due to Abel's own conduct, that is not relevant to the prima facie cause of battery.

C. Harmful or Offensive Contact to Abel's Person

Contact to anything connected with Abel's body is sufficient (here the scaffolding) . And certainly the contact was harmful.

It is unfortunate for Abel he can't establish intent. If he had, battery would have meant 1) Abel's own negligence (see below) would not be a defense, and 2) punitive damages would clearly be available. So, Abel must turn to a cause of action in negligence.

The prima facie case of negligence requires Abel to show 1) Diana owed a duty of care to Abel, 2) Diana breached this duty, and 3) the breach caused damages.

Diana clearly owed a duty of care to Abel. Abel is a foreseeable plaintiff under both the Andrews (Diana breached a duty to the owner of the scaffolding at the very least; breach of a duty to anyone renders Diana liable to all injured thereby) , and the Cardozo view (certainly workers on the scaffolding were in the foreseeable zone of danger of her negligence backing up near the scaffolding). Diana owed a duty to exercise the same care as a reasonable person of average intelligence, experience and knowledge, and of the same physical characteristics as Diana, would have under the circumstances.

Diana also clearly breached this duty. A reasonable person would not back up his/her car without assistance when he/she knows there is a risk of knocking a scaffolding down without such assistance. In fact, given her knowledge of the risk and the ease of obviating it (seeking assistance from another passerby or just parking elsewhere) and the magnitude of the risk (scaffolding usually has workers on it and knocking it down will injure them), her conduct probably rose to the level of recklessness.

Clearly Diana caused Abel to suffer damage, as discussed in connection with battery above.

Diana will attempt to raise the negligence of Abel in not wearing a hardhat as a defense to Abel's action. First, there is the question whether this is negligence. While Abel's act was in violation of employee safety rules, I don't believe that, unlike a statute, they are more than mere evidence of
negligence when they are violated (safety statutes designed to protect a party against the very type of injury the party suffered generally establish negligence per se unless it would have been more dangerous or impossible to conform to them). Assuming it is mere evidence (or even if it isn't), there is some question whether the reason to wear hardhats is to protect one from falling on one's head; much more likely, they are designed to protect workers from things falling on their heads. If I am correct about this, then the type of injury Abel received from not wearing his hardhat (i.e., knocked off a scaffolding and falling on his head) is too unforeseeable so that, while an actual cause of his injuries beyond a mild concussion, it was not a proximate cause and so can't be raised by Diana as a defense. (If I am wrong and violating employer safety rules is negligence per se, Abel still wins because the rifle, is not designed to protect against the type of injury he suffered and so isn't negligence per se).

But, assuming that hardhats are in part to protect against falls, Abel - clearly did not act as a reasonable person in not wearing his. In a contributory negligence jurisdiction, this would completely bar his recovery unless I am correct that Diana was reckless. If she was reckless, contributory negligence is no defense.

If Abel is in a comparative negligence jurisdiction, his damages will be reduced by the percentage of fault attributable to him in the case. (I am sure he was less at fault than Diana; if he wasn't, he would recover nothing unless he was in a pure comparative negligence state unless he would still get compensated for the percentage Diana was at fault.)

If I am correct Diana was reckless, Abel can also recover punitive damages.

II. Abel v. Sam

Sam failed to act. Normally, one has no duty to act to help others (and so can't be guilty of negligence for not acting). Hence, Sam owed no duty to Abel, nor even to Diana (breach of which would support Abel's recovery if [Cardozo] he was in the foreseeable zone of danger, which he was, or in any event [Andrews]) . As Sam was not responsible for either Diana being unable to park her car without risk to it and others, or for Abel being on top of a scaffold which Diana might hit, he owed no duty to act. Nor did Sam start to act and so put Abel or Diana in more danger, or preclude others from helping. There was just no exception to the general rule that one need not act and so Sam is not liable.

III. Baker v. Ed

It appears obvious from a rear end collision at an intersection, Ed was guilty of negligence. He has two main defenses to Baker's case.

First, he will allege that Baker was negligent in not seeking a doctor's attention after his first injury and that this negligence was a cause of his paralysis. I think it was negligent not to see a doctor, and the same rules about the effect of negligence by the plaintiff as discussed with Abel apply, depending whether we are in a contributory negligence, comparative negligence, or pure comparative negligence jurisdiction.

Ed may also argue that he is jointly and severally liable with Diana for Baker's injuries. This will probably fail because it was too unforeseeable that Diana's act would cause paralysis to Baker the way it happened (i.e., by negligent failure to get treatment by Baker and negligent

collision by Ed). If so, Diana is not jointly and severally liable for the aggravated injury.

But, Ed might show Diana is jointly and severally liable because her negligence created a clear and foreseeable risk of paralysis to Baker, and the fact it only occurred through a bizarre means of other's negligence won't relieve her.

If Diana is jointly and severally liable, then Ed will say the release to her releases Ed. A modern trend court won't accept this argument, but traditionally it worked. In any event, Ed could then seek contribution from Diana pro rata, or perhaps even indemnity if she was clearly more at fault. Some states would divide up the loss by percentage negligence of Diana and Ed. But, Baker could collect in full from either Diana or Ed it they were jointly and severally liable.

Note: If Diana is not jointly and severally liable and Baker was not negligent in not getting medical attention, Ed is liable for full paralysis because he must take plaintiff as he came under eggshell skull doctrine.

ANSWER B TO QUESTION 6

Abel v. Diana

Abel will have a negligence cause of action against Diana. Negligence is based upon a finding of a duty to act as a reasonable person would under similar circumstances and a breach of that duty which is the factual and proximate cause of damages to another.

Diana owed a duty to drive her car in a reasonable manner so that no harm would occur to any foreseeable victims. A duty can be found here to have existed because Diana was driving on the public street and knowingly attempted to park, creating a foreseeable risk to Abel and Baker.

Diana breached this duty by acting unreasonably in the face of a known risk. She knew there was a risk of knocking over the scaffolding and it would appear reasonably foreseeable that such a temporary construction might be holding workmen. A reasonable person, armed with knowledge that backing up without assistance created a risk of knocking down the scaffold, would have either waited for help or parked somewhere else. It was not reasonable to proceed to park and ignore the risk of harm such actions were thereby creating.

Clearly "but for" Diana's negligent driving, the scaffold would not have fallen and Abel and Baker would not have been hurt. It was also not an extraordinary result or something which could not be anticipated by Diana if she had been acting reasonably. Presumably this occurred

during the day
and workmen on such scaffolds are foreseeable because that is exactly what the scaffold was designed to do--hold workers needing to reach heights to construct things.

Abel's damages are clearly present as he severely fractured his skull and required hospitalization, thereby incurring medical expenses, possible lost wages for time off, and pain and suffering.

Thus, Diana owed a duty to Abel and Baker, who were foreseeable victims of her decision to drive into the spot with knowledge of the risk involved. Abel was injured as a result of the acts of Diana and suffered damages.

Diana, however, can assert a defense of contributory negligence against Abel based upon Abel's failure to wear his hardhat. Company rules required such hats and these rules will be evidence of Abel's duty to act reasonably by wearing a hardhat. Abel breached that duty by not wearing the hat and, if he had a hat, his injuries would have been much less severe. The lack of a hat was thus a cause of the injury to Abel.

Contributory negligence is basically viewed as ordinary negligence is, except the actions of the victim, not the tortfeasor, are looked at. Here, as stated above, it appears that Abel was at least partially to blame for the severity of his injuries. In contributory negligence jurisdictions this would act as a *complete* bar to Abel's claim.

More modern jurisdictions, however, have adopted a comparative negligence scheme whereby the victim can still collect for negligence even if the victim herself was negligent. If the scheme is a pure comparative negligence one, the victim can always collect something if the other person was negligent, while some states only allow recovery if the victim was less than 51% at fault. A jury would generally make this determination and here Diana would probably not be liable for the damage in excess of that which would have occurred had Abel been wearing a hat.

Abel v. Sam

Abel must also try to show that Sam was negligent in order to recover. This creates a problem because generally a stranger has no duty to aid or rescue another person. Duty may arise from either: 1) a contractual relationship (e.g., nurse/patient) , 2) statute, 3) familial parent/child situations (limited) , 4) causing the victim's plight, or 5) undertaking a rescue and abandoning, thereby leaving the victim in a worse position.

None of these situations are present here since Sam was merely a passerby who was a stranger to both Diana and Abel. Even though Sam showed a certain degree of anti-social behavior, he had no legal duty to help Diana park and no duty to Abel to prevent Diana from backing into the scaffolding.

Abel could not, therefore, succeed in a claim against Sam for negligence because Sam had no duty to act.

Abel might also try to bring an action for battery against Diana. Battery is an intentional harmful or offensive contact with another. Even though Diana did not specifically intend to harm Abel, it could be that she was
substantially certain that such a harm would occur since she knew hitting the scaffolding was at risk of being knocked down. The problem here would be in showing that Diana knew or was

substantially certain that Abel was on the scaffold, This is probably not true but her actions were at least reckless since she knowingly and voluntarily acted in the face of a substantial, and unreasonable danger.

Baker v. Ed

Baker would bring an action for negligence against Ed. This requires duty, breach, causation and damages.

Ed was under a duty to drive his car in a reasonable manner so that no harm was caused to another. This duty comes from the act of driving on a public street because people in other cars and pedestrians are foreseeable.

Ed's driving into the back of Baker's car was probably negligent since it is not a reasonable way to control one's car. The "reasonable person" would have been alert enough and stopped behind Baker's car a safe enough distance away so as not to hit the car in front. While we don't know what Ed did, the doctrine of res ipsa loquitur will apply because, but for negligence, Ed's car would not have hit Baker's car. Moreover, Ed's car was in Ed's exclusive control, thus the act of hitting Baker's car can be presumed negligent because "the thing speaks for itself." This is essentially circumstantial evidence of Ed's negligence (i.e., that a car striking another from behind is driven in a negligent manner).

Ed's negligence was the factual cause of the injury to Baker because but for his car hitting Baker's, Baker would not have been injured. Ed will most likely defend on the basis of lack of proximate cause because Baker was already injured by Diana's negligence. However, in torts there is a maxim that "you take your victim as you find him." This means that even though Baker was in an existing state of being injured, this was part of the "set scene" and Ed cannot be held any less liable because Baker happened to be more vulnerable to harm than an "ordinary" person would be. Thus, the aggravation of Baker's injuries were caused by Ed and Ed could be liable for the entire harm, including paralysis.

Damages are clearly present since it was Ed's negligence that caused Baker to be paralyzed and this condition entails medical expenses, pain and suffering, lost wages, etc.

Ed will most likely bring up a "defense" of contributory negligence on Baker's part for failing to seek proper medical attention. This could be also asserted as a lack of proximate cause because Baker should not have been driving in the injured state, but it is more appropriately raised as a contributory negligence *(complete* bar) defense.

The issue is whether a reasonable person in Baker's situation would have continued working with a fractured vertebra. Baker did not lose mobility as he was "able to walk" and "felt only slight pain." These facts are evidence that perhaps he was reasonable in continuing to work the rest of the day and drive home, since he was unaware of the extent of his injuries.

However, on the other hand, it might have been reasonable to at least check with a doctor for x-rays since the fall must have been from a fairly high distance, given the injuries sustained by Abel and the injury to Baker (even though he may not have been hurting) .

Since Baker cannot be presumed to have medical expertise and felt fairly well--at least well enough to keep working and drive home--it is not likely that his actions would be deemed negligent.

It is possible that in a comparative negligence jurisdiction some negligence would be found

because of Baker's failure to seek appropriate medical attention. This is more likely in these comparative jurisdictions because there is no complete bar of recovery, which in this case would be unfair to Baker given the extent of his injuries and questionable negligence on his part.

Ed cannot claim that he was not the cause of Baker's harm because Diana was, because there can be more than one cause of the injury to Baker.

Ed would thus be found negligent and would be responsible for Baker's harm. Ed might try to seek contribution from Diana if a statute exists in this jurisdiction, since Diana was a contributing factor to Baker's injury. It is not clear whether this would be appropriate here, however, since Ed and Diana were not technically joint tortfeasors and were not jointly and severally liable because they acted independent of one another and Baker's harm was incurred in two separate transactions. Of course, contribution is not appropriate since Baker signed a general release which effectively alleviated Diana from liability for Baker's injuries.

February 1985
QUESTION 1

White, a Marine Corps officer, was convicted of murder in 1946 in a highly publicized trial. The only evidence against him at the trial was the testimony of two former Marines that Japanese prisoners of war had been killed while in the custody of troops commanded by White during the battle for control of Guadalcanal. In 1954, one of these witnesses who was then dying of cancer confessed that he and the second witness had lied at the trial of White in order to avoid punishment for their own misconduct. When investigation confirmed the truth of the confession, White received a pardon, was released from prison, and entered a religious order where he lived in seclusion under vows of silence and poverty.

Late in 1984 White developed a serious illness. He reluctantly left the order and entered a hospital for treatment.

News, a daily newspaper in the city in which the hospital is located, has prepared a feature article that fully and truthfully recounts the trial, imprisonment, and the events leading to the pardon of White. The author and editors have relied solely on information available in public records. News has notified White that it intends to publish the article. White objects to the prospect of unwelcome publicity. White and News have been warned by White's doctors that the emotional stress White may suffer if the story is published will impede his recovery.

1. If the story is published, on what theory or theories might White base an action for damages against News? Discuss.

2. If White seeks an injunction to prohibit publication of the proposed story, what defense

or defenses should News offer, and how should the court rule on them? Discuss.

ANSWER A TO QUESTION 1

1. White's best theory would be that the story constitutes an invasion of privacy. There are four separate causes of action that are assumed under this rubric: 1) "false light" privacy, where facts that may be true are presented in such a manner as to be misleading; 2) "true" privacy, in which a person's repose is impaired by prying eyes, such as by an eavesdropper or a person rummaging through one's private effects; 3) "right of publicity," which involves the misappropriation of a person's name or face for commercial purposes; and 4) public revelation of private facts.

There is no question of false light privacy here, as we are told that the article fully and truthfully recounts the events. There is also no question of "true" privacy here, because the News relied solely on information available in public records. White might argue that he has been the victim of commercial misappropriation in that the News is publishing the story for commercial gain, but he would lose. If it were otherwise, any story appearing in a newspaper would constitute such a cause of action. The general rule distinguishes between a story in a newspaper, for example, and an advertisement.

If White has any hope of prevailing on a privacy claim, it will be on the theory that the News has publicly revealed private facts about him. In order to succeed, he would have to show that a reasonable person of ordinary sensibilities would object to the revelation. Thus, the fact that he objects to the story and finds the prospect of the publicity unwelcome is not sufficient to make out a claim for relief.

Had the story appeared shortly after the events in question, White would have no hope at all, for under the First Amendment, "newsworthiness" is an absolute defense to a "private facts"

cause of action. What makes this case difficult is the fact that three decades have passed since the occurrence of the events in question. Courts have recognized that facts that were once public may, over time, acquire the status of "private facts." Analogizing to principles developed in the law of defamation, courts have been particularly protective of those who did not voluntarily thrust themselves into the limelight. In this case, it is no doubt the case that White was an unwilling participant in the murder trial.

On the other hand, where information can be found in public records, a plaintiff would have a heavier burden of demonstrating that the story was not "newsworthy" and that the facts revealed were actually private. This is probably especially so in light of the fact that the conduct involved allegations of misfeasance by an agent of the government.

In determining whether White would succeed, it would make some difference that White has lived in seclusion as a monk, as that demonstrates that his activities are no longer of public concern.

On balance, I doubt that White could prevail. Although the story does not involve fast-breaking news, it does involve the history of World War II and is derived wholly from public sources.

White may also bring an action for intentional infliction of emotional distress. In order to make out such a claim, the plaintiff must demonstrate that the defendant acted for the purpose of causing such distress. Although a defendant is not ordinarily responsible for distress suffered by a peculiarly sensitive plaintiff, he is responsible if he knew that the plaintiff was unusually sensitive. In this case, the News has been warned that the story will impede White's recovery.

There is nothing in the fact pattern to suggest that News intends to cause emotional distress to White. Although it is acting with reason to believe that the story will cause such harm, that is not sufficient if News is acting in pursuit of its legitimate objectives through legitimate means. Again, this would come back to the question whether the story is newsworthy. If any subject of a news story could successfully bring an action for intentional infliction of emotional distress merely because the story offended, the chilling effect on the press would no doubt be significant.

Because a claim for intentional infliction requires the additional element of intent to harm, it would be even more difficult to succeed on this theory than on the privacy theory.

Plaintiff would have no cause of action for libel since the story is true and because it is unlikely that the story, taken as a whole, is defamatory in light of the fact that it shows that White was exonerated.

2. If White seeks an injunction, the News would respond that an injunction would constitute a prior restraint on the exercise of First Amendment freedoms. It would raise the objections already referred to in section 1, relating to the merits, and then point out that regardless of whether it appears that plaintiff has a substantial likelihood of prevailing on the merits, an injunction should be denied, since prior restraints are permissible only on the showing of a "clear and present danger." The archetype of a clear and present danger would be publication of secret troop movements during wartime.

A corollary of the lack of clear and present danger is the fact that White has an adequate remedy at law: awaiting of publication and then suing for damages.

Because of the strong First Amendment interests involved in cases like this, equity courts are exceedingly reluctant to grant injunctive relief, and this case is no exception. The best that White could do is to argue that he will be irreparably harmed by publication, since his health is not something that money damages can adequately protect. Although that is a reasonable argument, the court should not grant the injunction.

ANSWER B TO QUESTION 1

Action Based on Invasion Privacy:

Since the article prepared by News is a complete and accurate account of White's trial and imprisonment, White's best theory of recovery is invasion of privacy since an action can lie despite a defense of truth.

There are two types of privacy actions applicable to these facts. The first, public disclosure of private facts, makes actionable the publication of embarrassing or private facts which the reasonable individual would desire to keep private.

Here, the ordeal White suffered, the trial and imprisonment based on the perjured testimony of witnesses is the type of incident which a reasonable person would desire to forget. Indeed, White was so traumatized by the event that he entered a religious order and lived in seclusion, leaving only when illness precluded his continued seclusion.

Thus, not only could one construe the events surrounding White's imprisonment as ones which a reasonable man would desire to keep private, but

White himself is shown to be sensitive to the desire to maintain the peace and anonymity he sought by entering the order.

Newsworthy Defense: The primary hurdle which White faces in the above "true privacy" action is the defense of newsworthiness. The right of the public to know and the right of News as a media defendant to print true newsworthy information have usually been held to give way to the plaintiff's right to be left alone.

Thus, in Cox, the U.S. Supreme Court held there was no right of action by a plaintiff against a media defendant for the publication of the name of a rape victim whose identity was a matter of public record.

Similarly, White's conviction and imprisonment are matters of public record and since News plans to publish solely that information contained in public records, their reliance on Cox would be a strong argument.

Lapse of Time: Despite the "public records" defense and the newsworthy defense in

general, the courts have indicated that at some point the public's right to know is lessened as the time lapse between the event and the publication increases. Thus, the "newsworthy" defense is somewhat lessened by time.

Given the nearly 40-year lapse between White's trial and the proposed publication as well as the 30-year lapse between the discovered perjury and the anticipated publication, News' newsworthy defense is not as strong as it would have been.

The outcome in this case may well depend on the political climate which exists as News contemplates publication. Foreign affairs, Japanese relations, and military misconduct could all be current issues which would lend strength to a newsworthy defense despite passage of time.

Note that this tort is defeated by a newsworthy defense despite plaintiff's susceptibility to harm. Thus, White's anticipated emotional distress, discussed below, will not overcome News' First Amendment claims since as most courts have held, the newsworthy defense has virtually swallowed the
tort.

False Light: This type of privacy tort lies when technically true facts (or false) place plaintiff in a false light.

There are insufficient facts here to determine whether White's action could be based on false light. Certainly News could downplay the perjured testimony and pardon and write a story the essence of which casts White in a false light. Since the facts indicate full and truthful factual accounting, however, I would conclude no false light cause of action.

Defamation: Truth is generally regarded an absolute defense to a defamation action. Thus, even though the passage of time has stripped White of his public figure status, a defamation recovery is highly unlikely.

Moreover, News is a media defendant and given the First Amendment freedom of the press, a plaintiff seeking recovery against News must prove at least negligence under Gertz v. Welsh and malice under N.Y.T. v. Sullivan if White retains his public figure status.

Since fault in the context of Gertz and N.Y.T. relates to truth and not to the damage of plaintiff, there should be no recovery here given the truth of the article.

Intentional infliction of Emotional Distress: The above tort cause of action lies when a defendant engages in extreme or outrageous conduct with the intent to cause or in reckless disregard of the strong probability of causing extreme emotional distress.

When White's doctors informed News of the anticipated distress White would suffer if the story were published, their decision to publish despite that warning could be construed as reckless disregard of the probable consequences.

However, it is doubtful whether their actions would be construed as extreme and outrageous by a reasonable person. Even though News knew of White's particular sensitivity and even though the First Amendment is not a defense per se to this tort, the fact of News' status as a media defendant cannot be overlooked in that if media defendants suppress news on the basis of potential emotional distress, the First Amendment is weakened. Again, the facts surrounding publication should be examined, but I conclude on these facts no cause action.

Negligent infliction of emotional distress, actionable in some states, is a more viable action since the intentional and reckless prerequisites are omitted.

Injunction:

Injunction is an equitable remedy and will not be granted unless the remedy at law is inadequate. Modernly, "inadequate" is construed as "superior" and this element is met here given the irreparable harm to reputation and emotional stability which White faces.

White must also show that the right he seeks to enforce is one traditionally protectible in equity. Although there is no "property" right per se under these facts, the general rule is that courts modernly recognize important personal rights as well as constitutional rights as meeting the requirement.

Whether one construes White's right to privacy as being in the former or latter category, his privacy right meets this requirement.

However, the major exception to the "enforceable right" exists under these facts and that is that equity will not enjoin free speech.

The reason for the exception is two-fold. First, First Amendment rights are involved. Second, enjoining free speech deprives defendant of a jury trial.

The courts are particularly reluctant to enjoin speech when the content of the subject matter is true as in this case. Prior restraint is highly disfavored and the courts would rather punish the defendant after the wrongful publication rather than risk suppressing free speech at the outset.

I would conclude that given the truth of this publication, and its arguably newsworthy value, injunction should be denied.

Since newsworthiness will defeat the privacy action unless undue passage of time, the question should be one for the jury.

February 1986
QUESTION 1

Bayban is an oral contraceptive manufactured by Drugco. Unlike some other birth control pills, it has no known undesirable side effects. However, it is completely ineffective with about 0.4% of all women. Bayban could not be made 100% effective without creating a risk of side effects. Bayban is advertised only through circulars mailed to doctors and is sold only on a doctor's prescription. Its label does not mention that it is ineffective with some women, although Drugco so informs the physicians to whom its promotional literature is sent.

Albert and Amy Able had three minor children. Albert's salary, their only source of income, was $28,000 a year, and was not likely to increase significantly. In June 1984, Albert and Amy concluded that three children were as many as they could hope to raise and educate adequately. They decided to have no more children. Accordingly, Amy consulted her physician, who prescribed Millpill, another contraceptive which she took regularly until October 1984.

I n October 1984, the Ables spent two weeks with their friends the Bakers in a nearby city. When she unpacked her bag, Amy discovered that she had forgotten her Millpills. Mrs. Baker, informed of the problem, told Amy that she would give Amy some Bayban pills which the Baker family physician had prescribed.

Although her doctor had warned her that Bayban was not 100% effective, Mrs. Baker did not mention this when she gave the package of Bayban to Amy. Amy took the Bayban pills as directed on the package during the two-week visit. In December 1984, she discovered that she was pregnant.

Since they learned of Amy's pregnancy, the Ables have suffered from severe insomnia caused by economic worries, and as a result Amy has been treated by a psychiatrist. Their 17-year-old daughter, Dora, has also been emotionally upset and under psychiatric treatment since her parents told her they now could not afford to send her to college.

Amy refused to consider an abortion even though her doctor assured her that it would present no danger to her health. Both the pregnancy and the birth were normal and uneventful. Thomas Able, a healthy baby, was born on July 10, 1985. Thomas was conceived during the time Amy was taking Bayban. •

On what legal theory or theories, and for what injuries, might Albert, Amy, and Dora recover from Drugco? Discuss.

ANSWER A TO QUESTION 1

Concepts of products liability entitle a damaged or injured plaintiff to recover for such

injuries that result from the use of a product. There are several different theories of products liability that might be asserted by the Ables against Drugco.

Negligence - Defective Design

Was Mrs. Able a foreseeable plaintiff? Under the negligence theory of products liability (P. I.), a seller is liable for all foreseeable users or consumers who are within the zone of danger.

Although Drugco might attempt to argue that since the pills were a prescriptive drug given only under orders of a physician and therefore Mrs. Able was not a foreseeable user, the theory of negligence does not require privity and Mrs. Able should be deemed foreseeable.

Did Drugco owe a duty of care to Mrs. Able? Mrs. Able will successfully assert that as a foreseeable plaintiff, she was owed a duty of reasonable care with respect to the pills even though Drugco will contend that its warning Mrs. Baker satisfied its duty of care.

Drugco will argue that even if Mrs. Able is deemed a foreseeable plaintiff, its actions were not the proximate cause of the resulting condition. Drugco will contend that Mrs. Baker's act of giving Mrs. Able the Bayban pill was an intervening act that broke the chain of causation. An intervening act will relieve the original tortfeasor from liability if it is not foreseeable.

Mrs. Baker will successfully rebut this contention by the fact that negligent intervention is normally deemed foreseeable and therefore although Mrs. Baker was negligent in providing the pills to Mrs. Able without an adequate warning (as a licensee she was under a duty to disclose of known dangers). Such in itself would not relieve Drugco of ultimate responsibility. (Actual cause is not an issue since Mrs. Able conceived during the two-week period.)

Drugco will contend that in defense it should not be held ultimately liable because Mrs. Able was contributorily negligent in taking a prescription medication without the advice and consultation of a physician. If this is successful, Mrs. Able would be barred from recovery in a contributory negligence state. However, in a comparative negligence state, her recovery would simply be lessened by the amount of her own negligence.

In rebuttal, Mrs. Able will contend that she was not contributorily negligent due to the fact that there were no warnings on the box and that any other reasonable person would do exactly the same thing.

Drugco will probably succeed in its claim of contributory negligence since Mrs. Able most likely failed to act like the average reasonable person since the average person would not have taken the pill without a doctor's prescription.

Although Drugco might assert that Mrs. Able assumed the risk, such contention will probably not succeed since there is no indication that Mrs. Able knew of the risk and voluntarily assumed it since there is no warning on the box to apprise her of the danger. In defense, Drugco would also assert that the design itself was not defective since no safer product was available.

Strict Products Liability

Under the theory of strict products liability, a commercial seller is liable to all ultimate

users and consumers who are injured by the product. The product must be defective, reach the plaintiff in an unchanged condition and and be reasonably dangerous. Many (most states) jurisdictions apply this theory of strict liability to guests and employees and bystanders who are ultimately injured by the product, and thus Mrs. Able would be a qualified plaintiff.

Drugco will contend that the product is not defective since there is no alternate design that is safer and that a risk of 0.04% does not render a product unreasonably dangerous. Mrs. Able will successfully rebut that as long as the product defeats the average person's reasonable expectation (not getting pregnant) the product is unreasonably dangerous and defective.

Moreover, Drugco will attempt to show that by providing adequate instructions on the box that were clearly visible and in fact read by Mrs. Able, the product's dangerous condition was negated. Mrs. Able will successfully show that the box although containing instructions did not contain a warning of the 0.04% chance of becoming pregnant and that it would be very simple to include such a warning in the directions.

Considering the feasibility of providing an adequate warning on the box (simply adding it to the instructions already provided at little cost) and the fact that the product was rendered defective thereby, Mrs. Able should recover against Drugco (a commercial seller) under the theory of strict liability.

Although Drugco might assert that Mrs. Able misused the product by not getting a drug prescription, such misuse would not it itself negate the fact that the product was defective without the adequate warnings of dangers which Drugco knew about. Contributory negligence is not a defense but if in the unlikely case it is deemed that Mrs. Able assumed the risk, recovery would be barred.

Breach of Warranty - Implied

Under this theory a commercial seller is liable to an ultimate user if the product fails to satisfy the implied convenant of fitness for purposes (not to get pregnant).

According to the UCC 2-318(a) and the majority of states, privity is required between the seller and the injured party. This theory is extended to the purchaser and his family and is sometimes extended to guests in his home.

If such extention is followed in this jurisdictions, Mrs. Able as a guest should be able to recover for her injuries resulting from the failure of the product to work as impliedly promised (she became pregnant) because it did not work for its intended purpose.

Intentional Infliction of Emotional Distress

The Ables will contend that the conduct of Drugco constituted such extreme and outrageous conduct that manifested itself in physical aspects (insomnia and worries resulting in psychiatric care) that they should be able to recover for such pain and suffering.

Although Drugco might contend that such a result was not foreseeable and intentional (not reasonably anticipated given the 0.04% chance), the Ables should succeed since there was knowledge or substantial certainty that such severe emotional distress might result from the ineffective product.

Negligent Infliction of Emotional Distress

Dora will contend that the conduct of Drugco resulted in her being deprived of an opportunity to attend college. Many states, including California, have recognized this form of liability (negligent infliction of emotional distress) where a plaintiff was not directly physically harmed by the defendant's conduct (abandoned the impact requirement).

However, even under this liberal view, such injury will not entitle Dora to compensation for two reasons: a) She was not a foreseeable plaintiff within the zone of danger created by defendant's negligence; b) Pecuniary, economic injury is not compensable in the absence of some other type of harm or injury.

Constitutional Right of Privacy and Religion

As a defense to all of the above, Drugco will contend that under the doctrine of avoidable consequences, Mrs. Able need not have given birth to Thomas. We are told that an abortion would not have created any risk of danger to either Mrs. Able or to the child.

However, the Constitution guarantees the freedom of religion and respects an individual's right to privacy and procreation. Although technically a safe alternative, Mrs. Able would not be required to undergo an abortion since the same would violate her right to privacy under the First Amendment.

Wrongful Birth/ Life

Although some jurisdictions (very few) entitle a mother to assert such a claim in cases of unwanted pregnancies, such is not a widely accepted view. The courts might sometimes award an amount of money that will help compensate for the raising of the child as in this situation where we are told that the Ables are not financially secure, but emotional relief is usually denied because of the presumed joy that a child brings to his parents throughout his lifetime.

ANSWER B TO QUESTION 1

The oral contraceptive manufactured by Drugco is a product not a service. Furthermore, Drugco is a manufacturer not a one-time cookie seller. Consequently, Albert, Amy and Dora's legal theories rest on products liability and possibly ordinary negligence law.

Products liability:

There are 5 areas of products liability: strict liability, negligence, implied warranties of merchantability and fitness, express warranties and misrepresentation. The sixth area is intent and if used is proved as a battery.

Strict Liability

Under strict liability the focus is on the product (compare negligence to the conduct of the defendant). Specifically, whether it is unreasonably dangerous and no substantial changes have been made to it in the chain.

Privity is relaxed under strict liability so clearly, Mrs. Baker could sue as the consumer. Also her family, etc. Albert, Amy and Dora should claim privity as household guests under the relaxed privity standard.

The duty under strict liability is established under 3 tests: consumer expectation (equates the defect with unreasonably dangerous); California test under Lull v. Barker (the defect exists and is a proximate cause of injury); feasible alternatives test (no other reasonable alternatives under a cost-benefit analysis) . Drugco owes a duty for its birth control pills under any one of these tests. First, the reasonable expectation of the consumer is that a birth control pill will prevent pregnancy. Amy got pregnant even though she was on the pill. Amy should argue that her unexpected pregnancy was unreasonably dangerous to her health, therefore the defect exists. Second, the ineffectiveness of the pills were the proximate cause of the pregnancy. Third, there are feasible alternatives available to Drugco, such as a warning placed on the package.

Under strict liability as well as negligence theory there are other considerations. A manufacturer should anticipate the misuse of a product. Drugco should anticipate that other people may use drugs not prescribed to them as Amy had. A warning on the package wouldn't have been economically unreasonable.

Drugco will argue that there is no proximate cause because the chain of causation was broken by unforeseeable intervening acts. Specifically, the negligence of Mrs. Baker in not warning Amy of the 0.4$ ineffectiveness. In order to break the chain this would have to constitute gross negligence. Amy should argue that it is foreseeable that someone else would take the contraceptive pill and Drugco is liable.

There is actual cause under the facts because it states that conception occurred during the time Amy took Bayban. "But for" the ineffectiveness of the pill, Amy would not have become pregnant (she would've secured other means of birth control or abstained). Drugco was at least a substantial factor.

Under strict liability, there is no recovery for economic losses. Amy could recover for the severe insomnia if the court finds this is pain and suffering or mental duress. Dora could probably recover for mental duress
caused by the pregnancy. However, Albert could not recover for economic losses (the costs of having another child).

Drugco may want to rely on comparative negligence as a defense if this were a comparable negligence state. In a "pure" state, Amy could recover even if she were more negligent. Otherwise, she couldn't recover if she were found to be 51% negligent.

Negligence

Under negligence theory, the focus is on the conduct of the defendant (Drugco) not the product (Bayban). Again privity is relaxed.

The duty is the same as strict liability (follow same 3 tests).

Breach may be established against the manufacturer through res ipsa loquitur (the thing speaks for itself). If the pregnancy would not have occurred but for the negligence of the manufacturer, there is no contributory negligence, and Drugco has sole control of the instrumentality, negligence will be inferred (or in some states it is a rebuttable presumption. Drugco will argue that Amy was contributorily negligent by taking a pill prescribed to another patient. If they succeed, res ipsa loquitur will not work.

Amy should argue that Drugco acted unreasonably by failing to place a warning on the package regarding the potential ineffectiveness of the product. Drugco will argue, as under strict liability, that Amy's actions were not foreseeable--taking a prescription drug that is not

prescribed is not foreseeable. Furthermore, Mrs. Baker acted with gross negligence by failing to warn. The court will probably find Mrs. Baker's actions to not be gross negligence and that taking Mrs. Baker's pill was foreseeable.

Actual cause is established (see strict liability analysis). Negligence will not give recovery for economic losses so Albert will not recover here either. Again, Amy and Dora may recover for mental duress, etc.

Drugco may use contributory negligence (as well as comparative negligence, see earlier discussion) as a defense. Contributory negligence will bar Amy's claim if successful. Drugco should argue that taking someone else's prescription drug is not what the ordinary reasonable person would do. Contributory negligence is a bar to negligence products liability theory.

Implied warranties

Privity again is relaxed to include the consumer, household members, guests (MacPherson) so all could recover.

Implied warning of merchantability is a warranty regarding general quality and it must be a contract of sale by a merchant. Mrs. Baker purchased this from a drug store, undoubtedly. Proximate and actual causes have been established.

Implied warranty of purpose requires that the product was sold for a particular purpose, not necessarily by a merchant but known to the seller and that there was reliance by the purchaser. Proximate and actual causes established.

The important thing about implied warranties is that economic losses can be recovered. This, along with express warranty, is the only area under which Albert can recover (given privity). Amy and Dora could recover consequential damages here also.

Express Warranty

Express warranty requires an affirmative statement of fact that is the basis of the bargain. It is difficult to determine if there is an express warranty claim here because there are no facts other than the absence of information regarding effectiveness.

Again, economic losses can be recovered so if there is an affirmative statement regarding the effectiveness, Albert could get economic losses. comparative negligence is a defense.

Misrepresentation

The final products liability claim is misrepresentation. Here, there must be deceit. It should be argued that the failure to warn about the .4$ ineffectiveness was deceitful. There must be a misrepresentation about a material fact (here, pregnancy is material), reasonable reliance, and scienter. I f these elements are established, no economic losses can be recovered, and comparative negligence is a defense.

Finally, Albert, Amy and Dora may want to pursue a claim under ordinary negligence.

Drugco's duty would be that of a reasonable person (or manufacturer) under similar circumstances.

The question is are these foreseeable plaintiffs. Under the Andrews minority view, all 3 would be foreseeable because a duty to one is a duty to all. Anyone injured is foreseeable. However, under Cardozo's view, the plaintiff must be in the zone of risk (see Palsgraf). Drugco should argue that Albert is not a foreseeable plaintiff because he is not a woman who would even take the pill. Drugco should also argue that it is not foreseeable Amy would take a pill that was not prescribed (see previous discussion).

If foreseeability could be established for Amy and Dora, breach should be established by circumstantial evidence, custom, or res ipsa loquitur (see discussion re: problems with contributory negligence as a bar).

Proximate cause and actual cause would be established the same as under products liability. Contributory negligence would completely bar the claim if successfully used by Drugco. Furthermore, there must be actual injuries. Probably only Amy and Dora could recover for mental duress.

July 1988

Question 6

Jack, aged 22, and his friend, David, aged 16, were riding their motorcycles around Jack's property. They decided to race each other down Jack's driveway, across a seldom-used public road and into a neighboring field.

David was ahead of Jack by about 75 feet when, without slowing down, he entered the road. David failed to see Peter's car approaching. Peter, an adult, was driving carefully but he was not a licensed driver, and he was not wearing a seat belt although required to do so by state law.

Peter avoided hitting David by braking suddenly. This caused Peter to strike his windshield and to suffer severe physical injuries.

Peter sued David and Jack in state court, alleging negligence. The parties stipulated to the facts given above.

Jack moved for summary judgment, claiming that as a matter of law he was not liable for Peter's injuries. The court granted Jack's motion.

David moved for summary judgment on the grounds that Peter was not wearing a seat belt and was not a licensed driver. The motion was denied.

At trial, over Peter's objection, the judge instructed the jury to apply the standard of care applicable to children in assessing David's conduct.

Did the court err in:

1. Granting Jack's motion for summary judgment? Discuss.
2. Denying David's motion for summary judgment? Discuss.
3. Instructing the jury to apply the child standard of care? Discuss.

ANSWER A TO QUESTION 6

I. Jack's (J) Motion for Summary Judgment (S.J.)

J's motion for S. J, stating that he was not liable to Peter (P) as a matter of law was improperly granted. Whether J was liable for P's injuries should have been an issue of fact left for the jury, since P could state a prima facie case that J negligently caused P's injury. To state a cause of action for negligence, P must show that J owed a duty of care to him, that he breached that duty, and that this caused P damages.

A. Duty

One only owes a duty to foreseeable plaintiffs. Here, since J was racing across a public road, he would owe a duty to those people crossing the road. P is exactly the type of person who would tend to be injured by this type of conduct. Under Cardozo's view, P was foreseeable because he was within the "zone of danger." Andrew's view is not really necessary here since the person injured, P, is one of the people J owed a duty of care to. The standard of care required is that of a reasonably prudent person. This is an objective standard, J's particular mental characteristics would not be considered.

J would argue that he met this standard of care, since it was not unreasonable to race across a "seldom used" road. However, drag racing with a sixteen-year-old boy, even across a seldom used street, probably doesn't meet the reasonably prudent person standard. It certainly doesn't meet this standard as a matter of law justifying summary judgment.

B. If J didn't meet this standard of care, he breached his duty to all foreseeable plaintiffs.

C. Causation

J would argue that his conduct did not cause P's injuries since P stopped to miss D, not J. However, J is an actual cause of P's injury. "But for" J's conduct in racing with B, P would not have been injured in the time, place and manner he was.

J would argue that he was not a proximate cause of the injury since his conduct in racing was only an indirect cause of the injury -- and was superceded by D's decision to enter the road without slowing down. However, even if this could be considered a "separate" cause (probably their entire race could be considered one continuous direct cause), it does not serve as superceding cause because it was foreseeable. The foreseeable negligence of another party never serves to lift liability from a negligent party who was an actual cause of injury.

Since whether P can prove that J was a negligent cause of his injury is a matter for the jury to decide, the court's grant of summary judgment was improper.

II. David's (D's) Motion for S.J.

D's motion for S.J. was properly denied, at least if the court sits in a comparative negligence state, since the plaintiff could still sue to recover partial damages. The percentage of fault would be an issue of fact for a jury. Even if it is a contributory negligence jurisdiction, it is possible that the jury would find that D's conduct amounted to recklessness. So even if it were a contributory negligence state and the court found that P's conduct in not wearing a seat belt and being an unlicensed driver constituted negligence per se, the S.J. was properly denied since contributory negligence is not a bar to a claim based on recklessness in contributory negligence jurisdictions. (P has not alleged recklessness, so perhaps a S.J, would be allowed in a contributory negligence state.) However, there is also a question of whether D could even claim that P's conduct constituted negligence per se under these facts. For a statutory violation to constitute negligence per se, it must be shown that the law was meant to protect this type of person (here the defendant) and that it was meant to address and prevent this type of harm.

A. The seat belt law is intended to address this type of harm (to lessen injuries in case of an accident), but it probably was not meant to protect defendants from all liability for their negligence. Since the plaintiff has a duty to mitigate damages and although his failure to wear his seat belt should lessen his recovery in a comparative negligence state, it probably should not bar

recovery in a contributory negligence state. The statute was more likely meant to protect people like the plaintiff from themselves -- meant to encourage people to protect themselves from injury, not to shield other negligent drivers from liability.

B. The license law was intended to shield drivers from other unqualified drivers by requiring a test to prove driving ability. Since the facts state that P was driving carefully, this is not the type of harm the statute was meant to prevent.

So, in either a comparative negligence state or contributory negligence state, since D has not proved P's negligence as a matter of law, D's summary judgment was properly denied.

III. The Instruction on the Standard of Care

This instruction was improper. While generally minors are entitled to be tested by a subjective test (according to the conduct of a child of similar age, intelligence and experience) when the minor is engaged in an adult activity, especially when the child is so close to adulthood, the objective, reasonably prudent person-standard is the proper one to be applied. Therefore, since driving a motorcycle is an adult activity, the judge's instruction to the jury was incorrect.

ANSWER B TO QUESTION 6

1. Jack's motion for summary judgment.

A motion for summary judgment should be granted if, based upon the pleadings, there are no triable issues of fact. Here, the allegation is that Jack was negligent. This cause of action must be analyzed to determine the propriety of granting the motion. To establish negligence, Peter must show that Jack breached a duty that caused him (Peter) damages.

Duty

A defendant owes a duty to those for whom his actions create a foreseeable risk of injury. As the owner of the property, Jack owes a duty to those off the property as a result of his actions on his land. In addition, Jack and David planned to race off the land, across the road and into the neighboring field. Thus, Peter was in the zone of danger created by Jack's activities.

Breach

A breach occurs when the defendant fails to act as a reasonable, prudent person would act in like circumstances. A reasonable, prudent person would not be likely to race motorcycles across a road. Even though the road was seldom used, it was a public road. They raced down Jack's driveway, so they must have picked up speed. As the owner of the land, Jack must have

known_ cars used the road. The danger of the activity was great, and the probability of the harm was high, even if the road was seldom used. There was no social utility in the activity. There was a breach.

Causation

But for Jack's agreement to race David, the accident would not have occurred. Thus, Jack was the cause in fact.

Proximate Cause

David's driving into the street was an intervening act, but it was a reaction to Jack's agreement to race. Thus, it was dependent on Jack's negligence. David did not slow down and did not see Peter. Even if David was negligent, the negligence of others is foreseeable. This is especially true in this case in which the parties were racing. The dependent, foreseeable negligence of another will not serve to break the chain of causation. Jack's action was the proximate cause.

Damages

Peter's severe physical injuries are sufficient damages. It seems apparent a claim for negligence could have been made out. Since Jack was not the direct cause of Peter's injury, there was a triable issue as to whether he was liable. Even though the parties stipulated to all of the facts, summary judgment was improper since he appears to have been liable for Peter's injuries.

2. David's motion for summary judgment.

The same rules as to summary judgment and negligence apply to David as well. David's summary judgment claim is grounded not upon his own lack of negligence, but on Peter's contributory negligence.

Contributory Negligence

In those jurisdictions which apply the doctrine of contributory negligence, Peter's negligence, if established, would be a complete bar to his recovery and would justify the granting of the motion for summary judgment. In jurisdictions following a comparative negligence approach, Peter's negligence would only reduce his recovery.

Negligence Per Se

Peter was not wearing a seat belt, nor was he a licensed driver. Violation of a statute is negligence per se if the injury that results is of the kind the statute was designed to protect against and the party charged was in the class to be protected by the statute.

Wearing a seat belt is designed to protect against injuries such as Peter sustained. Had he been wearing his seat belt, it is possible his head would not have struck the windshield. However, there is no guaranty of this. He may still have sustained serious injuries. -

In some jurisdictions, negligence per se establishes a presumption of negligence. In others, it is a mere inference. But in all, the defendant (David) must establish that the negligence caused the injury. Absent such a showing, the denial of David's motion was proper.

The fact that Peter was unlicensed is probably not negligence per se. He was driving carefully. Licensing statutes are designed to keep poor drivers off the roads. Whether licensed or unlicensed, Peter's driving did not cause the accident. He was carefully driving. It was David's lack of care that was the cause.

3. Instructing the jury to apply the child standard of care.

Because of his agreement to race Jack, David created a foreseeable risk of harm to, drivers on the road. Thus, he owed a duty to Peter.

Breach

Generally, a child is held to the same standard of care as a child of like age and intelligence. As a boy of sixteen, this rule would apply to David. However, there is an exception when the child is engaged in an inherently adult activity. If riding motorcycles is held to be such an activity, then David's standard of care would be that of a reasonable, prudent adult in like circumstances. The jury instruction was wrong.

July 2001

QUESTION 5

Ann, an attorney, represented Harry in his dissolution of marriage proceedings, which involved an acrimonious dispute over custody of Harry and Wilma's minor children.

Ann advised Harry that a favorable custody ruling would be more likely if he could show that Wilma had engaged in improper behavior. Two days after receiving this advice Harry came to Ann's office with his wrist heavily bandaged. Harry told Ann that, when he went by the family home the prior evening to get some of his things, Wilma had tried to run over him with her car, actually hitting him. This was the first suggestion of any violence between Harry and Wilma. After listening to Harry's story, Ann urged Harry to sue Wilma for assault and battery. Ann said: "Filing this suit will improve our bargaining position on custody." Ann did nothing to investigate the truth of Harry's story.

Just before the hearing on custody, Ann filed a tort action on Harry's behalf alleging Wilma had committed an assault and battery on Harry. Ann referred to the tort action at the custody hearing, and Wilma denied that the incident ever occurred. The judge, however, believed Harry's version and awarded sole custody to Harry.

Three months later, Ann learned that Harry had fabricated the story about how he injured his wrist. Ann did not report Harry's lie to anyone and merely failed to prosecute the tort action, which, as a result, was dismissed with prejudice. Wilma then sued Ann for malicious prosecution, abuse of process, and defamation. Wilma also filed a complaint against Ann with the State's office of lawyer discipline.

A: What is the likelihood that Wilma can succeed on each of the claims she has

asserted in her civil suit against Ann? Discuss.

B: Did Ann's conduct violate any rules of professional ethics? Discuss.

ANSWER A TO QUESTION 5

I. What is the likelihood that Wilma **(W) can succeed on the following claims against Ann (A1?**

A. Malicious Prosecution

Malicious prosecution requires (1) filing of a claim against a party for a purpose other than seeking justice, (2) the claim being dismissed in the defendant's favor (3) that there was a not sufficient probable cause to bring the claim, and (4) damages.

On the first element, W will likely argue that A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, W may assert that the fact A filed the claim right before the custody hearing suggests that A's intent was to use the claim against W in the custody hearing. Because A did use the

information of the claim in the custody hearing, W will likely meet the requirements of this element (additionally, that A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it).

On the Second Element, the claim was dismissed with prejudice in favor of W because A failed to prosecute the claim prior to filing. Therefore, this element is satisfied.

On the Third Element, W will argue that because the event did not occur, that it was impossible for A to have sufficient probable cause that the event occurred. W will further argue that A failed to make a reasonable investigation to determine whether there was any substance to H's claims (such as inspecting the car, arranging to depose W to determine if W was the driver . . . etc). While A may assert that she had probable cause due to H's injuries, such a line of argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there was insufficient probable cause to bring the claim for either battery or assault, W will win on this element.

On the Fourth Element, W must establish some form of pecuniary loss. Because W was required to undergo the expense of preparing to defend the claim against her, W has suffered loss.

Because W has met her burden on all of the elements, she will likely win here.

Intentional Infliction of Emotional Distress

Further, W may seek damages for emotional distress under IIED. Because A's conduct was beyond the scope of social tolerance, and A had demonstrated recklessness by not pursuing

an investigation, if W has suffered severe emotional distress, W may recover here.

B. **Abuse of Process**

To establish abuse of process, a party must show (1) that a claim was brought to further an improper purpose, (2) that there was a sufficient act or threat used to accomplish that purpose, and (3) damages.

With regard to the first element, W may argue that the claim was not brought to adjudicate H's injuries, but rather to create false evidence to use against W in the child custody hearing. W may demonstrate that there was no proper purpose by showing that the claim was brought immediately before the child custody hearing even though the claim was not ready to file due to an insufficient investigation. Further, W may assert that the claim was raised as evidence in the hearing, and that after its usefulness had been served, A left the claim to wither by failing to even try and prosecute it. (Additionally, A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it.) While A may assert that she had a justification to file the claim due to H's injuries, such an argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there is sufficient evidence that the claim was brought to further H's interests in the custody hearing and not to adjudicate the alleged battery or assault, W will win on this element.

On the second element, W may assert that the act of filing the claim was intended to place pressure on the judge to award H custody by discrediting W's character. Because A filed a frivolous tort claim against W to achieve those purposes, A has engaged in a sufficient act under this element.

Because W has undergone damages, both emotionally (from the claim itself, and its effect in causing W to lose custody of her children) and economically (expenses in fighting the claim), there is sufficient damage here. Therefore, because W has satisfied all of the elements of the claim, she will likely win here.

C. **Defamation-** To establish a claim for defamation, the plaintiff must prove the following elements:

1. Defamatory Statement

A statement satisfies the defamatory element if the statement causes harm to a person's reputation. W will argue that a charge of assault and battery ruined her reputation (as evidenced by the judge's decision not to grant W custody of the children). Unless A can show evidence that W had a reputation for being violent, W will win this element.

2. Of or Concerning the Plaintiff

A statement can be said to be "of or concerning the plaintiff" if a reasonable person would know that the statement was about the plaintiff. Here, the claim was filed in W's name. Therefore, a reasonable person would be able to determine that the statement was concerning W.

3. Publication

The publication element requires that the statement be memorialized in some medium, or communicated to a 3rd party. Here, the statement that W had assaulted H was not only written in a claim that is public record, the claim was raised in the presence of several persons in the courtroom. Therefore, this element is satisfied.

4. Damages

As a general rule, a plaintiff does not need to establish damages if the statement was either libel or slander per se. Because the statement was recorded in writing and became public information, the statement is libel. However, W may assert that the statement was slander per se as well. A statement that reflects a crime of moral turpitude will fall under slander per se. W may argue that the battery against a spouse carries a high stigma in our society (and may use the judge's reaction as evidence). Because there is libel and slander per se, w will win on this element.

5. Are there any defenses?

a ***Absolute Privilege-***

A may assert that absolute privilege applies here. Although A is not a state actor, she is an officer of the court and the statements made against W were in furtherance of her duty to her client as an officer of the court. However, A may assert that A's intention in bringing the claim was not to further H's interests with regard to the assault and battery and that A failed her duty to the court by bringing frivolous claim and should not be entitled to immunity. Because A did not know that H was fabricating his story at the time A filed the claim (even if filed for improper purposes), A should be entitled to privilege here and should not be held liable for defamation.

b. ***Qualified***

PrivilegeDoes not apply.

II. Did Ann's conduct violate any rules of professional ethics?

A. Duties to the Court

1. Filing Frivolous Claims (Rule 1 1 FRCP)

Under Rule 11, an attorney, by signing the pleading, agrees that: (1) attorney has brought an action for a proper purpose, (2) the attorney has not brought a frivolous claim, (3) the claim is

supported by admissible evidence, and (4) a reasonable investigation have [sic] been conducted to ensure the above.

> Here, A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, prior to filing the claim A was required to ensure that the claim was supported by admissible evidence. Because A failed to conduct a reasonable investigation to determine whether the evidence was valid, and the claim was meritorious prior to filing the claim, A has violated the rules of ethics.

2. Duty to not allow client to commit perjury-

Under the model rules, if a client admits that he/she has committed perjury, the attorney must advise the client to inform the court. If the client refuses, the attorney must attempt to withdraw from representation, and if withdrawal is not possible, the attorney must disclose the perjury to the court. However, under the CA rules, once an attorney has advised the client to disclose the perjury to the court, and the client refuses, the attorney cannot disclose the perjury.

Here, A discovered that H had lied about W trying to hit H with the car, and that H had feigned his injury. Under either of the above stated rules, A had a duty to advise her client to disclose the perjury to the court. However, A did not advise H to disclose the fabrication, but instead chose to allow the case to die without prosecution. Because A failed to take the critical step of advising H to disclose the lie, A has violated the rules of ethics under both the model rules and the CA rules.

3. Duty to Withdraw

Under the model rules, an attorney cannot assist her client to commit fraud or a crime and must withdraw if the client insists that the attorney pursue these ends. In CA, an attorney's duty to withdraw is permissive, but not required. Here, although H did not ask A to commit fraud, A's failure to withdraw from representing H after learning that H had created his claim against W is questionable. That A failed to at least request H to drop the claim she knew was frivolous may rise to the level of participating in H's fraud.

B. **Duties to Client**

1. Breach of Client's Authority

While an attorney has the right to control the arguments and claims put forth, the client (in civil cases) has the right to determine the objectives of the case. Here, A has asked Harry (H) to file a claim against W for assault and battery. However, H did not consent to filing the claim prior to A's filing. However, because H did not challenge A's filing, H will likely be held to **have** implicitly ratified A's filing of the claim.

ANSWER B TO QUESTION 5

1. Wilma v. Ann
   a. Malicious Prosecution

Malicious prosecution in a civil setting is usually referred to as malicious institution of civil proceedings. It occurs when: 1) a plaintiff institutes- civil proceedings against a defendant; 2) the proceedings are instituted for an improper purpose; 3) the proceedings are resolved in favor of the defendant; 4) the proceedings were instituted without probable cause or a reasonable basis for believing their merit; 5) harm.

First, Ann instituted the tort action against Wilma for assault and battery of Harry.

Second, the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve

our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle. Additionally, Ann failed to investigate the facts involved in this situation before bringing the case. When a lawyer brings an action for any reason other than to vindicate the rights of the plaintiff, the purpose is improper. Therefore, Ann acted improperly when she instituted the proceedings against Wilma.

Third, the tort action was dismissed with prejudice when Ann failed to litigate it. Dismissal with prejudice means that Harry is precluded from bringing the action in the future. Therefore, this designation suggests that Wilma is "off the hook" for this tort action and the proceedings were, in fact, resolved in her favor.

Fourth, the facts suggest that Ann brought the action without a reasonable factual basis for believing in its merit. Ann suggested that Harry would have an advantage if he could show that Wilma had engaged in improper behavior. The fact that Harry came into Ann's office just 2 days after hearing this, claiming that Wilma had attempted to run him over with the car, creates a suspicious causal connection between the advice and the claim. Additionally, the facts indicate that this was "the first suggestion of any violence between Harry and Wilma" and should have put Ann on notice that the claim needed more investigation before bringing suit.

Ann will argue that she is entitled to believe in Harry's account, and the fact that he had a noticeably bandaged hand gave her a reasonable basis for bringing the suit. Since the judge in the custody hearing believed Harry, he must have been quite convincing. However, as discussed above, this probably is not enough basis to bring the suit, given the circumstances between Harry and Wilma's acrimonious custody battle.

Fifth, Wilma will certainly be able to show harm because the judge awarded full custody to Harry and she has no custody of her children.

Therefore, because all of these requirements indicate that Ann acted improperly, Wilma will likely be successful on her claim of malicious institution of civil proceedings.

b. Abuse of Process

Abuse of process occurs when a legal process or proceeding is used to gain an improper advantage and such advantage results in harm to the plaintiff. Here, Ann used the legal process of a civil claim in tort against Wilma for allegedly assaulting and battering Ann's client, Harry.

As discussed above, Ann used this process to gain an improper advantage in the custody hearing between Harry and Wilma. Her advantage was improper because the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle.

Wilma was also likely disadvantaged by Ann's use of the tort action against her. The facts indicate that the judge believed Harry's version of the story over Wilma's and awarded him sole custody of their children. Therefore, Wilma suffered harm and will be successful in showing that Ann abused process by bringing the tort action against her.

c. Defamation

Defamation is the: 1) publication 2) to a third party 3) of a statement about the plaintiff 4) that tends to adversely affect the reputation of the plaintiff. Here, Ann instituted a tort action for assault and battery against Wilma. By filing this complaint, she published in writing the accusations that Wilma acted violently with her husband. This publication is a form of libel. The publication was to a third party because it was filed with the court. Ann published the statements a second time by arguing about them before the judge in the custody hearing. This oral publication is a form of slander.

Because Wilma is not a public figure and the matter is not one of public concern, Wilma does not need to prove that the statement was false.

The statements were clearly about Wilma as the complaint had to name her as defendant and the statements in court must have expressly indicated Wilma as the tortious batterer. These accusations probably tend to adversely affect Wilma's reputation. The accusations suggest that Wilma has violent tendencies against her ex-husband. While some listeners might readily forgive such tendencies, a judge considering whether Wilma is a proper parent certainly would not. Therefore, the accusations not only tend to adversely affect Wilma's reputation but, in fact, hurt her reputation with the judge presiding over the custody hearing.

Defenses

No adequate defenses exist for the malicious prosecution or abuse of process actions.

Common Interest

Ann will try to argue that she had a defense to the defamation action because she made the statements to parties with a common interest. However, this privilege is only a qualified

privilege that can be extinguished with abuse. Even though Ann's publication to the judge and the court were to interested parties, Ann did not make any efforts to investigate the truth of the accusation and therefore she abused her privilege of spreading the accusations about Wilma.

Absolute Litigation Privilege

Ann will argue that her comments to the court were privileged because comments in a courtroom have an absolute privilege. Because Ann's publications were to a judge and were in a tort complaint, they do qualify as protected under the absolute privilege for statements made in a courtroom. Therefore, Wilma's defamation action against Ann will fail.

2. Professional Conduct

Duty of Candor to the Court

As an officer of the court, lawyers owe the court a duty of candor. This requires that lawyers do nothing to promote fraud on the court. Ann may have violated this duty by instituting a tort action against Ann without fully investigating the facts first and for the improper purpose of gaining an advantage in the custody battle. Furthermore, she planted the idea in Harry's mind to fabricate conduct about Wilma, thus aiding a client to defraud the court.

When a client seeks representation that would require the attorney to engage in conduct that violates a law or ethical standard, the attorney must withdraw from the representation. Ann should not have represented Harry in this action and should not have counseled her client to improperly gain an advantage by claiming a tort injury. Therefore, Ann will be subject to discipline for this conduct.

Additionally, Ann may have violated her duty of candor to the court when she learned that Harry's story about Wilma was fabricated and merely failed to prosecute the tort action

against Wilma.

The ABA Model Rules require that lawyers may not assist their clients in lying to the court. The ABA and California rules say that lawyers may withdraw if they learn that a client has used the lawyer to assist them in a past crime or fraud. California rules of conduct say that lawyers must do nothing to further the deception.

Here, when Ann found out about Harry's lies, she merely failed to prosecute the action against Wilma rather than withdrawing the action. This may have violated her duty of candor to the court because she allowed the case to remain on the docket even after finding out about the lie. Therefore, Ann may be subject to discipline for this action.

Duty Not to Suborn Perjury

Lawyers must not aid clients in suborning perjury. Here, Harry lied to the judge during the custody hearing by claiming that Wilma had engaged in tortious conduct. The ABA would allow Ann to withdraw. California does not allow Ann to do so but she must do nothing to further the deception. In either case, Ann should have counseled Harry to retract his lies to the judge so that the judge would be able to properly rule on the custody matter with truthful facts.

Duty of Fairness to the Adversary

Lawyers owe a duty of fairness to their adversaries. This duty precludes lawyers from engaging in conduct that obstructs the truth-seeking process. By filing a suit to gain an advantage in the custody battle, Ann violated her duty of fairness to Wilma as the adversary. Therefore, Ann is subject to discipline for this violation as well.

Duty of Competence

The rules of professional conduct require that lawyers competently serve their clients. The duty of competence requires lawyers to possess all of the knowledge, skill, thoroughness and preparation necessary for the representation.

Here, Ann may have violated her duty of competence by suggesting that Harry find some improper behavior in Wilma and by urging Harry to file a tort claim for assault and battery without first investigating all of the facts. When Harry came to Ann just two days after Ann's suggesting that Wilma's improper behavior would advantage [sic] Harry in the custody battle, Ann failed to prepare for tort litigation by investigating the facts of the incident. She merely accepted Harry's word.

Additionally, because this was the first suggestion of violence between Harry and Wilma, Ann should have been on notice that investigation was necessary. Therefore, Ann is also probably subject to discipline for violating her duty of competence in failing to adequately prepare for the tort claim against Wilma.

February 2002

QUESTION 5

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as "the modern, safe means of controlling allergy symptoms." Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her Doc (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because "this pill is the best-known method of controlling allergy symptoms."

Bud, Sally's brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally's eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally's medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

ANSWER A TO ESSAY QUESTION 5

Sally will bring products liability actions against Mfr. based on strict liability, negligence, intentional torts and warranty theories.

Strict Products Liability

A strict products liability prima facie case requires a manufacturer or (dealer) of the goods, an unreasonably dangerous product that could have been made safer with adequate warning, a foreseeable user of the product and a foreseeable use of the product that results in injury.

Mfr. is the manufacturer of the prescription allergy pills. The pills were rendered unreasonably dangerous by Mfr's failure to include a warranty that there was a remote risk of permanent loss of eyesight associated with the use. Sally was a foreseeable user because she was an allergy sufferer who read the Mfr's advertisement. Sally was injured because she suffered a substantial loss of eyesight as a result of using the pills, with eventual, total loss of eyesight.

Mfr's Defenses

Mfr. will first assert that the allergy pills are available by prescription only and they had informed doctors of the remote risk (Doc here was aware of the risk), and they were entitled to rely on Doc as a learned intermediary that would adequately warn patients as part of his prescription analysis and treatment

This will not succeed as Mfr. directly advertised the availability of the allergy pills as "the modern, safe means of controlling allergy symptoms" directly to Sally. Sally relied on the advertisement in requesting Doc to prescribe the pills.

Next Mfr. will assert Sally assumed the risk by taking the prescription pills. This will surely fail. Sally was not aware of the risk, much less willing to take it.

Finally, Mfr. will assert Sally had a duty to mitigate her damages. If a person unreasonably fails to seek medical care that could prevent or lessen damages, the defendant will not be liable for that preventable danger.

Here Sally had the opportunity to undergo surgery to replace a cornea. Her brother Bud was a willing and compatible donor and the surgery would likely have been a complete success. Additionally, Sally's insurance would have paid all expenses.

Because Sally was fearful she was unwilling to undergo the surgery. The issue is whether Sally was reasonable in that fear and whether Mfr. should be liable for her resulting complete loss of eyesight.

Normally a defendant is liable for all a plaintiff's injuries caused by the defendant even if the extent is more serious than expected. It is likely though that a jury would find Sally unreasonable under the circumstances here because of the low risk, the likelihood of success and the full coverage by insurance. Mfr. will be liable for some damages for Sally's loss of eyesight but not

for permanent and total loss.

Mfr. Negligence Products Liability

Sally must establish Mfr. owed her a duty of care, that they breached that duty and the breach is the actual and legal cause of her damages.

Duty

Mfr. owes a duty of care to all foreseeable users of its product. All allergy sufferers are foreseeable users; Sally is owed a duty.

Standard of Care

Mfr. owes Sally a standard of care of the reasonably prudent manufacturer of prescription drugs.

Breach

Mfr. breached its duty to Sally by failing to provide a warning with the allergy pills Mfr. was aware of a remote possibility of risk of permanent loss. The burden of providing a warning is minor compared with the magnitude of potential harm. Mfr.'s failure to provide this warning was a duty breach and resulted in Sally's injury.

Actual Cause

The facts state that the allergy pills were a direct cause of Sally's loss of eyesight.

Legal/Prox Cause

It is foreseeable that a failure to include a warning could result in injury. Sally is entitled to rely on the presumption that she would have heeded the warning had she been informed.

Damages

Sally suffered permanent total loss of eyesight in both eyes. Defenses

In addition to those described above under strict liability, Mfr. will assert contributory negligence. They will assert that Sally failed to use a reasonable standard of care to prevent injury to herself. This defense will not succeed. Sally was not aware of the risk of danger and this defense is not successful if her only negligence is in failing to discover the defect, here the lack of warning.

Intentional Tort Battery

Sally will assert that Mfr. acted to cause a harmful or offensive contact.

Mfr.'s act was intentional in that they knew with substantial certainty that there was a remote risk of eye damage. They intentionally did not include a warning. The harmful or offensive contact was Sally's loss of eyesight.

Damages as discussed above.

Mfr. will assert the defense of consent. Sally will argue Mfr. exceeded the scope of her consent by failing to include the warning that eye damage could result.

Because Mfr. knew of the risk and intentionally failed to warn Sally may prevail here as well.

Additionally Sally will assert warranty theories.

Express Warranty

Mfr. advertised "modern safe means of controlling allergy symptoms." No disclaimers are given in the facts, but disclaimers not valid as to express warranties anyway.

Sally will be entitled to recover here as well. Implied

Warranty of Merchantability

Implied in all sales of goods is the warranty by a merchant seller - here Mfr. - that the goods conform to reasonable standards of the use for which they are designed. While remedies could be limited here, they couldn't be eliminated and disclaimers are deemed unconscionable when personal injury results.

Implied Warranty of Fitness for Particular Purpose

Sally may bring this action against Mfr. or Doc or both. Sally was seeking relief from allergy symptoms. While there is no evidence she did get relief for allergy, it isn't reasonable that the loss of eyesight accompanies such relief. Sally will seek damages from Doc for negligence in prescribing the pills. Sally must show duty, breach, causation and damages.

Doc's Duty to Care and Standard of Care

Doc owes Sally the duty of a member of good standing practicing medicine in a similar area. It is minimally the duty of a reasonably prudent professional. If Doc is an allergy specialist he will be held to a higher standard.

Sally is owed a duty as a reasonably foreseeable plaintiff. As Doc's patient, Sally is clearly owed

a duty.

Breach

Doc breached his duty to Sally by failing to give her informed consent about the allergy pills he was prescribing.

The standard of breach here is judged two ways:

1) What a reasonable person would have wanted to know about the risk;

2) What Sally would have wanted to know. Causation

If a reasonable person wouldn't have consented or Sally wouldn't have consented if the risks were known and if the risks did in fact occur, Doc's breach was the actual and prox cause of injury.

Sally said she had not been warned and would not have consented to take the pills if she had known of the risk. Perhaps Sally had a[n] unusually high sensitivity to concern over eyesight. It doesn't really matter why she wouldn't have consented.

The lack of warning was the actual cause and prox cause of breach. Damages are

discussed above.

Doc will raise same defenses as above.

Doc and Mfr. will each seek contribution on the negligence claims.

ANSWER B TO ESSAY QUESTION 5

Sally v. MFR -Strict Products Liability

Sally may assert a claim of strict products liability against manufacturer. Manufacturers are held strictly liable for products they put into the market in a defective condition creating an unreasonable risk of injury or danger to the consumer. In this case, Sally has the burden of showing that the allergy medication produced by Manufacturer (Mfr) were [sic] defective when it left Mfr's control and the defect created an unreasonable risk of danger or injury to the consumer.

Failure to Warn

A product may be properly deemed "defective" for the purpose of strict liability if the manufacturer fails to place proper warnings on the product. If consumer warnings may be affixed to the product at relatively low cost to the manufacturer, it may be held liable on a products liability for failure to do so.

Here, Mfr will assert that its medication presented a remote risk of permanent eyesight. Inherent in almost all medication is the risk of some sort of unwanted side effect. Mfr will claim that the "remote" nature of the risk means that the product did not pose an unreasonable risk of danger or injury. However, the degree of harm that may be incurred by takers of Mfr's allergy medication is significant. Permanent blindness is a serious debilitating condition. As such even a remote risk may be something a reasonable person may not be willing to assume. As such, it is likely the court will find that the allergy medication produced by Mfr posed an unreasonable risk of danger or injury due to the fact that Mfr failed to place in warnings in its advertisements or on its packaging. Although the facts do not indicate the cost involved in making such warnings, it is unlikely that a label on a package or a statement in advertising is so cost prohibitive to warrant excuse from its duty to warn. As such, Sally will be able to prove that the allergy medication produced by Mfr is defective for failure to make adequate warnings.

Duty

As mentioned above, Mfr had a duty to warn of the damages inherent in its product.
It breached that duty when it failed to make such warnings. In order to recover, Sally must show that she is a foreseeable plaintiff to whom that duty was owed.

Under the majority test, a plaintiff is foreseeable if she is in the "zone of danger" created by defendant's conduct. Here, any person who received a prescription for the allergy medication produced by Mfr was within the zone of danger created by the risk involved in taking the pills. As such, Sally is a foreseeable plaintiff within the zone of danger under the majority approach.

A minority of jurisdictions follow the Andrews approach which holds that all plaintiffs are "foreseeable." As such, Sally would be a foreseeable plaintiff under this approach as well.

Causation

Once Sally has shown that the allergy medication was defective when it left the control of Mfr and Mfr breached a duty owed to her, she must then establish that the defect was the actual and proximate cause of her injuries.

Actual Cause - But for Test

Sally should have no problem proving the defect caused by failing to adequately warn caused her injury. The facts state that Sally would never have taken the pills if she had been warned of the possible side effect of blindness. Therefore, but for Mfr's failure to warn, Sally would not have ingested the pills and subsequently lost her eyesight.

Proximate Cause - Foreseeability Test

Even though Mfr is the "but for" cause of Sally's injury, Sally must also prove that her injury was foreseeable. Here, Mfr was well aware of the risk presented by its allergy medication. Mfr should have been aware of the fact that its failure to warn would cause users of the medication to unwittingly subject themselves to the risk and some of them would in turn suffer blindness. Here, Sally actively sought a prescription for the pills. There was no warning in the advertisements nor on the package and therefore Sally took the medication unaware of its incumbent risks. As a result, Sally lost her sight. Her injuries were foreseeable and therefore proximately caused by Mfr's breach of duty in failing to warn.

Mfr may assert that Doc's failure to inform Sally of the risks involved in the use of the medication was a supervening factor operating to relieve it of liability. A supervening factor is one that is unforeseeable and extraordinary. It is well established that ordinary negligence in the world is foreseeable and not extraordinary. Consequently, Doc's failure to warn is not a supervening factor because his conduct amounts to negligence and is not so extraordinary or unforeseeable as to amount to a supervening factor. As such, Mfr's conduct survives proximate cause analysis.

Damages

Lastly, Sally must prove that Mfr's failure to warn resulted in damages to her. As mentioned, Sally went blind and so damages are easily established.

Sally v. Mfr - Products Liability - Negligence

In the alternative to strict products liability, Sally may also pursue under a negligence theory. The analysis would be the same as for products liability; however, Sally's burden with respect to breach of duty would be different. In pursuing a negligence claim, Sally must show that Mfr was

negligent in its production of the allergy medication or failure to include a warning. In other words, Sally must show that Mfr could have taken reasonable steps to prevent the harm caused. Once shown, the analysis would proceed for causation and damages as stated above. Here the facts support equally a theory of negligence and strict liability. Because strict liability is an easier approach to pursue, Sally will likely proceed under this theory.

Breach of Warranty Express

Warranty

Sally may also assert that Mfr breached an express warranty made in its advertisement claims that the allergy medication was the "modern, safe means of controlling allergy symptoms." Sally may assert that the risk imposed means that the medication is not in fact "safe," and therefore Mfr's representations otherwise are unfounded.

Misrepresentation

In addition, Sally may assert that Mfr engaged in intentional misrepresentation. Sally will claim that Mfr's omission with regarding to the risks amounts to a misrepresentation of safety with knowledge of the falsity of the communication. In addition, Sally will claim such communication was made with the intent that consumers rely. Sally, as a consumer, relied on the representation of product safety and was injured. As such, she can proceed under this claim as well.

Defenses

Contributory Negligence and Comparative Fault are NO DEFENSE to Strict Liability and Intentional Misrepresentation

Mfr cannot assert any contributory negligence or comparative fault of Sally as a defense to her strict liability and intentional misrepresentation claims.

Contributory Negligence and Comparative Fault Available for Negligence

Although contributory negligence and comparative fault are available defenses under negligence, the facts do not indicate that Sally was negligent in taking the medication and so Mfr will not be able to assert these claims.

Assumption of Risk

Assumption of risk is a defense to strict liability if defendant can show that plaintiff went forward in face of a known risk. Mfr may try to assert assumption of risk in that Sally actively sought and procured a prescription for the allergy medication and thereby assumed the risk involved in taking the new medication. However, Sally's conduct was in response to Mfr's advertisements and as mentioned above, such advertisements did not contain any warnings of the risks. In addition, the packaging did not contain any warnings. Crucial to the defense of

assumption of risk is the element of "knowledge" on the part of the plaintiff. Here, Sally clearly did not have knowledge of the risk of blindness and therefore cannot be said to have assumed the risk.

Duty to Mitigate

A plaintiff has a duty to mitigate her damages. In other words, plaintiff must act to minimize her loss. Failure to do [so] limits the liability of a defendant for any aggravation of injury caused by the failure to mitigate. Here, Mfr may attempt to limit its liability for Sally's blindness by pointing to her refusal to engage in the cornea transplant operation that could have been accomplished with minimal risk and no cost to her. Sally opted not to go through with the surgery out of her fear of the operation. Plaintiffs duty to mitigate is judged by the reasonable person standard. If the court determines that Sally's decision not to undergo the surgery was not reasonable, Mfr's liability for damages will be seriously curtailed. However, because the mitigation at bar involves major surgery, it may will be likely that a reasonable person would not choose to undergo the risk involved. Even though the risk is stated to be minimal, this is not the same as involving not the same as involving no risk at all. In fact, Sally may well point to the "remote" risk realized by taking Mfr's medication as grounds for her decision not to undertake any further risks with her health and well-being. Depending on the court's determination of the reasonableness of Sally's decision, Mfr's responsibility for damages may or may not be reduced.

Sally v. Doc - Negligence

Sally may assert a claim against Doc in negligence for his failure to warn Sally of the risks involved in taking the allergy medication.

Duty

Here, Doc had a duty to conform his conduct to the reasonable doctor in good standing in the professional community in which he is situated. This means that if Doc fails to act as a reasonable doctor in good standing in his community, he will be held to have breached his duty of care.

Breach of Duty - Failure to Inform

Doctors have a duty to obtain informed consent of their patients with respect to medical treatment. The duty to "inform" is judged by what a reasonable patient would want to know in making health care decisions. This standard is judged from the patient's perspective, not the doctor's. It is irrelevant that the average doctor would not make a disclosure if the court finds that a reasonable patient would want to know the relevant information at bar.

Here, the risk of blindness is information that a reasonable patient would want to know in deciding whether or not to take medication. This is supported by the fact that Sally states that she would never have taken the medication had she known of the risks. Therefore, Doc's failure to advise is a breach of duty.

Causation

Here, the facts indicate that Doc's failure to warn was both the actual and proximate cause of Sally's injury. Similar to Mfr, Doc cannot point to Mfr's failure to provide a warning as a supervening cause that relieves him of proximate liability. Doc was aware of the risk and therefore had a duty in his own right to warn Sally. His failure to do so caused Sally to take the medication uninformed and she suffered injury because of it.

Damages

As mentioned above, Sally's blindness amounts to sufficient damages for recovery.

Defenses

Contributory Negligence & Comparative Fault

As mentioned above, the facts do not support a defense on grounds of contributory negligence or comparative fault as Sally manifested no signs of her own negligence in taking the medication.

Assumption of Risk

Doc's claim of Sally's assumption of risk will fail for the same reasons stated above with respect to Mfr.

Duty to Mitigate

The analysis with respect to Doc's liability for damages and any claim based upon Sally's failure to mitigate will proceed in the same manner as discussed above with respect to Mfr.

July 2003
Question 4

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly-publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, "Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn't pay him off."

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacy in publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.

2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

Answer A to Question 4

1. Paula v. KXYZ

Paula can attempt to bring a suit against KXYZ for invasion of her privacy on several theories including false light publication, intrus[t]ion upon seclusion, and public disclosure of private facts. The question asks how likely she is to succeed in these suits and each is treated separately below.

A preliminary first amendment concern is appropriate. The Supreme Court has recently held that a broadcaster cannot be held liable for the broadcast of illegally obtained information even if it is aware of the illegality of the recording so long as the broadcaster was not a party to the illegality and the information involves a matter of public concern. Here, the facts suggest that KXYZ was not a party to the illegality which was the surreptitious recorder's acts, and even though it could be aware that the information was not legally obtained, because the subject matter of the statement involves the Mayor as well as the highly publicized labor disputes that Paula was involved in, KXYZ will argue that this is a matter of a public concern and they are protected by the First Amendment in making their broadcasts. Now, special attention will be paid to each of the causes of action.

FALSE LIGHT

An action for false light publication can be brought where the plaintiff shows that there has been widespread dissemination of information that places plaintiffs beliefs, thoughts, actions in false light that would be objectionable to a reasonable person. Here, Paula would claim that KXYZ's actions in immediately playing the recording of her private conversation with Stan placed her in false light because it imputed to her the belief that Mayor was a crook.

The widespread dissemination element is met in this case because KXYZ broadcast the information over the airwaves.

There is an issue as to whether the dissemination of the information placed Paula's beliefs, thoughts, or actions in a false light in such a way that would be objectionable to a reasonable person. KXYZ would argue that a reasonable person would not object to having their claim that the mayor is a crook be publicized because the corruption of the mayor is something that Paula herself wanted to correct. Paula will argue that taking the statement out of context and publishing it makes it seem like she is making a very broad accusation of the mayor. Moreover, Paula would argue that publishing such a statement puts her in jeopardy of potential tort liability, which is the case here, as Mayor has sued her. Upon hearing the arguments of both sides, a court would probably consider the statements disseminated by KXYZ as not being objectionable to a reasonable person because they do not distort Paula's opinion of the mayor but rather accurately represent them because they played the taping of her speaking.

As a defense, KXYZ would argue that the publication of this information is protected by the First Amendment to the Constitution. The First Amendment is incorporated through the due process clause of the Fourteenth Amendment and binds the states as well. Therefore, a state - - as a state actor - - cannot enforce a cause of action where the underlying conduct being adjudicated is protected by the First Amendment unless certain standards are satisfied. In a false light case, KXYZ would argue that because the corruption of the mayor is a matter of public concern and also because the labor dispute between the labor union and the city has been highly publicized, the public has a right to be informed about both the mayor and the labor union's interactions. If the court finds that the subject matter of the broadcast implicating the mayor in corruption and involving negotiations between the Labor Union and Mayor indeed involves a matter of public concern, the court will require Paula to show actual malice on the part of KXYZ to recover. Here, Paula would emphasize their immediate broadcast of the information and claim that such highly reckless broadcast without checking the accuracy of the recording or ensuring that there might be some basis to it constitutes reckless disregard for the consequences of their broadcast. This is a close question, but a court would probably ultimately decide that the broadcasting of the information was short of reckless for false light purposes.

In conclusion, because there was not a material misrepresentation of Paula's views in the broadcast, a court will probably find that the broadcast did not place her views in a false light and Paula will not recover on this theory.

INTRUSION UPON SECLUSION

An action for intrusion can be brought where a plaintiff can show that a defendant intruded, by an act of prying or intrusion objectionable to a reasonable person, into a space where the plaintiff had a reasonable expectation of privacy. The tort provides a remedy for the privacy of the plaintiff, so therefore the truthfulness of any information gained as a result of the intrusion does not exonerate the defendant. Here, Paula will have to show that KXYZ intruded upon her by taking a private conversation she had with Stan and that the information that KXYZ broadcast was taken from a place where Paula had a reasonable expectation of privacy. Because KXYZ did not itself intrude upon Paula, Paula will have to pursue KXYZ on an agency theory. If Paul is not successful in linking KXYZ to the intrusion, then she cannot hold them liable for this tort.

The primary obstacle for Paula is in asserting that KXYZ is the party responsible for intrusion in this case. The tort does not protect the plaintiffs privacy interest as a result of the broadcast of the information, which KXYZ clearly did; rather, the tort provides relief for intrusion upon the privacy interest of the plaintiff. Paula will argue that KXYZ is vicariously liable for the surreptitious recording made by the unknown recorder of the information, the party most appropriately liable for intrusion. Here, Paula would have to draw a connection between KXYZ and the recorded [sic], perhaps by showing evidence that the recorded [sic] was an employee of KXYZ. If, for example, KXYZ by prearranged agreement paid the person to stakeout and follow Paula and record her conversation, Paula might be able to claim that there was an employer-employee relationship upon which vicarious liability could be grounded. However, the facts suggest that the recorder acted on his own and sent the conversation anonymously to KXYZ. If the court believes that there is no relationship between KXYZ and the recorder, then KXYZ cannot be found liable for intrusion because it was not the party responsible for the intrusion.

Whether or not KXYZ is found to be vicariously liable, it is helpful to discuss the remaining elements of the tort. The first element of intrusion will be difficult to satisfy for Paula. Under the law of intrusion, an intrusion occurs by some act of prying or meddling that is objectionable to a reasonable person. For example, someone using binoculars or high powered camera lens from across the street to spy on or take photographs of someone in a private place is a sufficient act of intrusion. Here, Paula will claim that the "surreptitious" recording of her conversation constitutes an act of intrusion. Paula will argue that a reasonable person would object to other people prying into their conversations. On the question of intrusion, KXYZ will emphasize that there is no intrusion where someone speaks in public. KXYZ will claim that it is not reasonable for a person to object that someone is listening to them when they speak in public, rather, KXYZ will argue, the speaker assumes the risk of an "uninvited ear" whenever they speak in public. This is a close question on intrusion, but because the facts suggest that the recording is surreptitious, a court will probably find that such secretive and intrusive recording of a conversation is sufficient to satisfy the first element of the tort.

On the question of whether Paula had a reasonable expectation of privacy in her place of seclusion, there will be difficulty. The tort of intrusion only protects the privacy interest of the plaintiff where they have a legitimate expectation of privacy in the place upon which their privacy was intruded. Here, Paula was in a coffee shop directly across the street from where contract negotiations were taking place. Paula will emphasize that she was in "the corner booth" of the coffee shop and that she was "whispering" to Stan when she made the statement, all suggesting that she subjectively intended, and that a reasonable person would objectively act that way, to keep the subject matter of her conversation private. KXYZ would argue, like on the intrusion element, that statements made in public, even if the speaker subjectively intends to keep them relatively secret, are not objectively reasonably private. KXYZ will emphasize that a speaker assumes the risk of "an unreliable ear" when they make statements in public. Paula will counter that she took reasonable precautions to keep her statement private despite being in public by being in a corner booth and by whispering. Again, this is a close question, but because the facts suggest that Paula made an effort to keep her statement quiet and between her and Stan, a court could find that she had a reasonable expectation of privacy in the corner booth and in her statement.

PUBLIC DISCLOSURE OF PRIVATE FACTS

An action for disclosure can be brought where a plaintiff can show that a defendant caused widespread dissemination of information in which plaintiff had a reasonable expectation of privacy and which a reasonable person would object to. Because the interest protected by this tort is the privacy of the plaintiff and not the subject matter of the information disseminated, truth is not a defense to the tort because even if the information is truthful, the injury to the plaintiff's privacy is still unremedied. Here, as discussed above, the primary obstacle for Paula is showing that she had a reasonable expectation of privacy in the contents of her statement.

Here, KXYZ clearly caused widespread public dissemination of the statements Paula made about the mayor. By broadcasting it over the airwaves, this element is met if the dissemination would be objectionable to a reasonable person. Here, KXYZ would argue that Paula was a public figure trying to settle the labor dispute with the city in the favor of her union. KXYZ would emphasize

that the labor dispute has been highly publicized already and that it is a matter of public concern. These arguments, however, emphasize the subjective feelings of Paula regarding the information rather than what would be objectionable to a reasonable person. Nevertheless, a reasonable person attempting to put forward a cause, KXYZ would argue, would not object to the disclosure of information pushing for that cause. Paula will counter that the information disclosed would certainly be objectionable to a reasonable person because of the potential tort liability that could arise to the speaker if such information were widely disseminated. Here, in particular, Paula can show that she is being sued by Mayor for defamation and without KXYZ's disclosure of the statement, she would probably not be sued. This, again, is a close question but a court could reasonably find that the disclosure of the information here would be objectionable to a reasonable person because of the potential tort liability the speaker assumes and thus Paula will have satisfied the first element.

The second element is more problematic for Paula because she must show that the facts were private to her and that a reasonable person would consider them private. Here, Paula is a labor union leader and she ardently pushes for the positions of her union through publicity and in her negotiations with the City. The alleged disclosure even concerns a contract to build the new union headquarters, something directly related to the public nature of Paula's position. KXYZ would emphasize this and say that the content of the statement is not private because it has to do with Paula's public actions, negotiating with the city and acting as president of the labor union. A court could find that, despite the private nature of the conversation in the coffee booth corner, the subject matter of the statement here is not private but rather a public matter because it involves the City and the labor union which is currently publicized a great deal. Only if the court finds that the statements contained private information to Paula, would an action for disclosure lie.

Mayor v. Paula & KXYZ

As a public figure, the mayor must prove additional elements in his case in order to recover for the tort of defamation. As the actions between the Mayor and Paula and the Mayor and KXYZ are of a different nature an d have different defenses, they will be treated separately.

The common law elements for defamation include: (1) a defamatory statement, meaning a statement which a reasonable person would take as being harmful to a person's reputation, (2) that the statement be "of or concerning" the plaintiff, meaning a reasonable person would understand it to refer to the plaintiff, (3) that the statement be "published," which requires only communication to a third person but may also include more widespread dissemination, and (4) damages, which may be presumed under certain circumstances.

When the plaintiff is a public figure, he must allow show [sic] (1) falsity of the statement as well as (2) some degree of fault on the part of the alleged defamer.

Mayor v. Paula

In Mayor's case v. Paula, he would focus on the actual conversation she had with Stan in the coffee shop. The allegation that Mayor is a "crook" is clearly defamatory particularly in the context of alleging that the Mayor required a payoff as a condition for allowing the union to build a new headquarters. A reasonable person would surely find that such a statement of alleged

fact would be considered harmful to the reputation of the target of the speech. Moreover, it is dear from the content of the statement that it concerns the Mayor, a reasonable person hearing the statement would know that it refers to Mayor because it specifically calls him a "crook." Third, the statement was published because Paula made the statement to Stan. Regardless of the subsequent broadcast of the information by KXYZ, Paula's making the statement to Stan is sufficient publication for a tort to lie as between Mayor and Paul. There might bean issue as to whether Paula can be held liable for subsequent damage which occurs to Mayor as a result of the broadcast because Paula is not responsible for that part of the injury to Mayor's reputation.

Because this is spoken defamation, it is considered slander. In particular, Paula's statement would be considered slander per se because it was a statement relating to the Mayor's profession and it was also a statement involving the moral turpitude of the Mayor. Slander per se exists where the alleged defamatory statement concerns a loathsome disease, the unchastity of a woman, the moral turpitude of the defamed person, or the defamed person's business or professional capacity. The effect of slander per se is that damages are presumed and need not be pled, although plaintiffs often will anyway. Here, Mayor need not prove special economic damages from the tort although he almost certainly will want to, particularly to avoid damages being called too speculative because of the problem of KXYZ's broadcast which enlarged the damage to Mayor. This would not be a problem if Paula and KXYZ were found jointly & severally liable for the entire undivided injury to Mayor, although it is not clear that they would be jointly & severally liable because two distinct acts of defamation could be argued to have occurred, one in the coffee shop and then the second on the airwaves. Only if it can be shown that Paula created a foreseeable risk that the information would be let out and that the broadcast was within that scope of risk created by Paula's statement, then the limiting principle of proximate cause would not cut short Paula's liability and allow her to be held responsible for the entire injury.

Having established the basic elements of the tort, Mayor will still have to argue falsity and, because he is a public figure, actual malice on the part of Paula. He will almost certainly not be able to do so, although more facts are necessary to reach a determination. Under New York Times v. Sullivan, a public figure tying to collect damages for defamation must prove the falsity of the information claimed to be defamatory. It is unclear whether the mayor is in fact a crook, but if he did require a payoff for the permission to build new labor headquarters, then he could not collect damages in this case. Moreover, Mayor will have to show that Paula acted with malice in making the statement, either reckless disregard for the truthfulness of the information itself or reckless disregard as to the consequences of making the statement. Here, because Paula can show that she was taking pains to keep the information between her and Stan private, a court will probably not find her statement to be malicious. If she had used a bullhorn, for example, and made the statements in front of City Hall, then malice might be more appropriately found, but liability would still only lie if the statements were false because Mayor is a public figure. The idea behind the heightened requirements is that the First Amendment protects rigorous debate and exchange of ideas over public issues.

Mayor v. KXYZ

As discussed above, Mayor would have to make the same showing as to KXYZ to recover. Because the broadcast involved the Mayor and defamed him, he has satisfied the basic

requirements for defamation. However, special First Amendment concerns arise that further protect KXYZ.

First, KXYZ under the Constitution may broadcast even illegally obtained information if it is truthful so long as KXYZ was not a party to the illegality and the information conveyed was a matter of public concern. Here, the facts take special pains to say the recorder, although surreptitious, was not related to KXYZ. Unless Mayor could connect KXYZ to the taping, they cannot be held liable for the publication of the information.

Second, the falsity of the information might not be able to [be] proven by the Mayor, which alone would relieve KXYZ of liability.

Third, the Mayor may be able to show malice on the part of KXYZ because they broadcast the information so quickly upon receiving the recording. This might be interpreted as reckless disregard for the consequences of broadcasting the defamatory material and if Mayor can show the other elements as well as the falsity of the statement, he might be able to recover by showing this level of actual malice. KXYZ would of course counter that at worst such behavior was merely negligent and should not expose them to liability given the First Amendment protections.

Answer B to Question 4

1. Paula v. KXYZ

Invasion of Privacy - Generally

Paula is suing KXYZ for invasion of privacy for publishing her conversation with Stan. This tort consists of four branches of causes of action. They include: (1) misappropriation, (2) intrusion, (3) false light, and (4) disclosure of private facts. These four causes of action are discussed next.

Misappropriation

To prove a prima facie case of misappropriation, plaintiff must show that the defendant used plaintiffs name or likeness for plaintiffs commercial advantage. Misappropriation is considered an invasion of privacy tort because a person's name or likeness is a matter within plaintiffs control. When another person takes that name or likeness and uses it for their own gain, an invasion into plaintiffs private affairs occurs.

Here, Paula could claim that KXYZ's publishing of the tape misappropriated her name or likeness. Paula is the president of a labor union. Stan is the secretary of the same union. These arc or potentially are-high profile positions in any community. Thus, KXYZ could use a salacious scandal involving these two figures to help boost its ratings. In this case, Paula would argue that KXYZ replayed the tape for precisely that reason. The fact that the conversation had been surreptitiously recorded made the dialogue even more intriguing, which would also help KXYZ's attempts to publicize itself and draw attention to its station. For this reason, Paula would argue that the station used her name and reputation (and even Stan's, if he pled this cause of action) for its own commercial advantage.

Thus, Paula's misappropriation claim has some merit because KXYZ's likely intent was to use this conversation-and its participants - to boost its audience.

Defense to Misappropriation - Newsworthiness

Newsworthiness is a defense to misappropriation. The newsworthiness doctrine states that a person's name or likeness can be appropriated for public consumption if it involves a matter of public concern.

Here, because the union was involved with a bitter and highly-publicized labor dispute with the Mayor and because the conversation involved a discussion about the Mayor, KXYZ would likely claim that it was privileged to replay the tape for those reasons.

Thus, because the tape did involve a matter of public interest, KXYZ's defense in this situation is likely valid.

Defense to Misappropriation - Freedom of Speech

A radio station also possesses a First Amendment right to broadcast issues involving a public matter. The courts have ruled that a radio station may replay a tape that was surreptitiously recorded and not violate a person's rights to privacy. This defense is related-and often intimately

commingled with-the newsworthiness defense, but it should be noted here for the sake of thoroughness because of the importance of the First Amendment in American constitutional jurisprudence. This defense also arises in the defamation context, but it might be applied here as well.

Here, KXYZ will argue that beyond mere "newsworthiness," the courts have previously ruled that a radio station may replay surreptitiously recorded conversations and not be liable for the airing. While this has been handed down in a defamation context, KXYZ might argue that it should apply here as well.

Thus, KXYZ might have a pure freedom of speech defense based on court precedent in a related area.

Intrusion

To prove a prima facie case of intrusion, plaintiff must show that the defendant invaded a space within which plaintiff had a reasonable expectation of privacy. This tort typically involves cameramen taking pictures of persons in their private homes or even Peeping Toms. However, it can be applied to surreptitiously recorded conversations as well. But the issue is whether KXYZ did the intrusion, or whether the anonymous person was the tortfeasor.

Here, KXYZ did not actually physically intrude on an area where Paula had a reasonable expectation of privacy. KXYZ is not the entity or person that recorded the tape. KXYZ merely] replayed the tape, which was recorded by an anonymous individual. Certainly, the anonymous person may be liable. However, even the anonymous person would argue that because the conversation took place in a corner booth of a coffee shop, it was in a public place where neither Paula nor Stan had a reasonable expectation of privacy. Paula would respond that she "whispered" her comments. However, courts have held that whispered comments in a public area are not afforded a reasonable expectation of privacy (though they have done this in a Fourth Amendment search and seizure context). Even if KXYZ could be held liable under an "agency" theory for the intrusion of the anonymous individual, this argument concerning the public place would prevail in KXYZ's favor.

Thus, KXYZ would prevail on Paula's intrusion claim.

Defense to Intrusion - Public Place with No Reasonable Expectation of Privacy

As discussed immediately above, KXYZ would defend that even if it could be held liable under an "agency" theory for the anonymous person's actions (which may not be possible under these facts), that Paula's comments in a public restaurant, even if whispered, were not private. The Court had held that "whispered" comments in a public area are not afforded a reasonable expectation of privacy, though it has done this in a Fourth Amendment context.

False Light

To prove a case of false light, plaintiff must show that defendant attributed to plaintiff actions she didn't take, views she doesn't hold, or even comments she didn't make. False light is a

watered down version of defamation because it includes material that doesn't necessarily harm plaintiffs reputation, but it merely misportrays her beliefs or actions.

Here, Paula was not portrayed in a false light. Her conversation with Stan was accurately recorded. Her views regarding the Mayor are her views and were not portrayed falsely.

Thus, Paula's false light cause of action is lacking. False

Light - Constitutional Considerations

It should also be noted that false light is likely subject to the same constitutional considerations as defamation. Meaning that plaintiff, if she were a public official or figure and the issue involved a matter of public concern, would have to demonstrate falsity (a prerequisite for false light in the first place) and fault, which would include actual malice if plaintiff were a public figure.

Here, Paula is most certainly a public figure. She is the president of the labor union and is involved in a highly publicized dispute with the Mayor. Paula may very well be an allpurpose public figure because of her position as president of the union, but at the very least, she is a limited-purpose public figure because of the controversy between the union and the Mayor. Thus, Paula might likely need to prove actual malice, which is clear and convincing evidence that KXYZ knew or had a reckless disregard for the falsity of the information. However, here, the conversation recorded truthful information.

Thus, Paula would likely not be able to prove falsity, as discussed, or fault. Defense

to False Light - Truth

As discussed above, Paula's views regarding the Mayor were accurately recorded. There is no false light here.

Private Fact

To prove revelation of private fact, plaintiff must demonstrate that defendant revealed private facts about plaintiff that were facts that a reasonable person would object to being revealed in a public fashion.

Here, Paula would argue that her views regarding the major [sic] were private views that she did not want exposed to the rest of the world. This argument is somewhat diminished by the fact that Paula and Stan (and the union) were in a bitter and highly-publicized dispute with the Mayor. However, Paula would respond that even in bitter disputes a reasonable person would not want their private views toward the other person revealed to the world-at-large. Paula has a good argument in this regard. However, KXYZ might contend this was a newsworthy event and, additionally, that Paula's dislike for the Mayor is likely well-known. This would be a reasonable

argument, if KXYZ could prove it.

Thus, Paula may have a cause of action under the private fact doctrine. Private

Fact - Constitutional Considerations

Again, it should be noted, as per the discussion above, that constitutional considerations are likely applied to the private fact cause of action (or at least some commentators and courts have so held). However, where - as here - there is not fault on KXYZ's behalf involving actual malice and because the material recorded was ostensibly truthful, Paula's cause of action suffers in this regard.

Defense - Truth

It should be noted that truth is no defense to private fact causes of action. In fact, what makes the private fact cause of action so unique is that the private facts may very well be truthful (in fact, they almost always are, which separates private fact from false light).

2. Mayor v. Paula

Defamation - Generally

To prove a prima facie case of defamation, plaintiff must demonstrate that defendant (1) made defamatory comments, (2) of or concerning the plaintiff, (3) published, (4) to third persons, and (5) that plaintiff suffered damage to her reputation. These issues are discussed next. Also, when the issue involves a public official, then the official must prove (6) falsity and (7) fault under a constitutional standard.

Defamatory Material

Defamatory material is material that harms plaintiff's reputation when it is published to the outside world.

Here, Paula was quoted as saying that the "[M]ayor is a crook who voted against us allowing us to build our new union headquarters because we wouldn't pay him off." Certainly, such comments are harmful to the Mayor's reputation, especially when they are released over a radio station.

Thus, in and of itself, the material here is certainly "defamatory" in the limited sense of how this term is defined.

Of or Concerning Plaintiff

The defamatory material must be of or concerning the plaintiff, or be reasonably construed to be of or concerning the plaintiff if the plaintiffs name is not explicitly mentioned.

Here, Paula refers directly to the "mayor." However, there may be other communities in the area with mayors. However, Mayor will likely be able to show that because of the controversy between the union and himself, that a reasonable person would construe the comments as being about him.

Thus, this element is satisfied.

Published

The defamatory material must be published to a third person.

Here, Paula "published" her comments to Stan, the secretary of her labor union. Paula might claim that this conversation was privileged between two officers of a union and that, thus, it was not "published" in the normal sense of the term. However, this is likely not an adequate defense. Since Paul revealed her comments to a third person capable of understanding those comments, she "published" the material. Also, it should be noted that Paula ran the risk of others hearing her comments in a public restaurant as well.

Thus, Paula published her comments.

To Third Persons

The comments must be published to a third person, not just to herself.

Here, as discussed, Paula published to Stan (and ran the risk of publishing to others in a public restaurant).

Thus, this element is satisfied.

Damage to Reputation

General damages are presumed when the comments involve libel, which are written statements. However, they are not presumed when it involves slander, which are oral comments. However, damages for slander per se are presumed when the comments involving [sic] the plaintiffs professional reputation.

Here, Paula's comments to Stan were oral. However, they also involved the Mayor's professional competence and integrity, which would likely fall under a slander per se exception, which would then make damages presumed.

Thus, damages based on slander per se would likely be shown here.

Falsity

The Mayor would need to prove falsity as part of his prima facie case against Paula.

Here, the Mayor may have a problem showing falsity if in fact the comments are true (of course, this goes without saying). But, if the facts later demonstrate that this was a false accusation and that Paul was saying this to spite the Mayor, he can win this element.

Thus, we would need more facts here to satisfy the Mayor's burden on this element. Fault

Because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, again, the issue depends on whether Mayor can show that Paula's statements were false and, if so, whether she acted in knowledge of that fact or in reckless disregard of the fact when conveying her comments to Stan.

Thus, again, more facts are needed here.

Conclusion

The Mayor may not have a problem showing the traditional common law elements of defamation, but more information is needed to determine whether he satisfies the constitutional elements. If he can show falsity (perhaps not!) and fault on Paula's behalf (again, perhaps not, but more facts are needed), then he has a cause of action. Otherwise, his case may be weak.

Mayor v. KXYZ

Defamatory Material

As per above, the material here is defamatory insofar as it hurts the Mayor's reputation when it was revealed. A similar analysis as applied to Paul applies here.

Of or Concerning Plaintiff

Again, as per above, the material here likely concerns the Mayor. Although he is not mentioned by name, because of his dispute with the union, Paula's comments could reasonably be attributed as being about him.

Published
Here, most certainly, the comments were published by KXYZ over its airwaves. To

Third Persons

Again, here, using the same rule discussed above with regards to Paula, the tape was replayed over the airwaves and played to KXYZ's listening audience. This most certainly qualifies.

Damage to Reputation

Unlike the situation with Paula, the issue here is whether the tape, when replayed over the air, is slander or libel. The courts have held that such tapes replayed over the air (along with other planned comments over the radio or comments over television) are generally libel. Thus, here, damages would be presumed, assuming the other elements are true. However, because this is also slander per se, proving that this qualifies as libel is not essential. General damages would likely be presumed either way.

Falsity

Again, Mayor would have to prove falsity as part of his prima facie case. The same problems arise here as arise above in the discussion regarding Paula.

Fault

Again, because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, the same problems arise with respect to the radio station as applied to Paula. The Mayor must show that KXYZ knew or had a reckless disregard for the truth regarding the tape-recorded comments.

Thus, more facts are needed for Mayor to prove his case.

Defense - Privilege and Newsworthiness

The courts have held that a radio station is privileged to replay tapes secretly recorded over its airwaves involving matters of public concern. These holdings are most likely premised on the fact that some comments are generally newsworthy and of public importance. Thus, KXYZ can claim this privilege in its defense.

Defense - Truth

It should be noted that because Mayor is a public figure, as discussed, he must prove falsity. This burden [sic] removes the burden of KXYZ proving truth as a defense.

Conclusion

Due to the absence of some critical facts that would help Mayor's case, along with the privilege and newsworthiness defense discussed above, KXYZ may likely win this suit, if for no other

reason than Mayor may not meet his prima facie case.

July 2000

Question 6

Dan operates a plant where he makes pottery. To provide a special high-capacity power source to his pottery kilns, Dan recently installed on the electric company's power pole outside of his building an electrical transformer that would increase the electrical current entering his plant from the main power line. He did this without the knowledge or consent of the electric company. Dan did not know that the power line on which he installed the transformer also feeds power to the adjacent office buildings.

Peter occupies one of those adjacent office buildings. In the building, he has an extensive computer network that he uses in his business of providing advanced computer services to local commercial enterprises. Peter has been in this business for ten years. He employs several highly paid computer operators and technicians.

Dan's installation of the transformer caused power surges each time his kilns were turned on and off. Soon after Dan had installed the transformer, Peter's computers began to malfunction and eventually were severely damaged by the repeated power surges. As a result, Peter lost a large amount of data stored in his computers. He laid off some employees without pay and shut down his business for two weeks while the computers were repaired and while the remaining employees restored the lost data.

During the shutdown, Peter lost considerable income because he was unable to furnish computer services to his customers.

Peter and the laid-off employees have filed suit against Dan.

1. In an action against Dan, what theories, if any, might Peter assert and what defenses might Dan raise if Peter seeks to recover:

   a) The cost of repairing his computers?

   Discuss. b) The cost of restoring the lost

   data? Discuss. c) His lost income? Discuss.

   d) Loss of goodwill and other incidental effects of the disruption of his business? Discuss.

2. May Peter recover punitive damages? Discuss.
3. May the laid-off employees recover lost wages and benefits from Dan under any theory? Discuss.

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ANSWER A TO QUESTION 6

Because of Dan's installation of a high power transformer, Peter claims to have suffered a number of different types of damages. Peter has brought a cause of action against Dan seeking damages under different theories of tort liability.

1. Theories under which Peter may ecover.

Negligence

A defendant has a duty to avoid actions that will cause damages to others. Failure to meet this duty, which actually causes damages to others, will result in liability.

Duty

Dan had a duty to conduct his affairs in a manner that would not harm others. This duty extended to his installation of the transformer on the power company's pole. In the installation of the transformer, Dan should have used the amount of care as would have been used by a reasonable person in undertaking such an activity.

Breach of Duty

Here, in installing the transformer, Dan failed to consult or ask permission of the electric company. Furthermore Dan failed to investigate the existence of other connections that may be affected by his installation of the transformer. A reasonably prudent person would normally not modify power lines, or install high power transformers on power lines without consulting the power company, or at the very least taking some precautions to ensure that the power lines do not affect others.

Causation

Peter's damages must have been both actually and proximately caused by Dan's actions. A plaintiff may demonstrate actual causation by demonstrating that but for the defendant's actions, he would not have been injured. Peter's computers were damaged by power surges that occurred when Dan activated his kilns with the transformer in place. The facts clearly indicate that with the transformers in place, the power surges occurred. Since Peter had been connected

to the same power lines for ten years and had not been damaged, Peter will be able to demonstrate that but for Dan's installation of the transformer, the power surges would not have occurred. Proximate cause is shown by demonstrating that the defendant could have foreseen the damages experienced by the plaintiff. Here, Dan did not know that the power line connected to Peter's business. Peter will argue that the lines are on poles, and that because they are visible, Dan should have known of their connection. Even if he proves this, Dan will argue that he could not have known that Peter was operating computers, and could not have known that they would be damaged. Many people use computers and other sensitive electronic devices. Because the use of

electricity is so prevalent in modern society, Peter's damages will be found to have been foreseeable.

Damages

A plaintiff is entitled to recover the amount of damages necessary to put that plaintiff back in the position he would have been had the tort not occurred. Peter is claiming several different types of damages:

Cost of Repairing Computers - Peter will claim that his computers were damaged by Dan's actions. Because the damages to the physical hardware of the computers was the effect of Dan's actions. Peter will likely receive damages to repair the computers. Dan will argue that computers are abnormally sensitive to electric surges and he should not be held liable because computer damage was not foreseeable. A defendant takes his plaintiff as he finds him, and is liable even for plaintiffs who are more susceptible to damages. Thus this defense will fail. Dan will also claim that Peter failed to mitigate his damages by installing surge suppression devices, or by not using them. It is unclear from the facts whether Peter knew the cause of the malfunctions, and could not be expected to mitigate if he did not.

Cost of Restoring Lost Data - Peter will claim that Dan is liable to restore the lost data. Data loss is a foreseeable result of computer failure which Dan could have predicted would occur if he damaged electronic devices. A plaintiff must be able to prove to a reasonable certainty, however, the amount of damages that have been inflicted. Dan will defend against this claim on grounds that the cost of restoring data is too difficult to determine to a reasonable certainty. If Peter is able to present facts demonstrating the amount of lost data, and its cost to be restored by reliable facts, he will be able to defeat Dan's claims.

Lost Income - Dan will argue that Peter's lost income is a purely economic loss, and that courts do not remedy a plaintiffs purely economic losses in tort. Here, Peter will demonstrate, however, that his losses are due to the destruction of his computers due to Dan's actions. Because the lost income is parasitic to actual damages, a court may allow him to recover. Peter will be required to present evidence as to what the losses in income would have been. He may do this by producing the contracts and other service history which he could not perform due to the damages.

Loss of Goodwill and Other Incidental Effects - Dan will argue that Peter cannot demonstrate to a reasonable certainty the amount to goodwill that Peter has lost. Because goodwill is exceedingly difficult to prove, Peter will likely not collect here. Any other incidental effects will be unactionable unless they were foreseeable results of Dan's actions.

2

Additional Theories of Recovery

Nuisance

A nuisance exists when a defendant's conduct creates a substantial and unreasonable interference with the plaintiffs use and enjoyment of his property. The interference must be unreasonable to an average ordinary person. Here, Peter will claim that Dan's actions created power surges that caused an interference with his computers, depriving him of the use of his property for his purposes. Dan will claim that an average person would not have found the surges to be unreasonable, but that only Peter, because of his computers, found them unreasonable. Because businesses and homes rely heavily on reliable electric power, it is likely that an average person would find power surges to be unreasonable. Thus Dan will be found liable for nuisance, and Peter will assert the same damages as noted above.

Strict Liability - Abnormally dangerous activities

A plaintiff may recover from a defendant for damages caused by the defendant's abnormally dangerous activities. Abnormally dangerous activities are actions taken that cannot be made safe no matter how much care is used, and that are not normally conducted in the area. Here, the transmission of electric power can be made safe through proper measures. It is merely Dan's negligence that caused the damages. Thus, Peter will be required to show fault through some other theory, and strict liability will not apply.

2. Recovery of Punitive Damages

Punitive damages may be available in injury causes of action if it is determined that the defendant's actions in inflicting the injury were malicious, willful, or completely reckless. Here Dan's actions were not willful or malicious. Dan did not install his transformer for the purpose of damaging Peters computers, or disrupting his business. The act of placing a high power transformer on a power line may be considered reckless activity, however. Power lines are probably considered to be hazardous. Making unauthorized modifications to power lines without knowing the full extent of the consequences of those modifications may be considered reckless activity, because it disregards the consequences that may result from the modifications. If a court finds that Dan was reckless, Peter may be awarded punitive damages. The court will not award the damages based on a theory of willful or malicious conduct.

3. Recovery of Laid-off Employees

Courts generally do not award damages for purely economic losses without some actual injury to the plaintiff. Purely economic losses are difficult to determine, and are thus avoided. Peter's

laid-off employees will therefore seek some theory to bring against Dan to recover their economic losses as parasitic to injuries.

3

Interference with Contract

Peter's employees may claim that Dan's actions constituted a tortious interference with their contract rights associated with their employment by Peter. The facts do not indicate, however, the existence of any employment contract. Additionally, if there is a contract, the interference with contract tort requires that the defendant knew of the existence of the contract and purposefully took actions to interfere with it. The facts indicate that he installed the transformer to operate his kilns more effectively, thus he did not purposefully interfere with any contract that may have existed.

Because the employees have suffered a purely economic loss based on being laid off by Peter, they will probably not be able to recover for their lost wages and benefits.

4

ANSWER B TO QUESTION 6

1) Theories of P in action against D. D's defenses, and likely remedies P may recover.

Theories:

A) Is D strictly liable for the damage caused to P as a result of his installation of the transformer on the power pole outside of D's building?

One may hold another strictly liable for damages caused by a defendant's abnormally dangerous activity. An activity is abnormally dangerous if it cannot be made safe with reasonable efforts, the risk of injury is great, and the activity is uncommon to that area, and the utility to society of the activity is low.

D will defend that this is not a strict liability.

Here, D's installation of the electrical transformer is not of great utility to society, and it might be uncommon in that area, but the facts do not say if it could be made safe by a reasonable installation of the transformer or whether risk of injury is great.

Therefore, P probably won't be able to assert strict liability.

B) Can P establish nuisance as a theory?

Nuisance is the unreasonable interference with another's use and enjoyment of property in P's possession.

Here D's conduct caused the electrical surges which caused P's damage. P's use and enjoyment of the building office he possesses (occupies) was interfered with by these surges. The question here is whether this interference was unreasonable, i.e., would a reasonable person find this power surge to be an obstacle on his use and enjoyment.

D's defense:

D will assert that power surges would not interfere with a reasonable use and enjoyment, and that P's nature of business made him peculiarly susceptible since his office relied on computers.

However, P will most likely win on this issue because office buildings such as D and P need electricity today to reasonably function because of the high use of computers today.

Therefore P will be able most likely to recover on a nuisance theory.

1

The remedies that P may recover will be discussed later in the paper under Remedies section.

C) Negligence

P may assert that D was negligent in his installation of the electrical transformer.

1) Did D owe a duty to P?

P had a duty to all foreseeable plaintiffs that are within the zone of danger of his installation of the transformer. D did not know that P or others in P's office building were fed by the electrical pole, but it is foreseeable to a reasonable person that someone would receive electricity from the pole. Therefore D owed a duty to P.

2) Did D breach that duty?

D did not act reasonably prudent when he put a transformer on an electrical pole that did not belong to him because an ordinarily prudent person would not tamper with dangerous electricity and the instrumentality of conveying electricity.

3) Causation?

But for D's installation, P would not have suffered the power surges, therefore D actually caused P's harm.

Proximate: It was reasonably foreseeable to D that persons receiving electricity would be harmed by power surges of the pole. Was the extent of P's harm foreseeable? So long as the injury was foreseeable and there is a direct causation (no intervening forces) D will be liable for the extent of P's injuries even if the extent was not foreseeable.

4) Damage?

Yes, as discussed below, P was damaged.

D) Intentional Tort Theory?

Did D trespass P's property? Trespass is the entering into someone's property without consent. There is no physical entering, most likely, because electricity is probably like sound waves which have been held to be not physical.

No Trespass Theory.

2

- Remedies -

Tort remedies make plaintiff whole.

a) Cost of Computers: P's loss in repairing property damage to computers is compensable in negligence.

In his negligence theory P will recover all damages arising from his breach that were the natural and probable consequence of his breach.

The natural result of tampering with electricity is that it will result in property damage to computers. Thus P will receive such cost of repair.

D will have no defenses.

b) Cost of restoring lost data Negligence Theory:

If data is property then the damage to the data and the cost to restore will be compensable by D as a natural flow of D's breach since it is foreseeable as a probable consequence of shortages in electricity.

D will assert that it is not natural because it is too remote from his act of installing the box but he will lose because it is a dependent result/consequence of the breach.

c) Lost Income
Negligence Theory

Lost income is a damage that must be proved with reasonable certainty to be **received.**

P was in business for 10 years and might be able to prove what he normally makes in two weeks.

If P is an employee that will be easy. If P is an owner it will be more difficult but could be done by prior bookkeeping records. D will try to defend that P cannot prove lost income certainly.

d) Loss of goodwill and other incidentals

Goodwill probably cannot be proven with sufficient certainty and therefore may not be received by P. It is too speculative. D will win on such a defense.

Incidentals: Nuisance theory will allow relief for lost rent P paid for time he was not able to enjoy his property/office.

2) Punitive damages

Punitive damages are recoverable only when conduct is malicious. Malice is intent to harm or extremely reckless behavior. D will assert he did not know that P was fed by the electrical pole so he did not intend to harm and that his behavior at most is negligent not reckless.

D will win on this point because he was negligent not reckless and had no bad faith. Therefore, no punitive damages. .

3) Laid-off employee wages and benefits.

Employees' wages and benefits

D will successfully defend that pure economic loss is not recoverable in tort and therefore the economic loss of the employees is not recoverable.

No tort theory will help the employees recover from D.